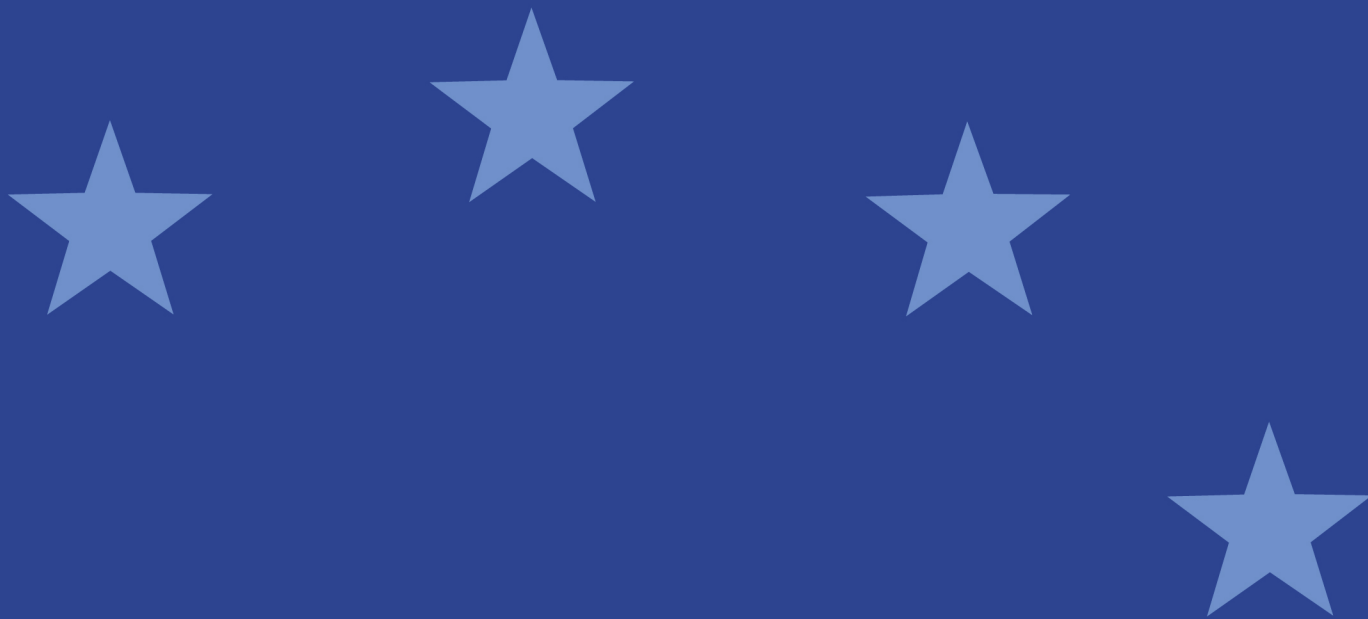




European Securities and  
Markets Authority

## **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:

- 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 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:

- 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](#)'.

### **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	Innovestment GmbH
Activity	Other - Crowdfunding Service Provider
Are you representing an association?	<input type="checkbox"/>
Country/Region	Germany

## Introduction

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

<ESMA\_COMMENT\_ECSP\_1>

Innovestment is a lending-based Crowdfunding platform for SME in the space of innovation, technology and sustainability founded 2011 based in Berlin. Our CEO Christin Friedrich is chairwoman of the European Crowdfunding Network.

<ESMA\_COMMENT\_ECSP\_1>

**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. The current proposal to revert within 10 business days stating the indicative timeframe within which a decision on the complaint may be expected, offers CSP with the possibility to assess on a case-by-case basis how much time it requires for a fair and thorough investigation. While we believe this in general sufficient, there may be a need to distinguish between complaints relating to the services that the platforms provide and complaints towards actions of campaign owners. It should be possible to extend the 10 days period, in case the complaint is raised in connection to the campaign owner. Platform may not be able to comply without timely cooperation of the campaign owner in for instance providing information relevant for handling the complaint.

As a separate point, we are missing clarity on the meaning of “complaint” in order to provide guidance as to when a question or statement of dissatisfaction of a client constitutes a “complaint” pursuant to this regulation. We believe that there should be a definition of complaint within the scope of ECSP by ESMA. Such definitions should address the specificity of ECSPR and should not be taken from other, different regulations, such as MiFID, which are very different in scope. We believe ESMA should provide relevant guidance to Member States in this respect.

