



### **New crowdfunding rules as per 1 April 2016**

In December 2014, one of the Dutch regulators, the Netherlands Authority for the Financial Markets (the "AFM"), published a [report on crowdfunding](#), titled 'Crowdfunding – Towards a sustainable sector'. In the report, regulatory bottlenecks are identified by the AFM which could impede a sustainable development of crowdfunding in the Netherlands. The report provides some insight of the reasoning of the AFM and includes the AFM's recommendations how the crowdfunding market in the Netherlands can develop into a sustainable one.

Subsequently and in response to the report of the AFM, the Dutch Ministry of Finance published a draft decree providing for a more specific regulatory framework for loan based and equity based crowdfunding in the Netherlands. This draft decree was open for consultation until 29 April 2015, following which the draft decree needed to go through the regular procedure for adoption. Our firm responded to the draft decree. Please see: our [main reaction FG Lawyers](#) as well as a recent our [additional reaction FG Lawyers](#).

Main part of this procedure is the advice of the Dutch Council of State (*Raad van State*). This advice was only recently published on 29 February 2016 in the Government Gazette (*Staatscourant*) together with the draft decree including some further amendments on the basis of the advice of the Council of State. Although it was contemplated to have the draft decree enter into force as per 1 January 2016, this deadline was not satisfied. On 16 March 2016, the new crowdfunding decree was published in the Bulletin of Acts and Decrees (please see: [Stb 2016, number 98](#)). The new crowdfunding decree will enter into force per 1 April 2016.

In anticipation of the entering into force of the new crowdfunding decree, the AFM published a [newsletter](#) on 10 December 2015 listing new provisions applicable to loan based and equity based crowdfunding platforms. These new provisions were partially amended on [21 January 2016](#) and become applicable as per 1 April as well.

### **Upcoming changes in respect of both loan based and equity based crowdfunding**

As per 1 April 2016 the following amendments in the AFM provisions will enter into force:

- **AMENDED:** Investment limits applicable to loan based and equity based crowdfunding platforms are raised. The current limits per retail investor per platform are up to €20.000 in equity based crowdfunding investments and €40.000 in loan based crowdfunding investments. These are each doubled to €40.000 (equity based) and €80.000 (loan based) respectively. It is emphasized that these limits apply per platform including its subsidiaries and/or sister companies. When posing questions in relation to the geographical scope of this provision, the AFM confirmed to us that these provisions are only applicable to platforms that are active in the Netherlands on the basis of a license or dispensation provided by the AFM. However, the investment limits apply to any retail investor investing through such a platform supervised by the AFM and therefore irrespective of such investor's residency.
- **NEW:** Loan based and equity based crowdfunding platforms need to conduct an investors test in order to assess whether the investment is sound (*verantwoord*) for this particular retail investor. The investors test, to be developed by the platforms themselves, should survey whether the investor has sufficient knowledge and experience to understand the risks involved in crowdfunding in general, in the specific project the investor contemplates to invest in and in the specific platform. Furthermore, from the investors test it should become apparent that the investor invests a sound part of his/her freely available assets for investment. The AFM holds the view that a retail investor should not invest more than 10% of his/her freely available assets for investments in crowdfunding projects. The crowdfunding platform has the responsibility to determine the outcome of the investors test. The crowdfunding platform notifies the investor of the outcome in an objective manner (not as a recommendation) and, if the outcome is negative, the platform should emphasize the risks involved by means of an explicit warning. The outcome is non-binding.



The crowdfunding platform needs to conduct such test (i) prior to the initial investment of such retail investor through the crowdfunding platform in excess of €500<sup>1</sup> and, (ii) if the investor already invested through the platform prior to 1 April 2016, the test should be conducted prior to the first investment of such investor in excess of €500 after 1 April 2016. Moreover, the crowdfunding platform needs to re-assess whether any investment exceeding the first €5000 as well as any multiple of €5000 thereafter through the platform is sound by re-determining whether the investor has sufficient freely available assets for investment.

