



ABBL's response to the ESAs Consultation paper on

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

(ESA 2024 12)

Date: 11 October 2024

EU Transparency register: 3505006282-58

Q1: Do respondents have any comments on the template for the purposes of Article 8(4) Regulation (EU) 2023/1114??

We are of the opinion that it will be important to have further guidance from ESAs on the qualification of hybrid crypto-assets, presenting features of both crypto-assets as defined under Regulation (EU) 2023/1114, as well as financial instruments. We understand that the qualification as financial instruments, based on the characteristics of tokens, should prevail.

In this context, we believe that the template should be expanded to include hybrid tokens in the list of different crypto-assets to examine. In line with the hierarchy principle set by ESMA, if a token exhibits the characteristics of a financial instrument, alongside other attributes (e.g., as a utility token), the classification as a financial instrument should prevail. Consequently, the token would not fall under the scope of MiCA. Therefore, an additional field should be included where the applicant must demonstrate that the token is not a hybrid token with features of a financial instrument covered by MiFID (see below our answer to questions 2 and 3 for additional comments).

Additionally, since the classification of 'crypto-assets other than ARTs and EMTs' requires a legal analysis similar to the one needed for ART or EMT classification, the template could suggest that a legal opinion is to be provided voluntarily, even though MiCA does not mandate it. This would be a more useful approach since the intention to classify crypto-assets in this category could be driven by a regulatory arbitrage logic to avoid stricter regulations applicable to ARTs and EMTs.

Q2: 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?

We would also suggest adding more elements to the test, in particular regarding the remuneration aspect of a crypto-asset. For example, a certain type of crypto-asset may pay a remuneration to the holder, which may be the case for tokens issued on a DLT using a proof of stake mechanism such as the one used in Ethereum. For certain types of crypto-assets remuneration to its holder cannot be provided. For example, article 40 of MiCA Regulation prohibits the remuneration of ARTs, which means that the asset should not pay any interest or other forms of remuneration.

Additionally, the template should require a detailed examination of compliance with all other legal criteria for classification as ART or significant ART, such as the right of redemption under Article 39. In this regard, the template should also include an additional section on the classification of ART as significant ART through a detailed examination of legal criteria in this respect, i.e. compliance with Articles 44 (voluntary classification of ARTs as significant ARTs) and 45 (specific additional obligations for issuers of significant ARTs).

Additionally, like in the previous template for Article 8(4), the possibility of hybrid tokens should be addressed. Given that for instance a “stablecoin” can possess a variety of characteristics, including those that might classify them as “instruments of payment” while simultaneously having features that could theoretically categorise them as transferable securities, money market instruments, or derivatives, a more thorough analysis is necessary. Specifically, the following should be considered:

- The potential classification as a financial instrument under MiFID;
- The redemption rights of the token;
- The credit risk faced by the holder.

Furthermore, there is a risk that issuers of crypto-assets may attempt to bypass regulatory constraints by avoiding the classification of crypto-assets as a financial instrument, which would deprive consumers of the protections provided by MiFID, as well as obligations related to contributions to the single resolution fund or deposit guarantee schemes. Furthermore, as highlighted by the Bank for International Settlements (BIS) and the IMF-FSB in recent reports, the widespread use of “stablecoins” as payment instruments could pose broader risks to the financial system, including undermining monetary policy and global financial stability.

Thus, more clarity should be provided regarding the exclusion of “instruments of payment” from the definition of “transferable securities.” It is crucial to clarify the interpretation of crypto-assets with potential payment functions that might also serve investment and store-of-value purposes. The term “instrument of payment” is pivotal in this analysis, and further clarification would ensure proper classification and treatment of crypto-assets that share characteristics of transferable securities.

Moreover, since the MiCA Regulation does not specify whether the legal opinion must be developed in-house or with the help of an external entity, the template is not prescriptive in this regard and leaves the choice open. Given the stakes and potential biases, we believe that opting for an external legal counsel, which would be liable, would provide greater precision and security in terms of classification.

Lastly, we would also suggest considering additional elements for the template covering the fungibility aspect of the crypto-asset.

Q3: 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?

Considering that the purpose of the template is to provide a standardised and harmonised framework at European level to classify a crypto-asset, it is our opinion that the template should also mention the length (e.g. minimum/maximum number of words) of each part of the template to ensure consistency.

For other aspects of the template, please see our comments provided above for the question 2 of the consultation.

Q4: Do respondents have any comments on the standardised test?

We believe that the standardised test should incorporate an assessment for hybrid crypto-assets. It should also incorporate the question of the granting of an interest (see our proposals given in orange colour in the flow chart).

