

Mairead McGuinness
Commissioner
Financial Services, Financial Stability
and the Capital Markets Union
European Commission
Rue de la Loi / Wetstraat 200
1049 Brussels
Belgium

Ref: European Crowdfunding Service Providers for Business (Regulation (EU) 2020/1503)

Dear Commissioner McGuinness,

In light of the upcoming date of application of Regulation (EU) 1503/2020 of the European Parliament and of the Council on the European crowdfunding service providers for business (ECSPR)¹, I would like to share with the European Commission some important interpretation issues that emerged from ESMA's interaction with national competent authorities and market participants.

I would also like to mention the concern, shared with national competent authorities, regarding potential issues in relation to the respective dates of application of the ECSPR and of the technical standards to be adopted by the European Commission pursuant to the ECSPR.

Interpretation issues in relation to the ECSPR

ESMA is of the view that it would be highly beneficial to market participants and national competent authorities alike that the European Commission clarify the following uncertainties identified in the interpretation of the ECSPR. Such clarifications would also facilitate an orderly application of the ECSPR from 10 November 2021. Please note that, if needed, ESMA staff could be in touch with your services in the coming months to suggest additional issues deserving clarification.

¹ Regulation (EU) 1503/2020 of the European Parliament and of the Council of 7 October 2020 on the European crowdfunding service providers for business and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937 (OJ L 347, 20.10.2020, p. 1).

These interpretation issues of the ECSPR are summarised in the Annex and cover:

- the transitional period set out in Article 48 of the ECSPR with respect to crowdfunding services provided in accordance with national law;
- the meaning of 'business activity' pursuant to point (l) of Article 2(1) of the ECSPR;
- the legal status of the provision of 'individual portfolio management of loans' in light of points (a) and (c) of Article 2(1) of the ECSPR;
- the scope of the prohibition to prevent prospective non-sophisticated or non-sophisticated investors from investing in crowdfunding projects pursuant to the second subparagraph of Article 21(6) of the ECSPR;
- the scope of the prohibition made to crowdfunding service providers to pay or accept any remuneration, discount or non-monetary benefit for directing investors' orders to a particular crowdfunding offer made on their crowdfunding platform or to a particular crowdfunding offer made on a third-party crowdfunding platform;
- the respective responsibilities of crowdfunding service providers and project owners regarding the content of the key investment information sheet.

Issue in relation to the respective date of application of the ECSPR and the expected date of application of delegated and implementing acts to be adopted by the European Commission pursuant to the ECSPR

Pursuant to its Article 51, the ECSPR will apply on 10 November 2021. ESMA is due to submit the majority of its technical standards by the same date. Notwithstanding the significant number of mandates, ESMA endeavours to submit its technical standards even prior to this date, including some or all of the draft technical standards that ESMA is due to submit by May 2022. It is however already unavoidable that the full endorsement process as regulated under Articles 10 to 14 of Regulation (EU) 1095/2010 will not be concluded before 10 November 2021. As a consequence, the ECSPR will begin to apply significantly before the application of the technical standards the European Commission should adopt pursuant to the ECSPR.

This situation triggers concerns in terms of harmonisation and level playing field among Member States during the interim period between the date of application of the ECSPR and the date of application of the technical standards. It is also likely to make the authorisation process more complex both for competent authorities and applicants.

Slightly delaying the date of application of the ECSPR would enable a more orderly and harmonised application of this new and important piece of legislation.

ESMA greatly appreciates your attention to this matter and looks forward to hearing from you.



For any further information on the above, please do not hesitate to contact me or Evert van Walsum, Head of the Investors and Issuers Department at ESMA.

Yours sincerely,

Anneli Tuominen

cc.:

John Berrigan, Director General, DG Financial Stability, Financial Services and Capital Markets Union, European Commission

Annex – ECSPR interpretation questions

The transitional period with respect to crowdfunding services provided in accordance with national law (Article 48 of the ECSPR)

According to Article 48(1) of the ECSPR, “[c]rowdfunding service providers may continue in accordance with the applicable national law to provide crowdfunding services that are included within the scope of this Regulation until 10 November 2022 or until they are granted an authorisation referred to in Article 12, whichever is sooner” (emphasis added).

