



The legal framework on crowdfunding in Spain

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Author

Héctor Simón Moreno
Universitat Rovira i Virgili
hector.simon@urv.cat

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The legal framework in crowdfunding in Spain

Héctor Simón Moreno

Introduction

According to a joint study carried out by the University of Cambridge and Ernst and Young¹, Spain was one of the top five European countries in terms of the cumulative value of alternative financing between 2012 and 2014 (it accounted for 101 million euros). With regard to crowdfunding, reward-based crowdfunding (where contributions are exchanged for current or future goods or services), peer-to-peer business lending (enterprises finance each other without credit entities taking part in the process), equity-based crowdfunding (where the exchange is company equity, e.g. becoming a shareholder of the company) and donation-based crowdfunding (where the crowd does not seek appropriate compensation in return for their investment in the project, which usually pursues a social purpose) were the most important online alternative finance sectors in Spain during the aforementioned period, as Figure 1 shows.

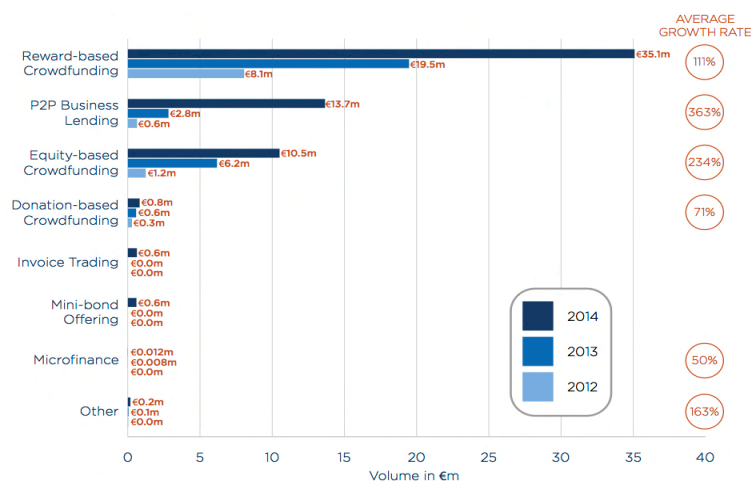


Figure 1. Online alternative finance market methods in Spain. Source: *The European Alternative Finance Benchmarking Report, 2015*².

Spanish enterprises have traditionally been highly dependent on bank financing, both for their investment needs and operating expenses (80 per cent of the country's SMEs funding comes from bank loans). Nevertheless, there has been a significant reduction in credit provision in Spain due to the economic crisis - bank lending to the private sector fell by 9.2% between 2009 and 2012³-. Furthermore, it must be taken into consideration that 66 per cent of new Spanish businesses survive no longer than three years, which does not bring confidence to lenders. This context has particularly affected SMEs, which have serious difficulties in gaining access to capital and credit. As a result, they need to rely less on credit institutions for that purpose, even though the provision of credit has shown signs of improvement in 2015 thanks to several factors, such as the reduction of both non-

¹ R. Wardrop & B. Zhang, R. Rau & M. Gray, *The European Alternative Finance Benchmarking Report* (February 2015) 15. See also S. Á. Royo-Villanova "El «equity crowdfunding» o financiación en masa de inversión: importancia, problemas y opciones en su regulación", *Cuadernos de derecho y comercio* (61) (2014) 17 ff.

² R. Wardrop & B. Zhang, R. Rau & M. Gray, *The European Alternative Finance Benchmarking Report*, 33.

³ C. Martínez Carrascal & M. Mulino Ríos, "La evolución del crédito bancario a las empresas españolas según su tamaño. Un análisis basado en la explotación conjunta de la información de la CIR y de la CBI", *Boletín Económico del Banco de España* (January 2014) 117 ff.

performing loans and the levels of debt of companies, together with the increase in turnover and profits⁴.

Due the growing importance of crowdfunding in Spain and the growing interest in alternative finance methods of Spanish *enterprises and start-ups* so as to face these funding problems, a proper *legal framework in this field* was strongly requested by Spanish crowdfunding platforms⁵, which was eventually established in Act 5/2015, dated 27th of April, on the Promotion of Corporate Financing⁶. The new rules governing the legal status of participatory crowd-funding platforms in Spain (articles 46 to 93) are analysed below.

1. Participatory crowd-funding platforms

1.1. Concept

The BBVA bank⁷ outlines the fact that financial crowd-funding platforms share a number of common features. One of them is acting as an intermediary between promoters and investors. This is reflected in article 46.1 Act 5/2015, according to which participatory crowd-funding platforms (hereinafter, “platforms”) are those authorised companies whose business is to bring a plurality of individuals or legal entities that provide funding in exchange for a monetary compensation, referred to as investors, into contact with natural or legal persons that request financing in the form of a participatory crowd-funding project (hereinafter, “projects”), referred to as promoters. As a result, the platform is the place where investors and promoters get into contact, which implies that several contracts are concluded in order to govern this three-corner legal relationship⁸.

This set of rules, however, focuses only on crowdlending, securities-based crowdfunding and equity-based crowdfunding, so those platforms seeking funding for promoters through grants, sale of goods and services and interest-free loans do not fall under its scope. This means, in practice, that they are governed by the general legal dispositions of either the Spanish Civil Code 1889⁹ -CCE- or the Spanish Commercial Code 1885¹⁰ -CCo- in accordance with the alternative finance method used. In this regard, the following conclusions may be drawn¹¹:

a) With regard to donation-based crowdfunding, the investment is done by the mere liberality of the investor (art. 1274 CCE), so the contract cannot be deemed to be a sale contract (art. 1445 CCE). In some cases, however, investors receive as consideration a gift or a sample of the product manufactured with the requested funding, which poses difficulties in defining the legal nature of the legal relationship. Be that as it may, the donation is done under suspensive condition of obtaining the requested funds (art. 117 CCE) and two duties are imposed to promoters (art. 619 CCE): to allocate contributions to the project and to deliver the agreed gift or product.

At the state level, it is in force the Act 49/2002, dated December 23th, on the fiscal regime

⁴ See the problems the Spanish SMEs face at I. Giménez Zuriaga, “La financiación de pymes y la crisis”, *Observatorio sobre la reforma de los mercados financieros europeos* (2013) 185-186. As for the changing trends in the provision of credit in Spain, see J. Maudos, *Evolución reciente del crédito y las condiciones de financiación: España en el contexto europeo* (Madrid: Funcas, 2015).

⁵ According to the survey carried out by the Spanish Crowdfunding Association among 30 crowdfunding platforms in 2014, *Informe de la encuesta de la asociación española de crowdfunding sobre las plataformas españolas de Crowdfunding* (June 2014) 11. Available at: <http://web.spaincrowdfunding.org/> (accessed 18 July 2016). The main need detected was a proper legal framework.

⁶ BOE (Spanish Official Gazette) 28 April 2015, num. 101, p. 3699. Available at: www.boe.es.

⁷ C. Cuesta *et al.*, “Crowdfunding en 360º: alternativa de financiación en la era digital”, *BBVA Research* (28 October 2014) 6. Available at: <https://www.bbvaesearch.com/> (accessed 18 July 2016).

⁸ See below paragraph 5.

⁹ Gazette 25 July 1889, num. 206.

¹⁰ Gazette 16 October 1885, num. 289.

