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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 | JUSCUTUM |
| Activity | Audit/Legal/Individual |
| Are you representing an association? |  |
| Country/Region | Other |

**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>

We agree with the suggested approach of providing general conditions and criteria, thereby avoiding the establishment of a one-size-fits-all guidance on the concepts of financial instruments and crypto-assets. These general conditions and criteria will promote and ensure that National Competent Authorities (NCAs) and market participants remain flexible and adaptive when determining the applicable regulatory regime for crypto-assets.

<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 agree that prioritizing the principle of technological neutrality is imperative to ensure the regulation of the dynamic crypto-asset market, regardless of its technological format.

The conditions and criteria for identifying crypto-assets as transferable securities must be based on the existing definition outlined in MiFID II.

Consequently, crypto-assets should be classified as transferable securities if they meet the following criteria: (i) they belong to a 'class of securities', (ii) they are negotiable on the capital market, and (iii) they are not instruments of payment.

We recommend further elaboration on criterion (ii), particularly regarding the term 'negotiability'.

As stated in clause 33 of the Consultation Paper, there is presently no Union law definition of negotiability.

Therefore, for a crypto-asset to be considered negotiable, it must be transferable or tradable on the markets, notwithstanding certain inherent restrictions such as legal, market, or technical limitations.

While most Member States interpret negotiability as the potential for transferability or tradability, some distinguish between transferability and negotiability by defining 'negotiable' as 'standardized'.

In this context, the broad interpretation of 'negotiability' must encompass both transferability and standardization, where standardization refers to characteristics ensuring similar rights and interchangeability.

Hence, transferability and standardization must be considered in conjunction.

The presence of transferability restrictions should indeed preclude the classification of a crypto-asset as a transferable security. However, the standardization of a crypto-asset must also be evaluated concurrently.

For instance, if a crypto-asset transferee does not automatically receive the same rights as the transferor, the term 'standardized' is not applicable, since the transferee is not guaranteed the same rights as the transferor. Conversely, if a crypto-asset transferee automatically obtains the same rights as the transferor, the term 'standardized' applies, as the transferee is ensured identical rights to the transferor.

Additionally, we recommend emphasizing element (iii) - that a crypto-asset is not an instrument of payment. This element excludes the classification of a crypto-asset as a transferable security and provides clear guidance for NCAs and market participants. Crypto-assets intended or utilized as payment instruments and accepted by merchants for goods and services must not be classified as transferable securities.

<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>

A crypto-asset derivative contract represents an instrument that derives its value from an underlying asset, enabling traders to capitalize on price fluctuations without physically owning the asset. Similar to derivatives in traditional financial markets, crypto derivatives involve two parties entering into a contractual agreement specifying terms for buying or selling the underlying asset, including duration, price, and volume.

For example, a crypto-asset mining company might sell futures contracts to hedge its long position in the underlying crypto-asset against a significant price decline. Alternatively, swap contracts allow traders to speculate on crypto-asset price movements using leverage.

Settlement of these contracts can be facilitated through smart-contract functionality and may be based on a standardized reference rate or deliverable settlement. Deliverable settlement requires a standardized spot price and addresses considerations like designating a custodian, providing addresses, and covering network transaction or gas fees.

<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>

Yes, we agree. We do not have any additional comments in this regard.

<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>

Yes, we agree. We do not have any additional comments in this regard.

<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 have no further comments on this matter. We concur that the uniqueness of crypto-assets should be assessed individually, with adherence to the logical conditions outlined in this Consultation Paper. Moreover, the forthcoming report by the European Commission to the European Parliament and Council, which delves into the market evolution of unique and non-fungible assets, will provide valuable insights for regulatory oversight and address any additional considerations that may arise.

<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 agree that a substance-over-form approach should be adopted when qualifying crypto-assets. Additionally, we believe that the classification of crypto-assets as financial instruments should take precedence over their classification as ARTs (Asset-Referenced Tokens), e-money tokens, or utility tokens. Therefore, the decisive factor should be the primary functions of the crypto-asset and the applicability of the indicated hierarchical approach.

<ESMA\_QUESTION\_MIC3\_7>