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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 | Max Crowdfund B.V. |
| Activity | CSP (real estate crowdfunding platform) |
| Are you representing an association? | ☐ |
| Country/Region | Netherlands |

# **Introduction**

Please make your introductory comments below, if any:

<ESMA\_COMMENT\_ECSP\_1>

n/a

<ESMA\_COMMENT\_ECSP\_1>

#

Q1

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

<ESMA\_QUESTION\_ECSP\_1>

We believe that there should not be a fixed date to handle a complaint. The nature of some complaints may require more detailed investigations than other complaints and CSP may very well depend on third parties to conclude a complaint. We propose to make this a target date instead. It must be possible to extend this period with substantiation.

<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>

In general, we believe the provided list is appropriate, although it is not an exhaustive list. It seems based on existing rules of conflict of interest in regulation for other financial services sectors. The enumeration of conflict-of-interest situations makes sense in a case where the nature of services may become highly subjective, especially investment firms.

As CSPs do not provide investment advice we believe that the risk of one person being involved in two activities where a real conflict of interest would arise is rather low. Hence, the need for extensive so-called Chinese walls between provision of services is clearly not as high as in the aforementioned entities. We feel that the provided list should be more in line with the nature of the business of the CSP and should focus on avoiding conflicts of interest by involvement of CSPs in campaigns allowed to raise funds and transparent information to investors on conflict of interest that exists.

<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>

Yes

<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>

In general, we see the requirements suggested in the draft RTS as reasonable. ESMA should provide clarifications to Member States as to what “exceptional circumstances causing significant business interruptions or incidents" is intended to capture and what approaches by CSPs would be deemed acceptable in the context of the business continuation plan.

<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 RTS is relevant and detailed. We also would welcome it if ESMA could provide more guidance to Member States regarding the treatment of prudential safeguards, for instance the minimum capital requirement or the procedure to ensure correctness and completeness of the KIIS.

<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>

We feel, the description of the marketing strategy that the prospective CSP plans to use in the Union, including languages of the marketing communications; identification of the Member States where advertisements will be most visible in media and expected frequency is in our view far too concrete and unnecessary detailed for the purposes of the application. Furthermore, due to passporting option, the member states where the offers are marketed as well as the languages may change, therefore we see no reason why this should be included already in the initial application. Clearly, CSPs will need to comply with marketing restrictions of the Member States they are operating or intending to operate in.

<ESMA\_QUESTION\_ECSP\_6>

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

<ESMA\_QUESTION\_ECSP\_7>

We do not think that the methodology is entirely clear and more important: could do better serving its purpose to inform (potential) investors. Regarding the calculation of the default rate, in Article 2 paragraph 2 of the RTS, the denominator consists of the number of non-default loans and the numerator consists of all loans with at least one default. This calculation does not reflect that some loans amount to EUR 100k whereas others could be up to EUR 5m. We strongly encourage investors to reduce risk by spreading their investments. We feel a weighted calculation method for default rates would best serve the purpose to properly inform investors. At least, ESMA should allow for both methods to be presented together.

The calculation method in the RTS does not take the actual risks from a default situation into account. A default situation indicates a risk of loosing money. The longer a default situation lasts, the higher the risk of losing money will be.

Also, the loan may be partially or even almost repaid. Only the actual outstanding amount is at risk of being fully repaid to investors. A loan may be fully recovered from the securities provided on that loan. Hence, the actual effect from the default situation to investors would be zero, which is not reflected in current model.

We suggest considering an alternative, weighted model:

* Default 90 - 179 days: 25% of outstanding amount added to numerator
* Default 180 - 269 days: 50% of outstanding amount added to numerator
* Default 270 - 359 days: 75% of outstanding amount added to numerator
* Default 360 days or more: 100% of outstanding amount added to numerator

Denominator being the total outstanding amount from all loans.

Default % = (numerator / denominator) x 100%

In the event, an alternative repayment schedule has been agreed with all investors, a default status of a loan is lifted and therefore not (no longer) included. Also, full recovery of a loan is reflected in this model since the default situation would no longer exist.

We recommend that CPS updates (at least) monthly and presents its Default % on their platform.

The RTS as well as abovementioned alternative do not cover insight in actual loss that has occurred. A default situation always results in either a full recovery of a loan or a (partial) loss of the money invested. We suggest CSPs should report on actual losses as well. We propose:

Numerator being the total amount over time that is written-off (no further options for recovery exist, hence lost).

