

ITALIAFINTECH

ESMA Consultation on Crowdfunding

Response to the Consultation Paper
on draft technical standards under
the ECSP Regulation

ESMA question	ECSP Article	RTS	Topic of the RTS	Discussion Points
<p>Q01 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?</p>	<p>Art. 7</p>	<p>Annex III (RTS Draft, pag. 55)</p>	<p>Complaint Procedures</p>	<p>The Association is of the view that the Annex II of the RTS Draft on complaint procedures strikes a good balance between the need of standardization and uniform application of the rules across the EU and the need to ensure sufficient flexibility for crowdfunding service providers, also taking into account the possible different size and organization of the crowdfunding service provider, as well as the possible different nature, scale and complexity of their business.</p> <p>Accordingly, the Association approves the approach taken by ESMA in the implementation of Article 7 of the ECSPR and only suggest to clarify that, where the applicant is an authorized financial institution (e.g. payment institution, investment firm, bank, etc.), it is allowed to use the complaint procedures set out in relation to the other services that it offers also with regard to the crowdfunding services.</p>

ESMA question	ECSP Article	RTS	Topic of the RTS	Discussion Points
<p>Q02 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?</p>	<p>Art. 8 ECSP / Art. 1(5) (RTS Draft, pag. 70)</p>	<p>Annex IV</p>	<p>Conflict of Interest</p>	<p>The Association agrees that the list set out in Article 5(1) RTS sets out a sufficiently harmonized minimal level of requirements for the internal rules to prevent conflicts of interest, considering the character of regulatory technical standards, which shall be general in nature, and the heterogeneous range of conflict of interests that may arise in the context of the provision of crowdfunding activities.</p> <p>Nonetheless, in order to ensure an adequate level of investor protection and the development of uniform practices, it would be useful if ESMA issues some guidance on the mapping of possible conflict of interests and on the possible measures that crowdfunding service providers can adopt to mitigate the risk arising of such conflicts, with a practical attitude.</p> <p>For example, such guidance might take the form of a report of good and poor practices, with a similar structure as the document “Inducements: Report on good and poor practices” issued by CESR in 2010 in relation to practices on inducements under MiFID.</p> <p>On a different note, the Association considers it helpful if ESMA could confirm that – as it seems from Art. 8, para. 2, of the ECSPR – it is possible for one or more companies belonging to the same group as the crowdfunding service provider to systematically invest in crowdfunding offers published on the providers’ platform, provided that (i) this is subject to full disclosure towards investors; (ii) the investment is made under the same conditions as those of other investors; and (iii) no preferential treatment or privileged access to information is granted to the group companies. In this regard, the Association would like to highlight that the fact that companies of the same group of the provider commit to acquire a non-negligible stake of all the instruments published on the platform can be a factor that enhance the credibility of the platform towards investors.</p>

ESMA question	ECSP Article	RTS	Topic of the RTS	Discussion Points
<p>Q03 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?</p>	<p>Art. 8 ECSP / Art. 3 (RTS Draft, pag. 72)</p>	<p>Annex IV</p>	<p>Conflict of Interest</p>	<p>Also in this case, the Association agrees with approach taken by ESMA. Nonetheless, likewise, in order to ensure an adequate level of investor protection and the development of uniform practices, it would be useful if ESMA issues some guidance – preferably in form of “good and bad practices”, with practical examples – on the disclosure of conflict of interests, so that crowdfunding service providers can have a more clear sense of the supervisory expectations on the level of granularity and details to be included in the disclosure document.</p>

ESMA question	ECSP Article	RTS	Topic of the RTS	Discussion Points
<p>Q04 Do you agree with the details of the business continuity plan suggested in the draft RTS?</p>	<p>Art. 12 Abs. 2 j) ECSP (RTS Draft, pag. 74)</p>	<p>Annex V</p>	<p>Business Continuity</p>	<p>NA</p>

