

# Reply form

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

## Responding to this paper

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

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

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

## Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. Use this form and send your responses in Word format (**pdf documents will not be considered except for annexes**);
3. Please do not remove tags of the type <ESMA\_QUESTION\_MIC3\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
4. If you do not wish to respond to a given question, please do not delete it but simply leave the text "TYPE YOUR TEXT HERE" between the tags.
5. When you have drafted your response, name your response form according to the following convention: ESMA\_MIC3\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_MIC3\_ABCD\_RESPONSEFORM.
6. Upload the form containing your responses, **in Word format**, to ESMA's website ([www.esma.europa.eu](http://www.esma.europa.eu) under the heading "Your input – Open Consultations" -> Consultation Paper on guidelines on conditions and criteria for the classification of crypto-assets as financial instruments").

## Publication of responses

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

## Data protection

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

**Who should read this paper**

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

### General information about respondent

Name of the company / organisation	Bundesverband der Wertpapierfirmen (bwf)
Activity	Investment Services
Are you representing an association?	<input checked="" type="checkbox"/>
Country/Region	Germany

## Questions

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

<ESMA\_QUESTION\_MIC3\_1>

We generally agree with establishing a one-size-fits-all guidance on the distinction between financial instruments and crypto-assets under MiCA, as MiFID II also does not provide a one-size-fits-all definition for all types of financial instruments. As a consequence, the member states transposed MiFID II with slight variances about what constitutes a financial instrument. This circumstance and the prevailing criteria for determining a financial instrument in the individual member states must be taken into account accordingly when differentiating between financial instruments and crypto-assets.

As there is no explicit form for the other part of the Consultation Draft guidelines on reverse solicitation under the Market in Crypto Assets Regulation (ESMA35-1872330276-1619), we add some general remarks here:

Remarks On the Draft guidelines on reverse solicitation under the Market in Crypto Assets Regulation (ESMA35-1872330276-1619):

General remarks:

The current wording of the Guidelines occasionally exceeds the requirements for the use of reverse solicitations under Art. 61 of MiCA in comparison to Art. 42 MiFID II significantly and without any obvious justification. The only “partial compliance” with the requirements of MiFID II (Art. 42) is justified by the necessity to protect EU-based investors and MiCA-complaint CASPs from undue incursions by third-country entities in the European market. However, the current wording bears the high risk of encapsulating the EU market from the global market and restricting the business activities of MiCA-complaint CASPs, which thrive on a global approach, particularly in the provision of crypto asset services.

Remarks on Guideline 2:

We see para. 16 of Guideline 2 as particularly problematic, as it states that the participation of regulated institutions acting on behalf of third-country entities is also considered as a breach of solicitation. We suggest at least to include a clarification that there is no breach of solicitation in the provision of crypto-asset swaps or in the

execution of orders on behalf of clients in crypto-assets (as the provision of crypto-asset services under MiCA) on trading platforms operated by third-country firms. Otherwise, the activities of CASPs in the area of trading would be severely restricted or even made impossible.

### Guideline 3

We also suggest deleting the time limit of one month set in para. 20 and aligning it with the existing requirements of the parallel provision Art. 42 MiFID II. A justification for a time limit on the use of the exemption provision can neither be derived from Art. 61 MiCAR itself nor from a higher need for protection (than that which applies in relation to MiFID II).

<ESMA\_QUESTION\_MIC3\_1>

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

<ESMA\_QUESTION\_MIC3\_2>

We basically agree with the conditions and criteria for determining a crypto asset that qualifies as a transferable security. However, we suggest to explicitly include in the wording of the definition of the criterion “[being “classes of securities”]” the requirement that the rights represented or conferred by the token are similar or equivalent to the rights conferred by securities.

Having said this, we propose changing the wording of the criterion “give access to the same rights” to “give access to the same *security-like* rights”.

With this explicit requirement that the rights to which the token gives the holder access must be similar to securities, crypto assets that have no securities characteristics or comparability with securities at all are prevented from being classified as financial instruments. Under the current definition of the criteria for identification as a transferable security, for example, crypto assets that only provide access to a specific service (which also meet the criterion to give access to the same rights) would also be covered. Even though “provide access to the same rights” is followed by a list of examples of rights that have the characteristics of securities, we believe further clarification by including “security-like rights” (or similar wording) is necessary.

Furthermore, the extension of the wording to “give access to the same security-like rights” largely complies with the previous interpretation practice of the NCAs (in particular that of the Federal Financial Supervisory Authority in Germany) and thus helps to clarify that crypto-assets with the character of securities are not subject to MiCAR, but to the MiFID II regime.

<ESMA\_QUESTION\_MIC3\_2>

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

<ESMA\_QUESTION\_MIC3\_3>

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<ESMA\_QUESTION\_MIC3\_3>

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

<ESMA\_QUESTION\_MIC3\_4>

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<ESMA\_QUESTION\_MIC3\_4>

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

<ESMA\_QUESTION\_MIC3\_5>

See above answer to Q2

<ESMA\_QUESTION\_MIC3\_5>

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

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

<ESMA\_QUESTION\_MIC3\_6>

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<ESMA\_QUESTION\_MIC3\_6>

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

<ESMA\_QUESTION\_MIC3\_7>

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<ESMA\_QUESTION\_MIC3\_7>