

Status Artis: Research in the Law and Practice of Crowdfunding

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Published in:
Nordic Journal of Commercial Law

DOI:
[10.54337/ojs.njcl.2.7541](https://doi.org/10.54337/ojs.njcl.2.7541)

Publication date:
2022

License:
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Document Version:
Final published version

[Link to publication](#)

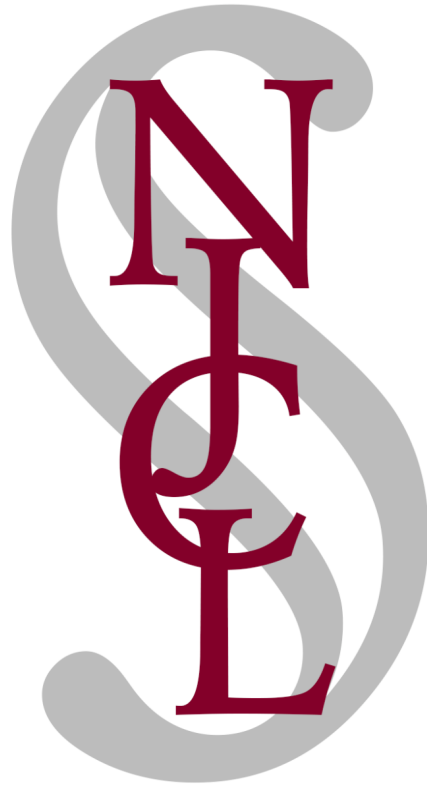
Citation for published version (APA):
Cattelan, S., & Neumann, T. (2022). Status Artis: Research in the Law and Practice of Crowdfunding. *Nordic Journal of Commercial Law*, 12, 7-53. <https://doi.org/10.54337/ojs.njcl.2.7541>

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Status Artis: Research in the Law and Practice of Crowdfunding

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| | | |
|------|---|----|
| 1. | INTRODUCTION | 9 |
| 1.1. | GROWING BUSINESS AND GROWING LEGISLATIVE EFFORTS | 9 |
| 1.2. | DEFINITIONS AND ACTORS | 13 |
| 2. | NON-INVESTMENT CROWDFUNDING MODELS | 16 |
| 2.1. | OVERVIEW | 16 |
| 2.2. | DONATION CROWDFUNDING | 17 |
| 2.3. | REWARD-BASED CROWDFUNDING | 21 |
| 3. | INVESTMENT CROWDFUNDING MODELS | 25 |
| 3.1. | OVERVIEW | 25 |
| 3.2. | DEBT-BASED CROWDFUNDING..... | 27 |
| 3.3. | EQUITY CROWDFUNDING..... | 31 |
| 4. | CONCLUSION AND PERSPECTIVES | 36 |
| 5. | BIBLIOGRAPHY ON LEGAL SCHOLARSHIP | 39 |
| 5.1. | SCHOLARSHIP ON DONATION CROWDFUNDING | 39 |
| 5.2. | SCHOLARSHIP ON REWARD CROWDFUNDING | 41 |
| 5.3. | SCHOLARSHIP ON DEBT-BASED CROWDFUNDING | 43 |
| 5.4. | SCHOLARSHIP ON EQUITY CROWDFUNDING..... | 47 |

ABSTRACT

The present article aims to provide a comprehensive overview of the state of the art of legal science on crowdfunding and to lay the foundation for the understanding of some of its key concepts, facilitating the development of future legal research. This paper demonstrates that legal scholarship seems to not take full comparative advantage of the fact that many concerns are common across jurisdictions, such as encouraging SME development through access to risk capital or ensuring the protection of the unsophisticated investor. It also shows that scholarship and legislative efforts, predominantly in the US and the EU, are most often focused on investment crowdfunding and that these efforts usually attempt to define the obligations of the crowdfunding service provider, striking a balance between stimulating access to risk capital for start-ups and scaling up the crowdfunding business while, at the same time, protecting investors - in particular the unsophisticated ones. Even though it is challenging to legally define specific crowdfunding services, the commonly used typology of crowdfunding is found to be meaningful in a legal context, as it denotes the applicable legal framework. Considering that there is a correlation between the clarity of regulation in a country and the volume of crowdfunding, and given that crowdfunding is growing as both a method of finance and as a business, the time is ripe for legal scholars to direct their attention to the field. In doing so, they assist the actors in the market, the legislators, and the judiciary.

1. INTRODUCTION

Crowdfunding is no longer a complete novelty and several publications have been devoted to various aspects of this phenomenon. However, it appears that the focus has been on the economical, entrepreneurial, and financial aspects of crowdfunding. Research in the legal and regulatory aspects of crowdfunding has only recently shown signs of vitality. The present article aims to provide a comprehensive overview of the state of the art of legal science on crowdfunding and to lay the foundation for the understanding of some of its key concepts, facilitating the development of future legal research. Thus far, legal scholarship appears to have been patchy and disconnected. This paper demonstrates that legal scholarship often addresses common themes across jurisdictions and therefore could benefit from a more integrated, comparative, and internationally focused approach.

1.1. GROWING BUSINESS AND GROWING LEGISLATIVE EFFORTS

Although crowdfunding as a concept has existed for a long time, it only recently took off as a mass phenomenon in its online form. The enormous potentialities of the internet 2.0 made it possible to connect

fundraisers and funders across different countries and continents.¹ In the aftermath of the 2008-2009 financial crisis, banks and financial institutions reduced credit outputs and increased constraints on access to capital - the so-called credit crunch.² In reaction, struggling companies, ambitious individuals, start-ups, and social campaigners started to view crowdfunding as a viable alternative to bank lending and other traditional capital raising methods.³ Especially small and medium enterprises (SMEs), which play a major role in the economy and provide employment to a large portion of the world population, may benefit from access to risk capital via crowdfunding. SMEs have always experienced difficulties in accessing credit, a phenomenon that amplifies itself in times of economic crisis - especially innovative SMEs and start-ups.⁴

From the 2000s onwards, several forms of crowdfunding have evolved to serve fundraisers' and funders' various needs. The scholarship usually relies on four primary types of crowdfunding.⁵ First, donation

¹ Zachary Fialkow, 'Crowd-Fundamentals: Balancing Rapidly Advancing Crowdfunding Innovation with Protections for Consumers' (2017) 4 *Emory Corporate Governance and Accountability Review* 391, 392.

² Douglas Arner, Janos Barberis and Ross Buckley, 'The Evolution of Fintech: A New Post-Crisis Paradigm?' (University of Hong Kong Faculty of Law Research Paper 047 2015); 'The Impact of the Global Crisis on SME and Entrepreneurship Financing and Policy Responses' (Report of the Centre for Entrepreneurship, SMEs and Local Development - OECD 2009).

³ Leopoldo Esposito, 'Il crowdfunding, uno strumento alternativo di finanziamento' (2019) 1 *Rivista Bancaria Minerva Bancaria* 97, 97-100; Gianlucca Quaranta, 'Crowdfunding. Il finanziamento della folla, o dei 'folli'?' (2016) 6 *Diritto ed economia dell'impresa* 249. Regarding the impact of the financial crisis, see De Kristof de Buysere, Oliver Gajda, Ronald Kleverlaan, and Dan Marom, 'A Framework for European Crowdfunding' (2012) 8(4) *Modern Economy* 1; Alma Pekmezovic and Gordon Walker, 'The Global Significance of Crowdfunding: Solving the SME Funding Problem and Democratizing Access to Capital' (2016) 7(2) *William and Mary Law Review* 351.

⁴ Thorsten Beck, Asli Demircug, and Dorothe Singer, 'Is Small Beautiful? Financial Structure, Size and Access to Finance' (2013) 52 *World Development* 19; Scott Shane and Nicos Nicolau, 'Exploring the Changing Institutions of Early-Stage Finance' (2018) 14(6) *Journal of Institutional Economics* 1121; Pekmezovic and Walker (n 3) 347; Alina Dibrova, 'Analysis of Crowdfunding in European Union: Performance and Perspectives' (2017) 98 *Contemporary Issues in Finance: Current Challenges from Across Europe* 37; BIS, 'SME Access to External Finance' 2012 BIS Economics Paper No 16 ; Andrew Freeman, 'Challenging Myths About the Funding of Small Businesses': *Finance for Growth* (Demos 2013).

⁵ The Cambridge Centre for Alternative Finance (CCAF) developed the most detailed typology of crowdfunding models in its industry reports, cf. Tania Ziegler, Rotem Shneur, Kieran Garvey, Karsten Wenzlaff, Nikos Yerolemou, Rui Hao, et al., 'Expanding Horizons: The 3rd European Alternative Finance Industry Report' (Cambridge Center for Alternative Finance 2018), 28-30; Tania Ziegler, Rotem

crowdfunding, where the contributors receive no material or monetary return in exchange for their donation. Second, reward-based crowdfunding, where the contributors receive perks, discounts, or early access to the funded product or service in exchange for their contribution.⁶ Third, debt-based crowdfunding, where the investors receive interests from the lendee on the money contributed. Fourth, equity crowdfunding, where the investors receive a stake in the company in exchange for their contribution. The two former crowdfunding types are usually categorised as non-investment crowdfunding, while the latter two are referred to as investment types. This foundational taxonomy is established both in economics and law literature, although further subdivisions are seen especially regarding investment crowdfunding.⁷

In the last few years, the number of crowdfunding platforms and the amount of money raised have continued to increase. If we exclude the unique context of China, global volumes concerning alternative finance have grown by 28% - from € 42 billion in 2016 to € 55.5 billion in 2017 -, growing by a further 48% - to € 79 billion - in 2018 (see fig. 1 below). More specifically, the European alternative finance market (including the United Kingdom) grew from € 10.6 billion in 2017 to € 15.9 billion in 2018, which represents a 52% year-on-year increase.⁸ Note that all currencies in this paper have been converted to € by the average currency rate for the year in question.

SMEs, which constitute the backbone of the European economy, are hoped to become the primary beneficiaries of such growth of the crowdfunding market, fostering economic recovery and new entrepreneurial activities.⁹ Across all macroregions, debt-based crowdfunding remains the dominating crowdfunding type in terms of volume, while non-investment crowdfunding is relegated to a fraction of the total, albeit socially significant (see table below).¹⁰

Shneor, Karsten Wenzlaff, Ana Odorovic, Daniel Johanson, Rui Hao, et al., 'Shifting Paradigms: The 4th European Alternative Finance Benchmarking Report' (Cambridge Center for Alternative Finance 2019), 31-35; Tania Ziegler and Rotem Shneor (eds.), 'The Global Alternative Finance Benchmarking Report' (Cambridge Centre for Alternative Finance 2020) 31. See also De Buysere et al. (n 3) 10-11; De Quesada CE, 'Crowdfunding in Europe' (2018) 3 *European Contract Law in the Digital Age* 103, 109.

⁶ Jeremy C Short, David Ketchen, Aaron McKenny, Thomas Allison, and R Duane Ireland, 'Research on Crowdfunding: Reviewing the (Very Recent) Past and Celebrating the Present' (2017) *Entrepreneurship Theory and Practice* 149, 150.

⁷ See below section 3.

⁸ *Ibid.* 26. See also Dibrova (n 4) 38-40.

⁹ *Ibid.* 39.

