

# REVIEW OF CROWDFUNDING REGULATION

## Interpretations of existing regulation concerning crowdfunding in Europe, North America and Israel

2014



EUROPEAN  
CROWDFUNDING  
NETWORK



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## IMPRESSUM

Review of Crowdfunding Regulation. Interpretations of existing regulation concerning crowdfunding in Europe, North America and Israel, 2014

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## Foreword

This second edition of our *Review of Crowdfunding Regulation* published at the end of 2014 marks yet another milestone in the work of the European Crowdfunding Network, its members and its supporters. Since we have started our work in 2012 and especially since our first edition of this paper in 2013, the discussion around crowdfunding has resulted in detailed regulatory actions in many countries. Details of how crowdfunding of all types is treated under national regulation across Europe and beyond can be found in this publication.

But we are still far from a harmonised single market for crowdfunding, maybe even further than last year. Nevertheless, we are proud to be able to work with our members and stakeholders in establishing guidelines of best practices, but need to be realistic about the effect of such guidelines in a highly fragmented Europe. We therefore ask policy makers and regulators, both on national and European level, and especially the new President of the European Commission and his team and his Commissioners to engage into a dedicated discourse.

We need to work on the framework and conditions for success that will ultimately help our entrepreneurs, innovators and our private investors to build a growing economy. The creation of a pan-European capital market will contribute to a better allocation of private funds and, as a consequence, to the development of small and medium sized enterprises which in turn will again lead to increased job creation. Small and medium sized enterprises are the backbone of the European economy and they are the main source for employment and value creation across the continent. With this paper we can only give a small insight in the complexities of European legislation keeping back private capital allocation into entrepreneurship, innovation and job creation.

The European Crowdfunding Network is extremely grateful to every single contributor to this paper, who has given her or his expertise free of charge and in a very short time frame. There are too many people involved to mention them all here, but the reader can find their contact details at the end of each contribution. Tanja Aschenbeck-Florange of Osborne Clarke, Germany, and her colleague Thomas Nagel, have assumed all initiative and work in creating this extraordinary paper and we would like to thank them for this. There are many other people that have helped in other ways and we are grateful for their support, too.

We trust that this paper will be once again a key tool for regulators across Europe and beyond, for entrepreneurs, investors and any other interested stakeholders working on delivering economic growth to Europe.

Oliver Gajda

Chairman and Co-Founder, European Crowdfunding Network, Belgium





## Introduction

Crowdfunding is an increasingly popular method of raising capital over the internet from the mass market. Its earliest successes have often been with social or art-based projects. But it is now emerging as a fund-raising method for start-up companies, renewable energy projects, real estate projects or other commercial projects (this kind of crowdfunding is also called "crowd investing").

Crowdfunding can be very beneficial for both sides. It provides for an alternative method of financing which can be attractive where borrowers struggle to qualify for full funding from traditional sources, such as banks, private equity houses and angel investors. Crowd investors on the other hand can invest directly into opportunities that have not previously been available to retail investors.

Due to the benefits crowdfunding provides for the financing of small and medium-sized enterprises, the European Commission has indicated its intention to support crowdfunding. For example, in its Green Paper on long-term financing of the European economy published on 25 March 2013 the European Commission asked how "*non-traditional sources of finance, such as crowdfunding, can be supported*". In late 2013 the European Commission conducted a public consultation asking for opinions on a (possible) harmonised regulation of crowdfunding. According to a summarising communication, the European Commission's aim is to "*unleash the potential of Crowdfunding in the European Union*". To support policy development in this area, the European Commission has set up the "European Crowdfunding Stakeholder Forum (ECSF)" as an expert group of high level representatives of associations of concerned stakeholder groups and national authorities.

However, the Commission has traditionally displayed strongly consumer-protectionist tendencies and certain public pronouncements it has made indicate that any benefits it may be able to confer through the creation of a harmonised single market may well be outweighed by regulatory requirements.

On a national level, currently a growing number of countries are implementing specific national crowdfunding regulations which are not harmonised. Hence, it is becoming burdensome for European market participants to develop a pan-European crowdfunding business and for crowdfunding platforms from abroad to enter into the European market. This trend goes against the aim of establishing a European single market and promoting crowdfunding as a method of financing on a European level.

This publication considers specific national crowdfunding regulations and varying applications of European legislation to crowdfunders across Europe both now and in the foreseeable future. Furthermore it takes a look at the crowdfunding regulation in other relevant countries outside of the European Union.

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## Austria

### 1 Recent developments in the market of Crowdfunding in Austria

Whereas a first Crowdfunding platform started in Austria in 2010, until now – as far as can be seen – at least seven Crowdfunding platforms ([www.1000x1000.at](http://www.1000x1000.at), [www.conda.at](http://www.conda.at), [www.crowdcapital.at](http://www.crowdcapital.at), [www.greenrocket.at](http://www.greenrocket.at), [www.inject-power.at](http://www.inject-power.at); [www.neurovation.net](http://www.neurovation.net) and [www.respekt.net](http://www.respekt.net)) have been established.

In the course of 2013, even a new political party in Austria, *NEOS – Das Neue Österreich und Liberales Forum*, funded relevant parts of their (at last quite effective) campaign for the elections for the Austrian parliament by means of Crowdfunding. Apart of the aforementioned outstanding example, technology and gastronomy projects are upon the most successful in Austria.

However, only manageable amounts – approximately EUR 1.200.000 in the course of 2013 – have been funded by Austrian Crowdfunding platforms in the recent past.

#### 1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

The Equity Model is one of the most important ways for people to invest in Crowdfunding projects. Investment either implies taking part in profit and loss (e.g. as a shareholder of capital companies or companionships), or taking part in profits only, under the exclusion of sharing losses (e.g. with some kinds of silent partnerships).

Looking at the Equity Model, one can find Crowdfunding platforms which are active in the business of investment broking and/or contract broking and do not obtain any license in the sense of the Federal law on Banking (*Bankwesengesetz – BWG*). They operate outside the prospectus regime and must therefore comply with the legally defined exemptions (for more details see section 3.2 hereof). The main field of the aforementioned Crowdfunding platforms works with the model of silent partnerships.

On the other hand, some Crowdfunding platforms operate within the scope of regulation especially of the Federal Law on Banking. Those platforms offer a trade market for security papers (*Wertpapiere*) or investment products (*Veranlagungen*) and therefore have to obtain a licence for financial services under the Banking Act.

Entrepreneurs issuing security papers (*Wertpapiere*) or investment products (*Veranlagungen*) to investors by means of a public offer can be subject to a prospectus requirement approved by Financial Market Authority according to the Capital Market Act (*Kapitalmarktgesetz – KGM*). Moreover, certain investment services might require a license of the Financial Market Authority in the sense of the Federal Law on the Supervision of Securities (*Wertpapieraufsichtsgesetz 2007 – WAG 2007*).



### 1.2 The Purchase Model

Some Crowdfunding platforms, especially so-called “citizen-powerplants” (*Bürgerkraftwerke*), are based upon a sale-and-lease-back-model. Citizens buy single parts of a facility (e.g. cells of a solar power station) and lease it back to the operating company.

As a principle, the conclusion of respective purchase and lease contracts are neither subject to a licence according to the Federal Act on Banking or the Federal Law on the Supervision of Securities, nor to any securities prospectus requirements.

### 1.3 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

Some Crowdfunding platforms offer loans (*Darlehen*) or subordinated loans (*Nachrangdarlehen*). Hence, individuals lend money to a Crowdfunding platform, which in the end returns money with interest to the lender. In this model, the investor does not share liability for any losses.

Such loans or subordinated loans can, under certain circumstances, fall under the definition of the commercial acceptance of foreign funds for management or as deposits (deposit business; *Einlagengeschäft*) and therefore require a license of the Financial Market Authority (*Finanzmarktaufsicht – FMA*).

Bonds are another possibility to receive money from investors. Bonds in general do not require a licence according to the Federal Law on Banking or the Federal Law on the Supervision of Securities, if marketable bearer bonds or registered bonds are issued.

### 1.4 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

The Donations or Rewards Model is mainly used to finance social, charity or creative projects or companies. Monetary returns are not envisaged for investors who fund projects or companies and they either get no return at all or a non-monetary reward (e.g. tickets or other rewards of a rather symbolic value).

## 2 Recent developments regarding Crowdfunding regulation in Austria

Until now, Austrian law does not provide for any explicit legal basis for Crowdfunding. Political efforts aiming for such explicit regulation, especially of *Die Grünen - Die Grüne Alternative* (550/A(E) XXV. GP) and of *NEOS – Das Neue Österreich und Liberales Forum* (623/A(E) XXV. GP), have not been successful yet.

As per September 2014, the Austrian Ministry of Finance and the Ministry of Education are about to evaluate the need of a comprehensive legal basis for Crowdfunding and/or the adoption of existing laws to the practical needs of Crowdfunding, whereas neither precise legislative proposals, nor any time schedule have been published yet (2149/AB XXV. GP).



## 3 Current regulation of Crowdfunding platforms in Austria

### 3.1 Licence under the Federal Law on Banking and the Federal Law on the Supervision of Securities

#### Equity Model

##### *Investment Services, Noncore Investment Services, Financial Instruments and Assessments*

The Federal Law on the Supervision of Securities rules investment services (*Wertpapierdienstleistungen*), noncore investment services (*Nebendienstleistungen*), financial instruments (*Finanzinstrumente*) and assessments (*Veranlagungen*). As to Crowdfunding models, especially the terms of financial instruments and assessments matter:

- Financial instruments, amongst others, are shares in transferable securities and instruments (e.g. stocks, certificates, loans).
- Assessments are, amongst others, uncertificated property rights, which serve as a direct or indirect investment for several investors, who bear – either alone or together with the issuer – the risk, and provided that investors do not manage the property rights (e.g. uncertificated holdings, limited partner participation, closed-end funds).

The Federal Law on the Supervision of Securities contains organizational requirements as well as good conduct rules, in which the latter can apply either directly or indirectly (which means an applicability to services, which in general do not fall under the regime of the Federal Law on the Supervision of Securities). For any services, which fall under the regime of the Federal Law on the Supervision of Securities, the Financial Market Authority is the competent controlling institution, whereas the Trade Office (*Gewerbebehörde*) is competent for any services, which fall upon the regime of the Federal Law on the Supervision of Securities indirectly (e.g. for commercial property consultants that solely convey assessments).

According to the Federal Law on the Supervision of Securities, the commercial provision of the following investment services requires a license of the Financial Market Authority:

- rendering of investment advice in relation to financial instruments;
- portfolio management by managing portfolios for individual customers with a discretion under a power of attorney of the customer, unless the customer portfolio contains one or more financial instruments;
- acceptance and transmission of orders in relation to subjects of one or more financial instruments;
- operating a multilateral trading facility.

Hence, the above mentioned services can only be rendered if either a discrete licence of the Financial Market Authority exists or one cooperates with a securities company or a credit institution as an auxiliary person.



### *Protection of Investors*

The Federal Law on the Supervision of Securities contains provisions regarding the protection of investors. In order to avoid any liability of the operator of a Crowdfunding platform for investors' possible losses, it should be considered not to raise investors' false expectations. Services of the operator of a Crowdfunding platform should be restricted to the acceptance and forwarding of orders of customers (execution-only-orders).

### *Other investment services*

The right to provide other investment services and ancillary services than mentioned above under the heading Investment services, noncore investment services, financial instruments and assessments by companies established in Austria's national territory is governed by the Federal Law on Banking. The latter rules the business of credit institutions and financial institutions, which, in principle, requires a license of the Financial Market Authority.

Also, the commercial assignment of credits and financing is subject to the Federal Law on Banking, whereas the commercial investment counselling is subject to the Trade Law (*Gewerbeordnung – GewO*) and also comprises the procurement of participations, loans and investments. Such activities have to be dissociated from so-called loro-emissions (*Loroemissionsgeschäft*), i.e. the adoption of the placement of emissions of third parties, which are reserved to credit institutions.

### **Summary**

To sum up, when one offers investment services, noncore investment services, or – important for Crowdfunding operators – financial instruments or assessments, the Federal Law on the Supervision of Securities might apply and therefore a license of the Financial Market Authority may have to be obtained. If other investment services and ancillary services than covered by the Federal Law on the Supervision of Securities are provided the Federal Law on Banking might apply.

### **Lending Model**

In a startling administrative proceeding, the Financial Market Authority ruled that commercial collection of loans on the basis of standardized loan agreements by a company, which uses such loans for the financing of its on-going business and pays these loans back with interest after a definite period, falls within the scope of section 1 subsection 1 figure 1 of the Federal Law on Banking and is therefore a commercial acceptance of foreign funds for management or as deposits (deposit business; *Einlagengeschäft*), a business reserved to credit institutions and requiring a license of the Financial Market Authority (FMA UB0001.200/0017-BUG 2012). The Constitutional Court (*Verfassungsgerichtshof – VfGH*) refused to handle a complaint against the aforementioned decision (B 54/13-11).

Therefore the Higher Administrative Court (*Verwaltungsgerichtshof – VwGH*) had to handle the complaint; the Higher Administrative Court rejected the complaint and affirmed the decision of the Financial Market Authority (Zl. 2013/17/0242-10).

By contrast, the emission of loans or subordinated loans does not constitute an assessment in the sense of the Federal Law on the supervision of securities.



## Donations or Rewards Model

Depending on the structure in detail, there are good reasons to state that these kinds of investments do not qualify as assessment products (*Veranlagungen*) and therefore should usually fall outside the jurisdiction of the Federal Law on Banking.

### 3.2 Prospectus Requirements

#### General Rule

Entrepreneurs issuing security papers (*Wertpapiere*) or investment products (*Veranlagungen*) to investors by means of a public offer can be subject to a prospectus requirement, namely a requirement to publish a prospectus approved by the Financial Market Authority.

The legal basis for publicly offering security papers or investment products for sale is the Capital Market Act (*Kapitalmarktgesetz – KGM*). In addition, EU Regulation Nr 809/2004, as amended, establishes the legal framework for drawing up prospectuses for investments. If the prospectus includes securities for admission to the stock exchange the Stock Exchange Act (*Börsegesetz – BörseG*) also applies.

A “*public offer*” is a notification to the public in any form and distributed in any way, which contains sufficient information on the conditions of the offer to allow an investor to decide whether or not to buy or subscribe to the securities or investments. The operator of a Crowdfunding platform is not usually subject to such a prospectus requirement, provided that he, or she, will not be responsible for the “*public offering*”. However, if the operator of a Crowdfunding platform merchandises the Crowdfunding project via a website and hereby makes a public offer, a prospectus might have to be published.

Depending on the structure, subordinated loans do not generally constitute assessments under the Capital Market Act and therefore no prospectus might be required. The same should apply to investments where individuals provide money to a company or project for benevolent reasons or for a non-monetary reward (Donations or Rewards Model).

#### Exceptions from Prospectus Requirement

The general prospectus requirements do not apply in exceptional cases exhaustively named in section 3 of the Capital Market Act, amongst others for offering security papers or investments products in the European Union for a total consideration of less than EUR 250.000,-, calculated over a period of twelve months.

Moreover, the general prospectus requirements do not apply for offers, targeted at less than 150 natural or legal persons per member state of the European Economic Area, if such persons are not qualified investors. In general, if Crowdfunding projects are available (e.g. advertised) via Internet, a public offer to more than only 150 natural or legal persons is at hand.

### 3.3 Possible Regulation of Crowdfunding Platforms under the AIFMD Regime in Austria

#### 3.3.1 Status of AIFMD Implementation

Austria implemented the European Alternative Investment Fund Managers Directive (*AIFMD*) by the Alternative Investment funds Manager Act (*Alternative Investmentfonds Manager-Gesetz – AIFMG*).



The AIFMG is heavily based on the AIFMD and in some parts corresponds literally to the AIFMD. Contrary to the AIFMD, the AIFMG also provides the legal possibility to market alternative investment funds to private customers. On August 1<sup>st</sup>, 2014, the legal situation hereof has changed by an additional insertion of a definition of a qualified private customer ("*qualifizierter Privatkunde*"), who have to fulfill certain criteria (e.g. minimum investment EUR 100,000 in an Alternative Investment Fund). Hence, § 48 (applicable to Austrian managers of Alternative Investment Funds) and § 49 AIFMG (applicable to foreign managers of Alternative Investment Funds) now contain specific regulations regarding the distribution to private customers as well as to qualified private customers.

### 3.3.2 Definition of an Alternative Investment Fund

The scope of the AIFMD is a broad one: The AIFMD is aimed at the managers of Alternative Investment Funds (*AIFM*). The AIFMD is applicable when either the alternative investment fund is authorized pursuant to relevant national law in a member state or its registered office or head office in a member state and / or the manager of an Alternative Investment Fund (*AIF*) has its registered office in the European Union. As defined in the AIFMG, an Alternative Investment Fund is any organ for a collective investment undertaking which,

- on the basis of a stipulated portfolio strategy
- raises capital from a number of investors
- with a view to investing it in accordance with a defined investment policy
- for the benefit of those investors
- as long as the money collected does not directly serve for operational activities.

However, any organs that require a permit under the Directive 2009/65/EC (UCITS), is excluded from the definition of an alternative investment fund.

In its brochure "*Frequently asked questions regarding the applicability of the AIFMG*" dated September 12, 2014, the Financial Market Authority clarifies that the examination of the question, whether an organ is to be classified as an AIF, must in any case be done on an individual basis, taking regard to the structural and content factors and not the pure form of an organ, whereas the crucial point is the structural and content condition and not the pure form of an organism.

#### 3.3.2.1 Company Seeking Funding

As stated above, the AIFMG does not apply if money collected does directly serve for operational activities.

Companies seeking funding by means of a Crowdfunding platform could only be operating companies outside the financial sector if

- their business strategy is simply the commercial success of their business,





- they do not intend to follow any defined investment policy, but want to finance their on-going day-to-day business, and
- they operate the facility, production or project themselves within their day-to-day business.

In general, these requirements are met by the typical start-up or developing company seeking funding for its general commercial business by means of a Crowdfunding platform, so that those companies mentioned before should usually fall outside the scope of the AIFMG.

As there are no consistent European guidelines regarding the term of an Alternative Investment Fund, the Financial Market Authority acclaims that, if it is located in the legal interests of a party, it is possible to obtain a notice of assessment (*Feststellungsbescheid*) by the Financial Market Authority on the issue whether an operating company is an Alternative Investment Funds or not. Finally, it has to be noted that Alternative Investment Funds are facilitated when the assets acquired through leverage do not exceed a total of EUR 100 Million or total assets do not exceed EUR 500 Million ("*de minimis-barrier*"). Although such Alternative Investment Funds must be registered with the competent authority, the other conditions regarding the licensing do not apply to those funds, which fall below this amount's specified limits.

### 3.3.2.2 Project Company Seeking Funding

#### Equity Model

Although neither the AIFMG, nor the explanatory notes hereto, nor the Financial Market Authority or courts have dealt with this question, we assume that, following the notion of the German BaFin relating to the comparable German law, companies cannot qualify as *operating companies* if they are established as a "project company" to finance a single project and do not operate the facility or production themselves.

Accordingly, it cannot be excluded that this kind of "Project Company" might constitute an AIF within the meaning of the AIFMG, if it seeks funding in return for a share in the profits or revenue generated by the project.

#### Lending Model

A subordinated loan ("*Nachrangdarlehen*") should generally be capable of being structured as a non-AIF investment, provided that the investor does not share liability for any losses. However, this issue has not been dealt with by the AIFMG, nor the explanatory notes hereto, nor the Financial Market Authority or courts.

#### Donations or Rewards Model

Some of the Project Companies do not offer any kind of revenue, but instead return non-financial rewards. Although neither the AIFMG, nor the explanatory notes hereto, nor the Financial Market Authority or courts have dealt with this question, we assume that, in the latter case it can be argued that the funds are not invested *for the benefit of those investors* and the funding therefore contains no collective investment undertaking and no alternative investment funds.



### 3.3.2.3 Crowdfunding Platform

As a general rule, since the operator of a Crowdfunding platform does not raise capital from investors for his or her own business, it should not qualify as an Alternative Investment Fund. Even if the underlying investment qualifies as an Alternative Investment Fund there are persuasive reasons to state that the Crowdfunding platform does not "*manage*" this underlying investment, but that the Crowdfunding platform merely arranges investment into it. The manager of the Alternative Investment Funds is typically the company seeking funding by means of the Crowdfunding platform.

To sum up, there are sound arguments that a Crowdfunding platform in general should not qualify as an Alternative Investment Fund in the sense of the AIFMG.

### 3.4 Licence under the Payment Services Supervision Law

A transfer of funds between investors and the operator of a Crowdfunding platform can constitute remittance services (*Zahlungsdienste*) in the sense of the Payment Services Act (*Zahlungsdienstegesetz – ZaDiG*). Such a transfer of funds could occur if the investors pay their investment amounts to the operator of the Crowdfunding platform, who passes the funds on to an entrepreneur.

The Payment Services Act provides for various legal institutes, which are excluded from the applicability of this law; this applies, amongst others, to commercial agents (*Handelsagenten*). Under various circumstances, especially provided that the operator of a Crowdfunding platform has the authorisation to negotiate, or negotiate contracts, on behalf of the funder and the fund seeker, the operator of a Crowdfunding platform may be regarded as a commercial agent.

As an alternative – in order to avoid licensing requirements – the operator of a Crowdfunding platform could use an external provider or partner for processing payments instead of acting as an intermediary himself.

### 3.5 Possible Additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- Trade Law;
- Act on Supervision of Securities;
- Consumer Credit Regulation (*Verbrauchercreditgesetz – VKrG*);
- Consumer Protection Act (*Konsumentenschutzgesetz – KSchG*).

## 4 Conclusion

In conclusion, Crowdfunding is regulated extensively in Austria as a cross-sectional matter, whereas there is no consolidated and explicit legal basis tailored to needs of crowdfunding:



As to the provisions of capital market law, under various circumstances, the operator of a Crowdfunding platform might demand a licence according to the Federal Law on Banking or the Federal Law on the Supervision of Securities.

Moreover, entrepreneurs issuing security papers or investment products to investors by the means of a public offer can be subject to a requirement to publish a prospectus, except for exemption clauses to be applicable in individual cases.

The application of the Alternative Investment Fund's Manager Act (AIFMG) to companies seeking funds by means of Crowdfunding platforms would make any attractive cost-reward ratio impossible. Yet, the Alternative Investment Fund's Manager Act is not applicable if money collected directly serves for operational activities, which, in several cases, can be for the benefit of Crowdfunding operators, too.

In consideration of the strict rules of Austrian capital market, there are discussions on-going whether financing models such as Crowdfunding platforms should be liberalized and decontrolled, yet no precise amendment of law is in sight.

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## Belgium

### 1 Recent developments in the market of Crowdfunding in Belgium

During the last 12 months there were the following significant developments in Belgium regarding Crowdfunding:

The most important development in the Belgian Crowdfunding market is the adoption of specific legislation which broadened the prospectus exemption for public Crowdfunding offers. It is too early to already assess the impact of these new rules, although they have certainly helped to draw public attention to the Crowdfunding alternatives.

The lending and equity based platforms are likely to be boosted by the new legislation. New entrants, including established financial institutions, have already announced that they will soon launch new Crowdfunding platforms.

The adoption of AIFMD this year may, but will probably not, have much impact on the market.

The Belgian Crowdfunding market is relatively less developed than in some neighbouring countries.

#### 1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

Recent amendments of April 2014 to the prospectus legislation (discussed below) also include a new exemption that entails that issuers issuing certain investment instruments under the public offering "Crowdfunding Exemption" (further detailed below) will not be considered as intermediaries requiring licensing as investment firms. This new exemption, which has received much less attention than the new thresholds for public offerings, may open the door to real equity Crowdfunding in Belgium.

However, to date there are virtually no Crowdfunding platforms offering "pure" equity Crowdfunding. The new Belgian Crowdfunding legislation may need a bit more time to sort its full effects.

As a consequence, the few Crowdfunding platforms that cater to businesses in Belgium do not offer direct equity participation. They all use the Lending Model.

Most opted for that model as the company being funded borrows money from the crowd through a loan note (see below for further details).

Some try to some extent to come close to the Equity Model by issuing exit-sharing notes ("Participative Notes") through a holding company or other profit sharing debt instruments. The Participative Notes, which are debt instruments, are only reimbursed once either 100% of the shares held by the holding company (a professional company, co-investing along with the crowd) are sold (in the case of success) or once the funded company has been liquidated (in the case of failure). Indirectly, therefore, the crowd is exposed to losses.



The timing of repayment of the notes is rather unclear and is controlled by the professional co-investor(s). The crowd has no say in the funded company. This type of platform operates within the prospectus regime as it raises more than EUR 300,000 within 12 months, mostly from professional investors (acting in the course of business). The crowd co-invests, albeit indirectly through the Notes, along with the professional investors.

A potential game changer is the fact that a group related to a Belgian bank recently announced that it is also opening a Crowdfunding platform. However, as this platform is not effectively active yet, it is too early to say if real equity Crowdfunding will be offered. The platform advertises the “Crowdfinance” model and states it will issue financial instruments in exchange of investments/lending by the crowd.

The only Crowdfunding platform to have offered direct equity participation in the funded company has had to suspend operations last year because, in order to avoid potential application of the regulatory framework applicable to investment firms, it waived its entire fees for its services. A Crowdfunding platform providing direct equity investment could, at the time, only avoid its services qualifying as financial services if it was not paid for those services. Obviously, this was not a financially viable proposition.

There are no licensed platforms offering equity Crowdfunding to the general public in Belgium. It seems that the new platform recently announced by a bank group may make use of its license but this has not yet been confirmed in practice and may, under the new exemptions, not be required.

In sum, pure, unlicensed equity Crowdfunding is not currently available in Belgium. The crowd never obtains a direct equity participation (and voting rights) in the funded company.

### **1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)**

Loans or debt instruments, such as the aforementioned Notes, are not deemed “financial instruments” falling under the regulation of investment service firms. As a result, in Belgium, crowd-financing of businesses has mostly developed through the Lending Model.

Even though there are only a few successful Crowdfunding platforms at present in Belgium, their numbers slowly increase. According to our information, the most active platforms catering to the business community are MyMicroInvest and Look & Fin. A not yet active newcomer is Bolero-Crowdfunding supported by the KBC group. Some smaller platforms specialise in financing real estate projects (e.g., ConseilB+). Others platforms such as Crofun and Angel.me are either mostly active under the Rewards Model or do not advertise investment projects on their website.

That said, the Lending Model has its own limitations. For instance, there are no consumer-to-consumer lending platforms operating in Belgium. This is due to regulatory constraints stemming inter alia from the consumer credit legislation.

### **1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)**

The Donations or Rewards Model was the first to develop in Belgium. It developed primarily in the music industry and with some international success, as the platform was one of the first of its kind in Europe.



There is a general perception in the Belgian Crowdfunding market that specialist Crowdfunding platforms have a competitive advantage. As a result, we see a variety of specialist Crowdfunding platform developing or about to start under the Rewards Model. These tend to be in the creative sector (music, movies, fashion, etc.). There are now also a few well established Crowdfunding websites specialising in fashion, movies and applications development.

Non-for-profit organizations involved in financial, social or artistic projects have also been amongst the first to use the Rewards Model.

The rewards-based platforms all operate as unlicensed platforms and outside the prospectus regime.

## 2 Recent developments regarding Crowdfunding regulation in Belgium

### 2.1 New legal framework for Crowdfunding: amended prospectus requirements

Before May 2014, there was no specific legislation addressing Crowdfunding issues.

In March 2014, the Belgian Finance Minister announced a Crowdfunding initiative addressing mainly, but not only, the public offering thresholds. The initiative was said to address “both the legal burdens for promoters and investor protection”.

On 7 May 2014, the Belgian Act of 25 April 2014 (which is not limited to Crowdfunding but addressed various topics) included various provisions amending the Prospectus Act (Act of 16 June 2006 on public offer of investments instruments, amended by the Act of 17 July 2013 which came into force on 16 August 2013) was published in the Belgian Official Journal.

The provisions that came into force on 17 May 2014 introduce among others a prospectus exemption making the existing provisions more flexible, and incorporate better investor protection.

The amended article 18 of the Prospectus Act increased the ceiling to benefit from the exemption to issue a prospectus from EUR 100.000 to EUR 300.000. To protect investors, the exemption limits each investment to a maximum of EUR 1.000 per project, in the absence of prospectus. These two conditions are cumulative. Additionally, all documents concerning the offer must mention the total value offered as well as the maximum subscription amount per investor (the “Crowdfunding exemption”).

In addition, the Act of 25 July 2014 exempts the persons or institutions carrying out intermediation for public offerings falling within the scope of the Crowdfunding exemption, from the obligation pursuant to Article 56 of the Prospectus Act, to be licensed as a credit institution or investment firm. This provision is crucial.

Article 13 of the Prospectus Act defines intermediation as any action towards investors, including temporary or incidental, in every capacity, in the placement of investment instruments on behalf of the offeror or issuer, against compensation or any benefit in kind, directly or indirectly provided by the offeror or issuer.



## 2.2 AIFMD implementation

Belgium, at last, implemented the European Alternative Investment Fund Managers Directive ("AIFMD"), by the Act on Alternative Investment Funds Managers of 19 April 2014 (*Wet betreffende de Alternatieve Instellingen voor Collectieve belegging en hun beheerders*– "the "AIFM Act") following its approval by the Parliament on 3 April 2014. The AIFM Act came into force on 27 June 2014.

For the most part, the AIFM Act is heavily based on the directive. However, it imposes more stringent rules on the managers of alternative investment funds marketed to the public.

The AIFM Act applies to all Belgian funds which qualify as AIFs, such as real estate closed-ended investment funds (*sicafis/vastgoedbevaks*)<sup>1</sup>, public closed-end private-equity investment companies (*openbare privak/pricaf publique*, both of which were, pursuant to the previous regulation (Act of 3 August 2012), already subject to a special status and to supervision by the FSMA, as well as to funds which do not raise funds from the public but are registered as institutional or private collective investment undertakings and which were previously unregulated. Finally, the AIFM Act applies to all AIFs which do not raise capital through private placements and which are not yet subject to the Act of 3 August 2012.

Accordingly, the AIFM Act applies to the managers of these funds which solicit capital from investors with a view to investing it in accordance with a defined investment policy for the benefit of those investors.

The AIFM Act excludes certain types of funds from its scope and provides for certain exemptions which may be helpful for managers of smaller or of certain specific funds. As such, holding companies, institutions for occupational retirement provisions, employee participation schemes/employee saving schemes, securitisation SPVs, family office vehicles, joint ventures, supranational institutions, national central banks and governments are excluded from its scope of application.

In addition to these exclusions, Belgium has opted to implement less stringent rules for "small" AIFM's. As a result, the following AIFMs benefit from a lighter regime:

- AIFMs managing AIFs with total assets under their management of a value of less than EUR 100 million;
- AIFMs managing AIFs with total assets under their management of a value of less than EUR 500 million (if the AIFs portfolios are unlevered and no redemption rights exist during a period of five years following the date of initial investment in each AIF).

All Belgian Crowdfunding platforms, that would be considered an AIFM, will benefit from the above "small" AIF exemption.

Concerning the AIFMD regulation impact on Belgian Crowdfunding platforms, it should probably be minimal, but it is too early to say. In its 2013 annual report the FSMA stressed that it pointed-out to one

<sup>1</sup> Pursuant to the Act of 12 May 2014, Belgian real estate closed-ended investment funds (which are subject to the Act of 3 August 2012) have the possibility to remain outside the scope of the AIFM Act if they opt for the new regulated investment company status (*société immobilière réglementée/gereguleteerde vastgoedvennootschap*)





Crowdfunding platform that it would again review application of the AIFMD provisions after implementation of the AIFMD Act. In the FSMA's view application would depend on the scope of the holding exemption under the AIFMD.

Although holding companies are excluded from the scope of the AIFM Act, this concept will be interpreted narrowly. Platforms using special purpose vehicles to manage the investment on a discretionary basis could fall under the AIFMD.

Pursuant to the Belgian AIFM legislation, an Operating Company seeking for funding with the purpose of generating profit to its shareholders should not qualify as an AIF, as the characteristics of AIF are not met. Usually such a company does not have a defined investment policy for the benefit of the investors.

With regard to a Project Company seeking funding, the Act does not apply to business in which collective investments are not conducted in the form of an AIF. However, it cannot be ruled out that a project company would constitute an AIF in the event that the project company would have several investors (at least two) and there would be a collective investment policy.

To conclude, the implementation of the AIFM Directive in Belgium seems unlikely to impact Crowdfunding activities, since the criteria will generally not be met by operating companies, project companies seeking funding or Crowdfunding platforms. Most will benefit from exemptions, or in worst case from the "lighter regime".

### 3 Current regulation of Crowdfunding in Belgium

There are numerous laws that might potentially apply to the Equity and Lending Models, depending on the finance structure used by the Crowdfunding platform. We list and summarize the main ones below.

The Donation or Rewards Model usually falls well outside the definition of financial services, financial or investment instruments and the Prospectus Act. They therefore fall outside the most restrictive aspects of Belgian financial regulation, provided due attention is paid to the collection of public savings issue.

Given the rise in applications that Belgium's Financial Services and Markets Authority, has received from potential promoters of Crowdfunding platforms, the FSMA issued a summary of them on 12 July 2012, with an overview of the regulatory framework applicable to Crowdfunding operations and a related FAQ section, as well as an additional note concerning the changed prospectus requirements on 26 June 2014.

#### 3.1 Supervision of investment firms

Pursuant to MiFID, the Act of 6 April 1995 (as amended) regulating investment firms defines "investment services" inter alia as the reception and transmission of orders in relation to one or more financial instruments, the execution of orders on behalf of clients, investment advice and the placing of financial instruments with or without a firm commitment basis.

"Financial instruments" include securities such as shares, bonds and other debt instruments. The definition of financial instrument used for the regulation of investment firms is narrower than that of





“investment instruments” under the Prospectus Act, which includes all types of instruments (including debt instruments) allowing of a financial investment, whatever the nature of the underlying assets.

With respect to the placing of Financial Instruments, the Banking, Finance and Insurance Commission (CBFA, the forerunner to the FSMA) clarified in a 2004 board report that the following factors are indicative that a regulated “placement service” is being offered:

- the existence of an agreement (whether written or oral) between the issuer and the financial intermediary whereby the intermediary acts on behalf of the issuer
- a consideration paid by the intermediary to the issuer.

The CBFA has further indicated that these indicators are usually accompanied by the financial intermediary providing marketing and advertising services, and “door-to-door” selling to, or cold calling of, potential investors.

These indicators do not sufficiently clarify whether a Crowdfunding platform will be automatically deemed to provide “placement services” when it merely passively facilitates the placement of financial instruments. In particular, it has been pointed out that most Crowdfunding platforms do not actively promote the offered securities (no road shows, no specific marketing devices, etc.). Usually, the issuer seeking the funds does the promotion direct (through the communication modules offered by the platform and other social networks), while the platform (management) often does not actively participate in that promotion exercise.

The above discussion may soon be outdated as the new Crowdfunding legislation, which modified the Prospectus Act, specifies that the persons or institutions carrying out intermediation for public offers falling within the scope of the “Crowdfunding exemption” (see above), are exempted from the obligation to be licensed as a credit institution or investment firm. This exemption is likely to open the door for equity Crowdfunding in Belgium.

Up to now no licensed financial services firms or intermediaries offered Crowdfunding services in Belgium. This may change with the entrance of KBC Securities in the market.

The FSMA has further pointed out that Crowdfunding platforms organizing a market for the financial instruments offered through the platform could be considered a multilateral trading facility, which also requires a licence.

### 3.2 Bank monopoly for the collection of public savings

In principle, only credit institutions (and the like) are authorized to collect deposits and other repayable funds from the public in Belgium (section 68bis Prospectus Act, previously regulated under the Banking Act).

This is a fundamental problem as Crowdfunding platforms often collect funds, which they pay back to the crowd if the minimum target financing is not achieved. Luckily, from the very inception of rewards based Crowdfunding, the FSMA has accepted that, subject to certain guarantees and given the limited funds that each investor usually invests in a Crowdfunding project (usually a few hundred euros), the funds stockpiled by Crowdfunding platforms are not considered as falling within the scope of the banking monopoly.



In this respect, Crowdfunding platforms need to build in adequate contractual and other guarantees to make sure that the collected funds cannot be used for any other purpose than either reimbursing the investor (if the fundraising venture fails) or investing in the project (in case of success).

In its earliest stage, because of that, Crowdfunding platforms set up non-profit organizations to collect the funds. The articles of association of these non-profit organizations offered additional guarantees regarding the limited use that could be made of the collected funds. Lately, it has been found to be sufficient for the general terms and conditions of the platform and the conditions of the specific account to provide such guarantees, e.g. by using special escrow bank accounts.

Lending based Crowdfunding platforms, whose core business is to obtain repayable funds from the public through the issue of debt instruments, fall within the scope of the banking monopoly. They circumvent that monopoly either by collecting non-repayable funds (i.e. by collecting the funds at the end, once the funding operation's success is already secure and it is certain that no funds will need to be repaid) or by issuing a prospectus, as the Prospectus Act provides for an exemption.

### 3.3 The Act on Collective Investment Schemes (2012)

Crowdfunding platforms that use a holding structure to pool collective investments in various funded companies and thereby manage the risk of such investments for the investors collectively could qualify as regulated public collective investment scheme, provided their offerings are public as defined *inter alia* in the Prospectus Act. This requires a licence as a collective investment scheme.

Since 22 July 2013, the AIFMD has added a new layer of regulation on top of the collective investment scheme regime. The AIFMD applies where the investment proposition involves an AIF (see above for further details).

In this regard, the scope of application of the Act on Collective Investment Schemes has been reviewed and limited to UCITS and collective investment undertakings investing in receivables, and all the provisions of the law of 3 August 2012 applying to funds qualifying as alternative investment funds under the Directive and to their managers, have been inserted in the AIFM Law.

In order to ensure the highest level of investor protection, the previous regulation remains unaffected insofar as it is complementary to the AIFM Act. As a result, public collective undertakings and their managers will thus become subject to two layers of regulation: the provisions of the directive as transposed, as well as the existing provisions of the Act on Collective Investment Schemes.

### 3.4 Prospectus requirements

As seen above, under the Prospectus Act the following operations do not qualify as a public offer of "investment instruments"; they are offers:

- for a total consideration of less than EUR 300.000;
- with a maximum investment of EUR 1.000 per person and per project.

All documents concerning the offer must indicate the total value offered as well as the maximum subscription amount per investor.



In order to benefit from this exemption, the Prospectus Act provides that the offeror is required to demonstrate to the FSMA that the public offer complies with the conditions of exemption and this PRIOR to the offer. For continuous offers, the offeror must demonstrate this each 12 months. The FSMA has put a notification procedure in place.

The FSMA recommends to issuers benefiting from the prospectus exemptions to point out to the public that the offer takes place without the publication of a prospectus and also to stress the risks associated with the investment instruments offered.

Most (but not all) Belgian Crowdfunding platforms operate within the prospectus exemptions.

### 3.5 Regulation of Crowdfunding under the AIFMD regime

As mentioned above, Belgium implemented the AIFMD by the AIFM Act of 19 April 2014.

Generally, the AIFM Act imposes a heavy regulatory burden above and beyond the Collective Investments regime on fund operators falling within scope. However, there is a light compliance regime for managers with a leveraged portfolio with total assets under management of less than EUR 100 million, and for managers with an unleveraged portfolio with total assets under management of less than EUR 500 million.

The impact of the Directive is reduced in Belgium in comparison with other European jurisdictions that do not all apply a light touch regime in respect of fund structures that fall within the EUR 100 million exemption. Holding companies are excluded of the scope of application of the AIFM Act.

### 3.6 Payments Services Act

Any transfer of funds through a Crowdfunding platform or payment operations executed by a Crowdfunding platform will generally constitute money remittance services within the meaning of the Belgian Payments Services Act of 21 December 2009 (sections 4(1°), (2°) and (12°) of that Act).

These activities are normally restricted to banks and payment establishments licensed by the Belgian National Bank that have been granted the status of Payment Institutions (section 6 of the Act).

If the Crowdfunding platform falls within the scope of the Payment Services Act, i.e. if the money transits through the Crowdfunding platform's bank accounts, it will have to apply for a licence from the Belgian National Bank.

To avoid this burden and expense, platforms usually rely on a third party, an external provider or partner, for processing payments rather than acting as a payment intermediary between the investors and the company seeking funding.

Most Belgian platforms even avoid the cost of a payment services provider by having the funds wired direct by the investor into the funded company's account.

Platform promoters will probably not be able to rely on the "sales agent" exemption provided for in section 4(1°) of schedule II to the Payment Services Act ("payment transactions from the payer to the payee through a commercial agent authorized to negotiate or conclude the sale or purchase of goods or services on behalf of the payer or the payee"), as the chance is that, in the absence of steady relations with the funded company, they will be deemed to be acting as a broker rather than an agent.



### 3.7 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- The Act on Market Practices and Consumer Protection
- Money Laundering Provisions
- The Privacy Act
- The Consumer Credit Act

## 4 Lessons learned from Belgium's regulation for a possible harmonized European Crowdfunding regulation

The development of a Crowdfunding market in Belgium remains slow. The Crowdfunding exemptions adopted in 2014 may speed up things a bit. Nevertheless in comparison to some other EU countries Belgium has adopted a very conservative approach as exemption thresholds remain low both on the amounts that can be collected and on the amounts invested. Further exemptions, regarding AIFMD or the investment service legislation may be required.

## 5 Conclusion

Belgium has been on the forefront of rewards based platforms, although by now other EU countries (especially the UK) have developed much bigger rewards based Crowdfunding platforms.

The new Crowdfunding exemptions to public offerings may strengthen the offer of platforms that cater to the business community. These new rules have also drawn more public attention to Crowdfunding. The two most established lending based platforms in Belgium will certainly benefit from that new regime. We may for the first time also see real equity based platforms surviving.

This said, given the limited amounts that Belgian investors may invest and issuers may collect, the reality is that both tend to quickly seek to advertise and invest on platforms in other EU countries.

It remains to be said that only an initiative at EU level (which will take some time) would really open up the Crowdfunding market and level the playing field amongst EU member states.

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## Bulgaria

### 1 Recent developments in the market of Crowdfunding in Bulgaria

During the last 12 months there were the following significant developments in Bulgaria regarding Crowdfunding:

#### 1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

During the last 12 months no significant developments concerning the Equity Model took place in Bulgaria. The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

During the last 12 months no significant developments concerning the Equity Model took place in Bulgaria.

#### 1.2 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

The new Bulgarian internet platform bgining.com which started in 2013 extensively promotes projects based on the Donation Model of Crowdfunding in the last months. It aims at assisting businesses, social and cultural projects of Bulgarian entrepreneurs, artists, etc. by publishing their projects on bgining.com. The possible investors may contribute small amounts as donation or against small non-monetary awards to the chosen projects.

The Bulgarian Crowdfunding platform bgcooperativ.com completed successfully a donation based project for construction of the first cloud technology data center in Bulgaria.

### 2 Recent developments regarding Crowdfunding regulation in Bulgaria

During the last 12 months no recent developments regarding Crowdfunding regulation took place.

### 3 Current regulation of Crowdfunding in Bulgaria

Upon investigation of the applicable Bulgarian legislation and the unofficial information obtained by the competent state authorities in this regard, we confirm that explicit regulations in the field of Crowdfunding financing have not been adopted yet.

The following legal framework could be applied in future to the already existing types of Crowdfunding:



### 3.1 Law on Credit Institutions & Law on Payment Services and Payment Systems

In general, pursuant to Art. 2 and 3 of the Law on Credit Institutions a legal entity is treated as a credit or a financial institution in any case it provides to the public financial services including payment services within the meaning of the Law on Payment Services and Payment Systems.

Financial institutions which are not subject to license under another special legal act are required to register in the Financial Institutions Register maintained by the Bulgarian National Bank (BNB) – the institution, supervising their activity. BNB shall be also competent to exercise control to payment service providers as defined in the Law on Payment Services and Payment Systems.

In summary, notwithstanding the type of the Crowdfunding platform, the operator of the platform shall be required to meet the prerequisites of at least one of the abovementioned legal acts.

### 3.2 Public Offering of Securities Act & Markets in Financial Instruments Act

In case the Crowdfunding platform offers an Equity Model it could fall within the legal framework of the Public Offering of Securities Act or the Markets in Financial Instruments Act.

Legal entities providing public offering of securities shall be required to register as a public joint-stock company and to comply with the requirements for those companies under the Law.

These rules do not apply where the total consideration of the offered securities is less than the BGN equivalent to EUR 100.000, which limit shall be calculated within a time period of one year.

Legal entities facilitating public offering of securities or investment products could have been required to register as an investment intermediary under the Markets in Financial Instruments Act.

The Financial Supervision Commission is responsible to supervise the public offering of securities and to exercise controlling activities in order to prevent and terminate legal violations in view to ensure protection of the interests of investors.

### 3.3 Regulation of Crowdfunding under the AIFMD regime

With regard to the management of the alternative investment funds (AIFs) a new chapter has been adopted in the Law on Collective Investment Schemes and Other Undertakings for Collective Investments which provides for detailed regulation of the activity of the fund managers, including their registration/licensing, requirements for their organization, terms and conditions in case of trans-border management. The competent body which shall regulate and supervise the activities of AIFs and their managers shall be the Financial Supervision Commission.. Nevertheless, pursuant to the Law on Collective Investment Schemes and Other Undertakings for Collective Investments, the Crowdfunding financing does not fall within the scope of its application.

It shall apply to closed-end investment companies, as far as the special investment purposes companies are excluded of the scope of application of the Directive.

### 3.4 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- the Commerce Act,



- the Law on Measures against Money Laundering and
- the Currency Act, in regard to the bank transfers regulations, as well as the different lending models, including between related parties.

#### 4 Lessons learned from Bulgaria's regulation for a possible harmonized European Crowdfunding regulation

There are no lessons that can be learned from Bulgaria's regulation for a possible harmonized European Crowdfunding regulation.

#### 5 Conclusion

As long as the Crowdfunding platforms in Bulgaria are not subject to a special legislative control at present, we consider that in the course of future development of the financial market in Bulgaria a specific legislative approach should be applied.

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## Canada

### 1 Recent developments in the market of Crowdfunding in Canada

#### 1.1 Introduction

In Canada, there is no national securities regulator, rather securities law is regulated by each province and territory in Canada as a matter of constitutional law. However, Canadian securities regulators work together through an umbrella organization called the Canadian Securities Administrators (the **CSA**) whose objective is to improve, coordinate and harmonize the regulation of the Canadian capital markets.

In Canada, equity Crowdfunding is legal under two existing prospectus exemptions: (a) the accredited investor prospectus exemption; and (b) the offering memorandum prospectus exemption. The province of Saskatchewan is the only jurisdiction in Canada that has legalized a specific start-up equity Crowdfunding exemption. In Canada, six provinces are considering a proposed equity Crowdfunding model while five provinces are also considering a start-up equity Crowdfunding model.

During the last 12 months there were various significant developments in Canada regarding Crowdfunding as discussed below.

#### 1.2 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

In Canada, only a few portals are registered as exempt market dealers that are currently engaged in 'accredited investor' equity Crowdfunding. Even though this type of equity Crowdfunding is targeting wealthy individuals that equate to roughly 4% of the Canadian population, the accredited investor prospectus exemption is a nationalized and harmonized prospectus exemption that is available across Canada.

Three notable portals and registered exempt market dealers that are currently selling securities on the internet under existing prospectus exemptions are: (a) SeedUps Canada ([www.seedups.ca](http://www.seedups.ca)) and Exempt Capital Network portals operated by Waverley Corporate Financial Services Ltd. (exempt market dealer); (b) The Funding Portal (<http://thefundingportal.com>); and (c) P2P Financial Inc. c/o/b as Optimize Capital Markets ([www.optimizecapitalmarkets.com](http://www.optimizecapitalmarkets.com)).

There are a number of portals that have made application to be registered as exempt market dealers across Canada or who are registered as an exempt market dealer and still developing their software and infrastructure systems to sell securities on the internet that are likely to launch in 2015.

Although there are over 700 registered exempt market dealers in Canada, the concept of selling securities on the internet under existing prospectus exemptions or the Proposed Equity Crowdfunding Model (defined below) or Start-Up Model (defined below) is still novel and slowly developing. However, interest in buying securities on the internet will likely increase in 2015 since the TSX Private Markets (a division of the TMX Group which owns the Toronto Stock Exchange) is launching in November 2014.



TSX Private Markets will operate an online platform facilitating private placements and secondary market trading to accredited investors under the accredited investor exemption through registered dealers.

### 1.3 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

Currently, there are no fully operating peer-to-peer (**P2P**) lending portals in Canada, however, there are a number of P2P portals at various stages of development that may launch in 2015.

### 1.4 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

Canada has approximately 77 non-equity Crowdfunding portals involving the Donations or Rewards Model.

## 2 Recent developments regarding Crowdfunding regulation in Canada

On March 20, 2014, several CSA members published proposed rules which would allow investors in large parts of Canada to participate in equity Crowdfunding under a specific Proposed Equity Crowdfunding Model.

Securities regulators in each of Manitoba, New Brunswick, Nova Scotia, Ontario, Quebec and Saskatchewan (the **Participating Jurisdictions**) published for comment a proposed framework for equity Crowdfunding for small and medium-sized enterprises (the **Proposed Equity Crowdfunding Model**) in Multilateral Instrument 45-108 *Crowdfunding Prospectus Exemption and Crowdfunding Portal Requirements (Proposed MI 45-108)*. Proposed MI 45-108 includes a specific equity Crowdfunding exemption from the requirement to deliver a prospectus to investors (the **Proposed Equity Crowdfunding Exemption**).

Securities regulators in the Participating Jurisdictions, except Ontario (the **Start-Up Jurisdictions**), also concurrently published for comment a proposed equity Crowdfunding framework for start-ups (the **Proposed Start-Up Model**) including a start-up prospectus exemption (the **Proposed Start-Up Exemption**).

While the British Columbia Securities Commission (**BCSC**) did not participate in the publication of the Proposed Start-Up Model, it did publish BCSC Notice 2014/03, which requested comment on whether it should adopt a similar model in British Columbia, given its view that a form of equity Crowdfunding was already available in British Columbia under the offering memorandum prospectus exemption.

As of November 7, 2014, capital markets participants are waiting for the applicable Canadian securities regulatory authorities to publish an update and/or provide guidance on next steps and possible adoption of the final version of the Proposed Equity Crowdfunding Model and the Proposed Start-Up Model.



For ease of reference, a comparison between the Proposed Equity Crowdfunding Model and the Proposed Start-Up Model is at Schedule "A" following the end of this chapter on Canada.

## 3 Current regulation of Crowdfunding in Canada

### 3.1 Registration of portals under applicable Canadian securities laws

#### 3.1.1 Equity Model

##### **Registration as an exempt market dealer to sell securities under existing prospectus exemptions**

In Canada, if one is in the 'business of' trading or advising in securities, one has to be registered as a dealer and/or advisor under applicable Canadian securities law, subject to available exemptions.

Except for the Proposed Start-Up Exemption (discussed below), a portal that is in the business of selling securities on the internet must be registered as a dealer under applicable Canadian securities law.

In Canada, there is a category of dealer called an 'exempt market dealer' that can act as a registered dealer in connection with selling securities under an available prospectus exemption (whether on the internet or not).

An exempt market dealer is required to satisfy a number of regulatory obligations and requirements under Canadian securities law including its 'know-your-product' obligation, 'know-your-client' obligation and suitability obligation (which requires an exempt market dealer to ensure that an investment is a suitable investment for each investor). An exempt market dealer can act as an intermediary in any type of prospectus-exempt offering in Canada where it is registered *provided that* the prospectus exemption relied upon is available in that jurisdiction.

##### **Registration as a 'restricted dealer' under the Proposed Equity Crowdfunding Exemption**

The Proposed Equity Crowdfunding Model contemplates that a portal will have to be registered as a 'restricted dealer' to sell securities on the internet. A 'restricted dealer' is similar to an exempt market dealer, however, it is a type of registered dealer that has fewer regulatory requirements or obligations under Canadian securities law than an exempt market dealer.

Under the Proposed Equity Crowdfunding Model, the portal will have to be registered as a restricted dealer in each jurisdiction in Canada where it seeks to sell securities on its portal to Canadian investors provided that the Proposed Equity Crowdfunding Exemption is available in that jurisdiction.

##### **No registration for portals under the Proposed Start-Up Model**



The Proposed Start-Up Model will not require a portal to be registered as a dealer under applicable Canadian securities law. However, the portal will have to file various forms with the applicable Start-Up Jurisdictions.

In Saskatchewan, a Start-up Equity Crowdfunding Model is currently in place and legal. The portal is not required to be registered as a dealer under applicable Saskatchewan securities law, however, it will have to file certain forms with the Saskatchewan securities regulator. See **Schedule "A"** at the end of this chapter on Canada for information about the applicable form filings.

### 3.1.2 Lending Model

The P2P Lending Model involves matching borrowers with lenders where individuals or entities lend money to an individual, company or project in return for the repayment of the principal amount of the loan plus interest on their original investment. The P2P Lending Model typically would be considered a 'security' under Canadian securities law, accordingly, any lending portal would have to comply with applicable Canadian securities law.

Canadian securities law does not have an express prospectus or registration exemption to permit the operation of an on-line P2P lending portal. A portal seeking to engage in a P2P Lending Model would have to consider what prospectus exemption would be available for it to raise loan capital from lenders/investors, or seek exemptive relief, and be registered as a dealer under applicable Canadian securities law.

For example, one company that operated a P2P Lending Model sought and obtained exemptive relief in 2009 from certain requirements under Canadian securities law. Although relief was provided and the company operated a P2P lending platform for accredited investors only, the company has since ceased operating this business and is engaged in a different business.

### 3.1.3 Donations or Rewards Model

Typically, a Donation or Rewards Model of Crowdfunding is not a security and therefore not regulated under applicable Canadian securities law.

## 3.2 Prospectus requirements

### 3.2.1 Regulation of securities in Canada

In Canada, one can only raise capital under a prospectus or an exemption from the prospectus requirement. Equity Crowdfunding involves selling securities on the internet under existing prospectus exemptions or a specifically tailored equity Crowdfunding exemption.

In Canada, a portal registered as an exempt market dealer can raise capital on the internet for an issuer under the accredited investor exemption or the offering memorandum exemption, each of which are discussed below.

In addition, the Participating Jurisdictions have proposed permitting securities to be sold on the internet under the Proposed Equity Crowdfunding Exemption and the Proposed Start-Up Exemption, each of which are also be discussed below. Saskatchewan is the only jurisdiction in Canada that has



legalized a start-up equity crowdfunding exemption which forms the basis of the Proposed Start-Up Exemption being considered by the Start-Up Jurisdictions.

### 3.2.2 Accredited investor prospectus exemption

A portal can raise capital for an issuer under the accredited investor exemption (the **AI Exemption**) The AI Exemption is a prospectus exemption for wealthy individuals and entities that is available in all jurisdictions of Canada. The AI Exemption is the most relied upon capital raising exemption for issuers in Canada in terms of the amount of capital invested (\$ 134 billion or 90% of the total invested in 2011 by Canadians) as well as the number of times it has been used for distributions to Canadian investors (64%).

Accredited investors include individuals who satisfy one of three types of financial tests:

- a *financial assets test* – where an individual who, either alone or with a spouse, beneficially owns financial assets (excluding an investor's primary residence) having an aggregate value that, before taxes, but net of any related liabilities, exceeds \$ 1,000,000;
- a *net income test* – where an individual whose net income before taxes exceeded \$ 200,000 in each of the two most recent calendar years or whose net income before taxes combined with that of a spouse exceeded \$ 300,000 in each of the two most recent calendar years and who, in either case, reasonably expects to exceed that net income level in the current calendar year; or
- a *net asset test* – where an individual, either alone with a spouse, has net assets of at least \$ 5,000,000.

There are a number of other types of entities (including governments and institutional investors) who by definition are also accredited investors, but a discussion of these types of accredited investors is outside the scope of this note.

To rely on the AI Exemption, the purchaser must purchase the security as principal and be an accredited investor. The AI Exemption is subject to certain resale restrictions and requires the filing of a report of trade, with the applicable Canadian securities regulatory authority and payment of an applicable fee. Any offering document provided to investors in reliance on the AI Exemption, other than a term sheet, in reliance on the AI Exemption, must be filed with certain Canadian securities regulators within 10 days of a trade and may require certain prescribed information. For example, in Ontario if a presentation was provided to investors in reliance on the AI Exemption it would require certain statutory rights of action to be included in the presentation which provides investors with a right to sue the issuer if there is a misrepresentation in the presentation, subject to other requirements and available defences.

The main advantages of using the AI Exemption includes its availability across Canada and the fact that there are no legally imposed limits on the amount an investor may invest or an issuer can raise. Exempt market dealers are well suited to selling securities on the internet under the AI Exemption provided they comply with their regulatory obligations, including their 'know-your-product', 'know-your-client', and suitability obligations.



### 3.2.3 Offering memorandum prospectus exemption

Another existing prospectus exemption used to sell securities on the internet is the offering memorandum exemption (the **OM Exemption**). The OM Exemption is available in all jurisdiction in Canada except Ontario.

There are two models of the OM Exemption in Canada; the 'British Columbia model' and the 'Alberta model'.

- the British Columbia model can be used in the Provinces of British Columbia, New Brunswick, Nova Scotia and Newfoundland and Labrador
- the Alberta model can be used in the Provinces of Alberta, Manitoba, Prince Edward Island, Québec, Saskatchewan and the Northwest Territories, Nunavut and the Yukon.

Under either model, a purchaser must purchase a security as principal and the issuer must: (a) deliver a prescribed form of offering memorandum (**OM**) to the purchaser; (b) obtain a signed risk acknowledgement form from the purchaser; and (c) satisfy such other requirements as discussed below. Under both models, issuers can sell securities to the public with no limit on the amount of capital that can be raised by an issuer or invested by an investor. However, under the Alberta model, an investor may only invest up to \$10,000 unless they are an "**eligible investor**" and if so, then there is no investment limit.

Generally, reliance on the OM Exemption is subject to the following requirements:

*Commission and finder's fee* – no commission or finder's fee may be paid to any person, other than a registered dealer, in connection with a distribution to a purchaser in the Northwest Territories, Nunavut, Saskatchewan and Yukon. It is permitted in the other jurisdictions.

*Prescribed form of OM* – an OM must be in compliance with the prescribed form requirements, as set out in Form 45-106 F2 - *Offering Memorandum for Non-Qualifying Issuers*, which describes the form requirements for private issuers. There is a separate form for public issuers.

*Audited financial statements* – issuer are required to include audited financial statements and interim financial statements for the most recently completed interim period that ended more than 60 days before the date of the OM, subject to a number of requirements.

*Cancellation right and holding funds in trust* – an OM must provide the purchaser with a contractual right to cancel the agreement to purchase the security if the securities legislation where the purchaser is resident does not provide a comparable right by delivering a notice to the issuer not later than midnight on the second business day after the purchaser signs the agreement to purchase the security. Accordingly, the issuer must: (a) hold in trust all consideration received from the purchaser in connection with a distribution of a security until midnight on the second business day after the purchaser signs the agreement to purchase the security; and (b) return all consideration to the purchaser promptly if the purchaser exercises the right to cancel the agreement to purchase the security.



*Statutory rights of action* – the OM must contain a prescribed contractual right of action against the issuer for rescission or damages if the securities legislation where the purchaser is resident does not provide a statutory right of action in the event of a misrepresentation in an OM delivered to a purchaser.

*Certificate* – the OM must contain a certificate page that states the OM does not contain a misrepresentation which must be signed by individuals holding certain titles within an issuer (such as CEO and CFO). This certificate must be true at the date the certificate is signed and delivered to a purchaser. If a certificate ceases to be true after it is delivered to a purchaser, the issuer cannot accept an agreement to purchase the security from a purchaser unless: (a) the purchaser receives an updated OM; (b) the updated OM contains a newly dated and signed certificate; and (c) the purchaser resigns the agreement to purchase the security.

*Risk acknowledgement form* – a signed risk acknowledgement form must be obtained from each purchaser and retained for eight years after the distribution.

*Filing the OM and any update OM* – the issuer must file a copy of an OM delivered to a purchaser and any update of a previously filed OM with the securities regulatory authority on or before the 10<sup>th</sup> day after the distribution of the OM or updated OM.

On March 20, 2014, the Ontario Securities Commission published a proposal for adopting a variant of the OM Exemption in Ontario based, in part, on the Alberta model. The securities regulators in Alberta, Quebec, Saskatchewan and New Brunswick have also published for comment proposed amendments to the existing form of OM Exemption. Ontario and certain other Canadian securities regulators have proposed, among other things, imposing an annual invest cap on investors of \$30,000. As of November 7, 2014, the proposals remain outstanding and an update is expected before the end of 2014.

### 3.2.4 Proposed Equity Crowdfunding Exemption

The key features of the Proposed Equity Crowdfunding Exemption is set out in **Schedule “A”** at the end of this chapter note. It is provided in tabular form and compared to the Proposed Start-Up Exemption.

### 3.2.5 Proposed Start-Up Exemption

The key features of the Proposed Start-Up Exemption are set out in **Schedule “A”** at the end of this chapter note. It is provided in tabular form and compared to the Proposed Equity Crowdfunding Exemption.

The features of the existing start-up exemption in Saskatchewan are also included in this comparison table. The Proposed Start-Up Exemption was based on the Saskatchewan start-up model.

## 3.3 Regulation of Crowdfunding under the AIFMD regime

Canada is not required to adopt the AIFMD since it is not part of the European Union (EU). However, to the extent that a Canadian-based portfolio advisor markets AIFs in the EEA, manages or sub-advises EEA domiciled AIFs, or is outside the safe harbour for “reverse solicitation” in a jurisdiction, it may need to comply with the local rules and requirements.



### 3.4 Payment Services Regulation

A portal that is registered as an exempt market dealer would be permitted to receive or hold investor funds in trust. An exempt market dealer can do this for any type of private placement in Canada including an equity Crowdfunding offering under the AI Exemption or the OM Exemption.

Under the Proposed Equity Crowdfunding Exemption, a portal that is registered as a restricted dealer cannot accept or handle funds for the purchase of an issuer's securities or hold assets of investors (funds will be held eternally by a reputable third party, in trust or an escrow arrangement).

Under the Proposed Start-Up Exemption the portal cannot hold funds, rather it must ensure that all funds received for distribution are held in trust in any of the Start-Up Jurisdictions for the investors by an accepted depository. The portal is responsible for instructing the depository to return all funds without deduction to investors in certain circumstances or release the funds if the minimum amount to close the distribution has been reached.

