



European Securities and  
Markets Authority

# Annex 1

**Legal qualification of crypto-assets – survey to NCAs**



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# 1. Background

1. To better understand the circumstances under which crypto-assets may qualify as financial instruments in the EU, ESMA undertook a survey of National Competent Authorities (NCAs) in the summer of 2018. The survey questions were designed to determine the way in which a given Member State had transposed MiFID II into its national law and based on that transposition whether a sample set of six ICO crypto-assets qualified as 'financial instruments' under their respective national laws. The questions referred to the types of financial instruments under MiFID II and took into account each element of the MiFID II definitions of such financial instruments. Also, there were questions on other national rules likely to apply to crypto-assets and the possible future regulatory treatment of crypto-assets and ICOs.
2. 29 NCAs provided answers to the survey, including the 27 EU Member States (all except Poland), Liechtenstein and Norway. Some NCAs did not provide responses to all questions. In particular, some NCAs considered that the information available was not sufficient to qualify the six crypto-assets. Others have seemingly not formed a view on certain questions yet, because the crypto-asset phenomenon is still nascent and evolving.
3. This note presents the outcomes of the survey, which will serve to inform ESMA's work on crypto-assets going forward.

## 2. Executive summary

4. There is currently no legal definition of 'crypto-assets' in the EU financial securities laws.<sup>1</sup> A key consideration of the legal qualification of crypto-assets is whether they may qualify as MiFID II financial instrument. The existing EU financial regulation establishes a comprehensive regulatory regime governing the execution of transactions in financial instruments.
5. In an effort to determine the legal status of crypto-assets and determine possible applicability of EU financial regulation ESMA undertook a survey of NCAs in the summer of 2018 with the aim to collect detailed feedback on the possible legal qualification of crypto-assets as financial instruments. The survey questions were designed to determine the way in which a given Member State had transposed MiFID II into its national law and, based on that transposition, whether a sample set of six crypto-assets issued in an ICO qualified as 'financial instruments' under their respective national laws. The sample crypto-assets reflected differing characteristics that ranged from investment-type (crypto-asset cases 1 and 2), to utility-type (case 5), and hybrids of investment-type, utility-type and payment-type crypto-assets (cases 3,

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<sup>1</sup> However, note that Directive 2018/843 of the European Parliament and Council of 30 May 2018 amending the Anti-Money Laundering Directive (EU) 2015/849 includes a definition of "virtual currencies" as " *virtual currencies*" means a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically".

4 and 6). Pure payment-type crypto-assets were not included in the sample set on purpose. The following is a summary of the survey sample results as reflected in the majority of the responses. The survey results are discussed in greater detail further below. The features of the six-sample crypto-assets are provided in Annex 1.

6. Noteworthy, the results reflected below should not be extrapolated to the entire crypto-asset universe. In particular, pure payment-type crypto-assets, like the Bitcoin which accounts for around half of the total market value of crypto-assets, are not represented in the survey sample.
7. The survey highlighted that most NCAs assessed that crypto-asset case 1, 2, 4 and 6 could be deemed as transferable securities and/or other types of financial instruments as defined under MiFID II. In addition, ten NCAs have highlighted in their response at least one example of crypto-assets in their jurisdiction (beyond the six crypto-asset cases presented) that would qualify as a transferable security or other type of MiFID II financial instrument.
8. The existence of attached profit rights, without having necessarily ownership or governance rights attached (crypto-asset case 1 and 2), was considered sufficient for a majority of NCAs to qualify crypto-assets as transferable securities (where such crypto-assets also meet the other conditions to qualify as transferable securities), whether as shares or another type of transferable securities not explicitly listed in Annex C of MiFID II. Those NCAs that disagreed with this view may do so on the basis of a more restrictive transposition of MiFID, e.g. a restrictive list of examples of transferable securities. The responses for crypto-asset case 4 suggested that the financial instrument features may prevail for hybrid types of crypto-assets, although views could vary depending on the exact circumstances (see crypto-asset case 3).
9. The fact that no NCA labelled case 5 as a transferable security and/or financial instrument suggests that pure utility-type crypto-assets may fall outside of the existing financial regulation across Member States. The rights that they convey seem to be too far away from the financial and monetary structure of a transferable security and/or a financial instrument.
10. The vast majority of NCAs did not believe that any national rules in place would capture any of the six case studies. However, two NCAs have domestic categories of financial/investment products that are broader than MiFID financial instruments, addressing products that are deemed to have an investment purpose or expectation of returns. For one NCA, this was sufficiently broad to capture five of the six cases. Another NCA has a separate 'unit of account' category, potentially catching two cases (1, 4). One NCA is implementing a bespoke national regime for crypto-assets, which could apply to cases 1 and 3.
11. There was broad agreement among NCAs that the crypto-assets that meet the necessary conditions to qualify as a financial instrument should be regulated as such. At the same time, a number of NCAs suggested that changes to existing legislation or additional provisions may be needed to respond to the unique characteristics of the sector, e.g. the decentralized nature of underlying technology, risk of forks, and the

custody of the underlying assets. NCAs also highlighted that a review of existing provisions related to clearing, settlement, safekeeping and record of ownership may be necessary.

12. Noteworthy, the vast majority of respondents considered that the qualification of all crypto-assets as financial instruments would have unwanted collateral effects, meaning that there may be a need to distinguish between the different types of crypto-assets. This is understandable considering the variety of crypto-assets being issued. Among the reasons given were 1) the existing regulation was not drafted having these instruments in mind; 2) acknowledging them as financial instruments would grant them potentially unwanted legitimacy; 3) the needed supervisory tools and resources may not be in place.
13. The vast majority of NCAs agreed that all crypto-assets should be subject to some form of regulation. There was little consensus as to whether a bespoke regulatory regime for those crypto-assets that do not qualify as financial instruments should be designed within the scope of MiFID or outside of it. There were as well diverging views regarding the extent of that regulatory regime, although with a broad consensus on that at minimum all crypto-assets should be subject to anti-money laundering laws.

### **3. Qualification as transferable security under the national transposition of MiFID**

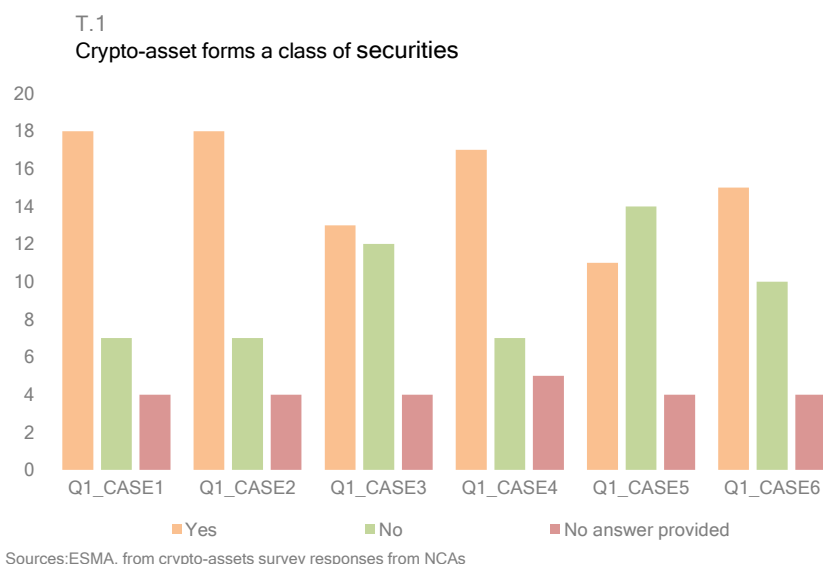
14. 'Financial instruments' are defined in Article 4(1)(15) of MiFID II as those "instruments specified in Section C of Annex I". These are inter alia 'transferable securities', 'money market instruments', 'units in collective investment undertakings' and various derivative instruments.
15. 'Transferable securities' under Article 4 (1) (44) of MiFID II, means those "classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as:
  - (a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;
  - (b) bonds or other forms of securitised debt, including depositary receipts in respect of such securities;
  - (c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures;" (emphasis added).

#### **Classes of securities**

16. MiFID II does not specifically define the term 'class' but refers to "classes of securities" in Article 4.1(44) MiFID II. Similarly, the majority of NCAs (24) have not defined 'class'

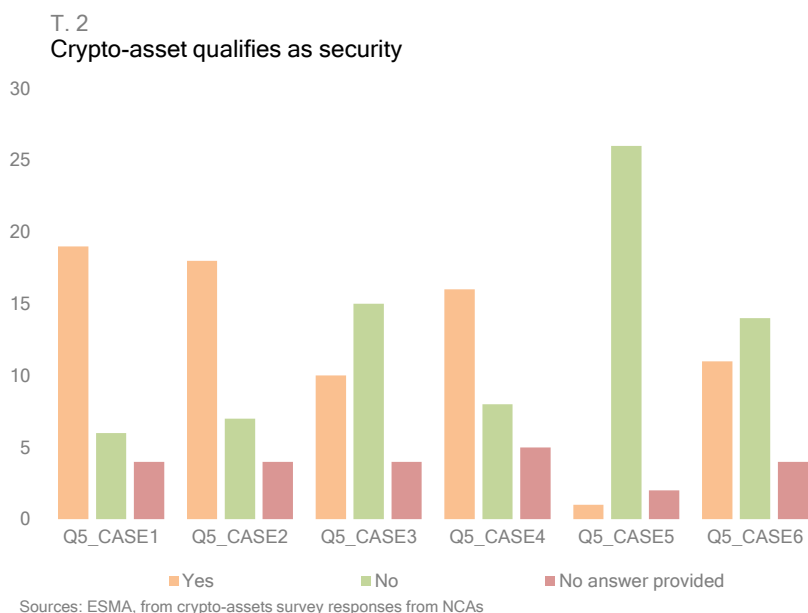
in their national legislation. Only four jurisdictions have developed the definition of ‘class’ in their regulation. Independently of whether the term ‘class’ has been introduced at national level, NCAs reported a similar interpretation, namely to form a class, units (i.e. crypto-assets in the cases presented) need to be interchangeable (some referred to the terms ‘fungible/replicable with one another’ or ‘identical’), issued by the same issuer, show similarities and give access to the same (equal) rights to the same group of investors. Such rights can include the right to receive a portion of company’s profit in the form of dividends, the right to participate in community management, e.g., voting rights, the right over a portion of company’s assets or rights to share any surplus in the event of liquidation.

