Association des Banques et Banquiers, Luxembourg
The Luxembourg Bankers' Association
Luxemburger Bankenvereinigung

ABBL's opinion on ESMA's Technical Standards specifying certain requirements of the Markets in Crypto Assets Regulation (1st package)

Date: 20 September 2023
EU Transparency register: 3505006282-58

General Drafting Principles
As a general comment on ESMA's first consultation paper on MiCA, ABBL notes that the topics addressed by ESMA in all of the draft technical standards are in most parts not unique to crypto-asset service providers (CASPs). These topics (*e.g.*, authorisation, complaints handling, disclosure of conflicts of interest, acquisition of qualifying holdings) are also relevant for other types of financial entities like investment firms and/or payment institutions, whether they are active in the crypto-asset field or not, and these topics are already subject to sectoral legislation. Consequently, ABBL considers that the technical standards for CASPs should not be different, more specific and/or more stringent than the requirements and standards that are already in place for other regulated financial entities but should rather be aligned with such existing requirements and standards, unless ESMA considers those as inadequate to address the crypto-asset specific business activity of CASPs. We believe that a level playing field and regulatory uniformity should be key in the practical implementation and management of regulatory requirements applicable to financial entities (including the administrative burden thereof), allowing for an increased globalisation of financial entities, and removing unnecessary obstacles in the innovation journey in the financial technology industry that EU aims to foster.
Q1: Do you think that anything is missing from the draft RTS and ITS on the notification by certain financial entities to provide crypto-asset services referred to in Articles 60(13) and 60(14) of MiCA?
No However, we would like to note that Article 70(5) of MiCA exempts CASPs that are electronic money institutions, payment institutions or credit institutions from the requirements on safekeeping of clients' crypto-assets and funds set out in paragraphs (2) and (3) of Article 70 of MiCA. The draft RTS do not specifically refer to this exemption. It would improve clarity for electronic money institutions and credit institutions that are eligible for the notification regime of Article 60 of MiCA if ESMA addressed this point explicitly in the draft RTS, *e.g.*, by an appropriate amendment to Article 5 of the draft RTS. This would also ensure an alignment between the draft RTS and the MiCA requirements. Additionally, certain requirements go beyond what is required for the authorisation of other types of financial institutions when they do not provide crypto-asset services, which could affect the level playing field and equitable treatment between the various types of financial institutions without specific justification. Such requirements should therefore be amended to be aligned with the existing legal framework applicable to those financial institutions. In particular, regarding the programme of operations to be filed, article 1(1)(b) of the draft RTS provides for a very stringent requirement that notifying entities include in their programme of operations *"an explanation of how the activities of the entities affiliated with the notifying entity, including where there are regulated entities in the group, is expected to impact the activities of the notifying entity."*. For instance, in respect of investment firms within the meaning of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, as amended, (MiFID II), article 6(a) of Commission Delegated Regulation (EU) 2017/1943 only requires that an applicant provides to the national competent

authority (NCA) "*a programme of initial operations for the following three years, including information on planned regulated and unregulated activities detailed information on the geographical distribution and activities to be carried out by the investment firm. Relevant information in the programme of operations shall include*: (*i) the domicile of prospective customers and targeted investors; (ii) the marketing and promotional activity and arrangements, including languages of the offering and promotional documents; identification of the Member States where advertisements are most visible and frequent; type of promotional documents (in order to assess where effective marketing will be mostly developed); (iii) the identity of direct marketers, financial investment advisers and distributors, geographical localisation of their activity*". By providing for more specific requirements, we understand that ESMA is seeking to harmonise the applicable rules among Member States, thus intending to avoid or limit regulatory arbitrage. However, adding further details and specifications in relation to the authorisation for CASP will, as already mentioned, create an uneven playing field with already regulated financial institutions subject only to notification and information requirements under MiCA. Knowing that any subsequent modifications to the information submitted to the NCA must be notified without any undue delay to the NCA (article 4 of the draft ITS), we consider that this obligation creates unnecessary regulatory compliance burden, especially in significant groups where affiliated entities can be numerous, as are their activities. We would also welcome, if and to the extent this obligation is maintained, that it is made clearer in Article 4 of the draft ITS that the obligation to notify the NCA applies in the application process only, in line with Recital 5 of the draft ITS.