¹¹ According to the study carried out by M. Gimeno Ribes, “Aproximación a la naturaleza jurídica del “crowdfunding”, *Revista de Derecho Mercantil* (1) (2014) 451 ff.

pertaining to non-profit organisations and tax benefits for patronage¹². This law does not provide an appropriate legal framework for donation-based crowdfunding: it focuses mainly on tax issues; non-profit organisations are the only ones allowed to raise funds; it focuses on donations made by natural persons, so legal persons are excluded from its scope; the donor is not entitled to receive any consideration in return; and tax incentives are not significant enough¹³. Some rules have been enacted however at the regional level aiming at boosting the donation-based crowdfunding by broadening its scope with tax incentives. Examples are the Valencian Patronage Act 9/2014, dated December 29th¹⁴, which defines the cultural crowdfunding as any private contribution that is intended to promote or develop any cultural or scientific activity or sports infrastructure (art. 2.1), as well as the Act of the Autonomous Community of Navarra 8/2014, dated May 16th, on the cultural patronage and its tax incentives¹⁵, which aims at fostering the cultural patronage undertaken by natural or legal persons –within which any artistic and literary creation, copyright, tangible and intangible cultural heritage, or the relationship between culture and other areas of public policy, such as education, science, technology, communication, gender equality, the environment, the economy and tourism may be included¹⁶.

b) And concerning reward-based crowdfunding, sale contract rules shall be applied (arts. 1445 ff. CCE).

The approach taken by Act 5/2015 appears to be restrictive, not only because some flourishing crowdfunding sectors such as reward-based crowdfunding have not been regulated, but also because a number of platforms operate in Spain within and outside such fields seeking to raise money for a variety of projects and purposes. Examples are “Bestaker”¹⁷ (offer financial support to entrepreneurs), “Creo en tu proyecto”¹⁸ (acts as an intermediary for new projects), Arboribus¹⁹ or Comunitae²⁰ (crowdlending), “Goteo”²¹ (seeks collaboration on social, cultural, technological and educational projects), Housers²² (real estate crowdfunding), or Kickstarter²³ (creative projects). Even new political parties at the Spanish political scene have used the collaborative economy so as to meet their operating costs. Examples are Podemos²⁴, whose financing comes almost exclusively from donations, and Ciudadanos²⁵ (C’s), which established a reward-based crowdfunding platform. In relation to the former, the Spanish Court of Auditors, after analysing the accounting of this political party, advocated the establishment of a legal framework on crowdfunding due to the regulatory gap

¹² BOE 24 December 2002, num. 307, p. 45229.

¹³ See J. Pedreira Menéndez, “Propuestas para la reforma del sector no lucrativo: especial consideración del régimen aplicable a las fundaciones y el mecenazgo”, *Revista Quincena Fiscal* (11) (2015). BIB\2015\1896.

¹⁴ BOE 10 February 2015, num. 35, p. 11119.

¹⁵ BOE 6 June 2014, num. 137, p. 42982.

¹⁶ Another example may be quoted as well, such as the Act of the Balearic Islands 3/2015, dated March 23th (BOE 22 April 2015, num. 96, p. 34948).

¹⁷ <https://www.bestaker.com/en> (accessed 18 July 2016).

¹⁸ <http://www.creoentuproyecto.com/> (accessed 18 July 2016).

¹⁹ <https://www.arboribus.com/> (accessed 18 July 2016).

²⁰ <https://www.comunitae.com/> (accessed 18 July 2016).

²¹ <https://goteo.org/> (accessed 18 July 2016).

²² <https://www.housers.es/es> (accessed 18 July 2016).

²³ <https://www.kickstarter.com/> (accessed 18 July 2016).

²⁴ Source: <http://podemos.info/financiacion/> (accessed 18 July 2016).

²⁵ Source: <https://www.ciudadanos-cs.org/prensa/ciudadanos-c-s-lanza-una-campana-de-crowdfunding-para-hacer-participes-a-los-espanoles-del-proyecto-de-ilusion/8531> (accessed 18 July 2016).

on this issue²⁶, this being an evidence of the need to draw up such rules on this matter. The (prospective) reward for the crowd in the latter was having the chance of enjoying the campaign's main event in the backstage.

As a result, a comprehensive regulation of crowdfunding would have brought legal certainty to the whole sector, as has been the case for instance in equity-based crowdfunding. Its functioning was difficult before the entry into force of the Act 5/2015²⁷: it usually operated through a joint account due to the long process to duly establish a company (arts. 239 to 243 CCo). Accordingly, businesspersons participated in operations by other businesspersons, contributing to them with a part of the capital they may agree, thus becoming partners in the profits or losses according to the proportion determined. Platforms acted as an intermediary between promoters and investors. As a result, investors used this legal institution in order to share in the profits of the business project²⁸.

It is also worth noting that the Spanish legislature has established an autonomous and independent set of regulations for platforms instead of extending the scope of the securities market regulation to them (i.e. Royal Legislative Decree 4/2015, dated 23rd of October, on the Securities Market²⁹), which means that platforms cannot engage in activities reserved for investment firms, credit institutions or financial advisory firms unless otherwise provided for in the law (art. 140.1 RDL 4/2015), such as the reception and transmission of orders in relation to one or more financial instruments or the execution of such orders for the account of clients; the establishment of a secondary market³⁰; the provision of investment advice (e.g. personal recommendations to investors) or guarantee either fundraising to promoters or the provision of loans and credit to both promoters and investors. As will be seen further on, platforms may however act as financial intermediaries due to the services that may provide to both investors and promoters (e.g. payments services under specific circumstances through the website) or as credit intermediaries (for instance, in crowdlending projects). Nor has Act 5/2015 laid down any differential tax treatment for crowdfunding³¹.

1.2. Legal and administrative requirements

Platforms must comply with several legal and administrative requirements (arts. 53 ff. Act 5/2015):

a) *Authorization, registration and supervision.* Platforms need to obtain prior authorization

²⁶ Tribunal de Cuentas, *Informe de fiscalización de las contabilidades de las elecciones al Parlamento Europeo de 25 de mayo de 2014* (20 December 2014). Available at: <http://www.tcu.es/> (accessed 18 July 2016). It pointed out the following: "Que el sistema de financiación a través de plataformas digitales de financiación colectiva (crowdfunding), que se ha utilizado por una formación política, para la obtención de recursos de financiación privada, que no está expresamente contemplado en la legislación actual sobre financiación de los partidos políticos, en el ámbito de la actividad electoral ni en el ámbito de la actividad ordinaria, sea regulado cubriendo el vacío legal que existe en esta materia, dadas sus especificidades respecto al medio de captación de los fondos y las dificultades en relación con la identificación de su procedencia que se han manifestado en la práctica".

²⁷ It has been pointed out regarding the equity model that "This model is not viable in Spain in the same form as in other countries. The formation of a Sociedad Anonima ("S.A.") as the investment vehicle would entail compliance with the requirements of the Companies Act and the Securities Exchange Commission ("CNMV"). The lack of speed and efficiency associated with this process appears to be incompatible with the aims of Crowdfunding. Similar procedural issues attach to the constitution of a Limited Liability Company or S.L", see T. Aschenbeck-Florange *et al.*, "Regulation of Crowdfunding in Germany, the UK, Spain and Italy and the Impact of the European Single Market", 30.

²⁸ C. Gracia Labarta, "Presente y futuro del crowdfunding como fuente de financiación de proyectos empresariales", *Revista Española de Capital Riesgo* (Vol. 1) (2014) 15.

²⁹ BOE 24 October 2015, num. 255, p. 100356.

³⁰ F. Zunzunegui, "Régimen jurídico de las plataformas de financiación participativa (crowdfunding)", *Revista de Derecho del Mercado Financiero*, Working Paper (3) (2015) 14.

