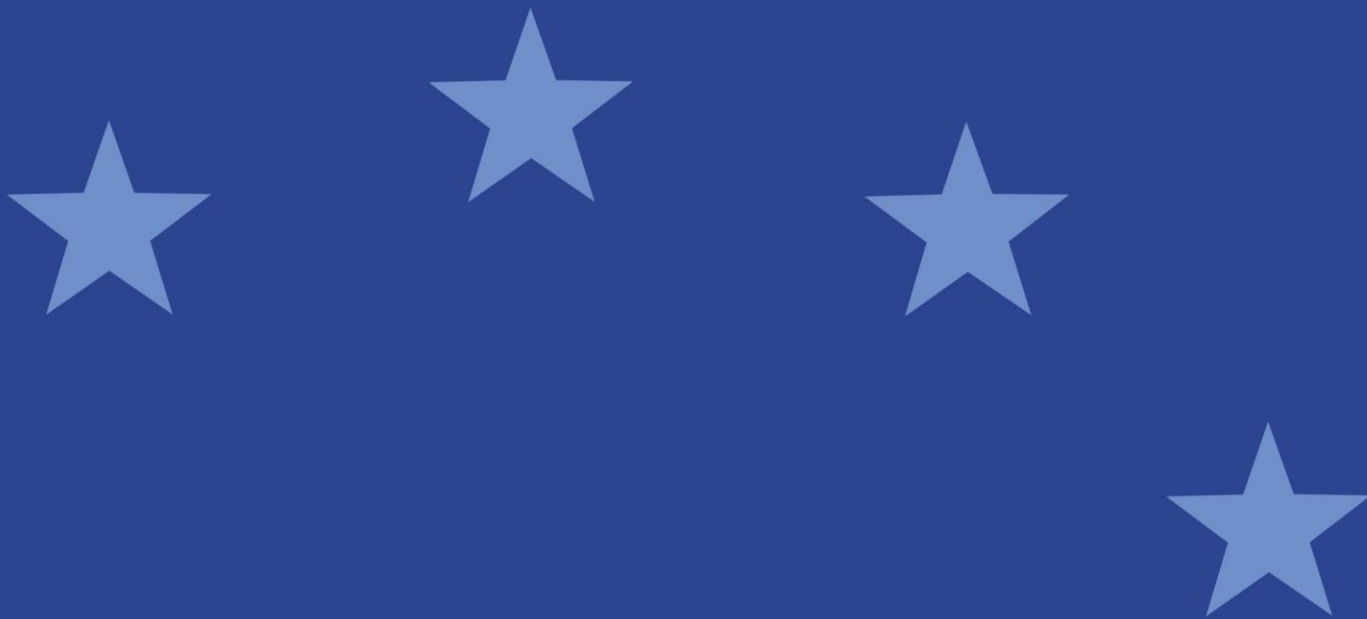


Response form for the Consultation Paper on draft technical standards under the ECSP Regulation



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:

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 28th May 2021**.

All contributions should be submitted online at 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 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 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	Financement Participatif France (FPF)
Activity	Non-governmental Organisation and Other Associations
Are you representing an association?	<input checked="" type="checkbox"/>
Country/Region	France

Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_ECSP_1>

Financement Participatif France (FPF) is the representative professional association for crowdfunding sector, in France. It gathered 130 members, including 70 platforms from all crowdfunding types (donation and reward crowdfunding, crowdlending and equity crowdfunding). FPF's response on ESMA's consultation was built collectively by the members of the association, following in-depth work on the proposals made by ESMA.

<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>

The French crowdfunding Association has no particular remark to make on this RTS. We do not think that setting a harmonised deadline to handle a complaint and reply to complainants would necessarily help ensure a better 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>

Financement Participatif France sees the list set out in Article 1(5) of the draft RTS as sufficiently harmonised to prevent the risks related to 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>

French crowdfunding platforms understand and support the approach proposed by ESMA regarding the identification, the disclosure, and the management of potential conflicts of interest.

