

FRANCE



1 Current Market of Crowdfunding platforms in France

In France enthusiasm for Crowdfunding (known as *financement participatif*) is high and has resulted in a proliferation of dedicated websites and substantial amounts raised, but, as is the case in other jurisdictions, regulatory restraints may apply to Crowdfunding activities.

French Crowdfunding platforms are organised on the same models as are found elsewhere, focused on generating equity investments, loans or donations. These platforms are potentially subject to several different regulatory regimes, including:

- rules regarding intermediation, solicitation and distance selling, whatever model is used by the platform;
- banking regulation, when the requested funding takes the form of a loan;
- securities regulation, when equity investments (or investments in debt securities) are sought;
- regulation of payment services, when funds are paid in through the crowdfunding platform;

and potentially other regulatory regimes, including those relating to anti-money laundering, combatting the financing of terrorism and sanctions (“AML/CFT/sanctions”).

1.1 Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

Examples of French platforms engaged in Crowdfunding through offers of equity include the following:

- Anaxago, which promotes crowdfunding offers of up to €2.5 million per issuer (accepting a minimum of €1,000 per investor).¹⁹
- Finance Utile proposes equity investments (with a minimum of €1,500 per investor) in small companies with high growth potential.²⁰
- SmartAngels, dedicated to investment in start-ups and SMEs.²¹
- WiSEED, supporting projects raising up to €100,000, via investments of not less than €100 per investor, and also projects funded by less than 150 non-qualified investors.²²

¹⁹ www.anaxago.com/

²⁰ www.financeutile.com

²¹ www.smartangels.fr

²² www.wiseed.fr



1.2 Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

Examples of French platforms engaged in Crowdfunding for business activities through loans include the following:

- Babyloan, which promotes micro-loans for entrepreneurs from developing countries.²³ Participants provide reimbursable loans without interest (and for that reason the loans are said not to be subject to the French banking monopoly).
- FriendsClear, which promotes loans among businesses. The loans are provided by the Crédit Agricole; FriendsClear has a status of a banking intermediary (intermédiaire en opérations de banque et en services de paiement, described below).²⁴
- SPEAR, which promotes loans to projects with an ecological, cultural and social impact²⁵ Participants place funds in the SPEAR cooperative association, at a low interest rate. Funds collected are deposited by SPEAR in one of its partner banks, which grants loans to the projects chosen by the participants.

Another major French lending platform is Prêt d'Union,²⁶ which promotes consumer credit rather than loans for business activities.

1.3 The Donations/Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

French platforms promoting donations, including in some cases with financial returns or other rewards, include (among others):

- KissKissBankBank, dedicated to financing artistic and other projects of many sorts (performers, photographers, writers, travel, etc.).²⁷
- My Major Company, which solicits financing for a broad range of performers and other projects with a cultural element.²⁸

2 Current regulation of Crowdfunding platforms in France

2.1 Regulation of financial intermediation

Services as a broker for securities transactions (including reception and transmission orders for third parties or execution of orders for third parties), underwriting securities offerings and certain other activities relating to securities or other financial instruments can be carried out in France only by an authorised French or EEA-passported "investment service provider" (*prestataire de services*

²³ www.babyloan.org/fr/ as of March 12, 2013

²⁴ www.friendsclear.com/ as of March 22, 2013

²⁵ www.spear.fr/ as of March 12, 2013

²⁶ www.pret-dunion.fr/

²⁷ www.kisskissbankbank.com/ as of March 25, 2013

²⁸ www.mymajorcompany.com/ as of March 25, 2013

d'investissement),²⁹ licensing requirements for which are extensive (including minimum capital of €125,000 if client funds are accepted and €50,000 if they are not; or €750,000 for certain underwriting activities). Crowdfunding platforms in France generally do not engage in such activities, and so should not be required to register as an investment service provider.

However, a less onerous licensing regime applies to persons providing advice on a regular basis regarding investments and certain related matters, which can be performed in France by a French or EEA-authorised financial investment adviser (*conseiller en investissements financiers*).³⁰ French Crowdfunding organisations such as WiSEED, Anaxago, Finance Utile and SmartAngels report that they are registered as financial investment advisers, since their activities consist of advice on providing financing.

