ABI response to ESMA third consultation package on the criteria for the qualification of crypto-asset as financial instruments and on reverse solicitation.

1. Criteria for the qualification of crypto-asset as financial instruments

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 condition and criteria?

The Italian Banking Association - ABI intends to respond to ESMA with specific regard to the Guidelines on reverse solicitation and on the qualification of crypto-assets as financial instruments which are designed to bring much-needed legal certainty to both MiCAR and MiFID discipline. The adoption of the Regulation on markets in crypto-assets represents a significant step forward in addressing the challenges posed by the rapidly evolving crypto-assets market while ensuring the protection of investors and the stability of financial markets. While MiCAR was strategically designed as a legislative intervention to specifically address the category of crypto-assets, its integration into European law inevitably triggered a cascade of implications and interconnectedness that necessitated further refinement and alignment with established disciplines. In this regard, it is fundamental that regulatory guidelines clarify when a crypto-asset can be considered a financial instrument within the meaning of the MiFID so that regulatory arbitrage conditions cannot be created.

In this context, we recall the position of the Association which has been prepared to meet the European Commission's feedback request in late 2020, when it first presented the proposal to the public. Precisely on that occasion, we expressed our support for the Commission's choice to clearly exclude financial instruments from the scope of the Regulation via a specific exemption, with the wider objective of avoiding any overlap between MiCAR and MiFID. At the same time, we stressed that simply exempting financial instruments from the scope of the MiCAR regulation was not sufficient to reduce legal uncertainty. To achieve full separation and thus the necessary legal certainty, the definition of ‘security tokens’ should be clear and the distinctive features of a crypto-asset that qualifies as a financial instrument should be specified. Moreover, in order to reduce legal uncertainty and guarantee a level playing field between operators, it is essential that this exemption be accompanied by exact identification of the requirements for treating a crypto-asset as a financial instrument. This would eliminate any possibility for different interpretations by individual Member States and an unlevel playing field.

ABI calls for a financial legal framework guided by level playing field principle and aimed at guaranteeing the highest investor protection. This is why we recognize the imperative need for an equivalent level of regulatory clarity between crypto-assets and traditional financial instruments as the former, while characterized by its unique attributes, continues to evolve, and intersect with traditional financial instruments.

The guidelines should effectively guide the National Competent Authorities (NCA) and market operators in the process of classifying crypto-assets, adopting a case-by-case approach, in order to include them in the category of financial instruments that are subject to the stringent reference regulations (MiFID).

Therefore, it is expected that the Authority, through the guidelines, will provide clear, specific, and detailed indications to reduce interpretative uncertainty and ensure the correct application of the law within the European Union. However, we believe that the proposed guidelines are not entirely adequate for this purpose and present significant room for improvement.

The general guiding principle of a case-by-case assessments of crypto-assets that should be conducted by the NCAs and market participants, could cause several critical issues, if not implemented with the necessary precautions. Firstly, there could be a discrepancy between the decisions made by different NCAs regarding the classification of various crypto-assets (for example, the French NCA may classify a certain crypto-asset as a financial instrument while the German NCA may not). This would entail the evident risk of inconsistent treatment of the same crypto-assets in different Member States, compromising the level playing field among market operators and resulting in different levels of protection for customers in different countries. Secondly, discrepancies could also arise within each country, considering the possible divergent interpretations that market participants may have in the absence of a clear decision by the national competent Authority.

Considering this, it is recommended to consider the introduction of mechanisms aimed at correcting, or at least minimizing, the potential inconsistencies in classification, both at the European and national levels. In light of the emphasis on achieving convergence regarding the classification of crypto-assets as outlined in Article 97 of the MiCAR, we suggest introducing a more active involvement of ESAs in evaluating the proper application of the criteria. This would include, at least initially or for a transitional period, making it compulsory for ESAs to be involved by national competent authorities of individual Member States whenever they have received a request to classify a crypto-asset, with the broader objective of exchanging methodologies and evaluations. Such collaborative efforts aim to foster a more uniform and harmonized framework for assessing crypto-assets across the European Union, thus enhancing consistency in regulatory practices, and facilitating a cohesive approach to crypto-asset classification. By leveraging ESA's expertise and facilitating cross-border dialogue among regulatory bodies, this approach seeks to mitigate discrepancies and promote convergence in crypto-assets categorisation, ultimately contributing to greater regulatory clarity and investor protection within the EU's 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.

