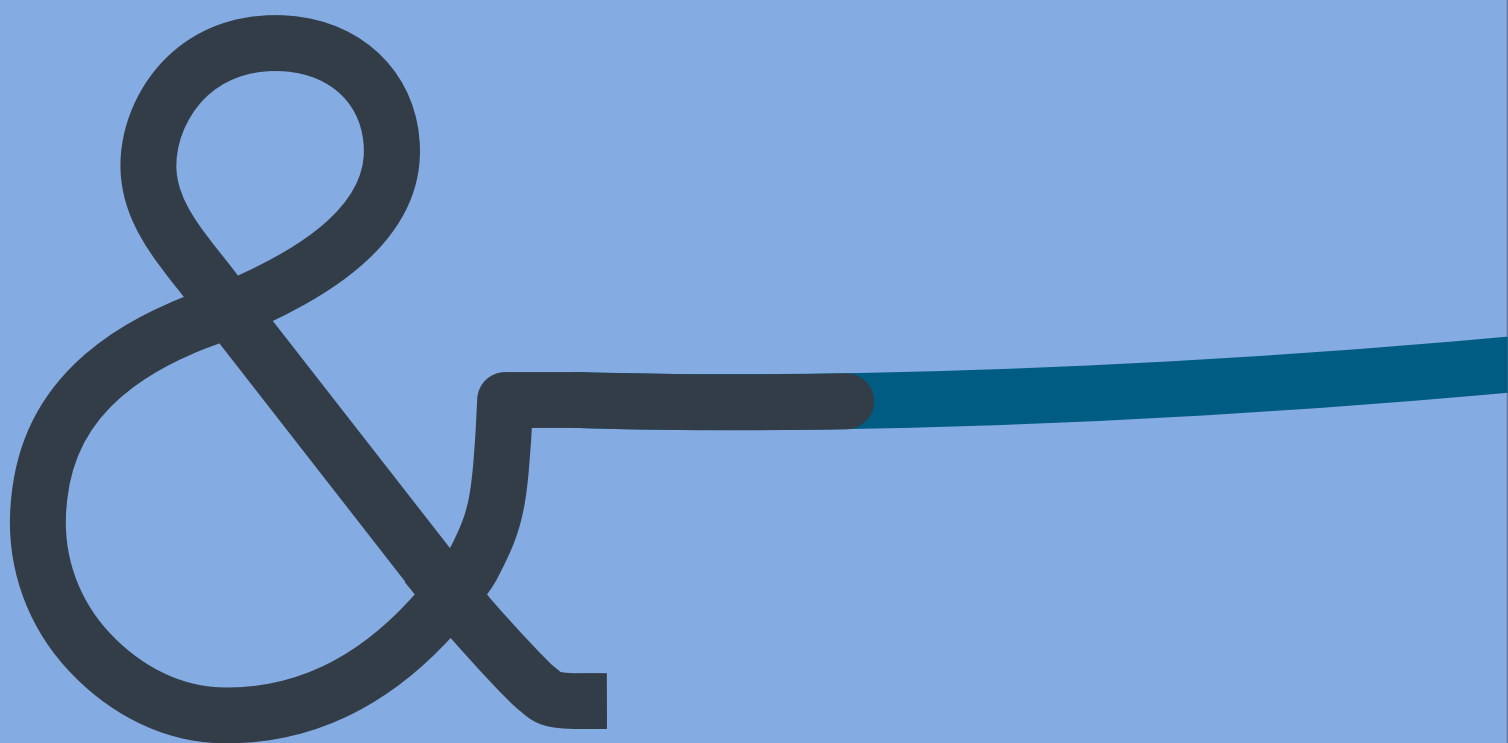


Bird & Bird

ECSPR

Guide to the European Crowdfunding
Regulation

March 2022



Contents

This is the Bird & Bird guide to the Regulation (EU) 2020/1503 (European Crowdfunding Service Provider Regulation – ECSPR). This guide will cover different topics in relation to the ECSPR and crowdfunding. It shall be updated from time to time.

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1. THE REGULATION FOR CROWDFUNDING SERVICES

On 10 November 2021, the Crowdfunding Service Provider Regulation ((EU) 2020/1503 - European Crowdfunding Service Provider Regulation - "ECSPR") became applicable. The services regulated therein (e.g. the facilitation of granting of loans or the placing without a firm commitment basis (i.e. the placement business in Germany) as well as the reception and transmission of client orders (i.e. the investment brokerage in Germany) of transferable securities and crowdfunding instruments, in each case via a platform) is subject to an independent licensing requirement, which will take precedence over the licensing requirements like those pursuant to section 34f of the German Trade Regulation Ordinance (GewO) and section 15 of the German Investment Firm Act (WpIG).

1.1 Scope

The ECSPR applies to crowdfunding services. Crowdfunding services are the facilitation of granting of loans or placing without a firm commitment basis and the reception and transmission of client orders of transferable securities and admitted instruments for crowdfunding purposes. The service must be offered through a publicly accessible internet-based crowdfunding platform.

Crowdfunding offers of more than EUR 5 million are excluded from the scope of the ECSPR. The threshold value is calculated for a period of 12 months. For crowdfunding offers exceeding EUR 5 million, the currently existing regulations apply as before (thus for Germany in particular the Capital Investment Act (*VermAnlG*), the EU Prospectus Regulation, the Securities Prospectus Act (*WpPG*) as well as the Trade Regulation Ordinance (*GewO*), the German Banking Act (*KWG*) or the Investment Firm Act (*WpIG*)).

Also, the ECSPR does not apply if the issuer (e.g. the borrower or project owner) is a consumer.

1.2 Crowdfunding instruments

The crowdfunding service can refer to three different instruments: Loans, transferable securities, as well as so-called "*admitted instruments for crowdfunding purposes*".

(a) Loans - problem case: subordinated loans - "genuine crowdlending".

First of all, loans can be brokered by a crowdfunding service provider. In Germany, there are different models: so-called "non-genuine crowdlending" and "genuine crowdlending".

