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CROWD-FUNDING, an antidote to SME's funding vacuum during Greek crisis

Crowd-funding is known as a new, accessible by the wider public way of funding a project, a goal or a business with small amounts usually through online platforms. Crowd-funding may use different models depending on the purposes both of campaigners and contributors. We can broadly distinguish non-financial return models such as donation-based crowd-funding or reward-based crowd-funding from financial return models which include “crowd-investing” and “crowd-lending”. The “crowd-investing” model raises funds either through profit-sharing schemes, which promise a part of future earnings made by the project that is being financed, or through investment into securities such as shares or bonds issued by the campaigner. Finally, the “crowd-lending” model enables contributors to support a project in return of repayment of the funds lent, with or without an interest rate.

Discussion on the benefits and opportunities of financial return crowd-funding has a growing popularity in the current economic environment in Greece in view of scarcity of financing and the need of economic growth through support of SMEs and start-ups. However, Greek legal framework lacks an appropriate regulatory approach of the financial return crowd-funding to the effect that the latter could trigger strict regulations destined for regulated entities of financial sector. Hence, the need for a balanced regulatory approach of the financial return crowd-funding is imminent. In this paper we will endeavor to demonstrate the main legal impediments for a workable financial

return crowd-funding under current legal framework attempting to highlight the criteria of a future regulation achieving a balance between the need for a market opening and the mitigation of relevant risks.

There is a variety of models that financial return crowd-funding platforms use and a variety of services that they cover (project evaluation, payments handling, advice, trading etc.). Depending on the model and the nature of such services the operation of the platform could fall within the ambit of existing EU and national legislation.

Financial institution or Alternative Investment Fund Manager

Generally speaking, crowd-funding platforms are outside the perimeter of credit institutions, given that the funds provided do not qualify as deposits. Greek Banking Law (L. 4261/2014) prohibits any granting of credit by non-holders of an authorization by the Bank of Greece. Hence any lending crowd-funding model could work only as an intermediary between the lender and the borrower matching them to each other and not as a grantor of credit. On this basis the platform could be considered as credit intermediary if the loan is qualified as consumer credit for the purposes of Directive 2008/48EC and thus bear some disclosure requirements. Consideration should also be taken whether equity crowd-funding model would qualify as Alternative Investment Fund Manager. Alternative Investment Fund

managers Directive (AIMFD)¹ was transposed in Greece through Law 4209/2013. AIF is defined as a collective investment undertaking, including investment compartments thereof which: (i) raises capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of the investors; and (ii) do not require authorization pursuant to Article 5 of Directive 2009/65/EC (UCITS Directive) or the Greek law having transposed it in Greece. Although an equity crowd-funding model could be capable of constituting manager of AIF, many crowd-funding platforms would enjoy the exemption from AIMFD regime for managers managing total assets of a value less than 100 million euros, which has been introduced by Greek law.

MiFID I and II

Law 3606/2007, which transposed in Greece Markets in Financial Instruments Directive² (MiFID) requires entities performing investment intermediation to be authorized by the Hellenic Capital Market Commission and comply with MiFID investor protection rules. Equity model crowd-funding has as core activities the reception and transmission of orders for financial instruments and the execution of order on behalf of customers. Such activities could qualify as “investment services” under MiFID I. In addition, in case a crowd-funding platform allows trading of securities among the investors, it would be captured by MiFID I as a multilateral trading facility. Although in an EU level the prevailing interpretation is that crowd-funding platforms do not provide “investment services”, the matter has not been tested in practice in Greek legal practice. It should also be noted that according to MiFID II³ Directive which repeals MiFID I Directive and is expected to apply not earlier than January 2018, it is likely that crowd-funding platforms would constitute an Organized Trading Facility (OTF), which is a new regulated trading venue.

