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Final Report

On the guidelines on reverse solicitation under the Markets in Crypto Assets Regulation (MiCA)

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Acronyms and definitions used

CP	Consultation Paper
ESMA	European Securities and Markets Authority
ESMA Regulation	Regulation (EU) 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision 716/2009/EC and repealing Commission Decision 2009/77/EC
EU	European Union
MiCA	Regulation (EU) 2023/1114 of the European Parliament and the Council of 31 May 2023 on markets in crypto-assets
MiFID II	Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU
NCAs	National competent authorities
SMSG	Securities and Markets Stakeholder Group established under Regulation (EU) No 1095/2010

1 Executive Summary

Reasons for publication

The Regulation on markets in crypto-assets (MiCA)[1] was published in the Official Journal of the EU on 9 June 2023. ESMA has been empowered to develop technical standards and guidelines specifying certain provisions.

ESMA previously underlined[2] that the provision of crypto-asset services or activities by a third-country firm is strictly limited under MiCA to cases where such service is initiated at the own exclusive initiative of a client (the so called “reverse solicitation” exemption). This exemption should be understood as very narrowly framed and as such must be regarded as the exception; and it cannot be assumed, nor exploited to circumvent MiCA.

Article 61(3) of MiCA gives ESMA a mandate to specify i) the situations in which a third-country firm is deemed to solicit clients established or situated in the Union and ii) supervision practices to detect and prevent circumvention of MiCA.

Consequently, on 29 January 2024, ESMA published a consultation paper to seek stakeholders’ views on draft guidelines on reverse solicitation.[3] The consultation period closed on 29 April 2024. ESMA received 35 responses, 6 of which were confidential. The answers received are available on ESMA’s website[4] unless respondents requested otherwise.

ESMA also sought the advice of the SMSG.

Contents

Section II explains the background to our proposals, Section III sets out the feedback received and our proposals for the guidelines. Annex I contains the cost-benefit analysis, Annex II includes the SMSG advice and Annex III presents the full text of the guidelines.

Next Steps

The Guidelines in Annex III of this report will be translated into the official EU languages and published on the ESMA website. The publication of the translations will trigger a two-month period during which competent authorities must notify ESMA whether they comply or intend to comply with the Guidelines. The Guidelines will apply from three months after the publication of the translations.

2 Background and legal basis

Article 61(3) of MiCA

"*3. ESMA shall by 30 December 2024 issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 to specify the situations in which a third-country firm is deemed to solicit clients established or situated in the Union.*

In order to foster convergence and promote consistent supervision in respect of the risk of abuse of this Article, ESMA shall also issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 on supervision practices to detect and prevent circumvention of this Regulation."

Overview

1. In accordance with Article 59(1) of MiCA, only legal persons or other undertakings that have been authorised as crypto-asset service providers under Article 63 of MiCA and certain EU-authorised financial entities (subject to a notification procedure) may provide crypto-asset services in the EU.

2. In addition, under Article 59(2) of MiCA, only a firm with a registered office in a Member State of the EU shall be able to be authorised as crypto-asset service provider in accordance with Article 63 of MiCA.

3. Consequently, third-country firms are prohibited from providing crypto-asset services in the EU.

4. There is, however, one exemption to such prohibition. Where a client established or situated in the EU at its own exclusive initiative requests the provision of a crypto-asset service or activity, the third-country firm contacted by the client may provide the crypto-asset service or activity requested without being in breach of the authorisation requirement established by MiCA.

5. The rationale for this exemption is that clients established or situated in the EU shall not be excluded from using third-country firms if they choose to do so without previously having been solicited by such firms.

6. In accordance with Article 61(2) of MiCA, third-country firms may, in addition, offer to a client crypto-assets or crypto-asset services of the same type as the one originally requested by the client without being in breach of the MiCA authorisation requirements.

7. The guidelines in Annex III provide more guidance on how Article 61 applies.

ESMA's mandate

8. Under Article 61(3) of MiCA, ESMA is mandated to issue guidelines: i) to specify the situations in which a third-country firm is deemed to solicit clients established or situated in the EU as well as ii) on supervision practices to detect and prevent circumvention of the reverse solicitation exemption.

9. These guidelines are meant to provide more clarity to NCAs and market participants, especially third-country firms, on the limited situations where the provision of a crypto-asset service or activity to a client established or situated in the EU would be regarded as having been initiated at the own exclusive initiative of the client and therefore as not being in breach of the authorisation requirement under Article 59 of MiCA.

Relevant key issues and considerations

10. In terms of scope, it must be specified that the reverse solicitation exemption only applies to third-country firms, in accordance with Article 61 of MiCA. Consequently, it may not be relied upon by EU-based firms to escape the authorisation or notification requirements under MiCA.

11. As previously specified in the ESMA statement dated 17 October 2023[5], genuine reverse solicitation situations should be understood as very limited and very narrowly framed and, consequently, should not be assumed, nor exploited to circumvent MiCA.

12. Consequently, to protect investors as well as MiCA-compliant crypto-asset service providers, the concepts of solicitation, means of solicitation and person soliciting should be construed very broadly. The concept of crypto-assets belonging to the same type, on the other hand, should be understood narrowly.

Public consultation

13. On 29 January 2024, ESMA published a consultation paper to seek stakeholders' views on draft guidelines on reverse solicitation.[6] The consultation period closed on 29 April 2024. ESMA received 35 responses, 6 of which were confidential. The answers received are available on ESMA's website[7] unless respondents requested otherwise.

14. In addition, ESMA sought the advice of the SMSG. The SMSG advice is hereto reproduced in Annex II.

Final report

[5] Available here.
[6] Available here.
[7] Available here.

15. This Final Report summarises and analyses the responses to the CP and explains how the responses, together with the SMSG advice, have been taken into account. ESMA recommends reading this report together with the CP published on 29 January 2024 to have a complete view of the rationale for the guidelines.

3 Feedback statement for the guidelines on the solicitation of clients by third-country firms

3.1 General Comments

3.1.1 The parallel with the MiFID II reverse solicitation regime

Feedback received

16. A large number of respondents had questions about the relationship between the draft guidelines and the MiFID II reverse solicitation regime (Article 42 of MiFID II).

17. Many noted that, in their view, the guidance provided by the draft guidelines was unduly stricter than the MiFID II reverse solicitation regime and that the two should be aligned (i.e. that the draft guidelines should be amended in line with the MiFID II reverse solicitation regime. Other respondents requested a clear distinction between the reverse solicitation regimes under MiCA and MiFID II and clarification that the draft guidelines do not apply to financial instruments (as defined under MiFID II). Such respondents specifically expressed the view that the reverse solicitation regime under MiCA should be stricter than the one under MiFID II.

18. Lastly, only a couple of respondents expressed the view that the reverse solicitation regimes under MiCA and MiFID are the same and, therefore, that the draft guidelines should be relevant also for the MiFID II reverse solicitation regime.

ESMA response

19. Article 61 of MiCA and Article 42 of MiFID II share many similarities, indicating that the reverse solicitation regimes under both frameworks adhere to the same overarching principles.

20. However, this Final Report focuses exclusively on providing guidance for the MiCA reverse solicitation regime. Any additional guidance or clarification needed for the MiFID II reverse solicitation regime will be addressed separately, if necessary.

3.1.2 Use of non-EU service providers by EU CASPs

Feedback received

21. Several respondents were concerned that the draft guidelines could prevent EU-authorised CASPs from outsourcing to or working with non-EU service providers. They

were also worried about the possibility for EU-authorised CASPs to route orders to or execute orders on non-EU execution venues.

22. Some respondents suggested to address the above issues by introducing a distinction between retail and professional clients.

ESMA response

23. Regarding the introduction of a distinction between retail and professional clients, as such categorisation of clients does not exist in the Level 1 text, this cannot be introduced through the draft guidelines. The authorisation requirements of Article 59 of MiCA apply to the provision of crypto-asset services within the Union, whether the crypto-asset service is provided to retail or professional clients. Exemptions to this requirement are set out in Article 2(2) and Article 61 of MiCA. Another exemption applicable to professional clients may thus not be introduced via guidelines. However, professional clients may benefit from the exemption under Article 61 of MiCA.