Further, acting (for consideration) as an intermediary with respect to banking operations or payment services requires registration as an *intermédiaire en opérations de banque et en services de paiement* (“IOBSP”).³¹ Several French Lending-Model platforms have registered as IOBSPs.

The foregoing rules apply to any intermediaries or advisers who carry out their activities in France, including foreign entities which can be deemed to conduct such activities in France via the internet. Whether the rules will apply in a given case is subject to a fact-based analysis. Guidelines on the subject have been published by the Autorité de Contrôle Prudentiel et de Résolution (“ACPR”).³²

2.2 Regulation of lending activity

Any lending activity in France, if conducted “habitually” and for profit (*à titre onéreux*), is a credit operation subject to the French banking monopoly, which can be carried out only by French or “passporting” EEA credit establishments.³³ In case of violation, administrative and penal sanctions may be imposed, but the relevant loan agreements should not thereby be voided. These rules are enforced by the ACPR.

Loans granted without interest or other consideration are not subject to the banking monopoly. The ACPR has announced that, subject to court review on a case-by-case basis, interest-free loans for which the lender receives a promotional reward of small value (such as a CD, DVD or concert ticket) seem likely to be considered interest-free.³⁴

To avoid violation of banking monopoly rules, some French Crowdfunding organisations arrange for the actual loans to be made by authorised banks, with the Crowdfunding organisation acting as an IOBSP.

²⁹ CMF article L.531-1 et seq.

³⁰ CMF articles L.541-1 et seq.

³¹ CMF articles L.519-1 et seq.

³² AMF/ACP Guide May 2013

³³ CMF articles L.311-1, L.313-1 & L.511-5

³⁴ AMF/ACP, Guide du financement participatif (crowdfunding) à destination des plates-formes et des porteurs de projet (May 14, 2013) (“AMF/ACP Guide May 2013”).

There are exceptions to the banking monopoly for various lending activities by non-profit organisations.³⁵ Such organisations are also permitted to make profit-participation loans under certain conditions.³⁶

If consumers are permitted to borrow via a platform following the Lending Model, consumer-protection rules will apply, including (among others) rules as to required documentation and a cooling-off period during which the borrower can withdraw from the transaction.

2.3 Regulation of payment services

Under French law any person providing payment services must be licensed as a payment institution (*établissement de paiement*)³⁷ consistent with the Payment Services Directive 2007/64 of 13 November 2007. However, exemptions from the licensing requirement may be obtained by a filing with banking/insurance regulator, the ACPR, by platforms which accept payments from investors within a “limited network” or for a “limited range of goods or services” or which collect donations in exchange for a definite and clearly defined counterpart having a value commensurate with the donation made.³⁸

Further, any person providing electronic money is regulated as an *établissement de monnaie électronique*,³⁹ consistent with the E-Money Directive 2009/110 of 16 September 2009. The ACPR considers that Crowdfunding platforms which arrange for funds for a given project to be collected in an account at a banking institution are “acquiring” and “executing” payment orders pursuant to CMF article L.314-1 II 3° and 5°, which activities require a licence as a payment service provider under CMF article L.522-6.

2.4 Prospectus regulation

2.4.1 General rule

The public offering rules in France comply with the general EU framework set out in the prospectus directive 2010/73 of November 4, 2003 (as amended) but with features specific to France. Making a public offering in France requires among other things the preparation of a prospectus approved by the securities regulator, the Autorité des Marchés Financiers (“AMF”), or the securities regulators of another EEA member state.

These French rules on public offerings, and exemptions thereto (see below), apply to offers of securities in France regardless of where the issuer is situated. With respect to offerings made over the internet, the offering is considered made in France, and thus becomes subject to these French rules, if French investors are targeted in some manner (for example, when the site is in French and is linked to sites of French organisations).

³⁵ CMF article L.511-6 5.

³⁶ See CMF articles L.511-6 6 and 313-3 et seq.

³⁷ CMF article L.522-1

³⁸ AMF/ACP Guide May 14, 2013.

³⁹ CMF article L.526-1 et seq.

