Technical Standards on Qualification of crypto-assets as financial instruments under MiCA Regulation

Adan's response

❖ Introduction

Adan brings together more than 200 professionals in France and Europe - new players and established companies - who develop innovation and use cases for the decentralized web in all areas of the economy on a daily basis. By removing the obstacles to their growth and competitiveness, Adan is working towards the emergence and influence of French and European champions in the service of our digital sovereignty. Adan promotes an appropriate, proportionate and catalytic framework for innovation, as well as a better understanding of new blockchain and Web3 technologies and their opportunities.

During the implementation phase of MiCA - from entry into force until the date of full application in December 2024 - ESMA, together with the National Competent Authorities ("NCAs") of the Member States, is preparing the technical standards ("RTS") and guidelines that specify how the new rules will apply to issuers, offerors, and service providers of crypto-assets.

On 29 February, the European Market and Financial Authority ("ESMA") published two drafted guidelines on the *reverse solicitation* and the *qualification of crypto-assets as financial instruments* under MiCA. The goal of these guidelines is to provide structured yet flexible conditions and criteria to determine whether a crypto-asset can be classified as a financial instrument.

❖ Executive summary

Under Article 2(5) of MiCA, ESMA is mandated to issue guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments, as defined in Article 4(1), point (15), of the Markets in Financial Instruments Directive ("MiFID II"). The draft guidelines presented below outline ESMA's proposal on the conditions and criteria that should be used for determining whether a crypto-asset should qualify as a financial instrument and therefore fall within the scope of sectoral Regulations other than MiCA. ESMA is not expected to clarify the entire scope of what constitutes a financial instrument, but only products that comply with both the crypto-asset definition of MiCA, and the financial instrument definition of MiFID II.

Adan is thankful to the European Securities and Markets Authority for allowing the expression of industry players thanks to this consultation on this draft Regulatory Technical Standard of the Markets in Crypto Assets ("MiCA") regulation, particularly concerning the qualification of crypto-assets as financial instruments.

Globally, Adan supports ESMA's flexible, case-by-case approach to defining crypto-assets as financial instruments. This stance acknowledges the diverse and evolving nature of crypto-assets, while supporting harmonization and fostering a competitive market environment within the EU. Adan recommends maintaining a balance that avoids overly rigid criteria which may become quickly outdated.

- **On the classification of crypto-assets:**
  The draft guidelines focus on classifying crypto-assets when they share characteristics with financial instruments defined under MiFID II. Adan concurs with the approach but cautions against an overly broad interpretation that could hinder innovation and market adaptability. Instead, Adan proposes a set of basic, standard criteria for assets to be considered as financial instruments to ensure clarity and consistency across Member States.

- **On specific recommendations of Nun-Fungible-Tokens ("NFT"):**
  On NFTs and unique crypto-assets, Adan stresses the importance of specific guidelines to differentiate NFTs and similar unique digital assets from traditional financial instruments, to prevent unnecessary regulatory burdens on non-financial use cases.

- **On Hybrid Tokens**:
  For tokens with mixed characteristics (for instance, utility and financial), Adan recommends a hierarchical evaluation method to prioritize the token's primary function, thus ensuring a proportional regulatory approach.

The Association remains entirely at ESMA's disposal for any further information it may require, whether on the points addressed in the present consultation or on the forthcoming reflections that will lead to a new consultation in the near future.

❖ **Adan's answer to ESMA's questions**

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

First, Adan would commend ESMA's efforts in classifying crypto-assets in this public consultation. Harmonization across Europe is a key factor for the competitiveness of the Union, ensuring a level playing field for businesses and investors across Member States. It's important that regulatory frameworks are aligned to foster innovation while maintaining investor protection and market integrity. The guidelines offer broad principles for authorities to classify and assess, case by case, whether a crypto-asset meets the criteria of a financial instrument under the MiFID II directive. This includes determining its classification as securities, CFDs, UCITs, derivatives, or emission allowances. These principles aim to remain neutral in terms of technology, which Adan does not oppose.

