

Luxembourg, 14 December 2023

Subject: ALFI's response to the second ESMA's consultation package on Technical Standards specifying certain requirements of Markets in Crypto Assets Regulation (MiCA)

Introduction

The Association of the Luxembourg Fund Industry (ALFI) represents the face and voice of the Luxembourg asset management and investment fund community. The Association is committed to the development of the Luxembourg fund industry by striving to create new business opportunities, and through the exchange of information and knowledge.

Created in 1988, the Association today represents over 1,500 Luxembourg domiciled investment funds, asset management companies and a wide range of business that serve the sector. These include depositary banks, fund administrators, transfer agents, distributors, legal firms, consultants, tax advisory firms, auditors and accountants, specialised IT and communication companies. Luxembourg is the largest fund domicile in Europe and a worldwide leader in cross-border distribution of funds. Luxembourg domiciled investment funds are distributed in more than 70 countries around the world.

We thank the ESMA for the opportunity to participate in this consultation on the second batch of Technical Standards specifying certain requirements of Markets in Crypto Assets Regulation (MiCA).

Our members appreciate the opportunity to share the views of the market practitioners in Luxembourg, with regards to the proposed technical standards, in the context of MiCA.

In order to provide evidence of the industry considerations with regards to those various topics in the context of MiCA, answers will be given on a number of selected questions focusing on the high-level assessment and spotted industry-related consideration.

1. Content, methodologies and presentation of sustainability indicators on adverse impacts on the climate and the environment

Question 1 *Do you agree with ESMA's assessment of the mandate for sustainability disclosures under MiCA?*

ALFI generally agrees with ESMA's assessment of the mandate for sustainability disclosures under MiCA. Yet, on certain considerations, ALFI would like to highlight the specificities of the crypto assets' disclosure and the central role of the whitepaper to this regard.

As paragraph 6, page 9 poses the principle of the publication of ESG elements on websites, we would be in favour of allowing CASPs to make references to and rely on the white paper in order to comply with the disclosures' requirement.

In addition, we consider that the responsibility of the disclosed information should highly depend on the respective role of each actor, with particular view on the large diversity and heterogeneity of DLT technical solutions and protocols (e.g. permissioned vs permissionless). In particular, it is suggested that, in accordance with his/her roles and responsibilities, the custodian should not be responsible for the sustainability disclosures (, e.g., Principles Adverse Impacts (PAIs)) in the whitepaper supporting the digital asset in custody.

Such consideration should be given to the various types of crypto assets service providers and issuers.

Question 3 *Do you agree with ESMA's approach to ensure coherence, complementarity, consistency and proportionality?*

Overall, ALFI supports ESMA's approach to ensure coherence, complementarity, consistency, and proportionality. Yet, some considerations with regards to crypto-assets require specific attention. To this respect, we would refer to our answers in questions 6 to 12.

In any cases, we would like to raise the concern with regards to data availability, being a main challenge for the industry when it comes to quality, reliability, and comparability of the disclosures. We would be in favour of a gradual, pragmatic implementation keeping in mind that data availability is a central prerequisite, in the best interest of both the financial market participants and the end investors.

We are in favour of the application of the proportionality principle to ensure that the right CASP is subject to the right set of disclosure duties while addressing the data challenge. All CASP will not necessarily have access to the same level of ESG information relating to crypto-assets and platforms, hence the necessity to adapt the disclosures regime depending on the respective role of each disclosing CASP.

Question 6 *Do you agree with ESMA's description on the practical approach to assessing the sustainability impacts of consensus mechanisms? If not, what alternative approach would you consider suitable to assess these impacts?*

With regards to the mandatory indicators, ALFI would raise concerns in consideration to the language used in the reporting, in the interest of understandability from an end-investor's perspective. We are of the view that the wording of the sustainability indicators considered for disclosure should be clear, easily understandable, and non-ambiguous.

In addition, a clear distinction should be made between the transaction itself and the subsequent maintenance, when assessing and disclosing the energy consumption. Mining may be quite highly energy intensive. This being said, energy consumption indicators value, on the transaction on the one hand and on the maintenance on the other hand, should be disclosed separately.

