



Brussels, 13.7.2022
C(2022) 4828 final

COMMISSION DELEGATED REGULATION (EU) .../...

of 13.7.2022

supplementing Regulation (EU) 2020/1503 of the European Parliament and of the Council with regard to regulatory technical standards specifying conflicts of interest requirements for crowdfunding service providers

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 8(7) of Regulation (EU) 2020/1503 on European Crowdfunding Service Providers for business ('the Regulation') empowers the Commission to adopt, following the submission of draft regulatory technical standards by the European Securities and Markets Authority (ESMA), and in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010, delegated acts specifying:

- (a) the requirements for the maintenance or operation of internal rules referred to in paragraph 3 of Article 8;
- (b) the steps referred to in paragraph 4 of Article 8;
- (c) the arrangements for the disclosure referred to in paragraphs 5 and 6 of Article 8.

When developing those draft regulatory technical standards, ESMA shall take into account the nature, scale and complexity of the crowdfunding services provided by the crowdfunding service provider.

Article 8(3) requires crowdfunding service providers to maintain and operate effective internal rules to prevent conflicts of interest. Article 8(4) requires crowdfunding service providers to take all appropriate steps to prevent, identify, manage and disclose conflicts of interest between the crowdfunding service providers themselves, their shareholders, their managers or employees or any natural or legal person linked to them by control, and their clients, or between one client and another client. Article 8(5) and Article 8(6) specify requirements in relation to disclosure of conflicts of interests.

In accordance with Article 10(1) of Regulation (EU) No 1095/2010 establishing the ESMA, the Commission shall decide within three months of receipt of the draft standards whether to endorse the drafts submitted. The Commission may also endorse the draft standards in part only, or with amendments, where the Union's interests so require, having regard to the specific procedure laid down in those Articles.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, the ESMA has carried out a public consultation on the draft technical standards submitted to the Commission in accordance with Article 8(7) of Regulation (EU) 2020/1503. A consultation paper was published on the ESMA's website on 26 February 2021, and the consultation closed on 28 May 2021. Moreover, the ESMA requested advice from the Securities and Markets Stakeholder Group set up in accordance with Article 37 of Regulation (EU) No 1095/2010. Within the final report on the draft technical standards, the ESMA included an explanation on how the outcome of these consultations has been taken into account in the development of the final draft technical standards submitted to the Commission.

Together with the draft technical standards, and in accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, the ESMA has submitted its analysis of the costs and benefits related to the draft technical standards submitted to the Commission. This analysis is included in the Final Report on the technical draft technical standards available at https://www.esma.europa.eu/sites/default/files/library/esma35-42-1183_final_report_-_ecspr_technical_standards.pdf.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The draft technical standards specify what internal rules to prevent conflicts of interest crowdfunding service providers should establish, implement and maintain.

The draft technical standards also set out minimum criteria that crowdfunding service providers should take into account when identifying the types of conflict of interest that arise in the course of providing crowdfunding services and whose existence may damage the interests of a client.

Finally, the draft technical standards also lay down how, where and when information regarding the general nature and source of conflicts of interest and mitigation steps should be disclosed and what it should contain.

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937¹, and in particular Article 8(7), fourth subparagraph, thereof,

Whereas:

- (1) Pursuant to Article 8(3) of Regulation (EU) 2020/1503, crowdfunding service providers are to maintain and operate effective internal rules to prevent conflicts of interest. In order to ensure that such rules meet their objective of preventing conflicts of interest over time, crowdfunding service providers should review those rules periodically and at least on an annual basis, and ensure that appropriate measures are taken to address any deficiencies regarding such rules.
- (2) To manage conflicts of interest, crowdfunding service providers should not over-rely on disclosure requirements set out in Article 8(5) of Regulation (EU) 2020/1503. Therefore, they should establish internal rules to prevent conflicts of interest. Internal rules to prevent conflicts of interest should be appropriate to the nature, scale and complexity of the crowdfunding services provided as well as to the size and organisation of the crowdfunding services provider's business. In that regard, internal rules to prevent conflicts of interest should take into account, where relevant, circumstances related to the fact that the crowdfunding service provider belongs to a group.
- (3) In designing internal rules to prevent conflicts of interest, crowdfunding service providers should make their best efforts to ensure the prevention, identification and management of conflicts of interest. Where a conflict of interest is nevertheless identified, crowdfunding service providers should take the necessary steps to ensure the disclosure of that conflict of interest to the clients of the crowdfunding service provider and to any other party who may be impacted.
- (4) The steps that crowdfunding service providers are to take in accordance with Article 8(4) of Regulation (EU) 2020/1503 should ensure with reasonable confidence that risks of damage to clients' interests will be prevented and, where this is not possible, appropriately mitigated.

¹ OJ L 347, 20.10.2020, p. 1.

