Technical Standards on Reverse Solicitation

Adan's response

❖ Introduction

During the implementation phase of MiCA - from entry into force until the date of full application in December 2024 - ESMA, together with the National Competent Authorities ("NCAs") of the Member States, is preparing the technical standards ("RTS") and guidelines that specify how the new rules will apply to issuers, offerors, and service providers of crypto-assets.

On 29 February, the European Market and Financial Authority ("ESMA") published two drafted guidelines on the *reverse solicitation* and the *qualification of crypto-assets as financial instruments* under MiCA.

The goal of these guidelines is to provide structured yet flexible conditions and criteria to determine whether a crypto-asset can be classified as a financial instrument.

Adan federates and represents 200 professionals – new players and established companies – who develop innovation and use cases for Web 3 in all areas of the economy. By removing the obstacles to their growth and competitiveness, Adan works towards the emergence and influence of French and European champions serving our strategic autonomy. Adan promotes an appropriate, proportionate and catalyzing framework for innovation, synergies between newcomers and incumbents, and a better understanding of new blockchain technologies and crypto-assets, their various use cases and their opportunities.

❖ Executive summary

Adan is thankful to the European Securities and Markets Authority for allowing the expression of industry players thanks to this consultation on this draft Regulatory Technical Standard of the Markets in Crypto Assets ("MiCA") regulation, particularly concerning the Reverse Solicitation issue. The Association's objectives are to help create the most favorable environment in the EU for the development of a crypto-asset industry competitive with other regions of the world.

Globally, Adan acknowledges the European Securities and Markets Authority's diligent efforts to protect investors within the EU and prevent the circumvention of the MiCA regulation, demonstrating a commitment to creating a safe and transparent market environment.

In a nutshell, the Association identified several critical issues that could impact the development of crypto-asset markets:

- **On the broad interpretation of "solicitation" and the need for restrictive definition of exemptions:** Adan argues that while ESMA's current interpretation of "*solicitation*" is considered too broad, **it is fundamental that the reverse solicitation exemption remains strictly defined**. Indeed, the definition of "*solicitation*" must therefore not be too broad or too vague. This approach is intended to prevent foreign players from easily circumventing MiCA regulations, thereby ensuring adequate investor protection and the integrity of the European market.

- **On the insufficient coercive measures and additional recommendations:** Adan concludes that the coercive measures currently proposed to prevent circumvention of the rules are not sufficiently robust. The Association therefore proposes additional recommendations to strengthen these measures, including the application of "name and shame" principles, the use of geoblocking for non-compliant players, and the facilitation of reporting by users through specific mechanisms set up by national authorities.

The Association remains entirely at ESMA's disposal for any further information it may require, whether on the points addressed in the present consultation or on the forthcoming reflections that will lead to a new consultation in the near future.

❖ Adan's answer to ESMA's questions

Q1. Do you agree with the approach chosen by ESMA? Do you see any potential loophole that could be exploited by third-country firms to circumvent the MiCA authorisation requirements?

Adan recognises and welcomes ESMA's efforts to provide clarifications to National Competent Authorities ("NCAs") and market participants, including third country firms, on the limited situations where the offer or provision of crypto-asset services to clients established or located in the EU would be considered to be initiated at the exclusive initiative of the client concerned. The various criteria identified by ESMA appear to embrace a broad interpretation of the concept of "*solicitation*," consistent with the approach taken by the AMF in its position 2020-07 (§3.4). In particular, Adan appreciates the fact that ESMA has followed the principles of MiFID II in this area, while including certain additional measures that take account of the lessons learned in the application of reverse solicitation under MiFID II. The Association is particularly referring here to the case of post-Brexit England, where some UK investments companies have taken advantage of the situation to circumvent regulatory requirements by using the reverse solicitation exemption in a controversial way. In parallel with MiFID's provisions, it would be appropriate to carefully examine the contractual clauses potentially used by players located outside the EU to circumvent MiCA's regulatory obligations. By way of example, ESMA has already pointed out, in a public statement dated 13 January 2021, that some of these clauses, frequently used post-Brexit as explained above, have no legal force and represent a means of circumventing MiFID rules. Furthermore, particular attention should be paid to the notion of "advice" in relation

to reverse solicitation. This issue has already been raised by the AMF with regard to financial investment advisers, with the aim of preventing regulatory circumvention.In addition, this is the first time that it has been recognised at European level that all forms of "*online communication*" (including social media platforms for example) are included in the scope. This shows that ESMA is, with a few reservations, in line with market practices.

