

MICA REVIEW

EUROPEAN COMMISSION'S CONSULTATION

AMAFI's answer

AMAFI is the trade association representing financial markets' participants of the sell-side industry located in France. It has a wide and diverse membership of more than 170 global and local institutions notably investment firms, credit institutions, broker-dealers, exchanges and private banks. They operate in all market segments, such as equities, bonds and derivatives including commodities derivatives. AMAFI represents and supports its members at national, European and international levels, from the drafting of the legislation to its implementation. Through our work, we seek to promote a regulatory framework that enables the development of sound, efficient and competitive capital markets for the benefit of investors, businesses and the economy in general.

I. GENERAL COMMENTS

AMAFI welcomes the Commission's initiative to review MiCA. The review provides an important opportunity to support the tokenisation of financial services in the EU at a time when global markets are expanding rapidly. Strengthening the competitiveness of the EU in digital finance is not only an economic objective but also a strategic one. The UE's ability to remain a relevant global financial center over time will depend on its capacity to foster innovation while preserving legal certainty, investor protection and regulatory coherence necessary to deep and competitive capital markets.

Tokenisation should be regarded as a technological evolution in the way assets are issued, recorded and transferred, rather than as creating a new legal category of assets. Accordingly, the applicable legal framework should continue to be determined by the legal nature of the asset and the activity performed by the crypto-asset provider, rather than by the technology through which it is represented or transferred. Just as the dematerialisation of paper-based assets did not alter the legal nature of those assets in the 1980s, the use of DLT should not bring economically equivalent assets or activities within a separate regulatory framework.

Rules should reflect the full implications of technological neutrality, and substance-over-form should prevail for the review of MiCA. Tokenisation nevertheless raises private-law issues. Depending on the applicable national law and the structure used, a token may itself constitute the relevant asset or entitlement, or merely represent or evidence rights existing off-chain. At present, the legal effects of tokenisation are not fully harmonised at EU level and may therefore depend on the applicable national law.

MiCA should not intend to harmonise national property-law systems that have developed over time to provide legal certainty, protect ownership rights and ensure the integrity of assets. Tokenisation does not fundamentally alter these objectives, as it concerns the wrapper of the asset rather than its underlying rights.

Hence, harmonisation at EU level of the legal effects of tokenisation and of the legal status of the token might be the proper target in order to reach the objective of technological neutrality and certainty. It should ensure that tokenisation does not alter the nature or scope of the underlying rights, while establishing a clear link between the recorded token and the underlying rights. Such harmonisation would ensure that the tokenisation process has the same legal effects across the EU and that tokens are subject to a common legal regime.

The review should also be an opportunity to support innovation through the removal of unnecessary regulatory duplication, the avoidance of multiple authorisations and overlapping reporting obligations for economically equivalent activities, and it should ensure a consistent application of Union law where different regulatory frameworks interact, notably through enhanced supervisory coordination.

Should the proposed extension of MiCA to all financial instruments aim to provide a more flexible regime than MiFID/MiFIR and IFR/IFD, the preferable approach would be to amend these regulations themselves. This would allow the benefits of simplification to apply consistently, preserve the overall coherence of the regulation applicable to financial instruments and ensure that the technology used does not become a determining regulatory criterion.

II. ANSWERS TO THE QUESTIONS

Consistent with its missions, AMAFI answers only those questions more directly related to financial instruments and investment services.

Question 1. Should crypto-assets that qualify as financial instruments as defined in Directive 2014/65/EU of the European Parliament and of the Council, continue to be governed by sectorial legislation (MiFID/MiFIR/MAR/Prospectus Regulation, etc.), or should all assets that are recorded and transacted on distributed ledgers and that meet the definition of a crypto-asset, or the services provided on such assets, in principle be covered by MiCA?

☒ Yes, they should remain under the main sectoral legislation

☐ No, all crypto-assets, or the services provided on such assets, should be covered by MiCA

Yes, they should remain under the main sectoral legislation.

Bringing tokenised financial instruments in the scope of MiCA would be **a significant departure from the principle of technological neutrality, which underpins EU financial regulation**. This principle is expressly enshrined in Recital 10 of MiFID II¹ and the European Commission has consistently relied on the concept of “*same activity, same risk, same rules*”² in developing the digital finance framework.

Although the use of distributed ledger technology may raise specific legal issues, the risks that financial services legislation seeks to address through the regulation of financial instruments remain fully relevant, irrespective of whether the asset is tokenised or not.

In this context, the rationale for two differing legal frameworks applicable to financial instruments, depending on the use of DLT, would have to be particularly compelling to outweigh the significant risks that would result from a divided legal framework for financial instruments based on technology. MiCA currently overcomes this challenge by providing expressly that it “*does not apply to crypto-assets that qualify as financial instruments*” (Regulation (EU) 2023/1114 (MiCA), Article 2(4)(a)) and that: “*Some crypto-assets, in particular those that qualify as financial instruments as defined in Directive 2014/65/EU [...], fall within the scope of existing Union legislative acts on financial services. Therefore, a full set of EU rules already applies to issuers of such crypto-assets and to firms conducting activities related to such crypto-assets*” (Regulation (EU) 2023/1114 (MiCA), Recital 3).

