



Civil Liability for the Key Investment  
Information Sheet in Denmark

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## ABSTRACT

Articles 23(9) and 24(4) of the ECSPR sets out the liability of “at least” the project owner or its administrative, management or supervisory bodies for the information given in the key investment information sheet (KIIS). Further, articles 23(10) and 24(5) of the ECSPR oblige EU Member States to ensure that their laws, regulations and administrative provisions on civil liability apply to those responsible for the key investment information sheet in situations where the sheet contains misleading or inaccurate information and where the information sheet omits key information needed to aid potential investors. No Danish legislation has been enacted regulating civil liability for the key investment information sheet. This article discusses the civil liability regime between the project owner and the CSP who are involved in preparing the key investment information sheet.

The article finds that the project owner is the main responsible for the accuracy of the key investment information sheet and as such will be the party to mainly be held responsible for any civil claims resulting from errors and omissions in the information sheet. Until legislation is enacted otherwise, the crowdfunding service providers’ civil liability for the key investment information sheet would most likely be limited to such errors, misleading information and omissions in the information sheet that result from inadequate procedures adopted by the crowdfunding service providers or their failure to comply with such procedures.

## 1. INTRODUCTION

The aim of this article is to shed light on the civil liability attaching to the key investment information sheet, or “KIIS”, in connection with equity crowdfunding via a crowdfunding service provider from a Danish law perspective.

The specific anatomy of crowdfunding is yet to be discovered and developed, and the recently adopted EU crowdfunding regulation (“ECSPR”) is the first step towards a unified EU-based approach on this public funding method. The ECSPR aims at strengthening the EU crowdfunding market by levelling the playing field and opting for a balanced approach between the level of investor protection and the burden of obligations for crowdfunding service providers (the platform) and project owners (the owner of the crowdfunding project in question). The ECSPR offers a transitional period whereby all crowdfunding service providers within the scope of the ECSPR that operates under applicable national law must be authorized under the ECSPR in order to continue its operations. According to article 48(1) in the ECSPR, the transitional period runs until 10 November 2022, though with possible extension being considered, at which point in time the crowdfunding service provider must either be authorized under the ECSPR or discontinue its operations. ESMA considers national law as either a specific

crowdfunding regime, other applicable legislation, or simply the private law applicable to crowdfunding transaction in a Member State.<sup>1</sup>

Denmark has not adopted any tailored legislation for crowdfunding purposes and consequently any Danish crowdfunding service providers are regulated by the relevant provisions in MIFID II<sup>2</sup> and the Danish implementing regulation.

It could be argued that the ECSPR is indeed a risk based regulatory approach as the ECSPR is directly binding in all Member States and the applicability of the ECSPR presupposes a crowdfunding offer of up to EUR 5,000,000.<sup>3</sup> Any offers above EUR 5,000,000 will be outside the scope of the ECSPR and fall within the scope of other EU financial law, for example the Prospectus Regulation.<sup>4</sup>

In Denmark, the threshold for prospectuses is EUR 8,000,000 and consequently any public offerings under this threshold are not subject to any disclosure requirements. The ECSPR will impose disclosure requirements for inter alia equity crowdfunding when a crowdfunding service provider is used as an intermediary between the investor and the project owner in order to fund the project owners' crowdfunding project.

Crowdfunding may play a crucial role in the financing of small and medium sized enterprises (SME's) and especially start-up's that have limited access to traditional financial resources like bank financing and financial markets due to a lack of profitability and track record.

This article focuses on equity crowdfunding as equity instruments nature have a higher risk than debt instruments. Consequently, equity investors will take on additional risk and when it comes to crowdfunding projects as the project owner in question will often be a start-up with limited track record and no proof of concept. To reduce the risk of poor investment decisions, the ECSPR imposes disclosure obligations in order

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<sup>1</sup> Answer 2.1 in ESMA Q&A on the European crowdfunding service providers for business Regulation of 20 May 2022. ESMA reference: ESMA35-42-1088.

<sup>2</sup> Full title being Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU Text with EEA relevance.

