

Consultation Paper

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

Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **29 April 2024**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading '[Data protection](#)'.

Who should read this paper?

All interested stakeholders are invited to respond to this consultation paper. In particular, ESMA invites crypto-asset service providers (including from third-countries) and financial entities dealing with crypto-assets as well as all stakeholders that have an interest in crypto assets.

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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. The European Securities and Markets Authority (ESMA) has been empowered to develop technical standards and guidelines specifying certain provisions. Prior to the below consultation paper, ESMA has already published two consultation packages in July 2023 and in October 2023. The aim of this consultation paper is to collect views, comments and opinions from stakeholders and market participants on the appropriate implementation of MiCA and in particular in relation to certain MiCA mandates that have to be developed by December 2024.

ESMA previously underlined² 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.

ESMA, and national competent authorities, through their supervisory and enforcement powers, will take all necessary measures to actively protect European Union (EU)-based investors and MiCA-compliant crypto-asset service providers from undue incursions by non-EU and non-MiCA compliant entities.

In order to provide more guidance on the conditions of application of the reverse solicitation exemption and the supervision practices that national competent authorities may take to prevent its circumvention, ESMA is therefore considering the adoption of the guidelines attached.

ESMA has prepared this Consultation Paper (CP) in order to consult interested parties for the purpose of producing these guidelines. Respondents are encouraged to provide the relevant information to support their arguments or proposals.

Contents

Section 2 explains the background to the proposals while section 3 presents the general approach of the guidelines. Annex I lists all the questions set out in the consultation paper; and Annex II contains the full text of the draft guidelines.

Next Steps

ESMA will consider the feedback received to this consultation and expect to publish a final report by the end of 2024 at the latest.

¹ Regulation (EU) 2023/1114 of the European Parliament and the Council of 31 May 2023 on markets in crypto-assets ("MiCA").
² ESMA statement addressed to entities providing crypto-asset services and the national competent authorities that will be responsible for their supervision, which lists expectations for each from now until the end of the MiCA transitional period, available [here](#).

2. Background

Overview

1. 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.
2. These guidelines are meant to provide more clarity to national competent authorities and market participants, especially third-country firms, on the limited situations where the offer or provision of crypto-asset services to clients established or situated in the EU would be regarded as initiated at the own exclusive initiative of the relevant clients.
3. As previously specified in the ESMA statement dated 17 October 2023³, such situations should be understood as very limited and very narrowly framed and, consequently, should not be assumed, nor exploited to circumvent MiCA.
4. While this Consultation Paper does not include a draft cost-benefit analysis, ESMA has developed its draft guidelines having due regard to the principle of proportionality and being mindful about the possible costs the obligations they contain would create for market participants. ESMA considers that the provisions included in the draft guidelines in the Annex of this paper do not create new costs for concerned market stakeholders beyond those that naturally stem from the obligations in MiCA. Nevertheless, respondents are invited to highlight in their response any specific concerns the ESMA proposals could raise for them in terms of their associated costs.

Relevant key issues and considerations

5. Firstly, 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.
6. 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 guidelines provide more guidance on such interpretation.
7. Article 61(2) of MiCA can also be understood as allowing third-country firms to offer to a client crypto-assets or crypto-asset services of the same type as the one originally requested. The draft guidelines specify the conditions of application of such

³ Available [here](#).

interpretation, notably regarding timing and how to assess whether a third-country firm markets new types of crypto-assets or crypto-asset services to a client.

3. 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

3.1 Background

Article 61(3) of MiCA:

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.

