**INTRODUCTION**

Payward Inc., d/b/a/ Kraken (“Kraken”) is pleased to respond to ESMA’s third Public Consultation on Technical Standards specifying certain requirements of the Markets in Crypto-Assets (‘MiCA’) Regulation EU 2023/1114.

Kraken remains committed to growing its business in the EU regulatory perimeter. Our Irish subsidiary Payward Europe Solutions Limited (‘PESL’) was granted registration as a Virtual Asset Service Provider (‘VASP’) with the Italian Organismo Agenti e Mediatori (‘OAM’) in June 2022, with the Central Bank of Ireland (‘CBI’) in April 2023, with the Bank of Spain in September 2023. Another Irish subsidiary Payward Continental Services Limited (‘PCSL’) was granted registration as a Crypto Service Provider (‘CSP’) with the Dutch Central Bank (‘DNB’) in February 2024. Kraken has also launched VASP services in Belgium through PESL. We are seeking further registrations and licences in the EU Member States as appropriate. This will include us applying for a Crypto-Asset Service Provider (‘CASP’) licence under MiCA, when available.

Founded over 12 years ago, Kraken is one of the world’s oldest and largest global digital asset platforms. Kraken provides products and services to retail and institutional customers that support key components across the digital asset market value chain. Outside of the EU, Kraken holds a number of registrations, licences, authorisations and approvals including in the United States, United Kingdom, Canada, and Australia, among other developed and emerging markets.  Subject to local regulatory requirements and authorisations, Kraken’s global product and service offering includes crypto trading, investment, benchmarks, staking, banking, and others.

Kraken welcomes MiCA, as it provides legal certainty, including a clear path to licensing, and will enable the growth of our business in the EU in a manner which both protects customers and promotes confidence in the market. We welcome these guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments as it aims to provide clearer guidance for market participants while allowing innovation within the crypto-asset industry.

We would be pleased to discuss any points or questions raised in further detail.

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**SUMMARY**

* **Guideline 1: General:**
  + We appreciate ESMA’s efforts to provide clarity and a methodology in classifying crypto assets uniformly across the EU. While we support ESMA’s guidance of not using a one-size-fits-all approach, we believe that this might lead to fragmentation across Member States’ classifications. In particular, given that there is no EU-wide harmonised definition of a financial instrument, we encourage ESMA to work with the National Competent Authorities (NCAs) to prevent classifying the same token differently in their Member State base which would bring an unwelcome divergence.
* **Guideline 2: Classifying crypto assets as Transferable Security:**
  + We note that the criteria for qualifying as a transferable security is broad, in some respect circular and would benefit from further clarification. E.g. We ask for additional clarification on what a “payment instrument” is, given that there is no harmonised definition of “payment instrument” between MiFID II and PSD2 across the EU. In addition, we believe that the condition of being “transferred or traded on capital markets” is too broad and should be narrowed down to MiFID venues or other OTC traditional finance mechanisms, and exclude centralised and decentralised exchanges.
* **Guideline 5: Classifying crypto assets as “Derivative contracts”:**
  + We ask for guidance on how perpetual contracts, i.e. contracts without any expiration date, would be qualified. We appreciate that perpetual contracts are unique to the crypto industry and there is no precedent in traditional finance. Our understanding is that they should be treated as derivative contracts and clear guidance on this would be helpful.
* **Guideline 7: Classifying as MiCA “Crypto assets”:**
  + 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.
  + We believe that the utility of the 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.
* **Guideline 8: Treatment of NFTs:**
  + We note that NFTs are functionally equivalent to any other digital asset that is sold over the internet (e.g. songs, ebooks, or audiobooks). 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 the criteria and conditions that they meet.
* **Guideline 9: Treatment of Hybrid tokens:**
  + We agree with the criteria of assessing hybrid tokens and treating them as a financial instrument if they display partial features of a financial instrument. This is mainly for the benefit of simplicity in categorisation, the ability to service these assets in a regulated context, and for oversight purposes.

Please see our detailed responses on the guidelines in the separate attachment.

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