

THE NEW CROWDFUNDING FRAMEWORK

On 10 November 2021, Regulation (EU) 2020/1503 on European crowdfunding service providers for business (the “[ECSPR](#)”) and Directive (EU) 2020/1504 amending [MIFID II](#) (the “[Crowdfunding Directive](#)”) will apply. This new framework will provide for a harmonised Pan-European regulatory framework for crowdfunding service providers (“**CSPs**”) established in one of the member states of the European Economic Area.

This new framework will bring numerous changes for CSPs currently already active in Europe. Existing CSPs still have some time to adjust to the new framework, if they so prefer. A transitional period of one year is available to existing CSPs to apply for the authorisation required under the ECSPR. However, during such transitional period these existing CSPs cannot benefit from the ECSPR either such as the passport regime enabling CSPs to provide crowdfunding services in other member states without being subjected to additional national regulatory requirements in such member states.

CSPs anticipating to enter the market after **10 November 2021** will need to comply with the Crowdfunding Regulation. The Netherlands Authority for the Financial Markets (the “**AFM**”) recently announced that Dutch CSPs already active in the market will need to apply for their new authorisation 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

On 21 October 2020, we wrote an extensive [blog](#) on the ECSPR, covering the new crowdfunding regulatory framework in general. In this series of blogs, we will dive into the new framework a bit deeper by analysing the - in our view - most conspicuous changes for existing CSPs established in the Netherlands.

In this series of blogs, we aim to give existing CSPs a gap analysis which they will encounter when applying for authorisation under the ECSPR. Due to the current deviating regimes applicable to crowdlending platforms in comparison to crowdinvesting platforms, the actual implications of the ECSPR on the business processes and internal organisation of existing CSPs may differ. Taken this current distinction in regulatory frameworks applicable to crowdlending platforms versus crowdinvesting platforms, we will differentiate between these two types of CSPs as a central theme when discussing the gaps between the current Dutch framework and the new European framework. We emphasize though that the ECSPR provides for a general framework applicable to CSPs irrespective of the type of crowdfunding services that they offer.

In this first issue, we will give an introduction on crowdlending and crowdinvesting and the most important changes that the ECSPR will bring for existing CSPs operating a crowdlending platform. But let’s kick off with an overview of the currently available documentation.

Status quo

With less than 1 week to go until the new crowdfunding framework will apply, CSPs are still awaiting the publication of finalised delegated acts under the ECSPR and, at least in the Netherlands, the publication of a finalised implementation act.

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](#) (published on 25 February 2021);
 - [Consultation paper on draft technical standards under the ECSPR](#) (published on 26 February 2021, closed for responses on 28 May 2021; Still awaiting final publication);
 - [Letter to Commissioner McGuinness](#) requesting certain uncertainties to be clarified by the European Commission (published 8 July 2021)
- EBA:
 - [Consultation paper on draft technical standards under the ECSPR](#) (published on 4 June 2021, closed for responses on 2 September 2021; Still awaiting final publication);
- Dutch Ministry of Finance (in Dutch language only):
 - [Public consultation document in respect of implementing the new crowdfunding framework](#) (published on 4 June 2021, closed for responses on 2 July 2021. Still awaiting final publication);
 - [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):
 - [Brochure on the ECSPR](#) (published on 14 April 2021)

Crowdlending versus Crowdinvesting

Crowdlending and crowdinvesting are both categories of crowdfunding. Crowdlending is a crowdfunding method via which investors can finance projects by lending money to the project owners in return for interest. With crowdinvesting, investors invest their money in securities, such as shares in the capital of a company or by purchasing bonds from a fundraising project owner.

CSPs take a similar intermediating role in both types of crowdfunding. However, due to the form of investment (private loan versus security) qualifying differently from a *current* Dutch regulatory perspective, CSPs were subjected to different frameworks up until now. Prior to the ECSPR becoming

effective, intermediating services in respect of private loans is a matter of national law only, whilst similar services in respect of securities is subjected to the heavy MiFID II regulatory framework. The Dutch regime for crowdinvesting is therefore much more legislated than it is for crowdlending. For that reason, the new ECSPR will have more impact on CSPs who provide crowdlending services in the Netherlands.

The ECSPR regulates both types of crowdfunding services (crowdlending and crowdinvesting) in one set of rules which apply to a CSP irrespective of the type of crowdfunding services such CSP intends to provide. Naturally, some – generally additional – rules may apply to a CSP depending on the exact services such CSP contemplates to provide. In this blog we will focus on the main implications for of the ECSPR for existing CSPs operating a crowdlending platform in the Netherlands.

