

MEMORANDUM

To: Crowdfunding Contacts
From: Reid Feldman & Hubert de Vauplane
Date: June 12, 2013
Re: Crowdfunding in France

In France enthusiasm for crowdfunding (known as *financement participatif*) is high and has resulted in a proliferation of dedicated websites and substantial amounts raised, but – as is the case in other jurisdictions – significant regulatory restraints may apply to crowdfunding activities.

French crowdfunding platforms generate funding of various sorts including equity investments, loans or donations. These crowdfunding activities are potentially subject to several different regulatory regimes, including: securities law, when equity investments (or investments in debt securities) are sought; banking regulations, when the requested funding takes the form of a loan; and rules regarding intermediation (brokerage) and solicitation, whether the funding is in the form of equity, loan, donation or some other form (pre-sale, non-financial reward, etc.). These rules should be taken into account by non-French crowdfunding operations which solicit or receive funds from French sources.

Proponents of crowdfunding in France have proposed modifications to the applicable regulatory regimes that they say will not undermine protection of investors. Public authorities have shown some sympathy with this view, but it seems uncertain whether and when there will be significant regulatory reform in this area.

This memorandum provides a snapshot of the relevant regulatory regimes relating to (1) securities law, (2) credit operations and (3) financial intermediaries and financial solicitation. It also discusses (4) proposals for reform and sets out (5) a checklist intended to assist in determining whether French regulatory rules are breached by crowdfunding organized outside France. This memorandum describes some key points relating to the topics addressed, but is not exhaustive.

(1) securities regulation

The public offering rules in France comply with the general EU framework set out in the prospectus directive 2010/73 of November 4, 2003 (as amended) but with features specific to France. Making a public offering in France requires among other things the preparation of a prospectus approved by the securities regulator, the *Autorité des Marchés Financiers* (“AMF”), or the securities regulators of another EEA member state and generally takes several months. However, exemptions from general prospectus and registration requirements are available not only for private placements (addressed to qualified investors and to fewer than 150 other investors) or high-value placements (at least €100,000 per investor or €100,000 per security) but also for offerings of less than €100,000 in total or larger offerings representing up to 50% of the issuer's pre-offer capital and not exceeding €2.5 million if the securities are traded on a multilateral trading facility (“MTF”)¹ or €5 million if not so traded.²

Securities issued pursuant to one of these exemptions can be publicly listed in France, if meeting relevant listing requirements. One possible listing platform is Alternext (a unit of Euronext), which requires a minimum free float of €2.5 million. This means that an offering of between €2.5 million and €5.0 million, which represents not more than 50% of the issuer's capital, can potentially be listed on Alternext and publicly traded thereon, with no prospectus required, as long as the free float is at least €2.5 million. Another potential trading platform for such an exempted offering is Alternativa, which is a MTF (so that to be eligible for the up-to-50%-of-capital exemption the offering should not exceed €2.5 million).

These French rules on public offerings, and exemptions thereto, apply to offers of securities in France regardless of where the issuer is situated. With respect to offerings made over the internet, the offering is considered made in France, and thus becomes subject to these French rules, if French investors are targeted in some manner (for example, when the site is in French and is linked to sites of French organizations). Of course, non-French crowdfunding activities will benefit from the €100,000/50%-of-capital exemptions (among others), but when exemptions do not apply sanctions are potentially applicable if there is a basis to consider that the offering is made in France.

When considering the impact of these rules, a threshold question to ask is whether or not the transaction proposed by the crowdfunding platform involves offering of a kind of security to which the public-offering rules apply, rather than distribution of some

¹ In French, a *système multilatéral de négociation* (“SMN”).

