

Secondary Trading of Crowdfunding Investments

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I. Introduction	13.01	2. A Multilateral Trading Facility (MTF) and an Organized Trading Facility (OTF)	13.35
II. The Scope of the Crowdfunding Regulation Compared with the MiFID II Framework	13.05	3. From Loans to Transferable Debt Securities	13.45
1. CSP and Crowdfunding Services	13.08	4. What Can a CSP Do When Operating a Bulletin Board?	13.55
2. Difference between a CSP and an Investment Firm	13.10	5. Or Is There a Workaround?	13.62
3. Some Further Scoping Questions	13.15	IV. Full Regulation: Just a Matter of Time?	13.64
III. Secondary Trading of Crowdfunding Investments	13.21		
1. Bulletin Board	13.24		

I. Introduction

The recent credit crisis did not only bring bad things. Crowdfunding was developed as an alternative form of financing for small and medium-sized enterprises (SMEs) when banks closed their credit desks. About thirteen years after the bankruptcy of Lehman Brothers, crowdfunding is ready for the next step: a European regulation will be harmonizing the regulatory framework applicable to the operators of crowdfunding platforms. These crowdfunding service providers (CSPs) have, until now, been subjected to the national laws of their home Member State as well as to the national laws of each of the Member States where they offered their services. Due to the crowdfunding regimes not being aligned at a European level, CSPs were confronted with multiple sets of rules and obligations which were not always consistent with each other. The result was a costly and difficult compliance puzzle. Only a handful providers took the effort of becoming active in more than one Member State. **13.01**

Thanks to the Crowdfunding Regulation, this is expected to change soon. One of the fundamental principles of the EU is the free movement of capital. To foster a stronger and more resilient EU, the Commission announced its objective to create a Capital Markets Union (CMU) in 2017. One of the main objectives behind the CMU is that a source of capital for financing SMEs can not only be found in established credit institutions but also in investors and savers. The Crowdfunding Regulation serves this purpose. It creates convergence and **13.02**

removes obstacles to the free movement of capital throughout the EU by offering a CSP the possibility to offer services in other Member States on the basis of its authorization as granted by the national competent authority of its home Member State. This European ‘passport’ is one of the main benefits of the Crowdfunding Regulation.

- 13.03** Another big step forward is the acknowledgment of the importance of offering secondary trading options to investors who have invested in a crowdfunding project. Up until now there has not really been a secondary market in crowdfunding investments that were concluded via a crowdfunding platform. It is in the interest of investors to enable the availability of a secondary market for crowdfunding investments, in particular because most of the investors are retail investors. To protect the interests of these investors, the possibility to exit their crowdfunding investments is important. The availability of trading options and a secondary market in crowdfunding investments could also give a boost to the further growth of this form of alternative finance.
- 13.04** This chapter focuses on the secondary trading option that can be facilitated by a CSP under the Crowdfunding Regulation. A CSP may operate a bulletin board on its platform to enable its clients to advertise their interest to buy or to sell a crowdfunding investment. Before we dive into the relatively technical description of the different manners of trading and trading venues in paragraph three, it is important to get a better understanding of the scope of the Crowdfunding Regulation and how it can be distinguished from the Markets in Financial Instruments Directive II (MiFID II). In the next paragraph, an analysis of the interconnectiveness of these frameworks shall be given. After comparing a bulletin board with two regulated trading venues, the multilateral trading facility (MTF) and organized trading facility (OTF) in the subsequent paragraph, the concluding paragraph of this chapter will take a look into the potential future of the secondary crowdfunding market.

II. The Scope of the Crowdfunding Regulation Compared with the MiFID II Framework

- 13.05** The MiFID II framework¹ provides for an extensive set of rules applicable to undertakings that provide investment services and/or perform investment activities. Annex I to MiFID II lists which services and activities fall within the scope of the MiFID II framework. Important to emphasize is that the MiFID II framework applies to investment services and investment activities relating to financial instruments as defined in MiFID II.² Crowdfunding projects can be financed through the issuance of financial instruments as well as by not-transferable loans. Such loans do not qualify as financial instruments. That clarifies why national competent authorities in numerous Member States have subjected operators of investment-based crowdfunding platforms to the MiFID II framework whilst subjecting operators of lending-based crowdfunding platforms to a less burdensome national framework. In

¹ With the MiFID II framework, I refer to the full set of European legislation on Level I and Level II applicable to investment firms, including MiFID II, MiFIR, and CRR, recently amended by CRR II which were partially replaced by the Investment Firm Directive and Investment Firm Regulation which apply as of 26 June 2021, as well as the implementing and delegated acts and standards promulgated thereunder.

² Financial instruments are the instruments specified in section C of Annex I to MiFID II. These include transferable securities. Pursuant to Art 1(4) MiFID II, parts of MiFID II also apply to structured deposits.

order to take away the legal obstacle formed by MiFID II for operators of investment-based crowdfunding platforms, MiFID II shall be amended by including CSPs in Art 2(1) MiFID II, resulting in MiFID II not to apply to CSPs.³ In other words: if an undertaking qualifies as a crowdfunding service provider within the meaning of Art 2(1)(e) of the Crowdfunding Regulation, the MiFID II framework shall not apply to such undertaking. Full stop. This is essential for CSPs.

For that reason, it is important that CSPs stay within the boundaries provided for in the Crowdfunding Regulation. If they do not, they will be confronted with the MiFID II framework when they offer their services in respect of financial instruments. Upon reading this chapter, one can assess that staying within these boundaries could be relatively difficult as the distinction between the Crowdfunding Regulation and the MiFID II framework is not particularly clear when it comes to secondary trading. **13.06**

To understand the intended scope, it is essential to elaborate on the terms used, both in the Crowdfunding Regulation and in MiFID II. **13.07**

1. CSP and Crowdfunding Services

A CSP is defined to be ‘a legal person who provides crowdfunding services.’⁴ Crowdfunding services are defined to be ‘the matching of business funding interests of investors⁵ and project owners⁶ through the use of a crowdfunding platform⁷ and which consists of any of the following activities:

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- the facilitation of granting of loans;⁸
- the placing without a firm commitment basis (as referred to in point (7) of Section A of Annex I to MiFID II) of transferable securities⁹ and admitted instruments for

³ Art 1 of Directive (EU) 2020/1504 of the European Parliament and of the Council of 7 October 2020 amending MiFID II.

⁴ Art 2(1)(e) of the Crowdfunding Regulation.

⁵ An investor is defined in Art 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’. The Crowdfunding Regulation distinguishes non-sophisticated investors from sophisticated investors. Please see Art 2(1)(k) Crowdfunding Regulation and Art 2(1)(j) Crowdfunding Regulation respectively. This is, unfortunately, not fully aligned with the terms ‘non-professional client’ and ‘professional client’ respectively as used in MiFID II.