Attention is brought in consideration for comparability: should one report use estimates and another one, actual values, then comparing the information in the various reports could result challenging and inaccurate. Resultingly, ensuring consistency and comparability with regards to energy usage would appear challenging.

Overall, we consider comparability of results is the key consideration and challenge, in the interest of investors in particular. To this regard, we would be in favour of a harmonization of the indicators' definition and methodology.

Referring to p14, paragraph 44, CASPs will be required to identify energy consumption of the DLT network nodes used to validate transactions, calculate GHG emissions and infer production of waste/use of natural resources. For these elements listed above, we would once again be in favour of applying a proportionality principle and focus the disclosure requirements on those CASPs having direct access to the related information. As an illustration, custodians may not have access to detailed energy consumption, GHG emission and waste/ use of natural resources of the network, while Trading platform or issuers many have easier access to such information.

Question 8 *In your view, are the proposed mandatory sustainability indicators conducive to investor awareness? If not, what additional or alternative indicators would you consider relevant?*

ALFI would like to raise some concerns, as some indicators measurements would lack actual data and making their disclosure mandatory would require the use of estimates. To this respect, we would consider the systematic use of estimates would create uncertainty around those disclosed estimated value indicators and the respective methodology applied in the estimate computation, hence raising concerns with regards to comparability.

Consequently, and concerning the proposed mandatory indicators, we would expect indicators to be deemed mandatory, only where actual quality data be available, to avoid misunderstanding. We would be of the view that, in order for the disclosures of indicators to reach its underlying purpose of providing quality comparable information to end-investors, the implementation of such mandatory indicators should follow a progressive approach, starting with the available data or emerging measurement practices, making the information understandable to investors and ensuring proper and comparable meaning across all actors.

With “emerging measurement practices”, we mean market-approved sources of information and associated estimation methods (the latter being used only in case actual data is not available for mandatory disclosure of indicators).

Clarity is considered a prerequisite across all measurement methodology standards for those indicators, allowing for a common understanding of the standards, leading subsequently to indicators’ comparability. Considering these challenges and concerns, we reiterate the interest for a step-by-step implementation of mandatory indicators.

Eventually, we would highlight the overarching requirement of the consistency of the data across the board. To this respect, the data, indicators and methodologies presented should be consistent in the various pieces of disclosure, throughout the whitepaper: in the sustainability considerations in the whitepaper, as well as in the project / usecase documentation.

Question 9 *Do you consider the proposed optional sustainability indicators fit for purpose? If not, what additional indicators would you consider relevant? Would you agree to making these optional sustainability indicators mandatory in the medium run?*

In the proposed step by step implementation described in our answer to question 8, we are of the view that none of the proposed optional sustainability indicators should be mandatory. We would focus on clarity, comparability and consistency to this regard, hence being in favour of a limited number of mandatory indicators in the initial stage, with particular focus on those indicators where actual quality data is available.

Question 10 *Do you consider the principles for the presentation of the information, and the template for sustainability disclosures fit for purpose? If not, what improvements would you suggest?*

In answering this question, we would like to highlight considerations focusing on investment funds investing in crypto assets:

For investment funds investing in crypto assets, the asset managers of the fund consider that filling in this information in the template will represent a real challenge. To this respect, they would certainly rely on a third party (the CASP) to be the central repository of the information and therefore provide this set of information in a complete, correct and timely manner. Asset managers would be recipients of this information, and rely on the CASPs capacity to retrieve and present the information in the template (with regards to investment in crypto-assets), which could result challenging, depending of the resources and operational organization of the CASP (and the availability of the information from the trading platform). To this regard we would refer to our response to question 6.

Eventually, and with regards to the interest of the disclosure information for the end-users of the information in the whitepaper, there are concerns towards the usability of information, with regards to clarity and meaningfulness.

Question 11 *In your view, are the calculation guidance for energy use and GHG emissions included in the draft European Sustainability Reporting Standards relevant for methodologies in relation to the sustainability indicators under MiCA? If not, what alternative methodologies would you consider relevant? For the other indicators for which the calculation guidance of the ESRS was not available, do you consider that there are alternative methodologies that could be used? If so, which ones?*

We would like to refer to the investment fund industry's general concern with regards to the availability of data, in relation to the gradual implementation of ESRS, starting in 2025. The delay in the availability of the end data will obviously lead to a gradual implementation of the reported data throughout the value chain.

