ECONOMIC INTEGRATIONS, COMPETITION AND COOPERATION

INTÉGRATIONS ÉCONOMIQUES, CONCURRENCE ET COOPERATION

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CROWDINVESTING REGULATORY FRAMEWORK IN FRANCE AND ITALY[1]

ABSTRACT

Crowdinvesting is a recently emerged business practice which challanged the application of an extensive European and national legislative framework designed in mind with practice of traditional capital market actors. The paper points out specificities of crowdinvesting, inherent risks and possible investor protection mechanisms as well as the role of the platform. The second part of the paper examines and compares legislative approaches of French and Italian legislators in course of legislation adressed speciffically to crowdinvesting.

Keywords: crowdinvesting, capital market law, investor protection, seed financing

Jel classification: K22, E22, G24

1. INTRODUCTION

Crowdfunding is a relatively new model of business financing, based on the idea that small amounts of money invested by large number of contributors via Internet platform, when put together could be a valuable source of financing. Although firstly used in financing of artistic and

[1] This paper has been supported by the Croatian Science Foundation project no. 9366 "Legal Aspects of Corporate Acquisitions and Knowledge Driven Companies' Restructuring"

non-profit projects with social component, CF emerged as an alternative method of raising capital for start-ups, micro and small enterprises (Lambert, Schwienbacher 2010; Hermer, 2011), finding its niche at the capital market. While there are different types of CF, such as donation CF, reward based or pre-selling CF, CF lending, equity CF (Hermer,2011; Bradford,2012), the focus of this paper is placed on crowdinvesting, where in return for money contributions, the crowd/investors acquire equity or debt financial instruments. This form of CF is faced with high degree of uncertainty from a legal point of view (Heminway, Hoffman, 2011; Larralde, Schwienbacher 2012; Pope 2011) since capital market in Europe is regulated by an extensive European and national legislative framework which has been designed having in mind with operating practice of traditional capital market actors. Having in mind benefits of crowdinvesting which were already been recognised at European level (EC Communication on unleashing the potential of CF, 2014) and the fact that extensive regulation could result in diminishing those benefits, the first part of the paper deals with the risks arising from crowdinvestment, possible investor protection mechanisms and the role of the platform, while second part examines regulatory approaches and solutions of French and Italian legislators.

2. ANATOMY OF CROWDINVESTING

2.1. High risk investments and investor protection issues

Majority project holders who raise funds via platform are unlisted smaller businesses or start-ups (Schwienbacher, Larralde, 2010; Parsont, 2014), i.e. companies in an early phase which often rely on innovative business concepts not yet proven on the market. That is why in general they face high default rates and may record considerable losses during the first few years of their activity. They choose relatively inexpensive corporate entity type (such as a closely held company) and issue equity or debt instruments which may or may not be transferable. In the best case scenario, instruments are transferable, but still relatively illiquid due to the limited secondary market (Grković, 2014:60; ESMA Advice, 2014:8). As a consequence, certain risks arising from crowdinvesting - such as the risk of total or partial loss of capital, liquidity risk, the risk of no recovery, the risk of dilution of equity holdings in subsequent rounds of capital rising, information asymmetries, are inherent when investing in such types of financial instruments (Bradford, 2012). Those risks also

exist when the same financial instruments are distributed through traditional means. One of the main hurdles associated with crowdinvesting is therefore, its open nature (De Buysere et. al, 2012). What was at first mostly opened to business angels and VC funds, now in practice becomes easily accessible to retail investors as well. At the same time, the openness is one of the most significant benefits of crowdinvesting, since it provides the access to a larger pool of investors (Bradford, 2012). The nature of the financial instruments concerned, risks attached thereto and easy access of retail investors calls for analysis of investor protection mechanisms. Since it is typically argued that amounts per investor are rather small and therefore the impact of the aforementioned risks to a retail investor seems to be reduced (Pope, 2011:985), this could be the object of a debate. On one hand, one might argue there is a need for a legislator to impose restrictions as to the maximum amount invested per retail investor (JOBS Act solution) especially due to the evolving nature of crowdinvestment industry which still explores different business models. On the other hand, those who advocate more flexible approach are of opinion that that it is sufficient to oblige the platform to conduct a MiFID appropriateness or adequacy test (art. 19(4) (5) MiFID) and to warn investor of the inherent risks of such investment. In latter case a certain level of financial knowledge is required from an average retail investor who invests via CF platform operator, complemented by his reliance on its general investment recommendations. Since there are situations where MiFID appropriateness test is not an absolute duty (e.g. when financial instruments offered are out of the scope of MiFID financial instruments as defined in Sec C of Annex II MiFID), there is a need to ensure that investment opportunities reach investors for whom they are likely to be appropriate, especially in the context of high risk investments.

