

PROPOSAL FOR A REGULATION ON EUROPEAN CROWDFUNDING SERVICE PROVIDERS (ECSP) FOR BUSINESS

POSITION PAPER FPF

FINANCEMENT PARTICIPATIF FRANCE

Financement Participatif France (FPF) is the representative professional association of the French crowdfunding sector. Created in August 2012, it now gathers 150 members, including 70 platforms of all crowdfunding categories (donation and rewards-based crowdfunding, crowdlending and equity crowdfunding). Beyond our self-regulation mission (FPF's members sign a code of conduct), we work with the authorities and the government to define an appropriate legal framework. We are the recognized representative of the crowdfunding industry. We participated in the coming into effect of the French crowdfunding regulation in October 2014. We share the common goal of promoting crowdfunding through education and information: we have published a bi-annual French industry report since 2013.

www.financeparticipative.org

FINANCEMENT PARTICIPATIF FRANCE'S PROPOSAL

The European Commission published a proposal for the regulation of crowdfunding which sends a strong message about the credibility and the growth potential of the sector. Financement Participatif France supports and encourages the implementation of a harmonized European regulation of crowdfunding. Nevertheless, if the proposal of the European Commission is to support the development of the sector without harming the States whose level of advancement is lower for lack of a sufficient local market, it is far from being suited to the needs of the French market. Indeed, only 27% of FPF's member platforms¹ who fall in the scope of the European proposal would be likely to adopt the status of European Crowdfunding Service Provider as it stands. Financement Participatif France therefore proposes to improve this proposal by adopting the following measures:

1. Raising the proposed maximum threshold of issuance above 1 million euros over 12 months

French crowdfunding platforms - which are leading Continental Europe with 444 million euros worth of financing raised in 2016² - strongly oppose the setting of a maximum threshold of 1 million euros over 12 months. Several reasons underpin this position:

- **This threshold is inconsistent with the provisions related to the New Prospectus Regulation**

The entry into force of Regulation (EU) 2017/1129 of 14 June 2017, known as the New Prospectus Regulation, will allow a public offering of securities between 1 million and 8 million euros to benefit from prospectus exemption. De facto, in the States where the national legislation has set this threshold above 1 million euros, there would be a range between the cap on crowdfunding and the Prospectus threshold to which no legislation would apply. It would seem paradoxical that an issuer could issue securities in this range but would be prohibited from using the services of a crowdfunding platform that would offer more protection to investors.

- **This threshold reduces investor protection**

Offerings above € 1 million allow individuals to diversify their portfolios by giving them the opportunity to finance more mature businesses that are less risky than smaller firms or seed companies.

¹ According to a survey conducted by FPF of the college of member platforms (<http://financeparticipative.org/qui-sommes-nous/membres-association/le-college-des-plateformes/>)

² Cambridge Center for Alternative Finance, *Expanding Horizons, the 3rd Annual European Alternative Finance Industry*, published in January 2018.

- **This threshold makes the proposed status unattractive compared to alternative opportunities**

The national regulation applicable to French platforms allows them to facilitate offerings of up to 2.5 million euros per issuer over a period of one year. This threshold could be raised to 8 million euros by the French government in the coming weeks. Adopting the European statute would thus very significantly reduce French platforms' scope of action.

In most national legislations, the intermediation of loans above 1 million euros per borrower does not present any legal difficulties.

- **This threshold reduces the profitability of the platforms**

The limitation of the scope of action proposed by the crowdfunding label will impose significant unit costs per crowdfunding offering, which will add to the platforms' sizeable fixed costs of maintaining and developing their technological system. Therefore, platforms should be able to consider arranging for financing that may go beyond this threshold to generate a turnover commensurate with their costs.

Limiting fundraising through crowdfunding to 1 million euros over 12 months would be a major setback for French platforms. Financement Participatif France alerts the European Commission to the risk that this proposal could curb the growth of crowdfunding platforms.

Financement Participatif France proposes to cap investments according to the Prospectus' threshold adopted by each Member State of the European Union, with an increase of the global threshold to 8 million euros.

2. Differentiating lending from investment securities

The European proposal treats in the same way loans and investment securities. However, these financial instruments are legally distinct and operationally different (type of issuers vs borrowers, level of risk, interest rates, maturity, etc.). In view of these disparities, it seems essential that the European Commission should adapt its position and propose different terms and conditions to the loan and securities platforms. In particular, the elements in the key investment information sheet should be reviewed in light of the practices exhibited by existing investors and platforms. Some elements are standard and should appear on every platform's information; others, such as the amortization table, should be further specified to take into account the different amortization and marketing methods available.

