



LEGALINK
INTERNATIONAL BUT PERSONAL

EQUITY CROWDFUNDING & PEER-TO-PEER LENDING

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INTRODUCTION

Crowdfunding has already an established and proven recognition worldwide as a powerful alternative financing tool. Three main points should be signaled in this respect. On the one hand, the volume of the crowdfunding market keeps increasing sharply at global level. On the other hand, the crowdfunding market is very dynamic as new crowdfunding platforms have recently started to operate. Finally, the projects to be financed through crowdfunding platforms are more and more diverse.

In this context, at a time when crowdfunding regulation is subject to discussion around the globe (namely in the context of the Proposal for a EU Crowdfunding Regulation), it seems important to assess the legal responses from various relevant jurisdictions, in respect to Equity Crowdfunding and Peer to Peer Lending. Such is the purpose of this publication.

This book is dedicated to the memory of Georg Van Daal, Former Deputy Head of Legalink FinTech Forum. Georg was a brilliant lawyer and a partner at Ekemans & Meijer from 2014 to 2018. He was key to the structuring and to the development of this project but unfortunately could not live to see its final form. He is dearly missed.

October 2019

Paulo Câmara
Managing Partner of Sérvulo & Associados
Leader of the Legalink FinTech Forum

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Equity Crowdfunding

For the purposes of the following, 'equity crowdfunding' means raising capital in an offering of shares (or instruments convertible into shares) through an online platform

1. Has your country introduced specific laws or regulations governing equity crowdfunding, or is it regulated under general securities or other laws?

Yes. Equity crowdfunding is governed by Law 102/2015 of 24 August, which approves the legal regime on crowdfunding, and Law 3/2018 of 9 February, which defines the crowdfunding penalties system. Some types of crowdfunding (including equity crowdfunding) are further governed by Regulation 1/2016 of the Portuguese Securities Market Authority (CMVM), which complements Law 102/2015.

2. If your country regulates equity crowdfunding, what are the names of the government agencies responsible for regulating it?

In Portugal the supervisor for equity crowdfunding is the CMVM, with whom any future operator of an equity crowdfunding platform must be registered prior to engaging in such role. This authority is also entrusted with regulating and supervising these players' business activities.

3. Are there limits on the amounts that can be raised by crowdfunding companies?

Yes. There are two different sets of limits that need to be observed. Firstly, a global raising limit of €1 million per offer or per set of offers raised within the European Union by the same raiser for a period of 12 months. This limit increases to €5 million if the target investors of such offer/set of offers are exclusively legal persons or natural persons with annual income of at least €70,000.

The second limit that needs to be taken into consideration is the global investment limit, which limits any investment to €3,000 per offer and a total of €10,000 per 12-month period. These investment limits are not deemed applicable if the investor is a legal person, a natural person with an annual income of at least €70,000 or a professional investor qualified as such under the Portuguese Securities Act.

4. Are there restrictions on the types of purchasers to whom shares can be offered?

No, there are no restrictions as to the type or nature of investors. However, some investment limits and raising limits apply, as described in the previous question.

5. What information needs to be disclosed to potential purchasers, and are offer documents or marketing materials required to be registered or approved by your country's regulators?

Before each offer, the beneficiary of the investment must provide the equity crowdfunding platform's operator with a standardised document containing all relevant information to the equity crowdfunding investors (this document is designated as IFIFC). The IFIFC shall be written in Portuguese and in a clear language and shall contain all truthful, complete, current, objective and detailed information that might be relevant for an investor to make an informed decision on its equity crowdfunding investment. The IFIFC will be disclosed to any potential investor prior to any offer and regarding each specific offer and

contains the following information:

