

Review of Crowdfunding Regulation

Interpretations of existing regulation
concerning crowdfunding in Europe, North
America and Israel

A Publication of the Tax & Legal Work Group
of the **European Crowdfunding Network**





DISCLAIMER

The content on this publication is offered only as a public service and does not constitute solicitation or provision of legal advice. This publication should not be used as a substitute for obtaining legal advice from an attorney licensed or authorised to practice in your jurisdiction. You should always consult a suitably qualified attorney regarding any specific legal problem or matter. The comments and opinions expressed on this site are of the individual author and may not reflect the opinions of the firm or any individual attorney.

IMPRESSUM

Review of Crowdfunding Regulation. Interpretations of existing regulation concerning crowdfunding in Europe, North America and Israel, 2013

Published by the European Crowdfunding Network AISBL

Editor: Oliver Gajda. Legal Editors: Tanja Aschenbeck-Florange, Thomas Nagel

This work is licensed under a Creative Commons
Attribution-NonCommercial-ShareAlike 3.0 Unported License.

CZECH REPUBLIC



1 Current Market of Crowdfunding platforms in the Czech Republic

In the Czech Republic, the Crowdfunding market is still in its developing phase, with project size and investment volume being relatively modest. Cultural and social projects significantly outnumber start-up funding or other business transactions. The following types of Crowdfunding are currently functioning:

1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

A Crowdfunding platform using the Equity Model has yet to emerge.

1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

The Lending Model is still emerging in the Czech Republic. Two platforms specialising in peer-to-peer lending currently exist, even though lending volume is low and private loans to individuals currently outnumber business loans.

1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

The Rewards Model is the most developed Crowdfunding model, with several platforms functioning. While the majority of Crowdfunding ventures still support cultural or social projects, funding for start-ups is no longer uncommon. Please note that it is not appropriate to refer to a Donations Model, as the current platforms do not accept pure donations – instead, they structure the transactions as a sale of the offered rewards. This is done in order to avoid falling under the scope of Act No. 117/2001 Coll. on public collections, as amended the “APC”, which imposes significant administrative limitations on the public collection of donations.

2 Current Regulation of Crowdfunding platforms in the Czech Republic

2.1 Licence under the Act no. 240/2013 Coll., on management companies and investment funds, as amended (the “AMCIF”)

2.1.1 Equity Model

Investing in return for a share in the profits or revenue generated by a company/project is defined by the AMCIF as a form of collective investment.

Such activity corresponds most closely to the definition of an investment fund under the AMCIF. An investment fund is either a joint-stock company with its registered office in the Czech Republic or a

mutual fund (which is merely a collection of funds and has no legal personality) that is entitled or the purpose of which is (i) to collect funds from the public by issuing shares/participation certificates and (ii) to perform the collective investment of the collected funds on the basis of a given investment strategy based on the principle of the division of risk for the benefit of the owners of the shares/participation certificates and further (iii) to manage the funds (“Investment Fund”).

An Investment Fund can either (i) be managed by a management company, (ii) exist in the form of an Investment Fund which is entitled to manage itself or (iii) exist in the form of an Investment Fund which is managed by its executive body being a management company. All three possibilities (a management company, a self-managing Investment Fund and an Investment Fund managed by its executive body) are required to obtain a licence from the Czech regulator (i.e. the Czech National Bank).

The capital of an Investment Fund has to reach at least EUR 1,250,000 within six months of the date of the establishment of such Investment Fund. Given this high capital requirement, Crowdfunding platforms or project companies in the Czech Republic usually do not choose the Equity Model.

If a project company or a Crowdfunding platform acting under the Equity Model would intend to provide investment services, it would have to be properly licensed under Act no. 256/2004 Coll, on capital markets, as amended (the “Capital Markets Act”).

Investment services (“Investment Services”) under the Capital Markets Act include in particular:

- reception and transmission of orders in relation to investment instruments (i.e. in particular investment securities such as shares or bonds and derivatives – “Investment Instruments”);
- execution of orders in relation to Investment Instruments on behalf of a client;
- dealing in Investment Instruments on own account;
- management of client's assets under a contract with the client if an Investment Instrument is part of such assets;
- investment advice concerning Investment Instruments;
- underwriting and/or placing of Investment Instruments on a firm commitment basis;
- placing of Investment Instruments without a firm commitment basis; and
- services of safekeeping and administration of Investment Instruments for the account of clients (including custodianship and related services).

