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## The Principle of Reverse Solicitation Under the Markets in Crypto Assets Regulation (MiCA)

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**Editors: Siegfried Fina and Roland Vogl**

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## General Note about the Content



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**Abstract**

The new Markets in Crypto Assets Regulation (MiCA) imposes rules and obligations on firms and service providers that want to engage actively in the offering of crypto-asset services and products in the EU. However, the novel regulation also encompasses another segment of service providers – the ones in scope of this thesis: Third-country entities that do not obtain an authorisation under the regulation but still wish to serve EU individuals on the basis of the principle of reverse solicitation. Under the principle of reverse solicitation, third-country firms may serve EU individuals if the product and service have been requested at the individual's own exclusive initiative. In short, the principle prohibits the third-country firm to market its products and services within the EU. It does, nevertheless, come with various questions and doubts that will be intended answered in this thesis. The overarching question is the principle's scope, range, and frames, and whether third-country firms will have any room of actions towards EU individuals under the application of this concept. Furthermore, the thesis will explore various sides of the legal incorporation of the principle of reverse solicitation under MiCA, national competent authorities' guidance and eventually, a practical assessment of traditional activities and whether these would fall within or outside the framework of the principle of reverse solicitation.

Table of Contents

# List of abbreviations

- AMF: L'Autorité des marchés financiers
- AML: Anti-Money Laundering
- AMLD5: Fifth Anti-Money Laundering Directive
- CASP: Crypto Asset Service Provider
- CFT: Combating the Financing of Terrorism
- DNB: De Nederlandsche Bank
- EBA: European Banking Authority
- ECJ: Court of Justice of the European Union
- ESMA: European Securities and Markets Authority
- EU / Union: The European Union including EEA Member States
- FSMA: Financial Services and Markets Authority
- KYC: Know-your-customer
- MiCA: Markets in Crypto-Assets Regulation
- MiFID II: Markets in Financial Instruments Directive
- NCA: National Competent Authority
- TFEU: Treaty on the Functioning of the European Union
- The Commission: European Commission
- VASP: Virtual Asset Service Provider

# 1. Introduction

The long-awaited Markets in Crypto-Assets Regulation[1] ("**MiCA**") was published in the Official Journal of the European Union on 9 June 2023, establishing a unified legal framework for the provision of crypto-asset products and services within the European Union (the "**EU**").[2] Recent developments in the industry the past years, from the Initial Coin Offering bubble in 2018 to the 2022 collapse of various crypto companies have shown a growing need for regulation, both for the benefit of investors and investor protection but also for the operating companies that keep navigating a fragment and uncomprehensive legal framework globally. The EU has, however, been a frontrunner with MiCA, which is seen as a first of its kind and will likely operate as a template for the future regulation of a growing industry.

With its 149 articles and 6 annexes, it would be an understatement to say that MiCA is comprehensive. The baseline of the regulation is, however, simple: Companies that wish to provide crypto-asset services and products within the EU must apply for authorisation in one EU Member State. With the MiCA authorisation comes the access to provide crypto-asset services freely throughout the EU, as, like many other EU-wide frameworks, the license can be passported into all Member States of the Union.

While there is much to say about the MiCA authorisation, the scope of this thesis is rather different. The aim is not to discuss and analyse the authorisation requirements nor the specific rights and obligations connected to the various crypto-asset services for which a

[1] Regulation (EU) 2023/1114 of the European Parliament and the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 [2023] OJ L150/40 (MiCA).

[2] In the following, the abbreviation "EU" will be used which includes the 27 EU Member States and the 3 EEA Member States – Norway, Liechtenstein, and Iceland.

MiCA authorisation can be sought. On the contrary, this thesis aims to analyse how companies that are *not* authorised under MiCA can operate and provide services in the EU. More specifically, this thesis will assess the access to provide services under the principle of reverse solicitation under Article 61 MiCA.

The principle of reverse solicitation has been present in the realm of EU's financial regulations for a long time. However, it was not before the introduction of the Markets in Financial Instruments Directive[3] ("**MiFID II**") that the principle obtained statutory status in an EU directive.[4] Implemented in Article 42 MiFID II, no license is required under the directive if investment services or activities offered by a third-country firm are provided at the client's "*own exclusive initiative*". Further context to Article 42 MiFID II can be found in the directive's Recital 111. The recital explicitly calls out marketing activities towards clients established in the EU as the exclusionary factor of the reliance of the principle of reverse solicitation, stipulating that "*where a third-country firm solicits clients or potential clients in the Union or promotes or advertises investment services or activities together with ancillary services in the Union, it should not be deemed as a service provided at the own exclusive initiative of the client*".

By implementing the principle of reverse solicitation in an EU directive, the EU legislator recognised the freedom for persons established in the Union to receive investment services

[3] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) Text with EEA relevance [2014] OJ L173/349 (MiFID II).

[4] Note that the principle of reverse solicitation is also incorporated under the Alternative Investment Fund Directive, Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 Text with EEA relevance [2011] OJ L174/1. However, this directive will not be touched upon under this thesis and only MiFID II with its reverse solicitation clause in Article 42 will be used for the broader assessment.

at its own exclusive initiative.[5] The principle stems from the Treaty on the Functioning of the European Union[6] ("**TFEU**") Article 56, which establishes one of the ground rules of the functioning of the EU: The prohibition on restrictions to provide services. Although the wording of Article 56 TFEU is only touches upon the freedom to *provide* services, the Court of Justice of the European Union ("**ECJ**") has consistently ruled that the right to provide services also encompasses a reciprocal right for EU citizens to *receive* services.[7]

Although MiCA is viewed as a unique legal framework that aims to regulate an – until now – relatively unrelated industry, the regulation bears many similarities to MiFID II: The purpose and structure of the legislative piece, the services for which an authorisation is required and the broader rights and obligations for companies for which the regulations apply. As for the principle of reverse solicitation, no exemption has been made. Article 61 MiCA – the legal incorporation of the principle of reverse solicitation under the regulation – is a close replica of Article 42 MiFID II, meaning that MiCA will also allow for third-country companies to provide and offer crypto-asset services and products without a MiCA authorisation. The condition is that the services are provided on the client's own exclusive initiative. Consequently, the thesis will partly focus on the interconnection with Article 61 MiCA and Article 42 MiFID II, and assess, given the current absent of MiCA guidance, whether the sources applied on the latter can be used to interpret and shed light the former.

In addition, this thesis will evidence how the principle of reverse solicitation does not only exist in EU's traditional financial markets regulations but also in other legal frameworks.

[5] See Recital 111 MiFID II.
[6] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.
[7] See Friedl Weiss and Clemens Kaupa, 'Freedom to provide and receive services (Articles 56–62 TFEU)' in *European Union Internal Market Law* (Cambridge University Press 2024), 241–287. See also Oonagh E. Fitzgerald and Eva Lein, *Complexity's Embrace: The International Law Implications of Brexit* (CIGI 2018), 124.

Relevant herein is the EU wide legal regime for crypto-asset services preceding MiCA, the inclusion of crypto-asset related services and market operators under the EUs 5th Anti-Money Laundering Directive ("**AMLD5**"),[8] sweeping crypto-asset service providers under the blanket of obliged entities for anti-money laundering ("**AML**") and combating the financing of terrorism ("**CFT**") purposes. This is a registration regime that informally goes under the names "Virtual Asset Service Provider regime" or "**VASP regime**". Interesting in this respect is how national competent authorities ("**NCAs**" or "**NCA**") have treated the principle of reverse solicitation (both implicitly and explicitly), which again can help shed light on how Article 61 MiCA will be applied and interpreted by NCAs under MiCA in the future.

Despite having existed for a long time, the principle of reverse solicitation remains being a vague and blurry concept within the EU financial markets regulatory framework. There is little guidance from EU authorities, no specific case-law from the ECJ and sparse information from the EU Member States. Yet, the principle is undoubtfully applied extensively in practice, as the access to provide and receive services through technological means have never been easier – both for the service provider and for the customer. Because of this, it is high time for a clarification and concretisation of the principle of reverse solicitation – something this thesis, to the extent possible, is aiming to achieve.

Marketing activities are often seen as the opposite to the principle of reverse solicitation. If clients or prospective clients are targeted with any kind of promotion, advertisement or other types of solicitation, the client can hardly be said to have requested the service on its own

[8] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L156/43 (AMLD5).

exclusive initiative. Because of this, and as further analysed in this thesis, the principle of reverse solicitation and thus Article 61 MiCA can be viewed as imposing a *de facto* marketing ban for third-country companies in the EU. Nevertheless, the concept of marketing is, as many other concepts, dynamic and no unified and consolidated agreement on what falls under the term exists. This can be seen as a cornerstone for the broader thesis and the analyses here within: What exactly can third-country companies relying on the principle of reverse solicitation undertake in the EU in light of the principle of reverse solicitation and where should the line be drawn?

## 2. Scope and purpose of the thesis

Before entering the specifics of Article 61 MiCA and its many interconnected questions and doubts, certain explanatory remarks must be done.

As for the *scope* of this thesis, and as mentioned above in section 1, the focus herein is on service providers that operate under the authorisation exemption stipulated in Article 61 MiCA. Because of this, the thesis will not go deep into the different categories of crypto-assets falling under MiCA,[9] nor will it analyse thoroughly types of crypto-asset services for which a MiCA authorisation can be sought. Title III concerning asset-referenced tokens and Title IV on e-money tokens are thus completely excluded from the scope of this thesis. What will be touched upon – albeit briefly – are the requirements pertaining to crypto-asset service providers, the services these providers may carry out under MiCA and activities related to crypto-assets other than asset-referenced tokens and e-money tokens.

[9] See, among others, Recital 18 MiCA, which stipulates that the regulation classifies crypto-assets into three categories: Asset-referenced tokens, e-money tokens, and crypto-assets other than asset-referenced tokens and e-money tokens.

While analysing the content, limits and permitted activities under the principle of reverse solicitation, the presumption is that we always and exclusively talk about service providers located *outside* the EU providing services *into* one or more EU Member States. In this thesis, what is often viewed as the 'classical' crypto-asset service provider will be used to exemplify the many different questions assessed. These are companies operating globally, often referred to as crypto exchanges, that may provide a variety of services related to crypto-assets. At its core, however, they offer the exchange between crypto-assets and official currencies (such as Euros and Dollars), the exchange between one crypto-asset for another crypto-asset and the transfer of crypto-asset.

Consequently, the term "CASP" (an abbreviation for "crypto-asset service provider") will be used throughout the thesis, aiming to represent a traditional crypto exchange that offer, among others, the services listed above. Naturally, the principle of reverse solicitation under Article 61 MiCA will not *only* apply to these types of service providers. However, at least of today, crypto exchanges are widely seen as some of the main actors within the crypto industry. Using the traditional CASP as a way of example for the analysis of Article 61 also has value for the broader assessment of this thesis. These CASPs are the ones AMLD5 mainly aimed to regulate through the national VASP regimes.[10] Consequently, how NCAs have regulated these CASPs and even more relevant, how these have viewed the provision of services from CASPs to national individuals on the basis of reverse solicitation adds crucial guidance to the currently sparse sources for the interpretation of Article 61 MiCA.

[10] More about this in section 3.1.

In addition, to avoid confusion and misunderstandings, some clarifications on the terms used throughout the thesis is necessary. The terms "CASP" or "third-country CASPs" will be applied interchangeably, and unless specified otherwise, the intended meaning of these terms is always the same: CASPs operating from a jurisdiction outside the EU, that have or will not obtain an authorisation under MiCA and that provide services relying on the reverse solicitation principle incorporated under Article 61 MiCA. With time, the terms covering what is today named crypto-assets and crypto-asset services under MiCA have varied and some references may include mentions of 'virtual currencies', 'digital currencies', or 'cryptocurrencies'. No differentiation is intended with respect to these terms, and all contain the same meaning as "crypto-assets" as defined under MiCA.

As for the *purpose* of the thesis, the overarching aim is to shed light on a principle that is challenging to apply in practise, has few sources for interpretation but is yet highly important and extensively used between EU clients and third-country services providers. One crucial question intended answered initially is whether the existing sources for the interpretation of Article 42 MiFID II can be used on Article 61 MiCA – at least until the latter has been applied in practice for some time. Nevertheless, MiCA may resemble MiFID II in its design and content, but the difference in the industries the two frameworks intend to regulate affect the possibility to interchange the existing legal sources for interpretation. In addition, Article 61 MiCA and its surrounding questions will be intended answered to the extent possible. The scope and content of the term "*own exclusive initiative*" will be assessed in-depth, as well the connected *de facto* marketing ban this term entails. Further to Article 61, the client base covered by the provision, the prohibition of contractual clauses, and the timing of the *de facto* marketing ban are analysed. Furthermore, whether third-country CASPs can market

the same types of crypto-assets the client has requested on its own exclusive initiative and the terms "*new types of crypto-assets or crypto-asset services*" as stipulated in Article 61(2) MiCA will be explored. As seen, some questions come with a clear solution. Others include deeper interpretation challenges which will require further guidance from EU authorities and NCA to answer.

In addition, part of this thesis is dedicated to the EU legal framework for crypto-assets existing before MiCA, namely the AMLD5 VASP regimes. Although this regime is not a direct legal source for the interpretation of Article 61 MiCA, past and on-going practise from certain NCAs on the principle of reverse solicitation give valuable insight on how the provision will likely be applied in practice. Consequently, three EU Member States and their respective NCA's practise related to the principle of reverse solicitation under the national VASP regimes will be assessed: Netherlands, France, and Belgium.

Ultimately, a goal for this thesis is to provide practical guidance for the principle of reverse solicitation, meaning that specific activities that may or not be seen as marketing will be assessed *in concreto*. Traditional activities that may be viewed as marketing activities that go contrary to the principle of reverse solicitation will be assessed, ranging from the engagement of influencers and affiliates, emails, sponsorship of events, the use of language on websites, mentioning of one or more EU countries on the website, and social media – to mention some.

Taking the above into account, the thesis is roughly divided into four main parts: The first part focuses on the road to MiCA, from the implementation of a dedicated crypto regime under the AMLD5 to the final publication of the comprehensive crypto-regulation – MiCA. This part will also go briefly into the main crypto-asset services and crypto-asset product

covered by MiCA, as these concepts are crucial to understand for the further assessment of Article 61 and the principle of reverse solicitation. The second part goes deep into Article 61 MiCA, shedding light on various aspects of the provision. As will be evidenced, the principle is not as straightforward as it may look by first glance and numerous grey areas exist. The third part aims to analyse existing application of the principle of reverse solicitation under the AMLD5 VASP regimes. Three NCAs will be assessed, each of them having their own approach to the principle and how it is applied in practice. Ultimately, part four of the thesis takes a practical and user-friendly perspective of the principle of reverse solicitation. In this part, various activities that can be used as either communication with clients or prospective clients or other ways of being visibility will be analysed, especially to what extent these activities fall within or outside the frames of Article 61 MiCA.

# 3. The road to MiCA

## 3.1. The VASP regime under AMLD5

The wish to regulate crypto-assets and crypto-asset services has been a standing priority for the EU authorities for more than a decade. Already in 2013, the European Banking Authority ("**EBA**") issued a public warning to consumers about the risks deriving from buying, holding and trading virtual currencies due to the lack of regulatory protection and the volatile nature of such assets.[11] In 2014, EBA recommended in an opinion on virtual currencies that EU legislators to declare market participants such as CASPs as "*obliged entities*" under the EU

[11] EBA, 'Warning to consumers on virtual currencies' (2013) EBA/WRG/2013/01 https://www.eba.europa.eu/sites/default/documents/files/documents/10180/598344/b99b0dd0-f253-47ee-82a5-c547e408948c/EBA%20Warning%20on%20Virtual%20Currencies.pdf accessed 20 June 2023.

Anti-Money Laundering Directive.[12] The same recommendation was repeated by the EBA in an opinion from 2016.[13]

In 2018, EUs 5th Anti-Money Laundering Directive (AMLD5) added providers engaged in exchange services between virtual currencies and fiat currencies and custodian wallet providers to the list of "*obliged entities*" under Article 2(1), subjecting these to know-your-customer ("**KYC**"), due diligence and reporting requirements, to mention some. In addition, Article 47(1) AMLD5 introduced an obligation for Member States to implement a registration requirement for said service providers.[14]

Consequently, with the implementation of the AMLD5 in 2018, EU got its first regulatory regime for crypto asset service providers. In Recital 8 AMLD5, the EU regulator stressed the fact that, at that point, virtual assets were unregulated in the Union and thus posed a risk of being used for money laundering and terrorist financing:

> "*Providers engaged in exchange services between virtual currencies and fiat currencies [...] as well as custodian wallet providers are under no Union obligation to identify suspicious activity. Therefore, terrorist groups may be able to transfer money into the Union financial system or within virtual currency networks by*

[12] EBA, 'EBA Opinion on 'Virtual Currencies'' (2014) EBA/Op/2014/08 https://www.eba.europa.eu/sites/default/documents/files/documents/10180/657547/81409b94-4222-45d7-ba3b-7deb5863ab57/EBA-Op-2014-08%20Opinion%20on%20Virtual%20Currencies.pdf?retry=1 accessed 20 June 2023.

[13] EBA, 'Opinion of the European Banking Authority on the EU Commission's proposal to bring Virtual Currencies into the scope of Directive (EU) 2015/849 (4AMLD)' (2016) EBA-Op-2016-07 https://www.eba.europa.eu/sites/default/documents/files/documents/10180/1547217/32b1f7f2-90ec-44a8-9aab-021b35d1f1f7/EBA%2520Opinion%2520on%2520the%2520Commission%25E2%2580%2599s%2520proposal%2520to%2520bring%2520virtual%2520currency%2520entities%2520into%2520the%2520scope%2520of%25204AMLD.pdf?retry=1 accessed 20 June 2023.

[14] See AMLD5 section 29: "*Member States shall ensure that providers of exchange services between virtual currencies and fiat currencies, and custodian wallet providers, are registered, that currency exchange and cheque cashing offices, and trust or company service providers are licensed or registered, and that providers of gambling services are regulated*".

*concealing transfers or by benefiting from a certain degree of anonymity on those platforms*." (own underlining added).

Because of this risk, the EU regulator stated further: "*It is therefore essential to extend the scope of Directive (EU) 2015/849 so as to include providers engaged in exchange services between virtual currencies and fiat currencies as well as custodian wallet providers*" by giving the competent NCA the possibility to "*monitor the use of virtual currencies*" through "*obliged entities*", and Article 47 (1) AMLD5 was added, clarifying that:

> "*Member States shall ensure that providers of exchange services between virtual currencies and fiat currencies, and custodian wallet providers, are registered, that currency exchange and cheque cashing offices, and trust or company service providers are licensed or registered, and that providers of gambling services are regulated*."

As a result, EU's Member States started implementing the national registration regimes on CASPs for AML and CFT purposes – the VASP regimes. It is, however, important to have in mind that these are *national* regimes, independently developed by each Member State's appointed NCA and VASP registrations cannot be passported throughout the EU. Because of the implementation of this non-passportable, national registration regime, CASPs have (in theory) had to apply for a VASP registration in all Member States to be able to provide crypto-asset services throughout the EU. As a result of this, the VASP registration regimes have developed rather differently in each EU Member State, and the requirements for each VASP registration vary broadly. In addition, the 'triggers' for when the obligation to register as a VASP in each member are different from Member State to Member State. Many Member States have, however, applied the concept of reverse solicitation as a base for

deciding when a CASP has an obligation to register as a VASP, something which will be further explored in this thesis.

### 3.2. The new Markets in Crypto-Assets Regulation

EU's VASP regime implemented through AMLD5 has so far only been limited to AML and CFT obligations, meaning that EU Member States generally approve a VASP registration if the CASP has sufficient compliance procedures in place to detect, avoid and combat money laundering and terrorism financing when providing crypto-asset services to clients. A specific and harmonised regulatory framework for the different kinds of crypto-assets that exist, crypto-asset trading venues and wallets has on the other side, until now been absent in the EU. Consequently, as part of an EU-broad Digital Finance package, the European Commission (the "**Commission**") came forward with a proposal for a regulation on markets in crypto-assets on 24th September 2020.[15] In the proposal, the Commission emphasized its effort to make the EU financial service regulatory framework "*innovation-friendly and […] not pose obstacles to the application of new technologies*". It also noted that "*most crypto-assets fall outside the scope of EU financial services legislation and therefore are not subject to provisions on consumer and investor protection and market integrity, among others*".[16] Because of this, the Commission stated the new regulation's four general and related objectives: 1) legal certainty, 2) support innovation, 3) achieve appropriate level of consumer and investor protection and market integrity, and 4) ensure financial stability.[17]

[15] Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/193 [2019] COM/2020/593 final.
[16] ibid, 1.
[17] ibid, 2–3.

On 24 November 2021, the Council of the European Union adopted its position on the Commission's proposal.[18] On 31 March 2022, trialogues negotiations started and on 30 June 2022, it was announced that the EU trialogue negotiators had reached a provisional agreement on the final text of MiCA.[19] Finally, on 9 June 2023, the final MiCA text was published in the Official Journal of the European Union, entering into force 20 days later.

### 3.3. Short about the MiCA authorisation and the applicable crypto-asset services

MiCA sets down obligations for both crypto-asset issuers[20] and crypto-asset service providers (CASPs). As mentioned above, this thesis will limit the scope to specific third-country CASPs, their applicable authorisation requirement under MiCA and the possibility to rely on the principle of reverse solicitation under Article 61 MiCA.

