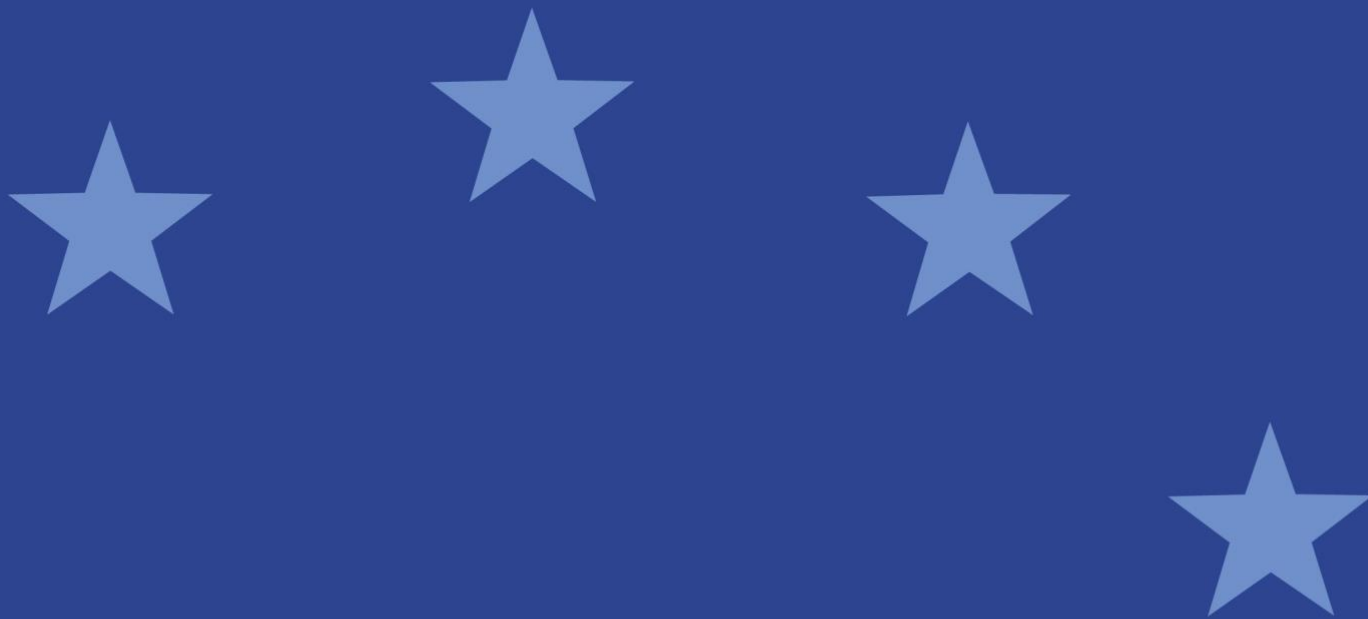


## **Response form for the Consultation Paper on draft technical standards under the ECSP Regulation**



## 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 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	GIM Legal STA S.r.l.
Activity	Legal and Accountancy
Are you representing an association?	<input type="checkbox"/>
Country/Region	Italy

## Introduction

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

<ESMA\_COMMENT\_ECSP\_1>

GIM Legal STA S.r.l., with offices in Rome, Milan and London, is a business law firm of lawyers and tax advisors, operating mainly in the financial and real estate sectors, offering legal and regulatory advice, litigation, and transaction services.

We are taking part in this public consultation through our Venture Capital Department.

GIM Legal STA S.r.l. welcomes the opportunity to provide comments and feedback on the ESMA's Consultation Paper on the Technical Standards that ESMA is due to submit to the European Commission according to the ECSPR.

<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>

Yes, we believe that setting a fixed deadline for a Crowdfunding Service Provider to handle a complain and reply to the complainants would surely enhance and harmonise investor protection by creating a harmonised complaint handling procedure across the Union. The draft Regulatory Technical Standards suggests that the Crowdfunding Service Provider shall acknowledge receipt of any complaint within 10 working days. We believe it would be reasonable to extend it to 15 working say. Additionally, we think that setting an additional deadline for the Crowdfunding Service Provider to reply to the complainant would be important and we propose this deadline to also be 15 working days from the acknowledgement of receipt of the complaint, essentially granting the Crowdfunding Service Provider 30 working days from the date the complaint is filed to respond.

