

DELIVERABLE D.T 4.2.1

Preventing money-laundering issue proposal

Version 1
11 2017





CONTENT

1. Introduction	3
2. Methodology	4
2.1. Key concepts/1: Identifying main areas of criminal liability in crowdfunding activities	6
2.1.1. Fraud	8
2.1.2. Money Laundering	11
2.1.3. Terrorist Financing	15
2.1.4. Violation of reporting obligations	20
2.2. Key concepts/2: Identifying relevant competent authorities	24
3. Analysis per legal system	25
3.1. International Law	25
3.1.1. Relevant International Law.	25
3.2. EU Law	27
3.3. Italian system	31
3.4. Other CE States with national regulation	35
3.4.1. Austria	35
3.4.2. Germany	37
3.5. States without national regulation	39
3.5.1. Croatia	39
3.5.2. Czech Republic	40
3.5.3. Hungary	42
3.5.4. Poland	44
3.5.5. Slovakia	45
3.5.6. Slovenia	47
4. Strong/weak points for international transfer possibilities	49
5. Proposal for unifying rules (way forward to DT. 4.2.2)	51
6. ANNEX I	53



DISCLAIMER

ON BEHALF OF THE UNIVERSITY OF BOLOGNA, THE PRESENT DELIVERABLE HAS BEEN DRAFTED BY GIUSEPPE CONTISSA (PHD, RESEARCH FELLOW), FEDERICO FERRI (PHD, RESEARCH FELLOW), GIULIA LASAGNI (PHD, RESEARCH FELLOW) AND PIERA SANTIN (PHD, RESEARCH FELLOW), UNDER THE SCIENTIFIC SUPERVISION OF PROF. ANTONINO ROTOLO (UNIBO COORDINATOR), PROF. MICHELE CAIANIELLO, PROF. FEDERICO CASOLARI, PROF. ADRIANO DI PIETRO, PROF. ANDREA MONDINI.



1. Introduction

D.T 4.2.1 is one of the streams of the thematic work package T4, renamed “Increasing competences of decision makers for crowdfunding”, whose overall objective is to provide legal knowledge to crowdfunding operators seeking to act in CE EU Member States others than the one where they are located.

This deliverable is part of Activity A.T 4.2 “Capacity building for improvement of legal issues”. It serves to describe criminal liability risks in crowdfunding activities within the countries participating to the present project, and envisages current pros and cons also with an aim of identifying new legal scenarios.

More precisely, this deliverable is made up of four stages.

- Identification of main areas of criminal liability risk in the EU legal context related to crowdfunding activities;
- Overview of national legislations and authorization systems tackling such risks, with focus on already developed Italian regulation;
- Identification of strong/weak points for international transfer possibilities;
- Proposal for unifying rules.

In this regard, D.T 4.2.1 is at the same time addressed to:

- Crowdfunding core operators, to provide them with useful information for the development, or mainstreaming of their cross-border activities;
- Decision-makers, to provide them with a more accurate and exhaustive knowledge of the current legal gaps, and suggest a possible way forward.

D.T 4.2.1 has been prepared by legal scholars of the University of Bologna. It is the output of a 5-month research period (July - November 2017) during which the authors analysed different sources of criminal law and procedure:

- International law;
- European Union law;
- National criminal law and procedure of the CE EU Member States;
- National practices (where information is available).



2. Methodology

As formally stated in the Work Plan of the project, the legal analysis carried out in D.T 4.2.1 is framed as follows.

- First, the authors will identify which are the main areas of criminal liability risk in crowdfunding activities within the EU legal context.
This will imply providing a common definition of the selected criminal conducts, to the extent possible referring to international or EU legal sources applicable to the CE EU Member States.
- Secondly, the authors will provide the state of play of the multilevel regulations dealing with the selected criminal offences; in particular the authors will:
 - Look at the most relevant international law norms/acts/documents related to criminal liability risks in crowdfunding, adopted by the EU or directly applicable to the CE EU Member States;
 - Look at the relevant EU legislative acts;
 - Assess the Italian relevant applicable regulation, as it was the first example of domestic discipline on crowdfunding within the CE EU areas;
 - Assess regulations subsequently adopted by other CE EU Member States (as identified in D.T 4.1.1), to verify whether they contain relevant criminal law provisions;
 - Focus on the practice emerged (to the extent possible) in the CE EU Member States who still do not have a domestic legal framework for crowdfunding.

The analysis of the applicable criminal law at domestic level will require two steps:

1. Understanding whether, and if so under which conditions, legal persons may be held liable for criminal risks in a specific national system, as most of the actors involved in crowdfunding (especially platforms, but also promoters) are likely to take the form of legal entities;
2. Analysing whether the areas of criminal risks identified are criminalized at national level (and if only for natural, or also for legal persons).

Although the authors will examine CE EU Member States following a group division based on the existence, evolution or lack of national regulations on crowdfunding, each country involved in the project will be the subject of a dedicated part in the deliverable.

- Third, following the analytical part on multilevel regulations for crowdfunding criminal risks and liability, the authors will identify strong and weak points about



transboundary potentials of relevant regulations amongst the CE EU countries involved in the project.

- Lastly, in light of the elements acquired, the authors will explore possible solutions, if any, for unifying national legislations by means of external and/or internal interventions; for example, through EU legal acts, amendments to/adoption of EU or domestic regulations, reorientation of national practice, etc.

Given the need to go beyond a mere description of the domestic legal frameworks for crowdfunding in the CE EU countries, and due to the recent evolution and hybrid nature of the core subject, the authors will refer to multiple legal systems and sectors; in fact, as explained in the Project Meetings held in Budapest (January 2017), Bologna (May 2017) and Zagreb (October 2017), the domestic legal frameworks dealing with criminal risks in crowdfunding are deeply conditioned by international and EU law. This approach will also serve to confer a higher-degree of exhaustiveness to the analytical streams developed in this deliverable, and to ensure a fair threshold of consistency between the deliverables under the leadership of the University of Bologna.

D.T 4.2.1 lays on objective definitions of key concepts. Such definitions are offered in the next section.

→ For the definition of the different applicable “Types of crowdfunding”, “Crowdfunding project”, and “Main actors involved in crowdfunding projects”, the authors refer to the definitions already provided in D.T 4.1.1., Section 2.1.

The overall work leading to this D.T has been carried out by relying on various sources and tools, such as:

- Legal official texts from different legal systems;
- Scholars’ contributions;
- Technical reports and studies;
- Local practice examples concerning relations between crowdfunding operators and national competent monitoring authorities.

Under this last profile, the authors also created a dedicated questionnaire, aimed at gathering relevant inputs from the national competent monitoring authorities (mainly Financial Intelligence Units, as defined below in Section 2.2).

Indeed, the completion of all the stages of the deliverable in part depended on the knowledge of some major factual issues of local crowdfunding actors, especially where domestic regulations on crowdfunding lack. Under DT. 4.1.1, a first questionnaire addressed to the other partners, who committed to spread it to relevant local crowdfunding actors, was first submitted to the consortium in February 2017.



Right after the starting time of Activity A.T.4.2, another questionnaire was circulated after consultations with the partners to the CE EU Member States Financial Intelligence Units.

The results obtained from the questionnaires, limited only to few countries which replied, have been integrated in the legal analysis of this deliverable.

2.1. Key concepts/1: Identifying main areas of criminal liability in crowdfunding activities

Alike to any human activity, especially when financial transactions are involved, crowdfunding may be a context for all sorts of criminal conducts.

Indeed, at first glance, crowdfunding could be perceived only as an occasional circumstance or background, where profiles of criminal liability may emerge.

On a closer look, however, crowdfunding possesses specific profiles which shall be especially taken into account when assessing risks of criminal liability in crowdfunding activities.

Identifying specific profiles in which such crimes may be perpetrated, is then useful and necessary to raise awareness among all actors involved in crowdfunding projects, avoiding phenomena of dangerous underestimation.

This second perspective is necessary for crowdfunding actors (platforms, promoters and supporters - as defined in D.T 4.1.1., Section 2.1 let. C), which shall accurately weight the legal risks, including those of criminal liability, when they set up a crowdfunding business, or otherwise decide to participate in it.

This perspective, however, is also useful for national and EU decision-makers. Indeed, identifying which are the main criminal risks involved in (relatively) new forms of financing and financial transactions, like crowdfunding (but also e-currency), may help to spot systemic weaknesses affecting the financial markets' regulations as a whole.

Understanding specific criminal risks linked to specific business activities also represents a necessary step for any policy making, at EU as well as at national level, who wish to implement effective regulation on a specific industry.

With specific regard to crowdfunding, several are the business-related situations in which criminal profiles may emerge: From common forms of illicit or suspicious activity - like credit card fraud, identity theft, tax fraud, account takeovers, provision of misleading information - to forms of more serious and hardly-detectable illicit activities - such as phishing schemes, shell company abuse, undeclared conflict of interests, money laundering or terrorist financing.



For the purposes of this paper, however, four areas of criminal liability are analysed as particularly relevant for crowdfunding activities:

- A) Fraud;
- B) Money laundering (ML);
- C) Terrorist financing (TF);
- D) Violation of reporting obligations.

In areas A), B) and C), crowdfunding does not constitute a characteristic element of the offence, but merely the mean, or the factual circumstance providing the context in which the crime may be perpetrated (as it could be for other economic businesses, such as credit, insurance activities).

Nonetheless, such areas are particularly relevant as they represent the most common (A), or serious (C, D) crimes which may be committed through crowdfunding activities.

The representativeness of this choice may find support also in a comparative perspective, in light of the United States experience. In fact, according to the 2015 FinCEN report, fraud and money laundering are among the most common types of criminal risks identifiable through the system of Suspicious Activity Reports obligations¹.

Terrorist financing is included in this paper due to the increasing reports of its occurrence in the global financial context (crowdfunding business included), and to the fact that, in the EU, the same legislation applies both Anti-money laundering (AML) and Combating the Financing of Terrorism (CFT).

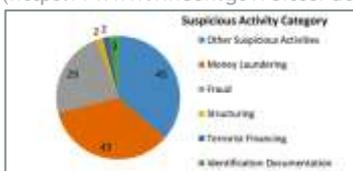
On the other side, **area D)** represents a rather specific case of liability.

Sanctions (also of criminal nature) for violating reporting obligations, in fact, are only typical of systems in which certain entities (e.g. brokers, or credit institutions) are subject to forms of regulatory oversight.

Even though cases in which similar reporting systems have been established for crowdfunding operators are currently rather limited in CE EU Member States, area D)

¹ FinCEN, SAR Stats, Technical Bulletin, October 2015

(https://www.fincen.gov/sites/default/files/sar_report/SAR_Stats_2_FINAL.pdf).



“It is important to note that a single SAR can provide multiple activity categories, which is why the total indicated in the chart exceeds the 79 total SARs led”.



represents both a significant burden for the actors already subject to such obligations, and a first regulatory basis for any policy maker wishing to set up forms of regulation for both criminal and civil law purposes.

With different degrees and profiles, risks of criminal liability may concern all subjects involved in crowdfunding, that is platforms, promoters and supporters.

Against this background, for each identified area of criminal risk, profiles of criminal liability are analysed taking into account the following factors:

- Who is the subject potentially reliable (platform, promoter, supporter, as defined in D.T 4.1.1., Section 2.1 let. C);
- Which is the role of the subject potentially reliable (the subject intentionally puts into place a criminally relevant conduct/ the subject does not properly exercise its supervisory powers over the subject that intentionally commits a criminally relevant conduct - if such negligence is criminally relevant in the applicable legal framework);
- Which type of crowdfunding is involved (as defined in D.T 4.1.1., Section 2.1 let. A).

2.1.1. Fraud

RELEVANCE TO CROWDFUNDFING

Fraud represents perhaps the most common cause of risks involving criminal liability connected to crowdfunding activity.