Financement Participatif France also points out that the development of a common crowdlending market is hampered first and foremost by national differences in matters of savings taxation, contract law and bankruptcy law, as well as by differences in business accounting and financial reporting.

Financement Participatif France would like the proposed text to take greater account of these divergences, as the regulation of financial intermediaries cannot by itself suffice to foster the development of crowdlending on a European scale.

3. Managing conflicts of interest

Financement Participatif France considers that the attention paid by the proposed text to the management of conflicts of interest and, in particular, the will to distinguish crowdfunding platforms from asset

management firms and credit institutions is necessary. The participation of the managers or employees of the platforms in the financing of the projects must be strictly limited, notably because these employees hold extremely sensitive and non-public information (comparable to insider information).

However, Article 7-2 prohibiting platforms from accepting significant shareholders as clients seems disproportionate, especially if the platforms independently select the projects they propose, without the intervention of their shareholders.

Financement Participatif France recommends, rather than a strict prohibition, the implementation of a policy of management of conflicts of interest and of transparency of information prohibiting, among other things, any preferential treatment in terms of information or transmission of orders.

4. Clarifying payment service provision

Financement Participatif France wishes that the possibility for platforms to be a payment service provider agent be clarified.

5. Specifying Project Communication and Marketing Requirements

The European Commission's proposal allows for institutional communication on the platform but prohibits any communication other than those specifically authorized (Article 3-1-j) or on a specific product or offer (Article 19). This prohibition seems to us to be incompatible with the management of the information and notifications that characterize the digital relationships that platforms maintain with their customers. It also rightly states that no project should receive preferential treatment over others. While it seems healthy to avoid favoring one project at the expense of another, this measure should be adapted to enable projects to reach a large number of potential financiers and effectively achieve their financing.

In addition, the proposed text seems to run counter to the commitment to harmonization and simplification, since the marketing and communication rules would remain specific to each Member State (Article 20).

Financement Participatif France wishes that:

- **The elements of communication regulated by the proposed text should be limited to promotional communications dedicated to specific projects;**
- **Platforms should be allowed to communicate fairly on all projects submitted online or having reached a given threshold of funding via, for example, a newsletter or social networks;**
- **Platforms should be allowed to grant labels to projects based on objective criteria: for example, the Ministry of Ecological and Solidary Transition has set up, in partnership with Financement Participatif France, a "Crowdfunding for Green Growth" label to promote projects which contribute to the ecological and energy transition;**
- **Marketing regulation should be provided in the proposed text and should be applicable as such in the Member States.**

6. Considering the conditions for national and European status cumulation or transition

FPF raises the question of the concrete relevance of this European status for existing French platforms which already enjoy a national status. Indeed, the proposal does not allow the cumulation of national and European statutes and requires therefore that existing platforms create a separate legal entity. This solution raises several issues:

- The issue of the economic viability of the platform, unless the two entities share resources which would create an endogenous risk of parasitism between them that cannot be conducive to the protection of the interests of platform clients;
- The question of the credibility of the newly created legal entity as an ex-nihilo structure deprived of historical performance record.

Thus, **it seems essential to consider either the conditions for cumulation or the modalities for a platform to abandon its national status in favor of the European one.** The second option requires providing the practical conditions of the takeover of previous commitments to customers for past (and possibly ongoing) (inventory) transactions by an entity that would enjoy European approval.

TO CONCLUDE

In the current state of the proposed text, the majority of Financement Participatif France's member platforms prefer to keep the national status rather than to opt for a very restrictive European status in terms of the amounts that may be raised, even if it means that they will have to comply with each national regulation to operate in other European countries. Far from being satisfactory, this situation would lead to a wide disparity among firms offering their services on the French market: on the one hand, platforms with national IFP or CIP statuses the regulation of which is strict and highly protective of the investor (maximum threshold of 2,000 euros per lender and per project for an interest-bearing loan, investment advisory service - MIFID II for investment in securities); on the other hand, European platforms with passportable status and much lower regulatory requirements.

Financement Participatif France invites the European Commission to review its proposal by taking into account the remarks mentioned above for an effective and realistic implementation of a European framework. Financement Participatif France asks to be associated with the drafting of the regulations.

Finally, the sector invites the AMF and the ACPR to rapidly join the discussion in order to anticipate the European regulations to strengthen the competitiveness of French platforms in the event of the entry into force of the proposed text.