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CITIZENERGY

LEGAL REPORT ON BARRIERS TO CITIZENS INVESTMENT IN RES PROJECTS

DELIVERABLE 2.1

SEPTEMBER 2016



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2ST UPDATE TO THE LEGAL REPORT – SEPTEMBER 2016

The *Description of Action* of the European Platform for Citizen Investment in Renewable Energy provides that the Legal Report should be updated yearly in order to ensure that all amendments and new laws are considered during the development of the Citizenenergy project.

The second update of the Legal Report reviews all new legislation and amendments that were presented or entered into force since July 2015 on EU and national legislation on renewable energy, crowdfunding and cooperatives.

At EU level, the European Commission published a Regulation proposal to replace the 2010 Prospectus Directive on November 2016. The proposal aims at enhance the coherence of the EU prospectus regime in the EU and simplify the prospectus requirements. Also, a proposal that will amend both the Regulation on European Venture Capital and Regulation on European Social Entrepreneurship Fund was published on July 2016.

At national level there were changes in crowdfunding legal framework in Portugal and Germany where new laws were adopted in the past year to regulate this activity.



1. EXECUTIVE SUMMARY

The legal report on barriers to citizens investment on renewable energy source (RES) projects aims at reviewing the relevant European and national legislation related to RES projects and citizens engagement. This analysis focuses in the legislation applicable in France, Germany, Portugal, Spain, the Netherlands and the UK the countries from where the RES promoters and platform owners participating in the Citizenenergy consortium come from.

The report starts with the legislative and business model context of the participation of citizens on renewable energy sources giving the analysis to the legislation applicable to citizens' investments in renewable energy in the EU and the national legal frameworks, and the definition of the various business models that are available for RES investment. These definitions are based on the Handbook on citizen RES business models drafted by the University of Santiago de Compostela.

The use of these models varies depending on the national legal framework, particularly the legal certainty and the business conditions, and the citizens' engagement to RES projects. RES promoters use different company structures and project financing structures across EU.

Further to the analysis of the general context, the report analyses the EU Directives and Regulations available and the national legislation applicable to RES projects, crowdfunding and cooperatives identified as the main channels for citizens investment on RES.

Regarding crowdfunding, the European Commission published a *Communication on Unleashing the potential of Crowdfunding in the European Union* in March 2014 that lays the foundations to a European approach to this recent reality.

Since the European legislation applicable to crowdfunding may vary depending on the model of crowdfunding used, the report focus on the analyses of the EU legislation applicable to financial return crowdfunding. In this context we highlight the fact that the legal environment varies widely from country to country depending mainly on the transposition of the EU Directives what impacts the possibility of cross-border RES investment and foreign citizen participation in RES projects. Despite the fact that in some Member States specific legislation in crowdfunding is already being discussed (e.g. France, Spain) a EU framework could help to create a *de facto* internal market for crowdfunding currently inexistent.

In what concerns cooperatives, these are a much more widely known legal entity that the Member States legislation covers with detail. We have also analysed the European legislation, especially the Regulation on the Statute for a European Cooperative Society and the national legislation applicable to this model very often used by RES promoters.

There are RES promoters that consider this legal form as more adequate to fund their projects.

The Rescoop project has a comprehensive study on the use of this model in Europe.

This report is finalised with the perception from RES promoters and platforms owners regarding the legal barriers in their countries, namely the regulatory uncertainty and unlevel playing field, the bureaucracy faced, tax incentives and lack of publicity for the projects. This part is based on the answers to the questionnaire that was sent to the RES promoters that are members of the Citizenenergy consortium.



The main legal barriers to RES promoters identified are the wide variety of national legislation applicable, the lack of transparency and legal certainty. In the majority of the countries analysed there is currently legislation being discussed and entering into force on crowdfunding and on renewable energy sources. Therefore this report will be updated yearly and when major legal changes occur.

In conclusion, a single national regulatory system that reduces unnecessary bureaucracy and cuts red tape allowing to conduct business easily and cross-border, e.g, through the adoption of a single EU framework that enables the creation of a real single market for crowdfunding and RES projects in particular as regards cross border investment, would be crucial.



2. INTRODUCTION

As stated in the *Description of the action* – annex I of the Citizenergy project - one of its objectives is to identify *“the national and EU legal barriers to engagement and investment by national and foreign citizens in RES projects, in the countries included in the project, and identification of measures to effectively address them, contributing to the success of relevant actions that aim at policy making for citizen investment such as the CO-POWER IEE project or the on-going debate on the creation of an EU framework for citizen investment”*¹.

Therefore, Eupportunity is in charge of drafting this report on the legal review on the requirements and barriers to citizen investment in RES projects for the six countries participating in this project: France, Germany, Portugal, Spain, the Netherlands, and the UK.

The analysis pursued has departed from the general identification of the different business models and their legal individual barriers to citizen investment, the barriers to transnational investment and what is the legal framework that allows the platform to promote investments, on a per country basis. We have also analysed the various EU legislative documents that had to be transposed to national law, from consumer's policy legislation to financial markets regulation. Further to this general assessment we have entered in the detail of renewable energy sources regulation and the obstacles being faced by RES promoters.

Despite the fact that there are several pieces of EU legislation transposed into national rules that apply to crowdfunding and platforms, there is not yet a regulatory framework that specifically addresses this matter EU wide although the Commission has started to work on it.²

Also, the European Securities Market Authority (ESMA) has initiated discussions within the Body of Supervisors in May 2013 and has considered³ that it is still difficult to gather data from the various Member States since crowdfunding is still in its beginnings. ESMA also acknowledges that there are various business models, there is not a consistent regulatory framework across Member States and not all platforms in Member States are registered. Indeed from our analysis of the six above-mentioned countries we can conclude that the business model varies significantly, i.e. in Portugal and Spain the most common model used is the donations or rewards model whereas in the Netherlands, the most common model is the equity and debt model.

Due to the margin of manoeuvre that Member States have regarding the transposition of the Directives, certain aspects of EU regulation applicable to crowdfunding depend very much on how they have been transposed to national law. This matter, together with the fact that there is not a lot of information available since crowdfunding is a pretty recent subject, makes it very difficult to analyse the application of EU law to crowdfunding what definitely has to be done based in a case-by-case approach. However, and in order to make cross-border activity

¹ The European platform for citizen investment in renewable energy – Annex I - Description of the action, page 9

² Further to the [public consultation Crowdfunding in Europe ? Exploring the added value of potential EU action](#) launched by the European Commission in October 2013, a [Communication on Unleashing the potential of Crowdfunding in the European Union](#) in March, within the scope of the broader discussion on the [long-term financing of the European economy](#). It has also launched a [Call for applications with a view to selecting members of the group of experts on social entrepreneurship called "European Crowdfunding Stakeholder Forum \(ECSF\)"](#)

³ See Laurent Gabriel, ESMA's head of investment and reporting division presentation from June 2013: [ESMA and the new financial supervision in Europe - Europa](#)



easier, some of the legislation confers a EU passport which makes such scope of activity less costly and easier.

There are RES promoters that are using cooperatives as a company structure to fund their projects. Regarding this legal form, legislation is clearer and more consistent than legislation on crowdfunding. We have analysed the EU framework, specially the European Cooperative Society Regulation and the RES promoters' national legal framework.

In order to draft this report, Eupportunity has also outlined the terms of reference and a questionnaire (at annex) in particular to analyse the legal barriers encountered by RES promoters in the countries included in the project where RES investment exists (France, Germany, Portugal, Spain, the Netherlands, and the UK. These terms of reference were used by some of the RES promoters and platform owners for subcontracting legal experts in their Member State and will be use for the expansion of the European RES promoters network as referred to the work package 5 of the Citizenenergy description of the action⁴.

This report will be updated in a yearly basis taking into account the regulatory developments both at national and EU level.

⁴ The European platform for citizen investment in renewable energy – Annex I - Description of the action.



3. LEGAL FRAMEWORK APPLICABLE TO RENEWABLE ENERGY

Through most recent years, renewable energies have been at the top of the EU agenda.

In January 2007, the European Commission launched its [*Renewable Energy Road Map - renewable energies in the 21st century: building a more sustainable future*](#)⁵ which put forward the Commission's long-term strategy for renewable energy in the EU including an increase in security of energy supply and reducing greenhouse gas emissions.

It also set up the target of 20% production of total EU energy consumption from renewable energy sources (RES) by 2020, and presented measures that promote RES in the electricity, biofuels and heating and cooling sectors.

3.1 EU framework

The [*Directive 2009/28/EC*](#)⁶ establishes a European framework for the production and promotion of renewable energy sources so to help Member States to fulfill the 20% of renewable energy target by 2020.

The RES Directive requires that Member States implement a national renewable energy action plan with targets for the use of renewable energy sources in transport, electricity, heating and cooling for 2020. The action plan sets out the necessary measures for the implementation and for the achievement of these targets.

The implementation of renewable energy standards for buildings – specially the buildings heating and cooling – is mandatory. Furthermore, Member States have to apply financial incentives or fiscal reductions for the investments on renewable energy.

Also, Member States can exchange an amount of energy from renewable sources and present joint projects concerning electricity production and heating from renewable sources. They may also establish cooperation agreements with third countries, depending on certain conditions that have to be met.

The European Commission adopted, on 9 April 2014, [*the guidelines on State aid for environmental protection and energy for 2014-2020*](#) which will apply as of 1 July replacing the guidelines adopted in 2008. The objective of the European Commission with these new guidelines is to achieve a balance between the needs of Member States in supporting renewable energies to achieve the goals of the Europe 2020 strategy and the goal of ensuring competitive markets.

Member States will have to set up tenders as from 2017 to grant support to all new renewable energy installations. The guidelines enable Member States to establish exemptions to the bidding process to small installations. Member States shall replace gradually the feed-in tariffs

⁵ Commission Communication *Renewable Energy Road Map Renewable energies in the 21st century: building a more sustainable future*, [COM\(2006\) 848](#) final, 10 January 2007

⁶ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC



by a top-up on the market price.

However, the new guidelines have no effect on existing approved aid schemes that benefit existing installations.



3.2 National regulations

3.2.1 FRANCE

In France the rules applicable to electricity from renewable energies emanate from the general energy legislation.

The renewable sources of electricity are promoted through a price regulation system based on tax cuts and a feed-in tariff. The electricity suppliers are forced to buy the energy from renewable sources. The distribution operator has an obligation to conclude agreements on the purchase of electricity at the price set by law. Citizens investing in renewable energy are no longer eligible for an income tax credit. The installation of photovoltaic panels on buildings is eligible for a reduced VAT rate.

Also, the government promotes tenders for building-up renewable energy plants so that the target capacity set by the multi-annual investment plan (*Programmation Pluriannuelle des Investissements PPI*) is reached.

The development, installation and usage of RES-installations is promoted by the French government through training programmes, certification schemes, research, development and demonstration programmes. A building obligation for the use of renewable heating and support schemes for RES-H infrastructures is also in place.

A new law, to be adopted in the next few months, will provide new incentives for Crowdfunded RES projects.

3.2.2 GERMANY

The Act on Granting Priority to Renewable Energy Sources (EEG) established a feed-in tariff for electricity from renewable sources, the criteria for eligibility and the tariff levels.

The grid operators are obliged to give priority and to reimburse renewable energy producers for the energy exported to the grid.

Different programmes provide low interest loans for investment in renewable energy plants and for the promotion of heat from renewable energy. Transports benefit from a quota system and biofuels are supported through fiscal legislation.

The promotion of renewable energy sources in Germany, which involves a high degree of self-commitment from public authorities, is also made through training, certification and research programs, the support of district heating networks and legislation making mandatory the use of renewable energy heat in buildings.

3.2.3 PORTUGAL

Electricity from renewable sources is currently promoted through a feed-in tariff (FIT). Depending on the technology this FIT is awarded for a certain period with a fixed rate per kWh produced, in order to promote investor confidence.



A special regime regulates the access of electricity from renewable sources to the grid system.

Under the special regime the renewable sources (except for hydro plants with an installed capacity exceeding 30 MW) have grid priority. Since 2011 only projects under 250kW are authorised as a consequence of a restriction on large RES projects.

The feed-in tariff and the obligation to purchase the electricity produced under the special regime enables the development of small-decentralised RES projects.

In what concerns the transport sector, the main incentives are a biofuel quota system and a tax exemption to small producers (PPDs).

It is also relevant to mention that Portugal is currently undergoing legal changes and as FITs have had their third 30% cut in three years.

In October 2014 a new law⁷ was published that enables consumers to produce energy for self-consumption through renewable sources. This new self-consumption scheme allows consumer to sell the energy surplus to the grid. In this case, the unit of production must be registered.

The production of energy for self-consumption not exceeding 200 W is license-exempt unless the producer intends to sell the energy surplus to the grid. For energy production from 200 W to 1500 W there is a mandatory prior communication to the proper authority and to sell the surplus to the grid the producer needs a license. The self-production of more than 1500 W is also possible but the consumer has to have a license. The new scheme will be determinant for the future of small, especially domestic, RES projects.

3.2.4 SPAIN

There is no support scheme for renewable energy sources in place in Spain – the only retribution received is market price, currently around 50 EUR/MWh.

Limits to early hours benefiting from feed-in-tariff were established for the photovoltaic (PV) sector⁸, concentrated solar power and wind installations⁹. These measures affected particularly the PV sector, since the limits were set too low, and they were usually reached in the summer, leaving PV generators with no support scheme for the rest of the year. In average terms, this cutback implies a reduction of 30 % in the retribution for PV producers. Moreover, [Royal Decree 1565/2010](#) limited to 25 the number of years, during which the feed-in-tariff for PV installations was going to be obtained¹⁰.

On 5 of August 2014, it was published a new legal framework for the retribution of solar and wind energy in the overseas territories that establishes a new regime for renewable energy

⁷ Decreto-Lei n.º 153/2014 de 20 de Outubro.

⁸ [Real Decreto-ley 14/2010, de 23 de diciembre, por el que se establecen medidas urgentes para la corrección del déficit tarifario del sector eléctrico](#)

⁹ [Real Decreto 1614/2010, de 7 de diciembre, por el que se regulan y modifican determinados aspectos relativos a la actividad de producción de energía eléctrica a partir de tecnologías solar termoelectrica y eólica](#)

¹⁰ [Real Decreto 1565/2010, de 19 de noviembre, por el que se regulan y modifican determinados aspectos relativos a la actividad de producción de energía eléctrica en régimen especial](#)



prices.¹¹ Until today the new regime is not in practice.

