

DIRECT LENDING

Crowdfunding Update: Marketing Requirements

21 April 2021

Regulatory activity continues to ramp-up in advance of 10 November 2021 (the application date of the new EU Crowdfunding Regulation) with the Central Bank of Ireland (**CBI**) publishing a consultation on marketing requirements for regulated providers of crowdfunding services (**CSPs**).

As mentioned in our recent briefing ([Arthur Cox Q&A: EU Crowdfunding Regulation](#)), the new regulatory framework set out in the [EU Crowdfunding Regulation](#) will apply, from 10 November 2021, to providers of two key types of crowdfunding: **peer-to-peer business lending** and **investment-based crowdfunding**.

EU CONSULTATIONS

At EU-level, [ESMA's consultation](#) on seven sets of technical standards, covering key issues such as authorisation applications, complaints-handling, conflicts of interest, the calculation of rates of default on business lending platforms, the entry knowledge test and simulation of ability to bear loss for non-sophisticated investors, cooperation between national competent authorities (**NCAs**) and cooperation between NCAs and ESMA, remains open for feedback until 28 May 2021. ESMA hosted an open hearing on those proposals on 12 April 2021.

The EBA has not yet launched a consultation on the draft technical standards that it has been tasked with developing, in advance of 10 November 2021, on the individual portfolio management of loans.

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Authorisations

In Ireland, the CBI has confirmed that (as anticipated) it will be the NCA for in-scope CSPs that will operate in Ireland. We expect that it will publish details of its authorisation framework for CSPs shortly, and this forms part of its consumer protection priorities for 2021 as outlined in its recent [Consumer Protection Outlook Report 2021](#).

Advertising

The CBI has published a Consultation Paper (**CP141**) on [Crowdfunding Marketing Requirements](#).

Under the EU Crowdfunding Regulation, marketing communications by a regulated CSP must:

- be fair, clear and not misleading
- be clearly identifiable as marketing communications
- not disproportionately target particular crowdfunding offers or projects

When the EU Crowdfunding Regulation comes into force, NCAs such as the CBI will be required to publish national provisions concerning marketing requirements for regulated CSPs on their website and notify these to ESMA.

In CP141, the CBI proposes to introduce an addendum to the Consumer Protection Code 2012 (**CPC**), setting out the [advertising requirements of the CPC that will apply to regulated CSPs when they provide crowdfunding services to Irish consumers](#). These are as follows:

Provision	Requirement(s)
9.1	Requirement to include a regulatory disclosure statement in all advertisements.
9.2 - 9.6	Requirements relating to the design, presentation and content of advertisements with a view to ensuring that they are clear, fair, accurate and not misleading, and that key information is prominent.
9.8 - 9.9	Requirements relating to the inclusion of warning statements.
9.13 - 9.14	Requirements relating to the use of recommendations and commendations in advertisements.
9.16	Requirements relating to the use of comparisons or contrasts in advertisements.
9.17	Requirements regarding explanations of any acronyms used in advertisements.

CSPs will also be subject to specific requirements where an advertisement:

- relates to a product or service where there are qualifying criteria referable to a minimum price or a maximum saving (**CPC Provision 9.7 will apply**)
- refers to promotional or introductory interest rates (**CPC Provision 9.10 will apply**)
- contains any statement, promise or forecast (**CPC Provision 9.11 will apply**)
- describes a product or service as ‘free’ (**CPC Provision 9.18 will apply**)
- refers to past performance (**CPC Provision 9.36 will apply**) or simulated future performance (**CPC Provision 9.39 will apply**)
- refers to impact of taxation (**CPC Provision 9.41 will apply**)
- relates to a product or service that is denominated or priced in a foreign currency (**CPC Provision 9.46**)

The CBI has also proposed a specific risk warning for advertisements by regulated CSPs. Under the CPC, a warning must be included in advertisements for investment products as follows:

“The value of your investment may go down as well as up”.

As this warning is not consistent with the warning that a regulated CSP will be

required to include in a Key Investment Information Sheet (KIIS), the CBI proposes that regulated CSPs will need to include a shortened version of the KIIS warning in their advertisements. Two options for that risk warning are set out in CP141, and the CBI is seeking views on which warning is preferred:

- Option A: **WARNING Investment in crowdfunding projects entails risks, including the risk of partial or entire loss of the money invested.**
- Option B: **WARNING Investment in crowdfunding projects entails risks, including the risk of partial or entire loss of the money invested. Your investment is not covered by a deposit guarantee scheme or by an investor compensation scheme.**

The CBI is seeking feedback on its proposals by 13 July 2021.

Application of CBI requirements

The CBI proposes that regulated CSPs comply with the above requirements when marketing peer-to-peer business lending and investment-based crowdfunding projects to Irish “consumers”.

In-scope CSPs should note that the CPC definition of “consumer” is wide-ranging and includes:

- individuals acting for business reasons
- partnerships
- other unincorporated associations
- bodies corporate (such as companies or ICAVs) with an annual turnover of ≤€3 million in the previous financial year (provided that the relevant body corporate is not part of a group of companies with a combined turnover above that threshold)

COMMENT

We expect further details in due course from the CBI on the authorisation application process for regulated CSPs in advance of the new regulatory framework coming into effect on 10 November 2021. Our Financial Regulation Group has extensive experience of advising on licensing perimeter issues and on licensing applications to the CBI for a wide range of regulated firms, and would be very happy to assist with queries in relation to the scope of the new regime and the licensing process.



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