

# WHERE THE ECSPR PINCHES THE DUTCH SHOE: SOME BRAIN TEASERS FROM A DUTCH LAW PERSPECTIVE

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## A. THE PRIOR DUTCH LEGAL FRAMEWORK

### 1. Introduction: history of crowdfunding regulation in the Netherlands and brief overview

Since the rise of crowdfunding as a source of alternative finance as a response to the financial crisis and the related unwillingness of banks to provide credit as per 2008, operators of crowdlending and crowdinvesting platforms ('CSPs') that provided their intermediating **45.01**

services in the Netherlands between lenders/investors, on the one hand, and project owners/issuers/borrowers, on the other hand, were subject to some sort of Dutch regulatory oversight. Where the Dutch regulators, the Dutch Central Bank (*De Nederlandsche Bank*, DNB) and the Dutch Authority for the Financial Markets (*Autoriteit Financiële Markten*, 'AFM'), were initially 'touching in the dark', in particular in respect of crowdlending platforms, the AFM commenced granting formal regulatory authorisations to CSPs as of 2012.<sup>1</sup>

**45.02** The first public guidance by the Dutch regulators was provided in 2013,<sup>2</sup> followed by a response of the Dutch government<sup>3</sup> to a consultation initiated by the European Commission ('EC') in 2013<sup>4</sup> and an interpretative document of the regulators in 2014.<sup>5</sup> In this interpretative document of the AFM and DNB, certain obstacles in Dutch laws and regulations were identified that could deter further growth of crowdfunding in the Netherlands. In response, the then incumbent Dutch minister of finance took up the gauntlet and started working on draft legislation to remove such obstacles.<sup>6</sup> This resulted in certain amendments to be made to Dutch laws and regulations as per April 2016.<sup>7</sup> Although a tighter Dutch legal framework for crowdlending platforms was consulted on in 2017,<sup>8</sup> this initiative was never transposed to Dutch law, presumably due to the simultaneous publication of a first-draft legislative proposal by the EC for an EU framework on crowd and peer-to-peer finance.<sup>9</sup> While the Dutch legal framework applicable to CSPs did not materially change since 2016, we all know what resulted from the consultation document of the EC: after rather difficult trilogue negotiations between

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- 1 AFM, 'Crowdfunding – Towards a Sustainable Sector – A Review of (Supervision of) the Crowdfunding Sector' (December 2014), 3, [www.afm.nl/-/profimedia/files/rapporten/2014/crowdfunding-engels.ashx](http://www.afm.nl/-/profimedia/files/rapporten/2014/crowdfunding-engels.ashx) accessed 31 January 2022 (cut-off date for all electronic resources). See also the public register of parties authorised to provide crowdfunding services on the website of the AFM: [www.afm.nl/nl-nl/professionals/registers/vergunningenregisters/crowdfundingplatformen](http://www.afm.nl/nl-nl/professionals/registers/vergunningenregisters/crowdfundingplatformen).
  - 2 AFM, 'Stappenplan crowdfunding voor betere consumentenbescherming' (May 2013): [www.afm.nl/nl-nl/nieuws/2013/mei/crowdfunding?la=nl-NL](http://www.afm.nl/nl-nl/nieuws/2013/mei/crowdfunding?la=nl-NL).
  - 3 Dutch Parliamentary Papers 2013–2014, 22 112, No 1797, attachment No 295819 and the annex thereto published as separate attachment No 295821. Both documents are available at <https://zoek.officielebekendmakingen.nl/blg-295819> and <https://zoek.officielebekendmakingen.nl/blg-295821>.
  - 4 Commission, 'Consultation Document – Crowdfunding in the EU – Exploring the added value of potential EU action' (October 2013), [https://ec.europa.eu/finance/consultations/2013/crowdfunding/docs/consultation-document\\_en.pdf](https://ec.europa.eu/finance/consultations/2013/crowdfunding/docs/consultation-document_en.pdf).
  - 5 Dutch Parliamentary Papers 2013–2014, 22 112, No 1797, attachment No 295820, <https://zoek.officielebekendmakingen.nl/blg-295820>.
  - 6 Dutch Parliamentary Papers 2014–2015, 31 311, No 145, 19 December 2014, <https://zoek.officielebekendmakingen.nl/kst-31311-145.html>, Dutch Parliamentary Papers 2014–2015, 31 311, No 148, 31 March 2015, <https://zoek.officielebekendmakingen.nl/kst-31311-148.html> and Dutch Parliamentary Papers 2015–2016, No 162, 14 December 2015, <https://zoek.officielebekendmakingen.nl/kst-31311-162.html>.
  - 7 Dutch Bulletin of Acts and Decrees 2016, No 98, applicable as per 1 April 2016, <https://zoek.officielebekendmakingen.nl/stb-2016-98.html>. See also FG Lawyers, 'New Crowdfunding Rules as per 1 April 2016' (April 2016), [www.fglawyersamsterdam.com/wp-content/uploads/2016/03/20160316-New-Crowdfunding-rules-as-per-1-April-2016.pdf](http://www.fglawyersamsterdam.com/wp-content/uploads/2016/03/20160316-New-Crowdfunding-rules-as-per-1-April-2016.pdf).
  - 8 Dutch Ministry of Finance, Consultation document 'Juridisch kader crowdfundingplatformen onderhandse leningen' (12 October 2017), [www.internetconsultatie.nl/crowdfunding](http://www.internetconsultatie.nl/crowdfunding).
  - 9 Commission, 'Inception Impact Assessment – Legislative proposal for an EU framework on crowd and peer to peer finance', [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1166-Legislative-proposal-for-an-EU-framework-on-crowd-and-peer-to-peer-finance\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1166-Legislative-proposal-for-an-EU-framework-on-crowd-and-peer-to-peer-finance_en).

the EC, the European Parliament and the European Council,<sup>10</sup> the ECSPR applies as of 10 November 2021.

CSPs take a similar intermediating role in both crowdlending and crowdinvesting models. However, due to the form of investment qualifying differently from a Dutch regulatory perspective (private loan versus financial instrument), CSPs were subjected to different frameworks prior to the ECSPR becoming effective. No special Dutch crowdfunding law was created. While CSPs operating a crowdinvesting platform ('crowdinvesting CSPs') were subjected to the MiFID II framework as implemented in the Netherlands and were required to have a licence as an investment firm, CSPs operating a crowdlending platform ('crowdlending CSPs') were subject to a prohibition included in the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, the 'DFSA') and were required to have an individual dispensation from such prohibition. This resulted in a much stricter legal framework being applicable to crowdinvesting than to crowdlending in the Netherlands. For that reason, the ECSPR has more impact on Dutch crowdlending CSPs. Paragraphs 45.04 to 45.15 of this chapter will delve into a bit more detail by describing the Dutch regulatory framework that applied to crowdlending CSPs until the ECSPR became effective (and which remained applicable during the transition period). Paragraphs 45.15 to 45.23 will describe the Dutch regulatory framework that applied to crowdinvesting CSPs in the Netherlands prior to the ECSPR becoming effective (and during the transition period). Paragraphs 45.24 to 45.49 reflect on the eight main changes the ECSPR entails for CSPs in the Netherlands. **45.03**

## 2. Crowdlending

### (a) Prior Dutch regulatory framework applicable to crowdlending CSPs for business loans

Prior to the ECSPR becoming effective, crowdlending CSPs operating in or from the Netherlands needed to obtain a dispensation for the prohibition to intermediate in attracting or getting the disposal of repayable funds from the public.<sup>11</sup> The market entrance requirements **45.04**

10 For a critical note and an elaborate overview of the legislative history of the ECSPR, please see: E Macchiavello, 'The European Crowdfunding Service Providers Regulation: The Future of Marketplace Lending and Investing in Europe and the "Crowdfunding Nature" Dilemma' (2021) 32 (3) EBLR 557.

