25 March 2024
ESMA75-453128700-1012

Reply form

to the Consultation Paper on certain requirements of the Markets in Crypto Assets Regulation (MiCA) on detection and prevention of market abuse, investor protection and operational resilience – third consultation paper

Responding to this paper

ESMA invites comments on all matters in this consultation paper and in particular on the specific questions. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **25 June 2024.**

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. Use this form and send your responses in Word format (**pdf documents will not be considered except for annexes**);
3. Please do not remove tags of the type <ESMA_QUESTION _MIC4_1>. Your response to each question has to be framed by the two tags corresponding to the question.
4. If you do not wish to respond to a given question, please do not delete it but simply leave the text "TYPE YOUR TEXT HERE" between the tags.
5. When you have drafted your response, name your response form according to the following convention: ESMA_MIC4_nameofrespondent_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA_MIC4_ABCD_RESPONSEFORM.
6. Upload the form containing your responses, **in Word format**, to ESMA's website (www.esma.europa.eu under the heading "Your input – Open Consultations" -> Consultation Paper on guidelines on conditions and criteria for the classification of crypto-assets as financial instruments").

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on 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 ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading Legal Notice.

Who should read this paper

All interested stakeholders are invited to respond to this consultation paper. In particular, ESMA invites crypto-assets issuers, crypto-asset service providers and financial entities dealing with crypto-assets as well as all stakeholders that have an interest in crypto-assets.

General information about respondent

Name of the company / organisation	AMF ITALIA – ASSOCIAZIONE INTERMEDIARI MERCATI FINANZIARI
Activity	Investment Services
Are you representing an association?	☒
Country/Region	Italy

Questions

Q1 Do you agree with ESMA's analysis on the personal scope of Article 92 of MiCA? Are there other types of entities in the crypto-asset markets that should be considered as a PPAET (e.g. miners/validators)? Do you believe that CASPs providing custody and administration of crypto-assets on behalf of clients should also be considered as PPAETs for the purpose of this RTS? Please elaborate.

<ESMA_QUESTION_MIC4_1>

In general terms, AMF ITALIA - Associazione Intermediari Mercati Finanziari (the "**Association**") concurs with the analysis regarding the personal scope of Article 92 of MiCAR and with the principles contained within the RTS on arrangements, systems and procedures for detecting and reporting suspected market abuse in crypto-assets (*).

However, without prejudice to the above, the Association believes that additional specifications could be beneficial for a clearer delimitation of the personal scope of the market abuse discipline under MiCAR.

The first of such clarifications, in particular, pertains to the exclusion of CASPs providing solely the service of transfer of crypto-asset, as defined in Article 3, Paragraph 1(26) of MiCAR, within the personal scope of Article 92.

Specifically - while the Association agrees with the clarifications provided under Section 3, Paragraph 37 of the consultation paper under examination, containing the list of subjects that should be considered as PPAETs under MiCAR, which does not include CASPs providing solely transfer services for crypto-assets - it notes that a specification in this sense could avoid situations of uncertainty regarding the subjective scope of application of the rules dictated on market abuse. Such lack of clarity would stem, specifically, from Article 1 of the RTS on record-keeping by crypto-asset service providers contained in the second consultation package issued by the ESMA, specifically providing that *"(c) "executing a transaction" means providing any of the following services or performing any of the following activities that result in a transaction:* […] *(v) transfer of crypto-assets to or from accounts.*

In this regards the Association, while recognizing that Art. 1 of the above-mentioned RTS focuses on the objective scope of the definition of execution of a transaction and therefore does not directly impact the subjective scope of application of the rules concerning market abuse, believes that would be highly beneficial for the clarity of the discipline under examination to explicitly confirm that CASPs providing only the service of transfer of crypto-assets would not fall within the personal scope of Article 92 of MiCAR.

Secondly, with reference to the question posed by ESMA as to whether CASPs that provide the service of custody and administration of crypto-assets on behalf of clients should be identified as PPAETs, the Association believes that such inclusion should be avoided. Indeed, in view of the very meaning of PPAET (Person professionally arranging or executing transactions), it is possible to assume that a subject who solely provides the service of custody and administration of crypto-assets on behalf of clients would not probably be aware of the

aspects and information required to detect a market abuse conduct, since it neither arranges nor executes transactions.