However, if Article 5 of the European regulation provides that the platforms must disclose the nature of every conflict and the actions taken to limit its effects, we would wish to warn ESMA and local authorities against the biases that could be occurred by disclosing some conflicts of interest in real time. Indeed, the Regulations allow partners, employees and managers of a platform, acting directly or through an intermediary structure, to invest in a project and this possibility must naturally be disclosed to investors. We understand that it is sufficient to indicate on the site that such investments are accepted, without detailing on each project the investors concerned or the amounts invested. The communication of such details, which would present practical problems - in particular if they had to be communicated in real time - not being provided for by the regulation and which could unduly encourage investors to invest in some projects because shareholders, employees or managers would have positioned themselves there.

In addition, we wanted to be clear that the SPVs referred to in Article 3 can be managed by the platform, as it is the standard market practice, since the SPV is not the project owner referred to in Article 8.

<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 French crowdfunding Association agrees with the details of the business continuity plan suggested in the draft RTS submitted for consultation.

However, we would like to draw to your attention the importance of giving platforms flexibility to choose who will be responsible for their continuity plan. In France, the current regulation requires that platforms set up a cessation activity plan (plan de gestion extinctive) with their payment service provider. In fact, these plans are extremely hard to set out and that is why, we urge ESMA and local authorities to allow platforms to entrust their continuity plan to any other third parties (parent companies, subsidiaries, other platforms, etc.)

<ESMA_QUESTION_ECSP_4>

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

<ESMA_QUESTION_ECSP_5>

Financement Participatif France would like to make two requests for clarification on this draft RTS:

- Regarding the form, the template proposed by ESMA does not seem to ask for the contact information of the person who is filing the application. We believe that this information (e-mail and phone number) should be asked.
- According to the level 1 text, any investor should, if he wishes, be able to invest in a project, as long as he had been subjected to the right test and that he had approved the warnings related to his situation. However, we strongly believe that platforms should be allowed to prohibit investors from investing, if the amount they wish to invest, their financial situation, or their understanding of the products and risks, do not seem relevant to the investment in question. We understand that this is possible as long as it is based on objective criteria disclosed (for instance in the general conditions). Nevertheless, we would like to seek ESMA's opinion about the compatibility of refusing some investors with the non-discrimination concept introduced by the term "discriminatory" (p.87 (b)) of this RTS. We will welcome a level 2 or level 3 text to clarify this position.

<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 platform's marketing strategy must be documented when the platform requests for approval (Article 12-2.d) The platform then must specify the means through which it will communicate and on which territory(ies). The RTS proposed by ESMA seems to go even further, by introducing the notion of "frequency" of marketing communication. By this notion, it seems that the platforms will be required, at the time of approval, to detail the frequency of its advertising communications, which is new compared to the level 1 text. Besides, regarding the essence of crowdfunding platforms communication, which is digitally and especially through social networks, it is unrealistic that a platform declares in advance the frequency of such marketing communications – and this information seems to us in any case of limited interest. However, to serve the objective of the level 1 text, Financement Participatif France proposes that the term "frequency" be replaced by the term "scope". This would respond to the logic on the Regulation, which is indeed to identify the means put in place by platforms for marketing purpose.

<ESMA_QUESTION_ECSP_6>

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

<ESMA_QUESTION_ECSP_7>

The definition and methodology proposed by ESMA to calculate the default rate are difficult to understand for French platforms. Financement Participatif France wishes to make two comments on this draft RTS:

- The definition of default seems too strict to us and does not consider the possible extension of a loan or the agreement between project owners and stakeholders to define a new repayment schedule. Indeed, as we currently define default in France, a failed project can become healthy again when a new schedule is put in place and the project is therefore no longer counted as a default. The definition proposed by ESMA considers that a failed project will be counted as such, even if it then reverts to a healthy project. Viewing all these projects as default could be detrimental to the industry, especially in the context of crisis we are going through. This reflects the wrong messages towards investors.
- Displaying the default rate in number of projects and not in volume does not seem relevant to certain kind of loans, especially for short-time loans. Financement Participatif France obviously understands the interest, and even the necessity, of setting up common indicators to all European platforms, calculated in the same way. However, these appear to us to be insufficient. We do not

want to impose more indicators' obligations on European platforms but allow those who wish to be able to do so. Indeed, since 2017, FPF members have implemented a grid of performance indicators and default rates. While the publication of this grid is an obligation for FPF's members, even non-member platforms publish it, and it seems that our indicators meet interest out of France. These FPF indicators are complementary to the legal indicators put in place by the ACPR and in no way replace them. The two are completely compatible. They allow great transparency in the activity of the platform and are a valuable tool for investors who can analyse the historical performance of projects and compare platforms against each other. Because not all investors are ignorant, on the contrary, many are experienced investors, in a process of diversifying their savings on platforms. And for the less experienced, this information is a source of financial education and skills development. In addition, we do not see what - in the European regulation - would prevent platforms that wish to publish additional indicators. For FPF and the French platforms, no longer publishing these indicators would be a backward step in terms of transparency and best practice.

<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>

Regarding the Assessment of appropriateness of crowdfunding services, Financement Participatif France would like to highlight the inconsistency identified in Article 3 (1) of the RTS which specifies that "crowdfunding service providers shall, prior to giving access to their crowdfunding platforms, assess the knowledge, skills and experience of prospective non-sophisticated investors", instead of "before giving prospective non-sophisticated investors full access to invest on their crowdfunding platform", as mentioned in the Article 21 (1) of the level-1 text. Indeed, the investor must be able to visit the platform and see the projects, and then, fill the assessment at the time he clicks on the button to invest.

The list of information set out in Article 4(1) of the draft RTS seems to go beyond the information mentioned in the level-1 text, by mentioning the academic level and professional experience: Article 4 . 1(c) "level of education, skills and profession". We wish to alert ESMA on the necessary proportionality of the information requested from potential investors regarding the amounts they wish to invest. The number of questions seems to be very important. It might break the customer pathway and discourage the investor from going to the end of the process.

However, according to Article 1 (2) of the RTS, the platform is responsible for verifying the accuracy and consistency of the data provided. However, this is declarative data, and the platform cannot be held responsible for the inaccuracy of the data provided by the potential investor. We understand from this article that the intention of ESMA is to make sure that the platforms will take measures to verify the consistency of the information provided. In any case, inconsistent data could suggest that the investor has not provided accurate data. However, we would like to draw attention to the legal uncertainty that could weigh on operators if ESMA does not specify its intention by amending the article and removing the notion of accuracy.

<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>

Although the French crowdfunding Association agree that requiring CSPs to make available to prospective non-sophisticated investors an online calculation tool will improve investor protection, we wish to make a remark regarding the wording of the text. Indeed, there seems to be an inconsistency between point 4 of the preamble and paragraph 5 of article 6. Indeed, the platform can provide the potential unsophisticated investor with a method so that he can calculate his ability to bear losses. The term used by ESMA in the preamble is "should", while Article 6 states "may". We suggest that ESMA replace the term "should" in the preamble with the word "may".

On another note, Financement Participatif France wishes to draw attention to the dissuasive nature of the warning text proposed in Annex III. If the objective of the warning text is to alert the investor of the risks he is incurring, we believe that a modification is necessary to allow a better understanding. Indeed, investors are often afraid to lose more money of what they invested. That is why, the wording of the warning should refer to the possibility of a partial or total loss of his capital and explain to the investor that his responsibility is limited to the amount he has invested. Financement Participatif France proposes to replace the first sentence of this warning by a wording found in the KIIS:

« Investment in this crowdfunding project entails risks, including the risk of partial or entire loss of the money invested. »