In "non-genuine crowdlending", the loans are first issued via a fronting bank and then sold to the investor. In "genuine crowdlending", on the other hand, the loans are issued directly via the platform. In this process, subordinated loans are usually issued in Germany. This also serves to avoid the need for permission as a lending or deposit-taking business.

The intermediation of subordinated loans via a platform is unlikely to be covered by the ECSPR. The ECSPR defines "loan" as (among other things) *unconditionally repayable*. The German Federal Financial Supervisory Authority (BaFin) assumes in its previous administrative practice that subordinated loans are, however, precisely not necessarily repayable, but undergo a change in nature due to the equity-like liability function. This reasoning will also be transferable to the ECSPR. It should be noted, however, that a "securitisation" of the subordinated loans (for example through tokenisation) can turn loans (including the subordinated ones) into securities. This would then again be covered by the regulation of the ECSPR.

In addition, from a regulatory perspective, subordination is no longer required for crowdfunding if the loan is granted via a platform with an ECSPR licence. According to the ECSPR, Member States must ensure that project owners and investors do not require authorisation as a credit institution for the loans facilitated by the crowdfunding service provider. To this end, the German Banking Act has been amended as of 10 November 2021.

(b) Securities

Crowdfunding services may also relate to securities. Transferable securities are those referred to in MiFID II. The term was implemented in Germany in the Securities Trading Act.

Admitted instruments for crowdfunding purposes

Admissible instruments for crowdfunding purposes include, in principle, shares in a private limited liability company that are not subject to restrictions that would effectively prevent the transfer of the shares, including restrictions on the way in which those shares may be offered or advertised to the public. This statement needs to be interpreted under the laws of the relevant EU member state. However, in no case should this be understood to mean that shares in a German GmbH are an admitted instrument for crowdfunding purposes. The transfer of GmbH shares requires notarisation, so they are subject to a transfer restriction. The German market will continue to focus on loans or securities. As securities, shares in stock corporations may fall under regulation in the future.

1.3 Permission and scope of permission

Legal persons wishing to provide crowdfunding services require a licence from the competent authority of the Member State in which they are established. The competent authority in Germany is BaFin.

Crowdfunding service providers that have a permit under the ECSPR do not require an additional permit under the WpIG or the KWG. However, companies that have a licence under the WpIG or the KWG also require a licence as a crowdfunding service provider if they wish to provide crowdfunding services. However, the effort required for these institutions to obtain a permit as a crowdfunding provider is considerably lower. Information and documents already submitted when applying for a permit under Directives 2009/110/EC, 2013/36/EU, 2014/65/EU or (EU) 2015/2366, i.e. having a permit as an e-money institution, payment institution, credit institution, financial services institution or securities institution in Germany, do not have to be submitted again. Rather, the ECSPR considers it sufficient if the documents submitted as part of the original application for authorisation are still sufficiently up-to-date.

2. ONGOING REQUIREMENTS AND CONDUCT OBLIGATIONS FOR CROWDFUNDING SERVICES

2.1 Duties to act

The ECSPR imposes general requirements on crowdfunding service providers that are already known in a similar way from the German Securities Trading Act (WpHG) and MiFID II. Crowdfunding service providers must act "*honestly, fairly and professionally*" and in the best interests of their clients. Crowdfunding service providers should offer investors the crowdfunding offers in a neutral manner. Therefore, they must not pay or accept any remuneration, discount or non-monetary benefit for routing investor's orders to a particular crowdfunding offer.

In the context of brokerage, ECSPR basically wants the investor to make the investment decision in each case. When managing loan portfolios, the respective parameters set by the investor must be followed and the best result needs to be achieved for the investor. The decision-making process must then be disclosed to the investor. In this case, the investor does not have to make every investment decision himself.

Special purpose vehicles (SPVs) may only be used in certain cases. In this regard, the European Securities and Markets Authority (ESMA) has already published a document with questions and answers (Q&As).

2.2 Management

The ECSPR requires effective and prudent management. This includes segregation of duties, business continuity in the event of a crisis and prevention of conflicts of interest.

The Management shall establish systems and controls to assess the risks of the loans intermediated. The crowdfunding service provider shall take this assessment into account when setting the price for the crowdfunding offer.

2.3 Due diligence on project owners

Before a crowdfunding service provider publishes an offering, the project owner (such as the borrower or issuer of the securities) needs to be reviewed carefully. This includes that the crowdfunding service provider checks whether the project owner has certain criminal records. It must also check that the project owner is not located in a high-risk country for money laundering or in a country classified as non-cooperative.

2.4 Complaints

The ECSPR also sets out certain requirements on how complaints from clients are to be handled. ESMA has already consulted on regulatory technical standards on rules, standard formats and procedures for complaint handling to be submitted to the European Commission by 10 November 2021.

Customer complaints must be free of charge. They must be dealt with promptly, fairly and consistently. A description of these procedures must be published.

2.5 Conflicts of interest

The ECSPR aims to prevent conflicts of interest. Therefore, crowdfunding service providers must adopt corresponding internal regulations and disclose the nature and cause of conflicts of interest on their website. This principle is also known from the German Securities Trading Act (WpHG) and MiFID II.

In order to avoid conflicts of interest, the ECSPR also prohibits a crowdfunding service provider from holding interests in crowdfunding offers brokered on its platform. Project Owners holding 20% or more of the capital shares or voting rights of the crowdfunding service provider may not be intermediated. Likewise, members of the management or employees of the crowdfunding service provider as well as persons associated with the shareholders, members of the management or employees may not act as project owners. It must be disclosed, if these persons are admitted as investors on the platform. The investment of these persons must be made on the same terms as those offered to other investors.

To this end, ESMA has already consulted on regulatory technical standards on the detailed requirements to be submitted to the European Commission by 10 November 2021.