Moreover, the Association deems appropriate to provide a series of clarifcations on the text of Article 92 of MiCAR, specifically in the part that provides for the obligation to report as a STOR any "*order or transaction, including any cancellation or modification thereof, and other aspects of the functioning of the distributed ledger technology such as the consensus mechanism*"

Firslty, with particular reference to the following excerpt "*aspects of the functioning of the distributed ledger technology such as the consensus mechanism*", the Association deems unclear which criteria should be used to identify reportable behavior in this context. In addition, we believe the example of the consensus mechanism to be inherently excessively broad therefore failing to adequately further substantiate the specific issue.

Secondly, with reference to "*any order or transaction, including any cancellation or modification thereof*", it is unclear how, given the nature of the DLT, a reportable cancellation or modification would occur, considering that a transaction is deemed irreversible once completed, and prior to completion, a violation of the principles outlined in the RTS cannot be established.

Finally, the Association believes that further clarificartions should be provided with reference to Paragraph 19 of Section 3 of the consultation paper, specifically in the part that provides that *"ESMA notes that MiCA is clear when indicating that orders, transactions, and other aspects of the distributed ledger technology may suggest the existence of market abuse e.g., the well-known Maximum Extractable Value (MEV) whereby a miner/validator can take advantage of its ability to arbitrarily reorder transactions to front-run a specific transaction(s) and therefore make a profit*". In particular, the Association believes that such an example lacks in terms of clarity, as the structure of a DLT inherently allows and/or obligates miners to prioritize transactions for which a party is willing to pay more. In this regards, we therefore deem essential to further detail the "*aspects of the functioning*" to be evaluated and provide more comprehensive examples. The Association also suggests to include a precise definition of "*aspects of the functioning*" within the RTS in order to avoid interpretative mistakes.

(*) These responses have been prepared together with Chiomenti.

<ESMA_QUESTION_MIC4_1>

Q2 Do you agree with the proposed elements that should constitute appropriate arrangements, systems and procedures to detect and prevent market abuse? If not, please specify the article of the draft RTS and elaborate.

<ESMA_QUESTION_MIC4_2>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_MIC4_2>

Q3 Do you agree with the proposed STOR template as presented in the Annex of the RTS?

<ESMA_QUESTION_MIC4_3>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_MIC4_3>

Q4 **Is there any parameter or naming convention that in your view should be modified to facilitate the identification of suspicious orders/transactions/behaviours involving crypto-assets?**

<ESMA_QUESTION_MIC4_4>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_MIC4_4>

Q5 **In Section II of the Annex, would the concept of 'location' be applicable to a distributed ledger? For instance, would the IP address of miners/validator nodes in the network be useful in a context where it can be masked through VPNs?**

<ESMA_QUESTION_MIC4_5>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_MIC4_5>

Q6 **Is there any other element or information relevant to crypto-asset markets that in your view should be included in the template? Please explain.**

<ESMA_QUESTION_MIC4_6>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_MIC4_6>

Q7 **Please provide information about the estimated costs and benefits of the proposed technical standard, in particular in relation to the arrangements, systems and procedures to prevent and detect market abuse.**

<ESMA_QUESTION_MIC4_7>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_MIC4_7>

Q8 **Do you agree with ESMA's approach regarding consistency between the MiCA and MiFID II suitability regimes? If you think that the two regimes should diverge, where and for which reasons?**

<ESMA_QUESTION_MIC4_8>

In general terms, the Association appreciates and agrees with the approach proposed by ESMA to shape the guidelines on suitability requirements on the basis of the MiFID II guidelines, while taking into consideration and reflecting the peculiarities, notably of technological nature, that crypto-assets inevitably present.

The Association is of the opinion that such an approach to MiCA suitability requirements regulation is able to guarantee an high level of harmonization between the MiCA and MiFID framework, reducing the compliance burden for financial institution already operating in the "traditional" financial market, intending to extend their business to the provision of crypto-asset services and ensuring a uniform level of protection for EU investors.