⁶ A project owner is defined in Art 2(1)(h) of the Crowdfunding Regulation as ‘any natural or legal person who seeks funding through a crowdfunding platform’.

⁷ A crowdfunding platform is defined in Art 2(1)(d) of the Crowdfunding Regulation as ‘a publicly accessible internet-based information system operated or managed by a crowdfunding service provider’.

⁸ A loan is defined in Art 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’.

⁹ Transferable securities are defined in Art 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’.

crowdfunding purposes¹⁰ issued by project owners or a special purpose vehicle and the reception and transmission of client¹¹ 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.¹²

Crowdfunding services relate to (a) loans, (b) transferable securities, and (c) admitted instruments for crowdfunding purposes¹³ (jointly referred to as Crowdfunding Investments). With the aforementioned scope of MiFID II in mind, it is important to note that—other than (non-transferable) loans—transferable securities are considered financial instruments within the meaning of MiFID II. If CSPs were not excluded from the scope of MiFID II, providing crowdfunding services in respect of transferable securities (or any other financial instrument) would result in a CSP to be subjected to the much heavier MiFID II framework.

- 13.09** The interconnectedness between the Crowdfunding Regulation and MiFID II clearly follows from the last type of crowdfunding service: placing without a firm commitment basis and reception and transmission of client orders. These crowdfunding services are (also) investment services within the meaning of MiFID II. Those operators, that are already authorized as an investment firm within the meaning of MiFID II, shall need to obtain a new authorization under the Crowdfunding Regulation, albeit under a simplified authorization procedure. On the basis of Recital 35 of the Crowdfunding Regulation such operators can decide to combine their current MiFID II authorization with an authorization as CSP under the Crowdfunding Regulation. Naturally, if it is no longer expedient to maintain the MiFID II authorization, such a CSP can choose to only hold an authorization under the Crowdfunding Regulation and have its MiFID II authorization been withdrawn by the national competent authority of its home Member State.

2. Difference between a CSP and an Investment Firm

- 13.10** In order to safeguard the exempt position under MiFID II for CSPs, they must ensure that they stay within the boundaries of the Crowdfunding Regulation. Due to the fact that both regulatory frameworks partially involve the exact same services (namely providing the services of (a) reception and transmission of client orders in transferable securities¹⁴ and/

¹⁰ Admitted instruments for crowdfunding purposes are defined in Art 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.’

¹¹ A client is defined in Art 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.’

¹² Art 2(1)(a) of the Crowdfunding Regulation.

¹³ During the law-making process of the Crowdfunding Regulation, the Council added the term ‘admitted instruments for crowdfunding purposes’ in order to ensure that transferable shares in private limited liability companies would be covered by the Crowdfunding Regulation. This appeared to be needed; despite the relatively clear definition provided in MiFID II, transferable securities do not have the same meaning in each Member State. This also follows from a survey that was conducted to national competent authorities by ESMA in respect of the legal qualification of crypto-assets. See ESMA, Annex 1—Legal qualification of crypto-assets—survey to NCAs, January 2019, ESMA 50-157-1384, part 3, pp 4–11 (ESMA Survey). I will not separately refer to admitted instruments for crowdfunding purposes in this chapter but I deem these to be a form of transferable securities within the meaning of both MiFID II and the Crowdfunding Regulation.

¹⁴ We note that the MiFID II framework has a broader scope and regulates investment services (and investment activities) in respect of financial instruments. Transferable securities are only one type of financial instruments.

or (b) placing transferable securities without a firm commitment basis), it is essential to understand the differences between a CSP on the one hand and an investment firm on the other hand.

The determining distinguishing element seems to be the use of a crowdfunding platform by a CSP since reference is made to the use of a crowdfunding platform in each of the definitions provided in the Crowdfunding Regulation for ‘investor’, ‘project owner’, and ‘crowdfunding services’. A crowdfunding platform is, however, very broadly defined in the Crowdfunding Regulation as ‘a publicly accessible internet-based information system operated or managed by a crowdfunding service provider’. The cross reference to a CSP in the definition of a crowdfunding platform results in an impasse. Combining these defined terms, an undertaking is considered to be a CSP if it provides crowdfunding services, which include, at least partially, two services that are also considered investment services under MiFID II but which fall out of scope of the MiFID II framework if such services are provided through the use of a crowdfunding platform, which in turn is operated by a CSP. **13.11**

An investment firm can provide the exact same investment services to its clients, for example in the event of an equity or (corporate) bonds offering by a company or Special Purpose Vehicle (SPV) that seeks funding. The only difference appears to be that a CSP can only offer these services through a publicly accessible Internet-based information system that is operated by such a CSP, whilst an investment firm can use other means to bring the opportunity to invest to the attention of its investor base. Would this then also mean that an investment firm, duly authorized in accordance with MiFID II, that wishes to use its website (or another publicly accessible Internet-based information system operated by such firm) to enable its investor base to invest in any such equity or (corporate) bonds offering, all of the sudden needs to obtain an authorization as a CSP under the Crowdfunding Regulation as well? On the basis of the recitals in the Crowdfunding Regulation, it can be derived that this is not intended.¹⁵ It is considered that the *joint* provision of reception and transmission of client orders and the placement of transferable securities without a firm commitment basis is the key feature of crowdfunding services within the meaning of the Crowdfunding Regulation compared to investment services within the meaning of MiFID II. But then again, an investment firm can provide these joint investment services as well. It will become apparent when reading this chapter that the lines between the Crowdfunding Regulation on the one hand and the MiFID II framework on the other hand are wafer-thin. **13.12**

An investment firm that uses a platform to bring an investment opportunity to the attention of its investors base may claim that it does not purport to provide crowdfunding services because the investment opportunity does not qualify as a crowdfunding offer in respect of a crowdfunding project. A crowdfunding project is defined to be ‘the business activity or activities for which a project owner seeks funding through the crowdfunding offer’.¹⁶ A crowdfunding offer is defined as ‘any communication by a crowdfunding service provider, in any form and by any means, presenting sufficient information on the terms of the **13.13**

However, for the purpose of comparing investment firms with CSPs, the provision of these investment services in respect of transferable securities are relevant only.

¹⁵ Recital 10 Crowdfunding Regulation.

¹⁶ Art 2(1)(l) of the Crowdfunding Regulation.

offer and the crowdfunding project being offered, so as to enable an investor to invest in the crowdfunding project'.¹⁷ These terms unfortunately do not result in a clear delineated scope of the Crowdfunding Regulation when compared to the MiFID II framework.

