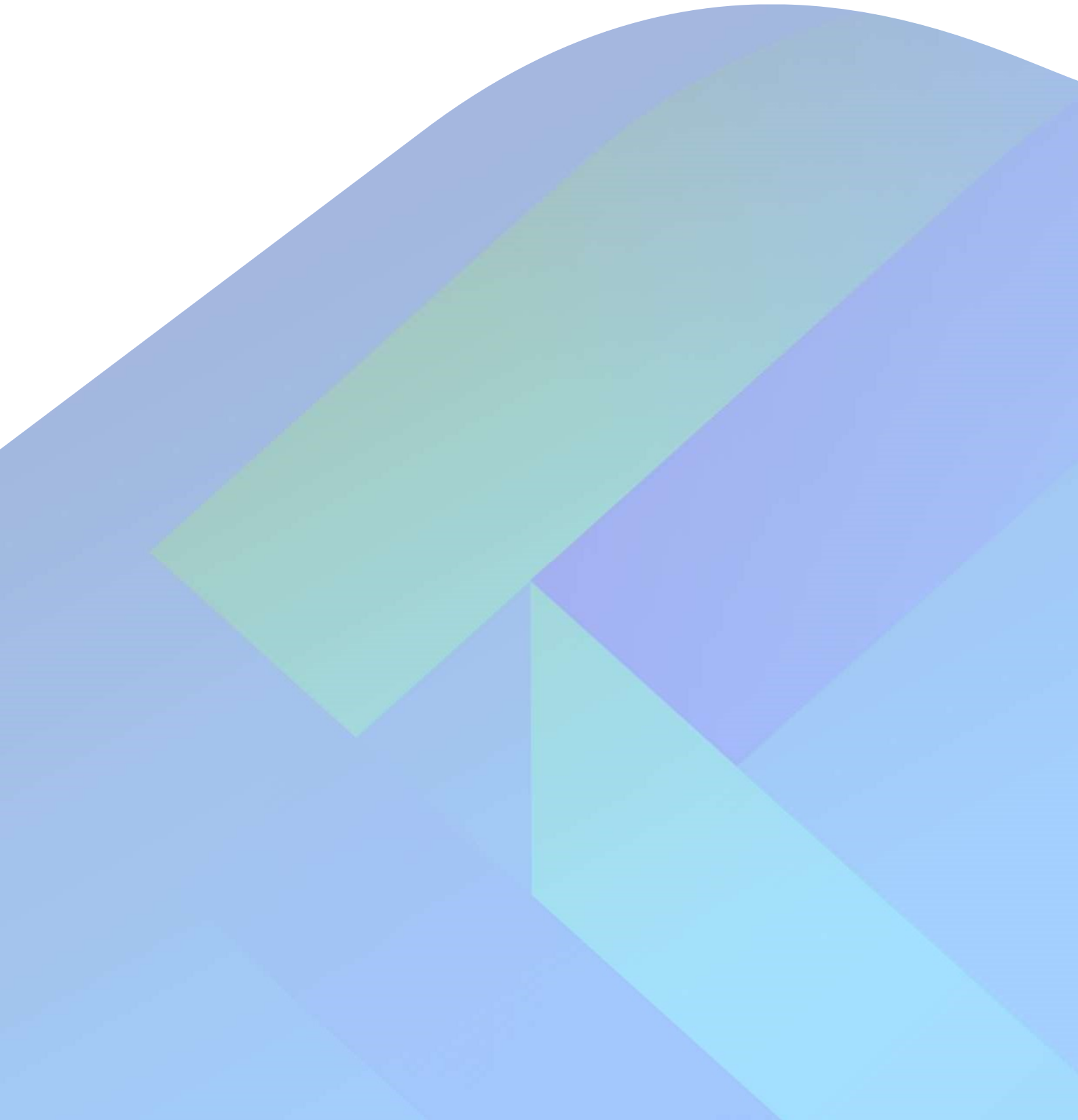


# Consultation paper

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



## Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex I. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **29 April 2024**.

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading 'Your input - Consultations'.

### Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

### Data protection

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading '[Data protection](#)'.

### Who should read this paper?

All interested stakeholders are invited to respond to this consultation paper. In particular, ESMA invites crypto-asset issuers, crypto-assets service providers, financial entities dealing with crypto-assets as well as any stakeholders that have an interest in the market for crypto-assets.

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## 2 Executive Summary

### Reasons for publication

The Regulation on markets in crypto-assets (MiCA)<sup>1</sup> was published in the Official Journal of the EU on 9 June 2023. The European Securities and Markets Authority (ESMA) has been empowered to develop technical standards and guidelines specifying certain provisions. Prior to the below consultation paper, ESMA has already published two consultation packages in July 2023 and in October 2023. The aim of this consultation paper is to collect views, comments and opinions from stakeholders and market participants on the appropriate implementation of MiCA and in particular in relation to MiCA certain mandates that have to be developed by December 2024.

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 market participant should consider, ESMA is therefore considering the adoption of the guidelines attached.

ESMA has prepared this Consultation Paper (CP) in order to consult interested parties for the purpose of producing these guidelines. Respondents are encouraged to provide the relevant information to support their arguments or proposals.

### Contents

Section 2 explains the background to the proposals; section 3 focuses on the scope of the guidelines while section 4 presents the general approach of the guidelines. Annex I lists all the questions set out in the consultation paper; and Annex II contains the full text of the draft guidelines.

### Next Steps

ESMA will consider the feedback received to this consultation and expect to publish a final report by the end of 2024 at the latest.

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<sup>1</sup> Regulation (EU) 2023/1114 of the European Parliament and the Council of 31 May 2023 on markets in crypto-assets (“MiCA”).

## 3 Background

### Overview

#### **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.*

1. 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).
2. The guidelines are meant to provide more clarity to National Competent Authorities (NCAs) and 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. These guidelines should be published by 30 December 2024.
3. In its 2018 FinTech Action plan, the European Commission requested the European Supervisory Authorities (ESAs) to assess the suitability of the EU regulatory framework with regard to crypto-assets offerings and secondary market activities<sup>2</sup>. To gain clarity on which crypto-assets might be qualified as financial instruments in the EU (and could therefore be subject to existing legislations), ESMA conducted a survey in the summer of 2018, involving EU NCAs<sup>3</sup>. The survey used a selection of crypto-asset use cases accessible to EU investors, showcasing a variety of products from pure investment crypto-assets to utility tokens, and combinations thereof<sup>4</sup>.
4. Based on this previous work, the draft guidelines presented below outline ESMA's proposal on the conditions and criteria that should be used for determining whether a crypto-asset should qualify as a financial instrument and therefore fall within the scope of sectoral Regulations other than MiCA.
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 comply with both the crypto-asset definition of MiCA, and the financial instrument definition of MiFID II. It can also be noted that ESMA, jointly with EBA and EIOPA, have to develop another set

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<sup>2</sup> Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions Fintech Action Plan: for a more competitive and innovative European financial sector.

<sup>3</sup> 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.

<sup>4</sup> Pure payment-type crypto-assets were not included in the sample set on purpose as they are unlikely to qualify as financial instruments.

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.

6. While this Consultation Paper does not include a draft cost-benefit analysis, ESMA has developed its draft guidelines having due regard to the principle of proportionality and being mindful about the possible costs the obligations they contain would create for market participants. ESMA considers that the provisions included in the draft guidelines in the Annex of this paper do not create new costs for concerned market stakeholders beyond those that naturally stem from the obligations in MiCA. Nevertheless, respondents are invited to highlight in their response any specific concerns the ESMA proposals could raise for them in terms of their associated costs.

