



The New EU Crowdfunding Regulation -  
Explanations & Perspectives

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## 1. INTRODUCTION

This article is for scholars and lawyers with the purpose of providing the reader with a legal introduction to the new EU legislation on crowdfunding (Regulation EU (2020/1503) on European crowdfunding service providers for business (hereinafter the “ECSPR”). The article focuses on key legal topics and aspects of the ECSPR, and seeks to provide perspectives, where applicable, of how the provisions of the ECSPR can be assessed from existing legislation of the EU Member States, mainly in a Danish law perspective. The authors are finance lawyers and will on the article include examples from practical legal application based in their experience.

## 2. CROWDFUNDING AS ALTERNATIVE MEANS OF FINANCING

Crowdfunding is an alternative way to finance start-ups and small and medium sized enterprises (“SMEs”). This means of financing is becoming more and more widespread the recent years and has become an important source of non-bank financing. During the financial crisis, entrepreneurs started to receive capital through crowdfunding, which at that time was an alternative and new way of financing. Since then, financing via crowdfunding has emerged and prospered, becoming an established and increasingly applied form of intermediation for the funding of business activities often without the publication of a prospectus.

A “crowdfunding service provider“ (a “CSP” or in plural “CSPs”), is within the meaning of the most recent EU legislation, a business which operates a digital platform matching the public, i.e., prospective investors or lenders with businesses that seek funding for their business or projects, according to Art. 2(1) of the ECSPR. The provision of crowdfunding services aims to facilitate the funding of a project by raising capital from a large number of people who each contribute relatively small investment amounts through a publicly accessible Internet-based information system, i.e., being the crowdfunding platform.

The ever-evolving traditional banking system has with time become heavily regulated resulting in banks being reluctant and (over)cautious to allocate financing to SMEs, thus, SMEs in general lacking access to financing, which has proved to be an issue for the investment climate of start-ups and SMEs<sup>1</sup>. Therefore, crowdfunding has become popular for SMEs as this way of financing provides easier access to financing than via the traditional banking system, thus filling out the gaps in the market for the lack of financing opportunities for SMEs.

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<sup>1</sup> Dentons, ‘The new ECSP-Proposal reaches the home straight on harmonized crowdfunding rules’ (July 30, 2020) <https://www.dentons.com/en/insights/articles/2020/july/30/the-new-ecsp-proposal-reaches-the-home-straight-on-harmonized-crowdfunding-rules>, Accessed 7 July 2022.

### 3. THE NEED FOR HARMONIZED EU REGULATION

In the various EU Member States, there is extensive and numerous financial regulation, and many EU Member States have introduced regulatory regimes for crowdfunding but no harmonized rules on crowdfunding was introduced. These non-harmonized (national) rules in EU Member States have resulted in significant divergence as regards the conditions of operating of crowdfunding platforms, the scope of permitted activities and the licensing requirements<sup>2</sup>.

The present legal state on the area has caused confusion and challenges not benefitting the stakeholders and interested parties of the crowdfunding area. This fragmentation of rules and supervisory expectations as well as an absence of passporting rights made it very difficult for CSPs to operate cross-border. This fragmentation is now set to partly end with the legislators acknowledging and recognizing the problem, thus introducing harmonized rules for crowdfunding platforms, however noting, that there still are issues and questions on the area left for national decision in each of the EU Member States.

### 4. THE NEW LEGISLATIVE FRAMEWORK

On 20 October 2020, the European Commission published the ECSPR as its legislation to regulate and harmonize crowdfunding for businesses within the EU.

The aim of the new legislative framework is to ensure a harmonized EU crowdfunding regime and to assure legal certainty of the rules regulating crowdfunding activities across the EU Member States, and thereby creating one of the world's largest harmonized regulated environments for crowdfunding<sup>3</sup>. The ECSPR is now in force and is directly applicable in all EU Member States.

### 5. AUTHORIZATION REQUIREMENTS

One of the requirements of the ECSPR is that a CSP needs to be authorized, according to Art. 12, in order to provide their services legally. CSPs must therefore file an application with the competent authority of the given EU Member State. CSPs successfully obtaining such a license (a "CSP-license") will be registered in a registry database of all CSPs under ESMA.

The application which the CSP must file in order to obtain a CSP-license must include, among other requirements, a description of the type(s) of crowdfunding services the prospective to-be-licensed CSP intends to provide, descriptions of the CSPs' systems and resources, procedures for the control and safeguarding of data processing systems, description of operational risks, prudential safeguards in place and

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<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

business continuity plan and any description of any outsourcing arrangements.

Upon the CSP becoming authorized as a CSP under the ECSPR, the CSP may avail of the European passporting regime as regards to offering their crowdfunding services throughout the EU. A licensed CSP will therefore have the right to provide crowdfunding services cross border within the EU as known from the traditional passporting regime from the EU financial regulation.

