



Regulating Equity Crowdfunding Service
Providers - An Innovation-Oriented Approach
to Alternative Financing

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ABSTRACT

In recent years the advancements in technology have led to an upheaval in many markets. In the financial sector, technological innovations have led to the emergence of technology-enabled financial services, ranging from new product offerings to new business concepts. In this article, the regulatory challenges facing online intermediary platforms, and in particular equity-based crowdfunding platforms, are discussed more in detail. An integral part of crowdfunding is the prevalence of actors who provide crowdfunding services, operating digital crowdfunding platforms, where the business funding interest of investors and companies is matched. Equity-based digital platforms have over the past few years become an important financing alternative, especially for small and medium-sized growth companies. However, such platforms have only recently attracted the attention of regulators. In this article, the regulatory framework covering equity-based crowdfunding platforms in the Nordic countries is discussed in detail. It is concluded that the Nordic countries have very different approaches to regulating crowdfunding platforms, hindering the development of a pan-Nordic market in equity crowdfunding. The proposal for a pan-European opt-in legislation covering Crowdfunding Service Providers (CSPs) is likely to complicate the regulatory framework in the Nordic countries even further. Although the Nordic countries have chosen different paths in regulating equity-based CSPs, the regulatory regime each country has chosen for the registration or authorization of CSPs does not seem to be decisive of the success of local equity crowdfunding markets. This does not mean that regulation of the sector is irrelevant for the success of an alternative finance market. On the contrary, the regulatory requirements on crowdfunding project owners seem to have a significant effect on the development of the market. It is suggested in the article that the dismal development of equity crowdfunding in Norway and Denmark is likely to be caused by the restrictions on offers in private company shares on online intermediary platforms in the two countries, and not by the admittedly burdensome authorization requirements applicable to CSPs. The legal environment is thus of importance for the development of equity crowdfunding in individual Nordic countries, although not in the way it is usually perceived to be of importance.

1. INTRODUCTION

In recent years, the advancements in technology have led to an upheaval in many traditional markets.¹ In the financial sector, cutting-

¹ This paper builds on previous research on equity-based crowdfunding published by the author, see Elif Härkönen, 'Crowdfunding and the Small Offering Exemption in European and US Prospectus Regulation— Striking a Balance Between Investor Protection and Access to Capital?' (2017) 14 Eur Comp and Fin L Rev 121; Elif Härkönen, 'Investeringsbaserad gräsrotsfinansiering— En expanderande marknad utan

edge innovations fuel the emergence of technology-enabled financial services, forming part of a growing FinTech sector. The growth of crypto-assets, block chain technology, cloud services and other FinTech products presents regulatory challenges both at the European and national level. At the same time as it is important to encourage financial innovation, which can provide consumers with more choices as well as better suited or more accessible products, it is necessary to ensure a high level of investor protection and integrity in the financial system.²

The digitalization of products and services has been instrumental to the development of the “platform economy”. Companies that form part of the platform economy use online platforms to reach their customers. From a legal perspective, the challenge lies in regulating a triangular relationship, involving the supplier of the goods or services and the platform, as well as the platform and the customer. The platform is not usually part of the contract between the supplier and the customer but is often in some sort of legal relationship both with the supplier and the customer.³ The platform economy covers companies in such diverse sectors as car transport services (Uber, Lyft), accommodation services (Airbnb, Homestay) and food delivery services (UberEATS, Delivery Hero). The challenges with regulating the platform economy have been discussed to some extent in legal circles, with particular attention paid to consumer law aspects, circumvention of labor law and competition law issues.⁴ In this article, the focus is on the financial services sector and the regulatory challenges facing equity-based crowdfunding platforms.

Crowdfunding can be described as an “open call via the Internet for the provision of funds by the public at large to support specific initiatives by typically small fundraisers.”⁵ Equity-based crowdfunding involves an individual or institutional investor who purchases an equity security issued by a company. An integral part of crowdfunding is the

reglering’ (2016–2017) 3 *Juridisk Tidskrift* 674; Elif Härkönen, ‘Investerarstyddet vid gräsrotsfinansiering— om intressekonflikter, asymmetrisk information och effektiva marknader’ (2017) 1 *Nordisk Tidsskrift for Selskabsret* 45.

² Commission, ‘FinTech Action Plan: For a more competitive and innovative European financial sector’ (Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions), COM (2018) 109 final, 2–3.

³ Christoph Busch, Hans Schulte-Nölke, Aneta Wiewiórowska-Domagalska, Frydryk Zoll, ‘The rise of the platform economy: A new challenge for EU consumer law?’ (2016) 5 *EuCML* 3, 4.

⁴ See for example the contributions by several authors in the thematic issue on platform services in (2016) 5 *EuCML* 1.

⁵ Commission, ‘Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on European Crowdfunding Service Providers for Business and Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/65/EU on markets in financial instruments’ (Commission Staff Working Document) SWD (2018) 56 final, 7.

existence of actors who provide crowdfunding services, so called Crowdfunding Service Providers (CSPs), operating digital crowdfunding platforms, where the business funding interests of investors and companies are matched.⁶ These digital platforms have become an important financing alternative, especially for small and medium-sized enterprises (SMEs).⁷ By creating innovation-oriented business models, CSPs have managed to disrupt the traditional market for business financing.

Online intermediary platforms have only recently attracted the attention of regulators. At the European level, a proposal for model rules on such platforms was published in 2016 under the auspices of the European Law Institute. The model rules are intended to cover contracts for the supply of goods, services or digital content that are concluded between a supplier and a customer, with the help of an online intermediary platform.⁸ Furthermore, after an initial observation period, the European Commission has decided to take a more active stand in regulating the platform economy. In April 2018, it published two regulatory acts; a decision on setting up a group of experts for the observation of the online platform economy and a proposal for a regulation on promoting fairness and transparency for business users of online intermediation services. A business user is in the regulation defined as a natural or legal person who offers goods or services to consumers through online intermediation services.⁹ Neither the model rules nor the European Commission proposal for a regulation is particularly helpful when navigating the triangular relationship present between actors on equity-crowdfunding platforms. The model rules exclude financial services from the scope of the rules and the European Commission regulation is not intended to affect the application of relevant rules in the financial services area.¹⁰

⁶ Commission, 'Proposal for a Regulation of the European Parliament and of the Council on European Crowdfunding Service Providers (ECSP) for Business' COM (2018) 113 final, art. 3.

⁷ In this article, the European Union definition of an SME is used, see Commission, 'Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises' [2003] OJ L124/36.

⁸ Research Group on the Law of Digital Services, 'Discussion Draft of a Directive on Online Intermediary Platforms' (2016) 5 EuCML 164.

⁹ Commission, 'Proposal for a regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services' COM (2018) 238 final; Commission, 'Commission decision of 26.4.2018 on setting up the group of experts for the Observatory on the Online Platform Economy', C (2018) 2393 final.

¹⁰ Research Group on the Law of Digital Services, 'Discussion Draft of a Directive on Online Intermediary Platforms' (2016) 5 EuCML 164 (art. 1(2)); COM (2018) 238 final (n 9) recital 32.

At present, there is no pan-European legislation specifically covering CSPs, allowing for a diversified approach at national level in the European Union (EU) member states. Some countries have decided that CSPs are covered by pan-European securities regulation, while others argue that national authorities retain the authority to enact their own regulation covering such platforms. In addition, some countries have decided to not take any regulatory action at all. The regulation of equity crowdfunding platforms has thus for years been in a flux in the EU member states. This article sets to discuss the divergent approaches taken by the Nordic countries when regulating equity-based crowdfunding platforms.¹¹ Is equity-based crowdfunding held back by excessive regulation in some/all of the Nordic countries? Recently, the European Commission proposed an opt-in regulation for European Crowdfunding Providers, allowing CSPs to either opt-in to the pan-European regulation or continue to be regulated at the national level.¹² An assessment is therefore also made of the pros and cons of the proposed pan-European framework for participatory platforms. Particular emphasis in the paper is placed on the relationship between FinTech innovations and regulation. Are digital innovations, and particularly equity-based crowdfunding platforms, disrupting the regulatory status quo in the Nordic countries?

