Securities and Markets Stakeholder Group

Advice to ESMA

SMSG advice to ESMA on its second consultation paper on Technical standards specifying certain requirements of the Markets in Crypto Assets (MiCA) Regulation

1   Executive Summary

The SMSG provides opinions and comments on a selection of issues discussed in the second MiCA consultation paper.

Proportionality. Proportionality is key to avoiding barriers to small-size players, holding constant all measures targeted to the soundness of the crypto ecosystem. The SMSG supports the approach to proportionality for business continuity proposed in the draft RTS, including the proposed self-assessment, as it allows each entity to calibrate business continuity measures on their own needs. The SMSG also recommends that proportionality, where appropriate, should be taken into account in other aspects of MiCA, where these do not compromise overarching safety and soundness considerations. This recommendation rests on the idea that a 'one size fits all' approach may limit the participation of small-size players and ultimately also the competitiveness of the EU crypto ecosystem with respect to other jurisdictions.

Governance. The draft RTS on organisational arrangements establishes that the CASP's management body must endorse and regularly review the business continuity policy. The SMSG supports the approach proposed in the draft RTS, including the roles of the CASP's management body to define, endorse, implement and review the business continuity policy. The SMSG does not see a need to require the establishment of a business continuity function to oversee the obligations in the RTS, leaving this possibility to the decision of the CASP's management body, also taking into account considerations related to proportionality. The SMSG also highlights that CASPs' governance is key to build a robust crytpo ecosystem.

Measures for permissionless DLT. The consultation paper clarifies that CASPs that intend to conduct their services on permissionless DLTs should make their clients aware of the risks that this entails at the point when their clients first access those services. ESMA encourages CASPs to explain to their clients that their liability does not extend to permissionless DLTs. The SMSG supports the proposal to require CASPs to communicate externally with their clients in the event of a service disruption involving a permissionless DLT. The SMSG recommends that external communications are performed making sure that users are actually reached and aware of the issues, also with the establishment of temporary contact points. The SMSG also recommends that appropriate disclosure should be carried out when users first access those services to make them aware of the risks associated to permissionless DLT and the scope of CASPs' liability (that includes their own smart contracts and does not extend to permissionless DLT).

The specialness of the user base. MiCA requires CASPs to keep records of all crypto-asset services, activities, orders, and transactions undertaken by them. Concerning clients that are not eligible for a LEI, ESMA proposes to use the list of national identifiers, which are dependent on the client's nationality, prescribed by MiFIR. The SMSG supports the proposal to rely on the methods for client identification that are used under MiFIR, having considered that the expected user base of crypto services may be largely represented by natural persons, not acting in a business capacity, who are not eligible for a LEI. The SMSG also highlights that the special composition of the users' base of crypto services deserves careful attention with regard to the communication methods used to reach crypto users.

Pre-trade transparency for AMMs. ESMA proposes to include a description and the related pre-trade transparency requirements for Automated Market Makers (AMMs) particularly in a Decentralised Exchange (DEX) context. The draft RTS requires the disclosure of the mathematical equation used to determine the price and the quantity of the crypto-assets in the liquidity pools. The SMSG supports the proposal to require the publication of the mathematical equation for price and quantity, as this requirement makes market participants aware of the price setting rule. The SMSG suggests to disclose details to enable market participants to understand the difference in the price discovery with respect to more widely known methods to set the price.

White paper. Crypto-asset white papers should contain information, among other things, on the project to be carried out with the capital raised. White papers for 'other cryptos' are expected to include the planned use of collected funds. The SMSG believes that investors also need to know the actual use of the funds after the issuance (not only the expected use at the time of the white paper). Issuers of 'asset-referenced tokens', in addition to the information provided in the white paper, should also provide information on an ongoing basis. The SMSG highlights the need to provide ongoing information to the holders of other cryptos (not only to the holders of 'asset-referenced tokens').

