



The Challenges Awaiting the European
Crowdfunding Services Providers Regulation:
Ready for Launch?

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ABSTRACT

The Regulation on European Crowdfunding Services Providers for Business (ECSPR), adopted in October 2020, has started applying on 10 March 2022, in a period in history regarded as particularly complex for the entire world and for Europe because of the post-pandemic effects. Before that, the UK has decided to leave the European dream and the difficult negotiations have left the financial sector with uncertainty about the legal treatment of most financial services, including crowdfunding operations, across such new borders. At the same time, the EU is moving forward in its integration process, adopting several actions within the Capital Markets Union (CMU) action plan: one of the main goals of the CMU is indeed the adaptation of existing financial regulation to SMEs' needs. Some legislative initiatives proposed, such as the Markets in Crypto-Assets Regulation (MiCAR), can be regarded as potentially favouring crowdfunding platforms' competitors, since they all provide services and in particular financing to SMEs. Moreover, climate change effects are becoming more and more severe, also in Europe, forcing international, European and national regulators to implement reforms and sustainable considerations in financial regulation. Considering this background, it is important to assess whether the ECSPR will be able to show the resilience needed to face all these challenges, with its text presenting already adequate responses or tools to adapt. The present paper will analyse the most relevant parts of the ECSPR trying to assess whether such newly adopted regime has the potential, considering its architecture, scope and specific rules, to successfully deal with and overcome the highlighted challenges.

1. INTRODUCTION: THE RESILIENCE OF THE ECSPR: THE ANALYSIS OF THE NEW REGULATION'S POTENTIAL IN FACING WITH CURRENT OPPOSING FORCES

A Regulation on European Crowdfunding Service Providers for businesses was first proposed by the Commission in March 2018. The final text was adopted and published, with significant changes made during trilateral negotiations, as EU Regulation No. 1503/2020 (hereinafter, ECSPR) in October 2020. The ECSPR has introduced a legal framework for providers of crowdfunding services which recalls MiFID but simplified. It entails general conduct rules (to act honestly, fairly and professionally in accordance with the best interests of their clients), disclosure obligations (for both platforms and project owners), in addition to organizational, risk management and prudential requirements, especially in case of more complex business models, as well as special protections for un-sophisticated investors (entry-knowledge test, simulation of losses, 4-days reflection period and warnings for larger investments: Art. 21-22).

The ECSPR entered into force on 10 November 2020 and started applying exactly one year after.¹ However, platforms authorized under national regimes at the time of the entry into force may continue to operate under such regimes until they get the new EU license also through national simplified procedures, anyway no later than 10 November 2022. In fact, after the expiration of the transitional period, all providers offering the services and products covered by the ECSPR must be authorized and operate in compliance with the EU Regulation. Considering that the ECSPR presents various innovative features compared to several national regimes, Member States and their crowdfunding service providers (CSPs) will have to adapt their legal frameworks and business models in a short time. Such difficulties are evident also from the recent ESMA report on the Commission's power to extend, for an additional year, such transitional period as regards platforms operating only at national level (Art. 48 ECSPR). In fact, only few Member States have adopted simplified procedures and national competent authorities' (NCAs) report have received very few applications so far, likely experiencing troubles in adapting their business models and anyway waiting for the final version of regulatory technical standards (RTS) and implementing technical standards (ITS).² Moreover, not all Member States have issued national acts to adapt their legal framework to the ECSPR.

¹ For a detailed and comprehensive assessment of the ECSPR, please let me refer to: E Macchiavello (ed), *Regulation on European Crowdfunding Service Providers for Business: A Commentary* (Edward Elgar, forthcoming 2022); E Macchiavello, 'The European Crowdfunding Service Providers Regulation and the Future of Marketplace Lending and Investing in Europe: The 'Crowdfunding Nature' Dilemma', (2021) 32(3) *European Business Law Review* 431. See also E Macchiavello and A Sciarrone Alibrandi, 'Marketplace Lending as a New Form of Capital Raising in the Internal Market: True Disintermediation or Re-intermediation?', in E Avgouleas and H Marjosola (eds), *Digital Finance in Europe: Law, Regulation, and Governance* (De Gruyter 2021) 37; P Ortolani and M Lousse (eds), *The EU Crowdfunding Regulation* (OUP 2022); SN Hooghiemstra, 'The European Crowdfunding Regulation – Towards Harmonization of (Equity- and Lending-Based) Crowdfunding in Europe?', 22 August 2020, <<https://ssrn.com/abstract=3679142>>; K Wenzlaff and others, 'Crowdfunding in Europe: Between Fragmentation and Harmonization', in R Shneor, L Zhao and B Flåten, *Advances in Crowdfunding* (Palgrave Macmillan 2020). For commentaries on earlier drafts of the Regulation: E Macchiavello, 'What to Expect When You Are Expecting' a European Crowdfunding Regulation: The Current 'Bermuda Triangle' and Future Scenarios for Marketplace Lending and Investing in Europe', 20 August 2019, European Banking Institute Working Paper Series No 55, <<https://ssrn.com/abstract=3493688>>. With special regard to MiFID II services, M Hobza and A Vondráčková, 'The New Financial Crowdfunding Regulation and Its Implications for Investment Services under MiFID II', 6 November 2020, Charles University in Prague Faculty of Law Research Paper No. 2020/III/2, <<https://ssrn.com/abstract=3725997>>.

² ESMA, 'ESMA's Technical Advice to the Commission on the possibility to extend the transitional period pursuant to Article 48(3) of Regulation (EU) 2020/1503 - Final Report' (19 May 2022) ESMA35-42-1445.

During the drafting of the ECSPR, several important events have occurred, such as Brexit, the pandemic crisis and the further advancement of different huge bulks of EU financial regulation e.g. the Capital Markets Union, Sustainable Finance, Digital finance, etc.

The present paper critically analyses whether the ECSPR text appears to be ready for application and whether it is resilient to current and future threats and challenges.

2. THE FIRST OPPONENT: RESIDUAL FRAGMENTATION AND UNCERTAINTY

The ECSPR's main objective is to harmonise the regulation of crowdfunding in Europe and facilitate cross-border operations, overcoming the pre-existing regulatory fragmentation. The level of harmonisation is indeed high as the ECSPR does not only set minimum requirements to obtain the authorisation from the national competent authority (NCA) and the consequent EU passport, but contains extremely detailed rules about CSPs' organisation and provision of services, authorisation procedures and forms, NCAs' supervisory powers and cooperation among authorities.

Nonetheless, the ECSPR also leaves room for residual fragmentation in the European crowdfunding market, under two different angles discussed below. First, exclusions from the ECSPR's scope, and second, areas left un-harmonised or of national discretions/options.

2.1. EXPLICIT OR IMPLICIT EXCLUSIONS FROM THE ECSPR'S SCOPE

The ECSPR applies to crowdfunding services defined as 'the matching of business funding interests of investors and project owners through the use of a crowdfunding platform' and consisting of: a) the 'facilitation of granting of loans' (lending-based crowdfunding), with exclusive reference to business loans; b) the joint provision of placing without firm commitment and reception and transmission of orders (investment-based crowdfunding), not hereby defined but identified through reference to Section A of Annex I MiFID II, respectively, points 7 and 1 (although crowdfunding services are exempted from the same Directive) and when pertaining to transferable securities or the new category of 'admitted instruments' (see below §2.2.1; Article 2(1)a ECSPR). However, the combination of this identification of scope with the definition of some of these terms and express exclusions leaves some services, products and offers outside the scope of ECSPR.

