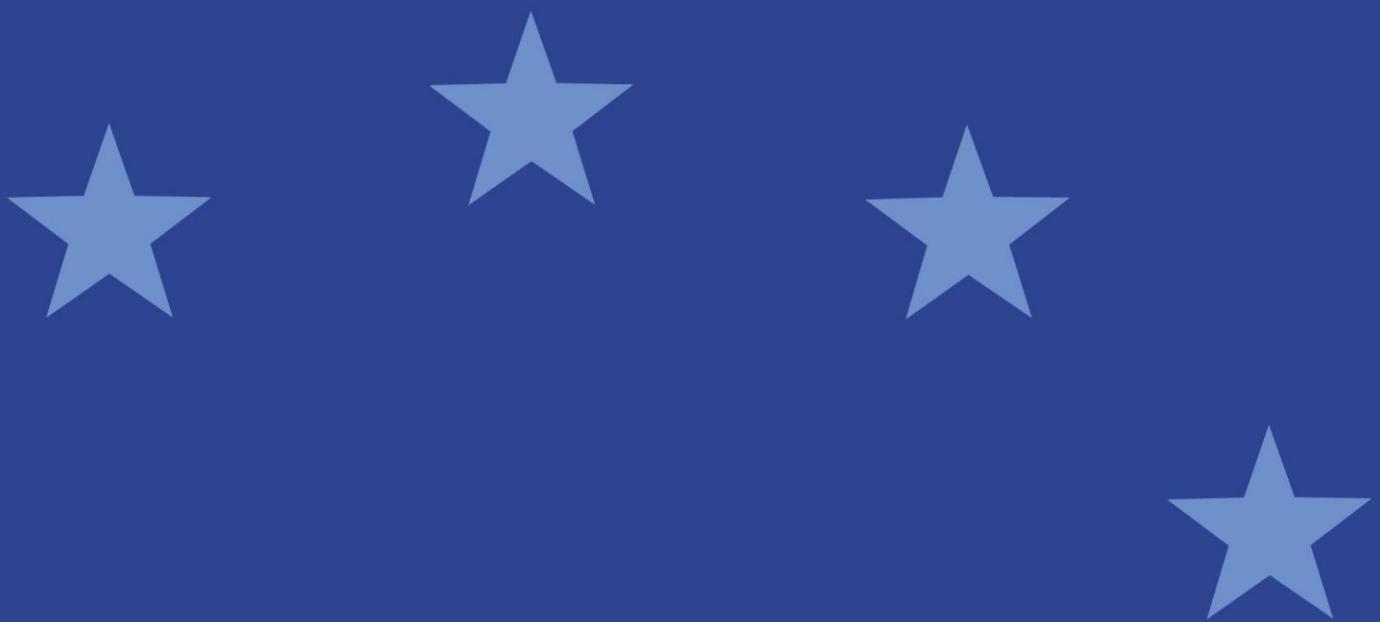


Final Report

ESMA's Technical Advice to the Commission on the possibility to extend the transitional period pursuant to Article 48(3) of Regulation (EU) 2020/1503





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2 Executive Summary

Reasons for publication

Article 48(1) of Regulation (EU) 2020/1503 ("ECSPR") provides for a "*transitional period with respect to crowdfunding services provided in accordance with national law*". In particular, it allows crowdfunding service providers to continue, in accordance with the applicable national law, to provide crowdfunding services that are included within the scope of the ECSPR until 10 November 2022 or until they are granted an authorisation pursuant to Article 12 of the ECSPR, whichever is sooner.

Article 48(3) of the ECSPR provides that the European Commission ("Commission") shall, after consulting the European Securities and Markets Authority ("ESMA"), make an assessment on certain aspects relevant to determine whether an extension of the transitional period set out in Article 48(1) of the ECSPR is desirable.

ESMA received a formal request (mandate) from the Commission on 29 March 2022 to provide, by 27 May 2022, technical advice on the aspects referred to in Article 48(3) of the ECSPR, namely:

- on the application of the Regulation to crowdfunding service providers that provide crowdfunding services only on a national basis;
- on the impact of the Regulation on the development of national crowdfunding markets and on access to finance; and
- on the relevance of extending the transitional period.

Considering the time-constraints to deliver the advice, ESMA only conducted targeted non-public consultations with national competent authorities¹, key stakeholders and key European-wide consumer associations.

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The final report contains ESMA's technical advice. Section 3 focuses on the application of the Regulation to crowdfunding service providers that provide crowdfunding services only on a national basis, Section 4 focuses on the impact of the Regulation on the development of national crowdfunding markets and on access to finance and Section 5 discusses the relevance of extending the transitional period.

Next Steps

The final report has been submitted to the European Commission on 27 May 2022.