In this respect, Adan fully understands that the proposed rules are stricter than those envisaged under MiFID II framework.

Despite ESMA's positive efforts, Adan respectfully disagrees with the approach taken in the draft guidelines. The draft guidelines, particularly concerning the definition and detection of "*solicitation*", may be overly restrictive and potentially limit the flexibility needed in the emerging crypto-asset markets. In addition, Adan believes that certain points could benefit from further clarification or a degree of flexibility to better accommodate the nuances of the market.

Below are Adan's comments on each Guidelines:

1. **On the means of solicitation (Guideline 1)**

- The term "*solicitation*" is deemed a very wide possible way and principally from advertising practices, meaning all online advertising practices that reach EU users will be deemed as offering in the EU. It includes banner advertisements, sponsorship deals, and solicitation "*by any kind of affiliates"*. A risky example illustrating this broad interpretation is for example when a company posts a "tweet" (from the platform formerly known as Twitter, now "X") on its general account about a new service or product. Even if the company does not specifically target EU users, this could be seen as "solicitation" under the new guidelines. This occurs because online content, even if not intentionally aimed at the EU market, can reach EU users and thus be considered as solicitation.

Adan proposes that ESMA reconsiders the application of these terms to allow for an interpretation that better reflects the realities of online interactions. This reconsideration should take into account the current market practices, particularly in the crypto-asset ecosystem, where much of the communication occurs through social media platforms. Adan suggests that clearer guidelines and practical examples be provided to help businesses understand what constitutes solicitation and what does not.

To make these recommendations more concrete, Adan proposes some specific actions that ESMA could undertake to provide greater clarity and flexibility:

  - Define specific criteria to determine if an action is solicitation. ESMA could provide a list of behaviors that are considered online solicitation to help

businesses avoid unintentional violations. For example, promoting crypto-asset products on social networks by European users;

- Provide examples of acceptable cases of public and online communication. This could include scenarios where businesses can interact with the public without violating reverse solicitation rules. For instance, awareness campaigns that do not specifically target European customers or interactions on platforms not aimed at the European market;

- Offer guidelines for evaluating the content of communications. ESMA could develop other recommendations in its draft guidelines on how to evaluate business communications to determine if they constitute online solicitation. This could include text or image analysis to detect elements indicating solicitation.

- **In addition to the various criteria proposed by ESMA to define the term "*solicitation*," Adan suggest adding the following practices, which are observed in the sector:**

  - Renting an office/space in a Member State of the European Union;

  - The presence of employees or contractors with a commercial profile in a Member State of the EU.

  Foreign service providers may rent or lease offices or spaces in an EU Member State without necessarily establishing a branch/headquarters within the European territory. These offices may be used to accommodate sales personnel, meet with partners, organize training sessions, etc. In our view, a physical representation of the service provider in the EU territory and/or the presence of personnel with a commercial profile demonstrate an intention to develop commercial activities within the EU and are highly likely to serve as an anchor point for soliciting clientele located within the EU.

- On the inclusion in the scope of *"invitations to events"*, Adan highlights that this industry is characterized by frequent international conferences and events that are critical for networking, education, and industry advancement. Prohibiting invitations to such events under the solicitation rule could isolate EU stakeholders from important developments and discussions that occur globally.

Examples:

- **Consensus:** organized by CoinDesk, is one of the largest and most influential conferences in the field of blockchain and cryptocurrencies. It brings together players from various sectors to discuss industry trends, innovations and challenges.

