

Guidelines

On the conditions and criteria for the qualification of crypto-assets as financial instruments

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1 Scope

Who?

1. The guidelines apply to competent authorities and to financial market participants, including issuers as defined in Article 3(1), point (10), offerors as defined in Article 3(1), point (13) of MiCA, crypto-asset service providers as defined in Article 3(1), point (15) of MiCA, investors and all persons engaging in activities relating to crypto-assets.

What?

2. These guidelines apply in relation to Article 2(5) of MiCA.

When?

3. These guidelines apply 60 calendar days from the date of their publication on ESMA's website in all official EU languages.

2 Legislative references, abbreviations and definitions

2.1 Legislative references

AIFMD	Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 ¹ .
DLTR	Regulation (EU) 2022/858 of the European Parliament and of the Council of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology ² .
ESMA Regulation	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 2009/77/EC ³ .
MiCA	Regulation (EU) 2023/1114 of the European Parliament and the Council of 31 May 2023 on markets in crypto-assets ⁴ .
MiFID II	Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) ⁵ .
MMFR	Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds ⁶ .
UCITSD	Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) ⁷ .

2.2 Abbreviations

AIF	Alternative investment fund
ART	Asset-referenced token
CASP	Crypto-asset service provider
DLT	Distributed ledger technology
EBA	European Banking Authority
EMT	Electronic money token

¹ OJ L 174, 1.7.2011, p. 1.

² OJ L 151, 2.6.2022, p. 1.

³ OJ L 331, 15.12.2010, p. 84.

⁴ OJ L 150, 9.6.2023, p. 40.

⁵ OJ L 173, 12.6.2014, p. 349.

⁶ OJ L 169, 30.6.2017, p. 8.

⁷ OJ L 302, 17.11.2009, p. 32.

ESMA	European Securities and Markets Authority
ESAs	European Supervisory Authorities
F-NFT	Fractionalised NFT
ITS	Implementing technical standards
NCA	National competent authority
NFT	Non-Fungible Token
RTS	Regulatory technical standards

2.3 Definitions

DLT	Distributed ledger technology (DLT) as defined in Article 3(1)(1) of MiCA.
NFT	Non-fungible tokens refer to crypto-assets that are unique and not fungible with other crypto-assets as mentioned in Article 2(3) of MiCA.
Hybrid tokens	Hybrid tokens refer to crypto-assets that encompass elements from diverse classifications, embodying a composite of characteristics typically associated with distinct types of crypto-assets.

3 Purpose

- These guidelines are issued under Article 16(1) of the ESMA Regulation and Article 2(5) of MiCA. The purpose of these guidelines is to specify conditions and criteria for determining whether a crypto-asset should qualify as a financial instrument and therefore ensuring the common, uniform and consistent application of the provisions in Article 2(4)(a) of MiCA. Furthermore, these guidelines provide clarifications on certain features of utility tokens, NFTs and hybrid tokens.
- These guidelines also contain examples for illustrative purposes. While these examples aim to provide clarity and aim at assisting both NCAs and financial market participants in their assessment, they should not substitute the performance of a complete assessment of whether a crypto-asset should qualify as a financial instrument and in that respect, they should not be interpreted as a definitive classification nor substitute or affect the necessary case-by-case analysis.

4 Compliance and reporting obligations

4.1 Status of the guidelines

6. In accordance with Article 16(3) of the ESMA Regulation, national competent authorities and financial market participants must make every effort to comply with these guidelines.
7. National competent authorities to which these guidelines apply should comply by incorporating them into their national legal and/or supervisory frameworks as appropriate, including where particular guidelines are directed primarily at financial market participants. In this case, competent authorities should ensure through their supervision that financial market participants comply with the guidelines.

4.2 Reporting requirements

8. Within two months of the date of publication of the guidelines on ESMA's website in all EU official languages, national competent authorities to which these guidelines apply must notify ESMA whether they (i) comply, (ii) do not comply, but intend to comply, or (iii) do not comply and do not intend to comply with the guidelines.
9. In case of non-compliance, national competent authorities should also notify ESMA within two months of the date of publication of the guidelines on ESMA's website in all EU official languages of their reasons for not complying with the guidelines.
10. Financial market participants are not required to report.

5 Guidelines on the classification of crypto-assets as financial instruments

General – Guideline 1

11. The technological format of crypto-assets should not be considered a determining factor by national competent authorities and financial market participants when assessing the qualification as financial instruments. Following this, the process of tokenisation of financial instruments⁸ should not affect the classification of such assets.

⁸ That could be described as “the digital representation of financial instruments on distributed ledgers or the issuance of traditional asset classes in tokenised form to enable them to be issued, stored and transferred on a distributed ledger”; See Recital 3 of DLTR; see also “financial instrument means those instruments specified in Section C of Annex I, including such instruments issued by means of distributed ledger technology”, Article 4(1)(15) of MiFID II.