Finally, we would note that, in Article 2 of the Draft RTS pursuant to Article 7(5) of the ECSPR, the effect of the wording is such that even where a client has agreed in writing to receive communications with the CSP in a designated language, the complainant may still choose to file a complaint in the language of a Member State where the CSP provides its services rather than the agreed language. This is not a reasonable outcome: it contradicts the spirit of the agreement between the CSP and the client as to the language in which they will communicate, and it has the potential to be highly burdensome for smaller platforms. We would therefore suggest that, in the second sentence of Article 2(2), the word “may” be replaced with “must”.

<ESMA\_

<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 a non-exhaustive list. However, as the argumentation is leaning heavily on existing rules of conflict of interest in regulation for other financial services sectors, we do not believe that it fully appreciates the specific intention of ECSPR. 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 by far not as high as in the aforementioned entities. We believe that ESMA should provide guidance to Member States to ensure the adequate implementation of ECSPR in line with its intentions.

<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, we believe these requirements strike an appropriate balance

<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 however would encourage ESMA to provide guidance to Member States to the meaning of “material change” in the meaning of ECSPR, which we believe must sufficiently diverge from existing definitions as used for example in securities law, as well as the meaning of “exceptional circumstances causing significant business interruptions or incidents” within the meaning ECSPR to ensure appropriate implementation across Member States. 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>

In the application, ESMA asks the applicants, not only to provide the overview of crowdfunding services that the CSP intends to provide, but also ancillary services such as asset-safekeeping, payment services, bulletin board etc. We believe that this goes beyond and above the intended requirements in ECSPR, because in the respective Article 12(2)(d) the regulation requires to determine only the crowdfunding and not ancillary services that the CSP intends to provide. In addition, 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 too concrete and unnecessary 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.

<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. The default period of 90 days is too short for the operating model described in ECSPR and used in the market, which is different from incumbent financial services as regulated under existing financial services laws. Generally, project owners pay interest/repayments on a quarterly basis. Therefore, if a project owner is late one quarter or an alternative repayment schedule is agreed because of which the loan is postponed by one quarter, the CSP would need to report the project as default. In practical terms, late repayments may not constitute a default if alternative repayment options have been negotiated with the investors, as has happened during the COVID crisis. Many project owners fully repay the loan after being late a quarter. Therefore, we would like to ask ESMA to extend the 90 day period to more than two quarters in order to reflect the specific business model regulated by ECSPR and suggest the wording for Article 1 sub 1 (b) to change to “the project owner is more than two

quarters past due on any material credit obligations and no alternative repayment schedule has been agreed with all investors.”

With regard to 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. While we understand that ESMA seeks to encourage comparable default rates across the sector, we would suggest adjusting the calculation method or to allow for two separate methods to be presented together. We suggest as an option for Article 2 sub 2: (a) the denominator consists of the number total amount of non-defaulted loans observed at the beginning of the 12-month observation window; (b) the numerator includes the amount of all loans considered in the denominator that had at least one default event during the 12-month observation window.

With regard to Article 2 sub 4, which states that in case of bias due to the relevant presence of short-term loans, CSPs shall take appropriate adjustments in the calculation of the default rate for the purpose of paragraph, we suggest ESMA provide guidance to Member States on the appropriate measures to be taken by the CSP.

<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>

As a threshold point, we do not believe that focusing on investors' previous investments or formal education or professional training represents the best way to ensure that a non-sophisticated investor understands the risk of what he or she is investing in. One of the significant innovations created by some of our members, for example crowdfunding platforms in the UK, has been the use of authorisation questionnaires that require the investor to demonstrate (through correctly answering multiple choice questions) that he or she actually understands the risks and characteristics of the prospective investments. Given that often investors with little formal experience have a substantial understanding of risk--and, conversely, experienced investors often do not understand risk as well as one might hope--far fewer false positives and false negatives are achieved through testing the investor on actual understanding rather than experience or education. We would therefore strongly encourage ESMA to consider replacing the list of information set out in Article 4(1) with a requirement that the CSP tests the investor's actual understanding of risk through a multiple choice questionnaire.

In the event that ESMA does not make this change and stays with the list set out in Article 4(1), we would strongly encourage ESMA to provide specific guidance that multiple choice / range-based questions can be used in lieu of open fields. If the information is requested via open questions, it will be too burdensome for the CSP to assess the responses. Especially since the test will need to be repeated each time a client invests EUR 1000 or 5% of its net worth, we suggest to provide guidance to Member States that the information can be requested through multiple choice questions by the CSP. For instance, please indicate how often you have invested in financial instruments or loans in the last three years A. never; B. between 1-5 times; C. between 6 to 15 times; D. more than 15 times.

