

Reply form

on the Consultation Paper on guidelines on conditions and criteria for the classification of crypto-assets as financial instruments for MiCA implementation

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 under the heading [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	SIMBULA LAW FIRM
Activity	Audit/Legal/Individual
Are you representing an association?	☐
Country/Region	Italy

Questions

Q1 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>

This Law Firm suggests the establishment of more concrete condition and criteria. This is essential to give a concrete guidance not only to NCAs and market participants, but also to Courts and judges in potential litigation proceedings throughout EU countries, in relation to decision adopted by NCAs.

<ESMA_QUESTION_MIC3_1>

Q2 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>

It is important to clarify if a crypto-asset can or cannot be considered as a financial instrument, in consideration of the way it is purchased and marketed. It is therefore crucial, before entering in potential contradictions, clarify if a crypto-asset sold to and by the consumers and investors in exchange of other crypto-assets or other crypto-currencies, has the potential to be a financial instrument. In other words, and as opinion of this Law firm, if the crypto-asset is sold to the public in exchange of other crypto assets or other crypto-currencies, without the involvement of euro (or FIAT money in general), then this crypto-asset can never be considered as a financial instrument. And this also when it aligns with MiFID II's definition of transferable securities under Article 4(1)(44) of MiFID II. This shall be clarified since the very beginning of these Guidelines.

On point 23 of the Guidelines, ESMA refers to a survey conducted on 2018. The results of such survey may be outdated considering the relevant evolution of the market scenario between 2018 and 2024. In particular, that period was characterized by a lot of so-called Initial Coin Offering and the market was immature and strongly speculative. The technology under many ICO projects where inconsistent if not non-existent and many projects where clearly focused on “neuro marketing” and pyramidal schemes.

It is strongly suggested to not consider data obtained in 2018 as a relevant basis for this Guidelines.

With reference to Guideline 1 (Conditions and criteria for the classification as transferable securities), this Law Firm strongly object **point 27** “*When evaluating whether crypto-assets qualify as financial instruments, national competent authorities and market participants should not view the technological*

structure of these assets as a key factor. Consequently, financial instruments issued by means of DLT (tokenised financial instruments) should not alter the fundamental nature of these assets”.

This Guideline may strongly hamper technological evolution of blockchain projects. There are many different blockchain projects proving their utility based not only on the general narrative of a white paper but mostly on the technological infrastructure. Basically, when you transfer a token, you transfer information. The value and scope of such information may radically change according to the technology used. Tokens without solid technology are generally related to pyramidal scheme or sales of trivial digital files without other scope than circulating money between consumers and investors.

So, indeed the technology, while cannot be in itself the cornerstone for determining whether or not a cryptoasset is a financial instrument or not, it should be anyway considered as key factor for such analysis.

If you keep this sentence in the Guidelines, this may radically negatively impact on many blockchain project, due to the substantial “irrelevance” on technology in regulatory process, not considering the risk that such Guideline may also have an impact on Courts decisions in judicial proceedings.

Statement in point 28 is very important: “*Crypto-assets constitute a category of assets primarily based on cryptographic methods and DLT*”. This should be absolutely emphasized considering that MICA is not very clear on distinguishing tokens based on cryptographic methods and are not defined as based on cryptography. This is why technological issues are fundamental and shall be absolutely considered in interpreting the nature and scope of the crypto-assets.

And in fact all the regulation concerning the various types of tokens in MICA, starts from an essential assumption: the tokens must be built on DLT. This definitional system, however, if not adequately perimeter, risks to include also less "reliable" blockchains since the cryptographic principle or the prohibition on violating the rules of the specific domain are not concept enshrined in MICA and these Guidelines may be helpful in this respect.

On point 34 it is stated that “*the term “capital market” should broadly encompass venues where securities are traded as well as over-the-counter markets. If a crypto-asset can be traded on such trading platforms or other electronic and/or voice trading platforms where buying and selling interest in securities meet, the capital market criterion should be met. As such, NCAs and market participants should broadly interpret the concept of capital market including all contexts where buying and selling interests in securities meet. Additionally, the “capital” aspect of the notion should also be taken into account (i.e. the fact that traditional markets in transferable securities are used to raise capital for the operation of businesses)*”.

