

# **Crowdfunding Platforms, an Innovative Way of Providing Crowdfunding Services in the Age of Artificial Intelligence. EU Legislative Implications. Applicability in Romania**

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*Equity crowdfunding is a technologically adapted alternative form of financing to bank financing, and also a type of intermediation in which a crowdfunding service provider, without taking risks itself, manages a digital platform, open to the general public, to connect or facilitate the connection of potential investors or lenders with the business community seeking finance. Through crowdfunding, investors can finance projects published on the crowdfunding platform either by providing loans (crowdlending) or by purchasing securities/instruments admitted for crowdfunding purposes issued by project developers (crowd-equity). At European Union level, the provision of equity crowdfunding services is stated by Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European providers of equity crowdfunding services to business and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937 (“Regulation (EU) 1503/2020”) and by delegated regulations of the European Commission which approved the regulatory technical standards drawn up by the European Securities and Markets Authority (ESMA) and the European Banking Authority (EBA). In Romania, in order to properly implement the EU legislative framework, Law no 244 of 20 April 2022 on measures implementing the Regulation (EU) 1503/2020. The present research aims at highlighting a number of issues for reflection, among which we mention by way of example: (i) the interpretation of the term “commercial activity or activities” in the context of the Regulation (EU) 1503/2020; (ii) the typologies of crowdfunding providers, their role in the crowdfunding mechanism, but also to what extent are they entitled to accept only sophisticated investors? doctrinal implications; (iii) minimum prudential requirements laid down by the EU legislator in Regulation (EU) 1503/2020 to the effect that a crowdfunding provider is required to have prudential safeguards in place at all times; (iv) to what extent can a project owner market their crowdfunding projects? (v) the particular nature of the activity of providers of equity financing services authorised in a Member State of the European Union who may provide equity financing services in a Member State other than the Member State whose competent authority granted the authorisation, on the basis of a simplified procedure (license passporting) involving notification to the competent authority of the Member State which granted the authorisation of the intention to provide equity financing services in*

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*other Member States of the European Union, etc. In summary of the above, we believe that, as an expression of the age of artificial intelligence, the crowdfunding market, both at EU level and in the particular case of Romania, shows an upward trend, characterised by the fact that both investors and project developers are increasingly interested in crowdfunding services and in the way crowdfunding platforms operate.*

**Keywords:** *Suppliers; Crowdfunding services; Online platforms; Digitisation*

## Introduction

The era of digitisation brings to the level of the single market of the European Union a new concept, a new reality, namely crowdfunding which represents a viable way of ensuring access to financing for SMEs and startups through online platforms.

What does the provision of crowdfunding services involve? This type of financing involves the participation of three types of actors: the project developer who proposes the project for financing, the investors who finance the proposed project and a crowdfunding service provider with an intermediary role, which connects project developers and investors within a publicly accessible online platform, including systems where user registration is required.

It is necessary to specify that both credit-based and investment-based crowdfunding (transferable securities) are considered, because these types of financing can be conceived as comparable financing alternatives.

Lending-based crowdfunding involves facilitating the granting of loans with an unconditional obligation to repay the investor an agreed amount, the role of lending-based crowdfunding platforms being only to facilitate the conclusion of loan agreements between investors and project developers, without the provider of crowdfunding services to act as a lender to the project developer at any time.

Therefore, with the development of the capital market<sup>1</sup> and online investments<sup>2</sup>, crowdfunding as a business model required regulation at the level of the European Union. Specifically, on October 7, 2020, the Union legislator adopted Regulation (EU) 2020/1503<sup>3</sup> of the European Parliament and of the

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<sup>1</sup>See Carreau & Juillard (2007) at 461-482.

<sup>2</sup>See for developments in this regard, Popa Tache (2020) at 456-465; Alschner & Tuerk at 11.