In particular, three are the main factors which made crowdfunding especially attractive for frauds:

- Little or no disclosure duties currently imposed on platforms or promoters (as underlined *sub D*)-*Violation of reporting obligations*);
- Nature of promoters: Most promoters are launching crowdfunding campaign only occasionally, or are start-ups, so that little or no operating history is available to the supporters or to the platform to check their reliability;
- Position of supporters: Most supporters have little experience in financial transactions, which makes them vulnerable to promoters and platforms fraudulent behaviours; moreover, once the fund is transferred to the promoter, supporters are granted a very little control over the correct usage of the proceeds, especially on a transnational dimension.

LEGAL DEFINITION



At EU level, a harmonised definition of fraud may be found in Directive 2017/1371 of 5 July 2017 (“PIF Directive”). Although the subject of the Directive refers exclusively to crimes affecting the Union’s financial interests, for the purposes of this analysis, the definitions there included design a model of fraudulent conducts which may be usefully applied also to other economic interests, such as those involved in crowdfunding activities.

According to Article 3(2) PIF Directive, fraud is defined as:

- a. Any act or omission in the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution, misappropriation or wrongful retention of funds or assets;
- b. Non-disclosure of information in violation of a specific obligation, with the same effect sub a);
- c. The misapplication of funds or assets for purposes other than those for which they were originally granted;
- d. The misapplication of a legally obtained benefit, with the same effect sub a).

PROFILES OF CRIMINAL LIABILITY

Liability for fraudulent behaviours may concern all the subject involved in crowdfunding activities.

- Examples of fraud liability affecting **platforms** may occur:
 - a) Where a platform commits fraud having a financial interest in the campaign, or being involved in a fraud perpetrated by promoters, or supporters.
 - Legal position: Platforms’ criminal liability is regulated by standard rules of criminal law for physical or legal persons, following the regulation applicable at national level.
 - Risk Assessment: The risks of fraud do not appear to vary depending on the implemented type of crowdfunding.
 - b) Where a crowdfunding platform neglects to properly control the activity of promoters using the platform, and the latter commits fraud.
 - Legal position: Platforms’ criminal liability depends on the applicable regulation concerning platform’s legal liability (cf. DT 4.1.1., Section 3.1.2.2., let H), and on the existence of national regulation requiring the platform to perform such controls.
 - Risk Assessment: The risk of fraud appears higher for donation, reward and lending-based crowdfunding, in which promoters, contrary to equity crowdfunding, are



usually not subject to any form of supervision (e.g. from securities, markets or banking regulators).

- Examples of fraud perpetrated by promoters may include:
 - a) A crowdfunding campaign soliciting or accepting funding while deliberately and deceptively concealing, or misrepresenting the true nature of the project or the expected results (the promised goal is only a pretext, but not really pursued, e.g. in reward-based crowdfunding when the promised rewards are significantly delayed, or not delivered at all as the promoter abandons the campaign);
 - b) The use of funds collected through crowdfunding campaign for purposes different from those declared (e.g. diverting the proceeds for personal expenses in a donation-based crowdfunding);
 - c) “Copycat” crowdfunding: When campaigns are created to look like other legitimate, successful campaigns to defraud supporters, possibly in combination with a diversion of the funds (e.g. of red flag: When funds sent to these campaigns are withdrawn immediately by the promoters);
 - d) Schemes where the fraud is arranged between the promoters and the supporters (e.g. a crowdfunding campaign funded with payments from stolen credit cards, or from accounts fraudulently taken over);
 - e) Other kinds of fraud related to tax or budget profiles, which are perpetrated through (or facilitated by) the transnational dimension of crowdfunding activities (e.g. VAT frauds).

- Legal position: Promoters’ criminal liability is regulated by standard rules of criminal law for physical or legal persons, following the regulation applicable at national level.

- Risk Assessment: The risk of fraud varies according to the business model adopted by the promoter, as that determines whether the latter falls under the supervision of other regulators (e.g. markets, securities or banking regulators, or chambers of commerce). In particular, the risk appears higher for donation, reward and lending-based crowdfunding, in which promoters, contrary to equity crowdfunding, are usually not subject to any form of supervision.

The risk of fraud generally considered more common is the failure of the promoter to exert good faith in the achievement of the project’s goal.

Nonetheless, also the impact of outright fraud - which potentially constitutes only a small percentage of crowdfunding projects² - shall not be underestimated, especially

² Cf. R. Waters, *Start-ups Seek the ‘Wisdom of Crowds,’* FINANCIAL TIMES (Apr. 3, 2012, 7:41 PM), <http://www.ft.com/intl/cms/s/0/c1f1695c-7da8-11e1-9adc-00144feab49a.html>, noting that, according to IndieGoGo CEO Slava Rubin, fraud accounts for less than 1 percent of money raised on Indiegogo.



considering the prominent role played by reputational issue in crowdfunding business, and therefore the impact that also a few cases of outright fraud may have on the whole crowdfunding system.

- Examples of fraud perpetrated by **supporters** may include:
 - a) Committing to financing a project, business or cause with all intents of cancelling and backing out of the campaign/ deliberately with the intent of filing a claim to have their funds returned;
 - b) Schemes where the fraud is arranged between the promoters and the supporters (e.g. a crowdfunding campaign funded with payments from stolen credit cards, or from accounts fraudulently taken over);
 - c) Other kinds of fraud related to tax or budget profiles, which are perpetrated through (or facilitated by) the transnational dimension of crowdfunding activities (e.g. VAT frauds).
- Legal position: Supporters' criminal liability is regulated by standard rules of criminal law for physical or legal persons, following the regulation applicable at national level.
- Risk Assessment: The risk of fraud does not appear to change according to the type of crowdfunding; however, the legal business model adopted by the supporter (if being a legal person), might an impact in the risk-assessment, as from that may depend whether the latter falls under the supervision of other regulators or not (e.g. markets, securities or banking regulators, or chambers of commerce).

2.1.2. Money Laundering

RELEVANCE TO CROWDFUNDFING

Crowdfunding possesses some peculiar features that make it potentially very attractive for money laundering purposes.

First, similarly to other “alternative” emerging models of financial services, like e-currency, Hawala, or money transfers, crowdfunding is generally subject to limited (where existing) regulation, both at national, and at transnational level.

Second, alike these “alternative” systems, but also similarly to the trade of other peculiar products (such as cash, gold, diamonds, or bit-coins) crowdfunding operates



with a certain degree of anonymity, especially towards promoters and supporters, which significantly limits identification and monitoring possibilities³.

The risk of money laundering in crowdfunding activity, therefore, shall not be underestimated, even though perpetrating money laundering in this context has been recognized to require some expertise to be profitable, and thus criminal operations in this field may result more costly (and therefore less attractive) than those carried out through traditional cash transactions.

Recognizing that the intent in perpetrating money laundering in crowdfunding is “not negligible”, in 2017 the Commission has included crowdfunding among the services potentially vulnerable to money laundering risk affecting the internal market; taking into account the data then available, the threat was classified as “lowly-moderately significant” (level 1/2 out of 4).

To date, some situations have already been reported at EU level in which promoters have set up a company then used for money laundering purposes in crowdfunding activities, but data in this sense is still scarcely collected⁴.

LEGAL DEFINITION

For the purpose of this paper, the definition of money laundering may be taken from Article 1(3), Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (“4th AML/CFT Directive”), according to which it shall comprise the following intentionally committed conducts:

- a. The conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an activity to evade the legal consequences of that person's action;
- b. The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is derived from criminal activity or from an act of participation in such an activity;
- c. The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such an activity;

³ As underlined by the EU Commission, in the Report from the Commission to the European Parliament and the Council on the assessment of the risks of money laundering and terrorist financing affecting the internal market and relating to cross-border activities, Brussels, 26.6.2017 COM(2017) 340 final, p. 8 *et seq.*

⁴ Commission Staff Working Document Accompanying the document Report from the Commission to the European Parliament and to the Council on the assessment of the risks of money laundering and terrorist financing affecting the internal market and relating to cross-border situations, Brussels, 26.6.2017 SWD(2017) 241 final, PART 2/2, p. 54.



- d. Participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions referred to in points (a), (b) and (c).

PROFILES OF CRIMINAL LIABILITY

Liability for money laundering behaviours may concern all the subjects involved in crowdfunding activities, which may be used as a mean to perform trans-border transfers of funds, avoiding forms of oversight typically applicable to financial transactions, and disguising the true origin of funds.

- Examples of suspicions of money laundering perpetrated by **platforms** may occur:
 - a) Where the platform - directly linked to financial institutions, or left to private initiatives on the internet - has been exclusively or mainly set up or acts for the purposes of money laundry, potentially conspiring with promoters or supporters to perpetrate so (e.g. platforms set up under fictitious projects in order to allow collection of funds which are then withdrawn within the EU or transferred abroad).
 - Legal position: Platforms' criminal liability is regulated by standard rules of criminal law for physical or legal persons, following the regulation applicable at national level.
 - Risk Assessment: The risk of money laundering does not appear to vary depending on the implemented type of crowdfunding.
 - b) Where a crowdfunding platform neglects to properly control the activity of promoters or supporters, and the latter use the platform to perpetrate money laundering, without the platform being aware of it.
 - Legal position: Platforms' criminal liability might depend on the existence of AML supervising duties upon crowdfunding platforms, and of reporting obligations (cf. below, Section 3.2).
 - Risk Assessment: The risk of money laundering appears higher for donation, reward and lending type crowdfunding, in which promoters, contrary to equity crowdfunding, are not usually subject to forms of supervision (e.g. from securities or banking regulators, or chambers of commerce).
- In general, crowdfunding models appear particularly attractive for money laundering purposes where they provide for short holding periods for funds or instruments; or where money is collected and held while the fundraising campaign is ongoing, but may be returned to those who committed them where the campaign's fundraising target is not met.
- Risks indeed appear mitigated where - even though platforms are not *per se* subject to AML regulations - at least some of the parties involved in the transfer of funds (e.g. financial



institutions, payment services, brokers or other financial intermediaries) are actually held responsible under AML statutes.

Nonetheless, also equity crowdfunding presents some risks, especially where limited or no due diligence obligations are into place upon the promoters, or with regard to the projects launched⁵.

- Examples of suspicions of money laundering perpetrated by **promoters** may include:
 - a) Launching of a campaign with the concealed goal of transferring funds (domestically, or abroad) for money laundering purposes, unbeknown to the platforms and the supporters, or to the majority of supporters (e.g. promoters use crowdfunding sites to send funds to a number of individuals, who immediately operate cash withdrawals from their accounts);
 - b) Launching of a campaign with the concealed goal of transferring funds (domestically or abroad) for money laundering purposes, in collusion with the platform and/or the majority of supporters (e.g. red flags: When funds transferred to crowdfunding sites originates from supporters' bank accounts funded by checks or cash deposits from unidentified individuals, businesses coming from high-risk country, or e-currency; or when transfers from supporters are followed from structured cash withdrawals from personal accounts).

- Legal position: Promoters' criminal liability is regulated by standard rules of criminal law for physical or legal persons, following the applicable EU regulation ("4th AML/CFT Directive") as transposed at national level.

- Risk Assessment: The risk of fraud depends on the business model adopted by the promoter, from which it depends whether the latter falls under the supervision of other regulators (e.g. from securities or banking regulators, or chambers of commerce); in particular, the risk may appear higher for donation, reward and lending-based crowdfunding, in which promoters, contrary to equity crowdfunding, are usually not subject to any form of supervision.

Risks indeed appear mitigated where - even though platforms are not *per se* subject to AML regulations - at least some of the parties involved in the transfer of funds (e.g. financial institutions, payment services, brokers or other financial intermediaries) are actually held responsible under AML statutes. Nonetheless, also equity crowdfunding presents some risks, especially where limited or no due diligence obligations are into place upon the promoters, or with regard to the projects launched⁶.

In general, crowdfunding models appear particularly attractive for money laundering purposes where they provide for short holding periods for funds or instruments; or where money is collected and held while the fundraising campaign is ongoing, but may be returned to those who committed them where the campaign's fundraising target is not met.

⁵ ESMA, Questions and Answers. Investment-based crowdfunding: money laundering/terrorist financing, 1 July 2015, § 12.

