

MICAR ROUNDTABLE EXPERT SERIES

Zug

Initiated by Dr. Nina-Luisa Siedler and Mariana de la Roche W., the MiCAR Roundtable Expert Series aims to enhance legal clarity within the evolving regulatory framework of the EU Markets in Crypto-Assets Regulation (MiCAR). The series facilitates high-level expert discussions, leading to the creation of public reports that compile insights on MiCAR's implementation across Europe.

The sixth roundtable in this series was hosted at CV Labs in Zug, Switzerland, on October 2nd, 2024. We extend our sincere gratitude to Joachim Schwerin, Principal Economist at the European Commission, for delivering the keynote address. We also thank our partners Crystal Intelligence, Token Recovery, and CV Labs for their invaluable support in making this event a success.

The Zug roundtable brought together regulators, industry leaders, and legal experts to explore key challenges associated with MiCAR. The discussions focused on contributions from Peter Lohmann, who addressed reverse solicitation in a group context; Tina Rebecca Balzli, who explored cross-border crypto-asset custody for EU-based clients; and Reto Luthiger, who discussed managing the combination of reverse solicitation and offering regulations for crypto-asset issuers.

This report consolidates the insights from these discussions. It is important to note that the perspectives and conclusions presented herein represent the collective understanding of the topics discussed and do not reflect the individual positions of any participants nor the respective rapporteurs.



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1. Navigating the Reverse Solicitation Labyrinth in a Group Context: Is Reverse Solicitation Possible for Third-Country Firms with a MiCAR-Licensed Subsidiary in the EU?

Peter Lohmann, Head Legal Internationalisation at Sygnum Bank AG, explored the complexities surrounding the availability of reverse solicitation by third-country firms with a MiCAR-licensed subsidiary in the EU.

Under MiCAR, crypto-asset service providers (CASPs) are generally required to be established within the EU. Third-country crypto-asset service providers may only serve EU customers under the reverse solicitation exemption. Therefore, when both the third-country firm and its EU subsidiary operate under the same brand, there is a heightened risk that marketing activities by the EU subsidiary could be interpreted as indirect solicitation by the parent company, thus jeopardising compliance with MiCAR's strict requirements.

Participants agreed that while MiCAR's goal of regulating crypto-asset services within the EU should not be undermined, ESMA's interpretation of "means of solicitation" and "person soliciting" might

be overly broad. This could make it difficult for firms with EU subsidiaries to maintain compliance, especially in cases where the subsidiary's marketing is seen as soliciting on behalf of the parent company' additional services. They also noted that imposing geo-blocking to prevent EU residents from accessing third-country services may be easily circumvented using VPNs and would also unduly limit EU citizens' freedom of choice.

The idea of creating a separate brand identity for the EU subsidiary was also discussed but was deemed counterproductive. It could reduce the value of globally recognized brands and make the EU market less attractive to businesses. The participants agreed that solutions should allow third-country firms to maintain their brand identity while ensuring compliance with MiCAR.

To address these challenges, several practical solutions were proposed. Firstly, third-country firms should clearly separate their service offerings from those of their EU subsidiary. This could be achieved by creating distinct sections of the website for EU customers and using location-based IP mapping to direct users to the appropriate service (without blocking them from intentionally also visit

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the third-country section). Secondly, firms should ensure that their customer-facing employees are well-trained to understand the differences between the parent company's services and those offered by the EU subsidiary, avoiding any inadvertent promotion of the third-country firm's services. Finally, it is crucial to properly document how customers initiated contact to the third-country parent, as standard disclaimers may not suffice. Firms must maintain detailed records to prove that

EU customers approached them independently.

The roundtable participants agreed that while MiCAR's provisions on reverse solicitation should be upheld, a nuanced approach is needed to prevent unnecessary restrictions on EU citizens' rights to choose a third-country service provider. Such servicing groups should implement clear service separations, train their staff, and maintain robust documentation.

Primary Calls to Action on Reverse Solicitation for Third-Country Firms with MiCAR-Licensed EU Subsidiaries

The primary calls to action based on the discussions are:

- **Seek clarification of the Scope of Reverse Solicitation for Group Structures:** Reach out to supervisory authorities to clarify the precise scope of reverse solicitation to third-country firms with EU subsidiaries under MiCAR by preparing a detailed overview of the intended marketing activities by EU subsidiaries.
- **Allow for Brand Consistency While Ensuring Compliance:** The roundtable participants were of the opinion that third-country firms should be permitted to maintain their global brand identity when operating in the EU, provided that they implement distinct separations in service offerings. This could include specific rules on website structures (e.g., IP-based redirection) and clearly defined service sections to ensure transparency and compliance without forcing firms to operate under separate brands. However, geoblocking of EU customers from using third-country firm's services would infringe the EU customers' freedom of choice and should be avoided.

