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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 | ABI – Italian Banking Association |
| Activity | Banking sector |
| Are you representing an association? |[x]
| Country/Region | Italy |

**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 believe that the guidelines under consultation will provide much needed legal certainty on the interaction between MiCAR and the MiFID discipline. The adoption of the Regulation on markets in crypto-assets represents a significant step forward in addressing the challenges posed by the rapidly evolving crypto-assets market while ensuring the protection of investors and the stability of financial markets. While MiCAR was strategically designed as a legislative intervention to specifically address the category of crypto-assets, its integration into European law inevitably triggered a cascade of implications and intersections that necessitated further refinement and alignment with established disciplines. In this regard, it is fundamental that regulatory guidelines clarify when a crypto-asset can be considered a financial instrument within the meaning of the MiFID so that regulatory arbitrage conditions cannot be created.

Since the publication of the proposed Regulation, we expressed our support for the Commission's decision to clearly exclude financial instruments from the scope of the Regulation through a specific exemption, with the broader objective of avoiding any overlap between MiCAR and MiFID. At the same time, we stressed that the mere exclusion of financial instruments from the scope of the MiCAR regulation was not sufficient to reduce legal uncertainty. To achieve full separation and thus the necessary legal certainty, the definition of ‘security tokens’ should be clear and the characteristics of a crypto-asset that qualifies as a financial instrument should be specified. Moreover, in order to reduce legal uncertainty and guarantee a level playing field between operators, it is essential that this exemption be accompanied by exact identification of the requirements for treating a crypto-asset as a financial instrument. This would avoid the possibility of different interpretations by individual Member States and an unlevel playing field.

ABI calls for a financial legal framework guided by level playing field principle and aimed at guaranteeing the highest investor protection. This is why we recognize the imperative need for an equivalent level of regulatory clarity between crypto-assets and traditional financial instruments, as the former, while characterized by its unique attributes, continues to evolve, and intersect with traditional financial instruments.

The guidelines should provide effective guidance to national competent authorities (NCAs) and market participants in the process of classifying crypto-assets, on case-by-case approach, in order to include them in the category of financial instruments that are subject to the rules of “traditional” financial instruments (such as MiFID). Therefore, it is expected that the Authority, through the guidelines, will provide clear, specific, and detailed guidance to reduce interpretative uncertainty and ensure the correct application of the law within the European Union. However, we believe that the proposed guidelines are not fully adequate for this purpose and have significant room for improvement.

The general guiding principle of a case-by-case assessment of crypto-assets to be carried out by the NCAs and market participants, could lead to several critical issues, if not implemented with the necessary precautions. First, there could be a discrepancy between the decisions of different NCAs on the classification of various crypto-assets (for example, one NCA may classify a certain crypto-asset as a financial instrument while another NCA may not). This would entail the risk of inconsistent treatment of the same crypto-assets in different Member States, which would undermine the level playing field between market participants and result in different levels of protection for customers in different countries. Secondly, there could also be inconsistencies within each country, given the potential for divergent interpretations by market participants in the absence of a clear decision by the national competent authority.

In this view, it is important to correct or at least minimise inconsistencies in crypto-asset classification. This is especially important given the focus on convergence in crypto-asset classification as outlined in Article 97 of the MiCAR. We suggest that ESAs should be more involved in evaluating the criteria. This would mean that ESAs must be involved by NCA whenever a crypto-asset is classified. This is to share methods and results. This will make the EU's approach to crypto-assets more consistent and help to make sure that crypto-assets are classified in the same way. This approach uses ESA's expertise and cross-border dialogue to reduce differences in how crypto-assets are classified. This helps to make the EU's crypto-assets market more transparent and protects investors.

<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>

With regard to the criteria for identifying a "transferable security," we believe it is desirable to have a higher level of detail in the guidelines provided by ESMA, in order to better contextualise each criterion in relation to the specificities of crypto-asset issuances. This need stems from the lack of harmonization on the definition of transferable securities between different Member States following the transposition of MiFID. For example, certain aspects of the indicators used to determine whether a crypto-asset falls within the scope of "classes of securities", certain aspects are not immediately clear.

