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Final Report

Guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments

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Acronyms and definitions used

CP	Consultation Paper.
ESMA	European Securities and Markets Authority.
ESMA Regulation	Regulation (EU) 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision 716/2009/EC and repealing Commission Decision 2009/77/EC.
EU	European Union.
MiCA	Regulation (EU) 2023/1114 of the European Parliament and the Council of 31 May 2023 on markets in crypto-assets.
MiFID II	Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.
NCAs	National competent authorities.
SMSG	Securities and Markets Stakeholder Group established under Regulation (EU) No 1095/2010.

1 Executive Summary

Reasons for publication

The Regulation on markets in crypto-assets (MiCA)[1] was published in the Official Journal of the EU on 9 June 2023. ESMA has been empowered to develop technical standards and guidelines specifying certain provisions.

The different approaches to the national transposition of MiFID across Member States mean that there is no commonly adopted application of the definition of 'financial instrument' under MiFID in the EU. Whilst this issue has been noted as a concern since the implementation of MiFID/MiFID II, practical consequences may emerge with Regulation (EU) 2023/1114 (MiCA) regarding the classification of crypto-assets as financial instruments.

In order to provide guidance on such qualification of crypto-assets as financial instruments that national competent authorities and financial market participant should consider, ESMA is issuing these guidelines as mandated in Article 2(5) of MiCA.

Contents

Section II explains the background to our proposals, Section III sets out the feedback received and our proposals for the guidelines. Annex I contains the cost-benefit analysis, Annex II includes the SMSG advice and Annex III presents the full text of the guidelines.

Next Steps

The Guidelines in [Annex III] of this report will be translated into the official EU languages and published on the ESMA website. The publication of the translations will trigger a two-month period during which competent authorities must notify ESMA whether they comply or intend to comply with the Guidelines. The Guidelines will apply from three months after the publication of the translations.

[1] Regulation (EU) 2023/1114 of the European Parliament and the Council of 31 May 2023 on markets in crypto-assets ("MiCA").

2 Background and legal basis

Article 2(5) of MiCA:

By 30 December 2024, ESMA shall, for the purposes of paragraph 4, point (a), of this Article issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 on the conditions and criteria for the qualification of crypto-assets as financial instruments.

Overview

1. The Regulation on Markets in Crypto-Assets (MiCA), published in the Official Journal of the European Union on 9 June 2023, aims to create a harmonised legal framework that addresses the unique challenges posed by crypto-assets, ensuring that they are subject to appropriate regulatory oversight while fostering innovation within the sector.

2. MiCA's scope covers crypto-assets that are not currently covered by existing EU financial services legislation, such as the Markets in Financial Instruments Directive II (MiFID II). In this context, ESMA was mandated to develop guidelines on the conditions and criteria for the classification of crypto-assets as financial instruments. This classification is essential as it determines the regulatory treatment of crypto-assets, influencing how they are issued, traded, and managed within the EU financial markets.

ESMA's mandate

3. Under Article 2(5) of MiCA, ESMA is mandated to issue guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments, as defined in Article 4(1), point (15), of MiFID II.

4. The guidelines are meant to provide more clarity to National Competent Authorities (NCAs) and financial market participants about the delineation between the respective scopes of application of MiCA and other sectoral regulatory frameworks (notably MiFID II). This ensures consistent approaches at national level regarding which crypto-assets should be considered financial instruments and therefore be subject to the sectoral regulatory frameworks. These guidelines should be published by 30 December 2024.

5. It is important to note that, under the MiCA mandate, ESMA is not expected to clarify the entire scope of what constitutes a financial instrument, but only products that fall within both, the crypto-asset definition of MiCA and the financial instrument definition of MiFID II. It should also be noted that ESMA, jointly with EBA and EIOPA, should develop another set of guidelines under Article 97(1) of MiCA relating to the content and form of the explanation

accompanying the crypto-asset white paper and the legal opinions on the qualification of ARTs and the standardised test for the classification of crypto-assets[2].

Relevant key issues and considerations

6. The scope of application of MiCA is defined under Article 2 and paragraph 4 lists in particular the type of crypto-assets that are excluded from the Regulation. It provides notably that MiCA "does not apply to crypto-assets that qualify as […] financial instruments". In line with the principles of "same activities, same risks, same rules" and of "technology neutrality" (Recital 9), MiCA applies only to crypto-assets that are not covered by existing EU legislation and in particular by MiFID II.

7. 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". Crypto-assets, depending on the rights they embody, may raise specific challenges for regulators and financial market participants, as there may be a lack of clarity as to their exact nature and, therefore, which regulatory frameworks apply to such instruments. As such, ESMA considers it important to take a technology-neutral approach, to ensure that equivalent activities and assets are subject to the same or very similar standards regardless of their form.

8. The MiCA definition of crypto-assets is also distinct from the definition of DLT financial instruments introduced by the Pilot Regime[3] and which refers to the limited types of financial instruments that can be admitted to trading or recorded on a DLT market infrastructure under this Pilot Regime[4].

9. Where crypto-assets do not fall within the scope of other EU legal frameworks applicable to financial instruments, such crypto-assets are likely but not automatically subject to the MiCA framework[5]. Whilst MiCA closes the existing regulatory gap in relation to crypto-assets, it does not cover all types of crypto-assets[6].

10. MiFID II does not include a one-size-fits-all definition for all types of financial instruments. The concept of financial instrument is delineated through a list of instruments outlined in Annex I section C rather than a distinct set of conditions and criteria. In addition, the transposition mechanism does not allow for practices and interpretations to be fully aligned at national level regarding the exact perimeter of the financial instrument definition. Member States, when transposing MiFID II into their national laws, have not defined the term financial instrument in a fully harmonised way. While some employ a restrictive list of examples to

[2] Available here.
[3] Regulation (EU) 2022/858 of the European parliament and of the council of 30 May 2022 ("DLTR").
[4] "DLT financial instrument means a financial instrument that is issued, recorded, transferred and stored using distributed ledger technology"; Article 2(11) of DLTR.
[5] It should be noted that the exemptions provided under Article 2(4) of MiCA extend beyond financial instruments. Specifically, this regulation does not apply to crypto-assets that qualify as financial instruments, deposits (including structured deposits), funds (except if they qualify as e-money tokens), securitisation positions, insurance products, pension products, officially recognised occupational pension schemes, individual pension products, pan-European Personal Pension Products (PEPP), or social security schemes.
[6] For instance, Non-Fungible-Tokens (NFTs) are outside the scope of MiCA under certain conditions, see recitals 10 and 11 of MiCA.

define transferable securities, others use concept-based definitions[7]. There might therefore be slight variances amongst NCAs about what constitutes a financial instrument[8].

11. This absence of a common definition and shared criteria applicable to all financial instruments make it more difficult to adopt a holistic approach in these guidelines and to establish a standardised test that could be applied to all types of crypto-assets qualified as financial instruments. At the same time, it is important to avoid a piecemeal approach and the below guidelines are therefore attempting 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. The assessment as to whether a crypto-asset should be considered a financial instrument should however remain a case- by-case exercise and the guidelines are only meant to promote convergent practices in this context.

12. While offerors or persons seeking admission to trading of crypto-assets are primarily responsible for the correct classification of such assets, this classification might however be challenged by the relevant NCA, both before the date of publication of the offer and at any time thereafter[9].

Public consultation

12. On 29 January 2024, ESMA published a consultation paper to seek stakeholders' views on draft guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments[10]. The consultation period closed on 29 April 2024. ESMA received 68 responses. The answers received are available on ESMA's website unless respondents requested otherwise.

13. In addition, ESMA sought the advice of the SMSG. The SMSG advice is hereto reproduced in Annex II.

Final report

14. This Final Report summarises and analyses the responses to the CP and explains how the responses, together with the SMSG advice, have been taken into account. ESMA recommends reading this report together with the CP published on 29 January 2024 to have a complete view of the rationale for the guidelines.

[7] See ESMA Advice on Initial coin offerings and crypto-assets Initial, 9 January 2019, ESMA50-157-1391. The paper describes the initial analysis of ESMA regarding the qualification of crypto-assets as financial instruments.
[8] It should be noted that, where crypto-assets qualify as transferable securities or other types of financial instruments under MiFID II, they are likely to be subject to a comprehensive suite of EU financial regulations (e.g. Prospectus Directive, Transparency Directive, MiFID II, Market Abuse Directive, Short Selling Regulation, Central Securities Depositories Regulation, Settlement Finality Directive).
[9] See recital 14 of MiCA.
[10] Available here.

3 Feedback statement for the guidelines

3.1 General Comments

1. Stakeholders generally appreciated the clarity of the draft guidelines and the comprehensive approach taken by ESMA. Several respondents highlighted the need for further clarity on specific criteria and conditions, while others expressed concerns about the potential administrative burden the draft guidelines might impose.

3.1.1 Scope of guidelines and concrete examples

Feedback Received

2. Several respondents highlighted the potential for legal uncertainty due to the scope of the guidelines and the way the conditions and criteria detailed in the guidelines could be understood by NCAs, which might lead to diverging interpretations across Members States. Such divergences could potentially lead to regulatory arbitrage where entities might seek out jurisdictions with more favourable interpretations. Concerns were also raised about the guidelines being too restrictive and potentially encompassing entities not traditionally viewed as financial institutions.

3. To address this, stakeholders called for more explicit and concrete examples and scenarios to aid in the practical application of the guidelines and assist financial market participants in understanding their obligations and ensuring compliance. Stakeholders stressed the importance of having practical examples to illustrate the application of the guidelines and for navigating the complex landscape of qualification. They called for case studies and real-world scenarios to help clarify the distinctions and ensure consistent interpretations across different jurisdictions. The absence of such examples, according to some respondents, could lead to inconsistent application and potential confusion among financial market participants.

4. In addition, while stakeholders valued the comprehensive nature of the guidelines, some expressed concerns that they might be too restrictive. There was apprehension that the guidelines could potentially encompass entities that are not traditionally viewed as financial institutions, thereby imposing undue regulatory burdens on them.

ESMA Response

5. ESMA acknowledges the necessity for greater clarity and examples to illustrate the application of the guidelines.

6. ESMA has included detailed examples that demonstrate how the criteria should be applied in various scenarios. This will help NCAs and financial market participants to better understand the guidelines and apply them consistently. Nevertheless, ESMA has not used ‘real-world scenarios’ because the guidelines cannot express an opinion on the classification of one or

more specific crypto-assets. This is the responsibility of the offerors or persons seeking admission to trading, who are primarily responsible for the correct classification of crypto-assets as well as NCAs in the course of their duties.

3.1.2 Harmonisation and call for a modification of MiFID II

Feedback Received

7. The importance of harmonisation and consistency in the application of the guidelines across Member States was a recurring theme of answers received to the Consultation Paper. Stakeholders stressed the need for a standardised approach to prevent regulatory arbitrage and ensure a level playing field across the EU.

8. Several stakeholders pointed out that the current fragmented approach to the definition of financial instruments under MiFID II across Member States could lead to significant inconsistencies in the treatment of crypto-assets. They argued for a revision of MiFID II to include a more explicit definition of crypto-assets as financial instruments. Stakeholders suggested that ESMA should provide more guidance to clarify the expectations at a Union level and consider moving the definition into MiFIR to promote a uniform approach.

ESMA Response

9. To promote harmonisation and consistency, ESMA has leverage on the lowest common denominator interpretation of the concept of financial instrument by the NCAs. The guidelines already strike a balance between (i) providing guidance (i.e. conditions and criteria) to help NCAs and financial market participants determine which conditions and criteria should be considered for the qualification of crypto-assets as financial instruments and (ii) avoiding establishing a one-size-fits-all guidance on the notion of financial instruments and the definition of crypto-assets. ESMA has also provided more detailed criteria and examples within the guidelines in order to bring further clarity.

