

THE NEW CROWDFUNDING FRAMEWORK

ECSPR BLOG SERIES – BLOG 3: THE DO'S AND DON'TS WHEN OPERATING A BULLETIN BOARD

As per 10 November 2021 the new Regulation (EU) 2020/1503 on European crowdfunding service providers for business (the “[ECSPR](#)”) applies and Directive (EU) 2020/1504 amending [MIFID II](#) (the “[Crowdfunding Directive](#)”) has been implemented. Or better: the Crowdfunding Directive should have been implemented as per 10 May already. The Dutch legislator did not meet this deadline, nor the date of effectiveness of the ECSPR. After the publication of the [consultation document](#) relating to implementation of the new framework applicable to crowdfunding in June of this year, and collecting responses from (some) market participants amongst which [FG Lawyers](#) until early July, this [implementation order](#) was published only recently, on 2 December. The [Dutch implementation decree](#), which amends some lower Dutch rules and regulations, was published on 27 October 2021.

The new crowdfunding framework provides for a harmonised Pan-European regulatory framework for crowdfunding service providers (“[CSPs](#)”) established in one of the member states of the European Economic Area.

Existing CSPs incorporated in the Netherlands will need to apply for their new authorisation with the Netherlands Authority for the Financial Markets (the “[AFM](#)”) ultimately on **10 May 2022** in order to ensure a timely granting of the new authorisation prior to 10 November 2022.

A series of Crowdfunding blogs

Following a general [blog](#) on the ECSPR which we published last year, we will dive a bit deeper into the new framework in this series of blogs. In this series, we aim to give existing CSPs a gap analysis which they will encounter when applying for authorisation under the ECSPR. In our [first issue](#), we gave an overall introduction on the new ECSPR and made a gap analysis for existing crowdlending platforms active in the Netherlands. In our [second issue](#), we focused on the gap analysis for existing crowdinvesting platforms active in the Netherlands. In this issue, we will dive into the do's and don'ts of a CSP when offering a bulletin board on its crowdfunding platform.

Status quo

In each blog in this series, we will include the most up to date hyperlinks to relevant laws, regulations and documentation. As from this blog, you can find these hyperlinks at the end of this blog, except for new or updated documents. Since the publication of our first two blogs in this series as published on 4 and 12 November 2021 respectively, ESMA has updated its [Q&As](#) on 19 November and the Dutch government published the [implementation order ECSPR](#), amending some Dutch rules and regulations in order to align the Dutch framework with the ECSPR, on 2 December.

Secondary trading of crowdfunding assets

One of the welcoming clarifications included in the ECSPR is the possibility for CSPs to operate a bulletin board to enable their clients to trade crowdfunding assets after the initial issuance thereof by the project owner. By including this possibility in the ECSPR, secondary trading of crowdfunding assets can be facilitated by the CSP. However, a CSP needs to be aware of the do's and don'ts when it decides to offer a bulletin board to its investors. The lines between the ECSPR on the one hand and the MiFID II framework on the other hand are wafer-thin and a CSP needs to ensure it does not, mistakenly, cross the line as it could become subjected to the MiFID II framework and the obligation to obtain a licence for operating a multilateral trading facility (MTF) or an organised trading facility (OTF).

In this issue, we anticipate to assist CSPs in getting a better understanding of the differences between a bulletin board on the one hand and a regulated trading venue such as an MTF or OTF on the other hand, and to give some insights in how CSPs can operate a bulletin board within the meaning of the ECSPR. A more elaborate paper on this subject drafted by [Anne Hakvoort](#) will be published shortly in P. Ortolani and M. Louise, *The EU Crowdfunding Regulation*, Oxford University Press, and shall also be published on [our website](#).