11 Article 4:3 DFSA, [https://wetten.overheid.nl/BWBR0020368/2022-01-01/#Titeldeel4\\_Hoofdstuk4.1\\_Afdeling4.1.2\\_Artikel4:3](https://wetten.overheid.nl/BWBR0020368/2022-01-01/#Titeldeel4_Hoofdstuk4.1_Afdeling4.1.2_Artikel4:3). The term 'the public' is derived from Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions, as amended from time to time ('CRR') and Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions, as amended from time to time ('CRD'). From a Dutch law perspective this term is interpreted as 'persons other than professional market parties' as long as no clear EU guidance is provided in respect of the term 'the public'. Recently, in September 2020, the European Banking Authority (EBA) published a revised opinion on the regulatory perimeter of the scope of the term 'credit institution' included in CRR (EBA, 'Opinion of the European Banking Authority on elements of the definition of credit institution under Article 4(1), point 1, letter (a) of Regulation (EU) No 575/2013 and on aspects of the scope of the authorisation', EBA/Op/2020/15, 18 September 2020, [www.eba.europa.eu/sites/default/documents/files/document\\_library/Publications/Opinions/2020/931784/EBA%20Opinion%20on%20elements%20of%20the%20definition%20of%20credit%20institution.pdf](http://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Opinions/2020/931784/EBA%20Opinion%20on%20elements%20of%20the%20definition%20of%20credit%20institution.pdf)). EBA has called on the European Commission to provide clarification as to the meaning of, among other things, the term 'the public'. Once EU guidance is provided, the Dutch legislator and regulators will adhere to such EU guidance. This may have an impact on the current interpretation of (among other things) the prohibitions laid down in Article 3:5 (see paragraph 45.10) and Article 4:3 DFSA.

for obtaining such dispensation were described in more detail in lower regulations.<sup>12</sup> Moreover, crowdlending CSPs were subjected to crowdfunding regulations created by the AFM ('AFM Regulations').<sup>13</sup>

- 45.05** Some of the market entrance requirements that applied to crowdlending CSPs under the Dutch framework are similar to those required under the ECSPR.<sup>14</sup> For example, crowdlending CSPs needed to have sound and controlled business operations as laid down in internal policies and procedures, including a conflict of interest policy and an adequate complaint-handling policy. Also, certain policymakers were assessed on their reliability and suitability to run the business of a crowdlending CSP. In addition, the AFM Regulations subjected crowdlending CSPs to further requirements in respect of their business operations, reporting obligations to the AFM and specific warnings:<sup>15</sup> the AFM Regulations were mainly aimed at protecting (consumer) lenders who provided loans to borrowers via a crowdlending CSP. Additional requirements applied to crowdlending CSPs when the lender qualified as a consumer.<sup>16</sup>
- 45.06** One of the main differences between the Dutch legal framework that applied to crowdlending CSPs and the ECSPR relates to prudential requirements. These were very limited or practically non-existent under the prior Dutch legal framework. No capital requirements applied to crowdlending CSPs under the prior Dutch legal framework. Other than under the ECSPR, the CSP was not required to cooperate with a payment service provider ('PSP') or considered to be one itself. Pursuant to the AFM Regulations, third party funds did have to be separated

12 Articles 2a–c of the Dutch Market Conduct Supervision Decree DFSA (*Besluit Gedragstoezicht financiële ondernemingen Wft*, the 'BGfo'), <https://wetten.overheid.nl/jci1.3:c:BWBR0020421&sz=2021-12-04&g=2021-12-04> and, via Article 2c BGfo, parts of Article 38 of the Dutch Market Access for Financial Undertakings Decree DFSA (*Besluit Markttoegang financiële ondernemingen Wft*, the 'BMfo'), <https://wetten.overheid.nl/jci1.3:c:BWBR0020413&sz=2021-12-04&g=2021-12-04>.

13 Pursuant to Article 1:105 in conjunction with Article 1:104 DFSA, the AFM can attach conditions when granting a dispensation for the prohibition as laid down in Article 4:3 DFSA. Initially, the AFM Regulations were not publicly available but only included in the individual dispensation decision of the AFM in respect of a specific CSP. At the request of the market, these AFM Regulations are now publicly available on the website of the AFM. Please see [www.afm.nl/nl-nl/professionals/doelgroepen/crowdfundingplatformen/vergunning-vereisten/voorschriften](http://www.afm.nl/nl-nl/professionals/doelgroepen/crowdfundingplatformen/vergunning-vereisten/voorschriften). The AFM Regulations were amended quite extensively as per 1 April 2016, as announced in the newsletter of the AFM dated 10 December 2015: <https://afm.m13.mailplus.nl/archief/ mailing-488439.html> and brought again under the attention of the market in its newsletter dated 9 August 2016, available here: <https://afm.m13.mailplus.nl/archief/ mailing-511319.html>. See for all newsletters published by the AFM in relation to crowdfunding: [www.afm.nl/nl-nl/professionals/nieuws/crowdfundingplatformen?page=1](http://www.afm.nl/nl-nl/professionals/nieuws/crowdfundingplatformen?page=1).

14 For a schematic, general overview of the similarities and differences between the prior Dutch framework applicable to crowdlending CSPs and the ECSPR, refer to the website of FG Lawyers, Blog Series 'The new Crowdfunding Framework', blog 1 'Gap analysis crowdlending platforms', available at [www.fglawyersamsterdam.com/wp-content/uploads/2021/11/The-New-Crowdfunding-Framework-Blog-1-4-November-2021.pdf](http://www.fglawyersamsterdam.com/wp-content/uploads/2021/11/The-New-Crowdfunding-Framework-Blog-1-4-November-2021.pdf).

15 Those warnings are aimed at bringing to the attention of the consumer investor the risks involved with crowdlending, as well as the advice of the AFM to not invest more than 10 per cent of one's freely investable assets in crowdlending projects.