<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>

When calculating assets, the investor must declare his income, liabilities, and cash. The ESMA project specifies the calculation methodology but leaves to the platform and competent national authorities the interpretation as to the implementation of this calculation on the platform. Financement Participatif France wishes to raise a point of vigilance regarding the different interpretations that could result from this text. Indeed, it seems far too intrusive to ask potential investors to declare in detail, line by line, their income, commitments, and cash. We believe it is more appropriate to allow investors to enter global amounts, while indicating to them the data to be taken into consideration, to maintain the educational objective pursued by the text. In addition, the calculation of assets is made based on financial data from December 31 of the previous year. However, significant changes may occur between December 31 and the time of investment. Financement Participatif France therefore proposes that the possibility be open for the investor to adjust the declared amount according to the relevant changes made before the investment or to be expected in the short term.

<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>

Financement Participatif France agrees with the extend of the provisions that ESMA proposes to specify the ECSPR's requirements for the KIIS model. Indeed, the KIIS seems to us well balanced and sufficiently comprehensive.

We would nevertheless like to raise two points:

- Regarding the amount of own funds committed to the crowdfunding project by the project owner [Part B (e)] : we are not comfortable with this obligation as the use of the term "intention" is quite subjective and as the KIIS has to be kept up to date which would imply for the project leader monitoring the intentions of its shareholders or members of the management bodies and updating the key information sheet which is weighty to implement.
- In general, since this sheet is already very dense, and the objective being that it remains understandable for investors, we would like to warn ESMA against additional requirements that could be requested by national regulators and would burden the KIIS. without respecting the proportionality provided for by the texts.

<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>

The French crowdfunding Association does not have any remarks to make at this stage. We welcome the KIIS proposal made by ESMA, regarding the constraints imposed by the level 1 text.
<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>
Financement Participatif France and its members do not have any suggestion.
<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>
The KIIS proposed by ESMA is dense and there is no doubt that it will require hard work from the platforms. However, in France, the national law requires different documents depending on the nature of the financial instrument, and the platforms are used to writing additional documents to help investors to have a full understanding of their investment. As ESMA's proposal cover all of this information in one document, the French platforms agree with this proposal.
<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>
The French crowdfunding Association 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>

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>
The French crowdfunding Association does not consider that the format for the submission of the information to competent authorities should be further specified in the final draft IST.
<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>
Financement Participatif France does not envisage any impact due to the anonymisation method.
<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>

Financement Participatif France sees the information on the national laws regarding to marketing communications as sufficient. As a matter of fact, we would appreciate ESMA to go further by asking national competent authorities to use the form for any other laws that make it difficult for CSPs to provide a unified product across the European Union, for instance liability regimes, pre-contractual reflection periods, thresholds in Art. 49, admitted instruments, relevant regulator contact, etc.

<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>

Financement Participatif France has no comments to make.

<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>

- The French crowdfunding platforms welcome the work of ESMA on its proposal for a balanced framework geared towards the desire to protect investors through the harmonization of processes and structuring documents, while allowing a certain flexibility. This is particularly the case with the framework proposed by RTS 1 (customer complaints), which establishes a harmonization of practices, while allowing actors freedom of action and decision-making regarding the implementation of this framework, or RTS 7 (key information sheet) which seems clear and comprehensive to us. However, we would like to draw attention to the wide leeway left to the competent local authorities for the establishment and monitoring of the new regime. Indeed, the competent local authorities in each country could be tempted to lay down a more or less restrictive framework on many points left to their discretion. FPF wishes to warn against the temptation to superimpose national doctrines and recommendations on the text proposed by ESMA, at the risk of going against the logic of the texts and creating distortions of competition and an insufficiently harmonised European market.
- As stated in question n°18, we encourage ESMA to provide a single-landing page for CSPs which lists the following information:
 - Contact points at the National Competent Authority, including links to the licensing forms, in accordance with Art. 1 ECSP-R,
 - Admitted instruments, in accordance with Art. 1 ECSP-R,
 - Thresholds, in accordance with Article 49 ECSP-R,
 - Liability Laws, in accordance with Art. 23 ECSP-R,
 - Communication Laws, in accordance with Art. 27 ECSP-R,
 - Any other laws affecting CSPs in that member state and which would prevent CSPs to provide services cross border.
- Financement Participatif France asks for details on the platform's language of communication. The question of language arises in two contexts: marketing communication and customer relations. This issue arose in several places when reading the RTS submitted for consultation. Indeed, the platforms wish to express their concern as to the responsibility which will weigh on them concerning the various translations of commercial communications and documents submitted to investors. If we understand that communication needs to be clear, accurate and not misleading, we would like ESMA to publish details on this area. In addition, the platforms must specify, at the time of the