### **Relevant key issues and considerations**

7. 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.
8. 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 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.
9. The MiCA definition of crypto-assets is also distinct from the definition of DLT financial instruments introduced by the Pilot Regime<sup>5</sup> and which refers to the limited types of financial instruments that can be admitted to trading or recorded on a DLT market infrastructure<sup>6</sup>.
10. 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. Whilst the MiCA regulation closes the existing regulatory gap in relation

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<sup>5</sup> Regulation (EU) 2022/858 of the European parliament and of the council of 30 May 2022 (“DLTR”).

<sup>6</sup> “DLT financial instrument means a financial instrument that is issued, recorded, transferred and stored using distributed ledger technology”; Article 2(11) of DLTR.

to crypto-assets, it does not cover all types of crypto-assets<sup>7</sup>. Non-Fungible-Tokens (NFTs) are outside the scope of MiCA under certain conditions set out in the regulation<sup>8</sup>.

11. 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 define transferable securities, others use concept-based definitions. There might therefore be slight variances amongst NCAs about what constitutes a financial instrument<sup>9</sup>.
12. This absence of a common definition and shared criteria applicable to all financial instruments makes it more difficult to adopt a holistic approach in these draft guidelines and to establish a standardised test that could be applied to all types of 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.
13. Finally, 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<sup>10</sup>.

## 4 Scope of the Guidelines

14. The below guidelines are of interest to all stakeholders (issuers, crypto-asset service providers, investors, etc.) engaged in activities relating to crypto-assets since this guidance aims to assist in determining which legal regime will apply to them.

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<sup>7</sup> More specifically, the MiCA Regulation does not apply either to crypto-assets that qualify as deposits, funds (except if they qualify as e-money tokens), securitisation positions, non-life or life insurance products and pension products; See Art. 2(4) of MiCA.

<sup>8</sup> See recitals 10 and 11 of MiCA.

<sup>9</sup> 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).

<sup>10</sup> See recital 14 of MiCA.

15. The guidelines are also of direct interest to NCAs that would have to comply with them (or explain their non-compliance) and use them for authorisation of issuers of crypto-assets as well as crypto-asset service providers and their on-going supervisory activities.
16. 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.

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

### 5.2 General approach

17. The goal of these guidelines is to provide NCAs and market participants with structured yet flexible conditions and criteria to determine whether a crypto-asset can be classified as a financial instrument.
18. To do so, the draft guidelines strike a balance between (i) providing guidance (i.e. conditions and criteria) to help NCAs and 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<sup>11</sup>. Such conditions and criteria pinpoint specific areas of consideration, guiding NCAs and market participants in their assessment to focus on essential attributes. This will reduce misunderstandings and misinterpretations of policy intent and support a harmonised approach throughout the Union.

**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?**

### 5.3 Classification as Financial Instruments

19. As explained above, 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<sup>12</sup>. Moreover, the DLTR was

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<sup>11</sup> See the EBA's report and advice on crypto-assets for a discussion of the qualification of crypto-assets under the second Electronic Money Directive (Directive 2009/110/EC) and the second Payment Services Directive (Directive 2015/2366/EU): EBA, 2019. 'Report with advice for the European Commission on crypto-assets', January 2019.

<sup>12</sup> See, instruments listed in Section C (1 to 11) of Annex I of MiFID II.



accompanied by a proposal for amending the MiFID II definition of financial instruments to reflect that those can be issued using the distributed Ledger Technology (DLT)<sup>13</sup>.

20. The classification of crypto-assets as financial instruments depends on the specific characteristics and nature of such crypto-assets. In order to assess whether a crypto-asset qualifies as a transferable security, or another type of MiFID II 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<sup>14</sup> in determining what constitutes a financial instrument should be followed. This notably implies that the legal qualification of the product should not be determined by its technological envelope.
21. Crypto-assets that are to be qualified as financial instruments should be treated as such from a regulatory standpoint regardless of the technology applied to such tokens. The application of financial markets legislation does not depend on the actual use of any technology or on its kind<sup>15</sup>.

### 5.3.1 Classification as transferable securities

#### **Article 4(1)(44) of MiFID II**

*‘transferable securities’ means those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as:*

*(a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;*

*(b) bonds or other forms of securitised debt, including depositary receipts in respect of such securities;*

*(c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures;*

22. Firstly, crypto-assets should be designated as financial instruments if they align with MiFID II's definition of transferable securities<sup>16</sup>. In such instances, these crypto-assets should be subject to the regulatory framework applicable to financial instruments. Transferable securities, as defined by MiFID II, encompass a wide range of instruments from shares and bonds to "other securities" which are related to other securities, currencies, interest rates, commodities, or other indices (i.e. securitised derivatives).

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<sup>13</sup> “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.

<sup>14</sup> See recital 11 of MiCA.

<sup>15</sup> See recital 9 of MiCA.

<sup>16</sup> Article 4(1)(44) of MiFID II

23. To better understand the circumstances under which crypto-assets may qualify as transferable securities, ESMA undertook a survey of Member States in the summer of 2018<sup>17</sup>. The survey highlighted the different classifications that may exist between NCAs for the same crypto-asset depending on their transposition of MiFID II and of the list of financial instruments of Annex I, Section C. In general, national frameworks either transposed MiFID II's qualification criteria and conditions without further interpretation (16 NCAs) or provided for a broader or more restrictive interpretation of what constitutes a transferable security (12 NCAs). The stricter interpretation implies that an additional formal national requirement of a "compulsory book-entry register" of transferable securities (3 to 4 NCAs) would make it less easy to classify a crypto-asset as a financial instrument. Another form of restrictive interpretation is to consider the list of transferable securities as exhaustive and to have a strict standard of equivalence (*numerus clausus* approach).
24. Despite these divergences, it resulted from the survey that most NCAs assessed that most of the analysed crypto-assets (1, 2, 4 and 6) could be deemed as transferable securities and/or other types of financial instruments as defined under MiFID II<sup>18</sup>. The existence of attached profit rights, without having necessarily ownership or governance rights attached (crypto-asset case 1 and 2), was considered sufficient for a majority of NCAs to qualify crypto-assets as transferable securities whether as shares or another type of transferable security.
25. It should be stressed that some NCAs interpret MiFID II as including a non-exhaustive list of transferable securities. Some also may have more extensive domestic categories of financial instruments or investment products that are broader than the MiFID II definition, addressing products that are deemed to have an "investment purpose"; an "expectation of profit" or a "promise of returns".
26. The existence of a non-enforceable expectation of profit, without having necessarily ownership or governance rights attached seems to be considered sufficient for some NCAs to qualify crypto-assets as transferable securities. However, such notion of "expectation of profit" is not a concept that is defined or even used to qualify a financial instrument under MiFID II. Although it could be understood as the transformation of an economic function into a qualification criterion, it has no clear legal basis within Union law. Consequently, unless the investor's intention were to become a qualifying criterion, the 'only investment' component would not be self-sufficient to qualify a crypto-asset as a transferable security.

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

27. When evaluating whether crypto-assets qualify as financial instruments, national competent authorities and market participants should not view the technological structure of these assets as a key factor. Consequently, financial instruments issued by means of DLT (tokenised financial instruments) should not alter the fundamental nature of these assets.

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<sup>17</sup> ESMA Advice on Initial coin offerings and crypto-assets, 9 January 2019, ESMA50-157-1391.

<sup>18</sup> Ibid, p.3

28. Crypto-assets constitute a category of assets primarily based on cryptographic methods and DLT. This domain includes a diverse array of crypto-assets, ranging from those known as "crypto-currencies," "digital tokens," to "virtual currencies." The characteristics of these crypto-assets vary widely, with some linked to profit or governance rights, others providing consumption or utility/usage rights, and some intended as a medium of exchange.
29. Financial instruments that have been tokenised should continue to be recognised as financial instruments in all regulatory contexts. The technology neutrality principle as outlined in MiCA, ensures that analogous activities and assets are regulated under the same rules, irrespective of their technological format. This assessment should be done on the case-by-case basis.

