Reply Form

**to the Consultation on draft ITS specifying certain tasks of collection bodies and certain functionalities of the European Single Access Point**

**Responding to this Consultation Paper**

ESMA invites comments on all matters in this Consultation Paper and in particular on the specific questions summarised in Annexes. Comments are most helpful if they:

* respond to the question asked;
* indicate the specific question to which the comment relates;
* contain a clear rationale; and
* describe any alternatives ESMA should consider or comment to specific questions irrespective of the preferred option.

ESMA will consider all comments received by **8 March 2024.**

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 below steps when preparing and submitting their response:

* Insert your responses to the questions in the Consultation Paper in this reply form.
* Please do not remove tags of the type < ESMA\_QUESTION\_ESAP\_0>. 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 responses, save the reply form according to the following convention: ESMA\_CP1\_ESAP \_nameofrespondent.
* For example, for a respondent named ABCD, the reply form would be saved with the following name: ESMA\_CP1\_ESAP \_ABCD.
* Upload the Word reply form containing your responses to ESMA’s website (**pdf documents will not be considered except for annexes**). All contributions should be submitted online at www.esma.europa.eu under the heading *‘Your input - Consultations’*.

**Publication of responses**

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publicly disclosed. 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 may be of particular interest to securitisation investors/potential investors, securitisation issuers/originators, market infrastructures, securitisation repositories, credit rating agencies as well as public bodies involved in securitisations (market regulators, resolution authorities, supervisory authorities, central banks and standard setters).

# General information about respondent

|  |  |
| --- | --- |
| Name of the company / organisation | S&P Global |
| Activity | Others |
| Are you representing an association? |[ ]
| Country / Region | International |

# Questions

1. Do you agree with the preferred approach outlined above, under which the validations will be defined on a cross-cutting basis without specifying explicitly the types of information to which a given validation should be applied (and understanding that they should be performed always when relevant for a given type of information as set out in the ITS on tasks of collection bodies or sectoral ITS)?

<ESMA\_QUESTION\_ESAP\_1>

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<ESMA\_QUESTION\_ESAP\_1>

1. Do you agree with the above proposal how the collection bodies shall verify that the information is data-extractable? In case of any challenges foreseen, please propose alternatives.

<ESMA\_QUESTION\_ESAP\_2>

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<ESMA\_QUESTION\_ESAP\_2>

1. Do you agree with the above proposal how the collection bodies shall verify that the information is machine-readable? In case of any challenges foreseen, please propose alternatives.

<ESMA\_QUESTION\_ESAP\_3>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_ESAP\_3>

1. Do you agree with the above proposal for the validation of the metadata? In case of any challenges foreseen, please propose alternatives.

<ESMA\_QUESTION\_ESAP\_4>

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<ESMA\_QUESTION\_ESAP\_4>

1. Do you agree with the proposed approach to the validation of the electronic seal? In case of any challenges foreseen, please propose alternatives.

<ESMA\_QUESTION\_ESAP\_5>

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<ESMA\_QUESTION\_ESAP\_5>

1. Do you agree that the format of rejection feedback to the submitting entities should be standardised?

<ESMA\_QUESTION\_ESAP\_6>

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<ESMA\_QUESTION\_ESAP\_6>

1. Do you agree that the rejection feedback should be provided in a common format in accordance with ISO 20022 methodology?

<ESMA\_QUESTION\_ESAP\_7>

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<ESMA\_QUESTION\_ESAP\_7>

1. Do you agree that the rejection feedback should be provided within sixty minutes?

<ESMA\_QUESTION\_ESAP\_8>

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<ESMA\_QUESTION\_ESAP\_8>

1. Do you agree that QES under ESAP should be in XAdES, CAdES or PAdES format?

<ESMA\_QUESTION\_ESAP\_9>

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<ESMA\_QUESTION\_ESAP\_9>

1. Do you agree that there is no need to use ASiC format under ESAP?

<ESMA\_QUESTION\_ESAP\_10>

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<ESMA\_QUESTION\_ESAP\_10>

1. Do you agree that QES under ESAP should be at least at conformance level LT?

<ESMA\_QUESTION\_ESAP\_11>

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<ESMA\_QUESTION\_ESAP\_11>

1. Do you agree with the requirement to include ISO 17442 LEI code as an attribute in the digital certificates whenever the information submitted to ESAP is accompanied by a QES?