The open access inherent to crowdinvesting raises the issue of a public offer (art. 2 (1) (d) PD) and general solicitation (Belleflamme et al, 2010, Heminway, Hoffman, 2011). Some company forms by provisions of national law are not allowed to raise capital by launching a public offer (Schwienbacher, Larralde, 2010). Therefore, if the project holder wants to benefit from crowdinvesting, it is required to use an entity type which might not perfectly match its needs, especially taking into account the low cost orientation of start-ups and SMEs. In the crowdinvesting context, information asymmetries seems are even more accentuated, at least when compared to an early stage financing by other subjects (such as banks, VC funds and business angels). Therefore it is difficult for an

investor to render informed investment decision. The reasons behind this lack of information are various. First, there is an issue of the costs associated with producing adequate information which may require some form of due diligence. Second, like pointed out by some authors, the operators of CF platforms believe that only sophisticated investors are capable of evaluating this information (Schwienbacher, Larralde, 2012). Third, providing the smaller amount of information, at least until a potential investor actively indicates its investing initiative, might help the CF platform to escape definition of the public offer or application of the solicitation rules (Livre Blanc, 2013). On the other hand, since CF platform typically enables not only direct communication between project holder and investors, but also an interaction and discussion between (potential) investors, it is considered that this exchange of information and opinions facilitates making investment decision and mitigates the risk of fraud (Surowiecki's "Wisdom of the Crowd", Schwienbacher, Larralde, 2010; Bradford, 2012). Nevertheless, the opinions of the e-community and peer review are not helpful if opinions are biased. In the context of crowdinvesting, there are at least three possible approaches in resolving pre-investment information asymmetries. First relies on the assumption that combination of traditional risks (arising from project holders and financial instruments offered) and risks arising from crowdinvesting (limited amount of information on specific project, ambiguous wisdom of crowd) is such that investors should be provided with more information than in traditional investment context, while the amount of information to be provided to investors should be proportionate to the risks. This approach is rather formalistic since traditional risks could be mitigated by using other mechanisms (limit per investor and/or MiFID test). Therefore emphasis should be placed on the quality of provided information, rather than the quantity. Second approach argues that traditional mechanisms (issuance of a previously approved prospectus) should apply, which may potentially impose significant costs for issuers. Namely, a public offer of transferable securities triggers the obligation to issue a prospectus approved by the national competent authority, unless certain exemptions regarding the size of the offer and investor profile apply. It should be noted that Prospectus Directive (PD) excludes the obligation to publish a prospectus for offers of the amount less than 100 million EUR (art. 3(2)(e) PD). Moreover, when the offer is addressed to less than 150 non-qualified investors per Member State (art. 3(2)(b) PD), issuer is exepmted from duty to publish prospectus. Since crowdinvesting

generally involves larger number of non-qualified investors and the amount of the offer usually exceeds the abovementioned threshold (see e.g. NESTA's analysis on UK CF platforms), it seems that both exemptions are not relevant for crowdinvesting. Although some CF platforms have designed their business models to fit into these exemptions (Grković, 2014), latter practice reduces the pool of potential investors. However, according to PD, Member States have a discretion to apply their own national regime in relation to offers in range between 100 000 EUR and 5 million EUR, meaning that an obligation to issue a prospectus will largely depend on the provisions of national law. Third approach challenges *status quo* by arguing a need to review situations when issuing a traditional prospectus is necessary. It takes into account CF specificities (internet context and specific type of issuers), but also issues which have much broader implications (same type of issuers outside CF context). First, Internet enables two-way communication between the project holder and investors making possible for investor to acquire relevant information to reach its informed investment decision. The risk that information obtained in such manner could be inaccurate/misleading is mitigated by the fact that the project holder should be responsible to provide the information that is fair, clear and not misleading. Second, issuing a traditional prospectus is costly and administratively burdensome for SMEs and start-ups while in the same time excessively detailed for target investors (i.e. crowd). The review could be done at a European level, by a revision of PD. The prospective revision would provide exemptions either exclusively related to crowdinvesting, or covering SMEs and start-ups in general. Even the latter "larger scope" approach (beyond crowdinvesting context), does not seems to be unlikely because EC has already initiated public consultations in that respect (EC press report: Unlocking Funding for Europe's Growth – EC consults on Capital Markets Union, February 2015). In the meantime, Member States could create their own national regimes within the discretion given by the PD currently in force. Therefore, there is a prospect that in the context of crowdinvesting investors will be provided with certain core information about the issue(r), although reduced when compared to traditional prospectus.

2.2. The role of the platform

CF platforms involved in crowdinvesting developed different innovative business models and being *start-ups* as well, became extremely adaptable to market's needs (Heminway, Hoffman, 2011; Hermer, 2011), operating with substantially lowered costs than traditional financial intermediaries. Definition and legal qualification of the services provided by platform operator to project holders and investors seems to be crucial. First, project holders as well as investors need to be certain in legal nature of the services offered (Rubinton 2011) and the extent of the platform's responsibilities and charged fees. Second, in case where services are related to MiFID financial instruments, it is vital to determine whether these services fall within the scope of MiFID investment services (as enumerated in sec. A of Annex I MiFID). This has significant impact on the platform operator. Namely, if the platform is providing MiFID investment services in relation to MiFID financial instruments, it is required to obtain prior authorisation from national competent authority, i.e. to operate as an investment firm (art. 5 MiFID), or be operated by investment firm (art. 20 MiFID), or act as a tied agent (art. 23 MiFID). Depending on each type of investment service, platform operator should meet certain capital requirements (art. 12 MiFID and Directive 2013/36/EU),[2] organisational requirements (art. 13 MiFID) and should apply rules of conduct. Third, legal qualification of services is necessary to determine whether Member States can design their own national regime (outside of MiFID) in relation to CF platforms, i.e. exercise an optional exemption provided by art. 3 MiFID. Conditions set in art. 3 MiFID suggest that this would be possible only if platform does not hold clients' funds or securities, provides only the investment services of reception and transmission of orders (RTO) and/or investment advice and transmits orders only to authorised firms.

