JC 2024 28

10 December 2024

Final Report

Guidelines

on templates for explanations and opinions, and the standardised test for the classification of crypto-assets, under Article 97(1) of Regulation (EU) 2023/1114

Contents

1. Executive Summary

MiCAR[1] regulates the offering to the public and admission to trading of asset-referenced tokens (ARTs), e-money tokens (EMTs), and other types of crypto-assets, as well as the provision of crypto-asset services in the European Union (EU). Inter alia, MiCAR sets out a wide range of regulatory requirements, including authorisations, conduct of business and prudential requirements for issuers of ARTs and EMTs and for crypto-asset service providers (CASPs).

The guidelines set out:

- a template establishing the content and form of the explanation accompanying the crypto-asset white paper referred to in Article 8(4) of MiCAR;

- a template establishing the content and form of the legal opinion on the qualification of ARTs referred to in point (b)(ii) of Article 17(1) and point (e) of Article 18(2) of MiCAR;

- a standardised test for the classification of crypto-assets, recognising that MiCAR applies to crypto-assets that are not:

    - unique and non-fungible with other crypto-assets (Article 2(3) of MiCAR);

    - in scope of relevant sectoral measures by virtue of their qualification as financial instruments, deposits, insurance and pensions products and other relevant financial products as referred to in Article 2(4) of MiCAR;

    - issued by persons excluded pursuant to Article 2(2) of MiCAR[2].

The standardised test acknowledges that the regulatory classification of a crypto-asset requires case-by-case assessment, taking account of applicable EU and national law, decisions of the Court of Justice of the European Union, decisions of the national court, and any regulatory measures or guidance applicable at the national level.

Next steps

The guidelines will apply from dd.mm.yyyy, two months after the publication of their translation in all official languages of the EU.

[1] Regulation (EU) 2023/1114 of the European Parliament and of the Council on Markets in Crypto-assets.

[2] Such persons include persons who provide crypto-asset services exclusively for their parent companies, for their own subsidiaries or for other subsidiaries of their parent companies; liquidators or administrators acting in the course of an insolvency procedure (except where stated); and relevant public bodies.

2. Background and rationale

Legal basis and objective

1. MiCAR[3] regulates the offering to the public and admission to trading of asset-referenced tokens (ARTs), e-money tokens (EMTs) and other type of crypto-assets, as well as the provision of crypto-asset services in the EU. MiCAR entered into force on 29 June 2023 and will apply from 30 December 2024, except for Titles III and IV regarding the offering to the public and the admission to trading of ARTs and EMTs, which apply from 30 June 2024.

2. The objectives of MiCAR are to harmonise the legal framework applicable to offerors or persons seeking the admission to trading of ARTs and EMTs and other crypto-assets, and to crypto-asset service providers (CASPs) to ensure the proper functioning of markets in crypto-assets, market integrity and financial stability in the EU, and to guarantee a high standard of protection for consumers and investors.[4] In particular, MiCAR aims to tackle risks that the wide use of ARTs and EMTs could pose to financial stability, the smooth operation of payment systems, monetary policy transmission or monetary sovereignty.[5] To this end, MiCAR sets out a wide range of regulatory requirements, including authorisations, conduct and prudential requirements for issuers of ARTs, EMTs and for CASPs.

3. The consistent application of MiCAR depends, at its foundation, on the common application of the regulatory classifications of crypto-assets under MiCAR. Accordingly, it is important that market participants adopt a common approach to the classification of crypto-assets, and to any explanations as to classification provided for regulatory purposes, including for the purpose of demonstrating which Title is engaged under MiCAR.

4. To this end, MiCAR requires credit institutions and other persons intending to offer to the public or seek admission to trading of an ART to provide to the competent authority a legal opinion on the qualification of the token pursuant to point (b)(ii) of Article 17(1) and point (e) of Article 18(2) of MiCAR.

5. Similarly, offerors, persons seeking admission to trading, or operators of trading platforms for a crypto-asset other than an ART or EMT are required to notify the crypto-asset white paper to the competent authority, accompanied by an explanation describing why the crypto-asset should not be considered excluded from the scope of MiCAR, or classified as an ART or EMT (Article 8(4) of MiCAR).

[3] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 (OJ L 150, 9.6.2023, p. 40).

[4] See Recital 112 of MiCAR.

[5] See Recital 5 of MiCAR.

6. To ensure consistency of the information provided to competent authorities Article 97(1) of MiCAR requires the European Supervisory Authorities (ESAs) to prepare joint Guidelines providing templates establishing the content and form of the legal opinion and explanation referred to in, respectively, point (b)(ii) of Article 17(1) and point (e) of Article 18(2) of MiCAR and Article 8(4) of MiCAR. Moreover, in order to ensure that market participants adopt a common approach to the regulatory classification of crypto-assets under MiCAR, Article 97(1) requires the ESAs to develop a standardised test. The templates established in Annexes A and B to these Guidelines provide a common format for the explanation and for the legal opinion thereby ensuring consistency in the submissions. The standardised test established in Annex C provides a common approach to crypto-asset classification thereby facilitating a uniform approach to the classification of crypto-assets.

Rationale

7. MiCAR establishes three different regimes for the issuance and offering to the public of crypto-assets (Titles II, III and IV) and for crypto-asset service provision (Title V). The applicable regime, and consequential regulatory requirements, depends on the classification of the crypto-asset (as EMTs (Title IV), ARTs (Title III), or as crypto-assets that are not EMTs nor ARTs (Title II); Title V applies to any crypto-asset under MiCAR).

8. To facilitate convergence in the classification of crypto-assets, and therefore the consistent application of MiCAR, it is essential that market participants adopt a common approach to determine the status of a crypto-asset under MiCAR (if any) and to explain the outcome to the competent authority. Pursuant to Article 97(1) of MiCAR, the ESAs set out in these Guidelines a standardised test for the classification of crypto-assets, and provide templates establishing the content[6] and form of the legal opinion and explanation referred to in, respectively, Article 17(1), point (b)(ii), and Article 18(2), point (e), of MiCAR (with respect to ARTs) and Article 8(4) of MiCAR (with respect to crypto-assets that are not ARTs nor EMTs).

9. The ESAs consider it important to acknowledge the following points regarding the standardised test:

    a. First, the ESAs emphasise that the standardised test to which reference is made in Article 97(1) of MiCAR is for the regulatory classification of the crypto-asset, rather than the person or persons who may be carrying out any activity involving that asset (e.g. issuance, offering, service provision or any other activity). As such the test relates solely to the classification of the asset and not to the environment in which that asset may be created, traded, transferred or redeemed. To determine if a person or persons are carrying out regulated activities under MiCAR, it is necessary to consider all relevant behavioural aspects. The ESAs recall that it can be the case that where a token has been classified as a crypto-asset in scope of MiCAR, regardless of whether there is an issuer,[7] there may be an offeror, a crypto-asset service provider regulated

[6] Any personal data received by competent authorities as a result of the submission of an explanation or legal opinion is to be treated in accordance with data protection requirements.

[7] In the case of ARTs and EMTs there must always be an issuer pursuant to, respectively, Article 16(1) and Article 48(1) MiCAR. In other cases, even if there is no identifiable issuer, Title V may apply (see further recital (22) MiCAR).

pursuant to MiCAR (e.g. in the case of Bitcoin, where there is no issuer, or in the case of tokens created via fully decentralised mechanisms).

b. Second, the ESAs underscore that all crypto-assets require a case-by-case assessment based on their individual attributes. The standardised test is intended to facilitate consistency in the approach to classification. This is done by establishing a common approach to determine if a crypto-asset is in scope of MiCAR and, if so, the regulatory classification under that Regulation. In developing the common approach, the ESAs take note of the fact that MiCAR applies to crypto-assets only where they are not in scope of other relevant EU law as referred to in Article 2(4) (and recital (9)) of MiCAR.

c. Third, the ESAs underscore that notions relevant to the assessment of crypto-assets against regulatory categories established in EU and national law (e.g. 'financial instrument' under MiFID,[8] 'deposit' as referred to in the DGSD[9] and insurance products referred to in Solvency II[10]) may be set out in the context of case law of the Court of Justice of the European Union, national courts, in regulatory measures (e.g. rules or guidance of competent authorities and other relevant authorities), and in interpretative guidance from the European Commission as the competent body for matters relating to the interpretation of EU Directives and Regulations. For instance, few Member States have adopted a statutory definition of insurance (e.g. Belgium, Hungary,[11] the Netherlands[12]). Often the main features of insurance contracts result from case law (e.g. in France[13]). Naturally, national rules and case laws can evolve or change over time. Therefore, any legal or natural person applying the standardised test should have regard to all potential sources relevant to the interpretation of regulatory concepts.

10. With regard to the templates establishing the content and form of the legal opinion referred to in point (b)(ii) of Article 17(1) and point (e) of Article 18(2) of MiCAR and explanation referred to in Article 8(4) of MiCAR, the ESAs acknowledge the following:

a. In order to provide a comprehensive statement and justification of the regulatory classification of a crypto-asset it is necessary to apply a common approach first to establish if a crypto-asset is in scope of MiCAR and then, if so, to establish its regulatory classification under MiCAR.

b. The outcome of the assessment should be capable of being articulated against each element of the standardised test in order to ensure that competent authorities

[8] 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 (OJ L 173, 12.6.2014, p. 349).

[9] Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ L 173, 12.6.2014, p. 149).

[10] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

[11] Art. 6:439. § (1) of Act V of 2013 on Civil Code.

[12] Art. 7:925 Burgerlijk Wetboek (Civil Code).

