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Crowdfunding à la française

Crowdfunding, also called *financement participatif* in France, is a new mode of funding “by the crowd” that recently emerged in response to banks’ unwillingness to lend money. As its name suggests, crowdfunding enables anyone to contribute to the development of Small and Medium-sized Businesses, so dear to our government, by providing funds in the form of loans, donations or subscription of securities, through online platforms designed to connect people wishing to initiate a specific project with people willing to contribute to the funding of that project.

Crowdfunding, as a fabulous communications tool that is increasingly used, especially through the rise of social networks, needed to be more strictly regulated. This has now been done.

Ordinance n°2014-559 of May 30, 2014 and Decree n°2014-1053 of September 16, 2014 on crowdfunding, supplemented by Governmental Order of September 22, 2014 approving the amendments to the General Regulation of the *Autorité des Marchés Financiers* (French Financial Market Regulator, hereinafter the “AMF”) and Governmental Order of September 30, 2014 on the professional capacity of crowdfunding intermediaries and on the joint position of the AMF and the *Autorité de Contrôle Prudentiel et de Résolution* (French Prudential and Supervisory Authority, hereinafter the “ACPR”) on non-guaranteed investments and crowdfunding issued on September 30, 2014, form the essential part of the rules governing crowdfunding in France that came into force on October 1, 2014.

1. Crowdfunding

As indicated above, crowdfunding can take the form of loans, (1.1), donations (1.2), or the subscription of securities (1.3).

1 Loan-based crowdfunding

As per Articles L.548-1 *et seq.* and Article D.548-1 of the French Monetary and Financial Code (the “FFMC”), such loans may be granted:

- to legal entities and natural persons acting for **professional purposes, within or without interest**;
 - when the loans bear interest:
 - by **natural persons** acting for **non-professional or non-commercial purposes**;
 - for a duration that may not exceed **seven years**;
 - at a **fixed** interest rate that may not exceed the **usury rate**;
 - up to a maximum of 1,000 euros per lender and per project;
 - when the loans do not bear interest:
 - up to a maximum of 4,000 euros per lender and per project;
- to natural persons who **do not act for professional purposes, without interest**, provided however that the lenders **do not act for professional or commercial purposes**;
- in any event, up to a maximum of **one million euros** per borrower and per project.

Pursuant to Article L.548-3 of the FFMC, crowdfunding platforms that fund projects through interest-bearing or interest-free loans **must be legal entities registered with the *Registre des Intermédiaires en Assurance*** (French Register of Insurance Intermediaries, hereinafter “ORIAS”) as ***Intermédiaires en Financement Participatif*** (Crowdfunding Intermediaries, hereinafter “IFP”) and meet the requirement set forth in Articles L.548-3 *et seq.* of the FFMC.

In practice, under Articles R.548-4 *et seq.* of the FFMC, the IFP is responsible, in particular, for:

- Presenting, for each to-be-funded project:
 - the project initiator and, in an adapted notice, the project itself and an analysis thereof;
 - the project financing plan, including, but not limited to, the total amount to be financed and, as the case may be, the portion of self-financing, the nature and the amount of any other loans, and the existence of any subsidies;
- Specifying whether the project initiator has taken out an insurance on the loan being sought, and, as the case may be, the collateral securities that have been granted;
- Providing a **model loan agreement**;
- Before the conclusion of the loan agreement:
 - Specifying to each co-contractor:
 - The amounts made available by the lender to the project initiator under the agreement;
 - The term of the credit facility or interest-free loan;

- The interest rate contractually applicable to the benefit of the lender;
- The amount of the installment received by the lender (capital and interest);
- The frequency of installments and the application terms and conditions for the amortization of the loan;
- If the lender has a right of withdrawal, the conditions in which such right may be exercised, including the time from which the right can be exercised, the period during which it can be exercised and the condition in which it can be implemented, and, if the lender has not such right, the indication that the interest-bearing or interest-free loan is irrevocable;
- Informing the project initiator and the lender of the method of calculation and amount – in euros and in percentage – of the borrowed capital, the interest on the borrowed capital, the other applicable charges, if any, and the conditions in which the funds can be released and made available;
- Setting out, in a clear and easily accessible way, the respective responsibilities and roles of the lender, the project initiator, the IFP and the other project partners, if any, in case of default of the project initiator.

