



European Securities and  
Markets Authority

# Response form for the Consultation Paper on draft technical standards under the ECSP Regulation



## Responding to this paper

ESMA invites responses to the questions set out throughout this Consultation Paper and summarised in Annex II. Responses are most helpful if they:

- respond to the question stated and indicate the specific question to which they relate;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **Friday 28<sup>th</sup> May 2021**.

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading 'Your input - Consultations'.

### Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the steps below when preparing and submitting their response:

- Insert your responses to the consultation questions in this form.
- Please do not remove tags of the type <ESMA\_QUESTION\_ECSP\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
- If you do not wish to respond to a given question, please do not delete it but simply leave the text "TYPE YOUR TEXT HERE" between the tags.
- When you have drafted your response, name your response form according to the following convention: ESMA\_ECSP\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_ECSP\_ABCD\_RESPONSEFORM.
- Upload the form containing your responses, in Word format, to ESMA's website ([www.esma.europa.eu](http://www.esma.europa.eu) under the heading 'Your input – Open consultations' → 'Consultation on draft technical standards under the ECSP Regulation').



### **Publication of responses**

All contributions received will be published following the close of the consultation, unless you request otherwise. If you do not wish for your response to be publicly disclosed, please clearly indicate this by ticking the appropriate box on the website submission page. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

### **Data protection**

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading '[Data protection](#)'.

### **Who should read this paper?**

This Consultation Paper primarily of interest to crowdfunding service providers within the meaning of point (e) of Article 2(1) of the ECSP Regulation, competent authorities and other entities that are subject to the ECSP but it is also important for trade associations and industry bodies, sophisticated and non-sophisticated investors, consumer associations, as well as any market participant engaged in the provision of crowdfunding services



## General information about respondent

Name of the company / organisation	Verband deutscher Kreditplattformen e.V.
Activity	Non-governmental Organisation and Other Associations
Are you representing an association?	<input checked="" type="checkbox"/>
Country/Region	Germany

## Introduction

***Please make your introductory comments below, if any:***

<ESMA\_COMMENT\_ECSP\_1>

TYPE YOUR TEXT HERE

<ESMA\_COMMENT\_ECSP\_1>

**Q1 Do you consider that the requirements should be made more granular, notably to set a fixed deadline for CSP to handle a complaint and reply to complainants, in order to ensure a better and more harmonised investor protection?**

<ESMA\_QUESTION\_ECSP\_1>

The requirements regarding complaint and reply to complainants set out in Art. 7 ECSP / Annex III of the RTS are detailed enough and adequate in order to ensure investor protection.

<ESMA\_QUESTION\_ECSP\_1>

**Q2 Do you agree that the list set out in Article 1(5) of the draft RTS sets out a sufficiently harmonised minimal level of requirements for the internal rules to prevent conflicts of interest?**

<ESMA\_QUESTION\_ECSP\_2>

The level of requirements for the internal rules set out in the list in Article 1 (5) / Annex IV of the RTS seems to be sufficient enough in order to prevent conflicts of interest.

<ESMA\_QUESTION\_ECSP\_2>

**Q3 Do you agree that the requirements set out in Article 3 of the draft RTS provide for arrangements that balance adequately the need to protect investors with the objective to limit unnecessary burden for CSP?**

<ESMA\_QUESTION\_ECSP\_3>

The requirements set out in Article 3 of the draft RTS seem to find a good balance between the need to protect investors and the objective to limit unnecessary burden for CSP. Only the regulation in Article 3 no. 4 of the draft RTS is not helping to understand how it should be ensured, that the disclosure referred to in Art. 8 (5) should be appropriate to the nature of the clients to whom/which it is addressed, in particular taking into account their qualification as sophisticated or non-sophisticated (prospective) investors. For our understanding a possible conflict of interest will have the same undesirable impact for sophisticated and non-sophisticated investors and it is not clear how the CSP should make differences in the disclosure for different clients.

<ESMA\_QUESTION\_ECSP\_3>

**Q4 Do you agree with the details of the business continuity plan suggested in the draft RTS?**

<ESMA\_QUESTION\_ECSP\_4>

The details of the business continuity plan suggested in the draft RTS seem reasonable. Especially it is understandable, that the plan should include detailed steps about the storage in safe place of agreements between the CSP and its clients, results from the entry knowledge test referred to in Article 21 ECSP and other critical business data (Art. 4 of the draft RTS). Not clear is the wording available in paper and digital form. Does this mean that this information should be saved in paper and digital form or does it mean, that all relevant information in paper and digital form have to be saved in either digital, paper or both forms? This is relevant, because the investing process usually takes place in a digital form and the relevant information is therefore also saved in a digital format. To save for example the results of the entry knowledge test also in paper form would be inefficient and an unnecessary burden for the CSP.