- Adan generally agrees with the approach proposed by ESMA. Indeed, Adan recognises that the regulation of financial instruments has always been based on broad and deliberately inclusive concepts in order to be adaptable to market developments. This approach has generally been effective and has allowed flexibility in the application of the rules. Regarding the degree of maturity of the crypto-asset market, this approach is then consistent. While it is essential to ensure a clear distinction between crypto-assets that fall under MiCA and those that fall under the financial instruments regulation, Adan warns against overly strict criteria that run the risk of quickly becoming obsolete. Therefore, it is important to avoid an overly broad approach to the notion of financial instruments.

Consequently, Adan advocates for an intermediate/in-between solution. In this regard, Adan recommends establishing a basic set of standard criteria for assets to be considered as financial instruments. In addition, Adan wishes to draw attention to the fact that a systematic reclassification of cryto-assets which share one of the "*characteristics of a financial instrument*" as a security token may be problematic and grants subjective discretion. This could lead to inconsistencies and uncertainty in the regulatory framework at the European level, undermining investor confidence and hindering innovation in the crypto-assets market.

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

As explained above, Adan agrees with the technologically neutral approach given by the ESMA to help the identification of crypto-assets qualifying as financial instruments, notably transferable securities.

Crypto-assets should qualify as transferable securities under MiCA only if:

- they meet the definition criteria of transferable securities;
- they are **(i)** not an instrument of payment; **(ii)** are issued in class; and **(iii)** negotiable on the capital markets;
- they characterize one of the types of transferable securities defined in the applicable law.

These elements should be considered collectively when determining whether a crypto-asset qualifies as a transferable security. This approach ensures that only those crypto-assets which truly possess the characteristics of traditional securities in terms of economic function and legal standing are recognized as such. This holistic approach would also support the objectives of investor protection and market integrity which are central to the regulatory framework of financial markets in the EU.

However, there are several additional factors that should be considered to ensure a better regulatory approach. For example, for crypto-assets to qualify as transferable securities, they should encapsulate a "monetary claim" against the issuer along with specific rights, such as profit sharing. This aligns with the fundamental nature of transferable securities which traditionally offer such economic benefits and control aspects to the holder. Then, the classification of crypto-assets as transferable securities must be consistent with the types defined in the applicable laws of each Member State, in order to prevent discrepancies that can lead to regulatory arbitrage across different jurisdictions. Crypto-assets should mirror the characteristics of the securities listed in national legislations to qualify as such.

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

Given the focus on derivative instruments settled in stablecoins or crypto-assets, it's clear that the industry currently lacks sufficient hands-on experience with these instruments to form a definitive stance.

However, regarding how derivatives are settled using crypto-assets or stablecoins, crypto-assets can indeed be integrated as underlying assets in various derivative formats (options, swaps, or futures for example). Contracts for Differences (CFDs) on crypto-assets are classified as financial instruments within specific regulatory frameworks (see C8 of Annex I Section C of MiFID II). Forward contracts on crypto-assets, as per C10, may be settled in cash, which includes the possibility of using other crypto-assets aside from traditional fiat currencies.

When it comes to the actual settlement of these derivatives, there are innovative methods in place. For instance, derivatives could operate through dual smart contracts—one managing the derivative itself and another handling the settlement through advanced protocols like Hash Time Locked Contracts (HTLC). Alternatively, a derivative contract might include a pre-margining system that allows the release of funds at the contract's maturity.

As the regulatory and practicality of crypto-assets in derivatives continues to develop, regulatory bodies and stakeholders have to recognize and consider crypto-assets as potential underlying assets in derivative contracts. This approach should be consistent with current financial regulatory standards to ensure a coherent and effective framework at the EU level.

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

Adan is in favour of aligning the criteria for the qualification of financial instruments established under MiFID for each respective category of instrument, in light of the

principle: “same activity, same risk, same rules”. Under this prerogative, crypto-assets whose function resembles MiFID financial instruments would be regulated by MiFID, mirroring MiCA's exclusion approach on such assets as referred to in recitals 3 and 4.

