



**LEGALINK**  
INTERNATIONAL BUT PERSONAL

# EQUITY CROWDFUNDING & PEER-TO-PEER LENDING

2019 1ST EDITION



## INTRODUCTION

Crowdfunding has already an established and proven recognition worldwide as a powerful alternative financing tool. Three main points should be signaled in this respect. On the one hand, the volume of the crowdfunding market keeps increasing sharply at global level. On the other hand, the crowdfunding market is very dynamic as new crowdfunding platforms have recently started to operate. Finally, the projects to be financed through crowdfunding platforms are more and more diverse.

In this context, at a time when crowdfunding regulation is subject to discussion around the globe (namely in the context of the Proposal for a EU Crowdfunding Regulation), it seems important to assess the legal responses from various relevant jurisdictions, in respect to Equity Crowdfunding and Peer to Peer Lending. Such is the purpose of this publication.

This book is dedicated to the memory of Georg Van Daal, Former Deputy Head of Legalink FinTech Forum. Georg was a brilliant lawyer and a partner at Ekelmans & Meijer from 2014 to 2018. He was key to the structuring and to the development of this project but unfortunately could not live to see its final form. He is dearly missed.

October 2019

Paulo Câmara  
Managing Partner of Sérvulo & Associados  
Leader of the Legalink FinTech Forum

## INDEX

ARGENTINA.....	04
Nicholson Y Cano Abogados	
AUSTRALIA.....	09
Piper Alderman	
CHILE.....	14
Grasty Quintana Majlis	
COLOMBIA.....	18
MTA	
CZECH REPUBLIC.....	26
Felix A Spol.attorneys At Law	
GERMANY.....	33
Rittershaus	
HONG KONG.....	41
Charltons	
ITALY.....	48
Cocuzza E Associati Studio Legale	
LATVIA.....	53
Vilgerts	
LIECHTENSTEIN.....	57
Gasser Partner Rechtsanwälte	
MALAYSIA.....	61
Azman Davidson & Co.	
MALTA.....	66
DF Advocates	
MEXICO.....	71
Ramos, Ripoll & Schuster	
NEW ZEALAND.....	80
Lowndes Law	
POLAND.....	85
FKA Furtek Komosa Aleksandrowicz	
PORTUGAL.....	99
Sérvulo & Associados	
RUSSIA.....	104
Intellect	
SOUTH AFRICA.....	112
Fluxmans Inc.	
SOUTH KOREA.....	118
Barun Law	
SPAIN.....	124
Ventura Garcés & López-Ibor	
SWEDEN.....	128
Hellström	
TURKEY.....	141
Gun+Partners	
UK.....	146
Mishcon De Reya	
UNITED KINGDOM.....	151
Weightmans	

## GERMANY RITTERSHAUS

### Preliminary Remark

Before we answer the following questions from the German law perspective, we would like to briefly address the terminology used in Germany in the field of crowdfunding in order to avoid misunderstandings. The German Federal Financial Supervisory Authority (BaFin) distinguishes between crowd investing, which corresponds to the following definition of Equity Crowdfunding, and crowdlending, which corresponds to the following definition of Peer-to-Peer Lending. This information is intended to help you better understand the publications of BaFin, most of which are also published in English.

### Equity Crowdfunding

For the purposes of the following, 'equity crowdfunding' means raising capital in an offering of shares (or instruments convertible into shares) through an online platform

#### **1. Has your country introduced specific laws or regulations governing equity crowdfunding, or is it regulated under general securities or other laws?**

Germany has not introduced specific laws or regulations governing equity crowdfunding. The different types and characteristics of crowdfunding are regulated under the existing securities and capital market laws.

Both the platform as well as the borrower, respectively the issuer of the shares, may require authorisation. Which of the existing provisions must be observed depends on the specific structure of the crowdfunding.