A special tax regime on electricity generation of 7 % of the value of the energy sold applies since 1 January 2013¹². However, this tax discriminates against renewables since the tax base for renewables is higher, as the feed-in-tariff is between 300 and 440 EUR/MWh, and market price is around 40-50 EUR/MWh. Thus, renewables have to pay much higher tax amounts. Also, utilities can pass the costs of the tax to consumers, whereas RES cannot, since they benefit from a fixed feed-in-tariff.

Also, [Royal Decree-Law 2/2013](#)¹³ changed the criteria for updating retribution to renewables, representing another 3% cutback. The last reduction in renewables retribution is from 2013¹⁴, which suppresses the complement for reactive energy and establishes a completely new support scheme for renewables that is still to be determined.

Renewables producers must also pay 0.5 EUR/MWh as access fees.

Municipalities may under the [Ley Reguladora de las Bases del Régimen Local](#)¹⁵ grant some tax reductions to self-consumption projects at domestic level. This is strictly limited to small projects.

Renewable energy plants have priority access to the grid and may require an expansion of the grid so that the plant is connected to it. However, difficulties exist in finding and obtaining the connection point, since Spain has already overcapacity, because its installed power is 102.000 MW and the highest consumption in 2013 was 42.000 MW.

Regarding self-consumption there are at least three very important barriers that may be pointed out:

1. The fact that net-metering is not allowed in Spain may discourage self-consumption installation;
2. As the fixed-part of the electricity bill has been strongly increased and the variable part reduced, the savings that will be obtained by self-consumption will be much less, because the electricity bill will not be reduced that much, since the fixed-component of the bill is now the most important part;
3. The Government has proposed a “support fee”, which needs to be paid by self-consumers, to compensate the fees they will not pay as a consequence of a reduction in consumption.

¹¹ [Orden IET/1459/2014, de 1 de agosto, por la que se aprueban los parámetros retributivos y se establece el mecanismo de asignación del régimen retributivo específico para nuevas instalaciones eólicas y fotovoltaicas en los sistemas eléctricos de los territorios no peninsulares](#)

¹² [Ley 15/2012, de 27 de diciembre, de medidas fiscales para la sostenibilidad energética](#)

¹³ [Real Decreto-ley 2/2013, de 1 de febrero, de medidas urgentes en el sistema eléctrico y en el sector financiero](#)

¹⁴ [Real Decreto-ley 9/2013, de 12 de julio, por el que se adoptan medidas urgentes para garantizar la estabilidad financiera del sistema eléctrico](#)

¹⁵ Ley 7/1985, de 2 de abril, reguladora de las Bases del Régimen Local



Also other technical barriers to RES projects can be determined, such as those identified by Unión Española Fotovoltaica in its annual Report 2013¹⁶ (p.25):

- The obligation to supervise RES installations every three years, whereas for the general regime this obligation applies every five years;
- This supervision needs to be carried out by an authorized technician, whereas for the construction and execution of the installation only an electrician is needed;
- The obligation to connect in a triphase modality for installations over 5 kW, even though distributors supply up to 15 kW in monophase. This requirement forces producers to build additional installations, which render the project more expensive.

Regarding biofuels, which also benefit from a quota system, and solar thermal for transports, a tax credit exists.

Programmes and policies of training and certification of solar panel installers, minimal solar contribution of warm sanitary water in buildings, and research, development and demonstration programmes also contribute to the promotion of renewable energies in Spain.

3.2.5 THE NETHERLANDS

In the Netherlands, a feed-in scheme is in place for promoting renewable energy. This support scheme (SDE+) favours low cost RES options (electricity, gas and heating) with a system of base tariffs. The grid providers have to give access for renewable energy sources according to the principle of non-discrimination. The access and transmission of renewable electricity to the grid is an obligation of the grid provider.

Also, investments in renewable energy technologies are supported via loans and various tax benefits, and net metering applies to small installations.

Heat is promoted through bonuses on top of the wholesale price and also takes advantage of tax benefits.

Regarding transports, tax credits exist for biofuels and hydrogen investments. An obligation of 10% renewable energy source share consumption applies to the transport sector.

The Dutch Energy Agency provides for the organization of training and certification facilities for RES installers and installations. Innovation is motivated through contracts between private companies, universities, and R&D institutes.

3.2.6 UNITED KINGDOM

A feed-in tariff for RES projects is in place in the UK, as well as a quota system and a tax regulation mechanism. Accredited producers can sell their electricity at fixed tariff rates if the

¹⁶ [Informe Anual 2013 “Hacia nuevos modelos de desarrollo para la energía solar fotovoltaica”](#), page 25



plant capacity is less than 5 MW. The Gas and Electricity Market Authority (OFGEM) establishes the tariff rates. A percentage of the electricity provided by electricity providers has to be from renewable sources under the Renewables Obligation Orders. RES projects larger than 5MW receive a number of Renewable Obligation Certificates (the default is one certificate per MWh) depending on the technology with one certificate worth about £40. A new support mechanism called Contracts for Difference has been setup to replace the Renewables Obligation – this will cover both renewable energy and nuclear and provides a fixed price for electricity generated. The Renewable Obligation is expected to end in 2017 for new projects, but this has been brought forward to April 2016 for some technologies (onshore wind and solar PV). Significant cuts to Feed-in Tariff rates were made in February 2016, particularly for solar PV and onshore wind, which has reduced the attractiveness of some potential renewable energy projects.

Regarding heating and cooling a price-based mechanism and subsidy is available for its installation. Transports benefit from a quota system applicable to biofuels.

In what concerns policies and the promotion of RES, training programmes for RES installers and a certification programme for RES-E installations exists.

There have been recent developments, still being discussed, at the Local Government Authorities level that will aim at setting up energy retail and service companies, which would transform the current business model and regulation of some community energy schemes.

Also, the new UK Community energy strategy developed by the UK Government Department of Energy and Climate Change was published in January 2014 and updated in April 2014.¹⁷

¹⁷ Policy paper Community Energy Strategy;



4. DEFINITION OF THE TYPE OF BUSINESS MODELS

In order to better address the legal framework applicable to RES promoters and platform owners in their countries and analysed below, it is important to define the different type of business models they might use to set up and finance their businesses. For the sake of consistency throughout the project, these definitions were drafted by the *Universidade de Santiago de Compostela* (USC) and included in their Handbook on citizen RES business models¹⁸.

4.1 Cooperative: equity

Cooperatives are companies that are democratically owned and controlled by the people, who use their services and are operated collaboratively for their mission. There are different kinds of cooperatives (consumption, production etc.), so many types of organizations can use cooperative model. Members could finance the cooperative mainly through: fees, share capital, individual member deposits or loans. Thus, cooperatives typically finance their needs with a combination of debt and equity from their members, but also from outsiders (bank loans, grants, etc.). In this Business Model (BM) we discuss about member share capital and similar products (some deposits).

Cooperatives require the purchase of a share or “non-withdrawable deposit” to their membership, which entitles the members to vote and democratically participate in the cooperative. This stock/ deposit is generally redeemed at the original purchase price by the cooperative when a member leaves the cooperative.

They usually have a local, regional or national scope and imply a long-term investment, but a member can leave the cooperative (common stock or deposit). Preferred stock usually has a target date for redemption.

Its risk level is considered as medium since buying stocks always involves the risk of losing money, but the amount of money invested in a normal stock or deposit is usually small, and the fact that this is refundable helps to reduce the risk level.

Additionally, this risk level depends, among others, on: cooperative's credit quality, revenue model of the RES projects developed (feed-in-tariff, etc.), type of energy, priority of the stocks (preferred versus normal), etc.

There are different types of stocks in a cooperative, mainly:

- Normal or voting stock: ownership of this kind of stock is limited to one per person and confers to the stockholder the membership and voting rights in the cooperative;
- “Preferred” shares are a class of stock that receives priority over other classes in the event of dissolution of the cooperative and usually offers a dividend (fixed or not) to stockholders. Usually they have a date or conditions for redemption;
- Other non-voting classes of stock with different par values: usually they have a date or conditions for redemption, like the preferred shares.

¹⁸ Handbook on citizen RES business models – Citizenenergy, Universidade de Santiago de Compostela, 2014;



4.2 Corporate firms or companies: equity

In this case, monetary resources available to RES projects are provided by the owners of the company, who buy different types of stocks. Stockholders expect to earn dividends from the stocks they bought (economic motivation). Raising equity financing can be achieved directly from investors (traditional model) or through crowdfunding platforms (new model). Equity crowdfunding is used by businesses to attract investment from a crowd or group of people.

Crowdfunding platforms are based on electronic platforms that put in touch projects or companies with investors. Currently, equity crowdfunding is regulated in the EU by national laws, so it is partly restricted regarding the funding amount. This fragmented regulation may be limiting the initiatives funded through crowdfunding¹⁹.

Different kinds of corporate firms (or companies) can be distinguished according to their legal form: the corporation (public limited company or Plc.), the limited liability company (private limited company or Ltd.), the partnership, and the limited partnership, among others²⁰.

It concerns long-term investment and it involves high risk since buying stocks always involves the risk of losing money (maximum loss of 100% of your investment amount). Thus, the risk is higher than cooperative investment since these stocks are not refundable. Similarly, the risk is higher than in debt financing due to the lesser priority of stocks in case of the company's bankruptcy. Besides, the risk level depends on additional factors: type of stock, financial position of the company and its credit quality, revenue patterns of the RES projects, type of energy, etc. The return from this investment is made on dividends and growth of the capital invested, and also the satisfaction to promote RES projects.

There are different types of stocks

1. There are different types of stocks:

- Common stock: it represents ownership in a company, so the investor earns a portion of profits. If a company goes bankrupt and liquidates, the common shareholders would not receive any money until the creditors, bondholders and preferred shareholders are paid;
- Preferred stock: it represents ownership in a company, so the investor earns a portion of profits but usually does not have the same voting rights. In exchange, preferred stocks have priority over common stock in dividend payment. The dividend rate of these shares may be fixed or variable and it is set at the time they are issued. There are many types of preferred stock, some of them are:
 - Fixed-rate preferred stocks: a type of preferred stock where the dividends are fixed;
 - Adjustable rate preferred stocks (ARPS): a type of preferred stock whose dividends vary with a benchmark, most often a Treasury bill rate. Therefore, the amount of the dividend is set by a predetermined formula. Because of this flexibility, which allows ARPS compensate for increases in inflation, they would be less risky than fixed-rate preferred stocks;
 - Convertible preferred stock: a type of preferred stock that includes an option for the holder to convert the preferred stocks into common stocks.

¹⁹ To "avoid" legal problems, some crowdfunding platforms organise their crowd as members of an investment club or through a SPV (Special Purpose Vehicle or Entity), as they were qualified investors.

²⁰ The national normative to regulate these entities slightly differs across countries.



4.3 Cooperative: equity / customer

Cooperatives can sell green energy to their members. This energy can be bought in the market or produced by the cooperative itself. The first option is more common. In this case, the cooperative sells only to its member's renewable electricity.

In this BM we are focused on the membership as synonym for consumption rather than for investment (BM Cooperative: equity). Members (customers) finance the cooperative with the price that they pay for to the consumed energy, which can be charged at the same price as normal electricity or at a higher price. If sales cover the costs, cooperatives will build up cash reserves by retaining profits. Unlike debt, equities or deposits, cooperatives do not have to pay interest or dividends for using retained profits.

They usually have a local, regional or national scope with a medium or long-term investment depending on the duration of the supply contract. For example, in Spain the duration of these contracts is generally annual, and is tacitly extended for annual periods. The risk level depends on the price of the "green" electricity, the amount of money paid to be a cooperative member, and the duration of the supply contract. Generally, the level of risk is low because prices of green energy tend to be similar to those of the market price and citizens have to contribute to be a member of the cooperative, which is generally a small amount of money. This deposit or stock is also refundable if a member decides to leave the cooperative.

There is no monetary return, only green energy. From a theoretical point of view, it could have savings (in the members' electricity bill) if the cooperative reduces the price of energy to costumers or returns these members dividends in energy. It also implies the satisfaction to promote RES projects.

Once citizens have become members of the cooperative, they are entitled to buy renewable energy, which, as we mentioned, can be:

- Bought in the market (energy with Renewable Energy Certificate or Green Certificate) and sold to its members;
- Produced by the cooperative itself.

Whatever the subtype of BM selected, the new cooperative projects should be financed from retained profits.

4.4 Mezzanine financing

Mezzanine financing is a hybrid that combines features of debt and equity funding. The term mezzanine (mezzanine debt, mezzanine equity or mezzanine financing) refers to a financial instrument that is placed between the debt and the capital in the company' balance sheet. The basic forms of mezzanine financings are subordinated debt (bonds or loans) and, less frequently, preferred stocks. For example, mezzanine debt incorporates equity-based options with a lower-priority and frequently unsecured debt, so it usually bears interest at a higher rate than other priority or secured bonds.

It might have a local, regional, national and European geographical scope with a medium- term investment (typical mezzanine financing is for 5 to 10 years). Its risk level is high due to high-



yield debt or convertible equity. However, the risk level depends on several factors: type of stock or bond, financial position of the company and its credit quality, revenue patterns of the RES projects, maturity in case of bonds, etc.

The return on investment is made through coupons (interests) from debt securities and the option to convert them into stocks. This equity kicker or equity incentive allows the lender to improve their return participating in the future on capital without assuming the high initial risk of shareholders.

Return is done through dividend from preferred stock and also the option to convert into ordinary stocks. Also, the satisfaction to promote RES projects.

There are different types of mezzanine financing. In practice, most mezzanine financing takes the form of subordinated, unsecured debt. They are commonly characterized by the inclusion of an equity participation (warrant, option, conversion features, etc.)

Mezzanine financings could also be on preferred stocks. There are typically structured with a high fixed-rate dividend and usually have an optional or mandatory conversion into common equity.

4.5 Debt: bonds

In this case, monetary resources available to RES projects are provided by debtholders of the company. Debtholders expect to earn an interest for their funds (economic motivation). Similarly to BM Companies: equity companies can raise equity and debt through crowdfunding. Debt crowdfunding is used by businesses that borrow money from a crowd or group of people, instead from a bank.

There are two main types of debt: bonds or loans. In this BM we describe bonds. Bonds are securities that incorporate an aliquot part of a collective credit constituted by a corporation. They are also known as fixed-income securities, because investors previously know the amount of cash they will get back in case of holding the bond until maturity (if there is not a default). Companies, but also co-op can issue some types of bonds²¹.

It may have a local, regional or national scope.

Its duration depends on the maturity of the bonds. Typically they are classified into short-term bonds (up to 1-2 years), medium-term bonds (2 years to 10 years) and long-term bonds (more than 10 years). There are also perpetual bonds (with no maturity date) that are not redeemable but pay a steady stream of interest forever. Most of them are callable.