[13] Cass. Civ. 1, 31 January 1956, N° pourvoi 2306; Published in Bulletin 1956 N° 52.

receive in a common format comprehensive information fully explaining and justifying the regulatory status of the crypto-asset.

c. To this end, the ESAs have established in the templates a comprehensive list of fields to be completed to justify the assessment of regulatory status. All information fields should be completed and any supporting documents should be referenced and attached to the legal opinion or explanation (as the case may be). In accordance with the principle of proportionality, the ESAs have included only information fields that are related to the standardised test and are necessary to fully explain the regulatory classification.

d. As regards the legal opinion, the ESAs note that this may be prepared by a legal adviser who is in-house[14] or external.

[14] For example by a member of the compliance and/or legal department.

3. Guidelines

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on explanations and opinions, and the standardised test for crypto-assets, under Article 97(1) of Regulation (EU) 2023/1114

1. Compliance and reporting obligations

Status of these guidelines

1. These Guidelines are issued pursuant to Article 16 of Regulation (EU) No 1093/2010, Regulation (EU) No 1094/2010 and Regulation (EU) No 1095/2010 (the ESA Regulations)[15]. In accordance with Article 16(3) of the ESA Regulations, competent authorities, financial market participants and financial institutions must make every effort to comply with the guidelines.

2. Competent authorities as defined in point (35)(a) of Article 3(1) of Regulation (EU) 2023/1114[16] (MiCAR) should comply with these guidelines by incorporating them into their practices as appropriate (e.g. by amending the legal framework or their supervisory processes), including where guidelines are directed primarily at financial market participants and financial institutions.

Reporting requirements

3. Within two months of the date of publication of these guidelines on the websites of the ESAs in all EU official languages, according to Article 16(3) of each of the Regulations to which reference is made in paragraph 1 of these Guidelines, competent authorities must notify the EBA, EIOPA or ESMA, as the case may be, as to whether they comply or intend to comply with these guidelines, or otherwise with reasons for non-compliance. In the absence of any notification by this deadline, competent authorities will be considered by the ESAs to be non-compliant. Notifications should be sent by submitting the form available on the websites of each of the ESAs with the reference 'EBA/GL/2024/16'. Notifications should be submitted by persons with appropriate authority to report compliance on behalf of their competent authorities. Any change in the status of compliance must also be reported to the respective ESAs.

4. Notifications will be published on the websites of each of the ESAs, in line with Article 16(3) of the ESA Regulations.

5. Financial market participants are not required to report whether they comply with these guidelines.

[15] EBA – Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

EIOPA – Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15.12.2010, p. 48).

ESMA – 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 2009/79/EC (OJ L 331, 15.12.2010, p. 84).

[16] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on Markets in Crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 (OJ L 150, 9.6.2023, p.40).

2. Subject matter, scope and definitions

Subject matter

6. In accordance with Article 97(1) of Regulation (EU) 2023/1114, these joint Guidelines establish:

    a. the content and form of the explanation and legal opinion referred to in Article 8(4) and Article 17(1), point (b)(ii), and Article 18(2), point (e), respectively, of that Regulation;

    b. a common approach for the regulatory classification of crypto-assets under that Regulation.

Scope of application and addressees

7. These Guidelines apply to competent authorities, as defined in Article 3(1), point (35)(a), of Regulation (EU) 2023/1114.

8. These Guidelines also apply[17] to:

    a. offerors, persons seeking admission to trading, or operators of trading platforms for a crypto-asset other than an asset-referenced token (ART) or an electronic money token (EMT), who are required to notify the crypto-asset white paper to the competent authority, accompanied by an explanation describing why the crypto-asset should not be considered excluded from the scope of that Regulation, or classified as an ART or EMT pursuant to Article 8(4) of that Regulation;

    b. credit institutions intending to offer to the public or seek admission to trading of an ART who are required to provide to the competent authority a legal opinion on the qualification of the crypto-asset pursuant to Article 17(1), point (b)(ii), of Regulation (EU) 2023/1114;

    c. legal persons or other undertakings that are not credit institutions intending to offer to the public or seek admission to trading of an ART who are required to provide to the competent authority a legal opinion on the qualification of the crypto-asset pursuant to Article 18(2), point (e), of Regulation (EU) 2023/1114.

9. These Guidelines also apply to persons intending to carry out, or carrying out, crypto-asset services when assessing whether activities within their existing or intended remit involve a crypto-asset within the scope of that Regulation.

[17] The application date for MiCAR is established by Article 149 MiCAR (entry into force and application) which should be read in accordance with Article 143 (transitional measures).

Definitions

10. Unless otherwise specified, terms used and defined in Regulation (EU) 2023/1114 have the same meaning in these Guidelines.

3. Implementation

Date of application

11. These Guidelines apply from dd.mm.yyyy, [Please insert date 2 months after the date of publication of the guidelines in all EU official languages (date of issuance of the guidelines) on the ESA websites].

4. Templates and standardised test

Template for the purposes of Article 8(4) Regulation (EU) 2023/1114

12. Offerors, persons seeking admission to trading, and operators of trading platforms for crypto-assets other than ARTs and EMTs (relevant persons) should use the template referred to in Annex A to provide the explanation referred to in Article 8(4) of Regulation (EU) 2023/1114.

13. All fields set out in the template should be completed with all information necessary to provide a clear, fair, not misleading and complete explanation of the classification of the crypto-asset. Reference should be made to the following informing the explanation of the classification of the crypto-asset:

    a. the source of the definitions taken into account for each regulatory product referred to in the template, including applicable EU and national law;

    b. all relevant:

        i. case law of the Court of Justice of the European Union and national courts;

        ii. regulatory measures, including rules and guidance, in the Member State concerned;

        iii. interpretative guidance from the European Commission and Guidelines from the European Supervisory Authorities;

        iv. interpretative guidance from competent authorities or any other source relevant to the interpretation of regulatory concepts.

Template for the purposes of Article 17(1), point (b)(ii), and Article 18(2), point (e), Regulation (EU) 2023/1114

14. Credit institutions, and legal persons and other undertakings intending to offer to the public or seek admission to trading of an ART should use the template referred to in Annex B for the purposes of the legal opinion on the qualification of the crypto-asset referred to in Article 17(1), point (b)(ii), and Article 18(2), point (e), of Regulation (EU) No 2023/1114.

15. All fields set out in the template should be completed with all information necessary to provide clear, fair, not misleading and complete explanation of the classification of the crypto-asset. Reference should be made to the following informing the explanation of the classification of the crypto-asset:

a. the source of the definitions taken into account for each regulatory product referred to in the template, including applicable EU and national law;

b. all relevant:

   i. case law of the Court of Justice of the European Union and national courts;

   ii. regulatory measures, including rules and guidance, in the Member State concerned;

   iii. interpretative guidance from the European Commission and Guidelines from the European Supervisory Authorities;

   iv. interpretative guidance from competent authorities or any other source relevant to the interpretation of regulatory concepts.

16. The template should be completed by an in-house or external legal adviser. The legal adviser should be able to issue the opinion in an objective manner, free from conflicts of interest that cannot be effectively managed. Evidence should be provided of the legal adviser's ability, as a matter of professional practice, to issue a legal opinion. This may include, as applicable, a diploma, a practicing certificate, registration with the relevant professional body in the Member State concerned.

Standardised test for the classification of crypto-assets

17. Competent authorities and other persons to whom these Guidelines are addressed should apply a common approach to determine the classification of a crypto-asset on a case-by-case basis taking into account all the attributes of the token in question in accordance with the flow chart provided in Annex C.

18. Competent authorities and other persons to whom these Guidelines are addressed should determine if there is a digital representation of a value or right, these being the necessary attributes of a crypto-asset as defined in Article 3(1) point (5) of Regulation (EU) 2023/1114. The terms 'value' and 'right' should be interpreted broadly in accordance with recital (2) of that Regulation. Crypto-assets with no-intrinsic value, but having a value attributed to them by the seller / buyer or by market participants[18] should be treated as digital representations of value.

19. Competent authorities and other persons to whom these Guidelines are addressed should also assess if the digital representation of the value and/or right can be transferred and stored electronically using distributed ledger technology (DLT) or similar technologies. A token may be considered 'non-transferable' only where at least the following conditions are satisfied (i) the token is accepted only by the issuer or offeror, and (ii) there is no technical possibility for the token to be transferred by a holder to persons other than the issuer or offeror (recital (17) of Regulation

[18] For example tokens such as Bitcoin and so-called 'meme coins' traded at exchanges with public prices.

(EU) 2023/1114). To assess if a technology is similar to DLT the functional attributes of such technology should be considered, including the basis on which the records (the ledger) are held, shared and how consensus is achieved (i.e. the functioning of any consensus mechanism).

20. If both elements (digital representation of a value and/or right, and transferred and stored electronically using DLT or similar technology) are satisfied competent authorities and other persons to whom these Guidelines are addressed should consider that the token is compatible with a crypto-asset for the purposes of Regulation (EU) 2023/1114.

21. In order to determine if the crypto-asset is within the scope of Regulation (EU) 2023/1114, competent authorities and other persons to whom these Guidelines are addressed should assess all of the exclusions identified in Article 2, points (2) to (4) of Regulation (EU) 2023/1114:

    a. Article 2(2): is the issuer or offeror a person referred to in that paragraph? MiCAR does not apply to persons who provide crypto-asset services exclusively for their parent companies, for their own subsidiaries or for other subsidiaries of their parent companies; liquidators or administrators acting in the course of an insolvency procedure (except for the purposes of Article 47 of MiCAR); the ECB, central banks of the Member States when acting in their capacity as monetary authorities, or other public authorities of the Member States; the European Investment Bank and its subsidiaries; the European Financial Stability Facility and the European Stability Mechanism; public international organisations.

    b. Article 2(3): is the crypto-asset unique and not fungible with other crypto-assets?[19] In assessing if the crypto-asset is unique and not fungible, competent authorities and other persons to whom these Guidelines apply should have regard to Article 2(3) and recital (11) of Regulation (EU) 2023/1114 as well as the Guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments.[20]

    c. Article 2(4): does the crypto-asset qualify as a relevant product enlisted in that paragraph? Regulation (EU) 2023/1114 does not apply to financial instruments, deposits, structured deposits, funds (except e-money tokens), securitisation positions (per Regulation (EU) 2017/2402[21]), insurance products and reinsurance contracts (per Directive 2009/138/EC), pension products primarily providing retirement income, officially recognised occupational pension schemes (per Directives (EU) 2016/2341[22] and 2009/138/EC[23]), employer-mandated individual pension products, pan-European Personal Pension

[19] This may include, for example, a non-fungible crypto-asset evidencing an exclusive property right in a specific tangible asset in real estate (such as a house or commercial property), or intangible asset such as a patent.

