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RESPONSE BY THE ADVISORY COMMITTEE OF THE CNMV TO ESMA'S PUBLIC CONSULTATION ON THE CONDITIONS AND CRITERIA FOR THE QUALIFICATION OF CRYPTO-ASSETS AS FINANCIAL INSTRUMENTS

1. Public Consultation

Regulation 2023/1114 of the European Parliament and of the Council, of 31 May, on markets in crypto-assets (MiCA), defines crypto-assets according to their technical characteristics as digital representations of value or of rights that can be transferred and stored electronically using distributed ledger technology or a similar technology.

Also, this Regulation specifies that it does not apply to financial instruments.

Thus, when a financial instrument is represented by means of distributed ledger technology or similar technology, it will be a crypto-asset for the purposes of MiCA, although both its issuance and the provision of services regarding this will not be subject to MiCA but to MiFID II and any regulation affecting the issuance, provision of services, operations, markets, etc. regarding financial instruments.

Therefore, it is necessary to identify what crypto-assets are financial instruments for the purpose of determining the respective scopes of application of either regulatory body, these being so different in so many aspects.

To that effect, Article 2.5 of MiCA establishes that ESMA will issue guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments.

In the Public Consultation (PC), ESMA proposes a working method to such effect, reviewing the different assets contained within the definition of financial instruments in Section C of Annex I of MiFID II and, in each of these, reviewing what elements qualify them as financial instruments even when they fall within the concept of crypto-assets due to their form of representation in accordance with MiCA.

Specifically, this review is performed regarding (i) marketable securities; (ii) money market instruments; (iii) units in collective investment undertakings; (iv) several derivative contracts; and (v) emission allowances.

All these criteria are provided in Guidelines 1 to 6.

In addition, the Public Consultation also contains Guidelines to establish the crypto-asset concept regarding MiCA, for this and among others, establishing Guidelines on what characterises Non-Fungible Tokens so they are not considered to be subject to MiCA, or the treatment of hybrid crypto-assets.

All these criteria are provided in Guidelines 7 to 9.

2. General considerations

2.1. The Advisory Committee considers the analysis framework ESMA establishes in the Consultation Guidelines paper, regarding their scope and purpose, and with regard to the analysis of the different elements comprising the concept of financial instrument, to be appropriate.

Similarly, it considers that using an extensive approach to the concept of financial instrument, based on the type of asset and not the underlying, will have as an effect the extension of the known and more elaborate regulatory and supervisory framework – that of MiFID II and the concomitant regulations – with higher levels of investor protection, this being considered to be positive and appropriate.

Therefore, should there be any doubt, the Committee believes this should be considered a financial instrument and not another type of crypto-asset.

2.2. The PC states that the differentiation between crypto-assets that are financial instruments and those which are not is very relevant as this will have implications in terms of issuance, service providers, investor treatment, etc.

Establishing this differentiation is, therefore, truly crucial as the application of one or another regulatory package will depend on it.

As an example, this differentiation will have implications regarding:

- (i) The issuance regime, subject or not to the regime on issuance and offer to the public of financial instruments.
- (ii) The application of all the investor protection rules regarding financial instruments.
- (iii) The coverage of retail investors or lack thereof by European investment guarantee funds. In addition, as Member States have different concepts regarding financial instruments, investors may have different coverage by different products in different Member States.
- (iv) The scope of activity being compliant or non-compliant with the licence. If a service provider only authorised for crypto-assets (CASP) provides a service regarding a crypto-asset that is a financial instrument, it would be non-compliant with the activity restriction principle, acting beyond the scope of its licence, and require an investment firm or bank licence.

- (v) This may pose passport problems between Member States. If an entity provides crypto-asset services and none of these is considered a financial instrument by the authority in the State of origin while they are by the authority of the host State, the latter may not admit the passport to provide services in financial instruments within its territory by an entity that is not an investment firm or a bank.

These implications do not intend to be exhaustive, but it is considered that ESMA should explicitly foresee and identify them in its Guideline paper, as it shows their relevance.

2.3. The basic premise of the PC is that, since the concept of financial instruments is one expressed in a Directive, its practical application is different in different Member States. This makes the differentiation between crypto-assets that are financial instruments and those that are not difficult, as the conclusion may be different in different Member States.

As a result, ESMA specifies that the purpose of these Guidelines is not to set a one-size-fits-all financial instrument concept, but to establish guidelines to aid national authorities to determine what conditions and concepts to follow in order to classify crypto-assets as financial instruments.

The Advisory Committee considers it very important for the financial instrument concept, which determines – as exemplified above – the legal and regulatory regime applicable, to be harmonised at EU level.

As indicated, the present regulation via a Directive leads to different financial instrument concepts in different Member States.

The Committee insists that it is totally necessary to harmonise this concept at EU level, also to progress towards the Capital Markets Union, where having different target scopes in different Member States is detrimental to the purpose of the regulation and lacks any sense.