Although the main function of the platform is to connect supply and demand, its role, i.e. services it provides to project holders and investors can vary significantly, especially when platform takes more active role and provides services beyond its core activity. While the main service provided to project holders seems to be providing access to a pool of potential investors and collection of their "commitments" (ESMA Advice, 2014), the essential service given to investors is providing

[2] Capital requirements vary in range from 50 000 EUR (or professional indemnity insurance) until 730 000 EUR. Amount depends on certain investment service and the fact whether the firm is authorized to hold client money.

information on investment opportunities and transmission of their investment decision/ commitments/expression of interest to the project holders. Some platforms also offer additional services like advising project holders and/or provide certain administrative services since SMEs and start-ups generally do not have necessary experience in this field (Hermer, 2011:10). In some cases platforms also transfer funds once the target amount is reached. The first dilemma is whether the main service provided to the project holders may be qualified as a placing of financial instruments without a firm commitment basis (hereafter "placement").[3] The dilemma arises from the fact that "placement" is not described in MiFID and CESR's advice although instructive, does not resolve the issue. This leaves the term and its scope rather ambiguous even in traditional context. It is recognised that "there is no one single process followed by investment firms and credit institutions in providing the services [...] of placing" and that "processes depend on the instrument involved, the issuer and the mores and rules of the local market" (CESR's advice, 2010:10). Therefore, it is evident that placing is considered as "a process" which includes a package of services typically combining advising, legal and accounting activities before the offer is launched (e.g. discussions on precise structure of the issue, including the pricing), contacting the network of potential investors, financial promotion and distribution, the sale of financial instruments to investors and operating a single 'pot' order book. Nevertheless, this process may also involve law and accounting firms and independent financial advisers which are not performing "regulated activity". It also evidently consists of other investment services (at least RTO for subscription) and financial promotion. It remains unclear how active the intermediary should be in search of clients. Also, if an active search of clients is a relevant criteria, how it can be applied in Internet context where platform operates a website which facilitates investments. At the same time, the core platform activity could be qualified simply as "providing support or taking care of subscription forms", which does not constitute the service provided exclusively by licenced financial intermediaries.

In relation to investors, one can argue that "collecting commitments or an expression of interest'' is nothing else but the investment service of RTO where the platform receives orders from investors and transmits them to the other party (see ESMA Advice, 2014). The notion of 'order'

[3] If that would be the case, platform could not be exempted under the art. 3 MiFID optional exemption and would be required to have capital in the amount of 730 000 EUR. Neverthless, it could act as a tied agent.

is not defined in MiFID but it should be emphasized that MiFID does not make a difference between primary and secondary capital market. Once we establish that " commitments or expressions of interest" are equal to the order, we can also argue that (unless the deal was concluded elsewhere without involvement from the platform) the platform "acted to conclude agreements to buy or sell one or more financial instruments on behalf of clients" therefore providing the service of execution of orders on behalf of clients (art. 4(1)5 MiFID).Additionally, in great number of cases the platform operator imposes certain selection criteria and procedure for „listing". It might decide not to list particular project (*vetting process*), to introduce selection process based on its own criteria (such as evaluation of a business plan) (De Buysere et. al, 2012) and to conduct a *due diligence* process the scope of which varies (Grković, 2014). The more complex and rigorous listing procedure is, the more probable is investor's reliance in the quality of the project. From the point of view of investor it may be perceived as investment advice, regardless of the fact that it might not legally constitute a personal recommendation which is essential element of investment advice (art. 4(1)4. MiFID).In a case where the platform acts both on behalf of the issuer (providing the service of placement) and on behalf of the investor (providing the service of execution of orders), conflict of interest may arise, as well as in the situation where both issuers and investors to a certain extent seem to relay in platform's advice. Additionally, some platforms operate on a co-investment model (De Buysere et. al, 2012), which could be another source of conflict of interest. While all activities listed above concern platform's activities in primary market, small numbers of platforms are also offering so-called bulletin boards, trying to develop secondary markets for these financial instruments. This activity calls for a closer examination whether the platform is operating the MTF (as defined in art. 4(1)15. MiFID) or a new category introduced by MiFID II (OTF) (Grković, 2014:69).

It should be noted that typical crowdinvesting campaign, even when successfully managed creates a capital structure, which is unattractive to other investors in subsequent funding rounds. Therefore, the likelihood of future external funding through ventures capitalists or business angles declines and every new round including more investors seems to make investing too complex to deal with. Nevertheless, certain platforms have spotted this loophole and have designed their business model in order to overcome this inconvenience and to make crowdinvesting more