<sup>3</sup>Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European providers of crowdfunding services for business and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937 (Text with relevance for the EEA), published in OJ L 347, 20.10.2020, p. 1–49. Regulation (EU) 2020/1503 is supplemented by the following provisions: (a) Commission Delegated Regulation (EU) 2022/2111 of 13 July 2022 supplementing Regulation (EU) 2020/1503 of the European Parliament and of the Council with regard to standards technical regulations specifying the requirements regarding conflicts of interest for crowdfunding service providers; (b) Delegated Regulation (EU) 2022/2112, supplementing Regulation (EU) 2020/1503 of the European Parliament and of the Council with regard to regulatory technical standards that specify the requirements and modalities for the application for authorisation as a service provider crowdfunding etc. (c) Delegated Regulation (EU) 2024/358 of the Commission of September 29,

Council of October 7, 2020 on European providers of crowdfunding services for businesses, a legislative framework that establishes uniform requirements for the provision of services of crowdfunding at the EU level, with reference to the organisation, authorisation and supervision of crowdfunding service providers, the operation of crowdfunding platforms, as well as transparency and advertising communications in relation to the provision of crowdfunding services in the Union.

## **Synoptic Approach to the EU Regulation of Crowdfunding as a Business Model**

### *Specific Concepts. Legislative Aspects*

Crowdfunding can be seen as a business model through which the crowdfunding service provider provides financing services on a specialised online platform and which, in the light of art. 2 para. (1) letter a of the Union harmonisation framework, assumes "connecting investors interested in providing business financing with project developers through the use of a crowdfunding platform, a service consisting of any of the following activities: (a) facilitating the granting of loans<sup>4</sup>, (b) placing, without firm commitment, of securities and instruments admitted for the purpose of participatory financing issued by project developers, etc.

Providers of crowdfunding services authorised in a member state of the European Union can provide crowdfunding services in a member state different from the member state whose competent authority granted the authorisation, based on a simplified procedure (*license passporting*) that involves informing the authority in the member state that granted the authorisation regarding the intention to provide crowdfunding services in other member states..

It is imperative to recall that in the sense of art. 4 para. (1) point 44 of Directive (EU) 2014/65<sup>5</sup> on the markets of financial instruments, by "*securities*" is meant "the classes of securities that can be negotiated on the capital market, with the exception of payment instruments, as for example: (a) shares held in companies and other securities equivalent to shares held in companies, partnerships or other entities, as well as depositary receipts for shares; (b) bonds

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2023 supplementing Regulation (EU) 2020/1503 of the European Parliament and of the Council with regard to regulatory technical standards specifying the requirements regarding the assessment of the creditworthiness of financing projects crowdfunding, pricing crowdfunding offers and risk management policies and procedures, OJ L 2024/358, 22.01.2024, [https://eur-lex.europa.eu/eli/reg\\_del/2024/358/oj](https://eur-lex.europa.eu/eli/reg_del/2024/358/oj)

<sup>4</sup>"loan" means a contract whereby an investor makes available to a project developer an agreed sum of money by an agreed term and whereby the project developer unconditionally undertakes to repay the investor that sum and accrued interest in accordance with payment schedule in instalments.

<sup>5</sup>Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets of financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast), OJ L 173, 12.06.2014, p.349-496, consolidated version on 28.03.2024

and other securitised debt securities, including depository receipts for such securities;(c) any other securities giving the right to buy or sell such securities or leading to a cash settlement, established in relation to securities, currencies, interest or return rates, commodities or other indices or units of measurement".

With reference to the concept of "*instruments admitted for the purpose of participatory financing*" we find specific references in the very text of the standardisation norm, where in art. 2 para. (1) letter (n) the Union legislator clarifies it in the sense in which it means "the social parts of a limited liability company that are not subject to any restrictions likely to effectively prevent their transfer, including restrictions on how these social parts are offered or presented to the public".

