



DIGITAL CURRENCIES
Governance Group



Open letter to:

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**Industry joint letter on ESMA's proposed guidance in relation to
the conditions of application of the reverse solicitation exemption
and the supervision practices that NCAs may take to prevent its circumvention**

As representatives of the blockchain sector, our associations are committed to supporting the European Union's (EU) agenda for a more competitive, sustainable, resilient economy – and a more inclusive, modern, prosperous society. In this regard, we recognise and welcome the pioneering role played by the EU in the development of a harmonised framework for markets in crypto-assets in order to support innovation and to provide significant benefits in terms of cheaper, faster and safer digital financial services and asset management.

The Markets in Crypto Assets Regulation (MiCA) is an important piece of regulation, part of a broader set of regulatory initiatives forming the basis of the EU digital finance framework. In this regard, we would like to ensure that its implementation - including ongoing/draft Level 2 and Level 3 measures - provides for clear, proportionate and transparent rules that follow the spirit as well as the letter of key provisions enshrined in the MiCA Regulation Level 1 text.

More specifically, we, representatives of the blockchain sector, would like to share our concerns regarding the [proposed draft guidance](#) developed by the European Securities and Markets Authority (ESMA) in relation to the conditions of application of the reverse solicitation exemption and the supervision practices that National Competent Authorities (NCAs) may take to prevent its circumvention. Whilst we fully agree that a third-country firm should not use these provisions to bypass MiCA, and that reverse solicitation is provided for as an exception, we also feel that the current drafting proposed by ESMA goes far beyond the original Level 1 mandate in a way that would, de facto, effectively ban all possible forms of reverse solicitation in the EU and the right of European customers to actively seek services elsewhere, should the wish to do so.

We would like to remind ESMA that the provision of crypto-asset services by a third-country firm to a client established or situated in the EU is expressly authorised under Article 61 provided that the provision of the crypto-asset service or activity is initiated by the client "at its own exclusive initiative", and under strict conditions similar to those already existing under different pieces of legislation such as the Markets in Financial Instruments Directive II (MiFID II), the

Alternative Investment Fund Managers Directive (AIFMD), the Undertakings for Collective Investment in Transferable Securities Directive (UCITS) or the Cross-Border Distribution of Investment Funds Regulation (CBDF).

Experience of how reverse solicitation is used in existing EU financial services legislation has shown that the interpretation of the reverse solicitation exemption has been understood, as intended, as narrowly framed and is regarded as the exception by NCAs throughout the EU. Therefore, we see no evidence to justify the assertion that third-country firms under MiCA's scope would use this as a way to circumvent the MiCA rules, given how strictly similar rules have been implemented and supervised by Member States across the financial services spectrum. This is why we would strongly support clear and fit-for-purpose ESMA guidelines to promote legal clarity for market participants and NCAs that would be aligned with the existing supervisory practices in the EU, the aforementioned Directives and Regulations, and the mandate of the MiCA Level 1 text.

Indeed, we fear that an overly broad interpretation by ESMA of what constitutes solicitation under MiCA as per these draft guidelines would ultimately make it impossible for EU consumers and investors to access third-country firms, at their own exclusive initiative, and would thus cause significant detriment, reduced competition and increased costs to consumers and business in the EU crypto market. Some EU consumers and investors may have very legitimate reasons to initiate at their own exclusive initiative, and accept the potential risks involved in dealing with a third country firm not covered by MiCA's protections in order to benefit from a broader range of services and greater portfolio diversification. Access for EU customers to actors and services which may not be available in the EU in turn promotes competitiveness of the EU crypto market vis-à-vis other jurisdictions, and spurs innovation in a highly competitive and fast-evolving market.

We respectfully suggest ESMA to consider a more proportionate approach, that would differentiate more clearly between solicitation (which could be defined in a more granular and detailed way) and marketing or educational practices inherent to the sector, which creates important uncertainties for the industry as a whole and risks creating a negative precedent for other parts of the financial sector if inadvertently pursued. We strongly urge ESMA to revert to a strict application of what actually constitutes direct solicitation, i.e. a direct invitation and/or inducement for EU customers and investors to invest into a specific type of product, service or activity. ESMA should not encourage NCAs to discriminate against the development of good practices such as educational materials, or the fight against criminal activities (such as phishing or scams) which would, under the current proposed guidelines, be considered to be direct solicitation tactics and thus be banned in the EU, to the detriment of EU consumers and investors.

In our opinion, the draft guidelines would not help EU consumers but would rather contradict the fundamental principles of the MiCA Regulation by weakening their protection, while at the same

time punishing well-intentioned international players who are not directly targeting European citizens under Article 61, and, by extension, their European partners duly licensed in the EU.

In that respect, our associations are concerned about the lack of legal clarity of ESMA's broad interpretation that puts customers' and investors' confidence in digital asset solutions and the reliability of the EU standards at risk. It is critical that the Level 1 text of MiCA be interpreted in a consistent manner, and aligned with broadly-accepted supervisory practices in the EU in the traditional financial sector, to guarantee legal certainty, consistency in the approach to the concept of reverse solicitation across EU legislative acts and to support the growth of a successful and harmonised crypto-asset market in the EU. We also urge ESMA to adopt an approach consistent with that of like-minded international jurisdictions in order to avoid discrepancies between supervisors globally and any perceptions or misconceptions regarding an extraterritorial EU regime.

Finally, we would like to note our disappointment that ESMA has not undertaken the necessary cost-benefit analysis of the effects of such a broad and extensive interpretation of reverse solicitation rules. This damages the principles of necessity and proportionality, arbitrarily reducing consumer choice for market participants. Such an expansive interpretation goes far beyond that of the expected obligations under MiCA, especially for international blockchain participants or technical providers not covered by the Regulation.

Our associations would welcome the opportunity to discuss our concerns with you and your staff in more detail if this may be helpful.

We remain at your disposal should you require further information, and reiterate our desire to work collaboratively to improve the safety and efficiency of Europe's crypto-assets sector.

Yours sincerely,

The undersigned associations:

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