Paris, 29 April 2024

Paris Europlace Cryptoassets Working Group
Response to the ESMA Consultations

ESMA consultation on 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?

We first welcome ESMA's proactive approach concerning the criteria for qualifying reverse solicitation in the context of the Market in Crypto-Assets ("MiCA") Regulation. The emphasis on determining a broad concept of solicitation, as well as the means and persons involved, shows a desire to protect both investors and MiCA-compliant crypto-asset service providers. This approach, which is broader than MiFID II, will help to avoid differences in interpretation while ensuring a fair level of competition between crypto-asset market participants in Europe.

I. On the means of solicitation

With regard to the means of solicitation, ESMA proposes an exhaustive list of all the ways in which a third-party firm could solicit European clients - an approach that Paris Europlace supports.

However, in our view, some points need to be clarified:

- The sole invitation of a third-party firm to events should not be qualified as active solicitation, unless that invitation is directly aimed at promoting the third-party firm's crypto-asset services. Thus, a third-party country should continue to be able to invite European users to educational events, for example.

- As regards the use of an official EU language, this notion remains rather debatable insofar as certain languages are used internationally (such as Spanish and Portuguese in Latin America or French in Africa). To this end, the use of an official language of the Union should not be considered as a "strong indication" of an act of active solicitation by a third-party firm.

Suggested wording
11. The solicitation of clients by third-country firms should be construed broadly and, in a technology, neutral way.

12. It includes the promotion, advertisement or offer of crypto-asset services or activities to clients or prospective clients in the Union by any means including by way of, without limitation, internet commercials, brochures, telephone calls, face-to-face meetings, press releases, or any other form of physical or electronic means, including social media platforms, mobile applications. It may also include participations in road shows and trade fairs, invitations to events **to directly promote crypto-asset services**, affiliation campaigns, retargeting of advertising, invitations to fill in a response form or to follow a training course and messaging platforms as well as promotions, advertisements and offers of a general nature and addressed to the public (with a broad and large reach) such as, for instance, brand advertisements by way of sponsorship deals.

13. 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**n ~~strong~~** indication **which must be coupled with other objective criteria** that a third-country firm is soliciting clients established or located in the Union. To the contrary, geo-blocking to prohibit access to a website by clients established or located in the Union would be a strong indication.

II. On the notion of influencers with regard to persons soliciting

We note that, as part of its desire to establish a broad concept of reverse solicitation, ESMA is proposing to apply reverse solicitation to promotions carried out by influencers - a concept that has no definition in European law.

The Group considers that these guidelines should not create a concept that does not exist in positive law, as this could **(i)** lead to considerable divergences of interpretation on this concept — particularly between Member States that have already provided for a clear regime for these actors (e.g : France, Spain, and Italy) those that have not passed legislation — and **(ii**) run counter to the principle of predictability of law.

<u>Proposition</u>: Withdraw the reference to influencers while waiting for dedicated legislation at European level, or specify in the recitals how the concept of influencers should be understood and interpreted by the Member States.

The reference to "influencers" should be <u>withdrawn</u>, as it can be included subsequently when a specific framework will be set up for influencers - in particular with the Retail Investment Strategy which should provide a framework for "*finfluencers*".

At least, it seems necessary to establish what could be considered as an influencer according to this guideline.

To this end, ESMA could clarify the notion of influencers, by giving them a non-legal definition in paragraph 14 and in guideline 2.

Suggested wording

Proposition 1:

14. Competent authorities should take into account that solicitation may occur irrespective of the person through whom it is performed.

15. 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 7 to it, as defined in Article 3(31) of MiCA. ~~**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.

16. 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 MiCA. 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).

Proposition 2:

14. Competent authorities should take into account that solicitation may occur irrespective of the person through whom it is performed.

15. 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 7 to it, as defined in Article 3(31) of MiCA. Such persons can include so-called influencers **which may be natural or legal persons who use their audiences to promote, directly or indirectly, a crypto-asset or a crypto-asset service. The determination and identification of an influencer must be based on a case-by-case analysis and be interpreted as broadly as possible to avoid any reverse solicitation from a third-party firm at the national level**. 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.

16. 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 MiCA. 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).

17. These guidelines should not apply if a so-called influencer promotes a crypto-asset or crypto-asset service offered by a third-party firm on his own initiative and without any financial compensation.

III. On the notion of solicitation carried out through general clauses

The criteria for qualifying the notion of reverse solicitation are broader than in MiFID II, but do not address a subject that has been central to financial regulation: general clauses.

