



**DLA**  
The Power of Fintech Lending

**Managing Director**

01/27/2023

Digital Lending Association e.V. • Leipziger Str. 124 • 10117 Berlin

European Securities and Markets Authority (ESMA)

201-203 rue de Bercy

CS 80910

F- 75589 Paris Cedex 12

## **ECSPR**

Ladies and Gentlemen,

We take the liberty of asking you questions about the use and interpretation of the ECSPR.

### **I. Regarding the answers 5.3 & 5.8 in ESMA's Q&A**

Your answers 5.3 and 5.7 suggests that Art. 27 of the ECSPR is relevant only for marketing communications disseminated in other Member States (MS) than the one where the CSP is authorised.

Answer 5.3 says:

*Pursuant to Articles (...) 27 of the ECSPR, (...) the marketing communications disseminated by CSP should be drafted at least in (i) one of the official languages of the MS where the CSP is authorised or (ii) another language accepted by the NCA of that Member State.*

#### **Address**

Digital Lending Association e.V.  
Leipziger Straße 124  
10117 Berlin  
AG Charlottenburg, VR 37585 B

#### **Contact**

✉: [info@digitallenders.eu](mailto:info@digitallenders.eu)  
☎: +49 (0) 30.94.85.46.60  
🌐: [www.digitallenders.eu](http://www.digitallenders.eu)  
🌐: [www.fintics.de](http://www.fintics.de)

#### **Board**

Marco Hinz  
Philipp Kriependorf  
Dr. Tim Thabe

#### **Managing Director**

Constantin Fabricius

**Tax ID: 27/620/63392**

**Bank:** Berliner Volksbank, IBAN DE19.1009.0000.2794.4660.01, BIC BEVODEBB

Answer 5.8 additionally says:

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

We have doubts that this interpretation is admissible. As far as we can see the regulation does not stipulate anywhere that the marketing communications shall be drafted in a language of the MS where the CSP received its authorisation. All Art. 27 sec. 3 of the ECSPR imposes is to use the language of the MS in which the marketing communications are disseminated. And a MS of dissemination can be one of the 27 ones, thus, also the state of authorisation. Hence, the respective reference to the latter is not only irrelevant but also misleading from my point of view.

Beyond that, it has to be taken into account that Art. 27 is placed in Chapter V on Marketing Communications whereas Art. 23 and 24 are placed in a different Chapter, in No IV on Investor Protection. And marketing communications is already expressly mentioned in Art. 19 which indicates that things in both chapters have to be neatly separated.

**Question 1: Would you agree with our view?**

## **II. Regarding the answer 5.7 in ESMA's Q&A**

From ESMA's point of view the opportunity for the project owner to perform marketing activities is indicated by the fact that the ECSPR does not explicitly exclude it. Therefore, this would give the project owner two options: Either he refers potential investors to the CSP, or he offers the investment opportunity himself and publicly outside the platform. In addition, ESMA points out that restrictions may arise from the terms and conditions of a CSP, from European or national legislation.

Against ESMA's view, which is unfortunately not provided with any reasoning, it can be argued that the text of the ECSPR at various points places the issue of marketing communication solely on the CSP.

**Address**  
Digital Lending Association e.V.  
Leipziger Straße 124  
10117 Berlin  
AG Charlottenburg, VR 37585 B

**Contact**  
✉: [info@digitallenders.eu](mailto:info@digitallenders.eu)  
☎: +49 (0) 30.94.85.46.60  
🌐: [www.digitallenders.eu](http://www.digitallenders.eu)  
🌐: [www.fintics.de](http://www.fintics.de)

**Board**  
Marco Hinz  
Philipp Kriependorf  
Dr. Tim Thabe

**Managing Director**  
Constantin Fabricius

**Tax ID: 27/620/63392**

**Bank: Berliner Volksbank, IBAN DE19.1009.0000.2794.4660.01, BIC BEVODEBB**

For example, the definition of marketing communications in Art. 2 sec. (1) lit. (o) SFVO refers solely to "information or communication from a crowdfunding service provider to a prospective investor or prospective project owner". Additionally, Art. 19 sec. (1) SFVO assigns to the CSP alone "all information, including marketing communications". Also, the crowdfunding service is attributed solely to the CSP via Art. 2 sec. (1) lit. (a), which is advertised with marketing activities. According to Art. 2 sec. (1) lit. (g) SFVO, the role of the project owner here is only that of the customer for whom the crowdfunding services and the marketing communications of the CSP are provided in relation to "its services" (Art. 2 sec. (1) (o)).

Similarly, in relation to public authorities, Art. 28 sec. (1) SFVO addresses only "those national laws, regulations and administrative provisions applicable to marketing communications of crowdfunding service providers that the competent authorities are responsible for overseeing compliance with, and enforcing vis-à-vis crowdfunding service providers." Accordingly, supervisory measures related to marketing communications under Art. 30 sec. (2) lit. (b) SFVO are directed solely against the CSP or an outsourcing third party. And that the latter could be the project owner is not claimed even by ESMA.

In this context, it is also relevant that the general rule of Art. 3 sec. (2) SFVO addresses the CSP alone on the subject of information and conduct. Thus, the project owner does not appear anywhere in all these supervisory contexts. Beyond that ESMA's response is not free of implications from a civil law perspective.

## **Question 2: Would you agree with our view?**

Thank you very much for your time and support.

Yours sincerely



Constantin Fabricius  
Managing Director

**Address**  
Digital Lending Association e.V.  
Leipziger Straße 124  
10117 Berlin  
AG Charlottenburg, VR 37585 B

**Contact**  
✉: [info@digitallenders.eu](mailto:info@digitallenders.eu)  
☎: +49 (0) 30.94.85.46.60  
🌐: [www.digitallenders.eu](http://www.digitallenders.eu)  
🌐: [www.fintics.de](http://www.fintics.de)

**Board**  
Marco Hinz  
Philipp Kriependorf  
Dr. Tim Thabe

**Managing Director**  
Constantin Fabricius

**Tax ID: 27/620/63392**

**Bank: Berliner Volksbank, IBAN DE19.1009.0000.2794.4660.01, BIC BEVODEBB**