

THE REVERSE SOLICITATION EXEMPTION UNDER MiCA – WHAT THIRD-COUNTRY FIRMS NEED TO KNOW

The Markets in Crypto-Assets Regulation (MiCA) is poised to further transform the European crypto-assets landscape, following the implementation of MiCA regulatory technical standards. Third-country firms (i.e. from outside the EU) that do not obtain a Crypto Asset Service Provider (CASP) license or cannot benefit from the 18 month transitional period¹, are prohibited from providing crypto-asset services, except under a narrow reverse solicitation exemption. While this may appear stringent, it is not entirely without precedent – similar provisions exist, for instance, in MiFID II – although the scope of solicitation provisions in MiCA is notably broader than in other EU regimes.

The European Securities and Markets Authority (ESMA) sought feedback on its proposed guidance for the application of the reverse solicitation exemption.

The final reports following consultation were published by ESMA on 30 December 2024. In the final guidelines on reverse solicitation (the Guidelines), ESMA maintains a strict approach on the solicitation prohibition, consistent with the narrow perimeter of the reverse solicitation exemption indicated by the draft guidelines from January 2024.

In this briefing, we cover the narrow circumstances in which third-country firms that do not have a CASP licence, or cannot benefit from the transitional period,

ESMA Guidelines

- On 29 January 2024, ESMA issued a consultation paper concerning the provision on reverse solicitation in MiCA.
- From its publication to 29 April 2024, ESMA sought feedback on its proposed guidance for the application of the reverse solicitation exemption

¹ Member States may establish a transitional regime permitting both EU and third country firms registered as crypto-asset service provider to continue offering their services for a period of maximum 18 months. For reference, please see ESMA's list of grandfathering periods decided by Member States under Article 143 of the Regulation (EU) 2023/1114 Markets in Crypto-Assets Regulation (MiCA)

can strategically engage with the EU market in relation to crypto-assets under the reverse solicitation exemption.

MARKETING BAN FOR THIRD-COUNTRY FIRMS

Third-country firms are subject to a strict ban on offering crypto-asset services in the EU, unless: (i) they are authorised as CASPs; (ii) they benefit from the grandfathering period; or (iii) act under the reverse solicitation exemption.

Unless one of the three circumstances above is satisfied, third-country firms that are not CASPs cannot promote to or solicit customers in the EU and the Guidelines clarify that any attempt to reach EU-based clients, whether directly or indirectly through affiliates or partners, would be caught by the prohibition in MiCA.

The scope of the marketing prohibition is very wide. It covers any marketing aimed at soliciting EU based clients, whether active or passive. Soliciting or indirectly promoting through intermediaries such as, among others, an EU regulated entity (even if the entity is part of the same group as the third-country firm), influencers, or well-known personalities, is also prohibited, even in the absence of a formal agreement or obvious remuneration. Activities such as directing audiences to a website, providing service access, or offering deals are all considered solicitations.

The marketing ban is technology-neutral and encompasses all forms of communication, including brochures, banners and pop-ups on websites/social media/the third-country firm's mobile application, face-to-face or online meetings, reviews (even those without a formal contract or obvious remuneration, where the third-country firm has merely consented, encouraged, or facilitated the review), press releases, and event invitations. Purely educational material, or industry events aimed at innovation are not subject to the ban.

National Competent Authorities (NCAs), who are responsible for supervision, will evaluate all the facts and circumstances of each case to determine whether a third-country firm is engaging in prohibited solicitation activities, which may include creating websites in an EU language not customary in international finance or employing SEO strategies to optimise EU market reach.

The Guidelines provide a non-exhaustive list of examples² where a third-country firm is likely to be regarded as soliciting clients within the EU, such as:

- the third-country firm uses geo-targeting strategies for running digital ads that target EU potential clients;
- the third-country firm uses the website of an EU affiliate or EU firm – be it regulated or not - to display its logo or a backlink to its website, or to promote its crypto-asset services or activities; or
- after being solicited by a client in relation to a specific crypto-asset service, the third-country firm offers this individual a package of bundled crypto-asset services.

