8

Financial Crowdfunding Regulation in EU Countries

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8.1 Introduction

Equity-based crowdfunding is not comprehensively regulated in the European Union. The absence of specific European regulations on crowdfunding may inhibit some entrepreneurs from using crowdfunding to raise capital, because entrepreneurs must comply with other, more complex, regulations on raising capital, and also need legal advice in each country in which they want to use crowdfunding.

It would seem to be worthwhile analysing the judicial framework in the European Union that regulates this innovative means of funding entrepreneurial activities. To do this, the focus of the chapter will be regulations specific to crowdfunding, where these exist; if there are none, the focus will be the effect on financial crowdfunding of national financial regulations.

In particular, we have chosen not to study all European countries, but just six countries that seem especially relevant in terms of the general importance of these countries as well as the volume of funds raised through platforms based in these countries.

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In some of these countries, crowdfunding is presently a work in progress. This should be a warning, since we are sometimes taking into consideration drafts or projects that could change in the future.

A further goal of this chapter is to define some standard rules that seem effective in the light of the different interests related to the phenomenon, such as protection for investors and the need for entrepreneurs to find funding. We hope that these rules could become a common model across the European Union, and perhaps constitute an example for the European Union itself.

8.2 France

Before the recent reform of crowdfunding, general rules on bank activities and investments used to apply to platforms. These rules imposed strict conditions, and required control by the competent authorities (Autorité de Contrôle Prudentiel and Autorité des Marchés Financiers), even for platforms dealing with small amounts of money (Alvisi 2014, p. 15; Daniel 2013). This situation was criticised, particularly by professionals, as an obstacle to the development of the phenomenon (Daniel 2013).

The French government tried to solve the problems arising from the application of the general regime mentioned above, and specific rules have been applicable since 1 October 2014. Such rules are considered to have been a benefit for the market, even if it is clear that they also tend to impose limits, primarily to protect investors (European Crowdfunding Network 2014a, p. 91).

There are now two specific statuses for platforms: '*conseil en investissement participatif*' (CIP), a crowdfunding investment advisor; and '*intermédiaire en financement participatif*' (IFP), a crowdfunding investment intermediary. These statuses are optional, because an operator could choose instead to be registered or licensed as a '*prestataire de services d'investissement*' (PSI) or a credit institution, if it is worthwhile for it to incur this expense, given the services that it will offer to its clients (European Crowdfunding Network 2014a, p. 93). The result is that, on the one hand, it is possible to adopt a legal status that is cheaper and more

flexible than the traditional ones (Daniel 2013), and, on the other hand, it is still possible to adopt a traditional status, if this is suitable.

As to the lending model, IFPs are legal entities, and it is not necessary for them to be established in France, which is an important feature for foreign investors. However, while the registration rules are substantially similar to those applying to CIPs, and include insurance duties, very low limits apply, in particular to interest-bearing loans, and specific requirements are established for borrowers and lenders, who are often assumed to be individuals and/or acting in a non-professional capacity.[1] From the point of view of a foreign investor, it seems that the possible advantage of using a branch of his own company to register as an IFP should not be over-valued, given the other limits to the lending activity that have been mentioned. Furthermore, if it is true that banks have lost their monopoly on remunerated loans to companies (Hornuf and Schwienbacher 2014c, p. 22, note 18), these limits will tend to limit the potential size of the crowdfunding phenomenon.

As to the equity model, there are strict requirements about the registration and activity of CIPs; in particular, it is worth emphasising the duties to take out specific insurance policies and to provide the investor with adequate information about the risk being taken on.[2] These tend to protect, by different means, the same interest. There is also another limit that probably acts in the same direction: only ordinary shares ('*actions ordinaires*') and fixed interest bonds ('*obligations à taux fixe*') can be issued through the platforms (European Crowdfunding Network 2014a, p. 95). It seems that forbidding platforms to be used to issue securities such as warrants and convertible bonds tends to protect investors. Such means of investment certainly involve different rights in comparison with shares and fixed interest bonds, and it might perhaps be more difficult for the investor to understand this difference. In general, it has been highlighted that the new discipline tends to make portals into gatekeepers, and this could lead to a reduction in the frequency at which investments are

[1] See European Crowdfunding Network (2014a, p. 96), detailing the rules about registration and requirements, and distinguishing between interest-free loans and interest-bearing loans with regard to limits and the personal qualities of lenders and borrowers.

[2] European Crowdfunding Network (2014a, p. 94), which also describes the registration obligations and requirements, and highlights that CIPs must be legal entities established in France.

issued and, at the same time, to a widening of their amounts (Hornuf and Schwienbacher 2014c, p. 29).

A relevant prospectus exemption is established for the offering of equity and fixed interest bonds on crowdfunding websites: this will not be considered as a public offering if the amount is lower than €1 million per issuer over a 12-month period. As a counterbalance to this exemption, investors must be provided with adequate information by the CIP or the PSI (and the information has to be provided 'in a language accessible to a lay person' [European Crowdfunding Network 2014a, p. 98]). This information must cover not only the risks involved in the investment, but also the rights the investor will have, the possibility of selling the securities, financial projections and the level of participation of the management of the issuer in the project (European Crowdfunding Network 2014a, p. 98). These last two aspects seem particularly interesting: the investor has to be aware of the rules, of both legal and contractual origin, applicable to the securities. The definitions of voting and information rights will clarify the powers that the investor will have in the organisation of the issuer. Specifying essential rules about the liquidity of the securities will allow the investor to understand how easy it could be to disinvest in the future; this is a very important condition, one that fundamentally distinguishes this form of investment from a traditional investment in a listed company.