ESMA question	ECSP Article	RTS	Topic of the RTS	Discussion Points
<p>Q05 Do you have any comment on the authorisation procedure proposed in the draft RTS?</p>	<p>Art. 12 Abs. 1, 2 ECSP (RTS Draft, pag. 78)</p>	<p>Annex VI</p>	<p>Licensing of CSP Providers</p>	<p>In general, the Association deems that the authorization procedure is clear and appreciate the provision on the designation of a contact point for receiving the applications for authorization, that goes in the direction of simplifying the interactions between crowdfunding service providers and competent Authorities.</p> <p>Without prejudice to the above, the Association would consider it helpful if the RTS would be integrated with a definition of “material changes” under Art. 5 of RTS Draft (pag. 80), in order to ensure that authorization proceedings are restarted only in situations where the changes are radical and require a substantial amount of work for the competent Authority to carry out the reassessment of the application. In particular, it should be avoided that the authorization proceedings are significantly extended, where this is not strictly proportionate to the extent of the changes.</p>

ESMA question	ECSP Article	RTS	Topic of the RTS	Discussion Points
<p>Q06 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?</p>	<p>Art. 12 Abs. 1, 2 ECSP (RTS Draft, TAB “Content of application”, pag. 82)</p>	<p>Annex VI - Ann. I (Information to be provided by the competent Authority)</p>	<p>Licensing of CSP Providers</p>	<ol style="list-style-type: none"> 1. TAB “Content of application” Field 5 SubField 1 (g) The Association would appreciate ESMA’s confirmation that only services subject to authorisation under national law (and not also non-reserved ancillary activities) have to be disclosed in this field. 2. TAB “Content of application” Field 5 SubField 2(c) This field requests to include in the application the “<i>description of the procedures for the transmission of the orders collected from investors to the entities that receive and execute the orders</i>”. This provision raises the doubt that the crowdfunding service provider shall transfer the order to an intermediary (e.g. an investment firm) for execution. However, this does not seem to be envisaged by the ECSPR. The Association would appreciate if ESMA can confirm that the crowdfunding service provider can transmit the order concerning the subscription of a permitted financial instruments directly to the issuer. 3. TAB “Content of application” Field 5 SubField 3 The Association would like to highlight that marketing strategies are not usually an aspect that supervisory Authorities take into account in the authorization process, neither in relation to more complex institutions that operate in the financial markets and carry out, to some extent, similar services (e.g. investment firms). Indeed, marketing strategies vary depending on a number of factors that rapidly change over time, such as market trends, costs of advertisements through different channels, results of “trial and error” learning etc. Accordingly, it is difficult to set out in advance meaningful information on the marketing strategy. That being considered, it is suggest to delete this field or limit the extent of the information required to general indications on how the crowdfunding service provider intend to structure the marketing campaign in the platform launch phase. 4. Field 19 D 1 lit. c) The draft RTS refer to “Article 21 paragraph 42”. This reference seems to be a typo as there is no Art. 21 paragraph 42 in the ECSPR. Please kindly review the relevant reference.

ESMA question	ECSP Article	RTS	Topic of the RTS	Discussion Points
<p>Q07 Do you think that the methodologies provided in the draft RTS are sufficiently clear?</p>	Art. 20 ECSP	Annex VII (RTS Draft pag. 114)	Loan Defaults	NA