2.1.1. CONSUMER CROWD-LOANS

The ECSPR expressly excludes its application to crowdfunding services 'provided to project owners that are consumers' as defined by Art 3(a) of the Consumer Credit Directive (CCD) No 2008/48/EC (Article 1(2)(a)). Despite a decrease in volumes also related to the pandemic, consumer crowd-lending segment remains the prevalent one of the

European crowdfunding market, not only compared to investment-based crowdfunding, which has always remained limited, but also to business crowd-lending.³ The exclusion of consumer crowd-lending can be partially justified by the ECSPR being placed within the CMU which focuses on businesses' funding. However, another justification for such exclusion relates to the assumption that consumer crowd-loans are more delicate and, in principle, already covered by the CCD⁴ or to be covered by the same once its review will be passed, which expressly includes peer-to-peer loans⁵. In any case, the proposed Directive does not include a comprehensive and harmonised license and regime for providers of crowdfunding services for project owners who are consumers. Combining all these aspects, it is evident that the regulation of consumer crowd-lending segment, except for certain limited contractual rules, will remain

³ Consumer crowd-loans represented in 2017 the 41% of the market (versus business loans 14%), 34% in 2019 (while business lending 12%) and 29% in 2020 (business lending 18,5%): see T Ziegler and others, 'Shifting Paradigms - The 4th European Alternative Finance Benchmarking Report', (2019), 31, <www.jbs.cam.ac.uk/fileadmin/user_upload/research/centres/alternative-finance/downloads/2019-04-4th-european-alternative-finance-benchmarking-industry-report-shifting-paradigms.pdf> (last access for all electronic sources: 24 May 2022); T Ziegler and others, 'The Global Alternative Finance Market Benchmarking Report' (2020), 74, <www.jbs.cam.ac.uk/fileadmin/user_upload/research/centres/alternative-finance/downloads/2020-04-22-ccaf-global-alternative-finance-market-benchmarking-report.pdf>.

⁴ See also Recital 8 ECSPR; Commission, 'Inception Impact Assessment. Legislative proposal for an EU framework on crowd and peer to peer finance', (30 October 2017), 32-33, <https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5288649_en>. Nonetheless, the CCD has been interpreted in many countries (eg Belgium, Italy and Poland) as not applicable to crowd-loans for applying to consumer loans between a consumer and a 'professional' lender as defined by Art 3(1)(b) CCD (even when facilitated by professional intermediaries) while crowd-lenders are generally non-professional lenders (*cf* Article 2(1) CCD). Some countries (the UK, the Netherlands, Finland, Spain and Lithuania), anyway, have decided to expressly extend CCD or certain provisions of the same to crowd-loans. Instead, the Commission considers that in case the platform performs an intermediary activity as described in Art 3(f) CCD, the Directive applies even in absence of a consumer loans as defined above (Commission, 'Impact Assessment' 112-13; see also Denmark, Estonia). The European Court of Justice had not the opportunity, eventually, to provide its interpretation (case *TrustBuddy AB v Lauri Pihjalaniemi*, C-311/15, 23 June 2015) because of the concerned platform went into bankruptcy. See E Macchiavello 'Financial-return crowdfunding and Regulatory approaches in the shadow banking, FinTech and collaborative finance era', (2017) 14(4) *European Company and Financial Law Review* 662, 696; Macchiavello 'The European Crowdfunding' (n 1) 565; Macchiavello and Sciarrone Alibrandi (n 1) 44. On the topic, see also M Ebers and BM Quarch, 'EU Consumer Law and the Boundaries of the Crowdfunding Regulation', in Ortolani and Louisse (n 1) 88.

⁵ See Commission, 'Proposal for a Directive [...] on consumer credits' COM(2021) 347 final.

fragmented along national borders and differently regulated than business crowdfunding.

2.1.2. SUBORDINATED LOANS AND PROFIT-PRACTICING LOANS, INTEREST-FREE LOANS AND INVOICE TRADING

The loan facilitated by CSPs and covered by the ECSPR is defined by Art 2(1)(b) as ‘an agreement whereby an investor makes available to a project owner an agreed amount of money for an agreed period of time and whereby the project owner assumes an *unconditional obligation to repay* that amount to the investor, *together with the accrued interest*, in accordance with the instalment payment schedule’ (emphasis added).

The definition excludes not only interest-free loans and invoice trading,⁶ but also products where the repayment is conditional on the previous satisfaction of other creditors (subordinated loans) and products where the recognition of any return depends on the existence and the amount of profits generated by crowd-borrowers (profit-participation loans or, in German, *partiarisches Darlehen*).⁷

Such products have flourished in countries characterised by strict bank monopoly with the aim of overcoming regulatory restrictions e.g. Germany⁸ and are common in other countries such as Portugal.⁹ The ECSPR should allow platforms to offer crowdfunding services in principle simply complying with its provisions and therefore overcoming *per se* previous national restriction. In particular, Article 1(3) and Recital 9 prevent Member States from applying national requirements for banks to crowdfunding service providers, project owners or investors, unless these are already authorised as credit institutions, and from requiring a credit institution authorisation or an exemption from the same for project owners or investors in connection with the provision of crowdfunding services. Therefore, some crowdfunding platforms, not constrained

⁶ Entailing the anticipation by an investor to an entrepreneur of a sum of money corresponding to a credit claim of the same entrepreneur towards a third party and the assignment to an investor of the relative credit claim (invoice trading) cannot fit such definition and are consequently excluded. See E Macchiavello, ‘The Commission’s Interim Report and Prospective Adaptations of the ECSPR’, in Macchiavello, *Regulation* (n 1), ch 31; U Piattelli and S Caruso, ‘Invoice Trading and Regulation: the Case of Italy’, *ibidem*, ch 44.

⁷ Instead, products assigning, together with the participation to the firms’ profit, the unconditional right to an interest might be included within the ECSPR’s perimeter.

⁸ About the German legal framework for crowdfunding, see K Wenzlaff, ‘The Crowdfunding Regulation within Germany - On the Path to Self-isolation?’, in Macchiavello, *Regulation* (n 1), ch 43; TH Tröger, ‘Regulation of Crowdfunding in Germany’, (2018) SAFE Working Paper No 199/2018, 7, <<https://ssrn.com/abstract=3122987>>.

⁹ D Pereira Duarte and J da Costa Lopes, ‘The Portuguese Crowdfunding Regime and the Impact of the European Regulation on Crowdfunding Service Providers’ in Macchiavello, *Regulation* (n 1), ch 46.

anymore by national regulatory limitations, might decide to change their business models and move to the ECSPR regime. Otherwise, a part of the crowdfunding market, and potentially the crowd-lending market of an entire country, will remain outside the ECSPR perimeter and potentially subject to different existing or new national crowdfunding regimes. For instance, Portugal will keep its national law to cover subordinated loans and profit-participation loans among other things.

2.1.3. CROWDFUNDING SERVICES NOT INCLUDED AND OFFERS ABOVE €5 MILLION

Crowdfunding services are not further defined or specifically described by Art 2(1)(a). Nonetheless, other parts of the ECSPR provide some useful indication.

Recital 22 clarifies that the ‘Regulation aims to facilitate direct investment and to avoid creating regulatory arbitrage opportunities for financial intermediaries regulated under other legal acts of the Union, in particular Union legal acts governing asset managers’. As a consequence, the investor must always ‘review and expressly take an investment decision in relation to each individual crowdfunding offer’ (Article 3(4)).