### 3.5 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- *Income Tax Act* (Canada) and its regulations and possibly other federal and provincial income tax legislation
- Proceeds of Crime (Money Laundering) and Terrorist Financing Act (Canada)
- Certain consumer protection legislation would apply to P2P lending platforms

## 4 Lessons learned from Canada's regulation for a possible harmonized European Crowdfunding regulation

### 4.1 Role model ("dos")

Not applicable.

### 4.2 Aspects that should be avoided ("don'ts")

Not applicable.

## 5 Conclusion

Equity Crowdfunding is legal in Canada under existing prospectus exemptions such as the AI Exemption and the OM Exemption in such jurisdictions where such exemptions are available. Six provinces in Canada are considering adopting a Proposed Equity Crowdfunding Model while five are considering a Proposed Start-Up Model. Saskatchewan has legalized a start-up equity Crowdfunding exemption which forms the basis of the Proposed Start-Up Model being considered by the Start-Up Jurisdictions.

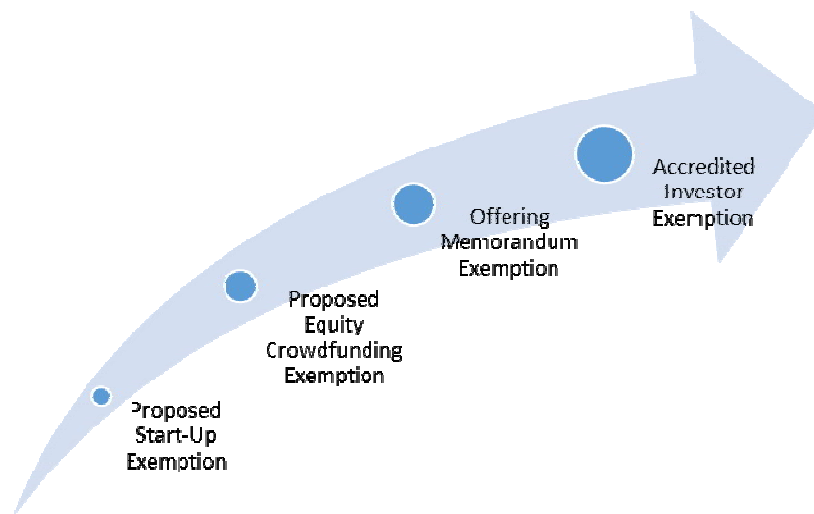




A registered dealer, such as an exempt market dealer, can sell securities on the internet today under existing prospectus exemptions. There are a few portals that are registered as exempt market dealers that are currently selling securities on the internet with more expected to launch in 2015.

The Proposed Equity Crowdfunding Model requires a portal to be registered as a 'restricted dealer' in order to sell securities under the Proposed Equity Crowdfunding Exemption. In contrast, the Proposed Start-Up Model does not require a portal to be registered as a dealer in the Start-Up Jurisdictions.

The new ecosystem of capital raising in certain jurisdictions in Canada will, if implemented, provide a graduated spectrum for start-ups, retail investors, eligible investors and accredited investors as illustrated in the diagram below.



Hundreds of comment letters were submitted in connection with the Proposed Equity Crowdfunding Model, the Proposed Start-Up Model and proposed changes to the OM Exemption. It is expected that certain Canadian securities regulators will provide an update on such matters prior to the end of 2014. Hopefully, such proposals will become final in some form and published by Q1 of 2015.



## Schedule "A"

### Comparison of the

### Proposed Equity Crowdfunding Model to the Proposed Start-Up Model<sup>2</sup>

		Proposed Equity Crowdfunding Model (MI 45-108)	Proposed Start-Up Model and Saskatchewan Equity Crowdfunding Exemption (Blanket Order)
<b>ISSUER RESTRICTIONS</b>			
1.	Applicable jurisdictions	Not available in all Canadian jurisdictions  Only available in the provinces of Ontario, Manitoba, New Brunswick, Nova Scotia, Quebec and Saskatchewan (the <b>Applicable Jurisdictions</b> )	Not available in all Canadian jurisdictions  Only available in the Applicable Jurisdictions except Ontario (the <b>Start-Up Jurisdictions</b> )  <i>Saskatchewan</i> – only available in Saskatchewan
2.	Issuer must be incorporated or organized in certain jurisdictions	Yes  Issuer must be incorporated or organized under the laws of Canada or a jurisdiction in Canada.	No
3.	Issuer's head office must be located in a specified jurisdiction	Head office must be in Canada	Head office must be in one of the Start-Up Jurisdictions.  <i>Saskatchewan</i> – issuer must have an address in Saskatchewan
4.	Majority of issuers directors must be Canadian residents	Yes	No*  * applies to portal only; not to issuer
5.	Available for reporting issuers (e.g., public issuers) and non-reporting issuers (e.g., private companies)	Yes  See #6 below for restrictions	No  Non-reporting issuers only (e.g., private companies) located in one of the Start-Up Jurisdictions

<sup>2</sup> This comparison chart is not intended to create, and does not create an attorney-client relationship. You should not act or rely on information in this article or comparison chart without first seeking the advice of a lawyer. This material is intended for general information purposes only and does not constitute legal advice. For legal issues that arise, the reader should consult legal counsel.



		<b>Proposed Equity Crowdfunding Model (MI 45-108)</b>	<b>Proposed Start-Up Model and Saskatchewan Equity Crowdfunding Exemption (Blanket Order)</b>
6.	<b>Restrictions on the availability of the exemption for certain industries and types of issuers</b>	<p>Yes</p> <p>Not available to:</p> <p>(a) investment funds;</p> <p>(b) related issuer of any registrant involved in a distribution</p> <p>(c) real estate issuers that are not reporting issuers;</p> <p>(d) issuers without a business plan (e.g., blind pools);</p> <p>(e) issuers not in compliance with ongoing requirements of the Crowdfunding prospectus exemption; or</p> <p>(f) issuers that are the subject of sanctions imposed by a court or a regulatory body.</p>	<p>Yes</p> <p>Not available to:</p> <p>(a) investment funds; or</p> <p>(b) reporting issuers.</p>
<b>DISTRIBUTION DETAILS</b>			
7.	<b>Types of securities that can be offered</b>	<p>Securities of issuer only.</p> <p>Can only offer:</p> <p>(a) common shares;</p> <p>(b) non-convertible preferred shares;</p> <p>(c) securities convertible into common shares or non-convertible preferred shares;</p> <p>(d) non-convertible debt securities linked to a fixed or floating interest rate;</p> <p>(e) limited partnership units; or</p> <p>(f) flow-through shares under the <i>Income Tax Act</i> (Canada).</p>	<p>Securities of issuer only.</p> <p>Same as the Proposed Equity Crowdfunding Exemption except no flow-through shares may be issued.</p> <p><i>Saskatchewan</i> – the securities being offered cannot be derivatives.</p>
8.	<b>Maximum aggregate offering</b>	<p>Yes</p> <p>Maximum of up to \$1.5 million by an issuer-group in a 12-month period immediately preceding the</p>	<p>Yes</p> <p>\$150,000 under each offering.</p> <p>Maximum of two offerings in a calendar</p>

		<b>Proposed Equity Crowdfunding Model (MI 45-108)</b>	<b>Proposed Start-Up Model and Saskatchewan Equity Crowdfunding Exemption (Blanket Order)</b>
		<p>beginning of the issuer's current distribution under the exemption.</p> <p>Overall maximum applies to an issuer, its affiliates and any other issuer that is engaged in a common enterprise with the issuer or its affiliates.</p>	<p>year (<i>i.e.</i>, maximum of \$300,000 in a calendar year and maximum of two offerings).</p> <p>Overall maximum applies to an issuer, its affiliates and any other issuer that is engaged in a common enterprise with the issuer or its affiliates.</p> <p><i>Saskatchewan</i> – exemption applies to issuers, promoters, directors, officers and control persons.</p>
9.	<b>Limitation on offering period</b>	<p>Yes</p> <p>Distribution cannot remain open more than 90 days. The issuer can commence a new equity Crowdfunding offering after the 90 day period.</p>	<p>Yes</p> <p>Distribution cannot remain open more than 90 days, except in <i>Saskatchewan</i> where it can remain open for up to 180 days.</p>
10.	<b>Requirement to disclose minimum and maximum offering size in offering document</b>	<p>Yes</p> <p>Offering cannot be completed unless:</p> <p>(a) minimum offering fully subscribed; and</p> <p>(b) at time of completion of the offering, the issuer has the financial resources sufficient to achieve the next milestone in its written business plan or, if no milestones, to carry out the activities set out in its business plan.</p>	<p>Yes</p> <p>Requirement to disclose minimum offering amount and maximum amount is implied as being \$150,000 if not a stated lower maximum amount.</p> <p>Minimum amount must be equal to amount needed to carry out the purpose for which the funds are sought as set out in the offering document.</p>
11.	<b>Ability to undertake concurrent offerings under other prospectus exemptions</b>	<p>Yes</p> <p>But not through a portal registered as a restricted dealer. A restricted dealer portal can only raise capital under the Proposed Equity Crowdfunding Exemption.</p> <p>A concurrent offering under another exemption must have the same offering terms.</p>	<p>Yes</p> <p>However, no concurrent offering under Proposed Start-Up Exemption permitted; only other available prospectus exemptions.</p> <p><i>Saskatchewan</i> – does not permit any concurrent offering by the issuer or any member of the issuer group for the same project under any other prospectus exemption.</p>
12.	<b>Restrictions on</b>	<p>Yes</p>	<p>Yes</p>



		<b>Proposed Equity Crowdfunding Model (MI 45-108)</b>	<b>Proposed Start-Up Model and Saskatchewan Equity Crowdfunding Exemption (Blanket Order)</b>
	<b>solicitation and advertising</b>	<p>Advertising on portal in accordance with exemption.</p> <p>Investors can be directed to portal's website by paper notice or social media.</p> <p>Marketing materials limited to:</p> <p>(a) offering document;</p> <p>(b) materials described in offering document; and</p> <p>(c) term sheet or other summary, including a video, of the information that is included in the offering document.</p>	Offering materials can be made available to potential investors only on the portal's website.
13.	<b>Offering document requirement</b>	<p>Yes</p> <p>Offering document must include:</p> <p>(a) Financing facts;</p> <p>(b) Issuer facts; and</p> <p>(c) Registrant or portal facts.</p> <p>Streamlined disclosure document must be provided that includes basic information about the offering, the issuer (e.g., its business and management, financial information), the use of proceeds and the portal.</p> <p>See also #18 below.</p>	<p>Yes</p> <p>Issuer must use a prescribed form of offering document. [In <i>Saskatchewan</i>, issuers must follow Form GO45-925F3 <i>Offering Document</i>].</p> <p>Streamlined disclosure document must be provided that includes basic information about the offering, the issuer (e.g., its business and management, financial condition) and the use of proceeds.</p> <p>See also #18 below.</p>
14.	<b>Certification of offering document by management</b>	Yes	No
15.	<b>Requirement to deliver offering document to regulator</b>	<p>Yes</p> <p>Requirement to deliver offering document to the regulator at the time that it is posted on the portal's website.</p>	<p>Yes</p> <p>Requirement to deliver offering material 10 days before distribution. [In <i>Saskatchewan</i>, issuers must use Form GO45-925F3 <i>Offering Document</i>].</p>



		Proposed Equity Crowdfunding Model (MI 45-108)	Proposed Start-Up Model and Saskatchewan Equity Crowdfunding Exemption (Blanket Order)
<b>INVESTOR PROTECTION MEASURES</b>			
16.	Restriction on type of purchaser and investment limits	Yes Maximum of \$2,500 per investor in an offering. Maximum of \$10,000 in total in a calendar year for each investor.	Yes Maximum of \$1,500 per investor in any offering. No maximum investment per calendar year.
17.	Risk Acknowledgement Form and/or risk warnings	Yes	Yes No specific Risk Acknowledgement Form, but investors must read and confirm on line that they understand the offering document and the specified risk warnings.
18.	Financial statement requirements	Yes <u>Non-reporting issuer:</u> Disclosure of the amount of the issuer's cash together with third party confirmation of cash in bank account or held in trust if issuer has not incurred any expenditures and its only asset is cash.  Audited financial statements are required if the issuer has raised more than \$500,000 under any prospectus exemption since its formation <u>and</u> expended more than \$150,000 since that time ( <b>Financial Thresholds</b> ).  Unaudited annual financial statements must be reviewed by an independent public accounting firm if the Financial Thresholds have not been achieved ( <i>i.e.</i> , review engagement).  <u>Reporting Issuer:</u> Audited annual financial statement and the most recent interim financial statement subsequent to year end that have been filed with the security regulator and available on SEDAR (the Canadian equivalent to EDGAR in the United States where public companies post their public documents).	No No financial statement requirements.
19.	Statutory or contractual rights of action in the event of	Yes Depending on the province, investors may have contractual rights of action or statutory rights of	Yes Rights of Action.



		<b>Proposed Equity Crowdfunding Model (MI 45-108)</b>	<b>Proposed Start-Up Model and Saskatchewan Equity Crowdfunding Exemption (Blanket Order)</b>
	<b>a misrepresentation</b>	action for rescission or damages for a misrepresentation in any materials provided to investors ( <b>Rights of Action</b> ).	
20.	<b>Withdrawal right ("cooling off" period)</b>	Yes Investors can cancel an investment until 48 hours prior to closing deadline identified in the issuer's offering document.	No Still under consideration by the Start-Up Jurisdictions.
21.	<b>Resale restrictions</b>	Yes <u>Reporting issuers</u> – securities are subject to a four-month hold period (subject to certain other conditions being met), but securities can be resold under a prospectus or a prospectus exemption. <u>Non-reporting issuers</u> - securities are subject to an indefinite hold period and can only be resold under another prospectus exemption or under a prospectus ( <b>Non-Reporting Issuer Resale Restrictions</b> ).	Yes Non-Reporting Issuer Resale Restrictions The Proposed Start-Up Exemption is not available for reporting issuers.
22.	<b>Ongoing disclosure requirement as a result of the exemption</b>	Yes <u>Reporting issuers</u> - must provide ongoing continuous disclosure in accordance with applicable Canadian securities law requirements. <u>Non-reporting issuers</u> - must provide annual audited financial statements and disclose how the gross proceeds of a crowdfunding distribution have been expended within 120 days of an issuer's fiscal year end. Also, an issuer must make available to security holders within 10 days of the occurrence of one or more of the following events:  (a) a fundamental change in, or discontinuation of, the issuer's business,  (b) a <u>significant</u> change to the issuer's capital structure,  (c) a major reorganization, amalgamation or merger	No Unless the issuer decides to provide such information to its shareholders or otherwise required under applicable law (e.g., corporate law).



		<b>Proposed Equity Crowdfunding Model (MI 45-108)</b>	<b>Proposed Start-Up Model and Saskatchewan Equity Crowdfunding Exemption (Blanket Order)</b>
		<p>(d) a take-over bid or issuer bid involving the issuer,</p> <p>(e) a significant acquisition by the issuer, and</p> <p>(f) changes in the issuer's directors and executive officers.</p> <p>(each being a <b>Triggering Event Report</b>).</p> <p>A non-reporting issuer remains subject to the above ongoing disclosure requirements until it becomes a reporting issuer, ceases to carry on business or has fewer than 51 securityholders worldwide.</p>	
23.	<b>Books and records requirement</b>	<p>Yes</p> <p>Issuer must maintain books and records that contain minimum prescribed information.</p>	No
<b>REGULATION OF FUNDING PORTALS</b>			
24.	<b>Requirement to involve a registrant (intermediary) in order to rely on the exemption</b>	<p>Yes</p> <p>Portals must be registered as a restricted dealer under applicable Canadian securities law.</p>	<p>No</p> <p>The funding portal is <u>not</u> required to be registered as a dealer under applicable Canadian securities law.</p>
25.	<b>Requirement for registration with a securities regulator for a funding portal and a registered individual</b>	<p>Yes</p> <p>Portals must comply with registration requirements generally applicable to exempt market dealers including minimum capital, regulatory reporting, record-keeping and record retention requirements.</p>	No
26.	<b>Form filing requirements for portal with securities regulators</b>	<p>Yes</p> <p>Portal and a registered individual must make an application to its principal Canadian securities regulator to be registered as a restricted dealer.</p> <p>Portal will have ongoing quarterly reporting obligations 30 days after the end of each quarter.</p>	<p>Yes</p> <p>Portal must deliver a completed Portal Information Form 30 days prior to beginning to facilitate distributions.</p> <p>In <i>Saskatchewan</i>, portals must use Form <i>GO 45-925 F5 Portal Information</i>.</p> <p>Each promoter, director, officer and control person of the owner of the portal must</p>





		<b>Proposed Equity Crowdfunding Model (MI 45-108)</b>	<b>Proposed Start-Up Model and Saskatchewan Equity Crowdfunding Exemption (Blanket Order)</b>
			<p>deliver a completed <i>Portal Individuals Information Form</i> 30 days prior to the portal beginning to facilitate distributions.</p> <p>In <i>Saskatchewan</i>, individuals must use Form GO 45-925F6.</p>
27.	<b>Required background checks by portal on individuals involved with issuer</b>	<p>Yes</p> <p>Background checks on issuer, directors, executive officers, promoters and control persons.</p>	<p>Yes</p> <p>See also #31 below.</p>
28.	<b>Location of head office requirement</b>	<p>Yes</p> <p>Background checks on issuer, directors, executive officers, promoters and control persons.</p>	<p>Yes</p> <p>See also #31 below.</p> <p><i>Saskatchewan</i> – owner of portal and portal must be located in Canada.</p>
29.	<b>Canadian residency requirement for prescribed individuals of portal</b>	<p>No</p>	<p>Yes</p> <p>The portal's promoters, directors, officers and control persons must be Canadian residents.</p> <p>In <i>Saskatchewan</i>, there is no Canadian residency requirement for the portal's promoters, directors, officers and control persons.</p>
30.	<b>Due diligence requirement</b>	<p><b>Yes</b></p> <p>A portal must understand the general structure, features and risks of a security offered.</p> <p>A portal must also review the information presented by the issuer on the portal's website to form a reasonable belief that the information adequately sets out:</p> <p>(a) the general features and structure of the security;</p> <p>(b) issuer-specific risks;</p> <p>(c) parties involved;</p> <p>(d) any identified conflicts of interest; and</p>	<p>No</p>



		<b>Proposed Equity Crowdfunding Model (MI 45-108)</b>	<b>Proposed Start-Up Model and Saskatchewan Equity Crowdfunding Exemption (Blanket Order)</b>
		<p>(e) intended use of funds.</p> <p>The portal will not be liable for the accuracy or completeness of the issuer information.</p> <p>No portal may include on its website any issuer information or communication that appears to be false, deceptive, misleading or contains a misrepresentation and must terminate any offering and report immediately to the principal regulator if fraud is discovered during the distribution period.</p> <p>The portal will take reasonable steps to confirm that the minimum offering is achieved before funds are transferred to the issuer.</p> <p>Business plans will be prepared by the issuer's management. Portals will not be required to assess the commercial viability of the business plan (<i>i.e.</i>, no merit review).</p> <p>Background checks on issuers, directors, executive officers, promoters and control persons will be performed by the portal to verify the qualifications, reputation and track record of the parties involved in the key aspects of the offering. The checks will include identifying criminal and regulatory issues.</p>	
31.	<b>Ability to deny access to portal for fraud</b>	<p>Yes</p> <p>A funding portal must not include on its website any offering document or information that appears to be false, deceptive, misleading or contains a misrepresentation and must terminate any offering and report immediately to its principal Canadian securities regulator if fraud is discovered during the distribution period.</p>	<p>Yes</p> <p>Ability to deny access if portal has reason to believe that issuer or its offering is fraudulent.</p>
32.	<b>Specified requirements with respect to transactions</b>	<p>Yes</p> <p>Portals will be required to:</p> <p>(a) conduct background checks on issuers, directors, officers, promoters and control persons;</p>	<p>Yes</p> <p>Portal will be required to:</p> <p>(a) make the offering document of the issuer and the important risk warnings separately available to investors</p>

		<b>Proposed Equity Crowdfunding Model (MI 45-108)</b>	<b>Proposed Start-Up Model and Saskatchewan Equity Crowdfunding Exemption (Blanket Order)</b>
		<p>(b) understand the general structure, features and risks of a security offered;</p> <p>(c) review the information presented by the issuer on the portal's website to confirm that the information adequately sets out the general features and structure of the security, issuer-specific risks, parties involved, any identified conflicts of interest, and the intended use of funds; and</p> <p>(d) deny access to an issuer if it has reason to believe that the issuer or its offering is fraudulent.</p>	<p>electronically online;</p> <p>(b) allow an investment only once the investor confirms online they have read and understood the offering document and important risk warnings;</p> <p>(c) release funds to the issuer only when the minimum offering amount has been reached;</p> <p>(d) ensure that all funds received for an offering are held in trust for an investor; and</p> <p>(e) provide the issuer with details on investors (name, address, telephone number, e-mail address, detail of purchase) within 15 days of closing of the offering.</p>
33.	<b>Investor education requirements</b>	<p>Yes</p> <p>A portal must take reasonable steps an investor understands the risks of a crowdfunding investment. Steps include, requiring an investor to complete an interactive questionnaire.</p> <p>Obtain a signed Risk Acknowledgement Form from investors.</p> <p>Portals must obtain written certification from investors that they comply with annual investment limits.</p>	<p>No, however, investors will not be permitted to complete their investment until they review and acknowledge on-line the following prescribed risk warnings:</p> <p>(a) that they may lose their entire investment;</p> <p>(b) it may be difficult to sell their shares;</p> <p>(c) that the investment opportunity has not been approved by any securities commission or government entity;</p> <p>(d) that they need to seek professional investment advice;</p> <p>(e) that they do not have the same legal rights as when purchasing through a prospectus offering; and</p> <p>(f) that they reside in one of the participating jurisdictions.</p>
34.	<b>Prohibited portal activities</b>	Yes	Yes



		<p><b>Proposed Equity Crowdfunding Model (MI 45-108)</b></p>	<p><b>Proposed Start-Up Model and Saskatchewan Equity Crowdfunding Exemption (Blanket Order)</b></p>
		<p>A portal cannot:</p> <ul style="list-style-type: none"> <li>(a) provide specific recommendations or advice to investors about securities being offered on their platform;</li> <li>(b) solicit purchases or sales of securities offered on their platform (other than through posting an offering on the platform);</li> <li>(c) compensate employees or agents to solicit the sale of securities on their platform;</li> <li>(d) hold or handle investor funds/securities;</li> <li>(e) invest in any issuer or underwrite any issuer (subject to receiving fees in the form of securities that do not exceed a 10% ownership interest in the issuer and fully disclosed on the portal’s website);</li> <li>(f) endorse or comment on the merits or expected returns of an investment to investors (since this would constitute a recommendation or advice); or</li> <li>(g) facilitate secondary trading (resales) in any securities issued under the exemption.</li> </ul> <p>A portal cannot be related to the issuer of the securities.</p>	<p>A portal cannot:</p> <ul style="list-style-type: none"> <li>(a) provide investment advice; or</li> <li>(b) be related to the issuer of the securities on the portal.</li> </ul>

## 6 Contact details of the author





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## Croatia

### 1 Recent developments in the market of Crowdfunding in Croatia

During the last 12 months there were the following significant developments in Croatia regarding Crowdfunding:

In 2014 the first Croatian operational Crowdfunding platform emerged, Croinvest.eu. It is described as a platform for financing entrepreneurial, infrastructural and socially useful projects, with particular emphasis on projects applying for financing from EU funds. The platform offers five financing models (donations, rewards, loans, equity shares and profit shares), so the platform enables investors to:

- i. donate funds,
- ii. invest funds in exchange for supply of a product or service within a set timeframe,
- iii. loan funds as an interest-free or interest bearing investment loan, to be repaid within a set timeframe;
- iv. invest funds in exchange for an equity share in a private limited liability company or a cooperative; or
- v. invest funds in exchange for a stake in profits on the basis of a silent (secret) partnership agreement.

From the elaborations provided by the platform organizers, it appears that the above options (and their specific descriptions) are structured in a way in which the platform organizers believe they would be feasible under Croatian laws.

The respective platform is said to be open to all Croatian natural persons and legal entities (e.g. companies, cooperatives, associations, private and public institutions, units of local and regional government) as well as to "all foreign citizens willing to invest in Croatia".

Croinvest.eu invites fund-seekers to apply with their projects and specify the desirable financing model. Projects applying for EU funds will have particular preference for enlisting on the platform. The platform users will be obliged to (a) answer any questions of backers or interested investors, (b) present to investors the scope of rights and obligations arising from the articles of association, statute of the cooperative or silent partnership agreement, (c) honor the duties and timeframes undertaken towards the investors; (d) apply received funds exactly as presented under the project; and (e) abide by all applicable laws.

The project campaign duration is limited to a maximum of 60 days, except for pilot projects. Furthermore, the pilot projects will also be able to draw the received funds even if the initially set goal is not reached, Otherwise, it is stated that later projects will be able to claim the received pledges only if the target amount is reached within the set timeframe (while if not, the funds will be returned to the investors).



As at September 2014 Croinvest.eu has had only one active campaign, a civil sector project funded by way of silent partnership stake model.

Finally, another Croatian platform of a donations/rewards type is seeking public attention, but it seems it is still in development stage.

### 1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

In Croatia there is currently only one (publicly recognizable) active Crowdfunding platform offering this model, Croinvest.eu. There are several options how fund seekers can structure the project while using the Equity Model on this platform, specifically by offering investors to:

1. invest in exchange for shares in (new or existing) private limited liability company – the structure as described seems to reflect basic rules of Croatian companies' law on establishing, ownership structure and managing of a co-owned private company. Notably, the ownership of equity will have to be acquired in proper procedure and registered with commercial court. The investor will generally hold such equity share in the company as corresponds to the proportion of her investment in the company's registered share capital; or
2. invest in exchange for stake in a cooperative - the structure as described seems to reflect basic rules of Croatian law on establishing, ownership structure and managing of a cooperative. Notably, regardless of the size of the investment, all members of the cooperative have equal voting rights. Also, one can only be a member of the cooperative if one directly participates in its operation, does business through the cooperative or otherwise directly participates by achieving the cooperative's goals; or
3. invest in exchange for a silent (secret) partnership stake in the profit of the fund-seeker's company – the structure seems to reflect basic rules of Croatian companies' and obligations' law on silent partnership agreements. The project holder must establish a company (e.g. a private limited liability company). This enters into an agreement with each investor whereby such investor, as silent partner, will be entitled to a certain percentage of profits of the relevant company (and losses, if so agreed), for a definite or indefinite number of years.

It seems that the platform is particularly recommending the silent partnership model, elaborating that in relation to other equity model options mentioned above, it offers a (much) more favourable structure both for the project holder (fund-seeker) and the investor. The particular emphasized advantages are that (a) the investor is (typically) not liable for company's losses or duties towards third-parties, (b) the relationship is not registered in a court registry and generally requires much less formalities, (c) there are no additional costs (as opposed to e. g, public notary costs when establishing or acquiring a formal shareholding in a company), (d) the project holder keeps a certain amount of independence, etc.

It appears that the first and the currently only active campaign on Croinvest.eu relates to a civil sector project structured on the silent partnership model. The project, raised by the organizers of the platform Croinvest.eu, is said to have reached 133% of the targeted EUR 10,000 financing goal, with 10 backers pledging from EUR 150 up to EUR 5,000 (although seemingly the largest investments came from the project holders and platform organizers themselves).



Finally, it should be noted that the respective platform and the first project mentioned above have been realized only very recently, and it is yet to be seen whether the legal structures proposed by the platform organizers are fully feasible under Croatian laws and practice of local regulators.

### **1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)**

In Croatia there is currently only one (publicly recognizable) active Crowdfunding platform offering this model, Croinvest.eu. Under this structure the project may offer investors to loan funds in the form of an interest-free or interest-bearing investment loan, to be repaid within a set timeframe. The fund-seeker will set out the amount of loan, interest (if any) and repayment deadline. A setup of multiple loans with different terms is also possible.

It seems that the model as described by the platform resembles the legal setup of a standard loan agreement involving natural persons or legal entities, with all applicable restrictions under Croatian laws (e.g. the maximum rates of interest). The platform does not specify whether this model may include issuance of bonds or other transferable debt securities.

There appear to be no Crowdfunding campaigns of this type currently active in Croatia. It is yet to be seen whether the legal structures proposed by the platform organizers are fully feasible under Croatian laws and practice of local regulators.

### **1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)**

In Croatia there is currently only one (publicly recognizable) active Crowdfunding platform offering these models, Croinvest.eu.

In the Donations Model, investors can donate funds for benevolent reasons (without receiving a monetary reward or share in equity or profits of a project). The platform does not publicly offer a description of this model but simply elaborates on certain tax repercussions (notably for fund-seekers).

Under the Rewards Model, investors can invest funds in exchange for supply of a product or service within a set timeframe. The project holder will be obliged to (i) register a business entity (not a non-profit organization) and satisfy relevant minimum technical requirements for sale of certain goods or services, (ii) specify the deadline for delivery of goods or services, and (iii) if the project collects targeted funds, supply the good/service along with issuing invoices to investors. In essence, the setup as described indicates that the platform organizers categorize the Rewards Model (unless the reward is only of symbolic value, e.g. a certificate), as a sale and purchase transaction, performed only by a for-profit entity.

Furthermore, there is information about another local Crowdfunding platform using the Donations/Rewards Model emerging, but it appears that the platform is still in preparatory phase and no details of the possibility of actually using the platform are available at this point. It is described that the platform will initially only be used to finance humanitarian and socially beneficial projects performed by NGOs, while it is yet to be decided on the possibility and extent of financial support for individuals or companies.





There appear to be no Crowdfunding campaigns of this type currently active in Croatia. It is yet to be seen whether the legal structures proposed by the platform organizers are fully feasible under Croatian laws and practice of local regulators.

## 2 Recent developments regarding Crowdfunding regulation in Croatia

During the last 12 months there have been no relevant developments in Croatia with respect to laws and regulations potentially applicable to Crowdfunding in Croatia. Furthermore, there is still no local law or regulation specifically addressing Crowdfunding.

## 3 Current regulation of Crowdfunding in Croatia

### 3.1 Licence under the Capital Market Act and Open-Ended Investment Funds Act

#### Equity Model

Under the Croatian Capital Market Act, anyone intending to provide "investment services" and conduct "investment activities" in Croatia requires a written licence from the domestic Financial Services Supervisory Authority (*Hrvatska agencija za nadzor financijskih usluga* – "HANFA"), or from Croatian National Bank ("CNB") if a credit institution is at hand.

The "investment services and activities" are defined as (*inter alia*) the brokering of business involving the purchase and sale of financial instruments (investment brokering), the purchase and sale of financial instruments in the name of and for the account of others (contract brokering), the placement of financial instruments without commitment to take up those instruments (placement of financial instruments), portfolio management, investment counselling, safeguarding and administering investments (including custodial services).

"Financial instruments" within the meaning of the Capital Market Act notably include transferable securities, units in collective investment funds, money market instruments options, futures, swaps, forward rate agreements and other derivative instruments linked to securities, currency, interest rates or returns.

"Transferable securities" are those types of securities which are transferable on capital markets, including, *inter alia*, (a) stock corporation shares and other equivalent securities representing shares in the capital or in membership rights within companies, and share deposit certificates; (b) bonds and other forms of securitized debt, including certificates of deposit relating to such securities; (c) any other security which permits the purchase or sale of securities described in the preceding paragraphs; d) any other security based on which a cash payment may be made as determined with reference to securities, currency, interest rates, returns, commodities, indices or measures.

On the other hand, depending on the structure of the particular platform, there is the possibility that the fund seeker and/or the platform operator could in fact be considered as operating an open-ended public collective investment fund (scheme). This interpretation could arise e.g. due to a non-standard



profit-sharing arrangement (as opposed to a classic company/shareholder relationship), and taking into account that the “investment fund” can refer to a body corporate or a collection of assets and that typically the investors would not have day-to-day oversight of management decisions. In such case, the applicable rules mandate both obtaining requisite approval from HANFA and registering with the relevant registry.

To summarize, where an online Crowdfunding platform facilitates the offering of financial instruments (notably securities transferable on capital markets or units in collective investment funds) and/or performs other regulated activities (investment services/activities as described above), it appears that the operator of the platform provides investment services or operates an investment fund within the meaning of the Croatian Capital Market Act and Open-Ended Investment Funds Act. Therefore, as a general rule, a license by HANFA and/or the CNB is required in such case, plus relevant registration in an investment fund scenario.

On the other hand, where the platform would offer only stakes which are not transferable on capital markets (e.g. shares in private limited liability companies, or stakes in a cooperative or silent partnership stakes) it could generally be argued that such regime would fall outside Croatian capital markets regulation, and that no license from securities regulator is required. In this context, it appears that the only currently active Croatian Crowdfunding platform (Croinvest.eu) is apparently offering only such Equity Models where stakes would not be transferable on capital markets. It also seems that Croinvest.eu did not seek any kind of license from HANFA (or CNB).

However, it should be noted that due to complete lack of Crowdfunding activity in Croatia until very recently, no settled practice on licensing issues has yet been developed. There is currently no available information on whether the Croatian legislation will change in a way where Crowdfunding would be separately regulated. It may be useful to note that the Croatian securities regulator has publicly called for interested parties to participate in the public debate on Crowdfunding organized by the EU Commission.

### **Lending Model**

To the extent that the platform would entail dealing in bonds or others transferable debt securities (to the extent these are deemed “transferable securities” in terms of Capital Market Act), it is likely that the appropriate license would have to be obtained from HANFA and/or CNB, similarly as with the Equity Model. On the other hand, if the loans would not be transferable nor otherwise be structured in a way qualifying as transferable securities, it appears that no such license would be necessary.

Furthermore, if the platform permits borrowers to be individuals (acting outside commercial activity), the Croatian Consumer Credit Act would generally apply and a proper license from the Ministry of Finance or CNB will generally be required for certain types of lending activity. There will also be implications for the form and content of the lending agreement.

However, it should again be emphasized that no (settled) practice has yet been established by Croatian authorities in respect to regulation of any kind of Crowdfunding.



## Donations or Rewards Model

Depending on the platform structure, there are good reasons to argue that these kinds of investments do not qualify as investment services or activities. Therefore, the platform operating Donations or Rewards Model should fall outside of Croatian financial services regulation.

### 3.2 Prospectus requirements

Under the Capital Market Act, a prospectus is mandated for a public offering of securities on the territory of Republic of Croatia. However, as a rule this refers only to offering of “transferable securities” (those transferable on capital markets), such as stock corporation shares. Therefore, if an Equity Model campaign would offer only stakes not transferable on capital markets (e.g. shares in private limited liability company, stakes in a cooperative or silent partnership stakes), it appears that there would be no prospectus requirement.

Likewise, the Lending Model of Crowdfunding could generally be subject to the rules on prospectus obligations only in cases where the lending involves bonds or other debt securities transferable on capital markets. For the Donations and Rewards Model it appears that the prospectus requirements will not be applicable.

Finally, even with “transferable securities”, there are a number of exceptions to the prospectus requirement, notably for offers worth less than EUR 5 million in the EU, calculated for a 12-month period.

### 3.3 Regulation of Crowdfunding under the AIFMD regime

In Croatia the Alternative Investment Fund Managers Directive (2011/61/EU) (“AIFMD”) has been implemented via the Alternative Investment Funds Act 2013 (“AIFA”) which applies as of 1 July 2013 (the day of Croatia’s accession to the EU) and relevant bylaws. This has brought a new layer of regulation on top of the “regular” collective investment scheme regime governed by Open-Ended Investment Funds Act.

AIFA governs, *inter alia*, the terms for establishment and operation of AIFs and AIF management entities (“AIFMs”). AIF is defined as an investment fund established for the purpose of: (i) raising assets through public or private offer; (ii) investing these assets into different types of property in accordance with a strategy and investment targets defined upfront; and (iii) exclusively for the benefit of investors in such AIF.

AIFs can be open-ended (generally only a collection of assets without legal personality, managed by AIFM) or closed-ended (a company formed as stock corporation or a private limited liability company, managed by AIFM). Open-ended AIFs are not the public open-ended investment funds regulated by the Open-Ended Investment Funds Act, and they are not subject to the license requirements prescribed therein. Shares in AIFs can generally be offered both publicly and privately.

A Crowdfunding scheme where a non-standard profit sharing arrangement is provided might be construed as involving an investment fund in form of AIF. Furthermore, AIFA does not offer conclusive guidance on whether an operating company seeking funding by way of Crowdfunding might be considered as an AIF. It could be argued that the typical start-up seeking funding for its general commercial business is not AIF as (i) such company does not invest the received capital “in accordance



with an upfront business strategy” (but only to finance its operations), and/or that (ii) the assets are not used “exclusively” for the benefit of the investors (as the fund-seeker is typically utilizing the majority or at least a small part of funds for its own business benefit).

However, as AIFA and the subsequent bylaws were rendered only very recently and the practice of local authorities is yet to develop, and having in mind the divergences in possible structures of Crowdfunding arrangements, a risk cannot be excluded that a particular kind of an operating company (e.g. a single project dedicated vehicle, or a company effectively operating a collective investment fund) might be construed as an AIF.

Finally, as to the Crowdfunding platform itself, it can be said that the operator of a Crowdfunding platform does not raise capital from investors itself but only provides a “technical” service facilitating the capital-raising by the fund-seeker. As the characteristics of AIF are not met, it appears that the operator of the Crowdfunding platform should not qualify as an AIF. Even if the underlying investment qualifies as an AIF, it could be argued that the Crowdfunding platform does not “manage” this investment, as the company seeking funding is the true manager of such AIF. Therefore it is likely that the Crowdfunding platform should not qualify as AIFM.

### 3.4 Licence under the Payment Services Act

The transmission of funds between the investor and the crowd-funded business via the Crowdfunding platform may involve the platform operator providing “money remittance” services as defined under the Croatian Payment Services Act (“PSA”). Money remittance services generally require authorization from CNB.

However, “money remittance” services under PSA do not extend to payments made by “commercial agents” authorized to negotiate or conclude contracts on behalf of the payer and payee. Therefore, depending on the overall structure, the platform operators would likely be able to invoke this exception and avoid the licensing obligation.

### 3.5 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- Croatian Act on Prevention of Money Laundering and Financing of Terrorism
- Croatian Act on Protection of Personal Data
- Croatian Companies Act

## 4 Lessons learned from Croatia's regulation for a possible harmonized European Crowdfunding regulation

As there is currently no regulatory regime in Croatia that is specifically adapted to Crowdfunding, and due to complete lack of Crowdfunding activity in Croatia until very recently, no settled practice on regulatory, licensing or implementation issues has yet been developed. Therefore, there would yet be no firm lessons from Croatia for a possible harmonized European Crowdfunding regulation.

## 5 Conclusion

Croatian practice has only very recently seen the birth of the first operational Crowdfunding platform, which has seemingly operated only one active project thus far. There is also currently no regulatory regime in Croatia that is specifically adapted to Crowdfunding. However, operating certain types of Equity Model or Lending Model (e.g. those involving offer of securities transferable on capital markets) may be subject to the provisions of Croatian law referring to securities, investment funds, consumer credits and payment services. These rules generally mandate obtaining specific approvals and/or registrations from Croatian authorities prior to performing the regulated activity. Some of the potential duties, such as the requirement of license for providing consumer credits or the prospectus obligation, can generally be avoided by appropriate structuring of the platform and/or the Crowdfunding project.

The AIFMD has been formally implemented in Croatia by very recent local laws and regulations. However, the historical lack of operative Crowdfunding platforms did not lead to a chance for development of a firm regulatory practice in interpretation of legislative framework. Coupled with the fact that there are yet no published opinions of the authorities which could offer conclusive guidance on all the aspects of Crowdfunding regulation, it only remains to be seen whether there is true potential for emergence and any significant growth of local platforms.

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## Czech Republic

### 1 Recent developments in the market of Crowdfunding in the Czech Republic

During the last 12 months there were the following significant developments in the Czech Republic regarding Crowdfunding:

#### 1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

While there currently still is no working equity Crowdfunding platform in the Czech Republic, we perceive an increased interest in creating such a platform. This increase may be partly attributable to new legislation governing corporations (Act no. 90/2012 Coll., the Corporations Act, which took effect on 1 January 2014). The Corporations Act enables more flexibility in setting up the corporate governance structure of target companies, thereby making equity Crowdfunding projects more viable in the long term.

#### 1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

There has been little to no development in the Lending Model, with peer-to-peer lending being the only currently operative model. In fact, one of the two platforms operating on this model seems to have ceased its operation. Business loans continue to be outnumbered by loans to private individuals.

#### 1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

Crowdfunding platforms based on the Rewards Model continue to be the most successful in the Czech Republic. As in the past, social and cultural projects still form a majority of funded ventures, along with a smaller number of start-up companies.

### 2 Recent developments regarding Crowdfunding regulation in the Czech Republic

In the past year the main regulations relevant to Crowdfunding remained largely stable and unchanged. We understand from unofficial contact with public bodies that the current extent of Crowdfunding regulation is viewed as sufficient and that, therefore, no specific regulatory changes directly affecting Crowdfunding are expected in the near future.



## 3 Current regulation of Crowdfunding in the Czech Republic

### 3.1 Licence under Act no. 240/2013 Coll., on management companies and investment funds, as amended (the "AMCIF")

#### Equity Model

Investing in return for a share in the profits or revenue generated by a company/project is defined by the AMCIF as a form of collective investment.

Such activity corresponds most closely to the definition of an investment fund under the AMCIF. An investment fund is either a joint-stock company with its registered office in the Czech Republic or a mutual fund (which is merely a collection of funds and has no legal personality) that is entitled or the purpose of which is (i) to collect funds from the public by issuing shares/participation certificates and (ii) to perform the collective investment of the collected funds on the basis of a given investment strategy based on the principle of the division of risk for the benefit of the owners of the shares/participation certificates and further (iii) to manage the funds ("**Investment Fund**").

An Investment Fund can either (i) be managed by a management company, (ii) exist in the form of an Investment Fund which is entitled to manage itself or (iii) exist in the form of an Investment Fund which is managed by its executive body being a management company. All three possibilities (a management company, a self-managing Investment Fund and an Investment Fund managed by its executive body) are required to obtain a licence from the Czech regulator (i.e. the Czech National Bank).

The capital of an Investment Fund has to reach at least EUR 1,250,000 within six months of the date of the establishment of such Investment Fund. Given this high capital requirement, Crowdfunding platforms or project companies in the Czech Republic usually do not choose the Equity Model.

If a project company or a Crowdfunding platform acting under the Equity Model would intend to provide investment services, it would have to be properly licensed under Act no. 256/2004 Coll, on capital markets, as amended (the "**Capital Markets Act**").

Investment services ("**Investment Services**") under the Capital Markets Act include in particular:

- (i) reception and transmission of orders in relation to investment instruments (i.e. in particular investment securities such as shares or bonds and derivatives – "**Investment Instruments**");
- (ii) execution of orders in relation to Investment Instruments on behalf of a client;
- (iii) proprietary trading in Investment Instruments;
- (iv) management of client's assets under a contract with the client if an Investment Instrument is part of such assets;
- (v) investment advice concerning Investment Instruments;
- (vi) underwriting and/or placing of Investment Instruments on a firm commitment basis;
- (vii) placing of Investment Instruments without a firm commitment basis; and
- (viii) services of safekeeping and administration of Investment Instruments for the account of clients (including custodianship and related services).





Alternatively, a Crowdfunding platform may position itself as an intermediary for a direct sale of shares in the individual companies to its investors, thereby avoiding the application of collective investment rules. Under this model, the platform would still have to be licensed with the Czech National Bank as an investment firm, in particular providing the Investment Services listed above under no. (ii), (iii), (vi) and (viii).

However, the application of this method provides for significant administrative constraints, in particular regarding the corporate structure of the target companies (e.g. the economies of the relevant administrative costs effectively rule out target companies structured as limited liability companies). Furthermore, prospectus requirements (as described in section 3.2) must also be respected.

### Lending Model

Under Czech law, the lending of money by individuals to a company/project in return for repayment of the loan and interest is a non-regulated activity. Despite the fact that the lending of money would occur through an online Crowdfunding platform, there are no regulatory requirements under Act no. 21/1992 Coll, on banking, as amended (the "**Banking Act**"). However, general civil and commercial rules on lending must be observed.

The Crowdfunding platform would also have to obtain a trade licence in order to be entitled to organise collective lending and borrowing.

Act no. 145/2010 Coll., on consumer credit (the "**Consumer Credit Act**") only applies to individuals as consumers, not to companies. Should the project be undertaken by an individual who is to be granted loans under the Lending Model, he/she cannot be qualified as a consumer within the meaning of the Consumer Credit Act, as long as he/she is going about his/her business activity or performing his/her profession in an independent way.

### Donations or Rewards Model

The provision of money by individuals to a company/project for benevolent reasons or for non-monetary reward constitutes an exemption under the AMCIF. Collecting funds or assets that can be valued in money the main purpose of which is the financing of activities that relate to the production or sale of goods, research or the provision of services (other than financial services) and further management of such collected funds or assets that can be valued in money (or assets gained for such funds or assets that can be valued in money) does not constitute collective investment. Such activity is thus not regulated by the AMCIF. However, a Crowdfunding platform which would organise such collection of funds would have to obtain a trade licence for these purposes.

Furthermore, the requirements of Act No. 117/2001 Coll., on public collections, as amended (the "**APC**") apply to the Donations Model. The APC applies to any activity by which voluntary donations are being collected from further unspecified members of the public (the "**Public Collection**") and imposes several restrictions. In particular, Public Collections may only be held for publicly beneficial purposes, such as humanitarian purposes, charity, education, sport, protection of cultural items, cultural heritage or the environment.

Any Public Collection has to be notified to the relevant Regional Authority (in Czech: "*krajský úřad*"). The Regional Authority subsequently scrutinizes the application and may reject it for non-compliance





with the statutory requirements, in particular if it finds that the purpose of the Public Collection is not publicly beneficial. Furthermore, detailed records of the contributions must be kept and must be submitted to the Regional Authority after the Public Collection has finished.

Due to the aforementioned administrative requirements and the fact that Crowdfunding of certain types of projects (e.g. business start-ups) would rarely satisfy the conditions of public benefit, current Crowdfunding platforms refrain from the use of the Donations model. Instead, the Rewards model is used where each project typically has to define rewards for contributors and the contribution is structured as a sale of such reward, thus falling out of the scope of the APC.

### 3.2 Prospectus requirements

Under the Capital Markets Act, the general prospectus requirement does not apply where the offering of investment securities (i.e. shares, bonds, securities substituting shares or bonds, securities enabling the acquisition or sale of shares or bonds, certain derivatives, or similar securities) in all member state of the European Union does not exceed EUR 1,000,000 within a time period of 12 months.

### 3.3 Regulation of Crowdfunding under the AIFMD regime

In the Czech Republic, the AIFMD has been implemented by the AMCIF. Under the AMCIF, an alternative investment fund (an "AIF") constitutes either a special fund or a fund of qualified investors.

A special fund under the AMCIF is defined as an Investment Fund which does not fulfil the requirements stipulated by the law of the European Union and thus is not registered in the relevant register kept by the Czech National Bank.

The AMCIF defines a fund of qualified investors as:

- a legal entity (limited partnership, limited liability company, joint stock company, *societas europea* or cooperative) with its registered office in the Czech Republic that is entitled to (i) collect funds or assets that can be valued in money from several qualified investors by issuing participation securities or in a way that such qualified investors become its shareholders, and (ii) perform collective investment of the collected funds or assets that can be valued in money on the basis of a given investment strategy for the benefit of such qualified investors, and (iii) to manage such assets; or
- a mutual fund the purpose of which is to (i) collect funds or assets that can be valued in money from several qualified investors by issuing participation certificates and (ii) invest the collected funds on the basis of a given investment strategy for the benefit of the owners of the participation certificates and (iii) manage these assets; or
- a trust fund (i) the statutes of which identifies several qualified investors as beneficiaries; such beneficiaries are the founder of the given trust fund or the person that increased the assets of the given trust fund on the basis of a contract and (ii) which is established for the purpose of investment on the basis of a given strategy for the benefit of its beneficiaries



### 3.3.1 Operating company seeking funding

Assuming that “operating company” means a start-up or developing company seeking funding for its general commercial business by means of a Crowdfunding platform, the operating company falls under an exemption under the AMCIF. Collecting funds or assets that can be valued in money the main purpose of which is the financing of activities that relate to the production or sale of goods, research or the provision of services (other than financial services) and the further management of such collected funds or assets that can be valued in money (or assets gained for such funds or assets that can be valued in money) does not constitute collective investment. Such activity is not regulated by the AMCIF; therefore, an operating company can neither fall under the definition of a special fund nor of a fund of qualified investors under the AMCIF.

Of course, the operating company would have to obtain a relevant trade license in order to be able to conduct its business.

### 3.3.2 Project Company seeking funding

As long as a project company is acting under the Equity Model (i.e. it invests in return for a share in the profits or revenue generated by such project company), then the provisions in the AMCIF apply to it. An investor in a project company acting under the Equity Model would probably not qualify as a qualified investor (as defined by the AMCIF), so a project company acting under the Equity Model would probably not constitute a fund of qualified investors under the AMCIF. However, it cannot be ruled out that such project company could constitute a special fund under the AMCIF (i.e. an AIF under the AMCIF).

The capital of a special fund has to reach at least EUR 1,250,000 within six months of the date of the establishment of such special fund.

Also, if a project company acting under the Equity Model would intend to provide Investment Services (as defined above), it would have to be properly licensed under the Capital Markets Act.

The AMCIF will not apply to project companies seeking funding via the Lending or Reward Models.

### 3.3.3 Crowdfunding Platform

Should the Crowdfunding platform organise funding for project companies under the Equity Model, it would probably not constitute a fund of qualified investors under the AMCIF (as an investor of a project company acting under the Equity Model would probably not qualify as a qualified investor, as defined by the AMCIF). It cannot be ruled out, however, that such Crowdfunding platform could constitute a special fund under the AMCIF (i.e. an AIF under the AMCIF).

The capital of a special fund has to reach at least EUR 1,250,000 within six months of the date of the establishment of such special fund.

Also, should the Crowdfunding platform intend to provide Investment Services (as defined above) when organising funding for project companies under the Equity Model would, it would have to be properly licensed under the Capital Markets Act.



Should the Crowdfunding platform organise funding for project companies under the Lending Model, it would neither constitute a special fund nor a fund of qualified investors, as the AMCIF would not apply due to the fact that organising the lending of money by individuals to a company/project in return for the repayment of the loan plus the payment of interest is a non-regulated activity.

Should the Crowdfunding platform organise funding for project companies under the Donations or Rewards Model, it would neither constitute a special fund nor a fund of qualified investors, as the AMCIF would not apply due to the fact that organising the provision of money by individuals to a company/project for benevolent reasons or for non-monetary reward constitutes an exemption under the AMCIF.

### 3.4 Licence under the Act no. 284/2009 Coll, on payment services, as amended (the "Payment Services Act")

Should the Crowdfunding platform intend to perform payment services itself in the Czech Republic, it would have to be properly licensed. There is the possibility to become either (i) a payment institution, (ii) a small-scale payment service provider, (iii) an electronic money institution or (iv) a small-scale electronic money issuer under the Payment Services Act. Becoming a payment institution or an electronic money institution requires a licence granted by the Czech National Bank. Becoming a small-scale payment service provider or a small-scale electronic money issuer requires registration with the Czech National Bank.

In any event, the Crowdfunding platform could also outsource payment services, which would not trigger any licensing or registration requirements.

### 3.5 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- Act 455/1991 Coll., on trading, as amended (which regulates trade licences) (the "Trade Licensing Act");
- the Capital Markets Act; and
- Act 253/2008 Coll., on some measures against the legalisation of proceeds gained from criminal conduct and financing of terrorism (AML provisions) (the "AML Act").

## 4 Lessons learned from the Czech Republic's regulation for a possible harmonized European Crowdfunding regulation

To a large extent, the regulatory regime of Crowdfunding is already heavily influenced by harmonized European legal provisions, as they are based on the AIFMD, the Payment Services Directive and others.

### 4.1 Role model ("dos")

With regard to the Lending Model and the Rewards Model, it may be viewed positively that little to no regulatory limitations apply.



#### 4.2 Aspects that should be avoided ("don'ts")

No specific Czech regulations currently exist for Crowdfunding; rather the existing regulations were adapted and applied to this emerging phenomenon. As a result, the level of investor protection required by the regulation may limit the viability of smaller investments.

The administrative requirements applied to the Equity Model often require written form with no possibility to complete such steps electronically, which would be most suited to the nature of Crowdfunding. The related costs may render investments in smaller amounts uneconomical.

Regulatory limitations to the Donation Model, such as a requirement to register Public Collections and maintain detailed records of the provided donations, effectively exclude the viability of this model.

## 5 Conclusion

During the past twelve months there has been growing interest in Crowdfunding in the Czech Republic, although this is not necessarily reflected in the amount of existing platforms. Currently, the Rewards Model remains the most popular and successful with the Lending Model losing its appeal. Despite regulatory constraints making it the most costly variant, we expect the emergence of platforms using the Equity Model in the near future.

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## Denmark

### 1 Recent developments in the market of Crowdfunding in Denmark

During the last 12 months there were the following significant developments in Denmark regarding Crowdfunding:

The Danish Financial Business Authority disclosed on 18 November, 2013 a guidance report on Crowdfunding in Denmark and the financial regulations, which may be of relevance and must be complied with by some of the Crowdfunding models.

In addition currently seven Crowdfunding platforms are present at the Danish market compared to four platforms established last year.

Moreover, on 28 August 2014 the Danish Crowdfunding platform [www.lendino.dk](http://www.lendino.dk) obtained a restricted authorisation from the Danish Financial Supervisory Authority to provide payment services in Denmark in accordance with section 38 of the Danish Payments Services and Electronic Money Act. Flex Funding A/S ([www.flexfunding.com](http://www.flexfunding.com)) obtained an authorisation from the Danish Financial Supervisory Authority (the Danish FSA) to provide payments services in Denmark in accordance with section 7 (2) of the Danish Payments Services and Electronic Money Act. The Danish FSA decided in their ruling of 23 June that the activities provided by Trustbuddy AB ([www.trustbuddy.com/dk](http://www.trustbuddy.com/dk)) constituted receiving from the public of deposits or other funds to be repaid and was therefore subject to a licensing requirement. In this ruling the Danish FSA reached their conclusion based on a purposive interpretation of the Danish Financial Business Act and the services provided by TrustBuddy was accordingly viewed as lending activities and therefore subject to a licensing requirement.

Finally, the Danish Government is currently contemplating to introduce new Danish regulation on Crowdfunding and it is currently being discussed in a committee as part of the Danish Government's 2014 growth plan.

#### 1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

Currently there are no Crowdfunding platforms in Denmark that offer the Equity Model or are intending to do so.

#### 1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

In addition to TrustBuddy mentioned above, there is one additional Danish Crowdfunding platform [www.lendino.dk](http://www.lendino.dk) which offers the Lending Model and one project was launched in May 2014 where the borrower is intended to repay the money raised via the Crowdfunding platform. As this is the first project in Denmark based on the Lending Model, it is difficult to say if this model will be used in many projects in the future.



### 1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

In Denmark the Donations or Rewards Model does not involve any form of financial investment or financial return and therefore is not within the scope of the Danish financial regulation. The Donations or Rewards Model is primarily used to finance social, creative or charity projects or companies. Investors in fund projects or companies normally receive non-monetary rewards (e.g. discounts, CD's, tickets or rewards of a symbolic value).

## 2 Recent developments regarding Crowdfunding regulation in Denmark

The Danish Government has established a committee who is currently looking into the potential regulation of Crowdfunding in Denmark. No additional information has been disclosed from the committee.

## 3 Current regulation of Crowdfunding in Denmark

### 3.1 Licence under the Danish Financial Business Act

#### Equity Model

Rendering of investment services in Denmark commercially are regulated activities under Danish law and such activities are subject to a licensing requirement from the Danish Financial Supervisory Authority according to the Danish Financial Business Act (Consolidated Act No. 928 of 4 August 2014).

For the purpose of Danish law "investment services" are, inter alia, receipt and arrangement for the account of investors of orders in relation to one or more financial instruments and, execution of orders with one or more financial instruments.

Financial instruments within the scope of the Danish Financial Business Act include securities and financial instruments.

Securities include shares in companies and other securities equivalent to shares in companies, partnerships and other businesses, and share certificates, bonds and other debt instruments, including certificates for such securities, and any other securities of which securities as mentioned above can be acquired or sold, or give rise to a cash settlement, the amount of which is fixed with securities, currencies, interest rates or returns, commodities indexes and other indexes and targets as reference.

Financial instruments are, inter alia, securities, money market instruments, units in collective investment schemes, options, futures, swaps, credit derivatives, financial contracts for difference and foreign-exchange spot transactions.

If a Crowdfunding platform facilitates the offering of securities or financial instruments, the operator of the platform renders investment services and is therefore subject to the licensing requirement under the Danish Financial Business Act if the Crowdfunding platform facilitates that investors meet public



limited companies that are seeking funding with a view to facilitating a transaction in respect of the shares in the limited companies. The Danish Financial Supervisory Authority has in November 2013 issued guidance on the licensing requirements and the exemptions thereunder.

### **Lending Model**

Any activity in Denmark comprising receiving from the public of deposits or other funds to be repaid requires a license in accordance with the Danish Financial Business Act. We understand that the Lending Model is based on the concept, that the Crowdfunding platform provider will repay the deposits provided by the investors, which under Danish law requires a license. Currently only one Danish platform offers the Lending Model ([www.lendino.dk](http://www.lendino.dk)) and has launched one lending project in May 2014. However, [www.lendino.dk](http://www.lendino.dk) was not the direct lender in relation to this project, but has a restricted authorisation to provide payment services in Denmark in accordance with section 38 of the Danish Payments Services and Electronic Money Act and established the contact between the borrower Retap and the private lenders in relation to the DKK 200,000 loan.

The ruling of the Danish FSA dated 23 June 2014 reveals that the Danish FSA has an extensive purposive interpretation of the Danish Financial Business Act as they ruled that the lending services provided by TrustBuddy constituted receiving from the public of deposits or other funds to be repaid and therefore was subject to a licensing requirement.

### **Donations or Rewards Model**

Each of the Donations and Rewards Model is structured in order not to constitute any form of financial investment or financial return and therefore is not within the scope of the Danish financial regulation. Accordingly, the provider of a Crowdfunding platform operating this model is not subject to any financial regulation or license requirements.

## **3.2 Prospectus requirements**

The public offering and sale of securities or investment products to investors is subject to a prospectus requirement pursuant to the Danish Securities Trading Act (Consolidated Act No. 831 of 12 June 2014). However, as the Danish Crowdfunding offers are very limited most Crowdfunding offers fall within the exemption for offers worth less than EUR 1,000,000 in a period of 12 months. There are other exemptions that may be applicable if single issues exceed this level such as if the issues are addressed solely to qualified investors or is addressed to fewer than 150 natural or legal persons. However, as the Danish offerings are very limited, and most often subject to the exemptions no prospectus requirement is likely to apply in respect of the three types of Crowdfunding which are currently available or will be in the near future in Denmark.

## **3.3 Regulation of Crowdfunding under the AIFMD regime**

A Crowdfunding platform where investors are offered a variety of start-ups, which they are able to invest in in order to receive a return may be subject to the Danish Act on Alternative Investment Fund Managers (Act No. 598 of 12 June 2013) (the "AIFM Act"), if the platform will qualify as an Alternative Investment Fund. This definition is laid out in the AIFM Act implementing the AIFMD in Danish legislation. If the platform qualifies as an AIF, the persons administering the platform will qualify as Fund Managers and thereby be subject to the AIFM Act. Currently, no platforms have been registered as an AIF according to the Danish Financial Supervisory Authority's homepage.



### 3.4 Licence under the Danish Act on Payment Services and Electronic Money (*Payment Services Directive*)

Under Danish law the rendering of payment services requires an authorisation from the Danish Financial Supervisory Authority pursuant to the Danish Payment Services and Electronic Money Act (Consolidated Act No. 365 of 26 April 2011). The transmission of funds between the potential investor and the project/entity which is being funded may require the Crowdfunding platform provider providing "money remittance" services under the Danish Payment Services and Electronic Money Act. However, in order to avoid the licensing requirements the Crowdfunding platform provider could cooperate with an external provider or partner for processing payments rather than acting as an intermediary himself.

### 3.5 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

Some activities connected to Crowdfunding will be subject to the Danish Act on Measures to Prevent Money Laundering and Financing of Terrorism and thereby subject to registration with the Danish Financial Supervisory Authority. The activities commonly connected with Crowdfunding will be i.e.: acceptance of deposits and other repayable funds, lending, guarantees or collateralisation, trading for own account or for account of customers etc.

## 4 Lessons learned from *Denmark's* regulation for a possible harmonized European Crowdfunding regulation

### 4.1 Role model ("dos")

Based on the recent trends in the Danish Crowdfunding market, i.e. the licensing of both lending and flexfunding the services that are provided via the platform have more common features with payment services than with receiving from the public of deposits or other funds to be repaid. Legislators should bear this in mind when drafting harmonized European Crowdfunding regulation.

### 4.2 Aspects that should be avoided ("don'ts")

New potential harmonized European Crowdfunding regulation should not be based on purposive interpretation of existing regulation as applied by the Danish FSA in the TrustBuddy ruling as this entails an uncertain legal status. Harmonized European Crowdfunding regulation should therefore be simple, transparent and straightforward.

## 5 Conclusion

As the Danish market for Crowdfunding is very limited, there is currently no regulatory regime that is specifically adapted to Crowdfunding in Denmark. However, the Danish Financial Supervisory Authority's guidance from November 2013 has brought guidance on their interpretation of the financial regulation in respect of the Crowdfunding. The Danish Government is currently discussing introducing a new Danish regulatory regime on Crowdfunding. This new focus on Crowdfunding may imply that





Crowdfunding is viewed as a new big source of financing for small and medium-sized enterprises in Denmark.

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## Estonia

### 1 Recent developments in the market of Crowdfunding in Estonia

During the last 12 months there were the following significant developments in Estonia regarding Crowdfunding:

#### 1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

Based on our research and analysis there are no operating Crowdfunding platforms based on the Equity Model in Estonia.

#### 1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

There are several peer-to-peer lending platforms in Estonia where individuals and businesses can invest and borrow money according to the terms (e.g. investment rate, interest, etc.) they agree on. Up until recently there were no Crowdfunding platforms that would enable businesses to take loans, the loans were taken by natural persons to use for the business purposes, but not by the businesses directly. A recent addition to the peer-to-peer lending market in Estonia has also made it possible for legal persons to take loans directly.

As far as we are aware there are at least two new platforms that focus on investing in real estate. Such platforms provide the possibility to give variable interest loans for the financing in real estate projects, the interest of which depends on the return of the real estate investment project.

