MICAR ROUNDTABLE EXPERT SERIES

Berlin 2.0

Initiated by Dr. Nina-Luisa Siedler and Mariana de la Roche W., the MiCAR Roundtable Expert Series aims to increase legal certainty within the realm of a new regulatory framework, the EU Markets in crypto-assets regulation MiCAR. The Roundtable Series facilitates expert discussions, resulting in public reports.

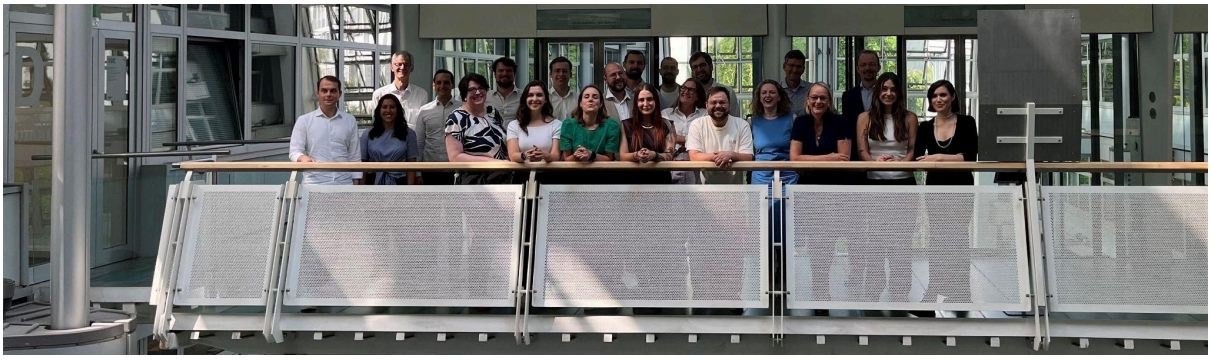
The fifth roundtable of this series was again hosted by Berlin Partner in August 2024. Franziska Giffey, Senator for Economic Affairs, Energy and Public Enterprises, stated:

"*Berlin is the city of startups and innovation. New ideas are developed and tried out here. The areas of Web3, crypto and fintech also play a crucial role on Berlin's path to becoming the innovation capital of Europe. With the House of Finance and Tech, Berlin now provides a central contact point for the fintech industry. Find more info on berlin.de/startups. We warmly welcome the experts and innovators to Berlin!*"

We thank Joachim Schwerin, Principal Economist at the European Commission, for his keynote, and Crystal Intelligence and Validvent for their ongoing support as well as the Blockchain Bundesverband (Bundesblock) and Web3 Foundation for their collaboration.

The roundtable focused on the contributions of Anja von Rosenstiel on AMM as public offer; Axel von Goldbeck on past communication as current offer and Nina-Luisa Siedler on the reverse solicitation exemption for offerors.

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 nor the respective rapporteur.



1. Automated Market Makers (AMMs) as a Public Offer?

Anja von Rosenstiel presented the challenges and complexities surrounding the regulation of AMM software and liquidity pools under MiCAR. AMMs are an innovative way and a crucial component of DeFi, enabling the exchange of digital assets through liquidity pools. This raises questions about whether providing liquidity and/or opening up a liquidity pool could be considered a public offer under MiCAR or fall under the regulatory remit of CASPs and therefore require authorization under MiCAR. The roundtable focused on the regulatory implications of AMMs and the potential risks associated with their operations.

The roundtable began by defining the structure and function of AMMs. Liquidity providers (LPs) contribute pairs of crypto assets to a liquidity pool open to market participants. The pool holds the contributed crypto assets in a custodial function for the liquidity provider but itself does not hold title to the liquidity provided. The providers receive liquidity provider (LP) tokens representing their share of the pool like a receipt. The purpose of LP tokens is to provide a mechanism for the distribution of accumulated trading fees on a pro-rata basis. LPs must cash these tokens in (burn them) in exchange for the return of the liquidity which they provided once they exit the pool.

AMMs enable users to trade digital assets they hold for any other asset held by the pool. Smart contracts running AMM software algorithmically determine the asset value based on the ratio of assets within the pool. One of the primary concerns was whether providing liquidity and communicating the availability of such liquidity pools to the public would constitute a public offer subject to MiCAR's regulatory framework.

The debate centred on whether LPs could be classified as "offerors" under MiCAR. "Offeror" means any person, undertaking or issuer, who offers crypto-assets to the public. "Offering to the public" requires a communication to persons, presenting sufficient information on the terms of the offer and the crypto-assets to be offered so as to enable prospective holders to decide whether to purchase those crypto-assets.