24. Non-EU execution venues on which EU-authorised brokers are looking for liquidity (therefore routing orders to or executing orders on such venues) may be in breach of MiCA if they are providing crypto-asset services in the Union and do not fall in scope of the exemption under Article 61 of MiCA. ESMA would also recommend referring to its opinion issued on 31 July 2024[8] for the circumstances where the routing or execution of orders by EU-authorised brokers to non-EU execution venues could be regarded as the provision of crypto-asset services within the Union by a non-EU firm.

3.2 Guideline 1 (Means of Solicitation)

24. A majority of respondents regretted that the marketing restrictions arising from the draft guidelines were too tight. Many respondents argued that the definition of what constitutes solicitation in the draft guidelines is too broad, goes beyond the level 1 text, is disproportionate and would effectively preclude any kind of reverse solicitation.

3.2.1 Passive versus active marketing or promotions, brand building

Feedback received

25. Some respondents argued that only direct offers to individual clients or targeted groups of clients (or active marketing as some respondents called it) should be regarded as solicitation for the purposes of Article 61 of MiCA. According to them, indirect (or passive) marketing (for instance, banner advertisements, having a website) should, to the

[8] Available here.

contrary, not be regarded as solicitation and should not prevent non-EU firms from relying on the reverse solicitation exemption. These respondents fear that third-country firms' marketing efforts not specifically aimed at EU potential clients may also be caught.

26. Many respondents pointed to paragraph 13 of the draft guidelines in the CP and to the fact that the mere availability of a website in an official language of the Union – and which is not customary in the sphere of international finance – does not necessarily indicate that a third-country firm is soliciting clients located or established in the EU. They particularly pointed to the fact that some of the official languages of the Union are shared with other parts of the world.

27. A number of respondents also argued that marketing not related to a specific product or service should not be regarded as solicitation under Article 61 of MiCA. Brand advertisement or brand building, for instance, should not, in their view, be considered solicitation.

ESMA response

28. Regarding the argument that the guidelines go beyond level 1, ESMA disagrees and notes that Article 61 of MiCA is very general and does not differentiate between active or passive solicitation, direct or indirect, brand advertisement or promotion of a specific crypto-asset product or service.

29. Article 61(2) is very clear and broad: "*…where a third-country firm […] solicits clients or prospective clients in the Union,* ***regardless of the means of communication used for the solicitation, promotion or advertising in the Union****, it shall not be deemed to be a service provided on the client's own exclusive initiative*". On this basis, any solicitation, promotion or advertising in the Union should be captured. Hence, the broad definition given to "solicitation" in the guidelines.

30. However, the purpose of the guidelines is not to capture solicitations, promotions or advertisements that were never intended or meant to reach clients located or established in the EU. The third-country firm should intend to reach EU potential clients or at least be aware that it is very likely that its marketing efforts will reach a significant number of EU clients. All facts and circumstances of the case should be relevant to assess whether such intention or knowledge exists.

31. For instance, a website in an official language of the Union – and which is not customary in the sphere of international finance (English) may be a relevant factor. However, as already specified by the draft guidelines in the CP: "*To assess whether third-country firms solicit clients established or located in the Union,* ***all facts and circumstances of the case are relevant***". Therefore, if it is clear that the language of the website may not

be the sole relevant indicator. If other factors point to a non-solicitation of EU clients, NCAs should also take this into account.

32. For instance, a third-country firm may have a website available in Spanish because it originates and is established in a non-European jurisdiction with Spanish as an official language. But, despite originating from a jurisdiction with Spanish as an official language, the third-country firm may still target EU clients (for instance, by using search engine optimisation targeted at clients from Spain to increase chances that Spanish clients may find its website when looking for a crypto-asset or crypto-asset service on a search engine). Hence, as set out in the guidelines, NCAs should consider all facts and circumstances of the case. The formatting of the guidelines has been amended to give more prominence to this principle (paragraph 14).

33. ESMA therefore amended the guidelines to clarify the above and, notably, added an annex to the guidelines to give examples of what may constitute solicitation of EU clients (please refer to the Annex to the guidelines).

34. Article 61 of MiCA being an exemption to the authorisation requirements under Article 59 of MiCA, it should be interpreted strictly – hence the broad definition of what constitutes solicitation, as explained below. Thus, if a third-country firm is in doubt as to whether it could be regarded as soliciting client in the EU, it could take precautionary measures to make sure that it is not in contravention of the authorisation requirements under MiCA by, for instance, not accepting new EU clients or preventing EU clients from reaching it. The guidelines have also been amended in that sense (paragraph 16).

3.2.3 Educational material or industry events

Feedback received

35. Many others also highlighted that educational materials or industry events should not be regarded as solicitation as their primary purpose was not marketing.

ESMA response

36. ESMA acknowledges concerns that the guidelines may curtail publications or events whose main purpose is normally not to solicit clients or promote a brand or services (such as educational material, industry events aimed at innovation, etc…). The aim of the guidelines is not to prevent such activities. However, it is also common practice to use such publications or events as a way to, either primarily or secondarily, promote a brand, a product or services. While ESMA recognises the need to allow purely educational or innovative publications or events – and the guidelines have been amended in that sense (please refer to paragraph 17 of the guidelines), such activities should not be used as a covert way of soliciting, advertising or promoting to clients in the EU.

3.3 Guideline 2 (Person Soliciting)

3.3.1 Own initiative reviews

Feedback received

37. A large number of respondents expressed concerns that the draft guidelines may result in third-country firms being held responsible for reviews they had nothing to do with or even no knowledge of. They feared that own initiative reviews may prevent third-country firms that are not soliciting EU clients from relying on the exemption of Article 61.

38. Some respondents also had questions regarding the following wording used in paragraph 15 of the draft guideline sin the CP: "*any other person acting explicitly or implicitly on behalf of the third-country firm*". For such respondents, it was not clear exactly what situations were covered by this.

ESMA response

39. The aim of the guidelines is not to prevent third-country firms that are not soliciting clients in the EU (themselves or through another entity acting on their behalf or having close links with the firm) from relying on reverse solicitation where EU clients have otherwise been made aware of the third-country firm's existence or crypto-asset products and services via third-parties who have not been mandated (formally or informally) by or have no close links with the firm. The guidelines have thus been amended to make this even clearer (paragraph 23 of the guidelines).

40. However, it is important to avoid creating a loophole whereby third-country firms use third-parties to promote their services under the pretence of own initiative reviews. The guidelines thus make clear that a formal contract and remuneration are not the sole indicators that a person or entity is acting on behalf of the third-country firm. The guidelines have thus also been amended to clarify further what could be considered acting "on behalf of" a third-country firm and that there need not be a formal contract and obvious remuneration.

3.3.2 Influencers

Feedback received

41. A number of respondents requested further clarification on what an influencer is and under what circumstances an influencer's activity constitutes solicitation. Among them, some advocated for the guidelines to provide a definition, others argued that the term was too vague and should be deleted from the guidelines.

ESMA response

42. ESMA notes that the reference to influencers in the guidelines is just an example of persons that may be soliciting clients on behalf of a third-country firm. There is thus no need for a definition and the criteria to take into account to assess whether a person (including influencers) is acting on behalf of a third-country firm when promoting it in the EU should be those applicable for all types of third-parties, as set out in Guideline 2.

3.4 Guideline 3 (Exclusive initiative of the client)

3.4.1 Timing

Feedback received

43. A large number of respondents disagreed with Guideline 3 on the basis that it goes beyond level 1 and imposes a time limit that is not in Article 61 of MiCA. Many also argued that this was a substantial difference with the reverse solicitation regime under MiFID II.

44. A few others argued that the example of one month included in paragraph 20 of the draft guidelines in the CP was too short. Others asked that a set time limit be provided by the guidelines, to allow clarity.

ESMA response

45. ESMA disagrees with the argument that Guideline 3 goes beyond the level 1 of MiCA. The reverse solicitation exemption is based on the premise that the product or service is provided at the client´s own exclusive initiative and can only be applied to the specific product or service requested ("*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*").

46. Article 61(2) of MiCA prohibits third-country firms from using a client's own exclusive initiative to market new types of crypto-assets or crypto-asset services to that client. A contrario, Article 61(2) is read as allowing third-country firms to market the same type of crypto-assets or crypto-asset services but the requirement that the contact has been made at the own exclusive initiative of the client still applies. Once some time has elapsed, one cannot argue that the contact is still maintained at the own exclusive initiative of the client. Hence this requirement is embedded in the level 1 text.