- 13.14** Recital 10 of the Crowdfunding Regulation may be the way out. It could be argued that the scope of the Crowdfunding Regulation should be limited to undertakings aiming to facilitate the funding of business activities of, primarily, start-ups and SMEs, by raising capital from an unrestricted pool of investors who are predominantly natural persons who each contribute relatively small investment amounts through a publicly accessible Internet-based information system. Unfortunately, this consideration did not make it to the body of the Crowdfunding Regulation though. It is questionable whether a mere appeal to the recitals of the Crowdfunding Regulation will be sufficient for an undertaking to claim that it does not fall under the scope of the Crowdfunding Regulation, for example, if it does not open up its platform to 'an unrestricted pool of investors', or not to 'investors who are predominantly natural persons who each contribute relatively small investment amounts'. Time will tell.

3. Some Further Scoping Questions

- 13.15** Does the scope of the Crowdfunding Regulation that could be derived from Recital 10 as described above mean that any debt funding via a platform shall only be considered crowdfunding if the loan is split in multiple loan parts and therefore requires a 'syndicate' of lenders 'who are predominantly natural persons'? And what if an undertaking provides intermediation services via a platform in respect of business loans (other than transferable debt securities) granted to the borrower by non-public lenders only? If these non-public lenders are not 'predominantly natural persons', would such an undertaking fall out of scope of the Crowdfunding Regulation? This is relevant to clarify, because this form of intermediation is currently, at least in the Netherlands, not prohibited or subject to a regulatory authorization.¹⁸
- 13.16** The Crowdfunding Regulation enables both non-sophisticated investors and sophisticated investors to invest in a crowdfunding offer through a crowdfunding platform. Sophisticated investors include both *per se* professional clients within the meaning of section I of Annex II to MiFID II as well as 'opt-up' non-professional clients who have requested to be treated as a sophisticated investor in accordance with Annex II to the Crowdfunding Regulation.¹⁹ As long as the Commission has not clarified who should be considered to be part of 'the public',

¹⁷ Art 2(1)(f) of the Crowdfunding Regulation.

¹⁸ From a Dutch law perspective, non-public lenders include professional market parties. A natural person can be considered a professional market party vis-à-vis the borrower if such person provides an amount of at least EUR 100.000 at once to the borrower. EBA has recently requested the Commission to provide for clear definitions on an EU, harmonized, level for material terms that compose the notion of 'credit institution'. One of these key terms is 'the public'. As such, it could well be that the Dutch interpretation is overruled by the Commission in the near future. Please see: Opinion of the European Banking Authority on elements of the definition of credit institution under Art 4(1), point 1, letter (a) of Regulation (EU) No 575/2013 and on aspects of the scope of the authorization, 18 September 2020, EBA/OP/2020/15 (EBA Opinion).

¹⁹ Art 2(1)(j) Crowdfunding Regulation.

as called upon by the European Banking Authority (EBA),²⁰ *per se* professional clients (and therefore sophisticated investors) are considered non-public lenders in any event.

On the basis of the Crowdfunding Regulation, it appears that undertakings that intermediate in non-transferable loans provided only by sophisticated investors, including *per se* professional clients within the meaning of MiFID II, to businesses through an internet-based platform fall within the scope of the Crowdfunding Regulation and require an authorization as CSP. The only way out seems to be a reasoning on the basis of Recital 10 of the Crowdfunding Regulation as described above. **13.17**

The answer to this scoping question is also relevant when determining the consequences of Art 1(2)(c) of the Crowdfunding Regulation. This provision limits the applicability of the Crowdfunding Regulation to crowdfunding offers of an individual project owner with a total consideration that does not exceed EUR 5 million, calculated in a period of twelve months and taking into account each crowdfunding offer for raising capital in the form of a loan, transferable security, or admitted instrument for crowdfunding purposes as well as each offer of transferable securities made pursuant to an exemption under the Prospectus Regulation without the involvement of a crowdfunding platform. This threshold of EUR 5 million is set in the interest of an effective protection of investors who invest in crowdfunding projects and similar offerings under the exemption regime pursuant to the Prospectus Regulation. But what if a project owner or SPV offers transferable securities to qualified investors only or against a consideration of at least EUR 100.000 per investor? **13.18**

Under the Prospectus Regulation, any such offering would be exempt from the obligation to publish an approved prospectus drawn up in accordance with the Prospectus Regulation, also if the total consideration of such offering exceeds EUR 5 million. Does this mean that any such offering cannot be intermediated for through a platform that is operated by a CSP or can this still be serviced by a CSP that also holds an authorization as investment firm in accordance with MiFID II? In my view, it follows from Recital 35 of the Crowdfunding Regulation that the latter interpretation should prevail. Moreover, the Crowdfunding Regulation does not include a prohibition to service crowdfunding offers exceeding the threshold of EUR 5 million. It merely determines that the Crowdfunding Regulation does not apply to any such crowdfunding offer. This means, in my view, that an undertaking that intermediates in any offering exceeding EUR 5 million is subjected to national laws, including the MiFID II framework and the Prospectus Regulation in respect of transferable securities. **13.19**

These scoping questions primarily relate to market entrance and services in the primary market. These questions are nevertheless interesting to touch on in this chapter relating to the secondary market as it shows the indistinctness as to the exact scope of the Crowdfunding Regulation. This lack of clarity also becomes apparent when moving to the secondary trading options made available under the Crowdfunding Regulation. **13.20**

²⁰ See the EBA Opinion.

III. Secondary Trading of Crowdfunding Investments

- 13.21** The Crowdfunding Regulation allows CSPs to operate a bulletin board on which their clients can advertise their interests in buying and selling their Crowdfunding Investments that were initially offered on the crowdfunding platform operated by such CSP.
- 13.22** When operating a 'bulletin board' a CSP does not take any role in relation to the transactions that can be executed between two individual investors outside the bulletin board. A bulletin board is no more than a digital place where investors can show their interest to buy or sell Crowdfunding Investments without an ability to interact through the bulletin board. A bulletin board is meant to only enable investors to exchange information necessary to make an offer and to conclude a transaction bilaterally outside the bulletin board. It may not effectively qualify as an MTF or an OTF within the meaning of MiFID II. Operating an MTF and/or an OTF qualifies as an investment activity within the meaning of MiFID II and requires an authorization as investment firm under MiFID II. A mere bulletin board, however, does not trigger this authorization obligation and a CSP can offer its clients secondary trading possibilities on a bulletin board operated by it.
- 13.23** This is in line with Recital 8 of the Markets in Financial Instruments Regulation (MiFIR) in which it is clarified that 'facilities' on which no genuine trade execution or arranging takes place in 'the system' are not considered an MTF or OTF. In line with guidance of the predecessor of the European Securities and Markets Authority (ESMA), the Committee of European Securities Regulators (CESR),²¹ MiFIR lists a number of excluded facilities, amongst which bulletin boards on which 'buying and selling interests' are advertised.²² But what is a bulletin board and how does it differ from an MTF or OTF? What is 'a facility' or 'a system' as referred to in Recital 8 MiFIR? What are 'buying and selling interests'? In order to have an understanding of the possibilities and limitations for a CSP when offering a bulletin board on its platform, these terms need to be analysed in more detail.