<ESMA\_QUESTION\_ESAP\_12>

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<ESMA\_QUESTION\_ESAP\_12>

1. Are there any other characteristics of the QES that should be defined under ESAP?

<ESMA\_QUESTION\_ESAP\_13>

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<ESMA\_QUESTION\_ESAP\_13>

1. Do you agree with the proposed approach to the open standard licences which shall be applied by collection bodies to the datasets to be made available to ESAP? If not, why not and what alternative approach would you suggest?

<ESMA\_QUESTION\_ESAP\_14>

S&P Global has concerns about the suggested approach outlined in paragraphs 51 – 58 of the Consultation Paper to allow open standard licences to be applied by collection bodies to datasets reported to ESAP. We believe that this suggestion is not in line with the intended approach outlined in the Level 1 ESAP Regulation concerning the limitations to use and re-use under certain circumstances to protect the commercial rights of reporting entities. We therefore urge that basic mechanisms to safeguard the intellectual property of information submitted to ESAP be introduced around the concept.

The ESAP Regulation contains a provision that is intended to prevent the limitation of use and re-use of information made available through ESAP for ***"regulatory and non-commercial purposes"*** (see Recital 18 and Article 9). However, the ESAP Regulation does not prevent limitation of use and re-use for other purposes, including limitation of use for commercial purposes. The ability and intent to limit use and re-use of ESAP information for commercial purposes is therefore clear.

S&P Global welcomes this safeguard (similar to safeguards on the European Ratings Platform) as it is essential to maintain the integrity of the credit ratings information made available on ESAP. If firms were unable to prevent use and re-use for commercial purposes, third parties could alter, either intentionally or accidentally, the credit ratings reported to ESAP by ESMA-regulated Credit Rating Agencies (CRAs) and disseminate these to the market.

Moreover, credit ratings are not simply regulatory disclosures but are commercial products created in line with the CRA Regulation by trained analysts applying a proprietary methodology. Credit ratings enable financial markets to operate more efficiently and effectively by conveying independent assessments of credit risk to the market and are used by financial market participants for many purposes in addition to regulatory reporting. Without having effective measures in place to limit use and re-use for commercial purposes and to prohibit adaptations, credit ratings could be taken from ESAP and commercialized by third parties which could lead to potential errors in transmission and the publication of credit ratings which are not faithful to the original.

Such re-commercialization of credit ratings without the permission of the issuing CRA could also create a situation where financial market participants could unknowingly be using “stale” credit ratings provided through an unauthorized third party. Importantly, given the use of credit ratings in EU prudential regulation for banks (Capital Requirements Regulation) and insurance undertakings (Solvency II), having multiple and competing sources of credit ratings would introduce undue risk into the financial system.

However, in paragraph 56, the consultation states that the conditions of the CCO “allow users to copy, modify, distribute, and perform the work even for commercial purposes”. We do not believe this is aligned to the wording in Article 9 and Recital 18 of ESAP which explicitly states that the limitation should apply to “use and re-use to regulatory and non-commercial purposes”.

Paragraph 51 of the Consultation Paper states that the Joint Committee’s mandate to apply an open standard licence *"deals with the licences which* ***collection bodies*** *may apply to the datasets they make available to ESAP"* (emphasis added).

S&P Global welcomes and supports the expectation that collection bodies should waive any copyright and related rights by the collection bodies in relation to ESAP (Paragraphs 56 – 58 Consultation Paper). This reflects the intention not to provide database rights for collection bodies per Article 5(5) ESAP Regulation. The collection bodies act as repositories of this information only by virtue of their role as collection bodies under the ESAP Regulation.