There is less risk in owning bonds than in owning stocks because bondholders are paid before stockholders. In case of bankruptcy, a bondholder will get paid before a stockholder (annual return and in case of bankruptcy). In any case, bondholders always take the risk of default and lose their money. The risk level will depend on:

²¹ The regulations differ across countries. For example, in Spain while a corporation (public limited company) can issue bonds, a limited liability company (private limited company) cannot.



- Bond Issuer and RES project: company's credit quality is as important as difficult to assess in RES projects. It depends on aspects as the quality of management or the corporation's ability to pay its obligations (changes in regulatory environment). In addition, the risk level is strongly linked to the revenue patterns of the RES project (type of energy, feed-in-tariff or FIT, etc.). Issuers with higher risk would have higher yields;
- Collateral: secured debt is a type of corporate bonds that has some form of collateral. In case of secured bonds, maximum loss would depend of collateral's value;
- Priority: if a company defaults, the priority indicates the "position" of debt respect other securities. Senior (unsubordinated) bonds take priority over junior (subordinate) bonds that are repayable only after other debts have been paid;
- Options: the most important option for a bondholder is a convertible bond, which may be redeemed for a predetermined amount of the company's equity at certain times during its life. Callable bonds can be redeemed by the issuer prior to its maturity, which makes them riskier than non-callable bonds.

The return type is through coupons (interest) and also satisfaction to promote RES projects.

Bonds can be classified attending to different criteria most of which have been previously mentioned. Thus:

- Collateral: secured bonds vs. unsecured bonds (debentures). Unsecured bonds are riskier than secured bonds;
- Priority: Senior (unsubordinated) bonds vs. junior (subordinate) bonds. Subordinated bonds are riskier than unsubordinated bonds;
- Maturity: short, medium, long-term and perpetual bonds. Bonds with longer maturities are most sensitive to change in interest changes and maybe less creditworthy. Therefore, the longer maturity, the riskier bonds;
- Options: convertible bonds, callable bonds, etc.;
- Return:
 - Fixed Return Bonds or Fixed Bonds: they pay a fixed rate of interest at regular intervals (for example, monthly or yearly);
 - Floating or Variable Return Bonds: they pay a variable rate of interest over a specific time period. One of the types of variable return bonds is Inflation-linked Bonds, which is adequate for investor who would beat inflation.
- In some bonds the interest may be conditioned to the existence of profits. Thus, we can distinguish into:
 - Participating bond: it pays the bondholder guaranteed interests plus extra coupon payments if the issuer achieves a level of profit. Special and important cases of participating debt used by cooperatives are participation certificates. For example, in Spain the law allows these certificates to be represented by securities (which facilitate its transmissibility) and to grant certain rights in the cooperative;
 - Income Bonds: Their coupons are paid only if the issuer has enough earnings.

In general, the risk of bonds depends mainly of future movements of interest rates. If interest rate increases, variable return bonds perform better than fixed bonds and vice versa. Also, bonds in which the interest may be conditioned are riskier than bonds that offer non-conditional coupons.



4.6 Debt: loans

In this BM we describe loans. Loans are an agreement in which borrower makes payments to lenders according to the loan's amortization schedule.

In the cooperatives, the typical capital structure includes both equity and debt. Therefore, this BM will be used for raising funds through the loans of their members, which are typically subordinated to loans by outside members.

This business model might have a local, regional or national scope.

Similarly to BM Debt, bonds can be classified as short, medium and long-term loans. Short-term loans provide funds to a RES project that has a temporary need for capital (up to 1-2 years). More frequently we find medium-term (2 to 10 years) and long-term loans (more than 10 years).

We can separate it in short, medium and long-term loans. Short-term loans provide funds to a RES project that has a temporary need for capital. More frequently we find intermediaries and long-term loans.

There is less risk in lending money through loans than in owning stocks because loans are debt, whereas stocks are equity. In case of bankruptcy, a lender will get paid before a stockholder. The risk would be high because lenders always poses the risk of losing money (maximum loss of 100% of your investment amount), but the exact level of risk will depend of various factor such as:

- RES project: quality of management, corporation's ability to pay its obligations (changes in regulatory environment), revenue model of the RES project (type of energy, feed-in-tariff or FIT, etc.);
- Collateral;
- Priority;

Return on investment is done through Interests and also satisfaction to promote RES projects.

Loans are classified into different classes. First we can talk about secured and unsecured loans:

- When some assets of the company are charged in favour of the loan is a secured loan.
- Loans that do not carry any charge on the assets of the company are unsecured loans.

Obviously, unsecured loans are riskier than secured bonds.

Also we can talk about subordinated loans that have a subordinate status in relationship to unsubordinated loans. Subordinated loans are riskier than unsubordinated loans.

There are different types of different loans regarding their return:

- Fixed rate loans: they pay a fixed rate of interest at regular intervals (for example monthly or yearly);
- Variable-rate loans: they pay a variable rate of interest over a specific time period.
- Also, there are loans in which the interest may be conditional on the existence of a certain level of benefits on the projects. The main type is participating loan that is a loan that



contains conditions under which the lender participates in the revenues of the project. It is a type of debt with priority over shareholders but not over ordinary debt so it is riskier. In terms of maturity of a loan we can talk about short, medium, long and perpetual loans.

There are different amortizing systems, most common are denominated: French system, German system and American system, this system affects the payment series. Also, loans can be repaid in a series of annual, semi-annual or monthly payments.

Finally, there are convertible loans that entitle the lender to convert the loan to stock.

4.7 Donation

There have been several projects in different fields that were financed by donations from the Internet community (films, etc.). Therefore, donation could also be a way to finance RES projects, especially local or social RES projects. Donations could be defined as the investment of money (services, human resource support and/or professional expertise provided by individuals who do not expect any material reward. Of course, non-material rewards are allowed, namely gratitude emails or mentions on the project web (acknowledgements), The donation must be done in a donation contract and the motivation of the crowd would be an intrinsic or social motivation (CO2 savings, etc.).

Its geographic scope might be local, regional, national or European, for a short, medium or long term with a low risk level since usually donations tend to involve low amounts of money and the donors have no expectations about a financial return, the only risk is that the project does not develop and the donor do not recover. The return type is the personal satisfaction of citizens involved in energy renovation process, CO2 savings, etc., and maybe a non-material reward (gratitude email or acknowledgment, etc.). This model is useful for local projects in which local society is sensitized or social projects.

There are mainly two subtypes of this model. Thus, there are platforms where contributions involve:

- Medium / long-term (for example €1 a month);
- Unique contribution.

4.8 Rewards

This BM is a variation of the BM donation in which donors receive a material reward. This material reward has a lower value than the amount of money provided by the donor. Although typical rewards are exclusive items, like t-shirts, pens, CDs, etc., they could also be services. This financing is usually organized by a crowdfunding platform that usually only puts in touch donors with the company that makes the “gift”. Legally this type of crowdfunding must be done in a product-service contract.

It has a local, regional, national or European geographic scope.

Its risk level is considered as negligible, since investments for rewards tend to involve low amounts of money, the risk is that donors never receive their “gift”. The return type is personal satisfaction and a material reward (normally exclusive items).

No subtypes were identified.



4.9 Crowdfunding through crowdsourcing

Crowdsourcing is a type of participatory activity in which a person or organization proposes to a group of individuals the voluntary completion of a task. There are lots of possibilities for social RES projects to funding through hybrid models of crowdfunding/crowdsourcing. The most widely known could be traditional voluntary contributions to collect bottle caps, pens, mobile phones, etc.

Significantly innovator is “playfunding”. It is a new way to finance projects and it may be classified as hybrid between “crowdfunding”, although the crowd does not invest money, and “crowdsourcing”, although there is not a process of outsourcing tasks to a large, anonymous number of individuals. Instead, the crowd do click on a web (platform) and watch the advertisement of a sponsor. The sponsor provides the RES project with money for each view or package of views. Besides, people could receive gifts for clicking on projects and watching their advertisements. There are four actors in playfunding:

- A platform of crowdfunding that puts in touch crowd with RES projects and sponsors;
- A RES project to finance;
- The sponsors’ spots of the initiatives that they like and associate their videos to them;
- The crowd play in the projects they want to support.

When people like a project, they watch the advertisement video of the sponsor. The RES project obtains the money directly from the sponsor.

Its geographic scope is local or other only if there is a social interest of crowd and usually of short-term.

The risk level is considered very low because people don’t spend money (input from users is not economic), only spend their time, being the return, the crowd – social citizens – satisfaction and maybe a material or non-material reward (acknowledgement, prize, etc.)

It is difficult to distinguish different types of crowdfunding thorough crowdsourcing activities. We suggest that in future new funding formulas will exist. In the description of this BM we mainly explain “playfunding”, because it is new and based on web crowdsourcing. This could be understood as a class of crowdsourcing to finance RES projects by watching advertisements. But there are other alternatives such: the collection of bottle caps, pens, mobile phones, etc. already done in other sectors.

It seems appropriate to fund social RES projects and local actions where there are companies interested in.



5. LEGAL FRAMEWORK APPLICABLE TO CROWDFUNDING

5.1 EU legislation applicable to crowdfunding

As referred in the Commission communication on [*Unleashing the potential of Crowdfunding in the European Union*](#)²² “the main issues EU legislation addresses with regard to all types of crowdfunding include anti-money laundering, advertising, consumer protection and - where relevant – intellectual property protection”.

Indeed, as a new instrument that involves matters from intellectual property right to financial regulation, is it covered by a wide range of EU legislation, which is analysed further below.

However, being a recent reality, crowdfunding does not yet have a clear regulatory environment. The European Commission identifies on the Communication “*the lack of transparency on the applicable rules*” as one of the biggest concerns of stakeholders, for instance, the difference in anti-money laundering rules or uncertainty on intellectual property protection.

The access to the internal market for financial return crowdfunding platforms is difficult and many platforms do not operate cross-border because of the uncertainty of the applicable rules.

The promotion of crowdfunding is essential to tackle the lack of awareness in Europe about this subject. The growth of crowdfunding is dependent on raising confidence and the knowledge of contributors in crowdfunding. The Communication of the European Commission proposes the creation of a quality label to “*help this recognition and build confidence*”.

The European Securities and Markets Authority (ESMA) published an Advice²³ and an Opinion²⁴ on the Investment-based crowdfunding on 18 of December 2014.

The Advice is addressed to the European Commission, European Parliament and the Council, analysing the gaps and issues in the current legal framework applicable to crowdfunding and suggest that policymakers consider to take action in issues such as “the impact of the Prospects Directive thresholds, capital requirements and the use of the MiFID optional exemption and the potential development of a specific EU crowdfunding regime, in particular for those platforms that currently operate outside of the scope of MiFID.”

The Opinion on the Investment-based crowdfunding analyses the different EU legislation that may apply to crowdfunding in its diverse business models. The Opinion is addressed to the national competent authorities and highlights how EU law applies to the different crowdfunding models. The objective of the Opinion is to provide guidance to the national competent authorities on the European regulations that apply to crowdfunding and suggests the key elements for regulate crowdfunding platforms that operate outside the scope of the harmonised EU rules.

²² Commission communication on [*Unleashing the potential of Crowdfunding in the European Union*](#), COM(2014) 172 final, 27 March 2014

²³ [*Advice on the Investment-based crowdfunding*](#), European Securities and Markets Authority, 18 December 2014

²⁴ [*Opinion on the Investment-based crowdfunding*](#), European Securities and Markets Authority, 18 December 2014



In the United States, President Obama has acknowledged crowdfunding as a key engine to promote entrepreneurship and to boost national economy through job creation and growth during the presentation of the JOBS Act in April 2012.

5.1.1 EU legislation applicable to all crowdfunding models

5.1.1.1 Anti-money laundering Directive (AMLD) and the Regulation on the transfer of funds

Further to the publication of the Commission proposals on 5 February 2013, the [Forth Anti-money laundering Directive](#)²⁵ and the [Regulation on the transfer of funds](#)²⁶ were revised in the context of the EU co-decision legislative procedure.

The proposed revision aims at, amongst other:

- Improving the clarity and consistency of rules, in general, to create a level playing field across the EU, and in particular applicable to customer due diligence so to ensure the fair nature of their business;
- Setting up a mechanism for identification of beneficial owners; companies will have to keep records on their management team;
- Promoting high standards for anti-money laundering;
- Covering all persons dealing in goods or providing services for cash payment of at least €7,500 or more (Member States may decide to increase this threshold) regarding which customer due diligence will have to be carried out, maintain records, have internal controls and file suspicious transaction reports;
- Reinforcing the sanctioning powers of the national competent authorities.

Regarding crowdfunding, stakeholders have identified the different implementation at national level of the anti-money laundering rules across Member States as a barrier to the creation of a level playing field across the EU²⁷. The rules that result from its transposition by Member States have led to different thresholds further to which check of flow of funds are required. The revision of the AMLD is foreseen to, among other rules, impose a common threshold to apply across the EU.

5.1.1.2 Intellectual property

The lack of intellectual property protection, in particular project owners point out the lack of a EU patent framework, and its fragmentation throughout the EU as a key problem for the promotion of projects through crowdfunding platforms. They might consider that they would

²⁵ Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing 2013/0025 (COD), 5 February 2013

²⁶ Proposal for a Regulation of the European Parliament and of the Council on information accompanying transfers of funds, 2013/0024 (COD), 5 February 2013

²⁷ Commission communication on [Unleashing the potential of Crowdfunding in the European Union](#), COM(2014) 172 final, 27 March 2014



only gather contributors to their projects if these are very innovative and bring about novelty, but if no intellectual property protection is guaranteed their ideas might be stolen. Other intellectual property aspects that might be pointed out by project owners are the violation of copyrights and trademark infringements.

In August 2000, the European Commission published a [proposal for a Council Regulation on the Community patent](#)²⁸, which would aim at creating a unitary and autonomous patent, granted, transferred or declared invalid for the whole of the Community. The Community patent would co-exist with the current systems: the national systems and the Munich Convention (which lays down a single procedure for the granting of European patents). In December 2012, Member States have reached an agreement regarding the adoption of the Regulations²⁹ that create the Community Patent. An international agreement amongst Member States on the Unified Patent Court³⁰ is currently in the process of ratification.

The Community patent would allow its proprietor the right to prohibit the direct and indirect use of the invention without his consent, although such prohibition does not apply to acts done privately and which have a non-commercial purpose. The rights acquired through the Community patent do not apply to products covered by the patent of a Member State if the product has been put on the market in the EU by its owner or with his consent, unless there are legitimate grounds that would justify otherwise. Also, if another person, prior to the filing date uses the invention of that person, in good faith and for business, may continue to use or may use the invention as planned during the preparations.