CASPs, or "*crypto-asset service providers*" are defined in Article 3(15) MiCA:

> "*a legal person or other undertaking whose occupation or business is the provision of one or more crypto-asset services to clients on a professional basis, and that is allowed to provide crypto-asset services in accordance with Article 59*".

The crypto-asset services mentioned in the definition are listed in Article 3(1)(16) MiCA and are similar to those available for financial service providers under MiFID II Annex I, section

[18] European Council, 'Digital finance package: Council reaches agreement on MiCA and DORA' (2021) Council of the EU Press Release https://www.consilium.europa.eu/en/press/press-releases/2021/11/24/digital-finance-package-council-reaches-agreement-on-mica-and-dora/ accessed 20 June 2023.
[19] European Council, 'Digital finance: agreement reached on European crypto-assets regulation (MiCA)' (2022) Council of the EU Press Release https://www.consilium.europa.eu/en/press/press-releases/2022/06/30/digital-finance-agreement-reached-on-european-crypto-assets-regulation-mica/ accessed 20 June 2023.
[20] As defined in Article 3(10) MiCA: "*a natural or legal person, or other undertaking, who issues crypto-assets*".

A (1–9). Thus, in accordance with Article 59 MiCA, CASPs must apply for authorisation to provide one or more of the following crypto-asset services:

1. providing custody and administration of crypto-assets on behalf of clients;
2. operation of a trading platform for crypto-assets;
3. exchange of crypto-assets for funds;
4. exchange of crypto-assets for other crypto-assets;
5. execution of orders for crypto-assets on behalf of clients;
6. placing of crypto-assets;
7. reception and transmission of orders for crypto-assets on behalf of clients;
8. providing advice on crypto-assets
9. providing portfolio management on crypto-assets;
10. providing transfer services for crypto-assets on behalf of clients;[21]

It is also important to note that MiCA will only apply to the currently unregulated crypto-assets in the EU, and exist side by side with already applicable EU law. Consequently, MiCA will not cover crypto-assets that fall under existing EU financial services legislation, regardless of the technology used for their issue or transfer.[22] As an example, MiCA will not apply to crypto-assets that qualify as financial instruments.[23]

Article 63 MiCA describes the procedures for the competent authorities to assess the application and the granting or refusal of authorisation to operate as a CASP in the EU. Once a CASP is granted the authorisation, it will be subject to a range of different obligations,

[21] Article 3(1)(16)(a–j) MiCA. See also Articles 75–82 for more comprehensive requirements tied to each crypto-asset service.
[22] Recital 9 MiCA.
[23] Article 2(4)(a) MiCA. The broader list of the excluded scope of MiCA can be consulted in Article 2(4)(b–j).

similar to the ones imposed on traditional financial service providers: Among others, prudential requirements, corporate governance structure obligations, outsourcing arrangements and continuous suitability of the management board.[24] In addition, specific requirements in Articles 75–82 MiCA are laid out for each of the crypto-asset services for which the CASP is authorised to provide. CASPs are also subject to market abuse rules under Title VI.

As illustrated, obtaining an authorisation under MiCA is an extensive process that will require significant resources from CASPs what wish to operate in the EU, both in terms of capital, internal systems and procedures, and staffing. There are, however, various advantages by holding a MiCA authorisation. In addition to the reputational benefit the authorisation may bring to CASPs that operate lawfully in the EU, it also gives CASPs green light to market the services for which it's licensed, though subject to certain rules under the regulation.[25] On the other hand, CASPs without the authorisation to operate under MiCA will not be entitled to market its crypto-asset services to EU based clients. These CASPs will have to be content with having potential clients come to them in order to provide their crypto-asset services – they will have to rely on the principle of reverse solicitation.

Upon the publication of the final text of MiCA on 9 June 2023, MiCA entered into force 20 days after.[26] 18 months after, on 30 December 2024, MiCA will enter into application, meaning that the regulation becomes mandatory law in all EU Member States.[27] At this point,

[24] See also the list of the required content of the CASP authorisation application in Article 62(2) MiCA.
[25] By way of example, MiCA Article 7(1)(a–e) requires that any marketing communication shall be clearly identifiable, the information in the marketing communication shall be fair, clear and not misleading, it must be consistent with the information in the crypto-asset white paper, where such crypto-asset white paper is required, state that a crypto-asset white paper has been published, indicate the address of the website, telephone number and email address of the offeror, the person seeking admission to trading, or the operator of a trading platform of the crypto-assets concerned and include a pre-drafted disclaimer.
[26] Article 149(1) MiCA.
[27] Article 149(2) MiCA.

CASPs can start applying for the MiCA authorisation applicable to the services they want to offer within the EU. Nevertheless, MiCA contains a 'grandfathering clause' in Article 143(3), which stipulates that CASPs that already offered crypto-asset services in accordance with applicable law before 30 December 2024, may continue to do so 18 months after the date of application (until 1 July 2026). This means that CASPs that obtained the VASP registration in one or more EU Member States before 30 December 2024 can continue to provide the crypto-asset services covered by the registration until mid 2026. However, at this point, the national VASP regimes expire and all CASPs that already actively offer or want to offer crypto-asset services covered by MiCA in the EU can only do so with a MiCA authorisation.

Article 59 MiCA imposes the main authorisation requirements obligation for CASPs to provide crypto-asset services in the EU. As a starting point, CASPs that seek a license under MiCA must have registered office in an EU Member State where they carry out at least part of their crypto-asset services.[28] Provided that this undertaking is followed, CASPs may apply for authorisation to the competent authority in their home Member State. The main requirements to obtain the CASP license is described in Article 62(2)(a)–(s). In short, the aspiring CASP must submit an application to the competent authority of its home EU Member State with a broad range of information. The application must contain a programme of operations describing the types of crypto-asset services to be provided and how and where these will be marketed,[29] proof that the CASP complies with applicable safeguarding requirements,[30] and description of the CASP's governance arrangements.[31] Furthermore, the

[28] Article 59(2) MiCA.
[29] Article 62(2)(d) MiCA.
[30] Article 62(2)(e) MiCA.
[31] Article 62(2)(f) MiCA.

CASP must ensure that members of the management body are of sufficiently good repute, possess the required knowledge, skills and experience,[32] and provide information about qualifying shareholders of the company.[33] Article 62(2) also requires the CASP to submit information about its AML/CFT compliance, ICT systems and security, procedure for segregation of crypto-assets and funds, and complaints handling procedure.[34] Depending on the crypto-asset services the CASP intends to provide, detailed information about how to carry out these services must be laid out in the application.[35] Ultimately, the CASP must give information on the types of crypto-assets to which the crypto-asset services relate.[36] Upon receipt of a complete application, competent authorities shall decide within 40 working days whether to accept of refuse an authorisation as a CASP under MiCA.[37]

Worth noting as well is that Article 93(1) MiCA obliges all EU Member States to designate a NCA for carrying out the functions and duties under the regulation. The appointed NCA must be notified to the EBA and ESMA. Because of this requirement, the existing NCAs for the national VASP regimes may or may not be appointed as the NCA under MiCA. This may have consequences for how the principle of reverse solicitation is viewed, especially for the current NCAs analysed under section 5.

The CASP license under MiCA comes, as seen, with extensive requirements and there is no doubt that only well organised CASPs will manage to land an authorisation under the regulation. However, despite the many advantages that come with an authorisation, certain third-country CASPs may decide that the registration regime is too extensive and

[32] Article 62(2)(g) MiCA.
[33] Article 62(2)(h) MiCA.
[34] Article 62(2)(i)–(l) MiCA.
[35] Article 62(2)(m)–(r) MiCA.
[36] Article 62(2)(s) MiCA.
[37] Article 63(9) MiCA.

burdensome to go through, or they may have no or little substance in the EU, both in terms of employees and other establishments. MiCA does not, however, directly prohibit third-country CASPs to provide services without a license, but has, similar to MiFID II, opened up for the provision of crypto-asset services on the basis of the principle of reverse solicitation.

## 4. Reverse solicitation under MiCA

### 4.1. Overview

As already mentioned, the principle of reverse solicitation is by no means a new concept in EU's traditional financial markets regulation. However, when incorporated within the legal text of MiFID II in 2014, a new level of substance was added to a concept that before (and even today) is challenging to give concrete and clear frames around.

Nevertheless, albeit implemented under Article 42 MiFID II, the extent of the use of the principle of reverse solicitation has proven difficult to measure and may also be the reason for the current uncertainty of the room of actions third-country service providers have in terms of soliciting clients in the EU. Because of this, on 24 September 2021, the Commission sent a letter to the European Securities and Markets Authority ("**ESMA**")[38], specifically asking ESMA to clarify with national competent authorities the following four questions:

- Have NCAs received any data from asset managers about the use of reverse solicitation?

[38] European Commission, 'Request for support in relation to article 18 of Regulation 2019/1156 (CBDF)' (2021) FISMA.C.4/UK/mp(2021)6503451https://www.esma.europa.eu/sites/default/files/letter_to_esma_on_cbdf-j.berrigan.pdf accessed 20 June 2023.

- Have NCAs obtained any other information about the use of reverse solicitation, e.g. from investor associations?
- Can NCAs estimate the share of reverse solicitation as compared to marketing?
- Have NCAs observed any impact of reverse solicitation on the passporting regime?

ESMA published a response letter to the Commission's request on December 17 2021.[39] In the letter, ESMA noted initially that "[t]*he result of this survey showed that almost all NCAs have no readily available information on the use of reverse solicitation*" and that "*the vast majority of NCAs were not in a position to provide an estimation of the share of reverse solicitation as compared to marketing*".[40] ESMA also stated that "*several NCAs believe that reverse solicitation is used in practice to circumvent the rules of the third-country and EU passport regimes, which raises some concerns in terms of investor protection but may also create an unlevel playing field between EU asset managers and non-EU asset managers operating in the Union via reverse solicitation*."[41]

In this statement, ESMA highlights the existing challenges for the principle of reverse solicitation. First, it is not a surprise that NCAs have a hard time to identify the extent of the use of reverse solicitation between EU individuals and third-country firms. As will be further explored below, the *point* of the principle of reverse solicitation is that clients come directly to the third-country firm to be provided services, and that no extraneous influence has been imposed on the client ahead of this action. Consequently, the fact that NCAs found it difficult to put a number on the prevalence seems reasonable. Secondly, ESMA highlights the two

[39] European Securities and Markets Authority, 'Ref: Request for support in relation to the report on reverse solicitation' (2021) ESMA34-45-1485 https://www.esma.europa.eu/sites/default/files/library/esma34-45-1485_letter_chair_commission_on_reverse_sollicitation.pdf accessed 20 June 2023.
[40] ibid, 1.
[41] ibid, 2.

main disadvantages of the principle being misused in practise, that is, through circumvention of the principle: Investor protection may be put at risk if clients are persuaded to request services from a firm that is not regulated under EU financial markets regulations. In addition, firms that have gone through a burdensome authorisation path in the EU may experience a competitive disadvantage if non-authorised firms take advantage of the same benefits that come with such authorisation: the possibility to solicit clients and prospective clients and advertise and promote products and services within the EU. Nonetheless, ESMA's statement also sheds light on a pressing need for guidance and clear frameworks around the principle of reverse solicitation, so that third-country firms have a plain and undisputed understanding of the action scope available.

Indeed, ESMA has been active to some extent in giving guidance and public statements regarding the principle of reverse solicitation. On 19 November 2021, ESMA published an updated guidance with questions and answers on MiFID II and MiFIR investor protection and intermediaries topics ("**ESMA Q&As**").[42] The ESMA Q&As are, until today, actively used as a source of truth of the scope and limits of the principle of reverse solicitation, and will also be thoroughly analysed further in this thesis.

In addition to the ESMA Q&As, around a year after the end of the United Kingdom's transitional period for the departure from the EU, ESMA issued a public statement to remind firms about the MiFID II requirements on the provision of investment services to retail and professional clients in the EU (the **"ESMA Public Statement**").[43] In the ESMA Public

[42] European Securities and Markets Authority, 'Questions and Answers On MiFID II and MiFIR investor protection and intermediaries topics' (2021) ESMA35-43-34 https://www.esma.europa.eu/sites/default/files/library/esma35-43-349_mifid_ii_qas_on_investor_protection_topics.pdf accessed 20 June 2023 (ESMA Q&As).

[43] European Securities and Markets Authority, Reminder to firms of the MiFID II rules on 'reverse solicitation' in the context of the recent end of the UK transition period (2021) ESMA35-43-2509

Statement, ESMA reminded about Article 42 MiFID the exemption from the obligation to obtain a license under the directive if investment services are provided on clients' own exclusive initiative.[44] However, ESMA pointed out that with the end of United Kingdom's transition period on 31 December, 2020, "*some questionable practices by firms around reverse solicitation have emerged*". Further content of the ESMA Public Statement will also be explored below.

### 4.2. Article 61 MiCA

The principle of reverse solicitation is incorporated under Article 61(1) MiCA, which reads as follows:

> "*Where a client established or situated in the Union initiates at its own exclusive initiative, the provision of a crypto-asset service or activity by a third-country firm, the requirement for authorisation under Article 59 shall not apply to the provision of that crypto-asset service or activity by the third-country firm to that client, including a relationship specifically relating to the provision of that crypto-asset service or activity*."

The provision explains the access third-country CASPs have to provide services on a reverse solicitation basis to clients situated in the EU. In short, an authorisation to offer crypto-asset services in the EU is not required if the client approaches the third-country CASP on its "*own exclusive initiative*". This authorisation exemption is further clarified in Recital 75 MiCA, where it is emphasised that the regulation shall not "*affect the possibility for persons*

https://www.esma.europa.eu/sites/default/files/library/esma35-43-2509_statement_on_reverse_solicitation.pdf accessed 21 June 2023 (ESMA Public Statement).
[44] ibid, 1.

*established in the Union to receive crypto-asset services by a third-country firm at their own initiative*".

The reverse solicitation regime is ultimately an acknowledgement from the EU regulator that it's not possible to regulate *all* services provided to EU based clients, and that the line must be drawn somewhere. In essence, it comes down to whether the service can be seen as provided within the borders of the EU, or as MiCA Recital 75 states:

> "[w]*here a third-country firm provides crypto-asset services on the own initiative of a person established in the Union, the crypto-asset services should not be deemed to be provided in the Union*" (own emphasis added).

The obligation to obtain a CASP authorisation under MiCA is also founded on the same geographical scope presumption, as stated in Article 59(1)(a): "*A person shall not provide crypto-asset services, within the Union, unless that person is* […] *authorised as crypto-asset service provider*" (own emphasis added). Whether crypto-asset services are provided "*within the Union*" will, among others, depend on the extent EU based clients are directly solicited by the CASP:

> "*Where a third-country firm solicits clients or prospective clients in the Union or promotes or advertises crypto-asset services or activities in the Union, its services should not be deemed to be crypto-asset services provided on the own initiative of the client*."[45]

While the reliance on reverse solicitation should not be seen as way of entering the EU market, it does provide for a less regulatory burdensome path to offer services within this territory. As seen in section 3.3, MiCA outlines strict and comprehensive requirements on

[45] Recital 75 MiCA.

CASPs, and there is no doubt that obtaining an authorisation under the regulation will require substantial resources from the respective applicants. However, despite the fact that the principle of reverse solicitation opens for a narrow path to provide crypto-asset services within the EU, various disadvantages can be pointed out. As discussed below, Article 61 MiCA can be seen as implementing a *de facto* marketing ban on CASPs without a proper authorisation under the regulation. It is likely that Article 61 MiCA will be interpreted with careful considerations by both ESMA and national NCAs, both with respect to the reach of the principle and the types of activities that will be considered forbidden marketing activities by unauthorised CASPs.

### 4.3. Application of MiFID II sources on Article 61 MiCA

Before entering the specifics of Article 61 MiCA and its interpretation challenges, one existential question on the sources for interpretation of the provision must be assessed. As already noted in previous sections, MiCA bears striking similarities with MiFID II, and the reverse solicitation clauses in the two legal frameworks, respectively Article 42 MiFID II and Article 61 MiCA, are no exemption from the main rule.[46] However, while Article 42 MiFID II has existed for almost a decade, the reverse solicitation clause under MiCA has yet to be applied in practise. Naturally, when it comes to the interpretation of Article 42 MiFID

[46] See Article 42 MiFID II which contains the description of the principle of reverse solicitation under the directive: "*where a retail client or professional client* […] *established or situated in the Union initiates at its own exclusive initiative the provision of an investment service or activity by a third-country firm, the requirement for authorisation under Article 39 shall not apply to the provision of that service or activity by the third country firm to that person including a relationship specifically relating to the provision of that service or activity*".

II, a range of different interpretation sources exist (guidelines from ESMA, statements from national NCAs, academic writing, and so on). On the contrary and albeit representing the same principle and with almost the same wording as its predecessor, Article 61 MiCA is uncharted territory. This brings one to the inevitable question: Can the same sources used to interpret Article 42 MiFID II be applied to interpret Article 61 MiCA?

On one hand, there are arguments that prudence should be shown when applying the sources used to interpret Article 42 MiFID II on Article 61 MiCA. More broadly, despite the similarities between the two legal frameworks, it is important to have in mind that these are intended to regulate different industries. Said with other words: The EU regulator has decided not to apply the regulatory regime for traditional financial instruments on crypto-assets but instead created a new framework for the part of the industry that does not fall under existing regulation. Because of this, one should therefore exercise caution for the direct application of sources that shed light on legislation which the EU regulator has explicitly decided should not apply. Narrowed down to the scope of Articles 42 MiFID II and 61 MiCA, the seemingly different way of providing services between the market participants is also an argument that speaks for a limited application of MiFID II sources. The sources used to interpret MiFID II may not sufficiently account for the perspectives, practices, and unique characteristics of CASPs. Ultimately, MiCA is a regulation that is intended to take account for the developing and rapidly evolving market for crypto-assets. A dynamic interpretation of the legal framework is thus necessary to keep up with the industry and the reliance on sources used for a directive targeting another industry may overlook the need for novel approaches and specific considerations required for the interpretation of MiCA.

On the other hand, while awaiting the dedicated guidelines for the interpretation of Article 61 MiCA,[47] there are also compelling arguments in favour for applying the sources employed on Article 42 MiFID II in the meantime. Fundamentally, MiCA and MiFID II are regulatory frameworks that share the common goals, including fair competition, investor protection and market integrity. The part of the EU financial industry regulated under MiFID II and the markets in crypto-assets are, in various manners, interconnected, and a cross-pollination of knowledge and guidelines can help leveraging off existing uncertainties under MiCA. Connected to this, one can argue that considerations like legislative continuity and regulatory consistency speak in favour of applying the existing sources on Article 42 MiFID II on Article 61 MiCA as, at least, a point of direction for how the latter should be interpreted. The fact that MiCA reflects the nature of MiFID II, and that Article 61 MiCA contains roughly the same wording as Article 42 MiFID II also speaks in favour of this argument.

To conclude, there are arguments both in favour and against the application of MiFID II sources, in this case, the sources for the interpretation of Article 42 MiFID II on Article 61 MiCA. The conclusion does not, however, need to be exclusively one way or the other. Given that we are dealing with two different legal frameworks aimed at separate industries, caution should be shown when analysing Article 61 MiCA in light of the existing directions of Article 42 MiFID II. On the other hand, Article 61 MiCA is unknown territory and according to the provision's section (3), ESMA will not be giving guidelines specifying when a third-country firm is deemed to solicit EU clients before 30 December 2024. In the meantime, CASPs wishing to rely on the principle of reverse solicitation will have a poor base to determine the action room for its activities in the EU. Because of this, having in mind the

[47] See Article 61(3) MiCA, which obliges ESMA to publish specific guidelines on the interpretation of the provision by 30 December 2024.

differences between the legal frameworks and the specific aspects and considerations of each applicable industry, the existing sources to interpret Article 42 MiFID II will be used *with caution* to analyse Article 61 MiCA.

### 4.4. The term "own exclusive initiative"

To start of the analysis of all aspects surrounding Article 61 MiCA, an in-dept review of the term "own exclusive initiative" is necessary. For third-country CASPs to exempt themselves from the MiCA authorisation requirements while still serving clients based in the EU, the crypto-asset service or activity must be provided at the client's "*own exclusive initiative*". This term is, unsurprisingly, subject to ambiguity, and neither MiFID II nor MiCA offer precise explication on the intended interpretation of the term.

A literal reading of the term, "*own exclusive initiative*" suggests that the client must, exclusively and without any extraneous influence, take the step to be served a specific service. The natural deduction from the term "*exclusive initiative*" is that it wipes out the possibility for service providers (in this case third-country CASPs) to attempt to affect or persuade the client to receive the crypto-asset service. As already mentioned above, MiCA follows MiFID II by acknowledging the right EU individuals have to receive services. Recital 75 MiCA confirms this by stating that MiCA "*should not affect the possibility for persons established in the Union to receive crypto-asset services by a third-country firm on their own initiative*". However, Recital 75 explicitly notes that when a third-country firm "*solicits*" clients or prospective clients, "*promotes or advertises*" crypto-asset services or activities, the crypto-asset service is not deemed to be provided on the client's "*own exclusive initiative*". In this case, the third-country firm should be authorised as a CASP under MiCA.