¹⁰ Raghavendra P. Rau, 'Law, Trust, and the Development of Crowdfunding' (Social Science Research Network 2020) 4.

| Region | Debt | Equity | Non-investment |
|------------|-----------|-----------|----------------|
| APAC | € 7.6 b | € 394.9 m | € 313.1 m |
| China | € 74.0 b | € 0.06 m | € 8.8 m |
| Europe | € 9.6 b | € 849.2 m | € 8.8 m |
| LAC | € 4.1 b | € 43.3 m | € 92.6 m |
| MENA | € 640.7 m | € 11.3 m | € 17.9 m |
| SSA | € 0.9 b | € 13.9 m | € 50.3 m |
| UK | € 7.3 b | € 547.4 m | € 1.9 b |
| US, Canada | € 43.2 b | € 1.7 b | € 666.1 m |

Fig. 1. Total volume by Region and Model Categories in 2020. (APAC = Asia-Pacific, excluding China; LAC = Latin America and the Caribbean; MENA = Middle East and North Africa; SSA = Sub-Saharan Afrika). Original data from Ziegler, Shneor, Wenzlaff et al., The 2nd Global Alternative Finance Market Benchmarking Report, 44. Currencies converted to € using the 2020 average rate from USD to EURO of 0.877.

Furthermore, the internationalisation of crowdfunding campaigns is on the rise. Not only is there a notable increase in the number of firms that operate in multiple jurisdictions, but also an increasing number of cross-border activities across regions. All the above mentioned four models are concerned by this trend.¹¹

Finally, the growth of crowdfunding as a business is challenged by fragmented national legislation.¹² National legislators, as well as the EU, are increasingly aware of the need to regulate this dynamic fundraising method. On the one hand, crowdfunding carries enormous potential for the funding of SMEs, start-ups and social goals, but, on the other, its nature and characteristics present challenges as far as fraud and funders' protection are concerned.¹³ Generally speaking, donation and reward-

¹¹ Ziegler, Shneor, Wenzlaff et al (n 5) 25.

¹² Karsten Wenzlaff, Ana Odorovic, Tania Ziegler and Rotem Shneor, 'Crowdfunding in Europe: Between Fragmentation and Harmonization' in Rotem Shneor, Liang Zhao and Bjorn-Tore Flåten (eds), *Advances in Crowdfunding: Research and Practice* (Springer International Publishing 2020), 373-375.

¹³ Gerry Tsoukalas, Simone Marinesi and Volodymyr Babich, 'Updating the Crowdfunding Narrative' (2019) 7(5) Public Policy Initiative 1; Dean Hanley and Paul Bork, 'Crowdfunding: A New Way to Raise Capital, or a Cut-Back in Investor Protection?' (2012) 26(6) Insights 44; Douglas Cumming, Lars Hornuf Moein Karami and Denis Schweizer, 'Disentangling Crowdfunding from Fraudfunding', in SSRN Electronic Journal (2016); Chen Ding, Anil Kavuri and Alistair Milne, 'Lessons from the Rise and Fall of Chinese Peer-to-Peer Lending' (2021) 22 Journal of Banking Regulation 133; Sondes Mbarek and Donia Trabelsi, 'Crowdfunding without Crowdfooling: Prevention Is Better than Cure', in Kent Baker, Lynnette Purda-Heeler and

based crowdfunding have thus far been subject to a minimal regulatory effort by legislators. In contrast, debt-based and equity crowdfunding have been subject to more legislative scrutiny and attention. Indeed, their higher complexity and their inclusion in the broader category of alternative finance appear to require specific rules.¹⁴ Besides, as shown in the chart above, investment-based crowdfunding now involves much larger capitals, and individual contributions tend to be more significant compared to non-investment crowdfunding.

Before turning to the state of the art of each of the four crowdfunding types, it is necessary to establish who the involved actors are and how fundamental concepts are defined at present. After providing the state of the art and thereby extrapolating the current trends in crowdfunding research, a bibliography of legal scholarship is provided in the hope that it will encourage and further future internationally oriented legal scholarship. A bibliography is created for each of the four crowdfunding types and therefore duplicates may occur regarding materials that are concerned with more than one of the four crowdfunding types.

1.2. DEFINITIONS AND ACTORS

Crowdfunding has no firm definition in scholarship, though the following statement seems to encapsulate the essence of most definitions and the traits of the trade: Crowdfunding is “[t]he efforts by entrepreneurial individuals and groups – cultural, social, and for profit – to fund their ventures by drawing on relatively small contributions from a relatively large number of individuals using the internet, without standard financial intermediaries”.¹⁵

Three parties are involved in crowdfunding transactions; the fundraiser, the funder, and the platform (“tripartite business”).¹⁶ First, the fundraiser (or borrower, investee) is defined as any individual or entity that proposes a public call for the financing of a project with a particular purpose.¹⁷ Second, the funder (or contributor, investor, lender, backer, supporter) can be defined as any individual or organisation that provides finance by answering a public call for the funding of a project with a particular purpose.¹⁸ The advantages of crowdfunding for the funders may

Samir Saadi, (eds) *Corporate Fraud Exposed* (Emerald Publishing Limited 2020) 221.

¹⁴ Fialkow (n 1) 398.

¹⁵ See Sunghan Ryu, *Beauty of Crowdfunding: Blooming Creativity and Innovation in the Digital Era* (Routledge 2020), 16, where more definitions are listed. The cited definition is attributed to Ethan Mollick, ‘The Dynamics of Crowdfunding: An Exploratory Study’ (2014) 29 *Journal of Business Venturing* 1 in the above work.

¹⁶ De Quesada (n 5) 109.

¹⁷ Rotem, Shneor and Liang Zhao, ‘Introduction: From Fundamentals to Advances’ in Rotem Shneor, Liang Zhao, nad Bjørn-Tore Flåten (n 12) 3-4.

¹⁸ Ibid.

be financial as well as non-financial. Customer engagement may be enhanced by allowing influence on the design of future products and future consumption opportunities while at the same time the customers' sense of belonging to a certain group or community is strengthened.¹⁹

Third, the crowdfunding platform (or platform, crowdfunding service provider) can be defined as "*an Internet application linking fundraisers and their potential backers while facilitating the exchanges between them in accordance with pre-specified conditions*".²⁰ Such intermediaries make their income in the forms of campaign success fees and payments for supporting services and may, despite their intermediary role, be in their own contractual relationship with the fundraiser as well as the funder. A salient role of the crowdfunding platform is to create a trustworthy framework for bringing fundraisers and funders, who are unknown to each other, together. Hence, each successfully completed campaign enhances the platform's own reputation, making them more attractive facilitators for future fundraising initiatives.²¹

However, platforms usually specify in their terms of use and contracts that they do not guarantee to funders that the money raised by the campaign will actually be used for the goals stated by the fundraisers.²² Crowdfunding platforms operate under regulations set by each national jurisdiction where they are based. However, the crowdfunding business seems characterised by an international nature, with platforms increasingly diversifying their activities outside their headquarters country in order to reach fundraisers and funders abroad.²³ The fact that the internationalisation of platforms and cross-border flows of capital are

¹⁹ More specific terms are used to refer to the different crowdfunding models: donors (in donation crowdfunding), investors (in equity crowdfunding), sponsors (reward crowdfunding), and lenders (debt crowdfunding). Ibid. 4; Norbert Steigenberger, 'Why Supporters Contribute to Reward-Based Crowdfunding' (2017) 23(2) *International Journal of Entrepreneurial Behavior & Research* 336.

²⁰ Rotem Shneor, 'Crowdfunding Models, Strategies, and Choices Between', in Shneor, Zhao, and Flåten (n 17) 21-22.

²¹ Rotem Shneor and Bjorn-Tare Flåten, 'Opportunities for Entrepreneurial Development and Growth through Online Communities, Collaboration, and Value Creating and Co-Creating Activities' in Hans Kaufmann and Riad Shams (eds), *Entrepreneurial Challenges in the 21st Century* (Palgrave Macmillan 2015); Paul Belleflamme, Nessrine Omrani and Martin Peitz, 'The Economics of Crowdfunding Platforms' (2015) 33 *Information Economics and Policy* 11.

²² In case of mismanagement concerning the money raised by a campaign, funders will have to recover their contribution directly from the fundraisers, a perilous endeavour. See De Quesada (n 5) 111; Steven C. Bradford, 'Shooting the Messenger: The Liability of Crowdfunding Intermediaries for the Fraud of Others' (2015) 83 *University of Cincinnati Law Review* 371.

²³ For an overview, see Oliver Gajda (ed), *Review of Crowdfunding Regulation: Interpretations of Existing Regulation Concerning Crowdfunding in Europe, North America and Israel* (Brussels: European Crowdfunding Network 2017).

gaining momentum, notably across Europe, presents its own challenges concerning cross-border regulation and enforcement.²⁴

Also, in light of the regulatory fragmentation hinted at above, public authorities are often seen as additional stakeholders in the crowdfunding process. Although they are “*not directly involved in each transaction, [they] do carry great influence on the way the industry develops, and how each party to the crowdfunding transaction interacts with the other*”.²⁵ More specifically, legislative acts and regulations provide the rules by which the different types of crowdfunding may be practised. Indeed, they define compliance requirements primarily aimed at consumer/investor protection and market integrity. However, at the same time, public authorities have also vested interests in supporting new channels for the financing of social and entrepreneurial goals in their jurisdictions, facilitating greater public contributions to initiatives that align with government policies and agendas and that would otherwise remain underfunded.²⁶

Throughout the 2010s, crowdfunding platforms seeking to offer their services across the European Union member states’ borders have faced the lack of common rules and diverging licensing requirements.²⁷

²⁴ On the internationalisation of platforms, see Ziegler et al *Shifting Paradigms: The 4th European Alternative Finance Benchmarking Report* (n 5) 48-52. The report highlights that in the European context, platforms operating from small open economies (e. g. the Baltic countries and Ireland) seem to be benefiting more from international operations, while platforms operating in relatively large home markets (i.e. France, Spain and Germany) tend to rely primarily on the growth of the domestic market.

²⁵ Shneor et al. (n 12) 4.

²⁶ Ibid. 4-5. On the role of institutions, see Nir Kshetri, ‘Success of Crowd-Based Online Technology in Fundraising: An Institutional Perspective’ (2015) 21(2) *Journal of International Management* 100.

²⁷ This has resulted in high compliance and operational costs, which prevented crowdfunding platforms from efficiently scaling the provision of their services. As a result, small businesses had fewer financing opportunities available to them, while investors faced less choice and more uncertainty when investing cross-border. European Commission, *Proposal for a Regulation of the European Parliament and of the Council on European Crowdfunding Service Providers (ECSP) for Business*, 2018/0048, 2018; *Proposed Regulation on European Crowdfunding Service Providers (ECSP) for Business, Position Paper of the European Crowdfunding Network*, 8 October 2018; *Proposed Regulation on European Crowdfunding Service Providers (ECSP) for Business Position Paper of the European Crowdfunding Network, Trialogue Stage*, 2 October 2019. See also Antonella Francesca Cicchiello, ‘Harmonizing the crowdfunding regulation in Europe: need, challenges, and risks’ (2020) 32(6) *Journal of Small Business & Entrepreneurship* 585; Dirk Zetzsche and Christina Preiner, ‘Cross-Border Crowdfunding: Towards a Single Crowdfunding Market for Europe’ (2017) 8 *EBI Working Paper Series*; Wenzlaff, Odorović, Ziegler and Shneor, ‘Crowdfunding in Europe: Between Fragmentation and Harmonization’, in Shneor, Zhao, and Flåten (n 12), 373-390.

