

## DCGG Position Paper on ESMA's Reverse Solicitation Guidelines under MiCAR

The Digital Currencies Governance Group (DCGG) is a trade association that represents digital assets issuers and service providers and artificial intelligence firms in the European Union, United Kingdom, Latin America and United Arab Emirates. Our mission is to facilitate an open dialogue and encourage communication between policymakers and industry experts to support the design of a sound and proportionate regulatory framework that ensures safety for all market participants.

The [ESMA35-1872330276-1899 Report](#), issued on December 17, 2024 (henceforth, the **Reverse Solicitation Guidelines** under Article 61(3) of the Markets in Crypto Assets (MiCA) Regulation), introduced by the European Securities and Markets Authority (ESMA), plays a pivotal role in compliance processes for cryptoasset sector market players in Europe. We believe that certain elements of the current guidelines risk exceeding the legal mandate provided under MiCA, resulting in regulatory uncertainty that may conflict with the Regulation's overarching goals of fostering innovation, ensuring legal clarity, and protecting users.

DCGG urges policymakers and competent authorities to consider refinements that align the application of these provisions more closely with MiCA's legislative intent, namely, targeted consumer protection without creating extraterritorial obligations or disproportionately limiting the ability of EU-based customers to access cryptoasset services on their own exclusive initiative. A proportionate, principles-based approach will be essential to ensure regulatory coherence, cross-border interoperability, and the continued development of a secure and competitive digital finance sector in the EU. This would also be consistent with the overall EU policy objectives for legislative simplification to ensure a better competitiveness of the EU.

### **Issue I: Overly Broad Interpretation of Solicitation Risks Misalignment with MiCA Objectives**

- ESMA's guidelines adopt an excessively expansive interpretation of what constitutes solicitation under Article 61(3) of MiCA. While the intention to enhance consumer protection is understood, the proposed approach risks exceeding the mandate set by the Level I text and undermining its core principles.

- MiCA, as aligned with MiFID II, explicitly allows EU consumers to engage with third-country providers on their own exclusive initiative. This preserves consumer choice, fosters competition and innovation, and supports access to diverse financial services. However, these guidelines may conflate neutral or educational communications (including awareness campaigns and crime prevention initiatives) with direct solicitation, even when no inducement or invitation to invest, is present.
- Such a blanket interpretation could disincentivise responsible global actors from engaging transparently with EU consumers or supporting efforts to combat fraud and harmful online activity, such as scams or child sexual abuse material (CSAM). This would be counterproductive from both a consumer protection and regulatory perspective. Rather than protecting consumers, this approach may inadvertently expose them to greater risks by pushing educational efforts and proactive safeguards out of the public domain.
- The reverse solicitation guidelines should focus on assessing whether a communication constitutes an inducement or invitation to invest, rather than treating all exposure to any kind of content as direct solicitation of EU customers. This ensures regulatory clarity while maintaining space for legitimate activity that does not actively promote investment.

**Recommendation:** *ESMA's guidelines would benefit from a more nuanced definition of solicitation, taking into account the intent, content, and context of communications. Greater legal precision is needed to ensure consistency in interpretation by NCAs and to uphold the balance between consumer protection and market openness envisioned by MiCA.*

### **Issue II: Guideline 1 (Means of Solicitation) Risks Overreach by Capturing Non-Targeted Communications**

- Guideline 1 adopts an expansive interpretation of "solicitation", encompassing a wide range of digital communications and public-facing activities, including social media posts, mobile applications, and participation in trade fairs. ESMA's stated aim is to ensure that "any solicitation, promotion or advertising in the Union" falls within scope. However, this approach lacks nuance and risks capturing non-promotional, non-targeted activities not intended to solicit EU clients.
- In today's globalised digital environment, international firms regularly make use of press releases, social media posts, and applications to share service updates, communicate technical developments, and enhance user security. These channels cater to a global audience and are not inherently promotional or targeted at EU consumers. Treating them as solicitation by default (irrespective of

audience, language, or intent) creates significant legal uncertainty and limits possibilities of transparent communication and responsible engagement by international actors.