Drawing parallels with the Prospectus Regulation which contains basically the same definition of public offer, participants discussed whether the act of providing liquidity to and advertising or

informing the public about this liquidity pool could be construed as a public offer in this sense.

According to Recital 28 of MiCAR (mirroring Recital 14 of the Prospectus Regulation), the mere admission to trading or the publication of bid and offer prices should not, in and of itself, be regarded as such an offer. Thus, like admitting to trading, providing liquidity to a pool only anticipates the future investment opportunity and communicating the existence of a liquidity pool, including publishing mathematical formula for price determination, is not specific enough to constitute an offer pursuant to Recital 28.

Further, according to the definition the activity must aim at concluding a purchase agreement. The concept of a public offer generally requires sufficient information to enable an investment decision by the purchaser and therefore merely passively providing an investment opportunity is not enough. The invitation to make an offer to exchange crypto assets qualify as an offer to the public must be accompanied by the intent to conclude a transaction to sell their respective proprietary crypto assets. The consensus was that simply providing liquidity to a pool does not fulfil this requirement. Contributing to the pair of crypto assets (maker) does not constitute an invitation to anyone to exchange a specific crypto asset. It lacks the intent by the LP to conclude a specific token transaction and sell and transfer title in the LP's specific proprietary assets to any specific user of the pool. The LP rather wants to earn a proportion of the pool fees as passive income. In other words, providing liquidity to a pool is exposing all those assets in the pool to sale at the pool's current exchange rate determined by the respective smart contract. LPs are not necessarily actively involved in offering assets to the public. They do not contract with any buyer directly, neither do they receive any purchase price. This exposure does not in itself constitute a public offer under MiCAR.

Based on materials of German implementation legislation for the Prospectus Regulation, an offeror is the person responsible for the offer, meaning having full control over the public offer. The roundtable agreed that a liquidity provider cannot be said to have control over the offer of pooled crypto assets, if it means to be able to make a "disposition" of them. However, depending on the circumstances of the case at hand whoever creates a liquidity pool and provides the initial crypto assets for the token pair, sets

its initial price which later automatically adjusts depending on the pool's composition. If this is combined with public announcements or advertising, this initial control might justify the qualification as "offeror" under MiCAR. However, it might still remain out of scope of MiCAR if the respective smart contract has been fully decentralised.

Furthermore, participants explored whether LPs could be considered regulated crypto asset service providers ("CASPs") under MiCAR. Generally, to qualify as CASP, the service must be provided on a professional basis and within a contractual relationship with a client. Here a key distinction was made between AMMs and traditional market-making activities. While AMMs serve a similar liquidity function as traditional market makers, they may operate in a decentralised, algorithm-driven environment where pool participants do not interact directly with liquidity providers via order books but exchange crypto assets via liquidity pools run by smart contracts. Participants stressed that there is no client relationship created between LPs and users in such case. LPs do not actively set prices, execute transactions against their own proprietary capital or profit from the bid-ask spread of trades like traditional MMs. That said, dealing on one's own account is equivalent to the exchange between crypto assets according to MiCAR. By the letter of the law MiCAR does not contain any explicit provision to exempt proprietary trading from its overall scope and therefore does also not contain the reverse exemption for market-making (as in MiFID II). Draft technical standards however require trading platform providers to give information on AMMs they use as trading systems.

Moreover, the roundtable discussed the criteria for differentiating between "fully decentralised" and "partially decentralised" AMM trading systems using liquidity pools and mathematical pricing and valuation models for the automatic execution of individual transactions. This discussion revolved around several factors. Fully decentralised AMMs operate without any central authority controlling key functions, such as mathematical asset pricing and valuation and the execution of individual transactions, or governance of the smart contract operating the liquidity pool or the AMM protocol, while partially decentralised platforms may still rely on a central entity to operate a user interface to access and communicate with the AMM or for decisions like contract upgrades or

governance interventions. Additionally, in fully decentralised AMMs, liquidity providers retain ownership of their assets through a self-custody wallet mechanism. Governance structures also play a role, as fully decentralised AMM protocols typically involve community-based voting mechanisms, whereas partially decentralised ones may have more centralised decision-making or execution. These distinctions are critical for regulators in defining the level of oversight or authorisation required under MiCAR for liquidity pools of different types of AMM protocols.