The activity of the platforms is loan brokerage and loan handling. The platforms control and analyse to a certain extent borrowers' loan history, payment defaults, financial status and/or bank account statements. In case of platforms enabling the lending to finance real estate projects the platform may also do a pre-assessment of the real estate investment projects for which the loan is applied. The platforms enable the meeting of lending and borrowing interests and mediate payments between lenders and borrowers.

#### 1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

The Donations or Rewards Model is currently used by one platform to finance creative projects (including design, music, art, film & photo, theatre). No financial investment or return is involved. Investors fund projects or companies and get no return at all or a non-monetary reward (e.g. tickets, books, thank you notes in publications etc.). In many cases these rewards are of a symbolic value only.



## 2 Recent developments regarding Crowdfunding regulation in Estonia

There have been no substantial developments regarding Crowdfunding regulation in Estonia and it has not been directly dealt with by any new legislations. However a new draft Creditor and Credit Broker Act has been prepared, which is expected to enter into force in 2015. The aim of the draft legislation is to impose a licence requirement from March 2016 on creditors and credit brokers, which would also have an impact on Crowdfunding platforms.

## 3 Current regulation of Crowdfunding in Estonia

### 3.1 Licence under the Estonian Securities Market Act (väärtpaberituruseadus) and Credit Institutions Act (krediitiasutuste seadus)

#### Equity Model

This model is not currently used in Estonia. The structure of equity-based platforms in Estonia could be shaped by the investment services regulation set forward in the Securities Market Act.

Investment services and activities include, inter alia, reception and transmission of orders related to securities, execution of orders related to securities in the name of or for the account of the client and organising an offer or issue of securities. Activity licences are required if such services are provided on professional basis as a permanent activity.

Securities are, inter alia, (a) shares in public limited companies (aktsiaselts) and other transferable securities equivalent to such shares; (b) bonds or other forms of securitised debt; (c) investment fund units; or (d) any other securities giving the right to acquire or sell any such transferable securities or the price of which is determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures.

It is worth noticing that shares in Estonian private limited companies (osaühing) are often not transferable securities due to the pre-emptive right of other shareholders under the Commercial Code (äriseadustik).

In summary, where an online Crowdfunding platform facilitates the offering of transferable securities, or its operator acts as a securities broker, most likely, the operator of the platform will be deemed to provide investment services within the meaning of the Securities Market Act and therefore will require an investment firm licence by the Estonian Financial Supervision Authority (EFSA).

However, as mentioned above, the licensing requirements only apply if services are provided in relation to tradable securities. Therefore, if the equity model entails offering or brokerage of securities which are not transferable (e.g. shares in private limited companies where the pre-emptive right of other shareholders exists) or facilitating the formation of limited partnerships (usaldusühing) or the joining of additional partners into such limited partnerships, such activities do not constitute provision of investment services. Therefore, no licensing requirement under the Securities Market Act would apply.



## Lending Model

Depending on the detailed structure of how the Lending Model is used, loans issued using the Lending Model are generally not considered as tradable securities and their offering or brokering would therefore not qualify as provision of investment services under the Securities Market Act.

Pursuant to the Credit Institutions Act, a company intending to receive cash deposits or other repayable funds from the public in any other manner and to grant loans for its own account and provide other financing, is a credit institution. The right to receive money from the public for the purposes of depositing is the exclusive right of the credit institution. In order to exercise this right the credit institution must hold a corresponding authorisation granted by the EFSA.

In Estonia, the Lending Model is based on loans between individuals and companies and is represented by private limited companies providing lending brokerage. Under Estonian models, the companies operating the platforms do not grant loans on their own account. Instead, they provide relevant information between potential borrowers and lenders. The whole process of investing and lending is under platform clients' own control.

Normally, the operators of platforms using the Lending Model receive money from lenders/borrowers, to pay the money on to, respectively, the borrowers as disbursement of the loan or the lenders as repayment of loan or interest.

However, in case a lending and borrowing interest do not meet, it may happen that the person who wanted to lend money may demand repayment of the funds from the platform operator, which may be deemed receipt of repayable funds from the public on part of the operator. On the other hand, the sums transferred to the operator are repaid only under exceptional circumstances and the repayment of sums is not the essence of the business. Therefore, we would conclude that the risk that such platform operators are considered to receive money from the public for the purposes of depositing is not great.

Consequently, these broking companies are not credit institutions within the meaning of the Credit Institutions Act and do not require a licence for operation. However, if a company wishes to use the Lending Model in Estonia by gathering money from lenders and borrowing it on its own account, such activity would most probably require a credit institution license.

No license or registration is required in Estonia to provide services relating to consumer credit. This might be subject to change as a new draft Creditor and Credit Broker Act (krediidiandjate ja – vahendajate seadus) has been prepared. Under the draft law both creditors and credit brokers would require a licence from EFSA. Although the speculative entry into force of the new Creditor and Credit Broker Act is in 2015, the licence requirement under the new Creditor and Credit Broker Act is not expected to enter into force until March 2016.

## Donations or Rewards Model

Depending on the detailed structure it could be stated that these kinds of investments do not qualify as investment services as they do not relate to (tradable) securities.



Also, as the money is donated rather than lent, such activity should not require a banking license. In case the platform operator, under certain circumstances, repays the money donated to the donator, the analysis of whether such activity would constitute receipt of repayable funds from the public would equally apply here. Similarly to the above analysis, in our opinion, it should not be deemed as receipt of repayable funds from the public.

### 3.2 Prospectus requirements

If securities (including tradable shares and/or bonds) are publicly offered to investors, the company issuing the securities has to publish a prospectus. The prospectus can be published only after the EFSA approves it. Where securities are publicly offered through a Crowdfunding platform, the operator of the Crowdfunding platform should ensure that the securities are publicly offered through the Crowdfunding platform only after the prospectus is published.

Requirements for the preparation, submission and approval of the prospectus and exemptions from the requirement to publish the prospectus are established by the Securities Market Act. In contrast to several other countries, where the prospectus requirement does not apply to the offering of securities with a value of EUR 5 million or less within a one-year period, in Estonia specific requirements towards the prospectuses in such offerings are established by a regulation of the Minister of Finance (Nõuded väärtpaberite avaliku pakkumise, kauplemis- ja noteerimisprospektile). Therefore, publicly offering securities using a Crowdfunding platform in Estonia is likely to require publication of a prospectus, subject to certain exemptions.

The prospectus is not required if securities are not offered publicly (definition of public offer as defined in the Prospectus Directive). Also, the prospectus requirement does generally not apply if the securities offered are not tradable. However, in case a foreign crowdfunding instrument constitutes an investment fund, we note that public offering of non-tradable units of such non-Estonian investment fund may be subject to Estonian law regulation on the public offering of investment fund units.

The platforms operating Lending Model and Donations and Rewards Model are not subject to prospectus requirements.

### 3.3 Regulation of Crowdfunding under the AIFMD regime

The Law enabling alternative investment fund managers (AIFM) from other EU countries marketing EU AIFs to passport to Estonia was passed on 20 June 2013, effective of 22 July 2013. Further amendments to the Investment Funds Act (investeerimis fondide seadus) were passed on 9 May 2014, effective of 19 May 2014. The aim of the amended Investment Funds Act was to transpose other provisions of the AIFMD into Estonian law. The new legislation does not introduce any new provisions that would explicitly deal with Crowdfunding, however, depending on the nature and the scope of services provided by a Crowdfunding platform it might qualify as an AIFM and therefore each situation should be evaluated on case by case basis. If the platform qualifies as an AIFM it will require a licence from EFSA.

### 3.4 Licence under the Payment Institutions and E-money Institutions Act (makseasutuste ja e-raha asutuste seadus)

In addition to the requirements set out above, any transfer of funds through the operator of a Crowdfunding platform may generally constitute payment services (if a payment account is opened) or



money remittance services (if no payment account is opened) within the meaning of the Payment Institutions and E-money Institutions Act. Transfer of funds could occur if the investors pay their investment amounts to the operator of the Crowdfunding platform who then passes the funds to the person taking advantage of the Crowdfunding financing scheme, or back to the investor in case the funding transaction fails.

The platform operator might rely on the exemption for commercial agents under the Payment Institutions and E-money Institutions Act. However, there is no established practice in Estonia regarding when the commercial agents exemption applies

As an alternative - in order to avoid such licensing or the need to apply for an exemption, as a case may be, requirements - the operator of a Crowdfunding platform might use an external provider or partner for processing payments rather than acting as an intermediary himself.

We are not aware of any cases in Estonia where a Crowdfunding platform holds a payment institution license or where either of above exemptions has been applied to a Crowdfunding platform. Thus, in each situation where any of these exemptions is considered we strongly recommend that beforehand respective project the structure of each platform is coordinated with the EFSA and/or local counsel is involved.

### 3.5 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- New Creditor and Credit Broker Act (krediidiandjate ja –vahendajate seadus)
- The Law of Obligations Act (*võlaõigusseadus*);
- Money Laundering and Terrorist Financing Prevention Act (*rahapesu ja terrorismi rahastamise tõkestamise seadus*);
- Estonian Advertising Act (*reklaamiseadus*);
- Personal Data Protection Act (*isikuandmete kaitse seadus*);
- Consumer Protection Act (*tarbijakaitse seadus*)

## 4 Lessons learned from Estonia's regulation for a possible harmonized European Crowdfunding regulation

### 4.1 Role model ("dos")

There is no special regulation governing Crowdfunding in Estonia, therefore no legal provisions or practice can be presented as examples.

### 4.2 Aspects that should be avoided ("don'ts")

There is no special regulation governing Crowdfunding in Estonia, therefore no legal provisions or practice can be presented as examples.



## 5 Conclusion

There have been no substantial developments in relation to Crowdfunding in Estonia and currently there is still no regulatory regime that is specifically adapted to Crowdfunding in Estonia. There is no operating Equity Model in Estonia, but this type of model might be subject to investment services or securities market regulation and thus be supervised by the FSA if the platform provides investment services such as securities brokering or organising an offer or issue of securities. In addition, those securities that are publicly offered are subject to the prospectus requirements.

The lending based platforms in Estonia are not subject to financial regulation and operate without any authorisation. However, this might change if the new Creditor and Credit Broker Act will be approved, as under the draft legislation both creditors and credit brokers would require a licence and fall under the supervision of EFSA.

The Donations and Rewards Model falls outside of the financial services scope and corresponding regulation.

In case of Crowdfunding platforms using any of the above models, it should be analysed on a case by case basis whether a payment institution license or applying for an exemption from the licensing obligation is needed.

To conclude, the two models of Crowdfunding platforms operating in Estonia operate without any licence or supervision by the EFSA, and the AIFMD regulation does not have an impact on Estonian Crowdfunding platforms, however it should still be considered depending on the scope and nature of the services provided.

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## Finland

### 1 Recent developments in the market of Crowdfunding in Finland

During the last 12 months there were the following significant developments in Finland regarding Crowdfunding:

The Nordic Crowdfunding Alliance was established in March 2014 by its key players, and is a partnership in the Nordic Crowdfunding scene committed to developing an ever more Crowdfunding friendly Nordic region, while empowering and facilitating entrepreneurial growth.

The alliance members are jointly responsible for helping entrepreneurs, artists and social ventures raise EUR 3.75 million in the period between mid-2012 to mid-2014, EUR 2.64 million in equity Crowdfunding of 20 projects and EUR 1.11 million in reward based Crowdfunding of 370 projects.

#### 1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

Due to the FIN-FSA's change in the interpretation of the Finnish Investment Services Act (see below, section 2 and section 3.1.1), Crowdfunding platforms providing the Equity Model are now required to seek authorisation. At the time of writing, at least two market players are applying for authorisation from the FIN-FSA.

In addition, one new player has entered the market. It differs from its competitors, among other things, in that it applies a tougher screening process and targets wealthier investors, foundations and corporate institutions.

#### 1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

In addition to the already existing lending platforms, a new player has entered the market. It is providing bridge lending to companies that have a positive decision regarding public funding from, e.g. Tekes (the Finnish Funding Agency for Innovation).

#### 1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

There were no recent developments in the Donations or Rewards Model during the last year.

### 2 Recent developments regarding Crowdfunding regulation in Finland

#### Recent political developments



In its structural policy programme in late 2013, the Finnish Government decided, among other things, to chart the needs to develop Crowdfunding activities regarding peer-to-peer lending and equity-based Crowdfunding. On the 27 March 2014, the Ministry for Employment and the Economy and the Ministry of Finance published a report on Crowdfunding based on a survey. The aim of the report was to explore the current status of Crowdfunding in Finland and to obtain a broad perspective to support the policies to be adopted.

The main results of the report can be summarised as follows:

- Crowdfunding has the potential to function as a source of funding for business life in Finland.
- The growth of Crowdfunding should be promoted, but the prevention of misconduct must also be taken into account.
- Regulation in the sector must be kept light and the sector must develop self-regulation and good practices.
- Instruction and education is needed not only in the sector itself but also in the general public.
- The role of the authorities must be clarified and the need for authorisation or registration must be assessed.
- A functional secondary market is important in supporting the sectors

In relation to Crowdfunding, the Money Collection Act (*Rahankeräyslaki*) has been the subject of public discussion and interest. The report mentioned above also stated that the Money Collection Act should account for the special characteristics of crowdfunding more efficiently than it does today.

Based on the findings of the report, the Ministry for Employment and the Economy and the Ministry of Finance suggested that an assessment of existing legislation and the 3 amendment thereof shall be carried out. However, no new legislation would be drafted before a possible EU legislative project. Until such a project is carried out, the report suggested that the Finnish Financial Supervisory Agency (FIN-FSA) should prepare instructions on Crowdfunding and the sector should produce self-regulation for its activities.

### Recent regulative developments

The major change in Finland with regards to Crowdfunding regulation is the new guidelines published by the FIN-FSA in July 2014.

According to the new interpretation of the FIN-FSA, an investment-based Crowdfunding service is an investment service for which the service provider must be authorised according to the Finnish Investment Services Act (*Sijoituspalvelulaki*). According to the old interpretation by the FIN-FSA, the operations of Crowdfunding platforms offering the Equity Model did not fulfil the definition of investment services requiring a license according to the Finnish Investment Services Act.



Hence, platforms offering equity based Crowdfunding services are now required to apply for an authorisation from the FIN-FSA.

The Money Collection Act has been updated as part of a two-phase process. In the first phase, the Act was amended to allow organisations other than purely non-profit organisations to receive a permit for money collecting. However, the Act was tightened with regards to the purpose of the collection - a money collection may now only be arranged for the purpose of raising funds for non-profit activities. The amended Act entered into force on 1 September 2014.

The second phase will entail a more thorough amendment of the Money Collection Act. The key points in the amended Act will be:

- A transition from permit to registration
- The use of the collected money will be supervised
- A publically available register will be established
- The supervising authority will be given rights to prohibit collections that have been wrongfully executed
- Money collection will also be available to organisations other than non-profit organisations
- Money may also be collected for other than non-profit purposes

It should, however, be noted that the precise content of the second phase is subject to change. The second phase amendment is expected to enter into force in 2015.

### 3 Current regulation of Crowdfunding in Finland

#### 3.1 Licence under the Finnish Credit Institutions Act (*Laki luottolaitostoiminnasta*) and Investment Services Act (*Sijoituspalvelulaki*)

##### Equity Model

Pursuant to the Finnish Act on Credit Institutions (*Laki luottolaitostoiminnasta*) and Act on Investment Services (*Sijoituspalvelulaki*) implementing the EU Credit Institutions Directive and the EU Markets in Financial Instruments Directive (MiFID) in Finland, the provision of banking or investment services are regulated activities. Any firm offering investment services in Finland must have the license of an investment firm or of a credit institution. This applies to the offering of investment services in Finland irrespective of whether the service is offered to professional or non-professional investors.

The provision of investment services includes, for example, investment broking (reception and transmission of orders in relation to financial instruments and their execution on behalf of customers), contract broking (execution of purchase and sale orders on behalf of others) and the offer to the public of financial instruments without a firm commitment basis. Financial instruments within the meaning of



the Act on Investment Services include transferable securities (i.e. shares and bonds or other forms of securitised debt) and other financial instruments. The offer to the public of shares is regulated as the issue of securities in accordance with the Securities Markets Act (*Arvopaperimarkkinalaki*).

Pursuant to the FIN-FSA's new and current interpretation of the Investment Services Act, an investment-based Crowdfunding service is an investment service for which the service provider must be authorized.

Lawful investment services requiring authorisation consist of reception and further transmission of orders related to financial instruments (Chapter 1, section 11, subsection 1(1) of the Investment Services Act). Such transmission of orders is considered to include a service, where the purpose is to bring together parties to a business transaction related to a financial instrument in the manner that enables execution of a transaction between these parties. Consequently, transmission of orders also includes acting as a place of subscription, where the service provider – for instance, in connection with a share issue – receives subscriptions from the public and transmits them further to the organiser of the issue.

It shall be noted that the scope of the authorisation is dependent on the services provided by the Crowdfunding platform and the scale of its operations. If the service provider executes an order on behalf of a customer, the activity is considered an execution of orders requiring authorisation, as defined in Chapter 1, section 11, subsection 1(2) of the Investment Services Act. If the investor is provided with individual recommendations (advice) tailored for the investor's needs in connection with a business transaction, such as a purchase or sale, related to a certain financial instrument, an authorisation for investment advice according to Chapter 1, section 11, subsection 1(5) of the Investment Services Act will be needed.

### **Lending Model**

The treatment of the Crowdfunding platform is dependent on how the service of the platform and the product it offers are constructed. Similarly, as explained above in respect of the Equity Model, the offer to the public of bonds is regulated as the issue of securities in accordance with the Securities Markets Act.

Currently, the platforms providing peer-to-peer lending operate outside the regulatory scope. Pursuant to the current interpretation of the Finnish Financial Supervisory Authority, licenses are not required for peer-to-peer lending since individual loan agreements do not constitute regulated financial instruments and, therefore, lending of funds to a company from the crowd through individual loan agreements has been interpreted to be an unregulated activity. This also applies to financing arranged through ordinary promissory notes (in Finnish: *tavallinen velkakirja*). However, if the Crowdfunding platform makes the investment decisions on behalf of the investors, the registration requirements arising from the AIFM Directive may apply.

### **Donations or Rewards Model**

Platforms using the Donations or Rewards Model are not subject to financial services regulation in Finland, unless they receive repayable funds from the public. Pursuant to the Finnish Act on Credit Institutions (*Laki luottolaitostoiminnasta*), an authorisation to act as a credit institution is required if repayable funds are received from the public.



Currently, there is only one platform providing the donations or rewards model in Finland, and it operates outside the scope of financial services regulation. It works as a matchmaking platform between the party seeking funding and the investors and does not gain possession of the funds at any point. The platform using the Donations or Rewards Model operates mainly in the field of social or creative projects.

### 3.2 Prospectus requirements

#### Equity Model and Lending Model

Pursuant to Finnish Securities Market Act (SMA), anyone who offers securities to the public or applies for the admission to public trading of a security shall be under an obligation to publish a prospectus relating to the securities before the entry into force of the offer or the admission to public trading and to have it available for the public during the validity of the offer. Shares and bonds are regarded as securities in accordance with the SMA in Finland. At present, all crowdfunding platform providers operate under the exemptions of the regulatory regime. The prospectus requirement does not apply to an offering of securities with a total consideration of less than EUR 1,500,000, calculated for the preceding 12-month period. However, when evaluating the total consideration for securities included in the above mentioned offer, offers for the same type of security throughout the EEA are considered.

A prospectus is also not required when the total value of securities offered is less than EUR 5.000.000, admission is applied for the securities to be traded in Finland on the First North market place and a company description compliant with the regulations of the said market place is kept available for investors.

No prospectus requirement is likely to apply in respect of the peer-to-peer lending model.

#### Donation or Rewards Model

No prospectus requirement is likely to apply in respect of the donations or rewards model.

### 3.3 Regulation of Crowdfunding under the AIFMD regime

The Act on Alternative Fund Managers (*Laki vaihtoehtorahastojen hoitajista*) sets the following criteria for an AIF which must all be fulfilled in order for an undertaking to be qualified as an AIF: (i) acquires funds or receives capital from (ii) several investors, (iii) invests in accordance with a defined investment policy (iv) for the benefit of the investors, and (v) the undertaking is not a UCITS fund.

#### Operating company seeking funding

Pursuant to the Act on Alternative Fund Managers, a company (in Finland: a limited liability company) operating within a certain field and seeking funding with the purpose of generating profit for its shareholders would be excluded from the definition of an AIF (usually such a company does not have a defined investment policy for the benefit of the investors). In such a business, the investors do not typically have the possibility for daily evaluation or supervision of investment targets. However, an operating company may also have the intention to invest into certain investment targets, which might constitute an AIF (with the exemption of holding companies which are excluded from the scope of the Act). It should also be noted that an operating company would not normally constitute an AIF in the event of the Lending, Equity or Donations or Rewards Models, in which the investor itself chooses the



investment target, since activities in which investment decisions are made by the investor itself are not regarded as AIF activities.

### **Project company seeking funding**

The Act on Alternative Fund Managers does not apply to business in which collective investments are not conducted in the form of an AIF. In the event that collective investments are connected to the regular business of an entity and where the investors maintain significant control over the project, such joint ventures (established to finance a single project) would not be regarded as AIFs. However, it cannot be ruled out that a project company would constitute an AIF in the event that the project company would have several investors (at least two) and there would be a collective investment policy.

### **Equity Model**

Primarily, it would seem that in the type of Equity Model Crowdfunding where the investment decisions are made by the investors and there is no collective investment policy, the criteria for an AIF are not met. However, equity model Crowdfunding may constitute an AIF in the event that there is an element of collective investment policy and the other qualifications of an AIF are met.

### **Lending model**

Similarly as in respect of the equity model, it would seem that Lending Model does not constitute an AIF, where the investor retains the power to make the investment decisions. However, it is possible that such types of the lending model, in which the investment decisions are made according to a defined investment policy, the qualifications of an AIF could be met.

### **Donation or rewards model**

The Crowdfunding platforms offering the Donations or Rewards Model are not likely to be governed by the Act on Alternative Fund Managers, since the investor in this model retains the power to consider, supervise and make investment decisions and there is no element of a collective investment policy.

### **Crowdfunding platform**

It is possible that the Crowdfunding platform could constitute an alternative investment fund manager (AIFM) within the meaning of the Act on Alternative Fund Managers.

Additionally, in respect of the Equity Model or Lending Model (as presented above), the question is whether the investment decisions are made on behalf the investor or by the investor. In the event that the platform makes the investment decisions, an AIF would be formed, and the Crowdfunding platform could be seen as an AIFM. It would also seem that since the Donations or Rewards Model do not entail an element of collective invest policy, there is no AIF or AIFM would be formed.

### **Pooling vehicle**

In case the company seeking funding prefers funding by just one major investor instead of a large number of small retail investors, it is possible that the platform involves a pooling vehicle. A pooling vehicle is a company founded to concentrate a large number of investors. Such pooling vehicle is likely to be an AIF and therefore to be subject to the Act on Alternative Fund Managers.



### 3.4 Licence under the Finnish Payment Institutions Act (Maksulaitoslaki) (*Payment Services Directive*)

Crowdfunding platform operators receive funds from investors after the financing round is completed and it has been deemed successful. This may be considered money remittance in accordance with the Finnish Payment Institutions Act (Maksulaitoslaki) implementing the Payment Services Directive. In order to provide payment services, service providers must either acquire authorisation for their business in line with the Payment Institutions Act or, in case of smaller scale activities, submit a notification of intention to provide payment services without authorisation. This requires that the service provider fulfills the requirements stipulated in the Payment Institutions Act applicable to the provision of payment services without authorisation.

There are good reasons to argue that transfer of funds through the platform operator's customer deposit account does not constitute a money remittance service and that the operators would be able to rely on the exemption of commercial agents on the basis that they have authorisation to negotiate or conclude contracts on behalf of the funder and the funding seeker. However, this interpretation has not been tested and the platform providers may be required to acquire authorisation or make a notification. The legal treatment of the lending model from this perspective is currently not resolved satisfactorily.

To avoid the license requirements the Crowdfunding platform provider may also use an external authorised payment service provider to process the payments.

### 3.5 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

#### **Money Collection Act (*Rahankeräyslaki*)**

In other parts of the world, Crowdfunding has been widely used to raise finance for charity targets and to support arts projects. In Finland, the decision of the National Police Board restricts the use of the Donations Model: collecting money without consideration and for charity requires a money collection permit granted by the authorities. According to the Finnish Money Collection Act, a money collection permit may be issued for an association or foundation which is registered in Finland and if the sole purpose of the association is to work for public good. Furthermore, according to the Money Collection Act, money can be collected only for charitable purposes. The money collection permit may not be issued for an individual.

Despite the strict interpretation of the Money Collection Act, the only platform in Finland offering the Donations or Rewards Model does promote projects with a charitable purpose. The platform requires that a money collection permit is acquired before the project can be entered in the platform.

#### **Consumer Protection Act (*Kuluttajansuojalaki*), Act on Registration of Certain Creditors (*Laki eräiden luotonantajien rekisteröinnistä*)**

The Finnish Consumer Protection Act regulates domestic and distance selling to consumers as well as the distance selling of financial services and instruments. No conduct that is inappropriate or otherwise unfair from the point of view of consumers shall be allowed in marketing. In addition, false or misleading information shall not be conveyed in marketing. It is also forbidden to not provide such



information in marketing or consumer relations that is relevant taking into account the context and which the consumer needs for a proper purchase decision.

The Consumer Protection Act also regulates the offering of consumer credit and sets out several obligations with respect to the offering of credit to consumers. These obligations include, for example, the duty of disclosure of a company offering consumer credit with regard to interest rate and other costs related to the credit, amount of credit and credit limit, duration of the credit agreement, cash price of the commodity, the aggregate amount of the credit, credit costs and the number of installments. Additionally, obligations include, e.g. the duty to provide the consumers with sufficient information on the credit before entering into the credit agreement, the obligation of the company offering the credit to act in accordance with principle of responsibility, the duty to assess the creditworthiness of the consumer before entering into the credit agreement, the obligation to verify the identity of the consumer applying for the credit and the duty to inform the consumer if the creditor's rights under the credit agreement or the agreement itself will be assigned to a third party. In addition, a Crowdfunding platform provider offering consumer credit has an obligation to register in the register for creditors pursuant to Act on Registration of Certain Creditors (*Laki eräiden luotonantajien rekisteröinnistä*) provided that a payment institution license or a credit institution license is not required with respect to offering of the services.

Consumer complaints may be made by consumers to the Finnish Consumer Disputes Board. The Board issues non-binding recommendations. If a larger number of consumers have a dispute with the same business regarding the same matter or if a business has concluded a contract containing an unfair term with many consumers, a group complaint can be filed by the Finnish Consumer Ombudsman to the Consumer Disputes Board after considering a case. A case may be heard as a class action if several persons have claims against the same defendant and based on the same or similar circumstances. A class action is brought by the Consumer Ombudsman, who also represents the class.

## 4 Lessons learned from Finland's regulation for a possible harmonized European Crowdfunding regulation

### 4.1 Role model ("dos")

There are no lessons that can be learned from Finland's regulation for a possible harmonized European Crowdfunding regulation.

### 4.2 Aspects that should be avoided ("don'ts")

There are no lessons that can be learned from Finland's regulation for a possible harmonized European Crowdfunding regulation.

## 5 Conclusion

At present, there is no regulatory regime specially adapted to Crowdfunding in Finland. Since the existing Finnish legislation (e.g. the Act on Credit Institutions, Act on Investment Services, Securities Markets Act and Consumer Protection Act) also covers Crowdfunding activities, the Finnish legislator is





more or less waiting for the European Commission's initiative and the development of the Crowdfunding market in Finland before starting any legislative actions. The current expectation is that, rather than imposing new legislation, the regulator will guide the market towards self-regulation or other soft-law solutions.

However, when implementing the MiFID II directive, the Ministry of Finance is considering using the optional exemptions provided in article 3 of the directive. A lighter authorisation process would hence apply to Crowdfunding platforms using the Equity Model. However, the directive shall be transposed into national legislation by 3 July 2016, and therefore, provides no immediate relief for Equity Model Crowdfunding platforms.

In respect of the fact that Crowdfunding may be conducted in various ways, it is somewhat difficult to assess, whether some Crowdfunding activities would fall within the scope of the Finnish Act on Alternative Fund Managers. However, it would seem that the Equity Model and the Lending Model, in particular, could fulfil the requirements of the Act when the investment decisions are made by the Crowdfunding platform providers according to a pre-agreed investment scheme.

Currently, Crowdfunding works well in the Finnish market, especially when the platform provider benefits from statutory exemptions regarding licensing and prospectus requirements, and provided that the financing is carefully planned. Even though there are only a few successful Crowdfunding projects at present in Finland, the number continues to increase at a fierce speed. One bump in the road seems to be the National Police Board's interpretation of the Money Collection Act. For this reason, foreign methods of conducting Crowdfunding projects cannot be directly copied in Finland.

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## France

### 1 Recent developments in the market of Crowdfunding in France

In 2014, the French Crowdfunding environment has substantially evolved both from a market and a regulatory perspective.

Based on a report of the French Crowdfunding Association Finance Participative (a not-for-profit association regrouping a large number of French prominent platforms) dated July 2014, the number of sponsors on Crowdfunding platforms in France exceeded 1 million people in France between 2008 and 2014, for over 44,112 projects for which sponsoring was proposed online over this period, with 10,777 projects for the first semester 2014. Overall investments on Crowdfunding platforms have doubled in a year from EUR 33 million for the first semester of 2013 versus EUR 66.4 million for the same period in 2014.

Most projects crowdfunded in France achieve financing on Lending Model platforms. Cultural and solidary projects are mostly financed on Rewards Model (66% of projects) and Donation Model platforms (83% of projects). Commercial companies mostly raise development capital on Lending Model (77% of Lending projects) and Equity Model platforms (96% of Equity projects).

As of February 2014, about sixty (60) Crowdfunding platforms operated in France.

A specific new regulation applies to the Crowdfunding market in France since 1 October 2014 and shall have a positive impact on the market, although the new regulation sets some limits to current practices aiming firstly to protect investors.

#### 1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

In France, investments under the Equity Model entitle the investors to either share(s) in the capital of the company that they finance and/or bonds bearing interests.

During the first semester of 2014, EUR 10 million were collected on Equity Model investment platforms.

The prominent Equity Model platforms on the French market to date include:

- Anaxago: <https://www.anaxago.com/>
- Wised: <https://www.wised.com/fr/crowdfunding>
- Smartangels: <https://www.smartangels.fr/>
- FinanceUtile: <http://www.financeutile.com/>



### 1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

Projects financed under the Lending Model have been sponsored for EUR 37 million for the first semester of 2014. As a result, the Lending Model is the first Crowdfunding model in terms of funds raised in France. Most of the projects financed under this model bear interest.

Under the new regulation applicable as from 1 October 2014, (i) a maximum amount has been set for the overall amount that one can borrow for a project under a platform, (ii) the interests rates have been capped together with (iii) the duration of the loans, and (iv) the maximum amount that the contributors can loan per project.

Moreover, the lenders and borrowers shall meet certain criteria depending on the loan category considered (bearing interests or not).

The prominent Lending Model platforms on the French market to date include:

- Unilend: <https://www.unilend.fr/>
- Babyloan: <http://www.babyloan.org/fr/>
- Lumo: <https://www.lumo-france.com/>
- Kisskissbankbank: <http://www.kisskissbankbank.com/>

### 1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

Projects financed under the Donation and Reward Models have been financed for an overall amount of EUR 19 million for the first semester of 2014.

Most of the projects that offer retribution for a donation under the Reward Model will graduate the value of the Reward, which can be non-monetary, according to a table presenting the details of the Rewards to be attributed for a set amount of donation.

Please also note that under the Donation Model (not under the Reward Model), donors can obtain a tax receipt from the Crowdfunding platforms and deduct 66% of their donation from their income tax for the relevant year, for donations to certain categories of projects.

Generally speaking, the donations eligible to such deductions are those made to an entity cumulating three criteria, i.e. (i) being not-for profit, (ii) having non-interested management and purpose (*objet social et gestion désintéressée*), and operate in a way not as to benefit solely to one category of persons.

The prominent Donation/Reward Model platforms on the French market to date include:

- Bulbintown: <http://www.bulbintown.com/>
- My major company: <https://www.mymajorcompany.com/>
- Ulule: <http://fr.ulule.com/>
- Cowfunding: <http://www.cowfunding.fr/>



- Kickstarter: <https://www.kickstarter.com>

## 2 Recent developments regarding Crowdfunding regulation in France

The new French regulation of Crowdfunding activities, anticipated as revolutionary by the French authorities, came into force on 1 October 2014. This was the date upon which the various platforms had to comply with the new set of rules.

To permit the development of the sector and the associated economic benefit for the French market, the regulator therefore intervened, modifying the French monetary and financial Code (CMF), the regulations governing both the ACPR and the AMF, thus establishing a comprehensive legal framework tailored to crowdfunding activities.

Two specific statuses have been created for the Crowdfunding platforms, i.e. **CIP** – *conseil en investissement participatif* (crowdfunding investment advisor) and **IFP** – *intermédiaire en financement participatif* (crowdfunding investment intermediary), which are optional but clarify the prior regulatory uncertainties on platform activities. Derogations to public offering rules and banking monopoly have also put an end to the exposure borne by the issuers, under the Equity Model, and by the lenders, under the Lending Model.

## 3 Current regulation of Crowdfunding in France

The French legal framework for Crowdfunding activities applicable as from 1 October 2014 was adopted on 30 May 2014 and detailed in Ordinance no. 2014-559 as later detailed on specific provisions by Decree no. 2014-1053 dated 16 September 2014. Further to the adoption of this new set of rules, the General Markets Authority Regulations (Regulations of the French Financial Market Authority *Autorité des Marchés Financiers* - **AMF**) were modified pursuant to Ministerial Order dated 22 September 2014, also applicable as from 1 October 2014.

The new French regulation provides exception to securities public offering rules and banking monopoly, and creates two specific regulatory statuses for Crowdfunding platforms (**CIP** – *conseil en investissement participatif* and **IFP** – *intermédiaire en financement participatif*). IFPs and CIPs will be subject to anti-money laundering and anti-terrorists regulations.

### 3.1 CIP and IFP registration requirements under the Ordinance on Crowdfunding activities dated 30 May 2014 and the Decree dated 16 September 2014

The CIP and IFP statuses are optional since the Crowdfunding platform operators can also register or be licenced, if they meet the relevant statutory criteria, as PSI or credit institutions (which implies far more costs and constraints). The election of a status by the relevant operators will depend on the range of financial and advisory services they are willing to offer to their clients/the investors.



## Equity Model - CIP status

Since 1 October 2014, Equity Model Crowdfunding platforms may register as *Conseil en investissement participatif* (crowdfunding investment advisors - **CIPs**). Such status was inspired by that of *Conseiller en investissement financier* – **CIF** (financial investment advisor).

CIPs are those which provide investment services in equity securities and certain debt securities on an internet website complying with specifications set forth by the AMF General Regulations<sup>3</sup>. CIPs may also provide a limited number of ancillary services (e.g. handling subscription applications). However, they cannot receive funds from investors (except for their remuneration) and are not authorized to receive securities from issuing companies. CIPs cannot have other activities except those of IFP (see below), in which case, although they will be IFPs, they shall not provide payment services.

CIPs shall be legal entities established in France. Although no license is required to operate, CIPs are placed under the supervision of the AMF and are subject to registration obligations.

Indeed, CIPs shall (i) be registered with the ORIAS (register for intermediaries in banking operations and payment services), (ii) present certain moral guarantees, (iii) be members of an AMF accredited association<sup>4</sup> which controls their activities (if the association is not accredited specific control procedures are implemented) in compliance with the AMF General Regulation and (iv) subscribe specific insurance policies (minimum guaranteed amount to be set out by a decree, this being mandatory as from 1 July 2016). They shall also (v) comply with the good conduct rules set forth in the Ordinance and the AMF General Regulations<sup>5</sup> and (vi) ensure that their clients' interests are protected and that they receive the adequate level of information to appreciate the risks connected to their investment.

To be registered as CIPs with the ORIAS, Equity Model platforms must join AMF accredited associations<sup>6</sup>. Such accredited associations shall control the professional capacity of their members and must have the AMF approve the good behaviour code and the capacity rules that they apply to their members. They also have reporting obligations towards the AMF<sup>7</sup>, which has the power to revoke the accreditation of an association.

The CIPs will endure a screening process managed by the relevant accredited association before their ORIAS registration is accepted. The applicants shall provide the relevant accredited association with specific information and meet certain professional (honour, repute) and competence criteria. The detailed conditions of access to the status have been specified by in the AMF General Regulations<sup>8</sup>, as modified per Ministerial Order dated 22 September 2014.

To date, no association has been accredited by the AMF yet, as indicated in a report issued by the AMF and the ACPR on Crowdfunding regulation on 30 September 2014. In the absence of accredited associations or when the platform has not joined such an accredited association, the registration is managed by the AMF which screens the applicants before they can register with the ORIAS. To that

<sup>3</sup> See articles 325-35 *et seq.* AMF General Regulations

<sup>4</sup> See articles 325-34, 325-45 and 325-51 *et seq.* AMF General Regulations

<sup>5</sup> See articles 325-35 *et seq.* AMF General Regulations

<sup>6</sup> See AMF General Regulations and of article L547-4 CMF

<sup>7</sup> See articles 325-60 *et seq.* AMF General Regulations

<sup>8</sup> See articles 325-32 *et seq.* AMF General Regulations



aim, the applicants to the CIPs status must demonstrate to the AMF that they comply with their obligations both (i) to inform their clients on risks associated with their investments and the costs associated thereto; and (ii) to ensure that the investments elected by their clients is proportionate to their experience, knowledge about investments, financial capacities and investment targets.

Contrarily to what applies for PSIs (see below), CIPs are not subject to any statutory provision as to a minimum share capital and they do not benefit from a European passport in relation to their activities.

Equity investments on Equity Model platforms (proposed by both PSIs and CIPs) are limited to investments in ordinary shares (*actions ordinaires*) and fixed interests bonds (*obligations à taux fixe*)<sup>9</sup>. The formerly envisaged solution that advocated for the issuance of specific shares deprived of voting right has not been retained by the government.

As a result, securities such as warrants, convertible bonds, etc. are excluded from the scope of investments authorised on Crowdfunding investment platforms. However, the new regulation has provided two significant exceptions to public offering rules in France.

First it provides for prospectus exemption for offers on Crowdfunding platforms (see 3.2 below and in particular a limit of EUR1 million per issuer and per year). Second, *Société par actions simplifiée* or "SAS" which is the more flexible type of limited liability company by shares that may be set up in France (often used for venture capital) are no longer prohibited from making public offering where proposed by a CIP or a PSI on their websites and only with respect to Crowdfunding operations. A number of conditions are set out in newly applicable article L227-2-1 of the French commercial Code on the content of such SAS articles of association (in particular for voting rights, calls to and powers of the shareholders' meetings and the decisions that can be taken at such meetings).

Further, based on the new regulations, Equity Model platforms can no longer take a share in the companies/projects they organise sponsoring for. As a result, they can no longer have seats at the board of directors of the relevant companies as was the practice implemented by the major Equity Model Crowdfunding platforms previously. Via this system, the Crowdfunding platforms also used to collect proxies for general shareholders' meetings from the investors which they can no longer do as they are not shareholders in the financed companies (in France mandates of representation at general shareholders meetings cannot be given to third parties to the companies).

As a result, some advocate that to organize proxy advisor solutions solutions (which is allow for publicly traded companies on regulated markets<sup>10</sup>) to make sure that no disturbance emerges in the management of the sponsored companies meanwhile ensuring that such investors/contributors still be able to participate in the decision making process and therefore protect their investment.

### **Lending and Donation/Reward Models – IFP status**

On-line fundraising platforms which propose project financing under the Lending Model (loans bearing interest or not), may register as *intermédiaires en financement participatif* (Crowdfunding Intermediaries - IFPs).

IFPs are legal entities (not necessarily established in France – can be branches of foreign companies) putting in contact, through a website, people carrying projects and people financing such projects by

<sup>9</sup> See article D. 547-1 CMF

<sup>10</sup> See article L225-106, I §2 of the French commercial Code.



way of loans or donations (see below), within conditions and limits set forth in article D548-1 CMF with regard to loans.

IFPs may also be banking and credit institutions, payment institutions, electronic currency establishments, PSIs and CIPs (if not licensed payment services intermediaries – prohibited under the CIP regime).

Registration as an IFP is possible but not mandatory for platforms operating under the Donation and/or the Reward Models. If a donation or reward platform elects to register as IFP, it shall have the same license and registration obligations as those applying to the Lending Model platforms.

To qualify as IFPs, a platform shall (i) be registered with the ORIAS, (ii) present certain moral guarantees, (iii) subscribe specific insurance policies (minimum guaranteed amount to be set by decree); and (iv) abide by a good conduct code implemented per the terms of the Ordinance.

The Decree no.2014-1053 specified (a) the conditions of applicability of the good conduct code together with (b) the registration modalities for the internet site of the intermediaries and (c) the conditions of use of the intermediaries' services (see below).

If IFPs wishes to implement transfer of funds between lenders and borrowers, and therefore act as payment establishments, they would then need to be authorized by the ACPR and to hold a licence as a payment institution (*prestataire de services de paiement*) under a simplified regime. In such instance, their share capital shall at least amount to EUR 40,000.

IFPs and credit institutions which are subject to a derogatory prudential regime (*regime prudentiel allégé*) can receive a maximum payment amount set to EUR 3 million per month<sup>11</sup>.

An exception to the banking monopoly has been set. Under this statutory exception, individuals can loan money to project carriers on Crowdfunding platforms, on a project per project basis, subject to duration and amount limitations. A project carrier cannot raise more than **EUR 1 million per project** on a Crowdfunding platform, whether by way of loan bearing interests or not. Interest-free loans are capped at EUR 4,000 per year, per project and per lender, while no limitation is currently set on their duration. Interest bearing loans are capped at EUR 1,000 per year, per project and per lender. They shall be of a maximum duration of seven (7) years. They cannot be granted at usury rates (determined according to a legally binding formula).

For interests bearing loans, only individuals can act as **lenders**, while acting in a non-professional capacity<sup>12</sup> both individuals or legal entities, acting in a professional capacity, can act as **borrowers**<sup>13</sup>.

With respect to interest-free loans, only individuals acting in a personal and non-professional capacity may act as **borrowers** on Crowdfunding platforms, while **lenders** may only be individuals or legal entities, provided they act in a non-professional capacity<sup>14</sup>.

IFP Crowdfunding platforms shall publish prior to 30 June of every year on their website an annual report regarding the previous calendar year of operations to make available to the public (i) a presentation of its management bodies, (ii) the number and overall amount of received and retained

<sup>11</sup> See articles D522-1-1 *et seq.* CMF.

<sup>12</sup> See article L511-6 CMF

<sup>13</sup> See article L548-1, 1<sup>o</sup> CMF

<sup>14</sup> See article L548-1, 3<sup>o</sup> CMF





projects over the given year, (iii) that of actually financed projects, (iv) the overall amount of loans, interest-free loans and donations, together with (v) the number of lenders, average number of lenders per project, (vi) average loan amount, (vi) interest-free loan amount and (vii) donations per loan/donation and per lender/donor and (viii) the number of defaults on loans<sup>15</sup>.

IFPs shall provide on their websites, *inter alia* template loan and interest-free loan agreements, as well as donation agreements (with a minimum of clauses to be provided according to the provisions of articles R.548-6 and 548-10 CMF), selection criteria for the projects on the part of the platform, possible renunciation option for the lenders, etc.

### National approval label granted to IFP, CIP and PSI

The platforms being registered as IFPs, CIPs, or PSI, can refer on their communications to the national approval label's logo showing that they have been approved by the French control authorities:



Such label aims to grant the platform users comfort as to the reliability of such labelled platforms.

### Specific criminal sanctions applying to IFP and CIP statuses

Both the IFPs and CIPs are subject to good behaviour rules set forth by law. In addition, they must comply with organisation and operation requirements. The management is also subject to specific prohibitions with respect to their capacity for being granted access to the IFP and CIP statuses. Shall they breach the regulations applying to the good behaviour codes and the organisational rules, IFPs and CIPs will be subject to criminal fines.

### 3.2 Prospectus requirements

Since 1 October 2014, a new derogatory regime has been implemented with respect to the obligation for issuing companies to establish a prospectus for the public offering of shares or bonds.

#### ***Prospectus exemption applying to Crowdfunding activities of CIPs and certain PSIs***

Since 1 October 2014, the offering of equity and fixed interest bonds (Equity Model) by a CIP or by an authorised *prestataire de services d'investissement* (PSI – investment services advisor, a status pre-existing the Crowdfunding regulations), **on their Crowdfunding websites** is not considered as a public offering (subject to a prospectus), if the offering amount is lower than **EUR 1 million per issuer over a 12-month period**<sup>16</sup>. An adequate level of information (simple, clear, balanced) must however be made available to the prospective investors. Pursuant to the provisions of articles L217-1 and 314-106 AMF General Regulations, CIPs or authorised PSIs offering such securities on their websites are bound to

<sup>15</sup> See article R548-4, II CMF

<sup>16</sup> See articles L411-2 and D.411-2 CMF



provide the investors (CIPs) /their clients (PSIs) with detailed information meant to assess the risks associated with the investment, to permit a better understanding of the organisation and management of the beneficiary of the investment.

PSIs can manage subscription forms when their clients subscribe to a project for which prospectus obligations are waived but should nonetheless comply with the provisions of article 315-66-1 AMF General Regulations, which sets obligations and procedures PSIs undertaking such role must abide by.

Similar rules apply to CIPs for the provision of services of subscription forms management<sup>17</sup>.

### **Specific information obligations binding on CIPs and PSIs when prospectus exemptions apply**

Where the project holders do not have to issue a prospectus in relation to the offering of shares or fixed interests bonds in their companies on CIP or PSI platforms, the relevant CIP/PSI has to provide the investors with an adequate level of information on its website, in a language accessible to a lay person.

Such information mainly consists of:

- presenting the activity and the project of the issuer together with specific risks associated therewith;
- providing the last statutory accounts of the issuer together with financial projections;
- providing the level of participation of the management of the issuer in the project;
- detailing the financial rights, voting rights and information rights attached to the securities offered and those attached to the categories of securities not offered as part of the offer, and the categories of beneficiaries of such not offered securities;
- details on conditions (*inter alia* financial) and limits to the liquidity of the securities according to the provisions of a shareholders' agreement or of the by-laws;
- conditions subject to which an investor can be provided with copies of recordings in the issuer's books relating to its investment (e.g. copy of his/its individual shareholder's account certified true and exact by the legal representative of the company);
- details of costs to be borne by the investor at the time of subscription and thereafter; and
- the opportunity to receive on demand the details of the services provided to the issuer and of the associated fees.

### **3.3 Regulation of Crowdfunding under the AIFMD regime**

The Alternative Investment Funds Management Directive has been transposed into French law by Ordinance no. 2013-676 modifying the framework of assets management dated 25 July 2013 and Decree no. 2013-687 taken on 25 July 2013 for the application of such ordinance, under articles L214-24 et seq. CMF.

<sup>17</sup> See article 325-50 AMF General Regulations



It results from the provisions relating to the scope of application of the AIMFD in France and the definition of Alternative Interest Funds (**AIFs**), that this regulation does general not apply to crowdfunding platforms in France.

Indeed, AIFs are identified in French law:

- as collective investment undertakings, other than UCITSs,
- which “raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors”. Under guidelines published by ESMA (European Securities and Market Authority), characteristics of such collective investment undertakings are that they
  - a) do not have a general commercial or industrial purpose;
  - b) pool capital raised from its investors for the purpose of investment with a view to generating a pooled return for those investors; and
  - c) allow unit holders or shareholders of the undertaking no day-to-day discretion or control.

Under the current regulation, and as anticipated in last year's comments, the Crowdfunding platforms that would be likely to present projects falling under the definition of the AIF's scope of activities would be those operating under the Equity Model.

Equity Model platforms do not generally “collect” the funds raised by the project holders, since they are prohibited from doing so under the CIP regime. Most of the projects funded on Equity Model platforms are to be operated by operating companies or project companies which have a general commercial or industrial purpose.

Therefore, since the criteria described above will generally not be met by the Equity Model funded projects, the AIFMD regime shall not apply to most Crowdfunding platforms in France.

However, the AMF pointed out recently that the AIFM regime could apply to Crowdfunding operations<sup>18</sup>, if platforms create holding companies to regroup shareholders of a single target company to simplify the relationships with the project holder, and in an exit perspective with a potential purchaser. In such a situation, a case by case analysis will have to be conducted to determine whether the company meets the definition of AIF, notably as regards its investment policy and its corporate purpose.

### 3.4 Licence under the Payment Services regulations

The Payment services directive was transposed into French law by Ordinance no.2009-866 dated 15 July 2009 which modified the provisions of the CMF.

Pursuant to the provisions of article L521-1, I CMF, “*payment services providers are payment establishments and credit institutions*”.

<sup>18</sup> See *S'informer sur le nouveau cadre applicable au financement participatif (crowdfunding)* – Note on crowdfunding regulations jointly issued by the AMF and the ACPR on 30th September 2014, p.12.



As a result, any IFP Crowdfunding platform proposing payment services whereby it gets paid funds on behalf of third parties in the framework of crowdfunding operations, will be acting as payment services provider.

Pursuant to the provisions of article L548-2, III CMF, the relevant IFP shall be at least licensed as payment establishment (*établissement de paiement*) by the ACPR<sup>19</sup> or be registered as agent for payment services provider (*agent pour prestataire de services de paiement*<sup>20</sup>). These IFPs shall have a minimum capital equal to EUR 40,000<sup>21</sup>.

The IFP shall mention on its website at an easily accessible location the mention of its accreditation as payment services provider<sup>22</sup>.

Breach of these provisions exposes the contravening platform to criminal fines and management to both criminal fines and jail sentences<sup>23</sup>.

### 3.5 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- Anti-terrorism control regulations,
- Anti-money laundering regulations,
- Consumer credit acts and regulations,
- Financial canvassing ("*démarchage financier*") regulation (prohibited for IFPs and very strictly limited for CIPs<sup>24</sup>)
- Information privacy regulations.

## 4 Lessons learned from France's regulation for a possible harmonized European Crowdfunding regulation

The French legal framework applying to Crowdfunding activities only came into force on 1 October 2014, giving the operators very little time to assess the adequacy of the newly implemented rules to the needs of the sector.

### 4.1 Role model ("dos")

- Specific statuses for Crowdfunding operators less constraining and less costly than for other regulated activities.

<sup>19</sup> See articles L522-1 *et seq.* CMF

<sup>20</sup> See articles L523-1 *et seq.* CMF

<sup>21</sup> See article D522-1-1 CMF

<sup>22</sup> See article L548-1, I CMF

<sup>23</sup> See articles L572-5 *et seq.* CMF.

<sup>24</sup> CIPs may promote their services under "institutional advertising" if not limited to a specific operation, unless it communicates on an operation for which a prospectus has been issued.



- Limiting the maximum amount that one can invest on a project per year will help ensure that individuals do not put themselves too much at risk on a project for which they expect a return on investment.
- Limiting the maximum amount that one can raise on a platform will permit to the sector to develop without pressure from the banking system which will not envisage the Crowdfunding platforms as a threat to their activities.
- Limited and strictly ruled exception to the banking monopoly, for the funding of crowdfunded projects.
- Limited and strictly ruled exception to the prospectus obligation, for the funding of crowdfunded projects.
- Implementing a reliability label attributed by public authorities to the Crowdfunding platforms to permit to establish confidence from the public at large in the actors of the Crowdfunding sector.

#### 4.2 Aspects that should be avoided ("don'ts")

- Providing for an obligation to offer only ordinary shares and fixed interests bonds for Equity Model projects
  - The persons organising the funds raising on a Crowdfunding platform will need to anticipate the dilution of the company's funders (voting powers) and may need to issue preferred shares or convertible bonds more fitted to the development of start-ups;
  - Proxy advisor systems will probably need to be implemented to resolve voting collection related issues and costs for the relevant funded companies.
- Prohibiting platforms from taking a limited number of shares in the capital of the Equity Model funded companies, to act as proxy holders while not modifying concurrently the proxy advisor regulation and not providing satisfactory solutions for the organisation of votes at general shareholders' meetings.

## 5 Conclusion

The new regulation has yet to prove its adequacy to the Crowdfunding market's needs and further evolution. Based on communication from the major actors of the sector in France, true enthusiasm emerges from the operators which are now ensured to operate their activities in a legal framework were they are not exposed to criminal sanctions for dealing in an unregulated sector.

The Crowdfunding operators in France expect to witness a fast and steady development of additional platforms to keep up with the demand of the French public at large, further to the enactment of the new regulations.

Although operators have gladly welcomed the implementation of the CIP and IFP statuses, commentators already anticipate that when growing platforms will want to develop their activities in



other fields and will most surely apply to pre-existing regulatory statuses (PSI, credit institutions, etc.) which offers more business opportunities.

It cannot however be denied that France is a pioneer in the field of Crowdfunding regulation and that the French government has met most of the operators' expectations in respect thereto.

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## Germany

### 1 Recent developments in the market of Crowdfunding in Germany

During the last 12 months there were the following significant developments in Germany regarding Crowdfunding:

#### 1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

Regarding equity Crowdfunding in Germany there are three main Crowdfunding platforms that operate within the scope of regulation (with different approaches).

One simply offers securities. Therefore all companies seeking funding ("entrepreneurs") must transform to a (private) stock corporation first. However, in the past 12 months only one company sought funding on this platform.

Another platform is more complicated and is structured similar to a fund. It does not have a licence, but has prepared an approved prospectus for the platform. They offer silent partnerships.

In the past year a third platform has emerged that focuses on the financing of medium-sized business (*Mittelstand*) by means of participation rights (*Genussrechte*). The platform promotes its ability to provide standardised prospectuses for projects exceeding EUR 100,000. However, currently all projects stay below this threshold and therefore no prospectus is required.

#### 1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

Due to the lack of a regulation for subordinated profit-participating loans (*partiarische Nachrangdarlehen*) in Germany, there was a shift towards this kind of investments in the past year. The main reason for this was that subordinated profit-participating loans (*partiarische Nachrangdarlehen*) can currently be used to collect more than EUR 100.000 without the requirement to publish a prospectus approved by the German Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht – "BaFin"*).

This trend led to an increase in platforms and companies/projects that organised Crowdfunding campaigns by means of subordinated profit-participating loans (*partiarische Nachrangdarlehen*). In these investments the investors participate in the success of the funded project or company as the interests are linked to the profit of the project or company. Still, the investor does not share liability for any losses.

However, the German legislator has noticed this trend and considers it as an approach to circumvent regulation – in particular prospectus requirements under the German Investment Products Act (*Vermögensanlagengesetz*).



Furthermore, peer to peer lending (“P2P lending”) became popular in Germany. Because of regulatory restrictions in Germany a bank needs to be involved in this process. The bank grants the loan to the borrower and then splits and assigns the loan to the Crowd (lenders). The biggest German P2P lending platform (no. 4 in Europe) alone has – according to the company’s own information – brokered 24,000 loans amounting to EUR 110 million since its launch in 2008.

### 1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

In Germany the Donations or Rewards Models are used predominantly to finance social or creative projects or companies (e.g. NGOs). Here, no financial investment or return is involved. Investors fund projects or companies and get no return at all or a non-monetary reward (e.g. tickets, CDs etc.). In some cases the rewards are of a symbolic value only. Actually the Crowdfunding platform with the largest community (Crowd) in Germany is a platform offering reward based Crowdfunding for creative projects.

Noteworthy is the current trend that well established market players – like cooperative banks (*Volksbanken*) – started offering their own platforms for donations and/or rewards based Crowdfunding. On these platforms regional projects (sports clubs, schools etc.) look for financial support from the Crowd. Thereby, the regionally organised cooperative banks (*Volksbanken*) want to bring Crowdfunding also to rural areas and intensify the relationship to their customers.

### 1.4 Real Estate Crowdfunding

Irrespective of the aforementioned categories, there is an emerging trend in Germany to facilitate Crowdfunding to finance real estate projects.

New Crowdfunding platforms specialised in this kind of projects emerge and existing platforms are extending their business. Just recently a well established German Crowdfunding platform established a European Crowdfunding record by raising over EUR 5 million for a the extension of a wellness resort at the Baltic Sea.

### 1.5 International approach

Finally, more and more US Crowdfunding platforms and platforms from other European countries enter the German market and plan to establish international Crowdfunding platforms in order to reach (at least) the complete European market with just one platform. However, due to the differences in the national Crowdfunding regulations such projects still require a lot of efforts and legal advice from 28 countries.

## 2 Recent developments regarding Crowdfunding regulation in Germany

On 16 December 2013 the newly elected federal government mentioned Crowdfunding explicitly in its coalition agreement and stated that “*new forms of financing such as Crowdfunding need a reliable regulatory framework*”. Later also BaFin addressed the subject and published an expert article on regulatory requirements and investor’s responsibility with regard to Crowdfunding.





On 22 Mai 2014 the German federal government presented a first package of measures to improve the protection of retail investors (*Maßnahmenpaket zur Verbesserung des Schutzes von Kleinanlegern*). However, the intended measures would have tremendous negative consequences for Crowdfunding in Germany. Therefore, the federal government already announced to find solutions which meet the requirements of young companies that are financed by Crowdfunding in consideration of the protection of investors.

Hence, on 28 July 2014 the first draft of the German Retail Investor's Protection Act (*Kleinanlegerschutzgesetz*) was published, that contains the first specific Crowdfunding regulation in Germany.

A revised draft (hereinafter referred to as the "Draft") was published on 12 November 2014. The current schedule provides for the coming into effect by mid-2015.

In a nutshell, the Draft provides for the following changes:

- subordinated profit-participating loans (*partiarische Nachrangdarlehen*) shall qualify as investment products (*Vermögensanlagen*) under the German Investment Products Act (*Vermögensanlagengesetz*)
- regulation for all investment products (*Vermögensanlagen*) – such as silent partnerships (*stille Beteiligungen*), participation rights (*Genussrechte*) and subordinated profit-participating loans (*partiarische Nachrangdarlehen*) – shall be increased: extended requirements for prospectus, extended obligation to publish addenda to the prospectus, ad hoc disclosures, strict rules for marketing of investment products (*Vermögensanlagen*)
- exception from most requirements under the German Investment Products Act (*Vermögensanlagengesetz*) explicitly tailored to fit financing by means of Crowdfunding within a threshold of EUR 1 million

However, please note that the Draft currently is still in the legislative procedure. Therefore, the described planned regulation of Crowdfunding in Germany might well become subject to changes.

### 3 Current regulation of Crowdfunding in Germany

#### 3.1 Licence under the German Banking Act (*Kreditwesengesetz*)

##### 3.1.1 Equity Model / Lending Model

###### General Rule

Pursuant to the German Banking Act (*Kreditwesengesetz*), anyone intending to provide financial services in Germany commercially or on a scale which requires a commercially organised business undertaking requires a written licence from BaFin.



The provision of "financial services" includes the brokering of business involving the purchase and sale of financial instruments or their documentation (investment broking), the purchase and sale of financial instruments in the name of and for the account of others (contract broking) and the placement of financial instruments without commitment to take up those instruments (placement of financial instruments).

#### *Current regulation*

"Financial instruments" within the meaning of the German Banking Act (*Kreditwesengesetz*) include securities, investment products (*Vermögensanlagen*) and shares in collective investment undertakings (*Investmentvermögen*).

Securities include shares in stock corporations, shares in collective investment undertakings (*Investmentvermögen*) as well as debt securities including participation certificates. Investment products (*Vermögensanlagen*) under the German Investment Products Act (*Vermögensanlagengesetz*) comprise, inter alia, shares in other legal entities (such as limited liability companies, limited partnerships, civil law partnerships or silent partnerships (*stille Beteiligungen*)), participation rights (*Genussrechte*) with regard to profits in those legal entities, shares in trust assets and registered bonds.

#### *Planned changes*

So far, subordinated profit-participating loans (*partiarische Nachrangdarlehen*) are not classified as investment products under the German Investment Products Act (*Vermögensanlagengesetz*). However, according to the Draft subordinated profit-participating loans (*partiarische Nachrangdarlehen*) shall now be added to the catalogue of investment products (*Vermögensanlagen*) and therefore shall be covered by the German Investment Products Act (*Vermögensanlagengesetz*).

Further, according to the Draft also "other investments that grant a repayment claim and a claim for interest" shall – as a rule – qualify as investment products (*Vermögensanlagen*). According to this wording also P2P lending could be covered by this definition and would – as a consequence – also be subject to the regulation under the German Investment Products Act (*Vermögensanlagengesetz*). However, the legislator clarified that P2P lending shall be outside the regulation if certain requirements are met. In particular the loans must be granted by a bank in the first place; later the bank splits this loan and assigns it to the crowd lenders.

In summary, where an online Crowdfunding platform facilitates the offering of securities, investment products (*Vermögensanlagen*) or shares in collective investment undertakings (*Investmentvermögen*), the operator of the platform provides financial services within the meaning of the German Banking Act (*Kreditwesengesetz*) and therefore, as a general rule, requires a license by BaFin.

#### **Exemptions from licencing requirement**

If securities (such as shares in stock corporations or limited liability companies) are offered, no exemptions are available from the licensing requirement.



However, most German Crowdfunding platforms offer subordinated profit-participating loans (*partiarische Nachrangdarlehen*) or interests in silent partnerships and can therefore benefit from a statutory exception to the licensing requirement.

The following requirements must be met:

- only investment broking and contract broking are conducted,
- only investment products (*Vermögensanlagen*) within the meaning of the Investment Products Act (*Vermögensanlagengesetz*) or shares in collective investment undertakings (*Investmentvermögen*) are offered;
- no acquiring of ownership or possession with regard to funds or shares of customers (unless a specific licence to do so has been obtained).

Where these requirements are met, the operator only needs a licence under the German Trade, Commerce and Industry Regulation Act (*Gewerbeordnung*) (which is a relatively straightforward matter). This kind of licence would also be sufficient for the operation of a Crowdfunding platform under the Crowdfunding exemption contained in the Draft.

### 3.1.2 Donations or Rewards Model

#### Current regulation

Depending on the structure in detail there are good reasons to state that currently these kinds of investments do not qualify as shares in collective investment undertakings (*Investmentvermögen*) or investment products (*Vermögensanlagen*). Therefore, it should fall outside of German financial services regulation.

