

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



Date: 26 February 2021

## 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:

1. respond to the question stated and indicate the specific question to which they relate;
2. contain a clear rationale; and
3. 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:

4. Insert your responses to the consultation questions in this form.
5. 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.
6. 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.
7. 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.
8. 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	Dutch crowdfunding industry association & Foundation SME Finance
Activity	Non-governmental Organisation and Other Associations
Are you representing an association?	<input checked="" type="checkbox"/>
Country/Region	Netherlands

## Introduction

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

<ESMA\_COMMENT\_ECSP\_1>

The Dutch crowdfunding industry association and the Foundation SME Finance represent around 90% of the Dutch crowdfunding market and have handled this consultation carefully. We specifically refer to the questions posed in Q20 where the issues of the Dutch crowdfunding platforms have been put forward.

We look forward to clarification from ESMA and hope to hear soon. Good luck with processing all consultations around Europe!

<ESMA\_COMMENT\_ECSP\_1>



- 1. 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>

No. We are of the opinion that a fixed deadline for CSP's to handle a complaint and reply to complainants is not appropriate, because this deadline depends on the variety of the specific facts and circumstances. Some complaints can be handled and replied pretty easily in a short time frame, while others require more time and research to collect all information. In our opinion a 'reasonable period' suffices. So sticking with an 'indicative timeframe' to communicate to the complainant, as ESMA proposes in § 2.1 under 16, is preferred.

<ESMA\_QUESTION\_ECSP\_1>

- 2. 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>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_ECSP\_2>

- 3. 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>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_ECSP\_3>

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

<ESMA\_QUESTION\_ECSP\_4>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_ECSP\_4>



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

<ESMA\_QUESTION\_ECSP\_5>

Yes. Article 5 sub 3 Annex VI states that a new application should be done in case of a 'material change'. This would entail new assessment timelines for the competent authority. What is considered "material change"?

<ESMA\_QUESTION\_ECSP\_5>

**6. 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>

We don't fully agree with the requested information in Annex VI Annex 1. For instance we don't see the added value of a LEI-code. ESMA states that identification of projectowners will be by ISO 17442 (Legal Entity Identifier LEI) and by ISO 3166-1 alpha-2-code (twoletter countrycode). This is not for supervision goals of the NCA. As far as we understand data goes to ESMA anonimised. Conform article 16 ECSPR the LEI-code is not part of information that will be sent to the NCA or ESMA. Article 1 Annex X RTS forces CSP's to report the LEI-code of their project owners. Most project owners in the Netherlands do not have a LEI-code. This brings extra costs.

1. Why can we not use the national Chamber of Commerce codes? A LEI-code is of no added value to NCA's.

2. Is it correct that a LEI-code only has to be requested once? (so that a project owner only has to pay for it once?) Our national Chamber of Commerce also charges costs to update the LEI-code on a yearly basis. This doesn't seem appropriate at all.

<ESMA\_QUESTION\_ECSP\_6>

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

<ESMA\_QUESTION\_ECSP\_7>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_ECSP\_7>

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

<ESMA\_QUESTION\_ECSP\_8>



TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_ECSP\_8>

- 9. 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>

No. We highly question the amount of non-sophisticated investors that will actually use the calculation tool in practice.

<ESMA\_QUESTION\_ECSP\_9>

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

<ESMA\_QUESTION\_ECSP\_10>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_ECSP\_10>

- 11. 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>

No. The KIIS is too extensive for relatively small project owners. The required information to be disclosed is disproportional and can be a burden for the project owner to choose for crowdfunding. For a non-sophisticated investor it is too much information to digest and not in proportion to the amount of investment. A small non-sophisticated investor who invests for only a few hundred euros has no interest in certain information.

A few examples:

- a) *Deadline on which the offer will be closed for prospective/potential investors*  
→ Why is not possible for CSP's to decide to prolong the deadline for reaching the target capital when this decision is made in mutual consultation with the project owner? A fixed deadline beforehand can increase the pressure to finalise the target capital and also pressure investors to make hasty investment decisions.

- b) *Consequences when the target capital is not raised by the deadline*  
→ This is information that belongs in the terms and conditions of the CSP. When investors are interested in this information they should be able to find this easily on either the website of the CSP or the terms and conditions, but not in the KIIS of the specific project.