2.6 Capital requirements

The capital requirements are simplified compared to credit institutions and financial services institutions/investment firms. Thus, a minimum capital of one quarter of the previous year's annually reviewed fixed overheads, but at least EUR 25 000, is required. The fixed overheads also include the costs of servicing loans if the crowdfunding service provider also arranges the granting of loans. The capital must be available either in the form of own funds (Common Equity Tier 1 items according to CRR), in the form of insurance or comparable guarantee or a combination of both. Special rules exist for credit institutions, financial services institutions/investment firms, payment institutions and e-money institutions.

3. CURRENT CROWDFUNDING MODELS UNDER THE CROWDFUNDING REGULATION

3.1 Credit-based crowdfunding - crowdlending

Crowdlending platforms have so far had various design options - and thus always the requirement to find out whether and which licence they need. This ranged from a permit as a credit broker under the German Trade Regulation Act (*GewO*) to a MiFID-license under the German Banking Act (*KWG*) or the German Investment Firm Act (*WpIG*). In the future, permission under the ECSPR will be sufficient for crowdlending platforms (within the scope of the ECSPR). This will facilitate the structuring and authorisation process for crowdlending platforms.

Crowdlending platforms often work together with licensed institutions (fronting banks) acting on their own behalf and/or broker subordinated loans. As already mentioned above, the ECSPR remedies this situation to the extent that project owners and investors on a crowdlending platform will not need a licence as a credit institution in the future if they accept or grant the loans brokered by the crowdlending service provider.

However, crowdlending platforms will only be allowed to provide payment services in the future if they are payment service providers under the Payment Services Supervision Act or its EU legal basis, the PSD2, or under the law of another EU member state.

3.2 Investment-based crowdfunding - crowdinvesting

Crowdinvesting, unlike crowdlending, does not involve brokering a loan, but rather profit-sharing, debt instruments or shares in the project owners.



Crowdfunding platforms have also generally required a permit under the German Trade Regulation Act (*GewO*), the German Banking Act (*KWG*) or the German Investment Firm Act (*WpIG*). Here too, permission under the ECSPR will suffice for crowdlending platforms in the future.

In addition, there is usually also a prospectus obligation under the Prospectus Regulation and the German Securities Prospectus Act (*WpPG*) or the Asset Investment Act (*VermAnlG*). Insofar as the crowdfunding platform meets certain requirements, it is possible to prepare only a securities information sheet or an asset investment information sheet instead of a prospectus. The crowdfunding platform must therefore always delimit and check which documents it must provide to the investor. In the future, the key investment information sheet (KIIS) will take over investor education. This also simplifies the work of the crowdfunding platform.

3.3 Tied Agents

A certain number of crowdfunding platforms currently act as tied agents for credit institutions or investment firms. Both the German Banking Act (*KWG*) and the German Investment Firm Act (*WpIG*) make special provisions for tied agents. As a tied agent, the crowdfunding platform operates under the liability umbrella of the institution and performs the regulated activity exclusively for the account and under the liability of the respective institution.

It is true that the ECSPR does not have a corresponding regulation. However, the regulations on the tied agents are only a special form of outsourcing. The ECSPR also contains provisions on outsourcing. Recital 27 of the ECSPR also emphasises that

"In the interest of the efficient and smooth provision of crowdfunding services, crowdfunding service providers should be allowed to entrust any operational function, in whole or in part, to a third party provided that such outsourcing does not impair the quality of crowdfunding service providers' internal controls or the effective supervision of the crowdfunding service providers. Crowdfunding service providers should however remain fully responsible for compliance with this Regulation with respect to the outsourced activities."

However, the requirements of the ECSPR (regulated in Article 9 of the ECSPR) for outsourcing are very rudimentary compared to the specific regulations of the German Banking Act (*KWG*) and German Investment Firm Act (*WpIG*) (specified in BaFin's MaRisk and Delegated Regulation (EU) 2017/565).

The ECSPR can be understood here in such a way that full outsourcing to third parties can take place as long as ultimate responsibility remains with the crowdfunding service provider and the quality of the crowdfunding service provider's internal control is not compromised.

However, it is problematic that the current German crowdfunding platforms, which act as tied agents, usually operate the platform themselves and only provide the regulated activity under the liability umbrella. Whether this division of activity and responsibility is also possible under the ECSPR seems questionable. Under the ECSPR, the crowdfunding service must be provided with the help of a crowdfunding platform operated by the crowdfunding service provider. Therefore, attention must be paid here to the proper design of the cooperation and outsourcing. It remains to be seen whether it will be possible to set up a service-crowdfunding financing platform comparable to the well-known service-fund manager under the German Capital Investment Code (*KAGB*) or white-label solutions for other banking services.

4. ANTI-MONEY LAUNDERING OBLIGATIONS OF CROWDFUNDING SERVICE PROVIDERS

4.1 Obligated entity?

In the context of the obligations under money laundering law, the first question is whether crowdfunding service providers are obliged entities within the meaning of the German Money Laundering Act (*Geldwäschegesetz - GwG*) (the implementation of the European Money Laundering Directives). Obligated entities are subject to certain duties of care and organisation, such as customer due diligence (KYC) when entering into business relationships, such as the identification of the contractual partner, or certain risk management requirements.

The German Money Laundering Act and also the European directives on money laundering do not include crowdfunding service providers in the list of obliged entities so far. Instead, after consulting the European Securities and Markets Authority (ESMA) and the European Banking Authority (EBA), the European Commission is to submit a report to the European Parliament and the Council by 10 November 2023 in which

it will assess, among other things, the necessity and proportionality of subjecting crowdfunding service providers to obligations for compliance with national implementations of the Money Laundering Directive.

Should the Commission's report come to the conclusion that the money laundering risk of swarm financing service providers is higher than currently assumed, it is likely that crowdfunding service providers will be included in the scope of the Money Laundering Directive. However, until such time as the adapted Money Laundering Directive is implemented (or gold-plating is made in Member States), crowdfunding service providers are not obliged entities under money laundering law.