Firstly, we suggest clarifying what exactly is meant by *"the same issuer"*, bearing in mind that many crypto-assets do not have a single issuer. For example, the creation (i.e. issuance) of new Bitcoin is validated through a process known as mining, which relies on software applications structured on specifically designed hardware, to which so called “miners” worldwide connect their mining devices to form a peer-to-peer network. It is clear, therefore, that in this case, identifying a single issuer is not possible. For these reasons, and in order to reflect the exclusion of mining activities from the scope of MiCAR, it would be appropriate to clarify that a crypto-asset can be considered a financial instrument only if an issuer can be identified. Similar considerations could also apply to those tokens which have a more or less identifiable issuer, even in the form of an unrecognised legal entity, but which, through the use of a consensus mechanism, entrust the issuance to validator nodes in a truly decentralised way. Conversely, the issuance of crypto-assets without its own consensus mechanism (or relying on other layer-1 blockchain) might be an indicator of a centralised and controlled issuance by a single entity (even Decentralised Autonomous Organisations - DAO), thus qualifying for one of the features *(“issued by the same issuer”*) highlighted by ESMA to form a class of securities.

Secondly, it is important to determine when a crypto-asset confers *"access to the same rights"*, as the rights listed in Guideline No. 100 ("dividend rights, voting rights on the issuer’s decision-making process, right over a portion of company’s assets or rights to liquidation proceeds") are not exhaustive. Therefore, it would be useful for ESMA to provide more practical examples as to which rights associated with crypto-assets can be considered similar to those typically associated with classes of securities.

It is important to look at point 111 of the Guidelines when trying to understand what it means to be negotiable on the capital market in the context of crypto-assets. The guidance says that capital markets are places where people save and invest money. This includes traditional trading venues, over-the-counter markets and electronic and/or voice trading platforms. These platforms allow people to buy and sell securities. This means that a capital market is a trading platform where supply and demand meet. However, this definition is not clear because it says that the tradability of crypto-assets on online trading platforms does not mean they are capital markets. This was a source of confusion because of what was said a few lines earlier in point 108. There it is said that the possibility of being traded on the capital market is enough, even if there is no specific market for the product. Another problem is that some crypto-assets are not seen as financial instruments because they can be traded on existing crypto-asset trading platforms. This makes it hard to know if they are part of a capital market. ESMA should explain what makes a capital market and give examples. This will help people understand crypto-assets better.

Lastly, we recognise that there is not a harmonised definition of payment instrument across the EU and that, similar to MiFID, the PSD outlines what payment services are. However, in our view, ESMA's assessment of broadening the definition of payment instrument to include all crypto-assets that can be used as a medium of exchange could effectively bring all crypto-assets within the 'broadened' definition of payment instrument, thus excluding them all from the classification as a financial instrument. As all crypto-assets can potentially be used as a medium of exchange, more granularity is needed in defining what can reasonably be intended to be a crypto-asset used as a medium of exchange is needed. Otherwise, none of the crypto-assets can be considered financial instruments in the sense of transferable security due to their potential use by an investor/user as a medium of exchange (e.g., purchase of NFTs or other goods and services from online vendors).

<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>

The proposed guidelines for identifying a crypto-asset with comparable characteristics that may warrant classification as part of the money markets are clearly outlined. Guideline 3 explicitly directs NCAs and market operators to evaluate whether a crypto-asset shares traits with treasury bills, certificates of deposit, and commercial papers. The guideline also shows how crypto-assets can be used like savings accounts, with users earning interest on locked crypto-assets (e.g., liquid staking or yield farming).

While the maturity period (maximum 397 days) of the savings account is crucial in determining whether the crypto-asset qualifies as a money market fund (MMF), it's important to clarify whether the MMF classification applies to savings accounts with longer maturities, but which allow investors/users to access funds before 397 days. Clarification is also needed on the condition requiring that a crypto-asset must have "a stable value and minimum volatility" to qualify as an MMF. Since all ARTs by their nature seek to maintain a stable value linked to the asset reserve, it's recommended to specify that Guideline 3 is specifically applicable only to EMTs. If this is not the case, clarification is needed, particularly given that ARTs tied to currencies other than official currencies may also offer similar returns.

Another request for clarification is about the content in paragraph 121. This says that national authorities and market participants should consider two issues: (i) whether the rights of crypto-asset holders depend on a future contract, and (ii) whether the crypto-asset's value depends on an underlying asset. Additionally, point 124 says that a crypto-asset model where one party agrees to buy a certain amount of a crypto-asset from another party at a future date for a price should be seen as a forward/future. Similarly, a crypto-asset that gives the right to buy or sell a specific crypto-asset (even a utility token) at a fixed price within a certain timeframe should be seen as an option. A crypto-asset might also represent futures contracts for traditional commodities like gold or oil and be classified as a financial instrument where the conditions of the above points are met. We share ESMA’s assumptions, and, at the same time, we believe that further effort by the Authority is necessary to reach more concrete conclusions and indications, which effectively guide authorities and operators in the classification exercise as derivative instruments of specific categories of crypto-assets that structurally present characteristics attributable to the two requirements mentioned in point 121. For example, in the case of ARTs, it is widely accepted that the value of the crypto-asset is inherently derived from the value of an underlying asset; however, it is more complex to establish the existence of a contractual obligation of the parties the performance of which is deferred to a time subsequent to the conclusion of the contract.

