

INATBA RESPONSE

by the FINANCE WORKING GROUP

ESA Consultation on Standardised Crypto-Asset Classification Test and Framework

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INATBA

International Association
for Trusted Blockchain Applications

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In this document, you will find INATBA's response to the ESA's consultation on the Classification of Crypto-Asset Frameworks.

INATBA's consultation response to the ESAs highlights concerns regarding the regulatory burden of crypto-assets under MiCAR. While INATBA welcomes clearer classification guidelines, the members emphasize the need for proportionality. Overly complex and onerous requirements will hinder Europe's competitiveness in the blockchain industry, and the ability of National Competent Authorities to implement MiCA effectively. Additionally, INATBA warns that high compliance costs could stifle innovation and startup growth, urging the ESAs to adopt a more modular and flexible regulatory approach. As such, INATBA proposes replacing some of the ESA's recommended mandates with leaner templates that do not hinder the clarifications sought after by the proposed frameworks.

INATBA raises concerns about the legal opinion required in multiple stages of the compliance pipeline, which adds costs. INATBA suggests simplifying the process by allowing a broader range of professionals to handle the opinion without liability, as opposed to mandating highly formalized legal opinions. INATBA believes a more practical, flexible approach will encourage adherence to regulations while promoting market innovation.

Overall, INATBA expresses a strong commitment to working with the ESAs to improve regulatory frameworks for crypto-assets. They stress that ensuring Europe's global competitiveness should be a priority alongside investor protection. Our recommendations include reduced reliance on formal legal opinions, more accessible templates, and a focus on proportionality, aiming to foster a regulatory environment that supports innovation in the emerging blockchain ecosystem.

As a final section of this forward, this document was created with the integral support and thought leadership of the below INATBA members:

- Jean-Christoph Mathonet - Prosquare - Finance WG Chair
- Izzat Begum B. Rajan - Imani Partners - Finance WG Chair
- Antonio Lanotte - EUBOF
- Jed Grant - Infrachain
- Mykola (Niko) Demchuk - AMLBot

Consultation Paper Draft Guidelines on templates for explanations and opinions, and the standardized test for the classification of crypto-assets, under Article 97(1) of Regulation (EU) 2023/1114

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

Although INATBA welcomes the opportunity to provide feedback on the draft guidelines and templates proposed by the European Supervisory Authorities (ESAs), the association's concerns echo those produced by the Draghi Report on the lack of European competitiveness. The expansion of the scope of MiCAR through the bodies that comprise the ESA and Level 3 guidance is an example of regulatory expansion that has contributed to Europe's lacklustre competitiveness on the global scale.

Under Regulation (EU) 2023/1114 (specifically Article 97(1) of the Markets in Crypto-Assets Regulation, (MiCAR)), offerors, persons seeking admission to trading, or operators of trading platforms dealing with crypto-assets other than asset-referenced tokens or e-money tokens must adhere to specific notification requirements. In this light, offerors (i.e., individuals or entities offering crypto-assets to the public), persons seeking to admit their crypto-assets to trading on a trading platform, or operators of trading platforms must notify but are not obligated to provide the crypto-asset white paper to the competent authority of their home Member State.

With that in mind, we recognise the importance of establishing clear and comprehensive crypto-asset classification and disclosure guidelines to ensure market transparency and investor protection. Simultaneously, we believe that a legal opinion to National Competent Authorities (NCA) should be optional and could very quickly provide clarity on whether or not the asset/CASP in question is in the scope of MiCAR or out of it. Non-lawyers can easily provide this information, and data collection should be conducted by a form intentionally designed to be filled out by anyone. A legal analysis instead of a legal opinion would achieve the same goals without increased compliance burdens, and INATBA recommends this course of action compared to a legal opinion. Response analysis by the NCA should determine whether or not the asset in question is out of the scope of MiCAR.

On similar reasoning, MiCAR's original text did not mandate the requirements to submit a full whitepaper to the NCA before reaching compliance. This task, under MiCAR, falls under the CASP that places the Crypto-asset onto the public market. Again, for the sake of European innovation, placing such unrealistic and rigid requirements onto a young and nascent industry, that needs to pivot to attain global competitiveness constantly, will simply limit Europe's role in

one of the most important emerging industries in the world. The harm done by such requirements is doubly exacerbated when considering that the CASPs in question need to comply with a legal framework to attain venture financing, which is, again, sub-par to other jurisdictions due to other Brussels-lead requirements.