Hence, the European crowdfunding market has been lagging behind other regions. More recently, the European Union has shown the willingness to create a coherent and harmonised crowdfunding market. After a number of proposals and tentative steps, the new *Regulation on European Crowdfunding Service Providers (ECSP) for business* was adopted in December 2020.²⁸ The ECSP regulation will enter into force in November 2021.

The new EU regulation lays down common rules for the member states relating to equity crowdfunding and debt-based crowdfunding services. Thus, it does not concern non-investment crowdfunding types. The ECSP regulation allows platforms to apply for an EU passport based on a single set of rules, which will enable them to offer their services across the EU with a single authorisation. The new rules are expected to both boost crowdfunding campaigns and enhance the investor protection framework. They lay down harmonised rules regarding information disclosure for fundraisers, platform governance, risk management, and the improvement of national authorities' supervisory powers.²⁹ The ECSP rules are further addressed below at 3.1. Further regional legislative developments are seen in both the US and China. These are described further below.

2. NON-INVESTMENT CROWDFUNDING MODELS

2.1. OVERVIEW

Thinking that crowdfunding is a “*method to obtain money from large audiences, where each individual provides a small amount, instead of raising large sums from a small group of sophisticated investors*”³⁰, it is obvious that this is no new phenomenon. Donation crowdfunding can be seen as a simple fundraising campaign, which could take place through any media. Donation and reward crowdfunding have always played a role in financing creative and cultural projects. A well-known example from 1885 is the pedestal of the Statue of Liberty, which was paid for by 160,000 people donating less than a dollar on average. Contributors donated to the project only for benevolent reasons and in return for having their name printed in Joseph

²⁸ Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937. Cf. Zetsche and Preiner, ‘Cross-Border Crowdfunding: Towards a Single Crowdfunding Market for Europe’.

²⁹ Rasmus Mandøe Jensen and Christian Scott Uhlig, ‘European Crowdfunding Platforms - New Opportunities for Alternative Financing for Start-Ups and SMEs’ (Plesner 2020): <https://www.plesner.com:443/insights/artikler/2020/10/european-crowdfunding-platforms?sc_lang=da-dk> accessed 15 April 2021.

³⁰ Shneor, Zhao, and Flåten (n 12) 1 attributes the definition to Paul Belleflamme P, Thomas Lambert, and Armin Schwienbacher, ‘Crowdfunding: Tapping the Right Crowd’ (2014) 29(5) *Journal of Business Venturing* 585.

Pulitzer's newspaper, *The New York World*. Before Pulitzer's fundraising campaign, the statue was at risk of not being erected at all or even relocated to other cities that were able to pay the pedestal's costs.³¹

Actual reward crowdfunding, where the contributor receives a benefit in return for a contribution, is also an old phenomenon. Rewards in return for donations are known to have been used by artists such as Mozart and Beethoven. Around the time that Mozart and Beethoven were children, Alexander Pope successfully crowdfunded his translation of the famous ancient Greek poem *Iliad* into English by promising 750 contributors that they would be mentioned in the acknowledgements and receive a copy of the first edition of the work.³² While fundraising from a crowd is nothing new, the novelty of crowdfunding lies in the use of the internet to reach many more potential contributors, who may be geographically spread over vast distances. Nowadays, it is possible to reach contributors virtually anywhere and the world has seen significant long-distance cross-border fundraising.³³ Donation and reward crowdfunding were the first to appear in an online context and from here the debt-based and equity crowdfunding models have developed.

2.2. DONATION CROWDFUNDING

Charitable fundraising through the use of a crowdfunding platform is characterised by the fact that the contributors (funders or donors) receive "*no material but immaterial, social rewarding in return for their contributions*" and that they are, as with any fundraising, driven by their benevolent reasons and desire to participate in efforts to solve "*real world problems*".³⁴ Hence, the donation crowdfunding model is sometimes also referred to as

³¹ See Ryu (n 15) 14; Rodrigo Davies, 'The Statue of Liberty and America's Crowdfunding Pioneer' *BBC News* (24 April 2013) <<https://www.bbc.com/news/magazine-21932675>> accessed 28 December 2020.

³² Ryu (n 15) 13.

³³ The creation of the George Floyd Memorial constitutes a recent example of successful donation-based campaigns, which confirmed the effectiveness of this fundraising method in supporting social goals. Following Mr. Floyd's killing by a Minneapolis police officer, his relatives launched a crowdfunding campaign on GoFundMe which raised almost \$ 14 million amid ongoing protests for his death in several countries. See Julie Bort, 'George Floyd's GoFundMe Accounts Have Raised over \$13.7 Million for His Family ... and Counting' (Business Insider, 8 June 2020): <<https://www.businessinsider.com/george-floyd-memorial-gofundme-has-raised-million-2020-6>> accessed 25 May 2021; Chelsea Ritschel, 'George Floyd's GoFundMe Receives Most Donations of All Time' (The Independent, 5 June 2020): <<https://www.independent.co.uk/life-style/george-floyd-gofundme-donations-record-protests-memorial-a9551561.html>> accessed 25 May 2021.

³⁴ Ricarda Bouncken, Malvine Komorek and Sascha Kraus, 'Crowdfunding: The Current State of Research' (2015) 14(3) *International Business* 407, 409; De Quesada (n 5) 112.

charity crowdfunding. However, it is difficult to unequivocally distinguish donation and rewards models in practice as they are often mixed.

Donation crowdfunding is most often used to finance “*humanitarian, social, or artistic projects*”³⁵ but also medical and educational projects attract donations.³⁶ In some regions, neglected children or the elderly are major receivers of donations through charity crowdfunding,³⁷ which could be linked to the general culture of donation in a society.³⁸ One significant crowdfunding service provider is GoFundMe Charity. The platform was formerly operating under the name Crowdrise, which was established as early as 2010 and later acquired by GoFundMe. While being registered in the United States, the platform demonstrates the inherent international character that the crowdfunding business has. Indeed, GoFundMe Charity offers fundraising services to fundraisers in almost twenty countries, including most of the European Union, UK, US, and Canada, but accepts donations worldwide.³⁹

The market for donation crowdfunding for 2016 was estimated by the University of Oxford and SAID Business School to be € 0.50 billion/year.⁴⁰ A few years later, GoFundMe Charity reported that they

³⁵ Franck Juredieu and Sébastien Mayoux, ‘Crowdfunding Legal Framework: An International Analysis’, in Jerome Meric, Isabelle Maque, and Julienne Brabet (eds.) *International Perspectives on Crowdfunding: Positive, Normative and Critical Theory* (Emerald 2016) 81, 83; Bouncken, Komorek and Kraus (n 34) 409. See also www.kickstarter.com (accessed 15 February 2021) who categorises projects as “Arts, Comics and Illustration, Design and Tech, Film, Foods and Craft, Games, Music, and Publishing”.

³⁶ GoFundMe Charity operates with project categories medical, memorial, emergency, charity and education.

³⁷ Zhichao Ba, Yuxiang Zhao, Liqin Zhou, and Shijie Song, ‘Exploring the Donation Allocation of Online Charitable Crowdfunding Based on Topical and Spatial Analysis: Evidence from the Tencent GongYi’ (2020) 57 *Information Processing & Management*.

³⁸ Krishnamurthy Suresh, Stine Øyna and Ziao Haque Munim, ‘Crowdfunding Prospects in New Emerging Markets: The Cases of India and Bangladesh’ in Shneor, Zhao, and Flåten (n 12) 297-318.

³⁹ Countries blocked from donating: Afghanistan, Haiti, Libya, Saint Kitts and Nevis, Syria, Bangladesh, Saint Lucia, Timor-Leste, Kosovo, Iran, Myanmar (Burma), Saint Vincent and the Grenadines, African Republic, Iraq, Pakistan, Turkey, South Sudan, Uzbekistan, Palestine, Lebanon, Ghana, Cuba, Singapore, Kosovo, Sudan, Korea (North) according to GoFundMe Charity *Countries blocked from donating* <<https://charitysupport.gofundme.com/hc/en-us/articles/360050070451-Countries-blocked-from-donating>> accessed 18 March 2021.

⁴⁰ Michele Scataglini and Marc Ventresca, ‘Funding the UN Sustainable Development Goals: Lessons from Donation-Based Crowdfunding Platforms’ (Social Science Research Network, Scholarly Paper ID 3328731 2019), 37.

raised more than € 8 billion.⁴¹ Given that the total charity market, of which charity crowdfunding may take up an increasing part, is estimated to be approximately € 355 billion/year, it is no neglectable business to service providers, fundraisers, criminals, and lawmakers.⁴²

The fact that some jurisdictions leave donation crowdfunding largely unregulated⁴³ enables platforms to become global marketplaces,⁴⁴ but at the same time, the lack of crowdfunding specific regulation also opens the door to fraud and malpractice.⁴⁵ With most contributions in donation crowdfunding campaigns being less than € 50, it is unlikely that each individual contributor will pursue any legal action. However, there may be a lot of money involved for the fraudulent fundraiser.⁴⁶ Popular media has recently reported convictions due to various fundraising crimes through donation crowdfunding, including for example fake cancer treatments (approx. € 50,000) or withholding money collected for a homeless veteran (approx. € 355,000).⁴⁷

While donation crowdfunding is subject to the general regulation of public fundraising in each jurisdiction,⁴⁸ the predominant legislative development focuses on debt-based crowdfunding and equity crowdfunding,⁴⁹ most likely because donation crowdfunding and reward

⁴¹ GoFundMe Charity *Social Fundraising Data for Nonprofits: The Complete Report* <<https://charity.gofundme.com/c/guides/nonprofit-social-fundraising-data-report>> accessed 18 March 2021 and GoFundMe Charity *A Year in Giving GoFundMe 2019* <<https://www.gofundme.com/2019>> accessed 18 March 2021.

⁴² Scataglini and Ventresca (n 40) 37.

⁴³ Thomas Lee Hazen, 'Crowdfunding or Fraudfunding - Social Networks and the Securities Laws - Why the Specially Tailored Exemption Must Be Conditioned on Meaningful Disclosure' (2012) 90 North Carolina Law Review 1735, 1737. 'Equity Crowdfunding & Peer-to-Peer Lending' (Legalink 2019) <https://www.legalink.ch/xms/files/PUBLICATIONS/LEGALINK_-_Equity_Crowdfunding_Peer-to-peer_Lending.pdf> accessed 21 November 2020, 91.

⁴⁴ Scataglini and Ventresca (n 40).

⁴⁵ Ying Zhao, Phil Harris and Wing Lam, 'Crowdfunding Industry - History, Development, Policies, and Potential Issues' (2019) 19 Journal of Public Affairs 1.

⁴⁶ GoFundMe Charity, *Social Fundraising Data for Nonprofits: The Complete Report* <<https://charity.gofundme.com/c/guides/nonprofit-social-fundraising-data-report>> accessed 18 March 2021.

⁴⁷ BBC News, *Woman guilty of fake cancer GoFundMe fundraising fraud*, 20 November 2020 <<https://www.bbc.com/news/uk-england-kent-55021836>> accessed 18 March 2021, and Bill Hutchinson, *Alleged ringleader of \$400,000 GoFundMe scam hit with federal indictment* (ABC News, 9 January 2020) <<https://abcnews.go.com/US/alleged-ringleader-400000-gofundme-scam-hit-federal-indictment/story?id=68169208>> accessed 18 March 2021.

⁴⁸ I.e. Denmark in LOV nr 511 af 26/05/2014 and BEK nr 160 af 26/02/2020.