compatible with the investments of venture capitalists (Grković, 2014). Those platforms typically step into or interfere the relationship and/or communication between specific project holder and its investors. Sometimes platforms act as a nominee of investors, e.g. when it comes to exercise of their voting rights and in some cases they look for exit opportunities for investors. From a legal point of view it is of the outmost importance to determine whether the platform operates in the concept of direct or indirect crowdfunding. Investments are direct if investors acquire directly shares or bonds issued by the issuer company (project holder). On the other hand, investments are indirect when investors become shareholders of a newly formed entity, i.e. SPV or collective investment scheme (established by the platform or a third party), which in turn invests in shares or bonds of the target company/project holder. Typically, SPV invests in a single project (ESMA Advice, 2014:7), previously chosen by a sufficient number of investors. The latter business model is usually referred to as a 'holding model' (Hermer, 2011:16, Tomczak, Brem, 2013:346). If platform is considered to manage a collective investment scheme, it actually acts as a manager of investment fund, i.e. a manager of alternative investment fund (AIF) and should comply with the set of requirements and rules set in Alternative Investment Fund Managers Directive (AIFMD).[4] The decisive legal concepts which should be taken into consideration are the definition of "a collective investment scheme" and "investing in accordance with a defined investment policy" (art. 4(1)a AIFMD). One might argue that in line with ESMA's guidelines, new entity established by platform or third party, as an "intermediary investor" between project holder and end investors, may be considered as "a collective investment scheme" (para12, ESMA/2013/611), especially since 'pooling of funds obtained from the crowd seems to be at the heart of the CF' (Heminway, Hoffman, 2011; Livre Blanc, 2012). However, the straightforward conclusion cannot be made in relation to prerequisite of "investment policy." It is because investors themselves make an investment decision in which project holder they will (indirectly) invest and the platform itself has no discretion in relation to investor's decision. On the other hand, one can also argue that, especially in a case when platform also acts as a selector of projects, it actually performs a rather restrictive investment policy (ESMA Advice, 2014:22) and that investment decision taken by end investors is actually a decision whether to invest

[4] While marketing of AIFs is in principle restricted to professional investors, Member States may choose to allow marketing of AIFs to retail investors.

in an AIF or not. Additional legal uncertainties rise from the fact that AIFMD contains various exclusions from its scope. In the context of indirect crowdinvesting, the platform can escape an application of obligations imposed by AIFMD if it acts as a "holding company" (art. 2(3)(a) AIFMD in relation to art. 4(1)o AIFMD) or as a "securitisation special purpose entity" (art. 2(3)(g) AIFMD). Also, the exemption set in art. 3(2) AIFMD allows entities with total Asset Under Management less than 100 million EUR (where there is leverage) or less than 500 million EUR (where there is no leverage and no redemption rights are exercisable for 5 years after the initial investment) only to register at the home Member State and to provide information on the AIFs they operate, their investment strategies and exposures. In latter case, a platform operating as AIFMD could also be able to carry out additional MiFID services and to be authorised under MiFID. That is a significant factor, since other AIFMs (which are not within the art. 3(2) AIFMD exemption) could only market the shares or units of an AIF, although Member States may permit them to provide MiFID services of RTO and/or investment advice (art. 6(4)2AIFMD), if AIF manager is external. In case where this regulation seems to be too burdensome for a platform operating under indirect model, there is also a possibility to relay on EuVECA Regulation designed for investments in SMEs. This regulation, under certain conditions offers a "lighter regime", the closer examination of which goes beyond the scope of this article.

3. FRANCE

In France, regulatory framework relevant for crowdinvestisting (*financement participative*) includes French Monetary and Financial Code (MFC), General Regulation of AMF (GR AMF) and Commercial Code (CC). Although by 2013 enthusiasm for crowdfunding was high, amounts collected were largely unbalanced in favour of donation based CF (Livre Blanc,2013:5). From the standpoint of CF industry representatives, the main reason was not that the French are risk adverse, but high regulatory constraints designed in line with the logic of traditional financial intermediaries (Livre Blanc, 2013). On May14th 2013, French national authorities (AMF and ACPR) published a Guide for CF addressed to platforms and project holders,[5] leaving some issues

[5] List of possible services provided by a platform included placement of financial instruments (art. D 321-1, 7 CMF), RTO (art. D 321-1, 1 CMF), execution of orders (art. D 321-1, 2 CMF), operating a MTF (art. L 424-1 CMF) and investment advice (D 321-1, 5 CMF).

unclear. According to Industry Review of Crowdfunding Regulationpublished in October 2013 there were at least four crowdinvestment platforms operating in France, some even employing an indirect model. They were authorised as financial investment advisers (*conseiller en investissements financiers,* CIF), which is a French specific status defined by art. L.541-1 CMF.[6] Inspired by new CF regulation in USA (JOBS Act, 5 April 2012) French CF industry representatives made several proposals during the 2012 and 2013 encouraging more flexible legislative regime (Livre Blanc,2013).They argued that existing exemptions in relation to the obligation to issue a prospectus should be expanded above the existing thresholds. Additionally, it was suggested to allow simplified joint stock company (*société par actions simplifiée,* SAS) to collect funds via platform and to be exempted from obligation to issue a prospectus. As to the position of a platform it was argued that a new status of '*établissement de financement participatif*' should be created as well as new structure of investment funds (*fonds commun participatif*) under the national regime, which would not have legal personality and would issue shares representing the project under conditions defined by its own rules (Livre Blanc, 2013:58). Even before EC launched public consultations on CF (October 2013) and published subsequent Communication (March 2014), French officials proposed legislative reforms impacting CF (30 September 2013). New rules were adopted by Ordonnance n° 2014-559 of 30 may 2014, Decree n°2014-1053 of 16 September 2014 and elaborated in new CF guide published by ACPR and AMF in 30 September 2014.