When considering the impact of these rules, a threshold question to ask is whether or not the transaction proposed by the Crowdfunding platform involves offering of a kind of security to which the public-offering rules apply, rather than distribution of some other instrument or investment, which may be subject to other regulatory obligations. The public-offering rules apply to offers of a financial security (*titre financier*), i.e. equity securities (shares or other securities giving access to equity or voting rights), debt securities (other than drafts or notes) or shares or interests in funds.⁴⁰

Those rules do not apply to distribution of other kinds of financial instruments (referred to as *contrats financiers*) including derivatives⁴¹ or to investments taking other forms (such as annuities or other contractual rights, which are referred to as *biens divers*⁴²). Consequently if a donation – even with a financial return – is structured so as not to be an investment in a financial security (*titre financier*), the offer thereof to the public can be considered not to fall within the ambit of public-offering rules. It is possible to ask the AMF for confirmation that a given Crowdfunding program is not subject to public-offering rules.

2.4.2 Exceptions/exemptions

Exemptions from general prospectus and registration requirements are available for private placements (addressed to qualified investors and to fewer than 150 other investors, for up to 20% of the issuer's pre-offer capital) or high-value placements (at least €100,000 per investor or €100,000 per security) and also for offerings of less than €100,000 in total or larger offerings representing up to 50% of the issuer's pre-offer capital and not exceeding €2.5 million if the securities are traded on a multilateral trading facility ("MTF")⁴³ or €5 million if not so traded.⁴⁴

Securities issued pursuant to one of these exemptions can nevertheless be publicly listed in France, if relevant listing requirements are met. One possible listing platform is Alternext (a unit of Euronext), which requires a minimum free float of €2.5 million. This means that an offering of between €2.5 million and €5.0 million, which represents not more than 50% of the issuer's pre-offer capital, can potentially be listed on Alternext and publicly traded thereon, with no prospectus required, as long as the free float is at least €2.5 million. Another potential trading platform for such an exempted offering is Alternativa, which is a MTF (so that to be eligible for the up-to-50%-of-capital exemption the offering should not exceed €2.5 million).

Of course, non-French Crowdfunding activities will benefit from the €100,000/50%-of-capital exemptions (among others), but when exemptions do not apply sanctions are potentially applicable if there is a basis to consider that the offering is made in France.

⁴⁰ CMF article L.211-1 II

⁴¹ CMF articles L.211-1 III and D.211-1 A

⁴² CMF article L.550-1 et seq.

⁴³ In French, a *système multilatéral de négociation* ("SMN").

⁴⁴ See *Code monétaire et financier* ("CMF"), article L.411-2, and AMF *Règlement Général* article 211-2. Amounts mentioned are cumulative amounts calculated over a period of 12 months. The limit of fewer than 150 non-qualified investors is calculated taking account of only investors located France. The exemption for offerings representing up to 50% of an issuer's capital is available for companies in the form of a *société anonyme* (a classic corporation) or a *société en commandite par actions* (a partnership limited by shares), but not those taking the form of a *société par actions simplifiée* (a simplified corporation).

2.5 Other applicable regulatory regimes

Other regulatory regimes potentially applicable to Crowdfunding activities include the following:

2.5.1 Regulation of marketing and distance selling

Marketing and distance-selling (including telephone and internet solicitation) are subject to restrictions on financial solicitation (*démarchage*) set out in the CMF and the Consumer Code.

The foregoing rules apply to any intermediaries or advisers who carry out their activities in France, including foreign entities which can be deemed to conduct such activities in France via the internet. Whether the rules will apply in a given case is subject to a fact-based analysis. Guidelines on the subject have been published by the ACPR.⁴⁵

French Crowdfunding organisations such as WiSEED, Anaxago, Finance Utile and SmartAngels report that they are registered as financial investment advisers.

2.5.2 AML/CFT/sanctions rules

Crowdfunding platforms may be required to comply with anti-money-laundering rules, requiring exercise of due diligence with regard to clients (*obligation de vigilance*), which consists of (i) identification of clients, (ii) gathering information relating to the purpose and nature of the transactions as planned and as carried out (among other things) and (iii) reporting suspicious transactions to French authorities (TRACFIN).⁴⁶ Although some French Crowdfunding organisations have reported difficulties in complying with anti-money-laundering rules, the need for compliance appears to have been accepted by most.

