Editorial

Marielle **Cohen-Branche**
Ombudsman of the Autorité des Marchés Financiers (AMF)
Former adviser to the Court de Cassation

The double trap of reverse solicitation BJB200w3

Who has heard of "reverse solicitation"? A few specialists, no doubt, but not that many. Yet it is a rule that warrants further explanation because it can be a trap for both retail investors, who are not familiar with it, and for market professionals, who are not using it wisely.

For investors: European financial law has its own definitions that may surprise people. For example, as a retail investor resident in France, if you wanted to know more about the reliability of the market professional from whom you are planning to buy bitcoins, you might be wondering whether the platform you are going to use is registered with the AMF. If you have an inquiring mind, you will know that failure to legally register a platform that provides such a service in France is punishable by two years' imprisonment and a €30,000 fine (French Monetary and Financial Code, Article L. 572-23). However, if it was you who took the initiative to use this platform, according to the definition of "provision of a service" in France (AMF General Regulation, Article 721-1-1), it is not enough for the platform to have sold you cryptoassets and for you to have bought them. The platform must also have solicited you actively. If you accessed the platform's online store of your own accord, without the platform having actively solicited you, you would then be in a situation of reverse solicitation and as such have no particular legal protection. In this case, the platform is entitled to consider that it was not required to be registered (Monetary and Financial Code, Article L. 54-10-2): it only engaged in passive marketing and is not considered to have provided such a service in France. It does not therefore incur any sanctions under French regulations and, since the platform is not registered, any dispute with an investor will be outside the AMF Ombudsman's jurisdiction. When the time comes, it will be necessary to determine whether the conditions for active solicitation have been met using the non-exhaustive list of indicators set out in Article 721-1-1 of the AMF GR (the existence of a French-language website alone is not sufficient to determine this). *For market professionals:* Market professionals – for example a UK platform after Brexit – are wrong if they believe that putting a standard clause into their agreements, stating that the client acknowledges that they sought this product entirely on their own initiative, is sufficient to escape EU regulation. In a public statement on 13 January 2021, ESMA stated that such standard clauses have no legal effect and amount to a circumvention of MiFID II rules. The AMF Enforcement Committee also took a firm stance on 30 April 2021 against a financial investment adviser's practices that it considered to be fraudulent "reverse solicitation". The FIA in question also believed it could use standard clauses to allow its clients to acquire products that were prohibited from being marketed in France, when the sole purpose of these clauses was to "artificially maintain the belief that these requests came from clients when in fact they were the result of the FIA's advice" (see BJB July 2021, no. BJB200c8, note by M Storck). The number of platforms registered in France is increasing steadily, but some very large foreign platforms have still not been registered. It is fortunate that the forthcoming European MiCA regulation (see BJB May 2021, no. BJB200a8, note by T Granier) provides that, in addition to registration, which essentially covers only verification of compliance with anti-money laundering regulations, authorisation, which is truly a comprehensive verification, will become mandatory rather than optional. However, the concept of service provision will in principle remain the same.