| 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 | Bitpanda GmbH |
| --- | --- |
| Activity | Crypto Broker |
| Are you representing an association? | ☐No |
| Country/Region | Austria |

**General Remarks:**

* We are pleased to see that ESMA clearly states that there are currently different approaches to the national transposition of MiFID across Member States. The effect of which is that there is no commonly-adopted application of the definition of “financial instrument” under MiFID in the EU. Indeed, this is very much relevant and critical in light of the MiCA directly applicable Rulebook. Although we understand the complexities of the issue, we should once more emphasise its importance so that in the long term it may be mitigated, and eventually resolved.
* We also would like to strongly encourage ESMA to produce a transparent “checklist” with the elements to consider for each financial instrument as well as crypto-assets. In addition, a chart flow for the classification incl. characteristics to take account of would be very much welcome. We find that certain paragraphs adopt a particular wording that is later on not continued (new words/synonyms or explanation is added in the additional brackets). We strongly believe that a check-list and chart flow would be of significant help given the lack of consistent terminology in the Member States, and numerous requirements to consider.
* We further strongly encourage more meaningful examples - practical implementation cases, case-studies for both more evident and borderline cases that will strongly facilitate harmonisation rather than fragmentation (as we have under MiFiD) including the question of passporting a definition determined by one Member State to another. There ought to be better case-studies that exemplify the analysis, min. elements to consider (non-exhaustive check-list) - this specifically for borderline/grey cases. Although the elements that ESMA provided here are welcome, we are not convinced that they will help to the extent that we will provide fundamentals for similar applications and understanding - we need to change from basic guidance to a more insightful hands-on approach. In this context, ESMA should lead by example or hold workshops and seminars with National Competent Authorities and industry to discuss and work on analysis. We believe that such an approach will mitigate the national fragmentation of financial instrument terminology and will ensure that we have more harmonisation for crypto-assets.
* Moreover, we are concerned that ESMA expressed “taking precedent over” for financial instrument characteristics over others. We do not believe that this is the right approach. Instead, we should maintain the emphasis on a comprehensive case-by-case analysis and non-discrimination. The benefit of doubt should be applicable to crypto-assets in borderline cases when the classification could go either way (50-50 scenario).
* We further encourage to ask NCAs for the feedback as well as to organise industry-wide seminars and open discussion. We cannot leave these topics in isolation and wait for supplementary classification from ESMA or EU Courts (which we believe will be inevitable).

**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 conditions and criteria?**

<ESMA\_QUESTION\_MIC3\_1>

**Bitpanda Answer to Section 3:**

* We agree on the need to have general conditions and criteria rather than one-size-fits all. As was proposed by ESMA in the reverse solicitation guidelines and, as expressed in our response to that consultation, it is important to bear in mind that all facts and circumstances of the case are relevant. Thus, we must be flexible and adaptable to the rapidly evolving character of the crypto industry rather than defining non-flexible frameworks that will be prone to circumvention and regulatory arbitrage by different interpretations. On the surface, an instrument may appear to clearly be a financial instrument or crypto-asset but the real effect can be hidden and point to the contrary (substance over form and features).
	+ This option aligns with ESMA’s previous surveys and findings (Section 3, point 3) that showcased “*a variety of products from pure investment crypto-assets to utility tokens, and combinations thereof*”. And similarly with point 11 where ESMA states that: “*MiFID II does not include a one-size-fits-all definition for all types of financial instruments.”.* This therefore would ensure that we have the same open approach and case-by-case analysis for crypto and traditional financial instruments.
* We understand that the guidelines are not to clarify the entire scope of what constitutes a financial instrument, but only instruments that qualify as a crypto-asset under MiCA and/or would fall under MiFID II and qualify as financial instruments in the EU. However, we are cognisant of the fact that MiFiD rules are EU Law that have been transported while granting discretion to Member States. If the national transposition goes against the spirit and idea of a legislative act, then we would be supportive of the development of “hands-on” (active) actions by ESMA, such as encouragement or dialogue on a policy level. This will contribute to the harmonisation of crypto-assets for which MiCA directly applies.