Ordonnance n° 2014-559 created a new status CF equity investment advisors (*les conseillers en investissements participatifs*, CIP), inspired by previously used CIF which is subject to a less restrictive regulation. CIP is defined as a legal person established in France (L 547-1-I and L547-3-I CMF) engaged in investment advisory activity (art. L. 321-1 5 CMF) on ordinary shares and fixed rate bonds not admitted to trading on a regulated market or a MTF (art. L 547-1-I CMF, art L 411-2 II, 2, I *bis* CMF, art. D 547-1 CMF). All other financial instruments are expressly excluded. In addition to abovementioned advisory activities, CIP may also provide ancillary services referred to in 3 of art. L. 321-2 CMF, i.e. providing advice to undertakings on capital structure, industrial strategy

[6] In relation to CIF, a less onerous licensing regime applies.

and related issues as well as providing advice and services relating to mergers and takeovers. Another ancillary service is 'taking care of subscription forms' provided under the conditions set by in art. 315-66-1 RG AMF and art. 325-50 RG AMF. The performance of any other activity is expressly f This paper has been supported by the Croatian Science Foundation project no. 9366 "Legal Aspects of Corporate Acquisitions and Knowledge Driven Companies' Restructuring "orbidden. CIP status excludes providing payment services (art. L547-1-III CMF) and receiving client's funds and securities (art. L. 547-6 CMF). Another decisive element of CIP status is that this activity is conducted through a restrictive access website, i.e. website meeting characteristics laid down by the art. 325-32 GR AMF (art. L 547-1-I CMF). Website has to offer several projects which were selected on the basis of criteria and procedure published on the site (*due diligence*). Also, potential investors may have access to details of the offers (i.e. prospectus or mini prospectus) only after they provide contact information and confirm they are aware of inherent risks,[7] while subscription assumes that investors have provided information that enables the platform to perform suitability test and assess whether the proposed offer meets customer's situation. Therefore, website presumes restrictive access both in relation to the project holders and potential investors, as well as in relation to the amount of information potential investors may access. As explained in Position given by AMF and ACPR, using a restrictive access website is one of the conditions under which it will not be considered that a platform provides the service of placement of financial instruments. The other condition is that platform does not actively search subscribers for specific activity.[8] According to new Guide to CF issued in September 2014 and in line with the rules on promotion and direct marketing, platform can promote its the services in a general manner, but not advertising specifically the characteristics of an investment deals it offers (CF Guide,2014:11). In contrary, it will be subject of the obligation to issue a prospectus. The same obligation arising from the public offer of financial instruments has also been examined. First, Ordinance allows SAS to raise funds via CIP if it issues ordinary shares or fixed rate bonds not admitted to trading on a regulated market or a

[7] As explained in a Position given by the AMF and ACPR, before the identification phase, a platform may provide a brief presentation of the project to be financed, i.e. issuer name and brief description of its activity, amount sought, subscription sheet date or subscription intentions.

[8] As explained, the active approach in the search of subscribers, would exist if platform is bound by a contract with the issuer whose purpose is to search for subscribers or purchasers, or if it is actively engaged in research subscribers or purchasers to present them a specific operation and to encourage them to invest.

MTF and if the amount of the offer is less than 1 million EUR (art L 411-2 CMF, art D 411-2 CMF, art. 211-2 RG AMF).[9] Nevertheless, in that case SAS also has to comply with certain provisions of SA related to voting rights and general meetings, i.e. with the provisions of art L 225-122 until L. 225-125 CC, art. L. 225-96 until L. 225-98 CC, the third para of art L. 225-105 CC. The exemptions of a public offer are wider, both for SA and SAS. Nevertheless, before any subscription issuer must provide via the same website a set of information referred in art. 217-1 GR AMF[10] which does not have to be previously approved by AMF. According to the art. 217-1, 314-106 and 325-38 of the GR AMF and AMF document (DOC-2014-12), those information should be supplemented by the information provided by investment firm or CIP[11] and communicated by e-mail to investors before any subscription, as well as be possible to download from the website, in its synthetic and full version.

Ordonnance and GR AMF set conditions for individuals who have the power to manage or administer CIP concerning age requirement, good repute and professional competence (art. L 547-3-II CMF, art. D 547-2 CMF). CIP also must be a member of professional association approved by AMF. Since there are no minimum capital requirements, a professional indemnity insurance policy is required (art. L. 547-5.-I. CMF). In addition, art. L. 547-9. CMF imposes rules of conduct which include a duty to conduct a business with due skill, care and diligence, to act in the best interests of clients, to collect information on investors and ensure that the proposed offer meets customer's situation. In the case where (potential) customers do not communicate the required information, the offer cannot be considered as suitable (art. L 547-9, 6°

[9] It should be noted that Consultation document of competent ministry of September 2013 opened this exemption only for offers of the amount less than 300 000 EUR.

[10] These information concern its business, project (including last existing accounts, forward-looking statements on the business as well as a chart of the management team and shareholders) and specific risks. Also a comprehensive information should be given on all the rights attached not only to the securities offered but also on other securities and their beneficiaries, as wellas the information on the level ofparticipation which the officers of the issuer have committed themselves in the context of the offer. Another set of information includes agreement or statute provisions which make conditions and limitations to the liquidity of securities and conditions under which investors can obtain inscription copies from the books of the issuer, copies of last year's and current reports on general meeting assembly.