While the AIFM / UCITS reform does not account for the possibility that activities with crypto-assets are partially open to UCITS and AIFM asset management companies, Article 60 of MiCA expressly provides it for::

> "*5. A UCITS management company or an alternative investment fund manager may provide crypto-asset services equivalent to the management of portfolios of investment and non-core services for which it is authorised under Directive 2009/65/EC or Directive 2011/61/EU if it notifies the competent authority of the home Member State of the information referred to in paragraph 7 of this Article at least 40 working days before providing those services for the first time.*
> *For the purposes of this paragraph:*
> *(a) the reception and transmission of orders for crypto-assets on behalf of clients is deemed equivalent to the reception and transmission of orders in relation to financial instruments referred in Article 6(4), point (b)(iii), of Directive 2011/61/EU;*
> *(b) providing advice on crypto-assets is deemed equivalent to investment advice referred to in Article 6(4), point (b)(i), of Directive 2011/61/EU and in Article 6(3), point (b)(i), of Directive 2009/65/EC;*
> *(c) providing portfolio management on crypto-assets is deemed equivalent to the services referred to in Article 6(4), point (a), of Directive 2011/61/EU and in Article 6(3), point (a), of Directive 2009/65/EC.*"

In parallel, ESMA guidelines on key elements regarding the AIFMD provide that:

> "*VI. Guidelines on ‘collective investment undertaking’*
> *12. The following characteristics, if all of them are exhibited by an undertaking, should show that the undertaking is a collective investment undertaking mentioned in Article 4(1)(a) of the AIFMD. The characteristics are that:*
> *(a) the undertaking does not have a general commercial or industrial purpose;*
> *(b) the undertaking pools together capital raised from its investors for the purpose of investment with a view to generating a pooled return for those investors; and*
> *(c) the unitholders or shareholders of the undertaking – as a collective group – have no day-today discretion or control. The fact that one or more but not all of the aforementioned unitholders or shareholders are granted day-to-day discretion or control should not be taken to show that the undertaking is not a collective investment undertaking.*"

Adan favors applying these criteria, currently limited to the "other AIFs" category for tokenized crypto asset fund units, although the combination of them should only concern the assets´ funds.

Furthermore, as highlighted at paragraph 57, it is worth noting that the absence of a general commercial or industrial purpose is not reflected in the criteria provided in the Draft Guidelines (Annex II- paragraphs 115 to 119). Adan recommends including these elements in the Draft Guidelines, in line with the ESMA Guidelines on key concept of the AIFMD.

Q5. Do you agree with the suggested conditions and criteria to differentiate between MiFID II financial instruments and MiCA crypto-assets? Do you have concrete conditions and/or criteria to suggest that could be used in the Guidelines? Please illustrate, if possible, your response with concrete examples.

Adan supports ESMA's approach as to the conditions and criteria to be used to differentiate between MiFID II financial instruments and MiCA crypto-assets. For Adan, the fact to reference the intrinsic features of crypto-assets rather than those of financial instruments to make such determination is sensible.

ESMA should also consider for the purposes of categorizing the crypto-assets those tokens which are not issued by a legal entity and also other tokens which give rights to other crypto-assets.

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

In essence, an NFT is a technological solution. It functions as a cryptographic token that represents a unique (physical or digital) item that is not interchangeable with another asset. This unique digital identifier guarantees ownership over the designated good.

Thus first, **it is paramount to acknowledge that NFTs are a powerful technological innovation tool that can be applied to a vast array of use cases, extending far beyond the realm of financial services**. They are interesting for many economic segments such as art, video games, metaverse, commodities (gems, diamonds, etc.), real estate tokenization, etc. **Therefore, NFTs are neither a uniform asset class nor do they automatically qualify as financial instruments or crypto-assets under the MICA Regulation.**

As outlined in its recital 9, MiCA is technology-neutral and therefore, aims at exclusively regulating the "financial" uses of crypto-assets, regardless of the underlying technological solution. This approach is reflected in Article 2(3) which explicitly excludes unique and not fungible crypto-assets from the application, the reading of which is informed by Recital 10, stating that NFTs features "*limit the extent to which those crypto-assets can have a financial use*", thus "*justifying their exclusion from the scope of the Regulation*".

While we agree that clarification is needed to bring greater certainty in relation to the regulatory treatment of NFTs, the **criteria under Guideline 8 must adhere to the mandate of Level I text, to not potentially bring into the scope of financial regulation irrelevant non-financial use cases.**

The mandate, articulated through Article 2(5) and Recital 14, refer that ESMA "*shall issue guidelines on the conditions and criteria 'for the qualification of crypto-assets as financial instruments' as defined in MiFID II*". This is indeed confirmed by the Guidelines in paragraph 5.2.

