Regulation of Crowdfunding Activities in Switzerland: Where do we Stand?

Executive summary:
Crowdfunding is growing in Switzerland. It can take several forms, from crowddonating to crowдинvesting through crowdlending, raising various legal issues, mainly depending upon the involvement (and expectations) of the project financers and the role played by the crowdfunding platforms. As of today, Switzerland has not adopted specific regulation governing crowdfunding, but the Swiss financial regulator FINMA has issued a «fact sheet» on this topic, setting out its current approach and informing the stakeholders of the crowdfunding industry that some of their activities may be subject to banking regulation, involving supervision by FINMA as well as additional obligations. Crowdfunding platforms and politicians however raised the concern that submitting the platforms to standard banking regulation may not be appropriate (nor sustainable from a business perspective) and may significantly stymie the process of development of crowdfunding in Switzerland. In the context of the revision of the Swiss legislation governing financial services, special provisions addressing the issue of crowdfunding have been proposed by the Swiss Government, providing in particular for a possible safe harbour from the banking regulation in case of publication of a «light prospectus». The proposed provisions remain however limited and in this context, it is interesting to get a general overview of the regulations adopted abroad, in particular in the USA and in the European Union, where countries such as the UK, France or Italy chose to adopt a more detailed regulation, some with financial limits applicable to crowdfunding campaigns or with specific requirements regarding who would be authorized to invest in crowdfunding campaigns. Such existing regulations may impact the upcoming discussions on the proposed Swiss regulations, which will in any case unlikely address all issues relating to crowdfunding (management of intellectual property, management of non-professional investors, overfunding, etc.). In the authors’ view, the stakeholders of the crowdfunding industry may be well advised to address such issues proactively, by adopting soft regulations or recommendations in the form of «Best Practices» or «Guidelines».

1. General Presentation of Crowdfunding

I Introduction

[Rz 1] Crowdfunding is not a new phenomenon in Switzerland. According to local experts, the first crowdfunding platforms based in Switzerland appeared as early as 2008, to reach now a number
of around thirty platforms based in Switzerland, but recent numbers tend to show that this new method to finance projects gained importance mainly in the past three years. As the practice of crowdfunding developed in Switzerland and more and more platforms emerged, the question of the legal and regulatory framework applicable to this new source of financing drew the attention of politicians and supervisory authorities. Following the path of other countries that adopted in the past years tailor-made regulations to address the specificities of crowdfunding, Switzerland contemplates adopting certain statutory provisions applicable to crowdfunding, in the course of a complete overhaul of the Swiss regulations governing financial services and products.

Before analysing the current regulatory framework and the scope of the contemplated new regulations, we will start by giving a brief overview of the notion of crowdfunding and of the legal issues raised by this fund raising method. We will then proceed to a short comparative review of the legislations that have already been adopted in other countries in this respect. We will conclude with some thoughts on other possible future evolutions of the Swiss legal environment applicable to crowdfunding.

II Definition of Crowdfunding

Crowdfunding – or more specifically online crowdfunding – refers to a broad phenomenon that can be defined as the practice of raising funds, usually by small contributions from a large number of persons via an online platform for the purpose of supporting a project or venture. In most cases, the project will be allocated a goal of minimum funds to be raised on the platform in order for the project to be launched. The setting of such financial goal can however lead to different results depending on the financial model of the platform on which the project is published. In practice, the two most common models adopted by the platforms are known as the «Keep-it-All» (KIA) model on the one hand and the «All-or-Nothing» (AON) model on the other hand. Under the latter, the individual or entity that published the project on the crowdfunding platform will only receive the funds if the financial goal set for the project is reached whereas in the case of KIA, all funds paid via the crowdfunding platform are received and kept by the project developer, even in case the financial goal set for the project is not reached. In addition to these two main financial models, new diverse models emerged, with some platforms choosing not to require from the project developers to set a financial goal for the crowdfunding campaign.
In addition to its various financial models, crowdfunding can occur under several forms (see below). But it will always involve the intervention of three groups of people: (a) the «project developer(s)», referring to the individuals or companies willing to launch a project or to raise funds and using crowdfunding to achieve that goal; (b) the «project financer(s)» (also called «backers» or «funders» on many crowdfunding platforms), referring to the individuals or companies willing to support a project or person by making a financial contribution in favour of the project, and (c) the «platform operator», referring to the manager of the crowdfunding online platform on which the project is published and through which the project developers and the project financers can connect. A bilateral contractual relationship exists among all parties to the crowdfunding process (i.e., between the project developer and the platform operator, between the project financer and the platform operator and more importantly between the project developer and the project financer). The characterization of such contractual relationships as well as the content of said contracts will however often vary depending on the modalities of the crowdfunding practiced on the relevant platform.

