

# Crowdfunding in Europe

## Legal Framework

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### A. Overview

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*Contributed by Dr. Marco Brand*

On 20 October 2020, Regulation (EU) 2020/1503 of 7 October 2020 on European crowdfunding service providers for business (“**Crowdfunding Regulation**”) was published in the Official Journal of the European Union. The Crowdfunding Regulation applies from 10 November 2021 but grants a transition period for the adaption of the business models under the Crowdfunding Regulation until 10 November 2023. To meet this deadline, crowdfunding service providers must become active now to adapt their business model to the new European legal framework.

The Crowdfunding Regulation is the first regulation of crowdfunding services on a European level. Up to now, crowdfunding has been governed under the various national laws of the Member States. A consequence of this has been the fragmentation of applicable regulatory regimes which makes the provision of cross-border crowdfunding services almost impossible. The key aim of the Crowdfunding Regulation is to change this position by fostering cross-border crowdfunding services in the Union while at the same time to ensure a high level of investor protection. This fragmentation will partly remain as the Crowdfunding Regulation does not cover all existing crowdfunding business models.

The Crowdfunding Regulation applies to the provision of crowdfunding services, which are defined as the matching of business funding interests of investors and project owners (*i.e.*, the persons seeking funding) through the use of an internet-based crowdfunding platform and which consist of any of the following activities:

- the facilitation of granting of loans; and
- the placing without a firm commitment basis and the reception and transmission of client orders in relation to transferable securities and admitted instruments for crowdfunding services.
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The Crowdfunding Regulation does not apply to:

- project owners who are consumers;
- crowdfunding offers of a project owner relating to transferable securities with a total consideration of EUR 5,000,000 or more calculated over a period of 12 months; and
- the brokerage of qualified subordinated loan receivables<sup>1</sup>.

With regard to the out-of-scope crowdfunding services, the regulatory requirements of the Member States concerned continue to apply. This makes things insofar more complicated as crowdfunding service providers, project owners and investors must have different regulatory regimes on their screen.

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<sup>1</sup> See *Brand*, Europa harmonisiert Schwarmfinanzierung, in: Börsenzeitung vom 12. März 2021.

In the following we will provide a high-level overview of the core provisions of (i) the Crowdfunding Regulation and (ii) national legislations of selected European countries.

## B. EU Crowdfunding Regulation<sup>2</sup>

*Contributed by Dr. Marco Brand*

### I. Authorization

Under the Crowdfunding Regulation, crowdfunding services may be provided only with an authorization as a crowdfunding service provider under Art. 12 of the Crowdfunding Regulation. This authorization also includes the provision of two ancillary services:

- Individual portfolio management of loans (e.g., auto-invest functions such as the selection of loans to be disbursed by the investor according to pre-defined criteria);
- Operation of a bulletin board (i.e., the provision of a secondary market on which the customers of the crowdfunding service provider can indicate their interest in buying and selling loans or securities originally offered on the crowdfunding platform being understood that the bulletin board must not be a multilateral trading facility within the meaning of MiFID II).

The authorization under Art. 12 does not cover payment services as defined in PSD II. Thus, for the provision of payment services (e.g., money remittance business), either an additional license under the PSD II or an authorized payment service provider is required.

Crowdfunding service providers will be supervised by the National Competent Authorities (NCAs) of the Member States concerned.

One of the big reliefs of the Crowdfunding Regulation is that investors and project owners are expressly excluded from any authorization requirements for the granting of loans and the acceptance of funds for loans which have been facilitated through an authorized crowdfunding service provider. In particular, they will not need a banking license for the deposit and credit business.

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<sup>2</sup> For more details on the Crowdfunding Regulation see *Brand*, The new European crowdfunding regulation: facilitating cross-border services, in: *Journal of Investment Compliance*, 2021; *Wallach/Brand*, in: *Kunschke/Spitz/Kohle*, Legal Handbook Fintech, 2<sup>nd</sup> ed. 2022, Sec. C. "Kreditplattformen und Crowdfunding", margin numbers 37 et seqq.

### II. European Passport

An authorization under the Crowdfunding Regulation includes the ability to render their crowdfunding services on a cross-border basis within the European Economic Area (EEA) by applying for a European Passport. This will allow investors to invest on a pan-European basis through crowdfunding platforms. Similarly, project owners will benefit from their ability to seek capital from investors throughout the EEA. The procedure to obtain a European Passport is straight forward. 15 days at the latest after the submission of the relevant information, the crowdfunding service provider can start to provide crowdfunding services in the relevant Member States. No additional approval will be required.

### III. Consumer Protection

Among many other consumer protection obligations, crowdfunding service providers are obligated to provide prospective investors with a key investment information sheet drawn up by the project owner including the information referred to in Annex I of the Crowdfunding Regulation. The key investment information sheet is not subject to an approval from the national competent authorities. However, where services are provided in connection with the ancillary service of loan portfolio management, the crowdfunding service provider itself must prepare the document (*i.e.*, at the platform level).

The Crowdfunding Regulation requires the Member States to ensure the responsibility of at least the project owner and/or the crowdfunding service provider or their administrative, management or supervisory bodies for the information given in a key investment information sheet. The Crowdfunding Regulation leaves it with the Member States as to whether only the project owner and/or the crowdfunding service provider or also their administrative, management or supervisory bodies are liable for misleading, inaccurate or incomplete information in the key investment information sheet. For further details on the Member States level, reference is made to Section 3 below.

## C. National Crowdfunding Legislations

### I. Germany

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*Contributed by Dr. Marco Brand*

Since the first crowdfunding platform commenced its operations in Germany in 2011<sup>3</sup>, crowdfunding has become more and more popular as alternative financing, in particular for

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<sup>3</sup> See BaFin Letter, Crowdfunding: Regulatory Requirements and Responsibility of Investors, 2 June 2014.

start-ups and private projects. Apart from big American platforms like Kickstarter and Indiegogo which are very popular in the German market, there are also significant German crowdfunding platforms such as Seedmatch, Startnext and Companisto.

