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COMMISSION IMPLEMENTING REGULATION (EU) .../...

of 13.7.2022

laying down implementing technical standards for the application of Regulation (EU) 2020/1503 of the European Parliament and of the Council with regard to standard forms, templates and procedures for the cooperation and exchange of information between competent authorities concerning European crowdfunding service providers for business

(Text with EEA relevance)

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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 on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937¹, and in particular Article 31(9), third subparagraph, thereof,

Whereas:

- (1) To facilitate communication and cooperation between competent authorities for the purposes of Regulation (EU) 2020/1503, each competent authority should designate and communicate to the European Securities and Markets Authority (ESMA) a contact point.
- (2) For reasons of transparency and to ensure good cooperation between different competent authorities, it is important to lay down that competent authorities that refuse to act on a request for information or a request to cooperate with an investigation, as referred to in Article 31(2) of Regulation (EU) 2020/1503, notifies the requesting competent authority of such refusal and informs that competent authority of the reasons of that refusal.
- (3) Competent authorities should be able to cooperate in an efficient manner when performing supervision, investigation and enforcement activities for the purposes of Regulation (EU) 2020/1503. For that purpose, it is necessary to set out common and uniform procedures in case the requested cooperation involves the taking of statements. Those procedures should set out the elements which competent authorities are to consider, in accordance with applicable national and Union law, when cooperating on the taking of a statement from any person. Those elements should include the rights of the person from whom the statement is to be taken and the arrangements enabling competent authorities' staff to proceed efficiently with the cooperation. In particular, competent authorities should ensure the protection of the right to an effective remedy and to a fair trial and the right to a presumption of innocence and right of defence, enshrined in Articles 47 and 48 of the Charter of fundamental rights of the European Union.

¹ OJ L 347, 20.10.2020, p. 1.

- (4) It is important to ensure that competent authorities engage efficiently in requests for cooperation on an on-site inspection or an investigation, including on the appropriateness to carry out a joint on-site inspection or investigation. It is therefore necessary to lay down common and uniform procedures to facilitate the communication between, consultations of, and interactions between the requesting competent authority and the requested competent authority, as well as to ensure the effective protection of the rights of the persons who are subject to on-site inspection or investigation.
- (5) This Regulation is based on the draft implementing technical standards submitted to the Commission by ESMA.
- (6) ESMA did not conduct public consultations on the draft implementing technical standards on which this Regulation is based, nor did it analyse the potential related costs and benefits, as this would have been highly disproportionate in relation to the scope and impact of those standards, taking into account the fact that they principally concern competent authorities.
- (7) ESMA has 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

Contact points

1. Competent authorities shall designate contact points for the purposes of cooperating and exchanging information pursuant to Article 31 of Regulation (EU) 2020/1503.
2. Competent authorities shall communicate the details of the contact points to the European Securities and Markets Authority (ESMA) and inform ESMA of any changes to those details.
3. ESMA shall maintain an up-to-date list of all contact points designated in accordance with paragraph 1 and update that list as necessary for use by the competent authorities.

Article 2

Request for cooperation or exchange of information

1. Competent authorities shall make a request for cooperation or exchange of information in writing, using the form set out in Annex I.

² Regulation (EU) No 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 No 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).

2. When making a request for cooperation or exchange of information, requesting competent authorities shall:
 - (a) specify the details of the information that the requesting competent authority is seeking from the requested competent authority;
 - (b) identify, where appropriate, issues relating to the confidentiality of the information sought.
3. In urgent cases, requesting competent authorities may make the request for cooperation or exchange of information orally, provided that a subsequent confirmation of the request is made in writing within a reasonable timeframe using the form set out in Annex I, unless the requested competent authority agrees otherwise.

Article 3

Acknowledgement of receipt of a request for cooperation or exchange of information

1. Within 10 working days of receipt of a request made pursuant to Article 2, the requested competent authority shall send an acknowledgement of receipt to the requesting competent authority using the form set out in Annex II and, where possible, shall indicate an estimate date for response.
2. Where the requested competent authority has any doubt about the precise content of the cooperation or exchange of information requested, it shall request further clarifications as soon as possible using any means appropriate, whether oral or written.

