

**Deutsche Börse Group Response to  
ESAs Consultation on 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**

Eschborn, 01. October 2024

Deutsche Börse Group (DBG) appreciates the opportunity to comment on the ESAs consultation on 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.

The standardised test offers an essential step towards a uniform approach that supports the goals of CMU/SIU, and we welcome the approach taken towards the overarching goal of creating regulatory coherence in the classification of crypto assets across all Member States. However, we consider the proposed framework not yet sufficiently elaborate to ensure harmonized application of MiCA across all jurisdictions.

Harmonized classification of crypto assets is essential for the functioning of the single market and ensuring passporting rights within the MiCA regime. Whilst initial classification of an asset remains within the purview of issuers, NCAs have the right to challenge this assessment. In case that, for example, a home and host NCA have differing views in terms of classification of the same asset, this could prove to be a significant hurdle to EU-wide scaling/passporting and a truly single market. In addition, divergent approaches taken by NCAs could create possibility for a regulatory arbitrage, further hampering harmonized application. We recognise that ESMA can provide a non-binding opinion if requested by an NCA; however, this mechanism does not seem sufficient to ensure harmonized approach, foster competition or prevent disputes between NCAs.

Therefore, we ask the ESAs to provide regulatory clarity in form of a policy statement including an arbitrage process that offers guidance to NCAs as well as legal certainty to market participants intending to offer crypto assets. This process should clearly define the mechanisms and a process to harmonise conflicting options between NCAs in a given period of time, while refraining challenging the principles of the case-by-case assessment by the NCAs and current classification structure as proposed with the standardised test.

Additionally, the legal regime covering completely decentralized assets (e.g., Bitcoin, Ether) remains an open issue. Recently held European Commission workshop reiterated the opinion that such assets would at least fall under the scope of the Title 5 regime set in MiCA, authorization and operating conditions for crypto asset service providers (CASPs).

DBG asks ESAs to provide clear and binding guidance on the legal nature of decentralized assets in order to offer certainty and predictability to market participants. Any solution needs to ensure the right level of investor protection whilst creating an attractive environment for CASPs that considers that there is no single issuer to decentralized assets. Otherwise, despite a pioneering attempt to create a regulatory framework for crypto assets, EU markets risk losing competitiveness vis a vis other jurisdictions that have made decisive steps in creating a predictable and sufficiently clear legal regime for decentralized assets.