Key issues

- The principle of the exemption is prohibition: the exemption is very narrow and designed solely to preserve the freedom of EU citizens to choose their own service provider.
- The reverse solicitation exemption is not intended to serve as a loophole for third-country firms that do not wish to obtain a CASP license.
- When third-country firms that have not obtained a CASP license are acting pursuant to the reverse solicitation exemption, they are nevertheless prohibited from promoting other additional products and services.
- Similarities can be drawn with MiFID II, although MiCA's scope is broader.

Definitions

crypto-asset (art. 3 (5); MiCA): a digital representation of a value or of a right that is able to be transferred and stored electronically using DLT (i.e. blockchain) or similar technology.

crypto-asset service provider (art. 3 (15); MiCA): a legal person or other undertaking whose occupation or business is the provision of one or more crypto-asset services to clients on a professional basis, and that is allowed to provide crypto-asset services in accordance with Article 59.

² ESMA; Final Report on the guidelines on reverse solicitation under MiCA; Annex; p. 47

ESMA acknowledges that third-country firms may sometimes appear to be soliciting EU based clients when they are not, in fact, doing so. To avoid breaching MiCA CASP authorisation requirements, ESMA therefore advises third-country firms that are not CASPs to take precautionary measures, such as not accepting new EU client accounts or geo-blocking access to their crypto-asset services for EU based clients.

REVERSE SOLICITATION EXEMPTION: WHAT DOES THE EXEMPTION COVER?

The prohibition does not apply to the provision of crypto-asset products, services or activities by third-country firms that are not CASPs in the case of 'reverse solicitation' from an EU based client. Third-country firms that are not CASPs can only provide crypto-asset products, services or activities in the EU at the client's own exclusive initiative. ESMA clarifies that this exemption should be understood as "very narrowly framed" and "cannot be assumed nor exploited to circumvent MiCA"³. The client's initiative must be expressed and explicit. In this regard, third-country firms cannot rely on contractual terms and disclaimers, or pre-completed templates like reverse solicitation letters, to override the factual nature of client initiation.

In addition, third-country firms relying on the reverse solicitation exemption are prohibited from promoting additional products, services or activities unless they are (i) directly related to the original transaction and (ii) of the same type as initially requested by the client:

(i) directly related to the original transaction: a third-country firm may rely on the reverse solicitation exemption for only a very short period. Although the Guidelines do not specify a definite time window for using the exemption, and ESMA has accepted that setting a fixed time limit is considered neither possible nor desirable as it will depend on the specific circumstances of each case, the Guidelines provide the following example⁴:

"if the client contacts the third-country firm to buy crypto-asset X, the firm may – at this point in time – market to the clients crypto-assets of the same type. However, the third-country firm would not be entitled to market further crypto-asset X transactions or transactions in similar crypto-assets to the client a month later"

Third-country firms relying on the reverse solicitation exemption must maintain records to demonstrate that the client exclusively initiated the request for any new products, services and/or activities.

(ii) of the same type as initially requested by the client: the concept of the 'same type' should be interpreted in a very limited manner. It is contended that the 'same type' requirement aims to prevent third-country firms from exploiting MiCA's broad asset categories by marketing all their services related to a particular type of asset. For example, if a client requests a specific service in relation to stablecoins, the third-country firm is prohibited from promoting its entire suite of stablecoin-related services solely on the basis of that initial request.

crypto-asset service (art. 3 (16); MiCA): any of the following services and activities relating to any crypto-asset:

- (a) providing custody and administration;
- (b) operation of a trading platform;
- (c) exchange for funds;
- (d) exchange for other crypto-assets;
- (e) execution of orders on behalf of clients;
- (f) placing of crypto-assets;
- (g) reception and transmission of orders on behalf of clients;
- (h) providing advice;
- (i) providing portfolio management;
- (j) providing transfer services on behalf of clients.

³ ESMA; Final Report on the guidelines on reverse solicitation under MiCA; Executive summary; p. 5

⁴ ESMA; Final Report on the guidelines on reverse solicitation under MiCA; point. 5.3 Exclusive initiative of the client (Guideline 3) (26)(27); p.43

Therefore, to assess whether it is marketing a new type of crypto-asset, service or activity, the third-country firm seeking to rely on the reverse solicitation exemption should consider: (i) the type of the crypto-asset, service or activity offered; and (ii) the risks attached to it.

