



European Economic and Social Committee

ECO/455
Crowd and peer-to-peer finance

OPINION

European Economic and Social Committee

**Proposal for a Directive of the European Parliament and of the Council amending Directive
2014/65/EU on markets in financial instruments**
[COM(2018) 99 final - 2018/0047 (COD)]

**Proposal for a Regulation of the European Parliament and of the Council on European
Crowdfunding Service Providers (ECSP) for Business**
[COM(2018) 113 final - 2018/0048 (COD)]

Rapporteur: **Daniel Mareels**

Consultation	European Parliament, 16/04/2018 Council of the European Union, 27/03/2018
Legal basis	Article 114 and Article 53(1) of the Treaty on the Functioning of the European Union
Section responsible	Section for Economic and Monetary Union and Economic and Social Cohesion
Adopted in section	27/06/2018
Adopted at plenary	11/07/2018
Plenary session No	536
Outcome of vote (for/against/abstentions)	146/0/1

1. **Conclusions and recommendations**

- 1.1 The EESC strongly welcomes these proposals to create an enabling framework for crowdfunding by means of a 29th regime. The Committee therefore calls for swift action in order to achieve a successful outcome, particularly as it fits into a broader framework that is of particular interest to the Committee¹.
- 1.2 The EESC welcomes the fact that the financing of small, young and innovative enterprises has been taken into consideration. Crowdfunding is an important part of their funding escalator, particularly when they move from a start-up to an expansion phase and traditional financing is not always available. At the same time, more and better opportunities are being created for investors.
- 1.3 It is very positive that, to this end, use is being made of innovative products and solutions supported by modern technology, meaning that this forward-looking proposal also forms part of the implementation of a digital single market. The proposal also adds a cross-border dimension, which contributes to the effective integration and deepening of capital markets. The creation of a single harmonised market in the EU with the same rules for both entrepreneurs and investors should be a primary consideration.
- 1.4 Taking account of the fact that artificial obstacles should not act as a brake on this innovative framework, the Committee nevertheless calls — on the basis of a global and holistic approach — for stronger proposals and additional measures in connection with certain points, at least in the initial stages (see point 1.5 and following). The Committee is guided in particular here by the principles of "credibility", "clarity" and "trust". That also means certainty and protection for all those concerned.
- 1.5 First of all, the Committee welcomes the consideration given to the risk aspects associated with crowdfunding operations and markets, but at the same time believes that — at least in the initial stages — there should be an even stronger focus on these aspects in order to better identify them or mitigate them where possible. This concerns the following issues:
 - 1.5.1 Transparency and protection of investors. The Committee is of the view that the risk assessment of specific projects on crowdfunding platforms is left too much to markets and investors. The EESC believes that appropriate measures are needed to better identify or mitigate all risks, both financial and non-financial. Ultimately, it is about better protection for investors. The MiFID approach could provide a basis in this connection. Furthermore, there is a danger here of creating an uneven playing field with traditional providers, such as financial institutions which have to apply strict protection rules in relationships with their clients.
 - 1.5.2 Possible areas of tension in the status of providers and the services they offer. The possibility that providers can enter into contracts with investors under which they may "exercise discretion" to obtain the best result for these investors, may lead to sensitive situations for providers who must act first and foremost as "neutral intermediaries".

¹ See points 3.1 to 3.4.