## 6. PAYMENT SERVICES

Obtaining a CSP-license does not per default provide the CSP with authorization to handle payments similar to that of a separate payment institution or electronic money institution authorization. If a CSP wish to conduct the handling of payments on their own, the CSP will need to obtain separate authorization as payment institution or electronic money institution according to the Danish Financial Business Act, Section 361(1)(9-10). The CSP may involve a third-party provider authorized to handle such payments as an outsourcing arrangement provided it being disclosed for the users of the crowdfunding platform.

## 7. SCOPE, ACTIVITY AND TERMINOLOGY

On 20 October 2020, the European Commission published the ECSPR as its legislation to regulate and harmonize crowdfunding for businesses within the EU.

The ECSPR applies to certain CSPs in the EU. A CSP can be described as the legal entity (i.e., a legal person) running a business offering an online internet-based platform accessible for the public (i.e., the “*crowd*”), which provides the facilitation of matching the crowd with businesses seeking funding for their projects, thus dubbing the activity the term “*crowdfunding*”, according to Art. 2(1) (d-f) of the ECSPR.

The business seeking funding for a given project through the online platform of a CSP is often referred to i.a. as the “*project owner*”, “*borrower*” and/or “*offeror*”, which may only be a business, i.e., a legal entity and not a consumer (natural person). An individual of the crowd deciding to fund a given project is often referred to as a “*crowdinvestor*” which may be a natural or legal person, according to preamble (2) of the ECSPR.

The ECSPR applies to CSPs offering crowdfunding services reminiscent of financial services, i.e., investment-based and lending-based crowdfunding services, since those types of crowdfunding services can be structured as comparable funding alternatives to traditional financial services. Hence, the ECSPR does not apply to CSPs offering donation-based, reward-based and/or peer-to-peer-lending-based crowdfunding services, nor does it apply to consumer-loans. CSPs and crowdfunding services referred to hereinafter are only the ones in scope of the ECSPR,

thus being the investment-based and lending-based CSP and crowdfunding services (as follows).

Newly established CSPs, not priorly having provided crowdfunding services, are required to obtain a CSP-license in accordance with the ECSPR at the latest of 10 November 2021, existing platforms will have an additional year to comply, i.e. being subject to a deadline of obtaining a CSP-license at the latest of 10 November 2022 according to preambles (76) and (77) of the ECSPR. The CSP-license shall be obtained from the competent authority of the EU Member State in which the legal entity of the CSP is established. CSPs failing to obtain a CSP-license cannot legally issue any new crowdfunding offers after said date. Private persons and consumers (i.e., natural persons) cannot be subject to obtainment of a CSP-license, why only legal entities can obtain a CSP-license. Hence, crowdfunding services targeted project owners that are consumers remains subject to the EU Consumer Credit Directive as well as the national implementation thereof according to Art. 1(2)(a).

The crowdfunding services of the CSPs in scope of the ECSPR are the facilitation of firstly to provide the opportunity for the project owner to “*publish*” a given project on the platform, the publishing thus making the project visible and accessible for the crowdinvestors. Thereafter, the crowdfunding services of the CSP can be described as providing the facilitation of the crowdinvestor’s allocation of funds to the project owner in return of either receiving (transferable) securities or an interest rate in return.

If the crowdinvestor’s allocation of funds to the project owner happens in consideration of the receipt of an interest rate in return, the activity is often referred to as being “*crowdlending*” and the crowdinvestor can in this case more specifically be called a “*crowdlender*”. In case the consideration for the allocation of funds are securities in return, the activity genuinely is “*crowdinvesting*”. However, speaking in general, the terms crowdinvestor and crowdinvesting covers both activities universally.

Such crowdfunding offers of lending and investment opportunities holds a threshold being capped at maximum EUR five (5) million per project owner calculated on an annual basis according to Art. 1 (2)(c). The cap means that each project owner can only seek and receive funds up to the maximum cap, whereof the project owner being considered as being the legal entity which the crowdfunding offer is conveyed through and thus subject to receipt of the funds.

Offers seeking more than EUR five (5) million are excluded from the ECSPR’s scope. Such offers would remain under the scope of existing regulations such as MiFID II and the EU Prospectus Regulation in addition to further local regulation in accordance with the given EU member states’ legislation subject to such offer.

## 8. INSTRUMENTS OF THE CROWDFUNDING PROCESS

The applicable instruments of which the crowdfunder can receive in return for funding of the project owner's project thus effecting the crowdfunding transaction are as follows.