¹ ESMA received data from the NCAs of the following 22 Member States AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HU, IE, IT, LU, LV, MT, NL, PL, RO, SK.

Definition and acronyms

ECSPR	Regulation (EU) 2020:1503 of 7 October 2020 on European crowdfunding service providers for business
KIIS	Key investment information sheet as referred to in Article 23 of the ECSPR
NCA	National Competent Authority
Q&A	Question and Answer

3 Application of the Regulation to crowdfunding service providers that provide crowdfunding services only on a national basis

3.1 Mandate

Extract from the Commission's request for advice

ESMA is invited to provide technical advice to assist the Commission in considering the need for the extension of the transitional period for crowdfunding service providers already authorised under national law, in accordance with Article 48(3) of the Regulation, and more specifically on the following aspects:

- on the application of the Regulation to crowdfunding service providers that provide crowdfunding services only on a national basis;

3.2 Analysis

3.2.1 *Expected impact of the application of the ECSPR to crowdfunding service providers benefiting from the transitional period*

1. Article 48(1) of the ECSPR provides that “*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*”.
2. In a Q&A published on 10 November 2021², the Commission has clarified that “*(...) 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.*”
3. Consequently, most crowdfunding providers which operated prior to the entry into application of the ECSPR (i.e. 10 November 2021) are currently operating in accordance to national law under the transitional period set out in Article 48(1) of the ECSPR.

² Q&A 2.1, available at: https://www.esma.europa.eu/sites/default/files/library/esma35-42-1088_qas_crowdfunding_ecspr.pdf .

4. Based on the feedback received from NCAs, it appears that the transition from the relevant national laws to the framework of the ECSPR is expected to be burdensome for crowdfunding providers across the Union.
5. Indeed, out of 22 NCAs which provided feedback to ESMA, 13 indicated that there was no dedicated regime³ in their Member State under national law. For crowdfunding providers established in these Member States stepping-up to the extensive set of requirements provided by the ECSPR will prove to be a substantial challenge.
6. NCAs of the remaining 9 Member States – those which had a pre-existing dedicated regime specific to crowdfunding - all estimated that the adaptation to the ECSPR will nevertheless prove to be burdensome for crowdfunding providers⁴.
7. Some aspects of the regime set out by the ECSPR have been specifically pointed out as particularly difficult to implement in an existing organisation, e.g., requirements on KIIS, information to investors in relation to loan-based crowdfunding offers, conflicts of interest, safekeeping and payment services or entry knowledge test.

3.2.2 Current status of the application of the ECSPR to crowdfunding service providers benefiting from the transitional period

8. Based on data collected from NCAs, it appears that, as of 22 March 2022, no crowdfunding service provider had been authorised pursuant to the ECSPR⁵.
9. It also appears that, as of this date, only 15 crowdfunding platforms applied for authorisation pursuant to the ECSPR out of an estimated EU population of 271 platforms currently benefiting from the transitional period (i.e., 94.5 % of crowdfunding service providers in the Union had not applied for authorisation pursuant to the ECSPR as of that date). It must also be noted that in some Member States, the designation of the competent authority in charge of the authorisation process is still pending in some Member States or has been done quite recently.
10. This low level of applications for authorisation received is even more pronounced in some of the Member States with a significant crowdfunding providers population⁶.

³ I.e. a legislative act specific to crowdfunding some or all of the key organisational and investor protection aspects covered by the ECSPR

⁴ 2 NCAs indicated that the adjustments needed would be moderately burdensome (some significant adjustments will be needed), 4 NCAs indicated that the adjustment would be burdensome (a number of significant adjustments will be needed) and 3 NCAs indicated that the adjustment would be very burdensome (a large number of significant adjustments will be needed).

⁵ ESMA is aware that at least one authorisation pursuant to the ECSPR has been delivered in the Union after 22 March 2022.

⁶ E.g. France (estimated population: 109 crowdfunding providers, 3 authorisation requests filed as of 22 March 2022) or Italy (estimated population of 54 crowdfunding providers and no authorisation request filed as of 22 March 2022).

Identified reasons of the delay of crowdfunding providers to request authorisation under the ECSPR

11. While the situation of each crowdfunding provider might be different, it seems possible, based on feedback received from stakeholders, to identify the following set of reasons to explain the delay of crowdfunding providers of the Union to apply for an ECSPR authorisation:

- (i) First and foremost, it appears that the adjustment from an, often, relatively lighter touch national framework to the full regime set out by the ECSPR represents a significant burden for crowdfunding providers and requires them to rearrange extensively their organisations, procedures and operations to comply with the ECSPR. Consequently, a large portion of crowdfunding providers in the Union are not yet prepared or ready to comply with the ECSPR. This reason emerged as the key one to explain the delay.
- (ii) Second, the increase of operational costs associated with the compliance with the ECSPR is expected to reduce margins of providers and their profitability. Based on feedback received, the ECSPR is also making it more difficult for crowdfunding platforms to attract investors (especially retail investors) and the most attractive projects (notably due to the threshold of EUR 5 000 000 set out in point (c) Article 1(2) ECSPR). This led some providers (including large ones) to reconsider their business model.
- (iii) Third, it seems that a number of crowdfunding providers are still waiting for the Level 2 measures to be adopted to adjust with sufficient granularity their internal procedures before applying for authorisation with their NCA and, in addition, consider that a few issues in relation to the interpretation and application of the ECSPR would deserve further clarifications. While acknowledging that a number of Level 2 measures are available in their draft form, it appears that the costs associated with the redesign of governance and operational arrangements, have led a number of crowdfunding providers to delay the implementation of organisational changes needed to rely on an overall stable legal framework.
- (iv) At last, it seems that financial uncertainties over the last 18 months due to the COVID-19 pandemic and the post-pandemic situation also played a role in the delay in applying for authorisation in accordance with the ECSPR.

Potential consequences of the delay of crowdfunding providers to request authorisation under the ECSPR

12. ESMA believes that the delay of the vast majority of crowdfunding providers to apply for authorisation under the ECSPR with their NCAs has the potential to trigger some negative consequences for the European crowdfunding market.

13. First, it is likely that many of the crowdfunding providers which have not applied yet will do so close to the end of the transitional period (i.e. towards the end of Q2/early Q3 of 2022). If this scenario materialises, NCAs will be faced with a high number of applications for authorisation. In some Member States this could represent several dozens of applications filed simultaneously. This sudden flow of applications would make it difficult for NCAs, and especially NCAs of Member States with a developed crowdfunding market, to deliver all requested authorisations prior to the end of the transitional period. (i.e., 10 November 2022). Indeed, out of 21 NCAs which expressed a view on this issue, 16 have indicated that, in such scenario⁷, delivering an ECSPR authorisation to all remaining crowdfunding service providers in their Member State prior to 10 November 2022 would be challenging, very challenging or even impossible⁸. It must be noted that NCAs of Member States with a more active crowdfunding market all expressed concerns deeming the delivery of authorisation prior to 10 November 2022 between challenging and impossible.
14. As a consequence of the above, assuming that the transitional period is not extended, it seems likely that a (potentially significant) number of crowdfunding providers will be required to stop performing crowdfunding services (including launching new crowdfunding offers) after 10 November 2022.
15. This would have, *inter alia*, 2 consequences:

- First, crowdfunding providers not authorised on time would need to stop charging fees to clients (investors and project owners) while continuing to bear their fixed operational costs. This situation may financially endanger some of these providers, sometimes in a significant way.
- Second, on-going crowdfunding projects offered on platforms of crowdfunding service providers not authorised before 10 November 2022 will need to be immediately suspended. This may negatively impact the performance of investments in such offers, with potential detrimental effect for investors who invested their money in such offers.

⁷ i.e., All remaining authorisation requests are indeed received by NCAs between the end of Q2 and early Q3.

⁸ Out of 21 NCAs, 5 considered that delivering authorisations to all crowdfunding providers by 10 November 2022 would be a straightforward process, 4 expects this to be challenging, 6 very challenging and 6 deemed it impossible.

3.3 Technical advice

ESMA suggests to the Commission to take in consideration that ensuring compliance with the ECSPR requires existing crowdfunding providers to implement significant changes to their current governance and operational arrangements.

ESMA also suggests to the Commission to carefully consider the impact for the European crowdfunding market of not extending the transitional period set out in Article 48(1) of the ECSPR.

The Commission is specifically invited to consider that, on the basis of input received from crowdfunding providers and NCAs, it appears very likely that a number of crowdfunding providers will not be authorised pursuant to the ECSPR before 10 November 2022 and that these providers will consequently need to put on hold their business activities while continuing to bear their fixed operating costs. The interruption of existing crowdfunding services may also affect investors, including non-sophisticated investors, which invested in crowdfunding projects offered on platforms of crowdfunding service providers benefiting from the transitional period.

4 Impact of the Regulation on the development of national crowdfunding markets

4.1 Mandate

Extract from the Commission's request for advice

ESMA is invited to provide technical advice to assist the Commission in considering the need for the extension of the transitional period for crowdfunding service providers already authorised under national law, in accordance with Article 48(3) of the Regulation, and more specifically on the following aspects:

- on the impact of the Regulation on the development of national crowdfunding markets

4.2 Analysis

16. As indicated in Section 3, no authorisation pursuant to the ECSPR has been delivered as of 22 March 2022. ESMA is therefore not in a position to advise on the impact of the application of the ECSPR.
17. However, feedback received from some crowdfunding providers indicated that the necessary adjustments and uncertainties associated with upcoming application of the ECSPR had negatively impacted the crowdfunding market, notably by pushing a number of players to adopt an attentive approach or reconsider their business model.
18. From a consumer protection standpoint, it is anticipated that the end of the transitional period and the actual application across the Union of the requirements set out in the ECSPR will increase the level of protection offered to investors across the EU and even more so to non-sophisticated investors. One European consumer association noted that extending the transitional period has the potential to harm investors by prolonging a situation where diverging regimes (i.e. ECSPR and national laws) with diverging levels of protection for consumers coexist.

