MICAR ROUNDTABLE EXPERT SERIES

LONDON

The MiCAR Roundtable Expert Series had been initiated by thinkBLOCKtank in cooperation with Validvent as contribution to increasing legal certainty within the realm of the EU crypto markets. As a new regulatory framework, the application of MiCAR still raises numerous questions. The MiCAR Roundtable Series aims at facilitating expert discussions, resulting in public reports and specific calls to action. The roundtables will be held across Europe throughout the year 2024.

On March 25th, the first MiCAR Roundtable of this series commenced in London at the Austrian Trade Commission. Organised by thinkBLOCKtank, Validvent, ADVANTAGE AUSTRIA UK, the Austrian Professional Association for Financial Service Providers, and the Vienna Business Agency, in partnership with APCO, INATBA, and EUBOF, a diverse group of experts had been invited to discuss a selected number of issues when applying for MiCAR.

The London roundtable discussion included reports from MiCAR experts Elise Soucie on Sustainability Requirements, Dr. Max Bernt on the intricacies of EMTs and E-Money, and Joey Garcia on the challenges related to reverse solicitation in the context of application store fronts.

This report aims to consolidate 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 or the respective rapporteur.

1. Sustainability requirements

The discussion on sustainability requirements was led by Elise Soucie, Director of Global Policy & Regulatory Affairs at Global Digital Finance. The conversation focused on how jurisdictions implementing MiCA could integrate renewable reporting aligned with existing sustainability frameworks like the Corporate Sustainability Reporting Directive (CSRD), the Sustainable Finance Disclosure Regulation (SFDR), and the European Sustainability Reporting Standards E1 (ESRS E1). These frameworks emphasise the importance of including positive metrics in renewable reporting to offer a more comprehensive view of the ecosystem's impact on climate change—both positive and negative.

The initial proposed solution encouraged jurisdictions to adopt additional reporting mechanisms equivalent to those in ESRS E1 and CSRD, providing broader context and enabling the inclusion of both qualitative and quantitative data on sustainability risks and opportunities. This alignment with broader EU sustainability requirements was seen as crucial for fostering a holistic understanding of the ecosystem's impact.

Several critical issues were raised concerning the integration of sustainability metrics into regulatory frameworks. Concerns were voiced about potential fragmentation within MiCA legislation, particularly regarding the alignment of sustainability indicators with other existing EU frameworks. Participants noted that inconsistent implementation across member states could misrepresent the digital asset industry if only negative metrics are reported without the ability to showcase positive indicators.

Questions arose about who should report the metrics, debating whether it should be a combined effort between the issuer and the CASPs, or if CASPs should report independently. It was suggested that for accuracy, CASPs might report solely on the metrics they directly influence, but a cooperative approach including issuers and both Layer 1s and Layer 2s could offer a more holistic view of the ecosystem.

The impracticality of CASPs reporting on the sustainability metrics of entire public chains was also acknowledged, with consensus that this could lead to inaccurate and potentially redundant reporting. The discussion then shifted to the balance between mandatory and voluntary reporting, especially considering whether the inclusion of positive metrics should be mandatory. Since the Corporate Sustainability Reporting Directive (CSRD) usually applies to larger businesses, the group pondered if mandating these requirements for smaller entities would be disproportionate. However, the voluntary inclusion of such metrics was suggested as a potential solution.

Political challenges were also highlighted, particularly the difficulty in achieving national alignment with EU-wide frameworks like CSRD and ESRS E1, given their political nature. This led to a proposal that the integration of positive metrics might be more suitably addressed in an update to MiCA legislation.

Concerns about regulatory arbitrage were discussed, with suggestions that the European Securities and Markets Authority (ESMA) could provide

additional guidance or issue a Q&A to help standardize the inclusion of positive metrics and prevent inconsistencies across jurisdictions.

Finally, the roundtable identified a tension between flexibility in reporting and the risks of greenwashing. A proposed solution was to standardize quantitative reporting of positive metrics and allow more flexibility in qualitative reporting. It was noted that even the absence of negative metrics (indicating carbon neutrality) could be considered a positive outcome. To conclude, the participants agreed that a collaborative effort between the public and private sectors would be crucial to determine what data is already being collected and how it can be integrated effectively into the reporting framework, ensuring that the measures are practical and appropriate across the industry.

There was a consensus at the roundtable that aligning MiCA proportionately with ESRS E1 and CSRD would be beneficial, including provisions for reporting positive metrics. The participants unanimously agreed that the most immediate and effective step forward involves a collaborative discussion between the public and private sectors to determine which criteria and data are currently reported and how they can be incorporated into the MiCA framework. Such integration would enhance the accuracy, proportionality, and practicality of MiCA sustainability reporting across the industry.