Regarding trademark protection, in March 2013, the European Commission has published a proposal for revision of the Community trademark [Regulation](#)³¹ and of the [Directive](#)³² on trademarks. These legislative proposals are still to be discussed between the European Parliament - which has already adopted its position on both the [Regulation](#)³³ and on the [Directive](#)³⁴ - and the Council in order to reach a common position so that these legislative documents enter into force as soon as possible.

²⁸ Proposal for a Council Regulation on the Community patent

²⁹ Council Decision [2011/167/EU](#) of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection [OJ L 76 of 22.3.2011].

Proposal for a European Parliament and Council Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection [COM (2011) 215 final – Not published in the Official Journal].

Proposal for a Council Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements [COM(2011) 216 final – Not published in the Official Journal].

³⁰ Proposal of 23 December 2003 for a Council Decision conferring jurisdiction on the Court of Justice in disputes relating to the Community patent [COM(2003) 827 final - not published in the Official Journal].

Proposal of 2 December 2003 for a Council Decision establishing the Community Patent Court and concerning appeals before the Court of First Instance [COM(2003) 828 final - not published in the Official Journal].

³¹ Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 on the Community trade mark, 2013/0088 (COD), 27 March 2014

³² Proposal for a directive of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks (Recast), 2013/0089 (COD), 27 March 2014

³³ European Parliament legislative resolution of 25 February 2014 on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 on the Community trade mark C7-0087/2013 – [2013/0088\(COD\)](#), 25 February 2014

³⁴ European Parliament legislative resolution of 25 February 2014 on the proposal for a directive of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks, C7-0088/2013 – [2013/0089\(COD\)](#), 25 February 2014



Such proposal aims at fostering innovation and growth within the EU by making trademarks more efficient and accessible for business. Therefore, it intends to reorganize and harmonise registration procedures throughout the EU departing from the Community trademark system set as a benchmark. This would lead to increase legal certainty and clarify trademark rights, taking into account the European Court of Justice. This proposed revision also aims at fighting counterfeiting and at facilitating cooperation between the Member States' offices and the EU Office for Harmonisation in the Internal Market (OHIM).

In what concerns copyrights, the Commission has adopted in 2010, the [*Digital Agenda for Europe*](#)³⁵ which set a number of actions for copyright. In 2011, the Commission has put forward its communication [*A Single Market for Intellectual Property Rights*](#)³⁶, which includes [*legislation on orphan works*](#)³⁷, and on collective rights management³⁸.

As a conclusion of the structured stakeholder dialogue³⁹, *10 pledges to bring more content online*⁴⁰ were published in November 2013.

The European Commission has launched a [*public consultation on the review of the EU copyrights rules*](#)⁴¹ [*that ended in March 2014. The report on the responses to the consultation was published in July.*](#)

The European Commission's Work Programme for 2015 forecasts a Digital Single Market Package. This new legislative proposal "will include, among other proposals, the modernisation of copyright". The European Commission is expected to publish its proposal in September 2016.

5.1.1.3 Directive on electronic commerce

The [*Directive on electronic commerce*](#)⁴² was adopted in 2000, and defines the Internal Market framework for electronic commerce. It aims at guaranteeing that businesses and consumers

³⁵ Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions – A Digital Agenda for Europe, COM/2010/0245, 26 August 2010

³⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Single Market for Intellectual Property Rights Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe, COM(2011) 287, 24 May 2011

³⁷ Directive 2012/28/EU of the European Parliament and of the Council of 25 October on certain permitted uses of orphan works, 25 October 2012

³⁸ Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market 2012/0180 (COD), 11 July 2012

³⁹ The structured stakeholder dialogue co-organised by the Michel Barnier, Internal Market and Services Commissioner, Neelie Kroes, Commissioner for the Digital Agenda, and Androulla Vassiliou, Commissioner for Education, Culture, Multilingualism and Youth, was set up in 2013 with the objective of studying measures which would focus on cross-border access and the portability of services; user-generated content and licensing for small-scale users of protected material; facilitating the deposit and online accessibility of films in the EU; and promoting efficient text and data mining for scientific research purposes

⁴⁰ See *Licences for Europe stakeholder dialogue – Frequently Asked Questions*, 13 November 2013, http://europa.eu/rapid/press-release_MEMO-13-986_fr.htm

⁴¹ Public Consultation on the review of the EU copyright rules, http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm

⁴² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)



benefit from legal certainty and that a level playing field through the harmonization of rules related to transparency and information requirements for online service providers, commercial communications, electronic contracts and limitations of liability of intermediary service providers.

The Directive establishes that information society services are, in principle, subject to the law of the Member State in which the service provider is established. However, the Member State in which the information society service is received cannot restrict incoming services; it enhances administrative cooperation between the Member States and the role of self-regulation.

Amongst the services covered by the Directive are basic intermediary services (access to the internet and transmission and hosting of information) such as in crowdfunding platforms. This Directive also applies to platforms, which charge money to finance projects.

On 11 January 2012, the European Commission has adopted the [*Communication A coherent framework to build trust in the Digital single market for e-commerce and online services*](#)⁴³ which puts forward the Commission's future path for online services and identifies the main obstacles to the development of e-commerce and online services: “(i) the supply of legal, cross-border online services is still inadequate; (ii) there is not enough information for online service operators or protection for internet users; (iii) payment and delivery systems are still inadequate; (iv) there are too many cases of abuse and disputes that are difficult to settle; (v) insufficient use is made of high-speed communication networks and hi-tech solutions”⁴⁴.

In April 2013, the Commission has published its staff working document [*Report on the implementation of the e-commerce action plan*](#)⁴⁵ which refers to the progress made in the implementation of the above-mentioned e-commerce action plan, and to key actions that are already in place. Amongst those, the reinforcement of consumer protection through the adoption of the “consumer agenda”, the development of administrative cooperation tools and better enforcement of EU law, and fighting internet abuse through the establishment of the European Cybercrime Centre and the definition of a cyber-security strategy.

5.1.1.4 Directive on unfair commercial practices

The [*Directive on unfair commercial practices \(UCPD\)*](#)⁴⁶, revised in 2005, applies to misleading and aggressive crowdfunding practices that are prohibited under its scope.

The UCPD aims at guaranteeing that consumers are well informed and protected when they engage in commercial practices, whilst promoting fair competition in commercial practices. The UCPD would also aim at boosting consumer confidence and cross-border trading through the creation of a level playing.

⁴³ Communication A coherent framework to build trust in the Digital single market for e-commerce and online services, COM/2011/0942, 11 January 2012

⁴⁴ Communication - A coherent framework to build trust in the Digital single market for e-commerce and online services, COM/2011/0942, 11 January 2012, page 4

⁴⁵ Commission Staff Working Document E-commerce Action plan 2012-2015 – State of play 2013, 23 April 2013

⁴⁶ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council



In December 2009, also when Member States have concluded the transposition of the Directive, the European Commission has published its [Guidance on the application/implementation of the Directive](#)⁴⁷.

In March 2013, the Commission has adopted a [Communication on the application of the Unfair Commercial Practices Directive - Achieving a high level of consumer protection Building trust in the Internal Market](#)⁴⁸ and published a [report](#)⁴⁹ analysing the implementation at national level and the observed shortcomings of this piece of legislation, in particular in what concerns digital and on-line services and financial services, amongst other sectors.

The Commission has then set up measures to address these shortcomings and create a better environment and opportunities for consumers. Amongst others, the Commission has proposed to strengthening the efficiency of the European consumer protection network and that it continues to promote coordinated enforcement actions, help Member States in the correct application of the Directive with guidance and sharing best practices amongst countries, and organising training for national enforcers and courts.

5.1.1.5 Directive on misleading and comparative advertising

The [Directive on misleading and comparative advertising](#)⁵⁰, adopted in 2006 protects traders and consumers against misleading advertising and its consequences. It creates a level playing field throughout the EU by establishing a minimum common level of protection regarding misleading advertising and harmonizing rules on comparative advertising in what concerns relations business-to-business (B2B) and on advertising directed at consumers. It also imposes that Member States put in place adequate mechanisms that enable persons and organizations to bring legal action for the ending and/or the prohibition of misleading or unlawful comparative advertising.

The Commission has published in November 2012, its Communication [Protecting businesses against misleading marketing practices and ensuring effective enforcement](#)⁵¹ where, through the revision of the rules that prohibit certain practices and by strengthening their cross-border enforcement, it proposes several actions. Amongst those, and with the objective of increasing legal certainty, it includes a ban on misleading practices as those from misleading directory companies, and strengthens penalties for infringements by Member States that should be proportionate and dissuasive. Member States competent authorities should cooperate in

⁴⁷ Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, SEC (2009) 1666, 3 December 2009

⁴⁸ Commission Communication On the application of the Unfair Commercial Practices Directive - Achieving a high level of consumer protection Building trust in the Internal Market, COM (2013) 138 final, 14 March 2013

⁴⁹ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee - First Report on the application of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), COM(2013) 139 final, 14 March 2013

⁵⁰ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising

⁵¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Protecting businesses against misleading marketing practices and ensuring effective enforcement Review of Directive 2006/114/EC concerning misleading and comparative advertising



order to ensure effective enforcement.

5.1.1.6 Directive on unfair terms in consumer contracts

The [Directive on unfair terms in consumer contracts](#)⁵², adopted in 1993, imposes that contract terms are drafted in a clear and intelligible language, without ambiguities, which in case they exist are to be inferred in favour of consumers. It also sets up a list of terms that are considered as unfair and it introduces the concept of "good faith" so to strike a balance between rights and obligations of consumers and traders.

Therefore, if unfair clauses are included in the terms and conditions used by the crowdfunding operator, these are not binding on the consumer participating in the platform.

5.1.1.7 Directive on e-money

The [Directive on e-money](#)⁵³, adopted in 2009, aims at modernizing the EU rules on electronic money by making possible that new, innovative and secure electronic money services are created and that new companies have access to the market what would contribute to foster competition in the internal market. This Directive may apply to crowdfunding e.g. if under national legislation is considered that the platform assembles money for a given project, for what it needs a license as payment services provider, to provide for electronic money (France).

5.1.1.8 State Aid rules on risk finance

The European Commission has adopted in January 2014 its [Risk Finance Guidelines](#)⁵⁴ with the objective of guaranteeing that SMEs and midcaps have access to finance, whilst maintaining a level playing field in the Single Market.

Amongst the new measures proposed to foster growth and economic development within the single market, the Commission included *"New and more flexible forms of support to alternative trading platforms: the guidelines allow grants for the setting up of such platforms, as well as tax incentives to investors buying the shares of SMEs listed on such platforms"*⁵⁵. As clarified, in the Communication's text, *"(35) The Commission recognises the growing importance of crowdfunding platforms in attracting funding for start-up companies. Therefore, if there is an established market failure and in cases a crowdfunding platform has an operator, which is a separate legal entity, the Commission may apply, by analogy, the rules applicable to alternative trading platforms. This applies equally to fiscal incentives to invest via such crowdfunding platforms. In the light of the recent appearance of crowdfunding in the Union, risk finance measures involving crowdfunding are likely to be subject to an evaluation as mentioned in Section 4 of these Guidelines"*⁵⁶.

⁵² Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

⁵³ Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC

⁵⁴ Communication from the Commission - Guidelines on State aid to promote risk finance investments, COM (2014) 34/2, 15 January 2014

⁵⁵ http://europa.eu/rapid/press-release_IP-14-21_en.htm

⁵⁶ Communication from the Commission - Guidelines on State aid to promote risk finance investments, COM (2014) 34/2, 15 January 2014, page 23, footnote 34



5.1.2 EU LEGISLATION APPLICABLE TO FINANCIAL RETURNING CROWDFUNDING

The EU financial services rules afford EU investors a high level of consumer protection whilst creating a more integrated single market for financial services. Some of the legislation described below may apply to forms of crowdfunding which imply a financial returning, depending on the type of activity and the specific business model they use and on the financial campaign's design e.g. amount of money being raised. Usually this set of rules does not apply to donations and rewards models.

5.1.2.1 Directives on prospectus to be published when securities are offered to the public

The [Prospectus Directive](#)⁵⁷ was adopted in November 2010, and was proposed with the objective of reducing administrative burdens, and consequently costs, for issuers and intermediaries. Amongst the measures proposed, less stringent disclosure requirements would apply to certain issuers such as small companies and lenders, new exemptions from the prospectus publication are foreseen as for example for companies that sell through intermediaries, issuers of all non-equity securities will be able to determine their home Member States, and the definition of 'qualified investors' is aligned with the 'professional clients' as defined in the [Directive on markets in financial instruments](#)⁵⁸.

In November 2015, the [Commission's proposal for the Prospectus Regulation](#) was adopted. The Regulation will replace the 2010 Directive. The main objective of the Commission's proposal is to simplify the rules, reduce costs of preparing a prospectus and enhance coherence in the prospectus rules in the EU.

The regulation proposal sets higher thresholds for the mandatory issuing of a prospectus. Issuers of securities are required to publish a prospectus for capital raisings above EUR 500 000, however Member States can set a higher limit not exceeding EUR 10 000 000. The regulation also sets new rules on the information required to make available to investors.

5.1.2.2 Directive on payment services

The [Payment Services Directive](#)⁵⁹ (PSD) was adopted in 2007 and should have been transposed by Member States by 1 November 2009. Its main objective was to prompt more competition in the market through harmonizing the rules applicable to information requirements and to provide a simplified and fully harmonised set of rules with regard to the information and the rights and obligations linked to payment services. Such harmonization would contribute to a reduction on legal compliance costs for payment service providers and would boost competition.

On 24 July 2013, the European Commission adopted the Payment Systems Package that proposes a revision of the Payment Services Directive and a Regulation on Multilateral

⁵⁷ Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC

⁵⁸ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC

⁵⁹ Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC



Interchange Fees (MIFs). Taking into account the recent developments in the electronic means of payment, this revision aims at facilitating and increasing the security of low cost internet transactions protecting consumers against fraud and abuses, increasing consumer protection for money remittances outside Europe or paid in non-EU currencies, and will promote more competition and market access to new players alongside the development of innovative mobile and internet payments in Europe.

It applies to crowdfunding platforms since in some countries it may be considered that the transfer of funds through the platform may constitute money remittance therefore falling under the scope of banking supervision. Exceptions may apply, e.g. if they are established as authorised commercial agents (Portugal and UK) or if a foreign regulated financial institution is used for processing the payments (the Netherlands).

