

Crowdfunding: *every little helps*



Presented by

Gabriel Jaccard

11-212-404

Semester four (last)

Under the direction of

Prof. Andreas Kellerhals

Glossary

Al.	paragraph;
AMLA	Anti-Money Laundering Act, RS 955.0;
AMLO-FINMA	FINMA's Ordinance on Anti-Money Laundering, RS 955.033.0;
Art.	Article;
B2B	Business to Business;
BA	Banking Act, RS 952;
BSK	Basler Kantonal Bank;
C2B	Consumer to Business;
C2C	Consumer to Consumer;
CC	Swiss Federal Civil code, RS 210;
Cf.	see;
CH	Switzerland;
CHF	Swiss francs;
CO	Swiss federal Obligation code, RS 220;
e.g.	For instance;
ECN	European Crowdfunding Network
Ed.	Editor(s);
Et al.	and all other Editors;
EU	European Union;
f.	And following;
FCA	Financial Conduct Authority;
ff.	And followings;
FINIA	Swiss Financial Institution Act;
FINMA	Swiss Financial Market supervisory Authority

FINRA	Financial Industry Regulatory Authority;
FINSA	Swiss Financial Service Act;
FinTech	Financial Technology;
FMIA	Financial market infrastructure act, RS 958.1;
FR	France;
GER	Germany;
Infra	See above;
JOBS	Act Jumpstart Our Business Startups Act;
KYC	Know Your Customer;
MIFID II	Markets in Financial Instruments Directive 2014/65/EU;
OB	Swiss Banking Ordinance, RS 952.02;
OMIA	Ordinance on the Market Infrastructure, RS 958.11;
p.	page;
pp.	pages;
RS	Swiss Systematic compilation;
SEC	Securities and Exchange Commission
SECA	Swiss Private Equity & Corporate Finance Association;
SME	Small and Medium Enterprise;
SRO	Self-Regulatory Organisation;
Supra	See above;
TOU	Terms of Use;
U.S.	United States of America;
U.S.A.	see U.S.
UK	United Kingdom;

Bibliography

- BAUMANN Simone, *Crowdinvesting im Finanzmarktrecht*, Zürich 2014.
- BEIER Michael, WAGNER Kerstin, *Das Verhalten von Nutzern in Crowdfunding-Kampagnen - Herding und Social Proof*, HTW Chur, September 2015.
- DIETRICH Andreas, AMREIN Simon, *Crowdfunding Monitoring Switzerland 2015*, Luzern, 2015.
- ESSEBIER Jana, AUF DER MAUR Rolf, *Fidleg als Chance für die Schweiz als Crowdfunding Standort*, in: Jusletter 28 septembre 2015.
- EUROPEAN COMMISSION, *Crowdfunding in the EU Capital Markets Union*, SWD (2016) 154 final, Brussels, 3.5.2016. (Citation: EUROPEAN COMMISSION, Crowdfunding in the EU Capital Markets, p.)
- EUROPEAN COMMISSION, *Crowdfunding innovative ventures in Europe The financial ecosystem and regulatory landscape*, 2014. (Citation: EUROPEAN COMMISSION, Crowdfunding innovative ventures in EU financial and regulatory landscape, p.)
- EUROPEAN CROWDFUNDING NETWORK, *Review of Crowdfunding regulation, Interpretations of existing regulation concerning crowdfunding in Europe, North America and Israel*, 2014.
- FILIPPI (DE) Primavera, *Blockchain-Based Crowdfunding: What Impact on Artistic Production and Art Consumption?*, May 31, 2015.
- FINANCIAL CONDUCT AUTHORITY, *A review of the regulatory regime for Crowdfunding and the promotion of non-readily realisable securities by other media*, February 2015.
- FISCHER Philipp, ANCELLE Juliette, *Regulation of Crowdfunding Activities in Switzerland: Where do we Stand?*, in: Jusletter 22nd of February of 2016.
- GABISON Garry A., *Understanding Crowdfunding and its Regulations How can Crowdfunding help ICT Innovation?*, 2015.
- GUENTHER Christina, JOHAN Sofia, SCHWEIZER Denis, *Is the Crowd Sensitive to Distance? How Investment Decisions Differ by Investor Type*, January 31, 2016.

- IVELL Katrin, LEISINGER Benjamin, *FINMA Introduces Technology-Neutral Regulation to Facilitate Client Onboarding Through Digital Channels*, in: CapLaw-2016-21, Ed. René Bösch *et al.*, 2016.
- RALCHEVA Aleksandrina, ROOSENBOOM Peter, *On the Road to Success in Equity Crowdfunding*, January 30, 2016.
- SCHNEUWLY Andreas, *Crowdfunding aus rechtlicher Sicht*, in: PJA 2014, ed. Arnold F. Rusch, 2014.
- SECA, *Swiss Venture Capital Report*, Edition No 4, 2016
- SPACEK Dirk, *Online-Crowdfunding*, Sic! 2013, p. 277 ff.
- WARDROP Robert, ZHANG Bryan, RAU Raghavendra, GRAY Mia, *The European Alternative Finance Benchmarking Report*, February 2015
- WEBER Rolf H., *E-Commerce und Recht, Rechtliche Rahmenbedingungen elektronischer Geschäftsformen*, 2. Edit., Zürich 2010.
- WECAN.FUND, *Terms of Use, state the 6.10.2015*, as of the 20.05.2016. (https://wecan.fund/media/upload/various/generalconditions/171005_-_CG_EN.pdf)
- WERLEN Thomas, HERTNER Jonas, *Crowdfunding nach Schweizer Art, Rückbesinnung auf die Prinzipien der Kapitalmarktregulierung*, in: Recht im digitalen Zeitalter, Festgabe Schweizerischer Juristentag 2015 in St.Gallen, Lukas Gschwend, et al. (ed.), St.Gallen 2015.
- ZHUNUSSOV Beibit, *Crowdfunding: Literature study for communication and information asymmetry*, September 1st of 2015.