2.1.2 Lending Model

Under Czech law, the lending of money by individuals to a company/project in return for repayment of the loan and interest is a non-regulated activity. Despite the fact that the lending of money would occur through an online Crowdfunding platform, there are no regulatory requirements under Act no. 21/1992 Coll, on banking, as amended (the “Banking Act”). However, general civil and commercial rules on lending must be observed.

The Crowdfunding platform would also have to obtain a trade licence in order to be entitled to organise collective lending and borrowing.

Act no. 145/2010 Coll., on consumer credit (the “Consumer Credit Act”) only applies to individuals as consumers, not to companies. Should the project be undertaken by an individual who is to be

granted loans under the Lending Model, he/she cannot be qualified as a consumer within the meaning of the Consumer Credit Act, as long as he/she is going about his/her business activity or performing his/her profession in an independent way.

2.1.3 Donations or Rewards Model

The provision of money by individuals to a company/project for benevolent reasons or for non-monetary reward constitutes an exemption under the AMCIF. Collecting funds or assets that can be valued in money the main purpose of which is the financing of activities that relate to the production or sale of goods, research or the provision of services (other than financial services) and further management of such collected funds or assets that can be valued in money (or assets gained for such funds or assets that can be valued in money) does not constitute collective investment. Such activity is thus not regulated by the AMCIF. However, a Crowdfunding platform which would organise such collection of funds would have to obtain a trade licence for these purposes.

Furthermore, the requirements of the APC apply to the Donations Model. The APC applies to any activity by which voluntary donations are being collected from further unspecified members of the public (the “Public Collection”) and imposes several restrictions. In particular, Public Collections may only be held for publicly beneficial purposes, such as humanitarian purposes, charity, education, sport, protection of cultural items, cultural heritage or the environment. Any Public Collection has to be notified to the relevant Regional Authority (in Czech: “*krajský úřad*”). The Regional Authority subsequently scrutinizes the application and may reject it for non-compliance with the statutory requirements, in particular if it finds that the purpose of the Public Collection is not publicly beneficial. Furthermore, detailed records of the contributions must be kept and must be submitted to the Regional Authority after the Public Collection has finished.

Due to the aforementioned administrative requirements and the fact that Crowdfunding of certain types of projects (e.g. business start-ups) would rarely satisfy the conditions of public benefit, current Crowdfunding platforms refrain from the use of the Donations model. Instead, the Rewards model is used where each project typically has to define rewards for contributors and the contribution is structured as a sale of such reward, thus falling out of the scope of the APC.

2.2 Licence under the Act no. 284/2009 Coll, on payment services, as amended (the “Payment Services Act”)

Should the Crowdfunding platform intend to perform payment services itself in the Czech Republic, it would have to be properly licensed. There is the possibility to become either (i) a payment institution, (ii) a small-scale payment service provider, (iii) an electronic money institution or (iv) a small-scale electronic money issuer under the Payment Services Act. Becoming a payment institution or an electronic money institution requires a licence granted by the Czech National Bank. Becoming a small-scale payment service provider or a small-scale electronic money issuer requires registration with the Czech National Bank.

In any event, the Crowdfunding platform could also outsource payment services, which would not trigger any licensing or registration requirements.

2.3 Prospectus requirements

Under the Capital Markets Act, the general prospectus requirement does not apply where the offering of investment securities (i.e. shares, bonds, securities substituting shares or bonds, securities enabling the acquisition or sale of shares or bonds, certain derivatives, or similar securities) in all member state of the European Union does not exceed EUR 1,000,000 within a time period of 12 months.

2.4 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- Act 455/1991 Coll., on trading, as amended (which regulates trade licences) (the “Trade Licensing Act”);
- Capital Markets Act;
- Act 253/2008 Coll., on some measures against the legalisation of proceeds gained from criminal conduct and financing of terrorism (AML provisions) (the “AML Act”);

3 Possible regulation of Crowdfunding platforms under the AIFMD regime in the Czech Republic

3.1 Status of AIFMD implementation

Act no. 240/2013 Coll., on management companies and investment funds, as amended (i.e. AMCIF, as mentioned above), which implements the Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers (“AIFMD”), has taken effect as of 19 August 2013 (with certain provisions taking effect at a later date).

3.2 Definition of an alternative investment fund ("AIF")

Under the AMCIF, an alternative investment fund constitutes either a special fund or a fund of qualified investors.