1. Bulletin Board

- 13.24** In order to get a better understanding of the possibilities, and limitations, of a CSP that operates a bulletin board and that offers its clients a secondary trading option on the crowdfunding platform, it is essential to determine what a bulletin board is. The Crowdfunding Regulation itself does not provide any clarity in this respect, albeit that it does specifically include which characteristics a bulletin board cannot have.²³
- 13.25** As referred to above, the term bulletin board was firstly used by CESR in 2002 in a document providing standards for alternative trading systems when compared to regulated markets. CESR distinguished a passive bulletin board from an active bulletin board. CESR

²¹ CESR, 'Standards for Alternative Trading Systems', July 2002, CESR 02-086b (CESR 2002).

²² Other examples of excluded facilities that were given by CESR in 2002 are: other entities aggregating or pooling potential buying or selling interests, electronic post-trade confirmation services, or portfolio compression, which reduces non-market risks in existing derivatives portfolios without changing the market risk of the portfolios.

²³ Art 25(2) Crowdfunding Regulation.

considered a passive bulletin board to be a mere advertisement system; investors could only conclude the trade outside the bulletin board. By contrast, an active bulletin board enabled execution within the system. CESR seemed to focus on the ability of execution of a transaction in the system when assessing whether such system would be in scope of the MiFID framework.²⁴ This is still the point of departure of CESR's successor, ESMA.²⁵ CESR published its standards in a time prior to MiFID I introducing the term MTF, let alone MiFID II introducing yet another trading venue: the OTF. This guidance given by CESR in 2002 has found its way into formal EU legislation in MiFIR over time.

Nonetheless, a lot has changed since then. Think of the speed of trading nowadays and the rise of high-frequency algorithmic trading. The development and use of trading technology have resulted in many benefits for secondary trading, such as more trading venues and therefore more possibilities to ensure best execution of trades, wider participation, more liquidity, reduction of short-term volatility, and increased competition leading to better pricing. On the other hand, it has also resulted in increased complexity and an incredible growth in trading volume. In order to ensure orderly and fair trading conditions, the obligations applicable to trading venues have changed enormously over time. The current regulatory framework applicable to operators of a regulated market, MTF or OTF, is by no means comparable to the provisions that applied to operators of regulated markets as recently as in 2002. This development and tightening of legislation was needed and welcome. However, one could question whether it is proportional to apply such heavy regulatory framework to a CSP that wishes to enable its clients to trade their Crowdfunding Investments whenever they need or want to. The European legislator seems to agree that the answer to this question is negative: CSPs may offer a secondary trading possibility to their clients through a bulletin board.

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The Crowdfunding Regulation emphasizes that such a bulletin board cannot be used to bring together buying and selling interests by means of the protocols or internal operating procedures of the CSP in a way that results in a contract. Additionally, it is emphasized that a bulletin board cannot consist of an internal matching system that executes client orders on a multilateral basis.²⁶ These limitations directly follow from MiFID II and the defined terms of an MTF and OTF included therein, which will be elaborated on in the next paragraph.

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Each type of regulated trading venue within the MiFID II framework, being a regulated market, an MTF, and an OTF, purports a genuine trading platform: the arranging and the execution of trades take place in the multilateral system offered by its operator. A bulletin board on which merely buying and selling interests are advertised without genuine trade execution or arranging taking place in the system offered by the operator of such bulletin board is not considered a genuine trading platform.²⁷ The term buying and selling interests should be interpreted broadly. MiFIR points out that it includes orders and quotes as well as indications of interest.²⁸ A bulletin board, or its underlying rules, protocols, or internal

13.28

²⁴ CESR 2002, p 5 and p 20.

²⁵ ESMA, MiFID II review report on the functioning of Organised Trading Facilities, ESMA 70-156-4225, 23 March 2021 (the document itself mistakenly refers to 2020), § 102, p 26 (hereafter referred to as ESMA OTF Report).

²⁶ Art 25(2) Crowdfunding Regulation.

²⁷ Recital 8 MiFIR.

²⁸ Recital 7 MiFIR.

operating procedures, cannot, in any way, match or bring together the buying and selling interests that are listed on the bulletin board. In addition, the operator cannot offer any type of trading system, such as a voice trading system, a request for quote system, a central (limit) order book system, order management system, execution management system, or distributed trading system.²⁹ ESMA states that a bulletin board only advertises trading interests without facilitating the interaction of those buying and selling interests in any way. ESMA considers that this is the material difference between a bulletin board and the regulated trading venues such as an MTF or OTF.³⁰

- 13.29** A bulletin board can include information on prices, quantities available, and list contact details of the persons who advertise their buying and selling interests on the bulletin board.³¹ You can compare it to an electronic/digital advertisement board that can still be found in local supermarkets.
- 13.30** ESMA ascribes the following characteristics to a bulletin board and recommends including a definition hereof in MiFID II:
- it is an interface that only aggregates and broadcasts buying and selling interests in financial instruments (including financial securities registered in a distributed ledger);
 - the system neither allows for the communication or negotiation between advertising parties, including any notification of any potential match between buying and selling interests in the system, nor imposes the mandatory use of tools of affiliated companies; and
 - there is no possibility of execution or the bringing together of buying and selling interests in the system.³²

In other words: the actual arranging, bringing together, matching, negotiating, and execution of the transaction takes place offline, outside the bulletin board, its system, rules, protocols, or internal operating procedures.

- 13.31** This gives clear guidance as to the possibilities and in particular the limitations for a CSP when operating a bulletin board for Crowdfunding Investments on its platform. However, some questions remain unanswered. For example, according to the above, no communication can take place between investors via the bulletin board nor can the bulletin board automatically create matching notifications. I presume this limitation is intended to relate to pre-transaction notifications to be sent to users of the bulletin board, rather than post-transaction notifications to be sent to the CSP via the bulletin board. After all, CSPs that provide asset safekeeping services should be notified of any transaction for administration purposes.³³
- 13.32** In addition, the Crowdfunding Regulation leaves room for the CSP to suggest a reference price for the buying and selling interests. This is more than only aggregating and broadcasting buying and selling interests. However, it follows from Art 25(5) Crowdfunding Regulation that a CSP that operates a bulletin board can have such further involvement.

²⁹ ESMA OTF Report, § 84 and § 99–100, p 26.

³⁰ ESMA OTF Report, § 107, p 27.

³¹ ESMA OTF Report, § 117, p 29.

³² ESMA OTF Report, § 116, p 29.

³³ Art 25(4) Crowdfunding Regulation.