As MiCA does not provide detailed categories for crypto-assets, the 'type' of crypto-asset should not be confined to the three broad categories defined under MiCA (i.e., ARTs, EMTs, and other crypto-assets). ESMA provides a non-exhaustive list of assets that should not be considered the same type, for example⁵:

- utility tokens, ARTs and EMTs;
- crypto-assets that are not stored or transferred using the same technology;
- EMTs that are not pegged to the same fiat currency; or
- liquid and illiquid crypto-assets.

ESMA clarified that it is the responsibility of the third-country firm to ensure compliance, with assessments thereof to be made on a case-by-case basis.

COMPARISON WITH REVERSE SOLICITATIONS UNDER MIFID 2 AND UK REGIME

MICA AND MIFID 2 REVERSE SOLICITATIONS

While market participants have encouraged the alignment of the MiCA and MiFID 2 regimes, ESMA maintains its position that, despite the regulations sharing many similarities and adhering to the same overarching principles, they should still be treated separately.

The MiCA reverse solicitation regime and the MiFID 2 solicitation regime both operate under the principle of client-initiated services. The main differences reside in the type of products third-country firms can market to a client that initiated the relationship and the assessment has to be conducted (under MiFID 2 the assessment has to take into consideration (i) the type of instrument offered; (ii) complex vs. non-complex products; and (iii) riskiness of the product).

DIFFERENCES BETWEEN UK AND EU REGIMES

The UK Financial Services and Markets Act 2000 (FSMA) sets a general prohibition on the communication of financial promotions, i.e. any invitation or inducement to engage in an investment activity, which is defined as a controlled activity (such as dealing or providing investment advice) that is performed in respect of a controlled investment (including shares, bonds and derivatives). Since 8 October 2023, qualifying crypto-assets have been classed as controlled investments, thereby expanding the scope of the UK financial promotions regime to cover all firms marketing crypto-assets to UK consumers, regardless of the technology used or whether the firm is based overseas. Indeed, third-country firms may also be caught by this regime as a

⁵ ESMA; Final Report on the guidelines on reverse solicitation under MiCA; point. 5.4 When is a crypto-asset or a crypto-asset service of the same type as another one (Guideline 4) (31)(32); p.43

financial promotion is in scope regardless of where it is communicated, so long as it is capable of having an effect in the UK.

Under this regime, the general prohibition will apply unless a financial promotion:

- has been made or approved by a firm which is either authorised by the FCA or registered under the Money Laundering Regulations; or
- qualifies for an exemption, such as the exemption for high-net worth individuals or self-certified sophisticated investors.

Unlike the EU regimes, there are no carveouts for reverse solicitation. As such, third-country firms should bear in mind that the EU's allowance for requests made by a client at their own exclusive initiative is not reflected in the UK regime, and the only way to avoid having to comply with the financial promotions regulations in the UK is by being authorised, registered, or within scope of an exemption.

CONCLUSION

Understanding the intricacies of the reverse solicitation exemption under MiCA is crucial for managing operations that reach into the EU within the crypto-asset space.

This involves special attention to facts and evidence gathering, which may entail ongoing costs (assessment of which crypto-services can be offered, if they belong to the same type, record-keeping of the initiation of the client etc..) for third-country firms that wish to rely solely on the reverse solicitation exemption⁶. A risk, need and cost-based assessment should be made by the third-country firm to determine whether to rely on the reverse solicitation exemption. This assessment should consider the firm's exposure to potential legal and financial risks, the specific needs of its customers, and the costs associated with ensuring compliance. The Guidelines highlight the narrow framing of the exemption and emphasise that it cannot be assumed or exploited to circumvent the reporting and licensing requirements established under MiCA. Therefore, when acting on reverse solicitation grounds, ESMA encourages third-country firms to take precautionary measures to ensure that they are not breaching MiCA authorisation requirements.

For further information, please also see our previous briefings: [EU Crypto regulation: MiCAR overview for issuers and crypto-asset service providers](#); [What does MiCAR mean for issuing and offering stablecoins and other crypto-assets in the EU?](#); and [Crypto-asset Service Providers: navigating your EU regulated status](#).

⁶ ESMA; Final Report on the guidelines on reverse solicitation under MiCA; p. 22

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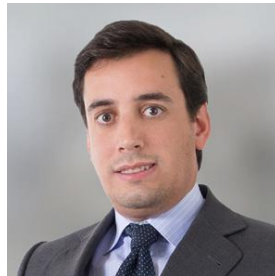
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