



Tied Agents within the ECSPR Regime

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ABSTRACT

The European Crowdfunding Service Provider Regime allows the intermediation of securities, loans and other admitted instruments for crowdfunding purposes up to five million Euro. Crowdfunding offers above five million Euro continue to be subject to national crowdfunding regimes, which may be regulated under MiFID.

The authors discuss how existing MiFID licenses can be used in parallel to a license under ECSPR, with a focus on tied agents who operate under a so-called liability umbrella (investment firm or credit institution) holding a MiFID license.

In Germany, the law implementing MiFID states that tied agents can operate “solely [*in the name,*] for the account and under the liability of” an investment firm or credit institution acting as liability umbrella. This raises the question, whether a tied agent can hold a license under ECSPR itself at the same time. However, the authors argue that both MiFID and ECSPR as well as the intent of the German legislator provide for the fact that one can hold an ECSPR authorization and at the same time be appointed as tied agent of a MiFID investment firm or credit institution.

1. DOES AN ECSPR LICENSE EXCLUDE BEING A TIED AGENT UNDER MiFID – THE CASE IN GERMANY

Since 10 November 2021, the European Crowdfunding Service Provider Regulation (ECSPR)¹ has been directly applicable in the Member States of the European Union. Since the ECSPR came into force, it lays down requirements for, among other things, the provision of crowdfunding services (i.e. investment brokerage, or the reception and transmission of client orders) between an entrepreneur as project owner and investors, provided that the brokering takes place via a crowdfunding platform.

According to Art. 1(2) lit. c) ECSPR, the ECSPR’s scope is limited to crowdfunding offers with an equivalent value of up to five million Euro. Some market participants see a need for financing with a higher total issue volume. This raises the question whether companies can act as crowdfunding service providers with a licence under Art. 12(1) ECSPR and broker instruments between project owners and investors up to five million Euro and, for issue volumes above five million Euro, can provide the placement or brokerage as a tied agent of a so-called liability umbrella subject to authorisation under the national MiFID implementation of the respective member state.

Crowdfunding service providers in Germany, offering the intermediation of securities, mostly operate within the tied agent regime under a so-called liability umbrella, which holds a license to intermediate

¹ Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European Crowdfunding service providers for business and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937.

securities within the MiFID framework. Only one German crowdfunding platform has its own MiFID license, as scholars generally agree that the implementation of the MiFID regime has been gold-plated by the German legislator.

The National Competent Authority (NCA) for the ECSPR, and thus responsible for the compliance and supervision of crowdfunding service providers under the ECSPR, is the Bundesanstalt fuer Finanzdienstleistungsaufsicht (BaFin). Asked whether it is possible to apply for the ECSPR license and then outsource one's license to tied agents, BaFin indicated that this would not be allowed. ESMA, the European Securities Market Authority, confirmed this view. Therefore, tied agents have to apply for and obtain an ECSPR license themselves, if they want to provide services under ECSPR.

However, under the German implementation of the MiFID regime, tied agents are required to "solely act for the account and under the liability" of one investment firm. This has led to the question whether tied agents can also apply for and receive their own ECSPR license. If that would be the case, a crowdfunding service provider could operate under the ECSPR regime for emissions below five million Euro, and could operate within the MiFID regime and the German exemption from the prospectus regulation (Regulation (EU) 2017/1129) for issues between five and eight million Euro.

If a tied agent would not be able to apply for an ECSP license without losing its status as tied agent, it would have to apply for the ECSP license with a separate legal entity. The two legal entities would have to share a common investor base. Such a practice would entail high costs of legal compliance.

The authors argue in this article that both MiFID and the ECSPR foresee that a tied agent of a MiFID investment firm can also obtain its own ECSP license. The exclusive ties to a so-called liability umbrella does not foreclose intermediating securities outside of MiFID and within the ECSPR. The argument is highly relevant also outside of Germany, as it discusses the relationship between the two regimes and entities planning to operate in both regimes.

2. COMPATIBILITY OF THE LICENCE AS A CROWDFUNDING SERVICE PROVIDER WITH THE ACTIVITY AS A TIED AGENT

2.1. OBLIGATION OF INTERPRETATION IN CONFORMITY WITH THE DIRECTIVE

The provisions of the Second Markets in Financial Instruments Directive² (MiFID II) as well as the legislative materials of the European

² Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directives 2002/92/EC and 2011/61/EU.

and German legislator on the tied agent speak in favour of a general combinability of both activities.

Recital 100 MiFID II reads:

“This Directive should be without prejudice to the right of tied agents to undertake activities covered by other Directives and related activities in respect of financial services or products not covered by this Directive [...].”

In line with this, Art. 29 (4) MiFID II states:

“Member States shall require investment firms [...] [to] take adequate measures in order to avoid any negative impact that the activities of the tied agent not covered by the scope of this Directive could have on the activities carried out by the tied agent on behalf of the investment firm.” (Emphasis added by the authors.)

The European legislator thereby clarifies that the activity as a tied agent does not have to be provided exclusively. Rather, the legislator assumes that the tied agent can and may provide other activities outside the scope of MiFID II. This is precisely the case here, as MiFID II does not regulate crowdfunding services which are subject to ECSPR (see section 2.2 below for more details).