4.2 Other obligations in relation to money laundering law

Even if crowdfunding service providers are not themselves subject to anti-money laundering obligations, there are nevertheless regulations that serve to combat money laundering:

(a) Examination in the permission procedure

The competent authority checks the reliability of the management of the crowdfunding service provider as part of the application for permission. For this purpose, the applicant must provide evidence that the management and all shareholders who hold at least 20% of the crowdfunding service provider have no criminal record for violations of anti-money laundering law. For this purpose, a certificate of good conduct, which does not contain any entries, together with a declaration of reliability (as known from the previous licensing procedures) will probably be sufficient.

In addition, the permission of the crowdfunding service provider can also be withdrawn if it commits money laundering offences.

(b) Examination of the project owners

The crowdfunding service provider is required to conduct an audit of the project owners. This audit can be considered as a kind of *KYC-light* (*know your customer*). The ECSPR does not specify the exact scope of the audit.

However, as a minimum requirement, it requires, among other things, that the crowdfunding service provider obtains evidence that the project owner has no criminal record for violations of anti-money laundering laws. In addition, the crowdfunding service provider must verify that the project owner is not established in a country or territory that is considered a "non-cooperative jurisdiction" or a "high-risk third country" under the Money Laundering Directive.

(c) Payment services

The requirement that the crowdfunding service provider may only cooperate with authorised payment service providers (or must itself hold such authorisation) in order to provide the payment services necessary for crowdfunding is also a precautionary measure from a money laundering perspective. Thus, the payment service provider (or the crowdfunding service provider that itself holds such a licence) is obliged to identify the customers.

(d) General compliance principles

In addition, crowdfunding service providers should also observe the general compliance principles in order to avoid money laundering. A money laundering case within the crowdfunding platform would not only create bad press for the crowdfunding service provider, but also carries the risk of criminal liability for the management and employees of the crowdfunding service provider.

5. THE KEY INVESTMENT INFORMATION SHEET (KIIS) FOR CROWDFUNDING OFFERS

5.1 Basic obligation

Crowdfunding service providers must provide a so-called key investment information sheet (KIIS) for crowdfunding offers. The KIIS is to be prepared by the project owner.

As the ECSPR has a single European market in mind, it also imposes requirements on the language of the KIIS. The KIIS must be written in the official language of the competent Member State (or another language accepted by its competent authority). In addition, to the extent that the crowdfunding service provider also promotes its offers in other Member States, the KIIS shall be made available to investors in the official language

of that Member State (or in a language accepted by the competent authorities of that Member State). Other language versions may be published by the crowdfunding service provider at any time. The European Securities and Markets Authority (ESMA) will publish on its website the languages accepted by the relevant competent authority for a Member State.

5.2 Applicability/transitional rules

As is known, the ECSPR is to be applied as of 10 November 2021. At the same time, there is a transitional period at least until 10 November 2022. During the transitional period, crowdfunding service providers (to the extent they have not yet been granted permission under the ECSPR) may continue to provide crowdfunding services falling within the scope of the ECSPR in accordance with the applicable national legislation.

The impact of the transitional rules on the KIIS is not clearly set out in the ECSPR. However, according to our interpretation, crowdfunding can initially continue as before (i.e. a securities or asset investment prospectus or a securities or asset investment information sheet can only be replaced by a KIIS once the crowdfunding service provider has received its permission under the ECSPR). The question of whether the previous prospectus requirements continue to apply for the time being is of particular importance, especially with regard to the potential liability of the crowdfunding service provider and its management.

5.3 Contents of the key investment information sheet

The ECSPR regulates in its Annex I the content of the KIIS. This must contain information on various categories:

(a) Information about the project owner and the crowdfunding project

The KIIS must provide information on the project owner. This includes the project owner's identity, legal form, ownership, management and contact details. In addition, all natural and legal persons responsible for the information in the KIIS must be indicated. These persons must make the following declaration in the KIIS:

“The project owner declares that, to the best of its knowledge, no information has been omitted or is materially misleading or inaccurate. The project owner is responsible for the preparation of this key investment information sheet.”

The KIIS must identify the main activity of the project owner and the products and/or services offered by the project owner. Certain financial figures must be disclosed and, if the project owner publishes annual accounts, a link to the most recent annual accounts must be included in the KIIS.

The KIIS must also describe the crowdfunding project. The purpose and the main characteristics of the project must be stated.

(b) Main features of the crowdfunding scheme and, as applicable, conditions for the capital raising or funds borrowing

The KIIS must describe the crowdfunding process. For this purpose, the minimum target capital to be raised or target funds to be borrowed in the crowdfunding offer as well as the number of offers already carried out for the crowdfunding project by the project owner or crowdfunding service provider must be named. The deadline for reaching the target capital or target funds must be stated.

The KIIS must provide information on what happens if the target capital or target funds are not reached by the deadline. If there is a maximum bid amount in addition to the target capital or target funds, information must also be provided about this.

For the assessment of the project by the investors, the own funds committed to the project by the project owner is also relevant. Therefore, the amount of own funds provided by the project owner for the crowdfunding project must be disclosed. Any changes in the composition of the project owner's capital or loans in connection with the crowdfunding offer must also be disclosed.

Non-sophisticated investors (for the criteria for classification, see Annex II of the ECSPR) must be made aware of the existence and conditions of a pre-contractual reflection period.

(c) Risk factors

The KIIS shall set out the main risks associated with the funding of the crowdfunding project, the sector, the project, the project owner and the transferable securities, admitted instruments for crowdfunding purposes or loans, including geographical risks, where applicable.

(d) Transferable securities and admitted instruments for crowdfunding purposes

The content requirements distinguish between the requirements for KIIS for transferable securities and admitted instruments for crowdfunding purposes (i.e. *investment-based crowdfunding*) on the one hand and loans (i.e. *lending-based crowdfunding*) on the other.

For *investment-based crowdfunding*, the following information must be provided:

(i) Information related to the offer of transferable securities and admitted instruments for crowdfunding purposes

The KIIS must set out the total amount and type of transferable securities or admitted instruments for crowdfunding purposes ("**investment instruments**") to be offered.

The subscription price and the possibility of oversubscription must also be indicated. The KIIS must contain the subscription and payment terms.

The KIIS must contain information on the custody of the investment instruments for the investor and their delivery to the investor.