² See *Code monétaire et financier* (“CMF”), article L.411-2, and AMF *Règlement Général* article 211-2. Amounts mentioned are cumulative amounts calculated over a period of 12 months. The limit of fewer than 150 non-qualified investors is calculated taking account of only investors located France. The exemption for offerings representing up to 50% of an issuer's capital is available for companies in the form of a *société anonyme* (a classic coporation) or a *société en commandite par actions* (a partnership limited by shares), but not those taking the form of a *société par actions simplifiée* (a simplified corporation).

other instrument or investment, which may be subject to other regulatory obligations. The public-offering rules apply to offers of a financial security (*titre financier*), i.e. equity securities (shares or other securities giving access to equity or voting rights), debt securities (other than drafts or notes) or shares or interests in funds.³ Those rules do not apply to distribution of other kinds of financial instruments (referred to as *contrats financiers*) including derivatives⁴ or to investments taking other forms (such as annuities or other contractual rights, which are referred to as *bien divers*⁵). Consequently if a donation – even with a financial return – is structured so as not to be an investment in a financial security (*titre financier*), the offer thereof to the public can be considered not to fall within the ambit of public-offering rules. It is possible to ask the AMF for confirmation that a given crowdfunding program is not subject to public-offering rules.

However, various regulatory requirements applicable to distribution of such other financial instruments or other forms of investment might apply to certain crowdsource financing, in particular when the participants are offered a financial return.

Examples of French entities engaged in crowdfunding through offers of equity, and taking advantage of the €100,000/50%-of-capital exemptions, include the following:

- Anaxago, which promotes crowdfunding offers of up to €2.5 million per issuer (accepting a minimum of €1,000 per investor). Anaxago has announced that since its creation in 2012 it financed three projects and raised capital of €600,000.⁶
- WiSEED, supporting projects raising up to €100,000, via investments of not less than €100 per investor, and also projects funded by less than 150 non-qualified investors. In existence since 2008, WiSEED states that it has financed 22 projects and collected €4 million.⁷
- SmartAngels, dedicated to investment in start-ups and SMEs. It has announced that since its creation in 2012 it has collected €1.8 million and financed six projects.⁸

Platforms promoting donations, including in some cases with financial returns, include:

- My Major Company, which solicits financing for a broad range of performers and other projects with a cultural element. It has announced that since its

³ CMF article L.211-1 II

⁴ CMF articles L.211-1 III and D.211-1 A

⁵ CMF article L.550-1 et seq.

⁶ <https://www.anaxago.com/> as of March 11, 2013

⁷ <http://www.wiseed.fr/> as of March 11, 2013

⁸ <http://www.smartangels.fr> as of March 20, 2013

creation in 2007 it financed about 42,000 projects and collected more than €12 million.⁹

- KissKissBankBank, dedicated to financing artistic and other projects of many sorts (performers, photographers, writers, travel, etc.). In existence since 2010, KissKissBankBank states that it has financed 800 projects and collected €3 million.¹⁰

There may be an opportunity for crowdfunding under public-offering exemptions applicable in both France, under the rules described above, and the U.S., under Title III of the JOBS Act. The U.S. exemption, applicable to crowdfunding offerings of up to \$1 million, will be subject to rules to be promulgated by the U.S. Securities and Exchange Commission. Such U.S. offerings, if they represent not more than 50% of the issuer's capital, might be directed to French investors without being subject to French prospectus/public-offering rules. Once the SEC issues its final crowdfunding rules, we will be better able to assess possible opportunities for joint U.S.-French crowdfunding through offerings of securities.

(2) regulation of credit operations

Any lending activity in France, if conducted “habitually” and for profit (*à titre onéreux*), is a credit operation subject to the French banking monopoly, which can be carried out only by French or “passported” EEA credit establishments.¹¹ In case of violation, administrative and penal sanctions may be imposed, but the relevant loan agreements should not thereby be voided. These rules are enforced by the banking/insurance regulator, the Autorité de Contrôle Prudentiel (“ACP”).

Loans granted without interest or other consideration are not subject to the banking monopoly. The ACP has announced that, subject to court review on a case-by-case basis, interest-free loans for which the lender receives a promotional reward of small value (such as a CD, DVD or concert ticket) seem likely to be considered interest-free.¹² To avoid violation of banking monopoly rules, some French crowdfunding organizations arrange for the actual loans to be made by authorized banks, with the crowdfunding organization acting as an intermediary (see below).

