

SUBMITTED VIA WEB FORM TO: <https://www.esma.europa.eu/>

To whom it may concern,

Re: European Securities & Markets Authority (ESMA) Consultation Paper on the draft guidelines on reverse solicitation under the Markets in Crypto Assets Regulation (MiCA)

About Global Digital Finance (GDF)

GDF is the leading global members association advocating and accelerating the adoption of best practices for crypto and digital assets. GDF's mission is to promote and facilitate greater adoption of market standards for digital assets through the development of best practices and governance standards by convening industry, policymakers, and regulators.

The input to this response has been curated through a series of member discussions and roundtables, and GDF is grateful to its members who have taken part.

As always, GDF remains at your disposal for any further questions or clarifications you may have, and we would welcome a meeting with you to further discuss these matters in more detail with our members.

Yours faithfully,

Elise Soucie - Director of Global Policy & Regulatory Affairs - GDF



Response to the Consultation Report: Executive Summary

GDF convened its MiCA Working group to analyze the European Securities & Markets Authority (ESMA) Consultation Paper on the draft guidelines on reverse solicitation under the Markets in Crypto Assets Regulation (MiCA).

Overall GDF is supportive of the aim of the proposals made in the Consultation Paper on the draft guidelines on reverse solicitation under MiCA, and of ESMA's intent of providing much needed clarity to the market. We appreciate the agility and speed with which ESMA has developed the proposed guidance, and believe the Consultation is an important step towards building a comprehensive EU global framework for digital assets. As such, the response to the Consultation looks to provide suggestions of areas where additional specificity and practical implementation measures may be needed for effective implementation of the guidance.

GDF has worked with our members to provide a constructive assessment of how to overcome challenges in implementing the guidance. Through this process, the Working Group has identified key areas that may require further drafting consideration or additional guidance for purposes of clarity, proportionality, and effective implementation. The four core areas identified are:

- 1. Support for a more precise definition of solicitation**
- 2. Encouraged alignment with MiFID II application of solicitation requirements**
- 3. Provision of specific guidance on “what good looks like” for compliance with solicitation requirements**
- 4. Revised criteria on types of clients and pairings of crypto-assets**

1. Support for a more precise definition of solicitation

In light of ESMA's mandate under Article 61(3) to provide guidance, GDF is supportive of ESMA providing clarity to the market. GDF agrees with ESMA that it is important to protect investors and make sure that clients of crypto-asset service providers (CASPs) benefit from full rights and protections afforded to them under MiCA. However, GDF members are also concerned that a too broad definition of solicitation could lead to unintended consequences and inconsistent application from the National Competent Authorities (NCAs) that are administering this regime. For example, a broad description such as this could lead to regulatory arbitrage in which different NCAs might take different stances or may have different views on perimeter related enforcement actions. It may also have the unintended consequence of creating regulatory uncertainty. Given this we would encourage greater precision which is further detailed throughout our response.

2. Encouraged alignment with MiFID II application of solicitation requirements

GDF would note that differences between MiFID and MiCA may unintentionally result in MiCA being at odds with the principle of same risk same regulation. Within MiFID II,



reverse solicitation is a right of EU market participants to seek and receive services from third country providers. Historically reverse enquiry fell under the territorial scope of national law. Furthermore, the proposed approach seems to adopt an application that is wider than that which is currently applied under MiFID II. Discrepancies such as these between MiFID II and MiCA do not maintain a level playing field, and this interpretation could have an expansive impact on the market, possibly resulting in unintended consequences and GDF would encourage greater alignment between MiFID II and MiCA in the final guidance.

3. Provision of specific guidance on “what good looks like” for compliance with solicitation requirements

GDF suggests that it would be beneficial for ESMA to provide guidance on what “good” looks like across the specific areas which we have detailed above. Providing this type of guidance would both enable the market to appropriately prepare for compliance and would also support a more consistent application of the guidance across NCAs. This could mitigate the risk of regulatory arbitrage across EU member states.

