



TRANSACTIONS – ADVICE – LITIGATION

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Anne Hakvoort, advocaat  
[hakvoort@fglawyersamsterdam.com](mailto:hakvoort@fglawyersamsterdam.com)  
T +31 (0)20 760 31 37

Title: Inception Impact Assessment for a legislative proposal for an EU framework on crowd and peer to peer finance

### Introduction

1. We have read the Inception Impact Assessment for a legislative proposal for an EU framework on crowd and peer to peer finance (the “**Inception Impact Assessment**”) with great interest.
2. FG Lawyers is a boutique law firm based in Amsterdam, the Netherlands, focusing on corporate & (alternative) finance 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, crowdinvesting 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/>).

### The current crowdfunding market

3. We embrace the aim of the European Commission to enable crowdfunding to flourish and to make use of its potential to serve as one of the alternative manners to divide capital within the European Union to start-ups and SMEs. In order for financial-return based crowdfunding to become a real alternative in an European Capital Markets Union platforms should be able to offer their services on a cross border basis without the need to obtain a local license in each Member States where the platform undertakes activities.
4. By its digital nature, the potential to act on a cross border basis is inherent to crowdfunding platforms. From a technical perspective, a crowdfunding platform can easily onboard both investors/fund providers and borrowers/fundraisers from another Member State than its home Member State.
5. However, due to the lack of a clear regulatory framework and guidance in respect of crowdfunding on an European level, crowdfunding business models are currently not treated on a harmonized level in the EEA Member States. For example, irrespective of ESMA’s opinion that a crowdinvesting platform generally qualifies as a broker under MiFID, not all Member States seem to consent to such opinion. As a result, a crowdinvesting platform can be required to obtain a MiFID license in its home Member State, but can experience material issues when passporting such license due to current local law approaches to crowdfunding. It is questionable whether local Member States can subject a MiFID licensed crowdfunding platform to a considerable

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|-----------|---|--|--|-------------------------------------|
| Advocaten | Prins Hendriklaan 28<br>1075 BD Amsterdam | T +31(0)20 760 31 31<br>F +31(0)20 760 31 33 | contact@fglawyersamsterdam.com<br>www.fglawyersamsterdam.com | KvK 56789092<br>BTW NL 852302757B01 |
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set of local rules and regulations, especially if the platform is only offering its investment services on a cross border basis in the host Member State. However, due to the local regulatory approaches, this is a fact of life for crowdfunding platforms that currently try to offer their services on a cross border basis.

6. Due to the fact that there is no specific European legislation on crowdfunding as yet, local regulators tend to take the existing legislation as a basis for the local crowdfunding regulatory framework. This often results in a somewhat artificial manner of applying a patchwork of regulatory rules with the aim to safeguard that the crowd can make an informed investment decision, is not being misled and understands the risks involved in investing in crowdfunding projects.

### **The most relevant European legislation**

7. As indicated by the EBA and ESMA in their advices and opinions on lending-based crowdfunding and investment-based crowdfunding respectively, a great number of European Directives and Regulations come into play when structuring a crowdfunding platform. The most important Level 1 European laws and regulations are in our view the following:

#### *General (relevant for any type of crowdfunding)*

- PSD II;
- Data Protection Regulation;
- Distance Marketing of Financial Services Directive; and
- Anti-Money Laundering Directive.

#### *Crowdinvesting*

- the Prospectus Directive as regards issuers of securities (i.e. fundraisers in investment-based crowdfunding);
- MiFID II and MiFIR as regards investment services provided by investment-based crowdfunding platforms;
- AIFMD as regards collective investment schemes initiated by crowdfunding platforms. In that respect also PRIIPS may become of relevance to crowdfunding platforms via whom PRIIPS are offered;

#### *Crowdlending*

- the Consumer Credit Directive and the MCD in respect of P2P consumer lending platforms; and
- CRD IV and CRR as regards credit institutions which could be of relevance to balance sheet lending platforms.

