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| 26 February 2021 |

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

* 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 28th 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](https://www.esma.europa.eu/about-esma/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

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| --- | --- |
| Name of the company / organisation | Ikosom GmbH |
| Activity | Issuer/ Non-Financial Undertaking |
| Are you representing an association? |  |
| Country/Region | Germany |

# Introduction

Please make your introductory comments below, if any:

<ESMA\_COMMENT\_ECSP\_1>

Ikosom GmbH is a company based in Berlin. We provide consultance for FinTechs, RegTechs and SupTechs. In the past, we have provided consultancy to SMEs, mostly start-ups and social entrepreneurs in using crowdfunding to receive seed- and growth financing. These SMEs often had no other form of financing other than Crowdfunding.

Through the project **CROWD-FUND-PORT**, financed through the program Interreg Central Europe, we have supported SMEs and Crowdfunding Platforms from Central Europe and assessed the strength and weaknesses of the Crowdfunding ecosystems in smaller European member states.

Through the project **CE-RESPONSIBLE**, financed through the program Interreg Central Europe, we have identified the financing needs of social entrepreneurs and social innovation companies.

Through the project **UNLOCKING THE CROWDFUNDING POTENTIAL FOR THE EUROPEAN STRUCTURAL AND INVESTMENT FUNDS (ESIF)** by DG Regio, we analysed the potential collaborations of public authorities and crowdfunding platforms.

The CEO of ikosom, Karsten Wenzlaff, is one of the founders of the **AltFinator Policy Network**. The AltFinator Policy Network is an pan-Europan network of Crowdfunding experts, platforms and academics, with more than 700 individual members. Karsten Wenzlaff was also a member of the European Crowdfunding Stakeholder Forum of the European Commission. He is an Alternative Finance Researcher at the University of Hamburg, works as the Research Affiliate at the European Center for Alternative Finance (ECAF, University of Utrecht) and Research Affiliate at the Center for Alternative Finance (CCAF) at the University of Cambridge. He is the editor of the Alternative Finance Benchmarking Report and one of the authors of the Global Covid-19 Fintech Rapid Market Assessment Study by the CCAF, World Bank and WEF. Karsten Wenzlaff has taught in the Cambridge Fintech Regulatory Innovation Classes, where more than 800 global regulators have studied Innovation in Fintech Regulation. Karsten Wenzlaff has appeared in front of the Finance Committee and the Digital Agenda Committee of the German Parliament as expert on Alternative Finance. He has consulted governments and international institutions on Crowdfunding Regulation in Africa, Asia and Latin America.

Since ikosom GmbH primarily consults innovative project owners, the following comments on the ESMA Level 2 proposals of the ECSP-regulation are primarily from the **perspective of potential project owners**. From our point of view, the ECSP will achieve that especially SMEs can use Crowdfunding to reach out to investors across Europe. Its success can already be seen because shortly after the legislative approval of the ECSP in November 2020, plans were published the US SEC to raise the thresholds for crowdfunding in the USA from approximately USD 1million to USD 5million, which mirrors the European threshold for EUR 5million. Many countries outside the European Union are currently working on emulating the European crowdfunding regulation in their jurisdictions.

However, for issuers the ECSP also comes with increased risks, which are partially due to unclear provisions in the text of the regulation, but which are also increased by unclear formulations in the Level 2 texts which, will be addressed below.

<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>

Not applicable to project owners as usually the platform manages the complaints.

<ESMA\_QUESTION\_ECSP\_1>

1. 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>

With concerns to possible conflict of interest within the platforms, this is less relevant for project owners. Potential conflict of interest between project owners and platforms should simply be made transparent, here the requirements set out in the RTS are sufficient. <ESMA\_QUESTION\_ECSP\_2>

1. 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>

Our comments on Article 8 and SPV structures have been made in our response in **Question 20**.

<ESMA\_QUESTION\_ECSP\_3>

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

<ESMA\_QUESTION\_ECSP\_4>

For the potential project owner, the business continuity plans as suggested in the draft RTS is sufficient, maybe slightly too detailed. The most relevant issue is the continuation of the administration of payments, which is the only issue that really needs to be required in case of insolvency of the platform.

<ESMA\_QUESTION\_ECSP\_4>

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

<ESMA\_QUESTION\_ECSP\_5>

From the point of view of the potential project owner, the authorisation procedures according to Article 12 of the ECSP regulation seem to be very excessive, since higher costs of the CSP licensing will eventually translate into higher fees for the project owners when using the platform. Therefore, ESMA would be well advised to reduce the level of detail which the platforms have to provide to the national supervisory agency.

