

The European Crowdfunding Regulation – Towards a harmonised framework for crowdfunding in Europe?

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opportunities, it is worthwhile to explore the CFR and the impact it is likely going to have on the European crowdfunding industry.

The CFR seeks to facilitate the scaling up of crowdfunding services across the internal market to increase access to finance for entrepreneurs, start-ups, scale-ups and SMEs in general. Till now, crowdfunding services have not been subject to EU action.⁴ Crowdfunding service providers ('CSP') were, therefore, subject to the different national frameworks implementing existing EU law that hindered the emergence of a European market for crowdfunding.⁵ The EU regime seeks to create a level playing field by introducing a harmonised EU legal framework for these service providers. Correspondingly, the CFR introduces a European passport for CSPs.⁶

This contribution seeks to assess whether and to what extent the CFR will lead to harmonisation of (equity- and lending-based) crowdfunding in Europe. To that end, this contribution evaluates several relevant aspects of the CFR, including its scope, 'platform', sales and marketing regulation that targets CSPs.

1. Introduction

On 7 October 2020, the official journal of the European Union published the European crowdfunding regulation ('CFR')², as well as a related directive to amend MiFID II.³ As the CFR will provide many

2. Scope of the European Crowdfunding Regulation

The CFR addresses the provision of crowdfunding services, the organisational and operational requirements of CSPs in the EEA. Its framework is mandatory for legal entities that qualify as a CSP within the scope of the CFR.

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 2. Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937.
 3. Directive (EU) 2020/1504 of the European Parliament and of the Council of 7 October 2020 amending Directive 2014/65/EU on markets in financial instruments.

4. Recital 1 CFR; G. FERRARINI and E. MACHIAVELLO, "FinTech and Alternative Finance in the CMU: The Regulation of Marketplace Investing" in D. BUSCH, E. AVGOULEAS and G. FERRARINI (eds.), *Capital Markets Union in Europe*, Oxford University Press, 2018.
 5. S.N. HOOGHMSTRA and K. DE BUYSERE, "The Perfect Regulation of Crowdfunding: What Should the European Regulator Do?" in O. GAJDA and D. BRÜNTJE (eds.), *Crowdfunding in Europe – State of the Art in Theory and Practice*, Springer, 2015.
 6. Recital 5 and 6 CFR.

2.1. Crowdfunding services providers and the provision of crowdfunding services

The CFR applies to legal persons that seek authorisation as a CSP in relation to the provision of crowdfunding services.⁷

Under Article 2(1)(e) CFR, a ‘CSP’ means “a legal person who provides crowdfunding services.”

2.1.1. Crowdfunding service

Under Article 2(1)(a) CFR, a ‘crowdfunding service’ means 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:

- the facilitation of granting of loans;
- the placing without firm commitment⁸ basis of transferable securities and admitted instruments for crowdfunding purposes issued by project owners or a special purpose vehicle (‘SPVs’)⁹ and the reception and transmission of client orders¹⁰ with regard to those transferable securities and admitted instruments for crowdfunding purposes.

2.1.2. Investors, project owners and crowdfunding platforms

The provision of crowdfunding services (generally) relies on three types of actors¹¹: the project owner¹² that proposes the project to be funded, investors¹³ who fund the proposed project, generally by limited investments, and an intermediating organisation in the form of a CSP¹⁴ that brings together project owners and investors through an online platform.

2.1.3. Lending-based crowdfunding

2.1.3.1. General

The CFR does not define ‘the facilitation of granting of loans’. Recital 11 CFR states, however, that the facilitation of granting of loans includes pricing or assessing the credit risk of crowdfunding projects or project owners and presenting crowdfunding offers to clients.

In this respect, ‘clients’ are any (prospective) investors or project owners to whom CSPs (may) provide crowdfunding services.¹⁵ Furthermore, ‘crowdfunding offers’ include

“any communication by CSPs, in any form and by any means, that contains sufficient information on the terms of the offer and the crowdfunding project offered, so as to enable an investor to invest in a crowdfunding project.”¹⁶

Hence, ‘loans’ under the CFR are defined as “an agreement whereby an investor makes available to a project owner an agreed amount of money for an agreed period of time and whereby the project owner assumes an unconditional obligation to repay that amount to the investor, together with the accrued interest, in accordance with the instalment payment schedule.”¹⁷

In this respect, Recital 11 CFR clarifies that lending-based crowdfunding platforms merely facilitate the conclusion by investors and project owners of a loan agreement without the CSP at any moment acting as a creditor of the project owner. The CFR stresses that ‘the facilitation of granting of loans’ performed by CSPs falling within the scope of the CFR is to be distinguished from the activity of credit institutions, which grant credit for their own account and take deposits or other repayable funds from the public.¹⁸

2.1.3.2. Individual portfolio management of loans

Lending-based CSPs may perform ‘individual portfolio management of loans’. In this respect, ‘individual portfolio management of loans’ means the allocation by the CSP of

“a pre-determined amount of funds of an investor, which is an original lender, to one or more multiple crowdfunding projects on its crowdfunding platform in accordance with an individual mandate given by the investor on a discretionary investor-by-investor basis.”

The CSP may exercise discretion on behalf of their investors within the agreed parameters without requiring investors to review and make an investment decision in relation to each individual crowdfunding offer.¹⁹

According to Recital 20 CFR, so-called ‘auto-investing’ that involves automated processes whereby funds are automatically allocated by the CSP to crowdfunding projects, in accordance with parameters and risk indicators predetermined by the investors, is to be considered as ‘individual portfolio management of loans’.

7. Art. 2(1)(e) CFR.

8. Annex I, s. A.7 MiFID II.

9. SPVs are under Art. 2(1)(g) CFR defined as, entities whose sole purpose is to carry on a securitisation within the meaning of Art. 1(2) of Regulation (EU) No. 1075/2013 of the European Central Bank. See for a detailed discussion of this definition: D.A. ZETZSCHE and S.N. HOOGHIEMSTRA, “Securitizations and SPVs under STSR and AIFMD” in D. ZETZSCHE (ed.), *The Alternative Investment Fund Managers Directive – European Regulation of Alternative Investment Funds*, Kluwer, 2020.

10. Annex I, s. A. 1 MiFID II.

11. Recital 2 CFR.

12. Art. 2(1)(h) CFR.

13. Art. 2(1)(i) CFR.

14. Art. 2(1)(d) and (h) CFR.

15. Art. 2(1)(g) CFR.

16. Art. 2(1)(f) CFR.

17. Art. 2(1)(b) CFR.

18. Recital 11 CFR.

19. Art. 3(5) CFR.