

Questions and Answers

On the European crowdfunding service providers for business Regulation

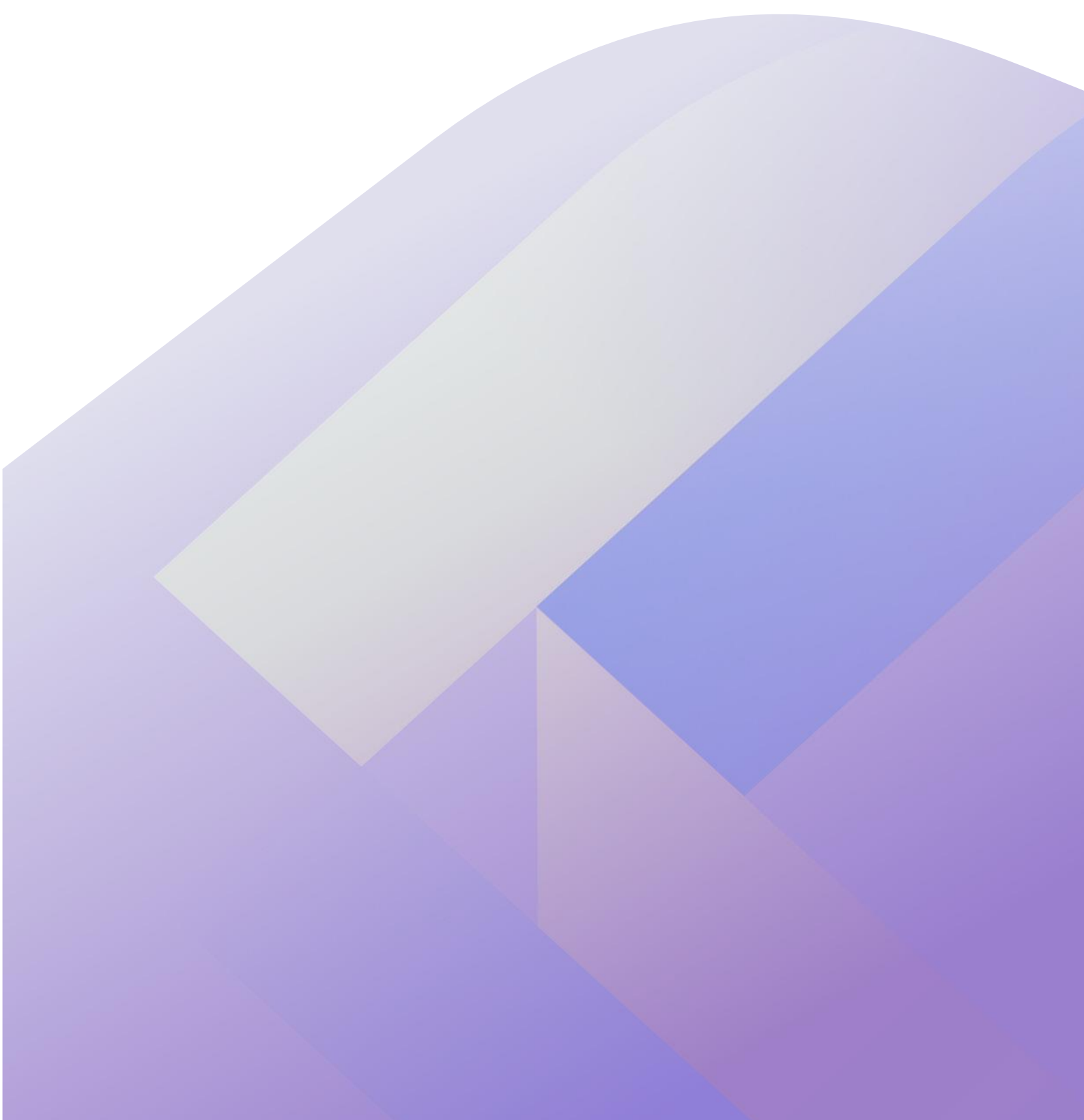


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Acronyms and definitions used

ECSPR	European crowdfunding service providers for business Regulation – Regulation (EU) 2020/1503 on European crowdfunding service providers for business
ESMA	European Markets and Securities Authority
ITS	Implementing Technical Standards
KIIS	Key investment information sheet as referred to in Article 23 of the ECSPR
KIIS at platform level	Key investment information sheet as referred to in Article 24 of the ECSPR
KIIS Delegated Regulation	Commission Delegated Regulation (EU) 2022/2119 supplementing Regulation (EU) 2020/1503 of the European Parliament and of the Council with regard to regulatory technical standards for the key investment information sheet
NCA	National competent authority
MiFID II	Markets in Financial Instruments Directive (recast) – Directive 2014/65/EU of the European Parliament and of the Council
Prospectus Regulation	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
PSD	Directive (UE) 2015/2366 on payment services in the internal market
Q&A	Question and Answer
RTS	Regulatory Technical Standards
SPV	Special Purpose Vehicle

1 Introduction

Background

The ECSPR was published in the Official Journal on 20 October 2020 and entered into application on 10 November 2020.

Purpose

The purpose of this document is to promote common supervisory approaches and practices in the application of the ECSPR. It aims at providing responses to questions posed by the general public, market participants and competent authorities in relation to the practical application of the ECSPR. The content of this document is aimed at competent authorities and crowdfunding service providers.

The content of this document is not exhaustive and does not constitute new policy.

This document also contains answers provided by the European Commission pursuant to Article 16b(5) of Regulation 2010/1095. These answers are clearly indicated as such.

Status of the answers provided by ESMA

The question and answer (Q&A) mechanism is a practical convergence tool used to promote common supervisory approaches and practices under Article 29(2) of the ESMA Regulation¹.

Due to the nature of Q&As, formal consultation on the draft answers is considered unnecessary. However, even if Q&As are not formally consulted on, ESMA may check them with representatives of ESMA's Securities and Markets Stakeholder Group, the relevant Standing Committees' Consultative Working Group or, where specific expertise is needed, with other external parties.