*c) Amount of own funds committed to the crowdfunding project by the project owner*

→ what is the added value to know this information? It can be concluded that the project owner has invested a lot of own funds. The other way around can it be concluded that a project owner doesn't have a lot of own funds. Though this doesn't necessarily has to say anything about the financial position of the project owner or the collateral profile of the project. Therefore it should be optional for the project owner to disclose the amount of own funds committed.

*d) Too much emphasis on potential risks associated with the crowdfunding project.*

→ for example risk type 3 and risk type 5 are risks that are basically always present for every project and do not add value for the investors to be disclosed in every KIIS. Moreover these are risks that have to tackled in the business continuity plan of the CSP. If this is not the case, a CSP cannot even get a license under ECSPR.

*e) Any default on credit agreements by the project owner within the past 5 years*

→ We understand this is valuable information, especially for the CSP that has to decide whether or not to provide crowdfunding services to the project owner. Investors should trust the CSP to do this analysis upfront. If the result is negative, the CSP should not allow the project owner on their platform. Therefore this is information that shouldn't be disclosed in the KIIS. Also it is questionable whether this information is allowed to be disclosed this way considering the privacy rules under GDPR.

*f) Description of servicing of the loan in situations where the project owner does not meet its obligations*

→ This is information that belongs in the terms and conditions of the CSP or the loan agreement between the project owner and the investors. When investors are interested in this information they should be able to find this easily on either the website of the CSP, the terms and conditions or the loan agreement itself, but not in the KIIS of the specific project.

Regarding the requested information in the KIIS it would be justified to distinguish between smaller and bigger projects. This is already the case under MiFID II considering the prospectus obligation.

<ESMA\_QUESTION\_ECSP\_11>

**12. 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>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_ECSP\_12>

**13. 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>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_ECSP\_13>

**14. 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>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_ECSP\_14>

**15. 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>

Not fully. We refer to the answer on Q6 about the LEI-code.

<ESMA\_QUESTION\_ECSP\_15>

**16. 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>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_ECSP\_16>

**17. 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>



TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_ECSP\_17>

**18. 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>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_ECSP\_18>

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

<ESMA\_QUESTION\_ECSP\_19>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_ECSP\_19>

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

<ESMA\_QUESTION\_ECSP\_20>

#	Issue	Reference	Remarks

<p><b>KIIS</b></p>	<p>§ 2.7 ESMA Annex IX  Part D</p>	<p>The Key Investment Information Sheet (KIIS) is too extensive for relatively small project owners. The required information to be disclosed is disproportional and can be a burden for the project owner to choose for crowdfunding. For a non-sophisticated investor it is too much information to digest and not in proportion to the amount of investment. A small non-sophisticated investor who invests for only a few hundred euros has no interest in certain information.</p> <p>A few examples:</p> <p>b) <i>Deadline on which the offer will be closed for prospective/potential investors</i> → Why is not possible for CSP's to decide to prolong the deadline for reaching the target capital when this decision is made in mutual consultation with the project owner? A fixed deadline beforehand can increase the pressure to finalise the target capital and also pressure investors to make hasty investment decisions.</p> <p><i>b) Consequences when the target capital is not raised by the deadline</i> → This is information that belongs in the terms and conditions of the CSP. When investors are interested in this information they should be able to find this easily on either the website of the CSP or the terms and conditions, but not in the KIIS of the specific project.</p> <p><i>c) Amount of own funds committed to the crowdfunding project by the project owner</i> → what is the added value to know this information? It can be concluded that the project owner has invested a lot of own funds. The other way around can it be concluded that a project owner doesn't have a lot of own funds. Though this doesn't necessarily has to say anything about the financial position of the project owner or the collateral profile of the project. Therefore it should be optional for the project owner to disclose the amount of own funds committed.</p> <p><i>d) Too much emphasis on potential risks associated with the crowdfunding project.</i> → for example risk type 3 and risk type 5 are risks that are basically always present for every project and do not add value for the investors to be disclosed in every KIIS. Moreover these are risks that have to be tackled in the business continuity plan of the CSP. If this is not the case, a CSP cannot even get a license under ECSPR.</p> <p><i>e) Any default on credit agreements by the project owner within the past 5 years</i> → We understand this is valuable information, especially for the CSP that has to decide whether or not to provide crowdfunding services to the project</p>
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<p><b>K I I S &amp; Approved accounts by accountant needed</b></p>	<p>Art. 8 of Draft RTS Annex IX</p> <p>Part A sub e Draft RTS Annex IX</p>	<p><b>1.</b> Art. 8 van de Draft RTS Annex IX could be interpreted in a way that the financial accounts of the last 3 years have to be approved by an accountant (conform IFRS/ GAAP). For starters this is of course impossible (as mentioned in Annex IX they are exempt), but for other (smaller) companies this is also difficult. 90% of SME's do not need these approved statements by national law so do not have them in a lot of cases (approximately only 40% of Dutch SME's use an AA/RA accountant). Therefore we read art. 8 Draft RTS Annex IX that financial ratios shall only be provided in accordance with IFRS or GAAP <u>when they are available.</u></p> <p><b>2.</b> Why does a project owner need to publish financial statements of the last 3 years (if available)? For instance, in case of equity issues based on the Growth Prospectus Regulation SME's are only required to publish 2 year financial statements of the last 2 years. For non-equity issues this is 1 year. Why is this more strict for crowdfunding?</p> <p><b>3.</b> Are the mentioned key annual financial figures in Part A sub e optional to disclose or mandatory?</p>
<p><b>Obligatory use of PSP</b></p>	<p>Art 10. ECSPR</p> <p>Art. 10.5 ECSPR</p>	<p>ECSPR states that platforms have to handle payments through an approved PSP or apply for a PSP-license themselves. We miss further details about this and this forms a major obstacle. This will increase costs for all platforms and requires impactful adjustment of procedures. A number of platforms now uses a TPF (in Dutch "Stichting Dergengelden") which actually functions as a PSP.</p> <p>Our NCA (national competent authority) sent a letter to ESMA about this on our request. This letter is drawn up by the Dutch crowdfunding industry association &amp; the Foundation SME Finance. We appreciate this is a level 1 text. Nonetheless we would like clarification and answers to our posed questions in this letter.</p> <p>In our opinion the TPF-structure we use in The Netherlands to execute payment transactions can be put under the scope of art. 10.5 ECSPR as an 'arrangement'.</p>