Without prejudice to the above, the Association believes that additional steps could be taken in order to ensure maximum harmonization and interoperability between the above indicated frameworks. Namely, the Association wish to provide its comments and recommendation on the following aspects:

i. the graduation of the rules of conduct depending on the classification of the client, in line with the proportionality principles;
ii. the categorization of crypto-assets, in terms of risk and complexity;
iii. the use of the client information collected for MiFID purposes in the context of the provision of the MiCA services by the same intermediary;
iv. the inclusion of sustainability preferences within the MiCAR suitability assessment; and
v. the classification of a crypto-asset as illiquid.

With reference to point (i) above, the Association appreciates the effort made by ESMA to include criteria corresponding to logics of proportionality. One of the instances where such an approach can be observed is the gradation of information to be requested depending on the level of vulnerability of the clients, which is however a concept that is not defined in the Guidelines.

Notwithstanding the above, the Association notes that the Authority does not link the graduation of the business conduct rules to the MIFID classification of the client. In the Association view, such classification, where available, shall be instead valued for the purpose of the suitability assessment under MiCAR, considering that the categorization of the client as retail or professional incorporates information on the client's knowledge and experience, financial situation and investment objectives that might be relevant also in relation to the provision of MiCAR services. In this perspective, the Association is of the opinion that the Guidelines at hand should allow to assume certain elements of the suitability assessment or, at least, ease certain obligations, where the (potential) client has been classified as "professional client" or "elibigle counterparties" under the MiFID framework. This solution, would ensure a more coherent and uniform treatment of investors that request to be provided with both investment and crypto-asset service by the same intermediary.

As to point (ii) above, it should be noted that ESMA, in the Consultation document, states that "*cryptoassets are to be considered risky and complex products*" and that there is "*no such thing as a 'safe' crypto-asset*".

The Association does not concur with such statements. As known, the notion of crypto-asset is extremely broad, since it does not incorporate any limitation to the rights and assets that can be represented in form of crypto-asset. Accordingly, the characteristics of crypto-assets can only be assessed on a case-by-case basis.

In this perspective, an aprioristic classification of crypto-asset as “risky” and “complex” appears unjustified and *de facto* creates a disparity in treatment between security tokens, governed by the MiFID framework, and the other crypto-assets, governed by MiCAR. This is because the former, despite being native to a DLT system, would be managed and considered entirely as financial instruments, therefore taking into account their level of complexity and riskiness when assessing the extent of the obligation of a MiFID investment firm under the suitability requirements. Conversely, crypto-asset would be always considered as an unsafe product, regardless of any consideration on its peculiaries, with the consequence that even asset-referenced token that are purported to maintain a stable value or other tokens incorporating guarantees would be considered risky, by default.

Based on the above, the Association, in this context, suggests to delete any references in the Guidelines to assumptions on the categorisazion of crypto-asset in terms of risk and complexity and to require, instead, crypto-asset service provider to assess the actual level of risk and complexity inherent in each type of crypto-asset, for the purpose of the product classification and suitability assessment.

With regard to point (iii), the Association notes that the document under consultation do not provide guidance on the use of client information collected for MiFID purposes for the MiCAR suitability assessment.

As this is, from an operational standpoint, a relevant point for firms providing both MiCAR and MiFID services, the Association suggests that the Guidelines elaborate on this issue, in particular by specifying if and to what extent MiFID firms that have collected a number of information through the MiFID questionnaire can rely on the same information also for MiCAR purposes and, thus, provide the MiFID clients with a shorter questionnaire, containing only the questions that are not already covered by the MiFID questionnaire.

Should ESMA intend to require, to some extent, MiFID firms to request MiFID clients to fill-in the same full MiCAR questionnaire used for MiCAR-only clients, it would be helpful if ESMA could provide some indications on best practices to adopt in case of conflicting information provided by the same client in the context of the MiFID and MiCAR questionnaire, taking into account that the information collected in the two different contexts may have overlaps. For instance, if a client declares yearly income over €100,000 in the MiFID questionnaire but then, in the MiCAR questionnaire, declares a yearly income of €50,000 — this raises the issue to determine which criteria should be used to consider one set of information as “prevalent” over the other (e.g., should the most recent or the most conservative data be considered?) or, more in general, how the firm should act to resolve such inconsistency.