### 8.1. LOANS

Loans are allowed as instrument of a crowdfunding transaction and CSPs may therefore facilitate the granting of loans between crowdfunders and project owners according to Art. 2(1)(a)(i). The crowdfunder then receives repayment of the loan including interest rates from the legal entity of the project owner in return for making funds available.

It is a requirement that the project owner assumes an unconditional obligation to repay the loan amount including accrued interest to the crowdfunders, in accordance with an instalment payment schedule according to Art. 2(1)(b). This means that the CSP and project owner must ensure that the crowdfunders are fully informed on when and how much is going to be paid out accordingly.

According to preamble (11) of the ECSPR, the facilitation of granting of loans that falls within the scope of the ECSPR shall be distinguished from the activity of a credit institution, which grants credits for its own account and takes deposits or other repayable funds from the public. This means that EU Member States must ensure that any local legislation does not require CSPs and project owners to have authorisations alike credit institutions etc. for the facilitation and granting of loans. Hereto, it may be seen that some EU Member States will need to amend their local legislation to ensure that it does not contradict with the ECSPR.

### 8.2. TRANSFERABLE SECURITIES

Securities are allowed as instrument of a crowdfunding transaction and CSPs may therefore facilitate the transfer of securities between crowdfunders and project owners according to Art. (2)(a)(ii). The crowdfunder then receives securities (i.e., shares) in the legal entity of the project owner (or in a "*special purpose vehicle*" designated for the project) in return for making funds available.

It is a requirement for such securities to be transferable. Restrictions on the transferability may apply to certain securities, according to local legislation of a given EU Member States and/or the articles of association etc. The ECSPR in Art. 2(1)(m) explicitly refers to Article 4(1)(44) of Directive 2014/65/EU ("MiFID II") for the exact definition of "*transferable securities*", according to which such transferable securities are the classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as:



- (a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;
- (b) bonds or other forms of securitised debt, including depositary receipts in respect of such securities;
- (c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures.

The transferable securities referred to in the ECSPR most commonly being the shares of a public limited company according to the reference to MiFID II's definition regarding securities which are negotiable on the capital market (as described above), the given public limited company being that of the project owner. However, the classification as transferable securities is subject to variations according to the national law of each EU Member State.

### 8.3. ADMITTED INSTRUMENTS FOR CROWDFUNDING PURPOSES

The ECSPR also provides for certain instruments being applicable for crowdfunding transactions other than loans (8.1) and transferable securities (8.2). Such instruments are defined in the ECSPR as '*admitted instruments for crowdfunding purposes*' and differs from the transferable securities mentioned above under item ii, the difference lying in the restrictions on such instruments, for example in regard to its transferability, in comparison to securities of a common public limited company which, in principle, always should be transferable (as defined in MiFID II).

The ECSPR defines the admitted instruments for crowdfunding purposes in Art. 2(1)(n) as meaning, in respect of each EU Member State, shares of a private limited liability company that are not subject to restrictions that would effectively prevent them from being transferred, including restrictions to the way in which those shares are offered or advertised to the public.

The ECSPR describes the process hereof in the same article (Art. 2(1)(a)(ii)) as the transferable securities mentioned under item ii, whereof the crowdfunder in the case of these admitted instruments for crowdfunding purposes most commonly will receive securities (i.e., shares) in the legal entity (being a private limited company) of the project owner (or in a "*special purpose vehicle*", being a private limited company, designated for the project) in return for making funds available.

The definition in the ECSPR shall as mentioned be applied in respect of each EU Member State's legislation, which is a result of the difference between EU Member States' local legislation on legal entity forms, of which the rules on transferability of shares differs between the different versions of the private limited company.

The ECSPR does in this regard set forth that project owners may seek and obtain funding from crowdfunders by transferring securities in a private limited company in return, albeit such crowdfunding offers in general are reminiscent of public offerings, which however, as mentioned above, shall be applied in respect of each EU Member State's legislation. A mentionable example is the Danish Companies Act's legislation regarding the restriction imposed on an ApS' (Danish version of a private limited company), whereof it under Danish law is illegal to make a public offering for the subscription of shares in an ApS according to Section 1(3) of the Danish Companies Act).

Presumably, Denmark and Italy is (to the best of our knowledge) the only EU Member State having such restrictions on the advertising or offering of securities in a private limited company to the public. However, we may see other EU Member States have similar issues, for example in regard to the transferability of shares in a private limited company in countries having a notarisation system in place (for example the German notary system).<sup>4</sup>

The German notary system and the mentioned restriction in the Danish Companies Act can arguably be criticized due to its inefficiencies and non-pragmatism, hence, the ECSPR fairly also can be critiqued for explicitly mentioning the need to see the definition in respect of each EU Member State instead of letting the ECSPR take precedence as *lex superior* ensuring further harmonization.