- 1.5.3 Supervision. The role of ESMA seems clear, that of national supervisors less so. The Committee is of the view that more clarity is needed here. Furthermore, the EESC wonders whether a substantial role should perhaps be assigned to national supervisors, especially as they are closer to national markets and can better assess local circumstances. In any case, it is important for the Committee that authorities and supervisors at national and European level consult and cooperate on a permanent and consistent basis, both with an eye to further harmonisation and integration in the Union and to the success of the current proposals.
- 1.6 Since the 29th regime and national systems will exist in parallel as a result of the choices made, interested parties may be confronted with different laws, different conditions and unequal protection at the same time and in the same market, which may give rise to confusion and uncertainty. Further measures are needed here to ensure greater clarity:
- 1.6.1 In the Committee's view, there should be additional obligations on authorities and supervisors to provide all users with accurate, easily accessible information that provides certainty and is available in their own language.
- 1.6.2 One option is to oblige crowdfunding platforms to mention their "EU label" explicitly and clearly whenever they address the public and in all their external communications.
- 1.7 The Committee also considers that the proposed rules on the fight against money laundering and terrorism financing remain relatively limited and largely indirect, and that the provisions on subjecting crowdfunding platforms to these rules should be extended and strengthened. The EESC believes that it cannot be the case that this possibility exists only once, and that only the Commission has the power to propose subjecting crowdfunding service providers to the aforementioned rules. In addition, clear criteria and conditions for such a decision should be laid down.
- 1.8 It is also striking that the tax treatment of income from crowdfunding and tax obligations on debtors are not addressed, in spite of the fact that one might still reasonably assume taxation to be one of the decisive factors in whether or not this initiative is successful. The Committee therefore calls for these aspects to be included in the discussion. If necessary, the rules should be adapted at the appropriate level.
- 1.9 As this is a market matter, the Committee considers it to be of the utmost importance that everyone is on the same page in order to make a real success of these proposals. It is essential that companies and investors make effective and extensive use of the 29th regime. From a market perspective, this raises the question as to whether the restriction to EUR 1 million per project will be an obstacle.
- 1.10 Finally, in order to ensure the future and continued success of crowdfunding platforms, the Committee takes the view that provision should also be made for regular measures to monitor, evaluate and measure the success of the 29th regime. Consultation and dialogue with all stakeholders and interested parties are equally important here.

2. Background

- 2.1 Upon taking office in 2014, the Juncker Commission drew up an "investment plan for Europe" with a view to achieving its top priorities: growth, jobs and investment². One of the plan's main goals is the gradual pursuit of a capital markets union, alongside a digital single market and an energy union. The aim is to develop a well-functioning and integrated capital markets union, encompassing all Member States.
- 2.2 With the Action Plan on Building a Capital Markets Union³, the Commission committed itself to putting all building blocks for such a union in place by 2019. In total, more than 33 initiatives and actions were planned.
- 2.3 Following calls for swift progress^{4,5}, a mid-term review of the action plan was conducted in 2017. This resulted in a number of new priority actions with a view to taking account of evolving challenges and changing circumstances, including "Brexit". At the same time, it is important to make real progress on establishing the Banking Union and the Capital Markets Union. Coherence and consistency are the primary considerations here.
- 2.4 Furthermore, the Commission indicated on that occasion that it was necessary "to step up the level of ambition, to address the obstacles but more importantly to take advantage of those new opportunities"⁶. It is in this context that on 8 March 2018 the Commission published a communication with two action plans⁷.
- 2.5 The Action Plan on Financial Technology (FinTech) seeks to give voice to the ambition to turn Europe into a global FinTech hub, where businesses and investors in the EU are able to derive maximum benefit from the advantages of the single market in this fast-evolving sector⁸.
- 2.6 The promotion of crowdfunding and peer-to-peer lending is one of the key measures under the Action Plan. The focus is on both the development of new services and labels and the integration of capital markets.

² See the European Commission's website http://ec.europa.eu/priorities/jobs-growth-investment/plan/index_en.htm.

³ Action plan of September 2015. "Action Plan on Building a Capital Markets Union" – Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2015) 468 final. See <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1447000363413&uri=CELEX:52015DC0468>

⁴ The Commission also adopted a communication calling for reforms to be stepped up. See COM(2016) 601 final.

⁵ For example, the European Council called for "swift and determined progress" on the plan, "to ensure easier access to finance for businesses and to support investment in the real economy". See <http://www.consilium.europa.eu/en/press/press-releases/2016/06/28-euco-conclusions/>.

⁶ See Communication from the Commission "Completing the Capital Markets Union by 2019 - time to accelerate delivery". See <https://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-114-F1-EN-MAIN-PART-1.PDF>.

⁷ The "Action Plan on Sustainable Finance", in addition to the Action Plan referred to in point 2.5.

⁸ Press release of 8 March 2018 "FinTech: Commission takes action for a more competitive and innovative financial market". See http://europa.eu/rapid/press-release_IP-18-1403_en.htm.