[20] Link to be added once ESMA GL are final (for the consultation paper, see ESMA75-453128700-52).

[21] Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012 (OJ L 347, 28.12.2017, p. 35).

[22] Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) (OJ L 354, 23.12.2016, p. 37).

[23] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

Products (per Regulation (EU) 2019/1238[24]), and social security schemes (per Regulations (EC) No 883/2004[25] and (EC) No 987/2009[26]).

22. Without prejudice to any other relevant materials, the information referred to in paragraph 13 of these Guidelines should be taken into account for the purposes of assessing whether the crypto-asset is a:

    a. financial instrument, competent authorities and other persons to whom these Guidelines are addressed should apply the Guidelines issued by the European Securities and Markets Authority under Article 2(5) of Regulation (EU) 2023/1114;[27]

    b. deposit, competent authorities and other persons to whom these Guidelines are addressed should refer to European Banking Authority's 2014 Opinion and Report and 2020 Opinion on the perimeter of credit institutions, which provide indications on the notion of 'deposit'[28] and to the EBA's 2024 Report on structured deposits[29];

    c. insurance product or insurance contract, competent authorities and other persons to whom these Guidelines are addressed should recall that there is no explicit definition of insurance at EU level, either as an activity or a contract.[30]

23. If none of the exclusions referred to in paragraph 22 apply, competent authorities and other persons to whom these Guidelines are addressed should assess the characteristics of the crypto-assets to determine if the crypto-asset is an EMT, ART or other crypto-asset under Regulation (EU) 2023/1114 and should take into account the following:

    a. Does the crypto-asset purport to maintain a stable value by referencing only the value of a single official currency? If so, it is to be classified as an EMT pursuant to Title IV of Regulation (EU) 2023/1114.

    b. If the crypto-asset does not purport to maintain a stable value by referencing only the value of a single official currency, does it purport to maintain a stable value by reference to another value or right (or combination thereof), including one or more official

[24] Regulation (EU) 2019/1238 of the European Parliament and of the Council of 20 June 2019 on a pan-European Personal Pension Product (PEPP) (OJ L 198, 25.7.2019, p. 1).

[25] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30.4.2004, p. 1).

[26] Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ L 284, 30.10.2009, p. 1).

[27] Link to be added once ESMA GL are final (for the consultation paper, see ESMA75-453128700-52).

[28] EBA 2014 Opinion and Report on the perimeter of credit institutions: https://www.eba.europa.eu/publications-and-media/press-releases/eba-publishes-opinion-perimeter-credit-institutions and EBA 2020 Opinion: https://www.eba.europa.eu/sites/default/files/document_library/Publications/Opinions/2020/931784/EBA%20Opinion%20on%20elements%20of%20the%20definition%20of%20credit%20institution.pdf

[29] EBA 2024 Report on structured deposits: https://www.eba.europa.eu/sites/default/files/2024-07/b807c1a8-6f1d-4c2b-b2a0-2cdcb7737282/Report%20on%20structured%20deposits.pdf

[30] Final Report of the Commission Expert Group on European Insurance Contract Law. European Commission, 2014, p 38 ff.

currencies? If so, it is to be classified as an ART pursuant to Title III of Regulation (EU) 2023/1114.

c. If the crypto-asset does not purport to maintain a stable value by referencing another value or right (and is therefore not an ART or EMT) it is to be classified as a crypto-asset pursuant to Title II of Regulation (EU) 2023/1114.

Annex A - Template

This template is provided for the purposes of the explanation referred to in Article 8(4) of Regulation (EU) 2023/1114.

TEMPLATE: EXPLANATION FOR THE PURPOSES OF ARTICLE 8(4) REGULATION (EU) 2023/1114

An explanation prepared for the purposes of Article 8(4) Regulation (EU) 2023/1114 (MiCAR) should contain information for each of the below fields.

Information about explanation	**Date on which this explanation is issued**	
	Name of the person(s) (legal or natural) issuing this explanation	*Please include: name, address, email address, and telephone number.*
	Point of contact of the person(s) (legal or natural) issuing this explanation (if different to above)	*Please include: name, address, email address, and telephone number.*
	Confirmation that this explanation is issued for the purposes of Article 8(4) of MiCAR	*Please confirm.*
Information about offeror(s), person(s) seeking admission to trading, and/or operators of trading	**Name of the offeror(s), person(s) seeking admission to trading, or operator(s) of trading platforms, on whose behalf this explanation is issued**	*Please use the Annex to this template for the provision of this information.*
	White paper to which this explanation refers *(this should be the 'final version' of the white paper submitted for the purpose of Article 8(1) of MiCAR))*	*Please indicate the date of the white paper notified for the purposes of Article 8(1) of MiCAR, and assessed for the purposes of this explanation and to which this explanation refers. Please also attach a copy of the white paper to this explanation.*
	Member State(s) in which the offer to the public or admission to trading will take place	
Crypto-asset	**Applicable law**	*Please indicate the law applicable to the crypto-asset as referred to in the white paper.*
	Executive summary of the regulatory classification of the crypto-asset	*Please indicate the purported regulatory classification and any key points you wish to highlight in the executive summary.*
	Detailed explanation that the digital representation to which the white paper relates is a crypto-asset within the meaning of Article 3(1), point (5), of MiCAR	*Explanation may be provided in an Annex and should cover all aspects of the definition of 'crypto-asset', including the value or right that it represents, and the distributed ledger technology or similar technology on which the crypto-asset may be transferred or stored.*
	Detailed explanation that the crypto-asset to which the white paper relates is not an electronic money token within the meaning of Article 3(1), point (7), of MiCAR	*Explanation may be provided in an Annex and should include all aspects that demonstrate that the crypto-asset is not intended to purport to maintain a stable value by reference to an official currency, with full cross-references to the relevant provisions of the white paper.*
	Detailed explanation that the crypto-asset to which the white paper relates is not an asset-referenced token within the meaning of Article 3(1), point (6), of MiCAR	*Explanation may be provided in an Annex and should include all aspects that demonstrate that the crypto-asset is not intended to purport to maintain a stable value by reference to another value or right or a combination thereof, with full cross-references to the relevant provisions of the white paper.*
	Detailed explanation that the crypto-asset is not any of the following:	

	- **Financial instrument, as referred to in Article 2(4), point (a), of MiCAR.**	**Source of definition(s) (EU and/or national law as applicable):** **Case law (including paragraph references, as appropriate) to which reference is made in the explanation:** **Regulatory measures or guidance to which reference is made in the explanation (including the Guidelines adopted pursuant to Article 2(5) of MiCAR):** **Explanation:** *Note: Explanation may be supplemented in an Annex and should include all aspects that demonstrate that the crypto-asset is not a financial instrument. The explanation should indicate why the crypto-asset does not correspond to any of the financial instrument types (transferable security, money market instrument etc), make full reference to the ESMA Guidelines under Article 2(5) of MiCAR, and any applicable case law, or relevant regulatory or supervisory materials issued by the competent authority for the purposes of [MiFID2] in the home Member State within the meaning of Article 3(1), point (33), of MiCAR.*
	- **Deposits, including structured deposits, as referred to in Article 2(4), point (b), of MiCAR**	**Source of definition(s) (EU and/or national law as applicable):** **Case law (including paragraph references, as appropriate) to which reference is made in the explanation:** **Regulatory measures or guidance to which reference is made in the explanation:** **Explanation:** *Note: Explanation should include all aspects that demonstrate that the crypto-asset is not a deposit. The explanation should make full reference to any applicable case law, or relevant regulatory or supervisory materials issued by the competent authority for the purposes of [CRD/CRR] in the home Member State within the meaning of Article 3(1), point (33), of MiCAR.*
	- **Funds as referred to in Article 2(4), point (c), of MiCAR**	**Source of definition(s) (EU and/or national law as applicable):** **Case law (including paragraph references, as appropriate) to which reference is made in the explanation:** **Regulatory measures or guidance to which reference is made in the explanation:**

		Explanation: *Note: Explanation should include all aspects that demonstrate that the crypto-asset is not funds. The explanation should make full reference to any applicable case law, or relevant regulatory or supervisory materials issued by the competent authority for the purposes of Directive (EU) 2015/2366 of the European Parliament and of the Council in the home Member State within the meaning of Article 3(1), point (33), of MiCAR.*
	Brief explanation, unless more detailed assessment is relevant, that the crypto-asset is not any of the following:	
	- **Securitisation positions as referred to in Article 2(4), point (d), of MiCAR**	*Note: Explanation should confirm that the crypto-asset is not a securitisation position.*
	- **Non-life or life insurance products or reinsurance or retrocession contracts as referred to in Article 2(4), point (e), of MiCAR**	*Note: Explanation should confirm that the crypto-asset is not a non-life or life insurance product.*
	- **Pension product as referred to in Article 2(4), point (f), of MiCAR**	*Note: Explanation should confirm that the crypto-asset is not a pension product.*
	- **Officially recognised occupational pension schemes as referred to in Article 2(4), point (g), of MiCAR**	*Note: Explanation should confirm that the crypto-asset is not an occupational pension scheme.*
	- **Individual pension products as referred to in Article 2(4), point (h), of MiCAR**	*Note: Explanation should confirm that the crypto-asset is not an individual pension product.*
	- **Pan-European Pension Products as referred to in Article 2(4), point (i), of MiCAR**	*Note: Explanation should confirm that the crypto-asset is not a Pan-European Pension Product.*
	- **Social security schemes as referred to in Article 2(4), point (j), of MiCAR**	*Note: Explanation should confirm that the crypto-asset is not a social security scheme.*
Additional relevant information		*Note: Please set out such other information as you consider appropriate to explain the regulatory classification of the crypto-asset.*

