German Banking Industry Committee

Die Deutsche Kreditwirtschaft

Comments on the Consultation Paper on the draft guidelines on reverse solicitation under MiCA

ESMA consultation paper: ESMA35-1872330276-1619

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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?

We welcome the fact that for the first time ESMA is – as part of the MiCA implementation process – developing and formulating standardized guidelines on reverse solicitation.

These should be suitable to serve as a blueprint for all comparable situations. To date, there have been various ESMA publications and Q&As on this issue, such as a statement in connection with Brexit (ESMA35-43-2509) and various ESMA Q&As on MIFID/MiFIR (ID 1862, ID 1864, ID 1865 and Q&A 1 in section 15 of ESMA document ESMA35-43-349). Summarizing all assessment standards in guidelines seems very sensible.

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?

We welcome the fact that ESMA – in ESMA Q&A ID 1864 – has drawn up a list of pairs of crypto-assets that are to be categorized as being of the "same type". However, the classification made in paragraph 25 of the draft guidelines as a differentiation criterion appears to be rather broad. For example using "liquid" or "illiquid" as a distinguishing feature seems very broad, whereby it is already unclear where a crypto asset is deemed to be liquid or illiquid.

We would propose to include the aspect of where and how a crypto asset is traded as a further differentiation criterion (e.g. in the case of shares, even trading in two different stock segments is sufficient to no longer belong to the "same type", see ESMA Q&A ID 1864).