<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>

8

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. We suggest an alternative wording for Article 6 sub 1: “Crowdfunding service providers can make available on their website a tool enabling non-sophisticated investors to simulate their ability to bear loss, or redirect to an adequate third party tool or one provided by the relevant national authorities that are responsible for financial literacy.” 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. We also do not believe that the CSP or

a third party should be allowed to make use of such data in their business operations and would suggest that such a tool does not identify the user.

<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

<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. The KIIS should be made available to all prospective investors and be retrievable after the investment.

We believe that the prospective investor must acknowledge that he is aware of relevant data protection and privacy laws prior to the CSP sharing any individual KIIS and that the liability for sharing any information from the KIIS with unauthorised persons may result in liability toward the issuer.

We believe that the KIIS should include relevant language that clarifies that the submitting issuer is aware that the KIIS will not only be shown to prospective investors in line with relevant data protection and privacy laws by the CSP but also shared by the CSP in its entirety with the NCA and, in aggregate format, with ESMA.

We would suggest a few clarifications within Annex IX:

With regard to Ownership (Annex IX Part A(a)) we suggest clarifying the text to ensure that existing private investors with a minority stake in the ownership do not have to be listed within the form. We would rephrase the text to read: "The date of the last change of ownership and a brief description of the ownership structure of (i) the project owner and, (ii) where relevant, the project. This information may be presented as a diagram. Existing private investors in the project owner - other than management - with a minority stake of less than 5% post valuation shall have the option to remain unnamed."

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. This would reflect that in practice there always is an initial subscription period with a set closing date, but that sometimes the offer is either fully subscribed - even oversubscribed - at an earlier date or not yet fully subscribed within that period. By setting an end date, CSPs must allow for adequate flexibility for issuers to allow closing already prior to the subscription deadline or after. We therefore suggest that the Deadline shall define the longest possible time frame under which the offer may be available for prospective investors, but that the issuer may be able to close the offer in case of being fully subscribed or oversubscribed at an earlier point in time.

With regard to the delivery date of the financial instruments (as per Annex IX Part D(e)) we suggest to clarify that 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. It may be adequate to require CSP to choose one of the suggested methods.

<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 that the preparation cost of the KIIS is acceptable regarding the benefits for the investors, especially since CSP would collect to some degree the same information as requested within the KIIS in 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 recital of the RTF claims that the collected data will be used for two purposes e.g. (i) enhancing capability to supervise the respective entities, including the provision of crowdfunding services as foreseen in Article 17 of the ECSPR, and (ii) monitoring of market trends per category such as sector or type of investors.

The recitals of the RTF should further clarify to what extent and how the reported data would help with the monitoring function, so that reporting entities are aware of the manner in which the data will be scrutinized for the reporting purposes.

The provided data is very sensitive business information, which in most cases 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 laws at all times, and that it will only be shared publicly on an anonymised or aggregated basis.

<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. However, we believe the format, if other than CSV does not need to be machine-readable, because it could pose additional IT-related burdens on the reporting entities. In the context of the purpose of the reporting and scope of the suggested data-points we do not see any justification for imposing such a burden.

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 guidance to Member States allowing for long term harmonisation of secure data collection and storage.

We suggest ESMA make relevant recommendations to Member States to ensure appropriate standardised data security and/or encryption during the data transfer from the CSP to the NCA 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 NCA. The reason is that ESMA does not have the capacity to directly monitor platforms within ECSPR. To this end 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 additional comments, the RTS as drafted seems to us 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>

Yes

<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>

We believe that ESMA should provide as much clarity within the technical standards as possible, in order to avoid unnecessary fragmentation through national implementation. To this end, we would like to ask ESMA to provide as much clarification as possible with regard to the identification of “admitted instruments for crowdfunding purposes” and ask for their timely publication by ESMA.

We also would like to make two points with respect to the use of Special Purposes Vehicles (SPVs). First, we would point out to ESMA that we understand, and would appreciate ESMA's confirmation, with regard to the Q&A from 25 February 2021 (ESMA35-42-1088) on the use of Special Purpose Vehicles (SPV) and in line with REGULATION (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020, that the CSP can administer the SPV against fee arrangements (including performance-based fees, such as carried interest), but cannot have an economic interest in the SPV otherwise.

Second, we understand, and would appreciate ESMA's confirmation, that it is contemplated that a CSP can administer the SPV as described above as part of its authorisation under the Regulation, and the CSP therefore does not require a separate licence (such as under MiFID) to provide such administration services.

<ESMA\_QUESTION\_ECSP\_20>