12. Tokenised financial instruments should continue to be considered as financial instruments for all regulatory purposes. National competent authorities should take a technology-neutral approach, a principle referred to in MiCA, to ensure that similar activities and assets are subject to the same rules regardless of their form⁹.

5.1 Classification of crypto-assets as transferable securities

Classification as transferable securities – Guideline 2

13. National competent authorities and financial market participants should classify crypto-assets as transferable securities if they confer to their holders equivalent rights to those granted by shares, bonds, other forms of non-equity securities or other transferable securities as referred to in Article 4(1)(44) of MiFID II¹⁰.
14. A crypto-asset should qualify as a financial instrument if it falls within the definition of a transferable security provided by MiFID II¹¹. In such case crypto-assets should be subject to the exact same rules as traditional financial instruments in line with the principle of technological neutrality. A substance over form approach should be adopted to determine if a crypto-asset qualifies as a financial instrument.
15. National competent authorities and financial market participants should thus consider that, a crypto-asset qualifies as transferable securities, when it cumulatively fulfils the following three criteria: (i) not being an instrument of payment; (ii) being “classes of securities”; and (iii) being negotiable on the capital market.

i. Exclusion of instruments of payment

16. National competent authorities and financial market participants should note that if a crypto-asset conforms to the definition of an instrument of payment it should not be qualified as a transferable security¹².

⁹ Recital 9 of MiCA.

¹⁰ Article 4(1)(44) of MiFID II defines transferable securities, which “means those classes of securities which are negotiable on the capital market, with the exception of instruments of payment” and include shares in companies, bonds and securitised debt, as well as “any other securities” giving: (i) a right to acquire or sell a transferable security; or (ii) “giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures”. This may include options, warrants, and structured bonds where the interest is linked to any derivative (e.g. selected stock index, interest rate, other derivative or a combination of derivatives).

¹¹ Article 4(1)(44) of MiFID II.

¹² For more detail on the notion of instrument of payment, see EBA Guidelines on the limited network exclusion under PSD2, 24 February 2022, EBA/GL/2022/02 ; Noteworthy, while MiFID II does not provide such definition, NCAs which have a national definition of instruments of payment have transposed the definition contained in Article 4(14) of Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market in their legislation ; see ESMA Advice Annex 1 Legal qualification of crypto-assets – survey to NCAs, p.11.

17. MiFID II does not provide any definition of “instruments of payment”. A crypto-asset that would be qualified as such should be seen as a crypto-asset which is used as a medium of exchange¹³. If a crypto-asset were to have several components, including that of an instrument of payment, national competent authorities and financial market participants should conduct a case-by-case analysis to determine the most appropriate qualification for this crypto-asset.

ii. Classes of securities

18. National competent authorities and financial market participants should consider the following indicators to identify whether crypto-assets form a "class": (i) the crypto-assets are issued by the same issuer and (ii) the crypto-assets are interchangeable¹⁴, i.e. giving access to the same rights (e.g. dividend rights, voting rights on the issuer's decision-making process, right over a portion of company's assets or rights to liquidation proceeds). If all crypto-assets of the same issuance represent or confer the same rights and obligations and are therefore interchangeable, or if the issuance comprises clearly identifiable different classes of crypto-assets¹⁵, the “class requirement” criterion should be considered to be met. National competent authorities and financial market participants should also note that the existence of multiple classes of crypto-assets within the same issuance should not *per se* affect their qualification as being part of a class of securities, provided each class maintains clearly defined and distinguishable rights and characteristics, as is common with traditional securities issuances.

19. An example of a token pertaining to a class is a scenario where tokens are interchangeable and grant holders equivalent voting rights and dividend entitlements. This interchangeability implies that each token is identical in rights and obligations for all holders. In such cases, national competent authorities and financial market participants may consider that these tokens meet the criteria for being part of a class.

20. After having assessed if the crypto-asset is part of a class, national competent authorities and financial market participants should assess if it is part of a class of securities. In this respect, they should consider that the classes of securities mentioned in points (a) to (c) of Article 4(1), point (44), of MiFID II are examples of securities that fall within the definition of transferable securities. To determine if a crypto-asset confers rights of securities, NCAs should evaluate whether the rights granted by the crypto-assets are equivalent to those typically granted by a specific type of transferable security.

21. To illustrate this, crypto-assets that would represent an ownership position in a company's capital and confer to their holders rights equivalent to the rights conferred by shares (e.g. stake in a company, right to vote with respect to certain decisions of the company, rights of

¹³ For instance, this notion usually includes liquid payment methods like cheques, bills of exchanges as well as non-cash payment tools including cards, bank transfers, direct debits, and electronic money.

¹⁴ The idea is to exclude crypto-assets that would be unique or that would have been customised for a particular investor (e.g. NFTs).

¹⁵ Each class being interchangeable.

dividend, rights to the company's liquidation proceeds), should be qualified as securities that have features specific to shares¹⁶.