The standing understanding of the term "*own exclusive initiative*" under Article 42 MiFID II and is that it imposes a *de facto* marketing ban on unauthorised third-country firms in the EU.[48] The same understanding should apply for the same term under Article 61(1) MiCA, meaning that third-country CASPs, as a starting point, are barred from providing marketing activities towards clients or prospective clients in the EU without a MiCA authorisation. Though, not surprisingly, both the term "*own exclusive initiative*" and the remaining part of Article 61 MiCA give way for a variety of additional uncertainties that all circle around the overarching question: What is the scope and content of the *de facto* marketing ban under Article 61 MiCA?

### 4.4.1. Solicitation, advertisement, and promotion under Article 61 MiCA

Although Article 61(1) MiCA does not specifically call out marketing activities as the factor that would exclude the reliance on the principle of reverse solicitation, Article 61(1)(2) confirms that the provision imposes a *de facto* marketing bank on unauthorised third-country CASPs. According to the provision, where a third country firm, including an entity acting on its behalf or having close links with such third country firm or any other person acting on behalf of such entity "*solicits clients or prospective clients in the Union, regardless of the means of communication used for solicitation, promotion or advertising*", the service cannot be deemed to be provided at the client's own exclusive initiative. Read in conjunction with Recital 75 MiCA, which lists "*solicits clients or prospective clients*" or "*promotes or advertises crypto-asset services or activities*" as activities that excludes the possibility to rely

[48] See for example Thomas Donegan, Barnabas Reynolds and Oliver Linch, 'On the Existence of a Pan-European Reverse Solicitation Regime under MiFID II, and Its Importance Following Brexit' (2021) *Journal of International Banking Law and Regulation* 202, 209: "*According to ESMA, any means of marketing to new EU27 clients is not possible under reverse solicitation*".

on the principle of reverse solicitation, it can be concluded, as a start, that Article 61 limits CASPs to actively conduct marketing activities towards EU clients that have not requested the services at its own exclusive initiative.

In line with the conclusion drawn above to use the sources for the interpretation of Article 42 MiFID II as a direction of travel (with caution), this preliminary view is also backed up by guidance given by ESMA on Article 42 MiFID II. As noted earlier, the reverse solicitation provision under Article 42 MiFID II is close to identical to the one implemented under Article 61 MiCA, and a source that has been actively used to understand the scope and limits of Article 42 MiFID is the ESMA's Q&As. Herein, ESMA clarifies that "*every communication means used such as press release, advertising on internet, brochures, phone calls or face-to-face meetings should be considered to determine if the client or potential client has been subject to any solicitation, promotion or advertising in the Union on the firm's investment services or activities or on financial instruments*."[49]

Various observations can be drawn out from ESMA's statement above. First, it gives specific examples of activities that would normally be considered to fall outside the scope of the principle reverse solicitation (press releases, advertising on internet, brochures, phone call or face-to-face meetings). The wording "*such as*" does however confirm that the list is not exhaustive and that other activities could easily be swept underneath the record of triggering activities. In addition, ESMA mentions three activities third-country firms are barred from without authorisation in the EU: solicitation, promotion, and advertising. In line with non-legal, day-to-day language, these activities can easily be said to mean the same. However, it is unlikely a coincidence that ESMA has chosen to call out all three and not only a broader

[49] ESMA Q&As, 116.

term such as "marketing", aiming to ensure that all possible undertakings are covered. Noteworthy, Recital 75 MiCA lists the exact same activities namely solicitation, promotion and advertisement as the activities that goes contrary to the term "*own exclusive initiative*" and that may bar the third-country CASP from relying on Article 61 MiCA in the EU. Like ESMA in its statement, Recital 75 places an "*or*" between the mentioned activities, indicating that there is a thought and couscous differentiation to be made between respectively solicitation, promotion, and advertisement under the regulation. In addition, Article 61 MiCA distinguishes between the three mentioned kinds of activities. Section (1)(2) of the provision states that a service is not deemed to be provided on the client's "own exclusive initiative" when an entity acting on behalf of the third-country firm "*solicits*" clients or prospective clients, "*regardless of the means of communication used for the solicitation, promotion or advertising*" in the Union (own emphasis added).

However, albeit the clear intention to establish a wide category of activities that exclude the possibility to rely on the principle of reverse solicitation in the EU, neither MiCA nor ESMA provide for definitions of the terms "*solicitation*", "*advertisement*", or "*promotion*". A unified definition of the terms on a pan-EU level has also not been identified. By way of simplifying, it can be said that all three terms are covered by the broader umbrella-term "*marketing*", but that each category contains particularities on exactly how the activity is carried out.

The term "*advertisement*" seems to be the one with the most legal footprint. A broad definition appears in EU Directive 2006/114/EC concerning misleading and comparative advertising Article 2(a): "*making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including*

*immovable property, rights and obligations*".[50] Another, perhaps more specific definition is advertisement being "*a form of persuasive communication created for a specific purpose, targeted at a particular audience, requiring payment for messages delivered through a proprietary medium*."[51] Advertisement seems thus to represent what one would normally think of when talking about marketing activities, i.e. paid advertisement on traditional platforms (i.e., tv, radio, newspapers) or digital platforms and social media (i.e., websites, Instagram, Facebook, Twitter, LinkedIn).

The term "*promotion*", on the other hand, does not seem to have the same coverage as the term "*advertisement*" and a clear legal definition from the EU legislator has not been identified. The only reference to [sales] promotion found is in the Commission's proposal for a Regulation on Sales Promotions in the Internal Market from 2001,[52] repealed in 2006.[53] Interesting in this context, however, the EU Commission noted in the executive summary of the proposal that "*sales promotions are key tools to market goods and services They cover discounts of all forms; premium offers, free gifts, promotional contests and promotional games and they are a key multi-faceted tool that can be adjusted to various circumstances: to break into new markets with innovative products ; to encourage customer loyalty; to stimulate short-term competitive actions ; to rapidly respond to lost sales; and to efficiently manage stocks*."[54] Academic legal writing confirms this definition, by characterising "*sales*

[50] Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version) [2006] OJ L376/21.
[51] Jerome M. Juska, *Integrated Marketing Communication – Advertising and Promotion in a Digital World* (1st edn, Routledge 2017), 4.
[52] See Proposal for a European Parliament and Council Regulation concerning sales promotions in the Internal Market [2001] COM/2001/0546 final.
[53] See Withdrawal of Commission proposals following screening for their general relevance, their impact on competitiveness and other aspects [2006] OJ C64/3.
[54] Communication from the Commission on sales promotions in the Internal Market [2001] COM/2001/0546 final, 1.

*promotion*" as "*a strategic method for motivating potential buyers to immediately purchase a product or service* […] [w]*hat are being offered to customers or potential buyers are financial incentives or extra rewards, available only within a limited time period*."[55] Translated to day-to-day language, sales promotion or "*promotion*" as mentioned in MiCA and by ESMA, seems to cover marketing tools such as short-term discounts and offers for a specific service or product.

Like the term "*promotion*", "*solicitation*" does not hold a unified definition under EU legislation. The term does, however, seem to be understood as a broader label that can cover activities such as advertisement and promotion, in addition to include actions like direct contact with clients and prospective clients. By way of example, in the Joined Cases *Pammer and Alpenhof* (more about this case below), the ECJ noted that "[a]*mong the evidence establishing whether an activity is 'directed to' the Member State of the consumer's domicile are all clear expressions of the intention to solicit the custom of that State's consumers*" (own emphasis added).[56] In another case from the ECJ,[57] the court held that the display in the inbox of an email service user of advertising messages in a form similar to that of real emails, and placed in the same position as those emails, falls within the concept of "*persistent and unwanted solicitations*" within the meaning of Annex I, point 26 of the Unfair Commercial Practices Directive (own emphasis added).[58] In the ESMA Q&As, ESMA also

[55] Juska (n 51), 4.
[56] Joined Cases C-585/08 and C-144/09 *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v Oliver Heller* [2010] ECR I-12527, para 80.
[57] Case C-102/20 *StWL Städtische Werke Lauf a.d. Pegnitz GmbH v eprimo GmbH* [2021] ECLI:EU:C:2021:954.
[58] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22. See also Annex I of the Unfair Commercial Practices Directive which lists "[m]*aking persistent and unwanted*

seems to view "*solicitation*" as an 'all-inclusive' term, covering marketing tools such as advertisement, promotion but also more broadly, activities directed directly towards an individual.[59]

To conclude, the specific notion of the three discussed activities solicitation, advertisement, and promotion by both ESMA and MiCA shows that a wide range of marketing activities can exclude the reliance on the principle of reverse solicitation and consequently that the service is provided on the client's "own exclusive initiative". It also evidences that a variety of *methods* on how the client or prospective client is potentially solicited is covered, clearly manifesting that the EU regulator with ESMA by its side intends to keep the scope of potential unlawful marketing activities as wide as possible. In the following, for the sake of ease, the term 'marketing' will be used as a generic reference that covers all applicable activities, being solicitation, advertisement, or promotion.

### 4.5. Retail or professional clients

Before digging further down into all aspects of Article 61 MiCA, a brief notion on the client base subject to the principle of reverse solicitation should be made. Article 42 MiFID II states that the principle applies to both "*retails client*[s] *and professional client*[s]" within the meaning of the directive. By this, third-country firms subject to licensing requirements under MiFID II may provide services on a reverse solicitation basis to both client segments.

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*solicitations by telephone, fax, e-mail or other remote media*" as examples of solicitations that could constitute unfair commercial practices under the directive.

[59] See the quote from ESMA already referenced above, where ESMA starts out by saying "*As for the means of such solicitations, ESMA is of the view that every communication means used such as press releases, advertising on internet, brochures, phone calls or face-to-face meetings should be considered to determine if the client or potential client has been subject to any solicitation, promotion or advertising in the Union on the firm's investment services or activities or on financial instruments"* (own emphasis added).

Equally, if either a retail client or a professional client within the meaning of the directive is solicited by the third-country firm, authorisation under Article 39 MiFID II is required.

MiCA does not distinguish between retail clients and professional clients the same way as MiFID II. In fact, the reverse solicitation clause in Article 61 only states that a "*client*" must exclusively initiate the crypto-asset service or activity for the principle to apply to third-country CASPs. The difference from the MiFID II wording does, however, only seem to be a formality, as neither frameworks differentiate between unauthorised marketing activities towards retail and professional clients. This view should not be altered by the fact that MiCA has implemented a specific definition of "*retail holder*", as "*any natural person who is acting for purposes which are outside the person's trade, business, craft or profession*".[60] Indeed, MiCA emphasises a number of times that the importance of protecting "*retail holders*".[61] However, in terms of the principle of reverse solicitation under Article 61 MiCA, the regulation is clear: regardless of the pressing need and wish to protect "*retail holders*", the marketing ban towards clients in the EU for third-country CASPs makes no separation, being an individual retail holder or a client that engages in crypto-asset services and activities on a professional basis.

### 4.6. Prohibition of contractual clauses

Article 61 MiCA (1)(3) prohibits the use of "*any contractual clause or disclaimer purporting to state otherwise, including any clause or disclaimer that the provision of services by a third-country firm is deemed to be a service provided on the client's own exclusive*

[60] See Article 3(1)(37) MiCA.
[61] See, among others, Recitals 6, 19, 37, 40, 47, 49, 51, and 112 MiCA.

*initiative*". Article 42 MiFID II does not include the same wording. However, the addition of this language in Article 61 MiCA comes as a result from experience with the application of the principle of reverse solicitation under MiFID II. In the ESMA Q&As from 2019, ESMA noted that the client's own exclusive initiative shall be assessed regardless of "*any contractual clause or disclaimer purporting to state, for example, that the third country firm will be deemed to respond to the exclusive initiative of the client*", but failed to specify *why* it decided to emphasise this prohibition.[62] Further context was nevertheless published by ESMA in the ESMA Public Statement from 2021, which came as a result of the United Kingdom leaving the EU. In the ESMA Public Statement, ESMA noted that some "*questionable practices by firms around reverse solicitation*" had emerged, for example, the inclusion of general terms to the Terms of Business or online pop-up "*I agree*" boxes where the client stated that any transactions were executed on the client's own initiative.[63] According to ESMA, this practise went contrary to the purpose and intention of the principle of reverse solicitation incorporated under the legal text of MiFID II.

As a result, the EU regulator has evidently seen the need not only to publicly state that the use of contractual clauses or disclaimers that state that the service is provided on the client's exclusive initiative goes contrary to the principle of reverse solicitation, but to include this prohibition directly under Article 61 MiCA. The practical difference from the application of Article 42 MiFID II is likely small. Nevertheless, there is no doubt that the inclusion in the legal text gives an extra weight, and third-country CASPs that apply the reverse solicitation principle under MiCA will have no room for discussion or claim of ignorance if trying to

[62] ESMA Q&A, 116.
[63] ESMA Public Statement, 1.

circumvent the principle through contractual clauses, disclaimers or other methods used to pass the responsibility over to clients.

### 4.7. Timing of the marketing ban and retrospectivity

Another aspect of Article 61 MiCA worth discussing is the timing and retrospectivity of the marketing ban under the provision. More precisely, Article 61 MiCA brings up at least two questions related to timing: First, it should be asked whether past marketing conduct by third-country CASPs before the entry into force of MiCA will prevent these firms from applying the reverse solicitation principle in the future. Secondly, the question is *when* the marketing ban becomes effective and third-country CASPs need to apply for authorisation under MiCA.

The first question is essentially about whether MiCA applies retrospectively to marketing activities carried out by an unauthorised CASP in the EU, and if past marketing activities without a lawful authorisation automatically renders the CASP's possibility to rely on the principle of reverse solicitation The question becomes more interesting when one takes into consideration the current VASP regime in the EU and the *de facto* marketing ban many Member States have imposed for unregistered CASPs. A useful example can be described as follows:

> *A third country CASP has been providing crypto-asset services to clients in the EU for years, but due to different priorities by the firm's management, it has not obtained any VASP registrations in any Member States. The CASP is, however, carrying out marketing activities of crypto-asset services in the Netherlands. The Dutch competent authority becomes aware of this and fines the CASP for circumventing the Dutch*

*AML regulatory regime, which requires CASPs to obtain a VASP registration if crypto-asset services are provided in the Netherlands (among others, through marketing activities). The CASP is considering whether to apply for a MiCA authorisation or continue serving clients in the EU on a reverse solicitation basis.*

The relevant question is this context is whether having carried out unlawful marketing activities in one or more EU Member State related to crypto-asset services *before* the entry into force of MiCA impedes the CASP to rely on the principle of reverse solicitation under Article 61 MiCA in the future.

If MiCA is seen in isolation, the natural answer to the question above is no; activities carried out by a third-country CASP in the past should not be taken into account before the entry into force of MiCA. This view is also backed by the basic principle of non-retroactivity of EU law, which implies that EU law should not take effect before it is published.[64]

The situation does, however, become slightly more complicated if one takes the national VASP regimes into account. As further explored below, certain EU NCAs have already taken a strong approach against marketing activities carried out by CASPs in the EU when no VASP registration has been obtained. As to date, one NCA has gone as far as imposing high fines on two international CASPs for unlawfully targeting national clients.[65] While the national VASP regimes are (mostly) AML/CFT related and thus limited compared to MiCA, these are often seen as a prolongment of the upcoming crypto regulation in the EU. MiCA is also not completely isolated from the national VASPs regimes. With the grandfathering clause incorporated under Article 143(3), CASPs are allowed to continue providing the

[64] See for example Leigh Hancher, Kim Talus and Moritz Wüstenberg, 'Retrospective application of legal rules in the European Union: recent practice in the energy sector' (2021) 39:1 Journal of Energy & Natural Resources Law DOI: 10.1080/02646811.2020.1804712 accessed 21 July 2023.

[65] More about this in sections 5.1.1 and 5.1.2.

crypto-asset services for which a VASP registration has been granted 18 months after the entry into force of the regulation. This shows that MiCA and the VASP regimes under AMLD5 are slightly interconnected, something that brings an additional factor to the question in scope under this section.

Taking the hypothetic example described above into account, the question is whether the Dutch NCA will or should allow the CASP it has already fined for unlawful marketing activities under the Dutch VASP regime to provide crypto-asset services on a reverse solicitation basis in the Netherlands under MiCA. Strictly according to the law, the answer to this question should be positive. Article 61 MiCA explicitly states that crypto-asset services can be provided to EU clients if the client has not been subject to solicitation, advertisement or promotion – the service must be provided on the client's own exclusive initiative. Article 61 MiCA is also connected to Article 59 MiCA, which requires CASPs to obtain a MiCA authorisation when crypto-asset services are offered in the EU.[66] This connection that can be read out of Article 61 implies that MiCA starts from 'zero' or with 'clean sheets' meaning that previous activities carried out by CASPs should not be considered when MiCA enters into application. Consequently, the most reasonable answer to the question asked is that the CASP will be entitled to rely on the principle of reverse solicitation under MiCA, regardless of the alleged infringements it has been subject to under the VASP regime under AMLD5.

By way of concretising the next question, the hypothetical example develops as follows:

> *The CASP has still not decided whether to apply for a MiCA authorisation when MiCA enters into force. However, the CASP wants to pick up market share and*

[66] A registration that can only be obtained once MiCA has entered into application on 30 December 2024.

*launches various marketing campaigns in different EU Member States for 18 months. When MiCA enters into application on 30 December 2024, the CASP decides not to apply for a MiCA authorisation and to serve EU clients on a reverse solicitation basis going forward.*

The relevant questions deducted from the example are two-folded: First, whether the marketing ban under Article 61 MiCA applies between the entry into force and the entry into application of the regulation. If the answer to the first question is negative, will and should national NCA persuade CASPs for unlawful marketing activities under the national VASP regime incorporated in accordance with AMLD5?

As described in section 3.2, MiCA entered into force on 29 June 2023 and will enter into application on 30 December 2024. During the following 18 months, CASPs that have obtained national VASP registrations may continue to provide and advertise crypto-asset services for which they are registered. It is, however, important to emphasise that CASPs can only provide and advertise crypto-asset services within the borders of the EU Member State where they have the VASP registration. On 1 July 2026, the national VASP regimes expire and all firms operating in the EU must have a CASP license.

Following a reverse reading of MiCA, it's rather clear that the *de facto* marketing ban for crypto-asset services without a MiCA authorisation will not become effective at the entry into force of the regulation. Article 61(1) states that "*the requirement for authorisation under Article 59*" shall not apply if the client initiates the service at its own exclusive initiative. Article 59 and the requirements to apply for authorisation under MiCA will not be activated until the entry into application, that is, on 30 December 2024. At this point, all third-country CASPs that wish to service EU clients without a MiCA registration can only do this on a

reverse solicitation basis. ESMA's mandate to issue guidelines to specify when a third-country firm is deemed to solicit clients in the EU is also not scheduled before 18 months after the entry into force of MiCA.[67] Until then, EU Member States and the appointed NCA will have no directions from ESMA on how to detect unlawful solicitation of EU clients. This speaks for the view that the CASP's marketing activities under the described hypothetical example is not *directly* covered by MiCA while the regulation has not entered into application, a view that is also supported by the conclusion to the former question: CASPs can still rely on reverse solicitation under MiCA despite having been called out for unauthorised marketing activities under the national VASP regimes. It's thus reasonable to argue that the picture should not look different if the marketing has been carried out *after* MiCA's entry into force but *before* the entry into application.

As seen, there is a time gap between the entry into force and entry into application of MiCA where the direction and scope of Article 61 is rather unclear, and there are various arguments for the view that it does not apply before the regulation's final entry into application. This leads to the second sub-question deducted from the hypothetical example: Whether third-country CASPs, between MiCA's entry into force and entry into application, will experience a 'loophole' to market crypto-asset services without any implications for 18 months, or if the CASP's activities will be covered by other regulatory regimes such as the VASP regimes under AMLD5.

While it has already been argued that Article 61 MiCA does not apply before 30 December 2024, the national VASP regimes will continue to apply until 18 months after the date of application of the regulation.[68] Both EU based and third-country CASPs can, in theory,

[67] Article 61(3) MiCA.
[68] See Article 143(3) MiCA.

continue to obtain national VASP registrations until MiCA enters into application, and thus be entitled to continue to provide the services covered by the registration until 1 July 2026. A natural consequence from this access is that national NCAs will have to continue monitoring and supervising both registered and unregistered CASPs – among others, third-country CASPs as the one under the hypothetical example. If NCAs discover that the third-country CASP has carried out unauthorised marketing activities in the period until the entry into application of MiCA, there is no reason for why they should not apply the tools at hand to react to such activities. As also described under section 5, various NCAs have issued and implemented strict guidelines on the marketing of crypto-asset services carried out domestically. Because of this, and leading back to the hypothetical example, solicitation, advertisement, and promotion of crypto-asset services in the timeframe until the date of MiCA's entry into application, has at least the potential to be picked up by national NCAs through the existing regulatory regime – in most cases the national VASP regime.