- a) A description of the activity or product to be funded and the funding goal(s);
- b) The amount to be raised and the deadline to achieve such goal;
- c) The price of each unit to be subscribed or how is that price calculated;
- d) The full name of the beneficiary;
- e) For legal persons and if available, the balance sheet and management report of the beneficiary regarding the preceding financial year;
- f) The key features of the activity or the product to allow potential investors to understand the nature and inherent risks of the product or the activity;
- g) The costs and charges related to the activity or the product to be funded, as well as a brief description of its profitability forecast;
- h) Details of the offer processing;
- i) The deadline for purchasers to revoke their subscription, whenever applicable;
- j) The timing and manner according to which any amounts raised are to be transferred to the beneficiary, including any underwriting mechanisms and refunding mechanisms if any invested sums exceed the maximum limits, the intended raising goal is not met and/or the offer's terms and conditions cannot be adjusted accordingly;
- k) A disclaimer on the risk of partial or total loss of the amounts invested;
- l) A disclaimer on the risk of the amounts invested not reaching the profitability forecast;
- m) A disclaimer on liquidity risks or lack of secondary market risk for financial instruments or credits wherein purchasers have invested;
- n) A disclaimer regarding the fact that neither products nor activities funded through equity crowdfunding are subject to authorisation or supervision by the CMVM or by any other financial supervision authority, nor do these entities approve any information disclosed with regards to these products/activities on them;
- o) A disclaimer that the investment is not guaranteed by the Portuguese Investors Compensation Scheme, unless it has occurred as a result of financial intermediation and provided it complies with said scheme's relevant eligibility requirements;
- p) A disclaimer that the investment is not guaranteed by the Portuguese Deposits' Guarantee Fund;
- q) A disclaimer on the fact that the issuance of securities (maxime equity crowdfunding) is not subject to supervision by the CMVM, neither does the latter approve the information made available through this IFIFC or any documents related to the offer;
- r) The relevant tax regime;
- s) The procedures to be followed, including, but not limited to, how and where the amounts invested will be committed if the equity crowdfunding platform's operator goes bankrupt or its activities are suspended for whatever reason;
- t) The procedures to be followed to ensure the continuity of payments of any invested amounts if the equity crowdfunding platform's operator goes bankrupt or its activities are suspended for whatever reason.

Further to the IFIFC, additional information needs to be disclosed to potential investors, including but not limited to any adjustment of the offer deadline or the revised funding goal (provided such changes are admissible for such specific offer). Other types of information do not need to be disclosed to the investor but rather have to be made available by the equity crowdfunding platform's operator (such as information regarding conflicts of interests prevention, registration with the supervisor, investments'

historical background of each offer, ongoing offers, pricing list etc).

With regards to marketing activities it should be noted that all advertising actions must state, in a clear and explicit manner, that an investor has a risk of losing its entire investment and cannot include any statements that may contradict or decrease this risk, nor the relevance of the IFIFC's content. Each advertising action shall further indicate the existence of the IFIFC and where/how an investor can obtain or receive such document.

6. Is there any requirement for an equity crowdfunding platform and/or its operator, or a crowdfunding company, to be licensed or registered or to comply with any particular rules?

Access to equity crowdfunding activity is subject to prior registration with the CMVM. The relevant rules state that one platform operator = one platform, hence only the operators are subject to registration.

As per Regulation 1/2016 of the CMVM, operators must comply with a minimum set of asset requirements, including a minimum share capital and a civil liability insurance with a specific coverage, and operational requirements, in terms of how the platform activities are defined, organised and forecasted. Provided all those requirements are met, an equity crowdfunding platform operator must complete the registration form in the annex I to the Regulation 1/2016 and submit it to the CMVM, hence providing the necessary information and documentation to the supervisor so the latter can issue the relevant authorisation. Only upon being authorised as such can an equity crowdfunding platform's operator start its activity.

7. Please provide any additional information you feel is important to understanding the regulation of equity crowdfunding in your country.

It is important to point out that the Portuguese legislator chose to establish a significant range of duties related to prevention of conflicts of interest, thus highlighting the importance of having well-designed policies and procedures governing that topic.

Moreover, on Law 3/2018 of 9 February, which defines the crowdfunding penalties system, it is important to note that Portugal currently has a very rigorous penalties regime which enables the CMVM to punish unauthorised activities with a penalty ranging from €5,000 to €1 million and breach of information, disclosure or other customer-related duties with a penalty ranging from €1,000 to €500,000, further to cancelling (temporarily or for good) the equity crowdfunding platform operator's registration.

8. Please identify a point of contact at your firm for equity crowdfunding-related enquiries.

CONTACT

Paulo Câmara (Partner | Advokat)
pc@servulo.com

www.servulo.com

Peer-to-Peer Lending

For the purposes of the following, 'peer-to-peer lending' means lending by individuals to businesses or other individuals where an online platform is used to match lenders with borrowers.