<ESMA\_QUESTION\_ECSP\_4>

**Q5 Do you have any comment on the authorisation procedure proposed in the draft RTS?**

<ESMA\_QUESTION\_ECSP\_5>

Regarding Art. 2 of the draft RTS the applicant shall submit his application to the competent authority in the Member State the applicant has its registered office and its head office including its key activities. The Level-1- text in Art. 12 (1) ECSP speaks about the Member State where the applicant is established. The registered office and the head office or the place where the key activities take place could be different locations. It would be much clearer to stay with the text of the Level-1-text and refer to the Member State in which the applicant is established.

The procedure itself like proposed in the draft RTS seems to be adequate.

<ESMA\_QUESTION\_ECSP\_5>

**Q6 Do you agree with the list of information set out in draft RTS to be provided to the Competent Authority of the Member State where the applicant is established? If not, what other information should ESMA further specify?**

<ESMA\_QUESTION\_ECSP\_6>

The List of information to be provided to the Competent Authority seems to demand more than the Level – 1 text requires. In Field 5 Sub-Field 1 description (d) the draft RTS requires that the applicant has to disclose the types of offers so detailed that for example he has to name the instruments he intends to use. This may vary over time and the business usually needs to get adjusted from time to time and cannot necessarily be foreseen by the applicant.

According to the description in Field 13 the sub-fields 9-10 (of Field 13) shall be repeated and completed for each natural person who is responsible of internal control functions as well as for the members of the management or supervisory body. We can understand that information in form of the Curriculum Vitae (Sub-Field 9) is important regarding the members of the management body. But such a detailed Curriculum Vitae as described in the description field for all natural persons who are responsible for internal control functions and for the supervisory board seems not to be adequate. The same has to be said on Sub-Field 10. The information about the time to be committed makes no sense especially for the members of the supervisory board. Finally we want to add that there seems to be a mistake in Field 19 in the description under 1.c) when there is a reference to Art. 21 (42) of the ECSP because a paragraph 42 does not exist in Art. 21 ECSP.

<ESMA\_QUESTION\_ECSP\_6>

**Q7 Do you think that the methodologies provided in the draft RTS are sufficiently clear?**

<ESMA\_QUESTION\_ECSP\_7>

The methodologies provided in the draft RTS is everything but clear. In the informational online event on 12<sup>th</sup> of April 2021 it was outlined more in detail by example how to calculate the yearly default rate and how to calculate the simple average of the yearly default rate. Such important details should be included in the draft RTS for clarification to limit the room for interpretations and misguidance. Especially the methodologies are generally highly sensitive.

<ESMA\_QUESTION\_ECSP\_7>

**Q8 Do you agree with the list of information set out in Article 4(1) of the draft RTS?**

<ESMA\_QUESTION\_ECSP\_8>

We agree with the list of information set out in Art. 4 (1) of the draft RTS. But we don't understand why in Art.3 (19) of the draft RTS it is provided that the entry knowledge test should take place prior to giving access on the platform. Looking at the Level-1-Text in Art. 21 (5) ECSP the entry knowledge test shall take place before giving full access to invest in a crowdfunding project. This is reasonable. First the potential investor will have to visit the platform and make the registration. During the registration process the investor has to agree to the platform terms, otherwise there is no reason to process the data (for the entry knowledge test) of the investor. Then the entry knowledge test can be done before the investor gets the possibility to invest.

<ESMA\_QUESTION\_ECSP\_8>

**Q9 Do you agree that requiring CSPs to make available to prospective non-sophisticated investors an online calculation tool will improve investor protection by simplifying the process of simulation of the ability to bear losses?**

<ESMA\_QUESTION\_ECSP\_9>

We do not see a great practical value of the requirement set out in Art. 21 (5) and (6) ECSP. But in order to fulfill the obligation we don't see any other instrument than an online calculation tool.

<ESMA\_QUESTION\_ECSP\_9>

**Q10 Do you agree with the suggested method to calculate the non-sophisticated investor's net worth?**

<ESMA\_QUESTION\_ECSP\_10>

We agree with the suggested method to calculate the net worth of the non-sophisticated investor.

