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CROWD-FUND-PORT

DELIVERABLE D.T4.1.1

Analysis of legal systems of CE countries on crowdfunding

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CONTENT

DISCLAIMER

ON BEHALF OF THE UNIVERSITY OF BOLOGNA, THE PRESENT DELIVERABLE HAS BEEN DRAFTED BY GIUSEPPE CONTISSA (PHD, RESEARCH FELLOW), FEDERICO FERRI (PHD, RESEARCH FELLOW), GIULIA LASAGNI (PHD, RESEARCH FELLOW) AND PIERA SANTIN (PHD, RESEARCH FELLOW), UNDER THE SCIENTIFIC SUPERVISION OF PROF. ANTONINO ROTOLO (UNIBO COORDINATOR), PROF. MICHELE CAIANIELLO, PROF. FEDERICO CASOLARI, PROF. ADRIANO DI PIETRO, PROF. ANDREA MONDINI.

1. Introduction

D.T4.1.1 is one of the streams of the thematic work package T4, renamed “Increasing competences of decision makers for crowdfunding”, whose overall objective is to provide legal knowledge to crowdfunding operators seeking to act in CE EU Member States others than the one where they are located.

This is the only deliverable leading to Activity A.T4.1 “Analysis of legal issues”. It serves to describe the state of the art of crowdfunding legal regimes in the countries participating to the present project and envisages current pros and cons also with an aim to identify new legal scenarios. More precisely, this deliverable is made up of three stages.

- overview of national legislations and authorization systems with focus on already developed Italian regulation;
- identification strong/weak points for international transfer possibilities;
- proposal for unifying rules.

Thus, D.T4.1.1 has to be structured not only to describe what it is going on but also to pave the way for the more specific tasks under Activity A.T4.2, entitled “Capacity building for improvement of legal issues”.

In this regard, D.T4.1.1 is at the same time addressed to:

- crowdfunding core operators, in order to provide them with useful information for the development or mainstreaming of their cross-border activities;
- decision-makers, in order to provide them with a more accurate and exhaustive knowledge of the current legal situation of crowdfunding and to suggest some further initiatives to take.

Being the initial step of the only activities of the present project having purely legal nature, D.T4.1.1 has been prepared by legal scholars of the University of Bologna. It is the output of a 5-month research period (February – July 2017) during which the authors merged competences referred to different law disciplines and fields:

- European Union law;
- tax law;
- legal informatics;
- criminal law.

2. Methodology

As formally stated in the Work Plan of the project, the legal analysis carried out in DT 4.1.1 is framed as follows.

- Firstly, the authors will provide the state of the art of the overall multilevel regulation for crowdfunding. In taking stock of the evolution of the crowdfunding legal framework in the systems involving the CE EU Member States, the authors will:
  - look at the most relevant international law norms plus the acts/documents related to crowdfunding which were adopted by the EU or on behalf of it;
  - assess the Italian applicable regulation, since it was the very first example of domestic discipline on crowdfunding within the CE EU areas;
  - assess the specific regulations subsequently adopted by other CE EU Member States, also in order to verify whether they can provide further hints for the evolution of further national regimes;
  - focus on the practice emerged in the CE EU Member States who still do not have provided a domestic legal framework for crowdfunding.

  Although the authors will include the CE EU Member States in three major groups, basing on the existence, evolution or lack of national regulations on crowdfunding, each country involved in the project will be the subject of a dedicated part in the deliverable.

- Secondly, following the analytical part on multilevel regulations for crowdfunding, the authors will identify strong and weak points about transboundary potentials of crowdfunding amongst the CE EU countries involved in the project.

- Thirdly, basing on the elements acquired, the authors will explore possible solutions, if any, for unifying national legislations by means of external and/or internal interventions; for example, through EU law acts, amendments to/adoption of domestic regulations, reorientation of national practice, etc.

Given the need to go beyond a mere description of the domestic legal frameworks for crowdfunding in the CE EU countries, and due to the recent evolution and hybrid nature of the core subject, the authors will refer to multiple legal systems and sectors; in fact, as explained in the Project Meetings held in Budapest (January 2017) and Bologna (May 2017) the domestic legal frameworks for crowdfunding are, or will be conditioned by international and EU law norms governing many aspects and issues. That will also serve to confer a higher degree of exhaustiveness to the analytical streams developed in this deliverable and to ensure a fair threshold of consistency between the deliverables under the leadership of the University of Bologna.

DT 4.1.1 lays on objective definitions of key concepts. Such definitions are offered in the next section.

The overall work leading to this DT has been carried out by relying on various sources and tools, such as:

- legal official texts from different legal systems;
- scholars' contributions;
- technical reports and studies;
- local practice examples concerning relations between crowdfunding operators.

The authors also created a dedicated questionnaire, aimed at gathering relevant inputs from the subjects commonly involved in crowdfunding projects. Indeed, the completion of all the stages of the deliverable in part depended on the knowledge of some major factual issues of local crowdfunding actors, especially where domestic regulations on crowdfunding lack. The questionnaire was first submitted to the consortium in February 2017, right after the starting time of Activity A.TA. 4.1, and circulated after consultations with the other partners, who committed to spread it to relevant local crowdfunding actors.

2.1. Key concepts: definitions

A) Types of crowdfunding

As reference to supranational level will be frequently made and given the need to move towards common rules, types of crowdfunding will be conceived in accordance with the European Commission (see "Commission Staff Working Document on Crowdfunding in the EU Capital Markets Union", doc. SWD(2016) 154 final, 3 May 2016, Annex I -> https://ec.europa.eu/transparency/regdoc/rep/10102/2016/EN/10102-2016-154-EN-F1-1.PDF), and within a legal framework; the taxonomy applied must thus be in line with the applicable legal norms and practices in CE-EU Member States.

- Investment-based crowdfunding. "Companies issue equity, debt or contractual instruments to crowd-investors, typically through an online platform (although this is not always the case)".
- Lending-based crowdfunding (also known as peer-to-peer lending or marketplace lending). "Companies or individuals seek to obtain funds from the public through platforms in the form of a loan agreement".
- Invoice trading crowdfunding. "A form of asset-based financing whereby businesses sell unpaid invoices or receivables, individually or in a bundle, to a pool of investors through an online platform".
- Reward-based crowdfunding. "Individuals donate to a project or business with expectations of receiving in return a non-financial reward, such as goods or services, at a later stage in exchange of their contribution".
- Donation-based crowdfunding. "Individuals donate amounts to meet the larger funding aim of a specific charitable project while receiving no financial or material return".
- Hybrid models of crowdfunding. "Combine elements of the other types of crowdfunding".

B) Crowdfunding project

Again, this expression is conceived according to the language used by the European Commission (see "Crowdfunding: Mapping EU Markets and Events Study" [Crowdsurfer and Ernst & Young", 30

September 2015, p. 16 -> https://ec.europa.eu/info/sites/info/files/crowdfunding-study-30092015_en.pdf]): “an individual fundraising attempt presented on a platform within the scope period”.

C) **Main actors involved in crowdfunding projects**

- Promoter -> anyone who launches a crowdfunding campaign through a platform;
- Platform -> any natural or legal person providing the crowdfunding platform services;
- Supporter -> anyone supporting the crowdfunding campaign launched by the promoter.

3. Analysis per legal system

3.1. International and EU law

3.1.1. International Law

The domestic legislation of EU Member States most of the time has to be compatible with legal provisions emerging from superior legal orders, especially the legal order of the International Community.

Need for compliance with relevant rules of the International community becomes even more urgent where domestic legal systems do not fully regulate the subject matter and in particular where national applicable norms tend to belong to different legal disciplines and sectors. That is the case of crowdfunding.

Furthermore, it is well known that crowdfunding potentials depend on the extent to which the actors involved in the activities amounting to crowdfunding campaigns succeed in operating on an international scale, while purely national legal relations are less important.

As one can see, cross-border crowdfunding necessarily opens up broader legal systems, which should be deepened in the hope to highlight common rules to be relied on as "starting points" for the on-going legal analysis.

Therefore, some brief preliminary considerations on applicable International law norms are deemed to be useful with a view to affording more consistency and comprehensiveness to the present deliverable.

3.1.1.1. Applicable International Law: Sources and Subjects

The key international legal norms to be taken into account for the evolution of the legal discourse on cross-border crowdfunding under the CE EU Member States point of view are provisions contained in international treaties. Indeed, those treaties can be:

- bilateral ones, which means agreements concluded either by one of the EU Member States or the EU, on the one hand, with a third country, on the other;
- multilateral ones, which means agreements to which are parties more than two subjects; for example, some multilateral treaties are mixed, since their parties are the EU and its Member States, on the one hand, plus a third country, on the other.

Given that the role played by the law of the European Union will be assessed in the following chapter, here it is sufficient to recall that States and international organizations bound by international treaties obligations are for sure obliged to respect them. So, being parties to these treaties, CE EU Member States must comply with the obligations provided since the entrance into force of the treaty, unless the parties agreed otherwise.

As for the subject matters of the agreements, the attention shall be focused on the following international treaties and legal systems.

A) Trade and investments

National and supranational legal regimes on crowdfunding will have to refer to the well-known General Agreement on Tariffs and Trade (GATT -> https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf) and General Agreement on Trade in Services (GATS -> https://www.wto.org/english/docs_e/legal_e/26-gats.pdf), especially if the crowdfunding project concerned involves actors established in non-EU

countries as well: for example, where a company established in a non-EU country which is a member to the GATS owns a company of a CE EU country participating in a crowdfunding project. Both agreements are connected to the World Trade Organization (WTO) system and open up to a higher degree of liberalisation for trade in goods and services.

Within this framework cross-border crowdfunding can be spurred or at least influenced also by several recent commercial agreements, chiefly Free Trade Agreements (FTAs). Agreements of such kind have been negotiating or have been concluded by the European Union and/or its Member States with third countries; to list but a few examples:

- South Korea (agreement already into force -> http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2011:127:FULL&from=EN);
- Canada ("CETA", already concluded, subject to provisional application, waiting for Member States' ratifications -> http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/);
- Japan (agreement about to be concluded -> http://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement/);
- Singapore (agreement about to be concluded -> http://trade.ec.europa.eu/doclib/press/index.cfm?id=961);
- the United States ("TTIP", currently under negotiation -> http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230).

With regard to commercial and free trade agreements, a major emphasis has to be given to the provisions governing investment protection, since they are extremely important for investment-based crowdfunding. As noted by the European Commission ("Trade for All", 2015 -> http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf), the EU policy on foreign direct investments should support smarter use of new and existing financial, in line with the current EU growth strategy's objectives and priorities. To this extent, investments made by foreign partners are essentials; however, applicable rules are mainly set forth by the aforementioned commercial/free trade agreements.

As far as investment protection is concerned, a basic principle shall be followed by all the States parties to these agreements (and other commercial/free trade agreements containing investment chapters): the guarantee of a high level of protection to the foreign investor. This implies that limits to foreign investments in the States where the investment has to be completed shall be reduced as much as possible. In terms of legal concerns for investment-based crowdfunding in CE EU area, it means that the CE EU Member States within which the investment is finalized as a general rule is not allowed to impose burdens on the foreign investor who devotes economic resources to a crowdfunding campaign.

Although trade agreements concluded by the EU are mixed agreements (because of the membership of the EU Member States), in its May 2017 opinion on the EU-Singapore Free Trade Agreement (-> http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=160019) the Court of Justice of the European Union (CJEU) acknowledged that the European Union owns a wide range of exclusive competences; basically, the CJEU broadened the set of EU's powers against the ones of the Member States. So, when negotiating and concluding trade agreements, also many aspects potentially affecting the evolution of cross-border crowdfunding will probably be dealt with by the EU itself.

B) Patenting of ideas

Intellectual property is an extremely sensitive field for the development of transnational crowdfunding. Indeed, who launches a crowdfunding campaign acts with a view to receiving external support, but this

implies that the idea behind the project gets disclosed. So, in case of lack of strong guarantees for the "owner" of the idea, transnational crowdfunding campaigns would hardly be launched. This is why legally binding instruments on intellectual property, especially on patenting of products and processes, are relevant for the mainstreaming of cross-border crowdfunding.

However, in principle this kind of instruments should be tracked down in the law of the International Community.

Firstly, many of those instruments fall under the legal system established by the World Intellectual Property Organization (WIPO), to which all the CE EU Member States belong. In particular, transboundary crowdfunding is expected to further develop also provided that the Munich Convention on the European Patent (-> http://www.epo.org/law-practice/legal-texts/html/epc/2016/e/ma1.html) is efficiently implemented by its parties. It should be recalled that the Munich Convention did not establish a unique European patent providing the applicant with protection in the whole European territory. Instead of establishing a unitary effect patent, the Munich Convention set up a centralized system for the grant of a patent, whilst national patent laws of the States where patent protection is sought keep applying.

Secondly, certain patent issues are also linked to the WTO system, notably to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS -> https://www.wto.org/english/docs_e/legal_e/27-trips.pdf). This agreement enshrines requirements and minimum standards that all members must observe to better protect intellectual property worldwide. Above all, TRIPS parties must ensure the respect of the principles of non-discrimination and most-favoured-nation treatment established in arts. 3 and 4. For sure, some exceptions to the regime provided by the TRIPS apply (as provided, for example, by art. 30, on the national legitimate exceptions to the rights conferred by patents) and members to TRIPS still retain meaningful substantial and procedural powers (for example, about the use of the good/process without the authorization of the right holder or about the procedures for revocation/forfeiture). Nevertheless, issues on the protection of the intellectual property rights (patent rights included) of ideas to be supported during crowdfunding campaigns will certainly be governed by TRIPS basic principles.