<sup>3</sup> Article 1(2)(c) in the ECSPR, where crowdfunding offers with a consideration of more than EUR 5 000 000 are to be calculated over a period of 12 months as the sum of (i) the total consideration of offers of transferable securities and admitted instruments for crowdfunding purposes as defined in points (m) and (n) of Article 2(1) of this Regulation and amounts raised by means of loans through a crowdfunding platform by a particular project owner; and (ii) the total consideration of offers to the public of transferable securities made by the project owner referred to in point (i) of this point in its capacity as an offeror pursuant to the exemption under Article 1(3), or Article 3(2), of Regulation (EU) 2017/1129.

<sup>4</sup> Full title being Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC. See for example article 33 of Delegated Regulation 2019/980.

to foster the prospective investor with relevant information about the project owner and the crowdfunding project in question by publicizing a key investment information sheet.

The ECSPR distinguishes between two types of investors – non-sophisticated investors and sophisticated investors. The latter is defined as “*any natural or legal person who is a professional client by virtue of point (1), (2), (3) or (4) of Section I of Annex II to Directive 2014/65/EU or any natural or legal person who has the approval of the crowdfunding service provider to be treated as a sophisticated investor in accordance with the criteria and the procedure laid down in Annex II to this ECSPR*”, and consequently a non-sophisticated investor can have the approval of the crowdfunding service provider to opt out of the investor protection pertaining non-sophisticated investors.

The key investor protection measures in the ECSPR are laid down in articles 20 (entry knowledge test), 21 (pre-contractual reflection period) and 23 (key investment information sheet).

The entry knowledge test is a prerequisite for any non-sophisticated investors who wishes to invest through a crowdfunding service provider. According to article 21 in the ECSPR, the crowdfunding service provider must assess whether and which crowdfunding services offered are appropriate for the prospective non-sophisticated investor by gaining information about non-sophisticated investors experience, investment objectives, financial situation and basic understanding of risks involved in investing in general and the risks regarding the investments offered at the crowdfunding platform.

Depending on the non-sophisticated investors answers to the entry test, the crowdfunding service provider may issue a risk warning and tell the non-sophisticated investor that any investment through the crowdfunding service provider may be inappropriate.<sup>5</sup>

According to article 22(5), the crowdfunding service shall require prospective non-sophisticated investors to simulate their ability to bear loss calculated as 10% of their net worth based on information stipulated in article 22(5)(a-c), e.g. regular income, assets, existing and future financial commitments.

If a non-sophisticated investors’ commitment exceeds EUR 1,000 or 5% of that investor’s net worth (calculated in accordance with article 22(5)), the crowdfunding service provider must ensure that the investor receives a risk warning, provides explicit consent to the crowdfunding service provider and that the investors prove to the crowdfunding service provider that the investor understands the investment in question and the attached risks cf. article 22(7).

According to article 22 in the ECSPR, non-sophisticated investors must be offered a reflection period following their investment commitment, whereby the commitment can be withdrawn. This

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<sup>5</sup> Article 21(4) in the ECSPR.

information must be given by the crowdfunding service provider in an accurate, clean and timely manner as further described in article 22(6).

While the investor protection measures described above may help investors understand their risk to bear losses and their rights to withdraw from a crowdfunding investment, one of the classic conditions is the provision of information from the seller of financial instruments – for crowdfunding purposes the information provided by the project owner in the key investment information sheet.

We will briefly discuss the disclosure requirements in the key investment information sheet below and analyse the civil liability attaching to its content.

## 2. THE KIIS AND THE PARTIES' RESPONSIBILITY FOR ITS CONTENTS

### 2.1. WHAT IS THE KIIS?

Before further examining the civil liability for the KIIS<sup>6</sup> by the relevant parties in the crowdfunding environment, we summarize the content and purpose of the KIIS from a general investor protection perspective and according to the ECSPR.

The aim of the KIIS is generally to foster the prospective investor with information about the crowdfunding project in question and thereby removing information asymmetries between the investor and the project owner. The KIIS is a pre-contractual document that must be presented to the investor before any investment decision is made. Consequently, the overall aim is to make information available to increase certainty and reduce risk.

