

Securities and Markets Stakeholder Group

Advice to ESMA

SMSG advice to ESMA on its consultation papers on reverse solicitation and the qualification of crypto-assets as financial instruments in the context of the Markets in Crypto Assets (MiCA) Regulation

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1 Executive Summary

Consultation paper on reverse solicitation.

The provision of crypto-asset services 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 “reverse solicitation” exemption). The SMSG fully supports the restrictive approach to the reverse solicitation exemption put forward by ESMA as it is consistent with investor protection and fair competition.

The SMSG supports the ESMA approach that time matters to define the reverse solicitation exemption, especially with the intention to define the exemption in a narrow way. The SMSG also highlights the need for a clarification on the time threshold beyond which the reverse solicitation exemption cannot be used.

MiCA leaves open the possibility for the third-country firm to market crypto-assets of the same type. The SMSG believes that the ‘same type’ requirement is indeed relevant to avoid the circumvention of MiCA by third country entities. The SMSG supports the approach proposed by ESMA to assess the ‘same type’ based on the risk exposure associated to the service initially requested by the EU investor. However, the SMSG also observes that the reference to the type of crypto-asset – which is present in the MiCA text – may actually produce unintended consequences as very different crypto-assets can be included within each one of the three types of crypto-assets that MiCA regulates.

The Advice also reports, for ESMA consideration, possible initiatives and measures to reinforce the restrictive approach to reverse solicitation set out in the consultation paper.

Consultation paper on the qualification of crypto-assets as financial instruments

MiCA does not apply to crypto-assets that qualify as financial instruments as defined by MiFID II. The SMSG very much supports the objective of achieving a high level of legal certainty around the qualification of crypto-assets as financial instruments. The SMSG acknowledges that there are different approaches in the individual Member States with regard to what qualifies as financial instruments and believes that the EU regulatory framework should progress to achieve a common definition of financial instruments in the EU.

The SMSG supports ESMA position regarding technology neutrality. The qualification of a financial instrument should depend on the rights and obligations that define its legal and economic profiles. The SMSG also supports the adoption of a substance over form approach to the qualification of crypto-assets as financial instruments because it is expected to reinforce investor protection.

The SMSG highlights the following areas where ESMA Guidelines might clarify the potential implications of the qualification of crypto-assets as financial instruments: the EU passporting system and cross-border activities; the coverage by Investors Compensation Schemes; the scope of a CASP licence; the application of the investor protection-related conduct of business rules contained in MiFID II.

The SMSG supports, in case of doubt, the adoption of an extensive interpretation for the qualification of crypto-assets as financial instruments as it would reinforce investor protection thanks to the application of the MiFID II well-established regulatory framework. The SMSG also believes that, to provide clarity to investors, it would be preferable to disclose the regulatory framework to be applied to the specific transaction (i.e., MiCA or MiFID II).

Given the cross-border nature of crypto-related activities, the SMSG highlights the relevance of information sharing among authorities. The exchange of information among authorities might involve not only NCAs but also other authorities (e.g., competition authorities).

Lastly, the SMSG suggests leveraging on the technology used by crypto-assets to reinforce monitoring of CASPs activities in terms of scope and speed (e.g., to detect abnormal transactions).

2 Background

1. On 29 January 2024, ESMA released two consultation papers related to the Markets in Crypto Assets Regulation (MiCA), one on reverse solicitation and one on the classification of crypto-assets as financial instruments.
2. In the consultation on reverse solicitation, ESMA is seeking input on proposed guidance concerning the conditions of application of the reverse solicitation exemption and the supervision practices that National Competent Authorities (NCAs) may take to prevent its circumvention. The provision of crypto-asset services by a third-country firm is limited under MiCA to cases where such services are initiated at the own exclusive initiative of a client. The proposed guidance confirms ESMA's statement released on 17 October 2023¹.
3. In the consultation paper on classification, ESMA is seeking input on establishing conditions and criteria for the qualification of crypto-assets as financial instruments. This initiative is aimed at bridging the MiCA regulation and the Markets in Financial Instruments Directive II (MiFID II) and ensuring consistency across the EU. The proposed guidelines

¹ See ESMA statement "ESMA clarifies timeline for MiCA and encourages market participants and NCAs to start preparing for the transition", released on 17 October 2023 and available at https://www.esma.europa.eu/sites/default/files/2023-10/ESMA74-449133380-441_Statement_on_MiCA_Supervisory_Convergence.pdf.

are intended to provide NCAs and market participants with indications to determine whether a crypto-asset can be classified as a financial instrument.