3.1.2. EU Law

Following considerations made in the previous chapter, when adopting acts of legal nature, the European Union must respect existing international law rules; however, at the same time the law of the European Union is generally binding for the EU Member States.

Thus, a legal analysis concerning the domestic regulations of CE EU countries in the field of crowdfunding needs to be conducted by considering the applicable law of the EU first, especially in the perspective of envisaging proposals for unifying rules.

In doing so, a material division between EU law acts shall be made, which is justified as follows.

- EU law directly covering crowdfunding. Firstly, it is fundamental to explore the legal system of the European Union to assess whether the EU institutions have so far adopted acts concerning crowdfunding. In the affirmative, the nature and scope of those acts shall be examined, with an aim to understand if and to what extent CE EU countries are bound by supranational rules.
- EU law governing certain sectors making an impact on the legal evolution of cross-border crowdfunding (especially in CE EU countries). Secondly, given that crowdfunding is a quite recent subject and that it touches upon several different sectors, the analysis shall be also intended to identify and select the most relevant sectors and to report the key aspects of the applicable EU law norms. In particular, this part of the research will mainly (although not exclusively) address the area of the EU internal market.

3.1.2.1. EU law on crowdfunding: state of the art and short-term scenarios

The European Union has recently started to deal with crowdfunding but it has not brought about any regulatory framework for this topic and that is not surprising; indeed, in some EU Member States crowdfunding initiatives have been developed only over last years and too many differences in terms of volumes and issues of crowdfunding activities still exist at national level.

Therefore, the analysis on the EU law directly covering crowdfunding will be developed through the following points.

A) Most relevant EU law acts and EU-related documents

- This is the most relevant EU law act directly covering crowdfunding:

i. "Unleashing the potential of Crowdfunding in the European Union" (European Commission, doc. COM(2014) 172 final, 27 March 2014 -> http://ec.europa.eu/internal_market/finances/docs/crowdfunding/140327-communication_en.pdf). As suggested by the title, the European Commission in 2014 started to engage in the "promotion" of crowdfunding. This is the very first EU secondary law act openly dedicated to crowdfunding. It contains a general overview of the main aspects of crowdfunding, notably distinctive characteristics, way of functioning and basic challenges of each model. In particular, the European Commission acknowledged that regulatory frameworks applicable to crowdfunding up to 2014 were weak and fragmented; it also mentioned a number of EU legislative acts governing subjects theoretically connected to one or more types of crowdfunding (some of those acts will be illustrated *infra*). In concluding this first analysis, the Commission made it clear that it would not commit to work on upcoming regulations for crowdfunding. Rather, it decided just to monitor crowdfunding evolutionary stages; to this extent, the European Commission announced it would set up the "European Crowdfunding Stakeholder Forum".

- These are the most relevant documents on crowdfunding issued by EU institutional subjects:

i. "Summary of the Responses to the Public Consultation on Crowdfunding in the EU" (European Commission, March 2014 -> http://ec.europa.eu/finance/consultations/2013/crowdfunding/docs/summary-of-responses_en.pdf). In 2013 the European Commission started dealing with crowdfunding by promoting a consultation addressed to relevant stakeholders. The outcome of the consultation served to clarify the first steps the European Commission would take to promote this new phenomenon. First of all, the majority of the respondents agreed on a possible definition for crowdfunding: "an open call to the public to collect funds for a specific project". Respondents also highlighted some of the key barriers for the development of crowdfunding in general; most of those barriers pertain to the areas and sectors listed in para. 3.1.2.2. That has been helping legal scholars to identify the most sensitive fields influencing the spreading of crowdfunding potentials at national and supranational level. As for procedural issues, not all the respondents proved worried by the lack of crowdfunding legal disciplines; however, most of them declared that legal clarity on legal status of platforms and on the legal treatment of contributions matter, as well as the lack of transparency about the project or business plan. Nevertheless, no particular requests for EU action were made.

ii. "Crowdfunding Explained" (European Commission's guide, May 2015 -> https://www.discuto.io/sites/default/files/crowdfunding_explained.pdf). This is a brief

practical guide for potential crowdfunding operators. It can be consulted to acquire technical knowledge to be spent when conducting legal analyses.

iii. "Commission Staff Working Document on Crowdfunding in the EU Capital Markets Union" (doc. SWD(2016) 154 final, 3 May 2016 -> https://ec.europa.eu/transparency/regdoc/rep/10102/2016/EN/10102-2016-154-EN-F1-1.PDF). As crowdfunding has gradually gained momentum in many EU Member States, more updates on behalf of the European Commission were made. This working document explores some topical aspects of crowdfunding in the framework of a Capital Market Union (see *infra* for further considerations). The leading crowdfunding business models are investments and loans, and national tries to regulate those types of crowdfunding have been made in a few Member States, even if different bespoken regimes emerged. This paper mainly focuses on authorization issues for platforms and rules applicable to investing activities and lending/credit intermediation. Some problems making quite a remarkable impact over cross-border crowdfunding potentials are illustrated, such as: investors losing part or all of their capital or not getting the returns they expect; dilution in the case of equity crowdfunding; inability to quit investments; insufficient information or inability to price correctly the securities invested in; conflict and misalignment of interests between issuers, platforms and investors; insolvency of the platform operators; security of client data; platforms may be used for illicit activities; fraud; money laundering. Limits impeding a satisfactory development of transboundary crowdfunding keep preventing the EU from taking more incisive actions.

iv. "Crowdfunding in Europe" (European Parliament's Briefing, January 2017 -> http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/595882/EPRS_BRI(2017)595882_EN.pdf). This short briefing is the first European Parliament's paper having crowdfunding as its own core subject. It basically takes stock of the EU's initiatives on crowdfunding.

- These are the most relevant documents produced by subjects other than the EU institutions, even though on behalf of the European Commission:

i. "Crowdfunding: Mapping EU Markets and Events Study" (Crowdsurfer and Ernst & Young, 30 September 2015 -> https://ec.europa.eu/transparency/regdoc/rep/10102/2016/EN/10102-2016-154-EN-F1-1.PDF). It is a technical study whose outcomes can contribute to basing multilevel programmatic and/or legal initiatives on crowdfunding. This study is useful for two reasons. Firstly, it offers technical data about platforms' activities and crowdfunding projects trends. For example, it is showed that cross-border crowdfunding projects at that time were increasing in number but still were just a few; it also showed that equity and loan based crowdfunding models were developing faster than the other types of crowdfunding. That can help legal scholars to better target certain areas and sectors which could potentially be subject to legal reforms over next years. Secondly, this study provides indications on where to find examples of developing legal schemes for crowdfunding; unfortunately, only the first version of the Italian discipline is mentioned as far as CE EU countries are concerned. Moreover, the study focuses on UK platforms and projects, as it was conducted before the UK decided to leave the EU.

ii. "Assessing the Potential for Crowdfunding and Other Forms of Alternative Finance to Support Research and Innovation" (Ernst & Young, Open Evidence, Politecnico di Milano, European Crowdfunding Network, 2017 -> https://view.publitas.com/open-evidence/crowdfunding_final-report/page/1). This study covers alternative finance in general. It is aimed at understanding the role of alternative finance for research and innovation, identifying the challenges and bottlenecks for full development of alternative finance and recommending policy actions. Therefore, although the analysis behind the study is driven falls

within the research and innovation area, it contains useful data and hints for more specific considerations of legal nature on cross-border crowdfunding and it also updates (at least in part) the study summarised in the previous point. In particular, as it will be recalled later on, this study confirms that there are too many national legal gaps negatively affecting a successful evolution of alternative finance models like crowdfunding; said gaps mainly concern platforms and cross-border investments.

- These are the most relevant EU Law acts not directly dealing with crowdfunding but contributing to define the EU framework of crowdfunding:

  i. "EUROPE 2020 A strategy for smart, sustainable and inclusive growth" (European Commission, doc. COM(2010) 2020 final, 3 March 2010 -> http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC2020&from=en). Being the act through which the new EU's growth strategy was launched, Europe 2020 draws down the guidelines leading to the envisaged growth model for the EU from 2010 to 2020. Such paradigm requires growth to be smart, sustainable and inclusive all at once. Obviously, Europe 2020 does not mention crowdfunding, but for sure crowdfunding began to appear in the EU's agenda because of the need to provide support to SMEs.

  ii. "Review of the "Small Business Act" for Europe" (European Commission, doc. COM(2011) 78 final, 23 February 2011 -> http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0078&from=EN). Small Business Act (SBA) was launched by the European Commission in 2008 as a preliminary strategy to support SMEs and it was then amended in 2011; SBA is now a manifestation of the Europe 2020. Even though crowdfunding is not mentioned in the 2011 version of the SBA either, it goes without saying that "thinking small first", that is to say, qualifying SMEs as pivotal drivers for growth and employment, is a slogan urging the EU and Member States to mainstream alternative finance forms within the EU. More specifically, SBA purposes match the need for crowdfunding development in favour of SMEs; Member States' transition to new models like crowdfunding appears to be advisable also because, as noted by the European Commission, until a few years ago considerable national administrative burdens for the implementation of the SBA existed. Accordingly, Member States are called on to reduce burdensome procedures for the SMEs' access to finance and market.

  iii. "Survey on access to finance for cultural and creative sectors" (European Commission, October 2013 -> http://ec.europa.eu/assets/eac/culture/library/studies/access-finance_en.pdf). Here the European Commission stressed the connection between the increasing in the diffusion of cultural and creative sectors and the need to foster crowdfunding as a means for financing those sectors (especially for particularly small sized actors) in the framework of the new growth strategy Europe 2020.

  iv. Resolution on Building a Capital Markets Union (European Parliament, 9 July 2015 -> http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0268+0+DOC+XML+V0//EN). With this non-binding act, the European Parliament built up a stronger link between the need to move to a Capital Markets Union and to mainstream crowdfunding as a new model. The European Parliament state that: "(…) the CMU should create an appropriate regulatory environment that enhances cross-border access to information on the companies looking for credit, quasi-equity and equity structures, in order to promote growth of non-bank financing models, including crowdfunding and peer-to-peer lending; (…) disclosure of such information should be on a voluntary basis for SMEs; underlines that investor protection rules should apply to all financing models to the same extent, irrespective of whether they are part of bank or non-bank financing models; considers that

such an environment would also require more systemic resilience and supervision of systemic financial intermediaries outside the banking sector.

v. "Action Plan on Building a Capital Markets Union" (European Commission, doc. COM(2015) 468 final, 30 September 2015 -> http://ec.europa.eu/finance/consultations/2015/capital-markets-union/docs/summary-of-responses_en.pdf). Taken for granted the interconnections between crowdfunding and Capital Markets Union, in this communication the European Commission underlined the importance of crowdfunding (especially equity-based crowdfunding) for the start-up phase of SMEs. However, the European Commission seized the opportunity to inform once again that the EU legislation on (equity-based) crowdfunding could ring warning-bells: "The EU should strike a careful balance between the objectives of investor protection and continued expansion of crowdfunding. Premature regulation could hamper, not foster, the growth of this fast-growing and innovative funding channel".

vi. "Communication on the Mid-Term Review of the Capital Markets Union Action Plan" (European Commission, doc com(2017) 292 final, 8 June 2017 -> https://ec.europa.eu/info/sites/info/files/communication-cmu-mid-term-review-june2017_en.pdf). The European Commission noted that the transition to a Capital Markets Union is still ongoing, because of several matters. In particular, the European Commission specified that there are "long-standing and deep-rooted obstacles stand in the way of EU cross-border investment, undermining the efficiency of the EU economy"; as a result, cross-border equity-based crowdfunding will not rapidly expand if those limits are not adequately tackled.

B) Type and nature of the acts and documents concerned

Acts adopted by EU institutions are part of the EU law. It can be said that generally the acts through which the EU has been dealing directly and indirectly with crowdfunding are:

- communications of the European Commission;
- resolutions of the European Parliament.

Those acts certainly belong to the law of the European Union and can be qualified as "secondary EU law acts". However, they lack binding character and for this reason no obligations upon the EU itself, its member States or any legal/natural person can be laid down acts of this kind.

To the contrary, the other acts and documents are not part of the EU law.

C) Possible relevance of the EU law acts and EU-related documents

- EU law acts. Despite their non-binding nature, the acts the EU has been resorting to address the evolution of cross-border crowdfunding among the Member States should not be considered irrelevant. In fact, being of political, programmatic or technical nature, those acts can serve, for example:
  - to include crowdfunding within some "macro-priorities" of the European Union's agenda;
  - to urge the EU institutions and Member States to get engaged in legal discourses on crowdfunding;
  - to contribute to justifying the adoption of possible future legal binding acts or to "tailor" the scope of application of the latter;
  - to identify commitments for the institution concerned (self-restraint effect).