4. Revised criteria on types of clients and pairings of crypto-assets

First, GDF would propose to add additional criteria on the type of client (including differentiation between retail and wholesale clients) as well as all types of crypto-assets the client stated they were interested in when they made the initial approach. Second, of the list of pairs set out under paragraph 25, GDF suggests that “crypto-assets not stored or transferred using the same technology” is overly restrictive. The broadest interpretation of this could mean that whenever a new or updated code is used the exemption for reverse solicitation no longer applies (for example, in the case of the Ethereum Merger or on a day-to-day basis for the updating of some DAOs). In the first instance, perhaps ESMA should consider that such restrictions (i.e., pairs not using the same technology/rails not being permitted to apply the exemption), should only apply to non-sophisticated clients (i.e., retail customers). This is further delineated throughout our response, but overall GDF would recommend clarification and differentiation regarding for both pairings of crypto-assets and types of clients.



Response to the Consultation Paper (CP): Questions for Public Consultation

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 authorization requirements?

Overall, GDF is supportive of ESMA's aim of consistent application of MiCA requirements and preventing bad actors from behavior designed to circumvent the MiCA requirements. Especially in light of ESMA's mandate under Article 61(3) to provide guidance, GDF is supportive of ESMA providing clarity to the market. GDF agrees with ESMA that it is important to protect investors and make sure that clients of crypto-asset service providers (CASPs) benefit from full rights and protections afforded to them under MiCA, most particularly for retail clients, who would normally be regarded as 'vulnerable clients. However, we note that there are a few areas where the approach may benefit from further clarification, and we have set out these specific areas, as well as potential solutions on how clarity can be provided throughout our response.

First, in paragraph 12 of the Consultation it notes that, "the draft guidelines follow largely, but not in all regards, the established practice under the MiFID II framework, as prescribed by ESMA Q&As", the proposed approach seems to adopt an application that is wider than that which is currently applied under MiFID II. For example, Article 61(1) of MiCA states:

"Where a client established or situated in the Union initiates at its own exclusive initiative the provision of a crypto-asset service or activity by a third-country firm, the requirement for authorisation under Article 59 shall not apply to the provision of that crypto-asset service or activity by the third-country firm to that client, including a relationship specifically relating to the provision of that crypto-asset service or activity."

This wording is in line with the wording under Article 42 of MiFID which states:

"Where a retail client or professional client within the meaning of Section II of Annex II established or situated in the Union initiates at its own exclusive initiative the provision of an investment service or activity by a third-country firm, the requirement for authorisation under Article 39 shall not apply to the provision of that service or activity by the third country firm to that person."

As with MiFID, GDF members understood that the wording in MiCA is intended to be read as an exemption for firms who have been approached by a client at their exclusive initiative. However, whilst the Guideline 3 of the consultation paper reflects this, GDF members are concerned with the wording introduced in paragraph 11 of the Consultation, where ESMA states:

"Article 61 of MiCA, although often referred to as the reverse solicitation exemption, is actually a prohibition."

GDF members are concerned that this would be inconsistent with how MiFID is interpreted and could inadvertently go beyond the mandate that ESMA has been given. As such, members would encourage that any revisions to Guideline 3 do not seek to introduce wording of a prohibition or seek to apply a stricter standard than that of MiFID as this could lead to regulatory fragmentation and inadvertently create regulatory confusion and opportunities for arbitrage.



To further expand upon this, members would note that historically reverse enquiry fell under the territorial scope of national law. Discrepancies such as these between MiFID II and MiCA do not maintain a level playing field, and this interpretation could have an expansive impact on the market, possibly resulting in unintended consequences, which are outlined below. We would also highlight that differences between MiFID and MiCA may unintentionally result in MiCA being at odds with the principle of same risk same regulation. Such differences could also result in consumer confusion as customers may be receiving both MiFID and MiCA services.

