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| Reply form to the Consultation Paper on certain requirements of the Markets in Crypto Assets Regulation (MiCA) on detection and prevention of market abuse, investor protection and operational resilience – third consultation paper |
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**Responding to this paper**

ESMA invites comments on all matters in this consultation paper and in particular on the specific questions. 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 **25 June 2024.**

**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:

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. Use this form and send your responses in Word format (**pdf documents will not be considered except for annexes**);
3. Please do not remove tags of the type <ESMA\_QUESTION \_MIC4\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
4. 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.
5. When you have drafted your response, name your response form according to the following convention: ESMA\_MIC4\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_MIC4\_ABCD\_RESPONSEFORM.
6. Upload the form containing your responses, **in Word format**, to ESMA’s website (www.esma.europa.eu under the heading “Your input – Open Consultations” -> Consultation Paper on guidelines on conditions and criteria for the classification of crypto-assets as financial instruments”).

**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 publically 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 [Legal Notice](http://www.esma.europa.eu/legal-notice).

**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**

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| --- | --- |
| Name of the company / organisation | ABBL - The Luxembourg Bankers' Association |
| Activity | Banking sector |
| Are you representing an association? |[x]
| Country/Region | Luxembourg |

**Questions**

1. Do you agree with ESMA’s analysis on the personal scope of Article 92 of MiCA? Are there other types of entities in the crypto-asset markets that should be considered as a PPAET (e.g. miners/validators)? Do you believe that CASPs providing custody and administration of crypto-assets on behalf of clients should also be considered as PPAETs for the purpose of this RTS? Please elaborate.

<ESMA\_QUESTION\_MIC4\_1>

We broadly support ESMA’s analysis subject to further explanations.

We would welcome explicit wording that clarify instructions related to transfer orders when settling transactions and when processing corporate actions are part of the custody service, as components of the administration activity of crypto assets to avoid any misunderstanding.

We share ESMA’s analysis that CASPs providing custody and administration of crypto-assets on behalf of clients should not be considered as PPAETs to avoid duplication of monitoring activities similarly to MAR approach in the context of financial instruments. In this context, we would be in favour of extending MAR towards crypto-assets.

We would also like to get clarity that executing transactions for discharging transactions fees obligations (sometimes called “gas fees”), that are ancillary to instructions related to transfer orders when providing custody and administration of crypto-assets on behalf of clients, should not associate those entities with the PPAETs definition.

<ESMA\_QUESTION\_MIC4\_1>

1. Do you agree with the proposed elements that should constitute appropriate arrangements, systems and procedures to detect and prevent market abuse? If not, please specify the article of the draft RTS and elaborate.

<ESMA\_QUESTION\_MIC4\_2>

We broadly support ESMA’s analysis subject to the below conditions.

When analysing paragraph 43 of the consultation document, we believe that some differentiation should be made between off-chain and on-chain execution notably in the context of algorithmic trading rationale. Off-chain execution will result in a discontinuity between execution time and settlement time where in the case of on-chain execution, the execution time is depending on nodes verification and miners/validators (validation of a block and, therefore, the underlying transaction in that block) may take a few minutes or one hour. In the later case, we are in a structural high latency environment where off-chain transactions may be done.

We would welcome also clarification on the definition of crypto-assets that are admitted to trading, which is not addressed in this consultation document while being key for determining which crypto-assets are in scope of monitoring arrangements. It seems to us that crypto-assets are currently traded OTC without being admitted to trading on a regulated or supervised trading platform. By analogy, they look like non TOTV financial instruments (ESMA opinion ESMA70-156-117).

In this vein, it is unclear if there are already crypto-assets that are admitted to trading for the time being. However, MiCA recital 113 seems to indicate that certain crypto-assets are already to be understood as admitted to trading. This statement is not easy to understand since securities token are not in scope of the MiCA Regulation and it seems that there are not yet in the EU multilateral trading facilities in activity that are operating a trading platform for crypto-assets (to be understood, multilateral trading facilities as defined under MiFID or as DLT MTF under the EU pilot regime on DLT market infrastructures in our own view).

We are of the opinion that the definition of “admitted to trading” should be further clarified to avoidance redundancy and confusion with MiFID.

Market Identifier Code (MIC) in accordance with ISO 10383 does not preclude that a crypto-asset exchange platform is a MiCA-related one (for instance, APA has MIC Code, Systematic Internalisers have MIC codes for reporting purposes).

<ESMA\_QUESTION\_MIC4\_2>

1. Do you agree with the proposed STOR template as presented in the Annex of the RTS?

<ESMA\_QUESTION\_MIC4\_3>

We broadly support ESMA’s analysis subject notably that part of the information to be reported may not be provided if not applicable and when known.

We are not sure the item “Account number(s) (where applicable and where known)” is correctly described. First, it is named as a securities account. In our view, it should be named as a crypto-asset account and its number is likely to be the identifier meaning the public address in the distributed ledger or in the smart contract.

<ESMA\_QUESTION\_MIC4\_3>

1. Is there any parameter or naming convention that in your view should be modified to facilitate the identification of suspicious orders/transactions/behaviours involving crypto-assets?