The risks of having two different legal frameworks applicable to financial instruments, depending on their underlying technology are manifold:

- Risk of **regulatory gaps**, as the duplication would not be complete, potentially undermining legal certainty, investor protection, transparency and market integrity;
- **Risk of fragmenting liquidity**;
- Risk of **differing levels of investor protection**, whereas investors are not necessarily aware of the technology underlying the instruments they hold, and investor protection should not depend on technology;
- **Regulatory arbitrage**, as one could choose the technological implementation of a financial instrument according to the applicable regulation. Financial instruments could be structured so as to benefit from differences in the levels of protection, obligations and constraints imposed under each regime;
- **A complex regulatory landscape, undermining the attractiveness of EU capital markets**. This concern would become more acute, as financial instruments increasingly combine DLT-based and conventional components, making the applicable framework uncertain or dependent on subjective assessments, despite the economic equivalence of the instruments concerned;
- **Substantial legal, operational, compliance and implementation costs**, as a lengthy transition is to be expected, during which instruments issued under different legal regimes would coexist, including some that would be fungible;
- **A regime harder to maintain** in the long run, as future amendments would have to be coordinated across the frameworks, creating a risk of unintended inconsistencies.

¹ This Directive “*should be technologically neutral*” (Directive 2014/65/EU (MiFID II), Recital 10).

² Communication from the Commission, 24 September 2020.

If some aspects of the financial services legislation prevent the development of tokenised financial instruments at scale in the EU, **this should be tackled in a targeted manner, through amendments to the legislation applicable to all financial instruments irrespective of the technology used, and through exemptions specific to tokenised financial instruments.** This would provide the benefits of simplification to all financial instruments, while preserving the overall coherence of the legislation. Such an approach responds more effectively to emerging regulatory challenges relating to investor protection, financial stability and competitiveness.

The DLT Pilot Regime³ provides a good illustration of an appropriate legislative approach, providing legal certainty and consistency, while supporting innovation⁴. The regime is anchored in the existing financial legislation, while facilitating innovation through targeted exemptions available for MiFID financial instruments recorded and traded using the DLT⁵. **The DLT Pilot Regime is an example of how innovation can be accommodated within the existing framework while ensuring that financial instruments remain subject to the robust safeguards of the financial services legislation.**

If the answer is “Yes”, is the distinction between financial instruments governed by MiFID and crypto-assets governed by MiCA sufficiently clear, also taking into account ESMA’s guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments?

☐ *Yes, sufficiently clear*

☒ **No, clarification is needed**

If the answer to the previous question is “No” please explain your response and suggest any policy actions for clarification if needed.

No, clarification is needed.

By way of background, ESMA’s Guidelines⁶ were adopted pursuant to Article 2(5) of MiCA to promote a common, uniform and consistent assessment of whether a crypto-asset qualifies as a financial instrument and is therefore excluded from MiCA under Article 2(4)(a). They set out criteria for applying the MiFID II categories of financial instruments and provide clarifications and illustrative examples concerning, among other matters, utility tokens, NFTs and hybrid tokens.

They expressly require a technology-neutral, substance-over-form and case-by-case assessment: the technological format of an asset, including its tokenisation, should not determine its regulatory classification.

³ (Regulation (EU) 2022/858).

⁴ Although the cap on the volume of activity under this framework and the limitation in time are a hindrance that should be removed (AMAFI / 26-14).

⁵ The regime “*should allow for certain DLT market infrastructures to be temporarily exempted from some of the specific requirements of Union financial services legislation that could otherwise prevent operators from developing solutions for the trading and settlement of transactions in crypto-assets that qualify as financial instruments*” (Regulation (EU) 2022/858, Recital 6).

⁶ *Guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments:* [link](#).

In line with the approach prioritising substance over form, they first require determining whether the instrument qualifies as a financial instrument under MiFID II, irrespective of the technology used for its issuance, recording or transfer. Only where the instrument does not fall within MiFID II should its potential classification under MiCA be assessed. AMAFI considers this approach relevant, as tokenisation should not alter the regulatory qualification of an instrument whose economic and legal characteristics otherwise bring it within the scope of MiFID II.

Still, uncertainty remains on certain assets and is not confined to technologically innovative instruments, as mentioned in our answer to question 2. For example, controversy has arisen over the classification of arrangements under which an investor acquires a direct proprietary interest in an underlying asset, rather than a transferable security, a unit in a collective investment undertaking or a derivative contract. The Cologne Higher Regional Court found that an arrangement offer of a real-estate arrangement that allowed exposure to the future revenues of a company could constitute a financial service for consumer protection purposes, as it displayed certain distinctive financial characteristics⁷. The Federal Court⁸ yet rejected the application of MiFID II because the arrangement fell outside the scope of the Section C of its Annex I. Nevertheless, in view of investor protection considerations, BaFin brought this type of arrangement within Germany's national regime governing Vermögensanlagen in 2023⁹.