8. One could take the view that as long as a European Directive or European Regulation in place, financial return based crowdfunding platforms should not experience too many legal obstacles when expanding within the EEA. As noted above, currently this is unfortunately not in line with the experiences of the platforms.

### **The main legal barriers**

#### *Crowd lending*

9. Crowd lending platforms experience the problem of having no passporting possibility at all, except when the crowd lending platform qualifies as a credit institution within



the meaning of CRD IV/CRR. Generally, however, a crowd lending platform will not qualify as a credit institution unless it is a balance sheet lender.

10. In our view, crowd lending platforms can only expand their business within the EU in three ways. Either (i) it goes through a generally burdensome and expensive regulatory process in each Member State in which it contemplates to expand to and, to the extent required, obtains a local law license, or (ii) it enters into a joint venture or other type of cooperation agreement with a local law crowd lending platform with the appropriate local law licenses; or (iii) it acquires a local crowd lending platform that already went through the local regulatory hurdles.

#### *Crowd investing*

11. Crowd investing platforms offer issuers the opportunity to offer tradable equity and debt securities as well as other types of financial instruments, such as (non)tradable participation rights in an AIF or derivatives such as convertibles notes, to the crowd. The crowd can include both consumers and other types of non-professional investors, and professional investors.
12. The main regulatory obstacles to the cross border development of crowd investing in the EU are raised by the Prospectus regime and the local law crowdfunding rules that undermine European legislation (such as MiFID II/MiFIR). Also the incredible broad scope of the AIFMD and the absence of passporting possibilities for an AIFM that falls under a registration rather than a licensing requirement, causes issues for – mainly – crowd investing platforms.

#### **Crowdfunding to the next level**

13. We highly favour harmonized guidance to be provided on a EU level in order to assist both crowdfunding platforms and the national regulators how to deal with financial based crowdfunding platforms on a cross border level.
14. There seems to be consensus that convergence of legal interpretation and practice in the European Union is desirable in order for the crowdfunding market to grow to a stable alternative manner of financing. Therefore, with reference to the options for EU action as described in the Inception Impact Assessment, in our view, option 2 should be the bare minimum of EU involvement. However, with an eye on the EBA and ESMA advices that were already published 2,5-3 years ago and the current non-harmonized regulatory framework with the EU, we do not believe that opting for a self-regulatory approach with minimum EU standards would solve the current cross border issues.
15. Option 3 does not have our preference as the proposed regulatory approaches do not really fit the shoe of the business models of crowdfunding platforms. Presuming the EC is referring to trading venues within the meaning of MiFID II/MiFIR, we do not agree that a general crowdfunding platform qualifies as such as a crowdfunding platform does not qualify as a regulated market, MTF or OTC within the meaning of MiFID II.



16. A crowdlending platform merely intermediates in originating a private loan offered by fund providers to a fundraiser and a crowdinvesting platform takes such intermediary role in respect of financial instruments issued by a fundraiser to fund providers.
17. Although we believe there should be a secondary market for 'crowdfunding assets', we believe the qualification of the platform as a trading venue within the meaning of MiFID II/MiFIR is disproportionate and not in line with the actual business of the absolute majority of crowdfunding platforms.
18. The activities of a PSP on the one hand and the activities of a crowdfunding platform that also services the payment side of the financing transactions entered into between the fundraiser and the fund providers through the intermediation of the crowdfunding platform on the other hand have more common ground. The activities of a crowdfunding platform do not materially differ from those of an e-commerce platform in that respect. It could create a level-playing field discussion if an e-commerce platform that offers assistance in the payments field would be required to obtain a PSP license whilst a crowdfunding platform that offers such payments assistance would not. However, as servicing the payments side of a transaction entered into between the fundraiser and the fund providers via the crowdfunding platform is not the core activity of a crowdfunding platform, the PSP qualification does not actually apply to a crowdfunding platform in our view.
19. We believe that an European level-playing field can be created and alignment between the local supervisory approach in Member States can be increased without the need to draw up a new crowdfunding regulation or directive. Level 2 and 3 guidance under the existing regulatory framework which could be applicable to crowdfunding models (we refer to paragraph 7 for a non exhaustive list) could do the trick.
20. If however the European Commission decides to prepare a standalone EU regulatory framework for crowdfunding, we favour option 4 over the second alternative offered in option 3. This in order to prevent that small crowdfunding platforms that only contemplate to offer their services on a national level need to obtain a costly license.