With reference to the criteria for identifying a "transferable security," we believe it is desirable to have a higher level of detail in the guidelines provided by ESMA, in order to better contextualize each criterion in correlation with the specific features of crypto-asset issuances. This need depends first of all on the lack of complete harmonization of the definition of transferable securities between different member states following the transposition of MiFID. For instance, regarding the indicators used to identify whether a crypto-asset falls within the scope of "classes of securities", certain aspects are not immediately clear.

Firstly, it is suggested to clarify what exactly is meant by "the same issuer", bearing in mind that many crypto-assets do not have a single issuer. For example, the creation (i.e. issuance) of new Bitcoin is validated through a process known as mining, which relies on software applications structured on specifically designed hardware, to which miners worldwide connect their mining devices to form a peer-

to-peer creation network. It is evident, therefore, that in this case, identifying a single issuer is not possible. For these reasons, and with the intention of reflecting the exclusion from MiCAR scope of mining activities, it would be appropriate to clarify that a crypto-asset can be considered a financial instrument only if an issuer can be identified. Similar considerations could also apply to those tokens that have a more or less identifiable issuer, even in the form of an unrecognised legal entity, but which, through the use of a consensus mechanisms, entrust the issuance to validator nodes in a truly decentralised way. Conversely, the issuance of crypto-assets without its own consensus mechanism (or relying on other layer-1 blockchain) might be an indicator of a centralised and controlled issuance by a single entity (even Decentralised Autonomous Organisations - DAO), thus qualifying for one of the feature ("issued by the same issuer") highlighted by ESMA to form a class of securities.

Secondly, it is important to precisely identify when a crypto-asset confers "access to the same rights", given that the rights listed in Guideline No. 100 ("dividend rights, voting rights on the issuer's decision-making process, right over a portion of company's assets or rights to liquidation proceeds") are not exhaustive. Therefore, it would be useful that ESMA provides more practical examples regarding which rights associated with crypto-assets can be considered similar to those typically attributable to classes of securities.

Moreover, in delving into the intricacies of comprehending the requirement of "being negotiable on the capital market" within the realm of crypto-assets markets, it's imperative to examine the guidance provided in point 111 of the Guidelines. The guidance delineates capital markets as platforms where savings and investments are channelled between capital suppliers and those in need of capital, encompassing both traditional trading venues, over-the-counter markets and also, broadening as much as possible the concept, electronic and/or voice trading platforms where buying and selling interest in securities meet. This suggests that a capital market can be conceptualized as a trading platform facilitating the exchange of supply and demand. However, the clarity of this definition becomes somewhat obscured by a subsequent statement within the same point, which states that "their [crypto-assets] tradability on online trading platforms for crypto-assets may serve as an indicator but does not necessarily coincide with the notion of capital market". This emerged as a point of strong misunderstanding as a result of what was said a few lines earlier in point 108, where it is reiterated that "the sole and abstract possibility of being transferred or traded on the capital market should be deemed sufficient, even if there is no specific market for the product yet". Beyond this discrepancy, there is the risk of not identifying any crypto-assets as financial instruments due to their tradability on existing crypto-asset trading platform, which are not seen as capable of representing a capital market. This ambiguity underscores the need for ESMA to provide clearer and more precise indications regarding the essential criteria for identifying a capital market. By offering comprehensive explanations and examples, ESMA can facilitate a more uniform and effective approach to tackle the complexities of crypto-assets markets.

Lastly, we are aware that there is not an harmonised definition of payment instrument throughout the EU and that, similarly to what MiFID does, the PSD outlines what payment services are. However, in our view, ESMA's assessment of broadening the definition of payment instrument to include all crypto-assets that can be used as a medium of exchange would in fact have the capacity to draw all crypto-assets into the 'broadened' definition of payment instrument, thus excluding them all from the classification as a financial instrument. As all crypto-assets can potentially be used as a means of exchange, more granularity in defining what can be reasonably intended as a crypto-asset used as a

medium of exchange is needed. Otherwise, none of the crypto-assets, due to its potential use by an investor/user as a means of exchange (e.g., purchase of NFTs or other goods and services on online vendors) can be considered financial instruments in the sense of transferable security.

