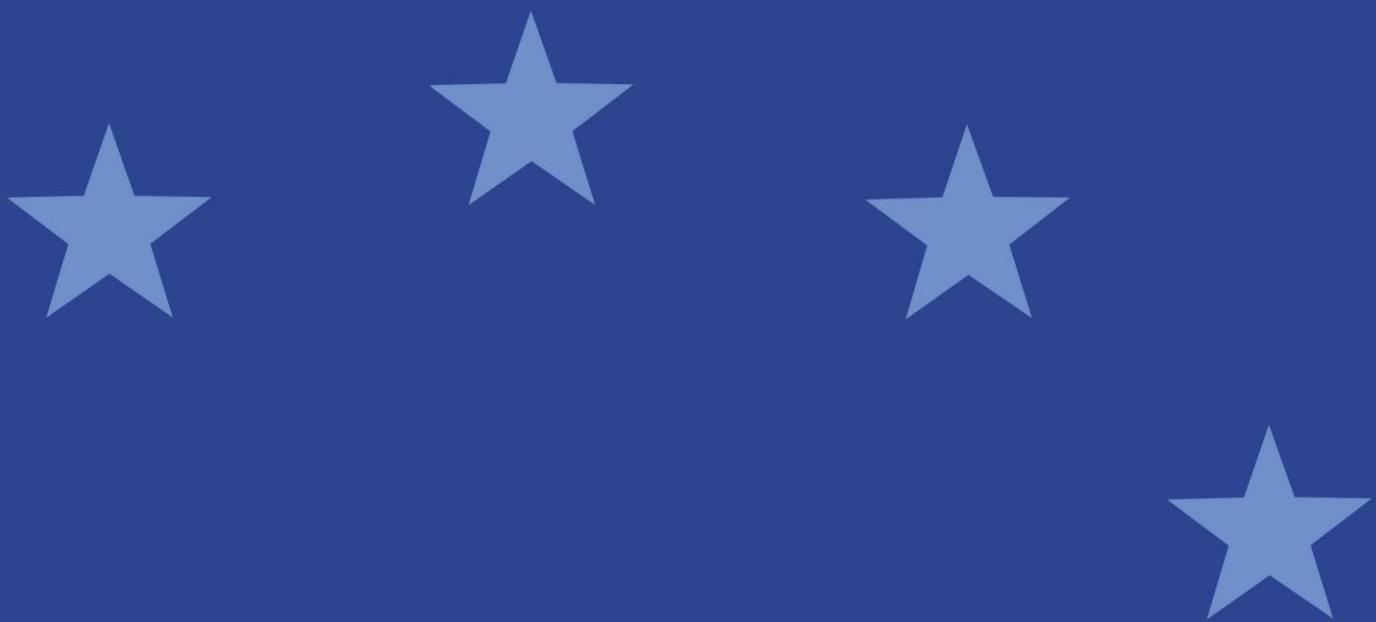


Questions and Answers

On the European crowdfunding service providers for business Regulation





European Securities and
Markets Authority

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ESMA35-42-1088

Table of Contents

Introduction	5
Table of questions	7
1 Use of Special Purpose Vehicles (SPV) [Last update: 25 February 2021]	9
2 Transitional period [Last update: 10 November 2021]	11
3 General Provisions [Last update: 10 November 2021].....	11
4 Provisions of crowdfunding services and organisational and operational requirements [Last update: 10 November 2021].....	13
5 Investor protection provisions [Last update: 28 January 2022]	13

Acronyms and definitions used

ECSPR	European crowdfunding service providers for business Regulation – Regulation (EU) 2020/1503 on European crowdfunding service providers for business
ESMA	European Markets and Securities Authority
ITS	Implementing Technical Standards
KIIS	Key investment information sheet as referred to in Article 23 of the ECSPR
KIIS at platform level	Key investment information sheet as referred to in Article 24 of the ECSPR
NCA	National competent authority
MiFID II	Markets in Financial Instruments Directive (recast) – Directive 2014/65/EU of the European Parliament and of the Council
Q&A	Question and Answer
RTS	Regulatory Technical Standards
SPV	Special Purpose Vehicle

Introduction

Background

The ECSPR was published in the Official Journal on 20 October 2020 and entered into application on 10 November 2020.