- EU-related documents (issued either by EU institutional subjects or non-EU institutional subjects). Even if they are not examples of EU law acts, these documents can serve
    - to stress the importance of crowdfunding for the EU;
    - to provide information on the EU institutions' standpoint on crowdfunding;
    - envisage possible multi-sectoral scenarios on crowdfunding at the EU level.

D) Approach emerging from the aforementioned acts and documents

The European Union's approach towards crowdfunding lays on a double perspective:

- focusing on the factors and conditions that can speed up a wider diffusion of crowdfunding;
- Underlying the importance of strengthening cross-border crowdfunding within the EU internal market, especially in the framework of the Capital Market Union.

E) Further legal aspects of crowdfunding at the EU level: estimated added values and risks.

By the above listed acts and documents, the following added values and risks concerning crowdfunding can be indicated which should be considered before framing any piece of legislation on this subject.

- Added values:
    - citizens' engagement and community building;
    - participation to innovation;
    - democratisation of finance;
    - alternative support to already existing "institutional channels" both at EU and national level.
- Risks:
    - fraud;
    - excessive burdens for platforms;
    - equity dilution and lack of liquidity;
    - investor's protection challenges;
    - loss of potential intellectual/industrial property rights;
    - money laundering.

F) Preliminary inputs and conclusions

The European Union is not going to adopt a regulatory framework on crowdfunding in the near future, and that for two main reasons:

- it is better to wait for a more evident cultural readiness and consequent evolution of crowdfunding under the practical and operational point of view;
- it is still more convenient to avoid the risk of getting crowdfunding operators bound by rigid obligations/limitations

For the moment, the European Commission will thus conduct a dedicated monitoring of the domestic evolution if crowdfunding in terms of national legal regimes and practices.

Nevertheless, the EU has been proving willing to dedicate efforts to the evolution of cross-border crowdfunding, so that some further preliminary inputs and conclusions can be drawn:

- a higher threshold of certainty about core concepts (for example, "platform"), types of crowdfunding and their main characteristics has been achieved;
- it is now clear that the EU will accord priority to investment-based and landing-based crowdfunding, which means that future supranational legal disciplines on crowdfunding, if any, will cover those forms of crowdfunding with economic return;
- crowdfunding should not be dealt with as an isolated sector but needs to be considered within a broader framework, with an emphasis on the EU internal market area and the capital market rules.

3.1.2.2. EU law on specific areas/sectors affecting the legal evolution of cross-border crowdfunding within CE EU countries

As already pointed out, rules applicable to crowdfunding could also be contained in norms governing other topics.

As for the additional areas/sectors to consider, the selection should be guided by the "relevance" criterion, that is to say, by the legal implications that those areas/sectors can have on the evolution of cross-border crowdfunding. When exploring those areas/sectors special reference will be made to most important secondary EU law acts, especially to the provisions affording discretionary powers to Member States.

Bearing in mind the above, the attention has to be directed towards the following areas/sectors.

A) Free movement of services

Moving from general to more specific considerations, it first has to be said that the activities carried out by the actors involved in cross-border crowdfunding projects are subject to the free movement of services regime. This is one of the fundamental freedoms enshrined by the EU primary law (arts. 56 ff. of the Treaty on the Functioning of the European Union – TFEU).

This fundamental freedom was further strengthened by the so called "Service Directive" (directive 2006/123/EC), which established an even more advantageous regime (in terms of procedures and limitations on host States' powers, see in particular arts. 5-10 and 16 of the directive) for the majority of service providers; in fact, only the activities listed in the directive do not fall within its scope of application.

Bearing in mind the above, it is necessary to mention some of the services not covered by the more favourable regime of directive 2006/123/CE (-> http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0123&from=IT, see the list provided in art. 2) but somehow relevant for the evolution of cross-border crowdfunding:

- all services related to tax sector;
- financial services, such as banking, credit, insurance and re-insurance, occupational or personal pensions, securities, investment funds, payment and investment advice;

These service activities are subject to the basic rules of arts. 56 ff. TFEU and can thus be subject to more national exceptions (in accordance with primary EU law).

B) Financial markets

The legal EU sector of financial markets is of primary concern for the evolution of (equity-based) crowdfunding, as stressed multiple times in the 2016 "Commission Staff Working Document on Crowdfunding in the EU Capital Markets Union".

In this sector, the EU tried to bring about a harmonization process for certain aspects by means of directives; the best known one is directive 2004/39/EC on markets in financial instruments ("MIFID" -> http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0039&from=EN), which was frequently amended until 2014 (directive 2014/65/EU -> http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0065&from=EN).

MIFID Directive applies to investment firms and regulated markets and imposes some common burdens upon EU Member States; it was adopted to harmonize some rules on cross-border investment services and activities. The most meaningful limitations to EU Member States' powers (generally implying burdens for national platforms) for the evolution of cross-border investment-based crowdfunding are the following:

- all EU Member States must introduce a legal authorization system applicable for the subjects falling under the scope of application of the MIFID Directive, as only once the authorization has been obtained they will be allowed to perform cross-border investment services and activities (as for the platforms, they need a MIFID "passport" to make cross-border investments);
- those services and activities can be performed also provided that the subjects in question have been included in a public register;
- additional harmonization rules are established which regard
    - procedures for the acquisition of qualifying holdings;
    - investor protection and transparency obligations that the operators indirectly bound by MIFID Directive will have to comply with (those obligations take the shape of national constraints, since Member States are directly bound by MIFID Directive).

Notwithstanding, EU Member States still enjoy some powers. In particular:

- optional exemptions are provided which allow each Member State to choose not to apply MIFID regime to the subjects listed in art. 3 of the first MIFID Directive, and that led Member States to take different paths for (crowdfunding) platforms;
- different authorization schemes (implying different burdens and costs for the operators concerned) can be introduced in each national legal order, with the effect of generating different rules for capital requirements, conduct of business, conflict of interest and organisation requirements;
- there is sufficient room for the application of national multiple standards and measures for investor protection (e.g. mandatory suitability tests to be undertaken by platforms).

C) Capital market and investor protection

Diffusion of cross-border investment-based crowdfunding, especially equity-based crowdfunding, also depends on the way Member States implement EU binding rules adopted to combine the pursuit of an efficient capital market and the need for a higher degree of investor protection. In this regard, equity crowdfunding is influenced by the so called "Prospectus" Directive (Directive 2003/71/EC -> http://eur-

lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:345:0064:0089:EN:PDF, soon to be amended by a forthcoming EU regulation).

The Prospectus Directive clarifies that, when securities are offered to the public or admitted to trading on a regulated market the operator at stake can act, provided that a dedicated prospectus has been approved by the national competent authority of the home Member State and subsequently published. This obligation only applies to transferable securities as defined in the MIFID Directive; as a consequence, for the reasons seen above, that might as well bind crowdfunding platforms.

Nevertheless, even in this case exceptions to the obligation of emitting a prospectus in favour of the investor exist, as well as the possibility or every Member State to adopt further national (different) rules for the subjects burdened with prospectus requirements. Above all, Member States own strong discretionary powers to decide the monetary limit for the exemption from the obligation to emit a prospectus.

D) Patenting of ideas

When exploring intellectual property forms of protection within a legal analysis on crowdfunding, the attention should be directed to patents, because the subject matters of copyrights are quite specific; indeed, copyright refers to artistic and scientific works (moreover EU legislation on copyright is currently under review), while patents can cover a product, a process or an apparatus which must be new, industrially applicable and involve an inventive step.

Need for non-disclosure of information of the fund raiser's idea was confirmed by recent studies as well which also highlighted that such aspect is generally not perceived as a problem by platforms (see above, "Assessing the Potential for Crowdfunding and Other Forms of Alternative Finance to Support Research and Innovation", carried out by Ernst & Young, Open Evidence, Politecnico di Milano, and European Crowdfunding Network in 2017).

As already specified, intellectual property is mainly regulated by international agreements; they also cover some aspects of patenting of ideas, despite national discretionary powers keep being quite intensive.

Here it has to be recalled that in 2012 the EU adopted a regulation establishing the European patent (regulation 1257/2012/EU -> http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:361:0001:0008:en:PDF). This form of protection falls under an enhanced cooperation regime and is other than the one provided by the Munich Convention; while the latter just sets forth a European system for the issuance of patents, the former grants the right holder a unitary effect patent to be used within the territories of the Member States participating to this enhanced cooperation.

Thus, according to art. 4, para. 2, reg. 1257/2012/EU, the participating Member States must take the necessary measures to ensure that, where the unitary effect of a European patent has been registered and extends to their territory, that European patent is deemed not to have taken effect as a national patent (even if Member States seem to own quite a broad room for manoeuvre in deciding which necessary measures they have to take).

The European patent with unitary effect shall confer on its proprietor the right to prevent any third party from committing acts against which that patent provides protection. Furthermore, it may only be limited, transferred or revoked, or lapse, in respect of all the participating Member States (art. 5, para. 1, reg. 1257/2012/EU); for example, the proprietor can allow any person to use the invention as a licensee in return for appropriate consideration.

E) E-commerce

Crowdfunding projects of almost any kind are handled through platforms. This means that e-commerce services are pivotal for crowdfunding and that any limitation to the possibility for service providers to operate via e-contracting is likely to hinder the diffusion of cross-border crowdfunding campaigns in the CE EU area.

With that in mind, CE EU Member States must take into account directive 2000/31/EC (-> http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0031&from=IT) on the approximation of national legislations on certain aspects concerning e-commerce (only where parties are provider and consumer). The point is that despite its core purpose, which is to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States, directive 2000/31/CE allows for certain legitimate derogations the envisaged regime.

With regard to e-commerce aspects, directive 2000/31/EC applies only within producer-consumer relations.

Accordingly, when it comes to crowdfunding, the smooth movement of services carried out by providers in favour of consumers within crowdfunding campaigns also depends on the intensity of the facultative derogations that CE EU Member States are entitled to apply notwithstanding the basic principle of directive 200/31/CE.

More precisely, these are the main aspects to consider:

- national exceptions to the prohibition of limiting/restricting the movement of the information society services falling within the field of application of the directive, such as prior authorizations imposed on other Member States' providers (moreover, given that such obligation does not refer to practical obstacles resulting from the impossibility of using electronic means in certain cases, it becomes quite relevant to assess the most frequent/intense obstacles of practical nature);
- information-related minimum standards that service providers must fulfil;
- general or specific domestic legal requirements for contracts to be fulfilled by electronic means;
- domestic obligations imposed on the service provider in order to grant consumers available, appropriate, effective and accessible technical means;
- sanctions (even of criminal nature, if any) provided by domestic legal systems for providers' failure to comply with national obligations established under directive 2000/31/EC.

F) E-contracting

Crowdfunding with economic return can take advantage of a smooth movement of financial services. directive 2002/65/EC (-> http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002L0065&from=IT) aims at finding a balance between two needs: free movement of financial services and protection of consumers of such services. For sure, where the latter need prevails CF services are likely to face bottlenecks. Therefore, it is useful to understand if national legislators apply derogations provided by directive 2002/65/EC or not, as this analysis could provide information on a double perspective (feasibility of such agreements/ degree of protection of the consumer) which is likely to affect choices made by the subjects involved in a cross-border crowdfunding project.

More precisely, these are the main aspects to consider:

- national restrictive measures (which can be adopted only for prudential reasons and provided that restrictions do not go beyond what is required to ensure the protection of consumers);
- national powers of the authorities tasked with control and/or supervision concerning the distance marketing of consumer financial services;
- the extent of possible national more stringent provisions on prior information requirements on distance marketing of consumer financial services;
- basic aspects of the national provisions issues such as cancellation, termination and non-enforceability of a distance contract.

G) Money laundering

Dealing with the legal risks related to crowdfunding, also criminal phenomena potentially involved in such activities shall be considered, especially in case of particularly serious offences, like money laundering and financing of terrorism (but also potentially frauds, considering that for those affecting the budget of the Union, at EU level the approval of the so-called PIF Directive is currently pending)[1].

According to the project planning, criminal risks connected with crowdfunding activities will be analysed in Deliverable D.T. 4.2.1.

To this aim, applicable legislation will be examined both at national (where available), and Union level, where the main relevant legal bases are represented by directive 2015/849 (the so-called 4th AML directive, -> http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L0849&from=IT)[2], currently about to be amended[3], and by directive 2017/541 on combating terrorism (http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L0541&from=EN)[4].

H) Liabilities of crowdfunding platforms as internet service providers

Directive 2000/31/EC on electronic commerce (ECD) (-> http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0031&from=IT) aims to remove obstacles to cross-border provision of on-line services in the Internal Market and to provide legal certainty to businesses and citizens.

According to the definitions provided by Article 2(a) and 2(b) of the ECD, crowdfunding platform operators can be considered as providers of information society services. In fact, they play the role of intermediaries or auxiliaries between the promoter of the crowdfunding campaign and the supporter, who

[1] After long negotiations, the directive is finally at its last stages of the legislative proceeding, see Communication from the Commission to the European Parliament pursuant to Article 294(6) of the Treaty on the Functioning of the European Union concerning the position of the Council at first reading with a view to the adoption of a directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, Interinstitutional File: 2012/0193 (COD), Brussels, 6 June 2017, available online.

[2] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing directive 2005/60/EC of the European Parliament and of the Council and Commission directive 2006/70/EC.