⁶ Idem.



- Indicators of money laundering suspicious transactions perpetrated by **supporters** may emerge when:
 - a) Supporters finance a crowdfunding project through accounts which are closed in the aftermath of the financing operation;
 - b) Supporters finance a crowdfunding project through accounts which receive electronic, out-of-state or anonymous deposits (possibly also from multiple accounts), and then are immediately used to made payments to crowdfunding sites.

- Legal position: Supporters' criminal liability is regulated by standard rules of criminal law for physical or legal persons, following the applicable EU regulation ("4th AML/CFT Directive") as transposed at national level.

- Risk Assessment: The risk of fraud does not appear to change according to the type of crowdfunding, however, it may depend on the business model adopted by the supporter (if being a legal person), from which it depends whether the latter falls under the supervision of other regulators or not (e.g. from securities or banking regulators, or chambers of commerce).

Risks indeed appear mitigated where - even though platforms are not *per se* subject to AML regulations - at least some of the parties involved in the transfer of funds (e.g. financial institutions, payment services, brokers or other financial intermediaries) are actually held responsible under AML statutes.

2.1.3. Terrorist Financing

RELEVANCE TO CROWDFUNDFING

In recent years, the increasing threat posed by terrorism in the EU has brought to the development of new strategies and legal tools to contrast this phenomenon starting from its financing resources.

Among other emerging new financing systems (such as e-currency) characterized by scarce (when existing) regulation, in 2017 the Commission identified crowdfunding as one of the tools that terrorists may use to obtain financing, especially to move funds at transnational level⁷.

The risk of terrorist financing in crowdfunding activity, therefore, shall not be underestimated, even though it has not yet been proved a mean able to raise large amounts of funds, and appears - from the perpetrator's perspective - rather insecure

⁷ EU Commission, in the Report from the Commission to the European Parliament and the Council on the assessment of the risks of money laundering and terrorist financing affecting the internal market and relating to cross-border activities, Brussels, 26.6.2017 COM(2017) 340 final, p. 8 *et seq.*



compared to other types of services. The Commission, however, acknowledged that although “suspicious activities are quite easier to detect and may deter terrorist groups from using this modus operandi as it is not the most secure option, [...] if perpetrators invest more consequent planning, they could enable them to set up collection platforms allowing for more anonymous operations (use of strawmen or relatives) - which makes it more attractive”⁸.

Recognizing that some indicators already show that crowdfunding has been used to finance terrorism, and taking into account the available data, the Commission in 2017 classified the risk of terrorist financing in crowdfunding activities as “moderately significant” (level 2 out of 4).

In January 2018, the Financial Action Task Force explicitly included crowdfunding among the “main sources of funding for terrorist recruiters”⁹.

LEGAL DEFINITION

For the purposes of this paper, the definition of terrorist financing (TF) may be taken from Article 1(5), 4th AML/CFT Directive, and Articles 3 and to 4 of Directive 2017/541 of 15 March 2017 (replacing Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism). According to these sources, TF encompasses the provision or collection of funds, by any means, directly or indirectly, with the intention that they be used or in the knowledge that they are to be used, in full or in part, in order to carry out, or threatening to commit, inciting, aiding or abetting, and attempting any of the following offences for terrorist aims:

- (a) attacks upon a person’s life which may cause death;
- (b) attacks upon the physical integrity of a person;
- (c) kidnapping or hostage taking;
- (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;
- (e) seizure of aircraft, ships or other means of public or goods transport;
- (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;
- (g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;
- (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;

⁸ Commission Staff Working Document Accompanying the document, cit., p. 54.

⁹ FATF Report, *Financing of Recruitment for Terrorist Purposes*, January 2018, p. 8, at 25.



- (i) aggravated theft;
- (l) extortion;
- (m) drawing up false administrative documents;
- (n) directing a terrorist group, or
- (o) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group.

For the purposes of this definition, according to Article 3(2) of Directive 2017/541 “terrorist aim” shall be recognized when “one or more of the offences mentioned above are committed for seriously intimidating a population, or unduly compelling a Government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation”.

PROFILES OF CRIMINAL LIABILITY

Liability for money laundering behaviour may concern all the subjects involved in crowdfunding activities.

- Examples of suspicions of terrorist financing perpetrated by **platforms** may occur:
 - a) Where the platform - directly linked to financial institutions or left to private initiatives on the internet - has been exclusively or mainly set up or acts for the purposes of raising funds to finance terrorism, unbeknownst to or conspiring with promoters or supporters (*e.g.* the platform supports a promoter raising funds for terroristic purposes; or the platform uses ambiguous language to conceal the real purposes of fundraising and avoid blocking; or the platform disguises its real intent with the pretext of collecting funds for charitable and humanitarian purposes
 - for instance: Fundraising advertisements and financial details may be placed in different image or video formats, which makes it impossible to detect them through the standard search engines, and therefore harder to identify sites that contain these advertisements, as well as to explore advertisements using known financial details)¹⁰.
 - Legal position: Platforms’ criminal liability is regulated by standard rules of criminal law for physical or legal persons, following the regulation applicable at national level.
 - Risk Assessment: The risks of money laundering do not appear to vary depending on the implemented type of crowdfunding.

¹⁰ FATF REPORT Emerging Terrorist Financing Risks, October 2015, p. 32.



b) Where a crowdfunding platform neglects to properly control the activity of promoters or supporters, and the latter use the platform to perpetrate terrorist financing, without the platform being aware of it.

(e.g. A group of individuals organised a scheme to raise funds via social networks and the internet. This group of individuals registered numerous e-wallets, credit cards and mobile phone numbers. The funding requests were placed on the internet (including social networks) under the pretext of collecting donations for Syrian refugees, people in need of medical and financial aid, and for the construction of mosques, schools and kindergartens. The wording contained some indirect indications that the money was intended as financial support for terrorist activities. Indeed, via the Internet, and then through cash couriers, funds were sent as an aid for terrorists and their families and to support terrorist activities¹¹).

- Legal position: Platforms' criminal liability might depend on the existence of CFT supervising and reporting duties upon crowdfunding platforms (cf. below, Section 3.2).

- Risk Assessment: The risk of money laundering appears higher for donation, reward and lending type crowdfunding, in which promoters, contrary to equity crowdfunding, are not usually subject to forms of supervision (e.g. from securities or banking regulators, or chambers of commerce).

In general, crowdfunding models appear particularly attractive for terrorist financing purposes where they provide for short holding periods for funds or instruments; or where money is collected and held while the fundraising campaign is ongoing, but may be returned to those who committed them where the campaign's fundraising target is not met.

Risks indeed appear mitigated where - even though platforms are not *per se* subject to AML regulations - at least some of the parties involved in the transfer of funds (e.g. financial institutions, payment services, brokers or other financial intermediaries) are actually held responsible under AML statutes.

Nonetheless, also equity crowdfunding presents some risks, especially where limited or no due diligence obligations are into place upon the promoters, or with regard to the projects launched¹².

- Examples of suspicions of terrorist financing perpetrated by **promoters** may occur when:

a) The promoter launches a campaign with the concealed goal of financing of terrorism unbeknown to the platforms and the supporters, or to the majority of supporters (e.g. disguising the raising of funds under legitimate charitable or humanitarian project: A charity was created in 2012 to raise funds for humanitarian projects in Palestinian

¹¹ FATF REPORT Emerging Terrorist Financing Risks, cit., p. 33; example from the Russian Federation.

¹² ESMA, Questions and Answers. Investment-based crowdfunding: money laundering/terrorist financing, 1 July 2015, § 12.



territories and Syria. After a donation campaign, in August 2013, the charity made a new call for funds on social networks, indicating that three members of the association planned to bring funds to Turkey. A customs control at a French airport revealed that each of them carried EUR 9 900, below the declaration threshold, but only EUR 6 000 were to be used for the humanitarian project. The remaining funds were to be given to terrorist organizations/supporters¹³);

- b) The promoter launches a campaign with the concealed goal of financing of terrorism, in collusion with the platform and/or the majority of supporters (e.g. a red flag may occur in case a campaign raises funds on behalf of an individual/ organization located in a high risk country);
- c) The promoter launches a campaign with the explicit goal of financing of terrorism, in collusion with the platform and/or the majority of supporters (e.g. Individuals associated with ISIS called for donations via Twitter and asked the donors to contact them through Skype. Once on Skype, those individuals asked donors to buy an international prepaid card (a credit for mobile phone or the purchase of an Apple or other programs or credit for playing on the Internet) and send them the number of this prepaid card via Skype. Then, the fundraiser sent this card number to one of his followers in a neighbouring country from Syria, who would sell this card number at a lower price and give the cash proceeds to ISIS¹⁴).

- Legal position: Promoters' criminal liability is regulated by standard rules of criminal law for physical or legal persons, following the applicable EU regulation ("4th AML/CFT Directive") as transposed at national level.

- Risk Assessment: The risk of money laundering appears higher for donation, reward and lending type crowdfunding, in which promoters, contrary to equity crowdfunding, are not usually subject to forms of supervision (e.g. from securities or banking regulators, or chambers of commerce).

In general, crowdfunding models appear particularly attractive for terrorist financing purposes where they provide for short holding periods for funds or instruments; or where money is collected and held while the fundraising campaign is ongoing, but may be returned to those who committed them where the campaign's fundraising target is not met.

Risks indeed appear mitigated where - even though platforms are not *per se* subject to AML regulations - at least some of the parties involved in the transfer of funds (e.g. financial institutions, payment services, brokers or other financial intermediaries) are actually held responsible under AML statutes.

Nonetheless, also equity crowdfunding presents some risks, especially where limited or no due diligence obligations are into place upon the promoters, or with regard to the projects launched¹⁵.

¹³ FATF REPORT Emerging Terrorist Financing Risks, cit., p. 34; example from the France.

¹⁴ FATF REPORT Emerging Terrorist Financing Risks, cit., p. 33; example from the Saudi Arabia.

¹⁵ ESMA, Questions and Answers. Investment-based crowdfunding: money laundering/terrorist financing, 1 July 2015, § 12.



- Suspicions of terrorist financing perpetrated by **supporters** may occur when:
 - a) Supporters intentionally finance a crowdfunding project aiming at financing terrorism;
 - b) Supporters finance a crowdfunding project under a legitimate fictitious purpose (e.g. charitable work), knowing that the funds are in reality transferred to a terrorist organization, or are otherwise used to finance terrorism.
- Legal position: Supporters' criminal liability is regulated by standard rules of criminal law for physical or legal persons, following the applicable EU regulation ("4th AML/CFT Directive") as transposed at national level.
- Risk Assessment: The risk of fraud does not appear to change according to the type of crowdfunding; however, the business model adopted by the supporter (if being a legal person) may be relevant, as from that it depends whether the latter falls under the supervision of other regulators or not (e.g. from securities or banking regulators, or chambers of commerce).
- Risks indeed appear mitigated where - even though platforms are not *per se* subject to CFT regulations - at least some of the parties involved in the transfer of funds (e.g. financial institutions, payment services, brokers or other financial intermediaries) are actually held responsible under CFT statutes.

2.1.4. Violation of reporting obligations

RELEVANCE TO CROWDFUNDING

Finally, a last profile of potential criminal liability for crowdfunding activities shall be considered.

In case financial activities (e.g. banking, insurance, securities) are subject to some form of supervision, regulatory systems usually require the supervised entity to periodically report a number of significant information to the competent overseeing authority.

When such reporting obligations are not duly complied with, regulatory systems usually entail supervisory authorities to impose sanctions upon the controlled entities found in breach.

Such sanctions usually range from the imposition of administrative pecuniary penalties, to temporary ban in the exercise of a business activity; to public statements identifying the natural or legal person responsible for the breach, and the nature of the breach; or withdrawal of licences or authorization, when that is needed to exercise a certain business.



Typically, under a formal perspective, these sanctions possess an administrative, and not criminal nature, but the choice upon the form of liability depends on the discretion of the national legislators.