47. It is however not possible or desirable to provide a set time limit, because the relevant time limit will depend on the specific circumstances of each case.

48. Lastly, regarding respondents that argued that Guideline 3 constitutes a substantial deviation from the MiFID II reverse solicitation regime, ESMA refers them to Q&A 13.4 of the ESMA Q&As on MiFID II and MiFIR investor protection and intermediaries topics[9] that sets out a similar position under MiFID II.

3.4.2 Ongoing relationships

Feedback received

49. Some respondents are concerned that Guideline 3 could prevent third-country firms from maintaining an ongoing relationship with an EU client, even where that relationship has been started at the own exclusive initiative of the client. They deemed that the time limit explicated in Guideline 3 was incompatible with an ongoing relationship with an EU client.

ESMA response

50. ESMA would like to clarify that the time limit explicated in Guideline 3 only applies to the marketing of new crypto-assets and crypto-asset services that are of the same type as the crypto-asset or crypto-asset service initially requested by the client at its own exclusive initiative[10]. It thus does not apply to the relationship resulting from the provision of the crypto-asset service initiated at the own exclusive initiative of the client. Therefore, if the crypto-asset service provided requires an ongoing relationship between the third-country firm and the EU client, this is not prohibited and is not subject to any time limit, only the marketing of new products or services is.

51. Thus, what is prohibited is that the third-country firm uses such ongoing relationship to market new crypto-assets or crypto-asset services that are either i) of a different type than the ones initially requested by the client or ii) of the same type but after some time has passed and therefore such marketing may not be regarded as being initiated at the exclusive initiative of the client.

3.5 Guideline 4 (When is a crypto-asset or a crypto-asset service of the same type as another one)

Feedback received

[9] Available here.
[10] Other types of crypto-assets or crypto-asset services cannot be marketed at all to the client on the basis of Article 61 of MiCA, even during a short period of time following the solicitation by the client.

52. Some respondents regret that the draft guidelines did not provide for a categorisation of crypto-assets. Others were unsure about whose responsibility it is to determine whether crypto-assets or crypto-asset services are of the same type or not.

53. In addition, a rather large number of respondents also had questions regarding the reference to liquidity as a criteria to determine whether two crypto-assets are of the same type or not. Most wondered which criteria should be taken into account to assess liquidity.

ESMA response

54. ESMA would like to clarify that, where a third-country firm intends to use the possibility under Article 61(2) to market new crypto-assets or crypto-asset services of the same type, it is that firm's responsibility to determine which crypto-assets or crypto-asset services are of the same type as the ones initially requested by the client at its own exclusive initiative. The wording of Guideline 4 has been slightly amended to make this clearer.

55. Such determination should be based on (i) the category of the crypto-asset or crypto-asset service or activity offered and (ii) the risks attached to each crypto-asset or crypto-asset service or activity. This assessment should be sufficiently granular so that third-country firm may not be regarded as circumventing the authorisation requirements under Article 59 of MiCA by abusing the possibility opened by Article 61(2).

56. Given that third-country firms have to take into account the risk profile of the crypto-assets, the reference to liquid and illiquid assets in Guideline 4 is therefore just one of several criteria that should be taken into account by firms to assess whether two crypto-assets are of the same type.

4 Feedback statement for the guidelines on the supervision practices to detect and prevent the circumvention of the reverse solicitation exemption

4.1 Feedback received

57. A few respondents asked ESMA to also address in the guidelines what enforcement actions NCAs could take when a third-country firm is found to have breached the authorisation requirements under Article 59 of MiCA.

58. In addition, others insisted that NCAs' supervision practices, as addressed in the guidelines, should be used only where there is a reasonable suspicion of wrongdoing.

59. Besides, two respondents suggested that where third-country firms rely on reverse solicitation, they should only be permitted to do so for a limited number and volume of transactions. They argued that this would be an effective tool to ensure that reverse solicitation remains the exception.

4.2 ESMA response

60. ESMA would like to clarify that enforcement powers of NCAs are not to be addressed in the guidelines as MiCA already addresses NCAs' powers in Article 94. In addition, as a preliminary step to a reasonable suspicion of wrongdoing, NCAs may need to monitor the market.

61. Thus, ESMA would also like to clarify that the supervision practices set out in the guidelines do not need, as a pre-requisite, a reasonable suspicion of wrongdoing as they are meant to "*detect and prevent circumvention of this Regulation*".

62. Lastly, regarding the suggested cap to the number or volume of transactions based on reverse solicitation, it is worth clarifying that no such limit exists in level 1. Besides, whilst a large number of transactions based on reverse solicitation may be a good indication that there may be a breach of the authorisation requirements under MiCA, a number of transactions within a set cap would not ensure that such transactions are actually based on reverse solicitation.

5 Annex I – Cost benefit analysis

5.1 Guidelines on the solicitation of clients by third-country firms

Impact of the guidelines under the first subparagraph of Article 61(3) of MiCA

1. As per Article 16(2) of Regulation (EU) No 1095/2010, any guidelines developed by ESMA are to be accompanied by an analysis of '*the related potential costs and benefits of issuing such guidelines*'. Such analysis shall be "*proportionate in relation to the scope, nature and impact of the guidelines*".

2. The following section outlines ESMA's assessment of the main policy options included in the guidelines on the solicitation of clients by third-country firms.

Problem identification

3. MiCA will enhance safeguards for holders of crypto-assets and clients of crypto-asset service providers, financial stability, and integrity of markets in crypto-assets that are not currently regulated by existing common EU financial services legislation. MiCA therefore represents an important legislative milestone for crypto-asset markets.

4. Adhering to MiCA could pose a significant regulatory challenge for previously unregulated crypto firms. Consequently, some might be inclined to continue serving EU clients without obtaining authorization as a CASP under MiCA.

5. Whilst Article 61 of MiCA allows unsolicited EU clients to seek third-country firms for the provision of crypto-asset services, such exemption to the authorisation requirements under Article 59 of MiCA must be understood as very narrowly framed and cannot be assumed, nor exploited to circumvent MiCA.

6. The guidelines should thus ensure that NCAs, through their supervisory and enforcement powers, are able to take all necessary measures to actively protect EU-based investors and MiCA-compliant CASPs from undue incursions by non-EU and non-MiCA compliant entities.

Policy objectives

7. The objective of these guidelines is to foster investor protection and a fair competition for EU-based and MiCA-compliant CASPs. To reach such objective, the guidelines further specify what may constitute solicitation of EU clients, so that the reverse solicitation exemption is not used to circumvent the authorisation requirements under MiCA.

Baseline scenario

8. In a baseline scenario, without the guidelines:

   i) where a client located or established in the EU initiates a crypto-asset service at its own exclusive initiative with a third-country firm, the authorisation requirements under Article 59 of MiCA do 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;

   ii) a third-country firm may not rely on the reverse solicitation exemption where such firm, including through an entity acting on its behalf or having close links with such third-country firm or any other person acting on behalf of such entity, solicits clients or prospective clients in the EU;

   iii) solicitation of EU clients for the purposes of ii) above should be assessed regardless of the means of communication used for the solicitation, promotion or advertising in the Union;

   iv) where a third-country firm has been contacted by a client at its own exclusive initiative, the third-country firm is entitled to market new crypto-assets or crypto-asset services to that client, if such new crypto-assets or crypto-asset services are of the same type as the ones initially requested by the client.

9. Without the guidelines, the interpretation of Article 61 of MiCA by third-country firms and NCAs would be subject to little harmonisation. This was made clear by the feedback received to the CP. In addition, the feedback received made clear that a majority of respondents seemed ready to take a very liberal approach to the reverse solicitation exemption, despite ESMA statement dated 17 October 2023[11] that such exemption should be understood as very narrowly framed.

10. A lack of harmonisation and broad interpretation of the reverse solicitation exemption under Article 61 of MiCA would lead to:

   i) investor detriment; and

   ii) unfair competition between third-country firms that do not have to comply with MiCA requirements and EU CASPs.

Options considered and preferred options

[11] Available here.

Policy issue 1: means of solicitation

11. ESMA has considered 2 options:

    Option 1a. Take a restrictive approach with respect to the concept of "means of solicitation" and limit its interpretation to direct offers only.