Furthermore, there are certain requirements set out in the draft RTS, which while being relatively detailed, could still give rise to divergent interpretations by national NCAs and it would therefore be worth to further clarify such requirements to limit the risk of forum shopping, either in the draft RTS or in the draft ITS. In particular, the following elements of the draft RTS would require clarifications:

- article 1(1) points (e) and (i): What is the level of granularity expected for the geographical distribution of services and clients and in terms of description of the human, financial and technical resources;
- article 2 (f): the concept of AML/CTF systems should be clarified so that the relevant entity can clearly identify the elements for which a copy must be provided to the NCA (e.g., by reference to the relevant requirements under the Anti-Money Laundering Directive);
- article 3(2): The concept of key person should be clarified;
- Finally, for the avoidance of doubt, it could be worth mentioning in the form annexed to the draft ITS that certain sections must only be filled-in if relevant considering the relevant CASP activities.

Q2. Do you agree with the list of information to be provided with an application for authorisation as a crypto-asset service provider? Please also state the reasons for your answer.

Yes

In general, we agree with the information to be provided with the application for authorisation as a CASP. We are in favour of harmonisation at European level that would enable a sufficient degree of granularity regarding the application requirements, while acknowledging the accompanying administrative challenges. Such harmonisation could enhance clarity, reduce ambiguity, and limit interpretational discrepancies. Additionally, we recognise that the decision to pursue granularity involves not only legal aspects but also strategic and political considerations.

In relation to the exemption under Article 70(5) of MiCA from the requirements on safekeeping of clients' crypto-assets and funds set out in paragraphs (2) and (3) of Article 70 of MiCA (see our response to Q1 above), ABBL would welcome that this exemption is addressed explicitly for clarity reasons in the draft RTS, *e.g.*, by an appropriate amendment to Article 10 of the draft RTS, since it will permit an alignment between the draft RTS and the MiCA requirements. This is relevant for payment institutions that are not subject to the notification regime but to the authorisation regime.

With regards to article 2(1)(b) of the draft RTS we refer to our comment under Q1 above regarding Art. 1(1)(b) of the draft notification RTS which applies *mutatis mutandis*.

Also, the requirement in article 7 (1) (e) of the draft RTS to provide letters of recommendation to the NCA goes beyond what is currently required for credit institutions (as per the EBA Guidelines on the assessment of the suitability of members of the management body and key function holders, which only list such recommendation letters as an example, rather than a mandatory document) or payment institutions (as per in the EBA Guidelines under Directive (EU) 2015/2366 (PSD2) on the information to be provided for the authorisation of payment institutions and e-money institutions and for the registration of account information service providers).

As already stated with regard to Q1 above, certain requirements set out in the draft technical standards while being relatively detailed, could still give rise to divergent interpretations by NCAs. It would therefore be worth clarifying such requirements to limit the risk of forum shopping, either in the draft RTS or in the draft ITS. In particular with regards to the following elements:

- article 2(1)(e) and (i): What is the level of granularity expected for the geographical distribution of services and clients and in terms of description of the human, financial and technical resources.
- article 3(b)(iv): Clarify whether there is any difference between the concept of type of client used therein and the concept of category of client referred to in article 2(1)(f).
- article (4): Indicate that all relevant procedures can be submitted in draft form.
- article 5(2): The concept of key person should be clarified.
- article 6 (f): the concept of AML/CTF systems should be clarified so that the relevant entity can clearly identify the elements for which a copy must be provided to the NCA (e.g., by reference to the relevant requirements under the Anti-Money Laundering Directive).
- article 7(1)(d): What is the level of granularity expected for the description of the delegation powers and internal decision-making powers and the areas of operation under control, bearing in mind that this information may be difficult to gather for the past 10 years?
- article 7(1)(f)(i): Indication as to whether reference is made to a criminal record issued by authorities in the country of residence of the relevant person or the country of nationality of the relevant person.
- article 7(1)(f)(i): It could be useful to clarify that, notwithstanding the three months old limit set out therein, declarations of honour do need to be resubmitted if assessment by the NCA lasts more than three months.