Nonetheless, following the consolidated case-law of the European Court of Human Rights, the classification of a sanction as administrative or criminal is only partially determined by the formal label that to that sanction has been attached at domestic level.

In particular, according to the landmark case *Engel and other v. The Netherlands* (1976), the Court has selected two additional criteria to identify the substantial nature of a sanction:

- The nature of the offence provided for by the law, to be determined taking into account whether: The legal rule in question is directed solely at a specific group or is of a generally binding character; the proceedings are instituted by a public body with statutory powers of enforcement; the legal rule has a punitive or deterrent purpose; the imposition of any penalty is dependent upon a finding of guilt; and how comparable procedures are classified in other Council of Europe member States; and/or
- The severity of the penalty that the person concerned risks incurring, with reference to the maximum potential penalty which the relevant law provides for.

According to the Court, these two criteria are alternative and not necessary cumulative (*Öztürk v. Germany*, 21 February 1984, Application no. 8544/79, § 54; *Lutz v. Germany*, 25 August 1987, Application no. 9912/82, § 55).

For the purposes of this analysis, the criterion related to the severity of the potential penalty is especially relevant: Indeed, in case the violation of reporting obligation is sanctioned with particularly severe penalties, also under a financial point of view, the substantial nature of the liability of the subject found in breach could be recognized as criminal rather than administrative (see, e.g., in the field of market abuse, *Grande Stevens and others v. Italy*, 4 March 2014, Application no. 18640/10).

Currently, this area of (potentially) criminal risk applies only to those legal systems which do provide forms of supervision towards at least certain forms of crowdfunding, mostly (as it has been pointed out in D.T. 4.1.1) equity crowdfunding.

LEGAL DEFINITION

To date at EU level there are no general reporting requirements upon crowdfunding platforms.

An example of reporting obligation - whose application to crowdfunding platforms is however debated for AML/CFT purposes - is represented by Article 33, 4th AML/CFT Directive.



According to it, obliged entities shall fully cooperate by promptly:

- Informing the national competent authority (Financial Intelligence Unit-FIU, as defined below in Section 2.2.), including by filing a report, on their own initiative, that funds or transactions are, or are suspected to be, or there are reasonable grounds to suspect they are proceeds of criminal activity or are related to terrorist financing;
- Responding to requests by the FIU for additional information in such cases; and
- Providing the FIU, directly or indirectly, at its request, with all other necessary information, in accordance with the procedures established by the applicable law.

According to Article 58, 4th AML/CFT Directive, breaches of national provisions implementing such reporting obligations shall be sanctioned by effective, proportionate and dissuasive penalties, either of administrative or criminal nature, applicable both towards natural and legal persons.

Following Article 59, 4th AML/CFT Directive, such penalties shall at least include:

- a. A public statement which identifies the natural or legal person and the nature of the breach;
- b. An order requiring the natural or legal person to cease the conduct and to desist from repetition of that conduct;
- c. Where an obliged entity is subject to an authorisation, withdrawal or suspension of the authorisation;
- d. A temporary ban against any person discharging managerial responsibilities in an obliged entity, or any other natural person, held responsible for the breach, from exercising managerial functions in obliged entities;
- e. Maximum administrative pecuniary sanctions of at least twice the amount of the benefit derived from the breach where that benefit can be determined, or at least EUR 1 000 000.

The possibility for the Member States to adopt sanctions of criminal nature for punishing reporting breaches, and - in light of the *Engel* criteria - the relevant amount of the formally administrative pecuniary sanctions applicable to breaching entities (in particular sub e)) confirm the relevance of raising awareness over the risk deriving from violation of reporting obligations also in an analysis of the profile of criminal liability relevant to crowdfunding activities.

PROFILES OF PUNITIVE/CRIMINAL LIABILITY

Liability for breaches of reporting obligations may concern platforms or promoters.

- Examples of violation of reporting duties committed by **platforms** may occur:



- a) Where a platform, subject to supervisory regulation, does not report the information required to the competent supervising authority (e.g. the platform does not file a suspicious activity report to the AML/CFT competent authority);
- b) Where the platform, autonomously or in agreement with the promoters, provides false information to the competent supervising authority, which impede the latter from exercising effective supervision;
- c) Where a platform, subject to supervisory regulation, autonomously or in agreement with the promoters, does not require the hosted promoters to provide the information concerning their own business activity, which are necessary for the platform to exercise its internal supervisory task, and comply with its reporting obligations.

- Legal position: Platforms' liability shall be regulated by national or EU legislation explicitly providing for applicable reporting duties with crowdfunding activities, and sanctions in case of breaches.

- Risk Assessment: The liability for breaching reporting duties does not appear to vary depending on the implemented type of crowdfunding.

Currently, however, forms of reporting obligations have been established in some Member States exclusively with regard to equity crowdfunding. Possibly, also platforms carrying out lending crowdfunding might be indirectly involved in liability for reporting obligations, in case the financial or banking institutions on which they depend for the execution of financial/payment services are found in breaches of their own reporting obligations by the respective competent authorities.

- Examples of violation of reporting duties perpetrated by **promoters** may include:
 - a) Where - in case platforms are subject to reporting obligations - a promoter does not comply with the duty to provide the relevant information required by the platform (e.g. the promoter does not provide the necessary details concerning its business history);
 - b) Where - in case platforms are subject to reporting obligations - a promoter, autonomously or in agreement with the platform, provides false information or withholds negative information to the platform (e.g. the promoter omits to include information on previous illicit or negligent behaviour, when asked to disclose its business history, or falsely declares not to have any previous negative record).

- Legal position: Promoters' criminal liability shall be regulated by national or EU legislation explicitly providing for applicable reporting duties, and sanctions in case of breaches.



- Risk Assessment: The liability for breaching reporting duties does not appear to vary depending on the implemented type of crowdfunding.

Currently, however, forms of reporting obligations have been established in some Member States exclusively with regard to equity crowdfunding. Possibly, also promoters launching out lending crowdfunding might be indirectly involved in liability for reporting obligations in case the financial or banking institutions on which the platform depends for the execution of financial/payment services are found in breaches of their own reporting obligations by the respective competent authorities.

2.2. Key concepts/2: Identifying relevant competent authorities

In analysing profiles of criminal liability applicable to the main actors involved in crowdfunding activities, reference will be made to the powers and role of the following bodies and authorities:

- Financial Action Task Force (“FATF”): Independent inter-governmental body representing the world major financial centres, operates with the goal of examining and developing measures to combat money laundering and terrorist financing (<http://www.fatf-gafi.org>).
- Financial Intelligence Units (“FIUs”): National authorities established to serve as a national centre for the receipt and analysis of: (a) suspicious transaction reports; and (b) other information relevant to money laundering, associated predicate offences and terrorist financing, and for the dissemination of the results of that analysis. FIUs may bear different structures, and nature (law-enforcement, judicial, administrative or hybrid type), and act within the cooperation network of the EGMONT Group.

→ Identification and contacts of the FIUs of the CE Member States participating to the project are included in Annex I.
- EGMONT Group of Financial Intelligence Units: International network representing the meeting point of national FIUs, and providing a platform for the secure exchange of expertise and financial intelligence to combat money laundering and terrorist financing (<https://egmontgroup.org/en>).



3. Analysis per legal system

3.1. International Law

Even in the area of criminal law, domestic legislations of EU Member States are increasingly urged to comply with legal provisions originated by supranational legal orders, including that of the International Community.

This need becomes even more pressing where national legal systems do not (or do not fully) regulate the subject matter, in particular where national applicable norms tend to belong to different legal disciplines and sectors, or where the dimension of the relevant factual phenomenon has a structural trans-border dimension. That is the case of crowdfunding.

Indeed, as underlined also in D.T 4.1.1, crowdfunding potentials depend on the extent to which actors involved in crowdfunding campaigns succeed in operating on an international scale, while purely national interests are less and less relevant.

While no specific binding international regulation specifically deals with the risk of criminal liability in crowdfunding activities, some standard exists at the transnational level concerning money laundering and terrorist financing risks, which may be applied also to this context. Their relevance is indeed notable: In the EU AML/CFT policy, most of the applicable legislation derives precisely by obligations set at international level.

Therefore, hereinafter some brief considerations on international standards are included.

3.1.1. Relevant International Law.

The *Recommendations* elaborated by the Financial Action Task Force (FATF) are the source of international law which is most relevant to the identified areas of criminal risk.

An independent inter-governmental body, representing the world major financial centres (including some EU Member States¹⁶), and two regional organizations (including the European Commission), the Task Force has been established in 1989 with the goal of examining and developing measures to combat money laundering (ML).

After 9/11, the FATF scope has been extended also to protect the global financial system from phenomena such as the financing of terrorism (TF), and the proliferation of weapons of mass destruction. The overall purpose of the Task Force is thus to improve national resistance to these criminal activities, and through that, contributing to protect the international financial system as a whole.

¹⁶ For a total of 15 EU Member States. Among the CE Member States CZ, HR, HU, PL, SK, SI are not participating: source <http://www.fatf-gafi.org/countries/#FATF> (last visited: 25 January 2018).



To achieve so, the body identifies the vulnerabilities of national systems in these fields of law, and promotes the implementation of international common guidelines to suggest an effective and coordinated response to financial crimes at the investigative level.

The last version (February 2012) of such guidelines, which go under the name of *FATF International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, but are better known as the “FATF Recommendations”, provides for a legal framework of rules and operational measures that all the States under FATF jurisdiction shall adopt and implement ([http://www.fatf-gafi.org/publications/fatfrecommendations/?hf=10&b=0&s=desc\(fatf_releasedate\)](http://www.fatf-gafi.org/publications/fatfrecommendations/?hf=10&b=0&s=desc(fatf_releasedate))).

The *Recommendations* cover both administrative and criminal models of supervision over financial operators and transactions, indicating in each case basic (but not necessarily minimum) standards to guarantee efficiency in the proceedings.

Even though not initially mentioned as such in the scope of the *Recommendations*, crowdfunding has been included among the evolving financing techniques which may be used by terrorists to raise funds.

In 2015 a FATF Report concluded that there are significant TF vulnerabilities associated with online and social media, including crowdfunding, characterized by “anonymity, access to a wider range and number of potential sponsors or sympathisers and the relative ease with which it integrates electronic payment mechanisms”. Specifically, the report underlined how “it is also apparent that donors are often unaware of the end-use of funds supported by social media, including crowdfunding, which presents a risk that terrorist organisations can exploit”¹⁷.

In January 2018, the Financial Action Task Force explicitly included crowdfunding among the “main sources of funding for terrorist recruiters”¹⁸.

Special reference, moreover, needs to be made with regard to donation-based crowdfunding.

Interestingly, the *Recommendations* have a rather extended scope of application which, taking into account a realistic view of the criminal risks connected to financial transactions, is not limited to credit and financial institutions, but addresses also, among others, Non-Profit Organisations (NPOs).

Under the FATF framework, NPOs are defined as legal persons or arrangements or organizations “that primarily engages in raising or disbursing funds for purposes such as charitable, religious, cultural, educational, social or fraternal purposes, or for the carrying out of other types of “good works””.

This definition appears especially relevant dealing with crowdfunding, as it seems to embrace also the definition of donation-based crowdfunding (at least, when platforms took the form of a legal person).

¹⁷ FATF Report, *Emerging Terrorist Financing Risks*, cit., p. 6.

¹⁸ FATF Report, *Financing of Recruitment for Terrorist Purposes*, cit., p. 8, at 25.



In particular, FATF *Recommendation 8* requires that:

“Countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. Non-profit organisations are particularly vulnerable, and countries should ensure that they cannot be misused:

- (a) by terrorist organisations posing as legitimate entities;
- (b) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset-freezing measures; and
- (c) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations”.

The enforcement of this *Recommendation*, however, remains rather poor at the domestic level, mostly due to the difficulties in defining a common approach towards such a vast range of organisations - often differently identified at national level, and subject to forms of supervision (if any) by a whole variety of overseeing authorities, not always able to efficiently cooperate with each other.

3.2. EU Law

The EU legal framework covers only partially the areas of criminal liability identified as relevant in crowdfunding activities.