Indeed, as mentioned above, crowdfunding can occur under different forms and practitioners usually draw a distinction between the following four main categories: (a) crowddonating, (b) crowdsupporting, (c) crowdlending and (d) crowdinvesting.

Originally, most crowdfunding projects were taking the form of crowddonating or crowdsupporting projects, in most cases in relation with artistic projects; crowddonating usually refers to projects where project financers (or backers) donate funds without expecting anything in return, whether in the form of reimbursement or of gifts from the project developer. This type of crowdfunding campaigns is often used by NGOs or humanitarian organisations, but can also be launched by individuals, seeking financial assistance and turning to the online community for help. Crowdsupporting, on the other hand, relates to the financing of a project in exchange for a reward, either in the form of a pre-order of the product to be developed or an autograph from the artist supported through the platform, or even other forms of rewards, some being more original than others. This type of crowdfunding is very often used to support artistic projects, some platforms having specialized in musical projects or sports-related ones. Some Swiss-based crowdfunding platforms are also specialized in that type of campaigns.

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3. One recent example of these crowddonating campaigns is the one created by the US office of the UNHCR in collaboration with the famous US-based crowdfunding platform Kickstarter, inviting participants to make donations in favour of Syrian refugees (see http://www.unrefugees.org/2015/10/usa-for-unhcr-announces-innovative-partnerships-to-raise-awareness-and-funds-for-refugees/).
5. A local example of a successful crowdsupporting campaign was the campaign for the opening of a wine bar in Lausanne: the project developers managed to raise CHF 200’000 in six days, offering in exchange to their backers ‘pre-dinner drinks for life’; see www.tacave.ch.
6. For specialized crowdfunding platforms, one can think of the London-based «Pledge Music» or the French platform «MyMajorCompany» for artistic projects or «Sportfunder» for sports projects; as for specialized crowddonating platforms, one can in particular think of the Swiss platforms Cause Direct, Fengearion or GivenGain.
[Rz 7] In the case of crowd donating or crowd supporting, the contractual relationship between the project developer and the project financer will often be characterized as a form of donation under Swiss contract law, within the meaning of Articles 239 ff of the Swiss Code of Obligations (SCO)\(^\text{13}\), or of a mixed donation with a form or consideration from the project developer to the investor. In some cases, when the award is a pre-sale of the product that will be launched through the project, the contractual relationship could be characterized as a sales contract (Articles 184 ff SCO)\(^\text{14}\).

[Rz 8] From a contractual viewpoint, crowd donating and crowd supporting will generally not raise complex legal issues. Crowd donating is even favored by users, as it can lead to some tax benefits for the project financer\(^\text{15}\). From a regulatory viewpoint, this form of crowdfunding, as the others, is subject to the existing Swiss financial regulatory framework, which will be further detailed below (see Section 2).

[Rz 9] Another common form of crowdfunding is crowd lending, which can be defined as a form of community financing made in the form of loans from the project financers: the platform operator connects companies or individuals wishing to borrow funds to third parties, which are neither banks, nor financial intermediaries\(^\text{16}\). In this kind of crowdfunding campaigns, the project developer is often willing to raise funds quickly, and without having to first provide heavy warranties and/or collateral that would likely be requested by a bank, and the project financers will usually be rewarded by a reimbursement of their investment plus applicable interests.

[Rz 10] As regards this type of crowdfunding, the legal and regulatory environment may present more constraints than the first two categories. From a contractual viewpoint, the relationship between the project developer and the project financer can no longer be characterized as a donation but will usually be considered a loan agreement, within the meaning of Articles 305 ff SCO. In some circumstances however, such contractual relationship can further be characterized as a consumer credit, which is regulated under the Swiss Consumer Credit Act. Such characterization may trigger regulatory obligations for the project financer, as we will see below (see Section 2(iii)).

[Rz 11] Furthermore, in the context of crowd lending campaigns, the platform often plays a more active role, managing the loan and its reimbursement and thus handling funds on behalf of the other parties\(^\text{17}\) which may trigger the application of financial regulations (see Section 2(i)).

[Rz 12] Finally, the last common category of crowdfunding is referred to as crowd investing, which can be defined as the investment of funds in a company, through a crowdfunding platform, in exchange for a stake in this company, usually in the form of equity or other types of securities granting a right to a portion of the company’s profits. This new financing mode is becoming more and more frequent among start-ups attempting to raise small amounts, either in the context of a bridge financing or to supplement amounts already provided by professional investors or business angels and some see this new mode of financing as a small revolution in the world of venture capital.