In its public statement of 13 January 2021, ESMA pointed out that "some firms appear to be trying to circumvent MiFID II requirements [...] through the use of online pop-up "I agree" boxes whereby clients state that any transaction is executed on the exclusive initiative of the client."

We understand that ESMA considers that reverse solicitation may be contractual or not, formal or informal (paragraph 15 and guideline 3), however, it is appropriate, in view of the issues that this has raised in the context of the application of MiFID to expressly mention general clauses and pop-up windows.

Proposal: Include a reference to general clauses and pop-up windows to harmonise with the regulations of financial instruments.

Suggested wording

It would thus be appropriate to add the following sentence at the end of paragraph 15: ***"For example, the use of general clauses or online pop-up "I agree" boxes whereby clients state that any transaction is executed on the exclusive initiative of the client is deemed to be reverse solicitation.***"

IV. On the duration of the reverse solicitation

With regard to the period of time during which a third-country firm can legitimately rely on the reverse solicitation exemption, ESMA proposes to make timing of essence by prohibiting a third-country firm, which has been solicited by a client in EU/EEA in respect of a specific crypto-assets, services or activities, "*to market further crypto-asset X transactions or transactions in similar crypto-assets to the client a month later*".

However, Article 61(1) of MiCA is drafted in a different way in the sense that it only refers in a first instance to "service" and "activity", not to "crypto-asset":

"*Where a client established or situated in the Union initiates at its own exclusive initiative the provision of a crypto-asset service or activity by a third-country firm, the requirement for authorisation under Article 59 shall not apply to the provision of that crypto-asset service or activity by the third-country firm to that client, including a relationship specifically relating to the provision of that crypto-asset service or activity.*"

Thus, on the basis of the MiCA drafting, once a client in the Union has started to receive one or more crypto-asset services in respect of any crypto-assets from a third-country firm, the latter should be able to continue to market the features (including new features) and products (including new crypto-assets) associated with that(those) crypto-asset service(s).

For example, if a client initiates the provision of the service of exchange of crypto-assets for funds in respect of the EUR/BTC trading pair, the third-country firm should be able to market any other trading

pairs pursuant to Article 61(1), provided that the crypto-assets in those pairs are of the same "type" (pursuant to Article 61(2)).

As another example, if a client initiates the provision of the service of operation of a trading platform for crypto-assets enabling to trade at market price (as this is the only order type available), the third-country firm should be able to market different order types (e.g. limit orders, stop orders) as they become available on the platform.

In this context, the development of new features or the availability of new trading pairs may take months or years, but are still strictly related to the same service originally requested by the client. Thus, by imposing a time limit, ESMA is stricter than MiCA and runs counter to the interests of EU-based clients (who, unlike clients in other countries, would not be able to benefit from these new features), and deviates significantly from our understanding of market practice.

We therefore believe that ESMA's guidelines should not be so restrictive and should either (i) allow third country firms to interpret Article 61(1) more broadly or (ii) suggest examples such as those mentioned above to reassure these third country firms that the availability of new features or new trading pairs in respect of the same service originally requested by the client can still be marketed to the client without any time limit.

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?

Regarding the paragraph 25 point 3, it seems opportune to **exclude from the scope of the guideline electronic money tokens not referencing the same official currency but issued by the same issuer**. The same reasoning could be made with ARTs in point 4. In our view, this is a relevant criterion to exclude reverse solicitation insofar as some EMT issuers issue several EMTs collateralised by different legal currencies (e.g Tether, Circle). Thus, although the underlying asset seems different, the similarities between these two assets seem undeniable (same issuers, probably same banks used for the reserve and same central securities depositories for the placement of highly liquid assets).

Suggested wording
Thus, paragraph 25 point 3 would read as follow: "**utility tokens, asset-referenced tokens or electronic money token, unless they are issued by the same issuer**."

The notion of « same technology » in paragraph 25 point 2 is unclear as every crypto-assets use the distributed ledger technology (as defined in article 3(1) of MiCA) to be stored or transferred. This provision, interpreted too broadly by a national competent authority, would risk overriding all the others provided for in the guideline. we understand that the idea is to consider that tokens native to the same protocol (e.g. ERC-20) would be considered as belonging to the same category, which we do not refute.

To avoid any misunderstanding when applying the text, it would be better to delete the term "same technology".

Suggested wording

Thus, paragraph 25 point 4 would refer to: "**crypto-assets not stored or transferred using the same ledger or the same protocol**".

Also, it should be provided that the provision of services on crypto-assets excluded from the scope of Article 3(16) would not have an impact on the notion of active solicitation, regardless of the expected time frame (a few weeks / one month) to consider an active solicitation after a customer has subscribed to a crypto-asset or crypto-asset service through a third-party firm.