16 Article 1:1 DFSA defines a consumer as 'a natural person who does not act in the course of its business or profession to whom a financial undertaking provides a financial service'. A CSP does, however, not qualify as a financial undertaking within the meaning of Article 1:1 DFSA and intermediating in respect of attracting repayable funds from the public (that is, the crowdfunding service) is not considered a financial service within the meaning of Article 1:1 DFSA either. In Article 6:193a, section 1, subsection (a) of the Dutch Civil Code ('DCC'), a consumer is defined as a natural person who does not act in the course of a business or profession. These additional requirements under the AFM Regulations therefore only apply to CSPs who offer their services to consumers within the meaning of the Dutch Civil Code.

from the assets of the CSP, but this could be done via a ‘foundation third party funds’ (*stichting derdengelden*) established by the CSP. CSPs could handle the payment flows relating to transactions in crowd-loans without being considered PSPs.<sup>17</sup> DNB held the view that CSPs that temporarily managed third party funds did not qualify as PSPs because such CSPs did not provide these services as a separately identifiable activity: the services of CSPs in relation to the payment flows were inextricably linked to the crowdfunding services offered on the platform rather than to separate identifiable payment services. The ECSPR therefore brought a big change in the business models of CSPs in the Netherlands in this respect.<sup>18</sup> The ‘foundations third party funds’ were not allowed to hold any third party funds in escrow. In order to ensure its compliance with Dutch regulatory laws, the foundation could only receive funds temporarily with the purpose of making forwarding payments to the beneficiaries, and it could not hold any such funds for a period any longer than was technically and organisationally necessary.<sup>19</sup>

The ECSPR is expecting more from these CSPs. As such, Dutch crowdlending CSPs needed **45.07** to step up their game to obtain the CSP licence under the ECSPR. I will describe the main changes for crowdlending CSPs under the ECSPR in section B of this chapter.

*(b) Exempt crowdlending services prior to the ECSPR becoming effective*

Under the Dutch regulatory framework that applied to crowdlending CSPs prior to the ECSPR becoming effective, the operator of the platform did not have to obtain a dispensation as described in paragraph 45.04 if it only accepted professional market parties as lenders to fund a business loan. In that case, the business-borrower was not subjected to the prohibition described in paragraph 45.12 either (and therefore was not limited to the conditions attached to the exemption as laid down in the Exemption Regulation DFSA, such as the maximum loan amount of €2,500,000 per 12 months). The different approach was caused by the fact that the relevant prohibitions only apply if the repayable funds are attracted or obtained from ‘the public’.<sup>20</sup> From a Dutch law perspective, the term ‘the public’ is interpreted as ‘from others than professional market parties’<sup>21</sup> and ‘beyond a restricted circle’.<sup>22</sup> Professional clients within the meaning of MiFID II are all considered professional market parties. Also, others

17 This interpretation was deleted from the website of DNB upon the ECSPR becoming effective. The metadata still lead to the Q&A relating to the scope of PSD2 on the website of DNB which included crowdfunding before (terms used in google search: ‘crowdfunding’, ‘betaaldiensten’, ‘DNB’): [www.dnb.nl/en/sector-information/supervision-laws-and-regulations/laws-and-eu-regulations/psd2/payment-service-provision-and-payment-transactions-which-are-not-self-contained/](http://www.dnb.nl/en/sector-information/supervision-laws-and-regulations/laws-and-eu-regulations/psd2/payment-service-provision-and-payment-transactions-which-are-not-self-contained/).

18 See para 45.31 and para 45.33.

19 From Dutch legal history it follows that funds that are forwarded within five calendar days are not considered repayable funds. Subject to it being technically and organisationally necessary, third party funds can be held up to one month. Informally, DNB accepted a period up to 90 calendar days for third party funds to be held on an account of a foundation third party funds.

20 I refer to footnote 11.

21 As defined in Article 1:1 DFSA and Article 3 of the Dutch Decree on Definitions DFSA (*Besluit definitiebepalingen Wff*), available <https://wetten.overheid.nl/jci1.3:c:BWBR0020412&artikel=3&z=2012-01-01&g=2012-01-01>.

22 This criterion is hardly applicable in crowdfunding situations. A business-borrower can only have one restricted circle, and this restricted circle must already exist before the loan is attracted and must also remain intact during the term of the loan. If a restricted circle no longer exists during the term of the loan, the business-borrower can no longer rely on the restricted circle criterion and must therefore repay the loans to avoid breaching the prohibition as laid down in Article 3:5 DFSA. Based on their pre-existing legal relationship with the business-borrower, lenders in the restricted circle must have an insight into the financial situation of the business-borrower and must be able to make a reasonable assessment

that exceed certain financial parameters or that have demonstrable experience on the financial markets could qualify as professional market parties. For crowdlending purposes, perhaps the most important type of professional market party is a person who provides a loan of at least €100,000 at once to a business-borrower. Such person qualifies as a professional market party on an individual basis vis-à-vis only one specific business-borrower to whom such person lends at least €100,000 at once.<sup>23</sup>

- 45.09** Undertakings that only offer matching/intermediary services on a platform in respect of business loans to be funded by professional market parties are no longer exempted from regulatory oversight. Pursuant to the ECSPR, the CSP needs to obtain a licence as a CSP irrespective of the type of investor if such CSP provides crowdfunding services within the meaning of the ECSPR.<sup>24</sup> This caused numerous Dutch platform-driven undertakings that were aimed at intermediating in business loans to be funded by professional market parties only to review their business models, and to assess whether their services fall within the scope of the ECSPR.

*(c) Dutch regulatory framework applicable to crowdlending CSPs for consumer loans*

- 45.10** A CSP that offers a crowdfunding platform for consumer loans was and still is subject to a Dutch national licence obligation. Despite the CSP merely providing intermediary services in the provision of consumer loans, the AFM considers these CSPs ‘offerors’ of consumer credit due to the broad scope of the term ‘to offer’, which includes the management of consumer credit agreements. This results in the obligation to obtain a licence for offering consumer credit and the need to comply with the applicable rules and regulations pursuant to the Consumer Credit Directive<sup>25</sup> as implemented in the DFSA<sup>26</sup> and the Dutch Civil Code (DCC).<sup>27</sup> In addition, these CSPs remain to be subject to the prohibition laid down in Article 4:3 DFSA and remain to be required to obtain a dispensation for this prohibition if the consumer loans are being funded by ‘the public’.<sup>28</sup>
- 45.11** The Dutch regulatory framework applicable to CSPs intermediating in consumer loans was stricter compared to that applicable to CSPs intermediating in business loans up until the ECSPR became effective. This may be the reason why the market share of this type of crowdlending remained limited in the Netherlands.<sup>29</sup> Since the ECSPR does not apply to consumer

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of the risks involved in granting a loan to the business-borrower on that basis. In addition, the restricted circle must have clear, pre-existing and verifiable (that is, not retrospectively created) conditions for joining.

23 Article 3, section 2 Decree on Definitions DFSA.

24 As informally confirmed by the AFM on 31 January 2022, after the AFM having discussed the same with ESMA.

25 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers (‘CCD’), as amended from time to time.

26 In particular (but not limited to): Article 2:60 DFSA (licence obligation) and paragraph 4.3.1 DFSA, as further elaborated on in lower regulations, such as the BGfo, the BMfo and the Further Regulations on the Supervision of the Conduct of Financial Undertakings DFSA (*Nadere Regeling gedragstoezicht financiële ondernemingen Wft* (‘NRGfo’), <https://wetten.overheid.nl/jci1.3:c:BWBR0020540&z=2020-01-01&g=2020-01-01>).

27 In particular in Titles 2A and 2B of Book 7 DCC, <https://wetten.overheid.nl/jci1.3:c:BWBR0005290&boek=7&titeldeel=2a&z=2022-01-01&g=2022-01-01>.

28 I refer to para 45.04 to 45.09.

29 In 2021, approximately 4 per cent of all crowdfunding projects in the Netherlands related to consumer loans. Business crowdlending takes, by far, the biggest slice of the cake: approximately 85 per cent of all crowdfunding projects in the Netherlands in 2021 related to business loans. Crowdinvesting platforms took approximately 5 per cent market

loans, this Dutch national regime will remain applicable to CSPs operating these types of crowdlending platforms in the Netherlands.