1. Has your country introduced specific legislation or regulations governing peer-to-peer lending, or is it regulated under generally applicable laws?

Yes. Peer-to-peer lending is governed by Law 102/2015 of 24 August, which approves the legal regime on crowdfunding, and Law 3/2018 of 9 February, which defines the crowdfunding penalties system. Some types of crowdfunding (including peer-to-peer lending) are further governed by Regulation 1/2016 of the Portuguese Securities Market Authority (CMVM), which complements Law 102/2015.

2. If your country regulates peer-to-peer lending, what are the names of the government agencies responsible for regulating it?

In Portugal the supervisor for peer-to-peer lending is the CMVM, with whom any entity intending to manage a peer-to-peer platform must be registered prior to engaging in such role. This authority is also entrusted with regulating and supervising these players' business activities.

3. Are there any limits on the amounts that can be lent?

Yes. There are two different sets of limits that need to be observed. Firstly, a global raising limit of €1 million per offer or per set of offers raised within the European Union by the same raiser for a period of 12 months. This limit increases to €5 million if the target investors of such offer/set of offers are exclusively legal persons or natural persons with annual income of at least €70,000.

The second limit that needs to be taken into consideration is the global investment limit, which limits any investment to €3,000.00 per offer and a total of €10,000 per 12-month period. These investment limits are not deemed applicable if the investor is a legal person, a natural person with an annual income of at least €70,000 or a professional investor qualified as such under the Portuguese Securities Act.

4. Are there any restrictions on the types of persons who can lend and/or borrow, or restrictions on the rate of interest that can be charged?

No, there are no restrictions as to the type or nature of investors. However, some investment limits and raising limits apply, as described in the previous question. Moreover, Portuguese legislation does not set an interest rate limit.

5. Is there any requirement for the online platform and/or the lenders to be licensed or registered or to comply with any particular rules?

Access to peer-to-peer lending activity is subject to prior registration with the CMVM. The relevant rules state that one platform operator = one platform, hence only the operators are subject to registration.

As per Regulation 1/2016 of the CMVM, operators must comply with a minimum set of asset requirements, including a minimum share capital and a civil liability insurance with a specific coverage, and operational requirements, in terms of how the platform activities are defined, organised and forecasted. Provided all those requirements are met, a peer-to-peer lending platform operator must

complete the registration form in the annex I to the Regulation 1/2016 and submit it to the CMVM, hence providing the necessary information and documentation to the supervisor so the latter can issue the relevant authorisation. Only upon being authorised as such can a peer-to-peer lending operator start its activity.

6. Are there any requirements applicable to marketing and promotional documents and activities?

With regards to marketing activities it should be noted that all advertising actions must state, in a clear and explicit manner, that an investor has a risk of losing its entire investment and cannot include any statements that may contradict or decrease this risk, nor the relevance of the content of the standardised document containing all relevant information to the peer-to-peer lenders (the IFIFC). Each advertising action shall further indicate the existence of the IFIFC and where/how an investor can obtain or receive such document.

Please note that all peer-to-peer lending platforms' operators must require any beneficiary to prepare and provide a comprehensive and standardised IFIFC comprising the content defined under the peer-to-peer lending regime.

7. Are there any particular consumer protection provisions that apply?

Not exactly. However, it should be noted that the beneficiary is, through the platform, subject to a significant range of information duties. Moreover, the abovementioned global raising limits and global investment limits take into consideration the nature of the investor (please refer to question 3 above).

8. Please provide any additional information you feel is important to understanding the regulation of peer-to-peer lending in your country.

It is important to point out that the Portuguese legislator chose to establish a significant range of duties related to prevention of conflicts of interest, thus highlighting the importance of having well-designed policies and procedures governing that topic.

Moreover, on Law 3/2018 of 9 February, which defines the crowdfunding penalties system, it is important to note that Portugal currently has a very rigorous penalties regime which enables the CMVM to punish unauthorised activities with a penalty ranging from €5,000 to €1 million and breach of information, disclosure or other customer-related duties with a penalty ranging from €1,000 to €500,000, further to cancelling (temporarily or for good) the peer-to-peer lending platform operator's registration.

9. Please identify a point of contact at your firm for enquiries related to peer-to-peer lending.

CONTACT

Paulo Câmara (Partner | Advokat)

pc@servulo.com

www.servulo.com