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| Reply form  on the Consultation Paper on guidelines on conditions and criteria for the classification of crypto-assets as financial instruments for MiCA implementation |
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**Responding to this paper**

ESMA invites comments on all matters in this consultation paper and in particular on the specific questions. Comments are most helpful if they:

* respond to the question stated;
* indicate the specific question to which the comment relates;
* contain a clear rationale; and
* describe any alternatives ESMA should consider.

ESMA will consider all comments received by **29 April 2024.**

**Instructions**

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. Use this form and send your responses in Word format (**pdf documents will not be considered except for annexes**);
3. Please do not remove tags of the type <ESMA\_QUESTION \_MIC3\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
4. If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
5. When you have drafted your response, name your response form according to the following convention: ESMA\_MIC3\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_MIC3\_ABCD\_RESPONSEFORM.
6. Upload the form containing your responses, **in Word format**, to ESMA’s website (www.esma.europa.eu under the heading “Your input – Open Consultations” -> Consultation Paper on guidelines on conditions and criteria for the classification of crypto-assets as financial instruments”).

**Publication of responses**

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

**Data protection**

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading [Legal Notice](http://www.esma.europa.eu/legal-notice).

**Who should read this paper**

# All interested stakeholders are invited to respond to this consultation paper. In particular, ESMA invites crypto-assets issuers, crypto-asset service providers and financial entities dealing with crypto-assets as well as all stakeholders that have an interest in crypto-assets.

**General information about respondent**

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| Name of the company / organisation | VBNL (“United Bitcoin Companies The Netherlands“) |
| Activity | Association |
| Are you representing an association? | Yes |
| Country/Region | The Netherlands |

**Questions**

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?**

<ESMA\_QUESTION\_MIC3\_1>

Regarding the proposed approach of providing general conditions and criteria while avoiding a one-size-fits-all guidance on financial instruments and crypto-assets, we understand the intention to allow flexibility due to the diverse nature of these domains.

However, we recognize the need for clearer guidance to ensure compliance and enhance market transparency. Therefore, we support the inclusion of more concrete criteria to provide industry stakeholders with clearer direction. This balanced approach would address complexities effectively while maintaining flexibility.

Furthermore, we contend that the assessment of the classification of crypto-assets as financial instruments should not fall within the purview of NCAs but rather within that of the ESMA, due to existing discrepancies among NCAs regarding the definition of financial instruments.

<ESMA\_QUESTION\_MIC3\_1>

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

<ESMA\_QUESTION\_MIC3\_2>

examples.

Regarding the conditions and criteria for identifying crypto-assets as transferable securities, we largely agree with the proposed criteria. However, we suggest a more specific interpretation of the concept of 'negotiability'.

Rather than a broad interpretation, we recommend considering concrete subcriteria specific to this concept, such as the degree of standardization, the degree of transferability, and the trading possibilities.

These subcriteria are derived from the characteristic aspect of negotiability (verhandelbaarheid) as perceived by the Dutch financial markets regulator (AFM). However, we do not advocate for a broad, economic approach when it comes to crypto-assets. With regard to the degree of standardization, it is important to note that a crypto-asset is either fully standardized and consequently interchangeable or not. The associated rights and/or obligations of the token must be correspondingly the same to classify the token as fully standardized. In assessing this, the analysis used for the first criterion ('class of securities') can perhaps be applied.

About the degree of transferability. A crypto-asset is transferable or it is not. If the transferability to a third party is not excluded in the protocol (e.g. like verifiable credentials), articles of association, or fund conditions, then transferability exists.

As for trading possibilities, it is essential that there is 'regular transferability,' and regular transfers typically occur. For instance, a crypto-asset could be deemed regularly transferable if it meets certain thresholds in terms of trading volume and liquidity on capital markets, excluding DeFi.

This approach could offer practical guidance for market participants for a crypto-asset to be recognised as a transferable security under MiFID II.

<ESMA\_QUESTION\_MIC3\_2>

1. **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**

<ESMA\_QUESTION\_MIC3\_3>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MIC3\_3>

1. **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 conditions, criteria and/or concrete examples to suggest?**

<ESMA\_QUESTION\_MIC3\_4>

We agree to a large extent with the conditions and criteria that help the identification of crypto-assets as another financial instrument, but would like to emphasize on the importance of creating a transparent and equal level-playing-field with detailed conditions in place that serve as a safeguard for our clients.

In the case crypto-assets are embedded in European Emissions Trading Schemes, we are of the opinion that it is important that users have access to equal and comparable data on greenhouse gasses, allowing crypto-asset service providers to inform clients in a rightful manner.