⁴⁹ See Gajda (n 23).

crowdfunding are not considered an investment product *per se*.⁵⁰ It is unknown from legal scholarship whether donation crowdfunding is in need of more, less, or different regulation, as legal scholarship on donation crowdfunding is very scarce.⁵¹ However, it is obvious that crowdfunding is a target of fraud as any other activity, and the scale of fraud may reach further and wider when relying on the internet.

It has been pointed out that the most effective way to combat fraud is to combine regulation, internal auditing with the platform, and a critical attitude by investors - a funder beware/caveat emptor principle.⁵² In retrospect, it is therefore no surprise that China became the breeding ground in 2014-2015 for what turned out to be a major crowdfunding-based Ponzi scheme, as there was almost no regulation in place at the time. The investment platform Ezubao was founded in 2014 and within two years the people behind the platform had managed to defraud 900,000 investors through their fake crowdfunding platform containing mostly fake investment projects. Even though the Chinese courts eventually convicted the people behind the € 8 billion scam,⁵³ it serves to show the need for at least some degree of preventive regulation.⁵⁴ In addition, the subsequent regulatory reaction by the Chinese authorities was perhaps an overreaction, as it cut the crowdfunding market by more than 40% and confirms the difficulty in balancing the need for regulation while avoiding over regulating.⁵⁵

Even though donation crowdfunding is regulated by the general rules of public fundraising in a jurisdiction, the fact that crowdfunding takes place online raises questions about the applicable law and its

⁵⁰ Osborne Clarke, 'Regulation of CrowdFunding in Germany, the UK, Spain and Italy and the Impact of the European Single Market' (European Crowdfunding Network - ECN 2013).

⁵¹ See bibliography on scholarship relating to donation crowdfunding below under 5.1.

⁵² Chad Albrecht et al., 'Ezubao: A Chinese Ponzi Scheme with a Twist' (2017) 24 *Journal of Financial Crime* 256, 259.

⁵³ *Ibid*; Reuters, 'Leader of China's \$9 Billion Ezubao Online Scam Gets Life; 26 Jailed' Reuters (12 September 2017) <<https://www.reuters.com/article/us-china-fraud-idUSKCN1BN0J6>> accessed 5 November 2020.

⁵⁴ China subsequently regulated the market, a development that is described further below under 3.2. For more on the regulatory conundrum, see Tsai C-H, 'To Regulate or Not to Regulate? A Comparison of Government Responses to Peer-to-Peer Lending among the United States, China, and Taiwan' (2019) 87 *University of Cincinnati Law Review* 1077.

⁵⁵ According to Ziegler and Shneur (n 5) 132, the market saw a 40% drop due to stricter regulation. See also Lin Lin, 'Managing the Risks of Equity Crowdfunding: Lessons from China' (2017) 17(2) *Journal of Corporate Law Studies* 327; Kang Yuan and Xu Duoqui, 'Legal Governance on Fintech Risks: Effects and Lessons from China' (2020) 7(2) *Asian Journal of Law and Society* 275; Ding, Kavuri, and Milne (n 14).

enforcement, since the fundraiser, the crowdfunding platform and the contributor may very well be located in different jurisdictions. The question of applicable law and enforcement aside, the crowdfunding industry and fundraisers can benefit from having some regulation in place that both enables crowdfunding and increases trust in the system and the platforms.

Scholarship points out that crowdfunding is a way to harness the wider community's will to contribute to, for example, a policy development, such as achieving the 17 sustainable development goals set by the UN.⁵⁶ One may wonder if international or regional legislative efforts can eliminate some of the legal fragmentation that exists and, in turn, increase trust in crowdfunding as a method of finance, helping to realise the inherent potential of crowdfunding to develop sustainable business practice and technologies.⁵⁷ In relation to crowdfunding in China, it has been stated that crowdfunding may trigger "*an upsurge of public support and [thus] elevating issues prioritised by the government, [hence] micro-charities may serve as an input institution in the spirit of 'responsive authoritarianism'*"⁵⁸ and thereby perhaps expand the space for civil society.

In sum, donation crowdfunding has strong international characteristics, with economic, developmental, and democratic potential. Legislative efforts and scholarship are scarce and leave room for further legal research. The purpose of such research could be to tease out palpable criteria for classifying donation crowdfunding as well as exploring whether the current legal framework facilitates trust, limits fraud, recognises the international character of the business, and strikes a fair and equitable balance between the interests involved. However, authors are right in stating that the level of risk of fraud undermines the positives of crowdfunding, including donation crowdfunding, and therefore regulation is required if crowdfunding is to have a future as a driver of initiative, creativity, and solidarity.⁵⁹

2.3. REWARD-BASED CROWDFUNDING

The reward-based model is characterised by the contributor receiving a benefit in return for a contribution. The benefit, or perk, may be unrelated to the product being backed, such as a poster or a cap, or it may be directly related to the product by way of early access or right to purchase the backed product at a discounted rate once it is released.

⁵⁶ Scataglini and Ventresca (n 40).

⁵⁷ Matthias Lehmann, 'Global Rules for a Global Market Place? - Regulation and Supervision of Fintech Providers' (2020) 38 Boston University International Law Journal 118.

⁵⁸ Kellee Tsai and Qingyan Wang, 'Charitable Crowdfunding in China: An Emergent Channel for Setting Policy Agendas?' (2019) 240 The China Quarterly 936, 958.

⁵⁹ Michelle Cumyn and Justin Ilboudo Wend-Nongdo, 'L'Encadrement Juridique du Sociofinancement au Quebec' (2019) 60 Cahiers de Droit 699, 734.

Reward-based crowdfunding is often tiered so that the bigger the contribution, the more benefits are received. Several platforms combine the reward-based model with the donations model, allowing contributors to pledge either a small amount as a donation or a larger amount in return for a reward. Combined models may be effective, since they appeal to both philanthropic focused contributors, who often donate early in the fundraising process, and reward focused contributors, who often donate late in the fundraising process.⁶⁰

Cultural production most often relies on reward crowdfunding and, in particular, music production - hence the term culture crowdfunding.⁶¹ Some platforms do not vet the fundraising projects, thus creating ample opportunity for anyone to seek funding from the crowd.⁶² However, even though crowdfunding creates an opportunity for the individual artist, one has to be aware that the growth of cultural crowdfunding is partly due to cuts in public funding.⁶³ The most successful campaigns relying on the reward-based model have mass appeal and it is therefore natural that they often are creative products or consumer products.⁶⁴ For those categories, rewards crowdfunding is a way to gain working capital and an initial demand test⁶⁵ while ensuring advance cover of the production costs.⁶⁶ The rewards model is now also used to fund litigation in return for a reward such as access to products or services 'saved' if the supported party wins the lawsuit.⁶⁷

A rewards campaign can be the first step towards developing and testing out new products and a way to generate user involvement. However, although the involvement of the customers is key to funding the campaign, it may also turn customers away. When Oculus VR in 2012 raised € 1.9 million in a reward campaign to develop their product, it generated a lot of bad will for both the platform and Oculus VR when the latter decided to sell the company to Facebook for € 1.55 billion just two

⁶⁰ Shungan Ryu, Keongtae Kim and Young-Gul Kim, 'Reward versus Philanthropy Motivation in Crowdfunding Behavior' (2016) 87 PACIS 2016 Proceedings 15; De Quesada (n 5) 113-114.

⁶¹ Anders Rykkja, Natalia Maehle, Ziaul Haque, and Rotem Shneor, 'Crowdfunding in the Cultural Industries' in Shneor, Zhao, Flåten (n 13) 423-435.

⁶² Andrew Schwartz, 'The Gatekeepers of Crowdfunding' (2018) 75 Washington and Lee Law Review 885, 895.

⁶³ Rykkja et al. (n 61) 423-435.

⁶⁴ Peter Chapman, 'Crowdfunding', in Jelena Madir (ed.), *Fintech: Law and Regulation* (Edward Elgar Publishing Limited 2019), 51-52.

⁶⁵ De Buysere et al (n 5) 18.

⁶⁶ Chapman (n 65) 51-52.

⁶⁷ Manuel A Gomez, 'Crowdfunded Justice: On the Potential Benefits and Challenges of Crowdfunding as a Litigation Financing Tool' (2015) 49 University of San Francisco Law Review 307.

years later - a sale that the many contributors received no monetary stake in, but felt they had been instrumental in.⁶⁸

One third of crowdfunding platforms in Europe are rewards-based ones.⁶⁹ The European market raised € 98 million in 2015⁷⁰ and € 158.80 million in 2017⁷¹. One significant platform in the market is Kickstarter.com, which at the time of writing had more than € 4.25 billion in pledges where the category ‘games’ and ‘design’ attracted € 1.25 billion and € 1.05 billion in pledges respectively.⁷² Two variations of the reward model exist, a keep-it-all and an all-or-nothing model. While the all-or-nothing model attracts more contributions because it demonstrates the fundraisers commitment and places the risk of not reaching the set target on the fundraiser,⁷³ the keep-it-all model may make sense if the fundraiser intends to supplement the crowdfunding capital with funding from a venture capitalist to reach the target.⁷⁴

Reward-based crowdfunding is not subject to any specialised legislation. However, in most jurisdictions, it is governed by the general laws of contracts, sales, marketing and consumer protection, and notably not by the financial and securities regulation.⁷⁵ Offering products in exchange for early capital is often seen by scholars as a pre-sale and not

⁶⁸ Jack Wroldsen, ‘Crowdfunding Investment Contracts’ (2017) 11 Virginia Law and Business Review 543, 548-549.

⁶⁹ European Commission, ‘Commission Staff Working Document: Crowdfunding in the EU Capital Markets Union’, SWD (2016)154, 03/05/2016 <<https://ec.europa.eu/transparency/regdoc/rep/10102/2016/EN/10102-2016-154-EN-F1-1.PDF>> accessed 27 November 2020, 9

⁷⁰ Ibid. 10.

⁷¹ Ziegler et al., *Shifting Paradigms: The 4th European Alternative Finance Benchmarking Report* (n 5) 31.

⁷² Kickstarter, ‘Stats’ <https://www.kickstarter.com/help/stats> accessed 15 February 2021.

⁷³ Douglas J. Cumming, Gael Leboeuf and Armin Schwienbacher, ‘Crowdfunding Models: Keep-It-All vs. All-Or-Nothing’ (2020) 49 Financial Management 331; Garry A. Gabison, ‘The Incentive Problems with the All-Or-Nothing Crowdfunding Model’ (2016) 12 Hastings Business Law Journal 489.

⁷⁴ Xihan Guo, Gongbing Bi and Jiancheng Lv, ‘Crowdfunding Mechanism Comparison If There Are Altruistic Donors’ (2020) European Journal of Operational Research S0377221720308900 <<https://linkinghub.elsevier.com/retrieve/pii/S0377221720308900>> accessed 15 November 2020.