General Comments:

- **Clarity and Accessibility:** The template for Article 8(4) is generally well-structured and provides a good framework for explaining the characteristics and properties of crypto-assets that are neither asset-referenced tokens (ARTs) nor electronic money tokens (EMTs). However, some terms and concepts could benefit from further clarification to enhance accessibility for issuers with varying levels of technical expertise.
- **Proportionality:** The template should be adaptable to accommodate crypto-assets diversity within its scope. Consider guiding and tailoring the explanation for simpler crypto-assets to avoid unnecessary complexity.
- **Technical Depth:** A balance needs to be struck between providing sufficient technical detail and ensuring the explanation remains concise and understandable for the intended audience.

Specific Comments:

- **Section 2.1 (General Information):** Clarify the level of detail required for the "Description of the project" and "Underlying technology". Provide examples or guidance on differentiating between a high-level overview and overly technical specifications.
- **Section 2.2 (Rights and Obligations):** Provide further specific guidance on describing the rights and obligations associated with the crypto-asset, particularly in cases where these rights are complex (e.g., hybrid between crypto-asset categories) or novel.
- **Section 2.3 (Risks):** While the template lists potential risks, consider including examples of how these risks might manifest in different crypto-asset contexts. This would aid issuers in providing more meaningful and relevant risk disclosures.
- **Section 2.4 (Information on the Issuer):** Clarify the scope of information required about the issuer, especially for decentralised ensure the information is and/or community-driven projects where a classic corporate structure may not exist.

Recommendations:

- **Develop Guidance and Examples:** Supplement the template with practical examples and more detailed guidance on completing each section. This would help issuers understand the expectations and ensure consistency in the quality of explanations.

- **Consider a Modular Approach:** Explore the possibility of a modular template that allows issuers to select relevant sections based on the specific characteristics of their crypto-asset(s). This would improve efficiency and avoid unnecessary information to be provided.

In addition, producing a bullet-point form that non-lawyers can complete will ensure a substantially higher level of compliance.

- **Conduct User Testing:** Conduct a further public consultation with potential users of the template (e.g., crypto-asset issuers) to gather feedback on its usability and identify areas for improvement.

INATBA believes incorporating these suggestions will enhance the clarity, effectiveness, and usability of the template for Article 8(4) of MiCAR, thus increasing the industry players' compliance level.

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?

INATBA appreciates the opportunity to comment on the proposed template for the legal opinion on the qualification of asset-referenced tokens (ARTs) under Article 17(1)(b)(ii) and Article 18(2)(e) of MiCAR. This template is crucial in ensuring legal certainty and consistency in classifying ARTs.

Under Regulation (EU) 2023/1114 (MiCAR), an asset-referenced token issued by a credit institution may be offered to the public or admitted to trading, provided that certain legal conditions are met. Specifically, the credit institution is required to submit a legal opinion that confirms the asset-referenced token does not qualify as a crypto-asset excluded from the scope of MiCAR according to Article 2(4), in particular, crypto-assets that qualify as financial instruments (e.g., securities, as regulated under MiFID II), central bank-issued digital currencies, crypto-assets used within closed systems where they are non-transferable and used only within specific environments (e.g., loyalty points).

General Comments:

- **Scope and Clarity:** The template appropriately addresses the key elements required for a legal opinion on ART qualification, covering aspects such as the legal nature of the token, its underlying assets, and its redemption rights. However, further clarity on certain aspects would be beneficial.
- **Expertise and Liability:** It is essential to emphasise that the requested legal opinion, or, preferably, analysis, does not incur liability for the counsel in question. Although this text

should be conducted by qualified professionals, these persons do not need to be legal professionals, nor should their opinion create a liability onto them and the CASP in question.

- **Standardisation vs. Flexibility:** While standardisation is essential, the template should allow flexibility to accommodate the unique features of different ARTs and their underlying assets.

Specific Comments:

- **Section 3.1 (Identification of the ART):** Please provide more detailed guidance on adequately describing the ART, including its technical specifications and functionalities.
- **Section 3.2 (Underlying Assets):** Please clarify the details to describe the underlying assets, particularly complex assets or baskets. Consider including specific requirements for demonstrating their ownership, as well as means of custody and control.
- **Section 3.3 (Redemption Rights):** Please offer more precise guidance on assessing and describing the redemption rights associated with the ART, including any limitations or conditions.
- **Section 3.4 (Legal Conclusion):** We would like to emphasise the importance of a clear and unambiguous legal conclusion regarding the ART's qualification, explicitly stating whether it meets the definition of an ART under MiCAR.