Existing CSPs operating crowdlending platforms

CSPs operating a crowdlending platform currently ‘only’ need to obtain a dispensation for the prohibition to intermediate in attracting repayable funds by a project owner as laid down in Article 4:3 Dutch Financial Supervision Act ([Wet op het financieel toezicht](#), “**DFSA**”) and comply with the [crowdfunding guidelines](#) which were created by the AFM. The market entrance requirements for obtaining such dispensation are described in more detail in Articles 2a-c of the Dutch Market Conduct Supervision Decree DFSA ([Besluit Gedragstoezicht financiële ondernemingen Wft](#), “**BGfo**”). Whilst the ECSPR includes similar requirements as well, it also introduces new obligations for CSPs that operate a crowdlending platform, as shown in the overview below.



	Current Dutch framework	ECSPR
Main market entrance requirements		
Authorisation requirement including general information about the CSP and its (contemplated) operations and services	Individual dispensation prohibition to be obtained from the AFM (4:3(4)DFSA, Art. 2c BGfo and Art. 38 Market Entrance Decree DFSA, Besluit Markttoegang financiële ondernemingen Wft)	License requirement to be obtained from national competent authority of the home member state of the CSP (Art. 12 ECSPR and described in more detail in draft ESMA RTS pursuant to Art. 12(16) ECSPR)
Passport	No	Yes (Art. 18 ECSPR)
Sound and controlled business operations as laid down in internal policies aimed at compliance with applicable laws and regulations	Yes (Art. 38(1)(j) Market Entrance Decree)	Yes (Art. 12(2)(e) ECSPR)
Description of systems, resources and procedures for the control and safeguarding of the data processing systems	GDPR requires CSP to have a privacy policy. AFM considers a data retention policy and description of the website functioning to be part of the CSP's sound and controlled business operations (Art. 38(1)(j) Market Entrance Decree)	Yes (GDPR, Art. 12(2)(f) ECSPR and draft ESMA RTS)
Prudential safeguards	No	Yes, higher of €25.000 and 25% of fixed overheads of preceding year or forward looking statements if not in operation for more than 12 months (Art. 12(2)(h), 12(2)(i) and Art. 11(1)(a) ECSPR and draft ESMA RTS). Does not apply to CSPs that also have a license as bank, investment firm, e-money institution or payment institution (as these CSPs will already be subjected to prudential safeguards pursuant to CRD V/CRR II, MiFID II/IFR, EMD2 and PSD2)
Business continuity plan	No legal ground, but in our experience the AFM does request a description hereof as part of the CSP's sound and controlled business operations (Art. 38(1)(j) Market Entrance Decree)	Yes (Art. 12(2)(j) and Art. 4(3) ECSPR and two draft ESMA RTs)
Fit and proper assessments managing directors, supervisory directors and <i>de facto</i> daily policymakers	Yes (Art. 2 and Art. 2a BGfo; Suitability ('fit') requirements laid down in the Suitability Policy Rule 2012, Beleidsregel Geschiktheid 2012).	Yes (Art. 12(2)(l) and 12(3) ECSPR). Questionable whether a legal person can still be appointed as director of a CSP (ESMA assumes natural persons only)

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		and whether the AFM can request a list of referees from each director.
Proper assessments shareholders	Yes, applicable to direct and indirect shareholders having at least 50% share capital or voting rights in the CSP (Art. 2 BGfo)	Yes, applicable to direct and indirect shareholders having at least 20% share capital or voting rights in the CSP (Art. 12(3)(a) ECSPR)
Conflicts of interest procedures	No	Yes (Art. 12(2)(m), Art. 8 ECSPR, two draft ESMA RTSs)
Skin in the game possible?	Yes (but not recommendable due to potential conflicting interests)	No (Art. 8 ECSPR)
Outsourcing arrangements	No legal ground, but the AFM requests a description hereof as part of the CSP's sound and controlled business operations (Art. 38(1)(j) Market Entrance Decree)	Yes (Art. 12(2)(n), Art. 9 ECSPR, draft ESMA RTS)
Adequate complaint handling procedures	Yes (Art. 2b(1)(d) and 2(b)(4) BGfo)	Yes (Art. 12(2)(o), Art. 7 ECSPR and two draft ESMA RTSs)
Incident reporting	Yes (Art. 2b(3) BGfo) and AFM Crowdfunding Guidelines)	No
Additional services		
Pricing of crowdfunding offer	Yes	Yes, subject to more checks and balances
Individual portfolio management of loans	Yes (No specific Dutch law impediments)	Yes (Art. 6 ECSPR, draft EBA RTS)
Payment services	Yes, but generally not considered to be subject to an authorisation obligation	<p>Yes (Art. 12(2)(p), Art. 10 ECSPR)</p> <ul style="list-style-type: none"> • By CSP itself • By authorised third party (PI, EMI, bank) • Direct handling by project owner subject to safeguarding by CSP of minimum safety arrangements by project owner <p>In our view, a CSP (or third party PSP) that can rely on an exemption from the license requirement pursuant to PSD2 as implemented in Art. 1a of the Exemption Regulation DFSA (Vrijstellingsregeling Wft) should be able to offer payment services in respect of crowdfunding offers in the Netherlands as well without being subjected to a license requirement</p>



