Reply form

**on** **the first Consultation Paper for MiCA implementation**

Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1 . 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 **20 September 2023.**

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘*Your input - Consultations’*.

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:

• Insert your responses to the questions in the Consultation Paper in this reply form.

• Please do not remove tags of the type < ESMA\_QUESTION\_MICA\_0>. Your response to each question has to be framed by the two tags corresponding to the question.

• 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.

• When you have drafted your responses, save the reply form according to the following convention: ESMA\_CP1\_MiCA \_nameofrespondent.

For example, for a respondent named ABCD, the reply form would be saved with the following name: ESMA\_CP1\_MiCA \_ABCD.

• Upload the Word reply form containing your responses to ESMA’s website (**pdf documents will not be considered except for annexes**). All contributions should be submitted online at *www.esma.europa.eu* under the heading *‘Your input - Consultations’.*

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 publicly 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](http://www.esma.europa.eu) under the heading ‘[Data protection](https://www.esma.europa.eu/about-esma/data-protection)’.

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 | Verenigde Bitcoin Bedrijven Nederland (VBNL) |
| Activity | Associations, professional bodies, industry representatives |
| Are you representing an association? |  |
| Country / Region | Netherlands |

# Introduction

Q0: Please make your introductory comments below, if any:

<ESMA\_QUESTION\_MICA\_0>

The Dutch Association for Bitcoin companies (VBNL) is the branch organization of DNB registered Crypto Asset Service Providers who are active in The Netherlands. VBNL welcomes the ESMA initiative on public consultation of the level 2 Regulatory Technical Standards. Through this writing, VBNL responds on those items which are of relevance for members (CASP’s) of VBNL.

<ESMA\_QUESTION\_MICA\_0>

# Questions

Q1: Do you think that anything is missing from the draft RTS and ITS on the notification by certain financial entities to provide crypto-asset services referred to in Articles 60(13) and 60(14) of MiCA?

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<ESMA\_QUESTION\_MICA\_0>

Q2: Do you agree with the list of information to be provided with an application for authorisation as a crypto-asset service provider? Please also state the reasons for your answer.:

<ESMA\_QUESTION\_MICA\_0>

With regard to point 17 and Article 87: VBNL recommends ESMA to provide further guidelines on how the NCA’s are to assess the knowledge, skills, experience of members of the management body. Many CASPs have members in their body who are the founders of their companies and have extensive experience in the crypto sphere. The existing assessment framework used by NCA’s might not be suitable here for appropriate assessment of members of the management body of CASPs.

With regard to point 28 & Article 1: Not all CASP’s have a Legal Entity Identifier and are obliged to have one. It would be better to request a company ID number such as an Chamber of Commerce number and include “where applicable” in the LEI requirement.

With regard to point 32 & Article 2h: The CASP will be required to provide a three year forecast for several items. Due to the dynamic nature of the crypto sphere this is quite challenging. In particular, it is challenging for planned marketing and promotional activities since these are planned based on market conditions. VBNL advices to reformulate this requirement in generic terms, to describe the channels and tools used without actual planned activities.

With regard to Article 3c: it might be the case that the latest financial statements have not yet been audited by an external auditor at the moment of filing the authorisation application. The suggestion is to reformulate this requirement in order for allowing delivering the latest financials audited when possible.

With regard to Article 4b: personal details of relevant functions (management, supervisory and

internal control functions) are to be included in the application. It would help CASPs if ESMA provides insight in its view on typical functions that are to be considered. This is to ensure the level playing field across the Union in terms of interpretation by NCA’s.

With regard to Article 4g: where relevant, a description of the arrangements put in place to prevent and detect market abuse is required. It would help CASPs if ESMA would provide more guidance in which situations such a description is deemed relevant (or not relevant).

With regard to Article 10e: It should be noted here that many CASPs are facing difficulties to obtain a client relationship with a bank or other credit institution due to (undesirable) derisking by this sector. As a consequence, CASPs do not have the luxury to select a suitable bank or credit institution from a broad range. This should be taken into account in the formulation of this requirement.

