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 | German Banking Industry Committee |
| Activity | Associations, professional bodies, industry representatives |
| Are you representing an association? |[x]
| Country / Region | Germany |

# Introduction

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

<ESMA\_QUESTION\_MICA\_0>

TYPE YOUR TEXT HERE

<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?

<ESMA\_QUESTION\_MICA\_0>

As we understand it, Art. 1 - 4 of the consulted RTS are to be submitted by all notifying companies, while the subsequent articles define additional requirements depending on the type of intended crypto value service.

In our view, however, there is almost no difference between this (Art. 2 of the RTS) and the requirements for the new application for authorisation as a CASP under Art. 62 MiCA.

It should be taken into account that these are already regulated financial entities, as the legislative intention is reflected in marginal 8 (point 3.2, page 10). A reference to previously submitted documents (Art. 60 (9)) is not a relief, as the authorisation applications for established companies often date back a long time. Should the documents all have to be provided again, this would mean a decisive administrational effort for all parties concerned. In addition, the documents to be provided are also often not crypto-specific, so it is not clear how the regulatory content differs from the already applicable requirements and supplied documents. Therefore, it should be clarified that due to existing reporting and verification processes, information already available does not have to be provided again. Therefore, in our view the focus should rather be on the crypto-specific features that supplement the previous authorisation, as provided for in marginal no. 10 (point 3.2, p. 10).

Likewise, greater differentiation should be made with regard to the Crypto Asset Services provided. If a credit institution has been providing investment advice, investment brokerage or portfolio management for many years, it is not necessary for them to provide the extensive documentation pursuant to Art. 1 - 4 of the planned RTS (e.g. extensive business plans, strategies, influence on the group and group strategy, or technical and security concepts) for the arguably equivalent crypto securities services pursuant to Art. 3 para. 16 h), i) and j) (acceptance and transmission of orders for crypto securities for clients; advice on crypto securities; portfolio management of crypto securities). This is an unnecessary barrier to market entry for many companies, as the compilation of the documents is very time-consuming and thus cost-intensive.

Instead, it seems sufficient if credit institutions that provide these activities under the MiFiD II regulation only attach the information pursuant to Art. 10 of the planned RTS with special reference to crypto assets to their notification.

**In addition, we have the following comments on the individual Articles of the RTS:**

Art. 1 (1): Due to the novelty of the offer and the changes to be expected, three years seems to us to be a long time, especially at the beginning.

Art. 1(1)a: This rather extensive information corresponds to the requirements for applications for authorisation by new providers. We would assume that this information is already known to the authorities for already authorised credit institutions.

Art. 1(1)b: This rather extensive information corresponds to the requirements for applications for authorisation by new providers. We would assume that this information is already known to the authorities for already authorised credit institutions.

Art. 1(1)f: Not quite clear what is meant by this. Distinction between private clients and professional clients? Or is it about individual sectors? Should be made more specific.

Art. 1(1)h (i): According to the list in recital 3, this would have to be done in great detail. This could be difficult to foresee for three years in advance. In addition, it is unclear what is meant by "means of identification" in the context of advertising? This should be made more specific.

Art. 1(1)i: It is not clear what is meant by “technical resources”. This should be made more specific.

Art. 1(1)j: It is not clear what is meant by “technical resources”. This should be made more specific.

Art. 1(2): The term “policies and procedures” is relatively vague and should be clarified.

Art. 1(3): The term “policies and procedures” is relatively vague and should be clarified.

Art. 5(c): In our opinion, the wording does not make clear whether it is a matter of separating the assets of the clients from those of the custodian or also of separating the assets of the clients from each other. This should be formulated more clearly.

Art. 5(f): The wording does not make clear in which manner customer may be informed. That may be stated on the website or by the custody agreement.

Art. 6(a): It is not clear to us what is meant by “the arrangements linked to the type or types of custody offered to clients”.

Art. 6(b)(iii) und (iv): Is this meant to be a technical or professional description?

Art. 9(e): Art. 27 MiFID II obliges investment firms to execute orders in the best possible way for the clients (*take all sufficient steps to obtain, when executing orders, the best possible result for their clients taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order.*). Art. 64 DelVO 2017/565 provides further details. In the case of retail investors, the best possible result is determined by an overall assessment of price, costs in connection with execution and, if applicable, commissions. As a result, the best execution requirement leads to an organized order routing. The order execution policies ensure the necessary transparency in this context.

Art. 9(e) requires arrangements to be in place in order to inform clients that the notifying entity may execute orders outside a trading platform. The client's prior express consent is to be obtained for this purpose. Since this requirement will also have to be reflected in the best execution policies, the question arises as to whether it is enough to include this possible procedure in the best execution policies or whether an explicit consent of the client is required in each specific situation. In our opinion, it should be sufficient to include this possible course of action in the best execution policies.