2. THE REGULATORY FRAMEWORK COVERING CROWDFUNDING PLATFORMS

2.1. THE EVOLUTION OF FINANCIAL SERVICES REGULATION IN THE EUROPEAN UNION

Although the topic of the paper is Nordic regulatory approaches to digital platforms in equity crowdfunding, the financial services sector is largely harmonized at the EU-level, why an analysis of Nordic law takes its starting point in EU-level regulation. One of the fundamental goals of the EU is to establish an internal market among the member states of the “ever closer” union.¹³ In the early days of European co-operation, the focus was on creating an internal market for goods and remove fundamental barriers to trade, such as customs tariffs.¹⁴ In the financial services sector, the harmonization of the European market started in earnest with the introduction of the financial services action plan in

¹¹ In the following, the discussion is limited to Denmark, Finland, Norway and Sweden. The author is well aware that Iceland is part of the Nordic countries. However, insufficient knowledge of Icelandic limits the author’s access to Icelandic regulatory sources.

¹² COM (2018) 113 final (n 6).

¹³ Consolidated version of the Treaty on European Union [2016] OJ C202/1, art. 1, 3(3).

¹⁴ Case C-26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* EU:C:1963:1.

1999.¹⁵ A number of regulatory initiatives were introduced as part of the action plan in 2003 and 2004. For example, the markets in financial instruments directive (MiFID) created a harmonized financial market structure and introduced a European passporting regime for investment firms, consisting of a freedom to provide investment services and activities in other member states.¹⁶

During this period, it was not always clear whether a legislative initiative was aimed at fully harmonizing the affected area or if there was still room for national initiatives. The relationship between national and EU-regulation of financial services was further complicated by the practice to adopt minimum and maximum harmonization directives.¹⁷ Minimum harmonization directives set a minimum threshold for standards in all member states, while maximum harmonization directives precluded both less and more restrictive provisions in national law.¹⁸ The same financial services directive could contain both maximum and minimum harmonization articles. In combination with the common practice of member states to engage in so called gold-plating, the result was a partly harmonized, partly fragmented internal market for financial services.¹⁹

More recently, the European Commission has updated most of the core financial services directives introduced in the financial services action plan. Increasingly, the amended legislative acts are in the form of regulations, directly binding in their entirety in all member states.²⁰ As

¹⁵ Commission of the European Communities, 'Implementing the Framework for Financial Markets: Action Plan' (Communication), COM (1999) 232 final.

¹⁶ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC [2004] OJ L145/1 (Directive 2004/39/EC) (No longer in force), art. 6(3).

¹⁷ According to the Lisbon treaty, regulations have general application, are directly applicable in the member states and binding in their entirety. Directives are binding as to the result to be achieved but leave to the member states the choice of form and methods, see Consolidated version of the Treaty on the Functioning of the European Union, [2016] OJ C202/1, art. 288.

¹⁸ Luca Enriques & Matteo Gatti, 'Is There a Uniform EU Securities Law After the Financial Services Action Plan?' (2008) 14 *Stan. J. L. Bus. Fin.* 43, 49.

¹⁹ Carsten Gerner-Beuerle, 'United in diversity: maximum versus minimum harmonization in EU securities regulation' (2012) 7 *Cap. Markets L. J.*, 317 (the author discusses the drive in the United Kingdom to abolish gold-plating). Gold-plating can be defined as an effort by national legislators to create a more attractive financial environment than in other member states, for example by adopting additional investor protection rules when implementing a directive.

²⁰ See for example Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L173/1;

part of its efforts to further integrate the capital markets in the EU, the European Commission introduced an ambitious action plan in 2015 aimed at creating a fully integrated capital markets union between the member states by 2019. An integral part of the new action plan is to develop financing opportunities for SMEs, by opening up the public capital markets as well as by creating a thriving seed and venture capital sector.²¹ Equity-based crowdfunding as an alternative financing model fits into the European Commission's plan by contributing to deeper external capital markets for SMEs.

2.2. THE RISE OF CROWDFUNDING AS A BUSINESS MODEL

Crowdfunding, as it is known today, is closely connected with the technological revolution of the past decades. However, crowdfunding as a concept was known much earlier. One of the earliest accounts of crowdfunding is the much-publicized crowdfunding effort by Joseph Pulitzer, who in 1885 raised funds for the building of a base to the Statue of Liberty. By an open call in his newspaper, *New York World*, he urged the people of New York to donate money to the project. In return, donors would get their name printed in his newspaper. Most of the donations were small, ranging from a couple of cents to a couple of dollars.²² In more recent history, the financing of the US tour of the rock band Marillion in the late 1990s is often mentioned in crowdfunding circles as a precursor to the projects which are today marketed on digital crowdfunding platforms.²³

Crowdfunding projects are usually divided into donation-, lending- and equity-based models, where only the last model is of interest in this article. Equity-based crowdfunding models can in their turn be divided into entrepreneur-led and investor-led models. Entrepreneur-led models are characterized by a call for investors made by a project owner through the digital platform. Swedish crowdfunding platforms *FundedByMe* and *Tessin* are two examples of Nordic platforms using an entrepreneur-led model. Investor-led models are headed by professional investors, who put their own money into the project. The project is then marketed on

Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC (Regulation (EU) 2017/1129) [2017] OJ L168/12; Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 [2014] OJ L173/84.

²¹ Commission, 'Action Plan on Building a Capital Markets Union' (Communication) COM (2015) 468 final.

²² *Geneva Daily Gazette* (Geneva, N.Y., 17 Apr. 1885) 3; *The Evening Gazette* (Port Jervis, N.Y., 13 June 1885) 1.

²³ See for example Martin Edwards, 'The Big Crowd and the Small Enterprise: Intracorporate Disputes in the Close-but-Crowdfunded Firm' (2018) 122 *Penn St. L. Rev.* 411, 420.

the platform, and crowd investors are allowed to join the project under the same terms as the lead investor. This business model is used, among others, by the Finnish platform Innovestor. In both models, investors get access, often for free, to sales pitches by different companies on a digital platform. Before investing in a crowdfunding company, most CSPs require potential investors to register with the platform. The platform then acts as an intermediary between the crowd investors and a business venture.

In many equity-based crowdfunding business models, the project owner issues a security, often in the form of a share in a private company, and the investor makes a direct investment by buying an equity interest in the business venture. Some CSPs have instead chosen to introduce a business model, where the investor makes an investment in a special purpose vehicle or a collective investment scheme. The special purpose vehicle or collective investment scheme will in its turn hold securities in the project, and the investor gets indirect exposure to the project through ownership in the investment vehicle.²⁴ The Swedish CSP Pepins Group AB for example has a business model where the project owner issues shares to a holding company, which in its turn issues shares to the investors in a specific project. A shareholder agreement is drafted between the holding company and the original owners of the marketed project in an effort to protect the crowdfunding investors.²⁵ Many CSPs offer additional services, such as taking care of the stock ledger of companies promoted on the platform or providing advice after a successful crowdfunding round. Others offer an even more diverse selection of services in connection to their crowdfunding services. The Finnish platform Innovestor for example manages venture capital funds, organizes networking events, has auto-bid features for investors and provides mentoring for start-ups, in addition to co-investing with crowd investors.²⁶

2.3. A NEW ALTERNATIVE FINANCING FORM FOR SMALL AND MEDIUM-SIZED COMPANIES

Small and medium-sized enterprises are of great importance for the economy. In the Nordic countries, the absolute majority of all companies are categorized as SMEs.²⁷ They provide around 60 percent of total employment and between 50 and 60 percent of value added in

²⁴ European Securities and Markets Authority, Advice, Investment-based crowdfunding (Advice), ESMA/2014/1560, ¶ 17.

²⁵ Pepins Group AB, 'Pepins explains' < www.pepins.com/pepins-explains > accessed 30 May 2018.

²⁶ Innovestor Group <www.innovestorgroup.com> accessed 30 May 2018 (The Innovestor Group consists of several companies under the same brand).

²⁷ OECD, 'Financing SMEs and Entrepreneurs 2018, An OECD Scorecard' (OECD Publishing 2018) 3, 126, 130, 164, 182.

the OECD area. Although the output of SMEs is imperative for the economic performance of a country, such companies often find it more difficult than larger companies to get access to the financing needed for investments and growth. Compared with the U.S., Europe has a stronger tradition of bank financing for businesses. More than 75 percent of the external financing used by European SMEs is supplied by banks.²⁸ After the 2007–09 financial crisis, banks faced new requirements on capital and loan portfolios, leading to lower availability of bank loans to SMEs.²⁹ Although the availability of bank financing has improved in recent years, such financing is often not an appropriate option for innovative fast-growing start-ups.³⁰ Banks are reluctant to loan funds to newly incorporated businesses, given their short financial history and high risk-return profile. Furthermore, innovative SMEs often lack collateral or own intangible assets, which are difficult to value correctly, complicating the securitization of loans. For such companies, external equity sources of financing are often a more appropriate alternative.³¹

In comparison with other EU member states, the Nordic countries have a relatively well-developed venture capital sector, providing equity capital to seed, start-up and early stage development of enterprises.³² They also have a high concentration of mixed-finance SMEs, i.e., firms that use a range of different financial instruments for financing and expansion. Mixed-finance SMEs tend to be newly established businesses, with innovative business ideas and high future growth expectations.³³ However, when comparing the Nordic countries with the United States, Canada and Israel, venture capital investment as percentage of GDP is still considerably lower, why there is room for improvement.³⁴ This is even more true, when comparing with a cross section of EU member states. The European Commission estimated in 2015 that if the EU

²⁸ COM (2015) 468 final (n 21) 7.