8. Third-country firms may not solicit clients in the Union as they are not authorised to provide CASP services in the Union. There is only one exemption, if the client at its own, exclusive initiative contacted the firm and requested the service, the third-country firm may provide it. The rationale for this exemption is that clients shall not be excluded from using third-country firms if they choose to do so without having been solicited by such firms.
9. Article 61(3) of MiCA provides that ESMA shall issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 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 Article 61, to foster convergence and promote consistent supervision in respect of the risk of abuse of the reverse solicitation exemption.
10. Article 61(1) of MiCA sets forth that where a client established or situated in the Union initiates at its own exclusive initiative the provision of a crypto-asset service or activity by a third-country firm, the requirement for authorisation under Article 59 MiCA shall not apply to the provision of that crypto-asset service or activity by the third-country firm to that client, including a relationship specifically relating to the provision of that crypto-asset service or activity.

3.2 Assessment

11. ESMA would like to stress that Article 61 of MiCA should be understood as applying in very limited and narrow circumstances. Article 61 of MiCA, although often referred to as the reverse solicitation exemption, is actually a prohibition: a prohibition for third-country firms to solicit clients established or situated in the Union, unless the crypto-asset service was requested at the own exclusive initiative of the client.
12. The draft guidelines follow largely, but not in all regards, the established practice under the MiFID II framework, as prescribed by ESMA Q&As⁴, as it is largely similar to the one under MiCA.
13. In order to make sure that clients of CASPs benefit from full rights and protections afforded to them under MiCA and that EU CASPs are not put at a competitive disadvantage compared to third-country firms *vis-à-vis* EU clients, it is important to actively protect EU-based investors and MiCA-compliant CASPs from undue incursions by non-EU and non-MiCA compliant entities. The draft guidelines therefore also provide guidance on some of the supervision practices that NCAs may use to monitor the activities of third-country firms in the Union.

3.2.1 Situations in which a third country firm is deemed to solicit clients established or situated in the EU

14. ESMA would like to highlight that the term solicitation should be construed in the widest possible way. It includes banner advertisements, sponsorship deals, solicitation by any kind of affiliates such as influencers and other celebrities. This broad interpretation of the term solicitation, especially with respect to online activities and the use of banner advertising and the use of influencers and other celebrities, reflects the fact that crypto-assets and crypto-asset services are essentially offered online.
15. Similarly, a broad interpretation should be given to the person soliciting. It may be the third-country firm or any entity or person on its behalf. The relationship between the third-country firm and the person soliciting on its behalf does not necessarily need to be a contractual relationship – it may be explicit or implicit.
16. For instance, if a third-party is undertaking a marketing campaign or building the third-country firm profile in the Union, then the third-country firm would not be able to claim that there was no solicitation carried out and to rely on Article 61 of MiCA.
17. In addition, ESMA would like to stress that timing is of the essence when a third-country firm relies on the reverse solicitation exemption. If the third-country firm meets all the conditions to rely on Article 61 of MiCA, it may only do so for a very short period of time.

⁴ See Section 13 of [ESMA35-43-349](#)

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. 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.

18. Lastly, the draft guidelines provide guidance on how to assess whether the third country firm markets a new type of crypto-asset or crypto-asset service or activity. First, the draft guidelines make clear that such assessment should be made on a case-by-case basis. Elements to take into account include: i) the type of the crypto-asset or crypto-asset service or activity offered and (ii) the risks attached to the new crypto-asset or crypto-asset service or activity.
19. The issue here is that MiCA does not provide for granular categories of crypto-assets but only for three main types of crypto-assets: asset-referenced tokens, electronic money tokens and crypto-assets other than asset-referenced tokens and electronic money tokens. Relying on such broad categories would allow third-country firms to circumvent the reverse solicitation exemption which, as set out above, should be understood very narrowly. Therefore, “type of crypto-assets” should not be understood as solely referring to such categories. This means that, for instance, an asset-referenced token and a crypto-asset other than an asset-referenced token or electronic money token would never belong to the same type of crypto-assets for the purposes of the reverse solicitation exemption. And this also does not mean that 2 asset-referenced tokens would necessarily be of the same “type” for the purposes of the application of Article 61 of MiCA. The draft guidelines provide some examples of pairs of crypto-assets that would not belong to the same “type” of crypto-assets.
20. Third-country firms should however 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.