Can it then also provide other ancillary services, such as template transaction documents to ensure that a transaction in respect of the Crowdfunding Investments is settled in a legally valid and binding manner? Such assistance would, in my view, be pre-eminently a post-matching form of assistance and therefore would not trigger the bulletin board to be changing colours to an MTF or OTF. Taken the presumed involvement of ‘predominantly natural persons’ in crowdfunding projects, such assistance could be in the interest of investors trading Crowdfunding Investments via a bulletin board. To take it one step further, one could even argue that it is part of the duty of care of a CSP to ensure that any secondary trading via a bulletin board offered on its platform is performed in a fair and orderly manner, which may include a derived obligation, rather than an option, to suggest a reference price as well as to assist in the valid settlement of the transaction. But the Crowdfunding Regulation does not provide any clarity in this respect. Again, time will tell.

Lastly, and most importantly, the Crowdfunding Regulation enables a CSP also to offer a secondary trading opportunity to its clients who invested in loans through the crowdfunding platform. The characteristics that ESMA ascribes to a bulletin board, as referred to above, only relate to financial instruments or financial securities registered in a distributed ledger. This may be based on the fact that regulated trading venues such as an MTF or OTF only relate to financial instruments under the MiFID II framework. Non-transferable loans are not financial instruments (or financial securities registered in a distributed ledger), yet the Crowdfunding Regulations does enable loans to be traded via a bulletin board. Apparently, this trading possibility does not entail a requalification of the loans as transferable debt securities; this issue, however, will be scrutinized in further detail below (see paragraph 13.43 a.f.). This also raises the question whether a CSP, or the bulletin board operated by it, can have a more substantive involvement in the arranging and execution of transactions via the bulletin board if these transactions relate to loans only. Given the limitations included in Art 25(2) of the Crowdfunding Regulation, the answer to this question is likely to be negative. However, one could question whether this limitation is fair when it comes to trading of loans only, assuming these are not considered transferable debt securities. After all, MiFID II would not subject an operator of such a ‘trading venue’ to an authorization obligation, as long as the trading does not relate to financial instruments.

13.33

At all times, a CSP needs to prevent itself (or the bulletin board) from crossing the line to an MTF or OTF as this will trigger the MiFID II framework to become applicable. As will follow from the below, this line is rather thin.

13.34

2. A Multilateral Trading Facility (MTF) and an Organized Trading Facility (OTF)

An MTF is defined as ‘a multilateral system, operated by an investment firm ... which brings together multiple third-party buying and selling interests in financial instruments—in the system and in accordance with non-discretionary rules—in a way that results in a contract ...’³⁴

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³⁴ Art 4(1)(22) MiFID II.

- 13.36** An OTF is defined as ‘a multilateral system which is not a regulated market or an MTF and in which multiple third-party buying and selling interests in bonds, structured finance products, emission allowances or derivatives are able to interact in the system in a way that results in a contract ...’³⁵

A. Multilateral System

- 13.37** Both types of trading venues are multilateral systems rather than bilateral systems on which an investment firm trades on its own account with its client, such as in case of systematic internalization and matched principal trading. A multilateral system is defined as ‘any system or facility in which multiple third-party buying and selling trading interests in financial instruments are able to interact in the system.’³⁶ From MiFIR it can be derived that the intended scope is very broad. This also follows from Art 1(7) MiFID II.³⁷ This provision requires all multilateral systems in financial instruments to operate on any of the regulated trading venues (regulated market, MTF, or OTF). This provision is aimed at ensuring that each multilateral system, irrespective of it qualifying as a regulated market, MTF, or OTF, or not, shall be subject to the MiFID II framework as regards such regulated trading venues. Operating a multilateral system is therefore material for determining whether its operator falls within the scope of the MiFID II framework.
- 13.38** The underlying system could be a mere set of rules determining the functioning thereof. Whether or not it provides for the matching of orders through underlying technology is irrelevant. The same applies to the type of trading protocol; it is explicitly considered that it also includes systems whereby investors are able to trade against quotes they request from multiple providers.³⁸ Even if there is no trading protocol but only a set of rules in respect of access to trading, admission of financial instruments to trading, rules in respect of trading and reporting rules, such a system can form the basis of a regulated trading venue such as an MTF or OTF if it offers the opportunity to have multiple third-party buying and selling interests to interact.³⁹ A crowdfunding platform, being a publicly accessible Internet-based information system, as operated by a CSP will be considered ‘a system’ within the meaning of MiFIR. A CSP shall not be able to change this, as such a system (the platform) is a material part of its business operations and its services. The mere fact of using a system does not result in the MiFID II framework becoming applicable to CSPs. Thankfully, it takes more to draw that conclusion. Only multilateral systems could bring the operator of a bulletin board in the danger zone.
- 13.39** This means that a bulletin board cannot be a multilateral system. But what should be considered a ‘multilateral system’?
- 13.40** In a preliminary ruling, the European Court of Justice (ECJ) gave some insights on what should be considered a multilateral system when compared to a bilateral system.⁴⁰ Although this ruling was provided under MiFID I and related to the definition of a regulated market

³⁵ Art 4(1)(23) MiFID II.

³⁶ Art 4(1)(19) MiFID II.

³⁷ ESMA recently proposed to move this provision to MiFIR in order to foster consistency and convergence within the EEA. See ESMA OTF Report, § 36, p 14.

³⁸ Recital 7 MiFIR.

³⁹ Recital 7 MiFIR.

⁴⁰ C-658/15 *Robeco Hollands Bezit N.V. v AFM* [2017] ECLI:EU:C:2017:870.

rather than an MTF, the ruling, and particularly the underlying opinion of the Advocate General, shed some light in the darkness around the meaning of a multilateral system. The Advocate General upheld a very strict reading of the objectives of the MiFID framework. This resulted in his interpretation of what should be considered a multilateral system to be very broad. He concluded (in my words) that a system that enables investors or their brokers to conclude a transaction in accordance with the rules established by the operator of the system should be considered a multilateral system.⁴¹ Only if the transaction is concluded outside the system could it be considered a bilateral trading system or over-the-counter (OTC) trading system.⁴² The Advocate General also shared his view that price formation is not a relevant factor for determining whether ‘buying and selling interests are able to interact in the system.’ The Court followed the opinion of the Advocate General.