A special fund under the AMCIF is defined as an Investment Fund which does not fulfil the requirements stipulated by the law of the European Union and thus is not registered in the relevant register kept by the Czech National Bank.

- The AMCIF defines a fund of qualified investors as: a legal entity (limited partnership, limited liability company, joint stock company, *societas europea* or cooperative) with its registered office in the Czech Republic that is entitled to (i) collect funds or assets that can be valued in money from several qualified investors by issuing participation securities or in a way that such qualified investors become its shareholders, and (ii) perform collective investment of the collected funds or assets that can be valued in money on the basis of a given investment strategy for the benefit of such qualified investors, and (iii) to manage such assets; or
- a mutual fund the purpose of which is to (i) collect funds or assets that can be valued in money from several qualified investors by issuing participation certificates and (ii) invest the

- collected funds on the basis of a given investment strategy for the benefit of the owners of the participation certificates and (iii) manage these assets; or
- a trust fund (i) the statutes of which identifies several qualified investors as beneficiaries; such beneficiaries are the founder of the given trust fund or the person that increased the assets of the given trust fund on the basis of a contract and (ii) which is established for the purpose of investment on the basis of a given strategy for the benefit of its beneficiaries

3.2.1 Operating company seeking funding

Assuming that an “operating company” to mean a start-up or developing company seeking funding for its general commercial business by means of a Crowdfunding platform, the operating company falls under an exemption under the AMCIF. Collecting funds or assets that can be valued in money the main purpose of which is the financing of activities that relate to the production or sale of goods, research or the provision of services (other than financial services) and the further management of such collected funds or assets that can be valued in money (or assets gained for such funds or assets that can be valued in money) does not constitute collective investment. Such activity is not regulated by the AMCIF; therefore, an operating company can neither fall under the definition of a special fund nor of a fund of qualified investors under the AMCIF.

Of course, the operating company would have to obtain a relevant trade license in order to be able to conduct its business.

3.2.2 Project Company seeking funding

Equity Model

As long as a project company is acting under the Equity Model (i.e. it invests in return for a share in the profits or revenue generated by such project company), then the provisions in the AMCIF apply to it. An investor in a project company acting under the Equity Model would probably not qualify as a qualified investor (as defined by the AMCIF), so a project company acting under the Equity Model would probably not constitute a fund of qualified investors under the AMCIF. However, it cannot be ruled out that such project company could constitute a special fund under the AMCIF (i.e. an AIF under the AMCIF).

The capital of a special fund has to reach at least EUR 1,250,000 within six months of the date of the establishment of such special fund.

Also, if a project company acting under the Equity Model would intend to provide Investment Services (as defined above), it would have to be properly licensed under the Capital Markets Act.

Lending Model

Under Czech law, the lending of money by individuals to a company/project in return for the repayment of the loan plus the payment of interest is a non-regulated activity. Despite the fact that the lending of money would occur through an online Crowdfunding platform, there are no regulatory requirements under the Banking Act. However, general civil and commercial rules regarding lending have to be observed.

Donations or Rewards Model

The provision of money by individuals to a company/project for benevolent reasons or for non-monetary reward constitutes an exemption under the AMCIF. Collecting funds or assets that can be valued in money the main purpose of which is the financing of activities that relate to the production or sale of goods, research or the provision of services (other than financial services) and further management of such collected funds or assets that can be valued in money (or assets gained for such funds or assets that can be valued in money) does not constitute collective investment. Such activity is not regulated by the AMCIF; therefore, a project company that follows the Donations or Rewards Model can neither fall under the definition of a special fund nor of a fund of qualified investors under the AMCIF.

3.2.3 Crowdfunding Platform

Should the Crowdfunding platform organise funding for project companies under the Equity Model, it would probably not constitute a fund of qualified investors under the AMCIF (as an investor of a project company acting under the Equity Model would probably not qualify as a qualified investor, as defined by the AMCIF). It cannot be ruled out, however, that such Crowdfunding platform could constitute a special fund under the AMCIF (i.e. an AIF under the AMCIF).

The capital of a special fund has to reach at least EUR 1,250,000 within six months of the date of the establishment of such special fund.

Also, should the Crowdfunding platform intend to provide Investment Services (as defined above) when organising funding for project companies under the Equity Model would, it would have to be properly licensed under the Capital Markets Act.