22. An assessment should also be made between crypto-assets giving voting rights typically associated with shares (e.g. voting rights on the company's decision-making process) and those giving governance rights that are more linked to technical and/or operational decisions and which do not provide holders with any influence over corporate governance matters. For instance, crypto-assets granting voting rights on the company's decision-making process allowing holders to participate in corporate governance decisions (such as electing board members, approving mergers and acquisitions) should be considered as granting voting rights equivalent to shares. On the contrary, crypto-assets that would grant governance rights solely on technical matters and/or operational changes, such as protocol upgrades and fee adjustments, without giving holders any influence over corporate governance decisions, should not confer rights equivalent to shares and should be distinguished from securities that provide traditional shareholder powers.
23. An example is that of crypto-assets which are designed as utility tokens within a specific ecosystem such as tokens used to access services, providing holders with access to premium content on a video game platform or granting discounts on future purchases (e.g. reduced transaction fees or priority access to new products). In such case, if the tokens do not provide any financial returns comparable to financial instruments (e.g. dividends or interest payments) and are lacking the element of pertaining to a class of securities, then the tokens should not be qualified as transferable securities. This reasoning would apply even if such tokens were bought by investors with the expectation of profit due to their potential appreciation in value.
24. National competent authorities and financial market participants should further take into account that tokens tracking the performance of one or several underlying assets, which grant holders rights comparable to those of acquiring or selling transferable securities (such as the right to acquire shares, bonds or similar transferable securities) should be viewed as a strong indication of conferring rights equivalent to securities and could hence be qualified as transferable securities if they are part of a class and are negotiable. National competent authorities and financial market participants should also consider whether such tokens give rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities, or other indices or measures.
25. With reference to the class of "bonds or other forms of securitised debt"¹⁷, provided that these instruments are negotiable on the capital market, national competent authorities and financial market participants should note that crypto-assets that would represent a debt akin a monetary debt like a portion of a loan owed by the issuer to the crypto-asset holder should be

¹⁶ National competent authorities and financial market participants should take into account that the term "share" is not defined by the EU law. As a result, Member States interpret this concept differently; in some, shares may lack dividend or voting rights (such as preference shares) yet still qualify as shares.

¹⁷ Article 4(1)(44), point (b) of MiFID II.

considered as securities that have features specific to bonds. The same applies for a debt that would be incorporated into a security, excluding bonds or money market instruments.

26. As an example, national competent authorities and financial market participants may consider the case of a company that would issue crypto-assets that provide to their holders regular interest payments and/or promise the repayment of the principal at a future date. Such tokens should be considered as pertaining to a class of securities similar to bonds due to their debt-representing characteristics.
27. National competent authorities and financial market participants should take into account that such assets may also fall within the ambit of “other securities”, as mentioned in MiFID II's Article 4(1), point (44), point (c), which give rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities, or other indices or measures.

iii. Negotiability on the capital market

28. National competent authorities and financial market participants should determine if the crypto-asset is freely negotiable on the capital market¹⁸. National competent authorities and financial market participants should therefore consider that if inherent restrictions on transfer prevent a crypto-asset from being negotiated, it is not a transferable security.
29. A crypto-asset should be considered to be negotiable where it is capable of being transferred or traded freely¹⁹. The abstract possibility of being transferred or traded should be deemed sufficient, even if there is no specific market for the product or even if there is a temporary lock-up period. The negotiability requirement set out in Article 4(1), point (44), of MiFID II seems to be met by most crypto-assets, since the DLT makes the transfer of ownership from the seller to the buyer possible.
30. National competent authorities and financial market participants should also consider that a crypto-asset can be designed in a way that it does not allow for any transfer in capital markets. Some restrictions may be placed on negotiability by not allowing holders to negotiate and/or transfer crypto-assets to a person other than the issuer. In respect of any restrictions on the transfer of crypto-assets, these need to be considered on a case-by-case basis, as the nature

¹⁸ The reference to “capital markets” is not defined but as a concept is intentionally broad to include all contexts where buying and selling interests in securities meet. It does not limit the scope to securities listed or traded on regulated markets; See Q&As published by the Commission on MiFID Directive 2004/39/EC.

¹⁹ Transferable securities should only be considered “freely negotiable” if before admission to trading no restrictions exist which prevent the transfer of crypto-assets in a way that would disturb “*creating a fair, orderly and efficient market*” (see recital 1 to Delegated regulation (EU) 2017/568 of 24 May 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards for the admission of financial instruments to trading on regulated markets). Therefore, the fact that investors must be for instance whitelisted should not on its own prevent a crypto-asset to be qualified as a transferable security, to be assessed on a case-by-case basis, see paragraph 29.

and impact of the restriction could be sufficient to render the instrument non-tradable²⁰. Similarly, national competent authorities and financial market participants should also take into account other restrictions that may exist and may not prevent a crypto-asset from being tradable (e.g. whitelist-only transfers, selling restrictions for a specified period of time, lock-up, specific country limitation).

