

# Capital Newsletter

Recent updates from capital markets

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## Crowdfunding services in light of ECSP Regulation.

November 10, 2021 marks the effective date for Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937 (the "ECSP Regulation"). It lays down uniform requirements for the provision of crowdfunding services and for the organization of crowdfunding service providers, applicable to all EU Member States. This seems to be the right moment to take a closer look at how the ECSP Regulation will influence the Polish and European crowdfunding market.

### 1. What are crowdfunding services according to the ECSP Regulation?

The ECSP Regulation covers two types of crowdfunding services:

- lending-based crowdfunding – consisting in the facilitation of granting of loans, defined as agreements whereby an investor makes available to a project owner an agreed amount of money for an agreed period of time, and whereby the project owner

assumes an unconditional obligation to repay that amount to the investor, together with the accrued interest, in accordance with the instalment payment schedule;

- investment-based crowdfunding – the placing, without a firm commitment basis, of transferable securities and admitted instruments for crowdfunding purposes, and the reception and transmission of client orders. This means that the role of a crowdfunding service provider comes down to the "sale" of such securities/instruments on the public market. The provider is not obliged to subscribe the instruments that have not been acquired by third parties, unlike in the case of other types of placements.
2. How will the ECSP Regulation affect the maximum issue value as part of crowdfunding campaigns?

Until November 10, 2023, the maximum issue value with respect to investment-based crowdfunding is going to be EUR 2.5 million. After that date, the threshold will rise to EUR 5 million. The issue of securities whose total value will exceed the respective amount shall be based upon the conditions specified in Regulation (EU) 2017/1129.

As a general rule, the ECSP Regulation applies to crowdfunding offers with a consideration of more than EUR 5,000,000, which are to be calculated over a period of 12 months as the sum of:

- the total consideration of offers of transferable securities and shares in private limited liability companies, and amounts raised by means of loans through a crowdfunding platform by a particular project owner; and
- the total consideration of offers to the public of transferable securities made by the project owner in its capacity as an offeror pursuant to Regulation (EU) 2017/1129.

However, for a period of 24 months from November 10, 2021, in case the threshold of total consideration for the publication of a prospectus in accordance with Regulation (EU) 2017/1129 is below EUR 5,000,000 in a given Member State, the ECSP Regulation shall apply in that Member State only to crowdfunding offers with a total consideration up to the amount of that threshold. In Poland, that amount is set at EUR 2,500,000.

### 3. Which entities will be allowed to provide crowdfunding services?

Crowdfunding services can be provided by legal entities with their registered office in the European Union, which have obtained an authorization from a competent authority (in Poland: the Financial Supervision Authority). The European Securities and Markets Authority (ESMA) will hold a register of all authorized crowdfunding service providers. The fact that such authorizations can be given exclusively to legal entities means that in Poland, only private limited liability companies, joint-stock companies and simplified joint-stock companies will be able to provide crowdfunding services. Partnership will be excluded due to their lack of legal personality.

It is worth noting that in its announcements issued in relation to the risk of failure to adjust the Polish legal system to the ECSP Regulation until November 10, 2021, the Financial Supervision Authority notes that until the Polish business crowdfunding act (the "Crowdfunding Act") is adopted, there will be no designated authority that could grant the aforesaid authorizations, which will render it impossible to embark on licensing processes. Pursuant to the ECSP Regulation, the competent authority shall, within three months from the date of receipt of a

complete application, adopt a decision granting or refusing to grant authorization. Consequently, crowdfunding service providers might find it difficult to adapt their operations to the new laws before the end of the transitional period (i.e. until November 10, 2022).