If the investment is secured by a guarantee or collateral, the project owner must provide the identity, legal form and contact details of the guarantor or collateral provider, as well as information on the nature and terms of the guarantee or collateral.

To the extent that the project owner undertakes to repurchase the investment instruments, the investor must be informed thereof and the period for such repurchase must be specified in the KIIS.

To the extent that the investment vehicle is not equity based, the nominal interest rate, the date from which interest is payable, the due dates for interest payments, the maturity and the applicable yield must be designated in the KIIS.

(ii) Information on special purpose vehicles

The project owner must indicate in the KIIS whether an SPV is interposed between the project owner and the investor. If this is the case, the contact details of the special purpose vehicle must be provided.

(iii) Investor rights

The KIIS must also present the rights of investors. This includes, on the one hand, the rights associated with the investment instruments, but also possible restrictions to which the investment instruments are subject, for example on the basis of agreements in partnership agreements or other agreements that prevent transferability (restrictions on transferability).

The restrictions on the transfer options of the investment instruments must be described. In addition, the other ways in which an investor can exit the investment must also be presented in the KIIS. Insofar as the investment instrument is an equity instrument, the distribution of capital and voting rights before and after the capital increase resulting from the offer (assuming that all investment instruments are subscribed) must be stated.

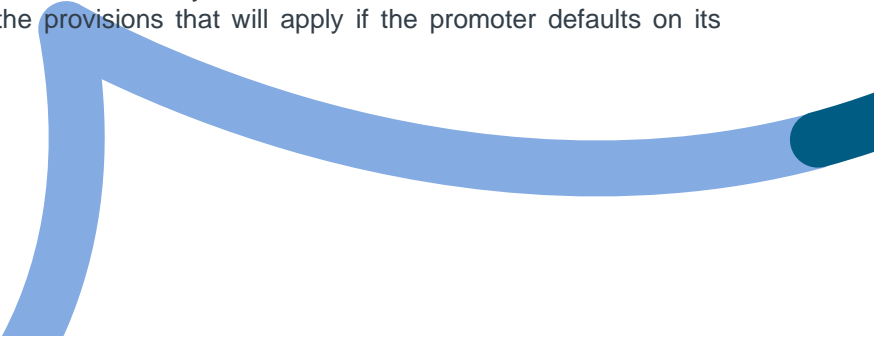
(e) Disclosures related to loans

For *lending-based crowdfunding* the following information must be provided.

If the crowdfunding offer provides for credit intermediation, the above information does not fit. Therefore, a KIIS for loans need not include this information. Instead, the KIIS must include the following information:

The project owner must provide information in the KIIS on the type, maturity and terms of the loan. The applicable interest rates or other investor remuneration, if any, must be presented. Risk mitigation measures, including available guarantors or other types of collateral, must also be disclosed.

The KIIS must include the repayment schedule for the loan amount and payment of interest. In addition, any default by the project owner on loan agreements in the last five years must be disclosed. The KIIS must also include the servicing of the loan and set out the provisions that will apply if the promoter defaults on its obligations.



(f) Fees, information and legal redress

Further disclosure obligations arise in relation to the fees charged to the investor in connection with the investment and the costs incurred by the investor in connection with the investment, including administrative costs as a result of the disposal of admitted instruments for crowdfunding purposes.

The KIIS must provide information on where and how additional information on the crowdfunding project, the project owner and the special purpose vehicle can be requested free of charge.

With regard to the project owner, the KIIS must also include any default by the project owner on loan agreements in the previous five years.

In addition, the KIIS must indicate to whom the investor may address a complaint about the investment or the conduct of the project owner or the crowdfunding service provider and the manner in which this may be done.

(g) Information on individual portfolio management of loans to be provided by crowdfunding service providers

The crowdfunding service provider is subject to certain disclosure obligations if it manages loan portfolios for investors. The KIIS must then contain information on the identity, legal form, ownership, management and contact details.

The KIIS must disclose the minimum and maximum interest rate for loans, if any, available to an investor's individual portfolio. Similarly, the minimum and maximum maturity of loans, if any, available to an investor's individual portfolio must be disclosed.

Depending on the design of the administration, the range and distribution of risk categories into which the loans fall, default rates and a weighted average interest rate per risk category with a further breakdown by years in which the loans were granted through the crowdfunding service provider shall be disclosed.

The crowdfunding service provider must also disclose the key elements of the internal methodology used to assess the credit risk of each crowdfunding project and to determine the risk categories.

Where a target rate of return on investment is offered in respect of investments, an annual target rate and its confidence interval of this annualized target rate over the investment period, taking into account fees and default rates, must be provided.

The crowdfunding service provider must indicate procedures, internal methods and criteria for the selection of crowdfunding projects for the investor's individual loan portfolio. Coverage and terms of applicable capital guarantees must be presented. The servicing of portfolio loans must be disclosed, including for cases where the project owner fails to meet its obligations.

The crowdfunding service provider must outline its risk diversification strategies in the KIIS and indicate the fees payable by the project owner or investor, including any deductions for interest payable by the project owner.

5.4 Presentation in the key investment information sheet

The KIIS shall be fair, clear and not misleading. It shall not contain footnotes, with the exception of references to, and where appropriate quotations from, applicable law. It shall be provided in a stand-alone, durable medium, clearly distinguishable from marketing communications, and shall not exceed six sides of A4-sized paper format if printed.

5.5 Mandatory disclaimer and risk warnings

The ECSPR requires the inclusion of the following text as a disclaimer directly under the title of the KIIS:

“This crowdfunding offer has been neither verified nor approved by competent authorities or the European Securities and Markets Authority (ESMA).

The appropriateness of your experience and knowledge have not necessarily been assessed before you were granted access to this investment. By making this investment, you assume full risk of taking this investment, including the risk of partial or entire loss of the money invested.”