The ECSPR may nonetheless provide inspiration and food for thought for legislators in regard to whether such restrictions should be lifted or amended. For example, the politically government-established forum *The Danish Business Regulation Forum* (the "DBRF") has, alongside Dansk Erhverv, provided recommendation to the Danish parliament - with specific reference to the discrepancy between the Danish Companies Act and the ECSPR - to either delete in full the rule of Section 1(3) or, as alternative to deletion in full, specify that the rule does not apply in the case of an ApS advertising and offering for subscription of shares, provided such advertising and offering is conducted as means of crowdfunding through a crowdfunding platform<sup>5</sup>. The proposal to amend Section 1(3) of the Danish Companies Act was further endorsed and advanced by the interest organisations of Landdistrikternes Fællesråd (Joint Council of Rural Areas), Dansk Iværksætter Forening (Danish

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<sup>4</sup> Dentons, Notary Services in Germany (No date) <<https://www.dentons.com/en/find-your-dentons-team/practices/notary-services-germany/regional-practices/notary-services-in-germany>> accessed July 7 2022.

<sup>5</sup> Erhvervslivets EU- og Regelforum, 'Anpartsselskaber skal kunne lave crowdfunding med udbud af kapitalandele (No date). <https://regelforum.dk/anbefalinger/anpartsselskaber-skal-kunne-lave-crowdfunding-med-udbud-af-kapitalandele>, Accessed July 7 2022.

Entrepreneurs) and DI (Danish Industry) as means of providing businesses in rural areas of Denmark easier access to crowdfunding<sup>6</sup>.

The Danish government has answered the recommendation from the DBRF affirmative hence confirming that they will work to have the amendment of the legislation passed through by adoption of the Danish Parliament. Initially, the first forecast was that the amendment should be passed in early January 2022 (effective as of January 2023), as part of a bill containing measures providing less strict and fewer requirements towards start-ups and SMEs<sup>7</sup>. However, due to various reasons the processing, assessment and negotiations regarding the bill are currently postponed<sup>8</sup>.

In the case of Italy, the legislators have been innovative and acted on the conflicting provisions of the ECSPR and Italian national law. The result hereof was Italy making it an exception for private limited companies seeking funding through CSPs hence allowing private limited companies to offer shares to the public as long as this is conducted by means of crowdfunding through a CSP<sup>9</sup>.

## 9. DUTIES OF THE CROWDFUNDING SERVICE PROVIDER

CSPs are subject to investor protectionary requirements imposed by the ECSPR reminiscent of fiduciary duties and rules that follows from financial legislation imposed on credit institutions. According to the ECSPR, the CSPs *'shall act honestly, fairly and professionally in accordance with the best interests of their clients'* according to Art. 3(2) which is the general clause of the ECSPR. Further, alike the aforementioned, the ECSPR sets forth in preamble (18) that in order for maintaining a high standard of investor protection, to reduce the risks associated with crowdfunding and to ensure fair treatment of all *"clients"* (i.e., the crowdfunders or crowdlenders), CSPs should have in place a policy designed to ensure that projects on their platforms are selected in a *"professional, fair and transparent way"*, and that the crowdfunding services of the CSP also are provided in the same

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<sup>6</sup> Landsdistrekternes fællesråd, 'Lokal vækst med lokal kapital' (no date) [https://www.landdistrikterne.dk/wp-content/uploads/sites/5/2021/11/15103\\_LF\\_publication\\_FINAL.pdf](https://www.landdistrikterne.dk/wp-content/uploads/sites/5/2021/11/15103_LF_publication_FINAL.pdf), Accessed July 7 2022.

<sup>7</sup> Erhvervslivets EU- og Regelforum, 'Anpartsselskaber skal kunne lave crowdfunding med udbud af kapitalandele (No date) <https://regelforum.dk/anbefalinger/anpartsselskaber-skal-kunne-lave-crowdfunding-med-udbud-af-kapitalandele>, Accessed July 7 2022 (See the tab "Regeringens svar").

<sup>8</sup> Christoffer Lund-Hansen, 'Kollerup forventer at indkalde til forsinkede iværksætterforhandlinger for sommer' (March 1 2022). <https://www.altinget.dk/erhverv/artikel/kollerup-forventer-forsinkede-ivaerksaetterforhandlinger-begynder-foer-sommer>, Accessed July 7 2022.

<sup>9</sup> Greenberg Traurig, 'View from Italy: crowdfunding in Italy' (December 8 2014) (See "Legal Framework") <https://www.lexology.com/library/detail.aspx?g=ffa7d1bc-213b-46e4-a601-0f55db1b9901>, Accessed July 7 2022.

professional, fair and transparent way, thus referring to the same principles which the policy are based on.

