

ESA 2024 12

12 July 2024

Consultation Paper

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

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1. Responding to this consultation

The European Supervisory Authorities (EBA, EIOPA and ESMA) (ESAs) invite comments on all proposals put forward in this paper and, in particular, on the specific questions summarised in 5.2.

Comments are most helpful if they:

- respond to the question stated;
- indicate the specific point to which a comment relates;
- contain a clear rationale;
- provide evidence to support the views expressed/ rationale proposed; and
- describe any alternative regulatory choices the EBA should consider.

Submission of responses

To submit your comments, click on the ‘send your comments’ button on the consultation page by 12 October 2024. Please note that comments submitted after this deadline, or submitted via other means may not be processed.

Publication of responses

Please clearly indicate in the consultation form if you wish your comments to be disclosed or to be treated as confidential. A confidential response may be requested from us in accordance with the ESAs’ rules on public access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the Board of Appeal of the respective ESA(s) and the European Ombudsman.

Data protection

The protection of individuals with regard to the processing of personal data by the ESAs is based on Regulation (EU) 1725/2018 of the European Parliament and of the Council of 23 October 2018. Further information on data protection can be found under the Legal notice section of each ESA’s website.

2. Executive Summary

Regulation (EU) 2023/1114 of the European Parliament and of the Council on Markets in Crypto-assets (MiCAR) regulates the offering to the public and admission to trading of asset-referenced tokens (ARTs), e-money tokens (EMTs), and other type of crypto-assets, as well as the provision of crypto-asset services in the European Union (EU). Inter alia, MiCAR sets out a wide range of regulatory requirements, including authorisations, conduct of business and prudential requirements for issuers of ARTs and EMTs and for crypto-asset service providers (CASPs).

The draft guidelines set out:

- templates establishing the content and form of the explanation accompanying the crypto-asset white paper referred to in Article 8(4) of MiCAR;
- templates establishing the content and form of the legal opinion on the qualification of ARTs referred to in point (b)(ii) of Article 17(1) and point (e) of Article 18(2) of MiCAR;
- a standardised test for the classification of crypto-assets, recognising that MiCAR applies to crypto-assets that are not:
 - o unique and non-fungible with other crypto-assets (Article 2(3) of MiCAR);
 - o in scope of relevant sectoral measures by virtue of their qualification as financial instruments, deposits, insurance and pensions products and other relevant financial products as referred to in Article 2(4) of MiCAR;
 - o issued by persons excluded pursuant to Article 2(2) of MiCAR.

The standardised test acknowledges that the regulatory classification of a crypto-asset requires case-by-case assessment, taking account of applicable EU and national law, decisions of the Court of Justice of the European Union, decisions of the national court, and any regulatory measures or guidance applicable at the national level.

Next steps

The draft guidelines are being publicly consulted for a three-month period. It is expected that they will apply from dd.mm.yyyy, two months after the publication of its translation in all official languages of the EU.

3. Background and rationale

Legal basis and objective

1. Regulation (EU) 2023/1114 of the European Parliament and of the Council on Markets in Crypto-assets (MiCAR) regulates the offering to the public and admission to trading of asset-referenced tokens (ARTs), e-money tokens (EMTs) and other type of crypto-assets, as well as the provision of crypto-asset services in the EU. MiCAR entered into force on 29 June 2023 and will apply from 30 December 2024, except for Titles III and IV regarding the offering to the public and the admission to trading of ARTs and EMTs, which will apply from 30 June 2024.
2. The objectives of MiCAR are to harmonise the legal framework applicable to offerors or persons seeking the admission to trading of ARTs and EMTs and other crypto-assets, and to crypto-asset service providers (CASPs) to ensure the proper functioning of markets in crypto-assets, market integrity and financial stability in the EU, and to guarantee high standard of protection for consumers and investors.¹ In particular, MiCAR aims to tackle risks that the wide use of ARTs and EMTs could pose to financial stability, the smooth operation of payment systems, monetary policy transmission or monetary sovereignty.² To this end, MiCAR sets out a wide range of regulatory requirements, including authorisations, conduct and prudential requirements for issuers of ARTs and EMTs, and for CASPs.
3. The consistent application of MiCAR depends, at its foundation, on the common application of the regulatory classifications of crypto-assets under MiCAR. Accordingly, it is important that market participants adopt a common approach to the classification of crypto-assets, and to any explanations as to classification provided for regulatory purposes, including for the purposes of demonstrating which Title is engaged under MiCAR.
4. To this end, MiCAR requires credit institutions and other persons intending to offer to the public or seek admission to trading of an ART to provide to the competent authority a legal opinion on the qualification of the token pursuant to point (b)(ii) of Article 17(1) and point (e) of Article 18(2) of MiCAR.
5. Similarly, offerors, persons seeking admission to trading, or operators of trading platforms for a crypto-asset other than an ART or EMT are required to notify the crypto-asset white paper to the competent authority, accompanied by an explanation describing why the crypto-asset should not be considered excluded from the scope of MiCAR, or classified as an ART or EMT (Article 8(4) of MiCAR).
6. To ensure consistency of the information provided to competent authorities Article 97(1) MiCAR requires the European Supervisory Authorities (ESAs) to prepare joint Guidelines providing templates establishing the content and form of the legal opinion and explanation referred to in,

¹ See Recital 112 of MiCAR.

² See Recital 5 of MiCAR.

respectively, point (b)(ii) of Article 17(1) and point (e) of Article 18(2) of MiCAR and Article 8(4) MiCAR. Moreover, in order to ensure that market participants adopt a common approach to the regulatory classification of crypto-assets under MiCAR, Article 97(1) requires the ESAs to develop a standardised test.

Rationale

7. MiCAR establishes three different regimes for the issuance and offering to the public of crypto-assets (Titles II, III and IV) and for crypto-asset service provision (Title V). The applicable regime, and consequential regulatory requirements, depends on the classification of the crypto-asset (as EMTs (Title IV), ARTs (Title III), or as crypto-assets that are not EMTs nor ARTs (Title II); Title V applies to any crypto-asset under MiCAR).
8. To facilitate convergence in the classification of crypto-assets, and therefore the consistent application of MiCAR, it is essential that market participants adopt a common approach to determine the status of a crypto-asset under MiCAR (if any) and to explain the outcome to the competent authority. Pursuant to Article 97(1) MiCAR, the ESAs set out in these Guidelines a standardised test for the classification of crypto-assets, and provide templates establishing the content and form of the legal opinion and explanation referred to in, respectively, point (b)(ii) of Article 17(1) and point (e) of Article 18(2) of MiCAR (with respect to ARTs) and Article 8(4) MiCAR (with respect to crypto-assets that are not ARTs nor EMTs).
9. The ESAs consider it important to acknowledge the following points regarding the standardised test:
 - a. First, the ESAs underscore that the standardised test to which reference is made in Article 97(1) MiCAR is for the regulatory classification of the crypto-asset, rather than the person or persons who may be carrying out any activity involving that asset (e.g. issuance, offering, service provision or any other activity). As such the test relates solely to the classification of the asset and not to the environment in which that asset may be created, traded, transferred or redeemed. To determine if a person or persons are carrying out regulated activities under MiCAR, it is necessary to consider all relevant behavioural aspects. The ESAs recall that it can be the case that where a token has been classified as a crypto-asset in scope of MiCAR, regardless of whether there is an issuer,³ there may be an offeror, a crypto-asset service provider regulated pursuant to MiCAR (e.g. in the case of Bitcoin, where there is no issuer, or in the case of tokens created via fully decentralised mechanisms).
 - b. Second, the ESAs underscore that all crypto-assets require a case-by-case assessment based on their individual attributes. The standardised test is intended to facilitate consistency in the approach to classification. This is done by establishing a common approach to determine if a crypto-asset is in scope of MiCAR and, if so, the regulatory classification under that Regulation. In developing the common approach, the ESAs

³ In the case of ARTs and EMTs there must always be an issuer pursuant to, respectively, Article 16(1) and Article 48(1) MiCAR. In other cases, even if there is no identifiable issuer, Title V may apply (see further recital (22) MiCAR).

take note of the fact that MiCAR applies to crypto-assets only where they are not in scope of other relevant EU law as referred to in Article 2(4) (and recital (9)) MiCAR.