10. Regarding the call for revising MiFID II's definition of financial instruments, although ESMA recognises the importance of a harmonised approach, these guidelines cannot modify the concept of financial instrument in MiFID II. In addition, the absence of a common definition and shared criteria applicable to all financial instruments makes it difficult to adopt a holistic approach in these guidelines and to establish a standardised test that could be applied to all types of financial instruments.

11. ESMA will continue to engage with NCAs to monitor the implementation of these guidelines and address any inconsistencies that may arise.

3.2 Guideline 1 – General guideline on technological neutrality and substance over form

Feedback Received

12. Stakeholders supported the principle of technological neutrality, emphasising that the classification of crypto-assets should be based on their inherent characteristics rather than their form of representation. The substance-over-form approach was widely endorsed as it reinforces investor protection by focusing on the rights and obligations that define the legal and economic profiles of crypto-assets.

13. There were calls for clarification on how technological neutrality should be applied, particularly in the context of new and evolving technologies.

ESMA Response

14. ESMA confirms its commitment to technological neutrality and the substance-over-form approach. The guidelines already provide clear instructions on applying these principles, ensuring that the classification of crypto-assets remains consistent regardless of technological advancements[11].

3.3 Guideline 2 (classification as transferable securities)

3.3.1 Clarification on negotiability and transferability

Feedback Received

15. Stakeholders expressed concerns about the broad interpretation of "negotiability" and "transferability" as criteria for classifying crypto-assets as transferable securities. They argued that the possibility for a crypto-asset to be sold or traded, even with inherent restrictions, should not automatically qualify it as negotiable and thereby as transferable securities. Stakeholders recommended that ESMA considers whether legal, market, or technical restrictions make the transfer or trading of a crypto-asset practically impossible or unlikely, even if theoretically possible.

16. In addition, some stakeholders emphasised the importance of standardisation and interchangeability for a crypto-asset to qualify as a transferable security. They suggested that the criteria should include specific sub-criteria such as the “degree of standardisation” and the frequency of transferability and trading.

ESMA Response

17. ESMA appreciates the detailed feedback from stakeholders regarding the interpretation of negotiability and transferability. ESMA's position is grounded in ensuring that the guidelines

[11] A crypto-asset should qualify as a financial instrument if it falls within the definition of Section C (1 to 11) of Annex I of MiFID II. In such case crypto-assets should be subject to the exact same rules as other traditional financial instruments in line with the principle of technological neutrality.

provide clear, practical criteria for the classification of crypto-assets as transferable securities, balancing regulatory clarity with market flexibility.

18. Firstly, following several comments received from stakeholders, it should be pointed out – as stressed in the guidelines – that the criteria for a crypto-asset to be qualified as a transferable security - i.e. (i) not being an instrument of payment; (ii) being “classes of securities”; and (iii) being negotiable on the capital market - are cumulative (meaning that each of these conditions need to be fulfilled in order to be qualified as a transferable security).

19. Secondly, ESMA's interpretation of "negotiability" and “transferability” aligns with MiFID II ‘s approach regarding financial instruments. MiFID II defines transferable securities in a manner that includes their capability to be traded on the capital market, regardless of certain inherent restrictions. This interpretation is essential to maintaining a consistent regulatory approach when qualifying a crypto-asset as financial instrument[12]. The same goes for the notion of “capital market”[13]. Such interpretation is necessary to ensure that the classification of crypto-assets as transferable securities is not unduly restrictive.

20. Lastly, ESMA recognises the importance of standardisation and interchangeability in the classification of crypto-assets as transferable securities. However, the guidelines already account for these aspects through the interpretation of negotiability[14]. Such concept of standardisation (although not addressed in MiFID II) and interchangeability are inherently addressed under the concept of negotiability on the capital market. This approach ensures that crypto-assets meeting the definition of negotiability are sufficiently standardised and interchangeable. On the contrary, including additional sub-criteria would create unnecessary complexity and potential inconsistencies. Furthermore, maintaining a flexible interpretation aligns with the principles of technological neutrality and substance over form, which are critical for adapting to the evolving nature of the crypto-asset market.

21. Nevertheless, to address such concerns, ESMA has provided more detailed guidance and add some concrete examples.

3.3.2 Distinction between rights conferred by crypto-assets and financial instruments

Feedback Received

[12] Although there is no explicit definition of "negotiability" in Union law, it implies that crypto-assets must be capable of being transferred or traded on the markets. Most Member States interpret negotiability as potential transferability or tradability, aligning with the principle that financial instruments should be freely transferable on the capital market.
[13] the reference to “capital markets” is not defined but as a concept is intentionally broad to include all contexts where buying and selling interests in securities meet. It does not limit the scope to securities listed or traded on regulated markets; See Q&As published by the Commission on MiFID Directive 2004/39/EC.
[14] Most Member States interpret negotiability as potential transferability or tradability, some others separate the notion of transferability and negotiability by considering the notion of being “negotiable” as being “standardised”; 22 See for example, BaFin. Guidance Notice, second advisory letter on prospectus and authorisation requirements in connection with the issuance of crypto tokens (2019), p. 6.

22. Several stakeholders highlighted the need for additional clarity in distinguishing between rights conferred by crypto-assets and those by traditional securities. They pointed out that governance rights in blockchain protocols are not akin to corporate voting rights associated with shares. There was a call for ESMA to clarify that participation in protocol governance does not equate to voting rights on corporate decision-making.

ESMA Response

23. ESMA has clarified that governance rights in blockchain protocols are distinct from corporate voting rights associated with traditional securities. The guidelines now explicitly state that participation in protocol governance does not automatically equate to voting rights on corporate decision-making, addressing concerns about the misclassification of such crypto-assets.

24. The guidelines have always emphasised that the classification of crypto-assets as financial instruments should be based on the substance of the rights conferred, rather than the form or context in which those rights are exercised. ESMA's approach prioritises the underlying characteristics and rights associated with crypto-assets, rather than their technological framework or the specific terminology used.

25. The guidelines reiterate the importance of a case-by-case analysis to determine whether a crypto-asset qualifies as a financial instrument. This approach allows NCAs to consider the specific rights conferred by each crypto-asset in the context of its use and impact on the holder's economic position.

3.3.3 Class of securities and instruments of payment

Feedback Received

26. A majority of respondents supported ESMA's approach to avoid a one-size-fits-all guidance, emphasising the importance of maintaining flexibility and technological neutrality. Concerns were raised about potential legal uncertainty and the risk of diverging interpretations by NCAs. Respondents generally favoured a principle-based approach but sought more concrete criteria to enhance clarity and consistency.

27. Feedback suggested that ESMA should more clearly define what constitutes a "class of securities" and an "instrument of payment". Stakeholders emphasised the necessity to differentiate between tokens providing access to services and those conferring security-like rights was highlighted.

ESMA Response

28. To ensure clarity, ESMA has further elaborated in the guidelines on what constitutes a class of securities. The guidelines specify that the rights represented or conferred by the crypto-asset must be similar or equivalent to those conferred by traditional securities.

29. The guidelines emphasise that crypto-assets used primarily for transferring or storing value should not be classified as transferable securities.

30. Therefore, while acknowledging the challenges posed by the classification of instruments of payment, especially in the context of hybrid tokens, ESMA has opted for a principles-based approach rather than a rigid, detailed definition due to the rapidly evolving nature of the crypto-asset market. This approach allows for flexibility and adaptability, ensuring that the classification can evolve alongside the market.

31. Finally, given the potential for hybrid tokens to serve multiple functions, ESMA emphasises the importance of a case-by-case analysis. This method allows for a thorough examination of the specific characteristics and functions of each crypto-asset, ensuring that the most appropriate classification is applied.

3.4 Guideline 3 (classification as money-market instruments)

Feedback Received

32. Stakeholders generally supported the conditions and criteria attached to crypto-assets qualified as money-market instruments but raised several points for further clarification. A key concern was the potential for legal ambiguity when distinguishing between crypto-assets that serve as tokenised deposits and those that qualify as money-market instruments. Stakeholders noted that both tokenised deposits and tokenised money-market instruments share similar characteristics, particularly in representing short-term credit balances or certificates of deposit.

33. Additionally, stakeholders emphasised the need for more explicit examples or case studies that illustrate how a crypto-asset might meet the criteria for classification as a money-market instrument. Concerns were also raised about the potential for varying interpretations across Member States, which could lead to regulatory inconsistencies and hinder market development.

ESMA Response

34. ESMA acknowledges the feedback on the similarities between tokenised deposits and money-market instruments. However, the classification as a money-market instrument under MiFID II requires that the crypto-asset in question exhibit characteristics akin to traditional money-market tools, such as treasury bills or certificates of deposit. These characteristics include a predefined maturity date, stable value, minimal volatility, and returns aligned with short-term interest rates. ESMA has clarified that for a crypto-asset to be classified as a money-market instrument, it must operate within the money market and possess these specific characteristics, which distinguishes it from tokenised deposits that might be more akin to bank deposits.

35. To address concerns about legal ambiguity and to aid in the consistent application of the guidelines across Member States, ESMA incorporated more detailed examples within the guidelines.

3.5 Guideline 4 (classification as units in collective investment undertakings)

Feedback Received

36. Many stakeholders asked for additional information on the distinction between utility tokens - which have a general commercial or industrial purpose - and units in collective investment undertakings. They argued that utility tokens, which may be used to access services or products, should not be classified as financial instruments simply because they provide some form of participatory rights in a blockchain project.

37. Some stakeholders also focused on the issue of staking. They raised concerns that without further guidance, there is a risk that NCAs might classify staking activities as collective investment undertakings. Stakeholders highlighted that staking, particularly in Proof of Stake (PoS) networks, serves a technical function related to the security and operation of the blockchain, rather than an investment function aimed at generating a pooled return for investors.

ESMA Response

38. ESMA's guidelines already emphasise that classification of crypto-assets should focus on the substance of the rights conferred, rather than the form. This approach is consistent with the regulatory principles under MiFID II and AIFMD[15]. The guidelines clarify that a crypto-asset should only be classified as a unit in a collective investment undertaking if it represents a stake in a pooled investment with the objective of generating a return for investors in accordance with a defined investment policy. Utility tokens, which would serve a commercial or industrial purpose and would not intend to provide a pooled return, should not be classified as financial instruments.

39. In response to concerns about the staking activities, it should be noted that the guidelines focus on the conditions and criteria for the qualification of crypto-assets as financial instrument. Staking, as an activity, involves various economic and operational factors that are distinct from the issues addressed by the guidelines on financial instruments.

40. ESMA agrees that the nature of participation rights is important. The guidelines have been updated to provide more clarity and remind that, for a crypto-asset to be considered a unit in

[15] Annex I, Section C, point (3) of MiFID II refers to units in collective investment undertakings as financial instruments. For a crypto-asset to qualify as such a unit in a collective investment undertaking, the crypto-asset itself should qualify as a unit, while the issuer of the crypto-asset should qualify as a collective investment undertaking. In addition, The term "units" typically refers to shares, interests, or participation rights issued by these undertakings to investors, representing their proportionate rights in the collective investment undertaking (see Art. 1(3)(b) of the UCITS Directive).

a collective investment undertaking, it should offer rights akin to those traditionally associated with collective investment units. However, ESMA also notes that while liquidity is a desirable feature, it is not a mandatory criterion for classification. The focus remains on whether the crypto-asset represents a stake in pooled capital with the aim of generating a return for investors.