A) Fraud

Currently there is no specific EU legislation about fraud in crowdfunding activities, even though two pieces of legislation are presently into force concerning fraud in general.

The first source is represented by Council Framework Decision of 28 May 2001 combating fraud and counterfeiting (2001/413/JHA). Its scope, however, is limited to non-cash payment services, which therefore does not include crowdfunding services.

The other regulation is represented by the 1995 Convention on the protection of the European Communities’ financial interests (OJ C 316, 27.11.1995, pp. 48-57), which provides for a definition of fraud in its Article 1.

While the Convention refers only to natural persons, its norms have been extended also towards legal entities by the Second Protocol to the Convention (OJ C 221, 19.7.1997, pp. 11-22), entered into force in all EU Member States.

The Convention - which currently applies to all EU Member States - will be substituted from 6 July 2019 by Directive 2017/1371 of 5 July 2017 on the fight against fraud to the Union’s financial interests by means of criminal law, which also provides for a definition of fraudulent conducts at transnational level (see above Section 2.1.1).



Both the Convention and the Directive apply only to fraud affecting the financial interests of the Union; therefore, they could be applicable to crowdfunding activities only in case EU public funding would be involved (e.g. a EU institutions invest in crowdfunding, or launches a crowdfunding campaign; or in case of VAT fraud).

For the time being, therefore, the risk of fraudulent conducts affecting private interests, also at transnational level, remains addressed mainly by national legislation.

B) Money Laundering

In the last few decades, the European Union has shown a particular interest in adopting measures to fight money laundering.

This policy brought the EU to adopt in 1991 the first anti-money laundering (AML) directive (Council Directive 91/308/EEC of 10 June 1991), which has been repeatedly updated over the years.

The 3rd AML Directive (2005/60/EC of 26 October 2005) was the first directive to incorporate the FATF *Recommendations* into EU law.

The last version of the FATF *Recommendations* (2012), was instead incorporated into EU law by the 4th AML/CFT Directive (2015/849 of 20 May 2015), whose terms for transposition at national level expired on 26 June 2017.

According to Article 1(2) of the 4th AML Directive, all EU Member States shall ensure that money laundering - as defined by Article 1(3) - is prohibited.

In 2016, the Commission issued a proposal for a Directive exclusively focused on money laundering, upon which a general approach was reached in June 2017 (cf. Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on countering money laundering by criminal law [First reading] - General approach, Interinstitutional File: 2016/0414 (COD), Brussels, 6 June 2017).

According to the Proposal, both natural and legal persons shall be held liable for money laundering.

Concerning natural persons, draft Article 5(1) requires Member States to implement effective, proportionate and dissuasive criminal penalties.

On the other side, draft Article 8 requires Member States to implement effective, proportionate and dissuasive sanctions towards legal persons, which shall include criminal or non-criminal fines, and may include other sanctions, such as:

- (a) exclusion from entitlement to public benefits or aid;
- (b) temporary or permanent disqualification from the practice of commercial activities;
- (c) placing under judicial supervision;



(d) a judicial winding-up order;

(e) temporary or permanent closure of establishments which have been used for committing the offence.

C) Terrorist Financing

Countering the financing of terrorism has been recognized as an EU priority since 2005, when the offence of terrorist financing was first introduced in the scope of the 3rd AML Directive.

Currently, according to Article 1(2) of the 4th AML/CFT Directive, all EU Member States shall ensure that terrorist financing (TF) - as defined by Article 1(5) - is prohibited.

Terrorist financing was also explicitly introduced in the counter terrorism legislation by Article 11, Directive 2017/541 of 15 March 2017 on combating terrorism, according to which the conduct shall be punishable as a criminal offence in all EU Member States when committed intentionally.

Under such framework, TF criminal liability may arise also in case funds are then not used, in full or in part, to commit, or to contribute to the commission of terrorist offences, nor is it required for the offender to know for which specific offence(s) the funds are to be used (cf. Article 11(2)).

Similarly to the 2017 proposed AML Directive, also Directive 2017/541 contains a few provisions concerning the level of imposable sanctions, which go little (if any) beyond the mere obligation to criminalize the conduct.

The Directive however specifies that both natural and legal persons may be held liable for terrorist financing.

Concerning natural persons, Article 15(1) requires Member States to implement effective, proportionate and dissuasive criminal penalties, which may entail surrender or extradition.

On the other side, Article 18 requires Member States to implement effective, proportionate and dissuasive sanctions against legal persons, which shall include criminal or non-criminal fines, and may include other sanctions, such as:

(a) exclusion from entitlement to public benefits or aid;

(b) temporary or permanent disqualification from the practice of commercial activities;

(c) placing under judicial supervision;

(d) a judicial winding-up order;



(e) temporary or permanent closure of establishments which have been used for committing the offence.

The terms for national transposition of Directive 2017/541 are still running, and will expire on 8 September 2018.

D) Violation of reporting obligations.

Under the EU AML/CFT legal framework, a set of reporting obligations aimed at preventing money laundering and terrorist financing risks has been established.

Such reporting obligations, as defined by Article 33, 4th AML/CFT Directive, shall be complied with by all entities falling under the scope of the Directive.

According to Article 58(1), the violation of these reporting obligations shall be sanctioned by effective, proportionate and dissuasive penalties.

According to Article 59, at least where breaches concerning customer due diligence, suspicious transaction reporting, record-keeping, and internal controls are serious, repeated, systematic, or a combination thereof, the administrative sanctions and measures that can be applied shall include at a minimum, the following:

- (a) A public statement which identifies the natural or legal person and the nature of the breach;
- (b) An order requiring the natural or legal person to cease the conduct and to desist from repetition of that conduct;
- (c) Where an obliged entity is subject to an authorisation, withdrawal or suspension of the authorisation;
- (d) A temporary ban against any person discharging managerial responsibilities in an obliged entity, or any other natural person, held responsible for the breach, from exercising managerial functions in obliged entities;
- (e) Maximum administrative pecuniary sanctions of at least twice the amount of the benefit derived from the breach where that benefit can be determined, or at least EUR 1 000 000.

Currently, however, not all services or products active in the financial market are covered by the AML/CFT legal framework.

Crowdfunding platforms, in particular, are not considered to be subject to the 4th AML/CFT Directive, unless they engage in additional activities which are already included in the AML/CFT regime - such as providing for credit, securities, MIFID or payment services¹⁹.

¹⁹ Commission Staff Working Document Accompanying the document, cit., p. 53.



For the time being, therefore, crowdfunding platforms are not subject to AML/CFT reporting obligations established at Union level.

According to Article 4, 4th AML/CFT Directive, however, Member States shall ensure that the scope of the Directive is extended, in whole or in part, also to professions and to categories of undertakings, which engage in activities which are particularly likely to be used for the purposes of money laundering or terrorist financing, according to a risk-based approach.

Also following this provision, besides for their intrinsic discretion, Member States could decide to extend AML/CFT reporting obligations also towards crowdfunding platforms.

In 2017, an EU wide risk-assessment for AML/CFT purposes was carried out by the Commission, according to which crowdfunding, even though not covered by the 4th AML/CFT Directive, was considered relevant for AML/CFT risk assessment (see Report to the European Parliament and the Council on the assessment of the risks of money laundering and terrorist financing affecting the internal market and relating to cross-border activities, Brussels, 26.6.2017 COM(2017) 340 final, p. 18)²⁰.

Along this line, the opportunity to proceed with an extension of the scope of the Directive including also crowdfunding (together with virtual currency exchange platforms and wallet providers, auction houses, art and antiques dealers and specific traders in high-value goods) was underlined by the Commission.

Interestingly enough, though, in the 2016 Commission's Proposal to revise the current AML/CFT legal framework, crowdfunding has not been included in the extended scope of what should become the 5th AML/CFT Directive (while, for instance, virtual currencies have been)²¹.

3.3. Italian system

LIABILITY OF LEGAL PERSONS

In Italy, legal persons may be held liable for their involvement in criminal offences, as provided for by legislative decree no. 231 of 8 June 2001 (https://www.unodc.org/res/cld/document/legislative-decree-8-6-2001-n-231_html/Legislative_Decree_8-6-2001_n_231_EN.pdf).

Formally of administrative nature, corporations' responsibility is however considered to possess a hybrid (or semi-criminal) nature, as in its case-by-case application, liability is

²⁰ Commission Staff Working Document Accompanying the document, cit.

²¹ Cf. Article 1, Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC, Strasbourg, 5.7.2016 COM(2016) 450 final.



for criminal law tribunals to establish, which apply a slightly modified version of the criminal procedural code.

Sanctions imposable upon corporations may consist of (also financially relevant) pecuniary penalties, and interdiction measures.

Corporations liability in relation to criminal offences may arise when the criminal offence has been committed in the interest or to the advantage of the company itself, by:

- a) Legal representatives or senior managements (directors/managers of the corporation, or of an organizational unit financially and functionally independent), or by individuals who are otherwise concretely in charge for management;
- b) Individuals under the management or supervision of the subjects sub (a), where the latter lacked (or were not diligent) in enforcing their supervisory powers upon employees.

Legislative decree no. 231/2001 provides for corporations' liability only for their involvement in a limited range of criminal offences.

With regard to the four areas of criminal liability analysed in this paper, the decree covers:

- Fraud involving State financial interests (Article 24) - fraud against private interests is not included in the list;
- Money laundering (Article 25-*octies*);
- Terrorist financing (Article 25-*quarter*).

Violation of reporting obligations, as will be illustrated hereinafter, is only provided for equity crowdfunding, and sanctioned by administrative penalties imposed by an administrative authority (CONSOB- Italian authority for the supervision of the financial markets).

Legislative decree no. 231/2001 also provides for legal persons' liability for violations of Italian copyright law (Article 25-*novies*).

This is therefore the regulation applicable towards crowdfunding platforms, promoters or supporters where they hold the form of a legal person.

For an analysis on the liability of platform operators, cf. D.T. 4.1.1, Section 3.2.2.

APPLICABLE LEGAL BASIS

A) Fraud (all-crowdfunding types)

Fraud is established as a criminal offence by Article 640 of the Italian criminal code, and by Articles 10-*bis* and 10-*ter*, legislative decree no. 74, of 10 March 2000 (tax frauds).



However, these provisions are currently applicable only towards natural persons, and therefore bear only a limited role in crowdfunding (e.g. for fraud committed by the promoting corporation against supporters, the natural persons committing it within the corporation may be held liable, but not the corporation itself).

Legal persons may be held liable for fraud only where it affects certain State financial interests (as established by Articles 316-*bis*, 316-*ter*, 640(2) no. 1, 640-*bis*, and 640-*ter* of the Italian criminal code) - interestingly, tax frauds are not included in the legislative decree, even though they certainly affect relevant State financial interests.

For fraud affecting the EU financial interests (e.g. VAT fraud) the Convention on the protection of the European Communities' financial interests applies towards both legal and natural persons until 6 July 2019 (when it will be replaced by the PIF Directive, see above Section 2.1.1, and 3.2).

B) Money Laundering (all-crowdfunding types)

Money Laundering conducts are established as criminal offences by Articles 648-*bis*, 648-*ter*, and 648-*ter* 1 of the Italian criminal code.

All natural and legal persons may be held liable for these offences.

Currently, the Italian FIU is not dealing directly with crowdfunding platforms, as the latter are not included in the scope of the 4th AML/CFT Directive.

However, indirectly, yet occasionally, some crowdfunding suspicious transactions may fall under the competence of the FIU, that supervises intermediaries which crowdfunding platforms may be leaning into, or which subjects involved in crowdfunding activities may be customers of (e.g. a bank reporting to the FIU transfers of money with ML risks performed by a bank's customer in favour of a crowdfunding platform).

C) Terrorist Financing (all-crowdfunding types)

Terrorist financing is established as a criminal offence by Article 270-*quinquies* 1 of the Italian criminal code.

All natural and legal persons may be held liable for this offence.