- c. Third, the ESAs underscore that notions relevant to the assessment of crypto-assets against regulatory categories established in EU and national law (e.g. ‘financial instrument’ under MiFID, ‘deposit’ as referred to in the DGSD and insurance products referred to in Solvency II) may be set out in the context of case law of the Court of Justice of the European Union, national courts, in regulatory measures (e.g. rules or guidance of competent authorities and other relevant authorities), and in interpretative guidance from the European Commission as the competent body for matters relating to the interpretation of EU Directives and Regulations. For instance, few Member States have adopted a statutory definition of insurance (e.g. Belgium, Hungary,⁴ the Netherlands⁵). Often the main features of insurance contracts result from case law (e.g. in France⁶). Naturally, national rules and case laws can evolve or change over time. Therefore, any legal or natural person applying the standardised test should have regard to all potential sources relevant to the interpretation of regulatory concepts.

10. With regard to the templates establishing the content and form of the legal opinion referred to in point (b)(ii) of Article 17(1) and point (e) of Article 18(2) of MiCAR and explanation referred to in Article 8(4) MiCAR, the ESAs acknowledge the following:

- a. In order to provide a comprehensive statement and justification of the regulatory classification of a crypto-asset it is necessary to apply a common approach first to establish if a crypto-asset is in scope of MiCAR and then, if so, to establish its regulatory classification under MiCAR.
- b. The outcome of the assessment should be capable of being articulated against each element of the standardised test in order to ensure that competent authorities receive in a common format comprehensive information fully explaining and justifying the regulatory status of the crypto-asset.
- c. To this end, the ESAs have established in the templates a comprehensive list of fields to be completed to justify the assessment of regulatory status. All information fields should be completed and any supporting documents should be referenced and attached to the legal opinion or explanation (as the case may be). In accordance with the principle of proportionality, the ESAs have included only information fields that are related to the standardised test and are necessary to fully explain the regulatory classification.

⁴ Art. 6:439. § (1) of Act V of 2013 on Civil Code.

⁵ [Art. 7:925 Burgerlijk Wetboek \(Civil Code\)](#).

⁶ [Cass. Civ. 1, 31 January 1956, N° pourvoi 2306; Published in Bulletin 1956 N° 52.](#)

- d. As regards the legal opinion, the ESAs note that this may be prepared by a legal adviser who is in-house or external.

4. Draft guidelines

In between the text of the draft Guidelines that follows, further explanations on specific aspects of the proposed text are occasionally provided, which either offer examples or provide the rationale behind a provision, or set out specific questions for the consultation process. Where this is the case, this explanatory text appears in a framed text box.

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Draft Guidelines

on explanations and opinions, and the standardised test for crypto-assets, under Article 97(1) of Regulation (EU) 2023/1114

1. Compliance and reporting obligations

Status of these guidelines

1. These Guidelines are issued pursuant to Article 16 of Regulation (EU) No 1093/2010, Regulation (EU) No 1094/2010 and Regulation (EU) No 1095/2010 (the ESA Regulations)⁷. In accordance with Article 16(3) of the ESA Regulations, competent authorities, financial market participants and financial institutions must make every effort to comply with the guidelines.
2. Competent authorities as defined in point (35)(a) of Article 3(1) of Regulation (EU) 2023/1114⁸ (MiCAR) should comply with these guidelines by incorporating them into their practices as appropriate (e.g. by amending the legal framework or their supervisory processes), including where guidelines are directed primarily at financial market participants and financial institutions.

Reporting requirements

3. Within two months of the date of publication of these guidelines on the websites of the ESAs in all EU official languages, according to Article 16(3) of each of the Regulations to which reference is made in paragraph 1 of these Guidelines, competent authorities must notify the EBA, EIOPA or ESMA, as the case may be, as to whether they comply or intend to comply with these guidelines, or otherwise with reasons for non-compliance. In the absence of any notification by this deadline, competent authorities will be considered by the ESAs to be non-compliant. Notifications should be sent by submitting the form available on the websites of each of the ESAs with the reference ‘**/GL/2024/xx’. Notifications should be submitted by persons with appropriate authority to report compliance on behalf of their competent authorities. Any change in the status of compliance must also be reported to the respective ESAs.
4. Notifications will be published on the websites of each of the ESAs, in line with Article 16(3) of the ESA Regulations.
5. Financial market participants are not required to report whether they comply with these guidelines.

⁷ EBA – Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

EIOPA – Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15.12.2010, p. 48).

ESMA – Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15.12.2010, p. 84).

⁸ Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on Markets in Crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 (OJ L 150, 9.6.2023, p.40).

2. Subject matter, scope and definitions

Subject matter

6. In accordance with Article 97(1) of Regulation (EU) 2023/1114, these joint Guidelines establish:
 - a. the content and form of the explanation and legal opinion referred to in Article 8(4) and point (b)(ii) of Article 17(1) and point (e) of Article 18(2), respectively, of that Regulation;
 - b. a common approach for the regulatory classification of crypto-assets under that Regulation.

Scope of application and addressees

7. These Guidelines apply to competent authorities, as defined in Article 3(1) point (35)(a) of Regulation (EU) 2023/1114.
8. These Guidelines also apply to:
 - a. offerors, persons seeking admission to trading, or operators of trading platforms for a crypto-asset other than an asset-referenced token (ART) or an electronic money token (EMT), who are required to notify the crypto-asset white paper to the competent authority, accompanied by an explanation describing why the crypto-asset should not be considered excluded from the scope of that Regulation, or classified as an ART or EMT pursuant to Article 8(4) of that Regulation;
 - b. credit institutions intending to offer to the public or seek admission to trading of an ART who are required to provide to the competent authority a legal opinion on the qualification of the crypto-asset pursuant to Article 17(1) point (b)(ii) of Regulation (EU) 2023/1114;
 - c. legal persons or other undertakings that are not credit institutions intending to offer to the public or seek admission to trading of an ART who are required to provide to the competent authority a legal opinion on the qualification of the crypto-asset pursuant to Article 18(2) point (e) of Regulation (EU) 2023/1114.
9. These Guidelines also apply to persons intending to carry out, or carrying out, crypto-asset services when assessing whether activities within their existing or intended remit involve a crypto-asset within the scope of that Regulation.

Definitions

10. Unless otherwise specified, terms used and defined in Regulation (EU) 2023/1114 have the same meaning in these Guidelines.

3. Implementation

Date of application

11. These Guidelines apply from dd.mm.yyyy, [Please insert date 2 months after the date of publication of the guidelines in all EU official languages (date of issuance of the guidelines) on the ESA websites].