[3] A Fifth revision of the current directive, also to tackle terrorist financing risks linked to virtual currencies activities, was proposed on 5 July 2016, and has recently reached a general approach, cf. Council of the European Union, Proposal for a directive of the European Parliament and of the Council on countering money laundering by criminal law [First reading] - General approach, Interinstitutional File: 2016/0414 (COD), Brussels, 6 June 2017, available online.

[4] Directive (Eu) 2017/541 of the European Parliament and of the Council of 15 March 2017on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.

both assign to the platform operator the role of transmitting or hosting information and contract declarations originated by the parties themselves.

Articles 12 to 14 of the ECD establish precisely defined limitations on the liability of intermediary service providers, that applies to certain clearly delimited activities carried out by internet intermediaries, i.e. to the technical process of access and transmission provision (mere conduit, caching), as well as storage of information provided by a recipient of the service in a communication network (hosting).

In particular, the main service provided by a crowdfunding platform can be considered as a "hosting" service, that is a service that "consists of the storage of information provided by a recipient of the service" (Article 14.1). In fact, large part of the information on a crowdfunding platform will consists of information about each crowdfunding campaign, and such information will be provided by the promoter itself.

According to Article 14.1(a) and 14.1 (b) of the ECD, the hosting provider will not be liable on condition that: (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

Article 15(1) prevents Member States from imposing on internet intermediaries, with respect to activities covered by Articles 12 to 14, a general obligation to monitor the information they transmit or store or a general obligation to actively seek out facts and circumstances indicating illegal activities.

However, Article 15(2) leaves to Member States the faculty of establishing obligations for information society service providers to (a) promptly inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or (b) obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.

The liability limitations provided for by the directive are established in a horizontal way, that is they cover civil, administrative and criminal liability for all types of illegal activities initiated by third parties online (including copyright and trademark, defamation, misleading advertising, unfair commercial practices, etc.).

There are a number of open issues concerning the interpretation and application of the provisions contained in the ECD. With regard to the activities of crowdfunding platforms, some points in particular should be mentioned:

1) Articles 12 to 14 of the ECD do not affect the possibility for a national court or administrative authority to require a given service provider to terminate or prevent an infringement on a case-by-case basis which is – in principle – subject to the national law of the Member States. What is concerned with the activities of crowdfunding platforms, that is with hosting services (Article 14), this will include in particular the possibility to issue injunctions towards platforms aiming at removing or disabling access to illegal information. Most injunctions concern copyright infringements; however legal treatment of "injunctions" may vary across Member States: most of them treat injunctions as a kind of preliminary relief for right holders, but others treat injunctions as a legal remedy, giving the right holder a claim to prevent future infringements in general.

2) Differently from injunctions by national courts or other authorities, notice and take down procedures by third parties are not regulated in the ECD itself. Instead, Article 16 and recital 40 of the directive expressly encourage self-regulation in this field. Such aspects may be regulated very differently under national legislations.

3) Article 15 prevents Member States from introducing a general obligation to monitor the information transmitted or stored. But when is an obligation on providers general? When does an order to terminate or

prevent an infringement become general? These are questions open to interpretation of national judges and public authorities. Moreover, the exclusion of a general obligation to monitor the information transmitted or stored (Article 15) does not prevent public authorities in the Member States from imposing a monitoring obligation in a specific, clearly defined individual case (recital 47).

Recently[5], in the case C-70/10 (Scarlet vs SABAM) the ECJ held that the injunction imposed by a national judge on an Internet service provider, concerning requiring it to install a filtering system to actively monitor all the data relating to each of its customers in order to prevent any infringement of intellectual-property rights, would have requested such Internet service provider to carry out a general monitoring, and therefore an activity prohibited by Article 15(1) of the ECD. However, such decision concerns only one specific monitoring system, while the issue of establishing whether an obligation to monitor is general or specific is still open, and may be addressed in different ways under different national jurisdictions.

4) Articles 14 and 15 of the ECD do not affect the possibility for Member States of requiring hosting service providers (therefore, also crowdfunding platforms) to apply duties of care which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities (recital 48).

5) The interpretation and application of concepts such as "awareness" or "actual knowledge" of illegality, and "obligation to act expeditiously upon obtaining such awareness or actual knowledge" laid down in Article 14 (1) of the directive, which are necessary conditions for the exoneration of hosting providers, is still debated, and addressed in different ways under national jurisdictions.

The issue of how to interpret the “actual knowledge” is a crucial question, because both the conducts of not removing illegal materials (for example, copyrighted materials), and of removing materials that are not illegal may in theory expose the hosting provider to liability, in particular civil liability for damage compensations.

National implementation and court practice differ between Member states considerably when assessing such concept. Some Member states require a formal procedure and an official notification by authorities in order to assume actual knowledge of a provider, while others leave it to the courts to determine actual knowledge. In this case, an open issue is whether providers are liable when they know that the information is on the platform, but they are not sure that it is illegal. In other words, the issue is what level of doubt is sufficient for preventing a provider from the belief that something is legal, taking also into account that according to Article 15(1) of the ECD, a provider has no obligations to actively seek out facts and circumstances indicating illegal activities.

For example, in the so-called “Pirate Bay” case before the Stockholm District Court[6], concerning the responsibility of the provider hosting on its website information that could have facilitated the exchange of files infringing copyright, the defendant (the hosting provider) claimed that it did not remove the files exchanged between users because it had no actual knowledge of their contents, and therefore that it was immune to liability. The court rejected the argument, stating that, even if there was not precise knowledge of the content of each infringing file, however it was clear that the defendants had been aware that copyright protected works were available via the website and, despite this knowledge, they chose to take no action to prevent the infringement of copyright.

A different approach is taken in other Member States, offering two ways to determine “actual knowledge”: a notice and take-down procedure, and the more traditional approach of notifying the provider according to the national legal standards of knowledge.

[5] Case C70/10, Judgment of the Court (Third Chamber) of 24 November 2011.
Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM).

[6] Stockholm District Court Division 5 Unit 52 VERDICT B 13301-06 of 17 April 2009, Case no B 13301-06

In conclusion, despite the exclusion of a general obligation to monitor all the information, where ISPs or crowdfunding platforms go beyond the mere passive role with regard to the content hosted on the platform, they may be expected to undertake some basic background checks, verify information supplied by promoters and screen the companies that wish to use their particular platform.

I) Liabilities of platforms in relation to intellectual property and privacy

Intermediaries of the information society, and in particular hosting providers, play a strategic role in in the perspective of the protection of intangible goods such as intellectual properties. Intellectual property rights shall be balanced both with data protection/privacy rights, and liability exemptions for providers.

Art. 8(3) of the Directive 2001/29/EC (Copyright and Related Rights in the Information Society Directive, -> http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0029&from=IT)[7] opens the space for the adoption of "notice and take down" systems in Member states legislations: "Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right."

Moreover, Art. 8 and Art. 9 of the directive 2004/48/EC[8] ("Enforcement Directive" -> http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:195:0016:0025:en:PDF) states that the rightholder may ask to the competent judicial authority to issue an order (towards the infringer, but also third parties) to provide information and data concerning the infringement. However, Art. 2.3(a) provides that the directive shall not affect the Community provisions governing directive 95/46/EC[9] ("Data Protection Directive" -> http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995L0046&from=IT).

Furthermore, protection of copyright needs to be balanced with the liability exemption provided by art. 15(1) of the ECD. In 2010, the French court of Appeal[10] found EBay liable for damages towards LVMH (Louis Vuitton), for not providing adequate screening systems or general warnings, thereby not doing enough to prevent counterfeit goods to be marketed via the eBay website. The French court of appeal referred also to the ECJ judgment in the "Google AdWords"[11] case. The judge said the exemptions from liability for ISPs established in that directive covered only cases in which the activity of the ISP was "of a mere technical, automatic and passive nature" which implied the service provider "has neither knowledge of nor control over information which is transmitted or stored". In applying this decision, the French court determined that due to the services provided by eBay (providing information to sellers for optimizing sellings, support in the description of products, sending instant messages to clients, etc.) it did not play a passive role but that it was acting as a broker.

This case highlights important issues for crowdfunding platforms in the context of IP rights, for example what kind of checks should a crowdfunding platform have in place to make sure a proponent seeking funding on its site is not infringing third party IP rights. The eBay case suggests that where an ISP or crowdfunding platform goes beyond the mere passive role with regard the information placed on the platform and is not merely a conduit for placing a funding request, it is open to claims from third party IP rights holders for infringement of their IP rights.

[7] Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

[8] Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights

[9] Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Data Protection Directive)

[10] CA Paris, chambre correctionnelle, n°11/00746, eBay International AG c/ Burberry Ltd, Christian Dior Couture et Louis Vuitton Malletier

[11] Google Adwords - Louis Vuitton Malletier (C-236/08 - C-238/08)

This is mostly relevant in reward-based crowdfunding, where campaigns can be added with little oversight of the platform regarding intellectual property. In equity-based crowdfunding, the platforms have usually more responsibilities for the provision of correct information.

In the EU case SABAM vs SCARLET (Case C-70/10) the ECJ hold that in adopting an injunction requiring the ISP to install a filtering system for monitoring *ex ante* all the materials uploaded by users, for intellectual property rights infringements, the Belgian national court did not respect the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other. For these reasons, the EJC concluded that:

- no injunction can be issue against an ISP which requires it to install a system for filtering all electronic communications passing via its services, in particular those involving the use of peer-to-peer software;

- which applies indiscriminately to all its customers as a preventive measure, exclusively at its expense, and for an unlimited period;

- which is capable of identifying on that provider's network the movement of electronic files containing a musical, cinematographic or audio-visual work in respect of which the applicant claims to hold intellectual-property rights, with a view to blocking the transfer of files the sharing of which infringes copyright.

Concerning data protection, it is dubious whether the ECD immunities for providers (including hosting providers) also apply to data protection issues, which is currently governed by the Data Protection Directive[12] and its national implementations. The main issue in this context is whether providers are liable for personal data uploaded by their users, in violation of data protection, or the ECD exemptions also applies to data protection issues. National judges and data protection authorities have adopted different approaches to address this issue.

According to a first interpretation, supported by a literal reading of Article 1 (5), of the ECD ("This Directive does not apply to […] questions relating to information society services covered by Directives 95/46/EC…") the ECD would exclude the immunity for providers, so that privacy and data protection rights would prevail over economic interests of providers.

According to a second interpretation, ECD exemptions are not needed in these matters, since providers can be immunised through data protection legislation, i.e., viewing them as processors (rather than as controllers). Therefore, the controller of the information shall only be considered the user uploading the content.

A third approach explain the provision arguing that data-protection directive identifies infringements, while ECD identifies immunities (also for those infringements). Under this interpretation, exemptions for providers would survive.

The legal framework has been changed by the introduction of the Regulation 2016/679 (GDPR- General Data Protection Regulation -> http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&qid=1501140952402&from=IT)[13], that will come in force in 2018.

[12] Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Data Protection Directive)

[13] REGULATION (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the freemovement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

According to Article 2(3) of the GDPR, the Regulation "shall be without prejudice to the application of Directive 2000/31/EC, in particular of the liability rules of intermediary service providers in Articles 12 to 15 of that Directive". This would end the question of "exceptionalism" of data protection.

However, the new GDPR also introduces a specific obligation for controllers, where personal data have not been obtained from the data subject (Article 14), to inform such data subject that data about him or her is being processed and to provide him or her with any 'information needed to guarantee fair processing'.

Another important aspect in this context concerns obligations to communicate and disclose information about users and clients. These obligations are deeply connected to privacy directives on one hand and intellectual property rights directives on the other. On this regard, it is important to cite the jurisprudence of the ECJ, in the Case C-275/06[14], where the Court considered the relationship between the protection of intellectual property rights and data protection. In particular, the Court considered Directive 2002/58/EC (-> http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002L0058&from=en) on the processing of personal data in the electronic communications sector, which provides that Member States must ensure the confidentiality of communications by means of a public communications network and publicly available electronic communications services, and of the related traffic data, and must inter alia prohibit, in principle, the storage of that data by persons other than users, without the consent of the users concerned, save in the case of exceptions laid down in the Directive. On this regard, the Court held that that Directive 2002/58/EC does not preclude the possibility for the Member States of laying down an obligation to disclose personal data in the context of civil proceedings.

3.1.2.3. "Brexit": possible implications on the evolution of EU cross-border crowdfunding

Some final remarks deserve to be added which regard the so called "Brexit".

It is well known that the United Kingdom showed the intention to quit the European Union and took steps forward to finalize this process. Although the definitive abandon of the UK will happen only within a few years (probably two), such scenario obviously raises questions in relation to the evolution of cross-border crowdfunding within the EU.

As demonstrated by the above-cited recent study developed by Crowdsurfer and Ernst & Young on behalf of the European Commission (2015), the UK market is by far the most relevant as long as crowdfunding is concerned. The UK market is the undisputed leader in terms of crowdfunding campaigns, successful projects, volume of economic resources addressed to crowdfunding projects. In sum, the vast majority of EU-based actors involved in EU cross-border crowdfunding campaigns are somehow "absorbed" by the UK market.

Accordingly, the evolution of EU cross-border crowdfunding can rely on the "UK model".