- **Devcon**: Organized by the Ethereum Foundation, Devcon serves as the main platform for Ethereum developers, offering technical sessions, workshops and discussions to foster collaboration and innovation.
- **Blockchain Expo:** this global exhibition has editions in Europe, North America, and online. It aims to discuss the latest innovations in the blockchain and Internet of Things sectors, with talks from thought leaders and industry experts.
- **Token2049**: held in London and Singapore, this conference brings together entrepreneurs, investors, developers, and thinkers in the blockchain sector to examine current and future developments in the token space.

These events are typically not designed to directly solicit new clients but rather to share knowledge and foster collaborations across the industry.

Adan recommends that ESMA should reconsider the inclusion of event invitations within the scope of solicitation by deleting "invitations to events" from the text. If ESMA does not agree with this approach, Adan believes that a distinction should at least be made between generic invitations to participate in global industry events and targeted attempts to attract EU clients.

Such distinction would ensure that **(i)** global events should not be considered solicitation unless specifically aimed at attracting EU clients; and **(ii)** EU stakeholders are not cut off from the global dialogue and developments that are crucial for staying at the forefront of technological and financial advancements.

- Then, according to the draft guidelines, a website using an "*official language of the Union*" could make it possible to claim that a third-party company is soliciting clients located in the Union. In other words, the use of *"EU language"* will be used for detecting a solicitation in the EU, as a "*strong indication*".

  However, Adan considers that this approach is not relevant.

  Indeed, Adan emphasizes that the languages used within the European Union are not exclusive to that region, and also that many projects or entities choose English directly due to its international reach, without necessarily the intention of targeting EU markets. Moreover, the choice of target language often depends on the specific geographical and thematic context. For instance, French is commonly used in Francophone Africa and in Romandy Switzerland, while Italian and German are predominant in regions such as Roman Switzerland and Alemannic Switzerland, respectively. Thus, ESMA's proposal may not adequately reflect the complexity of language use in a globalized context.

Therefore, Adan recommends that this criterion to detect a solicitation in the EU be removed, or at least, recognize that this criterion should never be a criterion taken in itself, but is part of a "*set of indicators*" to detect a solicitation in the EU.

- Then, certain definitions also need to be clarified. In particular the difference between "solicitation" and "communication on the part of the company" concerned by the practice. The boundary between these concepts can sometimes be very thin, and the ESMA should consider them very carefully.
- In addition, In some countries of the European Union, the concept of a "canvassing card" is used to regulate the commercial canvassing activities of traditional financial companies.

  This notion of a "canvassing card" is often associated with strict regulations that require financial firms to obtain prior authorisation or some form of certification before they can actively solicit new customers. It aims to protect investors by ensuring that only regulated and authorised firms can proactively approach customers to offer them financial services.

  In the context of reverse solicitation, it is therefore relevant for ESMA to see how similar concepts could be adapted or integrated to ensure an adequate level of investor protection while allowing flexibility in the provision of services at the request of customers.

2. On the person soliciting (Guideline 2)

- The person soliciting is interpreted very broadly by ESMA, as it may be the third-country company or any entity or person acting on its behalf. The draft guidelines then specified that the relationship between the third-country company and the person soliciting on its behalf does not have to be a contractual one but can be "*explicit*" or "*implicit*".

  By including the term "*implicit*" in the text, ESMA runs the risk of an overly broad interpretation that could potentially bring certain practices within the scope that, in Adan's view, should not be there. For example, what happens if an algorithm (to illustrate: Youtube algorithm) recommends advertising to a European user based on the user's preferences? The third-party company could be considered to be soliciting online, even though it was not specifically targeting the European market.

  Consequently, Adan recommends deleting the term "implicit" from the text.

- Then, ESMA includes "*influencers*" in the draft guidelines as the criteria have been broadened to take account of new forms of communication in the sector.

  This inclusion raises significant concerns regarding the definition and regulatory treatment of "*influencers*" within the EU regulatory framework. Currently, Adan emphasizes that there is no

harmonized definition of "*influencers*" at the EU level. As a consequence, regulating this type of actor could lead to inconsistencies in application and enforcement across different member states. Indeed, the decision to regulate them under MiCA without a clear and unified definition could necessarily result in legal uncertainty and uneven regulatory practices throughout the EU.

