
Ref: ESMA Consultation Paper on the draft guidelines on reverse solicitation under the Markets in Crypto Assets Regulation (MiCA)

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BETTER FINANCE answer to ESMA Consultation Paper on the draft guidelines on reverse solicitation under the Markets in Crypto Assets Regulation (MiCA)

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?

Overall, BETTER FINANCE supports ESMA’s broad approach to guiding prudential regulation concerning the solicitation of EU clients by third-country firms, which is essential to protect European consumers from non-MiCA compliant entities and therefore investor protection safeguards. We welcome that ESMA clarifies that the reverse solicitation exemption is to be considered as a prohibition for third country firms to solicit EU clients requested at the client exclusive initiative. However, some general shortcoming may be noted. Notably, there could be more granularity in distinguishing (specify) between ‘passive’ and ‘active’ solicitation to close potential loopholes. Conversely, clear examples could be beneficial in the guidelines to more directly define the scope of what shall constitute the “exclusive initiative of the client,” which will help prevent indirect solicitation through seemingly benign activities like responding to general inquiries that may lead to covert advertising of a wide range of crypto-related services.

A potential loophole exists within guideline 2, paragraph 20, which states that subsequent offerings by firms must be within the context of the original transaction to avoid being classified as solicitation. This stipulation can create ambiguity, particularly when determining what constitutes the “context” of the original transaction. This is especially complex in cases involving tailored smart contracts or bundled service packages, which could inadvertently bind consumers to ongoing interactions with non-EU providers. To mitigate this risk and ensure consumer protection, it is crucial to define this context more clearly and enforce stringent disclaimers for such transactions that involve ‘bundled’ or recurring services. This

approach would help to prevent any exploitation of this guideline, ensuring that the regulatory framework remains pro-active, robust. However, ESMA's emphasis on a fact-based approach to determining client initiative, and disqualifying arrangements or disclaimers that circumvent this, is positive and should be highlighted as a robust method to enforce compliance and to enforce legal action, also on behalf of ill-solicited clients.

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?

BETTER FINANCE did not assess all pairs, type of crypto-assets. However, some general comments are provided below.

While BETTER FINANCE appreciates ESMA's efforts to provide some granularity when listing pairs of crypto assets that shall not be considered as of the same type, there is concern that the lack of detailed criteria may challenge NCAs in their case-by-case analysis in light of market evolution. To enhance clarity, ESMA should further coordinate and regularly complement this guidance at EU level.

Besides the type of crypto-assets, the 'purpose' or 'use-case' should also be considered as an extra element in determining asset classification. This approach ensures a more nuanced oversight, focusing on intended outcomes and investor awareness of a crypto service, asset or product. Therefore, introducing a threefold criterion system that considers the type, risk and purpose of crypto-assets could refine the granular assessment and better address consumer protection needs in the context of prohibiting solicitation of services.

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

The main issues we identify within a non-binding guidelines lie in the supervision practices that can only correspond to a being a reactive as opposed to more

proactive approach. Therefore, we believe that enhanced EU-level coordination is necessary to effectively block firms attempting to circumvent MiCA rules.

BETTER FINANCE urges NCAs to adhere to guidelines despite their non-binding nature and recommends that ESMA centralise all flags from NCAs to ensure cross-border enforcement of measures. The criteria for assessing whether further solicitations are in the context of the original transaction need clarification. This is especially relevant for complex scenarios like tailored smart contracts or multi-service packages.

The provision of a one-month timeframe for marketing transaction services following initial client contact is commended for its clarity, aiding both supervision and consumer protection.

The guidelines shall pave the way for a stronger cross-border cooperation through advanced monitoring tools using machine learning should be mandated from NCAs and coordinated at ESMA level for immediate, EU-wide action. Formal mechanisms for information sharing among authorised market participants could significantly enhance the monitoring of third-country firms' activities targeting EU residents.