ESMA will periodically review these Q&As on a regular basis to update them where required and to identify if, in a certain area, there is a need to convert some of the material into ESMA Guidelines and recommendations. In such cases, the procedures foreseen under Article 16 of the ESMA Regulation will be followed.

Status of the answers provided by the European Commission

The answers provided by the European Commission are provided pursuant to Article 16b(5) of Regulation 2010/1095 to clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent

¹ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC Regulation, 15.12.2010, L331/84.

authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudice the position that the European Commission might take before the Union and national courts.

Ongoing editing and updates

This document is intended to be continually edited and updated as and when new questions are received. The date on which each section was last amended is included for ease of reference.

2 Table of questions

Subject	Q	Topic of the Question	Level 1/Level 2	Last Update
Use of SPVs	1.1	Circumstances and conditions in which an SPV can be created for the provision of crowdfunding services	Articles 2(1) and 3(6) of ECSPR	25/02/2021
	1.2	The types of instruments that can be offered to investors via an SPV	Articles 2(1) and 3(6) of ECSPR	25/02/2021
	1.3	Whether an SPV can give exposure to more than one underlying asset	Articles 2(1) and 3(6) of ECSPR	25/02/2021
	1.4	The type of underlying asset an SPV can give exposure to	Articles 2(1) and 3(6) of ECSPR	25/02/2021
	1.5	When an asset should be deemed to be illiquid or indivisible within the meaning of the ECSPR	Articles 2(1) and 3(6) of ECSPR	25/02/2021
Transitional period	2.1	Application of the transitional period <u>Answer provided by the European Commission</u>	Article 48(1) of ECSPR	10/11/2021
General provisions	3.1	Scope of the ECSPR - Interpretation of "business activity" <u>Answer provided by the European Commission</u>	Article 2(1), point (l) of the ECSPR	10/11/2021
	3.2	Legal status of the individual portfolio management of loans <u>Answer provided by the European Commission</u>	Article 2(1), point (a) of ECSPR	10/11/2021
	3.3	Asset safekeeping services	Article 10(1) of ECSPR	19/05/2021
	3.4	Payment services	Article 10(2), (3), (4) and (5) of ECSPR	19/05/2021
	3.5	Payment services	Article 10(2) of ECSPR	19/05/2021
	3.6	Tied agent <u>Answer provided by the European Commission</u>	N/A	19/05/2021
	3.7	Branches <u>Answer provided by the European Commission</u>	N/A	19/05/2021

	3.8	Crowdfunding Services and MiFID services	N/A	23/09/2022
	3.9	Scope of exemption under Art. 1(2)	Article 1(2) of ECSPR	23/09/2022
	3.10	Non-intermediated based platform	Article 2(1) of ECSPR	23/09/2022
	3.11	Offer to a sole investor	Article 2(1) of ECSPR	23/09/2022
	3.12	Entity offering of own projects	Article 2(1) of ECSPR	23/09/2022
	3.13	Scope of exemption under Art. 1(2)	Article 1(2) of ECSPR	16/12/2022
	3.14	Payment services <u>Answer provided by the European Commission</u>	Article 10(4) of ECSPR	08/03/2023 *NEW*
Provisions of crowdfunding services and organisational and operational requirements	4.1	Interpretation of the term "routing orders" <u>Answer provided by the European Commission</u>	Article 3(3) of ECSPR	10/11/2021
Investor protection and marketing communications	5.1	Entry knowledge test <u>Answer provided by the European Commission</u>	Article 21(7) of ECSPR	10/11/2021
	5.2	Respective liability for the preparation of the KIIS <u>Answer provided by the European Commission</u>	Article 23 of ECSPR	10/11/2021
	5.3	Language of the KIIS and KIIS at platform level	Articles 23, 24 and 27 of ECSPR	28/01/2022
	5.4	Language of the KIIS and KIIS at platform level	Articles 23, 24 and 27 of ECSPR	28/01/2022
	5.5	Language of the KIIS	Article 23 of ECSPR	28/01/2022
	5.6	Languages accepted by NCAs	Articles 23 and 27 of ECSPR	28/01/2022

	5.7	Marketing of crowdfunding projects	Article 27 of ECSPR	28/01/2022
	5.8	Cross-border Marketing	Article 27 of ECSPR	28/01/2022
	5.9	Role of Crowdfunding Service Providers (CSPs) in relation to the drawing up and information contained in the KIIS <u>Answer provided by the European Commission</u>	Article 23 of ECSPR	19/05/2021
	5.10	Simulation of the ability to bear loss	Article 21(5) of ECSPR	23/09/2022
	5.11	Simulation of the ability to bear loss	Article 21(5) of ECSPR	23/09/2022
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	5.13	Entry knowledge test	Article 21(7) of ECSPR	23/09/2022
	5.14	Entry knowledge test	Article 21(7) of ECSPR	23/09/2022
	5.15	Conflicts of interest	Article 8(1) of ECSPR	23/09/2022
	5.16	KIIS	Article 23 of ECSPR	16/12:2022
	5.17	KIIS	Article 23 of ECSPR	16/12:2022
	5.18	Marketing	Article 27(2) of ECSPR	16/12:2022
Authorisation and supervision of CSPs	6.1	Composition of the management body of a CSP	Article 12 of ECSPR	16/12:2022
	6.2	Use of several trading names	Article 12(2) of ECSPR	16/12:2022

3 Use of Special Purpose Vehicles (SPV) [Last update: 25 February 2021]

Question 1.1 [Last update: 25 February 2021]

In which circumstances and subject to which conditions can an SPV be created for the provision of crowdfunding services?

Answer 1.1

According to the ECSPR, an SPV is an entity created for the sole purpose of securitisation within the meaning of point (2) of Article 1 of Regulation (EU) No 1075/2013 of the European Central Bank. An SPV can only be created if (i) it is interposed between the project owner and investors and (ii) serves the sole purpose of enabling investors to acquire an interest in one illiquid or indivisible underlying asset which could otherwise not or not easily be offered to investors.