Purpose

The purpose of this document is to promote common supervisory approaches and practices in the application of the ECSPR. It aims at providing responses to questions posed by the general public, market participants and competent authorities in relation to the practical application of the ECSPR. The content of this document is aimed at competent authorities and crowdfunding service providers.

The content of this document is not exhaustive and does not constitute new policy.

This document also contains answers provided by the European Commission pursuant to Article 16b(5) of Regulation 2010/1095. These answers are clearly indicated as such.

Status of the answers provided by ESMA

The question and answer (Q&A) mechanism is a practical convergence tool used to promote common supervisory approaches and practices under Article 29(2) of the ESMA Regulation¹.

Due to the nature of Q&As, formal consultation on the draft answers is considered unnecessary. However, even if Q&As are not formally consulted on, ESMA may check them with representatives of ESMA's Securities and Markets Stakeholder Group, the relevant Standing Committees' Consultative Working Group or, where specific expertise is needed, with other external parties.

ESMA will periodically review these Q&As on a regular basis to update them where required and to identify if, in a certain area, there is a need to convert some of the material into ESMA Guidelines and recommendations. In such cases, the procedures foreseen under Article 16 of the ESMA Regulation will be followed.

Status of the answers provided by the European Commission

The answers provided by the European Commission are provided pursuant to Article 16b(5) of Regulation 2010/1095 to clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including

¹ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC Regulation, 15.12.2010, L331/84.

competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that the European Commission might take before the Union and national courts.

Ongoing editing and updates

This document is intended to be continually edited and updated as and when new questions are received. The date on which each section was last amended is included for ease of reference.

Table of questions

Subject	Q	Topic of the Question	Level 1/Level 2	Last Update
Use of SPVs	1.1	Circumstances and conditions in which an SPV can be created for the provision of crowdfunding services	Articles 2(1) and 3(6) of ECSPR	25/02/2021
	1.2	The types of instruments that can be offered to investors via an SPV	Articles 2(1) and 3(6) of ECSPR	25/02/2021
	1.3	Whether an SPV can give exposure to more than one underlying asset	Articles 2(1) and 3(6) of ECSPR	25/02/2021
	1.4	The type of underlying asset an SPV can give exposure to	Articles 2(1) and 3(6) of ECSPR	25/02/2021
	1.5	When an asset should be deemed to be illiquid or indivisible within the meaning of the ECSPR	Articles 2(1) and 3(6) of ECSPR	25/02/2021
Transitional period	2.1	Application of the transitional period <u>Answer provided by the European Commission</u>	Article 48(1) of ECSPR	10/11/2021
General provisions	3.1	Scope of the ECSPR - Interpretation of "business activity" <u>Answer provided by the European Commission</u>	Article 2(1), point (l) of the ECSPR	10/11/2021
	3.2	Legal status of the individual portfolio management of loans <u>Answer provided by the European Commission</u>	Article 2(1), point (a)	10/11/2021
Provisions of crowdfunding services and organisational and operational requirements	4.1	Interpretation of the term "routing orders" <u>Answer provided by the European Commission</u>	Article 3(3) of ECSPR	10/11/2021
Investor protection	5.1	Entry knowledge test <u>Answer provided by the European Commission</u>	Article 21(7) of the ECSPR	10/11/2021
	5.2	Respective liability for the preparation of the KIIS <u>Answer provided by the European Commission</u>	Article 23 of the ECSPR	10/11/2021
	5.3	Language of the KIIS and KIIS at platform level	Articles 23, 24 and 27 of the ECSPR	28/01/2022 *NEW*

5.4	Language of the KIIS and KIIS at platform level	Articles 23, 24 and 27 of the ECSPR	28/01/2022 *NEW*
5.5	Language of the KIIS	Article 23	28/01/2022 *NEW*
5.6	Languages accepted by NCAs	Articles 23 and 27	28/01/2022 *NEW*
5.7	Marketing of crowdfunding projects	Article 27	28/01/2022 *NEW*
5.8	Cross-border Marketing	Article 27	28/01/2022 *NEW*

1 Use of Special Purpose Vehicles (SPV) [Last update: 25 February 2021]

Question 1.1 [Last update: 25 February 2021]

In which circumstances and subject to which conditions can an SPV be created for the provision of crowdfunding services?