It does, however, remain to see to what extent NCAs will *actually* clamp down on unauthorised crypto-asset marketing as MiCA's entry into application is getting closer. With a few exceptions, most national NCAs cannot be said to have invested substantial efforts in pursuing third-country CASPs that solicit clients without a VASP registration, and there is little reason to believe that this effort will be intensified during the last days of the national VASP regimes. In addition, various EU Member States lack a comprehensive VASP registration regime, not to mention guidelines or legal implementations on the triggering factors for when a VASP registration requirement becomes applicable. It is also difficult to imagine that a NCA will dedicate time, effort and resources to investigate potential breaches of the reverse solicitation principle at this point, especially considering the small effort that

has been done up until now. The consequence of this may, however, be that CASPs increase their marketing activities in the waiting time between AMLD5 and MiCA, as illustrated in the hypothetical example. This can both be seen as unfair by the CASPs that have dedicated resources into obtaining VASP registrations in the EU or CASPs that have decided to follow the principle of reverse solicitation strictly throughout the EU. A clear solution is, nonetheless, challenging to identify and it is likely that the current unclear, non-harmonised and variable system for the principle of reverse solicitation for crypto-asset services will continue to apply until MiCA becomes national law throughout the EU.

### 4.8. Possibility to market services or activities already initiated by the client

Until this point, the scope of the term "*own exclusive initiative*" under Article 61(1) MiCA has been analysed. It has been concluded that Article 61 MiCA contains a *de facto* marketing ban for third-country CASPs without a MiCA authorisation and the content of the terms solicitation, advertisement and promotion has been assessed in depth. It has also been argued that the *de facto* marketing ban under Article 61 MiCA does not apply retrospectively and the dilemma the timeframe between the entry into force and application of the regulation raises in connection with the application of the principle of reverse solicitation has been discussed.

The next question Article 61 MiCA raises is whether a third-country CASP can market the *same* crypto-asset services or crypto-asset category that have been requested on the exclusive initiative by the client. For the sake of clarity, the following example will be used:

> *A client creates an account on a third-country CASP's website on its own initiative. The client then funds its account with Euros and exchanges the Euros to Bitcoin. The*

*client holds the Bitcoin for one month, then it exchanges its Bitcoin for another crypto-asset that the CASP lists on its platform*.

Firstly, it must be deducted the kind of crypto-asset services and categories of crypto-assets the client has initiated in the illustrated example. By exchanging the Euros with Bitcoin, the CASP performs the service under Article 3(1)(19) MiCA "*exchange of crypto-asset for funds*". By holding the client's Bitcoin for one month, the CASP performs the service under Article 3(1)(17) MiCA "*custody and administration of crypto-assets on behalf of clients*". Ultimately, by exchanging the client's Bitcoin for another crypto-asset, the CASP performs "*exchange of crypto-assets for other crypto-assets*" under Article 3(1)(20) MiCA.[69] In the example, the client only deals with "*crypto-assets*" as defined by Article 3(1)(5) MiCA.

When a client initiates the provision of a crypto-asset service or activity at its own exclusive initiative, Article 61(1) MiCA emphasises that the requirement to register under Article 59 does not apply to "*that service or activity by the third-country firm to that person*" (own emphasis added). The wording "*that service or activity*" clarifies that the CASP is not entitled to offer other crypto-asset services that the client has *not* requested at its own exclusive initiative. In the illustrated example, the CASP would among others not be entitled to offer the service "*advice on crypto-assets*" unless the client has explicitly asked to be provided this service.[70] This is also explicitly noted in Article 61(2), which prohibits a CASP to "*market new categories of crypto-assets or crypto-asset services*" to that client, unless registered in accordance with Article 59 MiCA.[71]

[69] For the sake of ease, additional services that may be part of the example, such as "*operation of a trading platform for crypto-assets*" (Article 3(1)(18) MiCA), "*execution of orders for crypto-assets on behalf of clients*" (Article 3(1)(21) MiCA) and "*reception and transmission of orders for crypto-assets on behalf of clients*" (Article 3(1)(23) MiCA) are not included.
[70] Article 3(1)(24) MiCA.
[71] More about this provision under section 4.9.

Nevertheless, if an antithesis of the wording "*market new categories of crypto-assets or crypto-asset services*" is applied, the question is whether Article 61 MiCA allows CASPs to market the *same* categories of crypto-assets or crypto-asset services that the client has initiated to *that* same client. By taking the example and the deducted services and products into account, the question is whether the third-country CASP can market to the client the services that the client has already requested on its own exclusive initiative. The CASP can for example be wishing to email the client about special features for its custody service or send a push notification on the CASP's app about lower fees for the exchange between Bitcoin and Euros on the platform. It may also want to let the client know about new crypto-assets available to purchase, or generally remind the client about its existence if the client has not performed any actions on the platform for some time. What Article 61(2) is saying is that no marketing activities can be conducted for new categories of crypto-asset products and services to clients, but it neither confirms nor prohibits the marketing of the crypto-asset products and services the client has requested on its own exclusive initiative.

Article 42 MiFID II describes in a similar way the same that is already noted for Article 61(1) MiCA, namely that the license requirement under the directive does not apply to the provision of "*that service or activity*" if the client has requested the service or activity on "*its own exclusive initiative*".

In the ESMA Q&As on MiFID II, a similar although not identical question on the interpretation of Article 42 MiFID II was raised, namely whether a firm, within the context of an on-off service[72] could, in the future, offer products or services from the same category

[72] According to ESMA, on-off services are typical ad-hoc services between the service provider and the client, and not part of a continuous client relationship governed by a contract, see ESMA Q&As, 124. In the provided example, the client would likely be seen to have a continuous client relationship with the CASP, and no on-off services would be provided.

without the client's prior explicit request.[73]. ESMA's answer to the question was a blatant "no", followed by its rationale: According to ESMA, the reverse solicitation exemption under MiFID II "*is based on the premise that the product or service is marketed at the client's sown exclusive initiative and can only be applied to the specific product or service requested*". Because of this, the wording of Article 42 MiFID II specifies that the authorisation requirements do not apply to the provision of "*that*" service or activity that the client has initiated. ESMA emphasised that, when providing an on-off investment service to a client, generally "*the third-country firm may not sell to that client* […] *a product or service from the same category unless requested to do so by the client at its own exclusive initiative and only at the time the client asks for an investment product or service*" (own emphasis added). However, ESMA noted that "*during the course of the transaction*", the firm may offer other products or services within the same category as requested by the client, but "*not at a later stage*". An example is if the client contacts the firm to buy a share, the firm can "*at this moment*", market to the client other shares. However, the firm would not be entitled to "*market more shares to the client a month later*".[74]

The explanation by ESMA is noteworthy in various ways: First, it explicitly affirms that the firm, in accordance with Article 42 MiFID II, *can* market to the client *other* products and services within the *same* category *at the same time* the client initiates the product or service at its own exclusive initiative. Given the similarities between Article 42 MiFID II and Article 61 MiCA, and the antithesis interpreted from Article 61(2) on new categories of crypto-assets and crypto-asset services above, it can be argued that the same view could apply for the reverse solicitation principle under MiCA: If the client has requested at its own exclusive

[73] ESMA Q&As question 4, 119.
[74] ESMA Q&As, 119–120.

initiative a crypto-asset service or activities related to a crypto-asset, the CASP is entitled, *at the time of the initiative of the client*, to advertise these specific crypto-asset services or crypto-assets to that client.

Nonetheless, provided that the above conclusion holds, it's crucial to keep in mind that MiFID II and MiCA are two different legal frameworks that not only focus on separate asset classes, but the way clients interact with the service providers can also be considerably different in the traditional financial world than in the 'crypto space'. Question 4 in the ESMA Q&As confirms this observation. Indeed, CASPs that i.e., only provide portfolio management on crypto assets[75] on a reverse solicitation basis may have a CASP–client relationship that 'fits' better into Article 61 MiCA, and it can be easier to identify *when* the client initiated the service, *what* was instructed by the client and *how* the CASP responded to the client initiative. However, CASPs that are mainly in focus in this thesis, namely the third-country crypto exchanges that provide a wide variety of crypto-asset services and products, globally, and from a webpage or a mobile application, do not carry out the classic client–CASP relationship where the client's initiative is easily identifiable and trackable.

It should also be noted that the example in question provided under the ESMA Q&As relates to the unique situation where the investment service provider offers an on-off service to the client, and it does not touch upon the situation where the service provider and the client have a continuous client relationship over time. This is also reflected by ESMA stating *"e.g. if the client contacts the third- country firm to buy a share, the firm could - at this moment in time - market to the client other shares from the same stock-exchange segment. However, the firm would not be entitled to market more shares to the client a month later*".[76] In contrast, in the

[75] See Article 3(1)(16)(i) MiCA.
[76] ESMA Q&As, 120.

described example with the CASP and the client above, the client initiates various crypto-asset services by itself; it instructs the CASP through actions on its laptop or mobile application to provide certain services, and no 'traditional' interaction happens between the CASP and the client. The breaking point of the initiative of the client can here become more unclear. Is it the first time the client initiates a service on the platform? Will the exchange of Euros to Bitcoin be one initiative, the holding of the Bitcoin in custody for one month another initiative and the exchange to another crypto-asset a last initiative? Is the timing of the initiative connected to the exact moment the client instructs the CASP on the crypto-asset products or services? Or should Article 61 be interpreted as once the client has initiated a certain service, for example the exchange between Euros and Bitcoin, the CASP can market that service to the client in the unforeseeable future?

As already mentioned, ESMA shall by 30 December 2024 guidelines to specify when a third-country firm is deemed to solicit clients in the EU.[77] It is likely that the current ESMA Q&As on Article 42 MiFID II will be used for direction, but ESMA will and should without doubt adapt the guidelines to the specificities of CASPs and their activities. Related to the questions raised above on the scope of permitted marketing services of the same categories of crypto-asset products and services, and the timing of when an initiative is deemed to happen, it is reasonable to assume that ESMA has at least three choices: Option 1 is to draw a strict line for all marketing activities, regardless of whether these are the same of other categories of crypto-assets and services. Under this scenario, ESMA will view the client's own exclusive initiative as a one-time event and even in on-going client relationships, no activities that can be considered marketing activities of the same categories of crypto-assets and services are

[77] Article 61(3) MiCA.

permitted. Option 2 is to align the guidelines closely to the ones for Article 42 MiFID II, meaning that CASPs that provide on-off services to clients can only market the same categories of crypto-assets or services during the course of the transaction, but not a later stage. Option 3 is that ESMA, either explicitly or implicitly, recognises the challenges with applying Article 61 MiCA to the traditional CASP business model and considers every new client action as new initiatives from the client.

Option 1 will without doubt give CASPs legal certainty, encourage CASPs to apply for authorisation and likely ensure that few CASPs operate under MiCA's reverse solicitation regime. On the other side, this option would impose tighter reins on third-country CASPs than what Article 42 MiFID II currently does. Option 2, as mentioned, falls more closely to ESMA's interpretation of Article 42 MiFID II. However, only CASPs providing certain on-off services to clients would experience some room for further marketing activities, only if the marketing happens during the course of the transaction. CASPs that provide services to clients on a continuous basis will, on the other hand, not be permitted to market anything within the same types of crypto-assets and services to these clients. Option 3 will unlikely be recognised by ESMA as a viable interpretation of Article 61 MiCA, as it would be seen as undermining the purpose of the regulation and disincentivise CASPs going for the MiCA authorisation within the EU.

ESMA has, as said, confirmed that the firm can offer other products or services of the same category as requested by the client "*during the course of a transaction*", but not at a later stage.[78] The reference to the "*course of a transaction*" reflects the legal wording in Article 42 MiFID II, namely that the client must "*initiate*" the product or service for the principle of

[78] ESMA Q&As, 119.

reverse solicitation to apply. Similarly, under Article 61 MiCA, the fact that the client "*initiates*" the crypto-asset service or product exempts the CASP from the registration requirement under Article 59 MiCA. As noted above, the client's initiative is easily identifiable when i.e., the client instructs a broker to buy shares in a firm (as illustrated by ESMA in the ESMA Q&As) or engages a portfolio manager to manage its crypto-assets. If Article 61 MiCA is interpreted the same as Article 42 MiFID II, in this situation the service provider or the CASP are entitled to market products or services within the same category during the course of the transaction, but not at a later stage. On the other hand and going back to the illustrated example with the client and the CASP in the beginning of this section, the client is *de facto* initiating the provision of various services, at its own exclusive initiative, on many different occasions over time. In fact, the client can end up having a long-lasting relationship with the CASP that extends over years, conducting thousands of transactions, engaging in a broad range of different services – all depending on the client's discretion (or initiative) at any point in time. Naturally, if all these actions by the client are seen as 'initiatives', the result can be that CASPs get a broad access to keep offering and market crypto-asset services to that client under Article 61 MiCA, which has hardly been the purpose and intend of the provision.

ESMA has, however, been clear in its guidelines on the reverse solicitation regime under MiFID II that the client's own exclusive initiative shall be assessed "*in concreto on a case by case basis for each investment service or activity provided*".[79] Held together with the notion that marketing activities can only be conducted during "*the course of a transaction*" and not at a later stage, it is unlikely that CASPs with client relationships as the one described

[79] ESMA Q&As, 116.

in the example will be able to market extensively without a MiCA authorisation. It would also be practically challenging for the CASP to keep track on the different transactions initiated by clients and tailor its marketing activities accordingly. For example, if the client in the illustrated example buys and sells Bitcoin numerous times over the years of the client–CASP relationship, it will require the CASP to keep an exact record of the activities of the client and tailor marketing activities specifically to only that client. It also seems at odd with Article 61 that the CASP can keep marketing the buying and selling of Bitcoin to that client every time and close in time of the transactions. This point of view is also strengthened by the only reference to reverse solicitation in Recital 75 MiCA, where it's emphasised that the marketing activities directed towards both "*clients or prospective clients*" excludes the third-country firm from relying on reverse solicitation in the EU.

The questions raised about the scope of marketing of the same categories of crypto-asset services and products is, and the timing of the initiative of clients are however, in need of clarification. As seen, the ESMA Q&As for Article 42 MiFID II gives certain answers to the interpretation of Article 61 MiCA, but it has been evidence that the guidelines cannot be applied directly to all operations and structures of CASPs. It must also be asked whether the EU regulator has thought extensively through the application of Article 61 MiCA to all types of CASPs and their way of providing services. The replication of Article 42 MiFID II seems logical in the way that the crypto-asset services regulated under MiCA are very much the same as the ones covered by MiFID II. However, the way of providing these services is often different, something that becomes clearer when diving into the specifics of interpreting Article 61 and how it will apply in practise. Because of this, one should expect that the upcoming ESMA guidelines on Article 61 MiCA will look quite different than the ones for

Article 42 MiFID, especially regarding the question on the types of marketing activities a CASP can carry out for the same categories of crypto-assets and services, and the timing of the client's exclusive initiative.

### 4.9. The term "new types of crypto-assets or crypto-asset services"

Article 61(2) MiCA stipulates that an initiative by a client to receive crypto-assets or crypto-asset services does not entitle the third-country CASP to "*market new types of crypto-assets or crypto-asset services to that client*". The provision clarifies that the access to provide crypto-assets or crypto-asset services exclusively requested by the client does not extend to the provision of new types of crypto-assets or crypto-asset services. Like the main description of the reverse solicitation regime under Article 61(1) MiCA, the restriction under section (2) has strong similarities to Article 42 MiFID, which prohibits marketing of new categories of both "*investment products*" and "*investment services*". Article 61(2) MiCA follows the same structure, only that the new types of products and services are "*crypto-assets*" and "*crypto-asset services*".

#### 4.9.1. New types of crypto-assets

The first question be assessed is the meaning of the terms "*new types of crypto assets*" and "*new types of* […] *crypto-asset services*". Having a clear understanding of these concepts may help CASPs to assess its possibilities and limits under the principle of reverse solicitation. However, as for the rest of Article 61 MiCA, section (2) does not give any further clarifications as to what is considered new types of respectively crypto-assets and

crypto-asset services. Consequently, the wording of the provision must be interpreted by its wording and in light of other available legal sources.

The natural interpretation of the wording "*new types of crypto-assets*" presumes that MiCA operates with different groups of crypto-assets and that a CASP that has served one type of crypto-asset to a client under the client's exclusive initiative is not entitled to market other categories of crypto-assets to the client in the future.

Recital 18 MiCA clarifies that the regulation "*classifies crypto-assets into three types*", which "*should be distinguished from one another and subject to different requirements depending on the risks they entail*". According to the Recital, these three types include "*crypto-assets that aim at stabilising their value by referencing only one official currency*"[80], "*'asset-referenced tokens'* [that] *aim at maintaining a stable value by referencing to any other value or right, or combination thereof, including one or several official currencies*"[81] and "*crypto-assets other than asset-referenced tokens and e-money tokens, and covers a wide variety of crypto-assets*".[82]

Although not explicitly noted anywhere in MiCA, there is no doubt that Article 61(2) makes reference to the three "*types*" of crypto-assets as described in Recital 18 and defined in Article 3(1). Worth noting, however, is that while Recital 18 lists three "*types*" of crypto-assets, Article 3(1) MiCA covers four crypto-asset definitions: asset-referenced tokens, electronic-money tokens, utility tokens and crypto-assets. The definition "*crypto-assets*"

[80] Defined in Article 3(1)(7) MiCA as "*electronic money token*" or "*e-money token*".
[81] As defined in Article 3(1)(6) MiCA.
[82] "*Crypto-assets*" are defined in Article 3(1)(5) MiCA as "*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*". "*Utility tokens*" which also seem to fall under this broader category of "*crypto-assets*" are defined in Article 3(1)(9) as "*a type of crypto-asset that is only intended to provide access to a good or a service supplied by its issuer*".

under Article 3(1)(5) MiCA is, however, 'all inclusive', meaning that a utility token will always be seen as a "*crypto-asset*", but a "*crypto-asset*" is not necessarily a utility token. The European Parliament has also confirmed that MiCA operates with three types of crypto-assets, namely asset-referenced tokens, electronic-money tokens and "*other crypto-assets not covered by existing EU law*".[83] The reasons for this may be many, but likely because the distinction between utility tokens and other crypto-assets can be fluid and depends on the specific use case of the token and functionalities. As for the topic in question, the merge of these two types of crypto-assets may, nevertheless, have consequences for the scope of marketing activities permitted by a CASP that provides its services on a reverse solicitation basis under Article 61 MiCA. More specifically, if utility tokens and other crypto-assets are within the same "*type*" of crypto-assets, Article 61(2) MiCA does not prohibit a CASP to market pure utility tokens to a client that has initiated the purchase of a crypto-asset that would only fall under the definition of Article 3(1)(5) MiCA.

By taking this approach to Article 61(2) MiCA, the result in practice may be different than what the EU regulator has envisioned. Most crypto-assets will either fall under the definition of "*utility token*" under Article 3(1)(9) or "*crypto-asset*" under Article 3(1)(5) MiCA, whilst only very specific crypto-assets will qualify as either asset-referenced tokens or electronic-money tokens (both are normally covered by the term "stablecoins"). By way of illustration, the stablecoin market accounted for not more than 12.9% of the total crypto market capitalisation as of January 31, 2023.[84] Most centralised CASPs only have a handful

[83] European Parliament, 'Markets in crypto-assets (MiCA)' (2022) PE 739.221, 1 https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/739221/EPRS_BRI(2022)739221_EN.pdf accessed 9 July 2023.
[84] Shaun Paul Lee, 'Stablecoins Statistics: 2023 Report' (2023) https://www.coingecko.com/research/publications/stablecoins-statistics accessed 21 June 2023.

stablecoins available for trading on their platforms,[85] and even though the exact number of existing stablecoins in the market is difficult to measure, various sources list or report that there are between 140–200 stablecoins available globally.[86] In contrast, existing CASPs currently list hundreds of 'coins' (utility tokens or crypto-assets) on their respective platforms,[87] and there are reportedly thousands of crypto-assets available worldwide.[88]

Having the above statistic in mind, a relevant question is whether ESMA and NCAs *in reality* will end up interpreting Article 61(2) MiCA more narrowly than what the legal wording of the provision assumes. If it is true that CASPs *can* market other crypto-assets that belong to the same MiCA "*type*" as the one the client has requested at its own initiative, the actual limitations of Article 61(2) MiCA are rather deficient. In all other situations where the client's activities are limited to asset-referenced token or electronic-money token activities, the CASP will have few boundaries as to which crypto-assets that can be marketed to the client *beyond* the client's own exclusive initiative.

This interpretation also highlights the differences between MiFID II and MiCA and confirms that the guidelines and understanding of Article 42 MiFID II will not necessarily apply directly to Article 61 MiCA. Compared to MiCA, MiFID II provides for a long list of different financial instruments covered by the directive in Annex 1, Section C. According to

[85] See for example Binance, which currently lists 4 stablecoins for trading: Binance, 'Top Stablecoin Tokens by Market Cap' https://www.binance.com/en/altcoins/stablecoin accessed 21 June 2023.
[86] See for example Coinmarketcap, which lists 145 stablecoins on its site: Coinmarketcap, 'Top Stablecoin Tokens by Market Capitalization' https://coinmarketcap.com/view/stablecoin/ accessed 21 June 2023. See also Bitpay, 'Guide to Stablecoins: What They Are, How They Work and How to Use Them' (2022) https://bitpay.com/blog/guide-to-stablecoins/ accessed 21 June 2021, and Khristopher J. Brooks 'What are stablecoins, and how do they differ from other cryptocurrencies' (2022) Moneywatch https://www.cbsnews.com/news/stablecoins-definition-cryptocurrency-cbs-news-explains/ accessed 21 June 2023 – both estimating the total amount of available stablecoins to be around 200.
[87] Coinmarketcap, 'Top Cryptocurrency Spot Exchanges' https://coinmarketcap.com/rankings/exchanges/ accessed 21 June 2023.
[88] See for example Coinmarketcap, 'Today's Cryptocurrency Prices by Market Cap' https://coinmarketcap.com/?page=92 accessed 21 June 2023 which lists 10,399 crypto-assets on its site.