### 1. (Previous) Legal Framework in Germany

For crowdfunding projects which are not covered by the Crowdfunding Regulation (in particular, crowdfunding where the project owners are consumers, brokerage of qualified subordinated loan receivables, crowdfunding beyond the EUR 5 million threshold (see A. above), the previous legal situation continues to apply. There has been no specific German regulation for crowdfunding in place. Rather the general financial services regulations such as the German Banking Act (*Kreditwesengesetz*), the German Payment Services Act (*Zahlungsdiensteaufsichtsgesetz*) and the German Investment Act (*Vermögensanlagegesetz*) apply to the different players in crowdfunding projects. This means that – unlike under the Crowdfunding Regulation – license requirements need to be checked not only for the platform provider but also for the investor and the project owner. There are different regulatory requirements for crowdlending (*i.e.*, loans) or crowdfunding (*i.e.*, securities).

The granting of loans, if provided commercially, qualifies as banking business subject to a banking license under the German Banking Act. The prerequisites to the feature “commercially” are rather low which makes it from a compliance perspective difficult to assess in advance whether or not investment activities in crowdfunding projects would amount to a licensable banking activity in the form of credit business. Therefore, in practice, two ways have been established to legally reach out the loans: (i) the loan is reached out by a regulated fronting bank which assigns the (fractionated) loan receivable to the investors or (ii) the loan is structured as a so-called “qualified subordinated loan” to not qualify as regulated credit business. Both structures allow investors to invest in loan receivables irrespective the fact whether or not they act commercially.

Not only the investors but also the platform operators are subject to a license. The platform operator acts as intermediary between the investor and the project owner which usually requires a loan brokerage license under the German Trade Ordinance (so-called Sec. 34f GewO-license). This license is granted by the competent Chamber of Industry and Commerce which are local authorities. The requirements to such Sec. 34f GewO-license are less strict compared to an investment brokerage license under the German Banking Act. However, the disadvantage of this license is that there is no passport available to render the crowdfunding services cross-border into other European countries. As a result, target market for such crowdfunding projects is limited to Germany.

The project owners do usually not need any license. However, depending on the legal structure, they could qualify as an investment fund.

As fractionated loan receivables and qualified subordinated loans qualify as investments under the German Investment Act, there is generally the obligation to publish a prospectus

under the German Investment Act (*Vermögensanlagegesetz*). However, crowdfunding is exempted from the prospectus requirement if certain thresholds are met, *e.g.*, all investment products issued by one issuer do not exceed the amount of EUR 6 million and (ii) the investor does not invest more than EUR 1,000 (or EUR 10,000 in case he can prove that he has enough funds) in an investment product of an issuer<sup>4</sup>. In practice, most crowdfunding projects are set up such that they do not require a prospectus under the German Investment Act.

### 2. German Legislation Supplementing the Crowdfunding Regulation

The Crowdfunding Regulation as European regulation applies without implementation directly in the Member States of the European Union. However, the Crowdfunding Regulation includes provisions which need to be specified by the Member States. Most importantly, under Art. 23(9) and 24(4) the Crowdfunding Regulation requires the Member States to ensure the responsibility of at least the project owner and/or the crowdfunding service provider or their administrative, management or supervisory bodies for the information given in a key investment information sheet. The Crowdfunding Regulation leaves it with the Member States as to whether only the project owner and/or the crowdfunding service provider or also their administrative, management or supervisory bodies are liable for misleading, inaccurate or incomplete information in the key investment information sheet. The German legislature decided in its legislation supplementing the Crowdfunding Regulation that not only the company but also their (management and in case of intent and gross negligence also supervisory) bodies shall be liable for misleading, inaccurate or key investment information sheets. By including the members of the management and supervisory bodies into the liability the German legislator established a very strict liability regime which has not been required by the Crowdfunding Regulation and which is unique compared to other prospectus liability regimes (in particular under the Prospectus Regulation). To avoid personal liability of the management and supervisory board members, a crowdfunding service provider might be tempted to choose a country where such personal liability does not exist. Such decision would have no impact on their access to the EU market as they profit from the European passport. Alternatively, insurances for the board members might be a solution to address their liability risks.

## II. France

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*Contributed by Jean-François Adelle, Jeantet AARPI*

### 1. Overview

France is a dynamic market for crowdfunding. 2.35 billion euros were reported to be invested and 116,155 projects to be financed in 2022, corresponding to an increase in value of 25% from 2021, putting an end to a slowdown period during Covid years where

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<sup>4</sup> For further details see *Wallach/Brand*, in: *Kunschke/Spitz/Kohle*, *Legal Handbook Fintech*, 2<sup>nd</sup> ed. 2022, Sec. C. “Kreditplattformen und Crowdfunding”, margin numbers 33 et seqq.

crowdfunding suffered from the competition of low interest rate state guaranteed loans (*Prêts Garantis par l'Etat - PGE*).

Growth factors include a diversification of fundraising mechanisms (private placements, investment funds, etc.), the growth of real estate projects, and the attractiveness of projects with a social or environmental dimension which represent nearly 25% of the total volume of the projects financed. Separately from a myriad of independent small projects, in a large array of activities covering corporate lending and energy related projects, a portion of crowdfunding projects consists in tranches of large projects.

### 2. Legacy of the 2014 regulation and transition to the EU Regulation regime

France pioneered a dedicated legislation of crowdfunding, under a regime put in place by ordinance 2014-559 of 30 May 2014 and its implementing decree of 16 September 2016, that provided for two sub-regulations of debt and equity crowdfunding.

The Regulation (EU) 2020/1503 of 7 October 2020 on European crowdfunding service providers for business (the “**Crowdfunding Regulation**”), has been transposed by ordinance 2021-735 of 22 December 2021 (the “**Ordinance**”), incorporated in Articles L. 547-1 et seq. of the French Monetary and Financial Code.

