ChromaWay welcomes the opportunity to comment on the European Securities and Market Authority's (ESMA) consultation paper: On the draft Guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments, published on 29 January 2024.

Founded in 2014 by three pioneers of blockchain technology, ChromaWay specializes in blockchain development, with particular focus on creating Chromia, a new layer-one blockchain. As technical experts in the Chromia ecosystem, ChromaWay serves as technical supplier for various different projects, both internal and external, building dApps on Chromia.

We would like to thank ESMA for the guidance and clarification that has been provided by drafting this consultation paper. We respectfully ask you to consider our comments and questions.

In this response to the consultation paper, ChromaWay focuses solely on section 5.5 "Classification as crypto-assets which are unique and not fungible with other crypto-assets (NFTs)" and Q6 "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.".

1. Introduction

In the blockchain space today, many non-fungible tokens (NFTs) are not used merely as a speculative instrument or a form of art, but rather as means to secure ownership over your digital assets in a world with a large online presence. A prime example of this is in blockchain-based games where players have real ownership over their in-game progress. The progress that a player makes in the game is its own, and owned by that player, compared to a centralized game studio where the progress and digital assets are stored and essentially controlled by the studio. The player in a blockchain-based game is free to do what they wish with the assets it has created or earned, just like physical assets. However, with the Markets in Crypto-Assets Regulation (MiCA) these game assets are at risk of being classified as crypto-assets, as these assets are transferable outside of the game itself due to the underlying blockchain technology and protocol.

For instance, if a player catches a fish, grows a carrot or buys a new outfit for the in-game avatar, in a blockchain-based farming game, the fish, carrot and outfit are not truly unique as there are multiple fishes, carrots and similar outfits within the game. We believe it is disproportionate to treat such items, with all the subsequent regulations, in the same manner as crypto-assets. The possibility to trade these digital assets within the game or at a separate platform, will likely lead to it falling under the crypto-asset service provider definition. It would be overly burdensome for small gaming studios to face the same regulatory demands as large cryptocurrency exchanges, simply because it has decided to build the game in a decentralized manner with blockchain technology rather than using a traditional centralized structure.

2. General comments on section 5.5

We strongly welcome your guidelines and believe that clarity on the differentiation between NFTs and crypto-assets, as outlined by MiCA, is essential for maintaining a balanced competitive landscape. To elucidate our concerns we illustrate our thoughts and concerns with examples, primarily drawn from the entertainment and gaming industry. We recognize that assessments must be made on a case-by-case basis;

however, any additional guidance is greatly appreciated. This is particularly important given that many issuers of NFTs may not realize their assets fall within the scope of MiCA, which could have significant consequences.

A character in a blockchain-based game could, due to its underlying technology, be commonly recognized as an NFT. The reason for this is to ensure the player's ownership over their progress and assets in the game. Under the MiCA framework, this character is at risk of being classified as a crypto-asset if it does not meet the criteria of genuine uniqueness. Therefore, we would appreciate clarity on what components could determine whether or not the in-game character is considered unique. If the character possesses various levels, attributes, or even minor physical differences (such as hair color, weapons, clothing, etc.), does it suffice to establish genuine uniqueness? If a player can add unique information and features to a character, would this enhance the character's uniqueness, potentially exempting it from certain regulatory requirements? Moreover, if it is theoretically possible for players to create identical characters, thereby increasing the likelihood of multiple identical characters existing, how does this impact their classification under MiCA? Additionally, we are interested in understanding whether there is any possibility that such NFTs could be exempt from MiCA or if they are more likely to be treated as crypto-assets.

Another perspective comes from the world of collectible cards, such as football player cards. If these cards are based on blockchain technology and allow free transfers, they are likely to be considered utility tokens or other crypto-assets. In this context, what determines uniqueness? Are all cards featuring Ronaldo, Messi, and a lesser-known Swedish player considered part of the same collection, or are cards featuring Ronaldo regarded as a separate collection from those of Messi? Despite these cards having different front-end images, would these still be classified under the same collection? Moreover, when new releases involve the same player but with updated imagery, do cards from an earlier season of Ronaldo differ in collection classification from a newer season?

Regarding your discussion on the value interdependency and where the price on crypto-assets influences the valuation of another, indicating a lack of uniqueness, we have some reservations. Market trends for collectible cards can influence the value of the entire set, yet the value of individual cards may also fluctuate based on the player featured. For example, a card representing Ronaldo is likely to be valued higher than one of a lesser-known player from a minor league.

Additionally, we seek guidance on the approximate size a collection must reach for a NFT to potentially lose its uniqueness. We recognize that providing an exact number may not be feasible, but an indication of what might be considered a large collection would be beneficial. Would it be 10, 100, 1000 items, or more? Further, what might constitute a 'series' within this context? It would be helpful if you could provide examples to illustrate these classifications.

Lastly, you mention that if the digital asset is a tokenized physical asset, such as real estate, it is exempt from MiCA. It is not uncommon for tokenized real estate to be divided into fractional parts. As you mention, fractional parts are not truly unique and therefore considered crypto-assets according to MiCA, does that also concern fractional parts of tokenized physical assets? Would factors related to the physical property affect its classification under MiCA? For example, would MiCA make a difference between a large property divided into 1,000 parts where one only knows they own 1/1000th from holding a certificate, as opposed to knowing that the certificate grants ownership of, and access to, a specific apartment within the property.

Thank you for your consideration.

Respectfully submitted,

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