3.6 Guideline 5 (classification as derivative contracts)

Feedback Received

41. Several respondents emphasised the need for further concrete examples and details on specific types of crypto-native derivative instruments, such as perpetual futures, which do not have an equivalent in traditional financial markets. There were concerns that applying traditional MiFID II criteria to such instruments could lead to misclassifications or regulatory overreach.

42. In addition, concerns were raised about the settlement process for derivative contracts involving crypto-assets. Some stakeholders pointed out that the traditional frameworks for settlement in cash might not fully apply when crypto-assets are used, especially given the volatility and liquidity differences between crypto-assets and fiat currencies. The suggestion was made for ESMA to consider the unique characteristics of crypto-assets, such as their potential for instant settlement via blockchain technologies.

ESMA Response

43. ESMA emphasises that the guidelines for the classification of crypto-assets as derivative contracts are grounded in the existing MiFID II framework.

44. ESMA recognises the unique characteristics of certain crypto-native derivatives, such as perpetual futures. While these instruments may not have a direct equivalent in traditional finance, their economic functions can however be similar somehow to warrant classification as derivative contracts under MiFID II. More details have been added to the guidelines on this.

45. On the issue of settlement, ESMA understands the complexities introduced by the use of crypto-assets. Among the responses received, very few included information on the settlement process for derivatives using a crypto-asset or a stablecoin. Stakeholders pointed out the lack of industry-wide experience with derivative contracts settled using crypto-assets. Traditional settlement frameworks may not fully capture the risks and operational dynamics of settling derivatives in crypto-assets. However, any crypto-asset used in the settlement of a derivative contract should be treated with the same rigor as traditional settlement assets. This includes considering factors such as volatility, liquidity, and the robustness of the settlement infrastructure.

46. The form of settlement, whether in cash or through any crypto-assets, would not necessarily affect the fundamental nature of the product. While the method of settlement is an important consideration, the general characteristics of the product are not likely to be inherently altered by the settlement medium.

3.7 Guideline 6 (classification as emission allowances)

Feedback Received

47. Many respondents highlighted the need for more details on what constitutes an emission allowance in the context of crypto-assets. Specifically, there were concerns about potential overlaps between crypto-assets representing emission allowances and other types of crypto-assets, such as those used in carbon trading schemes.

48. Several stakeholders emphasised the importance of ensuring that crypto-assets classified as emission allowances must be tied directly to recognised units under the EU Emissions Trading Scheme (ETS). They pointed out that without clear criteria, there is a risk that voluntary carbon credits or other similar tokens could be misclassified as financial instruments.

ESMA Response

49. ESMA's guidelines are carefully designed to align with the broader EU regulatory framework governing emission allowances, particularly under the EU Emissions Trading Scheme (ETS) and MiFID II. This alignment ensures that crypto-assets classified as emission allowances meet the stringent criteria established by these regulations, thereby maintaining consistency and avoiding regulatory overlap.

50. The guidelines have been updated to provide more concrete examples within the context of crypto-assets. This ensures that only those crypto-assets that genuinely represent a right to emit greenhouse gases, in compliance with Directive 2003/87/EC, are classified as emission allowances.

51. ESMA has taken steps to prevent the misclassification of other types of tokens, such as voluntary carbon credits, as emission allowances. The guidelines make it clear that for a crypto-asset to be classified as an emission allowance, it must be recognised for compliance with the EU ETS and must confer a clear right regarding emissions. In line with the principle of technological neutrality, ESMA's guidelines focus on the substance of the asset rather than its digital form.

3.8 Guideline 7 (crypto-asset's classification in MiCA)

Feedback Received

52. Some respondents emphasised the importance of maintaining clear distinctions between crypto-assets that qualify as financial instruments under MiFID II and those that fall exclusively under the MiCA framework.

53. They also expressed concerns about the possibility of dual classification. Additionally, there was significant concern about the potential for divergent interpretations by NCAs, which could undermine the harmonisation objectives of MiCA and create an uneven regulatory landscape across the EU.

54. Furthermore, stakeholders supported the guidelines' approach to avoid defining crypto-assets based on their underlying technology.

ESMA Response

55. The guidelines already emphasise that crypto-assets cannot be simultaneously classified under both frameworks. If a crypto-asset meets the criteria for classification as a financial instrument, it will be subject to MiFID II, not MiCA. This approach helps prevent regulatory overlap and ensures that financial market participants are subject to a consistent regulatory environment.

56. As mentioned above, ESMA remains committed to the principle of technological neutrality, ensuring that the classification of crypto-assets is based on their economic function and the rights they confer, rather than their underlying technology.

3.9 Guideline 8 (classification as crypto-assets which are unique and not fungible with other crypto-assets - NFTs)

Feedback Received

57. Stakeholders warned that an overly broad classification could stifle innovation in the nascent NFT market. Stakeholders also emphasised the need for more concrete examples of what constitutes an NFT. Many pointed out that the broad range of assets being labelled as NFTs (from digital art to in-game items), complicates their classification.

58. In addition, the criteria for determining whether an NFT is truly unique and non-fungible were questioned. Some stakeholders suggested that the concept of fungibility in the digital space might differ from traditional financial instruments, where fungibility is often tied to physical attributes or identical financial terms. They argued that digital uniqueness does not always equate to non-fungibility in economic terms.

59. Other respondents questioned the criteria for determining fungibility and the interdependence of value arguing that the concept of value interdependency used in the guidelines could be too broad and might lead to misclassifying NFTs that should not be considered financial instruments. Another area of concern was the classification of NFTs issued as part of a series or collection. Stakeholders, requested clearer guidelines on how such NFTs should be

treated, noting that while they may share similar attributes, they often have distinct characteristics that affect their value.

60. Finally, some respondents, argued that the guidelines overstep their remit by attempting to include NFTs within the scope of these guidelines. They highlighted the original legislative intent of the EU co-legislators to exclude NFTs from MiCA's scope, particularly those representing digital art and collectibles.

ESMA Response

61. ESMA acknowledges the importance of maintaining technological neutrality in the classification of NFTs, especially within the evolving NFT market. The guidelines are carefully designed to ensure that the classification of NFTs is based on the substance, rather than the underlying technology used to create them.

62. The guidelines are not intended to provide clarity on the broader concept of fungibility. Instead, the guidelines focus on the notion of uniqueness, a concept that is relatively new under MiCA. The distinction between uniqueness and non-fungibility is crucial in the context of NFTs, and the guidelines aim to clarify how such notion of uniqueness should be interpreted.

63. In response to feedback on the criteria for determining fungibility and the interdependence of value, ESMA has made modifications to the guidelines to enhance clarity. It is essential to understand that the concept of value interdependency is one of several indicators used as part of a bundle of indicators, allowing for a more nuanced assessment that considers multiple factors rather than relying on a single criterion. By providing clearer guidance on how such NFTs should be treated, the guidelines aim to ensure that NFTs with unique and non-fungible qualities are appropriately classified.

64. ESMA acknowledges the concerns raised by stakeholders regarding the scope of the guidelines. However, it is important to clarify that if NFTs are generally excluded from the scope of MiCA, some exceptions do still exist[16]. In addition, the guidelines are intended to provide a better understanding of the notion of NFTs in order for NCAs and financial market participants to be able to consider whether such crypto-assets might fall under MiCA or MiFID II.

65. This approach is consistent with ESMA's mandate under Article 16 of the ESMA Regulation, which empowers the Authority to issue guidelines to ensure the consistent application of Union law and the effective functioning of the financial markets. By providing clarity on the classification of NFTs, the guidelines aim to prevent regulatory gaps and ensure that all relevant assets are appropriately covered under the existing financial framework.

[16] See recitals 10 and 11 of MiCA.

3.10 Guideline 9 (classification as Hybrid tokens)

Feedback Received

66. A significant portion of respondents supported the hierarchical approach proposed by ESMA, which suggests that if a hybrid token displays features of a financial instrument, this characteristic should take precedence in its classification.

67. However, several respondents, called for a more flexible, principle-based approach. They suggested that instead of automatically classifying a token as a financial instrument based on certain features, there should be a consideration of the token's primary and secondary characteristics, as well as its intended and predominant use. Many respondents also expressed the need for more detailed examples.

68. Furthermore, there was concern among some respondents that the current guidelines could lead to “over-regulation”, highlighting that an overly broad interpretation of hybrid tokens might subject almost all tokens to MIFID II.

69. Finally, several stakeholders also pointed out the challenges associated with the evolving nature of hybrid tokens over time. A dynamic nature that could complicate their regulatory treatment.

ESMA Response

70. ESMA acknowledges the support for a hierarchical approach in classifying hybrid tokens and maintains that when a hybrid token displays features of a financial instrument, these characteristics should nevertheless take precedence. This approach is consistent with the principle of "same risks, same rules" and ensures that tokens with similar risks to traditional financial instruments are regulated under the appropriate frameworks, thereby protecting investors and maintaining market integrity.

71. However, ESMA recognizes the concerns about potential overreach and will ensure that this approach is applied judiciously, focusing on the substance over form. This means that only tokens that genuinely possess the economic characteristics of financial instruments will be classified as such, avoiding the misclassification of tokens that do not fully meet the criteria. Some concrete examples have also been added into the guidelines.

72. Recognising the evolving nature of certain hybrid tokens, the guidelines recommend to NCAs and financial market participants a periodic reassessment of such hybrid tokens to determine whether their classification needs to be updated. This ensures that the regulatory treatment of tokens remains appropriate throughout their lifecycle, adapting to changes in their use and function.

4 Annexes

4.1 Annex I – Cost benefit analysis

1. As per Article 16(2) of Regulation (EU) No 1095/2010, any guidelines developed by ESMA are to be accompanied by an analysis of '*the related potential costs and benefits of issuing such guidelines*'. Such analysis shall be "*proportionate in relation to the scope, nature and impact of the guidelines*".

2. The following section outlines ESMA's assessment of the main policy options included in the guidelines on the solicitation of clients by third-country firms.

Impact of the Guidelines under MiCA

3. The guidelines are expected to enhance the clarity and consistency of how crypto-assets can be classified as financial instruments across the EU. By providing clear conditions and criteria, these guidelines mitigate the risk of divergent interpretations among Member States, which could otherwise lead to regulatory arbitrage and market fragmentation.

Problem Identification

4. The rapid evolution and increasing adoption of crypto-assets have created a regulatory gap, as many of these assets do not clearly fall under existing financial regulations and or under the MiCA regulation, leading to some legal uncertainty. Without clear guidelines, there is a risk that similar crypto-assets could be treated differently across Member States, undermining the single market and leaving investors with different levels of protection. The guidelines should thus address these challenges as much as possible by specifying the criteria under which a crypto-asset should be classified as a financial instrument, ensuring as much as possible uniformity and legal clarity.

Policy Objectives

5. The primary objective of these guidelines is to establish clear and consistent conditions and criteria for the classification of crypto-assets as financial instruments. This will ensure that crypto-assets with similar economic functions are regulated similarly, regardless of their form or underlying technology. The guidelines aim to protect investors, enhance market integrity, and reduce the potential for regulatory arbitrage, thus contributing to the overall stability and efficiency of the EU financial markets.

Baseline Scenario

6. In the absence of these guidelines, the classification of crypto-assets as financial instruments would remain inconsistent across Member States, leading to regulatory disparities. This lack of harmonisation would likely result in legal uncertainty for financial market participants, reduced investor protection, and increased opportunities for regulatory arbitrage. The

baseline scenario highlights the necessity of these guidelines to address these issues comprehensively.

Options Considered and Preferred Options

Policy Issue 1: Criteria for Classification

7. ESMA has considered 2 options:

   - **Option 1a:** Develop highly specific criteria for the classification of crypto-assets as financial instruments.