The Ordinance has materially modified the previous architecture. It put an end to the dual regulated regimes of Participatory Investment Advisors (*Conseillers en Investissement Participatif - CIP*), authorised to provide investment services, and Intermediary in Participative Financing (*Intermédiaire en Financement Participatif - IFP*).

CIPs will disappear and IFPs will be surviving only for activities relating to interest-free loans and donations, that are not covered by the Crowdfunding Regulation. Project promoters wishing to benefit from this status must be registered with the French Agency for the Unique Registry of Insurance, Banking and Finance Intermediaries (*Organisme pour le registre unique des intermédiaires en assurance, banque et finance – ORIAS*) as an IFP. In such case, it will be possible to cumulate the two statuses.

The existing authorizations of ISPs and CIPs will cease to be effective on 10 November 2023 (subject to free loan activities), where only the authorization as ECSP will allow to provide crowdfunding services. If they fail to obtain the ECSP status beforehand, these IFPs and CIPs will have to cease their activities.

IFPs and CIPs are otherwise replaced by the single new profession of European Crowdfunding Service Providers (“**ECSPs**”), whose members, once authorized by their National Competent Authority (*NCA*) are able to offer crowdfunding services in the form of financial instruments/securities subscription (*Crowdequity*) and/or interest-bearing loans (*Crowdlending*), depending on the scope of their “*Program of activity*”, and provide ancillary services of individual portfolio management of loans and operation of a bulletin board.

While the provision of investment services is no longer within the scope of the new ECSP, it is understood that the filtering of professional and nonprofessional investors will not be seen as investment advice.



Simplified procedures for already authorised providers on the date of the entry into force of the Crowdfunding Regulation are provided. However, the regulator has recently called applicants' attention on the tightness of the approval process compared to the former one and that it may interrupt the review period of applications time required to issue or refuse approval (25 working days for analysis of completeness and three calendar months for investigation) where necessary.

### 3. Implementation of the EU Regulation

The Ordinance designates the French Financial Markets Authority (*Autorité des Marchés Financiers* – AMF) as the sole competent authority for the approval, control, sanction and withdrawal of approval of ECSPs. When the applicant's "*Program of activity*" includes facilitating the granting of loans, the approval of the ECSP may be issued by the AMF only after it has received the assent of the French Prudential Control and Resolution Authority (*Autorité de contrôle prudentiel et de résolution* - ACPR), sole competent for lending activities, which will intervene alongside the AMF for the supervision and control.

As regards the implementation of the Crowdfunding Regulation, in areas in which member states have regulation competence, the following shall be noted:

In respect of marketing and advertising, canvassing is prohibited. Marketing documents must be drafted in French, but subject to the conditions and limits set forth in the General Regulation of the French Financial Markets Authority, can be drafted "in a language customarily used in finance other than French".

When the project holder is a local authority, the ECSP shall inform it and the investors of the offences provided for in the French Criminal Code in connection with the illegal taking of interest and of the good practices established by the regulatory bodies to ensure compliance with those provisions.

As regards liability, project owner is ultimately responsible for any misleading or inaccurate information, as well as omissions, relating to the project, in the loan documentation in particular the KIIS unless those omissions are the direct result of inadequate procedures by the crowdfunding service provider in the collection of this information. The crowdfunding service provider is responsible for the procedures put in place to verify that the information provided is complete, correct and clear, and has an express obligation to ensure with the project owner that the total amount of the outstanding loans subscribed to in the form of crowdfunding does not exceed the statutory ceiling of the total amount of the loans granted for any one project. In case of a dispute, the ESCP would seek the liability of the project owner by way of impleader. No specific liability regime has been established; therefore, general civil liability rules apply (Article 1240 of the French Civil Code).

### III. Italy

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*Contributed by Emanuele Grippo, Gianni & Origoni*

The Italian Parliament in order to comply with, and implement the provisions of, the Regulation (EU) 2020/1053 on European crowdfunding service providers for business ("**Crowdfunding Regulation**") has assigned the Government the task to adopt a legislative decree aimed at amending the relevant national regulations and adapting the national law to the European legal framework.

In this regard, on August 26, 2022, Law No. 127 of August 4, 2022 (European Delegation Law for the year 2021, the "**European Delegation Law 2021**") was published in the Official Journal No. 199, containing the delegation to the Government, which, in article 5, provides the guiding principles and criteria for the implementation of the provisions of the Crowdfunding Regulation.

Pursuant to article 5 of the European Delegation Law 2021, in the exercise of the delegation, the Government, on December 9, 2022, approved a draft legislative decree<sup>5</sup>, which is currently being examined by the Parliament for the purpose of obtaining the opinions of the relevant parliamentary committees. The final decree is expected to be published in the Official Journal likely by March.

In implementing the aforementioned European regulation, the draft legislative decree provides for several amendments to the regulations contained in Legislative Decree 98/58 ("**TUF**"), as amended from time to time; in detail, the main points are as follow: (a) Consob and the Bank of Italy, each according to its functions, have been designated as the competent Authorities for the authorization process (including the withdrawal of authorization) and the supervision of crowdfunding service providers; (b) Consob has been designated as the point of contact with ESMA; (c) in the cases provided for in article 23(10) of the Crowdfunding Regulation, the liability for the information provided in the sheet containing the key investment information, including any translations thereof, shall be that of the project owner; (d) in the cases provided for in article 24(5) of the Crowdfunding Regulation, the liability for the information provided in the sheet containing the key investment information at the platform level, including any translations thereof, shall be that of the crowdfunding service provider (e) subjects providing crowdfunding services other than those regulated by the Crowdfunding Regulation shall publish on their website and include in the information made to customers regarding the service provided a notice that the crowdfunding service is not subject to authorization or supervision by the Bank of Italy

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<sup>5</sup> Please note that the draft legislative decree, containing the amendments to be made to the TUF (as defined above) in the implementation of the European regulation concerned, was drawn up after discussions at the technical level with the competent offices of the Bank of Italy and Consob and on the basis of informal consultations with operators of the sector.

or Consob and the rules and protections provided by the Crowdfunding Regulation do not apply; (f) simplified procedures for providers that on the date of the entry into force of the Crowdfunding Regulation (November 9, 2020) are already licensed under national law.