Cooperation. ESMA requested the opinion of the SMSG regarding two RTSs and two ITSs relating to (i) the exchange of information between competent authorities, (ii) procedures, forms and templates for the exchange of information between competent authorities, (iii) procedures, forms and templates for exchange of information between competent authorities and ESMA/EBA, and (iv) the template for cooperation with third-country authorities. The SMSG supports the adoption of the proposed technical standards.

2 Background

1. On 5 October 2023, ESMA released the second MiCA consultation paper as part of a series of three packages. Each package includes a number of draft implementing technical standards (RTS) and draft implementing technical standards (ITS). The first consultation

paper was published on 20 July 2023 and the SMSG provided an Advice to ESMA on 6 October 2023. This second consultation paper covers the following aspects:

    i.   sustainability indicators on adverse impacts on the climate and the environment[1];

    ii.   continuity and regularity in the performance of crypto services[2];

    iii.   offering pre- and post- trade data to the public[3];

    iv.   record keeping obligations for crypto-asset service providers (CASPs)[4];

    v.   machine readability of white papers and white papers register[5];

    vi.   technical means for appropriate public disclosure of inside information[6].

2.   In parallel, ESMA produced a set of draft technical standards which specify information relating to cooperation between national competent authorities (NCAs), European Supervisory Authorities and third-country authorities[7]. On 10 October 2023, ESMA requested the SMSG to provide advice on such draft technical standards by 14 December 2023.

3.   In this Advice, the SMSG replies to specific questions raised in the consultation paper and provides comments on more general issues that are related to the specific questions. The SMSG also provides its advice on the draft technical standards on cooperation.

3 SMSG Opinions and Comments

3.1 Proportionality

4.   MiCA Regulation builds upon available regulatory frameworks on different aspects. For example, to ensure continuity and regularity in their performance, CASPs are required to

---

[1] The consultation paper includes a draft RTS on content, methodologies and presentation of sustainability indicators on adverse impacts on the climate and the environment.

[2] The consultation paper includes a draft RTS on measures that crypto-asset services providers must take to ensure continuity and regularity in the performance of services.

[3] The consultation paper includes a draft RTS on trade transparency and a draft RTS on content and format of order book records.

[4] The consultation paper includes a draft RTS on record-keeping by crypto-asset service providers.

[5] The consultation paper includes a draft RTS on the data necessary for the classification of white papers and a draft ITS on the standard forms and templates for the crypto-asset white paper.

[6] The consultation paper includes a draft ITS on technical means for appropriate public disclosure of inside information.

[7] Namely, a draft RTS on cooperation between NCAs, a draft ITS on cooperation between NCAs, a draft RTS on cooperation with third countries, and a draft ITS on forms for information exchange between NCAs and ESMA/EBA.

employ appropriate and proportionate procedures to ensure resilient and secure ICT systems, as required by Regulation (EU) 2022/2554 (DORA)[8]. Along the same lines, ESMA has relied on standard Business Continuity Management (BCM) requirements found in existing regulations as a guide[9]. Specifically, ESMA relies on two RTS under MiFID II (for investment firms, and trading venues) as they elaborate general principles for business continuity arrangements.

5. The SMSG understands that business continuity requirements contribute to the maintenance of orderly markets by limiting, to the extent possible, undue losses for clients of CASPs in the event of a disruptive incident. The SMSG also highlights the need to strike the right balance between the soundness of the crypto ecosystem and the need to avoid barriers to new entrants.

6. Proportionality is explicitly included in this consultation with respect to the continuity dimension. Indeed, like DORA, MiCA calls for a "proportionate approach" whereby certain CASPs under scope should not be subject to "excessive and disproportionate administrative burden" (Recital 27 of MiCA) and the business continuity requirements should "tak[e] into account the scale, the nature and range of crypto-asset services provided" (Article 68(8) of MiCA).