Art. 10(a) (iii): In our opinion, it is difficult to quantify, as the employees are not trained singularly.

**We have the following comments on the ITS:**

Art. 2: The form in the Annex is basically fine. However, it should be possible to refer to information that has already been submitted. In addition, it is not exactly clear what is the standard of inalterability. Does there have to be a digital sealing?

Art. 4: Only substantial changes should lead to an obligation to notify. This should best be defined by reference to the specific information that is considered material. Otherwise, there could be excessive, unnecessary advertisements (e.g. advertising originally only planned on linkedIn. Now instagram is to be added).

<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.:

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TYPE YOUR TEXT HERE

<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.

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TYPE YOUR TEXT HERE

<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>

The alignment with previous rules on complaint handling expressed in marginal no. 77 is welcomed.

Since many companies provide financial services that fall under several European standards on complaint management, further harmonisation and standardisation of the rules on complaints handling management should be undertaken.

It is therefore desirable that, at least within a law such as the MiCA, the rules are uniform, as it can be assumed that some companies act both as issuers and as Crypto Asset Service Providers. However, this uniformity is not the case according to the EBA's RTS/ITS of 12.07.2023 (EBA/CP/2023/13), which is also under consultation. This applies in particular to the content of the acknowledgement of receipt and the time limits. It is not necessary that a copy of the complaint should be sent back to the customer again. It should also be sufficient to include the Rules of Procedure by means of a link in the acknowledgement of receipt.

The current supervisory regulations on the procedures for the handling of client complaints require a separation between the 2nd line function of complaint management (responsible for coordination, tracking and follow-up within the framework of complaint processing) and the operational processing of customer complaints, which is the task of the areas responsible for customers or processes in the 1st line.

In this context, it seems critical that the consultation paper provides a uniform response to the same facts (item 93). In the consultation it is assumed that circumstances can be similar, but not identical. Due to different product types, individual case conditions and content-related prerequisites, such a regulatory requirement poses a great challenge and does not seem suitable.

Furthermore, the consultation paper describes that complaints should/must be checked for admissibility and inadmissibility before processing. This appears to be difficult to implement in practice, since especially in a large branch network, a preliminary check could only be carried out with a great deal of effort.

The consultation paper demands that the average complaint processing time as well as the average processing time of the individual processing steps be documented. Whereas the average complaint processing time can be implemented with little effort, the presentation of the average processing time of the individual processing steps shows a high complexity due to the multitude of different product types, individual case conditions and content-related prerequisites.

Finally, even though the consultation paper contains aspects that are already regulated in the central complaint management today, this would entail a high number of complex challenges.

<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?

<ESMA\_QUESTION\_MICA\_0>

We believe that cryptocurrency services are an environment where both providers and customers have a high digital affinity. Therefore, we do not consider it necessary that complaints can still be submitted by post. Since crypto value services are often to be offered across borders in different member states, longer postal transit times would also hinder the speedy processing of complaints.

<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>

It is to be welcomed that ESMA has closely followed the Delegated Regulation on MiFiD II on conflicts of interest. Unfortunately, however, this is also supplemented by regulations from the Delegated Regulation on Crowdfunding and other regulations that are not absolutely necessary and also represent an additional regulatory burden for financial institutions already regulated under the MiFiD II regime.

<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?

<ESMA\_QUESTION\_MICA\_0>

The provisions in Art. 3 draft RTS seem to be based on the Guidelines on the assessment of the suitability of members of the management body and key function holders of the EBA and ESMA EBA/GL/2021/06 ESMA35-36-2319 of 02.07.2021, there para. 83 (p. 30).

In the sense of consistent regulations, it seems to us more sensible and more appropriate to regulate the provisions of Art. 3 of the planned RTS not in the conflicts of interest pursuant to Art. 72 MiCA, but in the requirements for business managers pursuant to Art. 7 of the planned RTS on applications for authorisation pursuant to Art. 62 MiCA (Annex 9.2.3 of the consultation package).

Irrespective of this, the indiscriminate inclusion of all employees according to Art. 3 draft RTS in connection with the definition in Art. 1 (a) of the planned RTS with reference to Art. 72 (1) point (a) (i) to (iv) MiCA is too far-reaching and also not provided for in comparable regulations.

Moreover, the terms in Art. 3 No. 1 such as personal ((b), professional (c) or political (d) connection are not sufficiently specified. The same applies to Art. 3 No. 1 (e).

<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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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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<ESMA\_QUESTION\_MICA\_0>

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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<ESMA\_QUESTION\_MICA\_0>

(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:

<ESMA\_QUESTION\_MICA\_0>

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<ESMA\_QUESTION\_MICA\_0>

(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?

<ESMA\_QUESTION\_MICA\_0>

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

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<ESMA\_QUESTION\_MICA\_0>

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

<ESMA\_QUESTION\_MICA\_0>

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<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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