As long as the legislative decree has not been enacted, Consob and the Bank of Italy may not receive formal applications for granting a license to operate as a crowdfunding service provider under the Crowdfunding Regulation and start the related authorization process.

Nevertheless, on October 21, 2022, Consob and the Bank of Italy published a joint communication making themselves available for informal dialogue to guide interested operators in the future submission of applications for authorization, including providing clarifications on the information and documentation to be attached to the applications, pending the completion of the process of adaptation of the national regulations<sup>6</sup>.

To date, the most updated official data on the number of active portals and campaign collections published on online crowdfunding platforms (equity-based model and lending-based model) in Italy are as of June 30, 2022<sup>7</sup>.

As of June 30, 2022, there are 90 active portals on the domestic market (many of which have yet to launch crowdfunding campaigns) - with total funding in the last 12 months (from 1/7/2021 to 30/6/2022) amounting to € 430.60 million (+27% year-on-year but comparing the first half of 2021 with the second half of 2022 shows a -2, 2%) - including 51 portals for collecting capital online (equity-based model), 7 portals (lending-based model) aimed at financing individuals (consumer, 1 more than in 2021), 12 portals aimed at financing businesses (business, 4 more than in 2021) and 20 portals specialized in the real state (6 more than in 2021)<sup>8</sup>.

In detail, annual funding (1/7/2021 to 30/6/2022) (a) for equity crowdfunding amounted to €97.79 million for non-real estate projects (with a decrease in the first half of 2022) and € 44.10 million for real estate projects, while minibonds placed on portals amounted to €37.63 million; (b) for lending portals, annual funding amounted to € 65.49 million lent to

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<sup>6</sup> To the communication is attached a form to be compiled and sent to the abovementioned Authorities by the entities interested in applying for providing crowdfunding services under Crowdfunding Regulation with, inter alia, the following information: (i) the crowdfunding services that are intended to be provided; (ii) whether it is intended to operate cross-border from the start of operation; (iii) the status of the documentation required in accordance with the provisions of the Delegated Regulations published by the European Commission on July 13, 2022; (iv) any registration in a list/register held by Consob or the Bank of Italy to operate as crowdfunding providers under national law. Please note that the latter shall also fill the form and transmit it to the authorities but following a simplified procedure and updating any information already rendered in this regard.

<sup>7</sup> A that stage, as the final legislative decree implementing the Crowdfunding Regulation to the national law has not yet been published, the Italian companies may not start the authorization process to operate under the Crowdfunding Regulation. In addition, there are no records showing the number of entities that have informally made contact with the authorities to initiate a "pre-filing".

<sup>8</sup>For further detail please refer to the 7th Italian CrowdInvesting Report at the following link: <https://www.osservatoriefi.it/efi/osservatorio-crowdinvesting/>

individuals and € 102.44 million to companies through generalist portals (with a decrease in the first half of 2022), and € 83.15 million from portals specializing in real estate<sup>9</sup>.

Hopefully the Government will enact as soon as possible the legislative decree thus enabling Italian companies to start the process to operate under European regulation. Italy will need to accelerate in these months in order to reduce the gap that has been created with other European countries that have already started operating cross-border (among all Spain and France).

In this regard, it is expected that some providers - in order to avoid exit from the market - will seek a way to consolidate through mergers or acquisitions/divestments not having, as of today, such economic strength as to justify the investments necessary to ensure compliance with the stricter requirements set by the European Regulations and therefore necessary to obtain authorization to operate.

### IV. Luxembourg

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*Contributed by Gary Cywie & Amaury Grevesse-Sovet, Elvinger Hoss Prussen<sup>10</sup>*

#### 1. Overview of crowdfunding and its manifestations in Luxembourg

Rather than opting for a traditional financing through banks for example, the idea of crowdfunding is to democratise the financing of a project by allowing many diverse and varied players to participate in it, for amounts that can be either modest or high. Particularly appreciated by start-ups as well as small and medium-sized companies, this type of financing is growing. In order to attract donors, in most cases projects are presented on platforms specially designed for this purpose. The first crowdfunding platforms were created at the end of the 2000s and have since grown considerably. In Luxembourg, however, the market is still relatively small compared to other countries.

Usually, crowdfunding is categorised into four types:

- Donation-based Crowdfunding (“**Crowddonating**”);
- Reward-based Crowdfunding (“**Reward-based Crowdfunding**”);
- Credit-based Crowdfunding (“**Crowdlending**”) and
- Equity-based Crowdfunding (“**Crowdinvesting**”).

In Luxembourg, Crowddonating platforms (aimed at financing social or charitable projects), Crowdlending platforms (particularly popular in real estate) and Crowdinvesting platforms are the most popular. This third category allows the lender to receive a share of the future

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<sup>9</sup> With reference to the donation and reward crowdfunding in Italy, the latest public data (shown in the 7th Italian Crowdinvesting Report) are from March 2021 and count 25 active portals and a funding of €52.2 million.

<sup>10</sup> With the kind collaboration of Thomas Göricke.

profits of the financed project. If the investment is linked to securities investments, the investor can also receive shares.

Currently, no Luxembourg-based crowdfunding platforms have yet received a licence from the *Commission de Surveillance du Secteur Financier* (the "**CSSF**"). To date, none of them appear in the register of European crowdfunding service providers ("**ECSP**") maintained by the European Securities and Markets Authority ("**ESMA**").<sup>11</sup> However, Luxembourg consumers like some of these platforms and use foreign platforms too.