These uncertainties arise for structural reasons¹⁰:

- The category of transferable securities is based on an open-ended list of examples set in Section C of Annex I of MiFID, rather than a precise conceptual test;
- Transferable securities and derivatives are defined in broad and, at times, circular terms;
- Transferable securities are defined at national level, which leads to divergences;
- This “constructive ambiguity” enables the framework to encompass new products but leaves considerable legal uncertainty at its boundaries.

Hence, the difficulties relating to classification that already materialise with existing regulation, are likely to persist, irrespective of the technology used, and cannot be resolved solely through MiCA-specific guidance, but through guidelines designed to further clarify the definition of transferable securities set out in Section C of Annex I to MiFID II.

Question 2. To what extent have ESMA's MiCA Article 2(5) guidelines and the joint ESA standardised classification test reduced uncertainty in practice? Which borderline cases remain difficult? Please explain your response and suggest any policy actions for clarification if needed.

ESMA's Guidelines under Article 2(5) of MiCA and the joint ESAs standardised classification test provide helpful criteria for assessing transferable securities, money-market instruments, units in

⁷ In particular, the acquisition of tangible assets combined with long-term management and realisation services intended to generate a future return.

⁸ (*German Federal Court of Justice, judgment of 15 May 2024, VIII ZR 226/2*).

⁹ BaFin's communication: “*Vermögensanlagen der Life Forestry Switzerland AG: Anhaltspunkte für fehlenden Verkaufsprospekt*”: [link](#).

¹⁰ Matthias Lehmann and Fabian Schiner, “*The Concept of Financial Instruments: Drawing the Borderline between MiFID and MiCAR*”, Oxford, Capital Markets Law Journal, 2024, 19, 330–351.

collective investment undertakings and derivatives. However, given the pace of financial innovation, they cannot be expected to resolve every practical situation, and certain questions are likely to arise in practice. The guidelines remain largely principle-based and do not always provide sufficiently operational answers for emerging products and services.

More fundamentally though, some of the difficulties encountered in determining the scope of application of MiFIR already exist, irrespective of the technology used. This suggests that the underlying issue is one of legal qualification rather than technology.

At present, there are at least four types of protocols that AMAFI considers challenging: hybrid tokens, wrapped tokens, Special Purpose Vehicles (SPV) and Liquid Staking Token.

- Hybrid tokens may combine payment, utility, store-of-value, investment or derivative-like features. While the guidelines rightly state that, where a hybrid token displays features of a financial instrument, that qualification should take precedence, additional practical guidance would be useful to determine how this principle should apply where several functions coexist and evolve over time.
- Wrapped tokens represent, reference or provide exposure to one or several underlying assets, including financial instruments. Further guidance would be useful to clarify the qualification of tokens linked to mixed baskets, providing synthetic exposures or indirect or contractual exposure to a financial asset rather than direct ownership of that asset.
- Special Purpose Vehicles (SPV) are dedicated legal entities typically holding the underlying assets, while the tokens issued to investors represent rights against the SPV or economic exposure to the assets held by it. This interposition of a legal vehicle may blur the relationship between the investor and the underlying assets, as the token holder generally does not directly own the underlying financial instruments, but may instead hold a contractual claim or an indirect economic exposure. As a result, the regulatory qualification of the token may be unclear, in particular where the underlying assets are financial instruments and the token is structured, marketed or used as a crypto-asset or stable-value instrument.
- Liquid staking tokens: it remains unclear whether these arrangements could qualify as units in collective investment undertakings. In decentralised staking protocols, the absence of an identifiable manager, collective management activity or investment strategy makes the application of traditional fund concepts challenging.

Accordingly, ESMA should continue to develop its Guidelines and adopt a harmonised classification methodology that embody DLT and non DLT assets to determine whether MiFID/MiFIR apply. The objective should be to provide market participants and NCAs with greater legal certainty, including as regards the applicable authorisation requirements, while ensuring uniform interpretation across the Union.

More generally, these considerations reinforce the case for ESMA playing a central role in the supervision of crypto-asset providers, avoiding inconsistent national practices and providing legal security and a level-playing field to market players.

Question 7. Which specific categories remain most difficult to classify in practice? (e.g. hybrid tokens, wrapped assets, tokenised fund interests, tokenised money-market instruments, governance tokens, synthetic exposures, or assets marketed as NFTs but issued in series)?

Please refer to our answers to question 1 and question 2.

***Question 27.** What are the potential benefits of global stablecoins for different use cases? For each use case below, please indicate on a scale of 1 to 5 how beneficial global stablecoins would be for EU holders:*

1: Not beneficial

2: Moderately beneficial

3: Neutral

4: Rather beneficial

5: Very beneficial

Please explain shortly your assessment and expectations as regards the use cases of global stablecoins (EMTs/ARTs) and the benefits for EU users.