The KIIS is mainly regulated by articles 23 and 24 of the ECSPR.

Each crowdfunding offer covered by the ECSPR shall be accompanied by a key investment information sheet. The KIIS must contain information regarding, among other things:

- the project owner(s),
- the crowdfunding project,
- main features of the crowdfunding process, such as minimum target capital to be reached, deadline, and amount of own funds committed by project owner,
- main risks associated with funding the project,
- information related to offered securities, such as subscription price, terms of payment,
- investor rights,
- information related to loans, such as duration and term of the loan, interest rates, mitigation measures, and schedule for repayment,
- fees and information, such as how and to whom an investor may address a complaint, as well as

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<sup>6</sup> In Danish: "*dokument med central investorerinformation*".

- a warning to potential investors that participating entails a risk of loss of their investment in full or in part.

The content of the KIIS are mainly regulated in article 23(6), Annex I of the ECSPR and a delegated regulation in the form of a regulatory technical standard (“RTS”) that has yet to be adopted.<sup>7</sup> The aim of the RTS is to draw of a technical standard, whereby the KIIS is drawn up subject to a uniform approach and the same information requirements.

The purpose of the KIIS is to provide information relating to the project and its owner(s) to enable the potential investors to make an informed investment decision. There are also requirements for how the KIIS shall be prepared and presented. Accordingly, the KIIS shall be “*fair, clear and not misleading and shall not contain any footnotes, other than those with references, including quotations where appropriate, to the applicable law*”.<sup>8</sup> Further, the KIIS “*shall be presented on a stand-alone, durable medium that is clearly distinguishable from marketing communications and consist of a maximum of six sides of A4-sized paper format if printed.*”<sup>9</sup>

The main purpose of the KIIS is therefore investor protection. To this effect, similarities can be drawn between the KIIS under the ECSPR and both the key information document to be prepared under EU Regulation No. 1286/2014<sup>10</sup> and the prospectus summary under the Prospectus Regulation.

The main parties responsible for the KIIS are the project owner and the crowdfunding service provider. The overall roles of the two are best summarized in preamble 51 of the ECSPR (our underlining):

“The key investment information sheet should also take into account, where available, the specific features and risks associated with project owners, and should focus on material information about the project owners, the investors' rights and fees, and the type of transferable securities, admitted instruments for crowdfunding purposes and loans offered. The key investment information sheet should be drawn up by the

<sup>7</sup> A draft RTS has been presented in ESMA’s final report on ECSPR, please refer to page 131ff. Full title: “Final Report – Draft technical standards under the European service providers for business Regulation” of 10 November 2021. ESMA reference: ESMA35-42-1183.

<sup>8</sup> Articles 23(7) and 24(3) of the ECSPR.

<sup>9</sup> Articles 23(7) and 24(3) of the ECSPR.

<sup>10</sup> Full title being ECSPR (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs). See for example section II of said regulation.

<sup>11</sup> Articles 23(15) and 24(8) of the ECSPR state that, if a KIIS is drawn up in according with the ECSPR, the crowdfunding service provider shall be considered to have satisfied its obligation to draw up a key information document under Regulation (EU) No 1286/2014.

project owners, because the project owners are in the best position to provide the information required to be included therein. However, since it is the crowdfunding service providers that are responsible for providing the key investment information sheet to prospective investors, it is the crowdfunding service providers that should ensure that the key investment information sheet is clear, correct and complete.”

In contrary to a prospectus under the Prospectus Regulation, the KIIS is not approved by a competent authority. As such, the KIIS will not undergo scrutiny from any official authority for approval before publication. This is further emphasized in the draft RTS, where it must be stated that *“This crowdfunding offer has neither been verified nor approved by [competent authorities – insert full denomination of competent authority/ies] or the European Securities and Markets Authority (ESMA).”*<sup>12</sup>

The two main parties in preparing the KIIS and providing the document to the public, the project owner and the crowdfunding service providers, have different responsibilities under the ECSPR in relation to the KIIS. As also discussed in the remainder of this section 2, they will also have different types of civil liability for the contents of the KIIS in case of errors or omissions. For sake of completeness, the existing of a legal basis for liability is not sufficient to award damages under Danish law. Other factors such as the existence of a loss, causation, foreseeability and potential own fault must also be assessed in determining whether damages can be awarded. It falls outside the scope of this article to discuss these requirements and the principles that regulate them any further.