Table of content

Glossary	II
Bibliography	IV
Table of content	VI
Introduction	1
1 Crowdfunding?	2
1.1 What is it?	2
1.2 Different kinds	2
1.3 Models of web Platforms	3
1.4 Numerical importance	4
1.5 Themes and crowd	5
1.6 Pros and Cons	6
2 Overview on Crowdfunding's regulation	7
2.1 Switzerland	7
2.2 Europe and the U.S.	10
3 The legal relationships	10
3.1 Terms of use	11
3.2 Project Developer and Platform	12
3.3 Platform and Crowdfunder	13
3.4 Project Developer and Crowdfunder	13
Conclusion	15
Appendix	16
EU regulation overview	16
U.S. exemption movement	16

Introduction

Funding is least as much important than having a business idea. In this quest of entrepreneurs for giving birth to the immaterial: “*every little helps*”. Recently, the apparition of **new disruptive methods of funding**, as Crowdfunding, is a socio-economically fascinating development, notably since it fulfils a role traditionally occupied by banks and other financial actors, which, for whatever reasons, have yet failed to prevail¹. As outlined, Crowdfunding is part of the “*FinTech*”’s² movement, which is attempting not less than to revolutionize the financial ecosystem by rethinking traditional financial services.

The crowdsourcing, meaning literally taking its source into the crowd, is however not a novelty. Already in the 12th century, the constructions of cathedral were often funded by the charity of the people, as seen more recently, in the 18th century, for the statute of liberty in New York, offered by the “*French people*”. Since the end of the 20th century mainly in the U.S., the Internet has enabled Crowdfunding, a subform of crowdsourcing, to develop like never before. This evolution appeared later on in Europe. For instance, the first Swiss Platform (named “*Cashare*”) was launched in 2008 only.

Today, thanks to the decentralisation and openness operated by the Internet, private web Platforms have operated a great democratization by giving the possibilities for anyone willing to support projects. The flexibility of choice, as if it were ones Ikea magazine, has seduced users and placed Crowdfunding in a position between e-commerce and social media³.

At the same time, many legal questioning have arisen. Like many cutting edges innovations, Crowdfunding activities are imperfectly treated by the current legal systems. Indeed, Crowdfunding is neither pure banking nor an activity that can be left unregulated⁴.

In this paper, we will assess some legal problematic regarding Crowdfunding, mostly under Swiss and European law. The first part explains what is Crowdfunding (*infra* n°1). In the second part, we will focus on the regulation adopted in Switzerland and abroad (*infra* n°2). Then, in the third part, we will discuss the legal relationships involved (*infra* n°3), before dressing a general conclusion.

¹ Local initiatives are either inexistent or annex (as the one of the BSK). <https://www.blkb.ch/die-blkb/medien/medienmitteilungen/2014/blkb-lanciert-Crowdfunding-marktplatz>

² Stands for “*Financial Technology*”. E.g. Uber (taxi-like), KNIP (insurance), Ethereum.

³ BEIER/ WAGNER, p.2.

⁴ ESSEBIER / AUF DER MAUR, p.10.

1 Crowdfunding?

1.1 What is it?

The regulations often do not define “*Crowdfunding*” as such. Much more, the approach consists first in categorizing it and afterwards either creating specific regulations per type or integrating Crowdfunding activities under pre-existing laws.

Informally, we propose to **define Crowdfunding** as “*the collection of money from investors for the realisation of a project Developer’s ideas; where the collection is made for a limited amount of time and the public offering is proposed to many persons via an Internet Platform*”^{5 6}.

1.2 Different kinds

When studying Crowdfunding, it is necessary to distinguish the Platform’s services according to their characteristics rather than considering them solely in a general category of “*Crowdfunding Platform*”. The reason of this **case-by-case assessment** is that the *de facto* elements of the Platform can trigger very different regulations and hence requirements. The approach taken here is consistent with the recent regulatory development of some European Member State (e.g. UK or FR), which choosed specific regulations instead of approaching this topic via an “*overall Crowdfunding regulation*”.

What types of Crowdfunding exists? In general, it is admitted that Crowdfunding can be divided in the following **four categories of Platforms**: Firstly, Crowdinvensting (1)⁷, which consists in financing a project against equity (or mixed form) in the company. Second, Crowdlending (2) enabling a Developer to lend money from investors. Those two forms represent the most problematic and legally regulated forms. They are also called “*financial Crowdfunding*”, since they goal is to make benefits. Thirdly, Crowdsupporting (3)⁸, it consists in supporting a project against a symbolic reward (e.g. goodies or a prototype acquired at a preferential price). Finally, Crowdonating (4), which is a pure donation. Those two categories sometimes fall under regulation (e.g. licence), however they mostly do not raise complex

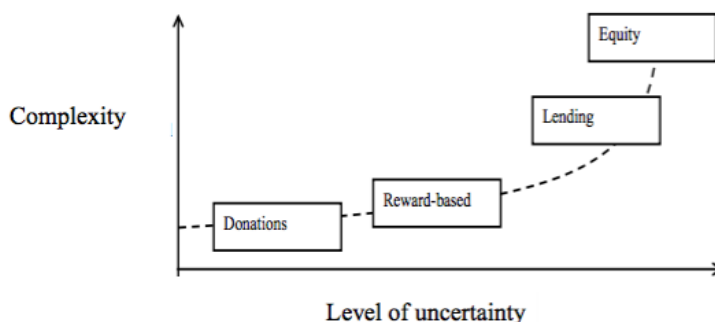
⁵ Inspired by: DIETRICH / AMREIN, p.6 f.; FISCHER / ANCELLE, p.1.