*(d) Prior Dutch regulatory framework applicable to project owner attracting a business loan via a CSP from the public*

Not only CSPs but also business-borrowers need to take into account the Dutch regulatory framework before attracting a loan from the public. It is prohibited for any person who, in the course of its business, attracts, obtains the disposal of or has the disposal of repayable funds from the public<sup>30</sup> in or from the Netherlands.<sup>31</sup> A business-borrower attracting a loan from the crowd via a CSP generally fell within the scope of this prohibition. In the early years of crowdlending in the Netherlands, DNB seemed to pursue a tolerance policy as it did not enforce this prohibition against business-borrowers. As of 1 April 2016 an exemption to this prohibition was included in the Exemption Regulation DFSA (*Vrijstellingsregeling Wft*).<sup>32</sup> Subject to specific conditions being satisfied, among which a maximum (aggregate) loan amount of €2,500,000 per 12 months, the business borrower was exempt from this Dutch law prohibition. This exemption was amended and brought in line with the ECSPR as of 10 November 2021. Business-borrowers who attract one or more loans from the public are exempt from the aforementioned prohibition subject to them (i) attracting those repayable funds from the public in or from the Netherlands for a crowdfunding project (ii) via a CSP, duly authorised in accordance with the ECSPR and (iii) not exceeding the maximum amount of €5,000,000, calculated in accordance with the ECSPR. **45.12**

*(e) Other Dutch laws and regulations*

In addition to the Dutch financial regulatory framework that applied to CSPs (and business-borrowers) prior to the ECSPR becoming effective, other Dutch laws and regulations needed (and still need) to be taken into account as well. In addition to ‘common’ obligations applying generally to any Dutch company, such as those arising from the DCC, the GDPR<sup>33</sup> and sanctions laws,<sup>34</sup> the most important obligation to mention is the civil law obligation to provide investors with all such information required to enable them to make an informed investment decision in an accurate, complete, comprehensible, not misleading and timely manner. This obligation applies primarily to the borrower, but the CSP has a responsibility **45.13**

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share in 2021, while the remaining 6 per cent related to donation- and reward-based crowdfunding projects: [www.crowdfundingcijfers.nl/crowdfunding-in-nederland-2021/](http://www.crowdfundingcijfers.nl/crowdfunding-in-nederland-2021/). See also Chapter 2, by Shneur.

30 See footnote 11 for a description of the term ‘the public’.

31 Article 3:5 DFSA, <https://wetten.overheid.nl/jci1.3:c:BWBR0020368&titeldeel=3&choofdstuk=3.2&artikel=3:5&z=2022-03-03&g=2022-03-03>.

32 This was laid down in Article 24b Exemption Regulation DFSA prior to amendment thereof as per 10 November 2021. The prior text of the exemption is available at <https://wetten.overheid.nl/jci1.3:c:BWBR0020536&choofdstuk=3&paragraaf=3.2&artikel=24b&z=2021-04-01&g=2021-04-01>.

33 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (‘GDPR’). See Chapter 27, by F Ferretti, on Art 36.

34 Dutch Sanctions Act 1977 (*Sanctiewet 1977*) and the rules promulgated thereunder, available at <https://wetten.overheid.nl/jci1.3:c:BWBR0003296&z=2020-05-21&g=2020-05-21>.

(and presumably a duty of care) in this respect as well. The ECSPR introduces more detailed information requirements.<sup>35</sup>

- 45.14** In light of this comparative chapter, it is also interesting to mention that the Dutch anti-money laundering and counter financing terrorism act ('Dutch AML Act')<sup>36</sup> did not apply to crowd-lending CSPs that offered crowdfunding services to business-borrowers<sup>37</sup> (and still does not apply directly, unless the CSP qualifies as a PSP itself).

### 3. Crowdfunding

#### (a) Dutch regulatory framework applicable to crowdfunding CSPs

- 45.15** Under the DFSA, a distinction can be made between the overall term 'financial product' (*financieel product*), the more limited term 'financial instrument' (*financieel instrument*) and the most limited term, 'security' (*effect*).<sup>38</sup> Similar to MiFID II, under Dutch law the main characteristic of a security compared to a financial instrument is the fact that a security is negotiable (*verhandelbaar*).<sup>39</sup> An instrument is considered negotiable from a Dutch law perspective if it is (i) transferable (*overdraagbaar*) and (ii) exchangeable/fungible (*uitwisselbaar*), which means that the instrument is standardised to a certain extent, resulting in (iii) the instrument being tradable (*verhandeling*) on the financial markets.<sup>40</sup>
- 45.16** A share in a Dutch private company with limited liability (*besloten vennootschap met beperkte aansprakelijkheid*) or a Dutch public company (*naamloze vennootschap*) is negotiable by definition. Even a limitation of transferability under a contract or the company's articles of association (*statuten*) cannot prevent such shares from being negotiable. The vast majority of companies in the Netherlands is structured as a private company with limited liability. As such, the vast majority of fundraising entities through a crowdfunding platform in the Netherlands

35 See para 45.43.

36 *Wet ter voorkoming van witwassen en financieren van terrorisme*, available at <https://wetten.overheid.nl/jci1.3:c:BWBR0024282&cz=2021-07-01&g=2021-07-01>.

37 Crowd-lending CSPs that offer crowdfunding services to consumer-borrowers do fall under the scope of the Dutch AML Act.

38 Each of these terms is defined in Article 1:1 DFSA. For this chapter the terms 'financial instrument' and 'security' are the important ones. Each security is a financial instrument, but not each financial instrument is a security. The definition of 'financial instrument' under the DFSA is the same as used in MiFID II. The definition of 'security' under the DFSA corresponds to the concept of transferable security under MiFID II. It is defined as '(a) a negotiable share or similar negotiable equity instrument or right excluding an apartment right, (b) a negotiable bond or similar negotiable debt instrument, or (c) any other negotiable instrument issued by a legal entity, company or institution which entitles the holder of it to a security as described under (a) or (b) above upon such instrument being exercised or converted or which instrument can be settled in funds'.

39 There are some exceptions, though. A negotiable unit in an open-ended investment fund is not considered a security from a Dutch law perspective, for example.

40 This condition of the instrument being tradable does not mean that it needs to be admitted to trading on any trading venue. Transferable and fungible debt instruments can be considered debt securities if the characteristics and nature of the debt instruments do not prevent such debt instruments from being negotiated on the capital markets. Please also see: AMF Hakvoort, 'Secondary trading of crowdfunding investments', in P Ortolani and M Louise (eds), *The EU Crowdfunding Regulation* (OUP 2021) 13.45–13.54.



are private companies with limited liability, the shares of which are considered securities, and therefore financial instruments, within the meaning of Article 1:1 of the DFSA.