<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>

Yes, we agree that the list set out in Article 1(5) of the draft Regulatory Technical Standards is satisfactory as it sets out an adequate level of requirements for the internal rules to prevent conflicts of interest ensuring harmonisation across Crowdfunding Service Providers in the EU. Nevertheless, we highlight the importance of ensuring periodic monitoring of the requirements for the internal rules to prevent conflicts of interest, due to the evolving nature of the crowdfunding market and with the aim to maximise investor protection.

<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>

We agree that it is important to strike a balance between investor protection and undue burden for the Crowdfunding Service Provider, however, we believe that such balance should lie more towards investors protection, especially considering the rising of involvement of non-sophisticated investor in crowdfunding investments. Nonetheless, we agree with the proposed requirements of disclosure of conflicts of interest and mitigation steps, as set out in the Article in question of the draft Regulatory Technical Standards, for it provides satisfactory measures to limit the burden on Crowdfunding Service Providers while still protecting investors.

<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>

Yes, we agree with the details of the business continuity plan as these are essential to promote investor protection by allowing investors to have a view of the long-term operativity of the Crowdfunding Service Provider. We also believe that it is crucial to include the valorisation of human resources and to draft disaster recovery procedures; with the aim to ensure the continuity of the business in case of changes of circumstances, such as changes in the governance of the CSP or financial difficulties. Additionally, we think that it would be important to promote, to some extent, the valuation of the Environmental, Social, and Corporate Governance (ESG) factors, which can help investors to determine the future financial performance of 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>

We believe that the authorisation procedure proposed in the draft Regulatory Technical Standards is satisfactory and that a time frame of 3 months, per Art 12(8) of ECSPR, is reasonable for the authority to reach an opinion. Nevertheless, it would be desirable to accelerate the authorisation procedures even further to be able to provide a response within an even quicker timeframe with the goal to reduce the costs of the perspective Crowdfunding Service Provider.

<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>

Article 12(2) of ECSPR sets out the information that a perspective Crowdfunding Service Provider needs to provide to the Competent Authority of the Member State to seek authorisation to provide crowdfunding services. Annex I to Annex VI of the draft Regulatory Technical Standards provides a template that summarises the information required pursuant to Art 12(2) of ECSPR.

We believe that the list of information set out in the draft Regulatory Technical Standards to be provided to the Competent Authority of the Member State where the applicant is established is satisfactory. We also appreciate the fact that a template has been drafted which will make it significantly easier for the Crowdfunding Service Providers to comply with the regulation. Finally, the draft template is of the utmost importance to ensure a harmonised application across the EU. A harmonised system is also valuable for Crowdfunding Service Providers wishing to expand and provide services beyond their national borders and into the EU; similarly, harmonisation would prove extremely valuable for potential investors wishing to invest abroad, ultimately, increasing the synergies in the market.

<ESMA\_QUESTION\_ECSP\_6>

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

<ESMA\_QUESTION\_ECSP\_7>

Pursuant to Article 20(3) of ECSPR, the draft Regulatory Technical Standards aims at clarifying the methodology used for the calculation of the default rates of the crowdfunding loans offered on the Crowdfunding Service Provider crowdfunding platforms. On a general note, we believe that such calculation methodologies are useful as long as they do not become too technical to safeguard the interests of non-sophisticated investors.

More technically, we believe that the methodology for the calculation of the default rate of the loans offered on a crowdfunding platform set out in Annex VII Article 2 of the draft Regulatory Technical Standards is sufficiently clear. Nevertheless, a suggestion could be to change the order of Art 2(2)(a) and (b) for the sake of comprehensiveness as the numerator is the higher number of the fraction.

Similarly, the methodology for the calculation of the actual default rate of loans by risk category set out in Article 3 is sufficiently clear, again, it would be advisable to change the order of Art 3(2)(a) and (b).

Finally, the methodology for the calculation of the expected default rate of loans by risk category does not seem sufficiently clear as it does not provide information on how to practically use the actual default rates of loans by risk category identified pursuant to Article 2 to calculate the expected default rate of loans by risk category. Therefore, it is advisable to provide more details as to how such data shall be used by the Crowdfunding Service Providers.