Question 1.2 [Last update: 25 February 2021]

What type of instruments can be offered to investors via an SPV?

Answer 1.2

Where a crowdfunding offer is made via an SPV, the instruments offered to investors can be either transferable securities within the meaning of point (44) of Article 4(1) of MIFID II or admitted instruments for crowdfunding purposes within the meaning of point (n) of Article 2(1) of the ECSPR. Conversely, the ECSPR does not envisage the possibility of loan-based crowdfunding offers made via an SPV.

Question 1.3 [Last update: 25 February 2021]

Can an SPV give exposure to more than one underlying asset?

Answer 1.3

No. According to Article 3(6) of the ECSPR, an SPV cannot serve the purpose of enabling the offering to investors of exposure to more than one illiquid or indivisible asset.

Question 1.4 [Last update: 25 February 2021]

What type of underlying asset can an SPV give exposure to?

Answer 1.4

The ECSPR aims to facilitate direct investments and avoid creating regulatory arbitrage opportunities. The use of an SPV interposed between an underlying asset and investors shall be permitted only when it enables investors to gain exposure to assets which could otherwise

not or not easily be offered to investors. For that reason, Article 3(6) of the ECSPR restricts the use of SPVs to illiquid or indivisible types of underlying assets only. Consequently, the interposition of an SPV can only be justified when the unique underlying asset is either illiquid or indivisible.

Question 1.5 [Last update: 25 February 2021]

What are possible indications of an illiquid or indivisible asset, for the purpose of the application of the ECSPR?

Answer 1.5

An asset should be deemed to be illiquid when it cannot be turned into cash swiftly. Factors such as, but not limited to, the following are indications that the asset may be illiquid:

- (i) there is no organised market for assets of that type;
- (ii) sales for that type of assets usually take place over the counter;
- (iii) there is no readily available value for assets of that type; or
- (iv) reaching an agreement on a selling price with a potential buyer encompasses significant costs (administrative fees, tax, audit and legal costs) and takes from a few weeks to a few months.

An asset should be deemed to be indivisible when it cannot be easily or swiftly divided into smaller, more moderately priced components for the purpose of its partial or total sale to investors or when such division in smaller component is not economically rational, notably because it prevents the asset from serving its core economical purpose. Factors such as, but not limited to, the following are indications that the asset may be indivisible:

- (i) because of its legal structure, the asset cannot be divided or easily divided into smaller components that can be sold easily to investors (examples of such smaller component include, for instance, shares or units);
- (ii) due to the very nature of the underlying asset, it can only be divided into a limited number of components each with a value far exceeding the value usually expected for shares or units (e.g. a residential building which typically can only be divided into a limited number of apartments and not into components with a smaller value);
- (iii) due to the nature of its core economical purpose, the asset if divided would stop achieving its core economical purpose (e.g. a solar power plant dismantled into individual solar panels).

4 Transitional period [Last update: 10 November 2021]

Question 2.1² [Last update: 10 November 2021]

According to Article 48(1) ECSPR, "crowdfunding service providers may continue in accordance with the applicable national law to provide crowdfunding services that are included within the scope of this Regulation until 10 November 2022 or until they are granted an authorisation referred to in Article 12, whichever is sooner" (emphasis added).

We would appreciate clarification on the meaning of "in accordance with the applicable national law" generally, and specifically whether the transitional period will apply in the following cases:

- (i) no national law specifically governing crowdfunding activities exists. However, national law provides that crowdfunding services can be performed by investment firms authorised under Directive 2014/65/EU of the European Parliament and of the Council*
- (ii) no national law specifically governing crowdfunding activities exist s. However, national law provides that crowdfunding activity requires neither authorisation nor a licence.*

Answer 2.1 (European Commission)

Article 48(1) of Regulation (EU) 1503/2021 ('ECSPR') provides for a transitional period applicable to existing crowdfunding service providers that are operating under the applicable national law. Recital 76 clarifies that the transitional period is appropriate to allow 'persons providing such crowdfunding services in accordance with national law' 'to have sufficient time to apply for an authorisation thereunder'. As a result, the transitional period should be intended as applicable to all entities providing crowdfunding services in the scope of the ECSPR under 'national law', whereby 'national law' can be either a specific crowdfunding regime or other applicable legislation or simply the private law applicable to crowdfunding transactions in that specific Member State.

It is also important to note that the transitional period would apply to crowdfunding service providers for existing crowdfunding service provision before the date of application (10 November 2021). Crowdfunding services under the scope of this Regulation that are newly provided on and after that date shall be subject to the ECSPR requirements and related authorisation process.

5 General Provisions [Last update: 08 March 2023]

Question 3.1³ [Last update: 10 November 2021]

According to Article 2(1), point (I) of Regulation {EU} 2020/1503 {hereinafter, 'ECSPR'}, a crowdfunding project means "the business activity or activities for which a project owner seeks funding through the crowdfunding offer".

² Question raised by ESMA on 8 July 2021

³ Question raised by ESMA on 8 July 2021

We would appreciate clarification on how the phrase "business activity or activities" should be interpreted in the context of the ECSPR.

More specifically, we would welcome confirmation that this provision does not prevent per se:

- (i) public law entities or other non-profit entities from acting as project owners for the purposes of the ECSPR, or*
- (ii) to seek funding for projects related to public infrastructure, utilities and other types of projects involving the provisions of public sector services.*

Answer 3.1 (European Commission)

The concept of 'business activity' is intended to be interpreted in a broad sense, encompassing all kinds of economic activities by a natural (in the course of their business, trade or profession) or a legal person that give rise to a profit or any other economic benefit for those owning this 'business activity'. That would imply that non-profit organisations (e.g. an association or local public authorities) may act as 'project owners' as long as they raise funds for an activity that generates some economic benefit for its owners/members/ultimate beneficiaries (whether monetary or non-monetary).