**Bitpanda Answer to Relevant key issues and considerations:**

* We agree that the notion of crypto-asset is broadly defined in Article 3(5) of MiCA, as “a digital representation of a value or of a right that is able to be transferred and stored electronically using distributed ledger technology or similar technology”. And this can indeed result in, depending on the characteristics/nature of “rights”, regulatory interpretative challenges. We therefore welcome here the reiteration of the important technology-neutral approach, to ensure that equivalent activities and assets are subject to the same or very similar standards regardless of their form.
* We recognise that there is an absence of a common definition and shared criteria applicable to all financial instruments on a Member State level. Despite this, we welcome that ESMA wants to avoid a piecemeal approach, and that it aims to establish some high-level criteria or general principles that can be used to promote convergent practices at national level regarding the classification of crypto-assets as financial instruments. We also acknowledge that we should apply a case-by-case exercise in determining the classification question.
* It should however be stated that we need concrete examples, including “grey area/borderline ” scenarios based on a case-by-case analysis. This will then support ESMA’s goal and promote convergent practices even if the financial instrument definition is fragmented. This, we believe, is not reflected in the draft guidelines. We do not see any concrete practical case implementation examples and analyses. There is no check-list and no flowchart, which would be of significant help given that the industry needs to define thousands of crypto-assets. As an example, more clarity is needed on what constitutes an ART vs. a financial instrument (complex and borderline case). Similarly, we need to clarify how the passporting rule applies - does it mean that if a member state classifies an asset as an ART that other member states will also accept it as such?
* We therefore need to avoid a situation in which we have different interpretations of crypto assets under these Guidelines at all costs. In the end, MiCA is a directly applicable Regulation. At the same time, ESMA must continue to urge NCAs to advocate at a national level for a harmonised definition of financial instruments and underline the risk of different interpretation of crypto-assets due to financial instruments fragmentation.
	+ With this in mind, we need meaningful guidance here rather than general points. We believe that ESMA should lead by providing examples for the industry. Accordingly, we need a “hands on” approach and active encouragement on the part of ESMA. We cannot risk here the situation of very divergent interpretation of financial instruments.
	+ We therefore strongly urge to organise workshops and seminars at the EU level for the industry and NCAs, as this is a common effort given the overall novelty of the space. We need to make an active effort on the classification here despite present discrepancies (ergo recital 14 MiCA “promoting discussion”).

**Bitpanda Answer to Section 4 Scope of the Guidelines**

* We understand that ESMA is not expected to clarify the entire scope of what constitutes a financial instrument, but only which products that comply with the crypto-asset definition of MiCA qualify as financial instruments. However, as mentioned above, we need to have an active and practical approach. A passive approach risks falling outside the industry expectation of meaningful guidance. Consequently, we would like to reiterate again that concrete and practical implementation examples of various scenarios should be provided incl. a check-list and chart flow.

**Bitpanda Answer to Section 5 Guidelines on conditions and criteria for the qualification of crypto-assets as financial instruments**

**Bitpanda Answer to Section 5.2 General approach**

* We welcome that the guidelines aim to strike a balance between (i) providing guidance (i.e. conditions and criteria) to determine which conditions and criteria should be considered for the qualification of crypto-assets as financial instruments and (ii) avoiding the introduction of a one-size-fits-all guidance on the notion of financial instruments and the definition of crypto-assets. We agree that such an approach is reasonable and proportionate in light of guiding market participants and reducing misunderstanding and misinterpretations while obtaining more harmonisation. Once again, we would like to reiterate the utmost need of concrete examples for better guidance incl. cross-border (grey) cases.

<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>

**Bitpanda Answer to Section 5.3 Classification as Financial Instruments**

* We welcome and agree with ESMA's position that the classification of crypto-assets as financial instruments depends on the specific characteristics and nature of such crypto-assets - this is of vital importance given the specific nature of the crypto industry. Therefore, as ESMA rightfully points out, the specific features, design, and rights attached to this crypto-asset should be considered. Further, we agree, once again, on the case-by-case basis analysis. Similarly, we concur that the “substance over form” approach is in line with MiCA’s “tech-agnostic” principle. With this position, we once more reiterate the need for practical case studies and examples that will clarify the analysis. Currently, we believe that the draft Guidelines are “passive” and not helpful enough in this regard.
* We would like to also reiterate, as pointed out by ESMA, that there are different interpretations of financial instruments through the EU. Bearing past experience in mind, we strongly urge to adopt a more active hands-on approach on providing further examples and practical use-case for the analysis as well as urge to coordinate and cooperate closely: ESMA, NCAs and the industry (as already mentioned above). This falls under features of “direct applicability” of the MiCA Regulation. We cannot afford to continue to have fragmentation in the industry that grows at a speed beyond regulatory adoption.