7. The draft RTS on continuity includes – in Article 6 – a general proportionality principle which is meant to specify the language found in Article 68(8) on the "scale, the nature and range of crypto-asset services provided". Paragraph 2 of Article 6 goes further by building on this proportionality principle with a mandatory 'self-assessment' to be completed by the CASP. The self-assessment is a concept once-again borrowed from MiFID and the rationale for including this provision is to ensure that CASPs are taking stock of the risk factors that may interrupt regularity or continuity in the performance of their services which may trigger the business continuity plan (and affect its execution). The criteria of this self-assessment are available in the Annex of the RTS.

8. The SMSG supports the approach to proportionality for business continuity proposed in Article 6 of the draft RTS, including the proposed self-assessment, as it allows each entity to calibrate business continuity measures on their own needs [10] . The SMSG also recommends that proportionality, where appropriate, should be taken into account in other

---

[8] CASPs are already included in the scope of DORA as a type of 'financial entity' listed in Article 2(1)(f) of DORA.

[9] Paragraph 76 of the consultation paper makes clear that the business continuity management requirements in the draft RTS follow the standardised playbook seen in other sectoral regulations (e.g., MiFID II). These include (i) organisational arrangements, (ii) the business continuity policy (including independent auditing), (iii) business continuity plan, and (iv) periodic review and testing of the business continuity policy.

[10] See Section 4.3.3 of the consultation paper (Proportionality principle) and 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?).

aspects of MiCA, where these do not compromise overarching safety and soundness considerations such as, inter alia, investor protection, antifraud requirements, AML/FT, and any risk-leakage to the broader financial system. Proportionality is key to avoiding barriers to small-size players, holding constant all measures targeted to the soundness of the crypto ecosystem. This recommendation rests on the idea that a 'one size fits all' approach may limit the participation of small-size players and ultimately also the competitiveness of the EU crypto ecosystem with respect to other jurisdictions. As highlighted in the SMSG Advice concerning the first consultation paper on MiCA, to protect EU investors, an important challenge is to bring crypto services into the scope of EU regulation. Barriers to small-size players may result in the unintended consequence of increasing the activity not in scope.

3.2 Governance

9. Article 68(4) of MiCA requires CASPs to adopt policies and procedures that are sufficiently effective to ensure compliance with MiCA and Article 68(6) requires the management body of CASPs to assess and periodically review the effectiveness of the policy arrangements and procedures.

10. Article 2 of the draft RTS on organisational arrangements establishes that the CASP's management body must endorse and regularly review the business continuity policy. The article further specifies MiCA Level 1 by requiring the management body to review the business continuity policy on at least an annual basis, specifying "periodically" set forth in Article 68(6) of MiCA.

11. The SMSG supports the approach proposed in Article 2 of the draft RTS, including the roles of the CASP's management body to define, endorse, implement and review the business continuity policy. The SMSG does not see a need to require the establishment of a business continuity function to oversee the obligations in the RTS, leaving this possibility to the decision of the CASP's management body, also taking into account considerations related to proportionality[11].

12. The SMSG also highlights that CASPs' governance is key to build a robust crytpo ecosystem. As known, recent cases of malpractice may hinder the reputation of the crypto ecosystem and ultimately its healthy growth. Against this background, a careful assessment of the CASPs' governance is also important for market confidence and systemic risk.

---

[11] See Section 4.3.2 of the consultation paper (Business continuity management), Q16 (Should this RTS also specify that CASPs should establish 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?) and Q17 (Are there other organisational measures to be considered for specific CASP services?).

3.3 Measures for permissionless DLT

13. ESMA proposes following the structure of business continuity management measures established by the relevant RTS in MiFID II. To clarify the general principal on proportionality in Article 6 (see also previous Section 3.1), the draft RTS on continuity introduces – in Article 1 – a definition of "permissionless distributed ledger technology" (permissionless DLT) adapted from a recent consultative document of the Financial Stability Board (FSB)[12]. The FSB defines "permissioned DLT" when entities – normally selected and authorised beforehand – perform validation and settlement of transactions, and "permissionless DLT" when validator nodes (miners) can be set up by anyone fulfilling the technical requirements and the protocols. The consultation paper refers to permissionless DLT as publicly accessible DLT such as Ethereum, that does not gatekeep access to the validator network.