4. Templates and standardised test

Template for the purposes of Article 8(4) Regulation (EU) 2023/1114

12. Offerors, persons seeking admission to trading, and operators of trading platforms for crypto-assets other than ARTs and EMTs (relevant persons) should use the template referred to in Annex A to provide the explanation referred to in Article 8(4) of Regulation (EU) 2023/1114.
13. All fields set out in the template should be completed with all information necessary to provide a clear, fair, not misleading and complete explanation of the classification of the crypto-asset. Reference should be made to the following informing the explanation of the classification of the crypto-asset:
 - a. the source of the definitions taken into account for each regulatory product referred to in the template, including applicable EU and national law;
 - b. all relevant:
 - i. case law of the Court of Justice of the European Union and national courts;
 - ii. regulatory measures, including guidance, in the Member State concerned;
 - iii. interpretative guidance from the European Commission and Guidelines from the European Supervisory Authorities;
 - iv. interpretative guidance from competent authorities.

Question 1:

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

Template for the purposes of Article 17(1) point (b)(ii) and Article 18(2) point (e) Regulation (EU) 2023/1114

14. Credit institutions, and legal persons and other undertakings intending to offer to the public or seek admission to trading of an ART should use the template referred to in Annex B for the purposes of the legal opinion on the qualification of the crypto-asset referred to in point (b)(ii) of Article 17(1) and point (e) of Article 18(2) of Regulation (EU) No 2023/1114.
15. All fields set out in the template should be completed with all information necessary to provide clear, fair, not misleading and complete explanation of the classification of the crypto-asset.

Reference should be made to the following informing the explanation of the classification of the crypto-asset:

- a. the source of the definitions taken into account for each regulatory product referred to in the template, including applicable EU and national law;
- b. all relevant:
 - i. case law of the Court of Justice of the European Union and national courts;
 - ii. regulatory measures, including guidance, in the Member State concerned;
 - iii. interpretative guidance from the European Commission and Guidelines from the European Supervisory Authorities;
 - iv. interpretative guidance from competent authorities.

16. The template should be completed by an in-house or external legal adviser. The legal adviser should be able to issue the opinion in an objective manner, free from conflicts of interest. Evidence should be provided of the legal adviser's ability, as a matter of professional practice, to issue a legal opinion. This may include, as applicable, a diploma, a practicing certificate, registration with the relevant professional body in the Member State concerned.

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?

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?

Standardised test for the classification of crypto-assets

17. Competent authorities and other persons to whom these Guidelines are addressed should apply a common approach to determine the classification of a crypto-asset on a case-by-case basis taking account all the attributes of the token in question in accordance with the flow chart provided in Annex C.

18. Competent authorities and other persons to whom these Guidelines are addressed should determine if there is a digital representation of a value or right, these being the necessary attributes of a crypto-asset as defined in Article 3(1) point (5) of Regulation (EU) 2023/1114. The terms 'value' and 'right' should be interpreted broadly in accordance with recital (2) of that Regulation. For instance 'value' may be attributed by an issuer and include a value in the form of a currency or another asset (e.g. a portion of gold or another commodity); 'right' may include an entitlement to a payment or reward (e.g. a right to receive a discount on goods or services, or a

voucher), a right to access a good or service, or a right of display (e.g. a tokenised visual). Crypto-assets with no-intrinsic value, but having a value attributed to them by the seller / buyer or by market participants⁹ should be treated as digital representations of value.

19. Competent authorities and other persons to whom these Guidelines are addressed should also assess if the digital representation of the value and/or right can be transferred and stored electronically using distributed ledger technology (DLT) or similar technologies. A token may be considered 'non-transferable' only where at least the following conditions are satisfied (i) the token is accepted only by the issuer or offeror, and (ii) there is no technical possibility for the token to be transferred to persons other than the issuer or offeror (recital (17) of Regulation (EU) 2023/1114). To assess if a technology is similar to DLT the functional attributes of such technology should be considered, including the basis on which the records (the ledger) are held, shared and how consensus is achieved (i.e. the functioning of the consensus mechanism).
20. If both elements (digital representation of a value and/or right, and transferred and stored electronically using DLT or similar technology) are satisfied competent authorities and other persons to whom these Guidelines are addressed should consider that the token is compatible with a crypto-asset for the purposes of Regulation (EU) 2023/1114.
21. In order to determine if the crypto-asset is within the scope of Regulation (EU) 2023/1114, competent authorities and other persons to whom these Guidelines are addressed should assess all of the exclusions identified in Article 2, points (2) to (4) of Regulation (EU) 2023/1114:
 - a. Article 2(2): is the issuer or offeror a person referred to in that paragraph? MiCAR does not apply to persons who provide crypto-asset services exclusively for their parent companies, for their own subsidiaries or for other subsidiaries of their parent companies; liquidators or administrators acting in the course of an insolvency procedure (except for the purposes of Article 47 of MiCAR); the ECB, central banks of the Member States when acting in their capacity as monetary authorities, or other public authorities of the Member States; the European Investment Bank and its subsidiaries; the European Financial Stability Facility and the European Stability Mechanism; public international organisations.
 - b. Article 2(3): is the crypto-asset unique and not fungible with other crypto-assets?¹⁰ In assessing if the crypto-asset is unique and not fungible, competent authorities and other persons to whom these Guidelines apply should have regard to Article 2(3) and recital

⁹ For example tokens such as Bitcoin and so-called 'meme coins' traded at exchanges with public prices

¹⁰ This may include, for example, a non-fungible crypto-asset evidencing an exclusive property right in a specific tangible asset in real estate (such as a house or commercial property), or intangible asset such as a patent.

(11)¹¹ of Regulation (EU) 2023/1114 as well as the Guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments.¹²

- c. Article 2(4): does the crypto-asset qualify as a relevant product enlisted in that paragraph? Regulation (EU) 2023/1114 does not apply to financial instruments, deposits, structured deposits, funds (except e-money tokens), securitisation positions (per Regulation (EU) 2017/2402), insurance products and reinsurance contracts (per Directive 2009/138/EC), pension products primarily providing retirement income, officially recognised occupational pension schemes (per Directives (EU) 2016/2341 and 2009/138/EC), employer-mandated individual pension products, pan-European Personal Pension Products (per Regulation (EU) 2019/1238), and social security schemes (per Regulations (EC) No 883/2004 and (EC) No 987/2009).

22. Without prejudice to any case law, regulatory measures or interpretative guidance referred to in paragraph 13 of these Guidelines, should be taken into account for the purposes of assessing whether the crypto-asset is a:

- a. financial instrument, competent authorities and other persons to whom these Guidelines are addressed should apply the Guidelines issued by the European Securities and Markets Authority under Article 2(5) of Regulation (EU) 2023/1114;¹³
- b. deposit, competent authorities and other persons to whom these Guidelines are addressed should refer to European Banking Authority's 2014 Opinion and Report and 2020 Opinion on the perimeter of credit institutions, which provide indications on the notion of 'deposit'¹⁴;
- c. insurance product or insurance contract, competent authorities and other persons to whom these Guidelines are addressed should recall that there is no explicit definition of insurance at EU level, either as an activity or a contract.¹⁵

23. If none of the exclusions referred to in paragraph 22 apply, competent authorities and other persons to whom these Guidelines are addressed should assess the characteristics of the crypto-

¹¹ Recital 11 states that "The fractional parts of a unique and non-fungible crypto-asset should not be considered unique and non-fungible. The issuance of crypto-assets as non-fungible tokens in a large series or collection should be considered an indicator of their fungibility. The mere attribution of a unique identifier to a crypto-asset is not, in and of itself, sufficient to classify it as unique and non-fungible. The assets or rights represented should also be unique and non-fungible in order for the crypto-asset to be considered unique and non-fungible. The exclusion of crypto-assets that are unique and non-fungible from the scope of this Regulation is without prejudice to the qualification of such crypto-assets as financial instruments. This Regulation should also apply to crypto-assets that appear to be unique and non-fungible, but whose *de facto* features or whose features that are linked to their *de facto* uses, would make them either fungible or not unique. In that regard, when assessing and classifying crypto-assets, competent authorities should adopt a substance over form approach whereby the features of the crypto-asset in question determine the classification and not its designation by the issuer."