As to the fourth point, the draft guidelines indicate that, while MiCAR does not make reference to the incorporation of sustainability preferences in the suitability assessment, should anyway be considered as a good practice for CASPs to collect information on the client’s preferences on environmental, social and governance factors and include them into their evalutations.

In this regards, the Association notes that MiCAR has been proposed, discussed and approved during a period in which the sustainability regulation was already at an advanced level of maturity.Indeed, MiCAR contains provisions concerning aspects related to sustainability, namely, for example, as to the information to be included within the whitepaper of a crypto-asset. In particular, Article 6 of MiCAR provides that "*A crypto-asset white paper shall contain all of the following information* […] *(j) information on the principal adverse impacts on the climate and other environment-related adverse impacts of the consensus mechanism used to issue the crypto-asset.*[…].

Sustainability factors are instead not taken into account with respect to the suitability assessments set forth under Art. 81 of MiCAR.

In light of the foregoing, the Association invites ESMA to reflect on the circumstance that the absence of references to the sustainability preferences in MiCAR might stem from an intentional decision of the European lawmaker, based – for example – on the goal not to penalize crypto-assets compared to other assets, considering that at least certain types of crypto-assets are particularly energy-intensive and, thus, have a lower performance in terms of environmental sustainability. In any case, the Association is of the view that the inclusion of sustainability preferences in the MiCAR suitability assessment should be considered as a purely voluntary decision of CASPs, based on their business strategy, rather than a best practice towards which all CASPs shall strive.

Finally, the Association believes that ESMA should provide a greater degree of granularity with reference to the notion of illiquid crypto-assets. In particular, paragraph 40 of the Guidelines provides that "*It is up to each crypto-asset service provider to define a priori which of the crypto-assets included in its offer to investors it considers as being illiquid".* In particular, the Association is of the opinion that it would be advisable for ESMA to clarify whether the criteria to be used to classify a crypto-asset as illiquid are the same, *mutatis mutandis,* as the criteria used under MiFID, and, should this be the case, it deems appropriate to make this choice explicit in the Guidelines and to specify any peculiarities linked to the specific nature of the crypto-asset that shall be taken into account, if appropriate.

<ESMA_QUESTION_MIC4_8>

Q9 Do you think that the draft guidelines should be amended to better fit crypto-assets and the relevant crypto-asset services? In which regard? Please justify your answer.

<ESMA_QUESTION_MIC4_9>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_MIC4_9>

Q10 Do you agree with the approach followed by ESMA regarding periodic statements provided in relation to portfolio management of crypto-assets?

<ESMA_QUESTION_MIC4_10>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_MIC4_10>

Q11 Do you agree with the approach taken by ESMA in the draft guidelines for crypto-asset service providers providing transfer services for crypto-assets on behalf of clients as regards procedures and policies, including the rights of clients? Please also state the reasons for your answer.

<ESMA_QUESTION_MIC4_11>

The Association acknowledges and appreciates the effort of ESMA in establishing a clear framework governing the policies and procedures to be adopted by a CASP providing transfer services for crypto-assets on behalf of clients.

However, and without prejudice to the above, the Association does not fully agree with the approach chosen by ESMA to shape the Guidelines on transfer services of crypto-assets on the basis of Directive (EU) 2015/2366 (PSD2), especially where such Guidelines do not provide for a differentiation in applicable rules depending on the type of crypto-assets to be transferred.

In particular, while the association fully agrees with the approach taken by ESMA with regards to e-money tokens — also given their explicit inclusion under the rules for payment services in light of the newly agreed PSD3 and PSR proposal texts — and understands the rationale for subjecting asset-referenced tokens to these Guidelines, it does not concur with the choice of applying the same approach to crypto-assets other than e-money tokens and asset-referenced tokens.

Indeed, whereas with reference to e-money tokens and asset-referenced tokens, the Association acknowledges the possibility of using such crypto-assets as means of payment, it fails to recognise such function in the case of other tokens, which, conversely, appear to serve a more investment-oriented purpose and therefore share similarities with security tokens. Such an approach has also been upheld by ESMA, which, with the declared intention of aligning and harmonising the MiFID and MiCAR regimes, has shaped the suitability guidelines under MiCAR on the basis of the guidelines used in the realm of properly defined financial instruments.