With regard to Article 13a: ESMA prescribes that CAPSs must provide a copy of the applicant’s standard agreement. It should be noted that as CASPs are predominantly online companies that communicate with customers via their websites. In general, agreements that are agreed upon online consist of 1) a flow with an ‘I agree’ or 2) a‘ place the order’ button together with checkboxes linking to policies, general terms etc. The prospective customer do mainly receive a confirmation in their email inbox. Does ESMA expect from CASPs to provide the flow, printscreens and the respective policies that are agreed upon?

<ESMA\_QUESTION\_MICA\_0>

Q3: Do you agree with ESMA’s proposals on standard forms, templates and procedures for the information to be included in the application for authorisation as a crypto-asset service provider? Please also state the reasons for your answer.

<ESMA\_QUESTION\_MICA\_0>

VBNL does not disagree with the proposed templates, but suggests to ESMA to accommodate for NCA’s to develop an online application tool for the smooth and efficient processing of the application and communications between the relevant CASP and NCA.

<ESMA\_QUESTION\_MICA\_0>

Q4: Do you agree with ESMA’s proposals to specify the requirements, templates and procedures for the handling of client complaints by crypto-asset service providers? Please also state the reasons for your answer.

<ESMA\_QUESTION\_MICA\_0>

VBNL considers the requirements as extensive, especially for smaller VASPs. It is mentioned that the complaints handling procedure and deployed resources should be proportional based on the specific setting and characteristics of the CASP. At the same time some prescribed requirements may have a large impact on CASPs, such as the complaints management requirement. Smaller entities may not be in a position to afford a dedicated function or FTE to focus on complaints handling. Moreover, the requirement on continued analysis of complaints might result in NCA’s requiring extensive and sophisticated systems and tooling for this purpose. (Automated) monitoring of (for example) processing times in each step in the complaints handling procedure will most probably incur additional compliance costs for CASPs. Despite the principle of ESMA on proportionality and mindfulness about costs incurred following the obligations this package contains, it must be noted that this obligation will increase compliance costs for CASP’s.

Furthermore, flexibility is desirable with regard to the template for filing a complaint. Since CASPs predominantly operate online, CASPs should have the possibility to develop an online flow/wizard (or similar) in which the elements of the template are included. This would also enable CASPs to increase processing times and conduct data driven analyses as a result from retrieving data from data fields as compared to a Word or PDF format. VBNL advices to include flexibility on this matter and to prescribe the relevant elements, but not the channel or form in which they are to be presented.

<ESMA\_QUESTION\_MICA\_0>

Q5: Do you think that it is useful to keep the possibility for clients of CASPs to file their complaints by post, in addition to electronic means?

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VBNL does not consider the possibility of filing a complaint by post - that is imposed by regulation - as added value. First of all, the crypto sector is by nature digital driven, and CASPs predominantly operate in a digital, non-face-to-face business, either through an app or browser. Therefore, clients will usually opt for digital means of filing a complaint. Secondly, persons in general do have the possibility to send complaints by post if the address is shown on the website, which is already an obligation for online companies. We do not see any added value to have this topic discussed in regulation.

<ESMA\_QUESTION\_MICA\_0>

Q6: Do you think that other types of specific circumstances, relationships or affiliations should be covered by Articles 1 and 2 of the draft RTS on the identification, prevention, management and disclosure of conflicts of interest by crypto-asset service providers?

<ESMA\_QUESTION\_MICA\_0>

Brokers are crypto exchanges that provide exchange services on own account. In a rapidly changing volatile market, brokers may react faster than the customer, which can lead to accusations of unfair advantage. Brokers should be clear about the fees, but the underlying value of the order, which is the price of the crypto, will differ, depending on how fast the customer pays for the inserted order. Upon inserting the order, brokers buy the requested crypto for the customer and wait until the order has been fully paid. Especially during very volatile bullish or bearish markets value of the underlying crypto differ. Identifying this particular situation as a conflict of interest will harm broker activities.