There are also two other new exceptions to public offering rules that are worth highlighting: a '*société par actions simplifiée*' (SAS) is now allowed to make a public offering through a crowdfunding platform; and platforms are forbidden to hold shares in the companies for which they collect funding.[3]

The new discipline has received a positive evaluation from professionals, particularly because it does not over-govern the platforms, providing a flexible and specific status for them (Daniel 2013; European Crowdfunding Network 2014a, p. 100). Beyond this, it has been argued

[3] European Crowdfunding Network (2014a, p. 95), underlining the flexibility of the SAS, often used for venture capital, and the consequence of the prohibition mentioned in the text, and also stating that the former practice of crowdfunding platforms collecting proxies from the investors for general shareholders' meetings will no longer be possible under the new rule.

that the limits on the amounts that it is possible to raise on a platform will avoid pressure from the banking system, since platforms are not likely to threaten banks' activities (European Crowdfunding Network 2014a, p. 101). But do the banks have the right to object to crowdfunding platforms even if they do represent a threat to their activities? It does not seem that banks need to be protected, while investors do. In general, such limits could also be considered as a means of protection for investors, with regard to the needs not just of investors as individuals, but also of the public as a whole.

The discipline of the prospectus exemption has also been judged to be a positive innovation (European Crowdfunding Network 2014a, p. 101); this is also true when one considers the duty to provide the investor with adequate and complete information, which could be even more effective than a prospectus in protecting the investor's interests. It can be difficult to furnish simple and clear information about the very complex subject of the risks and rights related to the investment, but trying to do this could very much help the investor to understand the consequences of his choice.

Finally, it is worth highlighting the interesting rule about insurance, as this seems suitable for the effective protection of investors to a greater extent than the other duties. Even if the information is complete, it is not necessarily the case that the investor is able to understand the information or to understand anything more than how complex it is, so that this duty looks like a useful supplementary guarantee. The insurance rule also seems original when looking at other national regimes.

The other aspects of this discipline that could be discussed basically concern the governance of the issuing company. The limit on the types of securities that can be issued through the platforms could lead to a dilution of the rights of the company's funders, which would be avoidable if preferred shares or convertible bonds were issued; this could make these means of funding less attractive. Forbidding the platforms to hold shares in the companies for which they collect funding would require a modification of the proxy advisor regulation, in order to provide satisfactory solutions to the organisation of votes at general shareholders' meetings (European Crowdfunding Network 2014a, p. 101).

8.3 Germany

The importance of crowdfunding is often emphasised with regard to the German market by noting that it gives self-employed people and micro-firms a chance to fund themselves, given that many banks tend not to find it attractive to lend in small volumes (particularly because of the administrative costs involved [Dapp and Laskawi 2014, p. 2]). Furthermore, there is the fact that the sector has seen rapid growth in recent years.[4]

As in other countries, crowdfunding regulation in Germany has recently been modified, and it is probably going to be modified again, with a review that is scheduled for 2016 (European Crowdfunding Network 2015). Consequently, it is worthwhile analysing the legislation (the German Small Investor Protection Act–*Kleinanlegerschutzgesetz*) enacted in 2015, and the modifications made to the bill, which tried to solve criticisms made by scholars and the crowdfunding industry (Klöhn et al. 2015, p. 2). In general terms, it seems that German legislators took into account stakeholders' opinions (European Crowdfunding Network 2015).

Starting from the licensing requirements and the exemptions, in general terms a crowdfunding platform, facilitating the offering of securities, provides financial services, and accordingly its operator requires a licence from BaFin (*Bundesanstalt für Finanzdienstleistungsaufsicht*, the German financial supervisory authority). A statutory exception to this licensing requirement is available if subordinated profit-participating loans are offered and other specific conditions are met, but a licence under the German Trade, Commerce and Industry Regulation Act will always be necessary.[5] The need for the platform to be an investment service enterprise or to be subject to monitoring by the general trade regulatory authorities arises from the legal obligation to monitor the subscription

[4] See Grummer and Brorhilker (2012): 'Just since the beginning of 2012, the number of websites that act as interfaces between start-ups and investors have more than doubled'; see also Dapp and Laskawi (2014, p. 7), reporting a growth of 253 % in crowdinvesting in 2013.

[5] European Crowdfunding Network (2014a, pp. 106–7) mentions the exception requirements regarding the activities carried out by platforms and the investment products that can be offered, as well as the prohibition on owning customers' funds or shares (unless a specific licence is obtained to do this).

limit, which will be mentioned below (Klöhn et al. 2015, p. 7 and footnote 29).

It is worth underlining that subordinated profit-participating loans (‘*partiarisches Nachrangdarlehen*’) will qualify as investment products (‘*Vermögensanlagen*’) under the German Investment Products Act (European Crowdfunding Network 2014a, p. 105), and this represents a big difference from the previous regulation, under which this form of participation did not represent a form of security. In the past, when the definition of what constitutes a security did not include specific forms of profit-participating loans (‘*partiarisches Darlehen*’), this type of form was often adopted to avoid the restrictions on raising funds.[6]

As to the limits established for investors, the bill proposed two regimes, for investments up to €1,000 and investments of more than €1,000, and an absolute maximum of €10,000 per investor (European Crowdfunding Network 2014a, p. 108), without distinguishing between potentially different types of investor (Klöhn et al. 2015, p. 9). The legislation did introduce such a distinction, allowing corporate entities to invest more than the limits usually provided for other investors, which are those limits mentioned above. The choice made by the legislators does not seem very convincing. It has been argued that the provision is, at one and the same time, over-inclusive, since qualified investors such as business angels are not covered by it unless they are corporate entities, and under-inclusive, since it applies to a corporate entity whether or not that entity is a sophisticated investor (Klöhn et al. 2015, p. 18). Indeed, this concept of qualified investor does not seem to have any justification, since the qualification does not seem to be related to the legal character of the investor. Besides this, a corporate entity could need protection. Comparing the rule with those enacted in other EU countries on this subject, this criterion does not seem likely to produce an effective balance between the interests involved.

[6] Weinstein (2013, p. 447) mentions the use of profit-participating loans by some platforms to raise more than €100,000 per project. Hornuf and Schwienbacher (2014c, p. 23) remind us that ‘the definition of what constitutes a security is not all-encompassing and leaves out specific forms of profit participating loans (e.g., *partiarisches Darlehen*)’, and consequently that offers of unlimited amounts could be possible if the financial contract is structured in a certain way.