#### Planned changes

However, the Draft also describes "*comparable investments that grant a claim for repayment and interest*" as investment products (*Vermögensanlagen*). As already stated the Draft is currently still subject to discussion – its final interpretation cannot be finally foreseen. However, according to some (unofficial) statements by one of the involved governmental departments it appears to be likely that also certain kinds of rewards based Crowdfunding projects could qualify as investment products (*Vermögensanlagen*). In this case the aforementioned regulation would be applicable.

## 3.2 Prospectus requirements

### 3.2.1 Equity Model / Lending Model

#### Current regulation

Entrepreneurs issuing securities or investment products (*Vermögensanlagen*) to investors can be subject to a prospectus requirement, namely a requirement to publish a prospectus approved by BaFin under the German Securities Prospectus Act (*Wertpapierprospektgesetz*) where securities are offered (e.g. shares in stock corporations) or under the German Investment Products Act (*Vermögensanlagengesetz*) where investment products (*Vermögensanlagen*) are offered (e.g. silent partnerships).



Currently, depending on the structure, subordinated loans (*Nachrangdarlehen*) do not constitute investment products (*Vermögensanlagen*) under the German Investment Products Act (*Vermögensanlagengesetz*) and therefore no prospectus is required.

The general prospectus requirement does not apply where the offering of securities or investment products (*Vermögensanlagen*) does not exceed EUR 100,000 within a time period of 12 months. This applies to the issuing of securities as well as the issuing of investment products (*Vermögensanlagen*).

### Planned changes

According to the Draft subordinated profit-participating loans (*partiarische Nachrangdarlehen*) shall in the future be covered by the German Investment Products Act (*Vermögensanlagengesetz*). Consequently, entrepreneurs offering subordinated profit-participating loans (*partiarische Nachrangdarlehen*) to investors will also be subject to the prospectus requirement under the German Investment Products Act (*Vermögensanlagengesetz*).

### Content of the prospectus

In addition, the Draft provides for extended requirements regarding the prospectus. The prospectus shall only be valid for 12 months after its publication, more information concerning the addressed investors is demanded, BaFin is verifying the operability of the business model and is allowed to demand more information within the authorisation process to guarantee the investors' protection. Moreover, the Draft introduces extra requirements for additions to the prospectus during an offering and contains on-going obligations to notify the investors about substantial changes.

### Crowdfunding-Exception from prospectus requirement

However, the Draft provides for a new exemption from the prospectus requirement for the offering of subordinated profit-participating loans (*partiarische Nachrangdarlehen*) that is specifically tailored to Crowdfunding.

According to the Draft a lighter regulation shall apply if the following (cumulative) conditions are met:

- Total offering maximum: EUR 1 million;
- Offering of profit-participating loans (*partiarische Darlehen*) or subordinated loans (*Nachrangdarlehen*);
- Total amount for each investor per investment product of one issuer (Start-up company, project initiator or similar) is restricted as follows:
  - up to EUR 1,000: no restrictions
  - more than EUR 1,000: cash deposits or financial instruments of the investor must exceed EUR 100,000 or maximum two monthly net incomes
  - EUR 10,000 = absolute maximum investment per investor;
- Marketing via online platforms that need to obtain a licence under the German Trade, Commerce and Industry Regulation Act (*Gewerbeordnung*), under the German Banking Act (*Kreditwesengesetz*) or the German Securities Trading Act (*Wertpapierhandelsgesetz, WpHG*).



If these requirements are met, in particular no prospectus is required. Instead only a three-page fact sheet (*Vermögensanlageninformationsblatt - VIB*) must be provided to the investors to inform them about the company/project. In addition, a lighter regulation under the German Investment Products Act (*Vermögensanlagengesetz*) is applicable.

#### Advertisement

However, the Draft significantly limits the possibilities to advertise investment products. At the current stage of the Draft, these changes are applicable to Crowdfunding to the full extent.

The first draft limited the possibilities to advertise investment products (*Vermögensanlagen*) to certain media, whose main topic is – at least inter alia – the presentation of economic topics. Furthermore, the advertisement had to be related to such presentation of economic topics. The Draft keeps this general principle. However, the *press* shall be excluded. In effect, this means that advertisement for investment products is permitted in print media as well as their online editions. Advertising campaigns via facebook, twitter or similar social networks still shall remain prohibited in general.

This regulation prevents Crowdfunding platforms from reaching the essential audience for Crowdfunding by approaching the broad public to shoulder funding of uprising enterprises by means of plenty of small investments.

### 3.2.2 Donations or Rewards Model

#### Current regulation

Due to the fact, that investments where individuals provide money to a company or project for benevolent reasons or for a non-monetary reward (Donation or Rewards Model) currently do not qualify as investment products (*Vermögensanlagen*) a prospectus pursuant to the German Investment Products Act (*Vermögensanlagengesetz*) is generally not required.

#### Planned changes

However, it cannot be excluded with absolute certainty that certain kinds of rewards based Crowdfunding projects could fall into the category of "*comparable investments that grant a claim for repayment and interest*" included in the Draft which qualify as investment products (*Vermögensanlagen*). In this case – as a rule – a prospectus under the German Investment Products Act (*Vermögensanlagengesetz*) would be required.

### 3.3 Regulation of Crowdfunding under the AIFMD regime

According to the Capital Investment Act (*Kapitalanlagengesetzbuch*) the AIFMD regulation of funds and fund managers applies when there is an alternative investment fund ("AIF") managed by an alternative investment fund manager ("AIFM"). The draft of the German Retail Investor's Protection Act (*Kleinanlegerschutzgesetz*) does not affect this regulation.

The Capital Investment Act provides that AIFs include a collective investment undertaking which:

- raises capital from a number of investors,



- with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and
- is not an operating company conducting business outside the financial sector and
- do not require authorisation pursuant to Article 5 of Directive 2009/65/EC (UCITS).

### 3.3.1 Operating company seeking funding

German AIFMD regulation does not apply to operating companies outside the financial sector which do not invest in accordance with a defined investment policy.

BaFin clarifies in its interpretation guideline on the "Scope of application of KAGB / Interpretation of the term collective investment undertaking" that companies are operating companies if they operate the facility or production themselves within their day-to-day business. However, BaFin states that an operating company can make use of the service of an intra-group company or an external service provider, as long as the day-to-day discretion remains at the company.

Taking this into account, companies seeking funding by means of a Crowdfunding platform could only be operating companies outside the financial sector if:

- their business strategy is simply the commercial success of their business;
- they do not intend to follow any defined investment policy but want to finance their ongoing day-to-day business; and
- they operate the facility, production or project themselves within their day-to-day business or make use of the service of an intra-group company or an external service provider (as long as the day-to-day discretion remains at the company)

In general, these requirements are met by the "typical" start-up or developing company seeking funding for its general commercial business by means of a Crowdfunding platform. Such companies should therefore fall outside the scope of the German AIFMD regulation.

### 3.3.2 Project Company seeking funding

#### Equity Model

BaFin illustrates in its Interpretation Guideline that companies that are established to finance a single project ("Project Company") such as movie, a computer game, a wind farm or a solar park and do not operate the facility or production themselves or by means of an outsourcing company leaving the day-to-day discretion to the "Project Companies" cannot qualify as operating companies.

Accordingly, this kind of "Project Company" might constitute an AIF within the meaning of the German AIFMD regulation if it seeks funding in return for a share in the profits or revenue generated by the project as in the Equity Model.

#### Lending Model



Investments by means of subordinated loans (*Nachrangdarlehen*) can generally be structured as non-AIF investments because the investors do not share liability for any losses.

### Donations or Rewards Model

Some of the Project Companies do not offer any kind of revenue but instead (often small) non-financial rewards in return (Donations or Rewards Model). In the latter case (e.g. if the promised reward is a ticket or a copy of the movie or game) it can be argued that the funds are not invested for the benefit of those investors and the funding therefore contains no collective investment undertaking and no AIF. BaFin has not yet commented on a possible application of the AIFMD regime to rewards based Crowdfunding.

### 3.3.3 Crowdfunding Platform

In general, due to the fact that an operator of a Crowdfunding platform does not raise capital from investors for its own business, he should not qualify as an AIF. Further, there are sound arguments to state that the Crowdfunding platform does not "manage" the underlying investment, but merely arranges investments into projects or companies.

Hence, the operator of a Crowdfunding platform should not be qualified as an AIF or an AIFM.

### 3.3.4 Pooling vehicle

In case the company seeking funding prefers funding by just one major investor instead of a large number of small retail investors, it is possible that the platform involves a pooling vehicle. A pooling vehicle is a company founded to concentrate a large number of investors. Such pooling vehicle is likely to be an AIF and therefore to be subject to the German AIFMD-regulation.

However, a contractual pooling of the investors could be a viable alternative. In this structure no pooling *entity* is involved but rather the investors enter into a pooling agreement with the company itself or a third party.

### 3.4 Licence under the German Payment Service Act (*Zahlungsdiensteaufsichtsgesetz*)

Any transfer of funds through the operator of a Crowdfunding platform generally constitutes money remittance services (*Finanztransfersgeschäft*) within the meaning of the German Payment Services Act (*Zahlungsdiensteaufsichtsgesetz*). Such transfer of funds could occur if the investors pay their investment amounts to the operator of the Crowdfunding platform who then passes the funds to the entrepreneur.

In this context BaFin has decided that operators of internet platforms (such as Crowdfunding platforms) in general are not covered by the exemption for commercial agents.

In order to avoid such licencing requirements the operator of a Crowdfunding platform could cooperate with a bank or a licenced payment institution for the handling of payments rather than acting as an intermediary itself. However, the structure of this cooperation must meet detailed requirements by BaFin.





### 3.5 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- German Trade, Commerce and Industry Regulation Act (*Gewerbeordnung*);
- German Act on Money Laundering (*Geldwäschegesetz*);
- German Securities Trading Act (*Wertpapierhandelsgesetz*);
- Consumer Credit Regulation (*Vorschriften für Verbraucherdarlehensverträge*).

## 4 Lessons learned from Germany's regulation for a possible harmonised European Crowdfunding regulation

### 4.1 Role model ("dos")

Considering the aim of the Draft to protect investors from dubious and risky investment products, it is certainly a positive signal that the German legislator recognised the importance of Crowdfunding as a new kind of funding and is willing to grant Crowdfunding the possibility to establish in the market.

For a possible harmonised European the following aspects can serve as a role model:

- exception of Crowdfunding from most regulatory requirements (in particular prospectus requirement)
- three-page fact sheet (*Vermögensanlageninformationsblatt - VIB*) for investors
- only lighter regulation of the Crowdfunding platform

### 4.2 Aspects that should be avoided ("don'ts")

However, the predominant part of the planned German Crowdfunding regulation should not build the basis for a possible European Crowdfunding regulation.

In particular, the following aspects should not be inherited:

- limitation of the reduced regulatory requirements to one kind of investment vehicle (profit-participating loans) – rather, all kinds of investments (Lending Model and Equity Model) should be treated equally
- limitation of the reduced regulatory requirements to Crowdfunding projects with a total offering maximum of EUR 1 million – EUR 5 million seem appropriate to enable e.g. property Crowdfunding also to benefit from a lighter regulation
- limitation of maximum investment per investor (EUR 10,000) and restrictions starting at EUR 1,000 – as this excludes so called qualified investors (i.e. angel investors etc.) from Crowdfunding campaigns
- limitation of advertisement for Crowdfunding in particular in online-media and social networks



## 5 Conclusion

In conclusion, the fact that Crowdfunding was recognised by the German legislator is a very positive signal for the Crowdfunding industry in Germany. The fact that the interests and needs of Crowdfunding are explicitly considered in a law that actually aims to increase the protection of (retail) investors means that Crowdfunding has reached the mainstream.

However, the current draft of a specific Crowdfunding regulation for Germany can only be a first step. Further legislative measures are required in Germany as well as on a European level.

The goal must be to reach a harmonised European Crowdfunding regulation that enables companies seeking for funding and investors to take part in Crowdfunding campaigns across the whole European Union. It will be exciting to see if this will only be achievable by a European regulation or if national regulations can be harmonised in a meaningful way.

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## Greece

### 1 Recent developments in the market of Crowdfunding in Greece

During the last 12 months no significant developments in the market of Crowdfunding took place in Greece.

### 2 Recent developments regarding Crowdfunding regulation in Greece

During the last 12 months no significant developments regarding Crowdfunding regulation took place in Greece.

### 3 Current regulation of Crowdfunding in Greece

#### 3.1 Financial Services license requirements

##### Equity Model

According to Law 3606/2007 implementing in Greece Directive 2004/39/ EC (“**MiFID**”), the offering of investment services and the performance of investment activities in Greece, in a professional capacity, is allowed in principle to investment firms licensed in Greece by the CMC or to investment firms from other European Union countries having the benefit of the European “passport” (i.e. following the notification procedure) to offer services either through a branch or on a cross-border basis without an establishment in Greece.

The provision of investment services includes, inter alia, the receipt, transmission and execution of orders on behalf of clients for performing transactions in financial instruments, the placement of financial instruments without commitment to take up those instruments and the provision of investment advice.

Financial instruments are, inter alia, securities, money market instruments, units in collective investment funds, options, futures, swaps, futures and other derivatives.

Where a Crowdfunding platform facilitates the offering of securities to the public and/or provides advice to investors on investment in securities, the operator of the platform may be considered to be providing the investment services of placing of financial instruments and/or investment advice, services which require the license by the CMC. However, the CMC has not yet expressed its position officially with respect to the possible unauthorized provision of investment services by the only Crowdfunding platform mentioned above allegedly operating under the Equity Model in Greece.



## Lending Model

Although the Lending Model is not currently offered in Greece, the general rule is that according to Law 3601/2007 (implementing in Greek legislation EU Council Directives 2006/48/EC and 2006/29), the provision of loans or other credits, in a professional capacity, is allowed only to credit institutions and certain financial institutions (i.e. credit companies) licensed by the Bank of Greece (“BoG”), or alternatively to credit institutions and certain financial institutions established in other European Union (EU) countries having the benefit of the European “passport” to offer services either through a branch or on a cross-border basis without establishment in Greece.

## Donations or Rewards Model

The structure of the Donations or Rewards Model is based on non-monetary returns/giveaways to the investors or on no return at all and no investment is involved. Based on said structure, the platforms operating this model may not be considered to be offering investment or banking services and thus fall outside the scope of the relevant regulations.

### 3.2 Prospectus requirements

Law 3401/2005 implemented in Greece Directive 2003/71/EC (the “Prospectus Directive” as amended by Directive 2010/73/EE), provides that the public offering of securities in Greece requires the prior publication of a prospectus, which must be approved by the CMC.

There is an exemption from the obligation to publish a prospectus for securities offerings with total value of less than Euro 100,000 within a time period of twelve (12) months. This is the exemption that the Crowdfunding platforms of the Equity Model may try to use for offerings of securities. However, the application of this exemption has not been tested in practice with respect to Crowdfunding platforms.

There was a general rule in Article 10 Law 876/1979 with respect to the approval that should be granted by the CMC in all cases where persons aimed to induce the public for investing in any kind of instruments, which has now been abolished. The abolished provision of Article 10 Law 876/1979 provided that it is prohibited “to perform in any way whatsoever advertisements, notifications, declarations or announcements to the public aiming at attracting the public for investing money in any kind of debt instruments as well as the collections of savings from the public for participating in any kind of investment, unless a special permission has been granted by the CMC”. Thus, as regards the offers of investments which do not qualify as “securities” or other regulated products (such as funds or deposits etc), within the meaning of Law 3401/2005, these are not subject to any regulatory requirements.

## Regulation of Crowdfunding under the AIFMD regime

In Greece, Directive 2011/61/EE on Alternative Investment Funds Managers (“AIFMD”) has been implemented by Law 4209/2013 (the “AIFMD Law”).

According to Article 4 of the AIFMD Law, an AIF is defined as any collective investment undertaking, including investment compartments thereof, which:

- (i) raises capital from investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and



(ii) does not require authorisation pursuant to Article 4 of Law 4099/2012 on UCITS or pursuant to Article 5 of Directive 2009/65/EC (UCITS).

On the basis of the aforementioned definition, Crowdfunding platforms could be subject to the provisions of the AIFMD law, if they qualify as collective investment undertakings which raise capital from investors with a view to investing it in accordance with a defined investment policy for the benefit of those investors and are not UCITS. Under the AIFMD Law, the management of an AIF in Greece is currently subject, apart from certain exemptions set out in Article 3 and to the transitional provisions set out in Article 53 of AIFMD Law, to the prior authorization from the CMC or other EU competent authority

### 3.3 Licence under the Payment Services Directive

As a general rule, any transfer of funds made by the operators of Crowdfunding platforms to the companies/projects could constitute money remittance services within the meaning of law 3862/2010 implementing Directive 2007/64/EC on payment services. Such transfer of funds could occur if the investors pay their investment amounts to the operator of the Crowdfunding platform who then passes the funds to the entrepreneur.

The provision of payment services in Greece is a regulated activity that may only be undertaken by specific categories of service providers, which are subject to prudential supervision, such as banks, emoney institutions, payment institutions etc. Companies which provide payment services in Greece are required either to be licensed as payment services providers by the BoG or to be duly passported (i.e. operating through a Greek branch or on a cross-border basis).

It is not clear whether the platform operator could rely on the exemption for commercial agents under point b) of article 3 of Law 3862/2010. The applicability of such exemption should be confirmed with the BoG on an ad hoc basis.

As an alternative – in order to avoid such licensing requirements – the operator of a Crowdfunding platform could use an external provider or partner for processing payments rather than acting as an intermediary itself. However, even in this case the structure should be coordinated in cooperation with BoG.

### 3.4 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- Law 3691/2008 on money laundering prevention;
- Laws 2472/1997 and 3471/2006 on data protection;
- Law 2251/1994 on consumer protection and sales performed from a distance;
- Law 2121/1993 on intellectual property;
- Law 3862/2010 on payment services



## 4 Lessons learned from Greece's regulation for a possible harmonized European Crowdfunding regulation

### 4.1 Role model ("dos")

No lessons can be learned from Greece's regulation for a possible harmonized European Crowdfunding regulation.

### 4.2 Aspects that should be avoided ("don'ts")

No lessons can be learned from Greece's regulation for a possible harmonized European Crowdfunding regulation.

## 5 Conclusion

Crowdfunding is still in its infancy in Greece and there is currently no specific applicable regulatory regime. Operating the Equity Model, depending on its actual form, may be subject to certain regulatory requirements, including but not limited to Law 3606/2007 on the provision of investment services as well as to Law 3401/2005 for the public offers of securities. Operating the Donations or Rewards Models is not subject to any regulatory provisions whereas the Lending Model may be subject to the provisions, among others, of Law 3601/2007 regarding lending activities.

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## Hungary

### 1 Recent developments in the market of Crowdfunding in Hungary

During the last 12 months there were the following significant developments in Hungary regarding Crowdfunding:

#### 1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

There were no significant developments in the Hungarian market in relation to the Equity Model during the last 12 months. The Equity Model still does not yet have any presence in the Hungarian market.

#### 1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

There were no significant developments in the Hungarian market in relation to the Lending Model during the last 12 months. The Lending Model still does not yet have any presence in the Hungarian market.

#### 1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

There were no significant developments in the Hungarian market in relation to the Donations or Rewards Model during the last 12 months. Although there have been certain changes in the market (e.g. certain previously active online platforms became inactive and new market participants appeared on the market), the over-all market has not been changed significantly.

There are few online platforms that use the Donations or Rewards Model in Hungary. Those online platforms collect and handle a relatively limited amount of funds.

### 2 Recent developments regarding Crowdfunding regulation in Hungary

Although, there have been major changes in the Hungarian legal system during the last 12 months in general, including the entry into force of the New Civil Code on 15 March 2014 and the entry into force of the new Banking Act, no legislative changes have been implemented in relation to Crowdfunding. There is still no regulatory regime specifically addressing Crowdfunding in Hungary.



## 3 Current regulation of Crowdfunding in Hungary

### 3.1 General licensing requirements

#### Equity Model

If the online Crowdfunding platform facilitates the offering of financial instruments, such activity of the platform operator is likely to qualify as a licensable investment service under the Hungarian Investment Services Act. "Financial instruments" under the Hungarian Investment Services Act include, inter alia, transferable securities, such as stocks in public limited companies and private limited companies and debt securities. Therefore, if the platform operator offers securities held in companies seeking Crowdfunding or bonds issued by such companies, such platform operators would very likely have to obtain an investment services licence from the Hungarian regulator.

Furthermore, structures in which the offering/placement of securities is involved would likely require the publication of a prospectus approved by the Hungarian regulator in connection with such offering/placement, provided that no exemption is available under the Hungarian Capital Markets Act.

If the online Crowdfunding platform is structured as a collective investment scheme it would be subject to regulatory requirements applicable to collective investment funds and their managers.

Furthermore, depending on the structure used by the Crowdfunding platform, Hungarian payment services requirements and custodial services requirements referred to in paragraph 3.3 below could also apply to platforms applying the Crowdfunding Equity Model in Hungary.

However, we believe that a Crowdfunding platform using an Equity Model could be structured in a way which would possibly exclude the applicability of all or most of the Hungarian investment services regulatory requirements, investment funds regulatory requirements and prospectus publication requirements. Such platform could be structured by using civil law contractual arrangements and/or civil law partnership arrangements pursuant to which the individual investors, platform operators and crowdfunded businesses agree on, inter alia, the terms of the profit and loss sharing methods between the parties involved and the distribution of interest on the investments of the individual investors based on the civil law principle of contractual freedom.

#### Lending Model

Lending is a regulated financial service under the Hungarian Banking Act. Therefore, a licence is required for the purposes of providing such regulated lending activities in Hungary. Although, a new Banking Act entered into effect as of 1 January 2014, the new regulation has not changed the licensing requirements applicable to lending activities. Therefore, while structuring a platform applying the Lending Model in Hungary, careful consideration should be given to avoid any licensing requirements that could apply either to the individuals lending to the crowdfunded business or to the operating platform which acts as an intermediary in such lending structure.

Lending is a licensable activity under Hungarian law only if it is a business activity carried out on a regular basis in the framework of an economic operation. The terms 'business activities carried out on regular basis' and 'economic operation' are not specifically defined under the Hungarian Banking Act. According to the public guidelines of the Hungarian Financial Supervisory Authority, which merged into the Hungarian National Bank as of 1 October 2013, an activity qualifies as being performed in the



framework of business activities carried out on regular basis if the activity is carried out on a regular basis, with the aim of entering into transactions that are not specified at the outset and with the aim of making a profit.

In general, individuals lending money to certain projects or businesses through Crowdfunding platforms do not provide funds on a regular basis with the aim of entering into transactions that are not specified at the outset. Furthermore, in most cases it is not the monetary return which is the most important driving factor for individuals when they provide loans to businesses through Crowdfunding platforms, even if a certain form of interest is payable on their loan.

Therefore, taking into consideration the very nature of Crowdfunding, it could be argued that that individuals lending money to a business through a Crowdfunding platform should not be considered as conducting a business activity on a regular basis as part of an economic operation. Therefore, we believe that the risk that the lending activity of the individuals qualifies as a licensable financial service and would require a financial service licence in Hungary is rather low. However, the Hungarian supervisory authority has historically followed a rather conservative approach as to the qualification of licensable financial services and in several cases qualified financial services as being conducted on a regular basis, even if the relevant transaction was only a one-off transaction. According to the public guidance of the Hungarian Financial Supervisory Authority, if the relevant entity expects future similar transactions to be realised at later dates and the entity takes measures to fulfil such transactions on a regular basis, even a one-off transaction may qualify as an activity carried out on a regular basis. Therefore, it can not be absolutely excluded that a Hungarian platform using the Lending Model would trigger licensing requirements applicable to the individual lenders and/or the platform operators.

However, the Crowdfunding platforms using the Lending Model could possibly structure their services so as to eliminate or limit the risk of triggering Hungarian licensing requirements. For example, such models could stipulate that individuals do not receive interest on the loans provided to the crowdfunded business (thereby eliminating the profit oriented element), which would in turn limit the risk of triggering licensing requirements). Furthermore, the Crowdfunding platform could limit the number of the lending transactions that could be initiated by the individual. It may effectively limit the applicability of the regularity element of the activity which would, in turn, also limit the risk of triggering licensing requirements.

In addition, depending on the structure used by the Crowdfunding platform, the Hungarian payment services requirements and custodial services requirements referred to in paragraph 3.3 below could also apply to platforms applying the Crowdfunding Donations or Rewards Model in Hungary.

### **Donations or Rewards Model**

The Donations or Rewards Model is used in Hungary for financing creative projects, art and design projects or civil initiatives. Although no monetary return is involved in such financing, in most cases, the company or person carrying out the project offers non-monetary rewards in return for the donations (e.g. a product sample, tickets).

In general, Donations or Rewards Models do not raise any specific Hungarian regulatory issue. However, depending on the structure used by the Crowdfunding platform, the Hungarian payment





services requirements and custodial services requirements referred to in paragraph 3.3 below could also apply to platforms applying the Crowdfunding Donations or Rewards Model in Hungary.

### 3.2 Prospectus requirements

Companies issuing securities to the public in Hungary might be subject to Hungarian prospectus requirements. According to the Hungarian Capital Markets Act, in such case a prospectus and a notice must be issued and approved by the competent Hungarian regulator.

However, in the case of Lending Model and Donations or Rewards Model, a Crowdfunding platform operator is normally not subject to such a prospectus requirement as it will not be responsible for the offering/placement of securities.

However, Equity Model Structures in which the platform operator is involved in the offering/placement of securities may require the publication of the prospectus/notice and approval by the Hungarian regulator in connection with such offering/placement, provided that no exemption is available under the Hungarian Capital Markets Act.

Such exemptions might include the following:

- (a) the offer of securities is addressed to fewer than 150 natural or legal persons in each Member State; and/or
- (b) an offer of securities where the a total consideration for securities in the European Union is less than EUR 100,000, which limit must be calculated over a period of 12 months.

However, even if an exemption is available, the offer/placement of securities in Hungary might constitute a private placement in Hungary triggering capital market requirements under the Hungarian Capital Markets Act (e.g. notification must be submitted to the Hungarian regulator, formality requirements may apply to the documents relating to the offer/placement).

### 3.3 Regulation of Crowdfunding under the AIFMD regime

The European Union Alternative Investment Fund Managers Directive has been implemented under the Hungarian Collective Investment Schemes Act. The Collective Investment Schemes Act is applicable in general to all collective investment schemes, including alternative investment funds. An 'alternative investment fund' is defined under the Collective Investment Schemes Act as a collective investment scheme which does not qualify as 'Undertakings for Collective Investment in Transferable Securities' (UCITS).

The Collective Investment Schemes Act provides licensing and regulatory requirements applicable to the alternative investment funds and its managers (e.g. licences required for the provision of collective portfolio management services; registration and marketing of the relevant alternative investment funds). Therefore, if a Crowdfunding undertaking wants to structure its operation as an alternative investment fund (or manager thereof) it must comply with the requirements under the Collective Investment Schemes Act.

### 3.4 Licence under the payment services and custodial services regulations

In general, the individuals transfer money to the platform operator and not directly to the crowdfunded businesses. The platform operator first collects the payments from the individuals and distributes such



funds only if the aggregated amount of the payments reaches or exceeds a specific threshold limit, or upon the satisfaction of other specified financing criteria. Therefore, in such cases the platform operator acts as an intermediary which collects funds from individuals holds such funds on escrow until the specified financing criteria are fulfilled and then transfers such funds to the crowdfunded businesses.

There is a risk that the collection and holding of such funds by platform operators on escrow may constitute a custodial service requiring a licence under the Hungarian Banking Act, provided that it is carried out as a business activity on a regular basis as part of an economic operation. However, Crowdfunding platforms could possibly avoid licensing requirements if the platforms structure their activities so as to rely on exemptions from the relevant custodial services licensing requirements, or by using an external financial institution or payment services provider for holding the amounts on escrow.

Once the financing criteria are fulfilled, the platform operator transfers the collected funds to the crowdfunded business. There is a risk that such transfer through the platform operator may qualify as a monetary remittance service and be subject to Hungarian payment services regulations if it is carried out as a business activity on a regular basis as part of an economic operation. If so, the platform operator would require a licence from the Hungarian regulator to carry out payment services in Hungary. However, Crowdfunding platforms could possibly avoid payment services licensing requirements if they can rely on exemptions from the payment services licensing requirements (e.g. the commercial agent exemption) or by using an external financial institution or payment services provider for processing payments.

### 3.5 Possible additional Regulations

The platform operator may be subject to further Hungarian regulations, in particular:

- laws applicable to on-line marketing and contracts;
- laws applicable to electronic commerce and information society;
- anti money laundering laws;
- data privacy and data protection laws;
- consumer credit regulations; and
- consumer protection regulations.

## 4 Lessons learned from Hungary's regulation for a possible harmonized European Crowdfunding regulation

### 4.1 Role model ("dos")

Given that there is no regulatory regime adapted specifically to the Crowdfunding Models in Hungary and due to the legal uncertainties and potential legal impediments referred to above, we do not



recommend following the Hungarian legal framework applicable to Crowdfunding for a possible harmonized European Crowdfunding regulation.

#### 4.2 Aspects that should be avoided ("don'ts")

With reference to the above, we believe that the lesson that could be learned from the current Hungarian legal framework that there is a need for a harmonized European Crowdfunding regulation or directive applicable to each model of the Crowdfunding concept, on the basis of which the local regulators can implement detailed domestic regulations applicable to Crowdfunding activities and/or the local platform operators and their clients can pursue Crowdfunding activities without having to face substantial legal impediments and/or legal uncertainties.

## 5 Conclusion

There are only a few Crowdfunding platforms in Hungary and those which exist use the Donations or Rewards Model only. The Lending Model and the Equity Model currently have no presence in Hungary.

There is no regulatory regime adapted to Crowdfunding in Hungary. However, depending on the structure used by the relevant platform operator, both the Lending Model and the Equity Model might trigger regulatory requirements in Hungary, including, inter alia, financial services requirements, investment services requirements, prospectus requirements and payment services requirements. Nevertheless, we believe that the platform operators seeking to intermediate Crowdfunding based on the Equity Model or the Lending Model could possibly structure its activities and business terms so as to limit and/or eliminate the risk of triggering Hungarian licensing requirements.

In our view, the Donations or Rewards Model is generally exempted from the Hungarian regulatory requirements. However, depending on the structure used by the platform and service provided by the company, they might trigger payment services and custodial services requirements.

Given the above uncertainties of the Hungarian regulatory requirements with regard to the Crowdfunding activities, unless the relevant Hungarian laws and regulations are amended we recommend to seek guidance from the Hungarian regulator on the interpretation of the relevant laws to clarify such ambiguities before using certain Crowdfunding methods and/or structures.

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## Ireland

### 1 Recent developments in the market of Crowdfunding in Ireland

During the last 12 months there were the following significant developments in Ireland regarding Crowdfunding:

In October 2014 the Irish Government published a National Policy Statement on Entrepreneurship. With regard to access to finance, the document noted that alternative financing activities like Crowdfunding can be valuable sources of funding to startups. This could be used as a complement to traditional bank funding or also an alternative means of finance if bank credit is declined to an enterprise. One of the action points in this document was to undertake a rolling review of new and innovative sources of funding for entrepreneurs, including Crowdfunding.

For the time being, there is no legislation or regulation in Ireland which specifically deals with Crowdfunding and for this reason the Central Bank of Ireland (“**Central Bank**”) issued a consumer notice on Crowdfunding in June 2014. It alerted consumers that various protections do not apply to consumers of Crowdfunding. It noted that the Central Bank’s codes of conduct do not apply to Crowdfunding platforms and it warned that complaints in relation to Crowdfunding cannot be made to the Financial Services Ombudsman as they are not regulated firms. The Central Bank also pointed out that consumers are not offered protection under the Irish Deposit Guarantee Scheme or under an Irish investor compensation scheme.

The Central Bank’s notice sets out specific risks to consumers when participating in Crowdfunding. These include the risk of failure of the platform with a potential loss of some or all of their money. The Central Bank also pointed out the risk of misleading or insufficient information disclosure, unfair contract terms and misleading commercial practices. There is also the issue of the absence of dispute resolution and dispute mechanisms.

The Central Bank concluded its notice by stating that it intends to actively monitor developments in Crowdfunding and to work closely with the European authorities in this regard.

In Ireland, the following types of Crowdfunding are possible:

#### 1.1 **The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)**

Crowdfunding platforms in Ireland do not currently focus on the Equity Model though some do offer it as an option available to companies / projects seeking funding. Lending to corporates in Ireland is not a regulated activity whereas the regulatory regime for the equity model is not as straightforward. Offers need to fall within the exceptions in the Prospectus Directive as discussed below.



### 1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

The Lending Model of Crowdfunding is the principal form of Crowdfunding currently being offered in Ireland. Lending to corporates is not a regulated activity in Ireland. The regulatory regime for lending focuses on lending to consumers. Under the Crowdfunding Lending Model a platform could fall within the meaning of “credit intermediary” set out in the Consumer Credit Act 1995 if it is deemed to be engaged in the business of arranging the provision of credit to a consumer. The Consumer Credit Act 1995 defines “consumer” as a natural person acting outside their business. It is feasible that a Crowdfunding platform could be engaged in the business of arranging credit for a project through a natural person rather than an incorporated body where that natural person’s involvement is outside his / her business. It should be noted that it is not particularly difficult to obtain authorisation as a credit intermediary under the Consumer Credit Act 1995. The process is more of a notification rather than an application for authorisation of a financial institution which is more onerous.

### 1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

Rewards Crowdfunding is not currently regulated in Ireland, as it does not involve investment or lending. Crowdfunding has been discussed in parliament as an important future source of funding for charitable causes and community initiatives. However, there is no proposed legislation or regulation currently being considered.

It is worth noting that the credit union movement is particularly strong in Ireland. Credit unions are established for the purpose of providing low-cost credit to individuals who have a so-called “common bond” meaning a community connection usually based on a geographic area or workplace. A recently published Report of the Commission on Credit Unions suggested that credit unions be permitted to lend to small and medium sized enterprises and charitable / community initiatives within their common bond. If these initiatives are adopted credit unions could prove to be a more structured alternative to Crowdfunding with respect to certain activities.

## 2 Recent developments regarding Crowdfunding regulation in Ireland

No recent developments regarding Crowdfunding regulation took place in Ireland during the last 12 months.

## 3 Current regulation of Crowdfunding in Ireland

### 3.1 Approval and licensing by the Central Bank

Irish law does not recognise or regulate Crowdfunding as a distinct means of raising finance.

A “banking business” requires an authorisation from the Central Bank. The legislative definition of banking business is very broad but the Central Bank focusses on deposit taking as the essential banking



business which triggers the requirement for authorisation. If an entity is not taking deposits, while it may be caught by other licensing requirements it will not be required to hold a bank licence.

It should be noted that section 7 of the Central Bank 1971 contains a broad prohibition on holding oneself out to be a banker. Section 7(2) provides that a person shall be deemed to hold himself out as a banker if, being a body corporate carrying on any business, the name of the body includes any of the words "bank", "banker" or "banking" or any word which is a variant, derivative or translation of or is analogous to any of those words. Therefore, a Crowdfunding platform is limited in the scope of the names it can use and must avoid any name that may infer that it conducts banking business.

There are no financial services rules in Ireland designed specifically for Crowdfunding. However, when a company pitches to investors on a crowd-funding platform, such a pitch is typically considered an "offer to the public". Equity Crowdfunding may be impacted by prospectus rules (as far as the issuer is concerned) and by financial promotion rules (as far as the issuer and platform are concerned).

### 3.2 Investment Services

It is illegal for a firm to "act as in investment firm, claim to be an investment firm or represent that the person is an investment firm in Ireland..." without the relevant authorisation/passport/exemption. An investment firm is a firm that provides investment services to third parties on a professional basis. Investment services under the Irish Regulations which implements the Markets in Financial Instruments Directive (the "**MiFID Regulations**") are the same as those set out in Annex 1 of MiFID. The Investment Intermediaries Act 1995 ("**IIA**") also regulates investment services and can apply to some activities not otherwise covered by MiFID. Investment advice is the most relevant IIA service in the case of Crowdfunding. Investment advice is regulated as an investment service under the IIA and MiFID, however, under the IIA advising a person on where they should get investment advice will itself constitute investment advice.

The reception and transmission of orders for financial instruments and the execution of orders on behalf of clients constitute "investment services" under the MiFID Regulations. The reception and transmission of orders for such instruments are core activities for Equity Crowdfunding. Such services can only be provided by authorised investment firms. The process of authorisation is expensive and lengthy, and the level of regulation and consumer protection is significant.

### 3.3 Prospectus Directive

The offering of securities to the public in Ireland is subject to the Prospectus Directive including the broad exemptions contained in that Directive. Note that the Prospectus Directive was a maximum harmonisation Directive and the Irish implementing regulations (SI No 324 of 2005) therefore one can assume that the Irish implementing regulations reflect the provisions of the Prospectus Directive itself.

Equity Crowdfunding may be impacted by prospectus rules (as far as the issuer is concerned) and by financial promotion rules (as far as the issuer and platform are concerned). An offer of securities to the public cannot be made without a prospectus, unless one of the exemptions is applicable. The preparation and approval process for a prospectus is incompatible with the nature and objectives of Crowdfunding. Failure to issue a prospectus when one is required is a criminal offence. Offers are exempt where the total consideration of securities offered within Ireland is less than EUR 100,000 over a 12 month period.



### 3.4 Regulation of Crowdfunding under the AIFMD regime

The Alternative Investment Fund Managers Directive (“AIFMD”) was implemented in Ireland on 16 July 2013 and applies in effect from 22 July 2013. During implementation in Ireland no additional requirement (i.e. gold-plating) was added to the requirements set out in the AIFMD itself.

An AIFM is a legal person whose regular business is managing one or more alternative investment funds or “AIF”. An AIF is defined in Article 4(1)(a) as follows:

“AIF” means collective investment undertakings, including investment compartments thereof, which:

- (i) raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and
- (ii) do not require authorisation pursuant to Article 5 of Directive 2009/65/EC [the UCITS Directive]”

Given the above definitions, the provision of services relating to Crowdfunding is capable of constituting management of an AIF. However, there is an exemption in the AIFMD for managers with total assets under management of less than EUR100 million.

### 3.5 Licence under the Payment Services Regulations

The business of money transmission is regulated by two statutes in Ireland, the first is the European Communities (Payment Services) Regulations 2009, Statutory Instrument No. 383 of 2009 (“**PSD Regulations**”) which implement the European Union’s Payment Services Directive, Directive 2007/64/EC (“PSD”). The PSD was a so called “maximum harmonisation” Directive, that the Member States were required to implement in total and were not permitted to either add additional requirements (so called gold plating) or provide for measures that are less than those set out in the PSD. We can confirm that Ireland’s implementation of the PSD through the PSD Regulations was consistent with this maximum harmonisation requirement and as such the PSD Regulations reflect very closely the requirements of the PSD itself.

Separately Part IV of the Central Bank Act, 1997 regulates a money transmission business which is defined as “... a business that comprises or includes providing a money transmission service to members of the public.” “Money Transmission Service” is defined as meaning a service that involves transmitting money by any means, other than such a service provided by a regulated entity or on an ancillary basis to other business conducted by an entity.

Therefore money transmission services which are not otherwise covered by the Payment Services Directive might be regulated by the Central Bank Act 1997 if they come with the definition of a “money transmission business”.

However, it is possible for Crowdfunding platforms to avoid the provision of payment services or money transmission in the course of their services, and so avoid the necessity for registration or authorisation under the PSD Regulations or the Central Bank Act 1997. The current Crowdfunding platforms operating in Ireland use the services of regulated payment service providers as the means through which a potential investor can transmit fund to a company / project. In this way the Crowdfunding



platforms do not transmit the funds themselves and are not required to be regulated to provide payment services.

## 4 Lessons learned from Ireland's regulation for a possible harmonized European Crowdfunding regulation

### 4.1 Role model ("dos")

There are currently no lessons that can be learned from Ireland's regulation for a possible harmonized European Crowdfunding regulation.

### 4.2 Aspects that should be avoided ("don'ts")

There are currently no lessons that can be learned from Ireland's regulation for a possible harmonized European Crowdfunding regulation

## 5 Conclusion

There is no legislation or regulations in Ireland which specifically deals with Crowdfunding. The financial regulation legislation in place is designed to regulate other business models. Therefore, Crowdfunding platforms need to ensure that they do not inadvertently provide a service which is regulated as part of legislation regulating, inter alia, investment services, banking business and / or payment services.

In Ireland, the lending activities of Crowdfunding platforms can be provided to corporates without any requirement for regulation provided the platform does not also provide investment services or payment services. A Crowdfunding platform may require authorisation as a credit intermediary if it is engaged in the business of arranging credit for consumers, being persons acting outside their business. Crowdfunding platforms cannot use the term "bank" or represent themselves as carrying on the business of banking. Equity Crowdfunding may come within the scope of the Prospective Directive and the AIFMD Regulations unless the exemptions set out above can be availed of.

The development of a Crowdfunding market and the regulation of Crowdfunding, in Ireland, are at a very early stage. However, given that the market is developing at a faster pace elsewhere in the European Union, and elsewhere, it would be timely for the EU Commission to propose legislation specific to this sector.





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## Israel

### 1 Recent developments regarding Crowdfunding regulation and market in Israel

#### 1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

In September 2014, the Israeli Securities Authority ("ISA") published a revised version of proposed regulations for equity Crowdfunding. These regulations are based on an Interim Report of a certain Committee for the Promotion of Investments in R&D Public Companies delivered to the ISA on 4 June 2013. Final regulations have not been enacted.

The main principles of the proposed regulations include:

- Issuer may raise up to 2 million New Israeli Shekel ("NIS") (US\$ 540,000) in 12 months in Crowdfunding campaigns.
- Each investor may invest up to NIS 20,000 (US\$ 5,400) in 12 months and up to NIS 10,000 (US\$ 2,700) in a single investment. Wealthy investors may invest higher amounts.
- Approval of the Chief Scientist at the Israeli Ministry of Economy is required.
- "Lead Investor" is required to invest at least 10% of the total investment amount. Lead Investor is:
  - Individual who made five investments in R&D companies in last five years, or an institutional investor.
  - Unaffiliated with the issuer.
  - Crowd investors have a right to participate in future sales by Lead Investor.

#### 1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

On 27 July 2014, the ISA published a proposal for debt Crowdfunding for small and medium businesses. The proposal was open for comments from the public until 10 September 2014. No regulations have been enacted.

The main principles of the proposed regulations include:

- A company may raise up to NIS 1 million (US\$ 270,000) of debt in 12 months in Crowdfunding campaigns.



- If a “Sophisticated Investor” participates, the maximum amount is increased to NIS 2 million (US\$ 540,000). A Sophisticated Investor is an institutional investor or a wealthy individual.
- Approval or actual investment by the Small and Medium Businesses Agency at the Israeli Ministry of Economy is required.

Each investor may lend up to NIS 10,000 (US\$ 2,700) in 12 months and up to NIS 5,000 (US\$ 1,300) in a single transaction.

### 1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

No recent changes.

## 2 Current regulation of Crowdfunding in Israel

### 2.1 Three types of Crowdfunding

In Israel, there are three types of Crowdfunding, differentiated by the return received by the funders:

#### 2.1.1 Equity Model

Currently, no law or regulations have been specifically enacted for Crowdfunding in Israel. The main legal consideration for equity Crowdfunding platforms is the prospectus requirement (discussed below). Each equity Crowdfunding platform in Israel must rely on specific exemptions from the prospectus requirement.

#### 2.1.2 Lending Model

The main regulatory framework that applies to Crowdfunding under the Lending Model is the laws and regulations that govern lending and supply of credit in general. Loans to corporations may be viewed as securities and therefore be subject to prospectus requirement in Israel. Loans to individuals do not require a prospectus. Additional regulatory requirements are discussed below.

#### 2.1.3 Donation or Rewards Model

This model is generally out of the scope of securities laws and no prospectus is required, as it does not involve acquisition of interest, profit sharing or any financial return. There are several platforms in Israel that operate donations or rewards Crowdfunding. The participants do not expect a financial profit. They receive either no return or a non-monetary reward that is not linked to the profit of the project (e.g. a copy of the book created with their support). Based on the operation of these platforms, they may not be subject to any regulation related to sale of equity or debt instruments. Consumer protection regulations may apply.

### 2.2 Prospectus requirements

#### General Rule





Pursuant to the Israeli Securities Law, 5728 - 1968 (the "Securities Law"), offer of securities to the public in Israel requires a prospectus approved by the Israeli Securities Authority. An "offer" is defined in the Securities Law as any action intended to induce the public to purchase securities, including, inter alia, any approach to the public to make offers to purchase securities. This is an intentionally wide definition. It should be noted that "Public" for Security Law purposes includes Israeli residents only.

### Exemptions

The Securities Law and regulations promulgated thereunder include certain exemptions from the prospectus requirement. Such exemptions include, inter alia:

- Offering securities to no more than 35 investors during a 12 month period;
- Offering securities to certain types of sophisticated investors, including banks, mutual funds, investment managers, investment advisors, underwriters, VC funds, and large corporations
- Offering securities to "Qualified Clients" that meet two of the following three criteria and have given their consent in advance to being considered Qualified Clients:
  - Have cash, deposits, financial assets and securities with total value exceeding NIS 12 million (approximately US\$ 3.5 million);
  - Have capital market expertise;
  - Performed at least 30 transactions per quarter, on average, in the past 4 quarters.
- It should be noted that the ISA has recently published a proposed change to the definition of "Qualified Client" aimed to broaden its scope.
- Sale for up to NIS 2.6 million (approximately US\$ 700,000) for up to 5% of the outstanding capital of the issuer in each offering and 10% in the aggregate, for up to 75 investors.

It should be noted that the law does not specify in detail how, to what extent and by whom the qualifications of the potential investors, for the purpose of the exemptions, should be verified.

Therefore, under current regulatory framework, an unrestricted issuance of securities to the "crowd" using an internet platform, without prospectus, is not permitted.

### Publication

According to the Securities Law, a publication of the intent to sell securities to no more than 35 investors (to be selected according to a defined procedure) or to certain sophisticated investors shall not be deemed an offering to the public and therefore does not require a prospectus. Subject to strict limitations, a Crowdfunding platform may be able to rely on this provision of the Securities Law in order to promote a proposed offering that will be later sold to a selected group of investors in compliance with the exemptions from the prospectus requirement. The content of the publication and any



communication with potential investors should be carefully monitored. The ISA has recently published a proposed change to this exemption.

### **2.3 License under the Banking Law (licensing), 5741 - 1981**

#### **Applicable to Lending Model**

Pursuant to the Banking Law, only a licensed bank may accept monetary deposits and provide credit. A Crowdfunding platform may claim that it does not directly accept deposits and provide credit as the loans are given directly from the lenders to the borrowers using the platform.

### **2.4 Privacy Protection Law, 5741 – 1981**

#### **Applicable to Equity and Lending Models**

A database owner in Israel is obligated to register his/her database in the official registry of data-bases under certain conditions. Registration is mandatory if a database contains "sensitive information" defined as "data on the personality, intimacy, health, financial situation, opinions and beliefs of a person". A Crowdfunding platform may hold sensitive financial information about its users, especially in the case of Crowdfunding lending, and therefore may need to register its data-base

### **2.5 Regulation of Investment Advice, Investment Marketing and Investment Portfolio Management, 5755 – 1995**

#### **Applicable to Equity and Lending Models**

A license is required in order to provide investment advice in Israel. The question is whether a Crowdfunding platform that only provides a service that enables investment transactions, and does not provide any advice, information or analysis beyond the information provided by the issuers, shall be deemed as providing investment advice.

#### **Applicable to Lending Model**

In connection with Crowdfunding lending, providing advice related to financial investments that are influenced by interest rate changes may require a license.

### **2.6 Regulation of Non-Banking Loans Law, 5753 - 1993**

#### **Applicable to Lending Model**

This law regulates the terms of loans given by entities other than banks, including disclosure requirements and terms of credit. This law may apply to lending Crowdfunding platforms, if it is determined that the platform is deemed a "lender" for the purpose of this law.

### **2.7 Credit Data Service Law, 5762 – 2002.**

#### **Applicable to Lending Model**

A license under this law may be required if the Crowdfunding platform collects, manages and stores credit data of borrowers and deliver such data to third parties.



## 2.8 Possible additional Regulations

Other Israeli laws to which the operator of a Crowdfunding platform may be subject include:

- Prohibition on Money Laundering Law, 5760 – 2000.
- Standard Contracts Law, 5743 – 1982.
- Consumer Protection Law, 5741 – 1981.

## 2.9 Licence under the Payment Services Directive

Israel is not an EU member state and therefore the Payment Services Directive is not applicable.

## 2.10 Possible regulation of Crowdfunding platforms under the AIFMD regime in Israel

Israel is not an EU member state and therefore the European Alternative Investment Fund Managers Directive ("AIFMD") is not applicable.

# 3 Lessons learned from Israel's Crowdfunding regulation

## 3.1 Role model ("dos")

We believe that certain limitations on investment amounts protect the interest of small investors.

## 3.2 Aspects that should be avoided ("don'ts")

We believe that the requirements for approval of the Chief Scientist at the Israeli Ministry of Economy and for participation of a sophisticated investor are too burdensome, and do not belong to a true Crowdfunding model. In addition, the Chief Scientist is a unique Israeli institute.

# 4 Conclusion

Until further legislation changes, equity Crowdfunding in Israel needs to be based on exemptions from the prospectus requirement of the Securities Law. Applicable exemptions include limited number of investors (35), certain types of sophisticated investors and "qualified clients", defined by their financial assets and investment expertise. It is evident that absent new legislation, equity Crowdfunding in Israel is severely restricted. Other forms of Crowdfunding are not similarly restricted. Several Crowdfunding platforms already operate in Israel under the various models. If and when the new legislation discussed above is approved, the three Crowdfunding models will be allowed in Israel, though they will still be limited compared to some European countries.



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## Italy

### 1 Recent developments in the market of Crowdfunding in Italy

As of the end of October 2014, 11 equity based Crowdfunding platforms have been registered in the Register held by CONSOB (the Italian Market Regulator). Nine offers have been issued to investors, three of which were successful (raising over EUR 1 million in total), while two were unsuccessful and four are still ongoing.

Compared to the year 2013 the boost of the equity Crowdfunding market has been dramatic (one platform operating outside the regulation framework compared to the 11 platforms authorised by the end of October).

By the end of September ten equity Crowdfunding campaigns were launched and the three completed raised more than EUR 1 million in total.

The two authorised Italian lending platforms are active in the peer to peer lending market, while the peer to business market is yet completely unexplored also by reasons of the restriction set forth by Italian laws and regulations applicable to the lending in favour of the entrepreneurs acting in the form of companies.

As of the end of 2013 the size of the peer to peer lending market was around 25 million EUR.

The market is growing and there is a high level of interest in the equity and lending Crowdfunding markets, particularly in light of starting also peer to business lending platforms, notwithstanding the restrictions set forth by Italian laws for this specific kind of Crowdfunding.

#### 1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

Equity Crowdfunding is regulated by Law no. 221 of 17 December 2012 (Law 221/2012) and by CONSOB Regulation of 26 June 2013 n. 18592 (CONSOB Regulation).

Equity Crowdfunding is available only for innovative start-ups which meet requisites set forth in Law 221/2012 and that are enrolled in a special section of the Companies Register. Innovative start-ups may offer their capital to the public through online Crowdfunding platforms registered in a special register held by CONSOB (Register of Platforms), provided that the overall amount of shares or quotas offered does not exceed EUR 5 million.

No MiFID application if the single investment is below EUR 500 and the overall investments during the year are below EUR 1,000

CONSOB Regulation is inspired by regulation applicable to investment companies, although the ordinary set of rules applicable to investment companies shall not apply to platforms which are not investment companies and/or banks (and that therefore cannot perform certain operations).





### 1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

According to this model individuals lend money to other individuals (against interest and repayment of the loan) through a platform which acts as point of contact between borrowers and lenders.

There are two Italian platforms which are operating this Crowdfunding model and both are authorised to operate by Bank of Italy: one of the two is operating as a payment institutions according to Section 114-sexies of the Italian Consolidated Banking Law and the other one is authorised as a financial intermediary (which may lend money on its own) according to Section 106 of the Italian Consolidated Banking Law.

It is not possible to operate a lending platform without the prior granting of the appropriate license by the Bank of Italy.

### 1.3 The Reward Model

Under the Reward Model, individuals pay money to a company to support a project, or to buy products to be developed later on after completion of the campaign.

The reward could be of different kind: (a) gadgets of small value, (b) products sold at discounted price, (c) special rewards, likewise dedicated products/services.

The main issue faced by this model is concerning taxation of the money collected by means of the campaign, particularly with reference to the VAT application on presale/pre-order of products.

Also the applications of Italian laws and regulations concerning consumer rights protection is under assessment.

There are around 30 Italian platforms operating in the reward Crowdfunding market and the trend is of strong growth.

### 1.4 The Donation Model

Under this model individuals provide money to a company or project pro bono, for charity or for other purposes but, in any case, without any valuable reward.

The Donations Model is mainly used to finance social, charity or creative projects or companies and no financial investment or return is involved.

This market is growing as well as the other Italian Crowdfunding markets, even if it is more difficult to define the trend of growth due to the lacking of available data.

### 1.5 Other Model

Profit-sharing Model is allowed by Italian law. This model is under assessment in order to understand its potential benefits and the differences with the equity Crowdfunding, also in light of understanding whether or not it is subject to the same laws and regulations applicable to the equity Crowdfunding campaigns and platforms.



Real estate Crowdfunding. There are no platforms which are offering real estate Crowdfunding in the Italian market. The model has not yet been developed, also with the purpose to comply with the existing laws and regulations.

## 2 Recent developments regarding Crowdfunding regulation in Italy

After the enforcement of the CONSOB regulation no. 18592 (June 2013) the equity based

Crowdfunding regulation has been completed; no new laws or regulations come into force after that date.

A few equity based Crowdfunding platforms are developing a different models which is in any case regarded as an equity Crowdfunding model: they operate without any licence and only engage in the business of investment broking and/or contract broking (*i.e.* no subscription of shares and quotas is concluded through the platform, which basically offers an online window to companies looking for investors).

They ensure security offerings comply with exemptions from the requirement to produce a prospectus.

Some other platforms are now exploring the possibility to start the peer to business/business to business lending Crowdfunding model and could be ready to operate under the appropriate license in 2015.

The main issue is the compliance with the existing Italian Consolidated Banking Law and enforcement regulations issued by the Bank of Italy.

## 3 Current regulation of Crowdfunding platforms in Italy

### 3.1 Financial Service Licence Requirements

#### 3.1.1 Equity Model

Pursuant to Italian Consolidated Financial Law and Italian Consolidated Banking Law, anyone intending to provide investment services in Italy commercially or on a scale which requires a commercially organised business undertaking requires a written licence from the competent authorities (CONSOB and/or Bank of Italy).

Investment services are, *inter alia*, the brokering of business involving the purchase and sale of financial instruments or their documentation (investment broking), the purchase and sale of financial instruments in the name of and for the account of others (contract broking) and the placement of financial instruments without commitment to take up those instruments (placement of financial instruments).

Financial products within the meaning of the Italian Consolidated Financial Act include securities and financial instruments.



Securities are, inter alia: (a) company shares and other shares equivalent to shares of companies, partnerships or other persons and share deposit certificates; (b) bonds and other debt securities, including certificates of deposit relating to such securities; (c) any other security normally negotiated which permits the purchase or sale of securities described in the preceding paragraphs d) any other security usually involving cash settlement determined with reference to securities described in the preceding paragraphs, to currency, interest rates, returns, commodities, indices or measures.

Financial instruments are, inter alia, securities, money market instruments, units in collective investment funds, options, futures, swaps, futures contracts on interest rates and other derivative contracts linked to securities, currency, interest rates or returns, or on commodities, derivatives for the transfer of credit risk, differential financial contracts.

Equity based Crowdfunding has been identified as a model to raise financing and help a company to succeed in executing certain projects. Italy has regulated this matter pursuant to Law 221/2012 which permits the raising of money online to support the development of "innovative start-up companies", being companies which meet requirements specified under the same Law 221/2012<sup>25</sup>. According to the new legislation, only shares and quotas (of innovative start-up companies) may be offered for subscription through a Crowdfunding platform.

On 26 June 2013 CONSOB has issued regulation no. 18592 which sets forth rules on the register of Platforms, requisites for the registration in the Register of Platforms, rules of conduct of the platforms, rules on the offers through platform, obligations of communications to CONSOB, sanctions.

Law 221/2012 seems to restrict the possibility of raising money online only to the Italian entities falling within the definition of "innovative start-up". However, whilst this is clearly a significant restriction, it may be that categories of equity investee may be widened after an initial trial period.<sup>26</sup>

The management of a platform for the collection of capital for innovative start-up can be conducted only by: (i) investment companies and banks, that are automatically enrolled in a special section of the Register of Platforms or (ii) companies specifically authorised by CONSOB to provide the relative service and that are enrolled in the ordinary section of the Register of Platforms, if they meet the relevant requirements. Such latter platforms are subject to a regulation which is lighter than that applicable to investment companies and banks. In turn, they are required to transmit the orders regarding the underwriting and trading of financial instruments representing capital exclusively to banks and investment companies (*i.e.* they cannot process them) and have no right to collect money from investors.

Under Italian law and regulation an offer may successful be completed only if at least 5% of the offered share capital is paid by a professional investors as defined by the relevant Italian Law and regulation.

<sup>25</sup> Article 25, paragraph 2 of Law 221/2012.

<sup>26</sup> A first revision already took place: Law Decree no. 76/2013, subsequently converted into Law 99/2013, has lightened some requisites or limits imposed to innovative start-up (such as requisites of man power, deletion of requirement of majority shareholding by natural persons, etc).



### 3.1.2 Lending Model

The two existing Italian platforms under this model operate under authorization by Bank of Italy: as a payment institutions according to Section 114-sexies of the Italian Consolidated Banking Law and as a financial intermediary (which may lend money on its own) according to Section 106 of the Italian Consolidated Banking Law.

Any platform operating lending Crowdfunding shall evaluate which kind of authorization must be required depending on the range of activities envisaged (ie, financing and/or payment service, etc) and apply to obtain the relevant authorisation by the Bank of Italy, before starting its activity.

The activities performed by the Italian platforms is only peer to peer lending.

### 3.1.3 Rewards Model

The contributions paid by backers are structured so as not to be regarded as investment products and therefore the platforms operating this Crowdfunding model falls outside of the Italian financial services laws and regulations.

### 3.2 Licence under the Payment Services regulation

Any transfer of funds through a Crowdfunding platform could constitute money remittance services and be subject to payment services regulation, requiring a specific authorisation by the Bank of Italy.

As already noted, the Crowdfunding Platform under the Equity Model cannot hold sums of money or financial instruments belonging to third parties, unless they are also authorised to operate as a bank or as an investment company (Section 106 of Italian Consolidated Banking Law).

### 3.3 Prospectus requirements

The prospectus requirement does not apply to the offering of securities or investment products with a value of EUR 5,000,000 or less within a time period of 12 months.

Law 221/2012 has provided that same limit applies also to Equity Crowdfunding and this should not restrict the diffusion of Equity Crowdfunding since the amounts raised are generally smaller. Hence, Crowdfunding platforms operating the Equity Model will not be subject to prospectus requirement: however, they will be subject to a specific set of rules included in CONSOB Regulation as to information to be publicly available on the platforms itself, information on the offer of shares and quotas to be provided in compliance with a form published by CONSOB, etc.

No prospectus requirement is likely to apply in respect of the Lending Model or the Donations or Rewards Model.

### 3.4 Possible additional requirements

The operator of a Crowdfunding platform could be subject to further regulations, in particular:

- Italian Money Anty-laundering law
- Italian Data Privacy law



- Consumer credit regulation
- Italian Law 231/2001
- AIMFD<sup>27</sup>

## 4 Lessons learned from Italy's regulation for a possible harmonized European Crowdfunding regulation

### 4.1 Role model ("dos")

The creation of a category of new regulated entities (professional equity Crowdfunding portal managers) has allowed the explosion of the relevant Italian market, bringing 11 platforms to be authorised in less than one year; the CONSOB light regime proved to be affordable for new comers and it is not a relevant barrier to enter the market.

The possibility for the issuers to create different categories of financial instruments to be offered to the investors is also very useful instrument in order to define the structure of each single share capital offer.

### 4.2 Aspects that should be avoided ("don'ts")

Law 221/2012 restricts the possibility of raising money online only to Italian entities falling under the definition of innovative start-up<sup>28</sup>; this provision could therefore be seen as a contradiction to the clear intention of the European Commission to support the Crowdfunding raising on a wider basis.

The rules applicable to the sale of units representing the share capital of limited liability Italian companies may impact the possibility to create a secondary market for this kind of financial instruments due to the strict requirement applicable to execute the relevant transfer of units between shareholders.

The peer to business lending model is still to be exploited in the lacking of a specific applicable regulations as those entered into force for the equity-based crowdfunding platforms.

## 5 Conclusion

The Crowdfunding Lending Model, either in the peer to peer or in the peer to business form, is not yet subject to a specific "light" regulation (and platforms must carefully review which authorisation must be sought pursuant to the Italian Consolidated Banking Law and/or the Consolidated Financial Law to operate in Italy) which could support a significant growth of the relevant markets.

<sup>27</sup> A general exemption from the AIFMD is deemed applicable to equity crowdfunding platforms; the same exemptions may not be applicable if special purpose vehicle will be allowed to raise money through equity crowdfunding campaigns with the purpose to use these proceeds to fund several start-ups.

<sup>28</sup> As of October, 2014, innovative start-ups amount to around 2.800 companies, considering that in 2013 only, more than 380.000 new companies/enterprises were incorporated in Italy.



The equity based Crowdfunding model is subject to its own specific regulatory regime, which is fully applicable and in force as of July 2013; the entering into force of this regulation has allowed a strong development of the relevant market in 2014.

The reward Crowdfunding market is increasing (either looking at the number of platforms and projects) while different crowdfunding models (profit sharing and real estate) are currently under assessment and development.

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## Latvia

### 1 Recent developments in the market of Crowdfunding in Latvia

During the last 12 months there were the following significant developments in Latvia regarding Crowdfunding:

#### 1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

No significant developments took place during the last year. There are still no operating Crowdfunding platforms based on the Equity Model in Latvia.

#### 1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

No significant developments took place during the last year. There are still no operating Crowdfunding platforms based on the Lending Model in Latvia.

#### 1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

According to publicly available information, two new platforms commenced their operation, of which one is solely devoted to financing creative or scientific projects, whilst the other has got broader spectrum and expressly provides for a consideration to be offered by the authors of the project to donors, without specifying the type of such consideration.

### 2 Recent developments regarding Crowdfunding regulation in Latvia

No significant developments regarding Crowdfunding regulation took place in Latvia during the last year. Up to date there are no legal enactments specifically addressing crowdfunding issues in Latvia.