14. ESMA proposes to add several provisions that would acknowledge the differences between permissionless DLTs and permissioned DLTs in the context of business continuity. These provisions acknowledge the novel risks posed by permissionless DLTs without losing sight of the fact that, ultimately, CASPs are responsible for deciding how best to manage this type of operational risk and reflecting this in their business continuity arrangements for a 'timely recovery and response' to disruptive incidents. As stated in paragraph 71 of the consultation paper, the differentiated approach for permissioned and permissionless DLT should not come at the expense of consumer protection, nor is it an invitation for CASPs to engage in 'decentralisation arbitrage'.

15. Article 4(2)(e) of the draft RTS on continuity establishes that the business continuity plan shall provide procedures for timely external communications with clients in the event of a disruption involving a permissionless DLT. Recital 3 of the draft RTS clarifies that such communication should include essential information for the client, including updates on when services may be expected to be resumed, information related to the reason for the disruptive incident affecting a distributed ledger once such information becomes available, how many DLT network nodes have been affected, whether client funds are at risk, and how the distributed ledger will be brought back online (e.g., a roll-back to a previous timestamp). ESMA believes this information should constitute an important feature of a CASP's business continuity planning.

16. The consultation paper clarifies that, as part of their duty in Article 66 of MiCA to act in the best interests of clients, CASPs that intend to conduct their services on permissionless DLTs should make their clients aware of the risks that this entails at the point when their clients first access those services. In the same spirit of disclosure, ESMA would also

---

[12] See Annex 1 of Financial Stability Board, *Regulation, Supervision and Oversight of Crypto-Asset Activities and Markets*, Consultative document, 11 October 2022, available at https://fsb.org/wp-content/uploads/P111022-3.pdf.

encourage CASPs to explain to their clients that their liability does not extend to permissionless DLT. The consultation paper also clarifies that – being conscious of the distinction between an issue related to a CASP smart contract vs. operational issues with the underlying DLT – CASPs should remain liable for any losses related to their own smart contracts, such as hacks or exploits, regardless of whether they are deployed on a permissionless or a permissioned DLT.

17. The SMSG supports the proposal to require CASPs to communicate externally with their clients in the event of a service disruption involving a permissionless DLT[13], having considered that such a requirement would imply a more orderly return to service once the incident is resolved. The SMSG recommends that external communications are performed making sure that users are actually reached and aware of the issues, also with the establishment of temporary contact points. The SMSG also recommends that appropriate disclosure should be carried out when users first access those services to make them aware of the risks associated to permissionless DLT and the scope of CASPs' liability (that includes their own smart contracts and does not extend to permissionless DLT).

3.4 The specialness of the user base

18. Article 68(9) of MiCA requires CASPs to keep records of all crypto-asset services, activities, orders, and transactions undertaken by them. Those records shall be sufficient to enable competent authorities to fulfil their supervisory tasks and to take enforcement measures, and in particular to ascertain whether crypto-asset service providers have complied with all obligations including those with respect to clients or prospective clients and to the integrity of the market.

19. In order to perform their surveillance duties, national competent authorities must be able to identity clients in a unique and consistent manner. Concerning clients that are eligible for a Legal Entity Identifier (LEI), similar to the requirements for investment firms reporting under MiFIR, ESMA considers that also CASPs should have appropriate arrangements in place in order to collect and verify the LEI of its client before the transaction takes place. Concerning clients that are not eligible for a LEI, ESMA considers that also in this instance the same identification methods as the ones imposed on investment firms authorised under MiFID should be applied. In particular, MiFIR prescribes a list of national identifiers, which are dependent on the client's nationality in accordance with a specific methodology for selection and assignment. ESMA considers that the same list should be used under MiCA because firm-specific codes to identify clients/buyer/sellers do not provide for a sufficiently

---

[13] See Section 4.3.1 of the consultation paper (Measures for permissionless distributed ledger technology) and 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)?).

unified and robust identification of natural persons, neither will this ensure the desired uniqueness of natural persons' identification.