It is opinion of this Law Firm that including in “capital markets” definition any kind of digital hub or venue, may be risky and may block the entire evolution of blockchain projects in EU.

For example: a gaming platform where a user can buy in-game money (not built on blockchain or cryptography) for purchasing skins, tools, scenarios, unlock levels, etc, and, while gaming, can earn digital tokens built on a blockchain (as example ERC-20 on Ethereum). Such tokens may be freely exchanged among users in the gaming platform but also via traditional crypto-exchange.

While it can be understandable considering such crypto-exchanges as venue aligning to “capital markets” definition, it should be clarified in the Guidelines that any digital platform not marketing

different kinds of token such as an exchange, shouldn't be considered as a "capital market" irrespective of the fact that such tokens may behave like financial instruments. In fact the very nature of the token shall be considered relevant and the speculative behavior of the purchasers an/or the market, cannot be controlled by the issuer.

Point 36 and 37 should consider the potentiality of tokenized real estate. We understand that tokenized real estate industry deserves separate regulation and the Guidelines, at this stage, should clarify when and if a crypto-asset tied to some rights and privileges related to a real estate is considered or not a transferable security.

<ESMA_QUESTION_MIC3_2>

Q3 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>

Generally speaking, and as said above, any settlement conducted only in crypto-assets or stablecoins, not involving FIAT money, shouldn't be considered in any way a financial instrument or a transferable security. In this respect, if we apply the general principle "*same activities, same risks, same rules*", settlement fully managed in cryptocurrency shouldn't be qualified as a financial instrument, until cryptocurrency is considered a regulated saving under relevant EU laws.

As of today we have seen many laws and regulation aimed to protect so called consumers and savers. It is therefore crucial understand that until EU does not protect "crypto savers" like traditional "savers", giving to such crypto savers possibility to spend crypto in every environment (including tax, bills, municipalities and state debts and taxes, etc.), we are not applying the principle "same activities, same risks, same rules".

On the contrary: we have same risks and same rules, but different activities, creating obstacles to blockchain enterprises and evolution in EU.

Having said that, it is crucial to exclude from the financial instrument provisions, settlement of tokens for wholesale energy and real estate projects traded on an OTF that must be physically settled.

<ESMA_QUESTION_MIC3_3>

Q4 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>

We do not agree with the identification of cryptoassets qualifying as another financial instrument, since in our opinion there is the risk to create through the regulator (in this case ESMA) a new

category, while the regulation already in place (MiFID II and MiFIR) sufficiently cover hypothesis that can be analyzed on a case by case basis.

Furthermore, as said at the beginning of this document, the European Commission released a legislative package on retail investment strategy in May 2023, contributing to the MiFID II amendments. This strategy aims to empower retail investors by providing free access to crucial market and regulatory data for informed decision-making by investors, academics, civil society organizations, and competent authorities. Among the points addressed by the Commission, there was a relevant one related facilitation of blockchain technology. According to this point, the use of technologies like blockchain and artificial intelligence will be promoted in financial markets to foster innovation and enhance competitiveness.

We believe that creating a new category of “crypto” - financial instrument, may affect such point.

<ESMA_QUESTION_MIC3_4>

Q5 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>

On point 63, it should be clarified that a token granting right to vote on matters of corporate policymaking, shouldn't be considered in itself as a security or as a financial instrument. On the contrary: there are several blockchain projects based on tokens giving to their users the right to vote and/or to participate in a decision making process, without granting to such users any direct financial reward.

It should be clarified that tokens giving rights to vote in a specific policy making process cannot be considered financial instruments if there is no reward from the issuer of the tokens. Financial reward arising from third parties or from the market, shouldn't be considered proof that such tokens are financial instruments. Otherwise the entire market of blockchain projects based on tokenization of decision making policy will be negatively impacted in EU.

<ESMA_QUESTION_MIC3_5>

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.

<ESMA_QUESTION_MIC3_6>

Generally speaking, it is important to clarify the following:

In many cases, the NFT is sold to the buyer merely as tokenized art.

