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Guidelines

On situations in which a third-country firm is deemed to solicit clients established or situated in the EU and the supervision practices to detect and prevent circumvention of the reverse solicitation exemption under the Markets in Crypto Assets Regulation (MiCA)

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1. Scope

Who?

1. These guidelines apply to competent authorities, as defined in Article 3(1)(35) of MiCA and, as regards Section 5, third-country firms.

What?

2. These guidelines apply in relation to Article 61 of MiCA.

When?

3. These guidelines apply 60 calendar days from the date of their publication on ESMA's website in all official EU languages.

2. Legislative references, abbreviations and definitions

2.1 Legislative references

ESMA Regulation	Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC[1]
MiCA	Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937[2].

2.2 Abbreviations

ESFS	European System of Financial Supervision
ESMA	European Securities and Markets Authority

[1] OJ L 331, 15.12.2010, p. 84.
[2] OJ L 150, 9.6.2023, p. 40.

EU	European Union

2.3 Definitions

Third-country firm	A firm that would be subject to Article 59 of MiCA if its head office or registered office were located within the Union

3. Purpose

4. These guidelines are based on Article 61(3) of MiCA. The objectives of these guidelines are to establish consistent, efficient and effective supervisory practices within the ESFS and to ensure the common, uniform and consistent application of the provisions in Article 61 of MiCA.

5. In particular, they aim to promote greater convergence in the interpretation of, and supervisory approaches to, the situations in which a third-country firm is deemed to solicit clients established or situated in the Union. In addition, to foster convergence and promote consistent supervision in respect of the risk of abuse of Article 61 of MiCA, these guidelines also aim to promote certain supervision practices to detect and prevent circumvention of MiCA.

4. Compliance and reporting obligations

4.1 Status of the guidelines

6. In accordance with Article 16(3) of the ESMA Regulation, competent authorities should make every effort to comply with these guidelines.

7. Competent authorities to which these guidelines apply should incorporate them into their national legal and/or supervisory frameworks as appropriate.

4.2 Reporting requirements

8. Within two months of the date of publication of the guidelines on ESMA's website in all EU official languages, competent authorities to which these guidelines apply must notify ESMA whether they (i) comply, (ii) do not comply, but intend to comply, or (iii) do not comply and do not intend to comply with the guidelines.

9. In case of non-compliance, competent authorities must also notify ESMA within two months of the date of publication of the guidelines on ESMA's website in all EU official languages of their reasons for not complying with the guidelines.

10. A template for notifications is available on ESMA's website. Once the template has been filled in, it shall be transmitted to ESMA.

5. Guidelines on the solicitation of clients by third-country firms

5.1 Means of solicitation (Guideline 1)

11. The solicitation of clients by third-country firms should be construed broadly and in a technology-neutral way.

12. Solicitation includes the promotion, advertisement or offer of crypto-asset services or activities to clients or prospective clients in the Union by any means. This may include, without limitation:

- internet commercials,
- brochures,
- telephone calls,
- emails,
- banners, pop-ups and/or similar tools on websites and social media,
- face-to-face meetings,
- press releases,
- other forms of physical or electronic means, including websites, social media platforms, mobile applications,
- participations in road shows and trade fairs,
- invitations to events,
- affiliation campaigns,
- retargeting of advertising,
- invitations to fill in a response form or to follow a training course,
- messaging platforms,
- sponsorship deals.

13. Promotions, advertisements, marketing and offers of a general nature such as brand advertisements, and which are addressed to the public (with a broad and large reach), may also constitute solicitation.

14. NCAs should consider all the facts and circumstances of the case to assess whether a third-country firm is soliciting clients established or located in the Union.

15. Please refer to the Annex hereto for examples of circumstances where a third-country firm is likely to be regarded as soliciting clients in the Union.

16. ESMA acknowledges that there are circumstances where third-country firms might also be considered to be soliciting EU clients, though not exclusively[3]. In such cases, the third country firm may take precautionary measures to make sure that it does not breach the authorisation requirements under MiCA by refraining from providing any crypto-asset services or activities to EU clients. To do so, the third-country firm may, for instance, not accept any new EU clients' accounts or geo-block[4] the means of access to its crypto-asset services or activities.