In light of the foregoing, we welcome the guidelines only insofar as they establish practical criteria for assessing the uniqueness and fungibility of crypto-assets strictly in relation to financial instruments under MiFID II.

1. Because the approach taken under Guideline 8 is too broad and too inclusive, we strongly recommend its deletion.

Adan believes the criteria being provided under Guideline 8 are excessively broad and unclear and are not adjusted to the mandate established by the Level I text, according to which clarifications must be framed to determine whether a crypto-asset can be classified as a financial instrument or not.

The formulation proposed in question 6 would contradict the General approach being laid down in paragraph 5.2 of the Guidelines where it is stated that their goal "*is to provide National Competent Authorities and market participants with structured yet flexible conditions and criteria* ***to determine whether a crypto-asset can be classified as a financial instrument***". Therefore not when they "*may fall under the MiCA regulation*".

Moreover, the guidelines provide general indicators to consider the "uniqueness" of the crypto asset.

Likewise, it provides a general statement in paragraph 67 that a "*crypto-asset that lacks genuine uniqueness due to the presence of comparable and interchangeable attributes should fall within MiCA's regulatory purview*".

Such an approach not only exceeds the scope of ESMA's mandate under MiCA but also implies that any crypto asset that is not considered unique, would automatically fall under MICA.

The consequences of this are:

- **First: the vague language and wide-scope criteria used in the guidelines to describe uniqueness not only lack clarity and legal certainty- contrary to their objective - but will potentially bring into the financial regulation perimeter irrelevant non-financial use cases**.

For instance, in paragraph 69, the representation of a digital artwork is illustrated as an example to assess the uniqueness of an NFT. In this regard, the Guidelines clarify in paragraph 67 that 'the asset may lose its uniqueness if it is part of a larger collection, and its value is influenced by other crypto assets in the series.

MICA indeed defines cryptoassets as *''a digital representation of a value or of a right that is able to be transferred and stored electronically using distributed ledger technology or similar technology*". **However, this doesn´t mean that any digital representation on DLT is a crypto asset under MICA**.

As previously stated, **MICA and MiFID II** are both technology-neutral financial regulations. Therefore, must apply only to financial assets and services.

Accordingly, and in the context of the mandate of these guidelines, only NFTs providing for MIFID-financial-instrument-like rights of underlying assets may qualify as a financial instrument. This means that **a lack of fungibility and uniqueness is not enough to classify an asset as a financial instrument under MiFID II or a crypto asset under MICA. Its functionality is core to determine its qualification.**

In the context of the specific example being provided, it must also be noted that artwork might be used as an investment instrument. Such Investment instruments might hold value and be used for investment purposes, but they often **lack the standardized format or tradability on a regulated market that defines MiFID II instruments. In the case of MICA, deeming if the exclusions provided in paragraphs 2 and 3 of Article 4 (3) should also (but not exclusively) be considered**. The guidelines should reaffirm this.

- **Second: Guideline 8 exceeds the scope of ESMA's mandate and preempts the European Commission report**

Article 142(2)(d) of MiCA ratifies the legislators' intention to carefully examine the appropriate regulatory treatment of NFTs. The European Commission's report will leverage data-driven market analysis alongside insights from all relevant stakeholders to asses whether NFTs require specific regulatory treatment and the most suitable approach.

Guideline 8 fails to address specific situations where NFTs could be considered financial instruments under existing laws and instead provides general criteria to deem the uniqueness of the asset. Likewise, outlines criteria according to which a given NFT could qualify as a crypto-asset under MICA.

In its current form, Guideline 8 would **go beyond the mandate granted to ESMA under MiCA preempting the European Commission's upcoming report**. **A broad Guideline, such Guideline 8, should therefore be avoided**.

2. Should ESMA decides to maintain Guideline 8, to preserve the principle of technological neutrality, Adan strongly advocates for a pragmatic approach focused solely on financial use cases. This entails a case-by-case analysis based on a comprehensive set of indicators.

The criteria under Guideline 8 are sufficiently broad to provide wide latitude for interpretation by national competent authorities (NCA). This can not only inadvertently bring multiple NFT projects outside the financial sphere into the scope of MiCA, but also risks inconsistent application across Member States, forcing projects to navigate across different EU regimes. To ensure legal predictability and harmonization, it is critical to provide a clearer approach to NFTs.

