



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 28th May 2021**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the steps below when preparing and submitting their response:

- 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 under the heading 'Your input – Open consultations' → 'Consultation on draft technical standards under the ECSP Regulation').



Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. If you do not wish for your response to be publicly disclosed, please clearly indicate this by ticking the appropriate box on the website submission page. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading '[Data protection](#)'.

Who should read this paper?

This Consultation Paper primarily of interest to crowdfunding service providers within the meaning of point (e) of Article 2(1) of the ECSP Regulation, competent authorities and other entities that are subject to the ECSP but it is also important for trade associations and industry bodies, sophisticated and non-sophisticated investors, consumer associations, as well as any market participant engaged in the provision of crowdfunding services



General information about respondent

Name of the company / organisation	FG Lawyers
Activity	Legal and Accountancy
Are you representing an association?	<input checked="" type="checkbox"/>
Country/Region	Netherlands

Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_ECSP_1>

We, FG Lawyers, kindly make use of the opportunity to respond to the Consultation Paper.

FG Lawyers is a boutique law firm based in Amsterdam, the Netherlands, focusing on corporate & (alternative) finance and FinTech from a transaction, advisory and litigation perspective. We advise – both national and cross border – on, amongst other things, alternative financing such as crowdlending, market place lending, crowd investing as well as on the financial and regulatory issues affecting the businesses of FinTech initiatives, including blockchain based business models such as initial (crypto)coin offerings and smart contracts. We regularly respond to law initiatives and publish on FinTech related matters, including in respect of the Crowdfunding Regulation.

We limit our response to this consultation document to the material questions we (and our clients) have in respect of the (scope of the) Crowdfunding Regulation. We do not have material input to the Consultation Paper itself. The draft RTS and ITS are drawn up well and seem to give more substance to the open standards included in the Crowdfunding Regulation in an adequate manner. With our response, we hope to obtain some further guidance from ESMA and EBA in relation to questions that we remain to have in respect of the Crowdfunding Regulation after reading the Consultation Paper in detail. We do understand that some of these questions may not fall within the scope of the delegated powers of the Commission, ESMA and/or EBA. We would very much appreciate if these questions are to be considered.

Thank you in advance.

Kind regards,

On behalf of FG Lawyers (the Netherlands),
Anne Hakvoort (Partner, attorney-at-law)

<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>
TYPE YOUR TEXT HERE
<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>
TYPE YOUR TEXT HERE
<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>
TYPE YOUR TEXT HERE
<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>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_ECSP_4>

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

<ESMA_QUESTION_ECSP_5>
TYPE YOUR TEXT HERE
<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>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_ECSP_6>

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

<ESMA_QUESTION_ECSP_7>
TYPE YOUR TEXT HERE
<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>
TYPE YOUR TEXT HERE
<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>
TYPE YOUR TEXT HERE
<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>
TYPE YOUR TEXT HERE
<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>
TYPE YOUR TEXT HERE
<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>
TYPE YOUR TEXT HERE
<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>
TYPE YOUR TEXT HERE
<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>
TYPE YOUR TEXT HERE
<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>
TYPE YOUR TEXT HERE
<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>
TYPE YOUR TEXT HERE
<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>
TYPE YOUR TEXT HERE
<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>
TYPE YOUR TEXT HERE
<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>
TYPE YOUR TEXT HERE
<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 would appreciate further guidance/clarity in respect of the following questions:

1. Scope of Crowdfunding Regulation: MiFID II and the Crowdfunding Regulation partially involve the exact same service (namely providing the services of (i) reception and transmission of client orders in transferable securities and/or (ii) placing transferable securities without a firm commitment basis). In order to ensure that (a) CSPs can rely on the exemption offered by MiFID II (upon amendment thereof as per the date that the Crowdfunding Regulation becomes applicable) and –

perhaps more importantly - (b) investment firms, already duly authorised pursuant to MiFID II, not being subjected to a new authorisation requirement pursuant to the Crowdfunding Regulation, it is essential to understand the differences between a CSP on the one hand and an investment firm on the other hand.

The Crowdfunding Regulation is, however, not very clear in this respect. The determining distinguishing element seems to be the use of a crowdfunding platform by a CSP. But this is a very broadly defined term in the Crowdfunding Regulation (“a publicly accessible internet-based information system operated or managed by a crowdfunding service provider”). The cross reference to a crowdfunding service provider in this definition of a crowdfunding platform results in an impasse when reading the relevant defined terms together.

How can a CSP be distinguished from an investment firm if they both offer the joint provision of reception and transmission of client orders and the placement of transferable securities without a firm commitment basis through a publicly accessible internet-based information system operated or managed by such CSP or investment firm?

Can investment firms rely on recital 10 of the Crowdfunding Regulation by stating that the scope of the Crowdfunding Regulation should be limited to “undertakings aiming to facilitate the funding of business activities of, primarily, start-ups and SMEs, by raising capital from an unrestricted pool of investors who are predominantly natural persons who each contribute relatively small investment amounts through a publicly accessible internet-based information system”? In other words: if investment firms offer the joint provision of reception and transmission of client orders and the placement of transferable securities without a firm commitment basis through a publicly accessible internet-based information system operated or managed by such investment firm to both professional and non-professional clients who are *not* predominantly natural persons who each contribute relatively small investment amounts, are these investment firms then off the hook as regards any authorisation requirement under the Crowdfunding Regulation?