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

30. Crypto-assets might be recognised as transferable securities if they grant rights similar to shares, bonds or other securities (e.g. securities embedding a derivative). According to MiFID II's Article 4(1)(44), three criteria must be satisfied for a crypto-asset to be deemed as a transferable security, it: (i) should be part of a "class of securities", must be (ii) negotiable on the capital market and (iii) should not be an instrument of payment. A substance over form approach needs to be adopted to determine if a crypto-asset is qualified as a financial instrument.
31. Instruments of payment are explicitly excluded from the definition of transferable securities in MiFID II. The PSD2 definition of "payment instrument" is not fully aligned with the concept of instrument of payment under MiFID II<sup>19</sup>. The latter seems closer to the notion of funds in PSD2, while the former refers to devices (physical or digital) used to make payment transactions. As such, the notion should be broadly understood (i.e. covering liquid payment methods as well as non-cash payment tools).
32. MiFID II refers to "classes of securities" but the term "class" is not defined by the EU financial regulations. In addition, only few Member States have developed a definition of "class" in their national framework<sup>20</sup>. The term "securities" is also not defined by MiFID II. For crypto-assets to form a class, they should confer similar rights to investors, ensuring their tradability on markets. Any crypto-asset class representing an abstract category of securities (e.g. an ownership in a company, conferring rights akin to shares, embodying bonds or other forms of securitised debt, or embedding a derivative should be considered under the ambit of securities. In order to form a class, crypto-assets are generally viewed as (i) interchangeable, (ii) issued by the same issuer, (iii) having similarities, and (iv) providing access to equal rights.

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<sup>19</sup> It should be noted that 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.

<sup>20</sup> ESMA Advice Annex 1 Legal qualification of crypto-assets – survey to NCAs, p.5.

33. Negotiability is also a key criterion. Although, there is currently no definition in Union law of negotiability<sup>21</sup>, this would imply for crypto-assets to be transferable or tradable on the markets, even if certain inherent restrictions exist (e.g. legal, market or technical restrictions). While, 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”<sup>22</sup>. As such, NCAs and market participants should broadly interpret the concept of negotiability including crypto-assets which are capable of being transferred or traded on capital markets. Negotiability on capital market also presupposes fungibility which has to be measured having regard to the capability of the crypto-asset to express the same value per unit.
34. Lastly, the term “capital market” is not explicitly defined in MiFID II but should broadly encompass venues where securities are traded as well as over-the-counter markets. If a crypto-asset can be traded on such trading platforms or other electronic and/or voice trading platforms where buying and selling interest in securities meet, the capital market criterion should be met. As such, NCAs and market participants should broadly interpret the concept of capital market including all contexts where buying and selling interests in securities meet. Additionally, the “capital” aspect of the notion should also be taken into account (i.e. the fact that traditional markets in transferable securities are used to raise capital for the operation of businesses).
35. Therefore, for a crypto-asset to be recognised as a transferable security under MiFID II, it must be negotiable, transferable, and encapsulate rights attached to securities. These key conditions and criteria should be assessed on a case-by-case basis by NCAs.
36. Moreover, certain types of securities have emerged that primarily serve an investment function, representing participation in the performance of an underlying asset (e.g. commodities, transferable securities, financial indices, other crypto-assets) without constituting a direct investment in that asset by the investor. These securitised derivatives include, but are not limited to, investment certificates such as Exchange Traded Commodities (ETCs), participation certificates and tracker certificates. Such instruments do not grant the holder an owner-like direct claim to the underlying asset. Rather, it gives a right to participate in its performance by containing a securitised claim against the issuer with regard to redemption against this performance or delivery of the underlying assets. This distinction is important especially in the realm of crypto-assets where a direct ownership right might be complex or undesirable for investors. Such assets could fall within the ambit of “other securities”, or “securitised debt” as mentioned in MiFID II's Article 4(1)(44), which give rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities, or other indices or measures.

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<sup>21</sup> 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](#).

<sup>22</sup> 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.

37. Therefore, crypto-assets comparable to these type of investment certificates, given their inherent characteristics and functions, should be treated as transferable securities as per the MiFID II framework, subject to case-by-case examination by NCAs to ensure their alignment with the overarching criteria of negotiability, transferability, and the encapsulation of rights.

**Q2: Do you agree with the conditions and criteria to help the identification of crypto-assets qualifying as transferable securities? Do you have any additional condition and/or criteria to suggest? Please illustrate, if possible, your response with concrete examples.**

### **5.3.2 Classification as other Financial Instruments**

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

##### **Article 4(1)(17) of MiFID II**

*‘money-market instruments’ means those classes of instruments which are normally dealt in on the money market, such as treasury bills, certificates of deposit and commercial papers and excluding instruments of payment;*

##### **Article 2(1)(o) of UCITSD**

*‘money market instruments’ means instruments normally dealt in on the money market which are liquid and have a value which can be accurately determined at any time;*

##### **Article 3 of Commission Directive 2007/16/EC**

*1. The reference in Article 1(9) of Directive 85/611/EEC to money market instruments as instruments shall be understood as a reference to the following:*

*(a) financial instruments which are admitted to trading or dealt in on a regulated market in accordance with points (a), (b) and (c) of Article 19(1) of Directive 85/611/EEC;*

*b) financial instruments which are not admitted to trading.*

*2. The reference in Article 1(9) of Directive 85/611/EEC to money market instruments as instruments normally dealt in on the money market shall be understood as a reference to financial instruments which fulfil one of the following criteria:*

*(a) they have a maturity at issuance of up to and including 397 days;*

*(b) they have a residual maturity of up to and including 397 days;*

*(c) they undergo regular yield adjustments in line with money market conditions at least every 397 days;*

*(d) their risk profile, including credit and interest rate risks, corresponds to that of financial instruments which have a maturity as referred to in points (a) or (b), or are subject to a yield adjustment as referred to in point (c).*

38. The definition of financial instruments under MiFID II includes money-market instruments like treasury bills, certificates of deposit, and commercial papers characterised by their short-term nature.
39. For a crypto-asset to be classified as a money-market instrument per Article 4(1)(17) of MiFID II, it must exhibit characteristics akin to traditional money-market tools. This involves (i) having a legal and residual maturity as required for in the Money Market funds regulation (MMFR), (ii) exhibiting stable value and minimal volatility and (iii) aligning returns with short-term interest rates.
40. Therefore, a crypto-asset should operate within the money market and embodies characteristics akin to treasury bills, certificates of deposit, and commercial papers. The crypto-asset should serve as a representation of a credit balance, either resulting from funds retained in an account or from temporary situations stemming from standard banking transactions, which a financial institution is obligated to repay as per Directive 2014/49/EU<sup>23</sup>.
41. A crypto-asset that would function as a representation of a short-term debt commitment issued and endorsed by a government, should also be classified as a money market instrument. Same should apply for a crypto-asset that represents a short-term negotiable debt obligation issued by either a bank or a corporation within the international money market to garner funds.

*Guideline 4 – Conditions and criteria for the classification as Units in collective investment undertakings*

42. Annex I, Section C, point (3) of MiFID II refers to units in collective investment undertakings as financial instruments<sup>24</sup>. 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<sup>25</sup>.
43. In order to qualify as a unit issued by a collective investment undertaking, a crypto-asset should represent the rights of investors in such undertakings. 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<sup>26</sup>. These undertakings can take various forms, such as open and closed-ended investment vehicles with or without legal personality (e.g. common funds, investment companies or trusts). For a crypto-asset to be recognised as a unit in such undertakings under the EU framework, several criteria and indicators should be used<sup>27</sup>.

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<sup>23</sup> Article 2(1)(c).

<sup>24</sup> UCITSD and AIFMD refer to MIFID for the definition of financial instruments; Art 2(1)(t) of UCITSD and Art 4(1)(n) of AIFMD.