ESMA, two instruments listed in different parts of Section C(1)–(11), Annex 1 MiFID II "*are considered different investment products for the purpose of Article 42 MiFID*".[89] This means that i.e. a transferable security (Annex 1, Section C(1) MiFID II) is considered another category of financial instruments than financial contracts for difference (Annex 1, Section C(9) MiFID II), and that a service provider that offers transferable securities to a client cannot market financial contracts for difference on a reverse solicitation basis under Article 42 MiFID II. MiCA, on the other hand, does not contain such a list, but has narrowed the types of crypto-assets to three.[90] Because of this, it remains to be seen whether ESMA will interpret Article 61(2) so broadly as suggested above, meaning that a CASP is only prohibited from marketing crypto-assets that belong to either of the three listed categories that the regulation operate with.

### 4.9.2. New types of crypto-asset services

Similar to the restriction to market new types of "*crypto-assets*" under Article 61(2) MiCA, third-country CASPs that provide services on a reverse solicitation basis in the EU are not allowed to market new types of "*crypto-asset services*". This restriction also reflects Article 42 MiFID II considerable, where the different activities a firm can carry out with a license are included in Annex 1, Section A (1–9) (investment services and activities) and Section B (1–7) (ancillary services). Like MiFID II – although not included in a separate annex – MiCA differentiates between various crypto-asset services a CASP may seek authorisation to provide under Article 59 MiCA. Article 3(1)(17–26) list the main definition of these crypto-asset services, and Articles 75–82 MiCA include specific requirements for each

[89] ESMA Q&As, 119.
[90] Recital 9 MiCA.

crypto-asset service CASPs must adhere to. Worth noting is that the crypto-asset services listed under MiCA are practically the same as under MiFID II. The only difference is that MiCA does not include the investment service "*dealing on own account*" (Annex I, Section A(3) MiFID II) and that MiCA contains the crypto-specific services "*exchange crypto-assets for funds*" (Article 3(1)(19)), "*exchange crypto-assets for other crypto-assets*" (Article 3(1)(20)) and "*transfer services for crypto-assets on behalf of clients*" (Article 3(1)(26).

Contrary to the explanation in Recital 18 MiCA about the different types of crypto-assets, no mention is made to the distinct types of crypto-asset services for which marketing is prohibited under Article 61(2) MiCA. However, the logical deduction from the various definitions of crypto-asset services under Articles 3(1)(17–26) MiCA is that these belong to the different "*types*" of crypto-asset services as described in Article 61(2) MiCA. Nonetheless, Recital 21 MiCA notes that considering the necessity to lay down specific rules for entities that provide services related to crypto-assets, the crypto-asset services are divided into two "*categories*": According to the Recital, the first category of such services includes "*ensuring the operation of a trading platform for crypto-assets, exchanging crypto-assets for funds or other crypto-assets, providing custody and administration of crypto-assets on behalf of clients, and providing transfer services for crypto-assets on behalf of clients*." The second category of such services encompasses "*placing of crypto-assets, the reception or transmission of orders for crypto-assets on behalf of clients, the execution of orders for crypto-assets on behalf of clients, providing advice on crypto-assets and providing portfolio management of crypto-assets*". The reasoning behind this categorisation is unknown and not specified in the regulation but is likely related to how the EU Regulator views how CASPs generally operate as of today: A CASP that operates a trading platform for crypto-assets will

*normally* also carry out the exchange between crypto-assets for funds or other crypto-assets, custody the clients' crypto-assets and perform transfer services of these assets (the first category). The second category relates to more 'ancillary services' such as the placing of crypto-assets, advice and portfolio management and typical brokerage services like the reception and transmission of orders and execution of orders for crypto-assets.

ESMA was in the ESMA Q&As Question 2 asked to provide clarity on how "*new categories of investment products or investment services*" within the meaning of Article 42 MiFID II should be understood.[91] Most of ESMA's answer was dedicated to the different categories of investment products, but it noted that a third-country firm would be deemed to provide "*a new investment service or investment activity as defined in Section A of Annex I of MiFID II where this service or activity is added to the existing services or activities after 3 January 2018*".[92] This comment does, however, relate to the date MiFID II came into effect. ESMA noted for example that third-country firms that had been providing investment advice under the national regime of a Member State would not be entitled to continue providing this service under MiFID II's reverse solicitation regime in relation to an investment product of another category. Apart from this, ESMA spent most effort on explaining the difference between distinct categories of investment products with specific examples.[93]

On can, nevertheless, argue that MiCA is relatively clear on the differentiation between the types of crypto-asset services. Despite Recital 21 listing two "*categories*" of crypto-asset services, it is unlikely that the EU regulator has envisioned that Article 61(2) refers to only two buckets of services. More likely, the list of crypto-asset services in Article 3(1)(17–26)

[91] ESMA Q&As, 117.
[92] ibid.
[93] See ESMA Q&As, 118–119.

and Articles 75–82 MiCA are the ones pointed towards under Article 62(2), meaning that a third-country CASP that for example provides the custody of crypto-assets on a reverse solicitation in the EU cannot market the exchange of crypto-assets for funds or the exchange of crypto-assets for other crypto-assets otherwise through an exclusive initiative from that same client.

This preliminary conclusion sounds reasonable, but as with many other aspects with MiCA and the principle of reverse solicitation, the situation is more complicated as such, especially with the traditional CASP in focus of this thesis. As already noted, many CASPs operate with an 'all in one' solution, and clients have the option to choose a variety of services at its own discretion. Several client actions also include the provision of multiple crypto-asset services at once. Explained earlier in section 4.8, if a client, on a reverse solicitation basis, exchanges Euros to Bitcoin on the CASP's platform, holds the Bitcoin for one month and then exchanges the Bitcoin for another crypto-asset, various crypto-asset services are initiated in the background. This does not only include the exchange of crypto-asset for funds (Article 3(1)(19)), custody and administration of crypto-assets on behalf of clients (Article 3(1)(17)) and the exchange of crypto-assets for other crypto-assets (Article 3(1)(20)). It can also involve the operation of a trading platform for crypto-assets (Article 3(1)(18)), the execution of orders for other crypto-assets on behalf of clients (Article 3(1)(21)) and the reception and transmission of orders for crypto-assets on behalf of clients (Article 3(1)(23)) – depending on whether the CASP entity the client has contracted with operates as a broker or the full exchange platform.

As noted, the preliminary view is that ESMA is expected to take a firm view on Article 61(2) MiCA. Given the different nature between market participants under MiCA and MiFID II

and the different way of providing services, ESMA will likely not open the door for extensive marketing activities of the same type of crypto-assets or crypto-asset activities – regardless of these having been requested on the own exclusive initiative by the client, and despite a literal reading of Article 61(2) indicating otherwise. Nonetheless, this view is yet not confirmed by ESMA and there is still a possibility that the marketing of the same type of crypto-assets and crypto-asset services will be interpreted either more or less stringently by ESMA.

Once again, the ESMA Q&As on the reverse solicitation regime under Article 42 MiFID II does not provide a satisfactory answer to the question, proving once more the need for clarifications by ESMA for the specific reverse solicitation regime under MiCA. In the meantime, third-country CASPs will be left with various questions on how extensively it can market crypto-asset services that clients have already requested on its own initiative. Can a third-country CASP for example market custody services to a client that holds Bitcoin for a month on the platform? Can it encourage the exchange of crypto-assets for other crypto-assets to clients that exchange Bitcoin for another crypto-asset? Article 61(2) and the rest of MiCA do not give a satisfactory answer, and it remains to be seen where ESMA lands on the final interpretation.

### 4.10. Consequences for non-compliance with Article 61 MiCA

What remains to be analysed is what MiCA says about the potential consequences for non-compliance with Article 61 and the tools NCAs have at hand if they deem the provision to be infringed. Article 61 does not contain a clear answer to this question. According to section (3) of the provision, ESMA shall issue guidelines to specify the situation in which a third-

country firm is "*deemed to solicit clients*" established or situated in the Union. In addition, section (3)(2) of Article 61 states that in order to "*foster convergence and promote consistent supervision in respect of the risk of abuse of this Article, ESMA shall also issue guidelines* […] *on supervision practises to detect and prevent circumvention of this Regulation*". What happens if the third-country CASP is "*deemed to solicit*" clients is, nevertheless, not specified.

MiCA does, nonetheless, contain various provisions on the access for Member States to impose administrative penalties and other administrative measures by NCAs. Article 111(1) MiCA states that NCAs shall have the power to impose administrative penalties or other measures in relation to infringement of "*at least*" the Articles listed in letters (a)–(f). Article 61 MiCA is not included in the list. By first glance this can suggest that MiCA does not authorise EU Member States and the appointed NCAs to sanction the deemed infringement of the principle of reverse solicitation. However, this has hardly been the intention of the EU regulator and a contextual reading of MiCA gives a more nuanced answer.

One of the provisions under MiCA for which Article 111(1) authorises NCAs to sanction infringements is Article 59.[94] Article 59 is the main provision establishing the legal obligation for CASPs to obtain authorisation under MiCA if crypto-asset services are provided "*within the Union*".[95] Consequently, NCAs have the authority under MiCA to impose administrative fines or other measures if they deem crypto-asset services to be provided "*within the Union*" without a MiCA authorisation.[96] This access read in

[94] See Article 111(1)(d) MiCA.
[95] See Article 59(1) MiCA.
[96] See also Article 111(1)(2) MiCA where it is noted that Member States may decide not to lay down rules for administrative penalties "*where the infringements referred to in the first subparagraph, point* […] *(d)* […] *are already subject to criminal penalties in their national law by 20 June 2024*". Consequently, non-compliance with Article 59 and connected the authorisation requirement may not only be subject to administrative actions by NCAs but even criminal persecution.

conjunction with Recital 75 and Article 61(1) gives a clearer picture of the consequences for NCAs determining third-country CASPs to solicit clients in the EU: Recital 75 explicitly notes that when crypto-asset services are provided on the exclusive initiative of clients, the crypto-asset services "*should not be deemed to be provided in the Union*". On the contrary, Recital 75 states that promotion or advertisement of crypto-asset services by third-country CASPs leads to the obligation for that CASP to "*be authorised as a crypto-asset service provider*". Article 61(1) also refers to Article 59, stipulating the same as Recital 75: The authorisation requirement under Article 59 only becomes applicable when crypto-asset services are provided beyond the exclusive initiative of the client – that is, the crypto-asset services are provided "*within the Union*".

As such, although Article 61 MiCA is not mentioned in the list of Articles for which penalties can be imposed by the NCAs, a contextual reading of MiCA shows that the *de facto* consequence for non-compliance with Article 61 MiCA is that the crypto-asset services are deemed to be provided "*within the Union*" and the third-country CASP is operating without a MiCA authorisation. Because of this, it is safe to state that NCAs have the powers in place under MiCA to sanction third-country CASPs that operate outside the scopes of the principle of reverse solicitation– or as Article 61(3)(2) indicates, carries out activities for the purpose of "*circumvention of this Regulation*".

### 4.11. Article 61 MiCA – Conclusion

Until this point, the scope and content of Article 61 MiCA have been assessed in detail. Some elements of the provision are clear whereas others are need for clarifications from ESMA and NCAs. Because of this, it is likely that Article 61 will be subject to doubt for

some time after MiCA's entry into force and there will probably be numerous 'tries and fails' by third-country CASPs while attempting to navigate the scope and limits of the principle in the EU.

With MiCA entering into application, there will finally be a unified framework for the provision of crypto-assets and crypto-asset services on a reverse solicitation basis in the EU. Nonetheless, and as already evidenced, the application and interpretation of Article 61 MiCA will likely be subject to numerous questions and doubts, and it will certainly take time before and if the provision is harmonised across all EU Member States. Additionally, although ESMA will provide guidelines for the interpretation of Article 61 MiCA by 30 December 2024, it is the NCAs that eventually will have to monitor, supervise and control that third-country CASPs operate within the framework of Article 61. What one NCA can find appropriate and in accordance with the principle of reverse solicitation can be seen as a violation of Article 61 MiCA by another. Because of this, it is relevant to analyse how NCAs for the national VASP regimes have viewed activities on non-registered CASPs and whether guidelines or other statements have been issued in this regard. This can help assess how NCAs across the EU will apply Article 61 in practise and give third-country CASPs at least a sense on the upcoming scope and limitations of the provision.

## 5. The concept of reverse solicitation under the AMLD5 VASP regime

As briefly touched upon previously, AMLD5 directs EU Member States to ensure that CASPs and custodian wallet providers are registered for AML/CFT purposes. The directive does, however, not give any further guidance as to *when* such national registration is required, nor does it make any references to the concept of reverse solicitation. Because of

this, it has been up to the appointed NCAs to determine the triggers for when CASPs need to apply for a national VASP registration. Many NCAs have linked the registration requirement to whether CASPs provide services *in* or *from* the specific Member State. The existence of marketing activities towards clients or prospective clients are often the main factor for this assessment.

Below, three EU Member States – the Netherlands, France, and Belgium – that have thoroughly implemented AMLD5 and the registration requirements for CASPs are analysed. Emphasis is added on how the NCAs in these Member States view the trigger for their national VASP regime. As will be evidenced, these NCAs already take a different view on marketing activities by third-country CASPs or EU based CASPs without a VASP registration in that specific Member State. This may in time have implications for how Article 61 MiCA and the related principle of reverse solicitation will be assessed and interpreted by the NCAs.

### 5.1. DNB and the term "in" the Netherlands

The first EU Member State to be analysed is the Netherlands. The NCA and supervisor for VASP registrations in the Netherlands is the De Nederlandsche Bank (the "**DNB**").[97] According to the Dutch AML Act Article 23b (1) and. (2), anyone who offers professional or commercial services *in or from* the Netherlands for the exchange between virtual currencies and fiat currencies and/or custodian wallet services must register as a VASP with the DNB.[98] Whether anyone offers services "*from*" the Netherlands is relatively

[97] DNB, 'Registration of crypto service providers' https://www.dnb.nl/en/sector-information/supervision-sectors/crypto-service-providers/registration-of-crypto-service-providers/ accessed 21 June 2023.
[98] Wet ter voorkoming van witwassen en financieren van terrorisme Geraadpleegd op 21-02-2023.

uncomplicated to determine: CASPs established with a permanent establishment in the Netherlands, and by this, operate *from* the country will naturally be covered by the registration requirement.

The wording "*in*" does, on the other hand, leave more room for interpretation, as it also applies to CASPs that serve Dutch clients on a cross-border basis from another EU Member State.[99] To help foreign CASPs determine whether they are covered by the registration requirements, the DNB has outlined guidelines on when a CASP based in another EU Member State is deemed to provide services "*in*" the Netherlands. On a general basis, an important consideration is that the CASP "*must have expressed its intention to engage in commercial relations with consumers in one or more Member States [other than that in which the provider itself is resident or domiciled], including the Member State where the consumer is resident.*"[100] Payments made to a search engine service for displaying advertisement in one or more Member States or showing reviews from customers from specific countries on the website are also indicators of the provision of services *in* the Netherlands.[101] In addition to these general guidelines on the DNB's website, the DNB also references to an explanatory memorandum to the Dutch AML Act (the "**Explanatory Memorandum**") (in Dutch only), which gives more context to the term "*in*" the Netherlands

Geldend van 21-05-2020 t/m 07-07-2020 (the Dutch AML Act).

[99] DNB, '"In or from the Netherlands" within the meaning of the Wwft' (2022) https://www.dnb.nl/en/sector-information/supervision-sectors/crypto-service-providers/registration-of-crypto-service-providers/in-or-from-the-netherlands-within-the-meaning-of-the-wwft/ accessed 21 June 2023. Also note that the Dutch AML Act Article 23g(1) and (2) prohibits third-country CASPs to provide the exchange between virtual currencies and fiat currencies and/or custodian wallet services in the Netherlands. When MiCA enters into application, the Netherlands will likely have to review this prohibition given that Article 61 MiCA allows for the provision of CASP services by third-country CASPs provided that this is done strictly in line with the principle of reverse solicitation.

[100] DNB, '"In or from the Netherlands" within the meaning of the Wwft' (2022) https://www.dnb.nl/en/sector-information/supervision-sectors/crypto-service-providers/registration-of-crypto-service-providers/in-or-from-the-netherlands-within-the-meaning-of-the-wwft/ accessed 21 June 2023.

[101] ibid.

(further analysed below).[102] Ultimately, the DNB has been active in its enforcement of the registration requirements for CASPs that allegedly provide services *in* the Netherlands without a VASP registration. In fact, up until today, the DNB is the only EU regulator that has actively fined two major CASPs for unlawful provision of crypto-asset services in the Netherlands (more about this in section 5.1.1 and 5.1.2).

In section 3.2.3 of the Explanatory Memorandum "*Uitvoering en toezicht*" [Implementation and supervision] (own translation), the Dutch legislator emphasises that it supervises CASPs that provide services *in or from* the Netherlands on a professional or commercial basis.[103] On how to interpret "*in*" the Netherlands, the Explanatory Memorandum uses existing case-law from the ECJ as a main point of reference, more precisely, principles established by the ECJ in the Joined Cases *Pammer and Alpenhof*.[104]

The Joined Cases *Pammer* and *Alpenhof* do not directly concern the scope of the principle of reverse solicitation, but the interpretation of the jurisdictional rules under for consumer contracts in the EU. The Explanatory Memorandum, does, however apply the cases analogously for the interpretation of when CASPs are deemed to provide crypto-asset services "*in the Netherlands*" under the Dutch AML Act. The cases involved two German clients that concluded contracts with two Austrian hotels, Hotel Pammer and Alpenhof through the hotels' online webpages. The clients eventually sued the hotels in Austria, claiming damages for breach of contracts. One of the main questions brought before the ECJ

[102] Kamerstuk Memorie Van Toelichting (2019) 35245 nr. 3 https://zoek.officielebekendmakingen.nl/kst-35245-3.html?cfg=wetsvoorsteldetails&qry=wetsvoorstel%3A35245 (Dutch only) (Explanatory Memorandum).
[103] ibid, 112: "*De verplichting om zich te registeren geldt voor een ieder die in Nederland woonachtig of gevestigd is, of zijn zetel heeft en die beroeps- of bedrijfsmatig wisseldiensten of bewaarportemonnees in of vanuit Nederland wil aanbieden*."
[104] Joined Cases *Pammer and Alpenhof* (n 56).

was whether Austrian courts had jurisdiction to handle the clients' claim, namely whether the seller's activity could be regarded as "*directed to*" the Member State of the consumers.[105] In the Joined Cases *Pammer* and *Alpenhof*, and referenced in the Explanatory Memorandum, the ECJ noted that the determining factor to decide when a service on the Internet is "*directed*" towards the market of a Member State and consumers residing therein is the existence of "*evidence demonstrating that the trader was envisaging doing business with consumers domiciled in other Member States* […] *in the sense that it was minded to conclude a contract with those consumers*."[106] According to the ECJ, the relevant indicator for whether an activity can be said to be "*directed*" towards a specific Member State is the presence of "*clear expressions of the intention to solicit* […] *that State's consumers*".[107] The ECJ further gives a non-exhaustive list of indications that can evidence a clear expression to solicit Member States' consumers: the seller's explicit mention of the Member State in which it provides its goods and services or payment to a search engine [like Google] to facilitate access to the seller's site by consumers domiciled in other Member States.[108] In addition, other relevant factors mentioned by the ECJ and repeated in the Explanatory Memorandum are the international character of the service,[109] the fact that the website can be consulted in another language and payment can be made in another currencies.[110] Nevertheless, the Explanatory Memorandum emphasises that the assessment has to be determined on a case-by-case basis or per service provider.[111]

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[105] ibid para 54.
[106] ibid para 76.
[107] ibid para 80.
[108] ibid para 81.
[109] ibid para 83.
[110] ibid para 84.
[111] Explanatory Memorandum (n 102) para 3.2.3: "*Per geval of per aanbieder zal moeten worden bepaald of dit het geval is*".

The above factors are, according to the Explanatory Memorandum, decisive when it comes to determining whether a CASP offer services "*in the Netherlands*" under the Dutch AML Act. The DNB has, however, not settled with only publishing applicable guidelines on the interpretation of the registration requirements. As mentioned above, the DNB has gone further than any other EU Member States in its intents to force CASPs to carry out the VASP registration in the Netherlands, and enforcement actions against two international CASPs have been carried out by the Dutch regulator.

### 5.1.1. DNB v Binance

On 18 August 2021, the DNB issued a public warning against Binance Holdings Ltd ("**Binance**"), a subsidiary of the world's biggest CASP, Binance[112], claiming the company was "*providing crypto services in the Netherlands without the required legal registration with the DNB*".[113] The DNB noted that Binance was acting in non-compliance with the Dutch AML Act and illegally offering its CASP services in the Netherlands. Less than a year after, on April 25, 2022, the DNB decided to impose an administrative fine on Binance Holdings Ltd. amounting to EUR 3,325,000 for violating Article 23(b)(1) and (2) and Article 23(c)(3) of the Dutch AML Act by offering CASP services in the Netherlands without registering with the DNB (the "**Binance Decision**").[114]

[112] Coinmarketcap (n 87).
[113] DNB, 'DNB warns against Binance" (2021) https://www.dnb.nl/en/general-news/news-2021/dnb-warns-against-binance/ accessed 21 June 2023.
[114] DNB, 'Besluit tot het opleggen van een bestuurlijke boete als bedoeld in artikel 30 van de Wet ter voorkoming van witwassen en financieren van terrorisme aan Binance Holdings Ltd.' (2022) (Binance Decision).