- 2.7 More specifically, the Commission's ideas are set out in:
- 2.7.1 The "Proposal for a Regulation of the European Parliament and of the Council on European Crowdfunding Service Providers (ECSP) for Business"⁹ and
- 2.7.2 the "Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/65/EU on markets in financial instruments"¹⁰.
- 2.8 These proposals are aimed at introducing a **European label for crowdfunding platforms** which facilitates cross-border activities. It should allow crowdfunding services to scale up their activities and to develop at EU level while providing greater access to financing for entrepreneurs and businesses, especially small, young and innovative enterprises. The proposals apply only in relation to transferable securities for investment-based crowdfunding services.
- 2.9 At the same time, the aim is to subject these platforms to **regulation and oversight that are both adapted and appropriate**. This should make it possible not only to maintain economic and financial stability in the EU but, even more importantly, to increase investors' confidence, particularly in a cross-border context.

3. **Observations and comments**

General comments — a welcome initiative

- 3.1 The EESC very much welcomes these proposals to introduce a 29th regime on crowdfunding, and calls for every effort to be made to achieve a swift and successful outcome.
- 3.2 First and foremost, these proposals contribute to a number of broader objectives which are of particular interest to the EESC and which it has previously advocated¹¹. These include:
- 3.2.1 The building of the CMU, which should go hand in hand with greater economic and social convergence and with financial and economic integration, and should increase the security, stability and resilience of the financial and economic system by broadening and diversifying the financing sources of the economy. Rapid implementation of the CMU must remain a top priority.
- 3.2.2 A single EU label for crowdfunding platforms promotes cross-border financing operations and therefore more private risk-sharing too. This is important in preventing asymmetric shocks in the event of crisis, or in reducing the impact thereof. In this way an important contribution can be made to convergent growth between the Member States of the Union, meaning that less developed economies will be able to catch up more quickly with those that are performing better.

⁹ See <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1521456325451&uri=CELEX:52018PC0113>

¹⁰ See <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1521456325451&uri=CELEX:52018PC0099>

¹¹ See the EESC opinion on the *Mid-term review of the Capital Markets Union Action Plan*, [OJ C 81, 2.3.2018, p. 117](#).

- 3.2.3 The CMU is also vital for the further deepening and completion of the EMU, and its implementation is indispensable. Together with a fully-fledged banking union, the CMU should lead to a genuine financial union, one of the four fundamental pillars of the EMU.
- 3.2.4 Since crowdfunding is underdeveloped in the EU compared with other major economies, the position of the EU vis-à-vis the rest of the world might also be mentioned here. The EU must firmly establish its position and prepare itself effectively, especially as a number of global power shifts between East and West are under way.
- 3.3 In earlier opinions¹², the Committee has raised concerns and questions as regards the relevance and effectiveness of the CMU for SMEs. The Committee welcomes the fact that a relevant approach is now taking shape. Crowdfunding is aimed in particular at a certain group of SMEs and a specific part of the funding escalator. The EESC welcomes the current proposals which improve the financing of small, young and innovative companies and make such financing easier, while creating more and better opportunities for investors.
- 3.4 Finally, the future-oriented nature of the proposals might be mentioned here as part of the FinTech Action Plan, which seeks to give voice to the ambition to turn Europe into a global FinTech hub. By tapping the potential of innovative products and solutions supported by modern technology, this proposal also forms an integral part of the implementation of a digital single market.

The proposals — a good basis but additional protective measures are needed

- 3.5 The EESC believes that every effort must be made to make a success of these proposals. For the Committee, it is of great importance that the new system is characterised by "credibility", "clarity" and "trust". Crowdfunding should be provided within a framework that provides certainty and protection to all those concerned.
- 3.6 The EESC strongly welcomes the choice of the "29th regime", which, by drawing on new and future-oriented technologies, lays the foundations for the creation of a single harmonised market with the same rules, both for young entrepreneurs looking for cross-border financing and for investors seeking additional investment opportunities.
- 3.7 The choice of a "regulation" to achieve this objective is therefore entirely appropriate here. This proposal may be regarded as an example of effective integration and deepening of capital markets.
- 3.8 Notwithstanding the following, the Committee also welcomes the fact that the Commission has, from the outset, paid attention to the risk aspects associated with crowdfunding operations and markets. The EESC is in favour of the conditions to be met by crowdfunding platforms and the

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See in particular EESC opinions on the *Action Plan on building a capital markets union*, [OJ C 133, 14.4.2016](#), p. 17, and on the *Mid-term review of the Capital Markets Union Action Plan*, [OJ C 81, 2.3.2018](#), p. 117.

services they provide¹³, as well as the plans for supervision. Moreover, investors are advised to limit the risks they take¹⁴.