## 2.2. PROJECT OWNER

### 2.2.1. THE CROWDFUNDING PROJECT OWNERS’ MAIN ROLES IN RESPECT TO THE KIIS

A “project owner” is defined as any natural or legal person who seeks funding through a crowdfunding platform, according to article 2(1)(h) of the ECSPR, and a “crowdfunding project” means the business activity or activities for which a project owner seeks funding through the crowdfunding offer.

In connection with equity crowdfunding – the aim of this article – the project owner must publish a KIIS that contains the relevant information laid down in the ECSPR and the RTS.

The KIIS is based on information from the project owner about the crowdfunding project in question. As this article discusses investment-based equity crowdfunding, the KIIS must include information about the

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<sup>12</sup> Annex to the RTS, where the draft technical format of the KIIS is presented – starting with warnings. Please refer to the draft RTS on page 135 in the ESMA’s final report on ECSPR.

shares or admitted instruments for crowdfunding purposes that are offered in a crowdfunding project.

In the draft RTS, where the technical requirements have been presented, the project owner must make a responsibility statement titled “*Responsibility for the information provided in this key investment information sheet*” and declare the following:

“The project owner declares that, to the best of its knowledge, no information has been omitted or is materially misleading or inaccurate. The project owner is responsible for the preparation of this key investment information sheet.”

The responsibility statement is inspired from the Prospectus Regulation that also contains a knowledge qualifier to stress that the project owner can only be reprehensible for information that the project owner has knowledge of. It lies implicit in the statement that the KIIS has been drawn up in accordance with the relevant disclosure obligations in the ECSPR and the RTS.

It follows from article 23(10) of the ECSPR that:

“Member States shall ensure that their laws, regulations and administrative provisions on civil liability apply to natural and legal persons responsible for the information given in a key investment information sheet, including any translation thereof, in at least the following situations:

- (a) the information is misleading or inaccurate; or
- (b) the key investment information sheet omits key information needed to aid investors when considering whether to finance the crowdfunding project.”

This regulatory approach corresponds with the Prospectus Regulation<sup>13</sup> and the general approach by the European Court of Justice (“CJEU”) in *Immofinanz*, where the CJEU ruled the following in paragraph 40 of the judgement:<sup>14</sup>

“While it is true that, unlike Article 25(1) of the prospectus directive, Article 28(1) of the transparency directive and Article 14(1) of the market abuse directive do not expressly refer to the civil liability regimes in the Member States, the fact remains that the Court has previously ruled that, in respect of the award of damages and the possibility of an award of

<sup>13</sup> Article 11(2) in the Prospectus Regulation.

<sup>14</sup> Judgment of the Court (Second Chamber), 19 December 2013: *Alfred Hirmann v Immofinanz AG*. In the context of prospectus liability, please refer to page 417, section IV “Unlawfulness and Imputability” in Danny Busch “*Prospectus Liability and Litigation, The influence of the EU Prospectus Rules on Private Law*” in Danny Busch et al: *Prospectus Regulation and Prospectus Liability*, Oxford University Press (2020).

punitive damages, in the absence of European Union rules governing the matter, it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages, provided that the principles of equivalence and effectiveness are observed (see, by analogy, Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraph 92, and the judgment of 6 June 2013 in Case C-536/11 *Donau Chemie and Others* [2013] ECR, paragraphs 25 to 27).”

In the context of Danish law, there are no national provisions governing the civil liability for project owners. The fallback is the general provisions of civil liability/general laws on tort in Denmark (“*dansk rets almindelige erstatningsregler*”). The general provisions require a basis of liability (typically fault) and that the person in question has acted in a negligent way as further described in the following section.