ESMA question	ECSP Article	RTS	Topic of the RTS	Discussion Points
<p>Q08 Do you agree with the list of information set out in Article 4(1) of the draft RTS?</p>	<p>Art. 21 ECSP</p>	<p>Annex VIII (RTS Draft pag. 118)</p>	<p>Investor Exploration</p>	<p>The Association agrees with the list set out in Article 4, para. 1, of the draft RTS, but has a comment on the stage when the appropriateness test shall be taken by the investor. In this regard, it should be noted that there seems to be a slight inconsistency between Art. 3, para. 1, of the RTS Draft and Article 21, para. 1, of ECSPR.</p> <p>In particular, 3, para. 1, of the RTS Draft states that crowdfunding service providers shall carry out the assessment of appropriateness <i>“prior to giving access to their crowdfunding platforms”</i>, while, according to Art. 21 of the ECSPR, such assessment shall be carried out <i>“before giving prospective non-sophisticated investors full access to invest in crowdfunding projects on their crowdfunding platform”</i>.</p> <p>It is, thus, unclear if the completion of appropriateness assessment by the potential investor shall be a pre-condition to able to see the crowdfunding offers published on the platform (as the RTS seems to suggest) or if it is sufficient that the prospect takes the test before being able to invest in one of the crowdfunding offers published on the platform.</p> <p>In this regard, it should be considered that, in the Association’s view, requiring that the investor takes the test before being able to invest is an adequate safeguard for investor protection purposes, as it prevents the prospect to make an actual investment without a prior assessment of its knowledge and experience and without any appropriate warnings. Anticipating the test further, from a commercial standpoint, would significantly increase the friction for investor to approach a crowdfunding provider, without a significant benefit in terms on investor protection. Indeed, the investor might not considered worthwhile to take a long test and giving away personal information, without being able to see if the platform have published offers that might be of its interest.</p> <p>In light of the above, the Association would suggest to review Article 3 of the Draft RTS in order to clarify this point, aligning the wording to the one of Article 21 of the ECSPR.</p>

ESMA question	ECSP Article	RTS	Topic of the RTS	Discussion Points
<p>Q09 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?</p>	Art. 21 ECSP	Annex VIII	Investor Exploration	<p>The Association appreciates ESMA's effort in specifying the factors to be considered in the simulation on the ability of the potential investor to bear losses. However, it deems that a couple of clarifications in this area would be helpful.</p> <p>First of all, it should be noted that Recital 4 of the draft RTS states that "<i>Crowdfunding service provider should however be able to also offer to their non-sophisticated clients the possibility to simulate their ability to bear loss without using this online calculation tool</i>". Nonetheless, this possibility does not seem to be reflected in the text of the RTS, as Article 6 seems to contemplate an "<i>online calculation tool</i>" only. The Association would thus appreciate a clarification on this point.</p> <p>In second place, the rationale of Article 6, para. 5, of the RTS on the calculation of the net worth by non-sophisticated investor is not entirely clear. It would be thus helpful to understand the relationship between the online calculation tool and the calculation of the net worth, as a separate requirement.</p>

ESMA question	ECSP Article	RTS	Topic of the RTS	Discussion Points
<p>Q10 Do you agree with the suggested method to calculate the non-sophisticated investor's net worth?</p>	Art. 21 ECSP	Annex VIII	Investor Exploration	NA

ESMA question	ECSP Article	RTS	Topic of the RTS	Discussion Points
<p>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.</p>	Art. 23 ECSP	Annex IX (RTS Draft pag. 129)		<p>Article 2, para. 2</p> <p>It would be useful to clarify how crowdfunding service providers shall ensure that the investor has been provided with the relevant key investment information sheet in a durable medium. In particular, we kindly ask ESMA to please clarify if, in order to comply with Article 2, para. 2, it is sufficient to publish the KIIS on the webpage related to the offer in a downloadable format or it is necessary to adopt other measures in order to ensure that the client effectively download the KIIS (or receives it through e-mail) before accepting to invest.</p> <p>Annex – Key Investment Information Sheet Model</p> <p><i>General comment on length</i> According to Article 23, para. 7, the KIIS shall consist of a maximum of six sides of A4-sized paper format if printed. Considering that the format in the Annex of the RTS, especially for transferable securities and admitted instruments, is already longer than 6 A4-sized paper format, it seems difficult to comply with Level 1 provision. ESMA's assessment shall consider, in particular, that certain field require to include a description (e.g. principal activities of the project owner; products or services offered by the project owner, description of the crowdfunding project, including its purpose and main features, terms of subscription and payment, custody and delivery to investors, etc.). Accordingly, it is suggest to limit the extent of information to be included in the KIIS, where possible and appropriate, in order to make it appropriate with its maximum length.</p> <p><i>Pre-contractual reflection period for non-sophisticated investors</i> It would be helpful that ESMA confirms that the reflection period of four calendar days specifically provided by Article 22 of the ECSPR overrides the 14-days period provided by Article 9 of the Directive 2011/83/EU on consumer rights for consumers' to exercise the right of withdrawal in case of conclusion of a service contract through means of distance communication, considering that the two periods have the same rationale. A different interpretation would give the consumer an overall reflection period of 18 days, which would seem disproportionate.</p> <p><i>Part A (a) - Conflict of interests</i> It is suggested to delete the field denominated "Conflict of interest", considering that: (a) the Level 1-texts of the ECSPR does not include this piece of information in the information that shall be provided in the KIIS; and (b) the identification, management and disclosure of conflict of interests is a responsibility of the crowdfunding service provider, according to Article 8 of the</p>