<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 that the list of information to be requested pursuant to Article 21(2) of ECSPR set out in Annex VIII Chapter 2 Article 4(1) of the draft Regulatory Technical Standards is satisfactory. Additionally, we believe that the fact that the request can be tailored to 'the extent appropriate to the nature, scale and complexity of the adapted to the competencies and experiences of the potential investor in question, especially if a non-sophisticated investor.

<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>

Yes, we agree that, in theory, providing perspective non-sophisticated investors an online calculation tool to calculate the possible default rate will improve investor protection by enabling perspective non-sophisticated investors to simulate their ability to bear loss. We appreciate the effort to ensure the online calculation tool is as user-friendly as possible, however, we believe that it may be complicated for non-sophisticated investors to use the system independently as it may be complicated to retrieve the information required by Article 21(5)(a), (b) and (c) of ECSPR and insert them in the tool. Therefore, we believe that such a system, although extremely valuable in theory, may prove expensive for a perspective non-sophisticated investor who may need the help of a professional such as an accountant to use the tool. Additionally, we believe that it should not be mandatory for the Crowdfunding Service Providers to run such systems, therefore, they should be considered as recommendations.

<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>

Yes, we agree that the method to calculate non-sophisticated investor's net worth outlined in Article 7 of the draft Regulatory Technical Standards seems satisfactory. Nevertheless, we stress the importance of ensuring that the online calculation tool be compliant with data protection rules and the GDPR in relation to the information provided by the investors purporting to use the tool.

Again, we stress on the importance of not making such systems mandatory for the Crowdfunding Service Providers.

<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>

We agree and support ESMA's proposal to incorporate the Key Information Investment Sheet (KIIS) approach resulting from Article 23(6) ECSPR, into the template in Annex IX referred to the delegated implementing measure under Article 23(16).

We believe that the standardization of the KIIS required by Article 23 (6) ECSPR through a uniform template could ensure: (i) the transparency of the information on the Crowdfunding Offer; (ii) an informed, autonomous and conscious investment decision relating also to the risks and costs of the investment; (iii) greater investor protection; and (iv) above all the development and promotion of cross-border crowdfunding services in the EU, by ensuring that investors and fund seekers can rely on the same minimum standards on a cross border basis. This would help to facilitate greater trust in cross-border activity as investors could rely on the same standards when accessing platforms.

According to Article 23 (16), ESMA's task was to draft an RTS based on Annex I ECSPR, detailing the relevant points a) to d) of that provision. Thus, in particular, the KIIS template proposed in RTS 7 (see Exhibit IX) should have indicated:

- (a) a concise summary table to allow investors to inquire about the key features of the crowdfunding offering at a glance (as per Article 23(6) and Annex I ECSPR);
- (b) specific requirements to provide investors with meaningful information about, among other: (i) the project owner and the crowdfunding project (as per part A of the Annex I ECSPR); (ii) the principal risks of the crowdfunding project (as per part C of the Annex I ECSPR); (iii) interest rate, applicable yield and maturity (as per parts D of the Annex I ECSPR); (iv) investor rights, including the right to file a complaint (as per parts F and H of the Annex I ECSPR); and (v) fees and costs (as per part H of the Annex I ECSPR).
- (v) fees and costs (including disclosure of all direct and indirect costs incurred by the investor).

But, reviewing the template developed in Annex IX of the RTS 7 delegated measure, we must note the extreme layering of detail obligations related to KIIS, the scope and depth of which we do not fully endorse either in general or on some requirements in particular.

In general, we cannot agree with the overall approach that explicitly refers, as explained in the same consultation document (see par. 75), to the KID (Key Information Document) model of the PRIIPs, governed by the Regulation (EU) No 1286/2014, and still under review by ESAs (following the Consultation Paper published on 16 October 2019 on the draft RTS to amend PRIIPs delegated regulation).

In this regard, we believe that the efforts made by ESMA, in the preparation of the KIIS template, to align the information to that one required by other regulatory frameworks to promote consistency of terminology and requirements in the EU regulation of financial services, especially PRIIPs, does not go in the right direction. But it ends up burdening the owners of crowdfunding projects, which may be start-ups and SMEs, with disclosure requirements that are typical instead of financial institutions authorized to offer PRIIPs on the market.