⁶ Note: the term “*online Crowdfunding*” is sometimes used in the Doctrine. Although, we believe this expression is misleading since today’s Crowdfunding is not thought “*offline*” but instead takes place per se on the Internet, which gave it its whole dimension. Crowdfunding is truly born with the Internet.

⁷ Also called « *Equity-based Crowdfunding* ».

⁸ Also called « *Reward-based Crowdfunding* ».

legal issues. In opposition with the two first, they are sometimes called “*non-financial Crowdfunding*”.



Source: ZHUNUSSOV, p.4

The four categories presented above are sometimes mixed with one another to constitute a **fifth type or hybrid** one. It is common for Platforms, especially the important ones, to mix the several type⁹. In this regard, we may already mention that the Platforms benefit from a total freedom to take the form they wish.

1.3 Models of web Platforms

If Crowdfunding Platforms can be seen as a defender of innovation, they nonetheless mainly follow economical interest; Crowdfunding is simply a **new business plan** from corporation active as Internet Service Providers that enables Developers to find money where it is today: on the Internet¹⁰.

But how do **Platforms** earn money? By charging fees on paid amount of project¹¹. Usually, there are three types of model “*up front fees*” (1), “*success fees*” (2), and “*annual fees*” (3). Others types of fees (e.g. administrative fees) are also possible. The amount perceived by Platforms in Switzerland is not negligible and oscillates between 0%-10%¹².

Regarding of **the inventors**, the Platforms proposes in general two models of payments: the “*all or nothing*” (1), meaning that the funds are only debited under the condition precedent (art.151 CO) that the fixed goal is reached¹³; or the “*keep-it-all*” (2), meaning that the money

⁹ (especially non-financial with non-financial for instance)

¹⁰ <https://www.kickstarter.com/trust?ref=footer> For instance, Kickstarter’s potential Crowdfunder goes up to 10 millions people!

¹¹ DIETRICH / AMREIN, p.15.

¹² DIETRICH / AMREIN, p.15 f.

¹³ Note : the Crowdfunder will pay under the conditions (151 ff CO) if the event appears.

is debited in any case. It exists also possibly other diverse models (e.g. the “*optional*” between variant 1) and 2)¹⁴).

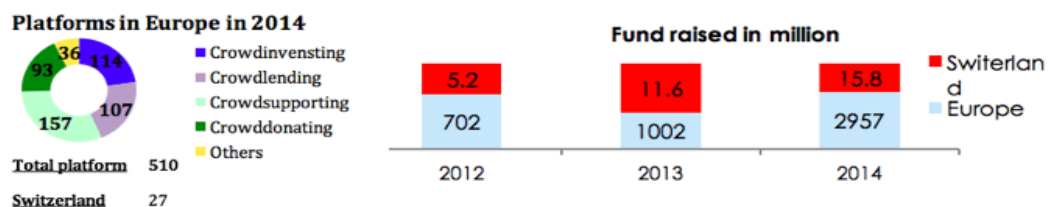
Today, the multiplication of Platforms has lead to an important level of competition, which pushed them to **specialize in niche markets** (e.g. estate Crowdfunding in Lugano¹⁵). For instance, geographically limited Platform supporting local project at the micro level (e.g. cantonal charity action, local start-up,...).

Briefly, we note that today few Platforms accept crypto currencies. However, regarding the international scope of some Platforms and the growing number of cross border activities, the combination of those two disruptive movements could be a great opportunity to combine a single currency with worldwide possibilities of investments.

1.4 Numerical importance

The worldwide numerical importance of Crowdfunding is centred between the U.S. and the EU (exception made with places like Japan). The USA, where Crowdfunding originates, is ahead with a total of 16.4 billions \$ of fund raised in 2014¹⁶. Furthermore, the international leading Platforms are Americans, as for instance Kickstarter or Indiegogo. In 2015, the market is deemed to grow significantly (by two)¹⁷, and it will probably continue on in 2016.

In **Europe**, Crowdfunding is step-by-step imposing itself as a valuable alternative funding method. However, the importance of Crowdfunding is very disparate considering the different member state. Among them, the leader of the market is undoubtedly the UK, far ahead with around 2,3 billions¹⁸ Euros of fund raised alone out of the 3 billions of the EU area in 2014¹⁹. In comparison, France and Germany (second and third positions) only account for around 150 millions each. The European market is still growing fast.



¹⁴ E.g. present on the Platform Indiegogo.

¹⁵ <http://www.swiss-crowd.ch/it>

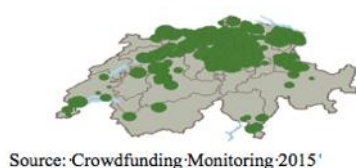
¹⁶ RALCHEVA / ROOSENBOOM, p.2.