The management body of the CSP must establish and implement the adequate policies and procedures needed to ensure effective and prudent management, including the segregation of duties, business continuity and the prevention of conflicts of interest, in a manner that promotes the integrity of the market and the interests of its clients according to Art. 4(1). Further, the responsible persons of the management body must be of good repute and have sufficient knowledge, skills and experience in the context of running the business of a CSP, the wording and context of the provision being very similar to the EU rules of the "*fit and proper*" regime imposed on the financial sector<sup>10</sup>.

Additionally, to the mentioned general investor protective provisions, the ECSPR also sets forth a number of specific duties and obligations to act which the CSPs must adhere to in order to stay compliant with the ECSPR. CSPs failing to stay compliant may lose their CSP-license as per the discretionary decision of the competent authority in the EU Member State of the CSP according to Art. 17(1)(e-f).

## 10. DISTINCTION OF INVESTOR SOPHISTICATION

For investor protective purposes, the ECSPR distinguishes between sophisticated and non-sophisticated investors according to preamble (42), hence allowing the ECSPR to introduce different levels of investor protection.

A sophisticated investor follows the definition in MiFID II according to Art. 2(1)(j) meaning any natural or legal person who is a professional client by virtue Section I (points 1-4) of Annex II to MiFID II or any natural or legal person who has the approval of the CSP to be treated as a sophisticated investor in accordance with the criteria and the procedure laid down in Annex II of the ECSPR. On the contrary, a non-sophisticated investor means an investor who is not a sophisticated investor according to Art. 2(1)(k).

Before a CSP allows a prospective non-sophisticated investor full access to invest in crowdfunding projects on their crowdfunding platform, CSPs must assess whether and which crowdfunding services offered are appropriate for the given prospective non-sophisticated investor. In order to conduct such assessment CSPs must ensure that prospective non-sophisticated investors on their crowdfunding platform becomes subject to an entry knowledge test as referred to in the description of the header in Art. 21. Further, CSPs must also ensure that prospective non-sophisticated investors becomes subject to a simulation test of their ability to bear loss, calculated as 10% of their net worth.

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<sup>10</sup> The European Central Bank, 'Guide to fit and proper assessments' (December 2021) [https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.fit\\_and\\_proper\\_guide\\_update202112~d66f230eca.en.pdf](https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.fit_and_proper_guide_update202112~d66f230eca.en.pdf), Accessed July 7 2022.

#### 10.1. ENTRY KNOWLEDGE TEST

The entry knowledge shall be based on information about the prospective non-sophisticated investor's experience, investment objectives, financial situation and basic understanding of risks involved in investing in general and in investing in the types of investments offered on the crowdfunding platform on the CSPs according to Art. 21(2). The information which CSPs must request, in accordance with according to Art. 21(2)(a-b), to conduct the entry knowledge test are information about:

- a) the prospective non-sophisticated investor's past investments in transferable securities or past acquisitions of admitted instruments for crowdfunding purposes or loans, including in early or expansion stage businesses;
- b) the prospective non-sophisticated investor's understanding of the risks involved in granting loans, investing in transferable securities or acquiring admitted instruments for crowdfunding purposes through a crowdfunding platform, and professional experience in relation to crowdfunding investments.

#### 10.2. SIMULATION TEST OF ABILITY TO BEAR LOSS

CSPs must also require prospective non-sophisticated investors to simulate their ability to bear loss, calculated as 10 % of their net worth. The simulation test shall be based on the following information according to Art. 21(5)(a-c):

- a) regular income and total income, and whether the income is earned on a permanent or temporary basis;
- b) assets, including financial investments and any cash deposits, but excluding personal and investment property and pension funds;
- c) financial commitments, including regular, existing or future commitments.

If a prospective non-sophisticated investor do not provide the information required to conduct the entry knowledge test, or if the CSP considers, on basis of the assessment made as per the outcome of the entry knowledge test, that the given prospective non-sophisticated investor has insufficient knowledge, skills or experience, the CSP must inform the prospective investor as deemed a non-sophisticated investor, that the services offered on their crowdfunding platforms may be inappropriate for said investor and issue a risk warning hereto. But the CSP shall not prohibit such non-sophisticated investor from access to the platform nor the available investments.

The risk warning shall clearly state the risk of losing the entirety of the money invested. Hereto it is a requirement, that such prospective non-sophisticated investors must expressly acknowledge that they have received and understood the warning issued by the CSP according to Art.

21(4). Subject to such acknowledgement, the non-sophisticated investor will be granted access to the platform.

Further, according to Art. 21(7), each time before a prospective non-sophisticated investor or non-sophisticated investor accepts an individual crowdfunding offer thereby investing an amount that exceeds the higher of either EUR 1,000 or 5 % of the given investor's net worth, such result being based on the outcome of the simulation test of the ability to bear loss, CSPs must ensure that such investor:

- a) receives a risk warning;
  - b) provides explicit consent to the crowdfunding service provider;
- and
- c) proves to the crowdfunding service provider that the investor understands the investment and its risks.