<sup>25</sup> It should be stressed that in the event the issuer of a crypto-asset qualifies as a UCITS or an AIF, it should meet the requirements set out in the UCITS Directive or AIFMD, such as the appointment of an authorised manager. Other consequences derive from this qualification, such as the allocation of costs linked to the investment into the undertaking by investors.

<sup>26</sup> See Article 1(3)(b) of the UCITS Directive, according to which "units" of UCITS shall also include shares of UCITS".

<sup>27</sup> See Guidelines on key concepts of the AIFMD, 13 August 2013, ESMA/2013/611

44. The notion of collective investment undertakings is not defined under MiFID II. Further guidance may be found in the ESMA Guidelines on key concepts of the AIFMD<sup>28</sup>, which provides a list of characteristics that, if met, should lead to the qualification of the entity as a collective investment undertaking. These characteristics relate to the absence of a general commercial or industrial purpose of the entity, the pooling together of capital raised from investors for the purpose of investment with a view to generating a pooled return for those investors, and the absence of day-to-day control of the unitholders or shareholders over the entity.
45. Primarily, the crypto-asset should encapsulate capital raised from a number of investors for the purpose of investment with a view to generate a pooled return for the benefit of those investors. This could manifest in the form of crypto-assets that represent an investor's stake in the pooled capital.
46. Investors should not possess direct, day-to-day control or discretion over the operational matters relating to the daily management of the undertakings' assets, as such day-to-day control should be left to the discretion of the undertaking's manager acting in accordance with a defined investment policy.
47. Another aspect to take into account is the general commercial or industrial purpose of the crypto-assets project. For the issuer of a crypto-asset to be classified as a collective investment undertaking, the purpose of the crypto-asset project should not be a general commercial or industrial purpose<sup>29</sup>. Lastly, while some undertakings may have diversification obligations to mitigate risks, having a diversified portfolio is not a strict criterion for classification. Liquidity of the units issued by the crypto-assets issuer is also not a strict criterion for classification.

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

**Article 4(1)(49) of MiFID II**

*'derivatives' means derivatives as defined in Article 2(1)(29) of Regulation (EU) No 600/2014;*

**Article 2(1)(29) of MIFIR**

*'derivatives' means those financial instruments defined in point (44)(c) of Article 4(1) of Directive 2014/65/EU; and referred to in Annex I, Section C (4) to (10) thereto;*

**Annex I, Section C from C(4) to (10) of MiFID**

*(4) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, emission allowances or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash;*

<sup>28</sup> ESMA/2013/611, Guidelines on key concepts of the AIFMD, 13 August 2013.

<sup>29</sup> See Guidelines on key concepts of the AIFMD, 13 August 2013, ESMA/2013/611, p.3 to 5

*(5) Options, futures, swaps, forwards and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event;*

*(6) Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market, a MTF, or an OTF, except for wholesale energy products traded on an OTF that must be physically settled;*

*(7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in point 6 of this Section and not being for commercial purposes, which have the characteristics of other derivative financial instruments;*

*(8) Derivative instruments for the transfer of credit risk;*

*(9) Financial contracts for differences;*

*(10) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event, as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market, OTF, or an MTF;*

48. Derivatives are financial contracts whose value is derived from an underlying asset such as a reference rate or index. They encompass rights and obligations, while the definition of crypto-asset within the meaning of MiCA makes only reference to the digital representation of a value or of a right<sup>30</sup>.

49. MiFID II categorises derivative contracts under Annex I, Section C of the directive and establishes specific criteria for their identification<sup>31</sup>. Derivative contracts relating to a crypto-asset, a basket of crypto-assets or an index on crypto-assets as an underlying should be qualified as financial instruments within the meaning of MiFID II<sup>32</sup> as it captures derivative contracts, which refer to an underlying such as assets, rights, obligations or indices<sup>33</sup>. 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.

50. Firstly, it should be noted that crypto-assets could be recognised as eligible underlying instruments in derivatives. MiFID II categorises derivative contracts broadly, encompassing financial derivatives linked to securities, currencies, and indices, which can include various crypto-assets like investment, payment or hybrid crypto-assets. Therefore, given the broad range of possible eligible underlying assets, crypto-derivatives could be considered as

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<sup>30</sup> Art. 3(1)(5) of MiCA.

<sup>31</sup> See, instruments listed in Section C (4 to 10) of Annex I of MiFID II.

<sup>32</sup> With the exception of contract for differences (CFDs) within the meaning of Annex I Section C(9) of MiFID II which do not require a particular type of underlying,

<sup>33</sup> See Annex I Section C(10) of MiFID II.



such provided that the crypto-asset derivative falls under one of the categories of derivative contracts under Section C of Annex I of MiFID II.

51. Furthermore, derivative contracts encompass a broad range of financial contracts, including options, futures, swaps, and forward contracts. These contracts derive their value from an underlying asset, variable, rate, index, instrument or commodity. To categorise a crypto-asset as a derivative, it needs to meet specific essential characteristics outlined in MiFID II.
52. Primarily, a crypto-asset to be possibly qualified as a financial derivative under MiFID II, should be the "digital representation" of a contract. In addition, a derivative crypto-asset should have an underlying reference, which determines its value. This reference, in accordance with the EU legislations, could be for example an asset, a rate, an index, an instrument or a commodity. The value of the crypto-asset should fluctuate based on changes in this reference asset. Moreover, an agreement between involved parties, detailing the terms, maturity (if any), price and other conditions, without necessarily be a compulsory condition or a criterion, should be seen as an indicator<sup>34</sup>.
53. Derivatives also involve financial settlement in accordance with the settlement conditions in MiFID II and the Commission Delegated Regulation (EU) 2017/565, where the parties exchange cash payments based on the difference between the contract price and the market value of the underlying reference. While the notion of "cash" is neither defined by MiFID II nor within the Commission Delegated Regulation (EU) 2017/565, the notion seems to be covered by the Regulation 2018/1672/EU<sup>35</sup> which refers to currency, bearer-negotiable instruments, commodities used as highly-liquid stores of value and prepaid cards. This raises the question of crypto-assets bearing rights similar to derivatives, but which would be settled in crypto-assets, EMTs or ARTs instead of cash. This particular issue is still under consideration by ESMA.

**Q3: Based on your experience, how is the settlement process for derivatives conducted using crypto-assets or stablecoins? Please illustrate, if possible, your response with concrete examples**

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

**Article 3(a) and (b) of Directive 2003/87/EC**

*(a) '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;*

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<sup>34</sup> Illustratively, a crypto-asset that represents an agreement for a future Bitcoin purchase at a set price would likely be classified as a future. Similarly, a crypto-asset giving one party a right to buy or sell a specific crypto-assets at a predetermined price within a stipulated timeframe might be seen as an option. These derivatives typically involve a financial settlement, where parties exchange payments based on the difference between the contract and market value of the underlying reference.

<sup>35</sup> Art. 2(1)(a) of Regulation 2018/1672/EU.

*(b) 'emissions' means the release of greenhouse gases into the atmosphere from sources in an installation;*

54. The notion covers “any units recognised for compliance with the requirements of Directive 2003/87/EC” (the EU Emissions Trading Scheme)<sup>36</sup>. Emission allowances permit the emission of a designated amount of greenhouse gases and are tradable on specific platforms. Under MiFID II's Annex I, Section C, point (11), these allowances are recognized as a distinct category of financial instruments, specifically units compliant with the EU Emissions Trading Scheme<sup>37</sup>.
55. To be categorized as an emission allowance, a crypto-asset must represent a right to emit a specified volume of greenhouse gases and comply with the EU Emissions Trading Scheme or an equivalent framework. A qualifying crypto-asset would have to be endorsed by the EU or member states under Directive 2003/87/EC and should symbolize such approved units.
56. Furthermore, crypto-assets should grant an explicit emission right and be tradable. However, most crypto-assets differ from emission allowances as they typically symbolize value, project stakes, or service access.