To provide services, CASPs (brokers) have an API connection with other CASPs. By having these networks, CASPs can look for the best price of a specific crypto. According to Article 2 sub (d), if CASPs carry out the same business activities as the client, this can lead to an immediate conflict. Does ESMA consider this market practice as an immediate conflict of interest and how should this be dealt with?

<ESMA\_QUESTION\_MICA\_0>

Q7: Do you think that other types of specific prevention or mitigation measures should be highlighted in the minimum requirements of Article 3 of the draft RTS on the identification, prevention, management and disclosure of conflicts of interest by crypto-asset service providers?

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With regard to article 7: it is mentioned that CASPs should ensure that they are informed on any personal transaction of a connected person. In practice, this requirement may lead to a location obligation for personal transactions by connected persons since many connected persons are active in crypto personally. Furthermore, this requirement would trigger advanced monitoring activities by CASPs to monitor the transactional behaviour of connected persons. Especially for smaller CASPs, such a requirement is not proportionate and will result in high additional compliance costs. Moreover, this requirement goes beyond traditional COI regulations. VBNL advices to change this requirement in such a way that it can be implemented proportionally by smaller CASPs. An alternative could be to require CASPs to designate insiders and to inform themselves on the personal transactions of these insiders. This enables a risk based approach for smaller VASPs to allocate scarce resources to those functions, roles and connected persons who have access to information which can be detrimental for the interests of clients.

<ESMA\_QUESTION\_MICA\_0>

Q8: Do you agree with the information request laid down in Article 1 and with the granularity envisaged for the information to be provided by proposed acquirers that are trusts, AIF or UCITS management companies or sovereign wealth funds?

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Q9: Do you agree with the proportionate approach to the request of information to be submitted by proposed indirect acquirers of qualifying holdings based on whether they are identified via the control or the multiplication criterion?

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<ESMA\_QUESTION\_MICA\_0>

Q10: Do you consider the list of information under Article 8 complete and comprehensive to assess the financing of the acquisition, in particular as regards funding originated in the crypto ecosystem?

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Q11: Do you agree with the identified cases where reduced information requirements apply and with the related requirements and safeguards?

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Q12: In which EU jurisdiction(s) do you plan to be authorised to provide CASP services? In which EU jurisdiction(s) do you plan to provide CASP services under cross-border provision of crypto-asset services as specified in Article 65 of Regulation (EU) 2023/1114?

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Q13: What crypto asset services as listed in point 16 of Article 3(1) of Regulation (EU) 2023/1114 do you plan to offer (e.g. reception/transmission of orders; execution of orders on behalf of clients; operation of a trading platform etc.)? In addition, please provide some high-level explanation of the business model, including, what type of trading systems do you plan to use.

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Q14: If you are planning to operate a trading platform:

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(a) How many white papers do you estimate to publish on you platform?

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(b) What turnover, in terms of crypto-assets trading volume, do you expect to attract on your platform according to your business forecasts for the upcoming years?

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(c) Do you plan to undertake transactions on the basis of an on-chain ledger or an off-chain one?

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i. In case of the former, which type of DLT are you planning to use (e.g. Ethereum, Corda, Stellar etc.)? Do you plan to store transaction data on-chain or off-chain or a mix of the two?

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ii. If the latter, how would you link on-chain and off-chain transaction data?

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Q15: If you are planning to execute/place orders on behalf of clients:

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(a) How many white papers do you estimate to offer to your clients for execution/order placement?

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(b) What is the expected turnover (i.e. revenues) according to your business forecasts for the upcoming years?

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(c) Do you plan to undertake transactions on the basis of an on-chain ledger or an off-chain one?

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i. In case of the former, is transaction data stored on-chain or off-chain or a mixed of the two?

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ii: If the latter, how do you link on-chain and off-chain transaction data?

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Q16: If you are planning to receive and transmit orders:

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(a) How many white papers do you estimate to offer to your clients for order transmission?

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TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MICA\_0>

(b) What is the expected turnover (i.e. revenues) according to your business forecasts for the upcoming years?

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(c) Which are the main platforms/brokers you are intending to transmit orders to?

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(d) In which jurisdictions are these platforms/brokers based?

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(e) How do you plan to keep track of the transmitted orders?

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