Significant limits were also established in the legislation with regard to the advertisement of investment products, which could prevent platforms from reaching a broad public through social networks (European Crowdfunding Network 2014a, p. 109), and consequently limit their chances. These limitations could be considered reasonable, in particular with regard to social networks, given that offering investment products through these tools could, in practice, lower the risk awareness of investors, who might receive the advertisement during their free time, and probably pay less attention to what they receive or read. However, the legislator has radically changed the regime in this area, allowing advertisements, and merely requiring a warning of the risk of a total loss of the investment to be published together with the advertisement (or to be reachable through a link if the advertisement on electronic media contains fewer than 210 letters) (Klöhn et al. 2015, p. 9).

As to prospectus requirements, offering profit-participating loans no longer represents an exception to the requirement for a prospectus (Klöhn et al. 2015, p. 7). At the same time, significant exemptions are established, and a prospectus will not be required if profit-participating loans or subordinated loans are offered through a crowdfunding platform, for a maximum amount of €2.5 million, which must be monitored by the platform (European Crowdfunding Network 2014a, pp. 108–9; Klöhn et al. 2015, p. 7). The maximum amount proposed was €1 million and the increase to €2.5 million is sometimes considered as a beneficial change, since it eliminates a restriction that was both stringent (Tordera 2015) and criticised (European Crowdfunding Network 2015). However, other authors tend to disregard the effect of this change, in the light of empirical data showing that a minimal number of crowdinvestments exceeds €2.5 million (Klöhn et al. 2015, p. 11), so that this change cannot be deemed to be very significant.

Some further remarks are worth making with regard to the prospectus exemption mentioned above, which is available if profit-participating loans or subordinated loans are offered to the public. It has been emphasised that for these types of investment there is also a need for investor protection, since this protection can be ensured only by taking into account the specific terms of the investment (Klöhn et al. [2015, pp. 11–2] highlight the paradox arising between the discipline applying to an issuance of profit-participating loans in an amount of €2.5 million

and that applying to an issuance of equity shares in an amount of less than €100,000). This remark seems more persuasive than another made by the same authors about this matter. They argue that making the crowdfunding exception available for all investments would not harm investor protection since investors can evaluate a project and an issuer and share their opinions on them (Klöhn et al. 2015, p. 13). Even if this does happen, it is not obvious that the crowd really has the ability to evaluate the project; nor it is obvious that, by virtue of the intermediation of the crowdfunding platforms, financing contracts will be set up that meet investors' and issuers' combined needs in the best way (although this is considered to be 'very plausible' by Klöhn et al. [2015, p. 13]).

It has been pointed out that the regulation conveniently provides for exemptions from requirements for crowdfunding and for lighter regulation for crowdfunding platforms (European Crowdfunding Network 2014a, p. 112, with regard to the proposed regulation that then entered into force).

Other aspects of the draft legislation that were criticised included the reduction of the regulatory requirements just for profit-participating loans, and the establishment of strict limits of investment per investor (European Crowdfunding Network 2014a, p. 112). In the final legislation, the first investment limit was confirmed, and the regime applicable to the investment limit was changed, but not in a persuasive way, as mentioned above. An appropriate change could consist in raising the limit provided for investors without relating this to their income, and exempting professional clients from the limits (defining such clients following the rules contained in the Securities Trading Act, and so without reference to corporate entities [Klöhn et al. 2015, p. 20]). Other possible suggestions are a widening of the scope of the application of the exception to the requirement for a prospectus, and the introduction of an investor education test to be carried out by the crowdfunding platforms (Klöhn et al. 2015, p. 20).

8.4 Italy

Italy was the first European state to enact a specific regulation on crowdfunding (Hornuf and Schwienbacher 2014c, p. 19). There is also a further regulation enacted by Consob (the Italian securities market authority)

following guidelines established by the Italian legislator. Despite this, crowdfunding has not, so far, grown in the same way as in other countries, as Consob has highlighted (Consob 2015, p. 2).

In particular, the rules established in the specific regulation have a limited scope of application. First, they apply only to equity-based crowdfunding (Piattelli 2013, p. 57). Lending crowdfunding platforms operate under the authorisation of the Bank of Italy as payment institutions and financial intermediaries (and the kind of authorisation required depends on the activities undertaken by the platform [European Crowdfunding Network 2014a, p. 140]). Second, the rules used to be applicable only to companies that met strict requirements (so-called 'innovative start-ups') (Piattelli 2013, p. 57). However, they were then applied to other entities such as innovative SMEs and others, following further reforms. Even so, the entities to which they apply have always been identified through specific criteria. This does not mean that other companies cannot offer their securities to the public; however, if they do this, general rules will be applicable (the Italian Consolidated Financial Act), and a preferential treatment will not be available (Alvisi 2014, p. 6).

Specific rules apply to platforms: their management can be conducted only by investment companies and banks, or by companies that have obtained a specific authorisation from Consob (European Crowdfunding Network 2014a, p. 139; Fregonara 2014, p. 9; it has been highlighted that heterogeneous entities are allowed to manage platforms [Vitali 2014, p. 381]).

In this second case, there are special prohibitions: platforms cannot process orders regarding the underwriting of financial instruments or collect money from investors, and in general terms are subject to a lighter regulation than that applicable to other entities that are allowed to manage platforms (such as investment companies and banks) (European Crowdfunding Network 2014a, p. 139). It has been underlined that for this reason platforms tend to become mere 'shop windows', given how strictly their activity is limited (Laudonio 2014, p. 23). Beyond this, if the company that manages the platform wants to raise funds not only for innovative start-ups but also for other entrepreneurs, separate platforms will be required (Pinto 2013, p. 824).

There is a general limit on the amount that it is possible to raise for each project (€5 million) (Ferrarini 2013, p. 217; European Crowdfunding

Network 2014a, p. 136). This limit has been established to exclude the application of general rules about public offerings of securities, but at the same time it could obstruct the potential growth in crowdfunding (Troisi 2014, p. 529). There is also a remarkable limitation with regard to the securities that can be offered through the platform: only shares in public or private companies, and not bonds and other debt securities.[7] This could make equity crowdfunding less attractive for investors who are not inclined to make risky investments (Fregonara 2014, p. 23).

