



Legal Update

Crowdfunding Regulations: New Questions and Answers

The European Securities and Markets Authority (“ESMA”) has recently published additional questions and answers concerning the European Crowdfunding Service Providers for Business Regulation (Regulation (EU) 2020/1503) (“ECSPR”), which entered into force on 10 November 2020. The latest Q&As concern topics such as the scope of the definition of a Special Purpose Vehicle (“SPV”), participation of the Crowdfunding Service Providers (“CSPs”) in a SPV, and proof of own funds by a CSP.

Scope of the definition of SPV

Article 2(1)(q) of the ECSPR defines an SPV as, “*an entity created solely for, or which solely serves the purpose of, a securitisation within the meaning of point (2) of Article 1 of Regulation (EU) No 1075/2013 of the European Central Bank*”.

Article 1(2) of Regulation EU No 1075/2013 of the European Central Bank defines securitisation as, “*a transaction or scheme whereby an entity that is separate from the originator or insurance or reinsurance undertaking and is created for or serves the purpose of the transaction or scheme issues financing instruments to investors, and one or more of the following takes place:*

(a) *an asset or pool of assets, or part thereof, is transferred to an entity that is separate from the originator and is created for or serves the purpose of the transaction or scheme, either by the transfer of legal title or beneficial interest of those assets from the originator or through sub participation..”*

Therefore, as per new question 1.6, an entity will be regarded as an SPV within the meaning of Article 2(1)(q) of ECSPR when: (i) the entity is created for the purpose or used for the purpose of the transaction; (ii) it is separate from the project owner; (iii) it is interposed between the crowdfunding project and investors; and (iv) it receives, either directly or indirectly, a transfer of legal title or beneficial interest over the crowdfunding project from the project owner. Such entities must comply with the requirements stemming from Article 3(6) ECSPR.

Participation of the CSP in a SPV

Another new question 1.7 queried whether a CSP may hold a participation in a SPV. It was confirmed that, as per Article 8(1) of ECSPR, that CSPs shall not have any participation in any crowdfunding offer on their platform. CSPs are intended to act as neutral intermediaries between clients on their crowdfunding platforms.

The holding by a CSP of a participation in a SPV interposed between the crowdfunding project and investors is not possible under the ECSPR unless the CSP can demonstrate to the NCA that such participation does not equal a participation in the underlying crowdfunding offer and does not impair the CSPs neutrality.

The nature of the participation of the CSP in a SPV and its potential impact on neutrality will be assessed on a case-by-case approach by the NCA.

Proof of own funds of CSP

New question 6.3 concerned when applying for the authorisation as a CSP, the proofs of own funds that existing undertakings can provide to the relevant authorising authority. Article 12(1)(i) of the ECSPR provides that the application of authorisation as a CSP shall contain proof that the applicant meets the prudential safeguards in accordance with Article 11 ECSPR. The CSP is also obliged to provide “*an audited account statement or public register certifying the amount of own funds of the applicant.*”

Next steps

ESMA periodically reviews the Q&As published to ensure the latest updates are disseminated to key stakeholders. Clerkin Lynch will continue to monitor and advise on these.

Mark Browne

Partner

Email:

markbrowne@clerkinlynch.com

Phone: 01 611 4400



Craig Behan