Should the Crowdfunding platform organise funding for project companies under the Lending Model, it would neither constitute a special fund nor a fund of qualified investors, as the AMCIF would not apply due to the fact that organising the lending of money by individuals to a company/project in return for the repayment of the loan plus the payment of interest is a non-regulated activity.

Should the Crowdfunding platform organise funding for project companies under the Donations or Rewards Model, it would neither constitute a special fund nor a fund of qualified investors, as the AMCIF would not apply due to the fact that organising the provision of money by individuals to a company/project for benevolent reasons or for non-monetary reward constitutes an exemption under the AMCIF.

4 Conclusion

Existing Czech Crowdfunding platforms usually chose the Rewards Model due to the fact that the regulations of capital markets or of collective investment together with regulations on public collections do not apply on the Rewards Model. The Equity Model, due to the regulatory requirements, is the most expensive variant.



5 Contact details of the authors:

Martina Březinová
Counsel
martina.brezinova@kinstellar.com



Kinstellar
Na příkopě 19
11719 Prague
Czech Republic

Tel +420221622111
www.kinstellar.com

KINSTELLAR

Adam Němec
Junior Associate
adam.nemec@kinstellar.com



HUNGARY



1 Current Market of Crowdfunding platforms in Hungary

Currently, the Crowdfunding market is not very well-developed or sophisticated in Hungary. Neither the Lending Model, nor the Equity Model has a presence in Hungary yet.

There are few online platforms that use the Donations or Rewards Model in Hungary. Those online platforms collect and handle a relatively limited amount of funds.

2 Current Regulation of Crowdfunding platforms in Hungary

2.1 General Regulation of Crowdfunding platforms

2.1.1 The Equity Model

In this model, individuals make investments in return for a share in the profits or revenue generated by the company/project.

The Crowdfunding Equity Model does not yet have any presence in Hungary. The Equity Crowdfunding Model could be structured in various ways. Depending on the type of structure used by the platform operator, there could be various regulatory requirements applicable to the platform operator.

If the online Crowdfunding platform facilitates the offering of financial instruments, such activity of the platform operator is likely to qualify as a licensable investment service under the Hungarian Investment Services Act. "Financial instruments" under the Hungarian Investment Services Act include, inter alia, transferable securities, such as stocks in public limited companies and private limited companies and debt securities. Therefore, if the platform operator offers securities held in companies seeking Crowdfunding or bonds issued by such companies, such platform operators would very likely have to obtain an investment services licence from the Hungarian regulator.

Furthermore, structures in which the offering/placement of securities is involved would likely require the publication of the prospectus approved by the Hungarian regulator in connection with such offering/placement, provided that no exemption is available under the Hungarian Capital Markets Act.

If the online Crowdfunding platform is structured as a collective investment scheme it would be subject to regulatory requirements applicable to collective investment funds and their managers.

Furthermore, depending on the structure used by the Crowdfunding platform, Hungarian payment services requirements and custodial services requirements referred to in paragraph 2.2 below could also apply to platforms applying the Crowdfunding Equity Model in Hungary.

However, we believe that a Crowdfunding platform using an Equity Model could be structured in a way which would possibly exclude the applicability of all or most of the Hungarian investment services regulatory requirements, investment funds regulatory requirements and prospectus publication requirements. Such platform could be structured by using civil law contractual arrangements and/or civil law partnership arrangements pursuant to which the individual investors, platform operators and crowdfunded businesses agree on, inter alia, the terms of the profit and loss sharing methods between the parties involved and the distribution of interest on the investments of the individual investors based on the civil law principle of contractual freedom.

2.1.2 The Lending Model

In this model, individuals lend money to a company or project in return for repayment of the loan capital, together with interest on the loan (if any).

The Crowdfunding Lending Model does not yet have any presence in Hungary. However, we have set out below certain regulatory requirements that an individual lender and/or platform operator applying a Lending Model could possibly face in Hungary.

Lending is a regulated financial service under the Hungarian Banking Act. Therefore, while structuring a platform applying the Lending Model in Hungary, careful consideration should be given to avoid any licensing requirements that could apply either to the individuals lending to the crowdfunded business or to the operating platform which acts as an intermediary in such lending structure.

Lending is licensable activity under Hungarian law only if it is a business activity carried out on a regular basis in the framework of an economic operation. The terms ‘business activities carried out on regular basis’ and ‘economic operation’ are not specifically defined under the Hungarian Banking Act. According to the Hungarian Financial Supervisory Authority (the “HFSA”), which will be merged into the Hungarian National Bank as of 1 October 2013, an activity qualifies as being performed in the framework of business activities carried out on regular basis if the activity is carried out on a regular basis, with the aim of entering into transactions that are not specified at the outset and with the aim of making a profit.