2. Scope of Crowdfunding Regulation: in line with question 1, does any debt funding via a platform only qualify as crowdfunding (subjecting the operator of such platform to the authorisation requirement pursuant to the Crowdfunding Regulation) if the loan is provided by investors ‘who are predominantly natural persons’? Does an operator of a platform also qualify as a CSP if it only allows non-public lenders to invest in the loans through its platform? This is relevant to clarify, because this form of intermediation is currently, at least in the Netherlands, not prohibited or subject to a regulatory authorisation. However, the Crowdfunding Regulation subject a CSP to an authorisation requirement irrespective of such CSP offering its services to ‘sophisticated investors’ or ‘non-sophisticated investors’. Non-public lenders could, presumably, generally qualify as ‘sophisticated investors’.

From a Dutch law perspective, non-public lenders include professional market parties. A natural person can be considered a professional market party vis-à-vis the borrower if such person provides an amount of at least €100.000 at once to the borrower. EBA is aware of the different interpretations in the Member States of the term ‘the public’ that was introduced in local laws upon implementation of CRD IV in 2014. EBA has recently requested the Commission to provide for clear definitions on an EU, harmonised, level for material terms that compose the notion of ‘credit institution’. One of these key terms is ‘the public’.¹

3. Article 10 Crowdfunding Regulation: pursuant to Article 10 Crowdfunding Regulation, the payment flows associated with the crowdfunding services can only be facilitated in the way as described in Article 10(4) Crowdfunding Regulation. There are actually three alternatives: i) the CSP facilitates the payment flows, ii) a third party PSP cooperates with the CSP and facilitates payment flows, or

¹ Opinion of the European Banking Authority on elements of the definition of credit institution under Article 4(1), point 1, letter (a) of Regulation (EU) No 575/2013 and on aspects of the scope of the authorisation, 18 September 2020, EBA/OP/2020/15 (EBA Opinion).

iii) payment flows take place directly between the investors and the project owner without any involvement of the CSP (in which case Article 10(5) Crowdfunding Regulation applies).

From recitals 29 and 37 and Article 17 CF Reg, alternatives one and two only appear to be available if the CSP and the third PSP respectively have a license to provide payment services. This license obligation does not follow from Article 10(4) CF Reg, nor from the chosen terminology. After all, reference is invariably made to a payment service provider and not to a payment institution. Article 10(4) CF Reg refers to a CSP or third party that is a payment service provider in accordance with PSD2.

The term 'payment service provider' has a broader scope than the term 'payment institution'. Payment service providers also include, amongst others, parties that are exempt from the licensing requirement, while payment institutions are only parties with a license as referred to in Article 11 PSD2.

It is our understanding based on the recitals/considerations in the CF Reg that Articles 10(4) and 10(5) CF Reg primarily aim to mitigate any AML and CFT risks, now that CSPs themselves do not fall directly within the scope of the AMLD.

Is our understanding accurate that, given the fact that (a) in Article 10(4) CF Reg the term 'payment service provider' is used instead of the term 'payment institution' and (b) the AML / CFT rationale is also guaranteed in the case of an exempt payment service provider, a CSP could remain to be involved in facilitating the payment flows associated with the crowdfunding services provided on its platform without having a PI license, provided that it qualifies as an exempt payment service provider and complies with the conditions applicable to such exemption pursuant to PSD2?

We do note that, of course, if the CSP would like to make use of the passport options offered by the CF Reg, the CSP cannot avoid having to cooperate with a third party PSP in terms of its services in other Member States (including national law, a similar reasoning could apply) or to opt for Article 10 (5) CF Reg.

4. Article 25 Crowdfunding Regulation: is our understanding accurate that it can be derived from Article 25 Crowdfunding Regulation that loans (within the meaning of Article 2(1)(b) Crowdfunding Regulation) do not 're-qualify' to transferable debt securities (and as such to financial instruments) upon these loans being traded via a mere bulletin board operated by CSP? If the answer is positive, can a CSP that operates a bulletin board have a more substantive involvement in the arranging and execution of transactions via the bulletin board if these transactions relate to loans only? As long as loans do not qualify as financial instruments within the meaning of MiFID II, such CSP would not be subjected to an authorisation requirement for operating a trading venue such as an MTF or OTF pursuant to MiFID II.
5. Article 25 Crowdfunding Regulation: guidance is highly appreciated in respect of the boundaries that a CSP needs to keep in mind when offering a bulletin board on its platform for secondary trading purposes of loans, transferable securities or admitted instruments. The recent MiFID II review report on the functioning of Organised Trading Facilities as published by ESMA (ESMA 70-156-4225, 23 March 2021 (the document itself mistakenly refers to 2020) is very useful in this respect, but we maintain to have some scoping question, such as:
 - Can a CSP protect the personal data of its investors by not requiring them to include their personal data in an buy or sell advertisement published by such investors on the bulletin board as operated by the CSP but instead publishing the advertisements under a unique client or advertisement number and only providing the personal data to genuinely interested buyers or sellers? In our view, this cannot be deemed the exchange of information in respect of material terms of a transaction, which would make the bulletin board a multi-lateral system according to the aforementioned report of ESMA.

- Can a CSP offer 'post-matching' services (after a buyer and seller have agreed on the trade outside the bulletin board), such as offering template transaction documents to ensure that a transaction is settled in a legally valid and binding manner?
- If a CSP cooperates with a regulated trading venue, can the operator of such regulated trading venue outsource services to the CSP? In particular, can a CSP operate the bulletin board as an arranging system subject to the pre-arranged transaction being executed on such regulated trading venue without the CSP violating Article 25 Crowdfunding Regulation or such bulletin board/arranging system qualifying as a regulated trading venue within the meaning of MiFID II?²

<ESMA_QUESTION_ECSP_20>

² We base this on ESMA OTF Report, § 103-105, p. 26-27.