



TRANSACTIONS – ADVICE – LITIGATION

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To: European Commission
DG for Financial Stability, Financial Services and Capital Markets Union

Title: Proposal for a Regulation on European Crowdfunding Service Providers (ECSP) for Business

Introduction

1. We have read the Proposal for a Regulation on European Crowdfunding Service Providers for Business (the “**Draft ECSP Regulation**”) with great interest. We are impressed by the swiftness of the publication of this Draft ECSP Regulation following the closing of the related inception impact assessment in November 2018. The Draft ECSP Regulation corresponds with the urgent request from stakeholders in the crowdfunding industry to facilitate cross border crowdfunding activities without being confronted with deviating national crowdfunding regimes in each Member State. Considering the Capital Market Union plans of the Commission, the Draft ECSP Regulation matches the goal of making more alternative forms of capital available to small and medium enterprises within the European Economic Area. By giving crowdfunding service providers (“**CSPs**”) an opportunity to make a choice between a national or a European framework depending on which framework suits their growth strategy and business best, the ECSP Regulation takes away currently existing regulatory and administrative (and therefore costly) burdens since the CSPs will then be confronted with one regulatory framework only.
2. We, FG Lawyers, kindly make use of the opportunity to give some considerations and suggestions in respect to the Draft ECSP Regulation. FG Lawyers is a boutique law firm based in Amsterdam, the Netherlands, focusing on corporate & (alternative) finance and FinTech from a transaction, advisory and litigation perspective. We advise – both national and cross border – on, amongst other things, alternative financing such as crowdlending, market place lending, crowd investing as well as on the financial and regulatory issues affecting the businesses of FinTech initiatives, including blockchain based business models such as initial (crypto)coin offerings and smart contracts. Together with CrowdfundingHub, we initiated an extensive research project on risks and liabilities associated with cross border crowdfunding in 11 Member States. We kindly refer you to the research report which can be found on our website (<https://www.fglawyersamsterdam.com/en/crowdfunding-crossing-borders/>).

Grandfathering option for current MiFID licensed CSPs

3. We particularly welcome the opportunity for CSPs operating a crowdlending platform to opt in for the European framework as this will enable them to enjoy a European passport (which is currently not available unless the CSP holds a MiFID or banking license). This will most definitely give a boost to the crowdlending market which is already growing exponentially. Moreover, it will result in crowdlending not only becoming a bigger source for alternative finance for small and medium businesses, but

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it will also result in crowdlending becoming a more interesting investment product for retail investors.

4. It also enables CSPs operating a crowd investing platform to enjoy the advantages they currently experience under the MiFID regime (provided that such CSP is regulated as an investment firm under national laws) under a considerable more proportionate EU framework under the ECSP Regulation. Current MiFID licensed CSPs can make a deliberate choice to stay ahead of their competitors and maintain their MiFID license, or to choose for the new EU regime under the ECSP Regulation which will be easier to comply with.
 - We give into consideration to the Commission to offer such CSPs (that already hold a MiFID license as granted by the regulator of their home Member State but choose to opt for a CSP license from ESMA) a grandfathering opportunity in the sense that such CSPs should be able to literally exchange their MiFID license with a CSP license granted by ESMA.