### 3 Current regulation of Crowdfunding in Latvia

#### 3.1 Licence under the Financial Instrument Market Law (in Latvian – *Finanšu instrumentu tirgus likums*)

##### Equity Model

Pursuant to the Financial Instrument Market Law ("FIML"), anyone intending to provide investment services in Latvia commercially or on a scale which requires a commercially organised business undertaking requires a licence from the Financial and Capital Market Commission ("FCMC").



Investment services are, *inter alia*, the brokering of business involving the purchase and sale of financial instruments or their documentation (investment brokerage), the purchase and sale of financial instruments in the name of and for the account of others (contract brokerage) and the placement of financial instruments without commitment to underwrite those instruments (placement of financial instruments).

Under the FIML a "financial instrument" means an agreement, which concurrently creates financial assets for one person, but financial liabilities or capital securities for another. Transferable securities (in Latvian – *pārvedami vērtspapīri*) are covered by this definition of a financial instrument.

Transferable securities are, *inter alia*, (a) shares in joint stock companies and other securities equivalent to shares in companies (shares in private limited liability companies would not count as transferrable) including convertible securities; (b) bonds or other forms of securitised debt; or (c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures.

In summary, where an online Crowdfunding platform facilitates the offering of financial instruments, most likely, the operator of the platform will be deemed to provide investment services within the meaning of the FIML and therefore will require a licence by the FCMC. Where the securities in issue do not qualify as financial instruments to which FIML applies, this may well fall outside the scope of investment services regulation (although guidance from the FCMC would be advised since there are few, if any, precedents of such activity resembling investment services but dealing in non-financial instruments).

### **Lending Model**

Depending on the structure in detail loans are considered as "debt" (in contrast to equity) and would not qualify as investment services under the FIML.

Where the borrowers are the consumers then the licence for consumer crediting must be obtained from the Consumer Rights Protection Centre.

### **Donations or Rewards Model**

Depending on the structure in detail there are good reasons to state that these kinds of investments do not qualify as investment services. Therefore, it should fall outside the scope of Latvian investment services regulation.

## **3.2 Prospectus requirements**

### **General rule**

Where transferable securities are offered to public (i.e., offer is expressed to more than 150 individuals in each EU Member State) it might be subject to a prospectus requirement, namely a requirement to publish a prospectus approved by the FCMC under the FIML. Again, if the equities in question do not qualify as transferable (negotiable) securities, then the prospectus requirement might not be triggered.

Depending on the structure, loans do not generally qualify as financial instruments under the FIML and therefore no prospectus is required. The same should apply to investments where individuals provide





money to a company or project for benevolent reasons or for a non-monetary reward (Donations or Rewards Model).

### Exceptions from prospectus requirement

The general prospectus requirement does not apply where (a) the offering of transferable securities does not exceed EUR 100,000 within a time period of 12 months, (b) only qualified investors are addressed, or less than 150 non-qualified investors per member state are addressed, (c) the offering is made in respect of transferable securities with the nominal value at least EUR 100,000, or (d) in offering each investor must acquire transferable securities with the nominal value at least EUR 100,000 and acquiring of one transferable security so that it belongs to several persons is prohibited.

### 3.3 Regulation of Crowdfunding under the AIFMD regime

Latvia implemented the AIFMD by adopting the "Law on Alternative Investment Funds and its' Managers" (in Latvian - *Alternatīvo ieguldījumu fondu un to pārvaldnieku likums*) ("**AIFM Law**") which entered into force on 7 August 2013.

According to the AIFM Law the extensive AIFMD regulation of funds and fund managers applies when there is an alternative investment fund ("**AIF**") managed by an alternative investment fund manager ("**AIFM**").

On most occasions a company seeking financing by means of Crowdfunding should not qualify as an AIF. At the same time, a project company established to finance a single project (such as for example a movie, a computer game, a wind farm or a solar park) that does not operate the facility or production itself might constitute an AIF within the meaning of the Latvian AIFMD regulation. The aforementioned applies if the project company seeks funding in return for a share in the profits or revenue generated by the project (within the Equity Model) provided that the funding is envisaged for its own project and does not distribute the funding to other companies/entities to finance their projects.

As a general rule the operator of a Crowdfunding platform does not raise capital from investors for its own business. Therefore, the operator of a Crowdfunding platform should not qualify as an AIFM.

There is a lack of practice on the use of Crowdfunding platforms for fundraising in Latvia, hence there is also a lack of guidelines provided by the regulator on whether a Crowdfunding platform would qualify as an AIFM. The answer to this question will depend on the scope of services provided by a Crowdfunding platform in practice. A Crowdfunding platform might qualify as an AIFM if it performs investment management or other functions that under the law can be performed only by licenced or registered AIFMs. For instance, under the AIFM Law one of ancillary services of an AIFM is distribution of units or shares of an AIF. This could apply if the underlying investment (e.g. a project company) qualifies as an AIF and the relevant Crowdfunding platform in fact distributes the shares of that AIF. Each situation should be evaluated separately to establish whether a Crowdfunding platform qualifies as an AIFM.

### 3.4 Licence under the Payment Services Directive

Any transfer of funds through the operator of a Crowdfunding platform will generally constitute money remittance services within the meaning of the Payment Services and E-Money Law (in Latvian -



*Maksājumu pakalpojumu un elektroniskās naudas likums*). Such transfer of funds could occur if the investors pay their investment amounts to the operator of a Crowdfunding platform which then passes the funds to the entrepreneur. The mentioned activity requires either a licence from, or registration with, the FCMC.

The platform operator might rely on the exemption for commercial agents under the Payment Services and E-Money Law, but this approach is untested in practice.

As an alternative - in order to avoid such licensing or registration, as the case may be, requirements - the operator of a Crowdfunding platform might use an external provider or partner for processing payments rather than acting as an intermediary himself.

We are not aware of any cases in Latvia where either of above exemptions have been applied to any Crowdfunding platform. Thus, in each situation where any of these exemptions is considered we strongly recommend that before starting the respective project advice from legal counsel is sought on the structure of each platform.

### 3.5 License under the Credit Institutions Law (in Latvian – Kredītiestāžu likums)

Besides, most likely an entity managing a Crowdfunding platform which is not a credit institution cannot hold sums of money belonging to third parties because such sums might be qualified as deposits. Under the Credit Institutions Law (in Latvian – *Kredītiestāžu likums*) only credit institutions are permitted to advertise (in Latvian – *izsludināt*, which in English means to advertise, to announce, to proclaim) the acceptance of deposits and other repayable funds, and to receive them.

### 3.6 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- Civil Law (in Latvian – *Civillikums*);
- Commercial Law (in Latvian – *Komerclikums*);
- Law on the Prevention of Laundering the Proceeds from Criminal Activity (Money Laundering) and of Terrorist Financing (in Latvian - *Noziedzīgi iegūtu līdzekļu legalizācijas un terorisma finansēšanas novēršanas likums*);
- Natural Persons' Data Protection Law (in Latvian – *Fizisko personu datu aizsardzības likums*);
- The Cabinet of Ministers regulations and/or FCMC regulations in relation to investment services and payment institutions (where applicable);
- Consumer Rights Protection Law (in Latvian – *Patērētāju tiesību aizsardzības likums*).



## 4 Lessons learned from Latvia's regulation for a possible harmonized European Crowdfunding regulation

### 4.1 Role model ("dos")

There is no special regulation governing Crowdfunding in Latvia.

### 4.2 Aspects that should be avoided ("don'ts")

There is no special regulation governing Crowdfunding in Latvia.

## 5 Conclusion

Crowdfunding is in the early stages of development in Latvia and the first projects have started only very recently. There is currently no regulatory regime that is specifically adapted to Crowdfunding in Latvia. In principle, Latvian law allows for the implementation of Crowdfunding projects. However, several Latvian law provisions are unclear as to how they should be applied in relation to Crowdfunding. In any event, in each situation we strongly recommend taking legal advice before any such project is started.

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## Lithuania

### 1 Recent developments in the market of Crowdfunding in Lithuania

During the last 12 months there were no significant developments in Lithuania regarding Crowdfunding:

#### 1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

According to publicly available information, Crowdfunding platforms based on the Equity Model have not been established in Lithuania during the last 12 months. Also individual initiatives to raise funds from the crowd based solely on the Equity Model have not been visible.

However, there is one individual initiative which was raising funds from the crowd using a hybrid model which combines the Equity Model and the Lending Model. Lithuanian start-up Aciety (<http://aciety.com/>) – a global IT finding platform – was raising funds from the crowd. Aciety created a web page (which now is under construction (<http://invest.aciety.com/>)) and via its IT platform was raising funds by concluding convertible loan agreements with their investors (crowd). By convertible loan agreements Aciety offered opportunity to the crowd to convert principle amount and interest thereon to shares of Aciety.

#### 1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

According to publicly available information, Crowdfunding platforms based on the Lending Model have not been established in Lithuania during the last 12 months. Except for an individual initiative of Aciety to raise funds from the crowd by concluding convertible loan agreements as described above there were no other initiatives to raise funds using the Lending Model.

However, the first peer-to-peer lending platform “Savy” (<http://savy.lt/>) was established in Lithuania during the last 12 months and it raised questions as well as interest in IT platforms for lending and financing. Since Lithuania does not have any practice regarding IT platforms designed for peer-to-peer financing, the “Savy” could encourage establishment of first Crowdfunding platforms in Lithuanian Crowdfunding market as well.

#### 1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

There is one social Crowdfunding platform based on the Rewards Model in Lithuania called Burės (<http://www.bkcentras.lt/bures/>). It helps raising funds for social projects and business initiatives which are shaped to help the society or make their life easier. Burės successfully finished its first financing stage and now it is selecting new social projects to be introduced to the crowd for fund raising.



## 2 Recent developments regarding Crowdfunding regulation in Lithuania

There have not been any recent developments regarding Crowdfunding regulation in Lithuania. The Lithuanian legislator has not adopted any legal acts designed for Crowdfunding so far. Lithuanian legislation is not shaped to facilitate the Equity Model, Lending Model and Donations or Rewards Model. However, the legal environment for implementation of the Donations or Rewards Model is quite appropriate and does not set major obstacles.

Activities of the first IT platform shaped for peer-to-peer lending in Lithuania have raised concerns of the Bank of Lithuania. Currently, the Bank of Lithuania is forming its position on IT platforms for peer-to-peer lending. Thus, it is also expected that the Bank of Lithuania will also form its position on the Crowdfunding platforms based on the Lending Model or its position will give indications whether the Crowdfunding platform based on the Lending Model complies with the regulation and does not trigger licensing or similar requirements.

## 3 Current regulation of Crowdfunding in Lithuania

### 3.1 Licence under the Laws of Lithuania

#### Equity Model

Crowdfunding based on the Equity Model could be implemented in Lithuania. Such platform could be designed through a public offering of shares of a public limited liability companies after publishing a prospectus (with several exemptions, please refer to Paragraph 3.2). The provisions of the Law on Securities of the Republic of Lithuania would be applicable to such offering and acquirement (*Lith. Lietuvos Respublikos vertybinių popierių įstatymas*).

The above activities of the platform, most likely, would be qualified as provision of investment services such as reception and transmission of orders in relation to one or more financial instruments, execution of orders on behalf of clients, provision of investment advice and placing of financial instruments without a firm commitment basis as described in the Law on Markets in Financial Instruments of the Republic of Lithuania (the Law on MFI, *Lith. Lietuvos Respublikos finansinių priemonių rinkų įstatymas*) which implements the MiFID. Under the Law on MFI, investment services could only be provided by investment firms (brokerage companies) and commercial banks, therefore, the platform would need to obtain a particular license.

If a public limited liability company decides to offer its shares on its own initiative, i.e. without a special platform operated by a third person, licensing requirements are not triggered. However, a public limited liability company has to comply with the prospectus requirements (with several exemptions, please refer to Paragraph 3.2).

Please note that we no longer consider implementation of the Equity Model under existing Lithuanian regulation on collective investment to be appropriate way for structuring the Crowdfunding platform in comparison with our position provided last year because such structure would trigger a number of regulatory requirements.



## Lending Model

The Lending Model could be implemented in Lithuania through the public offering of non-equity securities (bonds). Since bonds can be publicly offered only by a public limited liability company and only after publication of a prospectus (with several exemptions, please refer to Paragraph 3.2), the above requirements described for the Equity Model should be applicable.

The Lending Model could also be designed on the basis of loans to be granted under loan agreements with or without the use of the Crowdfunding platform. When structuring the Lending Model as loans granted under loan agreements, it should be noted that according to the Law on Financial Institutions of the Republic of Lithuania (Law on FI, *Lith. Lietuvos Respublikos finansų įstaigų įstatymas*) acceptance of repayable deposits or other repayable funds from non-professional market participants is allowed for credit institutions only and is subject to the licensing requirements established by Lithuanian law. Therefore the intended business model should be carefully assessed in each individual case, and advance consultations with the Bank of Lithuania may also be needed.

## Donations or Rewards Model

The Donations or Rewards Model could be designed without difficulty in Lithuania. The Donations or Rewards Model does not involve any form of investment services. The Crowdfunding platform based on donations or rewards is governed by the Civil Code of the Republic of Lithuania (the Code, *Lith. Lietuvos Respublikos civilinis kodeksas*). Under the Code, relationships between the parties where individuals provide money to a company or project for benevolent reasons can be qualified as a contract of gift and those provided for a non-monetary reward can be qualified as a sale and purchase agreement. Tax implications for the recipient of funds should be assessed when implementing the Donations or Rewards Model since the received funds would likely be considered as taxable income.

Please note that we no longer consider implementation of the Donations or Rewards Model under the Law on Charity and Sponsorship (the Law on CS, *Lith. Lietuvos Respublikos paramos ir labdaros įstatymas*) to be appropriate way for structuring the Crowdfunding platform in comparison with our position provided last year because the Law on CS is applicable only to recipients of sponsorship which could only be non-profit companies, and natural persons cannot be providers of charity.

### 3.2 Prospectus requirements

If securities (shares and/or bonds) are publicly offered to investors, the company issuing the securities has to publish a prospectus. The prospectus can be published only after the Bank of Lithuania approves it. Requirements for the preparation, submission and approval of the prospectus and exemptions from the requirement to publish the prospectus are established by the Law on Securities.

Where securities (shares and/or bonds) are publicly offered through the Crowdfunding platform, the operator of the platform is not responsible for publishing the prospectus.

The obligation to publish a prospectus shall not apply in the presence of at least one of the following conditions:

- an offer of securities addressed solely to professional investors;



- an offer of securities addressed to fewer than 150 natural or legal persons in each Member State of EEA, other than professional investors;
- an offer of securities addressed to investors who acquire securities for a total amount of at least EUR 150,000 for each separate offer;
- an offer of securities which nominal value per unit amounts to at least EUR 100,000;
- an offer of securities with a total amount of less than EUR 100,000, which shall be calculated over a period of 12 months.

### 3.3 Regulation of Crowdfunding under the AIFMD regime

AIFMD has not been implemented in Lithuania yet. However, a draft law implementing AIFMD has been provided to the Parliament of the Republic of Lithuania. Due to the uncertainty of implementation of AIFMD in the national law of Lithuania and possible regulation of alternative investment funds, further analysis of the regulation of the Crowdfunding platforms under the AIFMD regime in Lithuania is not provided.

### 3.4 Licence under the Law on Payments of the Republic of Lithuania (Lith. Lietuvos Respublikos mokėjimų įstatymas) (Payment Services Directive)

The transfer of funds through a Crowdfunding platform may be considered as a payment service under the Law on Payments.

The provision of payment services is subject to the licensing requirements in Lithuania. Since the establishment of a new payment service provider may take three to six months to complete and includes a significant amount of paperwork (operating programme, business plan, organisational structure, internal control procedures, etc), EU-licensed payment service providers may choose to provide payment services on a cross-border basis without establishing a branch, through a branch or an intermediary (which would generally require notification of the intention to provide payment services in Lithuania through its home Member State supervisory authority to the Lithuanian supervisory authority (the Bank of Lithuania)).

Following the pattern of the Payment Services Directive, the Lithuanian law provides for certain exemptions from the licensing and other regulatory requirements applicable to payment services. However, the possibility to apply such exemptions should be carefully assessed in each individual case; additional consultations with the Bank of Lithuania may also be needed.

### 3.5 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- Law on the Prevention of Money Laundering and Terrorist Financing of the Republic of Lithuania (*Lith. Lietuvos Respublikos pinigų plovimo ir teroristų finansavimo prevencijos įstatymas*);
- Law on Consumer Credit of the Republic of Lithuania (*Lith. Lietuvos Respublikos vartojimo kredito įstatymas*).





## 4 Lessons learned from Lithuanian's regulation for a possible harmonized European Crowdfunding regulation

### 4.1 Role model ("dos")

Not available since there are no specific regulation on Crowdfunding in Lithuania.

### 4.2 Aspects that should be avoided ("don'ts")

Not available since there are no specific regulation on Crowdfunding in Lithuania.

## 5 Conclusion

There is no regime specifically tailored to Crowdfunding in Lithuania and it has not been developed during the last 12 months. Crowdfunding would be a new form of financing in Lithuania, and the legal environment should be developed accordingly.

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## Luxembourg

### 1 Current Market of Crowdfunding platforms in Luxembourg

In Luxembourg, to our knowledge, only two Crowdfunding platforms have been created so far, one of which no longer exists. Both of these Crowdfunding platforms were based on the Donations or Rewards Model.

#### 1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

To date, Luxembourg does not yet have a Crowdfunding platform built after the Equity Model.

#### 1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

Again, no Crowdfunding platform under the Lending Model operates in Luxembourg.

Nonetheless, these forms of Crowdfunding should be possible under Luxembourg law; they have just not yet been put into place. In fact, when asked a parliamentary question on Crowdfunding activities in Luxembourg, the Luxembourg Minister of Finance pointed out in November 2012 that the evolution of Crowdfunding in Luxembourg seems to differ from what can be noted in other countries.

He explained that the *Commission de Surveillance du Secteur Financier* (the "CSSF"), the Luxembourg financial supervisory authority, has only on a few rare occasions been approached in the matter and that all projects were still at the development stage. He also confirmed that even though such Crowdfunding activities would fall under the supervision of the CSSF, the lack thereof explains the fact that the CSSF has yet to pronounce itself on the matter.

Hence, all of the above stated developments remain purely theoretical.

#### 1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

The only form of Crowdfunding to have existed and to exist in Luxembourg was built after the Donations or Rewards Model. One Crowdfunding platform that no longer exists, was used to finance artistic projects and investors were given non-monetary rewards, for example in the form of special thanks on the album cover of a CD the production of which was financed via the platform. The other Crowdfunding platform, that was only created seven months ago, allows individuals to contribute to project ideas that range from gastronomy, retail, sports, art, music, to design and events.



## 2 Recent developments regarding Crowdfunding regulation in Luxembourg

### Implementation of the Mini One Stop Shop regime (MOSS)

On 26 May 2014 the Mini One Stop Shop regime (MOSS) was implemented. This law integrates Article 5 of Council Directive 2008/8/EC related to new provisions as regards the place of supply of services and the consequential amendment to Luxembourg VAT Law.

MOSS is an optional and simplified way of declaring services by Luxembourg VAT e- services suppliers when they render those services to final EU consumers. It basically allows the said suppliers within the framework of the new changes of rules regarding the VAT place of supply under which now the supply takes place in the Member State of the customer and not the Member State of the supplier to avoid registering in each Member State of consumption.

The "MOSS" will be effective as of 1 January 2015 and will basically concern Crowdfunding internet platforms which render their taxable services to final consumers/investors established in other EU Member States and in which these Crowdfunding platforms do not have an establishment to account for the VAT.

## 3 Current regulation of Crowdfunding platforms in Luxembourg

As of this moment Luxembourg does not have any regulations that are specifically targeted at Crowdfunding. Nonetheless, other laws and regulations may apply.

### 3.1 Licence under the law on the financial sector dated 5 April 1993, as amended

#### Equity Model and Lending Model

Depending on the services offered by the Crowdfunding platform, be it under the Equity or the Lending Model, it is possible that the law on the financial sector could be applicable, which would mean that the Crowdfunding platform could be required to obtain a specific licence in order to execute its activities. This would be the case if the Crowdfunding platform was to offer investment or banking services. In particular, the crowdfunding platform could be considered a credit institution or possibly a professional carrying out lending activities if it was to grant loans under the Lending Model.

In that respect, investors, if they invest through a Crowdfunding platform operating under the Lending Model (depending on the manner they are financed), might also be considered to provide banking or lending services for which a licence could in theory be required.

#### Donations or Rewards Model

Most probably, Crowdfunding under the Donations or Rewards Model should not fall within the scope of the law on the financial sector. No licence would therefore be required.



### 3.2 Licence under the law on financial markets dated 13 July 2007, as amended

#### Equity Model and Lending Model

Depending on the services offered by the Crowdfunding platform, the platform might be considered to constitute a Multilateral Trading Facility and the law on financial markets would become applicable. The platform would have to obtain a licence from the minister, having in his competences the CSSF, before beginning its activities.

#### Donations or Rewards Model

A platform operating under the Donations and Reward Model should probably not fall within the scope of the law on financial markets and therefore no licence would be required.

### 3.3 Prospectus requirements

By offering to investors to subscribe to transferrable securities, the Crowdfunding platform (depending on its exact form) could be required to publish a prospectus, which would have to get approved by the CSSF.

### 3.4 Regulation of Crowdfunding under the AIFMD regime

The AIFMD was implemented on 12 July 2013 by the law on alternative investment fund managers.

Article 1 paragraph 39 gives the following definition: "Alternative Investment Funds (AIFs)": collective investment undertakings, including investment compartments thereof, which:

- (a) raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and
- (b) do not require authorization pursuant to Article 5 of Directive 2009/65/EC.

#### Equity Model

Under the Equity Model it is possible that the Crowdfunding platform could be considered to fall within the definition of an alternative investment fund and, thus could fall within the scope of the law on alternative investments fund managers, whereby licence requirements could apply.

#### Lending Model

In accordance with the interpretation provided by ESMA, it is rather unlikely that a Crowdfunding platform operating under the Lending Model (and being financed through loans) would be considered an alternative investment fund.

#### Donations or Rewards Model

In our opinion, a Crowdfunding platform operating under the Donations and Rewards Model would not be considered an alternative investment fund and should therefore not fall within the scope of the law on alternative investment fund managers.

### 3.5 Possible additional Regulations (depending on the use of proceeds)

Other common regulations to which the operator of a Crowdfunding platform may be subject include:



- Amended law on undertakings for collective investment dated 17 December 2010;
- Amended law on specialised investments funds dated 13 February 2007;
- Amended law relating to the investment company in risk capital (“SICAR”) dated 15 June 2004;
- Anti-money laundering law dated 12 November 2004, as amended;
- Law regulating the access to the occupations of craftsman, tradesman, industrialist and certain liberal professions dated 2 September 2011;
- Law of 10 November 2009 on payment services, on the activity of electronic money institution and settlement finality in payment and securities settlement systems (the “PSD”).

## 4 Lessons learned from Luxembourg’s regulation for a possible harmonized European Crowdfunding regulation

### 4.1 Role model (“dos”)

There are currently no lessons that can be learned from Luxembourg’s regulation for a possible harmonized European Crowdfunding regulation.

### 4.2 Aspects that should be avoided (“don’ts”)

There are currently no lessons that can be learned from Luxembourg’s regulation for a possible harmonized European Crowdfunding regulation.

## 5 Conclusion

Although welcome, Crowdfunding has yet to arrive in Luxembourg. Neither the legislator nor the financial authority have given any indications as to how Crowdfunding will be organised on the field or what laws and regulations will be applicable. It has to be noted that the CSSF ensures the respect of applicable laws which might potentially apply to the Crowdfunding platforms. Nevertheless, it has to be kept in mind that the CSSF, generally speaking, is very flexible and will probably deal in a pro-active way with prospective Crowdfunding platforms on a case-by-case basis.

It may also not be ruled out that, should Crowdfunding become a popular and wide-spread tool, the Luxembourg legislator would be keen to put in place an attractive legislation in this respect.

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## The Netherlands

### 1 Recent developments in the market of Crowdfunding in The Netherlands

During the last 12 months there were the following significant developments in The Netherlands regarding Crowdfunding.

The interest in Crowdfunding platforms and Crowdfunding initiatives is growing significantly in The Netherlands. Whereas in 2012 the total amount of monies sourced by way of Crowdfunding was approximately EUR 14 million, the 2013 sourcing amount was EUR 32 million.<sup>29</sup> In the first half of 2014 the amount sourced in the Netherlands was EUR 23 million.<sup>30</sup> Crowdfunding initiatives are more often being combined with bank financing. There is a challenge for banks to find ways of using or combining Crowdfunding as funding mechanism. Local governments may also find Crowdfunding interesting now that government budgets are decreasing. Crowdfunding for renewable energies has become fairly common in the Netherlands.

The aforesaid significant growth has also raised the interest of Dutch regulators, being the Dutch Central Bank (*De Nederlandse Bank N.V.*; "DNB") and the Financial Markets Authority (*Stichting Autoriteit Financiële Markten*; "AFM"). DNB and the AFM have jointly issued statements with respect to their views on Crowdfunding.<sup>31</sup> The AFM and DNB have identified, from the perspective of the lender, four models; investments (Equity Model or Debt Model), lending (Lending Model), donations and sponsoring (the latter two jointly the Donation or Rewards Model).

Financial regulatory laws for the Netherlands are mostly dealt with in the Financial Supervision Act (*Wet op het financieel toezicht*; "FSA"). From the perspective of the Crowdfunding platform no specific legislation has been drawn up in The Netherlands. However, it is clear to the AFM that the activities of the Crowdfunding platform in their nature have a strong alignment with intermediary type of activities. Depending on the Crowdfunding model of choice, such intermediary activities could in themselves be regulated as well. However the Ministry of Finance stresses that Crowdfunding platforms are more than just intermediaries as they supply two sides of the market, whereas a traditional intermediary only has one customer, the investor or the lender.<sup>32</sup>

<sup>29</sup> Crowdfunding in Nederland 2013, De status van Crowdfunding in Nederland, Douw & Koren, 15 January 2014.

<sup>30</sup> <http://www.douwenkoren.nl/crowdfunding-op-weg-naar-mainstream/>.

<sup>31</sup> Translated: "DNB and AFM are orientating themselves on "Crowdfunding"" and "DNB and AFM give interpretations on Crowdfunding".

<sup>32</sup> Source is document on the site of the Dutch Ministry of Finance headed , "List of provisions for consumer protection". The background of this document and its use is not entirely clear.



### 1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project) or Debt Model

In respect of the Equity Model, Symbid is the most well known Crowdfunding platform in the Netherlands. It is however not a straightforward equity model as each investor becomes a member in a cooperative. The cooperative is ultimately the shareholder in the business. As with all equity investments, the members run an entrepreneurial risk remain meaning that if a business cannot fulfil its obligations or goes bankrupt, the investors run the risk of losing their investment.

### 1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

In respect of the Lending Model, this seems to be the most successful form of Crowdfunding in the Netherlands. Such statement is solely based on the amount of Crowdfunding platforms that are active in the Netherlands and can operate on the base of an exemption from the AFM.<sup>33</sup> The exemption allows Crowdfunding platforms to intermediate in the attracting or making available of repayable funds (*opvorderbare gelden*) from the public. This activity is regulated under the FSA and either the intermediary requires a license or exception as financial services provider, or it requires the aforesaid individual exemption from the AFM.

### 1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

In the Netherlands the Donations or Rewards models are used predominantly to finance social or creative projects or companies. Notably as the Dutch government has made significant cuts in subsidising the art sector, several Crowdfunding platforms have developed in this area, such as Crowdfunding for theatre / art or Crowdfunding in respect of cinematic projects. As the Donation or Reward Models would normally not provide financial rewards, these Crowdfunding Models fall outside of the scope of the FSA.

### 1.4 Credit Union Model

Although not directly a 'traditional' Crowdfunding structure, the cooperative model whereby funding for SME is accommodated in the form of so-called credit unions, has become a new phenomenon in the Netherlands. Currently two cooperative credit unions (named as such)<sup>34</sup> have been registered with the AFM. Each of them has received from the AFM an exemption to intermediate in the attracting or making available of so-called repayable funds.

<sup>33</sup> As at 24 November 2014, 22 Crowdfunding platforms have an exemption from the AFM which allows them to intermediate in repayable funds. Source: Crowdfunding register of the AFM as at 24 November 2014, <http://www.afm.nl/~media/Files/registers/register-crowdfunders-311014.ashx..>

<sup>34</sup> Source: Crowdfunding register of the AFM as at 24 November 2014, <http://www.afm.nl/~media/Files/registers/register-crowdfunders-311014.ashx>.



## 2 Recent developments regarding Crowdfunding regulation in The Netherlands

No specific changes have been made to Crowdfunding regulation in the Netherlands. According to (non public) information, the AFM is currently preparing a recommendation which in all likelihood will be publishing on its website at the end of 2014. In tandem with such recommendations, the AFM has indicated that it will inform the Dutch Parliament on the 19<sup>th</sup> of December 2014 of the outcome of a survey in respect of Crowdfunding and the regulatory framework in the Netherlands. The survey will be accompanied by a reaction of the Dutch Ministry of Finance and the Dutch Ministry of Economic Affairs.

The AFM has issued various licenses or granted individual exemptions for entities that required a license for intermediary activities. As indicated in paragraph 1.2, most exemptions were granted in respect of the intermediation in respect of the attracting or making available of repayable funds from the public.

## 3 Current regulation of Crowdfunding in The Netherlands

As no regulation has been introduced specifically for Crowdfunding since 2013, this section is very much aligned with the 2013 version. A new section has been added in respect of consumer protection.

As a general note and as explained above, the Crowdfunding platform in its nature is likely to be regarded by the AFM as an intermediary type of platform. Hence rules on intermediation are more likely to apply to Crowdfunding platforms rather than rules on offerings of securities / shares / debt / etc. Such rules are more likely to apply to parties which are seeking funding through the use of the Crowdfunding platform (the Crowdfunding entity).

### 3.1 Licence under the Dutch Financial Supervision Act

#### Equity (and Debt) Model

Shares and bonds are regarded as financial instruments. In such case the Crowdfunding platform is likely to be regarded as an investment firm within the meaning of the Markets in Financial Instruments Directive (Directive 2004/39/EC). As a result the Crowdfunding platform requires a license as an investment firm with respect to the acceptance and transmission of orders of lenders with respect to financial instruments (order remitter).<sup>35</sup>

Since a debt instrument will normally have a repayment term, the issue of debt instruments also qualifies as the attracting of repayable funds. Repayable funds is to be explained under the FSA as funds which are to be repaid at some point of time. The taking up of repayable funds (*opvorderbare gelden*) is to be taken into account as this activity is regulated under the FSA when such repayable funds are received from the public. The intermediation in respect of the attracting of repayable funds from the public is also a regulated activity. Normally speaking the Crowdfunding platform would require either a license or an exemption from the AFM in order to allow it to operate as an intermediary with respect to the attracting of repayable funds. Since 2013 the AFM has been issuing various individual

<sup>35</sup> Source: Crowdfunding register of the AFM as at 24 November 2014, <http://www.afm.nl/~media/Files/registers/register-crowdfunders-311014.ashx>.





exemptions to Crowdfunding platforms<sup>36</sup> in order to allow such platforms to intermediate in respect of the attracting of repayable funds.

As for the issuer of the debt instruments, the Exemption Regulation to the FSA provides for an exception on this prohibition if the debt instruments are issued in accordance with Part V of the FSA. This in effect is a reference to the Prospectus Directive. In practice this means that an issuer that offers debt instruments in accordance with the Prospectus Directive (or an exception thereunder) is not subject to the FSA prohibition on the attracting of repayable funds. When making use of aforesaid exceptions one should be careful as most of the exceptions are subject to strict conditions, relating to selling restriction requirements and visual tags relating to the offering (*vrijstellingsvermelding*). If such requirements are not properly executed, the exception is not available.

### Lending Model

The making of non-consumer loans is not treated as a regulated activity under the FSA. However, the AFM and DNB suggest that borrowers that use Crowdfunding as an alternative to normal bank loans could very well qualify as consumers. As such the Crowdfunding platform may require a license as a financial services provider (*financieeldienstverlener*) due to the fact that it intermediates in relation to consumer credit.

As explained the attracting of or having available repayable funds (*opvorderbare gelden*) is also to be taken into account since this activity is also regulated under the FSA when such repayable funds are received from the public. As an example, should the funds taken from (the public) investors be held in escrow by the Crowdfunding platform, or an entity specifically designated for the escrow or even the designated Crowdfunding entity itself, until closing of the transaction, the escrow activity may be taken as an activity which qualifies as 'attracting of repayable funds' under the FSA. Unless a banking license, an exception or an individual exemption is available, the attracting of repayable funds from the public is, in principle, prohibited under the FSA.

Additionally and as explained under the Equity / Debt model, the intermediation in respect of the attracting of repayable funds from the public is also a regulated activity. Should the Crowdfunding platform be engaged in such intermediary activities it would require either a license or an exemption from the AFM.

### Donations or Rewards Model

As explained, if indeed there is no financial reward for the Donation or Reward this type Crowdfunding Model falls outside of the scope of the FSA.

### 3.2 Prospectus requirements

The prospectus requirement does not apply to the offering of securities or investment products with a value of EUR 2,5 million or less within a time period of 12 months. Until now no Crowdfunding initiatives in The Netherlands have resulted in offerings of equity or debt near such amount. As a result, Crowdfunding platforms (or in fact the issuing entities / entrepreneurs) that operate under the Equity Model or Debt Model whilst using the aforesaid exception, are currently not subject to a prospectus

<sup>36</sup> The amount as at 24 November 2014 is: 22. Source: Crowdfunding register of the AFM as at 24 November 2014, <http://www.afm.nl/~media/Files/register/register-crowdfunders-311014.ashx>.



requirement. However, as explained above, the use of exemptions is subject to strict formal requirements. If such requirements are not properly met, the exception is not available in the first place. Furthermore, some entities using Crowdfunding as a funding mechanism may at some point be so successful that the prospectus requirement could become an issue when exceeding the EUR 2,5 million threshold (assuming that this exception from prospectus requirements is indeed used).

No prospectus requirement is likely to apply in respect of the Lending Model or the Donations or Rewards Model.

Under the Act on Unfair Trade Practices (*Wet oneerlijke handelspraktijken*) the platform itself or the entity / person that provides (investment) information in relation to a Crowdfunding transaction can be held liable if it conducts an unfair trade practice towards a consumer. This could be the case if the information that is presented to investors (consumers) is misleading or incorrect, whether in the form of a prospectus or other information documents. Misleading is also to be understood as leaving out information that is deemed important to a consumer in its investment decision (a so-called misleading omission).

In 2014 there has been a significant increase of cases where the AFM has used the Act on Unfair Trade Practices to force parties to either inform the market with proper / updated information or to issue fines in respect of breaches of the Act on Unfair Trade Practices. The AFM is typically focussing on market participants that seek funding and technically are unregulated under the FSA, whilst at the same time the information shared by such market participants with potential investors is inadequate, vague or elusive.

### 3.3 Regulation of Crowdfunding under the AIFMD regime

The Alternative Investment Fund Management Directive ("AIFMD") which has taken effect as of 22 July 2013, has been implemented into the FSA and lower legislation promulgated thereto.

It is to be noted that the AIFMD (or fund structures in general) has not been mentioned directly in the context of Crowdfunding in the Netherlands. A Crowdfunding structure could constitute an AIF under the FSA. Regulators however have not yet made any comments on this issue to date. The AIFMD allows for a more lenient regime if the assets under management do not exceed a certain threshold. The exact rules are too detailed for the purposes of this briefing. The lowest thresholds amount is a EUR 100 million. Notwithstanding the aforesaid threshold, an AIF that does not exceed the threshold but which offers participations to retail investors in principle is caught by the AIFMD regime in full. An additional disclosure regime applies to retail offerings of AIFs. The disclosure rules must ensure transparency and should allow retail investors to receive proper information on their potential participation/investment.

The recognised Crowdfunding platforms seem to take form mostly in the form of the Lending (/Debt) Model. This could explain the absence of discussions of the AIFMD in the context of Crowdfunding in the Netherlands. It is understood however, that some jurisdictions indeed have found certain Crowdfunding platforms were operating within the scope of the AIFMD.

### 3.4 Licence under the Payment Services Directive (2007/64/EC)

The transfer of funds through the operator of a Crowdfunding platform could constitute money remittance services and be subject to payment services regulation.



Where external regulated financial institutions are used for processing payments the Crowdfunding platform could avoid being regulated as a payment services provider.

Note that only banks or investment firms can hold sums of money or financial instruments belonging to third parties. Similar to what is reflected in paragraph 2.1, it should be noted that it is prohibited to attract repayable funds (i.e. funds that are to be repaid) from the public.

### 3.5 Consumer regulations

Although there is no strict underlying legal basis for the following, the AFM and DNB recommend that the maximum amount of investment for consumers on a Crowdfunding platform in respect of:

- (i) the Lending Model, is EUR 40,000, with one time investments of EUR 5,000 to be spread over 3 or more projects and no more than 100 investments per platform; and
- (ii) the Debt / Equity Model, is EUR 20,000 with one time investments of EUR 2,500 to be spread over 3 or more projects and no more than 100 investments per platform.

At the same time the Ministry of Finance has indicated that it has a preference to introduce a threshold (%), which threshold depends on how much a consumer can spend.

Platforms are to inform consumers actively and continuously to spread their investments and that they should only invest a responsible amount of their income on Crowdfunding. Furthermore, the platforms must inform consumers actively and continuously of the risks of investing. Full disclosure is required with respect to the project, including all the relevant financial information. Information on the website of the Crowdfunding platform must be clear and not misleading (see previous paragraph on Act on Unfair Trade Practices in paragraph 3.3). Crowdfunding platforms also must have proper risk management in place to address matters such as credit risks, risks on overextension of consumer credit or interest rates in relation to the risk of projects.

### 3.6 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include, but is not limited to:

- Anti-money laundering regulations
- Act on protection of personal data (*Wet bescherming persoonsgegevens*)
- Act on unfair trade practices (*Wet oneerlijke handelspraktijken*, as implemented in several Dutch acts, including the Dutch Civil Code)
- Act on the consumer credit (*Wet op het consumentenkrediet*)
- Rules on distant marketing of consumer financial services
- Dutch civil code (not only in relation to corporate / contract law, but also implementing provisions on consumer credit and unfair trade practices)



## 4 Lessons learned from The Netherlands's regulation for a possible harmonized European Crowdfunding regulation

### 4.1 Role model ("dos")

Be assured that all parties involved in respect of a Crowdfunding platform are, where appropriate, authorised, financially solid and trustworthy. Check background and track record of key parties / individuals involved. Have good contracts in place and be assured that where appropriate, contracts within the chain of parties involved, are aligned with each other so as to avoid unintended mismatches, for example in the execution.

Even where a Crowdfunding platform is legally operating outside the scope of the Dutch regulatory framework (FSA), a platform could take note of the positive aspects of certain rules, for example rules in respect of consumer protection, or rules dealing with investor information (such as relating to the Prospectus Directive). The same applies where a Crowdfunding platform is made subject to certain rules of the FSA. It may be prudent to follow some aspect of the regulatory framework, from the perspective that Crowdfunding platforms literally aim to attract the crowd, which may have little to no knowledge of financial products and risks inherent to financial products.

### 4.2 Aspects that should be avoided ("don'ts")

The FSA regulates certain financial products and financial services which are not based on European rules. Where foreign Crowdfunding platforms wish to engage in activities in the Netherlands, they may run into financial services rules which are not based on European rules and regulations. This is a risk that needs to be taken into account. The same applies to the general principle that the FSA contains a prohibition to attract repayable funds from the public in / from the Netherlands. This typically will affect the debt/lending type of Crowdfunding instruments, though equity type instruments with conversion characteristics (into debt) should be careful of this prohibition as well.

In short, Crowdfunding platforms should not enter the Dutch market without having conducted a check on the regulatory framework which applies in The Netherlands.

## 5 Conclusion

The interim conclusion has been taken by the European Commission<sup>37</sup> earlier this year that it does not intend to come up with legislative measures. Several actions have however been proposed, which actions are aimed at promoting, raising awareness and building confidence in Crowdfunding. In the meanwhile the Dutch legislator is not likely to come up with new legislation specifically for Crowdfunding, notwithstanding that Crowdfunding has come under the scrutiny of the Dutch Ministry of Finance, the AFM and DNB.

<sup>37</sup> [http://europa.eu/rapid/press-release\\_MEMO-14-240\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-240_en.htm).



The AFM will provide further guidance on Crowdfunding before the end of 2014. Guidance is likely to be expected in respect of consumer protection and transparency requirements in line with the aforesaid suggested actions of the European Commission.

The AFM has informed Crowdfunding platforms (known to them) of the fact that they will present the outcome of a survey to the Dutch Parliament on the 19<sup>th</sup> of December 2014 on Crowdfunding and the regulatory framework. The survey will be accompanied by a reaction of the Dutch Ministry of Finance and the Dutch Ministry of Economic Affairs.

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## Poland

### 1 Recent developments in the market of Crowdfunding in Poland

Crowdfunding is a phenomenon gaining ever greater popularity in Poland, as can be seen in the development of Crowdfunding platforms, the levels of media interest and social knowledge on the topic of this financing method.

Poland is a prospective market for the development of (various models of) Crowdfunding. Many new Crowdfunding platforms have arisen over the last year, and models are also starting to operate in which Crowdfunding takes place without the intermediation of a platform (e.g. organised by private companies). Varieties of projects in Poland are being financed on a Crowdfunding basis, from the charitable, through to support for technical novelties and innovations or support for cultural projects.

During the last 12 months, we have seen the following significant developments in Poland regarding Crowdfunding:

#### 1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

Despite the first Crowdfunding project in Poland based on the Equity Model being conducted back in 2012, until recently Crowdfunding platforms have not offered such opportunities.

Over the last 12 months, the development of Crowdfunding using the Equity Model has accelerated significantly. At present, there are numerous Crowdfunding platforms operating using this model, although most of them are only just commencing their activity and the projects are still few. Considerable interest can however be observed in equity Crowdfunding, which is being contributed to by the attention being paid by the media.

#### 1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

Alternative methods for granting loans (social loans, online loans, etc.) are enjoying great and constantly growing popularity in Poland. Part of this growing market is in platforms acting on a lending based Crowdfunding model.

#### 1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

The model based on rewards is the most developed model in Poland. The largest numbers of Crowdfunding platforms operate and the largest numbers of projects are being implemented on the basis of this model. In this model, financiers receive a specified type of reward, this being a mutual performance for the contribution of a specified monetary amount.

The Donations Model is mostly being used by Crowdfunding platforms which collect money for charitable purposes.



## 2 Recent developments regarding Crowdfunding regulation in Poland

There has been an opportunity over the last year for familiarisation with the position of the Polish government on Crowdfunding and the potential regulation thereof in the future. A new Public Collections Act has also been adopted, which nonetheless, and despite its thematic closeness, does not regulate Crowdfunding.

The position of the government of the Republic of Poland was adopted in association with the European Commission Communication dated 27 March 2014 entitled “Unleashing the potential of Crowdfunding in the European Union”. The position was prepared by the Ministry of Administration and Digitization. Poland supported the main points in the Commission’s Communication and the designated direction of activity, being the development and use of Crowdfunding potential within the European Union. It was stressed that at present there is no need to introduce binding legal regulations, because the Crowdfunding market in Poland is at an early stage of development.

Similarly to the Commission, the Polish government has nonetheless stressed the necessity for continued monitoring of the situation on the market, in particular for investment Crowdfunding (by which is understood equity and lending based Crowdfunding). Attention was also drawn to the significant differences between investment and non-investment Crowdfunding (different purposes, use in different sectors, difference in legal regulations, different risks, etc.), which might bring different regulations in the future for different types of Crowdfunding.

In Poland, Crowdfunding is sometimes compared to public collections. The comparison of Crowdfunding and public collections was particularly popular before the entry into force of the new Public Collections Act dated 14 March 2014, which has replaced the Public Collections Act adopted on 15 March 1933. Nonetheless, Crowdfunding is not subject to these new regulations stemming from the new Public Collections Act.

The exclusion of Crowdfunding from the scope of the Public Collections Act is of vital significance for participants in social financing, and in particular for entities obtaining financing and owners of the platforms used for this purpose, which do not have to meet the requirements imposed by the Public Collections Act requiring the involvement of additional financial resources and, above all, holding back obtaining of financing until these have been fulfilled. This is because organising a public collection requires, in particular, notification to the minister responsible for public administration affairs and publication of details in the public collections portal maintained by that minister, as also the drawing-up of a report on the collection, which also requires to be published in the public collections portal.

The failure by the new Public Collections Act to encompass Crowdfunding is in accordance with the abovementioned position of the government, which stated that at the present stage of market development there is no need to introduce particular regulations for Crowdfunding.



## 3 Current regulation of Crowdfunding in Poland

### 3.1 Regulation under the Banking Act

In certain Crowdfunding models, the nature of activity by platforms might bring to mind the depositary activity conducted by banks. This can be seen particularly in lending based Crowdfunding, which can take various forms. In many cases, loans are granted directly between the financier and the beneficiary. In such cases, the role of the Crowdfunding platform operator comes down to bringing together the financier and the beneficiary, which in itself is not a regulated activity. A significantly more complicated situation arises in the model where, apart from bringing together the financiers and beneficiary, the platform operator also aggregates the resources coming from the financiers and then grants loans to the beneficiary itself. Such a model is intended to simplify the financing structure. This is because, in effect, the beneficiary only enters into one loan agreement with the operator, not into many loan agreements with particular financiers. On the other hand, in granting the loan the operator uses resources gathered from the financiers. At the moment the loan is repaid, the operator distributes the repayment received in proportion among the financiers. In this model, platform activity constitutes de facto banking activity.

The platform collects financial resources from the financiers (which is the equivalent of deposit-taking activity by the banks) and aggregates them, after which it grants loans to the beneficiary, financing the loan from the resources obtained from the financiers (which is the equivalent of credit granting activity by the banks). The resources gathered from the financiers are encumbered by risks in the sense that there is no guarantee that they will be repaid. Pursuant to article 171 section 1 of the Banking Law, whosoever without permission conducts activity based on gathering monetary resources from other natural persons, bodies corporate or organisational entities without legal personality for the purpose of granting credits, monetary loans or encumbering the resources with risk in another manner, is liable to a fine of up to PLN 5,000,000 and a penalty of imprisonment for up to 3 years.

The above regulation shows that certain lending based Crowdfunding models can be encumbered with significant legal risk, based on possible attempts to qualify this type of crowdfunding as banking activity requiring permission. Thus, in practice and given the present legal status, operators of platforms envisaging lending based Crowdfunding who wish to avoid unnecessary administrative burdens or penal liability should seek to create models that envisage financing taking place directly between the financier and beneficiary (the operator's role in this case is limited to bringing together the financier and beneficiary and to handing over the monetary resources).

### 3.2 Intermediating in trading of financial instruments

The basic function of a Crowdfunding platform is to bring together someone seeking financing with an investor, which can take place on the basis of acting on behalf of the originator of a project, through presenting his offer to potential investors, or by bringing together a seeker of finance with an investor, so as to bring about the conclusion of a transaction between them. In this second case, the platform would not represent the originator of an idea and would not act in his name. In addition, platforms can provide both sides with an indispensable "vehicle", or in other words a company, on the basis of which the originator's undertaking will be conducted after the necessary financial resources for this purpose have been obtained from participants.





The scope of regulations applicable to the platforms participating in organising equity Crowdfunding will to a certain degree be determined by the type of equity rights participants will obtain in exchange for the provided financing. Simplifying, this reduces to the reply to the question whether the equity rights received by a financing participant in the company, which is to conduct financing of the undertaking, will qualify as a financial instrument in the meaning of the Trade in Financial Instruments Act dated 29 July 2005.

Should Crowdfunding be organised on the basis of a limited liability company [*spółka z o.o.*], and participants financing the originator's project receive shares in such a company, then the platform's activity will not be a regulated activity, irrespective of which of the two formulae indicated above is taken, and more specifically brokerage activity.

If, however, the participants should acquire shares, whether in joint stock companies [*spółka akcyjna*] or limited joint stock partnerships [*spółka komandytowo-akcyjna*], then it will be necessary on each and every occasion to assess the activity of the platform from the point of view of the requirements for brokerage activity. This will be so because shares comprise financial instruments in the meaning of the Trade in Financial Instruments Act and intermediation in trade therein is subject to the regulations of this act.

Where the platform should happen to act and appear in the name of the project originator, carrying out a collection of funds in his name, this can be understood as an offer for participation in the company and in consequence a kind of brokerage activity may come into play, based on offering financial instruments. On the other hand, where the role of the platform is to bring together the parties to the transaction for the purpose of concluding a transaction between them, consideration should be given to brokerage activity as based on accepting and passing on instructions for the acquisition of financial instruments.

### 3.3 Prospectus requirements

For a limited joint stock partnership [*spółka komandytowo-akcyjna*] or joint stock company [*spółka akcyjna*] being a Crowdfunding vehicle to be able to seek financing through a public share offering, it should previously draw-up an issue prospectus, obtain confirmation thereof from the Polish Financial Supervision Authority [*Komisja Nadzoru Finansowego – KNF*] and make use of the intermediation of a brokerage house is performing the offer. The necessity to prepare and confirm in formal procedure the extensive document that an issue prospectus very often comprises is at odds with the idea of free access to financial resources which lies at the root of Crowdfunding, not to mention the significant costs that the originator would have to incur in drawing-up the prospectus.

The Public Offerings, Terms and Conditions for Introducing Financial Instruments into Organised Trade, and Public Companies Act dated 29 July 2005 envisages a series of exceptions from the prospectus requirement, for instance waivers from this obligation for low value public offerings, where the total financial value of financing obtained in this way is not to exceed EUR 100,000 over a 12-month period. Such an offer would be excluded from the prospectus obligation, as also from mandatory intermediation by a brokerage house.

Should, however, the needs of the originator for the undertaking be greater than EUR 100.000 and the prospectus requirement constitutes a too great an organisational and financial burden, Crowdfunding can be organised on the basis of participation in a limited liability company [*spółka z o.o.*]. Shares in a



limited liability company are not securities, and the act on public offerings will not apply to public proposals for taking hold of these, and in consequence such an offer to join a company would not require an issue prospectus.

### 3.4 Regulation of Crowdfunding under the Investment Funds Act and the AIFMD regime

In planning the obtaining of funds for a certain kind of undertaking through Crowdfunding, the beneficiary will have to consider the possible application to his planned activity of the regulations in the Investment Funds Act dated 27 May 2004.

At present, activities based on placing funds in certain rights (e.g. securities, receivables, derivative instruments), where these funds have been gathered from other persons through a proposal to enter into an agreement, the object of which is participation in such an undertaking, can be performed solely through the form of an investment fund on principles regulated by the Investment Funds Act.

Thus, should an originator seek to make use of Crowdfunding to obtain financial resources which would then be invested in rights to assets such as shares, securities or derivative instruments, for the purpose of increasing the value of the funds obtained, it should carry out a thorough-going analysis of the planned activity from the point of view of the requirements specified in the Investment Funds Act. The regulations concerning investment fund activity will not, on the other hand, constitute a barrier to obtaining resources through Crowdfunding for financing commercial undertakings based on manufacturing, trading or services activity, or in other words the activities typically undertaken by start-ups.

It is possible to come to similar conclusion on the basis of the AIFMD, which will shortly be implemented in Poland and will regulate the activity of Alternative Investment Funds (e.g. some private equity type funds). It thus seems that the implementation of AIFMD in Poland (the draft bill should be published towards the end of 2014) should not entail any significant new limitations on the operation of equity Crowdfunding in Poland.

### 3.5 The Payment Services Act

Operators of Crowdfunding platforms normally gather resources paid-in by funders and then, after gathering together a specified amount, transfer these to the target beneficiary. There might also be intermediation within the framework of specified Crowdfunding models in transferring resources from beneficiaries to financiers (e.g. in the framework of equity Crowdfunding). There is no doubt that they thereby perform a payment transaction in the meaning of the Payment Services Act dated 19 August 2011, which in turn implies that essentially they are providing a regulated payment service in the meaning of the Payment Services Act.

Despite the intermediation in payments performed by Crowdfunding platform operators being a payment transaction in the meaning of the Payment Services Act, it should be assumed that in most cases operators will not have to obtain permission for providing payment services. This is because most platforms will doubtless fulfil the prerequisite for applying an exception specified in article 6 point 2 of the Payment Services Act. Pursuant to this regulation, the requirements specified in the Payment Services Act do not apply to payment transactions between a payer and recipient of the actions carried out through the intermediation of the performing person, intended to bring about the conclusion between the payer and recipient of the said agreement, or containing such an agreement in the name



of or on behalf of the payer or recipient. Undoubtedly, in facilitating for beneficiaries the presentation of their offers on a platform, the operator of that Crowdfunding platform perform an activity aimed at the conclusion of an agreement between a funder and a beneficiary.

Simultaneously, it is worthwhile noting that application of the above cited exception in practice calls forth much controversy. The European Commission has drawn attention to this, and it is at present conducting a revision of the PSD<sup>38</sup>, which is the basis for the Payment Services Act. It is worthwhile following the work of the European Commission, because possible changes concerning the abovementioned exception might be of significance for the operators of Crowdfunding platforms.

### 3.6 Anti-money laundering regulation

On account of the binding regulations concerning money laundering and the financing of terrorism, all activity based on intermediation in transferring monetary resources should also be analysed from the point of view of the requirements imposed by the Counteracting Money Laundering and Financing of Terrorism Act dated 16 November 2000. From the perspective of the Crowdfunding platform operator, the key thing is to determine whether it will be one of the obligated institutions in the meaning of the Counteracting Money Laundering Act.

At the moment, there are no regulations which would refer directly to the operators of Crowdfunding platforms. Determining whether an operator is subject to the regulations on counteracting money laundering will depend in great measure on the Crowdfunding model adopted by the given operator. It seems that the most disseminated Crowdfunding models in Poland at the moment and simultaneously the simplest Crowdfunding models (donations based and rewards based Crowdfunding), will essentially not be subject to the regulations concerning counteracting of money laundering. Crowdfunding platform operators active in the framework of the models referred to do not conduct regulated activity which would imply the necessity of applying the regulations of the Counteracting Money Laundering Act. The role of the operators in this case comes down to just bringing together financers with beneficiaries.

The situation of platform operators based on the equity or lending models seems to be significantly more complicated. In this case, depending on the activity structure adopted for the platform, the operator may conduct regulated activity or activity in the nature of a financial institution in the meaning of article 4 section 1 point 7 of the Banking Law.

In such a case, the operator would be treated as an institution that was obligated in the meaning of the Counteracting Money Laundering Act and would be obliged to apply the preventative measures against money laundering and financing of terrorism envisaged by this act.

Further, attention should be drawn that a Crowdfunding platform operator performing exchange of currencies (e.g. converting the financer's currency to the beneficiary's currency) will be subject to the Counteracting Money Laundering Act due to the regime of this act clearly encompassing activity based on the exchange of currency.

<sup>38</sup> Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC



### 3.7 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

#### **Act on Rendering Electronic Services dated 18 July 2002**

Since Crowdfunding platforms are run using the Internet, there should be no doubt that the services provided by platform operators (even if they just come down to bringing together financiers and beneficiaries) should be qualified as being, as to principle, services provided by electronic means in the meaning of the provisions of the Act on Rendering Electronic Services. In association with such a qualification, Crowdfunding platform operators should possess regulations for the provision of services and adhere to the regulations concerning processing the personal data of persons using a platform, as specified in the Act on Rendering Electronic Services.

#### **Consumer Credit Act dated 12 May 2011**

A loan agreement is a standard lending based Crowdfunding instrument. In this context, it should be determined whether agreements entered into within the framework of a Crowdfunding platform should be treated as being consumer credit agreements in the meaning of the act on consumer credit. Also of key importance in this case is the specified model for lending based Crowdfunding. The Consumer Credit Act refers only to loan agreements in which the creditor is an entrepreneur in the meaning of the Polish Civil Code. It should be assumed that in the case of most models where loans are entered into directly between the financier and beneficiary, we will not be dealing with an entrepreneur on the financier's side. Practice hitherto shows that in most cases these are consumers. In such case, a loan agreement entered into between a financier and beneficiary will not be qualified as being a consumer credit agreement in the meaning of the act on consumer credit. On the other hand, the regulations on loan agreements contained in the Civil Code might apply thereto.

#### **Commercial Companies Code Act dated 15 September 2000**

Equity Crowdfunding can be organised on the principles of participation in a limited liability company [*spółka z o.o.*]. Shares in a limited liability company are not securities and the Public Offerings Act would not apply to public proposals to take hold of these, and in consequence such an offer to join a company would not require an issue prospectus.

The general legal nature of a limited liability company [*spółka z o.o.*] nonetheless imposes the view that a limited liability company seems to be the least appropriate form for Crowdfunding projects. This relates to both trade in shares and the internal organisation of the company. The actual formal requirements for performing trade in limited liability company shares are already in conflict with the nature of Crowdfunding activity conducted through the Internet because, pursuant to article 180 of the Commercial Companies Code, transfer of a share should be performed in written form with signatures confirmed by a notary public. Further, the limited liability company was conceived rather as a form for conducting enterprises with a smaller number of shareholders, who as to principle possess the right to personally audit company affairs. In this context, what will be particularly important will be the appropriate formulation of the articles of association for the company which is to be the Crowdfunding vehicle, so as to maximally safeguard the key role of the originator in the company, whilst simultaneously restricting the rights of other shareholders in all cases where this is justified by virtue of



the specific nature of their participation in the company. For instance, it is possible to institute a supervisory board in a limited liability company, and in such a case the individual right of control can be excluded. On the other hand, the limited liability company is generally used in equity Crowdfunding due to the low minimum initial share capital threshold (PLN 5,000 for a limited liability company [*Spółka z o.o.*] in comparison with PLN 50,000 for a limited joint stock partnership [*Spółka komandytowo-akcyjna*] and PLN 100,000 for a joint stock company [*Spółka akcyjna*]).

#### Foreign Currency Act dated 27 July 2002

Crowdfunding platform operators may also carry out currency exchanges in the course of their activity. This occurs in particular when a financing payment is provided in a currency other than a currency accepted by the beneficiary. In such a case, the platform operator converts the currency at an exchange rate determined in advance, and thus conducts activity based on the exchange of currencies.

Due to the definitional limitations encompassed by the Foreign Currency Law, this nonetheless does not automatically mean that an operator conducts bureau de change activity. This is because the regulations of the Foreign Currency Law imply that bureau de change activity relates to foreign currency in physical form (banknotes and coinage). Meanwhile, it should be assumed that in the decided majority of cases, if not always, the exchange of currency in Crowdfunding platforms will relate to currency in non-physical form. Thus, so long as Crowdfunding platform operators do not perform currency exchanges in physical form, they will not have to register their activity in the register of bureau de change activity maintained by the chairman of the National Bank of Poland [*Narodowy Bank Polski – NBP*].

The conducting of foreign exchange activity by a Crowdfunding platform operator may, on the other hand, give rise to the necessity of the operator applying the regulations of the Countering Money Laundering Act.

## 4 Lessons arising from Polish regulations for a possible harmonized European Crowdfunding regulation

### 4.1 Role model ("to do")

Poland does not possess regulations dedicated to Crowdfunding. On the one hand, this causes the necessity to apply numerous regulations of various kinds, not always adapted to the specific nature of Crowdfunding, but on the other hand this ensures flexibility in market development. It seems that potential regulations at the EU level at this stage should adapt the present regulations to the specific characteristics of Crowdfunding (including the removal of existing barriers), rather than seeking to provide a separate, comprehensive regulation of this phenomenon.

### 4.2 Aspects that should be avoided ("don'ts")

An approach in accordance with which the legislator holds back from adopting regulations concerning Crowdfunding until this market has developed seems appropriate. The European Union should not too quickly adopt regulations which might slow down the development of Crowdfunding and the creation of innovations associated therewith.



## 5 Conclusion

At present, there is a lack of regulations in Poland which would be clearly addressed to participants in Crowdfunding (platforms for Crowdfunding, financiers and originators). Many regulations of a general nature might be applied in situations where specified prerequisites are fulfilled. These regulations include, in particular, those concerning intermediation in the trade in financial instruments, banking regulations, regulations concerning payment services, capital market law, the regulations concerning the counteraction of money laundering or regulation of rendering electronic services.

We should not expect the adoption of dedicated Crowdfunding regulations in the near future. The Polish government does not intend to intervene in this market at the present early stage of its development. It has been announced, however, that the operation of the lending based and equity Crowdfunding market will be monitored, and thus if we can expect new regulations in the future it will be precisely with regard to these models.

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## Portugal

### 1 Recent developments in the market of Crowdfunding in Portugal

There are three broad types of Crowdfunding. In Portugal, the two main types of Crowdfunding platforms operate under the Lending Model and the Rewards Model:

#### 1.1 The Equity Model

The Equity Model usually implies, in exchange for a contribution or investment, the assignment of shares or warrants to buy shares of the company or the granting of a percentage share or fixed return from any revenues (or profits) generated by the company in the future.

This Model is still difficult to implement in Portugal due to the lack of specific legislation on this subject, once, according to the current Portuguese legislation, the offering of shares or any kind of equity interest in share companies would probably imply the compliance with the requirements of the Portuguese Securities Exchange Commission ("CMVM") including the registry of the platform as a financial intermediary at the CMVM and (eventually) the approval of a prospectus (according to the requirements established in the Portuguese Securities Code).

#### 1.2 The Lending Model (more specifically, The Pre-sale Lending Sub-model)

Traditionally, the Lending Model involves a loan to fund the project, with an expectation of monetary reimbursement in the form of interest. However, this model may be difficult to be implemented in Portugal, once it is qualified as a credit or financial transaction, which may only be carried out in Portugal by duly authorised credit or financial institutions.

Probably due to this, most of the Crowdfunding platforms in Portugal are based in a so called Pre-sale Lending Sub-model, where the finished product or service is promised in return for and according to the contributor's loan (usually through an assessment of the fair market value of the product/service). Pre-sales are also often combined with a Rewards Model.

#### 1.3 The Donations or Rewards Model

In the Donations or Rewards Model, individuals make a financial contribution to a project without any expectation of a financial return on that contribution.

The most common model in Portugal is probably the Rewards Model, where the individuals that fund the project are often recognized for their support with rewards that can increase according to the amount of money provided by each individual.





## 2 Recent developments regarding Crowdfunding regulation in Portugal

Portugal has continued to discuss and develop the draft of a specific legislation on Crowdfunding. This draft was made public and during the last twelve months there have been audits of Crowdfunding platforms operating in Portugal, Regulatory Authorities (as Portuguese Securities Exchange Commission and Bank of Portugal) and specialized professionals in that area.