In general, individuals lending money to certain projects/business through Crowdfunding platforms do not provide funds on a regular basis with the aim of entering into transactions that are not specified at the outset. Furthermore, in most cases it is not the monetary return which is the most important driving factor for individuals when they provide loans to businesses through Crowdfunding platforms, even if a certain form of interest is payable on their loan. Therefore, taking into consideration the very nature of Crowdfunding, we believe that individuals lending money to a business through a Crowdfunding platform would not be considered as conducting a business activity on a regular basis as part of an economic operation. Therefore, we believe that the risk that the lending activity of the individuals qualifies as a licensable financial service and would require a financial service licence in Hungary, is rather low. However, the HFSA had historically followed a rather conservative approach as to the qualification of licensable financial services and in several cases qualified financial services as being conducted on a regular basis, even if the relevant transaction was only a one-off transaction. According to the public guidance of the HFSA, if the relevant entity expects future similar transactions to be realised at later dates and the entity takes

measures to fulfil such transactions on a regular basis, even a one-off transaction may qualify as an activity carried out on a regular basis. Therefore, it can not be absolutely excluded that a Hungarian platform using the Lending Model would trigger licensing requirements applicable to the individual lenders and/or the platform operators.

However, the Crowdfunding platforms using the Lending Model could possibly structure their services so as to eliminate or limit the risk of triggering Hungarian licensing requirements. For example, such models could stipulate that individuals do not receive interest on the loans provided to the crowdfunded business (thereby eliminating the profit oriented element), which would in turn limit the risk of triggering licensing requirements. Furthermore, the Crowdfunding platform could limit the number of the lending transactions that could be initiated by the individual. It may effectively limit the applicability of the regularity element of the activity which would, in turn, also limit the risk of triggering licensing requirements.

Furthermore, depending on the structure used by the Crowdfunding platform, the Hungarian payment services requirements and custodial services requirements referred to in paragraph 2.2 below could also apply to platforms applying the Crowdfunding Lending Model in Hungary.

2.1.3 The Donations or Rewards Model

Under this model, individuals transfer money to an entity operating a platform to finance projects without any monetary reward. These platforms are mainly used in Hungary for financing creative projects, art and design projects. Although no monetary return is involved in such financing, in most cases, the company or person carrying out the project offers non-monetary rewards in return for the donations (e.g. a product sample, tickets).

In general, Donations or Rewards Models do not raise any specific Hungarian regulatory issue. However, depending on the structure used by the Crowdfunding platform, the Hungarian payment services requirements and custodial services requirements referred to in paragraph 2.2 below could also apply to platforms applying the Crowdfunding Donations or Rewards Model in Hungary.

2.2 Payment services and custodial services regulations

In general, the individuals transfer money to the platform operator and not directly to the crowdfunded businesses. The platform operator first collects the payments from the individuals and distributes such funds only if the aggregated amount of the payments reaches or exceeds a specific threshold limit, or upon the satisfaction of other specified financing criteria. Therefore, in such cases the platform operator acts as an intermediary which collects funds from individuals, holds such funds on escrow until the specified financing criteria are fulfilled and then transfers such funds to the crowdfunded businesses.

There is a risk that the collection and holding of such funds by platform operators on escrow may constitute a custodial service requiring a licence under the Hungarian Banking Act, provided it is carried out as a business activity on a regular basis as part of an economic operation. However, Crowdfunding platforms could possibly avoid licensing requirements if the platforms structure their activities so as to rely on exemptions from the relevant custodial services licensing requirements, or

by using an external financial institution or payment services provider for holding the amounts on escrow.

Once the financing criteria are fulfilled, the platform operator transfers the collected funds to the crowdfunded business. There is a risk that such transfer through the platform operator may qualify as a monetary remittance service and be subject to Hungarian payment services regulations, provided that it is carried out as a business activity on a regular basis as part of an economic operation. If so, the platform operator would require a licence from the Hungarian regulator to carry out payment services in Hungary. However, Crowdfunding platforms could possibly avoid payment services licensing requirements if they can rely on exemptions from the payment services licensing requirements (e.g. the commercial agent exemption) or by using an external financial institution or payment services provider for processing payments.