Such protective measures imposed towards the investors on the crowdfunding platforms can be seen as somewhat restrictive in the sense of being "limiting" towards investors. However, the outmost consequence of the measures is the issuance of a risk warning with the investor having to acknowledge receipt of the risk warning. Therefore, as also according to Art. 21(6), the rules do not prevent prospective non-sophisticated investors and non-sophisticated investors from investing in crowdfunding projects despite the outcomes of the entry knowledge test and/or simulation test of ability to bear loss.

Complementing the described distinction process, the ECSPR holds provisions regarding a pre-contractual reflection period of four (4) calendar days for non-sophisticated investors from the moment of the offer to invest or "the expression of interest" to invest in a crowdfunding offer according to Art. 22(3).

During the pre-contractual reflection period, the prospective non-sophisticated investor may, at any time, revoke his or her offer to invest or expression of interest in the crowdfunding offer without giving a reason and without incurring a penalty according to Art. 22(2).

Seen from a Danish perspective of law, the question can be raised of whether such investment in a crowdfunding offer conducted through an online platform is subject to Sections 18(2)(15) according to Section 18(3) of the Danish Consumer Protection Act. As per the Danish Consumer Protection Act, consumers making online purchases subject to said provisions, holds the right to cancel purchases in a period of fourteen (14) days from receipt of order. In case of such transaction investing in a crowdfunding offer being subject to said provisions, the pre-contractual reflection period of the ECSPR loses relevance, if the cancellation right was applicable anyways.

Reflecting further on the pre-contractual reflection period, it can be noted, that the Danish Consumer Protection Act is the result of the implementation of EU Directive 2011/83/EU on Consumer Rights (the "EU Consumer Rights Directive"), hence suggesting that the ECSPR's provisions on the pre-contractual reflection period may also lose some

relevance in other EU Member States, depending on the interpretation of the EU Consumer Rights Directive in the respective EU Member States.

The pre-contractual reflection period can also be seen in the context of Danish corporate law. According to Section 9 of the Danish Companies Act, the majority of all shareholder resolutions are subject to an obligation of registration and must hereto be filed and duly registered with the Danish Business Authority within two (2) weeks from passing the resolution (which may also conflict with the Danish Consumer Protection Act albeit solely being a Danish issue). In the case of crowdfunding offers, such registration-obliged shareholder resolution would presumably in most cases be investors' subscription (i.e. issuance) of new shares in the legal entity of the project owner.

According to Section 31 of the Danish Companies Act, investors cannot subscribe to new shares subject to reservations, i.e., a cancellation right. The pre-contractual reflection period may in this regard be seen as an subscription of shares subject to reservations.

The above highlights the fact, that ECSPR clearly is conflicting with the Danish Companies Act by its provisions on the pre-contractual reflection period. Further, the Danish Consumer Protection Act can be seen as "conflicting" by means of potentially taking away some relevance of the ECSPR's provisions on the pre-contractual reflection period.

## 11. DUE DILIGENCE ON PROJECT OWNERS

Due diligence requirements follow of the ECSPR's Art. 5, whereof CSPs are required to conduct a minimum level of due diligence on the project owner and related persons (i.e., the borrower or issuer of securities and related persons to that legal entity) prior to publishing the project sought funding for on the platform of the CSP.

The minimum level of due diligence which CSPs must perform (but not limited to) are to ensure that the project owner has no criminal record in respect of infringements of national legislation in fields of commercial law, insolvency law, financial services law, anti-money laundering law, fraud law or professional liability obligations and control that the project owner is not established in a non-cooperative jurisdiction, as recognised by the relevant Union policy, or in a high-risk third country according to the definition hereof in Art. 9(2) of Directive (EU) 2015/849 (Anti-Money Laundering Directive "AMLD").

## 12. HANDLING OF COMPLAINTS

The ECSPR further obligates CSPs have in place effective and transparent procedures for the prompt, fair and consistent handling of complaints received from crowdinvestors and crowdlenders and shall publish and make those descriptions of those procedures available on the platform according to Art. 7(1).

Further, the CSPs must make available standard templates for such complaints, and it must be free of charge for crowdfunders and crowdlenders to complain against the CSP. All complaints shall be investigated by the CSP in a timely and fair manner, and the CSP must hereafter communicate the outcome within a reasonable period of time to the complainant.

### 13. CONFLICTS OF INTEREST

Preventive and mitigative measures remedying the CSP's possible conflicts of interest are legislated in Art. 8. Measures legislated in the ECSPR are firstly, that CSPs are prohibited from having any "participation" in any crowdfunding offer on their crowdfunding platform, of which participation likely means that the CSP -licensed legal entity cannot invest in offers in the same way as if the CSP were a crowdfunder on the crowdfunding platform.