ANNEX TO TEMPLATE: INFORMATION ABOUT OFFERORS, PERSONS SEEKING ADMISSION TO TRADING, OPERATORS OF TRADING PLATFORMS

Name of the offeror(s), person(s) seeking admission to trading, or operator(s) of trading platforms, on whose behalf this explanation is issued	**Regulated status (if any) of the offeror(s), person(s) seeking admission to trading, or operator(s) (authorisation or registration to carry out financial services activity/ies)**	**LEI (if applicable)**	**EEA/Member State of establishment, branch or registered office (as applicable)**	**Point of contact**
			Please indicate jurisdiction and status (establishment, branch, registered office).	*Please include: name, address, email address, and telephone number.*

Annex B - Template

This template is provided for the purposes of the legal opinion referred to in Article 17(1), point (b)(ii) and Article 18(2), point (e) of Regulation (EU) 2023/1114.

TEMPLATE: LEGAL OPINION FOR THE PURPOSES OF ARTICLE 17(1), point (b)(ii) and ARTICLE 18(2), point (e) REGULATION (EU) 2023/1114

An Opinion issued for the purposes of these articles should contain information for all the below fields.

Information about Opinion	**Date on which this Opinion is issued**	
	Name of the person(s) (legal or natural) issuing this Opinion	*Please include: name, address, email address, and telephone number.*
	Point of contact of the person(s) (legal or natural) issuing this Opinion (if different to above)	*Please include: name, address, email address, and telephone number.*
	Declaration of any potential conflicts of interest and measures to manage effectively those conflicts	
	Evidence of the person(s) ability to act as a legal adviser	*Please include as much information as possible, e.g. degree, licence, professional registration number, certificate to practice law etc.*
	Purpose for which this Opinion is issued	*Specify:* - *Article 17(1), point (b)(ii), or* - *Article 18(2), point (e), of MiCAR*
Information about person intending to offer to the public or seek admission to trading	**Name of the credit institution/financial institution/other undertaking intending to offer to the public, or seek admission to trading of the crypto-asset on whose behalf this Opinion is issued**	
	Regulated status (authorisation or registration to carry out financial services activity/ies)	*E.g. credit institution, electronic money institution etc.*
	LEI (if applicable)	
	EEA/Member State of establishment	
	Point of contact	*Please include: name, address, email address, and telephone number.*
	Intention of the credit institution/financial institution/other undertaking	*Specify:* - *Offer to the public* - *Seek admission to trading*
	White paper to which this Opinion refers (*this should be the 'final version' of the white paper submitted for the purpose of Article 17(1), point (b) (ii) and Article 18 (2), point (e) of MiCAR*)	*Please indicate the date of the white paper assessed for the purposes of this Opinion and to which this Opinion refers. Please also attach a copy of the white paper to this Opinion.*
	Member State(s) in which the offer to the public or admission to trading will take place	
Crypto-asset	**Applicable law**	*Please indicate, the law applicable to the crypto-asset as referred to in the white paper.*
	Executive summary of the regulatory classification of the crypto-asset	*Please indicate the purported regulatory classification and any key points you wish to highlight in the executive summary.*
	Opinion, with detailed explanation, that the digital representation to which this	*Explanation may be provided in an Annex and should cover all aspects of the definition of 'crypto-asset',*

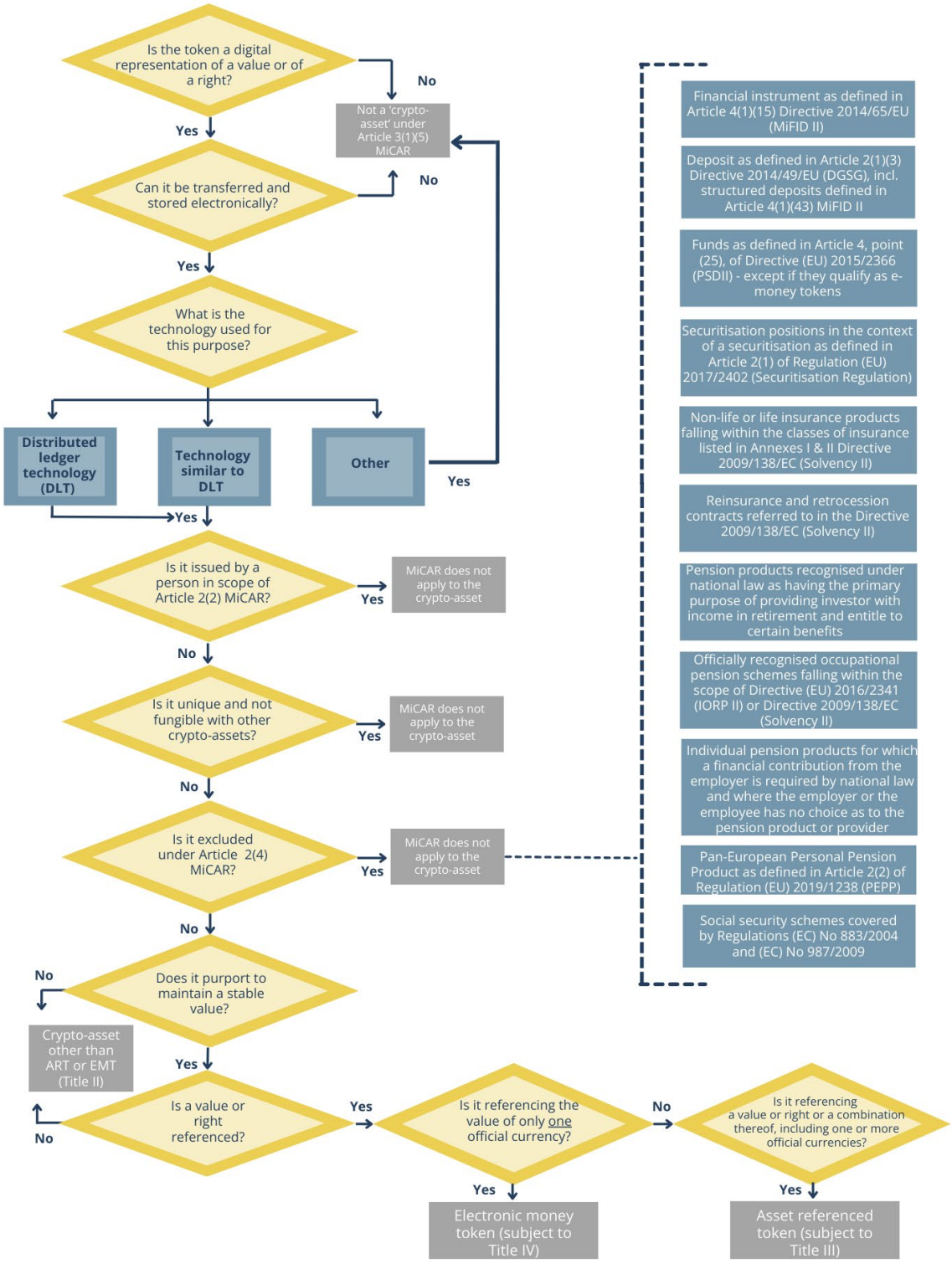
	Opinion relates is a crypto-asset within the meaning of Article 3(1), point (5), of MiCAR	*including the value or right, and the distributed ledger technology or similar technology on which the crypto-asset may be transferred or stored.*
	Detailed description of the value or right or official currencies to which the crypto-asset refers	*Description should set out the value, right or official currencies to which the crypto-asset refers and is intended to purport to maintain a stable value, with full cross-references to the relevant provisions of the white paper.*
	Opinion, with detailed explanation, that the crypto-asset to which this Opinion relates is not an electronic money token within the meaning of Article 3(1), point (7), of MiCAR	*Explanation may be provided in an Annex to the Opinion and should include all aspects that demonstrate that the crypto-asset is not intended to purport to maintain a stable value by reference to a single official currency, with full cross-references to the relevant provisions of the white paper.*
	Opinion, with detailed explanation, that the crypto-asset to which this Opinion relates is not any of the following:	
	- **Financial instrument, as referred to in Article 2(4), point (a), of MiCAR.**	**Source of definition(s) (EU and/or national law as applicable):** **Case law (including paragraph references, as appropriate) to which reference is made in the explanation:** **Regulatory measures or guidance to which reference is made in the explanation (including the Guidelines pursuant to Article 2(5) of MiCAR):** **Explanation:** *Note: Explanation may be supplemented in an Annex and should include all aspects that demonstrate that the crypto-asset is not a financial instrument. The explanation should indicate why the crypto-asset does not correspond to any of the financial instrument types (transferable security, money market instrument etc), make full reference to the ESMA Guidelines under Article 2(5) of MiCAR, and any applicable case law, or relevant regulatory or supervisory materials issued by the competent authority for the purposes of [MiFID2] in the home Member State within the meaning of Article 3(1), point (33), of MiCAR.*
	- **Deposits, including structured deposits, as referred to in Article 2(4), point (b), of MiCAR**	**Source of definition(s) (EU and/or national law as applicable):** **Case law (including paragraph references, as appropriate) to which reference is made in the explanation:** **Regulatory measures or guidance to which reference is made in the explanation:** **Explanation:**