Furthermore, there is no evidence in the German legislative history that would speak in favour of an intended prohibition of simultaneous activity as a tied agent and as an ECSPR institution. With the MiFID Implementation Act³, the German legislator, in implementation of MiFID I, has revised the field exemption for tied agents and introduced the exclusivity requirement provided therein. The legislator stated that due to *“the degree of integration within the organisation of the company [(the liability umbrella provider)], a tied agent can only be someone [...] who works solely for one company”*.⁴

Against this background, the purpose of the provision and the chosen wording is, according to the grounds of the law, merely to exclude “multiple representation” of different investment firms by a single tied agent.⁵ This also corresponds to views in published literature.⁶

Said multiple representation was still possible before the revision of the field exception, provided that the participating investment firms assumed joint and several liability for the activities of the tied agent.⁷ With the new version of the field exception for tied agents, the German legislator did not intend to go beyond the scope required by MiFID II and

³ FRUG, BT-Drs. 16/4028.

⁴ BT-Drs. 16/4028, p. 93. Translation by the authors.

⁵ BT-Drs. 16/4028, p. 93; cf. also recital 36 of the First Financial Markets Directive (MiFID I) and now recital 99 of MiFID II).

⁶ Cf. Reschke in: Beck/Samm/Kokemoor, Kreditwesengesetz mit CRR, § 2 Rn. 605, Albert in: Reischauer/Kleinhaus, Kreditwesengesetz, 7th EL 2022, § 2 marginal no. 154.

⁷ BT-Drs. 13/7142, p. 72.

did not want to extend the exclusivity requirement to the - permissible, see above - activities of tied agents outside the scope of MiFID II.

As will be explained in more detail below, the activity as a crowdfunding service provider subject to ECSPR is not covered by MiFID II and is therefore also permissible alongside the activity as tied agent, taking into account the legislative intent of the national legislator.

Thus, the required interpretation of the provisions on tied agents in conformity with the Directive, paired with the freedom to choose an occupation and the freedom to provide services, already speaks against an (implicit) prohibition of simultaneous activity as a tied agent and as a crowdfunding service provider subject to ECSPR.

2.2. SCOPE OF THE ECSPR REGARDING CROWDFUNDING SERVICE PROVIDERS DIFFERS FROM INVESTMENT BROKERAGE SUBJECT TO MiFID II

The European legislator assumes a competitive relation and the possibility of a requirement of dual authorisation only for "the same activity". This is not the case if, on the one hand, services are provided under the ECSPR and on the other hand, the placement or brokerage of issues in excess of five million Euro falls outside the scope of ECSPR.

The brokerage of crowdfunding offers by crowdfunding service providers is substantially different from the pure investment brokerage or placement of financial instruments according to MiFID II. This is exemplified by Recital 3 of Directive (EU) 2020/1504 amending MiFID II, which was adopted as a supplement to the ECSPR, as well as Article 1 thereof. From the recital can be concluded that exclusivity is not required for different activities:

"To provide legal certainty as to the persons and activities falling within the scope of Regulation (EU) 2020/1503 and of Directive 2014/65/EU of the European Parliament and of the Council, respectively, and in order to avoid a situation where the same activity is subject to multiple authorisations within the Union, legal persons authorised as crowdfunding service providers under Regulation (EU) 2020/1503 should be excluded from the scope of Directive 2014/65/EU."

Art. 1 of the Directive stipulates the corresponding exemption from the scope of MiFID II by adding a new letter p) to Art. 2(1) MiFID II.

2.3. COMBINATION OF SERVICE PROVISION PERMITTED UNDER ECSPR AND MiFID II

That the provision of crowdfunding services as crowdfunding service provider under the ECSPR in combination with other investment services regulated under MiFID II is permissible, can already be deducted from the statutory provision of Art. 12(14) ECSPR. According to this provision, the requirements to obtain an ECSPR authorisation for

investment firms that have already been granted a MiFID licence are eased. This logically assumes the admissibility of a corresponding combination of services.

Moreover, the admissibility of this combination is also recognised by the European Securities and Markets Authority (ESMA), which is primarily responsible for interpretation of the ECSPR: ESMA has updated its Questions and Answers on the ECSPR as of 23.9.2022.⁸ In question 3.8, ESMA comments on the question of whether crowdfunding services under ECSPR and investment services and activities provided in accordance with MiFID II can be provided by means of the same website. ESMA answers the question by stating that a combination of both services via the same website is possible, *“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”*⁹

ESMA thus assumes that both, the provision of crowdfunding services under ECSPR and the provision of investment services under MiFID II, can be provided simultaneously. As the provisions with regard to the tied agent are based on a provision of MiFID II¹⁰, ESMA's considerations can be applied here as well.

3. CONCLUSION

An explicit prohibition of the combination of the provision of crowdfunding services up to five million Euro as a crowdfunding service provider under the ECSPR and the activity as tied agent of an investment firm for issues above five million Euro can neither be derived from the ECSPR nor MiFID II itself nor the German national MiFID II implementation.

The provision of crowdfunding services under the ECSPR represents a qualitatively different activity than the brokerage or placement pursuant to MiFID II and therefore the activities are not in competition with each other. This is exemplified by the accompanying directive to the ECSPR, which excludes crowdfunding service providers and the provision of crowdfunding services according to ECSPR from the scope of MiFID II.

This conclusion is also supported by the relevant provisions of MiFID II and the ECSPR as well as opinions of ESMA, which all assume simultaneous activity under the MiFID regime and the ECSPR is permissible.

⁸ ESMA, Questions and Answers - On the European crowdfunding service providers for business Regulation, available at: https://www.esma.europa.eu/sites/default/files/library/esma35-42-1088_qas_crowdfunding_ecspr.pdf; as of 17.10.2022.

⁹ Ibid.

¹⁰ Cf. Art. 29 MiFID II.