

To:**Verena Ross**

Chair, ESMA
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Reverse Solicitation Under MiCA – Coinbase’s response to the European Securities and Markets Authority

Coinbase Global, Inc. and its EU subsidiary Coinbase Europe Limited (together, “Coinbase”) welcome the opportunity to respond to ESMA’s consultation on *“Draft guidelines on reverse solicitation under the Markets in Crypto Assets Regulation”* (“MiCA”).

Coinbase started in 2012 with the idea anyone, anywhere, should be able to send and receive Bitcoin easily and securely. Today, we are publicly listed in the US and provide a trusted and easy-to-use platform relied on by millions of verified users in over 100 countries to access the broader crypto economy.

We are committed to the EU, where we have a significant presence reflecting its importance as one of our largest international markets outside of the US. Coinbase has a crypto licence in Germany, EMI licence in Ireland and a number of registrations in national markets across the EU. We believe we are well placed to transition to a MiCA licence, and we are excited by the opportunities presented across the region. The EU has taken a leadership role globally with MiCA, introducing the most comprehensive regulatory framework in the world, and is now well positioned to capitalise on this new wave of technological innovation towards Web3, and to achieve its strategic autonomy ambitions by onshoring tech investment.

However, MiCA is not “done” and ESMA’s work is critical to maintaining EU competitiveness. Countries around the world continue to watch to see if the EU achieves the right balance: of fulfilling important regulatory objectives of financial stability, market integrity and consumer protection, and creating the right conditions to spur innovation and growth. We appreciate the thoughtful approach ESMA is taking to regulating the sector, and we stand ready to support it in this important work.

Yours sincerely,



Tom Duff Gordon, Vice President, International Policy, Coinbase

Introduction

Coinbase recognises and appreciates the important work that ESMA has done in drafting perimeter guidance on reverse solicitation.

For MiCA to adequately protect consumers, and to reward well governed, compliant, authorised, businesses, a key requirement is to prevent third-country firms, not subject to the robust standards of MiCA, from directly soliciting EU business from outside of the single market. Clarity on the perimeter of reverse solicitation, and robust anti-avoidance and enforcement measures, is therefore key.

Coinbase does however suggest modifications to the ESMA guidance in some areas which will help align the guidance better to standard market practice, and thereby helping to maintain the necessary protections and limits but without capturing legitimate business activities that do not involve any attempt by a third country firm to entice or solicit EU users:

Our principal comment is that **the focus of the guidance at the top level should be directed more towards “active marketing” as opposed to “passive availability”**:

- The guidance restricts active solicitation (i.e. email outreach, push notifications, and other marketing campaign activities) but also seeks to strongly restrict more “passive” offerings. For example, following the guidance as currently drafted would prevent a client, acquired via genuine reverse solicitation, from being able to see the full offering of the service provider when in the “logged-in” environment, even when that is just available for them to view once they have arrived on their own initiative at the third country firm’s website. That is an undue restriction.
- In contrast, we agree that active promotion of these offerings by a third country firm to EU users (for example via platform promotions, email or push notifications for example) should be prohibited. But this should not scope in the simple passive availability of services / website being visible to an EU user when they are on a website and/or logged into their online account with the third country firm should be clarified as not being considered solicitation, provided that the EU user created and then accessed their online account of their own initiative, on an ongoing basis.
- As noted below, seeking to capture passive availability of products and services creates a number of practical difficulties which overall make the concept of reverse solicitation impossible to navigate in practice. This is particularly true for online offerings for which anyone with an internet connection can find without the aid of solicitation. In our view the guidance should depend on *how* the EU user finds their way to the third country firm’s offering and *whether* the third country firm has directly solicited the user’s attention for any particular product.

We also note inconsistencies between the guidance and MiCA requirements that will engender unnecessary and costly burdens on industry.

- The concept introduced in the guidance around different “types” of crypto asset and provision of services only being allowed within the “type” of crypto asset the EU user originally contacted the third country firm for, is not reflective of the requirements of MiCA, or how the crypto assets industry operates. It places a costly and impractical burden on firms to establish strict “types” of products and services within its business operations, and then segregate products and services available to the EU user based solely on what the EU user originally requested. The guidance suggests a high degree of specificity within the “types” which further compounds the complexity. We would instead **advocate for the guidance to be strict in relation to active solicitation via outreach** (for example emails, marketing campaigns etc), to allow EU users to be able to passively view different products and services when within their user accounts on the third country firm’s platform, with no required segregation of products and services via “types”.

Finally, the guidance should more carefully distinguish between “passive availability,” which qualifies as genuine reverse solicitation, and “passive marketing” which does not.