This would allow these third-party firms to offer a customer who has already subscribed to a crypto-asset service or acquired a crypto-asset (e.g. ether) an “ancillary service” outside the scope of MiCA to further diversify his investment.

Suggested wording

A paragraph 26 could therefore be added to recommendation 5.4:

“**When the user has actively subscribed to a service on crypto-assets with a third-party country, the latter remains entitled to actively offer to the user other activities or services on crypto-assets that do not fall within the scope of the MiCA Regulation. These crypto-asset services may include, but are not limited to, the unique and non-fungible crypto-assets referred to in Article 2(3) of MiCA and the lending services referred to in Article 142 and recital 94 of MiCA**”.

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

Paris Europlace supports the approach that competent authorities should closely monitor the potential activity of third country firms in their respective jurisdictions and has no particular comment to make in this regard.

ESMA consultation on the qualification of crypto-assets 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?

Yes. The financial instruments regulation (with Annex 1C of MIFID) has always been built around broad and deliberately inclusive concepts to be future proof.

We believe that this approach has in most cases proved effective.

In order to offer a sufficient degree of legal protection and to facilitate the distinction between crypto-assets within the scope of MiCA and crypto-assets assimilated to financial instruments, ESMA has opted for a holistic approach, enabling the national competent authorities of EU member states to move forward in an harmonised way on the assimilation of crypto-assets to financial instruments, without the criteria set in place being too strict to risk rapidly becoming obsolete.

However, Paris Europlace would like to warn ESMA not to fall into the trap of taking an approach to the notion of financial instrument that does not reflect the historical position of EU member states. For example, economic criteria relating to the existence of a non-enforceable expectation of profit, without necessarily attaching ownership or governance rights, should not constitute a criterion for assimilating a crypto-asset to a financial instrument. Finally, these guidelines could also mention two new developments on the crypto-asset markets:

- **Specify definitively the nature of perpetual futures**: Perpetuals are a new type of financial contract in which two counterparties will trade a contract that defines the settlement at a future date of a crypto-asset without any fixed term being provided for when the financial contract is entered into. Although these contracts would probably be classified as financial instruments - more precisely as futures with the meaning of Annex II, Section C point 10 of MiFID II, or even CFDs within the meaning of point 9 of the same section - we consider that it would be relevant to mention these new instruments, which have recently experienced a significant growth in the crypto-asset markets.
- **Exclude margin trading from the category of financial instruments**: Margin trading, which, although sometimes inappropriately considered as derivatives, seems to us to fall more into the category of crypto-lending mentioned in Article 142 and recital 94 of the MiCA Regulation, since this operation consists of providing a certain amount of collateral in crypto-assets to increase the size of one's exposure to a crypto-asset. This analysis has already been validated at national level in several member states (notably France) when applying for a license for certain CASPs. It should be noted that this assimilation does not exclude the qualification of one or more crypto-asset services, such as services for exchanging crypto-assets for other crypto-assets, or the service of custody of crypto-assets on behalf of third parties.

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 condition and/or criteria to suggest? Please illustrate, if possible, your response with concrete examples.

Considering the diversity of approach on the definition of transferable securities among the Member States, ESMA favors a technologically neutral approach. It proposes to consider that, in order for crypto-assets to qualify as transferable securities, crypto-assets should fulfil cumulatively the following three criteria: (I) not being an instrument of payment; (ii) being "classes of securities"; and (iii) being negotiable on the capital markets.

Preliminary remarks:

- Paris Europlace fully supports the technologically neutral approach proposed by ESMA.

- Conceptually, and despite the various definitions adopted in the EU Member States, transferable securities do all represent a monetary claim against the issuer and embed specific prerogatives with regard to this issuer, including a right for profits. These criteria should be added to the cumulative criteria suggested above.

- Additionally, transferable securities are defined by a list of securities which has been implemented in the national law of each jurisdiction. For crypto-assets to qualify as transferable securities, it must characterize one of the types of transferable securities defined in the applicable law. If they do not, they should not qualify as such, regardless to the cumulative criteria listed above.

- Given the diversity of the list of securities which has been implemented in the national law of each jurisdiction, and to avoid regulatory shopping within the EU, a Q&A should be produced by ESMA to list examples, for each Member State, for which certain crypto-assets could be reclassified as financial instruments under national law. This Q&A could be updated and provide the European crypto-asset market with global visibility on the qualification risk with a view to harmonisation within the EU. This Q&A could also serve as a regulatory monitoring tool for the legal status of crypto-assets and help ESMA to identify any lack of harmonization in terms of qualification of crypto-assets as transferable securities within the EU.