However, certain information reported to the collection bodies responsible for ESAP may have copyright and related rights in the underlying information which makes up the datasets, such as the credit ratings issued by CRAs. The rights held by CRAs are separate and distinct from the waiver undertaken by the collection bodies with regard to intellectual property rights in the datasets. As such, the collection bodies are not entitled to license or waive rights of CRAs.

Therefore, an appropriate licence from the Creative Commons suite must be selected in order to adequately protect rights in the underlying information. The proposal to apply the "Creative Commons Public Domain Dedication CC0" to the datasets which collection bodies make available to ESAP is concerning. If CC0 were to be applied, then it must be combined with a clear warning to ESAP users about continuing rights of the ultimate authors in the underlying data. In this respect, we suggest that Creative Commons licence BY-NC-ND should be applied instead of CC0.

Paragraph 55 of the Consultation Paper considers that it is "appropriate" that data is made available by collection bodies for use and re-use under the conditions of the CC0. Public Domain Dedication CC0 differs from the six available Creative Commons licences. CC0 waives all copyright and related rights to the fullest extent permitted by law so third parties may use a work to which CC0 is applied for any purpose. However, the six available standardized licences in the Creative Commons suite place varying degrees of limitations on the licence granted. Of the six licences, licence BY-NC-ND should be applied instead of CC0. Licence BY-NC-ND prohibits commercial use and protects the integrity of the underlying data by prohibiting adaptations of the underlying data which is consistent with the ESAP Regulation for the reasons set out below.

In proposing CC0, paragraph 54 of the Consultation Paper relies on the Commission Guidelines on recommended standard licences, datasets and charging for the re-use of documents. These Guidelines were introduced in relation to Directive 2013/37/EU on the re-use of public sector information. However, the Guidelines specifically note that *"it should be borne in mind that the Directive* ***does not apply to documents for which third parties hold intellectual property rights****"* (emphasis added). Importantly, information in the datasets made available to ESAP is information authored by third parties and in which third parties hold intellectual property rights. Caution should therefore be exercised in any suggestion to adopt CC0s.

Per paragraph 58 of the Consultation Paper, under the CC0 the collection bodies would waive all copyright and related rights to the fullest extent permitted by law. This would allow third parties to use the datasets for any purpose, including for commercial purposes, "subject to other laws and the rights others (most importantly, the preparers of the information) may have in the work or how it is used". As a preparer of the information i.e. the credit ratings submitted to the collection bodies and made available on ESAP, we welcome the acknowledgment by the Joint Committee that any use third parties would be subject to the rights of the preparers in the work or how it can be used.

Under CC0 the affirmer (i.e. the collection body) disclaims responsibility for clearing the intellectual property rights of other persons which may apply to the work(s) covered by the CC0 including any person's copyright or related rights in the work(s) (see, for example Article 4(c) of the CC0 Legal Code). In addition, the explanatory notes emphasise that "you should only apply CC0 to your own work, unless you have the necessary rights to apply CC0 to another person's work".

The collection bodies will not conduct any clearance of rights in the underlying information. If ESAP applies CC0 to datasets made available by the collection bodies, a clear warning should also be made clear to users in respect of rights in the underlying information. The warning must explain that CC0 only waives rights of the collection bodies and not the rights of the preparers of the underlying information, such that the preparers may have rights entitling them to prevent commercial and other potentially harmful use and re-use of the information made available on ESAP consistent with the ESAP Regulation.

For the above reasons, the Creative Commons approach applied by the collection bodies must not purport to provide a waiver or licence under the preparers' rights in the information contained within the datasets. Therefore, if CC0 is to be applied by the collection bodies, it should be combined with a warning to ESAP users as to the possibility of continuing preparers' rights in the information contained within the datasets. Alternatively, and preferably, Creative Commons licence BY-NC-ND should be applied by the collection bodies instead of the CC0 Public Domain Dedication. Creative Commons licence BY-NC-ND more adequately protects the preparers' rights in the information whilst also complying with the scope of the permitted limitations of use and re-use under the ESAP Regulation.

<ESMA\_QUESTION\_ESAP\_14>

1. Do you agree with the proposed characteristics of the API for data collection? If not, what alternative characteristics would you recommend?