Despite these conclusions, participants emphasised the need for further regulatory clarity regarding potential risks associated with AMM activities. There should be pre-trade transparency for AMMs, regarding risks providing information for users, including about the risk of impermanent loss (when the value of assets in the liquidity pool is less than outside on the market) or price slippage / impact (lower price after execution of the trade). Whereas the risk of pump-and-dump schemes would be covered by the market abuse provisions of MiCAR, the risk of money laundering was identified as a potential key area for regulatory oversight. This might lead to the requirement to assess the use of AMMs in light of the AML and counter-terrorist financing regulations, particularly when AMM activities are tied to the issuance of virtual assets through opening up a liquidity pool.

In conclusion, participants largely agreed that AMMs currently fall outside the specific regulatory scope of MiCAR as public offerings. The same applies to crypto-asset services if provided in a fully decentralised manner. However, there is an obvious need to clarify the conditions under which participating in an AMM might actually be regulated under MiCAR. It was recommended to further assess whether certain risks inherent in AMM activities require regulatory intervention.

Primary Call to Action for AMMs as a Public Offer:

The primary calls to action based on the discussion on AMMs as a public offer are:

- **Clarify the Definition of Public Offers in DeFi Context:** Regulators should establish clear criteria whether initiating an AMM could be classified as public offers under MiCAR. This would also involve defining if the mere deployment of an AMM on a public blockchain or only the advertisement of a liquidity pool crosses the line to constitute a public offer.

- **Set Parameters for Dealing with Market Manipulation in DeFi:** CASPs should create standards to detect and prevent price manipulation schemes using AMMs. This includes monitoring transaction patterns that indicate potential abuse.

- **Develop Mechanisms for Disclosing Risks to Liquidity Providers:** CASPs providing access to AMMs for their customers should disclose specific risks, such as impermanent loss, price slippage market volatility and liquidity risks during stress events, to liquidity providers and users of liquidity pools in a standardised manner. This could involve setting technical standards for pre-trade transparency and specific risk disclosures for trading systems in the context of decentralised exchanges.

- **Differentiate Between Fully Decentralised and Partially Decentralised Market Makers**: Regulators should define criteria for what constitutes a "fully decentralised" AMM, which operates without central authority over key functions like liquidity pool, mathematical pricing, or governance of its underlying protocol, and would thus be exempt from certain regulatory obligations. In contrast, "partially decentralised" activity, which may rely on central entities to provide user interfaces for AMMs, as predetermined only counterparty to trades, or for decisions such as contract upgrades or governance of underlying protocols.

2. Past Communication as Public Offer

The topic of past communication as a public offer, presented by Axel von Goldbeck, explored the challenges concerning legacy public offers under MiCAR and the obligations they may trigger. As many issuers and supporting vehicles may have publicly offered tokens in the past and still have tokens available for sale, the question arises: Do these entities need to review past content on their websites, social media, or other communication channels accessible from within the EU to ensure they do not publicly offer crypto-assets in 2025 which fall under MiCAR. The discussion focused on understanding the regulatory implications of such communications and how offerors can mitigate potential risks.

Participants were reminded that under MiCAR, a public offer requires communication in any form—oral, written, electronic, or otherwise—and that past communication, if still accessible, could be considered current communication unless actively removed. Many issuers might not realise that content still publicly available could trigger MiCAR compliance obligations, even if the initial offer occurred before MiCAR was proposed.

Article 143 of MiCAR states that white paper obligations and other requirements will apply to any public offering of non-ART and non-EMT tokens that are not terminated before December 30, 2024. This means that any legacy public offer extending beyond this date, whether by intent or lack of an explicit termination period, may fall under MiCAR's regulatory scope.

One of the primary issues discussed was the ambiguity around whether public offers made years ago—before MiCAR was enacted—would need to comply with the new obligations. Participants debated whether this retroactive application could violate the principle of legal certainty, as offerors could not have anticipated these requirements at the time of the offering. Despite these concerns, it was acknowledged that this protection would require legislative intervention at the EU level.

To address this challenge, the roundtable discussed practical solutions that offerors could take in the absence of legislative changes. One suggestion was for offerors to proactively publish statements clarifying that any past communication regarding their token offerings, whether on websites, social media, or other platforms, no longer holds binding effect

as of December 31st, 2024. This self-regulation approach would provide clarity and reduce the risk of being retroactively held accountable for past communications while still selling the respective crypto-asset in 2025. The roundtable also proposed the creation of a standardised template for such declarations, which could be shared through industry platforms and community channels.