From this point of view, start-ups and SMEs could suffer from information burdens that are too heavy and in any case such as to make it excessively burdensome to access crowdfunding services to have alternative financing instruments.

In addition, we also have concerns on the imposition of the requirements relating to the “key annual financial figures and ratios” which, according to the provisions of Annex IX proposed in the RTS 7, “shall be calculated in accordance with IFRS or local Generally Accepted Accounting Principles (GAAP)”. But, since start-ups and other SMEs are private companies, often with small balance if not only start-up balance sheets, there is no legal requirement for them to comply with the GAAP developed by the IASB, let alone IFRS, and an information requirement in this sense to access crowdfunding services could constitute an expensive barrier to overcome.

There are some perceived disadvantages of start-up’s adopting GAAP or IFRS principles.

GAAP or IFRS compliance requires knowledge of the general and industry-specific rules and principles that apply to various businesses. This is much harder to manage without the help of a certified finance expert, requiring start-ups to hire an experienced accountant or finance firm rather than founders or business owners trying to do it themselves. And this could entail indirect costs of the same investment required with the crowdfunding offer, such as to discourage the investors.

Therefore, we suggest that the information to be provided with the KIIS be reduced to the bare minimum, limiting the range and depth of information to only the first level information required directly by art. 23 (6). This is also to distinguish the KIIS itself from the Prospectus in respect of the small size of the investments subject to the crowdfunding services governed by the ECSPR. Moreover, it must be considered what stated in the same consultation document, where it is well underlined that the obligations relating to the template of the KIIS need to be less extensive than the requirements for documents provided under Prospectus Regulation, aiming “a less stringent approach (than a prospectus) with regards to the obligations on the content and form of the key investment information sheet, when the ECSPR provisions allow for it” (see par. 78).

<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 KIIS is a pre-contractual document. So, investor protection for information in the KIIS is necessarily linked to the transparency, completeness, adequacy, and truthfulness of the information contained therein, as well as to the certainty that the potential investor has actually received checked and validated KIIS information before deciding whether to subscribe to an investment or to lend.



The topic of liability arises from the adequacy of the KIIS informational level, and the activity required to bring it to the investor's attention which is the responsibility of the project owner and the CSP respectively. In this regard, we believe that the KIIS itself could be alternatively structured on the issue of liability and a clearer provision should be added to the RTS 7 in Annex IX of the proposal especially about the CSPs position.

Article 23(8) to (12) of the ECSPR sets out the obligations related to the information given in a KIIS. Those requirements encompass, inter alia, that: (i) Member States are required to ensure the responsibility of at least the project owner (or its administrative, management or supervisory bodies) for the information given in KIIS. Those responsible for the key investment information sheet must be clearly identified in the respective document (Article 23 (9) and (10)); (ii) a CSP must have in place and apply adequate procedures to verify the completeness, correctness and clarity of the information contained in the KIIS (Article 23(11)), to identify an omission, mistake or inaccuracy in the KIIS that could have a material impact on the expected return of the investment (Article 23 (12)).

KIIS is drawn up by the project owner and it is consistent that the national law of the same deals with the civil liability applying to natural and legal persons responsible for the information given in a KIIS (Article 23(10)). But, CSPs must ensure that the KIIS is complete and must cancel any existing offer where there is a material omission or mistake.

Whereas, in relation to the activity required of the CSP, Article 23 (11) states that « crowdfunding service providers shall have in place and apply adequate procedures to verify the completeness and the clarity of information contained in the KIIS ». Nevertheless, this provision leaves open the question of liability of CSPs and does not make clear if the same CSP is liable for ensuring that he has adequate procedures in place or if also for any material omission or mistake in the KIIS. In addition, what is indicated in the RTS 7 of the Annex IX does not resolve these uncertainties concerning the limits and scope of the responsibility of the CPS, which, it should be noted, is required to validate the information of the KIIS, as per Article 23 (11) and (12).

No other specific duties are required to a CSP in respect of KIIS other than the additional one, after validating the KIIS information, of making the KIIS available on its website and providing it on a durable medium to the potential investor (see article 2 RTS 7). We, therefore, believe that the CSP's area of responsibility should be extended and its obligations strengthened for greater investor protection.

