Response of Deutsche Börse Group

on the ESMA Consultation on Reverse Solicitation and Classification of Crypto Assets as Financial Instruments under MiCA

Frankfurt am Main, 26th April 20224

ESMA THIRD BATCH OF CONSULTATIONS ON THE MARKETS IN CRYPTO-ASSETS REGULATION (MiCA)

CONSULTATION PAPER 1: ON THE DRAFT GUIDELINES ON REVERSE SOLICITATION UNDER MICA

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? (p. 11)

We agree with the approach taken by ESMA in the draft guidelines on Reverse solicitation under MiCA, as any crypto service offered by a provider should be regulated by MiCA and operate under a MiCA license in the EU.

Looking forward, we could identify a possible hurdle in the proposed regime regarding the proper classification of assets that are reverse solicited. As of now, it remains unclear whether the EU-based customer that reverse solicits services from a third-country company is responsible for the classification of those assets. If that is the case, it also remains an open question whether the home NCA of the EU based customer has the authority to challenge such assessment. Further deliberation and clarification are required on this matter, especially in the case of an asset with an unknown issuer (e.g., Bitcoin), to avoid loopholes and uncertainty in the markets. We also urge ESMA to provide guidance in case of heightened supervision costs incurred by reverse solicitation and which party shall bear the costs.

Regarding the solicitation practices, in accordance with the common market data for financial instruments practice, we are of the view that the sole provision of pre- and post-trade data transparency by third- country firm providing crypto-asset services should not be considered as solicitation. Contrary to this, we urge ESMA to consider a scenario where third-country service provider, or someone on their behalf, solicits clients during an industry event without a written record. Prospective clients are then kindly requested to send an official inquiry of services to the third-country firm in what appears as a reverse solicitation; however, it should not be regarded as such. We acknowledge that such practices are difficult to monitor and/or prevent, but by setting limits/thresholds such as number of clients, volumes/revenue in EUR, market share in %, etc. for third-country service providers in connection to reverse solicitation, we could prevent serious breach of intended outcomes.

Furthermore, it may be helpful to record evidence of the client's own exclusive initiative through a declaration of will of the client. This declaration could, for instance, be implemented using a GDPR compliant consent management platform, also specifying the type of crypto-assets or services the client wishes to obtain. This process would be comparable to the current consent management mechanism for cookies when visiting a website.

Lastly, to avoid any diverging interpretations in terms of additional solicitation following the original reverse solicitation, we urge ESMA to forego the 'initial-reverse-solicitation-time-period' criteria (point 17) and replace it with clear definitions of what constitutes the beginning and the end of a transaction.

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? (p.11)

No comment.

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

We propose to include in guideline 1 (chapter 6.1) the right of the competent authorities to request the records of relationship with the client from third-country firms referred to in point 21.

As a second point, with reference to guideline 2 (chapter 6.2), it may be sensible to develop common metrics to measure the usage of reverse solicitation (e.g. as percentage of the overall crypto-asset business volume or number of client/ contacts of the respective third-country firm).

CONSULTATION PAPER 2: ON THE DRAFT GUIDELINES ON THE CONDITIONS AND CRITERIA FOR THE QUALIFICTAION OF CRYPTO-ASSETS AS FINANCIAL INSTRUMENTS

Q1: Do you agree with the suggested approach on providing general conditions and criteria by avoiding establishing a one-size-fits-all guidance on the concepts of financial instruments and crypto-assets or would you support the establishment of more concrete condition and criteria? (p. 7)

We recognize the difficulties of establishing more concrete conditions and criteria for delineation between financial instruments and crypto-assets and understand the logic of opting for more general conditions and a case-by-case approach. We also welcome the principle of technological neutrality taken by ESMA. However, we can already identify potential hurdles along the way arising from the lack of uniform EU-wide classification of crypto-assets. For example, in case that home and host NCA have differing views in terms of classification of the same asset, this could lead to avoidable contradictions and prove to be an obstacle to EU-wide scaling/passporting of crypto-assets. Instead, it could be more practical to have a uniform definition and set of criteria regarding the already established and widely recognized asset classes, with the prospect to expand the definitions to any future innovative assets subject to coordination on the EU level.

To support our concern, similar challenges already exist in the MiFID II environment due to the lack of uniform definition of securities and the lack of harmonization of securities' laws across different Member States. We are of the view that it is in the best interest of the truly effective and functioning Single Market to ensure uninterrupted passporting rights and EU-wide trade of crypto-assets. To this end, in addition to above mentioned arguments, we strongly believe that an arbitrage process in the case of differing views by NCAs needs to be established, providing the markets with the necessary certainty, and ensuring that obstacles to passporting rights would be resolved in a timely manner.

We would therefore argue that the primary responsibility to assess which assets qualify as crypto-assets could befall on ESMA or the NCAs instead of the issuers. The latter approach might lead to uncertainty for offerors or persons seeking admission to trading of crypto-assets since they can only be sure that they classified such assets correctly in hindsight. Admission procedures might thus be prolonged since there is the danger of misclassifying an asset as a crypto-asset and (for example) applying for a MiCA license when the NCA considers the asset as a financial instrument and sees an application for a MiFID II license as admissible (or vice versa).

