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DANSK ERHVERV
Danish Chamber of Commerce

23 March 2018

Consultation on Proposal for a regulation on European Crowdfunding Service Providers

The Danish Chamber of Commerce and the Danish Crowdfunding Association welcomes and supports the initiative to implement a unified European wide regulatory framework for Crowdfunding Services Providers for Businesses. The overall goal of harmonizing crowdfunding regulation across EU member countries and thereby enable cross border activities is to be welcomed by many start-ups and SMEs, investors and platforms to boost access to capital and investment opportunity across Europe. We stress the importance of a uniform implementation of the regulation across the EU.

The Danish Chamber of Commerce and the Danish Crowdfunding Association have the following comments.

General comments

There seems to be a lack of principal understanding of the funding eco system and the players in each step in the proposal. For example:

The proposal states "This initiative is part of the Commission's priority of establishing a Capital Market Union (CMU), which aims to broaden access to finance for innovative companies, start-ups and other unlisted firms". The financial crowdfunding models (Equity og P2P lending) rarely is for start-ups – these companies are too early stage – especially for P2P lending. Crowdfunding is for growth companies and increasingly appeals also to more established SME´s which are entering series B and C funding rounds.

Further it is stated that "Crowdfunding can thus provide an alternative to unsecured bank lending". Whereas this may be correct for P2P lending then it is incorrect for investment crowdfunding (shares). Here the investor "invests" – and banks do not invest. Banks provide loans to credit worthy lenders.

There is a general need for a much clearer division between P2P lending and investment crowdfunding. The latter will be securities defined as shares, bonds and convertible bonds. Therefore, in the case of bonds/convertible bonds there will be similarities to P2P lending as both are debt instruments.

There is no definition of which types of companies that can be crowdfunded. Loans through P2P platforms can in principle be obtained by physical and legal entities. Securities can only be issued by legal entities. But in Denmark the Companies act §1 section 3 prohibits the legal entities ApS (IVS) (similar to the UK limited) to issue equity to the public – this basically only is allowed for an A/S (similar to the UK PLC). In the UK for example there are no such restrictions. Further the minimum capital requirement for a PLC is 25.000 Euro. But it is subject to local legislation to have higher thresholds – in Denmark it is currently DKK 400.000 or app. 53.000 EUR. This is

one example that illustrates the need for harmonization in this area in order to avoid regulatory arbitrage.

While we welcome the proposal, we recommend that a comparison between the existing requirements for an investment firm (execution only) and the proposal for crowdfunding platforms is carried out. Such a comparison may reveal that there are very limited differences between the two schemes, and hence the need for this proposal can be questioned. This proposals interaction with the proposed new regime for investment firms (KOM(2017) 790 og KOM(2017) 791) must be carefully considered, especially to avoid regulatory arbitrage because the benefits of being regulated as a class 3 investment firm could very well exceed the ones of being regulated as a crowdfunding service provider.

It is surprising that there is no reference to the coming implementation of the European Growth prospectus. This enables passporting of publich offers og up to 5 million euro. The whole purpose of this prospectus is to enable cross border fund raising and crowdfunding platforms could play a pivotal role in achieving this.

Lastly it is evidenced that the UK is by far the largest EU crowdfunding market. A major contributing factor is the legal requirement for banks to refer clients to crowdfunding platforms in case that funding applications are rejected. Such a compulsory referral should be implemented across the EU as platforms comes under ESMA supervision. The Danish Crowdfunding Association have been trying to establish a referral scheme locally in Denmark without success due to the lack of interest from the Danish Bankers Association mainly due to their perceived reputational risk. This should not be an issue if platforms come under ESMA supervision.

Specific comments

Article 2
This article exempts investment firms from the scope of the regulation. The relationship between investment firms and the proposal needs to be carefully assessed and addressed. In Denmark for example the prospectus exemption is 5 mill. EUR. Thus, there would be an incentive towards operating as an investment firm - and the services of this entity can be passportet.

In other countries with a prospectus exemption limit of 1 mill. EUR the incentive would be to operate as a crowdfunding platform according to this proposal. Therefore, the proposal does not provide a true harmonization and creates risks of regulation arbitrage and unfair competition. One way to address this issue is by rephrasing article 2.2.b to only exempt investments firms of class 1 and 2 under the new regime for investment firms (KOM(2017) 790 og KOM(2017) 791), and at the same time increase the threshold in article 2.2.d to 5 million EUR.

By conducting these changes the proposal would be much more relevant and the risk of regulatory arbitrage would be reduced. At the same time the threshold would come into line with the Growth Prospectus, which will enter into force in July 2019. Cross border fund raising up to 1 million euro would become possible without a prospectus and up to 5 million euro with a prospectus thus enhancing investor protection.

Article 4.1.
Crowdfunding services shall only be provided by legal persons that have an effective and stable establishment in a Member State of the Union and that have been authorized as crowdfunding service providers in accordance with Article 11 of this Regulation. From the above it is not clear if a legal entity in the EU being a fully or partly owned subsidiary of a non-EU legal entity can register as a crowdfunding platform. This should be clarified, especially in the light of the Brexit negotiations.

Article 4.5
As regard the use of special purpose vehicles for the provision of crowdfunding services, crowdfunding service providers shall only have the right to transfer one asset to the special purpose vehicle to enable investors to take exposure to that asset by means of acquiring securities. The keyword is “transfer one asset”. In most cases, there will be a need to place a portfolio of assets in a SPV.