The NFT buyer buys nothing more than media which has been tokenized. And in that case, the situation should be clear:

There is no security or financial instrument.

In other cases, the NFTs have “utility”, which is another way of saying that there are benefits attached to ownership of the NFT. The NFT allows its holders, among others, access to community; access to software, games, and experiences; free merchandise; and others. In such cases, the NFT may be a “utility token”, where its utility is derived from the benefits that the token holder enjoys.

Also this NFTs should be considered as financial instruments and this shall be clarified in these Guidelines.

On the contrary, if an NFT promise a reward in tokens exchangeable in FIAT value, such NFTs shall be considered financial instruments.

An example of this may be an NFT (let's called it Token A), which gives its token holder other tokens daily (lets call these second tokens as Token B), as a reward for doing nothing more than to hold the Token A in their wallet.

If Token B is exchangeable with FIAT money, than Token A shall be considered as a financial instrument, even if is an NFT.

However, if Token B is given to the user not just as a reward upon passive behavior, such as holding Token A in the wallet, but due to a work or a competition or an ability in a game, then it can be said that such Token B is “earned” by the user due to his work/ability/competence. In this case, save any applicable law related taxation of work or revenues in general, Token A (the NFT) cannot be considered as a financial instrument but rather as a utility token giving to the user the right to attend a contest, a game, a work, etc., provided that the Token B is given to the user upon verification of such work or activity (Proof of Work).

With reference to the game industry, in the example above, if there is no ability but only luck, laws and regulation on gambling shall apply.

Another example may be the NFT, which rewards its holders with tokens when they stake it. Also in this case, if such tokens are exchangeable in FIAT currency, then NFT shall be considered as a financial instrument.

In point 69 it is stated the following: *“For a crypto-asset to be considered unique, its value should be intrinsically connected to its individual attributes and the specific utility it confers to its holder. A key aspect that should be considered is the value interdependency that may exist between NFTs, or which determines if the value of one crypto-asset influences the valuation of another, indicating a lack of uniqueness. For example, an NFT representing a piece of digital artwork may lose its uniqueness if it is part of a larger collection, and its value is influenced by other crypto-assets in the series. To express it differently, if the valuation of a crypto-asset originates from a comparison between crypto-assets possessing comparable attributes that make them interchangeable, the crypto-asset should not be exempted from MiCA. Therefore, the notions of uniqueness and fungibility within the meaning of MiCA seemed to be detached from that of negotiability on a secondary market”.*

It is not clear why an NFT representing a piece of digital artwork may lose its uniqueness if it is part of a larger collection, and its value is influenced by other crypto-assets in the series.

On the contrary, NFTs part of broader collections proved to have an absolute uniqueness, increasing the differentiation.

This example, related artworks, may be misleading. We suggest erasing this example from the Guidelines since it shall be evaluated on a case by case basis and mentioning it in the Guidelines may negatively impact many blockchain businesses which issue and mint collection of NFTs without a clear alignment with financial instruments.

In **point 73** it could be misleading stating that “*Fractional parts of a unique and non-fungible crypto-asset should not be considered unique and non-fungible*”.

In fact there are several projects in which an NFT is a fractional part of a digital painting, representing the exact point of such digital painting, therefore keeping its uniqueness notwithstanding the fact that it is part of other NFTs each giving to their owners the right on a specific portion of the real physical painting, based on a digital grid on which such painting is digitally reproduced.

Each NFT may have different value, position, relevance and may be clearly differentiated from the other NFTs and, therefore, still unique.

<ESMA_QUESTION_MIC3_6>

Q7 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 with the substance over form approach.

A token initially designed as Utility Token (or in general Hybrid Token), may soon – in the course of the related offering or in the evolution of the related blockchain project – transform itself in a financial instrument (process that this Law Firm has defined as “**Token Mutation Process**”).

Token Mutation Process may happen any time: before, during or after the Offering; because of a change of marketing policy or on Terms and Condition related the Token Sale; or because the blockchain project is still not operative before the offering or because it does not comply with the proposed white paper.

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<ESMA_QUESTION_MIC3_7>