4. In this Advice, the MSG provides its views on the specific questions raised by ESMA in the consultation papers as well as comments on more general issues that are related to the topics discussed in the consultation papers.

3 SMSG opinions and comments on reverse solicitation

3.1 General approach

5. 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). The reverse solicitation exemption determines whether a third-country firm is allowed to provide a crypto-asset service to an EU client. ESMA clarifies that this exemption should be understood as very narrowly framed, must be regarded as the exception and it cannot be exploited to circumvent MiCA.
6. The SMSG believes that the reverse solicitation exemption deserves careful consideration for reasons related to both investor protection and level-playing field. As for investor protection, EU-based investors would lose the protections afforded to them under MiCA when using non-EU crypto-asset service providers (CASPs). As for competition, EU-based CASPs may be disadvantaged when competing with non-EU based entities which are not expected to be compliant with MiCA.
7. The SMSG fully supports the restrictive approach to the reverse solicitation exemption put forward by ESMA as it is consistent with the reasons related to investor protection and fair competition mentioned in the previous paragraph.

3.2 Timing of the reverse solicitation (Guideline 3)

8. ESMA consultation paper stresses that timing is of the essence when a third-country firm relies on the reverse solicitation exemption granted by Article 61 of MiCA. If the third-country firm meets all the conditions to rely on the reverse solicitation exemption, it may only do so for a very short period of time.
9. More specifically, Guideline 3 clarifies that the third-country firm relying on the exemption is not allowed to subsequently offer the client further crypto-assets or services, even if such crypto-asset or service is of the same type as the one originally requested, “unless they are offered in the context of the original transaction”.

10. The SMSG supports the ESMA approach that time matters to define the reverse solicitation exemption, especially with the intention to define the exemption in a narrow way. Against this background, the SMSG highlights that 10 days may constitute a reasonable limit to consider the provision of the service occurred “in the context of the original transaction”. The ultimate goal of this piece of regulation is not to take into account the third-country firm needs, but to limit the possibility that EU investors are offered crypto-assets or crypto-assets services beyond the EU protection framework.
11. The SMSG also highlights the need for a clarification on the time threshold as the consultation paper – on one side – states that the draft guidelines do not provide any definite time window during which the exemption may be used but – on the other side – it also makes reference to “a month or even a couple of weeks”², whereas the draft guidelines refer to a one month period as an example³. Both the consultation paper and the draft guidelines make clear that the exemption cannot be used to provide services beyond those time thresholds (a month and two weeks). However, the reference to a single time threshold may be useful to provide more certainty.

3.3 When is a crypto-asset of the ‘same type’ as another one (Guideline 4)

12. 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.
13. The SMSG believes that the ‘same type’ requirement is indeed relevant to avoid the circumvention of MiCA by third country entities and EU-investors ending up with services different from the ones that they initially asked for. For such reasons, the SMSG believes that the concept of ‘same type’ should be very limited.
14. According to Guideline 4, whether the third-country firm markets the ‘same type’ of crypto-asset or crypto-asset service or activity should be assessed on a case-by-case basis, taking into account elements such as (i) the type of the crypto-asset or crypto-asset service or activity offered and (ii) the risks attached to the new type of crypto-asset or crypto-asset service or activity. Guideline 4 also provides a non-exhaustive list of pairs of crypto-assets

² See paragraph 17 of the consultation paper (page 11): “Although the draft guidelines do not provide any definite time window during which the exemption may be used, the lapse of a month or even a couple of weeks between the provision of the crypto-asset service based on a request made at the own exclusive initiative of the client and a subsequent offer by the third-country firm would exclude the application of Article 61.”.

³ See paragraph 20 of the draft guidelines (page 19): “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.”.

which should not be considered as belonging to the same type of crypto-assets for the purpose of the reverse solicitation exemption⁴.