²⁹ Duygan-Bump et al., ‘Financing Constraints and Unemployment: Evidence from the Great Recession’ (2014) FEDS Working Paper No. 2014-92; European Central Bank, ‘Survey on the Access to Finance of Small and Medium-Sized Enterprises in the Euro Area: Second Half of 2009 10–11’ (16 Feb. 2010).

³⁰ European Central Bank, ‘Survey on the Access to Finance of Enterprises in the euro area, April to September 2017’, (2017) 9–10.

³¹ Kris Boschmans & Lora Pissareva, ‘Fostering Markets for SME Finance’ (2017) OECD SME and Entrepreneurship Papers No. 6, 9.

³² There are considerable differences between the Nordic countries when it comes to attitudes to equity financing. According to the European Commission survey on the access to finance, a majority of Swedish firms had either issued equity or considered equity capital as a relevant source of financing in 2017, while less than quarter of Danish and Finnish SMEs did the same, see Ton Kwaak et al., ‘Survey on the access to finance of enterprises (SAFE)’ (2017) European Commission Analytical Report 30.

³³ Demary Markus et al., ‘SME Financing in the EU: Moving Beyond One-Size-Fits-All’ (2016) IW-Report 11/2016, 8.

³⁴ OECD, ‘Entrepreneurship at a glance 2017’ (OECD Publishing 2017) 125.

venture capital markets would have been as deep as in the US, an additional €90 billions could have been provided to European SMEs.³⁵ In an effort to revitalize the European capital markets, the Commission has made it a top priority to build stronger capital markets as well as to provide better access to investment finance to SMEs and mid-size companies.³⁶

An important aspect, when trying to develop deeper venture capital markets, is the impact of technology on such markets. The digital revolution of the past decades has provided for an alternative finance market based on innovations in asset-backed financing, venture capital investment and crowdfunding.³⁷ In recent years, the growth of alternative finance has been exponential, with China as the market leader, followed by the United States (US) as a distant second.³⁸ The European alternative finance market is much smaller than both the Chinese and the US market. It is also geographically concentrated. Much of the activity in Europe is focused to the United Kingdom (UK), which makes up 73 percent of the total European market value of €7.671 billions.³⁹ Consumer and business lending platforms dominate the sector, while equity-based crowdfunding platforms have a lower market share. Only one tenth of total volume in mainland Europe is attributed to equity-based models.⁴⁰ Still, equity-based crowdfunding contributes substantially to seed and venture capital investment in countries with developed alternative finance markets. For example, in the UK, equity-based crowdfunding platforms provided for almost 20 percent of total seed and venture equity capital investment in the country in 2016.⁴¹

³⁵ COM (2015) 468 final (n 21) 4; see also Demary Markus et al., (n 33) 6.

³⁶ Commission, 'An Investment Plan for Europe' (Communication) COM (2014) 903 final, 5, 14.

³⁷ OECD (n 27) 3.

³⁸ The alternative finance market in mainland China is estimated to more than \$243 billion in 2016, see Kieran Garvey et al., 'Cultivating Growth, The 2nd Asia Pacific Region Alternative Finance Industry Report' (2017) Cambridge Centre for Alternative Finance & Australian Centre for Financial Studies 24, while the U.S. market is estimated to \$34.5 billion, see Tania Ziegler et al., 'Hitting Stride, 2017 The Americas Alternative Finance Industry Report' (n.d.), Cambridge Centre for Alternative Finance & Polsky Center for Entrepreneurship and Innovation & The University of Chicago Booth School of Business 27. The overall European market, including the UK, expanded by 41 percent annually. When excluding the UK, mainland Europe transaction volumes increased by 101 percent between 2015 and 2016, see Tania Ziegler et al., 'Expanding Horizons, The 3rd European Alternative Finance Industry Report' (n.d.), Cambridge Center for Alternative Finance 21.

³⁹ Ziegler et al., 'Expanding Horizons' (n 38) 21.

⁴⁰ Ziegler et al., 'Expanding Horizons' (n 38) 28.

⁴¹ Bryan Zhang et al., 'Entrenching Innovation, The 4th UK Alternative Finance Industry Report' (2017) Cambridge Centre for Alternative Finance 59.

2.4. NORDIC APPROACHES TO THE REGULATION OF DIGITAL PLATFORMS IN EQUITY CROWDFUNDING

During the past decade, the revolution in the FinTech sector has not only led to new opportunities for alternative financing, but also to new challenges from a regulatory perspective. The diversity in services provided as well as the diverse business models used by crowdfunding platforms makes it difficult to place CSPs under existing financial services regulation. Furthermore, the evolving business models of equity-financing platforms make it difficult to draft a relevant regulatory framework. As many as 57 percent of European equity-based CSPs reported significant changes to their business model in 2016.⁴² As mentioned, the legislative status of CSPs at the EU-level is unclear at the moment. There has not been any clear indication at the EU-level as to whether crowdfunding is covered under MiFID rules, other applicable EU legislation, such as the Payment Services Directive (PSD2) or the Alternative Investment Fund Managers Directive (AIFMD), or fall outside EU legislation.⁴³ PSD2 might become applicable depending on how funds are transferred from an investor to the promoted business venture and AIFMD might become applicable for certain CSPs using investment vehicles as part of their business model. The Commission noted in May 2016 that given the local nature of crowdfunding, there was no need for EU-level action at that point in time.⁴⁴ The lack of a targeted legislative approach in relation to crowdfunding has led to a variety of legislative approaches in different member states.

Although both PSD2 and AIFMD are of importance for some equity-based CSPs, the platforms (and member states) need to primarily position themselves in relation to the MiFID regulatory framework.⁴⁵ In order to fall under the MiFID framework an actor has to both *provide investment services* and provide those services in relation to *MiFID financial instruments*.⁴⁶ A CSP carrying out MiFID services in relation to MiFID

⁴² Ziegler et al., 'Expanding Horizons' (n 38) 43.

⁴³ Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L337/35; Directive 2011/61/EU of the European parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 [2011] OJ L174/1.

⁴⁴ Commission, 'Crowdfunding in the EU Capital Markets Union' (Commission Staff Working Document) SWD (2016) 154 final, 31.

⁴⁵ Parts of the following discussion on MiFID and crowdfunding has been previously published in Swedish by the author, see Härkönen, 'Investeringsbaserad gräsrotsfinansiering' (n 1).

⁴⁶ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and

financial instruments has to be authorized as an investment firm, unless it meets conditions to be exempted. An authorization is only obtained if the actor fulfills stated requirements on starting capital, organizational structure, internal guidelines and supervision.⁴⁷ MiFID financial instruments are in the directive defined as transferable securities, money-market instrument, units in collective investment undertakings, options, futures, swaps as well as other derivative instruments.⁴⁸

In some member states, such as Austria, Belgium, Germany and Sweden, certain forms of participatory instruments which are not classified as MiFID financial instruments have become popular on digital crowdfunding platforms, thus leaving them outside the scope of MiFID.⁴⁹ In Sweden, platforms have concentrated their services to shares in private limited liability companies.⁵⁰ Since the Swedish Companies Act contains a restriction on public offers in private limited liability companies, shares in such companies are not considered to be transferable financial instruments.⁵¹

In July 2016, the rise of crowdfunding platforms in Sweden prompted the Swedish government to establish a committee tasked with investigating the potential for new legislation covering crowdfunding.⁵² The committee published its report in February 2018, proposing a new Swedish crowdfunding law.⁵³ The law would introduce new organizational and ownership requirements on platforms offering securities in private limited liability companies which fall outside the MiFID framework. Offers of securities in public limited liability companies would, just as before, be covered by MiFID regulation.⁵⁴ Digital platforms marketing both private and public companies would only need to apply for authorization as investment firms according to national MiFID legislation, thus eliminating the need for platforms to apply for two different authorizations.⁵⁵ Furthermore, the proposal includes requirements on CSPs to disclose information on investments marketed on the platform to potential investors as well as similar but less

Directive 2011/61/EU [2014] OJ L173/349 (Directive 2014/65/EU), art. 4, annex I, section A and C.