Recently, ESMA has provided further guidance on the meaning of multilateral systems.⁴³ The crux is in the interaction of multiple third-party trading interests in the system. On the basis of Art 20(6) MiFID II, it could be derived that an OTF can operate a system that crosses client orders and a system that arranges transactions where the operator facilitates negotiations so as to bring together two or more potentially compatible trading interests in a transaction. This would both be forms of ‘interaction of trading interests in the system.’⁴⁴ In line with the aforementioned ruling of the ECJ, ESMA seems to uphold a much lower threshold: exchange of information in respect of material terms of a transaction, such as price and quantity with a view to conclude a transaction between parties via the system, already results in such system falling under the scope of the MiFID II framework, irrespective of such exchange of information resulting in a transaction in the system or not.⁴⁵

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How can this be compared to the aforementioned characteristics of a bulletin board (see paragraph 13.30)? And how to interpret the possibility for a CSP to suggest a reference price, as explicitly included in the Crowdfunding Regulation? Apparently, the mere listing of pricing and quantity information on a bulletin board cannot be deemed to be ‘an exchange of information with the view of concluding a transaction.’ It appears to me that a ‘one way’ publication of a buying or selling interest on a bulletin board including pricing and quantity information, directed at any user of the bulletin board and not to one or some individual investors, as well as the publication of a reference price by the CSP, is acceptable, provided that any follow-up negotiation or conclusion of a transaction occurs offline, outside the bulletin board. The exchange of information as referred to by ESMA seems to aim at a one-on-one contact between users of the system with the aim of getting the deal done. As such, electronic messaging or any form of communication through the bulletin board would trigger the conclusion that the system is considered a multilateral system and should comply with the MiFID II framework.⁴⁶ A bulletin board can therefore not be compared

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⁴¹ C-658/15 *Robeco Hollands Bezit N.V. v AFM* [2017] ECLI:EU:C:2017:870, § 87–89.

⁴² C-658/15 *Robeco Hollands Bezit N.V. v AFM* [2017] ECLI:EU:C:2017:870, § 83–84.

⁴³ ESMA OTF Report, part 4.2, p 12 a.f.

⁴⁴ See also ESMA, Questions and Answers on MiFID II and MiFIR market structures topics, ESMA 70-872942901-38, 6 April 2021, § 5.2, Q&A 10, p 45 (ESMA Q&A).

⁴⁵ ESMA OTF Report, § 23, p 12, § 40, p 15. This could be based on the standards given by CESR in 2002 already. CESR considered that any communication system whereby investors contact each other outside the system to negotiate material terms of a transaction will not fall under the scope of—then current—MiFID I. See CESR 2002, §13(d), p 5.

⁴⁶ This is emphasized by ESMA in the ESMA OTF Report, § 117, p 29.

with platforms like eBay or the Dutch Marktplaats.nl because persons can negotiate and conclude a transaction on such platform.

B. The Use of Discretionary Powers

- 13.43** The next step is to determine whether and how multiple third-party buying and selling interests interact with each other in the multilateral system. On an MTF this must take place on the basis of non-discretionary rules. Non-discretionary rules mean that the operator of an MTF does not have any discretion in respect of the way in which buying and selling interests interact in the system. These rules, protocols, or internal operating procedures of the system, whether or not embodied in technology or computer software, result, on a non-discretionary basis, in a transaction between the buyer and the seller.⁴⁷ As such, it is typical for an MTF (or regulated market) that a transaction is the automatic result of the coming together of a buying and selling interest on the basis of the rules, protocols, or internal operating procedures of the system operated by its operator.⁴⁸ In other words, the execution of a transaction on an MTF (and regulated market) is the outcome of rules, protocols, or internal operating procedures which the operator cannot influence.
- 13.44** An OTF deviates from an MTF (and regulated market) in this respect. An operator of an OTF has the obligation to carry out discretion.⁴⁹ The discretionary powers of an operator of an OTF enable it (a) to decide on the inclusion and withdrawal of orders in the system ('order discretion') and (b) to influence the matching process of orders in the system subject to best execution obligations and specific instructions (eg within an asset management mandate) ('execution discretion').⁵⁰ The access to an OTF should, however, be determined on the basis of non-discretionary rules. This deviating feature of an OTF compared to an MTF makes the boundaries between the Crowdfunding Regulation and the MiFID II framework even thinner. Where an MTF seems to have some sort of matching protocol within its system which automatically, or in any event on a non-discretionary basis, results in the conclusion of a transaction on the MTF upon buying and selling interests interacting, an OTF does not seem to operate in the same manner. Despite multiple third-party buying and selling interests still interacting on the OTF which results in a transaction, the operator of the OTF can steer or influence the matching process prior to such trade being concluded on or via the OTF.

3. From Loans to Transferable Debt Securities

- 13.45** With reference to the aforementioned scope of MiFID II, it is also important to note that MTFs and OTFs only relate to trading in financial instruments, where OTFs are limited to non-equity financial instruments.⁵¹ As emphasized above, not all Crowdfunding Investments qualify as financial instruments within the meaning of MiFID II. In any event loans do not, provided that such loans do not qualify as transferable debt securities. This

⁴⁷ Recital 7 MiFIR.

⁴⁸ Recital 7 MiFIR.

⁴⁹ Art 20(6) MiFID II.

⁵⁰ Recital 9 MiFIR. See also ESMA Q&A, §5.2, Q&A 19, p 50, and ESMA OTF Report, § 135, p 33.

⁵¹ Within the meaning of Art 4(1)(15) MiFID II.

raises questions as to the opportunities and limitations for a CSP when operating a bulletin board for loans only.

Taken the fact that the Crowdfunding Regulation, including Art 25 dealing with the possibility to operate a bulletin board, applies to both loans as well as transferable debt securities, it is interesting to get an understanding what the difference is between these two sorts of Crowdfunding Investments. Apparently, a loan does not automatically requalify into a transferable debt security if it can be traded bilaterally after having found a counterparty via a bulletin board. If this would be the case, Art 25 of the Crowdfunding Regulation would not (need to) have included 'loans' as well. **13.46**

A loan is defined to be '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.'⁵² Under the Crowdfunding Regulation, the borrower of a loan shall always be a person acting in the course of its trade, business or profession.⁵³ A loan is a form of repayable funds within the meaning of the Capital Requirements Directive (CRD) IV, as amended by CRD V, and the Capital Requirements Regulation (CRR), as amended by CRR II. EBA recently called on the Commission to clarify certain material elements of the notion of 'credit institution'—including in respect of the term 'repayable funds' and the term 'the public'—to establish a truly level playing field across the European Economic Area.⁵⁴ **13.47**

Transferable securities include debt securities and are defined as **13.48**

those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as (i) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares, (ii) bonds or other forms of securitized debt, including depositary receipts in respect of such securities, or (iii) 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.⁵⁵

From the definition of transferable security it can be derived that it is negotiable on the capital market. In order to be negotiable on the capital market, a transferable security needs to be interchangeable/fungible and therefore standardized in the sense that the same rights and obligations attach to each class of securities that are negotiated on the capital market. 'Negotiable on the capital market' does not entail that it needs to be listed on a trading venue. A transferable and fungible debt instrument can be considered a debt security if the characteristics and nature of the debt instrument do not prevent such debt instrument from being negotiated on the capital market. As such, a debt security differs from a 'regular loan' **13.49**

⁵² Art 2(1)(b) Crowdfunding Regulation.