However, the exit of the UK from the European Union gives rise to uncertainty with reference to the future framework of regime that the UK and the EU will agree upon for the movement of services and capitals; basically, whilst until present this regime has long been a "free movement" one, after the entrance into force of the agreement that will enshrine the new EU-UK relations many aspects might change. If this will be the case, CE EU operators will have to consider the new burdens that accessing the UK market will imply.

[14] Case C-275/06 Productores de Música de España (Promusicae) v Telefónica de España SAU, judgment of 29 January 2008

3.2. Italian system

In the existing legal framework, the discipline explicitly provided for crowdfunding lays down in the legislative decree n. 179 of December 2012, 29th , converted into law 221/2012 (-> http://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2012-12-18&atto.codiceRedazionale=12A13277; http://www.gazzettaufficiale.it/eli/id/2012/12/18/012G0244/sg), with whom have been introduced the discipline for innovative start-ups and a dedicated tax incentives, and in the CONSOB Regulation ***. It is referred exclusively to equity-crowdfunding activities, despite there isn't any specific provision for the others crowdfunding models.

Also, referring to equity crowdfunding current discipline is more focused on duties connected with identification of platform and enterprises who open their capital to investors through crowdfunding. Particularly, considering that a specific protection for consumers and investors is required, CONSOB Regulation has a lot of requirement for platforms and enterprises to be filled when a equity crowdfunding campaign starts.

Specifically, about tax law there is only one provision settled in art. 29, with whom a tax relief is offered to all the investors, with slightly differences between private investors and enterprises who participate to the crowdfunding campaign.

3.2.1. Equity crowdfunding

Law 221 establishes strict requisites for a company to be classified as an "innovative start-up". First of all the following requirements must be met:

- the company must be involved in the development, production or sale of innovative products or services having a high technological value;
- the company may not have been operational for more than 48 months;
- the principal place of business/centre of interests must be within Italy;
- the total value of annual production may not exceed EUR 5 million, from the second year of business;
- distribution of profits is prohibited as long as the company is classified as an innovative start-up (for a maximum period of four years from its incorporation); and
- the company may not be the result of mergers or demergers of other companies.

Second, at least one of the following requirements must be met:

- research and development costs must be at least 15% higher than the greater of production cost or production value;
- one third of the personnel must meet certain requisites specified in Law 221; and
- the company must have ownership of intellectual property rights

Equity crowdfunding may be carried out only through funding portals enrolled in the relevant register held by CONSOB (the CONSOB Register). There are two types of funding portals:

- investment companies and banks: these are enrolled in the special section of the CONSOB Register and simply must provide advance notice to the CONSOB prior to commencement of business; and
- other entities which carry out, on a professional basis, the business of online funding portals: they must apply for registration, provide detailed reports on their intended activity and meet the requisites of honourability and professionalism.

Funding portals of the second type, above, may not hold sums of money or financial instruments belonging to third parties and are obliged to transmit the orders regarding the underwriting and trading of financial instruments exclusively to banks and investment companies. Banks and investment companies must treat and process the orders in compliance with all the applicable regulations on investment services along the lines of the MiFID (Markets in Financial Instruments Directive) regime, including evaluation. An exemption in this regard will apply if the investment does not exceed the following thresholds:

- EUR 500 for each order (up to a maximum annual amount of EUR 1,000) for investments by individuals; and
- EUR 5,000 for each order (up to a maximum annual amount of EUR 10,000) for investments by legal entities.

According to the CONSOB Regulation there are some minimum information that the funding portal must publish: a description of specific risks associated with the issuer company and/or the offer; a description of the issuer company and of its business/industrial project; information on the corporate bodies of the issuer and their composition; a description of the financial instruments offered, the rights to which the investors are entitled and the ways to exercise such rights; clauses contained in the by-laws to safeguard the investors (with specific reference to the clauses that must be included under the CONSOB Regulation); the general conditions of the offer (costs, revocability, terms for payment and for the assignment/delivery of the financial instruments, applicable law, etc.); the quota to be subscribed by professional investors.

In order to protect non-professional investors, the CONSOB Regulation requires that: the by-laws of the issuer company contain a withdrawal right or a tag-along right in favour of such investors, in the event that the majority shareholders transfer their equity to third parties after the offer. Such rights must remain enforceable for not less than three years after the conclusion of the offer; and at least 5% of the offered securities be subscribed to and paid by professional investors and/or banks, banking foundations and start-up incubators. In the absence of such 5% subscription, the offer may not be completed and all the amounts subscribed and paid in by the other investors must be returned.

3.2.1.1. Tax Law

3.2.1.1.1. Equity Crowdfunding

There is a tax relief settled with the law 221 and hereinafter renewed with different provisions. With regards to the tax law applicable to investors in equity crowdfunding campaign is provided that:

- an (individual) investor to deduct from his gross income tax due an amount equal to 19% of the investment made through equity crowdfunding mechanisms in the issuer company, up to a maximum amount of EUR 500,000 per year. The tax deduction will be applicable if the financial instrument has been owned by the investor for a period of at least two years; and
- an investor (being a legal entity) to deduct from the gross corporation tax due an amount equal to 20% of the investment made through equity crowdfunding in the issuer company capital, up to a

maximum amount equal to EUR 1,800,000 per year. The tax deduction will be allowed if the financial instrument has been owned by the investor for a period of at least two years

Considering that the contributions are capital gains, the proponent enterprises gain no revenue, at the opposite it may have to act as the subject responsible for tax withdrawal, when the investors do not have a participation which represents more than the 20% of the enterprises' capital.

In general terms, it must be applied the common regulation of capital gains, which already exists in the Italian tax system.

Particularly:

- If the investor is another enterprise, 95% of the distributed dividends must be exempted from income taxes;
- If the investor is a physical person and he gains more than the 20% of enterprise's capital (or he expresses more than the 25% of the right to vote in the assembly), 49,72% of the distributed dividends must be exempted from income taxes;

If the investor is a physical person and he gains less 20% of enterprise's capital (or he expresses less than the 25% of the right to vote in the assembly), enterprises must apply a withdrawal tax (rate of 26%) before the distribution.

3.2.1.1.2. Crowd-lending

Central Bank of Italy, who is responsible for all kind of bank and financial services offered into the Italian system, defined the legal relationship of crowd-lending as a proper loan agreement. Such qualification is essential also to the determinate the applicable tax regime, because it allows to consider the interests paid by de founded enterprise to each crowd-investor as investment income.

Consequently, investors must declare the interest paid as remuneration for crowdfunding investment as income; such incomes concur to the definition of the whole taxable base for the application of Italian Income Tax on Physical Persons, upon which a progressive tax rate is applicable.

3.2.1.1.3. Reward-based crowdfunding

For this kind of crowdfunding, unlike for the crowd-lending and equity crowdfunding, we have no official qualification, so it's only possible to offer an interpretation based on the experience effectively carried out by the actors who plays a role in the crowdfunding campaign. For the most the contract that regulates this kind of crowdfunding is the one called "sales of a future assets" (Italian vendita di cosa futura, latin emptio rei sperata), which is quite similar to the presale, that is the model used in Austria and Germany (see points 3.3.1. ff and 3.3.2. ff.).

The main characteristics of this peculiar kind of sale are that there asset that has to be sold doesn't exist yet when the contract is concluded; the contract must be declared invalid if the good(s) that has been sold never come into existence; the buyer became the good's owner only when this is deliver or give to him but the payment must be done when the contract is signed; if the contract is declared invalid due to the impossibility of delivery of the promised good the price paid must be reimbursed to the buyer without any other cost for him.

In this case, the money spent as investment in crowdfunding represents the price for such peculiar sale and consequently it must be considered as income for the seller.

If the seller is an enterprise those payments will be always considered as revenues and income tax for the society (flat rate of 27%) will be applied.

Differently, if the seller isn't an enterprise but he acts regularly as an artisan such income must be considered as income from self-employed work despite, if the crowdfunded activity is carried on occasionally, incomes must be considered as part of the residual category of "other incomes".

If the seller is a non-commercial and non-lucrative legal entity, revenue produced by the supply of goods dedicated to fund a certain project shall be exempted from income taxation, because it can be considered as the revenue of a fundraising campaign.

VAT will be applicable to all these transactions, according to the general rules suggested by the VAT Committee, but the VAT is chargeable only when goods are sent or delivered, according to the VAT general rules or supply of goods.

3.2.1.1.4. Donation-based crowdfunding

Nor for this kind of crowdfunding there is an official interpretation but, considering that in those hypotheses there isn't any commercial intention or personal profit, the suggestion is for the exclusion from the field of relevant revenue for income taxation. Transactions must be consequently qualified as donation, otherwise whenever the campaign is carried on by a charity or a non-lucrative legal entity all the donation received are exempted also from the application of the inheritance and donation taxes.

Furthermore, in the Italian income tax system, is allowed the deduction from income taxable base of the money paid as donation to charities, political parties and non-lucrative entities with philanthropic purpose. So, every time a single contribution is higher than 50 euros it is possible for the contributor to deduct the sum payed from his incomes.

3.2.2. Liabilities of platform operators

In Italy, Directive 2000/31/EC is implemented under Legislative Decree 70/2003 (-> http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2003-04-09;70!vig=). In the implementation, Italy has carried out a near verbatim transposition, but has used the faculty provided by Article 15(2) of the directive of establishing obligations for information society service providers, as conditions for the immunity. In particular, article 16 of the Legislative Decree stipulates that the hosting provider is not liable for the information stored at the request of the recipient, on the condition that that the ISP:

a) is not *effectively aware* of the facts that the activity or information is illegal (in the case of penal offences);

b) in relation to claims for compensation, is not aware of the facts or circumstances that *render manifest the unlawful nature* of the activity or information (in the case of civil offences): "manifest" illegality would mean an illegality that does not require particular legal knowledge to be detected.

c) as soon as the ISP becomes aware of such facts, on notification by competent authorities, it acts immediately to remove the information or block access to it.

It is important to highlight that the actual knowledge ("*effectively aware*") standard is to be applied exclusively in criminal cases, whilst the awareness test ("*manifest" illegality*") is sufficient in cases involving damages claims. Besides, that Italy used the faculty provided by Article 15(2) ECD ("member states may establish obligations for intermediaries promptly to inform the competent public authorities of alleged illegal activities…"), establishing a special obligation on intermediaries to communicate illegal activities or information on their services.

Besides, in contrast to other Member states' implementations, Article 16 requires providers to act expeditiously (to remove or to disable access to the information) *only* upon notice from the relevant authorities. Whereas copyright holders complain about this restriction, intermediaries are obviously uncomfortable as to whether they should inform their users about receipt of notifications of illicit contents, since this could make them liable for complicity or aiding and abetting under Article 378 of the Italian Criminal Code.

Moreover, Italian case law has introduced a highly debated and controversial distinction, not explicitly present in the Directive nor in the Legislative Decree 70/2003, that is the distinction between:

- "passive" hosting providers, exempt from the liabilities according to Art. 17, implement the provisions of Art. 15 of the ECD; and

- "active" hosting providers, who would not be excluded. The new entity of the "active" Internet service provided, identified by the case law, would answer the need to penalize the conducts of ISPs in relation to infringements to intellectual property rights, and to the particular activities of "aggregators" ISPs, whose content is provided by third parties, such as user generated content providers (i.e. Youtube), social networks, and search engines.

According to case law, such ISPs would not limit their activities to hosting services, but would also undertake further activities, not merely automatic, that would affect their legal status of exemption from liability, including the following:

- indexing of content;
- selection and organization of content;
- filtering of content;
- procurement of advertising.

The existence of such activities - to be assessed on a case by case basis – would mean that the providers are not "neutral" with respect to the content they provide, but rather progressively enter the sphere of activities which are similar to editorial control in broad sense, and which would not be compatible with the exemption from liability enjoined by mere intermediaries under Legislative Decree 70/2003.

Therefore, the new entity of the "active" Internet provider would represent a new role, intermediate between the pure "passive" ISP and the content provider. This interpretation would undermine the exemption of liability, in particular for hosting provider, and possibly including also crowdfunding platform, and has been criticized by large part of the national doctrine, and also by some more recent jurisprudence.

Recently, in the Google-Vividown case, the first instance Judge in criminal proceeding[15] hold that Google, when carrying out activities such as indexing videos created by users, and linking advertisement to them, shall be considered as an "active" hosting provider, thus more similar to a content provider than a "passive" hosting provider. For this reason, the judge argued that the exemption of Art.16 of the legislative decree would not have worked. Such interpretation has been partially supported by the court of Appeal[16], that confirmed the definition of "active" hosting, but not the obligation to monitor the content, but has been eventually rejected and by the Court of Cassation[17], that completely disregarded the concept of "active" hosting.

[15] Tribunale di Milano, Sezione IV penale 24 Febbraio 2010 (n. 1972/2010)

[16] Corte di Appello di Milano, Prima Sezione Penale 21 dicembre 2012 (n. 8611/12)

[17] Corte di Cassazione, Terza Sezione Penale 17 dicembre 2013 (n. 5107/14)

The court of Cassation in the Google-Vividown also clarified the relationship between provider's liability and data protection: according to the Court, in case of upload of any kind of content (text, audio, video, multimedia, etc.) on a website providing a hosting service, only the uploader shall be considered as the data controller for the personal data included in the uploaded materials. Therefore, liabilities resulting from EU and national legislation shall be allocated to the uploaders, not to the hosting providers, that will be exempt also from liability, on the basis of the exemption according to art. 16 of the Legislative Decree 70/2003.