This had consequences for crowdfunders CSPs. Before the ECSPR became effective, 45.17 crowdfunders CSPs in the Netherlands needed to obtain an authorisation as an investment firm (*beleggingsonderneming*) and comply with the extensive MiFID II framework. Pursuant to the DFSA, it is prohibited to provide investment services (*verlenen van beleggingsdiensten*) or to carry out investment activities (*verrichten van beleggingsactiviteiten*) without a MiFID licence.<sup>41</sup> Providing investment services<sup>42</sup> includes, among other things, the service, in the pursuit of a profession or a business, of (i) receiving and transmitting orders of clients in relation to one or more financial instruments, or (ii) placing financial instruments without a firm commitment in the event of an offering thereof to the public by an issuer within the meaning of the Prospectus Regulation.<sup>43</sup> Interestingly, the *joint* provision of these two investment services was not considered to be the typical service of Dutch crowdfunders CSPs (like it is under the ECSPR). Although there were only a limited number of crowdfunders CSPs active in the Netherlands prior to the ECSPR becoming effective, these CSPs could apply for a licence for either or both of these investment services.<sup>44</sup>

Furthermore, CSPs that operated a platform in respect of ‘negotiable’ business loans were sub- 45.18 jected to the same strong MiFID II regulatory framework as well. Negotiable business loans are transferable, exchangeable debt instruments whose characteristics and nature do not preclude these instruments from being traded on financial markets.<sup>45</sup> From a Dutch law perspective, negotiable business loans are considered securities and therefore financial instruments. For those CSPs, a dispensation from the prohibition to act as intermediary in respect of repayable funds (as described in more detail in paragraph 45.04) no longer sufficed: the CSP was considered to provide investment services if it acted as an intermediary between the borrower (/issuer of debt securities) on the one hand and the investors on the other hand. As a consequence, such CSP was also required to obtain a licence as an investment firm as described above.

Crowdfunders CSPs enjoyed (and still enjoy) one advantage compared to ‘regular’ investment 45.19 firms. As of 1 April 2016, the inducement ban (*provisieverbod*) – generally limiting investment firms in providing and receiving, directly or indirectly, any inducement in respect of the investment services provided by them other than directly from their clients – did not apply to CSPs that offer the investment service of receiving and transmitting orders of clients in relation to shares or bonds that were issued in connection with a crowdfunders project subject to such CSPs complying with some additional conditions.<sup>46</sup>

41 Article 2:96 DFSA.

42 Article 1:1 DFSA.

43 Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market.

44 From recital 10 and the definition of crowdfunding services in the ECSPR it follows that the joint provision of investment services (a) and (f) distinguishes a CSP from an investment firm. I question this distinguishing element. See Hakvoort (n 40) 13.09.

45 Examples are bonds, notes and similar negotiable debt instruments. See para 45.15 and footnote 40.

46 Article 168a, section 2, subsection (f) *BGfo*.

**45.20** A great advantage of a crowdfunding CSP over a crowdlending CSP was (or perhaps better: should have been) that it had the opportunity to passport the licence into other Member States, which opportunity a crowdlending CSP did not have. However, until the ECSPR became effective, CSPs holding a MiFID license were confronted with local law restrictions in other Member States irrespective of their passport under MiFID II. This was caused by the fact that there was no harmonised view in the Member States as to how to regulate crowdfunding services. As a consequence, this great advantage was less valuable than expected. The ECSPR, naturally, changed this and created an EU Single Market for crowdfunding.<sup>47</sup>

*(b) Dutch regulatory framework applicable to project owner offering securities to the public via a CSP*

**45.21** Prior to the ECSPR becoming effective, a project owner that offered securities through a crowdfunding platform generally relied on an exemption to the obligation to publish an approved prospectus under the Prospectus Regulation. From a Dutch law perspective, offerings of securities below €5,000,000<sup>48</sup> are exempt from the obligation to publish a prospectus in accordance with the Prospectus Regulation, provided that an information document (drawn up in accordance with a prescribed template form)<sup>49</sup> is made available to the public and deposited with the AFM (together with some additional information). Such information document also needs to have a specific, again prescribed, warning text on the cover page.<sup>50</sup> The key investment information sheet ('KIIS') introduced in the ECSPR<sup>51</sup> and the new general exemption for the obligation to publish a prospectus, as introduced for crowdfunding projects of not more than €5,000,000<sup>52</sup> in the Prospectus Regulation,<sup>53</sup> replaced these Dutch law conditions.

**45.22** Moreover, companies that offer debt securities are excepted from the prohibition to attract, obtain or have the disposal of repayable funds<sup>54</sup> provided that they offer those debt securities in accordance with the Prospectus Regulation.<sup>55</sup> This does not mean that such company needs to publish an approved prospectus; if the company can validly rely on an exemption pursuant to the Prospectus Regulation it is still considered to offer the debt securities in accordance with the Prospectus Regulation. This resulted in a relatively big difference in terms of available

47 See para 45.32.

48 Calculated over a period of 12 months per category of security (ie either equity or debt) and taking into account all offerings of the issuer and any of its group companies both in the Netherlands as well as in any other Member State. See Article 53 Exemption Regulation DFSA (*Vrijstellingsregeling Wff*), <https://wetten.overheid.nl/jci1.3:c:BWBR0020536&choofdstuk=5&paragraaf=5.1&artikel=53&z=2021-12-03&g=2021-12-03>. It is notable that this offering limit was much higher for project owners who raised funding through the issuance of securities via a crowdfunding CSP under Dutch law than it was for project owners who attracted private loans via a crowdlending CSP. See para 45.08.

49 Article 53, section 3, under b Exemption Regulation DFSA in conjunction with Annex A to the Exemption Regulation DFSA. Please see for the template: <https://www.afm.nl/en/professionals/doelgroepen/effectuitlevende-ondernemingen/prospectustoezicht-nieuw/prospectusplicht>.

50 Article 53, section 4 Exemption Regulation DFSA in conjunction with Article 5:4 section 2 DFSA and Article 2:1 section 2 *NRgf* and Annex 1.2 to the *NRgf*.

51 See para 45.43.

52 As calculated per project owner (rather than including the group companies of such project owner as was the case pursuant to Article 53 Exemption Regulation DFSA) in accordance with Article 1, section 2, subsection (c) ECSPR.

53 Article 1, section 4, subsection (k) Prospectus Regulation.

54 As described in more detail in paragraph 45.10.

55 Article 3:5, section 2, subsection (d) DFSA.

offering size for crowdlending initiatives depending on the type of loan and the type of CSP being used for the project. Project owners that attracted repayable funds from the public with a non-negotiable business loan through a crowdlending CSP were limited to €2,500,000 per period of 12 months, while project owners that attracted repayable funds from the public with a negotiable debt instrument through a crowdinvesting CSP enjoyed an offering limit of twice as much.<sup>56</sup> Under the ECSPR (and the amended Prospectus Regulation) there will be a level playing field again.<sup>57</sup>

*(c) Other Dutch laws and regulations*

Crowdinvesting CSPs were subjected to the Dutch AML Act. This difference was caused by the qualification of such a CSP as an investment firm from a Dutch law perspective (and investment firms falling under the scope of the Dutch AML Act). CSPs that give up their MiFID II licence and instead limit their services to crowdfunding services within the meaning of the ECSPR will no longer be subjected per se to the Dutch AML Act.<sup>58</sup> **45.23**