Furthermore, national legislations, such as the French law of June 9, 2023, which aims to regulate influencer activities, have already sparked extensive debates on the definition and scope of influencer activities. These debates highlight the complexities and nuances of establishing a legal framework for "*influencers*", suggesting that a detailed discussion and consensus at the EU level are imperative before finalizing their inclusion in MiCA guidelines.

Despite these risks, Adan believes that it is imperative that the case of "*influencers*" be dealt with at European level, in the sense that the use of influencers is a means for players to engage in indirect marketing within the EU. Consequently, establishing a common definition of influencers at European level should be a short-term objective with the aim of including them in the framework.

Therefore, Adan recommends that the term "influencers" be removed from the current draft of the guidelines pending further discussion; and to engage in a dialogue involving various stakeholders - including regulators, influencers, legal experts, and industry representatives - to develop a harmonized definition and regulatory approach.

ESMA - proposition of Guideline 2 on Person Soliciting	Adan - proposition on Guideline 2 on Person Soliciting

14. Competent authorities should take into account that solicitation may occur irrespective of the person through whom it is performed. 15. The solicitation may be carried out either by the third-country firm itself or by any other person acting explicitly or implicitly on behalf of the third-country firm or having close links 7 to it, as defined in Article 3(31) of MiCA. Such persons can include so-called influencers. Indications of acting on behalf of the third country firm may include, for example, the direction of the audience to the third-country firm's website, the provision of the means of access to the services offered by the third-country firm, the offering of promotional deals or the displaying of a third-country firm's logo. 16. Solicitation done on behalf of a third-country firm by a person or entity regulated in the EU should still be regarded as a breach of MiCA. For instance, an EU credit institution, investment firm or payment service provider should not redirect clients (for instance, via its website) to payment services provided by a third-country firm (whether that third-country firm is part of the same group or not).	14. Competent authorities should take into account that solicitation may occur irrespective of the person through whom it is performed. 15. The solicitation may be carried out either by the third-country firm itself or by any other person acting explicitly or implicitly on behalf of the third-country firm or having close links 7 to it, as defined in Article 3(31) of MiCA. ~~**Such persons can include so-called influencers.**~~ Indications of acting on behalf of the third country firm may include, for example, the direction of the audience to the third-country firm's website, the provision of the means of access to the services offered by the third-country firm, the offering of promotional deals or the displaying of a third-country firm's logo. 16. Solicitation done on behalf of a third-country firm by a person or entity regulated in the EU should still be regarded as a breach of MiCA. For instance, an EU credit institution, investment firm or payment service provider should not redirect clients (for instance, via its website) to payment services provided by a third-country firm ~~(whether that third-country firm is part of the same group or not).~~

3. On the exclusive initiative of the client (Guideline 3)

The draft Guideline 3 stated that a firm should not be deemed to solicit clients if crypto-assets or services on crypto-assets are provided at the *"own initiative of the client"*. As explained by the ESMA, in the context of MiCA, the client's own initiative should be construed "*narrowly*". To sum up, the exemption for reverse solicitation allows firms located outside the EU to serve European clients who actively solicit them on their own initiative, under strictly limited circumstances and without any prior solicitation.

- Among other things, these firms can only offer crypto-assets similar to those initially requested (referred to as the "*initial transaction*") by the EU client and only for a limited period ("*one month*" or a "*few weeks*"). Indeed, the draft guidelines suggest that the reverse solicitation exemption should be limited in time ("*one month*" or "*few weeks*") and only pertain to specific requests made by clients on their own initiative.

  Adan does not support this temporal limitation for several reasons.

First, in our view, ESMA is going beyond MiCA and its mandate. Indeed, Article 61.3 of MiCA, which entrusts ESMA with defining circumstances *"under which a third-country firm is considered to solicit clients within the EU"* without imposing any time restrictions on the actions that follow from such client-initiated requests.