Question 3.2⁴ [Last update: 10 November 2021]

Article 2(1), point (a), of Regulation (EU) 2020/1503 (hereinafter, 'ECSPR') defines a 'crowdfunding service' as "the matching of business funding interests of investors and project owners through the use of a crowdfunding platform and which consists of any of the following activities:

- (i) the facilitation of granting of loans;*
- (ii) the placing without a firm commitment basis, as referred to in Annex I, Section A, point (7), of Directive 2014/65/EU, of transferable securities and admitted instruments for crowdfunding purposes issued by project owners or a special purpose vehicle, and the reception and transmission of client orders, as referred to in point (1) of that Section, in relation to those transferable securities and admitted instruments for crowdfunding purposes.*

Article 2(1), point (c), of the ECSPR defines 'individual portfolio management of loans' as "the allocation by the crowdfunding service provider of a pre-determined amount of funds of an investor, which is an original lender, to one or multiple crowdfunding projects on its crowdfunding platform in accordance with an individual mandate given by the investor on a discretionary investor-by-investor basis".

We would appreciate clarification as to the legal nature of the activity of individual portfolio management of loans. We would specifically appreciate if the European Commission could confirm that it should be considered as forming part of the notion of crowdfunding service and, if yes, that it should be regarded as ancillary to the activity of facilitation of granting loans referred to in Article 2(1), point (a)(i).

⁴ Question raised by ESMA on 8 July 2021

Answer 3.2 (European Commission)

Article 6 of the ECSPR introduces the possibility for crowdfunding service providers to offer individual portfolio management of loans. In that respect, the non-inclusion in the definition of core 'crowdfunding services' in article 2(1) of the ECSPR was the result of the consideration that individual portfolio management of loans is a more sophisticated allocation of funds to loans, but it remains in the nature of service that facilitates the granting of loans. As a result, the regulation imposes additional requirements over a minimum set of standards, which are those applied to providers of facilitation of granting of loans. As a consequence, this service should be considered an ancillary service to the facilitation of granting of loans, also in relation to the authorisation process that comes with it.

Question 3.3 [Last update: 19 May 2022]

Does a CSP need a separate authorisation in order to hold transferable securities or admitted instruments for crowdfunding purposes offered on a crowdfunding platform, which can be registered in a financial instruments account opened in the name of an investor or which can be physically delivered to a custodian?

Answer 3.3:

Yes, according to article 10(3) the holding of these instruments in custody requires a CSP to hold an authorisation in accordance with either Directive 2013/36/EU or 2014/65/EU. Alternatively, these instruments can be held in custody by a third party holding such authorisation.

As indicated in Recital 28 of the ECSPR, the safekeeping of transferable securities or admitted instruments for crowdfunding purposes that, in accordance with national law, are only registered with the project owner or its agent or are held on an individually segregated account that a client could open directly with a central securities depository shall be considered equivalent to asset safekeeping by qualified custodians. In such case, in accordance with Article 10(1) CSP shall clearly inform their clients about the safekeeping services according to national law.

Question 3.4: [Last update: 19 May 2022]

How can a CSP organize the provision of payment services?

Answer 3.4:

A CSP may provide payment service itself or through a third party (Article 10(4) of the ECSPR). It may alternatively put in place and maintain arrangements to ensure that project owners accept and proceed to payments (including funding of crowdfunding projects) only by means of a duly authorised payment service provider (Article 10(5)).

In order to provide payment services, a CSP shall be authorised in accordance with Directive (EU) 2015/2366. This authorisation shall be granted prior to the provision of any payment service by the CSP. For the purpose of Article 10, payment services shall mean any business activity set out in Annex I of Directive 2015/2366.

Likewise, when the CSP provides payment services through a third party, this third party must be authorised pursuant to Directive (EU) 2015/2366 prior to the provision of any payment service by the CSP.

When putting in place an arrangement pursuant to Article 10(5), the CSP shall notably:

- ensure that the payment service provider selected by the project owner is duly authorised in accordance with Directive EU 2015/2366;
- enter into written and legally binding arrangements with the project owner whereby the latter commits irrevocably to only accept fundings from the selected payment service provider (or any replacement provider duly authorised in accordance with Directive EU 2015/2366 provided that (i) the relevant national competent authority is clearly informed prior to such replacement and that (ii) the changes are made in compliance with the legal arrangements applicable between the CSP and the project owner);
- report the existence of such arrangements to its national competent authority together with a description of the procedures and systems established by which the funds from the investors will be sent to the project owner and by which the investors will receive the remuneration of the capital invested.

Question 3.5: [Last update: 19 May 2022]

Are there any circumstances where payment services can be performed by an entity not authorised as payment services provider in accordance with Directive (EU) 2015/2366?

Answer 3.5:

No, all payment services of a CSP must be performed by a payment services provider in accordance with Directive (EU) 2015/2366.

Question 3.6 [Last update: 19 May 2022]

Can an authorised Crowdfunding Service Provider (CSP) designate tied agents?

Answer 3.6 (European Commission)

The ECSPR does not provide a regulatory framework for tied agents. Therefore, there is no possibility for tied agents to provide crowdfunding services on behalf of the CSP under ECSPR. Nonetheless, the CSP can designate tied agents to promote the CSP's services. Such activity will be subject to national law.

Question 3.7 [Last update: 19 May 2022]

Can an authorised CSP establish a branch in another Member State?

Answer 3.7 (European Commission)

The ECSPR does not provide for a specific framework for branches of CSPs. As a result, the provision of crowdfunding services via branches may be subject to additional requirements

under national law. National law should, nevertheless, comply with the right of establishment and the right to provide services, respectively laid down in Articles 49 and 56 of the TFEU.

Question 3.8 [Last update: 23 September 2022]

Can crowdfunding services and investment services and activities provided in accordance with MiFID II be provided by means of the same internet-based information system?

Answer 3.8

Yes, provided that the distinction between crowdfunding services and MiFID II investment services and activities is very clear to the client at any moment, including with regards to the regulatory framework applicable to such services or activities. In practice, this should mean two separate areas: one for crowdfunding services and one for services and activities provided in accordance with MiFID II. This does not preclude the use of a single sign-on (SSO) authentication to access both those areas.

