

Public hearing: Joint-ESA Guidelines under Article 97(1) MiCAR

23 September 2024



Public hearing – Goals and Rules

Goals

- Public hearings are organised during the public consultation period for RTS / ITS / GL to **allow interested parties to ask clarifications**;
- The purpose of the hearing is for the ESAs to present a summary of the CP and ask attendees whether they require additional explanations or clarifications from the ESAs so as to be able to answer the questions in the CP;
- The **public hearing therefore does not replace written responses to the CP**: the ESAs can only consider the views of stakeholders via written responses.

Housekeeping rules

- To avoid background noise, please stay muted during the presentation, unless you take the floor.
- To increase audio quality please turn off video streaming if you are not speaking.
- If you would like to intervene during the Q&A session, please identify yourself, either:
 - a) Raising your hand on Teams and when the floor is given to you, by providing your full name and organisation; or
 - b) Indicating in the Teams chat your name and on which topic you'd like to intervene; or
 - c) Writing your question / comment directly in the Teams chat.

Purpose and objectives of the draft GL under Article 97(1) MiCAR

In accordance with the mandate for the ESAs conferred by Article 97(1) MiCAR the [draft GL](#) set out:

- A **template** establishing the content and form of the explanation accompanying the crypto-asset white paper referred to in Article 8(4) of MiCAR.
- A **template** establishing the content and form of the legal opinion on the qualification of ARTs referred to in point (b)(ii) of Article 17(1) and point (e) of Article 18(2) of MiCAR.
- A **standardised test** for the classification of crypto-assets.

Overall objective: To promote convergence in classification.

Template: explanation accompanying crypto-asset white papers (Title II)

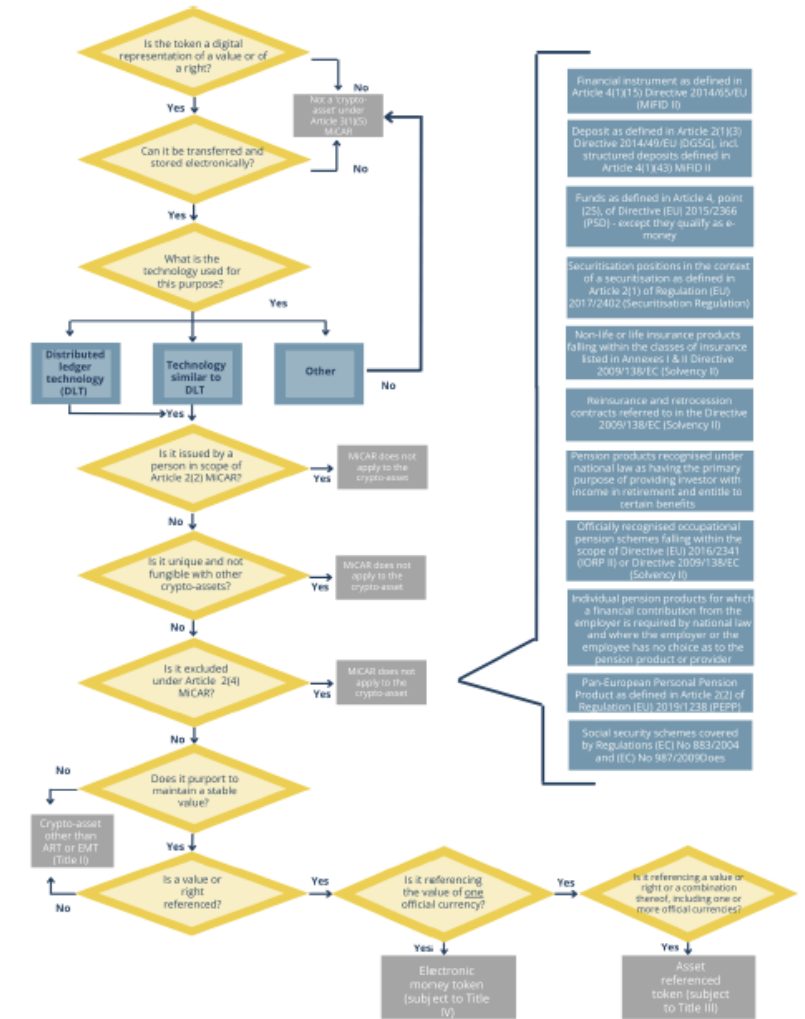
- Article 8 MiCAR specifies that notifications to competent authorities of white papers for crypto-assets that are not ARTs/EMTs should be accompanied by an **explanation** setting out why the crypto-asset described in the white paper should not be considered:
 - excluded from the scope of MiCAR pursuant to Article 2(4);
 - an EMT (Title IV);
 - an ART (Title III).
- The draft GL set out a **template** for this explanation.
- This is structured to facilitate a complete explanation against all three alternative possible qualifications to which reference is made above.
- The draft GL specify the information set out in the explanation should be **clear, fair, not misleading and complete** to facilitate the understanding of the status of the crypto-asset by competent authorities.