The final text of the Directive was published in the Official Journal of the European Union on November 2015, Member States have two years to transpose the new Directive.

5.1.2.3 Directive on Markets in Financial Instruments

The European Parliament and the Council recently adopted the revision of the [Directive on Markets in Financial Instruments](#)⁶⁰. It was published in the EU Official Journal on the 15th May 2014. Member States will have two years to transpose the new rules, which will be applicable from January 2017.

This new Directive⁶¹ introduces a market structure framework, which aims at ensuring that trading, wherever appropriate, takes place on regulated platforms, by imposing on shares and non-equity instruments a trading obligation. *“Investment firms which operate an internal matching system executing client orders in shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments on a multilateral basis have to be authorised as a Multilateral trading facility (MTF). It also introduces a new multilateral trading venue, the Organised Trading Facility (OTF), for non-equity instruments to trade on organised multilateral trading platforms”.*⁶²

It also increases transparency for non-equity instruments e.g. bonds and derivatives. For equities a double volume cap mechanism limits the use of reference price waivers and negotiated price waivers (4% per venue cap and 8% global cap) together with a requirement for price improvement at the mid-point for the former⁶³.

It also guarantees stronger investor protection through effective and harmonised administrative sanctions.

Since crowdfunding equity platforms usually trade shares or other financial instruments covered by MIFID, they usually fall under its scope of application. However, depending on the interpretation and national transposition by Member States regarding what are investment instruments and services, its application may vary.

⁶⁰ Directive 2014/65/EU of the European Parliament and of the Council of 15th May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU

⁶¹ http://europa.eu/rapid/press-release_MEMO-14-305_en.htm?locale=en

⁶² Idem

⁶³ Idem



5.1.2.4 Capital Requirements Directive

The [Capital Requirements Directive](#)⁶⁴ (CRD IV) and Regulation (CRR) entered into force in July 2013. These pieces of legislation transpose to EU legislation the Basel Committee on Banking Supervision (BCBS) rules setting new global regulatory standards on bank capital.

As key features, this legislation has the objective of guaranteeing that financial institutions have in their balance sheets better and more capital composed by own funds instruments, ensure their liquidity, have a leverage ratio to help them facing if risk weights happen to be incorrect, amongst other requisites.

Some of the CRD IV and CRR rules are to be developed through regulatory and implementing technical standards to be drafted by the European Banking Authority.

It may be applicable to crowdfunding platforms if Member States implementation goes even further than the scope of the Directive and include crowdfunding as peer-to-peer lending falling within the banking monopoly.

5.1.2.5 Directive on alternative investment fund managers

The [alternative investment fund managers Directive](#)⁶⁵ (AIFMD) was adopted by the European Parliament plenary in November 2010 with the objective to create a comprehensive and effective regulatory and supervisory framework for these funds across the EU. The proposed Directive aimed at providing robust and harmonised regulatory standards for all AIFM falling within its scope and enhancing the transparency of the activities of AIFM and the funds they manage towards investors and public authorities.

The AIFMD aims at increasing the transparency of this type of funds, which will also lead to a strong EU-wide investor protection, whilst increasing their accountability holding controlling stakes in companies (private equity) towards employees and the public at large.⁶⁶

The AIFMD is still being transposed in some EU Member States, e.g. Portugal.

In what concerns crowdfunding, platforms may be exempted from its application, depending on the national transposition despite the fact that the definition of alternative investment funds covers collective undertakings other than UCITS, under the ESMA guidelines on AIFMD.⁶⁷

5.1.2.6 Consumer Credit Directive

The [Consumer Credit Directive](#) was adopted in 2008 and it sets up the legal basis for a more integrated single market, through further harmonising rules across the EU, with a higher level of consumer protection.

⁶⁴ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC

⁶⁵ Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010

⁶⁶ http://europa.eu/rapid/press-release_MEMO-10-572_en.htm?locale=en

⁶⁷ See Final report Guidelines on key concepts of the AIFMD – 24 May 2013



This Directive, which covers all consumer credit, improved the transparency and comparability of credit offers and regarding the counterparties since the borrower is obliged to disclose all relevant information when asked by the lender and *the lender must "know thy client"*. The Directive also includes, among others, a 14 day period for consumers to exercise their right of withdrawal, imposes the registration of lenders and credit intermediaries, and established a regime for the liability of lenders if suppliers of goods and services act as their credit intermediaries.

The Commission has published on 14 May a report analysing the implementation of the Directive by Member States. The report concluded *that creditors should make further efforts to ensure that rights given to EU citizens by the Directive are respected. Amongst the rights demanding follow-up action are those regulating advertisements and pre-contractual information: creditors do not always inform consumers about their rights, such as the right to withdraw from the contract within 14 days and the right of early repayment.*⁶⁸

5.1.2.7 Directive on Distance Marketing of Financial Services

In 2002, the [Directive on distance marketing of financial services](#)⁶⁹ was adopted. It sets forward the fundamental rights for consumers engaging in contracts between a consumer and a bank, a credit card company, an investment fund, an insurance company, or another financial institution, regarding the acquisition or selling of financial services over the internet or by telephone/fax.

In particular, this Directive imposes that consumers have to be duly informed by the supplier before the contract is concluded, a consumer right to withdraw within 14 days, a ban on abusive marketing practices aiming at leading consumers to buy a service they have not solicited ("inertia selling"), as well as rules to restrict other practices such as unsolicited phone calls and e-mails ("coldcalling" and "spamming")^{70 71}.

5.1.2.8 Regulation on European Venture Capital

This [Regulation](#)⁷², adopted in April 2013, has created an EU label, through the adoption of a single set of rules applicable throughout the EU for venture capital funds, considered as a subclass of alternative investment schemes of particular interest to start-up companies. Funds that wish to apply for the label will have to prove that 70% of the capital received from investors is spent in supporting new and innovative companies. The EU unified regime will contribute to attract more investment and make venture capital funds bigger, consequently allowing for more investment in individual companies specialised in innovative sectors e.g. information technology, biotech or life-science.⁷³

⁶⁸ http://ec.europa.eu/consumers/rights/fin_serv_en.htm#credit

⁶⁹ Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC

⁷⁰ See http://ec.europa.eu/consumers/rights/fin_serv_en.htm#dist

⁷¹ See http://europa.eu/legislation_summaries/consumers/protection_of_consumers/l32035_en.htm

⁷² Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds

⁷³ Further information available at http://ec.europa.eu/internal_market/investment/venture_capital/index_en.htm



The European Commission published an amending proposal of the European Venture Capital Regulation on July 2016, which aims at review the regulation in order to enable the mobilisation of private investment into the European Fund for Strategic Investment. In the framework of the EFSI a European fund for investment in European venture capital is being established to support the European venture capital industry and boost the its impact in the EU.

5.1.2.9 Regulation on European Social Entrepreneurship Funds (EuSEF)

The Regulation on European Social Entrepreneurship Funds⁷⁴ was also adopted in April 2013. It concerns investment schemes applicable to enterprises that have a positive social impact and address social objectives. It is part of the Commission's Social Business Initiative⁷⁵ and allows investors to clearly identify this type of funds when interested to invest on them. Similarly to European Venture Capital, managers of social entrepreneurship funds will be able to benefit from a EU label, with a single set of rules to market their funds throughout the EU. Funds using the EU label will have to invest 70% of the capital received from investors in supporting social businesses.

The same proposal referred supra will also review the framework of the European Social Entrepreneurship Funds.

⁷⁴ Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds

⁷⁵ See http://ec.europa.eu/internal_market/social_business/index_en.htm



5.2 National regulation applicable to crowdfunding

5.2.1 FRANCE

In France a new regulation on crowdfunding came into force on the 1st October 2014. The *Code Monétaire et Financier (CMF)*, the regulations governing both the *Autorité de Contrôle Prudentiel et de Résolution (ACPR)* and the *Autorité des Marchés Financiers (AMF)*, was modified to create a specific regulation for crowdfunding activities.

This new regulation created two different statuses, the *Conseil en Investissement Participatif (CIP)* and the *Intermédiaire en Financement Participatif (IFP)*. The crowdfunding platforms have to be registered in the *Registre unique des Intermédiaires en Assurance, Banque et Finance (ORIAS)* after the AMF analysis and approval of the platform application and the ACPR analysis the CV of the CEO applicant.

The two new statuses are:

- *Conseil en Investissements Participatifs (CIP)*: for equity crowdfunding platforms, CIPs provide investment services in equity and certain debt securities. Equity crowdfunding is limited to investment in shares (*actions ordinaires*) and fixed interests bonds (*obligations à taux fixe*), securities such as warrants, convertible bonds, etc. are excluded from the scope of investments authorised. The CIPs have to comply with transparency and access to information rules, in particular in what concern the risks of losing capital and to assure that the investors have sufficient capital. Also, the new regulation enables the investments in *Société par action simplifiée*, the type of French limited liability companies by shares that is the most flexible. The maximum amount that can be raised through crowdfunding is 1 million EUR.
- *Intermédiaire en Financement Participatif (IFP)*: for lending crowdfunding platforms (interest-free loan or not); the IFP are legal entities that can be branches of foreign companies that connected investors and projects. The main obligation of an IFP is to guarantee the protection of the lender and borrower. The IFP has to publish on their website an annual activities report with information on, inter alia, the number of the projects and the amount of money raised by the platform, number of investors, the amount of interest-free loan and donations, the number of defaults on loan. To be an IFP, the platform must be registered in the *Registre unique des Intermédiaires en Assurance, Banque et Finance (ORIAS)*, offer certain moral guarantees, have specific insurances and comply with the code of conduct. The new regulation also sets limits to the amount that can be raised through IFP, each project can only seek a total of 1 million EUR per project and each lender can only lend 4,000 EUR, per year and per project, for interest-free loans and 1,000 EUR, per year and per project, for interest bearing loans. The duration of the loan is capped at seven years.

CIP and IFP platforms are granted a national approval label's logo by the French authorities that aim to ensure the investors that the platform is reliable and complies with the French regulations on crowdfunding.

Other regulations that may apply to crowdfunding platforms in France:



- Payment services and E-money directive

Further to the transposition of the Payment Services Directive of 2009, and although any person providing payment services must be licensed as a *établissement de paiement*, exemptions might be granted by the *Autorité de Contrôle Prudentiel et de Résolution* to platforms to which payments by investors are made within a “limited network” or for a “limited range of products or services”. However, any IFP Crowdfunding platform offering payment services will be acting as payment services provider and, in this case, must be licensed as a payment establishment by the ACPR or be registered as agent for payment services provider. To do so, it is mandatory to have minimum capital of 40, 000 EUR.

Crowdfunding platforms are also subject to the rules which transpose the e-money Directive which provides that anyone providing electronic money should be regulated as an *établissement de monnaie électronique* and required a license as a payment service provider since it is considered by the ACPR that they assemble funds for a given project that are collected e.g. in a bank account, therefore acquiring and executing payment orders in accordance to the licencing requirements of the CMF.

- Prospectus regulation

A new regime has modified the prospectus requirements for public offering of shares or bonds. Since 1 October 2014, a CIP can offer equity and fixed interests bonds without being considered as a public offering that would require the publication of a prospectus. Also, a *Prestataire de services d'investissement* (PSI), an investment services advisor, can also be exempt of publishing a prospectus providing that the offering is lower than 1 million EUR over one year.

Although equity crowdfunding platforms are exempt from the prospectus regulations crowdfunding regulation have to give an adequate level of information to possible clients. The investors should have access to detailed information and assessments of the risks associated with the investment. This information should cover, inter alia, the project and the risks associated with it, statutory accounts of the issuer and financial projections, detailed financial rights, details of costs to be borne by the investor at the time of the subscription.

- Marketing and distance selling regulation

Rules from the CMF and the Consumer Code on financial solicitation apply to telephone and Internet offers and to any national and foreign intermediary or adviser pursuing their activity in France. Application of these rules is made in a case-by-case analysis by the ACPR, following its guidelines⁷⁶.

- Anti-money laundering rules

Crowdfunding platforms may be required to comply with anti-money laundering rules and due diligence requirements on:

- i. Client identification;

⁷⁶ Idem



- ii. Collecting information regarding the purposes and nature of the transactions as planned and pursued;
- iii. Reporting suspicious transactions to the French authorities (TRACFIN).

- Alternative investment funds managers' directive

Further to its transposition, Alternative Investment Funds (AIF) are defined by the CMF in France as “collective 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”. The [ESMA guidelines⁷⁷](#) characterise these collective investment undertakings as:

(a) The undertaking does not have a general commercial or industrial purpose;

(b) The undertaking pools together capital raised from its investors for the purpose of investment with a view to generating a pooled return for those investors; and

(c) The unitholders or shareholders of the undertaking.

– As a collective group – have no day-to-day discretion or control. The fact that one or more but not all of the aforementioned unitholders or shareholders are granted day-to-day discretion or control should not be taken to show that the undertaking is not a collective investment undertaking.

Considering that crowdfunding platforms usually have, at least, a commercial or industrial purpose and that platforms do not pool capital from investors with a view to generating a pooled return for them, the AIFMD seems not to apply to crowdfunding platforms in France.

⁷⁷ Final report Guidelines on key concepts of the AIFMD – 24 May 2013



5.2.2 GERMANY

A large German wind operator Prokon declared insolvency in 2014, affecting 74,000 predominantly non-professional investors who invested above EUR 1.4 billion. This triggered new legislative changes, aiming to improve retail investors' protection.

The Retail Investors' Protection Act (*Kleinanlegerschutzgesetz*) was approved by the German Bundestag in April 2015, entering into force on 10 July 2015. The Retail Investors' Protection Act widens the scope of the German Investment Products Act (*Vermögensanlagengesetz*). It is relevant for many investment products used by renewable cooperatives and crowdfunding platforms, such as silent partnerships (*stille Beteiligungen*), debt participation rights (*Genussrechte*) and profit-participating loans (*partiarische Darlehen*). Now, subordinated profit-participating loans (*partiarische Nachrangdarlehen*) are defined as investment products.

All three investment products are now stricter regulated, in particular as regards prospectus requirements and marketing of investment products. The exception for cooperatives is also narrowed. For Crowdfunding, no prospectus is required for projects below EUR 2.5 mio, the total investment per investor is limited to EUR 10 000 and platforms need a new licence.

Importantly, it is not allowed to combine the Crowdfunding Exception with other exceptions under Investment Products Act (*Vermögensanlagengesetz*).

Regarding the **equity model**, if a crowdfunding platform enables the offering of securities, investment products or shares in collective investment undertakings it is considered that the operator of the platform provides financial services under the German Banking Act (*Kreditwesengesetz*)⁷⁸ and it requires a license from the German Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* (BaFin)).

