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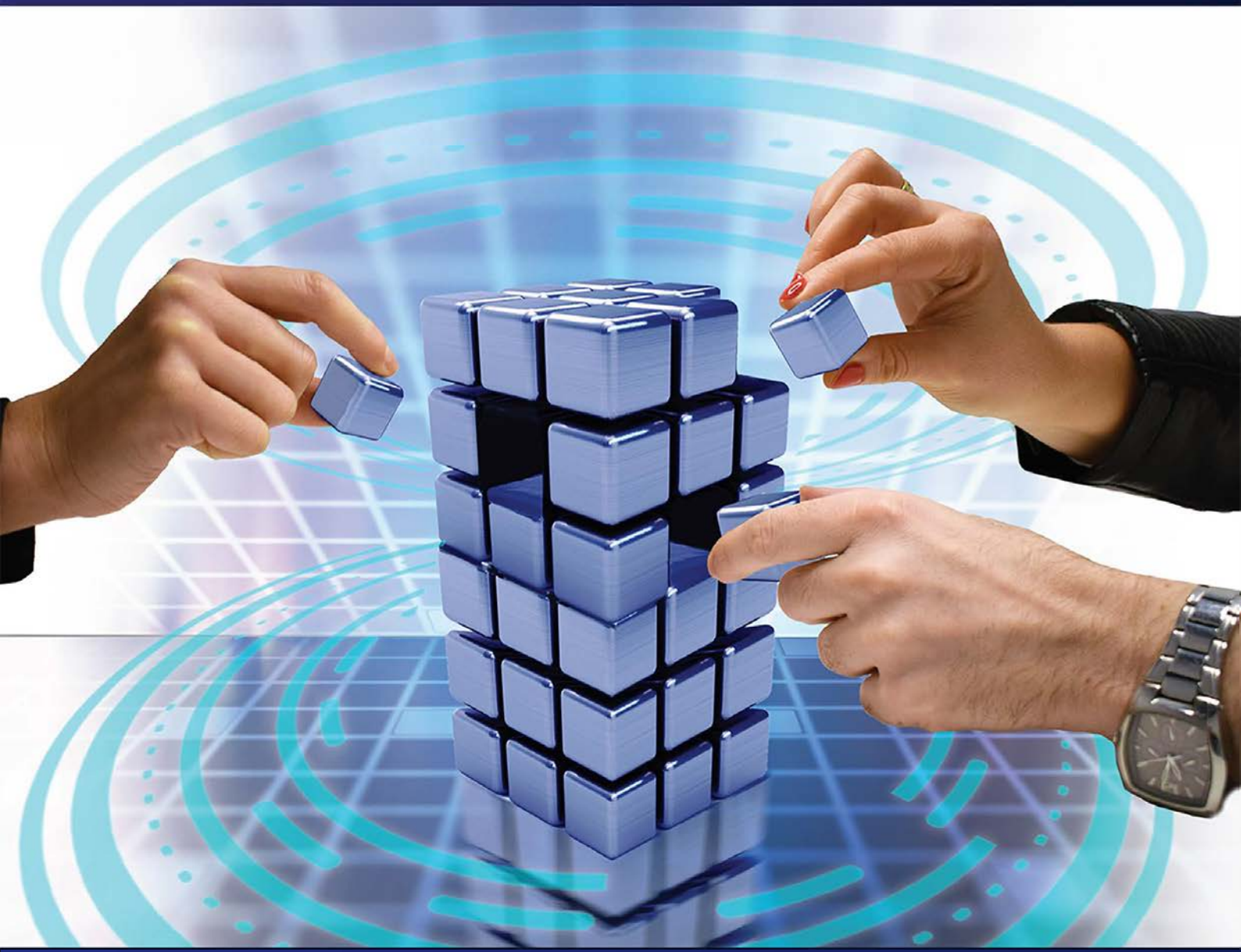

Position of the Polish Financial Supervision Authority on the operating principles of investment crowdfunding platforms

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9 April 2020

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1. Background. Scope and purpose of the position

Crowdfunding as a social and economic phenomenon was defined in the Communication from the European Commission of 14 March 2014[1]. As defined in the Communication, crowdfunding generally refers to an open call to the public to raise funds for a specific project. Such calls are usually published and promoted through the internet, and are open only for a specified time period. They allow for reaching a wider public and represent an offer for engaging in a project by donating money for a purpose specified by the campaigner. However, there is no legal definition of that term.

