
Consultation Response

ESAs Consultation Paper on Guidelines under Markets in Crypto-assets Regulation (MiCAR), establishing templates for explanations and legal opinions regarding the classification of crypto-assets along with a standardised test to foster a common approach to classification.

October 2024

The Association for Financial Markets in Europe (AFME) welcomes the opportunity to comment on **DRAFT ESAs' GUIDELINES ON TEMPLATES FOR EXPLANATIONS AND OPINIONS, AND THE STANDARDISED TEST FOR CLASSIFICATION OF CRYPTO-ASSETS, UNDER ARTICLE 97(1) OF REGULATION (EU) 2023/1114**. AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia.

AFME is registered on the EU Transparency Register, registration number 65110063986-76.

We summarise below our high-level response to the consultation, which is followed by answers to the individual questions raised.

Executive Summary

AFME strongly supports the proposed ESAs' guidelines under MiCAR to establish templates for explanations and legal opinions regarding the classification of crypto-assets, along with a standardised test to foster a common approach to classification. To further ensure a clear delineation between crypto-assets under the scope of the Regulation and those which are out of the scope, as well as the consistent application of ESMA's proposed conditions and criteria for the qualification of crypto-assets as financial instruments, we continue to strongly support messages shared in a previous [response](#) particularly in favour of minimising regulatory uncertainty and arbitrage risks in relation to crypto-assets displaying characteristics of financial instruments. As such, we support the expansion of the proposed templates for explanations and legal opinions regarding the classification of crypto-assets (in this Consultation Paper) to contain additional explanation on 1) whether a crypto-asset or asset-referenced token (ART) can be considered as a hybrid token, and 2) confirmation that an ART does not pay interest or offer other forms of remuneration.

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Questions

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

We are strongly supportive of the proposed templates' objective to ensure clear delineation between crypto-assets and other forms of traditional financial instruments. However, a targeted improvement should be considered to further promote consistency in determining why a crypto-asset described in its white paper should not be considered to be a crypto-asset excluded from the scope of MiCAR, an e-money token (EMT), or an asset-referenced token (ART), as prescribed under Article 8(4), by including an additional field in the template to provide a detailed explanation on whether a crypto-asset is or is not a hybrid token.

ESMA's proposed classification criteria and conditions qualifying crypto-assets as financial instruments take a hierarchical approach to classifying hybrid-types tokens, which prioritise the identification of as financial instruments (rather than crypto-asset) if displaying features of a financial instrument. To minimise possible risks of legal uncertainty and liability associated with incorrect qualification, we therefore view that a detailed explanation on whether a crypto-asset is or is not a hybrid token would be critical to facilitating such qualification and ensuring delineation between crypto-assets and crypto-assets excluded from the scope of MiCAR under Art. 2(4).

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?

As above, we view that the template for the purpose of the qualification of ARTs should also include a detailed explanation of why a token is or is not considered as a hybrid token.

In addition, we suggest adding a requirement in the template for the issuer to confirm that the ART does not offer any remuneration to its holders. We note that Article 40 of MiCA Regulation prohibits ARTs from granting interests.

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?

We generally agree that the proposed fields of the template relating to explanations as to regulatory status are sufficiently clear. However, for further clarity, we support the inclusion of a number of additional fields under the proposed template:

- Confirmation that a token does not grant interest to its holders (as Art. 40 prohibits ARTs to offer interest or other forms of remuneration) – see above
- The rights to redemption offered by the token (in accordance with Art. 39)
- Consideration for the voluntary classification of the token as a significant ART and any associated obligations (in accordance with Art. 44 and 45)

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

To facilitate a clear interpretation on the above points in ensuring that classification takes into account a crypto-asset or an ART's possible qualification as a hybrid token and any display of characteristics of remuneration, we believe the standardised test should incorporate two additional questions:

1. A question on whether the crypto-asset is a hybrid token. This can be a follow-up question if a negative answer is provided in response to the proposed question of 'Is it excluded under Article 2(4) MiCAR?'
2. A question on remuneration and the granting of interest. This can follow the proposed question of 'Is a value or right referenced?'

Finally, we note that the flow chart appears to contain an error regarding the choice between EMT and ART (under the question of 'Is it referencing the value of one official currency?'), with the choice between two positive responses (Yes/Yes). We view that one of the options should be a negative response (No).

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