2.3 Prospectus requirements

Companies issuing securities to the public in Hungary might be subject to Hungarian prospectus requirements. According to the Hungarian Capital Markets Act, in such case a prospectus and a notice must be issued and approved by the competent Hungarian regulator.

However, in the case of Lending Model and Donations and Rewards Model a Crowdfunding platform operator is normally not subject to such a prospectus requirement since it will not be responsible for the offering/placement of securities.

However, in Equity Model Structures in which the platform operator is involved in the offering/placement of securities may require the publication of the prospectus/notice and approved by the Hungarian regulator in connection with such offering/placement, provided that no exemption is available under the Hungarian Capital Markets Act.

Such exemptions might be among other the following:

- (a) the offer of securities is addressed to fewer than 150 natural or legal persons in each Member State; and
- (b) an offer of securities where the a total consideration of securities in the European Union is less than EUR 100,000, which limit must be calculated over a period of 12 months.

However, even if an exemption is available, the offer/placement of securities in Hungary might constitute a private placement in Hungary triggering capital market requirements under the Hungarian Capital Markets Act (e.g. notification must be submitted to the Hungarian regulator, formality requirements applicable to the documents relating to the offer/placement).

2.4 Possible additional requirements

The platform operator may be subject to further Hungarian regulations, in particular:

- laws applicable to on-line marketing and contracts;
- anti money laundering laws;
- data privacy and data protection laws;

- consumer credit regulations;
- consumer protection regulations; and
- laws applicable to alternative investment funds (the laws necessary for the implementation of the applicable alternative investment funds directive have not yet been approved yet in Hungary).

3 Possible regulation of Crowdfunding platforms under the AIFMD regime in Hungary

Despite the deadline applicable to the adoption and publication of national regulations implementing the provisions of the AIFMD, the Hungarian Parliament has not yet approved any of the laws necessary for the implementation of the AIFMD in Hungary. Therefore, as of the date of this report, we have no information on the possible implications of the AIFMD regime to the Hungarian regulations applicable to Crowdfunding.

4 Conclusion

There are only a few Crowdfunding platforms in Hungary and those which exist use the Donations or Rewards Model only. The Lending Model and the Equity Model currently have no presence in Hungary.

There is no regulatory regime adapted to Crowdfunding in Hungary. However, depending on the structure used by the relevant platform operator, both the Lending Model and the Equity Model might trigger regulatory requirements in Hungary, including, inter alia, financial services requirements, investment services requirements, prospectus requirements and payment services requirements. Nevertheless, we believe the platform operators seeking to intermediate Crowdfunding based on the Equity Model or the Lending Model could possibly structure their activities and business terms so as to limit and or eliminate the risk of triggering Hungarian licensing requirements.

We believe the Donations or Rewards model is generally exempted from the Hungarian regulatory requirements. However, depending on the structure used by the platform and service provided by the company, they might trigger payment services and custodial services requirements.

Given the above uncertainties of the Hungarian regulatory requirements with regard to the Crowdfunding activities, unless the relevant Hungarian laws and regulations are amended, we recommend to seek guidance from the Hungarian regulator on the interpretation of the relevant laws to clarify such ambiguities before using certain Crowdfunding methods and/or structures.



EUROPEAN
CROWDFUNDING
NETWORK

5 Contact details of the author:

Levente Hegedűs
Associate

levente.hegedus@kinstellar.com



Kinstellar
3 Széchenyi rkp
H-1054 Budapest
Hungary

Tel +3614284403
www.kinstellar.com

KINSTELLAR

SLOVAK REPUBLIC



1 Current Market of Crowdfunding platforms in the Slovak Republic

Despite the fast developments in Crowdfunding globally, it is still rather new in the Slovak Republic. There are currently no identified Crowdfunding platforms established or functioning to date. As such, any specific legal framework is not in place and there is little to none practice as to the legal aspects of functioning Crowdfunding platforms. 3 models are in theory possible. The Equity Model, in which the individuals profit from the revenue the project generates, the Lending Model in which the individuals lend money and expect return with interest and the Donations / Rewards Model, under which the individuals make donation with a possible non-monetary reward. As noted above, there are currently no functioning Crowdfunding platforms in Slovakia, therefore the models described below under the applicable legal frameworks are rather theoretical and untested.

2 Current Regulation of Crowdfunding platforms in the Slovak Republic

2.1 General regulation of Crowdfunding platforms

2.1.1 Equity Model

The Equity Model entails individuals making an investment into an operating or project company, while their shares would bear the right to participate on revenues generated by it.