As previously stated, MICA and MiFID II are both regulations designed for financial markets. Therefore, must apply only to financial assets and services.

This entails that not all digital representation on DLT is a crypto asset under MICA nor do all digital representations on DLT with monetary value that can be sold to third parties.

The notion of fungibility and uniqueness should not be mixed with the asset's negotiability on secondary markets, for example in artwork cases. ESMA should not link both notions that are distinct and not systematically correlated.

The Guidelines must make clear that fungibility and lack of uniqueness are not alone sufficient criteria to determine whether a token falls within a financial regulation perimeter. Its functionality will be equally critical to determine whether the token falls within the categories laid down in the financial legislation.

Guideline 8 should take a pragmatic approach, inviting NCAs to conduct a case-by-case analysis based on a series of indicators to assess whether or not a given NFT could potentially qualify as a financial instrument under MiFID II or (although this exceeds the guidelines' mandate) a crypto-asset under MiCA.

The guidelines should reaffirm the exclusions provided in paragraphs 2 and 3 of Article 4 of MICA and the criteria required for Financial Instruments in MiFID II such as the criteria of being tradable on a regulated market with a standardized format.

Additionally, **to accurately assess whether an NFT falls under MiFID or MICA regulations, National Competent Authorities (NCAs) should prioritize evaluating its inherent properties and intended use. This means understanding the core characteristics of the NFT and the purpose** for which it was created and issued.

This aligns with the approach adopted by the Financial Action Task Force (FATF)- of which the EU is a Member- whose guidelines exclude NFTs not used as a payment or investment instrument from the definition of a virtual asset.

Additionally, the guidelines should be aligned with the clarifications provided in the recitals of MiCA explicitly excluding from the scope NFT representing digital art and collectibles, product guarantees, or real estate. The wording should reaffirm this exclusion.

3. Adan recommends to better define '' Value interdependency''

The concept of "value interdependency" could be better defined to only capture use cases that should be covered by financial regulation.

4. Adan recommends the inclusion of a "common trading price" as a way to assess the lack of uniqueness

In addition to the "unicity of value" criteria, NCAs could also consider deeming the "independent value test" the existence of a "common trading price" in order to assess the lack of uniqueness of the token.

This might be particularly relevant in the case of Gaming NFTs. Unlike traditional financial assets, the value of an NFT is not linked to a common trading price but depends on a multitude of factors, especially for collectible NFTs. The value can result from established objective elements such as the ability to use the collectibles in a game or qualities attached to the item that differentiate it from others. The value can also depend on purely subjective or even emotional elements (as fans' attachment to their favorite character or team).

In this context, there is no common trading price as the value of each NFT.

Other criteria that may be taken into account is whether NFT functions in such a way that provides their holders specific unique prerogatives/values depending on how the NFT has been used, etc. We can find many examples of NFTs in the gaming industry.

The guidelines should also suggest taking into account that the value of an NFT may evolve over time due to the players' in-game performance and/or the content of its in-game items collection. The more the player performs in the game, the more "unique" their NFTs will become. This will impact their value in and out of the game.

Suggestion of amendments

67. In assessing the uniqueness and non-fungibility of a crypto-asset, such crypto-asset may be considered as unique and not fungible if its characteristics and/or the rights it provides distinguish it from the other tokens issued by the same (and any other) issuer. ~~In essence, a crypto-asset that lacks genuine uniqueness due to the presence of comparable and interchangeable attributes should fall within MiCA's regulatory purview~~. ***The sole criteria of lack of fungibility and uniqueness alone are insufficient to automatically classify a crypto asset as a financial instrument under MiFID II or a crypto asset under MICA. Its functionality is a determining factor in its qualification. Crypto assets that are in practice used as collectibles or consumer goods rather than as payment or investment instruments should not fall within MiCA's regulatory purview. Additionally, the established criteria and exemptions provided in the financial***

regulations should remain applicable. In conducting this assessment, national competent authorities should adopt a case-by-case approach based on a range of indicators including (but not limited to) intrinsic characteristics of a given NFT, its utility function and the overall digital experience in which the NFTs are embedded.