| | Bulletin Board | MTF | OTF |
|--|--|--|---|
| Description | Digital interface that aggregates and broadcasts buying and selling interests of investors | Multilateral system which brings together multiple third-party buying and selling interests in the system and in accordance with non-discretionary rules in a way that results in a contract | Multilateral system (other than a regulated market or an MTF) in which multiple third-party buying and selling interests can interact in the system in a way that results in a contract |
| Purpose | Not a genuine trading platform (arranging and trade execution outside the system) | Genuine trading platform (arranging and trade execution within the system) | Genuine trading platform (arranging and trade execution within the system) |
| License obligation | CSP or MiFID II licence for receipt and transfer of orders in financial instruments | MiFID II licence for operating an MTF | MiFID II licence for operating an OTF |
| Investment product | Loans, transferable securities, admitted instruments for crowdfunding purposes | Financial instruments, including transferable securities | Bonds, structured finance products, emission allowances or derivatives |
| Multilateral system (defined to be 'any system or facility in which multiple third-party buying and selling trading interests in financial instruments are able to interact in the system', Art. 4(1)(1) MiFID II) | No | Yes | Yes |

| | Bulletin Board | MTF | OTF |
|---|--|--|--|
| Role operator of platform | Offers a bilateral bulletin board which only advertises trading interests to its clients; not offer a trading system or facilitate in the interaction of advertised trading interests in any way | Offers a (multilateral) trading system, such as a voice trading system, a request for quote system, a central (limit) order book system, order management system, execution management system or distributed trading system | Offers a (multilateral) trading system, such as a voice trading system, a request for quote system, a central (limit) order book system, order management system, execution management system or distributed trading system |
| Role op system, underlying rules, protocols and/or the internal operating procedures | Cannot bring together buying and selling interests in a way that results in a contract | Can bring together buying and selling interests in a way that results in a contract | Can bring together buying and selling interests in a way that results in a contract |
| Information | <ul style="list-style-type: none"> • Price information (including suggested reference price by CSP) • Quantity information • Contact details of investors who advertise their buying and selling interests • Key investment information sheet • Performance on loans (if relevant) • Some additional mandatory information and risk warnings | <ul style="list-style-type: none"> • Quotations • Prospectus, information document or similar documentation • Up to date financial information of the issuer • Price sensitive information published by the issuer | <ul style="list-style-type: none"> • Quotations • Prospectus, information document or similar documentation • Up to date financial information of the issuer • Price sensitive information published by the issuer |
| Communication / negotiation between investors | Outside the bulletin board | N/A; the system automatically brings together buying and selling interests in such a way that it results in a transaction | N/A; the system automatically brings together buying and selling interests in such a way that it results in a transaction |
| Matching / arranging of transaction on a multilateral basis | No; only possible outside the bulletin board; bilaterally between investors without involvement of | Yes, within the system of the MTF on the basis of non-discretionary rules (operator of MTF does not have any discretion in manner in which buying | Yes, within the system of the OTF. An operator of an OTF has the obligation to carry out discretion, either in respect of the acceptance of orders in |

| | Bulletin Board | MTF | OTF |
|---|--|--|---|
| | operator of bulletin board | and selling interests interact in the system) | the system (order discretion) or in respect of the matching process of orders (execution discretion) |
| Execution of transaction | Outside the bulletin board; no involvement by the operator | Within the MTF; it is the outcome of rules, protocols or internal operating procedures within the system which the operator cannot influence | Within the OTF; the operator can influence the execution of transactions within the system due to its discretionary powers |
| Post-matching ancillary assistance | Not clear; in our view a CSP should be able to assist in the settlement of the transaction concluded outside the bulletin board to ensure a legally valid and binding transaction (e.g. by offering template transaction documents, receipt of notification of the transaction for administrative purposes (in particular to CSPs that provide asset safekeeping services). | Yes | Yes |
| Cooperation with third parties | Yes, but no mandatory use of tools of affiliated companies. Cooperation with regulated MTF or OTF worthwhile to look into; subject to the execution of the transaction takes place on the regulated trading venue, system operated by a CSP may be an arranging system rather than a mere bulletin board. ESMA considers a (multilateral) 'arranging system' an outsourced service by a regulated trading venue on which | Yes, could be commercially interesting to outsource arranging of transactions to third party, such as a CSP, provided that the execution of the transaction takes place on the MTF | Yes, subject to the obligation to carry out discretion by the operator of the OTF, it could be commercially interesting to outsource arranging of transactions to third party, such as a CSP, provided that the execution of the transaction takes place on the OTF |

| | Bulletin Board | MTF | OTF |
|--------------------------------|--|------------|------------|
| | the pre-arranged transaction is executed. ¹ | | |
| Market Abuse Regulation | Not applicable | Applicable | Applicable |