Answer is 5: Very beneficial

A prerequisite for the development of a DLT-based capital market is the availability of an on-chain cash leg for the settlement of tokenised transactions (wCBDC, tokenised deposits, stablecoins). Without it, the securities leg would settle on DLT while the cash leg would remain processed through traditional payment infrastructures, thereby limiting the benefits of tokenisation.

An on-chain cash leg would allow 24/7 settlement, removing the operational constraints associated with conventional market opening hours and batch-processing cycles. It would also enable atomic settlement, whereby the transfer of the asset and the corresponding payment occur instantly, thereby reducing principal and settlement risks. More broadly, the efficiency gains offered by the DLT can only be fully achieved where both the securities and cash legs are settled on the same infrastructure.

In this respect, global stablecoins could be very beneficial for EU users, alongside central bank money as it would enable seamless and low-cost cross-border payments with relatively limited risks, as they can act as a form of international currency usable by a wide range of participants worldwide for various types of transactions

To support innovation, users should hence be able to choose between central bank money and stablecoins, depending on their business needs and risk preferences, provided that those stablecoins offer legal security. While central bank money remains the risk-free and trusted settlement asset for large-value transactions, properly regulated stable coins may allow the emergence of new services and use cases. The development of EU-based, and properly regulated, stablecoins should therefore be supported, alongside CBDCs.

Question 28. How important is it for EU users (both people and businesses) to be able to access global stablecoins via EU-based and licenced issuers and CASPs? Please indicate on a scale of 1 to 5.

On a scale of 1 to 5, the response is 5 (very important).

Access to global stablecoins through EU-based issuers and CASPs is essential both for EU individuals and businesses. A global stablecoins issued by European issuers would provide users with EU legal guarantees and safeguards, through such requirements as governing rules, prudential requirements, reserve management and redemption rights. It would also prevent difficulties that could emerge for EU users in case of default of stablecoins issued outside the Union.

Beyond access to a global stablecoin, the emergence of a euro-backed stablecoin with global reach would offer several benefits for the Union, particularly in terms of sovereignty.

Question 45. Is the list of crypto-asset services as defined in Article 3(16) of MiCA adequate to effectively cover crypto-asset markets and provide sufficient legal clarity for businesses?

☐ Yes ☒ No

No.

The list of services set out in Article 3(1), point (16), of MiCA covers the main crypto-asset services. However, it is not fully aligned with current market practices and does not provide sufficient legal certainty in relation to certain activities that are already well developed. In particular, the regulatory treatment of staking activities should be clarified.

Staking consists of locking crypto-assets within a proof-of-stake network in order to contribute to the validation of transactions and the security of the network in exchange for rewards. Where staking services are provided by a CASP, particularly in conjunction with custody services, they raise specific issues relating to:

- client consent;
- the applicable custody regime;
- ownership of the staked assets; and
- client protection.

Staking activities appear to share certain characteristics with lending and borrowing activities (see our response to Question 67). In both cases, tokens are made available or immobilised for a specified period in return for remuneration. Consideration could therefore be given to regulating staking by reference to the framework applicable to lending and borrowing.

Question 49. Is the prudential regime for crypto-asset service providers appropriate to capture the risks associated with the provision of crypto-asset services, or would it be warranted to adjust the prudential stance, e.g. by aligning it with the requirements for own funds applicable to investment firms (including K-factors) that provide services that are broadly similar?

- ☐ *It is appropriate to capture the risks associated with the provision of crypto-asset services*
- ☒ *It would be warranted to adjust the prudential stance.*

It would be warranted to adjust the prudential stance.

The approach of prioritising substance over form should apply to the prudential treatment of crypto-asset service providers (CASPs). As such, **prudential requirements should be calibrated according to the nature and risk profile of the assets and the services they provide.**

Where CASPs provide services that are similar to investment services, hence triggering comparable risks, they should be subject to comparable prudential treatment as investment firms. This would help avoid regulatory asymmetries between CASPs and investment firms carrying out similar activities. However, convergence between MiCA and the prudential framework applicable to investment firms (IFR/IFD) should not result in cumulating MiCA and IFR/IFD prudential requirements. As such, the rules applicable to a single entity holding multiple licenses, such as a CASP or an investment firm, deserve further clarification. In particular, **it should be confirmed that the higher of the two capital requirements applies, and that a cumulative addition of the capital requirements from both licenses is excluded.**

Overall, the prudential framework should ensure that:

- economically equivalent activities are subject to equivalent prudential outcomes, irrespective of the regulatory status of the entity providing them;
- the respective articulation of MiCA and IFR/IFD requirements is clearly defined, in particular with regard to governance arrangements, ICAAP, SREP, prudential reporting and the prudential consolidation of investment firm groups including CASPs, thereby avoiding overlapping prudential requirements.

It is important to underline that DLT-specific risks are already addressed under IFR/IFD when they concern investment services. Thus, rather than duplicating this framework under MiCA specifically for CASPs carrying out investment services-like activities, regulatory coherence would require such CASPs to be bound by IFR/IFD. As regards investment services, this would ensure that IFR/IFD is the reference framework for prudential requirements irrespective of the technology used to provide these services.