To this respect, we would consider the current challenges the industry is facing in gathering these data for which a methodology is explicitly stated in ESRS. Resultingly, we would be concerned that proposing to complement with additional ad-hoc methodology for other indicators would only add another layer of challenges, which would be detrimental to the overall clarity and comparability of the disclosures.

Question 12 *Would you consider it useful that ESMA provides further clarity and guidance on methodologies and on recommended data sources? If yes, what are your suggestions in this regard?*

In answering this question, we would consider prescription versus flexibility:

- **Prescription:**

Overall, we agree that the more precise the prescribed methodology, the more clarity and the less room for interpretation. Preciseness in the prescribed methodology would definitely serve the purposes of clarity, comparability and consistency.

- **Flexibility:**

With this in mind, we would nevertheless need to ensure, throughout the implementation process, that the prescribed data is available in all instances for the players to use and disclosed in a precise and timely manner. To this regard, we would be of the view that offering the industry some flexibility and room for adapting to missing quality data would be necessary. Considering the data challenge the industry would be facing, a pragmatic, flexible and gradual approach would be welcomed, while serving the underlying requirement of clarity on the definitions. We would refer to our response to question 8 and suggest following a progressive approach, starting with the available data or emerging measurement practices, i.e. market-approved sources of information and associated estimation methods.

2. Continuity and regularity in the performance of crypto services

Question 13 *Is the definition for permissionless DLT in Article 1 sufficiently precise?*

The proposed definition covers relevant aspects to determine a '*permissionless distributed ledger*'. However, it is believed that it remains incomplete. Indeed, the definition focuses solely on the notion of 'service' and remains silent concerning the notion of '*user*'.

In order for the definition of '*permissionless distributed ledger*' to be complete, it would be necessary to add the notion of '*accepted user*' and the condition(s) of '*free entry point*'. The feature of free entry point is required to define '*permissionless*'.

The need to complement the definition with this criterion stems from the current industry practices adding restricted platform (no free entry point) on the top of permissionless distributed ledgers. This is, for instance, the case when an additional layer that is not accessible to everyone is supported by a classical permissionless distributed ledger (e.g. Polygone).

Under this model, most users will not "see" the blockchain. There is a need to make a distinction between:

- **The ecosystem** – permissionless distributed ledger that only serves as data warehouse and database
- **The platform** – the additional layer that runs the service

This distinction can have substantial implication regarding liabilities. Due to the true permissionless nature of the ecosystem, the limited liability can apply. On the other hand, the part of the platform that has no free entry point is more controlled by the entities calling for a broader scope of the liability.

With regards to paragraph 62 and the interpretation of the respective liability in the occurrence of losses in a permissioned DLT, we would reiterate that custody related regulatory frameworks (e.g. Alternative Investment Fund Managers 'AIFMD') establish the responsibility in case of loss and clarify the limits of this responsibility. This legal provision would allow for clear predictability and set up the field for an appropriate regime of responsibility. The relevant notions to delineate the responsibility of the custodian facing a loss of asset are those quoted below and based on the principles also relied upon by the MiCA Regulation to define responsibilities as established in the Article 75.8

"Crypto-asset service providers providing custody and administration of crypto-assets on behalf of clients shall be liable to their clients for the loss of any crypto-assets or of the means of access to the crypto-assets as a result of an incident that is attributable to them. The liability of the crypto-asset service provider shall be capped at the market value of the crypto-asset that was lost, at the time the loss occurred.

Incidents not attributable to the crypto-asset service provider include any event in respect of which the crypto-asset service provider demonstrates that it occurred independently of the provision of the relevant service, or independently of the operations of the crypto-asset service provider, such as a problem inherent in the operation of the distributed ledger that the crypto-asset service provider does not control."