⁴⁷ Directive 2014/65/EU (n 46), art. 5–16.

⁴⁸ Directive 2014/65/EU (n 46), art 4.1(2), annex I, section C.

⁴⁹ Esma, 'Investment-based Crowdfunding' (Opinion), ESMA/2014/1378, ¶ 45.

⁵⁰ There is some confusion regarding the term "limited liability company". In this article the term is meant to refer to a corporation, not to be confused with the "limited liability company" (LLC), which is a different business association altogether.

⁵¹ Swedish Companies Act ch 1 § 7; prop 2006/07:115 p 281–282 (Swedish preparatory works); see also prop 2005/06:158 p 68 (Swedish preparatory works).

⁵² Dir 2016:70; dir. 2017:112 (Swedish preparatory works).

⁵³ SOU 2018:20 (Swedish preparatory works).

⁵⁴ SOU 2018:20 p 244, 358 (Swedish preparatory works).

⁵⁵ SOU 2018:20 p 378 (Swedish preparatory works).

arduous requirements as in MiFID to know your customer.⁵⁶ If the proposal is adopted, Sweden would in addition to MiFID legislation have a separate crowdfunding framework based on national law.

Although some member states have determined that securities traded on crowdfunding platforms are not financial instruments falling under the scope of MiFID, in other member states, the shares transferred on crowdfunding platforms are deemed to be MiFID financial instruments. In those jurisdictions, it becomes important to determine if the platforms provide investment services, the second requirement under MiFID. The three services falling under the scope of MiFID, which most closely resemble the services provided by CSPs are reception and transmission of orders, placing of financial instruments without firm commitment basis and providing investment advice.⁵⁷ In its 2014 Opinion, Esma noted that the question of which services are being carried out has to be answered on a case-by-case basis, due to the different business models used by the crowdfunding platforms.⁵⁸ Although many platforms have in the past argued that they only operate bulletin boards, where the platform assists in collecting and transmitting expressions of interest, Esma has noted that there “*would have to be a real, substantive distinction between the expression of interest and something which could be considered as an order*” for the platform to be able to operate outside the MiFID framework.⁵⁹ The author of this article has previously argued that the business models of most Nordic platforms are likely to qualify under the definition of the investment service “reception and transmission of orders”, considering the expansive interpretation made by Esma.⁶⁰

If a crowdfunding platform fulfills both conditions, i.e., it provides investment services in relation to MiFID financial instruments, it will fall under the scope of MiFID regulation. In the Nordics, the Financial Supervisory Authority (FSA) of Norway has clarified that the position of the authority is that an activity where a CSP receives and transfers orders falls under national MiFID-legislation. Alternatively, CSPs can be covered by national AIFMD-legislation.⁶¹ Investment services can only

⁵⁶ Förslag till lag om viss verksamhet med förmedling av finansiering (a proposal for a crowdfunding law), ch 3 § 3–4, in SOU 2018:20 p 33–34. Compare with Directive 2014/65/EU (n 46), art. 25.

⁵⁷ Directive 2014/65/EU (n 46), art 4.1(2) and Annex I, Section A.

⁵⁸ Esma (n 49) ¶ 47–48.

⁵⁹ Esma (n 49) ¶ 49.

⁶⁰ See Härkönen, ‘Investeringsbaserad gräsrotsfinansiering’ (n 1).

⁶¹ Letter from the Financial Supervisory Authority of Norway to the Ministry of Finance, Regulering av folkefinansiering 7–8, 17, Ref No 16/11774 (1 Feb 2017). Compare with the definition of investment services in the Norwegian Securities Trading Act, see lov av 29 Juni 2007 nr 75 om verdipapirhandel, Ch 2 § 1–2. Recently, the possibility of a Norwegian crowdfunding regulatory framework has been put forward in preparatory works, see NOU 2018:5 p 92 (Norwegian preparatory works). See however Siv Jensen, Department of Finance, Brev till Stortinget, Om et norsk

be offered after authorization by the Norwegian FSA.⁶² Similarly, Danish MiFID legislation requires that persons who are interested in starting a digital platform, where investors are put in contact with project owners who offer them shares, shall apply for authorization as an investment firm.⁶³

Several countries in the EU have instead of applying all provisions in MiFID, adopted national bespoke regimes under the exemption for national legislation allowed in MiFID.⁶⁴ According to the exemption, member states may choose to regulate certain investment activities at the national level. Persons covered by the MiFID exemption are only allowed to provide a limited number of investment services, such as receiving and transferring orders in transferable securities and units in collective investment undertakings and the providing investment advice in relation to such financial instruments. Any persons acting under the exemption have to include a third party such as an investment firm or a credit institution in their business model, since they are only allowed to transmit orders to certain third parties, such as investment firms and credit institutions. Also, actors operating under the exemption are not allowed to hold client funds or securities in their possession. The article 3 exemption is strictly local in nature. Actors relying on national legislation enacted under the exemption are not allowed to use the European passporting regime, consisting of a cross-border right to offer financial services in other member states for investment firms authorized in one member state. Furthermore, they still need to follow many of the MiFID requirements concerning authorization, on-going supervision and conduct of business operations.⁶⁵ With the introduction of MiFID II, article 3 was amended to include new requirements on authorization as

regelverk for crowdfunding/folkefinansiering, Doc No 8:37 S (2017–2018) (15 Nov 2017), where the Minister of Finance dismisses the proposal to introduce bespoke regulation.

⁶² The power is delegated from the Ministry of Finance, see lov av 29 Juni 2007 nr 75 om verdipapirhandel, Ch 9 § 1 (Norwegian Securities Trading Act).

⁶³ Bekendtgørelse af lov om finansiel virksomhed, ch 3, § 9, bilag 4, afsnitt A (Danish Financial Business Act).

⁶⁴ See for example Legislative Decree No 58 of 24 February 1998 Consolidated Law on Finance pursuant to Articles 8 and 21 of Law no. 52 of 6 February 1996, art 50-quinquies, art 100-ter (Italy); Regulation on “the collection of risk capital via on-line portals”, Commissione Nazionale per le Società e la Borsa (Consob) Resolution no 18592 of 26 June 2013, amended by resolutions no 19520 of 24 February 2016, no 20204 of 29 November 2017 and no 2264 of 17 January 2018 (Italy); Code monétaire et financier, art L548-1–L548-9 (version of 3 Jan 2018); l’Ordonnance no. 2014-559 du 30 mai 2014 relative au financement participatif (consolidated version of 11 June 2018) (France); Ley 5/2015 de 27 abril, de fomento de la financiación empresarial, título V (Spain); see also Härkönen, ‘Investerarskyddet vid gräsrotsfinansiering’ (n 1) 46 (with more examples from different European Union member states).

⁶⁵ Directive 2014/65/EU (n 46), art. 3.

well as more stringent investor protection rules covering actors operating under the exemption.⁶⁶

Finland is the only Nordic country which has so far opted to introduce national bespoke legislation under the article 3 exemption. The country already had several CSPs operating under the MiFID-framework, when it in 2016 decided to adopt national bespoke regulation covering digital platforms.⁶⁷ The Finnish crowdfunding law adopted under the MiFID exemption covers both loan and equity-based crowdfunding and includes rules on authorization, organization of the platform, investor protection and sanctions.⁶⁸ The aim of the law is to introduce a less onerous legal framework than the MiFID-framework in an effort to accommodate the differing needs and risks with digital platforms.⁶⁹ The Nordic countries have thus decided to apply the MiFID framework in very different ways to the same phenomena, regardless of similarities in cultural, economic and legal framework. The development in the Nordic countries clearly illustrates the difficulty in creating an appropriate legal framework for new innovations that do not fit into established legislative structures.

3. A MODEST PROPOSAL FOR HARMONIZATION OF THE EUROPEAN CROWDFUNDING MARKET

3.1. A HARMONIZED EUROPEAN REGULATION ON CROWDFUNDING SERVICE PROVIDERS

Despite the fact that crowdfunding as an alternative finance model has exhibited exponential growth in Europe during the past years, there is cause for concern in the fragmented approach to regulation in the member states. The different legislative approaches by member states create a barrier for cross-border activity, at the same time as the concentration of crowdfunding to certain member states hinders the development of an internal market.⁷⁰ Less than 10 percent of the inflows and outflows in equity-based crowdfunding in Europe occur across national borders.⁷¹ In an effort to create clear and consistent rules for crowdfunding platforms across the EU, a legislative proposal on European Crowdfunding Service Providers was published in March 2018. The Regulation is set to cover both lending- and equity-based

⁶⁶ Compare Directive 2014/65/EU (n 46), art. 3 with Directive 2004/39/EC (n 16) art. 3.