Question 51. *Should the current approach be maintained or should there be enhanced oversight and coordination in relation to entities that in addition to providing crypto-asset services, offer (1) other unregulated services or (2) other types of regulated services, (3) a combination of crypto-asset services?*

☐ *The existing approach should be maintained*

☐ *There should be enhanced oversight and coordination in relation to such entities*

If you chose the second option, which of the following enhanced oversight and coordination mechanisms do you consider may be appropriate?

☐ *Group-level reporting to a centralised authority*

☐ *Enhanced supervisory cooperation between ESAs / NCAs*

☐ *Operation of new supervisory colleges*

☐ *Consolidated supervision*

☐ *Other Please provide any comments on the operational feasibility, legal implications, proportionality, or potential unintended consequences of the measures above.*

If your answer is "Other", please elaborate.

In relation to (2) *other types of regulated services*, and (3) *combination of crypto-asset services*, the priority should be not to strengthen supervision, but to enhance coordination between the relevant supervisory authorities.

Oversight coordination is particularly important for firms that combine crypto-asset services with other regulated services. At present, such firms are often subject to supervision by several authorities (ECB, ESMA, NCA), which often request the same documents or carry out largely similar assessments. Difficulties, however, arise when different authorities have diverging interpretations or conflicting expectations for the same activities. Coordination should be guided by the principle that the applicable regulatory framework is determined by the nature of the service provided, rather than by the technology used.

Coordination would help reduce unnecessary administrative burden, duplicative supervisory processes and would prevent divergent interpretations of rules or incompatible supervisory expectations where several activities are combined.

More generally, market participants need greater legal certainty in the way authorities conduct their supervision. Innovation is often hindered by uncertainties in the interaction between different regulatory frameworks. It is therefore particularly important that competent authorities agree on, and make public, the priority rules they will apply where there is uncertainty as to the applicability of one

or more Level 1 regulations, or where conflicting provisions arise under several applicable Level 1 regulations.

For the largest and most complex market participants, enhanced coordination alone may not always be sufficient. In such cases, there may be merit in a European centralised authority. For smaller entities, a centralised authority may be disproportionate. To limit the cost of supervision, the principle of subsidiarity should therefore prevail until a critical size or cross-border reach justifies centralised.

Question 52. Should CASPs report regularly their activities? If yes, what kind of reporting would be useful? How often?

Yes, CASPs should report regularly their investment services activities, as any investment firms and without additional burden regarding these activities.

As CASPs may already be subject to reporting obligations under MiFID/MiFIR, MAR, EMIR or other sectoral frameworks, any additional reporting requirements introduced under MiCA should be fully aligned with existing obligations. In particular, definitions, data fields, identifiers, formats, reporting frequency and submission channels should be aligned as much as possible to avoid requiring the same or substantially equivalent information to be reported under different rules.

A certain level of transparency regarding counterparty risk would be welcome in order to strengthen market discipline. Such transparency should focus primarily on identifying potential excesses or concentrations of risk, rather than on the crypto-assets themselves.

It should also be noted that reporting obligations could lead, through the disclosure of overly detailed client information or key parameters, to cyber risk.

The frequency of reporting should be determined by the same proportionality considerations and should not be more frequent than necessary to achieve the identified objective. A submission to a central reporting database, as identified in ESMA's Final Report on transaction reporting simplification¹¹, should also be pursued.

Question 55. The Payment Services Directive has been substantially reviewed recently, bringing notably more clarity on the interplay between the MiCA rules applying to the transfer services in relation to e-money tokens and the rules under the payment services framework which apply to the provision of payment services. As a result, the PSD3/R will clarify which crypto-asset services may qualify as payment services, including targeted exclusions from the Scope of PSD3/R for specific types of transactions/exchanges involving EMTs, and will specify the authorisation process under PSD3 in cases where CASPs are required to obtain a PSD3 authorisation. Do you consider these changes bring sufficient clarity or are there other issues that remain to be addressed? If so, please explain your response.

¹¹ ESMA, *Interim Report On the Call for Evidence on a comprehensive approach for the simplification of financial transaction reporting*, 04/05/2026, [link](#).

☐ Yes

☐ No

The progress made through the PSD3/PSR¹² proposals in clarifying the interaction between MiCAR and the payments framework are useful. However, further clarity would be welcome on the following points:

Definitions

- The treatment of business use cases should be clarified, such as the settlement of crypto-asset transactions, transfers linked to custody, intra-platform transfers, and the use of EMTs as a cash leg for the settlement of tokenised financial instruments;
The treatment of non-custodial wallets should be clarified, in particular, on how strong customer authentication (SCA) requirements should apply in practice in such cases;
- The concept of “payment-like services” should be illustrated with concrete examples (such as API-based crypto-checkout or instant token-to-fiat payments).