- While we believe that passive availability is consistent with genuine reverse solicitation, we caution against abuse of this interpretation by third-country firms that seek to operate on the basis of “passive marketing” – different from our concept of “passive availability” – which should be considered within supervisory practices to avoid this being used as a loophole.

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 authorisation requirements?

Crypto-assets are of, and in, the digital age, and ESMA correctly notes in its consultation that “*crypto-asset services are essentially offered online*”. This reality needs careful treatment in order to respect the guiding principle set out in recital 9 of MiCA “*of ‘same activities, same risks, same rules’ and of technology neutrality*” - which ESMA correctly adopts in guideline 1¹.

Active marketing vs passive availability

We agree with ESMA’s premise that crypto asset services are primarily offered online, and that marketing in the crypto assets industry can take place across a variety of online mediums, all of which must be considered and taken into account on a technology-neutral basis. We believe, however, that the guidance would benefit from greater clarity between active and passive offerings, with greater accommodation for the latter, which is commensurate with genuine reverse solicitation – activity generated at the own exclusive initiative of a client.

In particular, and at present, we are concerned that the guidance does not sufficiently accommodate the online nature of the service provision. As a practical matter, most consumers access crypto asset services through online platforms, requiring users to create an account before they can avail themselves of the firm’s products and services. EU users, once they have created an account, can generally see a variety of different products and services within the platform’s online environment. This is what we would term “passive availability” – these services are visible to the EU user but are not being actively pushed on or targeting the EU user. This is very different from active marketing, and in these situations, the guidance should be clear that this falls under the reverse solicitation exemption.

More generally, passive availability of services through an online platform can be analogized to offering a range of product categories and brands through a bricks-and-mortar experience. Walking into a department store exposes a client to a variety of other products including signage, associates, and information desks to help customers navigate the offerings. So it is online too. Online users of crypto-asset services expect and are provided with a means to navigate the range of products and services available through menus, user interface buttons, and account settings. If the EU user has arrived at the online platform and is using “service 1” but can see “service 2”, viewing information on and subsequently using service 2 should not be considered solicitation of

¹ Paragraph 11 “ The solicitation of clients by third-country firms should be construed broadly and in a technology neutral way.”

that EU user. However, if service 3 is being actively marketed on the platform – for example via a special offer visible to the EU user – then that service should be considered to have been solicited. In such a case, the EU user has been actively induced to view information on service 3 for the purposes of availing themselves of it.

Specifically on the points raised by ESMA in Guideline 1 around “*participations in road shows and trade fairs, invitations to events*” and “*brand advertisements by way of sponsorship deals*” as being considered solicitation, we would suggest that this goes too far and captures activities which should not be restricted. Taking an analogous situation under the UK financial promotions rules (which have been applied to crypto assets since 08 October 2023), whilst these contain extensive and comprehensive restrictions on marketing crypto assets, the FCA has recognised that advertising of a brand, with no reference to underlying products, should not be considered a regulated financial promotion, and we would urge ESMA to follow the same route. Further, we would request that ESMA consider the situation where a firm is not just a crypto asset firm and provides other services in unrelated fields - to prevent brand advertising in this case would be unduly restrictive.

It is also important to note that certain communication channels and activities that may be deemed marketing are not capable of being geo-fenced – for example posts by a third country firm on X would be viewable by EU residents with no option for the third country firm to exclude them from viewing it. In this instance, provided that the post on X was not designed to target the EU market, it should not be considered solicitation. In contrast, offering advertising on platforms that do offer geo-fencing (for example Facebook where the platform can choose to exclude EU countries from viewing marketing) should be considered soliciting. The choice of an advertiser not to exclude EU residents from seeing its advertising, when such an option is available, is tantamount to actively targeting those residents.

We are concerned that cumulative effects of the guidelines will be neither practical nor appropriate in practice. Guideline 1 states that “solicitation” is to be interpreted broadly, while guideline 3 that activity as a result of the “client’s own initiative” should be interpreted narrowly. In addition, guideline 4, imposes an assessment of guideline 3 an applicability based on categorizations of crypto assets subject to an independent solicitation analysis. What this means in practise is that an existing user who originally navigated to the third country firm’s platform via their own initiative, could not when logged into the website or mobile app, be given the means to navigate to do anything except avail themselves of the original product that they were intending to use when they first navigated to the online platform and created an account.

To comply with these guidelines, crypto-asset service providers would have to shut off all means *within their own service* for bona fide clients to undertake any new activities, or

activities with the relevant types of cryptoasset - or indeed for these clients to even be able to see the availability of these activities. Failing to do this would mean soliciting new activity, which under the guidance would mean such activity would not be at the exclusive initiative of the client (despite that they came to the online platform of their own initiative). In our example above, the online platform would have to be modified such that the EU user could only see and access service 1, and never even see the fact that services 2 and 3 are available.

