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From:	Presidency
To:	Financial Services Attachés Working Party on Financial Services (Crowdfunding)
Subject:	Proposal for a Regulation on European Crowdfunding Service Providers (ECSP) for Business and amending Regulation (EU) No 2017/1129 - Presidency Note

WK 10191/2019 INIT

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Presidency Note

Proposal for a Regulation on European Crowdfunding Service Providers (ECSP) for Business and amending Regulation (EU) No 2017/1129

The Finnish Presidency is planning to hold a first trilogue with the Parliament on the crowdfunding package as soon as the Parliament is ready to start the negotiations. This note is intended to draw the attention of the Member States to the key points of difference between the Council's and the European Parliament's positions on the dossier.

The aim of the 25 September working party is to hold an exchange of views of the key differences with our own general approach, as they are likely to dominate the forthcoming political trilogue negotiations. In line with standard practice, the Presidency plans to address the remaining non-key issues at the technical level.

Potential political issues:

1. Opt-in versus harmonised approach

The Commission's proposal would enable a potential ECSP to opt in to, and seek authorisation to provide crowdfunding services under, the Regulation. The authorisation would cover the provision of services both within a single Member State and on a cross-border basis in the EU, but would not interfere with national regimes or existing licences (such as under MiFID II). The European Parliament's position on the nature of the licence does not deviate from the Commission's proposal.

However, the Council has emphasised the need for harmonised set of rules across the Member States in order to boost the single EU market. The Council's position is not an opt-in model for ECSPs, but rather lays down an authorisation requirement for all legal persons wishing to provide crowdfunding services in the Union. The Council's general approach leaves room for national legislative measures only for those activities that are

exempted from the scope pursuant to Article 1(2) or would not meet the definition of crowdfunding service in Article 3(1)(a)

2. Scope of Regulation - Discretionary services

The Parliament's position expands the scope of services allowed to be carried out by an ECSP to investment advice and de facto (individual and collective) portfolio management. These business models are largely regulated under the Markets in Financial Instruments Directive and Regulation (MiFID/R) and the Alternative Investment Fund Managers Directive (AIFMD). The Parliament also allows complex lending-based models, which involve packaging and pricing of loans together with the possibility for ECSPs to act on their own account.

The definition of crowdfunding service in the Council text is also broad and could potentially cover all kinds of discretionary services, including automated lending activity. However, further provisions on crowdfunding services are stated in Article 4. Pursuant to Article 4(4), an investor should give his or her consent on each investment decision, which clarifies that discretionary services, where the investor does not review the investment in individual projects before it takes place, would be left out of the scope of the Regulation. For instance, individual portfolio management in loan agreements will be left to national legislation. Any collective portfolio management service on crowdfunding platforms will be subject to AIFMD rules.

Question:

Do Member States consider that the determination of the scope in the Council's general approach draws a clear line between EU regulated crowdfunding services and other services that could be provided in accordance with national law, e.g. discretionary lending-based crowdfunding? If not, please provide arguments and possible solutions.

3. Definition of crowdfunding service - Investment advice

Regarding the fundamental definition of crowdfunding service, the Council's general approach is closer than the Parliament's position to the Commission's proposal. The Commission and the Council distinguish between facilitation of granting of loans and two investment services defined under MiFID (placing without firm commitment and reception and transmission of client orders).

The EP divides the definition of crowdfunding service into direct (more or less meaning matching investors with project owners) and intermediated crowdfunding service. The latter would cover matching an investor with a project owner and determining the pricing and packaging of offers.

The EP also further clarifies intermediated crowdfunding services in a new Article 4a to cover the following MiFID investment services: placing without a firm commitment, investment advice and the reception and transmission of client orders.

By leaving the investment advice outside the scope, the Commission's and the Council's approach eliminates one potential source of conflicts of interest.

Question:

What are the Member States views on the difference between the EP's and the Council's positions on investment advice?

4. Size of the crowdfunding offering

The Commission's proposal allows for 1 MEUR per crowdfunding offer and the EP wishes to increase this limit to 8 MEUR per crowdfunding offer.

The Council's general approach allows crowdfunding offers with a total consideration up to 8 MEUR over a period of 12 months through a crowdfunding platform by a particular project owner. Furthermore, a Member State may decide to prohibit offers above 5 MEUR from its residents.

One justification that has been put forward for the higher threshold is the need to scale up crowdfunding services especially in the cross-border cases. The potential lower threshold reflects the need to respect lower national prospectus limits.

5. Level and measures of investor protection

The Commission's proposal introduced the investor entry knowledge test and the simulation of the ability to bear loss as well as the key investment information sheet.

In addition to the Commission's proposal, the EP proposes annual disclosure of the default rates of past crowdfunding projects.

The Council's general approach adds a classification of investors as either sophisticated or non-sophisticated investors according to their experience and knowledge. The Council sets different investor protection measures for these two classes of investors, strengthening investor protection measures for non-sophisticated investors. The Council has introduced possible investment limits for non-sophisticated investors for each individual crowdfunding offer as well as a reflection period during which non-sophisticated investors would be able to revoke their expressions of interest, without any reason or penalty.