⁷⁵ Patrick Møller Toftegård and Martin Christial Krull, *Netværksfinansiering - En guide til crowdfunding* (LETT 2016), 18-20; Tobias Hans Tröger, ‘Regulation of Crowdfunding in Germany’ (2018) SAFE Working Paper no. 199 <<https://www.ssrn.com/abstract=3122987>> accessed 28 December 2020, 17; Clarke (n 51) 32; Hector Simón-Moreno, ‘The Legal Framework on Crowdfunding in Spain’ (2016) 4 Revue Internationale des Services Financiers/International Journal for Financial Services 13, 15.

an investment. Therefore, the rewards model is not governed by securities laws.⁷⁶ Even though some state-specific securities laws in the US may apply, federal securities law in the US does not apply when the purchaser is motivated by a desire to consume the product.⁷⁷ Hence, fundraisers may choose to raise funds through reward-based crowdfunding as it avoids most regulation, especially the detailed and demanding securities regulation.⁷⁸

It has been stated that reward crowdfunding in the UK legal context will likely be treated as pre-paid goods or services without guarantee that the contributor will actually receive the product.⁷⁹ In terms of legal implications, one should probably distinguish between reward-based crowdfunding - where a perk is received - and pre-purchase - where the funded product itself is to be received⁸⁰ -, as this may affect whether the general contract law applies or not in some jurisdictions. However, the legal obligations between the fundraiser and the contributor(s) are largely undetermined in scholarship⁸¹ and deserve attention to create predictability for the stakeholders.

Despite the importance, no legislative efforts have been identified that will deter fundraisers from being trapped in a development promise they cannot fulfil and ensure that contributors understand that when it comes to delivery time, final design and function, rewards crowdfunding is different from purchasing off-the-shelf products⁸² and so should the legal implications be too. The lack of a crowdfunding-specific legal framework and the lack of legal scholarship in the field amplifies the importance of the contractual framework drafted by the platform. In this regard, Kickstarter's terms of use have been criticised for creating room for fraud and leaving the contributor without any real remedies⁸³, and this is most likely not unique to the terms of Kickstarter. Legal analysis could

⁷⁶ Blair Bowman, 'A Comparative Analysis of Crowdfunding Regulation in the United States and Italy' (2015) 33 *Wisconsin International Law Journal* 318, 325. Patricia H. Lee, 'Access to Capital or Just More Blues? Issuer Decision-Making Post SEC Crowdfunding Regulation' (2016) 18 *Transactions: the Tennessee Journal of Business Law* 19, 31.

⁷⁷ Bowman (n 76) 325-326.

⁷⁸ Alexa Lam, 'Less Is More? Different Regulatory Responses to Crowdfunding and Why the Hong Kong Model Stacks up Well' (2018) 48 *Hong Kong Law Journal* 191, 193.

⁷⁹ Chapman (n 64) 52.

⁸⁰ Steven Bradford, 'Crowdfunding and the Federal Securities Laws' (2012) *Columbia Business Law Review* 1, 16.

⁸¹ Christofer Moores, 'Kickstart My Lawsuit: Fraud and Justice in Rewards-Based Crowdfunding' (2015) 49 *UC Davis Law Review* 383, 389.

⁸² Jay H. Ganatra, 'When a Kickstarter Stops: Exploring Failures and Regulatory Frameworks for the Rewards-Based Crowdfunding Industry' (2016) 68 *Rutgers University Law Review* 48.

⁸³ Moores (n 81) 390-391.

assist in both classifying reward-based crowdfunding in relation to existing contract law regimes and establishing a legal framework that balances the need to combat fraud and promote innovation. It has been suggested that platforms could, or should, make use of online dispute resolution mechanisms to handle the, often low value, claims involved.⁸⁴

3. INVESTMENT CROWDFUNDING MODELS

3.1. OVERVIEW

The above mentioned non-monetary models usually receive the most media coverage, especially concerning socially significant campaigns on platforms such as GoFundMe or KickStarter. However, platforms that offer monetary returns to crowdfunders have grown at a faster pace in recent years, and are now moving much larger amounts of money.⁸⁵ Indeed, investment-based crowdfunding is a more modern creature, which originated in the US and the UK at the end of the 2000s, then spreading across the globe.⁸⁶ The central characteristic of all investment-based crowdfunding is that it involves financial return for the funders (or contributors, investors, lenders). However, funders often choose to support a campaign for non-financial motives, because they believe in the campaign's potentialities and objectives, as well as "*the investee's chances of success*".⁸⁷ Unlike traditional finance, investment crowdfunding puts the contributors, belonging to a crowd, in closer contact with the project owner.⁸⁸

Investment-based crowdfunding is usually subdivided in two main categories: debt-based crowdfunding (or loan-based crowdfunding, peer-to-peer lending, crowdlending) and equity crowdfunding (or crowdinvesting). Further subdivisions have been identified by commentators.⁸⁹ Investment-based crowdfunding constitutes nowadays a

⁸⁴ Anjanette Raymond and Abbey Stemler, 'Trusting Strangers: Dispute Resolution in the Crowd' (2015) 16 *Cardozo Journal of Conflict Resolution* 357.

⁸⁵ For a comprehensive typology of investment crowdfunding subtypes, see Rotem Shneor, *Crowdfunding Models, Strategies, and Choices Between Them*, in Shneor et al (n 12) 24-25; Soudes Mbarek and Donia Trabelsi, 'Crowdfunding without Crowd-Fooling: Prevention Is Better than Cure' in Kent Baker H, Lynnette Purda-Heeler and Samir Saadi (eds), *Corporate Fraud Exposed* (Emerald Publishing Limited 2020) 221; De Quesada (n 5) 116.

⁸⁶ Chapman (n 64) 52; Eleanor Kirby and Shane Worner, 'Crowd-Funding: An Infant Industry Growing Fast' (IOSCO 2014) Staff Working Paper of the IOSCO Research Department, 12.

⁸⁷ Olivier Joffre and Donia Trabelsi, 'Le crowdfunding: Concepts, réalités et perspectives' (2018) 44(273) *Revue Française de Gestion* 69.

⁸⁸ *Ibid.* 70.

⁸⁹ The taxonomy proposed by the CCAF and the University of Agder once again appears the more widely accepted one: Ziegler et al., *Shifting Paradigms: The 4th European Alternative Finance Benchmarking Report* (n 5) 31.

dynamic branch of alternative finance and FinTech. It holds great potential for the democratisation of access to financial capital and investment, making it possible for investors and fundraisers to bypass the traditional gatekeepers - the banks.⁹⁰ However, various regulatory and legal aspects remain problematic, which could hinder the full development of investment crowdfunding in the long term. Indeed, the financial sector has historically been characterised by a continuous and reciprocal chase between financial innovation and regulation, the so-called “regulatory dialectic”. This interplay appears accentuated in investment crowdfunding because of the accelerated pace of technological progress characterising the early twenty-first century.⁹¹

Furthermore, since investors typically contribute only small sums in projects, investment crowdfunding appeals to what has been dubbed “retail” or “consumer” investors as distinguished from sophisticated or professional investors. The main issue is that retail investors usually have limited capacity to assess a business’s prospects and related risks. As a result, they are prone to making investment decisions subject to biases and herding behaviour, following the crowd. Apart from potential losses to investors, this can cause capital to be misallocated to low-quality entrepreneurial projects instead of more solid ones. These risks raise

⁹⁰ Kirby and Worner (n 86) 14; Bill Frezza, ‘Caveat Emptor Banking: Peer-to-Peer Lending Challenges Too-Big-To-Fail Status Quo’ *Forbes* (2003), online version: <https://www.forbes.com/sites/billfrezza/2013/08/13/caveat-emptor-banking-peer-to-peer-lending-challenges-too-big-to-fail-status-quo/?sh=2ff9e9aa3bdc>; Raymond Michaels, ‘How Crowdfunding Is Challenging the Banking Sector’ *International Banker* (14 September 2015); De Quesada (n 5) 105; Robert Shiller, ‘Capitalism and Financial Innovation’ (2013) 69 *Financial Analysts Journal* 21-22; Alessandro Cordova, Johanna Dolci J and Gianfranco Gianfrate, ‘Crowdfunding’, in Daniele Archibugi and Andrea Filippetti (eds), *The Handbook of Global Science, Technology, and Innovation* (John Wiley & Sons Ltd. 2015) 245-266.

⁹¹ Eugenia Macchiavello, ‘Financial-return Crowdfunding and Regulatory Approaches in the Shadow Banking, FinTech and Collaborative Finance Era’ (2017) 14(4) *European Company and Financial Law Review* 662; Tsai Chang-Hsien, ‘To Regulate or Not to Regulate: A Comparison of Government Responses to Peer-to-Peer Lending among the United States, China, and Taiwan’ (2019) 87(4) *University of Cincinnati Law Review* 1077-1122. On financial innovation, see Scott Frame W and Lawrence White, ‘Technological change, financial innovation, and diffusion in banking’, in Allen Berger, Philip Molyneux and John Wilson (eds.), *The Oxford Handbook of Banking* (OUP 2009); Josh Lerner and Peter Tufano, ‘The Consequences of Financial Innovation: A Counterfactual Research Agenda’ (2011) NBER Working Paper No. 16780 <https://www.nber.org/system/files/working_papers/w16780/w16780.pdf> accessed 14 April 2021; Josef Ackerman, ‘Financial Innovations: Balancing Private and Public Interests’, in Miachel Haliassos (ed), *Financial Innovation: Too Much or Too Little?* (CUP 2013).

important questions for regulators, who must elaborate balanced and innovative solutions.⁹²

These concerns constitute the focal point of the newly passed ECSP regulation, which applies to debt-based crowdfunding and equity crowdfunding across the EU.⁹³ The regulation provides harmonised rules on the organisation and operation as a crowdfunding service provider, authorisation and supervision of platforms, and investor protection. It is worth noting that the ECSP regulation is very detailed and relies on further technical standards drafted by European Securities and Market Authority (ESMA). The technical standards are expected by the time the ECSP regulation enters into force on 10 November 2021.

3.2. DEBT-BASED CROWDFUNDING

Debt-based crowdfunding (or loan-based crowdfunding, crowdlending, peer-to-peer lending) has been subject to some attention by legal scholars in recent years.⁹⁴ In debt-based crowdfunding, an investee will raise finance by way of a loan from multiple lenders. In return, the investee agrees to pay the principal plus interest according to an agreed schedule. Debt-based crowdfunding platforms emerged in the mid-2000s with Zopa being established in the UK in 2005, Prosper and LendingClub in the United States soon after.⁹⁵ These platforms were created to connect potential lenders (or investors) to potential borrowers (or lendees, fundraisers). Especially in the last few years, the number of active

⁹² John Armour and Luca Enriques, 'The Promise and Perils of Crowdfunding: Between Corporate Finance and Consumer Contracts' (2017) Law Working Paper N° 366/2017 - European Corporate Governance Institute 58.

⁹³ See Regulation (EU) 2020/1503 of the European Parliament and the Council on European crowdfunding service providers for business and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937; Directive (EU) 2020/1504 of the European Parliament and the Council amending the Directive (2014/65/EU) relating on markets in financial instruments.

⁹⁴ See bibliography below at 5.3 for an overview on the existing legal scholarship concerning debt-based crowdfunding. Sharath Chandupatla and Manal Shah, 'Peer-to-Peer Lending and Equity-Based Crowd Funding - Status Quo and the Leap Forward' (2019) 9(1) Nirma University Law Journal 103-104; Catherine Houssa, 'Le Peer-to-peer Lending: Un Disrupteur Innovant à L'avenir Encore Incertain' 2016 2 StradaLex: Forum Financier / Droit Bancaire et Financier 75-84.