Lending model

Since July 2015, subordinated profit-participating loans are considered as investment products under the German Investment Products Act (*Vermögensanlagengesetz*)⁷⁹. Furthermore, any "investments that grant a repayment claim and a claim for interest" are considered as investment products, therefore their brokerage requires a licence by BaFin.

The **donations and rewards model** fall outside the scope of financial regulation.

Other regulations that may apply to crowdfunding platforms in Germany:

- Payment Services Act (*Zahlungsdiensteaufsichtsgesetz*)⁸⁰

Any transfer of funds (from the investor to the operator of the crowdfunding platform who passes it to the entrepreneur) will constitute money remittance within the meaning of the

⁷⁸ Banking Act (Kreditwesengesetz, KWG) - Gesetz über das Kreditwesen - in the amended text of the Announcement of September 9, 1998 (Federal Law Gazette I, page 2776), as last amended by Article 3 of the Act amending insolvency and banking law provisions (Gesetz zur Änderung insolvenzrechtlicher und kreditwesenrechtlicher Vorschriften*) of December 8, 1999 (Federal Law Gazette I No. 54, page 2384).

⁷⁹ Vermögensanlagengesetz vom 6. Dezember 2011 (BGBl. I S. 2481), das zuletzt durch Artikel 3 Absatz 2 des Gesetzes vom 4. Oktober 2013 (BGBl. I S. 3746) geändert worden ist

⁸⁰ Zahlungsdiensteaufsichtsgesetz vom 25. Juni 2009 (BGBl. I S. 1506), das zuletzt durch Artikel 6 Absatz 10 des Gesetzes vom 28. August 2013 (BGBl. I S. 3395) geändert worden ist



Payment Services Act. Although the platform may ask for an exemption for commercial agents under the payment's Act, recent decisions by BaFin only allow for a very limited application of this exemption.

- Prospectus Directive

- Projects under 2,5 million EUR are exempt from the prospectus requirements.

- AIFMD

The Alternative Investment Funds Manager Richtlinie ("AIFM-Directive") was transposed on 22 July 2013. It widens regulatory supervision via "der Bundesanstalt für Finanzdienstleistungsaufsicht ("BaFin)". Exceptions include operationally active cooperatives and cooperatives below a certain threshold amongst others.

There is no explicit declaration from the competent authorities (BaFin) but there are strong arguments for a crowdfunding platform not to qualify as an alternative investment fund manager since the platform does not raise capital for its own business. Therefore, the AIFM Directive should only apply to the companies seeking funds using crowdfunding platforms.

Other regulations

- German Trade, Commerce and Industry Regulation Act (Gewerbeordnung);
- German Act on Money Laundering ([Geldwäschegesetz](#))⁸¹;
- German Securities Trading Act ([Wertpapierhandelsgesetz](#))⁸²;
- Consumer Credit Regulation ([Vorschriften für Verbraucherdarlehensverträge](#))⁸³.

⁸¹ Geldwäschegesetz vom 13. August 2008 (BGBl. I S. 1690), das zuletzt durch Artikel 9 des Gesetzes vom 18. Dezember 2013 (BGBl. I S. 4318) geändert worden ist

⁸² Securities Trading Act (Gesetz über den Wertpapierhandel/ Wertpapierhandelsgesetz - WpHG) as promulgated on 9 September 1998 (Federal Law Gazette I p. 2708), as last amended by Article 2 of the Law Implementing the EC Deposit Guarantee Directive and Investor Compensation Directive of 16 July 1998 (Federal Law Gazette I p. 1842)

⁸³ Bürgerliches Gesetzbuch - Buch 2 - Recht der Schuldverhältnisse - Abschnitt 8 - Einzelne Schuldverhältnisse - Titel 3 - Darlehensvertrag; Finanzierungshilfen und Ratenlieferungsverträge zwischen einem Unternehmer und einem Verbraucher, Untertitel 1 – Darlehensvertrag, Kapitel 2 - Besondere Vorschriften für Verbraucherdarlehensverträge



5.2.3 PORTUGAL

The Portuguese Parliament approved a proposal on crowdfunding in July 2015. The new law foresees, amongst other features, that the equity and lending models will fall under the authorisation and supervision of the securities market regulator *Comissão do Mercado de Valores Mobiliários* (CMVM), the donations or rewards model will have to report and keep the consumer protection authority - *Direcção Geral do Consumidor* – informed about their activities. In what concerns platforms financing, it defines the information to be provided, the liability for transactions and the conditions for the financing of the transactions, as well as investors obligations.

In this context, in Portugal **the donations or reward model** is the most common since it does not require any licensing or authorisation nor does it fall under the supervision of the securities market regulator, CMVM, or the banking services regulator, *Banco de Portugal* (BdP).

For crowdfunding platforms to adopt an equity or **lending model** they have to register their activity at the CMVM that has supervisory powers over their activity.

Promoters of projects have to publish a document with key information for investors. The maximum amount allowed for crowdfunding is EUR 1 million for private investors or EUR 5 million for professional investors.

The new law entered into force in September 2015 and CMVM published the Regulation that details the rules on how to licence crowdfunding platforms in May 2016. To complete this framework CMVM is expected to publish a code of conduct.

Other regulations that may apply to crowdfunding platforms in Portugal:

- Payment services regulation

Crowdfunding platforms may also be exempted from the scope of application of the Payment Services Directive if they are established as authorised commercial agents, otherwise they may need an authorisation from the BdP since their activities of transfer of funds through an operator would constitute money remittance.

- Prospectus Directive

Crowdfunding platforms may also be exempted from issuing a prospectus if they comply with the exemption of the [Portuguese Securities Code](#)⁸⁴ for offers with a total value of less than 5 million EUR throughout 12 months.

- Other regulations

- [Decree-Law nº 375/2007](#) on a legal regime for venture capital⁸⁵;

⁸⁴ Código dos Valores Mobiliários



- [Law 25/2008](#) on the prevention of money laundering⁸⁶.

⁸⁵ Decreto-Lei n.º 375/2007 de 8 de Novembro que regula o exercício da actividade de investimento em capital de risco através de sociedades de capital de risco, de fundos de capital de risco ou de investidores em capital de risco e revoga o Decreto-Lei n.º 319/2002, de 28 de Dezembro

⁸⁶ Lei n.º 25/2008 de 5 de Junho Estabelece medidas de natureza preventiva e repressiva de combate ao branqueamento de vantagens de proveniência ilícita e ao financiamento do terrorismo, transpondo para a ordem jurídica interna as Directivas n.os 2005/60/CE, do Parlamento Europeu e do Conselho, de 26 de Outubro, e 2006/70/CE, da Comissão, de 1 de Agosto, relativas à prevenção da utilização do sistema financeiro e das actividades e profissões especialmente designadas para efeitos de branqueamento de capitais e de financiamento do terrorismo, procede à segunda alteração à Lei n.º 52/2003, de 22 de Agosto, e revoga a Lei n.º 11/2004, de 27 de Março



5.2.4 SPAIN

The **donations or reward model** is the most popular crowdfunding model in Spain, similar to what happens in Portugal, since it is not subject to financial services regulation.

New crowdfunding regulation

Spain adopted a law regulating crowdfunding (Ley 5/2015) on April 27 2015. The new law applies to lending and equity crowdfunding and include protection mechanisms for investors based on registration requirements, information, prohibitions, rules of conduct and investment limits. It also limits the volume of funds each project may capture through a crowdfunding platform to ensure that the activity of the platforms is effectively limited to the massive funding by retail so that projects above this limit, and with higher amount of funds, fall under the scope of financial services regulation and in particular securities regulations.

The Spanish law makes the distinction between qualified investors with no investment limit and non-qualified investors. A qualified investor needs to have an income of 50,000 EUR per year or personal assets of at least 100,000 EUR. The non-qualified investors can invest 3,000 EUR per project with a maximum of 10,000 EUR per year. The amount to be crowdfunded is limited to 2 million EUR but this limit is raised to 5 million EUR if the project is to be crowdfunded exclusively by qualified investors.

The law also establishes, in article 53, that platforms based on the equity or lending model need to be registered at the Comisión Nacional del Mercado de Valores and in the case of equity loans projects the Bank of Spain has to issue a licence.

Moreover, the platforms need to periodically inform the financial authorities of its annual accounts, and provide a summary of the projects financed and other relevant data, such as users' complaints.

The minimum capital requirement for Platforms is 60.000 EUR and a civil liability insurance of 300.000 EUR for damages and 400.000 EUR for all possible complaints. Moreover, in order to be registered, a platform needs to present a series of documents, such as an activities programme, an explanation of the organization, a list of main participants and administrators, a functioning regulation and the proceedings for complaints.

The Comisión Nacional del Mercado de Valores is the entity responsible for the supervision and inspection of crowdfunding platforms. The Bank of Spain has competence for supervision of lending crowdfunding platforms.

Crowdfunding platforms whose business does not fit the definition of platforms shall remain subject to the general regime of market, credit institutions and other applicable regulations.

Other regulations that may apply to crowdfunding platforms in Spain:



- On 13 November 2014 the [Law 22/2014](#)⁸⁷ was published in the Spanish Official Gazette. After a long process the AIFMD was implemented in Spain. However, crowdfunding platforms are not usually consider as Alternative Investment Fund Managers because platforms do not manage funds, as platforms are structured as intermediaries and facilitators between investors and entrepreneurs, although, in some cases, crowdfunding platforms can fall under the scope of AIFMD.
- [Draft bill that supports Entrepreneurs](#)⁸⁸;
- [Law 34/2002](#)⁸⁹ transposed the Directive 2000/31/EC on electronic commerce. [Law 3/2014](#)⁹⁰ that modifies certain aspects on electronic commerce, which applies to contracts, approved after 13 June 2014 and which increases consumer protection has been recently approved. This Law also considers that service providers established in Spain are obliged to inform the Commercial Register of their domain name or internet address to remain identified, as well as to provide information on the replacement or cancellation of that name. They have one month to obtain, cancel, or replace that name.

⁸⁷ Ley 22/2014, de 12 de noviembre, por la que se regulan las entidades de capital-riesgo, otras entidades de inversión colectiva de tipo cerrado y las sociedades gestoras de entidades de inversión colectiva de tipo cerrado, y por la que se modifica la Ley 35/2003, de 4 de noviembre, de Instituciones de Inversión Colectiva.

⁸⁸ Ley 11/2013, de 26 de julio, de medidas de apoyo al emprendedor y de estímulo del crecimiento y de la creación de empleo

⁸⁹ Ley 34/2002, de 11 de Julio, de servicios de la sociedad de la información y de comercio electrónico;

⁹⁰ Ley 3/2014, de 27 de marzo, por la que se modifica el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias, aprobado por el Real Decreto Legislativo 1/2007, de 16 de noviembre



5.2.5 THE NETHERLANDS

Most of the crowdfunding platforms take the form of the equity/debt model.

In the Netherlands crowdfunding is pretty much developed and is accepted by the national regulators - The Dutch central bank (*De Nederlandse Bank N.V. - DNB*) and the Financial Markets Authority (*Stichting Autoriteit Financiële Markten - AFM*); Regulations applicable to financial activities are covered by the Financial Supervision Act (FSA - *Wet op financieel toezicht*).

Regarding the **equity and debt model**, the crowdfunding platforms are considered as an investment firm issuing shares and bonds within the meaning of the market in financial instruments directive (MiFID) and therefore it has to be licensed as an investment firm regarding the acceptance and transmission of orders of lenders with respect to financial instruments.

Debt instruments are regulated under the FSA since the issue of debt instruments also qualifies as the attracting of repayable funds and its intermediation in what concerns non-professional market parties is also a regulated activity. Therefore, for crowdfunding platforms to operate as intermediaries regarding the gathering of repayable funds would require either a license or an exemption from the AFM, if the issuer issues a prospectus on the debt instruments being offered and therefore he is not subject to the FSA prohibition on the collection of repayable funds. Very strict requirements have to be observed for this exemption to apply.

Regarding the **lending model**, borrowers that use crowdfunding platforms as an alternative to normal bank loans are considered consumers and therefore the platform may require a license as a financial services provider (*financieeldienstverlener*) since it intermediates a credit relation. If repayable funds are received from non-professional market parties, this activity is regulated by the FSA and prohibited unless a banking licence or exemption is available. Also, and similarly to the equity or debt model, the intermediation regarding attracting of repayable funds from non-professionals market parties is regulated and a licence or an exemption from the AFM would be needed.

The **donation or rewards model** falls outside the scope of the FSA regulation since there is no financial reward.

Other regulations that may apply to crowdfunding platforms in the Netherlands:

- Payment services Directive

Similar to what happens in other jurisdictions, the transfer of funds through a crowdfunding platform may constitute money remittance and fall under the scope of the Payment services Directive. However, if a foreign regulated financial institution is used for processing payments, the crowdfunding platform could be exempted from this Directive.

- Prospectus Directive

It is unlikely that equity or debt crowdfunding platforms fall under the scope of the Prospectus Directive since for this to apply an offer of securities or investment products of up to 2,5



million EUR within a period of 12 month would have to be observed. Exemptions are subject to very strict limits.

- Act on unfair commercial practices (*Wet onnerlijke handelspraktijken*)

The crowdfunding platform or the entity that provides the investment information related to a crowdfunding transaction may be held liable if the practices it conduces are misleading or incorrect towards the consumer.

- AIFMD

Although crowdfunding may qualify as an alternative investment fund such issue has not yet been addressed probably due to the fact that most of the crowdfunding platforms take the form of the equity/debt model.

- Additional regulations

- Anti- money laundering rules;
- Act on protection of personal data;
- Act on unfair trade practices;
- Act on consumer credit;
- Dutch civil code.



5.2.6. UNITED KINGDOM

In the UK some platforms operating under the equity model, and applying only to institutional investors, have obtained an authorisation from the Financial Conduct Authority (FCA) – that considers it investment based crowdfunding, as well as debt based crowdfunding - whereas others have applied exemptions from the regulatory regime. The promotion of the services or products provided by the crowdfunding platform constitutes financial promotion, which shall be either fully authorised by the FCA or provided by an FCA, authorised firm. Exemptions to this regime apply if the platform creates a shareholder relationship with all funding subscribers and a parent/subsidiary relationship with fund-seeking subscribers; or are only accessible to sophisticated, high net and professional investors. If no exemption applies, the contents of the website will have to comply with chapter 4 of the FCA Conduct of Business Sourcebook so that they are clear, fair and not misleading.

Also, if the crowdfunding entails investing in a collective scheme, more stringent rules apply and therefore crowdfunding platforms tend to avoid this model.

