

Catherine Houssa | November 2020

At last, a European passport for crowdfunding! As from 10 November 2021, it will be possible for both new and existing crowdfunding platforms to obtain a licence allowing them to carry out their activities in all EU countries. What does it mean in practice for SMEs, start-ups and potential investors? Catherine Houssa clarifies the main takeaways of this major step forward to (finally) boost crowdfunding in the EU.

A EUROPEAN PASSPORT FOR CROWDFUNDING

LOOKING BACK

Without any doubt, it was crowdfunding that launched the Fintech movement. Crowdfunding facilitated access to funding for those who were excluded from the banking system via a digital platform, showing the possibility that finance could be done differently.

The Belgian legislator, like other national legislators, has taken up this new reality and transposed the requirements related to this new activity into Belgian law one step at a time (see our news published in 2016 on this subject [here](#)).

However, an inherently digital activity soon finds itself cramped when it is constrained within physical boundaries. The crowdfunding platform approved by the FSMA under the [Belgian law of 18 December 2016](#) must limit its activities to the Belgian territory unless it meets the legal conditions applicable to crowdfunding platforms in each of the various European countries where it wishes to carry out its alternative funding activities.

After a certain enthusiasm, crowdfunding has therefore continued its national activities without going through the spectacular development one could have hoped for. One of the main reasons for this is, in particular, the lack of a European passport linked to national authorisation.



HARMONISATION OF PARTICIPATORY FINANCING - A SINGLE EUROPEAN FRAMEWORK

From 10 November 2021 onwards, a crowdfunding platform will be able to obtain an authorisation entitling it to carry out its activities in all countries of the European Union.

On this date, [Regulation \(EU\) 2020/1503](#) of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers (ECSP) for business (the “**Crowdfunding Regulation**”) will become applicable.

By granting a European passport to ECSPs, the Crowdfunding Regulation makes it possible to overcome the barrier of fragmented national regulation. It undoubtedly creates a favourable environment for the emergence of new European crowdfunding players and facilitates the cross-border financing of small structures and startups. In other words, individual investors from different European countries will be able to participate in the financing of projects of companies established in other Member States.

Below, we provide a general overview of this new European regulation.

SCOPE OF APPLICATION

Actors

The project owner may be a natural person who is not a consumer. This is a first difference with the Belgian regulation which limits access to financing intermediated by platforms to legal entities. This will certainly raise questions regarding the Belgian regulation which does not allow the issuance of securities by natural persons.

On the other hand, ECSPs must be legal entities. This is also a difference from the Belgian regulation which also allows natural persons to offer alternative financing services, although it has to be acknowledged that, de facto, this possibility is not being used.

The Crowdfunding Regulation does not apply to participatory financing services provided to project owners who are consumers within the meaning of Directive 2008/48/EC, i.e. any natural person who acts for purposes not related to his commercial or professional activity.

This is a disappointment for peer-to-peer lending platforms which, provided that they are authorised to act as such by their national legislation, will have to pursue carrying out their activities exclusively within their national legal framework without benefiting from a European passport (for the lack of Belgian status of peer-to-peer lending, see our initial analysis of 2016 [here](#)).



Maximum amount collected

The Crowdfunding Regulation has opted to set a single collection threshold per project owner instead of per project. This threshold has been set at 5 million EUR over a 12-month period without the need to issue a prospectus.

This amount has been retained because this threshold is used by most Member States – as is the case in Belgium – to exempt the offers of securities to the public from the obligation to publish a prospectus. Moreover, this threshold is calculated to cover all offers made by the project owner, whether through ECSPs – in the form of loans or equity participations – or directly under the general exemptions provided for in the [Prospectus Regulation](#).

GRANT CONDITIONS

A European passport is something you have to earn! The Crowdfunding Regulation introduces extremely precise rules on transparency and investor protection. This Regulation also significantly strengthens the prudential and governance requirements with which platforms have to comply.

Investor protection and transparency

The process of a collection project always starts with the publication by the ECSPs of a Key Investment Information Sheet (KIIS) drawn up by the project owner. This document contains all the information listed in Annex I of the Crowdfunding Regulation, an exclusion of liability clause and a warning on the risks posed by the investment proposed by the platform. It must be kept up to date throughout the entire offer period. The ECSPs are closely involved. They are responsible for verifying the completeness, accuracy and clarity of the information contained in the KIIS. The KIIS must be published 7 days before the online publication of a project that coincides with the start of the collection.

The Crowdfunding Regulation also distinguishes sophisticated and non-sophisticated investors, who benefit from different levels of information and protection.

A non-sophisticated investor benefits from a higher level of information (more in-depth advice and guidance). He must take an appropriateness test to ensure that he understands the level of risk associated with a participatory investment, a test which should be renewed every two years. Unless the ECSP offers a discretionary loan portfolio management service, the non-sophisticated investor is given a withdrawal period of 4 days as from the day he makes an investment offer. If his investment exceeds 1,000 EUR per project or 5% of his assets, the ECSP is subject to additional obligations in terms of information and must obtain the explicit consent of the investor.



Prudential requirements

The Crowdfunding Regulation imposes many organisational and operational requirements on ECSPs. These include the obligation to put in place procedures to ensure the continuity of their activities. ECSPs must also ensure that they avoid any conflict of interest and, to this end, shall not participate in offers launched on their own platform, nor may their main shareholders, managers and employees act as a project owner of a project offered on the platform. When ECSPs engage in outsourcing, this must be documented and monitored at all times, with the ECSP remaining fully responsible for the outsourced activity. The custody of assets must comply with strict rules.

Evidence of compliance with these rules must be included in the application file submitted for approval to the supervisory authority of the Member State in which the applicant is established.

If the ECSP provides for payment services in relation to participatory financing services, the ECSP is logically obliged to obtain authorisation as a payment service provider within the meaning of [Directive 2015/2366](#) (PSD II).

GATEWAY

Finally, it should be noted that the Crowdfunding Regulation offers crowdfunding platforms that have already been approved under their national legislation the ease of not having to provide again the information and documents they have already provided when applying for approval, on the condition, of course, that this information and these documents are up-to-date and available to the competent authority. Platforms which obtain the European passport will have to give up their initial national authorisation, while platforms which do not apply for the European passport will remain subject to their initial national authorisation.

The European authorisation as a provider of participatory finance services was long expected by the industry. Even if it imposes strict rules to ECSPs, this is a necessary evil to give them the credibility they need to finally access the “big league”.

Come and discuss this with our team!

SIMONT BRAUN

Avenue Louise 250 / 10
1050 Brussels | Belgium

+32 (0)2 543 70 80

www.simontbraun.eu

Follow us on  

For any question, please contact
our [Digital Finance Team](#):

digitalfinance@simontbraun.eu