	Current Dutch framework	ECSPR
		pursuant to Art. 2:3a DFSA. We are awaiting DNB's view in this respect.
<ul style="list-style-type: none"> Separation of client assets from CSPs assets? 	Yes, via third party PSP or foundation third party account with independent board (or at least one independent director with veto rights in respect of payment flows) (AFM Crowdfunding Guidelines)	Yes
Bulletin board	No	Yes (Art. 25 ECSPR)
Investor protection		
Default rate disclosure	Not formally, but the crowdlending platforms that are a member of the industry association Nederland Crowdfunding agreed to provide this disclosure voluntarily	Yes (Art. 20 ECSPR and draft ESMA RTS)
Due diligence obligations on CSP in respect of project owner	Yes, minimum information to be obtained pursuant to the AFM Crowdfunding Guidelines	Yes (Art. 5 ECSPR)
Key investment information sheet crowdfunding offer	Yes, pursuant to Dutch Civil law (general obligation to provide a lender with accurate, complete and not misleading information needed to make an informed investment decision)	Yes (Art. 12(2)(q), Art. 23 ECSPR, Annex I ECSPR, two draft ESMA RTSs)
Key investment information sheet at platform level	No	Yes if CSP provides individual portfolio management services.
Marketing strategy	No legal ground but the AFM requests this to be part of business plan that needs to be submitted with the application	Yes, draft ESMA RTS
Investment limit	Yes, limit of €80.000 and advice not to invest more than 10% of one's freely investable assets in crowdfunding projects. Applicable consumers only (AFM Crowdfunding Guidelines)	No (Art. 23(c) ECSPR) but advice not to invest more than 10% of one's net worth and continuing risk warnings (Art. 21(7) ECSPR)
Appropriateness test investors	Yes, when an investor exceeds an invested amount of at least €500 via the platform of the CSP and repeated when the invested amount exceeds the thresholds of €5.000, €10.000, €20.000 and €40.000 (AFM Crowdfunding	Yes (Art. 12(2)(r), Art. 21 ECSPR, two draft ESMA RTSs) Repetition each 2 years and additional assessment in the event of an investment exceeding €1.000 or 5% net worth. Applicable to non-sophisticated investors only.



	Current Dutch framework	ECSPR
	Guidelines). Applicable to consumers only (AFM Crowdfunding Guidelines)	
Outcome appropriateness test binding?	No, but CSP needs to explicitly emphasize the risks involved (AFM Crowdfunding Guidelines)	No, but CSP must issue a risk warning in case of insufficient knowledge. The non-sophisticated investors must then expressly acknowledge that they have received and understood the warning (Art. 21(4) ECSPR)
Pre-contractual reflection period	Yes, 24 hours. Applicable to consumers only (AFM Crowdfunding Guidelines) Information in respect of crowdfunding offer needs to be published on platform at least 48 hours prior to investors being able to invest in such crowdfunding offer	Yes, 4 calendar days (Art. 22(3) ECSPR) All information must be communicated to investors at least prior to entering in a crowdfunding transaction (Art. 19(4) ECSPR)
Miscellaneous		
Reporting obligations CSP to national competent authority	Yes, on a semi-annual basis (AFM Crowdfunding Guidelines)	Yes, on an annual basis (Art. 16 ECSPR and draft ESMA ITS)

Stay tuned!

In our next post, we will focus on the implications of the ECSPR for existing crowdfunding platforms.

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!](#)