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Crowd Around – Europe's New Regime for Crowdfunding

The following EU legislative measures were published in the Official Journal of the EU (**OJ**) on 20 October, 2020 and entered into force on 9 November 2020:

- ▣ Regulation (EU) 2020/1503 (the **Crowdfunding Regulation**); and
- ▣ Directive (EU) 2020/1504 amending MiFID II¹ (the **Crowdfunding Directive**).

The Crowdfunding Regulation will apply from 10 November 2021.

In respect of the Crowdfunding Directive, Member States are required to adopt implementing legislation prior to 10 May 2021 and to apply the measures implementing the Directive from 10 November 2021.

The Crowdfunding Regulation can be accessed [here](#). The Crowdfunding Directive can be accessed [here](#).

The Crowdfunding Regulation

Crowdfunding takes place on a website platform that allows businesses or individuals to raise money and investors to provide that money. Hence three entities are involved: (1) the intermediating organisation which operates the crowdfunding platform (i.e. online platform); (2) the businesses or individuals who seek funding through the crowdfunding platform (**project owners**); and (3) the investors.

It is the intermediating organisation which operates the crowdfunding platform, as opposed to the project owners, which is the focus of regulation under the Crowdfunding Regulation.

The “*crowdfunding service provider*” is defined in the Regulation as a legal person who provides a “*crowdfunding service*”. A

¹ Directive 2014/65/EU on markets in financial instruments.

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crowdfunding service is defined as the matching of business funding interests of investors and project owners through the use of a “*crowdfunding platform*” and which consists of any of the following activities; (1) facilitating loans (i.e. loan based crowdfunding); and/or (2) the placing, without a firm commitment basis, of transferable securities, and “*admitted instruments for crowdfunding purposes*” issued by project owners or special purpose vehicles (and the reception and transmission of related client orders) (i.e. investment based crowdfunding).

A crowdfunding platform is defined as “*a publicly accessible internet-based information system operated or managed by a crowdfunding service provider*”. Admitted instruments for crowdfunding purposes are defined as “*shares of a private limited liability company that are not subject to restrictions that would effectively prevent them from being transferred, including restrictions to the way in which those shares are offered or advertised to the public*”.

Currently, several Member States have implemented domestic bespoke regimes on crowdfunding. Those regimes diverge across the EU as regards the conditions of operation of crowdfunding platforms, the scope of permitted activities and the authorisation requirements involved. The Crowdfunding Regulation aims to address this divergence, whilst ensuring a high level of investor protection at EU level.

Under the Crowdfunding Regulation, a crowdfunding service provider (**CSP**) will be entitled to access the entire European single market by way of a single authorisation obtained in one EU member state.

Scope

The Crowdfunding Regulation regulates a CSP established in the EU. The Crowdfunding Regulation only covers business finance. Project owners seeking funding cannot be consumers.

Fundraising using on an online platform which falls outside of scope of the Crowdfunding Regulation is not necessarily unregulated. Depending on the circumstances, other regulation or legislation, such as consumer credit legislation and/or investment regulation, may apply.

Project owners cannot raise more than €5m every 12 months. Larger operations will be regulated by MiFID II and the Prospectus Regulation².

Authorisation

CSPs must apply for authorisation from the competent authority in their Home Member State (i.e. Member State of establishment) in a similar way to payment service providers which are regulated under the regime implemented by the Payment Services Directive³. In Ireland, the competent authority is the Central Bank of Ireland (**CBI**).

The Crowdfunding Regulation is clear that an authorisation to provide crowdfunding services does not equate to an authorisation to also provide payment services. Hence a

² Regulation (EU) 2017/1129

³ Directive (EU) 2015/2366

CSP is required to clarify as part of its application to the competent authority whether it intends to provide payment services itself, or whether such services will be outsourced to an appropriately authorised third party. In the case of the former, the CSP will be required to be authorised or registered as a payment service provider (either a payment institution under the Payment Services Directive or an e-money institution under the E-Money Directive⁴).

ESMA must be informed of all authorisations and will maintain a public register of all authorised ECSPs across the EU.

Cross Border Services

No physical presence is required outside the home Member State of the CSP in order for the CSP to provide services into another Member State in Union.

Organisational and operational requirements

The Crowdfunding Regulation contains a number of organisational and operational requirements applicable to a CSP. These relate to, among other things, capital requirements, the safekeeping of assets for investment based crowdfunding, as well as certain audit, accounting, outsourcing, reporting and record-keeping requirements.

Requirements are imposed on CSPs to ensure effective and prudent management, including in relation to the establishment and implementation of adequate policies and procedures to ensure effective and prudent management, the segregation of duties, business continuity and the prevention of conflicts of interest.

CSPs are also required to undertake a certain level of due diligence in respect of project owners that propose their projects to be funded through the crowdfunding platform of the CSP and to comply with certain requirements in relation to the individual portfolio management of loans and complaints handling.

The Crowdfunding Regulation also contains certain investor protection safeguards. It distinguishes between sophisticated and non-sophisticated investors, and introduces different levels of investor protection safeguards applicable to each of those categories. It introduces requirements in relation to “cooling off” periods and the provision of specified information to clients, including a requirement for investors to be provided with a key investment information sheet.

Crowdfunding Directive

In order to avoid a situation where the same activity is subject to multiple authorisations within the EU, the Crowdfunding Directive excludes legal persons authorised as CSPs from the scope of MiFID II.

⁴ Directive 2009/110/EC

Contact us

If you have any queries about the information contained in this article, please contact the Financial Regulation Team or your usual Dillon Eustace contact.

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