<ESMA\_QUESTION\_ECSP\_5>

1. 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>

As mentioned in Question 05, the cost of complying with the regulation set out in the draft RTS will eventually be paid by the project owners. Therefore it would be advisable to refrain from adding additional requirements beyond the Level 1 text, as the ultimate price tag will be the potential projects owners.

<ESMA\_QUESTION\_ECSP\_6>

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

<ESMA\_QUESTION\_ECSP\_7>

For the project owner under economic distress, a narrow definition of a default is a potential risk. Similarly, for investors a narrow definition of default carries the risk that project owners willing to service their loans under a new payment schedule might be forced into a default. Broadening the definition of default would incentivize both platforms and project owners to offer new repayment schedules to investors instead of defaulting.

<ESMA\_QUESTION\_ECSP\_7>

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

<ESMA\_QUESTION\_ECSP\_8>

The Investor Exploration is done by the platform, therefore the potential project owners have to rely on the platform to segmentize and validate potential investors. However, the investor exploration as outlined in the RTS often goes beyond the requirements by Level 1, for instance in the information asked from potential investors. It would be advisable to stay very close to the Level-1-text of the regulation, because mandatory numerous questions to potential investors are conversion breakers on the platforms, therefore reducing the potential mobilization of private invests. From the point of view of the project owner, it would be better if the investor exploration is done at a minimal level only.

We want to point out that the ECSP regulation is not only in competition with other forms of traditional financing, but also several other forms of alternative financing becoming more and more available in Europe, such as digital factoring or blockchain-based finance. In some of these forms of alternative finance, virtually no investor exploration is required, therefore drastically reducing the costs. For crowdfunding to be competitive for potential project owners, the cost of investor exploration for the platform should be kept low.

<ESMA\_QUESTION\_ECSP\_8>

1. 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>

Investor are quite smart in estimating how much they can potentially invest on the platforms, therefore an online tool might not really be the breakthrough envisaged by ESMA, but if the provision of the online tool is cost efficient, then it might be helpful.

<ESMA\_QUESTION\_ECSP\_9>

1. Do you agree with the suggested method to calculate the non-sophisticated investor’s net worth?

<ESMA\_QUESTION\_ECSP\_10>

We find the method to calculate the net worth of the investor very detailed. Many investors might feel overwhelmed by the required input. It would be better to keep the required input to three questions:

* What is your wealth?
* What is your monthly income?
* What are your monthly expenses?

Based on these three data points, it would already be possible to give a close approximation of the net worth and the potential to bear losses. The requirement to provide an estimation for “payments for subscription services” seems to be very unclear for a potential investor.

<ESMA\_QUESTION\_ECSP\_10>

1. 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 KIIS requirements for potential project owners are derived from the requirements made in the ECSP regulation, however they do add substantial new requirements for potential issuers, some of which are not mandated by the Level 1 text.

The necessary balance which the KIIS needs to strike is a well-formulated six-page document which is clear, complete and correct. With the requirements set out in the RTS, it will be very challenging to provide all the information within six pages, without resorting to generalizations. However, since the project owner is liable for the content of the KIIS, this creates a significant legal risk for potential project owners. However, the legal risk translates into either costly insurance protections against legal liability or costly due diligence on behalf of the law firm which prepares the KIIS on behalf of the project owner.

Therefore ESMA would be well advised to **reduce the level of requirements for information** in the KIIS and focus on the information which is of ultimate importance to the investor. We want to re-iterate that the instruments applicable in the ECSP are all well-regulated and very simple instruments, therefore the most important information for the investor are the following:

* Part A, a) Identity of the Project Owner
* Part A, c) Principal Activities
* Part A, f) Description of the Crowdfunding project
* Part B, a) Minimum Target
* Part B, d) Maximum Target
* Part C, Project Risks
* Part D, a) Total Amount
* Part D, h) Interest Rate, Maturity
* Part E, a) SPV Contact
* Part F, a) Investor Rights
* Part G, a) Nature of the Loan
* Part G, b) Interest Rate

All other information requirements set out in the RTS are of less interest to the investors, thereby creating additional costs for the project owner, and ultimately make the KIIS more convoluted and less comprehensible.

Scientific research on the platform descriptions on existing crowdfunding platforms shows that the above items are the most relevant, that is why most crowdfunding platforms will create a small box on their website which displays the above items. From our research on investor behaviour in Germany, we know that this information is more frequently used than the mandatory 3-page investment information sheet which is also provided. We would therefore strongly urge ESMA to reduce the requirements, because extending the information requirement is ultimately not in the interest of investor.

