

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	AMF ITALIA – ASSOCIAZIONE INTERMEDIARI MERCATI FINANZIARI
Activity	Investment Services
Are you representing an association?	<input checked="" type="checkbox"/>
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>

In general terms, AMF ITALIA (the “**Association**”) appreciates the approach proposed by ESMA to provide general guidance on: (i) the defining characteristics of various financial instruments, such as securities, derivatives, and units in collective investment undertakings, particularly in areas where a clear definition under the Markets in Financial Instruments Directive (MiFID) is absent; and (ii) the characterisation of crypto-assets with peculiar characteristics, such as so-called hybrid tokens, Non-Fungible Tokens and out-of-scope tokens.

This strategy has, indeed, the significant advantage of giving the Guidelines the necessary degree of flexibility to maintain their relevance even in the face of the emergence of new categories of tokens. This “future-proof” feature is especially pertinent in an industry which is characterised for its continual innovation.

Without prejudice to the above, the Association observes that the fact that the characterisation exercise is ultimately to be carried out by the market participants on a case-by-case basis could potentially lead to a fragmented landscape of local practices in defining specific token types.

Such fragmentation is particularly problematic given its substantial impact on the regulatory framework governing intermediary services related to these tokens. For instance, if a token is classified as a crypto-asset under the Markets in Crypto-Assets Regulation (MiCAR) in one jurisdiction but as a MiFID financial instrument in another, it could result in redundant compliance costs—for example, the necessity to publish both a prospectus and a white paper for the same product. This also creates an uneven playing field within the European Union, contradicting the EU legislator's objective of achieving a high degree of harmonization in the internal market for crypto-assets by opting for a regulation over a directive. This is especially pertinent given the inherently transnational nature of the entirely digital crypto-assets market. Moreover, divergent local interpretations could pose significant challenges for market participants operating across borders with only a MiCAR license, potentially exposing them to legal and even criminal risks for intermediating products without the required authorization in jurisdictions that classify a token subject to MiCAR as a financial instrument.

To mitigate these risks, the Association proposes that the guidelines include practical examples that illustrate the characterization of specific types of crypto-assets, such as virtual currencies or crypto assets out of scope of MiCAR. For example, utility tokens for the provision of goods or services, non-transferable to other holders and that are only accepted either by the issuer or the offeror. Such indications could be included in an Annex to the Guidelines or, alternatively, be provided through the ESMA Q&A tool.

Furthermore, the Association recommends that ESMA actively monitor potential situations of emerging fragmentation through mechanisms such as industry working groups or the European Forum for Innovation Facilitators. By doing so, ESMA could address any issues in a timely manner, fostering innovation and ensuring a consistent level of consumer protection across the EU.

<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>

The Association appreciates the ESMA's initiative to establish conditions and criteria that aid in identifying which crypto-assets should be classified as transferable securities. This is particularly relevant given the ambiguity within the Markets in Financial Instruments Directive (MiFID) framework, where many key concepts are not explicitly defined, leading to a degree of uncertainty regarding their scope.

Without prejudice to the above, the Association wishes to express its concern that ESMA's stance on the characteristic of "negotiability" may be overly broad.

ESMA seems to equate negotiability with the ability of an asset to be transferred or traded, suggesting that the mere potential for a crypto-asset to be transferred or traded on capital markets is sufficient to consider it negotiable. This holds true even if no specific market exists for the asset or if it is subject to a temporary lockup period. The draft Guidelines also emphasize the close relationship between negotiability and fungibility. Fungibility refers to the characteristic of a crypto-asset to be interchangeable with others of the same category, possessing standardized features on a per-unit basis.

Similarly, ESMA's interpretation of the term "capital market" is notably expansive. The Authority advises that the concept should be interpreted broadly to encompass all venues where interests in securities are bought and sold, explicitly including over-the-counter markets.

Given that these guidelines are general and would apply in both digital and traditional MiFID contexts, the Association urges ESMA to consider the potential implications of such a wide interpretation on traditional financial markets.

Moreover, the Association notes that despite ESMA's efforts to provide clear guidance on identifying crypto-assets as transferable securities, the use of broad concepts for determining the applicable regulatory framework—whether MiCAR or MiFID—combined with variations in language and implementation across EU Member States, indicates that determining whether a specific crypto-asset qualifies as a transferable security will likely necessitate individual analysis.

In light of this – as also highlighted, more in general, in the Answer to question 1 – the Association underscores the importance of ESMA providing concrete examples that illustrate the characterization of specific types of crypto-assets and publishing Q&A sessions to assist market participants to

uniformly apply the guidelines' criteria and conditions. This approach would help to reduce the risk of divergent interpretations and prevent potential regulatory arbitrage.

In addition, the Association would consider it appropriate for ESMA to update the list of examples on a regular basis, perhaps also at the initiative of market participants.

<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>

<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>

The Association commends ESMA for its efforts to establish conditions and criteria that aid in the classification of crypto-assets as money market instruments, units in collective investment undertakings, derivatives, or emission allowance instruments.

The Association largely supports the identified criteria, while noting that it would be useful to clarify a couple of aspects regarding the categorization of crypto-assets as money market instruments and derivatives.