Other relevant categories of regulated financial activity are furnishing payment services, as an *établissement de paiement*,¹³ or providing electronic money, as an

⁹ <http://www.mymajorcompany.com/> as of March 25, 2013

¹⁰ <http://www.kisskissbankbank.com/> as of March 25, 2013

¹¹ CMF articles L.311-1, L.313-1 & L.511-5

¹² AMF/ACP, Guide du financement participatif (crowdfunding) à destination des plates-formes et des porteurs d projet (May 14, 2013) (“AMF/ACP Guide May 2013”).

¹³ CMF article L. 522-1

établissement de monnaie électronique.¹⁴ The ACP considers that crowdfunding platforms which arrange for funds for a given project to be collected in an account at a banking institution are “acquiring” and “executing” payment orders pursuant to CMF article L.314-1 II 3° and 5°, which activities require a license as a payment service provider under CMF article L522-6. However, exemptions from the licensing requirement are possible for platforms which collect donations in exchange for a definite and clearly defined counterpart having a value commensurate with the donation made.¹⁵

These restrictions and related sanctions are applicable to French and non-French crowdfunding activities carried out in France involving loans or providing other financial services, including via the internet when the lending activity has some connection to France (such as when potential French crowdfunding lenders are targeted).

Further, such activities may be required to comply with anti-money-laundering rules, requiring exercise of due diligence with regard to clients (*obligation de vigilance*), which consists of (i) identification of clients, (ii) gathering information relating to the purpose and nature of the transactions as planned and as carried out (among other things) and (iii) reporting suspicious transactions to French authorities (TRACFIN).¹⁶ Although some French crowdfunding organizations have reported difficulties in complying with anti-money-laundering rules, the need for compliance appears to have been accepted by most.

There are exceptions to the banking monopoly for various lending activities by non-profit organizations.¹⁷ Such organizations are also permitted to make profit-participation loans under certain conditions.¹⁸ However, these non-profit organizations remain subject to at least some anti-money-laundering obligations.

Examples of French entities engaged in crowdfunding for business activities through loans¹⁹ include the following:

- FriendsClear, which promotes loans among businesses. The loans are provided by the Crédit Agricole; FriendsClear has a status of a banking intermediary (*intermédiaire en opérations de banque et en services de paiement*, described below).²⁰

¹⁴ CMF article L. 526-1 et seq.

¹⁵ AMF/ACP Guide May 14, 2013.

¹⁶ CMF, articles L.561-1 et seq.

¹⁷ CMF article L.511-6 5.

¹⁸ See CMF articles L.511-6 6 and 313-3 et seq.

¹⁹ Another major French lending platform is Prêt d'Union, which promotes consumer credit (<http://www.pret-dunion.fr/> as of March 11, 2013).

²⁰ <http://www.friendsclear.com/> as of March 22, 2013

- SPEAR, which promotes loans to projects with an ecological, cultural and social impact. Participants place funds in the SPEAR cooperative association, at a low interest rate. Funds collected are deposited by SPEAR in one of its partner banks, which grants loans to the projects chosen by the participants. SPEAR has announced that since its creation in 2012 it has raised a capital of collected €500,000 and has financed eight projects.²¹
- Babyloan, which promotes micro-loans for entrepreneurs from developing countries. Participants provide reimbursable loans without interest (and for that reason the loans are said not to be subject to the French banking monopoly). Babyloan states that since the creation in 2008 it has collected €5 million and has helped finance 13,100 projects (including via micro-loans).²²

(3) regulation of financial intermediaries and financial solicitation

Brokerage or other financial intermediary services in France with respect to securities or other financial instruments can be provided only by an authorized French or EEA-passported "investment service provider" (*prestataire de services d'investissement*).²³

Persons providing advice on a regular basis regarding investments and certain related matters can be provided by French or EEA-authorized financial investment advisers (*conseillers en investissements financiers*).²⁴

Acting (for consideration) as an intermediary with respect to banking operations or payment services requires registration as an *intermédiaire en opérations de banque et en services de paiement* ("IOBSP").²⁵

Further, marketing and distance-selling (including telephone and internet solicitation) are subject to restrictions on financial solicitation (*démarchage*) set out in the CMF and the Consumer Code.