- **NEW:** The investor should be provided a reflection possibility. The crowdfunding platform should provide the investor either the opportunity to actively confirm the investment within 24 hours, failing which the investment will be cancelled, or the opportunity to terminate the investment in an easy manner without any costs being charged within 24 hours.<sup>2</sup>
- **AMENDED:** Any loan based or equity based crowdfunding platform needs to fill in the [monitoring form](#) made available on the website of the AFM on a semi-annual basis. The monitoring forms enable the AFM to literally monitor the crowdfunding market (albeit only the loan based and equity based types of crowdfunding) in terms of (i) size of the platform, (ii) financial situation of the platform, (iii) number of investors actively investing in crowdfunding projects on the platform, (iv) number of requests for crowdfunding financing, (v) number of accepted crowdfunding projects on the platform, (vi) number of successfully financed crowdfunding projects, (vii) peculiarities of projects such as (a) type of loans (consumer, business, mortgage) and (b) defaults, including insolvencies. The AFM contemplates to inform the market on the basis of the input provided in the monitoring forms once every two years.

#### Upcoming changes in respect of loan based crowdfunding only

A loan based crowdfunding platform in the Netherlands (and focusing on non-consumer credit only) should have obtained a dispensation for the prohibition to act as intermediary in respect of redeemable funds pursuant to the Dutch Financial Supervision Act before it can become operational.

This dispensation regime applicable to loan based crowdfunding platforms will be intensified in order to create a more level playing field in respect of the regulatory regime applicable to these type of crowdfunding platforms compared to equity based crowdfunding platforms. The character of the new set of rules applicable to business loan based crowdfunding platforms that will enter into force as per 1 April 2016 becomes more aligned with the regulatory framework involved as if there would be a license obligation rather than an individual dispensation regime.

In order to be eligible for obtaining the required dispensation, a crowdfunding platform needs to comply with the following requirements as per 1 April 2016 in addition to the requirements set out above:

- the reliability (*betrouwbaarheid*) of each policy maker and co-policy maker (including, according to the AFM, majority shareholders) and, if applicable, each member of the supervisory board of the applying crowdfunding platform, should be beyond doubt;
- **NEW:** the daily policymakers (i.e. directors) and the persons responsible for supervising the crowdfunding platform need to be eligible (*geschikt*) within the meaning of the Policy Rule on Eligibility 2012 (*Beleidsregel Geschiktheid 2012*) of the Dutch regulators. A person's eligibility appears from his/her knowledge, skills and professional conduct. This eligibility test entails that such a person shows that he/she has (i) sufficient administrative skills required to determine the (daily) policy of the platform, (ii) sufficient executive skills in a hierarchical setting, and (iii)

<sup>1</sup> One of the members of lower house of Parliament (*Tweede Kamer*) submitted a motion to increase the first threshold of €500 for applicability of the investor test to an investment of €1000, which motion was accepted by the lower house of Parliament. By [press release](#) of 22 February 2016, however, the AFM informed the Dutch Minister of Finance that the AFM does not agree to a further increase of the threshold and maintains €500.

<sup>2</sup> We note that there is a discrepancy between the Crowdfunding newsletter dated 10 December 2015 of the AFM and the new requirements applicable to loan based crowdfunding platforms as published on the website of the AFM. The newsletter refers to a period of only 24 hours to cancel an investment, whereas the requirements refer to a period of 14 days. At our request the AFM clarified to us that a termination period of only 24 hours suffices. However this 24 hours termination period does not affect the protection offered to consumers by means of a 14 days withdrawal period on the basis of Directive 2002/65/EC (Distance Marketing of Consumer Financial Services Directive) and Directive 2011/83/EU (Consumer Rights Directive). The AFM notified us, however, that they prefer to exclude loans provided via a loan based crowdfunding platform from that 14 days withdrawal period.



sufficient general and specific subject matter knowledge. At least one daily policymaker and, if applicable, at least one member of the supervisory board, needs to have *specific* subject matter knowledge gained during demonstrable experience in respect of assessing business credit risks and repayment capacity of the borrower. These skills and knowledge should be gained in a relevant working environment during at least two years, one of which was uninterrupted. The crowdfunding platform has the responsibility to prepare an eligibility judgment in respect of each daily policymaker and, if applicable, each member of its supervisory board. This eligibility judgment should be motivated and may not exceed one A4 paper per person.