17. Some NCAs (nine) completed the interpretation of a ‘class’ by the following criteria: to form a class, units should share the same characteristics, e.g., have the same nominal value, and/or represent standardized issued units, meaning that the contents/attributes of each security are not individually negotiated with investors, which allows them to be easily traded on a capital market. Four jurisdictions required further criteria, book-entry system and securities accounts.
18. Following this interpretation, the majority of NCAs (from 13 to 18) considered that cases 1, 2, 3, 4 and 6 form a ‘class’ (see Chart 1). For case 5 the majority of NCAs (14 against 11) reported that they did not consider the crypto-assets to form a class. The analysis of the responses demonstrates however that the reason for such divided opinions is that many NCAs do not interpret the concept of ‘class’ independently of ‘security’, i.e. they responded to the question of whether the crypto-asset qualifies as ‘security’ and not whether it forms a class.



19. NCAs tend not to distinguish the notion of ‘security’ from the definition of transferable securities as set out by MiFID II. To the question whether any of the sample crypto-assets qualify as ‘securities’ as referred to in Article 4.1(44) MiFID II, “class of securities”, NCAs provided a majority of positive answers (16 to 19) for cases 1, 2 and 4 (see Chart 2). Views were more divided for cases 3 and 6. For case 3, a number of

NCAAs highlighted the hybrid nature of the crypto-assets and the majority of NCAAs (15 against ten) did not qualify them as securities. For case 6, the majority of NCAAs (14) did not support the qualification as securities, with nine NCAAs highlighting that it qualified as units in a collective investment undertaking. Almost all NCAAs (26) did not qualify case 5 as a security, due to its utility nature.

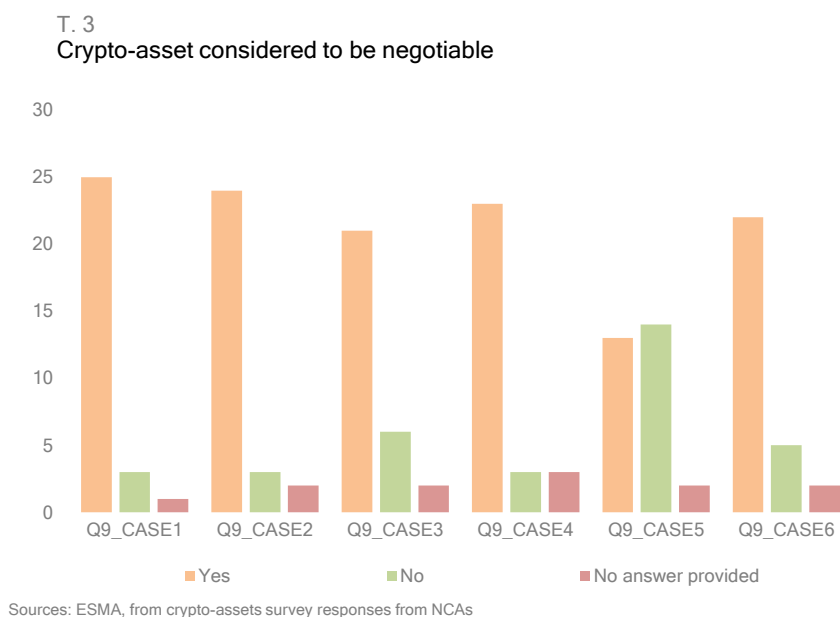


## Negotiability on the capital market

20. Most NCAAs (21 to 25) considered the majority of the sample crypto-assets as 'negotiable', generally because they are capable of being traded (see Chart 3). The abstract possibility of being traded is considered sufficient, even if there is not yet a specific market for the product or even if there is a temporary lock-up. Some NCAAs (two) emphasized the importance of standardization and fungibility to assess negotiability. Opinions were divided with regard to case 5: half of the NCAAs (14) were of the opinion that this crypto-asset is not negotiable. The fact that case 5 does not qualify as a security seemingly underpins this view. One NCA was of the opinion that the promise of negotiability is not sufficient and that there should be an evidence of trading. Another NCA was of the opinion that case 5 was not negotiable because its utility or value was limited to the acquisition of goods or services. It seems that many NCAAs (12) that considered certain sample crypto-assets to be not negotiable, made this qualification because they considered the asset not to be a security, meaning that they did not assess negotiability on a stand-alone basis.

21. In one Member State 'negotiability' is defined as the transferability on the basis of at least unilateral expression of will. In another Member State, 'negotiable security' is defined as any patrimonial right, regardless of its name, which, because of its own legal configuration and system of transfer, is susceptible to being traded in a generalised impersonal way in a financial market. Most Member States (20) without legal definition interpret negotiability as potential transferability or tradability, which does not necessarily imply that the assets have effectively been transferred or traded.

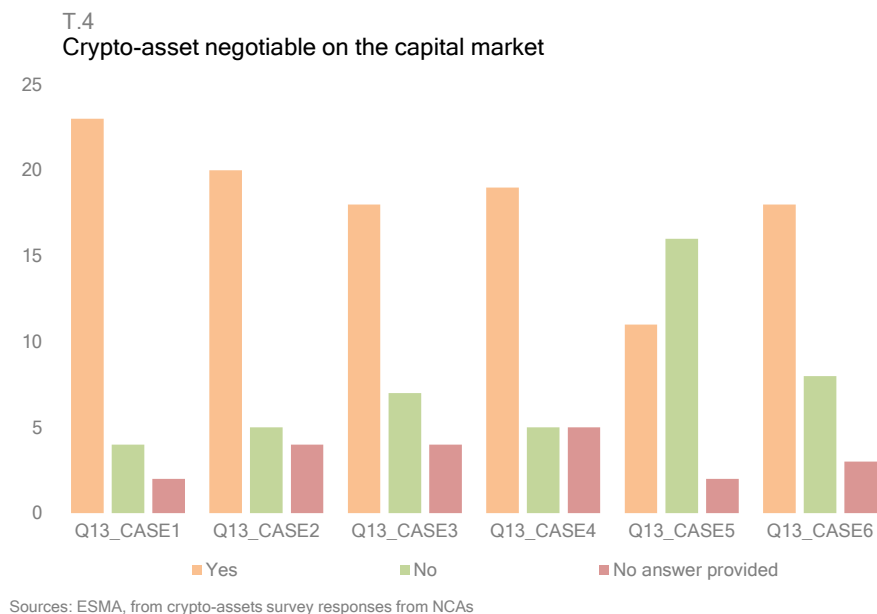
There was seemingly no common view on the impact of clauses limiting transferability. One NCA was of the view that the mere promise of transferability is insufficient, and that sufficient evidence of transferability needs to be provided. Some NCAs (three) opposed negotiability to the civil law assignment of claims and others additionally stated that it implies a kind of standardization. Some NCAs (three) were of the opinion that the negotiability requirement should not be assessed independently from the ‘capital market’ requirement.



22. Most NCAs (18 to 23) considered the sample crypto-assets as negotiable on the ‘capital market’, generally because they are capable of being traded on an exchange (see Chart 4). Opinions were mixed with regard to cases 5 and 6. More than half of the NCAs (17) were of the opinion that case 5 is not negotiable on the capital market, the main reason being that the crypto-asset does not qualify as a security. The same goes for case 6, albeit fewer NCAs (eight) were of this view. Two NCAs considered all assets to be not negotiable on the capital market, again because they do not qualify as securities in their opinion. One NCA highlighted that capital markets were not the appropriate venue for crypto assets to be negotiated. Noteworthy, many NCAs (from four to 17 depending on the case) did not assess the capital market criterion on a stand-alone basis.

23. No Member State has a legal definition of ‘capital market’. Most NCAs (23) interpreted ‘capital market’ as the place where buying and selling interests meet. Some NCAs (three) excluded money market instruments. One NCA stated with regard to money market instruments that this distinction is not always recognized in EU law and that capital markets and transferable securities are not defined by duration. One NCA interpreted ‘capital market’ as a regulated market, MTF or systematic internalisation. Two NCAs were of the opinion that, as they considered the assets not to be securities, the markets where they are traded cannot be qualified as capital markets under MiFID II.