More clarification requested in respect of bulletin board option

5. Critics stress the high risks involved with investing in small businesses, in particular start-ups. Crowdfunding opens the possibility for retail investors to invest alongside venture capital investors with the big difference that retail investors generally lack the required knowledge and experience to adequately assess the risks involved.
6. With the crowdfunding market becoming bigger and considering the relatively high risks, it is very important that investors can trade their crowdfunding investments. We are very much in favour of the proposal to enable CSPs to offer a bulletin board to their investors via which investors can interact directly with each other to transfer their crowdfunding investments ("**Crowdfunding Assets**").
7. In line with CESR guidance¹ and MiFIR,² such a bulletin board should not be considered a multilateral trading platform within the meaning of MiFID II. Following the relatively recent judgment of the ECJ,³ we would welcome more guidance from the Commission or ESMA in respect of the services that a CSP could provide when it offers a bulletin board on its crowdfunding platform.
 - Where is the line between offering a bulletin board on a crowdfunding platform and operating a multilateral trading platform? Is the mere fact that in case of a bulletin board a buy or sell offer of only one investor is published and therefore does not result in an interaction of orders of multiple investors within the system (i.e. the crowdfunding platform as operated by the CSP) sufficient to conclude that such CSP is *not* operating a multilateral trading platform?
 - From the proposed Article 17 section 2 Draft ECSP Regulation, we understand that a CSP can suggest reference prices, which is, in our view, to the benefit of retail investors as they will generally not have the knowledge or experience to

¹ CESR/02-086b – 'Standards for Alternative Trading Systems', July 2002.

² Recital 8 MiFIR.

³ ECJ, 16 November 2017, C-658/15 (Robeco Hollands Bezit N.V. a.o./ Netherlands Authority for the Financial Markets); ECLI:EU:C:2017:870.



determine a fair market price. Can a CSP assist in closing a trade by offering template transaction documents (to ensure that the transaction is entered in a legally binding and valid way)? Can a CSP assist in the settlement of the transaction in line with the delivery-versus-payment principle by (i) updating the investor/ownership/creditor's registration in the loan book/shareholders register/book-entry/alike administration upon (ii) payment for the trade being received (either by the CSP on behalf of the selling investor, a PSP or by the selling investor)?

- Moreover, could a CSP that chooses to be regulated under its national framework rather than the EU framework as provided under the Draft ESCP Regulation, offer a bulletin board on the platform without such bulletin board being considered a multilateral trading platform under MiFID II?

More clarification requested in respect of when a loan becomes transferable

8. Following on from the above, we would also welcome more clarity on the term 'transferability' in respect of Crowdfunding Assets, in particular business loans provided by investors via a crowdlending platform.
9. The Draft ECSP Regulation makes a clear distinction between 'loan agreements' and 'transferable securities'. If a loan agreement can be traded via a bulletin board, it will be freely transferable. From a Dutch law perspective, we generally consider loan agreements that are freely transferable, standardized and which characteristics enable trading on a financial market to be a transferable debt security. In our view, due to the relatively large number of investors who jointly invest in a crowdlending loan agreement, such loan agreement will (need to be) standardized. Upon such loan agreements being freely transferable via a bulletin board, one could take the view that such loan agreements should be qualified as transferable securities. However, taken the distinction made by the Commission in Article 17 of the Draft ECSP Regulation, we understand that this is not necessarily the case.
 - We would very much welcome the Commission (or ESMA) to share its views in respect of the main characteristics/elements of the term 'transferable'. When does a loan agreement become a transferable debt security according to the Commission (or ESMA)?

Maximum project size of €1 million

10. Upon Crowdfunding Assets becoming transferable, the fundraising business will be offering securities to the public. As such, it could be confronted with the Prospectus Regulation. We are fully aware that this issue will not arise under the Draft ECSP Regulation due to the maximum project size of €1 million (which is the same threshold under the Prospectus Regulation for offers being excepted from the obligation to publish). By choosing this maximum project size, the Commission can break off the ongoing discussion in respect of whether a business raising funds via a crowdfunding platform of a CSP is required to publish an approved 'Prospectus Regulation' proof prospectus. Although a project size of €1 million will be sufficient for most crowdfunding projects, it will also limit some crowdfunding initiatives.