68. It is important to distinguish between truly unique crypto-assets and those that might appear unique due to specific technical identifiers or standards. In that sense, the criterion of uniqueness should not ***solely*** *rely on the crypto-asset's technical specificities. The attribution of a unique identifier to a crypto-asset does not automatically qualify a crypto-asset as non fungible. The technical features (e.g. token identification code, unique token ID) and standards used (e.g. ERC-721 standard, BEP-721 standard)* ***could remain one of the indicators to be taken into account*** ~~*an indicator*~~ *but should not be determinative for national competent authorities and market participants when assessing the fungibility and uniqueness of* ***a given*** *crypto-asset.*

*69. For a crypto-asset to be considered unique, its value should be intrinsically connected to its individual attributes and****/or*** *the specific utility it confers to its holder. A key aspect that* ~~*should*~~ ***could*** *be considered is the value interdependency that may exist between NFTs, or which determines if the value of one crypto-asset* ~~*influences*~~ ***is tied to*** *the valuation of another,* ***possibly*** *indicating a lack of uniqueness. For example, an NFT representing a piece of digital artwork may lose its uniqueness if it is part of a larger collection, and its value* ***is identical with to*** ~~*influenced by*~~ *other crypto-assets in the series. To express it differently, if the valuation of a crypto-asset originates from* ***a common trading price, defined as a unique trading price for a given asset class,*** ~~*comparison*~~ *between crypto-assets possessing comparable attributes that* ***could possibly*** *make them interchangeable, the crypto-asset* ~~*should*~~ ***may*** *not be exempted from MiCA. Therefore, the notions of uniqueness and fungibility within the meaning of MiCA seemed to be detached from that of negotiability on a secondary market.*

70. NFTs that are part of a series, or a collection ~~*can*~~ ***could possibly*** *be qualified as crypto-assets in the meaning of MiCA if they are* ***readily and at all times*** *interchangeable. Such crypto-assets could be considered as* ***readily and at all times i****nterchangeable in practice if they share* ~~*equivalent*~~ ***identical*** *characteristics and* ***can be mutually substituted.*** ~~*This can occur in scenarios where the market views certain NFTs as having similar value despite unique attributes.*~~ *The existence of a series or a collection - and more precisely its size -* ***could*** ~~*should*~~ *thus be considered as an indicator of fungibility without being an overriding criterion*[2]*.*

~~*71. For instance, in the case of a collection of NFTs where the uniqueness of each cryptoasset can be questioned (e.g. several NFTs representing the same image with minor modifications) this collection should fall under MiCA. On the other hand, in the case of a series of NFTs in the manner of a series of numbered serigraphs or pictures, the numbering of which would have an impact on the value and uniqueness of the NFTs, these cryptoassets could be seen as a series of crypto-assets that are non fungible*~~.

72. In addition, the utility function of NFTs can also play a role. In some cases, NFTs might confer similar utility or access rights. Owning an NFT might grant access to exclusive events or benefits. ***In light of Article 4 (3) (a) of MICA, no requirements should apply to utility tokens providing access to an existing good or service, enabling the holder to collect the good or use the service, or when the holder of the crypto-assets has the right to use them only in exchange for goods and services in a limited network of merchants with contractual arrangements with the offeror***. Here, the specific attributes of the NFT ***may be assessed in light of*** ~~*become less relevant*~~

~~*compared to*~~the utility it provides, and should be assessed on a case-by-case basis *to consider where the crypto asset shall be deemed as a utility token in the meaning of Article 4 of MICA and therefore is excluded from Regulation.* ~~*making different NFTs functionally interchangeable for practical purposes*~~.

135. National competent authorities and 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. ***National competent authorities and market participants should also consider visual uniqueness specificities.***

136. An "interdependent value test" ***may*** ~~*should*~~ *be conducted by national competent authorities and 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 the unique characteristics of each individual asset and****/or*** *the utility/benefits it offers to its holder; (ii) the extent to which the interconnection of various types of crypto-assets* ~~*influences*~~ ***is tied to*** *the value of one another in such a way that the NFT has no value of its own that would be* ~~*decorrelated*~~ ***different*** *from the other NFTs in the series; as well as (iii) the unique characteristics that distinguish these crypto-assets from others*