[11] Investment firm or CIP has to inform on the arrangements for collection and transmission subscription forms and the rules applied in case of over subscription, details of fees charged to the investor as well as the ability to obtain on request a description of the services provided to the issuer of securities whose subscription is considered and the costs related thereto and the risks inherent in the project and in particular the risk of total or partial loss of capital, liquidity risk and the risk of no recovery. In the case of indirect CF, the platform has the obligation to ensure that the subscriber receives the information about the project it supports. In any event, the interposition of a SPV should not impede the delivery of information listed above.

CMF). Ordonnance clearly distinguishes indirect CF, since it imposes a duty on CIP to ensure that, where the company in which their clients invest is to own and manage shares in another company, clients' interests are not harmed and that they have all the information necessary for the appreciation of their investment (art. L 547-9, 9° CMF). Also, CIP has to ensure that companies in which their clients invest directly or indirectly by a company whose purpose is to hold and manage participation in other companies comply with (where applicable) the provisions of art L. 227-2-1 of the CC regarding the SAS (art. L 547-9, 8° CMF).

CIP status is one of the options which Ordonnance offers to CF platforms. Platform may also opt for the status of investment firm providing investment advice. In that case, the provisions on restricted access website, organizational rules and rules of conduct are also applicable, but such investment firm may choose between 'mini prospectus' or prospectus approved by AMF. Benefits of such status are EU passport, possibility to expand to all categories of securities and services it provides, as well as the possibility of holding a client's assets. Nevertheless, in that case it has to comply with minimum capital requirements (CF Guide, 2014). One of the downside of the CIP status is that, as a specific national regime does not enjoy the benefits of EU passport.

2. ITALY

In Italy, legislative amendments were designed in substantially different context when compared to the one in France. A specific regulation for crowdinvesting was made much earlier while Italian crowdinvesting business practice was rather underdeveloped (see analysis of Castrataro and Pais)and with a view to unleash its potential. Also, it was a part of broader legislative package aimed at fostering the development of innovative start-ups during its whole life cycle. Passing the Law Decree 179/2012 of 18 October 2012 (so called Growth Decree bis), subsequently converted into Law 221/2012 of 17 December 2012 and later developed by CONSOB's Regulation of 26 June 2013 (REG), Italy became the first country in Europe to adopt a legislation specifically directed at crowdinvesting. Nevertheless, it was considered highly restrictive and potentially harmful for the industry growth. A first revision was made very soon by Law Decree 76/2013, followed by

second revision in the beginning of 2015 (Law Decree 3/2015 of 24 January 2015).

Law Decree 179/2012 and Law 221/2012 made amendments on Consolidated Finance Act (*Testo Unico della Finanza*, TUF) by introducing "the service of management of portals for the collection of risk capital for the innovative start-ups" (art. 50-quinquies (1) TUF). This service may be provided either by an authorised investment firms and banks or by special entity, under condition of transmitting the orders for subscription to the investment firms or banks (art. 50-quinquies (2) TUF). The first category must simply notify the CONSOB prior to commencement of this activity and is enrolled in a special section of the CONSOB's register (art. 5(2) REG), while the second category must require an authorization (art. 5(1) REG). In order to be authorised, it is required to be an entity of specific legal form,[12] whose legal or administrative seat or stabile organisation (for EU subjects) is in Italy and whose only objective is to provide the service of management of aforementioned portals (art. 50-quinquies (3) TUF). It is also required to provide a detail description of its intended activity (all 2(A) REG)[13] and meet the requisites of honourability and professionalism set by CONSOB's REG. Once registered, it is excluded from the obligation to apply rules of conduct (art. 21- 25-bis TUF) and provision on promotion (art. 32 TUF) applicable to investment firms and banks. Nevertheless, CONSOB's REG introduces special set of rules of conduct and other investor protection mechanisms for retail investors. Apart from general obligations on diligence, fairness, transparency and equal treatment of clients (art. 13(1) REG), CONSOB's REG identifies information that must be published by a platform operator in detail, correct and easily comprehensible manner (art. 13(2) REG). This approach is taken since the exemption to issue a previously approved prospectus is applied to offers of the amount less than 5 million EUR (art. 100-ter TUF, art. 2 (1) g REG in relation to art. 34-ter (1c) ofCONSOB regulation on issuers) which is a remarkably high threshold. Information published on portal includes information on operator itself (art. 14. REG)[14] and individual

[12] Joint stock company, partnership limited by shares, limited liability company or cooperative.

[13] The description should indicate the project selection criteria, advisory services provided to project holders, whether it intends to publish regular information on milestones achieved by innovative start-ups, periodic reports on their progress, provide mechanisms to facilitate the flow information between the innovative start-up and investors or between investors.