Hence, crypto-assets should qualify as transferable securities under MiFID only if they pass cumulatively the following test:

- **they meet the criteria of the conceptual definition of transferrable securities, i.e. they represent a monetary claim against the issuer that embed a right for profits;**
- **they meet the cumulative criteria identified by ESMA, i.e. 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.**

Suggested wording
95. National competent authorities and market participants should classify crypto-assets as transferable securities if they confer to their holders ~~**similar or equivalent**~~ **the same** rights **as** ~~**to**~~ those granted by shares, bonds, other forms of non-equity securities or other negotiable securities as defined by MiFID II .
96. A crypto-asset should qualify as a financial instrument if it falls within the definition of a transferable security provided by MiFID II. In such case crypto-assets should be subject to the exact

same rules as other traditional financial instruments in line with the principle of technological neutrality. A substance over form approach needs to be adopted to determine if a crypto-asset is qualified as a financial instrument.

97. National competent authorities and market participants should thus consider that in accordance with Article 4(1), point (44), of MiFID II in order for crypto-assets to qualify as transferable securities, crypto-assets should fulfil cumulatively the following ~~three~~ **four** criteria: (i) **they represent a monetary claim against the issuer that embed a right for profits; (ii)** not being an instrument of payment; (iii) being "classes of securities"; and (iv~~ii~~) being negotiable on the capital market.

Remarks on the cumulative criteria proposed by ESMA:

i. On the exclusion of instruments of payment

Paris Europlace supports the broad definition of 'instruments of payment' for the purpose of determining the qualification of crypto-assets. In this regard, the interpretation used for the purpose of the regulation on anti-money laundering provides useful guidance (see for example art. 12 of EU Directive 2015/849).

In case of crypto-assets with several components, Paris Europlace supports the case-by-case analysis. However, this analysis should lead to characterize one or more qualifications applicable depending on the features envisaged. Merely referring to the most appropriate qualification leaves to much discretion to the NCAs.

Suggested wording

99. MiFID II does not provide any definition of "instruments of payment". A crypto-asset that would be qualified as such instrument should be seen as a crypto-asset which is used only as a medium of exchange. If a crypto-asset were to have several components, including that of an instrument of payment, national competent authorities and market participants should have to conduct a case-by-case analysis **to determine the ~~favouring the most~~** appropriate qualification for this crypto-asset.

ii. On the classes of securities

Paris Europlace supports the approach according to which crypto-assets can only be qualified as transferable securities if they are issued as class. However, Paris Europlace supports a precise interpretation of this notion, which shall be construed as requiring that all the assets issued as part of a class should confer identical rights.

ESMA should clearly indicate that crypto-assets presenting only similarities or being interchangeable may not be considered as issued in class.

Furthermore:

- Need to reword the wording "the attributes of each crypto-assets allow such instruments to be traded". It should be replaced by the fact that crypto-assets belonging to the same class should provide to any of their holders the same rights/obligations towards their issuer.

- Need to clarify the wording “if the issuance comprises different classes of crypto-assets that are clearly identifiable”.

Suggested wording
101. National competent authorities and market participants should also take into account that crypto-assets belonging to a class of securities are also linked to the fact that such securities are capable of being transferred even if not in fact traded. ~~**The term “class” may thus refer to the notions of interchangeability, fungibility and/or equivalence, meaning that the attributes of each crypto-assets allow such instruments to be traded66**~~. If all crypto-assets of the same issuance are of the same kind, ~~**or if the issuance comprises different classes of crypto-assets that are clearly identifiable**~~, the “class requirement” criterion should be considered to be met. 102. National competent authorities and market participants should consider that the classes of securities mentioned in points (a) to (c) of Article 4(1), point (44), of MiFID II are examples of securities that fall within the definition of transferable securities. As such, crypto-assets that would represent an ownership position in a company’s capital and confer to their holders **the same** rights ~~**similar or equivalent to**~~ **as** the rights conferred by shares (e.g. stake in the company, participation in the management of company rights, access to a part to company profits, or rights to the company’s liquidation proceeds), should be qualified as securities that have features specific to shares. National competent authorities and market participants should make a distinction between crypto-assets granting their holders dividend rights **identical** ~~**comparable**~~ to those given by a share and those granting financial rights that are unrelated to company profits or liquidation surpluses. 106. National competent authorities and market participants should conclude that crypto-assets conferring to their holders the rights **identical** ~~**similar**~~ to those of other transferable securities as defined by Article 4(1), point (44), of MiFID II should be considered as crypto-assets having features of financial instruments and are therefore subject to the MiFID II regime. This includes options, warrants, and structured bonds where the interest is linked to any derivative (e.g. selected stock index, interest rate, other derivate or a combination of derivatives).

iii. On the negotiability

Paris Europlace supports the approach according to which crypto-assets may qualify as transferable securities only if they are negotiable.