⁵³ This follows from Art 1(2)(a) Crowdfunding Regulation in which it is clarified that the Crowdfunding Regulation does not apply to project owners who qualify as consumers within the meaning of Art 3(a) of the Consumer Credit Directive. Consumer is defined therein as 'a natural person who, in transactions covered by this Directive, is acting for purposes which are outside his trade, business or profession'.

⁵⁴ See EBA Opinion as referred to in n 18.

⁵⁵ Art 4(1)(44) MiFID II.

on the basis of three elements: it is (a) transferable, (b) interchangeable/fungible, and (c) its characteristics and nature do not preclude it from being negotiated on the capital market.

- 13.50** A lending-based crowdfunding platform would usually entail numerous small investments by multiple investors who each provide a loan or jointly provide one aggregated loan to a project owner. Each investor will have the same rights and obligations vis-à-vis the project owner under the loan facilitated via the crowdfunding platform pro rata to their investment in the loan. Their loans or loan parts are therefore interchangeable/fungible.
- 13.51** Under the Crowdfunding Regulation, loans are explicitly included in Art 25 which describes the possibility for a CSP to operate a bulletin board. Investors can advertise their selling or buying interest in respect of a loan or loan parts on the bulletin board. This means that the loans facilitated through the crowdfunding platform cannot include restrictions on transferability. If the transfer of the loan or loan parts would be restricted, it would not make sense to advertise a buying or selling interest in respect of such a loan or loan part. This results in these loans or loan parts to be considered transferable.
- 13.52** The material question that is left is whether these loans or loan parts can be considered to be negotiable on the capital market. This seems to be the only distinctive element between a transferable crowdfunded loan and a transferable debt security. There is, however, no consensus in the EU as to the meaning of this element. There is no harmonized definition of ‘capital market’ included in European legislation, nor on a national level.⁵⁶ It is generally considered a place where buying and selling interests meet. Does this mean that a bulletin board, by nature, cannot be deemed a capital market since the buying and selling interests cannot meet (or interact) on the bulletin board? If this conclusion can be validly upheld, could it then be argued that crowdfunded loans are not negotiable on the capital market and therefore will not requalify to a transferable debt security as long as the only secondary trading option for these crowdfunded loans is via a bulletin board?
- 13.53** This could be a game changer, at least from a Dutch law perspective. This third characteristic of a transferable security—‘negotiable on the capital market’—was always considered to be satisfied relatively easily under Dutch law. The Dutch law interpretation is that if the category instruments similar to the loans or loan parts are generally negotiated on the capital market, such loans or loan parts shall be deemed to be negotiable on the capital market as well. It is considered not decisive whether there is a market available for the particular instruments, but rather that the instruments, considering their characteristics, *could* be negotiated on the capital market.⁵⁷ In the Policy on Tradability (*Beleidsregel Verhandelbaarheid*), the Dutch Authority for the Financial Markets (the AFM) concludes that if an instrument is transferred on a periodic basis, it will be deemed to be negotiable and as such a transferable security. The AFM has further clarified that it takes an economic approach when qualifying instruments tradable or not. The AFM considers that all arrangements where the economic interest of a standardized instrument can or will be transferred—directly or indirectly—to a third party, are considered tradable instruments. The AFM regards the transferability of the beneficial ownership/economic value of an instrument as the decisive factor for determining whether an instrument is tradable or not. Moreover, the AFM believes that only in

⁵⁶ ESMA Survey, § 22–23, p 7.

⁵⁷ This view seems to be shared in other Member States as well. See ESMA Survey, §20, p 6.

the event that an instrument ceases to exist in a formal legal sense without being replaced by another (economically similar) instrument, the original instrument could be considered not tradable.⁵⁸

This Dutch law interpretation may need to be revisited. Apparently, a loan provided via a crowdfunding platform does not automatically requalify to a transferable debt security in the event that the CSP operates a bulletin board and offers its clients a secondary trading option in respect of those crowdfunded loans outside the bulletin board. **13.54**

4. What Can a CSP Do When Operating a Bulletin Board?

Not much. That is the short, but presumably valid answer. A CSP can merely enable its clients to publish an electronic advertisement on the digital bulletin board in respect of a crowdfunding project that was financed through the crowdfunding platform operated by the CSP earlier. **13.55**

Upon operating a bulletin board, Art 25 of the Crowdfunding Regulation subjects the CSP to some requirements, mainly focused on ensuring that investors are able to make their investment decision on a well-informed basis. **13.56**

If the CSP plays it safely, it (or the system) does not become involved in any way in respect of any advertisements published on the bulletin board other than suggesting a reference price. The Crowdfunding Regulation explicitly accepts a CSP to suggest a reference price for any buying and selling interests in respect of Crowdfunding Investments that are advertised on the bulletin board.⁵⁹ I encourage CSPs to offer this service to their clients, in particular in respect of crowdfunding projects that are primarily financed by non-sophisticated investors. These investors will benefit from an objective third party suggesting a reference price and substantiating how it came to such reference price. How would such investors otherwise know what the appropriate market value of such Crowdfunding Investment is at that moment if no such market may be offered on a bulletin board? One of the most important principles in economics is the interaction of supply and demand as the basis for price formation. As described above, one of the main characteristics of a multilateral trading venue is that buying and selling interests interact or are brought together in the system. Despite the view of the Advocate General (as followed by the ECJ in the *Robeco* matter) that price formation is not relevant for assessing whether buying and selling interests interact in a system,⁶⁰ which in my opinion fails to convince, price formation seems to be the undeniable consequence of such interaction. With this main economic principle in mind, it is regrettable that CSPs are not allowed to let the market do its job by enabling this interaction in the system without its operator being confronted with the heavy MiFID II framework. **13.57**

⁵⁸ AFM, Policy on Tradability, p 8; AFM, Feedback Statement on Policy on Tradability, p 5. We note that the AFM explicitly rejected the argument made in the consultation conducted in respect of the Policy on Tradability that the interpretation of the AFM is broader than intended under (the then current) MiFID and the then current Prospectus Directive. The AFM considered its interpretation as laid down in the Policy to be in line with the intentions of both the Dutch and the European legislators. A recent decision of the Dutch Trade and Industry Appeals Tribunal backs this broad interpretation of the AFM (ECLI:NL:CBB:2017:409).

⁵⁹ Art 25(5) Crowdfunding Regulation.

⁶⁰ C-658/15 *Robeco Hollands Bezit N.V. v AFM* [2017] ECLI:EU:C:2017:870, § 83–84.