Managers, employees and shareholders are allowed to invest in projects offered through their crowdfunding platform, however, it must be clearly disclosed which natural and legal person(s) that are admitted as crowdfunders on the crowdfunding platform. Further, the investing of such persons in project offered through the crowdfunding platform must be carried out on the same terms and conditions as those offered to other crowdfunders.

Further, the CSP cannot accept as project owners, in relation to the crowdfunding services offered on their crowdfunding platform, their managers, employees, or shareholders of the CSP holding 20 % or more of the share capital (or voting rights). Additionally, any natural or legal person linked to those managers, employees or shareholders by control (i.e., close links), as defined in point (35)(b) of Article 4(1) of MiFID II, also cannot be accepted as project owners. The reference to MiFID II's definition of close links considerably widening the extent of the prohibition and thereby protecting investors from conflicting interests.

Preamble (19) of the ECSPR sets forth that CSPs should not accept any remuneration, discount or non-monetary benefit etc. for routing prospective crowdfunders' attention, and ultimately their investments, to a particular offer offered on their crowdfunding platform. However, CSPs are allowed to propose projects to individual crowdfunders based on one or more specific risk indicative parameters and factors without this being seen as "*investment advice*" as defined in MiFID II.

Such parameters and factors could be the type or sector of business activity or level of credit rating, which the individual crowdfunder explicitly has indicated in advance to the CSP, in practice most likely indicated in connection when signing up on the crowdfunding platform. These measures are taken by the regulators in order to ensure that prospective crowdfunders are offered investment opportunities on a neutral basis in accordance with the self-determined risk appetite of the crowdfunder.



The use of filtering tools shall be seen in the context of offering investment opportunities on a neutral basis. In this regard, the ECSPR protects CSPs since it explicitly states that such filtering tools or (investment) proposals based on parameters set by the crowdfunder in advance, will not be seen as “*investment advice*” as defined in MiFID II.

In accordance with the provisions of CSPs offering crowdfunders investment opportunities on a neutral basis and in accordance with the crowdfunders’ self-determined risk appetite, CSPs are allowed to have in place filtering tools on their crowdfunding platform. Such filtering tools must be based on criteria relating purely on objective information. Objective information in the context of a crowdfunding platform could, for example, be criteria as the economic sector, the instrument used (loans, securities etc.), key financial figures, interest rate (i.e., risk vs. reward) and risk category.

However, with risk category as filtering tool, it is provided that the crowdfunder is informed sufficiently regarding the calculation method of such risk category (i.e., full disclosure of calculation method). Similarly, with key financial figures as filtering tool, it is provided that such key financial figures are calculated without any scope for discretion according to preamble (21).

#### 14. PRUDENTIAL REQUIREMENTS

According to the ECSPR, crowdfunders are exposed to potential risks related to the CSPs, particularly “*operational risks*” and in order to protect clients against such risks, CSPs are subject to prudential requirements, according to preamble (24).

Prudential requirements subject to CSPs concerns capital requirements thus mitigating the operational risks of the CSP. The CSPs shall hereto, at all times, have in place prudential safeguards equal to an amount of at least the higher of either EUR 25,000, or one quarter of the fixed overheads of the preceding year, reviewed annually. The fixed overheads must include the cost of servicing loans for three months if the CSP also facilitates the granting of loans.

The mentioned capital requirement must be in place in either the form of “*own funds*”, meaning capital existing as Common Equity Tier 1 as referred to in the Capital Requirement Regulation 2013<sup>11</sup>, or by an insurance policy (or a comparable guarantee) covering the territories of the EU where crowdfunding offers are actively marketed on the crowdfunding platform.

The capital requirement may be fulfilled by a combination of Common Equity Tier 1 funds and an insurance policy (or a comparable

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<sup>11</sup> Common Equity Tier 1 according to Regulation (EU) No 575/2013 (the “Capital Requirement Regulation 2013” or “CRR”), Art. 26-30, after the deductions in full, pursuant to CRR Art. 36, without the application of threshold exemptions pursuant to CRR Art. 46 and 48.

guarantee), according to Art. 11(1-2). The specific required terms and characteristics of such insurance policy are governed by Art. 11(6-7). In regard to the fixed overheads, specific methods for the calculation hereof are governed by Art. 11(8-9).

#### 15. NON-OBLIGED ENTITY (ANTI-MONEY LAUNDERING)

It follows from the ECSPR's preamble (32), that CSPs can be exposed to money laundering and terrorist financing risks, which was underlined in a report of 26 June 2017 from the Commission to the European Parliament and the Council. Hence, the question was raised of whether the ECSPR should set forth CSPs as entities obligated to comply with the national law of the given EU Member State which implemented the AMLD.