One of the types of crowdfunding is **investment crowdfunding**, where the activities of a crowdfunding platform operator are carried out for the benefit of companies raising capital through the issuance of securities (shares or bonds); there are also cases of such distribution of shares in a limited liability company.

The lack of a legal definition of crowdfunding (including investment crowdfunding) despite the ongoing development of that market raises concerns among entities operating as investment crowdfunding platforms as to compliance of their activities with legislation, or as to the scope of legal and regulatory requirements that must be met with respect to such activities. Such concerns are reported to the Polish Financial Supervision Authority (Urząd Komisji Nadzoru Finansowego — UKNF).

1 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Unleashing the potential of Crowdfunding in the European Union (http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2014:172:FIN)

The purpose of this position is to indicate and explain the provisions of law applicable to crowdfunding platforms and issuers using their services as well as to indicate the standards that in the UKNF's opinion should be applied by crowdfunding platform operators and the issuers that use such platforms. The legal framework and the standards indicated in this position apply to crowdfunding platforms that do not hold an authorisation to provide the brokerage services referred to in Article 69 of the Act on trading in financial instruments[2].

As regards crowdfunding activities, this position refers only to investment crowdfunding platforms, i.e. platforms whose activities are carried out for the benefit of companies raising capital through the issuance of securities, e.g. shares or bonds. The UKNF also points to the risks associated with the sale of shares in a limited liability company through an investment crowdfunding campaign. Other types of crowdfunding have been briefly described in Annex 2 to the Report of the Special Task Force for Financial Innovation (FinTech)[3].

Currently, the investment crowdfunding activities *per se* are not regulated by any special rules regarding the establishment and operation of the platforms or the requirement to obtain authorisation. It means that unless the platform's business model covers regulated activities – in particular the offering of financial instruments as defined in the Act on trading in financial instruments, it is a business conducted under Article 8 of the Business Law[4]. According to that provision, *a business owner may undertake any activity, except for activities prohibited under the law*. *The owner may only be required to adopt a specific conduct on the basis of provisions of law.'* However, also in that case, provisions regulating certain aspects of such business may apply.

The UKNF sees crowdfunding as a phenomenon that could contribute to the development of the financial market and to economic growth. However, due to the risks it entails, if contributors fail to observe appropriate standards of due diligence, crowdfunding might have negative consequences for the financial market, and thus for economic development that market is to support.

2. Offering financial instruments

The functioning of crowdfunding platforms and the issues addressed in this position should be considered in conjunction with the Position of the UKNF on offering financial

[2] Act of 29 July 2005 on trading in financial instruments (consolidated text: Journal of Laws 2020, item 89, as amended)

3 https://www.knf.gov.pl/knf/pl/komponenty/img/Raport_KNF_11_2017_60290.pdf — Annex 2 to the Report contains a brief description of the following forms of crowdfunding: donation-based (for charitable purposes), rewards-based, pre-sales, investment (share-based) crowdfunding.

[4] Act of 6 March 2018 – the Business Law (consolidated text: Journal of Laws 2019, item 1292, as amended).

instruments[5] (hereinafter: 'Position on the offering'). It means that this Position does not preclude the application of the Position on the offering (or provisions listed therein) to the extent that the crowdfunding activities show the qualities of the offering of financial instruments in accordance with the Position on the offering and with the laws that Position seeks to clarify.

The Position on the offering presents an interpretation that sets out the scope of the service of offering financial instruments as referred to in Article 72 of the Act on trading in financial instruments, pointing to the line between the regulated activities (the brokerage activities) and the promotional activities (which do not require KNF authorisation).

