

## THE NEW CROWDFUNDING FRAMEWORK ECSPR BLOG SERIES – BLOG 2: GAP ANALYSIS CROWDINVESTING PLATFORMS

It is a fact! The new Regulation (EU) 2020/1503 on European crowdfunding service providers for business (the “[ECSPR](#)”) and Directive (EU) 2020/1504 amending [MIFID II](#) (the “[Crowdfunding Directive](#)”) applies as per yesterday, 10 November 2021. 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.

### 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 this second issue, we will focus on the gap analysis for existing crowdinvesting platforms active in the Netherlands. 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.

### Status quo

In each blog in this series, we will include the most up to date hyperlinks to relevant laws, regulations and documentation. Since the publication of our first blog in this series on 4 November 2021, the final reports on numerous technical standards under the ECSPR were published by ESMA and EBA respectively.

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:

[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). Some NCAs have already provided summaries of the national provisions concerning marketing requirements applicable to CSPs that the NCAs are responsible for overseeing compliance with. Interestingly, the AFM seems to have reported that no Dutch law marketing requirements apply which the AFM is responsible for overseeing compliance with. We note that – although there are no Dutch marketing rules specifically focusing on CSPs – CSPs who contemplate to be active in the Dutch market naturally do need to comply with the general Dutch marketing rules laid down in the Dutch Civil Code which marketing rules

are mainly derived from the Dutch law implementations of the [Unfair Commercial Practices Directive](#) (for B2C communications) and its [equivalent](#) for B2B communications, the [E-Commerce Directive](#), the [Consumer Rights Directive](#) and the [Distance Marketing of Financial Services Directive](#);

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

[Q&A on the ECSPR](#) (published on 25 February 2021);

- 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):

[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)

### Existing CSPs operating a crowdfundering platform

CSPs operating a crowdfundering platform in the Netherlands currently need to obtain an authorisation as an investment firm and comply with the extensive MiFID II set of rules and regulations.

These CSPs have already obtained a license under the MiFID II framework from the AFM. They have invested a considerable amount of time, funds and other resources in the preparation phase to get market access as well as in rolling out their crowdfundering platform from an operational and technological perspective to ensure compliance with the heavy MiFID II framework. If these CSPs fall within the scope of the ECSPR – which they generally will do if they provide the same type of services as they currently do in respect of crowdfunding projects up to €5 million – these CSPs are required to go through the whole process of obtaining a license from the AFM again, with considerable costs<sup>1</sup>

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<sup>1</sup> The regulatory costs to be charged by the AFM are for example (assuming the [implementation regulation](#) will become effective in its current draft for) an hourly rate of €200 up to €75.000 in total for reviewing the application. Additional costs apply for the fit and proper assessment that may need to be taken of policymakers (including shareholders holding, directly or indirectly, at least 20% in the CSP, see below) and supervisory directors of the CSP.

involved. Although the ECSPR explicitly states that NCAs cannot require the existing CSP to re-submit documents that the NCA reviewed before, such information does need to be up to date. As will follow from this blog, the ECSPR brings changes for existing CSPs operating a crowdinvesting platform, which changes may need to be reflected in internal procedures and policies of such CSP. The NCAs will, presumably, require such CSP to evidence that its internal procedures and policies have been amended to adequately reflect the changes that are required pursuant to the ECSPR. That being said, the process of obtaining an authorisation under the ECSPR should be a relatively easy and quick walk in the park for CSPs who already operate a crowdinvesting platform under a MiFID II license.

As such, these CSPs, already active in the Dutch market, are confronted with a difficult but interesting choice:

- (i) hand in the MiFID II license, apply for a CSP license under the ECSPR and limit the crowdfunding projects on the platform to €5 million;
- (ii) maintain the MiFID II license and combine it with a CSP license under the ECSPR and keep the flexibility to provide crowdfunding services for any project amount; or
- (iii) maintain the MiFID II license and not apply for a CSP license under the ECSPR and only offer services for any project higher than €5 million or otherwise out of scope of the ECSPR.

In this blog we aim to give a general overview of the main differences between the current MiFID II framework applicable to existing CSPs operating a crowdinvesting platform and the framework that is introduced in the ECSPR which may be helpful for CSPs to make the aforementioned choice.