Interoperability standards

- *Technical interoperability between MiCA settlement mechanisms and existing payment infrastructures must be supported by common standards.*

Supervision

The key objective should be to avoid duplicative authorisation requirements. Where a transfer of EMTs is ancillary or technically necessary to the provision of a MiCA service, it should not automatically trigger a separate PSD3 authorisation, unless the activity presents the characteristics and risks of a payment service. In particular, the framework should:

- Ensure effective supervisory coordination between competent authorities to avoid duplicative requirements and divergent interpretations across Member States, particularly as EMT-based business models develop;
- Clarify when CASPs are required to obtain authorisation as Electronic Money Institutions (EMIs) in order to provide EMT-related services, and avoid unnecessary duplication of authorisation procedures;
- Streamline simplified assessment procedures where EMT-related services do not qualify as payment services, in order to reduce procedural barriers and delays for CASPs.

¹² Directive of the European Parliament and of the Council on *Payment services and electronic money services in the Internal Market* amending Directive 98/26/EC and repealing Directives 2015/2366/EU and 2009/110/EC.

Prudential regime

- The potential overlap between PSP capital requirements and MiCA capital rules should be clarified to prevent disproportionate cumulative capital demands.

Question 67. Do you think that lending and borrowing of crypto-assets should be regulated?

☒ Yes

☐ No

If “Yes”, what do you believe should be the main elements of regulatory requirements applicable to lending and borrowing and why?

Yes.

Lending and borrowing of crypto-assets should be regulated where the nature of the activity and the risks associated with the underlying asset justify regulatory intervention, consistently with the approach already applicable to securities lending.

As an example, at EU level, securities lending is currently subject to the securities financing transactions regulation (SFTR)¹³ notably as regards transparency, reporting and reuse. This framework is complemented by MiFID II requirements on the safeguarding and use of clients’ financial instruments and, where relevant, by applicable prudential rules.

In accordance with the principle of technological neutrality, the need for regulation should not depend on whether the relevant assets are recorded or transferred through DLT. It should instead be assessed by reference to the economic and legal characteristics of the underlying (crypto) asset and to the risks arising from the foreseen lending or borrowing activity.

Where regulatory intervention is warranted (e.g. for lending or borrowing of MiCA crypto-assets such as EMTs on DeFi protocols) the framework should address, as appropriate, the contractual rights and obligations of the parties, ownership and transfer of the assets, collateral arrangements, custody and segregation, the treatment of client assets in the event of insolvency, risk management, conflicts of interest, client information and proportionate reporting requirements.

Existing regulatory frameworks on the underlying assets should serve as the starting point and be adapted only where the specific characteristics of the crypto-asset give rise to risks that are not already adequately addressed.

Question 70. Should prediction markets, where they are DLT enabled and facilitated through smart contracts be governed by MiFID or MiCA?

No.

¹³ ([Regulation \(EU\) 2015/2365](#))

Prediction markets should not be regulated on the basis of the technology used. The fact that a prediction market is DLT-enabled or facilitated through smart contracts should not, in itself, determine whether MiFID or MiCA applies. The relevant test should be based on the nature of the contract, the rights granted to users and the underlying reference event.

Where the product gives exposure to a financial instrument, index, rate, currency, commodity or other financial reference, it should be assessed under MiFID. In line with technological neutrality, MiFID should apply where the product qualifies as a financial instrument or derivative, even if it is issued or executed through DLT or smart contracts.

Where the product does not qualify as a financial instrument, MiCA may apply if the activity concerns crypto-assets within its scope. Other regimes may also be relevant, including national gambling or betting rules, depending on the structure of the market and the nature of the event.

The Commission should therefore avoid creating a specific DLT-based category for prediction markets. The regulatory treatment should remain activity-based, risk-based and technology-neutral, in coherence with the ESMA's Statement of the 3 July 2026 *"on the application of the national product intervention measures on binary options to event contracts"*¹⁴.

Question 72. Should perpetual futures on crypto-assets and services towards such perpetual futures be governed by MiCA or MiFID.

☐ Yes, by MiFID

☐ Yes, by MiCA

☐ No

Yes.

Guideline 5 of the ESMA Guidelines on the conditions and criteria for the qualification of crypto-assets as financial¹⁵ consider the possibility where crypto-assets serve as underlying assets for derivatives.

ESMA Guidelines recognise that crypto-assets can constitute eligible underlying assets for derivative contracts. The qualification as financial asset must be assessed by reference to the categories set out in points (4) to (10) of Section C of Annex I to MiFID II.

The Section C of Annex I to MiFID II provides that the qualification of financial instrument cover derivatives relating to *"securities, currencies, interest rates or yields, emission allowances or other derivatives instruments, financial indices or financial measures"* under point (4); commodities under points (5), (6) and (7); derivative instruments for the transfer of credit risk under point (8); contracts for differences under point (9); climate variables and official economic statistics under point (10); and

¹⁴ *On the application of the national product intervention measures on binary options to event contracts*, ESMA35-243228190-8148, ESMA [link](#).

¹⁵ The guideline 5 identifies another hypothesis which is not discussed here, where a crypto-asset is itself a derivative.