The following authorization requirements can be of relevance for the operator of a crowdfunding platform:

- authorisation requirements pursuant to the German Banking Act,
- the German Payment Services Supervision Act,
- the German Capital Investment Code or
- other obligations, particularly arising from the German Securities Trading Act

The issuer of the shares may be required to publish a prospectus pursuant to

- the German Capital Investment Act or
- the German Securities Prospectus Act.

Which of the aforementioned provisions and requirements apply depends on the structure of the platform and the sort of shares or convertibles.

#### **2. If your country regulates equity crowdfunding, what are the names of the government agencies responsible for regulating it?**

The government agency which is responsible for the regulation of the issuer of shares and of the

crowdfunding platform is the German Federal Financial Supervisory Authority.

### **3. Are there limits on the amounts that can be raised by crowdfunding companies?**

The German banking supervisory and capital market laws do not set a limit on the amounts that can be raised by crowdfunding companies.

### **4. Are there restrictions on the types of purchasers to whom shares can be offered?**

There are no restrictions on the types of purchases under German corporate or security law. If the issuer will offer shares or units of a special AIF according to the German Capital Investment Code, the group of purchasers is limited to semi-professional or professional investors. However, it is unusual to offer such financial instruments via crowdfunding.

### **5. What information needs to be disclosed to potential purchasers, and are offer documents or marketing materials required to be registered or approved by your country's regulators?**

Which information is to be published depends on whether the platform operator or the issuer is obliged to publish a sales prospectus. If a prospectus has to be published, it contains a wide range of detailed information, in particular about the issuer, the securities offered and the business plan of the issuer. If there is no prospectus requirement, there are no specific requirements for the disclosure of information.

If capital investments or securities are offered through the crowdfunding platform, the crowdfunding platform and/or the issuer of the shares or capital investments may be subject to prospectus requirements pursuant to the German Capital Investment Act or the German Securities Prospectus Act.

If the issuer offers capital investments such as bonds, convertibles or profit participation certificates, the German Capital Investment Act is applicable. If the issuer offers securities such as shares, the German Securities Prospectus Act is applicable.

Pursuant to the German Capital Investment Act there are two information requirements which come into consideration: (i) a capital investments information sheet, which is comparable to the key investor information document of investment funds, and (ii) a complete capital investments prospectus.

The capital investments information sheet provides brief information for the investor and is like a sort of 'instruction leaflet'. The purpose of this instruction leaflet is to increase the transparency of the capital investment and the comparability with other financial instruments. The information sheet must always be published whenever capital investments are offered.

Generally, an undertaking which publicly offers capital investments in Germany is also obliged to publish a complete prospectus. A publication of a prospectus is not required for offers where the number of units or shares offered in the same capital investment does not exceed 20, where the selling price for all units or shares in a capital investment offered within a period of 12 months does not exceed €100,000, or where the price of each unit or share in a capital investment offered amounts to at least €200,000 per investor.

A further exemption from the requirement to publish a complete prospectus applies to crowdfunders. There is no obligation to publish a prospectus for the capital investments offered if they are brokered via an internet-based services platform and the selling price for all capital investments of the same issuer does not exceed €2.5 million.

If one of the aforementioned exemptions applies, the crowd investing platform is only required to publish the short capital investments information sheet. This information sheet - as well as a complete prospectus where mandatory - has to be approved by BaFin before the issuer, or respectively the crowdfunding platform, can start the offer of the shares or convertibles. The same applies for a prospectus under the requirements of the German Securities Prospectus Act.

Pursuant to the German Securities Prospectus Act, a prospectus requirement only arises under said act if the public offer is made in Germany. Only in these cases is BaFin responsible for supervising the prospectus requirement and for approving the prospectus. A domestic connection exists if the prospectus will be addressed to investors domiciled in Germany. Generally, a domestic connection is assumed if the offer can be accessed from Germany.

This means that a prospectus is required in Germany if there is unrestricted online access to a public offer. If this is to be prevented, it must be clearly indicated who the offer is addressed to, pursuant to article 29(2) of the EU Prospectus Regulation.