Second, MiFID II does not impose time constraints on the provision of services following client-initiated engagements, thus allowing firms to offer a broader range of products or services beyond the initial contact, indefinitely. Adan does not understand why the crypto-asset sector should be subject to heavier regulation, even though it is still in its infancy and is regulated more quickly than any other financial sector. In the same vein, Adan believes that this limitation could be counter-intuitive, and potentially create unnecessary barriers for EU clients seeking to engage with third-country firms.

4. **On the utilization or not of "the same type" of crypto-asset (Guideline 4)**

Adan does not support the use of a (non-exhaustive) list. This point is addressed below.

Q2. Are you able to provide further examples of pairs of crypto-assets that would not belong to the same type of crypto-assets for the purposes of Article 61 of MiCA? Or are you able to provide other criteria to be taken into account to determine whether two crypto-assets belong to the same type?

Adan does not provide any other examples of crypto-asset pairs that would not belong to the same type of crypto-assets for the purposes of Article 61 of MiCA.

- ESMA explains that the categorisation of the asset or service must be granular enough to ensure that the reverse solicitation exemption cannot be abused. On this point, the granularity proposed by MiCA is not enough (only three main types of crypto-assets: **(i)** asset-referenced tokens; **(ii)** electronic money tokens; and **(iii)** crypto-assets other than asset-referenced tokens and electronic money tokens).

  Relying on such broad categories would allow third-country firms to circumvent the reverse solicitation exemption, which should be understood very narrowly. Adan believes that listing them (and not listing all of them; otherwise today's sub-categories will not necessarily be tomorrow's, as innovation is still in its infancy) is likely to make the regulations less understandable for market participants.

  Therefore, the applicability of such a provision is questionable, particularly regarding the capacity and means available to supervisory authorities to:

- Identify and determine the crypto-asset involved in the solicitation by the non-EU service provider by the client;

- Verify that the transaction conducted on the crypto-asset(s) indeed corresponds to the client's request;

- Verify that the solicitation of the non-EU service provider by the client pertains to a single crypto-asset or service;

- Identify reverse solicitation from a client who may have previously solicited the non-EU service provider regarding another crypto-asset.

Many clients contact service providers without necessarily having a clear vision of the crypto-asset they intend to acquire.

- Regarding crypto-asset pairs that do not belong to the "same type" of crypto assets for the purposes of Article 61 of MiCA, there are some additional questions:

1. Concerning *"crypto assets that are not stored or transferred using the same technology"*: is the technology referred to as the blockchain protocol? This would imply that bitcoin (BTC) is not a crypto-asset of the same type as ether (ETH), for example. It should be clarified that certain crypto-assets may be based on the same blockchain (*e.g.*, ERC-20 tokens on the Ethereum blockchain) without necessarily being classified as the same type (*e.g.,* ETH, which could be considered a "*utility*" token, and USDC, which could be likened to a token for electronic money).

2. Concerning *"liquid and illiquid crypto-assets"*: what criteria are used to determine if the crypto-asset is liquid or not? Is it the transaction volume over a given period? Will a single repository be published?

According to this, certain criteria could be taken into account:

- **Crypto-assets that do not use the same blockchain technology or are not based on similar distributed ledger technologies** can be considered different types. For example, Bitcoin uses a blockchain specific to its protocol, while Ethereum uses another that allows the creation of smart contracts and ERC-20 tokens, such as USDC.

- **Crypto-assets can be classified differently according to their function or intended use.** For example, a token like ETH could be classified as a utility token, enabling the execution of smart contracts, while a token like USDC could be classified as an e-money token, aiming to maintain parity with a fiat currency.

- **Liquidity can be an important criterion for distinguishing between types of crypto-assets.** Highly liquid assets that can be easily traded on many markets without significantly affecting their price could be considered different from less liquid assets. Criteria for assessing liquidity could include trading volume over different time periods, the number of trading platforms where the asset is available, and the depth of the order book.

Q3. Do you consider the proposed supervision practices effective with respect to detecting undue solicitations? Would you have other suggestions?

Globally, Adan supports the approach on supervision practices to detect and prevent the circumvention of the reverse solicitation exemption. The draft guidelines seem well-considered as they leverage both technology and collaboration with various enforcement bodies to create a comprehensive oversight mechanism.