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- **Set Clear Documentation Standards for Reverse Solicitation:** Service providers should establish specific documentation requirements to prove that solely EU-based customers initiated the contact independently and seek clearance from the national competent supervisory authority. This could involve mandatory data collection processes or logging mechanisms to ensure firms can provide evidence of customer-initiated interactions during regulatory reviews.
- **Limit Geo-Blocking Requirements:** Instead of mandating geo-blocking, regulators should focus on compliance solutions that respect EU citizens' rights to access services outside the EU. This could involve designing systems that ensure transparency about which services are offered by the EU subsidiary versus those offered by the third-country firm, rather than outright restricting access.

2. Handling the Combination of Reverse Solicitation in Crypto-Asset Services with Offering Regulations for Crypto-Asset Issuers

Dr. Reto Luthiger presented a significant issue during the MiCAR Roundtable, focusing on the challenges faced by third-country crypto projects that both provide crypto-asset services and issue crypto-assets. These projects must navigate two distinct regulatory regimes under MiCAR: the stringent reverse solicitation rules for third-country crypto-asset service providers as third-country firms cannot obtain a CASP licence according to MiCAR. To the contrary, third-country token issuers may

compliantly issue crypto-assets from a third-country by observing the respective obligations, especially the white paper obligation. This dual compliance creates a unique challenge for such projects, which need to ensure they meet both sets of requirements without undermining the reverse solicitation exemption.

Under MiCAR, reverse solicitation allows third-country firms to provide crypto-asset services to EU customers only if solely the customer initiates the contact. This regime imposes strict limitations, such as prohibitions on promotional activities, and access restrictions to ensure that firms are not actively soliciting EU-based customers. At the same time, these projects are allowed to issue and market crypto-assets in compliance with

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MiCAR's whitepaper requirements. The central question posed in the discussion was if third-country crypto projects can compliantly market their crypto-asset in the EU without threatening the availability of the reverse solicitation exemption for their service offering.

The solution lies in recognizing that while the rules for providing crypto-asset services are very restrictive, it still must be possible to comply with both sets of regulations concurrently. The issuance of crypto-assets must be clearly distinguished from the service provision. Therefore, one recommendation was to maintain separate websites: one for crypto-asset services clearly not targeting the EU, and another freely marketed and accessible to EU/EEA residents for the issued crypto-assets and whitepapers. Social media activity should also be limited to promoting self-issued crypto-assets, avoiding any reference to crypto-asset services to prevent conflicts with the reverse solicitation rules. Sponsorships should similarly focus on the product (the self-issued crypto-assets), while avoiding any links between those assets and the additional crypto-asset services.

Throughout the discussion, participants emphasised that the mere issuance of a

crypto-asset by the project itself should not per se invalidate the reverse solicitation exemption for providing crypto-asset services. This aligns with the principle that reverse solicitation aims to prevent targeted service provision, not independent product issuance. Additionally, comparisons were made with MiFID II and the Prospectus Regulation, which regulate public offerings and service provision separately: Unlike these traditional financial markets, where these functions are split into different regulatory regimes, MiCAR covers both the issuance of crypto-assets and the provision of services within the same regulation. This complexity necessitates careful handling of crypto-asset and service interdependencies. A key distinction was made between crypto-assets that are closely tied to the service (e.g., tokens required for exchange access) and those that are independent (e.g., utility tokens unrelated to the service), which preserves the reverse solicitation exemption.

In conclusion, the roundtable agreed that maintaining a clear separation between crypto-asset issuance and service provision is crucial to comply with both regulatory regimes under MiCAR. The issuance of brand-related tokens, provided they are not intertwined with

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the provision of services, was considered permissible without threatening the leveraging of the reverse solicitation exemption.

Primary Calls to Action on Reverse Solicitation for Product Offerors Providing Crypto-Asset Services

The primary calls to action based on the discussions are:

- **Ensure Regulatory Separation:** Maintain a clear separation between the issuance of crypto-assets and the provision of crypto-asset services. This can be done through distinct marketing strategies, separate websites, and clear disclaimers.
- **Avoid Overlap in Promotion:** Any promotion for self-issued crypto-assets should avoid overlapping with the promotion of crypto-asset services to prevent undermining the reverse solicitation exemption.
- **Assess Token-Service Connection:** Before issuing a crypto-asset, carefully assess the relationship between the token and the service. If the asset is closely tied to the service, it could prevent the service provider from accepting EU customers under the reverse solicitation rule.
- **Use Separate Channels for Services:** Utilise distinct channels, including (even geo-blocked) websites, for crypto-asset services, while promoting crypto-asset issuance through general channels to ensure compliance with both regulatory regimes.

3. Third-Country Custody Infrastructure for use by MiCAR-Licensed EU Entities

Tina Rebecca Balzli, Partner, Attorney-at-Law and Head of Fintech & Blockchain at CMS Switzerland, presented the important practical question of whether third-country crypto-asset

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custody infrastructure and operations can be used on a cross-border basis for EU based clients.