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

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?

Referring specifically to the proposed guidelines for identifying a crypto-asset with comparable characteristics that may warrant classification as part of the money markets, the criteria and conditions are evidently outlined. Guideline 3 explicitly directs NCAs and market operators to evaluate whether a crypto-asset shares traits akin to treasury bills, certificates of deposit, and commercial papers, such as representing a certificate of credit balance arising from funds held in an account. Furthermore, the Guideline provides a clear illustration of crypto-asset arrangements, similar to savings accounts, which offer users the opportunity to earn interest on locked crypto-assets (e.g., liquid staking or yield farming).

While the maturity period (maximum 397 days) of the savings account is crucial in determining whether the crypto-asset qualifies as a money market fund (MMF), it's essential to clarify whether the MMF classification applies to savings accounts with longer maturities but allowing investors/users to access funds before 397 days. Additionally, clarification is needed regarding the condition requiring that a crypto-asset must exhibit "a stable value and minimum volatility" to qualify as an MMF. Since all ARTs inherently strive to maintain stable value by design, linked to the reserve of assets, it's recommended to specify that Guideline 3 is specifically applicable to EMTs only. If this is not the case, clarification is required, particularly considering that ARTs tied to other than official currencies can also offer similar returns.

Another request for clarification arises with regard the content outlined in paragraph "Classification as derivative contracts" point 121: "national competent authorities and market participants should as part of their assessment consider whether: (i) the rights of the crypto-asset holders are contingent upon a contract based on a future commitment, creating a time-lag between the conclusion and execution of such contract; and (ii) the crypto-asset's value is derived from that of an underlying asset". Additionally, within point 124: "A crypto-asset's model where one party agrees to buy a certain amount of a crypto-asset from another party at a future date for a predetermined price should likely be seen as a forward/future. Similarly, a crypto-asset that provides a right (but not the obligation) to buy or sell a specific crypto-asset (even a utility token) at a predetermined price within a certain timeframe should likely qualify as an option. A crypto-asset might also represent futures contracts for traditional commodities like gold or oil and hence be classified as a financial instrument where the conditions of the above mentioned points C4 to 10 are met". We share the assumptions of ESMA and, at the same time, we believe that further effort by the Authority is necessary to reach more concrete conclusions and indications, which effectively guide authorities and operators in the classification exercise as derivative instruments of specific categories of crypto-assets that structurally present characteristics attributable to the two requirements mentioned in point 121. By way of example, for ARTs, it is widely

acceptable that the value of the crypto-asset inherently derives from the value of an underlying asset; however, it is more complex to establish the existence of a contractual commitment of the parties whose execution is deferred to a later moment than that of the conclusion of the contract.

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.

According to Guideline 7, "a utility token may be accompanied by governance rights (i.e. governance crypto-assets)" but to exclude them from the financial instruments discipline "it should not replicate the rights attached to financial instruments, starting with those attached to transferable securities within the meaning of MiFID II". The guidelines seem suggesting three different scenarios related to the categorisation of what are broadly called utility tokens as they can be: a) excluded from the scope of MiCAR; b) brought inside the perimeter of MiCAR; c) qualified as financial instruments.

Echoing MiCAR recitals, a utility token would only be excluded from the scope of MiCAR if it cannot be transferred to any other user (in P2P logic) and only accepted by the issuer or offeror, as the safeguards that the regulator itself wanted to introduce for crypto-assets markets would not be necessary. As it appears that the "interchangeable" condition is not required to exempt utility tokens from the MiCAR scope, we believe it is important to stress that also NFTs can provide access to rights to the holder and being non-transferable (e.g., tickets). Conversely, if the crypto asset is transferable to users beyond just the issuer or offeror, its transferability would warrant the application of measures outlined in MiCAR, thus making it subject to regulations concerning issuance, offering, or admission to trading.