In the Binance Decision, the DNB claimed that Binance had been providing CASP services "*in the Netherlands*" since at least 15 May 2020 by targeting the Dutch market in various ways, including through:

- A Dutch-language website (the language option was later changed to Flemish);
- A Dutch language option in the desktop version;
- Offering the online payment method iDEAL;
- Appstore description in Dutch language;
- A Dutch language newsletter;
- Hosting a webinar on Tax Return and Crypto in the Netherlands;
- Social media in Dutch, such as Instagram and Telegram.[115]

Binance denied having provided CASP services "*in the Netherlands*". The company argued that the mere fact that Binance has Dutch clients does not qualify as offering services to Dutch clients within the meaning of the Dutch AML Act. It also referred to the Explanatory Memorandum, claiming it supported that, although a service can be reached on the Internet by Dutch clients, this does not qualify as services being offered in the Netherlands.[116] As for the list of activities, Binance noted that it had stopped all marketing activities in the Netherlands. It had removed the payment option iDEAL, changed domain name, removed Dutch language from the app, and eliminated information about filing tax returns in the Netherlands for crypto-assets.[117] Binance also pointed out that the Instagram account was only aimed at the Belgian market and that the Telegram channel was Flemish.[118]

[115] ibid section 38.
[116] Binance Decision section 69 and Explanatory Memorandum (n 102) section 3.2.3.
[117] Binance Decision section 70.
[118] Binance Decision section 71.

The DNB rejected Binance's arguments outrightly. It did indeed confirm that the mere offering of Internet services does not trigger the VASP registration requirement with the DNB.[119] However, Binance had, according to the DNB, done more than just offering its services passively to Dutch clients (said with other words, on a reverse solicitation basis). For the sake of completeness, the DNB also emphasised that the statement in the Explanatory Memorandum "*Alleen het sec aanbieden van de dienst is niet voldoende"* [Merely offering the service is not sufficient] (own translation) for the registration requirement would only be relevant for Binance if it offered its services from a third country or another EU Member State and *not targeted the Dutch clients with its CASP services.* Nevertheless, according to the DNB, the obligation to register does not only relate to the initiation of contact with new clients, but also to the ongoing provision of crypto-asset services to Dutch clients. As it was not disputed that Binance served Dutch clients, the obligation to register would, according to the DNB, apply to Binance in that case. The DNB further held that it cannot be deducted from the Explanatory Memorandum that 'just' having Dutch clients would fall outside the registration requirement, and that the term 'merely offering the services is not sufficient' is considerably different from continuous serving of a large group of Dutch clients.[120]

As seen, the DNB takes a strong stance in the Binance Decision, rejecting any arguments of the application of the reverse solicitation principle towards Dutch clients. The DNB's view of the case does, however, appear to be reasonable and in accordance with both the Explanatory Memorandum and the applied case-law from the ECJ. Albeit only connected to

[119] Binance Decision section 73. To support its view, the DNB quoted the following part from page 43 of the Explanatory Memorandum (n 102): "*Deze registratieplicht geldt ook voor een aanbieder in een andere lidstaat of in een derde land die zich met zijn dienstverlening richt op de Nederlandse markt. Alleen het sec aanbieden van de dienst is niet voldoende*" [The registration obligation also applies to a provider in another Member State or in a third country that aims its services at the Dutch market. Merely offering the service is not sufficient] (own translation).

[120] Binance Decision section 76.

the Dutch AML Act, the decision will undoubtfully serve as a guide to CASPs that wish to operate under the reverse solicitation of Article 61 MiCA. In this respect, there are especially three things from the Binance Decision worth noting:

First, the DNB clearly calls out specific activities that are and will be seen as solicitation, promotion or advertisement in the Netherlands by third-country CASPs, something that will surely help to concretise the future assessment of Article 61 MiCA. The use of the Dutch language on the CASP's webpage, app or other marketing mediums are strong indicators that services are provided in the Netherlands, and the DNB does not seem to accept any arguments that the Dutch language is only intended on other Dutch-speaking areas such as Belgium. Other decisive activities are the use of payment methods only available in the Netherlands (such as iDEAL[121]), the targeting of Dutch clients with newsletters and the hosting of webinars about topics with strong connections to the Netherlands (such as tax returns on crypto investments). By calling out these activities, the DNB creates a kind of precedence for the future and third-country CASPs have certain predictability on how to act in line with the reverse solicitation regime in the Netherlands under MiCA. It is, nevertheless, evident from reading the Binance Decision that also *other* marketing activities can be viewed as targeting the Dutch market and that the DNB makes a case-by-case assessment on the extent of the activities combined.

Secondly, the DNB makes it clear that the removal of the alleged marketing activities does not 'repair' the situation, and the targeting of the Dutch market once is enough for the DNB to determine that services are provided unlawfully.

[121] See more about iDEAL at https://www.ideal.nl/en/ accessed 9 July 2023.

Thirdly, the DNB indicates that not only does marketing activities towards Dutch individuals eliminate the reverse solicitation argument of the third-country CASP. The continuous serving of a large group of clients can, in according to the DNB, also to be a decisive argument to say that crypto-asset services are provided in the Netherlands. This third observation is rather surprising and not in line with the broader understanding of the principle of reverse solicitation across the EU, where generally, there is no limit on the client base of the third-country firm if clients are not solicited or targeted. The DNB did, however, not go deep into this view in the Binance Decision but provided some more clarity in its next enforcement actions against Coinbase.

### 5.1.2. DNB v Coinbase

On 18 January 2023, Coinbase Europe Ltd. ("**Coinbase**"), a subsidiary of the world's second biggest CASP, Coinbase,[122] received an administrative fine of EUR 3,325,000 for the same reason as Binance: violation of the Dutch AML Act Article 23(b)(1) and (2) and Article 23(c)(3) by offering CASP services without a VASP registration in the Netherlands (the "**Coinbase Decision**").[123]

According to the DNB, Coinbase had been providing unauthorised crypto-asset services "*in the Netherlands*" at least since 15 November 2020 through the following activities:

- Providing the Dutch online payment method iDEAL;
- Naming the Netherlands on the webpage as one of the countries in which crypto-asset services are available;

[122] Coinmarketcap (n 87).
[123] DNB, 'Besluit tot het opleggen van een bestuurlijke boete als bedoeld in artikel 30 van de Wet ter voorkoming van witwassen en financieren van terrorisme aan Coinbase Europe Ltd' (2023) (Coinbase Decision).

- Coinbase app with a Dutch language option;
- Coinbase webpage with a Dutch language option;
- Dutch language results for the search term "Coinbase" on search engines, pointing to Coinbase's webpage
- Dutch affiliates promoting Coinbase.[124]

During the correspondence between the DNB and Coinbase, DNB asked Coinbase to cease all its crypto-asset services in the Netherlands, although it did not direct Coinbase on how the services needed to be terminated.[125] Coinbase defended its position by, among others, alleging that when it was approached by the DNB, Coinbase took measures to limit its activities in the Dutch market. Coinbase was, however, of the opinion that it could continue to serve existing Dutch clients and offer these a minimum level of services. Because of this, Coinbase did not cease all the alleged targeting activities, such as iDEAL as a payment method, the Dutch language option in the Coinbase app and "*the Netherlands*" in the list of countries where Coinbase's crypto-asset services were available on Coinbase's website.[126] Coinbase also noted that its Dutch customer base had grown significantly since the first contact with the DNB. This was, according to Coinbase, not a result of its marketing activities, but the overall growth in the crypto market, Coinbase's IPO in the United States, and media's general coverage of crypto-asset services.[127] Nevertheless, Coinbase alleged that having existing Dutch customers did not involve targeting the Dutch market, evidenced, inter alia, by the fact that there was no desire to establish commercial relations with these

[124] Coinbase Decision section 43.
[125] Coinbase Decision section 9.
[126] Coinbase Decision section 68.
[127] Coinbase Decision section 72.

clients (as they were already existing), because Coinbase did not actively encourage existing clients to purchase *new* services and had removed existing clients from marketing lists.[128]

In addition to the above, Coinbase pointed out the principle of reverse solicitation, claiming that the conditions for reverse solicitation under Article 42 MiFID II should be applied analogously to the Dutch AML Act Article 23(b)(1) and (2) and Article 23(c)(3). Based on this, Coinbase proclaimed that, between 21 December 2020 and until it obtained the VASP registration in the Netherlands, various clients were onboarded through the principle of reverse solicitation.[129]

The DNB did initially dedicate various sections of the Coinbase Decision on affiliates and how this constituted part of offering crypto-asset services "*in the Netherlands*".[130] According to the DNB, Coinbase had targeted the Dutch market through the Coinbase Affiliate Program.[131] Through this program, individuals could use their social media platforms or their own websites to bring Coinbase's crypto-asset services to the attention to their followers. Affiliates would get a specific percentage share of new users' trading costs on the trading platform, provided that the users had created an account via an affiliate link.[132] According to the DNB, 12 active Dutch-language websites had Coinbase affiliates links on them, and five of these had a Dutch domain extension (.nl).[133] It did not alter the DNB's conclusion that the affiliate marketing guide of the Coinbase Affiliate Program stipulated that affiliates were not allowed to conduct marketing activities in the Netherlands.[134]

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[128] Coinbase Decision section 89.
[129] Coinbase Decision section 98–99.
[130] Coinbase Decision sections 47–49.
[131] Coinbase Decision section 47.
[132] Coinbase Decision section 47.
[133] Coinbase Decision section 48.
[134] See the Coinbase Decision section 49: Coinbase's Affiliate Marketing Guide included the following disclaimer: "*Coinbase's products and services are not available in every country or in every state, territory, or province within a given country. While it's understandable that certain users in restricted areas may access*

To Coinbase's arguments on the principle of reverse solicitation, the DNB initially referred to the Explanatory Memorandum and the circumstances under which crypto-asset services are deemed to be provided "*in the Netherlands*".[135] However, the DNB further noted that neither the Explanatory Memorandum nor the parliamentary history of the Dutch AML Act provide for any guidance on the applicability of the principle of reverse solicitation. Coinbase could neither, in DNB's view, benefit from an analogous interpretation of the principle of reverse solicitation under Article 42 MiFID II, as it is not clear from AMLD5 that the principle would apply to crypto-services.[136] The application of the principle of reverse solicitation would also conflict with the objectives of the Dutch AML Act, as certain CASPs could be excluded from the regulatory framework and thus DNB's supervision.[137] Nevertheless, the DNB stated that, although its primary view is that the principle of reverse solicitation does not apply to the registration requirement under the Dutch AML Act, Coinbase would not be able to rely on the principle due to the various marketing activities directed towards Dutch clients over a long period of time.[138]

The DNB's rejection of the principle of reverse solicitation under the Dutch AML Act is of great interest and may be significant for the future interpretation of Article 61 MiCA. First, it can be argued that the DNB's views are contradictory. Although not named directly, the DNB has, both in the Coinbase Decision and the Binance Decision, *de facto* applied the principle of reverse solicitation when saying that the mere offering of services is not

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*generally available content, any targeted marketing campaigns which promotes Coinbase, including sending links related to Coinbase, must not be directed within the below prohibited jurisdictions. This list of restricted countries was last updated in December 2021 and may continue to be updated from time to time. […] Europe: […] Netherlands*".

[135] Coinbase Decision section 100.

[136] ibid.

[137] Coinbase Decision section 101.

[138] Coinbase Decision section 102.

sufficient for the registration requirement under the Dutch AML Act to apply. The DNB has also only reacted once alleged marketing services have been discovered within the Dutch territory, although Dutch clients have likely been served by both Coinbase and Binance for longer period of time. It is also noteworthy that neither MiFID II nor MiCA explicitly call out the principle of reverse solicitation, even though both applicable provisions (Article 42 MiFID II and Article 61 MiCA) describe the principle in practise.

That said, AMLD5 is indeed silent about the triggering cause for the VASP registrations that EU Member States have been required to implement, and the DNB is free to interpret the Dutch AML Act at its own discretion. Yet, DNB's resistance towards the principle of reverse solicitation under the Dutch AML Act may give some preliminary indications on how the appointed NCA under MiCA (being the DNB or other authority) will apply Article 61 MiCA in practise. To start, it remains to be seen whether the Dutch NCA under MiCA will be more receptive for an analogous interpretation of Article 42 MiFID II on Article 61 MiCA than for the VASP registration requirement under AMLD5. Further, once MiCA enters into application, the Dutch NCA under MiCA must undoubtfully comply with and apply the provision in accordance with the regulation's recitals, ESMA's guidelines and potential future case-law from the ECJ. This means that it must tolerate that certain third-country CASPs that operate purely on a reverse solicitation basis in the EU and in the Netherlands are excluded from MiCA's regulatory framework and thus the NCA's supervision.[139] On the other hand, CASPs can view the DNB's stand as a type of warning of how the regulator will interpret Article 61 MiCA going forward, and it is likely from both the Coinbase and the

[139] See the Coinbase Decision Section 101 where the DNB points out these two factors as main arguments against applying the principle of reverse solicitation to the Dutch AML Act.

Binance Decisions that the Dutch NCA under MiCA will accept little to no activities from CASPs apart from what is strictly allowed under the provision.

### 5.2. France and the principle of reverse solicitation

The second EU Member State to be analysed is France – another country where the NCA has established rules and guidelines for when a national VASP registration is applicable.[140] In France, the NCA for VASP registrations is the The Autorité des marchés financiers (the "**AMF**")[141]. According to the AMF, a registration with the regulator is mandatory when the following services are provided "*in France*": digital asset custody, buying or selling digital assets in a currency that is legal tender, trading of digital assets against other digital assets, and/or operation of a trading platform for digital assets.[142] The AMF also notes that the obligation to register applies to CASPs established in France but also the ones based outside France under the conditions established by the AMF.

Under the AMF General Regulation[143] Article 721-1-1, a digital asset service is considered provided in France when "*it is provided by a digital asset service provider* […] *at the initiative of the digital asset service provider to customers residing or established in*

[140] Note that the French legislator and the AMF use the term "digital asset" instead of crypto-assets, though the meaning of the two terms are the same. The AMF also uses the abbreviation "DASP" for digital-asset service provider, which contains the same meaning as the abbreviation "CASP" applied herein. To avoid any confusions, the term "VASP" for "virtual asset service provider" registration and "CASP" for "crypto-asset service provider" will be used for the French registration as well.

[141] AMF, 'Obtaining a DASP registration/optional licensing' (2023) https://www.amf-france.org/en/professionals/fintech/my-relations-amf/obtain-dasp-authorisation accessed 23 June 2023.

[142] AMF, 'In which cases is registration with the AMF mandatory?' (2023) https://www.amf-france.org/en/professionals/fintech/my-relations-amf/obtain-dasp-authorisation#In_which_cases_is_registration_with_the_AMF_mandatory accessed 21 June 2023.

[143] General regulation of the AMF into force from 12/02/2023 to 31/12/2023 [2023] ELI : /en/eli/fr/aai/amf/rg/20230212 (AMF General Regulation).

*France*."[144] Having commercial premises, automatic teller machines on French territory, and a French postal address or a telephone number are clear proof that services are provided in France, according to the AMF.[145] In addition, "*promotional communication, regardless of the medium, to customers residing or established in France*", "*the distribution of its products and services through one or several distribution system(s) to customers residing or established in France*", and "*a '.fr' extension as name domain for website*", are for the AMF equal to be providing services *in* France and thus requires a French VASP registration for AML and CFT purposes.[146]

The AMF has also issued detailed guidelines on when a foreign CASP is deemed to provide services in France (the **"AMF Q&As**").[147] One of the questions raised in the AMF Q&As is whether a "*foreign DASP* [CASP] [can] *have French clients without providing services in France?*" The AMF answers affirmative, noting that "*[w]hen the DASP* [CASP] *does not directly or indirectly solicit customers residing or established in France and the service is not provided in France within the meaning of Article 721-1-1 of the AMF General Regulation, it may provide them digital asset services that will not be deemed to be provided in France.*" The AMF does, however, specify that "*as soon as the service provider meets one of the criteria specified in article 721-1-1 of the AMF General Regulation, it must register in France*. [148]

[144] The French Code Monétaire et Financier (Version en vigueur au 21 juin 2023) (French Monetary Code) Article L. 54-10-2(1) provides for a definition of the digital asset services covered by the VASP registration in France, including custody of digital assets, buying or selling digital assets for legal tender, the exchange of digital assets for other digital assets, and the operation of a digital asset trading platform.
[145] AMF General Regulation (n 143) Article 721-1-1 (1), (2) and (5).
[146] ibid Article 721-1-1 (3), (4) and (6).
[147] AMF, 'Questions and answers on the digital asset service providers regime' (2020) DOC-2020-07 (AMF Q&As).
[148] ibid section 3.4, 9.

The first paragraph under section 3.1 of the AMF Q&A provides for an extensive list of what is considered by the AMF as "*promotional communication*" that will determine whether digital asset services are provided to customers in France, in particular:

- communications via the press; radio, or television, via social networks (including through influencers, or, more generally, social network users, acting on behalf of the provider); direct mail (mailing and emailing); on a proprietary website or of a third party, posters of any kind, banner;
- the provision of mobile applications;
- participation in road shows and trade fairs;
- any invitation to an event;
- affiliation campaigns;
- retargeting;
- invitation to fill out a response form or to download an application or to follow a training course.

In addition to the above list, the AMF notes:

> "[t]*he drafting of one or more pages of the website and/or any communication related to a digital asset service in French shall lead to the verification of whether one or other of the criteria provided for in Article 721-1-1 […] is met in order to characterize the provision in France of the said digital asset service*".

The AMF also specifies explicitly that the list of criteria is "*not exhaustive*", which means that also other activities not mentioned may fall under the category "*promotional communication*" of Article 721-1-1 of the AMF General Regulation.[149]

[149] ibid section 3.1, 8.

Various observations can be extracted from the AMF's guidance above: First, the AMF explicitly confirms that CASPs that do not directly or indirectly solicit clients based in France can provide services to these clients. By this, the AMF implicitly confirms the existence of the principle of reverse solicitation under the French VASP regime. It also suggests that France, contrary to the Netherlands, will not have to change its position on the principle when MiCA enters into application. That said, the current guidelines from the AMF shows that CASPs, at this point in time, have little room to promote their crypto-asset services without a national VASP registration and that the AMF takes a strong supervisory position when it comes to detecting any unlawful marketing activities to clients based in France. It is unlikely that this firm view will be eased under the practical application of Article 61 MiCA. Nevertheless, even AMFs comprehensive list can be subject to questions and doubts – questions that will likely also come up under the reverse solicitation regime under MiCA.

As an example, according to the list under section 3.1 of the AMF Q&As, CASPs without a French VASP registration cannot send "*direct mail (mailing and emailing)*" to customers residing or established in France. It is rather clear that marketing emails to *new* clients and emails to *existing* clients (that have signed up on their own exclusive initiative), promoting a new product or service, would be seen as "*promotional communication*" by the AMF and thus trigger the registration requirement. However, as any other service provider, one of the main channels of communication between CASPs and clients is email. CASPs may use this mean of communication to, among others, update clients about products they have requested on their own exclusive initiative, the changing in funding options on the platform, the winding down of a service or important information about clients' accounts. The question is

then whether the AMF sees *any* direct mail from the CASP to the client as "*promotional communication*", or if each email would be subject to a case-by-case assessment to determine its promotional nature. Read by its words, it looks like the AMF currently leans towards the first option of the two. If this is the case, and if the appointed French NCA keeps this position under Article 61 MiCA, CASPs relying on reverse solicitation for crypto-asset services in France will have few opportunities to communicate with their French client base. Nevertheless, it remains to be seen how the French NCA under MiCA will assess this particular communication channel in accordance with the reverse solicitation provision under MiCA.

Another item that leaves room for doubt is the prohibition of "*communications* […] *via social networks*". Like the example above, the situations where the unauthorised CASP opens a social media channel, i.e., an Instagram account dedicated to the French market, the situation would easily fall under the regime of "*promotional communication*" of the AMF General Regulation section 721-1-1. The same should apply if the CASP engages affiliates based in France to promote its services to the French market. Yet, grey areas arise when CASPs run social media platforms that are not targeted to specific countries, that is, they are *global*. The CASP can, for example, have global Twitter, Youtube, Instagram and Discord accounts, where it promotes crypto-asset services and products. The question here is whether the AMF sees these channels as targeting French territory with marketing activities. To date, the AMF has not publicly targeted any CASP solely based on its global social network channels. This indicates that the AMF does not view these as "*promotional communication*" to French based clients. On the other hand, the wording in the AMF Q&As section 3.1 first paragraph, "*communications* […] *via social networks*", is broad and opens for a wide

interpretation by the French regulator. As above, it remains to be seen whether the French NCA under MiCA will take a strict stance on Article 61 and consider all communication via social network channels as directed towards France, or if only French-specific channels will be seen as non-compliant with the principle of reverse solicitation for unauthorised CASPs. Ultimately, the mention of the use of French language in the AMF Q&As section 3.1 also rises questions. Indeed, the AMF does not claim that the use of French language on the CASP's website or other communication related to a digital asset service automatically means that the CASP targets the French market. The AMF states that the use of French shall "*lead to the verification*" on whether any of the listed criteria under Article 721-1-1 AMF General Regulation are met. Consequently, use of French language seems to function as a 'trigger' that raises the AMF's attention and can lead to a potential investigation of other marketing activities carried out by the CASP. The language aspect of reverse solicitation is, nevertheless, challenging. French is the official language in various countries worldwide and CASPs with a French website can allege that the use of French language is not meant to target one specific French-speaking country. Again, how the French NCA under MiCA will view the use of French language by unauthorised CASPs is an open question, but the use of the language will without doubt raise the attention of the regulator for further investigation.