#### 2.2.2. DANISH LAW ASPECTS

Civil liability under Danish tort law requires a basis for liability and generally, such basis must be either fault-based (*culpa*) or no-fault based.<sup>15</sup> As no specific Danish law has been drawn up to state that no-fault liability attaches to the contents of the KIIS, the fallback is the fault-based liability (*culpa*) which is based on case law.

The *culpa* rule or fault rule is regarded as the classical rule of liability in Denmark and involves “*the comparison between the cause of the damage and the normal conduct and attitude of a reasonable man (bonus pater familias)*”.<sup>16</sup> As the liability for KIIS will depend on its contents (or omissions therefrom), it follows that the project owner misleads or gives inaccurate information through act or omission may become liable under the fault rule (*culpa*). Further to the basis of liability, any award of damages must be based on a loss from the investor(s) having relied upon the KIIS being correct. It is out of the scope of this article to discuss how to prove any loss in relation to a financial investment, but a general example would be that a loss will occur if the initial pricing has been wrong in connection with the investment and consequently the investor bought a share that doesn’t have the perceived value. In such a situation, the investor would claim damages on the basis of the difference between the price paid and the fair market value, the latter ultimately proving to be lower than the price paid at the time.

In order to invest, the investor will be presented with the KIIS for the crowdfunding project. The KIIS must contain inter alia “Key annual financial figures and ratios for the project owner for the last three years”,

<sup>15</sup> Bo von Eyben, Helle Isager, *Lærebog i erstatningsret* (9th edn 2019), page 24.

<sup>16</sup> Bernhard Gomard: *Recent development in the Danish law of tort*, Scandinavian Studies in Law, volume 41, pages 233-248.

a “description of the crowdfunding project, including its purpose and main features” and “main risk types”.<sup>17</sup>

The provision of such information must be done by the project owner, meaning the legal person issuing shares, and in the context of Danish law, this liability will likely lie with the legal person’s management, i.e. the board of directors and executive board.

The KIIS must be “fair, clear and not misleading” according to article 22(7) in the ECSPR. Consequently, the question to what extent inaccuracies or untrue statements in the KIIS may result in liability. In the Danish court decision U.2013.1107.H regarding liability for the contents of a prospectus, the Supreme Court ruled the omissions in the prospectus must be material in order to be liable.<sup>18</sup> If the same standards for liability were to be projected onto the contents of the KIIS, the fact that the KIIS may contain inaccuracies or errors is not enough to support a claim for damages. The inaccuracies or errors must be material for the investors’ assessment of the crowdfunding project and the project owner.

### 2.2.3. THE CIVIL LIABILITY FOR THE KIIS FOR THE PROJECT OWNER

As the KIIS is limited in its length<sup>19</sup> there is a natural constraint on the volume of information that can be presented. This limits the level of information that is provided to the investors, and the risk of relevant information being omitted is consequently increased.

Article 23(11) of the ECSPR stipulates that crowdfunding service providers must have in place and apply adequate procedures to verify the completeness, correctness and clarity of the information contained in the KIIS. Article 23(12) of the ECSPR obliges the crowdfunding service providers to signal any findings relating to an omission, mistake or inaccuracy in the KIIS that could have a “*material*” impact on the expected return of the investment in question to the project owner, who shall promptly complete or correct that information. If the project owner does not complete or correct the information promptly, the crowdfunding service provider shall suspend the crowdfunding offer.

Accordingly, article 23(12) of the ECSPR supports that there is a materiality threshold based on the crowdfunding project in question and could be understood as though minor inaccuracies are acceptable and does not invoke any need to suspend the offer. This further supports an argument that the liability review between a prospectus and a KIIS would

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<sup>17</sup> Reference is made to the draft RTS on page 135 in the ESMA’s final report on ECSPR.