[14] It includes not only information on activities, cost born by investors and method of project selection, but also possible delegation to third parties, manner of the management of orders, measures taken to reduce and

offers available on the portal.[15] The operator has to refrain from recommendations on the financial instruments which are the object of individual offer (art. 13(4) REG) and ensure that retail investors may access information of particular offer only after they have read information on investor education, confirmed they are aware of risks inherent to investments in start-ups (by filling the questionnaire) and declared they are able to financially bear the entire loss of investment (art. 15(2) REG). The operator draws the attention to retail investors whether high risk investments are adequate in relation to their budget (art. 13(2) REG). In relation to the orders for subscription, operator may execute them only if their amount is under defined thresholds, i.e. for orders of individuals 500 EUR per order or 1000 EUR per year, and for legal persons 5000 EUR per order or 10 000 EUR per year (art 17(4) REG exemption). Above those thresholds, operator has the obligation to transmit orders in accordance with the time sequence they were received (art 17(1) REG) to banks or investment firms (art 17(2) REG) which execute them in line MiFID rules (art 17(3) REG). Holding client's funds or instruments is not allowed (art. 50-quinquies (4) TUF). Funds necessary for the execution of the order are kept on the specially formed account unavailable to the issuer (art 17(6) REG, art. 25(1) REG). Retail investors who have indicated their will to subscribe offered financial instruments have a right to revoke their decision in cases where in period between the launch of the offer and its closure, new fact arose which is capable of affecting the investment decision (art. 25(2) REG).

Art. 24 REG implements additional retail investor protection mechanisms. In a situation when after the offer members having control in innovative start-up transfer the control to the third party, retail investors which subscribed the financial instruments offered via portal are entitled either to withdraw from the company (withdrawal right) or to co-sell its holdings together with members having the control (tag-along right). It is the operator's responsibility to verify whether these rights, as well as the procedures established to exercise them, are included in issuer's statute or articles of incorporation. These rights exist at least three years after completion of the offer (art. 24(1)(a) REG). The operator's responsibility is to verify whether issuer's statute or articles of

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manage the risk of fraud, conflict of interest and complaints procedures, data on offers and their outcome, as well as the relevant regulation included as a website section on investor education.

[15] While complete and accurate disclosure of information related to individual offer (such as risk of loss of capital, liquidity risk, limitation on distribution of profits, tax treatment, the bankruptcy law exemptions, the content of business plan, the right of withdrawal and rules related to its realization) is responsibility of the project holder, the operator has also the obligation to disclose a list of information related to the offer.

incorporation contains provisions related to the communication of start-up and the publication of shareholders' agreements in the issuer's website. In addition, at least 5% of financial instrument offered has to be subscribed either by professional investors, banking foundations or start-up incubators (art. 24(2) REG). The latter condition was the subject of a debate during public consultations (Micic, 2015:45)

The amendments made in 2013 and 2015 reflected the view that too strict requirements were set in relation to the qualified project holders defined as innovative start-ups (art. 25(2) of Law 221/2012) (Micic,2015:48). [16] Classifying criteria for innovative start-up were therefore slightly simplified in 2013, while amendments made in 2015 broadened the category of suitable crowdinvesting project holders including innovative SME, one type of investment funds (*organismi di investimento collettivo del risparmio*) and other companies that predominately invest in innovative start-up or SME. Financial instruments which may be subject of the offer made via portal are shares or units representing a capital (art. 2(1)h REG). In addition, amendments made in 2015 created an alternative regime for subscription and transfer of limited liability company's units (art. 100-ter, 2-bis TUF).

5. FINAL REMARKS

Solutions provided by French and Italian legislator both aim to establish a light or at least specific regimes for CF platforms. Nevertheless, at least in the terms of qualification of services provided by the platform, legislative approaches are significantly different. French legislator's main concern was obviously open access and the key solution restricted access website which entails suitability test, obviously inspired by MiFID. It is an elegant solution because at the same time it resolves public offer issues and serves as a tool to tailor an investment advice service, as well as a line of distinction between investment advice and the investment service of placement. Similar solution is provided by the Italian legislator, but not as a tool to create investment advice service.

[16] Innovative start-ups are defined as companies of capital, including cooperatives, the shares of which are not listed on a regulated market nor on a MTF. Company has to be operational for less than 4 years, have its seat in Italy and a yearly turnover lower than 5 million EUR. It is not allowed to distribute profits and has todevelop and commercialize innovative products or services of a high tech value. It should not be a result of a merger,split-up or selling-off of a company or branch. In order to be considered as innovative three optional criteria are set.

Although Italian legislation does not positively enumerate services provided by the platform, it obviously considers that one of them is RTO and designs very interesting regime in relation to execution of the orders, combining maximum threshold solution and MiFID test. What is more, the investor protection mechanisms are implemented even in the content of the offer and were largely inspired by some of the clauses typically used in early stage finance by business angels and VC funds. Additional encouragement to involve in crowdinvesting is the confidence which retail investor may have when one of the investors is accredited one. What seems to be a uniform solution is that both Italy and France focused on financial instruments not admitted to trading on a regulated market or a MTF and expanded exemptions to issue a prospectus, requiring a disclosure of specific list of information. In relation to the indirect crowdinvesting, it will be interesting to observe the development of this market sector and regulatory approaches of Member States and ESMA.

REFERENCES

AMF and ACP: S'informer sur le nouveau cadre applicable au financement participatif, 30 septembre 2014.

AMF e ACP Guide du financement participatif à destination des plates-formes et porteurs de projets, publié le 14 mai 2013.

Arrêté du 22 septembre 2014 portant homologation des modifications du règlement général de l'Autorité de marché financiers concernant le financement participative, JORF n°0223 du 26 septembre 2014, texte n° 12.