4.3 Technical advice

Given that no crowdfunding provider has, to date, started operating with an ECSPR authorisation, ESMA is not in a position to advise the Commission on its actual application.

5 Relevance of extending the transitional period

5.1 Mandate

Extract from the Commission's request for advice

ESMA is invited to provide technical advice to assist the Commission in considering the need for the extension of the transitional period for crowdfunding service providers already authorised under national law, in accordance with Article 48(3) of the Regulation, and more specifically on the following aspects:

- on the relevance of extending the transitional period

5.2 Analysis

5.2.1 *Relevance of an extension from a consumer protection standpoint*

19. In light of the existing fragmented investor protection framework resulting from a diverse range of national legislations, and as confirmed by an EU-wide consumer association, the decision not to extend the transitional period would be better suited to ensure consumer protection. It is indeed rather in the interest of investors, and especially non-sophisticated investors, across the Union to benefit as soon as possible of a harmonised set of rules ensuring a high level of protection. Also, as indicated earlier, prolonging a situation where diverging regimes (i.e. ECSPR and national laws) with diverging levels of protection for consumers coexist has a potential to be detrimental to the overall level of investor protection in the Union.
20. On this important issue, it is worth noting that the vast majority of crowdfunding providers currently benefiting of the transitional period have their registered office in Member States where a dedicated regime on crowdfunding offering some level of protection to investors is nevertheless in place⁹.

5.2.2 *Relevance of an extension from a crowdfunding market standpoint*

21. Based on feedback received from stakeholders, it appears that a significant number of crowdfunding providers are not yet ready to operate in compliance with the ECSPR due to the reasons detailed in Section 3.2.3. Extending the transitional period would give crowdfunding providers additional time to prepare. However, such extension should in no

⁹ Based on information provided by NCAs, the following 9 Member States have a dedicated regime for crowdfunding AT, BE, DE, EL, ES, FI, FR, IT, NL. In accordance with NCAs' data, there are 234 crowdfunding providers in these 9 Members States out of 271 providers overall in the 22 Member States.

way be a mean for crowdfunding providers to pursue an attentive approach but rather a mean to push them to transition as soon as possible to the ECSPR.

22. Furthermore, as indicated in Section 3, the very low number of applications for authorisation received from crowdfunding providers currently performing crowdfunding services under national law is concerning (i.e., 15 in total in the 22 Member States which provided data to ESMA, out of an estimated population in these same 22 Member States of 271 crowdfunding providers).
23. There exists a tangible risk that a number of NCAs, and notably those of Member States with the largest population of crowdfunding providers, will not be able to approve the application of a number of crowdfunding providers prior to 10 November 2022. As already discussed, the financial consequences for those providers of a suspension of their business could be severe and could impact negatively the concerned national markets.

5.2.3 Views of NCAs on a potential extension

24. Out of 18 NCAs which expressed a view on this topic¹⁰, 6 NCAs indicated that they consider that an extension of the transitional period is not desirable and 12 NCAs expressed the view that such extension is desirable.
25. The 10 NCAs which deem an extension desirable are from Member States representing almost 84% (227 firms out of 271) of the crowdfunding providers population in the Union.

¹⁰ NCAs from 4 Member States did not express view on the relevance of an extension of the transitional period.

5.3 Technical advice

While an extension of the transitional period would delay the application of harmonised investor protection rules, it appears that the risks at stake for the European crowdfunding market as a whole are significant in case no extension is implemented.

For this reason, ESMA supports granting the extension of the transitional period.

At the same time, ESMA is of the view that such extension shall be designed (i) to avoid that it triggers any further unjustified delay in the transition to the ECSPR while (ii) ensuring that no existing crowdfunding provider with a pending authorisation request ends-up getting its activities suspended.

Consequently, ESMA suggests that the Commission explores the possibility to extend the transitional period only to the benefit of crowdfunding service providers currently operating under national law and which have applied for authorisation pursuant to the ECSPR before the end of the current transitional period.

For that purpose and to facilitate a proper and timely handling of applications received by NCAs, ESMA suggests that such extension applies to crowdfunding providers which have applied for authorisation pursuant to the ECSPR by 1 October 2022