## B. MAIN CHANGES UNDER THE ECSPR

### 1. One size fits all

The ECSPR brought the two forms of financial-return crowdfunding (crowdlending and crowdinvesting) under one regulatory framework. The vast majority of requirements are equal for each CSP irrespective of whether it provides crowdfunding services in relation to loans, securities or admitted instruments for crowdfunding purposes. This is, in my view, a very good development as it creates a level playing field between these types of CSP. The different Dutch law approaches prior to the coming into effect of the ECSPR resulted in a big – and in my view unfair – difference between crowdlending CSPs and crowdinvesting CSPs. Crowdlending CSPs could not offer an easy early exit to investors due to the risk of the loan re-qualifying as a debt security.<sup>59</sup> The strict MiFID II framework that previously applied to crowdinvesting CSPs in the Netherlands resulted in only a handful of CSPs becoming active in the Dutch crowdinvesting market. The fact that the ECSPR introduces one framework applicable to both types of CSP will likely result in growth of the crowdinvesting market in the Netherlands. **45.24**

*(a) Crowdlending<sup>60</sup>*

Dutch crowdlending CSPs have had to replace their prior dispensation with a licence under the ECSPR. The obligations under the ECSPR are heavier for Dutch crowdlending CSPs than under the prior Dutch framework.<sup>61</sup> These CSPs most likely had to amend and strengthen **45.25**

<sup>56</sup> Subject to compliance with the conditions as laid down in Article 53 Exemption Regulation DFSA.

<sup>57</sup> See para 45.26.

<sup>58</sup> See para 45.35.

<sup>59</sup> See para 45.18.

<sup>60</sup> See footnote 14.

<sup>61</sup> Article 12 ECSPR as worked out in the future Delegated Regulation specifying requirements and arrangements for the application for authorisation as a crowdfunding service provider ('RTS4'); as of March 2022, see ESMA, 'Draft technical standards under the European crowdfunding service providers for business Regulation – Final Report'

their internal policies and procedures to ensure full compliance with the ECSPR. Depending on the exact (ancillary) services provided by the CSP, additional policies and procedures need to be in place in relation to those services, such as asset safekeeping, payment services, individual portfolio management of loans, and so on. This overall heavier regulatory framework applicable under the ECSPR will likely cause the number of crowdlending CSPs in the Netherlands to shrink.

(b) *Crowdinvesting*<sup>62</sup>

**45.26** Dutch crowdinvesting CSPs have already jumped through regulated hoops to be able to provide crowdinvesting services in the Netherlands (and other Member States). The ECSPR required these CSPs to again go through an authorisation process in their home Member States. It is striking that the European legislator has not decided to grandfather MiFID-licensed CSPs in the ECSPR. While MiFID II has been amended to exclude CSPs that hold a licence under the ECSPR from the scope of MiFID II, investment firms that hold a licence under MiFID II are not exempt from the obligation to obtain an authorisation pursuant to the ECSPR. This is, to say the least, remarkable. If such investment firms are offering similar investment services through an online portal in respect of offerings below €5,000,000, these investment firms need to obtain an additional CSP licence under the ECSPR as well.

**45.27** Given the above, Dutch crowdinvesting CSPs were faced with an interesting choice:

- maintain the MiFID II licence and no longer intermediate in respect of crowdfunding offers falling under the scope of the ECSPR;
- maintain the MiFID II licence and obtain a licence for crowdfunding services under the ECSPR; or
- give up the MiFID II licence and obtain a licence for crowdfunding services under the ECSPR.

**45.28** A CSP's decision to give up its MiFID II licence had a number of consequences. Compliance-wise things became a bit easier, presumably, as the heavy and detailed MiFID II framework would no longer apply. Some specific Dutch rules, such as the rules around sound remuneration, including the cap on variable remunerations, could be put aside as well. Another alleviation was that persons holding, directly or indirectly, a qualified interest<sup>63</sup> no longer had to obtain a declaration of no objection from DNB.<sup>64</sup> In addition, the CSP per se would no longer fall under the scope of the Dutch AML Act. From a capital requirements perspective, CSPs may also have found some relief.<sup>65</sup>

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ESMA35-42-1183. I refer to Chapter 13, by Aschenbeck and Engler, for a more extensive description of the market entrance requirements with which CSPs need to comply in order to obtain an authorisation under the ECSPR.

62 For a schematic, general overview of the differences between the prior Dutch framework applicable to crowdinvesting CSPs and the ECSPR, I refer you to the website of FG Lawyers, Blog Series 'The new Crowdfunding Framework', blog 2 'Gap analysis crowdinvesting platforms', available at [www.fglawyersamsterdam.com/wp-content/uploads/2021/11/The-New-Crowdfunding-Framework-Blog-2-Gap-analysis-crowdinvesting-platforms-12-November-2021.pdf](http://www.fglawyersamsterdam.com/wp-content/uploads/2021/11/The-New-Crowdfunding-Framework-Blog-2-Gap-analysis-crowdinvesting-platforms-12-November-2021.pdf).

63 A qualified interest is a direct or indirect holding of 10 per cent or more capital interest, voting rights of comparable control in a company.

64 Article 3:95 DFSA.

65 See para 45.31.

However, giving up their MiFID licence also resulted in these CSPs no longer being able to provide their intermediary services in respect of crowdfunding offers exceeding €5 million calculated over a period of 12 months. So if CSPs were interested in accepting projects of such size they had no choice but to keep their MiFID II licence, along with the heavier obligations coming with it. **45.29**

Maintaining a MiFID II licence can have competitive advantages as well. CSPs that are also authorised to provide the ancillary service of custody services under their MiFID II licence may benefit because the ECSPR requires transferable securities and admitted instruments for crowdfunding purposes to be held in custody by a duly licensed custodian.<sup>66</sup> Another competitive advantage that such a CSP may experience is that it will not be considered to provide payment services if it carries out payment transactions related to securities asset servicing (including dividends, income or other distributions, or redemption or sale).<sup>67</sup> In my view, this means that CSPs that also hold a MiFID II licence, including for the ancillary service of custody services, should be able to be involved in the payment flows relating to the investments made in securities via their platform without being subjected to a PSD2 licence or being required to cooperate with a third party PSP pursuant to Article 10, section 4 ECSPR.<sup>68</sup> **45.30**

## 2. Capital requirement

The ECSPR introduced a capital requirement for CSPs.<sup>69</sup> This was a new obligation for Dutch crowdlending CSPs. Dutch crowdfunders were already subject to (heavier) capital requirements under MiFID II, the IFD and the IFR.<sup>70</sup> For those CSPs, the ECSPR brought either relief (if they gave up their MiFID II licence) or no change (if they decided to maintain their MiFID II licence).<sup>71</sup> Moreover, other than under IFD and IFR, no solvency requirements apply under the ECSPR and the risk of becoming subject to consolidated supervision for certain group companies is off the table as well. **45.31**

66 Duly licenced means either a licence as credit institution under CRD IV or as investment firm under MiFID II. I refer to Chapter 11, by Hooghiemstra, for a more extensive description of the requirements with which CSPs need to comply if they wish to offer asset safekeeping services.

67 Article 3(i) PSD2, as implemented in Article 1:5a, section 2, subsection (i) DFSA.

68 As per the cut-off date of this chapter, my view is still subject to discussion with the Dutch regulators. With reference to ESMA Q&As on the ECSPR under 3.4 and 3.5 (available here: [https://www.esma.europa.eu/sites/default/files/library/esma35-42-1088\\_qas\\_crowdfunding\\_ecspr.pdf](https://www.esma.europa.eu/sites/default/files/library/esma35-42-1088_qas_crowdfunding_ecspr.pdf)), the Dutch regulators currently hold the view that the ECSPR does not leave room for CSPs that also hold the relevant MiFID II license for offering custody services to rely on the exemption laid down in Article 3(i) PSD2. I disagree. In my view, it follows from recital 29 ECSPR that these type of CSPs remain to be able to rely on this exemption and that the same is 'in accordance with PSD2' as referred to in Article 10(4) ECSPR.