¹⁷ *Idem*.

¹⁸ <http://www.bilan.ch/argent-finances/Crowdfunding-suisse-mieux-faire>

¹⁹ *Idem*.

In **Switzerland**, the phenomenon is still a micro market with 27 Platforms active in the area (including Platforms based abroad)²⁰, generating 15,8 millions CHF fund raised in 2014. Further, we note that most amount raised are mostly low, around 5'000.- to 10'000.- CHF²¹. Even though its baby size, the Swiss market is growing fast²². There is notably a steady future for the development of geographically limited Platforms, which can raise local interest²³ and crowdfunding Platforms, where however the geographical distance appears as negatively correlated²⁴. Finally, a glimpse at the Swiss landscape (see below) of the campaign let appears a real cultural *Röstigraben* in the use of Crowdfunding between the West and East-Switzerland.



1.5 Themes and crowd

First, the three most encountered **themes of campaign** in 2015 for Switzerland were respectively: the technology/start-up, the social actions, and the artistic projects²⁵. The Swiss current model is hence in majority based on charity. However, a general change towards crowdfunding is growingly appearing²⁶.

In principle, any theme of campaign, within the limit of the law²⁷, is possible. This freedom of theme has creates a wide discrepancies regarding the seriousness of projects, as for the “*make a potato salad campaign*”, where an American citizen raised \$55'000.- to make his meal²⁸. Even though, the Platforms often set a list of **forbidden theme** in its TOU. Those creations of normativity over what can and cannot be funded poses ethical and legal questioning, which will require, sooner or later, to be answered by State regulations. For instance, some Platforms

²⁰ List of platforms ; <http://www.swissCrowdfundingassociation.ch/Platforms/>

²¹ DIETRICH / AMREIN, p.13.

²² DIETRICH / AMREIN, p.11.

²³ For instance, to help a local community or enterprise.

²⁴ See GUENTHER/ JOHAN / SCHWEIZER.

²⁵ DIETRICH / AMREIN, p.13.

²⁶ WARDROP / ZHANG / RAU / GRAY, p.9. E.g. Investiere Platform.

²⁷ E.g. not allowed: creation of a weed plantation for non-medical use.

²⁸ <https://www.kickstarter.com/projects/zackdangerbrown/potato-salad>

forbid political funding (e.g. Kickstarter)²⁹. At the opposite, others (Wemakeit) recently enabled a Swiss politician to fund its political campaigns³⁰.

Secondly, we must relativize the openness of the funding to the crowd. Indeed, Crowdfunder are required to register and accepted the TOU, which for instance can set personal requirements (e.g. being 18 years old)³¹. Further, we may note that some Platforms (e.g. Investiere) now tend to filter the crowd in order to create a “*selected*” or “*institutional*” crowd for high quality project (e.g. only Tech start-up). There is then no surprise to notice a sophistication of the business and a movement from C2C activities for retail investors, to the C2B (e.g. Wecan.fund³² or Investierere³³) and B2B perspective.

Last but not least, the Platforms become more and more professional. They counsels methods to convince investors (e.g. visual)³⁴, sometimes educate them in order that the Developers raise more money³⁵.

1.6 Pros and Cons

The first advantage of Crowdfunding is contextual and comes from the current international financial situation. Firstly, SMEs call for funds but in the meantime, negative interest rate and heavy new requirements in the banking industries (e.g. Basel III) disable them to furnish this liquidity. In this context, the gates are opened to not yet regulated actors³⁶, as stated by Mr. Draghi who acknowledged Crowdfunding has being a “*reliable funding method*”³⁷. The risks are that Crowdfunding appears as an alternative to conduct unsecured banking activities and lead to new financial crisis, notably regarding their low capital to face default or liabilities.

The second advantage relies in the diminishing of the cost of creation for enterprises (especially heavy in Switzerland³⁸). Crowdfunding encourages innovation, whilst the risk is shared among many investors. However, we will see the statute Crowdfunder is not truly alike

²⁹ <https://www.kickstarter.com/rules/prohibited>

³⁰ <http://www.lematin.ch/suisse/Une-campagne-trs-participative/story/28725082>

³¹ Kickstarter does requires it : <https://www.kickstarter.com/terms-of-use?ref=footer>

³² <http://bit.ly/24QHqyb>

³³ SECA, p.30.

³⁴ BEIER / WAGNER, p.12. See for instance, the marketing tips making a campaign more successful or the increasing success rate implied by the hiring of a professional board.

³⁵ E.g. of technique in ZHUNUSSOV, p.6.

³⁶ Notably, we mention that the fund hold by insurances are a topic of discussion. The Swiss investment fund is about to start and it is planned to invest 500 millions from institutionnal investors in 2016. See SECA, p.25.

³⁷ <https://www.finsquare.fr/blog/article/Crowdfunding-une-legislation-europeenne-reste-a-imaginer>

³⁸ Between 20'000- 100'000.- CHF.

investors. Further, the *ratione* of a high creation cost also aims at testing the seriousness of Developer and their credit reliability. Crowdfunding may weaken this *ratione*.

Finally we mention the followings beneficial elements of Crowdfunding: new marketing approach (e.g. the pre-testing of the products³⁹), creation of social synergies (e.g. in the music industry⁴⁰.) (but also tensions)⁴¹. And a mitigate one: the overfunding. Indeed, it can leads to riskier decisions behaviour⁴².