31. National competent authorities and financial market participants should broadly interpret the notion of capital market, including all contexts where buying and selling interests in securities meet, and simultaneously assess the differences between traditional venues and trading platforms for crypto-assets. Generally, capital markets are understood as trading venues where savings and investments are channelled between buyers which want to invest in an asset, and sellers which need capital against their assets. Consequently, if crypto-assets are capable of being traded on a trading platform equivalent to a MiFID trading platform, this should be a conclusive indication that they are negotiable on a capital market. The fact that a crypto-asset is traded on online trading platforms may serve as an indicator of their negotiability but does not necessarily coincide with the notion of capital market.
32. Therefore, national competent authorities and financial market participants should consider that the dependable criteria for classifying a crypto-asset as a transferable security might include: (i) transferability and interchangeability (negotiability and belonging to a class), and (ii) possession of rights akin to the rights of other securities. Drawing from the MiFID II definition of transferable securities, all aforementioned criteria need to be satisfied for crypto-assets to be categorised as a transferable security.

5.2 Classification as other types of financial instruments

Classification as money-market instruments – Guideline 3

33. To be classified as a money market instrument as defined in Article 4(1), point (17), of MiFID II, crypto-assets should be a class of instruments normally traded within the money market, with the exception of payment instruments.
34. National competent authorities and financial market participants should assess whether the crypto-assets possess characteristics similar to treasury bills, certificates of deposit, and commercial papers (e.g. represent a certificate of a credit balance). These instruments typically represent short-term negotiable debt obligations, issued by governments, credit

²⁰ Issuer-imposed restrictions may potentially limit the transferability of crypto-assets in various ways. Time-lock transfers may restrict the transfer of the asset for a specific period, preventing transactions before a set date or event. Geographical restrictions limit transfers to certain regions or jurisdictions, often to comply with local regulations. Technical restrictions, such as covenants, can be specific conditions encoded into the smart contract, which may require certain criteria to be met (e.g., holding periods, usage constraints) before transfers are allowed. In any case, such restrictions should be assessed on a case-by-case basis.

institutions, or corporations to raise funds in the money market²¹. In particular, certificates of deposit are transferable instruments that constitute short-term debt obligations. Accordingly, such crypto-assets should embody similar features, including obligations to repay a credit balance, without confusing them with standard banking deposits under Directive 2014/49/EU. This distinction ensures that only instruments meeting the necessary criteria for money market instruments are treated as such.

35. National competent authorities and financial market participants should consider that money-market instruments are known for their short maturity periods²². To qualify as a money-market instrument under MiFID II, a crypto-asset should thus, among other things, exhibit a predefined or residual maturity or redemption date maturity as required for in MMFR. This criterion ensures alignment with the core characteristic of short-term nature that money-market instruments possess. Some platforms offer short-term savings accounts for crypto-assets which aim to maintain a stable value (crypto-assets pegged to stable assets like Euro or U.S. dollar). If these savings arrangements had a short maturity and provided returns to users, this might be seen as one feature analogous to traditional money-market instruments.
36. As an example, national competent authorities and financial market participants may consider a scenario where a company would issue a crypto-asset traded on a platform to provide short-term loans to users, without being a payment instrument but a tradable token within the money market. It represents a certificate of credit balance, repayable by the borrowing party with interest at the end of a short period. Although the token's value is pegged to the Euro to maintain stability, the price of the token may fluctuate slightly to reflect the accrued interest over the loan period but may be accurately determined at any time. By meeting these criteria collectively, such crypto asset should, for those characteristics, be considered analogous to a short-term debt obligation used for financing and investment thus, where also other characteristics are met, should be considered as a money-market instruments.

Classification as units in collective investment undertakings – Guideline 4

37. National competent authorities and financial market participants should consider that for a crypto-asset to be qualified as a unit in a collective investment undertaking (CIU) the project attached to the crypto-asset should involve collectively: (i) the pooling of capital from a number of investors; (ii) the purpose of investing this capital in accordance with a defined investment policy; and (iii) with a view to generating a pooled return for the benefit of those investors²³. It

²¹ "Money market instruments are transferable instruments normally dealt in on the money market and include treasury and local authority bills, certificates of deposits, commercial papers, bankers' acceptances, and medium- or short-term notes. Money market instruments should be eligible for investment by MMFs only insofar as they comply with maturity limits and are considered by an MMF to be of high credit quality" (see recital 21 of the Money Market Fund Regulation 2017/11/31/EU, MMFR).

²² For instance - even though not valid for all money market instruments - short maturity periods at issuance or residual of up to 397 days as mentioned in Article 3 of Commission Directive 2007/16/EC.

²³ Guidelines on key concepts of the AIFMD, 13 August 2013, ESMA/2013/611, par. 12.

should be noted that, to qualify as a collective investment undertaking, it does not matter whether participants contribute fiat currency, cash equivalent, or crypto-assets to the pool.