Although, currently, most of Portuguese Crowdfunding platforms are based in a Rewards Model, sometimes combined with a Pre-sale Lending Sub-model, the draft made public already foresees several models of Crowdfunding, as the Equity Model, the pure Lending Model, the Pre-sale Lending Sub-model and the Donations or Rewards Model.

According to the draft made public, besides the authorisation and supervision of Portuguese Securities Exchange Commission ("CMVM") for the Lending and Equity Model, it will also be required a communication to the Portuguese Authority for Consumer's Protection ("*Direcção Geral do Consumidor*") just for information purposes.

This new Crowdfunding legislation also foresees several information requirements (including transparency obligations for the Crowdfunding beneficiaries), limits to the investment and prevention of conflicts of interest.

## 3 Current regulation of Crowdfunding in Portugal

### 3.1 General regulation

#### Equity Model

With the current legislation it is difficult to implement this model in Portugal, due to the fact that the public offering of shares or any kind of interest in a limited liability company by shares ("*sociedade anónima*") to unqualified investors is deemed by the Portuguese Securities Code as an activity of financial intermediation which can only be carried out by duly authorised Financial Intermediaries (that comply with all the requirements established by CMVM and "*Banco de Portugal*").

This qualification will involve the registry at CMVM as a Financial Intermediary and the compliance with all the requirements of supervision of CMVM that also includes the approval and issuance of prospectus regarding each offer and several requirements to guarantee the quality of the information made available to public investors, to prevent conflict of interests, etc.

The only exemptions we may appoint as applicable, is the offering of the shares just to qualified investors to the potential investors of an interest ("*quotas*") in a limited liability company by quotas ("*Sociedade por quotas*"), once this kind of interest does not qualify as a security, according to the Portuguese Securities Code. However, this type of legal structure is not suitable for Crowdfunding financing method, once this kind of company is not advisable for projects involving a high number of investors.



We only found one platform in Portugal offering the Equity Model, although, to our knowledge, not registered as a Financial Intermediary at CMVM.

We have no public pronouncements on this matter by the Portuguese Regulatory Authorities. A new legal regime to govern Crowdfunding is being discussed.

### Lending Model

A traditional Lending Model that involves the lending of money through the Crowdfunding platform with the expectation of reimbursement in the form of interest probably could only be carried out in Portugal by a credit or financial institution, duly authorised by the Bank of Portugal ("*Banco de Portugal*"). Therefore, the Crowdfunding platforms would have to be authorised by the Bank of Portugal and would be under the supervision of this entity.

However, the Pre-sale Lending Sub-model (where the finished product or service is promised in return for and according to the contributor's loan) does not fall under the financial services legal regime and, therefore, under the authorisation and supervision of CMVM.

### Donations or Rewards Model

The most common model in Portugal is the Rewards Model, where the individuals are recognized for their support with rewards that can increase according to the contribution of each individual, thus this model also do not require any licence/authorisation nor fall under the supervision of CMVM or Bank of Portugal. Sometimes we may find this model also combined with the Pre-Sale Lending Sub-model, where besides the finished product/services, individuals are also recognized for their support with a specific reward (for example, public recognition).

### 3.2 Licence under the CMVM and Banco de Portugal

As already stressed above, Portuguese Crowdfunding platforms that adopt an Equity Model or a Lending Model (where the reimbursement is made in the form of interest) may be qualified as financial intermediary (in the first case) or as a credit or financial institution (in the second case).

According to the Portuguese Securities Code ("CVM") the services and activities of investment in financial instruments (as, for example, receive and order the transmission of shares on behalf of investors and the offer shares to the public), like other financial activities, may only be carried out by Financial Intermediaries, duly registered at CMVM.

This registry may depend on an authorisation to be issued by Banco de Portugal (depending on the specific activity to be carried out), the submission of identification information concerning the Financial Intermediary and the evidence that the company has the necessary means (human, material and technical) to carry out the intended activity.

Besides the mandatory registry, the Securities Code also establishes several periodic information requirements to be met by Financial Intermediaries (with a supervision purpose), to check if the means comply with the provisions of internal organization and compliance requirements foreseen in Securities Code.

In what concerns the financial or credit institutions, it is mandatory the registry at Banco de Portugal, before starting the activity, which is made through the submission of identification information



concerning the company to the Bank of Portugal. Also in this case periodic information must be disclosed to Banco de Portugal for supervision purposes.

As for the eventual application of the Payment Services Directive to Crowdfunding platforms, we understand that transfer of funds through operator may constitute a money remittance service, and therefore an authorisation from Bank of Portugal would be required. However, an exemption established for authorised commercial agents may be applicable to Crowdfunding platforms.

### 3.3 Prospectus requirements

According to Portuguese Securities Code, all public offers of shares must be preceded by the issuance of a Prospectus which must be previously approved by CMVM. However, most Crowdfunding platforms will fall in the exemption established for offers with a total value under EUR 5 million, calculated during a period of 12 months.

### 3.4 Regulation of Crowdfunding under the AIFMD regime

The implementation of the Alternative Investment Fund Managers Directive (AIFMD) has not been executed in Portugal, although all EU member states should implement this Directive until July 22, 2013.

According to the text of AIFMD Directive, Crowdfunding platforms may be deemed as offers of AIF's, however we will have to wait for the implementation to take a position on this matter.

### 3.5 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- Decree-Law nr. 375/2007, dated November 8<sup>th</sup>, that establishes the legal regime of Venture Capital;
- Law nr. 25/2008, dated June 5<sup>th</sup>, concerning the prevention of money laundering;
- The future specific legal regime for Crowdfunding platforms that is currently in the process of approval.

## 4 Lessons learned from Portugal's regulation for a possible harmonized European Crowdfunding regulation

Currently there are no dos or don'ts for a European regulation from Portugal.

## 5 Conclusion

As the legal regime of Crowdfunding has not been yet approved in Portugal, only the Donations or Rewards Model and the Pre-sales Model have seen development among Portuguese Crowdfunding platforms.



According to Portuguese Banking Law and Securities Code, platforms that adopt the traditional lending model and the equity model may fall under the legal regime of financial institutions or financial intermediaries, although the supervision authorities have not made public statements on this matter.

This regulatory framework is expected to have great developments in the following years due to the importance of access to capital of small and medium sized companies in Portugal.

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## Romania

### 1 Recent developments in the market of Crowdfunding in Romania

During the last 12 months there were the following significant developments in Romania regarding Crowdfunding:

#### 1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

Most of the Crowdfunding platforms existing in the Romanian market continue to provide financing for small to medium-size companies. As such, the following platforms supported projects during the last year:

Multifinantare<sup>39</sup> platform remains an important Crowdfunding platform in Romania, supporting capital, creative and charity projects, managing to intermediate a distance phone and video-phone project amounting to EUR 800,000 in 2014, while other agriculture projects are still pending.

AngelConnect<sup>40</sup> (a platform of VentureConect) reports to have intermediated, in 2014, meetings between Romanian and Bulgarian IT entrepreneurs with possible investors. Local media reported that the number of submitted projects with VentureConect raised about 20-30%<sup>41</sup> since their establishment in 2010.

TechAngels<sup>42</sup> seems to discontinue its activity, since no project was financed in the last year.

#### 1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

As in the past year, no Romanian platform offers financing based on the Lending Model.

#### 1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

As in the past years, most of the Romanian Crowdfunding platforms promote the Donation or Rewards Model.

In 2014, Multifinantare Project financed one project in the artistic sector in amount of EUR 1,500. Other projects are still pending, such as a project regarding a blood substitute amounting to EUR 2,000.

Since the end of 2013, Crestem Idei managed to finance another 11 projects and obtained more than EUR 20,000.

<sup>39</sup> <http://multifinantare.ro>

<sup>40</sup> <http://www.angelconnect.ro>

<sup>41</sup> <http://www.zf.ro/business>

<sup>42</sup> <http://www.techangels.ro>



We are Here<sup>43</sup> and Pot si EU<sup>44</sup> supported social, cultural, creative, instructive and technologic projects, while Mindfruit's<sup>45</sup> platform is currently closed.

In addition, new Crowdfunding platforms have been created, such as:

- a) Kazuu<sup>46</sup>, a platform with a wide array of categories on the platform including agriculture, technology, sports, traditions, arts, TV shows. Kazuu has two projects pending in technology field, initiated in August 2014;
- b) BursaBinelui<sup>47</sup>, a platform created and supported by the Romanian Commercial Bank in partnership with Euplatesc, whereby non-government organisations may obtain financing directly from the investors. Also, a competition organized by the platform allows the organisations to double the amounts raised, up to EUR 5,000. In 2014, the highest amount raised through BursaBinelui was EUR 43,900;
- c) GoLibre<sup>48</sup>, a Crowdfunding project which will be activate in the field of travelling. Currently GoLibre is in the project phase and has its head office in Germany.

## 2 Recent developments regarding Crowdfunding regulation in Romania

Crowdfunding is not yet regulated as such in Romania. However, a draft proposal of the law for participatory financing development<sup>49</sup> ("**Crowdfunding Project**") was initiated by the Department for SME Business Environment and Tourism in September 2014. It is intended that the governmental strategy for SME development is implemented until 2020.

The Crowdfunding Project should apply only to the Equity and Lending Model, requiring that the investor receives shares, stocks or receivables which produce interests for a period of time. The maximum amount that can be collected is EUR 1.000.000 for one project, provided that an individual cannot participate with more than EUR 1,000 per project and EUR 5,000 cumulated per projects on each platform within a 12 month-period.

The entities operating Crowdfunding platforms shall have a minimum share capital of EUR 25,000, shall maintain a professional liability insurance and shall be registered with the register held by the Romanian Financial Supervisory Authority ("**FSA**").

The "all or nothing" principle will guide the financing, which means that if the financing is not raised, the amounts shall be reimbursed to the investors. The initial contribution of the developer shall be of minimum 5%.

<sup>43</sup> <http://www.we-are-here.ro>

<sup>44</sup> <http://potsieu.ro/>

<sup>45</sup> <http://www.mindfruit.ro>

<sup>46</sup> <http://www.kazuu.ro>

<sup>47</sup> <https://www.bursabinelui.ro/BursaBinelui/Home/Home>

<sup>48</sup> <http://golibre.co>

<sup>49</sup> <http://imm.gov.ro/CMS/o/PublicMedia/GetIncludedFile?id=520>



It is expected that a tax exemption shall apply to dividends returning to the business angels (without exceeding the amount of the loan granted) and to the exiting package.

### 3 Current regulation of Crowdfunding in Romania

There are numerous laws that might potentially apply to the Equity and Lending Model, depending on the finance structure used by the Crowdfunding platform, including:

- rules regarding intermediation, solicitation and distance selling, irrespective of the model used by the platform;
- banking regulation, when the funding takes the form of loans;
- securities regulation, when equity investments (or investments in debt securities) are requested;
- regulation of payment services, when funds are paid in through the Crowdfunding platform;

Also, other regulations may apply, such as anti-money laundering, combatting the financing of terrorism laws.

The Donation/Reward Model usually falls well outside the definition of financial services, financial or investment instruments and therefore falls outside the restrictive aspects of financial regulation.

#### 3.1 Regulation of lending activity

The lending activity in Romania, conducted habitually, is subject to supervision by the National Bank of Romania ("**NBR**") and may be carried out only by financial institutions, as well as non-banking financial institutions ("**IFN**").

The main regulation applicable to financial institutions is the Government Emergency Ordinance no. 99/2006 regarding credit institutions and capital adequacy as further amended, (the "**Banking Law**"), as well as a series of laws, ordinances and decisions, as well as special regulations issued by NBR. Also, the operation of IFN acting in the field of granting loans (such as leasing companies and non-banking financial institutions) is subject to dispositions of Law no. 93/2009 regarding non-banking financial institutions ("**IFN Law**").

In this respect, any entity providing loans (including leasing companies and non-banking financial institutions) must be licensed or, as the case may be, registered with the NBR and therefore, Crowdfunding platforms in Romania do not provide financing pursuant to this lending regulation.

However, currently financing pursuant to the Lending Model is theoretically possible, provided that the investor is a regulated entity and the initiator of the project complies with the applicable requirements of the financial institution and the general regulations applicable to lending activity.



In case the Crowdfunding Project becomes law, it shall apply to the Lending Model, requiring the Crowdfunding platform is registered with FSA and provides certain information to the users. In this respect, the Crowdfunding Project defines the participative loan as a loan made through alternative financing platforms, under which receivable titles are issued granting the investors the right to interest during the period until final maturity.

### 3.2 Prospectus requirements

According to Romanian laws, public offering of securities as well as the admission to trading on a regulated market of company shares are subject to the approval of a prospectus by the FSA, pursuant to Law no 297/2004 on capital markets ("**Capital Markets Law**"). In order to be listed on the capital markets, a company shall be a joint stock company or a public company (i.e. a percent of its stocks are owned by public). The Capital Markets Law applies to offers of securities in Romania, irrespective of where the issuer is located.

However, preparation and publication of a prospectus is not required for the offer of securities (i) addressed solely to qualified investors and/or (ii) addressed to fewer than 150 natural or legal persons other than qualified investors for each Member State; and/or (iii) addressed to investors who acquire securities each the equivalent in RON of EUR 100,000 at the most, for each separate offer; and/or (iv) whose denomination per unit is the equivalent in RON of EUR 100,000 at the most; and/or (v) whose total amount in the EU is lower than the RON equivalent of EUR 100,000, calculated for a period of 12 months<sup>50</sup> as well as in relation to certain securities (such as securities offered, allotted or to be allotted in connection with a merger or division, for dividends paid in the form of shares to existing shareholders in the same class as those which give right to such dividends) and in other cases specified by regulations issued by ASF, under the law.

The Capital Market Law defines securities as shares in companies and other securities equivalent, traded on the stock market, bonds and other debt securities, including government securities with maturity more than 12 months, negotiable on the capital market as well as any other securities normally dealt in, giving the right to acquire any such transferable securities by subscription or exchange, giving rise to a cash settlement, excluding instruments of payment. Therefore, a donation, even with financial return, will not be considered to fall within the public-offering rules.

### 3.3 Regulation of Crowdfunding under the AIFMD regime

Since the last update, Romania did not transpose the Directive 2011/61/EU of the European Parliament and of the Council on Alternative Investment Fund Managers ("**AIFMD**"). Discussions were made between FSA and the Romanian Ministry of Public Finance and on November 25, 2013 a revised draft law project (the "**Project law on alternative investment fund managers**") was published for public consultation on the website of the Romanian Ministry of Public Finance.

In case it will come into force the Project law on alternative investment fund managers shall apply to entities established in Romania whose main business activity is the management of one or more alternative investment funds ("**AIF**"), irrespective of whether the AIF is established in Romania, in another Member State or in another third country, including investment compartments thereof, which raise capital from at least two investors in order to place the funds in accordance with a defined

<sup>50</sup> Pursuant to article 15 of FSA Regulation no 1/2006.





investment policy for the benefit of those investors.

The Project law on alternative investment fund managers shall also apply to alternative investment fund managers („AIFM”) established in third countries who manage and/or distribute equities of one or more AIF established in Member States or third countries for which Romania is a reference member state of that AIFM.

### 3.4 Licence under the Payment Services Directive

Payment services in Romania are mainly regulated by the Government Emergency Ordinance no. 113/2009 regarding payment services (“**Payment Services Law**”), which transposed the Payment Services Directive 2007/64/EC, as well as by the provisions of the NBR Regulation no. 21/2009 regarding the payment institutions.

In Romania, payment services may be provided by payment services providers, including credit institutions, entities issuing electronic money and payment institutions, authorized by the NBR. The authorization to provide payment services is not applicable to entities licensed as deposit-taking banks, as e-money issuers or as IFN.

A payment institution authorized in another EEA member state can use the EEA passport system under the payment Services Directive 2007/64/EC by making a notification in its home member state in accordance with the procedures in that member state.

Pursuant to the information available to us, no Crowdfunding platform in Romania currently provides payment services. However, should the investors pay their investment amounts to the operator of the Crowdfunding platform who then passes the funds to the entrepreneur, such transfer of funds could occur and the operator of the Crowdfunding should be licenced as a payment services provider.

As an alternative, to avoid licensing requirements the operator of a Crowdfunding platform may use an external provider for processing payments rather than acting itself as a services provider.

### 3.5 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

#### 3.5.1 Regulation of marketing and distance selling

Marketing and distance-selling (including through web-sites, telephone, fax, e-mail) are subject to dispositions of Law no. 365/2002 on electronic commerce, Government Emergency Ordinance no. 34/2014 on consumers protection in contracts concluded with professionals, which transpose the Directive no. 2011/83/UE regarding the consumer rights, and Government Ordinance no. 85/2004 on consumers protection in case of distance contracts for financial services as well as the Consumer Code.

Furthermore, if the financed company is a professional, we could imagine a hypothesis in case of the Rewards Model where the investor receives goods in exchange to its contribution to a project. In this respect, the obligations provided in Government Ordinance no. 21/1992 regarding the consumer protection may apply.



To avoid sanctions imposed by the National Authority for Consumer Protection (“NACP”), Crowdfunding platforms in Romania shall comply with the restrictions set by the marketing and distance-selling regulations.

### 3.5.2 Anti-money laundering (“AML”) requirements;

According to the Law no. 656/2002 on preventing and sanctioning money laundering and instituting measures for preventing and fighting against financing the acts of terrorism („Law no. 656/2002”), financial institutions (such as banks, institutions issuing consumer or commercial credit, mortgage/real estate lenders, leasing companies); financial investment service providers as well as individuals or corporate traders of goods and/or services with a minimum EUR 15.000 cash turnover<sup>51</sup> must observe the AML requirements, including rules on client identification, where applicable, identification of the beneficial owner and taking risk-based and adequate measures to verify his identity, obtaining information about the purpose and intended nature of the business relationship as well as conducting ongoing monitoring of the business relationship. Any transaction suspected of involving money, laundering or terrorist financing must be reported to the NOPCML at once<sup>52</sup>.

In this respect, operators of Crowdfunding platforms falling under the dispositions of Law no. 656/2002 must comply with AML rules and perform anti money laundering or terrorist financing checking.

### 3.5.3 Data Protection

A personal data operator gathering information related to an individual either identified or identifiable (namely an individual that may be directly or indirectly identified by reference to a identification number or to one or several specific factors corresponding to his/her physical, physiological, psychological, economic, cultural or social identity) must obtain the explicit and unequivocal consent of the individual concerned and register with the National Authority for the Surveillance of Personal Data Processing (the “NASPDP”).

Since the Crowdfunding platform may hold sensitive information about its users, it should notify the NASPDP, directly or through a representative, before any processing of personal data. Moreover, if the personal data will be transferred outside Romania, an additional approval must be obtained from the NASPDP in respect of the transfer abroad.

## 4 Lessons learned from Romania's regulation for a possible harmonized European Crowdfunding regulation

The small number of operative Crowdfunding platforms in Romania did not raise the burning need for adopting a regulation in this respect until now. However, the Crowdfunding Project is expected to create an important and secure frame for intermediation between companies and the investors.

<sup>51</sup> Pursuant to article 10 of Law no 656/2002.

<sup>52</sup> Article 3 paragraph (6) of Law no 656/2002.



As such, it is welcomed that the new proposed regulation impose the Crowdfunding platforms acting according to the Equity Model to meet certain financial and ethical standards, as well as to be subject to regulatory requirements.

However, the licensing and prospectus requirements should rather be excepted and nevertheless not included to a possible European regulation as regards Crowdfunding platforms.

## 5 Conclusion

Some of Crowdfunding platforms which already existed in Romania have developed in the last year and managed to intermediate more projects. Other platforms appeared while other closed their activity.

Our research regarding the activity of Crowdfunding in Romania indicates that 90% of the projects are financed through donations, with a few projects in the field of innovation.

Currently there are a few Equity Model projects. The Lending Model is inexistent.

From the technologic point of view, Romania benefits from a high technology which makes it easier for the operators of Crowdfunding platforms to use the Lending Model.

However, the capital raised from the investors is still low and the main funds are obtained from non-governmental organisations and private companies/individuals.

Also, there is a lack of collaborative movement which is essential in the Crowdfunding activity as well as investment culture. Most of the investors tend to invest their money directly in the collector fund, without contacting platform operators to intermediate the transfer.

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## Slovak Republic

### 1 Recent developments in the market of Crowdfunding in Slovak Republic

Compared to year 2013, Crowdfunding is attracting slightly more attention as a fund raising, rather than investment alternative. Companies have become much more aware of Crowdfunding and are organizing conferences and courses on this topic. Furthermore, there have been attempts of small businesses and public interest organizations at attracting investments via Crowdfunding. Despite these developments, there are almost no functioning Crowdfunding platforms to date as it is still only an emerging trend in the Slovak Republic. This results in Crowdfunding not being as popular as in other countries yet. The legal framework and applicable models have in principle remained unchanged since the publishing of 2013 Crowdfunding Review.

#### 1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

While there is currently no working Crowdfunding platform, we have perceived minor attempts to establish such platforms. Most of these have ceased their operations, most likely due to poor marketing, which in turn resulted in a lack of interest from the public.

#### 1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

Since 2013, there had been no development in the Lending Model regulation.

#### 1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

The Donations Model remains as the model most viable and applied, mainly by organisations promoting some public interest.

### 2 Recent developments regarding Crowdfunding regulation in Slovak Republic

In the past year, the main Crowdfunding regulations have remained unchanged. In general, Crowdfunding largely remains unsupported in any way from the state. This also concerns a lack of any legislative motions that would regulate Crowdfunding specifically.



### 3 Current regulation of Crowdfunding in Slovak Republic

Crowdfunding in Slovak Republic is regulated by various acts, namely the Civil Code and the Commercial Code. There are currently no Acts that would regulate Crowdfunding per se.

#### The Equity Model

Offering of securities by the company would constitute a public offer of securities, as defined by Section 120(2) of the Act no. 566/2001 on Securities and Investment Services (the "Securities and Investment Services Act"). A public offer of securities is usually subject to the obligation to publish a prospectus. The issuer may be exempt from such obligation, if the total value of shares issued within the EU would be less than EUR 100,000 calculated over the period of 12 months (some other standard exemptions exist, but these are unlikely to apply in this case).

If the Crowdfunding platform facilitates the offering of securities, this activity constitutes an investment service. Subject to Section 54 of Securities and Investment Services Act, the Crowd-funding platform would have to obtain a license to provide such investment services from the National Bank of Slovakia (the "NBS"). There are no specific exemptions from this obligation available to Crowdfunding platforms.

#### The Lending Model

In the Lending Model a person lends certain amount of money and expects to receive the principal with interest. Two legal frameworks are in theory applicable, depending on the nature of lenders.

Lending is in general a regulated business, that may not be performed without a license under the Slovak Banking Act. It is however possible to be engaged in lending services based on a simple 'trade license', if performed in a non-banking manner – i.e. using personal funds of the lender. If the respective loan agreement is concluded by entrepreneurs who are acting within their regular business, upon the entrepreneurs' own responsibility, independently with the intention to make profit, the loan would be governed by the Act No. 513/1991 (the "**Commercial Code**"). Interest is a mandatory element of such relationship, which may or may not be mentioned expressly, but will nonetheless accrue.

By contrast, if the loan is provided as a one-off investment by a private person, i.e. is not provided systematically as a business of the lender, the relationship will be governed by Act No. 40/1964 (the "**Civil Code**"). Interest may or may not be agreed under such relationship and its regulation under the Civil Code is rather liberal.

Depending on the manner in which the Crowdfunding platform would function, it may be classified as an agent, assisting in the conclusion of the loan agreement between the parties. A simple trade licence for such activities would be required.

#### The Donations or Rewards Model

Two alternatives are in theory possible. The first one would be via the conclusion of donation agreement between the Creator and the Backers. Pursuant to section 628 of Civil Code, the donator transfers something or promises to transfer something free of charge and the donee accepts such gift



or promise. The donation agreement has to be in written form, if the gift is real estate, or if the gift is not transferred at the time of the agreement's conclusion.

A second option would be via the collection of funds. A Crowdfunding platform which would organise collection of funds under Donations or Rewards Model would have to obtain a simple trade licence.

The requirements of a rather obsolete Act No. 63/1973 on Public Collections and Lotteries (the "APC") may apply to the Donations Model. The APC applies to any activity by which voluntary donations are being collected from further unspecified members of the public (the "Public Collection") and imposes several restrictions. In particular, Public Collections may only be held for publicly beneficial purposes, such as humanitarian purposes, charity, education, sport, protection of cultural items, cultural heritage or the environment. Any Public Collection must be approved to the relevant Regional Authority (in Slovak: "obvodný úrad") or the Slovak Ministry of Finance. Records of the contributions must be kept and must be submitted to the Regional Authority or the Ministry of Finance after the Public Collection has finished.

Due to the aforementioned administrative requirements and the fact that Crowdfunding of certain types of projects (e.g. business start-ups) would rarely satisfy the conditions of public benefit, Crowdfunding platforms would likely have to refrain from the use of the Donations model. Instead, the Rewards model should be used where each project typically defines rewards for contributors (goods or services being results of the supported activity) and the contribution is structured as a sale of such reward, thus falling out of the scope of the APC.

### 3.1 Licence under the Banking Act

A bank interested in carrying out its activity in the Slovak Republic must obtain a license from the NBS. No relevant changes were introduced since 2013.

### 3.2 Prospectus requirements

A prospectus is usually required for the public offer of securities subject to the following exemptions:

A public offer of securities is exempted from prospectus requirement provided that the total value of shares issued within the EU would be less than EUR 100,000 (in words: one hundred thousand euros) calculated over the period of 12 months. In addition, certain other standard exemptions from mandatory publication of prospectus exist, but these are unlikely to apply in connection with Crowdfunding.

### 3.3 Regulation of Crowdfunding under the AIFMD regime

#### 3.3.1 Definition of an alternative investment fund ("AIF")

Pursuant to Section 4(12) of the Collective investment act, an AIF is either:



- a) special shares fund, i.e. a shares fund that is not a standard shares fund and into which funds are collected through public offering or a private offer to invest the funds so collected into the property covered by law or
- b) a collective investment entity with legal personality, which is a company or association established in the Slovak Republic, which collects money from several investors to invest them in accordance with a defined investment policy for the benefit of those investors

### 3.3.2 Operating company seeking funding

An operating company may fall under the definition of an AIF, if it meets the aforementioned criteria, mainly paragraph b), i.e. a company established in the Slovak Republic, which collects money from investors to invest them in accordance with a defined investment policy. It is important to note, that as a matter of general practise of typical start-up companies, the funds they are seeking are not usually invested further, as they are used to finance the basic activities of the company.

### 3.3.3 Project Company seeking funding

Same as Section 3.3.2 applies.

### 3.3.4 Crowdfunding Platform

As a matter of global practise, the Crowdfunding platform does not usually manage the investment provided. The Crowdfunding platform merely functions as an agent, providing the communications channel between subjects. Therefore, it will most likely neither qualify as an AIF nor an AIF manager (the "AIFM"). However, the marketing of securities and units of collective investment may only be performed only by an AIFM. In such case, the Crowdfunding platform would have to obtain a license from the NBS.

## 3.4 Licence under the Payment Services Act

Crowdfunding platforms intending to provide payment services in Slovakia have to be properly licensed to carry out such activity. In case the Crowdfunding platform would become only a limited provider of payment services, it may simply opt to notify the relevant prudential authority.

## 3.5 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- Act No. 40/1964 the Civil Code
- Act No. 513/1991 the Commercial Code
- Act No. 455/1991 the Trade Licence Act
- Act No. 203/2011 on Collective Investment
- Act No. 250/2007 on Consumer Protection
- Act No. 492/2009 on Payment Services





- Act No. 129/2010 on Consumer Credit

## 4 Lessons learned from the Slovak Republic's regulation for a possible harmonized European Crowdfunding regulation

Only in its initial stages, Crowdfunding has yet to expand in the Slovak Republic. The main regulation stem from the harmonized European norms. So far, there is little to non-state involvement in Crowdfunding support.

### 4.1 Role model ("dos")

With regards to the Lending and Rewards Models, the relatively loose regulations may be seen as positive.

### 4.2 Aspects that should be avoided ("don'ts")

The lack of specific Crowdfunding regulations decreases the level of investment protection. A further complication may be the fact, that with the current state of regulations, the Equity Model will pose a hassle of administrative procedures.

## 5 Conclusion

Compared to the year 2013, Crowdfunding has gotten slightly more attention from the general public, and companies show more interest in it as a viable option. Despite its growing popularity, it is still in its initial stages. The development of the Crowdfunding market in Slovak Republic seems to be progressing rather slowly, partly due to neighbouring Countries with much stronger Crowdfunding markets, which are almost always preferred to the non-existent Slovak ones. No legislative changes were introduced since 2013 that would effectively change the legal framework currently in place.

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## Slovenia

### 1 Recent developments in the market of Crowdfunding in Slovenia

Crowdfunding is still a relatively new concept in Slovenia and currently several public initiatives are working on developing an operational and legal framework for this new type of financing. To date there are no Crowdfunding platforms operating in Slovenia and it has become common practice to use foreign platforms, mostly over the Internet, for funding projects. An initiative is currently working on establishing a Slovene Crowdfunding platform. The prevailing Crowdfunding model in Slovenia is the donations or rewards based model. Social projects with charitable and humanitarian purposes are commonplace and raise funds under the Humanitarian Agencies Act (*Zakon o humanitarnih organizacijah*) through media campaigns and non-profit associations.

There is yet no Crowdfunding specific legal framework in place, however under applicable law the equity, lending as well as donations or rewards based models are possible. New regulation proposed for the implementation of the AIFMD is currently in the legislative procedure and it is expected that it will be adopted in April 2015. The AIFMD will be implemented through the Act on Alternative Investment Fund Managers (*Zakon o upraviteljih alternativnih investicijskih skladov*) and an amendment to the Investment Trusts and Management Companies Act (*Zakon o investicijskih skladih in družbah za upravljanje*). Current proposals of both Acts follow the AIFMD text.

### 2 Recent developments regarding Crowdfunding regulation

There have been no recent developments regarding Crowdfunding regulation during the last year.

### 3 Current regulation of Crowdfunding in Slovenia

#### 3.1 Licence under the Financial Instruments Market Act

##### Equity Model

Under the Financial Instruments Market Act (*Zakon o trgu finančnih instrumentov*), only banks, broker-dealers and investment enterprises that hold a licence issued by the Securities Market Agency may perform financial services and transactions. Financial services and transactions among others include brokerage and agency services involving financial instruments, operation of a multilateral trading facilities, investment consulting and trading of financial instruments on primary and secondary markets. Financial instruments include transferable securities, namely shares in joint-stock companies, Societas Europaea and limited partnerships with share capital, bonds, other debt securities and derivative financial instruments. However, membership units in limited liability companies and rights in limited and general partnerships formed under the Companies Act (*Zakon o gospodarskih družbah*) are not transferable securities and therefore do not fall under the regulation of the Financial Instruments



Market Act. It must be noted that under the Companies Act a limited liability company may not have more than 50 members without a special approval of the Ministry of Economic Development and Technology. Therefore, where a Crowdfunding platform enables the financial services and transactions with transferable securities a licence by the Securities Market Agency is required.

### Lending Model

Trade and services related to offering of bonds and other debt securities qualify as provision of financial services and transactions under the Financial Instruments Market Act, which triggers the requirement for a licence by the Securities Market Agency.

Taking in of money from unsophisticated persons in the form of deposits or otherwise pursuant to a deposit or other agreement whereby the depositor has the right to request repayment in certain time periods is considered provision of banking services under the Banking Act (*Zakon o bančništvu*). Additionally, granting of credits and loans as a business activity is also provision of banking services under the Banking Act. Only banks holding a licence from the Bank of Slovenia are permitted to preform banking services.

Otherwise, private and personal lending of money in return for the repayment with interest is a non-regulated activity in Slovenia even if the lending occurs through online Crowdfunding platform. Therefore, the creditors would not require a licence, but the general civil and commercial rules regarding lending would still apply.

However, the performance of intermediary and agency services with respect to consumer credit and other loan agreements are considered supplementary financial services under the Banking Act and require a licence by the Bank of Slovenia or the Securities Market Agency.

Depending on the lending model of the Crowdfunding platform licences by the Securities Market Agency and/or the Bank of Slovenia may be required.

### Donations or Rewards Model

Games of chance under the Gaming Act (*Zakon o igrah na srečo*) are games in which participants share the same likelihood of winning a price or reward and where the outcome of the game depends exclusively or predominantly on chance or on another uncertain event. For performance of games of chance a licence or concession granted by the Government of the Republic of Slovenia and of the Ministry of Finance is required.

Individual taxpayers in Slovenia may direct and give up to 0.5% of their personal income tax in a year to a designated recipient as a donation under the Personal Income Tax Act (*Zakon o dohodnini*). To qualify as a recipient of donations that may be paid under direction of a donor out of the donor's personal income tax the recipient must each year apply and qualify as a recipient before the Ministry competent for its business area. Further requirements for recipients are set forth under the Personal Income Tax Act and the Decree of the appropriation of the personal income tax for donations (*Uredba o namenitvi dela dohodnine za donacije*). Other tax implications may apply to donations received through Crowdfunding.



Depending on how a Donations or Rewards model of the Crowdfunding platform is structured, it might trigger licensing requirement for games of chance and/or the Personal Income Tax Act. Otherwise, Donations and Rewards models are not subject to financial services regulation or licence requirements.

### 3.2 Prospectus requirements

#### General rule

As a general rule nobody may offer securities in the Republic of Slovenia without publishing a prospectus that has been approved by the Securities Market Agency under the Financial Instruments Market Act. By offering of securities of third persons the Crowdfunding platform would likely fall under this requirement as the general rule applies to the same extent to any securities intermediaries. Same prospectus requirements would apply if bonds or other debt financial instruments would be used in a Crowdfunding financing model structure.

#### Exceptions

The prospectus requirement does not apply to the following offering of securities, in the relevant part: (i) hedge funds units, (ii) securities with the guarantee of the state or local government, (iii) offering of securities to sophisticated investors only, (iv) offering of securities to up to 150 natural or legal persons, who are not sophisticated investors, (v) offering of securities with the purchase price above EUR 100.000 for each individual offer of securities in such offering, (vi) offering of securities with nominal value of at least EUR 100.000 for each offered security, or (vii) offering of securities where the aggregate purchase price in the European Union within 12 months does not exceed EUR 100.000. Each subsequent offer of securities purchased under an exception to the prospectus requirement is subject to the general rule under the Financial Instruments Market Act defined above. In other words, each subsequent offer of securities purchased under an exception must rely on an exception or satisfy the prospectus requirement. Prior to any trade of securities on a stock exchange a prospectus must be approved by the Securities Market Agency and published in accordance with the Financial Instruments Market Act.

A limited prospectus requirement applies where the offering price of securities does not exceed EUR 5.000.000 in the European Union within 12 months. In such case, the issuer may replace the prospectus with a simplified prospectus under the Financial Instruments Market Act.

### 3.3 Regulation of Crowdfunding under the AIFMD regime

The AIFMD has not yet been implemented into the Slovenian law even though the implementation deadline of 22 July 2013 has past. The Act on Alternative Investment Fund Managers (*Zakon o upraviteljih alternativnih investicijskih skladov*) is a new piece of legislation, implementing the AIFMD in Slovenia. AIFMD will also be implemented through an amendment to the Investment Trusts and Management Companies Act (*Zakon o investicijskih skladih in družbah za upravljanje*). Drafts of both act proposals were produced and presented by the Government. As they are complementary they shall go through the legislative procedure simultaneously. The amendment to the Investment Trusts and Management Companies Act (*Zakon o investicijskih skladih in družbah za upravljanje*) was presented for public comments at the end of 2013 and the commenting period ended in January 2014, while the public comments period for the Act on Alternative Investment Fund Managers (*Zakon o upraviteljih alternativnih investicijskih skladov*) ended on 31 October 2014.



Currently, both act proposals are in the process of inter-ministerial coordination after which the Government will propose the final text. It is expected that both act proposals will be confirmed by the Government in December 2014. It is expected that the AIFMD will be fully implemented by April 2015.

Entities within the meaning of a collective investment undertaking, which raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors, are currently regulated only by the Investment Trusts and Management Companies Act implementing the UCITS Directive 2009/65/EC. Such entities are investment funds, namely mutual and umbrella funds, defined as funds whose sole purpose is investment in transferable securities and other liquid financial assets on the principle of risk spreading, within the meaning of Article 1 of the USTIC, and investment companies within the meaning of Chapter V of the USTIC. The Non-USTIC open ended investment funds under the Investment Trusts and Management Companies Act are the so called "alternative funds", defined as funds that do not qualify as hedge or umbrella funds, which underlay more relaxed set of rules for permitted investments (for example precious metal or units of other funds), but require a minimal first investment into the fund in the amount of EUR 100.000. Only investment funds management companies holding a licence by the Securities Market Agency may operate investment funds in Slovenia.

Under the Venture Capital Companies Act (*Zakon o družbah tvegane kapitala*), a venture capital fund may be registered in the form of a joint-stock company, limited liability company, dual company, limited partnership or limited partnerships with share capital, which are all legal entity forms under the Companies Act. A venture capital fund is managed and legally represented by another legal entity and must among other invest at least 50% of the fund's assets in small and medium sized enterprises. The minimal amount of capital investment in the venture capital fund is EUR 50.000. The status of a venture capital fund may only be granted by the Ministry of Economic Development and Technology after the requirements of the Venture Capital Companies Act have been met.

The European Securities and Market Authority (ESMA) in its Guidelines on key concepts of the AIFMD of 13 August 2013 explained that an ordinary company with a general commercial or industrial purpose (i.e. one that pursues a business strategy, which includes running predominantly a commercial activity, involving the purchase, sale, and/or exchange of goods or commodities and/or the supply of non-financial services, or an industrial activity, involving the production of goods or construction of properties, or a combination thereof), would generally not qualify as an alternative investment fund under AIFMD. It is expected that the Securities Market Agency and the Slovenian Legislator will follow the ESMA Guidelines in implementation of the AIFMD.

### 3.3.1 Operating company seeking funding

An operating company seeking funding would likely not qualify as neither a USTIC or Non-USTIC investment fund nor as a venture capital fund under Slovenian law, if it did not issue fund units for money received or operate an investment fund.

Under consideration of the above-mentioned ESMA Guidelines it is also expected that under the regulation implementing AIFMD in Slovenia the common start-ups or emerging companies with a general commercial or industrial purpose seeking funding through a Crowdfunding platform would not qualify as AIFs within the meaning of AIFMD.



### 3.3.2 Project Company seeking funding

#### Equity Model

Depending on the equity financing structure of a company established to finance a single project such as for example a movie, a computer game, a wind farm or a solar park (project company), it cannot be excluded that such project company might constitute an AIF under the Investment Trusts and Management Companies Act or the regulation that will be adopted for the implementation of the AIFMD or an AIF with the meaning of a venture capital fund under the Venture Capital Companies Act.

#### Lending Model

Depending on the debt financing structure of the project company it cannot be excluded that it might constitute an AIF under regulation that will be adopted for the implementation of the AIFMD. As noted above, performance of intermediary and agency services with respect to consumer credit and other loan agreements are considered supplementary financial services under the Banking Act and require a licence by the Bank of Slovenia or the Securities Market Agency.

#### Donations or Rewards Model

As noted above, in general donations or rewards based financing structures do not trigger licence requirements or other significant regulatory issues and would likely not constitute an AIF under the current law. However, tax, consumer protection and payment services laws may principally apply.

### 3.3.3 Crowdfunding Platform

If the Crowdfunding platform through its operations did not seek or raise funds from investors on its own behalf or operate an investment fund it will likely not fall under the regulation implementing the AIFMD in Slovenia. Provision of intermediary and agency services with respect to consumer credit and other loan agreements by a Crowdfunding platform would require a licence by the Bank of Slovenia or the Securities Market Agency.

### 3.4 Licence under the Payment services and systems Act (*Payment Services Directive*)

In addition to any requirements set forth above, a transfer of funds through the Crowdfunding platform will most likely constitute a payment service under the Payment services and systems Act (*Zakon o plačilnih storitvah in sistemih*). Such transfer of funds would occur if the investor, creditor or donor paid and transferred the funds through the Crowdfunding platform to the entrepreneur whereby the Crowdfunding platform performed any of these activities: deposit or withdrawal of cash, payment services for debit or credit of a bank account, issuance or acquisition of payment instruments, remittance of cash payments or transfer of funds by an intermediary between a customer and a provider of goods and services. In Slovenia only banks, licenced electronic money institutions, payment institutions and cash remittance institutions may perform payment services if they were granted a payment services licence by the Bank of Slovenia.

A Crowdfunding platform might however be able to rely on the exemption for “technical service providers” under the Payment services and systems Act, if it outsourced the payment transactions so that it performed only technical services with respect to these payment transactions. Such technical services may include processing and storage of data, data safety and person identification services, IT



and communication services, maintenance of payment services equipment and other similar technical services, as long as the provider of such technical services at any time does not have the power to freely dispose with the moneys that are being transferred.

### 3.5 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- Consumer Protection Act (Zakon o varstvu potrošnikov)
- Consumer Protection against Unfair Commercial Practices Act (Zakon o varstvu potrošnikov pred nepoštenimi poslovnimi praksami)
- Consumer Credit Act (Zakon o potrošniških kreditih);
- Prevention of Money Laundering and Terrorist Financing Act (Zakon o preprečevanju pranja denarja in financiranja terorizma)
- Book Entry Securities Act (Zakon o nematerializiranih vrednostnih papirjih)
- Personal Data Protection Act (Zakon o varstvu osebnih podatkov)
- Investment Trusts and Management Companies Act (Zakon o investicijskih skladih in družbah za upravljanje)
- Venture Capital Companies Act (Zakon o družbah tveganega kapitala)
- Supportive Environment for Entrepreneurship Act (Zakon o podpornem okolju za podjetništvo)
- Humanitarian Agencies Act (Zakon o humanitarnih organizacijah)
- Code of Obligations (Obligacijski Zakonik)
- Prevention of Restriction of Competition Act (Zakon o preprečevanju omejevanja konkurence)

## 4 Lessons learned from Slovenia's regulation for a possible harmonized European Crowdfunding regulation

### 4.1 Role model ("dos")

The possibility for taxpayers to give qualified non-state recipients a portion of their yearly personal income tax as a donation is widely perceived as a good practice.

Prospectus requirement exception, most notably the threshold for an offering of securities where the aggregate purchase price in the European Union within 12 months does not exceed EUR 100,000 is welcomed by may start-up raising money through crowdfunding. Therefore, some organizations active in Crowdfunding are pushing for the increase of the threshold to EUR 500,000.



## 5 Conclusion

Crowdfunding is not per se a heavily regulated business in Slovenia, but various regulatory and compliance issues might arise based on existing regulation of the financial instruments and markets, banking and payment services industries. In addition, the operation and investment through a Crowdfunding platform may have tax, consumer protection, game of chance and other legal implications that require attention.

Crowdfunding platforms, investors and companies seeking investment should also pay attention to the coming implementation of the AIFMD in Slovenia, which is likely to bring a new set of applicable regulation to the area of business financing as soon as by April 2015.

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## Spain

### 1 Recent developments in the market of Crowdfunding in Spain

During the last 12 months there were the following significant developments in Spain regarding Crowdfunding:

#### 1.1 The Equity Model

Regarding the Equity Model in Spain, there are two main Crowdfunding platforms that operate within the scope of current regulation, using different structures. One platform is based on financing of technology based start-ups or companies with an innovative business model that operate in a seed phase through the solid venture capital structure, which means the holding of the share capital of such start-ups. The contribution received by the company is treated as a capital contribution and the investor becomes a shareholder of such company. This type of investment Crowdfunding is recently considered as a new way of business angel or as an informal venture capital.

The other platform is based on financing of business projects from various sectors (technology, innovation, restaurants, trading and distribution, energy, building, leisure, etc.) developed by start-ups and consolidated companies in return for a holding of the share capital of the company, a job, an accommodation, profitability or any other proposal (even loans) that the entrepreneur could offer to the investor.

The turnover obtained from this model has risen by 40 per cent during the last 12 months.

Under the Equity Model, platforms are prohibited to exercise the activities reserved to investment firms, credit institutions and payment institutions, especially, the fundraising for payment purposes. Consequently, they could not receive, transmit or execute orders related to financial instruments on behalf of clients.

#### 1.2 The Lending Model

In the past year, the P2P Lending Model has consolidated its position as an alternative to bank financing because of its lower interest rate and the banking disintermediation. Despite the fact that this Model in Spain is the lowest developed of all, it has progressively moved away from the regulated activity of the financial institutions.

Under the debt based Crowdfunding, there are two main platforms that have registered a slight increase in its investments over the past 12 months. These platforms act as intermediaries (or match-makers) through which contributors (i.e. the lenders) and entrepreneurs (i.e. the borrowers) can interact directly with each other in order to provide unsecured loans. They are not considered as real intermediaries that raise repayable funds from the public because they do not grant the repayment of the loan under certain conditions. However, each project passes through a strict process of risk assessment in order to provide to the investor with the solvency of the borrower and the interest associated to it.



The operator of a Crowdfunding platform could grant loans or credits only if it invests in a project published in its web site without exceeding the 10 % of the funding target.

Consequently, these platforms are prohibited to exercise the activities reserved to credit institutions under this Lending Model.

The services provided by the platforms under Equity and Lending Models are exclusively:

- reception, selection and publication of the collective financing projects;
- development, establishment and exploitation of communication channels to facilitate financing contract between investors and entrepreneurs; and
- any other ancillary services as consulting, analysis of projects and its level of risk, availability model contracts etc.

### 1.3 The Donations or Rewards Model

In 2014, the Donations Model, based on raising funds for social projects, has registered the greatest growth of the Crowdfunding market in Spain (it has tripled the turnover reached last year). This model is based on contributions from users, by means of donations, to support as a non-profit organisation, specific projects of social aid managed by organisations (generally NGOs), associations or individuals. No financial investment or return is involved.

Despite the growth of the Donations Model, the most popular model of the market in Crowdfunding remains the Rewards Model, with a 41.40 % of the total funds collected in Spain in 2014. Under this traditional Reward based Crowdfunding, individuals provide funds to a specific project by means of contributions in cash, in exchange of a reward or consideration.

There are two different types of Rewards Model depending on the relationship between the amount of the contribution and the relative value of the reward:

First, the contributor generally provides a reduced amount of money and receives in ex-change a symbolic reward (right, good or service) which value is usually perceived higher than the amount contributed (e.g., for financing concerts, theatre and movies, the contributor receives VIP tickets, meetings with the artists, signed copies, autographs or preview invitations).

Second, a contract of sale, project contract or a contract for the provision of services, through which the contributor anticipates the payment of the price agreed to facilitate the entrepreneur enough funds for developing his/her professional activity (*pre-sale*). The contributor receives the good, project or the service as consideration.

## 2 Recent developments regarding Crowdfunding regulation in Spain

Recent changes in legislation have been aimed at encouraging the growth of those models in which investors expect to receive a pecuniary remuneration due to their contributions to the projects published in Crowdfunding platforms (i.e. Equity Model and Lending Model), excluding within the



scope of this legislation the Donations and Rewards Models. This is the case of the Draft Bill XX/2014, on encouragement for business financing, which has been approved by the Government on 3 October 2014 but has not yet entered into force. At the moment, this Draft Bill is going through an amendments period in the Senate until 11 November of the current year.

This Draft Bill XX/2014 regulates, for the first time, the legal framework of peer-to-peer lending and equity Crowdfunding platforms. These platforms bring into contact entrepreneurs of high potential projects that demand funds and investors that offer the said funds searching return in their investments.

Under the said Draft Bill, collective financing projects could be implemented via (i) the issue or subscription of transferable securities (debentures, ordinary and preference shares and other securities representing the capital) when it does not require prospectus in accordance with the Securities Market Act 24/1988, (ii) the issue or subscription of Limited Liability Company's shares, and (iii) loan applications, including subordinated profit-participating loans. The oversight of these collective financing forms is reserved to the Securities Exchange Commission ("CNMV"). Regarding loan applications, the Bank of Spain shall cooperate and collaborate with the CNMV facilitating the information required to exercise the oversight effectively.

Furthermore, transferable securities are subject to the Securities Market Act 24/1988 - as amended by means of the transposition of the Markets in Financial Instruments Directive (MiFID) - and to the Consolidated Text of the Spanish Corporate Act.

As we said before, platforms which activity consists on raising funds through donations, sale of goods and services and interest-free loans are excluded from the regulation of the Draft Bill XX/2014.

## **2.1 Discussions & arguments about the protection of investors vs. facilitating of investment in SMEs**

With the approval of the Draft Bill XX/2014, the Government has made a clear differentiation between two types of investors: accredited and non-accredited investors. The formers (i.e institutions, companies with more than EUR 1 million of assets, EUR 2 million of annual turnover or EUR 300,000 of own resources, and individuals with more than EUR 50,000 of annual income or EUR 100,000 of financial assets) will have no restrictions to their investments made in the projects. On the contrary, the latter will have certain limitations.

Before the changes that had been developed through the Draft Bill XX/2014 on 31 July 2014, there were limitations to non-accredited investors on their investments in the projects published on the Crowdfunding platforms: no investor could invest more than EUR 3,000 in the same project published by one Crowdfunding platform and more than EUR 6,000 in a 12 month period in different projects published by the same Crowdfunding platform. Despite this restriction to non-accredited investors, the last version of the Draft Bill XX/2014 has led to an amplification of the limitation of EUR 6,000 to a maximum of EUR 10,000.

Furthermore, the last version has increased the maximum amount that an entrepreneur can fundraise per project through each of the Crowdfunding platforms (up to EUR 2 million) and has permitted, under certain circumstances, to exceed the initial maximum term for participating and the financing target in a 25%.



Notwithstanding the global positive impact because of the limitless in the investments of accredited investors and the provisions avoiding hacking and intrusiveness, the collective financing industry is apprehensive about the Draft Bill XX/2014. This rejection is due to the amount of EUR 60,000 of share capital required to the platforms for operating, which means for the general opinion that the Government thinks operators of Crowdfunding platforms are financial companies when actually are just online start-ups (intermediaries) and not investment managers.

### 3 Current regulation of Crowdfunding in Spain

It should be noticed that the new regulatory framework in Spain for Equity and Lending Models will imminently enter into force, and so, we focus the analysis on the recent developments previously mentioned, despite there might be some amendments to the Draft Bill currently at the Parliament.

Concerning the Reward and Donations Models, it should be applied the regulation already considered in the 2013 Crowdfunding Review.

#### 3.1 Licence under the Draft Bill XX/2014, of encouragement for business financing

##### Equity Model/ Lending Model

The Securities Exchange Commission (CNMV) shall authorise and register participative financing platforms that publish projects referred to the issue or subscription of transferable securities and Limited Liability Company's shares. Participative financing platforms that publish projects referred to loan applications, including subordinated profit-participating loans, shall be authorised and registered by the CNMV following a mandatory and binding report from the Bank of Spain.

To obtain the licence, the operator must meet the following requirements:

- having as a sole purpose the implementation of the aforementioned activities;
- having its registered office, administration and management center in the national territory or in another EU Member State;
- taking the form of a company with share capital, incorporated for an indefinite time;
- having, at least, EUR 60,000 of share capital, paid in full and;
- meeting the rest of the specific financial requirements established in the Draft Bill.

##### Donations or Rewards Model

As already stated, Donations and Rewards Models are not subject to the Draft Bill XX/2014, of encouragement for business financing, and therefore, no licence is required.

#### 3.2 Prospectus requirements

According to the Securities Market Act 24/1988, in the case of a corporation, the offering of shares and other types of securities - defined as an initial public offering (IPO) - requires a prospectus approved by



the CNMV. Notwithstanding the above, the requirement regarding publication of a prospectus does not apply to an offering of securities amounting to a total of less than EUR 5 million (accumulated amount for the European Union) within a time period of 12 months.

Considering that the Draft Bill XX/2014 provides a EUR 2 million maximum ceiling of fundraising per project *through each of the Crowdfunding platforms*, it is discussed whether the exemption provided by the Securities Market Act 24/1988 to the obligation of publishing the prospectus for the issue or subscription of transferable securities which does not exceed EUR 5 million within a time period of 12 months, may be applicable or not to the equity based Crowdfunding.

Taking this into account, it seems that the intention of the Spanish legislator is to establish the EUR 2 million maximum limit with regard to one project published through one Crowdfunding platform (and not through several of them) so an entrepreneur may exceed the EUR 5 million limit if publishing the project in several platforms, although it is very unlikely to occur. However, at the present time there is nothing to prevent us from interpreting that the said limit refers to one project published through several platforms, in which case Spanish practice reveals that it is highly unlikely for the entrepreneur to exceed a EUR 2 million of fundraising and hence, the exemption would always apply.

Additionally, most of the platforms allow on its web sites the entrepreneurs to seek funds through other means of financing their projects (especially when the project is modulable and some of its modules best fit to certain Crowdfunding platforms), as long as they maintain the initial committed capital. If this is the case, the platform itself recommends, in order to avoid a confusion on investors due to a possible overlapping of two different promotional campaigns implemented in two different platforms, to draw up a schedule with the breakdown of the project (e.g. on the basis of different stages).

Also, for the purposes of investor protection, under the Draft Bill XX/2014 Crowdfunding platforms are required, to grant through its web site and prior to participate in a project, that investors receive and accept a specific communication which provides the existence of any risk, from the total or partial loss of the invested capital and not obtaining the expected return, to the illiquidity risk.

In Lending Model and Donations or Rewards Models, the prospectus is not required.

### 3.3 Regulation of Crowdfunding under the AIFMD regime

On 18 July 2014 Spanish authorities have published a Draft Bill which regulates private equity companies, other collective investment companies of closed-end type and the management companies for collective investment companies of closed-end type, amending Collective Investment Schemes Act 35/2003, 4 of November. This Draft Bill implements the European Alternative Investment Fund Managers Directive ("AIFMD") and repeals the current Private equity entities and their management companies Act 25/2005, 24 November.

Before Spanish regulation, according to some unofficial statements it was discussed whether operators of Crowdfunding platforms could be considered as Managers of Alternative Investment Funds ("AIFMs") according to AIFMD. It was understood that this was possible whether the platform's regular business was managing one or more Alternative investment funds ("AIFs").



Nowadays, practice reveals that platforms are not frequently considered as AIFMs, as its function generally consists in facilitate the interaction between investors and entrepreneurs and not managing funds; however, this possibility shall not be excluded automatically.

Therefore, as the regulation stands at present, it should be noted that the general rule is to apply the Draft Bill XX/2014, of encouragement for business financing, to participative financing platforms. In addition, if platforms meet the requirements provided by the AIFMD, it should be possible to apply residually the AIFMs regime. In fact, Draft Bill XX/2014 admits this duality by saying that platform's legal regime is governed by its provisions and the implementing legislation, without prejudice to the rest of the applicable regulation to such companies and its activities.

### 3.4 Licence under the Payment Services Directive

The Spanish Payment Services Act 16/2009, which partially implements the Payment Services Directive, states that payment services providers (among others, hybrid payment institutions) must submit an application for authorisation as a payment institution to the Minister for the Economy and Competitiveness, after consultation with the Bank of Spain and the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences.

As a general rule, under the Draft Bill XX/2014, participative financing platforms are prohibited from exercising the activities reserved to payment institutions and, especially, from receiving funds on behalf of the investors or the entrepreneurs.

However, as a derogation to the preceding paragraph, the Draft Bill XX/2014 itself states that if the aim of the funds is the payment and the platform is authorised as a hybrid payment institution (i.e. Entity that, apart from providing payment services, provides any other economic activity) in accordance with the Payment Services Act 16/2009, then the said platform could receive funds on behalf of the investors or the entrepreneurs.

### 3.5 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- in its relations with those entrepreneurs that are treated as consumers (i.e. a natural or legal person that operates in a field outside of his/her professional activity) the Crowdfunding platform shall be considered as an intermediary for the purpose of the Consumer contracting loans or mortgage and brokerage services for the conclusion of contracts of loan or credit Act 2/2009 and must provide the consumers the prospectus about the loans or mortgage applied;
- also in its relations with those entrepreneurs that are considered consumers, platforms shall be treated as an intermediary for the purpose of the Consumer credit contracts Act 16/2011;
- the activity developed by the operator of a Crowdfunding platform and the relations between entrepreneurs and investors may be subject to consumer and user protection rules: General Contracting Terms Act 7/1998, Act for the Protection of Consumers and Users (approved by Royal Decree 1/2007) and Retail Trade Act 7/1996;



- Money Laundering and Terrorist Financing Prevention Act 10/2010; and
- Personal Data Protection Act 15/1999.

## 4 Lessons learned from Spain's regulation for a possible harmonized European Crowdfunding regulation

### 4.1 Role model ("dos")

- No restriction in the investments of accredited investors.
- Exception of Crowdfunding from prospectus requirement.
- The opportunity that Crowdfunding models offer to entrepreneurs in the sense of seeking funds outside the bank financing.

### 4.2 Aspects that should be avoided ("don'ts")

- The differentiation between accredited and non-accredited investors and the investment restrictions of the latter should be avoided especially when the Draft Bill XX/2014, before the investor participates in a project, grants that he or she receives and accepts a specific communication through which the investor is noticed about the existence of any risk, from the total or partial loss of the invested capital and not obtaining the expected return, to the illiquidity risk.
- As already stated, Crowdfunding platforms are subject to strict minimum financial requirements to be able to operate, when actually they are just online intermediaries.
- The operator of a Crowdfunding platform is permitted to invest in projects published in its web site no more than the 10 % of the funding target of each project.

## 5 Conclusion

The new regulation on the activity of Crowdfunding platforms is a huge progress for the consolidation of an alternative funding channel for SME's in Spain without neglecting the rights and interests of investors and entrepreneurs.

While it is true that most of the industry is reluctant to this regulation because of its restricted scope of application only to the Equity and Lending Models despite of the more popularity of the Rewards Model, the Spanish legislator will continue to adapt the regulation to the needs of the subjects involved.

At the moment, we can conclude that this regulation has supposed to be an advance in security, due to the oversight of the Spanish regulator, and almost a material measure on encouraging an alternative way of financing potential projects and ideas of entrepreneurs in return of economic profitability for investors.

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## Sweden

### 1 Recent developments in the market of Crowdfunding in Sweden

During the last 12 months there were the following significant developments in Sweden regarding Crowdfunding:

#### 1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

Two platforms are currently offering Crowdfunding according to an Equity Model. None has a license or permit for their business. Their approach is to act strictly as investment brokers, without providing any advice on the investment, and ensure that no prospectus needs to be prepared. Neither platform handles transferring of investments from the investor to the project company.

#### 1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

The Lending Model is still emerging in Sweden. Two platforms have been introduced during 2014 with one specialising in peer-to-business and one in to peer-to-peer lending, i.e. private individuals offering loans to other private individuals. The peer-to-peer lending platform does not however currently offer the possibility to provide investments to a specific borrower; instead all investments are currently made to anonymous borrowers. The lender is therefore not able to invest in a specific project.

#### 1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

The number of platforms operating under a Donation Model in order to endorse social or cultural projects has grown to four.

### 2 Recent developments regarding Crowdfunding regulation in Sweden

There have been some legislative changes regarding Crowdfunding in Sweden since 2013. With the new Act on Certain Credits to Consumers (*lagen om viss kreditgivning till konsumenter*) platforms that mediate credits to consumers need to apply for a license from the Swedish Financial Supervisory Authority ("S-FSA").



## 3 Current Regulation of Crowdfunding in Sweden

### 3.1 Licence under the Swedish Securities Market Act

The Swedish Securities Market Act regulates financial trading of securities, including investment broking, financial advising and prospectus rules. Platforms that offer subscriptions to newly issued shares or purchase of existing shares are, as a general rule, considered as marketplaces and shall be subject to financial supervision. A Swedish platform which intends to publically offer equity Crowdfunding must apply for a license to conduct financial services with the S-FSA. Notably, platforms that only present investment offer to a closed group of investors (maximum 200 investors), or co-operate with a financial institution regulated by the S-FSA, are not subject to any license requirement.

Platforms operating under a Donations or Rewards Model are not subject to the Swedish Securities Market Act since no financial investment or return is offered.

### 3.2 Licence under the Swedish Act on Certain Credits to Consumers

As of 1 July 2014 Crowdfunding platforms operating under a lending based model which mediates credits to consumers must apply for a license from the S-FSA due to the Act on Certain Credits to Consumers. Platforms already conducting business before the Act was introduced are however exempt from the license obligation until 1 January 2015. The platforms are also required to ensure that the credit agreement clearly states the conditions for the credit and are also required to follow additional information requirements. The platforms must also assess whether the consumer financially is likely to comply with the conditions for the credit.

### 3.3 Prospectus requirements

According to the Swedish Financial Instruments Trading Act all public offerings are subject to prospectus requirements. In order to facilitate for smaller companies exemptions have been made where the offering does not exceed EUR 2 500 000 within a period of twelve months. Crowdfunding platforms are not subjects to the prospectus requirement themselves as they only work as an intermediary the obligation instead falls on the legal entity with the actual offering, i.e. the project companies. However, a platform should inform and alert project companies if a prospectus is required.

### 3.4 Regulation of Crowdfunding under the AIFMD regime

AIFMD is not applicable for the project companies as long as they are seeking funding to conduct "normal" business (supply of goods/services, production etc.). AIFMD is not applicable for Crowdfunding platforms either as they are not raising capital themselves, only acting as an intermediary. However, it is possible that a future Crowdfunding platforms that raise capital themselves and thereafter act as a representative for the investors towards the project company, and during the project, would fall within the scope of the AIFMD. Such service is yet to be launched in Sweden.

### 3.5 Licence under the Swedish Payment Services Act

The Swedish Payment Act is based on the Payment Services Directive. Any transfer of funds through the Crowdfunding platform operator, i.e. the platform operator receives all investments and then passes the funds to the project company, would constitute a service regulated by Swedish Payment Service Act. Exemptions from the Swedish Payment Services Act are limited and thus an operator would need to apply with the S-FSA to receive status as a registered payment service provider.



### 3.6 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- The Swedish Companies Act

The Swedish Companies Act allows two different types of limited liability companies – “public” or “private”. Private companies are allowed to have a lower share capital but may not raise equity capital through public offerings. Opposite applies to public companies. Majority of all start-ups are, due to the lower share capital requirements, formed as “private” limited liability companies. According to Chapter.1 Paragraph 7 of the Swedish Companies Act securities offerings in a private liability company directed to less than 200 investors are allowed (as it does not constitute a “public” offering). No restrictions apply to share offerings in limited liability companies formed as “public”.

- Swedish Personal Data Act;
- Swedish Anti-Money Laundering Act;
- Swedish Deposit-Taking Activities Act.