Moreover, there was a general agreement that despite some challenges regarding data availability for CASPs, it would be most effective for CASPs to report metrics as a single entity. Additionally, a collaborative approach could be considered, developing a unified set of metrics for issuers and CASPs, as well as for Layer 1 and Layer 2 networks, to foster a more comprehensive view of the ecosystem.

Regarding the oversight of positive metrics inclusion, the group suggested that these metrics could be incorporated into a subsequent regulatory update or, alternatively, ESMA could issue further guidance or a Q&A to standardise the inclusion of these metrics across member states, thereby reducing the risk of regulatory arbitrage. The consensus supported standardising positive metrics for quantitative reporting, potentially making them mandatory, while allowing more flexibility for qualitative metrics to be voluntarily reported.

The topic discussion culminated in a strong recommendation for the public and private sectors to work together closely to define what data is currently being reported and how it can be effectively integrated into the MiCA framework. This collaborative approach would ensure that sustainability reporting under MiCA is practical and truly reflective of the industry's capabilities, facilitating a balanced and thorough regulatory framework.

Primary call to action for Sustainability requirements:

The primary call to action for regulators in the context of sustainability requirements within MiCA is to incorporate positive sustainability metrics into reporting frameworks. This involves:

- Developing and implementing additional reporting mechanisms that align with existing sustainability frameworks such as the CSRD and the Sustainable Finance Disclosure Regulation (SFDR).
- Regulators are urged to establish clear guidelines and standards that allow for the inclusion of both positive and negative environmental impacts, ensuring that the digital asset industry's contributions to sustainability are accurately represented.

2. EMTs and E-Money: Regulatory Treatment

The second topic of the Roundtable, led by Dr. Max Bern, Managing Director, Europe of Taxbit, provided a comprehensive exploration of the regulatory treatment of Electronic Money Tokens (EMTs) under MiCA, along with related directives such as the Electronic Money Directive 2 (EMD II), Payment Service Directive 2 (PSD II), and the forthcoming Payment Services Directive 3 (PSD3). The session emphasised the complex regulatory landscape, highlighting significant challenges and discussions regarding the current classification and regulatory approaches towards EMTs.

The discussion commenced with a critique of MiCA's Article 48(2), which controversially equates E-money tokens with electronic money, a simplification that could overlook the fundamental differences between traditional electronic money and EMTs. To frame this discussion, electronic money was defined as electronically stored monetary value issued on receipt of funds for payment transactions and accepted by entities other than the issuer, as per EMD II. In contrast, EMTs, as defined by MiCA, are digital representations of value referencing a single official currency, including a diverse range of digital assets from fully backed stablecoins to algorithmic tokens.

Key distinctions between EMTs and traditional electronic money emerged from the discussion, particularly noting that EMTs are regulated under MiCA which does not blanket apply the regulations of the E-Money Directive. EMTs may be issued by a broader range of entities, unlike traditional electronic money which is restricted to issuance by Electronic Money Institutes or credit institutions. Additionally, EMTs enable permissionless transfers, a stark contrast to the permissioned nature of traditional electronic money transfers, and are used both as payment methods and mediums of exchange, while traditional electronic money primarily serves payment purposes.

Discussions on the regulatory treatment of EMTs highlighted significant complexities under the upcoming Payment Services Directive 3 (PSD3). There was a proposal for defining EMTs under PSD3 as those (i) duly issued by an entity meeting Article 48(1) of MiCA and (ii) in compliance with Title IV of MiCA requirements. This definition would clarify that only entities performing

public offerings or seeking trading admissions—as EMIs or credit institutions—should issue EMTs.

Throughout the roundtable, participants expressed scepticism about regulators' openness to discussing such a sensitive topic. They questioned the feasibility of the proposed classifications under PSD3, particularly with the broad categorization of EMTs under MiCA and its implications for various crypto-assets. Concerns were raised about the adaptability of regulatory frameworks to diverse EMT mechanisms and the challenges of aligning them with PSD3 requirements.

The discussions culminated in several key recommendations aimed at refining the regulatory framework to effectively address the unique attributes of EMTs. These included enhancing regulatory flexibility to accommodate diverse EMT structures and developing specific criteria for EMT classification under PSD3 based on compliance with MiCA. Additionally, there was a strong push for international collaboration to standardise regulations across jurisdictions and periodic reviews of the regulatory frameworks to ensure they remain relevant and effective amid rapid technological advancements. These initiatives are designed to promote stability, transparency, and protection in the digital financial market while fostering an environment conducive to innovation.

All involved parties agreed that a close public-private collaboration would be crucial to ensure that regulators can better address the complexities associated with EMTs, ensuring that the regulatory environment supports innovation while safeguarding the financial system and protecting consumers. Also, a closer look should be taken at the AML-requirements that would result from the qualification of EMTs as electronic money.