³¹ See below paragraph 6.

from the Spanish National Securities Market Commission (CNMV)³². The application must be accompanied by several documents, such as the draft Statutes, an explanation of the activities that the platform is intended to perform, a description of the administrative and accounting procedures, the company directors, a list of shareholders with a significant participation (e.g. those with at least 10% of the share capital) and an internal Code of Conduct. Once these requirements are met, the CNMV must take a decision no later than three months following its receipt. If such authorisation is granted, the platform is registered in a public register under the responsibility of the CNMV (art. 54.1 Act 5/2015 and art. 238.1.ñ) RLD 4/2015). The authorisation may be revoked by the CNMV in some circumstances, e.g. the platform remains inactive for one year or a serious penalty is imposed on the platform³³.

b) *Reservation of the company name*. In addition, the use of the name “participatory (crowdfunding) platforms” and its abbreviation shall be reserved for these entities (i.e. no other legal or natural person -e.g. a credit institution- can use the name or carry out the activities reserved for these entities). The Companies Register and other public registers shall refuse registration of those companies that breach these rules, the consequence of which being that any entry made in contravention of the above shall be void, and the registrar shall proceed to its cancellation *ex officio* or at the request of the competent authority. Such nullity shall not prejudice the rights of third parties acquired in good faith in accordance with the contents of the register.

c) *Corporate form*. Platforms must be incorporated as companies with share capital, so that the provisions of Royal Legislative Decree 1/2010, dated 2nd of July, on Capital Companies³⁴, shall be applicable to platforms.

d) *Solvency requirements*. As for the solvency requirements, platforms are required to have a fully paid-up share capital of at least 60.000 euros or, alternatively, a professional liability insurance (or a guarantor or some other comparable guarantee) providing coverage for liability arising from acts of negligence of up to at least 300.000 euros (damages) and 400.000 euros (whole claims). A minimum amount of shareholder equity is required as well: Should the amount of the funding obtained in the last 12 months for the whole projects published on the platform exceed two million euros, the platform must have a shareholder equity of at least 120.000 euros. This provision has been criticised by the Spanish Crowdfunding Association because, in their view, the annual average profit of the vast majority of Spanish platforms amounted to 100.000 euros, which means that they will face difficulties in complying with the minimum shareholder equity requirement within the first two years of life³⁵.

1.3. Territorial application

Spanish law shall govern platforms, as well as the activities of promoters and investors, if they operate within Spanish territory (art. 47 Act 5/2015). Nonetheless, it shall not be considered that a service has been rendered in Spain when a Spanish resident participates on his own initiative, as an investor or promoter, in a platform established abroad that provides the services foreseen in article 46.1 Act 5/2015. Act 5/2015 establishes that it shall not be considered that they are participating on their own initiative when the company advertises, promotes itself or otherwise attracts clients or potential clients in Spain, or when it addresses its services specifically to investors that reside in Spain.

The wording of article 47 Act 5/2015 is quite similar to the one used by article 4 RDL 4/2015

³² It is the agency in charge of supervising and inspecting the Spanish Stock Markets and the activities of all the participants in those markets (<http://www.cnmv.es>).

³³ See below paragraph 1.6.

³⁴ BOE 3 July 2010, num. 161, p. 58472.

³⁵ See Spanish Crowdfunding Association, *Proposal for the Senate in relation to the Draft bill for what latter approved as Act 5/2015* (2015) 3. Available at: <http://web.spaincrowdfunding.org> (accessed 18 July 2016).

(“*The provisions of this Act shall be applicable to all securities issued, traded or marketed in Spanish territory*”), the interpretation of which may then be useful when interpreting article 47 Act 5/2015. In this respect, the Supreme Court decision 1/07/2008³⁶ ruled that the Act 24/1988 (now repealed by the RDL 4/2015, the wording of which has not changed in this particular case) must be applied to the offer of securities to Spanish investors, conducted in the country, both in terms of customer acquisition and the reception and transmission of trading orders. As result, it is enough, therefore, the territorial connection (the activity in Spain) and the regularity in the performance of the activity subject to reservation (in the particular case, the reception and transmission of orders in transferable securities) so as to the Spanish RDL 4/2015 (and the repealed Act 24/1988) to be applied, regardless of whether or not the securities are actually quoted or traded on a Spanish market.

It has been pointed out³⁷ that Act 5/2015 appears to be based on strict control of platforms in the destination country, thus hindering the cross-border activity of those platforms established in other Member States. It contrasts, however, with the country-of-origin criteria on which the legislation on information society services is based. It has been called into question, therefore, whether or not Act 5/2015 is fully compliant with the requirements of the European internal market.

1.4. Payment services and money laundering

The provisions of the Act 5/2015 govern platforms, but nothing prevents other legal rules from being applied (art. 46.3 Act 5/2015). Should investors send transfers or charge credit cards through the website so as to take part in projects published by platforms, these transactions shall fall within the scope of Act 16/2009, dated 13th of November, on payment services³⁸. As platforms are companies devoted to the management of information (i.e. they bring into contact promoters and investors without having contact with the invested funds), and due to the fact that the provision of payment services is an activity reserved for specific bodies, such as credit entities, platforms willing to provide such a service must apply for authorization to act as a “hybrid entity” (art. 52.1.b Act 5/2015)³⁹. If that were the case, these platforms would be governed by the provisions of said Act, which could in the end, lead to transaction costs⁴⁰.

Regarding money laundering activities, Act 10/2010, dated 28th of April, on the prevention of money laundering and terrorism financing⁴¹, entrusts a set of duties and responsibilities to various bodies, such as credit institutions entities, investment firms or managers of pension funds. As an example, they shall assess with special attention any act or transaction, regardless of the amount, which by its nature is likely to be related to money laundering or terrorist financing, and shall report any relevant fact arising from such examination to the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences. Crowdfunding platforms may be included within its scope (art. 2.1.k) as they are deemed to be legal persons professionally dedicated to the task of intermediating in the granting loans or credits. It does not seem, however, that those platforms involved in equity or securities-based crowdfunding may be included, so the entities that manage the payments concerned shall have a duty to meet the obligations imposed by law.

1.5. Conflicts of interests

Arts. 62 to 64 Act 5/2015 lay down rules aiming at preventing conflicts of interests. This policy shall be published on its website and shall be adjusted to the size and organization of the

³⁶ ECLI:ES:TS:2008:3648 (available at: <http://www.poderjudicial.es/search/indexAN.jsp>).

³⁷ P. de Miguel Asensio, Full Professor of Private International Law (30 April 2015) (Source: <http://pedrodemiguelasensio.blogspot.com.es/2015/04/plataformas-de-financiacion.html>, accessed 18 July 2016).

³⁸ BOE 14 November 2009, num. 275, p. 96887.

³⁹ F. Zunzunegui, “Régimen jurídico de las plataformas”, 11.

⁴⁰ S. Á. Royo-Villanova, “El «equity crowdfunding» o financiación en masa”, 33 ff.

⁴¹ BOE 29 April 2010, num. 103, p. 37458.

platform as well as to the nature, scale and complexity of their business. Though this statement so general may be, the Act 5/2015 is more specific in prohibiting directors, senior management and employees of the platform to carry out activities that may lead to a conflict of interest or improper use, to improperly disclose of confidential information or to provide funding recommendations to investors about the projects published on the platform. In addition, platforms' partners may only advise investors on projects published on the platform if they are authorized to provide financial advisory services gathered in art. 140.1.g) RDL 4/2015 (e.g. investment advice, such as the provision of personal recommendations).

1.6. Duties and standard of diligence

1.6.1. Standard of diligence

Platforms should operate according to the principles of neutrality, transparency and diligence and in accordance with the best interests of their clients (promoters and investors). As for administrators, they must be persons of recognized commercial or professional honorability, and must possess adequate knowledge and experience to perform their duties. These requirements aim at achieving a professional management of platforms for the benefit of both promoters and investors. Though convenient this general provision may be, the Act 5/2015 does not require actually the possession of a diploma, certificate or other evidence of formal qualifications in this field, so problems may arise when interpreting what “adequate knowledge and experience” means in practise. The same may be said regarding other undetermined legal notions present in the Act 5/2015, such as “professional honorability”. These concepts, however, show that the duty of care to be expected of administrators goes beyond the (standard) duty of care of a good father that the general provisions of the CCE take as starting point. Indeed, as the Capital Companies Act 1/2010 applies to platforms, the required due diligence on their directors and administrators is the duty of a “prudent businessman and a loyal representative” (art. 225 RDL 1/2010). As a result, the provisions of this law and other legal rules and administrative regulations, as well as the rules of conduct, will be applied as minimum standards in order to ascertain in which cases platforms could be found liable for not following such standards of diligence⁴².