	Current Dutch / MiFID II framework	ECSPR
<b>Main market entrance requirements</b>		
Authorisation requirement including general information about the CSP and its (contemplated) operations and services	License requirement to be obtained from NCA of the home member state of the CSP (Art. 2:96 DFSA / Art. 5 MiFID II)	License requirement to be obtained from NCA of the home member state of the CSP (Art. 3 and Art. 12 ECSPR and described in more detail in <a href="#">Final Report ESMA RTS</a> pursuant to Art. 12(16) ECSPR)
Passport	Yes (Art. 2:127-2:129 DFSA / Art. 34 and 35 MiFID II)	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. 2:99(1)(d), Art. 2:99(1)(g) DFSA as further described in part 4 DFSA and lower rules promulgated thereunder / Art. 16(2)(5) MiFID II, Regulation (EU) 2017/565 and Directive (EU) 2017/593)	Yes (Art. 12(2)(e) ECSPR and Final Report ESMA RTS)
Separate compliance function	Yes (Art. 2d Dutch AML Act; Art. 31b BGfo / Art. 16 MiFID II, Art. 22 Regulation (EU) 2017/565)	Not required, but can be established as part of the governance arrangement and internal control mechanism (Final Report ESMA RTS)
Internal audit function	Yes, subject to nature, scale and complexity of the business (Art. 2d Dutch AML Act / Art. 16 MiFID II, Art. 24 Regulation (EU) 2017/565)	No
Risk management function	Yes, subject to nature, scale and complexity of the business (Art. 16 MiFID II, Art. 23 Regulation (EU) 2017/565)	Not required, but can be established as part of the governance arrangement and internal control mechanism (Final Report ESMA RTS)
Risk overview and risk management policy	Yes (Part of sound and controlled business operations as set out above; Art. 16 MiFID II; Art. 23 Regulation (EU) 2017/565)	Yes, Art. 12(2)(e), Art. 12(2)(g), Art. 4(2) ECSPR and Final Report ESMA RTS.
Description of systems, resources and procedures for the control and safeguarding of the data processing systems	Yes (GDPR, Art. 16 MiFID II)	Yes (GDPR, Art. 12(2)(f) ECSPR and Final Report ESMA RTS)
Prudential safeguards <ul style="list-style-type: none"> <li>Solvency requirements</li> <li>Minimum own funds requirements</li> </ul>	<ul style="list-style-type: none"> <li>Yes (Art. 2:99(1)(k) DFSA; Art. 3:57 DFSA and lower rules promulgated thereunder; Part Three IFR)</li> <li>Yes, minimum amount depending on exact services to be provided by the CSP, but starting with €50.000 (applicable to CSPs who obtained a MiFID II license prior to 26 July 2021, to be increased with €5.000 on an annual basis), or at least the highest of either the CSPs fixed overheads requirements (at least 25% of fixed overheads of preceding year), permanent minimum capital requirement (at least €75.000) or K-factor requirement (Art. 2:99(1)(j) DFSA; Art. 3:53 DFSA and</li> </ul>	<ul style="list-style-type: none"> <li>No</li> <li>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 ECSPR and Final Report ESMA RTS).</li> </ul> <p>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</p>