The negotiability shall be understood as referring to the enforceability of transfers of assets against third parties and the issuer without any formality. The absence of formalities does not imply the absence of limits or conditions to transfer (e.g. see limits that can be imposed in the by-laws on transfers of shares).

Based on this approach, ESMA should refrain from mixing this concept with others such as standardization and fungibility (which, regarding transferable securities, are more a consequence of the issuance in class). Identically, the concept of negotiability should not be mixed with tradability, which only refers to the possibility of trading an asset without specifying whether it is subject to formalities.

Suggested wording
107. National competent authorities and market participants should determine if the crypto-asset is freely negotiable on the capital market. Such concept implies that the instrument **may be**

transferred, with this transfer being enforceable against the issuer and third parties without any formality. ~~**is tradable. It also presupposes fungibility which has to be measured having regard to the capability of the crypto-asset to express the same characteristics per unit. National competent authorities and market participants should therefore consider that if inherent restrictions on transfer prevent a crypto-asset from being tradable in such contexts, it is not a transferable security**~~.

108. More specifically, a crypto-asset should be considered to be negotiable where it is capable of being transferred or traded **and where the ownership on the said crypto-asset being transferred to the recipient with no formality to perform other than the registration on the DLT** ~~**on capital markets 70 . 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 or even if there is a temporary lockup period.**~~ The negotiability requirement set out in Article 4(1), point (44), of MiFID II seems to be met by most crypto-assets, since the DLT makes the transfer of ownership from the seller to the buyer possible.

109. A crypto-asset can be designed in a way that it does not allow for any transfer in capital markets. Some restrictions may be placed on negotiability by not allowing holders to negotiate and/or transfer crypto-assets to a person other than the issuer **if certain formalities are not performed**. ~~**In respect of any restrictions on the transfer of financial instruments, these need to be considered on a caseby-case basis, as the nature and impact of the restriction could be sufficient to render the instrument non-tradable, hence falling outside the definitional scope of "transferable security". Similarly, national competent authorities and market participants should also take into account other restrictions that may exist which may not prevent a crypto-asset from being tradable (e.g. selling restrictions for a specified period of time, lock-up, specific country limitation).**~~

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

Crypto-assets, although not qualifying as financial instruments per se, may fall into one of the categories of underlying assets for derivatives, which are characterized as being either a forward, an option, a swap or a future. It should be noted that any contract for differences on crypto-assets would qualify as a financial instrument as falling in C8 of Annex I Section C of MiFID II.

Forwards on crypto-assets may qualify as financial instruments in meeting the criteria of C10, which notably, by reference to article 10 of Delegated Regulation 2017/565, are cash settled. Cash settlement should not be construed restrictively as only referring to cash settlement using fiat currency. Such settlement could also take place using other crypto-assets, or potentially and more generally any other asset being capable of valuation. Most of the forwards or CFDs (including binary options) are settled with crypto-assets and not fiat currency (as CBDCs are not yet available to allow an integrated blockchain settlement). We have no view whether asset-referenced tokens would be preferred for settlement purposes to other types of crypto-assets but it should not impact the characterization of the contract as a financial instrument.

On the settlement process itself, there may be two ways to ensure a proper settlement : either (i) two smart contracts would interact (one for the derivative itself and the other for the cash settlement at maturity, using a HTLC or (ii) a pre-margining mechanism by both parties within the derivative contract itself which would enable the cash settlement to be unlocked at maturity.

Suggested wording

120. National competent authorities and market participants should consider the possibility for crypto-assets to be eligible underlying assets in derivative contracts. National competent authorities and market participants should ensure that their approach to evaluating such derivatives is aligned with the categories specified in Annex I Section C, points (4)-(10) of MiFID.

121. Regarding the conditions and criteria for crypto-assets to be qualified as derivative contracts, 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 **(which can be either a forward, an option, a swap or a future)**, 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.