		Note: Explanation may be provided in an Annex and should include all aspects that demonstrate that the crypto-asset is not a deposit. The explanation should make full reference to any applicable case law, or relevant regulatory or supervisory materials issued by the competent authority for the purposes of [CRD/CRR] in the home Member State within the meaning of Article 3(1), point (33) of MiCAR.
	- **Funds as referred to in Article 2(4), point (c), of MiCAR**	**Source of definition(s) (EU and/or national law as applicable):** **Case law (including paragraph references, as appropriate) to which reference is made in the explanation:** **Regulatory measures or guidance to which reference is made in the explanation:** **Explanation:** *Note: Explanation may be provided in an Annex and that demonstrate that the crypto-asset is not funds. The explanation should make full reference to any applicable case law, or relevant regulatory or supervisory materials issued by the competent authority for the purposes of [PSD] in the home Member State within the meaning of Article 3(1), point (33), of MiCAR.*
	Brief explanation, unless more detailed assessment is relevant, that the crypto-asset is not any of the following:	
	- **Securitisation positions as referred to in Article 2(4), point (d), of MiCAR**	*Note: Explanation should confirm that the crypto-asset is not a securitisation position.*
	- **Non-life or life insurance products or reinsurance or retrocession contracts as referred to in Article 2(4), point (e), of MiCAR**	*Note: Explanation should confirm that the crypto-asset is not a non-life or life insurance product.*
	- **Pension products as referred to in Article 2(4), point (f), of MiCAR**	*Explanation should confirm that the crypto-asset is not a pension product.*
	- **Officially recognized occupational pension schemes as referred to in Article 2(4), point (g), of MiCAR**	*Note: Explanation should confirm that the crypto-asset is not an occupational pension scheme.*
	- **Individual pension products as referred to in Article 2(4), point (h), of MiCAR**	*Note: Explanation should confirm that the crypto-asset is not an individual pension product.*
	- **Pan-European Pension Products as referred to in Article 2(4), point (i), of MiCAR**	*Note: Explanation should confirm that the crypto-asset is not a Pan-European Pension Product.*

	- **Social security schemes as referred to in Article 2(4), point (j), of MiCAR**	*Note: Explanation should confirm that the crypto-asset is not a social security scheme.*
Opinion, with full explanation that the crypto-asset is within the meaning of Article 3(1), point (6), of MiCAR		**Source of definition(s) (EU and/or national law as applicable):** **Case law (including paragraph references, as appropriate) to which reference is made in the explanation:** **Regulatory measures or guidance to which reference is made in the explanation:** **Explanation:** *Note: Explanation should not repeat the foregoing but should describe the attributes of the crypto-asset that conform to the definition of 'asset-referenced token'. The explanation may be provided in an Annex to this Opinion and should refer to all relevant provisions of the white paper, among any other materials, that are considered relevant in supporting the Opinion as to the regulatory classification of the crypto-asset.*
Additional relevant information		*Note: Please set out such other information as you consider appropriate to explain the regulatory classification of the crypto-asset.*

Annex C – Flow chart

This flow chart is provided for the purposes of the standardised test referred to in Article 97(1) of Regulation (EU) 2023/1114.


Is the token a digital representation of a value or of a right?
No
Not a 'crypto-asset' under Article 3(1)(5) MiCAR
Yes
Can it be transferred and stored electronically?
No
Yes
What is the technology used for this purpose?
Distributed ledger technology (DLT)
Technology similar to DLT
Other
Yes
Yes
Is it issued by a person in scope of Article 2(2) MiCAR?
Yes
MiCAR does not apply to the crypto-asset
No
Is it unique and not fungible with other crypto-assets?
Yes
MiCAR does not apply to the crypto-asset
No
Is it excluded under Article 2(4) MiCAR?
Yes
MiCAR does not apply to the crypto-asset
No
No
Does it purport to maintain a stable value?
Crypto-asset other than ART or EMT (Title II)
Yes
No
Is a value or right referenced?
Yes
Is it referencing the value of only one official currency?
No
Is it referencing a value or right or a combination thereof, including one or more official currencies?
Yes
Electronic money token (subject to Title IV)
Yes
Asset referenced token (subject to Title III)
Financial instrument as defined in Article 4(1)(15) Directive 2014/65/EU (MiFID II)
Deposit as defined in Article 2(1)(3) Directive 2014/49/EU (DGSG), incl. structured deposits defined in Article 4(1)(43) MiFID II
Funds as defined in Article 4, point (25), of Directive (EU) 2015/2366 (PSDII) - except if they qualify as e-money tokens
Securitisation positions in the context of a securitisation as defined in Article 2(1) of Regulation (EU) 2017/2402 (Securitisation Regulation)
Non-life or life insurance products falling within the classes of insurance listed in Annexes I & II Directive 2009/138/EC (Solvency II)
Reinsurance and retrocession contracts referred to in the Directive 2009/138/EC (Solvency II)
Pension products recognised under national law as having the primary purpose of providing investor with income in retirement and entitle to certain benefits
Officially recognised occupational pension schemes falling within the scope of Directive (EU) 2016/2341 (IORP II) or Directive 2009/138/EC (Solvency II)
Individual pension products for which a financial contribution from the employer is required by national law and where the employer or the employee has no choice as to the pension product or provider
Pan-European Personal Pension Product as defined in Article 2(2) of Regulation (EU) 2019/1238 (PEPP)
Social security schemes covered by Regulations (EC) No 883/2004 and (EC) No 987/2009

5. Accompanying documents

5.1 Cost-benefit analysis / impact assessment

As per Article 16(2) of the ESA Regulations, any guidelines and recommendations developed by the ESAs shall be accompanied by an Impact Assessment (IA), which analyses 'the potential related costs and benefits'. This analysis presents the IA of the main policy options included in the Guidelines.[31] This IA is high level and qualitative in nature.

Regulation (EU) 2023/1114 of the European Parliament and of the Council on Markets in Crypto-assets (MiCAR) regulates the offering to the public and admission to trading of asset-referenced tokens (ARTs), e-money tokens (EMTs), and other type of crypto-assets, as well as the provision of crypto-asset services in the European Union (EU). Inter alia, MiCAR sets out a wide range of regulatory requirements, including classification of crypto-assets and a convergent approach across EU.

In more detail, MiCAR requires:

- offerors, persons seeking admission to trading, or operators of trading platforms for a crypto-asset other than an ART or an EMT as defined in Article 3(1) point (7), to notify their crypto-asset white paper to the competent authority of their home Member State, accompanied by **an explanation** describing why the crypto-asset should not be considered excluded from the scope of that Regulation, or classified as an ART or EMT pursuant to Article 8(4);

- credit institutions intending to offer to the public or seek admission to trading of an ART to provide to the competent authority **a legal opinion** on the qualification of the crypto-asset pursuant to Article 17(1) point (b)(ii);

- legal persons or other undertakings that are not credit institutions intending to offer to the public or seek admission to trading of an ART to provide to the competent authority **a legal opinion** on the qualification of the crypto-asset pursuant to Article 18(2) point (e).

Article 97(1) of MiCAR requires the ESAs to issue Guidelines establishing templates for the explanation and legal opinion. Additionally, the ESAs are also required to establish a 'standardised

[31] https://www.eba.europa.eu/activities/single-rulebook/regulatory-activities/asset-referenced-and-e-money-tokens-micar/esas-guidelines-templates-explanations-and-opinions-and-standardised-test-classification-crypto

test for the classification of crypto-assets, recognising that MiCAR applies to crypto-assets that are not:

- unique and non-fungible with other crypto-assets (Article 2(3) of MiCAR);
- in scope of relevant sectoral measures by virtue of their qualification as financial instruments, deposits, insurance and pensions products and other relevant financial products as referred to in Article 2(4) of MiCAR;
- issued by persons excluded pursuant to Article 2(2) of MiCAR.

A. Problem identification

The competent authority for the purposes of Articles 8, 17 and 18 of MiCAR needs to receive information with an appropriate level of detail to enable the authority to understand the regulatory classification of the crypto-asset which, in turn, establishes the applicable regime under MiCAR (i.e. whether the crypto-asset is indeed an EMT in scope of Title IV, and ART in scope of Title III, or another type of crypto-asset in scope of Title II).

Insufficient information, and a lack of standardised information, in the explanation or, as the case may be legal opinion, would impede the ability of competent authorities to consider in a consistent manner the regulatory status of crypto-assets, thereby undermining the effective application of MiCAR (and other Union acts relating to financial products within the scope of Article 2(4) of that Regulation), and potentially lead to regulatory arbitrage across the EU. Moreover, the absence of a systemic and consistent approach to the regulatory classification of crypto-assets could lead to similar issues.

B. Policy objectives

The strategic objectives of the Guidelines are to harmonise the format of explanations and legal opinions referred to in, respectively, Article 8(4), 17(1) and 18(2) of MiCAR, and to harmonise the approach to the regulatory classification of crypto-assets (the standardised test). The operational objectives are to specify the detailed templates for the explanations and legal opinions and to provide a standardised test, whilst respecting the fact that it may be necessary for those persons using the templates or applying the test to refer to a range of potentially applicable national laws, guidance and other measures (recalling that many regulatory products of a kind referred to in Article 2(4) of MiCAR are not exhaustively defined in EU law and that their interpretation made by Member Stated may differ).

C. Baseline scenario

In a baseline scenario where no harmonisation of the explanations or legal opinions is achieved and no standardised test is available, competent authorities would request information on a case-by-

case basis to review the purported regulatory classification of a crypto-asset. This may lead to significant divergences in the type and format of information requested, resulting in different information being available to competent authorities, potentially undermining the effective application of EU law, undermining the level playing field and potentially posing risks of regulatory arbitrage.

D. Options considered

The main policy options discussed, and the decision made, by the ESAs during the development of the Guidelines are described below.