Baeck, Peter, Collins, Liam, Zhang, Bryan (2014): Understanding Alternative Finance, The UK Alternative Finance industry report 2014, NESTA, University of Cambridge,
Available at: https://www.nesta.org.uk/sites/default/files/understanding-alternative-finance-2014.pdf

Belleflamme, P./Lambert, T./Schwienbacher, A. (2010): Crowdfunding,: An Industrial Organization Perspective
Available at:
http://www.researchgate.net/profile/Paul_Belleflamme/publication/2284

68454Crowdfunding_An_Industrial_Organization_Perspective/links/02bfe5146fedab2af1000000.pdf

Bradford, Steven: Crowdfunding and the federal securities laws, Columbia Business Law Review, Vol. 2012, No 1, 1-150, available at: http://ssrn.com/abstract=1916184

Castrataro, Daniela, Pais, Ivana: Analysis of Italian Crowdfunding Platforms, November 2012
Avaliable at: http://twintangibles.co.uk/wp-content/uploads/2012/12/CrowdfundingInItaly1.pdf.

Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organizational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, OJ L 241, 2.9.2006, p. 26–58.

Décret n° 2014-1053 du 16 septembre 2014 relatif au financement participatif, JORF n°0215 du 17 septembre 2014, texte n° 11.

DECRETO-LEGGE 24 gennaio 2015, n. 3: Misure urgenti per il sistema bancario e gli investimenti, *GU n.19 del 24-1-2015*.

DECRETO-LEGGE 28 giugno 2013, n. 76 Primi interventi urgenti per la promozione dell'occupazione, in particolare giovanile, della coesione sociale, nonche' in materia di Imposta sul valore aggiunto (IVA) e altre misure finanziarie urgenti. (13G00123) (GU Serie Generale n.150 del 28-6-2013)

Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, OJ L 145, 30.4.2004, p.1.

Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonization of transparency

requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, OJ L 327, 11.12.2010, p. 1–12.

Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, OJ L 174, 1.7.2011, p. 1–73.

Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC,OJ L 176, 27.6.2013, p. 338–436

Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173, 12.6.2014, p. 349–496.

ESMA's Opinion on investment –based crowdfunding, 18 December 2014, ESMA/2014/1378

Grković, Nikolina, Pravni aspekti državnog poticanja ulaganja u obnovljive izvore energije i uloga privatnog kapitala, završni rad na Poslijediplomskom specijalističkom studiju Financijsko pravo trgovačkih društava na Pravnom fakultetu Sveučilišta u Rijeci, 2014.

Hemer, Joachim (2011) : A snapshot on crowdfunding, Working papers firms and region, No. R2/2011
Available at: http://www.isi.fraunhofer.de/isi-wAssets/docs/p/de/arbpap_unternehmen_region/ap_r2_2011.pdf

Heminway, J., and S. Hoffman. 2010– 2011. “Proceed at Your Peril: Crowdfunding and the Securities Act of 1933.” Tennessee Law Review (78): 879– 922.

Instruction AMF relative aux Informations aux investisseurs à fournir par l’émetteur et le conseiller en investissements participatifs ou le

prestataire de services d'investissement dans le cadre d'une offre de financement participatif (DOC-2014-12).

Jason W. Parsont (2014): Crowdfunding: the real and the illusory exemption, Harvard Business Law Review, Vol. 4, 2014, 281-343.

Livre Blanc – Finance Participative, Plaidoyer et propositions pour un nouveau cadre réglementaire, FinPart, 29.07.2013.

Micic, Igor: Crowdfunding: Overview of the industry, regulation and role of crowdfunding in the venture startuo, Hamburg, Anchor Academic Publishing 2015.

Ordonnance n° 2014-559 du 30 mai 2014 relative au financement participatif, JORF n°0125 du 31 mai 2014, texte n° 14.

Pope, N. 2011. "Crowdfunding Microstartups: It's Time for the Securities and Exchange Commission to Approve a Small Offering Exemption." Journal of Business Law 13 (4): 973–1002.

Position AMF (DOC-2014-10) et position ACPR (2014-P-08) sur le placement non garanti et le financement participatif.

Position n° 2012-08 de l'AMF et Position 2012-P-02 de l'ACP du 16 juillet 2012 relatives au placement et à la commercialisation d'instruments financiers.

Regolamento sulla raccolta di capitali di rischio da parte di start-up innovative tramite portali on-line, Adottato dalla Consob con delibera n. 18592 del 26 giugno 2013 (Gazzetta Ufficiale n. 162 del 12 luglio 2013 e in CONSOB Bollettino quindicinale n. 7.1., luglio 2013.)

Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds, OJ L 115, 25.4.2013, p. 1–17.

Schwienbacher, Armin and Larralde, Benjamin: Crowdfunding of small entrepreneurial ventures, Book chapter forthcoming in Handbook of Entrepreneurial Finance (Oxford University Press), 2010

Available at: http://www.em-a.eu/fileadmin/content/REALISE_IT_2/REALISE_IT_3/CROWD_OUP_Final_Version.pdf

Testo del decreto-legge 18 ottobre 2012, n. 179 (pubblicato nel supplemento ordinario n. 194/L alla Gazzetta Ufficiale 19 ottobre 2012, n. 245), coordinato con la legge di conversione 17 dicembre 2012, n. 221 (in questo stesso supplemento ordinario alla pag. 1), recante: «Ulteriori misure urgenti per la crescita del Paese.». (12A13277) (GU Serie Generale n.294 del 18-12-2012 - Suppl. Ordinario n. 208)