

## CROWDFUNDING REGULATION PUBLISHED

On 20 October 2020, Regulation (EU) 2020/1503 on European crowdfunding service providers for business (the “[Crowdfunding Regulation](#)”) and Directive (EU) 2020/1504 amending [MiFID II](#) (the “[Crowdfunding Directive](#)”) were published in the Official Journal of the European Union. They shall apply as per 10 November 2021. In this blog we summarise the main obligations applicable to crowdfunding service providers (“CSPs”).

### Background

Since the financial crisis in 2008, new innovative and alternative manners of financing businesses have been developed. Crowdfunding is one of those alternative financing manners. A person operating a digital crowdfunding platform typically intermediates between a fundraiser on the one hand and a group of funders on the other hand.

Crowdfunding has many appearances. It can differ in respect of:

- the type of funding (donations, presales of goods or services, debt investments, equity investments);
- the type of funder (consumers or retail investors, professional investors);
- the type of fundraiser (consumer or business); and
- the type of ‘return on investment’ (a mere thank you, a product or service, interest or yield on a loan or debt instrument, dividends and voting rights on equity interests).

The regulatory framework applicable to the parties involved in a crowdfunding project<sup>1</sup> depends on the manner in which crowdfunding takes place and as such which choices have been made in respect of the above factors.

The regulatory framework was not harmonised in Europe. This resulted in different crowdfunding rules and regulations to apply in the different Member States, making it rather difficult for the crowdfunding platforms to expand their businesses to other Member States.

The Crowdfunding Regulation puts an end to that. It enables any CSP with a license as issued by the regulator of its home Member State to passport such license and to provide its crowdfunding services in the European Economic Area.

### Scope of the Crowdfunding Regulation

The Crowdfunding Regulation requires CSPs to obtain a license within the meaning of the Crowdfunding Regulation. A CSP is defined to be a *legal person* who provides crowdfunding services. Crowdfunding services are defined to be the matching of *business* funding interests of investors<sup>2</sup> and

project owners<sup>3</sup> through the use of a crowdfunding platform<sup>4</sup> and which consists of any of the following activities:

- the facilitation of granting of loans<sup>5</sup>;
- the placing without a firm commitment basis (as referred to in point (7) of Section A of Annex I to MiFID II) of transferable securities<sup>6</sup> and admitted instruments for crowdfunding purposes<sup>7</sup> issued by project owners or a special purpose vehicle<sup>8</sup>, and
- the reception and transmission of client<sup>9</sup> orders (as referred to in point (1) of Section A of Annex I to MiFID II), in relation to those transferable securities and admitted instruments for crowdfunding purposes.

A CSP may provide individual portfolio management of loans<sup>10</sup> subject to some specific obligations laid down in the Crowdfunding Regulation. However, a CSP is not authorised under its CSP license to provide individual (or collective) asset management services in respect of financial instruments within the meaning of point (15) of Article 4(1) MiFID II. Loans (other than transferable debt securities) do not qualify as financial instruments, resulting in the provision of individual portfolio management of loans to be an unregulated service.

The Crowdfunding Regulation does **not** apply in the following situations:

- provision of crowdfunding services to project owners that are consumers. As such peer-to-peer lending or any other type of consumer lending facilitated via a crowdfunding platforms remains to be subject to national laws and regulations in the relevant Member State. Moreover, this type of crowdfunding does not benefit from an EU passport (except when these services are offered by a bank);
- other services related to crowdfunding services that are provided in accordance with the applicable national laws. CSPs remain to be authorised to provide such other services; and
- crowdfunding offers<sup>11</sup> with a consideration of more than €5 million calculated over a period of 12 months in respect of a particular project owner through any crowdfunding platform and including any offers of transferable securities made by the project owner as an offeror pursuant to an exemption available to it under Article 1(3) or Article 3(2) the [Prospectus Regulation](#). It can be derived from recitals 16 and 17 of the Crowdfunding Regulation that it is intended to have this limitation of €5 million to apply to individual project owners irrespective on them using different crowdfunding platforms to make a crowdfunding offers and irrespective of them relying on the general exemptions available to them in their capacities as offerors/issuers under the Prospectus Regulation. This means that any project owner can no longer combine different types of crowdfunding (such as attracting a loan as well as the issuance of debt securities and/or the issuance of equity securities) to increase the aggregate size of the offer above such threshold of €5 million. Any project owner is limited to the threshold of €5 million per a 12 month-period. However, on the basis of Article 12(13) of the Crowdfunding Regulation we understand

that the CSP is authorised to also engage in activities other than those covered by its license as a CSP under the Crowdfunding Regulation, such as to act as order remiser, placement agent or underwriter in accordance with its MiFID II license as an investment firm. In our view, an issuer of securities (which could be a project owner) should be able to offer securities to the public in accordance with the Prospectus Regulation through the assistance of a CSP holding both a CSP license as well as a MIFID II license in an amount that exceeds the threshold of €5 million.

