



IOTA Stiftung - Pappelallee 78/79 – 10437 Berlin


Berlin, 11.10.2024

Response to the Consultation Paper on Draft Guidelines Under Article 97 of Regulation (EU) 2023/1114

Dear European Supervisory Authorities,

The IOTA Foundation welcomes the opportunity to contribute to the Consultation Paper for the Draft Guidelines under Article 97 of Regulation (EU) 2023/1114. We deeply appreciate the ESAs' efforts in developing a clear and harmonized regulatory framework for the classification of crypto assets. In our response, we aim to offer constructive feedback to further refine and enhance the proposed guidelines, ensuring they effectively support innovation while maintaining robust regulatory oversight. Our suggestions are intended to promote a balanced approach that addresses the complexities of the evolving crypto assets landscape.

Please feel free to contact us at legal@iota.org if you wish to discuss any of the points raised in more detail.

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Dr. Anja Raden
Member of the Board of Directors



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

The template for the purposes of Article 8(4) provides a structured framework. However, while it is clear and systematic, it lacks sufficient flexibility to address the diverse and evolving nature of crypto-assets, many of which do not fit neatly into predefined regulatory categories. A more nuanced and adaptable approach, perhaps by introducing additional optional fields or sections, would enable issuers to provide context-specific information about their assets, ensuring a more precise and tailored classification process. This would be especially beneficial for assets with hybrid characteristics or those still in developmental stages, where a one-size-fits-all model may not fully capture their intricacies.

Additionally, forcing issuers to prove that their assets do not fall under MiFID places an undue burden on them. This not only raises compliance costs but risks stifling innovation in the EU, as smaller entities may lack the resources to navigate the complex regulatory landscape. To mitigate this, we suggest adopting a tiered documentation system, where the level of detail required is proportional to the complexity and risk profile of the crypto-asset. For simpler, low-risk assets (e.g. utility tokens with limited market activity), the documentation could be streamlined, requiring only essential disclosures. For more complex assets, such as asset-referenced tokens or e-money tokens with significant market share, the documentation should be more comprehensive, ensuring a thorough regulatory review. This tiered approach would ensure proportionality and reduce unnecessary compliance costs for smaller projects while maintaining rigorous oversight for assets that pose higher systemic or market risks.

Furthermore, the approach of requiring issuers to prove that their crypto-assets are *not* excluded from MiCAR raises fundamental issues. This presumption essentially treats crypto-assets as regulated financial instruments by default as referred to in Article 2(4), point(a) MiCAR, which contradicts the distinct objectives of MiCAR and MiFID, each of which has distinct regulatory objectives. MiCAR was designed to address the specific risks and features of crypto-assets that do not align with traditional financial categories. By forcing issuers to demonstrate exclusion from MiFID, there is a risk of regulatory overlap and confusion, potentially leading to inconsistent interpretations across Member States. This could create opportunities for regulatory arbitrage and undermine the harmonization goals of MiCAR. Therefore, the assumption that crypto-assets are likely to be financial instruments unless proven otherwise could lead to a regulatory environment that is overly cautious and potentially hostile to innovation. This, in turn, could negatively impact the EU's competitiveness in the global crypto market.



Finally, to ensure the template remains effective over time, we recommend introducing a mechanism for periodic updates to the submitted explanations. This would allow for re-assessments as the characteristics of crypto-assets evolve and as market conditions shift. Given the rapid pace of technological and financial innovation, a dynamic approach would help ensure that regulatory classifications stay aligned with the actual use and impact of the crypto-assets in question.

For all the reasons above, we strongly believe that Option 1a, as described in Policy Issue A of the Guidelines, would be far more effective in promoting a proportionate, flexible, and innovation-friendly regulatory environment. It would align better with MiCAR's intent, reduce unnecessary burdens on market participants, and foster a more predictable and consistent application of the regulatory framework across the EU. Additionally, Option 2a would effectively require issuers to seek legal opinions, even though MiCAR does not mandate legal opinions for crypto assets that are not ARTs. MiCAR only requires a statement from the management body of the issuer confirming that the crypto asset white paper complies with MiCAR's requirements. This additional legal burden under Option 2a would place unnecessary strain on issuers, particularly those dealing with non-ART tokens, thereby increasing compliance costs without clear regulatory benefits.