1.6.2. The duty to disclose information

As an example, platforms have a duty to disclose general background information to investors on their website about the rights and obligations they assume in a clear, timely, adequate, accessible, and objective manner, which is in no way misleading (art. 61 Act 5/2015)⁴³, and also to warn investors that projects are not vetted in advance by the CNMV. Indeed, platforms must inform investors about the risk of total or partial loss of the invested capital, the risk of not getting the expected return and the risk of the investment suffering from a shortage of liquidity; the fact that the platform does not have the status of an investment firm or credit institution and that projects are not subject to authorization or supervision by neither the CNMV nor the Bank of Spain. Scholars outline the fact that the final point in the warning notification, would act as an official disclaimer for these public supervisory authorities. In other words, investors are advised that should any loss of the investment take place, they will hardly have the opportunity to make a claim for liability against the public administration⁴⁴.

Generally speaking, the promoter is liable to investors for the information provided to the

⁴² See about the liability of professionals S. Nasarre-Aznar, *Tort Law in Spain* (The Netherlands: Wolters Kluwer, 2016) 72-73.

⁴³ This information must be accessible, permanently available, updated, free and easily visible, and include several issues, such as the basic functioning of the platform (e.g. how the projects are selected and how the information received from the promoters is treated).

⁴⁴ See F. Zunzunegui, “Régimen jurídico de las plataformas”, 21.

platform (art. 73 Act 5/2015). Indeed, the promoter shall not hold the platform liable for the provision of false, incorrect or misleading information. Even though this provision emphasises the platforms' role as an intermediary between promoters and investors, the truth is, however, that some duties are placed on platforms. Indeed, it is the platforms' duty to publish such description as well as all relevant information related to loans and the issue of bonds⁴⁵. Furthermore, platforms must check that such information is complete and must provide any other relevant information in its possession about either the project or the promoter (art. 71 Act 5/2015). In addition, platforms must assess with due diligence the suitability of projects, which must comply with a set of legal requirements (e.g. the funding limits, see below).

1.6.3. Liability of platforms and remedies

As a result, platforms, despite being only intermediaries, can be found liable in some circumstances on the basis of incorrect disclosure (e.g. the promoter provides all the required information to the platform but the latter does not provide it to investors properly) or non-disclosure of information (e.g. of any fact that might call into question the validity and the accuracy of the information provided by the promoter, e.g. even though platforms have no duty to check whether or not the promoter is included in any "credit blacklists", they should inform investors whether they have knowledge of this fact).

In case platforms breach any of these duties, arts. 92 ff. Act 5/2015 lay down administrative penalties, which can lead not only to a fine but also to the withdrawal of the authorisation to act as a platform. In this vein, it may be found within the category of very serious infringements (which can lead not only to a fine but also to the withdrawal of the authorisation to act as platforms) acting without the mandatory authorisation, the publication of false information to mislead investors (e.g. about level of risk of the investment) or the reiterative lack of check of the promoter's identity. A serious and repeated breach of the duty to provide information to investors is deemed to be a serious infringement (which can lead to the suspension of the authorisation for a maximum of one year and to a fine amounting to between two and three times the gross profit obtained as a result of the acts or omissions which constitute an infringement, to between 3% and 5% of the total annual net turnover, or to between 50,000 to 100,000 euros), and the remainder will be minor infringements (which only lead to a fine).

The Act 5/2015 does not provide specific remedies to investors –which may be found however in article 28.1 RDL 1/2015, according to which the liability for the information contained in a prospectus shall lie, at least, with the issuer-, but they shall be entitled to terminate the contract on the basis of an absent of consent should investors rely on the (misleading) information provided by either the platform or the promoter, which can lead to the contract be rendered null and void by mistake (art. 1266 CCE)⁴⁶. In other cases, however, investors shall claim damages on the basis of either non-contractual liability rules (art. 1902 Spanish Civil Code⁴⁷) or the non-performance of the duties arising from the contracts governing the three-corner relationship (see below). Surprisingly enough, no administrative penalty is foreseen for promoters, which fall outside the supervision of the CNMV.

Should platforms act with due diligence, however, no liability shall arise for them, so investors must be aware of the fact that the selection of a project by the platform is no guarantee of success, which means that it is highly advisable for investors to conduct their proper investigation or

⁴⁵ See below paragraph 2.

⁴⁶ E. Hernández Sainz, "La transparencia como instrumento de protección de los inversores en PYMEs y start-ups a través de plataformas electrónicas de financiación participativa (crowdfunding de inversión)", *Revista de Derecho del Mercado de Valores*, 16, 2015, p. 6.

⁴⁷ "The person who, as a result of an action or omission, causes damage to another by his fault or negligence shall be obliged to repair the damaged caused".

due diligence of the project concerned and its promoter before taking a final decision due to the lack of external supervision⁴⁸.

1.7. Operational costs

The Act 5/2015 does not make any reference to the operational costs platforms face when offering projects to investors⁴⁹, such as the amount of the commission of the platform and the cost of the payment system, the specific costs in the equity-based crowdfunding –such as a capital increase–, the advice, the audiovisual production and graphic design, the promotion of the campaign and the shipping costs (in reward-based crowdfunding). The amount of such expenses will depend in the end on the market (see below regarding the cost of platforms' commissions).

2. Legal framework of projects

2.1. Crowdfunding sectors and purposes

Another paramount function platforms perform is acting as showcase for projects⁵⁰. In this vein, the Act 5/2015 allows platforms to act through websites or other electronic means. Despite the first option is the natural environment in which they operate, nothing prevents them from acting through other electronic means such as TV or radio. The truth is, however, that the Act 5/2015 takes the website as a starting point (e.g. some information must be compulsory provided through this channel, as pointed above), which is used by the promoters to describe and to promote their ideas and projects so as to attract funding, and by investors to check the catalogue of projects available for them.

Platforms are entitled to establish a communication channel between promoters and prospective investors, in which case they shall guarantee that all the information sent through that channel is accessible to other potential investors through its publication in an easily visible place on the platform's website. This information must be made available to investors in a durable medium and for a period of no less than five years from the closing of fundraising. Platforms shall update daily on its website the state participation in the project and the percentage of funding that has been taken over by investors who are deemed to be accredited and by the platform itself⁵¹. Once the deadline for investment has been reached, platforms shall announce this on the space reserved for the project in the website, and all information received and published about a project shall be available on the website for those investors who have participated in it for a period of no less than twelve months from the closing of fundraising.

The projects must compulsory meet some requirements gathered by the law:

a) *Target groups*. As it has already been pointed out, the projects must be addressed to a number of natural or legal persons, who expect to get a monetary compensation from their investment. Nevertheless, article 49.1.a Act 5/2015 also establishes that investors may invest or not in a professional manner, leaving open the possibility for consumers to take part in projects. This may have significant implications as far as the contractual relationship between platforms and investors is concerned⁵².

b) *Project's promotion*. The projects must be compulsory conducted by promoters, i.e.

⁴⁸ S. Álvarez, *La financiación participativa en la ley 5/2015 de 27 de Abril (25 May 2015)*. Available at: <http://www.elnotario.es/index.php/hemeroteca/revista-61/opinion/opinion/4101-regulacion-del-crowdfunding-y-crowdlending> (accessed 18 July 2016).

⁴⁹ See V. Acconcia, *Guía básica de crowdfunding (2015)*. Available at: <https://vanacco.com/guia-basica-de-crowdfunding/> (accessed 18 July 2016).