The concept of "client" in the union vision actually implies two meanings, namely "investor" and "project developer", in other words the two actors "face to face" "to do business" through the online platform, facilitated by the administrator or operator of financing services (provider of participatory financing services)<sup>6</sup>.

Whenever the crowdfunding service is about facilitating the granting of loans, the funding platform brings face to face in the digital environment the *investor* who can be a natural or legal person who grants loans and the *project developer* who intends to obtain funding through the crowdfunding platform. In the event that a crowdfunding service regarding the placement is offered through a platform, without a firm investment commitment, the *investor* will become a "player on the platform" in order to acquire securities or instruments admitted for the purpose of crowdfunding.

#### *Categories of Obligations Incumbent on Providers of Participatory Financing Services*

As stipulated in art. 3 paragraph (1) of Regulation (EU) 2020/1503, crowdfunding services can only be provided by a legal entity that is established in the European Union and has been authorised as a crowdfunding service provider by an authority competent authority of the member state in which the request for authorisation was registered in order to acquire this qualification.

References regarding the mandatory conditions to acquire the quality of crowdfunding service provider are not clearly identified by the Union legislator, however, they can be derived from the provisions of Article 12 of the Union standardisation norm, in the sense that, in order to be authorised in in this capacity, the following elements are required:

- (a) the name of the potential service provider (including the legal name and any other commercial name to be used), the address of the internet page operated by that provider and its physical address;
- (b) the legal form of organisation;
- (c) the constitutive act of the potential supplier;

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<sup>6</sup>Lazăr (2023).

- (d) identification of the types of services to be provided on the crowdfunding platform, including where and how the crowdfunding offers will be marketed;
- (e) a description of the prudential guarantees of the potential crowdfunding service provider in accordance with art. 11, including proof that it meets these guarantees;
- (f) the identity of the natural persons responsible for the administration of the potential provider of crowdfunding services, including proof that they enjoy a good reputation (for example, about the absence of a criminal record regarding cases of violation of the provisions of domestic law in commercial matters, of insolvency, in the field of financial services, in the field of combating money laundering, in the field of fraud) and possess sufficient knowledge, skills and experience to ensure the administration of the potential crowdfunding service provider;
- (g) a description of the procedures developed by the potential crowdfunding service provider to:
  - i. verify the correctness and clarity of the information contained in the key investment information sheet;
  - ii. control and protection of data processing systems<sup>7</sup>;
  - iii. to handle customer complaints.

#### *The Obligation to Report Annually the List of Projects Financed through its Financing Platform*<sup>8</sup>

A first obligation incumbent on the supplier, as stipulated by the Union legislator in the framework of art. 16 of Regulation (EU) 2020/1503, consists in reporting to the competent authorising authority, the projects financed through the crowdfunding platform, specifying for each: the project developer and the amount collected, but also aggregated information regarding investors and the amounts invested broken down into depending on the tax domicile of the investors, distinguishing between sophisticated and unsophisticated investors.

#### *Obligation to Inform Customers*

As the Union legislator states in art. 19-21 and art. 23 of Regulation (EU) 2020/1503, crowdfunding service providers have the obligation to convey to customers, in a fair and unequivocal manner, in a place visible, including on each mobile application and website on which the offer is made, all information, including advertising communications, references regarding crowdfunding services or investments (for example, the provider of crowdfunding services makes available to potential investors a sheet with essential information regarding the investment, developed by the project developer for each crowdfunding offer),

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<sup>7</sup>Fabiano (2017).

<sup>8</sup>Based on these reports, ESMA develops and publishes annual aggregated statistics on the crowdfunding market in the European Union, on its website: <https://www.esma.europa.eu>

financial risks, costs but also the commissions related to them. The information may also refer to the fact that their crowdfunding services are not covered by the deposit guarantee scheme established in accordance with Directive 2014/49/EU or that the securities or instruments admitted for the purpose of crowdfunding purchased through their platform of crowdfunding are not covered by the investor compensation system established in accordance with Directive 97/9/EC.