The participation of a professional investor is also required for the offering to be successfully completed: at least 5 % of the offered share capital has to be paid in by a professional investor (Weinstein 2013, p. 444; European Crowdfunding Network 2014a, p. 139; Fregonara 2014, p. 20).

Scholars have criticised this rule for several reasons. The concept of professional investor does not encompass business angels and venture capitalists, who are naturally interested in start-up investments (Culicchi 2013, p. 4; Fregonara 2014, p. 21). It does not seem likely that professional investors will always be found, especially for minor offerings (Piattelli 2013, p. 61; Fregonara 2014, p. 22). Last but not least, the presence of professional investors does not really protect retail investors, given, in particular, that the latter do not have the right to know anything about the due diligence carried out by the former before participating in the offering.[8] In conclusion, this rule could limit the chances of crowdfunding (Culicchi 2013, p. 4; Troisi 2014, p. 531; Vitali 2014, p. 402),

[7] See European Crowdfunding Network (2014a, p. 139), highlighting the great difference between securities that can be offered through a crowdfunding platform and the general definition of securities. Also, Vitali (2014, p. 391), who points out that excluded from the offering could be bonds, convertible bonds and the particular kind of bonds issued by limited liability companies. For greater detail see Ottolia (2014, pp. 49–50), who points the particular choice of the Italian legislator and argues that the important feature of the securities that a platform can offer is the participation in the entrepreneurial risk. This should make it possible to offer the securities governed by article 2346 of the Civil Code, which are hybrid securities that could be considered similar to shares from this point of view.

[8] Vitali (2014, p. 399) also underlines the fact that while professional investors could participate in the offer, even if they considered it risky, by lessening the risks through other investments, retail investors are not generally able to do that. Laudonio (2014, p. 26) harshly criticises the rule as not likely to guarantee retail investors. Other critical remarks are made by Fregonara (2014, p. 22) and Piattelli (2013, p. 60), who argue that crowdfunding should be an alternative means of funding, so that the need for professional investors is strange. See also Culicchi (2013, p. 3).

without guaranteeing that the company issuing securities can be relied on by investors (Consob 2015, p. 10).

As mentioned above, the Italian legislator made the peculiar choice to make crowdfunding initially available only for 'innovative start-ups' that meet the specific requirements set forth in law 221/2012 (Piattelli 2013, p. 26; Weinstein 2013, p. 443; European Crowdfunding Network 2014a, p. 139; Fregonara 2014, pp. 7–8). It is worth briefly analysing these requirements to help understand the extent to which it is possible to use equity crowdfunding in Italy. Apart from other conditions, the company must have been in existence for no longer than 60 months, must not have distributed any profits, and must carry out a hi-tech activity. Considering in particular the technological requirement and the prohibition on sharing profits, it is clear that a limited number of companies will be able to access crowdfunding. This approach has been criticised by scholars, given that many innovative entrepreneurs will be excluded from using the new funding tool, regardless of the fact that they could easily attract investors (Culicchi 2013, p. 1). This limitation does not seem to be justifiable, since it is not clear why investors cannot choose, from a much larger number of entrepreneurs, the one that they want to fund (Alvisi 2014, p. 4; Laudonio 2014, p. 19), and it also seems to contradict 'the clear intention of the European Commission to support the Crowdfunding raising on a wider basis' (European Crowdfunding Network 2014a, p. 141).

New rules have been enacted concerning this aspect, which widen the application of the regime, but the scope still seems limited. Following modifications brought in by law 33/2015, innovative SMEs, particular investment entities ('*organismi di investimento collettivo del risparmio*') and companies whose main financial assets are shares in innovative start-ups or innovative SMEs are now allowed to use crowdfunding. If one considers the legal definitions of such entities, and the strict requirements with which they have to comply to be considered as such, the approach has not actually changed in a significant way.

With regard to innovative SMEs, two out of three features are required: innovation expenses have to represent at least 3 % of the total income or the total costs related to the core business (whichever is highest), and this ratio would seem to be quite easy to reach; a certain percentage of

employees who are taking a PhD course or have a PhD qualification (1/5), which does not seem to be common; and the ownership of a patent directly related to the core business, which is also quite a specific condition. All of these features are consistent with the concept of innovation, and, at the same time, they also limit the concept of innovation.

With regard to the particular investment entities mentioned above (*organismi di investimento collettivo del risparmio*) and companies whose main financial assets are shares in innovative start-ups or innovative SMEs, these assets must represent 70 % of the company's total financial assets, which seems a high level.

As mentioned above, even if the scope of application of the regime is now wider, significant limits to the possibility of using crowdfunding persist for Italian enterprises, since this innovative means of funding is basically only available for innovative enterprises. It is also important to underline that Consob plans to modify its own specific regulation because of these new rules (Consob 2015, p. 1).[9]

As to the investors, there are no caps on how much money they can invest (as there are in other countries), but there are information duties[10] on the platforms that tend to protect investors. In particular, a declaration is required by the investor, which certifies that he or she understands the risks related to the investment and the possibility that there might even be a total loss of the capital invested (Crucil 2013, p. 1061; Manzi 2013, p. 403; Querci 2014, p. 37). Brief and clear information should be provided, avoiding the use of technical words, on a maximum of five pages. Scholars have argued that achieving this goal when potentially complex information is involved is unrealistic, in particular considering the required features of the language-not technical or containing jargon, and clear and succinct (Laudonio 2014, p. 25).

[9] The specific regulation has been modified through a Consob resolution adopted on 24th February 2016 and which has come into effect on 5th March 2016. Due to publishing needs, it has not been possible to update this paragraph taking the new rules into account.