ESMA question	ECSP Article	RTS	Topic of the RTS	Discussion Points
				<p>ECSPR and, therefore, it seems inconsistent to request to include a disclosure on the conflict of interests in a document prepared by the project owner, under its responsibility.</p> <p><i>Part F(b) - Restrictions to which the [transferable securities] or [admitted instruments for crowdfunding purposes] are subject and restrictions on the transferring of the instruments</i></p> <p>The definition of “admitted instruments for crowdfunding purposes” includes shares of a private limited liability companies “that are not subject to restrictions that would effectively prevent them from being transferred, including restrictions to the way in which those shares are offered or advertised to the public”. On the other hand, the KIIIS encompasses a section dedicated to the restrictions on the transferring of the offered instruments, to be included also in relation to “admitted instruments for crowdfunding purposes”. Accordingly, it would be useful if ESMA clarifies, for the example through a Q&A, which kind of restrictions to the transferability of the securities would not be able to preclude the relevant instruments from accessing crowdfunding platforms. By way of example, under Italian law, the subscription of certain instruments (in particular, debt instruments issued by limited liability companies) is restricted to professional investors subject to prudential supervision. Such instruments can currently be offered by investment crowdfunding platforms under the Italian national regime, in compliance with the mentioned restriction. It is not clear if this would be still possible in light of the ECSPR.</p>

ESMA question	ECSP Article	RTS	Topic of the RTS	Discussion Points
<p>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.</p>	<p>Art. 23 ECSP</p>	<p>Annex IX</p>	<p>KIIS Template</p>	<p>NA</p>

ESMA question	ECSP Article	RTS	Topic of the RTS	Discussion Points
<p>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.</p>	Art. 23 ECSP	Annex IX	KIIS Template	NA

ESMA question	ECSP Article	RTS	Topic of the RTS	Discussion Points
<p>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.</p>	<p>Art. 23 ECSP</p>	<p>Annex IX</p>	<p>KIIS Template</p>	<p>NA</p>

ESMA question	ECSP Article	RTS	Topic of the RTS	Discussion Points
<p>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?</p>	Art. 16 ECSP	Annex X	Data to Supervisory Agencies	NA

ESMA question	ECSP Article	RTS	Topic of the RTS	Discussion Points
<p>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?</p>	Art. 16 ECSP	Annex X	Data to Supervisory Agencies	NA

ESMA question	ECSP Article	RTS	Topic of the RTS	Discussion Points
<p>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?</p>	Art. 16 ECSP	Annex X	Data to Supervisory Agencies	NA

ESMA question	ECSP Article	RTS	Topic of the RTS	Discussion Points
<p>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.</p>	Art. 28 ECSP	Annex XI	Data to ESMA	NA

ESMA question	ECSP Article	RTS	Topic of the RTS	Discussion Points
<p>Q19 Do you agree with the cost benefit analysis as it has been described in Annex II?</p>		Annex II		NA