<ESMA\_QUESTION\_MIC4\_4>

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<ESMA\_QUESTION\_MIC4\_4>

1. In Section II of the Annex, would the concept of ‘location’ be applicable to a distributed ledger? For instance, would the IP address of miners/validator nodes in the network be useful in a context where it can be masked through VPNs?

<ESMA\_QUESTION\_MIC4\_5>

The concept of “location” can be difficult to apply to a distributed ledger, unless it is clearly operated by a centralised body, whether it is a foundation or a corporation.

<ESMA\_QUESTION\_MIC4\_5>

1. Is there any other element or information relevant to crypto-asset markets that in your view should be included in the template? Please explain.

<ESMA\_QUESTION\_MIC4\_6>

As a general comment, we would propose to include NFTs to the crypto-assets covered by MAR to tackle insider trading on NFT marketplace, to avoid the case happened in 2023:

<https://www.justice.gov/usao-sdny/pr/former-employee-nft-marketplace-sentenced-prison-first-ever-digital-asset-insider>

<ESMA\_QUESTION\_MIC4\_6>

1. Please provide information about the estimated costs and benefits of the proposed technical standard, in particular in relation to the arrangements, systems and procedures to prevent and detect market abuse.

<ESMA\_QUESTION\_MIC4\_7>

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<ESMA\_QUESTION\_MIC4\_7>

1. Do you agree with ESMA’s approach regarding consistency between the MiCA and MiFID II suitability regimes? If you think that the two regimes should diverge, where and for which reasons?

<ESMA\_QUESTION\_MIC4\_8>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MIC4\_8>

1. Do you think that the draft guidelines should be amended to better fit crypto-assets and the relevant crypto-asset services? In which regard? Please justify your answer.

<ESMA\_QUESTION\_MIC4\_9>

As a general principle, the guidelines should be more specific for crypto-assets rather than following to close the approach taken for financial assets to keep them separately, which may create additional confusion between the two.

<ESMA\_QUESTION\_MIC4\_9>

1. Do you agree with the approach followed by ESMA regarding periodic statements provided in relation to portfolio management of crypto-assets?

<ESMA\_QUESTION\_MIC4\_10>

In our opinion, ESMA guidelines should not be too strict in defining the content of the periodic statements. The guidelines should ensure consistency of the information presented in the report rather than being too precise on the type of content. This is in particular important considering the different nature of the crypto-assets and also in view of the difficulties on valuation of crypto-assets, traded 24/7.

<ESMA\_QUESTION\_MIC4\_10>

1. Do you agree with the approach taken by ESMA in the draft guidelines for crypto-asset service providers providing transfer services for crypto-assets on behalf of clients as regards procedures and policies, including the rights of clients? Please also state the reasons for your answer.

<ESMA\_QUESTION\_MIC4\_11>

We recognise the importance of having sounds policies and procedures in place to safeguard the interest of clients of crypto-asset service providers, and foster the creation of a professional market.

<ESMA\_QUESTION\_MIC4\_11>

1. Do you think that the draft guidelines address sufficiently the risks for clients related to on- and off-DLT crypto-asset transfers? Please justify your answer.

<ESMA\_QUESTION\_MIC4\_12>

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<ESMA\_QUESTION\_MIC4\_12>

1. Are there any additional comments that you would like to raise and/or information that you would like to provide, for example, on whether other relevant points or clients’ rights should be considered?

<ESMA\_QUESTION\_MIC4\_13>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MIC4\_13>

1. Do you support ESMA’s interpretation of the term, ‘systems’ in the mandate? If not, please explain your understanding of the term (and provide examples if possible).

<ESMA\_QUESTION\_MIC4\_14>

We think it is important to further clarify the definition of “system” in the ESMA guidelines, to exclude situations where CASPs are held responsible for issues on a decentralised ledger it uses for the purpose of their business, but that it is not directly managed by them (i.e. by CASPs).

<ESMA\_QUESTION\_MIC4\_14>

1. Are there other ‘appropriate Union standards’ beyond those identified in the consultation paper that you consider relevant for this mandate? If yes, please list them and provide a rationale for why they would be relevant.

<ESMA\_QUESTION\_MIC4\_15>

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<ESMA\_QUESTION\_MIC4\_15>

1. Do you agree with the inclusion of minimal administrative arrangements in Guideline 2 (i.e., no reference to implementing a risk management framework)? If no, please explain whether you would consider either *fewer* or *more* administrative arrangements appropriate.

<ESMA\_QUESTION\_MIC4\_16>

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<ESMA\_QUESTION\_MIC4\_16>

1. Do you support the inclusion of Guideline 5 on ‘cryptographic key management’? Do you consider cryptographic keys relevant as either a ‘system’ or a ‘security access protocol’? Is this guideline fit for purpose (i.e., can cryptographic keys be ‘replaced’ as implied in paragraph 29 of the draft guidelines)?

<ESMA\_QUESTION\_MIC4\_17>

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<ESMA\_QUESTION\_MIC4\_17>