### Main takeaways from the Crowdfunding Regulation

- Only CSPs that are structured as a **legal person** and **established in the EU** and holding a license as CSP are allowed to provide crowdfunding services;
- Each CSP needs to obtain a **license** pursuant to Article 12 of the Crowdfunding Regulation. The market entrance obligations to which the CSP needs to comply in order to be able to be granted a license under the Crowdfunding Regulation are listed in Article 12. ESMA shall prepare regulatory technical standards (RTS) to further elaborate on parts of Article 12. The national competent authority needs to decide on the application within 3 months from the date of receipt of a complete application. If the application is not complete, such needs to be notified to the CSP within 25 business days of receipt of the application. A striking point is, in our opinion, that credit institutions and investment firms are not excluded from the scope of the Crowdfunding Regulation. These highly regulated financial undertakings should, however, in our view, on the basis of their banking license or MiFID II license be able to provide crowdfunding services;
- a CSP has several **ongoing obligations**, including, but not limited to, the following:
  - have in place **adequate governance policies and procedures** to ensure effective and prudent management in a manner that promotes the integrity of the market and the interests of its clients;
  - undertake **due diligence** in respect of a project owner, the minimum level of which is described in Article 5(2) of the Crowdfunding Regulation;
  - have in place effective and transparent **complaints handling procedures**. ESMA shall prepare RTS to clarify the manner in which a CSP is expected to comply with this ongoing obligation;
  - **have no skin in the game** - CSPs are not allowed to participate in any crowdfunding offer on its platform, nor are CSPs allowed to accept project owners that are affiliated to the CSP. Any such affiliated persons may act as an investor on the crowdfunding platform subject to full transparency thereof. Moreover, CSPs need to have **adequate conflicts of interest procedures**. ESMA shall prepare RTS to clarify the manner in which a CSP is expected to comply with this ongoing obligation;
  - **capital requirements apply** to CSPs that are not already subject to similar capital requirements – CSPs need to have in place prudential safeguards (either in the form of (i) own funds consisting of common equity Tier 1 items within the meaning of

Articles 26-30 of the [Capital Requirements Regulation](#), (ii) an insurance policy or a comparable guarantee, or (iii) a combination of these forms) in an amount equal to the higher amount of (a) €25.000 or (b) one quarter of the fixed overheads of the preceding year which are to include the cost of servicing loans for 3 months if the CSP facilitates the granting of loans. This will particularly have an impact on crowdlending platforms (as crowdinvesting platforms, at least from a Dutch law perspective, are already subjected to capital requirements);

- **an annual reporting obligation** to the competent authority applies to the CSP. ESMA shall develop implementing technical standards (ITS) in respect of the manner, formats and templates of satisfying this obligation;
- the CSP has ongoing **information obligations to its clients**, which information shall be fair, clear and not misleading at all times. The information obligation includes a requirement for CSPs that apply credit scores to crowdfunding projects or that suggest pricing of crowdfunding offers to publish the calculation methods used for that purpose, as well the requirement to publish default rates for CSPs providing crowdfunding services in respect of loans. EBA and ESMA will develop RTS to further specify these information obligations;
- a CSP needs to provide the **key investment information sheet (KIIS)** drawn up by the project owner for each crowdfunding offer. The KIIS needs to contain all the information as set out in Annex I to the Crowdfunding Regulation, a responsibility statement of the project owner or its representatives, as well as a specific disclaimer and risk warning. The KIIS needs to remain up to date for the duration of the crowdfunding offer.

A CSP needs to have in place adequate procedures to **verify the completeness, correctness and clarity of the information included in the KIIS** and needs to actively request the project owner to amend the KIIS if the CSP identifies an omission, mistake or inaccuracy in the KIIS that could have a material impact on the expected return of the investment. If not amended by the project owner within 30 calendar days, the CSP must cancel the crowdfunding offer.

Member States may require a KIIS to be submitted to the national competent authority at least 7 business days prior to making it available to investors. KIIS do not need to be approved by the regulator.

CSPs that provide individual portfolio management of loans need to draw up and make available a KIIS at platform level (rather than on crowdfunding offer level) containing information as set out in parts H and I of Annex I to the Crowdfunding Regulation as well as a responsibility statement of the CSP.