(see to this section BaFin fact sheet on crowd investing)

#### **6. Is there any requirement for an equity crowdfunding platform and/or its operator, or a crowdfunding company, to be licensed or registered or to comply with any particular rules?**

Pursuant to section 32(1) sentence 1 of the German Banking Act, authorisation is required by anyone wishing to conduct banking business or provide financial services in Germany, if such businesses or services are to be conducted or provided commercially or on a scale which requires commercially organised business operations.

The operator of a platform conducts deposit business in the meaning of the German Banking Act if they accept funds from others as deposits or other repayable funds from the public, unless the claim to repayment is securitised in the form of bearer or order debt certificates. An authorisation requirement would come into question if, for example, the operator has the funds paid in by potential investors before the conclusion of specific contracts. This may be the case within the context of the user login process.

Furthermore, other authorisation requirements may arise for the operator of a crowdfunding platform if the platform operators broker or place financial instruments. In this case - depending on the structure of the platform and the shares/convertibles - the operator of the platform may require a licence for investment broking, contract broking, placement business or operation of a multilateral trading facility.

In addition to an authorisation requirement under the German Banking Act, an authorisation requirement under the German Payment Services Supervision Act also comes into question. This is the

case when the operator of the internet services platform receives money from investors and transfers it to the equity investment providers. It is then performing a money remittance business pursuant to the German Payment Services Supervision Act.

**7. Please provide any additional information you feel is important to understanding the regulation of equity crowdfunding in your country.**

As the platform operators regularly receive funds and forward those to the issuers in accordance with the structure frequently found in Germany, many platform providers work together with a bank. The bank then handles the necessary payment services so that the platform operator itself does not need a banking licence or a licence under the German Securities Supervision Act.

**8. Please identify a point of contact at your firm for equity crowdfunding-related enquiries.**

**CONTACT**

**Lars Schmidt** (Rechtsanwalt and Partner)  
lars.schmidt@rittershaus.net

[www.rittershaus.net](http://www.rittershaus.net)

## Peer-to-Peer Lending

For the purposes of the following, 'peer-to-peer lending' means lending by individuals to businesses or other individuals where an online platform is used to match lenders with borrowers.

### **1. Has your country introduced specific legislation or regulations governing peer-to-peer lending, or is it regulated under generally applicable laws?**

Germany has not introduced specific laws or regulations governing peer-to-peer lending. The different types and characteristics of peer-to-peer lending are regulated under the existing banking supervisory law and the prospectus requirements.

The following authorisation requirements can be of relevance for the operator of a peer-to-peer lending platform:

- authorisation requirements pursuant to the German Banking Act, and
- the German Payment Services Supervision Act.

The borrower may be required to publish a prospectus pursuant to

- the German Capital Investment Act.

Which of the aforementioned provisions and requirements apply depends on the structure of the platform and the business model.

### **2. If your country regulates peer-to-peer lending, what are the names of the government agencies responsible for regulating it?**

The government agency which is responsible for the regulation of the borrower and of the peer-to-peer lending platform is the German Federal Financial Supervisory Authority (BaFin).

If the platform operator operates credit brokerage, he requires a business licence. In this case, the relevant trade supervisory authority is the competent authority.

### **3. Are there any limits on the amounts that can be lent?**

The German banking supervisory law does not set a limit on the amounts that can be lent over a peer-to-peer lending platform.

### **4. Are there any restrictions on the types of persons who can lend and/or borrow, or restrictions on the rate of interest that can be charged?**

There are no restrictions on the types of lenders or borrowers or on the interest rates that can be charged.

### **5. Is there any requirement for the online platform and/or the lenders to be licensed or registered or to comply with any particular rules?**



Pursuant to section 32(1) sentence 1 of the German Banking Act, authorisation is required by anyone wishing to conduct banking business or provide financial services in Germany, if such businesses or services are to be conducted or provided commercially or on a scale which requires commercially organised business operations.