Article 4

Reply to a request for cooperation or exchange of information

1. When responding to a request made pursuant to Article 2, the requested competent authority shall:
 - (a) respond in writing, using the form set out in Annex III;
 - (b) take all reasonable steps within its powers to provide the requested cooperation or information;
 - (c) act without undue delay and in a manner which ensures that any necessary regulatory action can proceed expediently, taking into account the complexity of the request and the need to involve third parties or another competent authority.
2. In urgent cases, the requested competent authority may reply to a request for cooperation or exchange of information orally, provided that the response is subsequently given in writing within a reasonable timeframe using the form set out in Annex III, unless the requesting competent authority agrees otherwise.

Article 5

Means of communications

1. Except where otherwise stated in this Regulation, any forms to be used under this Regulation shall be transmitted in writing by post or by electronic means.

2. In determining the most appropriate means of communication in any particular case, due account shall be taken of confidentiality considerations, the time necessary for correspondence, the volume of material to be communicated, and the ease of access to the information by the requesting competent authority.
3. Competent authorities shall ensure that the completeness, integrity and confidentiality of the information subject matter of the exchange are maintained during the transmission.

Article 6

Procedures for processing and executing a request for cooperation or exchange of information

1. The requesting competent authority shall respond promptly to any request for clarifications as referred to in Article 3(2) from the requested competent authority.
2. The requested competent authority shall notify the requesting competent authority where it anticipates a delay of more than 5 working days beyond the estimated date of response specified in the acknowledgement of receipt referred to in Article 3(1).
3. Where the request has been qualified by the requesting competent authority as urgent, the requested competent authority and the requesting competent authority shall agree on the frequency with which the requested competent authority will update the requesting competent authority on its handling of the request and on the date when it expects to provide a response.
4. The requested competent authority and the requesting competent authority shall cooperate to resolve any difficulties that arise in executing the request.
5. Competent authorities shall provide, where appropriate, feedback to each other on the usefulness of the assistance received, the outcome of the case in relation to which the assistance was sought and any problems encountered in providing such assistance.

Article 7

Notification of refusal to act on the request for cooperation or exchange of information

Where, in accordance with Article 31(2) of Regulation (EU) 2020/1503, the requested competent authority refuses to act, in full or in part, on a request as referred to in Article 2 of this Regulation, it shall, within 15 working days of receipt of the request, notify the requesting competent authority in writing of its refusal to act, using the form set out in Annex IV.

Article 8

Procedures for a request for cooperation concerning the taking of a statement

1. Where a request for cooperation as referred to in Article 2 includes the taking of a statement from any person, the requesting competent authority and the requested competent authority shall, in accordance with the applicable national law, assess and take into account all of the following:
 - (a) the rights of the person from whom the statement is to be taken, in accordance with applicable national and Union Law, including the Charter of Fundamental Rights of the European Union;

- (b) the rights of the person related to the language of the statement, and possible translations schemes;
 - (c) the role of the staff of the requesting competent authority and the requested competent authority in the taking of the statement;
 - (d) whether the person from whom the statement is to be taken has the right to be assisted by a legal representative and, if so, the scope of the legal representative's assistance during the taking of the statement, including in relation to any record or report of the statement;
 - (e) whether the statement is to be taken on a voluntary or compulsory basis;
 - (f) whether, based on the information that is available at the time of the request, the person from whom the statement is to be taken is a witness in or subject to an administrative or judicial investigation;
 - (g) whether, based on the information that is available at the time of the request, the statement could be or is intended to be used in legal proceedings;
 - (h) the recording of the statement and the applicable procedures, including whether it will be contemporaneous or summarised in written minutes or in an audio or audio-visual recording;
 - (i) procedures for the certification or confirmation of the statement by the person providing the statement, including whether that takes place after the statement is taken;
 - (j) the delivery procedures of the statement to the requesting competent authority, including the requested format and time period.
2. The requested competent authority and the requesting competent authority shall ensure that arrangements are in place for their staff to proceed efficiently and to be able to agree on any additional information that may be necessary, including on the following:
- (a) planning of dates;
 - (b) the list of questions to be asked to the person from which the statement is to be taken and its review;
 - (c) travelling or video conference arrangements, including ensuring that, where necessary, the competent authorities concerned are able to meet to discuss the matter prior to the taking of the statement;
 - (d) translation arrangements.

