Public Response to ESMA's Second Consultation Paper on Markets in Crypto-Assets (MiCA)

14 December 2023

Re: Second Consultation Paper on Markets in Crypto-Assets (MiCA)

Consensys Software Inc. respectfully submits this response to the ESMA's Second Consultation Paper on Markets in Crypto-Assets (MiCA) published on 5 October 2023.

We remain fully at your disposal in case we can be of further assistance in relation to both the current considerations and evidence gathering for future work on crypto-assets and DeFi.

1. Background on Consensys

Consensys was founded in 2016 by Joseph Lubin, one of the co-founders of Ethereum. The company was created after the launch of the Ethereum protocol with the goal of achieving the promise of decentralisation that this new computer network presented by supporting the development of blockchain-based computing software. We believed then, as we do now, that decentralised networks like Ethereum will allow people to collaborate in ways never before possible. We have dedicated our talents, product offerings, and resources to help drive this evolution.

Today, Consensys is a leading blockchain and Web3 software company. We have been at the forefront of innovation, pioneering technological developments within the Web3 ecosystem. Through our product suite, including the MetaMask platform, Infura, Linea, Diligence, and our NFT platform, we have become the trusted collaborator for users, creators, and developers on their path to build and belong in the world they want to see. Consensys maintains a global workforce consisting of over 800 full-time employees.

MetaMask is the most broadly used self-custody wallet in the world by both Web3 developers and users. In 2022, MetaMask surpassed 100 million users. It is open-source software[1] that can be downloaded from the Apple or Google app stores and run locally as either a mobile application or a browser extension. The software is maintained by a development team at Consensys and also supported by a global community of developers and designers who wish to democratise access to the decentralised web.

In late September 2023, MetaMask announced the global public launch of MetaMask Snaps. Snaps are new features and functionality created by third-party developers that MetaMask users worldwide can install directly into their wallets. Previously, MetaMask features were exclusively developed by MetaMask developers employed by Consensys. Now, any Web3 developer in the world can add to the MetaMask wallet by building features directly into the wallet, which expands MetaMask's utility. By providing users with a new set of tools developed by third-party developers across the globe, MetaMask Snaps will empower individuals to shape their Web3 experience according to their unique needs and preferences.

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[1] *See* https://github.com/MetaMask (accessed 5 December 2023).

2. Response

At Consensys, we very much welcome ESMA's essential work on the Markets in Crypto-Asset Regulation (MiCA) and the publication of its Second Consultation. We are grateful for the opportunity to contribute to the consultation and happy to share our feedback and technical expertise on the subject matters. Our response focuses on Questions 13 and 15 relating to permissionless Distributed Ledger Technology (DLT) and on Question 23, regarding the definition of Automated Market Makers (AMMs) included in Table 1 of Annex I of the draft RTS.

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

That definition reads "a technology that enables the operation and use of distributed ledgers in which no entity controls the distributed ledger or its use or provides core services for the use of such distributed ledger, and DLT network nodes can be set up by any persons complying with the technical requirements and the protocols". While this is a good definition, it could be amended to make it more precise.

First, the word "protocol" is most often used in the blockchain space to mean a "network protocol," in other words, a set of rules for formatting and processing data that works as a common language for a network of computers that may be able to use vastly different hardware and software. It is unclear whether the reference to "protocols" here is meant to reference "network protocols", and clarifying that would avoid confusion.

Second, the concept of "permissionless" should also account for the scenarios where a blockchain combines elements of permissioned as well as permissionless participation, such that it would not be accurate that "anyone" can set up a node, but it may be accurate that "most nodes" are set up without a permission. This increasingly happens when a particular jurisdiction's regulatory regime impacts the actors engaging in DLT activities from within that jurisdiction. In such jurisdictions where the extent or character of a participant's use or support of a blockchain is impacted by regulations, such regulatory influence in one particular jurisdiction does not render the entire blockchain "permissioned" as a result. While, as a practical matter in such scenarios, not "anyone" can set up a node and operate it purely based on the technical standards, it remains the case that people in other jurisdictions not so similarly encumbered can operate on the blockchain more freely, and it also remains the case that, should the regulations in the restrictive jurisdiction become more liberal, then the previously constrained actors can participate more freely themselves.