Conclusion

As follows from the above overview, a CSP that operates a bulletin board cannot be involved in any transaction concluded between investors outside the bulletin board. The bulletin board should merely serve the purpose of informing other investors of one's buying or selling interest in respect of loans, transferable securities or admitted instruments for crowdfunding purposes that were originally issued by a project owner on the crowdfunding platform as operated by the CSP. In our view, CSPs should – or in light of their duty of care arguably must - be able to assist in the post-trade settlement of a transaction that was bilaterally agreed upon between investors outside the bulletin board in order to ensure a legally valid and binding transaction in accordance with the applicable laws. CSPs should at all times be conscious of the restrictions applicable to them as operators of a bulletin board. If they, whether or not mistakenly, cross the line and could be held to operate a regulated trading venue instead of a bulletin board, they will be subjected to the heavy MiFID II framework.

Relevant laws, regulations and documentation

After the publication of the [ECSPR](#) and the [Crowdfunding Directive](#) in the Official Journal on 20 October 2020, the following relevant documents have been made available:

- ESMA:

[Q&A on the ECSPR](#) (updated version published on 19 November 2021);

[Final report on draft technical standards under the ECSPR](#) (published on 10 November 2021);

[Document listing information received by ESMA from National Competent Authorities \(“NCAs”\)](#) (published on 10 November 2021). We refer to the [second blog](#) in this series for a bit more background information in respect of this document published by ESMA;

[Letter to Commissioner McGuinness](#) requesting certain uncertainties to be clarified by the European Commission (published 8 July 2021);

¹ ESMA, MiFID II review report on the functioning of Organised Trading Facilities, ESMA 70-156-4225, 23 March 2021 (the document itself mistakenly refers to 2020), § 103-105, p. 26-27 .ESMA emphasizes that it does not work the other way around as the fundamental characteristic of a trading venue is to execute transactions. See in this respect also: ESMA, Questions and Answers on MiFID II and MiFIR market structures topics, ESMA 70-872942901-38, 6 April 2021, § 5.1, Q&A 7, p. 41.

- EBA:
[Final report on draft technical standards on individual portfolio management by CSPs](#) (published 9 November 2021);
- Dutch Ministry of Finance (in Dutch language only):
[Dutch Implementation order ECSPR](#) (published in the Dutch Government Gazette on 2 December 2021, Stcrt. 2021, 48097);
[Dutch Implementation decree ECSPR](#) (published in the Dutch Bulletin of Acts and Decrees on 27 October 2021, Stb. 2021, 497);
- AFM (in Dutch language only):
The AFM has prepared the application form for CSPs who wish to apply for a license under the ECSPR. The AFM only makes available this form to CSPs (or to their advisors subject to such advisor informing the AFM on their clients names) at request via CSPvergunningaanvraag@afm.nl. For more information, please also see the [CSP section](#) of the website of the AFM (in Dutch language only);
[Brochure on the ECSPR](#) (published on 14 April 2021);
- DNB (in Dutch language only):
[Short news bulletin](#) briefly touching upon the role of the Dutch Central Bank in relation to CSPs falling under the scope of the ECSPR (published on 28 October 2021).

Stay tuned!

In our next post, we will dive into the newly introduced Key Investment Information Sheet (KIIS) in the ECSPR and related information and duty of care obligations of the CSP.

About us

FG Lawyers is a boutique law firm offering corporate and financial regulatory expertise. We have a special focus on innovative business models. We offer unique advisory services, firmly nourishing on our corporate and regulatory roots but also constantly addressing issues that require an out of the box mindset. We find joy in facilitating all sorts of clients in this fascinating interplay of financial regulation, corporate law and business strategies.

If you have any questions regarding the ECSPR or need assistance in preparing and applying for a CSP license under the ECSPR, please do [reach out!](#)