Policy Issue A: Templates

Option 1a: To require in the templates for the explanation and legal opinion only information that relates to the purported regulatory classification of a crypto-asset.

Option 2a: To require in the templates for the explanation and legal opinion information that relates to not only the purported regulatory classification of a crypto-asset but also provides information that justifies why the crypto-asset is not another type of regulatory product (within the scope of Regulation (EU) 2023/1114 or outside the scope pursuant to Article 2(4) of that Regulation).

Option 2a is preferred because, notwithstanding the higher costs associated with the production of the explanations and legal opinions, the provision of such broader set of information will (a) ensure those persons seeking to issue, offer to the public, or seek admission to trading of crypto-assets have performed a comprehensive assessment of the crypto-asset against the standardised test and (b) ensure the competent authority has available a complete set of information and rationale justifying the identified regulatory status.

Policy Issue B: References to the law

Option 1b: Regulatory classification of a crypto-asset requires case-by-case assessment, taking account of applicable EU and national law without regard to any case law, regulatory measures or guidance applicable at the national level.

Option 2b: Regulatory classification of a crypto-asset requires case-by-case assessment, taking account of applicable EU and national law with regard to any case law, regulatory measures or guidance applicable at the national level.

The prospective issuers/offerors/persons seeking admission to trading will submit the information and the filled templates to their respective competent authorities. Such information may include references to EU and national law, case law and guidance that is relevant to assessing the regulatory status of a crypto-asset in the Member State concerned, recalling again that many regulatory products within the scope of Article 2(4) of MiCAR are not exhaustively defined in EU law. Option

2b is preferred because an assessment of the regulatory status of a token may benefit from consideration of relevant case law, regulatory measures of guidance in the Member State concerned, thus enabling a comprehensive assessment.

E. Cost-Benefit Analysis

In general, the Guidelines will primarily benefit prospective issuers/offerors/persons seeking admission to trading and competent authorities more than they would cost them. A more detailed evaluation of costs and benefits is provided in Table 1.

Table 1. Costs and benefits of the Guidelines

Stakeholder	Costs	Benefits
Prospective issuers/offerors/persons seeking admission to trading	Additional data and information to be provided to the competent authority which may also require additional resources.	Transparent evidence on the information required on the regulatory classification of a crypto-asset. Minimise ad-hoc requests from/to the Competent Authority on clarifications and decision on the legal opinion. Common and consistent approach and pre-defined templates across member states, thus ensuring a level playing field.
Competent authorities	Additional data and information for analysis which may also require additional resources.	Harmonised and complete information submitted to the competent authority for the assessment of the regulatory classification of a crypto-asset. This also ensures the effective application of Regulation (EU) 2023/1114. Consistent and systemic approach leading to common application of a crypto-asset classification assessment across EU member states. Competent Authorities will not need to address case-by-case requests to request information necessary to conduct the assessment of a crypto-asset.

F. Preferred option

When comparing with the baseline scenario of no templates and standardised test, the Guidelines are expected to offer benefits by achieving a harmonisation of information and predefined submission templates which will help both prospective issuers/offerors/persons seeking admission to trading who will be aware in advance on the information they need to collect and submit and the competent authorities who will be able to conduct the assessment for the regulatory classification of crypto-assets. The Guidelines may to lead to some moderate costs related to the resources would be required for gathering and analysing the submitted information for the prospective issuers/offerors/persons seeking admission to trading and the competent authorities respectively.

5.2 Feedback on the public consultation

The ESAs publicly consulted on the draft proposal contained in this paper.

The consultation period lasted for 3 months and ended on 12 October 2024. 24 responses were received, of which 22 were published on the EBA's website.

This section presents a summary of the key concerns and other comments raised by respondents, the analysis and discussion resulting from these comments, and the actions the ESAs have taken to address them, if deemed necessary, including changes to the draft Guidelines.

In many cases, respondents made similar comments. In such cases, the comments, and the ESAs' analysis thereof, are grouped in a way that the ESA consider most appropriate.

Summary of key issues and the ESAs' response

The draft templates and standardised test were well supported. The key concerns and requests for clarifications that were raised by respondents are as follows:

- several respondents queried the interpretation of several terms used in MiCAR, including 'value', 'right', and 'fungible' (these being Level 1 interpretation issues which cannot be addressed by the ESAs in the Guidelines);

- several respondents requested more guidance on the treatment of so-called hybrid and non-fungible tokens (this change has not been made due to the need for a case-by-case assessment);

- several respondents called for a more proportionate approach with regard to explanations/opinions on why crypto-assets are not to be classified as insurance or pensions products (this comment has been addressed in the templates in Annexes A and B to the Guidelines);

- several respondents requested the inclusion of fields in the templates in Annexes A and B regarding 'executive summary' and 'other relevant information' (this comment has been addressed in the templates in Annexes A and B to the Guidelines);

- several respondents requested minor tweaks to the standardised test set out in Annex C to the Guidelines (notably to remove the 'no' between the last two 'diamond' shapes in the flow chart) (these comments have been addressed in the updated version of the flowchart);

- two respondents requested an acknowledgement of the transitional arrangements referred to in Article 143 MiCAR (this has been addressed in section 2 of the Guidelines).

It is also noted that several respondents submitted comments on matters outside the scope of the mandate, including on issues relating to MiFID II where many reiterated comments submitted to ESMA with regard to the ESMA consultation paper under Article 2(5) MiCAR.

In the feedback table that follows, the ESAs have summarised the comments received from respondents and has explained which responses have or have not led to changes and the reasons for the decision. It is to be noted that several stakeholders repeated comments in response to different questions. The comments appear in the feedback summary in relation to the first question in which they are raised (i.e. they are not repeated in the summary of feedback to subsequent questions).

Summary of responses to the consultation and the ESAs' analysis

No	Summary of responses received	ESA analysis	Amendments to the proposals
Responses to questions in Consultation Paper ESA/2024/12			
Q1. Do respondents have any comments on the template for the purposes of Article 8(4) Regulation (EU) 2013/1114?			
1.	Several respondents noted there is limited civil law case law in the area of crypto-assets and asked if common law cases be used, particularly in view of the limited case law (in general) to-date.	The ESAs observe that references to 'case law' encompass any relevant cases at the national level in the Member State(s) concerned, and of the Court of Justice of the European Union (CJEU).	**No changes made**
2.	One respondent noted that it may be helpful to include in the template references to existing EU directives and case law and another noted it would be helpful to specify a hierarchy of legal sources to which reference could be made in the explanation. Another indicated the Guidelines (GL) should include an Annex detailing the relevant legal interpretations across individual Member States regarding regulatory product definitions.	The ESAs note that the background section of the GL refers to the fact relevant EU Directives and Regulations and any relevant national law or guidance should be taken into account in assessing the regulatory classification of a crypto-asset in the Member State(s) concerned and referenced appropriately in the explanation submitted under Article 8(4) MiCAR using the template set out in Annex A. The ESAs do not consider it appropriate to introduce a 'hierarchy' or to insert a matrix of legal definitions at the national level as the relevant elements may vary, respectively, from jurisdiction to jurisdiction, and over time.	**No changes made**
3.	Two respondents noted that market developments are continuous, and templates must be adapted to accommodate novelties in a timely manner. Another respondent suggested to conduct user testing and pilot programs to assess its practical application before full implementation.	The ESAs recognise that the continuous nature of crypto-asset market developments and note that the GL can be updated from time-to-time if appropriate based on market developments and experience acquired in the classification of crypto-assets, including pursuant to the performance by the ESAs of their roles under Article 97 MiCAR.	**No changes made**
4.	One respondent noted it should be possible to include a statement that a crypto-asset does not purport to maintain a stable value by referencing to the value of one official currency (EMT) or another value	The ESAs agree that Title II encompasses a wide variety of crypto-assets and, for reasons of proportionality, it should be possible, for the explanation under Article 8(4) MiCAR, to indicate briefly	**Changes made** to the templates in Annexes A and B to the GL to differentiate between the type and

No	Summary of responses received	ESA analysis	Amendments to the proposals
	or right of combination thereof (including one or more official currencies) (ART). Several respondents made the same comment with regard to the financial products referred to Article 2 MiCAR (e.g. insurance and pensions products).	that, with regard to specific types of regulatory product (e.g. insurance and pensions products), the crypto-asset in question is not such a thing. It is to be noted that a NCA may request further clarifications in this respect if needed, as part of the notification process under Article 8 MiCAR. However, in other cases, more detailed explanation is expected. Such explanation may be longer or shorter depending on the characteristics of the crypto-asset in question.	level of explanation regarding different types of regulatory product, with a clear signal that a less detailed explanation may be appropriate in cases where the crypto-asset is more obviously not an insurance or pensions product or social security scheme, but more detailed explanation is needed in other fields (in particular, to explain why a crypto-asset is not a financial instrument under MiFID II). The explanation should sufficiently evidence the thought process of the person offering to the public or admitting to trading in the EU to determine that the crypto-asset is not a financial product to which other EU regulation applies as referred to in Article 2(4) MiCAR.
5.	One respondent suggested that further clarity may be provided regarding the regulatory treatment of crypto-assets that confer rights in relation to real-world assets (e.g. real estate) but do not purport to maintain a stable value.	The ESAs note that crypto-assets, including those that may confer on the holder a right in relation to a 'real world' asset, require a case-by-case analysis and it is not possible to include in the GL further guidance at this stage. However, the ESAs recall that the GL can be updated from time-to-time if appropriate based on market developments and experience acquired in the classification of crypto-assets, including pursuant to the performance by the ESAs of their roles under Article 97 MiCAR.	**No changes made**
6.	Two respondents suggested that, for all crypto-assets, a clear obligation for classification by the issuer is only mandated after 31 December 2027 because of the transitional arrangements.	The ESAs recognise the transitional arrangements established by Article 143 MiCAR. However, these arrangements do not have the effect of deferring the obligation to 31 December 2027.	**Changes made** to include a cross-reference to the transitional

