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Additional Information

Level 1 Regulation
MiCA

Topic
Crypto-Asset Service Provider (CASP)

Additional Legal Reference
Article 75.4 MiCA

Subject Matter
Custody agreements in the exercise of rights attached to crypto-assets

Question
Would the ‘terms of service’ or any type of non-negotiated standard user agreement between a client and a crypto-asset service provider (CASP) providing custody services constitute a

‘valid agreement’ that ‘expressly provides otherwise’ per the clause in the second subparagraph of Article 75(4) of MiCA?

If so, can this agreement stipulate that a CASP providing custody services may be unable to facilitate the exercise of client rights with respect to a crypto-asset in the event of any modifications to those rights?

ESMA Answer

17-06-2025

Original language

No. The principle expressed in the first subparagraph of Article 75(4) is that CASPs providing custody and administration of crypto-assets on behalf of clients shall facilitate the exercise of the rights attached to the crypto-assets and that any event likely to create or modify the rights of a client shall immediately be recorded in the client’s register of positions.

In addition, where there are changes to the underlying distributed ledger technology or any other event likely to create or modify a client’s rights, the client shall be entitled to any crypto-assets or any rights newly created on the basis and to the extent of the client’s positions at the time of the occurrence of that change or event, except in cases where, “a valid agreement signed with the crypto-asset service provider providing custody and administration of crypto-assets on behalf of clients pursuant to paragraph 1 prior to that change or event expressly provides otherwise”. Thus, CASPs may derogate to that principle only where:

i) there are changes to the underlying distributed ledger technology or another event likely to create or modify a client’s right; and

ii) the CASP has obtained from the client prior express and signed consent to the derogation.

Terms of service or any type of non-negotiated standard user agreement between the client and the CASP providing custody services would not be sufficient to demonstrate the express consent to the derogation by the client. Otherwise it would have been listed in Article 75(1) as

one of the terms required in the custody agreement (if the CASP is intending to use the extension). It is clear that CASPs providing custody and administration of crypto-assets on behalf of clients should ensure that it is sufficiently clear that the client has consented in an explicit and affirmative way to the specific provision of the terms of service or other standard agreement that is derogating from Article 75(4) of MiCA. To this end, CASPs may, for instance, obtain the client’s express acknowledgement of the derogation by requesting that they agree to a specific clause via a pop-up box when accepting the terms of service.