In the event that crowdfunding service providers apply credit rating to projects or suggest pricing for offers on their crowdfunding platform, they shall provide a description of the method used to calculate such credit ratings or pricing.

Last but not least, whenever the crowdfunding services consist of facilitating the granting of loans, the service providers have the obligation to publish on their financing platforms (on the provider's web page) in a visible place, annually, the rates of default related to crowdfunding projects.

#### *Obligation to keep Records of Services and Transactions carried out on Online Financing Platforms*

In the light of the provisions of the standardisation rule, crowdfunding service providers are obliged to keep all records related to their services and transactions on a durable medium for a period of at least five years, as well as the contracts concluded by them with their clients. It should be emphasised that, in order to ensure the transparency of financing services on specialised online platforms, providers have the obligation to submit due diligence so that their customers have permanent access to the records of the services.

#### *Obligations Regarding Advertising Communications*

As regulated in art. 27 of the Union regulation, financing service providers have the obligation to transmit advertising communications regarding their services, including those outsourced to third parties, respecting the following requirements:(a) One or more of the official languages of the Member State in which the advertising communications are broadcast or a language accepted by the competent authorities of that Member State is used. (b) The information must be correct, clear and consistent with the information contained in the key investment information sheet.<sup>9</sup>

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<sup>9</sup>In Romania, the responsibility to supervise compliance and to ensure compliance by crowdfunding service providers with legal acts and administrative acts applicable to advertising communications, rests with F.S.A.

## Peculiarities of Crowdfunding Implementation in Romania

### *Authorisation in Romania, as a Provider of Participatory Financing Services*

As can be seen from the content of this study, crowdfunding is a particular way of multi-financing available to startups and SMEs for various projects and business, carried out through digital platforms<sup>10</sup>.

Circumscribed by the provisions inserted in art. 3 paragraph 1 in conjunction with art. 12 of Regulation (EU) 2020/1503, the implementing text of Law no. 244/2022<sup>11</sup> specifically identifies the essential elements that a company must take into account for authorisation in Romania as a provider of participatory financing services, namely -

- (a) the notification of the Financial Supervisory Authority of Romania in order to authorise the operation according to the provisions of art. 12 of Regulation (EU) 2020/1503, with the compliant application of the regulatory technical standards drawn up by ESMA and EBA and approved by the delegated regulations of the European Union Commission, and also the submission of supporting documents in this regard. These documents refer to the terms and conditions of use of the platform, to the draft contracts that will be concluded between investors and project developers through the crowdfunding platform, to the activity program or to the business continuity plan, to the description of operational risks and prudential guarantees, to the description of the governance and internal control mechanisms, to the procedures used for the control and protection of data processing systems, the description of the internal rules regarding the conflict of interests, etc. With reference to the provisions of art. 12 paragraph 2 letter (b) of Regulation (EU) 2020/1503, namely the legal form of the potential supplier, they are supplemented with the provisions of art. 6 paragraph 2 of Law no. 244 of 2022, in the sense that in Romania, the crowdfunding service provider is established as a Romanian legal entity, according to the provisions of Law no. 31/1990 republished;
- (b) ensuring the fulfilment of the minimum prudential requirements provided for by Regulation (EU) 2020/1503, in the sense that a crowdfunding service provider must permanently have prudential guarantees<sup>12</sup> at least equal to the greater of the following: (a) the amount of EUR 25,000; (b) one quarter of the previous year's fixed overheads, revised annually;
- (c) performing an IT audit regarding the IT systems used, regarding compliance with the Norm issued by the Financial Supervision Authority under no. 4 of February 28, 2018 regarding the management of operational risks generated by the IT

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<sup>10</sup> Worldwide, the most famous crowdfunding sites are Kickstarter and Indiegogo, from the USA. The first one does not allow financing projects by selling social shares, but it is very popular among startups who want to get funds by selling their products to supporters. Indiegogo was launched in 2008 and is headquartered in San Francisco, with offices in Los Angeles and New York.