<ESMA\_QUESTION\_ECSP\_10>

**Q11 Do you agree with the extent of the provisions that ESMA proposes to specify the ECSPR's requirements for the KIIS model? Please also state the reasons for your answer.**

<ESMA\_QUESTION\_ECSP\_11>

The structure of the KIIS model and the provisions that ESMA proposes its requirements seems adequate in order to inform the investors properly. Regarding Annex IX we would consider the following:

Regarding the "Overview of the offer in Annex IX we assume that the deadline for the offer is defined as the longest possible time frame under which the offer may be available for potential investors. So that the project owner could "close" the offer before in case the offer has been fully subscribed. This could be clarified.

Annex IX Part A(a): The text should clarify that investors with a minority stake of ownership (for example less than 25 %) shall not be named in the KIIS.

Annex IV Part B (a): It should be clarified or defined what is meant by a “non-public” offer. We understand the provision in a way that only public and non-public offers via crowdfunding will have to be disclosed.

Annex IV Part B (e): It should be clarified that the disclosure of the indication of whether major shareholders or members of the project owner’s management, supervisory or administrative bodies intend to invest and the amount thereof has not to be updated in case the intention later changes.

Annex IV Part G (b): The annual interest rate shall be calculated by way of the Actual/365 method. We do not understand, why the proposed method has to be used and other common calculation methods such as 30/360 cannot be applied. This is not reasonable because in specific case and business models other calculation methods are more appropriate. We would prefer if the method were optional but would have to be mentioned in the KIIS.

Annex IV Part G (e): The provision to disclose any default on credit agreements by the project owner within the past five years is not specified enough. The term “default” is defined and clear. But we are not sure how to interpretate the term credit agreements. This should be defined as well. We consider that it is meant in the way loan is defined in 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.

<ESMA\_QUESTION\_ECSP\_11>

**Q12 How could the KIIS be alternatively structured to foster its provision by project owners, while ensuring investor protection? Please provide specific examples, if possible.**

<ESMA\_QUESTION\_ECSP\_12>

We don’t see any other ways to structure the KIIS due to the fact, that the structure is already provided in a relatively detailed form in the Level-1-Text of the ECSP and the annex 1 of the ECSP.

<ESMA\_QUESTION\_ECSP\_12>

**Q13 Based on your experience with investor information documents required under your national regulatory framework on crowdfunding: Have you seen good practices of information disclosure which could help investors to better understand risks, benefits and other key features related to crowdfunding offers under the ECSPR? Please provide specific examples, if possible.**

<ESMA\_QUESTION\_ECSP\_13>

There exists a couple of different investor information documents in Germany depending on the different types of financial instruments. But in general it has to be assumed in our opinion that investors will not read to long and detailed information documents. The focus should lie on the risks of the investment and they should be described in a short and clear way.

<ESMA\_QUESTION\_ECSP\_13>

**Q14** What, if any, additional costs and/or benefits do you envisage arising from the proposed approach taken for the KIIS? Please quantify and provide details.

<ESMA\_QUESTION\_ECSP\_14>

According to Art. 23 (9) the Member States shall ensure the responsibility of at least the project owner or its administrative, management or supervisory bodies for the information given in the KIIS. Germany has unfortunately implemented a liability for the project owner and the management body even for simple negligence. Therefore, it has to be assumed that many project owners or the members of the management bodies of especially SME will only finance their project if legal consultants will help preparing the KIIS. Therefore, we estimate approximately 5.000 € of additional costs.

<ESMA\_QUESTION\_ECSP\_14>

**Q15** Do you agree with the proposals with respect to standards, formats, templates and procedures for the provision of data by crowdfunding service providers to competent authorities?

<ESMA\_QUESTION\_ECSP\_15>

We agree with the proposals.

<ESMA\_QUESTION\_ECSP\_15>

**Q16** Do you consider that the format for the submission of the information to competent authorities should be further specified in the final draft ITS? Which technical format (e.g. CSV, others) should be considered by ESMA?

<ESMA\_QUESTION\_ECSP\_16>

We would appreciate a template for the submission of the information to competent authorities in form of a common file format.

<ESMA\_QUESTION\_ECSP\_16>

**Q17** Do you envisage any impacts of the proposals with respect to provision of data by competent authorities to ESMA, and in particular on the anonymisation methods that should be used when transmitting information by competent authorities to ESMA? Which specific anonymisation methods would be appropriate to fulfil the reporting requirements?