    Option 1b. Make clear that solicitations should be interpreted broadly, including regarding the means of targeting clients.

12. Article 61(1), second subparagraph is clear in that solicitation should be considered "*regardless of the means of communication used for the solicitation*". Therefore, the format, support or occasion used for the solicitation should be irrelevant. The main criterion is whether there is a solicitation, promotion or advertisement done.

13. Similarly, it is clear that solicitation under Article 61 of MiCA is not limited to direct offers as it also refers to promotions or advertisement.

14. In addition, taking a restrictive interpretation to the means of solicitation that would prevent third-country firms from relying on the reverse solicitation exemption would create a loophole easily exploited by third-country firms.

15. ESMA thus chose Option 1b.

Policy issue 2: brand advertisement

16. ESMA has considered 2 options:

    Option 2a. Limit the interpretation of solicitation, promotion or advertisement to those relating to a specific crypto-asset or crypto-asset service or activity.

    Option 2b. Consider that a solicitation, promotion or advertisement need not be in relation to a specific crypto-asset or crypto-asset service or activity to be considered as solicitation and prevent a third-country firm from relying on Article 61 of MiCA.

17. Article 61 of MiCA does not specify that a solicitation, promotion or advertisement should only be considered as preventing a third-country firm from relying on the reverse solicitation exemption where it is related to a specific crypto-asset or crypto-asset service.

18. In addition, excluding brand advertisement from the notion of solicitation under Article 61 of MiCA would create a loophole easily exploited by third-country firms.

19. ESMA therefore chose Option 2b.

Policy issue 3: person soliciting

20. ESMA has considered 2 options:

    Option 3a. Interpret the concept of "person acting on behalf of" the third-country firm to persons who have a formal agreement to solicit, promote or advertise for the third-country firm.

    Option 3b. Consider that a person may be soliciting EU clients on behalf of a third-country firm even where there is no formal agreement or obvious remuneration between them.

21. Option 3a would allow third-country firms to easily circumvent the authorisation requirements under MiCA by using third-parties to promote their activities thourgh an informal agreement. Option 3a would also not be flexible enough for nCAs to supervise and enforce MiCA.

22. For the above reasons, ESMA chose Option3b.

Policy issue 4: possibility to market new crypto-assets or crypto-asset services of the same type as the ones initially requested by the client – time limit

23. ESMA has considered 2 options:

    Option 4a. Refrain from providing further guidance on this topic on the basis that Article 61 is already sufficiently clear.

    Option 4b. Explicit the time limitation applicable when a third-country firm is marketing new crypto-assets or crypto-asset services of the same type as the ones initially requested by the client.

24. Option 4a ran the risk that the limitations applicable to the possibility opened by Article 61(2) of MiCA may not be sufficiently clear. The feedback received confirmed such suspicion.

25. For clarity and investor protection purposes, ESMA chose Option 4b.

Policy issue 5: Types of crypto-assets and crypto-asset services

26. ESMA has considered 3 options:

    Option 5a. Refrain from providing further guidance on this topic.

Option 5b. Provide guidance as to the criteria that should be taken into account by third-country firm to determine whether crypto-assets or crypto-asset services are of the same type as the ones initially requested by the client.

Option 5c. Provide a categorisation of crypto-assets and crypto-asset services that are of the same type.

27. With Option 5a, there was a risk that third-country firms may use Article 61(2) to circumvent MiCA by using a very broad interpretation of what crypto-assets or crypto-asset services may belong to the same type (for instance by assuming that all crypto-assets that are not asset-referenced tokens or e-money tokens belong to the same type).

28. Option 5c, on the other hand, was not possible for several reasons: i) it is not possible for ESMA to categorise all crypto-assets that exist on the market; ii) their risk profile may change from time to time based on the evolution of the market and the information available; and iii) two crypto-asset services may belong to the same type for one firm but not for another, depending on the conditions of the provision of such crypto-asset services by each firm. Option 5c would also leave little flexibility to take into account evolutions of the market or innovations.

29. Option 5b however offered the right balance of guidance (including through some examples and a reminder that the possibility offered by Article 61(2) should be interpreted restrictively) and flexibility.

30. ESMA thus chose Option 5b.

Cost-benefit analysis

31. The guidelines are expected to result in limited costs for third-country firms and persons soliciting on their behalf , but also in benefits for investors and for EU-CASPs.

32. The costs described hereafter are mainly attributable to Level 1 regulation, which sets the prohibition for third-country firms to provide crypto-asset services in the Union. They should also be fairly limited as these guidelines provide guidance on a prohibition, thereby requiring third-country firms to refrain from certain actions (providing crypto-asset services in the Union). Some limited costs may however be expected where third-country firms may need to take precautionary measures to ensure that they do not breach the authorisation requirements under MiCA or when they intend to rely on the reverse solicitation exemption and shall ensure that they stay within its limits.

Costs

33. Third-country firms are expected to incur very limited costs in situations where they are unsure as to whether they may be regarded as soliciting clients in the EU and thus may

need to take precautionary measures to make sure that they do not provide crypto-asset services in the Union. Such costs may be one-off costs or ongoing costs, depending on the marketing/promotion/advertisement situation of the third-country firm.

34. Third-country firms may also incur some limited costs where they intend to rely on the reverse solicitation exemption. Such costs may result from i) records to be kept as evidence that the provision of the crypto-asset service was initiated at the own exclusive initiative of the client and ii) the categorisation of crypto-assets or crypto-asset services where the third-country firm intends to use the possibility to market new crypto-assets or crypto-asset services of the same type as the ones initially requested by the client.

35. But, overall, costs for third-country firms should be fairly limited or inexistent as the guidelines mostly refer to situations where third-country firms should refrain from any action (providing crypto-asset services in the Union).

Benefits

36. As one of the main objectives of MiCA is to foster investor protection by creating a safer crypto-asset market in the EU, the guidelines promote investor protection by providing strict guidance on how to interpret Article 61 so that the reverse solicitation may not be circumvented.

37. The introduction of a harmonised interpretation of Article 61 also promotes supervisory convergence by lessening the risk of third-country firms using one Member State as its point of entry to the EU market.

38. Lastly, a restrictive interpretation of Article 61 also promotes a fair competition between third-country firms and CASPs.

Table: costs and benefits

Stakeholder groups affected	Costs	Benefits
CASPs	None	Fair competition with third-country firms
Third-country firms	Limited one-off or ongoing costs where they are unsure as to whether they may be regarded as soliciting EU clients and thus need to take precautionary measures to	Legal certainty

Stakeholder groups affected	Costs	Benefits
	ensure they are not in breach of the MiCA authorisation requirements For third-country firms that intend to rely on the reverse solicitation exemption only, ongoing costs regarding record-keeping of the initiation of the relationship by the client For third country-firms that rely on reverse solicitation and intend to market new crypto-assets or crypto-asset services of the same types as the ones initially requested, ongoing costs of assessing which crypto-assets or crypto-asset services they offer belong to the same type	
Competent authorities	Ongoing cost of supervision that there is not breach of the authorization requirements under MiCA	Safer crypto-asset market. Facilitation of supervision of the reverse solicitation exemption
Clients of CASPs	None	Safer crypto-asset market

5.2 Guidelines on the supervision practices to detect and prevent the circumvention of the reverse solicitation exemption

Impact of the guidelines under the second subparagraph of Article 61(3) of MiCA

39. As per Article 16(2) of Regulation (EU) No 1095/2010, any guidelines developed by ESMA are to be accompanied by an analysis of '*the related potential costs and benefits of issuing such guidelines*'. Such analysis shall be "*proportionate in relation to the scope, nature and impact of the guidelines*".

40. The following section outlines ESMA's assessment of the main policy options included in the guidelines on the supervision practices to detect and prevent the circumvention of the reverse solicitation exemption.

Problem identification

41. MiCA will enhance safeguards for holders of crypto-assets and clients of crypto-asset service providers, financial stability, and integrity of markets in crypto-assets that are not currently regulated by existing common EU financial services legislation. MiCA therefore represents an important legislative milestone for crypto-asset markets.

42. Adhering to MiCA could pose a significant regulatory challenge for previously unregulated crypto firms. Consequently, some might be inclined to continue serving EU clients without obtaining an authorisation as a CASP under MiCA.

43. The guidelines should help NCAs, through their supervisory activities, to detect and prevent the circumvention of the reverse solicitation exemption.

