

Corporate Department

# Crowdfunding: Current Thinking

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## Crowdfunding – Current Thinking

Crowdfunding is the practice of raising funds through relatively small amounts of money from a large number of people and invariably via an online platform. The concept has become increasingly familiar to the public over the past couple of years.

To date crowdfunding in Ireland has typically been:

- donation based;
- reward based; or
- lending – either peer to peer or peer to business.

What has not tended to be active in Ireland yet is equity based crowdfunding which involves individuals making investments in return for shares in the company to which they provide the funding (equity model). There are crowdfunding platforms operating in other jurisdictions, including the UK which offer the equity model.

There are legislative and regulatory issues to consider if contemplating setting up a crowdfunding platform in Ireland. These may well account for the lack of activity to date in Ireland in platforms providing the equity model. Many aspects of a crowdfunding platform activity may be impacted by existing Companies legislation and Financial Services regulation. The platform operator needs to have a clear understanding of the extent to which these relate to the specifics of their proposed operation.

### Companies Acts provisions relating to private companies

Irish company law prohibits a private company from issuing securities to the public; there are certain exemptions and of relevance to issuing equity is the fact that the only exemptions arise where the issue is made to fewer than a 100 people and/or to qualified investors (as defined in the Prospectus Directive 2003/7-1/EC, as amended (PD). This cap of less than 100 will increase to less than 150 with the commencement of the Companies Act, 2014 due in mid-2015. The type of companies interested in raising finance on crowdfunding platforms will invariably be start-ups or early development companies and these tend to be private companies. The nature of how the equity model on a crowdfunding platform would operate will tend to involve an offer by the investee company such as would typically be considered to be an "offer to the public". Therefore, the exemptions mentioned above will be of real significance to any one hoping to operate the equity model on a crowdfunding platform.

### Prospectus Directive

The equity model (or indeed the offer of any transferable securities) will be impacted by the provisions of the PD as implemented in Ireland, which requires the publication of a prospectus approved by the Central Bank of Ireland, where an offer of securities is made to the public. There are exemptions and any crowdfunding platform offering the equity model would need to ensure that it can come within these exemptions as the nature of how such platforms operate would make it extremely difficult to meet the preparation and approval process required for a prospectus.

### Regulatory Aspects

There is no financial regulation specifically designed for and covering crowdfunding. However, there are a number of aspects of crowdfunding activity which may fall to be regulated and these need to be

considered before commencing the crowdfunding platform operations. All businesses which engage in regulated activities must comply with the host of authorisation, regulatory and reporting requirements prescribed by legislation.

It is illegal for a firm to act as an investment firm without the relevant authorisation or exemption. An investment firm is any firm that provides "investment services to third parties on a professional basis". Investment services are set out in the Markets in Financial Instruments Directive (**MiFID**). While a crowdfunding platform may not be offering investment advice, which is one element of investment services, it may well be caught by other categories of investment services most notably the "reception and transmission of orders for financial instruments".

The business of money transmission is also a regulated activity under the Payment Services Directive 2007/64/EC (**PSD**). If not covered by the PSD, money transmission may alternatively fall to be regulated under the Central Bank Act, 1997. This is something a crowdfunding platform operator needs to consider in relation to how it conducts its operations. It may be that the platform can avoid falling to be regulated as carrying on a money transmission by using the services of a regulated payment services provider.

The lending activities on a crowdfunding platform may or may not require to be regulated. Peer-to-business lending should not require authorisation provided it is not also providing investment services or payment services. However, peer-to-peer lending which involves lending to consumers may fall to be regulated as a credit intermediary.

## Summary

There is currently no specific legislation or regulations dealing with crowdfunding applicable in Ireland, but many aspects of a crowdfunding platform activity may be impacted by existing Companies legislation and Financial Services regulation.

The donation/reward based and lending models for a platform may well not require regulation under MiFID or otherwise as an investment services firm, but a platform which proposes offering the equity model will most likely need to consider the fact that the execution and transmission of orders for securities falls within the definition of investment services for the purpose of MiFID and requires to be regulated.

It may alternatively be an activity which could alternatively be regulated under the Alternative Investment Fund Managers Directive and this is something that a crowdfunding platform operator should consider.

The platform operator needs to have a clear understanding of the extent to which Companies legislation, Financial Services regulation and the PSD relate to the specifics of their proposed operation.

It is interesting to note that in the UK, the Financial Conduct Authority (**FCA**) has published its Policy Statement on "*The FCA's regulatory approach to crowdfunding over the internet, and the promotion of non-readily realisable securities by other media*" and this gives helpful insight into the UK's regulatory approach to crowdfunding activities.

For further information on any matter relating to crowdfunding please contact: Eileen Grace, Partner, Corporate Department, E: [egrace@efc.ie](mailto:egrace@efc.ie) or Laura McLoughlin, Associate, Corporate Department, E [lmcloughlin@efc.ie](mailto:lmcloughlin@efc.ie)