Template: legal opinion on the qualification of ARTs (Title III)

- Article 17(1) and 18(2) MiCAR specify that white papers submitted to competent authorities regarding purported ARTs should be accompanied by a **legal opinion** explaining that the crypto-asset does not qualify as a crypto-asset
 - excluded from the scope of MiCAR pursuant to Article 2(4);
 - an EMT (Title IV).
- The draft GL set out a **template for the legal opinion**. Again, the template is structured.
- The draft GL specify the information set out in the legal opinion should be **clear, fair, not misleading and complete** to facilitate the understanding of the status of the crypto-asset by competent authorities.
- The draft GL specify the legal opinion should be prepared by an in-house or external legal adviser. The legal adviser should be able to issue the opinion in an **objective manner, free from conflicts of interest**. Evidence should be provided of the legal adviser's ability, as a matter of professional practice, to issue a legal opinion. This may include, as applicable, a diploma, a practicing certificate, registration with the relevant professional body in the Member State concerned.

Standardised test (universal)

- Competent authorities and other persons to whom the draft GL are addressed (e.g. issuers, CASPs etc) should apply a common approach to determine the classification of a crypto-asset on a case-by-case basis taking account all the attributes of the token in question.
- In particular, this should involve an assessment of whether the token:
 - Is a crypto-asset;
 - is in scope of MiCAR (or otherwise some other EU regulation such as MiFID);
 - If it is in scope of MiCAR, whether the crypto-asset is in scope of:
 - Title IV (EMT)
 - Title III (ART)
 - Title II (crypto-assets that are not ARTs/EMTs).
- The draft GL establish common test for this purpose, acknowledging that:
 - a case-by-case assessment will always be needed;
 - the GL cannot further prescribe definitions of terms defined in EU law;
 - the GL do not cover the same content as for the ESMA GL under Article 2(5) MiCAR (guidelines on the conditions and criteria for qualification of crypto-assets as financial instruments)

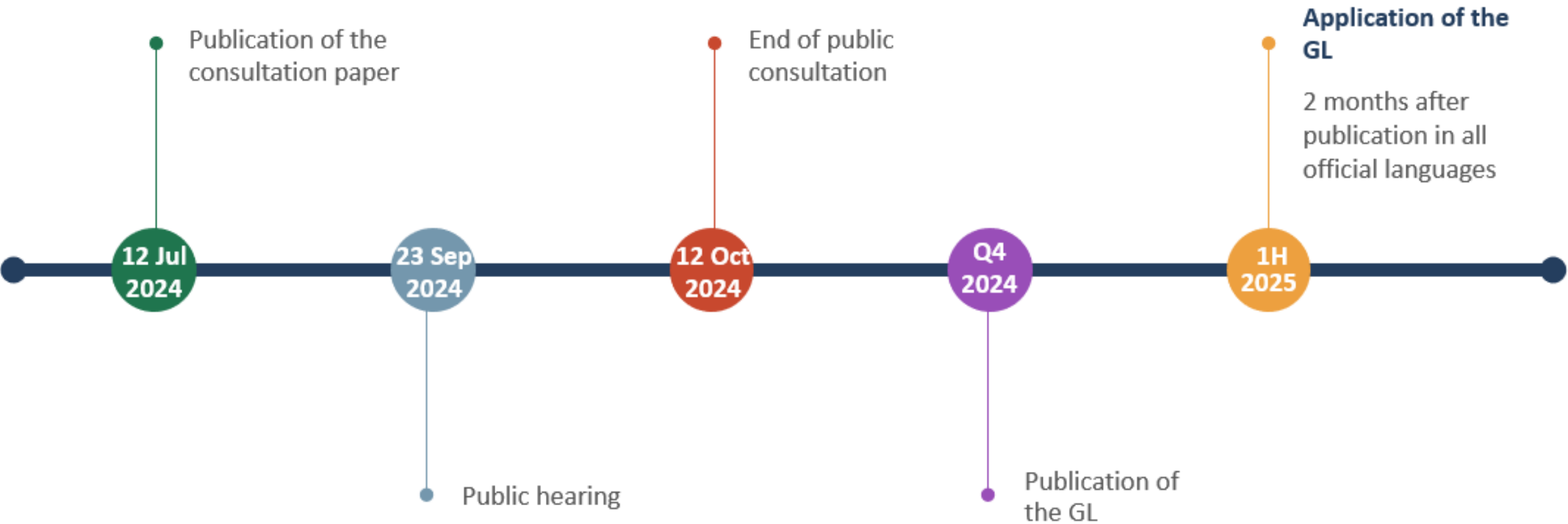


Overview of consultation questions

1. Do respondents have any comments on the template for the purposes of Article 8(4) Regulation (EU) 2023/1114??
2. Do respondents have any comments on the template for the purposes of Article 17(1) point (b)(ii) and Article 18(2) point (e) of Regulation (EU) 2023/1114?
3. Do you consider that the fields of the template relating to explanations as to regulatory status are sufficiently clear and would enable a proportionate completion in line with the simplicity or complexity of the structure of the crypto-asset to which the explanation or legal opinion relates?
4. Do respondents have any comments on the standardised test?

Deadline for responses: 12 October 2024

Timeline



Q&As