In its 2017 Annual Report, the Italian FIU included crowdfunding among the new innovative methods used to finance terrorism, together with e-currency, and other hardly-traceable transactions, like those carried out through money transfers, and NPOs (see Rapporto Annuale dell'Unità di Informazione Finanziaria, Roma, May 2017, p. 21 <https://uif.bancaditalia.it/pubblicazioni/rapporto-annuale/2017/Relazione-UIF-anno-2016.pdf>). Currently, however, the Italian FIU is not dealing directly with crowdfunding platforms, as the latter are not included in the scope of the 4th AML/CFT Directive.



Similarly to money laundering, indirectly, yet occasionally, some crowdfunding suspicious transactions may fall under the competence of the FIU, that supervises intermediaries which crowdfunding platforms may be leaning into, or which subjects involved in crowdfunding activities may be customers of (e.g. a bank reporting to the FIU suspicious transfers of money performed by a bank's customer in favour of a crowdfunding platform).

D) Violation of Reporting Obligations (Equity crowdfunding)

A regulation concerning equity crowdfunding was introduced in the Italian legal system by legislative decree no. 179 of 29 December 2012, converted into law no. 221/2012 (http://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2012-12-18&atto.codiceRedazionale=12A13277;http://www.gazzettaufficiale.it/eli/id/2012/12/18/012G0244/sg).

Particularly relevant in a criminal law analysis is Article 30 of law 221/2012, which amended the Italian financial market regulation introducing in the latter Article 50-*quinquies* on the “Management of portals for the collection of capital for SMEs” (cf. Testo Unico della Finanza - “TUF”, legislative decree no. 58 of 24 February 1998,

http://www.consob.it/web/consob-and-its-activities/laws-and-regulations/documenti/english/laws/fr_decree58_1998.htm?hkeywords=&docid=0&page=0&hits=18&nav=false).

The regulation requires platforms involved in equity-based crowdfunding to register with the Italian authority for the supervision of the financial markets (CONSOB).

According to Article 50-*quinquies* (7), portal managers who breach these provision or the other obligations imposed by CONSOB, are punished, according to the severity of the breach and taking into account possible relapse, with a fine from 500 to 25,000 euro.

Registered subjects may also be suspended from one to four months or struck off the register.

Under the Italian legal framework, these particularly relevant sanctions are formally administrative punishments, but their substantive nature might be disputable in light of the Court of Strasbourg's *Engel* criteria (cf. above, Section 2.1.4), especially taking into account the severity of the imposable fine (some CONSOB's fines in market abuse regulation have already been considered of substantive criminal nature by the same Court in *Grande Stevens and others v. Italy*, 4 March 2014, Application no. 18640/10).



3.4. Other CE States with national regulation

3.4.1. Austria

LIABILITY OF LEGAL PERSONS

In Austria, legal persons may be held liable for their involvement in criminal offences, as provided for by the Act on the Responsibility of Associations entered into force on 1 January 2006 (*Bundesgesetz über die Verantwortlichkeit von Verbänden für Straftaten* - “VbVG”;

<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004425>).

Corporations’ responsibility is considered to be of criminal nature (even though sanctions are not officially called *Geldstrafe*, but *Geldbuße*): For instance, the assessment over the legal entity liability falls under the competence of a criminal judge, and the conviction is written down in the register of criminal records (*Strafregister*).

Sanctions imposable upon corporations may consist of pecuniary penalties.

Corporations liability in relation to criminal offences may arise when a criminal offence has been committed to the advantage of the company itself, or in violation of the duties to which the company is subject to, by:

- a) A decision-maker of the corporation;
- b) An employee where (s)he has acted deliberately, or has disregarded the due care required by the circumstances; or committing the offence has been made possible or substantially facilitated by decision-makers disregarding of the reasonable care required by the circumstances.

Legal persons may be held responsible for any criminal offence provided for by the criminal code.

Violation of reporting obligations, as will be illustrated hereinafter, is only provided for equity crowdfunding, and sanctioned by administrative penalties imposed by an administrative authority.

This is therefore the regulation applicable towards crowdfunding platforms, promoters or supporters where they hold the form of a legal person.

For an analysis on the liability of platform operators, cf. D.T. 4.1.1, Section 3.3.2.3.

APPLICABLE LEGAL BASIS

A) Fraud (all-crowdfunding types)



Fraud is established as a criminal offence (for the profiles that are mostly relevant in crowdfunding activities) by Sections 146, 147 and 148 of the Austrian criminal code, and by Section 39 (tax fraud) of the Act on Financial Crime (*Finanzstrafgesetz* - “FinStrG”).

For fraud affecting the EU financial interests (e.g. VAT fraud) the Convention on the protection of the European Communities’ financial interests applies towards both legal and natural persons until 6 July 2019 (when it will be replaced by the PIF Directive, see above Section 2.1.1, and 3.2).

All natural and legal persons may be held liable for these offences.

B) Money Laundering (all-crowdfunding types)

Money Laundering conducts are established as criminal offences by Section 165 of the Austrian criminal code.

All natural and legal persons may be held liable for these offences.

C) Terrorist Financing (all-crowdfunding types)

Terrorist financing is established as a criminal offence by Section 278 b, c, d of the Austrian criminal code.

All natural and legal persons may be held liable for this offence.

D) Violation of Reporting Obligations (Equity crowdfunding)

A regulation concerning equity crowdfunding was introduced in the Austrian legal system with the Alternative Financing Act (*Alternativ nanzierungsgesetz* - “AltFG”) of 1 September 2015

(<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20009241>).

Promoters (depending on their overall counter value in the European Union), and platforms are subject to specific reporting obligations, respectively provided for by Section 4 and 5 of the Alternative Financing Act²².

In particular, according to Sections 4(5) and 5(1), both promoters and internet platforms are subject to Anti-money laundering and financing the terrorism obligations²³; platforms are also specifically required to identify the identities of the promoters, as

²² In particular, according to Section 5, operators of an internet platforms shall provide information such as: legal form, company name, registered office, details of the administrators, details of the owners and disclosure of all relevant beneficial owners involved, excerpt from the corporate register, corporate purpose, current annual accounts or opening balance sheet; specification of the selection criteria for the authorization of issuers on the internet platform; indication of the nature, frequency and level of fees paid by investors and issuers; the latest annual financial statements once a year, and significant changes.

²³ As provided by *Gewerbeordnung 1994 - GewO 1994*, §§ 365m to 365z.



well as of the investors, in case of the conclusion of a contract for the acquisition of alternative financial instruments.

According to Section 6 of the same Act, violating such obligations, unless otherwise punished more severely, is sanctioned at administrative level with a fine up to 30,000 euros.

Although formally administrative, the substantive nature of this fine might be disputable in light of the Court of Strasbourg's *Engel* criteria (cf. above, Section 2.1.4), especially taking into account the severity of the imposable fine.

3.4.2. Germany

LIABILITY OF LEGAL PERSONS

In Germany, legal persons may be held liable for their involvement in criminal offences, as provided for by §§ 30 and 9 of the Administrative Offences Act of 24 May 1968 (Ordnungswidrigkeit- sgesetz - "OWiG" - https://www.gesetze-im-internet.de/englisch_owig/index.html).

Corporations' responsibility is of administrative nature, and its assessment follows substantial and procedural administrative rules.

Nonetheless, imposing sanctions against corporations may also fall under the competence of the criminal tribunal who is proceeding against the natural person who committed the offence.

Sanctions imposable upon corporations may consist of pecuniary penalties.

Corporations liability in relation to criminal offences may arise when a criminal or administrative offence has been committed to the advantage of the company itself, or in violation of the duties to which the company is subject to, by:

- a) A legal representative, board member, or authorized representative of a legal partnership;
- b) A general representative or, in a managerial capacity, authorized signatory or authorized representatives;
- c) Any other person responsible for business management, including supervising the management or otherwise exercising supervisory control.

Legal persons may be held responsible for any criminal offence provided for at Federal or Land level.

Limited reporting obligations, as will be illustrated hereinafter, are provided only for equity crowdfunding, and violations of the first may be sanctioned by an administrative authority.



This is therefore the regulation applicable towards crowdfunding platforms, promoters or supporters where they hold the form of a legal person.

For an analysis on the liability of platform operators, cf. D.T. 4.1.1, Section 3.3.1.2.

APPLICABLE LEGAL BASIS

A) Fraud (all-crowdfunding types)

Fraud is established as a criminal offence (for the profiles that are mostly relevant in crowdfunding activities) by Sections 263, 264, 264a, 265b, 266, and 370 (tax fraud) of the German criminal code.

For fraud affecting the EU financial interests (e.g. VAT fraud) the Convention on the protection of the European Communities' financial interests applies towards both legal and natural persons until 6 July 2019 (when it will be replaced by the PIF Directive, see above Section 2.1.1, and 3.2).

The risk of legal liability arising from crowdfunding with regard to customs duties has been recently underlined by the German FIU (http://www.zoll.de/SharedDocs/Pressemitteilungen/DE/Sonstiges/2017/z74_crowdfunding_geschaefte.html).

All natural and legal persons may be held liable for these offences.

B) Money Laundering (all-crowdfunding types)

Money Laundering conducts are established as criminal offences by Section 261 of the German criminal code.

All natural and legal persons may be held liable for these offences.

C) Terrorist Financing (all-crowdfunding types)

Terrorist financing is established as a criminal offence by Section 89c of the German criminal code.

All natural and legal persons may be held liable for this offence.

D) Violation of Reporting Obligations (Equity crowdfunding)

A regulation concerning equity crowdfunding was introduced in the German legal system with the Retail Investors' Protection Act (Kleinanlegerschutzgesetz) of 23 April 2015 (entered into force on the 10th of July 2015 - http://www.bundesfinanzministerium.de/Content/DE/Downloads/Gesetze/2015-07-09-kleinanlegerschutzgesetz.pdf;jsessionid=A9BDDF9F38A48432EBA008D2E7355330?__blob=p



[publicationFile&v=3](#)), which amended the Capital Investment Act (<https://www.gesetze-im-internet.de/kagb>).

The regulation exempts crowdfunding from prospectus duties when it complies with certain duties, even though capital investment information is still required to be produced, and shall be submitted to the German banking supervisory authority (BaFin) before launching a public offer. The same authority, in its 2016 Annual Report underlined the potential risk posed by new technologically forms of carrying out financial transactions, including crowdfunding, was by the FIU in (cf. p. 22, https://www.bafin.de/SharedDocs/Downloads/EN/Jahresbericht/dl_jb_2016_en.pdf?blob=publicationFile&v=4).

According to Sections 39 and 340 of the Capital Investment Act, in case information were based on unlawful information (or illegally obtained), or administrative offences as listed by Section 340 have been committed, or AML regulation is seriously, repeatedly or systematically violated, a fine may be imposed.

Although formally administrative, the substantive nature of these fine shall be assessed in light of the Court of Strasbourg's *Engel* criteria (cf. above, Section 2.1.4).

3.5. States without national regulation

3.5.1. Croatia

LIABILITY OF LEGAL PERSONS

In Croatia, legal persons may be held liable for their involvement in criminal offences, as provided for by the Act on the Responsibility of Legal Persons for the Criminal Offences of 11 September 2003 (Official Gazette no. 151/2003; http://www.vsrh.hr/CustomPages/Static/HRV/Files/Legislation_Responsibility-Legal-Persons-CO.pdf).

Corporations' responsibility is considered to be of criminal nature.

Sanctions imposable upon corporations may consist of pecuniary penalties, or interdiction measures.

Corporations liability in relation to criminal offences may arise when a criminal offence has been committed violating the duties of the corporation, or if the latter has produced or should have produced illegal gain at the corporation's or third parties advantage, by:

- a) A person in charge of the management;
- b) A person entrusted with tasks within the scope of operation of the legal person.

Legal persons may be held responsible for any criminal offence provided for by the criminal code.

This is therefore the regulation applicable towards crowdfunding platforms, promoters or supporters where they hold the form of a legal person.

For an analysis on the liability of platform operators, cf. D.T. 4.1.1, Section 3.4.2.

