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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**

|  |  |
| --- | --- |
| Name of the company / organisation | KBC Group |
| Activity | Banking sector |
| Are you representing an association? |[ ]
| Country/Region | Belgium |

**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>

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<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>

KBC broadly agrees with the suggested conditions and criteria.

However, one area where further clarification may be required is regarding the notion of "*negotiability*". KBC considers that it would be prudent to ensure Guideline 2 is consistent with Guideline 7 "Classification of crypto-assets" (see answer to question 5 below).

In paragraph 132 of Guideline 7 it is stated that crypto-assets that are non-transferable to other holders and that are only accepted either by the issuer or by the offeror do not fall within the definition of crypto-assets and should be excluded from the scope of MiCA.

As per our rationale set out below, KBC considers that Guideline 2 should be redrafted as follows:

*108. More specifically, a crypto-asset should be considered to be negotiable where it is capable of being transferred or traded on capital markets. The sole and abstract possibility of being transferred or traded on the capital market should be deemed sufficient, even if there is no specific market for the product yet or even if there is a temporary lock- up period. The negotiability requirement set out in Article 4(1), point (44), of MiFID II seems to be met by* ***~~most~~*** *crypto-assets* ***under MiCA****, since the DLT makes the transfer of ownership from the seller to the buyer possible.*

*109. A crypto-asset can be designed in a way that it does not allow for any transfer in capital markets. Some restrictions may be placed on negotiability by not allowing holders to negotiate and/or transfer crypto-assets to a person other than the issuer* ***or other parties with whom the issuer has contractual arrangements****. In respect of any restrictions on the transfer of financial instruments, these need to be considered on a case- by-case basis, as the nature and impact of the restriction could be sufficient to render the instrument non-tradable, hence falling outside the definitional scope of “transferable security”* ***and of "crypto-asset" under MiCA****. Similarly, national competent authorities and market participants should also take into account other restrictions that may exist which may not prevent a crypto-asset from being tradable (e.g. selling restrictions for a specified period of time, lock-up, specific country limitation).*

<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>

KBC broadly agrees with the suggested conditions and criteria to differentiate between MiFID II financial instruments and MiCA crypto-assets.

However, we note that further clarification will be required under Guideline 7, to delineate, crypto-assets under MiCA, financial instruments under MiFID and reward / loyalty schemes.

Paragraph 64 of the consultation states that:

‘*It should be noted that crypto-assets that are non-transferable to other holders and that are only accepted either by the issuer or by the offeror are excluded from the scope of MiCA*’

This is in reference to recital 17 of MiCA which states that:

‘*Digital assets that cannot be transferred to other holders do not fall within the definition of crypto-assets. Therefore, digital assets that are accepted only by the issuer or the offeror and that are technically impossible to transfer directly to other holders should be excluded from the scope of this Regulation. An example of such digital assets includes loyalty schemes where the loyalty points can be exchanged for benefits only with the issuer or offeror of those points*.’

It is clear, as the consultation states, that ‘*transferability to other holders*’ and ‘*acceptance of the crypto-assets by players other than the issuer*’ make up the qualification criteria for crypto-assets.

However, KBC contend that this can cause some confusion and lead to a NCA inadvertently bringing a much larger remit of crypto-assets into scope. Taking each in turn, the notion of transferability may well give an indication of a crypto-asset that falls within MiCA, but it is also an indicator of a crypto-asset that falls under MiFID. Put simply, most crypto-assets are transferable in one way or another, including those that are part of excluded activities for example rewards schemes. The key differentiator needs to be who the transferability is with and what this transferability seeks to transfer. In this regard, KBC urges ESMA to ensure that transferability only refers to transfer between holders.

In addition to this, KBC highlights the unique characteristic of loyalty / reward tokens. A loyalty / reward token is only valid for a single use, that is to say, once the token is earned it can then have one transfer before being destroyed, it cannot be reused or transferred further. It therefore cannot satisfy the concept of ‘negotiability’ as mentioned in paragraph 108 of Guideline 2 (“*a crypto-asset should be considered to be negotiable where it is capable of being transferred or traded on capital markets*”).

Merchants in the loyalty / reward scheme i.e. commercial partners of the issuer in the scheme will accept these tokens but will not be able to spend this themselves, they will only be able to destroy the token. Whilst invariably, tokens are not transferred between customers, even if this was the case, the one transfer rule would render doing so futile. The second point regarding who can accept the crypto-asset, the current drafting means that only crypto-assets which are only accepted by the issuer are out of scope. This is not reflective of the current loyalty / reward scheme market. It is common practice on larger schemes to allow points to be used with commercial partners that are not ‘the issuer’.

Therefore left unaddressed, there is a concern that there will be a different treatment to firms operating loyalty schemes on technologies other than DLT or similar to those that are using DLT. As such, again, this limb unintentionally threatens to bring a larger range of firms within the remit of MiCA. Given this, KBC recommends including the wording ‘*or other parties with whom the issuer has contractual arrangement*’ in the guidelines.

This will also be in line with the wording under Article 3 paragraph 4(d) of MiCA: ‘*the holder of the crypto-asset has the right to use it only in exchange for goods and services in a limited network of merchants with contractual arrangements with the offeror.*’

Therefore, we suggest some minor changes to the following section of the draft guidelines:

*132. National competent authorities and market participants should ensure that digital assets that are non-transferable to other holders****, that are for one time use*** *and that are only accepted either by the issuer or by the offeror* ***or other parties with whom the issuer has contractual arrangement****, do not fall within the definition of crypto-assets and should be excluded from the scope of MiCA.* ***In this context the "holders" are the persons that have the right to use the crypto-asset vis-à-vis the issuer, or other parties with whom the issuer has contractual arrangement****. The same applies to crypto-assets that are unique and not fungible with other crypto-asset as such crypto-assets are not readily interchangeable and because their value cannot be compared to an existing market or equivalent asset.*

<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>