INATBA believes that addressing these points will strengthen the template and contribute to a more robust and consistent framework for ART qualification under MiCAR. However, ART requirements, as a whole, have created a prohibitive environment for their issuance in Europe, and the ART market simply does not, and shall not, exist because of MiCAR requirements. As such, INATBA members believe that the proposed form will fail to produce any positive impact in Europe for ARTs.

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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?

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INATBA appreciates the opportunity to comment on the clarity and proportionality of the templates concerning explanations of regulatory status within the context of MiCAR. We believe that achieving a balance between clarity and flexibility is crucial to ensure effective implementation across the diverse landscape of crypto-assets.

It is important to note that proportionality is tied to the risk and operations of the industries in question. The risk within an industry, such as crypto-assets, is heavily impacted by its size. As such, and due to Europe's demonstrable lack of competitiveness in the global markets, the need to attain proportionality to the rules is further evidence of the expansion of the scope of MiCA and of overdone requirement creation.

General Comments:

- **Clarity of Terminology:** While the templates generally use precise language, some terms related to regulatory status might benefit from further definitions or examples to avoid ambiguity. This is particularly important for issuers who may need to become more familiar with all MiCAR aspects.
- **Proportionality:** The principle of proportionality is vital to avoid unnecessary burdens on issuers, especially those dealing with more superficial crypto-asset structures. The templates should allow for concise explanations while still capturing essential information.
- **Guidance on Complexity:** Clear guidance is needed on what constitutes "simplicity" or "complexity" in a crypto-asset's structure. This would help issuers determine the appropriate level of detail to include in their explanations.

Specific Comments:

- **Template for Article 8(4):** The "Regulatory Status" section should provide further specific guidance on addressing the potential applicability of other EU legislation, particularly in cases where the crypto-asset may have features overlapping with existing financial instruments.
- **Template for Article 17(1)(b)(ii) and 18(2)(e):** The section on "Compliance with MiCAR Requirements" should offer more detailed guidance on demonstrating compliance with specific provisions relevant to ARTs, such as those related to reserve assets and redemption rights.
- **Standardised Test:** The standardised test should differentiate between different categories of crypto-assets, helping issuers determine the appropriate template and level of detail required for their explanations. It should also be intentionally designed so that anyone familiar with the CASP can conduct it.

Recommendations:

- **Develop a Tiered Approach:** Consider a tiered approach to the templates, offering different levels of detail based on the complexity of the crypto-asset. This could involve separate templates or optional sections within the existing templates.

- **Provide Decision Trees or Flowcharts:** Visual aids such as decision trees or flowcharts could assist issuers in navigating the templates and determining the relevant information to include.
- **Offer Examples for Different Crypto-asset Types:** Include practical examples demonstrating how the templates should be completed for various crypto-assets, ranging from simple utility tokens to complex decentralised finance (DeFi) protocols.

INATBA believes incorporating these suggestions will improve the templates' clarity, proportionality, and usability, ultimately promoting greater compliance with MiCAR and enhancing investor protection. We are committed to working with the ESAs to achieve a well-regulated and transparent crypto-asset market.

Question 4: Do respondents have any comments on the standardized test?

INATBA, a European technology and innovation-focused body, regards Europe's competitiveness as equally important as investor protection and market transparency. Our feedback in this document will primarily focus on ensuring the EU's competitiveness within Blockchain-enabled finance, a goal shared by this new commission.

As the templates and requirements stand, the essential cost to comply with MiCAR's requirements and produce a legal opinion brings the startup compliance cost imposed by MiCAR onto European CASPs to a bare minimum of 55.000,00 EUR. In a venture market that is non-competitive compared to other jurisdictions, and in a time where Europe seeks to innovate to be globally competitive, the requirements to provide legal opinions, instead of an analysis, and to use internal or external counsel to simply attain compliance produces an unfriendly environment.

With that in mind, INATBA welcomes the ESAs' efforts to develop a standardised test for crypto-asset classification under MiCAR. A clear and objective test is crucial for consistently applying the regulation across the EU and providing legal certainty for market participants.

