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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 | DLA PIPER STUDIO LEGALE TRIBUTARIO |
| Activity | Audit/Legal/Individual |
| Are you representing an association? |[ ]
| Country/Region | Italy |

**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>

ESMA proposes to provide general conditions and criteria for crypto-assets’ classification as financial instruments over a one-size-fits-all guidance.

Before commenting on the proposed approach, it is undoubted that the crypto-assets space is continuously evolving and brand new types of crypto-assets are constantly entering the market. For this reason, a one-size-fits-all guidance would not probably be the best approach in that it may turn out to became inadequate for market dynamics quite soon.

This nonetheless, the general conditions and criteria approach, as set out in the Guidelines, risks to create a gold plating scenario across the European Union considering the very different approaches that NCAs showed when assessing the conditions under which an asset should be considered a financial instrument (see the survey of January 2019[[1]](#footnote-2)). As crypto-assets are typically offered throughout several jurisdictions, it might be the case that certain NCAs will consider as financial instruments certain crypto-assets that are conversely excluded from this classification in other Member States, thus imposing additional requirements for issuers and service providers.

For these reasons, we would ask the Authority to set out more concrete and possibly unambiguous criteria of classification. In this respect, although we are conscious that the Guidelines have a low degree of bindingness, it would be preferable to indicate the criteria with a more binding wording rather than as “*indicators*”.

<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>

Since its first proposal, MiCA explicitly excluded from the scope of application crypto-assets that classify as financial instruments, in that they fall under the existent MiFID II regulatory framework.

According to MiFID II, financial instruments are (i) transferable securities, (ii) money-market instruments, (iii) units of collective investment undertakings, (iv) derivative contracts and (v) emission allowances. The concept of transferable securities is undoubtedly the most controversial, as proved by the survey conducted among NCAs showing severely differentiated approaches and interpretations. In fact, some NCAs disclosed a quite strict interpretation relying upon the definition of transferable securities in article 1 (44) of MiFID II (*i.e.* shares, bonds) with a very low standard of equivalence (closed list), whilst other NCAs are taking into account other factors such as the existence of attached profit rights, without having necessarily ownership or governance rights attached, or having investment purposes or generating expectation of financial returns.

As a preliminary consideration, we understand that ESMA is overruling the concept of transferable security as limited to those securities listed in article 1(44) of MiFID II as transposed in local legislation; in other words, the closed list approach seems to be excluded.

On the other hand, also the wider interpretation of transferable securities as those generating a mere expectation of a profit is not consistent with the concept of transferable security.

Finally, utility tokens cannot be framed in the transferable securities category, unless they replicate rights attached to financial instruments.

Based on these assumptions, ESMA sets out the requirements that crypto-assets must meet to be considered financial instruments:

* (i) being “classes of security”, thus interchangeable (*i.e.* fungible), issued by the same issuer, having similarities and providing access to equal rights;
* (ii) being negotiable on the capital market,
* (iii) not being payment instruments.

Points (i) and (ii) are those around which the major concerns arise.

On the basis of the Guidelines, we understand that ESMA is taking the following views:

* crypto-assets should be qualified as securities when they “*represent an ownership position in a company’s capital and confer to their holders rights similar or equivalent to the rights conferred by shares (e.g. stake in the company, participation in the management of company rights, access to a part of company profits, or rights to the company’s liquidation proceeds”*
* the concept of negotiability coincide with that of transferability, meaning that all crypto-assets that are technically transferable are also negotiable
* the notion of capital market also includes over-the-counter transactions.

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1. *Rights attached to crypto-assets*

We have concerns around the concept of rights attached to crypto-assets that may qualify them as financial instruments, especially with respect to profit rights. A crucial point is whether a crypto-asset that grant profits detached from ownership or governance over the issuer can or cannot be considered financial instruments.

This issue seems to be partially addressed in footnote (67) which however leaves more than a doubt on ESMA’s final conclusions. The footnote reads “*the question whether the existence of attached profit rights to a token, without having necessarily ownership or governance rights attached to it, can be considered sufficient to be qualify as a share or as another type of transferable securities not explicitly listed in Section C, Annex I of MiFID II*”, seeming to be an unconcluded sentence.

Whether profit rights detached from ownership or governance rights are sufficient to consider a crypto-asset as a financial instrument is a key issue in the current market scenario. By way of example, certain crypto-assets grant rights to receive proceeds deriving from the issuer’s specific activity carried out in the interest of the investors, such as staking or mining activities, or from the achievement of certain project’s milestones rewarded through airdrops or other returns (especially those contemplated in the tokenomics in favor of certain categories of early adopters). These proceeds are unrelated to ownership or governance rights, nor they can be considered attached to company’s profits or liquidation proceeds. Their classification is then highly debatable based on the current Guidelines.

In our view, it would be advisable to exclude profits rights detached from ownership or governance rights from the list of criteria based for classification as financial instruments. In fact, should the Authority take the opposite view, the vast majority of crypto-assets would end up being regulated under MiFID II rather than under MiCA, which in practice would be limited to pure speculative crypto-assets only.

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1. *Negotiability on capital markets*

A second indicator of a crypto-asset being classified as transferable security is its negotiability on the capital markets. In this regard, ESMA’s interpretations is extremely broad.

In essence, the Guidelines clarify that the abstract possibility of a crypto-asset of being transferred and traded fulfill the negotiability requirement, even though no market is ready to accept trading on that crypto-asset or a locking period is embedded in the smart contract. For crypto-assets, in sum, the concept of transferability seems to coincide with that of negotiability, unless specific technical restrictions are hard coded.

The term “capital market” is also broadly interpreted to include any trading venue as well as over the counter markets, which basically makes transferable crypto-assets meet the negotiability requirement all the times.

The over-the-counter market also raises some concerns, in that it may include private transactions that may be occasional and not systematic or somehow structured or organized. In our view, the OTC negotiability should be better defined in order to exclude purely occasional or spot transactions.

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1. *A case-by-case approach*

Based on the current draft of the Guidelines, uncertainties remain on the type of rights that qualify a crypto-asset as a security, this probably leading Member States to stick to their domestic interpretation criteria and creating risks for cross-border issuances.

The classification shall then be made on a case-by-case basis (probably and unfortunately also on a country-by-country basis) and NCAs are entitled to challenge the qualification before the public offering or afterwards at any point in time.

Considering the severe consequences deriving from a (late) classification of a crypto-asset as financial instrument, it would be appropriate that ESMA encourages NCAs to be available to discuss and assess in advance the nature of a crypto-asset with the issuer/offeror or the service provider.

<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>

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<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>

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<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>

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<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>

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<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>

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<ESMA\_QUESTION\_MIC3\_7>

1. [esma50-157-1384\_annex.pdf (europa.eu)](https://www.esma.europa.eu/sites/default/files/library/esma50-157-1384_annex.pdf) [↑](#footnote-ref-2)