   - **Option 1b:** Provide a principles-based approach with criteria and conditions to allow flexibility in interpretation.

8. **Preferred Option: Option 1b.** This approach was chosen to balance the need for clarity with the flexibility required to accommodate the rapidly evolving nature of crypto-assets as well as to take into account the different interpretations that may exist within the EU when it comes to the definition of financial instruments. In addition, by focusing on the substance of the rights conferred by the asset rather than its technological form, the guidelines ensure that all relevant crypto-assets are appropriately classified, without stifling innovation.

Policy Issue 2: Technological Neutrality

   - **Option 2a:** Exclude certain technologies from the scope of the guidelines to prevent overreach.

   - **Option 2b:** Maintain technological neutrality to ensure that the guidelines apply to all relevant crypto-assets, regardless of their underlying technology.

9. **Preferred Option: Option 2b.** This option ensures that the guidelines remain relevant and adaptable to future technological developments, thereby providing a robust and enduring regulatory framework.

Cost-Benefit Analysis

10. The costs associated with implementing these guidelines primarily stem from the broader regulatory framework established at Level 1. Given that these guidelines are designed to provide clarity and criteria for the classification of crypto-assets as financial instruments, the additional costs should be minimal. These guidelines primarily serve to assist National Competent Authorities (NCAs) and financial market participants in correctly identifying crypto-assets that qualify as financial instruments under MiFID II, thereby ensuring consistent application of existing regulations. As such, the guidance does not impose new obligations but rather enhances the understanding and application of current requirements.

11. Any additional costs that may arise are expected to be limited to specific situations where financial market participants or third-country firms may need to reassess their crypto-asset offerings or internal procedures to ensure compliance with the established classification criteria. However, these costs should be viewed as necessary to avoid potential regulatory breaches and to align business practices with the legal framework, ultimately reducing the risk of misclassification and the associated regulatory penalties.

12. The guidelines aim to promote a uniform approach across jurisdictions, which could also lead to cost efficiencies for firms operating in multiple EU member states by reducing the complexity and variability of compliance requirements across different NCAs.

Costs

13. NCAs and financial market participants may incur some costs related to the implementation of these guidelines, particularly in ensuring that their activities and crypto-assets are correctly classified under the new criteria. These costs could include legal reviews, adjustments to internal processes, and training for staff to understand and apply the guidelines effectively. However, since the guidelines provide clarity on existing regulations rather than introducing new requirements, these costs are expected to be limited. Moreover, it should be noted that the Guidelines on conditions and criteria for the qualification of crypto-assets as financial instruments are mandated by Article 2(5) of MiCA.

14. Financial market participants might also face costs associated with updating their compliance frameworks to align with the guidelines. This could involve categorising crypto-assets accurately and ensuring that all financial instruments are appropriately managed within the existing regulatory framework. The costs here would primarily relate to the resources needed to conduct a thorough analysis of their assets and activities to ensure compliance.

15. Overall, the costs for NCAs and financial market participants should be minimal, as the guidelines mainly provide a structured approach to interpreting and applying existing regulations. The focus is on reducing ambiguity and ensuring consistent classification practices across the EU, which, in the long term, could lead to cost efficiencies by reducing the likelihood of regulatory discrepancies and the need for corrective actions.

Benefits

16. The guidelines enhance investor protection by providing a clear framework for the classification of crypto-assets as financial instruments. This reduces the risk of misclassification, which can lead to inadequate regulatory oversight and potential harm to investors. By ensuring that all relevant assets are appropriately classified, the guidelines contribute to a safer and more transparent market environment.

17. The introduction of a harmonised classification approach across the EU promotes supervisory convergence, ensuring that all NCAs apply the same criteria when assessing crypto-assets.

This consistency helps to prevent regulatory fragmentation and ensures that financial market participants face uniform standards, regardless of the Member State in which they operate.

18. Additionally, a clear and consistent classification framework fosters fair competition among financial market participants. By ensuring that all participants adhere to the same standards, the guidelines prevent any single entity from gaining an unfair advantage due to differing interpretations of what constitutes a financial instrument. This promotes a level playing field, which is essential for a healthy and competitive market.

Table: costs and benefits

Stakeholder groups affected	Costs	Benefits
Financial market participants	**Compliance costs:** Issuers and CASPs may incur costs to review and ensure that their crypto-assets are classified correctly under the new guidelines. This may involve legal consultations, updates to compliance frameworks, and staff training. **Operational adjustments:** Issuers and CASPs might need to adjust their operational processes to ensure alignment with the guidelines, which could involve system updates and process reengineering.	**Regulatory clarity:** The guidelines provide clear criteria, reducing the risk of misclassification and potential regulatory penalties. **Market stability:** By ensuring proper classification, issuers and CASPs contribute to a more stable and trustworthy market, which can enhance their reputation and customer trust.
National competent authorities	**Implementation costs:** NCAs might need to allocate resources for the interpretation and enforcement of the guidelines, which could include training staff and updating regulatory frameworks. **Supervisory costs:** Ongoing costs associated with monitoring and ensuring compliance among market participant (L1 cost more than costs due to the GLs).	Safer crypto-asset market. Enhanced supervisory convergence.
Clients of financial	Clients might indirectly bear some costs passed on by financial market participants due to compliance	Increased protection and transparency.

Stakeholder groups affected	Costs	Benefits
market participants	activities, though these are expected to be minimal.	

4.2 Annex II : Advice of the Securities and Markets Stakeholder Group

Advice to ESMA

SMSG advice to ESMA on its consultation papers on reverse solicitation and the qualification of crypto-assets as financial instruments in the context of the Markets in Crypto Assets (MiCA) Regulation

1 Executive Summary

Consultation paper on the qualification of crypto-assets as financial instruments

MiCA does not apply to crypto-assets that qualify as financial instruments as defined by MiFID II. The SMSG very much supports the objective of achieving a high level of legal certainty around the qualification of crypto-assets as financial instruments. The SMSG acknowledges that there are different approaches in the individual Member States with regard to what qualifies as financial instruments and believes that the EU regulatory framework should progress to achieve a common definition of financial instruments in the EU.

The SMSG supports ESMA position regarding technology neutrality. The qualification of a financial instrument should depend on the rights and obligations that define its legal and economic profiles. The SMSG also supports the adoption of a substance over form approach to the qualification of crypto-assets as financial instruments because it is expected to reinforce investor protection.

The SMSG highlights the following areas where ESMA Guidelines might clarify the potential implications of the qualification of crypto-assets as financial instruments: the EU passporting system and cross-border activities; the coverage by Investors Compensation Schemes; the scope of a CASP licence; the application of the investor protection-related conduct of business rules contained in MiFID II.

The SMSG supports, in case of doubt, the adoption of an extensive interpretation for the qualification of crypto-assets as financial instruments as it would reinforce investor protection thanks to the application of the MiFID II well-established regulatory framework. The SMSG also believes that, to provide clarity to investors, it would be preferable to disclose the regulatory framework to be applied to the specific transaction (i.e., MiCA or MiFID II).

Given the cross-border nature of crypto-related activities, the SMSG highlights the relevance of information sharing among authorities. The exchange of information among authorities might involve not only NCAs but also other authorities (e.g., competition authorities).

Lastly, the SMSG suggests leveraging on the technology used by crypto-assets to reinforce monitoring of CASPs activities in terms of scope and speed (e.g., to detect abnormal transactions).

2 Background

19. On 29 January 2024, ESMA released two consultation papers related to the Markets in Crypto Assets Regulation (MiCA), one on reverse solicitation and one on the classification of crypto-assets as financial instruments.

20. In the consultation on reverse solicitation, ESMA is seeking input on proposed guidance concerning the conditions of application of the reverse solicitation exemption and the supervision practices that National Competent Authorities (NCAs) may take to prevent its circumvention. The provision of crypto-asset services by a third-country firm is limited under MiCA to cases where such services are initiated at the own exclusive initiative of a client. The proposed guidance confirms ESMA's statement released on 17 October 2023[17].

21. In the consultation paper on classification, ESMA is seeking input on establishing conditions and criteria for the qualification of crypto-assets as financial instruments. This initiative is aimed at bridging the MiCA regulation and the Markets in Financial Instruments Directive II (MiFID II) and ensuring consistency across the EU. The proposed guidelines are intended to provide NCAs and financial market participants with indications to determine whether a crypto-asset can be classified as a financial instrument.

22. In this Advice, the SMSG provides its views on the specific questions raised by ESMA in the consultation papers as well as comments on more general issues that are related to the topics discussed in the consultation papers.

3 SMSG opinions and comments on reverse solicitation

4 SMSG opinions and comments on the qualification of crypto-assets as financial instruments

4.1 Preliminary remarks

23. Article 2 of MiCA defines the scope of MiCA and paragraph 4 lists in particular the type of crypto-assets that are excluded from the Regulation. It provides notably that MiCA "does not apply to crypto-assets that qualify as […] financial instruments as defined in Article 4(1), point (15), of Directive 2014/65/EU". In line with the principles of "same activities, same risks, same rules" and of "technology neutrality" (Recital 9), MiCA applies only to crypto-assets that are not covered by existing EU legislation and in particular by MiFID II.

[17] See ESMA statement "ESMA clarifies timeline for MiCA and encourages financial market participants and NCAs to start preparing for the transition", released on 17 October 2023 and available at https://www.esma.europa.eu/sites/default/files/2023-10/ESMA74-449133380-441_Statement_on_MiCA_Supervisory_Convergence.pdf.

24. Under Article 2(5) of MiCA, ESMA is mandated to issue guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments, as defined in Article 4(1), point (15), of the Markets in Financial Instruments Directive (MiFID II). The SMSG acknowledges that, under its MiCA mandate, 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. The guidelines are meant to provide more clarity to National Competent Authorities (NCAs) and financial market participants about the delineation between the respective scopes of application of MiCA and MiFID II, ensuring ultimately consistent approaches at national level regarding which crypto-assets should be considered financial instruments and therefore be subject to the sectoral regulatory frameworks and notably the MiFID II framework.

25. MiFID II does not include a one-size-fits-all definition for all types of financial instruments. The concept of financial instrument is delineated through a list of instruments outlined in Annex I section C rather than a distinct set of conditions and criteria[18]. In addition, the transposition mechanism does not allow for practices and interpretations to be fully aligned at national level regarding the exact perimeter of the financial instrument definition. Member States, when transposing MiFID II into their national laws, have not defined the term financial instrument in a fully harmonised way. While some employ a restrictive list of examples to define transferable securities, others use concept-based definitions. There might therefore be slight differences amongst NCAs about what constitutes a financial instrument.

4.2 Legal certainty and the goal of a common definition of financial instruments

26. The SMSG very much supports the objective of achieving a high level of legal certainty around the qualification of crypto-assets as financial instruments.

27. The SMSG acknowledges that, since the concept of financial instruments is defined in a Directive, there are different approaches in the individual Member States as to what qualifies as a financial instrument and what does not.

28. Since the qualification of an asset as a financial instrument is particularly relevant, the SMSG believes that the EU regulatory framework should progress to build a common definition of financial instruments in the EU. This outcome can be achieved either providing the definition of financial instruments in a Regulation or giving ESMA wider powers to determine whether a particular asset qualifies or not as a financial instrument.

29. The SMSG is aware of the fact that this scenario is today beyond ESMA powers, and beyond the current Consultation Paper. However, the SMSG intends to stress the importance of this point and consequently supports the goal of converging into a unique concept of financial instrument at EU level implemented in each Member State.