⁵⁰ C. Cuesta *et al.*, "Crowdfunding en 360º: alternativa de financiación en la era digital", 6.

⁵¹ See below paragraph 2.4. about the possibility of platforms to take part in projects.

⁵² See below paragraph 5.

individuals or legal entities applying for funding on their own behalf (art. 49.1.b) Act 5/2015). Platforms must allocate the funding that is intended to capture only to a particular project of the promoter.

c) *Purpose of the project.* Projects must pursue a business, educational or consumer objective, and in no case may any other purposes be pursued such as third-party professional financing, in particular the granting of credit or loans (this aims at preventing promoters from acting as credit entities); the subscription or purchase of shares, bonds and other financial instruments admitted to trading on a regulated market, a multilateral trading facility or equivalent third country markets; or the subscription or acquisition of shares and units of collective investment institutions or their management companies, venture capital firms, other closed-end type collective investment undertakings and their management companies.

In order to fund these projects, promoters may raise money, first, through the issuance or subscription of bonds, ordinary and preference shares or other equity securities or the issuance or subscription of capital shares in private limited companies, and second, through the application of mortgage loans.

2.1. The issue of securities

In the case of the issuance or subscription of bonds, ordinary and preference shares or other equity securities, promoters (i.e. the company issuing the securities) are entitled to issue public offerings for the sale or subscription of securities without the need to publish the prospectus (see below) and without the involvement of an investment service provider, as would ordinarily be the case (art. 35.3 RDL 4/2015). In the case of the issuance or subscription of capital shares in private limited companies, the limited liability company shall be deemed to be the promoter.

It is worth noting that a number of protective measures established in the RDL 4/2015 for the investors' benefit, where financial instruments are involved (i.e. issuance or subscription of bonds, ordinary and preference shares or other equity securities), are absent in Act 5/2015⁵³, such as the issuance of the prospectus and the lack of application of MiFID rules that aim to protect retail investors⁵⁴.

In relation to the former, the prospectus must be presented to the CNMV before the admission of securities to trading in an official secondary market and contains all necessary information to enable investors to make an informed assessment of the assets and liabilities, financial position, profits and losses, prospects of the issuer and of any guarantor, and of the rights attached to said securities (art. 37 RDL 4/2015). In addition, art. 35.1 RDL 4/2015 establishes regarding the public offering for the sale or subscription of securities that the obligation to publish a prospectus shall not apply to the offer of securities amounting to a total of less than five million euros, which limit shall be calculated over a period of 12 months. This limit correspond to the one established by the Act 5/2015 when accredited investors are involved (see below). It has been criticised, however, that promoters are not allowed to issue an informative prospectus even if they want to in order to provide more transparency and security⁵⁵.

In relation to the latter, according to articles 214 (convenience test) and 123 RDL 4/2015 (aptitude test), firms providing investment services other than investment advice or portfolio management must ask the client to provide information regarding his knowledge and experience in the investment field relevant to the specific type of product or service offered or requested. This

⁵³ These were pointed out by Á. Carrasco Perera, "Consumidores bailando en plataformas de 'crowdfunding'", *Actualidad Jurídica Aranzadi* (893/2014). BIB 2014/3625.

⁵⁴ In particular, the convenience test -art. 214 RDL 4/2015- and the aptitude test -art. 123 RDL 4/2015-.

⁵⁵ E. Hernández Sainz, "La transparencia como instrumento de protección de los inversores en PYMEs y start-ups a través de plataformas electrónicas de financiación participativa (crowdfunding de inversión)", *Revista de Derecho del Mercado de Valores* (16) (2015) 6.

information will enable the investment firm to assess whether the investment service or product envisaged is appropriate for the client. If they do provide such investment services, they must assess in addition his financial situation and his investment objectives so as to enable the firm to recommend the investment services and financial instruments that are most suitable for him.

In addition, it must be taken into consideration that all Spanish investment firms, including portfolio managers, brokers and broker-dealers, are mandatory members of the FOGAIN⁵⁶, i.e. the Investors Compensation Scheme for clients of Spanish investment firms, which has been established to compensate to those clients of any of the above entities that, for instance, becomes insolvent. As neither platforms nor promoters have the condition of investment firms, investors will not be benefit from the protection provided by this legal institution, which is supervised by the CNMV; and also that there is no secondary market for crowdfunding securities and shares, so there is a risk of illiquidity as the investors' ability to sell or liquidate the securities are limited. The International Organisation of Securities Commission pointed out this problem in 2015⁵⁷.

As a result, investors must be aware of the lack of assessment of the project by the CNMV, so they rely in the end on the information provided by platforms about one specific project and on the analysis of the level of risk involved in each project by the platform. In this vein, projects must contain at least the following information about the promoter (art. 78 Act 5/2015): a description of the company, its corporate bodies, the business plan and the identity and CV of managers and directors, the corporate name and the registered office; the internet domain address and the registration number of the promoter; the form of social organization; the number of employees; f) the description of the financial situation; and the corporate capital and the indebtedness structure. Platforms must also provide information about these projects (art. 79 Act 5/2015), such as the description of the type and class of securities being offered, a brief description of the essential characteristics and risks associated with investing in the securities in question; an indication of whether the securities are represented in the form of certificates or book entries; a description of the rights attached to the securities and how these may be exercised, including any limitations of those rights; and where applicable, the guarantees provided. As pointed above, problems arise when this information is misleading, as platforms shall not ordinarily be liable, but the promoter.

2.2. The application for loans

Another way to obtain financing is to apply for loans, including equity loans, funds from the public which shall not be considered repayable. In this case, borrowers (individuals or legal entities) shall be deemed to be the promoters. While it is true that platforms must properly identify the promoter, in crowdlending projects, platforms are allowed to hide its identity provided that investors are given access to this information at any stage prior to the effective contribution of funds⁵⁸. As the law allows legal and natural persons to be both promoters and investors, the legal regime may vary from one loan to another⁵⁹: a loan granted by a legal entity (investor) to a natural person (promoter) shall be governed by the Act 16/2011, dated 24th of June, on Consumer Credit Contracts⁶⁰. On the contrary, if both are legal entities, the Spanish Commercial Code shall govern the loan; and if both are individuals, then the provisions of the Spanish Civil Code shall be applicable.

Regardless of who is the promoter or the investor, the following rules are of application to

⁵⁶ <https://www.fogain.com>.

⁵⁷ International Organization of Securities Commissions, *Statement on Addressing Regulation of Crowdfunding* (December 2015) 1. Available at: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD521.pdf> (last visit 16 February 2016).

⁵⁸ The investor should have the right to revoke his investment after knowing the promoter's identity as it could be an essential factor in deciding on an investment project, see F. Zunzunegui, "Régimen jurídico de las plataformas", 22.

⁵⁹ See M. J. Marín López, "Crowdfunding, intermediarios de crédito y préstamos al consumo en la Ley 5/2015" (*Diario La Ley* 4526/2015).

⁶⁰ BOE 25 June 2011, num. 151, p. 9370.

any loan (arts. 74 ff. Act 5/2015):

a) Loans cannot be secured by a mortgage encumbering the borrower's (promoter) main residence. Thus, the parties may create any security right over movables, such as the mortgage (Act 16 December 1954⁶¹) or the pledge (arts. 1863 ff. Spanish Civil Code), or may mortgage any real estate other than the borrower's home residence. Personal guarantees may also be set up (arts. 1822 ff. Spanish Civil Code). This has been criticized, as the development of platforms as an alternative to bank financing, highly depends on the use of mortgages as collateral⁶².