Primary call to action for EMTs and E-Money: Regulatory Treatment:
For EMTs, the primary call to action for regulators focuses on the clarification and adaptation of regulatory frameworks to better accommodate the unique characteristics of EMTs under PSD3. This involves: • Defining specific regulatory criteria for EMTs under PSD3 that ensure all EMTs are issued by entities compliant with MiCA's stipulations, particularly focusing on those EMTs that adhere to stringent operational and collateralization standards as outlined in MiCA. • Encouraging the implementation of a dynamic regulatory sandbox where EMTs can be innovatively tested under regulatory oversight, allowing for real-time adaptation and risk management.

3. Solicitation

The third topic of the Roundtable, led by Joey Garcia, explored the evolving challenges of solicitation of business, focusing particularly on licensing triggers and the enduring 'characteristic performance' tests amidst modern digital landscapes. During the discussion, it was highlighted the rigorous updates to guidelines by platforms like Apple, Google, and other social media that host crypto-related services, necessitating stringent jurisdictional assessments based on the principle of reverse solicitation.

The tests for the Solicitation of Business, licensing triggers and legacy ‘characteristic performance’ tests have been in place for some time. Modern application store fronts like Apple have updated their guidelines which crypto related service providers are obliged to comply with. Exemptions or permissions for crypto related service providers to continue to be able to run and update their applications are subject to compliance with these guidelines. Various participants in the industry are required to go through jurisdictional assessments on the principle of reverse solicitation. For example, Apple has updated their processes to ensure compliance with the FinProm rules in the UK for the UK facing App Store.

ESMA’s Reverse Solicitation Guideline under Art 61(3) of MICA has significant implications for global crypto related service providers which intend to continue to offer services, and in particular new services through any form of application. How will international service providers that service users in the EU be able to continue to offer services through European App Stores on the basis of the extended definition around the concept of solicitation. There is no ability to geo-fence (a general ‘strong indicator’ against the principle of solicitation), and it will be unclear as to whether the interaction with an app store can be construed as on the initiative of the user, whether the app store will itself be constructed as the intermediary or ‘arranger’ of the introduction/transaction, or whether the wording, description, images etc accompanying the application will be the basis of an interpretation of this being a ‘solicitation’.

How will financial institutions which may ultimately also offer crypto related exposure be treated and will they be treated under existing (MiFID) rules or under these new standards? To address the challenges discussed, the following solutions were proposed: First, initiate consolidated and constructive interactions with major application storefronts, aiming for a clear interpretation that allows international crypto-related service providers to align with updated guidelines. Second, provide consolidated feedback on the ESMA consultation, focusing specifically on application interactions. Third, achieve a definitive determination on whether a properly described application should be considered as constituting solicitation under the guidelines. Lastly, clarify whether a financial institution, although not necessarily authorized under MiCA but licensed within the EU, is exempt from or subject to these guidelines.

The existing frameworks for determining the solicitation of financial services across borders have long been guided by criteria set by the European Commission, the Financial Conduct Authority (FCA), and the Bank of England, specifically concerning the banking sector. For

instance, the Commission's interpretative communication indicates that to locate where an activity is carried out, one must identify the "characteristic performance" of the service—the crucial supply for which payment is due. This is echoed in the EBA October 2019 report, which notes the challenges of pinpointing this characteristic performance in the era of digital and long-distance services. It suggests considering factors such as the physical location where the service's key performance occurs, whether the service is targeted at the host member state, the territorial scope within which the service is provided, and who initiated the service relationship. The complexity and lack of uniform EU regulations on whether online activities constitute cross-border services require that each case be assessed individually.

Moreover, under MiFID II, if a retail or professional client within the EU independently initiates a service from a third-country firm, the firm isn't required to seek authorization to operate. However, ESMA's January 2021 statement clarifies that solicitation or advertising by a third-country firm within the EEA does not qualify as client-initiated, affecting how services are legally classified and regulated. This underscores the nuanced nature of 'reverse solicitation' and the importance of accurately assessing solicitation activities to comply with regulatory expectations.

Under MiCA the position has been determined 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.”

Unlike traditional solicitation, where service providers actively seek clients, reverse solicitation occurs when the initiative to acquire a service stems solely from the client’s behalf. Such authorisation exemption is further clarified in Recital 75 of MiCA, where it states 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”. In brief terms, the reverse solicitation regime established by MiCA comes down to whether the service can be seen as provided within the European Union, as well as depend on the extent to which EU based clients are directly solicited by the Crypto-Asset Service Provider (CASP).