However, as they stand, the measures proposed are a good basis, but they are not enough. Indeed, the draft guidelines only mention the surveillance measures that various supervisory authorities must put in place to identify and prevent foreign service providers from circumventing the reverse solicitation exemption. Limiting the role of authorities to a surveillance function without any enforcement dimension seems insufficient and inadequately binding to deter a non-EU service provider from violating applicable rules considering the potential benefit they could derive from soliciting clients within the EU. It should also be noted that the success of the proposed measures and practices will largely depend on the resources available to the competent authorities and their ability to effectively implement and utilize these tools.

❖ Additionals suggestions

To improve the effectiveness of these measures, Adan suggests the following recommendations:

- **Principle of "name and shame"**

As stipulated in Article 110 of the MiCA regulation, foreign service providers who circumvent the reverse solicitation exemption must be listed in the register of *"deficient entities providing services on crypto-assets."*

Adan recommends that this register be subject to wide communication and dissemination. It is justified by the fear that this register may be relegated solely to the ESMA website and thus may be rarely accessed by end investors.

It is essential that national authorities play an active role in disseminating this register, for example, by ensuring communication through various channels (primarily social media) whenever a foreign service provider is added to the list and by activating cooperation with consumer/investor protection organizations.

In line with Article 109 of the MiCA regulation, it also seems relevant to consider establishing a "MiCA compliant" label for approved PSCAs. This label would effectively promote a "white list" of duly approved PSCAs, for example, by including QR codes displayed on the websites of regulated entities, leading directly to the ESMA register.

- **Principle of "*geoblocking*"**

  Provide local and European authorities with the option to "*geoblock*" the websites of service providers who circumvent the reverse solicitation exemption, making them inaccessible in the geographical areas where they are actively operating illegally.

  For example, in France, the Gaming Regulatory Authority ("ANJ") seized the Paris Judicial Court in 2021, which ordered the blocking of two online casino websites operating unlawfully in France (*Cbet.gg* and *Stake.io*). These two companies, lacking the necessary regulatory authorizations, actively solicited clients located in France. The Judicial Court then ordered the main internet service providers located in France to prevent access to these sites.

  These measures have proven effective in dissuading the relevant actors from actively soliciting clients residing in France, as these individuals could no longer access their various websites.

- **Facilitating reporting to national authorities**

  As indicated in ESMA's draft guidelines, national authorities are tasked with taking measures to detect foreign service providers soliciting clients located in the EU. One measure mentioned is taking into account reports made by individuals/companies regarding the practices of these service providers.

  This measure seems relevant in this context. It requires the establishment of a specific space or form on the websites of national authorities to facilitate feedback. Such a form should be easily accessible, adequately publicized, and designed intuitively for users, for example, using drop-down menus.

  To promote these forms, one conceivable approach would be for each national authority, when announcing the addition of a provider to the register provided for in Article 110 of the MiCA

regulation through its various communication channels, to also promote the form allowing any investor to report illegal practices by foreign actors.

For example, in France, the General Directorate for Competition, Consumer Affairs, and Fraud Control (“DGCCRF”) developed a relatively intuitive form called "PHAROS," which allows reporting of illicit practices and content encountered on the internet. This form benefited from a dedicated advertising campaign, particularly on social media, and thus allowed the DGCCRF to receive 91,221 reports during the first half of 2023, leading to the removal of over 50,000 illicit contents. This example illustrates how an accessible, simple, and adequately promoted reporting form can collect a significant number of reports.

- **Engaging/involving payment service providers for the detection of payments to non-EU providers**

  Consider reporting transactions made to non-EU providers beyond defined thresholds (*e.g.*, > 2 transactions for the same client). Require payment service providers to warn their clients who engage in transactions with non-EU crypto asset providers.

- **Restriction for foreign providers seeking CASP approval**

  If the aforementioned coercive measures are effective, it is likely that many foreign providers will seek PSCA approval to actively and lawfully solicit clients located within the EU.