⁶⁷ RP 46/2016 rd p 22, 63–64 (Finnish preparatory works).

⁶⁸ Joukkorahoituslaki, 25.8.2016/734 (Finnish Crowdfunding Law).

⁶⁹ RP 46/2016 rd p 65–67 (Finnish preparatory works).

⁷⁰ COM (2018) 113 final (n 6) 1–2. The proposal was published as the first targeted action of the Commission's Fintech action plan, published at the same time, see COM (2018) 109 final (n 2) 5–7.

⁷¹ Ziegler et al., 'Expanding Horizons' (n 38) 46.

CSPs, covering crowdfunding services consisting of either the facilitation of granting of loans, the placement without firm commitment of transferable securities issued by project owners and the reception and transmission of client orders with regard to those securities.⁷² An important limitation is that only CSPs for business are covered by the regulation. The regulation thus does not cover any crowdfunding services that are provided to project owners that are consumers.⁷³ CSPs that are authorized as investment firms are also exempted from the scope of the proposed regulation.⁷⁴ Although the legislative act is in the form of a regulation, implying maximum harmonization and preclusion of national legislative acts in the regulated area, the CSP-regulation is a voluntary opt-in regulation. The regulation is not applicable to services provided in accordance with national law, thus allowing CSPs to choose if they want to opt-in to the pan-European legislation by applying for authorization at the EU-level.⁷⁵ An authorization allows a CSP to offer its services cross-border in all EU-member states, in line with other European passports in the regulatory framework for financial services.⁷⁶

One of the most criticized sections of the proposed CSP regulation is the monetary threshold on eligible crowdfunding offers.⁷⁷ The current proposal does not cover crowdfunding offers of more than €1M, calculated over a period of 12 months.⁷⁸ According to the recital to the crowdfunding regulation, the threshold is aligned to the new prospectus regulation, where a similar “mandatory” threshold exists for prospectuses.⁷⁹ However, the monetary threshold in the prospectus

⁷² COM (2018) 113 final (n 6) art 3(a). It is proposed in a draft report by a European parliament committee that service providers facilitating initial coin offerings should also be covered by the regulation, see European Parliament, Committee on Economic and Monetary Affairs, ‘Draft report on the proposal for a regulation of the European Parliament and of the Council on European Crowdfunding Services Providers (ECSP) for Business’ (2018) 2018/0048 (COD).

⁷³ COM (2018) 113 final (n 6) art. 2.2(a).

⁷⁴ COM (2018) 113 final (n 6) art. 2.2(b).

⁷⁵ COM (2018) 113 final (n 6) art. 2.2(c).

⁷⁶ COM (2018) 113 final (n 6) art. 10.

⁷⁷ See for example FG Lawyers B.V., Letter to the European Commission, Feedback on the prospectus regulation, F11569 (11 May 2018) (Netherlands); ItaliaFinTech, Letter to the European Commission, Feedback on the prospectus regulation, F11566 (May 11, 2018) (Italy); Financement Participatif France, Proposal for a Regulation on European Crowdfunding Service Providers (ECSP) for Business, Position Paper FPF , F11554 (11 May 2018) (France); but see European Savings and Retail Banking Group, ‘ESBG Position Paper on the European Commission “Have your Say” consultation on its proposal for a regulation of the European Parliament and of the Council on European Crowdfunding Services Providers for Business’ (2018) F11562 (Belgium).

⁷⁸ COM (2018) 113 final (n 6) art. 2.2(d).

⁷⁹ COM (2018) 113 final (n 6) recital, p. 12. The prospectus regulation covers offers of €1M or more, while the CSP regulation covers offers of €1M or less, which would imply that offers of €1M are covered by the CSP regulation and the prospectus

regulation is more flexible than the reference to a mandatory threshold suggests. It is correct that member states are not allowed to require a prospectus for public offers falling beneath the €1M threshold according to the prospectus regulation. They may however still “*require other disclosure requirements at national level to the extent that such requirements do not constitute a disproportionate or unnecessary burden*”.⁸⁰ Member states are also allowed, according to the prospectus regulation, to exempt offers where the total consideration does not exceed €8M over a period of 12 months.⁸¹ The prospectus thresholds thus allow for diversification based on the national market and need for investor protection, determined by national legislatures.⁸² The Nordic countries have all opted for different prospectus thresholds. In Denmark and Norway offers of less than €1M are exempted.⁸³ Many member states have however opted for a higher monetary threshold. In Sweden, offers not exceeding €2.5M are exempted from prospectus requirements.⁸⁴ In Finland, a specific exemption exists for crowdfunding offers, according to which crowdfunding offers of less than €5M are exempted.⁸⁵

The proposed 1M€ threshold on crowdfunding offers would limit the potential of scaling up CSP business models to include larger financing rounds. In the United Kingdom, the average deal size in 2016 was £807,214, corresponding to around €1M, depending on the currency exchange rate.⁸⁶ Admittedly, the average deal sizes in mainland Europe are lower, at €324,608. However, the Nordic countries seem to have at least some projects with higher deal values, more in line with the United Kingdom.⁸⁷ The proposed threshold is thus likely to limit the activities in

regulation. The exact wording of the CSP regulation is however likely to be modified at a later stage before adoption.

⁸⁰ Regulation (EU) 2017/1129 (n 20), art. 1(3).

⁸¹ Regulation (EU) 2017/1129 (n 20), art. 3(2) (b); see also SWD (2018) 56 final (n 5) 33–34.

⁸² The author of this article has previously noted that the prospectus thresholds hardly enhance harmonization efforts between the member states. Instead, they are likely to lead to further fragmentation of the internal market, see Härkönen, ‘Crowdfunding and the Small Offering Exemption’ (n 1).

⁸³ Bekendtgørelse af lov om værdipapirhandel m.v., LBK nr 251 af 21/03/2017, Ch 12, § 43–44 (Danish Securities Trading Law); lov om verdipapirhandel (verdipapirhandelloven) § 7–2 (Norwegian Securities Trading Act).

⁸⁴ Lag (1991:980) om handel med finansiella instrument, Ch 2 § 4 p 5 (Swedish Securities Trading Act).

⁸⁵ Joukkorahoituslaki § 11, 25.8.2016/734 (Finnish Crowdfunding Law). Compare with the threshold of 2.5M€ for other types of offers, see arvopaperimarkkinalaki, ch 4, § 3, 14.12.2012/746 (Finnish Securities Markets Act).

⁸⁶ Zhang et al., (n 41) 59.

⁸⁷ Ziegler et al., ‘Expanding Horizons’ (n 38) 35. See also FundedByMe Crowdfunding Sweden Aktiebolag (publ.), ‘Annual Report 2016’ (2016) (where at least two funding

more mature alternative finance markets, such as Finland and Sweden. Furthermore, it creates an inconsistent regime of investor protection in countries that have opted for a higher prospectus threshold. For example, in Finland and Sweden, offers of €1M or less on crowdfunding platforms falling under the CSP-regulation would be covered by more advanced investor protection measures than offers of €2.5M or less made through banks or other intermediaries or offers of less than €5M made on Finnish crowdfunding platforms operating under national bespoke regulation. In a recently published draft report by the Committee on Economic and Monetary Affairs of the European Parliament, a higher threshold of €8M is proposed.⁸⁸ There is thus a possibility that the disparity between the proposed CSP-regulation and the prospectus regulation will be remedied at a later stage of the legislative process.

3.2. USING AN OPT-IN REGULATORY TECHNIQUE-ACHIEVING A SINGLE FINANCIAL SERVICES MARKET?

As mentioned, the regulation of the financial services sector has evolved from minimum harmonization in the 1990s to the current stage, where the aspiration is to create a capital markets union by 2019. Considering the general development in financial services regulation from directives to directly binding regulations, it is surprising that the Commission in its proposal for a CSP-regulation has chosen a legislative technique allowing for a diversified approach. The legislative technique of having parallel national and EU-legislation has been used sparingly in financial services legislation. Instead, member states are often allowed to exempt certain services from the scope of EU-legislation. For example, member states can exempt certain investment services from the scope of MiFID II as well as introduce additional disclosure requirements for offers that are not covered by the prospectus regulation.⁸⁹ The exempted services or products are usually less complicated services or services of a local character. Furthermore, the decision to exempt certain services from the scope of EU-legislation is made by member states and not the actors involved. Although not common, the concept of opt-in regulation is not unheard of in financial services regulation. For example, a similar regulatory technique is adopted in the regulation on European venture capital funds, laying down uniform requirements for managers of alternative investment funds that wish to use the designation

rounds, involving the platform itself and Uniti, approached or exceeded the €1M threshold).