Prospectus Publication

Another legal barrier that the crowd-funding needs to escape from, is local public offering rules. Greek law having implemented in Greece the Prospectus Directive⁴ through Law 3401/2007, as in force, exempts under certain requirements marketing of securities from the obligation of prior drafting and approval of Prospectus. Namely, the obligation to publish a prospectus does not apply to the following types of offer: (a) an offer of securities addressed solely to qualified investors; and/or (b) an offer of securities addressed to fewer than 150 natural or legal persons per Member State, other than qualified investors; and/or (c) an offer of securities addressed to investors who acquire securities for a total consideration of at least EUR 100 000 per investor, for each separate offer; and/or (d) an offer of securities whose denomination per unit amounts to at least EUR 100 000; and/or (e) an offer of securities with a total consideration of less than EUR 100 000, which limit shall be calculated over a period of 12 months. Although many offers in a crowd-funding model are expected to fall under the above exemptions, a “catch-all” exemption should be provided for crowd-funding given that the preparation and the approval process of a prospectus is incompatible with the flexibility of such new industry.

Payment institution

Law 3862/2010 transposing in Greece European Payments Directive⁵ regulated the credit institutions and the payment institutions, which perform payment services. These services might have a relevance with all models of crowd-funding. Where crowdfunding platforms intend to provide directly such services, they could be regarded as payment service providers (PSPs) and be subject to an authorization by the Bank of Greece. In other cases crowd-funding platforms may be considered as agents of payment institutions and therefore bear a disclosure requirement to the Bank of Greece. In an EU law

1 Directive 2011/61/EU

2 Directive 2004/39/EC

3 Directive 2014/65/EU

4 Directive 2003/71/EC

5 Directive 2007/64/EC

level there has been a dispute whether the money handling performed by a crowd-funding platform qualifies as payments service as well as whether crowd-funding platforms could enjoy the exemption of Article 3 of the Directive concerning commercial agent. Any regulation on crowd-funding should lift such uncertainties.

Anti - Money Laundering and anti- Terrorist Financing legislation

Law 3691/2008, as in force transposing in Greece relevant Directives provides for several entities that fall within the scope of anti-money laundering (AML) obligations, including non-regulated institutions, such as any natural or legal persons trading in goods, to the extent that payments are made in cash in an amount exceeding euro 15.000. It is likely that some crowd-funding platforms fit in to these categories and thus are caught by the relevant legislation. However, it is evident that the AML obligations are of great relevance for all models of crowd -funding and thus any new regulation should expressly make the platforms subject to AML legislation.

Consumer Protection – E-commerce- Data Protection

EU directives and relevant national legislation concerning the distance marketing of financial services, unfair commercial practices and consumer protection, as well as e-commerce and data protection set forth additional obligations to campaigners of crowdfunding platforms. In this context it is worth noting that the EU Commission has recently launched a consultation on online platforms, Cloud and Data, Liability of Intermediaries and the Collective Economy⁶ covering inter alia, the issue of transparency of online platforms.

Crowd-funding platform recently launched in Greece

On 29.01.2016 the National Bank of Greece announced the launch of Act4Greece⁷, a

crowdfunding platform which will fund several areas such as social solidarity, entrepreneurship, culture and innovation. This platform will be funded through the “donation-based” crowdfunding, “crowd-investing” and “crowd-lending”, while in its early steps will use particularly the donation model. Due to the fact that the platform at issue is operated by a credit institution, any authorization requirements and AML obligations outlined above would not pose impediments should a financial return model was put into practice. Nevertheless, even in this case many grey zones of existing framework would be needed to be lifted by interpretation, if not by a new regulation.

Need for a new regulation

In conclusion, and having assessed existing EU and national legislation, the risks encountered in financial return crowd-funding are specific to such innovative industry and to a large extent are left unaddressed by existing legal framework. Crowd-funding regulation should be a regulated activity given the need for protection against several risks such as failure of platform, assessment of credit worthiness of lenders/ borrowers, segregation of accounts, anti –money laundering concerns. Such regulation could follow the patterns of the existing legislation which sit in the perimeter of crowd – funding as outlined above, however by applying a proportionality test given the small scale of the lending and investment activity involved in crowd-funding. On the other hand lenders/issuers and borrowers/ investors might not have adequate financial literacy to assess projects, corporates or counterparties. Thus, any disclosure requirements imposed on crowd-funding platforms should be broad enough to address such risk.

Your Legal Partners will closely follow the matter and any legislative development and will keep clients, friends and market players briefed.



⁶ <https://ec.europa.eu/digital-agenda/en/news/public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud>.

⁷ <https://www.nbg.gr/act4greece/act4greece/>