The use of collateral is paramount, as one the major risks investors face in crowdfunding is the recovery of the money whether the promoter falls into bankruptcy. It is worth mentioning that art. 89.1 Act 22/2003 states that the claims included on the list of creditors shall be classified, for the purposes of the insolvency proceedings, as preferential, ordinary, and subordinated. Loans borrowed for crowdfunding purposes cannot be secured with voluntary mortgage on the primary debtor's residence, but it can be created over other real estate, and other security rights may be created, such as a pledged. This means that those secured claims shall be deemed to be claims with special preference, which shall have preference over subordinate and ordinary claims (the investor's claim shall ordinarily be considered as an ordinary claim, as subordinate claims are those in which concur specific circumstances, art. 93 Act 22/2003).

Furthermore, platforms cannot publish projects in which consumers apply for mortgage loans, so they are prohibited *de facto* from obtaining funding with the purpose of buying houses. Generally speaking, the constitution of a mortgage is not reserved to some entities (only in specific cases, such as the reverse mortgage –First Additional Provision of the Act 41/2007⁶³- or the limited mortgage – art. 153 bis Mortgage Law 1946⁶⁴), so the law imposes unnecessary restrictions for individuals to get mortgage loans from the crowd.

b) When the promoter is a legal entity, projects shall contain at least the information foreseen in article 78 Act 5/2015 (which establishes the information to be provided to investors in bonds). If it is a natural person, projects must include at least the following information: the CV; the address for notification purposes and the description of the financial and economical situation.

c) Some information on several issues must be provided as well (art. 76.1 Act 5/2015), such as a brief description of the essential characteristics of the loan (such as the total amount and the total cost) and the risks associated with financing; a description of the rights attached to the loans and how they are exercised, including any limitations of those rights; or the information on remuneration and repayment of loans.

Lastly, it is worth mentioning the promoter's duty to change the company bylaws so as to recognise the right to attend the meeting by electronic means (under the terms provided in art. 182 Act 1/2010) and the right of representation in the general meeting by anyone, as well as the duty to establish that any shareholders' agreement affecting the right to vote at general meetings or in any way the transferability of shares or other equity securities should be reported immediately to the this society, which will inform the other partners. In relation to this provision, it has been argued⁶⁵ that any society aiming at attracting funding through these crowdfunding methods should set up first a corporate website before having new members. It may be convenient to provide communication with partners through electronic means. Scholars⁶⁶ also advocate taking into consideration tag-along rights or co-sale agreements that govern the exit from the investment as the Act 5/2015 does not pay

⁶¹ BOE 18 December 1954, num. 352, p. 8303.

⁶² F. Zunzunegui, "Régimen jurídico de las plataformas", 20.

⁶³ BOE 8 December 2007, num. 294, p. 50593.

⁶⁴ BOE 27 February 1946, num. 58, p. 1518.

⁶⁵ S. Á. Royo-Villanova, "La financiación participativa en la ley 5/2015 de 27 de Abril". Available at: <http://www.elnotario.es>.

⁶⁶ *Ibid.*

attention to such clauses. Such tag-along clauses would allow minority shareholders to join the transaction and sell their minority stakes in the company if a majority shareholder (i.e. a venture capital firm) invests so much money in a start-up becoming the majority shareholder and wants to sell the stake after some time.

2.3. Funding limits

The maximum amount of money each project may raise through each platform cannot exceed two million euros, with the possibility of undertaking successive rounds of financing, insofar as this amount is not exceeded on an annual basis (art. 68 Act 5/2015). When the projects are aimed exclusively towards accredited investors (see below), however, the amount may reach five million euros. These limitations unnecessarily restrict the amount of fundraising⁶⁷ and may stem from the fact that crowdfunding has been considered by the Spanish government as the first step in obtaining external financing. According to the Spanish State Council, the Alternative Equity Market (MAB), through which SMEs, SICAVs (open-ended investment schemes), REITS (real-estate investment trusts) and VCFs (venture capital firms) have access to the securities market, would be the second one; and the final stage would be trading on regulated markets. Regarding such limits, it has been stated that this rule goes against the right of entrepreneurial freedom (art. 38 Spanish Constitution)⁶⁸. In addition, Act 5/2015 does not shed light on the possibility of one promoter having the same project offered by several platforms⁶⁹.

It is also possible that the promoter publishes several projects in several platforms. In both cases, the money raised through the issuance or subscription of bonds, ordinary and preference shares or other equity securities may exceed five million euros. Would the securities market regulation be applied to such offer of securities, according to the above-mentioned article 35.2.b RDL 4/2015? The answer should be affirmative, thus increasing investors' protection. In this regard, scholars⁷⁰ outline the fact that this legal framework would not be of application to the issuance or subscription of capital shares in private limited companies, so investors in such companies shall not be protected by the securities market regulation but for the provisions of the Act 5/2015. In order to address such problems, it has been proposed that the ceiling for fundraising through a platform should be established for each issuer and in relation to a twelve-month period regardless of the projects to which the raised amount would be allocated to and the number of offerings of securities.

As for the timescale and the quantitative limits of projects, these are established in art. 69 Act 5/2015. Accordingly, platforms shall ensure that for each project a funding target has been established and a maximum period of time has been set for taking part in it. Notwithstanding this limit, it is left to promoters to decide these aspects and the funding raised may be exceeded by up to 25 per cent insofar as the operating rules of platforms provide for it and provided the investor is informed about such a possibility prior to the investment. Generally speaking, if the funding target has not been reached within the time set or it has been exceeded in accordance with the previous statements, platforms shall proceed to reimburse the amounts provided by investors (*cf.* 63.1 Act 5/2015). However, platforms may state in their operational rules that projects receives funding when the threshold of at least 90 per cent of the funding target is achieved after deducting the share in the project which may have the own platform in accordance with article 63.1, and provided that they report of such possibility prior to the investment. Once the minimum percentage of the amount requested by the promoter has been reached, then the platform proceeds to disburse the raised money in the account provided by the promoter for that purpose, and starts the project management phase,

⁶⁷ It, see Consejo de Estado, *Dictamen num. 859/2014* (17 September 2014) 17.

⁶⁸ F. Zunzunegui, "Régimen jurídico de las plataformas", 7.

⁶⁹ R. Palá Laguna & C. Cuervo-Arango, "Alternativas a la financiación bancaria", 105.

⁷⁰ E. Hernández Sainz, "La transparencia como instrumento de protección de los inversores en PYMEs y start-ups a través de plataformas electrónicas de financiación participativa (crowdfunding de inversión)", 6.

i.e. platforms shall be in charge of managing monetary flows associated with the project (payment of installments of interest or dividends), shall provide to investors relevant information on the evolution of the project and the promoter and, if necessary, shall deal with the prospective defaults and incidents on behalf of investors⁷¹.

2.4. Linked projects

As it has already pointed out, the starting point of the Act 5/2015 is that platforms are mere intermediaries between investors and promoters. Platforms, though, are allowed to take part in funding projects published on its website in accordance with the following requirements (art. 63 Act 5/2015):

a) The participation may not exceed 10 per cent of the funding target for each project and must not allow platforms to control the company under the terms provided in art. 42 CCo, according to which it shall be presumed that a company holds the control over one or several others in a corporate group, for instance, when it holds the majority of the voting rights or has the power to appoint or dismiss the majority of the members of the governing body.

b) Platforms must inform investors in a clear and accessible way about the extent of their shares or the shares of the persons listed in article 63.3 Act 5/2015 in each project (e.g. senior executives, directors and shareholders). The internal policy criteria for deciding on their participation in projects shall be published on the website.

This provision makes all the more sense if one takes into consideration that nothing prevents platforms from becoming part of a financial group whose parent company is a credit institution or an investment firm, so that they can perform investment activities from platforms⁷².