As the responsibility for the truthfulness, and accuracy of the KIIS information remains to the project owner, the only way to reinforce the protection of investors, especially non-sophisticated investors concerning the activity of a CSP is to provide additional rights during the pre-contractual period.

In this regard, especially for the benefit of unsophisticated investors, alongside the benefit from a reflection period during which they can, at any time, revoke their offer to invest or expression of interest in the crowdfunding offer without giving a reason and without incurring a penalty, we suggest strengthening RTS 7 with:

- (a) The express CSP's declaration of absence of conflict of interest that may arise when the project owner is the same person of the CSP;
- (b) the right to withdraw the offer if, between the time of subscription and its closure, a new fact influencing the information provided with the KIIS, or material error is discovered concerning the information displayed on it;
- (c) the obligation of CSPs to verify preliminarily that the investor's characteristics correspond to the essential characteristics and risks of the investment;
- (d) the obligation of CSPs to allow access to crowdfunding offers only by interviews or questionnaires to investors who are aware of the details of the offer for which they have been provided with KIIS;
- (e) the obligation of CSPs to diligently select borrowers/investees and check the information provided for KIISs

Furthermore, we suggest in any case that it should be provided with KIIS different information requirements for crowdlending and crowdfunding.

For crowdlending investors is more helpful to review the performance of the loans generated by a CSP's platform rather than detailed information on individual projects. This includes default rates, recovery rates and other key indicators. Therefore, the KIIS could be enriched with some information under the exclusive responsibility and care of the CSP about some metrics and parameters to measure the loan performance generated by its platform.

<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>

Under the Italian regulatory framework on crowdfunding, good practices of information disclosure can be found under the Consob Reg. no. 18593/2013, updated on 16 February 2020 by the Consob decision no. 21259.

In relation to the information base for an individual offer, we report that under article 16 the crowdfunding providers shall make available to investors in a detailed, fair, clear, non-misleading and non-obscure manner all information regarding the offer that is provided by the project owner so that they may reasonably understand the nature of the investment, the type of financial instruments offered and the risks involved and make investment decisions in an informed manner. Furthermore, the crowdfunding service provider must ensure that the information provided through the portal is up-to-date, accessible for at least 12 months after the closing of the offer and made available to interested parties on request for a period of 5 years after the closing date of the offer. In the Consob Regulation, the information on the offer is not subject to approval by any authority. Moreover, the project owner is solely responsible for the completeness and truthfulness of the data and information provided by him, solving the ECSPR's problem of liability in the event of omission or misstatement of information.

But what characterises Consob's investor protection rules are undoubted all those disclosure requirements that precede and go beyond an individual offer and the KIIS of each of them. There are, in fact, very precise dispositions that anticipate the level of pre-contractual protection of the investor and are based on conduct standards to which every CSP is held, in a general way, in running its activity and in the management of its portal.

In particular, on investor protection related to the general consistency of information not limited to a single offer, we point out:

- Article 13, which lays down precise obligations for the manager of crowdfunding platforms. Among these obligations of conduct, a special part has the rules aimed to avoid conflicts of interest, especially those that may arise from CSP's offers, on its portal, concerning financial instruments of its own issuance or issued by controlling, or controlled, entities (i.e. due diligence by an independent third- party).
- Article 14, which sets out all the detailed information that each CSP must publish on the management of its portal (i.e. i. orders management; ii. any costs on the investors; iii. the measures in place to reduce and manage the risk of fraud; iv. the measures in place to ensure the proper handling of personal data and information; v. the measures in place to identify, prevent or manage conflicts of interest; vi. the measures in place to deal with complaints; vii. the mechanisms provided for alternative settlement of disputes; viii. aggregate data on the crowdfunding offers made through the portal and their outcomes, and so on).
- Article 15, which poses very stringent information standards in relation to the investment in financial instruments through portals.
- In this last respect, it is worth noting that, for non-sophisticated investors, the CSP must ensure that are eligible to participate in individual offers only investors, other than professional investors, who have: 1) read the investor education information made available by Consob on its site; and 2) provided information regarding their knowledge and experience in order to understand the essential characteristics and risks involved in the financial instruments to be offered.