Offering of securities by the company would constitute a public offer of securities, as defined by Section 120(2) of the Act no. 566/2001 on Securities and Investment Services (the “Securities and Investment Services Act”). A public offer of securities is usually subject to the obligation to publish a prospectus. The issuer may be exempt from such obligation, if the total value of shares issued within the EU would be less than EUR 100,000 calculated over the period of 12 months (some other standard exemptions exist, but these are unlikely to apply in this case).

If the Crowdfunding platform facilitates the offering of securities, this activity constitutes an investment service. Subject to Section 54 of Securities and Investment Services Act, the Crowdfunding platform would have to obtain a license to provide such investment services from the National Bank of Slovakia (the “NBS”). There are no specific exemptions from this obligation available to Crowdfunding platforms.

2.1.2 Lending Model

In the Lending Model a person lends certain amount of money and expects to receive the principal with interest. 2 legal frameworks are in theory applicable, depending on the nature of lenders.

Lending is in general a regulated business, that may not be performed without a license under the Slovak Banking Act. It is however possible to be engaged in lending services based on a simple ‘trade license’, if performed in a non-banking manner – i.e. using personal funds of the lender. If the

respective loan agreement is concluded by entrepreneurs who are acting within their regular business, upon the entrepreneurs' own responsibility, independently with the intention to make profit, the loan would be governed by the Commercial Code. Interest is a mandatory element of such relationship, which may or may not be mentioned expressly, but will nonetheless accrue.

By contrast, if the loan is provided as a one-off investment by a private person, i.e. is not provided systematically as a business of the lender, the relationship will be governed by the Civil Code. Interest may or may not be agreed under such relationship and its regulation under the Civil Code is rather liberal.

Depending on the manner in which the Crowdfunding platform would function, it may be classified as an agent, assisting in the conclusion of the loan agreement between the parties. A simple trade licence for such activities would be required.

2.1.3 Donations or Rewards Model

A Crowdfunding platform which would organise collection of funds under Donations or Rewards Model would have to obtain a simple trade licence.

The requirements of a rather obsolete Act No. 63/1973 on Public Collections and Lotteries (the "APC") may apply to the Donations Model. The APC applies to any activity by which voluntary donations are being collected from further unspecified members of the public (the "Public Collection") and imposes several restrictions. In particular, Public Collections may only be held for publicly beneficial purposes, such as humanitarian purposes, charity, education, sport, protection of cultural items, cultural heritage or the environment. Any Public Collection must be approved to the relevant Regional Authority (in Slovak: "*obvodný úrad*") or the Slovak Ministry of Finance. Records of the contributions must be kept and must be submitted to the Regional Authority or the Ministry of Finance after the Public Collection has finished.

Due to the aforementioned administrative requirements and the fact that Crowdfunding of certain types of projects (e.g. business start-ups) would rarely satisfy the conditions of public benefit, Crowdfunding platforms would likely have to refrain from the use of the Donations model. Instead, the Rewards model should be used where each project typically defines rewards for contributors (goods or services being results of the supported activity) and the contribution is structured as a sale of such reward, thus falling out of the scope of the APC.

2.2 License under the Payment Services Act.

In case the relevant Crowdfunding platform would intend to provide payment services in Slovakia, such platform would have to be properly licensed under the Act no. 492/2009 on payment services and on the amendment of certain laws, as amended (the "Payment Services Act"). The Crowdfunding platforms may instead of license only opt to notify the relevant prudential authority in case they would become limited providers under the Payment Services Act.

Crowdfunding platforms could possibly avoid licensing or notification requirements if the platforms structure their activities so as to rely on exemptions under the Payment Services Act. Alternatively,

Crowdfunding platforms can outsource payment services by using an external payment services institutions.

2.3 Prospectus requirements

A public offer of securities is exempted from prospectus requirement provided that the total value of shares issued within the EU would be less than EUR 100,000 (in words: one hundred thousand euros) calculated over the period of 12 months. In addition, certain other standard exemptions from mandatory publication of prospectus exist, but these are unlikely to apply in connection with Crowdfunding.