**Bitpanda Answer to Section** 5.3.1 Classification as transferable securities

*Guideline 1 – Conditions and criteria for the classification as transferable securities*

* We agree with point 27 and 29 concerning the tech-agnostic principle and element as a key factor for the assessment. And, consequently, with the statement that financial instruments issued by means of DLT (tokenized financial instruments) should not alter the fundamental nature of these assets.
* We similarly agree that characteristics of crypto-assets across the board vary, which continues to show the need of a case-by-case analysis likewise meaningful practice case-studies example. Next, ESMA correctly illustrates some of those characteristics: connection to profit or governance rights, consumption or utility/usage rights, or intention to be a medium of exchange. We would like to point out that these are non-exhaustive - and this should also be noted.

*Guideline 2 – Conditions and criteria for the classification as transferable securities*

* We agree that certain crypto assets might be recognised as “transferable securities” if they grant rights similar to shares, bonds, or other securities. Yet, we point to a cautious approach given that “not everything that shines, is gold”, which falls into case-by-case analysis and a tech-agnostic approach. Especially given the fact that crypto assets are still distinct from traditional assets even if they might present similar or the same characteristics as securities. We also welcome the substance over form approach.
* We welcome the clarification concerning securitised derivatives. We agree that case-by-case analysis of the three elements is crucial here to confirm the correct nature.
* Overall, we welcome clarification. However, we believe that we need more examples - a case-study - to properly steer national authorities in the analysis of how a crypto-asset may fall under financial instruments. Every element is broadly defined. This combined with the already fragmented nature of MiFiD II might cause further divergent interpretations where one crypto asset will be seen as a security and other not (See above our suggestions how to mitigate this).
* Regarding the **first** condition “classes of securities”, we believe that the proposed guidelines are not sufficiently exemplary and leave more room to different interpretations. More examples of each requirement would help including case-study type analysis/illustration (and this specifically for borderline/grey cases). Otherwise, we risk incorrect interpretation and further fragmentation.
* Regarding the **second condition** “negotiability on the capital market”, again, as expressed above, there are not enough examples/application of the broad definition adopted by ESMA. This condition is by its nature broadly interpreted also given the cross-border nature of crypto assets.
	+ Regarding the “capital market” - we understand the broad application. However, we would like to stress that if a crypto-asset is tradable on the capital market this does necessarily have to imply that it is a security. Similarly, if a tokenized security is traded on blockchain it does not mean that it falls under the crypto asset category. We believe that it has more inherent features and characteristics rather than a place where an asset is traded.
* Regarding the **third condition** “should not be an instrument of payment”, please see our comment below for Section3.2 Guideline 2.

**Bitpanda Answer to Section** 3.2 Guidelines on the classification of crypto-assets as financial instruments

*General – Guideline 1*

* We agree with points 92-94. Please see our remarks above for Guideline 1.

*Classification as transferable securities – Guideline 2*

* We agree on points 95-96. Please See our remarks above for Guideline 2. In addition:
* **Exclusion of instruments of payment**: We agree on points 98-99 with the emphasis on case-by-case analysis given the fragmented definition of what is payment/instruments of payments. We would urge however to also make a reference to MiCA that uses the wording of “means of exchange” with example in recital 61.
* **Classes of securities**: please see our comment above for Guideline 2. We are however concerned with point 106. We urge ESMA to underline that the features of financial instruments are clearly visible and interpreted for one to consider crypto-assets as such (we cannot risk that mere financial instrument features overrides the dominant nature of crypto assets after proper analysis). Any borderline cases should fall under “benefit of doubt”. This approach will correspond to MiCA recital 9 stating:“*the principles of ‘same activities, same risks, same rules’ and of technology neutrality*”.
	+ Furthermore, we believe that the elements mentioned in point 100 should be elaborated by examples (hypothetical ones). This would give national competent authorities and market players better assistance in the assessment.
* **​​Negotiability on the capital market**: “*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*.” Again, we would like to point to case-by-case analysis not giving false impressions about “taking precedence over” something to confirm such assertion.
* We would like to further point out that we should have more consistency in the wording (point 112). This ending paragraph should bring “*transferability and interchangeability (negotiability)*” to the other paragraphs. The lack of a structured check list or table with the requirements together with different wording here and there is already causing difficulty in navigating several elements to consider.