To achieve this level of data quality, coin issuers should have robust internal control mechanisms, systems and procedures in place that safeguard. This information should be accurate and complete, which allows third parties (e.g., external auditors) to perform an independent assessment of the legitimacy of the claims made with respect to greenhouse gasses. In addition thereto, coin issuers should implement measures to mitigate the risk with respect to the technical integrity of the data, including (e.g.) data manipulation.

It is important to create further awareness that qualifying crypto-assets as an emission allowance instrument also results in further risks with respect to the crypto-assets industry, since this provides further opportunities for insider trading and market abuse, whilst crypto-asset service providers are faced with the obligation to establish fair trading practices.

<ESMA\_QUESTION\_MIC3\_4>

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

<ESMA\_QUESTION\_MIC3\_5>

We agree that a utility token should give neither financial rights that would be related to a company’s profits, capital, or liquidation surpluses (and therefore representing an ownership position in a company’s capital), nor voting rights which could lead investor participation in the company's decision-making process.

However, clarification on the criteria for a qualification of a utility token as a financial instrument under MICA is crucial. For example: 1) whether utility tokens qualified as financial instrument under MiCA only applies to tokens related to listed companies in the EU, 2) whether this qualification is related to ownership rights of companies listed outside the EU; 3) whether this qualification is related to ownership risks for companies not listed in the capital markets (globally), 4) whether the qualification tokens related to listed companies in the EEA, 5) and whether tokens can be categorized as such when the issuing firm has no clear physical principal headquarters (‘fully remote firms, e.g. GitLab’).

We agree that the classification of an asset as utility token is also to be dismissed if the sole objective of the token is to participate in the performance of one or several underlying assets without directly investing in these assets, which would be typically a feature of derivative contracts or units in collective investment undertakings and are both considered financial instruments under MiFID.

Finally, we are requesting the ESAs to provide more clarity on the rights attached to utility tokens and the ways they are used. If a utility token has multiple objectives, for example the right to underlying assets as a derivative (MIFID) and the right as utility tokens (MICAR), will this utility token fall under both MIFID and MICAR?

<ESMA\_QUESTION\_MIC3\_5>

1. **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 conditions and/or criteria to suggest? Please illustrate, if possible, your response with concrete examples.**

<ESMA\_QUESTION\_MIC3\_6>

We agree that several aspects of the conditions and criteria proposed for NFTs to remain exempt from MiCA, such as uniqueness and non-fungibility, the substance over form approach and applying interdependent value tests. While the current framework is robust in many respects, we would incorporate additional considerations to further refine guidance.

Further scrutiny on the utility functions of NFTs could be useful. If owning an NFT confers rights or access (like entry to an event or access to a service), the value and uniqueness should be assessed based on how essential the NFT is to obtaining these benefits. If multiple NFTs offer similar utilities, their supposed uniqueness could be called into question.

Ensuring that an NFT’s history and provenance are transparent and verifiable could be an additional criterion for determining its uniqueness. This could involve use of blockchain technologies that support detailed metadata and history logs that are tamper-proof.

NFTs representing cultural, artistic, or historical significance could be considered under a special category that acknowledges their non-fungible nature beyond mere market value. For instance, digital representations of historical documents or artworks could be treated differently from more commercial uses of NFTs.

Currently, it remains unclear whether NFT’s as digital representations of (non-financial) real world assets are always considered unique and what conditions and criteria apply for the classification of this NFT class that is growing in popularity.

On another note, the focus in the discussion around NFTs often centers on those compatible with the Ethereum Virtual Machine (EVM), such as those following the ERC-721 and ERC-1155 standards. However, emerging technologies and token standards on other blockchains like Bitcoin, particularly ordinals/inscription- and Rune-based NFTs, present unique technical and functional characteristics that challenge the current regulatory framework.

Under current guidelines, the linkage of an NFT’s uniqueness to a fungible asset (as the Ordinal Protocol on Bitcoin allows NFT that are inscribed into, c.q. ‘printed on’, a satoshi - being 1:100.000.000th of a bitcoin) might be interpreted as detracting from its classification as a truly unique asset. The primary concern here is whether the value of the fungible token, (its established use as currency on the Bitcoin blockchain - although currently valued at less than a tenth of an eurocent) overshadows the unique attribute it carries, thereby influencing its uniqueness from a regulatory perspective. Per 20th of April (Bitcoin block 840.000 to be precise), the Rune protocol on Bitcoin introduced the capability of NFTs that are linked to Unspent Transaction Outputs (UTXO’s), instead of single sats. While UTXO’s say nothing about the value of the attached token(s), a UTXO can be worth anything. Although very unlikely that anyone would still use the fungibility of their sat or UTXO, it is not technically impossible.