Answer 1.1

According to the ECSPR, an SPV is an entity created for the sole purpose of securitisation within the meaning of point (2) of Article 1 of Regulation (EU) No 1075/2013 of the European Central Bank. An SPV can only be created if (i) it is interposed between the project owner and investors and (ii) serves the sole purpose of enabling investors to acquire an interest in one illiquid or indivisible underlying asset which could otherwise not or not easily be offered to investors.

Question 1.2 [Last update: 25 February 2021]

What type of instruments can be offered to investors via an SPV?

Answer 1.2

Where a crowdfunding offer is made via an SPV, the instruments offered to investors can be either transferable securities within the meaning of point (44) of Article 4(1) of MiFID II or admitted instruments for crowdfunding purposes within the meaning of point (n) of Article 2(1) of the ECSPR. Conversely, the ECSPR does not envisage the possibility of loan-based crowdfunding offers made via an SPV.

Question 1.3 [Last update: 25 February 2021]

Can an SPV give exposure to more than one underlying asset?

Answer 1.3

No. According to Article 3(6) of the ECSPR, an SPV cannot serve the purpose of enabling the offering to investors of exposure to more than one illiquid or indivisible asset.

Question 1.4 [Last update: 25 February 2021]

What type of underlying asset can an SPV give exposure to?

Answer 1.4

The ECSPR aims to facilitate direct investments and avoid creating regulatory arbitrage opportunities. The use of an SPV interposed between an underlying asset and investors shall

be permitted only when it enables investors to gain exposure to assets which could otherwise not or not easily be offered to investors. For that reason, Article 3(6) of the ECSPR restricts the use of SPVs to illiquid or indivisible types of underlying assets only. Consequently, the interposition of an SPV can only be justified when the unique underlying asset is either illiquid or indivisible.

Question 1.5 [Last update: 25 February 2021]

What are possible indications of an illiquid or indivisible asset, for the purpose of the application of the ECSPR?

Answer 1.5

An asset should be deemed to be illiquid when it cannot be turned into cash swiftly. Factors such as, but not limited to, the following are indications that the asset may be illiquid:

- (i) there is no organised market for assets of that type;
- (ii) sales for that type of assets usually take place over the counter;
- (iii) there is no readily available value for assets of that type; or
- (iv) reaching an agreement on a selling price with a potential buyer encompasses significant costs (administrative fees, tax, audit and legal costs) and takes from a few weeks to a few months.

An asset should be deemed to be indivisible when it cannot be easily or swiftly divided into smaller, more moderately priced components for the purpose of its partial or total sale to investors or when such division in smaller component is not economically rational, notably because it prevents the asset from serving its core economical purpose. Factors such as, but not limited to, the following are indications that the asset may be indivisible:

- (i) because of its legal structure, the asset cannot be divided or easily divided into smaller components that can be sold easily to investors (examples of such smaller component include, for instance, shares or units);
- (ii) due to the very nature of the underlying asset, it can only be divided into a limited number of components each with a value far exceeding the value usually expected for shares or units (e.g. a residential building which typically can only be divided into a limited number of apartments and not into components with a smaller value);
- (iii) due to the nature of its core economical purpose, the asset if divided would stop achieving its core economical purpose (e.g. a solar power plant dismantled into individual solar panels).

2 Transitional period [Last update: 10 November 2021]

Question 2.1² [Last update: 10 November 2021]

According to Article 48(1) ECSPR, "crowdfunding service providers may continue in accordance with the applicable national law to provide crowdfunding services that are included within the scope of this Regulation until 10 November 2022 or until they are granted an authorisation referred to in Article 12, whichever is sooner" (emphasis added).

