PARIS EUROPLACE

Paris, 11 October 2024

Consultation paper on draft guidelines article 97 of Regulation (EU) 2023/1114

Paris Europlace's contribution

1. 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?

Paris Europlace strongly supports the methodology adopted by the ESAs to determine the classification of a crypto-asset within the meaning of Article 8(4) of MiCA when a token is offered to the public or admitted to trading.

Allowing market players to refer to a variety of sources appears to be an appropriate way of integrating the case-by-case approach desired by MiCA. However, this classification does not seem to address several key points raised by crypto-asset market players:

- Firstly, this draft guideline is not sufficiently exhaustive on the normative criteria to be taken into consideration to clearly delineate how to classify the various crypto-assets. This lack of clarity could lead to important arbitrations in the legal opinion of certain tokens. For example, the question arises as to whether a tax or accounting dimension needs to be considered in order to classify a crypto-asset.
    - **Establishing a certain hierarchy between the different legal sources used to classify the type of crypto-assets might therefore seem appropriate, even if the template sets a certain number of minimum and non-exhaustive criteria.**
- Secondly, the notion of "hybrid" crypto-assets does not feature in these draft guidelines, whereas it did in ESMA's draft RTS on the conditions and criteria for the qualification of crypto-assets as financial instruments[1]. This notion seems important in order to definitively decide on the legal classification of a crypto-asset that meets the conditions for classifying several types of crypto-asset. Beyond a crypto-asset that meets the conditions for classification as both a utility token and a financial instrument, the qualification of certain crypto-assets with other crypto-assets is sometimes unclear, this is particularly the case for

[1] https://www.esma.europa.eu/sites/default/files/2024-01/ESMA75-45312870052_MiCA_Consultation_Paper_-_Guidelines_on_the_qualification_of_crypto-assets_as_financial_instruments.pdf

utility tokens with ARTs. ARTs aim to maintain a stable value. However, ARTs are not intended to achieve this objective by reference to an official currency, but rather to another value, a right, or a combination of these (which may include one or more official currencies). According to this definition, ARTs are another type of "stablecoin" introduced by European legislators.
However, the new nature of these assets, and the lack of precision surrounding the definition MiCA has given them, has led many legal experts to question whether certain crypto-assets can be assimilated to ARTs:

- Real World Asset ("**RWA**") tokens: certain RWA tokens (notably those that would not de facto fall within the notion of financial instrument) could a priori fall within the qualification of ART, since they aim to maintain a stable value by referring to another value. However, as they can also be the simple representation of a value, giving access to an underlying asset, they could simply be qualified as utility tokens. We can also mention the example of asset-backed securities that do not pay interest, are valued by reference to the underlying assets (whose value can evolve) and which can also be in physical delivery (therefore giving access to the underlying assets). In this case, there is a real problem of distinction between ART, ABS and even utility tokens. Is it ultimately the intention that should prevail?
- Liquid Staking Token ("**LST**"): while the notion of ART seems to have been created with the intention of regulating stable asset-backed crypto-assets, the definition of this category of crypto-assets appears broad enough to cover LSTs, insofar as these tokens are backed by the value of a crypto-asset and are intended to retain the value of this asset (in addition to the staking interest recovered by the user). However, LSTs could also be likened to utility tokens in that they synthetically convey ownership of the crypto-assets involved. They therefore constitute a synthetic form of dismemberment of ownership of the asset at stake, with the token representing the legal right of token-holding users to dispose of their asset and derive income from it. They do not confer or purport to confer on their respective owners any rights against any identifiable party.

➢ **Considering the hybrid nature of certain crypto-assets to avoid any misinterpretation and differences in classification for crypto-assets that have the same nature might therefore seem appropriate.**

- Finally, should also be considered that in many cases, legal opinions will contain reservations that may weaken them. Furthermore, in the absence of a visa and passport, could the qualification of a crypto-asset according to the law of a member state be contested or challenged in another country?