In short, it is correct not to have the status of permissionless v. permissioned be influenced by the capacity for regulation to impact individual actors in specific jurisdictions, and it may be productive to clarify that in guidance concerning the definition of "permissionless" if not the definition itself. For example, the definition could be clarified as follows: "a technology that enables the operation and use of distributed ledgers in which no entity controls the distributed ledger or its use or provides core services for the use of such distributed ledger, ~~and DLT network nodes can be set up by any persons complying with the technical requirements and the protocols~~ and in which no entity's permission is required to set up DLT network nodes (assuming the technical requirements and the protocols are complied with).

<u>For the avoidance of doubt, the term "entity" in this definition does not refer to public bodies or state actors."</u>

Third, the phrase "entity [that] [...] provides core services for the use of such distributed ledger" can be open to interpretation as to which services are "core". For example, Infura is one of the most popular Ethereum blockchain node service providers, supporting billions of transactions.[2] While Infura (and other Ethereum blockchain nodes) makes interacting with the Ethereum blockchain easier, it is not an essential service without which the Ethereum blockchain would be unusable. Users and developers can communicate with the Ethereum blockchain directly. Blockchain node providers therefore do not gatekeep access to or use of the Ethereum blockchain. However, without further guidance, some may interpret services such as Infura as a "core service" given their widespread use, leading to the wrong conclusion that Ethereum is not "permissionless" according to the proposed definition. To avoid confusion, we suggest deleting the reference to "core services" in the definition, as the remainder of the definition is, in our view, sufficient.

- **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)?**

Even though the matters in this consultation do not directly affect Consensys, we are responding from the perspective of Consensys being a long-time supporter of innovation on permissionless DLTs such as Ethereum. Due to their nature, permissionless DLTs have attracted a large number of developers all over the world building applications that are used by millions of people. For this innovation to continue, it is important that CASPs remain able to leverage permissionless DLTs. We, therefore, agree with ESMA's view that "it is necessary to avoid subjecting CASPs to requirements that may unintentionally prohibit their use of permissionless DLTs by a failure to comply—an outcome that would be contrary to the spirit of MiCA."

We generally agree with ESMA's assessment at section 4.2 of the consultation. In particular, we agree with ESMA's interpretation of Recital 83 of MiCA that CASPs should be exempted from liability for incidents relating to the operation of the distributed ledger that the CASP does not control or manage (i.e., no contractual arrangement exists). We also agree with ESMA's assessment that permissionless DLT infrastructure can be considered a form of "common good" and that its use does not constitute a third-party provider relationship that would fall under scope of the MiCA outsourcing rules.

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[2] Infura is operated by Consensys. Infura is the default connection that MetaMask users rely upon to read blockchain data from and send transaction messages to the Ethereum blockchain. Infura also runs "relays" which take read and write calls pertaining to other blockchain networks and communicate them to nodes for those other networks. Infura thus is analogous to an internet service provider, serving as a communication tool that allows users to obtain information, send user instructions, and otherwise interact with third-party platforms on the blockchain. Infura itself does not execute transactions for or on behalf of users.

Overall, we believe that the proposed measures relating to Question 15 would avoid hindering innovation on permissionless DLTs while ensuring that CASPs remain liable for any losses related to their own smart contracts that are within their control.

- **Q23: Regarding more specifically AMMs, do you agree with the definition included in Table 1 of Annex I 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?**

We believe that the definition of Automated Market Makers (AMMs) as set out in Table 1 of Annex I would not raise issues per se. However, we are concerned that the current drafting of the Regulatory Technical Standard (RTS) leaves the door open for unintended interpretations. According to this version of the draft RTS, in cases where a crypto-asset service provider (CASP) owns and runs an AMM, the CASP would be required to obtain a licence under the MiCA framework. We think that the current disposition could also be interpreted in a way that AMMs in general, even the ones not owned or operated by a CASP, would be required to apply for a MiCA licence. This interpretation of the draft RTS would be inconsistent with the well-established scope of MiCA, create uncertainty in the system and produce unnecessary and undesired consequences.

Additionally, because DeFi was intentionally excluded from the scope of MiCA Regulation by the Co-legislators, the European Commission (EC) must produce a first report by 31 December 2024 to recommend whether decentralised finance applications such as AMMs should be regulated, and how. Not expressly limiting the scope of this AMM definition to those AMMs owned and operated by CASPs would undermine that important workstream. We therefore suggest clarifying the draft RTS to define the AMMs that are implicated by this guidance as those that are owned and operated by a CASP.

Respectfully submitted,

CONSENSYS SOFTWARE INC.

by/

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