



Proposal for a Regulation of the European Parliament and of the Council on European crowdfunding service providers (ECSP) for business. June 2018.

On 8 March the European Commission (EC) published a set of measures aimed at moving towards the achievement of a Capital Markets Union (CMU), together with the Communication entitled “It is time to accelerate delivery on completing the Capital Markets Union by 2019”. Among these measures is the proposal for a **Regulation of the European Parliament and of the Council on European crowdfunding service providers (ECSP) for business**, the main objective of which is to open up access to financing throughout the entire European Union (EU) for innovative companies, start-ups, and other unlisted companies. With this initiative the EC aims to make crowdfunding an important source of non-bank financing, thereby moving forward in the achievement of the overall objectives of the CMU.

In turn this proposal forms part of the **FinTech Action Plan**, which aims to leverage technology-based innovation in the field of financial services (financial technology), improve the competitiveness and innovation of the financial markets, and help achieve a single digital market.

The proposal for a Regulation of the European Parliament and of the Council on European crowdfunding service providers for business has the following outstanding features:

1) Optional European regime and scope of application

The proposal enables crowdfunding platforms subject to the provisions of this regulation to obtain an **European label** (passport) allowing a platform authorised in one Member State to carry out its activities in all the other Member States of the EU. In this way the EC aims to remove one of the greatest barriers to the growth of crowdfunding, the lack of any common legislation at a European level, which is giving rise to an increase in operating and compliance costs for platforms wishing to expand into Member States other than the one for which they have authorisation.

Article 2 of the proposal for a regulation establishes the regulation’s scope of application and points out that it **shall apply** to:

- Legal persons **opting to** apply for an authorisation under the terms of Article 10, including crowdfunding platforms already authorised under national legislation and able to request authorisation as ECSPs.
- ECSPs authorised under the provisions of that article.

Therefore crowdfunding platforms authorised under national legislation will be able to choose between either continuing to provide services locally under the national law (also in cases in which a Member State decides that MiFID 2 is applicable to crowdfunding activities), or requesting the authorisation referred to in the aforementioned article and being subject to the future regulation to be able to provide services throughout the EU. If an ECSP should choose to be subject to EU legislation, the authorisation obtained under applicable national rules shall be withdrawn. It should also be noted that Article 10.9 of the proposal states that Member States may not require ECSPs to have a physical presence in the territory of a Member State other than the one in which they are established in order to provide cross-border services.

The Regulation **shall not apply** to crowdfunding services when:

- Project owners who at the same time qualify as consumers (according to Directive 2008/48/EC on credit agreements for consumers) and receive a loan for personal consumption aside from their professional

status (activity regulated by the aforementioned directive), or to acquire a property (activity regulated by Directive 2014/17/EU on mortgage credits).

- Services are provided by natural or legal persons who have been authorised as investment firms under MiFID 2.
- Services are provided by natural or legal persons in accordance with national law.
- Crowdfunding offers have a consideration of more than EUR 1,000,000 per crowdfunding offer, calculated over a period of 12 months in regard to a particular crowdfunding project (to which MiFID 2 and Regulation 2017/1129 on prospectuses shall apply).

The explanatory memorandum of the proposal for a Regulation states that free crowdfunding is also excluded from the scope of application of this legislation, as are those that involve the sale of goods or services.

Crowdfunding services are defined in Article 3 of the proposal for a regulation as the matching of the business funding interests of investors and project owners through the use of a crowdfunding platform, and which consist of any of the following: a) the facilitation of granting of loans; b) the placing without firm commitment of transferable securities issued by project owners and the receipt and transmission of client orders. The EC may adopt delegated acts to specify further technical elements of the definitions laid down in Article 2 to take into account market developments, technological developments and experience.

2) Authorisation and supervision entrusted to ESMA (European Securities and Markets Authority)

ESMA shall be the authority entrusted with granting authorisation and maintaining a public registry of ECSPs, in accordance with the provisions of Articles 10 and 11 of the proposal for a regulation. In order to obtain authorisation, the request must include, inter alia, a description of the following elements of the future ECSP: a) governance and internal control mechanisms; b) procedures for the control and safeguarding of data processing systems; c) business continuity measures; d) internal rules to avoid conflicts of interest between its shareholders and crowdfunding operations; e) outsourcing arrangements, and f) procedures for handling complaints from clients. The request must also identify the persons responsible for the management of the possible ECSP and provide proof of their good repute, and that they collectively have the knowledge and experience required. The proposal, however, contains no requirements regarding equity or solvency.