Policy objectives

44. The objective of these guidelines is to provide some guidance for NCAs as to what supervisory activities they might put in place to detect and prevent the circumvention of the reverse solicitation exemption.

Baseline scenario

45. In a baseline scenario, without the guidelines, each NCA reflects on the supervisory activities that they may put in place to detect and prevent the circumvention of the reverse solicitation exemption.

46. Some supervisory convergence activities and information sharing may however be put in place at ESMA level to enhance supervisory convergence in this respect.

Options considered and preferred options

Policy issue 1: level of details of the guidelines

47. ESMA has considered 2 options:

Option 1a. Take a high-level and flexible approach to the guidelines.

Option 2b. Develop detailed and more forceful guidelines on the supervisory activities that NCAs should put in place to detect and prevent the circumvention of the reverse solicitation exemption.

48. Option 2b was rejected for the following reason:

i) it could hinder NCAs' independence and flexibility in respect of their supervisory activities;

ii) such independence and flexibility are desirable as NCAs should adapt their supervisory activities to their market and to its evolution (as supervisory activities may evolve depending on the market);

iii) third-country firms may use detailed guidelines as a manual on how not to be detected when circumventing the reverse solicitation exemption.

49. On the other hand, a high-level and flexible approach to the guidelines would leave enough room for NCAs to tailor their supervisory activities to their market and its evolution.

50. ESMA thus opted for Option 1a.

Cost-benefit analysis

51. The guidelines are expected to result in ongoing costs for NCAs and no cost for other entities or persons. They are expected to result in benefits for investors and for EU-CASPs.

52. The costs described hereafter are mainly attributable to Level 1 regulation, which sets the prohibition for third-country firms to provide crypto-asset services in the Union – which NCAs have to supervise.

Costs

53. NCAs are expected to incur costs to supervise that third-country firms do not breach the MiCA authorisation requirements and do not circumvent the reverse solicitation exemption.

54. Such costs may be allocated between one-off costs and ongoing costs, depending on the type of supervisory activities put in place by the NCA.

Benefits

55. As one of the main objectives of MiCA is to foster investor protection by creating a safer crypto-asset market in the EU, the guidelines promote investor protection by providing guidance to NCAs on how they may detect and prevent the circumvention of Article 61. By doing so, the guidelines also promote supervisory convergence.

Table: costs and benefits

Stakeholder groups affected	Costs	Benefits
CASPs	None	Fair competition with third-country firms
Third-country firms	None	Legal certainty
Clients of CASPs	None	Safer crypto-asset market
Competent authorities	Ongoing cost of supervision that there is no breach of the authorisation requirements under MiCA One-off costs where NCAs put in place some punctual supervisory activities	Safer crypto-asset market. Facilitation of supervision of the reverse solicitation exemption

17 December 2024
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6 Annex II – Advice of the SMSG

Advice to ESMA

SMSG advice to ESMA on its consultation papers on reverse solicitation and the qualification of crypto-assets as financial instruments in the context of the Markets in Crypto Assets (MiCA) Regulation

Table of Contents

1. Executive Summary

Consultation paper on reverse solicitation.

The provision of crypto-asset services by a third-country firm is strictly limited under MiCA to cases where such service is initiated at the own exclusive initiative of a client (the "reverse solicitation" exemption). The SMSG fully supports the restrictive approach to the reverse solicitation exemption put forward by ESMA as it is consistent with investor protection and fair competition.

The SMSG supports the ESMA approach that time matters to define the reverse solicitation exemption, especially with the intention to define the exemption in a narrow way. The SMSG also highlights the need for a clarification on the time threshold beyond which the reverse solicitation exemption cannot be used.

MiCA leaves open the possibility for the third-country firm to market crypto-assets of the same type. The SMSG believes that the 'same type' requirement is indeed relevant to avoid the circumvention of MiCA by third country entities. The SMSG supports the approach proposed by ESMA to assess the 'same type' based on the risk exposure associated to the service initially requested by the EU investor. However, the SMSG also observes that the reference to the type of crypto-asset – which is present in the MiCA text – may actually produce unintended consequences as very different crypto-assets can be included within each one of the three types of crypto-assets that MiCA regulates.

The Advice also reports, for ESMA consideration, possible initiatives and measures to reinforce the restrictive approach to reverse solicitation set out in the consultation paper.

Consultation paper on the qualification of crypto-assets as financial instruments

MiCA does not apply to crypto-assets that qualify as financial instruments as defined by MiFID II. The SMSG very much supports the objective of achieving a high level of legal certainty around the qualification of crypto-assets as financial instruments. The SMSG acknowledges that there are different approaches in the individual Member States with regard to what qualifies as financial instruments and believes that the EU regulatory framework should progress to achieve a common definition of financial instruments in the EU.

The SMSG supports ESMA position regarding technology neutrality. The qualification of a financial instrument should depend on the rights and obligations that define its legal and economic profiles. The SMSG also supports the adoption of a substance over form approach to the qualification of crypto-assets as financial instruments because it is expected to reinforce investor protection.

The SMSG highlights the following areas where ESMA Guidelines might clarify the potential implications of the qualification of crypto-assets as financial instruments: the EU passporting system and cross-border activities; the coverage by Investors Compensation Schemes; the scope of a CASP licence; the application of the investor protection-related conduct of business rules contained in MiFID II.

The SMSG supports, in case of doubt, the adoption of an extensive interpretation for the qualification of crypto-assets as financial instruments as it would reinforce investor protection thanks to the application of the MiFID II well-established regulatory framework. The SMSG also believes that, to provide clarity to investors, it would be preferable to disclose the regulatory framework to be applied to the specific transaction (i.e., MiCA or MiFID II).

Given the cross-border nature of crypto-related activities, the SMSG highlights the relevance of information sharing among authorities. The exchange of information among authorities might involve not only NCAs but also other authorities (e.g., competition authorities).

Lastly, the SMSG suggests leveraging on the technology used by crypto-assets to reinforce monitoring of CASPs activities in terms of scope and speed (e.g., to detect abnormal transactions).

2. Background

1. On 29 January 2024, ESMA released two consultation papers related to the Markets in Crypto Assets Regulation (MiCA), one on reverse solicitation and one on the classification of crypto-assets as financial instruments.

2. In the consultation on reverse solicitation, ESMA is seeking input on proposed guidance concerning the conditions of application of the reverse solicitation exemption and the supervision practices that National Competent Authorities (NCAs) may take to prevent its circumvention. The provision of crypto-asset services by a third-country firm is limited under MiCA to cases where such services are initiated at the own exclusive initiative of a client. The proposed guidance confirms ESMA's statement released on 17 October 2023[12].

3. In the consultation paper on classification, ESMA is seeking input on establishing conditions and criteria for the qualification of crypto-assets as financial instruments. This initiative is aimed at bridging the MiCA regulation and the Markets in Financial Instruments Directive II (MiFID II) and ensuring consistency across the EU. The proposed guidelines are intended to provide NCAs and market participants with

[12] See ESMA statement "ESMA clarifies timeline for MiCA and encourages market participants and NCAs to start preparing for the transition", released on 17 October 2023 and available at https://www.esma.europa.eu/sites/default/files/2023-10/ESMA74-449133380-441_Statement_on_MiCA_Supervisory_Convergence.pdf.

indications to determine whether a crypto-asset can be classified as a financial instrument.

4. In this Advice, the SMSG provides its views on the specific questions raised by ESMA in the consultation papers as well as comments on more general issues that are related to the topics discussed in the consultation papers.

3. SMSG opinions and comments on reverse solicitation

3.1 General approach

5. The provision of crypto-asset services or activities by a third-country firm is strictly limited under MiCA to cases where such service is initiated at the own exclusive initiative of a client (the so called “reverse solicitation” exemption). The reverse solicitation exemption determines whether a third-country firm is allowed to provide a crypto-asset service to an EU client. ESMA clarifies that this exemption should be understood as very narrowly framed, must be regarded as the exception and it cannot be exploited to circumvent MiCA.

6. The SMSG believes that the reverse solicitation exemption deserves careful consideration for reasons related to both investor protection and level-playing field. As for investor protection, EU-based investors would lose the protections afforded to them under MiCA when using non-EU crypto-asset service providers (CASPs). As for competition, EU-based CASPs may be disadvantaged when competing with non-EU based entities which are not expected to be compliant with MiCA.

