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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 | Kraken |
| Activity | Other Financial service providers |
| Are you representing an association? |[ ]
| Country/Region | UK |

**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>

The approach taken in this consultation provides clearer guidance for market participants while allowing innovation within the crypto-asset industry. We appreciate ESMA’s efforts to provide clarity and a methodology in classifying crypto assets uniformly across the EU. MiCA provides a unique opportunity for creating a harmonised regime, benefitting from the fact that crypto, unlike MiFID instruments, does not suffer from the fragmentation stemming from each individual EU member state defining it differently.

While we support ESMA’s guidance of not using a one-size fits all approach, we believe that this might lead to divergent approaches in Member State classifications. In particular, given that there is no EU-wide harmonised definition of a financial instrument in the EU, we believe that different National Competent Authorities (NCAs) may classify the same token differently in their Member State base which would be contrary to the level playing field MiCA seeks to achieve. These guidelines come close to helping avoid such an outcome.

Technology neutrality is a very important concept and we would appreciate additional focus on this in the final guidelines from ESMA. We recommend that ESMA includes in its guidance that the risk analysis of a financial instrument should be technology neutral and that a financial instrument should not have a higher risk profile solely due to the fact that it relies on DLT or has a crypto-asset as its underlying.

<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>

We note that the criteria for qualifying as a transferable security is quite broad, in some respects circular and would benefit from further clarification.

With regards to the criterion of:

* “**not being an instrument of payment**”, we note that additional clarification on what is a “payment instrument” would be helpful, given that there is no harmonised definition of “payment instrument” between MiFID II and PSD2 across the EU. The Guidelines should specifically refer to the PSD/PSR definition for avoidance of doubt.
* “**forming a class of securities**”. It should also be clarified that “giving access to the same rights” should not capture attributes of tokens that allow participation in protocol development processes. We believe that such tokens that give access to protocol governance should not be viewed as transferable securities, given that the governance dynamics is not akin to “voting rights on the issuer's decision-making process”. For more detail regarding this clarification, please see our response to Question 5.
* “**being transferred or traded on capital markets**”, where capital markets are all “...venues where securities are traded as well as over-the-counter markets … or other electronic and/or voice trading platforms where buying and selling interest in securities meet” we suggest that the Guidelines specify that these are MiFID authorised venues or other OTC traditional finance mechanisms to make it clear that MiCA crypto-asset platforms or decentralised exchanges are not considered.

<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>

Crypto derivatives settle in a variety of ways, including but not limited to, stablecoins, crypto assets (e.g. BTC), and cash (e.g. EUR or USD), where the value of the derivative contract at expiration is settled in the quote currency of the contract, based on the difference between the contract’s price upon opening the position and the market price of the underlying crypto asset at expiration.

Some derivatives physically settle which means that the underlying crypto asset is delivered to the buyer. At expiration, the seller of the derivative delivers the underlying crypto asset specified in the contract, and the buyer receives it. Certain exchanges allow for clients to choose between receiving the underlying asset or settling in the quote currency.

Derivatives that settle in crypto assets other than EMTs should not be considered cash settled, as the equivalence between such crypto assets and cash is not possible. In this sense, Bitcoin, for example, or any similar crypto asset, should not be considered (i) a currency since it is not a banknote or coin that is in circulation as a medium of exchange or that has been in circulation as a medium of exchange and can still be exchanged through financial institutions or central banks for banknotes or coins that are in circulation as a medium of exchange; (ii) a bearer-negotiable instrument since it does not entitle the holder to claim a financial amount upon presentation of the instrument; (iii) a commodity used as highly-liquid store of value since it is not listed in point 1 of Annex A of Regulation 2018/1672; (iv) a prepaid card since it does not fit within the definition.

<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>

ESMA delineations are broadly sensible. With regard to derivatives, we would welcome guidance on how perpetual contracts, i.e. contracts without an expiration date, would be qualified. We appreciate that perpetual contracts are unique to the crypto industry and there is no equivalent product in traditional finance. Our preference is that they are treated as derivative contracts.

<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>

According to the Guidelines, Utility tokens should “facilitate practical/functional utilisation within a DLT-based ecosystem or similar technology”. We note that MiCA Level 1 does not limit the scope of Utility tokens in this manner. We believe that the utility of a utility token could be exercised outside of a DLT based platform (e.g. in a web browser, video game, or in person) and so the scope for Utility token should be wider and not reference DLT specifically. Alternatively, the guidelines could reference DLT as an example, among other platforms in a list of examples.

We would welcome consideration of the different functions of “voting rights” associated with crypto assets, as they can serve different purposes. This applies to a variety of crypto assets or tokens, including utility tokens and governance tokens. We recommend further clarifying that voting rights associated with protocol governance should not be conflated with voting rights associated with financial instruments. Crypto assets providing these different kinds of rights should be subject to distinct treatment. This nuance requires a more thorough and case-by-case analysis of the governance dynamics of a token (e.g., the role of voting in the ecosystem) as opposed to rendering a blunt conclusion based solely on the presence of a voting mechanism.

<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 note that at the time of drafting of MiCA, NFTs were deemed as not ready to be regulated by MiCA. As such, MiCA contains no provisions to deal with NFTs specifically and a vast majority of NFTs were meant to be scoped out of MiCA. Since then, the NFT markets have not experienced any significant losses of customer funds, or any other meaningful failures.

NFTs are functionally equivalent to any other digital assets sold over the internet (e.g. songs, ebooks, audiobooks). ESMA’s assessment in the Guidelines could bring a number of NFTs in the scope of MiCA, mainly based on challenging their “non-fungible” status. Unfortunately, MiCA Level 1 makes the link between fungibility and size of a collection. ESMA further challenges fungibility, based on vague notions such as exhibiting “interconnected value dynamics” being contrary to asset’s fungibility. We see these two attributes as independent. We believe that if NFTs fulfil the criteria outlined in the guidelines to qualify as crypto-asset or other financial instrument, they should be regulated appropriately, but this should not be based on the fungibility challenges of “uniqueness” or be linked to the size of the collection they belong to. The assessment should instead be based on the underlying features and whether the appropriate criteria and conditions are met.

We note and welcome that by 30 December 2024, the European Commission will submit a report to the European Parliament and Council focusing on the market evolution of NFTs and evaluating the need for their regulatory oversight.

<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>

We have no objection to treating hybrid tokens displaying features of a financial instrument as financial instruments. Any alternative treatment would be costly to assess and difficult to oversee. For example, theoretically, if a hybrid token displays features partly of a utility token and partly of a financial instrument, but over time its utility significantly outgrows its financial instrument investment potential - such token might benefit from being seen as a utility token. However, this would be challenging to implement into practice.

<ESMA\_QUESTION\_MIC3\_7>