Question 3.9 [Last update: 23 September 2022]

Should offers to the public of transferable securities made by a project owner in its capacity as offeror pursuant to the exemptions under Article 1(4) points (a) and (b) of Prospectus Regulation be taken into account when calculating the EUR 5 000 000 threshold applicable under Article 1(2) point (c) of the ECSPR?

Answer 3.9

No. The reference made in point (ii) of point (c) of Article 1(2) of the ECSPR is strictly meant to capture the total consideration of offers of securities made by the project owner in its capacity as offeror pursuant to the exemption under Articles 1(3) and, when applicable, the exemption under 3(2) of the Prospectus Regulation. Consequently, the consideration of offers referred to in point (a) and (b) of Article 1(4) of the Prospectus Regulation made by the project owner in its capacity as offeror should not be taken in consideration for the purpose of the calculation of the threshold referred to in point (c) of Article 1(2) of the ECSPR.

Question 3.10 [Last update: 23 September 2022]

Can a CSP operate or manage a non-internet based crowdfunding platform?

Answer 3.10

The operation of a crowdfunding platform not based on the internet does not constitute a crowdfunding service as defined in point (a) of Article 2(1) of the ECSPR. Indeed, point (a) of Article 2(1) refers to the use of a crowdfunding platform, which, according to point (d) of the same article, is defined as a “publicly accessible internet-based information system”.

However, pursuant to Article 12(13) of the ECSPR, a CSP may engage into other activities. A CSP can therefore operate a platform which is not based on the internet provided that it complies for that activity with other applicable Union or national law, including, when relevant,

MIFID II. In such case, the CSP would not be able to benefit of the provision set out in Article 18 of the ECSPR in relation to such activity.

ESMA is also of the view that whenever a CSP intends to offer crowdfunding projects to non-sophisticated investors on both an internet-based crowdfunding platform under the ECSPR and on a platform not based on the internet under other applicable Union or national law, it is good practice for such CSP to liaise with its authorising competent authority to verify that the dual offer does not trigger investor protection concerns for non-sophisticated investors.

Question 3.11 [Last update: 23 September 2022]

Can a CSP offer a crowdfunding project to a sole investor?

Answer 3.11

The offering of a crowdfunding project to a sole investor does not constitute a crowdfunding service as defined in point (a) of Article 2(1) of the ECSPR. Indeed, point (a) of Article 4(1) refers to the use of a crowdfunding platform, which, according to point (d) of the same article, needs to be publicly accessible (i.e. open to the public).

Consequently, ESMA is of the view that the offering of a crowdfunding project to a sole investor does not constitute a crowdfunding service.

However, pursuant to Article 12(13) of the ECSPR, a CSP may engage in other activities than those covered by the authorisation referred to in Article 12 of the ECSPR. A CSP can therefore engage into the activity of offering crowdfunding project to a sole investor on this basis provided that it complies for that activity with other applicable Union or national law.

Question 3.12 [Last update: 23 September 2022]

Does an entity solely offering its own project through a publicly available information system on the Internet need to be authorised as a crowdfunding service provider?

Answer 3.12 [Last update: 23 September 2022]

The offering to investors on a publicly available information system on the Internet by a project owner directly of one or several of its own projects (i.e. excluding projects of third parties), does not qualify as crowdfunding services within the meaning of point (a) Article 2(1) of the ECSPR (the element of "matching of business funding interests of investors and project owners" is missing) and, as such, does not require an authorisation under the ECSPR.

However, depending on its exact features, such offerings may be subject to additional restrictions and/or conditions under other applicable European and national laws.

Question 3.13 [Last update: 16 December 2022]

Should the total consideration of offers made by the project owner pursuant to an exemption under Regulation (EU) 2017/1129 other than those under Articles 1(3) and 3(2) of that Regulation be taken in consideration for the purpose of the calculation of the threshold set out in point (c) of Article 1(2) of the ECSPR?

Answer 3.13

No. Only the consideration of offers made pursuant to the two exemptions referred to in point (ii) of point (c) of Article 1(2) of the ECSPR (i.e., Article 1(3) and 3(2) of Regulation (EU) 2017/1129) shall be taken into account for this calculation (together with the total consideration of offers as described in point (i) of point (c) of Article 1(2) of the ECSPR). The consideration of offers made under other exemptions under Regulation (EU) 2017/1129 should not be taken into account.

Question 3.14 [Last update: 08 March 2023]

Can a MiFID firm benefiting of the exemption set out in Article 3(i) of PSD2 and authorised under the ECSPR perform payment services under Article 10 of the ECSPR in relation to its activities as Crowdfunding Service Provider (CSP) using such exemption?

Answer 3.14 (European Commission)

Article 10(4) of Regulation (EU) 2020/1503 (hereinafter, 'ECSPR') sets out that a crowdfunding service provider may itself or through a third party provide payment services, provided that that service provider itself or the third party is a payment service provider in accordance with Directive (EU) 2015/2366 (hereinafter, 'PSD2'). Article 3(i) PSD2 exempts from its scope payment transactions related to securities asset servicing, including dividends, income or other distributions, or redemption or sale, carried out by persons referred to in point (h) or by investment firms, credit institutions, collective investment undertakings or asset management companies providing investment services and any other entities allowed to have the custody of financial instruments. Yes, it can, insofar as this MiFID firm, authorised under the ECSPR, carries out, in the context of the provision of crowdfunding services, the transactions referred to under Article 3(i) PSD2.

6 Provisions of crowdfunding services and organisational and operational requirements [Last update: 10 November 2021]

Question 4.1⁵ [Last update: 10 November 2021]

Article 3(3) of Regulation (EU) 2020/1503 (hereinafter, 'ECSPR') provides that "crowdfunding service providers shall not pay or accept any remuneration, discount or non-monetary benefit for routing investors' orders to a particular crowdfunding offer made on their crowdfunding platform or to a particular crowdfunding offer made on a third-party crowdfunding platform".