As seen, both the Dutch and the French regulators use the same overall approach to decide whether crypto-asset services are provided in respectively the Netherlands and France, namely the *solicitation of clients* through local marketing activities. Many of the same activities are highlighted by both, such as promotion through national affiliates and influencers and the use of local language in communication with clients. However, differences exist if one looks more closely, both in terms of the legal sources used to back

their views but also on the specific activities that are deemed decisive for the existence of unlawful crypto-asset services offering within the country. Ideally, once MiCA becomes national law and regulators need to apply Article 61 actively, all EU regulators will have roughly the same approach towards marketing activities and the scope and limits around the principle of reverse solicitation. However, the current state shows that certain EU regulators have, to a certain extent, a distinct focus, something which may influence both the harmonised interpretation of Article 61 MiCA and the related legal certainty for CASPs in the EU. In any case, various marketing activities highlighted by either the DNB and the AMF or both, will be analysed under section 6 as an attempt to assess how these activities will fall under the reverse solicitation principle in Article 61 MiCA.

### 5.3. Belgium and the principle of reverse solicitation

Belgium has approached both the VASP regime under AMLD5 and the triggering factor for the registration requirements differently than its neighbouring countries, the Netherlands and France. An analysis of this jurisdiction is thus interesting from a reverse solicitation perspective, but for other reasons than the two countries above. In Belgium, the NCA for VASP registrations is the Financial Services and Markets Authority ( the "**FSMA**").[150] The legal basis for the VASP registrations in Belgium are the VASP Royal Decree[151] and the Belgian AML Act.[152] According to the VASP Royal Decree Article 2, a formal VASP

[150] FSMA, 'Virtual Asset Service Provider (VASP)' https://www.fsma.be/en/virtual-asset-service-provider-vasp accessed 9 July 2023.
[151] 8 FEBRUARI 2022. — Koninklijk besluit over het statuut van en het toezicht op aanbieders van diensten voor het wisselen tussen virtuele valuta en fiduciaire valuta en aanbieders van bewaarportemonnees (in French and Dutch only) (the VASP Royal Decree).
[152] 1 FEBRUARI 2022. — Wet tot wijziging van de wet van 18 september 2017 tot voorkoming van het witwassen van geld en de financiering van terrorisme en tot beperking van het gebruik van contanten om bepalingen in te voeren rond het statuut van en het toezicht op aanbieders van diensten voor het wisselen

registration with the FSMA is required if the CASP meets all of the following conditions: crypto asset-services[153] are provided on Belgian territory, the services are offered as part of a professional activity and the service provider is either a legal person or a regulated company in Belgium or a legal person or regulated company in another EU Member State with a permanent establishment in Belgium.[154]

Interestingly, and unlike the Netherlands and France, Belgian law does not impose a VASP registration obligations if Belgian clients or potential clients are targeted by the CASP through marketing activities from outside the Belgian territory. On the contrary, the preparatory work of the VASP Royal Decree states that not all providers of crypto-asset services need to register with the FSMA. The registration only applies to providers governed by Belgian law or providers governed by the law of another EU Member State if they have a branch or any other form of permanent establishment in Belgium.[155] This is also confirmed by the FSMA under their frequently asked question on the informational webpage for VASP registrations.[156]

Although the FSMA confirms that there is no EU passporting regime for VASP registrations,[157] the Belgian regulator seems to accept that CASPs registered in another EU Member State can provide services on a cross-border basis in Belgium, provided that no permanent establishment in Belgium exists. This perspective is rather unique in an EU

tussen virtuele valuta en fiduciaire valuta en aanbieders van bewaarportemonnees (French and Dutch only) (the Belgian AML Act).

[153] Exchange services between virtual currencies and fiat currencies and custodian wallet services.

[154] FSMA, 'Wie moet zich als aanbieder van diensten met virtuele valuta laten inschrijven?' https://www.fsma.be/nl/faq/1-wie-moet-zich-als-aanbieder-van-diensten-met-virtuele-valuta-laten-inschrijven accessed 9 July 2023 (in Dutch only).

[155] See the preparatory work of the VASP Royal Decree, 16154.

[156] FSMA (n 154).

[157] FSMA, 'Beschik ik, als aanbieder van diensten met virtuele activa, over een 'Europees paspoort'?' https://www.fsma.be/nl/faq/23-beschik-ik-als-aanbieder-van-diensten-met-virtuele-activa-over-een-europees-paspoort accessed 9 July 2023.

context, as most EU Member States explicitly require all CASPs to separately register as a VASP if crypto-asset services are provided "in" that specific country, either through a type of permanent establishment *or* through cross-border marketing activities.

In addition to the above, on 17 March 2023, a new FSMA regulation on 5 January 2023 of marketing of virtual currencies to consumers was published in the Belgian State Gazette (the "**FSMA Regulation**").[158] The FSMA Regulation imposes new obligations when virtual currencies are marketed in Belgium.[159] In addition, various guidelines for the FSMA Regulation have also been published by the FSMA.[160] What is, however, noteworthy about the FSMA Regulation is that it does not state that a CASP needs to be registered as a VASP in Belgium in order to carry out marketing activities of virtual currencies [crypto-asset services] to consumers. Said with other words, as long as CASPs comply with the provisions of the FSMA Marketing Regulation, they do in fact not need to rely on the principle of reverse solicitation in order to provide their crypto-asset services in the country. This does indeed align with the Belgian AML Act and the FSMA's position, namely that only the

[158] 5 JANUARI 2023. — Koninklijk besluit tot goedkeuring van het reglement van de autoriteit voor financiële diensten en markten dat beperkende voorwaarden verbindt aan de commercialisering van virtuele munten bij consumenten [C − 2023/40640] (in Dutch and French only) (the FSMA Regulation). See the unofficial translation of the regulation published by the FSMA: Regulation of the Financial Services and Markets Authority placing restrictive conditions on the distribution of virtual currencies to consumers, approved by the Royal Decree of 8 February 2023 [2023] https://www.fsma.be/sites/default/files/media/files/2023-03/reglem_05-01-2023_en.pdf accessed 9 July 2023.

[159] See Article 1(1) of the unofficial translation of the FSMA Regulation (n 158) which stipulates that the regulation "*imposes certain obligations that must be complied with in connection with the advertisements disseminated to consumers when distributing virtual currencies in Belgium as a regular professional activity or on an occasional basis for remuneration*."

[160] FSMA, 'Guide to the prior notification to the FSMA of advertisements for virtual currencies as part of a mass media campaign' (2023) FSMA Communication https://www.fsma.be/sites/default/files/media/files/2023-03/fsma_2023_05_en.pdf accessed 9 July 2023 and FSMA, 'Regulation on the distribution of virtual currencies to consumers in Belgium' (2023) FSMA Webinar https://www.fsma.be/sites/default/files/media/files/2023-04/20230419_virtualcurrencies.pdf accessed 9 July 2023.

existence of a permanent establishment would trigger the obligation as a VASP for CASPs based in another EU Member State.

On the other hand, while Belgium has opened the door for the cross-border provision of crypto-asset services from another EU Member State (contrary to most other EU Member States), the Belgian legislator has drawn a strict line on the provision of crypto-asset services by third-country CASPs. In accordance with the VASP Royal Decree, natural or legal persons governed by the law of a country outside the EEA is prohibited to offer crypto-asset services on Belgian territory.[161] Effectively and if read by its words, third-country CASPs should not be able to offer clients crypto-asset services without either a VASP registration in Belgium or another EU Member State. Neither the reliance on the principle of reverse solicitation for third-country CASPs seems to be possible under the current regulatory framework in Belgium today. Nonetheless, whether the FSMA actually supervises and monitors the provision of all third-country CASPs and the availability of their services to Belgian clients in unknown, but there are no public sources on enforcement actions towards such CASPs by the FSMA.

Interesting in this regard, on 23 June 2023, the FSMA went out publicly, ordering Binance to cease all offers of crypto-asset services in Belgium with immediate effect.[162] The reason for this enforcement action was not that Binance had targeted Belgium based individuals unlawfully and without a proper VASP registration. According to the FSMA, Binance had offered crypto-asset services from countries that are not members of the European Economic Area, which, as described above, is prohibited in accordance with the VASP Royal Decree.

[161] See also FSMA, (n 150).

[162] FSMA, 'FSMA orders Binance to cease immediately all offers of virtual currency services in Belgium' (2023) FSMA press release https://www.fsma.be/en/news/fsma-orders-binance-cease-immediately-all-offers-virtual-currency-services-belgium accessed 10 July 2023.

Binance was thus obliged to cease and desist all offering of services to clients based in Belgium. Nonetheless, with Article 61 MiCA entering into application, the FSMA will likely have to take a different approach to this item. Without attempting to predict Binance's future position in the Belgian market, it remains to be seen whether 1) the appointed Belgian NCA under MiCA will re-allow Binance (or other CASPs it may have enforced against on the same basis), and 2) if the appointed Belgian NCA under MiCA will keep its reluctancy towards third-country CASPs offering services into Belgium.

To conclude, Belgium has without implemented its own, special regime for VASP registrations – a regime it will be interesting to follow along with the implementation of MiCA. On one side, the Belgian legislator has opened the door for both marketing activities and the provision of crypto-asset services by CASPs holding one or more VASP registrations in other EU Member States. On the other side, Belgium does not (at least on paper) allow third-country CASPs to provide crypto-asset services to Belgian clients. Nevertheless, when MiCA finally enters into application, the Belgian legislator and the appointed Belgian NCA will likely have to change its current practice. EU based CASPs with a MiCA license will naturally be able to passport into Belgium, and thus not need to rely on the principle of reverse solicitation. Whether the FSMA Marketing Regulation will continue to apply to these CASPs is unknown, but the Belgian legislator will probably want to keep certain rules for the marketing of crypto-assets, although marketing *per se* will be allowed with a proper MiCA authorisation.

Third-country CASPs providing services to EU clients without a MiCA license, on the other hand, will have to operate under the reverse solicitation regime in accordance with Article 61, something that may have various effects on the current Belgian regime: Firstly, according

to MiCA, third-country CASPs *should* be able to offer crypto-asset services to clients based in Belgium, provided that this happens strictly in line with Article 61.

Secondly, the Belgian NCA under MiCA will also have to expand its scope of the triggering factors for the MiCA license requirement: Today, the obligation to register as a VASP is only required if the CASP has a permanent establishment in Belgium. Under MiCA, marketing activities by a third-country CASPs towards Belgian clients should without doubt be brought under this umbrella of triggering factors for a requirement to obtain a MiCA authorisation. Nonetheless, what sort of activities the Belgian NCA under MiCA will see as targeting Belgian territory by third-country CASPs is still unknown, but having the current ban of the provision of crypto-asset services for third-country CASPs in mind, it is likely that the scope of Article 61 MiCA will be interpreted narrowly in Belgium as well.

## 6. Practical examples and applicability of Article 61 MiCA

The clearest statement for the principle of reverse solicitation is actually incorporated in MiCA's recital: EU based clients have the right to receive services from third-country CASPs that are not authorised under MiCA.[163] Said with other words, the mere offering of crypto-asset services is not sufficient for third-country CASPs to lose the opportunity to rely on Article 61 MiCA. With this as a starting point, the question is: Can the third-country CASP do *anything* more in the EU than *only* providing services?

Albeit the attempt in this thesis to clarify the principle of reverse solicitation, the results of the assessment show that it remains a vague and blurry concept across EU's regulatory

[163] Recital 75 MiCA: "*This Regulation should not affect the possibility for persons established in the Union to receive crypto-asset services by a third-country firm on their own initiative*."

frameworks. Truth be told, the enigmatic character of the principle is odd, especially given that it is extensively applied by businesses and clients on a daily basis. Even with United Kingdom leaving the EU, and the frequent offering of financial services from United Kingdom based firms to EU clients on a reverse solicitation basis, the principle has not been subject to more practical guidance from ESMA nor EU's NCAs. The base line of the principle – that clients must request the service on its own exclusive initiative – is indeed undisputed. Nonetheless, when digging deeper into the practical application of reverse solicitation, various grey areas arise.

Because of this, it is high time that the principle of reverse solicitation is transformed from a vague concept with unclear frames to a concept that can easily be applied in practise. As already mentioned earlier, a clarification like this comes with advantages for various participants that are affected by MiCA: Third-country CASPs, EU based individuals, NCAs and CASPs authorised under MiCA, to mention some. For third-country CASPs that wish to operate under MiCA's reverse solicitation regime, knowing exactly what they *can* and *cannot* do is crucial and it will be easier for these to stick within the lines or Article 61. With a clear framework for Article 61 and active enforcement and supervision, individuals based in the EU will not be subject to unauthorised marketing activities of crypto-asset services and activities, and it will be clearer for these which CASPs are covered by the regulation and which are not. NCAs will also have an easier time to detect, supervise and react to unlawful marketing activities and most importantly, for the sake of legal certainty and consistency, NCAs across the EU will and should have the same approach to the principle of reverse solicitation.

In the following, various traditional activities that can be seen as marketing will be assessed. The analysis is partly based on existing guidance from some of the discussed NCAs (France and the Netherlands) and own general observations. As evidenced below, certain activities would be seen as clear marketing of the CASP's services that would exclude the reliance on Article 61 MiCA. Other activities remain in a grey area where guidance from ESMA and NCAs is needed. Taking the existing guidance and application of the principle of reverse solicitation into account, the decisive factor is whether the activity is directly targeting individuals in one or more EU countries. In other words, the geographical proximity of the activity is the critical item to be analysed.

### 6.1. Affiliates and influencers

Affiliates and influencers are individuals or companies that promote the products or services of another company in return of a payment or fee. These can for example recommend the company and/or its services on social media platforms such as Twitter and Youtube or gain a percentage fee of the trading revenue if the client has signed up to the platform through the affiliate link posted on a website or other media. There is little doubt that affiliates and influencers are and will be seen as clear marketing of third-country CASPs under MiCA. Both the DNB and the AMF have called out the use of these marketing activities as undisputable marketing within the territory of respectively the Netherlands and France.[164] Especially when the affiliate or influencer are EU nationals or promote the services in a local EU language, there is little room to argue that the principle of reverse solicitation can apply.

[164] See the Coinbase Decision section 43, the Binance Decision section 38 and the AMF Q&As section 3.2.

If the affiliate or influencer are based outside the EU, the assessment should look differently. In this situation, EU individuals would be able to access the marketing material of the affiliate or influencer, but it would be harder to establish a geographical proximity between an EU country and the activity. The condition for this conclusion is, however, that the affiliate and influencer do not include material in the advertisement that directly target EU individuals. However, if there is no such material precent, there are good arguments for the view that non-EU influencers and affiliates can be engaged by third-country CASPs that rely on the principle of reverse solicitation in the EU.

### 6.2. Paid Advertisement

What is meant with the term paid advertisement is, in general, the online placement of ads on platform paid for by the advertiser. Common platforms used for such advertisement are for example Instagram, Twitter, Facebook, Youtube, Google or websites in general.

Usually, the advertiser that wants to place paid ads on different platforms can chose the location for where the ads appear. See for example Google's guide to paid ads, which specifies that "*Google Ads location targeting allows your ads to appear in the geographic locations that you select: countries, areas within a country, a radius around a location, or location groups, which can include places of interest, your business locations, or tiered demographics*."[165] It is up to the advertiser to choose the geographical location of the ads, and as seen, the flexibility of targeting very specific places or client segments is high.

[165] Google Ads Help, 'Target ads to geographic locations' https://support.google.com/google-ads/answer/1722043?hl=en accessed 10 July 2023.

Consequently, paid advertisement will likely be seen as one of the clearest examples of direct, targeting marketing activities that would violate Article 61 MiCA. The reason for this is simple: The advertiser has control of where the ads are placed which means that there is a will and intent to target the EU if the ad appears for individuals based in one or more EU countries. In addition, the ad would 'pursue' the individual and not the way around, meaning that the individual would not approach the advertisement at its own exclusive initiative. Because of this, third-country CASPs operating under Article 61 MiCA should be reluctant with engaging in paid ads and ESMA and NCAs should take a strong approach against this kind of marketing activities.

### 6.3. Emails

Email is seen as the most used communication tool between firms and clients, and according to one report, 62% of communication to clients happens through email.[166] As emails go directly into the electronic inbox of a specific individual, it can be viewed as a personal and even intimate way of communication. Emails are also a way of sending specific information to specific clients – contrary to broader marketing channels such as a social post or articles. Because of the above, it is not a surprise that various NCAs have called out emails as a clear indication of targeting clients or prospective clients and thus non-compliant with the reliance on the principle of reverse solicitation. The AMF lists "*communication via* […] *social networks*" to customers residing or established in France as a type of promotional communication which indicates that VASP services are provided within French territory.[167]

[166] See for example Project.co, 'Communication Statistics 2023' [2023] https://s3.eu-west-2.amazonaws.com/project.co/PDFs/Project.co-Communications-Stats-2023.pdf accessed 9 July 2023.
[167] AMF Q&As section 3.1, 8.

In the Coinbase Decision, the DNB also emphasised that Coinbase had on at least two occasions sent two marketing-related emails to all its existing Dutch clients, and that this evidenced that Coinbase was still offering services in the Netherlands actively.[168] ESMA one the other side does not specifically call out emails as a mean of unauthorised solicitation under the reverse solicitation regime. However, it notes at "*every communication means used*", with explicit examples such as phone calls, brochures, and advertising on the internet, are indications of clients or prospective clients being subject to unauthorised solicitation, promotion, or advertisement in the EU.[169] Emails containing marketing material would without doubt fall under ESMA's general category of "*every communication means*".

Based on the above and the promotional and targeting nature of emails as a means of communication, the main rule should be that third-country CASPs relying on the reverse solicitation regime under Article 61 MiCA are not entitled to send clients or prospective clients emails. The natural follow-up question to the main rule is, however, whether this applies to all kinds of emails, or if it is the content of the email that decides whether the third country CASPs has operated outside the framework of Article 61 MiCA. The third-country CASP can, for example, see the need to send existing clients an email about a change in a funding method or the de-listing of certain crypto-assets that client's hold on the CASP's platform – communications that cannot be seen as having a directly targeting nature.

Looking at ESMA's general answer to how the term client's "*own exclusive initiative*" should be understood within the meaning of Article 42 MiFID II, ESMA seems to focus more on the *nature and content* of the communication rather than the mere fact that a

[168] See the Coinbase Decision section 96.
[169] ESMA Q&As, 116.

communication has taken place.[170] Thus, one can argue that an email in itself will not immediately place a third-country CASP in non-compliance with Article 61 MiCA but it will be a strong indication that the client or prospective client has been targeted. Nonetheless, if the nature of the email is purely informative, categorising these as marketing *by default* and outside the framework of Article 61 MiCA appears to be a too strict interpretation of the provision. It is also worth noting that both Article 61(2) and Recital 75 MiCA focus on the promotional nature of the marketing material but does not directly prohibit the third-country firm to communicate with clients that have requested services on their own exclusive initiative.

What, on the other hand, falls clearly outside the scope of Article 61 MiCA are 1) emails to clients promoting other types of crypto-assets or crypto-asset services that the client has requested on its own exclusive initiative, and 2) emails to prospective clients that trigger the request to be provided a crypto-asset or crypto-asset service.[171] Such promotional communication would go directly against Article 61(1) MiCA in the way that the service would not be provided on the client's "own exclusive initiative". Except for these clear situation, other emails from third-country CASPs will likely have to be assessed on a case-by-case basis where the promotional nature of the email will be detrimental.

### 6.4. Mentioning of the country on the webpage

[170] According to ESMA, every means of communication shall be assessed "*to determine if the client or potential client has been subject to any solicitation, promotion or advertising in the Union on the firm's investment services or activities or on financial instruments*", see the ESMA Q&As, 116 (own emphasis added).

[171] See the assessment in section 4.8 where it has been concluded that it is still an open question to what extent third-country CASPs can market the same types of crypto-asset products and services the client has requested on its own exclusive initiative. The preliminary view is, however, that ESMA will take a strict view on this access and either not open for any marketing of these categories whatsoever or allow for some marketing if this happens strictly during the course of the transaction but not a later stage.

With the regulatory framework around crypto-asset services still being in its early phases in many jurisdictions worldwide, there may be geographical differences for the various services offered by CASPs. Because of this, many CASPs maintain an informative subpage on its webpage with information about where it provides services worldwide. The relevant question in this regard is whether naming one or more EU countries on the webpage for where the third-country CASP offer services would be seen as marketing activities under Article 61 MiCA and thus require the CASP to obtain a MiCA authorisation.