➢ **In this respect, it would seem appropriate to assume that a legal qualification authorized within a Member State should be authoritative throughout the European Economic Area to ensure that the objectives of harmonizing regulation on crypto-asset markets are met.**
Over time, the European supervisory authorities will clarify the differences of interpretation that may exist from one Member State to another for the qualification of crypto-assets, without restricting their offer in the EU.

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?

Pursuant to articles 17(1)(b) et 18(2)of MiCA, any applicant envisaging to issue an ART (being a credit institution or a mere corporation or undertaking) shall provide the relevant regulator with a legal opinion confirming that the envisaged ART to be issued (i) is not an asset that would fall into one of the categories listed in article 2(4) of MiCA, and (ii) is a crypto asset in accordance with article 3(1)(6). This consists therefore in the negative demonstration that the asset is not an asset listed in article 2(4) nor an e-money token. The proposed template B covers each of the listed items (10) and requires for each of them legal references (EU or national statutes, case law, soft law) supporting the analysis.

This approach seems to favor, or at least allow, applicants to have different approaches or analysis in respect of the fundamental characteristics of each of the item, while each of them is governed by EU legislation and therefore should have a unique definition and characterization. In particular, it would not be satisfactory that due to this approach, for a same class of crypto-asset, based notably on national law or the way the applicant interprets EU legislation, the end analysis would depend not on the actual and unified interpretation of EU legislation but on particularities of national laws. In this respect, it should pertain to the Commission or the ESAs to provide for the terms of reference of characterization of each item listed in article 2(4), so that each applicant starts the analysis from the same legal basis, leaving the latter to only focus on the specific characteristics of the ART to be issued that make it not falling into the various categories of items listed in article 2(4). Since the main purpose of the templates is to standardise the assessment to be made by the relevant national authority, such standardisation should start with a unified EU legal basis in consideration of which the assessment of the specificities of the ART is conducted. This also means that the interpretation exercise carried out by ESMA pursuant to the mandate set out in article 2(5) in relation to the characteristics of crypto-assets as financial instruments should be also made by the relevant ESAs in relation to the other instruments listed in article 2(4) (i.e. deposits, funds, securitisation positions, etc.), consistently with article 97 which aims at promoting convergence on the classification of crypto-assets."

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?

Please see the answer to the question 2 above.

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

On the text (§17 to 23)

"Value" and "right" are not defined in the EU legislation but have different definitions and interpretations in national law across all the Member States, leading to difficulties of harmonisation and interpretation.

It would be appropriate for the ESAs to clarify the meaning of these terms to avoid a situation where certain values or rights are included in the definition of a crypto-asset in one Member State but excluded in others.

On the decision tree (Annex C – Flow chart)

Article 3.1(5) of MiCA defines crypto-assets as: "*a digital representation of a value or of a right that is able to be transferred and stored electronically using distributed ledger technology or similar technology*".

However, we are of the view that the decision tree is not granular enough, specifically considering the importance of this decision tree for NCAs and market stakeholders in the future. We therefore suggest the following amendments:

1. The first question refer to "token": however, there is no definition under EU law of what is a token and its meaning is not even well understood in the common language. Therefore, we suggest to replace this word by "asset" or to define the word "token" in the context of this guideline.
2. To split the first question in two as follows:
   - "Is it digital?". Indeed, an asset which is not digital is not caught by the definition of crypto-asset.
   - "Is this [asset] a value or a right, or a representation of a value or of a right?". If the asset is a right or a value, rather than a representation, it will not be caught by the definition of crypto-asset.
3. To split the second question in four as follows:
   - "Can it be stored?". Indeed, if no storage is possible, regardless the mean of transfer, it will not be caught by the definition of crypto-asset.
   - "Electronically?"
   - "Can it be transferred?" If no transfer is possible, regardless the mean of transfer, it will not be caught by the definition of crypto-asset.
   - "Electronically?"
4. We have doubt about the difference between the 7th and 8th questions:
   - What the question "Is a value or right referenced?" brings in addition to "Does it purport to maintain a stable value"?