38. For example, a crypto-asset that would enable holders to (i) invest in digital investment funds, where holders are entitled to a proportional share of the returns generated by the managed portfolio, without any participation in the governance regarding investment strategies (e.g. no voting rights) and (ii) redeem their tokens for a share of the portfolio's value, should be considered as a unit in a collective investment undertaking.
39. National competent authorities and financial market participants should also consider whether token holders – as a collective group – have day-to-day discretion or control²⁴ over operational matters relating to the daily management of the assets included in the pool. Where this is the case, the crypto-asset would likely not qualify as a collective investment undertaking. In this context, it is not relevant whether decisions are made by humans, code/algorithms, or smart contracts as long as those decisions are in strict adherence to the established investment policy.
40. For instance, a token received as part of a liquid staking service (i.e. where users delegate their tokens/governance rights attached to those tokens to a staking service provider) could be regarded as representing a share in the staking rewards generated by the pooled staked assets/governance rights. However, if there is no collective management by a third party following a predefined investment policy – such as users retaining day-to-day control over their staking tokens and can trade them freely²⁵ – such crypto-asset should not typically be considered by national competent authorities and financial market participants as a unit of a collective investment undertaking.
41. While some schemes may have diversification obligations, having a diversified portfolio is not a criterion for classification. Liquidity of the assets invested in or of the units issued by the undertaking is also not a criterion for the classification as a collective investment undertaking. For a crypto-asset to be classified as a unit in a collective investment undertaking, it should aim at providing investors with a pooled return, which is generated by the pooled risk arising from acquiring, holding or selling of the underlying investment assets. These criteria ensure that investors are entitled to a share of profits or losses as a result of their participation.
42. For a crypto-asset to be qualified as a unit or share of an alternative investment fund, it should be used to raise capital from a number of investors with a view to investing in accordance with a defined investment policy for the benefit of those investors²⁶. National competent authorities

²⁴ Ibid.

²⁵ "Freely" here refers to the ability to transfer or trade tokens without significant restrictions, excluding necessary operational requirements due to the use of distributed ledger technology (DLT), such as 24 to 48-hour locking period, which are common in liquid staking services.

²⁶ Without requiring an authorisation pursuant to Article 5 of UCITS Directive. See, article 4(1)(a)(ii) of AIFMD.

and financial market participants should carefully assess in particular whether the crypto-asset has a defined investment policy, taking into account the criteria set out in the ESMA Guidelines on key concept of the AIFMD²⁷.

43. Another key aspect to take into account is the general commercial or industrial purpose of the crypto-assets project²⁸. For the issuer of a crypto-asset to be classified as a collective investment undertaking, the purpose of the crypto-asset project should not be a general commercial or industrial purpose.

Classification as derivative contracts – Guideline 5

44. In relation to derivatives and crypto-assets, national competent authorities and financial market participants should distinguish two situations. The first situation, not envisaged by MiCA, is when crypto-assets serve as an underlying asset for derivatives. The second situation is when crypto-assets themselves can be qualified as derivatives.
45. In relation to the first situation, national competent authorities and financial market participants should consider the possibility for crypto-assets to be eligible underlying assets in derivative contracts. National competent authorities and financial market participants should ensure that their approach to evaluating such derivatives is aligned with the categories specified in Annex I Section C, points (4)-(10) of MiFID II.
46. For example, national competent authorities and financial market participants could consider the case of a crypto-asset designed as a prearranged sale agreement where one party agrees to buy a certain amount of specific crypto-assets at a future date for a predetermined price²⁹. The rights attached to this crypto-asset would include the obligation to deliver the crypto-assets at the agreed date and price, regardless of the market price at that future date or to pay the difference between the agreed price and the market price. Depending on the circumstances, such a contract establishing a future commitment and deriving its value from the underlying cryptocurrency's price, could be considered as meeting the characteristics of a derivative contract.
47. National competent authorities and financial market participants should also consider the unique nature of perpetual futures, which are derivative instruments that do not have an expiration or settlement date. Unlike traditional futures contracts, perpetual futures are designed to provide continuous exposure to the underlying asset without requiring periodic rollovers. Despite their unique structure, perpetual futures should be treated as derivative

²⁷ Section IV of ESMA/2013/611.

²⁸ Guidelines on key concepts of the AIFMD, 13 August 2013, ESMA/2013/611, p.29 and 31. The general commercial or industrial purpose notion can be defined as “the purpose of pursuing a business strategy which includes characteristics such as running predominantly i) a commercial activity, involving the purchase, sale, and/or exchange of goods or commodities and/or the supply of non-financial services, or ii) an industrial activity, involving the production of goods or construction of properties, or iii) a combination thereof.”

²⁹ Provided that such arrangements do not fall within the scope of primary market transactions or other pre-arranged sales that are not classified as derivatives under MiFID II.

contracts as they involve an agreement between parties to exchange the performance of an underlying asset over time, and their value is derived from the price movements of that asset. National competent authorities and financial market participants should thus ensure that tokenised perpetual futures are assessed against the criteria set out in Annex I Section C, points (4)-(10) of MiFID II, acknowledging their growing significance in the crypto-asset markets.