122. National competent authorities and market participants should ascertain that the crypto-asset has an underlying reference point such as, rates, indexes, or instruments relevant in accordance with Annex I Section C, points (4)-(10) of MiFID II. To do so, national competent authorities and market participants should take into account the list of Annex I Section C, points (4)-(10) of MiFID II as well as all related level 2 texts, and carefully analyse if the relevant crypto-asset includes the elements mentioned therein. The underlying is the basis for determining the value or payoff of the derivative. The value of the crypto-asset should also depend on changes in the value of the underlying reference asset. If a crypto-asset does not derive its value from specified underlying assets as defined in MiFID II, but exists as a standalone crypto-asset, it should be distinguished from a derivative contract.

123. National competent authorities and market participants should consider that there should be a contractual agreement between parties as opposed to "securitised derivatives", that should be covered by the definition of transferable securities (such contract may specify the terms of the derivative instrument, including its maturity, price and other relevant terms). Therefore, a crypto-asset lacking an underlying asset and a contractual relationship entailing a forward commitment should generally not be considered a derivative contract.

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 abovementioned points C4 to 10 are met.

124bis. As for any financial instrument referred to in Annex I Section C, point (10) of MiFID II, a forward agreement on a type of crypto-assets providing for a cash settlement, may be settled in any way, except in delivering the referenced underlying asset, including by the transfer of other crypto-assets (being an asset-referenced token or other type of crypto-assets).

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 condition, criteria and/or concrete examples to suggest?

As a general view, we remain in favour of an alignment of the criteria for qualification of financial instruments with those set in MiFID, by virtue of the "same activity, same risk, same rules" principle for each respective category of financial instruments.

The application of this principle would imply that crypto-assets that have the features of the related MiFID financial instrument would be captured by MiFID, thus echoing the exclusion approach laid down in MiCAR.

Activities involving crypto-assets are partially open to UCITS and AIFM asset management companies. This possibility is not directly written into the AIFM / UCITS reform. However, it is expressly provided for in article 60 of the MiCA regulation, an extract of which is reproduced below:

> "*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****."*

ESMA guidelines on key concepts of the AIFMD state the following:

> "*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*."

Paris Europlace supports these 3 criteria, which, until now, only target the "other AIFs" category for tokenized crypto-asset fund units. However, the combination of these 3 criteria should only concern the fund's assets. This combination should also serve as criteria when it comes to qualifying a smart contract as a tokenized fund.

Moreover, it should be noted that the absence of a general commercial or industrial purpose, which is mentioned at paragraph 57, is not included in the criteria provided in the text of the Draft Guidelines (Annex II), and more specifically in paragraphs 115 to 119. We suggest including this element in the Draft Guidelines, in accordance 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 condition and/or criteria to suggest that could be used in the Guidelines? Please illustrate, if possible, your response with concrete examples.

Paris Europlace supports ESMA's approach of setting out the conditions and criteria for differentiating between financial instruments within the meaning of MiFID II and crypto-assets within the meaning of MiCA, by reference to intrinsic features of crypto-assets rather than by referring to those intrinsic to financial instruments as discussed in guidelines 1 to 6.

This being said, whilst we understand the rationale for excluding ARTs and EMTs from the scope of these guidelines, we believe that, when addressing the characteristics of the third category of crypto-assets, namely crypto-assets other than ARTs and EMTs, ESMA should not limit Guideline 7 to discussing the characteristics of "utility tokens" (§61 to 63 of the guidelines). This is because utility tokens are indeed only one category of crypto-assets other than ARTs and EMTs which is are narrowly defined with reference to their provision of "access to a good or a service supplied by its issuer".

Yet, crypto-assets other than ARTs and EMTs may encompass other types of crypto-assets falling into the general definition set out in Article 3(1)(5) of MiCA and which are not stablecoins (i.e. ARTs or EMTs), whilst being fungible but not issued by a designated legal entity (such as Bitcoins, which are not issued by someone, but are created by way of an algorithmic process), and whilst not always giving solely access to a good or service.

ESMA should therefore:

- **clarify that the definition of crypto-assets other than ARTs and EMTs includes crypto-assets other than utility tokens, in line with Recital (18);**
- **rewrite §62 and §63 to expressly include the case for crypto-assets other than ARTs, EMTs and utility tokens, such as: (i) tokens not issued by a legal entity; and (ii) tokens which may give access to other crypto-assets (or clarify that the concept of goods include the concept of crypto-assets) or translate into some monetary rights (or a combination of monetary rights, goods and/or crypto-assets);**
- **be more specific when it says that governance rights attached to crypto-assets should not replicate the rights attached to financial instruments, by giving more concrete examples of governance rights which, in ESMA's view, do not replicate those attached to financial instruments.**

In addition to distinguishing between financial instruments and crypto-assets, Paris Europlace welcomes ESMA's move to clarify the scope of recital 17 of MiCA. Indeed, the exclusion from the scope of MiCA provided for in its recital 17 should not be restricted to loyalty/reward program crypto-assets, but to all crypto-assets that are non-transferable to other holders and that are only accepted either by the issuer or by the offeror.