**Civil liability risks** attaches to persons responsible for the KIIS, which could therefore either be the project owner or the CSP itself or their respective representatives.

ESMA will develop RTS to specify parts of Annex I to the Crowdfunding Regulation;

- special requirements apply when CSPs offer non-sophisticated investors<sup>12</sup> the possibility to invest in crowdfunding offers, such as (and in respect of which ESMA will develop RTS to further specify these special requirements):
  - an initial appropriateness test (referred to as an entry knowledge test), which test is to be repeated by the CSP on two-yearly basis;
  - the review of an initial simulation to bear loss, calculated as 10% of their net worth, to be prepared by non-sophisticated investors, which review it to be repeated on a five-yearly basis; and
  - additional risk warnings and safeguards need to be complied with each time that a non-sophisticated investor invests the higher amount of either (i) €1000 or (ii) 5% of his net worth in a separate crowdfunding offer; and
  - except when the CSP provides individual portfolio management of loans, a 4 calendar day pre-contractual reflection period should be offered to non-sophisticated investors during which period such an investor may revoke his offer to invest. This reflection period commences as from the moment that the non-sophisticated investor makes an offer to invest. Under Dutch law perspective, currently a similar obligation applies, though only for 24 hours. This obligation will result in no investment agreements with non-sophisticated investors to become effective prior to the expiration of this reflection period.

#### Main advantages for CSPs under the Crowdfunding Regulation compared to the current (Dutch) framework

- Subject to informing the national competent authority of their home Member States, all CSPs with a license have passporting rights; CSPs can provide their crowdfunding services in other host Member States either on a cross border basis from the home Member State or through a local branch office in the host Member State(s);
- CSPs may operate a bulletin board on which their clients can advertise their interest in buying and selling their investments in crowdfunding projects that were initially offered on the crowdfunding platform operated by such CSP. This enables some sort of secondary market for crowdfunding assets. A bulletin board may not effectively qualify as a multilateral trading facility or an organized trading facility within the meaning of MiFID II (the mere characteristics of which are described in Article 25(2) of the Crowdfunding Regulation). However, a CSP may suggest a reference price for bid or sell advertisements to be published on the bulletin board without this mere fact resulting in the bulletin board to be deemed an MTF or OTF. Up until now the Dutch competent authority, the AFM, has taken the view that any such secondary market in crowdfunding assets was not possible without the platform having a license to operate an MTF or OTF. We do expect the AFM to heavily scrutinize the exact manner in which a CSP proposes to offer a bulletin board and we expect discussions to be needed in individual matters to convince the AFM that a mere bulletin board rather than an MTF or OTF is being operated by the CSP;

- To the extent the crowdfunding offer entails a packaged retail investment product or an insurance-based investment product within the meaning of the [PRIIPs Regulation](#), a KIIS is considered to satisfy the obligation to publish a key information document under the PRIIPs Regulation;
- No requirement applies that information in respect of the project owner has to be made available on the crowdfunding platform prior to offering investors the possibility to invest in a crowdfunding offer (such as the current 48-hour rule under the Dutch Crowdfunding Regulations).

### **Main disadvantages for CSPs under the Crowdfunding Regulation compared to the current (Dutch) framework**

- To the extent payment services are provided in relation to crowdfunding services by the CSP or through a third party, these payment services may only be provided by a **payment service provider** in accordance with [PSD2](#). This results in a CSP that provides payment services itself to be required to obtain a license as a payment institution or to register as exempt PSP in accordance with PSD2 as implemented in national laws of the Member States. If no payment services are provided by the CSP or through a third party in cooperation with the CSP, the CSP has an obligation to have arrangements in place to ensure that the payment flows are made through a PSP in accordance with PSD2;
- Specific rules apply to the CSP if it provides asset safekeeping services. To the extent these services are provided in relation to financial instruments, a MIFID II license (or banking license) would be required;
- **Capital requirements** apply to all CSPs;
- Heavier obligations to be complied with by the CSP in respect of non-sophisticated investors;
- The obligations and civil liability risks relating to a KIIS are not limited to the project owner, but may, under circumstances, also apply to CSPs.