Comparable to the real world would be if a 5-cent coin was engraved with a piece of art by a famous painter on its back. While still being able to spend as a fungible fiat currency when inside a wallet, if put in a frame and hung on the wall it would clearly be considered a unique piece of art or collectible.

Some marketplaces (e.g. Magic Eden) even trade “rare sats” als NFTs, which are single satoshi’s that have significant historical value. Examples are sats that originate from the first block of the blockchain, the very first sat of the block after the halving, sats that were involved in the first Bitcoin Pizza transaction, etc. Although very unlikely that anyone would still use the fungibility of their sat or UTXO, it is not technically impossible.

To address these concerns in the regulatory framework, several proposals could be considered:

Dual-Value Recognition: Regulatory guidelines should recognize that certain assets can simultaneously hold dual value – both as a functional currency and as a carrier of unique digital art or other unique identifiers. This recognition should not diminish the asset’s classification as an NFT, provided the unique attribute is not merely decorative but holds inherent value independently of the base asset.

Clear Guidelines for Technological Neutrality: Establish clear guidelines that ensure technological neutrality, encompassing NFTs created on all blockchain platforms, not just those that are EVM-compatible. This would encourage innovation across different technologies without penalizing certain blockchains for their unique approaches to NFTs.

Specific Disclosures for Dual-Function Assets: Require specific disclosures for assets that function both as currency and as a bearer of unique properties. This would help potential buyers understand the dual nature of the asset and make informed decisions based on both its fungible and unique characteristics.

As the crypto-asset landscape evolves, it should be imperative for regulatory bodies like those involved in drafting Regulations and Technical Standards to consider the full spectrum of technologies and token functionalities. By adopting a more inclusive and flexible regulatory approach, it is possible to foster innovation while maintaining rigorous standards for consumer protection and market integrity. Addressing the nuances of emerging technologies such as Rune and inscription-based NFTs on platforms like Bitcoin and Dogecoin will be essential for developing a comprehensive regulatory framework that truly reflects the diversity of the digital asset ecosystem.

<ESMA\_QUESTION\_MIC3\_6>

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

<ESMA\_QUESTION\_MIC3\_7>

The approach outlined for classifying hybrid-type tokens under the Markets in Crypto-Assets (MiCA) regulation addresses the complexity of crypto-assets that combine elements of different asset types, such as utility, governance, payment, and investment functions. The guideline suggests a hierarchical approach prioritizing the classification as a financial instrument if those characteristics are present, reflecting a rigorous, pragmatic regulatory stance.

The hierarchical approach to classifying hybrid tokens, where the presence of characteristics takes precedence is prudent for alignment with existing financial regulations and aims to extend regulatory clarity. We also recognize that prioritizing financial characteristics can also help protect investors by applying stricter oversight where tokens act similarly to traditional investment vehicles, which are typically associated with higher risks. Lastly, assessing crypto-assets based on their actual features and not just the labels applied by issuers helps to avoid misclassification and potential misuse of asset labels to circumvent regulation.

However, while the proposed conditions provide a solid foundation, additional criteria could further refine the classification process and address potential ambiguities:

Economic Purpose and Usage Context: Beyond the financial instrument characteristics, the economic purpose and context of usage of the token should play a significant role in its classification. For instance, a token primarily used within a specific platform or ecosystem for accessing services (primarily: utility function) might still possess investment characteristics if it is marketed with the expectation of profit derived from the efforts of others.

Hybrid Functionality Tracking: Implementing a tracking mechanism to monitor how a token's function evolves over time could be beneficial. If a token initially classified as a utility token begins to be used predominantly as a payment or investment vehicle, its classification might need reassessment. A good example is recent (proposed) changes for the Uniswap protocol.

Transparency and Disclosure Requirements: Enhanced disclosure requirements for hybrid tokens could help investors understand the multifaceted nature of these assets. Issuers could be mandated to clearly describe each function of the token and the associated risks.

Consider a hypothetical hybrid token issued by a blockchain-based gaming platform. This token allows users to purchase in-game items (utility), acts as a medium of exchange within the game (payment), and can be traded on external exchanges where its price is subject to market dynamics (investment). Under the guidelines, the classification of the token would initially only focus on whether it fits the definition of a financial instrument based on its tradability and the expectations of profit by holders. However, if the primary use of the token within the game dominates and its investment function is secondary, this should influence its classification. Hence, a classification based on the primary economic purpose and the context of usage would provide guidance that is both more clear and more fair.

<ESMA\_QUESTION\_MIC3\_7>