**Q4: Do you agree with the conditions and criteria to help the identification of crypto-assets qualifying as another financial instrument (i.e. a money market instrument, a unit in collective investment undertakings, a derivative or an emission allowance instrument)? Do you have any additional condition, criteria and/or concrete examples to suggest?**

## **5.4 MiCA's categorisation of crypto-assets**

57. Due to the diverse designs and rights attached to crypto-assets, both academics and legislators widely follow the functional approach of dividing crypto-assets into three categories (i.e. utility tokens, currency/payment tokens and financial/investment/security tokens) which MiCA partly reflects.
58. The definition of crypto-assets in MiCA is broadly defined capturing not only “cryptocurrencies”, such as Bitcoin or Ethereum, but also “stablecoins” and so-called utility tokens. The categorisation of crypto-assets under MiCA is divided into three sub-categories of crypto-assets each governed by distinct requirements tailored to the associated risks they pose: (i) Asset-referenced tokens (ARTs); (ii) Electronic money tokens (EMT); and (iii) crypto-assets that are not considered ARTs or EMTs.

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

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<sup>36</sup> See, Section C (11) of Annex I of MiFID II points (11).

<sup>37</sup> Directive 2003/87/EC.

**Art. 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;*

**Art. 3(1)(2) of MiCA**

*'distributed ledger' means an information repository that keeps records of transactions and that is shared across, and synchronised between, a set of DLT network nodes using a consensus mechanism;*

**Art. 3(1)(6) of MiCA**

*'asset-referenced token' means a type of crypto-asset that is not an electronic money token and that purports to maintain a stable value by referencing another value or right or a combination thereof, including one or more official currencies;*

**Art. 3(1)(7) of MiCA**

*'electronic money token' or 'e-money token' means a type of crypto-asset that purports to maintain a stable value by referencing the value of one official currency;*

**Art. 3(1)(9) of MiCA**

*'utility token' means a type of crypto-asset that is only intended to provide access to a good or a service supplied by its issuer;*

**Crypto-Assets' basic inherent characteristics**

59. A crypto-asset remains a digital representation of a value or right that can be transferred and stored using a DLT. Inherent to the crypto-asset is an entitlement that concretely signifies a right vis-à-vis its issuer and/or any kind of value especially when there is no issuer for such crypto-asset. Representations of value include external, non-intrinsic values attributed to a crypto-asset by the parties concerned or by market participants, meaning the value is subjective and based only on the interest of the purchaser of the crypto-asset.

60. It is important to highlight that these guidelines are not intended to define the concepts of ART and EMT as the ESAs have been tasked to develop Joint-Guidelines for the content and form of the explanation accompanying the crypto-asset white paper and the legal opinions on the qualification of ARTs under Article 97(1) of MiCA<sup>38</sup>.

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

61. This third category of crypto-asset in MiCA (i.e. crypto-assets other than ARTs or EMTs) is broadly defined as any "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

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<sup>38</sup> See joint-ESA Guidelines for the content and form of the explanation accompanying the crypto-asset white paper and the legal opinions on the qualification of ARTs, Article 97(1) of MiCA

technology”<sup>39</sup>. This includes “utility tokens” which enable holders to get access to a good, application or service or are required to interact with a DLT’s ecosystem. Utility tokens serve a specific utility/usage or provide some consumption rights. The rights granted by a utility token may thus vary according to the different business models implemented by DLT projects. In addition, crypto-assets are characterised by their fungibility, aligning themselves with a uniform set of crypto-assets with identical rights and characteristics, making them interchangeable.

62. A utility token is typically not regarded as a security or financial product. Instead, it facilitates practical/functional utilisation within a DLT-based ecosystem. Although utility tokens 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<sup>40</sup>.
63. In contrast to 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 in the company’s decision-making process (e.g. token giving the right to vote on matters of corporate policymaking). The classification of an asset as utility token is also to be denied, if the sole objective is to participate in the performance of one or several underlying assets without directly investing in these assets, which is a feature of derivative contracts or units in collective investment undertakings, both financial instruments under MiFID.
64. It should be noted that crypto-assets that are non-transferable to other holders and that are only accepted either by the issuer or by the offeror are excluded from the scope of MiCA<sup>41</sup>. Although such type of crypto-asset explicitly refers to loyalty/reward program crypto-assets, it seems that the EU legislator intended to make the notions of (i) transferability to other holders, and (ii) the acceptance of the crypto-asset by players other than the issuer, qualification criteria for crypto-assets other than ARTs or EMTs. The same goes for crypto-assets that are unique and not fungible with other crypto-assets<sup>42</sup> as such crypto-asset possessing its own uniqueness is not readily interchangeable and because its value cannot be compared to an existing market or equivalent asset<sup>43</sup>.

**Q5: Do you agree with the suggested conditions and criteria to differentiate between MiFID II financial instruments and MiCA crypto-assets? Do you have concrete condition and/or criteria to suggest that could be used in the Guidelines? Please illustrate, if possible, your response with concrete examples.**

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<sup>39</sup> Art. 3(1)(5) of MiCA.

<sup>40</sup> Art. 4(1)(44) of MiFID II.

<sup>41</sup> See recital 17 of MiCA.

<sup>42</sup> Article 2(3) of MiCA.

<sup>43</sup> See recital 10 of MiCA.

## 5.5 Classification as crypto-assets which are unique and not fungible with other crypto-assets (NFTs)

65. MiCA does not apply to crypto-assets that are unique and not fungible with other crypto-assets<sup>44</sup>. It is the same for crypto-assets representing unique and non-fungible services or physical assets (such as product guarantees or real estate)<sup>45</sup>. Non-Fungible Tokens (NFTs)<sup>46</sup> which cumulatively meet the criteria of uniqueness and non-fungibility remain exempt from MiCA.
66. As such, crypto-assets possessing its own uniqueness are not readily interchangeable. Their value cannot be compared to an existing market or equivalent asset<sup>47</sup>. Although, there is no common definition of what constitute a “unique and non-fungible” crypto-asset, MiCA emphasises the concept of substance over form approach.

### Guideline 8 – Conditions and criteria attached to NFTs

#### **Art. 2(3) of MiCA**

*This Regulation does not apply to crypto-assets that are unique and not fungible with other crypto-assets.*

67. In assessing the uniqueness and non-fungibility of a crypto-asset, such crypto-asset may be considered as unique and not fungible if its characteristics and/or the rights it provides distinguish it from the other tokens issued by the same (and any other) issuer. In essence, a crypto-asset that lacks genuine uniqueness due to the presence of comparable and interchangeable attributes should fall within MiCA’s regulatory purview.
68. It is important to distinguish between truly unique crypto-assets and those that might appear unique due to specific technical identifiers or standards. In that sense, the criterion of uniqueness should not rely on the crypto-asset’s technical specificities. The attribution of a unique identifier to a crypto-asset does not automatically qualify a crypto-asset as non-fungible<sup>48</sup>. The technical features (e.g. token identification code, unique token ID) and standards used (e.g. ERC-721 standard, BEP-721 standard) could remain an indicator but should not be of primary importance for national competent authorities and market participants when assessing the fungibility and uniqueness of crypto-asset.
69. For a crypto-asset to be considered unique, its value should be intrinsically connected to its individual attributes and the specific utility it confers to its holder. A key aspect that should be considered is the value interdependency that may exist between NFTs, or which determines if the value of one crypto-asset influences the valuation of another, indicating a lack of uniqueness. For example, an NFT representing a piece of digital artwork may lose its uniqueness if it is part of a larger collection, and its value is influenced by other crypto-

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<sup>44</sup> Article 2(3) of MiCA.

<sup>45</sup> See recital 10 of MiCA.

<sup>46</sup> For ease of reference, the acronym “NFT” is used to refer to this type of crypto-asset. The use of this term is not a guarantee of uniqueness or non-fungibility.

<sup>47</sup> See recital 10 of MiCA.