¹² Link to be added once ESMA GL are final (for the consultation paper, see ESMA75-453128700-52).

¹³ Link to be added once ESMA GL are final (for the consultation paper, see ESMA75-453128700-52).

¹⁴ EBA 2014 Opinion and Report on the perimeter of credit institutions: <https://www.eba.europa.eu/publications-and-media/press-releases/eba-publishes-opinion-perimeter-credit-institutions> and EBA 2020 Opinion: https://www.eba.europa.eu/sites/default/files/document_library/Publications/Opinions/2020/931784/EBA%20Opinion%20on%20elements%20of%20the%20definition%20of%20credit%20institution.pdf

¹⁵ [Final Report of the Commission Expert Group on European Insurance Contract Law. European Commission, 2014, p 38 ff.](#)

assets to determine if the crypto-asset is an EMT, ART or other crypto-asset under Regulation (EU) 2023/1114 and should take into account the following:

- a. Does the crypto-asset purport to maintain a stable value by referencing only the value of a single official currency? If so, it is to be classified as an EMT pursuant to Title IV of Regulation (EU) 2023/1114.
- b. If the crypto-asset does not purport to maintain a stable value by referencing the value of a single official currency, does it purport to maintain a stable value by reference to another value or right (or combination thereof), including one or more official currencies? If so, it is to be classified as an ART pursuant to Title III of Regulation (EU) 2023/1114.
- c. If the crypto-asset does not purport to maintain a stable value by referencing another value or right (and is therefore not an ART or EMT) it is to be classified as a crypto-asset pursuant to Title II of Regulation (EU) 2023/1114.

Question 4:

Do respondents have any comments on the standardised test?

Annex A - Template

This template is provided for the purposes of the explanation referred to in Article 8(4) of Regulation (EU) 2023/1114.

TEMPLATE: EXPLANATION FOR THE PURPOSES OF ARTICLE 8(4) REGULATION (EU) 2023/1114

An explanation prepared for the purposes of Article 8(4) Regulation (EU) 2023/1114 (MiCAR) should contain information for each of the below fields.

| | | |
|---|---|---|
| Information about explanation | Date on which this explanation is issued | |
| | Name of the person(s) (legal or natural) issuing this explanation | <i>Please include: name, address, email address, and telephone number.</i> |
| | Point of contact of the person(s) (legal or natural) issuing this explanation (if different to above) | <i>Please include: name, address, email address, and telephone number.</i> |
| | Confirmation that this explanation is issued for the purposes of Article 8(4) MiCAR | <i>Please confirm.</i> |
| Information about offeror(s), person(s) seeking admission to trading | Name of the offeror(s), person(s) seeking admission to trading, or operator(s) of trading platforms, on whose behalf this explanation is issued | <i>Please use the Annex to this template for the provision of this information.</i> |
| | White paper to which this explanation refers (this should be the 'final version' of the white paper submitted for the purpose of Article 8(1) MiCAR)) | <i>Please indicate the date of the white paper notified for the purposes of Article 8(1) MiCAR, and assessed for the purposes of this explanation and to which this explanation refers. Please also attach a copy of the white paper to this explanation.</i> |
| Crypto-asset | Applicable law | <i>Please indicate the law applicable to the crypto-asset. Please indicate the governing law of the jurisdiction in which the offer to the public or admission to trading will take place (if different from the law applicable to the crypto-asset).</i> |
| | Detailed explanation that the digital representation to which the white paper relates is a crypto-asset within the meaning of Article 3(1), point (5) MiCAR | <i>Explanation may be provided in an Annex and should cover all aspects of the definition of 'crypto-asset', including the value or right that it represents, and the distributed ledger technology or similar technology on which the value or right may be transferred or stored.</i> |
| | Detailed explanation that the crypto-asset to which the white paper relates is not an electronic money token within the meaning of Article 3(1), point (7) MiCAR | <i>Explanation may be provided in an Annex and should include all aspects that demonstrate that the crypto-asset is not intended to purport to maintain a stable value by reference to an official currency, with full cross-references to the relevant provisions of the white paper.</i> |
| | Detailed explanation that the crypto-asset to which the white paper relates is not an asset-referenced token within the meaning of Article 3(1), point (6) MiCAR | <i>Explanation may be provided in an Annex and should include all aspects that demonstrate that the crypto-asset is not intended to purport to maintain a stable value by reference to another value or right or a combination thereof, with full cross-references to the relevant provisions of the white paper.</i> |
| | Detailed explanation that the crypto-asset is not any of the following: | |
| | - Financial instrument, as referred to in Article 2(4), point (a) MiCAR. | Source of definition(s) (EU and/or national law as applicable): |

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| | | <p>Case law (including paragraph references, as appropriate) to which reference is made in the explanation:</p> <p>Regulatory measures or guidance to which reference is made in the explanation (including the Guidelines adopted pursuant to Article 2(5) MiCAR):</p> <p>Explanation:</p> <p><i>Note: Explanation may be supplemented in an Annex and should include all aspects that demonstrate that the crypto-asset is not a financial instrument. The explanation should indicate why the crypto-asset does not correspond to any of the financial instrument types (transferable security, money market instrument etc), make full reference to the ESMA Guidelines under Article 2(5) MiCAR, and any applicable case law, or relevant regulatory or supervisory materials issued by the competent authority for the purposes of [MiFID2] in the home Member State within the meaning of Article 3(1), point (33) MiCAR (the competent authority).</i></p> |
| | <ul style="list-style-type: none"> - Deposits, including structured deposits, as referred to in Article 2(4), point (b) MiCAR | <p>Source of definition(s) (EU and/or national law as applicable):</p> <p>Case law (including paragraph references, as appropriate) to which reference is made in the explanation:</p> <p>Regulatory measures or guidance to which reference is made in the explanation:</p> <p>Explanation:</p> <p><i>Note: Explanation should include all aspects that demonstrate that the crypto-asset is not a deposit. The explanation should make full reference to any applicable case law, or relevant regulatory or supervisory materials issued by the competent authority for the purposes of [CRD/CRR] in the home Member State within the meaning of Article 3(1), point (33) MiCAR.</i></p> |
| | <ul style="list-style-type: none"> - Funds as referred to in Article 2(4), point (c) MiCAR | <p>Source of definition(s) (EU and/or national law as applicable):</p> <p>Case law (including paragraph references, as appropriate) to which reference is made in the explanation:</p> <p>Regulatory measures or guidance to which reference is made in the explanation:</p> <p>Explanation:</p> |