Article 4(2) of the draft ITS provides that the calculation of the time limit set out in article 63 (9) of MiCA shall start again if the applicant submits updated information during the assessment by the NCA. The ABBL believes that a materiality threshold should be provided for in case of minor updates that have no impact on the assessment by the NCA (such as for instance change in address of the applicant or one of the members of the management of the future CASP), meaning that the calculation of the time limit shall not start again in such cases.

Finally, for the avoidance of doubt, it could be worth mentioning in the form annexed to the draft ITS that certain sections must only be filled-in if relevant considering the relevant CASP activities.

Q3: Do you agree with ESMA's proposals on standard forms, templates and procedures for the information to be included in the application for authorisation as a crypto-asset service provider? Please also state the reasons for your answer.

Yes

Q4: Do you agree with ESMA's proposals to specify the requirements, templates and procedures for the handling of client complaints by crypto-asset service providers? Please also state the reasons for your answer.

No

In general, the requirements, templates, and procedures proposed by ESMA for the handling of client complaints by CASPs are reasonable. Current ABBL members which are Virtual Assets Service Providers

(VASPs) – registered with the Luxembourg Financial Sector Supervisory Commission, *Commission de Surveillance du Secteur Financier*, in accordance with the implementing provisions of Article 47 of Directive (EU) 2015/849 (as amended) (AMLD) – do not see any operational issues with implementing and executing ESMA's proposals as put forward in the current version of the regulatory technical standards. Some CASPs have even stricter complaints handling policies in place, which would ensure that the requirements set by ESMA will be met.

We note, however that even though ESMA has taken a different approach than the EBA in relation to complaints-handling, the more detailed ESMA requirements should be aligned with the principle-based approach adopted by the EBA, applicable to issuers of asset-referenced tokens, in order to avoid imposing additional burden by requiring entities subject to both texts to implement different type of complaints-handling procedures when they act as a CASP or as an issuer of asset-referenced tokens. In particular, some requirements provided for in the ESMA draft RTS might be too burdensome for CASPs and go beyond the requirements which will be applicable to issuers of asset-referenced tokens in accordance with the EBA draft RTS. For example, the ESMA draft RTS provides for a requirement for CASPs to review their complaints handling procedures at least on an annual basis while this requirement does not exist in the EBA draft RTS. Also, as another example, article 5(2) of the ESMA draft RTS provides that, when investigating complaints, CASPs should not require from their clients "*information and evidence that should be in their possession*". This type of requirement is too general as it is not cross-referring to a provision listing all the information (or at least types of information) that CASPs should have in their files and could therefore be a source of dispute between CASPs and their clients and could also be interpreted in divergent ways by NCAs.

Also, the ESMA draft RTS provides for far reaching language requirements while no similar requirements exist in the EBA draft RTS. Hence, the ESMA draft RTS requires, in its article 1(4), that the description of the complaints handling procedure and the standard template for submission of complaints be published in all languages used by the CASP and in at least one of the official languages of the home Member State and each Member State. Article 3(2) of the ESMA draft RTS provides that clients shall have the right to file complaints in all such languages. For a CASP active in all EU Member States, this would imply translations of the description of the complaints handling procedure and of the standard template in at least 27 EU languages and also to have human resources capacity to address potential complaints in all these 27 EU languages (including when the CASP acts on the mere basis of the freedom to provide services on a cross-border basis, without having a physical presence and employees in (all) other EU Member States). We believe that to the extent the contractual documentation is provided to the clients in a language they can understand, the description of the procedure and the templates should be published only in languages used in the contractual documentation concluded with the clients and the CASP should have capacity to address client complaints only in the same languages. Requiring a CASP to have all documentation translated in all relevant EU languages and having staff mastering all relevant EU languages would in our view be of limited added value to clients (who should be able to communicate in the language in which the contract was concluded) and generate unnecessary costs for CASPs which would need to hire additional staff with extensive language skills. We note that this approach would also be in line with article 101(1) of PSD II which provides that a payment service user and a payment service provider can agree upon the language to be used for complaints handling purposes.

