

Regulating crowdfunding

As a step towards Capital Markets Union, the European Commission presented a proposal for a regulation on crowdfunding service providers in March 2018, to facilitate the cross-border offer of such financial services across the EU. It was accompanied by a proposal for a directive, to exempt those providers from the scope of the Markets in Financial Instruments Directive (MiFID II). The co-legislators reached a political agreement in December 2019, significantly modifying the Commission proposals. Parliament is expected to vote on the Council's positions at second reading during its October I plenary session.

Background

[Crowdfunding](#) is an [open call](#) for the collection of resources (funds, money, tangible goods or time) from the population at large through an internet platform. Crowdfunding can help ensure that both individuals and companies get access to finance, especially in the seed and early growth stages of their projects or business. Member States with a developed crowdfunding market have designed bespoke regulatory regimes that differ with regard to the conditions under which platforms can operate, their scope of permitted activities and their licensing requirements. As a result of this diversity, cross-border flows remain limited and crowdfunding service providers (CSPs) face challenges in scaling up their operations.

European Commission proposal

To remedy this, in 2018 the Commission [proposed](#) a regulation providing for uniform, proportionate and directly applicable requirements for the operation, organisation, authorisation and supervision of CSPs, as well as for the transparency of, and marketing communications related to, crowdfunding services. In addition to the above, given the need to ensure a clear separation of services in order to manage conflicts of interest and ensure effective supervision, the Commission [proposed](#) a directive exempting CSPs from the scope of the Markets in Financial Instruments Directive (MiFID II).

European Parliament position

Parliament's first-reading [position](#) adopted on 27 March 2019 under the ordinary legislative procedure would introduce several amendments to the **Commission proposal for a regulation**. Notably, it would raise the threshold of crowdfunding offers on which the regulation does not apply, from €1 million to €8 million. On the **authorisation** of CSPs, it would add elements to the application a prospective CSP must provide to be authorised (for example, the platform it intends to operate, as well as proof it holds sufficient capital to cover the financial consequences of its professional liability). It would also prevent persons established in third countries applying for authorisation. As far as **organisational and operational requirements** are concerned, Parliament would include due diligence obligations for CSPs, procedures for the handling of complaints, the obligation for CSPs to disclose annually the default rates of crowdfunding projects offered on their platforms, and incentive mechanisms to ensure that crowdfunding platforms align their incentives with those of investors. Concerning the **supervision** of CSPs, Member States would designate the relevant National Competent Authority (NCA) and would inform the European Securities and Markets Authority ([ESMA](#)). CSPs would have to provide their services under the supervision of the NCA of the Member States where they had been authorised. In addition, a procedure for the settlement of disputes between competent authorities would be introduced. Parliament proposed that Member States confer on NCAs the power to apply minimum administrative penalties and other administrative measures in the event of infringements of the regulation. It would further introduce provisions for cooperation between ESMA and NCAs, as well as for the publication of administrative penalties and other administrative measures.

For the **proposed directive**, Parliament would [underline](#) that crowdfunding is a financial technology solution that provides SMEs with alternative access to finance, to promote innovative entrepreneurship in the Union, thereby strengthening the CMU. In addition, given the opacity of virtual currencies markets, a

new recital would invite the Commission to keep virtual currencies under review, to propose guidelines setting out the conditions that they should meet to be considered financial instruments and, if the Commission thinks it necessary, to regulate them.

Trilogue agreement

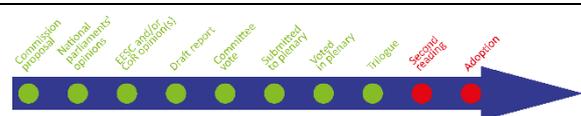
Negotiators for the Parliament and Council reached a political agreement on 18 December 2019. Under the agreement, the **regulation** would not apply to offers exceeding €5 million. The scope of the regulation would increase to include shares of limited liability companies. Also, Member States would ensure that their national laws do not require a credit institution licence for CSPs to provide crowdfunding services. As far as **organisational and operational requirements** are concerned, due diligence obligations for CSPs as well as procedures for the handling of complaints, would be included. The provisions for effective and prudent management would be significantly enhanced, with obligations for the management of CSPs to establish systems and controls for assessing the risks related to the loans intermediated on the platform and reviewing the scale and complexity of crowdfunding services provided. In addition, there would be significant obligations when CSPs determine the price of a crowdfunding offer. Another significant addition would be requirements for CSPs when they offer individual portfolio management of loans. Also, CSPs should, at all times, have in place prudential safeguards (CET1 own funds and/or an insurance policy). They should not have any participation in any crowdfunding offer on their platforms. Finally, in case of outsourcing operational functions, they should take reasonable steps to avoid extra operational risk.

In relation to the **authorisation** of CSPs, the application that a prospective crowdfunding service provider must provide to be authorised would contain detailed information (e.g. the platform it intends to operate, a description of the operational risks and prudential safeguards, and a description of the CSP's business continuity plan). It would also prevent persons established in third countries from applying for authorisation. With regard to the **supervision** of CSPs, a new provision would introduce the obligation for CSPs to provide annually and on a confidential basis, a list of projects funded through their platform to the competent authority which granted their authorisation. If an authorised CSP intends to provide crowdfunding services in another Member State, it should submit specific information to the competent authority designated as a single point of contact for the country in which authorisation was granted. A new chapter would have provisions to **ensure investor protection**. A new article would introduce the obligation for CSPs to provide for pre-contractual reflection periods, as well as contain provisions aimed at non-sophisticated investors wishing to invest in crowdfunding projects. The article about the key investment information sheet would be developed and a new article would be introduced on key investment information sheet obligations for CSPs providing individual portfolio management of loans. Marketing communications would have to be clearly identifiable as such and contain fair, clear and non-misleading information. A new article would provide detailed information about the **powers of NCAs**. Similarly, the articles relative to NCAs' cooperation, as well as their cooperation with ESMA, would be expanded. Lastly, apart from the aforementioned administrative penalties, a new article would be introduced concerning precautionary measures to protect investors.

The **amendments to the proposed directive** would oblige Member States to adopt and publish, at the latest six months after the date of entry into force of the regulation, the laws, regulations and administrative provisions necessary to exempt CSPs from MiFID II (those measures would apply one year after the entry into force of the regulation). In addition, they would provide that Member States must communicate to the Commission and to ESMA the text of the main provisions of national law, which they adopt in the field covered by the Directive.

Parliament's Committee on Economic and Monetary Affairs (ECON) approved the agreed texts on 7 May 2020. The Council adopted its first-reading positions in conformity with the agreement on 20 July 2020. On 28 September, ECON adopted its recommendations for second reading which are to be voted during the October I plenary session.

Recommendations for second-reading: [2018/0048\(COD\)](#) and [2018/0047\(COD\)](#); Committee responsible: ECON; Rapporteurs: Eugen Jurzyca (ECR, Slovakia) and Caroline Nagtegaal (Renew, the Netherlands).



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