15. We now comment first on the risks (i.e., element (ii) mentioned in the previous paragraph) and then on the type (i.e., element (i) mentioned above).
16. As for the risks, the SMSG supports the approach proposed by ESMA to assess the ‘same type’ based on the risk exposure associated to the service initially requested by the EU investor because the client has originally asked for a specific product when renouncing to the MiCA protection, and not for other products with different risk profiles.
17. As for the type, the SMSG is aware of the fact that Article 61(2) of MiCA refers to “new types of crypto-assets”. However, the SMSG observes that the reference to the “type of the crypto-asset” may produce unintended consequences. Indeed, very different crypto-assets can be included within each one of the three types of crypto-assets that MiCA regulates. This approach risks opening too much the space to the reverse solicitation exemption in a way that may hinder the goal set by ESMA of ensuring that this exemption cannot be used to circumvent the MiCA framework.
18. Against this background, Guideline 4 states that the ‘same type’ requirement should be assessed taking into account elements such as (i) the type and (ii) the risks. The SMSG believes that both type and risks (jointly, and not alternatively) should be considered⁵, although the use of “such as” might be read as meaning that the elements listed in Guideline 4 as illustrative. This interpretation put forward by the SMSG is consistent with a restrictive approach to the assessment of the ‘same type’ requirement. A clarification from ESMA in this respect would be beneficial.
19. The SMSG considers that the meaning of risk exposure should not be restricted to the standard categories of financial risk (e.g., market risk, counterparty risk, etc.) and also include dimensions related to the technology used to perform the transaction. Against this background, the SMSG fully share the broad wording used by ESMA that refers to the “the risks attached to the new type of crypto-asset or crypto-asset service or activity”, with no limitations as for the nature of the risks considered in the assessment.

⁴ Precisely: 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.

⁵ The consultation paper has a specific question related to the ‘same type’ requirement. See 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?”).

20. The SMSG appreciates that the consultation paper states very clearly the importance of the risk dimension in paragraph 20, that reads: “Third-country firms should however assess such condition on a case-by-case basis, taking into account, notably, whether two crypto-assets carry the same risks and level of risks.”. However, the SMSG also observes that this statement is not included in Guideline 4 and considers that its inclusion would be useful.
21. For what concerns the list of pairs of crypto-assets which should not be considered as belonging to the ‘same type’ set out in Guideline 4, the SMSG observes the reference to utility tokens, asset-referenced tokens and electronic money tokens may produce unintended consequences for the same reasons as those stated above in paragraph 17 since very different crypto-assets can be included within each one of the three types of crypto-assets.

3.4 Possible initiatives and measures to reinforce the restrictive approach to reverse solicitation

22. The next paragraphs of this section report, for ESMA consideration, a number of possible additional measures to reinforce the restrictive approach to reverse solicitation set out in the consultation paper.
23. First, the consultation paper considers the application of the reverse solicitation exemption to situations in which the crypto-assets are offered to EU investors. The SMSG is of the opinion that, to define an offer of crypto-assets as being made in the EU for MiCA purposes, what should be taken into account is that EU investors are allowed to buy these crypto-assets. To assess this circumstance, it is possible to refer to the promotional materials and check the presence therein of data relevant for an EU investor to acquire the crypto-asset as well as the absence of a specific and express limitation that the offer is not addressed to EU investors in any case.
24. Second, the SMSG considers that ESMA might propose that all NCAs share through ESMA the crypto-assets offers and offerors that are active, attracting EU investors, and that do not collaborate or do not attend information requests by NCAs. The SMSG believes that having a comprehensive view at the EU level would be very beneficial to achieve a clear picture of potential investors protection challenges and level playing field issues. It would also be useful to design potential actions to be taken by ESMA and by NCAs or for proposing measures to EU regulators.
25. Third, the SMSG considers that it could be challenging for an EU NCA to get a fully satisfactory cooperation from non-EU crypto-assets service providers. In this respect, among the measures to be taken into consideration by NCAs, ESMA might propose to share or disclose the identity of non-EU CASP and ‘finfluencers’ that do not cooperate with

an NCA. Since this lack of cooperation gives an indication that the non-EU entity is not very much concerned about compliance with the EU rules, the fact that a non-EU CASP or ‘finfluencer’ does not cooperate with the relevant NCA would be a very relevant information for EU investors and authorities.