Article 6
The article is not very specific in case a dispute cannot be resolved between the platform and the investor. The established legal system is always an option, but can be costly for the investor. In most countries, there is an established complaints system both for banks but also investment firms. It would be beneficial to have a similar system for crowdfunding.

Furthermore, we recommend establishment of a whistleblower model.

Article 7
It should be allowed for Crowdfunding Service Providers themselves to invest in projects on their own and other platforms under full transparent conditions. It is however important that the platforms interests are visible and transparent for investors.

Article 9
Paragraph 1 (a) states that “ whether and on which terms and conditions they provide asset safekeeping services including references to applicable national law”

This is particularly relevant for P2P platforms and is indeed governed by national law. One cannot however have a situation where part of the platform operation is subject to ESMA regulation and part is subject to local regulation.

Article 10
In general, the requirements are very much in line with the requirements for authorization as an investment firm. A specific comparison between the existing requirements for an investment firm (execution only) and the proposal for crowdfunding platforms should be done. It may reveal that there is no need for the proposal as the objective can be achieved as an execution only investment firm.

Further, it needs to be clarified that the platforms are subject to the anti-money laundering legislation (AML) To delegate the AML responsibility to Payment Service Providers is not in line with the AML directive. In general the risks are not determined by the absolute funding threshold but rather the size and frequency of the individual transaction/transactions which may be related to money laundering and/or terrorist financing.

Paragraph 2.I
It would be beneficial to use the existing Fit & Proper assessment procedures.

Article 11
The Danish Chamber of Commerce and the Danish Crowdfunding Association welcome the register envisaged in art.11. The banks resistance towards referring business to crowdfunding platforms due to reputational risk should not be an issue if this provision enters into force, as platforms will be under ESMA supervision. The Danish Chamber of Commerce and the Danish Crowdfunding Association strongly suggests that a referral scheme is incorporated in the regulation.

Article 15
There is no mentioning of the AIF/AIFMD). A project that is regulated under this legislation can be crowdfunded if the requirements for retail marketing are fulfilled.
Under AIF/AIFMD there is however no need for a prospectus (instead a requirement for an information memorandum) and there is no requirement for an appropriateness test. (entry knowledge test and simulation of the ability to bear loss). This has to be taken into consideration in order to avoid regulatory arbitrage.

Article 16
A new P2P crowdfunding project should be displayed on the platforms in a “frozen zone”, for example 48 hours, in order to provide potential investors enough time for their own due diligence before submitting bids. This is particularly relevant for P2P projects. For investment in securities the consumer legislation secures the investor a right to withdraw following the close of the offer period.

16.2.
The crowdfunding service providers should be required to provide information about risks and terms when an investor register on the platform. Understanding of the risk and terms should be confirmed prior to each investment.

Article 17
It is not clear whether the possibility for investors to interact is limited to the specific investors in a specific offering or whether it includes all investors having invested through the platform. The first situation will be difficult to manage/control and the latter will give large platforms a vast competitive advantage.

Further there may be a conflict between the platform and the companies that have raised funds. The latter may not be interested in disclosing their shareholder registry.

Article 19
The Danish Chamber of Commerce and the Danish Crowdfunding Association strongly opposes that crowdfunding service providers are banned from the opportunity to market ongoing and upcoming projects. This prevents potential investors from being alerted to projects that, for example, benefit their workplace, local area, etc. At the same time, there is a risk that projects will not be funded due to lack of knowledge. The marketing of crowdfunding projects is a central part of crowdfunding as a concept. In the most developed and largest crowdfunding market in the EU, the UK, marketing of platforms and individual projects has been crucial in the development of a well-functioning crowdfunding sector.

Article 22
Paragraph 1 (b, c, d, e,) It is not acceptable to extend the powers of ESMA to 3rd parties. Any such powers should only be delegated to the local legal system.

Article 23
Paragraph 1. ESMA powers to perform investigations should be limited to Article 22 (1, a) persons only.

Paragraph 1.e.
If ESMA is empowered to "request records of telephone and data traffic" then it must be specified how the information is to be stored and for how long. Further this empowerment must be in line with other legislation covering this such as GDPR and ePrivacy and must be uniform within the EU.

Article 24
In case ESMA wishes to conduct an on-site inspection, this must be done in collaboration with the local regulator. This is to ensure that there are no language barriers and that local implementation of EU-regulation is understood.

Article 30
There should be a requirement for all platforms to disclose on their website all outcomes of inspections similar to what applies to many other regulated entities.

Article 28, 29, 30, 31, 32, 33. It is unacceptable that ESMA is empowerd to impose fines. This must be under local jurisdiction. Administrative fines in fact are against Danish legislation.

Other matters:

Budget
ESMA calculates with 3 FTE´s in 2019 and 7 in 2017. Also ESMA budgets to supervise 25 entities. In the approval process it is outlined that approval must be granted in 20 work days. This corresponds to 500 work days in 2020. It is difficult to see what justifies 7 FTE´s.

Shareholder registry
It is up to local legislation whether the full shareholder registry must be disclosed to the public. As more and more retail investors subscribe to unquoted shares there will be a need for a central registry in order to facilitate secure transfer. Further in case an investor passes away there will be a need for the heirs to be notified of the existence of the securities.

Yours sincerely,

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