As an example, a foreign Crowdlending platform offers the possibility for individuals and professionals to lend to real estate developers, thus giving access to investment opportunities previously reserved for institutional investors. Crowdlending has been used to finance the construction of projects and the purchase of land in Luxembourg (i.e., three residences in a business district, seven apartments on the outskirts, a day care centre and two town houses). More recently, Crowdlending has allowed the financing of four new residential properties in the North of the country.<sup>12</sup>

### 2. The legal framework in Luxembourg

To support the development of crowdfunding platforms in the European Union, the European Commission adopted Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for businesses and amending Regulation (EU) 2017/1129 as well as Directive (EU) 2019/1937 (the "**Crowdfunding Regulation**").

The Crowdfunding Regulation created a new legal status for ECSP which allows them to apply for a European passport, based on a single set of rules.<sup>13</sup> This harmonisation and these new rules should increase the availability of this innovative form of financing, which will consequently help companies seeking alternatives to bank financing. Thanks to the Crowdfunding Regulation, investors on crowdfunding platforms also benefit from a reinforced protection regime based on clear rules concerning, in particular, the disclosure of information by project holders and crowdfunding platforms, in the form of a key investment information sheet.<sup>14</sup> It should be noted that project owners looking for funds on crowdfunding platforms are exempt from the scope of the Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC, as amended from time to time (the "**Prospectus Regulation**"). As one of the main interests of crowdfunding is to give start-ups and small and medium-sized companies easier access to finance and in order to avoid any inconvenience

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<sup>11</sup> Accessible on ESMA's website at <https://www.esma.europa.eu/document/register-crowdfunding-services-providers>.

<sup>12</sup> SHILLITO Josephine, « *Quand le crowdlending remplace les banques* », Paperjam, 12 October 2022.

<sup>13</sup> ELVINGER HOSS PRUSSEN, "[New regulatory framework for Crowdfunding Service Providers](#)", 3 February 2022.

<sup>14</sup> *Id.*

caused in this respect, it was essential for the Prospectus Regulation not to be applicable to the crowdfunding projects owners.<sup>15</sup>

Directly applicable in all Member States since 10 November 2021, the Crowdfunding Regulation has been complemented by the Law of 25 February 2022 through which the legislator has notably specified the terms of application in Luxembourg.<sup>16</sup> As the regulatory and supervisory authority for financial activities in Luxembourg, the CSSF has been granted a key role in the supervision of crowdfunding platforms to ensure that they comply with the laws and rules in force<sup>17</sup>. Indeed, crowdfunding platforms must be granted a licence by the CSSF before they can operate. To obtain this licence, platforms must provide detailed information on their operation, their ownership structure, their risk management system and their compliance policy. Once licensed, these platforms must comply with regulatory requirements regarding transparency, investor protection and anti-money laundering. The CSSF underlines that ECSPs intending to provide payment services in addition to crowdfunding services, may need to obtain a separate licence under the amended Law of 10 November 2009 on payment services. Platforms must also ensure that the proposed projects are legitimate and they also respect the regulatory framework. In this respect, the CSSF also monitors them to ensure that they comply with transparency and investor protection requirements, in particular with regard to the disclosure of information relating to the projects proposed on the platform<sup>18</sup>. In the event of non-compliance, the CSSF may impose sanctions.<sup>19</sup> These sanctions may include fines or even the suspension of the platform's licence.

In response to a question raised by the ESMA<sup>20</sup>, the European Commission clarified that the provisions of Article 48 of the Crowdfunding Regulation, according to which existing crowdfunding service providers operating under national law, may continue to provide services within the meaning of the Crowdfunding Regulation, according to the applicable national law, for a transitional period. These provisions apply also to crowdfunding service providers operating in a jurisdiction where no national law is applicable.<sup>21</sup> The transitional period referred to in Article 48(1) of the Crowdfunding Regulation is extended until 10 November 2023.

What about tax? Crowdfunding is subject to the same tax rules as other forms of investment. Thus, the income generated by loans or donations are subject to income tax.

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<sup>15</sup> MANZARI Nadia and LLERENA Maxime, "European Regulation on Crowdfunding Service Providers (CSPs) for business", *Revue Pratique de Droit des Affaires* (Legitech, November 2021).

<sup>16</sup> Chapter 4quater of the Law of 25 February 2022.

<sup>17</sup> Art. 20-15 of the Law of 25 February 2022.

<sup>18</sup> Art. 20-18 and 20-19 of the Law of 25 February 2022.

<sup>19</sup> Art. 20-16 of the Law of 25 February 2022.

<sup>20</sup> ESMA, "[Q&A on the European crowdfunding service providers for business Regulation](#)", Question 2.

<sup>21</sup> See CSSF's web page dedicated to [crowdfunding service providers](#).

### 3. Cautionary notes and future outlook

Although very attractive, crowdfunding is still subject to certain risks. These risks can be related to the investment in the sense that the projects proposed on the platforms are often high-risk projects, such as start-ups or real estate development projects. There is therefore a risk that these projects will not be profitable and that investors will not recover their investment. Incidentally, the projects often experience major difficulties in collecting the necessary funds through crowdfunding. Risks can also be related to the platform, which may be subject to fraud or mismanagement.

Furthermore, it is worth mentioning the current limitations of the Crowdfunding Regulation as it only applies to crowdfunding services provided to non-consumer project owners relating to offers for an amount up to EUR 5m calculated over a period of twelve months per project owner.<sup>22</sup> Indeed, there are other crowdfunding activities, which are out of scope of the Crowdfunding Regulation:

- Other types of crowdfunding such as donation-based crowdfunding (where the funders do not receive any consideration) or reward-based crowdfunding (where the funders receive a non-financial consideration, like a copy of the project result);
- Crowdfunding offers with a consideration of more than EUR 5m calculated over a period of twelve months (these offers will instead be subject to the rules set out in MiFID II and the Prospectus Regulation); and
- Crowdfunding offers where project owners are consumers.