Another relevant case is the Italian "Big Brother case" or Mediaset v. Google[18]. The case concerned episodes of the Big Brother show published by users on the YouTube platform. Mediaset requested damages (500 millions) and an order to eliminate all Big Brother videos from the platform and to stop their further distribution.

The court held that there was no general obligation to monitor on the hosting provider, however it also held that the ISP who manages a platform, intervenes, collects advertising, is no longer a mere host provider, and that the ISP who knows or should have known of illegal material is liable, but only if the material to be removed had been clearly indicated by the rightholder. For these reasons, the court ordered Youtube to remove all Big Brother material.

Concerning infringements of intellectual property rights, it is relevant the regulatory framework set out under the AGCOM (Italian Communication Authority) Resolution no. 680/13 (-> https://www.agcom.it/documents/10179/540163/Delibera+680-13-CONS/2fb37939-620c-410d-a23f-2150d505b103?version=1.1), establishing the Regulation on copyright enforcement in electronic communications networks, which provides the (alleged) owner of copyright with an administrative claim for simplified and fast removal of infringing material.

The Regulation allows AGCOM to demand to different kinds of providers (including, among others, also hosting providers), following a short administrative procedure, that: a) providers selectively remove or block access to websites hosting allegedly copyright infringing materials; and b) providers remove illegal content from their catalogues and refrain from retransmitting illegal works in their future schedules. In cases of non-compliance with the orders, AGCOM can impose fines.

Concerning claims for disclosure of information, in the Peppermint Case, concerning copyright infringements via P2P networks, a record company asked the judge to order several access providers, pursuant to article 156bis of the Italian Copyright Act, to provide the name and the addresses of the peer-to-peer systems users. However, the request was dismissed by the judge[19], because it was not admissible on the basis of data protection legislation.

3.3. Other CE States with national regulation

3.3.1. Germany

3.3.1.1. Tax law

3.3.1.1.1. Equity crowdfunding

An investment instrument under the mezzanine/equity model is in most cases structured as a participation right or a silent partnership. Both instruments may, depending on their specific structure, qualify as either debt or equity for German tax purposes. This mainly depends on three criteria: (i) the more rights the

[18] Tribunale di Roma, ordinanza del 16 dicembre 2009

[19] Tribunale di Roma, Sezione IX civile, ordinanza del 14 luglio 2007

investor has besides the purely financial interest (such as information rights or even veto rights); the more likely that the respective instrument will be regarded as an equity instrument. This criterion usually does not play a major role in crowdinvesting, as the investors typically do not have significant rights besides their financial interest;

(ii) a participation in the profits of the investee is also a criterion for an equity instrument;

(iii) a participation in the hidden reserves and/or potential liquidation proceeds of the investee is another indication of an equity instrument.

Assuming that investors do not have significant rights with respect to the investee besides their financial interest, an equity instrument for German tax purposes requires a participation in the profits and the hidden reserves/liquidation proceeds of the investee. As a participation in potential profits is very common in crowdinvesting scenarios, a debt instrument for German tax purposes is typically structured by not granting the investor a participation in the hidden reserves or potential liquidation proceeds of the investee.

The qualification as a debt or equity instrument for German tax purposes as described above does not correspond to the qualification as debt or equity for German GAAP purposes. As a result, it is possible to structure an instrument as debt for German tax purposes, while it still qualifies as equity for German GAAP purposes, which may be beneficial with respect to the equity ratio of the investee.

Payments under participation rights or silent partnerships are subject to a withholding tax of 25% plus solidarity surcharge thereon, resulting in an overall withholding tax rate of approximately 26.4% to be levied from the investee. Depending on the personal situation of the investor, such withholding tax is either credited against the personal income tax liability of the investor or the personal flat tax liability of the investor is deemed to be settled by means of the withholding tax.

3.3.1.1.2. Lending based crowdfunding

For the lending model, the same principles apply for German tax purposes as described for the mezzanine/ equity model. As the respective investment instruments are typically structured as profit participating loans (without any participation in hidden reserves or potential liquidation proceeds), such instruments usually qualify as debt instruments for German tax purposes. The withholding tax mentioned above also applies to such profit participating loans.

Particular care must be taken with the wording of potential subordination clauses. A business may, on its German tax balance sheet, not account for contingent liabilities, the payment of which exclusively depends on future profits. As a result, the nominal investment amount would be treated as immediately taxable profit for the investee. There are, however, standard subordination clauses due to which a repayment of the respective capital is also required to the extent that the investee has sufficient capital reserves. As a result, the repayment of the nominal amount does not exclusively depend on future profits, which avoids the detrimental consequences mentioned above.

3.3.1.1.3. Reward based crowdfunding

To the extent that the investor does expect some kind of reward for the respective payment, e.g. in form of the supply of a product that is still to be developed or the rendering of services, the payment may be seen as an advance payment for the acquisition of the respective product or services. For (corporate) income and trade tax purposes, the investee may therefore account for a respective liability – at least as long as it is likely that the supply of the product or the rendering of the services will actually take place. As a result, the respective payment as such does not trigger any immediate (corporate) income or trade tax consequences for the investee. However, as soon as it becomes clear that the products will never be

supplied or the services will never be rendered, e.g. because the development of the products was not successful, the investee is no longer allowed to account for the respective liability, which as a result triggers a taxable gain in the nominal amount of the money received.

3.3.1.1.4. Donation based crowdfunding

If the investor does not expect any reward for the invested money, the "investment" may be subject to gift tax. Gift tax is generally levied from the donee, but if the donee cannot or does not pay his or her gift tax liability, the donor is also liable for the respective gift tax. The gift tax rate in such cases ranges from 30% to 50% of the donation' s value. There is, however, an allowance of EUR 20,000 per donor which in most cases of crowdfunding should prevent gift tax from becoming due. Furthermore, the investee cannot account for a liability in the amount received because there is no obligation to repay the respective money. As a result, the entire amount received is immediately subject to (corporate) income tax and potentially trade tax for the investor. A private investor, on the other hand, cannot deduct the respective payment for income tax purposes. Due to these extremely detrimental tax consequences, the pure donation model makes sense under German tax law only in cases where the investee is recognized as a charitable institution by the competent tax authority. As a result, the investee is generally not subject to (corporate) income tax or trade tax, the donation is generally not subject to gift tax and the investor may – at least up to a certain amount and subject to some further requirements – deduct the amount at stake from his or her taxable income. Being recognized as a charitable institution, however, materially restricts the investee' s possibility to carry out commercial activities, which is why this form of crowdfunding is hardly suitable for start-up companies attempting to start their (commercial) business activities.

3.3.1.2. Liabilities of platform operators

Germany has carried out the transposition of the ECD through the law Telemedia Act (Telemediengesetz – TMG -> http://www.gesetze-im-internet.de/tmg/TMG.pdf)[20]. What is concerned the provision for hosting providers, the German law slightly deviates from the ECD by using the word "knowledge" instead of "actual knowledge".

The level of knowledge or awareness required by Article 14 ECD has been the subject of court decisions in Germany. According to these decisions, knowledge shall be interpreted as a "positive" human knowledge rather than of abstract or automated computer-knowledge. In particular, according to the case law, "negligent ignorance" does not amount to "knowledge" in the meaning of § 10 TMG.

"Knowledge" shall refer to knowledge of a specific illegal content, since the provider is only able to delete or block accurately identifiable content, while a "general" awareness of the fact that illicit offers or materials have been put on the platform by users is not deemed to be equivalent to "knowledge" in terms of § 10 TMG.

With regard to claims for damages, host providers enjoy the liability exemption provided by § 10 TMG only if they are not aware of facts or circumstances from which the illegal activity or information would be "apparent" (interpreted in German legal literature as absence of gross negligence). Gross negligence can only be assumed in cases of "obvious" infringements.

What is concerned with requirements for notifications that establish legally the knowledge of an infringement, German law does not require any specific formal requirement, so that any kind of notice

[20] Gesetz zur V ereinheitlichung von V orschriften über bestimmte elektronische Informations- und Kommunikationsdienste (Elektronischer-Geschäftsverkehr-Vereinheitlichungsgesetz – ElGVG) of 26.2.2007, BGBl. I, S. 179.

may in principle be given by any person or authority. However, courts have nonetheless demanded certain minimum standards for notifications.

Concerning the injunctions to block/remove content and prevent future infringements, The German Federal Court of Justice ruled – particularly referring to § 7 (2) 2nd Sentence TMG (incorporating articles 12 (3), 13 (2), and 14 (3) ECD) – that the liability exemptions of the TMG are not applicable to injunctions based on claims for termination of or refraining from infringements[21].

Besides, the German Federal Court of Justice ruled that once a provider (in the case in question, an auction platform that had been classified to be a host provider) obtains notice of an infringement, the provider is not only obliged to remove the unlawful content but also has to take all technically feasible and reasonable precautions to prevent future infringements[22].

Differently from Italy, Germany does do not provide for obligations for providers to give information of illegal behaviour without administrative request. Concerning instead obligations to provide information at request of public authorities, Germany did not introduce any specific provision incorporating Art. 15(2) ECD. However, general rules regarding requests for information based on the codes of criminal procedure and other law already establish such obligation for hosting providers.

With regard to claims for disclosure of information, German courts have not usually acknowledged any right to force a provider to disclose the names and addresses of users who had allegedly committed copyright infringements.

On June 30, 2017, the Bundestag adopted the bill "Improving the Law Enforcement in Social Networks" (18/13013), also called Netzwerkdurchsetzungsgesetz, or Network Enforcement Act (-> https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_NetzDG.pdf?__blob=publicationFile&v=2). According to the new law, the operators of “social networks” are required to remove “obviously” reported criminal contents within 24 hours of receiving a notification, as well as secured for the purpose of evidence.

There will be a slightly more lenient limit of seven days for providers to respond to content that is less obviously criminal.

The law obliges platform operators to maintain an effective and transparent procedure for dealing with complaints, which is readily accessible and constantly available to users.

Platforms not complying with the new rules will be subjected to fines up to €50 million. The measure won’t be imposed after only one violation, but only after a company systematically refuses to delete or block illegal content, the bill suggests.

Providers must also publish a quarterly report on how they are handling complaints on their websites.

It is not clear if the definition of “social networks” (contained in §1) may be interpreted to include also crowdfunding platforms. However, §2 provides exemptions for platforms with less than two million registered users in Germany.

[21] GE12. – BGH, 11.3.2004, I ZR 304/01, MMR 2004, 668 – Internetversteigerung I ; GE13. – BGH, 19.4.2007, I ZR 35/04, MMR 2007, 507 - Internetversteigerung II; see also GE14. – BGH, 12.7.2007, I ZR 18/04.

[22] GE12. – BGH, 11/3/2004, I ZR 304/01, MMR 2004, 668 – Internetversteigerung I.

3.3.2. Austria

3.3.2.1. Tax law

According to Austrian Jurisprudence, incomes can be defined as all increase of money or monetary value caused by the operation. According to the BFH's judgment of September 2, 2008, company revenues are not only revenue which, from the entrepreneur's point of view, is meant to be produced by the commercial acrivities carried on by the company, but can go far beyond that. It is neither required that a legal claim is present, nor that there is any asset growth in the enterprise comes. Even unintended or unwanted revenue can be operating income. According to the definition in Sect. 6.5 para. 1 dEStR, subsidies are asset advantages which: promote, for the most part, the interests of the beneficiary; beneficiaries (without consideration). These grants (even if legally not taxable) are also to be recorded as operating income as income tax. Only when there is no economic relationship with the company, the payment is shifted to theand is not income taxable.

3.3.2.2. Equity-based and Lending based Crowdfunding

Investment form: subordinated loans:

Hybrid form of equity and debt financing (Mezzanine financing):

- SubordinationLong-term investment
- Returns depending on company development

subordinated loan:

- no profit participation
- profit participation

Plattform: License needed, platform needs to identify investor and investment project (KYC/AML). For some platforms, investment flows have to be reported to tax authorities.

Projects: No Taxation of.

Supporters: Income tax and capital gains tax paid by the investor or the company. Losses can be deducted under special circumstances.

Guidelines for Austria as followed (subordinated loan): The interests and the value growth of the bonus have to be indicated within the incom tax return (capital assets of 0 % - 50 % incom tax). If the process has not been indicated before, the investor have to submit the application of tax return if income increases about 730 Euro (tax allowance) of the same tax year.

3.3.2.3. Liabilities of platform operators

Austria transposed the ECD in national legal system through the Federal Act of 21 December 2001 (E-Commerce-Gesetz-ECG -> https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/20001703/ECG%2c%20Fassung%20vom%2027.07.2017.pdf).

What is concerned with hosting, Austria has carried out near verbatim transposition of Article 14 ECD into to its national legal system. It distinguishes between actual knowledge and, as regards civil liability for damages, awareness of facts or circumstances from which illegal activity or information is apparent. Intermediaries may be held criminally liable only where they have actual knowledge, whereas civil liability for damages is subject to the lower threshold of an "awareness of facts or circumstances from which the illegal activity or information is apparent".

Austrian courts seem to interpret the notion of "actual knowledge" according of § 16 ECG, following an approach similar to Germany, that is interpreting it with reference to general legal standards for obtaining knowledge of illicit content.