Moreover, this profiling activity, which Italian CSPs carry out with online questionnaires at the stage of the potential investor's registration, give rise to the attribution of a score level of risk appetite. It is repeated when individual acceptances of crowdfunding offers are received, there being also the possibility for the CSP, if it considers that an offer is not appropriate for the potential investor, to warn him/her of this situation.

This new approach, introduced by Consob as early as 2016, and which obliges Italian CSPs to carry out a MIFID profiling of investors before letting them access the online sections where offerings can be made, aims to incentivise the spread of crowdfunding through the simplification of operating methods. In the light of this system, and of the updates due, over time, to the MiFID II revision process, Consob has obtained a

strengthening of investor protections reinforcing its supervision on crowdfunding portals whose activity, in any case, has similar characteristics to those of financing intermediaries, even if they are not authorised to handle funds and financial instruments on behalf of investors.

<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>

We believe that additional benefits arising from the proposed approach taken for the KIIS are especially greater transparency, more risk diversification as a result of greater geographical reach and less regulatory uncertainty that helps investors to make an informed investment decision. The KIIS will also standardise the content and the presentation of information relating to the project owner, the crowdfunding project and the terms and conditions of the offer. A standardized template in the form of the KIIS will enable investors to directly compare potential pay-offs and risks associated with the project across platforms and Member States.

An additional cost that may potentially arise from the proposed approach taken for the KIIS, is the burden for the project owners to draft the KIIS and he could need help from external experts such as lawyers and accountants (especially if the project owner's financial statements and data are to be prepared and provided in accordance with international accounting standards).

Another cost can be that the Member States are required to ensure the responsibility of at least ECSP for information provided in the KIIS by ensuring that their laws, regulations or administrative sanctions procedures reflect that responsibility.

<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 with respect to standards, formats, templates and procedures for the provision of data by CSPs to competent authorities and we believe they appear sufficiently clear and appropriate.

We agree also with the rule setting that the competent authorities of the Member State in which the CSP has been granted authorisation may require ex-ante notification of a KIIS before making it available to potential investors. The KIISs are not subject to ex-ante approval by the competent authorities, provided that this does not entail any authorisation of a crowdfunding project.

<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 reporting requirements are set out in Article 16 ECSPR. Each CSP produces to the competent authority ("CA") that granted authorization an annual report on its activities with a list of projects funded through its crowdfunding platform and the breaking down of the project owners and the amounts raised, the instruments issued, and aggregated information about the investors and invested (Article 16 (1)). National CAs provide the information referred to the above to ESMA in anonymized format (Article 16 (2)).

About, the technical format to be used for the transmission of data from national authorities to ESMA, on which the question focuses, it is necessary to concentrate on two circumstances: 1) the information flow from the national CAs to ESMA represents re-use, albeit partial, of the data already obtained and of the data sets coming from the CSPs; 2) there is a need to make possible the anonymization that each authority is required to do when sending reports to ESMA.

We consider this clarification to be necessary, because from a general point of view we agree with the reasoning under ESMA's decision to reduce the IT implementation cost caused by the submission of data by using a machine-readable form as XML messages developed under ISO 20022 methodology and to adopt, on the other hand, a common electronic format to submit data reporting allowing ESMA and NCAs to put in place reporting solutions involving manual preparation of data, in spreadsheet format or CSV. But, we believe that there may be counter-indications to the use of the CSV format by national CAs arising both from the type of format used by CSPs, which, moreover, appears to be unstandardized, and from the possible worse unsuitability of the CSV format for subsequent anonymizations and de-anonymization operations by ESMA.

A comma-separated value ("CSV") is a delimited text file that uses a comma to separate values. It contains different values separated by a delimiter, which acts as a database table or an intermediate form of a database table. The advantage of using the CSV file format for data exchange is that the CSV file is relatively easy to process by any application and data extraction can be achieved with the help of a simple program. For the most part, a CSV file would only be used for a relatively simple data set, especially whether they are tabular information structures, as is evident from two templates proposed with RTS 8 in Annex X.

On the other hand, if the application requires more complexity a technical standard as eXtensible Markup Language known as XML would be more appropriate. However, the use of machine-readable reporting format, as XML, implies that the reporting entities have to develop specific IT reporting solutions in order to be able to prepare and submit reports.