<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 Guideline 7, *“a utility token may be accompanied by governance rights (i.e. governance crypto-assets)”* but to exclude them from the financial instruments discipline *“it should not replicate the rights attached to financial instruments, starting with those attached to transferable securities within the meaning of MiFID II”*. The guidelines seem to suggest three different scenarios related to the categorisation of what are broadly called utility tokens as they can be: a) excluded from the scope of MiCAR; b) brought inside the perimeter of MiCAR; c) qualified as financial instruments.

In line with MiCAR recitals, a utility token would only be excluded from the scope of MiCAR if it cannot be transferred to any other user (in P2P logic) and only accepted by the issuer or offeror, as the safeguards that the regulator itself wanted to introduce for crypto-assets markets would not be necessary. As it appears that the “exchangeability” condition is not required to exempt utility tokens from the MiCAR scope, we believe it is important to emphasise that also NFTs can provide access to rights to the holder and being non-transferable (e.g., tickets). Conversely, if the crypto-asset is transferable to users beyond just the issuer or offeror, its transferability would justify the application of the measures set out in MiCAR, thus making it subject to rules on issuance, offering or admission to trading.

Given that only utility tokens are transferable between users, the guidelines seem to suggest that the difference between MiCAR utility tokens and MiFID instruments lies in the rights attached to the tokens. Utility tokens under MiCAR must not include any financial or voting rights, otherwise, they may have characteristics that could classify them as financial instruments.

<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>

The approach taken by the EU regulator to identify the boundaries of MiCAR's scope for an NFT mirrors that used for utility tokens. In this sense, as much as we agree with the reasons for excluding some NFTs from the scope of regulation, on the other hand we believe it is useful to highlight some points of attention that may raise interpretative doubts as to whether one or the other instrument is covered.

First, point 70 of ESMA document states that *“the existence of a series or a collection - and more precisely its size – should thus be considered as an indicator of fungibility without being an overriding criterion”*, referring to the MiCAR recital introducing the concept of *“large series”*. In our view, the approach to exclude large-scale NFT issuances inherently requires the establishment of a specific quantitative metric to determine the threshold at which a collection of NFTs qualifies as a large series. Regardless, any defined threshold would likely incentivize issuers to create collections with volumes below that threshold to avoid MiCAR rules. It is crucial to conduct a thorough assessment to ensure that this does not unduly hamper innovation within this sector. In addition, as paragraph 71 states that *“in the case of a series of NFTs in the manner of a series of numbered serigraphs or pictures, the numbering of which would have an impact on the value and uniqueness of the NFTs, these crypto-assets could be seen as a series of crypto-assets that are non-fungible”* we would like to flag a point of attention.

We believe it is useful to point out that all collections of NFTs that alter the same image with minor changes adopt an approach whereby these minor changes, following a principle of scarcity, assign different values to individual pieces. These minor alterations can give value to an individual piece, just as a serigraph or painting can have a different value from others because of its numbering (in general, the lower the number, the more value the market assigns). However, since minor changes to the same image in an NFT collection can have the same effect as a numbering on a print or photograph, we find the assessment made in the examples in paragraph 71 to be inconsistent. It may be more useful to rely on factors that are easily identifiable and less subjective, such as quantity, to explain the difference in treatment between the application of MiCAR rules and, conversely, exclusion.

Second, according to our interpretation, some NFTs may lose their inherent characteristic of uniqueness due to their high degree of interchangeability. This potential loss of uniqueness and the assumption of fungibility characteristics could lead competent authorities and market participants to consider whether these assets qualify as financial instruments. This consideration arises because other conditions for recognition as transferable securities may also be met (or even as derivative contracts if they give rise to the possibility of acquiring other products). Has this specific scenario been thoroughly considered by the Authority, or is it rather considered that it does not relate to the qualification of NFTs as financial instruments, but is only addressed for the purpose of excluding them from MiCAR? Clarification on these aspects will also contribute to NCAs' assessments and thus to the harmonisation of the treatment of crypto-assets across the EU.

<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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