However, the parliament has adopted a doctrine developed by the Supreme Court of Justice, in cases concerning liability of mere contributors, to assist in the interpretation of "actual knowledge" in § 16 ECG. The doctrine – which was also applied in cases regarding injunctions against intermediaries – requires that a person, in order to be liable as a contributor, must deliberately promote the direct infringer's actions - which could only be demonstrated where an infringement was "obvious to any non-lawyer without further investigation"

Concerning the injunctions to block/remove content and prevent future infringements, the Austrian Supreme Court ruled that the liability exemption of § 16 ECG (regarding host providers) only exempts a defendant from possible liability for damages and criminal prosecution, but leaves untouched claims for injunctive relief under civil law.

Furthermore, the Austrian Copyright Act (BGBl. No. 111/1936 - Federal Law on Copyright in Works of Literature and Art and on Related Rights -> https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10001848/Urheberrechtsgesetz%2c%20Fassung%20vom%2027.07.2017.pdf) provides in § 81 (1a) for a special legal basis for injunctions against intermediaries.

Differently from Italy, Austria does do not provide for obligations for providers to give information of illegal behaviour without administrative request. Concerning instead obligations to provide information at request of public authorities, § 18 (2) ECG provides that both mere conduit and host providers are obliged to inform courts authorised by law for this purpose about user identities for purposes of criminal prosecution. § 18 (3) contains an obligation for host providers to inform authorities about the names and addresses of recipients of their services.

With regard to claims for disclosure of information, the Austrian Copyright Act provides in in § 87b (3) a right for copyright holders to obtain information from intermediaries (including hosting providers and platforms) in case of infringements of copyright.

The Austrian Internet Service Providers Association (ISPA) has developed a set of codes of conduct that are binding for the members of ISPA, and establish a set "notice-and-take-down-procedures".

3.4. States without national regulation

Where there isn't a specific regulation in crowdfunding with regards to the considered field of law, we work on a double direction. On one hand we considered the existing singular regulation, even though not directly connected with the relevant research addresses nor part of a general system for crowdfunding discipline; on the other hand we work on the questionnaire's results, that have been submitted to all the different parts involved in crowdfunding, without distinction of typology (if donation, reward, equity or lending) or role played in the campaign (questionnaire were equally directed to platforms and project's proponent).

Spreading those questionnaire we have handled a sort of mistrust by the operator, which apparently refuses to spread with us relevant information, particularly on field of tax law and IP matters, which are also the field in which deregulation still prevails and, consequently, a disclosure can make more vulnerable the involved organization. Hence, the lack of information about the practical experience, all the times that actions and qualificationas are not supported by a legal regulation, may became a serious problem for the operators themselves. Even though right now nobody encountered any problem and nothing was contested by administration (in the field of tax law and criminal law) or by a third part who complains for data protection or IP protection, the current lack of regulation may became a major problem in the future.

3.4.1. Czech Republic

Crowdfunding in the Czech Republic is not covered by any specific legal act. While the market is growing, it still seems unlikely that specific crowdfunding regulations will soon be adapted. As no specific legal act governs crowdfunding in the country, the regulation remains quite vague. Each aspect of crowdfunding is covered by applicable Act, such as Acts on Data Protection, Income Tax etc. Significant regulatory burden arises, however, in case of equity-based crowdfunding as it remains rather problematic to offer investment stakes in limited liability companies to a crowd of investors in the online environment of crowdfunding marketplaces. In case of equity-crowdfunding models, the current environment may require compliance with the provisions of the Act on Banks, the Act on Undertaking Business on the Capital Market, the Act on Bonds or the Act on Investment Companies and Investment Funds.

In order to operate an equity-crowdfunding platform, the firm providing the platform may need to be an investment firm (in Czech: “obchodník s cennými papíry”) licensed pursuant to the Act No. 256/2004 Coll., the Capital Markets Act, as amended and meet all the requirements for duly licensed investment firm (the “Investment Firm”), and satisfy further conditions, such as hold a licence for execution of orders concerning investment instruments (e.g. investment securities) on the customer’s account and others.

The total consideration for the investment instruments offered by the platform with respect to each individual project company has to be lower than €1,000,000, otherwise a prospectus must be produced and approved by the respective regulator.

Equity crowdfunding

This model of crowdfunding is defined as investing in return for a share in the profits or revenue generated by a company/project, according to the Czech Act on management, companies and investment funds. According to this definition the investment shall be qualified as capital gains and the distribution of dividends will be subject to national rules on investment income.

Income from capital (i.e. dividends and other yields from securities, limited liability companies or limited partnerships, and interest and profit shares from silent partnerships) is taxable income and is generally treated as a part of the total annual tax base.

Dividends and other yields from securities or partnerships from limited liability companies or limited partnerships, profit shares from silent partnerships, and interest from deposit certificates and bonds paid by a Czech resident entity to a Czech tax resident are all subject to WHT of 15%. A WHT rate of 15% applies to income received by resident individuals from interest and other yields from savings on deposit accounts.

The rate of 15% also applies to income paid to Czech tax non-residents residing in EU/EEA states or in a state having concluded a DTT or an agreement on exchange of tax information with the Czech Republic. In other cases, the tax rate for this type of income is 35%.

WHT may be reduced under the applicable DTT. Several of these treaties further reduce the rate of WHT. Reduced WHT rates are only applicable if the individual remains tax resident in another jurisdiction (i.e. the other party to the DTT) and is not treated as a Czech tax resident as defined under the treaty.

Crowd-lending

Under Czech law, lending of money by individuals to a company in return for repayment of the loan and interest is non-regulated activity. However, general civil and commercial rules on lending must be observed.

Reward-based crowdfunding

There is no specific indication on this kind of crowdfunding, despite it is one of the more developed ones in the countries (considering that a half of the existing platforms work on reward-based crowdfunding project).

Donation based

The gift tax was abolished as of 1 January 2014 and it was implemented into the Czech Income Tax Act. Income Tax (at the rate of 15%) is generally imposed on assets donated. The tax legislation allows for an exemption from income tax of gifts between relatives, between the persons living in the same household for a period at least one year before the gift was provided and exemption applies under certain circumstances in case of gifts provided to the trust.

Moreover, the gifts up to the annual value of CZK 15,000 are generally exempt from the income tax. Gifts provided abroad are generally subject to 15% withholding tax (in case of EU residents, EEA residents, bilateral double tax treaty country residents or residents of a country having a bilateral agreement on exchange of information in tax matters concluded with the Czech Republic) unless the relevant double tax treaty does not provide otherwise. Otherwise, 35% withholding tax is applicable.

Liabilities of platform operators

Czech Republic implement the ECD with the Czech Act no. 480/2004 Sb.(Certain Services of Information Society Act -> https://portal.gov.cz/app/zakony/download?idBiblio=58329&nr=480~2F2004~20Sb.&ft=pdf). Article 5(1b) requires receipt of provable information not just on the quality of the content but also as regards its illegal nature. Concerning the concept of "actual knowledge", Czech law establishes the liability of hosting providers through reference to the concept of conscious negligence (culpa lata). First, it must be proven that the host provider had obtained knowledge of the illegal nature of the information provided by the user. Second, the fact that the provider is aware of the information as such does not directly imply its awareness of its illegal nature. Its knowledge of the illegality depends largely on the nature of the illicit information.

3.4.2. Croatia

Also in Croatia there are no regulations (statutes, ordinances or bylaws) specifically addressed to crowdfunding.

Equity Model

Operations would be characterized as investment within the application of Capital Market Act, which means that incomes meant to be qualified as capital gains.

Tax on capital income is withheld at source without a right for the individual to claim expenses or personal allowances. An obligation to submit an annual personal income tax return does not arise.

A non-taxable threshold for dividends and profit shares of HRK 12,000 per annum was abolished as of 1 January 2015; therefore, a non-taxable threshold applies on the personal income tax returns for 2015 that will be submitted in 2016 year.

Capital gains arising on the disposal of property and intangible assets are subject to tax.

Crowd-lending

The lending model resembles the classical loan agreement, although the platforms offering this model do not specify whether it includes issuance of bond or other transferable debt securities.

With effect from 1 January 2015, interest on saving accounts is treated as income from capital, subject to income tax at the rate of 12 percent, plus city surtax if applicable. The tax is withheld by the payor.

Interest on a positive balance on giro accounts, current accounts and foreign currency accounts up to 0.5 percent per annum, interest on investment bonds and interest due pursuant to court rulings and rulings of the bodies of regional and local authorities are exempt from tax. Loan interest received by individuals from other individuals or legal entities is generally subject to withholding tax.

Donation and reward based crowdfunding

Those models are not regulated as well and, considering that they are also excluded from MIFID provision and prospectus requirements, in order to understand the applicable tax regime will be necessary an analysis of the rule settled by contract in each case.

Liabilities of platform operators

In Croatia, provisions on providers liability are part of the Electronic Commerce Act (ECA, -> http://narodne-novine.nn.hr/clanci/sluzbeni/2003_10_173_2504.html)[23], that implements the ECD in Croatian law. However, the provisions of ECA do not apply (among other areas) to data protection issues. Other than a set of explicit exclusions, the exemption from liability applies in a horizontal way for any kind of unlawful content.

Art. 19 of the ECA contains a new exemption, not existing in the ECD, related to the provision of hyperlinks to third party information, and modelled on the basis of the provisions for hosting providers.

The Croatian Copyright Law (CRAA)[24] in Article 185 para.1 states that a court can order any preliminary injunction against the intermediary, whose services are used by third parties to infringe intellectual property rights, with the aim of blocking and preventing the infringement.

Besides, the right holder that commenced a civil proceeding may request, through a claim or a preliminary injunction, information directly to the service provider.

Croatian law does not provide for a formal notice and take down procedure.

3.4.3. Poland

Under the Polish Trading in Financial Instruments Act of 29th of July 2005 (TFIA), respective activities are regulated and require a license. Equity crowdfunding can potentially fall within the scope of TFIA. This depends on two factors. Firstly, whether the instrument involved in crowdfunding qualifies as a financial instrument. Secondly, whether the activities of a crowdfunding platform are investment services, as defined in MiFID.

[23] Official Gazette of the Republic of Croatia 173/2003, 67/2008, 130/2011, 36/2009 and 30/2014

[24] Copyright and Related Rights Act (OG No. 167/2003)

If a project initiator places funds gathered on a Crowdfunding platform under certain rights (e.g., securities, receivables, derivatives), where these funds have been gathered from other persons through a proposal to enter into an agreement, the object of which is participation in such an undertaking, the operator of the platform carries out activities reserved for investment funds. In these cases Financial Supervision Commission's authorization is required.

Liabilities of platform operators

Poland has implemented the ECD through the Act of July 18, 2002 on the provision of services by electronic means (APSEM, -> http://dziennikustaw.gov.pl/du/2002/s/144/1204/D2002144120401.pdf). Polish legislation provides for an obligation on the part of host providers merely to disable access to the offending content, but does not also required that it be removed (Article 14 (1) APSEM)

Poland explicitly exempts providers from contractual liability towards recipients whose data has been blocked due to a claim for injunctive relief against the provider. (Articles 14 (2),(3) APSEM)

Poland has not implemented any notice and take down procedure, nor a self-regulation procedure at the level of associations of intermediaries. Differently from Italy, Poland does do not provide for obligations for providers to give information of illegal behaviour without administrative request.

3.4.4. Hungary

There have been no recent regulatory developments considering crowdfunding in Hungary and crowdfunding itself has been little developed in the internal market.

Equity and Lending

Both the equity-based and lending-based crowdfunding might trigger regulatory requirements, including, inter alia, financial services requirements and payment services requirement.

Capital gains are taxed as part of the accounting profit, at a rate of 9%. However, no tax is due if the participation exemption applies. Capital gains realized by a shareholder resident in a nontreaty country on the sale of its shares are not taxable, but Hungarian taxation may apply if the shares are in a Hungarian real estate company (and possibly to a resident of a tax treaty country if the relevant treaty so provides). In this case, gains are taxable at a 9% rate.

Donation and reward based

They are generically exempted from the Hungarian regulatory requirements, however, depending on the structure used by platform and service provided by the company, they may trigger payment services and custodial services requirements.

Liabilities of platform operators

Hungary has implemented the ECD trough the Act CVIII of 2001 on certain aspects of electronic commerce services and of services related to the Information Society (-> http://njt.hu/cgi_bin/njt_doc.cgi?docid=57566.323251).

The original formulation of act restricted liability exemption for host providers to civil liability, excluding criminal liability. However, Hungary amended § 10 ECSA in order to make clear that the liability exemptions also apply to criminal cases.

Hungary has implemented a "notice-and-take-down-procedure" in § 13 of ECSA dealing, however, only with infringements of intellectual property rights, including not only copyright but also trademark protection, which is very similar to the procedure established by Sec. 512 of the US DMCA act.

Moreover, according to the revised Criminal Code[25], article 77, content of criminal nature "disclosed through an electronic communications network" can be ordered by courts to be "rendered irreversibly inaccessible"

§ 94 of the Copyright act[26] establishes an obligation for intermediaries (including hosting providers) to provide information to public authorities when requested.

3.4.5. Slovakia

Although there isn't any provision specifically dedicated to crowdfunding in Slovakia, all different types of crowdfunding models are available and recognized under Slovak law.