Nonetheless, Recital 21 specifies that the use of filtering systems to display projects, based on objective criteria of investor’s preference, such as economic sector, interest rate, and risk category, can be considered as part of the above-mentioned crowdfunding services, not amounting to investment advice when pertaining to transferable securities in the absence of personal recommendation nor investment portfolio management. For the same reasons, the use of special purpose vehicles (SPV) to provide crowdfunding services is limited to cases involving only one illiquid or indivisible asset and where the decision to take partial exposure to the same only belongs to investors (see recital 22 and Article 3(6)).¹⁰

However, the ECSPR allows also more complex services, even with a component of asset management, which the Commission seems to consider ancillary services,¹¹ subject to additional requirements. This is the case of scoring/pricing of loans and debt-instruments and individual portfolio management of loans. In particular, the latter consists in the ‘allocation by the crowdfunding service provider of a pre-determined amount of funds of an investor [...] to one or multiple crowdfunding projects [...] in accordance with an individual mandate given by the investor on a discretionary investor-by-investor basis’, where such mandate is based on the investor’s preferences about interest rate, maturity, risk category or even target return (Articles 2(1)(c) and 6(1)). The allocation of funds based on investor’s preferences through automatic

¹⁰ About the limits to the use of SPV, see also ESMA, ‘Questions and Answers on the European Crowdfunding Services Providers for Business Regulation’, (20 May 2022) ESMA35-42-1088.

¹¹ *Ibidem*, sec 3.2.

systems ('auto-bid') is considered individual portfolio management of loans too.

Finally, platforms can also set up systems allowing clients to publish indications of their buy/sell interests regarding products previously subscribed through the platform ('bulletin boards') which cannot anyway consist in multilateral matching system bringing together buying and selling interests, i.e. trading venues, not even when only pertaining to loans, and therefore requiring the parties to conclude the transaction outside the platform and the platform to comply with certain requirements.¹²

Other types of crowdfunding services, such as the ones provided as investment advice or investment portfolio management or through collective investment vehicles, cannot be provided by CSPs under the ECSPR. However, these seem in principle not prohibited, but platforms offering them must thus far follow the respective national and/or EU regime, e.g. MiFID II or AIFMD. In order to distinguish crowdfunding from banking and reduce conflict of interests, ECSPs cannot have any financial participation in the offers, not even when aligning platforms' and clients' interests¹³, excluding therefore business models entailing platforms' co-financing and direct lending.

Finally, the ECSPR requires that crowdfunding offers of loans and transferable securities/admitted instruments alike and even combined do not exceed €5 million in total consideration within 12 months,¹⁴ taking into account any offer from the same project owner exempted from the Prospectus Regulation even under grounds other than the crowdfunding exemption and not for the same product.¹⁵ Until 10 November 2023, Member States with lower threshold of total consideration for the general exemption under the Prospectus Regulation, can require crowdfunding offers available in their territories to respect such lower threshold.¹⁶

In conclusion, while national crowdfunding regimes covering the same crowdfunding services, products and offers as the ECSPs are expected to be repealed, the EU Regulation does not specify whether national regimes can be truly residual and therefore cover any case not covered by the ECSPR. The issue is raised, for instance, in regard to CSPs natural persons since the ECSPR requires CSPs to be legal persons, offers of transferable securities and admitted instruments between €5 million and

¹² E.g. to specify that bulletin boards are not regulated trading venues, that the exchanges are under the exclusive responsibility of investors and, where a price is suggested, that this is not binding (while substantiating the suggested reference price).

¹³ Recitals 11 and 26; Article 8(1) ECSPR.

¹⁴ Cf limits set for certain offerings of tokens in the 'Proposal for a Regulation [...] on Markets in Crypto-assets, and amending Directive (EU) 2019/1937' (MiCAR) COM/2020/593 final.

¹⁵ Article 1(1)(c) ECSPR.

¹⁶ Article 49 ECSPR.

€8 million, offers of business loans above €5 million that are not covered by any EU law, and business models entailing a CSPs' financial participation to the loans' intermediated. The nature of maximum harmonization of the ECSPR¹⁷ might be used as argument in support of a negative answer. However, for this situation Finland has introduced a national regime for offers of crowd-loans between €5 million and €8 million.¹⁸

2.1.4. CROWDFUNDING SERVICES FOR PUBLIC INTEREST PROJECTS

The above-mentioned definitions of crowdfunding services allow the exclusion from the ECSPR's scope of forms of crowdfunding not recognising a financial return to investors, such as donation and reward-based crowdfunding. Nonetheless, it is unclear whether crowdfunding services covered by the ECSPR can be provided in relation to not-for-profit or public interest projects despite recognising a financial return to investors. Article 2(1)(l) defines 'crowdfunding project' as 'the *business activity* or activities for which a project owner seeks funding through the crowdfunding offer' (emphasis added). This has induced France to maintain a special national regime for public interest projects involving public authorities and interest-free loans.¹⁹ Nonetheless, the Commission has clarified in its Q&A on the ECSPR pertaining to the concept of 'business activity' that also public entities and not-for-profit entities can be project owners under the ECSPR 'as long as they raise funds for an activity that generates some economic benefit' even just for the 'ultimate beneficiaries (whether monetary or nonmonetary)', not only for its owners or members.²⁰

2.1.5. TOKEN OFFERED THROUGH CROWDFUNDING PLATFORMS

Some commentators have interpreted the ECSPR as excluding all sorts of tokens from its scope.²¹ Recital 15 specifies that the ECSPR does not cover 'initial coin offerings' (ICOs), considered too different from crowdfunding services to be regulated under the same rules.²² However,

¹⁷ See also Macchiavello, 'The European Crowdfunding' (n 1) 598; Macchiavello and Sciarrone Alibrandi (n 1) 63-64; A Hakvoort, 'Secondary Trading of Crowdfunding Investments', in P Ortolani and M Lousse, *The EU Crowdfunding Regulation* (OUP 2022) 273 (in favour of leaving to national laws offers between €5 million and €8 million).

¹⁸ See E Härkönen, T Neumann and C Højvang Christensen, *The Regulation of Crowdfunding in the Nordic Countries*, in Macchiavello, *Regulation* (n 1), ch 48.

¹⁹ JM Moulin, *Crowdfunding in France after the Adoption of the European Regulation on Crowdfunding Service Providers*, *ibidem*, ch 42.

²⁰ ESMA (n 10) 12, para 3.1.

²¹ See R Battaglini and D Davico, 'Is the Crowdfunding Regulation Future-Proof? Forms of Blockchain-based Crowdfunding Falling Outside of the Scope of the Regulation', in Ortolani and Lousse (n 1) ch 6.

²² The draft report of the Committee on Economic and Monetary Affairs of the European Parliament, instead, included in the ECSPR's scope ICOs of tokens (under

the expression ‘ICOs’ often refers only to the offers of ‘utility tokens’ or tokens other than security tokens. Moreover, the announced revisions of MiFID II and the Prospectus Regulation will change the reference to transferable securities in these texts, including also the ones ‘issued by means of distributed ledger technology’.²³ Therefore, such recital cannot exclude the offering of security tokens *per se*, i.e. tokens classified as financial instrument/transferable securities, from the scope of the ECSPR when offered through crowdfunding platforms.²⁴

2.2. AREAS LEFT UN-HARMONISED OR OF NATIONAL DISCRETION/COMPETENCE

2.2.1. CRITERIA TO IDENTIFY TRANSFERABLE SECURITIES AND ‘ADMITTED INSTRUMENTS FOR CROWDFUNDING PURPOSES’

Member States have adopted different interpretations of the MiFID II term ‘transferable securities’ and identification criteria of the same. This has led to divergent classification of certain instruments, such as shares of private limited liability companies and silent partnerships, widespread in a crowdfunding context.²⁵ Since the classification as transferable security represents a condition for the application of other legal frameworks, e.g. MiFID II and Prospectus Regulation, this has also contributed to

more stringent conditions to be defined through delegated acts) but the final draft reverted the choice, also recognizing the lack of adequate reflections and impact assessment on this aspect (European Parliament-ECON, ‘Report on the Proposal for a Regulation of the European Parliament and of the Council on European Crowdfunding Service Providers (ECSP) for Business’, 9 November 2018, <www.europarl.europa.eu/doceo/document/A-8-2018-0364_EN.html>).