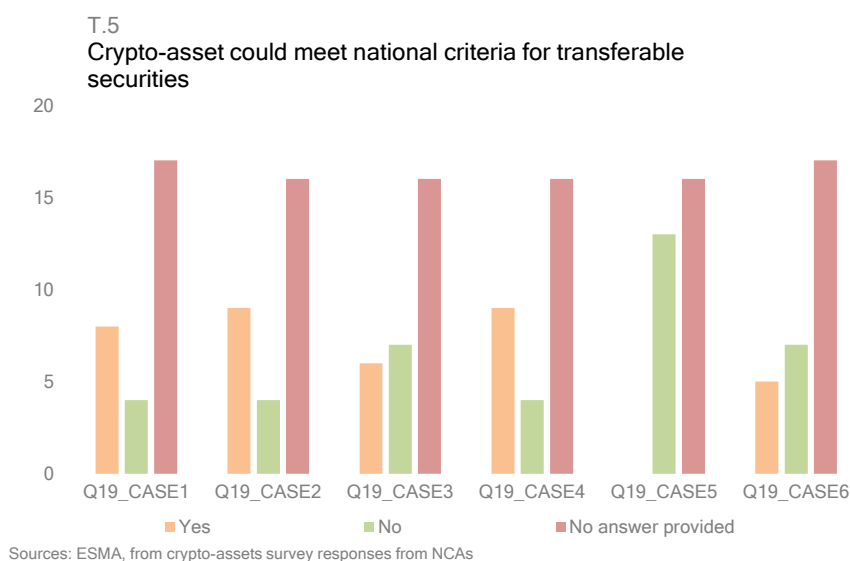




### Additional criteria set at national level

24. The majority of NCAs (16) have no specific criteria under their national legislation to identify transferable securities in addition to those set out under MiFID. Other NCAs (12) stated that they have national criteria in place, some providing for a more restrictive interpretation and some for a broader interpretation of what constitutes a transferable security.
25. Among those NCAs that have a restrictive approach, some (three) include in their national legislation additional requirements in the form of a compulsory book-entry recording requirement which does not allow them to qualify as transferable security any securities other than those explicitly qualified/classified as security by law. Some (four) not only use the elements of definition provided by MiFID II but also assess the embodiment of rights in the crypto-asset, i.e. whether there are shareholder rights or creditor claims or claims comparable to shareholder rights or creditor claims, on a case-by-case basis. One NCA stated that the national criterion refers with respect to shares to the fact that a right to share profits exists and in relation to debt securities, to the fact that a debt represents a sum of money, and that these two components provide the basis for a broader approach.
26. Some NCAs with a broader interpretation use a 'substance over form approach' when applying their national regulation. One NCA has implemented a Financial Instrument Test, wherein no specific attributes/characteristics are attached to either shares or debentures. Another NCA said that its national legislation includes a non-exhaustive list of different 'types' of transferable securities already, which provides for a broad definition of the term, and that 'substance over form' should prevail. One NCA stated that under their national legislation they sometimes have used a slightly broader wording than in Article 4(1)(44) of MiFID II and provide some examples.

27. On the question whether they have identified other categories of transferable securities that are relevant to crypto-assets, almost all NCAs (16) said no. However, one NCA considered that transferable securities could be crypto-assets with no economic or political rights attached to them but with a relevant investment component. Two more NCAs stated that they have not encountered such cases yet but would be open to qualify crypto-assets as transferable securities on a case by case basis under their national criteria.
28. Around half of the NCAs (15 to 16) did not respond to the question as to whether the six sample crypto-assets would fulfil their national criteria to qualify as transferable securities (see Chart 5). Among those that did respond, 4 NCAs considered that all six cases would not fulfil their national criteria, which include a compulsory book-entry of securities. Excluding these 4 NCAs, there was agreement among the others (eight to nine) that crypto-assets 1, 2 and 4 would meet their national criteria and qualify as transferable securities. The arguments to support this view were that these crypto-assets have similar features to shares, providing similar rights to shareholders, e.g., dividend rights, voting rights, an annual profit participation or the right to participate in the management of the community. Also, elements in relation to the negotiability and tradability on secondary markets and the aspect of conferring the same rights to all crypto-asset holders were considered.
29. For case 3, views were almost equally split. Seven NCAs were of the opinion that the crypto-asset did not meet their national criteria, while six NCAs said it did and therefore would qualify as transferable security. For case 6, more than half of those NCAs that responded considered that the crypto-asset would not meet their national criteria (seven), while five NCAs said they would. For case 5, which is a utility crypto-asset, there were differing opinions among respondents about the statement that the crypto-asset does not encompass any component that would lead to a classification as a security.



## Investment component

30. As a preliminary remark, it should be noted that NCAs using similar arguments have indistinctly responded 'yes' or 'no' to the questions about the 'investment component'. Statistics in this section should therefore be considered with caution.
31. The majority of NCAs (17) were of the opinion that the 'investment component' is a necessary characteristic for the qualification as a 'transferable security' within the meaning of Article 4.1 (44) MiFID II. However, there were also NCAs (nine) that stated that the 'investment component' is not necessary for this qualification and there is no general consensus on this point. Some of the NCAs (two) were of the opinion that the 'investment component' concept needs to be further defined (via examples or guidance), to foster a level-playing field and a consistent approach in the EU and that the issue should be addressed by the European Commission.
32. No NCA had a national legal definition of 'investment component' and views differ as to its interpretation. For most NCAs (13) the 'investment component' involved the promise or indication of future profits stemming from the investment (distribution of profit), shared revenues or a direct flow of payments. Two NCAs stated that the 'investment component' has to be assessed on a case-by-case basis. Some NCAs (four) also mentioned that the intention of the investor is relevant. Some NCAs stated that securities linked to goods/products or services should not be considered as instruments with an 'investment component' (three), or that the appreciation in value which is the result of a subsequent sale should not be taken into consideration for the 'investment component' (one).
33. As to whether the 'investment component' requires an expectation of a direct flow of payment from the originators of the ICO to the holders of crypto-assets, there is no common view. Most NCAs (14) stated that an expectation of direct flow of payment is not necessary. Others (three) highlighted that neither MiFID II nor domestic law require the existence of any investment component. Another NCA stated that the existence of a legal claim (for a form of payment or re-payment) against the issuer is the main criteria, while another NCA stated that if the flow of payment were a contractual entitlement it would consider it as a strong indication that the crypto-asset is a security, irrespective of whether the flow of payment is direct or indirect. Another NCA said that it has not encountered instances where the 'investment component' would be relevant, as no crypto-asset qualifies as transferable securities due to the lack of form.
34. Those NCAs that considered the expectation of direct flow of payment as necessary for the national interpretation of 'investment component' highlighted that the investment component may be derived through, inter alia, the negotiability of the crypto-asset. Another NCA stated that the appreciation in value of a 'utility crypto-assets' after issuance, due to secondary trading, is irrelevant to determine whether a crypto-asset is comparable to typical transferable securities.
35. As to whether NCAs have identified any difficulties when interpreting the concept of 'investment component' in relation to hybrid crypto-assets, the majority of NCAs (12) indicated that they have not encountered such cases yet. One NCA explicitly stated

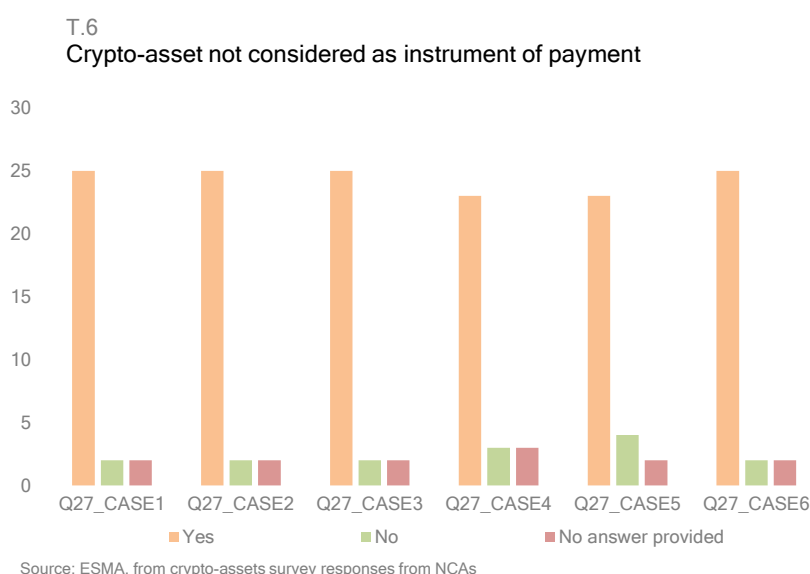
that its national law defines 'virtual financial assets' in a broad manner so as to capture any hybrid crypto-assets as well as any permutations thereof that are not MiFID II financial instruments. Those (10) NCAs that had difficulties regarding the interpretation of 'investment component' consider that the main challenges come from the fact that the concept is not clear.

36. Most NCAs (14) considered that utility crypto-assets have no 'investment component' when a limited amount of such crypto-assets is created that can be exchanged on a common platform, when management has retained an amount of such crypto-assets for remuneration purposes and when the expectation of value increase of those crypto-assets derives solely from secondary trading.
37. Two of those NCAs that were of the opinion that utility crypto-assets have an 'investment component' said it is not sufficient though to classify them as a 'security' and that the classification as a transferable security has to be undertaken on a case-by-case basis while another NCA believed that the value of utility crypto-assets is indeed dependent on the issuers success.

### **Instruments of payment**

38. Almost all NCAs (23 to 25) stated that the six cases do not qualify as instruments of payment (see Chart 6). A few countries however (varying from 2 to 4 depending on the case) believed that all or some cases may qualify as 'instruments of payment'. To define instrument of payments, NCAs referred to Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on Payment Services in the Internal Market (PSD2). It defines 'payment instrument' as a personalised device(s) and/or set of procedures agreed between the payment service user and the payment service provider and used in order to initiate a payment order. MiFID II does not provide a definition of instruments of payment, but specifies in Article 4.1 (44) that the concept of 'transferable securities' excludes 'instruments of payment'.
39. The majority of the respondents (16) reported that their national regulation does not provide the legal definition of 'instruments of payment' unlike 10 other countries that reported to have national definitions. The countries that reported to have a national definition of 'instruments of payment' have transposed in their legislation the PSD2 provision.
40. The countries (11) that do not have a national legal definition of 'instruments of payment' reported that they interpret the instrument of payment in line with Answer to question 2 of the European Commission's document named 'Your questions on MiFID' that stipulates that "Instruments of payment' are securities which are used only for the purposes of payment and not for investment. ESMA however considers that the drafting of the referred EC's document named 'Your questions on MiFID' is poor because it allows the interpretation of instruments of payment as securities that would be misleading. MiFID II and PSD2 clearly provide that instruments of payments are not securities.