Under MiCAR, crypto-asset service providers (CASPs) are generally required to be established in an EU member state in which they conduct at least part of their crypto-asset service business. Accordingly, a pure cross-border provision of crypto-asset services (including custody services) from Switzerland directly to EU-based clients is generally not possible under MiCAR, except under the general reverse solicitation exemption. Unlike in the area of offering crypto-assets, this applies regardless of the type of client being addressed (i.e. retail vs. qualified investors).

Against this background, the main question discussed during the roundtable was whether third-country service providers (such as in particular banks) can somehow nevertheless leverage their crypto-asset custody infrastructure and operations for their EU branches and take advantage of synergies.

Under certain general conditions, EU CASPs may outsource services or activities to third parties in third-countries, such as Switzerland.

However, MiCAR requires, among other things, that EU CASPs must ensure that the third parties involved cooperate with the supervisory authorities responsible for supervising the EU CASP and that such supervisory authorities have access to the information required for their supervisory activities at the third parties' premises at all times (cf. Art. 73 (1) lit. d MiCAR).

The participants in the roundtable agreed that third-countries should seek to enter into bilateral treaties with EU member states to allow for such access to information by the supervisory authorities responsible for supervising the EU CASP, including at the third parties' premises. This will eliminate one of the most important hurdles for EU CASPs to use specifically intra-group third-country services providers.

In addition to the general outsourcing conditions, further specific rules apply to the custody [and administration] of crypto-assets for clients. These stipulate that if EU CASPs, which provide custody [and administration] of crypto-assets on behalf of clients, use other CASPs, they may only use CASPs that are themselves MiCAR-authorised, i.e. CASPs authorised within the EU (cf. Art. 75 (9) MiCAR).

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On its face, this seems to exclude the use of custody infrastructure abroad by an EU CASP. Nevertheless, the roundtable participants rightly raised the question of how custody is defined under MiCAR.

Pursuant to the definition provided in MiCAR, 'providing custody [and administration] of crypto-assets on behalf of clients' means the safekeeping or controlling, on behalf of clients, of crypto-assets or of the means of access to such crypto-assets, where applicable in the form of private cryptographic keys (cf. Art. 3 (1) no. 17 MiCAR).

The participants therefore agreed that the term 'providing custody' in the sense of MiCAR should be construed to only cover circumstances where a service provider disposes of individual access to the crypto-assets by way of the private cryptographic keys. This rightly excludes pure custody infrastructure providers without individual access to the crypto-assets from the scope of application of the specific outsourcing rules applicable to custody services.

Under this interpretation, third-country service providers (such as in particular banks) can still leverage their crypto-asset custody infrastructure and operations for their EU branches and take advantage of

synergies as long as they do not have individual access to the crypto assets.

The roundtable participants further agreed that this interpretation also makes sense from a risk-based approach in that the main goal of the MiCAR provisions on crypto custody is to minimise the risk of loss of the client in the event of the custody provider's insolvency. This is due to the fact that unless there is individual access to the crypto-assets, they will not fall into the bankruptcy estate of the provider in most jurisdictions.

There was further a general agreement amongst the participants that in interpreting the rules of MiCAR, regulators should generally prevent unnecessary restrictions on third-country firms, be it in connection with reverse solicitation (see supra Section 1) or as service providers in conjunction with EU CASPs (here Section 2). This will prevent the EU from unnecessarily being secluded from technological developments and innovative competition from which EU based clients should be able to benefit also from an economic perspective. It further avoids that the EU branche can deliver its service at higher costs and thereby EU clients might choose the third-country service instead.

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Primary Calls to Action on Third-Country Custody Infrastructure for Use by MiCAR-Licensed EU Entities

- **Seek to enter into bilateral treaties with EU Member States:** Third-countries should, in their own interest, seek to enter into bilateral treaties with EU Member States in order to allow the supervisory authorities responsible for the oversight of the EU CASP to access information necessary for their oversight of outsourcing arrangements, including at the premises of third parties.
- **Precise interpretation of the term 'providing custody [and administration] of crypto assets on behalf of clients':** This term should only cover cases where the service provider effectively disposes of individual access to the crypto-assets by way of the private cryptographic keys. This will exclude pure custody infrastructure providers without individual access to the crypto-assets from the scope of application of the specific outsourcing rules applicable to custody services and allow them as service providers in this field.
- **Take a risk-based approach when interpreting MiCAR provisions:** The proposed interpretation of the term also makes sense from a risk-based approach in that the main goal of the MiCAR provisions on crypto custody is to minimise the risk of loss of the client in the event of the custody provider's insolvency. However, unless there is individual access to the crypto-assets, they will not fall into the bankruptcy estate of the respective provider in most jurisdictions.
- **Respect EU citizens' rights to access services outside the EU:** Any interpretation of the rules of MiCAR should generally prevent unnecessary restrictions on third-country firms, be it e.g. in connection with reverse solicitation or as service providers in conjunction with EU CASPs. This will prevent the EU from unnecessarily being secluded from technological developments and innovative competition from which EU based clients should be able to benefit also from an economic perspective.

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