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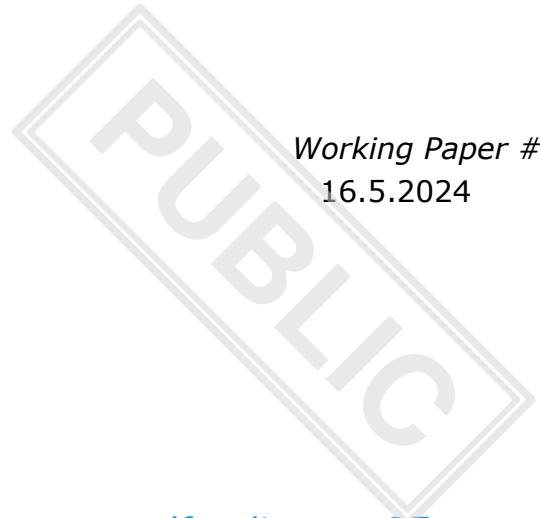
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WORKING PAPER

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WORKING DOCUMENT

From:	Presidency
To:	Working Party on Financial Services (Crowdfunding)
Subject:	Finnish Presidency non-paper: preparation of the third political trilogue on crowdfunding



Presidency Note

Preparation of the third political trilogue on crowdfunding on 25 November 2019

A. THRESHOLD

In the second political trilogue on 6 November the Rapporteur indicated his readiness to accept the harmonised regulation approach, but with certain conditions. In that connection, the threshold issue as well as the discretionary services were mentioned. The EP would require one single threshold of 8 MEUR, considering that to be logically consistent with the harmonised regulation approach.

After much discussion, Coreper agreed on a very delicate balance regarding the threshold issue in the Council's negotiating mandate in June 2019.

The negotiating mandate's compromise contains two key elements:

- Article 1(2)(d) excludes from the scope of the Regulation crowdfunding offers where the total consideration of offers by a particular project owner through a crowdfunding platform exceeds 8 MEUR; and
- Article 1(2a) allows a Member State to prohibit the raising of capital for crowdfunding projects from its residents over its national limit under the Prospectus Regulation for the publication exemption. In addition, Article 1(2a1) allows a Member State which decides to introduce such a prohibition under Article 1(2a) to also prohibit the raising of capital for crowdfunding from its residents above 5 MEUR.

The Council's approach in the compromise is satisfactory for the most of the Member States, but it could be argued that it is overly complex and not very workable from the perspective of the crowdfunding service provider. It should be recalled that the aim of the Regulation is to facilitate cross-border crowdfunding activity - whilst at the same time ensuring adequate investor protection.

The threshold is an investor protection measure and is connected to overall market size and structure as well as investor types in each Member State. Variations in all these factors help to explain the differences in the level of the threshold set by the Member States. The Prospectus Regulation is designed to be applied in cross-border cases so that, even if the threshold is not the same, the offer can still be executed by providing the prospectus. In practice, Member States cannot prohibit the offering if the prospectus has been duly approved and disseminated.

However, the different thresholds in the Council's negotiating mandate could actually block crowdfunding activity. The KIIS, which would in the crowdfunding offering replace the prospectus, would be required for every crowdfunding offering and would not facilitate basic securities offerings in the way that the prospectus can.

Investor protection concerns

The Prospectus Regulation has made a vital contribution to investor protection and, together with MiFID legislation, helps to guarantee a high standard of investor protection. It is therefore welcome that the Council's negotiating mandate for the Crowdfunding Regulation would reinforce investor protection even further by introducing investor testing, investment limits, reflection periods and additional warnings. Even if the KIIS would not provide the same level of disclosure as the prospectus, the KIIS would be a very reader-friendly document and easier for the retail or non-sophisticated investor to digest than a full prospectus.

Concerns of crowdfunding service providers (CSPs) to shift towards lighter regime business models

Furthermore, Member States have expressed concerns over the CSPs' possible preference for a lighter regime and to take advantage of opportunities for regulatory arbitrage. The Council's negotiating mandate helps CSPs by setting out a much lighter regime as regards all the organisational, prudential and other requirements including the code of conduct of services,. However, it limits allowed services to receiving and transmitting client orders (subscriptions only) and placing without firm commitment. There is no secondary market at crowdfunding side at all - only the bulletin board possibility. Finally, the actual offering to the investors with its possible investment limits and reflection period would be rather cumbersome compared to the MiFID framework.

Question to Member States: Can the Member States agree on one single threshold under the Crowdfunding Regulation. If yes, what could that be? If no, what other investor protection measures could be dropped in order to achieve a compromise on the threshold with the EP?

B. INDIVIDUAL PORTFOLIO MANAGEMENT IN LOANS

During the second trilogue, the EP asked the Commission to provide a non-paper on the possible discretionary services. The Commission submitted this non-paper, which has been distributed to the Member States as WK 12967/2019.

Question to Member States: Do the Commission's drafting suggestions capture all the essential service models and provisions that should be added to the Regulation at this point to cover the additional risk elements relating to this service? If not, please provide arguments.

C. ROLE OF ESMA

The Commission has also provided a non-paper on ESMA role in the Crowdfunding Regulation as requested by the EP. This Commission non-paper has been distributed to the Member States as WK 12968/2019.

Question to Member States: Do Member States consider the Commission's drafting suggestions to be acceptable - especially regarding dispute mediation, ESMA powers to draft level 2 regulation and the ECSP's reporting obligation to ESMA?

D. PROVISION OF OTHER SERVICES BY THE CROWDFUNDING SERVICE PROVIDER (Article 28a)

The EP has asked the Council for further argumentation for the Article 28a that was introduced by the Council's negotiating mandate.

Question to Member States: Do Member States see a special need for the Article? If so, please provide your a justification.