²³ See Art 6(1) of the ‘Proposal for a Directive amending Directives 2006/43/EC, 2009/65/EC, 2009/138/EU, 2011/61/EU, EU/2013/36, 2014/65/EU, (EU) 2015/2366 and EU/2016/2341’, COM(2020) 596 final. In Italy, Consob is even considering incentivising the use of crowdfunding platforms for conducting ICOs of tokens (if not qualified as financial instruments or as other investment products already covered by EU law but this Proposal might be limited by MiCA adoption (Consob, *Le offerte iniziali* (n **Error! Bookmark not defined.**)). The Bank of Lithuania has simply specified that existing financial regulation, including the crowdfunding law, applies to offerings of tokens that can be qualified as financial instruments (Bank of Lithuania, ‘Guidelines on Securities Token Offerings’, October 2019, <www.lb.lt/uploads/documents/docs/23488_be8ce9606ecb203bf8a9a4bde09ac399.pdf>).

²⁴ See M Gargantini, ‘Secondary Markets for Crowdfunding: Bulletin Boards’, in Macchiavello, Regulation (n 1) ch 21; F Annunziata and T de Arruda, ‘Crowdfunding and DLTs: the Imperative Need for More Clarity’, *ibidem*, ch 36 (also discussing the interaction of the ECSPR with the MiCAR Proposal and the ‘Proposal for a Regulation on a pilot regime for market infrastructures based on distributed ledger technology’ (DLT pilot) COM/2020/594 final).

²⁵ Macchiavello, ‘The European Crowdfunding’ (n 1); Macchiavello, ‘Financial-return’ (n 4).

subjecting crowdfunding to different regimes and a variety of levels of strictness among Member States. Therefore, the ECSPR includes the new category of ‘admitted instruments for crowdfunding purposes’²⁶ defined as shares of limited liability companies not considered transferable securities under national law, but not subject to restrictions on transferability according to Article 2(1)(n).

Nonetheless, we can expect a residual high level of regulatory fragmentation in this regard. In fact, the national competent authority granting the CSPs’ authorisation maintains the power to assess whether the shares of a private limited company can be considered admitted instruments and in particular which are the obstacles to transferability preventing such classification.²⁷ For instance, in Sweden, Denmark and Germany, shares of private limited companies are not considered transferable securities and will likely not be listed among the admitted instruments for crowdfunding purposes, while in Italy and Romania, the same shares are not considered transferable securities, but have been indicated by the national competent authority to ESMA as admitted instruments for crowdfunding purposes.²⁸ Furthermore, platforms will have to take into account different national rules since the transfer of admitted instruments remains governed by national rules.²⁹

Importantly, admitted instruments are only equity-based ones while countries’ classifications as transferable securities might still diverge when it comes to debt-based instruments. One can here refer to mini-bonds and debt instruments issued by private limited companies which are differently categorised and subject to different limits in Italy and Portugal. Moreover, standardised loans available on a bulletin board are considered transferable security in the Netherlands but not in other countries.³⁰

²⁶ Article 2(1)(a) ECSPR.

²⁷ Article 2(2) ECSPR. The Council’s version entailed a more rigid (and therefore, inadequate) system, consisting in an annex (III) to the Regulation listing the shares of private limited liability companies to be considered admitted instruments and covered by the ECSPs Regulation (as decided by Member States) and an information to be published by ESMA on its website in case of Member States’ decision to add or remove an instrument from the list.

²⁸ See ESMA, ‘European Crowdfunding Service Providers for Business Regulation (2020/1503) - Miscellaneous reporting to ESMA’ (10 November 2021) ESMA35-42-1305, 3, <www.esma.europa.eu/file/121782/download?token=rKWN71uD>.

²⁹ Recital 14.

³⁰ About different positions on the possibility to interpret the transferability of loans on a bulletin board as an evidence of their negotiability and therefore nature of transferable security: Gargantini (n 24) and A Hakvoort, ‘Where the ECSPR Pinches the Dutch Shoe. Some Brain Teasers from a Dutch Law Perspective’, in Macchiavello ‘Regulation’ (n 1), ch 45; A Hakvoort, ‘Secondary Trading of Crowdfunding Investments’, in Ortolani and Lousse (n 1) 281; Macchiavello and Sciarone Alibrandi (n 1) 54; Macchiavello (n 4) 689.

2.2.2. NATIONAL COMPETENCE AND UNCLEAR ASPECTS: MARKETING COMMUNICATIONS, CIVIL LIABILITY; COMPANY LAW AND ADDITIONAL NATIONAL REQUIREMENTS FOR CSPs

As mentioned, the ECSPR aims at achieving a high level of harmonisation in the regulation of crowdfunding. Nonetheless, this cannot contradict traditional national competences, leaving the room for persistent regulatory fragmentation on relevant aspects. For instance, the ECSPR recognises the competence of national rules as regards civil liability of the parties involved.

In particular, CSPs have direct and indirect disclosure duties. Before entering into the contract, they must provide fair, clear and not misleading information about themselves, the costs and risks involved, the functioning and project selection criteria to clients and potential clients, and warn them about the lack of a deposit guarantee or securities compensation coverage with additional requirements in case of facilitation of loans and complex services.³¹

In addition, in relation to single offers CSPs must also provide clients with a synthetic Key Investor Information Sheet (KIIS) prepared by the project owner under his/her own responsibility³², except in case of portfolio management of loans which requires the CSP to prepare the KIIS³³ based on the model set by ESMA. Following the Prospectus Regulation's model, the ECSPR requires Member States to ensure the responsibility of, at least, the project owner and its main bodies for the information provided in the KIIS, disregarding CSPs' liability for the same. Nonetheless, the same Regulation requires CSPs to have in place systems to verify the clarity, completeness and 'correctness' of the KIIS³⁴ and requires the project owner to correct omissions, mistakes and inaccuracies when identified by the former.³⁵ Moreover, their insurance policy must cover also damages for misrepresentations/misstatements made (although this might be referred to information provided to clients on their own) and acts/omissions in breach of their legal obligations.³⁶ Finally, Article 5 requires CSPs to perform due diligence checks on project owners only limited to criminal records for certain violations and establishment in non-cooperative jurisdictions under an anti-money laundering and counter-terrorism financing perspective.

It is worth underlying that the Regulation does not clarify the above mentioned term 'correctness' despite its relevance. While it is reported that during trilateral negotiations 'correctness' seemed to refer to the non-misleading character of the information, covering at most also the absence

³¹ Articles 19-20 ECSPR.

³² Art 23(1)-(2) and (9)-(10) ECSPR.

³³ Art 24 ECSPR.

³⁴ Art 23(11) ECSPR.

³⁵ Art 23(12) ECSPR.

³⁶ Art 11(7) ECSPR.

of evident mistakes in filling the form, ESMA, in updating its Q&A on the ECSPR in May 2022, has asserted that ‘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’, therefore shifting on CSPs a relevant burden, equivalent to the one recognize in some countries on IPO’s underwriters.³⁷

Member States tended to limit the responsibility for the information provided to crowdfunding investors to the project owner (Norway, Sweden, Italy) in their legal frameworks before the entry into force of the ECSPR, but differences exist. In Spain, investment-based crowdfunding platforms could be held responsible for the concealment of data or lack of identity verification³⁸ and in Finland a platforms’ liability might be recognised for the breach of their duties, which include the duty to oversee the services.³⁹ Therefore, also in consideration of the traditional differences among Member States in the area of civil law and liability from omitted, false or misleading information, we can expect a variety of solutions in this regard both in terms of issuers and CSPs’ civil liability.