ALFI recommends to establish a clear responsibility regime for the custodian in case of loss of assets including the limit of this responsibility relying on the "beyond reasonable control" notion. In application of the "beyond reasonable financial exposure" principle, we would suggest to specify the responsibility limit as the exposure to the market value of the assets at the time the loss occurred. We would expect the regime to apply without distinction between permissioned and permissionless DLT.

In conclusion, we are of the view that a clear distinction should be made between the full ecosystem and the distributed ledger layer only. The addition of the notion of 'free entry point' in the definition would be of help in making this distinction.

Question 14 *Throughout the RTS, we refer to 'critical or important functions'. The term is borrowed from DORA and does not just capture ICT-specific systems. Does this approach make sense?*

Consistency across the definitions used in the different regulatory frameworks applying to the same entities is critical. This is a requirement to ensure consistency of the different overlapping frameworks. Against this background, the proposed definition of 'critical or important function' would support this objective as it is aligned with DORA.

Question 15 *Do you consider subparagraph (e) in Article 4(2) on external communications with clients in the event of a disruption involving a permissionless DLT appropriate for the mandate (i.e., does it constitute a measure that would ensure continuity of services)?*

Provided that the provision relates to the technology and not the service, we are of the view this is acceptable.

Nevertheless, particular attention should be given to:

- the significance of the impact; and
- the clarity and preciseness of the information

when it comes to any external communication of disruption.

From a technical standpoint, the events falling into the definition of "disruption" can be very heterogeneous in nature and in terms of consequences. This heterogeneity needs to be acknowledged for and the subsequent impact be clearly communicated.

In absence of such clarity, the communication would result in a noisy signal and could create damageable confusion for investors, who would eventually be unable to distinguish benign and inconsequential events from sever disruptions.

Question 16 *Should this RTS also specify that CASPs should establish a business continuity management function (to oversee the obligations in the RTS)? In your view, does this fall within the mandate of 'measures' ensuring continuity and regularity?*

The level of prescription of this proposal does not seem to fit the mandate and would not be necessarily required, to effectively ensure continuity.

Indeed, the question proposes to introduce the requirement to establish a specific function to manage continuity in a prescriptive way, formalising the specific organigram of CASPs. We consider that a more flexible approach, consisting in requiring to identify dedicated resources to ensure management of business continuity would allow to achieve the same objective while allowing different operational model to emerge and address the divergence in models across CASPs. Different operational models would allocate the business continuity responsibility at different levels and departments, to fittingly rely on existing competences and expertise.

Accordingly, the level of granularity for organisational requirements introduced in this question is not needed at this level and could be complemented by the local supervision frameworks.

Question 17 *Are there other organisational measures to be considered for specific CASP services?*

No significant additional measure has been identified in this context.

Question 18 *Do you consider the obligation for CASPs to conduct testing of the business continuity plans in Article 4(4) via an internal audit function appropriate for the mandate?*

Reiterating our views described in the previous responses, we consider that this question draws attention to the diversity of business models implemented across emerging operating CASPs. This is tightly related, in particular, to whether the CASPs are 'intra-group' or 'standalone' entities.

For 'intra-group' CASPs, the testing of the business continuity plans can be effectively carried out by the internal audit function.

On the other hand, subject to potential client request for certification, 'standalone' CASPs may see benefit in relying on a testing executed by an external party (e.g. ISAE audit type).

In this context, it is important to provide CASPs with the flexibility to select the appropriate and most efficient approach to this respect, taking into account internal resources and client needs/request. This would efficiently allow to avoid duplicated testing while relying on the available expert resources.

Question 19 *In Art. 68(8), CASPs are required to take into account the scale, nature, and range of crypto asset services in their internal risk assessments. Is there support for this general principle on proportionality in Article 6? Do you support the proposed self-assessment under Article 6(2) and in the Annex of the draft RTS?*

In light of the abovementioned heterogeneity of CASPs and crypto-assets, the principle of proportionality is supported in our views, and in line with current and emerging market practices.

3. Offering pre- and post- trade data to the public

4. Record keeping obligations for CASPs

5. Machine readability of white papers and white papers register

Question 57 *Do you agree with the criteria proposed for identifying a relevant machine-readable format for the MiCA white paper and consequently with the proposal to mandate iXBRL as the machine-readable format for MiCA white papers, subject to the outcome of the study referred to in paragraph 239?*

The justifications and reasoning provided in the consultation and proposed ITS, as well as the rationale behind the choice appear reasonable and in line with the stated objectives.