[10] See Querci (2014, p. 39), who shows that the Italian legislator wants to guarantee that investors have knowledge about investments that are particularly risky, because of their involvement in the innovative technologies field. Fregonara (2014, p. 13) underscores the fact that the protection of retail investors consists in their comprehension of the features of the investment and the risks related to it. For greater detail, including a comparison between the information required by crowdfunding platforms and that required in general, see Laudonio (2014, p. 24).

Offering securities only to qualified investors means that a different regime for required information is applied (Crucil 2013, p. 1061).

As to prospectus exemptions, the prospectus requirements do not apply to offerings of securities with a maximum value of €5 million within a 12-month period. The European Crowdfunding Network (2014a, p. 140) stresses that crowdfunding platforms, even if they are not subject to a requirement for a prospectus, will be subject to specific duties in terms of providing information. The importance of this benefit has been highlighted (Rizzo 2014, p. 304).

As mentioned above, some choices made by the Italian legislator do not seem persuasive. In particular, the need for the participation of a professional investor in crowdfunding offerings and the limited scope of application of the new discipline because of the strict requirements on which companies are allowed to use crowdfunding. Even if scholars assert that the scope of application of the discipline could be widened in the future (Weinstein 2013, p. 443; European Crowdfunding Network 2014a, p. 139), the Italian legislator has confirmed that crowdfunding will be available only for innovative companies and for companies whose main investments are in innovative companies.

8.5 The Netherlands

In the Dutch market, crowdfunding is a rapidly developing sector that is characterised by interesting perspectives of growth (Douw and Koren Crowdfunding Consultancy 2013; Autoriteit Financiële Markten 2014, pp. 12–6; Schwienbacher 2015, p. 8). Given the absence of a specific discipline applicable at this time (see below), supervisory activities are carried out by authorities such as the central bank (*De Nederlandse Bank*—DNB) and The Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*—AFM), depending on how the platforms operate, and taking into account the fact that platform activities are in general quite similar to intermediary activities (Alvisi 2014, pp. 18–9; European Crowdfunding Network 2014a, p. 158). Some platforms are not subject to supervision by

the AFM, if their activities do not require a licence, because, for example, they just introduce clients to fund projects.[11]

When the Dutch Financial Supervision Act (FSA) applies, it is possible to distinguish lending-based and equity-based crowdfunding. For lending, the platform may need a licence as a financial services provider if its activity involves consumer credit, or an individual exemption if repayable funds are received from the public. The requirement in the first case would arise from the fact that the platform intermediates in relation to consumer credit. For equity-based crowdfunding, attracting available repayable funds is prohibited under the FSA, unless there is a banking licence, an exception or an individual exemption (European Crowdfunding Network 2014a, p. 161).

As to the equity model, the platform will require a licence as an investment firm to accept and transmit the orders of lenders because shares and bonds are regarded as financial instruments. Debt instruments normally also qualify as repayable funds, given that a debt instrument will normally have a repayment term, but the licence or exemption from the AFM that would usually be necessary will not be required if the issue is made in accordance with the Prospectus Directive (or is exempt under that directive) (European Crowdfunding Network 2014a, pp. 160–1).

As to the prospectus exemptions, there is an exception for offerings of securities or investment products with a value of €2.5 million or less within a time period of 12 months. This amount is not usually reached by offerings carried out by Dutch crowdfunding platforms (European Crowdfunding Network 2014a, pp. 161–2; Schwienbacher 2015, p. 12).

After analysing the statutory framework, it is also worth underlining a peculiarity of crowdfunding in the Dutch context that is beyond the statutory framework and depends on a specific activity of the AFM. This authority has attached specific provisions to each licence or exemption that it has given to platforms. These provisions tend to protect private

[11] Autoriteit Financiële Markten (2014, p. 32, footnote 15) mentions platforms that are 'structured as a kind of notice board where the services provided by the platform for the funding of projects is limited to the introduction of clients' (such an activity being exempt from the requirement to obtain a licence), and platforms that allow lenders to invest collectively in a legal entity that holds shares in the borrower (normally a start-up company). Alvisi (2014, p. 19) also notes this aspect, referring to the activities of platforms that fall outside the scope of the regulations.

investors, limiting the amount they can invest, educating them about how to lessen the risks when investing money, and requiring the platform not only to provide them with adequate awareness of the risks related to the investment, but also to ensure that the borrower furnishes correct and clear information and is likely to repay.[12] The extent of these provisions is remarkable, but, as the AFM admits, the fact that they are not at a statutory level makes it difficult to supervise compliance (Autoriteit Financiële Markten 2014, p. 33). More generally, and as a result of this difficulty, the authority emphasises that a statutory framework to guarantee adequate protection for lenders and borrowers would be necessary in relation to the regimes of intermediation in callable funds and in loans. Also, it calls for the licensing regime for the provision of loans should also be reformed because it does not guarantee enough protection for lenders (Autoriteit Financiële Markten 2014, pp. 33–4).

A further issue for lenders is the absence of a secondary market, which implies that they actually need to hold their financial instruments or loans until maturity, with possible consequences if their financial situation changes (Autoriteit Financiële Markten 2014, p. 22). Some platforms are trying to face up to this problem, giving their investors the option to disinvest; Symbid is an example here (Clifford 2013). As the AFM was expecting (Autoriteit Financiële Markten 2014, p. 22), platforms are starting to help investors in this way. It is worth highlighting that in this specific case the AFM does not recommend the introduction of statutory rules, but just wishes platforms to set voluntary remedies. The lack of a secondary market actually seems common to all EU countries.

What is the probable future of crowdfunding in The Netherlands?

Professionals sometimes argue that, apart from regulation, the creation by platforms of a code of conduct that contains quality standards for their activities could improve professionalism in this field (Douw and

[12] See Autoriteit Financiële Markten (2014, p. 31): investors should not invest more than 100 times and with limits of €40,000 per platform for loan-based crowdfunding and €20,000 per platform for equity-based crowdfunding. Also, the investor's education has to be carried out by the platform through advice to invest a sensible proportion of one's assets, to spread investments across different projects, and to be aware of the risks associated with a crowdfunding investment. Furthermore, the platform must ensure that the borrower provides correct communications about the projects and must carry out risk assessments and an assessment of the borrower's capacity to repay.