In response, the Commission will in a report be assessing the necessity and proportionality of subjecting CSPs to the AMLD by adding CSPs to the obliged entities under the purposes of the AMLD. The Commissions' report assessing the question will come out by the latest of 10 November 2023. Under current applicable law, CSPs are not obliged entities under the AMLD, however, we may see gold plating from local legislators thus amending their national law, which implemented the AMLD, to include CSPs to the list of obliged entities. In Denmark CSPs will (very likely) be subject to the Danish AML Act.

#### 16. KEY INVESTMENT INFORMATION SHEET

CSPs shall provide prospective crowdfunders with a so-called Key Investment Information Sheet ("KIIS") which shall be made available in at least one of the official languages accepted by the given EU member states' FCA. The information of the KIIS must be in accordance with the provisions set forth Annex I of the ECSPR.

Apart from information on the project owner(s) and the crowdfunding offer, Annex 1 further provides, that the KIIS must, among others, contain descriptions and information on the crowdfunding process, conditions for the capital raising or funds borrowing (as applicable), information related to the offer of transferable securities and admitted instruments for crowdfunding purposes (as applicable), information on SPVs (as applicable), specific disclosures in regard to loans (as applicable), investor rights, risk factors and fees.

Art. 23 of the ECSPR further provides that the KIIS must contain specific disclosures stating that the crowdfunding offer at hand has not been verified or approved by competent authorities (i.e., ESMA or an FCA) and that the crowdfunder may suffer loss of the entire capital invested. Further, the disclosure notes for the investor, shall also state that the invested capital is not covered by the deposit guarantee scheme or investor compensation scheme. The disclosures are expressly and explicitly formulated in Art. 23(6)(b-c), and the KIIS must contain these

disclosures in unmodified form appearing directly underneath the title on the KIIS document.

The KIIS must be "*fair, clear and not misleading*" and shall not contain any footnotes, other than those with references, including quotations where appropriate, to the applicable law. The KIIS shall be presented on a stand-alone, durable medium that is clearly distinguishable from marketing communications and consist of a maximum of six sides of A4-sized paper format according to Art. 23(7).

Project owners are requested to notify the CSP in case of any changes in information regarding the crowdfunding offer, in order for the CSP to keep the provided KIIS updated at all times. CSPs must immediately inform investors who have made an offer to invest or expressed an interest in the crowdfunding offer about any material change to the KIIS according to Art. 23(8). If a CSP identifies an omission, mistake or inaccuracy in the KIIS that could have a material impact on the expected return of the investment, the CSP must signal such an omission, mistake or inaccuracy promptly to the project owner, who shall promptly complete or correct that information according to Art. 23(12).

The EU member states shall ensure that their laws, regulations and administrative provisions on civil liability apply to natural and legal persons apply to at least the project owner and its management body, who shall be responsible for the correctness of information regarding the KIIS. Those responsible for the KIIS and its information shall be clearly identified in the KIIS by, in the case of natural persons, their names and functions or, in the case of legal persons, their names and registered offices. Further, the responsible person(s) must declare that, to the best of their knowledge, the information contained in the KIIS are factual and that they have made no omissions in the provided information likely to affect its appearance towards prospective crowdfunders according to Art. 23(9-10).

## 17. CONCLUSION

Although the implementation deadline of the ECSPR in Denmark is closing up, the Danish FSA has still not made an application form available for existing and new crowdfunding providers to be licensed in Denmark. Consequently, applications must for now be made according to the application annex issued by ESMA, leaving the applicants with some uncertainty.

The Danish FSA has stated that the national application form will not be issued until the Commission has adopted and thus issued a delegated regulation on the regulatory technical standards regarding application process and scheme<sup>12</sup>.

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<sup>12</sup> Finanstilsynet (The Danish FSA), 'Finanstilsynet skal godkende udbydere af crowdfundingtjenester' (June 23 2022) [https://www.finanstilsynet.dk/Nyheder-og-Presse/Pressemeddelelser/2021/Crowdfunding\\_101121](https://www.finanstilsynet.dk/Nyheder-og-Presse/Pressemeddelelser/2021/Crowdfunding_101121), Accessed July 7 2022.

As the Danish FSA, moreover, require not less than three (3) months case processing time, the latest application date is 10 August 2022 if the applicant shall have obtained the license not later than the implementation deadline 10 November 2022, assuming that the application is mint and raises no comments from the Danish FSA. Though the new legal crowdfunding regime to a far extent is clear in a legal perspective, there are still uncertainty on some aspects, and as no Danish guidelines exist, this applies to the application process and practicalities as well.