Denominator being the total amount raised on CSP platform.

Written-off % = (numerator / denominator) x 100%

We recommend that CPS updates (at least) monthly and presents its Written-off % on their platform.

<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>

Yes, but if the information is requested via open questions, it will be too burdensome for the CSP to assess the responses. We suggest providing guidance to Member States that the information can be requested through multiple choice questions by the CSP.

Under current definition the test is repeated each time a non-sophisticated investor invests the highest of EUR 1000 or 5% of its net worth. We presume this refers to the total invested or outstanding amount other than a single investment. We suggest defining this more clearly. We also propose a subset of the comprehensive initial test can be applied when the test is repeated.

<ESMA\_QUESTION\_ECSP\_8>

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

<ESMA\_QUESTION\_ECSP\_9>

We agree that CSPs should make available, either on their own website or via a link to a third party, an online calculation tool as suggested for the benefit of the prospective investor. However, we do not believe that the use of such a calculation tool should be a mandatory requirement to accept investments from prospective non-sophisticated investors.

<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 suggest to add Business income to article 8 (2). Question: should the value of crypto currencies held be considered as liquid assets?

<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 fully support this proposal.

<ESMA\_QUESTION\_ECSP\_11>

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

<ESMA\_QUESTION\_ECSP\_12>

We believe that the KIIS is well structured and captures all relevant data and should be made available to all prospective investors and remain available after the investment.

We would suggest a few clarifications within Annex IX:

With regard to Ownership (Annex IX Part A(a)) we suggest to limit listing to the Beneficial Owners (25% ownership/control or more).

With regard to the “Deadline” as stated in the Overview of the Offer in Annex IX we suggest to clarify that this deadline describes the date at which the offer will be closed the latest but may be closed prior to the subscription deadline in case of being fully subscribed at an earlier point in time. Also, it should be possible to extend the Deadline.

With regard to the delivery date of the financial instruments (as per Annex IX Part D(e)) we suggest to clarify that the the delivery date under certain circumstances might be subject to conditions outside the scope of the CSP or issuer, for example when the delivery of the financial instrument is subject to conditions related to the investment, such as securities against assets, i.e. mortgages or liens) or the need for notarisation.

With regard to the calculation of the Nominal Interest Rate (Annex IX Part D(h) and Part G(b) we suggest to allow for all commonly in financial services used calculation methods (30/360, 30/365, 365/365 and 365/360) of Nominal Interest Rates in order to allow for adequate assessment of different assets and business models. However, we would suggest that the CSP must clearly communicate the applied calculation method to potential investors on their website and within the KIIS.

<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>

n/a

<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 a CSP would collect to some degree the same information as requested within the KIIS as part of their usual due diligence.

<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 recitals of the RTF should clarify to what extent and how the data is provided? Will this be by submitting KIIS or otherwise and when?

The provided data contains sensitive business information, which do not become publicly available. Therefore, it is of utmost importance to provide assurances that the data will be received and stored in a safe manner and in accordance with applicable privacy laws at all times.

<ESMA\_QUESTION\_ECSP\_15>

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

<ESMA\_QUESTION\_ECSP\_16>

We generally agree that the format, in which the data shall be submitted should be a relevant, secure and accessible format. We suggest a Comma Separated Values (CSV) or similar widely used format.

In order to limit future reporting burdens to issuers and CSPs, especially also with regard to the potential impact of the European Single Access Point (ESAP) to information published by companies in the area of financial services, we would ask ESMA to provide further guidance to Member States allowing for long term harmonisation of secure data collection and storage and consistent reporting format to various CAs.

We suggest ESMA make relevant recommendations to Member States in order to ensure appropriate standardised data security and/or encryption during the data transfer from the CSP to the CA in order to safeguard private and confidential business information.

<ESMA\_QUESTION\_ECSP\_16>

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

<ESMA\_QUESTION\_ECSP\_17>

We believe that the data provided to ESMA, as suggested, should be in a more generic and anonymised aggregate format than the one provided to CA. All identifiers that would allow identifying individual SME should be removed from the data and all legal safeguards regarding data protection and privacy laws should be respected.

<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>

No comments, the RTS as drafted seems adequate to achieve an easy access of CSP to information about national rules related to marketing communications.

<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>

n/a

<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>

n/a

<ESMA\_QUESTION\_ECSP\_20>