No	Summary of responses received	ESA analysis	Amendments to the proposals
			arrangements in footnotes added section 2 of the GL.
7.	One respondent suggested combining the two templates set out in Annexes A and B to the draft GL. Another respondent noted that, for crypto-assets in scope of Title II, a legal opinion could also be provided, and another noted that legal opinions should be optional.	The ESAs note that different obligations apply depending on whether the crypto-asset is purported to be in scope of Title II or Title III. In particular, in the former case, an 'explanation' is required (Article 8(4) MiCAR), whereas in the latter case a 'legal opinion' is required (Article 17(1), point (b)(ii) and Article 18(2), point (e)). The expectations are therefore different and thus the ESAs consider it is helpful to provide separate templates for each case. However, this would not preclude an explanation under Article 8(4) MiCAR being prepared by a legal adviser.	**No changes made**
8.	Several respondents suggested that specific consideration should be given to so-called 'hybrid' crypto-assets.	The ESAs are aware that some crypto-assets may have characteristics that could imply different regulatory classification, and/or that these characteristics may evolve during the lifecycle of the crypto-asset. 'Hybrid crypto-asset' is not a term used in MiCAR, nor other EU regulation, and thus is not used in the templates set out in Annexes A and B of the GL nor in the standardised test (Annex C). Instead, a case-by-case assessment is needed to assess what a crypto-asset is. If a crypto-asset conforms to the expectations of a MiFID II financial instrument, then that is to be the prevailing classification, following the standardised test. Should the characteristics of the crypto-asset evolve during the lifecycle of the crypto-asset it is possible that the regulatory classification (and associated documents such as the white paper, and notification under Article 8(4) MiCAR etc) may need to be revised from time-to-time accordingly.	**No changes made**
9.	One respondent referred to the need to clarify the concept of 'means of payment'/ 'means of exchange'.	The ESAs note that this concept is not relevant to the definition (and therefore regulatory classification) of EMTs and ARTs under MiCAR (Article 3(1)(6) and (7)).	**No changes made**

No	Summary of responses received	ESA analysis	Amendments to the proposals
10.	Two respondents noted that Article 8(1) MiCAR imposes a requirement on 'offerors, persons seeking admission to trading, or operators of trading platforms for crypto-assets other than [ARTs or EMTs] to notify their crypto-asset white paper to their home Member State accompanied by the explanation of the regulatory classification referred to in Article 8(4) MiCAR, which could result in duplication and called for streamlining of the obligation or for an EU-wide registry. Another respondent considered it should be possible for explanations and legal opinions to be prepared jointly or by consortia.	The ESAs note the requirements established by Article 8 MiCAR, and also note that the information, including the white paper, to be published via ESMA's register as established by Article 109 MiCAR. The ESAs cannot disapply Level 1 requirements in the GL, including to 'switch off' the requirements established by Article 8 MiCAR. However, the templates set out in Annexes A and B to the GL anticipate that the explanation or legal opinion may be prepared on behalf of more than one person. The ESAs encourage market-based solutions that would facilitate transparency, and efficiencies in the process.	**No changes made**
11.	One respondent proposed to eliminate the data elements that are duplicative with the LEI reference data – specifically EEA/Member State of establishment, branch or registered office.	The ESAs acknowledge the utility of the LEI. However, for expediency, the ESAs encourage those persons preparing the explanation or legal opinion to include directly in the template all relevant information.	**No changes made**
12.	Several respondents indicated that some crypto-assets display a large degree of complexity and thus it may be difficult to include all relevant information in the fields established by the templates at Annexes A and B of the draft GL, and considered further flexibility or 'optional' fields, may be helpful. Another respondent proposed a 'modular' approach to the template that would provide more flexibility. Another respondent proposed there should be an 'executive summary' field added for ease of review by competent authorities. A respondent proposed a 'tiered documentation' with 'lower risk' (e.g. due to limited market activity) crypto-assets using streamlined documentation, and 'higher risk' crypto-assets being subject to more extensive requirements.	The ESAs agree some crypto-assets can be complex and all require a case-by-case assessment in terms of regulatory classification. The ESAs also recognise that the explanation as to the regulatory classification may need to be more or less extensive depending on the circumstances. The template provides flexibility for this calibrated approach. Additional flexibility is provided (as described above) to respond with a standardised statement where the crypto-asset in question is clearly not a specific type of financial product (e.g. insurance or pensions product). However, the ESAs agree that it could be helpful to include in the template an additional, optional, field enabling the person completing the template to include additional relevant information if they consider helpful. The ESAs also agree that it would be helpful to introduce an executive summary field. Finally, the ESAs do not agree that it would be appropriate to differentiate the template fields on the basis of 'lower'/'higher' risk crypto-assets or regarding market activity as such elements may be subjective and,	**Changes made** to include in the templates an 'executive summary' and 'additional relevant information' field.

No	Summary of responses received	ESA analysis	Amendments to the proposals
		at the time of the preparation of the explanation on the regulatory classification market activity regarding the crypto-asset may be limited but this may grow rapidly over time.	
13.	Several respondents observed that it could be burdensome to require information explaining why a crypto-asset is not a MiFID II financial instrument. One respondent noted that the detailed explanation possibly turns into a complex legal analysis and interpretation of national laws and proposed to streamline this requirement, e.g. to a description of key arguments and elements supported by references to a more general level. Several respondents recalled comments with respect to ESMA's GL under Article 2(5) MiCAR.	The ESAs note that it is important for any relevant person to assess if a crypto-asset is a financial instrument under MiFID II (in which case it would be excluded from MiCAR pursuant to Article 2(4) and the MiFID regime would apply). In some cases, the situation may be straightforward to explain based on the characteristics of the crypto-asset in question. However, in other cases the situation may be more complex and require both more careful analysis, and more detailed explanation. The template provides flexibility in this respect. The ESAs also refer to the ESMA Guidelines under Article 2(5) MiCAR with regard to the conditions and criteria for the qualification of crypto-assets as financial instruments, which acknowledge that it may be necessary to take account of any national specificities in assessing whether a crypto-asset is a financial instrument. The ESAs do not respond to the observations with regard to ESMA's GL under Article 2(5) MiCAR as these are outside the scope of the present GL.	**No changes made**
Q2. Do respondents have any comments on the template for the purposes of Article 17(1) point (b)(ii) and Article 18(2) point (e) Regulation (EU) 2023/1114?			
14.	One respondent requested a 'sample' legal opinion for guidance.	The ESAs note that crypto-assets require a case-by-case analysis and what will constitute sufficient explanation as to the regulatory classification will vary depending on the complexity of the issues at hand. As such no 'sample' legal opinion will be provided.	**No changes made**
15.	One respondent asked if it is possible for lawyers from common law jurisdictions to be allowed to assist clients in preparing a legal opinion.	The ESAs note that the legal adviser preparing the opinion should have the relevant qualification for the purposes of the Member State concerned (see further paragraph 16 of the GL).	**No changes made**

No	Summary of responses received	ESA analysis	Amendments to the proposals
16.	One respondent asked for clarification as to what is sufficient 'evidence' of a person's lack of conflicts, particularly in the case of in-house counsel. Another respondent considered the legal opinion should only be provided by external counsel and not in-house. Another observed that it should be possible for a compliance department to prepare a legal opinion.	The ESAs have clarified in paragraph 16 of the GL that the legal adviser must be free of conflicts of interest that cannot be effectively managed. For indicative examples of potential types of conflicts of interest, regard can be had to the draft technical standards developed by the EBA and ESMA under, respectively, Article 32 and Article 72 MiCAR. The ESAs do not consider that the mandate for the GL enables the ESAs to prescribe that the legal adviser must always be external counsel. The ESAs also note that it could be disproportionate to require the legal adviser also to be external counsel. The ESAs agree that it is possible a relevant person completing the template could be in the compliance department of the relevant person.	**Changes made** to clarify paragraph 16 of the GL to refer to conflicts of interest that cannot be effectively managed.
17.	One respondent indicated that the GL should provide that legal advisers do not incur liability regarding the content of the legal opinion.	The ESAs do not consider that the mandate for the GL enables the ESAs to make provision to 'switch off' any liability that may arise with regard to the content of the legal opinion.	**No changes made**
18.	One respondent noted that, since a central database of opinions is not an option [including because it is not mandated as part of the register under Article 109 MiCAR], it as a key responsibility of the regulatory authorities, to whom the opinions are submitted, to ensure consistent evaluation of identical products.	The ESAs note that, pursuant to Article 97 MiCAR, they are tasked with promoting discussion among competent authorities about, and promoting convergence with respect to, the regulatory classification of crypto-assets. The ESAs will report annually on this experience (Article 97(4) MiCAR) and will keep under review the GL.	**No changes made**
19.	One respondent noted that they consider the work of the international bodies, in particular FSB, IOPSC and IAIS, could be referred to in legal opinions.	The ESAs note that the legal opinion concerns the regulatory classification of a specific crypto-asset pursuant to EU and national law in the Member State(s) concerned. Accordingly, while the ESAs do not exclude (and nor do the templates preclude) reference to works of international bodies, it is noted this may be less relevant to the specifics of regulatory classification under	**No changes made**