<sup>11</sup> Law no. 244 of 20 July 2022.

<sup>12</sup> Prudential guarantees can be represented by own funds or insurance policies or a combination thereof.

systems used by entities authorised/approved/registered, regulated and/or supervised by the F.S.A.,<sup>13</sup> and

- (d) whenever required, identifying and contracting the services of external providers which, as the case may be, could be: payment service providers, cloud service providers, IT services or know-your-customer (KYC) services.;

Regarding the natural persons involved in the administration of the potential crowdfunding service provider, the text of art. 12 paragraph (3) letter b of the union standardisation norm is supplemented with the provisions of art. 6 paragraph 3 of the implementing law, so the natural persons involved in the administration of the potential crowdfunding service provider must hold, at a collective level, sufficient knowledge, skills and experience to ensure the administration of the potential crowdfunding service provider. It is necessary to mention that, this condition is to be considered fulfilled if at least half of the members of the board of directors/supervisory board or other bodies or functions assimilated to them (i) are graduates, with a bachelor's or master's degree, of a higher education institutions in the financial-banking, economic, legal, accounting, auditing, public administration, information technology fields, or (ii) have professional experience in the financial field in management positions of at least 3 years.

*Particularity of the Attributions of the Financial Supervisory Authority (FSA) in Romania, in the matter of Crowdfunding*

It should be emphasised that, pursuant to art. 6 of Law no. 244/2022, in order to provide crowdfunding services on the territory of Romania, crowdfunding platforms must obtain an authorisation from the Financial Supervisory Authority - FSA whose competence, in the light of art. 2 of Law no. 244/2022 consists in authorising, supervising and controlling financing service providers<sup>14</sup>. F.S.A. collaborates with the National Bank of Romania, hereinafter referred to as B.N.R., according to the provisions of art. 33 of Regulation (EU) 2020/1503, if authorisation requests come from entities that already hold a valid authorisation issued by B.N.R. as a credit institution, electronic money issuing institution or payment institution or have been registered as specialised account information service providers, legal entities or non-banking financial institution<sup>15</sup>.

References regarding the procedural mechanism that must be followed by the applicant in order to acquire the quality of provider of participatory financing

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<sup>13</sup>On the website of the Romanian Financial Supervisory Authority one published the list of external IT auditors registered with the Financial Supervisory Authority who can be considered for the preparation of an IT audit report

<sup>14</sup>The provisions regarding the organisation and operation of ASF Romania are stipulated in Law no. 113 of April 13, 2013.

<sup>15</sup>In accordance with the provisions of O.U.G. no. 99/2006, approved with amendments and additions by Law no. 227/2007 with subsequent amendments and additions, of Law no. 209/2019 regarding payment services and for the modification of some normative acts, and of Law no. 210/2019 regarding the activity of issuing electronic money or of Law no. 93/2009 with subsequent amendments and additions.



services can be found in the content of art. 7-10 of Law no. 244/2022. Specifically, any applicant for authorisation to provide crowdfunding services submits an application addressed to F.S.A., on the basis of which they will be entered in the F.S.A. Register. In accordance with art.8 and art.9 paragraph (1) of the law on application of the Union regulation, the Romanian authority has the power to withdraw the authorisation granted to the crowdfunding service provider, notifying ESMA in this regard, in the situations provided for in art. 17 paragraph (1) of Regulation (EU) 2020/1503:

- did not use the authorisation within 18 months from the date it was granted;
- he expressly renounced the authorisation that had been granted to him;
- has not provided crowdfunding services for nine consecutive months and at the same time is no longer involved in the administration of existing contracts that were originally concluded by connecting investors interested in providing financing through the use of its crowdfunding platform;
- obtained the authorisation through irregular means, including false statements in his application for authorisation;
- no longer fulfils the conditions under which the authorisation was granted;

As stipulated in art. 9 paragraph 2 of Law no. 244/2020, in application of the provisions of art. 17 paragraph 2 of Regulation (EU) 2020/1.503, A.S.F. has the obligation to notify both ESMA and the competent authorities of other member states if the crowdfunding service provider has notified A.S.F. regarding the intention to provide cross-border crowdfunding services in the respective member states according to art. 18 of Regulation (EU) 2020/1503.