Finally, the risks also relate to the regulatory framework. Crowdfunding laws and regulations are evolving and investors may be exposed to risks if platforms do not comply with the applicable legal framework. Compliance requirements are one of the challenges for the development of ECSP, but if completed successfully, the crowdfunding ecosystem will be even more secured and successful.

Although less used than in our neighbouring countries (France and Belgium in particular), crowdfunding is becoming more and more attractive due to its accessible and attractive model in Luxembourg, in line with the digitalisation of the economy. With an active, increasingly younger population interested in the world of finance, together with players looking for financing other than through traditional channels, it is likely that crowdfunding will have a growing influence on our economy in the years to come.

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<sup>22</sup> *Idem.*



### V. Hungary

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*Contributed by Marina Juhasz & Gréta Bujdosó, KNP LAW*

#### 1. Overview

Since 2010, the available capital resources to small and medium-sized enterprises in Hungary have increased significantly, primarily in connection with venture capital funds (JEREMIE programs<sup>23</sup>) supported by the European Union and with the range of resources available outside the bank sector. Additionally, there are Hungarian State aids that can be required by small and medium-sized enterprises, which means that financial state aid is mainly provided with soft loans<sup>24</sup>.

Among small and medium-sized enterprises in Hungary, most start-up companies under development intend to acquire outside financing for their starting projects. However, they are requested to perform strict conditions imposed by banks, which they can only act on after their establishment<sup>25</sup>.

In the spring of 2022, Hungary's first crowdfunding platform started operating. As of today and to the best of our knowledge, the so-called "Brancs Community" is the only crowdfunding service provider in the country<sup>26</sup>.

#### 2. Legal Framework in Hungary

In Hungary, crowdfunding activities were not regulated by law before the publication of the Crowdfunding Regulation. Hence, various crowdfunding activities have been treated as financial activities already covered by Hungarian legislation. Until the adoption of the Crowdfunding Regulation, crowdfunding activities like financing legal or natural persons, transferring and investing money (B2B, B2C) have been regulated in **Act CXXXVIII of 2007 on Investment Firms and Commodity Dealers, and on the Regulations Governing their Activities**, in **Act CCXXXVII of 2013 on Credit Institutions and Financial Enterprises and Act XVI of 2014 on Collective Investment Trusts and Their Managers, and the Amendment of Financial Regulations**. These activities are regulated under the mentioned laws because, in credit-based crowdfunding activities, the investor's activity could qualify as an activity subject to authorization. In these cases, the platform operator could qualify as the intermediary for financial services, which is also subject to the approval of the **National Bank of Hungary** (hereinafter: "**MNB**").

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<sup>23</sup> JEREMIE program is a business development program of the European Union, financed by the European Investment Fund and European Investment Bank.

<sup>24</sup> Bethlendi András, *Executive Director of National Bank of Hungary in the field of consumer protection and market surveillance*, Végh Richárd, *Director of National Bank of Hungary in the field of market surveillance - Közösségi finanszírozás – valós lehetőség-e a hazai kisvállalatok számára?*, Financial and Economic Review, 2018, pages 120-121.

<sup>25</sup> FinTech and Digitalization Report of the National Bank of Hungary, 2020, page 19. <https://www.mnb.hu/kiadvanyok/jelentesek/fintech-es-digitalizacios-jelentes/fintech-es-digitalizacios-jelentes-2020-aprilis>

<sup>26</sup> Website of Brancs Community: <https://brancskozosseg.hu/>



The Hungarian legislator has responded to international developments and the growing demand for community financing by allowing the Budapest Stock Exchange (hereinafter: “**BSE**”) to carry out this activity. According to Act CXX of 2001 on the Capital Market (hereinafter: “**Capital Market Act**”), from July 1, 2016, BSE may operate platforms to raise capital market funds by companies. To increase the capital market integration of small and medium-sized enterprises, and in line with initiatives in European and regional markets, the law ensures that BSE can operate sub-markets specialized in the needs of small and medium-sized enterprises, such as a closed-end financing platform and a crowdfunding platform.

MNB presented its fintech strategy on October 25, 2019. They explained that alternative financing solutions - becoming more widespread globally- needed to be specifically regulated in Hungary. These platforms and businesses were not included in the specific financial sphere of activity of financial services.

The amendment of the Capital Market Act does not include the operation of fund-raising platforms as a stock exchange activity. BSE is the only entity entitled to carry out such action under the provisions of the Capital Market Act. Crowdfunding requires the operation of a platform to help intermediaries seek and provide financing. As a specialized trading venue, the stock exchange may be suitable for such activity from all points of view.

### 3. National Legislation specifying the Crowdfunding Regulation

Upon entry into force of the Crowdfunding Regulation, the crowdfunding-related sections of the Capital Market Act will be replaced by the Crowdfunding Regulation<sup>27</sup>. However, under Section 450/G of the Capital Market Act, by derogation from Article 1(2)(c) of the Crowdfunding Regulation, the law only applies to crowdfunding offers with a total consideration exceeding EUR 1,000,000 **until November 10, 2023**.

In August 2022, MNB issued an official notification on its website, informing the public about the Crowdfunding Regulation, cross-border crowdfunding services, and the authorization procedure, which also includes the necessary documentation service providers have to prepare until November 10, 2023. The requirements are all based on the Crowdfunding Regulation<sup>28</sup>.

**Act CXXXIX of 2013 on the National Bank of Hungary** states that MNB shall carry out the responsibilities regarding implementing the Crowdfunding Regulation. Among the duties relating to implementing the Crowdfunding Regulation, MNB carries out the authorization procedure for crowdfunding service providers<sup>29</sup>.