APPLICABLE LEGAL BASIS

A) Fraud (all-crowdfunding types)

Fraud is established as a criminal offence (for the profiles that are mostly relevant in crowdfunding activities) by Article 224 of the Croatian criminal code.

For fraud affecting the EU financial interests (e.g. VAT fraud) the Convention on the protection of the European Communities' financial interests applies towards both legal and natural persons until 6 July 2019 (when it will be replaced by the PIF Directive, see above Section 2.1.1, and 3.2).

All natural and legal persons may be held liable for these offences.

B) Money Laundering (all-crowdfunding types)

Money Laundering conducts are established as criminal offences by Article 279 of the Croatian criminal code.

All natural and legal persons may be held liable for these offences.

C) Terrorist Financing (all-crowdfunding types)

Terrorist financing is established as a criminal offence by Article 278d of the Croatian criminal code.

All natural and legal persons may be held liable for this offence.

D) Violation of Reporting Obligations

Not regulated by national law with regard to crowdfunding, according to the available information.

3.5.2. Czech Republic

LIABILITY OF LEGAL PERSONS



In Czech Republic, legal persons may be held liable for their involvement in criminal offences, as provided for by the Act on Corporate Criminal Liability no. 418/2011, entered into force on 1 January 2012.

Corporations' responsibility is considered to be of criminal nature.

Sanctions imposable upon corporations may consist of pecuniary penalties, and interdiction measures.

Corporations liability in relation to criminal offences may arise when a criminal offence has been committed on behalf, or to the advantage of the company itself, or within the scope of its business activity, and the offence may be imputed to the corporation, by:

- a) A statutory body or its members, or another person authorized to act on behalf of the corporation/with management functions/who exercises a major influence on the management;
- b) An employee where (s)he has acted: On the basis of a decision, approval or instruction issued by the corporate's authority or by any person mentioned sub (a); or where committing the offence has been made possible or substantially facilitated by the persons sub (a) that did not adopt supervisory measures which they should have, according to the law or which were reasonably expectable from them, or did not perform obligatory or necessary supervisory controls.

Corporate criminal liability extends towards legal persons only for the offences not excluded by Article 7, which does not mention fraud, money laundering, and terrorist financing (for which therefore legal entities may be hold liable).

Violation of reporting obligations, as will be illustrated hereinafter, are provided for equity and donation-based crowdfunding, and sanctioned by administrative penalties imposed by administrative authority.

This is therefore the regulation applicable towards crowdfunding platforms, promoters or supporters where they hold the form of a legal person.

For an analysis on the liability of platform operators, cf. D.T. 4.1.1, Section 3.4.1.

APPLICABLE LEGAL BASIS

A) Fraud (all-crowdfunding types)

Fraud is established as a criminal offence (for the profiles that are mostly relevant in crowdfunding activities) by Sections 209, 211, 212 of the Czech criminal code.

For fraud affecting the EU financial interests (e.g. VAT fraud) the Convention on the protection of the European Communities' financial interests applies towards both legal and natural persons until 6 July 2019 (when it will be replaced by the PIF Directive, see above Section 2.1.1, and 3.2).



All natural and legal persons may be held liable for these offences.

B) Money Laundering (all-crowdfunding types)

Money Laundering conducts are established as criminal offences by Sections 216 and 217 of the Czech criminal code.

All natural and legal persons may be held liable for these offences.

The subject matter is also covered by Act No. 253/2008 COLL., of June 5, 2008, on Selected Measures against Legitimation of Proceeds of Crime and Financing of Terrorism. In particular, according to Section 2, § 1 letter b), items 6 and/or 7 of that Act, equity-based crowdfunding is considered covered by the AML provisions.

C) Terrorist Financing (all-crowdfunding types)

Terrorist financing is established as a criminal offence by Section 278d of the Czech criminal code.

All natural and legal persons may be held liable for this offence.

In particular, according to Section 2, § 1 letter b), items 6 and/or 7 of the 2008 Act (see above sub B), equity-based crowdfunding is considered covered by the CFT provisions.

D) Violation of Reporting Obligations (Equity and donation-based crowdfunding)

No specific regulation on crowdfunding has been yet introduced in Czech Republic.

Nonetheless, equity-based crowdfunding promoters and platforms are subject to AML reporting duties.

Donation-based crowdfunding platforms are subject to the Public Collection Act No. 117/2001 COLL. of 28 February 2001 on public collections and on the amendment of some laws (<https://www.zakonyprolidi.cz/cs/2001-117>), which covers all collections of monies for charitable purposes performed by legal persons, regardless the form of fundraising. This activity is subject to notification to administrative competent authorities.

In both cases, violations may be sanctioned with administrative penalties.

3.5.3. Hungary

LIABILITY OF LEGAL PERSONS

In Hungary, legal persons may be held liable for their involvement in criminal offences, as provided for by Act CIV of 2001, entered into force on 1 May 2004, as amended by Act



XXVI

of

2008

(https://www.imolin.org/doc/amlid/Hungary/Hungary_Act_CIV_of_2001_on_measures_applicable_to_legal_entities_under_criminal_law.pdf).

Corporations' responsibility is considered to be of criminal nature.

Sanctions imposable upon corporations may consist of pecuniary penalties, and interdiction measures.

Corporations liability in relation to criminal offences may arise when a criminal or administrative offence has been committed to the advantage of the company itself, by:

- a) The corporation's executive officer/member/ employee/ officer/ managing clerk entitled to represent it;
- b) Its supervisory board members and/or their representatives, within the legal entity's scope of activity.

Legal persons may be held responsible for any criminal offence provided for by the criminal code.

This is therefore the regulation applicable towards crowdfunding platforms, promoters or supporters where they hold the form of a legal person.

For an analysis on the liability of platform operators, cf. D.T. 4.1.1, Section 3.4.4.

APPLICABLE LEGAL BASIS

A) Fraud (all-crowdfunding types)

Fraud is established as a criminal offence (for the profiles that are mostly relevant in crowdfunding activities) by Sections 373, 374, 376, 377 of the Hungarian criminal code.

For fraud affecting the EU financial interests (e.g. VAT fraud) the Convention on the protection of the European Communities' financial interests applies towards both legal and natural persons until 6 July 2019 (when it will be replaced by the PIF Directive, see above Section 2.1.1, and 3.2).

All natural and legal persons may be held liable for these offences.

B) Money Laundering (all-crowdfunding types)

Money Laundering conducts are established as criminal offences by Sections 399 to 402 of the Hungarian criminal code.

All natural and legal persons may be held liable for these offences.

C) Terrorist Financing (all-crowdfunding types)



Terrorist financing is established as a criminal offence by Section 318 of the Hungarian criminal code.

All natural and legal persons may be held liable for this offence.

D) Violation of Reporting Obligations

Not regulated by national law with regard to crowdfunding, according to the available information.

3.5.4. Poland

LIABILITY OF LEGAL PERSONS

In Poland, legal persons may be held liable for their involvement in criminal offences, as provided for by the 2002 Act on Liability of Collective Entities for Acts Prohibited under Penalty, entered into force on 28 November 2003 (<http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20021971661/U/D20021661Lj.pdf>), and then repeatedly amended (lastly in 2016).

Corporations' responsibility is considered (cf., e.g., Polish Supreme Court Judgment of 5 May 2009, IV KK 427/2008) to be of quasi-criminal nature, and it is for criminal law tribunals to establish, applying criminal law rules

Sanctions imposable upon corporations may consist of pecuniary penalties, or interdiction measures.

Corporations liability in relation to criminal offences may arise when a criminal offence has been committed to the advantage of the company itself, by:

- a) A person acting in name, or in the interest of the entity pursuant to authority or obligation to represent it;
- b) A person permitted to act as a result of exceeding authority or non-fulfilment of obligations by the person sub (a), or acting on behalf of the entity with the consent of the person sub (a).

Legal persons may be held responsible for a selected list of criminal and fiscal offences, which include fraud, money laundering, and terrorist financing.

This is therefore the regulation applicable towards crowdfunding platforms, promoters or supporters where they hold the form of a legal person.

For an analysis on the liability of platforms operators, cf. D.T. 4.1.1, Section 3.4.3.

APPLICABLE LEGAL BASIS



A) Fraud (all-crowdfunding types)

Fraud is established as a criminal offence (for the profiles that are mostly relevant in crowdfunding activities) by Article 286 of the Polish criminal code.

For fraud affecting the EU financial interests (e.g. VAT fraud) the Convention on the protection of the European Communities' financial interests applies towards both legal and natural persons until 6 July 2019 (when it will be replaced by the PIF Directive, see above Section 2.1.1, and 3.2).

All natural and legal persons may be held liable for this offence.

B) Money Laundering (all-crowdfunding types)

Money Laundering conducts are established as criminal offences by Section 299 of the Polish criminal code.

All natural and legal persons may be held liable for these offences.

C) Terrorist Financing (all-crowdfunding types)

Terrorist financing is established as a criminal offence by Section 165a of the Polish criminal code.

All natural and legal persons may be held liable for this offence.

D) Violation of Reporting Obligations

Not regulated by national law with regard to crowdfunding, according to the available information.

3.5.5. Slovakia

LIABILITY OF LEGAL PERSONS

In Slovakia, legal persons may be held liable for their involvement in criminal offences, as provided for by Act No. 91/2016 Coll. on Criminal Liability of Legal Persons, of 13 November 2015, entered into force on 1 July 2016 (<https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2016/91/20170101>).

Corporations' responsibility is considered to be of criminal nature.

Sanctions imposable upon corporations may consist of pecuniary penalties, and interdiction measures.

Corporations liability in relation to criminal offences may arise when there is a link between the interests of the company and the criminal offence, committed by:



- a) A statutory body, or a member of the statutory body of the corporation;
- b) Persons vested with supervisory powers in the corporation; or
- c) Another person authorized to represent or decide on behalf of the legal person.

Corporate liability is provided for by the law for a set of specified criminal offences; among those, money laundering and terrorist financing are included.

This is therefore the regulation applicable towards crowdfunding platforms, promoters or supporters where they hold the form of a legal person.

For an analysis on the liability of platform operators, cf. D.T. 4.1.1, Section 3.3.2.3.

APPLICABLE LEGAL BASIS

A) Fraud (all-crowdfunding types)

Fraud is established as a criminal offence (for the profiles that are mostly relevant in crowdfunding activities) by Sections 221, 222, 224, 225, 226, 227 of the Slovak criminal code.

For fraud affecting the EU financial interests (e.g. VAT fraud) the Convention on the protection of the European Communities' financial interests applies towards both legal and natural persons until 6 July 2019 (when it will be replaced by the PIF Directive, see above Section 2.1.1, and 3.2).

Those crimes are excluded from the list of offences which legal entities may be held liable for.

B) Money Laundering (all-crowdfunding types)

Money Laundering conducts are established as criminal offences by Sections 233, and 234 of the Slovak criminal code.

All natural and legal persons may be held liable for these offences.

C) Terrorist Financing (all-crowdfunding types)

Terrorist financing is established as a criminal offence by Section 419(2) of the Slovak Criminal Code, and by Section 3 of the Act on the Prevention of Legalization of Proceeds of Criminal Activity and Terrorist Financing and on Amendments and Supplements to Certain Acts, No. 297/2008 Coll., of 2 July 2008, as amended by the acts No. 445/2008 and No. 186/2009 (http://www.minv.sk/swift_data/source/policia/finpol/297_2008en.pdf).

All natural and legal persons may be held liable for this offence.

D) Violation of Reporting Obligations (Donation-based crowdfunding)



Donation-based crowdfunding is subject to some reporting obligations according to Act No 162/2014 Coll. on public collections funds (<https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2014/162/20140701>).

According to Section 15 of this Act, a legal person violating such obligations commits an administrative offence, which may be sanctioned by a fine. Even though the amount of the fine is currently rather limited (100 to 1000 Euros), the administrative body shall impose it taking into account the nature, gravity, manner, duration, consequences and circumstances of the offense (Section 15(2)).

