



ABBL's response to the ESMA Consultation paper On the draft Guidelines on reverse solicitation under the Markets in Crypto Assets Regulation (MiCA) (ESMA35-1872330276-1619)

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Question 1:

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

We agree, subject to ESMA considering ABBL's comments and amendments.

In general, we support ESMA's proposed approach to avoid circumvention of MiCA authorisation requirements, however there are several issues that we would like to point out.

Scope

We are of the opinion that the draft Guidelines on reverse solicitation under MiCA are too strict in case that a third-country company has a parent/subsidiary licensed in the EU. The draft guidelines should be adjusted to reflect the possibility of a third-party parent/subsidiary providing services on behalf of and for the account of the EU licensed company.

Furthermore, we would appreciate additional clarification regarding the scenario where an EU based credit institution / bank, not registered as CASP, outsources crypto-related services to an entity in a third country, whether within the same Group or not. This issue is also evident not only for banks, but also to other financial institutions and service providers handling crypto-assets.

Besides, we believe that, in order to ensure a consistent interpretation of the concept of reverse solicitation, the ESMA guidelines should not provide for additional restrictions, compared to MiFID II, regarding the possibility for a CASP, if solicited at the sole initiative of a client, to provide further crypto-assets or crypto-asset services or activities of the same type as the one(s) originally requested by the client. Therefore, a CASP should have the possibility to provide further crypto-asset services or activities of the same type as the one(s) originally requested by the client even if this is within the scope of a different transaction from the original transaction and without any time limit to do so (i.e. the one-month deadline should be deleted).

Definitions

The definition of the reverse solicitation needs to be construed in a broad and technology-neutral way. Nowadays, each Member State and National Competent Authority (NCA) can have its own



interpretation and definition of the terms such as solicitation, advertisement, marketing, promotion, offer, public offer. We admit that there is a risk of absence of harmonisation on this topic. Thus, the lack of legal certainty is not only evident for third-country firms but also for an EU CASP who is brought into this diversity of varying NCA understandings of the term «solicitation».

In our opinion, the current version of the Guidelines does not make a distinction between exempted offer and non-exempted offer, while this distinction exists in the MiCA regulation itself. We are of the opinion that this gap should be addressed.

Question 2:

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?

We agree, subject to ESMA considering ABBL's comments and amendments.

We would like to draw the attention of ESMA to the fact that digital custody service is different as compared to the other MiCA services. Such type of services is likely to occur in the context of a longstanding relationships with a client and are of non-occasional nature. Moreover, the digital custody service is agnostic to the type of crypto-assets and rather dependent on the ability to store and transfer those assets with the technology set up of the digital custody service provider.

We are of the opinion that the second bullet point of paragraph 25 of the draft Guidelines, specifically Guideline 4 (p. 20), may be counterproductive due to the generic language used. For instance, settlement of the cash leg (transfer of a digital asset between two public addresses) with a given type of crypto-asset could occur with the help of a technology that is different from its native distributed ledger technology (DLT).

The list proposed in paragraph 25 (p. 20) may have unintended consequences on the liquidity of the crypto-assets market including for EU CASPs, thus hampering investors to operate through cross-chain arrangements.

Question 3:

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

We agree, subject to ESMA considering ABBL's comments and amendments.

The current text appears to propose effective supervision practices. However, we emphasise the importance of clear guidance on exemptions that may apply to services solicited by an EU-based entities to entities located in third countries, whether or not part of the same Group.

While we support the emphasis on ensuring that third-country entities comply with MiCA regulations when engaging in cross-border activities, we advocate for a consistent regulatory approach. Specifically, we suggest that the same rigorous enforcement standards applied to third-country entities should also apply to EU firms conducting cross-border activities within the EU. This will ensure



that all entities are subject to equivalent scrutiny and compliance expectations, fostering a fair competitive landscape.

Besides, we witness that EU regulators currently view the concept of reverse solicitation as a matter governed by national laws on consumer protection and advertisement, rather than by an EU-wide legislation. Although this perspective has its merit, this creates a potential for a competitive imbalance. EU CASPs could find themselves at a disadvantage compared to third-country firms when it comes to engaging with EU clients. Therefore, we urge ESMA to address this issue directly. By clarifying the application of reverse solicitation in the context of EU law, ESMA can help prevent any unintentional competitive disparities between EU and third-country firms.

Furthermore, an essential principle that should underpin the MiCA framework is the protection of EU residents' fundamental rights, particularly their right to engage in contracts with firms across the EU. This includes transactions involving crypto-assets. We believe that EU citizens should not face more restrictive conditions when contracting with EU firms compared to what is allowed to third-country firms. Thus, we recommend that ESMA explicitly affirm the fundamental rights of EU citizens to engage in cross-border transactions, in compliance with existing laws and without undermining the Distance Marketing Directive related to financial services.

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