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| | | <p><i>Note: Explanation should include all aspects that demonstrate that the crypto-asset is not funds. The explanation should make full reference to any applicable case law, or relevant regulatory or supervisory materials issued by the competent authority for the purposes of Directive (EU) 2015/2366 of the European Parliament and of the Council in the home Member State within the meaning of Article 3(1), point (33) MiCAR.</i></p> |
| | <p>- Securitisation positions as referred to in Article 2(4), point (d) MiCAR</p> | <p>Source of definition(s) (EU and/or national law as applicable):</p> <p>Case law (including paragraph references, as appropriate) to which reference is made in the explanation:</p> <p>Regulatory measures or guidance to which reference is made in the explanation:</p> <p>Explanation:</p> <p><i>Note: Explanation may be provided in an Annex should include all aspects that demonstrate that the crypto-asset is not a securitisation position. The explanation should make full reference to any applicable case law, or relevant regulatory or supervisory materials issued by the competent authority for the purposes of Regulation (EU) 2017/2402 in the home Member State within the meaning of Article 3(1), point (33) MiCAR.</i></p> |
| | <p>- Non-life or life insurance products or reinsurance or retrocession contracts as referred to in Article 2(4), point (e) MiCAR</p> | <p>Source of definition(s) (EU and/or national law as applicable):</p> <p>Case law (including paragraph references, as appropriate) to which reference is made in the explanation:</p> <p>Regulatory measures or guidance to which reference is made in the explanation:</p> <p>Explanation:</p> <p><i>Note: Explanation should include all aspects that demonstrate that the crypto-asset is not a non-life or life insurance product. The explanation should make full reference to any applicable case law, or relevant regulatory or supervisory materials issued by the competent authority for the purposes of [Solvency II] in the home Member State within the meaning of Article 3(1), point (33) MiCAR.</i></p> |
| | | |
| | <p>- Pension product as referred to in Article 2(4), point (f) MiCAR</p> | <p>Source of definition(s) (EU and/or national law as applicable):</p> |

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| | | <p>Case law (including paragraph references, as appropriate) to which reference is made in the explanation:</p> <p>Regulatory measures or guidance to which reference is made in the explanation:</p> <p>Explanation:</p> <p><i>Note: Explanation should include all aspects that demonstrate that the crypto-asset is not a pension product. The explanation should make full reference to any applicable case law, or relevant regulatory or supervisory materials issued by the competent authority in the home Member State within the meaning of Article 3(1), point (33) MiCAR.</i></p> |
| | <ul style="list-style-type: none"> - Officially recognised occupational pension schemes as referred to in Article 2(4), point (g) MiCAR | <p>Source of definition(s) (EU and/or national law as applicable):</p> <p>Case law (including paragraph references, as appropriate) to which reference is made in the explanation:</p> <p>Regulatory measures or guidance to which reference is made in the explanation:</p> <p>Explanation:</p> <p><i>Note: Explanation should include all aspects that demonstrate that the crypto-asset is not an occupational pension scheme. The explanation should make full reference to any applicable case law, or relevant regulatory or supervisory materials issued by [the competent authority for the purposes of [IORPS II] in the home Member State within the meaning of Article 3(1), point (33) MiCAR.</i></p> |
| | <ul style="list-style-type: none"> - Individual pension products as referred to in Article 2(4), point (h) MiCAR | <p>Source of definition(s) (EU and/or national law as applicable):</p> <p>Case law (including paragraph references, as appropriate) to which reference is made in the explanation:</p> <p>Regulatory measures or guidance to which reference is made in the explanation:</p> <p>Explanation:</p> <p><i>Note: Explanation should include all aspects that demonstrate that the crypto-asset is not intended to be an individual pension product. The explanation should make full reference to any applicable case law, or relevant regulatory or supervisory materials issued by the competent authority in the home Member State within the meaning of Article 3(1), point (33) MiCAR.</i></p> |

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| | <p>- Pan-European Pension Products as referred to in Article 2(4), point (i) MiCAR</p> | <p>Source of definition(s) (EU and/or national law as applicable):</p> <p>Case law (including paragraph references, as appropriate) to which reference is made in the explanation:</p> <p>Regulatory measures or guidance to which reference is made in the explanation:</p> <p>Explanation:</p> <p><i>Note: Explanation should include all aspects that demonstrate that the crypto-asset is not a Pan-European Pension Product. The explanation should make full reference to any applicable case law, or relevant regulatory or supervisory materials issued by [the competent authority for the purposes of [PEPP] in the home Member State within the meaning of Article 3(1), point (33) MiCAR.</i></p> |
| | <p>- Social security schemes as referred to in Article 2(4), point (j) MiCAR</p> | <p>Source of definition(s) (EU and/or national law as applicable):</p> <p>Case law (including paragraph references, as appropriate) to which reference is made in the explanation:</p> <p>Regulatory measures or guidance to which reference is made in the explanation:</p> <p>Explanation:</p> <p><i>Note: Explanation should include all aspects that demonstrate that the crypto-asset is not a social security scheme. The explanation should make full reference to any applicable case law, or relevant regulatory or supervisory materials issued by [the competent authority for the purposes of Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 in the home Member State within the meaning of Article 3(1), point (33) MiCAR.</i></p> |

ANNEX TO TEMPLATE: INFORMATION ABOUT OFFERORS, PERSONS SEEKING ADMISSION TO TRADING, OPERATORS OF TRADING PLATFORMS

| Name of the offeror(s), person(s) seeking admission to trading, or operator(s) of trading platforms, on whose behalf this explanation is issued | Regulated status (if any) of the offeror(s), person(s) seeking admission to trading, or operator(s) | LEI (if applicable) | EEA/Member State of establishment, branch or registered office (as applicable) | Point of contact |
|---|---|---------------------|--|--|
| | | | <i>Please indicate jurisdiction and status (establishment, branch, registered office).</i> | <i>Please include: name, address, email address, and telephone number.</i> |
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Annex B - Template

This template is provided for the purposes of the legal opinion referred to in Article 17(1), point (b)(ii) and Article 18(2), point (e) of Regulation (EU) 2023/1114.

TEMPLATE: LEGAL OPINION FOR THE PURPOSES OF ARTICLE 17(1), point (b)(ii) and ARTICLE 18(2), point (e) REGULATION (EU) 2023/1114

An Opinion issued for the purposes of these articles should contain information for all the below fields.