We would appreciate if the European Commission could clarify its interpretation of the term 'routing of orders' and confirm that, considering the embedded risk of conflicts of interest and the associated serious investor protection concerns associated with such practices, the

⁵ Question raised by ESMA on 8 July 2021

prohibition set out in Article 3(3) applies broadly to any form of specifically directing prospective investors to a particular crowdfunding offer.

Answer 4.1 (European Commission)

'Routing of orders' does mean any form of practice to direct prospective investors to a particular offer, unless that practice is based on objective criteria that are disclosed *ex ante* (such as filtering or search engines).

7 Investor protection and marketing communications [Last update: 16 December 2022]

Question 5.1⁶ [Last update: 10 November 2021]

Article 21(6), second subparagraph of Regulation (EU) 2020/1503 (hereinafter, 'ECSPR') provides that "prospective non-sophisticated investors and non-sophisticated investors shall not be prevented from investing in crowdfunding projects [...]".

We would appreciate if the European Commission could clarify its interpretation regarding the perimeter of this prohibition set out in Article 21(6), second subparagraph, and notably confirm that this prohibition does not apply to the situation referred to in Article 21(7), notably when a prospective non-sophisticated investor fails to prove to the crowdfunding service provider that she/he understands the investment and its risks.

Answer 5.1 (European Commission)

Article 21(6) of the ECSPR, second subparagraph, refers to the general outcome of tests under Articles 21(1) and 21(5) of the ECSPR. On the contrary, Article 21(7) of the ECSPR refers to a specific situation that requires additional restriction, i.e., the investment above the higher of either 1,000 EUR or 5% of net worth in an individual project. As a result, Article 21(6) ECSPR, second subparagraph, shall not apply to article 21(7) of the ECSPR.

Question 5.2⁷ [Last update: 10 November 2021]

Article 23, paragraphs 2, 8, 11 and 12 of Regulation (EU) 2020/1503 (hereinafter, 'ECSPR') set out the requirements regarding the preparation of the KIIS, its publication on the crowdfunding platform and the verification that needs to be undertaken to ensure the completeness, correctness and clarity of the information it contains.

We would appreciate if the European Commission could clarify the respective responsibilities of the project owner and the crowdfunding service provider in respect of those requirements, in particular with respect to offers made in more than one Member State.

⁶ Question raised by ESMA on 8 July 2021

⁷ Question raised by ESMA on 8 July 2021

Answer 5.2 (European Commission)

Article 23(9) of the ECSPR sets out the liability of 'at least' the project owner for the information given in a key investment information sheet (hereinafter, KIIS). That paragraph needs to be read in conjunction with article 23(11), which limits the responsibility of the crowdfunding service provider to having 'adequate procedures to verify the completeness, correctness and clarity of the information contained in the key investment information sheet'. As a result, the project owner is the one ultimately responsible for the information provided in the KIIS, while the crowdfunding service provider is responsible for the procedures in place to verify that the information provided is complete, correct and clear. In other words, the project owner is solely responsible for any misleading or inaccurate information, as well as omissions, unless those omissions are the direct result of inadequate procedures by the crowdfunding service provider in the collection of this information made available in the KIIS. In that case, the crowdfunding service provider could be partially or fully responsible.

Question 5.3 [Last update: 28 January 2022]

In which language should the KIIS, the KIIS at platform level and marketing communications be prepared?

Answer 5.3

Pursuant to Articles 23, 24 and 27 of the ECSPR, the KIIS, the KIIS at platform level and the marketing communications disseminated by CSP should be drafted at least in (i) one of the official languages of the Member State where the CSP is authorised or (ii) another language accepted by the NCA of that Member State⁸. Additionally, when a crowdfunding offer or the provision of crowdfunding services are promoted through a marketing communication in another Member State than the one where the CSP was granted its authorisation, the KIIS or the KIIS at platform level shall be made available at least in (i) one of the official languages of that Member State or (ii) another language accepted by the NCA of that Member State.

Question 5.4 [Last update: 28 January 2022]

Can a KIIS be translated by a CSP at the request of a prospective investor?

Answer 5.4

A prospective investor can request a CSP to arrange for the translation of a KIIS into a language of his/her choice. The ECSPR does not create an obligation for CSP to accede to such request.

⁸ A table summarising the official languages and, when applicable, the other language(s) accepted by NCA is available on ESMA's website https://www.esma.europa.eu/sites/default/files/library/esma35-42-1305_crowdfunding_tables.pdf

Where a CSP decides to accede to such request, the translation must faithfully and accurately reflect the content of the original KIIS.

Where a CSP decides not to accede to such request, the CSP must, in compliance with Article 23(13) of the ECSPR, clearly advise the prospective investor to refrain from investing

Question 5.5 [Last update: 28 January 2022]

Can the KIIS, the KIIS at platform level and marketing communication be translated into other languages?

Answer 5.5

Besides the languages referred to in the answer to question 5.3 above, Article 23(4) of the ECSPR provides that a CSP can, in addition, arrange for the translation of a KIIS in any other language as long as the translation accurately reflects the content of the KIIS that was originally drawn up in one of the languages mentioned in Article 23(2). This provision applies *mutadis mutandis* to the KIIS at platform level.

However, pursuant to Article 27(3) marketing communications can only be prepared in (i) at least one of the official languages of the Member State in which the marketing communications are disseminated or (ii) in a language accepted by the NCA of that Member State.

Question 5.6 [Last update: 28 January 2022]

Which languages are accepted by NCAs for the purposes of marketing communications and the KIIS?

Answer 5.6

NCAs may also accept additional languages as referred to in Article 23(2) and (3) and Article 27(3) of the ECSPR.

The list of languages accepted by each NCA is available on ESMA's website⁹

Question 5.7 [Last update: 28 January 2022]

Can a project owner market its crowdfunding projects?

Answer 5.7

The ECSPR does not prevent project owners from taking steps to seek funding for their business activity either by (i) directing potential investors to the crowdfunding platform or (ii)

⁹ Available at : https://www.esma.europa.eu/sites/default/files/library/esma35-42-1305_crowdfunding_tables.pdf

offering transferable securities, admitted instruments for crowdfunding purposes or loans in relation to their business activity to the public, outside the crowdfunding platform.