	Current Dutch / MiFID II framework	ECSPR
<ul style="list-style-type: none"> <li>Consolidated group (prudential) supervision</li> </ul>	<p>lower rules promulgated thereunder; Art. 13 (1)(d) MiFID II; Art. 11-15 IFR)</p> <ul style="list-style-type: none"> <li>Yes, generally applicable if CSP is sole subsidiary of a holding or if CSP is part of a group of companies the majority of which are financial undertakings (Art. 7 IFR)</li> </ul>	<p>prudential safeguards pursuant to CRD V/CRR II, MiFID II/IFR, EMD2 and PSD2)</p> <ul style="list-style-type: none"> <li>No</li> </ul>
Business continuity plan	Yes, generally requested by the AFM	Yes (Art. 12(2)(j) and Art. 4(3) ECSPR and two Final Report ESMA RTSs)
Fit and proper assessments managing directors, supervisory directors and <i>de facto</i> daily policymakers	<p>Yes (Art. 2:99(1)(a), Art. 2:99(1)(b), Art. 4:9, Art. 4:10 DFSA and Dutch Policy rule on Suitability; Art. 9 MiFID II)</p> <ul style="list-style-type: none"> <li>Minimum of two natural persons to be appointed as managing directors (2:99(1)(e) and 4:83(1) DFSA)</li> <li>Managing directors to perform their management activities from its home Member State (which would be the Netherlands if the CSP is established in the Netherlands)</li> </ul>	<p>Yes (Art. 4, Art. 12(2)(k), Art. 12(2)(l) and Art. 12(3) ECSPR and Final Report ESMA RTS).</p> <ul style="list-style-type: none"> <li>No minimum number of managing directors;</li> <li>No requirement for managing directors to perform their management activities from its home Member State;</li> <li>Questionable whether a legal person can still be appointed as director of a CSP (ESMA assumes natural persons only) and whether the AFM can request a list of referees from each director.</li> </ul>
Rules on composition and functioning of the management board	Yes (Art. 4:9.0a DFSA; Art. 31e BGfo / Art. 88 CRD V, Art. 91 CRD V)	No
Regulation on the oath of affirmation	Yes (Art. 4:9(9) DFSA)	No
Proper assessments shareholders	Yes (Art. 2:99(1)(b), Art. 4:10 DFSA; Art. 10 MiFID II)	Yes, applicable to direct and indirect shareholders having at least 20% share capital or voting rights in the CSP (Art. 12(3)(a) ECSPR)
Declaration of no objection	Yes, applicable to direct and indirect holders of a qualified interest (10% or more) in the CSP (Art. 3:95 DFSA)	No
Professional conducts rules applicable to staff	Yes (Art. 4:9(3) DFSA)	No
Conflicts of interest procedures	Yes (Art. 2:99(1)(h), Art. 4:88 DFSA / Art. 23 MiFID II; Regulation (EU) 2017/565)	Yes (Art. 12(2)(m), Art. 8 ECSPR, two RTSs in Final Report ESMA RTS)
Skin in the game possible?	Yes (but not recommendable due to potential conflicting interests)	No (Art. 8 ECSPR)
Outsourcing policy	Yes (Art. 4:16 DFSA / Art. 16 MiFID II, Regulation (EU) 2017/565)	Yes (Art. 12(2)(n), Art. 9 ECSPR, Final Report ESMA RTS)
Adequate complaint handling procedures	Yes (Art. 4:17 DFSA, §7.2 BGfo / Art. 26 Regulation (EU) 2017/565)	Yes (Art. 12(2)(o), Art. 7 ECSPR and two RTSs in Final Report ESMA RTS)
KiFID registration	Yes (Art. 4:17 DFSA, §7.2 BGfo)	No
Incident reporting	Yes (Art. 4:11 DFSA; Art. 24 BGfo)	No

	Current Dutch / MiFID II framework	ECSPR
<b>Additional services</b>		
Asset safekeeping services	Yes, subject to having a license for the ancillary service of safekeeping B1 in Annex 1 to MiFID II)	Yes, subject to having a license for the ancillary service of safekeeping of loans under the ECSPR and/or, in respect of offering asset safekeeping services in relation to financial instruments subject to having a MiFID II license including the ancillary services of safekeeping B1 in Annex 1 to MiFID II (Art. 10 ECSPR)
Separation of client assets from CSPs assets	Yes (Art. 2:99(1)(h), Art. 4:87 DFSA, Chapter 7 Nrgfo / Art. 16 MiFID II and Regulation (EU) 2017/593). Depending on manner of asset separation, additional own funds requirements could be applicable	Yes
Payment services	Yes, <b>but generally not considered to be subject to an authorisation obligation</b> . Moreover, CSPs having a license for the ancillary service of safekeeping B1 in Annex 1 to MiFID II are not considered to provide payment services if they carry out payment transactions in connection with the provision of services relating to securities (including dividend payments and yield payments, redemption and sale)	<p>Yes (Art. 12(2)(p), Art. 10 ECSPR)</p> <ul style="list-style-type: none"> <li>• By CSP itself</li> <li>• By authorised third party (PI, EMI, bank)</li> <li>• Direct handling by project owner subject to safeguarding by CSP of minimum safety arrangements by project owner</li> </ul> <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 (<a href="#">Vrijstellingsregeling Wft</a>) should be able to offer payment services in respect of crowdfunding offers in the Netherlands as well without being subjected to a license requirement pursuant to Art. 2:3a DFSA. We are awaiting DNB's view in this respect.</p> <p>Moreover, CSPs operating a crowdfunder platform and maintaining their MiFID II authorisation including the ancillary service of safekeeping B1 in Annex I to MiFID II will not be considered to provide payment services if they carry out payment transactions in connection with the provision of services relating to securities (including dividend payments and yield payments, redemption and sale). These CSPs should, in our view, remain to be exempt from a PSP license obligation subject to such CSP merely facilitating in the payment flows relating to transactions in securities.</p>