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

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?

3.2.2 Supervision practices to detect and prevent the circumvention of the reverse solicitation exemption

21. With respect to supervision practices, the draft guidelines point to various actions that NCAs can take in an effort to detect significant EU-based activity by third-country firms.
22. Such supervisory practices include the monitoring of marketing activities targeting EU-based clients, consumer surveys, cooperation with other authorities (the police, for instance) and reacting to clients' complaints or whistleblowing.

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

3.3 Proposal

23. The draft guidelines on the situations in which a third-country firm is deemed to solicit clients established or situated in the Union and on the supervision practices to detect and prevent circumvention of the requirement for authorisation as a crypto-asset service provider are presented in Annex II.

Annex I – Summary of questions

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

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?

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

Annex II – Draft 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 as from [dd month yyyy].

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 ⁵
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 ⁶ .

2.2 Abbreviations

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

2.3 Definitions

<i>Third-country firm</i>	A firm that would be subject to Article 59 of MiCA if its head office or registered office were located within the Union
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⁵ OJ L 331, 15.12.2010, p. 84.

⁶ OJ L 150, 9.6.2023, p. 40.

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. It includes the promotion, advertisement or offer of crypto-asset services or activities to clients or prospective clients in the Union by any means including by way of, without limitation, internet commercials, brochures, telephone calls, face-to-face meetings, press releases, or any other form of physical or electronic means, including social media platforms, mobile applications. It may also include participations in road shows and trade fairs, invitations to events, affiliation campaigns, retargeting of advertising, invitations to fill in a response form or to follow a training course and messaging platforms as well as promotions, advertisements and offers of a general nature and addressed to the public (with a broad and large reach) such as, for instance, brand advertisements by way of sponsorship deals.
13. To assess whether third-country firms solicit clients established or located in the Union, all facts and circumstances of the case are relevant. For instance, a website in an official language of the Union – and which is not customary in the sphere of international finance – should be a strong indication that a third-country firm is soliciting clients established or located in the Union. To the contrary, geo-blocking to prohibit access to a website by clients established or located in the Union would be a strong indication that a third-country firm is not soliciting clients in the Union via such website.

5.2 Person soliciting (Guideline 2)

14. Competent authorities should take into account that solicitation may occur irrespective of the person through whom it is performed.
15. The solicitation may be carried out either by the third-country firm itself or by any other person acting explicitly or implicitly on behalf of the third-country firm or having close links⁷ to it, as defined in Article 3(31) of MiCA. Such persons can include so-called influencers. Indications of acting on behalf of the third country firm may include, for example, the direction of the audience to the third-country firm's website, the provision of the means of access to the services offered by the third-country firm, the offering of promotional deals or the displaying of a third-country firm's logo.

⁷ As defined in Article 3(31) of MiCA.

16. Solicitation done on behalf of a third-country firm by a person or entity regulated in the EU should still be regarded as a breach of MiCA. For instance, an EU credit institution, investment firm or payment service provider should not redirect clients (for instance, via its website) to payment services provided by a third-country firm (whether that third-country firm is part of the same group or not).

5.3 Exclusive initiative of the client (Guideline 3)

17. 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.
18. 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.
19. 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.
20. As such, the time of the request from the client and of the offering, promotion or advertisement of other crypto-asset services or activities 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. 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.
21. 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)

22. 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, subject to the third-country firm also complying with Guideline 3 above.
23. 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.
24. The categorisation of crypto-assets and crypto-asset services or activities should be granular enough to ensure that the reverse solicitation exemption cannot be used to circumvent the authorisation requirements under Article 59 of MiCA.
25. 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.

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

26. 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.
27. 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)

28. 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.).
29. Competent authorities may also conduct consumer surveys to identify the firms used by consumers in their jurisdiction for crypto-asset services.
30. 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)

31. 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)

32. 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.