7. The SMSG fully supports the restrictive approach to the reverse solicitation exemption put forward by ESMA as it is consistent with the reasons related to investor protection and fair competition mentioned in the previous paragraph.

3.2 Timing of the reverse solicitation (Guideline 3)

8. ESMA consultation paper stresses that timing is of the essence when a third-country firm relies on the reverse solicitation exemption granted by Article 61 of MiCA. If the third-country firm meets all the conditions to rely on the reverse solicitation exemption, it may only do so for a very short period of time.

9. More specifically, Guideline 3 clarifies that the third-country firm relying on the exemption is not allowed to subsequently offer the client further crypto-assets or services, even if such crypto-asset or service is of the same type as the one originally requested, “unless they are offered in the context of the original transaction”.

10. The SMSG supports the ESMA approach that time matters to define the reverse solicitation exemption, especially with the intention to define the exemption in a narrow way. Against this background, the SMSG highlights that 10 days may constitute a reasonable limit to consider the provision of the service occurred "in the context of the original transaction". The ultimate goal of this piece of regulation is not to take into account the third-country firm needs, but to limit the possibility that EU investors are offered crypto-assets or crypto-assets services beyond the EU protection framework.

11. The SMSG also highlights the need for a clarification on the time threshold as the consultation paper – on one side – states that the draft guidelines do not provide any definite time window during which the exemption may be used but – on the other side – it also makes reference to "a month or even a couple of weeks"[13], whereas the draft guidelines refer to a one month period as an example[14]. Both the consultation paper and the draft guidelines make clear that the exemption cannot be used to provide services beyond those time thresholds (a month and two weeks). However, the reference to a single time threshold may be useful to provide more certainty.

3.3 When is a crypto-asset of the 'same type' as another one (Guideline 4)

12. The reverse solicitation exemption is based on the premise that the crypto-asset product, service or activity is provided at the client's own exclusive initiative. Article 61(2) of MiCA leaves open the possibility for the third-country firm to market to that client crypto-assets or crypto-asset services or activities of the same type.

13. The SMSG believes that the 'same type' requirement is indeed relevant to avoid the circumvention of MiCA by third country entities and EU-investors ending up with services different from the ones that they initially asked for. For such reasons, the SMSG believes that the concept of 'same type' should be very limited.

14. According to Guideline 4, whether the third-country firm markets the 'same type' of crypto-asset or crypto-asset service or activity should be assessed on a case-by-case basis, taking into account elements such as (i) the type of the crypto-asset or crypto-asset service or activity offered and (ii) the risks attached to the new type of crypto-asset or crypto-asset service or activity. Guideline 4 also provides a non-exhaustive list of pairs

[13] See paragraph 17 of the consultation paper (page 11): "Although the draft guidelines do not provide any definite time window during which the exemption may be used, the lapse of a month or even a couple of weeks between the provision of the crypto-asset service based on a request made at the own exclusive initiative of the client and a subsequent offer by the third-country firm would exclude the application of Article 61.".
[14] See paragraph 20 of the draft guidelines (page 19): "For instance, if the client contacts the third-country firm to buy crypto-asset X, the firm may – at this point in time – market to the clients crypto-assets of the same type. However, the third-country firm would not be entitled to market further crypto-asset X transactions or transactions in similar crypto-assets to the client a month later.".

of crypto-assets which should not be considered as belonging to the same type of crypto-assets for the purpose of the reverse solicitation exemption[15].

15. We now comment first on the risks (i.e., element (ii) mentioned in the previous paragraph) and then on the type (i.e., element (i) mentioned above).

16. As for the risks, the SMSG supports the approach proposed by ESMA to assess the 'same type' based on the risk exposure associated to the service initially requested by the EU investor because the client has originally asked for a specific product when renouncing to the MiCA protection, and not for other products with different risk profiles.

17. As for the type, the SMSG is aware of the fact that Article 61(2) of MiCA refers to "new types of crypto-assets". However, the SMSG observes that the reference to the "type of the crypto-asset" may produce unintended consequences. Indeed, very different crypto-assets can be included within each one of the three types of crypto-assets that MiCA regulates. This approach risks opening too much the space to the reverse solicitation exemption in a way that may hinder the goal set by ESMA of ensuring that this exemption cannot be used to circumvent the MiCA framework.

18. Against this background, Guideline 4 states that the 'same type' requirement should be assessed taking into account elements such as (i) the type and (ii) the risks. The SMSG believes that both type and risks (jointly, and not alternatively) should be considered[16], although the use of "such as" might be read as meaning that the elements listed in Guideline 4 as illustrative. This interpretation put forward by the SMSG is consistent with a restrictive approach to the assessment of the 'same type' requirement. A clarification from ESMA in this respect would be beneficial.

19. The SMSG considers that the meaning of risk exposure should not be restricted to the standard categories of financial risk (e.g., market risk, counterparty risk, etc.) and also include dimensions related to the technology used to perform the transaction. Against this background, the SMSG fully share the broad wording used by ESMA that refers to the "the risks attached to the new type of crypto-asset or crypto-asset service or activity", with no limitations as for the nature of the risks considered in the assessment.

20. The SMSG appreciates that the consultation paper states very clearly the importance of the risk dimension in paragraph 20, that reads: "Third-country firms should however

[15] Precisely: utility tokens, asset-referenced tokens or electronic money tokens; crypto-assets not stored or transferred using the same technology; electronic money tokens not referencing the same official currency; asset-referenced tokens based mostly on FIAT currencies and asset-referenced; tokens having significant crypto-currency ponderations; liquid and illiquid crypto-assets; crypto-assets other than asset-reference tokens and electronic money tokens with a non-identifiable-offeror and crypto-assets other than asset-reference tokens and electronic money tokens with an identifiable offeror.
[16] The consultation paper has a specific question related to the 'same type' requirement. See 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?").

assess such condition on a case-by-case basis, taking into account, notably, whether two crypto-assets carry the same risks and level of risks.". However, the SMSG also observes that this statement is not included in Guideline 4 and considers that its inclusion would be useful.

21. For what concerns the list of pairs of crypto-assets which should not be considered as belonging to the 'same type' set out in Guideline 4, the SMSG observes the reference to utility tokens, asset-referenced tokens and electronic money tokens may produce unintended consequences for the same reasons as those stated above in paragraph 0 since very different crypto-assets can be included within each one of the three types of crypto-assets.

3.4 Possible initiatives and measures to reinforce the restrictive approach to reverse solicitation

22. The next paragraphs of this section report, for ESMA consideration, a number of possible additional measures to reinforce the restrictive approach to reverse solicitation set out in the consultation paper.

23. First, the consultation paper considers the application of the reverse solicitation exemption to situations in which the crypto-assets are offered to EU investors. The SMSG is of the opinion that, to define an offer of crypto-assets as being made in the EU for MiCA purposes, what should be taken into account is that EU investors are allowed to buy these crypto-assets. To assess this circumstance, it is possible to refer to the promotional materials and check the presence therein of data relevant for an EU investor to acquire the crypto-asset as well as the absence of a specific and express limitation that the offer is not addressed to EU investors in any case.

24. Second, the SMSG considers that ESMA might propose that all NCAs share through ESMA the crypto-assets offers and offerors that are active, attracting EU investors, and that do no collaborate or do not attend information requests by NCAs. The SMSG believes that having a comprehensive view at the EU level would be very beneficial to achieve a clear picture of potential investors protection challenges and level playing field issues. It would also be useful to design potential actions to be taken by ESMA and by NCAs or for proposing measures to EU regulators.

25. Third, the SMSG considers that it could be challenging for an EU NCA to get a fully satisfactory cooperation from non-EU crypto-assets service providers. In this respect, among the measures to be taken into consideration by NCAs, ESMA might propose to share or disclose the identity of non-EU CASP and 'finfluencers' that do not cooperate with an NCA. Since this lack of cooperation gives an indication that the non-EU entity is not very much concerned about compliance with the EU rules, the fact that a non-EU

CASP or 'finfluencer' does not cooperate with the relevant NCA would be a very relevant information for EU investors and authorities.