## 4 Lessons learned from Sweden's regulation for a possible harmonized European Crowdfunding regulation

As mentioned above there is no new regulation targeting Crowdfunding specifically, although the new consumer credit regulation, Act on Certain Credits to Consumers, will have an impact on lending based Crowdfunding platforms. However, as the new consumer credit regulation was introduced in July 2014 it is too early to draw any conclusions from it. For this reason the lessons to be learned from the Swedish regulator’s actions are still to come.

## 5 Conclusion

Crowdfunding has been a fairly limited phenomenon in Sweden mostly attracting attention from the younger population. The Crowdfunding projects that have gained most publicity have posted their project on American Crowdfunding platforms. During the last year Crowdfunding has however been getting more attention in the general public and a few new Crowdfunding platforms have been introduced, including platforms offering Crowdfunding through the Lending Model. The most recognizable of these new platforms is the American platform Kickstarter that has decided to target the Swedish market. It should however be noted that the market activity is still low.

On the regulatory side only one new regulation has been introduced - The Swedish Consumer Credit Act - which affects Lending Model based platforms. Such platforms are now obligated to apply for a licence with the Swedish Financial Supervisory Authority in order to operate. In conclusion, both equity based and lending based Crowdfunding platforms are under financial supervision.



Equity based platforms assisting limited liability companies formed under the “private” form to find investors from closed group of investors, not exceeding 200 individuals, may however under certain circumstances operate without a financial license.

Although the Swedish Financial Supervisory Authority has stated that they are interested in Crowdfunding as a phenomenon, that they are following the development closely no new directive or guideline was issued yet.

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## Switzerland

### 1 Recent developments in the market of Crowdfunding in Switzerland

Overall, the Swiss Crowdfunding market remains rather small in comparison with the USA, Germany and France, although, on average, commitments seem to be higher than elsewhere. Nevertheless it is growing strongly. In 2013, CHF 11.6 million was collected through Crowdfunding in Switzerland. This is more than twice the volume of 2012.<sup>53</sup>

#### 1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

The biggest growth occurred in fund raising through Equity Model. In fact, the growth rate from 2012 to 2013 regarding the Equity Model amounts to 192%. The average volume for the successfully financed campaigns in 2013 was CHF 558,000. The Equity Model is, by volume of funds invested (CHF 5.58 million in 2013), the most important model in Switzerland to date.<sup>54</sup> However, the number of platforms is still small.

#### 1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

The Lending Model is, by volume of funds invested, the least important model in Switzerland. In 2013, it involved a volume of CHF 1.78 million. Nevertheless, compared to 2012, this amounts to a growth of +109%. The average volume for the successfully financed campaigns in 2013 was CHF 15,000.<sup>55</sup>

#### 1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

In 2013, the Donations or Rewards Model raised a volume of CHF 4.23 million. Compared to 2012, the growth of the volume amounts to +68%. Compared to the growth of the Equity and Lending Model, this is the lowest growth. Although it is the second biggest model by volume of funds invested, the average funds raised through successful campaigns was lower (namely CHF 7,000)<sup>56</sup> than for the Equity and Lending Model. This model is popular mainly in the art, music, film, sport and design scene, where several platforms operate using the Donations or Rewards Model. By contrast, community projects are practically unheard of in Switzerland.

<sup>53</sup> Source: DIETRICH, ANDREAS/AMREIN, SIMON, The Crowdfunding Monitoring Switzerland 2014, orderable under <http://blog.hslu.ch/retailbanking/Crowdfunding2014/>, p. 3 (cited: DIETRICH/ AMREIN, Monitoring).

<sup>54</sup> See DIETRICH/AMREIN, Monitoring, p. 3.

<sup>55</sup> Source: DIETRICH/AMREIN, Monitoring, p. 3.

<sup>56</sup> Source: DIETRICH/AMREIN, Monitoring, p. 3.



## 2 Recent developments regarding Crowdfunding regulation in Switzerland

### 2.1 Developments in politics and authorities regarding Crowdfunding regulation

#### 2.1.1 In General

By international standards, Crowdfunding did not trigger a major attention in Switzerland.<sup>57</sup> It received some media attention, which however did not lead to any legislative initiative.<sup>58</sup> This is particularly noteworthy considering that two major regulatory initiatives were launched in Switzerland.<sup>59</sup>

Swiss regulators did not address Crowdfunding in detail so far. As far as can be seen, only the Swiss Financial Market Supervisory Authority (FINMA) and the Swiss State Secretariat for Economic Affairs (SECO) addressed this issue in passing.<sup>60</sup>

#### 2.1.2 FINMA

FINMA has not addressed Crowdfunding in detail so far. It only commented on Crowdfunding in passing in a report called "How investors can protect themselves against unauthorized financial market providers".<sup>61</sup> In this report, FINMA noticed that more and more individuals seeking finance (borrowers) and investors are looking for alternatives to banks. However, since there is a huge variety of Crowdfunding platforms, no general answer to the question of whether such platforms require a license exists. Therefore, FINMA must review each business model on a case-by-case basis.<sup>62</sup>

Pursuant to newspaper articles, FINMA has issued rulings on at least three different platforms so far deciding that none of them is subject to the supervision of FINMA.<sup>63</sup> However, FINMA seems to take a cautious, if not suspicious, approach to Crowdfunding.

#### 2.1.3 SECO

In December 2013, SECO has published an opinion called "Diskussionspapier Risikokapital in der Schweiz" prepared by Vischer AG.<sup>64</sup> This document gives an overview over the forms of Crowdfunding, the platforms in Switzerland and the current regulation in Switzerland and some other countries. Moreover, the authors of the document formulated some recommendations in terms of the necessity to intervene in this area. They especially recommend that FINMA issue a policy paper stating its view on

<sup>57</sup> See KUNZ, PETER V., Crowdfunding, in: Jusletter 25 August 2014, para 1 (cited: KUNZ, Crowdfunding).

<sup>58</sup> See KUNZ, Crowdfunding, para 1 and 62.

<sup>59</sup> See below, chapter 2.2.

<sup>60</sup> KUNZ, Crowdfunding, para 52.

<sup>61</sup> This FINMA report can be downloaded under [www.finma.ch/e/privatpersonen/documents/kundenschutz-e.pdf](http://www.finma.ch/e/privatpersonen/documents/kundenschutz-e.pdf) (cited: FINMA report).

<sup>62</sup> FINMA report, p. 11.

<sup>63</sup> See e.g. <http://www.tagesanzeiger.ch/schweiz/standard/Die-Fallstricke-des-CrowdfundingBooms/story/27666437>.

<sup>64</sup> The opinion can be downloaded under <http://www.seco.admin.ch/themen/05116/05118/05319/index.html?lang=de&download=NHzLpZeg7t,lnp6loNTUo42lzZ6ln1acy4Zn4Z2q> (cited: SECO, Diskussionspapier).



various issues in relation to Crowdfunding. Furthermore, the report recommends amending various legislations to clarify the scope and applicability to Crowdfunding.<sup>65</sup>

However, this document caused neither wide discussions nor actions in Switzerland.<sup>66</sup>

## 2.2 Future Financial Services and Markets Act, Financial Market Infrastructure Act and Financial Institutions Act

Currently, the Swiss government has initiated a new regulatory initiative and published bills for three new legislative instruments, namely a new Financial Services and Markets Act (*Finanzdienstleistungsgesetz*, FSMA),<sup>67</sup> a new Financial Market Infrastructure Act (*Finanzmarktinfrastukturgesetz*, FMIA),<sup>68</sup> and a new Financial Institutions Act (*Finanzinstitutsgesetz*, FinIA).<sup>69</sup> None of these bills addresses Crowdfunding directly.<sup>70</sup> Nevertheless, especially the FSMA and FMIA might have some impact on Crowdfunding platforms. The FMIA can be relevant to platforms if they qualify as a stock exchange or a trading system.<sup>71</sup> The FSMA can bear some consequences for the Equity Model since it aims to introduce a comprehensive prospectus regime for equity offerings. Moreover, platforms may be subject to rules of conducts if they, for instance, buy and sell securities, receive and transmit orders in connection with securities or if they hold assets for the account of a client.

## 3 Current Regulation of Crowdfunding in Switzerland

### 3.1 License under the Swiss Federal Act on Banks and Savings Banks (*Banking Act*)

#### 3.1.1 General Rule

The Swiss Federal Act on Banks and Savings Banks (*Bankengesetz*, Banking Act) and its implementing ordinance, the Banking Ordinance (*Bankenverordnung*, Banking Ordinance), require natural persons and/or legal entities (collectively **Persons**, and each a **Person**) mainly active in the financial sector intending to either (i) accept deposits from the public on a professional basis, or (ii) recommend themselves for financing any number of persons or companies (with which they do not form an economic unit of their own) with public deposits or by refinancing themselves from five or more banks, to obtain a license from FINMA. This licensing requirement also applies in case any Person intends to advertise any such services (in advertisements, prospectuses, circular letters, electronic media or similar publication media).

A Person is considered to act on a professional basis in case it constantly accepts more than 20 deposits from the public. The Banking Ordinance does not contain a positive definition of deposits; it does, however, contain a list of exemptions for funds not qualifying as deposits. According to this list, *inter*

<sup>65</sup> On the whole SECO, Diskussionspapier, p. 7 et seq.

<sup>66</sup> KUNZ, Crowdfunding, para 52.

<sup>67</sup> See <https://www.news.admin.ch/message/index.html?lang=en&msg-id=53561>.

<sup>68</sup> See [www.admin.ch/aktuell/00089/index.html?lang=en&msg-id=54305](https://www.admin.ch/aktuell/00089/index.html?lang=en&msg-id=54305).

<sup>69</sup> See <https://www.news.admin.ch/message/index.html?lang=en&msg-id=53561>.

<sup>70</sup> Cf. KUNZ, Crowdfunding, para 63.

<sup>71</sup> Cf. KUNZ, Crowdfunding, footnote 153 to para 63.



*alia*, the acceptance of (i) funds provided in consideration of a contract, due to the transfer of property or the rendering of a service, or (ii) funds which are transferred as a security are not considered as deposits.

### 3.1.2 Legal Consequences for the Crowdfunding Platforms in Switzerland

In order not to be required to obtain a banking license from FINMA, a Crowdfunding platform in Switzerland should generally refrain from collecting funds from investors on its own account and from keeping any accounts in the name of the investors, e.g. to keep accounts for the investors from which funds (for the purchase of shares or for loans to be granted) are debited and directed to the companies and to accept payments (interest, principal, or dividends) from the companies in the name and for the account of such investors.

Under the current Swiss legislation, it is not clear whether the purchase of equity securities and the provision of financing aids for the account of third parties qualify as financing under the Banking Act. Crowdfunding platforms should therefore generally be cautious in providing such services for the account of investors (e.g. to purchase shares or to grant loans to the companies in the name and for the account of the investors).

## 3.2 License under the Federal Act on Collective Investment Schemes

### 3.2.1 General Rule

According to the Federal Act on Collective Investment Schemes (*Kollektivanlagengesetz, CISA*), all Persons responsible for the management of collective investment schemes, the safekeeping of assets held in such schemes as well as the distribution of such schemes to retail (i.e. non-qualified) investors are required to obtain an authorization from FINMA.

Collective investment schemes are defined as assets raised from several investors for the purpose of collective investment, and which are pooled and collectively managed for the account of such investors.

Distribution is generally defined as any offering of and advertising for collective investment schemes and covers any kind of activity which is aimed at investors acquiring collective investment schemes.

An exemption from the above authorization obligation applies if (i) the funds are solely invested in one operating company which is active in a manufacturing, trade or service business and generates its revenues and profits with such business (and not solely by way of committing funds), or if (ii) the investment decisions are primarily made by the investors and not by the management of the investment scheme.

Loans granted to a collective investment scheme should in principle also be outside the scope of the CISA. However, each case needs to be assessed globally, i.e. taken as a whole it must in a specific case be excluded that a loan (due to its risk profile or repayment schedule) can be characterised as an investment in a collective investment scheme.





### 3.2.2 Equity Model

To be outside the scope of the collective investment scheme regulation, an equity based Crowdfunding platform should thus be set up in a way that it is able to primarily profit from the exemption applicable with regard to investments into operating companies; i.e. it should introduce possible investors to operating companies only and should refrain from any activities which could result in the platform pooling or managing any funds received from the investors for the account of such investors and subsequently investing them collectively into a company via the platform itself. It should be active only as an intermediary for purposes of information exchange (e.g. names, phone numbers and other contact details) with regard to possible direct investments into specific operating companies and not directly or indirectly transfer any funds from investors to companies.

### 3.2.3 Lending Model

A debt based Crowdfunding platform should generally avoid holding itself out as a collective investment scheme, i.e. the management of third party funds. Therefore and in order not to be subject to regulation by FINMA, such platforms should avoid (i) accepting funds from investors, (ii) pooling such investments from investors in the name of the platform in a way that the investments cannot be personalized anymore, and (iii) subsequently granting such investments as loans to a company advertising on the platform.

With regard to debt based Crowdfunding platforms, the situation is basically the same as described above with regard to Equity Models; i.e. loans granted directly to operating companies or to private persons only (and in particular not to the operator of the platform for further on lending) should fall outside the scope of the CISA. Even if loans were to be granted by an investor to a collective investment scheme presented on the platform (but operated by a party other than the operator of the lending platform), the operator of the platform should still not be subject to the CISA, because granting a loan to a collective investment scheme should not be qualified as distributing a collective investment scheme.

Further, the investment decision to grant any funds to a specific company should always remain with and be made by the investor itself and not by the platform. Contractual arrangements appearing as third party management of funds should generally be avoided.

### 3.2.4 Donations or Rewards Model

Normally, these platforms are structured in a way that the contributions are not investments related to a direct return, if any, and therefore such platforms do not fall under the collective investment schemes regulations.

## 3.3 Federal Act on Stock Exchange and Securities Trading (SESTA)

### 3.3.1 General Rule

Pursuant to the Federal Act on Stock Exchange and Securities Trading (*Börsengesetz*, SESTA), all Persons qualifying as securities dealers are required to obtain an authorization from FINMA. A securities dealer is defined as a Person or partnership who, in its professional capacity, (i) buys and sells



securities on the secondary market, either for its own account with the intent of reselling them within a short period of time or for the account of third parties, (ii) publicly offers securities on the primary market, or (iii) creates derivatives and offers them to the public.

Securities dealers include in particular own-account dealers (dealers who, in their professional capacity, trade in securities for their own account on a short-term basis), client dealers (dealers who, in their professional capacity, trade in securities in their own name for the account of clients) and issuing houses (securities dealers who, in their professional capacity, underwrite securities issued by third parties on a firm basis or against commission and offer them to the public on the primary market).

Furthermore, SESTA requires a stock exchange to obtain a license from FINMA. A stock exchange is defined as an organization set up solely for the purpose of securities trading (e.g. shares and bonds) on the secondary market, which enables the simultaneous exchange of offers of securities (and not only the exchange of price-related information) among a number of securities dealers as well as the execution of such transactions.

In addition, the Federal Council may subject organizations which are, in whole or in part, similar to exchanges to the SESTA or exempt certain exchanges or similar organizations from the application of the SESTA whenever justified by the objectives of the SESTA. Exchanges, as well as organizations similar to exchanges, are organizations which facilitate secondary market transactions (and not the offering of new securities).

### 3.3.2 Legal Consequences for Crowdfunding Platforms in Switzerland

In the light of the foregoing, Crowdfunding platforms should, *inter alia*, refrain from the following business activities in order not to be considered as a securities dealer:

- a) Trading of shares (or similar participation rights) in companies presented on the platform in the name and for the account of the investors and, in particular, not (i) maintain any accounts for the settlement of transactions for such investors by itself or with third parties, and/or (ii) hold any shares (or similar participation rights) on behalf of the investors in safe custody with itself or with third parties but in its own name; and
- b) Underwriting any kind of securities (in particular shares or bonds) newly issued by companies presented on the platform on a firm basis or against commission and subsequently publicly offer such securities to investors.

Furthermore, a Crowdfunding platform should generally be careful not to qualify as a stock exchange or an exchange-like institution in connection with additional services offered to facilitate the execution of investments or subsequent divestments (i.e. services other than providing information on possible investments). Normally, Crowdfunding platforms should not qualify as a stock exchange or exchange-like institution because they present direct investment into new (not existing) shares and thus facilitate primary market transactions. Moreover, even if the investments presented on the platform were investments to be made on the secondary market (i.e. into existing securities), the platforms should not qualify as exchanges (however, the analysis might be different with regard to exchange-like institutions), as such platforms do not (yet) have the capability to enable the simultaneous exchange of



offers, the conclusion of the respective contracts or the settlement of such contracts concluded over the platform.

### 3.4 Anti-Money Laundering Act

#### 3.4.1 General Rule

Pursuant to the Swiss Anti-Money Laundering Act (*Geldwäschereigesetz*, AMLA), Persons providing services as financial intermediaries must be affiliated to a recognized self-regulatory organization or need to obtain a license from FINMA for their professional business activities. In addition, financial intermediaries must comply with the statutory provisions and procedures of the AMLA, e.g. verification duties regarding the identity of the customer (and the beneficial owner), duties to clarify and to keep records, and certain organizational measures.

Financial intermediaries are in particular Persons who, in their professional capacity, accept or keep third party funds or who assist in the investment or transfer of such funds, such as Persons carrying out credit transactions, providing services for payment transactions or assets, or securities managers and Persons making actual investments in their capacity as investment advisors. However, Persons solely providing investment advisory services (including platforms who act as intermediary without assisting in any kind of the flow of funds) are not considered as financial intermediaries.

#### 3.4.2 Legal Consequences for the Crowdfunding Platforms in Switzerland

Whether an operator of a Crowdfunding platform (irrespective of the model operated) falls under the money laundering regulation very much depends on whether it limits its services to (i) providing information on possible investments, (ii) acting as intermediary with regard to possible transaction, and/or (iii) provides solely advisory services (in each case without assisting in the transfer or flow of funds), in which cases the money laundering regulation should theoretically not apply.

Other services offered in connection with investments presented on a platform, such as (i) services facilitating the execution of a transaction (e.g. assisting investors and/or companies or borrowers in the investment or transfer of funds), (ii) accepting or keeping funds of investors and/or companies or borrowers, (iii) the platform making investments on behalf of investors, or (iv) the platform enabling the operator of the platform to dispose of funds or financial assets (even on the basis of specific instructions only), need to be carefully analyzed. In particular, services provided by the operator of the platform in connection with (i) the flow of funds, (ii) keeping securities, or (iii) keeping accounts of investors will most likely bring a platform operator within the scope of the money laundering regulations as it will be considered a financial intermediary subject to the AMLA.

### 3.5 Consumer Credit Act

#### 3.5.1 General Rule

According to the Swiss Consumer Credit Act (*Konsumkreditgesetz*, CCA), a Person regularly acting as a consumer credit broker is required to obtain an authorization from its canton of residence for the provision of such services.



A *consumer credit agreement* is defined as an agreement according to which a Person who regularly grants credits in the course of its business (creditors) grants or promises to grant a credit to a consumer in the form of a deferred payment, a loan or a similar financial accommodation. Credit agreements entered into by creditors who do not regularly grant loans are not considered to be *consumer credit agreements*. Furthermore, certain consumer credit agreements are excluded from the scope of the CCA, in particular those with an amount of less than CHF 500 or exceeding CHF 80,000, those with a duration of less than three months or those repayable in maximum four instalments during a period of twelve months.

Besides the authorization requirement for consumer credit brokers mentioned above, the CCA requires that *consumer credit agreements* comply with certain material and formal requirements and that the consumers shall not be obliged to pay any compensation to a credit broker.

### 3.5.2 Legal Consequences for Crowdfunding Platforms in Switzerland

Crowdfunding platforms (including debt-based platforms) do normally not grant credits falling under the definition of a consumer credit mainly because the lenders normally are not Persons who regularly grant credits in the course of their business. However, should the credit agreements offered on the platforms be qualified as *consumer credit agreements*, the operators of such platforms would most likely qualify as consumer credit brokers and thus require authorizations from their canton of residence. To avoid such qualification, operators of lending platforms exclude lenders who regularly grant credits in their professional capacity.

### 3.5.3 Prospectus Requirements

In case equity securities or bonds are publicly offered for subscription, the issuing company needs to establish and issue an issue prospectus containing certain information regarding, *inter alia*, the company and its business activities. Generally speaking, any invitation to subscribe for equity securities which is not addressed solely to a limited number of Persons is considered as a public offer.

According to our knowledge, Crowdfunding platforms in Switzerland are not making any public offers for their own equity or debt securities. Therefore, they are generally not subject to the prospectus requirements under Swiss law. If in a particular case, an issue prospectus is required, the company itself would be the one obligated to produce, issue and publicly distribute such prospectus to the investors.

Despite the obligation to produce an issue prospectus lying with the companies offering their shares publicly, one needs to keep in mind that anyone who, upon the issuance of shares, intentionally or negligently contributed to an issue prospectus (or similar distribution material) containing incorrect, misleading or incomplete information, is liable to the acquirers of such newly issued and publicly sold shares for any damage caused in connection with the public offer of such shares. Accordingly, operators of platforms should put adequate measures in place to limit the risk of such prospectus liability.



## 4 Lessons learned from Switzerland's regulation for a possible harmonized European Crowdfunding regulation

### 4.1 Role model ("dos")

Currently, the Swiss prospectus requirements are limited (no pre-approval for non-listed securities), which allows companies to raise funds at relatively low cost.

Another positive aspect regarding the Swiss regulation is the flexibility it gives. It is advisable also in regard to a possible harmonized European Crowdfunding regulation to retain some flexibility whether and how to regulate Crowdfunding platforms as "institution similar to an exchange". This allows the regulation to be tailored to the size and business model of Crowdfunding platforms.

This flexibility is supported by an open and constructive attitude of regulators, who are open to a dialogue to ensure that Crowdfunding platform are implemented in compliance with applicable laws.

### 4.2 Aspects that should be avoided ("don'ts")

We can learn from the Swiss system that the flexibility of the regulatory framework has a downside: the case-by-case approach leads to legal uncertainty and higher costs for platforms, because the authorities as well as the Crowdfunding platform's operators need more time and resources to evaluate the requirements and legality of the operator's activities because there is no standardized procedure.

Moreover, the overall uncertainty and the lack of *de minimis* exemptions or specific exemptions for Crowdfunding prevents further growth in this area.<sup>72</sup> It is regrettable that also the planned bills for an FSMA, an FMIA and a FinIA do not provide any exemptions.

## 5 Conclusion

In 2013, CHF 11.6 million was collected through Crowdfunding in Switzerland. This is more than twice the volume of 2012. Nevertheless, Swiss Crowdfunding market remains rather small in comparison with the USA, Germany, and France.

There is currently no specific legislation or regulation in Switzerland explicitly addressing Crowdfunding platforms in Switzerland. However, there are several laws and regulations which may, under certain circumstances, be applicable to Crowdfunding platforms. Depending on the services provided and on the specific business model, Crowdfunding platforms (irrespectively whether they operate an Equity or Lending Model) may require particular a banking license, a license as securities dealer, a license as an institution similar to an exchange and/or a license under the CISA. Nevertheless, Crowdfunding platforms can be structured with minimal regulatory constraints and some platforms obtained a no-action letters from FINMA, confirming that the platforms as operated do not fall under the scope of application of neither the Swiss Federal Act on Banks and Savings Banks, the Federal Act on Stock Exchange and Securities Trading, the Federal Act on Collective Investment Schemes nor the Swiss Anti-Money Laundering Act.

<sup>72</sup> Cf. SECO, Diskussionspapier, p. 14; HETTICH, PETER, Finanzierungsquellen für KMU im Zeitalter von Crowdfunding, GesKR 2013, 386 et seqq., p. 396.



While Crowdfunding received some media attention, this did not create an impulse for political player to act. Quite to the contrary, three regulatory initiatives, namely the bill for a FMIA as well as the draft bills for a FSMA and a FinIA do not address Crowdfunding in any way, although they may have a material impact on Crowdfunding platforms.

The Swiss regulation contains some positive aspects such as the granting of flexibility to authorities and the Crowdfunding platforms as well as limited prospectus requirements. However, it also bears some negative aspects such as the assessment on a case-by-case basis, which causes higher costs and legal uncertainty. The lack of Crowdfunding exemptions is also a downside. These negative aspects should be handled differently in a possible harmonized European Crowdfunding regulation.

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## United Kingdom

### 1 Recent developments in the market of Crowdfunding in the United Kingdom

There are three broad types of Crowdfunding, each distinguishable by the return that the funder receives:

#### 1.1 The Investment Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

In the UK, the financial services regulatory regimes for corporate finance business and investment funds both tend to shape the structure of investment-based Crowdfunding platforms. As both regimes have not traditionally been used to facilitate the participation of large numbers of retail investors, there was lobbying for the creating of a new regulatory regime specifically designed for investment-based Crowdfunding. However, the Financial Conduct Authority's ("FCA") approach was to acknowledge the permissibility of investment-based Crowdfunding as a valid business model operating under the existing regime, with minor amendments. As a result of this approach, the regulation of platforms offering debt-based securities (such as bonds or debentures) is closer to the regime for equities platforms than it is to non-securities-based lending (known as P2P lending). For example, the FCA clarified its expectations of firms wishing to promote "non-readily realisable securities", covering most unlisted shares and debentures: such investments can be sold on a non-advised basis provided firms ensure the investors have the requisite level of understanding. The FCA has also signalled its disapproval of platform operators making use of exemptions in order to avoid becoming subject to regulation, although the legal loopholes that Crowdfunding firms had been using to operate outside the scope of regulation still exist.

#### 1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

Crowdlending is commonly referred to as peer-to-peer lending or P2P, although when individuals lend to businesses, many refer to it as P2B. The making of non-consumer loans was generally not treated as a regulated activity and so the Crowdfunding Lending Model developed quickly as an alternative to bank lending. However, from 1 April 2014, the new regulated activity of "operating an electronic platform in relation to lending" was introduced to the Regulated Activities Order. The activity only applies to loans where either:

- 1) the lender is an individual; or
- 2) the borrower is an individual and either:
  - a) the loan is £25,000 or less; or
  - b) the individual is not borrowing for business reasons.

In this context, "individual" includes a partnership with 2 or 3 partners.





As most P2P platforms target individual lenders, the status of the borrower does not affect the requirement for the platform to be authorised. However, the nature of the lending does affect the regulatory regime that will apply to the platform, as more extensive rules apply to P2P platforms that facilitate consumer credit.

Firms operating P2P platforms as before April 2014 were required to apply to the FCA for interim permissions to continue carrying on the activity. The FCA has allotted a time window (generally between August – October 2015) to each platform with interim permissions during which they will be required to apply for full permission or lose their authorised status. It is generally accepted that the regulatory regime for P2P platforms constitutes "light touch" regulation, which is in-keeping with the UK's ambitions to encourage increased responsible SME business lending and make the UK an international hub for Crowdfunding.

### 1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

The Donations or Rewards Model does not involve any form of financial investment or return and so it falls outside the scope of UK securities regulation. Crowdfunding originated from Donations or Rewards-based platforms, where the interest of participants was to help a worthy or interesting cause for the sake of being associated with it, rather than to profit financially. The idea of combining worthy causes with financial returns led to the development of the Investment and Lending Models, which are the focal points of several deep-pocketed institutions already operating in the financial services industry.

## 2 Recent developments regarding Crowdfunding regulation in the United Kingdom

See above

## 3 Current Regulation of Crowdfunding in the United Kingdom

### 3.1 Regulation under the Financial Promotion Regime

The offer of shares or other securities will generally constitute a financial promotion, namely an invitation or inducement to engage in investment activity. A financial promotion cannot be made to a retail investment audience unless the promotion is communicated or approved by a firm authorised by the FCA or it benefits from an exemption from the financial promotion regime. Much of the Crowdfunding website's contents will comprise an element of financial promotion. Accordingly, either the operator will need to be FCA-authorised or the operator of the platform will need to ensure that an FCA-authorised firm approves the financial promotion. Where an exemption is not available, the contents of the website's financial promotions need to comply with the requirements of chapter 4 of the FCA's Conduct of Business Sourcebook to ensure that they are clear, fair and not misleading. The approval of financial promotions entails costs and administrative burden. Accordingly, it is common for





operators to engage an FCA-authorised firm to approve initial investor communications and procure that the promotion of specific investment opportunities fall within one of the two exemptions highlighted below:

- existing shareholders - the platform creates a shareholder relationship with all funding subscribers and a parent/subsidiary relationship with fund-seeking subscribers; and/or
- sophisticated, high net worth and professional investors - the platform assesses the investment sophistication of subscribers or requires the subscriber to certify their own net worth or investment experience.

If the Crowdfunding entails investing in a collective investment scheme, there is a more restrictive financial promotion. For this reason, Crowdfunding platforms generally take all necessary steps to ensure that the investment does not constitute a collective investment scheme.

### 3.2 Regulation under the Financial Services and Markets Act 2000

The Financial Services and Markets Act 2000 requires platform operators to become authorised by the FCA in order to conduct regulated activities. Conducting a regulated activity without authorisation is a criminal offence. Regulated activities associated with Equity Crowdfunding may include:

- bringing about transactions in investments issued by the party seeking funding;
- making arrangements with a view to transactions in investments (which captures referral arrangements even where a specific issuer or investment is not identified); or safeguarding and administering investments (custody).

Less commonly, the platform operator could become involved in advising on securities, managing securities or dealing in securities, depending on the business proposition. Where the party seeking funding does not issue shares in a company, platform operators may also need to consider whether they are carrying on the regulated activity of operating a collective investment scheme or managing an alternative investment fund (see below).

Many Investment Crowdfunding platforms used to be structured using a combination of exclusions and exemptions from the regulated activities regime. This practice has become less common as a result of the recognition of Crowdfunding as a legitimate form of regulated business. Nonetheless, seeking authorisation is a costly and time-consuming process and, amongst other things, obliges the regulated firm to comply with the FCA's conduct of business obligations to ensure that the investments arranged through the platform are appropriate for the investor on a case-by-case basis. Many platforms are established as appointed representatives of authorised firms, benefitting from their regulatory permissions and bound by certain of the FCA Rules (not including capital requirements) as a matter of contract.

### 3.3 Regulation concerning Collective Investment Schemes ("CISs")

Where the profit share being offered to investors is not channelled through a standard corporate issuer/shareholder relationship (e.g. the investor receives a contractual entitlement to profits from a project), the investment may be characterised as units in a CIS. Crowdfunding generally entails the pooling of investor contributions or the pooling of profits and/or income prior to distribution to the



investor, with no investor involvement in the day-to-day management of the proposition (or project), the two key components of a "collective investment scheme".

Operating a CIS and managing an alternative investment fund are regulated activities and must be conducted by an FCA authorised firm (see the section on Regulation under the Financial Services and Markets Act 2000). There is overlap between this regulated activity and the activity of managing an alternative investment fund (see the section on Regulation under the AIFMD regime). There is potential for either the platform operator or the fund-seeking party to be a person that would conduct the regulated activity, depending on how the arrangements are structured. The promotion of single-project CISs is subject to greater restriction than the promotion of shares, even when the promotion is communicated or approved by an FCA-authorised firm. These restrictions also apply to other forms of non-mainstream pooled investment, such as shares in a special purpose vehicle.

It is necessary, therefore to apply further restrictions to the classes of potential funder of a CIS or special purpose vehicle than those that apply to funders of non-readily realisable securities. The potential categories of exempt funder to whom units can be promoted are often narrower than for shares, because of limitations on the scope of the self-certified high net worth and sophisticated individual financial promotion exemptions.

### 3.4 Prospectus requirements

The UK Financial Services and Markets Act 2000 (as amended) requires a prospectus to be published where transferable securities are offered to the public. Most Crowdfunding offers fall within an exemption for offers worth less than EUR 5 million in a period of 12 months. There are other exemptions that may be of use if single issues exceed this level.

Section 755 of the Companies Act 2006 also prohibits the offer of shares in a private limited company to the public. The involvement of the platform can be structured so as to reduce the risk of breach.

### 3.5 Regulation under the AIFMD regime

A range of measures implementing the Alternative Investment Fund Managers Directive ("AIFMD") came into force in the UK from 22 July 2013, creating a new pan-European concept of "alternative investment fund" that sits alongside the existing UK regime for CISs. Broadly, most CISs will constitute alternative investment funds. The AIFMD has added a new layer of regulation on top of the CIS regime. The AIFMD applies where the investment proposition involves an "alternative investment fund" ("AIF"), namely:

- a collective investment undertaking;
- which raises capital from a number of investors; and
- which invests in accordance with a defined investment policy for the benefit of its investors.

Most CISs will be AIFs, but the AIFMD is also capable of applying to a body corporate that falls outside the CIS regime. Managing an alternative investment fund is a regulated activity that also permits the firm to operate a CIS. The AIFMD imposes a heavy regulatory burden above and beyond the CIS regime on fund operators falling within scope, for example, the requirement to appoint an independent



depository. However, there is a light touch compliance regime for managers with total assets under management of less than EUR 100 million, which most UK-based platforms would fall into if they were managing an AIF. Under the limited compliance regime, the fund manager (e.g. the platform operator) will either be required to:

- where the fund is not also a CIS and satisfies certain other requirements, register with the FCA as a small registered AIFM and provide annual reports on the level of its funds under management; or otherwise
- become authorised as a small authorised AIFM and comply with a limited conduct of business and capital requirements regime.

In both cases, the light touch regime does not prohibit the marketing of AIFs to retail investors in the UK, provided the AIF is not also an unregulated CIS.

The impact of the Directive is reduced in the UK in comparison with other European jurisdictions that do not apply a light touch regime in respect of fund structures that fall within the EUR 100 million exemption.

### 3.6 Regulation under the P2P Regime

From 1 April 2014, platforms carrying out the new regulated activity of "operating an electronic platform in relation to lending" became subject to regulation by the FCA under an interim permission regime. Firms with interim permissions generally need to apply for full authorisation between August and October 2015 or lose their permissions. Firms without interim permissions wishing to operate a P2P platform must apply for full authorisation. Where the participation is structured as a debt security, rather than a loan, the platform is subject to regulation pursuant to the Investment Model, described above. Variations of the Lending Model can also lead to participants being offered units in a CIS and/or an AIF.

The main tenets of the P2P regime (where the loan does not fall within the consumer credit regime referred to in Possible additional Regulation, Consumer Credit Act) are:

- Publication of historic performance data on loans;
- Arrangements for investor protection in the event of platform failure;
- Capital adequacy requirements, based on the higher of a fixed requirement (£20,000 rising to £50,000) and a variable requirement relating to loan volumes;
- Client money segregation;
- Clear, fair and not misleading communications with lenders;
- An appointed representative regime.

The application of certain of these requirements is subject to phased introduction.



### 3.7 Regulation of Payment services

The transmission of funds between the investor and the crowd funded business may involve the platform operator providing "credit transfer" or "money remittance" services under the Payment Services Regulations 2012 (as amended) ("PSRs", implement in the UK the Payment Services Directive.) A platform operator will require separate FCA authorisation if it is conducting payment services.

Operators should however normally be able to rely on the exemption for "commercial agents" under the PSRs on the basis that they have authorisation to negotiate or conclude contracts on behalf of the funder and the fund seeker. Escrow arrangements pose particular payment services issues and have been the subject of specific European Commission guidance.

It is common practice for payment services providers (e.g. Paypal) to withhold a percentage of pledged funds pending satisfaction of any funding criteria stipulated by the fund raiser. This is because the payment services provider has a legal obligation to refund credit card payments in certain circumstances where the transaction is subsequently reversed.

### 3.8 Possible additional Regulations

#### Consumer Credit Act

The Consumer Credit Act 1974 (as amended by the Consumer Credit Act 1986) ("CCA") applies to consumer credit or consumer hire agreements where the borrower/hirer is not a body corporate or a partnership of four or more persons. From 1 April 2014, all consumer credit firms (previously regulated by the Office of Fair Trading) were required to register with the FCA and apply for interim permissions. The P2P lending interim permission regime was developed in the context of the wider transfer of lending regulation to the FCA.

The FCA's Consumer Credit Sourcebook (CONC) applied to firms carrying out "credit-related regulated activities". This applies to both the mainstream consumer credit activities and to operating a P2P platform. However, the application to a P2P platform is greatly reduced where the loans in question are not credit agreements: namely where the borrower is not an individual or small partnership. Further conduct of business requirements in relation to living wills (arrangements, for when the platform becomes insolvent), client money, publication of default statistics, and regulatory capital, amongst others. It is therefore common for crowd lending platforms to restrict lending to bodies corporate.

The application of the consumer credit regime also has implications for whether the platform will fall under the scope of the UK Money Laundering Regulations.

#### ISA Status of peer-to-peer loans

In the 2014 budget, the Government confirmed that peer-to-peer loans would be made eligible for inclusion within Individual Savings Accounts (ISAs) and therefore subject to the tax benefits that the ISA wrapper entails. On 17 October 2014, HM Treasury launched a consultation into the ways in which this could be achieved, through amendments to the RAO and the ISA Regulations. The consultation closes on 12 December 2014. One of the most significant things P2P platforms will need to do for their



loans to be eligible is demonstrate a sufficiently liquid secondary market, enabling lenders to exit their loans or transfer to another ISA investment.

## 4 Lessons learned from the United Kingdom's regulation for a possible harmonized European Crowdfunding regulation

### 4.1 Role model ("dos")

There are currently no lessons that can be learned from the United Kingdom's regulation for a possible harmonized European Crowdfunding regulation.

### 4.2 Aspects that should be avoided ("don'ts")

There are currently no lessons that can be learned from the United Kingdom's regulation for a possible harmonized European Crowdfunding regulation.

## 5 Conclusion

Over the last 12 months, Crowdfunding has been a key focus of the FCA and the UK Government, and has undergone significant change. The resulting regime is generally felt to have achieved a sensible balance between promoting Crowdfunding as an alternative financing method for individuals and businesses, whilst offering an appropriate level of protections to investors.

The introduction of a new regulated activity for debt-based Crowdfunding, together with a consolidation of the rules around equity-based Crowdfunding may suggest that it is safe to assume that the current regime is here to stay, at least for the next few years. However, perhaps due to its relatively new and innovative nature, Crowdfunding is an area which is subject to on-going monitoring in the UK, and may be subject to further change in the near future, as the awareness and experience of both investors and investees increases. Possible changes to the regime may come in the areas of financial promotions, where the industry as a whole is pushing for a lighter touch regime in respect of promotions published through the medium of social media. In addition, the results of the Government's consultation on the ISA status of P2P loans could see the lines between debt-based Crowdfunding and traditional bank lending being blurred even further.

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## United States

### 1 Current Market of Crowdfunding Platforms in the United States

There are three primary categories of Crowdfunding in the US, as in most of the world:

#### 1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

The Jumpstart Our Business Startups Act (“**JOBS Act**”) signed into law by the President of the United States after bi-partisan Congressional support on April 5, 2012, formally embraced Crowdfunding in the US. Title III of the JOBS Act (“Title III”) details the fundamental requirements for equity Crowdfunding in the US. Actual offerings cannot commence until the US Securities and Exchange Commission (“**SEC**”) promulgates rules for such offerings and the Financial Industry Regulatory Authority (“**FINRA**”) establishes a rule set specifically designed for funding portals (i.e., Crowdfunding websites). While both the SEC and FINRA published proposed rules on October 23, 2013 and have received hundreds of comment letters, there is no clear date when the final rules will be published.

We distinguish equity “Crowdfunding” from “private placements” that are marketed by “general solicitation or general advertising” but only available to “accredited investors.”<sup>73</sup> Title II of the JOBS Act lifted the historic ban on broad marketing of private placements offered pursuant to the safe harbor requirements of Rule 506 of Regulation D under the Securities Act of 1933, as amended. Until September 2013, portals facilitating such offerings restricted access to pre-qualified Accredited Investors via password-only access consistent with SEC guidance issued in the form of letter granting ‘no action’ relief from SEC enforcement. As of September 23, 2013, new Rule 506(c) permits offerings to be conducted over the internet or other wide distribution channels, so long as sales of securities are limited to accredited Investors who demonstrate that they meet net income or net worth standards as defined in Regulation D. Frequently, these offerings are conducted in coordination with a registered broker-dealer. In addition, these offerings may be conducted indirectly through private equity or venture capital fund investment vehicles either as single issuer or basket investments. In March 2013, the SEC granted no action relief to two portals in which venture capital and angel investors identify early-stage investment opportunities and establish a special purpose vehicle for a pooled investment by accredited investors. In both cases, an affiliate of the portal manages the fund. This has spurred the

<sup>73</sup> The term “accredited investor” is defined in Rule 501 of Regulation D to include: (i) a bank, insurance company, registered investment company, business development company, or small business investment company; (ii) an employee benefit plan, within the meaning of the Employee Retirement Income Security Act, if a bank, insurance company, or registered investment adviser makes the investment decisions, or if the plan has total assets in excess of \$5 million; (iii) a charitable organization, corporation, or partnership with assets exceeding \$5 million; (iv) a director, executive officer, or general partner of the company selling the securities; (v) a business in which all the equity owners are accredited investors; (vi) a natural person who has individual net worth, or joint net worth with the person’s spouse, that exceeds \$1 million at the time of the purchase, excluding the value of the primary residence of such person; (vii) a natural person with income exceeding \$200,000 in each of the two most recent years or joint income with a spouse exceeding \$300,000 for those years and a reasonable expectation of the same income level in the current year; or (viii) a trust with assets in excess of \$5 million, not formed to acquire the securities offered.



establishment of many similar arrangements pending (or perhaps as a companion to) Crowdfunding, with real estate ventures quickly becoming one of the most prevalent investment opportunities supported by such arrangements. Until Title III is implemented and realizes its full potential, Regulation D offerings will continue to be an attractive option for small and medium sized businesses in need of capital.

Due to the uncertainty surrounding when the SEC will make available workable Title III Crowdfunding regulations, many states have enacted (or are in the process of enacting) their own Crowdfunding exemption statutes for intra-state offerings. These statutes require the issuer and all investors to be based in the state. Commonly, permitted offerings are limited to \$1 million and the states require submission of the offering materials before the offering can commence. As of November 2014, thirteen (13) states have either enacted separate intra-state Crowdfunding exemptions or have enacted amendments to their existing blue sky laws to permit some type of intrastate Crowdfunding. Fourteen (14) states are in various stages of enacting or considering an intra-state Crowdfunding exemption. To date, only two states, Florida and North Carolina, have reviewed and rejected intra-state Crowdfunding exemptions.

### **1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)**

Currently, there are peer-to-peer (P2P) and peer-to-business sites operating in the US. However, these facilities follow different regulatory structures than that defined as Crowdfunding in Title III. Kiva.org is a US-based microfinance lending site that operates as a not-for-profit enterprise and does not charge interest to borrowers or promise any return to lenders. Other leading websites for debt-based funding comply with elaborate federal securities registration requirements as well as state licensing and lending laws. Some of the other lending based platforms utilize the Rule 506 offering model described above. However, these models are outside the description of Crowdfunding within Title III.

### **1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)**

These models have been in operation in the US for many years. Fundraising in exchange for a donation, credit or reward is not subject to any regulation in the US, although there are antifraud statutes and possible implications for the future sale of securities.

## **2 Recent developments regarding Crowdfunding Regulation in the United States**

It has been over a year since the proposed Crowdfunding regulations were published. There is still no timeline for adoption of the final rules. The generally solicited private placements discussed in Section 1.2 above are estimated at less than 10% of the US private placement notice filings submitted to the SEC since implementation in September 2013.





## 3 Proposed Regulation of Crowdfunding in the United States (Title III)

### 3.1 Banking / Financial Service License Requirements

Crowdfunded offerings must be conducted by an SEC registered and FINRA licensed intermediary which can be a funding portal or a broker-dealer. Regulations for funding portals have not yet been published and are expected to be issued in conjunction with or shortly after the offering rules are proposed. The new rules will likely be less stringent than those for broker-dealers because funding portals are not permitted to receive or hold investor funds or securities. Title III bars funding portals from providing investment advice (broker-dealers are permitted to recommend investments). That said, regulators may be prepared to permit funding portals to “curate” offerings posted on their sites as a function of their investor protection responsibilities. Consistent with the limited regulation, funding portals cannot compensate employees, agents or others for solicitation or based on the sale of securities displayed on the website (this “salesman’s stake” is deemed to be the province of the more heavily regulated registered brokers).

### 3.2 Prospectus requirements

Title III requires issuers to provide investors with the necessary information to appreciate the potential risks and rewards of an investment and offering materials must include the following:

- **Company:** the issuer and its members, including the name, legal status, physical address, the names of the directors and officers holding more than 20 % of the shares of the issuer.
- **Offering:** the anticipated business plan of the issuer, the target offering amount, the deadline to reach the target offering amount and the price to the public of the securities.
- **Structure:** the ownership and capital structure of the issuer, including terms of the securities of the issuer being offered.
- **Valuation:** how the securities being offered are being valued, and examples of methods for how such securities may be valued by the issuer in the future, including during subsequent corporate actions; and
- **Risks:** the risks to purchasers of the securities relating to minority ownership in the issuer, the risks associated with corporate actions, including additional issuances of shares, a sale of the issuer or of assets of the issuer, or transactions with related parties.
- **Financial Statements:** The extent to which an issuer must disclose its financial statements varies depending on the aggregate amount offered, including any prior offerings in the preceding 12 month period. For Crowdfunding offerings with an aggregate offering amount up to \$100,000, the issuer must disclose its most recently filed income tax returns and its financial statements certified by the issuer’s principal executive officer. For offerings that exceed \$100,000 during the 12 month period but are less than \$500,000, the issuer must provide financial statements reviewed by an



independent public accountant. If an aggregate offering amount exceeding \$500,000, the issuer must provide audited financial statements.

The Crowdfunding portals are also required to make available to the SEC and to potential investors any information provided by the issuer no later than 21 days prior to the first day on which securities are sold to any investor.

### 3.3 Regulation of Crowdfunding under the AIFMD regime

Since it is not part of the EU, the US is not required to adopt the AIFMD. However, to the extent that a US-based investment adviser markets AIFs in the EEA, manages or subadvises EEA domiciled AIFs, or is outside the safe harbor for “reverse solicitation” in a jurisdiction, it may need to comply with the local rules and requirements. More to the point, Title III requires that only an operating company can conduct an offering under US law. As such, AIFMD would not apply to US crowdfunded offerings.

### 3.4 Payment Services Regulation

Title III does not speak to escrow or fund collection mandates. However, consistent with current law, Crowdfunding intermediaries will not be permitted to receive or hold investor funds. The new rules are expected to address this concern and will likely impose a requirement for funds to be held by a bank or trust company or other qualified custodian.

### 3.5 Possible Additional Regulations

Title III requires Crowdfunding intermediaries to undertake the following additional requirements for crowdfunded offerings:

- Ensure that each investor: (i) reviews such investor-education material; (ii) positively affirms that he or she understands that there is a risk of losing their entire investment, and that such investor could bear such a loss; and (iii) answer questions demonstrating: (1) an understanding of the level of risk generally applicable to investments in startups, emerging businesses, and small issuers; and (2) an understanding of the risk of illiquidity.
- Take measures to reduce the risk of fraud, including obtaining a background and securities enforcement regulatory history check on each officer, director, and person holding more than 20 % of the outstanding equity of every issuer whose securities are offered.
- Observe annual limits on issuers to sell up to an aggregate of \$1,000,000 of its securities during any 12 month period.
- Ensure that all offering proceeds are only provided to the issuer when the minimum offering amount is met or exceeded.
- Permit investors to cancel their commitments to invest.
- Ensure that no investor exceeds the maximum amount an individual is permitted in invest in such securities.



- Implement measure to protect the privacy of information collected from investors.
- Prohibit its directors, officers, or partners, or such person performing a similar function, from having any financial interest in an issuer using its services.
- Limit Crowdfunding offerings to domestic issuers that are neither reporting companies under the Securities Exchange Act of 1934 nor investment companies.
- Reject any issuers associated with certain “bad actors” from participating, including persons with criminal convictions or court injunction in connection with the purchase or sale securities.

Title III also imposes investor guidelines:

- Annual investment limits - Investors with an annual income or net worth of less than \$100,000 will only be permitted to invest the greater of \$2,000 or 5% of their annual income or net worth in any 12 month period. Investors with an annual income or net worth greater than \$100,000 will be permitted to invest the greater of \$100,000 or 10% of their annual income or net worth. Investors are limited to investing \$100,000 in Crowdfunding issues in a 12 month period.
- Investors are restricted from transferring their securities for one year, subject to certain exceptions, including transfers: (i) to the issuer; (ii) to an accredited investor; (iii) pursuant to an offering registered with the SEC; or (iv) to the investor’s family members.

Finally, and somewhat incongruously, issuers and funding portals may not advertise specific investment opportunities. Prospective investors can be driven to the funding portal, but not to any particular raise.

## 4 Conclusion

Small and medium sized businesses and the market participants who support their financing eagerly await the SEC’s action to promulgate rules under Title III of the JOBS Act. Rule 506 platforms have already consummated tens of millions of dollars in funding of entrepreneurs in the pre-Title II period and as a result of the implementation of the Title II regulations. Title III will broaden the market for such offerings by enabling entrepreneurs to receive financing from non-accredited investors. Crowdfunding, when it becomes available to startups and the public, will more efficiently permit entrepreneurs across the country to raise much needed capital from friends, family, customers, and others for their community-based businesses and high-growth technology opportunities. We eagerly await the final regulations and implementation.

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## Summary – Regulation of Crowdfunding in Europe, North America and Israel

Country	Austria	Belgium	Bulgaria	Canada
<b>Regulation</b>				
<b>Recent developments in Crowdfunding regulation</b>	<p>Crowdfunding is regulated extensively in Austria as a cross-sectional matter.</p> <p>Despite of efforts of certain political parties, no explicit legal basis for Crowdfunding has been established in Austria yet. However, the competent ministries are about to evaluate the need of a comprehensive legal basis for Crowdfunding and/or the adoption of existing laws to the practical needs of Crowdfunding.</p>	<p>The most important development concerns the adoption of specific legislation which broadened the prospectus exemption for public Crowdfunding offers (up to 300.000 EUR/year with a maximum of 1.000 EUR per investor).</p>	<p>Donation/Reward Model: New Bulgarian internet platform bgining.com extensively promotes donation based projects aiming at assisting businesses, social and cultural projects of Bulgarian entrepreneurs, artists.</p>	<p>On March 20, 2014, six provinces in Canada published for comment a Proposed Equity Crowdfunding Model and five provinces published for comment a Proposed Start-Up Model.</p> <p>A few operating portals are registered as exempt market dealers selling securities on the internet under existing prospectus exemptions, such as the accredited investor exemption. There is room for a lot more.</p> <p>A number of portals are seeking registration as exempt market dealers or are registered and completing their software and infrastructure build-out and expected to launch in 2015.</p> <p>In November 2014, TSX Private Markets will be launching its on-line platform and selling securities on the internet to accredited investors through</p>

				registered dealers and advisers. The TSX Private Markets Platform seeks to do private placements and facilitate secondary market trading of securities of private and public issuers. It will likely increase interest, trust and understanding of selling securities on the internet - equity Crowdfunding.
<b>Current / planned Crowdfunding regulation</b>				
<b>General regulation</b>	<p>If a Crowdfunding platform offers securities or investment products, the operator of the platform provides financial services in the sense of the WAG 2007 → the commercial provision of various investment services requires a license from the FMA → Alternatively, the operator of a Crowdfunding platform can cooperate with a securities company or a credit institution as an auxiliary person</p> <p>The commercial collection of loans, which finance the on-going business, can constitute a deposit</p>	<ul style="list-style-type: none"> <li>• Crowdfunding platforms facilitating direct investment in financial instruments but under the Crowdfunding exemption for public offerings will not need to be licensed investment firms.</li> <li>• Crowdfunding platforms facilitating direct investment in financial instruments operating outside the Crowdfunding exemption for public offerings are likely to require a licence under the Act regulating investment services firms – authorization and supervision by the FSMA (or Belgian National Bank,</li> </ul>	<ul style="list-style-type: none"> <li>• The operator of the platform may be required to be licensed / registered either as a financial or a credit institution by the Bulgarian National Bank in accordance with the Law on Credit Institutions, respectively with the Law on Payment Services and Payment Systems.</li> <li>• Legal entities providing public offering of securities shall be required to register as a public joint stock company in compliance with the Public Offering of Securities Act.</li> </ul>	<ul style="list-style-type: none"> <li>• For a portal to sell securities on the internet under existing prospectus exemption, it needs to be registered as an exempt market dealer.</li> <li>• The Proposed Equity Crowdfunding Model would require a portal to be registered as a 'restricted dealer' in those jurisdictions where it intends to sell securities on the internet and only in those jurisdictions where the exemption is available.</li> <li>• The Proposed Start-Up Model would not require a portal to be registered with any Canadian securities regulator in a Start-Up Jurisdiction; only form filings</li> </ul>

	<p>business in the sense of the BWG → such business is reserved to credit institutions and requires a license of the FMA.</p> <p>Depending on the structure in detail: sound arguments argue that contributions under Donations/Rewards Model do not constitute investment products</p>	<p>depending on the nature of their activities) save if no compensation is charged for these services.</p> <ul style="list-style-type: none"> <li>• Onward trading in financial instruments requires a licence</li> <li>• Collection of limited public refundable funds does not fall within banking monopoly if sufficient safeguards are provided to guarantee that the funds will only be used to refund the crowd or finance the project</li> <li>• The Lending (and Rewards) Model uses debt instruments, which are not regulated by the Act regulating investment services firms.</li> <li>• The Donation Model is least prone to financial regulation</li> </ul>	<ul style="list-style-type: none"> <li>• Legal entities facilitating public offering of securities or investment products could be required to register as an investment intermediary under the Markets in Financial Instruments Act.</li> <li>• The Financial Supervision Commission is responsible to supervise both the public offering of securities and the investment intermediaries.</li> </ul>	<p>and subject to satisfying certain requirements.</p>
<b>Prospectus requirement</b>	<ul style="list-style-type: none"> <li>• Prospectus requirement according to the BWG for the public offering of securities or investment products. If the prospectus includes securities for admission</li> </ul>	<ul style="list-style-type: none"> <li>• Prospectus requirement for offering investment instruments (a term broader than financial Instruments, as it encompasses contract-</li> </ul>	<ul style="list-style-type: none"> <li>• Prospectus requirement for companies which publicly offer securities to investors</li> <li>• Threshold: EUR 100.000 per issuer within 12</li> </ul>	<ul style="list-style-type: none"> <li>• Equity Crowdfunding is legal under existing prospectus exemptions such as the accredited investor exemption and the offering memorandum exemption in</li> </ul>

	<p>to the stock exchange, also the KMG can apply.</p> <ul style="list-style-type: none"> <li>The general prospectus requirements do not apply in exceptional cases, inter alia for offering security papers or investments products within the European Union for a total consideration of less than EUR 250.000,-, calculated over a period of twelve months.</li> <li>Depending on the structure in detail: no prospectus requirements for subordinated loans or contributions under Donations/Rewards Model.</li> </ul>	<p>based debt instruments).</p> <ul style="list-style-type: none"> <li>Thresholds: EUR 300,000 per issuer within 12 months, a maximum of 1.000 Euros per project per investor</li> </ul>	<p>months</p>	<p>Canada.</p> <ul style="list-style-type: none"> <li>Saskatchewan has legalized a specific start-up equity Crowdfunding exemption</li> <li>Six provinces in Canada are considering a Proposed Equity Crowdfunding Exemption.</li> <li>Five provinces in Canada are considering a Proposed Start-Up Exemption. The Province of British Columbia is also considering this exemption.</li> </ul>
<b>AIFMD-regulation</b>	<ul style="list-style-type: none"> <li>Typical start-up or developing companies in general do not constitute an AIF.</li> <li>Alternative investment funds are facilitated when the assets acquired through leverage do not exceed</li> </ul>	<ul style="list-style-type: none"> <li>AIFMD has been transposed in Belgium but, those platforms' not benefiting from the holding exemption, will still benefit from the lighter regime put in place. Impact of AIFMD will probably be low.</li> </ul>	<ul style="list-style-type: none"> <li>With regard to the management of alternative investment funds (AIFs) a new chapter has been adopted in the Law on Collective Investment Schemes and Other Undertakings for</li> </ul>	<p>Canada is not an EU member state and therefore the European Alternative Investment Fund Managers Directive is not applicable in Canada</p>



	<p>a total of EUR 100.000.000,-- or total assets do not exceed EUR 500.000.000 ("<i>de minimis-barrier</i>").</p> <ul style="list-style-type: none"> <li>• A "Project Company" may, under various circumstances, constitute an AIF.</li> <li>• Depending on the structure in detail, Crowdfunding by means of subordinated loans or contributions under Donations/Rewards Model should not entail an AIF.</li> </ul>		<p>Collective Investments.</p> <ul style="list-style-type: none"> <li>• Pursuant to the Law on Collective Investment Schemes and Other Undertakings for Collective Investments, the Crowdfunding financing shall not fall within the scope of its application.</li> <li>• It shall apply to closed-end investment companies only, as far as the special investment purposes companies are excluded from the scope of application of the Directive.</li> </ul>	
<b>Payment service regulation</b>	<ul style="list-style-type: none"> <li>• Transfer of funds between investors and the operator of a Crowdfunding platform can constitute remittance services in the sense of the ZaDiG → authorisation by the FMA required.</li> <li>• Exception of the applicability of the ZaDiG, if the operator of a Crowdfunding</li> </ul>	<ul style="list-style-type: none"> <li>• Transfer of funds through operator may constitute money remittance service → Belgian National Bank licence required</li> <li>• "Commercial agents" exemption probably does not apply to Crowdfunding platform operators.</li> <li>• If consumers are borrowers, licence needed as a consumer credit professional and formal</li> </ul>	<p>Transfer of funds through operator may constitute money remittance service – in future, the operator of the platform may be required to be licensed / registered either as a financial or a credit institution by the Bulgarian National Bank in accordance with the Law on Credit Institutions, respectively with the Law on Payment Services and</p>	<ul style="list-style-type: none"> <li>• A portal that is a registered as an exempt market dealer is permitted to receive or hold investor funds in trust.</li> <li>• Under the Proposed Equity Crowdfunding Exemption, a portal registered as a restricted dealer cannot accept or handle funds for purchase of issuer's securities or hold assets of investors.</li> <li>• Under the Proposed Start-Up Exemption, a portal cannot</li> </ul>

	platform acts as a commercial agent. Alternatively the operator could use an external provider or partner for processing payments.	contractual and precontractual requirements apply	Payment Systems.	hold funds, rather it must ensure that all funds received for distribution are held in trust in any of Start-Up Jurisdictions for investors by accepted depository.
<b>Consumer credit regulation</b>	If consumer borrowers lend money to a Crowdfunding platform (Lending Model), there are impacts on the form and content of the lending agreements according to the VKrG.	Credit to consumers is a regulated activity requiring authorisation from the Ministry of Economic Affairs	At present, lending agreements, including between related parties or between a local and foreign entities are subject to a registration under the Currency Act in a special register at the Bulgarian National Bank.	Certain consumer protection legislation would apply to P2P lending platforms.
<b>Further possible requirements</b>	<ul style="list-style-type: none"> <li>• Trade Law (<i>Gewerbeordnung</i>);</li> <li>• Law regarding the Supervision of Securities (<i>Wertpapieraufsichtsgesetz 2007</i>);</li> <li>• Consumer Protection Act (<i>Konsumentenschutzgesetz</i>).</li> </ul>	<ul style="list-style-type: none"> <li>• The Act on Market Practices and Consumer Protection</li> <li>• Money Laundering Provisions</li> <li>• The Privacy Act</li> <li>• The Consumer Credit Act</li> </ul>	<ul style="list-style-type: none"> <li>• The Commerce Act</li> <li>• The Law on Measures against Money Laundering</li> <li>• The Currency Act</li> </ul>	<i>Income Tax Act</i> (Canada) and its regulations and possibly other federal and provincial income tax legislation  <i>Proceeds of Crime (Money Laundering) and Terrorist Financing Act</i> (Canada)
<b>Lessons learned for a possible harmonized European Crowdfunding regulation</b>				
<b>Role model ("dos")</b>		<ul style="list-style-type: none"> <li>• Clear regulations allowing public offering under</li> </ul>		Not applicable

		<p>certain thresholds</p> <ul style="list-style-type: none"> <li>• Exemption from investment service act for crowdfunding offers under threshold.</li> <li>• No overregulation of crowdfunding platforms.</li> </ul>		
Aspects that should be avoided ("don'ts")		<ul style="list-style-type: none"> <li>• Thresholds for public offers are to low –not competitive in compared to other EU countries. EU harmonisation required.</li> <li>• Clearer exemptions from investment services regulations required for crowdfunding platform</li> <li>• Absence of any fiscal incentive on donations in crowdfunding framework.</li> </ul>		Not applicable

Country	Croatia	Czech Republic	Denmark	Estonia
<b>Regulation</b>				
<b>Recent developments in Crowdfunding regulation</b>	<ul style="list-style-type: none"> <li>No relevant developments in Croatia with respect to laws and regulations potentially applicable to Crowdfunding in Croatia.</li> <li>Still no local law or regulation specifically addressing Crowdfunding</li> <li>Only one operational Crowdfunding platform, opened very recently and with only one active project operated thus far</li> </ul>	<ul style="list-style-type: none"> <li>No new developments in applicable regulations</li> <li>New Corporations Act enables more flexible structure of target companies using Equity Model</li> <li>No new regulation is expected in the near future</li> </ul>	<p>Danish Financial Supervisory Authority issued guidance on Crowdfunding and the relevant financial regulation.</p> <p>Danish Government is currently contemplating introducing regulation of Crowdfunding in Denmark. This is being discussed in a committee under the Danish Government.</p>	<p>There have been no recent substantial developments in Crowdfunding regulation.</p>
<b>Current / planned Crowdfunding regulation</b>				
<b>General regulation</b>	<ul style="list-style-type: none"> <li>No regulatory practice</li> <li>Certain types of Equity</li> </ul>	<ul style="list-style-type: none"> <li>Project company or Crowdfunding platform</li> </ul>	<ul style="list-style-type: none"> <li>If a Crowdfunding platform facilitates</li> </ul>	<ul style="list-style-type: none"> <li>If Crowdfunding platform organises offering of</li> </ul>

	<p>Model and Lending Model are potentially subject to a regulated regime under local securities and investment funds laws.</p> <p>→ HANFA and/or CNB authorisation and registration required</p> <ul style="list-style-type: none"> <li>Depending on the structure, Donations/Rewards Model is not subject to financial services regulation</li> </ul>	<p>acting under Equity Model can be qualified as an Investment Fund under AMCIF → licence from Czech National Bank required</p> <ul style="list-style-type: none"> <li>Alternatively, Crowdfunding platform may to a limited extent act as intermediary in direct purchase of shares by investors → licence from the Czech National Bank required</li> <li>Project company or Crowdfunding platform acting under Lending Model is not a regulated entity → no licence required</li> <li>Project company or Crowdfunding platform acting under Donations or Rewards Model enjoys an exemption under AMCIF and cannot be qualified as an Investment Fund → no licence required</li> </ul>	<p>offering of securities or investment products the operator of the platform renders financial services, which is subject to a licensing requirement</p> <ul style="list-style-type: none"> <li>Donations or Rewards Model does not involve any form of financial investment or financial return and therefore is not within the scope of the Danish financial regulation</li> </ul>	<p>securities or acts as a securities broker, it provides investment service → FSA authorisation required</p> <ul style="list-style-type: none"> <li>Crowdfunding platforms operating the Lending Model use exemptions from regulated activities regime (acting as broker and not as a lender or a deposit holder)</li> <li>Crowdfunding platform operating the Donations/Rewards Model is not subject to financial services regulation</li> <li>No Crowdfunding platforms are currently supervised by the FSA</li> </ul>
<b>Prospectus requirement</b>	<ul style="list-style-type: none"> <li>Prospectus requirement for offering of securities transferable on capital markets.</li> <li>Threshold: EUR 5 million</li> </ul>	<ul style="list-style-type: none"> <li>General prospectus requirement for offering of investment securities</li> <li>Exemptions apply under threshold of EUR</li> </ul>	<ul style="list-style-type: none"> <li>Prospectus requirement for offering of securities or investment products</li> <li>Threshold: EUR 1.000,000</li> </ul>	<ul style="list-style-type: none"> <li>Prospectus requirement for public offering of securities</li> <li>Threshold: EUR 5 million per issuer within 12</li> </ul>

	EU-wide per issuer within 12 months	1,000,000 per issuer for investment securities offered in any Member State of EU within 12 months	per issuer within 12 months	months <ul style="list-style-type: none"> <li>For securities the issue of which is under this threshold, specific prospectus requirements provided in a regulation of the Minister of Finance apply</li> </ul>
<b>AIFMD-regulation</b>	<ul style="list-style-type: none"> <li>Legislation only recently implemented and no regulatory practice</li> <li>Typical start-up company seeking funding for regular operations should generally not constitute an AIF</li> <li>Crowdfunding structure could constitute an AIF if it includes profit share arrangements otherwise than in a commercial company</li> <li>Depending on the structure, funding by non-transferable loans or contributions under Donations/Rewards Model should not entail an AIF</li> <li>Crowdfunding platforms are likely not AIFM</li> </ul>	<ul style="list-style-type: none"> <li>Operating company like start-up or developing company will not be qualified as AIF under AMCIF → no licence required</li> <li>A project company/Crowdfunding platform acting under Equity Model could possibly be qualified as AIF under AMCIF → license from Czech National Bank re-quired</li> <li>Project company/Crowdfunding platform acting under Lending or Rewards Model will not be qualified as AIF →no licence required</li> </ul>	<ul style="list-style-type: none"> <li>Crowdfunding platform may qualify as an AIF and be subject to the Danish AIFM Act</li> <li>The persons administering the AIF – platform will qualify as Fund Managers of the AIF.</li> </ul>	<ul style="list-style-type: none"> <li>AIFMD regulation was implemented in the Investment Funds Act in 2013 and 2014.</li> <li>Act does not implement any provisions that would explicitly deal with Crowdfunding.</li> </ul>
<b>Payment</b>	Transfer of funds through	Provision of payment services	• Transfer of funds through	• Transfer of funds through

<b>service regulation</b>	<p>operator may constitute money remittance service → Ministry of Finance / CNB authorisation required</p> <p>Exemption for "commercial agents" likely to apply to operators of Crowdfunding platforms</p>	<p>as defined under Payment Services Act by a project company or a Crowdfunding platform triggers licensing requirements (licence granted by Czech National Bank)</p>	<p>operator may constitute money remittance service</p> <ul style="list-style-type: none"> <li>Requires Danish FSA's authorisation</li> </ul>	<p>operator may constitute payment service or money remittance service. → FSA activity licence or application to use exemption required.</p> <ul style="list-style-type: none"> <li>"Commercial Agents" exemption may be applicable to operators of Crowdfunding platforms.</li> </ul>
<b>Consumer credit regulation</b>	<p>If consumer borrowers are permitted on a platform (Lending Model) a consumer credit license is generally required → implications for the form and content of the lending agreements</p>	<ul style="list-style-type: none"> <li>The Consumer Credit Act only applies to individuals who are consumers. The Consumer Credit Act does not apply to business relationships.</li> </ul>	<p>If consumer borrowers are permitted on a platform and Crowdfunding offered is based on Lending Model there are requirements to the lending agreement pursuant to the Danish Act on Credit Agreements</p>	<ul style="list-style-type: none"> <li>If consumer borrowers are permitted on a platform (Lending Model) there are implications for the form and content of the lending agreements.</li> </ul>
<b>Further possible requirements</b>	<ul style="list-style-type: none"> <li>Croatian Act on Prevention of Money Laundering and Financing of Terrorism</li> <li>Croatian Act on Protection of Personal Data</li> <li>Croatian Companies Act</li> </ul>	<ul style="list-style-type: none"> <li>Trade Licensing Act</li> <li>Capital Markets Act</li> <li>AML Act</li> </ul>	<ul style="list-style-type: none"> <li>The Danish Act on Measures to Prevent Money Laundering and Financing of Terrorism</li> <li>Danish Marketing Practices Act</li> <li>Danish Investment Associations, etc. Act.</li> <li>Danish Act on Credit Agreements</li> </ul>	<ul style="list-style-type: none"> <li>New Creditor and Credit Broker Act</li> <li>Money Laundering and Terrorist Financing Prevention Act (<i>rahapesu ja terrorismirahastamisetokes tamiseseadus</i>)</li> <li>Estonian Advertising Act (<i>reklaamiseadus</i>)</li> <li>Estonian Law of Obligations Act</li> </ul>

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## Lessons learned for a possible harmonized European Crowdfunding regulation

<b>Role model ("dos")</b>	No firm lessons from Croatia due to lack of specifically adapted regulation and historical lack of Crowdfunding activity	Light regulation of Lending Model and Rewards Model	<ul style="list-style-type: none"> <li>• Tendency that Danish Crowdfunding resembles payment services more than receiving of deposits.</li> <li>• New harmonized European Crowdfunding regulation should accommodate this tendency.</li> </ul>	There is no special regulation governing Crowdfunding in Estonia, therefore no legal provisions or practice can be presented as examples.
<b>Aspects that should be avoided ("don'ts")</b>	No firm lessons from Croatia due to lack of specifically adapted regulation and historical lack of Crowdfunding activity	<ul style="list-style-type: none"> <li>• Strict requirements of investor protection which do not take account of special features of Crowdfunding</li> <li>• Equity Model: certain administrative steps require written form and may not be completed electronically</li> <li>• Strict regulation of the Donations Model</li> </ul>	<ul style="list-style-type: none"> <li>• Purposive interpretation of existing legislation to accommodate Crowdfunding regulation</li> <li>• A harmonized European Crowdfunding legislation should be simple, transparent and straightforward</li> </ul>	There is no special regulation governing Crowdfunding in Estonia, therefore no legal provisions or practice can be presented as examples.