41. The prevailing argument among NCAs on why the six cases are not instruments of payment was that these crypto-assets do not serve the payment function that is characteristic of instruments of payment. A number of NCAs (four) highlighted that to be classified as instruments of payments, crypto-assets should be intended solely for payment purpose (without combining investment purposes).
42. The majority of NCAs (17) reported that they did not identify any difficulties when interpreting what is an instrument of payment in relation to hybrid crypto-assets with a currency and investment component. It would be difficult however to conclude from the answers how the NCAs qualify hybrid crypto-assets and what would be the rationale.

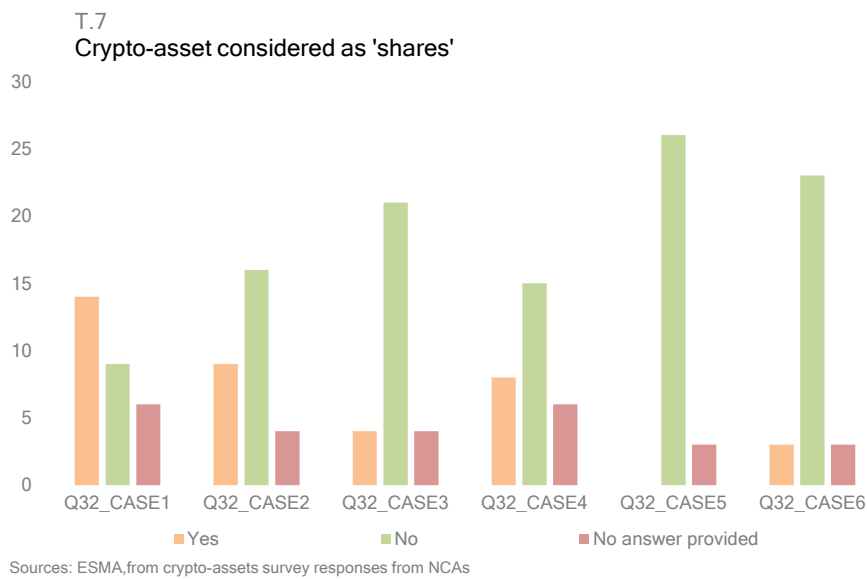


### Types of transferable securities

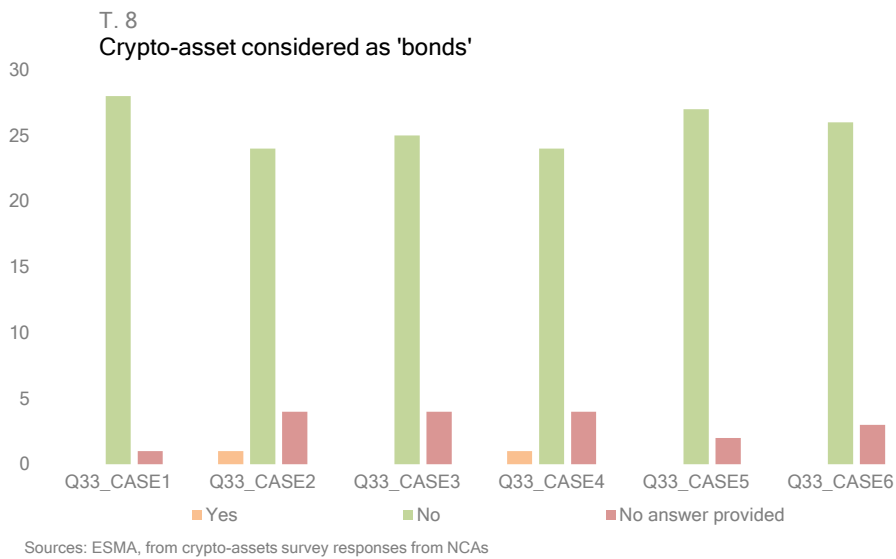
43. There was a majority view (14 NCAs) that crypto-asset 1 form a share in companies or other securities equivalent to shares as referred to in Article 4.1(44) (a) MiFID II (see Chart 7). The arguments to support this view included the participation in the profits (in the form of dividends) and certain kind of management rights given by the crypto-asset. The reasons given by those NCAs (nine) that did not consider case 1 as a share included: the investment component is not sufficient to qualify it as a share (three NCAs), the crypto-asset does not in the legal meaning represent a portion of a company's capital (two NCAs), it is not considered negotiable (1 NCA) or based solely on the white paper documentation, the crypto-asset does not seem to entail legal rights or obligations to its holders (one NCA).
44. A number of NCAs qualified crypto-assets 2, 4 (nine and eight respectively) and to a lesser extent crypto-asset 3 (four) as shares or other securities equivalent to shares as well. These NCAs emphasized that although these crypto-assets give either a sole right to receive a portion of the distributable profit or only a voting right, it is sufficient to qualify the crypto-asset as a share. Given the substance over form approach, the

lack of decision making powers or profit rights does not hamper the classification as share.

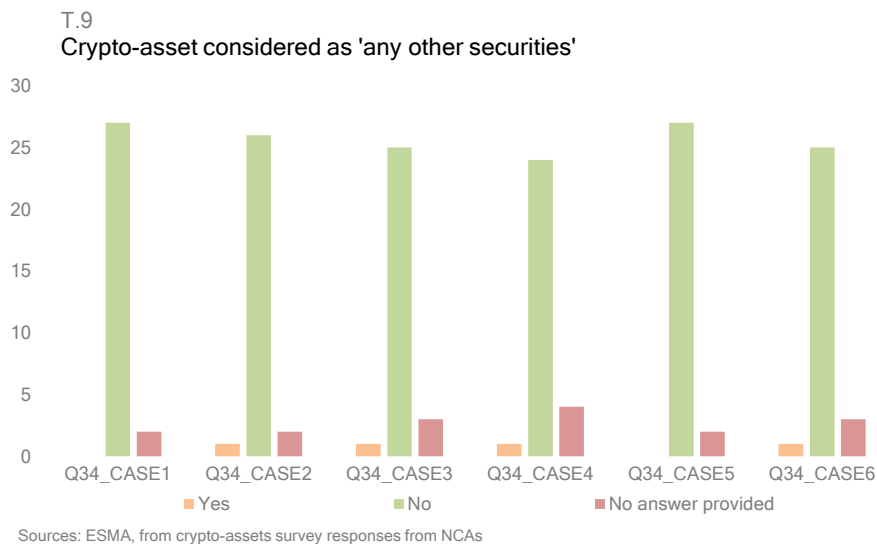
45. Those NCAs (15 to 21) that disagreed that these cases formed a share did so mainly on the basis that they do not offer rights equivalent to shares. In particular, some NCAs (three) underlined the absence of any decision-making power granted to the holders. Some NCAs mentioned the existence of rights to company assets in case of liquidation. Two NCAs considered that there should be a right to receive proceeds in the case of liquidation. Another NCA considered that a common feature of securities is the liquidation bonus. One NCA stated that the qualification as share also depends on whether the crypto-asset is negotiable on the capital market or not.



46. The vast majority of NCAs (between 24 and 28) agreed that all six cases do not form bonds or 'other forms of securitised debt, including depositary receipts in respect of such securities' as referred to in Article 4.1(44) (b) MiFID II. Only one NCA considered cases 2 and 4 form bonds (see Chart 8).



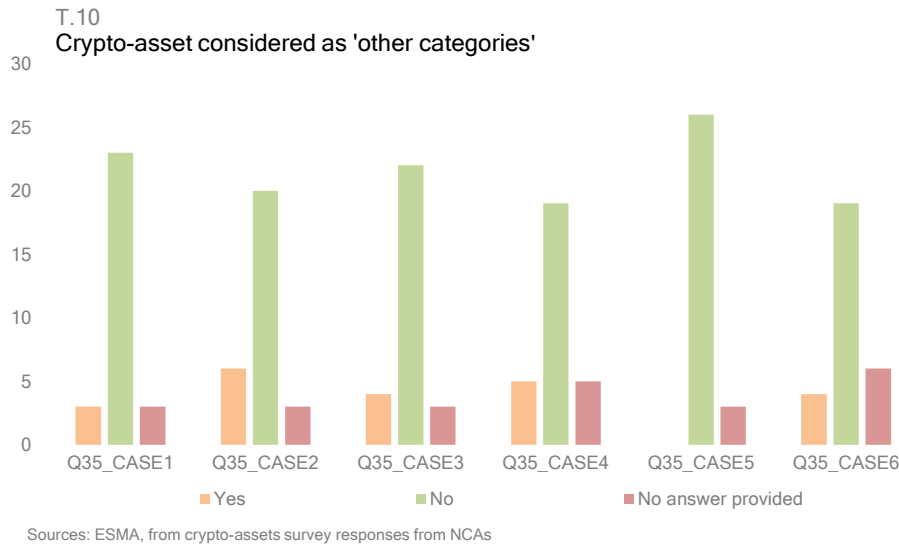
47. In the same vein, the vast majority of NCAs (24 to 27) considered all six cases to not form any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures as referred to in Article 4.1(44)(c) MiFID II. Only one NCA for cases 2, 3 and 4, and another NCA for case 6, considered those to be potentially defined as other securities as referred to in Article 4.1(44)(c) MiFID II (see Chart 9).