⁸⁸ European Parliament (n 72).

⁸⁹ Directive 2014/65/EU (n 46) art. 3; Regulation (EU) 2017/1129 (n 20), art 1(3).

“EuVECA” when marketing their funds to investors in the EU.⁹⁰ The regulation does not apply to managers that do not wish to use the EuVECA designation, creating a similar opt-in regulation for investment fund managers as the new CSP regulation creates for CSPs.⁹¹

It can be discussed if the opt-in legislative technique will create an integrated crowdfunding market. In countries which have introduced bespoke regulation, the same activity could in the future be covered by three different laws; national bespoke regulation, the CSP regulation and MiFID. In other countries, CSPs with MiFID authorization might be reluctant to opt-in to the CSP regulation if they already fulfill the conditions required for MiFID authorization. In the Nordics, Danish and Norwegian CSPs without any MiFID authorization will probably gain from the adoption of the CSP regulation, regardless of if they plan to be involved in cross-border activities or not, due to the strict rules in place in national law. Finnish and Swedish CSPs involved in cross-border activities might also gain from opting-in to the regulation, due to the European passport, which forms part of the regulation. However, the exemptions from prospectus requirements are more generous both in Finland and Sweden, why some platforms might prefer to continue to be governed by national legislation (or MiFID), despite the fact that growth opportunities are limited in countries with small home markets.

There are indications that the proposal, as it stands now, is not an attractive choice for European CSPs. For example, only about 27 percent of French platforms were interested in opting-in to the new regulation according to an industry survey.⁹² A mandatory regulation would have achieved the aim of an integrated European market better, as well as reduced transaction costs for CSPs operating under different regimes. However, from a political perspective, a mandatory proposal would have been difficult to reach consensus about, considering the fact that most member states have adopted national CSP legislation recently. In that sense, the wait-and-see approach adopted by the Commission earlier has backfired, when member states decided to take action instead.

⁹⁰ Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds (Regulation No 345/2013) [2013] OJ L115/1.

⁹¹ Regulation 345/2013 (n 90) recital, p. 10, art. 1.

⁹² Financement Participatif France (n 77) 2.

4. IS THE LEGAL ENVIRONMENT IMPORTANT FOR THE DEVELOPMENT OF CROWDFUNDING?

4.1. IS THE REGULATION OF CROWDFUNDING SERVICE PROVIDERS DECISIVE FOR THE DEVELOPMENT OF THE ALTERNATIVE FINANCE MARKET?

Technology-enabled financial innovations are transforming the financial services sector, introducing new concepts, challenging traditional actors in the sector as well as disrupting established regulatory frameworks. Many countries have embraced the change by taking steps to foster innovation and competition in the FinTech sector, for example through the introduction of financial sandboxes or innovation hubs at the national level.⁹³ Innovative business models are, in addition to innovation support, dependent on a proportionate regulatory framework, why it is important to eliminate unnecessary regulatory hurdles. Administrative burdens or burdensome authorization requirements can create unnecessary transaction costs to companies interested in alternative financing. At the same time, it is important to create a legal framework that increases transparency and strengthens consumer and investor protection.

In an environment of regulatory competition, it is important for a country to adopt a regulatory structure that is internationally competitive.⁹⁴ More than 40 percent of equity-based CSPs in Europe have noted that the current regulatory framework is excessive and too strict for their platform activities.⁹⁵ There is thus a real need for a simpler regulatory framework. The lack of an appropriate regulatory framework can also deter the development of new financial products if entrepreneurs are forced to operate in a “grey” zone, where the applicability of certain rules is unclear. The European Commission has noted that

*“[o]ptimal framework conditions for business across the Single Market are essential to unlock the full potential of investment in Europe. The regulatory framework, at national as well as European level, needs to be simple, clear, predictable and stable to incentivize investments with a longer term horizon”*⁹⁶

⁹³ Svein Andresen, Secretary General, Financial Stability Board, ‘Cambridge Centre for Alternative Finance conference on Navigating the Contours of Alternative Finance, Regulatory and Supervisory Issues from FinTech’ (Remarks) (29 June 2017) 5.

⁹⁴ In the late 1990s, several controversial European Court of Justice judgments opened up for regulatory competition in Europe, see Case C-212/97 *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen* EU:C:1999:126; Case C-208/00 *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)* EU:C:2002:632; Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.* EU:C:2003:512.

⁹⁵ Ziegler et al., ‘Expanding Horizons’ (n 38) 54.

⁹⁶ European Commission, ‘An Investment Plan for Europe’ (2014) COM (2014) 903 final, 13.

There seems to be a correlation between growth of the financing form and a regulatory structure that is perceived as adequate by CSPs. This suggests that regulation should be amended to facilitate growth of the financing form rather than enacted when volumes have grown large enough.⁹⁷

The Nordic alternative financing market has experienced an exponential growth during the past years. It is now the second largest market for alternative financing in mainland Europe, after France but before Germany, the Baltics and the Benelux countries. Although the volumes in the Nordic market as a whole seem to indicate well-developed opportunities to use crowdfunding as an alternative financing form, there are huge differences between the Nordic countries. In Iceland and Norway, the market is almost non-existent, with a total estimated value of €1 million in Iceland and €5 million in Norway. On the other hand, the Danish and the Swedish markets are valued at more than €80 million each and the market leader, Finland has an alternative financing market with an estimated value of more than €140 million. Equity-based crowdfunding in the Nordic countries grew by an astonishing 493 percent from 2015 to 2016, but it is only two countries, Finland and Sweden, which have established markets for equity-based crowdfunding. Equity-based crowdfunding volumes in Norway, Denmark and Iceland are non-existent.⁹⁸ Admittedly, Denmark has one actor, Crowdinvest, engaged in equity-based crowdfunding, but there is no reported data from any money raised through the platform. In Norway, the only activity is associated with foreign platforms.⁹⁹

It could be argued that the differences in which regulatory regime each country has chosen for the registration or authorization of CSPs is decisive of the success of the local crowdfunding market.¹⁰⁰ However, evidence from the Nordic countries does not support this hypothesis. It does not seem to matter if a country has left the area unregulated, even if such uncertainty forces CSPs to operate in a “grey” area. Both the Swedish and the Finnish markets have large equity crowdfunding markets, irrespective of if they have introduced national bespoke legislation or not. It therefore does not seem to be a decisive factor if a country has introduced specific crowdfunding regulation as in Finland, or lack a regulatory framework, as in Sweden.

Admittedly, the imposition of the full range of MiFID requirements on CSPs in Norway and Denmark raises administrative costs and can deter new entrepreneurs from entering the market, why it

⁹⁷ Ziegler et al., ‘Expanding Horizons’ (n 38) 54.

⁹⁸ Ziegler et al., ‘Expanding Horizons’ (n 38) 75–76.

⁹⁹ Vækstfonden & Dansk Crowdfunding Forening, *Det danske crowdfunding marked anno 2017* (15 Jan 2018) 24; The Financial Services Authority of Norway, *Letter to the Royal Norwegian Ministry of Finance, Regulering av folkefinansiering* (1 Feb 2017) 6, Ref. No. 16/11774.

¹⁰⁰ NOU 2018:5 p 91–92 (Norwegian preparatory works).

might seem to be more advantageous to choose to regulate crowdfunding under the article 3 MiFID exemption. However, with the new requirements on companies providing services under the article 3 exemption introduced in MiFID II, operating under the article 3 exemption is not as attractive as it used to be. The introduction of MiFID II has for example forced the Finnish authorities to amend their national crowdfunding law, in line with the more burdensome requirement on member states who use the article 3 exemption. The changes include new requirements on authorization for crowdfunding platforms as well as more burdensome investor protection requirements.¹⁰¹ The differences between operating under the full MiFID regulatory framework or under an article 3 exemption are currently only marginally more burdensome for digital platforms operating under MiFID.¹⁰² For example, platforms operating under article 3 exemptions are required to transfer the orders to an authorized third party under MiFID, while CSPs operating in countries with MiFID requirements need to operate under an authorization. Digital platforms operating in countries with the more burdensome MiFID requirements have easily seemed to be able to circumvent the cost of the rules, by establishing strategic partnerships with actors who already have the required authorizations. For example, the Danish crowdfunding platform Crowdinvest has established a strategic partnership with the bank Merkur.¹⁰³ It is therefore not likely that the dramatic difference in the Finnish crowdfunding market on one hand and the Norwegian and Danish markets on the other hand is caused by the latter requiring full MiFID compliance from CSPs.