The crowdfunding lending model is quite popular since it would fall outside banking regulation until July 2013 when the Financial Services Markets Act 2000 Amendment 2 Order 2013⁹¹ has imposed that “operating an electronic system in relation to lending” by peer-to-peer lending platforms should be treated as a regulated activity as from 1 April 2014 – what the FCA identifies as loan based crowdfunding. The majority of the lending platforms are regulated as mortgage brokers or as consumer credit brokers regulated by the Office of Fair Trading, covered by the Financial Services Markets Act. Therefore, crowdfunding lending platform operators would have to be authorised by the Financial Conduct Authority unless exemption applies. The FCA published a review of the regulatory regime for crowdfunding where it is stated “we (FCA) see no need to change our regulatory approach to crowdfunding, either to strengthen consumer protections or to relax the requirements that apply to firms”.⁹²

The donations or rewards model, and invoice trading, fall outside the scope of financial regulation, and therefore of the FCA.

Other regulations that may apply to crowdfunding platforms in the UK:

- **Alternative Investment Funds Managers Directive:** The AIFMD application to crowdfunding platforms is reduced in the UK since it has been transposed with a light touch regime related to fund structures below 100 million EUR, which also covers retail investors. In any case, the platform operator (fund manager) would either have to register with the FCA as a small AIFM and present annual reports regarding the funds being managed, or be an authorised as a small AIFM thus complying with a limited conduct of business and capital requirements;
- **Prospectus Directive:** Regarding the application of the Prospectus Directive, most crowdfunding platforms in the UK fall under the exemption for offers of less than 5 million EUR in a 12-month period;

⁹¹ The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013, 25 July 2013

⁹² A review of the regulatory regime for crowdfunding and the promotion of non-readily realisable securities by other media, Financial Conduct Authority, February 2015



- **Payment Services Directive:** The transfer of funds through the platform between the investor and the activity to be funded may be considered has money remittance and therefore would fall under the scope of the Payment Services Regulations from 2012. This means that the crowdfunding platform would need an additional authorisation from the FCA to provide services payments. They may however be exempted as “commercial agents” since they may have an authorisation for negotiating and concluding contracts on behalf of the funder and the fund seeker.

- **Consumer credit:** some platforms restrict their lending to bodies corporate, otherwise they may fall under the scope of the of the Consumer Credit Act 1974 (as amended in 1986) (CCA) since they might be considered as consumer credit or consumer hire agreements if the borrowers/hirer is not a body corporate or a partnership of four or more persons. If the consumer would be allowed in a platform a CCA license would be required with implications on the form and content of the lending agreement. The application of the CCA would also imply the application of UK anti money laundering regulations.



6. LEGAL FRAMEWORK APPLICABLE TO COOPERATIVES

Unlike the crowdfunding legal framework, the cooperatives are a well-known legal entity in the Member States and with a clear European and national legal framework. Nevertheless, in some areas, it may be difficult to identify and distinguish the cooperatives from crowdfunding.

A cooperative is an association of persons or legal entities that have a common economic, social or cultural goal, with a democratic structure, jointly owned and an equitable and fair distribution of the net profit.

The European Commission published a [Communication on the promotion of cooperatives in Europe](#)⁹³ in 2004 that calls for “*the promotion of the greater use of cooperatives across Europe by improving the visibility, characteristics and understanding of the sector; the further improvement of the cooperative legislation in Europe; the maintenance and improvement of cooperatives’ place and contribution to community objectives*”.⁹⁴

Although each Member State has a regulatory framework for cooperatives with different traditions, there is a common definition that is applied. Every Member State authorises the creation of cooperatives but in some cases these are not allowed to operate in some sectors. In Portugal and Spain there are specific tax treatments for these legal forms.

In what concerns cooperatives in Europe, the Renewable Energy Sources Cooperatives (RESCOOP) is an initiative supported by the Intelligent Energy Europe Program that aims to promote renewable energy through citizens cooperatives. The project RESCOOP 20-20-20 published a [report with the best practices](#)⁹⁵ in Europe used by cooperatives with renewable energy projects. The RESCOOP 20-20-20 was launched in 2012 and we refer to its comprehensive work on the cooperatives legal aspects.

6.1 EU Regulation on the Statute for a European Cooperative Society

The [Regulation](#)⁹⁶, adopted in 2003, sets up the statute for a European Cooperative. It allows cooperatives to have a single legal framework and legal personality in every Member State enabling them to operate throughout the EU.

The Regulation requires:

1. For the formation of a European cooperative:
 - Five or more persons resident in at least two Member States, or

⁹³ Communication from the Commission to the Council and the European Parliament, the European Economic and Social Committee and the Committee of Regions on the promotion of cooperative societies in Europe, 23 February 2004;

⁹⁴ Communication from the Commission to the Council and the European Parliament, the European Economic and Social Committee and the Committee of Regions on the promotion of cooperative societies in Europe, 23 February 2004, page 4;

⁹⁵ Report RESCOOP 20-20-20, Best practices;

⁹⁶ Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE)



- Five or more persons and companies and firms resident in at least two different Member States, or
 - Companies and firms governed by the law of at least two different Member States, or
 - Merger between cooperatives or conversion of a cooperative;
2. Capital must be divided into shares and the minimum capital is of 30,000 EUR;
 3. The main objective is the satisfaction of its members' needs and the development of their economic and social activities;
 4. The European cooperative must have legal personality.



6.2. National regulations on cooperatives⁹⁷

6.2.1 FRANCE

In France the [Law no 47-1776 of 1947](#)⁹⁸ regulates the cooperative sector but the rules on the limited company and on the joint stock company complete the legal framework. The complexity of French cooperative legislation is the main obstacle to the use of this legal form. Although cooperatives under French law use the common solutions in Europe, innovative solutions also apply. In some sectors the federations are responsible for their supervision and some cooperatives may benefit from a different tax treatment.

6.2.2 GERMANY

The Cooperative Societies Act of 1889 ([GengG](#))⁹⁹ regulates Germany's cooperative law. In 2006 it was amended to adjust the provisions of GenG to the Statute for a European Cooperative Society and with the aim of enhancing the conditions for the small and medium cooperatives. The minimum number of members was reduced and investor-members are allowed.

There are few exceptions to the one person, one vote rule and the membership in a cooperative auditing federation is mandatory.

6.2.3 PORTUGAL

The [Cooperatives Code](#)¹⁰⁰ sets out the legal principles for cooperatives in Portugal and defines the 12 different types of cooperatives allowed. Special laws regulate each type of cooperative in particular. The non-profit way of conduct is compulsory as referred to in the definition of cooperatives. The law distinguishes between dividends on paid-capital and patronage refunds. One legal obstacle to the use of the cooperative form is the impossibility to derogate from the one member, one vote rule. Cooperatives might be financed by member's participation in the formation of capital and through loans.

6.2.4 SPAIN

In Spain the cooperative law is complex since the Autonomous Regions have exclusive competences in this area, therefore there are 14 cooperative laws. The cooperative law of one region can only apply to cooperatives that have their main activity in that region's territory. The [law 27/1999](#)¹⁰¹ applies to cooperatives that operate in more than one region and to cooperatives in Ceuta and Melilla.

⁹⁷ This text has been drafted based on the studies on the implementation of the Regulation 1435/2003 on the Statute for a European Cooperative Society: "Final Study Executive Summary and Part I: Synthesis and comparative report the responses provided to the questionnaire" and "Final Study Part II. National Reports"

⁹⁸ Loi n° 47-1775 du 10 septembre 1947 portant statut de la coopération
Version consolidée au 24 mars 2012

⁹⁹ Genossenschaftsgesetz in der Fassung der Bekanntmachung vom 16. Oktober 2006 (BGBl. I S. 2230), das zuletzt durch Artikel 8 des Gesetzes vom 15. Juli 2013 (BGBl. I S. 2379) geändert worden ist

¹⁰⁰ Código Cooperativo, Lei Nº 51/96 de 7 de Setembro, alterado pelo Decreto-Lei nº 343/98, de 6 de Novembro, Decreto-Lei nº 131/99, de 21 de Abril, Decreto-Lei nº 108/2001, de 6 de Abril, Decreto-Lei nº 204/2004 de 19 de Agosto, Decreto-Lei nº 76-A/2006 de 29 de Março e Decreto-Lei nº 282/2009 de 07 de Outubro

¹⁰¹ Ley 27/1999, de 16 de Julio, de Cooperativas



The one person, one vote rule may be derogate in some cases and it is possible that one person has more than one vote in proportion to the member's activity in the cooperative. A specific tax treatment for cooperatives applies.

Cooperatives are often chosen by RES promoters in Spain since they are considered to allow for transparency, citizens trust, unlimited capital contributions by citizens, and easy to grow counting with the participation of militant members and volunteers. However it takes time to take decisions due to its composition and contributions to the cooperative joint stock must be refundable.

The government of Catalonia approved a new draft of the cooperatives law¹⁰² and the discussion in the regional parliament is on going. The adoption of the final text is expected by the spring 2015. The objectives of the new law are to improve the conditions for the creation, growth and management of cooperatives and to cut red tape.

6.2.5 THE NETHERLANDS

The second book of the civil code¹⁰³ regulates the cooperatives, legal persons, associations and private companies limited by shares. The legal framework gives autonomy to the cooperatives so in some aspects the Dutch law does not follow the traditional cooperative principles. The cooperative insurance companies have a special regulation but it is the only special law regarding cooperatives. For forming a cooperative two members is the minimum number of people or legal entities. The one person, one vote is the default rule established in the Dutch Civil Code but the cooperative statutes may derogate this rule. The cooperatives have a special tax treatment.

Cooperatives are considered as very democratic and therefore very easy for companies and citizens to work together.

In order to set up a cooperative in the Netherlands, any individual may do so at a notary, what is a smooth process, as long as in its statutes it is stated that the cooperative exists for the needs of its members.

6.2.6 UNITED KINGDOM

In the UK a cooperative can assume different legal forms (including the forms permitted under the Companies Act 2006¹⁰⁴). The Financial Services Authority is responsible to access if the statutes of the cooperative are in accordance with the cooperative principles with a very broad limit of the *bona fide cooperative*. Therefore, the new cooperative is free to choose the provisions of the statutes and submit them to the Financial Services Authority for its approval. The legislation does not define a minimum level of shared capital, or legal reserves, or the functioning of the cooperative. The supervision of the cooperative activity is a responsibility of the members and, generally, the principal one member, one vote applies.

Cooperatives that are constituted as 'Industrial and Provident Societies - IPS' can issue bonds or shares considering that they are exempted from FCA financial regulations. However, they

¹⁰² Projecte de llei de cooperatives, Tram. 200-00020/10

¹⁰³ Burgerlijk Wetboek Boek 2, Rechtspersonen

¹⁰⁴ Companies Act 2006



must be registered with the FCA in order to guarantee that they operate under the framework of the IPS legislation - a company that exists for the benefit of its members, and of its members and wider community.

An IPS can also qualify as a Community Benefit Society. This means that the asset is 'locked' for the benefit of the community.



7. PERCEPTION FROM RES PROMOTERS AND PLATFORM OWNERS - NATIONAL MODELS AND LEGAL BARRIERS

7.1 FRANCE¹⁰⁵

In France equity crowdfunding is available as an alternative financing source for new RES projects. However it is considered too costly. The company form usually used is the *société par action simplifiée* – SAS – a limited liability company with lighter requirements, although for community energy projects the *société en commandite par action*¹⁰⁶ (SCA) or *Clubs d'investissements*¹⁰⁷ are more used.

Regarding the regulation applicable to crowdfunding platforms, no foreigners can invest in the French projects or platforms, nor can these projects be located outside the country. Also, there are no tax incentives available for investors in RES projects in France. Since 1 July, projects can be publicly announced.

Usually it takes about one month to have the permit on *Conseiller en Investissement Financier* (CIF) but this permit is not sufficient. Within the new regulation to be soon adopted it should take a few months to get the new permit on *Conseiller en Investissements Participatifs* (CIP).

As main advantages identified regarding the equity crowdfunding model is the fact that bonds are safer than stocks and more easily understood by investors, and citizens who invest have their return after one year. However, this model also presents some shortcomings, in particular, that they provide for no liquidity and that investors do not 'own' the RES project. Other forms that can be chosen but which are considered has having some shortcomings are loans that do not allow for a pass portable product throughout Europe, and stock since they might be considered too risky for the general public.

BARRIERS IDENTIFIED

1. Equity crowdfunding is too costly
2. No foreign investment is allowed in French RES projects or crowdfunding platforms
3. No tax incentives for investors in RES projects

¹⁰⁵ This text has been drafted based on the responses provided to the questionnaire by Lumo-France

¹⁰⁶ EPI (Energies Partagé Investissement) - <http://www.energie-partagee.org/faq-page#t12n102>

¹⁰⁷ <http://www.beganne.fr/environnement/projet-eolien-citoyen/les-acteurs-du-projet/>



7.2 GERMANY¹⁰⁸

Most project finance instruments are available in Germany to fund RES individual projects. We can refer in particular to crowdfunding equity and debt, venture capital, bank loans via KfW and other instruments, such as Mezzanine finance and cooperatives (*Genossenschaften*).

Usually such investments are pursued through a limited liability company (*gesellschaft mit beschränkter Haftung - GmbH*). Acquiring a licence may take about 5 months following the registration at the IHK (*Chamber of Commerce*) and application at the Commercial Register (*Gewerbeamt*).

The choice of the underlying entity that is the loan participant has an impact on the credit rating. A special purpose vehicle can reduce risks because of its ring-fencing effect.

Community RES projects, which can be publicly announced, are usually done through the setting up of cooperatives shares¹⁰⁹ with a 20 years maturity linked to the feed-in tariffs. Some offer funds and loans. These are considered as being very efficient in local communities via direct communication.

The traded financial product is considered simple to understand and transparent. However, the legal framework is very heavy: a cooperative/crowdfunding platform might need five different licences from different institutions depending on the type of financial instrument it intermediates. Also, its subordinate nature is less flexible than other instruments. Therefore, it is important to undertake further due diligence to assess the risk profile of the loan participant.

The main shortcoming in the referred crowdfunding platform model is reaching out to investors via online marketing channels. However, cooperatives are considered as the most efficient form for direct communication and work with a local community.

Other common forms are *KG-Strukturen (GmbH & Co. KG)* and *Gesellschaften bürgerlichen Rechts (GbR)*. The financial instruments are typically funds and loans. Investors in this type of projects are usually non-professional investors that have to be Germans. However, projects may be located outside Germany.