#### *The Sanctioning Regime for Violating the Provisions on the Operation of Crowdfunding Platforms*

Regulation (EU) 2020/1503 states that, until November 10, 2021, EU member states, including Romania, must regulate, through implementing rules, fines for crowdfunding platforms and for their heads, as natural persons, in case of irregularities, these having a level of at least 500,000 euros or up to 5% of the turnover.

With reference to this issue, we mention that in Romania, the contravention fines regime was regulated by Law no. 244/2022, their amount being between 10,000 RON and 2,433,700 RON or up to 5% of the total annual turnover of the crowdfunding platform, in case of irregularities. Also, administrators of multi-financing platforms in Romania will risk fines between 5,000 RON and 2,433,700<sup>16</sup> RON for various irregularities. Depending on the seriousness of the

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<sup>16</sup>This limit of 2.43 million lei, proposed by the Romanian authorities, represents 500,000 euros at the rate of November 10, 2020, according to Regulation (EU) 2020/1503.

act, the platforms can also bear complementary sanctions, such as the withdrawal of the authorisation to operate on the market.

What deviations are considered by the legislator? Mainly, as regards crowdfunding platforms, the irregularities referred to in Law no. 224/2022 are contained in Regulation (EU) 2020/1503 and refer to situations where a crowdfunding service provider addressed to potential investors from Romania:

- in applying the provisions of art. 23 para. (2) of Regulation (EU) 2020/1503, do not write in Romanian the sheet with essential information regarding the investment.
- does not fulfil its obligation to act "honestly, fairly and professionally in the interests of his clients".
- an advertising communication disproportionately targets individual crowdfunding projects or offers (for example, providing unclear information that may mislead investors regarding the projects subject to the crowdfunding campaign).
- in the advertising communications in Romania, formulate expressions like "the biggest", "the best provider of crowdfunding services", expressions prohibited in accordance with the provisions of the applicable law.
- does not ensure that all advertising communications, relating to their services, are clearly identifiable as such.
- refuses to cooperate or comply in the event of an investigation, control or request from the authorities.
- proposes to individual investors crowdfunding projects that do not correspond to the risk indicators determined by the investor.
- violates its obligations regarding prudential safeguards. In this regard, we remind you that in accordance with the provisions of Regulation (EU) 2020/1503, crowdfunding service providers must permanently have prudential guarantees of at least 25,000 euros. Likewise, if the platform also facilitates the granting of loans, it must also have prudential guarantees equivalent to 25% of the previous year's fixed general expenses, reviewed annually, which should include the cost of administering the loans for a period of 3 months.

It is necessary to remember in the light of the provisions of application, on the territory of Romania, the platforms will not be allowed to make estimates regarding their future achievements or to publish the statements of previous, present or potential investors in this sense. In addition, they have an obligation to warn potential investors, in all advertising communications being introduced the saying: "Read the key investment information sheets at project or platform level before investing in the platform".

## Conclusions

In the synthesis of the above, we appreciate that the union standardisation norm was adopted with the aim of promoting cross-border crowdfunding services, in order to facilitate the exercise of the freedom to provide and benefit from these services on the internal market of the European Union.

We also believe that the view of the Union legislator regarding the issue analysed in this study is circumscribed by the Union policy of maintaining a standard of investor protection, at the same time aiming to reduce the risks associated with crowdfunding but also to ensure a fair treatment for all customer

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