48. The vast majority of NCAs (between 19 and 26 NCAs) was of the opinion that all six cases cannot be qualified as transferable securities under other categories ('classes of securities which are negotiable on the capital market, such as...') as referred to in Article 4.1(44) MiFID II. However, six and five NCAs considered case 2 and 4 respectively as potentially being transferable securities under other categories than those referred to under indents (a), (b) and (c) of Article 4.1(44) of MiFID II, as they

include features that are close to shares, but do not constitute shares in the legal meaning (see Chart 10).

49. Interestingly, a large majority of NCAs (25 out of 26 that provided an answer) have not previously qualified a financial product as a transferable security falling within other categories than the ones defined under indents (a), (b) or (c) of Article 44(1) of MiFID II. It would therefore be the first time, if they were to use this possibility for crypto-assets.



50. Importantly, if we add up the 'yes' for the qualification as shares or shares equivalent (chart 7) and other categories of transferable securities (chart 10), we see that there was a majority of NCAs in favour of qualifying cases 1, 2 and 4 as transferable securities (see Chart 11).<sup>2</sup> An overview of the qualification of the six crypto-assets is provided in Appendix 2.

<sup>2</sup> Note: no NCA responded 'yes' to both questions, i.e., by adding up the 'yes' for shares and other categories we are not double counting. Also the 'no' in chart 11 include not only those NCAs that have responded 'no' for both shares and other categories but also those that have not responded, meaning that it may be biased towards the 'no'.



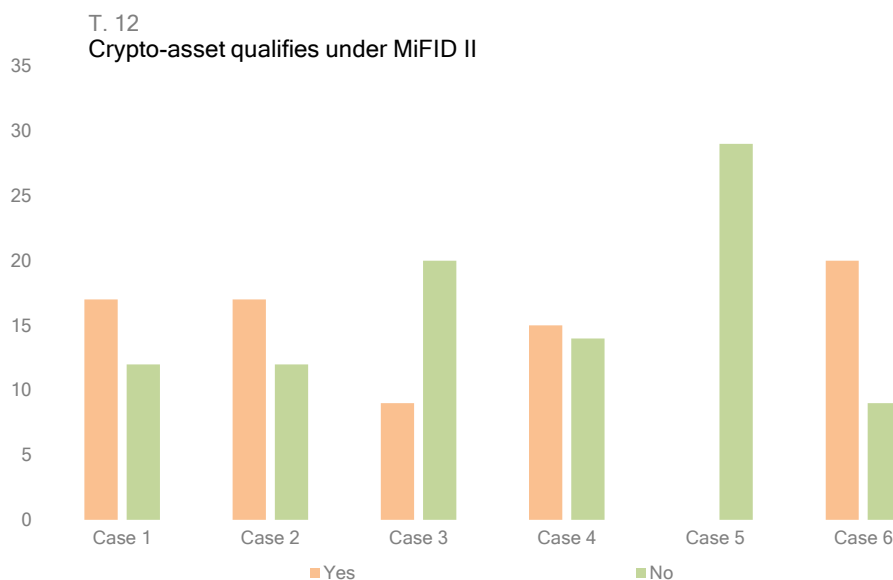


Sources: ESMA, from crypto-assets survey responses from NCAs

## 4. Qualification as other types of financial instruments under the national transposition of MiFID

51. All NCAs indicated that they would not qualify any of cases 1 to 6 as money market instruments as defined in Article 4(1)(17) of MiFID II.
52. Most NCAs (25 to 27) also agreed that crypto-assets in cases 1 to 5 cannot be qualified as units in collective investment undertakings as referred to in item 3, Part C of Annex I of MiFID II. However, views were more split in relation to case 6 but with a rather large majority of authorities (16) qualifying them as units of collective investment undertakings under MiFID II, against 12 NCAs that replied 'no', provided no answer, or an inconclusive answer.
53. There was also a strong consensus (25 to 27 NCAs) that crypto-assets in cases 1 to 6 cannot be qualified as derivatives under MiFID II, with nearly all NCAs replying negatively for all cases. NCAs provided the following reasons: the crypto-assets qualify as other types of instruments, there is no underlying, the crypto-assets would not behave as a contract (a key concept of derivatives), the crypto-assets do not give their holders a forward commitment with any exposure to the fluctuations of an underlying asset and the crypto-asset should be settled in accordance with the settlement conditions in MiFID and the Commission Delegated Regulation (EU) 2017/565. For case 6, one NCA answered positively saying that the crypto-asset derives its value from an underlying (other crypto-related assets). Another NCAs that replied positively stated that the crypto-asset could fall within item (4) of Section C of Annex I of MiFID II: derivative instruments relating to securities ('shares in or loans to miners, platforms, exchanges, app developers, crypto-developers etc') and currencies ('Fiat currencies assets'), which may be settled physically.

54. If we add up the different categories of MiFID instruments, we see that there was a majority view that cases 1, 2, 4 and 6 qualify as financial instruments (see Chart 12). Only for case 5 there was unanimous agreement that the crypto-asset does not qualify as financial instrument.



Sources: ESMA, from crypto-assets survey responses from NCAs

## 5. Implications of the qualification as financial instruments under the national transposition of MiFID

55. The vast majority of NCAs (23) was of the opinion that the qualification of crypto-assets as financial instruments would have unintended collateral effects. Varied reasons supported this view, including (i) the fact that the current regulation was not designed for these instruments and may be ill-suited and excessive (7 NCAs); (ii) the fact that it would effectively legitimise crypto-assets (two NCAs) and (iii) the issues that it would raise in terms of supervision (nine NCAs). Several NCAs (three) were also concerned about the implied costs for firms and the consequences for the attractiveness of the EU. Among the pieces of regulation that could raise challenges, MiFID and the Prospectus Regulation were cited many times. Clearing, settlement, custody and safekeeping came up several times as well.

## 6. Application of a national regime

56. A vast majority of NCAs (24 to 27) did not capture any of the six cases under national rules. Looking at the responses case by case however, one to four NCAs viewed one or more of the case studies as potentially being subject to national rules. Two NCAs had domestic categories of financial / investment products that were broader than MiFID financial instruments, addressing products that are deemed to have an investment purpose or expectation of returns. For one NCA, this was sufficiently broad to capture 5 of the 6 cases. Another NCA had a separate 'unit of account' category,

potentially catching two cases (1, 4). One NCA indicated a bespoke national regime being implemented for crypto-assets which could apply to cases 1 and 3.

57. Four other NCAs indicated additional domestic regimes or laws that could potentially capture crypto-assets. Two noted broader concepts of collective investment scheme at national level that may capture certain crypto-assets. One of these NCAs also indicated regimes relating to crowdfunding and 'miscellaneous assets' that might apply to crypto asset initiatives, although it has not been the case yet. Another NCA could capture investments in physical assets if someone other than the investor manages the asset but expects a monetary return, and also noted consumer protection law for non-financial products could apply to unfair sales practices. One NCA had a domestic definition of instruments of payment that it felt could capture some currency-like crypto-assets. Finally, one NCA noted that it also planned a bespoke regime for crypto-assets that may be applicable in future.
58. In terms of requirements of national regimes, a common feature was that they were domestic in nature and so did not extend to cross-border activity or involve specific MoUs with other NCAs. The two NCAs with broad concepts of investment products / instruments had prospectus-like requirements for public offers, as well as intermediary activity relating to such products, and supervised them accordingly. The NCA with the 'unit of account' concept applies domestic MiFID II standards, with certain exceptions.
59. The two NCAs with imminent regimes for crypto-assets broadly appear to apply more proportionate versions of MiFID-like standards to intermediary activity, with slightly more tailored requirements for issuers of crypto assets. Both regimes stipulated that the regime only applies to crypto-assets that are non-MiFID financial instruments. Both regimes also envisage the application to crypto-asset 'exchanges' but have not yet developed detailed venue-like requirements. One regime will be voluntary in the first instance. One regime created a novel concept of 'agents' who will be registered with the NCA and provide a due diligence function for issuers' projects or intermediaries engaged with crypto assets, and therefore will be a focal point for the NCA's supervision of such activities.

## **7. Supervisory actions in the past**

### **Examples of crypto-assets that qualify as MiFID financial instruments**

60. A significant minority of NCAs (ten) have identified at least one type of crypto-asset that they deem to be a MiFID financial instrument, with just over 20 examples provided in total.
61. One NCA identified contracts for difference (CFDs) referencing crypto-assets as one example of financial instruments that could fit within a broad categorisation of 'crypto-assets', indicating that this would also include other types of derivative contracts such as futures or options referencing crypto-assets. These would correspond to either C9 or C10 categories of MiFID Financial instruments, although the instruments themselves may not take a 'crypto' form.