Question 58 *If yes, do you agree that the white paper should be required to be a stand-alone document with a closed taxonomy (i.e., without extensions nor complex filing rules)?*

In order to achieve the enounced goals of 'simplicity', 'readability' and 'comparability', the standalone and closed taxonomy format requirements have a virtue and are favoured.

Nevertheless, a provision allowing for the evolution of the template when material technology and market developments would be observed should be considered while assessing the respective trade-off between economic benefits and additional costs of the updates.

Question 65 *Would you deem it useful for ESMA to provide an editable template to support preparers with the compliance of the format requirements proposed in the draft ITSSs?*

An editable template would be useful considering the respective speed of implementation and comparability aspects. Past experience demonstrated that financial information formatting and communication can be indeed facilitated through the use of editable template. This in general provides investors with enhanced confidence, while reducing information asymmetry.

Question 66 *Are there any other data elements that you would consider relevant to ensure that investors can properly compare different crypto-asset white papers and NCA can perform their classifications on the basis of harmonised information?*

Adopting investors perspective is pivotal to ensure the information be appropriate and clear for investors. In this context, and considering potential retail investors, providing practical comparisons and yardsticks can foster a better understanding of end-users. As an example, such provisions fostering comparability and clarity would be beneficial in the disclosures presented in the section on sustainability indicators (e.g. comparison among transactions' energy consumption).

6. Technical means for appropriate public disclosure of inside information

Question 72 *In your view, is there any obstacle for the website of the relevant parties to allow for specific alerts?*

We consider this process, in which the website of the relevant parties would be allowing for specific alerts, is included in the "business as usual" processes in the digital and crypto-assets world. Therefore, we do not see any particular obstacle to report. Particular consideration could be made, with regards to data protection regulation (GDPR) and any provision to this respect that could, in some instances, bring some obstacle to the diffusion of such alerts.

Question 73 *In your view, what are the media most relied upon by the public to collect information on crypto-assets? In case you are an issuer, offeror or person*

seeking admission to trading, please specify/add which media you would normally use to communicate with investors and the reasons supporting your choice.

Crypto-assets may not have the same target audience as the traditional financial assets. Therefore, this question on the most adequate media is welcomed.

From a practitioner standpoint, we would appreciate leveraging on the existing media, since adding new media in the process may bring up challenges with regards to trust and reliability. In any cases, the media used need to having passed through an approved accreditation process, to ensure the reliability, validity and quality of the information provided.

New companies and media service providers may emerge in this field. Yet, they should be reviewed with regards to reliability of information, the absence of corruptibility, as well as considering any case of potential conflict of interest.

For instance, Stock Exchanges would remain trusted sources of information in this field.

In particular, scrutiny should be carried on information published on any social media, as the reliability of information published through this channel may be questionable. With this in mind, we would appreciate some rules to be implemented, governing the posting of such information on social media. As identified in the IOSCO regulatory measures to address increasing risks and challenges from digitalisation of retail marketing and distribution, social media can be, at times, subject to deficiencies, in particular with regards to reliability and cross-referencing validation of posted information.

Question 74 *Should a social media or a web-based platform be media reasonably relied upon by the public, what are the risks that you see when using them to achieve dissemination of inside information in relation to crypto assets? Should the dissemination rather take place through traditional media channel?*

The suggestion of using social media is overall appreciated, with views on the digital access perspective. Nevertheless, there should be clear rules in place with regards to the actual posting, quality validation and maintenance of such publication to ensure the consistency, reliability and trustworthiness of the information.

Alternatively, having a central EU website for such publications of news could be considered a valid option, so as to have a reliable, golden source and central source of information shared by all EU jurisdictions and offering the required level of reliability, trustworthiness and information security.

Question 75 *Please comment the proposed means for dissemination of inside information? Please motivate your answer by indicating why the means they are/are not valuable tools for dissemination purposes.*

Please refer to answers to Q73 and Q74.