

Statement

Avoiding Misperceptions: Guidance for Crypto-Asset Service Providers Offering Unregulated Services

Just a few months after the application of the Markets in Crypto-Assets Regulation (MiCA)¹ to firms providing crypto-asset services (CASPs), ESMA reminds CASPs of their obligation to act fairly, professionally and in accordance with the best interests of their clients and prospective clients². As such, when offering both regulated (under MiCA) and unregulated services, CASPs must avoid creating confusion or misleading clients or prospective clients as to whether the service benefits from the protections afforded by MiCA.

ESMA warns that the practice of CASPs offering both MiCA-regulated and unregulated³ products and services gives rise to investor protection risks.

The purpose of this Statement is to set out some of the risks that are likely to arise and the issues that CASPs should pay particular attention to when providing such unregulated products and/or services.

Risks for investors

Where CASPs provide both regulated and unregulated products and/or services, there is a significant risk that clients and prospective clients misunderstand the protections they are afforded. This is because they may not be aware that the protections afforded by MiCA do not apply to unregulated products and/or services. Indeed, unregulated activities conducted by CASPs do not offer the same safeguards as would crypto-asset services regulated under MiCA: management of conflicts of interests, complaints handling requirements, safeguarding of clients' assets, ongoing supervision by national competent authorities.

A CASP regulated status under MiCA may create a 'halo effect' that may often serve to provide potentially misguided reassurance in relation to the unregulated products and/or services offered by that CASP or related-entities offering unregulated product and/or services through the same platform.

Some CASPs may even use their regulated status under MiCA as a marketing argument and encourage the confusion between regulated and unregulated products and services. Therefore, CASPs should be particularly vigilant about avoiding any confusion in clients or prospective clients about the protections attached to unregulated products and/or services.

¹ Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets.

² In accordance with Article 66(1) of MiCA.

³ That do not fall in the scope of MiCA or other sectoral EU legislation such as, for instance, Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments.

Dos and don'ts to mitigate the risks to investors

CASPs have the obligation to act fairly, professionally and in accordance with the best interests of their clients and prospective clients. In addition, they must comply with their obligation to ensure that all information, including marketing communications, addressed to clients or potential clients is fair, clear and not misleading.⁴

To mitigate the risks that clients or prospective clients misunderstand whether a product or service is regulated under MiCA, CASPs should take all necessary measures to ensure that clients and prospective clients are fully aware of the regulatory status of the product/service they are receiving. Such measures include:

Dos	Don'ts
<p>The regulatory status of the product and/or service is clearly and effectively communicated in all dealings with clients, and at every stage of the sales process.</p> <p>For example, all marketing communications should indicate clearly if a product and/or service offered by a CASP is regulated or not.</p> <p>Such indication should be clearly visible to clients and prospective clients.</p>	<p>The terminology used implies that a product or service falling outside of the scope of MiCA or other EU sectoral legislation is regulated in any way where this is not the case.</p> <p>Information as to the unregulated status of a product or service is merely visible in the Terms and Conditions only.</p>
<p>Any information on a CASP's website related to unregulated activities is clearly distinguished from regulated activities. CASPs have separate sections on any website they operate for regulated activities and any other activities which they carry out. Client documentation is distinguished accordingly in order to ensure that clients are sufficiently aware of the differences in protection.</p>	<p>The CASP's regulatory status is used as a promotional tool. When engaging in unregulated activities, information provided to the client or potential client, including marketing materials and other documentation, includes a reference to the CASP being authorised/regulated by an NCA.</p>
<p>The entity offering each service and/or product is clearly communicated, their legal and regulatory status established and conflicts of interest are managed in line with MiCA requirements, as applicable.</p>	<p>It is unclear which entity is providing the unregulated service and/or product at the time of entering into the related agreement and the related risks are obfuscated.</p>

⁴ In accordance with Article 66(2) of MiCA.

	The differentiation between service providers is made exclusively in the Terms and Conditions.
Before the client is provided unregulated services and/or products, there is a pop-up window stating that these are unregulated services/products. This pop-up includes a check the box approach requiring that the client has read the information provided in the pop-up window and acknowledges the unregulated status of the service/product before the client is actually able to receive the unregulated services and/or products	Unregulated entities (be they part of the same group as the CASP or not) offer services and/or products regulated or unauthorised under MiCA through the CASP's interface with clients.