Finally, since one of the ECSPR’s objectives was to remove previous regulatory obstacles to crowdfunding activities created at national level, it is reasonable to interpret the same as prohibiting Member States to impose additional requirements on CSPs⁴⁰, unless expressly allowed by the ECSPR itself. This is the case, for instance of national offering limits during a transitional period or marketing communications rules. Nonetheless, national competence in certain areas, such as corporate law, might support the argument in favour of the maintenance of certain national requirements. As an example, Italy has not adapted its legal framework to the ECSPR yet (as of 24 May 2022) and it has not been clarified whether corporate requirements for project owners such as ‘tag-along’ and other minority shareholders’ rights will be maintained, although we might propend for a negative answer.

³⁷ Macchiavello ‘The European’ (n 1) 588.

³⁸ See M Cuenca Casas and S Álvarez Royo-Villanova, *A Comparative Analysis of the Spanish Crowdfunding Regulation and the ECSR*, in Macchiavello, *Regulation* (n 1), ch 47.

³⁹ See Härkönen, Neumann and Højvang Christensen (n 18).

⁴⁰ See for instance Art 1(3): as regards the application of banking law to peer-to-peer lending: ‘Unless a crowdfunding service provider, a project owner or an investor is authorised as a credit institution in accordance with Article 8 of Directive 2013/36/EU, Member States shall not apply national requirements implementing Article 9(1) of that Directive and shall ensure that national law does not require an authorisation as credit institution or any other individual authorisation, exemption or dispensation in connection with the provision of crowdfunding services in the following situations: a) for project owners that in respect of loans facilitated by the crowdfunding service provider accept funds from investors; or (b) for investors that grant loans to project owners facilitated by the crowdfunding service provider’.

A national competence is recognised also in the area of marketing communications (Art 28(2)) and therefore also CSPs' contractual duties towards clients. This will also re-invigorate the discussion about the application of certain legal acts within the area of the EU consumer acquis to crowdfunding and underline the relevant differences among Member States in this regard. For instance, Directive No 2002/65 on distant financial services is considered applicable to CSPs alongside the ECSPR in Denmark and Sweden, while Norway has excluded its applicability when ECSPR's rules already apply.⁴¹

From another angle, different interpretations of the same unclear provision can lead to divergent solutions. For instance, regulated providers, such as banks, investment firms, payment services and e-money providers, under the ECSPR, seem allowed to conduct crowdfunding services after obtaining also the ECSP license through a simplified procedure according to Recitals 35 and 55, and Art 12(14)). Nonetheless, as an example, Sweden has regarded crowdfunding services offered by MiFID II investment firms as ancillary to investment services and consequently decided to allow the same to provide crowdfunding services simply after the NCA's approval of their request for an extension of authorisation.⁴² At the same time, the same ECSPs will be allowed to offer additional services, complying with the relevant laws, including other regulated services such as payment, custodian or banking services and other investment services but, having to obtain, in this case, separate authorizations.⁴³

Anyway, relevant aspects in terms of conditions, limits and applicable rules and requirements as regards the provision of crowdfunding services by other regulated operators or by ECSPR holding other authorisations remain uncertain. For instance, the ECSPR clarifies that incumbents are exempt from the prudential safeguards set for crowdfunding services providers when already subject to capital adequacy requirements for operational risk but leaves implicit that they must comply with the ECSPR's conduct rules when providing crowdfunding services and with their own regime for the other services offered. However, the ECSPR, unfortunately, does not provide details in this regard. Since they can in principle conduct a varied range of activities different national interpretations and overlap in terms of rules and supervision might arise in case of joint provision of crowdfunding services under different business models where only some are covered by the ECSPR, and some are not or even prohibited to ordinary CSPs.⁴⁴

⁴¹ See Härkönen, Neumann and Højvang Christensen (n 18).

⁴² Ibid.

⁴³ See Article 10 ECSPR.

⁴⁴ Think, for instance, to a bank managing a crowdfunding platform and participating to crowd-loans or to an investment firm offering also crowdfunding investment advice. On this topic, see Macchiavello 'The European Crowdfunding' (n 1) 576-77; Hooghiemstra

2.2.3. OTHER NATIONAL DISCRETIONS/OPERATIONS

The KIIS must be written in a language accepted by the NCA but, in case of offering in different Member States, the KIIS must be prepared in a language accepted by the NCA of each of these countries. The identification of the languages accepted might create different levels of investor protection, regulatory differences and arbitrage. According to the data communicated by Member States to ESMA by March 2022, English will be among the language accepted only in Spain, Croatia, Hungary, Luxembourg and Malta.⁴⁵ Finally, Member States are free to introduce the requirement of the *ex ante* notification (not approval) of the KIIS.⁴⁶

Other areas of residual differentiated regulatory treatment and arbitrage can result from the discretion left to Member States in setting the intensity of supervision in line with the proportionality principle and administrative sanctions according to Art 15(2) and 39 ff.⁴⁷

Moreover, although the procedure for applying for authorisation has been highly harmonised, NCAs can freely set supervisory fees: the application of different supervisory fees, especially if proportionally high when compared to MiFID II firms', can create fragmentation and regulatory arbitrage.

3. THE SECOND OPPONENT: BREXIT

The second element potentially challenging the ECSPR and its objectives is Brexit. Considering in fact the prominent role of the UK in the EU financial sector in general and in the crowdfunding market in particular, Brexit is expected to significantly affect the crowdfunding sector, and the scope and effective application of the ECSPR, also creating regulatory competition between the two systems in attracting platforms and investors.

While a draft of the ECSPR circulating during trilateral negotiations presented by the ECON Committee of the EU Parliament⁴⁸ had proposed a separate regime for third countries providers with equivalent legal frameworks, the final version makes the ECSPR regime accessible only by legal persons established in the EU (Art. 3(1)), without mentioning the treatment of non-EU country providers.

(n 1); E Macchiavello, 'The Scope of the ECSPR: the Difficult Compromise Between Harmonization, Client Protection and Level-Playing Field', in Macchiavello *Regulation* (n 1) Ch 3 (with cross-references to other relevant chapters).

⁴⁵ ESMA (n 28) 4-5.

⁴⁶ Art 24(14) ECSPR.

⁴⁷ See F Chiarelli, L Droghini and R D'Ambrosio, 'Supervision and Reporting Obligations of Crowdfunding Service Providers', in Macchiavello *Regulation* (n 1) Ch 14; K Serdaris, 'Withdrawal Rights in Crowdfunding Transactions: The Precontractual Reflection Period', *ibidem*, ch 19.

⁴⁸ See European Parliament-ECON (n 22).

Therefore, British crowdfunding providers, as third countries' providers, cannot apply for a ECSPR authorisation, unless establishing a separate stable organisation in one Member State. Despite the existence of a quite strict and well-functioning crowdfunding regime in the UK, the absence of an equivalence clause in the ECSPR blocks any short-cut. In any case, the result of an equivalence decision might be difficult and therefore discretionary and subject to political forces. The British 2019 reform has undoubtedly served as inspiration for the ECSPR for the risk management measures for loan intermediation, partially the pricing criteria and portfolio management as well as business continuity arrangements. Nonetheless, the solutions as regards investor protection do not always correspond. For instance, the UK regime presents investment limits and marketing restrictions absent in the ECSPR, while the latter, in contrast to the former, entails due diligence obligations, reflection period and a sort of appropriateness/suitability test for un-sophisticated investors in addition to a maximum size threshold for offerings of loans.