Koren Crowdfunding Consultancy 2013). It is important to highlight that this proposal does not at all diminish the importance of a new regulation, given that the consequences of a violation of the code of conduct would probably play out at a non-statutory level, with all the problems arising from this.

The introduction of specific rules is strongly recommended by the AFM: changes to or clarifications of the regimes that prohibit the offering of payment services and the raising of callable funds are deemed necessary to avoid potential contraventions of the Financial Supervision Act (Autoriteit Financiële Markten 2014, pp. 39–41). In particular, the most remarkable aspects of these recommendations seem to be the introduction of sub-regimes for loan-based and equity-based investments, and of a suitability test for wealthier consumers, to allow these people to exceed the generally established limits. Both of these rules are similar to those of other countries, and could probably create an effective balance between the different interests related to crowdfunding.

In general terms, a specific discipline of crowdfunding is likely to unleash the potential growth of the sector, in particular assisting foreign investors, who would otherwise face problems in trying to understand what is allowed and what is not and to follow the general rules that are often not really adequate for these new means of funding. As of today, the Dutch government has published a consultation paper that takes into account the AFM's recommendations. The main points of this paper are a ban on inducements for investment firms and the reinforcement of the exemption regime for intermediates in relation to callable funds. De Graaf and Hasker (2015) list the requirements that a platform must meet to make use of the exemption regime.

8.6 Spain

The Spanish legal system did not regulate crowdfunding until 2014. Before then, professionals had to use traditional investment means to achieve the typical goals of crowdfunding. They created such things as special purpose vehicles (SPVs), through the model of '*Sociedad Anonima*',

or '*cuentas de partecipación*', which are not companies and did not allow fast and immediate contact with investors (Vitali 2014, p. 379).

On 3 October 2014, the government approved bill XX/2014, which aimed to encourage business financing. The bill was enacted on 27 April 2015 (*Ley 5/2015, de 27 de abril, de fomento de la financiación empresarial*). Many articles focusing on the draft are useful because only minor amendments were introduced when the bill became law.

The new discipline concerns the equity and the lending models, with limited differentiation between them (European Crowdfunding Network 2014b).

There are strict requirements for platforms, starting from registration with the market authority (*Comisión Nacional del Mercado de Valores*) (see the act, articles 48, 53, 54). Platforms are supposed to have a minimum share capital of €60,000 (paid in full) or liability insurance that covers €300,000 in damages (article 56 of the act); such rules are considered to be crucial aspects of the regime (Perez 2015).

The capital requirement tends to treat platforms as financial companies, rather than as online start-ups, and the financing industry was apprehensive about the proposed legislation because of this (European Crowdfunding Network 2014a, p. 204). Also, it is worth highlighting a further requirement, which focuses on the platform's own resources. These resources have to grow when the funding collected through the platform grows: in particular, when the funding collected exceeds €2 million in a 12-month period, the platform's own resources have to be at least €120,000. This is sufficient until the funding that has been collected reaches the next cap, which is €5 million. Further growth in the funding that has been collected leads to the duty to provide the platform with more resources of its own (article 56). The application of these rules depends on the real size of the platform, in contrast to the first general rule that could be a barrier for platforms trying to enter the market. Nevertheless, platforms have to be careful about these progressive duties, periodically checking the amount of money raised to avoid any violation.

As to duties related to the activity of platforms, the most important aspect is the information for investors (European Crowdfunding Network 2014b). Besides the rules about general information on the risks related

to crowdfunding investment,[13] there are specific duties about the admission of projects to a platform because a diligent evaluation is required (article 66), and the need for a declaration by investors that they are aware of the risks.[14] The regulations aim to guarantee that the potentially high risks arising from the investment are known by investors, at both a general and an individual level, that is, by means of the information available on platform website and the specific information given with regard to the funded project.

Relevant limits are also established with regard to the maximum amount that can be raised per project. Under article 68, the general cap is €2 million, but the original proposal was for a lower figure (see European Crowdfunding Network 2014a, p. 203). A higher amount (€5 million) is allowed if only qualified investors are invited to invest in the project. With regard to the investors, article 82 provides a limit for each project of €3000 and a global limit for the platform (for the projects funded through it) in a 12-month period of €10,000. This limit also applies over all platforms (article 82.2), so that it is actually a general limit for crowdinvesting for each investor. This second limit is only applicable to non-accredited investors, while accredited ones are free to invest as much money as they want.

The notion of accredited investor is interesting, particularly with regard to individuals: accredited investors are not just supposed to have more than €50,000 of annual income or €100,000 of financial assets (European Crowdfunding Network 2014a, p. 203), but must also explicitly ask to be considered as accredited investors, clearly waiving their right

[13] See articles 60 and 61. Article 60 contains principles that address, among other things, the features of the information to be provided by the platform. Article 61 governs, in general terms, the duties of information, defining what the platform website should state with regard to the particular character of crowdinvesting. Alerts about financial risks and about the differences between crowdfunding platforms and financial institutions are always required. Depending on the kind of securities issued through the platform, more warnings are required, related to the risk of not having an effective voice in the company or to the existence of limits to the free transferability of the limited liability company's shares. The importance of this aspect is underscored by European Crowdfunding Network (2014a, p. 205).

[14] See article 84, which distinguishes between accredited and non-accredited investors, asking from the former a declaration of their awareness of their specific status, and from the latter a declaration of their awareness of the risks involved in crowdfunding and a statement about the total amount they have invested through platforms in the previous 12 months. The article also requires specific features to be contained in the declaration to avoid the risk of it being manipulated.

to be treated as non-accredited. The platform will have to evaluate the experience and knowledge of clients to be sure of their awareness of the risks: article 81.2 refers to these two conditions, that is, a certain individual wealth and a specific request by the investor, and the platform's duty to carry out an adequate evaluation. In this way, while the financial caps are quite low, an explicit request by the client should guarantee a willingness to take risks; but it is worth noting that the evaluation by the platform of the investor's awareness can be difficult.