Considering, now, only the utility tokens that can be transferred amid user, the guidelines seem suggesting that the difference between MiCAR utility tokens and MiFID instruments lies in the rights associated with the tokens. Utility tokens under MiCAR must not include any financial or voting privileges; otherwise, they may exhibit traits that could categorize them as financial instruments.

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.

The approach delineated by the EU regulator for discerning MiCAR scope boundaries for an NFT mirrors that employed for utility tokens. In this sense, just as we agree with the reasons for the exclusion of some NFTs from the scope of regulation, on the other hand we believe it is useful to highlight some points of attention that may raise interpretative doubts about the subjection of one or the other instrument.

First of all, point 70 of ESMA document states that "the existence of a series or a collection - and more precisely its size – should thus be considered as an indicator of fungibility without being an overriding criterion", recalling MiCAR recital that introduces the concept of "large series". From our perspective, the approach to excluding large-scale NFT issuances inherently demands the establishment of a specific quantitative metric determining the threshold at which a collection of NFTs qualifies as a large

series. Regardless, any designated threshold would likely incentivize issuers to create collections with quantities below that threshold to evade MiCAR regulation. It is crucial to conduct a thorough assessment to ensure that this does not unduly hamper innovation within this particular sector. Moreover, as point 71 states that “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 crypto-assets could be seen as a series of crypto-assets that are non-fungible” we would flag a point of attention.

We believe it is useful to point out that all collections of NFTs that alter the same image with minor changes adopt an approach whereby these small modifications, following a principle of scarcity, assign different values to individual pieces. These minor alterations can give value to a single piece just as a serigraphs or pictures can assume a different value from others due to its numbering (generally, the lower the number, the more value the market assigns). With that said, since minor modifications to the same image in an NFT collection can have the same impact as a numbering on print or a photograph, we find the assessment made in the examples of point 71 to be inconsistent. It might be more useful to rely on factors that are easily identifiable and less subjective, such as the quantity, to explain the difference in treatment between the application of MiCAR rules and, conversely, exclusion.

Secondly, as per our interpretation, some NFTs can, due to their high interchangeability, lose their inherent characteristic of uniqueness. This potential loss of uniqueness and the assumption of fungibility characteristics could prompt competent national authorities and market operators to evaluate whether these assets qualify as financial instruments. This consideration arises because other conditions for recognition as transferable securities may also be satisfied (or even as derivative contracts if they allow the possibility of purchasing other products). Has this specific scenario been thoroughly examined by the authority, or is it instead believed that this does not pertains to the qualification of NFTs as financial instruments but is solely addressed for the purpose of excluding it from MiCAR? Clarification also on these aspects contribute to the NCAs evaluations and, in this way, to the EU crypto-assets treatment harmonisation.

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.

2. Reverse solicitation

Q1: Do you agree with the approach chosen by ESMA? Do you see any potential loophole that could be exploited by third-country firms to circumvent the MiCA authorisation requirements?

At point 13 of Chapter 5.1 "Means of solicitation (Guideline 1)" it is stated that "To assess whether third-country firms solicit clients established or located in the Union, all facts and circumstances of the case are relevant. For instance, a website in an official language of the Union – and which is not customary in the sphere of international finance – should be a strong indication that a third-country firm is soliciting clients established or located in the Union". We certainly find the example provided to be clarifying. However, it would be helpful, in our opinion, to further specify the expression "which (language) is not

customary in the sphere of international finance" and identify which languages may be deemed as such. For example, English is one of the official languages of the EU and is universally considered a language prevalent in the "sphere of international finance." Therefore, it raises the question of how the opening of a website in English, accessible to EU citizens, by a company located in a third country should be considered.

For these reasons, reasoning solely on the use of language as a driver to identify solicitation may prove inadequate and, consequently, could advantage companies from third countries, as they may still find ways to solicit EU clients (e.g., by creating a website with advertising messages in a language common to the "sphere of international finance," particularly English, which would likely be known by a significant portion of the target clients). Therefore, it is imperative, in our view, to consider other, more stringent criteria, such as: the number of EU clients using a service from the same non-EU company, the number and volumes of transactions made by EU clients through such companies, the number of visits to a hypothetical website accessible within the EU created by a third-party company, etc. Upon surpassing certain thresholds (e.g., based on the ratio between the EU clients of the CASP and the total client base; or considering the operations specific to EU clients using the services of a particular CASP and the total operations attributable to the same Provider), it would be appropriate to establish a presumption of solicitation, which would necessitate for third-party company compliance with the relevant regulations and the requirement, primarily, for authorization from the crypto-asset service providers under MiCAR.