11. In particular, this limit will result in renewable and sustainable energy projects not to be available to investors on a cross border basis by a CSP that opted for the EU framework under the ECSP Regulation. Such projects will require higher funding than €1 million. Under the Prospectus Regulation, Member States have – and take – the possibility to increase the threshold from €1 million up to € 8 million (and any threshold in between) to exempt local offers of securities from the scope of the Prospectus Regulation. These thresholds under the Prospectus Regulation have been agreed upon within the Commission, Parliament and Council relatively recently.
12. We do not understand the rationale for deviating from these higher thresholds under the Draft ECSP Regulation. If a crowdfunding project relates to the offering of transferable securities, why does a lower threshold need to be set for offerors that offer their transferable securities through a CSP than for offerors that offer their transferable securities directly to investors or through another brokerage firm or underwriter?
13. Moreover, it is not clear (to us) from the text of the Draft ECSP Regulation, whether CSPs that have opted for the EU framework under the ECSP Regulation can only accept crowdfunding offers up to €1 million, or whether they can also provide their services in respect of crowdfunding offers exceeding such threshold, but with the consequence that national laws apply in respect of the relevant crowdfunding offer. In the Draft ECSP Regulation, it is stated that if a CSP chooses to opt in for the EU framework, its local authorisation under national laws and regulations will be withdrawn. Does this merely mean that ESMA, instead of the national competent authority, will supervise such crowdfunding offer being made in one Member State only?
 - If the €1 million threshold is meant to be an eligibility condition for the EU framework under the Draft ECSP Regulation to be available to CSPs, we give the Commission into consideration to offer an opt in to CSPs irrespective of the project size.
 - We give into consideration to clarify that – in line with the Prospectus Regulation – any crowdfunding project up to €1 million can be offered through a CSP on a cross border basis and that any crowdfunding project exceeding such threshold (i) cannot be offered on a cross border basis, and (ii) will be subject to the threshold set by applicable national laws in accordance with the Prospectus Regulation (in respect of transferable securities) or otherwise (in respect of loan agreements).

Instead of PSD2, subject CSPs to the Anti-Money Laundering Directive

14. On the basis of Article 9 of the Draft ECSP Regulation, we understand that the fund flows and distributions of interest or dividend streams cannot be facilitated by the CSP (or an affiliated company) through, for example, a segregated clients' funds account administered by an insolvency remote special purpose vehicle in accordance with national rules on separation of assets, without such CSP or affiliated company qualifying as a payment service provider (such as a payment institution under PSD2, a bank, an electronic money institution or a PSP enjoying an exemption under PSD2).



- We kindly request the Commission to clarify how this requirement is dealt with in case of for example the following situations:
 - The CSPs (or affiliated company) is merely acting as a commercial agent for only the payer or the payee;
 - No actual payment service is provided by the CSP (or affiliated company) because the underlying contractual arrangements determine that the debtor can pay in discharge of its payment obligations against its creditor by making a payment to the CSP, resulting in a subsequent (new) independent payment obligation of the CSP as a debtor against the creditors.
15. We understand that this Article 9 of the Draft ECSP Regulation is mainly suggested to ensure that crowdfunding projects are not used for money laundering or terrorist financing. This object is achieved by requiring that a party that is subjected to the Anti-Money Laundering Directive forms part of the fund flow chain involved with payments made in respect of crowdfunding projects. It is our understanding that not all Member States qualify crowdfunding platforms that take an intermediary facilitating role in the mutual fund flows between the investors and the fundraising business as PSPs. Nor do these Member States require the cooperation of a PSP in such fund flow chain. We note that such national laws and regulations will remain to be relevant for CSPs who do not opt in for the EU framework under the ECSP Regulation. Depending on the national laws applicable to such CSP, it may not be subjected to the local anti-money laundering rules. This will be the case for CSPs that operate a crowd lending platform (presuming the CSPs operating a crowd investing platform will generally be subjected to MiFID and therefore, as an investment firm, subjected to local anti-money laundering rules).
- Instead of the setting the requirement for CSPs that opted in for the EU framework under the ECSP Regulation to be licensed (or registered as an exempt) payment institution or to cooperate with a PSP, we give in consideration to amend the AMLD and to bring CSPs (irrespective of whether they opted in for the EU framework under the ECSP Regulation or chose to be subjected to local laws only) under the scope of Article 2 of AMLD.

Kind regards,

/S/

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