- 3.9 At the same time, and from a holistic perspective, the Committee believes that — at least in the initial stages — there should be an even stronger focus on these risk aspects. The Committee is of the view that all risks, both financial and non-financial, need to be better identified and mitigated where possible. In addition, closer attention should be paid to a number of other environmental factors that are important for the success of these proposals.
- 3.10 The policy choice made in favour of a complementary service-based solution¹⁵ means that national and EU regulations will exist and apply in parallel. Interested parties will be confronted, at the same time and in the same market, with operators of differing status, such as EU-labelled providers that operate across borders, the same providers working locally and providers that come under (existing) national rules or existing authorisations¹⁶. Different laws, different conditions and unequal protection¹⁷ may result. The Committee calls for more attention to be paid to this issue, which may give rise to uncertainty and confusion¹⁸. A number of specific proposals are set out below.

Providers of crowdfunding services

- 3.11 Crowdfunding service providers will be able to carry out their activities across the European Union using a single authorisation, which enables them to scale up their activities. This is an important innovation and a major step forward compared with the current situation where it is almost impossible to carry out cross-border activities.
- 3.12 Notwithstanding the above¹⁹, the EESC calls for more attention to be paid to possible areas of tension concerning the status of providers and the services they offer. For example, the option available to providers of entering into contracts with investors under which they may "exercise discretion", seems likely to give rise to sensitive situations. As intermediaries, providers must be "neutral", even though they are contractually obliged "to obtain the best possible result for their clients"²⁰. For the Committee, the obligation of neutrality may not be called into question under any circumstances. Additional measures are needed here. Platforms should offer high-quality services.

13 See the explanatory memorandum to the draft regulation and Articles 1 to 9 thereof.

14 See Article 16 of the draft regulation. The key investment information sheet to be made available to interested parties includes the following recommendation: "you should not invest more than 10% of your net wealth in crowdfunding projects."

15 The impact assessment put forward 4 policy options. See draft regulation, Chapter 3, "Impact Assessment".

16 Including those on the basis of the Markets in Financial Instruments Directive (MiFID II), the Payment Services Directive (PSD) and the Alternative Investment Fund Managers Directive (AIFMD).

17 Depending on whether the interested party is an entrepreneur or an investor.

18 This is one of the "environmental factors" which the Committee asked to be considered in point 3.9.

19 See point 3.8.

20 See recital 16 of the draft regulation.

- 3.13 For all potential users, entrepreneurs and investors, it is essential and paramount at all times to clearly know which platform they are dealing with. This is all the more important given that, as mentioned above, national and EU regulations will exist and apply in parallel²¹. In this connection, the registers of EU platforms to be kept by ESMA are considered to be insufficient as a means of publicity. In the Committee's view, there should be additional obligations on authorities and supervisors to provide all users with accurate, easily accessible information that offers certainty and is available in their own language.
- 3.14 The Committee believes that platforms should also be subject to publicity obligations. Specifically, it might be stipulated that platforms should state explicitly and clearly that they have an "EU label" whenever they address the public or interested parties²² and in all their external communications²³.
- 3.15 The supervisory role and responsibility of ESMA seems clear, but the question may also arise as to whether a role should be assigned to national supervisors, especially as they are closer to national markets and more familiar with local circumstances. In any event, clarity is needed here. This is also important for others, including those entrepreneurs wishing to make use of crowdfunding.
- 3.16 More generally, and as mentioned above, since national and EU rules will exist and apply in parallel, it is important for the Committee in any event²⁴ that the various authorities and supervisors at national and European level consistently and permanently consult one another and cooperate, not least with an eye to further harmonisation and integration in the Union. Furthermore, they also have a major role to play in the "trust" that is vital if crowdfunding is to succeed.
- 3.17 If ESMA imposes sanctions as part of its supervisory role, any appeal must, where appropriate, be brought before the European Court of Justice. Not only is this a heavy process but, moreover, it also raises the question of whether this should come under the remit of the Court of Justice.