Moreover, under guideline 3, it seems even the original activity would have to be disabled – made not available to the user – if the user hadn't requested to use it within the last month. A further issue arises around the third country firm even being able to ascertain what service it was that the EU user intended to use, when first finding the online platform of its own initiative – under the guidance it could be argued that the third country firm must know what service the EU user wishes to receive, before they have even logged onto the online platform itself.

Ironically, such an outcome would serve to require service providers to tailor their online platforms for EU users – entailing significant engineering work for this segregation of services – which goes against the concept of reverse solicitation as the avoidance of tailoring of an online platform to specifically cater for EU customers. This goes against the general concept of the reverse solicitation exemption. Third country firms should be allowed to operate as they normally would outside of the EU, and if they do not actively seek any business from EU users, they should not be required to undertake a specialized engineering build.

The requirement of “segregation” based on categories of assets to suit the guidance imposes an unwarranted burden on third country firms and creates far too high a bar for firms to have to meet in order to avoid breaching EU law. It also represents a significant departure from existing approaches taken to reverse solicitation in the context of traditional finance, which is not burdened with having to deal with segregation of different product types.

On this basis, Coinbase suggests that ESMA takes the opportunity to clarify the following:

- in guideline 1, that offering navigation options to a logged-in user to other products and services that they may not have initially sought as part of their first outreach to the third country firm is not considered solicitation of those products or services, such that “segregation” of services will not be required to meet the reverse solicitation exemption; and
- in guideline 3, that a user logging into a crypto-asset service, and navigating within the logged-in environment to view and potentially use a new product or service

which they did not initially request in their first outreach to the third country firm, should be considered as being done at the user's exclusive initiative.

Timing restrictions

Coinbase welcomes ESMA providing strong leadership to NCAs and clear examples for market participants, each helping achieve the harmonisation objectives of MiCA. However in some cases we believe the guidance has gone too far. For example, in Guideline 3², ESMA goes beyond the constructs of MiCA and establishes a period of time requirement – i.e. the time of a client's exclusive request matters. In doing so, ESMA narrows the scope of 'reverse solicitation' more than MiCA sets out, or contemplates.

We also question whether the timing restriction proposed by ESMA is compatible with how crypto asset services are typically provisioned today, through online applications. As a practical matter, most users of these applications, including EU users, choose to access their online accounts from time to time, and in the vast majority of cases there is no "request" for services that start the timer. The concept of the proposed timing restriction appears to be designed for one-off transactions where service provision time periods can be managed. And as we discussed above, the consequence of this approach would entail the "segregation" of services in a way that goes against the concept of reverse solicitation.

Accordingly, we suggest further guidance to confirm that a user creating an account and then choosing (of their own initiative) to use it from time to time, including at intervals greater than 30 days after the account creation, will not breach any concept of time periods as proposed. We feel this could be done by clarifying the concept of a "request" in an online context, to make clear that each individual access to their online account and use of the services offered, would be considered a new "request" entered into at the own initiative of the EU user.

We also suggest that care is taken when considering retail vs institutional customer types. The one month window seems to be with an online retail context in mind, which as noted above we consider to be difficult to reconcile with the practical realities of crypto asset service provision. The very different pace and nature of B2C versus B2B business, and between on-line and off-line communications, mean that a one month window is quite different in an online retail context compared to an offline B2B context. In the former, many dozens of messages, trades, and activities may have occurred in the month, but in the later, that might just represent one communication cycle. Given the wide scope of soliciting, including trade fairs and training courses, we would suggest that the one month

² Paragraph 20

window in paragraph 20 be given clearer context for when it applies in an institutional context, and for offline vs online.

Marketing crypto-assets of the same type

Coinbase's view is that ESMA, in paragraph 19 of the proposed guidance, correctly identifies the subtle difference between 'marketing' the same type of crypto-asset service following a reverse solicitation (which is permitted implicitly under Article 61(2)), and the continuing requirement that the crypto-asset services be provided only on the basis of reverse solicitation (based on Article 59 and 61(1) together).

In Coinbase's view, marketing of the same type of crypto-asset to an originally reverse solicited customer (as per Article 61(2), and such as in the example in paragraph 20 of the proposed guidance), should not trigger the Article 61(1) arrangement that where a third-country firm advertises in the Union the service shall not be deemed to be on the client's own exclusive initiative. The permitted advertising in Article 61(2) should abrogate any further reverse solicitation impositions under Article 61(1). It would be of general benefit to the market if ESMA were to confirm this interpretation, and if otherwise unable to, then explain an alternative interpretation and associated reasoning.