The phrase 'own exclusive initiative' is subject to ambiguous and uncertain interpretation since MiCA refrains from offering a definitive description or elucidation of its intended meaning. The only reference to date is identified in the ESMA consultation paper published in accordance with Article 61(3) on the draft guidelines on reverse solicitation under MiCA, stating the following: “The client’s own exclusive initiative should be construed narrowly. The assessment should be a factual one”. The term, therefore, may be interpreted in a way that the client must, exclusively and without any external influence, solely signify that they intend to receive a specific service from a third-country firm. This term aims to eliminate the mere possibility of CASPs in any way

attempting to persuade or influence to receive the crypto-asset service. Though, the terms “own exclusive initiative” and the remaining part of Article 61 MiCA signify additional uncertainties revolving around the scope and content of the ‘marketing prohibition’ under Article 61 MiCA.

Apple’s “App Store Review Guidelines” (the “Guidelines”) available on the Apple App Store were recently updated and explain, inter alia, that they are designed to help developers/programmers understand the guidelines required to proceed through Apple’s App review process quickly. In relation to exchanges of cryptocurrencies, sub-clause 1.3.5(iii) of the Guidelines provides that: “Apps may facilitate transactions or transmissions of cryptocurrency on an approved exchange, provided they are offered only in countries or regions where the app has appropriate licensing and permissions to provide a cryptocurrency exchange. Section 5 of the Guidelines states that apps must adhere to all legal requirements in any location where they are made available. It emphasises the developers' responsibility to ensure their apps comply with all applicable local laws, not just the guidelines provided.

In practice, Apple will request the licensing status as a CASP in any store front that it is offered. They will typically halt and restrict any updates in the application from running until this has been provided. They may however accept individual legal assessments in respect of each jurisdiction through which the Application is active. This is of course subject to on-going reviews, updates and challenges. The most concrete example of this has been the Financial Promotion Rules in the UK. Post the introduction of the FinProm rules Apple will typically request evidence of FCA authorisation or evidence of the approval of the Application and the App Store wording as a Financial Promotion. They may also request direct confirmation from the FCA.

In the case of the EU, ESMA has been clear that even the geo-blocking of a website may be persuasive but not determinative in the assessment of whether business is being solicited from the EU. It is likely that Apple, and subsequently other application providers like Google will begin to form positions around this in the near future. The question is whether the act of downloading and using an application should be deemed to, within itself, constitute a financial promotion, regardless of the language, image or description accompanying the application. On this matter, participants of the roundtable unanimously agreed that this should not be the case.

During the roundtable, participants also discussed the complexities surrounding the provision of 'new services' by Third Country CASPs. These providers are generally restricted from marketing new types of crypto assets or services to existing clients. A variety of interpretive questions need to be carefully assessed to clarify these rules. The participants highlighted several key factors:

Firstly, if a client has already initiated engagement with a crypto-related service provider, there is generally an understanding that the provider might offer additional services over time. The introduction of new services under these circumstances is often and should not be considered solicitation, especially if the client has agreed to receive updates or new offerings as part of their initial contract.

Conversely, if a service provider actively markets new services directly to clients—through methods like targeted ads within the app, push notifications highlighting the new service, or direct emails—this could be seen as solicitation. This is because such direct promotion might be perceived as an invitation or inducement to engage in a new investment activity.

Furthermore, general updates within an app about new features or services, which do not directly target the client to undertake new investment activities, are typically not and should not be regarded as solicitation. The core of this distinction depends on how the updates are presented and whether they appear as general information or as an explicit encouragement to engage in specific investment activities.

Lastly, the introduction of entirely new services or assets that significantly differ from the initial engagement could necessitate a cautious approach. The participants highlighted that according to ESMA guidelines, if a third-country firm offers types of crypto-assets or services not originally requested by the client, this could be construed as solicitation unless it fits within what is considered the same type of service originally requested by the client.

Primary calls to action for Solicitation:

The primary calls to action for regulators regarding the solicitation of business under MiCA involve concrete steps to address ambiguities and inconsistencies in how digital services are regulated across the EU. These actions aim to:

- Form a working group to engage with major application storefronts, such as Apple's App Store and Google Play, to clarify and standardise the interpretation of solicitation in digital contexts. This group would focus on drafting a position paper that clearly defines when the language in these storefronts may constitute financial promotion or solicitation, aiming to establish exemption standards across all major platforms.
- Develop and Implement a Financial Services Test by designing a framework to distinctly differentiate between the solicitation tests under MiFID II and those under MiCA. This involves the industry proactively engaging in dialogue with regulatory bodies and submitting formal responses to the ESMA consultation to harmonise the varied tests for solicitation across different financial services frameworks within the EU.

For an overview of the event please visit: https://www.youtube.com/watch?v=v-onhO5G10w