17. Educational materials, trainings, and industry events that are purely educational or focused on sharing knowledge about underlying technologies or innovations of the industry should not be considered solicitation. Educational materials, trainings, and industry events would be considered as having the effect to directly or indirectly promote the third-country firm or its crypto-asset services or activities when, for example, the audience is directed to the third-country firm's website, the means of access to the services offered by the third-country firm are given, brochures linked to the crypto-asset services are handed, the audience is invited to fill in a client profile or the services of the third country firm are, in any manner, otherwise promoted.

[3] For instance, a third-country firm may be sponsoring an international sporting competition in which Member States national teams or EU athletes may also be entering. MiCA does not prohibit such sponsorship deals. However, as a consequence of this, the firm should be considered to be soliciting clients in the EU and would thus be unable to benefit from the reverse solicitation exemption.

[4] For instance, if access to the third-country firm's website is geoblocked to EU clients with an IP address originating in the EU and if the third-country firm's mobile application was not available for EU countries in mobile applications stores.

5.2 Person soliciting (Guideline 2)

18. Competent authorities should take into account that solicitation may occur irrespective of the person through whom it is performed.

19. The solicitation may be carried out by the third-country firm itself or any person acting on its behalf or having close links with the third-country firm[5]. A person acting on behalf of a third-country firm may be doing so either: i) expressly by virtue of a contract; or ii) implicitly via an informal agreement.

20. Such persons can include so-called influencers. Indications that a person is acting on behalf of a third country firm may include, for example, the direction of the audience to the third-country firm's website, the provision of the means of access to the services offered by the third-country firm, the offering of promotional deals or the displaying of the third-country firm's logo. The existence of any form of remuneration or benefit (monetary or non-monetary) provided by the third-country firm to the third party should be a strong indication that the third party is acting on behalf of the third-country firm. The lack of remuneration or benefit should, however, not necessarily exclude the fact that the person may be acting on behalf of the third country firm.

21. Own initiative reviews (i.e., as long as they are not performed on behalf of) of a third-country firm's crypto-asset services or activities, on the other hand, should not be regarded as solicitation by or on behalf of the third-country firm. Such reviews, however, can only be considered as "own initiative" where the third-country firm does not have knowledge of the review and has not consented, encouraged or otherwise facilitated it.

22. The provision of crypto-asset services following solicitation on behalf of a third-country firm by a person or entity regulated in the EU should still be regarded as a breach of MiCA. For instance, an EU credit institution, investment firm or payment service provider should not redirect clients (for instance, via its website) to crypto-asset services provided by a third-country firm. This applies whether that third-country firm is part of the same group or not.

[5] As defined in Article 3(31) of MiCA.

5.3 Exclusive initiative of the client (Guideline 3)

23. A firm should not be deemed to solicit clients, if the crypto-asset service or activity is provided at the own exclusive initiative of the client. The client's own exclusive initiative should be construed narrowly.

24. The assessment of whether a crypto-asset service provider solicited a client or whether the contact was exclusively initiated by the client should be a factual one. Contractual arrangements or disclaimers cannot supersede contrary facts.

25. The reverse solicitation exemption is based on the premise that the crypto-asset product, service or activity is provided at the client's own exclusive initiative. Article 61(2) of MiCA leaves open the possibility for the third-country firm to market to that client crypto-assets or crypto-asset services or activities of the same type. However, the requirement that the crypto-asset services be provided on the basis of the own exclusive initiative of the client still applies.

26. As such, the time of the request from the client and of the offering, promotion or advertisement of other crypto-asset services or activities of the same type matters. The said provision should thus be construed as not permitting third-country firms to offer the client further crypto-assets or crypto-asset services or activities, even if such services or activities are of the same type as the one(s) originally requested by the client, unless they are offered in the context of the original transaction.