There are a number of items which can be reduced in complexity, for instance the ownership structure, the conflict of interest or the number of previous offers. Most importantly, any provisions should be deleted which require the project owner to make guesses about the future, except for the project risk. The investor should be able to quickly understand and assess the business model of the project owner – the current degree of detailed information is very likely going to obfuscate the most relevant information.

<ESMA\_QUESTION\_ECSP\_11>

1. 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>

As the structure of the KIIS is mandated by the Level 1 text, we do not see much space for changing the structure. From academic research, we know that Part D is the most relevant part and should therefore be at the top of the KIIS.

<ESMA\_QUESTION\_ECSP\_12>

1. 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>

The 3-page Investment Information Sheet for Securities or Investment Assets in Germany can be cited as a best practice for the disclosure of information. It is not understandable why six pages are necessary for securities emissions below EUR 5 million to cover the same information which is written down on three pages for securities emissions between EUR 5 million and EUR 8 million.

<ESMA\_QUESTION\_ECSP\_13>

1. 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>

A typical security prospectus cost around EUR 60.000 in Germany. A typical 3-page investment information sheet cost between EUR 4.000 to EUR 8.000. It is difficult to estimate, but most likely the costs for the KIIS will be higher than that in the early stages of the ECSP implementation. As soon as the markets create templates, the cost might decrease.

<ESMA\_QUESTION\_ECSP\_14>

1. 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>

From the point of view of the project owners, this is not relevant.

<ESMA\_QUESTION\_ECSP\_15>

1. 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>

From the point of view of the project owners, this is not relevant..

<ESMA\_QUESTION\_ECSP\_16>

1. 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>

For project owners it is important that sensible information about their business model is not disclosed to competitors. Therefore it is important that market statistics are only published on an aggregated level.

<ESMA\_QUESTION\_ECSP\_17>

1. 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>

We have commented below in Question 20 on the information requirements for potential project owners.

<ESMA\_QUESTION\_ECSP\_18>

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

<ESMA\_QUESTION\_ECSP\_19>

The cost-benefit analysis is written from the point of view of the platforms. We estimate that the benefits are described accurately, however the costs are certainly not described accurately. Platforms will have to invest considerably in on-boarding procedures, investor exploration, data analysis, customer complaints, conflict of interest measures and after all incur costs through the requirements set out in Art. 11 of the ECSP. They will also incur costs from switching from multi-asset SPVs to single asset SPVs.

From the point of view of the project owner, the cost benefit analysis is also quite different. For project owners in countries where crowdfunding is currently unregulated or prohibited, the benefit of having a reliable regime surely outweighs the cost of compliance. However, the costs of providing accurate, complete and comprehensible information, under the potential legal risk of liability, is considerably more costly than current documentation requirements under existing national crowdfunding regimes.

<ESMA\_QUESTION\_ECSP\_19>

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

<ESMA\_QUESTION\_ECSP\_20>

From the point of view of **potential project owners**, there are a number of issues which we would like to raise in addition to the points already mentioned above.

From the point of view of an issuer, it is important to be able to select the right platform. The ECSP license might be an indicator of quality, but the ECSP regulation does not cover all aspects which are important for potential project owners. Therefore **self-regulation and quality labels** by industry associations such as Finance Estonia, Financement Participatif France or the Bundesverband Crowdfunding provide an important tool to assess the quality of platform intermediaries. We would strongly encourage DG FISMA to create a landing page at the European Commission which highlights existing quality labels. The German Government in response to a Parliamentary Request by the Liberal Party in Germany has listed several quality labels in Europe for Crowdfunding platforms.

There are a number of websites which allow **comparing and ranking of platforms**, such as AltFinator, CitizEnergy, CrowdCreator or CrowdCircus. It would be important if ESMA could link to these initiatives, especially since they were often funded by money from the European Union.

DG Grow in 2015 published a **Guide Book** for Crowdfunding, which was very helpful for SMEs to understand crowdfunding. In 2018, ikosom GmbH published a 250 page guidebook as part of the Crowd-Fund-Port project, this also was very helpful for potential crowdfunding project owners. However, since 2015 and 2018, the market has considerably developed, therefore we would encourage both DG FISMA and DG GROW to provide an updated Guidebook for projects owners under the ECSP, which includes a clear analysis of the rights and duties of prospective project owners.