3. The promoter

The promoter, who requests financing on its own behalf, shall be validly constituted in Spain or in another Member State of the EU, if it is a legal person (art. 67 Act 5/2015). In the case of natural persons, their tax residence shall be in Spain or in another Member State of the EU. The promoters or the associates of the entity, the promoter's administrator or the members of its Board of Directors shall not be declared unfit to manage under the provisions of the Insolvency Act 22/2003, dated 2nd of July, on Insolvency Proceedings⁷³, or equivalent legislation of other Member States of the EU, nor be serving sentences for committing crimes or offences against property, money laundering, the socioeconomic order, the Treasury and Social Security.

4. The investor

The law distinguishes between accredited or non-accredited investors (art. 81 Act 5/2015).

The following are deemed accredited investors: a) Natural and legal persons gathered in article 205.1.a) and b) RDL 4/2015, such as financial institutions and other legal persons that need to be authorised or regulated by the States of the EU or by an other accredited supervisory bodies, in order to operate in the financial markets (such as credit entities or investment firms); b) Entrepreneurs who individually meet at least two of the following conditions: total assets are equal to or greater than one million euros; an annual turnover equal to or greater than 2 million euros; or shareholder equity that is equal to or greater than 300.000 euros (these requirements are different than the ones foreseen in art. 205.1.c) RDL 4/2015); c) Individuals who meet the following

⁷¹ See how the funding process for a specific project usually works at M. del Rosario Martín Martín and S. Vadillo Cortázar, "Las plataformas digitales de financiación participativa (crowdfunding): características, desarrollo reciente e iniciativas reguladora, Informes y análisis", *Informe Anual de Gobierno Corporativo de las sociedades cotizadas del ejercicio 2013*, Boletín CNMV (2015) 95 ff.

⁷² R. Palá Laguna & C. Cuervo-Arango, "Alternativas a la financiación bancaria", 109.

⁷³ BOE 10 July 2003, num. 164, p. 26905.

conditions: prove to have an annual income of more than 50,000 euros or, alternatively, more than 100,000 euros of financial assets; may request to be considered as accredited investors in advance with an express waiver of their treatment as non-accredited; d) SMEs and legal persons not mentioned in the preceding paragraphs when they comply with the requirements established in letter b).

Any investor who does not comply with the previous provisions shall be considered non-accredited

The Act 5/2015 establishes different treatment for each one. Whereas the former shall be advised about its exposure to greater risks and about the fact that its investment enjoys lesser protection (platforms shall demand that the investor examines such a statement before acting in this capacity for the first time), platforms shall require that the former not only gives their consent but also provides a statement evidencing that they have been warned about the risks of investing in the project and that their investment shall not exceed the threshold of 10,000 euros in the period of twelve months⁷⁴. Indeed, non-accredited investors cannot invest or commit to invest over 3.000€ in the same project managed by the same platform or more than 10.000€ over a period of twelve months in projects published by the same platform⁷⁵. Act 5/2015 however, does not specify what the consequences would be in the case of the submission of inaccurate or false statements by non-accredited investors⁷⁶, nor which remedies would be exercised if platforms have knowledge of such inaccuracy or falsity. As a matter of fact, such statement does not guarantee that investors fully understand the risks they assume, but it shall be used by platforms to avoid any claim from investors seeking to invalidate the contract concluded on the basis of the existence of defects of consent⁷⁷.

5. Legal relationship between platforms and promoters or investors

5.1. Platforms and promoters

Platforms must compulsorily perform some services for the benefit of promoters (art. 51.1 Act 5/2015): the reception, selection and publication of projects, and the development, establishment and exploitation of communication channels to facilitate the transmission of funding between investors and promoters. As a matter of fact, the search for funding by the promoter through crowdfunding start with the selection and evaluation phase, when one project is submitted for publication in one platform. The platform shall carry out an initial evaluation process in which the viability and characteristics of the project are assessed. Platforms usually advise promoters on the most appropriate way to develop the project, and the platform shall check whether or not the investor is accredited or non-accredited. Other ancillary services may be provided by platforms as well (art. 51.2 Act 5/2015), such as the advice in the areas of information technology, marketing, advertising and design (a); the establishment of remote communication channels for users, investors and developers to directly contact each other before, during or after the proceedings leading to the project's financing (c); providing the parties involved with model contracts (d); providing investors with the information submitted by the developer on the project's progress as well as the most important corporate events (e); and any other service determined by the Ministry of Economy and Competitiveness or with its express authorization, together with that of the National Securities

⁷⁴ Both statements may be submitted in writing or through electronic or telephonic channels (e.g. electronic signature).

⁷⁵ Spanish investors invest, on average, 4,853€ per project, and lenders lend 2,025€ on average. By contrast, the average contribution per person in donation and reward-based crowdfunding does not reach 40€, according to the Spanish Crowdfunding Association, *Informe de la encuesta de la asociación española de crowdfunding sobre las plataformas españolas de Crowdfunding*, 7. It seems therefore that the limits laid down in the Act 5/2015 are not in accordance with reality.

⁷⁶ R. Palá Laguna & C. Cuervo-Arango, "Alternativas a la financiación bancaria", 103.

⁷⁷ E. Hernández Sainz, "La transparencia como instrumento de protección de los inversores en PYMEs y start-ups a través de plataformas electrónicas de financiación participativa (crowdfunding de inversión)", 15.

Market Commission as appropriate.

In order to govern this legal relationship, a contract shall be drawn up between the platform and the promoter, which has been considered as a business agency contract (art. 244 CCo)⁷⁸ as its object is a trade or business transaction, and a businessperson or commercial intermediary is the principal or agent, the platform, which charges a fee to the promoter (who must be also another trader), usually a commission of 5-10 per cent of the amount raised plus sometimes a fixed up-front fee⁷⁹. If the promoter is an individual, then the rules of the mandate contract, by which one person undertakes to provide a service or to do something on account or on behalf of another (arts. 1709 ff.), shall be applied, in addition to the consumer protection rules:

a) The Royal Legislative Decree 1/2007, dated 16th of November, on the General Law for the Protection of Consumers and Users and other complementary laws⁸⁰. According to art. 3 RDL 1/2007, consumers or users are natural persons acting for purposes which are outside his trade, business or profession activity, but also legal persons and not-for-profit entities without legal personality acting without trade or business purposes. This means that promoters established as associations or foundations, even if they are considered legal entities, shall fall under the scope of RDL 1/2007. Even though the contract concluded between the promoter and the platform does fall under the scope of the RDL 1/2007, in the sense that it applies to distance, off premises and package travel contracts, the general provisions governing the legal relationship between enterprises and consumer shall be applied. This means in practice that the consumer will be protected against unfair commercial practices and the inclusion of unfair terms in contracts (arts. 80 ff.), and the platform will have to provide some pre-contractual information to the consumer (art. 60). The competent public authorities may impose fines on the platform (arts. 46 ff.), and claims are handled under a Consumer Arbitration System (arts. 57 ff.).

b) As for crowdlending, platforms shall be deemed to be acting as a financial intermediary in the terms established by Act 2/2009, dated 31st of March, on Contracting with Consumers for Mortgaged Backed Credits or Loans by Companies other than Credit Entities or Their Agents⁸¹. Art. 86.1 Act 5/2015 establishes, however, that some provisions of Act 2/2009 are not applicable to the platforms, such as articles 4 (transparency duties in relation to the general terms and conditions of contracts), 7 (civil liability insurance), 19.2 (duty to indicate in any commercial communication that the activity promoted is credit intermediation) and 22 (additional obligations, i.e. companies are not allowed to perceive from consumers the price or the funds that constitute the main contract). Regardless of this exclusion, the application of these rules can lead in practice to higher costs for establishing the platform, as it must be registered in the local regional registry prior to starting their business (art. 3.1 Act 2/2009).