Also, financial entities falling under the notification regime, like credit institutions, would become subject to the new complaints-handling rules, in addition to the complaints-handling regime they are subject to already so that an alignment to a principle-based approach between the different complaints-handling regimes would be welcomed by ABBL. In that respect, we note that handling client complaints might prove cumbersome if different procedures need to be applied depending on the type of service offered. For example, article 4(1) and article 6(2) of the ESMA draft RTS provide for a timeline which is different from the timeline contemplated under article 101(2) of PSD II.

Q5: Do you think that it is useful to keep the possibility for clients of CASPs to file their complaints by post, in addition to electronic means?

No

At the moment, the post-channel of communication with clients for complaints handling by CASPs is used to a limited extent. We are of the opinion that the use of such mode of communication for the purposes of complaints handling will remain limited (as a share in the total volume of complaints) for the years to come, and its role will be decreasing considering the fact that all operations of CASPs and their interactions with clients from the first contacts until the end of business relationships are generally digital by design. Even though the post-channel of communication does not represent an operational challenge for CASPs – due to its limited role and the obligation for CASPs to use the same channel of communication chosen by complainants – we believe that it will be in the interest of both clients and CASPs to use a digital channel of communication to gain speed and efficiencies, increase customer satisfaction, and reduce CO_2 footprint. Resorting to post communications will increase the time required for complaints handling by default due to the time needed to convey a message from one party to another.

Therefore, offering the possibility to file complaints by post might put an additional operational burden on CASPs without however providing any real added value for their clients.

Q6: Do you think that other types of specific circumstances, relationships or affiliations should be covered by Articles 1 and 2 of the draft RTS on the identification, prevention, management and disclosure of conflicts of interest by crypto-asset service providers?

No

However, we query whether the reference to Articles 1 and 2 of the draft RTS in the question should be read as a reference to Articles 2 and 3 of the draft RTS, as Article 1 is limited to setting out certain definitions, while the types of specific circumstances, relationships or affiliations are covered by Articles 2 and 3 of the draft RTS.

We note that the circumstances, relationships or affiliations specified in Articles 2 and 3 of the draft RTS go beyond what is required for investment firms under Article 33 of the MiFID Delegated Regulation 2017/656. In particular, by requiring CASPs to provide a broader range of elements could potentially make it more difficult for CASPs to effectively identify situations which may raise conflicts of interest. References to "any form of contractual arrangement" should thus be avoided.

We further note that, contrary to the above MiFID Delegated Regulation, the draft RTS are much more granular on the conflict of interests, which are potentially detrimental to the CASP itself and we query whether ESMA views CASPs as potentially subject to an increased risk for internal conflicts of interest compared to investment firms or other financial entities.

Q7: Do you think that other types of specific prevention or mitigation measures should be highlighted in the minimum requirements of Article 3 of the draft RTS on the identification, prevention, management and disclosure of conflicts of interest by crypto-asset service providers?

No

However, we query whether the reference to Article 3 of the draft RTS in the question should be read as a reference to Article 4 of the draft RTS, as Article 4 lays down the requirements on conflicts of interest policies and procedures and details specific prevention or mitigation measures.

Q8: Do you agree with the information request laid down in Article 1 and with the granularity envisaged for the information to be provided by proposed acquirers that are trusts, AIF or UCITS management companies or sovereign wealth funds?

No

General comments:

The question highlights the fact that there are notably more detailed and possibly restrictive conditions to consider when seeking a qualifying holding in an entity authorised as a CASP, in comparison to existing sectoral requirements on the assessment of acquisitions of qualifying holdings, including the ones applicable to credit institutions.

Hence, the analysis of these new conditions and their implications reveals a disparity between on the one hand already existing regimes for regulated financial entities, like the ESAs joint guidelines on the prudential assessment of acquisitions of qualifying holdings (JC/GL/2016/01) or the Commission Delegated Regulation 2017/1946 of 11 July 2017 supplementing Directives 2004/39/EC and 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards for an exhaustive list of information to be included by proposed acquirers in the notification of a proposed acquisition of a qualifying holding in an investment firm, and on the other hand the draft ESMA regulatory technical standards. Accordingly, acquirers of qualifying holdings in a CASP would need to provide more extensive information than, for instance, acquirers of qualifying holdings in a credit institution or an investment firm.