Enterprises that make use of crowdfunding

- 3.18 Crowdfunding is mainly aimed at start-ups and early-stage enterprises that have less easy access to bank financing or deal with more risky and innovative projects, in the initial period of their activities, especially when they move from a start-up to an expansion phase. The Committee welcomes the fact that the new proposals create additional possibilities for financing for this type of SME and enterprise which is broader and more easily accessible, and with a cross-border dimension too.

21 See point 3.10.

22 For example on their website.

23 For example in all documents intended for interested parties.

24 Irrespective of the monitoring and the issue referred to in point 3.15.

- 3.19 Furthermore, the Committee agrees with the view²⁵ that there are other benefits to crowdfunding apart from those already mentioned. For example, it can provide concept and idea validation to the project owner, give access to a large number of people providing the entrepreneur with insights and information and be a marketing tool if a crowdfunding campaign is successful.
- 3.20 Enterprises have the option of having their projects financed up to an amount of EUR 1 million over a period of 12 months. This raises the question as to whether or not this threshold is too low, especially when crowdfunding is "investment-based"²⁶. In such circumstances, the obligatory transferability of securities is an important safeguard for investors wishing to exit a project²⁷. One might ask whether the planned 1 million threshold might be an obstacle to the establishment and smooth functioning of the markets for this type of securities. Furthermore, higher thresholds seem possible under national rules²⁸.

(Potential) investors

- 3.21 The Committee welcomes the fact that a new channel is opening up for investors which operates on a cross-border basis. This will broaden investors' options and increase choice.
- 3.22 It is undoubtedly positive that the proposal provides for an initial assessment of a potential investor's suitability by means of an entry knowledge test, and for the possibility of simulating the ability to bear losses²⁹, but the same cannot be said of the fact that the risk (and the assessment thereof) will be left entirely to the market and potential investors.
- 3.23 Actually, the fact that, under the proposal, the competent authorities shall not require "ex ante" approval³⁰ of the "key investment information sheet", or even any notification³¹, certainly does not serve to protect potential investors. The limited obligations concerning the translation of key documents³² do not help either. This situation seems unsatisfactory. The Committee believes therefore that, at least during the initial stages of the regime, appropriate measures are needed in

25 Recital 4 of the draft regulation.

26 For example, shares or securities of the same type.

27 See recital 11 of the draft regulation.

28 The Prospectus Regulation (which comes into force in July 2018) contains no specific derogation for crowdfunding. Many Member States, including Belgium, have their own derogation arrangements in place. This is allowable for transactions below EUR 8 million, which are not harmonised (above this figure, a prospectus is required in every case). The result is that each Member State has developed its own system of exemptions from the obligation to provide a prospectus for crowdfunding transactions, leading to market fragmentation. Platforms which seek to be active in several Member States must therefore monitor and comply with the national system in each case. The proposal is currently limited to transactions of less than EUR 1 million, and therefore contributes little to the crowdfunding market for transactions of more than EUR 1 million.

29 Article 15 of the draft regulation.

30 See Article 16 of the draft regulation.

31 In particular, the national competent authorities. See Article 16(8) of the draft regulation.

32 The proposal stipulates that, "The key investment information sheet shall be drafted in at least one of the official languages of the Member State concerned or in a language customary in the sphere of international finance". An investor "may request a crowdfunding service provider to arrange for a translation of the key investment information sheet into a language of the investor's choice", but the provider does not appear to have any absolute obligation to provide such a translation. See Article 16 of the draft regulation.

order to better identify the risk or mitigate it where possible, as regards investors. The same applies to the information they receive.

- 3.24 If one also takes into account the more traditional way of offering securities, particularly via banks and stock-exchange companies, then the limited protection of investors under the current proposals risks creating an uneven playing field between the different providers³³. The Committee believes that excessive differences in this area should be avoided because it may undermine confidence in certain market participants and lead to uncertainty and regulatory arbitrage. Ultimately, it may also have consequences for the EU's financial stability.