| | | |
|---|--|---|
| Information about Opinion | Date on which this Opinion is issued | |
| | Name of the person(s) (legal or natural) issuing this Opinion | <i>Please include: name, address, email address, and telephone number.</i> |
| | Point of contact of the person(s) (legal or natural) issuing this Opinion (if different to above) | <i>Please include: name, address, email address, and telephone number.</i> |
| | Evidence of person(s)' (legal or natural) ability to act as a legal adviser | <i>Please include as much information as possible, e.g. degree, licence, professional registration number, certificate to practice law etc.</i> |
| | Purpose for which this Opinion is issued | <i>Specify:</i> <ul style="list-style-type: none"> - Article 17(1), point (b)(ii), or - Article 18(2), point (e) |
| Information about person intending to offer to the public or seek admission to trading | Name of the credit institution/financial institution/other undertaking intending to offer to the public, or seek admission to trading of the crypto-asset | |
| | Regulated status (authorisation or registration) | <i>E.g. credit institution, electronic money institution etc.</i> |
| | LEI (if applicable) | |
| | EEA/Member State of establishment | |
| | Point of contact | <i>Please include: name, address, email address, and telephone number.</i> |
| | Intention of the credit institution/financial institution/other undertaking | <i>Specify:</i> <ul style="list-style-type: none"> - Offer to the public - Seek admission to trading |
| | White paper to which this Opinion refers (this should be the 'final version' of the white paper submitted for the purpose of Article 17(1), point (b) (ii) and Article 18 (2), point (e)) | <i>Please indicate the date of the white paper assessed for the purposes of this Opinion and to which this Opinion refers. Please also attach a copy of the white paper to this Opinion.</i> |
| Crypto-asset | Applicable law | <i>Please indicate, the law applicable to the crypto-asset.</i> <i>Please indicate the law applicable to the offer to the public or admission to trading (if different from the law applicable to the asset-referenced token).</i> |
| | Opinion, with detailed explanation, that the digital representation to which this Opinion relates is a crypto-asset within the meaning of Article 3(1), point (5) MiCAR | <i>Explanation may be provided in an Annex to the Opinion and should cover all aspects of the definition of 'crypto-asset', including the value or right, and the distributed ledger technology or similar technology on which the value or right may be transferred or stored.</i> |
| | Detailed description of the value or right or official currencies to which the crypto-asset refers | <i>Description should set out the value, right or official currencies to which the crypto-asset refers and is intended to purport to maintain a stable value, with full cross-references to the relevant provisions of the white paper.</i> |

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| <p>Opinion, with detailed explanation, that the crypto-asset to which this Opinion relates is not an electronic money token within the meaning of Article 3(1), point (7) MiCAR</p> | <p><i>Explanation may be provided in an Annex to the Opinion and should include all aspects that demonstrate that the crypto-asset is not intended to purport to maintain a stable value by reference to a single official currency, with full cross-references to the relevant provisions of the white paper.</i></p> |
| <p>Opinion, with detailed explanation, that the crypto-asset to which this Opinion relates is not any of the following:</p> | |
| <ul style="list-style-type: none"> - Financial instrument, as referred to in Article 2(4), point (a) MiCAR. | <p>Source of definition(s) (EU and/or national law as applicable):</p> <p>Case law (including paragraph references, as appropriate) to which reference is made in the explanation:</p> <p>Regulatory measures or guidance to which reference is made in the explanation (including the Guidelines pursuant to Article 2(5) MiCAR):</p> <p>Explanation:</p> <p><i>Note: Explanation may be supplemented in an Annex to the Opinion and should include all aspects that demonstrate that the crypto-asset is not a financial instrument. The explanation should explain why the crypto-asset is not each type of financial instrument (transferable security, money market instrument etc), make full reference to the ESMA Guidelines under Article 2(5) MiCAR, and any applicable case law, or relevant regulatory or supervisory materials issued by [the competent authority for the purposes of MiFID2] in the home Member State within the meaning of Article 3(1), point (33) MiCAR.</i></p> |
| <ul style="list-style-type: none"> - Deposits, including structured deposits, as referred to in Article 2(4), point (b) MiCAR | <p>Source of definition(s) (EU and/or national law as applicable):</p> <p>Case law (including paragraph references, as appropriate) to which reference is made in the explanation:</p> <p>Regulatory measures or guidance to which reference is made in the explanation:</p> <p>Explanation:</p> <p><i>Note: Explanation may be provided in an Annex to the Opinion and should include all aspects that demonstrate that the crypto-asset is not a deposit. The explanation should make full reference to any applicable case law, or relevant regulatory or supervisory materials issued by the competent authority for the purposes of [CRD/CRR] in the home Member State within the meaning of Article 3(1), point (33)</i></p> |

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| | | <p><i>MiCAR in the home Member State within the meaning of Article 3(1), point (33) MiCAR.</i></p> |
| | <ul style="list-style-type: none"> - Funds as referred to in Article 2(4), point (c) MiCAR | <p>Source of definition(s) (EU and/or national law as applicable):</p> <p>Case law (including paragraph references, as appropriate) to which reference is made in the explanation:</p> <p>Regulatory measures or guidance to which reference is made in the explanation:</p> <p>Explanation:</p> <p><i>Note: Explanation may be provided in an Annex to the Opinion and should include all aspects that demonstrate that the crypto-asset is not funds. The explanation should make full reference to any applicable case law, or relevant regulatory or supervisory materials issued by the competent authority for the purposes of [PSD] in the home Member State within the meaning of Article 3(1), point (33) MiCAR.</i></p> |
| | <ul style="list-style-type: none"> - Securitisation positions as referred to in Article 2(4), point (d) MiCAR | <p>Source of definition(s) (EU and/or national law as applicable):</p> <p>Case law (including paragraph references, as appropriate) to which reference is made in the explanation:</p> <p>Regulatory measures or guidance to which reference is made in the explanation:</p> <p>Explanation:</p> <p><i>Note: Explanation may be provided in an Annex to the Opinion and should include all aspects that demonstrate that the crypto-asset is not a securitization position. The explanation should make full reference to any applicable case law, or relevant regulatory or supervisory materials issued by [the competent authority for the purposes of Regulation (EU) 2017/2402 in the home Member State within the meaning of Article 3(1), point (33) MiCAR.</i></p> |
| | <ul style="list-style-type: none"> - Non-life or life insurance products or reinsurance or retrocession contracts as referred to in Article 2(4), point (e) MiCAR | <p>Source of definition(s) (EU and/or national law as applicable):</p> <p>Case law (including paragraph references, as appropriate) to which reference is made in the explanation:</p> <p>Regulatory measures or guidance to which reference is made in the explanation:</p> |

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| | | <p>Explanation:</p> <p><i>Note: Explanation may be provided in an Annex to the Opinion and should include all aspects that demonstrate that the crypto-asset is not a non-life or life insurance product. The explanation should make full reference to any applicable case law, or relevant regulatory or supervisory materials issued by the competent authority for the purposes of [Solvency II] in the home Member State within the meaning of Article 3(1), point (33) MiCAR.</i></p> |
| | <ul style="list-style-type: none"> - Pension products as referred to in Article 2(4), point (f) MiCAR | <p>Source of definition(s) (EU and/or national law as applicable):</p> <p>Case law (including paragraph references, as appropriate) to which reference is made in the explanation:</p> <p>Regulatory measures or guidance to which reference is made in the explanation:</p> <p>Explanation:</p> <p><i>Note: Explanation may be provided in an Annex to the Opinion and should include all aspects that demonstrate that the crypto-asset is not a pension product. The explanation should make full reference to any applicable case law, or relevant regulatory or supervisory materials issued by the competent authority in the home Member State within the meaning of Article 3(1), point (33) MiCAR.</i></p> |
| | <ul style="list-style-type: none"> - Officially recognized occupational pension schemes as referred to in Article 2(4), point (g) MiCAR | <p>Source of definition(s) (EU and/or national law as applicable):</p> <p>Case law (including paragraph references, as appropriate) to which reference is made in the explanation:</p> <p>Regulatory measures or guidance to which reference is made in the explanation:</p> <p>Explanation:</p> <p><i>Note: Explanation may be provided in an Annex to the Opinion and should include all aspects that demonstrate that the crypto-asset is not an occupational pension scheme. The explanation should make full reference to any applicable case law, or relevant regulatory or supervisory materials issued by [the competent authority for the purposes of [IORPS II] in the home Member State within the meaning of Article 3(1), point (33) MiCAR.</i></p> |