69 Article 11, section 1 ECSPR. I refer to Chapter 12, by Louisse, for a more extensive description of the prudential requirements which CSPs need to comply with under the ECSPR.

70 Directive (EU) 2019/2034 of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms ('IFD') and Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms ('IFR').

71 Article 11, section 3 ECSPR. I refer to para 45.28.

### 3. Passport

**45.32** The ECSPR also brought good news for Dutch crowdlending CSPs. The introduction of a passport<sup>72</sup> enabling CSPs to offer their crowdfunding services on a cross-border basis in other host Member States has great merit for Dutch crowdlending CSPs as well as Dutch crowdinvesting CSPs that experienced difficulty in using their passport rights under their MiFID II licence due to the lack of a harmonised legal framework applicable to crowdfunding in the EU. However, it also takes away national legal obstacles for foreign CSPs to enter the Dutch market. Without doubt this will result in more CSPs offering their services in multiple EU Member States, giving rise to more competition.

### 4. Involvement in payment flows

**45.33** One of the main changes for CSPs under the ECSPR compared to the Dutch framework is the limitation on involvement of the CSP in the payment flows resulting from its crowdfunding services.<sup>73</sup> The obligation under Article 10 ECSPR to either involve an authorised PSP or to become authorised as a PSP<sup>74</sup> itself when being involved in these payment flows has quite an impact on Dutch CSPs and their revenue models.

### 5. Investor protection

**45.34** The ECSPR includes some specific obligations with which CSPs need to comply if they offer their crowdfunding services to non-sophisticated investors. The ECSPR introduces a more protective framework for non-sophisticated investors than the one CSPs were confronted with under the prior Dutch framework. These protective measures need to be taken by any CSP vis-à-vis a non-sophisticated investor, irrespective of the type of crowdfunding service offered.

#### *(a) Onboarding of clients*

**45.35** Given the intermediating character of the services provided by a CSP, both investors and project owners are considered clients of a CSP. Although this will presumably change in the relatively near future,<sup>75</sup> CSPs licensed under the ECSPR are not subjected to the client identification and verification requirements pursuant to the AML/CFT framework.<sup>76</sup> It is believed

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72 Article 18 ECSPR. I refer to Chapter 16, by Tortorici, for a more extensive description of the EU-passporting system for CSPs.

73 See para 45.06. I refer to Chapter 11, by Hooghiemstra, for a more extensive description of the requirements with which CSPs need to comply if they wish to be involved in the payment flows between investors and project owners.

74 I refer to para 45.30 for my view of types of CSPs that should be exempt from the obligation to obtain a PSP license themselves (or to be required to cooperate with a third-party PSP). In addition, in my view, CSPs that offer payment services on the basis of a valid exemption pursuant to PSD2 should also be deemed to fall out of scope of the obligation pursuant to Article 10(4) ECSPR.

75 Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing', COM/2021/420 final (Proposed AMLR), at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0420>. It is proposed to include CSPs that do not hold a license under the ECSPR in the scope of the Proposed AMLR.

76 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (AMLD), as amended.

that these risks are mitigated adequately thanks to the required involvement of a PSP (which does fall within the scope of the AML/CFT framework).

Under the prior Dutch framework, crowdfunding CSPs did fall within the scope of the Dutch AML Act on the basis of their MiFID II licence. Presumably these CSPs will not change their onboarding processes. However, if these crowdfunding CSPs give up their MiFID II licences such CSPs will, from a GDPR perspective, need to critically review their privacy policies and the personal data of clients that they process to ensure that they comply with these privacy rules going forward, as the Dutch AML Act no longer provides legal ground for these CSPs to process such personal data.<sup>77</sup> **45.36**

Irrespective of CSPs not falling under the Dutch AML Act, a CSP naturally needs to onboard its clients and obtain certain information from its clients in order to categorise it into either project owner, sophisticated investor or non-sophisticated investor. The ECSPR introduced specific know-your-customer requirements ('KYC') that a CSP needs to take into account when onboarding a non-sophisticated investor.<sup>78</sup> No such requirements apply in respect of sophisticated investors. The KYC requirements applicable under the ECSPR vis-à-vis non-sophisticated investors are similar to the suitability assessment that can be derived from MiFID II. It is notable that this suitability assessment under MiFID II only needs to be conducted if an investment firm provides investment advice or portfolio management services<sup>79</sup> or if it concerns bail-in instruments.<sup>80</sup> Under MiFID II, the services of receipt and transfer of orders and placing services without a firm commitment basis (that is, investment services that are considered crowdfunding services when provided jointly by a CSP) merely require an appropriateness assessment of the client.<sup>81</sup> **45.37**

CSPs also need to offer a simulation tool on their platforms enabling a non-sophisticated investor to simulate their ability to bear losses, which simulation is to be repeated on an annual basis.<sup>82</sup> Under the prior Dutch framework, crowdlending CSPs merely had a best-efforts obligation to ensure that a consumer would not invest more than 10 per cent of his freely investable assets in crowdlending projects. **45.38**

As regards project owners, the ECSPR includes some limited due diligence requirements. Interestingly enough, part of this due diligence obligation is to obtain evidence that the project owner does not have a criminal record in respect of, among others, AML/CFT laws.<sup>83</sup> As far as I know, criminal records are not publicly accessible in the Netherlands by a CSP. It remains questionable to me how a CSP can properly satisfy its due diligence obligations in this respect. **45.39**

77 Within the meaning of Article 6(1)(c) GDPR.

78 Article 21 ECSPR as elaborated on in Delegated Regulation (EU) specifying the entry knowledge test and the simulation of the ability to bear loss for non-sophisticated investors.

79 Article 25(2) MiFID II, implemented in Article 4:23 DFSA.

80 Within the meaning of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (BRRD), implemented in Article 4:23a DFSA.

81 Article 25(3) MiFID II, implemented in Article 4:24 DFSA.

82 Article 21(5) and (6) ECSPR.

83 Article 5(2)(a) ECSPR.

*(b) Investment limit removed*

**45.40** The investment limit of €80,000 that applied to consumers who invested in crowdlending projects, and which limit was to be monitored by crowdlending CSPs in the Netherlands pursuant to the AFM Regulations under the prior Dutch national framework, no longer applies under the ECSPR.