Question 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?

We do not have any comments on this question.

Question 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?

Article 2 of MiCA specifies that it applies to persons engaged in the issuance of crypto-assets or the provision of services related to crypto-assets in the EU. The affirmative language of Article 2 should serve as a guiding principle when determining the scope and application of MiCA, implying that crypto-assets are included in the scope of MiCA as a starting point. However, ESA's draft guidelines contradict this understanding by placing the burden of proof on the issuers and persons seeking admission to trading, requiring them to prove that their token does *not* fall under the scope of MiFID instead. In practice, the approach proposed by ESA would introduce additional obstacles for issuers and persons seeking admission to trading, such as the need to seek legal advice regarding the



prevailing interpretations and case law related to MiFID, and make it more difficult to introduce new crypto-assets to the market under MiCA.

Additionally, the principle of proportionality should guide the design of the templates, ensuring that issuers are not disproportionately burdened by compliance requirements relative to the complexity of the crypto asset. Simpler crypto assets should require less documentation, while more complex or systemically important ones may demand more comprehensive disclosures. A proportional system would ensure fairness and efficiency, facilitating market entry for smaller or less risky projects while maintaining necessary safeguards for more advanced crypto assets and tokens.

Question 4: Do respondents have any comments on the standardised test?

The proposed standardized test offers a strong foundation for the consistent classification of crypto-assets, which is vital for reducing regulatory uncertainty and promoting a harmonized approach across the EU. However, while the test is helpful in providing consistency, its current structure may not adequately account for the diversity and evolving nature of crypto-assets. Given that many tokens exhibit hybrid features or may change in functionality over time, a one-size-fits-all approach could limit the test's effectiveness.

The lack of specific guidance and illustrative examples in the test, as well as the overly simplified flow chart in Annex C, could lead to inconsistent interpretations across Member States. Crypto-assets are complex, and the test should provide clearer instructions to help national authorities navigate challenging classification scenarios. This would help minimize discrepancies and ensure that issuers and service providers across the EU operate under consistent regulatory expectations. By offering more detailed examples and guidance, the test would also lower the risk of misclassification, promoting greater compliance and ultimately supporting MiCAR's broader objectives of fostering innovation, protecting financial stability, and safeguarding consumer interests.

Another critical issue is the technical capability of NCAs to implement the standardized test effectively. The classification of crypto-assets requires a deep understanding of blockchain technology, its use cases, smart contracts and emerging economic models. Expecting NCAs to have the necessary expertise may be unrealistic, leading to inconsistent or incorrect classifications across jurisdictions.

Given the rapid pace of innovation in the crypto assets ecosystem, even well-resourced authorities may struggle to keep up with the evolving landscape, increasing the risk of regulatory gaps or misclassifications. To address these challenges, it would be beneficial to establish specialized units within the ESAs or



to create a centralized technical advisory body that NCAs can consult for complex cases. This body could provide expertise, technical guidelines, and best practices to ensure accurate and consistent token classification across the EU.

In terms of Policy Issue B, we strongly prefer Option 1b, which calls for a case-by-case assessment of crypto-assets under MiCAR, relying solely on applicable EU and national law, without incorporating national case law. This approach ensures that the classification of crypto-assets is based on uniform EU principles, reducing the risk of fragmentation across different jurisdictions due to varying national interpretations. We believe this will enhance legal certainty for issuers and avoid conflicts that could undermine MiCAR's goal of harmonization and standardization.

However, if Option 2b is pursued, which takes national case law and regulatory measures into account, we see a need for specific clarifications. In particular, there must be guidance on how pre-MiCAR rulings will be treated under the new framework. For instance, if a national court previously classified a crypto-asset as a security under existing national laws, but post-MiCAR, that same asset would now be considered a utility token, it is crucial to clarify how such conflicting classifications will be reconciled. Without such clarity, issuers and market participants could face legal uncertainty and inconsistent regulatory outcomes, undermining the goal of a unified regulatory framework.