Although this is beyond ESMA's powers and what may be achieved with these guidelines, it is important for this target to be mentioned and included within the scope of ESMA's advice to the European regulator at each point in time.

2.4. ESMA considers the principle of neutrality in the form of representation a starting point in its PC. Thus, the fact that an asset is represented by means of distributed ledger technology does not make it a financial instrument. This will depend on its characteristics and content, but the form of representation does not affect this classification.

The Advisory Committee fully coincides with the principle of technological neutrality being applied, as proposed by ESMA.

3. Specific comments referring to the questions in the Public Consultation

In accordance with that stated, the Advisory Committee generally values the Guidelines submitted to Public Consultation positively.

Nevertheless, it does make certain comments on the PC.

These comments should be read in conjunction with the general comments provided in section 2 of this response.

Q.1. Do you agree with the suggested approach on providing general conditions and criteria by avoiding establishing a one-size-fits-all guidance on the concepts of financial instruments and crypto-assets or would you support the establishment of more concrete condition and criteria?

The Advisory Committee appreciates the difficulty in advancing to a more concrete definition of which instruments are financial instruments and which are not, therefore understanding ESMA's aim to ensure general guidelines.

However, what must be sought is a converging application of these criteria in the Member States with the highest levels of legal certainty.

For this reason, wherever feasible, the Advisory Committee backs the highest level of harmonisation and convergence possible.

Q.2. Do you agree with the conditions and criteria to help the identification of crypto-assets qualifying as transferable securities? Do you have any additional condition and/or criteria to suggest? Please illustrate, if possible, your response with concrete examples.

In general, the Advisory Committee considers that the criteria put forward in the PC are appropriate.

In addition, the regime for all financial instruments (according to their description in MiFID II) involving indirect investment in crypto-assets that are not financial instruments must be stated explicitly.

In this sense, the Committee backs the criteria expressed by ESMA, particularly with regard to investment funds that invest in crypto-assets (indirectly in Paragraph 115) and to derivatives whose underlying are crypto-assets (Paragraph 49), in both cases considering them financial instruments.

Specific reference to the structured notes whose yield is indexed to a crypto-asset or a crypto-asset basket or index is missed.

Although it may be considered these structured notes to be included in the "other securities" concept in Paragraphs 36 and 37, it should be expressly mentioned that these are financial instruments.

In the Committee's opinion, this should be so since the implicit derivative in this type of structured note is that which determines the yield of the note in reference to a crypto-asset or a crypto-asset basket or index.

Furthermore, there is no reason for this derivative to receive any different treatment from that generally given by the PC to derivatives relating to crypto-assets in Paragraph 49, which this considers financial instruments.

Q.3. Based on your experience, how is the settlement process for derivatives conducted using crypto-assets or stablecoins? Please illustrate, if possible, your response with concrete examples.

Paragraph 51 expressly states that for a crypto-asset to be categorised as a derivative, it needs to meet specific essential characteristics outlined in MiFID II.

The Committee considers this approach to be correct, but these characteristics should be stated explicitly.

The Committee as such has no experience regarding specific forms of settlement of derivatives relating to crypto-assets.

However, regarding crypto-assets that are derivatives but are settled by payment in kind in crypto-assets, the Committee considers that, in principle, these instruments should be categorised as financial instruments, in such a manner these products that are so complex and likely to involve additional risks, are conveyed to the MiFID II regulatory framework.

Q.4. Do you agree with the conditions and criteria to help the identification of crypto-assets qualifying as another financial instrument (i.e. a money market instrument, a unit in collective investment undertakings, a derivative or an emission allowance instrument)? Do you have any additional condition, criteria and/or concrete examples to suggest?

The Advisory Committee agrees with ESMA's considerations.

However, given how widespread these products are, it considers that express reference should be made to the case of contracts for differences (CFDs) and ETFs, as both are financial instruments even when referring to or having underlying assets in crypto-assets.

Q.5. Do you agree with the suggested conditions and criteria to differentiate between MiFID II financial instruments and MiCA crypto-assets? Do you have concrete condition and/or criteria to suggest that could be used in the Guidelines? Please illustrate, if possible, your response with concrete examples.

The Committee agrees with the PC regarding this.

Q.6. Do you agree with the conditions and criteria proposed for NFTs in order to clarify the scope of crypto-assets that may fall under the MiCA regulation? Do you have any additional condition and/or criteria to

suggest? Please illustrate, if possible, your response with concrete examples.

The Committee understands that the differentiation between what is a NFT and what is not, regarding the application of MiCA, is complex.

However, it has no comments regarding ESMA's proposal.

Q.7. Do you agree with the conditions and criteria proposed for hybrid-type tokens? Do you have any additional condition and/or criteria to suggest that could be used in the Guidelines? Please illustrate, if possible, your response with concrete examples.

The Advisory Committee agrees with ESMA and considers it particularly important that, when a hybrid crypto-asset contains, at least partially, elements defining a financial instrument, it should be considered as such, therefore giving preference in the classification to the presence of these elements.