3 Possible regulation of Crowdfunding platforms under the AIFMD regime

The AIFM Directive 2011/61 of 8 June 2011 in article 5(1) requires Member States to enact rules to ensure that every “alternative investment fund” (“AIF”) have a manager (an “AIFM”) responsible for ensuring compliance with rules set out in the directive. AIFs are defined in article 4(1)(a) as collective investment undertakings, other than UCITSs, which “raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors”. Under guidelines published by ESMA,⁴⁷ characteristics of such collective investment undertakings are that they (a) not have a general commercial or industrial purpose; (b) pool capital raised from its investors for the purpose of investment with a view to generating a pooled return for those investors; and (c) allow unitholders or shareholders of the undertaking no day-to-day discretion or control.

⁴⁵ AMF/ACP Guide May 2013

⁴⁶ CMF, articles L.561-1 et seq.

⁴⁷ See ESMA, Final Report - Guidelines on key concepts of the AIFMD, 24 May 2013.

3.1 Status of AIFMD implementation

Under CFM articles L.214-24 et seq., transposing the AIFM Directive 2011/61 of 8 June 2011, every “alternative investment fund” (“AIF”) must have a manager (an “AIFM”) responsible for ensuring compliance with rules set out in legislation (essentially identical to those set out Directive 2011/61). AIFs are defined in CMF article L.214-24 as collective investment undertakings, other than UCITs, which “raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors”. Under guidelines published by ESMA, characteristics of such collective investment undertakings are that they (a) not have a general commercial or industrial purpose; (b) pool capital raised from its investors for the purpose of investment with a view to generating a pooled return for those investors; and (c) allow unitholders or shareholders of the undertaking no day-to-day discretion or control.

3.2 Impact on Crowdfunding platforms

This legislation applies to Crowdfunding platforms only if they constitute collective investment undertakings in the sense described above, which would seem to require (among other things) that the funding take the form of either equity or loan; that the funding from Crowdfunding participants be collected by the platform, before being disbursed; that the investment in the supported company or project be maintained in the form of a collective investment, i.e. that the individual funders not have a direct investment relationship with the company or project in question.

The implementation of the AIFM Directive in France seems unlikely to impact Crowdfunding activities, since the criteria described above will generally not be met by operating companies or project companies seeking funding (since, among other things, they have a general commercial or industrial purpose) or Crowdfunding platforms (which generally do not pool capital from investors with a view to generating a pooled return for them).

4 Conclusion

Crowdfunding activists have called for several modifications of law and regulation intended to facilitate Crowdfunding. Measures proposed by Crowdfunding advocates include establishing a new category of intermediary for Crowdfunding operations, increasing above 150 persons the exemption for a “restricted circle” of investors, increasing from €100,000 to €1 million the threshold for application of public-offering rules and others.

On 30 September 2013 French officials proposed legislative reforms impacting Crowdfunding. The reforms are the subject of consultation, scheduled to end on 15 November 2013. The following is a summary of some key features of the proposed legislation:

- The legislation would create a new category of adviser, a conseiller en investissements participatifs (“CIP”), operating internet platforms offering equity and debt securities. The CIP will be subject to various requirements, including (among others) adherence to a code of conduct and establishing adequate management procedures. The internet site of the Crowdfunding platform must provide certain minimum information about the issuer, and must restrict access to investors registered with the site.

- The legislation would establish a new exemption for offers of equity and debt securities made exclusively through the internet site of a CIP, up to a maximum of €300,000 per issuer during any 12-month period.
- A new exemption would be made to the current lending monopoly, allowing interest-bearing loans from individuals to borrowers, up to a maximum of €250 per lender and a total of €300,000 for the borrower, provided that the loans are made collectively by more than 20 lenders.
- A new exemption would be provided to payment services rules, allowing Crowdfunding platforms (or other organisations) with a minimum capital of €40,000 to furnish payment services (i.e. collect and transmit funds), for amounts of up to €3 million per month. AML/CFT rules will remain applicable. This regime will apply only to payments within France, and will not give the payment service provider “passport” treatment in other EEA member states.

Many Crowdfunding advocates are submitting comments to French authorities suggesting that the new legislation be liberalised in various respects.

The new legislation is expected to come into force (perhaps with some changes from its proposed form) soon after the conclusion of the consultation.

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