General Comments:

- **Clarity and User-Friendliness:** The standardised test should be presented in a clear and user-friendly format accessible to issuers with varying levels of technical expertise. Consider using visual aids, flowcharts, or decision trees to enhance comprehension.
- **Comprehensiveness:** The test should cover all relevant aspects of crypto-asset classification, encompassing the various categories defined in MiCAR (e.g., ARTs, EMTs, and other crypto-assets). It should also adequately address the unique characteristics of novel crypto-asset types.

- **Objectivity and Legal Certainty:** The test should be designed to minimise subjective interpretation and ensure consistent outcomes. Clear criteria and thresholds should be established for each test step to provide issuers with legal certainty.

Specific Comments:

- **Step 1 (Issuance):** Provide further clarity on what constitutes "issuance" in decentralised or community-driven projects where there may not be an identifiable issuer.
- **Step 2 (Fungibility):** Offer more detailed guidance on assessing crypto-assets fungibility, particularly for those with complex, hybrid or novel features.
- **Step 3 (Purpose):** Clarify the criteria for determining a crypto-asset's "purpose," especially when it may have multiple or evolving purposes.
- **Step 4 (Underlying Rights):** Provide more specific guidance on assessing the nature of underlying rights, particularly for crypto-assets that represent claims on a basket of assets and/or future rights.

Recommendations:

- **Develop Detailed Guidance and Examples:** Supplement the standardised test with comprehensive guidance and illustrative examples to demonstrate its application to various crypto-asset types.
- **Consider a Modular Approach:** Explore a modular structure for the test that allows users to navigate relevant sections based on the specific characteristics of their crypto-asset(s).
- **Conduct User Testing and Pilot Programs:** Engage with potential users of the test (e.g., crypto-asset issuers) to gather feedback on its usability and effectiveness. Consider conducting voluntary pilot programs to assess its practical application before full implementation.

INATBA believes that a well-designed standardised test is essential for successfully implementing MiCAR. We are committed to supporting the ESAs in their efforts to create a robust and transparent framework for crypto-asset classification. To assist in these efforts, INATBA members have proposed a more precise and direct set of questions that indicate the clean, often multiple yes or no choice form discussed and requested in previous responses. These are attached below.

ANNEX A – Questionnaire Suggestions

Part 1: General Applicability

- Is the crypto-asset being issued or offered within the European Union?
- Is the crypto-asset being admitted to trading on a crypto-asset trading platform within the EU?
- Is the issuer of the crypto-asset established in the EU?
- Is the issuer of the crypto-asset targeting investors in the EU?
- Is the crypto-asset offered to more than 150 persons?
- Is the total value of the offering greater than €1 million over 12 months?

Part 2: Classification of Crypto-Asset

- Does the crypto-asset provide access to a product or service on a blockchain (utility token) or a technology similar to DLT?
- Does the crypto-asset claim to be backed by a basket of assets (asset-referenced token)?
- Is the crypto-asset backed by a single fiat currency (e-money token)?
- Is the crypto-asset intended for use as a means of payment?
- Does the crypto-asset represent a digital form of fiat currency (e.g., digital euro)?
- Does the crypto-asset represent a claim on a tangible asset (e.g., movable assets like a car, or commodities or immovable assets like real estate)?

Part 3: Exemptions for Other Regulatory Frameworks

- Does the crypto-asset qualify as a financial instrument under MiFID II?
- Does the crypto-asset qualify as e-money under the E-Money Directive (EMD2)?
- Does the crypto-asset function as a bank deposit?
- Does the crypto-asset qualify as a securitization under the Securitization Regulation?
- Does the crypto-asset represent an insurance or reinsurance contract under the Solvency II Directive?
- Is the crypto-asset used solely within a closed system (cannot be traded externally)?
- Is the issuer a central bank, public authority, or public international body?
- Is the issuer a credit institution, investment firm, or insurer regulated by other EU financial laws?

Part 4: Issuer Obligations

- Does the issuer guarantee full redemption of the crypto-asset at any time?
- Does the issuer maintain a reserve of assets backing the token (for asset-referenced or e-money tokens)?
- Are the reserves backing the crypto-asset held in a segregated account?
- Does the issuer provide regular reports or audits on the reserves backing the token?



Contact details

Website inatba.org

Contact contact@inatba.org

Join INATBA membership@inatba.org