20. The SMSG supports the proposal to rely on the methods for client identification that are used under MiFIR[14], having considered that the expected user base of crypto services may be largely represented by natural persons, not acting in a business capacity, who are not eligible for a LEI. The SMSG also highlights that the special composition of the users' base of crypto services deserves careful attention with regard to the communication methods used to reach crypto users.

3.5 Pre-trade transparency for AMMs in a DEX context

21. ESMA builds upon the existing MiFIR rules to develop the MiCA transparency framework, having considered the important similarities between centralized exchanges (CEXs) and traditional exchanges. Therefore, in line with the requirements for financial instruments under MiFIR, ESMA proposes to use the type of trading system as a starting point for determining the appropriate level of pre-trade transparency which must be made public.

22. In its draft RTS, ESMA therefore proposes to calibrate the transparency requirements taking into consideration the different types of trading systems. To that effect, the draft RTS therefore includes in Table 1 of Annex I the description, and the related pre-trade transparency requirements, for continuous auction order books as well as other types of trading systems which can also be relevant to the trading of crypto-assets (i.e., quote-driven, periodic auction, and hybrid).

23. In addition, considering the importance and innovative nature of Automated Market Makers (AMMs) particularly in a Decentralised Exchange (DEX) context, ESMA proposes to include a description and the related pre-trade transparency requirements for these trading facilities in Table 1 of Annex I of the draft RTS. AMMs are described as a decentralised protocol relying on liquidity pools and smart contracts which allows the execution of individual transactions in a permissionless and automatic way. As for the information to be made public on operating rules for trading platforms required by Article 1 of the draft RTS, Table 1 of Annex I indicates the mathematical equation used to determine the price and the quantity of the crypto-assets in the liquidity pools and any further information and parameters that allow to determine the price at which a specific order would be executed.

---

[14] See Section 6.2.4 of the consultation paper (Data elements to be included in the records of all CASPs (Article 68 of MiCA)) and Q50 (Do you anticipate practical issues in the implementation of the methods for client identification that are used under MiFIR?).

24. The SMSG supports the proposal to require the publication of the mathematical equation used to determine the price and the quantity of the asset in the liquidity pools[15], as this requirement makes market participants aware of the price setting rule. In this respect, it should be noted that the price discovery function with AMMs differs from the standard one: instead of finding the equilibrium price through the minimization of the order imbalance between buy and sell orders, AMMs determine the price algorithmically through a conservation function (the most common being the "constant product function"). The meaning of 'price' with AMMs is therefore different from the usual one. Consequently, the SMSG suggests to disclose not only the mathematical function but also the difference that such function would imply in comparison with more widely known methods to set the price.

3.6 White paper

25. MiCA Regulation – as highlighted by paragraph 228 of the consultation paper – explicitly indicates that the purpose of white papers is to inform prospective holders and in particular *retail* holders of the characteristics, functions and risks of the crypto-assets that they intend to purchase. Recital 24 of MiCA states that – to ensure their protection – prospective retail holders of crypto-assets should be informed of the characteristics, functions and risks of the crypto-assets that they intend to purchase. In particular, when making an offer to the public of crypto-assets other than asset-referenced tokens or e-money tokens (henceforth "other cryptos"), offerors should draw up, notify to their competent authority and publish an information document containing mandatory disclosures ('a crypto-asset white paper').

