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Submitted online

ESMA
201-203 rue de Bercy
CS 80910
75589 Paris Cedex 12
France

Dear ESMA,

Technical Standards specifying certain requirements of Markets in Crypto Assets Regulation (MiCA) - second consultation paper

On behalf of Ashurst LLP, I have the pleasure to provide this response to the above-referenced consultation paper (CP).

Ashurst LLP is a leading international law firm, and our global, multi-disciplinary team of experts provides innovative advice to local and global corporates, financial institutions, and governments on all areas of commercial law. Our practitioners have deep experience and are involved across the cryptoasset and digital asset industry on some of the most strategic and innovative projects to date.

Our response contains our own views based on our general knowledge of digital assets and our experience of advising clients in respect of specific examples. Our response is not made on behalf of any of Ashurst's clients.

We welcome the publication of the draft RTS and ITS texts for consultation. Our detailed responses to the questions in the CP are attached.

We hope that our comments are of assistance. We are available to discuss any of the points in this response.

Yours faithfully,



Etay Katz, Partner
ASHURST LLP

QUESTIONS

Q1: Do you agree with ESMA's assessment of the mandate for sustainability disclosures under MiCA?

We agree with the response of the Association for Financial Markets in Europe (AFME).

Q2: In your view, what features of the consensus mechanisms are relevant to assess their sustainability impacts, and what type of information can be obtained in relation to each DLT network node?

We agree with the response of AFME.

Q3: Do you agree with ESMA's approach to ensure coherence, complementarity, consistency and proportionality?

We agree with the response of AFME.

Q4: Do you agree with ESMA's approach to mitigating challenges related to data availability and reliability? Do you support the use of estimates in case of limited data availability, for example when data is not available for the entirety of a calendar year?

We agree with the response of AFME.

Q5: What are your views on the feasibility and costs of accessing data required to compute the sustainability metrics included in the draft RTS?

We agree with the response of AFME.

Q6: Do you agree with ESMA's description on the practical approach to assessing the sustainability impacts of consensus mechanisms? If not, what alternative approach would you consider suitable to assess these impacts?

We agree with the response of AFME.

Q7: Do you agree with the definitions proposed in the draft RTS, in particular on incentive structure and on DLT GHG emissions? If not, what alternative wording would you consider appropriate?

We agree with the response of AFME.

Q8: In your view, are the proposed mandatory sustainability indicators conducive to investor awareness? If not, what additional or alternative indicators would you consider relevant?

We agree with the response of AFME.

Q9: Do you consider the proposed optional sustainability indicators fit for purpose? If not, what additional indicators would you consider relevant? Would you agree to making these optional sustainability indicators mandatory in the medium run?

We agree with the response of AFME.

Q10: Do you consider the principles for the presentation of the information, and the template for sustainability disclosures fit for purpose? If not, what improvements would you suggest?

We agree with the response of AFME.

Q11: In your view, are the calculation guidance for energy use and GHG emissions included in the draft European Sustainability Reporting Standards relevant for methodologies in relation to the sustainability indicators under MiCA? If not, what alternative methodologies would you consider relevant? For the other indicators for which the calculation guidance of the ESRS was not available, do you consider that there are alternative methodologies that could be used? If so, which ones?

We agree with the response of AFME.

Q12: Would you consider it useful that ESMA provides further clarity and guidance on methodologies and on recommended data sources? If yes, what are your suggestions in this regards?

We agree with the response of AFME.

Q13: Is the definition for permissionless DLT in Article 1 sufficiently precise?

Yes, we agree that the definition of "permissionless distributed ledger technology" in Article 1 of the draft RTS is sufficiently precise for the purposes of the RTS; however, it could be improved.

There is nothing to stop participants in a permissionless DLT system involving an entity which "provides core services for the use of such distributed ledger"; eg, a development team that is responsible for the improvement of the technology, organised in the form of an association or company. Such an entity might not be in a position to agree with any individual user of the system to provide services to it or on its behalf, while still falling within the quoted part of the definition. In our view, deleting the cited portion of the definition would tighten it while maintaining the focus on the overall lack of control of the permissionless DLT.

Q14: Throughout the RTS, we refer to 'critical or important functions.' The term is borrowed from DORA and does not just capture ICT-specific systems. Does this approach make sense?

Yes, we agree that the use of the term, "critical or important function," cross-referenced to DORA, makes sense.

Q15: Do you consider subparagraph (e) in Article 4(2) on external communications with clients in the event of a disruption involving a permissionless DLT appropriate for the mandate (i.e., does it constitute a measure that would ensure continuity of services)?

No, we do not consider that external communications with clients, in the event of a disruption involving permissionless DLT, would constitute a measure that would ensure continuity of services. We would also suggest that the proposed communications are more extensive than might be reasonable in the circumstances.