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| | <ul style="list-style-type: none"> - Individual pension products as referred to in Article 2(4), point (h) MiCAR | <p>Source of definition(s) (EU and/or national law as applicable):</p> <p>Case law (including paragraph references, as appropriate) to which reference is made in the explanation:</p> <p>Regulatory measures or guidance to which reference is made in the explanation:</p> <p>Explanation:</p> <p><i>Note: Explanation may be provided in an Annex to the Opinion and should include all aspects that demonstrate that the crypto-asset is not an individual pension product. The explanation should make full reference to any applicable case law, or relevant regulatory or supervisory materials issued by the competent authority in the home Member State within the meaning of Article 3(1), point (33) MiCAR.</i></p> |
| | <ul style="list-style-type: none"> - Pan-European Pension Products as referred to in Article 2(4), point (i) MiCAR | <p>Source of definition(s) (EU and/or national law as applicable):</p> <p>Case law (including paragraph references, as appropriate) to which reference is made in the explanation:</p> <p>Regulatory measures or guidance to which reference is made in the explanation:</p> <p>Explanation:</p> <p><i>Note: Explanation may be provided in an Annex to the Opinion and should include all aspects that demonstrate that the crypto-asset is not a Pan-European Pension Product. The explanation should make full reference to any applicable case law, or relevant regulatory or supervisory materials issued by the competent authority for the purposes of [PEPP] in the home Member State within the meaning of Article 3(1), point (33) MiCAR.</i></p> |
| | <ul style="list-style-type: none"> - Social security schemes as referred to in Article 2(4), point (j) MiCAR | <p>Source of definition(s) (EU and/or national law as applicable):</p> <p>Case law (including paragraph references, as appropriate) to which reference is made in the explanation:</p> <p>Regulatory measures or guidance to which reference is made in the explanation:</p> <p>Explanation:</p> |



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| | | <p><i>Note: Explanation may be provided in an Annex to the Opinion and should include all aspects that demonstrate that the crypto-asset is not a social security scheme. The explanation should make full reference to any applicable case law, or relevant regulatory or supervisory materials issued by [the competent authority for the purposes of Regulation (EC) No 883/2004 and Regulation (EC) No 9876/2009 in the home Member State within the meaning of Article 3(1), point (33) MiCAR.</i></p> |
| | <p>Opinion, with full explanation, that the crypto-asset is within the meaning of Article 3(1), point (6) MiCAR</p> | <p>Source of definition(s) (EU and/or national law as applicable):</p> <p>Case law (including paragraph references, as appropriate) to which reference is made in the explanation:</p> <p>Regulatory measures or guidance to which reference is made in the explanation:</p> <p>Explanation:</p> <p><i>Note: Explanation should not repeat the foregoing but should describe the attributes of the crypto-asset that conform to the definition of ‘asset-referenced token’. The explanation may be provided in an Annex to this Opinion and should refer to all relevant provisions of the white paper, among any other materials that are considered relevant in supporting the Opinion as to the legal status of the token.</i></p> |

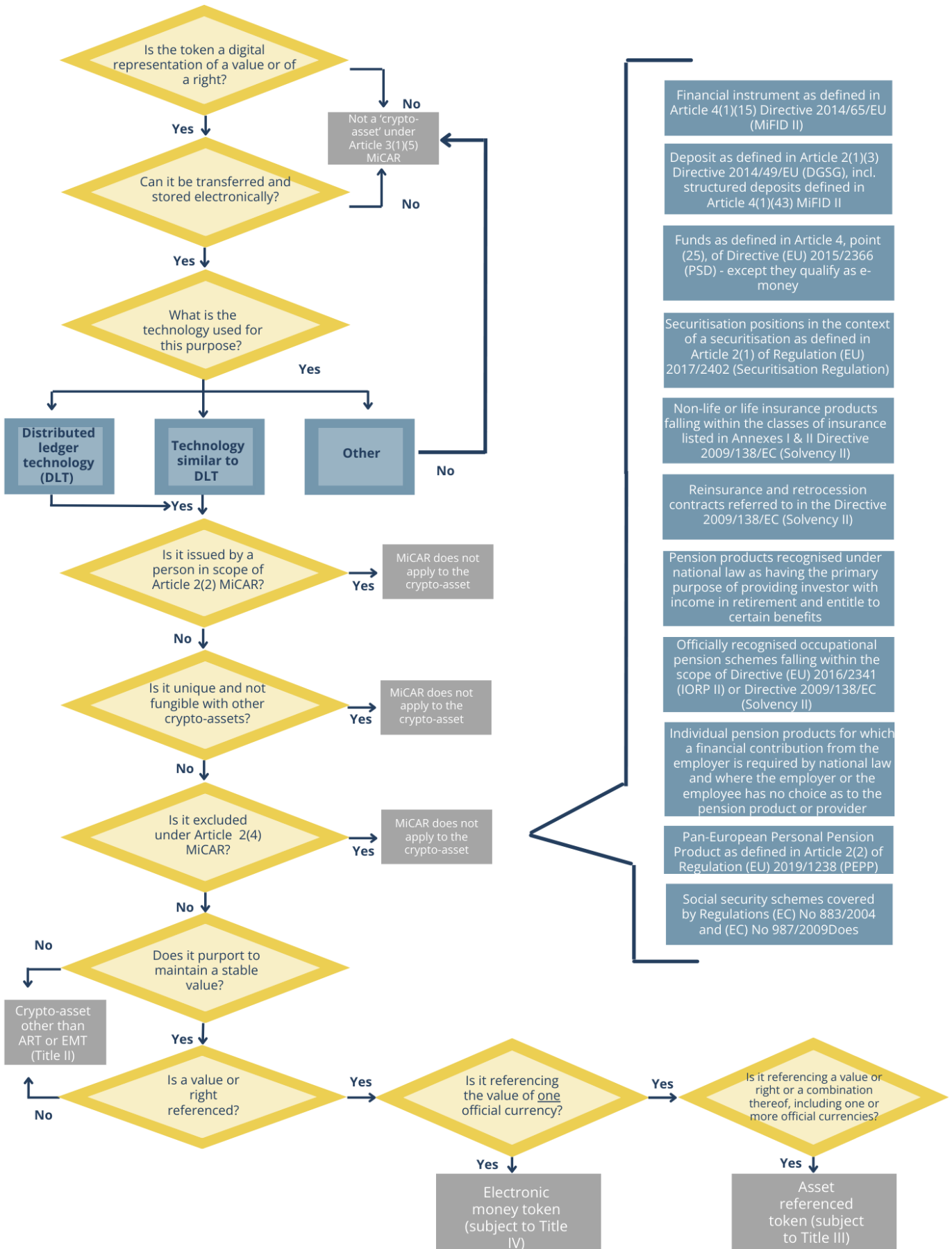


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Annex C – Flow chart

This flow chart is provided for the purposes of the standardised test referred to in Article 97(1) of Regulation (EU) 2023/1114.

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5. Accompanying documents

5.1 Draft cost-benefit analysis / impact assessment

As per Article 16(2) of the ESA Regulations, any guidelines and recommendations developed by the ESAs shall be accompanied by an Impact Assessment (IA), which analyses ‘the potential related costs and benefits’. This analysis presents the IA of the main policy options included in this Consultation Paper on the draft guidelines. This IA is high level and qualitative in nature.