62. There were five examples of types of crypto-assets from three NCAs that could be derivatives taking a direct crypto asset form. Two of these were deemed to be a form of equity warrant or option, which could fall within either C1 (Article 4(1) (44)(c)) or C4 (as options relating to securities). The other three examples were a potential option or forward relating to a commodity, which would fall under C5 financial instruments, a commodity derivative whereby the crypto-asset value was linked to energy prices, falling under C5-7, and other type of derivative linked to the price of diamonds, falling under C10.
63. Six NCAs gave at least one example of a crypto-asset that they thought could form a transferable security under C1 as either crypto-assetized equity shares (or equivalent to shares) or debt, referring to Article 4(44) (a) or (b) respectively, with one of those NCAs indicating that the crypto-assets would fall within a new category of transferable security under MIFID and another NCA qualifying the crypto-assets as securities of an hybrid nature. One NCA stated that the ICO issuance had been subject to an approved prospectus and another NCA that they were in the process of approving a tailored prospectus for the issuance of this type of securities. Interestingly, one NCA took the differing view that for a crypto asset to qualify as security under C1 (based on Article 4.1) 44) a) of MIFID), the investor must have a proprietary right in the company capital; otherwise, the crypto-asset would qualify as a mere utility-type crypto-asset.
64. Three NCAs gave examples of crypto-assets that could form units in collective investment undertakings and therefore fall within the C3 financial instruments category. Two examples were effectively offering crypto-assets that served to pool investments into other crypto-assets. Another crypto-asset example pooled funds to then be invested in real estate assets. Another NCA noted several examples of alternative investment funds (AIFs) that have been approved by the NCA. It was unclear whether the three examples listed were cases where the 'units' took a crypto-asset form, or more traditional 'units' for a collective investment undertaking which are invested in crypto-assets.
65. One NCA gave an example of a crypto-asset that could be an instrument of payment. Another NCA gave four examples of crypto-assets that it views as qualifying as utility with an 'important investment component'. They suggested that all examples could be considered as a new type of transferable security under MiFID II.

### **Examples of crypto-assets that qualify under national rules**

66. Only a handful of NCAs (seven) has provided at least one example of a crypto-asset that has been under their supervision on the basis of national rules. The examples provided, as well as their legal qualification, have been very diverse given the domestic nature of the relevant applicable laws to the cases reported.
67. Most of these seven NCAs have expanded on the features of the domestic legislation that would capture the relevant crypto-assets in the event these could not qualify as financial instruments under MIFID II. Another NCA indicated a recently approved bespoke regime for certain types of crypto-assets that will apply in the future but that has not entered into force yet. Two NCAs noted broader concepts of collective

investment schemes at national level that may capture certain crypto-assets. One of those NCAs indicated that in such cases no securities were issued, and a domestic prospectus was required. Another NCA indicated a category of financial investment that is broader than MiFID financial instruments, addressing investment products that are deemed to have an investment purpose or expectation of returns. One NCA provided two cases where the crypto-assets issued functioned as alternative currencies which not only gave access to services provided by the issuer but also by third parties, which made them qualify as a separate 'unit of account' category, that in turn qualifies as financial instrument at national level. One NCA had a domestic definition of instrument of payment that could capture some currency-like crypto assets such as bitcoins, and another NCA referred to their domestic regime of 'miscellaneous assets', that could theoretically apply to certain types of crypto-assets that fall outside MIFID's scope.

## **8. De lege ferenda: possible future regulatory developments**

68. As a preliminary remark, we have noted that a number of NCAs have not provided answers to the questions about their preferred approach to the future regulation of crypto-assets. In addition, when they have, they did not necessarily provide a rationale and/or elaborate on the scope or key components of a future regime. We understand that this may be because they have not formed a definite view on these issues yet.
69. There was broad agreement across NCAs (18) that those crypto-assets that meet the relevant conditions should be treated as equivalent to financial instruments and regulated as such, as regulation should be technology neutral. A few number of NCAs (four) considered that crypto-assets should not be treated as such and some others did not answer to the question (six). Several NCAs (three) have highlighted that they support a 'substance over form' approach when it comes to qualifying crypto-assets, including to prevent regulatory arbitrage. However, they have also underlined the legal challenges that this approach raises, because of the restrictive definition of financial instruments in their jurisdiction. Several NCAs (three) stressed that only a small portion of crypto-assets may legally qualify as financial instruments, and that a detailed analysis may be needed as the current rules were not designed with crypto-assets in mind and some adaptations to the rules may be needed. This was stated by two NCAs that considered that the crypto-assets should be treated as equivalent to financial instruments if they meet the relevant conditions and one NCA that did not.
70. Provided they meet the relevant conditions, most NCAs (15) agreed that crypto-assets should comply with the full set of EU rules applicable to financial instruments. Yet, a number of them believed that some changes or additional provisions may be needed to cater for their specificities, e.g. the decentralised nature of the underlying technology, the risks of forks and the custody of private keys. In particular, existing provisions in relation to clearing, settlement, safekeeping and record of ownership activities/services may require some changes (three NCAs). Some adaptations to the Prospectus regulation and other disclosure rules may also be relevant (three NCAs).

One NCA highlighted though that any changes to the existing regulatory framework would be premature at this stage, considering the novelty of crypto-assets and the need to build further expertise on the topic. One NCA would welcome more proportionality within MiFID.

71. There is limited support from NCAs to create a new category of MiFID financial instrument, i.e. a C12 category, for crypto-assets for various reasons. Some NCAs (four) considered applying the same rules across all crypto-assets as not being relevant because of their variety. Other NCAs (three) pointed to the 'same business, same risk, same rules' approach and the fact that differences in the underlying technology do not suffice to support a specific regime. Also, a new C12 category might create confusion and regulatory arbitrage issues with existing categories. Because many crypto-assets are substantially different from traditional financial instruments, some NCAs (four) also questioned the relevance of a regime that would be carved out from MiFID. One NCA would rather focus on the interpretation of existing MiFID rules. One NCA would welcome guidance from ESMA on how to apply the definition of transferable securities to crypto-assets.
72. Yet, some NCAs (eight) argued that a new C12 category would provide certain benefits, including legal certainty and harmonisation in the EU. The vast majority of those NCAs (six) that supported the creation of a new C12 category believed that all the requirements applicable to MiFID financial instruments should apply to this new category. We interpret this as an indication that the primary objective of developing a C12 category would be to provide legal certainty and to bring more crypto-assets under the existing financial securities rules but not to develop a 'lighter' regime under MiFID for these instruments.
73. On the question whether a bespoke regime outside MiFID should be created, views are mixed. One NCA highlighted that this new regime would allow to address a number of gaps and issues in the current regulatory framework, e.g. the existing rules are ill-suited to a phenomenon that mainly involves start-ups and they do not address certain risks to investor protection. The same NCA highlighted the risk of increased linkages with traditional securities markets if crypto-assets were to be considered financial instruments and also the fact that overly cumbersome requirements would drive crypto-asset projects away from Europe. Setting-up a bespoke regime would allow a flexible, proportionate and step-wise approach to the regulation of crypto-assets. One NCA saw such a bespoke regime as an ideal but not reasonable solution, considering the implied costs.
74. Among those NCAs (12) that are not in favour of a bespoke regime outside MiFID, one saw no strong business case for it at this point, considering the size of the market and the costs of setting up a new regime. The same NCA also questioned the viability of those crypto-assets that fall outside of MiFID, although it recognised the need to monitor market developments to see whether this view may need reconsideration in the future. Instead of a new regime, one NCA would welcome the clarification that ESMA and NCAs are empowered to prohibit the sale of such products to retail investors. Views on the exact scope of a bespoke regime outside MiFID varied as well.

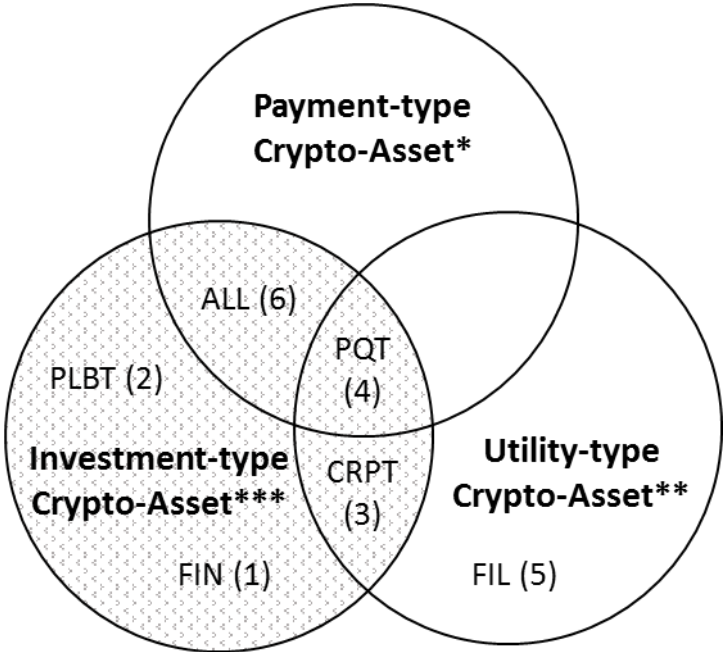
Several NCAs (four) expressed the view that the regime should apply to all those crypto-assets that do not qualify as financial instruments when others had a more restrictive approach, e.g. they suggested including utility-type crypto-assets only or even a subset of those. Insights on the likely components of this bespoke regime were limited. A couple of NCAs mentioned the need to address transparency issues and market integrity issues and to cover both the issuance and the secondary trading of crypto-assets.

75. The vast majority of NCAs disagreed with the statement that all crypto-assets should remain unregulated. Investor protection issues, but also potential risks to financial stability and the risk of regulatory arbitrage underpinned this view.
76. There was no consensus on whether only certain types of crypto-assets should be regulated. Some NCAs (three) felt that all crypto-assets, including currency-type crypto-assets, should be regulated. Others (four) thought that certain types of crypto-assets, e.g. those that are not equivalent to financial instruments, could stay outside of the regulated space. Two NCAs considered those crypto-assets that are fully-decentralised with no issuing entity to not be regulated, including because it would raise supervisory challenges. One favoured an optional regime.
77. Many NCAs (11), whether in favour of regulating currency-type crypto-assets or not, insisted on the need to subject them to AML rules. Those NCAs (four) that were in favour of regulating these instruments generally believed that minimum rules should apply to both the issuance process and secondary markets. Several NCAs (six) highlighted that they are not competent to regulate/supervise currency-type crypto-assets. One NCA, which does not see a strong business case to regulate crypto-assets, was afraid that regulating currency-type crypto-assets might effectively legitimise them.