In addition, the KIIS must contain the following risk warning:

*“Investment in this crowdfunding project entails risks, including the risk of partial or entire loss of the money invested. Your investment is not covered by the deposit guarantee schemes established in accordance with Directive 2014/49/EU of the European Parliament and of the Council (*1). Nor is your investment covered by the investor compensation schemes established in accordance with Directive 97/9/EC of the European Parliament and of the Council (*2).*

You may not receive any return on your investment.

This is not a savings product and we advise you not to invest more than 10 % of your net worth in crowdfunding projects.

You may not be able to sell the investment instruments when you wish. If you are able to sell them, you may nonetheless incur losses.

*(*1) Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ L 173, 12.6.2014, p. 149)."*

*(*2) Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes (OJ L 84, 26.3.1997, p. 22)."*

German crowdfunding service providers are already familiar with similar requirements from the German Investment Act (*VermAnlG*), although the wording of the ECSPR differs from the German Investment Act (*VermAnlG*).

6. THE TRANSITION PERIOD FOR CROWDFUNDING SERVICE PROVIDERS

In practice, the question arises as to how crowdfunding service providers can handle the transition between the old national crowdfunding regime and the regulations of the ECSPR best.

6.1 Basic regulations of the ECSPR

The ECSPR lays down basic rules on its entry into force and the date of applicability. It provides a transition period to allow crowdfunding service providers to adjust to the new requirements and apply for a license. The transition period started on 10 November 2021 and is to run (initially) until 10 November 2022. Crowdfunding service providers will therefore not have to comply with the requirements of the ECSPR until 10 November 2022 or from the date of obtaining license under the ECSPR. The earlier of the two dates is deemed to be the decisive date. This means that for the time being, crowdfunding service providers can continue to provide crowdfunding services under the previously applicable national regulations. The main German regulations are set out in the German Banking Act/Investment Firm Act (*Kreditwesengesetz/Wertpapierinstitutsgesetz*), the German Trade Regulation Ordinance (*Gewerbeordnung*) and the German Asset Investment Act (*Vermögensanlagegesetz*).

The European Commission may extend the transitional period once by 12 months.

6.2 The license requirement in the transition

Currently operating crowdfunding service providers can now submit their license applications to the national supervisory authorities, in Germany the BaFin. The first crowdfunding service providers have already done so. It can be assumed that the transitional period until 10 November 2022 should be sufficient for BaFin to process the applications and grant the license. The particular difficulty, however, is that the EU delegated acts still exist only as draft regulatory technical standards of ESMA and have not yet been officially adopted by the European Commission.

Until the granting of the licence (or 10 November 2022), it remains the case that these crowdfunding service providers (depending on the structure of their activities) require and must maintain a licence under the German Banking Act/Investment Firm Act or the German Trade Regulation Ordinance.

ESMA's Q&As on the ECSPR clarify that the transitional regime only applies to previously operating crowdfunding service providers. If someone wants to take up the activity for the first time, he must first successfully go through the license procedure.

6.3 Prospectus obligations in transition

For crowdfunding offers, either investor information for asset investments (i.e. asset investment information sheets (VIB) or asset investment prospectuses) or securities (i.e. securities information sheets (WIB) or securities prospectuses) are currently prepared under German law. These must meet the requirements of the German Asset Investment Act or the EU Prospectus Regulation in conjunction with the German Securities Prospectus Act.

Under the ECSPR, crowdfunding service providers must provide potential investors with an key investment information sheet prepared by the project owners for each crowdfunding offering. The ECSPR and the draft regulatory technical standards prepared by ESMA impose certain requirements on the key investor information sheet. These differ in content from the requirements for asset investment information sheets (VIB), asset investment prospectuses, securities information sheets (WIB) and securities prospectuses. This poses a particular difficulty for crowdfunding service providers who are still in the licensing process. From the time license is granted, the provision of previous investor information (such as the VIB) does not meet the legal requirements. Ongoing offers must be interrupted and a key investment information sheet must be published in accordance with the requirements of the ECSPR. The challenge is increased by the fact that it is not a fixed date from which the key investment information sheets are required, but this is linked to the individual date of the granting of license by the supervisory authority. There are no transitional provisions or regulations to protect the status quo, as was the case with the German Retail Investor Protection Act (*Kleinanlegerschutzgesetz*).

We therefore recommend that crowdfunding service providers discuss this problem with BaFin in the licensing procedure and, in case of doubt, prepare two investor information sheets for an offer, one under the previous legal situation and one key investment information sheet.

7. CROWDFUNDING REGULATION AND CRYPTO TOKENS

7.1 Are crypto tokens covered by the ECSPR at all?

The recital (15) of the ECSPR make a statement about crypto tokens when it refers to initial coin offerings:

"Whilst initial coin offerings have the potential to fund SMEs, innovative start-ups and scale-ups, and can accelerate technology transfer, their characteristics differ considerably from crowdfunding services regulated under this Regulation."

However, this does not mean that all crypto tokens fall outside the scope of the ECSPR. Both the German version ("*Ausgabe neuer virtueller Krypto-Token*") and the French version ("*offres initiales de jetons*") are somewhat unclear in their respective language versions. If we look at the English version, on the other hand, it does not speak of crypto tokens, but of the term "*initial coin offerings*", which is a common term in the market. Initial coin offerings, or ICOs for short, are not generally understood to mean the issuance of any tokens, but usually only those that qualify as utility tokens or currency tokens in general usage. The issuance of security tokens, on the other hand, is referred to as a Security Token Offering - STO.

It therefore seems obvious that only ICOs should not fall under the ECSPR, whereas STOs can in principle fall under the ECSPR. This is also supported by the indication that the characteristics of ICOs differ too much from those of crowdfunding. This is because security tokens do have parallels to crowdfunding, as will be shown in the further course of this article. Therefore, investment instruments do not fall outside the scope of the Regulation solely because they are crypto token.

7.2 Which tokens are covered by the ECSPR?

The ECSPR applies in principle to crowdfunding services. These are activities for the intermediation of loans or the placement or intermediation of transferable securities and instruments authorised for crowdfunding purposes. Thus, tokens can fall under the ECSPR if they are a loan, a transferable security or an instrument authorised for crowdfunding purposes.