2. Donation-based crowdfunding

Pursuant to Article L.548-1 of the FMFC, donations may be made by any natural persons or legal entities, **with no cap whatsoever** and with or without a reward.

As per Article L.548-2 of the FMFC, crowdfunding platforms that exclusively collect donations do not have the obligation to register to the ORIAS as an IFP. This is merely an **option**.

3. Securities-based crowdfunding

The investment can be made directly or indirectly (through a holding that gathers the crowdfunders).

Crowdfunding platforms that offer to provide funds through the subscription of securities issued by a non-listed company can be:

- Either ***Prestataires en Services d'Investissement*** (Investment Service Providers, hereinafter “PSI”) that provide consultancy services;
- Or legal entities registered with the ORIAS as ***Conseillers en Investissements Participatifs*** (Crowdfunding Investment Advisors, hereinafter “CIP”) and **members of an accredited association** which controls the activities of its members, in which case, as per Article D.547-1 of the FMFC, offers may only apply to **ordinary shares** and **fixed-rated bonds**, to the exclusion of all other types of securities.

In practice, when the offer of securities does not exceed **one million euros** over **twelve months**, the publication of a **prospectus** is not required. Yet, in this case and pursuant to Article 325-38 of the General Regulation of the AMF, the PSI or CIP must make available to the client, in the conditions set forth in Article

325-32 of the AMF General Regulations:

- The information prepared by the issuer, as required under Article 217-1 of the AMF General Regulation¹:
 - A description of its activity and its project, together with the latest financial statements, forward-looking statements on the business as well as an organizational chart of the management team and shareholding structure;
 - Information about the level of equity ownership that the issuer's managers have committed to take in the framework of the proposed offer;
 - Exhaustive information about the rights attached to the securities offered in the framework of the proposed offer (voting rights, financial rights, rights of information);
 - Exhaustive information about the rights (voting rights, financial rights, rights of information) attached to the securities and categories of securities not offered in the framework of the proposed offer, as well as exhaustive information about the categories of beneficiaries of such securities;
 - A description of the provisions of the by-laws or agreements that structure the liquidity of the securities, or an explicit indication that such provisions do not exist;
 - The conditions in which copies of the registrations in the investors' individual accounts held in the books of the issuer and evidencing ownership of their investment shall be delivered;
 - A description of the risks that are specific to the issuer's business and project;
 - A copy of the report of the corporate management bodies to the general meetings of the last financial year and current financial year and, as the case may be, a copy of the report(s) of the statutory auditor(s) issued during the last financial year and current financial year;
- The process governing the collection of the subscriptions forms and the dispatch of such forms to the issuer, as well as the rules applicable in case of over-subscription;
- Details of the expenses invoiced to the investors and the possibility to obtain, upon request, the description of the services provided to the issuer of the securities, the subscription of which is contemplated, and the related expenses;
- The risks associated with the project, including, but not limited to, the risk of loss of all or part of the capital, the illiquidity risk and the risk of lack of value.

1. The Beneficiary of crowdfunding: the specific situation of the *Société par Actions Simplifiée*

Most of the projects financed through crowdfunding are carried out by ***sociétés par actions simplifiée*** (a type of joint stock company, hereinafter "SAS") primarily because SAS is the most flexible form of company in France. Article L.227-2-1 of the French Commercial Code, introduced as a result of the enactment of the legislation on crowdfunding, undermines what used to make SASs the prime vehicles of startups as it now imposes on SASs that use crowdfunding the obligation to comply with **strict formalities** that were so far applicable only to *sociétés anonymes* (joint stock companies, hereinafter "SAs"). As such, SASs that use crowdfunding must henceforth observe the rules applicable to SAs with respect, in particular, to voting rights and the convening and holding of general meetings of shareholders, by reference to Articles L.225-96 to

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L.225-98, L.225-122 to L.225-125, L.225-105, R.225-66 to R.225-70 and R.225-83 of the French Commercial Code.

¹ If the issuer is not the company that carries out the project, the information that the CIP must provide under Article 217-1 of the FPMC is that related to the company which carries out the project and, as the case may be, the companies acting as intermediaries between the company that carries out the project and the issuer. In addition, information on the contractual arrangements between the above-mentioned companies, if any, must be provided.

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