26. Fourth, NCAs should not only monitor firms offering crypto-assets but also, specifically, any offers of crypto-assets. Indeed, it is not common that the promotion of a crypto-asset (e.g., through a 'finfluencer') makes reference to the issuer or offeror, and it is more likely that the promotion refers to the crypto-asset itself. Thus, NCAs should follow crypto-assets promotion and not only offerors or issuers. Along these lines, a useful measure is to presume that anyone promoting a crypto-asset in social networks or media is acting on behalf of the issuer/offeror of that crypto asset.

27. Fifth, market participants should be aware of a firm approach to limit the reverse solicitation exemption. For example, the sanctions for offerings beyond the reverse solicitation limits should be mentioned in a clear way. While this would be a natural consequence, mentioning it expressly gives the idea of a firm approach to limit the exemption.

4 SMSG opinions and comments on the qualification of crypto-assets as financial instruments

4.1 Preliminary remarks

[…]

This advice will be published on the Securities and Markets Stakeholder Group section of ESMA's website.

Adopted on 23 April 2024

[signed]	[signed]
Veerle Colaert Chair Securities and Markets Stakeholder Group	Giovanni Petrella Rapporteur

7 Annex III – Guidelines

Guidelines on situations in which a third-country firm is deemed to solicit clients established or situated in the EU and the supervision practices to detect and prevent circumvention of the reverse solicitation exemption

1. Scope

Who?

1. These guidelines apply to competent authorities, as defined in Article 3(1)(35) of MiCA and, as regards Section 5, third-country firms.

What?

2. These guidelines apply in relation to Article 61 of MiCA.

When?

3. These guidelines apply 60 calendar days from the date of their publication on ESMA's website in all official EU languages.

2. Legislative references, abbreviations and definitions

2.1 Legislative references

ESMA Regulation	Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC[17]
MiCA	Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937[18].

[17] OJ L 331, 15.12.2010, p. 84.
[18] OJ L 150, 9.6.2023, p. 40.

2.2 Abbreviations

ESFS	European System of Financial Supervision
ESMA	European Securities and Markets Authority
EU	European Union

2.3 Definitions

Third-country firm	A firm that would be subject to Article 59 of MiCA if its head office or registered office were located within the Union

3. Purpose

4. These guidelines are based on Article 61(3) of MiCA. The objectives of these guidelines are to establish consistent, efficient and effective supervisory practices within the ESFS and to ensure the common, uniform and consistent application of the provisions in Article 61 of MiCA.

5. In particular, they aim to promote greater convergence in the interpretation of, and supervisory approaches to, the situations in which a third-country firm is deemed to solicit clients established or situated in the Union. In addition, to foster convergence and promote consistent supervision in respect of the risk of abuse of Article 61 of MiCA, these guidelines also aim to promote certain supervision practices to detect and prevent circumvention of MiCA.

4. Compliance and reporting obligations

4.1 Status of the guidelines

6. In accordance with Article 16(3) of the ESMA Regulation, competent authorities should make every effort to comply with these guidelines.

7. Competent authorities to which these guidelines apply should incorporate them into their national legal and/or supervisory frameworks as appropriate.

4.2 Reporting requirements

8. Within two months of the date of publication of the guidelines on ESMA's website in all EU official languages, competent authorities to which these guidelines apply must notify ESMA whether they (i) comply, (ii) do not comply, but intend to comply, or (iii) do not comply and do not intend to comply with the guidelines.

9. In case of non-compliance, competent authorities must also notify ESMA within two months of the date of publication of the guidelines on ESMA's website in all EU official languages of their reasons for not complying with the guidelines.

10. A template for notifications is available on ESMA's website. Once the template has been filled in, it shall be transmitted to ESMA.

5. Guidelines on the solicitation of clients by third-country firms

5.1 Means of solicitation (Guideline 1)

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

12. Solicitation includes the promotion, advertisement or offer of crypto-asset services or activities to clients or prospective clients in the Union by any means. This may include, without limitation:

- internet commercials,
- brochures,
- telephone calls,
- emails,
- banners, pop-ups and/or similar tools on websites and social media,
- face-to-face meetings,
- press releases,
- other forms of physical or electronic means, including websites, social media platforms, mobile applications,
- participations in road shows and trade fairs,
- invitations to events,
- affiliation campaigns,
- retargeting of advertising,
- invitations to fill in a response form or to follow a training course,
- messaging platforms,
- sponsorship deals.

13. Promotions, advertisements, marketing and offers of a general nature such as brand advertisements, and which are addressed to the public (with a broad and large reach), may also constitute solicitation.

14. NCAs should consider all the facts and circumstances of the case to assess whether a third-country firm is soliciting clients established or located in the Union.

15. Please refer to the Annex hereto for examples of circumstances where a third-country firm is likely to be regarded as soliciting clients in the Union.

16. ESMA acknowledges that there are circumstances where third-country firms might also be considered to be soliciting EU clients, though not exclusively[19]. In such cases, the third country firm may take precautionary measures to make sure that it does not breach the authorisation requirements under MiCA by refraining from providing any crypto-asset services or activities to EU clients. To do so, the third-country firm may, for instance, not accept any new EU clients' accounts or geo-block[20] the means of access to its crypto-asset services or activities.

17. Educational materials, trainings, and industry events that are purely educational or focused on sharing knowledge about underlying technologies or innovations of the industry should not be considered solicitation. Educational materials, trainings, and industry events would be considered as having the effect to directly or indirectly promote the third-country firm or its crypto-asset services or activities when, for example, the audience is directed to the third-country firm's website, the means of access to the services offered by the third-country firm are given, brochures linked to the crypto-asset services are handed, the audience is invited to fill in a client profile or the services of the third country firm are, in any manner, otherwise promoted.

5.2 Person soliciting (Guideline 2)

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

19. The solicitation may be carried out by the third-country firm itself or any person acting on its behalf or having close links with the third-country firm[21]. A person acting on behalf of

[19] For instance, a third-country firm may be sponsoring an international sporting competition in which Member States national teams or EU athletes may also be entering. MiCA does not prohibit such sponsorship deals. However, as a consequence of this, the firm should be considered to be soliciting clients in the EU and would thus be unable to benefit from the reverse solicitation exemption.
[20] For instance, if access to the third-country firm's website is geoblocked to EU clients with an IP address originating in the EU and if the third-country firm's mobile application was not available for EU countries in mobile applications stores.
[21] As defined in Article 3(31) of MiCA.

a third-country firm may be doing so either: i) expressly by virtue of a contract; or ii) implicitly via an informal agreement.

20. Such persons can include so-called influencers. Indications that a person is acting on behalf of a 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 the third-country firm's logo. The existence of any form of remuneration or benefit (monetary or non-monetary) provided by the third-country firm to the third party should be a strong indication that the third party is acting on behalf of the third-country firm. The lack of remuneration or benefit should, however, not necessarily exclude the fact that the person may be acting on behalf of the third country firm.

21. Own initiative reviews (i.e., as long as they are not performed on behalf of) of a third-country firm's crypto-asset services or activities, on the other hand, should not be regarded as solicitation by or on behalf of the third-country firm. Such reviews, however, can only be considered as "own initiative" where the third-country firm does not have knowledge of the review and has not consented, encouraged or otherwise facilitated it.

22. The provision of crypto-asset services following solicitation 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 crypto-asset services provided by a third-country firm. This applies whether that third-country firm is part of the same group or not.

5.3 Exclusive initiative of the client (Guideline 3)

23. A firm should not be deemed to solicit clients, if the crypto-asset service or activity is provided at the own exclusive initiative of the client. The client's own exclusive initiative should be construed narrowly.

24. The assessment of whether a crypto-asset service provider solicited a client or whether the contact was exclusively initiated by the client should be a factual one. Contractual arrangements or disclaimers cannot supersede contrary facts.

25. The reverse solicitation exemption is based on the premise that the crypto-asset product, service or activity is provided at the client's own exclusive initiative. Article 61(2) of MiCA leaves open the possibility for the third-country firm to market to that client crypto-assets or crypto-asset services or activities of the same type. However, the requirement that the crypto-asset services be provided on the basis of the own exclusive initiative of the client still applies.

26. As such, the time of the request from the client and of the offering, promotion or advertisement of other crypto-asset services or activities of the same type matters. The said provision should thus be construed as not permitting third-country firms to offer the client further crypto-assets or crypto-asset services or activities, even if such services or activities are of the same type as the one(s) originally requested by the client, unless they are offered in the context of the original transaction.