⁹⁵ Ziegler and Shneor, *Lending Crowdfunding: Principles and Market Development*, in Shneor, Zhao, and Flåten (n 12) 63; Alexander Bachmann, Alexander Becker, Daniel Buerckner et al., 'Online Peer-to-Peer Lending – A Literature Review' (2011) 16(2) Journal of Internet Banking and Commerce 1; Garry Bruton, Susanna Khavul, Donald Siegel et al., 'New Financial Alternatives in Seeding Entrepreneurship: Microfinance, Crowdfunding, and Peer-to-Peer Innovations' (2015) 39(1) Entrepreneurship Theory and Practice 9.

platforms has increased.⁹⁶ In contrast to equity crowdfunding, in debt-based crowdfunding the borrower does not surrender any portion of the company's ownership. For the lender, the prospect of a capital and interest repayment schedule may be attractive as a yield generating opportunity, as opposed to the possibility of a dividend and/or capital gain later in the future.⁹⁷

Although debt-based, or peer-to-peer lending (P2P), is not easily defined in a strict manner, the model can usefully be described as the *"matching of investors (lenders) and project owners (borrowers) through the use of an electronic information system (the platform) managed by a service provider, which as a legal person facilitates the granting of loans"*.⁹⁸ Here, the term 'peers' refers to both individuals and businesses.

Indeed, debt-based crowdfunding is usually divided into two main categories depending on the nature of the borrower. First, P2P business lending, whereas *"individuals or institutional funders provide a loan to a business borrower"*.⁹⁹ Second, P2P consumer lending, *"understood as individuals or institutional funders who provide a loan to a consumer borrower"*.¹⁰⁰ In both types, the platform acts as the intermediary between borrowers and lenders, vetting prospective borrowers.¹⁰¹ Given their need to build trust and a respectable platform, it is in the interest of the crowdfunding service providers to vet prospective borrowers. Hence, a degree of self-regulation in the business is to be expected.

In terms of numbers, debt-based crowdfunding models exhibit high year-on-year growth rates and account for the majority of funds raised across all macroregions, such as Europe, North America and the Asia-Pacific.¹⁰² For instance, in 2017, P2P business lending accounted for € 466.60 million across European markets, or 14% of the total. P2P consumer lending accounted for € 1,392.38 million, or 41% of the total, the largest single category by far.¹⁰³ In 2018, if we exclude the UK, debt-based crowdfunding models accounted for approximately € 7,745.00 million overall.¹⁰⁴ The global Covid19 crisis is likely to impact P2P

⁹⁶ Tanja Jørgensen, 'Peer-to-Peer Lending – A New Digital Intermediary, New Legal Challenges' (2018) 1 Nordic Journal of Commercial Law 234.

⁹⁷ Chapman (n 64) 53.

⁹⁸ Jørgensen (n 96) 234.

⁹⁹ Ibid. 234.

¹⁰⁰ Ibid. 235.

¹⁰¹ For the typical procedure for the obtention of a P2P financing, see Rainer Lenz, 'Peer-to-Peer Lending: Opportunities and Risks' (2016) 7(4) European Journal of Risk Regulation 688.

¹⁰² Rau (n 11) 4; Ziegler et al., *Shifting Paradigms: The 4th European Alternative Finance Benchmarking Report* (n 5) 31; De Quesada (n 5) 114.

¹⁰³ Ziegler et al., *Shifting Paradigms: The 4th European Alternative Finance Benchmarking Report* (n 5), 31.

¹⁰⁴ Ziegler and Shneor (n 5), 41. The UK continues to be the largest p2p market in Europe, although its share is decreasing year after year.

numbers', although the industry's prospects remain positive.¹⁰⁵ Commentators have highlighted that institutional investors are increasingly becoming involved in debt-based crowdfunding.¹⁰⁶

Debt-based crowdfunding can provide a cheaper and promising funding opportunity for both consumer and business borrowers, while usually offering higher interest rates to lenders compared to traditional and more structured forms of investment.¹⁰⁷ However, debt-based crowdfunding comes with its own set of risks and legal challenges. Thus, the need for balanced regulations and investor protection is particularly felt among commentators.¹⁰⁸

Looking at China, which by far is the bigger market for debt-based crowdfunding provides an illustrative example as it has been the object of recent scholarship. Indeed, Chinese P2P lending expanded by a factor of sixty between 2013 and 2017, dwarfing all other markets¹⁰⁹. In 2017, P2P lending volumes in China peaked at € 292.18 billion, while in the US, the second largest market volumes reached only € 15.46 billion.¹¹⁰ P2P lending met both the demand for alternative financing sources for Chinese SMEs and savers' demand for a better investment alternative. In a few years, it attracted million of retail investors.¹¹¹

¹⁰⁵ For an overview, see Tania Ziegler and et al., 'The Global Covid-19 FinTech Market Rapid Assessment Report' (CCAF, World Bank and World Economic Forum 2020).

¹⁰⁶ Eugenia Macchiavello, 'Peer-to-peer lending and the "democratization" of credit markets: Another financial innovation puzzling regulators' (2014-2015) 21 *Columbia Journal of European Law* 537; Kathryn Judge, 'The future of direct finance: The diverging paths of peer-to-peer lending and Kickstarter' (2015) 50 *Wake Forest Law Review* 603, 613.

¹⁰⁷ Regarding the benefits of P2P lending, see Kirby and Worner (n 86) 21-22. The authors list: 1) Helping economic growth through new and increasing flows of credit to SMEs and other users in the real economy; 2) filling a gap left by banks; 3) Lower cost of capital/high returns - Leveraging off a lower cost basis; 4) creating a new product for portfolio diversification; 5) cost efficiency and convenience; increased competition in a sector traditionally dominated by a few providers.

¹⁰⁸ More in general, among the risks of P2P lending, Kirby and Worner (n 86) 23-28, list: 1) risk of default; 2) platform risk; 3) risk of fraud; 4) information asymmetry; 5) risk of investor inexperience (retail investors); 6) liquidity risk; 7) risk of cyber-attack. See also Lenz, "Peer-to-Peer Lending: Opportunities and Risks", 688-700. With regard to the US, see Andrew Verstein, 'The Misregulation of Person-to-Person Lending' (2011) 45 *UC Davis Law Review*, 445.

¹⁰⁹ Ding, Kavuri and Milne, (n 14) 134. See also Lin (n 55) 327; Yuan and Xu (n 55) 275.

¹¹⁰ Ding, Kavuri and Milne (n 13) 134.

¹¹¹ Traditionally in China "the interest rate is kept artificially low by the state so that cheap loans become

However, the country recently saw the closure of hundreds of P2P lending platforms due to issuers' defaults. This was caused, as foreseen by some scholars, by the poor level of oversight and regulation imposed by Chinese authorities on P2P platforms.¹¹² In the 2010s, the authorities allowed the industry's numbers to rise exponentially in what effectively was, until 2015, a regulatory vacuum, as opposed to the traditionally tightly regulated Chinese financial sector. Furthermore, many platforms applied the 'guarantee' model, under which a P2P platform not only matches lenders and borrowers, acting as an intermediary, but also provides guarantees for the lender's principal and interests. Due to the lack of specific regulation, platforms allowed underserved borrowers to receive financing, which in turn made the investments riskier for consumer lenders.¹¹³ The ensuing series of financial scandals, platform failures, frauds and massive Ponzi schemes received ample media coverage.¹¹⁴

In reaction, the Chinese government imposed a more stringent and comprehensive regulatory framework, the *2016 Interim Measures on Online Lending*, which is described as the "cornerstone" of the Chinese regime.¹¹⁵ These interventions inevitably increased the operational costs for platforms, making it difficult for them to sustain themselves and causing a steep contraction of the P2P lending market and the number of active P2P platforms in the country.¹¹⁶ The Chinese case of study highlights the inherent difficulty of striking a balance between investor protection and business promotion.¹¹⁷ European institutions in recent years have shown to be aware of the necessity to strike such a delicate balance.¹¹⁸ One may

available to borrowers", and this made P2P lending even more attractive to investors compared to traditional financial instruments (so-called "policy of financial repression"). In Ding, Kavuri and Milne (n 13) 135.

¹¹² Shen Wei, 'Internet Lending in China: Status Quo, Potential Risks and Regulatory Options' (2015) 31 *Computer Law & Security Review* 793.

¹¹³ Ding, Kavuri and Milne (n 13) 136.

¹¹⁴ Amanda Lee, 'China's P2P Lenders Face Tough 2020 amid Tighter Regulation' *South China Morning Post* (7 January 2020); Emily Feng, 'Chinese Government Faces Peer-to-Peer Lending Scandals Dilemma' *Financial Times* (12 November 2018); 'Leader of China's \$9 Billion Ezubao Online Scam Gets Life; 26 Jailed', *Reuters* (12 September 2017); Joe Zhang, 'Collapse of China's Disgraced P2P Sector Offers Important Lessons' *Nikkei Asia* (10 February 2020) <<https://asia.nikkei.com/Opinion/Collapse-of-China-s-disgraced-P2P-sector-offers-important-lessons>> accessed 4 February 2021.

¹¹⁵ Ding, Kavuri and Milne (n 13) 137.

¹¹⁶ *Ibid.* 134. In 2018, the Chinese market volume fell to € 174.70 billion, compared to € 23.10 billion in the US.

¹¹⁷ See Fialkow (n 1) 391-405; Yuan and Xu (n 56) 275-304.

¹¹⁸ See, for instance: European Commission, 'Commission Staff Working Document: Crowdfunding in the EU Capital Markets Union' <<https://ec.europa.eu/transparency/regdoc/rep/10102/2016/EN/10102-2016-154-EN-F1-1.PDF>> accessed 27 November 2020; European Commission and European

wonder what the impacts of the recently passed ECSP regulation in the EU may be in this regard. While legal scholarly opinion is extremely scarce and leaves the field wide open, it is seen in the preparatory works that crowdfunding in Europe is “[...] characterised by its highly heterogeneous nature, shaped by the different starting points of nascent national crowdfunding sectors across the EU, and largely determined by the incumbent regulatory frameworks”. The European Commission concluded already in 2016 that crowdfunding is rapidly developing, is transforming the financial system, and has the potential to become a key source of SME finance.¹¹⁹ Prior to any legislative action, the predictability of law, transaction costs, authorisation of crowdfunding service providers, the conduct of crowdfunding businesses, and investor protection had the attention of the European Commission.¹²⁰

3.3. EQUITY CROWDFUNDING

Debt-based crowdfunding does not allow investors to acquire stakes in the business or venture they wish to finance. To fill this gap, equity crowdfunding (or crowd investing) has evolved as a further alternative fundraising channel. It complements, more than substitutes, the traditional source of equity funding represented by venture capitalists.¹²¹ Equity crowdfunding enables companies, start-ups, and entrepreneurs to obtain capital from a large range of investors, each of them acquiring a small piece of equity. Specialised online platforms act as intermediaries, and investors receive shares in the company in return for their investment, enjoying the opportunity to be part of the business instead of mere creditors.¹²² This aspect makes equity crowdfunding more complex than

Crowdfunding Network (AISBL), ‘European Commission. Directorate General for Financial Stability, Financial Services and Capital Markets Union. and European Crowdfunding Network AISBL., ‘Identifying Market and Regulatory Obstacles to Cross-Border Development of Crowdfunding in the EU: Final Report’ (Publications Office 2017) <<https://data.europa.eu/doi/10.2874/65957>> accessed 28 December 2020’. Cf. Jørgensen (n 96) 258-260.

¹¹⁹ European Commission, Commission Staff Working Paper (n 118) 30-31.

¹²⁰ Ibid. 30-31; European Commission and European Crowdfunding Network (n 118).