27. For instance, 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.

28. Third-country firms should be able to provide records tracking the relationship with the client and, in particular, whether the client has taken the initiative to receive crypto asset services with respect to a new product.

5.4 When is a crypto-asset or a crypto-asset service of the same type as another one (Guideline 4)

29. The reverse solicitation regime leaves open the possibility for a third-country firm to market crypto-assets or crypto-asset services or activities of the same type in the context of the relationship started at the own exclusive initiative of a given client, subject to the third-country firm also complying with Guideline 3 above.

30. Where the third-country firm wants to use such possibility, it should assess whether crypto-assets or crypto-asset services or activities belong to the same type on a case-by-case basis, taking into account elements such as (i) the category of the crypto-asset or crypto-asset service or activity offered and (ii) the risks attached to each crypto-asset or crypto-asset service or activity.

31. The categorisation of crypto-assets and crypto-asset services or activities a third-country firm uses should be granular enough to ensure that the reverse solicitation exemption cannot be used to circumvent the authorisation requirements under Article 59 of MiCA.

32. Below is a non-exhaustive list of pairs of crypto-assets which should not be considered as belonging to the same type of crypto-assets for the purpose of the reverse solicitation exemption:

- utility tokens, asset-referenced tokens or electronic money tokens;
- crypto-assets not stored or transferred using the same technology;
- electronic money tokens not referencing the same official currency;
- asset-referenced tokens based mostly on FIAT currencies and asset-referenced tokens having significant crypto-currency ponderations;
- liquid and illiquid crypto-assets;
- crypto-assets other than asset-reference tokens and electronic money tokens with a non-identifiable-offeror and crypto-assets other than asset-reference tokens and electronic money tokens with an identifiable offeror.

33. Please note that the examples above should not be read a contrario. For instance, electronic money tokens not referencing the same official currency do not belong to the same type. But the fact that two electronic money tokens are referencing the same official currency does not necessarily imply that they are of the same type. Similarly, crypto-assets not stored or transferred using the same technology do not belong to the same type. But crypto-assets stored or transferred using the same technology are not necessarily of the same type.

6 Guidelines on the supervision practices to detect and prevent the circumvention of the reverse solicitation exemption

34. Third-country firms may try to circumvent the authorisation requirements under Article 59 of MiCA by various means and practices. It is therefore paramount that competent authorities closely monitor the activity, if any, of third-country firms in their respective jurisdictions. Given that crypto-asset services are almost exclusively offered and promoted online, particular emphasis should be given to the online activities of third-country firms.

35. Competent authorities should use one or more of the supervision practices detailed in the guidelines below.

6.1 Monitoring entities targeting clients established or situated in the Union or active in the Union (Guideline 1)

36. Competent authorities may search for third-country firms with telephone numbers starting with local country codes or mailing, email or website addresses indicating or hinting at their presence, at least virtual, in the Union (e.g., URL ending with “lu”, “de”, “fr”, etc.).

37. Competent authorities may also conduct consumer surveys to identify the firms used by consumers in their jurisdiction for crypto-asset services.

38. Competent authorities may use marketing monitoring tools, especially those with the ability to monitor social media activity as they may give an indication of the geographic markets targeted by third-country firms.

6.2 Exchanges with other authorities (Guideline 2)

39. Competent authorities may work closely with other authorities (national authorities or foreign authorities) that might have insight into whether third-country firms are offering services in the relevant market. Such authorities may include the police and local tax authorities.

6.3 Reacting to client complaints or whistle-blowers (Guideline 3)

40. Competent authorities should follow up on complaints from clients or information from whistle-blowers indicating that a third-country firm might have been soliciting clients in its jurisdiction.

Annex – Non-exhaustive list of examples of circumstances where a third-country firm is likely to be regarded as soliciting clients in the Union

The examples of circumstances mentioned in the table should be read together with the relevant Guidelines.