This situation creates a discrepancy between standard industry players (*e.g.*, credit institutions or investment firms) and those affected by these new rules (*i.e.*, CASPs). The justification for this might be warranted, calling for higher standards than the ones reflected in the abovementioned ESA guidelines or Commission Delegated Regulation 2017/1946. We would like to highlight that while introducing new standards is plausible, it could have a significant impact from a broader industry perspective. Perhaps, there should be consideration given to a more extensive review of what is required under existing regimes on the prudential assessment of acquisitions of qualifying holdings and whether any additional overlay is justified in relation to acquisitions of qualifying holdings in CASPs.

Specific comments

The following adjustments would, in ABBL's view, be required with regards to the content of the information to be provided:

- article 1(4)(d) of the draft RTS: The request for a detailed description of the performance of qualifying holdings of crypto-asset services previously acquired by AIFs or UCITS in the last three years does not seem to match the objective of the assessment by the NCA nor the assessment criteria set out in article 84(1) of MiCA. The suitability of the proposed acquirer cannot be inferred from the analysis of an element such as the performance of shares in other undertakings – which does not completely depend on the skills and experience of the proposed acquirer, nor the fund manager. Being a suitability assessment, and not a merit-based one, this information seems disproportionate and should not be requested. The analysis of the good repute and experience of the AIF or UCITS is already ensured by other required information such as the one set in article 3(1)(a)(i) of the draft RTS (cross-referring, among others, to article 2(a)(iii) of the draft RTS) on the occurrence of any bankruptcy, insolvency or similar procedures in the previous 10 years. The same remark is valid for the related requirement of indicating whether the previous acquisition of such qualifying holdings was approved by an NCA.
- article 1(5)(d) of the draft RTS: The concept of "details of any influence" should be clarified in order to mitigate the risk of divergent interpretations by NCAs, in particular to clarify if it encompasses only influence by the effect of applicable laws or also *de facto* influence.
- article 2(a)(vi): It could be useful to clarify that, notwithstanding the three months old limit set out therein, declarations of honour do not need to be resubmitted if assessment by the NCA lasts more than three months.
- article 2(a)(xi) of the draft RTS: The obligation for a proposed acquirer which is a natural person to communicate any dismissal from a previous employment or removal from a fiduciary relationship sounds excessive with respect to the suitability assessment under article 83 of MiCA and the assessment criteria set out in article 84(1) of MiCA. Indeed, such an information – a fortiori if the reasons of the dismissal/removal

are not known by the NCA – does not constitute a reliable element for evaluating the suitability of the proposed acquirer. - article 3(1)(e): The concept of "significant influence" should be defined directly in the draft RTS or by cross-reference to other relevant EU legislation. - article 10 (2): From the wording of this paragraph, it is not clear who should carry out the comprehensive assessment of the structure of the shareholding of the target entity. We suggest specifying that such an assessment is to be performed by the NCA and not by the proposed acquirer itself. Leaving such a complex assessment in the hands of the proposed acquirer not only seems disproportionate but risks also to lead to biased outcomes, given that it would essentially constitute a self-assessment. Additionally, to avoid this comprehensive assessment from becoming a purely discretionary exercise, ESMA should set out some detailed criteria to be followed by the NCA when carrying out such an assessment.
Q9: Do you agree with the proportionate approach to the request of information to be submitted by proposed indirect acquirers of qualifying holdings based on whether they are identified via the control or the multiplication criterion?
Yes The differentiation between indirect acquirers identified via the control criteria and those identified with the multiplication criteria is proportionate to the degree of influence exercised on the CASP by the proposed acquirer in each of the two situations and it is also in line with the Joint ESA guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector.
Q10: Do you consider the list of information under Article 8 complete and comprehensive to assess the financing of the acquisition, in particular as regards funding originated in the crypto ecosystem?
Yes
Q11: Do you agree with the identified cases where reduced information requirements apply and with the related requirements and safeguards?
Yes The cases falling into the scope of the reduced information requirements are justified by the fact that the exempted information is already in the possession of the relevant NCA.

Contacts: digital@abbl.lu