### **Considering to become active as a CSP in the near future?**

The Crowdfunding Regulation becomes applicable as per 10 November 2021. As per such date, new CSPs are required to obtain a license under the Crowdfunding Regulation. In our experience, from a Dutch law perspective, it takes a considerable amount of time to obtain authorisation pursuant to the current applicable national laws and regulations to either launch as a crowdlending platform or as a crowdfunder platform. Not only the review by the national competent authority of a complete application to obtain the relevant authorisation takes time (in the Netherlands generally 13-18 weeks as from submitting a good and complete application), but also preparing for such authorisation takes time. We highly recommend you to take into account the Crowdfunding Regulation when preparing for your authorisation. This will simplify the process which you would need to go through as per 10 November 2021 (or such later date in the event you may rely on the

transitional period up to 10 November 2022) when applying for a CSP license under the Crowdfunding Regulation.

If your home Member State is the Netherlands and if you need assistance, please do [reach out to us](#).

### **What to do if you are already active as a crowdfunding platform in accordance with the laws of your home Member State?**

If you are already active as a crowdfunding platform prior to 10 November 2021, you may rely on a transitional period of maximum 1 year. This means that you will need to ensure to have obtained a license as CSP under the Crowdfunding Regulation ultimately on 10 November 2022.

Article 12(14) of the Crowdfunding Regulation clarifies that platforms that are currently authorised under national laws may not be requested to submit documents that it already submitted before when it applied for its current authorisation, subject to those documents still being up to date and accessible for the regulator. The Crowdfunding Regulation mainly brings additional obligations for crowdlending platforms rather than crowdinvesting platforms (as least from a Dutch law perspective). We therefore expect that crowdinvesting platforms (required to hold a MiFID license under Dutch law) will be able to obtain a CSP license relatively easily and quickly upon application.

If your home Member State is the Netherlands and if you need assistance, please do [reach out to us](#).

### **Main Dutch law implications**

The Crowdfunding Regulation shall result in several amendments to be made to Dutch laws and regulations. We expect the main amendments to be as follows.

- An exception needs to be included for project owners who raise repayable funds via a licensed CSP in respect of the prohibition to – in the course of one’s business – attract, obtain the disposal of and have the disposal of repayable funds from the public in (or from) the Netherlands as laid down in Article 3:5 of the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, the “**DFSA**”). Alternatively, the current exemption available to project owners pursuant to Article 24b of the Exemption Regulation DFSA (*Vrijstellingsregeling Wft*) can be amended accordingly (or deleted in its entirety if Article 3:5 DFSA is amended).
- An exception needs to be included for licensed CSPs in respect of the prohibition to – in the course of one’s business or profession – intermediate in respect of attracting or obtaining the disposal of repayable funds from the public in or from the Netherlands as laid down in Article 4:3 DFSA. Articles 2a-2c (as well as any reference thereto in Article 3) of the Dutch Market Conduct Supervision (Financial Institutions) Decree (*Besluit Gedragtoezicht financiële ondernemingen Wft*) can be deleted in full.
- An exception for the obligation to obtain a MiFID license pursuant to Article 2:96 DFSA needs to be included for licensed CSPs.

- Article 53 of the Exemption Regulation DFSA should be amended to take into account the KIIS that needs to be drawn up by a project owner in respect of each crowdfunding offer or by the CSP on platform level. It should be clarified that this KIIS comes in lieu of the information document that needs to be published by offerors of securities to the public in the Netherlands when relying on the exemption to publish an approved prospectus pursuant to Article 3(2) the Prospectus Regulation. From a Dutch law perspective, such limitation is set at €5 million per category of security, calculated in a 12 month-period and taking into account all offerings of securities made by group companies of the offeror.
- The Dutch policy rule on suitability (*Beleidsregel geschiktheid 2012*) needs to be amended and include a reference to natural persons responsible for the management of a CSP who are subject to the suitability test pursuant to Article 12(2)(l) of the Crowdfunding Regulation.
- In our view, the Crowdfunding Rules (*Crowdfunding voorschriften*) as published by the AFM can be repealed.
- DNB should clarify whether CSPs that facilitate in the payment transactions in respect of a crowdfunding project through a separate foundation are deemed to provide payment services and required to either obtain a license as a payment institution pursuant to Article 2:3a DFSA or to register as exempt PSP pursuant to Article 1a Exemption Regulation DFSA. On the basis of Article 12(2)(p) of the Crowdfunding Regulation, it is our preliminary understanding that the European legislator no longer leaves room for alternative manners to facilitate the payment flows relating to crowdfunding projects other than through an authorised PSP (which, for the avoidance of doubt includes, banks and e-money institutions). We do question whether Article 1:5a DFSA remains to be available if and to the extent that the services provided by a CSP would not qualify as payment services on the basis of such Article, or, if facilitating in the payment transactions in respect of a crowdfunding project merely qualifies as a side activity (*nevenactiviteit*) of the CSP rather than a principal activity (*hoofdwerkzaamheid*).