For a credit intermediary for subordinate loans to set up an online platform it is necessary to obtain a license under the *Gewerbeordnung (GewO)*¹¹⁰ by the *Gewerbeamt*. A license under the *Kreditwesengesetz*¹¹¹ is not required.

The main obstacles pointed out to set up a crowdfunding platform are the wide scope of legislation that applies, the legal requirement for the website and obtaining a license.

¹⁰⁸ This text has been drafted based on the responses provided to the questionnaire by Greencrowding.

¹⁰⁹ By 2013, 888 renewable cooperatives were initiated in Germany - <http://www.kommunal-erneuerbar.de/de/202/energiegenossenschaften/einleitung.html>

¹¹⁰ Gewerbeordnung (GewO) § 34c

¹¹¹ Kreditwesengesetz § 32



BARRIERS IDENTIFIED

1. The legal framework is very heavy (platforms or cooperative might need up to five different licences
2. In some of the forms, the investment can only be made by German citizens
3. Crowdfunding platforms have to comply with a very wide scope of legislation
4. The legal requirements to set up a crowdfunding website and the procedures to obtain a licence are also considered burdensome



7.3 PORTUGAL¹¹²

In Portugal the experience with community energy projects is very reduced. Crowdfunding would be crucial to allow for large-scale projects. The most common legal company structures used by RES promoters to set up their projects are limited liability companies and cooperatives. Partnerships may also be created by groups of citizens, but these will have to comply with strong bureaucratic requirements what will limit their ability to grow. Usually the projects are financed with own funds or by investment funds and banks, which apply very unattractive conditions to promoters. Financing may be done through direct loans where the investor loans a certain amount to the company/cooperative according to certain pre-established conditions. Cooperatives may create investment instruments which are however limited to twice the own funds of the cooperative.

Foreign investors are allowed to invest in and be part of RES projects in Portugal although they cannot be publicly publicized. This is so since, despite the large set of rules applicable to the public dissemination of financial product, the current framework is not drafted so to allow for the existence of small financial intermediaries. Therefore, investment is raised through pre-established contacts and via word-of-mouth. RES promoters will not be able to develop their project outside Portugal. These factors, together with the very high level of bureaucracy in what concerns the acquisition of business permits, leads to the existence of very limited business models available to RES promoters in Portugal.

In what concerns tax incentives, these can be considered independently of renewable energies, but depending on the fact that the financing of the projects is done through private loan contracts. This allows investors to benefit from a reduced tax on interests (16,5% instead of 28%).

BARRIERS IDENTIFIED

1. Portugal has reduced experience with community energy projects
2. Lack of a single regulatory framework applicable to crowdfunding
3. There are strong bureaucratic requirements to create partnerships to invest in RES projects by a group of citizens
4. The investment in RES projects cannot be publicly publicized
5. RES promoters cannot develop their project outside Portugal

¹¹² This text has been drafted based on the responses provided to the questionnaire by BOAENERGIA. BOAENERGIA does not have a platform, they work through backend operations not publicly visible through the website, also due to the public dissemination restrictions.



6. High level of bureaucracy to acquire licences

7.4 SPAIN¹¹³

The more common legal forms used to carry out RES projects in Spain are partnerships, cooperatives, limited liability companies (the most used to fund RES projects) or even a single person that can be the owner of the installation. The most common financing mechanism is through venture capital.

Limited liability partnerships might be owned by the RES cooperatives. Due to fiscal, economic and administrative purposes it is advisable to create one vehicle for each RES installation.

Community projects, which may be set up through cooperatives, special vehicles and limited liability companies are not very common in Spain and big companies mainly in what concerns wind and concentrated solar power technologies own most RES projects. Regarding photovoltaic projects, they are usually done through a specific company created to own the plant, participated by several partners, either companies or individuals.

RES projects might be opened to citizens through their participation in the cooperative and they might participate in its financing in exchange of a return, opened to both domestic and foreign investors. However, in the case of green electricity consumers cooperative, since energy can only be sold in Spain (except in the Canary Islands where more legal proceedings are required), participants are nationals. Participants in the cooperative are also responsible for announcing the projects at stake since they cannot be publicly announced.

As previously mentioned, in Spain there is currently no support scheme for renewable energies¹¹⁴. A renewable energy project, also if based on citizen investment, will have to comply with the following legal and financial requirements in order to be set up¹¹⁵:

Legal requirements:

1. A building permit by the Municipality, when required, will have to be obtained;
2. An administrative authorisation for the installation will have to be granted by the authorities of the Autonomous Community, for installations of more than 100 kW – if based on citizen investment this requirement may not apply;
3. Obtain a connection point from the Distributor: granted by the company holding the monopoly of the Energy Distribution in the specific territory, e.g. in Catalonia from Endesa Distribución;
4. Obtain the condition of market actor or hiring a market representative, in order to be able to sell electric energy to the grid;
5. For citizen investments, a legal entity would have to be created so that citizen investment could be gathered.

Financial requirements:

¹¹³ This text has been drafted based on the responses provided to the questionnaire by SOM ENERGIA

¹¹⁴ See 3.5 of this report

¹¹⁵ See Article 4, Royal Decree-Law 6/2009



1. Offering a guarantee for grid access¹¹⁶ to the “Caja General de Depósitos de la Administración General del Estado”, depending on the size of the installation¹¹⁷:
 - Any installation of less than 10 kW: no need for a guarantee
 - PV installations between 10 and 100 kW: 20 EUR/kW
 - PV installations over 100 kW: 500 EUR/kW
 - Rest of installations: 20 EUR/kW
2. Having own resources or a loan equivalent to at least 50% of the amount necessary for the whole investment of the installation;
3. Having an agreement for the acquisition of the necessary components for the installation of at least 50% of the value.

It may take about 3 months to set up as a cooperative, 9 months to obtain an electricity-selling permit, and for the time being, for crowdfunding no special permits are required.

A key barrier to RES projects is the lack of a single regulatory framework applicable to crowdfunding, which leads to legal uncertainty, although, as previously said, this legislation is currently being finalised. Even though in general terms, very few projects are over the million euros, in the renewables case, it is very likely that many projects will be over this amount.

BARRIERS IDENTIFIED

1. No support scheme for renewable energy
2. Lack of a single regulatory framework applicable to crowdfunding
3. High level of bureaucracy to acquire licences

¹¹⁶ When support scheme mechanisms existed, a guarantee for opting to these mechanisms was needed, but this is not applicable any more, as there is no support scheme of any kind for new installations.

¹¹⁷ This guarantee is not refundable if the project is not finally developed for reasons other than those imputable to the Administration.



7.5 THE NETHERLANDS

In the Netherlands, the main alternative sources of financing to facilitate new projects related to renewable energy sources (RES) we can point out crowdfunding equity and crowdfunding debt, venture capital, bank loans and governmental investment funds.

Cooperatives have been identified as a company structure well suited to RES projects, in particular to wind and solar community projects, which may also be located in foreign countries. They may be financed through direct investment based from its members, including foreign members, who provide loans to the cooperative, as stated in the loan agreement previously signed by members of the cooperative. They may also be financed through capital loans from banks. Investors do not benefit from tax exemptions.

Investment opportunities in RES can be publicised although taking into account certain limits:

- Cooperatives cannot promise a secure dividend; if they would do so it becomes a financial product that is subject to regulations of the AFM (Authority Financial Market);
- Members decide on the dividend every year on the Annual General Meeting;
- Only members can invest.

BARRIERS IDENTIFIED

1. Lack of a single regulatory framework applicable to crowdfunding



7.6 UNITED KINGDOM

In the United Kingdom, three main groups of financing mechanisms are accessible to retail investors despite certain caveats. These are:

1. Regulated Investment models (companies issuing regulated investment products either directly or via a crowdfunding platform)
 - a. Fund or Listed Security based financing (own or manage projects within a listed fund structure)
 - b. Equity Based Crowdfunding
 - c. Debt security based crowdfunding
 - d. Mini-bonds
 - e. Loans based crowdfunding or peer to peer / business lending
 - f. Specialist Building Society or Mutual Society savings accounts and bond issuance
2. Investment models exempt from financial regulation
 - a. Industrial and Provident Societies (IPS) (Society run for the benefit of its members)
 - b. Community Shares issued by IPS (Community benefit company – which as well as the Community Interest Company provide an “asset lock” which precludes the company selling the asset for the benefit of shareholders alone)
3. Unregulated crowdfunding models (models outside the scope of regulation).
 - a. Donation Based Crowdfunding
 - b. Rewards Based Crowdfunding

There are certain models that are exclusive for institutional investors or ‘high net worth’ individuals.

Regarding the company models that are more common in the UK regarding crowdfunding platforms and which can apply to RES projects, we may point out:

- Public Limited Company structure (PLC), which may be used to issue regulated debt securities (debentures) that may be listed and are tradable and transferable. As referred to above (see 5.2.6) if the issuance falls below 5 million EUR over a period of 12 month, no prospectus approval by the FCA is needed. This type of companies may also issue ‘mini bonds’ which are unlisted and non-transferable bonds (with shorter term maturities) with a lower level of regulatory approval;
- Limited Liability Companies (Private companies) can issue loans in conjunction with a regulated peer to peer lending/ loans based crowdfunding platform; they may also issue bonds and shares to retail investors as a private offer limited to 150 subscribers;



- Cooperatives, constituted as 'Industrial and Provident Societies' can issue bonds or shares as they are exempted from financial promotions regulations by the FCA (although the IPS itself must be registered with the FCA to ensure it operates in the spirit of the IPS legislation – i.e. a company that exists for the benefit of its members or members + wider community). These can also qualify as a Community Benefit Society what means that the asset is 'locked' for the benefit of the community. This is similar to the Community Interest Company which enables a similar 'asset lock' and has controls on what percentage of profits can be distributed to shareholders.

Often companies are set up through direct investment but usually the asset is owned and managed by a special purpose vehicle constituted as an operating Public Limited Company usually wholly owned by the developer or issuer company. The peer-to-peer lending or loans based crowdfunding model allows direct investment without the need for an SPV.

UK RES projects or platforms can be located in other countries and allow for foreign investment. Although there are no specific tax incentives for investors, individual savings account may be available to UK investors within the next 12 months for crowdfunding based in debentures and loans.

Investment opportunities from firms authorised by the FCA may be publicised but the first investment from individuals is limited to 10% of net investable assets. Regarding peer-to-peer loans no restrictions apply to publicity although rules on misleading advertising apply.

It may take two years to acquire all licences to set up a crowdfunding platform using debentures and loans under the form of a public limited liability company (PLC). It is considered that the debenture investment approach offers greater transparency and flexibility for investors who may buy and sell their investment when they consider adequate.

Further to the April 2014 Regulation, the peer to peer model has analogous advantages, although might be considered as offering a lower level of investor protection.

In what concerns the creation of the online platform, third party suppliers are responsible for the platform's compliance with the permissions needed regarding the handling of client's money and payment services provisions. Also, the FCA authorisation covers all the responsibilities. The regulatory costs of compliance and capital requirements of setting up the platform are very similar between peer to peer / loans based crowdfunding platforms. The regulatory process currently takes less than 6 months.

BARRIERS IDENTIFIED

1. The procedures to acquire all licences to set up a crowdfunding platforms may take two years
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8. CONCLUSION

In order to sum up the results of our main analysis pursued during this report regarding the legal framework in which RES promotes projects are developed, we would like to stress that:

- There is a wide variety of national legislation that may apply to crowdfunding and cooperatives across Member States, also depending on the model chosen by the platform owner;
- This variety also results from the discretion that in some cases Member States have when transposing EU Directives;
- The amount of legislation with which crowdfunding platforms and cooperatives have to comply with are considered as too burdensome and are referred to, therefore, as a strong barrier to the development of RES projects;
- The most common company form used, and which helps to reduce RES promoters and platform owners bureaucracy and costs are limited liability companies, which may be the owners of the cooperative itself;
- Tax incentives also vary widely depending on the national energy policy, the financing form used for the projects, etc.;
- Also, the lack of a single regulatory framework across Member States makes it difficult for RES promoters and platform owners to pursue their businesses cross-borders and the difficulties in publicising the projects hinders foreign investment in some countries (e.g. Portugal, Spain);
- A very important step for the development of energy crowdfunding projects and platforms would be in one hand the adoption of a single national regulatory framework that would make easier the process of licensing and conducting business, and in the other, the adoption of a single EU framework which would allow for the creation of a real internal market for crowdfunding and RES projects.



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- Règlement Général de l'Autorité des Marchés Financiers

GERMANY

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UNITED KINGDOM

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- The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013, 25 July 2013



ANNEX 1 – TERMS OF REFERENCE AND QUESTIONNAIRE

Terms of reference

- Identification of the existing national legal and financial requirements to set up RES projects;
- Identification of the legal and financial requirements regarding citizen investment in RES projects;
- Identification of the existing alternatives, and their legal and financial requirements, for direct citizen investment in RES projects in your country;
- Identification of the barriers to citizen investment in RES projects, at national level, and their relation to the identified alternatives;
- Identification of the barriers to cross-border citizen investment in RES projects and their relation to the identified alternatives;
- Identification of the role of national financial authorities regarding alternative financing of projects e.g.: crowdfunding, remuneration of investment on cooperatives, etc.
- Identification of national rules applicable to national online crowdfunding platforms, advantages and shortcomings

Questionnaire

1. What alternative sources of financing aiming at facilitating individual projects, start-ups or SMEs related to renewable energy sources are available in your country:

(Please highlight the right answer)

- a. Crowdfunding equity
- b. Crowdfunding debt
- c. Venture capital
- d. Other – *please specify*



2. What company structures are you using in your country to fund RES projects:

(Please highlight the right answer)

- a. Limited liability companies
- b. Limited liability partnerships
- c. Cooperatives
- d. Others – *please specify*

3. Do you do it through direct investment or through a special purpose vehicle?

4. Which forms of community energy projects have been used in your country?

5. Regarding your business model, please answer the following questions:

5.1 Can you have foreign investors in your projects or platforms?

5.2 Can you have projects that are located outside of your country?

5.3 Are there any tax incentives available for investors? Can you please develop?

5.4 Can your investment opportunities be legally publicly announced? If not, why?

5.5 How long did it take you to obtain the legal permits for your business model?

5.6 What are in your opinion its advantages and shortcomings/barriers?

5.7 Why did you not choose another model? Which are the advantages and shortcomings?

6. Setting up the online platform – what legal requirements do apply in your country (transposition of Directive on e-commerce, etc.)?

7. What are, in your opinion and from a practical point of view, the main obstacles faced e.g. compliance costs and other costs on setting up the online platform? Minimal capital requirement, set up fees paid to a regulator, what type of regulations do you comply with?