*(c) Pre-contractual reflection period*

**45.41** Under the prior AFM Regulations, crowdlending CSPs needed to offer consumers a 24-hour period during which the consumer could either confirm the investment or terminate it. Crowdfunding CSPs in the Netherlands were not subjected to such a requirement albeit that Dutch Civil Law includes a 14-day withdrawal period for consumers, which right needs to be taken into account and appreciated by crowdfunding CSPs. The ECSPR introduced a new reflection period, applicable to any CSP. A non-sophisticated investor has the right to revoke its offer to invest in the crowdfunding project within a period of four calendar days.<sup>84</sup>

*(d) Default rate disclosure*

**45.42** Although a number of crowdlending CSPs in the Netherlands already disclosed their default rates voluntarily,<sup>85</sup> the ECSPR brings some firm disclosure obligations for these CSPs, including an annual obligation to disclose the default rates of the crowdfunding projects offered on their platforms in the preceding three years.<sup>86</sup>

## 6. KIIS

**45.43** Following the examples under other European legislation, the ECSPR introduced yet another key investment information sheet.<sup>87</sup> This KIIS should enable investors to easily compare the crowdfunding projects offered on the platforms of CSPs. It generally applies to each project owner in respect of each crowdfunding project to be published on any crowdfunding platform.<sup>88</sup> Although the project owner has the responsibility (and liability) to prepare the KIIS, CSPs need to have procedures in place to ensure that the KIIS is complete, correct and clear before publishing the same on its platform. This KIIS requirement will lead to significantly more preparatory work being performed by the project owner (in conjunction with the CSP). It will inevitably benefit the comparison and transparency purposes of crowdfunding projects.

<sup>84</sup> Article 22(2) and (3) ECSPR. It is not clear to me how this 4-day reflection period under the ECSPR compares to this 14-day withdrawal period pursuant to Article 6:230x DCC which is based on Directive 2002/65/EC.

<sup>85</sup> These CSPs published the default rates on the basis of a Code of Conduct of the industry association 'Nederland Crowdfunding', available at (in Dutch only) <https://nederlandcrowdfunding.nl/gedragscode/>. With only four members, it is questionable whether this association is a fair representation of the Dutch crowdlending market.

<sup>86</sup> Article 20 ECSPR as elaborated on in Delegated Regulation (EU) specifying the methodology for calculating the default rates of loans offered on a crowdfunding platform.

<sup>87</sup> Articles 23 and 24 ECSPR and Annex I thereto as elaborated on in the future Delegated Regulation on the KIIS ('RTS7'); as of March 2022, see ESMA (n 61). See also ESMA, 'Q&A on the ECSPR', ESMA35-42-1088, No 5.2ff.

<sup>88</sup> The only exception is that if a CSP provides individual portfolio management of loans services, a KIIS at platform level, drawn up by the CSP, is required (Article 24 ECSPR). The CSP is responsible (and liable) for the accuracy of such KIIS and for ensuring it is not misleading (nor by omission of material information).



## 7. Individual portfolio management of loans

Crowdfunding CSPs may also provide individual portfolio management of loans, which includes auto-investing.<sup>89</sup> Since a non-negotiable business loan is not considered a financial instrument from a Dutch law perspective,<sup>90</sup> crowdfunding CSPs in the Netherlands could already provide individual portfolio management services prior to the ECSPR. These services could, however, conflict with the general obligation pursuant to the prior AFM Regulations to publish pre-contractual information at least 48 hours before investors were able to invest in the crowdfunding offer. In my view, taking into account the rationale behind this obligation (namely to ensure that investors had sufficient time to read the offer materials in order for them to make an informed investment decision), the protective purpose of this obligation was adequately satisfied if the CSP invested in crowdfunding offers within the parameters set by the investor in the mandate. **45.44**

The ECSPR and the (future) Delegated Regulation provides for a much clearer framework within which the CSP needs to operate if it offers individual portfolio management services. This will inevitably result in the need for Dutch CSPs to step up to the new mark set by the ECSPR. **45.45**

Due to the prohibition on attracting, obtaining or having the disposal of repayable funds from the public in the Netherlands,<sup>91</sup> CSPs cannot hold funds in escrow on behalf of their clients.<sup>92</sup> If CSPs offer individual portfolio management services, clients generally prefer to provide a lump sum, which is to be invested by the CSPs in different crowdfunding projects. From a Dutch law perspective, CSPs must invest such amount in full within five calendar days or such longer period as is technically and organisationally necessary (not exceeding 30 calendar days). From an operational perspective, this Dutch law prohibition could result in the provision of individual portfolio management services only to be available to professional market parties in the Netherlands. **45.46**

The ECSPR also seems to limit a CSP's ability to offer individual portfolio management services to non-sophisticated investors if the investment amount in a project exceeds €1,000 or 5 per cent of that investor's net worth. The CSP would be required to provide a risk warning, await the investor's explicit consent and offer evidence to the CSP that he/she understands the investment and the risks involved prior to an investment being made.<sup>93</sup> This does not seem to correspond with the idea behind individual portfolio management. **45.47**

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89 I refer to Chapter 7, by R Ferretti, for a more extensive description of the requirements to which CSPs need to comply if they wish to (maintain to) offer individual portfolio management of loans.

90 See para 45.18.

91 See para 45.12 for a more information in respect of this Dutch law prohibition.

92 Clients who qualify as professional market parties are excluded; CSPs can hold funds of these type of clients in escrow.

93 Article 21 section 7 ECSPR. See also ESMA (n 87), No 5.1.

## 8. Trading options for crowdfunding investments

- 45.48** The ECSPR includes the possibility for CSPs to operate a bulletin board to enable their clients to trade crowdfunding investments after the initial issuance thereof by the project owner.<sup>94</sup> A CSP that operates a bulletin board cannot offer much more than a passive digital gateway through which investors can post their intention to buy or sell a crowdfunding investment. Interaction via the bulletin board should be prevented by the CSP. This is in order to safeguard the CSP's own position. The lines between the ECSPR, on the one hand, and the MiFID II framework, on the other hand, are wafer-thin. A CSP needs to ensure it does not mistakenly cross the line as it could become subject to the MiFID II framework and the obligation to obtain a licence for operating a regulated multilateral trading venue.<sup>95</sup>
- 45.49** In the Dutch crowdfunding market, it is a welcome clarification that a CSP can operate a bulletin board. Perhaps even more interesting is that not only buying and selling interests in respect of securities (and admitted instruments for crowdfunding purposes) can be advertised on the bulletin board, but also buying and selling interests in respect of loans. From a Dutch law perspective, a loan can requalify as a debt security if it is negotiable. Such requalification has major consequences.<sup>96</sup> Apparently, a loan provided via a crowdfunding platform does not automatically requalify as a transferable debt security in the event that the CSP operates a bulletin board and offers its clients a secondary trading option in respect of those loans outside the bulletin board.<sup>97</sup> This could be a game changer in the Netherlands.

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94 Article 25 ECSPR.

95 I refer to Chapter 21, by Gargantini, for a more extensive description of the opportunity for a CSP to offer a bulletin board and the restrictions which the CSP needs to take into account in order to prevent the CSP from being deemed an operator of a regulated trading facility. I also refer to Hakvoort (n 40), at 267, and the website of FG Lawyers, Blog Series 'The new Crowdfunding Framework', blog 3 'The do's and don'ts when operating a bulletin board', available at [www.fglawyersamsterdam.com/wp-content/uploads/2021/12/ECSPR-blog-series-Blog-3\\_-The-do\\_s-and-don\\_ts-when-operating-a-bulletin-board\\_75207\\_1.pdf](http://www.fglawyersamsterdam.com/wp-content/uploads/2021/12/ECSPR-blog-series-Blog-3_-The-do_s-and-don_ts-when-operating-a-bulletin-board_75207_1.pdf).

96 See para 45.18.

97 Hakvoort (n 40) 13.45-13.54.