4.2. IS THE REGULATION OF CROWDFUNDING PROJECT OWNERS DECISIVE FOR THE DEVELOPMENT OF THE ALTERNATIVE FINANCE MARKET?

If the applicability of MiFID on CSPs is not the decisive factor between the different developments in the Nordic countries, then what is? One theory is that the company laws in some of the Nordic countries pose a hurdle in the development of equity crowdfunding. What seems to be important is which categories of companies are granted access to the digital platforms. The Nordic countries have similar company law structures, with a division between private and public limited liability

¹⁰¹ Joukkorahoituslaki, § 1, § 9–10 (Finnish Crowdfunding Act); HE 151/2017 vp, p 84–86 (Finnish preparatory works).

¹⁰² An important difference is however that platforms operating under article 3 are constrained to their national markets, while platforms operating under MiFID are included in the European passport regime, thus allowing them to operate in other member states with the authorization acquired in their home state.

¹⁰³ Merkur Andelskasse, 'Crowdfunding kan blive en finansiel folkebevægelse' (Press Release) (19 Oct 2016) on file with author.

companies. In Denmark, Finland and Sweden, the two company forms are regulated in the same law, while each company form is regulated in a separate law in Norway.¹⁰⁴ The countries have, regardless of the similarities in their company laws, applied them very differently when it comes to crowdfunding platforms.

The majority of all securities offered on equity-based crowdfunding platforms in Finland and Sweden are shares in private limited liability companies. Sweden, which is the market leader in the Nordics, as well as one of top-three countries when comparing crowdfunding volumes in Europe, has taken a peculiar stance on the legal status of the shares offered on Swedish equity-based crowdfunding platforms. An offer of shares in a private limited liability company is restricted in the Swedish Companies Act. No advertising of share offers is allowed. Furthermore, no solicitation of an offer to more than 200 persons is allowed, unless the solicitation is directed at persons who have previously announced that they are interested in such offers and the lots on offer do not exceed 200 lots.¹⁰⁵ The exemption from the solicitation ban is aimed at covering solicitations and offers to professional investors, although no such restriction is placed in the law.¹⁰⁶ The shares are also “restricted” in the sense that they cannot be sold on regulated markets or other organized marketplaces.¹⁰⁷

When MiFID was implemented in Sweden, shares in private limited liability companies were deemed to fall outside the scope of the directive. Shares in private limited liability companies could not be considered “transferable securities” due to the restrictions placed on transfers in Swedish company law.¹⁰⁸ According to Swedish preparatory

¹⁰⁴ In Denmark, the two forms are called anpartsselskaber or ApS (private limited liability companies) and aktieselskaber or A/S (public limited liability companies), see Bekendtgørelse af lov om aktie- og anpartsselskaber (selskabsloven), §1–2, LBK no 1089 af 14/09/2015 (Danish Companies Act). In Sweden the two forms are called privata aktieföretag (private limited liability companies) and publika aktieföretag (public limited liability companies), see Aktieföretagslag (2005:551), § 2. In Finland, the two forms are called yksityinen osakeyhtiö (private limited liability company) and julkinen osakeyhtiö (public limited liability company), see Osakeyhtiölaki, 21.7.2006/624, § 1 (Finnish Companies Act). In Norway the two forms are called aksjeselskaper (private limited liability companies) and allmennaksjeselskaper (public limited liability companies), see Lov om aksjeselskaper (aksjeloven), § 1–1, LOV 1997-06-13-44 (Norwegian Private Limited Liability Companies Act), Lov om allmennaksjeselskaper (allmennaksjeloven), § 1–1, LOV 1997-06-13-45 (Norwegian Public Limited Liability Companies Act).

¹⁰⁵ An exemption is also made for advertising and solicitations, where the total number of buyers will not exceed ten persons, or the company is a community interest corporation (in Swedish bolag med särskild vinstutdelningsbegränsning).

¹⁰⁶ Prop. 1993/94:196 p 143 (Swedish preparatory works).

¹⁰⁷ Swedish Companies Act, ch 1 § 8.

¹⁰⁸ Compare with the definition in Directive 2014/65/EU (n 46), art. 4(1)(44).

works, it is not enough that a share is transferable, but the conditions must be such that a share, at least in principle, can be bought by anyone as a financial placement. The share must be negotiable on the capital market, and an investor must be able, at least in theory, to exchange the share for cash.¹⁰⁹ This has led to an uneasy compromise, where shares in private limited liability companies are allowed on crowdfunding platforms, but do not fall under the MiFID protective framework, since they are not considered transferable securities. With the expansion of the equity-based crowdfunding market in Sweden, the distinction becomes harder and harder to justify. Swedish CSPs are marketing the shares of private limited liability companies as “the best investment deals” and urge investors to create a “diversified portfolio” of investment deals.¹¹⁰ There are also several existing secondary markets for Swedish crowdfunding shares, why investors can, at least in theory, easily sell their shares.¹¹¹ At the same time, the shares are not transferable securities according to law.

In some business models, CSPs use a special purpose vehicle, which can be structured as a public company or a foreign business entity. In those cases, the restrictions on transfer of shares are not applicable. However, if investors directly invest in the crowdfunded company, the transfer restrictions become problematic. It has been argued that the registration process with CSPs, which investors must undertake before they can invest in a crowdfunding company, might be enough to place CSPs under the exemption for offers, where investors have previously announced that they are interested in such offers.¹¹² It is however doubtful if the registration in itself is considered a “previous” show of interest, when it is so closely connected to the investment procedure.¹¹³ Furthermore, it is important to understand that the registration procedure is in no way connected to any investor protection measures.¹¹⁴ The registration process at one of the leading Swedish CSPs takes for example less than 30 seconds to complete, and an investor is only required to provide a username, password, country of origin and an e-

¹⁰⁹ Prop. 2006/07:115 p 282 (Swedish preparatory works).

¹¹⁰ See <www.fundedbyme.com/en/for-investors/> accessed 1 June 2018).

¹¹¹ For example, the company Pepins Group AB runs a platform where crowdfunding shares are traded, see Pepins Group AB, ‘Annual Report 2016’ (2016).

¹¹² SOU 2018:20 p 317–218 (Swedish preparatory works).

¹¹³ The Danish Industry Organization for crowdfunding actors has stated that such a procedure is probably not considered a “closed” round of funding according to Danish law, see Regina M Andersen, Dansk Crowdfunding Forening, ‘10 hurtige Q&A’s om udbud af værdipapirer i forbindelse med crowdfunding’ (17 Nov 2015) <www.danskcrowdfundingforening.dk/10-hurtige-q-as-om-udbud-af-vaerdipapirer-i-forbindelse-med-crowdfunding/> on file with author.

¹¹⁴ SOU 2018:20 p 317 (Swedish preparatory works).

mail address.¹¹⁵ A private limited liability company or a CSP involved in equity-based crowdfunding might also violate the advertising prohibition in the Swedish company law. In the Swedish proposal for a new crowdfunding law, it is noted that the question of a possible violation of the transfer restrictions in Swedish company law should be solved in case law, and not by legislators. It is however noted that there have never been any cases, where the restrictions on transfer of private limited liability companies on crowdfunding platforms have been tried. Nor are there any pending cases.¹¹⁶

The situation in Sweden will be further complicated when the previously mentioned EU-regulation on CSPs is adopted. The regulation covers CSPs that offer crowdfunding services, defined as “*the matching of business funding interest of investors and project owners through the use of a crowdfunding platform*” which consists of the placing without firm commitment of *transferable securities* issued by project owners and the reception and transmission of client orders with regard to those transferable securities.¹¹⁷ Considering the Swedish classification of shares in private limited liability companies as non-tradable shares, it is doubtful if Swedish CSPs fall under the regulation. Even if the proposed Swedish bespoke regulation would make an exemption for CSPs covered by the EU-regulation, the latter does not *per se* cover the trade in non-transferable securities. An exemption in the national bespoke law would therefore need to cover such shares, for example by allowing CSPs under the EU-regulation to follow the requirements in the regulation when marketing private limited liability company shares.

Finland has a very similar company law framework as in Sweden. However, Finnish law was modified in the early 2000s, and most of the restrictions on the transfer of shares in private limited liability companies were repealed.¹¹⁸ It was seen as important to develop different types of financial instruments in an effort to create a diversified financial services sector. To become successful in an international setting, it was paramount to have an innovative and diversified financial sector.¹¹⁹ Finnish equity-based crowdfunding platforms are therefore free to market shares in private limited liability companies on their platforms.