2.4 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- Act No. 40/1964 the Civil Code
- Act No. 513/1991 the Commercial Code
- Act No. 455/1991 the Trade Licence Act
- Act No. 203/2011 on Collective Investment
- Act No. 250/2007 on Consumer Protection

3 Possible regulation of Crowdfunding platforms under the AIFMD regime in the Slovak Republic

3.1 Status of AIFMD implementation

The AIFMD has been implemented in the Slovak Republic by way of amendment to the Act No. 203/2011 (the "Collective Investment Act"), effective on 22 July 2013. There is no practical experience with the newly implemented legislation and the experience in Slovakia shows it may take some time and several further amendments to the Collective Investment Act until the aim of the AIFMD is achieved. The overview below should therefore be read as a theoretical application of the AIFMD with no available precedents and no guidelines of the relevant regulatory authorities. It can also be noted that Slovak regulatory authorities will, in performing their supervisory function and interpreting the legislation, likely follow interpretations and recommendations of relevant European bodies such as ESMA, or practices of other member states' regulators.

3.2 Definition of an alternative investment fund ("AIF")

Pursuant to Section 4(12) of the Collective Investment Act, an AIF is either:

- a. special fund, i.e. a fund (without legal personality) that is not a standard fund and does not fulfil the requirements stipulated by the EU law (UCITS) and thus is not registered in the relevant registers of funds kept by the NBS,

- b. a collective investment undertaking, i.e. legal entity (limited partnership, limited liability company, joint stock company, Societas Europea or cooperative) with its registered office in Slovakia that is entitled to collect funds or assets that can be valued in money from several investors and perform collective investment of such funds or assets on the basis of a given investment strategy for the benefit of such investors.

3.2.1 Operating company seeking funding

Assuming that an “operating company” means a start-up or developing company seeking funding for its general commercial business by means of a Crowdfunding platform, the operating company will likely not be regulated under the Collective Investment Act. Collecting funds or assets, main purpose of which is the financing of activities that relate to the production or sale of goods, research or the provision of services (other than financial services) and further management of such funds or assets does not constitute collective investment. An operating company should therefore not be considered as AIF. The operating company would have to obtain a relevant trade license in order to be able to conduct its business.

3.2.2 Project Company seeking funding

Equity Model

A project company established to develop a specific project such as e.g. a movie, a computer game, a wind farm or a solar park and does not operate the facility or production itself might qualify as AIF (has a specific investment strategy for the benefit of its investors) and will therefore be subject to the regulation by the Collective Investment Act.

Lending Model

Under Slovak law, the lending of (own) money by individuals to a company / project in return for the repayment of the loan plus interest is a non-regulated activity. A project company seeking funding through loans should not be considered a regulated AIF. However, a detailed analysis for each specific case should be made and the guidance of the NBS may also be required in this respect.

Despite the fact that the lending of money would occur through a Crowdfunding platform, there are no regulatory requirements under the Banking Act or the Collective Investment Act. However, general civil and commercial rules regarding lending have to be observed (see also above).

Donations or Rewards Model

The provision of money by individuals to a company/project for charitable reasons or for small non-monetary reward constitutes an exemption under the Collective Investment Act; therefore, a project company that follows the Donations or Rewards Model should not be considered as AIF.

3.2.3 Crowdfunding Platform

A Crowdfunding platform organising funding for project companies under the Equity Model should not constitute an AIF. However, as noted above, the Crowdfunding platform will likely be viewed as providing investment services under the Securities and Investment Services Act when organising funding for project companies. Therefore, it would have to apply for the licence under the Securities and Investment Services Act.

No regulation should apply to a Crowdfunding platform that organises funding under the Lending Model or the Donations or Rewards Model.

4 Conclusion

There are currently no identified functional Crowdfunding platforms in the Slovak Republic. There is also no legal framework that would expressly regulate apply to Crowdfunding platforms. The above three models may function on the market under the existing legal framework, but there is no tested practice as yet. The lending and donations model are more practical due to limited regulation. The equity model would be subject to complex regulation under the Collective Investment Act and the Securities and Investment Services Act.

5 Contact details of the author:

Adam Hodoň
Partner
adam.hodon@kinstellar.com



Kinstellar
Hviezdoslavovo námestie 13
81102 Bratislava
Slovakia

+421259291111
www.kinstellar.com

KINSTELLAR

BUILDING A PAN-EUROPEAN CROWDFUNDING ECOSYSTEM

by raising professional standards,
fostering transparency, creating
networking opportunities,
and undertaking industry and
impact research.

**The EUROPEAN
CROWDFUNDING
NETWORK**

www.europecrowdfunding.org