  However, it is important for different national regulators to take into account, when processing certain files, whether these foreign providers respected the reverse solicitation exemption before submitting this approval request.

  In case of non-compliance with Article 61 of the MiCA regulation by these providers, Adan believes it would be legitimate for the files of these "high-risk" actors seeking to become CASPs not to be processed in the same manner as those of actors already regulated within the EU for several years and actively collaborating with various supervisory authorities.

  Therefore, Adan suggests two measures:

  1. Pre-notice and observation period (*e.g.,* 6 months) for any non-EU provider identified as having solicited EU investors without authorization and wishing to submit a MiCA approval application, accompanied by an obligation to demonstrate the absence of any solicitation before the application is accepted for analysis by the competent authorities.

2. Postponement of (X) months (*e.g.,* 6 months) of effective authorization, post-obtaining approval if applicable, to solicit investors within the EU by a non-EU provider identified as having previously solicited investors within the EU prior to the validation of its MiCA approval dossier.

- **Financial penalty**

Implement a system of financial penalties applicable to any non-EU provider who solicited investors within the EU prior to obtaining a MiCA approval.

For example, a penalty amounting to 50% of the revenue generated with EU clients legitimately during the first 12 months of activity following the approval.

❖ Comments regarding the criteria used by the ESMA

On the proposed criterion, Adan has the following comments:

- Adan has reservations regarding the criterion of "*EU presence*" in the proposed Guideline 1 *"Monitoring entities targeting clients established or situated in the Union or active in the Union"*. By establishing a non-soliciting presence in the EU, third-country firms can, for instance, lay the groundwork for potential future operations if they decide to obtain the necessary licenses. This proactive approach helps them understand the local market and regulatory environment better, making it easier to comply with EU regulations if they eventually choose to expand their services. As a result, it can be particularly beneficial in building a reputation over time, preparing for possible future expansion under compliant conditions. Third-country firms can also use their EU presence to share insights and knowledge about global financial markets, trends, and analysis, positioning themselves as thought leaders. This can be done through reports, whitepapers, and industry analyses that are informational rather than promotional, contributing to a deeper understanding and dialogue within the industry.

Furthermore, some entities offer crypto-assets and/or crypto-asset services on an ancillary basis. However, the services offered on a principal basis may not necessarily fall within the scope of financial regulation (*e.g.,* regulations requiring entities to hold specific authorisations to operate on European territory) at European Union level. It therefore seems difficult to recognize that these same actors cannot have a website, local email or a presence in the EU.

Therefore, the presence in the EU and - necessarily, as a consequence - the use of local email or website addresses should not automatically be assumed to indicate involvement to circumvent regulations.

- Adan recommends adopting an approach based on the *"presumption of non-compliance,"* where serious indications or tangible signs of potentially non-compliant activities would be required to initiate an investigation into a third-party company. The presence of specific red flags related to the use of their local resources could justify a more in-depth examination to ensure they are not conducting prohibited activities under the guise of their authorized operations. These indications could, for example, include the specific promotion of crypto-asset services targeting EU residents, instructions for accessing these services despite local restrictions, or the use of intermediaries based in the EU to circumvent regulations. Moreover, the presence of EU client or web traffic analysis, as proposed for this last point, showing significant activity from the EU to specifically restricted services can also serve as warning signals. Likewise, these elements should never be considered in isolation; but, as explained, considered in a set of indications, then these elements would justify a thorough investigation to verify whether the third-country firm complies with EU reverse solicitation rules.

❖ Contacts at Adan

Faustine Fleuret, President: faustine.fleuret@adan.eu

Mélodie Ambroise, Head of Strategy and Institutional Relations: melodie.ambroise@adan.eu

Alizée Van Den Schrieck, Legal Officer: alizee.vandenschrieck@adan.eu

Adriana Torres Vergara, EU Policy Officer: adriana.torresvergara@adan.eu

❖ Special contributions

Adan would like to thank members of the CASP Committee and the Law Committee for their contributions, especially: Coinhouse, Clifford Chance, Hasthag Avocats, Meria.

~