2 Overview on Crowdfunding's regulation

In preamble, we can say that Crowdfunding's legal framework are often set at the national level even though the model of Platforms can become easily cross-border. Further, as above mentioned, Crowdfunding's regulation follows a sectorial approaches depending on the activities. This vagueness and heterogeneity is detrimental since Platforms might not know, in advance which legal framework and in which proportion will apply to them⁴³.

2.1 Switzerland

In Switzerland, today, neither the Parliament nor the Federal Council foresee a general Crowdfunding Act⁴⁴. Further, we note that the FMIA was silent on this topic. We believe this qualified silence is a deliberate will to exclude the Crowdfunding Platforms of the Markets Infrastructure. In consequence, many law (we cannot develop here) can and will apply according to the type of Platform⁴⁵. Hereafter, we focus on the Platform's frequents questions.

Firstly, a Platform often wishes to know if it is required to register and obtain an authorization (e.g. as a bank, dealer, Investment scheme...). If yes, the consequences regarding duty and obligations are heavy, notably with regards to capital requirements. Most often, the activity would require to register as it *imperfectly* falls under a banking licence constellation. We underlined "*imperfectly*" because the *ratione* of such stringent requirements are not met and

³⁹ It enables inventor to know whether its product will be successful and also to build a first database of client.

⁴⁰ FILIPPI (DE), p.2: The Author notes that Crowdfunding played an important role in the music industry.

⁴¹ For instance, a recent activist launched a project to respond to the UDC party in the Swiss journal "*20 minuten*". He received more than 140'000.- CHF. In this situation we could legitimately wonder if the Platform did not create some kinds of insane arena? <http://bit.ly/24QHv58>

⁴² ZHUNUSSOV, p.19.

⁴³ DIETRICH / AMREIN, p.28.

⁴⁴ http://www.parlament.ch/f/suche/Pages/geschaefte.aspx?gesch_id=20144300

⁴⁵ Banking Act, Financial Service Act, Financial Institution Act, Fact Sheet from FINMA, Contract law, Collective investment Act, Stock exchanges and Securities Act, Anti-money laundering Act, Consumer credit Act,...

many, including us, criticize the outdated vision that triggers it⁴⁶. The content of those critics being that the risks posed are not proportionate in comparison with traditional actors⁴⁷.

The recent critics regarding **banking licence**, focused notably on the fact licence is required when Platforms receive “20 deposit from the public”⁴⁸. In this regards, the Platforms did not wait to organize themselves and avoid it, notably by using the services of escrow agents, which enabled them to receive deposit only indirectly. However, this solution was precarious and risky.

Hopefully, the FINMA released its project to support a **lighter licence regime** more adapted to financial innovations⁴⁹. The regime would be threefold: an (unchanged) regular licence (1), a (new) licence called the “*Light licence*” (2), and an exemption regime called the “*Sandbox*” (3). The difference in comparison with the above mentioned model lies in its logic: licences are thought in relation with numerical importance of the business and not numbers of depositors.

The *light licence* would concern banking activities with limited acceptance of client’s asset and no lending activities⁵⁰. The idea is that under a certain cap (50 million in deposit) a percentage (5%) is kept by the licensee as collateral (least 300’000.- CHF). It would affect and benefit Crowdfunding Platforms in particular. Further, the *Sandbox* exemption sets a threshold of 200’000.- CHF deposit before, which no licence requirement is triggered irrespectively of the numbers of depositors.

Second frequent question is to know whether **Anti-Money Laundering regulation (AML)** applies? The AML applies to financial intermediaries (art.1 AML), which is generally the case whenever client’s assets channel via the Platform’s banking account. One of the most prominent requirements is the duty of diligence (e.g. art.3 AML), notably imposing to verify the identity of the customer and beneficial owner (so-called Know Your Customer (KYC) rule).

In this regards, we highlight that significant **adaptations** were recently conduct. The FINMA lowered its requirements towards a lighter regime hence creating a two-tier system with *de*

⁴⁶ <http://www.bilan.ch/argent-finances-plus-de-redaction/comment-investir-Crowdfunding>

⁴⁷ Communiqués de presse de la FINMA du 17 mars 2016 : *La FINMA réduit les obstacles auxquels sont confrontées les Fintech.*

⁴⁸ See art.6 OB.

⁴⁹ BRANSON Mark, Exposé Business Club Zurich, Zunfthaus Saffran, Zürich 10 septembre 2015, 2-3. (1)

⁵⁰ IVELL / LEISINGER, p.3.

minimis exceptions, much more adapted for the optimal development of new technologies, like Crowdfunding. For instance we mention the recent Circular 2016/07⁵¹, notably enabling to verify identity online (e.g. for Crowdfunder or Developer) and to open a bank account via Internet means⁵². Further, another important novelty from the FINMA's regulation is the lightened duty of care introduced by the art.11 AMLO-FINMA. Without entering into details, this article will enable small payments falling under a certain cap (notably those concerned by Crowdfunder) to escape heavy general duty of care set in art.10 AMLO-FINMA for the Crowdfunding Platform⁵³.

Third aspect we would like to approach is the recent adoption of the **FinSA and FinIA** (entering in force in 2017). This regulation reforms the former prospectus requirements (652a CO) and foresees that a basic information sheet shall be presented to regulate the financial Crowdfunding (lending and equity only) and that no prospectus requirements are required when the offer of publication is presented to less than 150 clients (notably relevant for Crowdlending)⁵⁴. Then, similarly to what was said above regarding AMLA, the new regime will set *de minimis*, which, unless reached, will not trigger prospectus requirements. Further, we note that the taking into account of the "*level of sophistication of Investors*" will be a determinant element of the content of those sheet, which will need to be taken into account by Crowdlending Platforms. The KYC requirements will then take into account the level of knowledge of the investors, which is interesting regarding the actual discrepancies between Platforms approach in this domain.