#	Issue	Reference	Remarks
4.	<b>Default rate</b>	<p>§2.5 ESMA Article 1 sub 1 (b) Annex VII</p> <p>consideration 6 Annex VII</p> <p>Article 1 sub 3 Annex VII</p> <p>Article 2 sub 4 Annex VII</p>	<p><b>1.</b> The default period of 90 days is too short. Generally, project owners pay interest/repayments on a quarterly basis. Therefore, if a project owner is late one quarter or a repayment schedule is agreed as a result of which the loan is postponed with one quarter, the CSP would need to report the project as default. This would give a wrong impression, as many project owners fully repay the loan after being late a quarter.</p> <p>Therefore, we would like to suggest to either extend the 90-day period to more than two quarters late or to make it possible to deviate from the 90-day period in certain contracts where repayment is allowed more than 90 days late without triggering default status.</p> <p><b>2.</b> Also it is unclear if a provision method (where amounts are reserved proportionally conform [x] days late of repayment) is still allowed. This is better suited to actual risk and possible default for investors.</p> <p><b>3.</b> Can this article be read in a way that CSP's can develop and maintain own criteria to identify when a default status is triggered based on the project owner being 90 days late with repayment? Or what is meant with <i>'disclosing the criteria used to identify the materiality threshold'</i>?</p> <p><b>4.</b> Article 2 sub 4 states that in case of bias due to the relevant presence of short-term loans, CSP's shall take appropriate adjustments in the calculation of the default rate for the purpose of paragraph. This can be interpreted differently by different CSP's.</p> <p>Therefore we would like to suggest to clarify what measures CSP's must take in such situation (what are "appropriate adjustments" that CSP's have to take?</p>