26. Fourth, NCAs should not only monitor firms offering crypto-assets but also, specifically, any offers of crypto-assets. Indeed, it is not common that the promotion of a crypto-asset (e.g., through a ‘finfluencer’) makes reference to the issuer or offeror, and it is more likely that the promotion refers to the crypto-asset itself. Thus, NCAs should follow crypto-assets promotion and not only offerors or issuers. Along these lines, a useful measure is to presume that anyone promoting a crypto-asset in social networks or media is acting on behalf of the issuer/offeror of that crypto asset.
27. Fifth, market participants should be aware of a firm approach to limit the reverse solicitation exemption. For example, the sanctions for offerings beyond the reverse solicitation limits should be mentioned in a clear way. While this would be a natural consequence, mentioning it expressly gives the idea of a firm approach to limit the exemption.

4 SMSG opinions and comments on the qualification of crypto-assets as financial instruments

4.1 Preliminary remarks

28. Article 2 of MiCA defines the scope of MiCA and paragraph 4 lists in particular the type of crypto-assets that are excluded from the Regulation. It provides notably that MiCA “does not apply to crypto-assets that qualify as [...] financial instruments as defined in Article 4(1), point (15), of Directive 2014/65/EU”. In line with the principles of “same activities, same risks, same rules” and of “technology neutrality” (Recital 9), MiCA applies only to crypto-assets that are not covered by existing EU legislation and in particular by MiFID II.
29. Under Article 2(5) of MiCA, ESMA is mandated to issue guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments, as defined in Article 4(1), point (15), of the Markets in Financial Instruments Directive (MiFID II). The SMSG acknowledges that, under its MiCA mandate, ESMA is not expected to clarify the entire scope of what constitutes a financial instrument, but only which products that comply with the crypto-asset definition of MiCA qualify as financial instruments. The guidelines are meant to provide more clarity to National Competent Authorities (NCAs) and market participants about the delineation between the respective scopes of application of MiCA and MiFID II, ensuring ultimately consistent approaches at national level regarding which crypto-assets should be considered financial instruments and therefore be subject to the sectoral regulatory frameworks and notably the MiFID II framework.

30. MiFID II does not include a one-size-fits-all definition for all types of financial instruments. The concept of financial instrument is delineated through a list of instruments outlined in Annex I section C rather than a distinct set of conditions and criteria⁶. In addition, the transposition mechanism does not allow for practices and interpretations to be fully aligned at national level regarding the exact perimeter of the financial instrument definition. Member States, when transposing MiFID II into their national laws, have not defined the term financial instrument in a fully harmonised way. While some employ a restrictive list of examples to define transferable securities, others use concept-based definitions. There might therefore be slight differences amongst NCAs about what constitutes a financial instrument.

4.2 Legal certainty and the goal of a common definition of financial instruments

31. The SMSG very much supports the objective of achieving a high level of legal certainty around the qualification of crypto-assets as financial instruments.

32. The SMSG acknowledges that, since the concept of financial instruments is defined in a Directive, there are different approaches in the individual Member States as to what qualifies as a financial instrument and what does not.

33. Since the qualification of an asset as a financial instrument is particularly relevant, the SMSG believes that the EU regulatory framework should progress to build a common definition of financial instruments in the EU. This outcome can be achieved either providing the definition of financial instruments in a Regulation or giving ESMA wider powers to determine whether a particular asset qualifies or not as a financial instrument.

34. The SMSG is aware of the fact that this scenario is today beyond ESMA powers, and beyond the current Consultation Paper. However, the SMSG intends to stress the importance of this point and consequently supports the goal of converging into a unique concept of financial instrument at EU level implemented in each Member State.

35. Against this background, the SMSG agrees with the ESMA's approach of providing NCAs and market participants with structured conditions and criteria to determine whether a crypto-asset can be classified as a financial instrument⁷.