Regarding the critical investment information sheet (at the platform level), as stated in Articles 23 and 24 of the Crowdfunding Regulation, the Hungarian **legislation specifies the liabilities of the crowdfunding service providers in the Capital Market Act**. The relevant provisions state that the

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<sup>27</sup> Szikora Andrea, *regulatory expert of National Bank of Hungary* - A pénzügyi technológia fejlődése és a közösségi finanszírozás, page 3. <https://www.mnb.hu/kiadvanyok/szakmai-cikkek/felugyelet/dr-szikora-andrea-a-penzugyi-technologia-fejlodes-e-a-kozossegi-finansziroz-as>

<sup>28</sup> <https://www.mnb.hu/felugyelet/engedelyezes-es-intezmenyfelugyeles/engedelyezes/szektorok/tokepiac/kozossegi-finanszirozasi-szolgaltatok>

<sup>29</sup> Subsection 37 Section 40 of Act CXXXIX of 2013 on the National Bank of Hungary.

crowdfunding service provider, its senior executive(s), the project owner, and the project owner's senior executive(s) are subject to joint and several liability for ensuring that the information contained in the key investment information sheet has accurate information and cannot be misconstrued. If the critical investment information sheet includes a translation to a foreign language, the crowdfunding service provider and the translator bear joint and several liabilities for damages resulting from translation errors<sup>30</sup>.

Since crowdfunding service providers must obtain a license until November 10, 2023, they are provided with sufficient time to prepare the necessary documentation for obtaining the license for crowdfunding services.

## VI. United Kingdom

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*Contributed by David Blair, Legal Alternative*

### 1. The UK crowdfunding market

The UK crowdfunding market is still internationally significant, but has lost market share over the past 3-4 years. The biggest players (Funding Circle, Zopa, Ratesetter and most recently, Assetz Capital) have all successfully moved to institutional funding models due to lower costs of capital and the increasing costs and liabilities of ever-tightening regulation. The removal of the biggest firms has created huge numbers of orphan investors looking for a new home and so competition is healthy.

The Financial Conduct Authority and the Government have largely completed the implementation of a range of measures following the failure of London Capital & Finance, which shook the confidence of officials with a consumer-protection agenda. These measures were deliberately designed to reduce the volumes of people investing and firms providing crowdfunding investments. They have not been particularly well-received by industry. However, the new rules have the advantage of being specific and precise in setting out regulatory expectations and they may provide the certainty the industry needs to see another period of continued growth to meet undoubted demand.

According to most commentators, the UK is still the largest domestic crowdfunding market in Europe by some margin. The combined effects of Brexit and the EU Crowdfunding Directive are likely to make the EU more attractive to crowdfunding platforms relative to the previous status quo, but these factors will not, of themselves, significantly diminish the investment appetite of UK investors. The trend over the coming years is likely to be for platform providers with international ambitions to seek to establish a presence in the UK and a presence in the EU in order to maximise their reach. Firms operating subject to this dual regulation will frequently need to provide two different offerings in order to meet the differing requirements of each regime.

### 2. Crowdfunding Framework

“Crowdfunding” does not carry a legally-defined meaning. The regulatory regime for crowdfunders depends on the nature of the investment being offered. Donations and rewards-based crowdfunding is not subject to financial services regulation, as they do not entail an underlying financial investment. The requirements for platforms offering debt and equity investments differ significantly.

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<sup>30</sup> Subsection 1-4 of Section 296/B of Capital Market Act

### *a) Equity*

Equity-based crowdfunding broadly divides into two categories: funding shares in businesses (under the UK's MiFID legacy legislation); and funding units in investment funds (under the AIFMD legacy legislation and UK-specific law relating to unregulated collective investment schemes). FCA-authorisation is generally required for all types of equity offer, although the exact structure impacts on which entity needs to be authorised. The platform designer can either be directly authorised, an appointed representative of an authorised firm, a registered fund manager or operate a white label or introducer arrangement with an authorised firm.

All forms of equity are subject to financial promotion restrictions, which require investors to be categorised, typically as: high net worth individuals (£250k net assets or £100k income); sophisticated individuals (*e.g.*, through previous investment experience); restricted investors (not investing more than 10% of net assets in high-risk investments); high net worth bodies (£5m net assets); or investment professionals. Investors must be provided with a 24-hour period between on-boarding and seeing promotions. Firms must also assess the appropriateness of investment based on the investor's knowledge and experience and provide personalised risk warnings designed to catch the investor's attention. The precise manner in which the rules apply is complex and subject to many exemptions.

There is no limit to the amount that can be raised through crowdfunding (*i.e.*, the €5m limit in Europe is not replicated in the UK). The Prospectus regime currently places an €8m cap on the offering of transferable securities, although it is likely that this will be replaced by a post-Brexit prospectus regime that exempts offers through a regulated crowdfunding platform from the prospectus regime.

### *b) Debt*

Debt investments generally fall into three categories: regulated P2P loans; regulated debt securities; and unregulated lending.

The legal regime for debt-securities is very similar to the regime for offering shares in businesses described above. The main differences are:

- (1) Debt securities offered through a crowdfunding platform are potentially eligible for inclusion within an Individual Savings Account (ISA) tax wrapper, providing tax-free returns (the annual subscription limit being £20,000).
- (2) The marketing of debt securities that invest in property or other assets or are used for on-lending (these being designated as "speculative illiquid securities") is more heavily restricted than the marketing of debt securities issued by commercial trading businesses.

A completely different regulatory framework was developed for P2P lending when it became a recognised industry. There has been alignment between the financial promotion regime for commercial debt securities and P2P loans, but P2P loans can be used for property transactions without being subjected to the speculative illiquid securities regime. P2P loans are also potentially ISA-eligible.

Areas where P2P platform operators are subject to distinct regulation include: different (generally more favourable) regulatory capital regime; no prospectus restrictions; greater ability to offer a secondary market without falling within the scope of Multilateral Trading Facility regulation; no coverage for investors under the Financial Services Compensation Scheme if the P2P platform

operator fails; higher emphasis on wind-down planning to ensure the loan book continues to be managed.