# Appendix 1 – Overview of the six sample crypto-assets

This appendix provides a brief description of the six crypto-assets that had to be classified in the survey. It includes a proposed ‘functional’ classification of the six crypto-assets within the categories of payment-type, utility-type and investment-type, for illustration and reference purposes only. All participating NCAs were provided with the whitepapers of the respective crypto-assets in order to ensure a common basis for the analysis.

Figure 1: Potential mapping of crypto-asset examples.



\*Payment-type Crypto-Asset: meant to be used as a means of payment or exchange for goods or services that are external to the ecosystem in which they are built. \*\*Utility-type Crypto-Asset: provides some ‘utility’ function other than as a means of payment or exchange for external goods or services. \*\*\*Investment-type Crypto-Asset: resembles financial instruments.

### Potential investment-type crypto-assets:

- Case 1: FINOM (FIN) uses Blockchain technology to provide fully integrated financial services. The FINOM ecosystem aims at allowing access to crypto-assets to a wide range of users. Other expected benefits include full transparency and traceability of transactions. The issued crypto-assets (FIN) have the following attached rights: 1) right to receive a portion of company profit in the form of dividends, 2) right to participate in community management, and 3) right to a portion of company assets. USD 41m were raised through the crypto-asset sale, which ended on 31 December 2017. The funds raised will be used to develop the services that the firm aims to provide. Crypto-assets have been placed in accordance with Regulation D (Rule 506(c) of Regulation D) of the U.S. Securities Act of 1933, meaning that FINOM crypto-assets could only be acquired by accredited investors from the United States. The crypto-assets are seemingly not traded on crypto exchanges at this point.



- Case 2: Polybius Bank (PLBT) is a project by Polybius Foundation that aims to offer all the services of a ‘traditional’ bank, without any branches or physical front-offices and leveraging on digital technologies. The ICO, which ran in June 2017, raised around USD 30m. The funds raised will serve to develop the infrastructure of the bank and its services. The white paper includes a roadmap for the development of the bank. The Polybius crypto-asset (PLBT) comes with the right to receive 20% of the distributable profit of a financial year. Crypto-assets do not provide any decision making power to their holders. As of 7<sup>th</sup> November 2018, the PLBT crypto-asset was trading at USD 1.64 (Market Cap: USD 6,522,615), to be compared with USD 5.36 (Market Cap: USD 20,468,400) as of 1 January 2018.

#### **Potential investment/utility hybrid:**

- Case 3: Crypterium (CRPT) aims to build up a “cryptobank” with vertically integrated services. It claims to be faster and less costly than existing banking solutions and stresses its international scaling opportunities. The crypto-asset sale ended in January and raised USD 51m from 68,125 crypto-asset purchasers. The crypto-assets may be used to pay for transaction fees when using the services of the cryptobank. In addition, they grant the right to receive a monthly share of the revenues derived from the transactions. In addition, services not known yet might be available to crypto-asset holders at a cheaper price or for free in the future. Crypto-asset holders are also granted ‘priority treatment’ (although the white paper does not specify what this priority treatment would entail).

#### **Potential investment/utility/payment hybrid**

- Case 4: PAquarium (PQT) aims to build the world’s largest aquarium. PAquarium promises to pay 20% of the aquariums operational profit to crypto-asset holders on an annual basis. The whitepaper also mentions the possibility to sell and exchange PQTs. The crypto-assets come with voting rights on the location of the Aquarium and additional voting provisions may be available in the future. In addition, they may be used as a means of payment for goods at the aquarium. Purchasing a certain amount of crypto-assets gives a lifetime free entry to the aquarium. PAquarium put on sale 1.2 Billion PQT crypto-assets for a total value of USD 120 Million. The funds raised will be used as follows: construction and development (65%), marketing and promotion (20%), operations and legal (15%). It appears that PQTs are not traded on any crypto exchange at the moment. The project is still at a very early stage, e.g., a vote on the location of the aquarium is still underway.

#### **Utility Crypto-asset distributed with an offering memorandum through a Simple Agreement for Future Crypto-assets (SAFT) to accredited investors and in compliance with SEC and FCA’s securities laws**

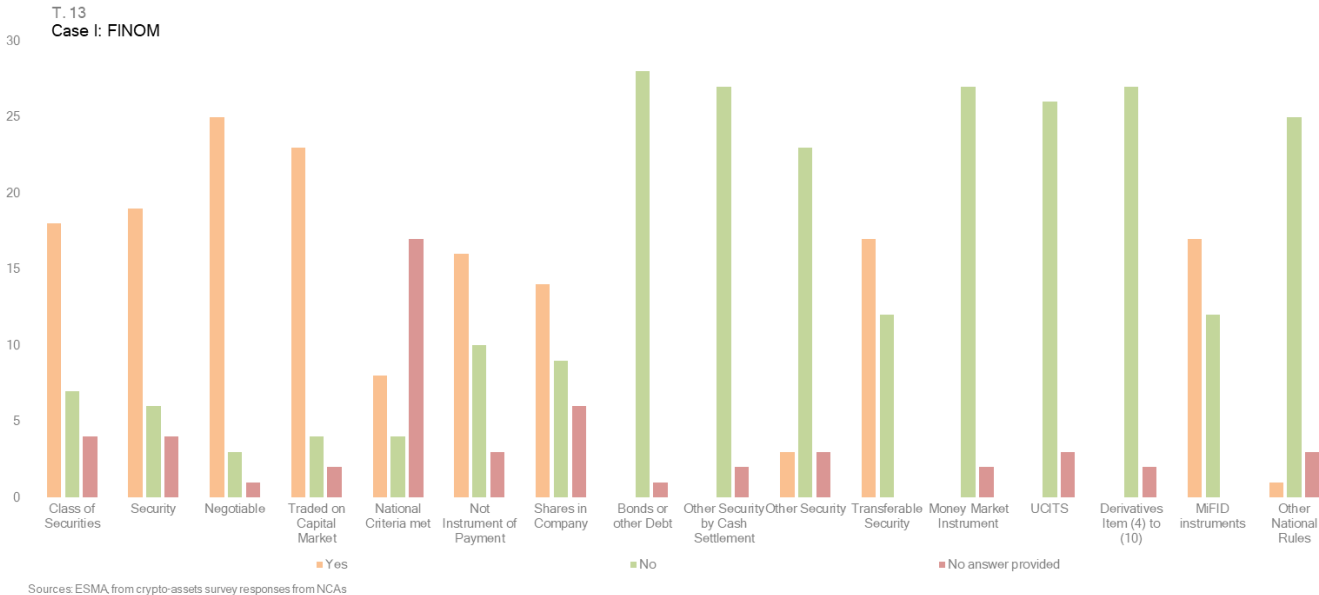
- Case 5: Filecoin (FIL) is a decentralized storage network that turns cloud storage into an algorithmic market. Filecoins can be spent to get access to unused storage capacity on computers worldwide. Providers of the unused storage capacity in turn earn filecoins, which then can be sold for cryptocurrencies or fiat money.

### **Potential investment/payment hybrid**

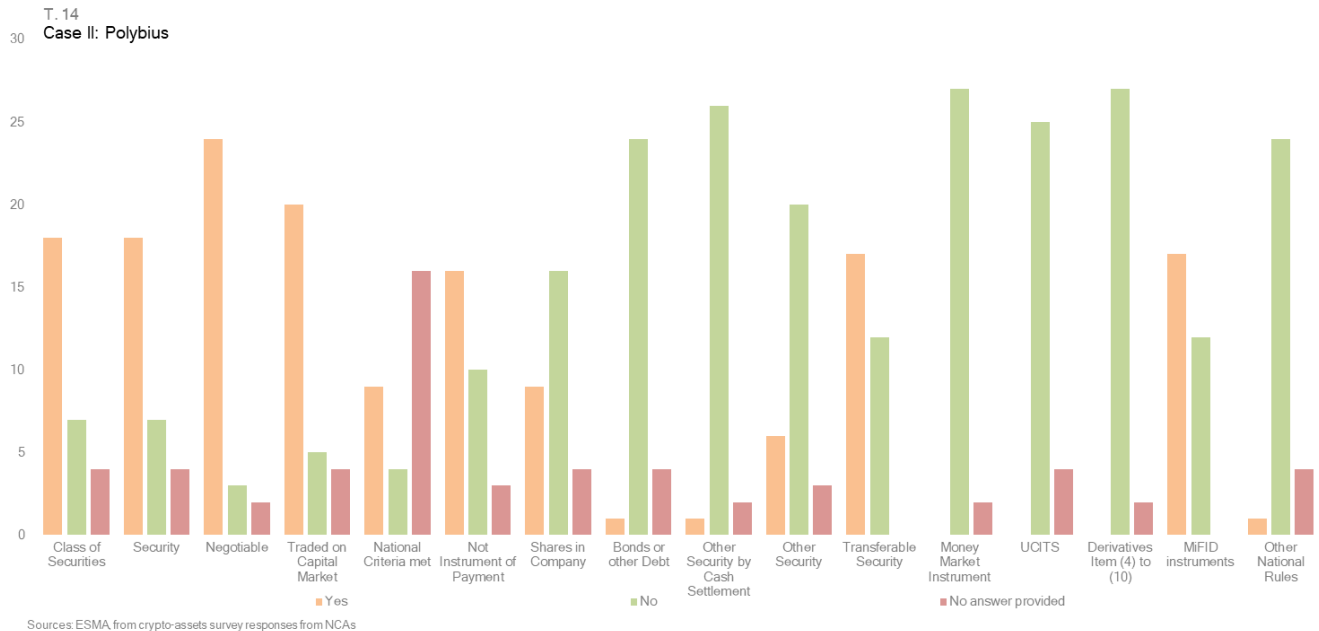
- Case 6: AlchemyBite (ALL) aims to provide a crypto-asset that is backed by different crypto-assets. The value of the crypto-asset can be determined by the value of the crypto-assets it is backed with. Between 70% and 75% of the crypto-asset are backed by crypto-assets, whereas the rest is backed by crypto-related assets such as shares in crypto-asset developing companies.

