



14th December 2023

European Securities and Markets Authority
201-203 rue de Bercy
75012 Paris

Re: ESMA Consultation Paper - Technical Standards specifying certain requirements of Markets in Crypto Assets Regulation (MiCA) - second consultation paper

The members of the European Focus Committee of the Association of Global Custodians¹ (the “AGC-EFC”) are broadly highly supportive of ESMA’s proposals as set out in the second consultation referenced above² (the “Consultation Paper” or “CP”).

However, as asset servicing providers who will not address elements of the CP applicable to CASPs operating trading platforms, the AGC-EFC emphasises a core structural problem with ESMA’s proposed approach as it would apply to CASPs who do not operate trading platforms.

Sustainability disclosure requirements

Our concerns regarding sustainability disclosure requirements are founded in what we believe is the correct application of the principle of proportionality: put simply, CASPs who themselves are not providing the service of “operation of a trading platform for crypto-assets” (as defined in MiCAR Art. 3(1)(16)(b)) should not be subject to the same requirements as those that do. This is because CASPs not operating trading platforms (i.e., those falling under (a) or (c) through (j) of MiCAR Art. 3(1)(16)) will not have access to the same level of sustainability information relating to crypto-assets as parties responsible for white papers or operators of trading platforms. As we explain in more detail in our responses to the Call for Evidence, we urge adaptation of the proposed approach to sustainability disclosures so that it is more appropriate to the role of the disclosing CASP.

There is an important question of scope of responsibility of CASPs who are not privy to the information available to issuers and operators of trading platforms. It is essential to ensure a workable framework in which service providers can operate predictably. Applying the principle of proportionality would suggest that CASPs should be able to rely on information set out in white papers and not require the information to be sourced elsewhere, which, for those CASPs not operating trading platforms, would create the risk of divergent disclosures that could well vary widely.

¹ Established in 1996, the Association of Global Custodians (the “Association”) is a group of 12 global financial institutions that each provides securities custody and asset-servicing functions primarily to institutional cross-border investors worldwide. As a non-partisan advocacy organization, the Association represents members’ common interests on regulatory and market structure. The member banks are competitors, and the Association does not involve itself in member commercial activities or take positions concerning how members should conduct their custody and related businesses. The members of the Association are: BNP Paribas; BNY Mellon; Brown Brothers Harriman & Co; Citibank, N.A.; Deutsche Bank; HSBC Securities Services; JP Morgan; Northern Trust; RBC Investor & Treasury Services; Skandinaviska Enskilda Banken; Standard Chartered Bank; and State Street Bank and Trust Company.

² *Consultation Paper - Technical Standards specifying certain requirements of Markets in Crypto Assets Regulation (MiCA) - second consultation paper*, ESMA75-453128700-438 (5 October 2023).

It is crucial that single sources of information are used for purposes of disclosure, which can only happen if a recognised point of centrality is considered definitive. Such a point of centrality would be a white paper, or - failing this – as otherwise facilitated by the operator of the relevant trading platform. Indeed, as we explain in our responses to the CP, this approach is supported in the text of the Regulation.

Consequently, for the reasons stated above, it would be appropriate to exclude CASPs falling under (a) or (c) through (j) of MiCAR Art. 3(1)(16) from having to source information independently of any white papers, including where for whatever reason there is no white paper. Where no white paper has been issued, we strongly urge ESMA to recognise that only operators of relevant trading platforms can act as the single, definitive source of information upon which other CASPs – and the wider investing public – can rely.

A conceptually sound distribution model is a model in which information is stored and maintained in one place, and all parties have access to this information. The obligations placed on issuers to publish white papers, and on CASPs to provide links to these white papers for crypto assets for which they provide services (MiCAR Article 66(3)), are in line with such a conceptually sound distribution model.

In summary, we believe that ESMA should apply the following three principles in drafting the RTS:

1. Tailoring the obligations depending on the role of the CASP, and in particular with respect to whether, or not, the CASP acts as an operator of a trading platform.
2. Differentiating between crypto assets with a white paper provided by the issuer, and those without.
3. Applying to the greatest extent possible the principle of data uniqueness, namely, the principle of a “golden source” of data (i.e. of data being stored and maintained in one location, and not in multiple, separate locations).

The AGC-EFC makes specific recommendations to apply these principles in our responses to the CP.

CASP liability

ESMA in the CP touches on the liability of CASPs for loss of crypto- assets in the CP by drawing a distinction between “permissioned” and “permissionless” DLTs. We believe the assumptions and support for this distinction or significantly flawed and represent a departure from longstanding approaches taken to legal and operational risks by the financial services community who would operate as CASPs.

In our responses to the CP, we point out that a distinction between “permissioned” vs. “permissionless” DLT is inconsistent with MiCA regulation (specifically MiCAR Art. 75(8)) and therefore inappropriate. There will be CASPs that do not operate trading platforms themselves and – perhaps more important – there will be CASPs who participate in and provide access to permissioned networks on the basis that they will be required to accept the rules of those networks, similar to the way in which participants in financial market infrastructures (FMIs) (such as CSDs) “participate” in those FMIs today. As is the case with respect to post-trade FMI arrangements today, participants will be unable to control the actions (or inaction) of permissioned networks, who of course will be required to be highly regulated themselves. We would expect the liability regime applicable to CASPs to be applied without distinction between permissioned or permissionless DLT - but rather with reference to what is beyond the control of CASPs and where the relevant incident is not “attributable” to the CASP, etc. – all as set out in MiCAR Art. 75(8).

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More detail explaining our positions in respect of the two core points referenced above can be found in our responses to the CP.

In the meantime, we look forward to further engagement with ESMA on the development of this very important regulatory framework. We would be pleased to discuss any questions ESMA representatives may have.

Sincerely,

A handwritten signature in black ink, appearing to read 'John Siena', is written over a horizontal line.

John Siena

Chair, European Focus Committee
The Association of Global Custodians