



**LEGALINK**  
INTERNATIONAL BUT PERSONAL

# EQUITY CROWDFUNDING & PEER-TO-PEER LENDING

2019 1ST EDITION



## 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 Ekelmans & 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?**

No specific laws or regulations have been introduced in the UK to govern equity crowdfunding. General principles of securities law imposed under the Financial Services and Markets Act 2000 (FSMA) and relevant statutory instruments are applied in this context.

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

The Financial Conduct Authority (FCA) is responsible for the regulation of equity crowdfunding in the UK.

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

The FCA does not impose limits on the amounts that can be raised by crowdfunding companies. However, limits are typically imposed by the platforms themselves to ensure that the companies fall outside the scope of the Prospectus Regulations (issues of up to €8 million are currently exempt).

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

Yes. Companies may only offer shares (categorised as non-readily realisable securities in an equity crowdfunding context) to the following categories of investor:

- retail clients who are certified or self-certify as sophisticated investors;
- retail clients who are certified as high net worth investors;
- retail clients who confirm before a promotion is made that, in relation to the investment promoted (i.e. the shares), they will receive regulated investment advice or investment management services from an authorised person; and
- retail clients who certify that they will not invest more than 10% of their net investible portfolio in unlisted shares or unlisted debt securities (i.e. excluding their primary residence, pensions and life cover).

Appropriateness checks must also be undertaken for non-advised sales.

### **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?**

Assuming the offer of shares falls outside the scope of the Prospectus Regulations, marketing materials

do not need to be registered or approved by the FCA. However, any communications made to potential investors by a crowdfunding platform to promote or offer an investment will constitute financial promotions and must comply with the FCA's rules in this regard. This includes rules to ensure that any promotion received by a retail client will comply with certain disclosure obligations, including in relation to information regarding the shares being offered. It may also include a summary of the taxation of any investment to which it relates and the consequences for the average member of the group to whom it has been promoted.

Any promotions made by the company itself (on the assumption that the company is unauthorised) would need to comply with the general restriction on financial promotions and either be approved by an authorised person (such as the platform operator) or fall within an exemption. In this respect, it is worth noting that the UK rules are technology neutral and the FCA has released specific guidance regarding the application of financial promotion rules in the context of social media.

All promotions should be clear, fair and not misleading.

**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?**

We would typically expect the operator of the crowdfunding platform (or, in certain circumstances, the platform itself) to be undertaking regulated activities for the purposes of FSMA and, therefore, need to be FCA authorised or exempt (i.e. become an appointed representative of an existing FCA authorised firm).

The authorised firm would then need to comply with the FCA's Handbook of Rules and Guidance.

In addition to the above, the Companies Act 2006 prohibits private limited companies from making an offer of shares to the public. In our view, this would mean that a company raising investment through a crowdfunding platform would, in most cases, need to convert to a public limited company before offering its shares.

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

NA

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

For equity crowdfunding-related enquiries, please contact **Charlotte Wilson** [Charlotte.Wilson@mishcon.com](mailto:Charlotte.Wilson@mishcon.com)

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## 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?**

The UK has introduced specific rules that apply where the operator of the P2P platform is conducting the regulated activity of 'operating an electronic system in relation to lending'. Where the activities fall outside the scope of this activity, existing securities law/regulation would apply.

In summary, the activity of 'operating an electronic system in relation to lending' involves operating an electronic system which enables the operator (A) to facilitate persons B and C becoming the lender and borrower where:

- The system operated by A is capable of determining which agreements should be made available to each of B and C (whether in accordance with general instructions provided to A by B or C or otherwise);
- A, or another person acting under an arrangement with A or at A's direction, undertakes to receive payments in respect of interest or capital or both due under the agreement from C, and make payments in respect of either interest or capital or both due under the agreement to B; and
- A, or another person acting under an arrangement with A or at A's direction, undertakes to perform, or A undertakes to appoint or direct another person to perform, either or both of the following activities: (a) taking steps to procure the payment of a debt under the agreement or (b) exercising or enforcing rights under the agreement on behalf of B.

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

The Financial Conduct Authority (FCA) is responsible for the regulation of equity crowdfunding in the UK.

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

No.

### **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?**

Lenders:

There are no current rules relating to who can lend.

However, in July 2016, the FCA published a call for input to the post-implementation review of its crowdfunding rules. The subsequent policy statement, issued on 4 June 2019, summarises the

feedback received to the consultation and sets out the final policy position reached (and the rules to implement those policy decisions). The new rules will, for the most part, come into effect in December 2019. As at this date, P2P platforms will broadly be subject to the same marketing restrictions as equity crowdfunding platforms in terms of the investors they are permitted to target.

Borrowers:

There are no current rules relating to who can borrow. However, under the new rules that will come into effect in December 2019, where the P2P platform takes on the responsibility of determining the price of the loans on behalf of investors, it will be required to conduct a credit risk assessment of the borrower.

Interest Rates:

No restrictions.

**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?**

Please see above regarding regulation of the platform operator.

Depending on the nature of the lender (and the underlying loans) the lender may also need to be authorised for the purposes of either the regulated mortgage or consumer credit regimes.

In addition, if the borrowers are using the funds raised to on-lend for business purposes, they may also need to be authorised.

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

As noted above under section 4, with effect from December 2019 new rules will come into effect regarding which categories of retail investor the loans can be marketed to.

Rules will also apply in relation to specific information to be provided to lenders (for example, in relation to a firm's role in facilitating P2P agreements, what happens in case of platform failure, and access to the Financial Services Compensation Scheme).

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

Not over and above the protections built into the applicable rules and regulations (for example, in relation to financial promotions generally and who can access the platform itself).

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

NA

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

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