Finally, considering the current lack of responses for the financial services in the UK-EU deal, non-EU operators will have to follow the general, unsatisfactory, complex and fragmentary principles about cross-border financial services which is further complicated by the above-mentioned difference in crowdfunding services qualification and regulation among countries. For instance, if British crowdfunding platforms had to use an investment firm license to operate without creating a separate EU-based subsidiary, they might have access to the European crowdfunding market under MiFID II/MiFIR. However, such legal framework allows third country's investment firms to operate only after a discretionary and revocable with a 30-day notice decision of the Commission supported by ESMA about the equivalence of the regimes. The decision is in principle based on the analysis of the requirements, their objectives and results, the supervision; under condition of reciprocity and new criteria set in the recent IFR for systemically-relevant firms. Moreover, such equivalence regime exists only as regards trading venues and investment services offered to professional investors and eligible counterparties and, by the way, equivalence decisions of such sorts have never been issued by the Commission so far. Also the equivalence clause in the AIFMD pertains to services only towards non-retail investors, while UCTIS scope is limited to the EEA territory. Anyway, prospectuses of third-countries' issuers could be offered in the EU when satisfying Art. 29 Prospectus Regulation.

In any case, this reasoning cannot be applied to lending-based crowdfunding: also considering that not even the PSD 2 for payments services or the CRD IV for deposits and lending services have an equivalence clause, such platforms will have to look for solutions in each

different national regime in terms of third country providers' national regimes or bilateral agreements.⁴⁹

4. THE THIRD OPPONENT: CLIMATE CHANGE, THE RECENT SUSTAINABLE FINANCE FRAMEWORK AND OTHER EU ACTIONS

In March 2018, the European Commission adopted the 'Financing Sustainable Growth' Action Plan,⁵⁰ aiming at reorienting private capital to more sustainable investments, managing financial risks stemming from climate change, environmental degradation, and social issues as well as fostering transparency and long-termism in financial and economic activity.⁵¹ The European Green Deal of December 2019⁵² has confirmed the important role played by sustainable finance in accompanying the EU in the ecological and sustainability transition.⁵³ The EU has proposed and

⁴⁹ About Brexit and financial services: Commission, 'EU Equivalence Decisions in Financial Services Policy: an Assessment', SWD(2017) 102 final, 27 February 2017; Commission, 'Equivalence in the Area of Financial Services', (Communication) COM/2019/349 final, 29 July 2019; J Deslandes, 'Third Country Equivalence in EU Banking and Financial Regulation' August 2019, <[www.europarl.europa.eu/RegData/etudes/IDAN/2018/614495/IPOL_IDA\(2018\)614495_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/614495/IPOL_IDA(2018)614495_EN.pdf)>; K Alexander, 'The UK's Third-Country Status Following Brexit: Post-Brexit Models, Third-Country Equivalence and Switzerland', in K Alexander and others, *Brexit and Financial Services. Law and Policy* (Hart 2018); S Bergbauer and others, 'Implications of Brexit for the EU financial landscape in ECB, Financial Integration and Structure in the Euro Area', (March 2020), <www.ecb.europa.eu/pub/fic/article/html/ecb.ficart202003_01~690a86d168.en.html#toc1>; M Lehmann and DA Zetzsche, 'How Does It Feel to Be a Third Country? The Consequences of Brexit for Financial Market Law', (15 April 2018), <<https://ssrn.com/abstract=3155355>>; EO Wymeersch, 'UK Post Brexit Access to the EU and its Effect on Dispute Resolution', (16 April 2018), EBI Working Paper Series 2018, <<https://ssrn.com/abstract=3169066>>.

⁵⁰ Commission, 'Action Plan: Financing Sustainable Growth', (Communication) COM/2018/097 final, 8 March 2018.

⁵¹ See also High Level Expert Group on Sustainable Finance, 'Final Report', 31 January 2018, <https://ec.europa.eu/info/sites/default/files/180131-sustainable-finance-final-report_en.pdf>. Several International bodies have long been underlying the fundamental link between finance and sustainable development goals, such as the OECD, G20, UN (creating in 1992 a partnership between the United Nations Environment Programme and the global financial sector).

⁵² Commission, 'The European Green Deal', (Communication) COM(2019) 640 final, 11 December 2019.

⁵³ About EU sustainable finance, among others: D Busch, 'Sustainable Finance Disclosure in the EU Financial Sector', 13 July 2020, European Banking Institute Working Paper Series 2020 - No 70, <<https://ssrn.com/abstract=3650407>>; D Busch, G Ferrarini and A van den Hurk, 'The European Commission's Sustainable Finance Action Plan', 9 October 2018, <<https://ssrn.com/abstract=3263690>>; V Colaert, 'Integrating Sustainable Finance into the MiFID II and IDD Investor Protection

adopted several legal acts in this regard and a very fast pace. Some of them are expected to have a revolutionary impact on the financial sector, aiming at integrating sustainability and therefore environmental, social and governance considerations, into investment firms' and investment fund managers' investment processes, including disclosure and organizational duties. For instance, the Regulation No. 852/2020, so called 'EU Taxonomy Regulation' provides criteria to determine the environmental sustainability of economic activities⁵⁴ and aims to set the basis not only for standards and labels for sustainable financial products, but also for the disclosure duties of the Sustainable Finance Disclosure Regulation (No. 2019/2088, SDFR),⁵⁵ in order to reduce 'greenwashing'⁵⁶. In fact, the latter requires financial advisors and managers of various types of investment funds to disclose, at entity and product level depending on the case, whether (if not, why) and how they integrate sustainability risks in their organization and investment process as well as whether and how they consider the impact of their investments on the sustainability factors, with additional requirements in case of financial instruments marketed for their sustainability characteristics especially in case of environmental objectives, in relation to the EU taxonomy. Revisions of the delegated regulations and directives of, among others, MiFID II, IDD, AIFMD, UCITS⁵⁷ have

Frameworks', in Danny Busch, Guido Ferrarini, Seraina Grünewald (eds), *Sustainable Finance in Europe. Corporate Governance, Financial Stability and Financial Markets* (Springer 2021) ch 13; C Gortsos, 'The Taxonomy Regulation: More Important Than Just as an Element of the Capital Markets Union', 16 December 2020, European Banking Institute Working Paper Series 2020 No 80, <<https://ssrn.com/abstract=3750039>>; M Siri and S Zhu, 'Will the EU Commission Successfully Integrate Sustainability Risks and Factors in the Investor Protection Regime? A Research Agenda', 11(22) *Sustainability* 6292.

⁵⁴ Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 [2020] OJ L 198/13.

⁵⁵ Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on of the sustainability-related disclosures in the financial services sector [2019] OJ L317/1. Art 26(2)(b) Taxonomy Regulation empowers the Commission to propose the extension to sustainability factors other than environmental ones (eg social) in its review Report. Meanwhile the expert group has issued its final report on the social taxonomy: Platform on Sustainable finance, 'Final Report on Social Taxonomy Platform on Sustainable Finance' (February 2022), <https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/280222-sustainable-finance-platform-finance-report-social-taxonomy.pdf>.

⁵⁶ 'Greenwashing' is 'the practice of gaining an unfair competitive advantage by marketing a financial product as environmentally friendly, when in fact basic environmental standards have not been met' (Art. 11 Taxonomy).