But, CSV files – which can be a very useful format – are so spartan that the data, without documentation, are often useless as it becomes almost impossible to identify the meaning of the different columns. It is therefore essential that appropriate documentation is provided along with the CSV format files. It is also essential that the structure of the file is respected. The omission of even one field may prevent the reading of all the remaining data in the file, with no possibility of correction, as it is not possible to interpret the meaning of the subsequent fields. Moreover, CSV is difficult to integrate and is not easily scalable.

It is true that the data to be indicated for each CSP, by the CAs are relatively few and with a table structure, and, therefore, such as to make the use of the CSV format very suitable. But the data set must keep intact as much as possible reusability in order to be correctly extracted, aggregated and anonymised by the CAs before being sent to ESMA. And it is foreseeable that there must be a prior massive export of all data sets within servers in order to create a database and proceed to the efficient application of anonymisation tools. Therefore, to say with certainty that the CSV is 100% suitable, apart from its certain usefulness in terms of cost savings, it would be necessary, in our opinion, to understand what the anonymisation tool will be in place and the possibility of using the CSV format for the massive constitution of a database at each CA that gives guarantees on the subsequent usability of the data for various phases preceding the application of the anonymisation tools.

As per Article 16, part 2 of paragraph 2, the purpose of data provision by CAs to ESMA is to provide an aggregated data stream with the aim of developing aggregated annual statistics relating to the crowdfunding market in the Union, we consider that it may be worth using, already at the level of CAs, a more suitable data transmission format for the formation of Open Data.

<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>

Article 16 of the ECSPR establishes the obligation of CSPs to annually report on the funded projects to their CA. This information shall be transmitted, after anonymisation by each CA to ESMA to allow for the publication of annual statistics on the crowdfunding market. As mandated in 16(3), ESMA develops a draft of the ITS which, in the present case, is proposed in Annex X.

As a general principle, we can support ESMA's decision that requires CAs to provide to ESMA the information provided by CSPs in an anonymized format. We agree also with the proposed data hashing techniques which map data to codes (hashes) in order to ensure data anonymization through the use of hashing algorithms.

However, hashing functions aspire to be irreversible, but the existence of identifiers or pseudo-identifiers in the original data message may increase the risk of re-identification. To prevent the re-identification of the hashed information, we recommend that the initial message or the hash value should be encrypted with a confidential key, or that a constant value or random value, known as “salt” should be added to all original messages before the hash is created. Nevertheless, data encryption brings a variety of benefits, that include helping to meet regulatory requirements and prevent service providers from accessing or inadvertently exposing the data.

All of the above, to answer the question, we have to consider that the burden of anonymisation of all data to be transmitted to ESMA lies with each CA. Whereas the CSP, according to Art. 4 of RTS 7, must anonymise – we believe reversibly – only the data relating to the project owners that must include the well-established and widely used Legal Entity Identifier (LEI) and, in case the project owner is a natural person, the set of identification codes for natural persons set out in Article 6 of Commission Delegated Regulation (EU) 2017/590, given that a common international identifier of a natural person has not been established.

In this perspective, the main impact of the ITS formulated in relation to Article 16 is on the CAs who must equip themselves with anonymization tools. But, CAs have a dual role in reporting obligations and receive a large amount of data. The reports to CAs should include information on all projects, including those which did not raise any funds during the year, to enhance their capability to supervise the respective entities as well as to monitor the crowdfunding national markets development. While the purpose of data collection by ESMA is to publish aggregated annual statistics relating to the crowdfunding common market in the Union. Furthermore, as in the proposed ITS there are no precise references to anonymization techniques, as only the “common methods” are required to ensure, probably, the de-anonymisation, reuse and re-aggregation of data by ESMA on a cross-border basis, the problems for CAs maybe even more difficult to solve.

Given the information on the identification of project owners, which will be provided to national CAs, is not required by ESMA and shall be anonymized irreversibly, and the using a hashing algorithm, due to its irreversibility, would ensure that ESMA could not determine the identifier of the project. But CAs have supervisory powers over the CSPs and must be able to de-anonymise all other project information and attribute it to a project owner managed by a specific CSP.