5.	<b>Interest rate</b>	§ 2.7 ESMA Annex IX Part D sub (h) & Part G sub (b)	Why can't interest be based on 360 days? The regulation only refers to interest rate that must be disclosed. Based on the KIIS this must be 365 days. Many loan administration systems are set up based on 360 days' interest period. This is more convenient, because at 360 days the interest is always the same every quarter / month. This way, you can easily calculate the accrued interest from month [x] to year by using $((y-x) * 30) / 360$ . You do not have to take into account the number of days in a month. It will be a costly and time-consuming project to amend the loan administration system. We would be grateful if the RTS can refer to a flexible 360-365 days interest period.
6.	<b>KIIS &amp; Pre-contractual reflection period</b>	§ 2.7 ESMA Art. 22 ECSP	In case of a pre-contractual reflection period of 4 days, it is recommended that other pre-contractual reflection periods (such as 14 days for consumers) are specifically excluded.
7.	<b>KIIS &amp; ownership structure</b>	§ 2.7 ESMA Annex IX Part A sub (a):	It is not appropriate nor necessary that a project owner has to disclose the complete ownership structure in case a shareholder holds a relative small part of the shares and who prefers to stay confidential. Therefore we would like to propose for the KIIS that only shareholders have to be disclosed who hold 25% or more of the shares (or voting rights) of the project owner need to be disclosed. This percentage is in line with the requirements of AML/KYC where UBO's have to be disclosed from 25% shareholding (or holding of votes) and onwards.
8.	<b>KIIS &amp; delivery date</b>	§ 2.7 ESMA Annex IX Part D sub (e):	<p>The delivery date of admitted crowdfunding instruments is unclear in a lot of cases and depends on how quickly the project owner fulfils the additional conditions. For example loans can have mortgages or pledges as collateral and the date of establishing this collateral is sometimes hard to predict and doesn't match the delivery date of the loan provided, because it also depends on other parties (i.e. notary, the project owner itself). It would be more suitable when there is only a deadline until when investors can invest, but not a deadline for the moment the loan has to be 'delivered'.</p> <p>In practice the delivery period can be extended with the approval of the CSP and the project owner.</p> <p>In short: flexibility of the delivery date would be more appropriate. Postponement of the delivery date should be allowed.</p>

9.	<b>KIIS &amp; filing AFM</b>	§ 2.7 ESMA Art. 23(7)	<p>In practice the current KIIS is available to investors 48 hours prior to the starting date of the funding of the project. Normally the NCA doesn't request the KIIS at all. In case the KIIS needs to be filed to the NCA 7 days prior, this forms a burden to both the CSP and the project owner, because the starting date of the funding of the project will be delayed.</p> <p>Also compared to the current legislation regarding equity issues the 'KIIS' only needs to be filed 1 day prior to the starting date of the project.</p> <p>We don't see a justification to introduce a 7 day-period for crowdfunding.</p>
10.	<b>KIIS &amp; LEI identification project owners</b>	KIIS art. 4 lid 2 sub a Draft RTS Annex IX	<p>Identification of projectowners will be by ISO 17442 (Legal Entity Identifier LEI) and by ISO 3166-1 alpha-2-code (twoletter countrycode. This is only for the NCA (data goes to ESMA anonimised) . Most project owners do not have a LEI-code. This brings extra costs.</p> <p>1. Why can we not use the national Chamber of Commerce codes?</p> <p>2. Is it correct that a LEI-code only has to be requested once? (so that a project owner only has to pay for it once?) Our national Chamber of Commerce also charges costs to update the LEI-code on a yearly basis. This doesn't seem appropriate at all.</p>

#	Issue	Reference	Remarks
11	<b>Complaints handling</b>	§2.1 ESMA Art. 7 ECSP	<p>There is no uniform definition of "complaint". When does a question or statement of dissatisfaction of a client constitute a "complaint" pursuant to the regulation? And what is the difference between a complaint against the entrepreneur (via the CSP) or against the CSP itself?</p> <p>A clear definition would ensure a consistent interpretation and application EU-wide throughout the Member States by the respective competent authorities.</p>

12	<b>Application</b>	§ 2 . 4 & 2 . 7 ESMA Sub 70 Art. 23 sub 8 ECSPR	A subsequent "material change" of information related to the application for authorisation shall be treated as a new application instead of modifying the existing one. This would entail new assessment timelines for the competent authority. What is considered "material change"?  Clarification would also ensure a consistent interpretation and application EU-wide throughout the Member States by the respective competent authorities.
13	<b>Ability to bear loss for non-sophisticated investors</b>	§2.6 ESMA Article 1 sub 1 Annex VIII	What are "reasonable steps"? How can a CSP check this and can it be held liable by the investor later for not having checked correctly?

We would also find it useful when ESMA creates a landing page on her website for CSP's who seek information about ECSP and applicable national regimes of all EU-countries. For example this would also be helpful in order to check national provisions on marketing requirements in case CSP's provide crowdfunding services abroad.

<ESMA\_QUESTION\_ECSP\_20>