- 13.58** Since the bulletin board cannot in any way bring clients together in the system, and as such neither the rules, protocols, or internal operating procedures underlying the bulletin board can have that effect, clients should include their contact details in the advertisement that they publish on the bulletin board. However, in my view, a CSP should be able to service its clients in a very limited way by, for example, safeguarding a client's privacy by offering the possibility to publish an advertisement under a unique client or advertisement number and the CSP only providing the personal contact details of the person having published the advertisement to other clients who request these details when they are interested in the advertisement. In my modest view, this cannot be deemed the exchange of information in respect of material terms of a transaction which would make the bulletin board a multilateral system according to ESMA.⁶¹
- 13.59** In the same line of thought, and taking into account the duty of care that a CSP has towards its clients, in my view a CSP should be able to publish template transaction documents on the crowdfunding platform which the clients can use if they have, bilaterally amongst themselves and outside the platform or bulletin board, agreed on a trade in respect of Crowdfunding Investments. Taken that crowdfunding investors are 'predominantly natural persons'⁶² who, presumably, do not conclude transactions such as contract takeovers, assignments, or security transfers on a daily basis, the CSP should be able to offer template transaction documents that comply with local law requirements to safeguard a valid and legally binding transaction between its two clients. In addition, where the involvement of a civil law notary or a similar third party is required pursuant to local law, I do not see any regulatory issue with the CSP listing contact details of one or more of such professionals on the platform with the aim of assisting its clients. Any such assistance to settle a bilaterally agreed transaction in Crowdfunding Investments outside the bulletin board would also have a cost benefit for the clients of the CSP. Lower transaction costs stimulate secondary trading, which is beneficial to the investors as well as the further growth of the crowdfunding market.
- 13.60** From a costs perspective, it is regrettable that it is not allowed to execute the transaction on the bulletin board automatically without the CSP becoming subjected to the MiFID II framework for operating a multilateral trading venue. Where third party professionals need to become involved, such as a civil law notary, to transfer the Crowdfunding Investment by the seller to the purchaser validly, it is doubtful whether a secondary market in those Crowdfunding Investments will actually arise. As crowdfunding typically involves relatively small investments, the transaction costs will possibly not outweigh the benefits of trading. In this respect, CSPs should take into account the local law requirements for validly transferring a Crowdfunding Investment when structuring their services. By way of example, from a Dutch law perspective, it may be more client-friendly to have an intermediate foundation administration office issue depositary receipts to investors, with these depositary receipts being linked to shares held by such foundation in the capital of the project owner, rather than having a project owner issuing shares to the investors directly. The issuance and each transfer of shares in a Dutch capital company requires a notarial deed. By

⁶¹ See n 45.

⁶² Recital 10 Crowdfunding Regulation.

placing a foundation administration office in between the project owner and the investors, the terms and conditions that apply to the depositary receipts can determine that a transfer can take place by means of a private deed rather than a notarial deed. Another benefit of this structure is that the project owner is not confronted with many new shareholders but rather with one new shareholder (the foundation administration office) that represents the interests of the depositary receipt holders (the investors).

The requirements when operating a multilateral trading venue in accordance with the MiFID II framework are so far beyond the regulatory framework applicable to a CSP that it is essential for CSPs that they do not, mistakenly, cross the line and would be deemed to operate an MTF or OTF rather than a mere passive bulletin board. It should prevent the system to become a genuine trading platform if it does not consciously aim to ‘jump to the other side’.

5. Or Is There a Workaround?

The limitations for a CSP naturally also offer chances to other market parties. In light of the G20 commitments and one of the objectives of MiFID II to move trading to organized, multilateral regulated venues ‘in order to increase market transparency, add more quality to the price discovery process, increase investor protection and access to liquidity’,⁶³ operators of already regulated trading venues may decide to include a market segment for Crowdfunding Investments.

CSPs could cooperate with such regulated trading venues. A particular interesting point is that the role of a CSP could in the event of such a cooperation possibly become much bigger. The system operated by the CSP may even enable the pre-arranging of transactions in Crowdfunding Investments between clients of the CSP, as long as the actual execution of the transaction takes place on the regulated trading venue. ESMA considers such (multilateral) ‘arranging system’ an outsourced service by a regulated trading venue on which the pre-arranged transaction is executed.⁶⁴ Apparently, ESMA holds the view that a ‘arranging system operator’ is not considered to be an operator of a multilateral trading system if the actual execution of the transaction takes place on a regulated trading venue on the basis of an outsourcing agreement between the arranging system operator and the operator of the regulated trading venue. Whether this is a commercially viable option to consider for CSPs is questionable, as well as whether this view will be followed by national competent authorities. Again, time will tell.

⁶³ ESMA OTF Report, §15, p 11.

⁶⁴ In this way, it is ensured that the MiFID II framework is still applicable, albeit not directly on the ‘arranging system operator’ but rather via the operator of the trading venue that outsources the arrangement to such other person. Please see: ESMA OTF Report, § 103–105, p 26–27. ESMA emphasizes that it does not work the other way around as the fundamental characteristic of a trading venue is to execute transactions. See in this respect also ESMA Q&A, § 5.1, Q&A 7, p 41.

IV. Full Regulation: Just a Matter of Time?

- 13.64** As mentioned in the introductory paragraph of this chapter, the Crowdfunding Regulation will presumably stimulate the further growth of the European crowdfunding market. This form of alternative finance is by no means in its infancy anymore; the global market size as per 2019 is expected to triple to approximately USD 40 billion by 2026.⁶⁵ Although this is still a fraction compared to the size of the global capital markets, the expected continuing exponential growth of crowdfunding could be taken as a forerunner of further regulation yet to come. Generally, the adage applies that the bigger the market, the higher the risks, the more regulation is developed. Regulation always lags behind the developments and innovation. This was also explicitly brought to the attention of the Commission by trading venues, expressing their concerns about the rise of alternative platforms in which trading interests are matched on a bilateral basis rather than a multilateral basis. The regulated trading venues claim that these alternative platforms cause competitive distortions because the operators do not comply with the MiFID II framework. On the basis of the analysis in this chapter, matching of trading interests in a system would result in such system to qualify as a multilateral system and as such would result in the operator of such a system falling under the scope of the MiFID II framework. A recent consultation document on the review of the MiFID II framework considers whether the MiFID II framework should ‘take a more functional approach and define the operation of a trading facility in broader terms than the current definition of trading venues or multilateral system as to encompass these systems and ensure fair treatment for market players.’⁶⁶
- 13.65** With this recently conducted consultation in mind, it would not be surprising if the bulletin board option in the Crowdfunding Regulation would only be a temporary means of boosting secondary trading in Crowdfunding Investments, and over time CSPs would be required to move trading in Crowdfunding Investments to regulated multilateral trading venues.
- 13.66** However, CSPs should not be discouraged, and should start with the first step: open up secondary trading in Crowdfunding Investments by operating a bulletin board, and protect clients’ interests by enabling them to exit their investment when they want or need to in an orderly and informed manner against fair value.

⁶⁵ <<https://www.statista.com/statistics/1078273/global-crowdfunding-market-size/>>.

⁶⁶ Public consultation on the review of the MiFID II/MiFIR regulatory framework, part VI (Multilateral systems), 17 February 2020, p 82.