Finally, we can say FINMA keeps a close look on FinTech's company. FINMA provides rulings on specific cases as well as displaying furnished information⁵⁵. FINMA is currently the sole supervisor but, in the near future, an umbrella association (maybe the Swiss Crowdfunding Association)⁵⁶ might be playing the role of a SRO. The FINMA's approach is to stay neutral and reduce the obstacles vis-à-vis new technologies⁵⁷. Note, the Swiss Doctrine also takes this approach, for instance by considering that funding of company⁵⁸ or the

⁵¹ FINMA Circular 2016/07: Video and online identification (3.3.2016).

⁵² SCHNEUWLY, p.1611 : the others put this requirements under the scope of the Crowdlending.

⁵³ Requiring: the name, the number of account, the address of the owner of the account and the beneficiary.

⁵⁴ ESSEBIER / AUF DER MAUR, p.10.

⁵⁵ <https://www.finma.ch/en/authorisation/fintech/>

⁵⁶ <http://www.swissCrowdfundingassociation.ch>

⁵⁷ IVELL / LEISINGER, p.2

⁵⁸ BAUMANN, p.117 ff.

potential unlimited number of Founders (and funders)⁵⁹ complies with the requirements of the Swiss Code of obligation (however not without any difficulties: e.g. voting rights in case of potential unlimited Founders⁶⁰).

2.2 Europe and the U.S.

In **Europe**, At the EU level, no general Act was promulgated and many directives, apply according to the types of Platforms (sectorial approach), the most regulated being the equity and lending part⁶¹, which both require an authorization⁶². Note that MIFID II may consider Platforms as infrastructure (unlike FMIA). At the Member state level, some legislators (e.g. FR and UK) have decided to create specific sets of rules to face Crowdfunding activities. Finally, we note that UK in particular will probably provide a substantial source of inspiration⁶³. Further details in the documentation⁶⁴.

In the U.S., at the federal level, the title III of the recent modification of the JOBS Act allow the equity Crowdfunding within limits (funding: <1mio for Company. And investment <100'000.-\$. Both over 12 months' period). The SEC requires equity Crowdfunding being licenced as Broker-dealer at the SEC or (novelty) as a funding portal at the FINRA⁶⁵. At the State level, so-called "*Crowdfunding exemption movement*"⁶⁶ exists that precise the regime of Crowdfunding: see appendix⁶⁷.

3 The legal relationships

In this section, we briefly will observe and discuss some elements of the legal relationships between the three actors composing the Crowdfunding relationship respectively: the « *Crowdfunder* » (1)⁶⁸, the « *Project Developer* » (2), the « *Platform* » (3).

⁵⁹ BAUMANN, p.117 f.

⁶⁰ BAUMANN, p.136 f.

⁶¹ Payment service directive, consumer rights, AMLA, Prospectus, capital requirements, consumer credit, MiFID II, AIFMD, UCITSD,... in addition to national regulation. See appendix EU regulation overview.

⁶² EUROPEAN COMMISSION, Crowdfunding in the EU Capital Markets, p.26 ff.

⁶³ FCA, p.1 ff.

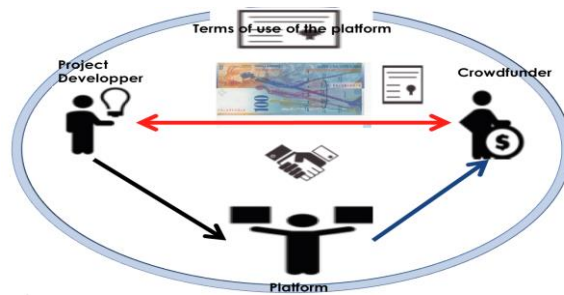
⁶⁴ GABISON, 21 ff.

⁶⁵ http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=12218

⁶⁶ <http://bit.ly/1qfis8w>

⁶⁷ See appendix U.S. exemption movement.

⁶⁸ In the U.S. called the « *Backer* ».



3.1 Terms of use

Terms of Use (TOU) are the most important element of the tripartite relationship⁶⁹. TOU applies directly between Platforms and the others and indirectly⁷⁰ between Crowdfunder and Developer⁷¹. In general, Crowdfunder and Developer must accept (click or use of website⁷²) them at the registration stage. As a consequence, the casuistic relating to the General Conditions of contract apply; in particular, the interpretation *contra stipulatorem* and the invalidation of abusive clause. This opinion is motivated with regards to the potential asymmetry of information and the risks of abuses⁷³.

Regarding their **content**, we note that Platforms are entirely free to shape them at their discretion⁷⁴. Here underneath, we take Wecan.fund's TOU as example. The most usual element of TOU aims at distinguishing activities and **excluding liability's** Platform from others actors (e.g. from content of a campaign)⁷⁵. In this regard, Platforms can only do so within the limit of the CO, i.e. crass faults (art.100 par.1 CO) may not be exempted⁷⁶. However, it can exclude the liability for its auxiliary (101 par.2 CO). Further, TOU can also set a **place of competent jurisdiction**. In this regard, we note that the procedural rights of other actors than Platforms are very weak⁷⁷. Furthermore, TOU also sets obligation for the Developer. We can name several of them as: Firstly, the Developer must **describe the project in a loyal way**⁷⁸, notably whit their eventual risk and problematic according to the doctrine⁷⁹. Secondly, a certain level of **organisation** (*Aufgabenteilung*) is asked: "they have to know how

⁶⁹ (pictured in the blue circle here above)

⁷⁰ SPACEK, p.283.