Utility tokens and currency tokens are generally structured in such a way that they do not fall under either the concept of a loan or the concept of a transferable security. The ECSPR defines loan as

"an agreement whereby an investor makes available to a project owner an agreed amount of money for an agreed period of time and whereby the project owner

assumes an unconditional obligation to repay that amount to the investor, together with the accrued interest, in accordance with the instalment payment schedule;"

Utility tokens are usually structured in such a way that the acquirer receives a good or service, but no repayment of the amount paid. Currency tokens are also not usually structured as a loan.

Security tokens, on the other hand, regularly fall under the concept of transferable securities - at least in the opinion of the German Federal Financial Supervisory Authority (BaFin).

7.3 What special features apply to security tokens issued by way of crowdfunding?

As BaFin qualifies security tokens as transferable securities, their issuance is subject to the preparation and publication of a securities prospectus within the meaning of the Prospectus Regulation (Regulation (EU) 2017/1129). Under an exemption from the Securities Prospectus Act, the preparation of a securities information sheet may also be sufficient. This obligation now changes for security tokens issued by way of crowdfunding.

The obligation to publish a prospectus under the Prospectus Regulation will not apply in the future if the offer is made by an authorised crowdfunding service provider and the threshold of less than EUR 5,000,000 has been met. The German Securities Prospectus Act also does not apply to such an offer.

Thus, in the future, only the regulations of the ECSPR are applicable to STOs via crowdfunding service providers, but not those of the Prospectus Regulation or the Securities Prospectus Act.

8. ESMA PUBLISHES REPORTING FROM NATIONAL SUPERVISORY AUTHORITIES

ESMA has published an update of the various notifications it has received from national supervisors (as of 17 January 2022). The full reporting from ESMA is available [here](#).

8.1 Types of limited liability companies and their shares - Art. 2(3) ECSPR

The national supervisory authorities (in Germany, BaFin) are to inform ESMA annually of the types of limited liability companies and their shares offered under the ECSPR.

Various supervisory authorities have reported company forms. Other supervisory authorities, including the German BaFin and the Austrian FMA, have reported that there are no company forms. This means that shares in GmbHs remain excluded from the scope of application of the ECSPR and equity crowdfunding remains difficult.

EU Member State	National Competent Authority	Types of limited liability companies and their shares
Austria	Financial Market Authority (FMA)	None
Czech Republic	Czech National Bank (CNB)	None
Germany	Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin)	None
Greece	Hellenic Capital Market Commission (HCMC)	None
Spain	Comisión Nacional del Mercado de Valores (CNMV)	Sociedad de Responsabilidad Limitada (S.R.L.) or Sociedad Limitada (S.L.)
Finland	Finanssivalvonta (FSA)	Finnish: Osakeyhtiö (Oy) Swedish: Aktiebolag (Ab)
Hungary	Magyar Nemzeti Bank (MNB)	None
Ireland	Central Bank of Ireland	Irish: Teoranta (Teo) - Cuideachta Ghníomhaíochta Ainmnithe (C.G.A.) English: Private company limited by shares (LTD) - Designated activity company (DAC)

Italy	Commissione Nazionale per le Società e la Borsa (CONSOB) and Bank of Italy	Società a responsabilità limitata (S.r.l.)
Latvia	Financial and Capital Market Commission (FCMC)	Sabiedrība ar ierobežotu atbildību (SIA)
Malta	Malta Financial Services Authority (MFSA)	None
The Netherlands	Netherlands Authority for the Financial Markets (AFM)	Besloten Vennootschap (B.V.)
Romania	Romanian Financial Supervisory Authority (ASF)	Societate cu raspundere limitata (S.R.L.)

8.2 Permitted languages - Art. 23(5) ECSPR

National supervisory authorities must also notify ESMA of the language or languages they accept for key investment information sheets. While many countries accept several languages (in particular English in addition to the respective national language), the German BaFin only allows German as a language. The same applies to the Austrian FMA. Luxembourg accepts most languages (Luxembourgish, German, French, English), with the exception of English, the other languages being official languages there anyway.

EU Member State	National Competent Authority	Permitted Languages
Austria	Financial Market Authority (FMA)	German
Czech Republic	Czech National Bank (CNB)	Czech
Germany	Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin)	German
Greece	Hellenic Capital Market Commission (HCMC)	Greek
Spain	Comisión Nacional del Mercado de Valores (CNMV)	Spanish, English, Official languages in the respective Autonomous Communities (to be used only in their respective Autonomous Community)
Finland	Finanssivalvonta (FSA)	Finnish, Swedish
Hungary	Magyar Nemzeti Bank (MNB)	Hungarian, English
Ireland	Central Bank of Ireland	Irish, English
Italy	Commissione Nazionale per le Società e la Borsa (CONSOB) and Bank of Italy	Italian
Luxembourg	Commission de Surveillance du Secteur Financier (CSSF)	Luxembourgish, German, French, English
Latvia	Financial and Capital Market Commission (FCMC)	Latvian
Malta	Malta Financial Services Authority (MFSA)	English, Maltese
The Netherlands	Netherlands Authority for the Financial Markets (AFM)	Netherlands (Dutch)
Romania	Romanian Financial Supervisory Authority (ASF)	Romanian
Slovakia	National Bank of Slovakia (NBS)	Slovak

8.3 Laws, regulations and administrative provisions for marketing communications – Art. 28(2) ECSPR

Another reporting obligation of the national supervisory authorities exists with regard to the laws, regulations and administrative provisions for marketing communications of crowdfunding service providers that are

supervised and enforced by them. While the Austrian FMA refers to the regulation of the Austrian Crowdfunding Implementation Act (*Schwarmfinanzierung-Vollzugsgesetz*), the German BaFin reports that there are no such regulations in Germany. It does not refer to the German Crowdfunding Implementation Act (*Schwarmfinanzierung-Begleitgesetz*), which amended the German Securities Trading Act (*WpHG*), among other things.