<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>

**Bitpanda Answer to Section** 5.3.2 Classification as other Financial Instruments

*Guideline 3 – Conditions and criteria for the classification as money-market instruments*

* See our comment below Guideline 3 Section 3.2

**Bitpanda Answer to Section** 3.2 Guidelines on Classification as other types of financial instruments

*Guideline 3 - Classification as money-market instruments*

* We welcome ESMA clarification and reference to MiFID II rules. Nevertheless, we would welcome, once again, more examples including a step-by-step analysis (elements to be taken for consideration in the template format - a check-list that is non-exhaustive) especially for a) straightforward cases and b) borderline/grey cases for crypto-assets. This will not only help the industry but also will be a welcome step toward more harmonisation. Finally, we would find it very useful if ESMA could express to what extent it sees, based on its research and understanding, the current characteristics of crypto-assets to be able to fall under financial instruments.

**Bitpanda Answer to Section** 5.3.2 Classification as other Financial Instruments

*Guideline 4 - Classification as units in collective investment undertakings*

* See our answer to Guideline 3 Section 3.2 above.

**Bitpanda Answer to Section** 3.2 Guidelines on Classification as other types of financial instruments

*Guideline 4 – Classification as units in collective investment undertakings*

* See our answer to Guideline 3 Section 3.2 above.

**Bitpanda Answer to Section** 5.3.2 Classification as other Financial Instruments

*Guideline 5 – Conditions and criteria for the classification as derivative contracts*

* See our answer to Guideline 3 Section 3.2 above.

**Bitpanda Answer to Section** 3.2 Guidelines on Classification as other types of financial instruments

*Guideline 5 – Classification as derivative contracts*

* See our answer to Guideline 3 Section 3.2 above.

**Bitpanda Answer to Section** 5.3.2 Classification as other Financial Instruments

*Guideline 6 – Conditions and criteria for the classification as emission allowances*

* See our answer to Guideline 3 Section 3.2 above.

**Bitpanda Answer to Section** 3.2 Guidelines on Classification as other types of financial instruments

*Guideline 6 – Classification as emission allowances*

* See our answer to Guideline 3 Section 3.2 above.

<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>

**Bitpanda Answer to Section** 5.3.2 Classification as other Financial Instruments

*Guideline 6 – Conditions and criteria for the classification as emission allowances*

* See our Comment above to Question 3.

<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>

**Bitpanda Answer to Section** 5.4 MiCA's categorisation of crypto-assets

*Guideline 7 – Conditions and criteria attached to the crypto-asset’s classification in MiCA*

* In relation to the point 59, we would like to stress that investors who want to understand and explore are aware that the value of certain crypto-assets is based on their inherent features, characteristics, or modelling. We agree that there are non-intrinsic values attributable, but we cannot state that the value is subjective and based only on the interest of the purchaser of the crypto-assets. Non-intrinsic essentially represents the inherent values of a crypto-asset - without them market participants and free market economies would not consider certain projects valuable. So not only the value is based on the interest of the purchaser but more importantly on the understanding of the crypto asset.

*Crypto-assets other than ARTs or EMTs’ basic inherent characteristics*

* We agree that the utility token is typically not regarded as a security or financial product, and that this should remain as such. We also agree with ESMA's description that it facilitates practical/functional utilisation within a DLT-based ecosystem. We also agree that utility token should not replicate the rights attached to financial instruments, which could change its classification based on case-by-case analysis (point 62 and 63).
* We would like to highlight however that the criteria only concerns the utility tokens. On this, we acknowledge the example and consideration in light of the utility token but we miss guidance on other crypto assets. At least, there should be a remark that the same characteristics apply to other crypto assets. We also believe that the importance of case-by-case analyses should be stressed once more, as was mentioned earlier above, and which align with the guidelines on reverse solicitation. Again, appearances vs. practical application can show completely different outcomes. Finally, we should adopt a clearer approach for the conditions - an indicative list of what to consider. This will make the analysis easier, clearer, and more organised.
* Further, we find the case-study for utility tokens presented in the guidelines at odds with the statement in point 64 that: “*it seems that the EU legislator intended to make the notions of (i) transferability to other holders, and (ii) the acceptance of the crypto-asset by players other than the issuer, qualification criteria for crypto-assets other than ARTs or EMTs*.”
	+ Those criteria are not mentioned in the case-study. We cannot deduce such an important element as “it seems” at the end of the section. This is especially given the non-binding nature of the guidance that inherently risks maintaining current fragmentation. Furthermore, it looks like this statement is disconnected from the rest given examples and elements for consideration. We find this confusing and unclear. We would like to therefore urge for more clarity that is: i) clear examples for other crypto assets and statements that the same elements apply as in the case of utility token, ii) clear list of requirements that are essential for consideration – a list with elements to consider.