[18] Financial instruments are defined in MiFID II mainly through a list of instruments that should be regarded as financial instruments. These are: (i) transferable securities, (ii) money-market instruments, (iii) units of collective investment undertakings, (iv) various derivative contracts and (v) emission allowances. See, instruments listed in Section C (1 to 11) of Annex I of MiFID II.

30. Against this background, the SMSG agrees with the ESMA's approach of providing NCAs and financial market participants with structured conditions and criteria to determine whether a crypto-asset can be classified as a financial instrument[19].

4.3 Technology neutrality and substance over form approach to the classification

31. The SMSG supports ESMA position regarding technology neutrality. The qualification of a financial instrument should depend on the rights and obligations that define its legal and economic profiles. The form of representation (e.g., a physical certificate, a book entry in a standard technology or in a DLT) is not relevant in this respect.

32. Along the same lines, the SMSG also supports the adoption of the substance over form approach. The consultation paper clarifies that, in order to assess whether a crypto-asset qualifies as a financial instrument, the specific features, design and rights attached to this crypto-asset should be considered. Thus, ESMA is of the opinion that the circumstances must be considered on a case-by-case basis in order to legally qualify crypto-assets. For this purpose, a "substance over form" approach in determining what constitutes a financial instrument should be followed.

33. In the definition of the conditions and criteria attached to hybrid tokens (Guideline 9), the consultation paper highlights that NCAs and financial market participants should adopt a substance over form approach when assessing such crypto-assets. The classification of a crypto-asset should be guided by its actual features rather than solely relying on the label given by the issuer or offeror. The label given by the issuer or offeror may need to be amended to reflect this classification not to mislead the investor.

34. The SMSG supports the adoption of a substance over form approach to the classification of hybrid crypto-assets as it reinforces investor protection[20].

4.4 Possible implications of the qualification of crypto-assets as financial instruments

35. The qualification of crypto assets as financial instruments is very relevant because it has a number of potential regulatory implications. In this respect it should be noted that, where crypto-assets qualify as transferable securities or other types of financial instruments under MiFID II, they are likely to be subject to a comprehensive set of EU financial regulations (e.g., Prospectus Directive, Transparency Directive, MiFID II, Market Abuse Directive, Short Selling Regulation, Central Securities Depositories Regulation, Settlement Finality Directive).

36. The SMSG is of the opinion that ESMA Guidelines might clarify some potential implications of the qualification of crypto-assets as financial instruments. Specifically:

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[19] See 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?").
[20] See Q7 ("Do you agree with the conditions and criteria proposed for hybrid-type tokens? Do you have any additional condition and/or criteria to suggest that could be used in the Guidelines? Please illustrate, if possible, your response with concrete examples?").

a. the EU passporting system and cross-border activities, to clarify situations in which home and host competent authorities have different positions. E.g., if a crypto-asset is not considered a financial instrument by the home NCA but it is considered a financial instrument by the host NCA, a home Member State CASP could intend to provide services on this particular crypto-asset in the host Member State. Since the host Member State NCA considers that this crypto-asset is a financial instrument it could not allow the provision of the service under MiCA in the host Member State, challenging the freedom of provision of services in the EU and raising problems for the passporting system to operate;

b. the coverage by ICS (Investors Compensation Schemes), a relevant and specific investor protection tool[21] ;

c. the scope of a CASP licence, to clarify that if a CASP provides services on a crypto-asset that qualifies as a financial instrument it would be acting beyond its licence and should then be authorised as an investment firm;

d. the application of the investor protection-related conduct of business rules contained in MiFID II.

4.5 Investor protection, MiFID II and the interpretation of the definition of financial instruments

37. The SMSG believes that an extensive interpretation of the definition of financial instruments would reinforce investor protection thanks to the application of the MiFID II well-established regulatory framework. Consequently, in case of doubt, the SMSG supports the adoption of an extensive interpretation for the qualification of crypto-assets as financial instruments.

38. The SMSG also believes that, to provide clarity to investors, it would be preferable to disclose the regulatory framework to be applied to the specific transaction (i.e., MiCA or MiFID II). In this respect, the SMSG considers that the distributor might state the regulatory regime to be applied in the relevant information documents made available to the investors.

4.6 Indirect exposure to crypto-assets

39. The SMSG shares the specific attention devoted by ESMA Guidelines to assets whose acquisition implies indirect exposure to crypto-assets that do not qualify as financial instruments.

40. The consultation paper specifically mentions the case of derivatives whose underlying asset are related to crypto-assets in Guideline 5. In particular, paragraph 49 of the consultation paper states that derivative contracts relating to a crypto-asset, a basket of crypto-assets or an index on crypto-assets as an underlying asset should be qualified as financial instruments

[21] It is worth noting that potentially different approaches adopted by EU Member States as to the concept of financial instruments may also imply different coverage levels provided by investors compensation schemes within the EU.

within the meaning of MiFID II. The SMSG notes that the qualification of the derivative contract as financial instruments is not contingent on the qualification of the underlying crypto-assets as financial instruments.

41. Additionally, the consultation paper clarifies that, as the term “asset” is not defined within MiFID II, such notion should be interpreted in broad terms, resulting in covering assets such as crypto-assets. The SMSG agrees with this approach since it means a more extensive concept of financial instruments and a greater level of investor protection.

42. The SMSG notes that the consultation paper makes no explicit reference to structured notes whose underlying assets are crypto-assets not qualifying as financial instruments. Since a structured note is usually composed of a spot component (e.g., a stock or a bond) and an embedded derivative, and it is this latter part that refers to the underlying crypto-asset, the SMSG considers that the same rationale that applies for derivatives should apply to structured notes. Consequently, the SMSG is of the opinion that structured notes indexed to crypto-assets should also be considered as financial instruments.

43. The SMSG is also aware that in paragraphs 36 and 37 of Guideline 2 (Conditions and criteria for the classification as transferable securities) a reference is made to “other securities” and, according to the discussions therein reported, it could be concluded that structured notes indexed to crypto-assets not qualifying as financial instruments might be considered as financial instruments. For the sake of clarity, the SMSG is of the opinion that a specific reference should be made to structured notes specifying that they are considered financial instruments (e.g., in paragraph 106 of the Draft Guidelines, where a reference is made to “structured bonds”).

4.7 Conditions and criteria to help the identification of crypto-assets qualifying as other financial instruments

44. The consultation paper states in section 5.3.2 the conditions and criteria to help the identification of crypto-assets qualifying as other financial instruments (i.e., a money market instrument, a unit in collective investment undertakings, a derivative or an emission allowance instrument).

45. The SMSG supports the conditions and criteria defined in the Consultation Paper.

4.8 Hierarchic approach to the classification of hybrid crypto-assets

46. Crypto-assets may be structured as “hybrids” combining, spanning or associating several characteristics, component and purposes (e.g. means of payment, utility-type, investment-type). In the definition of the conditions and criteria attached to hybrid tokens (Guideline 9), the consultation paper highlights that when a hybrid token displays features of a financial instrument, this characteristic should take precedence in its classification. Thus, the classification process for hybrid tokens should not only consider their multifaceted nature but also prioritise their identification as financial instruments where applicable. The primary step

in this process should involve a rigorous assessment to determine if the asset fits the definition of a financial instrument. Only when an asset does not meet these criteria should alternative classifications be considered, such as utility tokens.

47. The SMSG supports the adoption of a hierarchical approach to classification as it ensures regulatory clarity and consistency with the overarching framework of MiCA[22].

4.9 Exchange of information among authorities

48. Given the cross-border nature of crypto-related activities, the SMSG highlights the relevance of information sharing among authorities. A systematic exchange of information would be helpful to share best practice and to accelerate the detection of malpractices (and possibly their spreading across borders).

49. The exchange of information among authorities might involve not only NCAs but also other authorities (e.g., competition authorities).

4.10 Use of technology for monitoring purposes

50. According to Article 3(1)(5) of MiCA, crypto-asset means 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.

51. The SMSG suggests leveraging on the technology used by crypto-assets in order to reinforce monitoring of CASPs activities in terms of scope and speed (e.g., to detect abnormal transactions).

52. Technology may prove important also to counteract potential illegal activity (e.g., money laundering or terrorist financing) carried out through crypto-asset markets by identifying the origin of large buy and sell crypto asset orders or transactions. The identification of the trade origins can be obtained requesting CASPS to notify NCAs the relevant information.

This advice will be published on the Securities and Markets Stakeholder Group section of ESMA's website.

[22] See Q7 ("Do you agree with the conditions and criteria proposed for hybrid-type tokens? Do you have any additional condition and/or criteria to suggest that could be used in the Guidelines? Please illustrate, if possible, your response with concrete examples.").

4.3 Annex III: Guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments

1 Scope

Who?

1. The guidelines apply to competent authorities and to financial market participants, including issuers as defined in Article 3(1), point (10), offerors as defined in Article 3(1), point (13) of MiCA, crypto-asset service providers as defined in Article 3(1), point (15) of MiCA, investors and all persons engaging in activities relating to crypto-assets.

What?

2. These guidelines apply in relation to Article 2(5) of MiCA.

When?

3. These guidelines apply 60 calendar days from the date of their publication on ESMA's website in all official EU languages.

2 Legislative references, abbreviations and definitions

2.1 Legislative references

AIFMD	Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010[23].
DLTR	Regulation (EU) 2022/858 of the European Parliament and of the Council of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology[24].
ESMA Regulation	Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC[25].
MiCA	Regulation (EU) 2023/1114 of the European Parliament and the Council of 31 May 2023 on markets in crypto-assets[26].
MiFID II	Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast)[27].
MMFR	Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds[28].
UCITSD	Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)[29].

2.2 Abbreviations

AIF	Alternative investment fund
ART	Asset-referenced token
CASP	Crypto-asset service provider
DLT	Distributed ledger technology
EBA	European Banking Authority
EMT	Electronic money token
ESMA	European Securities and Markets Authority

[23] OJ L 174, 1.7.2011, p. 1.
[24] OJ L 151, 2.6.2022, p. 1.
[25] OJ L 331, 15.12.2010, p. 84.
[26] OJ L 150, 9.6.2023, p. 40.
[27] OJ L 173, 12.6.2014, p. 349.
[28] OJ L 169, 30.6.2017, p. 8.
[29] OJ L 302, 17.11.2009, p. 32.

ESAs	European Supervisory Authorities
F-NFT	Fractionalised NFT
ITS	Implementing technical standards
NCA	National competent authority
NFT	Non-Fungible Token
RTS	Regulatory technical standards

2.3 Definitions

DLT	Distributed ledger technology (DLT) as defined in Article 3(1)(1) of MiCA.
NFT	Non-fungible tokens refer to crypto-assets that are unique and not fungible with other crypto-assets as mentioned in Article 2(3) of MiCA.
Hybrid tokens	Hybrid tokens refer to crypto-assets that encompass elements from diverse classifications, embodying a composite of characteristics typically associated with distinct types of crypto-assets.

3 Purpose

4. These guidelines are issued under Article 16(1) of the ESMA Regulation and Article 2(5) of MiCA. The purpose of these guidelines is to specify conditions and criteria for determining whether a crypto-asset should qualify as a financial instrument and therefore ensuring the common, uniform and consistent application of the provisions in Article 2(4)(a) of MiCA. Furthermore, these guidelines provide clarifications on certain features of utility tokens, NFTs and hybrid tokens.

5. These guidelines also contain examples for illustrative purposes. While these examples aim to provide clarity and aim at assisting both NCAs and financial market participants in their assessment, they should not substitute the performance of a complete assessment of whether a crypto-asset should qualify as a financial instrument and in that respect, they should not be interpreted as a definitive classification nor substitute or affect the necessary case-by-case analysis.