Even though the ECSP is a harmonized regime, it still gives considerable leeway for member states to deviate from the joint approach to Crowdfunding. The most relevant item of divergence is the **threshold for offers**. In Art 49, member states can set the threshold to lower than EUR 5 million if their national threshold for prospectus-free security emissions is also below EUR 5 million. However, there is no clear statement by the European Commission on how the thresholds have to be calculated for cross-border offers if the target member states have several thresholds. There is also no central landing page which summarizes how member states will set the threshold. This should be addressed either by ESMA or by DG FISMA. We want to stress that the best way to prevent that SMEs from one country are disadvantaged would be to encourage member states not to make use of Art. 49 in the ECSP regulation.

The central landing page should also include a description of the **admitted instruments**. Already, we see a divergence here. Germany has chosen not to include the shares of limited companies in the scope of the ECSP, even though Recital 14 and 15 clearly state that shares of limited companies can be within the scope of the ECSP, even if they are not securities. The German government has falsely argued that shares of limited companies are subject to transfer restrictions, even though Recital 14 of the ECSP clearly indicate that this should not be a barrier for the inclusion in the scope. For project owners in Germany, this means that they are disadvantaged to SMEs in other countries, which can place their shares on a Crowdfunding platform. ESMA and DG FISMA should monitor these developments and urge member states to increase the scope of the ECSP, rather than artificially restricting it.

Another concern regarding the admitted instruments is the topic **of security tokens**. Even though ICOs are excluded from the scope of the ECSP, tokenized securities are not. It would be highly relevant for potential project owners to have clarity whether tokenized securities are within the scope of the ECSP.

Art 23 paragraph 9 allows the member states to create **liability regimes** for the potential project owners. The project owners are liable for the completeness, correctness and clearness of the KIIS. However, the liability regimes greatly differ from one country to the next, as evidenced by the 2013 report by ESMA on the liability regimes under the Prospectus Directive. Under the Prospectus Directive, the jurisdiction of the investor, not the issuer, is relevant for the applicability of the liability regime. For potential project owners, it is important to understand the extent and nature of the liability, especially since there is no obligation by the Crowdfunding platform to inform the potential project owner about the liability. Therefore, a single landing page provided by ESMA or DG FISMA which has an updated overview of liability regimes in the member states would be extremely important to make ECSP attractive.

Art. 27 foresees that **marketing and communication restrictions by member states** may occur. Here ESMA has a clear mandate to be informed about member states actions, and provide a general information website to inform potential project owners about the marketing restrictions. This landing page can also be used to inform about the other potential divergences.

In general, ESMA would help potential project owners by clarifying which member state regime applies if the project owner, the platform and the investor are from different jurisdictions in the case of **cross-border offers**, as both Level-1 and Level-2 text are not clear about that.

One important element are **special purpose vehicles** (SPV). In general, the requirement for single-asset SPVs is not informed well by market practice. There are many good reasons why SPVs may hold several assets. For instance, a project owner might own several assets, such as renewable energy constructions or real estate portfolios or start-up portfolios, and want to allow the crowd investor to invest in this composition of assets by creating an SPV, which then offers securities to investors. If there is enough transparency about the underlying composition of the assets, then from the point of view of the investor, this should not be prohibited.

However, since single-asset SPVs are mandated if they are used for providing crowdfunding services (Art 3 (6) of the ECSP-Regulation, and since project owners usually do not provide crowdfunding services, but use crowdfunding services, it should be clarified that Art 3 (6) does not apply to SPVs managed by the project owner.

In most cases, the SPV will be managed by the platform on behalf of the investor. This has several benefits. The cap table of the SME is much more simpler since the SPV bundles the shares of the investors, which makes it easier for subsequent financing rounds to mobilize investors. Also, the platform usually has more experience in setting-up the SPV and managing the investor voting rights, which reduces transaction costs for the investors. Lastly, the SPV managed by the platform can create an additional check on the project owner, since it is usually in the interest of the platform to make sure that investors are satisfied. Therefore, it should be clarified that Article 8 of the ECSP regulation does not apply to SPVs managed by the platform, since Article 8 only says that the platforms is not allowed to accept project owners which are connected to the platform, but the SPV is usually not the project owner.

In summary, even though the ECSP regulation does not have the primary intention to provide a growth of market for the platforms, any Level-2-clarifications should be aimed at **providing a level-playing field across Europe for project owners**. Project owners benefit if the concentration of the market is not too high – otherwise they might face a monopoly or oligopoly of platforms which would reduce competition. Therefore from the point of view of project owners, it is important to ensure that also small platforms can apply to the ECSP license.

<ESMA\_QUESTION\_ECSP\_20>