- pre-contractual information requirements apply to the crowdfunding platform requiring the platform to inform the counterparty of its rights and obligations under the agreement in a clear and complete manner;
- the platform should recommend the consumer to only invest a sound part of his assets in loans;
- the platform should continuously recommend the consumer to diversify his assets in different loans;
- the platform should have a policy in place which forms the basis for the platform's assessment of a loan application;
- the platform should retain any information obtained from a loan applicant and the loan agreement in respect of which the platform acted as intermediary at least five years following the date of settlement of the respective loan agreement;
- the platform should provide sufficient information in order to enable the consumer to take an informed investment decision. The AFM recommends to provide at least an auditor's statement including the financial information of the borrower, a business plan of the borrower and information of other and/or prior indebtedness of the borrower and yield figures;
- the platform should take into account the payment behavior and payment morality of the borrower when making a risk assessment;
- the platform should have a policy in place which forms the basis for the risk classification of the loan. The risk classification should be determined on both the repayment capabilities of the borrower and other characteristics. Only loans applied for by borrowers who have sufficient repayment capabilities from the outset can be published on the website of the crowdfunding platform;
- the platform should record the risk classification of a loan in a written manner and in such a way that it can explain at hindsight why the loan was classified in the specific risk category;
- the platform should continuously make consumers aware of the risks involved in a crowdfunding investment on its website and in any advertising publications. Information from borrowers in respect of the loans on the platform should at all times be accurate, clear and not misleading;
- the platform should apply ranges of risk percentages corresponding to the risk classification of the loans. This enables the consumer to determine whether the requested yield is realistic;
- the platform must segregate the funds from the investors/lenders and borrower from its own assets either by means of the incorporation of a separate foundation (*stichting*) with an independent board, or by making use of a payment services provider or an electronic money institution;
- the platform should inform the AFM in respect any material changes of its business operations and business structure. The AFM recently clarified that this should be done *prior* to effectuating any such material changes.
- **NEW**: the platform should pursue an adequate policy safeguarding the sound (*integer*) conduct of business. This policy should be aimed at preventing the crowdfunding platform and/or its employees from committing (criminal) offences or other transgressions of the law that could damage confidence in the platform or in the financial markets. Moreover, the crowdfunding platform must ensure that the reliability of its employees and of other natural persons directly engaged in performing intermediary services in respect of redeemable funds under the responsibility of the platform is beyond doubt. This entails that such persons must submit a certificate of good behaviour (*verklaring omtrent het gedrag*) and have not been declared bankrupt.
- **NEW**: the crowdfunding platform may not be affiliated to persons in a formal or actual control structure which is impenetrable to such an extent that it constitutes or may constitute an impediment to the adequate exercise of supervision by the AFM of the crowdfunding platform;
- **NEW**: the crowdfunding platform must construct its business operations in such a way that a controlled and ethical running of the business is safeguarded. As part of a controlled and ethical running of its business, the crowdfunding platform must inform the AFM forthwith in respect of any incidents and it should adopt certain procedures and measures with regard to dealing with



and recording of an incident. These procedures and measures should at the bare minimum safeguard that suitable measures are taken aimed at managing the occurred risks and preventing re-occurrence of such risks; and

- **NEW**: the crowdfunding platform must ensure an adequate handling of complaints of any persons for whom the intermediary services in respect of redeemable funds are performed by the crowdfunding platform (i.e. both the investors/lenders and the borrower). As part of this requirement, the crowdfunding platform should have an internal complaints procedure aimed at a speedy and careful handling of complaints.