However, additional restrictions and/or conditions may apply to project owners pursuant to European and national laws or may derive from the terms and conditions of some CSPs.

Question 5.8 [Last update: 28 January 2022]

Which laws, regulations or administrative provisions apply when marketing communications are disseminated in the Member State in which the CSP is authorised or in another Member State?

Answer 5.8

Marketing communications disseminated in one or several Member States other than the one where the CSP is authorised, must comply with the provisions of Article 27(1), (2) and (3) of the ECSPR.

In addition, when disseminating marketing communications in a given Member State (including the Member State where the CSP is authorised), CSPs are required to ensure that such marketing communications comply with national laws, regulations and administrative provisions applicable to marketing communications in such Member State.

For the avoidance of doubt, the national rules on marketing communications of Member States are to be complied with separately and not cumulatively (e.g. a CSP authorised in Member State A and disseminating marketing communication in Member States A and B will be required to comply only with the national rule of Member State A when disseminating marketing communication in Member State A and only comply with the national rule of Member State B when disseminating marketing communication in Member State B).

According to Article 27(4), the NCA of the Member State where the marketing communications are disseminated shall be responsible for overseeing compliance with and enforcing their national laws, regulations and administrative provisions applicable to marketing communications.

A link to the applicable laws, regulations, and administrative provisions applicable to marketing communications of each Member State is available on ESMA's website together with a summary in English¹⁰.

Question 5.9 [Last update: 19 May 2022]

What is the role of Crowdfunding Service Providers (CSPs) in relation to the drawing up and information contained in the KIIS?

Answer 5.9 (European Commission)

¹⁰ Available at: https://www.esma.europa.eu/sites/default/files/library/esma35-42-1305_crowdfunding_tables.pdf

According to Article 23(2) of Regulation (EU) 2020/1503 (the European Crowdfunding Service Provider Regulation -ECSPR), project owners must draw up the key investment information sheet (KIIS) in at least one of the official languages of the Member State of the National Competent Authority (NCA) which granted the authorisation of the CSP or in another language accepted by such NCA, if any. The project owner may benefit from the assistance of the CSP to draw up the KIIS.

According to Article 23(11) ECSPR, CSPs must have in place and apply adequate procedures to verify completeness, correctness and clarity of the information contained in the KIIS for the duration of the crowdfunding offer. The establishment and maintenance of these procedures should not discharge the project owner of its responsibility, set out in Article 23(9) ECSPR, to provide accurate and non-misleading information, as well as its responsibility not to omit key information as set out in Article 23(10)(b). The CSP maintains the responsibility to have adequate procedures in place to identify cases where inaccurate or misleading information may be provided by the project owner and to take appropriate action.

The requirement to verify the completeness, correctness and clarity of the information contained in the KIIS should apply both (i) prior to the publication of the KIIS on the crowdfunding platform CSPs operate or manage and (ii) on an on-going basis afterwards for the duration of the crowdfunding offer, where new information comes to light that would give sufficient reason to believe that the KIIS document might be incomplete, incorrect or unclear.

Question 5.10 [Last update: 23 September 2022]

Can a CSP prevent a prospective non-sophisticated investor or non-sophisticated investor from investing on the basis of the result of the simulation of the ability to bear loss referred to in Article 21(5) of the ECSPR.

Answer 5.10

No. The simulation of the ability to bear loss is a self-assessment to be performed by prospective non-sophisticated investors or non-sophisticated investors in their own interest. It is not intended to be a ground to prevent prospective non-sophisticated investors or non-sophisticated investors from investing. However, in accordance with Article 21(5) and 21(6) non-sophisticated investors shall acknowledge they have received the results of the simulation.

Question 5.11 [Last update: 23 September 2022]

Can a CSP give full access to its platform to a prospective non-sophisticated investor or non-sophisticated investor refusing to share the result of its simulation to bear loss?

Answer 5.11

Yes. The simulation to bear loss is intended to help prospective non-sophisticated investors or non-sophisticated investors to assess whether an envisaged investment is aligned with their financial resources. The refusal of an investor to share the result of its simulation does not require a CSP to prevent such investor from investing under the ECSPR. In such case,

pursuant to Article 21(6), non-sophisticated investors shall acknowledge that they have received the results of the simulation of the ability to bear loss.

Question 5.12 [Last update: 23 September 2022]

Can a CSP accept the investment of a prospective non-sophisticated investor or non-sophisticated investor in cases where such investor (i) wants to invest an amount in excess of the higher of EUR 1,000 or 5% of that investor's net worth but (ii) does not meet the conditions set out in points (a), (b) and (c) of Article 21(7)?

Answer 5.12

No, in such case, the CSP shall prevent the prospective non-sophisticated investor or non-sophisticated investor from investing. Indeed, as indicated by the European Commission in its answer to Question 5.1., Article 21(6) second paragraph which provide that prospective non-sophisticated investors and non-sophisticated investors shall not be prevented from investing does not apply to the specific situation of Article 21(7) of the ECSPR.

When preventing a prospective non-sophisticated investor or non-sophisticated investor from investing, the CSP shall clearly indicate to the investor that it acts on the basis of applicable regulatory requirements aiming at the protection of investors.

Question 5.13 [Last update: 23 September 2022]

Can the condition set out in point (c) of Article 21(7) be fulfilled through other means than using the assessment referred to in Article 21(1) of the ECSPR as a proof that the prospective non-sophisticated investor or non-sophisticated investor understands the investment and its risks?

Answer 5.13

Yes. The condition set out in point (c) of Article 21(7) may be fulfilled through any means deemed relevant by the CSP for that purpose where those means ensure that the CSP may reasonably determine whether the investor understands the investment and its risks.

Question 5.14 [Last update: 23 September 2022]

Can the assessment of the client's knowledge and experience conducted for the purpose of MiFID investment services be used for the purpose of crowdfunding services?

