

Feedback

to

ESMA Consultation Paper (CP) on

Guidelines for the criteria on the assessment of knowledge and competence under the
Markets in Crypto Assets Regulation (MiCA)

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by

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Q1: Do you agree with the minimum requirements regarding qualification, experience and continuous professional development of staff giving information on crypto-assets and crypto-asset services to clients included in paragraphs 19 to 21 of draft Guideline 2? If not, what would, in your view, be adequate minimum requirements? Please state the reasons for your answer.

Crypto-assets (even when reduced to the subset dealt by MiCA) are a very wide and inhomogeneous field for which complete knowledge and competence may not be possible. Thus, it is practical that CASPs only need to demonstrate knowledge and competence for crypto-assets they offer. My advice would be to change paragraph 18a to read “(...) crypto-assets ~~in the scope of these services~~ on which the staff provide information to clients”. “In the scope” would potentially include a wide range of crypto-assets that a CASP has explicitly eliminated from its service suite.

Paragraph 18b requires CASPs to “understand any general tax implications”. This is too vague and not within the qualification/mandate of a CASP. It may be understandable that ESMA aims at making sure that investors do not fall victim to some rumors about potential anonymity/pseudonymity and about the lack of tax consequences (e.g., given Council Directive (EU) 2023/2226 of 17 October 2023 amending Directive 2011/16/EU on administrative cooperation in the field of taxation), but requiring CASPs to clearly indicate to clients that they should seek tax advice from qualified tax authorities should be sufficient, in my view.

Paragraph 18j (“understand specific market structures for the crypto-assets”) is not specific enough, in my view. The crypto ecosystem includes a range of participants, some of which are MiCA-regulated CASPs, some of which are outside of regulation (such as miners/validators and other participants in the blockchain). There is a systematic risk of an entire crypto-asset ecosystem collapsing if and when certain participants are no longer around (due to technical difficulties, political interference, legal/regulatory limitations, lack of profitability, abuse/fraud etc.). An example would be the inability of validators to do their job, causing transactions on the blockchain coming to a standstill. Given that there is no backstop and no liquidity provision by CASPs, NCA, ECB or other central parties, the systemic risk should be addressed on an intuitive level and less so on a too granular level as done in the bullet points following paragraph 18k.

Paragraphs 19 and 20 allow “Crypto-asset service providers [to] ensure that staff giving information about crypto- assets or crypto-asset services on their behalf have obtained, prior to providing such information, at least (...) appropriate experience of at least 1 year under supervision”. Apart from the difficulty to determine what is “appropriate”, one year is not sufficient, in my view. Having given information for one year neither implies nor guarantees that the information was given based on a sufficient (minimum) knowledge and competence. In fact, the lack of sufficient (minimum) knowledge and competence may only become apparent many years later, if and when clients complain and/or face financial risks/losses. My advice would be to allow “experienced” staff to start providing information, but to require fulfilling the same continuous professional development and training requirements for new staff within a certain grace period. Only that way it can be assured that over time all staff have the same command of basic crypto-asset topics.

Q3: Do you agree that with the proposed draft guidelines? Please state the reasons for your answer.

The differentiation between “giving information” and “giving advise” on crypto-assets and crypto-asset services to clients could be arbitrary and unnecessarily complicates the definition of minimum knowledge and competence, as well as its supervision. From a client’s perspective, *any* signal that has the potential to influence investment behavior is potentially harmful, if not based on well-informed, transparent, unbiased and proportionate data, independent on whether it is advise or “merely” information. My advice would be to do away with this unnecessary differentiation and to collapse guidelines 2 and 3 into one set of requirements. This would also eliminate the uncertainty about what specifically is meant by “higher standard” in paragraph 16.

Q4: Are there any additional comments that you would like to raise and/or information that you would like to provide?

Paragraph 15 proposes that the “management body of the crypto-asset service provider should, at least on an annual basis, assess and review the effectiveness of the policies and procedures (...)”. This frequency may be reasonable for well-established financial market instruments, or at some point in the future if/once crypto-assets have become an established investment class. However, given the “rapid pace of evolution of crypto-asset markets” (as acknowledged by ESMA in paragraph 24), a quarterly basis may be more appropriate for the time being.

Disclaimer: Opinions expressed are solely my own and do not express the views or opinions of my employer.

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