

Project Finance

Liability of crowdfunding platforms for project owner defaults

Crowdfunding platforms are not covered by the "safe harbour" for providers of mere intermediation services. They are thus exposed to the rules on liability for the actions of others that may result from national legislation.

ÁNGEL CARRASCO PERERA

Professor of Civil Law, University of Castilla-La Mancha
Gómez-Acebo & Pombo, Academic Counsel

The reference pieces of legislation are Regulation (EU) 2020/1503 on European crowdfunding service providers for business (the "Regulation" or "ECSP") and the Business Creation and Growth Act 18/2022 of 28 November, which gives a new wording to Title V of the Business Finance Fostering Act 5/2015. Although the Regulation does not apply to project owners that are consumers, it will end up being applied due to the saving clause referral to this Regulation in Article 55 of the Non-Contentious Jurisdiction Act 15/2015 as introduced by Act 18/2022. The underlying passive recipients of the credit transaction are called "project owners", the platforms are the providers

of the crowdfunding service and the third parties are "investors", a status that can also be held by a consumer. If the project owner is a consumer, the credit transaction between the non-consumer investor and the consumer project owner is subject to Directive (EU) 2023/2225 on credit agreements for consumers and the platform is then a "credit intermediary" (Recital 22 and Art. 46(2) of the Directive). Platforms will not be considered "credit institutions" and will not be subject to the administrative authorisation required of credit institutions, although they will be subject to specific authorisation as "providers of crowdfunding services" (Art. 47 of Act 5/2015, as amended by Act 18/2022).

A crowdfunding service is the connection of the interests of investors and project owners in corporate finance matters through the use of crowdfunding platforms¹, consisting of the facilitation of the granting of loans or the placement, without a firm commitment basis, of marketable securities and instruments eligible for crowdfunding issued by project owners or by a special purpose vehicle, and the receipt and transmission of client orders in relation to such marketable securities and instruments eligible for crowdfunding. The participation of investors in the project requires a contract with the service provider, notwithstanding that the former acquire the status of “lenders” only vis-à-vis the project owner; and without prejudice to a deeper contractual commitment when the provider provides individual portfolio management (Art. 6 and 24 ECSP) or payment and safekeeping (Art. 10 ECSP) services.

The platform operator is subject to stringent pre-contractual information requirements and marketing restrictions (Arts. 19, 23 and 27 ECSP). Providers owe fiduciary responsibility to clients (Art. 3(2), 3(3) and 8 ECSP) and a kind of outcome-focused duty of care principle (Art. 4 ECSP: “effective and prudent management”). A crowdfunding service provider shall undertake at least a minimum level of “due diligence” in respect of project owners that propose their projects to be funded through the crowdfunding platform of the crowdfunding service provider (Art. 5(1) ECSP). The minimum level of due diligence referred to in Article 5(1) shall include obtaining evidence that the project owner has no criminal record or is not established in a high-risk third country within the meaning of Directive (EU) 2015/849. Crowdfunding service providers shall, before giving prospective non-sophisticated investors full access to invest in crowdfunding projects on their

crowdfunding platform, assess whether and which crowdfunding services offered are appropriate for the prospective non-sophisticated investors (Art. 21 ECSP).

The crowdfunding service provider shall provide for a pre-contractual reflection period, during which the prospective non-sophisticated investor may, at any time, revoke his or her offer to invest or expression of interest in the crowdfunding offer without giving a reason and without incurring a penalty (Art. 22 ECSP) and shall provide prospective investors with a key investment information sheet drawn up by the project owner for each crowdfunding offer (Art. 23 ECSP). Member States shall ensure that their laws, regulations and administrative provisions on civil liability apply to natural and legal persons responsible for the information given in a key investment information sheet, including any translation thereof, if it is misleading, inaccurate or incomplete (Art. 23 ECSP and Art. 51 of Act 5/2015, as amended by Act 18/2022). Crowdfunding service providers shall have in place and apply adequate procedures to verify the completeness, correctness and clarity of the information contained in the key investment information sheet.

Under the terms of Article 4(4) and 6(2) ECSP, the platform operator is obliged to assess the credit risk of the project owner and other provisions (such as Art. 3(3) or 19 ECSP) create non-marginal areas of conduct that may compromise the liability of crowdfunding service providers. Article 52 of Act 5/2015, as amended by Act 18/2022, requires the service provider to publish a key information sheet for investors to whom it has undertaken to provide an individual loan portfolio management service, and is personally liable for the content of this sheet.

¹ Defined as a publicly accessible internet-based information system operated or managed by a crowdfunding service provider.

Nothing else is provided in the Regulation and the Acts that is relevant to the issue under consideration here. But unlike Article 6 of Regulation (EU) 2022/2065 (commonly referred to as the Digital Services Act, following in the footsteps of the US Digital Millennium Copyright Act), the Regulation on European Crowdfunding Service Providers does not create a specific safe harbour for the platform's non-liability for "illegal content" of the project owner. In addition, these platforms certainly do not qualify as providers of information society services such as hosting services, so they are not covered by the prima facie exemption rule of Digital Services Act either. The external nature of the project owner's obligations is therefore based solely on the fact that the platform operator warns investors in its general terms and conditions that it does not assume the economic risks of the project and does not guarantee the recovery of the investment.

To conclude, it is *highly unlikely* that the platforms under consideration can, under the present

legislation, be considered as *co-borrowers* along with the project owner, but that it is *highly likely* that they will end up being liable on similar terms as the project owner in the event of inaccuracies in the key investment information sheet *drawn up by the said owner*, on terms equivalent to the liability for the prospectus under Art. 38 of the Securities Market Act. It is *likely* that the platform will also end up being liable to the investor for a breach of its own instrumental duties of care under the Regulation, a scope that would be consistent with the *expansive* trend of the liability of controlling third parties that can be expected from the legal doctrine handed down by the Supreme Court in the Gowex/Ernst & Young case². And nowadays it is certain that platforms of this type, even if they do not directly offer credit to consumers, are installed in the area of *consumer credit intermediaries*, whatever the legal regime to which these intermediaries will be subject in the future, in the development of Articles 38 and 46(2) of Directive (EU) 2023/2225 on credit agreements for consumers.

² Judgment of the Supreme Court of 19 April 2023 (RJ 2023\2464).