A crowdfunding platform which has not been authorised to provide the brokerage services referred to in Article 69 of the Act on trading in financial instruments should organise and conduct its activities in such a manner that its actual operations are not part of an activity recognised as the service of offering.

3. Investment crowdfunding platforms

An investment crowdfunding platform is a website made available to project owners or companies (platform users) that can use it to raise funds to finance a project or the development of a company.

For the purposes of this Position, a terminological standard was adopted according to which the term 'crowdfunding platform' refers also to crowdfunding platform operators, i.e. entities running the above-mentioned websites whose activities consist in providing solutions to generate publicity about public offers (e.g. a website) and that may provide issuers with solutions to support the management of a public offer. A reference to permitted or prohibited activities of a platform should be understood as a reference to permitted or prohibited activities of platform operators.

The core activities of a platform include providing information about the platform user (company/issuer) and its ongoing or planned process of raising funds (issuance) as well as activities related to the distribution of a carrier of such information.

In practice, platforms also offer other services for users. Such ancillary services for users include for example:

- preparing information documents in relation to an offer (securities note);
- preparing advertising documents and/or materials;

5 https://www.knf.gov.pl/knf/pl/komponenty/img/Oferowanie_Instrumentow_65197.pdf

- providing tools to facilitate the use of payment services;
- organisation of meetings between issuers and potential investors.

4. Advertisement of a public offering

A platform may advertise a public offering, which according to Article 2(k) of the Prospectus Regulation[6] is a communication with the following features:

- it refers to a specific public offering of securities or to an admission to trading on a regulated market;
- it aims to promote, in a particular way, a potential subscription for, or a potential acquisition of, securities.

As a rule, in matters regarding public offerings that do not require a prospectus under the Prospectus Regulation, the provisions pertaining to advertising public offerings do not apply.

An advertisement relating to public offerings that do not require a prospectus should meet the requirements set out in Article 53(4) of the Act on public offering[7].

In accordance with Article 53(4) of the Act on public offering, the content of advertisements should be consistent with the information provided in the information memorandum or any other document required under the Act on public offering or the Prospectus Regulation, made available to the public, or with the information that should be provided in such a memorandum or other document where such information memorandum or other document have not yet been made available to the public. Additionally, the content of the advertisements must not mislead the investors as to the situation of the issuer or evaluation of the securities. In cases where material information is disclosed by an issuer or an offeror and addressed to one or more selected investors in oral or written form, such information must, as applicable, be also disclosed to the other investors to whom the offer is addressed (Article 22(5)(a) of the Prospectus Regulation).

The breach of duties under Article 53(4) of the Act on public offering, or other provisions of law regulating the acceptable forms and methods of conducting advertising activity, may result in the imposition by the KNF Board of the measures referred to in Article 16 of the Act on public offering, for example the issuance of the order to suspend the public offering before the launch of the public offering or

[6] 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.

[7] Act of 29 July 2005 on the public offering and conditions governing the introduction of financial instruments to organised trading, and public companies (consolidated text: Journal of Laws 2019, item 623, as amended)

subscription, or the issuance of the prohibition of its continuation.

On the other hand, under Article 96(1c) of the Act on public offering, an issuer or offeror who runs an advertisement that is in breach of Article 53(4) of the Act on the public offering may be subject to a financial penalty of up to PLN 1 000 000. Thus the supervisory authority has powers with regard to the oversight of advertisements of such offers, even if they are not subject to the requirement to publicly disclose a prospectus.

5. Website of the platform vs website of the issuer

According to the wording of Article 5 § 5 of the Commercial Companies and Partnerships Code effective as of 1 January 2020[8], a joint-stock company and a limited joint-stock partnership must operate their own websites designed to communicate with shareholders where they should
public the announcements required under the law or their articles of association. In the UKNF's opinion, the website should contain all the information about the public offerings conducted by the issuer.