¹²¹ Venture capitalists and angel investors have traditionally focused their resources on established businesses or on highly innovative firms with the potential for fast growth, usually located in clusters of innovation, such as Silicon Valley. See Alan Tomczak and Alexander Brem, ‘A Conceptualized Investment Model of Crowdfunding’ (2013) 15(4) *Venture Capital: An International Journal of Entrepreneurial Finance* 335, 351-355; David Groshoff, ‘Equity Crowdfunding as Economic Development?’ (2016) 38 *Campbell Law Review* 48. See bibliography below at 5.4 for an overview on the existing legal scholarship concerning equity crowdfunding.

¹²² Marina Nehme, ‘Regulating Crowd Equity Funding: The Why and the How’ (2018) 45(1) *Journal of Law and Society* 116; Tao Huang and Yuan Zhao, ‘Revolution of Securities Law in the Internet Age: A Review on Equity Crowd-Funding’ (2017) 33 *Computer Law & Security Review* 802.

debt-based crowdfunding from a contractual perspective, since “*the transaction between the investor and the promoter is not a single exchange contract, or a loan, but it has instead a more associative nature that approximates it to the field of corporate law*”.¹²³

The investor base in equity crowdfunding is usually composed of a motley “*group of individuals with varying levels of professional and educational backgrounds and investor professionalism*”.¹²⁴ In addition, angel and venture capital investors themselves are starting to make use of the opportunities offered by equity crowdfunding platforms. While investors’ motivations for investing are heterogeneous, a wish for financial returns generally appears to be the common driving force.¹²⁵

The equity crowdfunding market grew significantly in the early 2010s across the world. However, from 2016 onwards, volumes in some regions have experienced declines driven by regulatory uncertainty and restraints.¹²⁶ Across European countries (excluding the UK) equity-based crowdfunding accounted for € 210.93 million, or 6 % of the crowdfunding market in 2017.¹²⁷ In 2018, the amount rose to € 740.00 million, or 11,5 % of the total volume.¹²⁸

On the one hand, equity crowdfunding certainly holds promise for entrepreneurs as an innovative source of financing and a remedy to SMEs’ traditional shortfall of capital.¹²⁹ On the other hand, recent studies suggest that, based on the so-called pecking-order-theory, entrepreneurs usually prioritise internal funds whenever possible, then external capital obtained through debt, including both traditional types and debt-based crowdfunding, turning to equity crowdfunding only as a last resort.¹³⁰ In

¹²³ De Quesada (n 5) 116.

¹²⁴ Anna Lukkarinen, ‘Equity Crowdfunding: Principles and Investor Behaviour’, in Shneor, Zhao, and Flåten (n 12) 96, 108; see also Kim Keongtae and Siva Visawanathan, ‘The Experts in the Crowd: The Role of Experienced Investors in a Crowdfunding Market’ (2019) 43(2) MIS Quarterly 347.

¹²⁵ Ibidem; Krista Tuomi and Richard T. Harrison, ‘A Comparison of Equity Crowdfunding in Four Countries: Implications for Business Angels’ (2017) 26(6) Strategic Change 609; Anna Lukkarinen, Jyrki Wallenius and Tomi Seppälä, ‘Investor Motivations and Decision Criteria in Equity Crowdfunding’ (2017) SSRN Electronic Journal 1.

¹²⁶ Lukkarinen (n 125) 93-94.

¹²⁷ Ziegler et al., *Shifting Paradigms: The 4th European Alternative Finance Benchmarking Report* (n 5) 31.

¹²⁸ Ziegler and Shneor (n 5) 41.

¹²⁹ Nehme (n 122) 118-123; Lars Hornuf and Armin Schwienbacher, ‘Should Securities Regulation Promote Crowdfunding?’ (2017) 49 Small Business Economics 579.

¹³⁰ Xavier Walthoff-Borm, Armin Schwienbacher, and Tom Vanacker, ‘Equity Crowdfunding: First Resort or Last Resort?’ (2018) 33(4) Journal of Business Venturing 513; Brage Humphries, ‘Funding the Future: Marketplace Lending Equity Crowdfunding, and Bank Lending’ 2020 24(1) North Carolina Banking Institute 229.

addition, equity crowdfunding may only generate a financial return in the long run and, of course, only if the investee proves successful. Like venture capitalists, equity crowdfunders invest in nascent businesses with all the related uncertainties and risks. However, unlike venture capitalists *“retail crowdfund investors usually lack specialist expertise about the prospects of the business projects they back, which leaves them more exposed to poor selection”*.¹³¹ Furthermore, they do not take control rights because the costs of doing so outweigh the benefits, given crowdfunding investors’ lack of expertise and high coordination costs. This lack of control leaves them more exposed than a venture capitalist to opportunistic and potentially fraudulent conduct by the fundraiser after the investment is made.¹³²

The literature review carried out for the purpose of this paper shows that US legal literature on equity crowdfunding is three times the amount compared to European writings. The finding is not surprising, as the US was one of the first countries to implement legislative initiatives on the subject starting from 2012. However, commentators generally view the current US regulatory regime as unsatisfactory.¹³³ Indeed, until 2012 equity crowdfunding in the US remained regulated by the securities laws first issued in 1933, after the Great Depression.¹³⁴ Securities laws are designed to regulate financial products deemed to be securities, imposing costly registration procedures to the issuers.¹³⁵ The US Congress designed the Securities Act with a focus on disclosure of information about investments, more than on the quality of investments in itself. US legislators believed that full and truthful disclosure would allow individuals to make informed investing decisions, while the U.S. Securities and Exchange Commission (SEC) acted as the watchdog.¹³⁶

The cession of equity crowdfunding shares, which are securities, was initially subjected to the requirements of the securities laws. This seemed too burdensome since the object of crowdfunding investments were

Empirical evidence suggests that firms listed on equity crowdfunding platforms are usually less profitable, often presenting excessive debt levels, and have more intangible assets than matched firms not listed on these platforms.

¹³¹ Armour and Enriques (n 92) 12.

¹³² Ibid.

¹³³ Regarding the regulation of equity crowdfunding in the US, see Fialkow (n 1) 391-405; Abbey Stemler, ‘Equity-Based Crowdfunding: Allowing the Masses to Take a Slice of the Pie’, in Méric, Maque, and Brabet (n 35) 219-232.

¹³⁴ Joan Heminway, ‘Selling Crowdfunded Equity: A New Frontier’ (2017) 70 Oklahoma Law Review 189, 195.

¹³⁵ Under US federal law, the term “security” broadly covers all traded financial assets, usually divided in three: 1) Equity securities, namely stocks; 2) Debt securities, e.g., bonds and banknotes; 3) Derivatives, e.g., options. Cf. Rafael Porrata-Doria, ‘Resolving the Crowdfunding Conundrum: The Experience of the United States and Spain’ (2020) 9(2) American University Business Law Review 219, 240.

¹³⁶ Christine Hurt, ‘Pricing Disintermediation: Crowdfunding and Online Auction IPOs’ (2015) University of Illinois Law Review 217, 234-235.

relatively small sums. Therefore, the American Congress intervened in 2012 with Title III of the *Jumpstart Our Business Startups Act* (JOBS act). It outlined an exemption for crowdfunding from many securities law requirements, in order to boost this new alternative finance method.¹³⁷ Thus, Title III of the JOBS Act (also known as CROWDFUND Act, or “Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act”) opened the door for wider participation in crowdfunding by allowing non accredited investors to make limited investments in privately held companies.¹³⁸ The JOBS Act maintained the distinction between consumer and accredited investors, the latter being defined only by their higher net-worth.¹³⁹

Under Title III, entrepreneurs and small business owners may utilise the crowdfunding exemption to raise up to US \$ 1 million within a one-year period without registering the sales with the SEC. However, the legislator still envisaged requirements concerning disclosure, registration of the crowdfunding service provider, and capital limitations. Any investor, whether accredited or unaccredited, could invest in companies relying on the crowdfunding exemption, albeit with a max cap determined by their income or net worth.¹⁴⁰

In order to make Title III effective at the federal level, especially in terms of consumer equity crowdfunding, the SEC needed to adopt implementing regulations. The latter were released only in October 2015, entering into force in May 2016.¹⁴¹ Since its inception, a number of

¹³⁷ Heminway (n 134) 191.

¹³⁸ Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012).

¹³⁹ Commentators highlight how wealth in itself is not a real indicator of whether an investor is sophisticated or not. Cf. Porrata-Doria (n 135) 224.

¹⁴⁰ More specifically: JOBS Act, § 302 (a) amending Section 4 of the Securities Act of 1933 “... (B) the aggregate amount sold to any investor by an issuer, including any amount sold in reliance on the exemption provided under this paragraph during the 12-month period preceding the date of such transaction, does not exceed—(i) the greater of \$2,000 or 5 percent of the annual income or net worth of such investor, as applicable, if either the annual income or the net worth of the investor is less than \$100,000; and (ii) 10 percent of the annual income or net worth of such investor, as applicable, not to exceed a maximum aggregate amount sold of \$100,000, if either the annual income or net worth of the investor is equal to or more than \$100,000...”.

¹⁴¹ Lee (n 76) 23. See also Thomas Coke, ‘Why the New Crowdfunding Rules Are Important but Ultimately a Letdown’ (2017) 17 *Journal of Business & Securities Law* 218; David Groshoff (n 121) 48; Max Isaacson, ‘The So-Called Democratization of Capital Markets: Why Title III of the JOBS Act Fails to Fulfill the Promise of Crowdfunding’ (2016) 20 *North Carolina Banking Institute* 440; Marquise Rivon, ‘Don’t Let Them Fool Ya: Examining the SEC Rules on Crowdfunding and Their Effect on Small Business Growth’ (2016) 44 *Rutgers Law Records* 21; ‘The 2017 State of Regulation Crowdfunding: US Securities-Based Crowdfunding under Title III of the JOBS Act’ (*Crowdfund Insider*, 15 January 2018); Amy Wan, ‘Title III

scholars have lamented the complexity and costs for intermediaries and issuers of this equity crowdfunding regulatory regime.¹⁴² Besides, it has been noted that it did not really prevent crowdfunding from becoming a “*market of lemons*”.¹⁴³ Other commentators remain sceptical regarding the so-called wisdom of the crowds, considering that non-sophisticated investors are still likely to make poor investment decisions and incomplete risk assessments, especially considering the limited information available to them.¹⁴⁴ Others continue to underline that the danger of fraudulent offerings is amplified because the small volume of individual investments makes it uneconomical and difficult to get redress via the traditional legal remedies, while enforcing a judgement vis-à-vis impecunious fraudsters remains unlikely.¹⁴⁵

Existing legal literature in the US has so far focused on the regulatory regime devised by the legislator from the JOBS Act onwards, its shortcomings and suggested improvements.¹⁴⁶ The securities watchdog, the SEC, remains concerned with investor protection, while legislators confront the need to boost SMEs’ access to capital through equity crowdfunding. That being said, the SEC is currently reflecting on modifying its regulations to address some of the weaknesses highlighted by practitioners and scholars alike.¹⁴⁷ In other words, the analysis of the interplay between financial innovation / inclusion and investor protection / fraud avoidance so far has taken the lion’s share of US legal literature on crowdfunding.

In comparison to the US, European legal literature on equity crowdfunding appears still in its infancy, focusing on each jurisdiction’s regulatory approach to equity crowdfunding.¹⁴⁸ Indeed, throughout the

Crowdfunding Became Legal on May 16: What it Does & What’s Still Lacking’ (*Crowdfund Insider*, 17 May 2016).