In this perspective, it is foreseeable, therefore, that each CAs will equip itself with a mixed anonymisation tool that makes the re-identification of project owners' personal data irreversible, and the identification of other required data reversible, and that in itself is a major technical problem, because it means combining irreversible anonymisation techniques with a pseudo-anonymisation process.

About pseudonymization, we know that its process allows data to be processed in such a way that it can no longer be attributed to a user, in particular, without the combination of additional information which must, at the same time, not be attributed to an identified or identifiable person. In concrete terms, with this measure, some identifiers are replaced with pseudonyms (or tokens, literally 'symbol' or 'symbolic'), i.e. realistic, but not true, data. The original data are stored in a separate database consisting of a table of correspondences between the original data and the pseudonyms used. This system makes it possible to re-identify persons, as the data controller or processor possesses the 'additional information' that allows the identity of the data subjects to be traced reversibly.

And all this could be very problematic for a CA, which would be obliged to set up and manage more than one database in relation to the crowdfunding activity carried out by its supervised CSPs. Moreover, in all cases where the project owner is a natural person, there would also be huge problems to deal with in this regard.

In fact, with the EU Regulation 2016/679 ("GDPR") the broadening of the notion of personal data in Article 4, attributed only to natural persons, now allows referring to data in the most inclusive and all-encompassing manner possible, with the consequence, however, that such an expansion paradoxically increases, rather than decreases, the difficulties of effective protection in all contexts of the emergence of personal information.

Therefore, we consider that the specific provisions in the ITS of Article 16 ECSPR should be more detailed on the point of the anonymisation techniques to be implemented. Since, according to us, the limits of the encryption must also be clarified

What above, in any case, bearing in mind that each CA, beyond the irreversible encryption of project owner data, is obliged to keep the rest of the information of the KIIS managed by its supervised CSPs in a pseudo-anonymised context and in full compliance with the GDPR for project owners who are natural persons which can benefit from a very broad notion of personal data compared to the mere indication of personal details.

<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>

We agree with the information on the national laws, regulations and administrative provisions applicable to marketing communications. Having two templates will ensure a clear distinction between the notifications requested by Article 28 (2) and Article 28 (3) of the ECSPR and will help ESMA in processing the notifications and information provided. Moreover, standardized templates for notification will help ESMA in processing the notifications received to achieve, increase transparency and investor protection.

To provide greater clarity, the information should be as complete as possible and the relevant bodies of law should be accompanied by hyperlinks in a standardized form. We suggest that CAs should also publish a summary of the national laws, regulations and administrative provisions governing marketing requirements. In order to ensure the ease of access to the information, such summaries should be published on the same page of CAs' website as the complete and up-to-date information on the applicable national laws, regulation and administrative provisions governing marketing requirements. In addition, we agree that the compliance costs are fully justified and largely compensated by the benefits of having a harmonized regime for notifications of national provisions on marketing requirements.

Finally, with regard to marketing communications per se, we would like to underline how Article 28 of the ECSPR along with the ITS pursuant to the paragraph 5 - in the Annex XI - may be a determining factor at the level of national authorities to achieve a desirable level of legal certainty regarding the sources that regulate commercial and marketing communications in the crowdfunding context.

This need is very much felt in Italy since, although in a type of case other than the crowdfunding, even the last level of jurisdiction had to intervene with a decision issued by the Italian Court of Cassation (Cass. no. 29736/2018) on the subject of "Investment Solicitation and Prospectus" concerning the delicate issue of the "soft" or "grey market" phase. The Court's decision is intended as a point of reflection on the boundary between abusive solicitation of investment in the period between the publication of the prospectus and that prior to it, from a perspective that is always aimed at ensuring the protection of investors and the project owners.

<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>

Yes, we believe that the cost-benefit analysis is sufficiently appropriate and clear.

We believe, however, that for greater comprehension, all cost-benefit assessments of the impact analysis can be analytically offered in a tabular format.

<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 conclusion of all the above observations, it is probably worth highlighting the possibility of introducing, through the delegated power of ESMA, an incentive mechanism to CSPs that takes into account the environmental benefits deriving from the digitalization and sharing of information and data related to crowdfunding projects. This is also consistent with the more general perspective of the so-called ecological transition which, as we know, also has impacts in the financial sector.

<ESMA\_QUESTION\_ECSP\_20>