Moreover, participants recommended that a request be made to ESMA to include guidance on past communications in its forthcoming FAQ on MiCAR. This guidance would help clarify the extent to which legacy offers must comply with MiCAR's white paper and disclosure requirements.

Primary calls to Past Communication as Public Offer:

The primary calls to action for regulators and authorities, based on the discussion of past communication as a public offer, are:

- **Clarify the Retroactive Application of MiCAR to Past Offers:** Regulators should provide clear guidance on whether and how MiCAR applies to public offerings made before its enactment, particularly regarding the legal certainty of issuers who could not have anticipated these obligations at the time of their offering.
- **Request ESMA to Issue Specific Guidance on Legacy Offers:** A formal request will be made to ESMA to address the treatment of past offers in its FAQ, particularly focusing on whether offerors need to review and remove historical content from accessible channels to avoid non-compliance with MiCAR.
- **Encourage Proactive Declarations by Offerors:** Authorities might consider encouraging offerors to publish statements regarding past communications, clarifying that such communications no longer hold binding effect after December 30, 2024. A standardised template for such declarations should be developed and made available to the industry.

The roundtable suggested to further discuss the following template:	
English	**Deutsch**
Please note: This text is for informational purposes only and does not constitute legal advice. It was drafted in accordance with German law and only takes into account the relevant national regulations. Neither the author nor any other individuals or companies assume liability for the completeness, accuracy, or timeliness of the information provided. It is strongly recommended to seek independent legal advice in all matters related to this information.	***Bitte beachten: Dieser Text dient ausschließlich zu Informationszwecken und stellt keine Rechtsberatung dar. Er wurde unter Anwendung des deutschen Rechts verfasst und berücksichtigt ausschließlich die entsprechenden nationalen Bestimmungen. Weder der Verfasser noch andere Personen oder Unternehmen übernehmen eine Haftung für die Vollständigkeit, Richtigkeit oder Aktualität der bereitgestellten Informationen. Es wird ausdrücklich empfohlen, sich in sämtlichen mit diesen Informationen zusammenhängenden Angelegenheiten eigenständig rechtlichen Rat einzuholen.***
Important Notification with Regard to the xyz Token Offering XYZ Ltd. (the "Company") has been offering xyz-Tokens (the "Token Offering") since [Date of initial public offering]. It considers the Token Offering exempt from any white paper disclosure obligations applicable from December 30, 2024, under Art. 4 MiCAR.	Wichtige Mitteilung bezüglich des xyz-Token-Angebots XYZ Ltd. (das „Unternehmen") bietet seit dem [Datum des ersten öffentlichen Angebots] xyz-Token (das „Token-Angebot") an. Es betrachtet das Token-Angebot als von jeglichen Offenlegungspflichten eines Whitepapers nach Art. 4 MiCAR ab dem 30. Dezember 2024 befreit. Bezüglich des Token-Angebots wird jegliche

With regard to the Token Offering, any communication in any form (written or oral, on social media platforms, by email, [in the White Paper if applicable] or through any other channel) by the Company and/or its executives, staff, advisors and/or other service provided instructed to advise on and/or assist in the Token Offering regarding the Company's intention to apply for a listing of xyz-Tokens is being revoked by the date of this notification. [Place, Date] XYZ-Company	Kommunikation in jeder Form (schriftlich oder mündlich, auf Social-Media-Plattformen, per E-Mail, [im Whitepaper, falls zutreffend] oder über andere Kanäle) durch das Unternehmen und/oder seine Führungskräfte, Mitarbeiter, Berater und/oder andere beauftragte Dienstleister, die mit der Beratung und/oder Unterstützung beim Token-Angebot beauftragt sind, hinsichtlich der Absicht des Unternehmens, einen Antrag auf Listung der xyz-Token zu stellen, mit Datum dieser Mitteilung widerrufen. [Ort, Datum] XYZ-Unternehmen

3. Reverse Solicitation for Crypto-Asset Offerors

The topic of reverse solicitation for crypto-asset offerors, presented by Dr. Nina-Luisa Siedler, addressed a critical issue regarding the absence of an explicit reverse solicitation exemption for crypto-asset issuers and offerors under MiCAR. While MiCAR contains reverse solicitation rules for CASPs, it lacks such provisions for crypto-asset offerors, leading to concerns about whether this gap could create regulatory discrepancies. The discussion explored whether MiCAR's silence on reverse solicitation for offerors was intentional or is simply based on the historically evolved financial regulation, and what implications this has for the industry.