In addition, Act 16/2011 on Consumer Credit Contracts shall be applicable to the platform acting as a loan intermediary if the promoter is a consumer⁸². Again, art. 86.2 Act 5/2015 excludes the application of some provisions of the Act 16/2011: arts. 8 (binding offer), 9 and 10 (pre-contractual information). This rule imposes some duties on credit intermediaries, e.g. in the event that the consumer should pay a fee to the credit intermediary for his services, they must report it to the consumer and agree the amount before the conclusion of the contract, they shall likewise communicate the amount thereof to the lender for the purpose of calculating the annual percentage

⁷⁸ M. Gimeno Ribes, "Aproximación a la naturaleza jurídica del "crowdfunding", 451 ff.

⁷⁹ See K. E. Wilson & M. Testoni, *Improving the Role of Equity Crowdfunding in Europe's Capital Markets* (9) (2014), p. 5. According to the Spanish Crowdfunding Association's survey (p. 8), platforms charge in donation a smaller commission, 3.5%; in crowdlending and reward-based crowdfunding a commission between 5% and 6%; and finally, in investment projects the commission accounted for 6.4%.

⁸⁰ BOE 30 November 2007, num. 287, p. 49181.

⁸¹ BOE 1 April 2009, num. 79, p. 30843.

⁸² See M. J. Marín López, "Crowdfunding, intermediarios de crédito y préstamos al consumo en la Ley 5/2015", *La Ley* (4526/2015).

rate.

5.2. Platforms and investors

Platforms may provide some ancillary services that, by their nature and purpose, may only be provided to investors (art. 51.2.b) and f)), for instance the analysis of the level of risk involved in each project and the determination of any other variable that may be useful for investors to make investment decisions (the publication, classification and clustering of such information in objective terms, without performing personalized recommendations, shall not constitute financial advice), or the handling of loan collections, both through legal proceedings and out of court claims procedures, acting on behalf of investors if they had assigned this process to the platform. The assessment of the risk and/or the classification of the projects are usual duties of platforms⁸³, so they catalogued projects according to the risk, prior assessment of the creditworthiness of the borrower or the viability of entrepreneurship.

This necessarily requires the existence of a prior contract between the promoter and the investor⁸⁴. Nevertheless, Act 5/2015 does not provide any information on this, so the general rules of the Spanish Civil Code shall be applied⁸⁵. As a result, the contract governing the legal relationship between the investor and the platform shall be deemed to be a lease of services (art. 1544 Spanish Civil Code), where one of the parties undertakes to execute a work or provide a service to the other for a certain price. The Spanish Civil Code imposes the platform an obligation of means, the non-performance of which will lead to compensation of any damages caused (art. 1101).

5.3. Promoters and investors

Should the investor be a lender in the terms established in article 2.2 Act 16/2011 and the promoter be a consumer as defined in article 2.1 Act 16/2011, then the contract is subject to this law. However, the application of this Act is not extent of difficulties⁸⁶ as this law lays down several rules aiming at protect borrowers, which were not originally designed to be applied to crowdlending projects. Examples are the application of the duty to assess the solvency of the relevant consumer, the right to withdraw from the credit agreement within a specific period, the provision of pre-contractual information or the binding offer on the credit terms that the consumer may request.

6. Taxation issues

The Act 5/2015 does not lay down any differentiated tax treatment for crowdfunding⁸⁷. This means in practise that each crowdfunding method shall be taxed according to the contracts used. Taking donation-based crowdfunding as an example, the donee/promoter natural person shall pay for each *inter vivos* donation the inheritance and donations tax (Spanish Act 29/1987, of 18 December⁸⁸), the amount of which may vary from one Autonomous Community to another (the have assumed competence on this issue)⁸⁹. The donee/promoter legal person shall pay according to the

⁸³ C. Cuesta *et al.*, “Crowdfunding en 360º: alternativa de financiación en la era digital”, 6.

⁸⁴ M. J. Marín López, “Crowdfunding, intermediarios de crédito y préstamos al consumo en la Ley 5/2015”, *La Ley* (4526/2015).

⁸⁵ See S. García Guardiola, *Aproximación al régimen jurídico del Crowdfunding y posibles vías de interacción con la función notarial* (19-2-2015). Available at: <http://www.notariosyregistradores.com> (last visit 4 April 2016).

⁸⁶ M. J. Marín López, “Crowdfunding, intermediarios de crédito y préstamos al consumo en la Ley 5/2015”, *La Ley* (4526/2015).

⁸⁷ See in more detail Y. Martínez Muñoz, “El tratamiento fiscal del Crowdfunding”, *Revista Quincena Fiscal* (14) (2015). BIB\2015\2777; and H. Benito Mundet & D. Maldonado Gutiérrez, “La financiación colectiva y su papel en el mundo de la empresa”, *Análisis Financiero* (129) (2015) 74 ff.

⁸⁸ BOE 19 December 1987, num. 303, p. 37402.

⁸⁹ See Consultation with the General Directorate of Taxes V4050-15, of 16 December.

corporate income tax (Act 27/2014, dated November 27th, on Corporate Income Tax⁹⁰). It is true, however, that some regional rules has fostered crowdfunding for cultural purposes with tax incentives, as pointed above. Regarding other crowdfunding methods, such as crowdlending, the lender invests money and expects compensation in return. This will be taxed by the Personal Income Tax Act 35/2006 or by the corporate income tax, should the lender be a legal entity. It all depends in the end on whether the promoter or the investor is a legal or natural person and on the crowdfunding method used.

It is worth noting that art. 27 of Act 14/2013, dated 27th September, of support to entrepreneurs and their internationalization⁹¹, has introduced a new deduction: taxpayers may deduct 20 percent of the amounts paid during the period in question for the subscription of shares in new or recently created companies, such as the one seeking funding through crowdfunding, the maximum amount of which being 50,000 euros on an annual basis.

Both entities and investors should meet some requirements (e.g. the entity must exercise an economic activity and the amount of net equity of the entity must not exceed 400,000 euros at the beginning of the tax period in which the taxpayer acquires the shares, and the shares in the entity must be acquired by the taxpayer either at the time of its constitution or when a capital increase takes place in the next three years).

7. Conclusions

The new rules governing crowdfunding in Spain are very welcome, as they fill a legal vacuum by establishing a legal framework regarding new alternative finance sectors. However convenient these rules are, there is a perception that Spanish regulations are excessive and too strict⁹². There are various reasons that can serve as an explanation for this statement: a) Some crowdfunding methods which have experienced a significant growth in recent years have not been regulated yet, such as donation-based and reward-based crowdfunding; b) Promoters must allocate the requested funding, which may not exceed the limit set by law, to specific purposes; c) Platforms could be subject to a number of different rules depending on the services they provide to both promoters and investors and on the crowdfunding method used, which may lead to an increase in the transaction costs; and d) Non-accredited crowdfunding investors are only permitted to invest the amount set by law. As a result, the Spanish lawmaker has decided to draw up a new prudential regulation on crowdfunding with the aim of providing legal certainty for the actors involved, albeit with a few restrictions. Despite crowdfunding has good prospects for the future⁹³, it remains to be seen what the impact of the new measures in each crowdfunding sector will be, but the legislator should pay particular attention hereinafter to ensuring that the legal framework meets the needs of all actors involved.

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⁹⁰ BOE 28 November 2014, num. 288, p. 96939.

⁹¹ BOE 28 September 2013, num. 233, p. 78787.

⁹² R. Wardrop & B. Zhang, R. Rau & M. Gray, *The European Alternative Finance Benchmarking Report*, 33.

⁹³ “The future of crowdfunding in Spain has good perspectives because there is yet a long way for the development of the industry and the creation of new models into the industry. The global increment in the number of platforms and start-ups in this sector as well as the growth in the amount of money achieved for the financing of projects and enterprises is a good proof of this” 56, see the Report carried out by the CrowdfundingHub, (Eva M^a Gómez Jiménez) *Current State of Crowdfunding in Europe An Overview of the Crowdfunding Industry in more than 25 Countries: Trends, Volumes & Regulations* (2016).

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