<sup>18</sup> See page 299f. in Poul Krüger Andersen and Nis Jul Clausen with assistance of Jesper Lau Hansen *Børsretten*, (6, edn. 2019), DJØF

<sup>19</sup> Six sides of A4-sized paper if printed cf. article 22(7) in the ECSPR. If information about any investor rights in accordance with section 5 in Annex I to the Regulation exceeds one A4-sized paper if printed, the remainder shall be produced in an annex attached to the KIIS

be similar, meaning that errors and omissions must be material to form a basis of liability.

We note that article 23(12) concerns the obligations on the crowdfunding service provider to help ensure that the KIIS is correct. Accordingly, although the article could be read as both being lenient on the crowdfunding service providers (not given them the responsibility to identify errors and omissions that are not material) and to avoid disrupting the information flow to investors by compelling the project owner to correct such errors and omissions, the provision also accepts the reality that errors and omissions will reach the potential investors and that not all such are relevant to correct. This suggests that inaccuracies or errors must be material for the investors' assessment of the crowdfunding project and the project owner.

It follows from the review above that the board of directors or the executive board in the project owner is liable for the information provided in the KIIS. Liability is based on the culpa rule and can only occur if the information in the KIIS is misleading, inaccurate or if any information has been omitted – and such information must be material for the prospective investors' assessment and understanding of the crowdfunding project. There would therefore likely be a similar basis for liability review of a KIIS as under a prospectus.

We note that a clear distinction between the KIIS and the contents of for example a key information document (KID) under EU Regulation No. 1286/2014 or a prospectus summary must be made. The latter are also examples of concentrated investment information material. However, there will be underlying documents providing more detailed information (for example a prospectus). As such, the KIIS does not offer the responsible persons for the KIIS to include supplementing information as a part of the KIIS or assume that the reader of the KIIS familiarizes itself with supplemental information. The counterweight in terms of investor protection and protection of the project owner is that the project owner can choose to draw up a prospectus instead and opt into the Prospectus Regulation. However, this would mean that the project owner cannot market the shares on the crowdfunding platform.

The fact that the size of the crowdfunding offers may not exceed EUR 5,000,000 ensures a limited exposure for the general investing public.

As the market for crowdfunding services will now be regulated by the ECSPR, it is likely that the market will adapt and develop further. As no existing "best practice" or supporting case law have been developed yet under the ECSPR, it will likely evolve now as all existing crowdfunding platforms must comply with the ECSPR following the transition period. Consequently, we will likely see that a uniform approach to the contents of KIIS will be adopted like prospectuses and KID where the market has developed best practices and uniform approaches.

In contrary to prospectuses, the KIIS will not be approved by a competent authority before its publication. However, the supervisory

authorities in the Member States and ESMA will likely follow and monitor the market and issue warnings or guidance in order to improve the conduct of the project owners and the crowdfunding service providers if any risks are identified.

### 2.3. THE CROWDFUNDING SERVICE PROVIDER

#### 2.3.1. THE CROWDFUNDING SERVICE PROVIDERS' MAIN ROLE IN RESPECT TO THE KIIS

The crowdfunding service providers' responsibilities for the KIIS are mainly regulated in the ECSPR. There are only a few provisions in Danish law outside the ECSPR specifically regulating crowdfunding service providers. These are mainly found in the Danish Financial Business Act (the "Danish FBA")<sup>20</sup> and will be described briefly below.

To understand the crowdfunding service providers' responsibilities for the KIIS, the role of the crowdfunding service providers in a crowdfunding project should be considered. A key role for the crowdfunding service providers is to match the funding interests between the project owners, seeking funding, and the potential investors, seeking investment opportunities. One of the ways the crowdfunding service providers facilitate these interests is by marketing the project owner's project, including the KIIS, towards the potential investors.

Given that the potential investors will have to rely on information facilitated by the crowdfunding service providers, the crowdfunding service providers have certain obligations with respect to the accuracy of the contents of the KIIS, regardless that they are a third party to the project owner. Another reason for this is to provide additional investor protection given that there is no requirement for governmental approval of the KIIS under the ECSPR. The obligations of the crowdfunding service providers are laid down in the ECSPR.