Regarding point 15 of Chapter 5.2 "Person soliciting (Guideline 2)": "The solicitation may be carried out either by the third-country firm itself or by any other person acting explicitly or implicitly on behalf of the third-country firm or having close links to it, as defined in Article 3(31). Such persons can include so-called influencers. Indications of acting on behalf of the third-country firm may include, for example, the direction of the audience to the third-country firm’s website, the provision of the means of access to the services offered by the third-country firm, the offering of promotional deals or the displaying of a third-country firm’s logo." There are no particular observations or doubts, as the principle expressed is clear and agreeable. However, we emphasize the importance of clarification from ESMA, as it directly pertains to companies based in the EU, for example providing further details and practical cases to strengthen awareness at the community level regarding what scenarios may be considered prohibited and avoid inadvertently violating regulations.

Similarly, it is deemed agreeable in orientation 16 of the same Chapter 5.2, "Solicitation done on behalf of a third-country firm by a person or entity regulated in the EU should still be regarded as a breach of MiCAR. For instance, an EU credit institution, investment firm or payment service provider should not redirect clients (for instance, via its website) to payment services provided by a third-country firm (whether that third-country firm is part of the same group or not)." However, it is not fully understood the rationale behind the inclusion in the second sentence, as a negative example, of redirecting clientele by a EU company to payment services provided by a non-EU company, since MiCAR, per se, is not related to such services but aims to establish "uniform requirements for the offering to the public and admission to trading on a trading platform of crypto-assets other than asset-referenced tokens and electronic money tokens, of asset-referenced tokens and electronic money tokens, as well as the requirements for providers of services for crypto-assets."

Q2: Are you able to provide further examples of pairs of crypto-assets that would not belong to the same type of crypto-assets for the purposes of Article 61 of MiCA? Or are you able to provide other criteria to be taken into account to determine whether two crypto-assets belong to the same type?

With reference to orientation 19, Chapter 5.2 "Exclusive initiative of the client (Guideline 3)," "The reverse solicitation exemption is based on the premise that the crypto-asset product, service or activity is provided at the client's own exclusive initiative. Article 61(2) of MiCAR leaves open the possibility for the third-country firm to market to that client crypto-assets or crypto-asset services or activities of the same type. However, the requirement that the crypto-asset services be provided on the basis of the own exclusive initiative of the client still applies", it is necessary to highlight how the orientation, as well as the primary level regulations, may generate significant uncertainty regarding the extent of the exemption under Article 61(1), which appears potentially broadened, regardless of what is considered "crypto-assets or crypto-asset services or activities of the same type." Therefore, it is deemed necessary to provide further clarification regarding the scope of paragraph 2 of the aforementioned article, which, as formulated, paradoxically seems to allow solicitation by a third-country CASP in all cases where the first transaction involving that type of crypto-asset occurred at the client's initiative (a conduct that should instead constitute an abuse). For this reason, it is considered essential to explicitly examine the applicability margins of the said paragraph 2 and clearly define the boundaries of a hypothetical exemption from the applicability of paragraph 1. The example provided within orientation 20 of the same chapter above: "For instance, if the client contacts the third-country firm to buy crypto-asset X, the firm may – at this point in time – market to the clients crypto-assets of the same type. However, the third-country firm would not be entitled to market further crypto-asset X transactions or transactions in similar crypto-assets to the client a month later" in our opinion, does not achieve the objective of clarifying the scenario.

Lastly, it is deemed necessary to specify that, according to paragraph 2, "new types of crypto-assets" should be understood as each individual crypto-asset different from the one subject to the first exempted transaction under paragraph 1. It is not understood why the provision of services (e.g., executory) on a crypto-asset at the client's initiative would then legitimize the solicitation of the same services by the CASP on other crypto-assets, even if of the same type.

Q3: Do you consider the proposed supervision practices effective with respect to detecting undue solicitations? Would you have other suggestions?