⁷¹ SPACEK, p.283.

⁷² WECAN.FUND, p.1 ; e.g. Kickstarter <https://www.kickstarter.com/terms-of-use?ref=footer>

⁷³ ZHUNUSSOV, p.47 : « *Information asymmetry in Crowdfunding financial capital usually related to fraudulent activities.* » ; and ZHUNUSSOV, p.8.

⁷⁴ SPACEK, p.280.

⁷⁵ WECAN.FUND, p.2.

⁷⁶ For instance, if it shall have known that the project of the Developer was a scam.

⁷⁷ E.g. a Parties may have no financial incentive or can be very far away from jurisdiction's place.

⁷⁸ WECAN.FUND, p.2

⁷⁹ SPACEK, p.282. Also this obligation could be deduce from the general principle of good faith (art.2 CC).

to do it”⁸⁰. Thirdly, Developer must perform a “*good faith attempt*”⁸¹, where the Developer must try to develop the project. Fourth obligation, we mention is project must be “*realistic*”. It should be recognized as general. Fourthly and finally, Crowdlending often insert **exclusivity clause** with the Platform before the lend is fully reimbursed⁸².

At the Platform level, violation of TOU is only **sanctioned** by suspension of Developer from the Platform⁸³. However, it could also trigger criminal law liability and, under civil law, a repetition of what has been paid since there is no more legitimate cause under art.62 al.1 CO.

3.2 Project Developer and Platform

The Doctrine usually considers that this relationship can be assimilated to a **brokerage contract** (art.412 ff. CO) or an **agency contract** (art.418 ff. CO) in the eventuality the relationship lengths a significant amount of time⁸⁴. In our view, this qualification is unclear in relation with Crowdfunding since, for instance, a serial entrepreneur could then be considered differently if he uses repeatedly the same Platforms. Further, the brokerage contract requires that a payment being made, which is indirect via Crowdfunder, and a public displaying occurs (displaying of the project on the Internet)⁸⁵. According to this vision the Developer shall be able to destitute the Platform at any time, without consequences (art.404 CO)⁸⁶.

In addition, the relationship can contain some elements of innominate contracts (debated)⁸⁷. First we mention the **data and web hosting services**. This is the case whenever Platforms enable Developers to inform on the following of the projects⁸⁸. This comparison at-arm-lengths is interesting, notably because the Swiss jurisprudence recently expanded its views on the question of host liability. It stated that regarding the control over data and information provided on its website, a hosting party (e.g. Crowdfunding Platform?), could be seen as co-author of a user personality right lesion⁸⁹. In the future, this extension towards co-liability

⁸⁰ SPACEK, p.282. It consists in telling the people what you intend to do.

⁸¹ WECAN.FUND, p.3.

⁸² WECAN.FUND, p.3.

⁸³ WECAN.FUND, p.7.

⁸⁴ SPACEK, p.280: “*ein bestimmte dauernde Zeit*”.

⁸⁵ SPACEK, p.284.

⁸⁶ SPACEK, p.285.

⁸⁷ Differing opinion: SCHNEUWLY, p.1613.

⁸⁸ WEBER, p.375.

⁸⁹ See for instance the case of Tribune de Genève, where the art.28 CC was extended to the hosting. It is interesting to note that the *ratio decidendi* was the power the Host had on the avoiding of the lesion. With regards to investment decision, we believe that it will be require in the future by law for Platforms to conduct least adequate control and due dilligence in order to avoid to be hold liable next to a Developer.

could be thought maybe in further domains (as IP?), notably regarding degree of care given by the Platforms with regards to the Investors for which the campaign was displayed to (e.g. unsophisticated Investors). This should force harmonized best practices to appear⁹⁰. Today however, Platforms usually excludes their liability for the information presented⁹¹.

Secondly, **others additional contracts** can sometimes be concluded. For instance, we mention that Developers are concerned with the disclosure of their IP that could be compromised or stolen by competitors. Notably since, if nothing is foreseen, Crowdfunder could be legally considered as owner of the IP created (e.g. proposition of the theme for the next song of a singer)⁹². This can lead to the exacerbation of the incentive of Developers to create an asymmetry of information, which is problematic in an investment perspective. For now, it is admitted as best practice that Platforms should conduct a “*plausibility check*”⁹³.

3.3 Platform and Crowdfunder

Their relationship is mostly regulated via the **TOU** (*supra* n°3.1). and the **national regulations** (*supra* n°2). The registration notably enables Platforms to comply with the KYC and AMLA requirements⁹⁴.

The **main problematic** relies in the massive exclusion of liability, the weak due diligence to be met by the Platform and the weak procedural right or possibilities of Crowdfunder. Further, Platforms face potential conflict of interest since its interest and the one of the Developer are aligned against those of the Crowdfunder⁹⁵ and both can directly influence the content of the concluded contract⁹⁶.

3.4 Project Developer and Crowdfunder

The Doctrine qualifies this relationship as being *sui generis* since the counter-party can be freely decided by the Developer⁹⁷. Legally speaking, the **contract can be assimilated**,

⁹⁰E.g. the obligation for Platforms to conduct rigorous entrance test for Developers to ensure that projects are legal and do not create lesion to third party.

