

29 April 2024

FIA EPTA response to the ESMA Consultation Paper on the draft Guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments

FIA EPTA members welcome the opportunity to respond to the ESMA Consultation Paper on the draft Guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments.

FIA EPTA represents Europe's leading Principal Trading Firms. Our members are independent market makers and providers of liquidity and risk transfer for markets and end-investors across Europe, providing liquidity in all centrally cleared asset classes including shares, bonds, listed derivatives and ETFs. FIA EPTA works constructively with policymakers, regulators and other market stakeholders to ensure efficient, resilient and trusted financial markets in Europe.

Our members are becoming a part of the digital/crypto assets space, using their existing knowledge to improve the liquidity in digital/crypto products and in the development of technology. Our members are at the forefront of using blockchain technology to transform more traditional parts of the financial market industry. For example, our members are closely involved with the development of the Pyth network which aims at consolidating financial market data to DeFi applications and making it available to the general public. Our members welcome regulation in this growing new asset class and believe it is important for investor protection and the normalisation of trading digital/crypto assets. Building a more mature crypto-assets market also contributes to the competitiveness of the EU and will attract innovative business into the EU.

FIA EPTA is committed to supporting policymakers and regulators in the DeFi space to develop a dynamic, innovative and resilient part of the financial market industry.

Q1. Do you agree with the suggested approach on providing general conditions and criteria by avoiding establishing a one-size-fits-all guidance on the concepts of financial instruments and crypto-assets or would you support the establishment of more concrete condition and criteria?

FIA EPTA members welcome the aim to provide general conditions and clarity on the divergence between financial instruments and crypto-assets. However, FIA EPTA members believe that in the

suggested approach by ESMA, there is too much focus and room for interpretation for NCAs, we believe that clear criteria from ESMA are critical to define the regulatory perimeter between MiFID II and MiCAR. We would suggest ESMA together with market participants to adopt a more pragmatic approach, with a view to ultimately publishing criteria and a list of MiCAR crypto-assets.

The definition of financial instruments sits in a Directive and therefore has been subject to NCA interpretation which has led to different definitions concluding to legal uncertainty. Notwithstanding this, given the maturity of that market, ultimately the term is relatively well understood and workable. However, given the aim of MiCAR to harmonize regulation and introduce passporting of crypto-assets, the divergence with financial instruments and setting the criteria and publishing a list of MiCAR instruments is of the utmost importance.

Crypto-assets, however, are defined in a Regulation. Given this, FIA EPTA members believe clear ESMA guidance on the terms that all NCAs should follow. This is all the more important given how new and global the crypto-asset market is, market participants must have clarity on which assets fall into the scope of MiCAR.

Q2: Do you agree with the conditions and criteria to help the identification of cryptoassets qualifying as transferable securities? Do you have any additional condition and/or criteria to suggest? Please illustrate, if possible, your response with concrete examples.

FIA EPTA members believe that more clarity would be welcome and would suggest the establishment of a database like ISIN to identify products and improve transparency. All financial instruments should have an ISIN, if an asset does not have an ISIN but does meet the Crypto-asset definition we would expect it to be a Crypto-asset in-scope of MiCAR. Having a Crypto ISIN-type database would ensure the regulatory perimeter between financial instruments in-scope for MiFID and Crypto-assets in-scope for MiCAR would be well defined and market participants would have clarity as to when they are subject to MiFID and when they fall under MiCAR.

Q3: Based on your experience, how is the settlement process for derivatives conducted using crypto-assets or stablecoins? Please illustrate, if possible, your response with concrete examples

N/A.

Q4: Do you agree with the conditions and criteria to help the identification of cryptoassets qualifying as another financial instrument (i.e. a money market instrument, a unit in collective investment undertakings, a derivative or an emission allowance instrument)? Do you have any additional condition, criteria and/or concrete examples to suggest?

N/A.

Q5: Do you agree with the suggested conditions and criteria to differentiate between MiFID II financial instruments and MiCAR crypto-assets? Do you have concrete condition and/or criteria

to suggest that could be used in the Guidelines? Please illustrate, if possible, your response with concrete examples.

Although the conditions and criteria are helpful, as mentioned above, we would support further clarity around the perimeter between financial instruments and Crypto-assets.

Q6: Do you agree with the conditions and criteria proposed for NFTs in order to clarify the scope of crypto-assets that may fall under the MiCA regulation? Do you have any additional condition and/or criteria to suggest? Please illustrate, if possible, your response with concrete examples.

N/A.

Q7: Do you agree with the conditions and criteria proposed for hybrid-type tokens? Do you have any additional condition and/or criteria to suggest that could be used in the Guidelines? Please illustrate, if possible, your response with concrete examples.

N/A.