
FECIF's reply to the Consultation Paper on Draft Guidelines on templates for explanations and opinions, and the standardised test for the classification of crypto assets, under Article 97(1) MiCAR

General comment to ESAs Draft Guidelines

Setting the regulatory perimeter is essential for sound financial regulation and supervision. In the European Union, MiCAR has chosen to develop a taxonomy of crypto-assets, including decentralised finance (DeFi) by empowering the European Financial Authorities (ESAs) to develop draft templates, accompanied by a standardised test for the classification of crypto-assets. Given the global nature of crypto-assets, FECIF acknowledges the monumental effort being made by the ESAs to provide Draft Guidelines on templates for explanations and opinions, and the standardised test for the classification of crypto-assets. We believe that with this effort we are moving towards the legal certainty necessary for an orderly development of the crypto-asset market, with a balance between innovation and investor protection, ensuring the stability of the financial system as a whole. We therefore express our positive opinion on the Draft Guidelines submitted for consultation. However, in order to improve the Draft there are four points that may need further clarification.

Global nature of crypto assets

The concept of crypto assets is a concept under construction of a global nature. For this reason, when explaining crypto-assets or preparing the legal opinion, it is necessary to extend the sources to international organisations, in particular financial ones (FSB, IOSCO, IAIS). The concept of crypto assets is an evolving concept on a global scale. The European Union must be prevented from developing its own taxonomy, in isolation from the rest of the world, which could be detrimental to innovation and competitiveness.

The templates are part of the White Paper aimed at overcoming the information asymmetry of the retail investor.

The templates and the accompanying standardised test are undoubtedly of great use to supervisors, but they are also of interest to institutions and investors. For this reason, they should accompany the publication of the White Paper in the terms set out in MiCAR.

Indeed, as the consultation states, regulatory classification of the crypto-asset facilitates the ability of competent authorities to consider in a consistent manner the regulatory status of crypto-assets, thereby strengthen the effective application of MiCAR.

While the strategic objective of the Draft Guidelines is 'to harmonise the format of explanations and legal opinions' by the supervisors, the operational objective is to specify the detailed templates for the explanations and legal opinions and to provide a standardised test' for those persons using the templates or applying the test, including institutions and investors.

However, FECIF considers that it would be useful to clarify whether the templates, as an integral part of the White Paper, should be published for the knowledge and use of institutions and investors.

As the main objective of the White Paper and the corresponding templates is the protection of the retail investor, the training of staff informing or advising investors is essential. The guidelines should mention that crypto-asset advisors must have the knowledge and skills to clarify the content of the White Paper to investors through the templates and standardised tests developed by the ESAs. In fact, the templates could include a notice to investors that they can go to the national supervisor or their financial advisor to clarify the content of the whitepaper, including the templates and the standardised test case by case.

The evolving nature of the concept of crypto assets calls for caution.

With regard to the taxonomy of crypto assets, these are not closed concepts on which there is a consolidated doctrine. In fact, discrepancies may arise between the sources used to develop the concepts. For example, national case law may take positions that differ from the interpretation of MiCAR offered by the ESAs. Following ESMA: 'Due to the evolving nature of crypto-asset arrangements in the market, making an exhaustive and up to date classification would be overly sweeping'^[1] The classification of crypto-assets is not an exact science, which can offer closed answers. The open and evolving nature of the regulatory perimeter is inherent to crypto assets. Providing investors with clarity that contrasts with the diversity of opinions from sources can be misleading. In this respect, the templates accompanying the White Paper should warn of this legal risk and of the evolving nature of crypto assets.

The need to specify when decentralised funding falls within the regulatory perimeter.

Given the development of decentralised finance (DeFi), it should be clarified when and to what extent it falls within the regulatory perimeter of MiCAR. FECIF welcomes the Draft's rationale that 'where a token has been classified as a crypto-asset in scope of MiCAR, regardless of whether there is an issuer, there may be an offeror, a crypto-asset service provider regulated pursuant to MiCAR', in reference to Bitcoin and other tokens created via fully decentralised mechanisms. But this generic mention should be complemented by reference to solutions reached in other jurisdictions.^[2]

^[1] ESMA, *Consultation paper on the draft Guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments*, ESMA75-453128700-52, 29 January 2024, p. 22.

^[2] US H.R. 4763, Financial Innovation and Technology for the 21st Century Act of 2024 defines a decentralized system one in which no one person or entity has 'unilateral authority' to control or materially alter the functionality or operation of the blockchain system.