In paragraph 14, page 10, the Consultation states that, “the term solicitation should be construed in the widest possible way.” Members are concerned that this overarching description could lead to unintended consequences and inconsistent application from the National Competent Authorities (NCAs) that are administering this regime. For example, a broad description such as this could lead to regulatory arbitrage in which different NCAs might take different stances or may have different views on perimeter related enforcement actions. It may also have the unintended consequence of creating regulatory uncertainty, that could prevent business from assessing whether certain business models are permitted under the reverse solicitation exemption or require separate licensing. As such, we urge ESMA to provide clarifications on these matters set out below.

GDF members also cautioned that this wide interpretation could lead to uncertainty in the market. Not all social media communication is marketing communication, however, there is concern that NCAs taking an overly wide interpretation could capture benign communications between market participants that do not relate to the provision of specific MiCA services. The same applies to conference advertising and communications about events and roundtables. A wide interpretation of solicitation could have the unintended consequence of preventing CASPs from engaging in events, sharing reports, or participating in white papers in the EU. These activities are important for knowledge sharing and the maturing of the industry. GDF notes the important role cross-industry engagement plays in developing industry standards, sharing best practice (particularly in respect of compliance issues) and facilitating cross-industry projects. GDF notes the importance of input from global firms to what are global solutions and cautions against ESMA inadvertently creating fortress Europe. To mitigate this risk, we would propose that if a post or event is informational in nature rather than promotional, that should be excluded from this broad definition and not be considered as active solicitation.

On the interpretation of solicitation, it would also be beneficial to clarify that the solicitation of clients established or situated in the Union is only deemed to take place where:

- (i) there is promotion, advertisement or offer of crypto-asset services or activities; and
- (ii) such promotion, advertisement or offer targets clients established or situated in the Union.

On point (i), we commented above on the need to exclude informational content from the definition of what constitutes promotion, advertisement or offer of crypto-asset services or activities. Regarding point (ii), paragraph 13 of the proposed Guidelines (found on page 18) mentions websites and communication in an official language of the Union which is not commonly used in international finance would be deemed an indicator that firms are targeting clients located or established in the Union. Members call on ESMA to provide greater clarity to set out the perimeter for what “not commonly used in international finance” is deemed to capture in this point. We should note there can be instances where firms are operating outside



of the Union with no intention to operate in the Union but are now being captured by this provision because they have an official language that is also used in an official capacity within the Union, which could lead to an overreach of MiCA.

To prevent discouraging third-country firms from providing services accessible to their audience outside the Union, it would be relevant to exclude official languages also used outside the Union when the third-party firm has presence in countries that share these official languages or have significant speaking populations. Otherwise, this approach might inadvertently encourage service provision methods that limit access.

Members also drew attention to paragraph 15, where ESMA deems that a broad interpretation should be given to the person soliciting, noting that it could be an entity or person acting on the firm's behalf. Members asked ESMA to provide greater clarity on this, noting that without exact clarification, the definition may include price comparison websites and consumer websites that are third-party sources. These sites may not have a relationship with the service provider or CASP and as such considering their activities as "solicitation" would not be appropriate as the CASP may have no control over the third-party providing information about its services. Members note the importance of shutting down loopholes such as this but advise ESMA to clarify that this type of activity, if not affiliated with the CASP, is not captured by the definition of solicitation – which is only intended to capture scenarios where a link or relationship between the CASP and third party can be identified.

GDF notes that it would be beneficial to demarcate a distinction between engaging with non-EU parties for the purposes of solicitation of services versus discussions about partnerships such as those provided by infrastructure and other similar third-party service providers. If EU firms are not able to effectively engage with infrastructure providers, they may not be able to access some of the necessary services that can support the EU developing its own digital finance ecosystem, and their ability to provide the best possible service to clients could be compromised.

GDF acknowledges the Consultation's concern about loopholes. However, GDF also notes that there will always be bad actors who will look to exploit the system. This is consistent across both traditional markets, as well as digital finance. That being said, this does not mean that an overly expansive definition would be beneficial for the rest of the market; it may in fact be to the detriment of the EU to unintentionally capture certain firms and activities within the definition of active solicitation and unfairly punish firms that genuinely have had their crypto-asset services requested at the clients own exclusive initiative.