No	Summary of responses received	ESA analysis	Amendments to the proposals
		EU/national law for the purposes of Article 2(4) MiCAR/ wider MiCAR purposes.	
20.	Two respondents suggested including in the templates new fields enabling information to be provided regarding compliance with applicable requirements under MiCAR (e.g. the right of redemption under Article 39 MiCAR, the non-payment of interest in the case of EMTs (Article 50 MiCAR etc)) and other information regarding remuneration aspects.	The ESAs note that the templates provided in Annexes A and B of the GL concern the regulatory classification of the crypto-asset and do not relate to conformity with any regulatory requirements that arise as a result of that classification. More generally, the ESAs note that, if relevant to the regulatory classification of the crypto-asset, additional information can be included in the new field 'additional relevant information' introduced in the templates available from Annexes A and B to the GL.	**Changes made** to include in the templates an 'executive summary' and 'additional relevant information' field.
21.	Several respondents requested clarification of the concept of non-fungibility, and one respondent suggested including additional elements in the template covering the fungibility aspect of the crypto-asset.	The ESAs recall that no definition is provided in MiCAR and it is not possible for the ESAs to provide in the GL an exhaustive definition of the concept of fungibility.	**No changes made**
22.	One respondent called for further convergence efforts by the EC or the ESAs regarding the terms of reference of characterization of each item listed in Article 2(4) MiCAR, so that each applicant starts the analysis from the same legal basis.	The ESAs recall that the definitions of some of the regulatory products referred to in Article 2(4) MiCAR are not fully harmonised across the Member States. This is a well-known issue and is beyond the institutional competence of the ESAs to address in these GL.	**No changes made**
23.	One respondent called for the template to include a field to convey the definitive legal conclusion.	The ESAs note that the legal conclusion can be reflected in the executive summary for the legal opinion. This does not displace the need to provide the explanations requested in the template.	**Changes made** to include in the templates an 'executive summary' and 'additional relevant information' field.
24.	One respondent noted that the template should enable legal advisers to indicate the functional attributes, use case and operational purposes of the crypto-asset. Another noted the template should enable legal advisers to indicate elements to demonstrate the ownership (including control and custody arrangements) of 'underlying assets'.	The ESAs note that, should these elements be relevant to the regulatory classification, they can be reflected in the executive summary or other relevant fields of the template for the legal opinion.	**Changes made** to include in the templates an 'executive summary' and 'additional relevant information' field.

No	Summary of responses received	ESA analysis	Amendments to the proposals
25.	One respondent indicated that in the case of doubt as to the classification of a crypto-asset (MiFID financial instrument or ART), MiCAR should take precedence.	The ESAs do not agree MiCAR takes precedence in such a circumstance. The EU adopts a technology neutral approach to regulation and, consistent with Article 2 MiCAR, if a crypto-asset is determined to be a relevant financial product, it is excluded from MiCAR.	**No changes made**
Q3. Do you consider that the fields of the template relating to explanations as to regulatory status are sufficiently clear and would enable a proportionate completion in line with the simplicity or complexity of the structure of the crypto-asset to which the explanation or legal opinion relates?			
26.	One respondent noted that complex answers (in the context of explanations and legal opinions) will require the use of Annexes**.**	The ESAs agree that it may be appropriate for Annexes to be used (e.g. to provide supplemental references or supporting materials).	**No changes made**
27.	One respondent suggested that the template include elements relating to the assessment of crypto-assets as significant. Another two respondents also indicated that examples should be embedded.	The ESAs note that the templates for the explanation and legal opinion, as well as the standardised test, relate to the regulatory classification of a crypto-asset and not whether the crypto-asset (in the case of ARTs and EMTs) is to be determined as significant, for which a specific EBA procedure exists.[32] The ESAs recognise that the continuous nature of market developments and note that the Guidelines can be updated from time-to-time if appropriate based on market developments and experience acquired in the classification of crypto-assets, including pursuant to the performance by the ESAs of their roles under Article 97 MiCAR. However, no precise examples are included at this stage (a) due to the limited experience acquired with the application of MiCAR; (b) so as to not undermine the principle that all crypto-assets require a case-by-case analysis.	**No changes made**
28.	One respondent indicated a word count should be provided for each part of the template (e.g. minimum/maximum number of words).	The ESAs observe that a wide range of crypto-assets exist with different characteristics and levels of complexity and therefore do not consider it appropriate to include a word limit.	**No changes made**

[32] https://www.eba.europa.eu/publications-and-media/press-releases/eba-clarifies-procedure-classification-asset-referenced-tokens-and-e-money-tokens-significant-and

No	Summary of responses received	ESA analysis	Amendments to the proposals
29.	One respondent indicated that there should be a presumption of MiCAR application, and that it should not be necessary for a person to evidence why a crypto-asset is not covered by other regulatory requirements.	The ESAs note that specific types of crypto-assets are excluded from the scope of MiCAR and may be within the scope of other sectoral requirements. It is important for persons seeking to offer to the public or admit to trading crypto-assets to have carried out an assessment of whether a crypto-asset is correctly classified. The templates for the explanation and legal opinion ensure this explanation is set out in a standardised manner against all relevant potential alternatives.	**No changes made**
30.	One respondent requested clarification as to what is intended by the field 'regulatory status' in the templates in Annex A.	The ESAs agree that this is benefit in clarification and have adjusted the note embedded in the template accordingly (and aligned the wording also in the template available from Annex B).	**Changes made** to clarify what is intended by this field
31.	One respondent requested to include fields for 'compliance with MiCAR requirements' in templates in Annexes A and B.	The ESAs note that the templates for the explanation and legal opinion, as well as the standardised test, relate to the regulatory classification of a crypto-asset and is not a compliance assessment against the requirement established by MiCAR.	**No changes made**
32.	Two respondents indicated the standardised test should differentiate between different categories of crypto-assets and/or be more granular.	The ESAs note the mandate refers to 'a' standardised test and therefore have developed a consolidated test articulating the key aspects to be assessed in establishing the regulatory classification of a crypto-asset.	**No changes made**
Q4. Do respondents have any comments on the standardised test?			
33.	One respondent queried the term 'token' in the first question of the flow chart and suggested to replace this word by "asset" or to define the word "token" in the context of the GL.	The ESAs attempted to find a neutral representation as the 'thing' may not be a 'crypto asset' as defined in MiCAR, nor may it be an asset. 'Code' is an alternative formulation. However, this may not imply a 'thing'. For these reasons the ESAs retain 'token' as the starting point meaning something digital as the starting point for the standardised test.	**No changes made**

No	Summary of responses received	ESA analysis	Amendments to the proposals
34.	Respondents called for additional guidance and clarity on what is meant by 'technology similar to DLT'. Several respondents called for additional guidance on the terms "stable value", "right", "value". In particular, the "stable value" in Question 7 might refer to volatility of the asset. Another respondent queried whether a token with no intrinsic value but to which value may be attributed to the market is a crypto-asset in scope of MiCAR. One respondent suggested to split Q1 into two as follows: (a) *"Is it digital?".* (b) *"Is this [a digital representation of] a value or a right, or a representation of a value or of a right?".* A similar comment was made with regard to Q2, and Qs7 and 8.	The ESAs note that these remarks relate to the interpretation of MiCAR and are unable to provide further guidance beyond that included in the draft Guidelines. However, the ESAs recall that the notions of 'right' and 'value' are to be interpreted broadly. The ESAs do not disagree with the proposal to split Q1 (and other Qs as proposed). However, for the purposes of keeping the standardised test as simple as possible, this split has not been implemented.	**No changes made**
35.	One respondent indicated that further guidance is needed on how to assess whether a token is truly "non-transferable." While recital (17) of MiCAR outlines conditions under which a token is considered non-transferable, it is crucial that the test be able to differentiate between tokens that are deliberately designed to remain within a closed system and those intended for broader market participation. Another respondent asked to clarify that Q2 should refer to transfers 'to other holders'.	The ESAs note that this question relates to the interpretation of MiCAR and are unable to provide further guidance beyond that included in the GL. The ESAs note that the definition of crypto-asset set out in Article 3(1)(5) does not refer to the notion of transferability with regard to other holders (albeit the existence of recital (17) is fully noted) and therefore the ESAs have not inserted this notion into the standardised test.	**No changes made**
36.	Several respondents noted that 'from the rhombus where it is asked whether the CA refers to the value of a single official currency – the middle of the bottom three – two arrows erroneously start out, both referring to an affirmative answer. The rightmost arrow should instead refer to the negative answer', and called for additional clarity between the rhombus for ARTs and EMTs.	The ESAs agree on the need for clarification.	**Changes made** to clarify the flowchart.
37.	One respondent expressed a preference for Option 1b, which calls for a case-by-case assessment of crypto-assets under MiCAR, relying	The ESAs note that in explaining the regulatory classification of a crypto-asset may be appropriate to have regard to case law which	**No changes made**

No	Summary of responses received	ESA analysis	Amendments to the proposals
	solely on applicable EU and national law, without incorporating national case law.	provides further clarification as to regulatory terms or concepts in the Member State concerned.	
38.	One respondent suggested to include in the standardised test the exclusions from the scope of MiCAR based on the identity of the 'person' carrying out the activity – e.g. person who provide crypto-asset services exclusively for their parent companies, for their own subsidiaries or for other subsidiaries of their parent companies (Article 2(2) MiCAR). Another respondent requested further clarity on what constitutes "issuance" in decentralised or community-driven projects where there may not be an identifiable issuer. Another respondent offered a set of suggested questions in place of the standardised test proposed in the consultation paper, including questions about the location in which the crypto-asset is being offered, the proposed use of a crypto-asset and obligations on the issuer.	The ESAs note the standardised test relates to the (regulatory classification of the) crypto-asset itself and not persons who may be carrying out activities involving crypto-assets, ecosystems in which crypto-assets may be transacted, nor the use to which the crypto-asset may be put.	**No changes made**
39.	One respondent suggested to conduct user testing and pilot programs to assess its practical application before full implementation.	The ESAs recognise that the continuous nature of market developments and note that the GL can be updated from time-to-time if appropriate based on market developments and experience acquired in the classification of crypto-assets, including pursuant to the performance by the ESAs of their roles under Article 97 MiCAR.	**No changes made**