#### 2.3.2. THE CROWDFUNDING SERVICE PROVIDERS' RESPONSIBILITY FOR THE KIIS

As stated above, the ECSPR provides in the preamble that crowdfunding service providers shall "ensure that the key investment information sheet is clear, correct and complete". This principle is expressed in article 23(11), stating that crowdfunding service providers "shall have in place and apply adequate procedures to verify the completeness, correctness and clarity of the information contained in the key investment information sheet". There are no other provisions in the ECSPR concerning the crowdfunding service providers' responsibilities for the contents of the KIIS. Where the preamble broadly sets out the crowdfunding service providers' obligation to verify the KIIS, the

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<sup>20</sup> In Danish: "*lov om finansiel virksomhed*".

governing provisions in the ECSPR limits the responsibilities for the crowdfunding service providers to have adequate procedures.

As also stated above, the ECSPR states that member states shall ensure that their rules on civil liability apply to the natural and legal persons responsible for the KIIS, at least in situation where (i) the information is misleading or (ii) key information is omitted.<sup>21</sup> As of writing, no laws have been enacted in Denmark specifically setting out the civil liability for the contents of the KIIS by the crowdfunding service provider (or the project owner for that matter). The civil liability of a crowdfunding service provider for the contents of the KIIS is therefore currently only regulated by the ECSPR and the general laws on tort in Denmark.

### 2.3.3. LOCAL DANISH LAW ASPECTS

The main changes to Danish law caused by the ECSPR have been the adoption of law no. 1163 of 8 June 2021, changing the Danish Financial Business Act (“Danish FBA”) to encompass the supervision of the ECSPR under the merits of the Danish Financial Supervisory Authority. The new rules are primarily enacted by way of inserting a new chapter 20a in the Danish FBA.

Although no rules on civil liability have been enacted, the above cited law does regulate certain types of criminal liability for violation of the ECSPR. For example, violation of articles 23(2)-(14) and 24 of the ECSPR has with the law become punishable by fine or imprisonment up of to 4 months.<sup>22</sup> According to the preparatory works of the amended law, “articles 23(2)-(14) and 24 of the ECSPR regulates a document with a key investment information sheet” and that “an example of a criminal act is a failure by the crowdfunding service provider to provide to the potential investors all information required by articles 23 and 24”<sup>23</sup>. In general, under Danish tort law, a failure to comply with legislation could form basis of civil liability by the legal or natural person.

### 2.3.4. THE CIVIL LIABILITY FOR THE KIIS FOR THE CROWDFUNDING SERVICE PROVIDER

The crowdfunding service providers’ civil liability for the content of the KIIS must be determined based on the ECSPR and general principles under Danish law as there are currently no legislation enacted locally governing such liability.

In the ECSPR, as described in section 2.2 above, the project owner is responsible for drawing up the KIIS and in a fair, clear and not misleading manner. Further, the project owner shall correct any mistakes, omissions and inaccuracies after they have been identified.

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<sup>21</sup> Article 23(10) of the ECSPR.

<sup>22</sup> Section 373(2) of the Danish FBA.

<sup>23</sup> Proposed bill no. 193 of 24 March 2021.

In the ECSPR, the crowdfunding service providers have (limited) responsibilities to have adequate procedures in place to verify the completeness, correctness and clarity of the information contained in the key investment information sheet. This should be read in conjunction with the project owners' responsibilities for drawing up the KIIS. In general, the project owners themselves will be the only ones with the knowledge required to draw up the KIIS in a manner which complies with the standards set out in the ECSPR. Crowdfunding service providers will by nature of their involvement in a crowdfunding project not necessarily obtain the information required about the project owner or the project. This is further emphasised by the level of due diligence required to be made by crowdfunding service providers of the project owner which is also limited. Such due diligence shall as a minimum include obtaining the following evidence<sup>24</sup>:

“(a) that the project owner has no criminal record in respect of infringements of national rules in fields of commercial law, insolvency law, financial services law, anti-money laundering law, fraud law or professional liability obligations;

that the project owner is not established in a non-cooperative jurisdiction, as recognised by the relevant Union policy, or in a high-risk third country pursuant to Article 9(2) of Directive (EU) 2015/849”

As such, the crowdfunding service providers' civil liability under the ECSPR for the KIIS would most likely be limited to errors, misleading information and omissions in the KIIS to the extent they result from inadequate procedures adopted by the crowdfunding service providers or their failure to comply with such procedures.