Equity crowdfunding

Offering securities by the company would constitute a public offer if securities under the Act no. 566/2001 Coll., on Securities and Investement Services Act, which implements the MIFID Directive in Slovakian legal system.

The recent approved amendment of the income tax act changed taxation of the dividend income in Slovakia. Dividend income from profits arising from 2004 to 2016 is not subject to Slovak tax (subject to anti avoidance provisions). However, the dividend income from profits arising from 1 January 2017 and later years will be subject to 7% tax rate (WHT applies if paid from Slovak company). The same 7% tax rate will apply also to dividend income arising from profits before 2004. This amendment is effective as of 1 January 2017.

Crowdlending

According with Slovakian legal system, if the loan is provided as a one-off investement by a private person, which shall be the model in crowdlending, the relationship will be governed by Act. No 40/1964 of the Slovakian Civil Code. Interests may or may not be agreed under such relationship and its regulation under the Civil Code is rather liberal.

Whereas contractors agree for an obligation of interest's payment, such interest shall be taxed in accordance. Taxable investment income includes interest and other yields from securities, interest, winnings, income from savings on deposit accounts, yields from supplementary pension insurance, and yields from life insurance after passing a certain age. Some of these types of income are subject to withholding tax (WHT), unless they are received from abroad, in which case they are treated as part of the tax base. The WHT may be reduced under double taxation treaties (DTTs) for individuals who are not Slovak tax residents. Income from bonds arising to a foreign taxpayer is not subject to taxation in Slovakia.

Reward-based and donation-based crowdfunding

It may be considered as donation agreement, pursuant to art. 628 of the Slovakian Civil Code or as a collection of funds under the obtainment of a trade licence.

Liabilities of platform operators

The Slovak Republic has implemented the ECD trough the Electronic Commerce Act No. 22/2004 JO of 3 December 2003 (-> http://www.zakonypreludi.sk/zz/2004-22). The Act has only implemented an obligation to remove illicit information, but not to disable access (§ 6 (4)).

[25] Act LXXVIII of 2013

[26] Act LXXVI of 1999 on Copyright and other laws on intellectual property rights

3.4.6. Slovenia

Despite there is no specific Crowdfunding regulation in Slovenia, yet equity, lending and donation-based or reward-based crowdfunding are possible under the applicable law.

Equity crowdfunding and crowdlending

Under the Financial Instruments Market Act only banks, broker-dealers and investments enterprises that hold a licence issued by the Security Matket Agency may perform financial services and transactions. Financial services and transactions includes transferable securities, namely shares in joint-stock companies, Societas Europaea and limited partnerships with share capital, bonds, other debt securities and derivative financial instrument.

Private and personale lending of money in return for repayment with interests is a non-reglated activity in Slovenia even if the lending occurs through online crowdfunding platforms. Therefore creditors, would not require a licence, but the general civil and commercial law regard lending will be applied.

Capital gains, interest, dividends, and rental income are taxed at a flat rate of 25%. The tax rate on capital gains is decreased according to the length of the holding period: the tax rate is 25% for a holding period of up to five years, 15% for a holding period from five to ten years, 10% for a holding period from ten to 15 years, 5% for a holding period from 15 to 20 years, and 0% for a holding period greater than 20 years. The tax is treated as a final tax for residents and non-residents alike.

Interest derived from bank deposits with banks or savings banks registered in Slovenia or elsewhere in the European Union is not subject to taxation up to the amount of EUR 1,000.

Reward and donation based

Individual taxpayers in Slovenia may direct and give up to 0.5% of their personal income tax in a year to a designated recipient as a donation under the Personal Income Tax Act. To qualify as a recipient of donations that may be paid under direction of a donor out of donor's personal income tax, the recipient must each year apply and qualify as a recipient before the Ministry competent for its business area. Further requirements for recipients are set forth under the Personal Income Tax Act and the Decree of the appropriation of the personal income tax for donations.

Other tax implication may apply to donations received through crowdfunding.

Liabilities of platform operators

The ECD was implemented in Slovenian Law through the Electronic Market Act of 2006[27] (-> http://www.pisrs.si/Pis.web/npbDocPdf?idPredpisa=ZAKO6919&idPredpisaChng=ZAKO4600&type=pdf). It is a verbatim translation of the ECD. Slovenian law does not provide for a formal notice and take down procedure, nor for any obligation on hosting service providers to block or filters online resource on websites or platforms.

[27] Zakon o elektronskem poslovanju na trgu (ZEPT) no. 61/2006

4. Strong/weak points for international transfer possibilities

After having examined the main aspects of the legal multilevel framework on crowdfunding directly and indirectly applicable to CE EU Member States, it is now possible to make some concluding remarks non the current situation.

What should interest both relevant actors and multilevel decision makers is the presence of points of weakness and strength for cross-border crowdfunding; a closer look to the main legal problems and added values can help crowdfunding operators take better strategic and operational choices, while decision makers can be supported in the framing of reforms.

Indeed, the EU institutions and many European stakeholders see cross-border crowdfunding as a strategic tool to foster growth, employment, research and innovation in the EU; accordingly, a stronger cultural readiness on crowdfunding potentials within CE EU Member States is to be accompanied by efficient multilevel legal novelties.

A) Weak points

- Lack of national regulations on crowdfunding. The analysis conducted insofar has demonstrated that the legal multilevel approach towards crowdfunding is still developing and quite much fragmented. Only 7 European States have adopted norms to directly regulate crowdfunding and only 3 of them are CE EU Member States (Italy, Austria, Germany). What is more, the other Member States with a domestic discipline on crowdfunding are Western EU Member States; it means that Eastern EU Member States at the moment are unwilling or not capable to regulate crowdfunding.
- Deep differences between existing disciplines/practices on crowdfunding. The analysis conducted insofar has demonstrated that the legal multilevel approach towards crowdfunding is still developing and quite much fragmented. Norms and/or practices tend to vary from State to State; uncertainty and lack of transparency cannot but hinder the potentials of cross-border crowdfunding.
- Narrow scope of application of the existing disciplines on crowdfunding. To make matters worse, the few existing national disciplines on crowdfunding up to now were not framed to capture a wide series of urgent issues; for example, the Italian regulation only covers equity and until last year just applied to innovative start-ups.
- Uncertain law and case law for provider's liabilities and burdens:
    - Current EU law has difficulties in coordinating providers' liabilities on the one side, and data protection and e-commerce legislation on the other side, so that they are often viewed as non-communicating domains.
    - It is difficult to establish what kind of activity can be required from the provider to prevent violations in these domains: case law provides us with many conflicting judgements at national and European level, while a set of different legal solutions are opportunistically used (especially at national level) to avoid unwanted conclusions (e.g., platforms are/are not host providers, they are "active" /"passive" hosting providers, they are/are not controllers of personal data processing activities, etc.).
    - The meaning of the concept of "actual knowledge of illegality" contained in the ECD is not clear, and interpreted in different ways under different jurisdictions

  - Notice and take down procedures are different among Member States. Besides, they are not established in many national systems.
  - Claims (towards providers) for disclosure of information are regulated very differently under different national jurisdictions.

- Issues for the promoters. Member States enjoy intensive powers when it comes to regulating national material and procedural aspects of patents, whilst the European patent is way too costly and time consuming. The risk of losing patent rights on the product/process to be supported through crowdfunding campaigns is still high.
- Complete lack of regulation for reward-based crowdfunding in quite each EC State. Considering that this crowdfunding model is the most common so far, the complete shortcoming on those activities creates uncertainty about the qualification for tax purposes. If it is considered as income, they must be declared for tax purposes and the previous one may be claimed by tax administration. In such perspective tax contribution may became an unexpected burden for operators and it may block crowdfunding development.
  - Similar danger may be imagined also for other crowdfund revenue, even tough in donation and reward-based experiences income shall be attributable to crowdfunding promoter, despite in equity and landing model interests and dividends will be paid to investors, so these last will produce taxable income.
- Difficulties in crossborder investments. Uncertainty about applicable tax regime, applicable contractual scheme, even financial, criminal and civil responsibilities depends from the comparison of national legal system. Whereas there is a lack of legislation, crowdfunding, considered as an economic exchange regulated by a contract, must be interpreted with national categories, thanks to the possibility of analogy with already regulated phenomena. So to be reassured in an international operation, investors have to know the regulation of a third country and this is obviously uneconomical and it represents an obstacle to crossborder crowdfunding.

B) Strong points

- Penetration of crowdfunding discourse in the field of law. Although the most worrying aspects emerged by the state of the art of crowdfunding in CE EU countries concern the insufficient level of national regulation, it cannot be deined that at least some Member States decided to consider this new phenomenon also under the legal point of view. Moreover, current national crowdfunding discipline do not appear to be particularly demanding for national crowdfunding operators.
- New legal and juridical models. CE EU countries which have not adopted any domestic discipline on crowdfunding yet can now rely on new models that in other few Member States national competent authorities and tribunals have been defining and are further developing.
- Awareness on problems. Having identified some major troubles affecting the potentials of cross-border crowdfunding within CE EU countries is nevertheless a necessary step towards the taking of useful actions.
- Increase in crowdfunding projects. Probably, most of the deficiencies affecting the legal evolution of crowdfunding norms in the countries participating to the present project are logical consequences of the recent diffusion of crowdfunding itself. Perhaps, the increase in crowdfunding projects (even if at national level) would urge decision makers to start working on domestic disciplines for crowdfunding, in the hope that transboundary aspects will be duly considered.

- Freedom of forms. The same shortcoming of regulation which represents a problem under certain point of views is one of the most important keys for the success of the crowdfunding campaigns. Indeed, lack of regulation means a full disposability of all the element relevant in those exchanges. If a stricter regulation will occur to different crowdfunding models it may represents a constraint and it may become crowdfunding itself less attractive.
- Idea wins, not the balance sheet. Crowd investors will be interests in the campaign for different reasons, but they will be mainly connected with what is described as support to the project expressed with financial contribution. For those kinds of investors company's goodness of balance sheet is not a fundamental criterion for the investment. So, it is possible for new companies, innovative and willing despite with a thin capital, to realize their goals without the participation of banks or similar credit institutions.

5. Proposal for unifying rules (way forward to DT. 4.2.2)

Having ascertained that lack of regulation as well as the coexistence of too different rules constitute legal major legal barriers for the spreading of cross-border crowdfunding, some suggestions will be now proposed to overcome this macro-problem.

This final part of this deliverable is a first attempt to envisage some initiatives that will be further discussed in D.T4.2.2 ("Recommendations for unification of legislation and implementation procedures"); therefore, proposals made here are formulated in more general terms and mainly concern procedural aspects, while proposals for decision makers under D.T4.2.2 will tackle specific topics.

A) Domestic practices

National already existing local practices about crowdfunding legal schemes should be harmonized at least in part, especially amongst the CE EU Member States still lacking regulations on crowdfunding.

B) National regulations

- CE EU Member States already fitted with crowdfunding regulations should strive to broaden their scope of application. That particularly applies to Italy.
- CE EU States still lacking any kind of regulation on crowdfunding should take steps forward to the adoption of a domestic legal discipline and in doing so they could rely on already existing models.

C) EU soft-law guidelines

The time is still not ripe for the EU to adopt pieces of legislation covering crowdfunding either in whole or in part. Under the above mentioned circumstances, it is not surprising that the European Commission showed its intention not to propose any binding act on crowdfunding, meaning a first decisive step towards the unification of domestic rules/practices on crowdfunding.

However, over last three years crowdfunding has considerably developed and the same can be said for technical and legal studies on this alternative finance instance. So, nothing seems to prevent the European Commission to draft useful guidelines on cross-border crowdfunding through soft law acts.

These guidelines could serve:

- to raise awareness and contribute to creating a cultural environment on crowdfunding;
- to justify the adoption of further legislative acts somehow connected to the evolution of crowdfunding across the EU countries;
- as a benchmark to frame EU wider strategies;
- to interpret potentially risky issues in compliance with the need to mainstream the potentials of transboundary crowdfunding in all its forms.

D) Further EU-driven consultations

In view of intervening on its applicable legislation, and as soon as new domestic norms no crowdfunding are adopted, the European Commission should promote consultations of relevant crowd-funding actors (like platforms, investors, campaign promoters, intermediaries, etc.) to deepen the core bottlenecks affecting cross-border crowdfunding.

Specifically, with these consultations the European Commission should ask to the recipients if already existing EU law binding acts should be amended and, in the affirmative, which acts and to what extent.

E) Mentioning crowdfunding in the texts of EU legislative acts

When amending any of the legislative acts currently influencing the evolution of transboundary crowd-funding, the EU could begin to mention crowdfunding in their recitals, especially where explanations for harmonization provisions are illustrated.

F) Adoption of notice and take down procedures and codes of conduct

The adoption of a common and simple “notice and take down” procedure, combined with a counter-notice and put-back option, would be a solution to balance providers’ liabilities with interests of rightholders and public interests.

Article 16 and recital 40 of the ECD (e-commerce directive) expressly encourage self-regulation in this field, that is the adoption of Codes of conduct and other agreements elaborated between various stakeholders in order to provide for notice and take down procedures for illegal (and harmful) information when one of the parties to such agreements is a hosting provider or platform.