⁵⁷ MiFID Delegated Regulation No 2017/565/EU and Delegated Directive No 2017/593/EU; AIFMD Delegated Regulation No 231/2013/EU; UCITS Implementing Directive No 2010/43/EU (as amended in April 2021).

integrated ESG risks and ESG preferences in existing organizational e.g. product governance, conflict of interest, due diligence, conduct, such as suitability test and report, and duties of financial intermediaries.

Considering the severe carbon footprint of technology, Fintech and sustainability have not been associated since the beginning but the interest for the interaction of the two areas is growing⁵⁸ and, currently, both digitalization and sustainability are identified as key factors for achieving more affordable, sustainable and healthier societies, within the recent EU industrial, SMEs, data and recovery strategies.⁵⁹

In Europe, there are several crowdfunding platforms facilitating investments in the form of loans or equity and debt instruments in sustainable economic activities.⁶⁰ In a crowdfunding context, where the complex technical nature of renewable energy projects and of ESG assessments is coupled with the platform-type of intermediation - which entails in principle a lower level of due diligence -, the risk of greenwashing and lack of investors' adequate information might appear higher. Nonetheless, introducing sustainability requirements in the crowdfunding context equivalent to the above-mentioned ones of the traditional finance universe might imply excessive costs for all the parties involved, although other emerging technology-based solutions might help with that.⁶¹ The ECSPR has so far omitted sustainability requirements, but there are even grounds for facilitations for 'green crowdfunding' platforms.

In fact, certain ECSPR requirements might not work so well in a ESG context, in particular as regards renewable energy. For instance, the €5 million cap on the offers might frustrate the expectations of certain companies in the renewable energy segment where high initial investments are required. Moreover, the restrictions on bulletin boards might significantly limit the level of liquidity of the market, disincentivizing investments, while the ban on platform's co-investing might further reduce due diligence on the side of the latter. Especially in this particular area, co-investing with business angels and funds can help reduce asymmetric information, but, at the same time, might leave retail investors with 'lemons' if certain conditions are not met, e.g. disclosure and equal terms. The ECSPR does not contain particular provisions in this regard, leaving the corresponding risks unaddressed. Furthermore, the restrictions in the ECSPR to the use of SPVs clash with the public-private

⁵⁸ E Macchiavello and M Siri, 'Sustainable Finance and Fintech: Can Technology Contribute To Achieving Environmental Goals? A Preliminary Assessment of 'Green Fintech' and 'Sustainable Digital Finance' (2022) 19(1) *European Company and Financial Law Review* 128.

⁵⁹ See for instance Commission, 'A New Industrial Strategy for Europe', (Communication) COM/2020/102 final; Commission, 'An SME Strategy for a sustainable and digital Europe' (Communication) COM/2020/103 final.

⁶⁰ Examples of these platforms are: Lendosphere and Lumo in France; Oneplanetcrowd in the Netherlands; Ecomill in Italy.

⁶¹ Macchiavello and Siri (n 58).

partnerships structure typically used in the ‘green’ sector.⁶² Finally, existing experiences involving tokens related to renewable energy or sustainable behaviours exchanged on a P2P platform might suffer from the difficult interaction between the ECSPR and the uncertain regime for hybrid or security tokens (MiFID II, Prospectus, etc. with possible future adaptations) and utility tokens (MiCAR).

Instead, we might also want to assess whether the ECSPR should include requirements similar to the ones introduced for traditional providers aimed at integrating sustainability into their activity in the future. This would probably ensure a level playing field and respect the EU sustainability objectives but the additional compliance costs involved might discourage to proceed in this direction in order not to overburden the sector and avoid related negative effects in terms of SMEs access to finance.

Finally, other relevant legislative acts within the CMU and Fintech action plan (renamed Digital finance strategy) have progressed since the Commission’s proposal. Nonetheless, the ECSPR does not always ensure coordination or consistency with these.

While I have already discussed the lack of clarity about the relationship with MiCAR, the ECSPR does not clarify how it should be interpreted its interaction with some recent Proposals, e.g. Digital Services Act – DSA,⁶³ or adopted act, e.g. Digital Content Directive No 2019/770, conceived with the platform economy in mind and also dealing with platforms’ liability for the ‘illegal content’ published online. These do not mention either the ECSPR but expressly exclude financial services from their scope and therefore seem not applicable to crowdfunding. Doubts might exist on the applicability to crowdfunding of the Regulation No 2019/1150 on fairness and transparency for business users of online intermediation services.⁶⁴ This Regulation aims at protecting business users - instead of consumers – in respect to platforms and apply to online intermediation services, which are so broadly defined to cover in principle

⁶² Ibidem; E Macchiavello, ‘The Crowdfunding Regulation in the Context of the Capital Markets Union’, in Ortolani and Louisse (n 1) 25, 42.

⁶³ Proposal for a Regulation [...] on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final.

⁶⁴ Regulation (UE) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services OJ [2019] L 186/57.

crowdfunding services.⁶⁵ However, again, the ECSPR might represent a *lex specialis* prevailing over the *generalis*.⁶⁶

Moreover, as already mentioned, since marketing communication rules remain mainly national, the ECSPR does not clarify the applicability of certain consumer protection laws, such as the Directive No 2002/65 on distant financial services and Directive No 2005/29 on unfair business-to-consumer commercial practices and Directive No 93/13 on unfair terms in consumer contracts, currently to be reviewed.

5. THE FOURTH OPPONENT: THE PANDEMIC CRISIS

Covid-19 pandemic has afflicted the lives of the worldwide population and depressed our economies, also rising the risk of defaults, increasing risk aversion and the offer of funds while aggravating firms' and consumers' need of financing (business and consumer lending). Nonetheless, the European crowdfunding market has demonstrated some resilience during the pandemic crisis. The donation-based crowdfunding segment during 2020 recorded an incredible spur thanks to online charity directed to countries and hospitals most affected by the pandemic. The investment-based crowdfunding segment, after an initial slow down, has reprised its growth curve, while the lending-based crowdfunding market has registered a contraction (negative growth) in terms of volumes and number of transactions but an increase in the number of borrowers, in particular new ones.⁶⁷ Platforms has generally showed preparedness in adopting measures to respond to the economic downturn, such as waiver of late repayment fees, repayment easement, review of onboarding criteria, operational support in the preparation of contingency plans and provision

⁶⁵ Art 2(1) of Directive 2019/1150 identifies 'online intermediation services' with the services meet all of the following requirements: (a) constituting 'information society services' under Directive No 2015/1535; (b) facilitating business users to offer goods or services to consumers through direct transactions between the two; (c) provided to business users on the basis of contractual relationships with the provider of the same services.

⁶⁶ On these topics, see also C Estevan de Quesada, 'Crowdfunding Platforms, Competition Law and Platform', in Macchiavello *Regulation* (n 1) Ch 37.

⁶⁷ See T Ziegler and others, 'The Global Covid-19 FinTech. Market Rapid Assessment Study', (December 2020), 45ff, 87-88, <www.jbs.cam.ac.uk/wp-content/uploads/2020/12/2020-ccaf-global-covid-fintech-market-rapid-assessment-study.pdf>. For preliminary data (April 2020) on the impact of the pandemic on marketplace lending and investing (capital inflow - new investments – and deal flow - number of new projects registered on platforms, payment delays, cash flow problems): European Crowdfunding Network (ECN), 'Early Impact of CoVid19 on the European Crowdfunding Sector', (April 2020), <<https://eurocrowd.org/early-impact-of-covid19-on-the-european-crowdfunding-sector-2/>>; see also F Battaglia, F Busato, M Manganiello, 'Equity Crowdfunding: Brave Market or Safe Haven for the Crowd During the COVID-19 Crisis?', (1 July 2020), <<https://ssrn.com/abstract=3666021>>.

of information on government subsidies, but could not count on government support.⁶⁸

Therefore, the potential of crowdfunding in terms of fast, convenient, resilient and distant funding instrument has raised the question about the same deserving increased government support, both economic and regulatory. The recently approved ECSPR, introducing a EU-wide regime for financial-return crowdfunding platforms, might push governments to consider this sector closer to the traditional one and therefore assimilated not only in terms of regulation but also of governmental measures.⁶⁹

6. CONCLUSIONS

The ECSPR represents a great advancement in the European crowdfunding world and should facilitate CSPs' activities thanks to its passport, increased level of regulatory harmonisation and legal certainty. Nonetheless, for several providers (especially small and previously lightly regulated ones) will represent a big change and challenge: as already mentioned, NCAs are reporting difficulties of national providers to adjust in such a short time their business models to the new rules, therefore benefiting from the possibility to obtain an extension of the transitional period (see above §1).