We would appreciate clarification on the meaning of “in accordance with the applicable national law” generally, and specifically whether the transitional period will apply in the following cases:

- (i) no national law specifically governing crowdfunding activities exists. However, national law provides that crowdfunding services can be performed by investment firms authorised under Directive 2014/65/EU²;
- (ii) no national law specifically governing crowdfunding activities exists. However, national law provides that crowdfunding activity requires neither authorisation nor a licence.

The meaning of ‘business activity’ in the context of the scope of the ECSPR (Article 2(1)(l) of the ECSPR)

Pursuant to point (l) of Article 2(1) of the ECSPR, a crowdfunding project means “*the business activity or activities for which a project owner seeks funding through the crowdfunding offer*”.

We would appreciate clarification on how the phrase “business activity or activities” shall be interpreted in the context of the ECSPR.

More specifically, we would welcome confirmation that this provision does not prevent *per se*:

- (i) public law entities or other non-profit entities from acting as project owners for the purposes of the ECSPR, or
- (ii) to seek funding for projects related to public infrastructure, utilities and other types of projects involving the provisions of public sector services.

Legal status of the activity of ‘individual portfolio management of loans’ (Article 2(1)(a) and (c) of the ECSPR)

Point (a) of Article 2(1) of the ECSPR defines a ‘crowdfunding service’ as “*the matching of business funding interests of investors and project owners through the use of a crowdfunding platform and which consists of any of the following activities*:

² Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

(i) *the facilitation of granting of loans;*

(ii) *the placing without a firm commitment basis, as referred to in point (7) of Section A of Annex I to Directive 2014/65/EU, of transferable securities and admitted instruments for crowdfunding purposes issued by project owners or a special purpose vehicle, and the reception and transmission of client orders, as referred to in point (1) of that Section, in relation to those transferable securities and admitted instruments for crowdfunding purposes.”*

Point (c) of Article 2(1) of the ECSPR defines ‘individual portfolio management of loans’ as “*the allocation by the crowdfunding service provider of a pre-determined amount of funds of an investor, which is an original lender, to one or multiple crowdfunding projects on its crowdfunding platform in accordance with an individual mandate given by the investor on a discretionary investor-by-investor basis*”.

We would appreciate clarification as to the legal nature of the activity of individual portfolio management of loans. We would specifically appreciate if the European Commission could confirm that it should be considered as forming part of the notion of crowdfunding service and, if yes, that it should be regarded as ancillary to the activity of facilitation of granting loans referred to in Article 2(1)(a)(i).

Entry knowledge test and simulation of the ability to bear loss - Effect (Article 21(6) of the ECSPR)

The second subparagraph of Article 21(6) of the ECSPR provides that “[p]rospective non-sophisticated investors and non-sophisticated investors shall not be prevented from investing in crowdfunding projects. [...]”.

We would appreciate if the European Commission could clarify the perimeter of this prohibition set out in the second subparagraph of Article 21(6). In particular, the Commission could confirm whether Article 21(6) only refers to the simulation of the investor’s ability to bear loss and it does not apply to the situation in which the investor has not proven that he/she understands the investment and its risks, in the situation covered under Article 21(7) (i.e. the investor should be prevented from investing in crowdfunding projects in a way which exceed thresholds set in Article 21(7) if she/he has failed to prove her/his understanding of the investment and its risk).

Applicability of the prohibition set out in Article 3(3) of the ECSPR

Article 3(3) of the ECSPR provides that “*crowdfunding service providers shall not pay or accept any remuneration, discount or non-monetary benefit for routing investors’ orders to a particular crowdfunding offer made on their crowdfunding platform or to a particular crowdfunding offer made on a third-party crowdfunding platform*”.

We would appreciate if the European Commission could clarify its interpretation of the term ‘routing of orders’ and confirm that, considering the embedded risk of conflicts of interest and the associated serious investor protection concerns associated with such practices, the prohibition set out in Article 3(3) applies broadly to any form of specifically directing prospective investors to a particular crowdfunding offer.

Respective responsibilities of crowdfunding service providers and project owners regarding the content of the key investment information sheet (KIIS)

Article 23(2), (8), (11) and (12) of the ESCPR set out the requirements regarding the preparation of the KIIS, its publication on the crowdfunding platform and the verification that needs to be undertaken to ensure the completeness, correctness and clarity of the information it contains.

We would appreciate if the European Commission could clarify the respective responsibilities of the project owner and the crowdfunding service provider in respect of those requirements in particular with respect to offers made in more than one Member State.