The documents related to a public offering, the possibility to subscribe, the information on how to transfer funds for the acquisition of securities, and any other information and documents necessary to conduct a public offering may only be published on the website of the issuer. The platform may publish only a limited scope of information on its website in relation to the disclosure of information about the company and the planned issue. Such information must not include information about the financial instruments and terms of their acquisition, which would constitute the sufficient grounds to make a decision on the acquisition of those instruments – since such information may only be published on the website of the issuer.

After reading the information available on the website of the platform and clicking on the active field, a potential investor should be automatically directed to the website of the customer of the platform (the issuer).

Presentation, on the website of the platform, of an element indicating the progress of the issue, i.e. the number of investors who made the investment, or the amount of the capital raised before the end of the offering (in graphic form, e.g. the status of progress of the issue, or in the form of text, or both) constitutes information about the issue. However, such presentation does not constitute information which gives sufficient grounds for making an investment decision, so it may be published on the website of the platform. It should be noted that the end date of the subscription (the subscription deadline), presented during the public offering by the crowdfunding platform or by the issuer, should be the same as the date indicated in the securities note.

[8] Act of 15 September 2000—the Commercial Companies and Partnerships Code (consolidated text: Journal of Laws 2019, item 505, as amended).

The practice of informing the investors that the possibility to invest in a given company will expire before the subscription deadline stated in the terms of the offer should be considered illegal.

1) The platform may publish the following information about the company:

- information about the company's business activities, including its products and services;
- historical data on the company, including information about any past issue or its shares or bonds;
- plans regarding the company's growth.

The above list includes information which may be published by the platform.

2) However, in relation to the ongoing or planned public offering, the only information that may be posted on the platform includes:

- information that the issuer is offering shares/bonds or intends to offer them at a particular time;
- information about the time limit within which one may familiarise themselves with the terms of issue;
- information on where the terms of issue are available (e.g. the website or registered office of the issuer);
- the link to the website of the issuer, including directly to the section containing the terms of issue.

Where information about the issue listed in point 2 above is made available on the platform, it should be noted that such information constitutes advertisement as defined in Article 2(k) of the Prospectus Regulation.

The scope of information to be disclosed and the scope of activities determine the scope of responsibility of the platform.

The cases where the information or documents received by the platform from the issuer, or the information available or received by the platform from other sources (in each case before the disclosure of the information about the company and before the ongoing or planned issue, or before the preparation of the securities notes) indicate, in particular, that:

- **the financial means obtained through the issue will not be used for its intended purpose;**

- **the financial standing of the issuer will not allow it to continue business dealings or to make the payments due to investors on account of the securities they hold (or to make such payments in a timely manner);**
- **the security of claims of holders of securities is inadequate (liquidity, value, degree of being encumbered with other claims) and must not constitute an adequate asset as security of claims;**
- **the issuer is planning to present information about itself or the issue that is inaccurate or ignores essential facts (and thus is misleading as to the issuer's situation and the assessment of the securities; in fact the appropriate information must refer to the actual reality, not a state that is expected after obtaining funding, if any, unless it is made clear that such presented data constitute a forecast);**

and despite having such information the platform is participating in preparing the securities note or passes information about the company and the ongoing or planned issue, may result in criminal liability for fraud or aiding and abetting of fraud.

According to Article 286 of the Penal Code[9], *any person who in order to get a private financial gain induces another person to manage their own or another person's property by misleading them or using an error or inability to properly understand one's action* is subject to a criminal penalty. According to that provision, the conduct of the perpetrator must be direct and aimed at getting an unlawful private financial gain[10].

The UKNF recommends that the platform first pay attention to the following information:

- how the issuer's activities are presented on the website in terms of separation of information about the issuer's plans from its achievements,
- where the issuer uses a brand used or owned by another entity (e.g. a related company), whether the issuer has indicated what rights he has and what kind of costs he incurs on that account,
- in the presentation of the company – in relation to the information about achievements, e.g. the volume of sales of the product or the revenue, the issuer should clearly state whether the declared level of sales applies to the activities of the issuer or, for example, the related company that sells the product under the same brand,

[9] Act of 6 June 1997 — the Penal Code (consolidated text: Journal of Laws 2019, item 1950, as amended). 10 According to Article 18 § 3 of the Penal Code, any person who, intending that another person commits a prohibited act, facilitates the commission of such an act with their conduct, in particular by supplying tools, means of transport, giving advice or providing information, is liable for aiding and abetting; the same liability arises also for any person who, contrary to the special legal duty to prevent the commission of a prohibited act, facilitates the commission of such an act by another person.

