

Implementation of ECSP Regulation in Austria

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Introduction

Before the European Crowdfunding Service Providers (ECSP) Regulation⁽¹⁾ came into force on 10 November 2021, there was no uniform regulation on crowdfunding at EU level.

The national rules for crowdfunding currently vary between member states. Some have introduced a separate regulatory framework for crowdfunding, while others assess such activity pursuant to the existing rules. As a result, the national rules differ to such a degree that the cross-border provision of crowdfunding services is obstructed. Nevertheless, crowdfunding is an increasingly established form of alternative financing for start-ups and small and medium-sized enterprises.

The ECSP Regulation has now established a uniform regulatory framework for crowdfunding services and aims to facilitate cross-border provision of services and eventually the free movement of capital. The ECSP Regulation covers crowdfunding services involving enterprises (ie, not consumers) seeking financing of up to €5 million. This involves both lending-based and investment-based crowdfunding. The ECSP Regulation covers the following services:

- bringing together the business financing interests of investors and project owners by arranging loans;
- the acceptance and transmission of customer orders; and
- the placement without firm underwriting commitment of transferable securities and instruments eligible for crowdfunding purposes.

Implementation in Austria

In order to make the ECSP Regulation applicable in Austria, the Swarm Funding Enforcement Act has been enacted. In the Act, the Financial Market Authority (FMA) has been designated as the authority responsible for the licensing and supervision of swarm funding service providers and has been provided with the supervisory and penalising powers required for this purpose.

Furthermore, the amendments to the Capital Markets Act 2019 (CMA 2019), the Alternative Financing Act (AltFG), the Financial Market Authority Act (FMABG) and the Consumer Protection Act (KSchG) enable the applicability of the ECSP Regulation and demarcate its scope in relation to the CMA 2019 and the AltFG.

Main aspects of Swarm Funding Enforcement Act

The Swarm Funding Enforcement Act contains several provisions:

- designation of the FMA as the competent authority for the authorisation and supervision of swarm finance service providers within the meaning of the ECSP Regulation in Austria and endowment with the necessary supervisory and penalising powers;
- provisions on appeals, publication of decisions and notification of penalties and administrative measures to the ESMA;
- regulation of liability for the information contained in key investor information documents;
- regulations authorising the FMA to permit instruments licenced for swarm financing purposes and requiring advance notification of basic investment information sheets;
- exemption from further licensing requirements for certain financing activities carried out in connection with the provision of swarm financing services by authorised swarm financing service providers – for example, the acceptance or allocation of funds by project sponsors or investors;
- exemption from the licensing requirement under the Austrian Banking Act (BWG) and all other laws;
- amendment to the CMA 2019 and the AltFG to exclude swarm financing offers that fall within the scope of the ECSP Regulation from the scope of these two acts, while ensuring that they are included in certain amount limits;
- extension of the exemptions from the reporting requirement for the issuance calendar;
- amendment of the FMABG in order to regulate the responsibility for the supervision of swarm finance service providers within the FMA and to make the provisions on unauthorised business operations applicable also to swarm finance service providers; and
- amendment to the KSchG to extend injunctive relief to violations relating to the provision of crowdfunding services.

Impact on legal framework in Austria

The ECSP Regulation covers the intermediation of "genuine" credits, namely credits with an unconditional obligation of the borrower to repay the agreed loan amount, plus the accrued interest, in accordance with an instalment plan. So far, no crowdlending platforms have

existed in Austria that broker such loans. A significant reason for this is that the activities to be performed in connection with credit-based crowdfunding regularly constitute banking activities subject to a licence pursuant to the BWG. For this purpose, it is sufficient that the persons involved act commercially. Relevant in relation to crowdfunding is section 1(1) of the BWG, which regulates the taking out of loans as a deposit-taking business of the project sponsor requiring a licence, the granting of loans as a lending business of the investor and the brokering of loans as a credit brokering business of the service provider.

As a result, qualified subordinated loans have become established as a common crowdfunding instrument in Austrian practice. The raising, granting and brokering of qualified subordinated loans do not trigger any banking licence obligation.

Qualified subordination means that the borrower does not have to repay the loan, despite its maturity, if the payment could cause the borrower a serious financial crisis. The lender cannot demand repayment of the loan if it could trigger insolvency on the part of the borrower. Qualified subordinated loans do not constitute loans within the meaning of the ECSP Regulation due to the lack of an unconditional repayment obligation on the part of the project promoter and can continue to be brokered on the basis of the AltFG.

The good news for existing crowdfunding providers in Austria is that they will not fall under the ECSP Regulation with the brokerage of qualified subordinated loans and will therefore not need a licence as a crowdfunding service provider. This form of investment can still be offered in Austria under the provisions of the AltFG.

Banking licence obligation

The ECSP Regulation merely clarifies that the acceptance of loans and the granting of loans may not require a banking licence. This clarification is also found in the Swarm Funding Enforcement Act. It does not take into account the Austrian peculiarity that credit intermediation may also require a banking licence for the service provider. However, the BWG provides for an exemption from the licensing requirement for credit intermediation if it concerns intermediation activities of mortgage and personal loans carried out in the context of the trades of real estate brokers, and the intermediation of personal loans, mortgage loans and investment advice.

This means that crowdlending platforms that obtain authorisation as a swarm finance service provider can nevertheless only broker genuine loans if they either have a banking licence or fall within an exception to the BWG.

Swarm financing instruments

The instruments approved for crowdfunding purposes are shares in a limited liability company that is not subject to any transfer restrictions. In Austria, limited liability company (GmbH) shares are to be classified as instruments permitted for crowdfunding purposes within the meaning of the ECSP Regulation, irrespective of the notarial deed obligation upon their transfer.

Restrictions on the transfer of shares that prevent them from being classified as such instruments may arise, in particular, from provisions in the articles of association.

In Austria, GmbH shares are not qualified as securities under the EU Markets in Financial Instruments Directive, but as investments under the Capital Market Act. Therefore, the exemption from the EU Prospectus Regulation, which is standardised for securities in the ECSP Regulation, does not apply to shares in limited liability companies in Austria. The existing national provisions on the preparation of an AltFG information sheet or investment prospectus in the case of a public offer of GmbH shares are superseded by the ECSP Regulation within its scope of application. Unfortunately, the Swarm Act does not include an exemption from the CMA 2019 and the AltFG.

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Endnotes

(1) 2020/1503/EU.