#### *Existing platforms*

These new rules shall also apply to crowdfunding platforms that already obtained a dispensation for the prohibition to act as intermediary in respect of redeemable funds prior to the date that these new rules become effective. As such, each of these platforms need to ensure to satisfy these new rules as per 1 April 2016 in order to prevent enforcement measures to be taken by the AFM, including the possibility to lose their dispensation. In respect of the newly to be introduced eligibility test applicable to the daily policymakers (i.e. directors) and, if applicable, supervisory directors of such a crowdfunding platform, the platform needs to evidence to the AFM that each of such persons is eligible within the meaning of the Policy Rule on Eligibility 2012 (*Beleidsregel Geschiktheid 2012*) prior to 1 April 2016. When assessing any such person's level of experience, the experience gained during the preceding period during which the platform was already active may be taken into account. If those directors cannot satisfy the eligibility criteria, the platform should urgently look for new eligible directors. The platform should take special notice of the already applicable requirement to notify the AFM in advance of any such change in the composition of the board and, if applicable, the supervisory board and should take into account the potential requirement – in addition to evidencing that such person is eligible – to have the AFM determine that the reliability of any new daily policy maker or supervisory director is beyond doubt.

#### *Borrowing businesses*

One of the regulatory impediments that was identified and announced to be taken away but for which no draft amendment bill was published as yet relates to a prohibition applicable to borrowers who, in the pursuit of their profession or business, attract, receive or have the disposal of redeemable funds from the public in the Netherlands. This prohibition is laid down in Article 3:5 of the DFSA. Generally, this prohibition applies to each business that obtains a loan from consumers, including through the intermediation of a crowdfunding platform. To our knowledge, the Dutch Central Bank (*De Nederlandsche Bank*, "DCB"), the relevant regulator in respect of this prohibition, currently does not take any enforcement measures against any such borrower. This apparent – not published or officially communicated – tolerance policy would be replaced by a clear exception from the prohibition applicable to loan based crowdfunding. As no formal draft language for such exception has been made available as yet, we cannot guarantee this exception to become effective nor that the tolerance policy will be maintained by DCB. The safest way to deal with this prohibition is to either obtain a written confirmation from DCB that it will not take any enforcement measures against the borrower on the basis of violating Article 3:5 DFSA or to structure its financing needs in another manner. For example, if the borrower attracts, receives or has the disposal of the redeemable funds by means of the issuance of negotiable securities (*effecten*), such as notes, bonds and other negotiable debt securities, in accordance with the regulatory regime applicable to the issuance of securities to the public, the borrower will be excepted from this prohibition of Article 3:5 DFSA. However, this also limits the borrower in a great extent in respect of potential crowdfunding platforms it can choose from. Once the loan becomes negotiable (*verhandelbaar*), another regulatory regime becomes applicable to the crowdfunding platform. As from that moment, a dispensation from the prohibition to act as intermediary in respect of redeemable funds no longer suffices; the crowdfunding platform will generally be considered to provide investment services (in particular the investment service of 'in the pursuit of a profession or a business, receiving and transmitting orders of clients in relation to one or more financial instruments') if it acts as a broker between the borrower on the one hand and the investors on the other hand. As a consequence, the platform would require a license as an investment firm (*beleggingsonderneming*) and will become subject to the heavy 'MiFID' framework.

#### **Upcoming changes in respect of equity based crowdfunding only**

In anticipation to MiFID II an inducement ban (*provisieverbod*) already applies to investment firms under Dutch law. As such, an equity based crowdfunding platform will – subject to it qualifying as an investment firm – not be entitled to provide or receive, directly or indirectly, any inducement in respect of the investment services provided by it other than directly from its client and subject to a limited number,



generally not applicable, exceptions. Loan based crowdfunding platforms are not subject to this inducement ban. In order to create a level playing field between these two types of crowdfunding platforms, the crowdfunding decree includes a new exception to this inducement ban for crowdfunding platforms having a MiFID license. As per 1 April 2016, a crowdfunding platform that requires a license as an investment firm will be excluded from the inducement ban if and to the extent it complies with the conditions set for a platform in order to be able to rely on this exception. The main conditions are that (i) the services of the platform are limited to investment services as defined under section 1 (reception and transmission of orders), (ii) the services of the platform relate to securities issued in a crowdfunding campaign and (iii) the platform has notified the AFM that it wishes to provide these investments services (and as such wishes to rely on this exception). Moreover, a definition for crowdfunding is introduced and provides for a further limitation to the potential reliance on this exception by a platform.

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