Especially lending-based crowdfunding platforms might perceive their activities as more strictly regulated than in the past (but sometimes even if compared to similar activities such as alternative credit funds or investment portfolio management)⁷⁰: for instance, in case of mere facilitation of loans, platform must demonstrate 'appropriate systems and controls to assess the risks related to the loans intermediated on the crowdfunding platform' (Art 4(2), first period). Moreover, when offering, instead, scoring/pricing services (loans and bonds), they must have in place policies and procedures ensuring a reasonable assessment of credit risk based on sufficient data (at least the ones indicated in Article 4(4)b) and reasonable prices, using factors and criteria in accordance with technical standards set by EBA and ESMA (Art 4(4) and 19(7)). Additional requirements, about the timing of the credit risk assessment, apply in case of loans (instead of debt-based financial instruments). Finally, when platforms offer individual portfolio management of loans, they need to have in place robust internal processes and methodologies for risk management and financial modelling (Article 4(2), second period) and for

⁶⁸ Ziegler and others (n 67) 17, 29-31, 45, 88-89; ECN (n 67) 5-6.

⁶⁹ Instead about US government measures supporting crowdfunding during the pandemic: A Vanderlaan, 'SEC Provides Temporary Relief from Certain Regulation Crowdfunding Requirements in Response to COVID-19', 2020, <www.orrick.com/en/Insights/2020/05/SEC-Provides-Temporary-Relief-from-Certain-Regulation-Crowdfunding-Requirements-in-COVID-19-Response>.

⁷⁰ See Macchiavello and Sciarrone Alibrandi (n 1) 77.

complying with the requirements set in Article 6(1)-(2), including respecting investors' preferences and using appropriate data. They also need to assess the credit risk of individual crowdfunding projects selected for the investor's portfolio, of the portfolio itself and of the project owners' prospects of meeting their obligations. When offering and operating contingent funds, ECSPs must have policies, procedures and organizational arrangements that will be specified through RTS drafted by the EBA in cooperation with ESMA (Art 6(7)). Another new requirement for several providers might consist in the prudential safeguards for operational risk, omitted in several jurisdictions: they will have to ensure, through CET1 or through professional insurance or a combination of these two, the higher between €25,000 and 1/4 of overheads of the previous year.⁷¹

Nonetheless, our main objective with this paper has been to test the ECSPR's resilience to several 'external' forces and challenges.

To this end, previous paragraphs have identified several areas of potential residual fragmentation and critical aspects.

However, the ECSPR had already contemplated the need to adjust its text after the first years of application: in particular, Article 45 requires the Commission, '[b]efore 10 November 2023' and 'after consulting ESMA and EBA' to 'present a report to the European Parliament and the Council on the application' of the ECSPR, 'accompanied where appropriate by a legislative proposal'. The same provision presents a quite long list of areas potentially interested by this future revision and related to some of the challenges mentioned above.

For instance, on a general level, the Commission will assess the overall impact of the ECSPR on the sector (also in terms of number of CSPs, in particular small ones, and cross-border operations) with the objective of adjusting over time the requirements in the light of the level playing field with other operators and respective regimes, financial inclusion implications as well as market evolutions (Art 45(2), letters (a)-(b), (f)-(g), (h)-(j), (t)-(w)).

In terms of still insufficiently harmonised areas, the combination of Articles 2(3) and 45 might reduce the existing fragmentation. Article 2(3) requires in fact NCAs to inform ESMA, on an annual basis, about the types of private limited liability companies and their shares that are offered falling within the ECSPR's scope.⁷² ESMA has to compare such

⁷¹ This requirement recalls class 3 firms' capital requirements under Investment Firms Regulation (IFR 2019/2033) and Directive (IFD 2019/2034) but is potentially lower (since IFD/IFR requirement is based on the minimum capital requirement set depending on the service provided, where the lowest is €75,000).

⁷² As of 31 March 2022, only 7 countries have communicated to ESMA to consider certain shares of private limited companies as admitted instruments for crowdfunding purposes, while the others have either chosen not to envisage such types of instruments

information received from the NCAs with the one obtained on its own collecting, for the first two year of ECSPR's application, the KIIS of project owners offering admitted instruments, with particular regard to the national restrictions on such instruments and on their transferability, and transmit such comparison to the Commission for the Report under Art 45 (Article 2(4)).⁷³ All this might - eventually and hopefully - lead to more common criteria and harmonised categorisation (although this is not made explicit).

Also in the area of administrative sanctions, Art 45(2)(y) requires the Commission to assess the effectiveness of the ECSPR enforcement and against the risk of fragmentation, through the analysis of the 'number and amount of administrative fines and criminal penalties imposed' by Member States in particular deciding whether further harmonization is needed as regards 'administrative penalties provided for infringements' of the ECSPR (para 2, letter (o) and (y)).⁷⁴

Similarly, the report has to assess the effects of marketing communication rules, on the 'freedom to provide services, competition and investor protection' (para 2(n)), with the possibility to propose, as outcome of the assessment, further harmonization in this area.

Article 45 also takes into account the current lack of a third country regime: para 2, at letter q) entrusts the Commission with evaluating in its report the appropriateness of allowing entities established in third countries to be authorised as crowdfunding service providers under the Regulation.

Finally, according to Article 45(2)(s), the Commission might consider proposing the introduction in the ECSPs Regulation of specific measures to promote sustainable and innovative crowdfunding projects also through the use of Union funds. This expression sounds ambiguous and might be interpreted as either suggesting the introduction of facilitations for CSPs in the area of sustainable finance or, on the contrary, to introduce requirements similar to the sustainable finance action plan ones to improve sustainability in finance. Postponing the decision on how to ponder all interests involved (proportionality, SMEs access to finance, green transition, etc) for some years seems appropriate in consideration of the difficult balance and the novelty of the sustainable finance framework (therefore untested): the final outcome of such assessment and balance might depend on both the future evolution and stabilization of the EU sustainable finance legal framework and the assessment about the

(5) or not provided such information (the remaining). See ESMA (n **Error! Bookmark not defined.**) 2-3.

⁷³ In its Report, the Commission will have to assess 'the use of admitted instruments for crowdfunding purposes in the cross-border provision of crowdfunding services' (Art 45(2)(c)).

⁷⁴ See K Serdaris, *Ex Post Enforcement of the EU Crowdfunding Regime: Administrative Sanctions and Measures*, in Macchiavello, *Regulation* (n 1), chp. 29.

compliance costs and overall impact of the already existing ECSPR provisions on the sector.

In conclusion, the ECSPR present a potential high level of resilience to the highlighted challenges but some areas of uncertainty and insufficient harmonisation remain: in these cases, further adjustments at level one or, where allowed and anyway ensuring a careful and shared assessment of impact, at level 2 or at interpretative level are needed.