# Appendix 2 – Qualification of the six sample crypto-assets

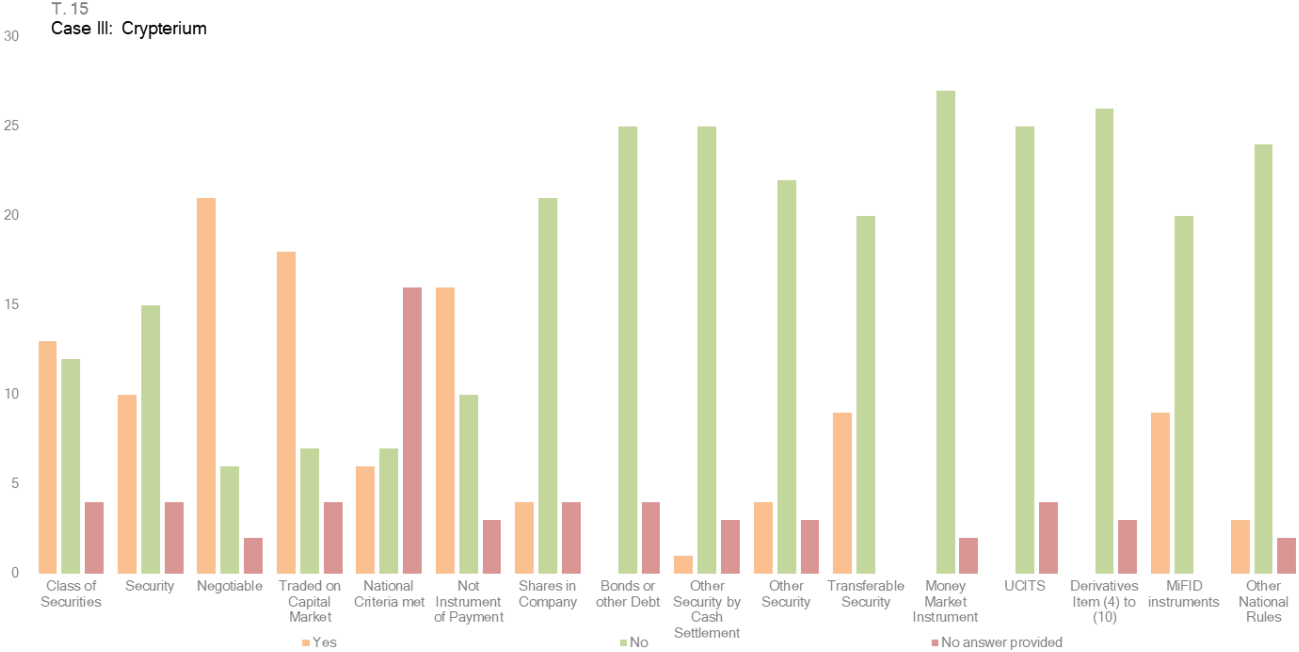
## Case 1: FINOM



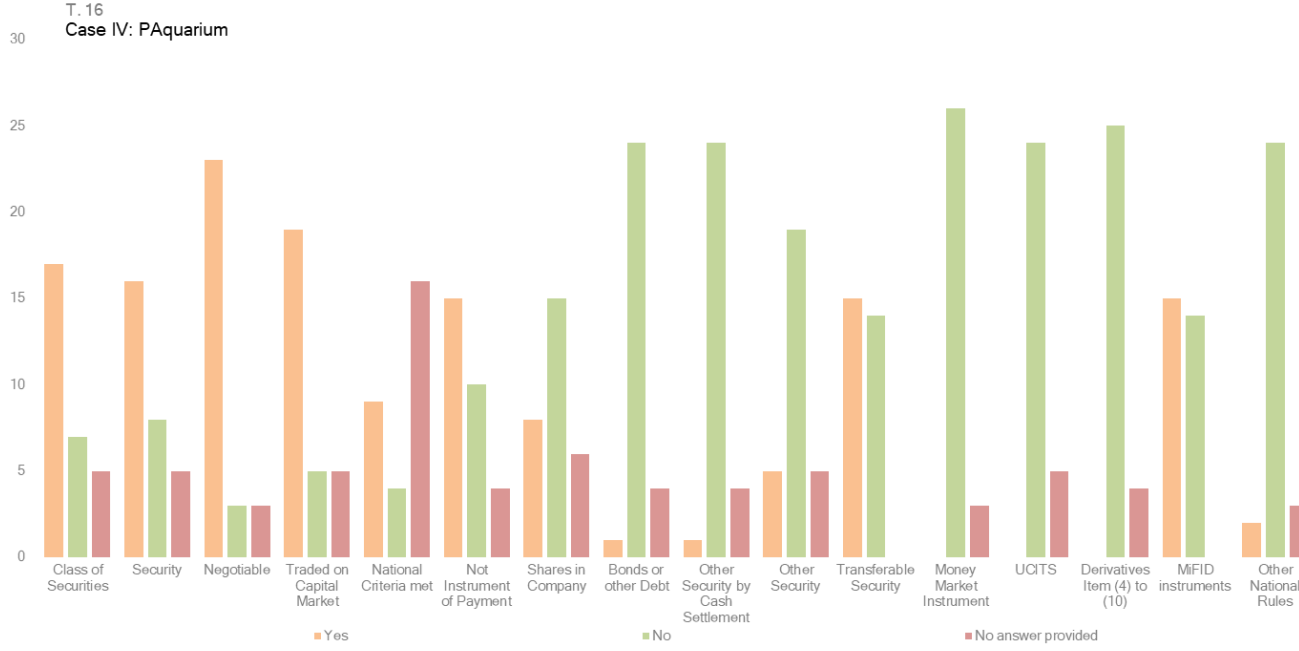
## Case 2: Polybius



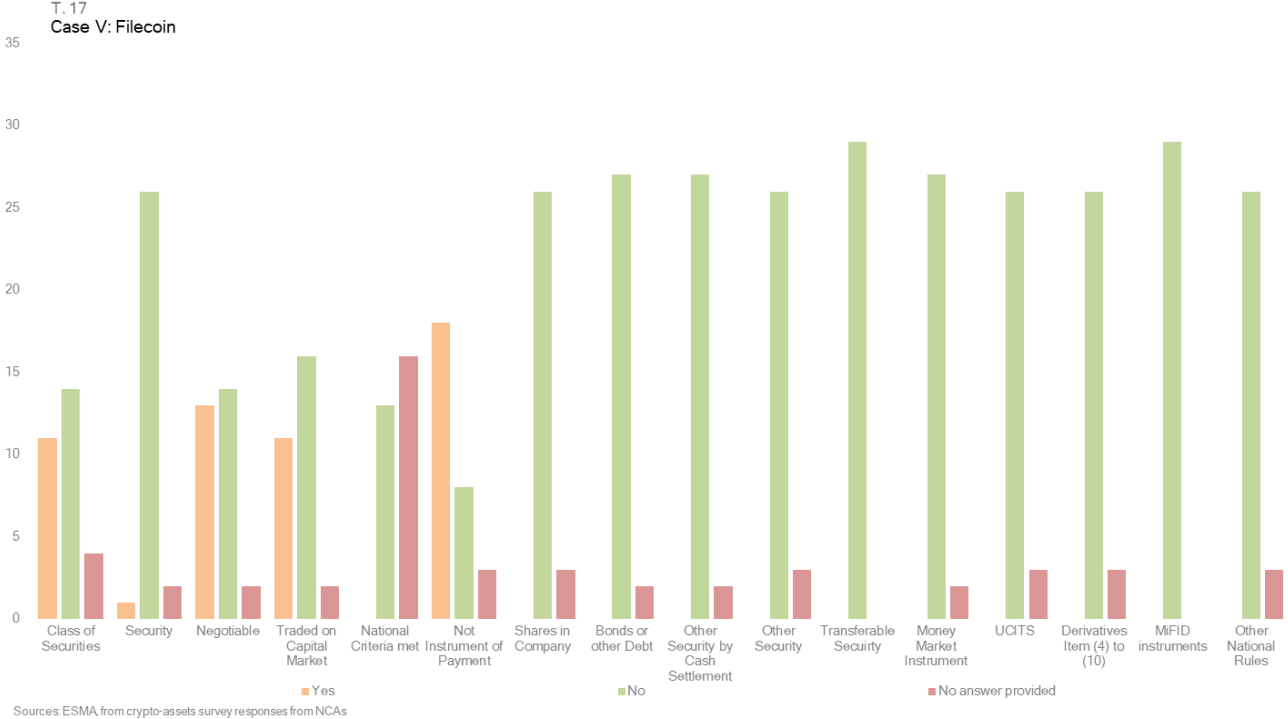
### Case 3: Crypterium



### Case 4: PAquarium



# Case 5: Filecoin



# Case 6: AlchemyBite