“any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market, OTF or MTF” under point (10).

The Guidelines specifies what “any other derivative contract” covers and set out that a future defined 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 price”, based on the price of an underlying cryptocurrency, could, “depending on the circumstances”, be considered to possess the characteristics of a derivative contract.

As a conclusion, perpetual futures are defined by the guideline as futures “designed to provide continuous exposure to the underlying asset without requiring periodic rollovers”. The Guidelines do not provide for any different treatment of such instruments and state that, “[d]espite their unique structure, perpetual futures should be treated as derivatives”.

Futures are regulated under MiFID and MiFIR. As a perpetual future is merely a future without an expiry date, regulatory consistency requires perpetual futures to be covered by those frameworks as well.

Question 80. *Is there legal uncertainty as to the private law treatment of issuance, holding and transfers of tokens, under national law?*

☐ Yes

☒ No

If you believe there is material legal uncertainty in issuing, holding and transferring tokens (i) which of the following issues are most significant and (ii) what is the urgency with which each issue should be addressed by regulators? Scales used:

No.

In France, the legal framework has been adapted to ensure that assets recorded on DLT benefit from safeguards similar to those applicable to traditional assets. The rules governing their issuance, trading, transfer and use as collateral are clearly defined.

Still, the Commission could encourage EU members to enhance legal certainty, through a directive, to require Member States to clarify the legal effects associated with assets circulating on DLT systems. This could include, where relevant, issues relating to ownership rights, the existence or absence of “a good-faith acquisition principle” for such assets, the event triggering such acquisition (i.e., the event that prevents third parties from asserting claims over the asset, such as the crediting of the purchaser's account by the custodian), the conditions for enforceability against third parties and the treatment of tokens in case of insolvency.

The French Monetary and Financial Code recognises DLT as an alternative to traditional book-entry recording, as it provides that financial securities may be recorded either in a securities account or, in the cases provided for by Article L. 211-7¹⁶, on DLT (*French Monetary and Financial Code, Art. L. 211-3*). It further specifies that a DLT entry shall produce the same legal effect as a book entry and shall provide equivalent safeguards, particularly regarding authentication.

The French legal regime also provides that securities recorded on DLT must be entered in the name of their owner (*French Monetary and Financial Code, Art. L. 211-4*). In addition to this, it is also specified that ownership is transferred when the securities are recorded for the benefit of the purchaser on the DLT (*French Monetary and Financial Code, Art. L. 211-17*), while good-faith purchasers are protected against claims brought by third parties (*French Monetary and Financial Code, Art. 211-16*).

The Code also establishes a framework for the use of DLT assets as collateral. In this regard, it allows financial securities recorded on DLT to be pledged under the rules applicable to pledges over financial securities (*French Monetary and Financial Code, Art. L. 211-20*). For crypto-assets falling within the scope of MiCA, a specific pledge regime applies (*French Monetary and Financial Code, Art. L. 226-5*). It provides, *inter alia*, that the pledge is created and becomes enforceable by means of a declaration signed by the owner and may extend to substituted assets, income and proceeds. The provision also determines the ranking of successive secured creditors, grants the creditor a right of retention and sets out the conditions under which the pledged crypto-assets may be realised.

The French Monetary and Financial Code also determines the law applicable to DLT market infrastructures operating under the DLT Pilot Regime. Under French law, the proprietary conditions and effects of transactions are governed by the law of the Member State in which the entity authorised to operate the relevant DLT settlement system or DLT trading, and settlement system is established.

Question 81. *Would you recommend increasing the legal certainty in the treatment of tokens through EU law?*

☐ Yes

☐ No

Yes.

Regulatory intervention aimed at increasing legal certainty should not take the form of a uniform ownership regime. Rather any further harmonisation should remain targeted and be carried out, where appropriate, within the existing sectoral regulatory framework. This would preserve the current allocation of scope under Union law, whereby the applicable legal regime is determined by the legal qualification of the relevant asset rather than by the technology through which it is issued,

¹⁶ If the securities are registered securities or held within a DLT Infrastructure as defined in the Pilot Regime.

recorded or transferred (the so-called principles of technological neutrality). Any intervention should also take into account the specificities of each Member State's property law framework.

Hence, the applicable legal framework should be determined by the nature of the asset and the service provided, not by the technology used to represent or transfer it.

Accordingly, where token-related activities are functionally equivalent to activities already governed by EU financial services legislation, any additional legal certainty should, as a matter of principle, be achieved through targeted amendments, by clarifying or, where necessary, by adapting those existing sectoral frameworks rather than through the establishment of a separate horizontal regime applicable to all tokens. In particular, in the field of custody, CSDR should remain the primary framework for activities falling within its scope, subject, where appropriate, to targeted adjustments addressing risks or operational features specific to DLT.

A minimum degree of clarification may be appropriate at EU level. In particular, further clarity could be provided regarding the legal effects of registration on a DLT, the treatment of tokens and client assets in insolvency proceedings, and the legal relationship between a token and any *instrumentum* represented by the token (see Question 82). Such clarification should remain targeted and should not result in the creation of a separate horizontal regime applicable to all tokens. Any such clarification should complement, rather than replace, the existing sectoral regimes.