The problem starts with the fact that reverse solicitation is a concept well understood under the Prospectus Regulation and MiFID II. Under the Prospectus Regulation, a public offer requires the offeror to actively reach out to the public and induce investors to make an investment decision. If an investor

takes the initiative without any inducement or encouragement from the offeror, the offer is not considered "public," and therefore, the usual regulatory requirements do not apply.

MiCAR contains similar reverse solicitation rules for service providers under Article 61, where third-country CASPs do not need authorization if a client initiates the provision of services independently. However, this exemption does not explicitly extend to crypto-asset offerors, raising questions about how MiCAR should be interpreted in this regard.

The roundtable began by analysing the historical and legal background of MiCAR's provisions on reverse solicitation. Participants noted that MiCAR's structure appears to have been borrowed from both the Prospectus Regulation and MiFID II. The Prospectus Regulation, which serves as the foundation for MiCAR's rules on crypto-asset offerings, does not include explicit reverse solicitation provisions. Conversely, MiFID II, which inspired MiCAR's rules for crypto-asset service providers, does contain such a rule for service provision. Therefore, it is likely that the absence of a reverse solicitation rule for crypto-asset offerors is due to the historical roots of the legislation, rather than an intentional differentiation by MiCAR.

A key issue discussed was whether the absence of explicit reverse solicitation provisions for offerors under MiCAR implies a stricter regulatory regime for public offerings of crypto-assets compared to traditional securities. The consensus was that while MiCAR does not explicitly mention reverse solicitation for public offerings, the established legal interpretation of the Prospectus Regulation should apply. This means that, in practice, if an investor independently initiates a crypto-asset purchase without any inducement from the offeror, this should not be considered a public offer subject to MiCAR's regulatory obligations.

The discussion also covered the potential risks associated with allowing reverse solicitation for crypto-asset offerors. While extending the reverse solicitation rule to offerors might provide clarity and flexibility, participants expressed concerns that this could open a loophole for issuers to claim reverse solicitation when, in fact, they had actively promoted the offering through indirect means such as social media campaigns or influencer partnerships. Striking a balance between regulatory oversight and flexibility for

offerors is essential to avoid potential abuses.

Primary calls for Reverse Solicitation for Crypto-Asset Offerors
The primary calls to action for Reverse Solicitation for Crypto-Asset Offerors are: • **Extend Reverse Solicitation to Crypto-Asset Offerors:** Regulators should clarify that the established legal principle under the Prospectus Regulation—that reverse solicitation is not considered a public offer—applies to crypto-asset offerors under MiCAR. This would provide consistency between the treatment of traditional securities and crypto-assets, ensuring that issuers are not subject to unnecessary regulatory burdens when investors independently initiate a purchase. • **Define Clear Parameters for Reverse Solicitation:** Authorities should establish clear guidelines outlining the conditions under which reverse solicitation applies to crypto-asset offers. This should include clear distinctions between investor-initiated transactions and situations where offerors indirectly induce investments through marketing or other promotional activities. • **Prevent Misuse of Reverse Solicitation Claims:** To avoid abuse of reverse solicitation provisions, regulators should monitor for situations where offerors may claim reverse solicitation while engaging in indirect marketing. Clear enforcement mechanisms should be put in place to ensure that reverse solicitation is not used as a means to circumvent MiCAR's public offering requirements and to protect the legitimate market for crypto-asset offerings.

We thank all participants of the Berlin roundtable for contributing to the discussion:

Anja von Rosenstiel (FINLAW), Anna-Maria Irgang (Validvent), Axel von Goldbeck (Möhrle Happ Luther), Celina Mousa (research assistant with siedler legal), Dr. Ulrich Gallersdörfer (Carbon Credit Rating Institute), Emma Chenning, Gustav Hemmelmayer (Botlabs), Izabela Kuprasz (Web3 Foundation), Jakob Zwiers (Berlin Partner), Jannik Piepenburg (tBt), Joachim Schwerin (European Commission), Johannes Ruppel (CZR / carbonify), Joanna Rindell (World of Women), Laura Kajtazi (Validvent), Mariana de la Roche (INATBA), Martin Sommerfeldt, Maximilian Göth (DLT Finance), Michal Truszczynski (Bitpanda), Nina-Luisa Siedler (siedler legal), Tim Adrelan (Osborn Clarke), Tim Zölitz (Crypto Risk Metrics), and Verena Ritter-Döring (Taylor Wessing).