The operator of a platform conducts deposit business in the meaning of the German Banking Act if they accept funds from others as deposits or other repayable funds from the public, unless the claim to repayment is securitised in the form of bearer or order debt certificates. An authorisation requirement would come into question, if, for example, the operator has the funds paid in by potential investors before the conclusion of specific contracts. This may be the case within the context of the user login process.

The platform operators generally do not engage in credit business within the meaning of the German Banking Act, as they themselves do not offer loans to borrowers, but only broker them. The platform operators do not conduct credit business within the meaning of the German Banking Act, i.e. the granting of money loans and acceptance credits:

- if they either only broker the loans and use the services of licensed credit institutions for the actual granting of loans; or
- if, as a result of the nature of the contract chosen, they avoid the authorisation requirement by agreeing to a qualified subordinated loan.

In addition to an authorisation requirement under the German Banking Act, an authorisation requirement under the German Payment Services Supervision Act also comes into question. This is the case if the operator of the internet services platform accepts money from investors and passes this on to the equity investment providers. They are then conducting a money remittance business pursuant to the German Payment Services Supervision Act.

(see to this section BaFin fact sheet on Crowdlending)

If the activity of the platform operator is limited to brokering a loan agreement between a borrower and a credit institution and to brokering the conclusion of agreements on the purchase of receivables between the credit institution and several investors, he does not need a banking licence. In this case, he only needs a business licence.

The lender is deemed to conduct credit business within the meaning of the German Banking Act (granting of money loans and acceptance credits) if they grant money loans commercially or on a scale which requires commercially organised business operations.

However, if a licensed credit institution awards the loan and the lender/investor merely has the repayment claim transferred, then the lender/investor is not deemed to be conducting credit business. They then only acquire the repayment claims of the loans granted by the credit institution, and do not grant any loans themselves.

## **6. Are there any requirements applicable to marketing and promotional documents and activities?**

The obligations to publish a sales prospectus also apply to peer-to-peer lending. In this case, the publicly

offered partial amounts of the loan repayment claim are to be classified as capital investments and open up the scope of application of the German Capital Investment Act.

The offeror of the asset investment is obliged to publish a prospectus. The offeror is the one who is responsible for the public offer and/or who is externally recognisable to investors as the offeror. In crowdlending, the internet platform is usually not the provider and is therefore usually not subject to the prospectus requirement. In most constellations, the borrower is classified as the provider.

With regard to exemptions from the prospectus requirement, the same applies to peer-to-peer lending as to crowdfunding under question 5 above.

### **7. Are there any particular consumer protection provisions that apply?**

The obligation to publish a sales prospectus or at least an investment information sheet serves to inform the consumer and thus to protect his interests.

If only an investment information sheet has to be published, the provider must grant the consumer a 14-day right of withdrawal. The revocation period begins with the clear reference to the right of revocation, at the earliest however with the conclusion of the contract, and expires, at the latest, 12 months after conclusion of the contract.

### **9. Please provide any additional information you feel is important to understanding the regulation of peer-to-peer lending in your country.**

In most peer-to-peer lending constellations, a credit institution is included. The peer-to-peer lending then takes place in the following steps:

- Would-be borrowers place their investment ideas on a platform. Investors can pick which projects they would like to invest in.
- If there are enough investors, the platform brokers the conclusion of a loan agreement between a credit institution and the borrower.
- The credit institution then resells the repayment claim arising from the loan agreement in the form of partial claims to individual investors through agreements on the purchase of receivables, and transfers the receivables.

### **10. Please identify a point of contact at your firm for enquiries related to peer-to-peer lending.**

## CONTACT

**Lars Schmidt** (Rechtsanwalt and Partner)

[lars.schmidt@rittershaus.net](mailto:lars.schmidt@rittershaus.net)

[www.rittershaus.net](http://www.rittershaus.net)