<ESMA\_QUESTION\_ESAP\_15>

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<ESMA\_QUESTION\_ESAP\_15>

1. Do you agree with the proposed approach to the format, list and characteristics of the metadata? If not, what alternative approach would you recommend?

<ESMA\_QUESTION\_ESAP\_16>

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<ESMA\_QUESTION\_ESAP\_16>

1. Do you agree with the proposed approach with regards to time limits? If not, what alternative approach would you suggest?

<ESMA\_QUESTION\_ESAP\_17>

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<ESMA\_QUESTION\_ESAP\_17>

1. [for users of information only] Do you currently access price and time-sensitive information via the Officially Appointed Mechanisms or other (private or public) databases? If so, which ones? If not, how do you access such information?

<ESMA\_QUESTION\_ESAP\_18>

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<ESMA\_QUESTION\_ESAP\_18>

1. Do you expect that a maximum time delay of sixty minutes between when information is available at the level of the collection body and when it is available on ESAP will diminish the usefulness of ESAP? If so, what maximum time delay would you consider acceptable?

<ESMA\_QUESTION\_ESAP\_19>

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<ESMA\_QUESTION\_ESAP\_19>

1. Do you agree with the indicative list of formats and characteristics proposed? If not, what alternative formats or characteristics would you recommend?

<ESMA\_QUESTION\_ESAP\_20>

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<ESMA\_QUESTION\_ESAP\_20>

1. Do you agree with the proposed characteristics of the API for data publication? If not, what alternative characteristics would you recommend?

<ESMA\_QUESTION\_ESAP\_21>

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<ESMA\_QUESTION\_ESAP\_21>

1. Do you agree with the proposal to specify that the legal entity identifier should be the ISO 17442 LEI code? If not, what other identifier would you suggest and why?

<ESMA\_QUESTION\_ESAP\_22>

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<ESMA\_QUESTION\_ESAP\_22>

1. Do you agree with the proposed approach with regards to types of information? If not, what additional/ alternative type of information do you recommend?

<ESMA\_QUESTION\_ESAP\_23>

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<ESMA\_QUESTION\_ESAP\_23>

1. Do you think that information required at national level pursuant to Article 3(1) of the Transparency Directive (so-called gold plating) should be captured by certain specific types of information? Or would you prefer such information be captured by one generic category, namely “Additional regulated information required to be disclosed under the laws of a Member State”?

<ESMA\_QUESTION\_ESAP\_24>

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<ESMA\_QUESTION\_ESAP\_24>

1. Do you agree with the proposed approach with regards to the categories of the size of the entities? If not, what alternative approach would you suggest and why?

<ESMA\_QUESTION\_ESAP\_25>

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<ESMA\_QUESTION\_ESAP\_25>

1. Do you agree that it would be disproportionate to the purpose of the ESAP search function to introduce new categories by size for reporting regimes where currently no size category is foreseen in level one legislation? If not, for what additional categories of entities would you add a size category and on the basis of what thresholds?

<ESMA\_QUESTION\_ESAP\_26>

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<ESMA\_QUESTION\_ESAP\_26>

1. Do you think it would be useful to leverage on the thresholds introduced by DORA for the classification by size of at least some entities in scope of ESAP, such as IDD intermediaries and PRIIS manufacturers? If not, why not? If yes, are there other entities in scope of ESAP for which you think the thresholds defined in DORA would be applicable and/or useful?

<ESMA\_QUESTION\_ESAP\_27>

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<ESMA\_QUESTION\_ESAP\_27>

1. Do you agree with proposed approach with regards to the categorisation of industry sectors? If not, what approach would you suggest and why?

<ESMA\_QUESTION\_ESAP\_28>

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<ESMA\_QUESTION\_ESAP\_28>

1. Do you think additional or fewer sectors would be appropriate for the ESAP search function? If so, which ones would you propose to add and/or remove?

<ESMA\_QUESTION\_ESAP\_29>

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<ESMA\_QUESTION\_ESAP\_29>