Finally, beyond the distinction between financial instruments and crypto-assets, the guidelines should confirm that the exclusion of services provided in a decentralised manner also applies to services involving crypto-assets qualified as financial instruments. As crypto-assets qualified as financial instruments are considered a type of crypto-asset (see notably recital 3 of MiCA), they should already be included in the exclusion provided for in recital 22 concerning the provision of services on crypto-assets in a fully decentralised manner. However, to offer greater legal predictability to industry players, these draft RTS should expressly specify that the provision of functionalities on derivative contracts (and more broadly on tokenized financial instruments) in a fully decentralized manner should, as for the provision of services on crypto-assets within the meaning of Article 3(16) of MiCA, benefit from the exemption provided for in Recital 22 of the MiCA Regulation. Indeed, the reasoning behind Recital 22 - that traditional financial regulation (based on the territorial application of rules to easily identifiable and centralized entities) is not adapted nor proportionate to protocols managed by fully decentralized communities (i.e., so-called DAOs) on public blockchain networks - must consider all the use cases offered by crypto-asset markets.

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 condition and/or criteria to suggest? Please illustrate, if possible, your response with concrete examples.

Paris Europlace supports clarifications on the exclusion of unique and non-fungible crypto-assets ("NFT") from the definition of crypto-assets under the MiCA Regulation.

However, the group consider that the following elements should be taken into greater consideration:

- The approach on the possible qualification of NFT as crypto-assets should not be too inclusive, with the risk otherwise of too many NFT-projects falling within the scope of MiCA whereas the resources of NCAs will not be adapted accordingly. This could hamper the capacity of NCAs to handle properly crypto-players clearly within the scope of MiCA and make to transition to the new EU regulation more difficult for them.

- The guidelines are welcome only to the extent they provide practical criteria to qualify unique and non-fungible crypto-assets as financial instrument or not. In the absence of such practical criteria, and considering the absence of explicit mandate for ESMA to issue guidelines on the treatment of NFT in relation to the definition of a crypto-asset (only assimilation as a financial instrument is provided), **Paris Europlace would prefer not to preempt the report to be submitted by the European Commission by 30 December 2024.**

To provide a practical and pragmatic approach, Paris Europlace supports the case-by-case analysis based on a range of indicators, including (but not limited to) the technical specificities of NFTs. To this end, the purely subjective conception of fungibility should be retained more by ESMA, especially when it comes to implementing the compensation mechanism (i.e. determining whether two NFTs have the same settlement value, because it makes no difference to the creditor to receive one rather than the other). However, the guidelines may, in certain specific uses related to NFTs (see below), authoritatively consider certain types of crypto-assets to be non-fungible, reflecting any risk of misinterpretation of the notion of fungibility with regard to the crypto-asset definition. Subjectivity must continue to prevail in order not to assess the artistic value of certain NFTs and to consider that, in some cases, NFTs that are not sufficiently visually (or economically) dissociable would qualify as

crypto-assets and would have to comply with financial regulations, even though this is not the primary use of such NFTs. The FATF also specified in its guidelines that NFTs used primarily for payment or investment purposes are sometimes qualified by jurisdictions as virtual assets[1].

- In this regard, the criteria of the value interdependency, as defined by ESMA, is one of the aspects that may be taken into account. But it should not be more important than others, as there are numerous non-fungible goods whose value is dependent upon assets of the same class (e.g., real estate).

- One of the other criteria that may be taken into account is whether NFT are structured in such a way as to providing to their holders specific prerogatives/value that are unique, for example because they depend on how the NFT has been used, etc. Typically, many examples of NFTs in the gaming industry, for which the issuer may be subject to *ad hoc* regulations, should be excluded from the definition of crypto-assets under the MiCA Regulation.

- The notion of fungibility and uniqueness should not be mixed with the asset's negotiability on secondary markets. ESMA should not preempt the link to be made between these notions that are distinct and not systematically correlated.

- In any case, NFT could be considered as within the scope of MiCA if they qualify as crypto-assets. Crypto-assets are defined 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". NFT should be subject to MiCA only if they represent: (i) a value or (ii) a right, i.e. an extrinsic right that goes beyond the proprietary right on the NFT for its holder. A such, NFT representing a pure certificate of authenticity or a domain name, should not qualify as crypto-assets and should remain out of scope of MiCA.