Country Regulation	Finland	France	Germany	Greece
Recent developments in Crowdfunding regulation	<ul style="list-style-type: none"> <li>Inclusion of Crowdfunding in the structural policy programme of Finnish Government</li> <li>New guidelines by FIN-FSA on interpretation of Investment Services Act</li> <li>Amendment of Money Collection Act as part of a two-phase process</li> </ul>	<ul style="list-style-type: none"> <li>New regulation applicable since 1 October 2014</li> <li>Creation of 2 optional statuses (alternative to more costly and stringent statuses), subject to the control and disciplinary powers of the <i>Autorité des Marchés Financiers</i> (AMF) and the <i>Autorité de contrôle Prudentiel et de Résolution</i> (ACPR): <ul style="list-style-type: none"> <li>CIP – <i>conseil en investissement participatif</i> (crowdfunding investment advisor) – for Equity Model platforms,</li> <li>IFP – (crowdfunding investment intermediary) – for Loan and Donation/Reward Model platforms,</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Crowdfunding mentioned in coalition agreement of new federal government</li> <li>BaFin addressed Crowdfunding and published an expert article on supervisory requirements and investor responsibility</li> <li>First draft of a specific Crowdfunding regulation in Germany</li> </ul>	No recent developments

		<ul style="list-style-type: none"> <li>• Crowdfunding activities opened to PSIs – <i>prestataire de services d'investissement</i> (investment services advisors),</li> <li>• New exceptions to banking monopoly and prospectus requirements.</li> </ul>		
<b>Current / planned Crowdfunding regulation</b>				
<b>General regulation</b>	<ul style="list-style-type: none"> <li>• Investment-based Crowdfunding service is an investment service for which service provider must be authorised according to Investment Services Act.</li> <li>• Platforms providing peer-to-peer lending operate outside regulatory scope, but possible authorisation is dependent on services performed and products offered.</li> <li>• Platforms using Donations or Rewards Model are not subject to financial services regulation, unless they receive repayable funds from public. However, Donation Model may be subject to Money Collection Act.</li> </ul>	<ul style="list-style-type: none"> <li>• Monetary and financial Code as modified by Ordinance no. 2014-559 dated 30 May 2014 and Decree no. 2014-1053 dated 16 September 2014,</li> <li>• AMF General Regulations as modified by Ministerial Order 22<sup>nd</sup> September 2014.</li> </ul>	<ul style="list-style-type: none"> <li>• If Crowdfunding platform facilitates offering of securities, investment products (<i>Vermögensanlagen</i>) or shares in collective investment undertakings (<i>Investmentvermögen</i>), the operator of the platform provides financial services → BaFin authorisation required <u>Currently:</u> subordinated loans (<i>Nachrangdarlehen</i>) are no investment products (<i>Vermögensanlagen</i>) <u>Planned:</u> Qualification of subordinated loans (<i>Nachrangdarlehen</i>) as investment products (<i>Vermögensanlage</i>)</li> <li>• Exemption for investment broking and contract broking</li> </ul>	<ul style="list-style-type: none"> <li>• Financial Services license requirements <ul style="list-style-type: none"> <li>○ Equity Model: Financial Services license might be required according to Law 3606/2007, but CMC did not express its position yet</li> <li>○ Lending Model: Provision of loans or other credits requires authorisation according to Law 3601/2007</li> <li>○ Rewards or Donation Model: platforms may not be</li> </ul> </li> </ul>

			<p>only regarding investment products (<i>Vermögensanlagen</i>) or shares in collective investment undertakings (<i>Investmentvermögen</i>)</p> <p><u>Planned</u>: straight forward licence sufficient for operator of Crowdfunding platform</p> <ul style="list-style-type: none"> <li>• Donations/Rewards Model</li> </ul> <p><u>Current</u>: Depending on the structure in detail: sound arguments that contributions under Donations/Rewards Model do not constitute investment products (<i>Vermögensanlagen</i>)</p> <p><u>Planned</u>: Under the Draft it cannot be excluded completely that certain kinds of donations or rewards based Crowdfunding projects could qualify as investment products (<i>Vermögensanlagen</i>)</p>	<p>considered to be offering investment or banking services → no requirements</p>
<b>Prospectus requirement</b>	<ul style="list-style-type: none"> <li>• Pursuant to Finnish Securities Market Act (SMA), anyone who offers securities to public or applies for admission to public trading of a security shall be under an obligation to publish a prospectus. Prospectus</li> </ul>	<ul style="list-style-type: none"> <li>• Specific crowdfunding exceptions:           <ul style="list-style-type: none"> <li>○ Ordinary shares of <i>societies par actions simplifiées</i> with specific provisions in their by-laws can be offered on Crowdfunding platforms to the public,</li> </ul> </li> </ul>	<p><u>Current</u></p> <ul style="list-style-type: none"> <li>• Prospectus requirement for offering of securities or investment products (<i>Vermögensanlagen</i>)</li> <li>• General threshold: EUR 100,000 per issuer within 12 months</li> </ul>	<ul style="list-style-type: none"> <li>• Law 3401/2005 regulates prospectus requirement, exemption may be used, CMC did not express its position yet</li> </ul>

	<p>requirement does not apply to offering of securities with total consideration of less than EUR 1,500,000. At present, all Crowdfunding platform providers operate under exemptions of the regulatory regime.</p> <ul style="list-style-type: none"> <li>No prospectus requirement is likely to apply in respect of the peer-to-peer Lending Model and the Donation or Rewards Model.</li> </ul>	<ul style="list-style-type: none"> <li>General cap applying to CIPs and PSIs for public offering on Crowdfunding websites of ordinary shares and fixed interest bonds for a maximum raised amount of EUR 1m per year.</li> </ul>	<p><u>Planned</u></p> <ul style="list-style-type: none"> <li>Qualification of subordinated loans (<i>Nachrangdarlehen</i>) as investment products (<i>Vermögensanlage</i>)</li> <li>Increased regulatory requirements for prospectus for all investment products (<i>Vermögensanlagen</i>)</li> <li>Exception from prospectus requirement for Crowdfunding – under specific conditions</li> </ul>	
<b>AIFMD-regulation</b>	<ul style="list-style-type: none"> <li>Operating company does not typically constitute an AIF.</li> <li>Joint ventures (established to finance single project) would not be regarded as AIFs, if collective investments are connected to regular business of entity and investors maintain significant control over project.</li> <li>Primarily, it seems that in the type of Equity Model Crowdfunding where investment decisions are</li> </ul>	<ul style="list-style-type: none"> <li>Generally not applicable.</li> <li>Can apply where platforms may create holding companies to regroup shareholders of a single target company to simplify the relationships with the project holder and a potential purchaser in an exit scenario. A case by case analysis will determine if they fall in the category of AIF subject to the AIFM regulations.</li> </ul>	<ul style="list-style-type: none"> <li>Typical start-up company in general does not constitute an AIF</li> <li>"Project Company" might constitute AIF           <ul style="list-style-type: none"> <li>→ extensive AIFMD regulation for AIF and its manager</li> <li>→ manager (AIFM) requires BaFin authorisation</li> </ul> </li> <li>Funding by means of subordinated loans (<i>Nachrangdarlehen</i>) or contributions under Donations/Rewards Model should not entail an AIF</li> </ul>	AIFMD Law may be applicable.

	<p>made by investors there is no collective investment policy, the criteria for an AIF are not met.</p> <ul style="list-style-type: none"> <li>• It seems that the Lending Model does not constitute an AIF, if investor retains power to make investment decisions.</li> <li>• Crowdfunding platforms offering Donations or Rewards Model are not likely to be governed by Act on Alternative Fund Managers.</li> <li>• It is possible that Crowdfunding platform could constitute AIFM. Same question as above, whether investment decisions are made on behalf investor or by investor.</li> <li>• Pooling vehicle is likely to be an AIF and, therefore, to be subject to Act on Alternative Fund Managers.</li> </ul>		<ul style="list-style-type: none"> <li>• Sound arguments that Crowdfunding platforms should not constitute AIFM</li> </ul>	
<b>Payment service regulation</b>	Reception of funds by Crowdfunding platforms from investors after financing round is completed and it has	<ul style="list-style-type: none"> <li>• CIPs cannot collect payments for the project holders from the investors.</li> </ul>	<ul style="list-style-type: none"> <li>• Transfer of funds through operator may constitute money remittance service</li> </ul>	Transfer of funds made by operators of Crowdfunding platforms to companies/projects

	<p>been deemed successful may be considered money remittance in accordance with the Finnish Payment Institutions Act (<i>Maksulaitoslaki</i>) implementing Payment Services Directive.</p> <p>It's possible to argue that operators would be able to rely on exemption of commercial agents. Interpretation has not been tested and platform providers may be required to acquire authorisation or make a notification.</p>	<ul style="list-style-type: none"> <li>IFPs can apply to be licensed as payment services operator (unless they also are CIPs and are prohibited from doing so).</li> </ul>	<p>→ BaFin authorisation required</p> <ul style="list-style-type: none"> <li>"Commercial Agents" exemption not applicable to operators of Crowdfunding platforms</li> </ul>	<p>could constitute money remittance services within meaning of law 3862/2010 -&gt; license is required, not clear whether commercial agent exemption applies</p>
<b>Consumer credit regulation</b>	<p>Consumer Protection Act also regulates offering of consumer credit and sets out several obligations with respect to offering of credit to consumers.</p>	<ul style="list-style-type: none"> <li>Usury interest rates prohibited,</li> <li>Obligation for IFPs to provide template loan agreements and risk assessment factors on their websites.</li> </ul>	<p>If consumer borrowers are permitted on a platform (Lending Model) there might be implications for the form and content of the lending agreements</p>	
<b>Further possible requirements</b>	<ul style="list-style-type: none"> <li>Money Collection Act</li> <li>Consumer Protection Act</li> </ul>	<ul style="list-style-type: none"> <li>CIPs and IFPs shall comply with:           <ul style="list-style-type: none"> <li>Anti-terrorism control regulations,</li> <li>Anti-money laundering regulations,</li> <li>Financial canvassing</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>German Trade, Commerce and Industry Regulation Act (<i>Gewerbeordnung</i>)</li> <li>German Act on Money Laundering (<i>Geldwäschegesetz</i>)</li> <li>German Securities Trading Act</li> </ul>	<ul style="list-style-type: none"> <li>Law 3691/2008 on money laundering prevention;</li> <li>Laws 2472/1997 and 3471/2006 on data protection;</li> <li>Law 2251/1994 on consumer protection</li> </ul>

		<p>("démarchage financier") regulation (prohibited for IFPs and very strictly limited for CIPs),</p> <ul style="list-style-type: none"> <li>○ Information privacy regulations.</li> </ul>	(Wertpapierhandelsgesetz)	<p>and sales performed from a distance;</p> <ul style="list-style-type: none"> <li>• Law 2121/1993 on intellectual property;</li> <li>• Law 3862/2010 on payment services</li> </ul>
<b>Lessons learned for a possible harmonized European Crowdfunding regulation</b>				
<b>Role model ("dos")</b>		<ul style="list-style-type: none"> <li>• Specific statuses for Crowdfunding operators less constraining and less costly than for other regulated activities,</li> <li>• Transparency and information obligation binding on the platforms towards the investors/donors,</li> <li>• Labelling of the platforms to increase the public's confidence in the platforms,</li> <li>• Investors' protection:           <ul style="list-style-type: none"> <li>○ Cap on maximum investments, funds raised,</li> <li>○ Specific crowdfunding related exceptions to banking monopoly,</li> <li>○ Specific crowdfunding related exceptions to prospectus requirements.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Exception of Crowdfunding from most regulatory requirements (in particular: prospectus requirement)</li> <li>• Three-page fact sheet (<i>Vermögensanlageninformationsblatt VIB</i>) for investors</li> <li>• Reduced regulation of the Crowdfunding platform</li> </ul>	No lessons can be learned

<b>Aspects that should be avoided ("don'ts")</b>		<ul style="list-style-type: none"> <li>• Imposing that Equity Model only provide for investment of the investors in shares,</li> <li>• Not adapting the proxy advisor regulations to companies financed by way of offering of shares on Equity Model platforms,</li> <li>• Not limiting the number of projects to which one can contribute to for a given year.</li> </ul>	<ul style="list-style-type: none"> <li>• Limitation of the reduced regulatory requirements to only one kind of investment vehicle (profit-participating loans)</li> <li>• Limitation of the reduced regulatory requirements to Crowdfunding projects with a total offering maximum of EUR 1 million</li> <li>• Limitation of maximum investment per investor (EUR 10,000) and restrictions starting at EUR 1,000 – as this excludes so called qualified investors (i.e. angel investors etc.) from Cowdfunding campaigns</li> <li>• Limitation of advertisement for Crowdfunding in particular in online-media and social networks</li> </ul>	No lessons can be learned
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Country	Hungary	Ireland	Israel	Italy
<b>Regulation</b>				
<b>Recent developments in Crowdfunding regulation</b>	no recent developments in the Hungarian Crowdfunding regulation	No recent developments regarding Crowdfunding regulation took place in Ireland during the last 12 months.	Israeli Securities Authority published proposed regulations for equity Crowdfunding and general principles for debt Crowdfunding. No final legislation has been enacted.	5 % of offer to be reserved and paid by one or more professional investors as a condition precedent of completion of offer
<b>Current / planned Crowdfunding regulation</b>				
<b>General regulation</b>	<ul style="list-style-type: none"> <li>If Crowdfunding platform facilitates offering of securities, operator of platform may be subject to investment services requirements → licence from Hungarian supervisory authority required</li> <li>If Crowdfunding platform facilitates and/or intermediates granting of loans to crowdfunded business, such activity may trigger financial services requirements in relation to platform operator and</li> </ul>	<ul style="list-style-type: none"> <li>Lending to corporates is not a regulated activity.</li> <li>Arranging credit for person acting outside his business may require authorisation as credit intermediary.</li> <li>Crowdfunding platforms cannot use term "bank" or any variant of that term in their names or advertising.</li> <li>Crowdfunding platforms must be careful not to provide MiFID investment services such</li> </ul>	<ul style="list-style-type: none"> <li>If securities are offered, a prospectus is required unless an exemption is available</li> <li>Lending Model platforms may be subject to regulations related to loans</li> <li>If investment advice is provided, a platform may need an investment advisor license</li> <li>A platform may need to register its database if it contains sensitive information of its users</li> <li>If credit data of borrowers is stored and used, a Lending Model platform may need a</li> </ul>	<ul style="list-style-type: none"> <li>Equity based Crowdfunding is subject to regulated activities regime</li> <li>According to Italian Law 221/2012 platform must restrict offers of securities to shares and quotas in "innovative start-up Italian companies"</li> <li>A few equity based Crowdfunding platforms use exclusions and exemptions from regulated activities</li> </ul>

	<p>individuals granting loans → licence from the Hungarian supervisory authority required</p> <ul style="list-style-type: none"> <li>• Crowdfunding under Equity and Lending Model could be structured so as to eliminate/limit the risk of triggering licensing requirements</li> <li>• The Donation or Rewards Model do not raise any specific Hungarian regulatory issues</li> </ul>	<p>as receipt and transmission of orders and / or investment advice. Non-MiFID investment services which are regulated under the IIA should also be avoided. Of these, provision of investment advice which includes advice on where to get advice would be relevant for Crowdfunding platforms.</p>	<p>license as a credit data service</p>	<p>regime</p> <ul style="list-style-type: none"> <li>• Amendment to Law 221/2012 regulating the equity -based Crowdfunding could enter into force in 2015</li> </ul>
<b>Prospectus requirement</b>	<ul style="list-style-type: none"> <li>• Prospectus requirement for offering of securities and certain other financial instruments (e.g. shares, bonds, certain derivatives)</li> <li>• Threshold: EUR 100,000 aggregated issue value for securities offered in all member states of EU within a period of 12 months</li> </ul>	<ul style="list-style-type: none"> <li>• Prospectus requirement may apply depending on structure and amounts raised by issuers however exemptions are available.</li> </ul>	<ul style="list-style-type: none"> <li>• Prospectus is required for offering securities to the public</li> <li>• Exemptions include: <ul style="list-style-type: none"> <li>o Up to 35 investors in 12 months</li> <li>o Certain sophisticated investors</li> <li>o Wealthy individuals</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Prospectus requirement for offering of securities</li> <li>• Threshold: EUR 5 Million per issuer within 12 months</li> </ul>
<b>AIFMD-regulation</b>	<p>If Crowdfunding undertaking wants to structure its operation as an AIF (or manager thereof) it must comply with requirements under Collective Investment</p>	<p>AIFMD regulations may be applicable however Directive provides for exemption.</p>	<p>Israel is not an EU member state and therefore the European Alternative Investment Fund Managers Directive is not applicable</p>	<p>From perspective of Equity Crowdfunding, platforms should not constitute AIFM and innovative start-ups should not constitute an AIF unless operating as special purpose vehicle (holding)</p>

	Schemes Act			investing in start-up companies
<b>Payment service regulation</b>	<ul style="list-style-type: none"> <li>Transfer of funds through platform operator may constitute money remittance service → licence from Hungarian supervisory authority required</li> <li>Collection and holding of funds as escrow by platform operator may constitute financial service → licence from Hungarian supervisory authority required</li> </ul>	Payment services regulations and Central Bank Act 1997 (regulation of money transmission) may be applicable, depending on money transmission route chosen.	Israel is not an EU member state and therefore the Payment Services Directive is not applicable	<ul style="list-style-type: none"> <li>Transfer of funds through platforms may constitute money remittance service</li> <li>Payment service regulation may apply to any platforms (equity, lending, reward or donation Crowdfunding) managing the payments of the investors/backers/lenders and of the issuers/borrowers</li> <li>Platforms operating in the peer to peer lending Crowdfunding market, are not subject to specific legislation addressed to lending Crowdfunding but are subject to Italian Consolidated Banking Law and relevant regulations, depending on activity carried out</li> </ul>
<b>Consumer credit regulation</b>	Depending on structure used by platform, consumer credit regulations may be applicable	Arranging credit for person acting outside his business will require authorisation as	Regulation of Non-Banking Loans Law, 5753 – 1993 and other consumer regulations may apply to	May be applicable to peer to peer lending regulation

		credit intermediary.	a Lending Model platform	
<b>Further possible requirements</b>	<ul style="list-style-type: none"> <li>Laws applicable to online marketing and contracts</li> <li>Laws applicable to e-commerce and information society</li> <li>Anti money laundering laws</li> <li>Data privacy and data protection laws</li> <li>Consumer credit regulations</li> <li>Consumer protection regulations</li> </ul>		<ul style="list-style-type: none"> <li>Prohibition on Money Laundering Law, 5760 – 2000</li> <li>Standard Contracts Law, 5743 – 1982</li> <li>Consumer Protection Law, 5741 – 1981</li> </ul>	<ul style="list-style-type: none"> <li>Italian Money Laundering law</li> <li>Italian Data Privacy law</li> </ul>
<b>Lessons learned for a possible harmonized European Crowdfunding regulation</b>				
<b>Role model ("dos")</b>	No "do" recommendations in respect of the Hungarian legal framework	Currently, no lessons can be learned	We believe that certain limitations on investment amounts protect the interest of small investors.	Light authorisation CONSOB regime to operate as an equity based Crowdfunding platform
<b>Aspects that should be avoided ("don'ts")</b>	Lack of detailed regulations applicable to Crowdfunding methods should be avoided	Currently, no lessons can be learned	<ul style="list-style-type: none"> <li>We believe that the requirements for approval of the Chief Scientist at the Israeli Ministry of Economy and for participation of a sophisticated investor are too burdensome, and do not belong to a true Crowdfunding model.</li> <li>The Chief Scientist is a unique Israeli institute and cannot serve as a model.</li> </ul>	<ul style="list-style-type: none"> <li>Restrictions to innovative start-ups for equity based Crowdfunding</li> <li>General financial and banking regulation application to lending platforms and to the peer to business lending Crowdfunding</li> </ul>

Country	Latvia	Lithuania	Luxembourg	The Netherlands
<b>Regulation</b>				
<b>Recent developments in Crowdfunding regulation</b>				<ul style="list-style-type: none"> <li>• Crowdfunding has come under the scrutiny of the Dutch Ministry of Finance, but so far this has not resulted in changes to laws.</li> <li>• AFM will publish recommendations on its website probably at the end of 2014. AFM recommendations are likely to be aligned with the recommendations of the European Commission.</li> <li>• AFM will inform Dutch Parliament on 19<sup>th</sup> of December 2014 of its findings in respect of a survey of Crowdfunding and the regulatory framework.</li> </ul>
<b>Current / planned Crowdfunding regulation</b>				
<b>General regulation</b>	<ul style="list-style-type: none"> <li>• No regulatory regime specifically adapted to Crowdfunding. In principle, Latvian law allows for the</li> </ul>	<ul style="list-style-type: none"> <li>• If activities of a Crowdfunding platform are related to public offering of securities, operator of</li> </ul>	<ul style="list-style-type: none"> <li>• If the crowdfunding platform operates banking, lending or investment services → a</li> </ul>	<ul style="list-style-type: none"> <li>• Distinction should be made between the activities of the Crowdfunding platform and the activities</li> </ul>

	<p>implementation of Crowdfunding projects. In each situation it is recommended to involve local counsel.</p> <p>If Crowdfunding platform facilitates offering of securities or other financial instruments or holds money belonging to third persons, operator of the platform most likely provides investment or financial services → FCMC authorisation required</p> <p>Where securities do not qualify as financial instruments, this may fall outside the scope of investment services regulation, although guidance from FCMC would be advised.</p> <ul style="list-style-type: none"> <li>Depending on the structure in detail: there are sound arguments that loans and contributions under Donations/Rewards Model do not constitute provision of investment or financial services</li> </ul>	<p>platform has to be licensed, except for individual initiatives</p> <ul style="list-style-type: none"> <li>No need for licence if Crowdfunding is based on Lending Model and financing through loan agreements</li> <li>Donations or Rewards Model is not qualified as licensed activity but tax implications for recipient of funds should be assessed</li> </ul>	<p>license from the minister, having in his competence the CSSF, could in theory be required</p> <ul style="list-style-type: none"> <li>If the crowdfunding platform operates as a multilateral trading facility → a license from the minister, having in his competence the CSSF, could in theory be required</li> </ul>	<p>of the Crowdfunding entity.</p> <ul style="list-style-type: none"> <li>Crowdfunding platform could be taking up a regulated activity under the FSA as it intermediates (or advises) in relation to: <ul style="list-style-type: none"> <li>consumer credit</li> <li>repayable funds</li> <li>financial instruments</li> <li>other types of financial products regulated under the FSA</li> </ul> </li> <li>Crowdfunding entity could be taking up a regulated activity under the FSA as it: <ul style="list-style-type: none"> <li>attracts repayable funds</li> <li>issues and offers financial instruments</li> <li>issues and offers other types of financial products regulated under the FSA</li> </ul> </li> </ul>
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	<ul style="list-style-type: none"> <li>• Most likely an entity managing a Crowdfunding platform which is not a credit institution cannot hold sums of money belonging to third parties           <ul style="list-style-type: none"> <li>→ sums might be qualified as deposits</li> <li>→ Credit Institutions Law only permits credit institutions to advertise receipt of deposits and other repayable funds, and to receive them.</li> </ul> </li> </ul>			
<b>Prospectus requirement</b>	<ul style="list-style-type: none"> <li>• Prospectus requirement for public offer regarding transferable securities (i.e., offer is expressed to more than 150 individuals in one EU Member State)</li> <li>• Exemptions of Prospectus requirements (a) offering of transferable securities does not exceed EUR 100,000 within a time period of 12 months, (b) only qualified investors are addressed, or less than 150 non-qualified investors per member state are addressed, (c) the offering is made in respect of transferable securities</li> </ul>	<ul style="list-style-type: none"> <li>• Prospectus requirement for offering of securities publicly</li> <li>• Law on Securities determines exemptions from requirement to publish a prospectus</li> </ul>	<ul style="list-style-type: none"> <li>• Prospectus requirement for offers of securities to the public and admission of trading of securities on a regulated market</li> <li>• Exceptions:           <ul style="list-style-type: none"> <li>○ an offer of securities addressed solely to qualified investors; and/or</li> <li>○ an offer of securities addressed to fewer than 150 natural or legal persons per Member State, other than qualified investors; and/or</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Currently no specific regulation is envisaged.</li> <li>• AFM may be issuing recommendations in respect of, inter alia, information requirements. AFM may require Crowdfunding platforms to provide investors with information that meets certain standards.</li> <li>• Be aware that when having the benefit of an exception from the prospectus requirement there are strict conditions, relating to selling restriction requirements and visual</li> </ul>

	<p>with the nominal value at least EUR 100,000, or (d) each investor must acquire transferable securities with the nominal value at least EUR 100,000 and acquiring of one transferable security so that it belongs to several persons is prohibited.</p> <ul style="list-style-type: none"> <li>Depending on the structure in detail: there are no prospectus requirements for loans or contributions under Donations/Rewards Model</li> </ul>		<ul style="list-style-type: none"> <li>an offer of securities addressed to investors who acquire securities for at least the total amount laid down in Article 3(2)(c) of Directive 2003/71/EC and in the delegated acts adopted in accordance with Article 24a of this Directive, per investor, for each separate offer; and/or</li> <li>an offer of securities whose denomination per unit amounts to at least the amount laid down in Article 3(2)(d) of Directive 2003/71/EC and in the delegated acts adopted in accordance with Article 24a of this Directive; and/or</li> <li>an offer of securities with a total consideration in all Member States of less than the amount laid down in Article 3(2)(e) of Directive 2003/71/EC and in the</li> </ul>	<p>tags relating to the offering (<i>vrijstellingsvermelding</i>). If such requirements are not properly executed, the exception is not available.</p>
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			delegated acts adopted in accordance with Article 24a of this Directive. Such limit shall be calculated over a period of 12 months.	
<b>AIFMD-regulation</b>	<ul style="list-style-type: none"> <li>• Typical start-up company in general does not constitute an AIF A project company might constitute AIF → extensive AIFMD regulation for AIF and its manager → manager (AIFM) requires FCMC authorisation</li> <li>• Depending on the structure in detail: funding by means of or contributions under Donations/Rewards Model should not entail an AIF</li> <li>• Depending on the scope of the services provided by the Crowdfunding platform, Crowdfunding platforms might qualify as AIFM.</li> </ul>	AIFMD is not implemented in national laws	If the crowdfunding platform would be considered as an AIF, the AIFMD could apply and licencing requirements thereof would have to be complied with. Depending on the form of the Model and the investments, exceptions or derogations might apply.	<ul style="list-style-type: none"> <li>• Currently no specific regulation is envisaged.</li> <li>• Typically a start up company would not constitute an AIF. However, if the proposition offered assumes that the crowd collectively puts in money and the risks and benefits are shared by the crowd the qualification of an AIF cannot be excluded.</li> </ul>
<b>Payment service</b>	Transfer of funds through operator may constitute	<ul style="list-style-type: none"> <li>• transfer of funds through operator may be considered as payment</li> </ul>		<ul style="list-style-type: none"> <li>• Currently no specific regulation is envisaged.</li> </ul>

<b>regulation</b>	<p>money remittance service → FCMC licensing or registration with the FCMC required.</p> <ul style="list-style-type: none"> <li>• "Commercial Agents" exemption probably not applicable to operators of Crowdfunding platforms</li> <li>• Other exemption might be that the operator of a crowdfunding platform uses an external provider or partner for processing payments rather than acting as an intermediary himself</li> </ul>	<p>services, thus, may be subject to licensing requirements in Lithuania</p> <ul style="list-style-type: none"> <li>• Exemptions under Lithuanian law must be assessed in each individual case</li> </ul>		<ul style="list-style-type: none"> <li>• Crowdfunding platforms that are part of the money chain / flows, often use electronic money institutions.</li> <li>• Crowdfunding platform could be considered intermediating in respect of electronic money when so-called e-wallets are used.</li> </ul>
<b>Consumer credit regulation</b>	<p>If consumer borrowers are permitted on a platform (Lending Model) there are implications for licence for consumer crediting, form and content of the lending agreements.</p>	<p>If consumer borrowers are permitted on a platform (Lending Model), there are implications for the form and contents of lending agreements, including pre-contractual information</p>	<ul style="list-style-type: none"> <li>• The crowdfunding undertaking may fall within the scope of the PSD. The envisaged services may constitute either (i) money remittance (in the event that no account is being created in the name of the payer or the payee) or (ii) payment transaction, which implies an existence of a payment account, at least, in the recipient's side.</li> <li>• In the event that the</li> </ul>	<ul style="list-style-type: none"> <li>• AFM recommends a minimum threshold for the crowd, meaning: <ul style="list-style-type: none"> <li>○ the Lending Model; EUR 40,000, with one time investments of EUR 5,000 to be spread over 3 or more projects and no more than 100 investments per platform; and</li> <li>○ the Debt / Equity Model; EUR 20,000 with one time investments of EUR</li> </ul> </li> </ul>

			crowdfunding does fall within the scope of the PSD, potential exemption methods would have to be addressed on a case-by-case basis.	<p>2,500 to be spread over 3 or more projects and no more than 100 investments per platform.</p> <ul style="list-style-type: none"> <li>• Platforms must           <ul style="list-style-type: none"> <li>○ inform consumers to spread their investments and that they should only invest a responsible amount of their income</li> <li>○ inform consumers of risks of investing</li> <li>○ provide full disclosure with respect to the project</li> <li>○ provide clear and not misleading information</li> <li>○ have proper risk management in place</li> </ul> </li> </ul>
<b>Further possible requirements</b>	<ul style="list-style-type: none"> <li>• Civil Law (in Latvian <i>Civillikums</i>)</li> <li>• Commercial Law (in Latvian – <i>Komerclikums</i>)</li> <li>• Law on the Prevention of Laundering the Proceeds from Criminal Activity</li> </ul>	<ul style="list-style-type: none"> <li>• Law on Prevention of Money Laundering and Terrorist Financing of the Republic of Lithuania (<i>Lith. Lietuvos Respublikos pinigų plovimo ir teroristų finansavimo prevencijos įstatymas</i>)</li> </ul>	With regard to consumer credit regulations, it is possible that crowdfunding platforms might be considered to perform a banking activity which would in theory require for them to have a licence under the Law on the financial	<ul style="list-style-type: none"> <li>• Anti-money laundering regulations (<i>Wet ter voorkoming van witwassen en financieren van terrorisme</i>)</li> <li>• Act on protection of personal data (<i>Wet bescherming</i>)</li> </ul>

	<p>(Money Laundering) and of Terrorist Financing (in Latvian - <i>Noziedzīgi iegūtu līdzekļu legalizācijas un terorisma finansēšanas novēršanas likums</i>)</p> <ul style="list-style-type: none"> <li>Natural Persons' Data Protection Law (in Latvian – <i>Fizisko personu datu aizsardzības likums</i>)</li> <li>The Cabinet of Ministers regulations and FCMC regulations in relation to investment services and payment institutions (if any)</li> <li>Consumer Rights Protection Law (in Latvian – <i>Patērētāju tiesību aizsardzības likums</i>)</li> </ul>	<ul style="list-style-type: none"> <li>Law on Consumer Credit of the Republic of Lithuania (<i>Lith. Lietuvos Respublikos vartojimo kredito įstatymas</i>).</li> </ul>	sector (see above).	<p><i>persoonsgegevens</i>;</p> <ul style="list-style-type: none"> <li>Act on unfair trade practices (<i>Wet oneerlijke handelspraktijken</i>);</li> <li>Act on the consumer credit (<i>Wet op het consumentenkrediet</i>);</li> <li>Dutch civil code (<i>Burgerlijk Wetboek</i>)</li> </ul>
<b>Lessons learned for a possible harmonized European Crowdfunding regulation</b>				
<b>Role model ("dos")</b>	There is no special regulation governing Crowdfunding in Latvia	There are no specific regulation designed for Crowdfunding	We believe that certain limitations on investment amounts protect the interest of small investors.	<ul style="list-style-type: none"> <li>Check regulatory status of proposition, both in respect of the Crowdfunding platform, the company seeking funding and third parties offering services in respect of the Crowdfunding platform.</li> <li>Have proper</li> </ul>

				<p>documentation and align documentation where relevant in order to avoid unintended mismatches (in execution for example).</p> <ul style="list-style-type: none"> <li>• Incorporate aspects of the regulatory framework that are prudent from the perspective that the Crowdfunding platform attracts the crowd which may have little to no knowledge of financial products.</li> </ul>
<p><b>Aspects that should be avoided ("don'ts")</b></p>	<p>There is no special regulation governing Crowdfunding in Latvia</p>	<p>There are no specific regulation designed for Crowdfunding</p>	<ul style="list-style-type: none"> <li>• We believe that the requirements for approval of the Chief Scientist at the Israeli Ministry of Economy and for participation of a sophisticated investor are too burdensome, and do not belong to a true Crowdfunding model.</li> <li>• The Chief Scientist is a unique Israeli institute and cannot serve as a model.</li> </ul>	<ul style="list-style-type: none"> <li>• Be aware of specific rules for the Netherlands such as the prohibition to attract repayable funds from the public.</li> <li>• When considering entering the Dutch market with a Crowdfunding initiative, do not enter the Dutch market without having conducted a check on the regulatory framework in The Netherlands that applies to such initiative.</li> </ul>

Country Regulation	Poland	Portugal	Romania	Slovak Republic
<b>Recent developments in Crowdfunding regulation</b>	<ul style="list-style-type: none"> <li>A new Public Collections Act has been adopted, the scope of regulation by which nonetheless does not extend to Crowdfunding.</li> </ul>	<ul style="list-style-type: none"> <li>Process of approval of specific legal regime applicable to Crowdfunding platforms</li> <li>Adherence of start-up companies as an alternative to traditional financing models</li> </ul>	A law project regarding participatory financing development has been published by the Department for SME Business Environment and Tourism. The project is still in the public debate.	<ul style="list-style-type: none"> <li>Slight increase in interest from general public in Crowdfunding.</li> <li>No new applicable regulations are expected</li> </ul>
<b>Current / planned Crowdfunding regulation</b>				
<b>General regulation</b>	<ul style="list-style-type: none"> <li>The Polish government has adopted a position, in accordance with which it will not be undertaking work on the regulation of Crowdfunding in the near future;</li> <li>The market and present operation of existing regulations will nonetheless be monitored (in particular Crowdfunding in equity and lending based models);</li> </ul>	<ul style="list-style-type: none"> <li>Crowdfunding Platforms operating under the Donation and Rewards Model are not subject to regulation</li> <li>Crowdfunding Platforms operating under the Pre-sale sub-model are not subject to regulation</li> <li>Crowdfunding Platforms in Portugal that offer services under the traditional Lending Model and the Equity Model, will fall under the supervision of</li> </ul>	A law project initiated in 2013 should transpose the Directive 2011/61/EU regarding alternative investment fund managers. The law project is still in the public debate.	<ul style="list-style-type: none"> <li>Act No. 40/1964 the Civil Code</li> <li>Act No. 513/1991 the Commercial Code</li> <li>Act No. 455/1991 the Trade Licence Act</li> <li>Act No. 203/2011 on Collective Investment</li> <li>Act No. 250/2007 on Consumer Protection</li> <li>Act No. 492/2009 on Payment Services</li> <li>Act No. 129/2010 on</li> </ul>

		Bank of Portugal and Securities Exchange Commission (CMVM)		Consumer Credit
<b>Prospectus requirement</b>	<ul style="list-style-type: none"> <li>Public offers of shares require the drawing-up of issue prospectuses, confirmation by the Polish Financial Supervision Authority [<i>Komisja Nadzoru Finansowego – KNF</i>] and intermediation by a brokerage house when conducting the offer;</li> <li>There are, however, a series of exceptions to the prospectus requirement, e.g. the waiver from this obligation for public offers of low value, where the total value of financing obtained in this manner would not exceed EUR 100,000 over a 12-month period.</li> </ul>	<ul style="list-style-type: none"> <li>Prospectus requirement for offering securities</li> <li>Exemptions: if the nominal value of securities is equal or higher than EUR 100.000 or if the price of subscription/sale per subscriber is equal or higher than EUR 100.000</li> </ul>	<ul style="list-style-type: none"> <li>Public offering of securities is subject to the approval of a prospectus by ASF with several exceptions.</li> <li>Trading of shares of a company on regulated markets is subject to the approval of a prospectus by ASF. This rule shall apply to the Equity Model.</li> </ul>	<ul style="list-style-type: none"> <li>Prospectus must be published for offering securities</li> <li>Threshold: EUR 100.000 in the EU issuer within 12 months</li> </ul>
<b>AIFMD-regulation</b>	<ul style="list-style-type: none"> <li>The AIFMD has not yet been implemented in Poland, but implementation should not bring any significant, new limitations on the operation of equity Crowdfunding.</li> </ul>	<ul style="list-style-type: none"> <li>AIFMD Directive has not been implemented in Portugal until now.</li> <li>According to AIFMD, companies that submit projects to Crowdfunding platforms could be deemed as AIF's, and</li> </ul>	<ul style="list-style-type: none"> <li>Romania did not transpose the Directive 2011/61/EU of the European Parliament and of the Council on Alternative Investment Fund Managers.</li> </ul>	<ul style="list-style-type: none"> <li>Depending on the particulars, both Project Companies and Operating Companies may constitute an AIF</li> <li>A Crowdfunding platform will most likely not constitute an AIF, but it</li> </ul>

		therefore their management qualified as AIFM's.		may constitute an AIFM
<b>Payment service regulation</b>	<ul style="list-style-type: none"> <li>In situations of intermediating in the transfer of resources from beneficiaries to financers, e.g. through Crowdfunding platforms, payment transactions are performed in the meaning of the Payment Services Act, which might be decisive as to the qualification of this service as a regulated payment service;</li> <li>In the majority of cases, operators will nonetheless not have to obtain permission due to exceptions of permission according to the Payment Services Act.</li> </ul>	<ul style="list-style-type: none"> <li>Transfer of funds through operator may constitute money remittance service, and therefore an authorisation from Bank of Portugal would be required</li> <li>Exemption for "Commercial Agents" may be applicable to Crowdfunding platforms</li> </ul>	Providers of payment services need an authorization by NBR. Authorization by NBR is not applicable to entities licensed as deposit-taking banks, e-money issuers or IFN.	Licensing required
<b>Consumer credit regulation</b>	<ul style="list-style-type: none"> <li>Only applicable when financer is acting as an entrepreneur and the beneficiary as a consumer.</li> <li>In other cases, standard regulations for a loan agreement from the Civil Code shall apply.</li> </ul>	If consumer borrowers are permitted on a platform (Lending Model) there are implications for the form and content of the lending agreements	<ul style="list-style-type: none"> <li>Currently in Romania, no Crowdfunding platform offers financing pursuant to the lending regulation; in principle, any financial institution which finances its clients for development of an activity/business by public issuance of stocks/bonds falls under</li> </ul>	Consumer Credit Act may in theory apply, as long as borrower is consumer and loan is not intended for business, i.e. is intended for fulfilling personal needs.



			<p>the Banking Law or NFI Law requirements.</p> <ul style="list-style-type: none"> <li>In order to avoid breaching the requirements on lending activity, some Crowdfunding organisations act as intermediaries between the initiator of the project and the banks and/or NFI.</li> </ul>	
<b>Further possible requirements</b>	<ul style="list-style-type: none"> <li>Act on Rendering Electronic Services;</li> <li>Counteracting Money Laundering and Financing of Terrorism Act Banking Act</li> <li>Regulations concerning intermediation in the trade in financial instruments</li> </ul>	<ul style="list-style-type: none"> <li>Portuguese Money Laundering Regime</li> <li>Portuguese Venture Capital Regime</li> </ul>	To avoid sanctions imposed by the National Authority for Consumer Protection ("NACP"), Crowdfunding platforms in Romania shall comply with the restrictions set forth in by the law which regulates the activity of marketing and distance selling.	Trade licensing
<b>Lessons learned for a possible harmonized European Crowdfunding regulation</b>				
<b>Role model ("dos")</b>	<ul style="list-style-type: none"> <li>Regulation at European Un-ion level should concentrate on adaptation of present regulations and removal of existing barriers;</li> <li>Comprehensive regulation of Crowdfunding should be adopted only after a further stage of development of</li> </ul>			

	the European market.			
<b>Aspects that should be avoided ("don'ts")</b>	The EU legislator should avoid adopting regulations too early, not to slow down the development of this market.			

Country	Slovenia	Spain	Sweden
<b>Regulation</b>			
<b>Recent developments in Crowdfunding regulation</b>	AIFMD implementation regulation is in legislative process and shall be passed by April 2015	Crowdfunding platforms operating the Equity Model and the Lending Model are regulated, for the first time, by the Draft Bill XX/2014, on encouragement for business financing	New consumer credit regulation, Act on Certain Credits to Consumers
<b>Current / planned Crowdfunding regulation</b>			
<b>General regulation</b>	<ul style="list-style-type: none"> <li>Financial services and transactions related to offerings of securities provided by a Crowdfunding platform trigger requirement for a licence by Securities Market Agency</li> <li>Intermediary services with respect to consumer credit and other loan agreements require a licence by Bank of Slovenia or Securities Market Agency</li> <li>Donations and Reward Crowdfunding Models would among others likely have tax, game of chance and consumer protection legal implications</li> </ul>	<ul style="list-style-type: none"> <li>Crowdfunding platforms operating under Draft Bill XX/2014, encouragement for business financing are not treated as providers of financial services. → CNMV authorisation required for Equity and Lending Models</li> <li>Donations and Rewards Models are not subject to Draft Bill XX/2014 and therefore, no licence is required.</li> </ul>	<ul style="list-style-type: none"> <li>If Crowdfunding platform facilitates offering of securities or investment products, the operator of the platform provides financial services → S-FSA license or co-operation with licensed firm required.</li> <li>Possible to offer investments in limited liability companies formed as "private", with limitations on the number of investors</li> </ul>
<b>Prospectus requirement</b>	<ul style="list-style-type: none"> <li>Prospectus requirement for offer of securities</li> <li>Threshold: EUR 100.000 in EU within 12 months</li> <li>Other most relevant exceptions: (i)</li> </ul>	No prospectus requirement in any Model. → It is discussed whether Equity Model falls within exception to obligation of publishing prospectus, provided by Securities Market Act 24/1988, or not.	Prospectus requirement for are generally not a problem as threshold is set high: EUR ≥ 500 000 within 12 months.

	<p>offering of securities to sophisticated investors only, or (ii) offering of securities to up to 150 natural or legal persons, who are not sophisticated investors</p> <ul style="list-style-type: none"> <li>• Simplified prospectus possible for offerings of securities below or equal to EUR 5.000.000 in EU within 12 months</li> </ul>		
<b>AIFMD-regulation</b>	<ul style="list-style-type: none"> <li>• AIFMD has not yet been implemented in Slovenia</li> <li>• AIFs presently regulated by Investment Trusts and Management Companies Act and Venture Capital Companies Act</li> <li>• Crowdfunding platform might fall under AIF regulation and future regulation implementing AIFMD in Slovenia</li> <li>• Intermediary services with respect to consumer credit and other loan agreements would require a licence by Bank of Slovenia or Securities Market Agency</li> </ul>	<ul style="list-style-type: none"> <li>• Platforms are not frequently considered as AIFMs and consequently, general rule is to apply Draft Bill XX/2014.</li> <li>• If platforms meet requirements provided by AIFMD, it should be possible to apply residually AIFMs regime.</li> </ul>	<ul style="list-style-type: none"> <li>• Generally not a problem, typical start-up company not subject to AIFMD.</li> <li>• Platform could be considered as AIF if managing investments on behalf of investors.</li> </ul>
<b>Payment service regulation</b>	<ul style="list-style-type: none"> <li>• Remittance of cash payments or transfer of funds by intermediary between customer and provider of goods and services constitutes provision of payment services, which requires a licence by Bank of Slovenia.</li> <li>• Crowdfunding platform might rely on</li> </ul>	<p>If platforms want to receive funds on behalf of investors or entrepreneurs, Minister for the Economy and Competitiveness authorisation is required.</p>	<p>Transfer of funds through operator may constitute money remittance service — FSA authorisation required</p>

	"technical service provider" exemption		
<b>Consumer credit regulation</b>	Consumer Credit Act ( <i>Zakon o potrošniških kreditih</i> ) applies only to credit and loan agreements entered into with natural persons who are acting as consumers, which means acting outside of their employment or gainful activity	Consumer credit contracts Act 16/2011 shall apply if entrepreneurs are considered as consumers.	If consumer borrowers are permitted on a platform (Lending Model) platform needs to apply for a financial license with the Swedish Financial Supervisory Authority. Platform would also be subject to lending regulation regarding form, content of the lending agreements and information requirement etc.
<b>Further possible requirements</b>	<ul style="list-style-type: none"> <li>• Consumer Protection Act (<i>Zakon o varstvu potrošnikov</i>)</li> <li>• Consumer Protection against Unfair Commercial Practices Act (<i>Zakon o varstvu potrošnikov pred nepoštenimi poslovnimi praksami</i>)</li> <li>• Prevention of Money Laundering and Terrorist Financing Act (<i>Zakon o preprečevanju pranja denarja in financiranja terorizma</i>)</li> <li>• Book Entry Securities Act (<i>Zakon o nematerializiranih vrednostnih papirjih</i>)</li> <li>• Personal Data Protection Act (<i>Zakon o varstvu osebnih podatkov</i>)</li> <li>• Investment Trusts and Management Companies Act (<i>Zakon o investicijskih skladih in družbah za upravljanje</i>)</li> <li>• Venture Capital Companies Act (<i>Zakon o družbah tveganega kapitala</i>)</li> <li>• Supportive Environment for Entrepreneurship Act (<i>Zakon o</i></li> </ul>	<ul style="list-style-type: none"> <li>• Consumer contracting loans or mortgage and brokerage services for conclusion of contracts of loan or credit Act 2/2009.</li> <li>• General Contracting Terms Act 7/1998, Act for Protection of Consumers and Users (approved by Royal Decree 1/2007) and Retail Trade Act 7/1996.</li> </ul>	<ul style="list-style-type: none"> <li>• Swedish Personal Data Act;</li> <li>• Swedish Anti-Money Laundering Act;</li> <li>• Swedish Companies Act;</li> <li>• Swedish Deposit-taking Activities Act;</li> </ul>

	<p><i>podpornem okolju za podjetništvo)</i></p> <ul style="list-style-type: none"> <li>• Humanitarian Agencies Act (<i>Zakon o humanitarnih organizacijah</i>)</li> <li>• Code of Obligations (<i>Obligacijski Zakonik</i>)</li> <li>• Prevention of Restriction of Competition Act (<i>Zakon o preprečevanju omejevanja konkurence</i>)</li> </ul>		
<b>Lessons learned for a possible harmonized European Crowdfunding regulation</b>			
<b>Role model ("dos")</b>	<ul style="list-style-type: none"> <li>• Portion of personal income tax may be donated by taxpayer to qualified recipients</li> <li>• Prospectus requirement exceptions based on threshold amount raised work for start-up companies</li> </ul>	<ul style="list-style-type: none"> <li>• No restriction in investments of accredited investors</li> <li>• No prospectus requirement in any Crowdfunding Model.</li> <li>• Draft Bill provides a solid alternative to bank financing for entrepreneurs.</li> </ul>	
<b>Aspects that should be avoided ("don'ts")</b>		<ul style="list-style-type: none"> <li>• Differentiation between ac-credited and non-accredited investors creates high restrictions to participation of the non-ac-credited investors</li> <li>• Strict financial requirements applied to Crowdfunding platforms.</li> </ul>	

Country	Switzerland	United Kingdom	United States
<b>Regulation</b>			
<b>Recent developments in Crowdfunding regulation</b>	<ul style="list-style-type: none"> <li>• FINMA report "How investors can protect themselves against unauthorized financial market providers"</li> <li>• SECO publication "Diskussionspapier Risikokapital in der Schweiz"</li> <li>• Future Financial Services and Markets Act, Financial Market Infrastructure Act and Financial Institutions Act</li> </ul>		
<b>Current / planned Crowdfunding regulation</b>			
<b>General regulation</b>	<p>Banking Act:</p> <ul style="list-style-type: none"> <li>• Collection of funds, keeping of accounts in the name of investors or acceptance of deposits from investors might bring operator within activities covered by Banking Act → FINMA license required</li> </ul> <p>CISA:</p> <ul style="list-style-type: none"> <li>• Pooling and subsequent collective investment of funds into a company might bring operator within scope of CISA → FINMA license required</li> <li>• Exemptions for direct investments</li> </ul>	<ul style="list-style-type: none"> <li>• Equity Model generally entails conducting regulated securities business → FCA authorisation required</li> <li>• For the Lending Model, a new regulated activity of "operating an electronic platform in relation to lending" was introduced in April 2014 - &gt; FCA authorisation required.</li> <li>• Donations/Rewards Model is not subject to financial services regulation.</li> <li>• For the Equity Model, new FCA rules restrict the promotion of "non-readily realisable securities" to certain categories of retail investor.</li> </ul>	<p>Final rules have yet to be published, however the JOBS Act requires that:</p> <ul style="list-style-type: none"> <li>• Issuers limited to annual aggregate capital raise of \$1,000,000</li> <li>• Investors limited to annual aggregate investments based on annual income or net worth</li> <li>• Transaction must be conducted through a registered broker or a funding portal registered with FINRA</li> <li>• Issuer must comply with filing, disclosure, advertising, compensation, reporting and other requirements</li> <li>• Funding Portal limitations (which</li> </ul>

	<p>into an operating company or in case investment decision remains with the investor</p> <p>SESTA:</p> <ul style="list-style-type: none"> <li>• Trading of shares, keeping of accounts or underwriting of securities could result in operator of platform being a securities dealer → FINMA authorization required</li> <li>• Limitation of purpose of the platform to exchange of information (e.g. price, names) and no simultaneous exchange of offers, conclusion of contracts or settlement of contracts</li> </ul>		<p>would not apply to broker-dealers conducting a crowdfunded offering)</p> <ul style="list-style-type: none"> <li>○ cannot provide investment advice</li> <li>○ cannot receive or hold investor funds or securities</li> <li>○ cannot compensate employees, agents or others for solicitation, or commission-based sales of securities posted on the website</li> </ul> <p>cannot advertise specific offerings, only the portal website</p>
<b>Prospectus requirement</b>	<ul style="list-style-type: none"> <li>• Prospectus requirement for public offer for subscription of equity securities or bonds for companies advertising on the platform; not the platform itself</li> <li>• Platform may be liable for incorrect, misleading or incomplete information in issuing prospectuses or similar offering material</li> </ul>	<p>Prospectus requirement for offering of transferable securities (such as shares) → Threshold: EUR 5 million per issuer within 12 months.</p>	<p>No prospectus requirement but offering materials must include necessary information on potential risks and rewards of an investment:</p> <ul style="list-style-type: none"> <li>• financial information disclosure depends on the aggregate amount offered</li> <li>• issuer information: name, legal status, business description, physical and website address, the names of the directors, officers and each person holding more than 20 percent of the shares of the issuer</li> <li>• offering: anticipated business plan, target offering amount, deadline to</li> </ul>



			<p>reach target offering amount and price to the public</p> <ul style="list-style-type: none"> <li>• structure: ownership and capital structure of issuer, including terms of securities being offered</li> <li>• valuation</li> <li>• risks: risks relating to minority ownership in issuer, risks associated with corporate actions, including additional issuances of shares, a sale of the issuer or of assets of the issuer, or transactions with related parties</li> <li>• issuer must provide regular updates to investors and regulators</li> </ul>
<b>AIFMD-regulation</b>	<p>CISA</p> <p>Asset management services for collective investment schemes might bring operator within scope of CISA</p> <p>→ FINMA license required</p>	<ul style="list-style-type: none"> <li>• For the Equity Model, where profit share is not channelled through a standard corporate issuer/shareholder relationship, investment may be characterised as collective investment scheme.</li> <li>• For the Equity Model, to the extent that an investment amounts to a collective investment scheme -&gt; prohibition on promoting collective investment schemes to retail investors.</li> <li>• Crowdfunding structure could constitute an AIF if it includes profit share arrangements otherwise than in a commercial company.</li> <li>• Light-touch regime for managers with management assets under EUR 100</li> </ul>	<p>The U.S. is not required to adopt the AIFMD, nor would it apply to U.S. crowdfunded offerings The U.S. is not required to adopt the AIFMD, nor would it apply to U.S. crowdfunded offerings</p>

		million → FCA authorisation/registration and reporting requirements, but Directive marketing restrictions not applied.	
<b>Payment service regulation</b>		<p>Transfer of funds through operator may constitute credit transfer or money remittance services → FCA authorisation would be required.</p> <p>Exemption for "Commercial Agents" may apply to operators of Crowdfunding platforms, although are likely to fall outside of the more restricted exemption proposed by the second Payment Services Directive.</p>	Funding portals will not be permitted to receive or hold investor funds; proposed rules impose a requirement for funds to be held by a bank or trust company or other qualified custodian (a qualified third-party escrow agent)
<b>Consumer credit regulation</b>	<p>Activity as consumer credit broker (charging of fees for broker service)</p> <p>→ FINMA authorization required</p>	If consumer borrowers are permitted on a platform (Lending Model), platforms must become authorised by the FCA to conduct consumer credit activities → borrowers accorded rights that may be enforceable against the platform.	
<b>Further possible requirements</b>	<ul style="list-style-type: none"> <li>• Anti-Money Laundering Act (Geldwäschereigesetz): Services regarding flow of funds, keeping of securities or of accounts for investors → Operator of platform to be affiliated to a recognized self-regulatory organization or to obtain a license from FINMA</li> <li>• Data Protection Act</li> </ul>	<ul style="list-style-type: none"> <li>• Money Laundering Regulations 2007 → platform operator has to verify the identity of clients.</li> <li>• Platforms must ensure requirements relating to investor protection and liquidity are complied with in order for P2P loans (and possibly debt securities) to qualify under proposed tax exemptions pursuant to Individual Savings Account (ISA) regime.</li> </ul>	<p>Investor resale restriction:</p> <ul style="list-style-type: none"> <li>• Investors must hold their securities for one year before they can transfer their holdings; certain exceptions</li> <li>• Fraud prevention requirements</li> <li>• Restrictions on Communications</li> <li>• Additional requirements for funding portals and broker dealers for investors' protection</li> <li>• Proposed rules require exempt</li> </ul>

	(Datenschutzgesetz)		offerings to be conducted only through a single online intermediary <ul style="list-style-type: none"> <li>Once the SEC finalizes Crowdfunding regulations, funding portals will be subject to additional FINRA requirements, including disclosures regarding their management, ownership, business relationships and compensation, and will be required to implement additional compliance procedures for the prevention of fraud</li> </ul>
<b>Role model ("dos")</b>	<ul style="list-style-type: none"> <li>Limited prospectus requirements</li> <li>Flexibility from a case-by case analysis</li> <li>Regulators that are accessible and open to a constructive discussion</li> </ul>	.	
<b>Aspects that should be avoided ("don'ts")</b>	<ul style="list-style-type: none"> <li>No exemptions for Crowdfunding</li> <li>Assessment on a case-by-case basis           <ul style="list-style-type: none"> <li>→ legal uncertainty and higher costs</li> </ul> </li> </ul>		

# REVIEW OF CROWDFUNDING REGULATION



EUROPEAN  
CROWDFUNDING  
NETWORK



JADEK & PENSA



Gorrissen Federspiel



CASTRÉN & SNELLMAN

ZEPOS & YANNOPOULOS



Matheson

KEIJSER VAN DER VELDEN  
advocaten



SEDLO JIMENEZ LUNZ CLEMENT  
LAW FIRM LUXEMBOURG