<sup>48</sup> See recital 11 of MiCA.

assets in the series<sup>49</sup>. To express it differently, if the valuation of a crypto-asset originates from a comparison between crypto-assets possessing comparable attributes that make them interchangeable, the crypto-asset should not be exempted from MiCA. Therefore, the notions of uniqueness and fungibility within the meaning of MiCA seemed to be detached from that of negotiability on a secondary market.

70. NFTs that are part of a series, or a collection can be qualified as crypto-assets in the meaning of MiCA if they are interchangeable. Such crypto-assets could be considered as interchangeable in practice if they share equivalent characteristics. This can occur in scenarios where the market views certain NFTs as having similar value despite unique attributes. The existence of a series or a collection - and more precisely its size - should thus be considered as an indicator of fungibility without being an overriding criterion.
71. For instance, in the case of a collection of NFTs where the uniqueness of each crypto-asset can be questioned (e.g. several NFTs representing the same image with minor modifications) this collection should fall under MiCA. On the other hand, in the case of a series of NFTs in the manner of a series of numbered serigraphs or pictures, the numbering of which would have an impact on the value and uniqueness of the NFTs, these crypto-assets could be seen as a series of crypto-assets that are non-fungible<sup>50</sup>.
72. In addition, the utility function of NFTs can also play a role. In some cases, NFTs might confer similar utility or access rights. Owning an NFT might grant access to exclusive events or benefits. Here, the specific attributes of the NFT become less relevant compared to the utility it provides, making different NFTs functionally interchangeable for practical purposes.
73. Fractional parts of a unique and non-fungible crypto-asset should not be considered unique and non-fungible. Such fractional parts involve dividing a NFT into several other crypto-assets, allowing multiple investors to collectively own a portion of such fractional-NFT. It differs from a collection of NFTs in that each fraction of a fractionalised NFT represents a fractional ownership of the NFT. It would be thus possible to reconstitute the entire NFT by holding all the fractional parts. The outcome this operation of fractionalisation may consist for each fraction to possess identical attributes and inherently devoid of uniqueness. The “interdependent value test” could help in the classification of these types of crypto-assets.
74. It should be noted that by 30 December 2024, the European Commission shall submit a report to the European Parliament and Council detailing crypto-asset advancements, focusing on the market evolution of unique and non-fungible assets and evaluating the need for their regulatory oversight.

**Q6: Do you agree with the conditions and criteria proposed for NFTs in order to clarify the scope of crypto-assets that may fall under the MiCA regulation? Do you have any**

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<sup>49</sup> The value interdependency should be material to be an indicator of absence of non-fungibility, as there are instances where genuine NFTs will exhibit value correlation precisely because of their common features – such as the same author, as is the case with art in the real world. Additionally, interdependency test should only be an indicator, and a final assessment should always be made on a case-by-case basis, taking all of the features of the crypto-asset into account.

<sup>50</sup> In any case, these criteria must be studied on a case-by-case basis by the NCAs.

**additional condition and/or criteria to suggest? Please illustrate, if possible, your response with concrete examples.**

## **5.6 Classification as Hybrid Tokens**

75. Additional issues may arise when crypto-assets are likely to fall under more than one legal classification. Indeed, 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) and may perform distinct functions after issuance. Hybridisation of crypto-assets can thus occur at several stages of its life cycle, either when it is created or during its lifetime. This renders the classification of such crypto-assets particularly difficult.
76. In each individual case, NCAs should examine hybrid forms of crypto-assets regardless of how the crypto-asset is designated. What should matter are rights, functions and, to a lesser extent, the values that are associated with the crypto-assets. Due to the evolving nature of crypto-asset arrangements in the market, making an exhaustive and up to date classification would be overly sweeping. Determining a regulatory classification requires a thorough assessment of the distinct circumstances and attributes of each case<sup>51</sup>.
77. In such instances, the classification of hybrid tokens may be not conclusive, even though their classification, such as financial instrument or utility tokens, might offer an initial indication of the crypto-asset’s nature.

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

78. According to MiCA, the primary determinant for classification of a crypto-asset, including hybrids, hinges on whether it exhibits characteristics of a financial instrument as defined in Directive 2014/65/EU. This pivotal aspect of MiCA regulation needs to be accentuated in the assessment of hybrid tokens to align with the regulation’s core principles.
79. As part of these guidelines, when a hybrid token displays features of a financial instrument, this characteristic should take precedence in its classification<sup>52</sup>. Thus, the classification process for hybrid tokens should not only consider their multifaceted nature but also prioritize their identification as financial instruments where applicable. This ensures regulatory clarity and consistency with the overarching framework of MiCA. A hierarchical approach to classification should thus be adopted.
80. 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.

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<sup>52</sup> 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.

81. Consequently, national competent authorities and market participants should consider that if a financial instrument exists for hybrid types of crypto-assets, it should prevail. The documentation of the instrument and market materials should be drafted accordingly and not present the ancillary characteristics as the predominant elements of the instruments.

82. NCAs and market participants when assessing such crypto-assets (i.e. unique and non-fungible, and hybrid) should consequently adopt a substance over form approach. 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.

**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.**



## 6 Annexes

### 6.2 Annex I - Summary of questions

**Q1: Do you agree with the suggested approach on providing general conditions and criteria by avoiding establishing a one-size-fits-all guidance on the concepts of financial instruments and crypto-assets or would you support the establishment of more concrete condition and criteria?**

**Q2: Do you agree with the conditions and criteria to help the identification of crypto-assets qualifying as transferable securities? Do you have any additional condition and/or criteria to suggest? Please illustrate, if possible, your response with concrete examples.**

**Q3: Based on your experience, how is the settlement process for derivatives conducted using crypto-assets or stablecoins? Please illustrate, if possible, your response with concrete examples**

**Q4: Do you agree with the conditions and criteria to help the identification of crypto-assets qualifying as another financial instrument (i.e. a money market instrument, a unit in collective investment undertakings, a derivative or an emission allowance instrument)? Do you have any additional condition, criteria and/or concrete examples to suggest?**

**Q5: Do you agree with the suggested conditions and criteria to differentiate between MiFID II financial instruments and MiCA crypto-assets? Do you have concrete condition and/or criteria to suggest that could be used in the Guidelines? Please illustrate, if possible, your response with concrete examples.**

**Q6: Do you agree with the conditions and criteria proposed for NFTs in order to clarify the scope of crypto-assets that may fall under the MiCA regulation? Do you have any additional condition and/or criteria to suggest? Please illustrate, if possible, your response with concrete examples.**

**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.**

## **6.3 Annex II - Draft Guidelines on the classification of crypto-assets as financial instruments**

### **1 Scope**

#### **Who?**

83. The guidelines apply to competent authorities and to financial market participants, including issuers as defined in Article 3(1), point (10), 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?**

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

#### **When?**

85. These guidelines apply as from [dd month yyyy].

## 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 <sup>53</sup> .
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 <sup>54</sup> .
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 <sup>55</sup> .
MiCA	Regulation (EU) 2023/1114 of the European Parliament and the Council of 31 May 2023 on markets in crypto-assets <sup>56</sup> .
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) <sup>57</sup> .
MMFR	Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds <sup>58</sup> .
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) <sup>59</sup> .

### 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
ESAs	European Supervisory Authorities

<sup>53</sup> OJ L 174, 1.7.2011, p. 1.

<sup>54</sup> OJ L 151, 2.6.2022, p. 1.

<sup>55</sup> OJ L 331, 15.12.2010, p. 84.

<sup>56</sup> OJ L 150, 9.6.2023, p. 40.

<sup>57</sup> OJ L 173, 12.6.2014, p. 349.

<sup>58</sup> OJ L 169, 30.6.2017, p. 8.

<sup>59</sup> OJ L 302, 17.11.2009, p. 32.

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 tokens that encompass elements from diverse classifications, embodying a composite of characteristics typically associated with distinct types of tokens.