- Furthermore, one of the other criteria should also be to assess if an NFT, together with other assets, could give rise to an 'offer to the public' as defined in the MiCA Regulation. More specifically, one should assess whether, for such NFT together with the other assets envisaged, there could be a "communication to persons in any form, and by any means, presenting sufficient information on the terms of the offer and the crypto-assets to be offered so as to enable prospective holders to decide whether to purchase those crypto-assets". The unicity and non-fungibility of certain NFT may make it impossible to prepare a global communication with enough global information on them to enable the purchase by prospective holders, especially if prices vary for each NFT depending on numerous factors.

- Finally, the guidance should comply with the clarifications provided in the recitals of the MiCA Regulation. These recitals explicitly exclude from the scope of MiCA NFT representing digital art and collectibles, product guarantees or real estate. The guidelines should reaffirm this exclusion.

[1] "Most jurisdictions that are more advanced in regulating VASPs (i.e., those that have implemented the Travel Rule) are regulating NFTs as VAs where appropriate (e.g., where NFTs are used for payment or investment purposes)."

ESMA's guidelines should provide anonymized examples of situations where the qualification of 'crypto-assets' should be applied or not.

Suggested wording

134. National competent authorities and market participants should consider that to be unique, NFTs should be considered distinct and irreplaceable where their characteristics and/or the rights they provide are not identical to the other crypto-assets issued by the same (or any other) issuer.

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. **The assessment of whether an asset is not fungible shall be based on a range of indicators, including (but not limited to) the technical specificities of NFTs.**

136. An "interdependent value test" **is one of the indicators that may be taken into account ~~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 the utility/benefits it offers to its holder; (ii) the extent to which the interconnection of various types of crypto-assets influences the value of one another in such a way that the NFT has no value of its own that would be decorrelated 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 value dynamics. This interconnectedness should become a ~~**key**~~ factor when these crypto-assets influence each other's value, thereby challenging their perceived "uniqueness".

138. When evaluating the uniqueness of a crypto-asset, NCAs **may consider ~~should focus on~~** the features that contribute to its distinct value.

139. ~~**The assessment of uniqueness and fungibility in the context of MiCA should be considered independently of the asset's negotiability on secondary markets. The ability to trade a crypto-asset on such markets does not inherently affect its classification under MiCA as unique or non-unique**~~. NFTs that are issued "in a large series or collection" may be considered fungible and thereby covered by MiCA84 . **By contrast, NFTs structured to provide to their holders specific prerogatives/value that are unique, for example because they depend on how the NFT has been used (especially for NFTs in the gaming industry, for which the issuer may be subject to ad hoc regulations), should be excluded from the definition of crypto-assets under the MiCA Regulation.**

140. In any case, NFT could be considered as within the scope of MiCA if they qualify as crypto-assets, i.e. 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". Hence, NFTs should be subject to the MiCA regulation only if they represent: (i) a value or (ii) a right, i.e. an extrinsic right that goes beyond the proprietary right on the NFT for its holder. A such, NFT representing a pure certificate of authenticity or a domain name should not qualify as crypto-assets and should remain out of scope of MiCA. Furthermore, NFTs may qualify as crypto-assets under the MiCA regulation only if they can give rise to an 'offer to the public', i.e. a "communication to persons in any form, and by any means, presenting sufficient information on the terms of the offer and the crypto-assets to be offered so as to enable prospective holders to decide whether to purchase those crypto-assets". The unicity and non-fungibility of certain NFTs

may make it impossible to have a global communication with enough general information on them to enable the purchase by prospective holders, especially if prices vary for each NFT depending on numerous factors.

1410. National competent authorities and market participants should also consider that fractionalised NFT (F-NFTs) may be qualified as a crypto-asset within the meaning of MiCA 85 . As part of their assessment, national competent authorities and market participants should consider whether the crypto-assets represent a partial ownership stake in a single unique and non-fungible token; if fractional parts of a unique and non-fungible crypto-asset, when considered separately, are also deemed unique and non-fungible; whether these fractional parts share identical attributes or characteristics; and the possibility of reconstructing complete ownership of the unique and non-fungible token by aggregating all its fractional components.

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

This recommendation states that if a crypto-asset presents the characteristics of several assets (i.e., utility tokens and financial instruments), the qualification of financial instrument should prevail over the other characteristics.

Paris Europlace agrees with this general approach, which will need to be considered on a case-by-case basis, and has no specific comments to make in this respect.