48. In relation to the second situation, regarding the conditions and criteria for crypto-assets to be qualified as derivative contracts, national competent authorities and financial market participants should as part of their assessment consider whether: (i) the rights of the crypto-asset holders are contingent upon a contract based on a future commitment (which can be either a forward, an option, a swap or a future), creating a time-lag between the conclusion and performance of the obligations under such contract; (ii) the crypto-asset's value is derived from that of an underlying asset³⁰ and (iii) follows the settlement modalities as referred to in Annex I Section C, points (4)-(10) of MiFID II.
49. National competent authorities and financial market participants should ascertain that the crypto-asset has an underlying reference point such as, rates, indexes, or instruments relevant in accordance with Annex I Section C, points (4)-(10) of MiFID II. To do so, national competent authorities and financial market participants should take into account the list of Annex I Section C, points (4)-(10) of MiFID II as well as all related level 2 texts³¹, and carefully analyse if the relevant crypto-asset includes the elements mentioned therein. The underlying is the basis for determining the value or payoff of the derivative. The value of the crypto-asset should also depend on changes in the value of the underlying reference asset. If a crypto-asset does not derive its value from specified underlying assets as defined in MiFID II, but exists as a standalone crypto-asset, it should be distinguished from a derivative contract.
50. National competent authorities and financial market participants should also consider, that when the value of a token is established through reserved assets, this token should be considered as an asset-reference token within the meaning of MiCA and not as a derivative. On the contrary, when the value or performance of the token is established by synthetically referencing another asset or right or a combination thereof, national competent authorities

³⁰ E.g. the underlying is commodity like gold, oil or gas; the token has link with securities, foreign exchange, rates, credit, or other financial underlying instruments; the trade involve actual European Emission Allowances or equivalents like Certified Emission Reductions; the token's link to climatic variables, freight rates, inflation rates, or other official economic statistics; whether the token representing a cash-settled arrangement based on the difference between open and closing trade prices, the token's design or use primarily for transferring credit risk.

³¹ See Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, (OJ L 87, 31.3.2017, p. 1). Financial market participants and competent authorities are invited to also consider Q&As and Guidelines as the ESMA Questions and Answers on MiFID II and MiFIR commodity derivatives topics, ESMA70-872942901-36, 23 September 2022; See also ESMA Guidelines on the application of C6 and C7 of Annex 1 of MiFID II, ESMA-70-156-869, 5 June 2019.

and financial market participants should analyse whether it should be qualified as a financial instrument.

51. An example could be a company that issues a crypto-asset aiming at reflecting the value of a share, bond or other type of financial instrument (performance and/or revenues generated). National competent authorities and financial market participants should consider whether these tokens confer an economic benefit directly correlated to a financial instrument (in a manner akin to that of a securitised equity swap) and should be considered as a derivative.
52. As another illustration, national competent authorities and financial market participants could consider a crypto-asset designed to track the performance of an index composed of emerging market crypto-assets. In this example, the primary characteristic of this crypto-asset is that it provides the holder with the returns of a specific index over a defined period. In a swap arrangement, two parties agree to “swap” the performance of this index, with counterparties respectively receiving or paying the index's performance at regular intervals. If the crypto-asset similarly represents an obligation to deliver the equivalent value of the index at a future date, it resembles a futures contract. In this example, the holder gains or loses depending on the index's value at the contract's maturity compared to the initial agreement. This setup establishing a time-lag between the contract's conclusion and execution, and for which the value of the crypto-asset depends on the niche index's performance, should be considered as meeting the characteristics of a derivative contract, provided that the other relevant elements referred to in MiFID II Annex I Section C, points (4)-(10) of MiFID II are present.
53. An example could also be drawn from a crypto-asset representing synthetic exposure to a basket of tokens. In this example, such crypto-asset mimics the performance of a basket of tokens without requiring direct ownership of the underlying assets. In a synthetic exchange-traded product setup, the holder gains from the combined performance of the basket, with the contractual terms specifying the exposure. The crypto-asset could typically be structured to provide returns based on specific performance metrics and maturity conditions, making it a structured financial instrument tailored to the performance of tokens. The synthetic exposure means the holder's returns depend on the future performance of the underlying tokens, involving a time-lag between the contract's initiation and the realisation of gains or losses. The value of the crypto-asset is directly tied to the combined performance of the basket of tokens. Furthermore, the terms of the synthetic exposure, including maturity and performance metrics, are defined. Consequently, such crypto-asset should be qualified as a derivative contract provided that the other relevant elements referred to in Annex I Section C, points (4)-(10) of MiFID II are present.
54. A crypto-asset's model where one party agrees to buy a certain amount of a crypto-asset from another party at a future date for a predetermined price should likely be seen as a forward/future. Similarly, a crypto-asset that provides a right (but not the obligation) to buy or sell a specific crypto-asset (even a utility token) at a predetermined price within a certain timeframe should likely qualify as an option. A crypto-asset might also represent futures contracts for

traditional commodities like gold or oil and hence be classified as a financial instrument where (in this case and in the previous cases) the conditions of the abovementioned points (4)-(10) of Annex I Section C, of MiFID II are met.