4 Compliance and reporting obligations

4.1 Status of the guidelines

6. In accordance with Article 16(3) of the ESMA Regulation, national competent authorities and financial market participants must make every effort to comply with these guidelines.

7. National competent authorities to which these guidelines apply should comply by incorporating them into their national legal and/or supervisory frameworks as appropriate, including where particular guidelines are directed primarily at financial market participants. In this case, competent authorities should ensure through their supervision that financial market participants comply with the guidelines.

4.2 Reporting requirements

8. Within two months of the date of publication of the guidelines on ESMA's website in all EU official languages, national competent authorities to which these guidelines apply must notify ESMA whether they (i) comply, (ii) do not comply, but intend to comply, or (iii) do not comply and do not intend to comply with the guidelines.

9. In case of non-compliance, national competent authorities should also notify ESMA within two months of the date of publication of the guidelines on ESMA's website in all EU official languages of their reasons for not complying with the guidelines.

10. Financial market participants are not required to report.

5 Guidelines on the classification of crypto-assets as financial instruments

General – Guideline 1

11. The technological format of crypto-assets should not be considered a determining factor by national competent authorities and financial market participants when assessing the qualification as financial instruments. Following this, the process of tokenisation of financial instruments[30] should not affect the classification of such assets.

12. Tokenised financial instruments should continue to be considered as financial instruments for all regulatory purposes. National competent authorities should take a technology-neutral approach, a principle referred to in MiCA, to ensure that similar activities and assets are subject to the same rules regardless of their form[31].

[30] That could be described as "the digital representation of financial instruments on distributed ledgers or the issuance of traditional asset classes in tokenised form to enable them to be issued, stored and transferred on a distributed ledger"; See Recital 3 of DLTR; see also "financial instrument means those instruments specified in Section C of Annex I, including such instruments issued by means of distributed ledger technology", Article 4(1)(15) of MiFID II.
[31] Recital 9 of MiCA.

5.1 Classification of crypto-assets as transferable securities

Classification as transferable securities – Guideline 2

13. National competent authorities and financial market participants should classify crypto-assets as transferable securities if they confer to their holders equivalent rights to those granted by shares, bonds, other forms of non-equity securities or other transferable securities as referred to in Article 4(1)(44) of MiFID II[32].

14. A crypto-asset should qualify as a financial instrument if it falls within the definition of a transferable security provided by MiFID II[33]. In such case crypto-assets should be subject to the exact same rules as traditional financial instruments in line with the principle of technological neutrality. A substance over form approach should be adopted to determine if a crypto-asset qualifies as a financial instrument.

15. National competent authorities and financial market participants should thus consider that, a crypto-asset qualifies as transferable securities, when it cumulatively fulfils the following three criteria: (i) not being an instrument of payment; (ii) being "classes of securities"; and (iii) being negotiable on the capital market.

i. Exclusion of instruments of payment

16. National competent authorities and financial market participants should note that if a crypto-asset conforms to the definition of an instrument of payment it should not be qualified as a transferable security[34].

17. MiFID II does not provide any definition of "instruments of payment". A crypto-asset that would be qualified as such should be seen as a crypto-asset which is used as a medium of exchange[35]. If a crypto-asset were to have several components, including that of an instrument of payment, national competent authorities and financial market participants should conduct a case-by-case analysis to determine the most appropriate qualification for this crypto-asset.

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[32] Article 4(1)(44) of MiFID II defines transferable securities, which "means those classes of securities which are negotiable on the capital market, with the exception of instruments of payment" and include shares in companies, bonds and securitised debt, as well as "any other securities" giving: (i) a right to acquire or sell a transferable security; or (ii) "giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures". This may include options, warrants, and structured bonds where the interest is linked to any derivative (e.g. selected stock index, interest rate, other derivate or a combination of derivatives).

[33] Article 4(1)(44) of MiFID II.

[34] For more detail on the notion of instrument of payment, see EBA Guidelines on the limited network exclusion under PSD2, 24 February 2022, EBA/GL/2022/02 ; Noteworthy, while MIFID II does not provide such definition, NCAs which have a national definition of instruments of payment have transposed the definition contained in Article 4(14) of Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market in their legislation ; see ESMA Advice Annex 1 Legal qualification of crypto-assets – survey to NCAs, p.11.

[35] For instance, this notion usually includes liquid payment methods like cheques, bills of exchanges as well as non-cash payment tools including cards, bank transfers, direct debits, and electronic money.

ii. Classes of securities

18. National competent authorities and financial market participants should consider the following indicators to identify whether crypto-assets form a "class": (i) the crypto-assets are issued by the same issuer and (ii) the crypto-assets are interchangeable[36], i.e. giving access to the same rights (e.g. dividend rights, voting rights on the issuer's decision-making process, right over a portion of company's assets or rights to liquidation proceeds). If all crypto-assets of the same issuance represent or confer the same rights and obligations and are therefore interchangeable, or if the issuance comprises clearly identifiable different classes of crypto-assets[37], the "class requirement" criterion should be considered to be met. National competent authorities and financial market participants should also note that the existence of multiple classes of crypto-assets within the same issuance should not *per se* affect their qualification as being part of a class of securities, provided each class maintains clearly defined and distinguishable rights and characteristics, as is common with traditional securities issuances.

19. An example of a token pertaining to a class is a scenario where tokens are interchangeable and grant holders equivalent voting rights and dividend entitlements. This interchangeability implies that each token is identical in rights and obligations for all holders. In such cases, national competent authorities and financial market participants may consider that these tokens meet the criteria for being part of a class.

20. After having assessed if the crypto-asset is part of a class, national competent authorities and financial market participants should assess if it is part of a class of securities. In this respect, they should consider that the classes of securities mentioned in points (a) to (c) of Article 4(1), point (44), of MiFID II are examples of securities that fall within the definition of transferable securities. To determine if a crypto-asset confers rights of securities, NCAs should evaluate whether the rights granted by the crypto-assets are equivalent to those typically granted by a specific type of transferable security.

21. To illustrate this, crypto-assets that would represent an ownership position in a company's capital and confer to their holders rights equivalent to the rights conferred by shares (e.g. stake in a company, right to vote with respect to certain decisions of the company, rights of dividend, rights to the company's liquidation proceeds), should be qualified as securities that have features specific to shares[38].

22. An assessment should also be made between crypto-assets giving voting rights typically associated with shares (e.g. voting rights on the company's decision-making process) and those giving governance rights that are more linked to technical and/or operational decisions

[36] The idea is to exclude crypto-assets that would be unique or that would have been customised for a particular investor (e.g. NFTs).
[37] Each class being interchangeable.
[38] National competent authorities and financial market participants should take into account that the term "share" is not defined by the EU law. As a result, Member States interpret this concept differently; in some, shares may lack dividend or voting rights (such as preference shares) yet still qualify as shares.

and which do not provide holders with any influence over corporate governance matters. For instance, crypto-assets granting voting rights on the company's decision-making process allowing holders to participate in corporate governance decisions (such as electing board members, approving mergers and acquisitions) should be considered as granting voting rights equivalent to shares. On the contrary, crypto-assets that would grant governance rights solely on technical matters and/or operational changes, such as protocol upgrades and fee adjustments, without giving holders any influence over corporate governance decisions, should not confer rights equivalent to shares and should be distinguished from securities that provide traditional shareholder powers.

23. An example is that of crypto-assets which are designed as utility tokens within a specific ecosystem such as tokens used to access services, providing holders with access to premium content on a video game platform or granting discounts on future purchases (e.g. reduced transaction fees or priority access to new products). In such case, if the tokens do not provide any financial returns comparable to financial instruments (e.g. dividends or interest payments) and are lacking the element of pertaining to a class of securities, then the tokens should not be qualified as transferable securities. This reasoning would apply even if such tokens were bought by investors with the expectation of profit due to their potential appreciation in value.

24. National competent authorities and financial market participants should further take into account that tokens tracking the performance of one or several underlying assets, which grant holders rights comparable to those of acquiring or selling transferable securities (such as the right to acquire shares, bonds or similar transferable securities) should be viewed as a strong indication of conferring rights equivalent to securities and could hence be qualified as transferable securities if they are part of a class and are negotiable. National competent authorities and financial market participants should also consider whether such tokens give rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities, or other indices or measures.

25. With reference to the class of “bonds or other forms of securitised debt”[39], provided that these instruments are negotiable on the capital market, national competent authorities and financial market participants should note that crypto-assets that would represent a debt akin a monetary debt like a portion of a loan owed by the issuer to the crypto-asset holder should be considered as securities that have features specific to bonds. The same applies for a debt that would be incorporated into a security, excluding bonds or money market instruments.

26. As an example, national competent authorities and financial market participants may consider the case of a company that would issue crypto-assets that provide to their holders regular interest payments and/or promise the repayment of the principal at a future date. Such tokens

[39] Article 4(1)(44), point (b) of MiFID II.

should be considered as pertaining to a class of securities similar to bonds due to their debt-representing characteristics.

27. National competent authorities and financial market participants should take into account that such assets may also fall within the ambit of “other securities”, as mentioned in MiFID II's Article 4(1), point (44), point (c), which give rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities, or other indices or measures.

iii. Negotiability on the capital market

28. National competent authorities and financial market participants should determine if the crypto-asset is freely negotiable on the capital market[40]. National competent authorities and financial market participants should therefore consider that if inherent restrictions on transfer prevent a crypto-asset from being negotiated, it is not a transferable security.

29. A crypto-asset should be considered to be negotiable where it is capable of being transferred or traded freely[41]. The abstract possibility of being transferred or traded should be deemed sufficient, even if there is no specific market for the product or even if there is a temporary lock-up period. The negotiability requirement set out in Article 4(1), point (44), of MiFID II seems to be met by most crypto-assets, since the DLT makes the transfer of ownership from the seller to the buyer possible.

30. National competent authorities and financial market participants should also consider that a crypto-asset can be designed in a way that it does not allow for any transfer in capital markets. Some restrictions may be placed on negotiability by not allowing holders to negotiate and/or transfer crypto-assets to a person other than the issuer. In respect of any restrictions on the transfer of crypto-assets, these need to be considered on a case-by-case basis, as the nature and impact of the restriction could be sufficient to render the instrument non-tradable[42]. Similarly, national competent authorities and financial market participants should also take into account other restrictions that may exist and may not prevent a crypto-asset from being

[40] The reference to “capital markets” is not defined but as a concept is intentionally broad to include all contexts where buying and selling interests in securities meet. It does not limit the scope to securities listed or traded on regulated markets; See Q&As published by the Commission on MiFID Directive 2004/39/EC.

[41] Transferable securities should only be considered “freely negotiable” if before admission to trading no restrictions exist which prevent the transfer of crypto-assets in a way that would disturb “*creating a fair, orderly and efficient market*” (see recital 1 to Delegated regulation (EU) 2017/568 of 24 May 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards for the admission of financial instruments to trading on regulated markets). Therefore, the fact that investors must be for instance whitelisted should not on its own prevent a crypto-asset to be qualified as a transferable security, to be assessed on a case-by-case basis, see paragraph 29.

[42] Issuer-imposed restrictions may potentially limit the transferability of crypto-assets in various ways. Time-lock transfers may restrict the transfer of the asset for a specific period, preventing transactions before a set date or event. Geographical restrictions limit transfers to certain regions or jurisdictions, often to comply with local regulations. Technical restrictions, such as covenants, can be specific conditions encoded into the smart contract, which may require certain criteria to be met (e.g., holding periods, usage constraints) before transfers are allowed. In any case, such restrictions should be assessed on a case-by-case basis.

tradable (e.g. whitelist-only transfers, selling restrictions for a specified period of time, lock-up, specific country limitation).