In light of the above, we believe that ESMA's choice to equate the transfer regime for other crypto-assets with the regime governing payment services appears to conflict with the aforementioned principle of harmonisation and alignment of the MiFID and MiCAR regimes. Thus, the Association, in order to prevent treatment discrepancies that may prove detrimental to crypto-assets other than e-money tokens and asset-referenced tokens, invites ESMA to consider that the transfer of other crypto-assets should be subject to the same, or at least similar, regulatory regime as the transfer of financial instruments, including in form of crypto-asset.

In addition and without prejudice to the paraghraps that precede, the Association deems that certain aspects of the Guidelines under examination would benefit further clarification.

In particular, firstly, paragraph 109 of chapter 5 provides that "*The purpose of draft Guideline 1 is to ensure that crypto-asset service providers providing transfers for crypto-assets have in place adequate policies and procedures (including appropriate tools) to provide the client with some essential information on the conditions of the provision of the service, in good time before the client enters into any agreement for the provision of crypto-asset transfer services*". In this particular case, with reference to the necessity to provide the client with essential information "*in good time before,*" the Association deems unclear whether the Guidelines require the provision of such information before the conclusion of the contract (*e.g.*, during the onboarding process) or even at a earlier stage. Additionally, considering that the contract itself will presumably include the same "*essential information on the conditions of the provision of the service*" (as listed in point 12 of the Guidelines), it would be helpful to clarify whether providing a copy of the contract is sufficient or if a separate, specific document is expected, provided that the Association would suggest to opt for the first option, considering that a separate document: (i) would essentially duplicate details already included in the contract; and (ii) might overlap with information provided in other contexts, such as the information on the custody policy to be provided to the client in accordance with Article 75 of MiCAR.

Finally, paragraph 16 of the Guidelines, provides that "*Crypto-asset service providers should establish, implement and maintain adequate policies and procedures (including appropriate tools) to ensure that, after receipt of an instruction to transfer crypto-assets but before the execution of the transfer of crypto-assets, the crypto-asset service provider provides the client with at least the following information: - a brief and standardised warning as to whether and when the crypto-asset transfer will be irreversible or sufficiently irreversible in case of probabilistic settlement; - the amount of any charges for the crypto-asset transfer payable by the client and, where applicable, a breakdown of the amounts of such charges".* In this context, the Association believes that further clarifications would be beneficial as regard as to whether Gas Fees (*i.e.* the fees paid by users to compensate for the expenditure of energy required to process and validate transactions on the blockchain) should be included in the "charges" filed, in the conxtet of the information to be provided to the clients when transferring crypto-assets.
<ESMA_QUESTION_MIC4_11>

Q12 Do you think that the draft guidelines address sufficiently the risks for clients related to on- and off-DLT crypto-asset transfers? Please justify your answer.

<ESMA_QUESTION_MIC4_12>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_MIC4_12>

Q13 Are there any additional comments that you would like to raise and/or information that you would like to provide, for example, on whether other relevant points or clients' rights should be considered?

<ESMA_QUESTION_MIC4_13>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_MIC4_13>

Q14 **Do you support ESMA's interpretation of the term, 'systems' in the mandate? If not, please explain your understanding of the term (and provide examples if possible).**

<ESMA_QUESTION_MIC4_14>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_MIC4_14>

Q15 **Are there other 'appropriate Union standards' beyond those identified in the consultation paper that you consider relevant for this mandate? If yes, please list them and provide a rationale for why they would be relevant.**

<ESMA_QUESTION_MIC4_15>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_MIC4_15>

Q16 **Do you agree with the inclusion of minimal administrative arrangements in Guideline 2 (i.e., no reference to implementing a risk management framework)? If no, please explain whether you would consider either *fewer* or *more* administrative arrangements appropriate.**

<ESMA_QUESTION_MIC4_16>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_MIC4_16>

Q17 **Do you support the inclusion of Guideline 5 on 'cryptographic key management'? Do you consider cryptographic keys relevant as either a 'system' or a 'security access protocol'? Is this guideline fit for purpose (i.e., can cryptographic keys be 'replaced' as implied in paragraph 29 of the draft guidelines)?**

<ESMA_QUESTION_MIC4_17>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_MIC4_17>