Should permissionless DLT cease to be available for any period of time, there is a risk that transactions might not be completed and data (in corresponding cases, representing property) might be lost. We would expect CASPs to describe this general risk in their terms and conditions of business, so that there isn't a need to call it out when permissionless DLT becomes unavailable.

Assuming that the CASP has no control over the availability or operations of the relevant permissionless DLT, other than as a participant in the relevant system, then it is unlikely to be in a position to report – during the time of nonavailability – on the time-to-recovery, the reasons and the impact of the incident, or the risks to clients' funds or crypto-assets held on their behalf. What it can and should do is take reasonable measures to secure the property of its clients, monitor the situation with the permissionless DLT, and provide reasonable reporting to clients on the situation.

Q16: Should this RTS also specify that CASPs should undertake a business continuity management function (to oversee the obligations in the RTS)? In your view, does this fall within the mandate of 'measures' ensuring continuity and regularity?

We do not believe that a dedicated business continuity management function is necessary for all CASPs. However, there should be clear responsibility within the firm for the maintenance and commencement of its business continuity plan, irrespective of whether it has dedicated staff or not.

Q17: Are there other organisational measures to be considered for specific CASP services?

Q18: Do you consider the obligation of CASPs to conduct testing of the business continuity plans in Article 4(4) via an internal audit function appropriate for the mandate?

No, we do not agree that the obligation of CASPs to conduct testing of the business continuity plans in Article 4(4) via an internal audit function are appropriate for the mandate.

We note that, under Art 11(3) of DORA, independent audit functions are required to assess business continuity plans. Testing, under Art 11(4) of DORA, is a task assigned to the relevant financial entity and not its audit function or an external auditor. While it is appropriate for auditors to look at the outputs from planning and testing, we do not believe that it will be appropriate for them to organise and be responsible for the testing of business continuity plans. That responsibility should sit with the management of the firm, while internal or external independent audit functions should play a "third line of defence" role to follow-up on issues arising.

Q19: In Art. 68(8), CASPs are required to take into account the scale, nature, and range of crypto asset services in their internal risk assessments. Is there support for this general principle on proportionality in Article 6? Do you support the proposed self-assessment under Article 6(2) and in the Annex of the draft RTS?

Yes, we agree with the application of the general principle on proportionality in Article 6 of the proposed RTS.

Yes, we agree with the proposed self-assessment under Art 6(2) and in the Annex of the draft RTS.

Q20: Do you agree with the description provided for the different types of CEX and DEX listed?

Yes, we agree with the description provided for the different types of CEX and DEX.

Q21: For trading platforms: Please provide an explanation of (i) the trading systems you offer to your users, (ii) which type of orders can be entered within each of these trading systems and (iii) whether you consider these trading systems to be a CEX or a DEX (please explain why)?

Q22: Do you consider the trading systems described, and the transparency obligations attached to each trading system, in Table 1 of Annex 1 of the draft RTS appropriate for the trading of crypto-assets? Do you offer a trading system that cannot meet the transparency requirements under the provisions in this Table ? Please provide reasons for your answers.

Yes, we consider the trading systems described, and the transparency obligations attached to each trading system, in Table 1 of Annex 1 of the draft RTS appropriate for the trading of crypto-assets.

Q23: Regarding more specifically AMMs, do you agree with the definition included in Table 1 of Annex 1 of the draft RTS? What specific information other than the mathematical equation used to determine the price and the quantity of the asset in the liquidity pools would be appropriate to be published to allow a market participant to define the price of the assets offered in the liquidity pool?

Yes, we agree with the definition of AMMs included in Table 1 of Annex 1 of the draft RTS.

Q24: Do you agree with ESMA's proposals on the description of the pre-trade information to be disclosed (content of pre-trade information) under Table 2 of Annex 1 of the draft RTS? If not, please explain why. If yes, please clarify whether any elements should be amended, added and/or removed.

Yes, we agree with ESMA's proposals on the description of the pre-trade information to be disclosed under Table 2 of Annex 1 of the draft RTS.

Q25: Do you agree with ESMA's proposals to require a specific format to further standardise the pre-trade information to be disclosed (format of pre-trade information)? If not, please explain why and how the pre-trade information can be harmonised. If yes, please clarify whether any elements should be amended.

Q26: Do you agree with the proposed approach to reserve and stop orders?

Yes, we agree with the proposed approach to reserve and stop orders.

Q27: Do you agree with the proposed list of post-trade information that trading platforms in crypto assets should make public in accordance with Tables 1, 2 and 3 of Annex II of the draft RTS? Please provide reasons for your answers.