3.5.6. Slovenia

LIABILITY OF LEGAL PERSONS

In Slovenia, legal persons may be held liable for their involvement in criminal offences since 1995, as provided for by the Article 33 of the Slovenian Criminal Code, and by the 1999 Act on Liability of Legal Person for Criminal Offences (ZOPOKD, http://www.mp.gov.si/fileadmin/mp.gov.si/pageuploads/mp.gov.si/zakonodaja/angles_ki_prevodi_zakonov/071030_liability_of_legal_persons.pdf), as amended in 2008.

Corporations' responsibility is considered to be of criminal nature.

Sanctions imposable upon corporations may consist of pecuniary penalties, and interdiction measures.

Corporations liability in relation to criminal offences may arise when a criminal offence is committed in the name of, on behalf, or in favour of the legal entity, if:

- a) The committed criminal offence means carrying out an unlawful resolution, order or endorsement of its management or supervisory bodies;
- b) The corporation's management or supervisory bodies influenced the perpetrator or enabled her/him to commit the offence;
- c) The corporation has at its disposal unlawfully obtained property benefit or uses objects obtained through a criminal offence;
- d) The management or supervisory bodies have omitted due supervision of the legality of the actions of employees subordinate to them.

Corporate liability is provided for by the law for a set of specified criminal offences; which covers fraud, money laundering and terrorist financing.

This is therefore the regulation applicable towards crowdfunding platforms, promoters or supporters where they hold the form of a legal person.

For an analysis on the liability of platform operators, cf. D.T. 4.1.1, Section 3.4.6.



APPLICABLE LEGAL BASIS

A) Fraud (all-crowdfunding types)

Fraud is established as a criminal offence (for the profiles that are mostly relevant in crowdfunding activities) by Articles 211, 227, 228, 231, 249 of the Slovenian criminal code.

For fraud affecting the EU financial interests (e.g. VAT fraud) the Convention on the protection of the European Communities' financial interests applies towards both legal and natural persons until 6 July 2019 (when it will be replaced by the PIF Directive, see above Section 2.1.1, and 3.2).

All natural and legal persons may be held liable for these offences.

B) Money Laundering (all-crowdfunding types)

Money Laundering conducts are established as criminal offences by Article 245 of the Slovenian criminal code.

All natural and legal persons may be held liable for these offences.

C) Terrorist Financing (all-crowdfunding types)

Terrorist financing is established as a criminal offence by Article 109 of the Slovenian criminal code.

All natural and legal persons may be held liable for this offence.

D) Violation of Reporting Obligations

Not regulated by national law with regard to crowdfunding, according to the available information.



4. Strong/weak points for international transfer possibilities

After having examined the main aspects of the legal multilevel framework on criminal liability risks in crowdfunding, as applicable to CE EU Member States, it is now possible to make some concluding remarks on the current situation.

What should interest both relevant actors and multilevel decision makers is the presence of points of weakness and strength for cross-border crowdfunding; a closer look to the main legal problems and added values can help both crowdfunding operators, and law and policy decision-makers in taking better strategic and operational choices in their respective fields of competence.

A) Weak points

- **Lack of harmonised criminal law provisions, and legal uncertainty.**
Legal multilevel approach towards crowdfunding is still developing and is rather fragmented also in the field of criminal law. Norms and/or practices, starting from the scope of criminal liability for legal persons, tend to vary from State to State; uncertainty and lack of transparency cannot but hinder the potentials of cross-border crowdfunding.
- **Uneven legal playing field in AML/CFT policy.**
Even where harmonised EU law does exist (AML/CFT), the lack of a specific reference to crowdfunding platforms in the AML/CFT regulations, causes differences in anti-money laundering rules towards platforms, which may be required to provide information or not, depending more on where they are located, rather than on an objective risk assessment of their activity, and - even where so required - may be required to perform checks at different transaction thresholds.
- **Generalized lack of reporting obligations.**
Provided only in few CE Member States (AT, CZ, DE, IT, and partially SK), and mostly towards equity-based crowdfunding (with the exception of SK), the limited range of such obligations significantly impairs the possibilities to:
 - legally recognize the existence of most crowdfunding platforms - a step which is necessary for all sorts of legal regulations/assessment;
 - efficiently prevent and/or fight serious crimes like money laundering or terrorist financing, which requires a constant monitoring over financial (also alternative) transactions to be spotted.

The lack of data - as it is the case of most examined CE Member States, where no reporting obligations are in place - may lead to the misleading



conclusions that such serious crimes do not concern crowdfunding, while they are at least partially already reported to occur.

As underlined in 2017 by the Commission, both for AML and CFT purposes, the “level of risk exposure varies depending on whether crowdfunding is directly linked to financial institutions or left to private initiatives on the internet”, but “even when a financial institution is involved, there is a lack of knowledge about the sources of funds, the scope of the funding and its purpose.

When provided through private initiatives, crowdfunding services are out of the scope of any AML/CFT monitoring. Competent authorities, including at EU level, are aware that ML/TF risks exist but the risk assessment is still incomplete at this stage to have a clear understanding of the risks”. However, “where these platforms are included in the list of obliged entities, FIUs receive Suspicious Transaction Reports”²⁴.

- **Complete lack of EU/transnational supervision over non-profit organizations, including donation and reward-based crowdfunding.**

Considering that these crowdfunding models are so far the most popular, the complete shortcoming of supervision over those activities creates uncertainty about their legal status, and makes it hard to determine how to better tackle risks of criminal infiltration and liability.

B) Strong points

- **Penetration of crowdfunding issues in the debate on the development of criminal law.**

Although the most worrying aspects emerged by the state of play of crowdfunding in CE EU countries concern the insufficient level of national regulation, it cannot be denied that at least some Member States decided to consider this new phenomenon also under the criminal risks connected to it. It also seems that FIUs and national legislators are increasingly aware of the need to fight criminal infiltrations within crowdfunding models, even where no regulation has been adopted yet.

- **Availability of applicable legal models.**

CE EU countries which have not adopted any domestic discipline tackling crowdfunding criminal risks, may refer to the AML/CFT systems already implemented under EU legislation, using the same reporting obligations and the same competent authorities.

- **Increasing awareness in the public opinion and crowdfunding operators of the criminal risks connected to crowdfunding activities, which allows**

²⁴ Commission Staff Working Document Accompanying the document, cit., p. 55.



both crowdfunding operators, and supporters to make more informed judgment in their choice of entering into crowdfunding business.

5. Proposal for unifying rules (way forward to DT. 4.2.2)

Having ascertained that lack of regulation, as well as the coexistence of rather fragmented and scarcely coordinated criminal justice systems, this final part of the deliverable provides for a first attempt to envisage some initiatives that will be further discussed in D.T4.2.2 (“Recommendations for unification of legislation and implementation procedures”); therefore, proposals made here are formulated in more general terms, while proposals for decision makers under D.T4.2.2 will be described more in details.

A) Practices

Transnational cooperation among the authorities already dealing with criminal risks (also) in crowdfunding activities should be strengthened and better implemented, both through traditionally criminal justice channels (cooperation among judicial and law-enforcement authorities, directly or through Eurojust and Europol), and through specific AML/CFT cooperation channels (FIUs). In particular, it might appear especially appropriate for all CE EU Member States that still have not joined the FATF to do so.

B) National level

- CE EU Member States already fitted with crowdfunding regulations imposing reporting obligations (AT, CZ, DE, IT, and partially SK) should strive to **broaden** their scope of application, especially towards donation and reward-based crowdfunding;
- CE EU States still lacking any kind of regulation on crowdfunding should take steps towards the **adoption** of domestic legal disciplines imposing reporting obligations, and in doing so they could rely on already existing models (from other national systems, or from the AML/CFT reporting mechanism established at EU level);
- In the lack of a specific reference to crowdfunding platforms under the 4th AML/CFT Directive, it would be advisable for Member States to **use their discretion** and include the latter among the entities subject to reporting AML/CFT obligations;
- In the lack of a specific EU legislation on criminal risks connected to crowdfunding, Member States should make sure that at least the four risky areas identified (fraud, money laundering, terrorist financing, and violation of reporting obligations) are **punishable**, also when committed by a legal entity.

C) EU level

As already shown by discussion preceding the Commission's proposal for the 5th AML/CFT Directive, it is about time for the EU to **include crowdfunding among the scope of application of the EU AML/CFT legislation.**

In order not to create an excessively burdensome regulation which would have negative impacts of the spreading of crowdfunding activities, reporting obligations could be calibrated in simplified forms for low risk contexts, or when SMEs are involved.

D) EU and/or national level

No amount of regulation can eliminate criminal risks in human activities.

In case criminal offences occur, an **effective remedy** needs to be in place.

This is especially challenging when supporters' interests are at stake, as these subjects are mostly lacking any specific legal or business competence, and are spread over a transnational market.

Specific procedural rules thus need to be implemented, possibly at EU level, to determine jurisdiction, trial forum and applicable procedural rules in case an offence has been perpetrated.

This could also require creating forms of **collective class actions**, to supply the limited resources (and damage) of the single supporter, and facilitate the achievement of trans-border procedural responses.



6. ANNEX I

List of national Financial Intelligence Units of the Member States participating to the project²⁵.

Country	Authority	Contacts
Austria	Geldwäschemeldestelle	Josef-Holaubek-Platz 1, 1090 Wien telefax: +43-(0)1-24836-985290 e-mail: A-FIU@bmi.gv.at http://www.bmi.gv.at/cms/bk/meldestellen/geldwaesche/start.aspx
Croatia	Anti-Money Laundering Office - FIU Croatia (AMLO)	Ulica grada Vukovara 72, 10000 Zagreb tel: +385 1 6345 455, fax: +385 1 6345 452 e-mail: info.uzspn@mfin.hr http://www.mfin.hr/en/anti-money-laundering-office
Czech Republic	Financial Analytical Unit (FAU-CR)	Washingtonova 1621/11, 110 Praha 1 tel: +420 257 044 501; +420 603 587 663 fax: +420 257 044 502 e-mail: fau@mfcrcz http://www.financnianalytickyrad.cz/kontakty.html
Germany	Zentralstelle für Finanztransaktionsuntersuchungen (ZOLL)	Postfach 85 05 55, 51030 Köln tel: 49 (0) 351 44834 - 556 fax: +49 (0) 221 672 - 3999 e-mail: info.fiu@zoll.de http://www.zoll.de/DE/Der-Zoll/FIU/fiu_node.html
Hungary	Hungarian Financial Intelligence Unit (HFIU), National Tax and Customs Administration	42 Huszti st., Budapest, Hungary 1033 tel: +36 1 43 09 466 fax: +36 1 43 09 305 e-mail: fiu@nav.gov.hu http://en.nav.gov.hu/anti_money_laundering/Hungarian_Financial_Intelligence_Unit
Italy	Unità di informazione finanziaria	Largo Bastia 35 00181 Roma tel: +39 06 47921 e-mail (PEC): uif@pec.bancaditalia.it http://uif.bancaditalia.it
Poland	General Inspector of Financial Information	Ministerstwo Finansów, ul. Świętokrzyska 12, 00 - 916 Warszawa tel: +48 22 694 30 60 fax: +48 22 694 54 50 e-mail: sekretariat.IF@mf.gov.pl http://www.mf.gov.pl/en/ministry-of-finance/aml-ctf/contact
Slovakia	Finančná spravodajská jednotka/ Národná kriminálna agentúra Financial Intelligence Unit of the National Criminal Agency (FSJ)	Ministerstvo vnútra SR Prezídium Policajného zborunárodná kriminálna agentúra Pribinova 2, 812 72 Bratislava tel: 09610 51402 fax: 09610 59047 e-mail: naka@minv.sk http://www.minv.sk/?financna-policia
Slovenia	Office for Money Laundering Prevention (OMLP)	Cankarjeva 5, p.p.1696, SI-1001 Ljubljana tel: +386 1 425 4189 fax: +386 1 425 2087 e-mail: mf.uppd@mf-rs.si http://www.uppd.gov.si/en/

²⁵ source: https://egmontgroup.org/en/membership/list?field_region_value=europe_1 (last seen: Nov. 2017)