ESMA question	ECSP Article	RTS	Topic of the RTS	Discussion Points
<p>Q20 Are there any additional comments that you would like to raise and/or information that you would like to provide?</p>				<p>Bulletin Board The Association is aware that ESMA has not a mandate to implement Article 25 of the ECSPR on the bulletin board. However, it is of the view that the provision of some clarifications on the mentioned provision, in form of Q&As, would be helpful, in order to ensure a uniform application of the Article across the EU.</p> <p>Indeed, the Regulation specifies that the bulletin board shall not be used to bring together buying and selling interests by means of the crowdfunding service provider's protocols or internal operating procedures in a way that results in a contract and shall therefore not consist of an internal matching system that executes client orders on a multilateral basis.</p> <p>Accordingly, it would be useful to clarify if platforms – under the assumption that they have no role in the matching of potential sellers and potential buyers – are allowed to carry out “merely operational” or “ancillary” services in relation to the bulletin board (e.g. facilitating the conclusion of the purchase and sale contract through the platform; providing the parties with a standard sale and purchase agreement, etc.).</p> <p>In this regard, the Association recommends that such assessment takes into account that activities that merely have an operational nature and are ancillary to the autonomous decision of investors to enter into a share purchase agreement (i) on one hand, would be far from qualifying as the management of a multilateral trading facility, and (ii) on the other hand, would be extremely useful for the effective development of a “secondary market”, as it seems difficult that, especially in the case of small investments, investors would dedicate time and resources to the execution of the off-platform transactions.</p> <p>We would like to encourage both the European Commission and ESMA to ensure that the regulation is uniformly applied in Europe, and where there are differences in the member states, that CSPs can easily access information about the situation in each member state. We would urge both ESMA and the European Commission to indicate to member states that the success of the ECSP-R depends on a harmonized regime, which works for CSPs in all member states. With great concern we noticed that in some member states, the governments are considering deviations from the harmonized regime, or have already implemented to laws which counteract the policy goal of the ECSP-R. The policy goal of the ECSP-R is to make it easier for SMEs to mobilize funding across the European Union. With reference to the ESMA 2013 report on the divergence of the liability regimes under the Prospectus Directive, we potentially see the</p>

ESMA question	ECSP Article	RTS	Topic of the RTS	Discussion Points
				<p>threat of the liability regimes across Europe being so substantially diverging from each other that platforms and issuers alike would run serious risks.</p> <p>Therefore, we would strongly encourage member states not to reduce the investment thresholds of Art. 1 ECSP-R, even if it is only limited for a short time as foreseen in Art. 49 ECSP-R. Different investment thresholds would make it more difficult for CSPs to assess the correct investment thresholds for the group of investors from a particular country. We understand Art. 1 ECSP-R in such a way that the platform would have to identify the investors from a particular country and limit their total investment threshold to the limit set by the member state, thus not affecting the total investment threshold of the project. However, it would be burdensome to research thresholds if ESMA would not provide a single landing-page for all information on the thresholds.</p> <p>We would therefore encourage ESMA to provide a single-landing page for CSPs which lists the following information:</p> <ul style="list-style-type: none"> - Contact points at the National Competent Authority (NCA), including links to the licensing forms, in accordance with Art. 1 ECSP-R - Admitted Instruments, in accordance with Art. 1 ECSP-R - Thresholds, in accordance with Article 49 ECSP-R - Liability Laws, in accordance with Art. 23 ECSP-R - Communication Laws, in accordance with Art. 27 ECSP-R - Any other laws affecting CSPs in that member state and which would prevent CSPs to provide services cross border <p>In addition, we would encourage both ESMA and DG FISMA to identify and clarify possible conflicts of legal regimes if project owner, investor and CSP reside in different jurisdictions within the European Union. Liability Regime >>As the CSPs is the one being authorized by the NCA, we would assume that for all matters regarding the interpretation of the ECSP-R, only the Level-1-Text, the Level-2-Text and the law where the CSP resides is relevant, except for Art. 27 ECSP-R- (Marketing Communication).</p>

ItaliaFintech is the main Italian FinTech association that brings together the most innovative national and international companies.

It represents a point of reference for institutions and authorities.

It facilitates the establishment of an innovation culture and the development of new services.

ItaliaFintech is one of the founding members of EDFA (European Digital Finance Association), the main European body that represents FinTech associations in Europe.

Thanks to Chiomenti Law Firm for the contribution and support to the drafting of the Document.

ITALIAFINTECH

Corso Matteotti 1 - 20121 Milano

www.italiafintech.org