	Current Dutch / MiFID II framework	ECSPR
<ul style="list-style-type: none"> <li>Separation of client assets from CSPs assets?</li> </ul>	Yes (Art. 2:99(1)(h), Art. 4:87 DFSA, Chapter 7 Nrgfo / Art. 16 MiFID II and Regulation (EU) 2017/593). Depending on manner of asset separation, additional own funds requirements could be applicable	Yes
Passive bulletin board	No (although MiFIR already enabled it, we experienced difficult discussions with the AFM, that generally tends to qualify the platform as an MTF or OTF)	Yes (Art. 25 ECSPR)
<b>Investor protection</b>		
Product approval and review process	Yes (Art. 4:14 DFSA, Art. 32, Art. 32a BGfo / 16 MiFID II, Chapter III Directive (EU) 2017/593)	No
Due diligence obligations on CSP in respect of project owner	No	Yes (Art. 5 ECSPR)
Key investment information sheet crowdfunding offer	<ul style="list-style-type: none"> <li>Information document in prescribed template format for offerings under €5 million, to be deposited with the AFM (Art. 53 Exemption Regulation DFSA); or</li> <li>Prospectus drawn up in accordance with Prospectus Regulation and approved by NCA for offerings over €5 million (Art. 3 Prospectus Regulation)</li> </ul>	<ul style="list-style-type: none"> <li>Yes KISS required (Art. 12(2)(q), Art. 23 ECSPR, Annex I ECSPR, two RTSs in Final Report ESMA RTS)</li> <li>Exemption to publish a prospectus for any crowdfunding offering below €5 million via a CSP authorised under the ECSPR (Art. 1(4)(k) Prospectus Regulation)</li> </ul>
Key investment information sheet at platform level	No	No (unless CSP also provides crowdfunding services in respect of loans (not securities) and provides individual portfolio management services in respect of those loans; a CSP cannot offer similar services in respect of securities (or other financial instruments) unless the CSP also holds a MiFID II license for providing individual asset management services.
Marketing strategy	Yes (Art. 24(3) MiFID II)	Yes, Final Report ESMA RTS
Appropriateness test requirements	Yes (Art. 4:24 DFSA / Art. 25(2)(3) MiFID II, Art. 55 Regulation (EU) 2017/565)  Applicable to consumers only	Yes (Art. 12(2)(r), Art. 21 ECSPR, two RTSs in Final Report ESMA RTS)  Applicable to non-sophisticated investors only Repetition each 2 years and additional assessment in the event of an investment exceeding €1.000 or 5% net worth.
Outcome appropriateness test binding?	No, but the CSP needs to warn the client via a standardised format that they think the service/product is not appropriate for them	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)

	Current Dutch / MiFID II framework	ECSPR
Investment limit	No	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)
Pre-contractual reflection period	No, but consumer had the right to terminate the agreement with the CSP within 14 calendar days without cause (Art. 6:230x Dutch Civil Code)	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)
Investor compensation scheme	Yes (Art. 3:258 DFSA)	No
<b>Miscellaneous</b>		
Financial reporting obligations	Yes (Art. 3:72, Art. 4:26 DFSA / Art. 22 MiFID II, a.o. Part 7 IFR)	No
Transaction reporting obligations	Yes subject to the financial instruments being admitted to trading on a regulated trading venue (Art. 26 MiFIR)	No other than the obligation to report a list of projects funded through the CSP's platform on an annual basis (Art. 16 ECSPR and Final Report ESMA ITS)
Sound remuneration policy	Yes (Chapter 1.7 DFSA; Art. 27 Regulation EU 2017/565)	No
AML laws and regulations	Yes	No
Commission ban	No, exemption made available for CSPs (Art. 168a Bgfo)	No

### Stay tuned!

In our next post, we will discuss the bulletin board feature which is introduced by the ECSPR including its do's and don'ts.

### 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!](#)