- any expectations and assumptions as to the future value of sales of a product that the newly established company makes on the basis of the position of the product under a specific brand developed by another entity and that should be clearly described as expectations or assumptions.

6. Disclosure of information to individuals interested in the investment

In the opinion of the UKNF, the provisions of Article 72 points 1 and 3 of the Act on trading in financial instruments and Article 53 of the Act on public offering are not infringed by activities of a platform operator through which the operator addresses customised electronic communications to individuals to whom the operator promotes the platform only or vaguely states that the platform contains information about a new company, and gives the link to the platform.

However, the platform must not send e-mails containing information about the financial instruments and terms of their acquisition which constitute sufficient grounds for making a decision on their acquisition. The e-mail communications sent by the platform should not contain the link automatically redirecting to the website of the issuer on which information about the offer is available.

7. Intermediation in the disposal of financial instruments acquired by entities as a result of presentation of information about those instruments

The position on offering explains that the service of offering financial instruments includes the act of accepting declarations to subscribe to the acquisition of financial instruments, and the funds used to finance the acquisition. The purpose of the position on offering was to discuss the substance of Article 72 of the Act on trading in financial instruments, to the extent that article has been amended. This is why the position on offering does not address any other forms of the activities referred to in Article 72 point 2 of the Act on trading in financial instruments.

Therefore the scope of the activities referred to in Article 72 point 2 of the Act on trading in financial instruments include, in particular:

- confirming to the investor that he/she has effectively subscribed for the issue;
- reviewing the correctness of the declaration to subscribe to the issue.

The above list of acts is non-exhaustive. Please remember that the provision of promotional and advertising services *per se* does not constitute grounds for undertaking other actual acts related to the disposal of financial instruments.

8. Organisation of meetings

Where a platform organises events open to potential investors and issuers, this does not constitute the service of offering financial instruments, unless the following conditions are met.

At such meetings, the platform may promote its activities, the business activities of the issuer, and any other activity or achievement of the issuer.

The platform and persons acting on its behalf should refrain from any activity recognised as the service of offering financial instruments, as described in the Position on offering.

The platform may also undertake to organise a meeting during which the issuer will present information about the issue to potential investors. In that case, the platform may provide technical support during the meetings (e.g. space rental, guest reception, printing materials, services related to the conduct and moderating of the meeting).

However, representatives of the platform should not provide information concerning the issue or provide such information as an answer to questions from other entities (including participants in the meeting).

9. Preparing securities notes

One of the additional activities that the platforms carry out in practice for the issuers is the preparing of securities notes.

Where a platform prepares or participates in the preparation of information to be contained in the securities notes, the platform should be aware of the criminal liability provided for in Article 100 of the Act on public offering. According to that provision, *any person who, being responsible for the information in the prospectus, in the information memorandum or in the documents referred to in Article 37a(1), Article 38, Article 38a or Article 39(1), or for any other information related to a public offering or admission of securities or other financial instruments to trading on a regulated market, or to applying for admission of securities or other financial instruments to trading on a regulated market, or for the information referred to in Article 17(1) or (2) of Regulation 596/2014 or Article 56(1), provides inaccurate data or conceals true data which materially affect the substance of information, shall be punishable by a fine of up to PLN 5 000 000 or by the penalty of deprivation of liberty for a period from 6 months to 5 years, or by both those sanctions.* Moreover, under Article 100(2) of the Act on public offering, the same penalty must be imposed on *any person who commits the act specified in Paragraph 1, acting for or on behalf of a legal person or non-corporate entity*.

Where a platform limits its activities solely to making available the space on its website and providing possible organisational solutions to support the issuer in managing the issue, and does not participate in preparing securities notes, in the case of irregularities on the issuer's side the platform will not be held liable for the irregularities resulting from the information communicated to investors.