As to the prospectus requirements and exemptions, it is not necessary to publish a prospectus if securities worth less than €5 million in a 12-month period are offered. Given the above mentioned cap of €2 million, a prospectus could be required for crowdfunding in the case that the project raises money through more than one platform, but this does not seem probable (European Crowdfunding Network 2014a, p. 205). Even if a prospectus is not required, subsidiary information has to be provided by the platform where the securities are offered through crowdfunding. Article 79 requires a description of the kind of security offered, its main features and the related risks and rights arising from it from a financial perspective, and information about the chances to disinvest.

This new discipline of crowdfunding has been criticised because it is too restrictive, providing for limits[15] and prohibitions[16] that could stifle crowdfunding (European Crowdfunding Network 2014b). Barrera (2014) has been particularly harsh, deeming regulators to be 'lacking experience or knowledge'. The caps are low, with regard to both borrowers and lenders. However, sometimes the critics focus on aspects that do not really seem to be inadequate. As an example, it has been argued that it could be possible to avoid the distinction between accredited and non-accredited investors, given that specific information about the investment

[15] As to the limits established for lenders (and borrowers) and capital (or insurance) requirements, see Barrera (2014) and European Crowdfunding Network (2014b), who consider the limits on the maximum individual contribution to be 'seemingly random hurdles'. The costs arising from the application of these new rules might not be affordable by some platforms: see Perez (2015).

[16] The platform cannot invest more than 10 % of the funding target of each project in a project published on the platform (see European Crowdfunding Network [2014a, p. 207]); platforms are not allowed to advertise crowdfunding projects outside their own platform, and the automatic allocation to projects of larger investments is also prohibited (European Crowdfunding Network 2014b).

is required (European Crowdfunding Network 2014a, p. 207). However, even taking into account this individualised notice, the distinction seems reasonable, since the mere communication of information is not likely to transform a retail investor into an accredited one.

Until now, it seems that the Spanish legislator has not always taken much account of these critics, given that the capital and insurance requirements grew in the last version of the regulations. On the other hand, the limit for projects was doubled to €2 million, and the annual global limit for each investor was increased from €6,000 to €10,000. These data come to light when comparing the caps established in the legislation with the caps mentioned by Barrera (2014) and the European Crowdfunding Network (2014b).

8.7 The United Kingdom

Crowdfunding is a fast-growing sector in the UK, whether one considers loan-based or equity-based funding. From the data collected by the Financial Conduct Authority (FCA) (2014, p. 44), it is clear that loan-based crowdfunding platforms used to raise much higher amounts than investment-based ones, but at the same time the rapid growth of the latter type is also evident, expanding more than 600 % between 2012 and 2013 and 200 % between 2013 and 2014 (Financial Conduct Authority 2015, p. 4). The rise of equity-based activities is particularly pronounced and is consistent with a similar rise in the rest of Western Europe and elsewhere.[17]

As in other countries, crowdfunding regulation is still developing in the UK, and a full review of the crowdfunding market and regulatory framework is expected by the FCA in 2016 (Financial Conduct Authority 2014, p. 7). Even if, in the view of the authority, there is no need at present to change the regulatory approach, a 'full post-implementation review' is already scheduled (Financial Conduct Authority 2015, p. 12). It seems, then, that future changes in regulation are probable, although

[17] Collins et al. (2013, p. 10) highlight the rapid development of both peer-to-peer lending and peer-to-business lending models as well as of equity-based crowdfunding. With regard to the peer-to-business lending sector, the UK is the world leader, and through it British SMEs are able to get funding in a short time and to bypass banks' lending processes.

they may consist of minor modifications, given that the general approach is considered adequate.

Starting with an analysis of the general rules, offering shares[18] or other securities will generally be subject to the financial promotion rules, and then, to reach a retail investment audience, the operator will need authorisation from the FCA or approval of its financial promotion provided by an FCA-authorised firm. The European Crowdfunding Network (2014a, p. 224) emphasises that financial promotion is often involved in crowdfunding websites and that the requirements of Chap. 4 of the FCA's Conduct of Business Sourcebook have to be met when an exemption is not available. Some exemptions are established if the promotion of investment opportunities is made to existing shareholders or to sophisticated, wealthy and professional investors.[19]

In a consistent way, the specific crowdfunding regulation also distinguishes between professional and retail investors. In particular, in the UK there are limits on the investors to whom an offer through a crowdfunding platform can be made (see the FCA's Conduct of Business Sourcebook, Sect. 4.7.7). As the FCA emphasises (2014, pp. 35–6), apart from professional clients, only certain types of retail clients should receive such an offer–clients who have a specific knowledge about the investment or for whom the influence of the crowdfunding investment on their investible financial assets is expected to be limited. The distinction is made because professional clients are assumed to be more knowledgeable about investments in start-up companies and these activities, such as backing high-tech companies, are often particularly risky (Alvisi 2014, p. 14). In other words, only retail clients who can understand

[18] As to the concept of share, see European Crowdfunding Network (2014a, p. 226), emphasising that the offer of shares in a private limited company to the public is prohibited, pursuant to section 755 of the Companies Act 2006. It is worth highlighting that in other countries, for example Italy, a specific exception to the similar rules is explicitly provided: the general prohibition on offering shares in a limited liability company to the public does not apply to 'innovative start-ups', which are allowed to use crowdfunding in Italy.