<ESMA\_QUESTION\_ECSP\_17>

We do not envisage any impacts of the proposal with respect to provision of data by competent authorities to ESMA.

<ESMA\_QUESTION\_ECSP\_17>

**Q18** Do you agree with the information on the national laws, regulations and administrative provisions applicable to marketing communications of CSPs that is being requested from CAs in the two templates? If not, which items should be added or deleted and for which reasons? Please provide a detailed answer.

<ESMA\_QUESTION\_ECSP\_18>

The information on the national laws, regulations and administrative provisions applicable to marketing communications of CSPs which is requested in the two templates seem to be sufficient and adequate.

<ESMA\_QUESTION\_ECSP\_18>

**Q19 Do you agree with the cost benefit analysis as it has been described in Annex II?**

<ESMA\_QUESTION\_ECSP\_19>

The cost benefit analysis seems to be adequate regarding the impact of the majority of the RTS drafts. The German platforms which are members of our trade body for example already have developed and implemented a system for complaints handling and a process to avoid conflict of interests based on our own VdK industry standards so that they will only have to do adaptations. Only the standardized list of information which is provided in the Annex to the draft RTS according to Ar. 12 (16) ECSP seems to have significant impact on higher costs for the applicants due to the fact, that the list demands (as stated above in the answer to question 6) more than the Level-1-text requires.

<ESMA\_QUESTION\_ECSP\_19>

**Q20 Are there any additional comments that you would like to raise and/or information that you would like to provide?**

<ESMA\_QUESTION\_ECSP\_20>

In the context of the transposition of Article 23 (9) lit. 1 and Article 24 (4) lit. 1 of the ECSP Regulation, the German legislator passed drastic liability provisions three weeks ago. According to these, both project owners and platforms as companies as well as the respective management bodies will be held liable for simple negligence whereas supervisory bodies and administrative bodies will only be held liable for gross negligence. Germany has thus almost completely exhausted the regulatory framework provided by the text of the regulation. While, from a purely legal point of view, this regulation does not constitute a violation of EU law, it is a development for Germany of which we take a critical view. German retail investors have nothing to gain from it for several reasons.

The provisions adopted in the law transposing parts of the ECSP Regulation discourage SMEs and especially start-up founders. In all likelihood, they will opt for the less stringent liability for capital market financing available under conventional financing. The German legislator has thus created clear disincentives for ECSP financing to the detriment of private investors: they will not be able to profit from giving senior loans within the scope of the ECSP but will have to stick to qualified subordinated junior loans, providing private investors with the least favourable creditor position in the event of insolvency. Besides, ECSP financing will simply be obtained from platforms in other EU countries with less strict liability provision. In our view, the Commission's objective in proposing the ECSP is thus thwarted. It is to be feared that the ECSP will come to nothing in Germany. And SMEs and start-ups will not be the only ones to suffer. Private investors will also be affected because the variety of ECSP products on the German market is likely to be very small. The idea of the Capital Markets Union could not suffer any greater damage.

For further details on the impact, please refer to our statement to the Chair of the Finance Committee in the German Bundestag dated April 16, 2021 ( [https://kreditplattformen.de/wp-content/uploads/2021/04/210416\\_VdK\\_Schwarmfinanzierung-Begleitgesetz-III\\_English\\_FINAL.pdf](https://kreditplattformen.de/wp-content/uploads/2021/04/210416_VdK_Schwarmfinanzierung-Begleitgesetz-III_English_FINAL.pdf) ).

Another point of great relevance for retail investors in connection with the ECSP regulation is the topic of claims management, for which the ECSP does not stipulate any requirements. Chapter IV, Investor Protection, enumerates various information obligations such as the disclosure of default rates, but private investors are left "alone" with regard to his receivables if there are actually delays in payment or other payment problems. Neither does the ECSP contain any possibilities for joint management of the claims, for



instance analogous to the German act on issues of debt securities, so that, for example, no joint declarations/measures can be taken vis-à-vis the issuers on behalf of the investors.

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Response has been saved.

## CONSULTATION ON DRAFT TECHNICAL STANDARDS UNDER THE ECSP REGULATION

Respond

From 26 February 2021 to 28 May 2021

CROWDFUNDING

### DETAILS

ESMA invites responses to the questions set out throughout this Consultation Paper and summarised in Annex II. Responses are most helpful if they:

- respond to the question stated and indicate the specific question to which they relate;

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<ESMA\_QUESTION\_ECSP\_20>