Naturally, if crowdfunding service providers adopt procedures by which they elect to perform a more comprehensive due diligence of the project owner than stated above or the project itself, they will be better prepared to identify errors and omissions in the KIIS, and their basis of liability would likely be broader. There are currently no standards or guidance on EU level or local Danish level with respect to the crowdfunding service providers procedures described. Such standards would help in providing guidance on the procedures to be drafted and implemented by crowdfunding service providers as they would be a factor in determining their civil liability for the KIIS.<sup>25</sup>

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<sup>24</sup> Article 5(2) in the ECSPR.

<sup>25</sup> As of writing, there is no Danish form to apply as a crowdfunding service provider. Until such form is made by the Danish FSA, ESMA's application form must be used. In section 18 of the form, the application must provide a description of its procedures on the KIIS. However, there is no requirement to attach the procedures themselves.

It can be debated whether law no. 1163 of 8 June 2021, changing the Danish FBA, is more extensive than the basis for potential liability on the crowdfunding service provider's liability for the contents of the KIIS under the ECSPR.

As stated above Civil liability under Danish tort law requires a basis for liability. Generally, such basis must be either fault-based (*culpa*) or no-fault based<sup>26</sup>. No-fault based liability must be stipulated by either law or case law<sup>27</sup> which is not the case for law no. 1163 of 8 June 2021. However, fault-based liability can occur if an act or omission violates generally accepted behavioural patterns, for example, the failure to comply with regulations.<sup>28</sup> Given the responsibilities on the crowdfunding service provider for complying with the ECSPR as set out in the preparatory works for law no. 1163 of 8 June 2021, one could argue that, in case of errors in a KIIS, the crowdfunding service providers has not complied with law no. 1163 of 8 June 2021 resulting in a basis for liability for the provider.

However, we do not view the preparatory works as the legislator's intention to expand the civil liability of the crowdfunding service provider's civil liability compared to the ECSPR. No other circumstances indicate this, and such liability would most likely not be considered consistent with the principle of conforming interpretation of national legislation.

Accordingly, until other rules are enacted stipulating otherwise, the crowdfunding service provider should under the ECSPR only be liable for errors, misleading information and omissions in the KIIS to the extent they result from the provider's inadequate procedures. Such adequate procedures would likely be sufficient to rightly claim the existence of a fault-based liability basis.

### 3. CONCLUSION

It can be concluded the ECSPR contains a balanced approach between the level of investor protection and the burdens of the project owner in relation to the magnitude of pre-contractual information that must be provided. The KIIS is limited in its contents and accordingly does not impose a lot of burdens on the project owner.

Pre-contractual information is only useful to base an investment decision on if its contents are true and correct. If not, the investor should have access to remedies in order to be compensated for any subsequent loss.

The main responsible party for the KIIS under the ECSPR is the project owner. The project owner will be liable for errors, misleading information and omission in the KIIS. The liability is vested with the

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<sup>26</sup> Bo von Eyben, Helle Isager, *Lærebog i erstatningsret* (9th edn 2019), page 24.

<sup>27</sup>Ibid. page 24.

<sup>28</sup> Ibid. page 97.

management of the project owner, meaning the board of directors or the executive board. Any misleading information or omissions must be material in order to form a basis of liability. It is expected that good practises for KIIS will develop and consequently it will be easier to assess the level of detail in KIIS disclosures and evaluate whether or not material information have been left out or misstated.

The crowdfunding service providers' civil liability under the ECSPR for the KIIS would most likely be limited to such errors, misleading information and omissions in the KIIS to the extent they result from inadequate procedures adopted by the crowdfunding service providers or their failure to comply with such procedures.