Additionally, it seems to us that the flow chart contains an error regarding the choice between EMT and ART, with an alternative between two positive responses, whereas one of the branches of the alternative should be a negative response (see blue oval in the flow chart, Figure 1).

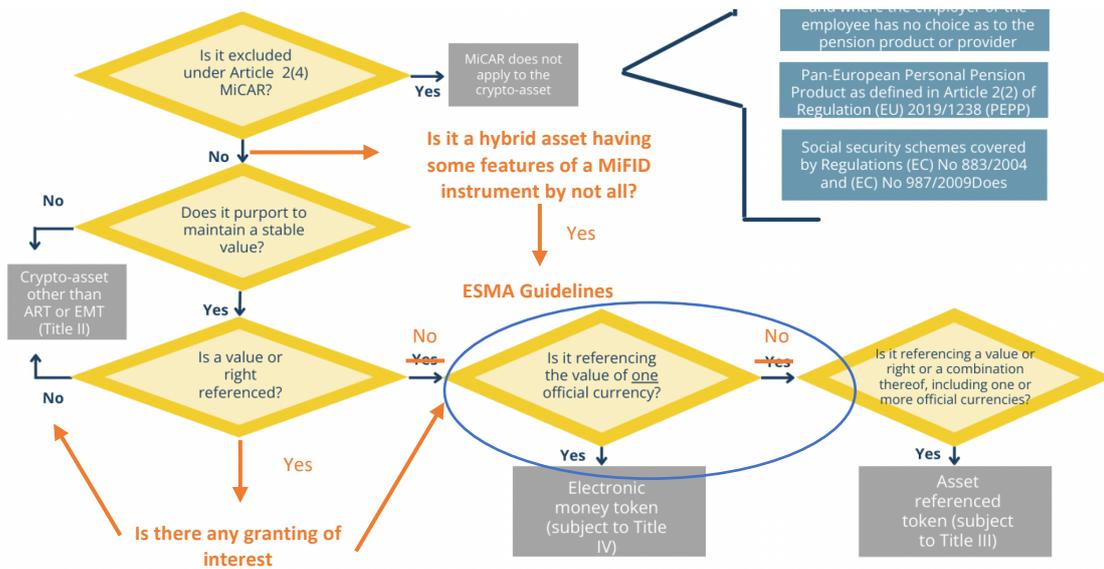


Figure 1 – Suggested updates in the flow chart for the purposes of the standardised test referred to in Article 97(1) of Regulation (EU) 2023/1114

Furthermore, we would propose changing the wording of the question “*What is the technology used for this purpose*” to make the question close-ended to better align it with the answers Yes/No, and being consistent with the options proposed. In the current version of the wording, the question does not entail answering it with “Yes” or “No” answers (see orange oval in the flow chart, Figure 2).

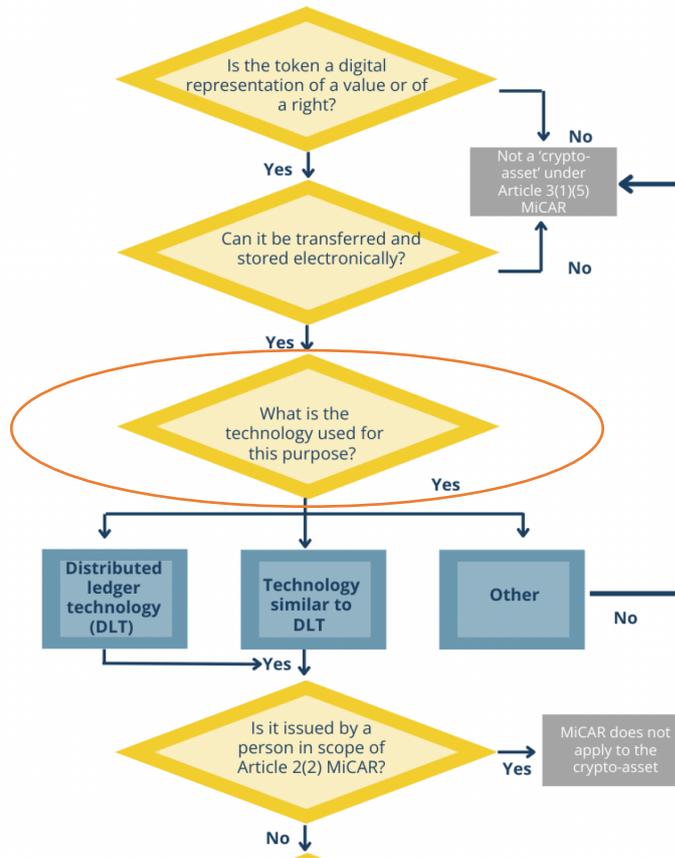


Figure 2 – Suggested updates in the flow chart: Technology used

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