⁹¹ WECAN.FUND, p.8 f.

⁹² SPACEK, p.287.

⁹³ SPACEK, p.285; SCHNEUWLY, p1612 : talks about solvability-test in crowdlending context.

⁹⁴ SPACEK, p.284.

⁹⁵ FILIPPI (DE), p.1 and p.6 : Proposition of solution, e.g. a blockchain solution where the Crowdfunder can have a share (cryptoequity) in the company where he invests.

⁹⁶ SPACEK, p.281.

⁹⁷ SPACEK, p.281 ff

according to its characteristics, as: donation (art.239 CO), sell (art.184 CO), enterprise contract (art.363 CO), lending⁹⁸, services, or else. Platforms are external to the contract⁹⁹.

Crowdfunders' legal situation can be summed up as follow: *one main obligation few rights*. The principal obligation of the Crowdfunder is to pay¹⁰⁰. Further, non-financial Crowdfunder have no rights in the subsequent benefit and success in comparison with stock owners (e.g. Oculus Rift case). Their rights are therefore very limited and everything is made to evict them (E.g. in no rights in case of a subsequent capital augmentation) even though Crowdfunders takes most of the risk¹⁰¹.

This situation is very unfair considering notably that most of Crowdfunder have no expertise or any idea regarding the business they are investing in¹⁰². Platforms often state that Crowdfunder must be due diligent¹⁰³, ask question and be aware of the risk of default. For instance Investiere's warning section stress the fact that placement are illiquid and very risky¹⁰⁴: Over 4 years more than 75% of the Crowdfunded start up fail¹⁰⁵.

Another legal problematic can be spot in the counter-part offered by Developer. For instance, a Developer that promises to follow someone "for life" on Twitter. The Swiss regulation would probably consider it as an excessive obligation (art.27 CC) regarding its lengths. Further, either no damages would be in cause¹⁰⁶ or eventual small damages may not raise the economical incentive (N.b. no class actions!¹⁰⁷) nor give the procedural rights to enable Crowdfunder to sue. In addition, when set by the Platform, the place of jurisdiction are often a discouraging element¹⁰⁸. In definitive, as the interest of parties are not aligned¹⁰⁹, Developers could be tempted to promise counter-part they know are not feasible, and which may be not claimable nor sanctioned in the facts.

⁹⁸ SCHNEUWLY, p.1613 f.

⁹⁹ WECAN.FUND, p.5 f.

¹⁰⁰ Others, as the obligation to register under a « *real name* » (similar on Facebook's TOU), are not studied.

¹⁰¹ ZHUNUSSOV, p.6.

¹⁰² ZHUNUSSOV, p.17.

¹⁰³ WECAN.FUND, 4.

¹⁰⁴ <https://www.investiere.ch/risk-warning>

¹⁰⁵ WERNEN / HERTNER, p.326.

¹⁰⁶ (e.g. if the Developer does not follow on Twitter at all)

¹⁰⁷ <http://rostigraben.ch/en/challenges-for-swiss-start-ups-is-the-valley-of-death-seeing-any-rain-in-the-distance/>

¹⁰⁸ Shall it be sued at the siege of the Company ? At the place where the contracts has its mains effects ? Are the TOU or the contract stating an answer ?

¹⁰⁹ FILIPPI (DE), p.1 and p.6.

Conclusion

In this work, we gave an overview of what is Crowdfunding and how its functioning. We saw that a sectorial approach according to the type of Crowdfunding, doubled by a case-by-case assessment of the Platform's rules and Developer's contracts, is necessary if one wishes to appreciate fully the legal framework that will be required by a Platform. Today, the eventual vagueness in addition with the heterogeneity of law are detrimental and dangerous for funding in general and Crowdfunding Platform in particular¹¹⁰.

Further, we found that many legal questions are still in suspense. However, even though the regulation is (always) one foot behind, it is progressively evolving everywhere in the world in proportion with the phenomenon of Crowdfunding.

In this regards, we took several Swiss example of the *lighter regimes* triggered by the FinTech developments. Those adaptations to innovation towards a clearer, more adapted regime demonstrates that worldwide legislators and in Switzerland's one in particular, go in the right direction by encouraging innovation, setting aside the obstacles and having the boldness to revise their traditional models of regulation. Those adaptations are most welcome since it mitigates Crowdfunder weak position and give a clearer regime for Platforms.

In conclusion, we acknowledge that the evolution of Crowdfunding may be detrimental on the short term to some traditional actors (e.g. Bank). Nevertheless, we believe that the times for innovation has come and it will be beneficial in overall because Crowdfunding is actually complementary to them. As would matches, Crowdfunding enables random sparkles to light but it does not provide the continuous nurture to keep the fire burning, as do Banks.

¹¹⁰ DIETRICH / AMREIN, p.28.

Appendix

EU regulation overview

EU Directive	Equity	Lending	Donation / Reward
Payment Services	✓	✓	✓
Consumer Rights	✓	✓	✓
Anti-Money Laundering	✓	✓	✓
Distance Marketing of Financial Services	✓	✓	
Prospectus	✓	(✓)	
Capital Requirements	(✓)	(✓)	
Consumer Credit		✓	
MIFID (II)	✓		
AIFMD	(✓)	(✓)	
UCITSD	(✓)		

U.S. exemption movement

