

## **Consultation on reverse solicitation and classification of crypto assets as financial instruments under MiCA**

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#### **1. – Target participants**

All interested stakeholders are invited to respond to this consultation paper. In particular, ESMA invites crypto-asset service providers (including from third countries) and financial entities dealing with crypto-assets as well as all stakeholders that have an interest in crypto assets.

#### **2. - Information Note**

ESMA has been empowered to develop technical standards and guidelines specifying certain provisions under MiCA. The consultation contains two papers which aim is to collect views, comments and opinions from stakeholders and market participants on the appropriate implementation of MiCA and in particular in relation to certain MiCA mandates that have to be developed by December 2024. These are:

##### 1) [Consultation Paper \(CP\) on the draft guidelines on reverse solicitation under MiCA](#)

ESMA previously underlined that the provision of crypto-asset services or activities by a third-country firm is strictly limited under MiCA to cases where such service is initiated at the own exclusive initiative of a client (the so called “reverse solicitation” exemption). This exemption should be understood as very narrowly framed and it cannot be assumed, nor exploited to circumvent MiCA.

In order to provide more guidance on the conditions of application of the reverse solicitation exemption and the supervision practices that national competent authorities may take to prevent its circumvention, ESMA is therefore considering the adoption of the guidelines in the CP. Section 2 explains the background to the proposals while section 3 presents the general approach of the guidelines that include an assessment and proposal regarding (1) the situations in which a third country firm is deemed to solicit clients established or situated in the EU and (2) the supervision practices to detect and prevent the circumvention of the reverse solicitation exemption. Annex I lists all the questions set out in the consultation paper; and Annex II contains the full text of the draft guidelines.

##### 2) [Consultation paper \(CP\) on the draft Guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments](#)

The different approaches to the national transposition of MiFID across Member States mean that there is no commonly adopted application of the definition of ‘financial instrument’ under MiFID in the EU. Whilst this issue has been noted as a concern since the implementation of MiFID/MiFID II, practical consequences may emerge with MiCA

regarding the classification of crypto-assets as financial instruments. In order to provide guidance on such qualification of crypto-assets as financial instruments that national competent authorities and market participant should consider, ESMA is therefore considering the adoption of the guidelines in this CP. Section 2 explains the background to the proposals. Section 3 focuses on the scope of the guidelines. Section 4 presents the general approach of the guidelines that is developed in the following way: guidelines 1 to 6 on the conditions and criteria for the classification as financial instruments, guideline 7 on the conditions and criteria attached to the crypto-asset's classification in MiCA, guideline 8 on the conditions and criteria attached to crypto-assets which are unique and not fungible with other cryptoassets (NFTs) and guideline 9 on conditions and criteria attached to Hybrid Tokens. Annex I lists all the questions set out in the consultation paper; and Annex II contains the full text of the draft guidelines.

ESMA will consider the feedback received to these two consultation documents and expect to publish the final reports by the end of 2024 at the latest.

### **3. - Submission of comments**

The deadline for submitting comments is **29 April 2024**.

Respondents may send their comments through ESMA's website: [www.esma.europa.eu](http://www.esma.europa.eu). Both the consultation papers and the response forms are available on [ESMA's website](#) (place the cursor on the word to obtain the link).

Likewise, please send a copy of your answers to the CNMV to the following email address: [documentosinternacional@cnmv.es](mailto:documentosinternacional@cnmv.es)

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