The foregoing rules apply to any intermediaries or advisers who carry out their activities in France, including foreign entities which can be deemed to conduct such activities in France via the internet. Whether the rules will apply in a given case is subject to a fact-based analysis. Guidelines on the subject have been published by the ACP.²⁶

²¹<http://www.spear.fr/> as of March 12, 2013

²²<http://www.babyloan.org/fr/> as of March 12, 2013

²³CMF article L.531-1 et seq.

²⁴CMF articles L.541-1 et seq.

²⁵CMF articles L.519-1 et seq.

²⁶AMF/ACP Guide May 2013

French crowdfunding organizations such as WiSEED, Anaxago, Finance Utile and SmartAngels report that they are registered as financial investment advisers, since their activities consist of advice on providing financing.

(4) proposals for reform

Crowdfunding activists have called for several modifications of law and regulation intended to facilitate crowdfunding. Various reforms were proposed in a "Manifeste" published in February 2012 by representatives of 36 organizations and later in a "Livre Blanc"²⁷ and a statement of ethical principles (*charte déontologique*) published by a trade association, Financement Participatif France.

Measures proposed by crowdfunding advocates include establishing a new category of intermediary for crowdfunding operations, increasing above 150 persons the exemption for a "restricted circle" of investors, increasing from €100,000 to €1 million the threshold for application of public-offering rules, and others.

The French President, François Hollande, has announced that the government will propose in September 2013 measures to reform regulatory rules related to crowdfunding. The AMF and the ACP are currently consulting the crowdfunding community in France, with a view to proposing new rules without compromising protection of investors and other crowdfunding participants.

(5) checklist for non-French crowdfunding activities potentially subject to French regulation

The following checklist can serve as an initial guide to determining how French regulatory regimes might apply to crowdfunding activities centered outside of France:

1. Is the crowdfunding activity (whether solicitation or acceptance of equity, loan, donation, pre-sale, non-financial reward, etc.) directed toward any French-resident individual or entity operating in France via its registered seat or a branch?

The activity would generally be considered to be so directed if it involves in-person solicitation or meetings in France, telephone calls made to persons in France or websites linked to sites of French organizations; it would generally not be so considered if it included acceptance of funding from French residents but none of the parties was in France while taking any of the steps relating to the activity. Accepting funding from French residents who take the initiative to

²⁷ Livre Blanc : Finance Participative - Plaidoyer et propositions pour un nouveau cadre réglementaire, available at <http://finpart.org/download/plaidoyer-juin/Livre-Blanc-Finance-Participative-Plaidoyer-et-Propositions-pour-un-Nouveau-Cadre-Reglementaire.pdf>

contact a non-French crowdfunding organization, but who provide the funding while in France, is arguably not sufficient to trigger application of French law and regulation, although this should be reviewed on a case-by-case basis.

2. If the activity might be considered directed toward a French-resident individual or an entity operating in France:
 - a. If the activity involves issuance or sale of a security (defined as all financial instruments, shares, bonds etc.), does it qualify for an exception from rules governing public offerings?
 - b. If the activity involves loans:
 - (i) Are the loans expected to be repaid (i.e. are they in fact donations)?
 - (ii) Are the loans interest-bearing or does the lender have a stake in the profit of the borrower?
 - (iii) Are the loans subject to any of the exceptions to banking monopoly rules, such as not-for-profit loans or those made by certain non-profit organizations?
 - c. Are anti-money-laundering rules potentially applicable?
 - d. Does the activity involve:
 - (i) intermediation (including brokerage)?²⁸
 - (ii) solicitation (*démarchage*) of a consumer²⁹

The answers to these questions would help identify which French rules might apply to crowdfunding activities.

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Please feel free to consult us with any questions about the issues mentioned above.

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²⁸CMF article L.519-1 et L.550-1

²⁹CMF article L.341-1 : “constitue un acte de démarchage bancaire ou financier toute prise de contact non sollicitée, par quelque moyen que ce soit, avec une personne physique ou une personne morale déterminée, en vue d’obtenir, de sa part, un accord sur un certain nombre de services ou d’opérations”.