Defining types of crypto-asset

Reiterating the discussion above, we believe the creation of sub-types of crypto asset for the purpose of determining how they can be offered is problematic and creates a number of practical difficulties which cannot be overcome without third country firms carrying out significant EU-specific engineering, and even then may be difficult to work with in practice:

- In an online context there must be a distinction drawn between active marketing vs passive availability - merely allowing passive availability of different types of crypto assets should be possible without falling outside of Article 61 or otherwise any online platform will be unable to comply.
- A crypto-asset could conceivably change 'type' from time to time - for example when its liquidity changes. This would therefore require on-going monitoring, and an arbitrary grouping of liquidity in this example, which might be inconsistently applied across time and market participants.
- The combination of characteristics of crypto-assets would mean the 'types' may run to the thousands (a type for each fiat currency, and then for each tech type, and then for liquidity, etc.), and need regular review.
- Some of the characteristics listed in paragraph 25 relate to the sub-type of cryptoasset, and some relate to the purpose or product the crypto-asset is being applied to. 'Type' and 'purpose' are quite different (in nature, propensity to change,

and in variance amongst market participants), and the analysis of them is quite different. ESMA should be careful that it is considering the 'type' of the crypto-asset, not the purpose of it, or the outcome of holding it.

- The crypto-asset industry is fast moving, and further delineations of the nature set out in paragraph 25 may arise in time. Paragraph 25 is not technology neutral (going against the principles of MiCA³), and would create large workloads to keep the guidelines up to date, and for the market to remain in compliance with

Given that the creation of new crypto-asset types: (a) is not contemplated by MiCA; (b) is outside the scope of what ESMA has been tasked with in this guidance, Coinbase urges that ESMA reconsider Guideline 4. We believe it creates significant complexity which cannot be overcome and would require third country firms to adopt significant EU-specific practices which go against reverse solicitation. In our view, the guidance should instead focus on how the EU user was initially acquired, and consider active marketing differently than pure passive availability of new products / services / crypto asset types.

In the event that EMSA chooses to preserve Guideline 4 as currently stated, ESMA should note there will be material ongoing costs on market participants. As such, we believe this would be in violation of the presumption that a cost-benefit analysis is not needed (Paragraph 4). In particular, we disagree that these requirements “naturally stem from the obligations in MiCA” and believe a full cost-benefit analysis would be needed.

Languages

We note in Guideline 1 the reference to the use of an EU language which is not customarily used in the finance sector as being a strong indicator of a firm targeting the EU. Whilst we follow the overall argument here, we would urge there to be nuance provided when considering this point in live examples - French for example is a language likely not considered as customarily used in finance, but is spoken widely outside of France (for example in Switzerland and Canada), and Spanish is another example of the same argument. We would therefore request that the Guidelines provide further nuance on this point to make clear that language is an indicator that must be taken into account alongside all other factors, when considering if a firm is targeting the EU.

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?

³ Recital 9: “Union legislative acts on financial services should be guided by the principles of ‘same activities, same risks, same rules’ and of technology neutrality.”

Coinbase disagrees with the approach that ESMA has taken in defining new types of crypto-asset, as set out in question 1.

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

We agree that practices should be developed with respect to detecting undue solicitation, and agree with the processes described in section 6 of the guidance. However we suggest some additions and modifications to increase the potential effectiveness of these processes, as follows:

- Paragraph 28 describes detection based on considering telephone numbers and top-level domains. These are sensible but we note that these likely only apply to firms that are actively holding themselves out as being EU-based, or with a strong EU focus, and accordingly are most likely to apply primarily to “scam” websites. The majority of third country firms in the crypto assets sector will not provide any jurisdictional identifiers like phone numbers or country-specific top level domains and therefore we would consider this to be of limited benefit.
- We note that Union-specific languages are used in non-EU countries, while for example, if a website is available in French ESMA guidance as currently drafted suggest this would be a strong indicator that a firm is seeking to target French-speaking customers, as called out in Guideline 1, that does not necessitate that the website is targeting residents of France/EU.
- Importantly the guidance should reflect the ability of firms to be able to “geofence” different global populations when marketing online. As noted above, platforms that offer no geofencing option should be treated differently to those that do, and the supervision practices should be built to reflect that. Many non-compliant firms in the industry seek to operate on the basis of “passive marketing” (note, this is different from our concept of “passive availability” described above) and argue that generic brand advertising available on global social networks should not be considered solicitation – we would argue that this type of activity should be considered within supervisory practices to avoid this being used as a loophole.
- We would further recommend additional information be added to paragraph 30 around influencer activity specifically, making clear that influencers will be actively monitored. Non-compliant platforms make extensive use of influencer marketing and therefore a clear position stated by ESMA that influencers will be actively monitored will help to reduce circumvention activity in this regard, and increase awareness within the influencer community around the potential to be reviewed by ESMA.