55. National competent authorities and financial market participants should carefully consider whether the form of settlement, whether in cash or through any crypto-assets, may affect the fundamental general classification of the product (i.e. between crypto-assets regulated under MiCA and financial instruments), if all other inherent characteristics and functions of derivative contracts in accordance with MiFID II are fulfilled by a product. Subject to the necessary case-by-case assessment, while the method of settlement is an important consideration, the general characteristics of the product are not likely to be inherently altered by the settlement medium.

Classification as emission allowances – Guideline 6

56. National competent authorities and financial market participants should consider that for a crypto-asset to be classified as an emission allowance, it should represent a right to emit a certain quantity of greenhouse gases and be recognised for compliance with the EU Emissions Trading Scheme. The crypto-asset's capability to be exchanged, managed and used like conventional emission allowances within existing carbon trading frameworks should also be assessed.
57. Crypto-assets that represent a verifiable emission allowance recognised for compliance with the requirements of Directive 2003/87/EC³² (or a set number of allowances) and that are tradeable, should fall under MiFID II's remit.
58. National competent authorities and financial market participants should take into account that crypto-assets should have to be recognised for compliance with the requirements of Directive 2003/87/EC. This means that for a crypto-asset to be classified as an emission allowance, it should ideally be tied to or represent such recognised units. A crypto-asset issuance that would not be recognised by a Member State and organised by the European Commission could be qualified as a voluntary carbon credit and thus be out of the scope of the definition of a financial instrument.
59. In order to be considered as an emission allowance, the crypto-asset should confer a clear right regarding emissions, such as the right to emit a set quantity of greenhouse gases or serve as a recognized offset for such emissions. National competent authorities and financial market participants should consider in their assessment whether companies and organisations may use this crypto-asset to fulfil legal obligations related to carbon emissions

³² According to Article 3(a) and (b) of Directive 2003/87/EC 'allowance' means an allowance to emit one tonne of carbon dioxide equivalent during a specified period, which shall be valid only for the purposes of meeting the requirements of this Directive and shall be transferable in accordance with the provisions of this Directive and 'emissions' means the release of greenhouse gases into the atmosphere from sources in an installation'.

reduction. The crypto-asset should also be tradable on third-party platforms or be capable of being traded.

60. It should be highlighted that emission allowances are fundamentally different from most crypto-assets currently on the market, which often represent a store of value, a stake in a project, or access to a service.

5.3 Background on the notion of crypto-assets

Classification as crypto-assets – Guideline 7

61. National competent authorities and financial market participants should take into account whether the crypto-asset is a digital representation of value or rights, capable of being transferred and stored using DLT, including whether these values or rights represent a right vis-à-vis the issuer and/or someone designated by the issuer. The nature of the crypto-asset's electronic transfer and storage should be taken into account considering the use of DLT or similar technologies.
62. National competent authorities and financial market participants should consider that although a utility token may be accompanied by governance rights (i.e. governance crypto-assets), it should not replicate the rights attached to financial instruments, starting with those attached to transferable securities within the meaning of MiFID II³³. The same applies to crypto-assets accompanied by an expectation of profits. National competent authorities and financial market participants should therefore consider that such expectation of a future profit should not in itself be sufficient to qualify a crypto-asset as a financial instrument in accordance with MiFID II³⁴.
63. National competent authorities and financial market participants should consider that crypto-assets that are non-transferable to other holders and that are only accepted either by the issuer or by the offeror do not fall within the scope of MiCA³⁵. The same applies to crypto-assets that are unique and not fungible with other crypto-asset³⁶.
64. These guidelines are not intended to specify all types of crypto-assets that do not fall under the scope of MiCA and are listed in Article 2(4) of that Regulation. Nevertheless, an assessment of whether a crypto-asset qualifies as one or more of the instruments listed in

³³ Art. 4(1)(44) of MiFID II. In any case, as explained above, the classification as a financial instrument needs to be performed by assessing all the features/characteristics of the relevant financial instrument as referred to in MiFID II.

³⁴ In contrast to traditional shares, a utility token should give neither financial rights that would be related to a company's profits, capital, or liquidation surpluses - and thus representing an ownership position in a company's capital (e.g. unit of equity ownership in the capital stock of a corporation) - nor voting rights which would lead the investor to participate to the company's decision-making process (e.g. token giving the right to vote on matters of corporate policymaking).

³⁵ See recital 17 of MiCA.

³⁶ Article 2(3) of MiCA; See also recital 10 of MiCA.

Article 2(4) of MiCA and its similarity to financial instruments should be carried out by national competent authorities and financial market participants as part of their assessment.