31. National competent authorities and financial market participants should broadly interpret the notion of capital market, including all contexts where buying and selling interests in securities meet, and simultaneously assess the differences between traditional venues and trading platforms for crypto-assets. Generally, capital markets are understood as trading venues where savings and investments are channelled between buyers which want to invest in an asset, and sellers which need capital against their assets. Consequently, if crypto-assets are capable of being traded on a trading platform equivalent to a MiFID trading platform, this should be a conclusive indication that they are negotiable on a capital market. The fact that a crypto-asset is traded on online trading platforms may serve as an indicator of their negotiability but does not necessarily coincide with the notion of capital market.

32. Therefore, national competent authorities and financial market participants should consider that the dependable criteria for classifying a crypto-asset as a transferable security might include: (i) transferability and interchangeability (negotiability and belonging to a class), and (ii) possession of rights akin to the rights of other securities. Drawing from the MiFID II definition of transferable securities, all aforementioned criteria need to be satisfied for crypto-assets to be categorised as a transferable security.

5.2 Classification as other types of financial instruments

Classification as money-market instruments – Guideline 3

33. 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 normally traded within the money market, with the exception of payment instruments.

34. National competent authorities and financial market participants should assess whether the crypto-assets possess characteristics similar to treasury bills, certificates of deposit, and commercial papers (e.g. represent a certificate of a credit balance). These instruments typically represent short-term negotiable debt obligations, issued by governments, credit institutions, or corporations to raise funds in the money market[43]. In particular, certificates of deposit are transferable instruments that constitute short-term debt obligations. Accordingly, such crypto-assets should embody similar features, including obligations to repay a credit balance, without confusing them with standard banking deposits under Directive 2014/49/EU.

[43] "Money market instruments are transferable instruments normally dealt in on the money market and include treasury and local authority bills, certificates of deposits, commercial papers, bankers' acceptances, and medium- or short-term notes. Money market instruments should be eligible for investment by MMFs only insofar as they comply with maturity limits and are considered by an MMF to be of high credit quality" (see recital 21 of the Money Market Fund Regulation 2017/11/31/EU, MMFR).

This distinction ensures that only instruments meeting the necessary criteria for money market instruments are treated as such.

35. National competent authorities and financial market participants should consider that money-market instruments are known for their short maturity periods[44]. To qualify as a money-market instrument under MiFID II, a crypto-asset should thus, among other things, exhibit a predefined or residual maturity or redemption date maturity as required for in MMFR. This criterion ensures alignment with the core characteristic of short-term nature that money-market instruments possess. Some platforms offer short-term savings accounts for crypto-assets which aim to maintain a stable value (crypto-assets pegged to stable assets like Euro or U.S. dollar). If these savings arrangements had a short maturity and provided returns to users, this might be seen as one feature analogous to traditional money-market instruments.

36. As an example, national competent authorities and financial market participants may consider a scenario where a company would issue a crypto-asset traded on a platform to provide short-term loans to users, without being a payment instrument but a tradable token within the money market. It represents a certificate of credit balance, repayable by the borrowing party with interest at the end of a short period. Although the token's value is pegged to the Euro to maintain stability, the price of the token may fluctuate slightly to reflect the accrued interest over the loan period but may be accurately determined at any time. By meeting these criteria collectively, such crypto asset should, for those characteristics, be considered analogous to a short-term debt obligation used for financing and investment thus, where also other characteristics are met, should be considered as a money-market instruments.

Classification as units in collective investment undertakings – Guideline 4

37. National competent authorities and financial market participants should consider that for a crypto-asset to be qualified as a unit in a collective investment undertaking (CIU) the project attached to the crypto-asset should involve collectively: (i) the pooling of capital from a number of investors; (ii) the purpose of investing this capital in accordance with a defined investment policy; and (iii) with a view to generating a pooled return for the benefit of those investors[45]. It should be noted that, to qualify as a collective investment undertaking, it does not matter whether participants contribute fiat currency, cash equivalent, or crypto-assets to the pool.

38. For example, a crypto-asset that would enable holders to (i) invest in digital investment funds, where holders are entitled to a proportional share of the returns generated by the managed portfolio, without any participation in the governance regarding investment strategies (e.g. no voting rights) and (ii) redeem their tokens for a share of the portfolio's value, should be considered as a unit in a collective investment undertaking.

[44] For instance - even though not valid for all money market instruments - short maturity periods at issuance or residual of up to 397 days as mentioned in Article 3 of Commission Directive 2007/16/EC.
[45] Guidelines on key concepts of the AIFMD, 13 August 2013, ESMA/2013/611, par. 12.

39. National competent authorities and financial market participants should also consider whether token holders – as a collective group – have day-to-day discretion or control[46] over operational matters relating to the daily management of the assets included in the pool. Where this is the case, the crypto-asset would likely not qualify as a collective investment undertaking. In this context, it is not relevant whether decisions are made by humans, code/algorithms, or smart contracts as long as those decisions are in strict adherence to the established investment policy.

40. For instance, a token received as part of a liquid staking service (i.e. where users delegate their tokens/governance rights attached to those tokens to a staking service provider) could be regarded as representing a share in the staking rewards generated by the pooled staked assets/governance rights. However, if there is no collective management by a third party following a predefined investment policy – such as users retaining day-to-day control over their staking tokens and can trade them freely[47] – such crypto-asset should not typically be considered by national competent authorities and financial market participants as a unit of a collective investment undertaking.

41. While some schemes may have diversification obligations, having a diversified portfolio is not a criterion for classification. Liquidity of the assets invested in or of the units issued by the undertaking is also not a criterion for the classification as a collective investment undertaking. For a crypto-asset to be classified as a unit in a collective investment undertaking, it should aim at providing investors with a pooled return, which is generated by the pooled risk arising from acquiring, holding or selling of the underlying investment assets. These criteria ensure that investors are entitled to a share of profits or losses as a result of their participation.

42. For a crypto-asset to be qualified as a unit or share of an alternative investment fund, it should be used to raise capital from a number of investors with a view to investing in accordance with a defined investment policy for the benefit of those investors[48]. National competent authorities and financial market participants should carefully assess in particular whether the crypto-asset has a defined investment policy, taking into account the criteria set out in the ESMA Guidelines on key concept of the AIFMD[49].

43. Another key aspect to take into account is the general commercial or industrial purpose of the crypto-assets project[50]. For the issuer of a crypto-asset to be classified as a collective

[46] Ibid.
[47] "Freely" here refers to the ability to transfer or trade tokens without significant restrictions, excluding necessary operational requirements due to the use of distributed ledger technology (DLT), such as 24 to 48-hour locking period, which are common in liquid staking services.
[48] Without requiring an authorisation pursuant to Article 5 of UCITSD. See, article 4(1)(a)(ii) of AIFMD.
[49] Section IV of ESMA/2013/611.
[50] Guidelines on key concepts of the AIFMD, 13 August 2013, ESMA/2013/611, p.29 and 31. The general commercial or industrial purpose notion can be defined as “the purpose of pursuing a business strategy which includes characteristics such as running predominantly i) a commercial activity, involving the purchase, sale, and/or exchange of goods or commodities and/or the supply of non-financial services, or ii) an industrial activity, involving the production of goods or construction of properties, or iii) a combination thereof.”

investment undertaking, the purpose of the crypto-asset project should not be a general commercial or industrial purpose.

Classification as derivative contracts – Guideline 5

44. In relation to derivatives and crypto-assets, national competent authorities and financial market participants should distinguish two situations. The first situation, not envisaged by MiCA, is when crypto-assets serve an as underlying asset for derivatives. The second situation is when crypto-assets themselves can be qualified as derivatives.

45. In relation to the first situation, national competent authorities and financial market participants should consider the possibility for crypto-assets to be eligible underlying assets in derivative contracts. National competent authorities and financial market participants should ensure that their approach to evaluating such derivatives is aligned with the categories specified in Annex I Section C, points (4)-(10) of MiFID II.

46. For example, national competent authorities and financial market participants could consider the case of a crypto-asset designed as a prearranged sale agreement where one party agrees to buy a certain amount of specific crypto-assets at a future date for a predetermined price[51]. The rights attached to this crypto-asset would include the obligation to deliver the crypto-assets at the agreed date and price, regardless of the market price at that future date or to pay the difference between the agreed price and the market price. Depending on the circumstances, such a contract establishing a future commitment and deriving its value from the underlying cryptocurrency's price, could be considered as meeting the characteristics of a derivative contract.

47. National competent authorities and financial market participants should also consider the unique nature of perpetual futures, which are derivative instruments that do not have an expiration or settlement date. Unlike traditional futures contracts, perpetual futures are designed to provide continuous exposure to the underlying asset without requiring periodic rollovers. Despite their unique structure, perpetual futures should be treated as derivative contracts as they involve an agreement between parties to exchange the performance of an underlying asset over time, and their value is derived from the price movements of that asset. National competent authorities and financial market participants should thus ensure that tokenised perpetual futures are assessed against the criteria set out in Annex I Section C, points (4)-(10) of MiFID II, acknowledging their growing significance in the crypto-asset markets.

48. In relation to the second situation, regarding the conditions and criteria for crypto-assets to be qualified as derivative contracts, national competent authorities and financial market

[51] Provided that such arrangements do not fall within the scope of primary market transactions or other pre-arranged sales that are not classified as derivatives under MiFID II.

participants should as part of their assessment consider whether: (i) the rights of the crypto-asset holders are contingent upon a contract based on a future commitment (which can be either a forward, an option, a swap or a future), creating a time-lag between the conclusion and performance of the obligations under such contract; (ii) the crypto-asset's value is derived from that of an underlying asset[52] and (iii) follows the settlement modalities as referred to in Annex I Section C, points (4)-(10) of MiFID II.

49. National competent authorities and financial market participants should ascertain that the crypto-asset has an underlying reference point such as, rates, indexes, or instruments relevant in accordance with Annex I Section C, points (4)-(10) of MiFID II. To do so, national competent authorities and financial market participants should take into account the list of Annex I Section C, points (4)-(10) of MiFID II as well as all related level 2 texts[53], and carefully analyse if the relevant crypto-asset includes the elements mentioned therein. The underlying is the basis for determining the value or payoff of the derivative. The value of the crypto-asset should also depend on changes in the value of the underlying reference asset. If a crypto-asset does not derive its value from specified underlying assets as defined in MiFID II, but exists as a standalone crypto-asset, it should be distinguished from a derivative contract.

50. National competent authorities and financial market participants should also consider, that when the value of a token is established through reserved assets, this token should be considered as an asset-reference token within the meaning of MiCA and not as a derivative. On the contrary, when the value or performance of the token is established by synthetically referencing another asset or right or a combination thereof, national competent authorities and financial market participants should analyse whether it should be qualified as a financial instrument.

51. An example could be a company that issues a crypto-asset aiming at reflecting the value of a share, bond or other type of financial instrument (performance and/or revenues generated). National competent authorities and financial market participants should consider whether these tokens confer an economic benefit directly correlated to a financial instrument (in a manner akin to that of a securitised equity swap) and should be considered as a derivative.

52. As another illustration, national competent authorities and financial market participants could consider a crypto-asset designed to track the performance of an index composed of emerging

[52] E.g. the underlying is commodity like gold, oil or gas; the token has link with securities, foreign exchange, rates, credit, or other financial underlying instruments; the trade involve actual European Emission Allowances or equivalents like Certified Emission Reductions; the token's link to climatic variables, freight rates, inflation rates, or other official economic statistics; whether the token representing a cash-settled arrangement based on the difference between open and closing trade prices, the token's design or use primarily for transferring credit risk.