¹⁴² Porrata-Doria (n 135) 256-260; Dylan J. Hans, ‘Rules Are Meant to Be Amended: How Regulation Crowdfunding’s Final Rules Impact the Lives of Startups and Small Businesses’ (2018) 83(3) *Brooklyn Law Review* 1089; Lee (n 77) 21: “*The author contends that for the high-growth issuers targeted by the legislation, crowdfunding is likely to be too expensive, too complex and have too great of liability risk to undertake, when the issuer has other financing alternatives.*”

¹⁴³ Hurt (n 136) 254-255.

¹⁴⁴ Porrata-Doria (n 135) 254; Melissa Baucus and Cheryl Mitteness, ‘Crowdfrauding: Avoiding Ponzi Entrepreneurs when Investing in New Ventures’ (2016) 59 *Business Horizons* 37, 39; Garry Gabison, ‘Equity Crowdfunding: All Regulated but Not Equal’ (2015) 13 *DePaul Business & Commercial Law Journal* 359, 369.

¹⁴⁵ Steven C. Bradford, ‘Online Arbitration as a Remedy for Crowdfunding Fraud’ (2018) 45 *Florida State University Law Review* 1169.

¹⁴⁶ For instance, see Stemler (n 133) 231. Most legal articles on the subject were published between 2014 and 2017.

¹⁴⁷ Porrata-Doria (n 135) 256.

¹⁴⁸ For instance, see Nehme (n 122); Macchiavello E, “La travagliata evoluzione normativa dell’equity crowdfunding in Italia, il nuovo regolamento Consob e la

2010s the regulatory framework remained fragmented across the continent. While some states, such as France (Ordonnance 2014-559), Spain (Ley 5/2015), Italy (Decreto Legge 179/2012), and the UK (FCA 2014), introduced specific laws regulating equity crowdfunding, other states opted for the application of the general rules while yet others simply have maintained a ban on equity crowdfunding.¹⁴⁹ The UK has consistently remained the major market for equity crowdfunding, although its neighbours are increasing their share of the total volumes of equity crowdfunding raised across the continent.¹⁵⁰ In November 2021, the entering into force of the ECSP Regulation across the EU member states will likely provide new momentum to European scholarship on equity crowdfunding.

4. CONCLUSION AND PERSPECTIVES

Upon examination, almost 300 unique publications on crowdfunding law have been identified globally.¹⁵¹ By comparison, it is evident that crowdfunding, as an area of legal scholarship, is still in its infancy. Knowing that the amount of money raised through crowdfunding is growing, domestic and regional legislators increase their efforts to regulate, and that there is a documented “*correlation between regulatory clarity – the introduction of an explicit legal crowdfunding regulation in a country – and the volume of crowdfunding in the subsequent year*”.¹⁵² The time is ripe for legal scholars to contribute to the development of the market.

No matter the specific type, and possible crowdfunding-specific legislation, like the ECSP regulation in the EU aside, crowdfunding activities are governed by general legal frameworks, such as marketing law

prospettiva di regolazione del crowdfunding a livello europeo: una disciplina destinata a breve vita?” (2018) 3 Rivista Di Diritto Bancario | Dottrina e Giurisprudenza Commentata 1; De Quesada (n 5) 121-132; Lars Klöhn, Lars Hornuf and Tobias Schilling, ‘The Regulation of Crowdfunding in the German Small Investor Protection Act: Content, Consequences, Critique, Suggestions’ (2016) 13(2) European Company Law 56; Isabella Wichmann and Josephine Worm Andersson, ‘Aktiebaseret crowdfunding - en ny spiller inden for alternativ finansiering i Danmark’ (2016) Nordisk tidsskrift for selskabsret 21.

¹⁴⁹ National legislation relating specifically to crowdfunding is also seen in Belgium: Belgisch Staatsblad, 20 december 2016, Wet tot regeling van de erkenning en de afbakening van crowdfunding en houdende diverse bepalingen inzake financiën; Finland: Crowdfunding Act (734/2016); Portugal: Lei n. 102/2015 - Regime jurídico do financiamento colaborativo; Denmark: LBK n. 763 af 23/07/2019 § 1, stk. 3, which prohibits limited liability companies (as different to joint stock company) to publicly offer equity, thus limiting equity crowdfunding to zero in practice.

¹⁵⁰ Respectively, € 732.50 million in the UK and € 743.35 million across the other European countries in 2018. See Ziegler, Shneor, Wenzlaff et al (n 5) 41.

¹⁵¹ See section 5, ‘Bibliography on Legal Scholarship’ where a total of 186 unique sources are referenced to the benefit of future scholarship.

¹⁵² Rau (n 10) 5.

and intellectual property law.¹⁵³ These provide part of the picture of the regulatory framework of crowdfunding activities and should be considered by legal scholars.

Despite focusing on various crowdfunding models and different jurisdictions, legal scholarship is often concerned with questions of how to regulate a highly internationalised market, how to encourage development to the benefit of innovation and, at the same time, protect the often-unsophisticated investors. Legal researchers should beware that the regulation dialectic may taint crowdfunding, that investors may be unable to assess prospects and risks properly, and that presumptions of crowd wisdom may in fact be mindless herd behaviour.

Virtually all legal scholarship in the field relies on a distinction between investment and non-investment crowdfunding types and categorises crowdfunding models into four basic types: the donation model, the rewards model, the debt-based model, and the equity model. While there are several other crowdfunding sub-models, there is a consistent reference to the four primary types in the literature, which correlates with the fact that the general legal framework is often dependent on the four types.

Legislators appear to recognise, welcome, and react to the disruptive nature that crowdfunding has on the financial market and that it is part of a larger trend concerning democratisation and digitalisation of the financial sector. Much of the legal writings seem to focus on the US JOBS Act and less on European initiatives. However, there is an overlap in themes across scholarship as it often addresses predictability of law, conduct of the crowdfunding businesses, protection of investors / disclosure, and access to risk capital. Legal scholars who desire to carry out comparative studies will have at least some footing to do so in the pool of literature. Further legal studies may help abate some of the uncertainties of interpreting the legal framework of crowdfunding. Moreover, they could provide a critical and comparative opinion to the benefit of crowdfunding service providers forum shopping, harmonisation, and development of national and regional legislation. All stakeholders in crowdfunding, the investors, the crowdfunding service providers, the fundraisers, and public authorities too, have a mutual interest in a common and predictable legal framework to increase trust in crowdfunding as a source of finance.

Even though crowdfunding is still not the typical source of risk capital for start-ups, the sector is growing fast in both the volumes of money raised, types of crowdfunding services, and the number of service providers. As a result, one may wonder if crowdfunding provides a useful method for civil society to help kick-start the economy in a post-pandemic world.

¹⁵³ Møller Toftegård and Krull (n 75) 42-46.

Both legislators and legal scholars have largely overlooked donation and reward-based crowdfunding. One problem attached to these crowdfunding types is that it is difficult to distinguish between donation and reward-based crowdfunding, as they are often mixed in practice. The distinction is critical for deciding whether the general legal framework regarding public fundraising or the laws of contract and sales apply to the activity. Another problem is that it is unknown whether these frameworks are predictable enough to create trust in crowdfunding and to effectively decide the default legal obligations of fundraisers and crowdfunding service providers. It is unknown whether the many consumer protection measures in place, especially in Europe, apply, and whether they are possible to modify in crowdfunding pre-sales situations as there may be good reasons to do so. It is problematic that donation and rewards-based crowdfunding provide the opportunity of testing initial demand and involving consumers in product development on one hand when, on the other hand, the legal relationship between funder and fundraiser remains unexplored. One may fear that, over time, this will lead to disappointed stakeholders and therefore less trust and use of crowdfunding.

Investment crowdfunding has attracted more legal scholars than the non-investment types. In addition to the concerns already raised, the focus on investor protection is stronger in the literature addressing debt-based and equity crowdfunding. The disruption of the financial markets becomes particularly apparent here, as crowdfunding relies on more lax regulation to work the best. At the same time, stakeholders have an interest in combating fraud that undermines the trust that is instrumental to crowdfunding. Legislators attempt to strike the right balance between protecting the retail or unsophisticated investors while still encouraging SMEs' access to risk capital. The lessons from China may be useful to legal scholars in this regard.

Investment-based crowdfunding also enjoys the most attention of legislators and the preponderant part of legal research is devoted to the US legal framework in this regard. The recent EU regulation of ECSPs is largely unaddressed in the literature at this point. The legislative roadmap from domestic law into the harmonised EU regulation is not described by scholars, despite it being valuable to the interpretation and critique of the regulation.

In summary, it can be concluded that the comprehensive overview of the state of the art of legal science on crowdfunding reveals several concerns that legal scholars may address. While many key concepts of crowdfunding are somewhat established in the literature, the legal scholarship seems not to take full comparative advantage of the fact that many concerns are common across jurisdictions, such as encouraging SME development through access to risk capital or ensuring the protection of the unsophisticated investor. To stimulate further development of the legal aspects of crowdfunding, a categorised bibliography is attached below.

5. BIBLIOGRAPHY ON LEGAL SCHOLARSHIP

To support and foster new legal scholarship, we provide a bibliography of legal scholarship relevant to each of the four crowdfunding types. It should be noted that while many listed publications are concerned with one type of crowdfunding, there are several publications concerned with several of the crowdfunding types. Hence, these latter materials are categorised under each of the relevant crowdfunding types. Materials published after 1 May 2021 have not been considered.¹⁵⁴

5.1. SCHOLARSHIP ON DONATION CROWDFUNDING

‘Review of Crowdfunding Regulation 2017: Interpretations of Existing Regulation Concerning Crowdfunding in Europe, North America and Israel’ (2017)

Bowman B, ‘A Comparative Analysis of Crowdfunding Regulation in the United States and Italy’ (2015) 33 *Wisconsin International Law Journal* 318

Bradford CS, ‘Crowdfunding and the Federal Securities Laws’ (2012) 2012 *Columbia Business Law Review* 1-151

Buysere K et al., ‘A Framework for European Crowdfunding’ (2012)

Chapman P, ‘Crowdfunding’, *Fintech: law and regulation* (Edward Elgar Publishing Limited 2019)

Clarke O, ‘Regulation of Crowdfunding in Germany, the UK, Spain and Italy and the Impact of the European Single Market’ (European Crowdfunding Network (ECN) 2013)

Cumyn M and Wend-Nongdo JI, ‘L’Encadrement Juridique du Sociofinancement au Quebec’ (2019) 60 *Cahiers de Droit* 699

Davis KE and Gelpert A, ‘Peer-to-Peer Financing for Development: Regulating the Intermediaries’ (2010) 42 *New York University Journal of International Law and Politics*

Durdenic K, ‘Crowdfunding - Croatian Legal Perspective and Comparison to Other Sources of Financing’ (2017) 41 *Public Sector Economics* 259

Esposito L, “Il crowdfunding, uno strumento alternativo di finanziamento” (2019) 1 *Rivista Bancaria Minerva Bancaria* 97

European Commission, ‘Commission Staff Working Document: Crowdfunding in the EU Capital Markets Union’, SWD(2016)154, 03/05/2016

Farnkoff BJ, ‘Crowdfunding for Biotech: How the SEC’s Proposed Rule May Undermine Capital Formation for Startups’ (2013) 30 *Journal of Contemporary Health Law & Policy* 131

¹⁵⁴ For the most updated bibliography, we kindly refer to the online version accessible at www.theCLEARproject.dk.

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