- Similarly, the automatic classification of mobile app availability as solicitation is disproportionate. Mobile applications are essential tools for service access and security; removing them from app stores due to potential EU exposure may hinder essential security updates, inadvertently increasing consumer risk.
- Moreover, the inclusion of participation in international events and roadshows as solicitation, regardless of the content or intent of participation, overlooks the role such events play in fostering innovation, market integrity, and consumer education. Where participation is evidently of educational or industry-focused nature, it should not fall under the scope of solicitation.
- The final guidelines clarify that “purely educational” communications should not constitute solicitation, which is a positive revision. However, the absence of a clear definition of “purely educational” leaves significant scope for subjective interpretation by NCAs, potentially resulting in inconsistent enforcement. In DCGG’s view, ESMA should introduce objective criteria for assessing promotional intent. Without this, there is a risk of regulatory overreach and misclassification, which could deter firms from sharing informative, security-focused, and innovation-related content that ultimately serves the public interest.
- Overall without a clear distinction between targeted promotional activity and communications that do not constitute solicitation, these guidelines risk restricting the availability of neutral or consumer protection-oriented information and services to EU consumers, in contrast with the foundational principles of MiCA.

**Recommendation:** *To ensure proportionality and legal clarity, the guidelines should more clearly distinguish between targeted solicitation and general company communications, excluding from scope any activities that are not directly aimed at EU consumers and do not actively promote a product or service.*

### **Issue III: Liability under Guideline 2 (Person Soliciting) Should Reflect Nuances like Market Structure, Investor Type and MiFID Rules**

- DCGG supports the general principle in Guideline 2 that active solicitation through third parties (such as paid influencers, direct referrals to third-country firms’ websites, or promotional offers) could constitute solicitation. However, the current guidelines fail to account for the diversity of market structures and investor profiles within the cryptoasset space.
- In particular, there is a clear distinction between retail and sophisticated investors, especially within primary and secondary market dynamics. Sophisticated investors

typically initiate contact with issuers independently and are capable of assessing investment risks without needing the regulatory protections intended for retail clients. Conversely, stablecoin issuers often have limited control over how or where their tokens are marketed once they enter secondary markets, especially by third-country CASPs acting without coordination or consent.

- Moreover, the mere display of an issuer's logo on a third-party platform (when no contractual relationship or active promotion is present) should not be assumed to constitute solicitation. This interpretation, outlined in the final guidelines, diverges from traditional finance practices under MiFID II and risks imposing undue liability on issuers who lack operational control over such communications.

**Recommendation:** ESMA should refine Guideline 2 to distinguish between active, compensated promotion, and passive references or listings beyond the issuer's control. Liability for reverse solicitation breaches should only arise where there is provable intent or direct involvement by the issuer in promotional activity.

#### **Issue IV: Guideline 3 (*Exclusive initiative of the client*) Risks Creating a De Facto Ban on Reverse Solicitation**

- DCGG broadly supports Guideline 3 and its definitions on client-initiated engagement. However, we are concerned that the proposed one-month limit on follow-up activity is overly rigid and creates legal and operational uncertainty for market participants.
- The guidelines state that third-country firms may not offer the same or similar cryptoassets to a client one month after the initial request. This timeframe does not reflect how digital services operate. For example, if a user downloads a mobile app to access cryptoasset services, it would remain available and functional beyond the one-month window without further solicitation by the third-country firm. The proposed restriction would unjustifiably constrain user access to services they have proactively sought, even in the absence of additional marketing or direct solicitation.
- While we acknowledge the need to safeguard EU markets post-MiCA enforcement, it is essential to distinguish between new EU clients and pre-existing clients who continue to engage at their own volition. If legacy EU clients (who initiated contact prior to MiCA's enforcement) continue to seek services voluntarily, the proposed limitations would deny them ongoing access without any new solicitation, thereby undermining legitimate business relationships. We believe this approach exceeds what is required by the Level I text and may result in a de facto ban on reverse solicitation, contrary to the objectives for this Regulation.

- The language on offering “cryptoassets of the same type” is also unclear. While the text restricts such offerings after one month, it also allows them “in the context of the original transaction” without defining this scope. This ambiguity could lead to inconsistent interpretation and enforcement.
- Combined with similarly broad provisions elsewhere in the guidelines, this lack of clarity could undermine the Guidelines’ legal certainty and hinder consumer access to safe, familiar products.

***Recommendation:*** *To preserve the integrity of the reverse solicitation framework and avoid unintended market exclusions, DCGG recommends that ESMA remove the one-month restriction and provide clear, objective criteria for determining what constitutes a continuation of the original transaction.*