Finally, to prevent exploitation, GDF suggests that it would be beneficial for ESMA to provide guidance on what "good" looks like across the specific areas which we have detailed above. Providing this type of guidance would both enable the market to appropriately prepare for compliance and would also support a more consistent application of the guidance across NCAs. This could mitigate the risk of regulatory arbitrage across EU member states.

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?



GDF propose to add additional criteria on the type of client (including differentiation between retail and wholesale clients) as well as all types of crypto-assets the client stated they were interested in when they made the initial approach. GDF proposes that firms should be able to provide all services requested by the client in their initial approach, as it would be impractical to mandate multiple approaches for each individual service that the client is interested in receiving.

Furthermore, depending on if the business is wholesale or retail, differing approaches may be required. For retail clients, applying tools and mechanisms to document client's consent for each individual services or on a product-by-product basis, may render timely provision of trading services difficult. GDF supports appropriate disclosures and consumer education, however it is also crucial for businesses to deliver services to the best of their ability in a timely and efficient manner. We would encourage a proportionate approach to the guidance that still enables this. For professional/institutional clients however, this approach may simply be unworkable given the differences in volume and transactions, as well as the multiple products that may need to be delivered concurrently.

We would also suggest including a provision that states once a client is onboarded with a third-party firm, they should be allowed to opt in for further information and products and kept up to date. This would enable consumers to be aware of their options and deliver the best outcomes for themselves as well as enabling them to make more informed choices. Not being able to do so could result in the unintended consequence of the consumer having important information withheld from them. For example, important developments relating to a token after the one-month period has expired, or notices that are mandated to be sent to all customers by a regulator.

Of the list of pairs set out under paragraph 25, GDF suggests that “crypto-assets not stored or transferred using the same technology” is overly restrictive. The broadest interpretation of this could mean that whenever a new or updated code is used the exemption for reverse solicitation no longer applies (for example, in the case of the Ethereum Merger or on a day-to-day basis for the updating of some DAOs). In the first instance, perhaps ESMA should consider that such restrictions (i.e., pairs not using the same technology/rails not being permitted to apply the exemption), should only apply to non-sophisticated clients (i.e., retail customers). Furthermore, with regards to updating coding, GDF would note that this is usually part of market development. In traditional financial services, if an FX algorithmic code is updated, this is usually for the purposes of product development. This would require a sign off at the particular market or asset class risk committee and would be regarded as a major change or development. However, in the crypto-asset space, amendments to codes, due to the cryptographic nature of the technology and the code on which it is built, these are often regarded as tweaks/minor upgrades and happen on a frequent basis. These are usually analogous to IT system updates rather than changes to investment products. If the exemption became null and void with every minor adjustment, this would be very impractical. Therefore, clarification and differentiation regarding what is deemed a major code upgrade that would trigger a void exemption and a tweak would be appreciated.

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

GDF contends that the proposals will be most effective if they are accompanied with further clarifications on the specific areas discussed throughout our response which would support



consistent implementation across NCAs, and prevention of undue solicitations. Lack of clarity could also inadvertently delay the NCAs in their MiCA implementation, and stated aim of an application period in 2024-2026. GDF suggests that training for NCAs and examples of best practice would be effective.

To further support this GDF encourages a clear approach with due process. Clearly setting out expectations for what is expected, would enhance the competitiveness of the EU as a digital jurisdiction.

As set out under Q1, an overly expansive and restrictive application may have unintended consequences which may harm the competitiveness of the EU. Should the application be overly restrictive, it may prevent or discourage firms from participating in the market or prevent EU firms from engaging in international discussions and marketplaces.

Another consideration discussed under Q1 is that supervision will be more effective if it is aligned with MiFID II and the provisions that already exist across financial services. This alignment would also support effective policing and would prevent the unintended consequence of policing inefficiencies if many activities are captured that are beyond the scope of solicitation.