

SFC response to the ESMA consultation on the draft guidelines on reverse solicitation under MiCA

Introduction

The Swiss Finance Council (SFC) engages in dialogue around policy developments in finance at a European level. Our members include the largest global asset and wealth management firms and have substantial activities within the EU, contributing to a diverse market and choice for European retail investors.

General Remarks

Crypto assets and crypto asset service providers, such as crypto trading platforms, have characteristics and a risk profile that is substantially different from providers of regulated financial instruments. This includes the volatility and high-risk nature of crypto assets; the limited or absence of a regulatory framework for crypto asset service providers in some countries outside of the EU; the inherently global nature of crypto assets and their predominantly online marketing and offering.

These factors justify a tailored approach to reverse solicitation within MiCA that protects retail investors when investing in a relatively novel asset class without established regulatory protections. Recent high profile failures and corresponding losses among retail investors illustrate the risks.

However, it must be made clear in the guidelines that these enhanced rules apply exclusively to the provision of MiCA services and have no bearing on the reverse solicitation regime in place for traditional regulated financial services, including when crypto assets are defined as financial instruments and subject to the MiFID regime. The draft guidelines could give a misleading impression that the regime for reverse solicitation that is currently applied for investment services is largely replicated (see for example point 12, the guidelines “follow largely, but not in all regards, the established practice under the MiFID II framework, as prescribed by ESMA Q&As”). In fact, a different treatment is proposed that materially changes the conditions under which a firm can be considered to “solicit” a client and it is important that this is understood by supervisors, national competent authorities and market participants.

There is an understandable investor protection goal to ensure that EU consumers interact with crypto asset service providers authorised in the EU, since certain third country crypto asset service providers may operate under limited or no regulation. However, we should be realistic that some EU consumers will seek to access products and services provided by firms outside of the EU. The purpose of the reverse solicitation framework is not to ‘prohibit’ such contact, rather it is to determine the circumstances under which it is permitted.

EU investor protection would be reduced if, as a consequence of the broad approach taken in the draft guidelines, well-regulated financial services firms were unable to respond to an EU client request regarding any crypto asset product or service due to the impact on their ability to market their brand or other services to the EU market. The effect would be to push EU consumers towards providers operating with fewer regulatory protections in place.

To address this, we recommend that the guidelines establish a clear nexus between brand marketing and a crypto asset service or product.

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?

Broad interpretation of the term solicitation

The draft guidelines seem to prohibit advertising that is not targeted towards offering specific services but used for brand building, even when there is no nexus to crypto assets and services.

We do not agree with this as it is likely to deter established third country financial institutions with an EU footprint from being able to respond to an EU client request regarding any crypto asset or service in the future in case they market their brand or other services to EU markets. Therefore the proposed guidelines require adaptation to cater for established third country financial firms with multiple business lines and whose brand is not predominantly associated with crypto assets or services.

This restriction is made more challenging by the presumption that having a website in an official language of the EU would be a strong indication of solicitation of EU clients. For those third country financial service providers that already have strong links with EU countries because of their diversified and international footprint or in the case of Switzerland share language roots, there is a risk that exclusively local activities would be presumed to have marketed itself to EU customers. For example Swiss banks will have a domestic website aimed at Swiss customers in their native Italian, French or German.

Consistency with the level 1 mandate

The proposed guidelines state that the reverse solicitation exemption is intended to apply for a limited period and only in respect of the particular type of product or service requested by the client at its own initiative. We believe that this conflicts with Article 61.3 under MiCA, which invites ESMA to specify the situations in which a third-country firm is deemed to solicit clients established or situated in the EU without reference to a time limitation to act on that request.

Moreover, Article 61 (1) states that the exemption applies to a “relationship” between a client and a firm, which by definition is long term, and is at odds with ESMA’s assertion that the exemption can only be used for a very short period of time. The differentiation between a one-off service and where a relationship exists as it pertains to reverse solicitation is well established, including in ESMA’s Q&A on MiFID/R investor protection and intermediaries topics.

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?

N/A

Question 3: Do you consider the proposed supervision practices effective with respect to detecting undue solicitations? Would you have other suggestions?

We believe that it is important to clarify that a suspicion of wrongdoing, based on reasonable grounds, should be the determining factor for investigation a firm for breaching the reverse solicitation requirements.

For example, established third country financial institutions may have an EU presence for certain business lines, hence the use of local email or website addresses cannot be presumed as being used for the purpose to conduct prohibited activities.