- (5) To ensure that clients can take an informed decision about services presenting actual conflict of interests, crowdfunding service providers should keep up-to-date the information, disclosed in accordance with Article 8(5) of Regulation (EU) 2020/1503, about the general nature and sources of conflicts of interest as well as the steps taken to mitigate them. Such disclosure should be appropriate to the nature of the clients to whom or which it is addressed, in particular taking into account their qualification as sophisticated or non-sophisticated investors, including prospective investors. The disclosure should include a description of the conflicts of interests and the related risks for the clients.
- (6) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Securities and Markets Authority.
- (7) European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council².
- (8) The European Data Protection Supervisor was consulted in accordance with Article 42(1) of Regulation (EU) 2018/1725 of the European Parliament and of the Council³ and delivered an opinion on 1 June 2022,

HAS ADOPTED THIS REGULATION:

Article 1

Maintenance and operation of internal rules to prevent conflicts of interest

1. Crowdfunding service providers shall establish in writing, and implement and maintain, internal rules to prevent conflicts of interest. The rules to prevent conflicts of interest shall be appropriate to the size and organisation of the crowdfunding service provider, as well as the nature, scale and complexity of its business.
2. Where a crowdfunding service provider is a member of a group, the internal rules to prevent conflicts of interest referred to in paragraph 1 shall take into account any circumstances that constitute or may give rise to a conflict of interest due to the structure and business activities of other members of the group.
3. The internal rules to prevent conflicts of interest referred to in paragraph 1 shall require the crowdfunding service provider to:
 - (a) ensure that any of the persons referred to in Article 8(2), first subparagraph, points (a), (b) and (c) of Regulation (EU) 2020/1503 are not accepted as project owners in the crowdfunding projects offered on their crowdfunding platform;
 - (b) identify whether any of the persons referred to in Article 8(2), first subparagraph, points (a), (b) and (c), of Regulation (EU) 2020/1503 have been

² Regulation (EU) 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

³ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

- accepted as investors in the crowdfunding projects offered on their crowdfunding platform;
- (c) identify any other circumstances which may give rise to an actual or potential conflict of interest between the persons referred to in Article 8(4) of Regulation (EU) 2020/1503, while taking into account the size and activities of the crowdfunding service provider and, where applicable, of the group to which it belongs, and the risk of damage to the interests of clients;
 - (d) where relevant, specify procedures to be followed and measures to be adopted, including procedures and measures concerning the relevant internal responsibilities within the organisation of the crowdfunding service provider, to comply with the requirements laid down in Article 8(2) of Regulation (EU) 2020/1503 and pursuant to point (c) of this paragraph.
4. In the situation referred to in paragraph 3, point (b), persons as referred to in Article 8(4) of Regulation (EU) 2020/1503 that are engaged in different business activities involving a conflict of interest of the kind specified in Article 8(2), first subparagraph, points (a), (b) and (c), of Regulation (EU) 2020/1503 shall carry on those activities at a level of independence appropriate to:
- (a) the size and activities of the crowdfunding service provider;
 - (b) where applicable, the size and activities of the group to which the crowdfunding service provider belongs;
 - (c) to the risk of damage to the interests of clients.
5. In the situation referred to in paragraph 3, point (c), internal rules shall consist all of the following:
- (a) effective procedures to prevent or control the exchange of information between persons as referred to in Article 8(4) of Regulation (EU) 2020/1503 that are engaged in activities involving a risk of a conflict of interest where the exchange of that information may harm the interests of one or more clients of the crowdfunding service provider;
 - (b) provisions for separate supervision of persons as referred to in Article 8(4) of Regulation (EU) 2020/1503 whose principal functions involve carrying out activities on behalf of, or providing services to clients whose interests may conflict, or who otherwise represent different interests that may conflict, including the interests of the crowdfunding service provider;
 - (c) removal of any direct link between the remuneration of persons as referred to in Article 8(4) of Regulation (EU) 2020/1503 that are principally engaged in one activity and the remuneration of, or revenues generated by, different persons, as referred in article 8(4) of Regulation (EU) 2020/1503, principally engaged in another activity, where a conflict of interest may arise in relation to those activities;
 - (d) measures to prevent or limit any person from exercising inappropriate influence over the way in which a person as referred to in Article 8(4) of Regulation (EU) 2020/1503 carries out crowdfunding services;
 - (e) measures to prevent or control the simultaneous or sequential involvement of a person as referred to in Article 8(4) of Regulation (EU) 2020/1503 in separate

crowdfunding services where such involvement may impair the proper management of conflicts of interest.

6. Crowdfunding service providers shall assess and review their internal rules to prevent conflicts of interest at least annually and shall take all appropriate measures to address any deficiencies identified.

Article 2

Steps to prevent, identify and manage conflicts of interest

1. The steps that crowdfunding service providers are required to take in accordance with Article 8(4) of Regulation (EU) 2020/1503 shall aim at ensuring with reasonable confidence that risks of damage to client interests will be prevented, and, where that is not possible, appropriately mitigated.
2. For the purposes of identifying the types of conflict of interest that arise while providing crowdfunding services and whose existence may damage the interests of a client, in addition to the types of conflicts of interests referred to in Article 8(2), first subparagraph, of Regulation (EU) 2020/1503, crowdfunding service providers shall take into account, as a minimum, whether any of the persons referred to in Article 8(4) of that Regulation:
 - (a) is likely to make a financial gain, or avoid a financial loss, at the expense of the client;
 - (b) has an interest in the outcome of a service provided to the client which is distinct from the client's interest in that outcome;
 - (c) has a financial or other incentive to favour the interest of a client or group of clients over the interests of another client.

Article 3

Disclosures regarding the general nature and source of conflicts of interest and mitigation steps

1. Crowdfunding service providers shall publish and update the information referred to in Article 8(5) of Regulation (EU) 2020/1503 on their website on a place that is easily accessible for clients. Crowdfunding service provider shall disclose that information to clients on a durable medium, unless no conflict of interest has been identified in accordance with Article 8(4) of Regulation (EU) 2020/1503, and shall update that information where relevant.
2. The disclosure referred to in paragraph 1 shall contain a specific and clear description of the conflicts of interest and associated risks identified in the context of a given service, taking into account the nature of the clients to whom the disclosure is being made, in particular their qualification as sophisticated or non-sophisticated prospective investors.

Article 4

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 13.7.2022

For the Commission
The President
Ursula VON DER LEYEN