**Bitpanda Answer to Section** 3.3 Background on the notion of crypto-assets

*Guideline – 7 Classification as crypto-assets*

* Please see our answer above to Section 5.4.
* We would like to reiterate that we need more practical examples and case-studies and not only one for the utility tokens. This guideline should be more elaborative — the assessment in point 5.4 considers more than Section 3.3. In addition, the requirements should be organised more intuitively — a checklist- with practical examples and a flowchart.

<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>

**Bitpanda Answer to Section** 5.5 Classification as crypto-assets which are unique and not fungible with other crypto-assets (NFTs)

* Only very specific parts of NFTs fall under MiCA (case-by-case analysis). Therefore, we would welcome more practical considerations for other crypto- assets also given the fact that NFTs fall outside the scope of MiCA. Again, also for the specific case of NFTs, we urge for more clarity, practical examples, and analysis.

*Guideline 8 – Conditions and criteria attached to NFTs*

* We agree that, in essence, a crypto-asset that lacks genuine uniqueness due to the presence of comparable and interchangeable attributes should fall within MiCA’s regulatory purview. We also agree on the statement in point 68 - which points to the substance over form and ultimate case-by-case analysis.

**Bitpanda Answer to Section** 3.3 Background on the notion of crypto-assets

*Guideline 8 - Crypto-assets which are unique and not fungible with other crypto-assets (NFTs)*

* Please see our answer above to Section 5.5

<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>

**Bitpanda Answer to Section** 5.6 Classification as Hybrid Tokens

* We agree that Hybrid tokens are not straightforward cases and that any classification needs to be done on a case-by-case basis. We also agree on the elements that are essential for consideration: rights, functions and, to a lesser extent, the values that are associated with the crypto-assets.
* We also agree about the evolving nature of crypto-asset arrangements in the market and that making an exhaustive and up to date classification would not be workable. This also risks inflexibility and a narrow framework. Therefore, we welcome the need for a thorough assessment on a case-by-case analysis.

*Guideline 9 – Conditions and criteria attached to Hybrid Tokens*

* In order to follow the substance over form approach and maintain impartiality we would like to point that the wording of this statement should be changed:
	+ “*As part of these guidelines, when a hybrid token displays features of a financial instrument, this characteristic should take precedence in its classification*” (point 79 as well as point 141 in Section 3.3)
* This will then be consistent with the other types and ESMA's own statement in point 80 and 82 about the primary step, namely a rigorous assessment to determine if the asset fits the definition of a financial instrument. Otherwise, it is confusing and inconsistent with other types of crypto-assets.
* In addition to this we have the impression that where there is a borderline case, the classification of financial instruments takes precedence over any other identifiable features. It is pointed out that:
	+ *Consequently, national competent authorities and market participants should consider that if a financial instrument exists for hybrid types of crypto-assets, it should prevail. The documentation of the instrument and market materials should be drafted accordingly and not present the ancillary characteristics as the predominant elements of the instruments.*  (the same wording is found in point 79)
* We do not agree that where a hybrid token exemplifies financial instrument features alongside with crypto-assets ones, the traditional finance nature should take over. We should rather follow the “benefit of doubt” approach, especially in cases that are 50-50. Otherwise we risk that all of the different types might be considered as financial instruments.
* Finally, we would like to highlight that there appears to be a lack of meaningful guidance on this point. Neither a reference to the Section 5.3 Classification as Financial Instruments is included. We lack specific examples here and elements to consider - a non-exhaustive list - for straightforward as well as borderline cases.

**Bitpanda Answer to Section** 3.3 Background on the notion of crypto-assets

*Guideline9 – Hybrid crypto-assets*

* Please see our answer to section 5.6.
* We would like to add that we, similarly as above, do not agree with point 141 (equivalent to point 79 above). ESMA cites recital 9 of MiCA. However, there is nothing therein that might suggest that certain features should “take precedence over” others: therefore, we cannot, without being subjective and discriminatory, to simply state that the traditional financial elements should have priority over other ones (See our answer above for the whole argument).
* We welcome point 143. However, as already mentioned throughout this consultation, we believe we need more elaborative examples, especially regarding borderline cases, check-lists with elements (non-exhaustive) to consider, and more details. We need this given the non-binding nature of these guidelines, the many discrepancies and approaches on the national level both for crypto-assets and traditional financial instrument interpretations; otherwise, we risk further de-fragmentation.

<ESMA\_QUESTION\_MIC3\_7>