### 4. Can shares in a private limited liability company be covered by an investment-based crowdfunding campaign?

Based on new crowdfunding regulations, shares in a private limited liability company cannot be subject to a crowdfunding campaign. Investment-based crowdfunding can involve transferable securities or other admitted instruments for crowdfunding purposes. The latter means, in respect of each Member State, shares of a private limited liability company that are not subject to restrictions that would effectively prevent them from being transferred, including restrictions to the way in which those shares are offered or advertised to the public. The draft Crowdfunding Act involves a ban on addressing offers for subscription of shares in private limited liability companies to unspecified recipients, and on promoting them through advertising or other forms of promotion intended at unspecified recipients. This legislative change would mean that it is not possible to conduct crowdfunding campaigns concerning shares in private limited liability companies.

### 5. Does the ECSP Regulation include different investor statuses, depending on their level of experience?

MiFID 2 does not apply to crowdfunding service providers. The ECSP Regulation distinguishes between sophisticated and non-sophisticated investors. In order to be categorized as a sophisticated investor, it is necessary to submit a relevant request. The approval of the sophisticated investor status shall have a validity term of two years.

Legal entities meeting at least one of the following criteria shall be regarded as sophisticated investors: own funds of at least EUR 100,000; net turnover of at least EUR 2,000,000; or balance

sheet of at least EUR 1,000,000. Natural persons meeting at least two of the following criteria shall be regarded as sophisticated investors:

- personal gross income of at least EUR 60,000 per fiscal year, or a financial instrument portfolio, defined as including cash deposits and financial assets, that exceeds EUR 100,000;
- the investor works or has worked in the financial sector for at least one year in a professional position which requires knowledge of the transactions or services envisaged, or the investor has held an executive position for at least 12 months in a legal entity that meets the sophisticated investor criteria;
- the investor has carried out transactions of a significant size on the capital markets at an average frequency of 10 per quarter, over the previous four quarters.

## 6. How does the ECSP Regulation protect non-sophisticated investors?

Pursuant to the ECSP Regulation, before giving prospective non-sophisticated investors full access to invest in crowdfunding projects, it is required to assess whether and which crowdfunding services offered are appropriate for them. For that purpose, service providers will be obliged to carry out an entry knowledge test and simulation of the ability to bear loss.

In case a non-sophisticated investor plans to invest an amount that exceeds the higher of either EUR 1,000 or 5% of their net worth, the crowdfunding service provider shall ensure that such investor receives a risk warning, submits an express consent, and proves to the crowdfunding service provider that the investor understands the investment and its risks.

Moreover, the ECSP Regulation provides for a four-day reflection period for non-sophisticated investors. During that period, the prospective non-sophisticated investor may revoke their offer to invest or expression of interest in the crowdfunding offer, without specifying any reason and without incurring any penalty. Crowdfunding

service providers are obliged to adequately inform non-sophisticated investors about their rights related to the reflection period.

## 7. Can a crowdfunding platform facilitate the investors' further trading of rights acquired as part of crowdfunding?

Crowdfunding service providers may operate a bulletin board on which they allow their clients to advertise interest in buying and selling loans, transferable securities or admitted instruments for crowdfunding purposes that were originally offered on their crowdfunding platforms. Nevertheless, the bulletin board shall not be used to bring together buying and selling interests by means of the crowdfunding service provider's protocols or internal operating procedures in a way that results in a contract.

## 8. Does an authorization issued in Poland make it possible to provide cross-border services?

Pursuant to the ECSP Regulation, a provider that has obtained an authorization is entitled to perform crowdfunding services in another Member State, as long as it has gone through the relevant validation procedure. In order to do, it is required to provide the domestic supervisory authority with a notice about the intention to embark on cross-border operations. Such notice will be forwarded to supervisory authorities in the target Member States and ESMA.

## 9. How is the ECSP Regulation going to affect the Polish investment-based crowdfunding services?

Until now, Polish investment-based crowdfunding platforms have operated upon the principle of freedom of business activity. They have acted as entities that operate websites which deliver solutions making it possible to advertise public offers. Domestic entities will be obliged to adjust their activities to the ECSP Regulation and to obtain an authorization from the Financial Supervision Authority. It is worth noting that providers can continue their operations in accordance with the existing domestic regulations

until the earlier of November 10, 2022 or the date when they obtain the authorization.

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