Q28: Is the information requested in Table 2 of Annex II of the draft RTS sufficient to identify the traded contract and to compare the reports to the same/similar contracts?

Q29: Is there any other information, specific to crypto-assets, that should be included in tables of Annex II of the draft RTS? Please provide reasons for your answer.

Q30: Do you expect and challenges for trading platforms in crypto asset to obtain the data fields required for publication to comply with pre- and post-trade transparency requirements under Annex I and Annex II of the draft RTS?

Q31: What do you consider to be the maximum possible delay falling under the definition of "as close to real-time as is technically possible" to publish post-trade information in crypto-assets? Please provide reasons for your answer.

Q32: Do you agree with ESMA's approach on the requirements to be included in the draft RTS in relation to a trading platform's operating conditions? Please provide reasons for your answer.

Yes, we agree with ESMA's approach on the requirements to be included in the draft RTS in relation to a trading platform's operation conditions.

There is no barrier to a trading platform publishing its operating rules in a way that is both comprehensible and comprehensive.

Q33: Do you consider that ESMA should include in the RTS more specific disclosure rules regarding a trading platform's operating conditions, in particular in relation to co-location and access arrangements?

No, we do not consider that ESMA should include in the RTS more specific disclosure rules regarding a trading platform's operating conditions, in particular in relation to co-location and access arrangements.

The corresponding provisions in the MiFID II package are not immediately relevant for cryptoasset trading platforms. In the future, they may become more significant.

Q34: From your experience, are all crypto-assets trading platforms making their data available free of charge? If not, what specific barriers have you encountered to access the data (e.g., price, level of disaggregation).

Q35: Do you agree with the level of disaggregation proposed in the draft RTS? Please provide reasons for your answer.

Q36: In the context of large number of CASPs and possible different models of data access, what kind of measures (common messages, common APIs, others) would you consider feasible to ensure effective and efficient access to data?

We would suggest that the market for data should be allowed to develop organically. The technology and business arrangements supporting the markets for crypto-assets are still evolving. The experience of the MiFID II package is that much of the data required to be produced by trading venues is not useful to market participants. Care should be taken not to impose burdens on trading platforms that will not yield tangible benefits to market participants.

Q37: Do you agree with using the DTI for uniquely identifying the crypto-assets for which the order is placed or the transaction is executed? Do you agree with using DTI for reporting the quantity and price of transactions denominated in crypto-assets?

Yes, we agree with using the DTI for uniquely identifying the crypto-assets for which the order is placed or the transaction is executed.

Yes, we agree with using the DTI for reporting the quantity and price of transactions denominated in crypto-assets.

Q38: Are there relevant technical attributes describing the characteristics of the crypto-asset or of the DLT on which this is traded, other than those retrievable from the DTIF register? Please detail which ones.

Q39: Do you agree with using the transaction hash to uniquely identify transactions that are fully or partially executed on-chain in orders and transactions records? Please clarify in your response if this would be applicable for all types of DLT, and also be relevant in cases where hybrid systems are used.

Q40: Do you agree that a separate field for the recording of “gas fees” should be included for the purpose of identifying the sequencing of orders and events affecting the order?

Q41: Do you agree with the inclusion of the above data elements, specific for on-chain transactions, in both RTS?

Q42: Are some of the proposed data elements technology-specific, and not relevant or applicable to other DLTs?

Q43: Do you consider it necessary to add a different timing for the provision of identification codes for orders in the case of CASPs operating a platform which uses only on-chain trading?

Q44: Please suggest additional data elements that may be included to properly account for on-chain trading.

Q45: Do you find the meaning of the defined terms clear enough? Should the scope be adjusted to encompass or exclude some market practices? Provide concrete examples.

Yes, we agree with the defined terms as they have been set out in the draft RTS.

Q46: Are there other aspects that should be defined, for the purposes of this RTS?

No, we have not identified any other aspects that should be defined for the purposes of this RTS.

Q47: Do you anticipate practical issues in the implementation of the proposed approach to reception and transmission of orders?

Q48: What transaction information can be retrieved in cases where a CASP execute the order on a third country platform/entity?

Q49: Do you anticipate problems in retrieving information about the buyer/seller to the transaction?

Q50: Do you anticipate practical issues in the implementation of the methods for client identification that are used under MiFIR

Q51: Do you anticipate practical issues in the implementation of the short selling flag?

Q52: Do you consider that some of the proposed data elements are not applicable/relevant to trading in crypto-assets?

Q53: Do you consider that additional data elements for CAPS operating a trading platform are needed to allow NCAs to properly discharge their supervisory duties?

Q54: Do you believe that a specific definition of routed orders should be provided as it applies to orders that are routed by the trading platform for crypto-assets to other venues? Should this definition include CASPs operating a platform which uses only on-chain trading?