request for approval, the language in which they will communicate in each country where they will market their offers. However, the summary table of national laws may not yet be published on the ESMA website or be incomplete. How does ESMA intend to enable platforms to obtain their approval, without necessarily having knowledge of the marketing practices permitted in each of the countries in question?

- The scope of the Regulation: the member platforms of Financement Participatif France wish to express their concern about the interpretation of the scope defined by the Regulation. Indeed, the French translation of the Regulation defines crowdfunding as « la mise en relation des intérêts d'investisseurs et de porteurs de projets en matière de financement d'entrepreneurs ». We therefore wonder about the definition of the terms "activités commerciales", "entreprises" or even "entrepreneurs", which do not fall within a legal vocabulary and whose translations do not correspond exactly to the text of the Regulations voted in English. The interpretation of these terms is crucial for many platforms. We call on ESMA and, by extension, the European Commission, to clarify that a sufficiently broad interpretation of these terms makes it possible to include in the scope of the regulation projects carried out by public authorities, associations, or agricultural companies, which, in France, are "civil societies".
- The Q&A on "special purpose vehicles" ("SPVs") issued by ESMA (25 February 2021) needs additional clarification. We suggest that ESMA clarify the following points:
 - Art. 1 and Art. 2 of the ECSP-R provide separate definitions for project owner and issuers. It is common market practice for platforms to manage and administer the SPVs on behalf of the investors. The SPVs are only vessels of the investor rights, not having any economic purpose of their own. Therefore Art. 8 ECSP-R does not apply, since the SPV as the issuer of the securities is not the same as the project owner.
 - A SPV as defined in article 2(1)(q) of the Regulation includes any entity created only for holding loans, transferable securities and/or admitted instruments referred to in article 2(1)(a), or which holds only such assets.
 - An SPV will meet the criteria set out in the first two sentences of article 3(6) if it holds an asset meeting the criteria set out in the ESMA Q&A, Answer 5, for example equity or debt securities or other admitted instruments issued by, or loans granted to, a project owner, which are not listed on an organised market. The criterion set out in the last sentence of article 3(6) is met if the purposes of the SPV set out in its constitutive document(s) identify the asset it holds or will hold and the relevant project owner.
 - Pursuant to article 8(2) second sentence, shareholders, managers and/or employees of a crowdfunding service provider ("CSP") or persons controlling or controlled by such shareholders, managers and/or employees (per point (35)(b) of article 4(1) of Directive 2014/65/EU) may invest in such SPVs as long as the possibility that such investment may be made is revealed by the platform for each SPV in which investments might be made.

Finally, we suggest that ESMA confirm that platforms are not restricted as to the amounts and forms of remuneration that they can receive from investors and/or project owners. When such remuneration is from project owners it can be in the form of fixed or variable monetary payment and/or securities issued by the project owner (whether or not identical to securities issued in the crowdfunding offer). The freedom to agree on remuneration is not restricted by requirement in article 3(3) that CSPs not pay or accept remuneration, discount or non-monetary benefit for routing investors' orders to a particular crowdfunding offer made on their platforms or on a third-party platform.

<ESMA_QUESTION_ECSP_20>