Additional remarks

- 3.25 Concerning the fight against money laundering and terrorism financing, the proposed rules are not bold enough, particularly as ESMA has previously highlighted specific risks and hazards in this area³⁴. Questions have been raised about the relatively limited nature of the rules proposed in this connection³⁵, and the power given to the Commission to potentially subject crowdfunding service providers to the relevant rules³⁶. The question arises here as to whether this decision should fall to the Commission. If so, what criteria apply in this case³⁷? Moreover, why is this possibility, i.e. to subject crowdfunding service providers to these rules, provided for only once³⁸? The Committee believes that this option should exist at all times and should not be the sole competence of the Commission. Moreover, the conditions and criteria under which it is possible should be made clear.
- 3.26 Particularly in light of the objectives pursued, it is striking that the tax treatment of the income from crowdfunding and the obligations on debtors³⁹ in this area are not addressed or discussed

33 Banks and stock-exchange companies are subject to MiFID rules, while crowdfunding platforms are exempt (see draft directive). The latter are subject to specific rules, as set out in the draft regulation.

34 ESMA argued that "Investment-based crowdfunding carries a risk of misuse for terrorist financing, particularly where platforms carry out limited or no due diligence on project owners and their projects. Project owners could use investment-based crowdfunding platforms to raise funds for terrorist financing, either overtly or secretly." ESMA, Questions and Answers Investment-based crowdfunding: money laundering/terrorist financing. See https://www.esma.europa.eu/sites/default/files/library/2015/11/esma_2015_1005_qa_crowdfunding_money_laundering_and_terrorist_financing.pdf.

35 See the draft regulation. In particular, Article 9 requires that payments for crowdfunding transactions must take place via entities that are authorised under the Payment Service Directive (PSD) and, therefore, subject to the 4th Anti-Money Laundering Directive (AMLD), whether the payment is made through the platform itself or via a third party. Article 9 also sets out that crowdfunding service providers must ensure that project owners accept funding of crowdfunding offers or any payment only via an entity authorised under the PSD. Article 10 introduces requirements for the "good repute" of managers, which include the absence of any criminal record under anti-money laundering legislation. Article 13 requires National Competent Authorities (NCAs), including national competent authorities designated under the provisions of Directive (EU) 2015/849, to notify ESMA of any issue that is relevant under the AMLD and involves a crowdfunding platform. ESMA may subsequently withdraw the authorisation based on this information.

36 Article 38 of the draft regulation.

37 See Article 38 of the draft regulation. In a point-by-point overview, the proposal states that the Commission must submit a report to the Parliament and the Council on the application of the regulation within a timeframe to be specified (2 years). The report must assess "the necessity and proportionality of subjecting crowdfunding service providers to obligations for compliance with the national provisions" (on money laundering and terrorism financing). Where appropriate, this report shall be accompanied by a legislative proposal.

38 See previous footnote: on the basis of the aforementioned Art. 38, this seems therefore to be the only time in which a decision can be taken on whether or not to subject crowdfunding platforms to these rules.

39 What is being specifically referred to here are the obligations on debtors of (*inter alia*) interest and dividends, on the basis of transparency obligations, for instance withholding and reporting obligations.

in the current proposals⁴⁰. This is in spite of the fact that one might reasonably assume taxation to be one of the decisive factors in whether or not this initiative is successful. The Committee therefore calls for these aspects to be taken into consideration. If necessary, the rules should be adapted at the appropriate level.

Start cautiously, build credibility and have an eye for the future

- 3.27 In order to make a real success of this market-related proposal, it is of the utmost importance that everyone is on the same page. This will only happen if enterprises and investors make effective and extensive use of the enabling framework created under the current proposals. Only then will a true market emerge where credit demand and supply can come together. For the EESC, it is important to build credibility in the initial phase, and to begin carefully and cautiously, with a stronger focus on risk management and environmental factors.
- 3.28 In the Committee's view, the proposals should most definitely provide for regular measures to follow up, evaluate and measure the success of the 29th regime in order to secure its future. Other crowdfunding systems that exist in the Member States should also be involved in this exercise. It is important to learn from best market practices and to incorporate them into the European system. Consultation and dialogue with all stakeholders and interested parties are equally important here.

Brussels, 11 July 2018

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This concerns another "environmental factor" which the Committee asked to be considered in point 3.9.