ESMA shall provide ongoing supervision of the services provided by the ECSPs and shall have the authority and competencies to request information and carry out investigations and on-site inspections. However, Article 35 of the proposal for a regulation provides that ESMA may delegate specific supervisory tasks to the competent authority of a Member State if it is necessary for the proper fulfilment of the supervisory task.

ESMA also has the power to impose penalties when an ECSP has, intentionally or negligently, failed to comply with the provisions of the proposal for a regulation. Under Article 13 a serious infringement of the provisions of the regulation by an ECSP may be cause for the withdrawal of authorisation.

3) Common investor protection regime and key investment information sheet

ECSPs must comply with a set of standards of conduct, among the most important of which are the following:

- To obtain the **best possible results** for their clients when exercising discretion on behalf of clients with respect to the parameters of the clients' orders and to disclose the exact method and parameters of the discretion (Article 4.4 of the proposal for a Regulation). ECSPs may not provide investment services other than the placing, receipt and transmission of orders. Any buying and selling activity on their platforms is at the client's discretion and responsibility.

- **Not to pay or accept** any kind of remuneration, discount, or non-monetary benefit for routing investors' orders to a particular offer provided on their platform or to a particular crowdfunding offer provided on a third-party platform (Article 4.3 of the proposal for a Regulation).

- **To be neutral**, which means not having any financial participation in the crowdfunding offers they publish, not accepting as clients shareholders who hold 20% or more of the share capital or voting rights of the ECSP, or directors, employees, or anyone linked directly or indirectly to them, and notifying prospective clients of any possible conflicts of interest (Article 7 of the proposal for a Regulation). In addition, with regard to the use of

special purpose vehicles (SPVs) by ECSPs to be interposed between the project and the investors, ECSPs shall only have the right to transfer one asset to the SPV to enable investors to take exposure to that asset by means of acquiring securities. In other words, the transfer shall be limited and of a temporary nature while the investors, who are solely responsible for taking the decision, decide whether or not to take on exposure to the transferred asset (Article 4.5 of the proposal for a regulation).

.- **Inform** clients about the costs and risks associated with the ECSP's services and about project selection criteria should be included also in the marketing communications, in an understandable, comprehensive, clear and precise manner. The information shall be provided ex ante to possible clients and shall be published on the ECSP's website in such a way that no specific project is treated in a more favourable manner by singling it out from other projects published on the platform. (Article 14 of the proposal for a Regulation)

.- Prior to giving prospective investors full access to their crowdfunding offers, ECSPs should **assess whether the services offered are suitable** for the prospective investors and, if they are, inform them as to which of them are suitable (Article 15 of the proposal for a Regulation). To this end ECSPs should:

- Run an **entry knowledge test** to find out prospective clients' basic knowledge and whether they understand the risk of investing in general and investing in the types of products offered on their crowdfunding platform in particular.

- Offer investors and prospective investors at all times the possibility to **simulate their capacity to bear loss**, calculated as 10% of their net worth, based on information provided by the prospective client regarding their income, assets and financial commitments.

.- **Provide** prospective investors with a **key investment information sheet** prepared by the project owner for each crowdfunding offer. This document shall contain specific information on the project (on the owner or issuer, the project itself, the process of raising funds, securities and loans, fees, investor rights, and legal actions), an explanatory statement regarding the fact that it is not a verified or approved offer, and a standard warning about the risks. (Article 16 of the proposal for a Regulation)

.- When clients are permitted to interact directly with one another to buy and sell loan agreements or transferable securities which were initially crowdfunded, inform them that they do not operate a trading system and that the platform acts as a mere **notice board**, and that such buying and selling activity on their platforms is at the client's own discretion and responsibility. If ECSPs suggest a reference price for the buying and selling referred to above, they should inform their clients that the suggested reference price is not binding. ECSPs should also substantiate the reference price. (Article 17 of the proposal for a Regulation)

This proposal for a regulation shall be pursued until its approval by the Council and the European Parliament for subsequent publication.

Links of interest:

[Proposal for a regulation of the European Parliament and of the Council on European crowdfunding service providers for business](#)

[Communication of the European Commission - FinTech Action plan for a more competitive and innovative European financial sector](#)

[Communication "It is time to accelerate delivery on completing the Capital Markets Union by 2019"](#)