



The Trusted Advisor in
Digital Asset Compliance

Response to European Supervisory Authorities Consultation Paper

The draft Guidelines on templates for explanations and
opinions including the standardised test for the
classification of crypto-assets

October 2024



RESPONSE TO EUROPEAN SUPERVISORY AUTHORITIES CONSULTATION PAPER

DRAFT 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

12 July 2024 ESA 2024 12

Introduction

BitCompli welcomes the opportunity to provide feedback on the Draft 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 from the European Securities Authorities (ESAs).

As a firm specializing in regulatory compliance and support for cryptoasset firms, we are committed to fostering a robust regulatory framework that balances innovation and compliance within the crypto space.

Our response focuses on the practicality and clarity of the proposed templates, the potential impact of the standardized test on firms within the crypto ecosystem, and recommendations for ensuring regulatory certainty while promoting industry growth. We look forward to contributing to the ongoing dialogue and helping shape a regulatory environment that supports the responsible development of crypto-assets.



About us

BitCompli provides expert regulatory and compliance support within the crypto and digital asset sectors. With our expertise, we've successfully streamlined and supported regulatory registrations for diverse cryptoasset institutions in key regions like the UK, EU, EEA, UAE and more.

Our partners, who are located globally, consists of FCA approved MLROs and CCOs as well as Board Members and Directors of registered cryptoasset businesses throughout the UK, EU/EEA, South-East Asia and the UAE. All our partners have substantial experience within the traditional finance and cryptoasset industries.

All our partners have led or supported cryptoasset registrations and payment licence applications.

BitCompli's partners have also supported governmental agencies in relation to the regulation of cryptoassets including the UK National Crime Agency (NCA) and the UK All Party Parliamentary Group (APPG) on Cryptoassets.

BitCompli are proud members of CryptoUK; the self-regulatory trade association for the UK cryptoasset industry, established to promote higher standards of conduct.

A handwritten signature in black ink, appearing to read "Tom Griffiths".

Tom Griffiths

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1. Do respondents have any comments on the template for the purposes of Article 8(4) Regulation (EU) 2023/1114?

Response

Crypto-asset box

'Detailed explanation that the crypto-asset ... is not an [EMT ... an [ART]'

It is obviously difficult to explain what something is not from both a legal and logical standpoint – the problem of proving a negative.

In many cases, it should be simple enough to state that something is just not excluded by Article 2(4) and is not an EMT or an ART.

A suggested statement that would suffice to comply might be just stating that the crypto-asset does not purport to maintain a stable value either by reference to:

- an official currency [an EMT under Article 3(1)(7)]; or**
- another value or right or a combination thereof [an ART under Article 3(1) (6)].**

The case of an EMT is simpler given Article 48(1)(a) since it requires authorisation either as a credit institution or an EMI – put simply, those are objective criteria easily asserted by making no claim to be either.

It is our contention that a crypto-asset token that gives the right to a real-world asset (say real estate) but does not purport to maintain a stable value is clearly not an ART subject to Article 2(3) relating to NFTs and Recital 11 regarding fractionalisation.

Article 48(1) second sub-paragraph relating to 'other persons' (offers to the public and admission to trading of an [EMT]) requires the written consent of the issuer of the EMT – again, put simply, if this does not exist then the token is not an EMT.

'Detailed explanation that the crypto-asset is not [a] ... (a) financial instrument ... (j) social security schemes'



It is obviously difficult to explain what something is not from both a legal and logical standpoint – the problem of proving a negative.

In many cases, it should be simple enough to state that the crypto-asset is just not something that is excluded by excluded by Article 2(4)(a) to (j).

Article 8(4)

The notification of the crypto-asset white paper referred to in paragraph 1 shall be accompanied by an explanation of why the crypto-asset described in the crypto-asset white paper should not be considered to be:

- (a) a crypto-asset excluded from the scope of this Regulation pursuant to Article 2(4);
- (b) an e-money token; or
- (c) an asset-referenced token.

2. Do respondents have any comments on the template for the purposes of Article 17(1) point (b)(ii) and Article 18(2) point (e) of Regulation (EU) 2023/1114?

Response

Information about Opinion box:

‘Evidence of person(s) ... ‘

What evidence is necessary for an in-house legal adviser who may (for example) not hold a practising certificate as/when it is not required.

Crypto-asset box:

‘Opinion, with detailed explanation ...’

Our response to Question 1 (above) applies mutatis mutandis to the requirements to explain and/or prove a negative.



It would be disproportionate to require detailed explanations to prove negatives particularly with respect to Articles 2(4)(a) to (j) on the grounds of the excessive cost of external (or internal) legal advice of proving negatives.

Article 17(1) Requirements for credit institutions

(b) notifies the respective competent authority, at least 90 working days before issuing the asset-referenced token for the first time, by providing it with the following information:

- (i) ...
- (ii) a legal opinion that the asset-referenced token does not qualify as either of the following:
 - a crypto-asset excluded from the scope of this Regulation pursuant to Article 2(4);
 - an e-money token;

Article 18(2) [Requirements for non-credit institutions]

The application referred to in paragraph 1 shall contain all of the following information:

...

- (e) a legal opinion that the asset-referenced token does not qualify as either of the following:
 - (i) a crypto-asset excluded from the scope of this Regulation pursuant to Article 2(4); or
 - (ii) an e-money token;



3. 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

Response

Yes, subject to the explicit recognition that in many cases compliance with the requirements could be achieved by simple assertions that do not require the proof of a negative – this would be proportionate and avoid unnecessary legal costs.

The templates use boxes for the answers to the questions – it would be helpful to make it clear whether or not the use of the exact format is mandatory.

Complex answers will require the use of Annexes.

4. Do respondents have any comments on the standardised test?

Response

No comment.





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