[19] European Crowdfunding Network (2014a, p. 225) specifies that in the case of sophisticated, wealthy and professional investors, there are two alternatives, since the platform could itself assess the investment sophistication of investors or it could require them to certify their own qualities, such as their total assets and investment experience. See also Collins and Pierrakis (2012, p. 21), mentioning, as examples of exempt persons, beyond wealthy individuals and sophisticated investors, and also investment professionals such as business angels.

and bear the risks involved in this investment can be invited, so that crowdfunding should become 'more accessible to a wider, but restricted, audience' of investors (Hornuf and Schwienbacher 2014c, p. 21). To give more detail on the first aspect, these clients are those who receive regulated investment advice, are venture capital contacts or corporate finance contacts, and are certified or certify themselves as sophisticated investors; the crucial point seems to be this last one, as there could be much debate as to whether it is enough that individual investors merely assume that they are qualified. As to the effect of crowdfunding investment on a client's investible financial assets, retail clients are admitted if they are certified as high net worth investors[20] or if they certify that they will not invest more than 10 % of their net investible financial assets, so that they will only invest money that does not put at risk essential resources such as their home and pension. It is also worth underlining that some platforms used to apply protective rules even before these became mandatory. Dapp and Laskawi (2014, p. 12), discuss this and propose a debate on investor protection between stakeholders and the competent authorities.

As to prospectus requirements and exemptions, the general rule requires a prospectus to be published if transferable securities are offered to the public, unless the amount offered is less than €5 million over a period of 12 months, as is often the case with crowdfunding offers.[21] It is also worth taking into account that this exemption should not be overvalued, because the promotion must meet near-prospectus standards, and consequently the related costs, which can vary from £20,000 to £100,000 (Collins and Pierrakis 2012, p. 21), will not be very different.

[20] For the concept of wealthy, or high net worth, individuals see Weinstein (2013, p. 438), detailing the income and assets required, and comparing 'the exempted groups of investors' to 'the SEC's groups of accredited or sophisticated investors who are allowed to invest in equity offerings'. From this point of view, there seems to be a remarkable convergence between European and US law.

[21] See European Crowdfunding Network (2014a, p. 226), referring to the UK Financial Services and Markets Act 2000 and pointing out that crowdfunding offers mostly fall within the exemption mentioned; see also Financial Conduct Authority (2014, p. 41, footnote 15) for more details about the exemptions established in the Financial Services and Markets Act and in the Prospectus Directive, and also distinguishing between businesses that are covered by MiFID and businesses that are not.

8.8 Final Remarks

After analysing the national regulations, it is now possible to try to define which rules are really effective for equity crowdfunding, given the need to protect the investor and the need to assist entrepreneurs who require funding. On the one hand, investors run severe risks since businesses that use crowdfunding tend to go bankrupt more frequently than other businesses. On the other hand, it is known that investor protection that is too strong may harm entrepreneurs' funding needs (Hornuf and Schwienbacher 2014c, p. 1). In other words, it is vital to protect investors in an effective way, which means a way that also takes account of entrepreneurs' interest in getting funds easily.

Here are some examples of effective rules that have been established by national regulations.

Starting from the platforms' activities, insurance duties for platforms, such as those provided by the French and Spanish regulations, seem better at protecting investors than do share capital requirements. If the platform is deemed to be liable for damages suffered by investors, insurance can immediately settle such damages. It is also worth noting that, in more general terms, the importance of share capital is diminishing in the recent company law reforms enacted across EU countries. The possibility of incorporating companies with a very low minimum share capital is becoming more and more frequent in such countries. Given this trend, trying to protect investors through duties related to minimum share capital would probably not be the best option.

Limits on the categories of security that it is possible to offer may also be helpful, at least when the rules tend to forbid offerings of complex securities (such as warrants or convertible bonds) that involve rights or powers that an investor can barely understand. The limits are not helpful when they simply exclude some kinds of securities, such as debt securities under the Italian regulations, since this exclusion is not likely actually to protect investors, but, on the contrary, could make crowdinvesting less attractive to investors who prefer securities that are less risky than shares.

Provisions aiming to provide the investor with brief and comprehensible information about investments are important (and are established in detail under the Italian regulations). Even if it can be difficult to explain

complex concepts in easy language and in a short report, clarifying the essential features of the securities and the risks involved in a comprehensible form is an important goal. Overwhelming information would actually be counter-productive.

As to the specific declarations sometimes required from investors, who have to certify their comprehension of the risks related to the investment and the possibility of losing all the capital invested, the second of these, which is required in the Italian system, seems an important rule. A declaration like this is objective: investors are not waiving some rights that they could even ignore, but have to state something that is really tangible. If they make a false statement, they alone can be deemed liable for the consequences. Unlike the agreement to be treated as a retail investor (which is required under the Spanish regime), this specific declaration does not imply any specific knowledge of rules or standards, and directly and effectively refers to the main problem, which is, the risk posed by the crowdfunding investment to the investor's personal assets. Focusing exclusively on the particular investor's immediate protection, this declaration could even be sufficient in itself, making further information duties redundant. From a wider perspective, taking into account in more general terms the public interests involved with the issue, information and education for investors nevertheless seem to be very important. Gaining information about investments could help investors gradually to obtain more knowledge and make the best choices.

With regard to the distinctions between the different categories of investors, which are provided by the British and Spanish regulations, an objective approach, like the British one, seems preferable. In particular, categories of retail investors should be admitted to crowdfunding by reference to specific, unambiguous, data that can be more easily used, avoiding legal uncertainty. By contrast, the evaluation of investor awareness that should be carried out by the platform under the Spanish regulations could be difficult.

As to the consequences of such distinctions, an absence of restriction on the investments of accredited investors is usually allowed. However, if the outcome is that one accredited investor or a few such investors buy all the securities, this may not be consistent with the concept of crowdfunding. If the democratisation of investment is considered to be a relevant

interest and accordingly deserves strong protection, a minimum number of investors should be necessary. However, taking into account the different interests involved in crowdfunding, if only one or a small number of investors participate in the offer, there are probably no relevant interests that are affected. The situation would affect the balance of power in the new company. Even so, it seems difficult to argue that the interests of the crowd in investing in that particular project deserve special protection by means of a rule that makes the presence of a minimum number of investors mandatory.

Finally, it is possible to note that a European Union regulation on crowdfunding would probably be the only way to give legal certainty and to improve the use of this instrument across the nations in the economic bloc (Schwienbacher 2015, p. 19). The enactment of such a regulation does not seem likely at the moment (Schwienbacher 2015, p. 18). An EU directive could also be useful, even if it would not be a direct answer to the problems arising from the absence of a common framework.