Bitpanda response to 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

General observations:

We welcome the ESAs points that: *all crypto-assets require a case-by-case assessment based on their individual attributes. The standardised test is intended to facilitate a consistent approach to classification. This is done by establishing a common approach to determine whether a crypto-asset falls within the scope of MiCA and, if so, the regulatory classification under this Regulation*.

However, once again, we want to highlight the need to strive for more clarity in terms of the definition of a "financial instrument". Please see our key arguments in our public response to ESMA: Consultation paper on the draft Guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments, Reference ESMA75-453128700-52, where we provided our recommendation and points that need addressing. The response provided will help EBA to properly and proportionately address the guidelines at hand. Overall, we are conscious that the definition remains within the national jurisdictional boundaries, but this should not prevent EU-wide collaboration of national competent authorities (NCAs) and a close dialogue on the national interpretations and understandings. Otherwise, market participants will be left in the obligation to clarify unclear legal terms and - in some cases - country by country different implementations or interpretations without support for harmonisation. We also believe that it would be worthwhile for ESAs to conduct a study and provide a summary of key differences, interpretations and approaches to see where a common ground could be found. Generally, we see it as a key topic for the ESAs to ensure harmonisation in such a significant topic as "what assets are to be considered financial instruments", as this lays the groundwork for many obligations to be applicable (MiFID II).

It is also important to ensure that only after MiCA applicability any such assessment/template, as referred to in the draft guidelines, is expected. We cannot risk distorting the MiCA implementation by national competent authorities, preparation by crypto firms of the application process, with the retroactively applicable requirements. Thereby, the proposed guidelines should make it clear that they only apply from January 2025.

Overview of questions for consultation

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

The template is very comprehensive. The information required should give a good overview of the financial instrument. However, the amount of information including argumentation and citations to case-law and/or other sources, has a risk of overburdening the crypto industry. If we are required to explain in detail why a crypto-assets is not a particular financial instrument, we could certainly write an argumentative paper. We should, however, limit the discussion to the essential points, arguments and references. Currently, there is a risk of "over-providing" and "over-doing". In this regard, we especially propose that "clearly not applicable topics" such as, for example, a pension scheme/product, should not require more information than a statement with a short explanation that this is not a pension scheme/product. The obvious cases need to be resolved proportionally and reasonably. Therefore, a generic statement should be sufficient. Thus, in such cases, it is strongly recommended to avoid any details (e.g. applicable law, definitions, case law etc). In the unlikely event that someone disputes this classification, further arguments could be provided. It should therefore be clarified that details only need to be provided in "case of doubt".

Inhouse capacities can be limited given the number of legal issues to be dealt with, while external counselling will increase the burden, cost and time if we do not limit the level of detail of the Annex A. Consequently, we would propose to be more specific and provide a limitation regarding the necessary interpretation to keep it to the bare minimum rather than engaging in legal research. An executive summary with key findings, that includes further reference to the source, should be sufficient from our point of view. Moreover, we would propose to add compliance department advice as another option to use as "legal opinion", which can be further strengthened by appropriate legal training.

Additionally, please see our response to Q3 for Annex A template below.

We would also like to underscore that the revised listing process for new coins should be implemented starting in 2025 and should not apply to coins listed prior to this date, with the exception of ARTs and EMTs. This will avoid unnecessary reassessment burden. We need to focus on the correct application process for obtaining MiCA authorisation, which cannot be endangered by the retroactive application of certain rules.

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?

Please see our response to Q1.

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?

The detailed explanation that the crypto-asset is not any of the financial instruments is burdensome and possibly turns into a complex legal analysis and interpretation of national laws. We would propose to streamline this requirement, e.g. to a description of key arguments and elements supported by references to a more general level. If the explanation in the template raises questions, NCAs can follow up. Otherwise, we risk a backloging authorisation process and great cost for the companies here. Additionally, as mentioned above, we should simplify the procedure for cases where it is evident that it is not a financial instrument to avoid creating unnecessary burdens. We would propose to streamline the description of whether a crypto-asset qualifies as ARTs or EMTs by referring to the key elements, characteristics, usage, and nature.

Furthermore, we would like to reiterate again that we need clearer guidance from ESMA and collective action by ESAs together with NCAs to find a common ground and understanding in relation to "when there is a financial instrument". Otherwise, we continue the obscurity and uncertainty that also indirectly affects MiCA. Ultimately, the decision will have to be made by the court should some regulatory bodies disagree. This can be considered as inevitable and only illustrates the magnitude of uncertainty.

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

We welcome the effort to provide a standardised test (flow chart in Annex C) to meet the requirement of Art. 97 of MiCA. We agree with the statement that NCAs should apply a common approach to determine the classification of a crypto-asset on a case-by-case basis taking account of all the attributes of the token in question - this fact needs to be strongly highlighted for the flow chart.

We find the flow chart useful and clear as it constitutes a good holistic overview regarding determination of asset classification. We would, however, suggest that the standardised test should be clarified in regards to the exemptions of Art 2 (2), e.g. an entity that is only servicing group internal entities but is issuing an asset. From our point of view, "the asset itself" is not exempted, only the "group internal offer" and that would not be a public offer in the first place. This needs to be clarified.