Guideline	Description
Guideline 1	A third-country firm is using regional- or country-specific search engine optimisation (SEO) strategies to optimise its online presence and rank well in the search engine results pages (SERPs) of EU potential clients or SERPs of potential clients of certain Member States. The objective of SEO is to improve a website's ranking in (non-paid) search engine results. Successful SEO leads to increased web traffic and brand exposure. Regional or country-based SEO allows a third-country firm to appear in a higher position in the SERPs of EU potential clients. Regional- or country-specific SEO may include, for example: i) using a country-code top-level domain (TLD) in the domain name (such as ".fr", ".es", ".at"); ii) using a generic TLD (such as ".com" or ".org") with EU country-specific subdirectories (such as ".com/fr", ".org/es") in the domain name; iii) using a generic TLD but set geographic targeting when setting criteria in SEO tools; iv) using geo-targeted link building[6] as part of its marketing strategy to build traffic from EU-based potential clients (for instance, a third-country firm uses backlinks on websites with an EU country-specific TLD or subdirectory).

[6] Geo-targeted link building is when a firm gets backlinks from other websites within a geographic region. A backlink is a link from another website to the firm website, thereby redirecting or encouraging web traffic from the initial website to another one.

Guideline 1	A third-country firm is using geo-targeting strategies for running digital ads, be it on SERPs or social media platforms, that target EU potential clients or potential clients of certain Member States.
Guideline 1	A third-country firm has a website or part of a website in an official language of the Union – which is not customary in the sphere of international finance – (or integrated translation tools in its website) and there is no indication that such third-country firm originates from a jurisdiction using the same language or that the third-country firm has a clientele or is targeting potential clients in a non-EU jurisdiction also using the same language.
Guideline 1	A third-country firm is sponsoring an EU- or Member State-centric sporting event such as a national championship, or a European championship.
Guideline 1	A third-country firm is redirecting EU potential clients to its website by including a link to such website on training or educational material.
Guideline 1	A crypto group (including both EU regulated entities and third-country firms) is using strategies which insufficiently allow the client to differentiate between the offering of the EU regulated entities and third-country firms.
Guideline 1	A third-country firm is responding to an EU-based enquiry about non-MiCA regulated services or activities and uses its responses to market its crypto-asset services or activities.
Guideline 2	A third-country firm is using the website of an EU affiliate or EU firm – be it regulated or not - to display its logo, a backlink to its website or promote its crypto-asset services or activities.
Guideline 2	A third-country firm is using an EU-based influencer or content creator, and remunerating them, to push their crypto-assets or crypto-assets services or activities, or build their profile, on social media or otherwise.
Guideline 2	An EU-regulated crypto-asset service provider redirects EU clients that intend to trade in unauthorised asset-referenced token to the non-EU trading platform or broker of its group.
Guideline 3	A third-country firm is contacted by an EU client that wishes to buy a crypto-asset. The EU client installs the third-country firm's mobile application on its mobile phone to trade such crypto-asset.

	Two days after the initial transaction, the EU client receives a push notification encouraging them to go back to the third-country firm's mobile application to consult what crypto-assets are trending, including crypto-asset that are not of the same type as the one initially traded by the EU client.
Guideline 3	A third-country firm is contacted by an EU client that wishes to buy a crypto-asset. The EU client installs the third-country firm's mobile application on its mobile phone to trade such crypto-asset. Two months after the initial transaction, the EU client receives a push notification encouraging them to go back to the third-country firm's mobile application to return to the application and take action by trading more (for instance, a push notification about a temporary promotion).
Guideline 4	A third-country firm is contacted by an EU client that wishes to buy an asset-referenced token issued by an issuer that is not authorised in accordance with Title III of MiCA. At the time of providing the relevant crypto-asset service(s), the third-country firm also markets or offers a widely different type of crypto-asset, for instance, meme coins to the EU client.
Guideline 4	A third-country firm is contacted by an EU client that wishes to buy an asset-referenced token authorised in the EU under Title III of MiCA. At the time of providing the relevant crypto-asset service(s), the third-country firm also markets or offers "meme coins" to the EU client.
Guideline 4	A third-country firm is approached by an EU-based individual for the provision of a specific crypto-asset service. In response, the third-country firm offers this individual a package of bundled crypto-asset services.