In that perspective, EU law should not create a uniform form of “*digital entitlement*” detached from the property-law systems of the Member States. It should instead define the minimum legal effects attached to an entry on a DLT, including the time of transfer, enforceability against third parties, the protection of a good-faith acquirer and the creation of security interests. Harmonisation of the legal effects attached to transfers could be considered through CSDR, and the EU should deem that the property right are transferred when the entry becomes irreversible under the relevant consensus mechanism or, where the assets are held by a CASP, when the purchaser's position is recorded in the custodian's internal register.

Finally, regarding the development of a regime clarifying the relationship between the token and the tokenised instrument, the EU law should maintain a technology-neutral approach. It should indeed provide that the use of DLT should not result in the creation of a new proprietary asset distinct from the instrument or other right represented by the electronic record. Rather the recording of an asset on a DLT should be regarded as a new method of representing and transferring the same financial instrument, without affecting the legal nature of the underlying asset or the legal regime otherwise applicable to it. The token and the financial instrument therefore do not constitute two separate proprietary assets. **In the same way that the transition from paper-based asset to dematerialised asset did not alter the nature of those assets in the 1990s, the transition from digitally represented assets to assets recorded on DLT should not lead to the creation of new categories of assets in the 2020s.** Accordingly, the rights attached to the instrument and the effects of its transfer should remain governed by the applicable sectoral legislation.

Hence, a 28th regime or full harmonisation of national property law would be difficult to implement with a risk a risk of a split in the applicable legal regimes depending on the technology used, even if the assets represented were identical.

Question 82. There are different “ownership models” that could be used to increase legal certainty over tokens. Please indicate maximum two models listed below that you think EU law could apply if it were to improve the legal certainty of tokens in the EU.

Two concepts should be distinguished.

First, the rules determining the rights attached to securities, including ownership. These rights vary across Member States, but such divergences do not in themselves constitute specific operational barriers for DLT (*see question 81*) and should not be harmonised through MiCA.

Second, the rules governing the relationship between an asset and its representation in a tokenised form. Harmonising the legal effects of tokenisation at EU level, through a legal instrument defining the nature of the tokenised asset in relation to the asset represented by the token, would be desirable to ensure a uniform and consistent legal framework. It would provide legal certainty on the consequences of the creation, holding and transfer of the DLT-based representation of an asset, depending on the legal structure concerned.

The objective is therefore not to harmonise securities law, i.e. the rights attached to a financial instrument, but rather the legal relationship between the financial instrument and, for example, its tokenised representation. In this respect, different types of tokens should be distinguished according to their nature:

- (i) a financial instrument natively issued on DLT;
- (ii) a technical token used to facilitate the circulation of an existing asset without itself being the legal asset;
- (iii) a tokenised intermediary representation of another asset; and
- (iv) a representative certificate

As such, given the very different natures a token could have, there cannot be a unique entitlement model.

The model 4 identified by the Commission could be suitable for tokens of type (ii), (iii), (iv):

“The token is the legal carrier of rights associated with a related (often off-chain) asset. The law defines tokens as legal objects that do not create new rights, but can – like a ‘container’ – represent various kinds of rights, such as membership rights, ownership, intellectual property rights, usage rights or rights of lien, etc. The token would represent the rights stemming from the underlying assets and the law would ensure that the transfer of a token on the ledger legally transfers ownership of the rights stemming from the underlying asset.”

The model 3 identified by the Commission could be suitable for tokens of type (i):

“The token is the asset by law. In this case the law does not actively regulate legal aspects such as what property is or how transfer of ownership occurs, etc. but instructs on the legal consequences of entries in a DLT register (this is often called a functional approach). The law could at EU level stipulate who may exercise rights, i.e. the person recorded in the DLT register as holder of a tokenised asset, that these rights have full third-party effect and protects from competing claims. This also creates legal certainty for collateral use. The EU law would create a uniform rule of ‘digital entitlement’ that functions across all Member States’ property law structures.”

The entitlement model should be determined by the nature of the token, in particular by whether it represents an underlying asset, and must protect and embody the owner's rights in the underlying asset in accordance with national ownership rules.

Question 84. *Should EU law introduce a conflict of law rule for tokens?*

☐ Yes

☐ No

No.

Under the current legal framework, it is provided that the “*law of the Member State under which the securities are constituted shall continue to apply*” (Regulation (EU) No 909/2014 (CSRD), art. 49). The principle of technological neutrality, which should remain applicable, requires that the same approach be applied to DLT.

A specific conflict-of-law rule would likely have detrimental effects on investor protection. It could also encourage forum shopping to the detriment of jurisdictions with the highest and most protective standards. A minimum degree of harmonisation of the applicable rules, as discussed in Question 81, should therefore be a prerequisite before assessing the opportunity of the introducing a conflict-of-law rule.