[53] See Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, (OJ L 87, 31.3.2017, p. 1). Financial market participants and competent authorities are invited to also consider Q&As and Guidelines as the ESMA Questions and Answers on MiFID II and MiFIR commodity derivatives topics, ESMA70-872942901-36, 23 September 2022; See also ESMA Guidelines on the application of C6 and C7 of Annex 1 of MiFID II, ESMA-70-156-869, 5 June 2019.

market crypto-assets. In this example, the primary characteristic of this crypto-asset is that it provides the holder with the returns of a specific index over a defined period. In a swap arrangement, two parties agree to “swap” the performance of this index, with counterparties respectively receiving or paying the index's performance at regular intervals. If the crypto-asset similarly represents an obligation to deliver the equivalent value of the index at a future date, it resembles a futures contract. In this example, the holder gains or loses depending on the index's value at the contract's maturity compared to the initial agreement. This setup establishing a time-lag between the contract's conclusion and execution, and for which the value of the crypto-asset depends on the niche index's performance, should be considered as meeting the characteristics of a derivative contract, provided that the other relevant elements referred to in MiFID II Annex I Section C, points (4)-(10) of MiFID II are present.

53. An example could also be drawn from a crypto-asset representing synthetic exposure to a basket of tokens. In this example, such crypto-asset mimics the performance of a basket of tokens without requiring direct ownership of the underlying assets. In a synthetic exchange-traded product setup, the holder gains from the combined performance of the basket, with the contractual terms specifying the exposure. The crypto-asset could typically be structured to provide returns based on specific performance metrics and maturity conditions, making it a structured financial instrument tailored to the performance of tokens. The synthetic exposure means the holder's returns depend on the future performance of the underlying tokens, involving a time-lag between the contract's initiation and the realisation of gains or losses. The value of the crypto-asset is directly tied to the combined performance of the basket of tokens. Furthermore, the terms of the synthetic exposure, including maturity and performance metrics, are defined. Consequently, such crypto-asset should be qualified as a derivative contract provided that the other relevant elements referred to in Annex I Section C, points (4)-(10) of MiFID II are present.

54. A crypto-asset’s model where one party agrees to buy a certain amount of a crypto-asset from another party at a future date for a predetermined price should likely be seen as a forward/ future. Similarly, a crypto-asset that provides a right (but not the obligation) to buy or sell a specific crypto-asset (even a utility token) at a predetermined price within a certain timeframe should likely qualify as an option. A crypto-asset might also represent futures contracts for traditional commodities like gold or oil and hence be classified as a financial instrument where (in this case and in the previous cases) the conditions of the abovementioned points (4)-(10) of Annex I Section C, of MiFID II are met.

55. National competent authorities and financial market participants should carefully consider whether the form of settlement, whether in cash or through any crypto-assets, may affect the fundamental general classification of the product (i.e. between crypto-assets regulated under MiCA and financial instruments), if all other inherent characteristics and functions of derivative contracts in accordance with MiFID II are fulfilled by a product. Subject to the necessary case-by-case assessment, while the method of settlement is an important consideration, the

general characteristics of the product are not likely to be inherently altered by the settlement medium.

Classification as emission allowances – Guideline 6

56. National competent authorities and financial market participants should consider that for a crypto-asset to be classified as an emission allowance, it should represent a right to emit a certain quantity of greenhouse gases and be recognised for compliance with the EU Emissions Trading Scheme. The crypto-asset's capability to be exchanged, managed and used like conventional emission allowances within existing carbon trading frameworks should also be assessed.

57. Crypto-assets that represent a verifiable emission allowance recognised for compliance with the requirements of Directive 2003/87/EC [54] (or a set number of allowances) and that are tradeable, should fall under MiFID II's remit.

58. National competent authorities and financial market participants should take into account that crypto-assets should have to be recognised for compliance with the requirements of Directive 2003/87/EC. This means that for a crypto-asset to be classified as an emission allowance, it should ideally be tied to or represent such recognised units. A crypto-asset issuance that would not be recognised by a Member State and organised by the European Commission could be qualified as a voluntary carbon credit and thus be out of the scope of the definition of a financial instrument.

59. In order to be considered as an emission allowance, the crypto-asset should confer a clear right regarding emissions, such as the right to emit a set quantity of greenhouse gases or serve as a recognized offset for such emissions. National competent authorities and financial market participants should consider in their assessment whether companies and organisations may use this crypto-asset to fulfil legal obligations related to carbon emissions reduction. The crypto-asset should also be tradable on third-party platforms or be capable of being traded.

60. It should be highlighted that emission allowances are fundamentally different from most crypto-assets currently on the market, which often represent a store of value, a stake in a project, or access to a service.

[54] According to Article 3(a) and (b) of Directive 2003/87/EC 'allowance' means an allowance to emit one tonne of carbon dioxide equivalent during a specified period, which shall be valid only for the purposes of meeting the requirements of this Directive and shall be transferable in accordance with the provisions of this Directive and 'emissions' means the release of greenhouse gases into the atmosphere from sources in an installation'.

5.3 Background on the notion of crypto-assets

Classification as crypto-assets – Guideline 7

61. National competent authorities and financial market participants should take into account whether the crypto-asset is a digital representation of value or rights, capable of being transferred and stored using DLT, including whether these values or rights represent a right vis-à-vis the issuer and/or someone designated by the issuer. The nature of the crypto-asset's electronic transfer and storage should be taken into account considering the use of DLT or similar technologies.

62. National competent authorities and financial market participants should consider that although a utility token may be accompanied by governance rights (i.e. governance crypto-assets), it should not replicate the rights attached to financial instruments, starting with those attached to transferable securities within the meaning of MiFID II[55]. The same applies to crypto-assets accompanied by an expectation of profits. National competent authorities and financial market participants should therefore consider that such expectation of a future profit should not in itself be sufficient to qualify a crypto-asset as a financial instrument in accordance with MiFID II[56].

63. National competent authorities and financial market participants should consider that crypto-assets that are non-transferable to other holders and that are only accepted either by the issuer or by the offeror do not fall within the scope of MiCA[57]. The same applies to crypto-assets that are unique and not fungible with other crypto-asset[58].

64. These guidelines are not intended to specify all types of crypto-assets that do not fall under the scope of MiCA and are listed in Article 2(4) of that Regulation. Nevertheless, an assessment of whether a crypto-asset qualifies as one or more of the instruments listed in Article 2(4) of MiCA and its similarity to financial instruments should be carried out by national competent authorities and financial market participants as part of their assessment.

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

65. National competent authorities and financial market participants should consider that, crypto-assets that are unique and not fungible with other crypto-assets are outside the scope of MiCA

[55] Art. 4(1)(44) of MiFID II. In any case, as explained above, the classification as a financial instrument needs to be performed by assessing all the features/characteristics of the relevant financial instrument as referred to in MiFID II.
[56] In contrast to traditional shares, a utility token should give neither financial rights that would be related to a company's profits, capital, or liquidation surpluses - and thus representing an ownership position in a company's capital (e.g. unit of equity ownership in the capital stock of a corporation) - nor voting rights which would lead the investor to participate to the company's decision- making process (e.g. token giving the right to vote on matters of corporate policymaking).
[57] See recital 17 of MiCA.
[58] Article 2(3) of MiCA; See also recital 10 of MiCA.

(e.g. digital art, collectibles, and tokens representing unique services or physical assets, such as product guarantees or real estate).

66. In addition, regardless of the exemptions under MiCA, if NFTs meet the criteria of financial instruments they will be subject to MiFID II and other relevant EU regulations. The same principle applies if NFTs qualify under other regulatory frameworks.

67. National competent authorities and financial market participants should consider that to be unique, NFTs should be considered non-substitutable. They should have clear distinct characteristics and/or rights compared to the other crypto-assets issued by the same (or any other) issuer. National competent authorities and financial market participants should not base the classification of a crypto-asset as unique and non-fungible solely on its technical specificities, such as the attribution of a unique identifier or the use of specific technical features and standards.

68. National competent authorities and financial market participants should base their assessment of whether an asset is unique and non-fungible on a range of relevant indicators attached to NFTs, such as (but not limited to): intrinsic value and rarity (e.g. whether the crypto-asset possesses unique attributes that contribute to its intrinsic value and rarity, making it distinct from other assets); utility and functionality (e.g. specific utility or functionality); ownership and rights (e.g. exclusive access or usage rights that are unique to the holder).

69. When evaluating the uniqueness of a crypto-asset, national competent authorities and financial market participants should also focus on the features that contribute to its distinct value. If a crypto-asset's valuation largely stems from its comparability to others with equivalent attributes, rendering them substitutable, it should not warrant an exemption under MiCA. Conversely, if NFTs derive their value from their unique characteristics or the specific utility they provide to the holder while they may be traded and speculated upon, they should not be seen as substitutable as their value cannot be easily compared to other assets.

70. For this purpose, an “interdependent value test” may be considered by national competent authorities and financial market participants as part of their assessment in order to classify a crypto-asset as unique and non-fungible considering: (i) if the value of the crypto-asset primarily stems from its unique characteristics and/or the utility/benefits it offers to its holder (e.g. a specific NFT tied to a limited edition digital artwork by a renowned artist); (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 or collection (e.g. the existence of a common trading price for a series of tokens)[59]; as well as (iii) the unique characteristics that distinguish these crypto-assets from others.

[59] Such interconnection may be exacerbated by the size of the series or collection which NFTs belong to.

71. The assessment of uniqueness and fungibility in the context of MiCA should be considered independently of the asset's negotiability on secondary markets. The ability to trade a crypto-asset on such markets does not inherently affect its classification under MiCA as unique or non-unique.

72. National competent authorities and financial market participants should not automatically consider fractionalised NFT (F-NFTs) as unique and non-fungible[60]. As part of their assessment, national competent authorities and financial market participants should take into account: whether the crypto-assets represent a partial ownership stake in a single unique and non-fungible token; if fractional parts, when considered separately, are deemed unique and non-fungible; whether these fractional parts share identical attributes or characteristics; and the possibility of reconstructing complete ownership of the unique and non-fungible token by aggregating all its fractional components.

73. For instance, national competent authorities and financial market participants may consider an NFT collection where an NFT is fractionalised into hundreds of smaller tokens representing a part of the initial NFT picture. While the original NFT picture is unique, the fractionalised tokens might not individually meet the criteria of being unique and non-fungible. If all fractional parts can be recombined to restore full ownership of an original NFT, this may indicate that the fractional parts do not independently qualify as unique and non-fungible under MiCA.

Hybrid crypto-assets – Guideline 9

74. National competent authorities and financial market participants when determining whether a crypto-asset has hybrid characteristics should first evaluate if the crypto-asset meets the criteria of a financial instrument. If the hybrid token displays features of a financial instrument, such nature should take precedence in its classification[61]. This assessment should be the primary focus before considering alternative classifications, such as utility tokens.

75. National competent authorities and financial market participants should prioritise assessing a crypto-asset's inherent attributes over the labels provided by issuers, especially for hybrid tokens whose functions or attributes might evolve during their life-cycle, to determine whether they seamlessly combine investment-driven functions (e.g. returns or capital appreciation), with utility-centric purposes (e.g. granting exclusive access to a service or digital platform).

76. National competent authorities and financial market participants should take into account whether the crypto-asset possesses a range of characteristics that complicate its classification (e.g. considering whether the crypto-asset fulfils multiple roles or combines various attributes, such as aspects of a financial instrument, payment, and utility; the extent

[60] Ibid.
[61] This approach aligns with the wording of recital 9 of MiCA, which explicitly states that crypto-assets qualifying as financial instruments fall outside the scope of this regulation.

to which the presence of these diverse characteristics and functions contributes to the crypto-asset's overall definition).