⁶ Financial instruments are defined in MiFID II mainly through a list of instruments that should be regarded as financial instruments. These are: (i) transferable securities, (ii) money-market instruments, (iii) units of collective investment undertakings, (iv) various derivative contracts and (v) emission allowances. See, instruments listed in Section C (1 to 11) of Annex I of MiFID II.

⁷ See 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?").

4.3 Technology neutrality and substance over form approach to the classification

36. The SMSG supports ESMA position regarding technology neutrality. The qualification of a financial instrument should depend on the rights and obligations that define its legal and economic profiles. The form of representation (e.g., a physical certificate, a book entry in a standard technology or in a DLT) is not relevant in this respect.
37. Along the same lines, the SMSG also supports the adoption of the substance over form approach. The consultation paper clarifies that, in order to assess whether a crypto-asset qualifies as a financial instrument, the specific features, design and rights attached to this crypto-asset should be considered. Thus, ESMA is of the opinion that the circumstances must be considered on a case-by-case basis in order to legally qualify crypto-assets. For this purpose, a “substance over form” approach in determining what constitutes a financial instrument should be followed.
38. In the definition of the conditions and criteria attached to hybrid tokens (Guideline 9), the consultation paper highlights that NCAs and market participants should adopt a substance over form approach when assessing such crypto-assets. The classification of a crypto-asset should be guided by its actual features rather than solely relying on the label given by the issuer or offeror. The label given by the issuer or offeror may need to be amended to reflect this classification not to mislead the investor.
39. The SMSG supports the adoption of a substance over form approach to the classification of hybrid crypto-assets as it reinforces investor protection⁸.

4.4 Possible implications of the qualification of crypto-assets as financial instruments

40. The qualification of crypto assets as financial instruments is very relevant because it has a number of potential regulatory implications. In this respect it should be noted that, where crypto-assets qualify as transferable securities or other types of financial instruments under MiFID II, they are likely to be subject to a comprehensive set of EU financial regulations (e.g., Prospectus Directive, Transparency Directive, MiFID II, Market Abuse Directive, Short Selling Regulation, Central Securities Depositories Regulation, Settlement Finality Directive).

⁸ See 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?”).

41. The SMSG is of the opinion that ESMA Guidelines might clarify some potential implications of the qualification of crypto-assets as financial instruments. Specifically:

- a. the EU passporting system and cross-border activities, to clarify situations in which home and host competent authorities have different positions. E.g., if a crypto-asset is not considered a financial instrument by the home NCA but it is considered a financial instrument by the host NCA, a home Member State CASP could intend to provide services on this particular crypto-asset in the host Member State. Since the host Member State NCA considers that this crypto-asset is a financial instrument it could not allow the provision of the service under MiCA in the host Member State, challenging the freedom of provision of services in the EU and raising problems for the passporting system to operate;
- b. the coverage by ICS (Investors Compensation Schemes), a relevant and specific investor protection tool⁹;
- c. the scope of a CASP licence, to clarify that if a CASP provides services on a crypto-asset that qualifies as a financial instrument it would be acting beyond its licence and should then be authorised as an investment firm;
- d. the application of the investor protection-related conduct of business rules contained in MiFID II.

4.5 Investor protection, MiFID II and the interpretation of the definition of financial instruments

42. The SMSG believes that an extensive interpretation of the definition of financial instruments would reinforce investor protection thanks to the application of the MiFID II well-established regulatory framework. Consequently, in case of doubt, the SMSG supports the adoption of an extensive interpretation for the qualification of crypto-assets as financial instruments.

43. The SMSG also believes that, to provide clarity to investors, it would be preferable to disclose the regulatory framework to be applied to the specific transaction (i.e., MiCA or MiFID II). In this respect, the SMSG considers that the distributor might state the regulatory regime to be applied in the relevant information documents made available to the investors.

⁹ It is worth noting that potentially different approaches adopted by EU Member States as to the concept of financial instruments may also imply different coverage levels provided by investors compensation schemes within the EU.