## 3 Purpose

86. 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.

### 3.1 Status of the guidelines

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

88. 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 market participants. In this case, competent authorities should ensure through their supervision that third-country firms comply with the guidelines.

### Reporting requirements

89. 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.

90. 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.

91. Market participants are not required to report.

## **3.2 Guidelines on the classification of crypto-assets as financial instruments**

### **General – Guideline 1**

92. The technological format of crypto-assets should not be considered a determining factor by national competent authorities and market participants when assessing the qualification as financial instruments. Following this, the process of tokenisation of financial instruments<sup>60</sup> should not affect the nature of such assets.

93. Tokenised financial instruments should continue to be considered as financial instruments for all regulatory purposes. ESMA considers that it is essential to 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<sup>61</sup>.

94. The assessment about whether a crypto-asset should be considered a financial instrument should remain a case-by-case exercise and the guidelines are only meant to promote convergent practices in this context.

### **Classification as transferable securities – Guideline 2**

95. National competent authorities and market participants should classify crypto-assets as transferable securities if they confer to their holders similar or equivalent rights to those granted by shares, bonds, other forms of non-equity securities or other negotiable securities as defined by MiFID II<sup>62</sup>.

96. A crypto-asset should qualify as a financial instrument if it falls within the definition of a transferable security provided by MiFID II<sup>63</sup>. 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. A substance over form approach needs to be adopted to determine if a crypto-asset is qualified as a financial instrument.

97. National competent authorities and market participants should thus consider that in accordance with Article 4(1), point (44), of MiFID II in order for crypto-assets to qualify as transferable securities, crypto-assets should fulfil cumulatively the following three criteria:

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<sup>60</sup> 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.

<sup>61</sup> Recital 9 of MiCA.

<sup>62</sup> Article 4(1)(44) of MiFID II provides for a broad definition of the concept of transferable securities and is accompanied by a list of examples (Section C of Annex I of MiFID II). This list includes 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” (e.g. warrants, covered warrants, convertible shares, etc...).

<sup>63</sup> Article 4(1)(44) of MiFID II.

(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

98. National competent authorities and 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<sup>64</sup>.

99. MiFID II does not provide any definition of “instruments of payment”. A crypto-asset that would be qualified as such instrument should be seen as a crypto-asset which is used only as a medium of exchange<sup>65</sup>. If a crypto-asset were to have several components, including that of an instrument of payment, national competent authorities and market participants should have to conduct a case-by-case analysis favouring the most appropriate qualification for this crypto-asset.

(ii) Classes of securities

100. National competent authorities and market participants should consider the following indicators to identify whether crypto-assets form a “class of securities”: (i) crypto-assets are issued by the same issuer; (ii) are interchangeable; and (iii) give 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).

101. National competent authorities and market participants should also take into account that crypto-assets belonging to a class of securities are also linked to the fact that such securities are capable of being transferred even if not in fact traded. The term “class” may thus refer to the notions of interchangeability, fungibility and/or equivalence, meaning that the attributes of each crypto-assets allow such instruments to be traded<sup>66</sup>. If all crypto-assets of the same issuance are of the same kind, or if the issuance comprises different classes of crypto-assets that are clearly identifiable, the “class requirement” criterion should be considered to be met.

102. National competent authorities and market participants 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. As such, crypto-assets that would represent an ownership position in a company’s capital and confer to their holders, rights similar or equivalent to the rights conferred by shares (e.g. stake in the company, participation in the management of company rights, access to a part of

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<sup>64</sup> 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.

<sup>65</sup> 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.

<sup>66</sup> The idea is to exclude crypto-assets that would be unique or that would have been customised for a particular investor (e.g. NFTs).

company profits, or rights to the company's liquidation proceeds)<sup>67</sup>, should be qualified as securities that have features specific to shares<sup>68</sup>. National competent authorities and market participants should make a distinction between crypto-assets granting their holders dividend rights comparable to those given by a share and those granting financial rights that are unrelated to company profits or liquidation surpluses.

103. A difference should be made between crypto-assets giving voting rights on the company's decision-making process and those offering voting rights on a project (without participating in the company's decision-making process). The fact that a crypto-asset traces the performance of one or several underlying assets with the purpose of participating in price developments or those which would grant rights comparable to the right to acquire or sell transferable securities (like the right to acquire shares, bonds or similar transferable securities) should be viewed as a strong indication of being a financial instrument. National competent authorities and market participants should also consider whether the crypto-asset gives rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities, or other indices or measures.

104. With reference to the class of "bonds or other forms of securitised debt"<sup>69</sup>, provided that these instruments are negotiable on the capital market, national competent authorities and 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 the features specific to bonds. The same applies for a debt that would be incorporated into a security, excluding bonds or money market instruments.

105. While it can serve as an indicator, relying solely on the investment component or anticipated profit (cashflow) should not be adequate in itself to deem a crypto-asset a transferable security. Types of crypto-assets have emerged that primarily serve an investment function, representing participation in the performance of an underlying asset without constituting a direct investment in that asset by the investor. National competent authorities and market participants should take into account that such assets may fall within the ambit of "other securities", or "securitised debt" 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.

106. National competent authorities and market participants should conclude that crypto-assets conferring to their holders the rights similar to those of other transferable securities as defined by Article 4(1), point (44), of MiFID II should be considered as crypto-assets

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<sup>67</sup> These criteria can be used to refer to the definition of shares in MiFID for which there is no EU notion of it: "*shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares*" (Directive 2014/65/UE, Art. 4(1)(44)(a)). The question whether the existence of attached profit rights to a token, without having necessarily ownership or governance rights attached to it, can be considered sufficient to be qualify as a share or as another type of transferable securities not explicitly listed in Section C, Annex I of MiFID II.

<sup>68</sup> National competent authorities and market participants should take into account that the term "share" is not defined by the EU law. Therefore, NCAs assess this notion differently, some of which may be either devoid of dividend rights or voting rights but still qualify as shares for certain Member States (e.g. preference shares).

<sup>69</sup> Article 4(1)(44), point (b) of MiFID II.

having features of financial instruments and are therefore subject to the MiFID II regime. This includes options, warrants, and structured bonds where the interest is linked to any derivative (e.g. selected stock index, interest rate, other derivative or a combination of derivatives).

(iii) Negotiability on the capital market

107. National competent authorities and market participants should determine if the crypto-asset is freely negotiable on the capital market. Such concept implies that the instrument is tradable. It also presupposes fungibility which has to be measured having regard to the capability of the crypto-asset to express the same characteristics per unit. National competent authorities and market participants should therefore consider that if inherent restrictions on transfer prevent a crypto-asset from being tradable in such contexts, it is not a transferable security.

108. More specifically, a crypto-asset should be considered to be negotiable where it is capable of being transferred or traded on capital markets<sup>70</sup>. The sole and abstract possibility of being transferred or traded on the capital market should be deemed sufficient, even if there is no specific market for the product yet or even if there is a temporary lock-up period. 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.

109. 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 financial instruments, 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, hence falling outside the definitional scope of “transferable security”. Similarly, national competent authorities and market participants should also take into account other restrictions that may exist which may not prevent a crypto-asset from being tradable (e.g. selling restrictions for a specified period of time, lock-up, specific country limitation).

110. National competent authorities and 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 and explore the differences that may exist between traditional venues and trading platforms for crypto-assets.

111. Generally, capital markets are understood as trading venues where savings and investments are channelled between suppliers who have capital and those who need

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<sup>70</sup> 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, 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).



capital. It also covers over-the-counter markets. Consequently, if crypto-assets are capable of being traded on a multilateral system equivalent to a MiFID trading platform, this will be a conclusive indication that they are negotiable on a capital market. Their tradability on online trading platforms for crypto-assets may serve as an indicator but does not necessarily coincide with the notion of capital market.