Article 9

Procedures for a request for cooperation on an on-site inspection or an investigation

1. Where a request for cooperation as referred to in Article 2 concerns the carrying out of an on-site inspection or an investigation, the requesting competent authority and the requested competent authority shall consult each other on the best way to give effect to that request, including on the merits of conducting a joint on-site inspection or a joint investigation.
2. For the purposes of the consultation referred to in paragraph 1, the competent authorities shall take into account all of the following:

- (a) the content of the request, including the appropriateness to carry out the investigation or the on-site inspection jointly;
 - (b) whether the competent authorities are conducting their own inquiries into a matter with cross-border implications separately, and whether that matter would be more suitably dealt with by joint collaboration;
 - (c) the legal and regulatory framework applicable in each of the competent authorities' jurisdictions, ensuring that both competent authorities have a good understanding of the potential constraints and legal limitations on their conduct and on any proceedings that may follow, including any issues relating to the principle of *ne bis in idem* and the protection of the rights of the persons subject to the on-site inspection or the investigation;
 - (d) the management and direction needed for the investigation or the on-site inspection;
 - (e) the allocation of resources and appointment of staff in charge of carrying out the investigation or the on-site inspection;
 - (f) the possibility to establish a joint action plan and timings of work;
 - (g) the actions to be taken, jointly or individually, by the competent authorities;
 - (h) the mutual sharing of the information gathered and reporting on the outcomes of the individual actions taken.
3. Where the requested competent authority carries out the on-site inspection or the investigation itself as referred to in Article 31(4), point (a), of Regulation (EU) 2020/1503, it shall keep the requesting competent authority informed of the progress of the inspection or investigation and shall deliver its findings in good time.
- (a) Competent authorities that decide to carry out a joint investigation or a joint on-site inspection as referred to in Article 31(4), point (b), of Regulation (EU) 2020/1503 shall:
 - (b) engage in ongoing dialogue to coordinate the information gathering process and the finding of facts;
 - (c) work closely and cooperate with each other when conducting the investigation or the on-site inspection;
 - (d) identify the specific legal requirements that form the subject matter of the investigation or the on-site inspection;
 - (e) provide mutual assistance on subsequent enforcement proceedings to the extent legally permitted, including coordinating in respect of any proceedings or other enforcement action related to the outcome of the investigation or the on-site inspection or, where appropriate, the prospects of a settlement;
 - (f) where relevant, agree upon all of the following:
 - (g) the drawing up of a joint action plan specifying the substance, nature and timing of the actions to be taken, including the allocation of responsibilities in delivering the outcome of the work and taking into account each competent authority's respective priorities;
 - (h) the identification and assessment of any applicable legal limitations or constraints and any differences in procedures with respect to investigative or

enforcement action or any other proceedings, including the rights of any person subject to investigation;

- (i) the identification and assessment of specific legal professional privileges that may have an impact on the investigation proceedings as well as the enforcement proceedings, including self-incrimination;
- (j) the public and press strategy;
- (k) the intended use of the information exchanged during the joint investigation or joint on-site inspection.

Article 10

Unsolicited exchange of information

1. A competent authority that has information that it believes would assist another competent authority in carrying out its duties under Regulation (EU) 2020/1503 shall transmit that information in writing using the form set out in Annex III.
2. By way of derogation from paragraph 1, if the competent authority sending the information believes that the information should be sent urgently, it may initially communicate the information orally, provided that it is subsequently transmitted within a reasonable timeframe using the form set out in Annex III, unless the competent authority receiving the information agrees otherwise.

Article 11

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