4.6 Indirect exposure to crypto-assets

44. The SMSG shares the specific attention devoted by ESMA Guidelines to assets whose acquisition implies indirect exposure to crypto-assets that do not qualify as financial instruments.
45. The consultation paper specifically mentions the case of derivatives whose underlying asset are related to crypto-assets in Guideline 5. In particular, paragraph 49 of the consultation paper states that derivative contracts relating to a crypto-asset, a basket of crypto-assets or an index on crypto-assets as an underlying asset should be qualified as financial instruments within the meaning of MiFID II. The SMSG notes that the qualification of the derivative contract as financial instruments is not contingent on the qualification of the underlying crypto-assets as financial instruments.
46. Additionally, the consultation paper clarifies that, as the term “asset” is not defined within MiFID II, such notion should be interpreted in broad terms, resulting in covering assets such as crypto-assets. The SMSG agrees with this approach since it means a more extensive concept of financial instruments and a greater level of investor protection.
47. The SMSG notes that the consultation paper makes no explicit reference to structured notes whose underlying assets are crypto-assets not qualifying as financial instruments. Since a structured note is usually composed of a spot component (e.g., a stock or a bond) and an embedded derivative, and it is this latter part that refers to the underlying crypto-asset, the SMSG considers that the same rationale that applies for derivatives should apply to structured notes. Consequently, the SMSG is of the opinion that structured notes indexed to crypto-assets should also be considered as financial instruments.
48. The SMSG is also aware that in paragraphs 36 and 37 of Guideline 2 (Conditions and criteria for the classification as transferable securities) a reference is made to “other securities” and, according to the discussions therein reported, it could be concluded that structured notes indexed to crypto-assets not qualifying as financial instruments might be considered as financial instruments. For the sake of clarity, the SMSG is of the opinion that a specific reference should be made to structured notes specifying that they are considered financial instruments (e.g., in paragraph 106 of the Draft Guidelines, where a reference is made to “structured bonds”).

4.7 Conditions and criteria to help the identification of crypto-assets qualifying as other financial instruments

49. The consultation paper states in section 5.3.2 the conditions and criteria to help the identification of crypto-assets qualifying as other financial instruments (i.e., a money market

instrument, a unit in collective investment undertakings, a derivative or an emission allowance instrument).

50. The SMSG supports the conditions and criteria defined in the Consultation Paper.

4.8 Hierarchic approach to the classification of hybrid crypto-assets

51. Crypto-assets may be structured as “hybrids” combining, spanning or associating several characteristics, component and purposes (e.g. means of payment, utility-type, investment-type). In the definition of the conditions and criteria attached to hybrid tokens (Guideline 9), the consultation paper highlights that when a hybrid token displays features of a financial instrument, this characteristic should take precedence in its classification. Thus, the classification process for hybrid tokens should not only consider their multifaceted nature but also prioritize their identification as financial instruments where applicable. The primary step in this process should involve a rigorous assessment to determine if the asset fits the definition of a financial instrument. Only when an asset does not meet these criteria should alternative classifications be considered, such as utility tokens.

52. The SMSG supports the adoption of a hierarchical approach to classification as it ensures regulatory clarity and consistency with the overarching framework of MiCA¹⁰.

4.9 Exchange of information among authorities

53. Given the cross-border nature of crypto-related activities, the SMSG highlights the relevance of information sharing among authorities. A systematic exchange of information would be helpful to share best practice and to accelerate the detection of malpractices (and possibly their spreading across borders).

54. The exchange of information among authorities might involve not only NCAs but also other authorities (e.g., competition authorities).

4.10 Use of technology for monitoring purposes

55. According to Article 3(1)(5) of MiCA, crypto-asset means a digital representation of a value or of a right that is able to be transferred and stored electronically using distributed ledger technology or similar technology.

¹⁰ See 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.”).

56. The SMSG suggests leveraging on the technology used by crypto-assets in order to reinforce monitoring of CASPs activities in terms of scope and speed (e.g., to detect abnormal transactions).

57. Technology may prove important also to counteract potential illegal activity (e.g., money laundering or terrorist financing) carried out through crypto-asset markets by identifying the origin of large buy and sell crypto asset orders or transactions. The identification of the trade origins can be obtained requesting CASPS to notify NCAs the relevant information.

This advice will be published on the Securities and Markets Stakeholder Group section of ESMA's website.

Adopted on 23 April 2024

[signed]

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Chair
Securities and Markets Stakeholder Group

[signed]

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