EU Member State	National Competent Authority	Laws, regulations and administrative provisions for marketing communications
Austria	Financial Market Authority (FMA)	Law - Crowdfunding Implementation Act (entry into force on December 31st, 2021)
Czech Republic	Czech National Bank (CNB)	No measures / national regime in place
Germany	Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin)	No measures / national regime in place
Greece	Hellenic Capital Market Commission (HCMC)	No measures / national regime in place
Spain	Comisión Nacional del Mercado de Valores (CNMV)	Administrative Provision - Circular 2/2020, of 28 October, of the Spanish National Securities Market Commission, on the advertising of investment products and services. * Pending confirmation through national regulatory development - Entry into force on February 13th, 2021, except Rule 7 (Registration of advertising) which entered into application on June 22nd, 2021.
Hungary	Magyar Nemzeti Bank (MNB)	Law - Act XLVIII of 2008 on the Basic Requirements and Certain Restrictions of Commercial Advertising Activities (1 September 2008) - Act XLVII of 2008 on the Prohibition of Unfair Business-to-Consumer Commercial Practices (29 June 2008)
Luxembourg	Commission de Surveillance du Secteur Financier (CSSF)	Law Code de la consommation
Latvia	Financial and Capital Market Commission (FCMC)	- Advertising law (Reklāmas likums) (24 January 2000) - Unfair Commercial Practices Prohibition Law (Negodīgas komercprakses aizlieguma likums) (1 January 2008) - Consumer Rights Protection Law (Patērētāju tiesību aizsardzības likums) (15 April 1999)
The Netherlands	Netherlands Authority for the Financial Markets (AFM)	None
Romania	Romanian Financial Supervisory Authority (ASF)	Draft law laying down measures for the implementation of Regulation (EU) 2020/1503 of the European

Parliament and of the Council of 7 October 2020 on European providers of crowdfunding and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937

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Slovakia	National Bank of Slovakia (NBS)	<ul style="list-style-type: none"> - Act No. 205/2007 Coll. on consumer protection and on amending act of the Slovak National Council No. 312/1990 Coll. on offences as amended - Act No. 147/2001 Coll. On advertising and on amending and supplementing of certain acts - Act No. 22/2007 Coll. on electronic commerce and on amending and supplementing of Act No. 128/2002 Coll. On state control of internal market regarding consumer protection and on amending and supplementing of certain acts and amended by the Act No. 284/2002 Coll.
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8.4 Information on the complaints procedures – Art. 38(2) ECSPR

The national supervisory authorities shall inform ESMA about the procedures that allow, inter alia, clients to submit complaints against crowdfunding service providers to them. BaFin and the Austrian FMA each refer in this respect to their general consumer information on complaints against supervised entities, which is not specifically addressed to crowdfunding service providers.

EU Member State	National Competent Authority	Permitted Languages
Austria	Financial Market Authority (FMA)	German: https://www.fma.gv.at/beschwerden-ueber-beaufsichtigte-unternehmeneinbringen/ English: https://www.fma.gv.at/en/complaints-and-consumer-enquiries/
Czech Republic	Czech National Bank (CNB)	Czech: https://www.cnb.cz/cs/verejnost/kontakty/formular-podani-dotazu-podnetuupozorneni/index.html https://www.cnb.cz/cs/verejnost/kontakty/stiznosti-na-financni-institute/ English: https://www.cnb.cz/en/public/contacts/electronic-form/ https://www.cnb.cz/en/public/contacts/complaints-concerning-financial-institutions/
Germany	Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin)	German: https://www.bafin.de/dok/14738826 English: https://www.bafin.de/dok/15510648
Spain	Comisión Nacional del Mercado de Valores (CNMV)	Spanish: https://www.cnmv.es/portal/inversor/Reclamaciones.aspx?lang=es English: https://www.cnmv.es/portal/inversor/Reclamaciones.aspx?lang=en Pending adaptation to include ECSP clients
Finland	Finanssivalvonta (FSA)	Finnish: https://www.finanssivalvonta.fi/finanssivalvonta/yhteystiedot/ilmoitusfinanssivalvonnalle/ Swedish: https://www.finanssivalvonta.fi/sv/om-fi/kontaktinformation/anmalan-tillfinansinspektionen/
Hungary	Magyar Nemzeti Bank (MNB)	Hungarian: https://www.mnb.hu/fogyasztovedelem/penzugyi-panasz English: https://www.mnb.hu/en/financial-customer-protection

Italy	Commissione Nazionale per le Società e la Borsa (CONSOB) and Bank of Italy	Italian: https://www.consob.it/web/investor-education/l-invio-di-esposti
Luxembourg	Commission de Surveillance du Secteur Financier (CSSF)	French: https://www.cssf.lu/fr/reclamations-clientele/ German: https://www.cssf.lu/de/kundenbeschwerden/ English: https://www.cssf.lu/en/customer-complaints/
Latvia	Financial and Capital Market Commission (FCMC)	Latvian: https://www.fktk.lv/klientu-aizsardziba/veidlapa-sudzibas-iesniegsanai/ https://latvija.lv/
Malta	Malta Financial Services Authority (MFSA)	Maltese: https://www.mfsa.mt/consumers/complaints/
The Netherlands	Netherlands Authority for the Financial Markets (AFM)	Dutch: https://www.afm.nl/nl-nl/consumenten/contact English: https://www.afm.nl/en/consumenten/contact
Romania	Romanian Financial Supervisory Authority (ASF)	Romanian: https://asfromania.ro/ro/c/46/consumator
Slovakia	National Bank of Slovakia (NBS)	Slovak: https://www.nbs.sk/sk/ofs/informacie-pre-spotrebitehov-onas/rieseniestaznosti

9. DO YOU HAVE ANY QUESTIONS REGARDING A LICENSE AS CROWDFUNDING SERVICE PROVIDER?

Our financial regulation experts combine pragmatism and an interest in innovative solutions with technical know-how. In our daily dealings with German and European regulators, we navigate our clients safely through all registration and licensing procedures and are always up-to-date on new procedures and regulatory practice. We will be happy to advise you on this.



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