26. The white paper should consequently be an "information document", aimed at ensuring the protection of perspective retail holders in particular. Article 6 and Annexes I to III[16] of MiCA establish content and form of crypto-asset white papers. A crypto-asset white paper should contain general information on the issuer, the offeror and *the project to be carried out with the capital raised*, on the rights and obligations attached to the crypto- assets, on the underlying technology used for such crypto-assets and on the related risks.

27. In this respect Annex II of the draft ITS on crypto-asset white papers establishes formats and disclosure templates for the white papers. In particular, Table 2 contains the templates for other cryptos white papers and item D.10 – included in the part of the white paper providing information about the crypto-asset project – concerns indeed the planned use of collected funds. The SMSG observes that the white paper is published at the issuance of

---

[15] See Section 5.2.1 of the consultation paper (Pre-trade transparency) and 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?).

[16] Annex I lists items to be disclosed in the crypto-asset white paper for other crypto assets, Annex II lists items to be disclosed in the crypto-asset white paper for an asset-referenced token, and Annex III lists items to be disclosed in the crypto-asset white paper for an e-money token.

crypto assets and requires to disclose the expected use of funds. The SMSG believes that investors also need to know the actual use of the funds after the issuance (not only the expected use at the time of the white paper).

28. Recital 48 of MiCA states that – in addition to the information provided in the crypto-asset white paper – issuers of *asset-referenced tokens* should also provide holders of such tokens with information on an ongoing basis. In particular, Article 30 of MiCA requires the issuers of asset-referenced tokens to disclose on their website – and update at least on a monthly basis – the amount of asset-referenced tokens in circulation and the value and composition of the reserve assets[17]. The SMSG highlights the need to provide ongoing information to the holders of other cryptos (not only to the holders of asset-referenced tokens).

29. As regards the format of the white papers, ESMA considers that iXBRL is the machine-readable format that would best meet the legal requirements and policy objectives set out in MiCA and ensure the highest level of consistency with other disclosure requirements for sustainability information. ESMA also observes that the expected cost and effort associated to the preparation of a white paper in the proposed iXBRL format would be very limited[18]. In this respect ESMA considers a MiCA white paper structured as a standalone iXBRL file with a simple "closed" taxonomy (i.e., a template).

30. The SMSG supports the proposal to use a "closed" taxonomy for the white papers[19], having considered that such a format would reduce costs and also allow greater comparability across crypto-assets, with positive implications for the information set available to prospective holders.

3.7 Draft technical standards on cooperation

31. MiCA Regulation empowers ESMA to develop technical standards dealing with the powers of competent authorities and cooperation between competent authorities, the European Banking Authority (EBA), and ESMA. These technical standards detail how competent authorities, the European Supervisory Authorities (ESAs), and third-country authorities

---

[17] Article 30(3) of MiCA requires that issuers of asset-referenced tokens should also disclose any event that has or is likely to have a significant impact on the value of the asset-referenced tokens or on the reserve assets, irrespective of whether such crypto-assets are admitted to trading.

[18] The costs that issuers or CASPs will face to source the information required by the MiCA Regulation for the white paper are not included in the estimates reported in the consultation paper.

[19] See Section 7.1 of the consultation paper (Standard forms, formats and templates of the white papers), 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?) and 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)?).

should cooperate with each other in the performance of their supervisory duties (and other requirements) under MiCA.

32. ESMA requested the opinion of the SMSG regarding two RTSs and two ITSs relating to (i) the exchange of information between competent authorities, (ii) procedures, forms and templates for the exchange of information between competent authorities, (iii) procedures, forms and templates for exchange of information between competent authorities and ESMA/EBA, and (iv) the template for cooperation with third-country authorities.

33. The SMSG, having examined the drafts, supports the adoption of the proposed technical standards.

This advice will be published on the Securities and Markets Stakeholder Group section of ESMA's website.

Adopted on 6 December 2023.

[signed]   [signed]

Veerle Colaert   Giovanni Petrella
Chair   Rapporteur
Securities and Markets Stakeholder Group