Answer 5.14

No, the entry knowledge test and the simulation of ability to bear loss under ECSPR as well as the suitability and appropriateness assessments under MiFID II must be all performed extensively.

ESMA recognizes, however, that the information collected for the purpose of one assessment or test can be used for the purpose of another (assuming the information is up-to-date). For example, information collected in the context of MiFID II can be used by a CSP to perform the assessment in the context of Article 21(7)(c) of ECSPR. Where relevant, any remaining information might be collected by means of a supplement questionnaire.

Question 5.15 [Last update: 23 September 2022]

Can an entity linked to a crowdfunding service provider by control as defined in point (35)(b) of Article 4(1) of Directive 2014/65/EU take or have a participation in an offer on the crowdfunding platforms managed by the crowdfunding service provider?

Answer 5.15

Yes, the provision set out in Article 8(1) only applies to the CSP. Entities linked to the crowdfunding service provider can be accepted as investors in crowdfunding projects offered on its platforms provided that the requirements set out in Article 8 of the ECSPR and especially paragraphs (2), (3), (4), (5) and (6) are duly complied with. However, the provision of Article 8(4) shall not be used as a mean to circumvent the rule set out in Article 8(1). NCAs will notably monitor that CSPs do not set up ad hoc entities for the purpose of circumventing the prohibition of Article 8(1).

Question 5.16 [Last update: 16 December 2022]

When does the key investment information sheet have to be made available to prospective investors?

Answer 5.16

Pursuant to Article 1(2) of the KIIS Delegated Regulation, the KIIS shall be made available on the platform as soon as the relevant crowdfunding offer is published by the CSP.

Furthermore, pursuant to Articles 23(1) and 23(2) of the ECSPR, a CSP shall provide prospective investors with a key investment information sheet (KIIS) drawn up by the project owner for each crowdfunding offer.

In order to enable the prospective investor to assess the offer in full knowledge of facts, the KIIS shall be provided before the investor is bound by any offer relating to a crowdfunding project.

Question 5.17 [Last update: 16 December 2022]

Is the project owner responsible for the translation of the content of a KIIS made available to prospective investors?

Answer 5.17

The KIIS drawn up in accordance with Article 23(2) of the ECSPR, in at least one of the official languages of the Member State whose competent authorities granted the authorisation in accordance with Article 12 of the ECSPR, qualifies as “original KIIS”¹¹.

¹¹ The term “original key investment information sheet” is referred to in the last sentence of Article 23(4) of the ECSPR

According to Article 23(9) of the ECSPR, the project owner is responsible for the information provided in the KIIS. ESMA is of the view that this responsibility shall be limited to the conformity with the facts, clarity, completeness and non-misleading character of the information provided in the original KIIS.

Therefore, the responsibility of the project owner may only be incurred based on the information provided in the original KIIS. In principle, only the CSP is responsible for potential translation errors contained in translations provided pursuant to paragraphs (3), (4) and (13) of Article 23 of the ECSPR.

However, the project owner shall also be responsible for translation errors (together with the CSP) whenever the project owner has prepared the translation made available on the platform by the CSP.

Question 5.18 [Last update: 16 December 2022]

Can the marketing effort of a CSP focus on a specific project or a specific category of projects?

Answer 5.18

Yes, subject to certain conditions.

The first sub-paragraph of Article 27(2) of the ECSPR provides that prior to the closure of raising funds for a given crowdfunding project, no communication shall disproportionately target planned, pending or current individual crowdfunding projects or offers. This provision aims at ensuring that CSPs treat all crowdfunding projects (with ongoing fundraising) on their platform fairly and on an equal footing.

Consequently, when preparing marketing communications, CSPs should aim at not focusing exclusively or too heavily on a crowdfunding project or on a group of crowdfunding projects. However, CSPs can organise the content of their marketing communications on the basis of objective criteria, such as, but not limited to, the following:

- (a) the marketing communication is focused on crowdfunding projects in a certain business field and/or operating with a certain demonstrated sustainable development objective,
- (b) the marketing communication is focused on crowdfunding projects aiming at developing a business activity in a given geographical location,
- (c) the marketing communication focuses on crowdfunding projects based on their funding stage (e.g., marketing communication focusing on offers recently added to the crowdfunding platform or offers with calls for funding about to reach the closing date).

The first sub-paragraph of Article 27(2) of the ECSPR does not prevent CSPs from issuing marketing communications focusing exclusively or heavily on projects for which fundraising is closed. In such cases, CSPs should ensure that such marketing communications comply at all times with the requirements of Articles 3(2) and 3(3).

8 Authorisation and supervision of CSPs [Last update: 16 December 2022]

Question 6.1 [Last update: 16 December 2022]

Can a legal person with a single member of the management body be authorised as a crowdfunding service provider?

Answer 6.1

NCA may consider the authorisation as CSP of a legal entity with a management body composed of a single member as the ECSPR does not contain a provision formally requiring more than one person to be member of the management body of a CSP.

ESMA is of the view that NCAs may authorise a legal person with a single member of the management body when the applicant demonstrates that, taking into account the nature, scale and complexity of the crowdfunding services it intends to provide, its organisation is adequate to ensure, both from a workload and expertise standpoints, an effective and prudent management of the CSP.

In such cases, the authorising NCA can, as part of its on-going assessment of the CSP, subsequently request the appointment of one or several additional members of the management body of the authorised CSP when it appears that changes in the nature, scale and complexity of the services provided by the authorised CSP justify so.

Question 6.2 [Last update: 16 December 2022]

Can a CSP use several trading names?

Answer 6.2

Yes. A CSP can operate using different trading names. Pursuant to point (a) of Article 12(2), of the ECSPR these trading names shall be communicated to the competent authority. The register kept by ESMA pursuant to Article 14 of the ECSPR shall contain the commercial name or names of the authorised CSP.

Pursuant to Article 3(2) of the ECSPR, a CSP shall, at all times, act honestly, fairly and professionally with its clients. Consequently, a CSP shall ensure that its use of different trading names should not have the potential to create confusion for its investors and especially its non-sophisticated investors (and prospective non-sophisticated investors).