Regulation (EU) 2023/1114 of the European Parliament and of the Council on Markets in Crypto-assets (MiCAR) regulates the offering to the public and admission to trading of asset-referenced tokens (ARTs), e-money tokens (EMTs), and other type of crypto-assets, as well as the provision of crypto-asset services in the European Union (EU). Inter alia, MiCAR sets out a wide range of regulatory requirements, including classification of crypto-assets and a convergent approach across EU.

In more detail, MiCAR requires:

- offerors, persons seeking admission to trading, or operators of trading platforms for a crypto-asset other than an ART or an EMT as defined in Article 3(1) point (7), to notify their crypto-asset white paper to the competent authority of their home Member State, accompanied by **an explanation** describing why the crypto-asset should not be considered excluded from the scope of that Regulation, or classified as an ART or EMT pursuant to Article 8(4);
- credit institutions intending to offer to the public or seek admission to trading of an ART to provide to the competent authority **a legal opinion** on the qualification of the crypto-asset pursuant to Article 17(1) point (b)(ii);
- legal persons or other undertakings that are not credit institutions intending to offer to the public or seek admission to trading of an ART to provide to the competent authority **a legal opinion** on the qualification of the crypto-asset pursuant to Article 18(2) point (e).

Article 97(1) of MiCAR requires the ESAs to issue Guidelines establishing templates for the explanation and legal opinion. Additionally, the ESAs are also required to establish a ‘standardised test for the classification of crypto-assets, recognising that MiCAR applies to crypto-assets that are not:

- unique and non-fungible with other crypto-assets (Article 2(3) of MiCAR);
- in scope of relevant sectoral measures by virtue of their qualification as financial instruments, deposits, insurance and pensions products and other relevant financial products as referred to in Article 2(4) of MiCAR;

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- issued by persons excluded pursuant to Article 2(2) of MiCAR.

A. Problem identification

The competent authority for the purposes of Articles 8, 17 and 18 of MiCAR needs to receive information with an appropriate level of detail to enable the authority to understand the regulatory classification of the crypto-asset which, in turn, establishes the applicable regime under MiCAR (i.e. whether the crypto-asset is indeed an EMT in scope of Title IV, and ART in scope of Title III, or another type of crypto-asset in scope of Title II).

Insufficient information, and a lack of standardised information, in the explanation or, as the case may be legal opinion, would impede the ability of competent authorities to consider in a consistent manner the regulatory status of crypto-assets, thereby undermining the effective application of MiCAR (and other Union acts relating to financial products within the scope of Article 2(4) of that Regulation), and potentially lead to regulatory arbitrage across the EU. Moreover, the absence of a systemic and consistent approach to the regulatory classification of crypto-assets could lead to similar issues.

B. Policy objectives

The strategic objectives of the Guidelines are to harmonise the format of explanations and legal opinions referred to in, respectively, Article 8(4), 17(1) and 18(2) of MiCAR, and to harmonise the approach to the regulatory classification of crypto-assets (the standardised test). The operational objectives are to specify the detailed templates for the explanations and legal opinions and to provide a standardised test, whilst respecting the fact that it may be necessary for those persons using the templates or applying the test to refer to a range of potentially applicable national laws, guidance and other measures (recalling that many regulatory products of a kind referred to in Article 2(4) of MiCAR are not exhaustively defined in EU law and that their interpretation made by Member States may differ).

C. Baseline scenario

In a baseline scenario where no harmonisation of the explanations or legal opinions is achieved and no standardised test is available, competent authorities would request information on a case-by-case basis to review the purported regulatory classification of a crypto-asset. This may lead to significant divergences in the type and format of information requested, resulting in different information being available to competent authorities, potentially undermining the effective application of EU law, undermining the level playing field and potentially posing risks of regulatory arbitrage.



D. Options considered

The main policy options discussed, and the decision made, by the ESAs during the development of the Guidelines are described below.

Policy Issue A: Templates

Option 1a: To require in the templates for the explanation and legal opinion only information that relates to the purported regulatory classification of a crypto-asset.

Option 2a: To require in the templates for the explanation and legal opinion information that relates to not only the purported regulatory classification of a crypto-asset but also provides information that justifies why the crypto-asset is not another type of regulatory product (within the scope of Regulation (EU) 2023/1114 or outside the scope pursuant to Article 2(4) of that Regulation).

Option 2a is preferred because, notwithstanding the higher costs associated with the production of the explanations and legal opinions, the provision of such broader set of information will (a) ensure those persons seeking to issue, offer to the public, or seek admission to trading of crypto-assets have performed a comprehensive assessment of the crypto-asset against the standardised test and (b) ensure the competent authority has available a complete set of information and rationale justifying the identified regulatory status.

Policy Issue B: References to the law

Option 1b: Regulatory classification of a crypto-asset requires case-by-case assessment, taking account of applicable EU and national law without regard to any case law, regulatory measures or guidance applicable at the national level.

Option 2b: Regulatory classification of a crypto-asset requires case-by-case assessment, taking account of applicable EU and national law with regard to any case law, regulatory measures or guidance applicable at the national level.

The prospective issuers/offerors/persons seeking admission to trading will submit the information and the filled templates to their respective competent authorities. Such information may include references to EU and national law, case law and guidance that is relevant to assessing the regulatory status of a crypto-asset in the Member State concerned, recalling again that many regulatory products within the scope of Article 2(4) of MiCAR are not exhaustively defined in EU law. Option 2b is preferred because an assessment of the regulatory status of a token may benefit from consideration of relevant case law, regulatory measures of guidance in the Member State concerned, thus enabling a comprehensive assessment.

E. Cost-Benefit Analysis

In general, the draft Guidelines will primarily benefit prospective issuers/offerors/persons seeking admission to trading and competent authorities more than they would cost them. A more detailed evaluation of costs and benefits is provided in Table 1.

Table 1. Costs and benefits of the draft Guidelines

| Stakeholder | Costs | Benefits |
|--|--|---|
| Prospective issuers/offerors/persons seeking admission to trading | Additional data and information to be provided to the competent authority which may also require additional resources. | <p>Transparent evidence on the information required on the regulatory classification of a crypto-asset.</p> <p>Minimise ad-hoc requests from/to the Competent Authority on clarifications and decision on the legal opinion.</p> <p>Common and consistent approach and pre-defined templates across member states, thus ensuring a level playing field.</p> |
| Competent authorities | Additional data and information for analysis which may also require additional resources. | <p>Harmonised and complete information submitted to the competent authority for the assessment of the regulatory classification of a crypto-asset. This also ensures the effective application of Regulation (EU) 2023/1114.</p> <p>Consistent and systemic approach leading to common application of a crypto-asset classification assessment across EU member states.</p> <p>Competent Authorities will not need to address case-by-case requests to request information necessary to conduct the assessment of a crypto-asset.</p> |

F. Preferred option

When comparing with the baseline scenario of no templates and standardised test, the draft Guidelines are expected to offer benefits by achieving a harmonisation of information and predefined submission templates which will help both prospective issuers/offerors/persons seeking admission to trading who will be aware in advance on the information they need to collect and submit and the competent authorities who will be able to conduct the assessment for the



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regulatory classification of crypto-assets. The draft Guidelines may lead to some moderate costs related to the resources that would be required for gathering and analysing the submitted information for the prospective issuers/offerors/persons seeking admission to trading and the competent authorities respectively.



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5.2 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??**
- 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?**
- 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?**
- 4. Do respondents have any comments on the standardised test?**