The question has not been touched upon in neither the ESMA Q&As nor in the ESMA Public Statement on the reverse solicitation regime under MiFID II. That said, ESMA's current guidelines on the reverse solicitation regime are not too specific, hence the need for clarification on the various potential marketing activities under Article 61 MiCA. ESMA's only express mention of activities that may be viewed as solicitation, promotion or advertisement in the EU is the note on page 116 ESMA Q&As: "*every communication means used such as press releases, advertising on internet, brochures, phone calls or face-to-face meetings*…". Apart from this, no further examples are given by ESMA. On the other hand, ESMA does not explicitly state that listing an EU country on the global webpage excludes the reliance on the principle of reverse solicitation for third-country firms.

As already seen in section 5.1.2, the Dutch regulator for VASP registrations – the DNB – takes a more stringent approach to the principle of reverse solicitation under the current VASP regime and has claimed that Article 42 MiFID II and existing interpretation material cannot be applied analogously to VASPs providing services on a reverse solicitation in the Netherlands.[172] Under MiCA, the Dutch NCA will naturally have to adhere to Article 61 and

[172] See the Coinbase Decision section 100 where the DNB states that the conditions for reverse solicitation under MiFID II could not be applied analogously by Coinbase. In the same decision, the DNB also hinted that

ESMA's future guidelines on the provision of crypto-asset services on a reverse solicitation basis from third-country CASPs. The question is, however, how the Dutch NCA under MiCA will supervise third-country CASPs, and there is little doubt that past activities can give a point of direction in this sense.

In the Coinbase Decision, one of the activities the DNB pointed out as evidence for determining that Coinbase had targeted the Dutch market and hence provided crypto-asset services "*in*" the Netherlands was the naming of the Netherlands in the list of the countries in which crypto-asset services are available on Coinbase's website.[173] To support its view, the DNB referred to the following statement from the ECJ in the Joined Cases *Pammer and Alpenhof*:

> "*Clear expressions of such an intention on the part of the trader include mention that it is offering its services or its goods in one or more Member States designated by name"* (own emphasis added).[174]

Consequently, at this point, the DNB sees such mention of the Netherlands as a way of targeting the Dutch market. The questions are, however, whether this view will be maintained under Article 61 MiCA by the Dutch appointed NCA and picked up by other NCAs under the reverse solicitation regime of MiCA.

As of now, no other EU NCAs under the national VASP regimes have publicly called out the mentioning of one or more EU countries on CASP's websites or other media as equivalent as providing services *in* the country. It is also worth noting that the Joined Cases

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the reverse solicitation regime does not exist for the VASP regime under the Dutch AML Act, although it has been argued that this notion goes against DNB's previously statements in both the Coinbase Decision and the Binance Decision.

[173] See the Coinbase Decision section 43.

[174] Joined Cases *Pammer and Alpenhof* (n 56) para 81. See the reference to the Joined Cases in the Coinbase Decision para 111.

*Pammer and Alpenhof* does not specifically relate to the principle of reverse solicitation but jurisdictional rules for consumer contracts, and ESMA has not used this decision from the ECJ in its guidance on reverse solicitation under MiFID II. Considering this, it seems like the DNB is currently taking a stricter approach than both other NCAs for the national VASP regimes and ESMA for Article 42 MiFID II.

Taking the above into account, it seems to be an open question whether the listing of EU countries on third-country CASP's to inform where they provide services (on a reverse solicitation basis) will fall outside or within Article 61 MiCA. On one hand, adding a country on the websites undoubtedly shows will from the firm's side to provide services to clients based in that specific country. On the contrary, it is arguable that the country list is purely informative and not solicitation towards clients and prospective clients.

As mentioned earlier, ESMA has in its guidelines focused more on the means of advertisement communication and not dived deep into other activities that *may* violate the principle of reverse solicitation regime under MiFID II. Strictly in line with the ESMA Q&As for Article 42 MiFID II, it is hard to imagine that ESMA would consider having one or more EU countries listed on the website of a, for example, UK based company, as a clear violation of the principle incorporated under Article 42 MiFID II. This is, however, not exact science. Neither does it mean that Article 61 MiCA will be interpreted in the same way.

When ESMA creates the Article 61 MiCA guidelines,[175] it will have the advantage to be able to look at how NCAs have treated the principle of reverse solicitation under the AMLD5 VASP regime for years. It may such be that ESMA will look to strong NCAs like for example the DNB and reuse some of the views stipulated in its guidelines and the Coinbase and

[175] As stipulated in Article 61(3) MiCA.

Binance Cases. Consequently, the view herein is that it is likely that adding one or more EU countries on the CASP's website where the third-country CASP provides crypto-asset services will be viewed by ESMA as incompatible with Article 61 MiCA. However, as various other marketing activities, this is still an open question that only time and further guidance from the ESMA will eventually answer.

### 6.5. Translation to official EU languages

The EU has the astonishing amount of 24 official languages,[176] and while English is widely spoken, many EU citizens prefer accessing services in their own native language. Because of this, firms may want to translate their webpage and other platforms to include various EU languages, for example German, Dutch, Spanish and French. CASPs are not an exemption and being able to offer customised crypto-asset services in different EU countries is often seen as a competitive advantage.

The question is whether the translation of the webpage and other platforms by third-country CASPs will be seen as a violation of the reverse solicitation principle under Article 61 MiCA. Again, the ESMA Q&As for Article 42 MiFID II does not give any clarifications and we are left with reviewing NCA's practise under the AMLD5 VASP regime and estimations on ESMA's view in the future.

Some NCA's views on translation to local languages under the AMLD5 VASP regimes have already been touched upon in sections 5.1 (the Netherlands) and 5.2 (France). In the Binance Case, the DNB focused heavily on the fact that Binance had targeted the Netherlands through

[176] European Union, 'Languages' https://european-union.europa.eu/principles-countries-history/languages_en accessed 9 July 2023. In addition, the European Economic Area includes Norway (with Norwegian as official language), Iceland (with Icelandic as official language) and Liechtenstein.

various activities in Dutch: translation of Binance's website to Dutch, App store description in Dutch, a Dutch language newsletter and social media such as Instagram and Telegram in Dutch.[177] Similarly, in the Coinbase Decision, the DNB called out having the website and app with Dutch translations as a way of targeting the Netherlands by Coinbase.[178] There is thus no doubt that the DNB views translation to Dutch as a clear act of solicitation. France's NCA for VASPs, the AMF, has not carried out similar enforcement activities (at least not publicly). However, in the AMF Q&As, the AMF notes that the drafting of one or more pages to French "*shall lead to the verification of whether one or other of the criteria provided for in Article 721-1-1* […] *is met in order to characterize the provision in France of the said digital asset service*".[179] As mentioned earlier, having French translation is viewed by the AMF as a 'trigger' that may initiate further investigation by the regulator.

What other NCAs opinion about local translation is still unclear, but both DNB's and the AMF's views can for now be used as a point of direction on how third-country CASPs should navigate this field under Article 61 MiCA. Translation is, nonetheless, a challenging item to be reviewed. First, it cannot be said to constitute 'marketing' in the traditional sense. It is not directed towards specific individuals, and it does not involve promotional communication (at least not in the way ESMA has framed it in the ESMA Q&As page 116). Additionally, many EU languages are not only spoken in the EU but are also official languages in other countries worldwide (for example French and Spanish). Consequently, third-country CASPs may argue that the translation of, for example French on the website is

[177] See the Binance Decision 38.
[178] See the Coinbase Decision section 43.
[179] See the AMF Q&As section 3.1, 8. By way of reminding, Article 721-1-1 of the AMF General Regulation lists various activities that may constitute "*promotional communication*", meaning that crypto-asset services are provided "*in France*" and thus require a national registration.

not directed specifically towards France based individuals, but to other countries where French is either widely spoken or an official language (for example Canada).

Binance did, however in the Binance Decision, try to argue that the Dutch langue on the website was Flemish (the Dutch language spoken in Flanders)[180], and thus not directed towards Dutch individuals in the Netherlands. The DNB did not accept this argument, which indicates that at least Dutch will be a challenging language to implement for third-country CASPs under Article 61 MiCA. It does, however, make certain sense that Dutch is seen as a way of targeting the Netherlands, as Dutch is not a widely spoken language globally. As for languages like Spanish and French, the answer is more open.

It may also be the case that *what* is translated is decisive for whether the third-country CASP is deemed acting in violation of Article 61 MiCA. Direct communication towards EU individuals in local languages should naturally be seen as a way of solicitation (for example emails or other targeted campaigns). Nevertheless, these activities will likely be seen as marketing activities in the EU regardless of being in English or another local language. The items that raise most doubts are the third-country CASP's webpages and apps, as these can both be seen as global platforms accessible from every corner of the world but also local platforms directed towards specific countries.

This said, today, companies have great technological flexibility to tailor the visibility of webpages, apps, and other communications in a very exact manner. Certain services can for instance be viewed by individuals in one country whereas individuals in another country will not even be able to access the webpage describing this specific service from their geographical location. Because of this, NCAs under MiCA can argue that third-country

[180] Angus Stevenson (ed), *Oxford Dictionary of English* (3rd ed. Oxford University Press 2010), 1671.

CASPs have the possibility to limit the translated pages to the countries where the language is an official language in the EU, for example exclude France based individuals to see the French translated webpage. The presumption for this is, nevertheless, that translation of webpages and apps is seen as a type of marketing activity prohibited by third-country CASPs.

### 6.6. Sponsorships of events and other brand marketing

Another way of catching client's and prospective client's attention is through brand marketing, among others defined as "*any event, activity, or method that exposes individuals or groups to a brand name, logo, theme line, or image that requires a payment for participation, but requires either the exclusion of competitors or the ownership of exclusive intellectual properties*".[181] The sponsorship of a crypto event or of a sports team would fall under this definition, and the question is whether this activity would be seen as targeting one or more EU countries that would require a MiCA authorisation.

While promotion, advertisement and solicitation are all about incentivising the purchase or use of a specific product or service, "[t]*here is no direct attempt to motivate the purchase of a product or service through financial incentives*" with brand marketing, yet it "*can immediately change measurable awareness and favourable attitudes*".[182] This view taken in isolation can indicate that brand marketing by a third-country CASP by, for example, having its logo on the t-shirts of a sports team does not constitute a violation of the reverse solicitation principle of Article 61 MiCA.

[181] Juska (n 51), 186.
[182] ibid.

Again, the ESMA Q&As do not provide a satisfactory answer to the question and no specific mentioning of brand marketing has been identified from NCAs under the AMLD5 VASP regime. It is, however, unlikely that all sorts of brand marketing in the EU will fall outside the radar of Article 61 MiCA and that third-country CASPs will enjoy unlimited access to create awareness and visibility of its brand without a MiCA authorisation. A nuanced approach by NCAs in this regard can, nonetheless, be reasonable:

In terms of events, firms can often choose to participate through sponsorship (they pay for the event organisers to include the logo and other brand material on the event collateral) or by mere participation in panels and discussions. If the event is country-specific, meaning that it is only held in one country, the sponsorship should likely fall outside the principle of reverse solicitation and thus be seen as marketing activities by the third-country CASP. If the event is a 'travelling event', meaning that it is not country-specific but held in different locations each time, the assessment should be more nuanced. On the other hand, if the third-country CASP's participation in the event is limited to only physical presence by for example sending representatives to speak on a panel, this should be viewed as within Article 61 MiCA – provided that the CASP does not promote its crypto-asset services or products in the discussions.

As for other kinds of brand marketing, the assessment becomes more complex. If the third-country CASP sponsors a sports team located outside the EU, will the visibility of the team's t-shirt in a sports event in an EU country be considered marketing of the CASP's crypto-asset services? Under a strict interpretation of Article 61 MiCA, the answer to the question would be yes: The distribution of the third-country CASP's brand to EU individuals, being on the sports arena or through media streaming, is a way of targeting these individuals and

a MiCA authorisation should be required. A more moderate interpretation, on the other hand, would be that only the possibility to view the third-country CASP's brand is not directed specifically towards EU individuals. Eventually, it may depend on the location, type of event and origin of the team, and it should be assessed on a case-by-case basis whether such activities should fall under the principle of reverse solicitation of Article 61 MiCA.

### 6.7. Social media

Most companies today, including CASPs, have presence on various social media platforms, such as Twitter, Instagram, LinkedIn, and Telegram, using these platforms to communicate information about the company and give updates about its products and services. The question herein is whether such activities would be considered marketing activities within the territory of one or more EU countries that would exclude the possibility to rely on Article 61 MiCA.

In the Binance Case, one of the detrimental marketing activities alleged by the DNB was social media activity on Instagram and Telegram in Dutch.[183] The decisive factor for the DNB viewing this as targeting the Dutch market seems though to be the Dutch language part of the activity. In addition, the DNB did not call out Binance's global social media activity, nor was this mentioned in the Coinbase Case – despite both CASPs having an extensive social media footprint worldwide.

As mentioned above in section 5.2, the AMF lists "*communications via* […] *social networks*" as a kind of promotional communication that would be equivalent to providing services in

[183] See the Binance Case section 38.

France.[184] The AMF does not specify whether this applies to the global social media platforms or social media activity specifically directed towards France, for example through a France-focused Instagram account. Considering however that the AMF has yet to react to global CASP's social media activity on the global social media accounts, it is likely that the guidelines apply to the latter. This also aligns with the DNB's view in both the Coinbase and Binance Decisions.

Taking the above into account, it can be argued that third-country CASP's activity on global social media platforms would not be considered marketing activities that would require a MiCA authorisation. The condition for this is, nonetheless, that the communication provided on these platforms do not target one or more EU countries. An interesting example in this regard is the German financial regulator ("**BaFIN**") allegedly investigating the decentralised CASP Uniswap for targeting the German market through its global twitter account. Without going into the details of the decentralised nature of the company and its services, Uniswap posted a tweet with the text "Good morning Germany!" and a link to download a crypto wallet for interested parties in Germany.[185] Uniswap does not have the required authorisation to provide its services actively in Germany, however, as many other NCAs described herein, "*BaFin assumes that German regulation applies when someone approaches the German market - regardless of where in the world someone is located. Addressing the German market is always the case when potential customers in Germany are approached*."[186] Where the investigation has landed is still unknown, but it is clear that the line between global social

[184] See the AMF Q&As section 3.2.
[185] John Stanley Hunter, 'Finanzaufsicht Bafin ermittelt gegen Kryptoprojekt Uniswap' (2023) Finance FWD https://financefwd.com/de/bafin-uniswap/ accessed 8 July 2023.
[186] Michael Jünemann, Johannes Wirtz and Timo Förster, 'BaFin Investigations against DeFi Wallet - What is regulated in Germany?' (2023) Lexology https://www.lexology.com/library/detail.aspx?g=17768d04-73e1-4ef9-93a0-99f0c360efcd accessed 8 July 2023.

media activity not directed towards one or more EU countries and the same activity being seen as the opposite is thin. Ultimately, it depends on the content of the social media activity, and third-country CASPs should monitor all content to be published on its social media platforms to ensure it operates within the framework of Article 61 MiCA.

### 6.8. Practical application of Article 61 MiCA – Conclusion

As evidenced, assessing whether an activity constitutes marketing within the meaning of Article 61 MiCA does not always lead to a straightforward answer. Some activities obviously fall outside the action room of Article 61 MiCA – certain types of emails, national affiliate and influencer programs, sponsorship of national events and country-specific social media, to mention some. With the existing guidelines from certain NCAs, third-country CASPs can already get a sense on where the line will be drawn for marketing activities in the EU under the reverse solicitation principle. Nonetheless, a great variety of activities are not that easily put into the marketing bucket prohibited under the principle of reverse solicitation. For these activities, third-country CASPs that wish to rely on reverse solicitation must patiently wait and see how ESMA and NCAs will navigate this concept under MiCA, or at least take a prudent approach to its activities in the EU while the interpretation sources for Article 61 is developed.

## 7. Conclusion

The introduction in section 1 outlines the main research question attempted answered in this thesis, namely what the room of action of is third-country CASPs relying on the principle of reverse solicitation in the EU, and where should the line be drawn. Section 2 – scope and

purpose of this thesis – adds further context to the main question. Until this point, all questions raised have been answered. Some have shown a clear and undisputable solution. Others have evidenced the need for further guidance from ESMA and NCAs.

As for the first question raised – whether sources for Article 42 MiFID II can be used to interpret Article 61 MiCA, the answer is a yes but with certain reservations. Nevertheless, with a new and developing legal framework such as MiCA, some directions from existing sources must be used. Otherwise, market participants will be left without guidance for a long time, and considerations like legal certainty, predictability and unified interpretation will not be sufficiently maintained.

Furthermore, the term "*own exclusive initiative*" has proven to encompass a great deal of sub-questions, among others, the scope and content of the *de facto* marketing ban it entails, what can be seen as a client "initiative" under the provision and the timing of the marketing ban. As for this section, there is little doubt that ESMA has work to be done to clarify outstanding doubts and guide third-country CASPs that wish to operate under Article 61 going forward. It has in particular been emphasised the importance for ESMA to take the different industries into account, and not presume that CASPs are the same service providers as those falling under MiFID II – only in a different industry. ESMA's upcoming guidance on when third-country CASPs are deemed to solicit clients in the Union should reflect this clearly.

Two other questions that have raised considerable doubt is whether third-country CASPs can market the same types of crypto-asset and crypto-asset services to existing clients and what MiCA has envisioned to be the exact content of other types of crypto-assets and crypto-asset services. For these questions, the ESMA Q&As and other existing sources have proven to

be uncomplete and unclear, showing again the need for tailored guidelines on Article 61 MiCA.

A part of the thesis that has given more satisfactory answers to the overarching question has been the analysis of NCAs and their view on the reverse solicitation principle under AMLD5's national VASP regimes. Although only three NCAs have been subject to the assessment, these are seen as 'strong' NCAs among the EU Member States that will undoubtfully lead the navigation of the new MiCA regulation. The NCAs discussed have already established a comprehensive framework with related guidance on the 'triggers' for the VASP registration. As evidenced, these triggers share many of the same characteristics as the principle of reverse solicitation. This helps understand how NCAs under MiCA will treat Article 61 in the future. Not surprisingly, the preliminary conclusion is that most NCAs will take a prudent approach to the provision and third-country CASPs cannot expect much leeway on the marketing front without a MiCA authorisation.

Ultimately, the aim for this thesis has been to concretise the principle of reverse solicitation and turn it into something tangible that can easily be used in practise. The practical assessment of Article 61 MiCA and potential marketing activities should be seen as complying with this goal. Whether ESMA will take the same practical approach in its guidelines is unknown. However, given the sparse guidelines on Article 42 MiFID II from ESMA, third-country CASPs should not expect a comprehensive, practical guide to Article 61. Nevertheless, as with new regulations in general, uncertainties of the interpretation and future application will always exist until the framework has been given time to adapt throughout all EU's Member States. MiCA will unlikely be an exemption to this rule. Hopefully, this thesis can help covering at least some of the existing doubts that exist.

The fact that ESMA is obliged to issue guidelines on Article 61 MiCA by 30 December 2024 gives some hope for legal certainty. It is, nonetheless, crucial that ESMA takes certain items into account: Most importantly, the difference in nature between CASPs and many MiFID II service providers should be a foundation stone when the guidelines are drafted. A reproduction of the ESMA Q&As would add little to the existing knowledge of the principle of reverse solicitation, and ESMA should take this chance to transform a vague concept into a clear and concrete principle that all involved parties can easily apply in practice. Secondly, ESMA should make sure that all NCAs under MiCA across the EU and EEA apply Article 61 MiCA in a unified, reasonable, and consistent manner. This is certainly easier said than done but indeed essential for the broader functioning of the regulation. Weak supervision by certain NCAs could lead to CASPs choosing to rely on Article 61 MiCA instead of obtaining the MiCA authorisation, hampering the purpose of the regulation, and putting investor protection at risk. On the other hand, a radical interpretation of Article 61 MiCA can potentially impede the reliance of a long-standing EU principle and ultimately restrain EU individuals their fundamental right to receive services – regardless from where the services are offered.

The EU regulator has made the decision to draft Article 61 MiCA almost identical to Article 42 MiFID II. This choice makes sense in the way that MiCA *in general* is a close replica of MiFID II, with certain exceptions of specific crypto-asset services and products. Nevertheless, the choice can also be viewed as an "easy solution" or even based on the view that most CASPs will have the same structure and way of providing services as many companies that fall under MiFID II. This is true for certain CASPs, but the ones in scope of this thesis – the "all-inclusive" crypto-exchanges that provide a variety of crypto-asset

services and products – are fundamentally different from what has been seen under MiFID II. Article 61 MiCA does not fit perfectly on these CASPs, neither do the existing guidelines from ESMA on Article 42 MiFID II.

It remains to be seen whether Article 61 MiCA will be used extensively in practice or if most CASPs will chose the harder path to obtain a MiCA authorisation. As mentioned earlier, with the MiCA authorisation come many advantages, but the road to authorisation seems – at least at this point – onerous. With the evolving market in crypto-assets, new companies, services, and products will likely appear frequently. Because of this, there is a high chance that Article 61 MiCA will have an important role in the future application of the regulation, emphasising the need for further clarification of the principle of reverse solicitation incorporated therein.

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