We would appreciate clarification on the meaning of "in accordance with the applicable national law" generally, and specifically whether the transitional period will apply in the following cases:

- (i) *no national law specifically governing crowdfunding activities exists. However, national law provides that crowdfunding services can be performed by investment firms authorised under Directive 2014/65/EU of the European Parliament and of the Council*
- (ii) *no national law specifically governing crowdfunding activities exists. However, national law provides that crowdfunding activity requires neither authorisation nor a licence.*

Answer 2.1 (European Commission)

Article 48(1) of Regulation (EU) 1503/2021 ('ECSPR') provides for a transitional period applicable to existing crowdfunding service providers that are operating under the applicable national law. Recital 76 clarifies that the transitional period is appropriate to allow 'persons providing such crowdfunding services in accordance with national law' 'to have sufficient time to apply for an authorisation thereunder'. As a result, the transitional period should be intended as applicable to all entities providing crowdfunding services in the scope of the ECSPR under 'national law', whereby 'national law' can be either a specific crowdfunding regime or other applicable legislation or simply the private law applicable to crowdfunding transactions in that specific Member State.

It is also important to note that the transitional period would apply to crowdfunding service providers for existing crowdfunding service provision before the date of application (10 November 2021). Crowdfunding services under the scope of this Regulation that are newly provided on and after that date shall be subject to the ECSPR requirements and related authorisation process.

3 General Provisions [Last update: 10 November 2021]

Question 3.1³ [Last update: 10 November 2021]

According to Article 2(1), point (l) of Regulation (EU) 2020/1503 (hereinafter, 'ECSPR'), a crowdfunding project means "the business activity or activities for which a project owner seeks funding through the crowdfunding offer".

We would appreciate clarification on how the phrase "business activity or activities" should be interpreted in the context of the ECSPR.

² Question raised by ESMA on 8 July 2021

³ Question raised by ESMA on 8 July 2021

More specifically, we would welcome confirmation that this provision does not prevent per se:

- (i) *public law entities or other non-profit entities from acting as project owners for the purposes of the ECSPR, or*
- (ii) *to seek funding for projects related to public infrastructure, utilities and other types of projects involving the provisions of public sector services.*

Answer 3.1 (European Commission)

The concept of 'business activity' is intended to be interpreted in a broad sense, encompassing all kinds of economic activities by a natural (in the course of their business, trade or profession) or a legal person that give rise to a profit or any other economic benefit for those owning this 'business activity'. That would imply that non-profit organisations (e.g. an association or local public authorities) may act as 'project owners' as long as they raise funds for an activity that generates some economic benefit for its owners/members/ultimate beneficiaries (whether monetary or non-monetary).

Question 3.2⁴ [Last update: 10 November 2021]

Article 2(1), point (a), of Regulation (EU) 2020/1503 (hereinafter, 'ECSPR') defines a 'crowdfunding service' as "the matching of business funding interests of investors and project owners through the use of a crowdfunding platform and which consists of any of the following activities:

- (i) *the facilitation of granting of loans;*
- (ii) *the placing without a firm commitment basis, as referred to in Annex I, Section A, point (7), of Directive 2014/65/EU, of transferable securities and admitted instruments for crowdfunding purposes issued by project owners or a special purpose vehicle, and the reception and transmission of client orders, as referred to in point (1) of that Section, in relation to those transferable securities and admitted instruments for crowdfunding purposes.*

Article 2(1), point (c), of the ECSPR defines 'individual portfolio management of loans' as "the allocation by the crowdfunding service provider of a pre-determined amount of funds of an investor, which is an original lender, to one or multiple crowdfunding projects on its crowdfunding platform in accordance with an individual mandate given by the investor on a discretionary investor-by-investor basis".

We would appreciate clarification as to the legal nature of the activity of individual portfolio management of loans. We would specifically appreciate if the European Commission could confirm that it should be considered as forming part of the notion of crowdfunding service and, if yes, that it should be regarded as ancillary to the activity of facilitation of granting loans referred to in Article 2(1), point (a)(i).

Answer 3. 2 (European Commission)

Article 6 of the ECSPR introduces the possibility for crowdfunding service providers to offer individual portfolio management of loans. In that respect, the non-inclusion in the definition of

⁴ Question raised by ESMA on 8 July 2021

core 'crowdfunding services' in article 2(1) of the ECSPR was the result of the consideration that individual portfolio management of loans is a more sophisticated allocation of funds to loans, but it remains in the nature of service that facilitates the granting of loans. As a result, the regulation imposes additional requirements over a minimum set of standards, which are those applied to providers of facilitation of granting of loans. As a consequence, this service should be considered an ancillary service to the facilitation of granting of loans, also in relation to the authorisation process that comes with it.