**Suggestions for a standalone opt-in EU framework for crowdfunding**

21. If such a standalone opt-in EU regulatory framework for crowdfunding is to be developed, we kindly offer the European Commission some suggestions:
  - in our response to the FinTech Consultation of the European Commission we suggested the introduction of a step-up license. It could be a basic license requirement for any type of financial undertaking irrespective of the financial product or financial service such undertaking offers, but requiring the undertaking to comply with minimum requirements (such as a prudent board of directors, AO/IC policy to ensure a sound business and prevent conflicts of interest, a minimum information document requirement such as a KIID, required segregation of accounts and an exit plan). Either at the request of the financial undertaking, or if a specific growth indicator is exceeded (such as volume, profits, customer base, employees, etc), the financial undertaking should be required to bring its license to the next level and become subject to the regulatory requirements that are appropriate to its size, risk profile, etc. In our



view this gives more flexibility and proportionality to the current framework, whilst it also enables the regulators to keep an eye on all parties being active in the financial sector;

- an alternative suggestion, specifically for the crowdfunding sector, would be to offer the possibility of a 'MiFID II light license' to both crowd lending platforms and crowd investing platforms up to a certain size (e.g. as long as they are considered an SME themselves under MiFID II) that wish to intermediate in / provide investment services in respect of financial instruments (including SME loans, participation rights in investment vehicles / SPVs, simple derivatives such as convertible loans and securities) with the possibility to passport such license to other Member States without goldplating possibilities for the host Member States;
- offer start-ups and SMEs the possibility to offer tradable financial instruments (including SME loans and securities) to the public in any of the EEA Member States without the need to publish a 'Prospectus Regulation proof' prospectus up to a certain maximum offering size<sup>1</sup> but subject to the obligation to publish a standardized information document including the relevant information that is needed for a fund provider to make an informed investment decision. Under Dutch law, such a standardized information document was introduced as a mandatory document to be published by any issuer of securities below the exemption threshold of (since 1 October 2017) €5 million. This information document forms a mini-prospectus that does not need to be approved by the Dutch regulator. It could serve as an example for the European Commission when considering a standardized information document for the crowdfunding sector. Naturally, the information document should be complete, accurate, comprehensible and non-misleading. Moreover, in our view, such information document should be updated in a periodic manner on the website of the issuer and the platform to enable any investor, at any time, to make an informed investment decision before investing in the start-up or SME;
- enable a platform with a 'MiFID II light license' as described above to operate an SME growth MTF without being confronted with the current capital requirements applicable to investment firms operating an MTF (such as minimum equity of €730.000 and the solvency requirements). More importantly prevent such type of platform to be subjected to those CRD IV, CRR, BRRD provisions only because of being subjected to the minimum equity requirement of €730.000; and
- ensure actual convergence in the Member States and ensure that material terms are defined in the same manner in the Member States resulting in a real harmonized regime for crowdfunding.

Kind regards,  
/S/  
Anne Hakvoort  
FG Lawyers

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<sup>1</sup> In respect of which we note that an maximum offering size of €1 million would be too low; crowdfunding projects tend to become bigger in size and, subject to ensuring an adequate level of investors protection, SMEs and start-ups should, in our view, be offered the opportunity to make an offering to the public up to the higher threshold of the Member State option of the exception limit, though *with* passporting opportunities. If an issuer experiences a higher financing need that this upper threshold, it will generally be given the opportunity to publish an EU Growth prospectus instead of a full blown Prospectus Regulation proof prospectus.