Q2: Do you agree with the conditions and criteria to help the identification of crypto-assets qualifying as transferable securities? Do you have any additional condition and/or criteria to suggest? Please illustrate, if possible, your response with concrete examples. (p. 12)

We are of the opinion that conditions and criteria set for classification of crypto-assets as transferable securities is inseparable from the ambiguities of the definition of transferable securities within MiFID II. In line with the part of our response to the previous question, we believe that more uniform conditions and criteria agreed upon on the EU level need to be in place in order to avoid different classifications in different Member States regarding the definition of transferable securities as well.

With regards to ESMA's approach in number 35 ("*Therefore, for a crypto-asset to be recognised as a transferable security under MiFID II, it must be negotiable, transferable, and encapsulate rights attached to securities.*") we concur that (following the definition of transferrable securities in Art. 4 para. 1 no. 44 MiFID II) any crypto-asset qualifying as a transferable security needs to be negotiable and transferable.

With regards to the criterium "classes of securities" in Art. 4 para. 1 no. 44 MiFID II and "*encapsulate rights attached to securities*" in number 35 we would suggest the following:

- As already described in number 100, crypto-assets qualifying as securities (and form a class of securities) must be interchangeable and have a single issuer.
- For a crypto-asset to qualify as a transferrable security, the rights encapsulated within it must be identical to the rights encapsulated in other securities. That means for example:
    - A crypto-asset qualifying as a share in a company (Art. 4 para. 1 no. 44 lit. a) MiFID II) must encapsulate a unit of equity ownership (and/or voting rights) in a company.
    - A crypto-asset qualifying as a bond (Art. 4 para. 1 no. 44 lit. b) MiFID II) needs to encapsulate the right to the repayment of the provided capital sum (plus interest, if applicable) against an issuer.

Crypto-assets that do not fulfil the above mentioned criteria (i.e. crypto assets that do not confer ownership or voting rights in a company or do not embody a repayment claim against a defined issuer) cannot qualify as a transferrable security. Such an approach would ensure that a clear delineation between crypto-assets under MiCA and crypto-assets qualifying as transferrable securities under MiFID II would reliably be possible. Before the background of the variety of conceivable crypto-assets, the suggested comparative assessment of crypto-assets on a case-by-case basis to determine whether they incapsulate rights attached to securities bears the danger of leading to a convoluted administrative practice based on individual cases.

Q3: Based on your experience, how is the settlement process for derivatives conducted using crypto-assets or stablecoins? Please illustrate, if possible, your response with concrete examples. (p. 16)

We have gained some experience on how the settlement process of derivatives could look like and have shared this already with ESMA. We would be happy to provide further information upon request.

Q4: Do you agree with the conditions and criteria to help the identification of crypto-assets qualifying as another financial instrument (i.e. a money market instrument, a unit in collective investment undertakings, a derivative or an emission allowance instrument)? Do you have any additional condition, criteria and/or concrete examples to suggest? (p.17)

No comment.

Q5: Do you agree with the suggested conditions and criteria to differentiate between MiFID II financial instruments and MiCA crypto-assets? Do you have concrete condition and/or criteria to suggest that could be used in the Guidelines? Please illustrate, if possible, your response with concrete examples. (p.19)

While the conditions and criteria are clear and reasonable, it should be examined whether a specific definition of crypto-assets according to MiCA and not only in distinction to MiFID II, in the near future, would make sense to avoid the transfer of inaccuracies regarding the definition of financial instruments to the new field of crypto-assets.

Additionally, we would like to point out that utility tokens seem to be overrepresented in the proposed description. Crypto-assets that would qualify as crypto-assets other than ART or EMT include crypto currencies (without a reference value) and other types of crypto-assets. An example of this would be a crypto-asset that encapsulates a co-ownership portion in commodities. For providing a more comprehensive definition of crypto-assets other than ART or EMT, we would suggest including other forms of crypto-assets in the guidelines as well.

Q6: Do you agree with the conditions and criteria proposed for NFTs in order to clarify the scope of crypto-assets that may fall under the MiCA regulation? Do you have any additional condition and/or criteria to suggest? Please illustrate, if possible, your response with concrete examples. (p.21)

We disagree with the proposed conditions and criteria for NFTs as we consider the distinction between NFTs that are part of a series or collection and those that are not (number 70), to be too complicated. This could lead to ambiguity and, especially, there is a risk that the classification of an NFT will not remain constant but may have to be adjusted during the life cycle of the crypto-asset. An alternative approach would be to make the distinction based on the underlying asset of the NFT, or depending on the fact whether the NFT is subject to trade. Ambiguity could be avoided in such case bringing certainty to market participants.

Q7: Do you agree with the conditions and criteria proposed for hybrid-type tokens? Do you have any additional condition and/or criteria to suggest that could be used in the Guidelines? Please illustrate, if possible, your response with concrete examples. (p. 23)

We agree with the conditions and criteria proposed for hybrid-type tokens and are in favor of the approach taken by ESMA on MiFID properties taking precedence when deciding whether an asset could be classified as a financial instrument or crypto-asset falling under MiCA. We would, nonetheless, call on ESMA to further clarify this approach, by considering outlier cases so as to avoid any confusion or diverging classifications and ensure EU-wide harmonization. In line with that, we are of the view that a minimum amount of financial instrument properties should suffice to classify an asset as a financial instrument falling under MiFID.

Furthermore, as some jurisdictions recognize security tokens as a category, and seeing that no equivalent recognition exists on the EU level, we recognize the need for clarify in the situation where two jurisdictions do not recognize same categories and a clear process in that case to avoid uncertainty.