Q55: Do you believe that fill-or-kill strategies as referenced in MiFID II apply to trading in platforms for crypto-assets? Do they apply to partially filled orders?

We suggest that fill-or-kill strategies are likely to be relevant under MiCAR.

Q56: Do you agree with using messages based on the ISO 20022 methodology for sharing information with competent authorities?

Q57: Do you agree with the criteria proposed for identifying a relevant machine-readable format for the MiCA white paper and consequently with the proposal to mandate iXBRL as the machine-readable format for MiCA white papers, subject to the outcome of the study referred to in paragraph 239?

Q58: If yes, do you agree that the white paper should be required to be a stand-alone document with a closed taxonomy (i.e., without extensions nor complex filing rules)?

Q59: If not, please elaborate your answer and propose alternative solutions that would best meet the criteria identified in section 7.3.

Q60: Are you currently preparing white paper documents in a different machine-readable format? If yes, which one?

Q61: How different is the white paper mandated by MiCA and further specified in this Consultation Paper from any white paper which you have drawn up or analysed prior to MiCA? Do you think that any additional information that used to be included in white papers prior to MiCA but that is no longer allowed under the relevant provisions of MiCA for the white paper will continue to be made available to investors as marketing communication

Q62: Do you agree with ESMA's estimate of the cost of preparing a white paper in iXBRL format? If not, where would you put the estimate of a preparing a white paper in iXBRL format (not considering costs of information sourcing which should be considered as base scenario)?

Q63: Do you agree with the proposed template for presenting the information as indicated in the Annex to this CP? We welcome your comments on the proposed fields and values/descriptions to be included in the fields - please provide specific references to the fields which you are commenting in your response and pay specific attention to the areas where additional explanatory description of the information is provided.

Q64: Are there additional data elements in the table of fields that would benefit from further explanatory descriptions to ensure that the information provided by a given issuer/offeror is understandable and comparable to the

information provided by other issuer/offerer of the same type of crypto-asset? If yes, please elaborate and provide suggestions.

Q65: Would you deem it useful for ESMA to provide an editable template to support preparers with the compliance of the format requirements proposed in the draft ITSs?

Yes, we would deem it useful for ESMA to provide an editable template to support preparers with the compliance with the format requirements proposed in the draft ITS.

Q66: Are there any other data elements that you would consider relevant to ensure that investors can properly compare different crypto-asset white papers and NCA can perform their classifications on the basis of harmonised information?

Q67: Do you agree with ESMA's conclusion that an issuer, an offeror or a person seeking admission to trading of crypto-assets should always be eligible for an LEI? If not, please provide a description of the specific cases

Yes, we agree that an issuer, an offeror or a person seeking admission to trading of crypto-assets should always be eligible for an LEI.

Q68: Do you agree with the proposed metadata elements, also considering the mandatory metadata expected to be mandated in the context of ESAP?

Q69. Do you have any feedback in particular with regards to the metadata on the "industry sector of the economic activities" and its relevance for the ESAP search function?

Q70: Do you agree with the listed definitions? Would you consider useful to clarify any other term used in the ITS?

Q71: Do you agree with the proposed requirements for publication on the website of the issuer, offeror or person seeking admission to trading?

Would you consider necessary any additional requirements regarding the publication on the website?

Yes, we agree with the proposed requirements for publication on the website of the issuer, offeror or person seeking admission to trading.

Q72: In your view, is there any obstacle for the website of the relevant parties to allow for specific alerts?

No, we do not see any obstacle to the website of the relevant parties allowing for specific alerts. The technical means to implement such arrangements are available broadly.

Q73: In your view, what are the media most relied upon by the public to collect information on crypto-assets? In case you are an issuer, offeror or person seeking admission to trading, please specify/add which media you would normally use to communicate with investors and the reasons supporting your choice.

Q74: Should a social media or a web-based platform be media reasonably relied upon by the public, what are the risks that you see when using them to achieve dissemination of inside information in relation to crypto assets? Should the dissemination rather take place through traditional media channel?

The challenge for disclosure of inside information in relation to crypto-assets is that investors will not be made aware of the availability of the information at essentially the same time. Wide dissemination, including through channels used by cryptoasset-holders, should be welcomed; however, the use of traditional media channels should be encouraged in order to ensure that there are no advantages secured to the users of alternative channels only.

Q75: Please comment the proposed means for dissemination of inside information? Please motivate your answer by indicating why the means they are/are not valuable tools for dissemination purposes.

Q76: Would you add any means of communications for the persons subject to the disclosure obligation to consider when disseminating inside information? Please motivate your answer.

Q77: Do you agree with the technical means for delaying the public disclosure of inside information as described?