4 Provisions of crowdfunding services and organisational and operational requirements [Last update: 10 November 2021]

Question 4.1⁵ [Last update: 10 November 2021]

Article 3(3) of Regulation (EU) 2020/1503 (hereinafter, 'ECSPR') provides that "crowdfunding service providers shall not pay or accept any remuneration, discount or non-monetary benefit for routing investors' orders to a particular crowdfunding offer made on their crowdfunding platform or to a particular crowdfunding offer made on a third-party crowdfunding platform".

We would appreciate if the European Commission could clarify its interpretation of the term 'routing of orders' and confirm that, considering the embedded risk of conflicts of interest and the associated serious investor protection concerns associated with such practices, the prohibition set out in Article 3(3) applies broadly to any form of specifically directing prospective investors to a particular crowdfunding offer.

Answer 4.1 (European Commission)

'Routing of orders' does mean any form of practice to direct prospective investors to a particular offer, unless that practice is based on objective criteria that are disclosed *ex ante* (such as filtering or search engines).

5 Investor protection provisions [Last update: 28 January 2022]

Question 5.1⁶ [Last update: 10 November 2021]

Article 21(6), second subparagraph of Regulation (EU) 2020/1503 (hereinafter, 'ECSPR') provides that '[p]rospective non-sophisticated investors and non-sophisticated investors shall not be prevented from investing in crowdfunding projects [...]'.

We would appreciate if the European Commission could clarify its interpretation regarding the perimeter of this prohibition set out in Article 21(6), second subparagraph, and notably confirm that this prohibition does not apply to the situation referred to in Article 21(7), notably when a

⁵ Question raised by ESMA on 8 July 2021

⁶ Question raised by ESMA on 8 July 2021

prospective non-sophisticated investor fails to prove to the crowdfunding service provider that she/he understands the investment and its risks.

Answer 5.1 (European Commission)

Article 21(6) of the ECSPR, second subparagraph, refers to the general outcome of tests under Articles 21(1) and 21(5) of the ECSPR. On the contrary, Article 21(7) of the ECSPR refers to a specific situation that requires additional restriction, i.e. the investment above the higher of either 1,000 EUR or 5% of net worth in an individual project. As a result, Article 21(6) ECSPR, second subparagraph, shall not apply to article 21(7) of the ECSPR.

Question 5.2⁷ [Last update: 10 November 2021]

Article 23, paragraphs 2, 8, 11 and 12 of Regulation (EU) 2020/1503 (hereinafter, 'ECSPR') set out the requirements regarding the preparation of the KIIS, its publication on the crowdfunding platform and the verification that needs to be undertaken to ensure the completeness, correctness and clarity of the information it contains.

We would appreciate if the European Commission could clarify the respective responsibilities of the project owner and the crowdfunding service provider in respect of those requirements, in particular with respect to offers made in more than one Member State.

Answer 5.2 (European Commission)

Article 23(9) of the ECSPR sets out the liability of 'at least' the project owner for the information given in a key investment information sheet (hereinafter, KIIS). That paragraph needs to be read in conjunction with article 23(11), which limits the responsibility of the crowdfunding service provider to having 'adequate procedures to verify the completeness, correctness and clarity of the information contained in the key investment information sheet'. As a result, the project owner is the one ultimately responsible for the information provided in the KIIS, while the crowdfunding service provider is responsible for the procedures in place to verify that the information provided is complete, correct and clear. In other words, the project owner is solely responsible for any misleading or inaccurate information, as well as omissions, unless those omissions are the direct result of inadequate procedures by the crowdfunding service provider in the collection of this information made available in the KIIS. In that case, the crowdfunding service provider could be partially or fully responsible.

Question 5.3 [Last update: 28 January 2022]

In which language should the KIIS, the KIIS at platform level and marketing communications be prepared?