Since Brexit, firms are not longer able to passport investment services into or out of the UK.

### 3. Legislation

The legislation that determines which activities are subject to FCA-regulation is contained in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001.

The rules which govern the conduct of authorised firms are contained in the Financial Conduct Authority's Handbook of Rules and Guidance. This in turn is divided into several Sourcebooks, such as the Conduct of Business Sourcebook (COBS).

## D. Biographies



**Dr. Marco Brand** is Attorney in Frankfurt am Main, Germany. He has a broad expertise in advising national and international clients on commercial law matters. The focus of his advice lies on the financial services regulation. His client base includes providers of innovative financial services (FinTechs), traditional banks, payment service providers as well as investment funds, family offices and asset managers. He is the author of numerous publications in the financial markets field. For further information, please visit <http://www.attorney-frankfurt.de>.



**Jean-François Adelle** is a banking and finance partner of Jeantet AARPI law firm in Paris, France. He assists his clients in a wide range of general and structured debt finance transactions, and regulatory advice related to credit disintermediation, collateral, trusts, risk transfer, digital assets and derivatives. He is also involved in litigation matters relating to financial arrangements.

Jean-François is a member of P.R.I.M.E Finance panel of experts and serves as Co-Chair of the Banking Law Committee of the IBA. He has authored several book chapters and many articles in, and regularly speaks about, finance related topics, and has chaired marketplace law committees of the French Financial Forum whose reports inspired legislative reforms. He is recognised in many leading legal directories. Directories have mentioned him as “finance specialist who enjoys a “stellar reputation” as a finance and regulatory specialist”.

Jean-François graduated from the law schools of Nancy (magna cum laude), Paris Panthéon-Assas, the Paris Institute of Comparative Law (magna cum laude) and holds an LL.M from the Carey Law School of the University of Pennsylvania. A list of Jean-François Adelle’s representative appointments is available at [www.jeantet.fr](http://www.jeantet.fr).



**Emanuele Grippo** specialises in investment services, asset management, pension funds, securities regulation and structured finance transactions as well as in extraordinary corporate transactions involving regulated companies, including those acting in the insurance sector and the banking and financial sectors. He is known for his strong expertise in insurance contractual and commercial law, review of insurance policies and the regulatory aspects of insurance activities. He also provides advice and assistance to listed issuers in relation to their on-going duties, including disclosure requirements and

treatment of price sensitive information, advising also on money laundering legislation. Emanuele is Head of , Gianni & Origoni 's Luxembourg desk and Co-Head of the Financial Markets Department. He graduated in Law "*maxima cum laude*" from the University "La Sapienza" of Rome. For further information, please visit [www.gop.it](http://www.gop.it).



**Gary Cywie** specialises in Technology. His particular areas of expertise are the drafting and negotiating of IT outsourcing agreements in the financial services and insurance sectors, software licence and maintenance agreements and commercial contracts. In addition, he specialises in data protection and privacy, internet and e-commerce, electronic signature, electronic archiving, IT security and media and telecommunications. He also handles IP matters.

Gary is also involved in Fintech developments, more particularly in relation to digital ledger technologies (DLT) such as blockchains, smart contracts and virtual currencies. For further information, please visit <https://www.elvingerhoss.lu>.



**Thomas Göricke.** Tom's practice focuses on collective asset management and investment funds with a specific focus on rules regarding sustainable finance and ESG. He advises clients on the set-up and structuring of their Luxembourg investment fund operations as well as on regulatory matters.

Tom is part of the firm's sustainable finance task force and actively participates in various industry association working groups, such as the Association of the Luxembourg Fund Industry (ALFI) and the British Chamber of Commerce, on this subject.

He holds an LLM in French and European law from the Université Paris 1 Panthéon-Sorbonne (France) and an LLB from the University of Birmingham (UK). For further information, please visit <https://www.elvingerhoss.lu>.



**Amaury Gre vess-Sovet.** Amaury's main fields of activity are corporate law, mergers and acquisitions, capital markets, financial and securities law. In addition, he specialises in financial crime and more specifically, the fight against money laundering.

Interested in new technologies and cryptocurrencies, Amaury is a member of EHP's Blockchain and Virtual Assets Taskforce.

Amaury holds a maîtrise in business law from the Université de Lorraine (France) as well as a Master's degree in European economic and financial criminal law from the University of Luxembourg. For further information, please visit <https://www.elvingerhoss.lu>.



**Marina Juhasz** graduated from the International Law Section of the University of Szeged, Faculty of Law and Political Sciences with a JD Degree. During her studies she participated in the annual competition of the International Criminal Court (“International Criminal Court Moot Court Competition”) as Defense Counsel. Additionally, she was an active member of the Scientific Students’ Association and attended the 35th National Scientific Students’ Associations Conference, where she won the Special Award of Hungarian Lawyers Association for her human rights related research. Marina assisted with several pro-bono cases during her studies, and she worked as a demonstrator at the Department of International and European Law for two semesters. Prior to joining KNP LAW, Marina gained experience as a tax consultant in one of the “Big 4” firms. For further information, please visit [www.knplaw.com](http://www.knplaw.com).



**Gréta Bujdosó.** During her university studies, Greta took part in and was a member of the Pro Jure Association for Law Students which involved several scientific conferences, including one held at the University of Istanbul. She graduated from the Criminal Law Section of the University of Szeged, Faculty of Law and Political Sciences with a Juris Doctor (JD) Degree. She is an attorney candidate member of the Budapest Bar Association. For further information, please visit [www.knplaw.com](http://www.knplaw.com).



**David Blair** is founder of Legal Alternative in 2016, a firm providing advice on financial services regulation with a particular specialism in alternative finance. Former Head of Finance Regulation at international law firm headquartered in London. Over 20 years’ post-qualification experience exclusively in financial services law. Member of the UK Crowdfunding Association from inception. For further information, please visit