### Need assistance?

If you have any questions regarding the Crowdfunding Regulation or need assistance in preparing and applying for a CSP license under the Crowdfunding Regulation, please do [reach out to us](#).

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### Interested in more? Please get in touch!



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- 1 A **crowdfunding project** is defined in Article 2(1)(l) of the Crowdfunding Regulation as “*the business activity or activities for which a project owner seeks funding through the crowdfunding offer*”.
- 2 An **investor** is defined in Article 2(1)(i) of the Crowdfunding Regulation as “*any natural or legal person who, through a crowdfunding platform, grants loans or acquires transferable securities or admitted instruments for crowdfunding purposes*”.
- 3 A **project owner** is defined in Article 2(1)(h) of the Crowdfunding Regulation as “*any natural or legal person who seeks funding through a crowdfunding platform*”.
- 4 A **crowdfunding platform** is defined in Article 2(1)(d) of the Crowdfunding Regulation as “*a publicly accessible internet-based information system operated or managed by a crowdfunding service provider*”.
- 5 A **loan** is defined in Article 2(1)(b) of the Crowdfunding Regulation 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*”.
- 6 **Transferable securities** are defined in Article 2(1)(m) of the Crowdfunding Regulation as “*transferable securities as defined in point (44) of Article 4(1) of MIFID II*”.

In MiFID II transferable securities are defined as “*those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as: (a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares; (b)*”

bonds or other forms of securitised debt, including depositary receipts in respect of such securities; (c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures”.

7 **Admitted instruments for crowdfunding purposes** are defined in Article 2(1)(n) of the Crowdfunding Regulation as “in respect of each Member State, 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”.

8 A **special purpose vehicle**, or SPV, is defined in Article 2(1)(q) of the Crowdfunding Regulation as “an entity created solely for, or which solely serves the purpose of, a securitisation within the meaning of point (2) of Article 1 of Regulation (EU) No 1075/2013”.

In Regulation (EU) No 1075/2013 a securitisation is defined as “a transaction or scheme whereby an entity that is separate from the originator or insurance or reinsurance undertaking and is created for or serves the purpose of the transaction or scheme issues financing instruments to investors, and one or more of the following takes place: (a) an asset or pool of assets, or part thereof, is transferred to an entity that is separate from the originator and is created for or serves the purpose of the transaction or scheme, either by the transfer of legal title or beneficial interest of those assets from the originator or through sub-participation; (b) the credit risk of an asset or pool of assets, or part thereof, is transferred through the use of credit derivatives, guarantees or any similar mechanism to the investors in the financing instruments issued by an entity that is separate from the originator and is created for or serves the purpose of the transaction or scheme; (c) insurance risks are transferred from an insurance or reinsurance undertaking to a separate entity that is created for or serves the purpose of the transaction or scheme, whereby the entity fully funds its exposure to such risks through the issuance of financing instruments, and the repayment rights of the investors in those financing instruments are subordinated to the reinsurance obligations of the entity; Where such financing instruments are issued, they do not represent the payment obligations of the originator, or insurance or reinsurance undertaking.”

9 A **client** is defined in Article 2(1)(g) of the Crowdfunding Regulation as “any prospective or actual investor or project owner to whom a crowdfunding service provider provides, or intends to provide, crowdfunding services”.

10 **Individual portfolio management of loans** is defined in Article 2(1)(c) of the Crowdfunding Regulation as “the allocation by the crowdfunding service provider of a predetermined amount of funds of an investor, which is an original lender, to one or multiple crowdfunding projects on its crowdfunding platform in accordance with an individual mandate given by the investor on a discretionary investor-by-investor basis”.

11 A **crowdfunding offer** is defined in Article 2(1)(f) of the Crowdfunding Regulation as “any communication by a crowdfunding service provider, in any form and by any means, presenting sufficient information on the terms of the offer and the crowdfunding project being offered, so as to enable an investor to invest in the crowdfunding project”.

12 A **non-sophisticated investor** is defined in Article 2(1)(k) of the Crowdfunding Regulation as “an investor who is not a sophisticated investor”.

A **sophisticated investor** is defined in Article 2(1)(j) of the Crowdfunding Regulation as “any natural or legal person who is a professional client by virtue of point (1), (2), (3) or (4) of Section I of Annex II to MIFID II or any natural or legal person who has the approval of the crowdfunding service provider to be treated as a sophisticated investor in accordance with the criteria and the procedure laid down in Annex II to this Regulation”.