As to “money market instrument”, ESMA states that: *“to be classified as a money market instrument as defined in Article 4(1), point (17), of MiFID II, crypto-assets should be a class of instruments typically traded within the money market, with the exception of payment instruments. National competent authorities and market participants should assess whether the crypto-assets possess characteristics similar to treasury bills, certificates of deposit, and commercial papers (e.g. represents a certificate of a credit balance), which might arise from funds left in an account or temporary situations linked to standard banking transactions, and is obligated to be repaid by a credit institution, as per the meaning of “deposit” in Article 2(3) of Directive 2014/49/EU; embodies a short-term debt obligation issued and backed by a government; or constitutes a short-term negotiable debt obligation issued by a credit institution or corporation in the international money market for the purpose of raising funds)”*.

The Association is of the view that such guideline creates ambiguities as to the possibility to distinguish between a tokenised deposit and a tokenised money market instrument.

In this regard, it should be noted that MiCAR acknowledges the possibility, at least from a theoretical standpoint, that a token may qualify as a deposit, where - under Article 2, para. 3, let. (b) – it states that the Regulation does not apply to cryptoasset qualifying as deposits.

Yet, a tokenised deposit has intrinsic characteristics that make it similar to a certificate of deposit or a commercial paper, since it is a representation of funds deposited in an account. The primary distinction lies in the form of representation—digital for tokens and typically paper for certificates of deposit, which – however – should be irrelevant for categorisation purposes, according to the general technology neutrality principle.

In this perspective, it appears to be difficult to grasp the differences between a tokenised deposit and a tokenised money market instrument. This ambiguity leads to significant legal uncertainty, particularly because the regulatory treatment of deposits and money market instruments differs substantially, not only in conduct rules but also in the type of authorization required for intermediating the latter.

In light of this, the Association urges ESMA to clarify the criteria for distinguishing between a tokenized deposit and a tokenized certificate of deposit, if such a distinction may be drawn at all.

Regarding derivatives, the Association notes that ESMA has not yet taken a stance on the characterization of crypto-assets that represent contracts with derivative-like rights, where settlement occurs through Electronic Money Tokens (EMTs), Asset-Referenced Tokens (ARTs), or other crypto-assets instead of cash. This is because the concept of a derivative, as outlined in MiFID II and the Commission Delegated Regulation (EU) 2017/565, involves a "financial settlement" traditionally understood to involve the exchange of cash payments. Although "cash" is not explicitly defined in these regulations, it is referenced in Regulation (EU) 2018/1672, which includes currencies and other highly liquid stores of value.

From a literal perspective, tokens or traditional derivatives settled in cryptocurrencies might appear to fall outside the scope of MiFID II. However, from a substance-over-form approach, they are functionally equivalent. The Association recognizes the importance of providing market participants with clear guidance on this matter, especially as MiCAR reaches full application and practical implementation and, thus, it can be reasonably expected that settlements of transactions regarding crypto-assets will be increasingly conducted through EMTs for efficiency.

Without harmonized guidance, there is a risk of regulatory arbitrage and divergent local interpretations, which could impact the cross-border provision of MiCAR services.

Therefore, the Association calls on ESMA to offer guidance on this matter or, if this is a matter of interpretation of EU laws that exceeds the boundaries of its mandate, to solicit the European Commission to provide a clear interpretation on the issue.

<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>

With respect to cryptoassets, such as utility tokens for the provision of goods or services, which are not transferable to other holders and which are only accepted by either the issuer or the provider, we would suggest specifying that such utility tokens are outside the scope of MiFID in the absence of any possibility for the holder to obtain a financial return not strictly linked to the use of the good or service.

<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>

The Association acknowledges and appreciates the efforts of the ESMA in establishing comprehensive conditions and criteria to classify tokens as Non-Fungible Tokens (NFTs).

Without prejudice to the above, the Association believes that the draft Guidelines proposed by ESMA may inadvertently broaden the application of MiCAR by constricting the boundaries of the NFT exemption as outlined in Article 2, paragraph 3, of MiCAR, for the reasons outlined below.

In the draft Guidelines, ESMA sets out the so called “interdependent value test” to assess a token’s non-fungibility and uniqueness. This test involves evaluating, in relation to a specific token, the following elements:

- (i) “if the value of the crypto-asset primarily stems from the unique characteristics of each individual asset and the utility/benefits it offers to its holder”;
- (ii) “the extent to which the interconnection of various types of crypto-assets influences the value of one another in such a way that the NFT has no value of its own that would be decorrelated from the other NFTs in the series”; as well as
- (iii) “the unique characteristics that distinguish these crypto-assets from others”.

As a result, according to ESMA, a key characteristic of NFTs is their substantial indifference to the value of other tokens.

The Association views this interpretation as overly stringent, potentially leading to the inclusion of digital representations of football stickers or serial artworks within the scope of MiCAR. This is because the value of such items (stickers or artworks) can be interdependent with that of others similar to it, for example, based on rarity level or year of issue, etc.

This potential expansion of MiCAR's scope seems to contradict the intentions of the EU legislator, as expressed in Recital 10 of MiCAR, which explicitly excludes digital art and collectibles from the regulation's perimeter.

In consideration of these points, the Association urges ESMA to more closely align the Guidelines with the intentions of MiCAR's Recitals regarding NFTs. It is recommended that ESMA establishes clear guidelines for the exclusion of digital art and collectibles from the regulation's scope, to prevent these items from being unintentionally encompassed by MiCAR in the absence of additional clarification.

<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>

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