

Proposal for a regulation of the European Parliament and of the Council on European crowdfunding service providers for business published on March 8th, 2018

The *Autorité des marchés financiers* (AMF) welcomes the European Commission's initiative to create a European legislative framework for crowdfunding.

The proposal for a European regulation on European crowdfunding services providers for business (the "proposal") is part of the Capital Markets Union which aims to broaden access to finance for innovative companies, start-ups and non-listed SMEs. It could also foster the development of large crowdfunding players within the European Union.

In France, crowd-lending and donation-based crowdfunding are under the supervision of the French Prudential Supervisory Authority (the "ACPR") while investment-based crowdfunding is under the supervision of the AMF. As such, this AMF feedback only regards investment-based crowdfunding. However, crowd-lending having the largest market share within the European Union, it is necessary that the proposal takes into account the specific characteristics of crowd-lending.

In the AMF's opinion, **a fair balance should be struck between the appropriate level of investor protection and measures to make the European regulation proposal attractive for crowdfunding service providers.** In order for such a balance to be struck, the current European regulatory proposal would need to be improved.

The first component of such a balance is **the threshold of €1 million per crowdfunding offer in the European Union calculated over a period of 12-month¹. Such a threshold is contrary to the goal of creating a truly attractive European regime for crowdfunding service providers.**

In France, as in other member States², currently a threshold higher than €1 million is set under its national crowdfunding regime. It would therefore be a paradox that a crowdfunding offer made solely in France under its national regime can raise more than a crowdfunding offer that would be made throughout the European Union under the proposal.

The European Commission justifies³ the threshold of €1 million by Regulation (EU) No 2017/1129 of 14 June 2017 known as the "Prospectus Regulation" according to which a prospectus shall be drawn up for any cross-border offer of securities to the public of an amount equal to or higher than €1 million.

In order to raise the €1 million threshold for crowdfunding offers in the proposal, the AMF considers that **Prospectus Regulation should be amended to exclude from its scope crowdfunding offers made by a European crowdfunding service provider under the proposal.**

Decoupling the European crowdfunding regulation and the Prospectus Regulation with regards to disclosure requirements would follow the same logic as the one proposed by the European Commission to distinguish crowdfunding services from other investment services defined in Directive 2014/65/EU on markets in financial instruments known as "MiFID 2". On March 8th, 2018, the European Commission published a proposal for a Directive amending MiFID 2 to exclude crowdfunding service providers from its scope.

If the crowdfunding offers made under the proposal were excluded from the scope of the Prospectus Regulation, it would then be possible to increase the €1 million threshold to a level which would make the European legislative framework attractive for crowdfunding service providers and consistent with the ambition stated by the European commission to create a successful European crowdfunding regime.

As a second component of the balance, an increased crowdfunding threshold would imply proportionate but sufficient measures for investor protection. In addition, the lack of reference to the investment advice in

¹ Article 2(2)(d) of the proposal.

² According to European Commission's impact assessment published on March 8th, 2018 (page 81), of the 10 member states reviewed, 9 (Austria, Finland, France, Germany, Italy, Lithuania, Portugal, Spain, United-Kingdom) have a threshold higher than €1 million.

³ Regulation proposal, explanatory memorandum, page 5.

the proposal, which prevails in France, may only be contemplated on a European scale only if the proposal includes substantial guarantees of investor protection.

The investor protection measures cover both organization and good conduct rules imposed on crowdfunding service providers as well as investors' access to crowdfunding offers and the information to be provided.

As regards the organization of providers, since there is no minimum capital requirement, the proposal should include a requirement for crowdfunding service providers to justify at any time the existence of an insurance contract covering them against pecuniary consequences in the event of a breach of their professional obligations.

As regards information, **the transparency and entry knowledge test⁴ taken by potential investors should be strengthened** to better guarantee the informed consent of the investor with regard to the risks incurred. Details of such provision would be better fitted in a delegated act. The scope of the test should not only cover the potential investor's knowledge and experience, but also his/her financial situation and his/her investment objectives. In addition, a potential investor who does not provide sufficient information and, as a consequence, is not able to take the transparency and entry knowledge test, should not be allowed to subscribe to a crowdfunding offer.

Likewise, it could be expected that any potential investor, before being able to access the crowdfunding offers on a crowdfunding platform, should have identified and **expressly accepted the risks** related to crowdfunding such as investment loss and illiquidity of the securities received.

The AMF **welcomes the creation of a harmonised information document⁵** as in the current European legal system there is no harmonised information for crowdfunding offers. The harmonised information document allows crowdfunding service providers to benefit from a harmonised legal system (and not to apply with different member state's legal regimes) as well as investors to benefit from comparable information on crowdfunding offers. The specific sections of the information document, to be adjusted, could be defined by a delegated act as opposed to an annex of the proposal.

Finally, the proposal needs **to be better explained or clarified on other matters**, such as the possibility for a crowdfunding service provider to be a payment agent, the exclusive nature of the European crowdfunding service provider status, the implementation of rules to prevent money laundering and terrorism financing, alignment of interests and conflicts of interests, or indeed the operating procedures for the bulletin board.

The AMF supports the European Commission's initiative to create a European legislative framework for crowdfunding. It should be attractive to crowdfunding service providers whilst protecting investors in a well-balanced way.

In order to strike this balance, the AMF has chosen to respond to the European Commission's call for feedback on the regulation proposal by focusing on two key elements:

=> the necessary increase of the €1 million threshold per crowdfunding offer in the European Union calculated over a 12-month period;

=> as an essential counterpart to this threshold increase, the strengthening of measures to protect investors.

The above two points are key to the success of a European legislative framework. However, the AMF considers that other articles of the proposal should also be improved and discussed.

The AMF, together with the French authorities, will closely follow the negotiations on this legislative initiative and continue to formulate proposals for improvement.

⁴ Article 15 of the proposal.

⁵ Article 16 of the proposal.