⁷ Question raised by ESMA on 8 July 2021

Answer 5.3

Pursuant to Articles 23, 24 and 27 of the ECSPR, the KIIS, the KIIS at platform level and the marketing communications disseminated by CSP should be drafted at least in (i) one of the official languages of the Member State where the CSP is authorised or (ii) another language accepted by the NCA of that Member State⁸. Additionally, when a crowdfunding offer or the provision of crowdfunding services are promoted through a marketing communication in another Member State than the one where the CSP was granted its authorisation, the KIIS or the KIIS at platform level shall be made available at least in (i) one of the official languages of that Member State or (ii) another language accepted by the NCA of that Member State.

Question 5.4 [Last update: 28 January 2022]

Can a KIIS be translated by a CSP at the request of a prospective investor?

Answer 5.4

A prospective investor can request a CSP to arrange for the translation of a KIIS into a language of his/her choice. The ECSPR does not create an obligation for CSP to accede to such request.

Where a CSP decides to accede to such request, the translation must faithfully and accurately reflect the content of the original KIIS.

Where a CSP decides not to accede to such request, the CSP must, in compliance with Article 23(13) of the ECSPR, clearly advise the prospective investor to refrain from investing

Question 5.5 [Last update: 28 January 2022]

Can the KIIS, the KIIS at platform level and marketing communication be translated into other languages?

Answer 5.5

Besides the languages referred to in the answer to question 5.3 above, Article 23(4) of the ECSPR provides that a CSP can, in addition, arrange for the translation of a KIIS in any other language as long as the translation accurately reflects the content of the KIIS that was originally drawn up in one of the languages mentioned in Article 23(2). This provision applies *mutatis mutandis* to the KIIS at platform level.

However, pursuant to Article 27(3) marketing communications can only be prepared in (i) at least one of the official languages of the Member State in which the marketing communications are disseminated or (ii) in a language accepted by the NCA of that Member State.

⁸ A table summarising the official languages and, when applicable, the other language(s) accepted by NCA is available on ESMA's website https://www.esma.europa.eu/sites/default/files/library/esma35-42-1305_crowdfunding_tables.pdf

Question 5.6 [Last update: 28 January 2022]

Which languages are accepted by NCAs for the purposes of marketing communications and the KIIS?

Answer 5.6

NCAs may also accept additional languages as referred to in Article 23(2) and (3) and Article 27(3) of the ECSPR.

The list of languages accepted by each NCA is available on ESMA's website⁹

Question 5.7 [Last update: 28 January 2022]

Can a project owner market its crowdfunding projects?

Answer 5.7

The ECSPR does not prevent project owners from taking steps to seek funding for their business activity either by (i) directing potential investors to the crowdfunding platform or (ii) offering transferable securities, admitted instruments for crowdfunding purposes or loans in relation to their business activity to the public, outside the crowdfunding platform.

However, additional restrictions and/or conditions may apply to project owners pursuant to European and national laws or may derive from the terms and conditions of some CSPs.

Question 5.8 [Last update: 28 January 2022]

Which laws, regulations or administrative provisions apply when marketing communications are disseminated in the Member State in which the CSP is authorised or in another Member State?

Answer 5.8

Marketing communications disseminated in one or several Member States other than the one where the CSP is authorised, must comply with the provisions of Article 27(1), (2) and (3) of the ECSPR.

In addition, when disseminating marketing communications in a given Member State (including the Member State where the CSP is authorised), CSPs are required to ensure that such marketing communications comply with national laws, regulations and administrative provisions applicable to marketing communications in such Member State.

For the avoidance of doubt, the national rules on marketing communications of Member States are to be complied with separately and not cumulatively (e.g. a CSP authorised in Member State A and disseminating marketing communication in Member States A and B will be

⁹ Available at : https://www.esma.europa.eu/sites/default/files/library/esma35-42-1305_crowdfunding_tables.pdf

required to comply only with the national rule of Member State A when disseminating marketing communication in Member State A and only comply with the national rule of Member State B when disseminating marketing communication in Member State B).

According to Article 27(4), the NCA of the Member State where the marketing communications are disseminated shall be responsible for overseeing compliance with and enforcing their national laws, regulations and administrative provisions applicable to marketing communications.

A link to the applicable laws, regulations, and administrative provisions applicable to marketing communications of each Member State is available on ESMA's website together with a summary in English¹⁰.

¹⁰ Available at: https://www.esma.europa.eu/sites/default/files/library/esma35-42-1305_crowdfunding_tables.pdf