137. National competent authorities and market participants should consider that despite their inherent non-fungible nature, certain NFTs may be part of a group of crypto-assets exhibiting ~~*interconnected*~~ ***identical*** *value dynamics. This interconnectedness* ***may be*** ~~*should become*~~ *a* ***key*** *factor when these crypto-assets* ~~*influence*~~ ***have identical*** ~~*each other's*~~ *value, thereby challenging their perceived "uniqueness".*

138. When evaluating the uniqueness of a crypto-asset, NCAs should focus on the features that contribute to its distinct value. If a crypto-asset's ***value***~~*ation*~~ *largely stems from its comparability to others with similar attributes, rendering them interchangeable,* ***it could possibly*** ~~*should*~~ *not warrant an exemption under MiCA.*

139. The assessment of uniqueness and fungibility ~~*in the context of MiCA*~~ should be considered independently of the asset's negotiability on secondary markets. ***However,*** the ability to trade a crypto-asset on such markets does not ***automatically*** ~~*inherently*~~ affect its ***consideration*** ~~*classification under MiCA*~~ as unique or non-unique ***nor its classification as a financial instrument under MiFID II or as a crypto asset under MICA***. NFTs that are issued "in a large series or collection" ***could possibly, on a case-by-case basis,*** ~~*may*~~ be considered fungible ~~*and thereby covered by MiCA*~~. ***Yet, when evaluating the asset classification, national competent authorities shall equally consider the established criteria and exemptions provided in the financial regulations.***

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

Globally, Adan agrees with the case-by-case basis approach as proposed by the ESMA for the classification of hybrid-type tokens. Then, ESMA suggests that in cases where a crypto-asset exhibits features of multiple asset types (such as utility tokens and financial instruments), its classification as a financial instrument should take precedence over its other characteristics.

- However, Adan suggests further flexibility could be more advantageous. Specifically, introducing a hierarchy of attributes for crypto-assets would provide more proportionality in the regulatory analysis. Instead of concluding that a crypto-asset offering certain rights is automatically a financial instrument, a tiered approach could be adopted.

  This method would assess primary and secondary characteristics separately, ensuring that not all tokens resembling securities are classified as such. This structured yet flexible approach would better accommodate the diverse functionalities and economic roles of hybrid tokens, reflecting their unique aspects more accurately. Moreover, it aligns with the general principle of proportionality, essential for fostering innovation while ensuring regulatory compliance. This proposal echoes the need for detailed, nuanced consideration of hybrid tokens' attributes, avoiding overly broad or restrictive classifications that could hinder technological and economic development.

Example of a hybrid token with predominantly utility characteristics:

- Token: suppose a token offers access to a decentralized file storage network but also entitles holders to a share of the fees generated by network usage.
- Primary attribute: utility (access to service).
- Secondary attribute: Financial (profit sharing).

Under a hierarchical approach, this token would primarily be classified based on its utility function because the essential service (file storage access) outweighs the financial aspect (fee sharing), thus potentially not qualifying as a financial instrument under stringent criteria.

Example of a hybrid token with predominantly investment characteristics:

- Token: Consider a token that represents ownership in a blockchain-based real estate asset, providing both governance rights in property decisions and dividends from rental income.
- Primary attribute: Financial (ownership and dividends).
- Secondary attribute: Utility (governance in property decisions).

This token would be classified primarily as a financial instrument because its characteristics align closely with traditional securities, offering financial returns and participatory rights akin to shares in a company.

Example of a Hybrid Token with equally weighted attributes:

- Token: Imagine a token that is used to both bet on the outcomes of online games and redeem rewards within the game itself.
- Primary attribute: Financial (betting).
- Secondary attribute: Utility (redeem rewards).

In this case, both attributes should be assessed carefully. If betting is deemed a predominant economic activity, the token might be considered a financial instrument. However, if the gaming aspect is more integral, it could lean more towards utility classification.

❖ Contacts at Adan

Faustine Fleuret, President: faustine.fleuret@adan.eu

Mélodie Ambroise, Head of Strategy and Institutional Relations: melodie.ambroise@adan.eu

Alizée Van Den Schrieck, Legal Officer: alizee.vandenschrieck@adan.eu

Adriana Torres Vergara, EU Policy Officer: adriana.torresvergara@adan.eu

❖ Special contributions

Adan would like to thank members of the CASP, Law and NFT Committees for their contributions, especially: Clifford Chance, Coinhouse, Hashtag Avocats, PMU and Sorare.