10. Preparing investment recommendations

Where a platform concludes that one of additional services provided to the issuer may be investment analysis, financial analysis or formulation of any other general recommendation, or has undertaken to carry out such activities on its own initiative, the platform should take account of the following matters.

The assessment of the terms of such service for compliance with Article 72 of the Act on trading in financial instruments was discussed in point 2.2.2.3 of the Position on offering. The aim of such activities is to provide potential investors with reliable analytical data on the situation of the issuer and the expected values of the financial instruments issued by that issuer – so as to enable them to make an informed investment decision. For investment firms, the conduct of such activities represents brokerage activities referred to in Article 69(4) point 6 of the Act on trading in financial instruments. Also in that case, both investment firms and entities providing such a service under the freedom to provide services are required to observe all the rules for producing and making available recommendations on the acquisition or disposal of financial instruments. The definition of 'investment recommendations' is given in Article 3(1)(35) of MAR[11]. According to that provision, 'investment recommendations' means information recommending or suggesting an investment strategy, explicitly or implicitly, concerning one or several financial instruments or the issuers, including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the public.

Whereas under Article 3(1)(34) of MAR, 'information recommending or suggesting an investment strategy' means information:

- produced by an independent analyst, an investment firm, a credit institution, any other person whose main business is to produce investment recommendations or a natural person working for them under a contract of employment or otherwise, which, directly or indirectly, expresses a particular investment proposal in respect of a financial instrument or an issuer; or

[11] 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.

- produced by persons other than those referred to above, which directly proposes a particular investment decision in respect of a financial instrument.

The method of producing and communicating investment recommendations is regulated in detail in the Commission Delegated Regulation[12]. The Regulation sets out a number of standards for the activities in question.

Special attention should be paid to the provisions on the disclosure of conflicts of interest (Articles 5–6 of the Commission Delegated Regulation). A conflict of interest must be understood as all relationships between the person producing the recommendations and the issuer and all circumstances that may be expected to impair the objectivity of the recommendation. The situation where a platform provides the services described in this position to the issuer and at the same time produces recommendations concerning the securities or other financial instruments issued by that issuer results in a conflict of interest.

While for investment firms the interest of a potential investor is protected through the application of a number of technical and organisational solutions regulated under the law, such as for example the rules for handling conflicts of interest, an internal information protection system (so called 'Chinese walls'), the rules regarding the remuneration of staff – no such protective measure is mandatory for platforms that are not investment firms. For crowdfunding platforms, it must be noted that there is a very strong conflict of interest between the activity consisting in promoting an offer of a given issuer and the activity of producing recommendations concerning that issuer, and such conflict generates a significant risk of harm to the investors. The main reason is that the amount of remuneration of the platform may be directly dependent on the success of the issue. At the same time, there is no mechanism, similar to the ones described above, to prevent the violation of investors' interest, which mechanism and its operation would be subject to formal internal and external supervision, as in the case of investment firms. The absolute minimum requirement for such activities to be available to the platform is therefore to disclose and describe any existing conflict of interest.

Additionally, separating the recommendations from the advertisements when they are being communicated and promoted may be a big challenge associated with the risk of misleading the recipients.

[12] Commission Delegated Regulation (EU) 2016/958 of 9 March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the technical arrangements for objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest.

11. Providing issuers with framework agreements with payment service providers

Striving to provide an end-to-end service to issuers, the platforms also allow them to open payment accounts with payment service providers using framework agreements concluded between the platforms and such providers. The issuer benefits from lower costs of payment services.

The issuer is the only entity that can be the holder of the payment account on which the investors are to pay their funds. However, that does not restrict the platform's access to the issuer's payment account in read-only mode, which may be used to, for example, determine the remuneration of the platform. Where a link to payment is used on the website of the issuer, the link must redirect to the website of the payment service provider, who will transfer the funds directly to the issuer's account.