112. Therefore, national competent authorities and 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 (ii) possession of rights akin to 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 such.

## **Classification as other types of financial instruments**

### **Classification as money-market instruments – Guideline 3**

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

114. National competent authorities and market participants should consider that money-market instruments are known for their short maturity periods<sup>71</sup>. To qualify as a money-market instrument under MiFID II, a crypto-asset should thus exhibit a predefined 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 maturity and provided returns to users, they might be seen as analogous to traditional money-market instruments.

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

115. National competent authorities and market participants should consider that for a crypto-asset to be qualified as a unit in a collective investment undertaking the project attached to the crypto-asset should involve the pooling of capital from a number of

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<sup>71</sup> For instance, short maturity periods at issuance or residual of up to 397 days as previously mentioned in Article 3 of Commission Directive 2007/16/EC.

investors for the purpose of investing this capital in accordance with a defined investment policy and with a view to generating a pooled return for the benefit of those investors<sup>72</sup>. 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.

116. National competent authorities and market participants should also consider whether unitholders or shareholders— as a collective group –have a day-to-day discretion or control<sup>73</sup> over operational matters relating to the daily management of the assets included in the pool. Where this is the case, the crypto-asset will likely not qualify as collective investment undertaking. In this context, whether decisions are made by humans, code/algorithms, or smart contracts, is not relevant provided they adhere to the investment policy.

117. 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 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.

118. For a crypto-asset to be qualified as a unit or share of AIFs, the crypto-asset 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<sup>74</sup>.

119. National competent authorities and 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<sup>75</sup>.

### **Classification as derivative contracts – Guideline 5**

120. National competent authorities and market participants should consider the possibility for crypto-assets to be eligible underlying assets in derivative contracts. National competent authorities and 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.

121. Regarding the conditions and criteria for crypto-assets to be qualified as derivative contracts, national competent authorities and market 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, creating a time-lag between the conclusion and

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<sup>72</sup> Guidelines on key concepts of the AIFMD, 13 August 2013, ESMA/2013/611, par. 12.

<sup>73</sup> Ibid.

<sup>74</sup> Without requiring an authorisation pursuant to Article 5 of UCITS. See, article 4(1)(a)(ii) of AIFMD.

<sup>75</sup> Section IV of ESMA/2013/611.

execution of such contract; and (ii) the crypto-asset's value is derived from that of an underlying asset<sup>76</sup>.

122. National competent authorities and 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 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<sup>77</sup>, 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.

123. National competent authorities and market participants should consider that there should be a contractual agreement between parties as opposed to "securitised derivatives", that should be covered by the definition of transferable securities (such contract may specify the terms of the derivative instrument, including its maturity, price and other relevant terms). Therefore, a crypto-asset lacking an underlying asset and a contractual relationship entailing a forward commitment should generally not be considered a derivative contract.

124. 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 the conditions of the abovementioned points C4 to 10 are met.

### **Classification as emission allowances – Guideline 6**

125. National competent authorities and 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

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<sup>76</sup> 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.

<sup>77</sup> 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). Market participants and competent authorities are invited to consider also 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.

used like conventional emission allowances within existing carbon trading frameworks should also be assessed.

126. Crypto-assets that represent a verifiable emission allowance<sup>78</sup> (or a set number of allowances) and that are tradeable should fall under MiFID II's remit.
127. National competent authorities and 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.
128. 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 market participant should assess whether companies and organisations can 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.
129. It should be highlighted that the 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.

### **3.3 Background on the notion of crypto-assets**

#### **Classification as crypto-assets – Guideline 7**

130. National competent authorities and 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 value or rights represent a right vis-à-vis the issuer, aligning with the definition of 'crypto-asset' within the meaning of MiCA. The nature of the crypto-asset's electronic transfer and storage should be taken into account considering the use of DLT or similar technologies (e.g. a database using a consensus mechanism for ledger state agreement, transaction record maintenance, shared, managed and synchronized among a group of distributed participants).
131. National competent authorities and market participants should consider that a utility token should facilitate practical/functional utilisation within a DLT-based ecosystem or similar technology. Although a utility token may be accompanied by governance rights (i.e. governance crypto-assets) it should not replicate the rights attached to financial

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<sup>78</sup> '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; See, Article 3(a) and (b) of Directive 2003/87/EC.

instruments, starting with those attached to transferable securities within the meaning of MiFID II<sup>79</sup>. The same applies to crypto-assets accompanied by an expectation of profits. National competent authorities and market participants should therefore consider that such expectation of a future profit is not in itself sufficient to qualify a crypto-asset as a financial instrument under Union law<sup>80</sup> whereas it could be relevant – together with other coexisting criteria – to qualify it as a crypto-asset covered by MiCA.

132. National competent authorities and market participants should ensure that digital 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 definition of crypto-assets and should be excluded from the scope of MiCA<sup>81</sup>. The same applies to crypto-assets that are unique and not fungible with other crypto-asset<sup>82</sup> as such crypto-assets are not readily interchangeable and because their value cannot be compared to an existing market or equivalent asset<sup>83</sup>.
133. 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, the classification of a crypto-asset in relation to the instruments listed in Article 2(4) of MiCA and its similarity to financial instruments should be carried out by national competent authorities and market participant as part of their assessment.

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

134. National competent authorities and market participants should consider that to be unique, NFTs should be considered distinct and irreplaceable where their characteristics and/or the rights they provide are not identical to the other crypto-assets issued by the same (or any other) issuer.
135. National competent authorities and 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.
136. An “interdependent value test” should be conducted by national competent authorities and 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 the unique characteristics of each individual asset and the utility/benefits it offers to its holder; (ii) the extent to which the interconnection of various types of crypto-assets influences the value of one another in such a way that the NFT has no value of its own that

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<sup>79</sup> Art. 4(1)(44) of MiFID II.

<sup>80</sup> 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).

<sup>81</sup> See recital 17 of MiCA.

<sup>82</sup> Article 2(3) of MiCA.

<sup>83</sup> See recital 10 of MiCA.

would be decorrelated from the other NFTs in the series; as well as (iii) the unique characteristics that distinguish these crypto-assets from others.

137. National competent authorities and market participants should consider that despite their inherent non-fungible nature, certain NFTs may be part of a group of crypto-assets exhibiting interconnected value dynamics. This interconnectedness should become a key factor when these crypto-assets influence each other's value, thereby challenging their perceived "uniqueness".
138. When evaluating the uniqueness of a crypto-asset, NCAs should focus on the features that contribute to its distinct value. If a crypto-asset's valuation largely stems from its comparability to others with similar attributes, rendering them interchangeable, it should not warrant an exemption under MiCA.
139. 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. NFTs that are issued "*in a large series or collection*" may be considered fungible and thereby covered by MiCA<sup>84</sup>.
140. National competent authorities and market participants should also consider that fractionalised NFT (F-NFTs) may be qualified as a crypto-asset within the meaning of MiCA<sup>85</sup>. As part of their assessment, national competent authorities and market participants should consider whether the crypto-assets represent a partial ownership stake in a single unique and non-fungible token; if fractional parts of a unique and non-fungible crypto-asset, when considered separately, are also 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.

### Hybrid crypto-assets – Guideline 9

141. National competent authorities and market participants should adopt a hierarchical approach in the classification of hybrid crypto-assets. The initial step should be a comprehensive evaluation to ascertain if the crypto-asset meets the criteria of a financial instrument. If the hybrid token displays features of a financial instrument, this characteristic should take precedence in its classification<sup>86</sup>. This assessment should be the primary focus before considering alternative classifications, such as utility tokens.
142. National competent authorities and market participants should prioritise assessing a crypto-asset's inherent attributes over the labels provided by issuers, especially for hybrid

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<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> 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.

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).

143. National competent authorities and 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 financial instrument, payment, and utility; the extent to which the presence of these diverse characteristics and functions contributes to the crypto-asset's overall definition).