Crypto-assets which are unique and not fungible with other crypto-assets (NFTs) – Guideline 8

65. National competent authorities and financial market participants should consider that, crypto-assets that are unique and not fungible with other crypto-assets are outside the scope of MiCA (e.g. digital art, collectibles, and tokens representing unique services or physical assets, such as product guarantees or real estate).
66. In addition, regardless of the exemptions under MiCA, if NFTs meet the criteria of financial instruments they will be subject to MiFID II and other relevant EU regulations. The same principle applies if NFTs qualify under other regulatory frameworks.
67. National competent authorities and financial market participants should consider that to be unique, NFTs should be considered non-substitutable. They should have clear distinct characteristics and/or rights compared to the other crypto-assets issued by the same (or any other) issuer. National competent authorities and financial market participants should not base the classification of a crypto-asset as unique and non-fungible solely on its technical specificities, such as the attribution of a unique identifier or the use of specific technical features and standards.
68. National competent authorities and financial market participants should base their assessment of whether an asset is unique and non-fungible on a range of relevant indicators attached to NFTs, such as (but not limited to): intrinsic value and rarity (e.g. whether the crypto-asset possesses unique attributes that contribute to its intrinsic value and rarity, making it distinct from other assets); utility and functionality (e.g. specific utility or functionality); ownership and rights (e.g. exclusive access or usage rights that are unique to the holder).
69. When evaluating the uniqueness of a crypto-asset, national competent authorities and financial market participants should also focus on the features that contribute to its distinct value. If a crypto-asset's valuation largely stems from its comparability to others with equivalent attributes, rendering them substitutable, it should not warrant an exemption under MiCA. Conversely, if NFTs derive their value from their unique characteristics or the specific utility they provide to the holder while they may be traded and speculated upon, they should not be seen as substitutable as their value cannot be easily compared to other assets.
70. For this purpose, an “interdependent value test” may be considered by national competent authorities and financial market participants as part of their assessment in order to classify a crypto-asset as unique and non-fungible considering: (i) if the value of the crypto-asset primarily stems from its unique characteristics and/or the utility/benefits it offers to its holder (e.g. a specific NFT tied to a limited edition digital artwork by a renowned artist); (ii) the extent to which the interconnection of various types of crypto-assets influences the value of one

another in such a way that the NFT has no value of its own that would be decorrelated from the other NFTs in the series or collection (e.g. the existence of a common trading price for a series of tokens)³⁷; as well as (iii) the unique characteristics that distinguish these crypto-assets from others.

71. The assessment of uniqueness and fungibility in the context of MiCA should be considered independently of the asset's negotiability on secondary markets. The ability to trade a crypto-asset on such markets does not inherently affect its classification under MiCA as unique or non-unique.
72. National competent authorities and financial market participants should not automatically consider fractionalised NFT (F-NFTs) as unique and non-fungible³⁸. As part of their assessment, national competent authorities and financial market participants should take into account: whether the crypto-assets represent a partial ownership stake in a single unique and non-fungible token; if fractional parts, when considered separately, are deemed unique and non-fungible; whether these fractional parts share identical attributes or characteristics; and the possibility of reconstructing complete ownership of the unique and non-fungible token by aggregating all its fractional components.
73. For instance, national competent authorities and financial market participants may consider an NFT collection where an NFT is fractionalised into hundreds of smaller tokens representing a part of the initial NFT picture. While the original NFT picture is unique, the fractionalised tokens might not individually meet the criteria of being unique and non-fungible. If all fractional parts can be recombined to restore full ownership of an original NFT, this may indicate that the fractional parts do not independently qualify as unique and non-fungible under MiCA.

Hybrid crypto-assets – Guideline 9

74. National competent authorities and financial market participants when determining whether a crypto-asset has hybrid characteristics should first evaluate if the crypto-asset meets the criteria of a financial instrument. If the hybrid token displays features of a financial instrument, such nature should take precedence in its classification³⁹. This assessment should be the primary focus before considering alternative classifications, such as utility tokens.
75. National competent authorities and financial market participants should prioritise assessing a crypto-asset's inherent attributes over the labels provided by issuers, especially for hybrid tokens whose functions or attributes might evolve during their life-cycle, to determine whether

³⁷ Such interconnection may be exacerbated by the size of the series or collection which NFTs belong to.

³⁸ Ibid.

³⁹ This approach aligns with the wording of recital 9 of MiCA, which explicitly states that crypto-assets qualifying as financial instruments fall outside the scope of this regulation.

they seamlessly combine investment-driven functions (e.g. returns or capital appreciation), with utility-centric purposes (e.g. granting exclusive access to a service or digital platform).

76. National competent authorities and financial market participants should take into account whether the crypto-asset possesses a range of characteristics that complicate its classification (e.g. considering whether the crypto-asset fulfils multiple roles or combines various attributes, such as aspects of a financial instrument, payment, and utility; the extent to which the presence of these diverse characteristics and functions contributes to the crypto-asset's overall definition).