Denmark has similar rules as Sweden on the restriction of public offers in private limited liability companies.¹²⁰ However, instead of allowing private limited liability companies to offer shares on digital

¹¹⁵ See Fundedbyme, <www.fundedbyme.com/en/accounts/register/business-investor/?button=register&from=header> accessed 1 June 2018.

¹¹⁶ SOU 2018:20 p 319 (Swedish preparatory works).

¹¹⁷ COM (2018) 113 final (n 6) art 2, 3.

¹¹⁸ Laki osakeyhtiölain muuttamisesta 1524/2001 (28 Dec 2001) (amendment of the Finnish Companies Act).

¹¹⁹ HE 184/2001 VP. p 13–14 (Finnish preparatory works).

¹²⁰ Bekendtgørelse af lov om aktie- og anpartsselskaber (selskabsloven), §1, LBK no 1089 af 14/09/2015 (Danish Companies Act).

platforms outside the MiFID framework, as in Sweden, Danish platforms are prohibited from offering shares in the two Danish forms of private limited liability companies, *anpartsselskaber* and *iværksætterselskaber*. MiFID-compliant digital platforms are only allowed to offer shares in public limited liability companies and financial instruments which are similar to shares in such companies, for example participatory instruments in limited liability partnerships with more than ten partners.¹²¹ In Norway, offers of private limited liability company shares on crowdfunding platforms are not prohibited per se, but considering that there is limited transferability of such shares according to Norwegian company law, such offerings are highly unlikely.¹²² Furthermore, the FSA clearly states that the activities of many crowdfunding platforms are closely connected to investment services regulated under Norwegian MiFID-regulation.¹²³ Since the activities of CSPs are already covered by financial services regulation, the FSA does not see any need for a separate bespoke regulation in Norway. A national bespoke regulation in Norway would, according to the FSA, instead risk creating a two-tier system for CSPs. Such a system would lead to an unclear legal position for CSPs and inconsistent regulation of similar activities.¹²⁴ However, several actors have instead noted that the uncertainties in regulation of crowdfunding existing today in Norway have hindered the development of such funding alternatives in the country.¹²⁵

When comparing the crowdfunding sectors in the Nordic countries with the actual restrictions placed on the transfer of shares in private limited liability companies, there is a correlation between allowing shares in such companies on crowdfunding platforms and the development of

¹²¹ Finanstilsynet, Notat, Orientering om samspillet mellem alternativ finansiering og den finansielle regulering 9 (18 Nov 2013) (Denmark). See also Bekendtgørelse af lov om kapitalmarkedet, § 4(1)(a), LBK no 12 af 08/01/2018 (Danish Capital Markets Law); Bekendtgørelse af lov om finansiel virksomhed, annex 5, LBK no. 1140 af 26/09/2017 (Danish Financial Business Act); Bekendtgørelse af lov om aktie- og anpartsselskaber (selskabsloven), §1, LBK no. 1089 af 14/09/2015 (Danish Companies Act).

¹²² Lov om aksjeselskaber (aksjeloven), § 4-15–4-23, LOV 1997-06-13-44 (Norwegian Private Limited Liability Companies Act).

¹²³ Depending on the business model, they might also be covered by Norwegian AIFMD-regulation.

¹²⁴ The Financial Services Authority of Norway, Letter to the Royal Norwegian Ministry of Finance, Regulering av folkefinansiering (1 Feb 2017) Ref. No. 16/11774, 7–8, 17; see also lov av 29. juni 2007 nr. 75 om verdipapirhandel, § 2–1 (Norwegian Securities Trading Act); lov av 20. juni 2014 nr. 28 om forvaltning av alternative investeringsfond, § 1–2 (Norwegian AIFM Act).

¹²⁵ NOU 2018:5 p 89–92 (Norwegian preparatory works); see also Letter from Finans Norge to the Royal Norwegian Ministry of Finance, ‘Regulering av folkefinansiering (’crowdfunding’) i Norge’ (30 Nov 2017) Ref. No. 16–1123.

equity-based crowdfunding in the country. The companies that use crowdfunding platforms are usually innovative but cash-strapped companies with a short financial history. Furthermore, they often have a negative cash flow and few assets, which can be securitized. As mentioned, such companies do not have access to bank financing, which can limit the growth of potentially successful companies. Crowdfunding possesses an alternative financing form with low transaction costs at the same time as the high risk in such companies is spread between a number of investors.¹²⁶ It is imperative that crowdfunding platforms are able to offer their services to these companies.

Considering that most innovative businesses start their existence as private limited liability companies, it is likely that the Danish and Norwegian restrictions on offering shares in private limited liability companies on crowdfunding platforms severely restrict the development of equity-based crowdfunding.¹²⁷ In order to incorporate as a public limited liability companies, a business needs a starting capital of NOK1M in Norway and DKK500K in Denmark.¹²⁸ Businesses in need of seed capital usually do not have these kinds of funds in the corporation, preventing them from incorporating as public limited liability companies. Although it cannot be determined with certainty that the restrictions on transfer of shares in private limited liability companies are hindering the development of equity-based crowdfunding, the manner in which a country has regulated share transfers seems the most likely determinant of the success of equity-based crowdfunding in the Nordic countries.

5. CONCLUSION

The Nordic countries are characterized by similar cultural, economic and regulatory frameworks. However, when it comes to equity-based crowdfunding, the countries have taken different paths, both when it comes to regulating the sector as well as the volumes raised on alternative seed and venture capital crowdfunding platforms. Sweden has decided to regulate equity-based CSPs outside the MiFID regulatory framework, while Denmark and Norway have decided to impose the full range of MiFID requirements on Danish and Norwegian CSPs. Finland has chosen a middle ground, by adopting national bespoke regulation, within the exemption allowed in the MiFID framework. In this article, the different approaches of the Nordic countries have been analyzed in relation to the performance of equity-based CSPs. It is argued that the

¹²⁶ NOU 2018:5 p 87–88 (Norwegian preparatory works).

¹²⁷ See also SOU 2018:20 p 322 (Swedish preparatory works).

¹²⁸ Bekendtgørelse af lov om aktie- og anpartsselskaber (selskabsloven), § 4, LBK no 1089 af 14/09/2015 (Danish Companies Act); Lov om allmennaksjeselskaper (allmennaksjeloven), § 3–1, LOV 1997-06-13-45 (Norwegian Public Limited Liability Companies Act).

regulatory differences in regulating crowdfunding platforms have at most a marginal effect on the development of the sector. This does not mean that regulation of the sector is irrelevant for the success of an alternative finance market. Quite the contrary, it is argued that the restrictions on marketing shares in private limited companies are likely to have contributed to the dismal performance of Danish and Norwegian equity-based crowdfunding markets. Furthermore, the fact that CSP-regulation is not the likely determinant of the success of the alternative equity finance market does not mean that CSPs should be left unregulated. CSP-regulation is important in achieving transparency in the sector as well as in achieving proportionate investor protection regulation. As the alternative financial market matures, it could become an important source for seed and venture capital in Europe. With a larger market share of the venture capital funding market, it could also become systematically important for the European economy. In an effort to avoid systematic market failures, regulation and supervision of CSPs is imperative. However, it cannot be concluded that the CSP-regulation in the Nordic countries is the determining factor of the current disappointing performance/success of equity-based crowdfunding in individual Nordic countries.

In addition to the regulatory structure in the Nordic countries, the pros and cons of the pan-European CSP-regulation have been discussed in this article. All of the Nordic countries are limited by their small home markets. The lack of harmonization of crowdfunding regulation has limited cross-border crowdfunding growth. Although the majority of Nordic crowdfunding platforms have indicated their plans to internationalize their business and cater to international clients, the fragmented regulatory framework in the Nordic countries and the EU makes it difficult to expand outside national markets.¹²⁹ A harmonized regulation is therefore likely to be beneficial for the Nordic countries. Already, some Nordic CSPs have used the European passport rights in MiFID to expand their business cross-border.¹³⁰ The introduction of a harmonized CSP regulation would allow a further integration of the Nordic markets and the introduction of crowdfunding as an alternative financing model in Denmark and Norway, which have been underserved by CSPs. However, the legislative technique, with an opt-in regulation, is likely to further diversify the sector, creating several different regimes in the member states as well as inside a country. There is also a great risk that such a regulatory technique will increase transaction costs for CSPs as well as contribute to an unclear regulatory structure. The vision of a European Capital Markets Union, or even a Nordic Capital Markets

¹²⁹ Ziegler et al., 'Expanding Horizons' (n 38) 83.

¹³⁰ Invesdor, Press Release, 'Invesdor Launches in Norway' (Press Release) (17 Feb 2016) on file with author.

Union, is still some years away from becoming a reality, at least when it comes to the regulation of equity-based crowdfunding.