27. For instance, if the client contacts the third-country firm to buy crypto-asset X, the firm may – at this point in time – market to the clients crypto-assets of the same type. However, the third-country firm would not be entitled to market further crypto-asset X transactions or transactions in similar crypto-assets to the client a month later.

28. Third-country firms should be able to provide records tracking the relationship with the client and, in particular, whether the client has taken the initiative to receive crypto asset services with respect to a new product.

5.4 When is a crypto-asset or a crypto-asset service of the same type as another one (Guideline 4)

29. The reverse solicitation regime leaves open the possibility for a third-country firm to market crypto-assets or crypto-asset services or activities of the same type in the context of the relationship started at the own exclusive initiative of a given client, subject to the third-country firm also complying with Guideline 3 above.

30. Where the third-country firm wants to use such possibility, it should assess whether crypto-assets or crypto-asset services or activities belong to the same type on a case-by-case basis, taking into account elements such as (i) the category of the crypto-asset or crypto-asset service or activity offered and (ii) the risks attached to each crypto-asset or crypto-asset service or activity.

31. The categorisation of crypto-assets and crypto-asset services or activities a third-country firm uses should be granular enough to ensure that the reverse solicitation exemption cannot be used to circumvent the authorisation requirements under Article 59 of MiCA.

32. Below is a non-exhaustive list of pairs of crypto-assets which should not be considered as belonging to the same type of crypto-assets for the purpose of the reverse solicitation exemption:

- utility tokens, asset-referenced tokens or electronic money tokens;
- crypto-assets not stored or transferred using the same technology;
- electronic money tokens not referencing the same official currency;

- asset-referenced tokens based mostly on FIAT currencies and asset-referenced tokens having significant crypto-currency ponderations;

- liquid and illiquid crypto-assets;

- crypto-assets other than asset-reference tokens and electronic money tokens with a non-identifiable-offeror and crypto-assets other than asset-reference tokens and electronic money tokens with an identifiable offeror.

33. Please note that the examples above should not be read a contrario. For instance, electronic money tokens not referencing the same official currency do not belong to the same type. But the fact that two electronic money tokens are referencing the same official currency does not necessarily imply that they are of the same type. Similarly, crypto-assets not stored or transferred using the same technology do not belong to the same type. But crypto-assets stored or transferred using the same technology are not necessarily of the same type.

6 Guidelines on the supervision practices to detect and prevent the circumvention of the reverse solicitation exemption

34. Third-country firms may try to circumvent the authorisation requirements under Article 59 of MiCA by various means and practices. It is therefore paramount that competent authorities closely monitor the activity, if any, of third-country firms in their respective jurisdictions. Given that crypto-asset services are almost exclusively offered and promoted online, particular emphasis should be given to the online activities of third-country firms.

35. Competent authorities should use one or more of the supervision practices detailed in the guidelines below.

6.1 Monitoring entities targeting clients established or situated in the Union or active in the Union (Guideline 1)

36. Competent authorities may search for third-country firms with telephone numbers starting with local country codes or mailing, email or website addresses indicating or hinting at their presence, at least virtual, in the Union (e.g., URL ending with “lu”, “de”, “fr”, etc.).

37. Competent authorities may also conduct consumer surveys to identify the firms used by consumers in their jurisdiction for crypto-asset services.

38. Competent authorities may use marketing monitoring tools, especially those with the ability to monitor social media activity as they may give an indication of the geographic markets targeted by third-country firms.

6.2 Exchanges with other authorities (Guideline 2)

39. Competent authorities may work closely with other authorities (national authorities or foreign authorities) that might have insight into whether third-country firms are offering services in the relevant market. Such authorities may include the police and local tax authorities.

6.3 Reacting to client complaints or whistle-blowers (Guideline 3)

40. Competent authorities should follow up on complaints from clients or information from whistle-blowers indicating that a third-country firm might have been soliciting clients in its jurisdiction.

Annex – Non-exhaustive list of examples of circumstances where a third-country firm is likely to be regarded as soliciting clients in the Union

The examples of circumstances mentioned in the table should be read together with the relevant Guidelines.

Guideline	Description
Guideline 1	A third-country firm is using regional- or country-specific search engine optimisation (SEO) strategies to optimise its online presence and rank well in the search engine results pages (SERPs) of EU potential clients or SERPs of potential clients of certain Member States. The objective of SEO is to improve a website's ranking in (non-paid) search engine results. Successful SEO leads to increased web traffic and brand exposure. Regional or country-based SEO allows a third-country firm to appear in a higher position in the SERPs of EU potential clients. Regional- or country-specific SEO may include, for example: i) using a country-code top-level domain (TLD) in the domain name (such as ".fr", ".es", ".at"); ii) using a generic TLD (such as ".com" or ".org") with EU country-specific subdirectories (such as ".com/fr", ".org/es") in the domain name; iii) using a generic TLD but set geographic targeting when setting criteria in SEO tools; iv) using geo-targeted link building[22] as part of its marketing strategy to build traffic from EU-based potential clients (for instance, a third-country firm uses backlinks on websites with an EU country-specific TLD or subdirectory).
Guideline 1	A third-country firm is using geo-targeting strategies for running digital ads, be it on SERPs or social media platforms, that target EU potential clients or potential clients of certain Member States.

[22] Geo-targeted link building is when a firm gets backlinks from other websites within a geographic region. A backlink is a link from another website to the firm website, thereby redirecting or encouraging web traffic from the initial website to another one.

Guideline 1	A third-country firm has a website or part of a website in an official language of the Union – which is not customary in the sphere of international finance – (or integrated translation tools in its website) and there is no indication that such third-country firm originates from a jurisdiction using the same language or that the third-country firm has a clientele or is targeting potential clients in a non-EU jurisdiction also using the same language.
Guideline 1	A third-country firm is sponsoring an EU- or Member State-centric sporting event such as a national championship, or a European championship.
Guideline 1	A third-country firm is redirecting EU potential clients to its website by including a link to such website on training or educational material.
Guideline 1	A crypto group (including both EU regulated entities and third-country firms) is using strategies which insufficiently allow the client to differentiate between the offering of the EU regulated entities and third-country firms.
Guideline 1	A third-country firm is responding to an EU-based enquiry about non-MiCA regulated services or activities and uses its responses to market its crypto-asset services or activities.
Guideline 2	A third-country firm is using the website of an EU affiliate or EU firm – be it regulated or not - to display its logo, a backlink to its website or promote its crypto-asset services or activities.
Guideline 2	A third-country firm is using an EU-based influencer or content creator, and remunerating them, to push their crypto-assets or crypto-assets services or activities, or build their profile, on social media or otherwise.
Guideline 2	An EU-regulated crypto-asset service provider redirects EU clients that intend to trade in unauthorised asset-referenced token to the non-EU trading platform or broker of its group.
Guideline 3	A third-country firm is contacted by an EU client that wishes to buy a crypto-asset. The EU client installs the third-country firm's mobile application on its mobile phone to trade such crypto-asset. Two days after the initial transaction, the EU client receives a push notification encouraging them to go back to the third-country firm's mobile application to consult what crypto-assets are trending, including crypto-asset that are not of the same type as the one initially traded by the EU client.

Guideline 3	A third-country firm is contacted by an EU client that wishes to buy a crypto-asset. The EU client installs the third-country firm's mobile application on its mobile phone to trade such crypto-asset. Two months after the initial transaction, the EU client receives a push notification encouraging them to go back to the third-country firm's mobile application to return to the application and take action by trading more (for instance, a push notification about a temporary promotion).
Guideline 4	A third-country firm is contacted by an EU client that wishes to buy an asset-referenced token issued by an issuer that is not authorised in accordance with Title III of MiCA. At the time of providing the relevant crypto-asset service(s), the third-country firm also markets or offers a widely different type of crypto-asset, for instance, meme coins to the EU client.
Guideline 4	A third-country firm is contacted by an EU client that wishes to buy an asset-referenced token authorised in the EU under Title III of MiCA. At the time of providing the relevant crypto-asset service(s), the third-country firm also markets or offers "meme coins" to the EU client.
Guideline 4	A third-country firm is approached by an EU-based individual for the provision of a specific crypto-asset service. In response, the third-country firm offers this individual a package of bundled crypto-asset services.