12. Equal treatment of issuers

As part of fair and professional operation of the platform, no issuer may be favoured in a manner that would suggest that an offer of a given issuer is more attractive or more secure or that is guarantees a higher rate of return than other offers promoted by the platform. Each time, the active field redirecting users from the website of the platform to the website of the issuer should look the same. That does not restrict the possibility of placing the logo of the issuer, which may attract attention to a larger or lesser degree. The purpose of that action of the platform should be to prevent a situation where one issuer would be promoted more intensively (though unintentionally) than others. Such unbalanced promotion of various issuers could induce the investors to believe that according to the platform one offer is more attractive than others.

13. Additional activities of the platform in relation to investors

The platform should not offer activities which might create a false impression among investors as to the nature of the activities of the platform. The UKNF recommends that the platforms should not undertake any activity which might create an impression that they operate under the same rules as professional intermediaries in the capital market (e.g. investment firms).

The platforms may carry out educational activities to raise the general level of knowledge among investors. However, the educational activities should be clearly separated from the other activities of the investment platform.

14. Running an investment crowdfunding platform by an entity authorised to conduct brokerage activities

Entities authorised to provide the brokerage services referred to in Article 69 of the Act on trading in financial instruments (i.e. entities having the status of investment firm, or entities authorised to conduct such activities under the law, i.e. the banks referred to in Article 70(2) of the Act on trading in financial instruments) may conduct activities as an investment crowdfunding platform. Such entities are not bound by the above-described restrictions resulting from the lack of authorisation to provide brokerage services, so their range of services for issuers may be much wider. Thus it is possible, for example, to provide the services of offering instruments or accepting and transmitting orders to acquire or dispose of financial instruments, if that falls within the scope of authorisation held by the entity. An investment firm operating a crowdfunding platform must – also in relation to the activity of operating a crowdfunding platform – ensure compliance with all the rules for brokerage activities, including the positions of the UKNF on such activities. No statement in this position represents or is to be construed as an exemption or limitation of the requirements applicable to investment firms due to their brokerage activities.

15. Offering shares in a limited liability company

No activity of trading in shares in limited liability companies is a regulated activity (an activity subject to KNF supervision). This is due to the fact that a share in a limited liability company is not listed in the catalogue of financial instruments provided in Article 2 of the Act on trading in financial instruments.

Nevertheless, it is worth mentioning the systemic context of that topic related to the model of a limited liability company existing in the Polish law (as a private closed company) and to the legislator's approach to shaping the legal framework for the assignment of rights from shares in such a company (including requirements on the form). Under Article 180 § 1 of the Commercial Companies and Partnerships Code, the disposal of a share or a fractional thereof should be effected in writing, on a document bearing signatures certified by a notary public. That means that in order for the assignment of a share to be effective, it is necessary to conduct a notarial transaction. The failure to observe that form results in the invalidity of the legal transaction. Due to the above-mentioned conditions it must be noted that in the Polish legal system regulating the functioning of commercial companies and partnerships, a limited liability company was not designed as a company in which shares are held for massive trading. That issue may be important in terms of investor protection. In fact, inasmuch as public offering of securities is subject to regulations aimed at allowing investors to make a decision on acquisition based on accurate information, no such solution exists in the Polish law in relation to limited liability companies.

In the opinion of the UKNF, the operations of platforms carried out in the form of an advertisement concerning the acquisition of shares in limited liability companies to ensure an appropriate level of investor protection should be carried out in accordance with the similar standards of conduct as for an advertisement concerning the acquisition of shares or bonds. This applies in particular to the accuracy of a communicated addressed to investors, including the requirement to provide clear information about the above-mentioned restriction on secondary trading following from Article 180 § 1 of the Commercial Companies and Partnerships Code.

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Should you have any question or doubt regarding investment crowdfunding platforms, you may send your request through the Innovation Hub Programme. The detailed rules for participation in the Innovation Hub Programme and the application form are available here: https://www.knf.gov.pl/dla_rynku/fin_tech/ Innovation_Hub

Activity carried out within the framework of:

and

PROGRAM INNOVATION HUB

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