\(^\text{13}\) RS 220.
\(^\text{14}\) Spacek (note 7), p. 281.
\(^\text{15}\) Swiss Crowdfunding Association, White paper – Crowdfunding in Switzerland, 2015, p. 38.
\(^\text{16}\) Andreas Schneuwly, Crowd funding aus rechtlicher Sicht, AJP 2014, p. 1611.
capital\textsuperscript{18}. There are several Swiss crowdfunding platforms dedicated to crowdinvesting\textsuperscript{19} and such platforms are becoming important players in the financing of innovative projects.

[Rz 13] The contractual relationship between the project developer and the project financer in the context of crowdinvesting is more complex than in the previous categories, as the project financer will in most cases become a shareholder of the company raising funds, and will often be requested to enter into a shareholders agreement with the other shareholders of such company. In some cases, the project financer may also be requested to enter into an investment agreement.

[Rz 14] Although not heavily regulated, an equity investment in a Swiss company is subject to a legal framework that may not always be compatible with crowdfunding\textsuperscript{20}. First, according to Article 652a SCO, a limited company that publicly offers the subscription of new shares must publish a prospectus containing a certain number of information: details of the registration with the trade registry, information on the share capital including preferences attached to certain categories of shares, information regarding the company’s accounts and relating to the dividends paid to shareholders during the past five years\textsuperscript{21}. Such prospectus must not be published for any offering of shares, but only for those deemed to constitute a «public» offering of shares. A majority of legal scholars consider that the criteria to determine whether the offering is «public» are met in the case of crowdfunding\textsuperscript{22}. Preparing such prospectus and making such information publicly available may be perceived as an obstacle and companies might prefer to seek funding by way of a private placement to avoid that step. One should also keep in mind that the persons involved in the preparation of the prospectus incur a liability for any false information contained therein. In addition, in order to become shareholders of the crowdfunded company, the project financers will be required to formally subscribe shares, which can only be done through a subscription deed, signed in original by the subscriber or its representative\textsuperscript{23}. Thus, the operation will not be fully digital, contrary to what will usually be the case for the project financer in other forms of crowdfunding.

III Common Issues of Crowdfunding

[Rz 15] As noted above, there is not only one form of crowdfunding, and some legal issues that may arise in relation to one form of crowdfunding (e.g., the issue of consumer credit regulation in case of crowdlending) may not apply to the other forms of crowdfunding. It may thus be difficult for the legislator to adopt a special legislation to govern crowdfunding when the legal questions and risks are not uniform within the notion of crowdfunding.

[Rz 16] Some authors have however identified common issues that could be addressed in connection with all forms of crowdfunding. One common legal feature in connection with this type of campaigns


\textsuperscript{19} See for example the platform «Investiere» or the platform «Raizers», launched in 2015.

\textsuperscript{20} Peter Hettich, Finanzierungsquellen für KMU im Zeitalter von Crowdfunding, GesKR 2013, p. 393.

\textsuperscript{21} Silvio Venturi and Marie-Noëlle Zen-Ruffinen, Commentaire romand du code des obligations, 652a N 6 ff, Helbing Lichtenhan, Bâle 2008.

\textsuperscript{22} Interview of A. de Boccard, Les limites légales du Crowdfunding en Suisse, L’Agefi, November 11, 2015; P. Hettich (note 20), p. 393; Swiss Crowdfunding Association, White paper – Crowdfunding in Switzerland, 2015, p. 36.

\textsuperscript{23} See Article 652 SCO.
is the issue of management of intellectual property rights over the project and the risks that the crowdfunding process may create in connection with such rights.

[Rz 17] The issues over intellectual property rights can arise at different stages of the project\(^{24}\). First, the project developer will need to check whether the publication of its project on a crowdfunding platform could result in the loss of its rights on the project: the rule is particularly strict as regards patent protection, which is lost if the invention is shared publicly prior to the filing of a patent application\(^{25}\). In some instances also, the concept behind the contemplated project, although highly innovative, may simply not be protected by intellectual property rights, and sharing such concept on a crowdfunding platform could expose the project developer to the risk that third parties exploit such concept on their own, with no (or almost no\(^{26}\)) legal means for the project developer to prevent it. Another intellectual property issue often raised in connection with crowdfunding is to ensure, for the project developer, that the crowdfunding process will not result in a transfer or co-ownership of the intellectual property rights over the project. On that regard, although the authors have no knowledge of existing crowdfunding platforms that would request that the intellectual property rights on the project be transferred, either to the platform or to the project financers against financing, it is always recommended to check the terms and conditions of the platform to ensure that it is not the case. If nothing is specified in such terms and conditions, the project developer will usually only be deemed to have granted a license to the platform to publish some content protected by intellectual property rights (trademarks, copyrighted works, etc.) for the purpose of promoting the project, and the financial contribution from the project developer will usually not be deemed as resulting in co-ownership of the intellectual property rights on the project. Finally, in the case of crowinvesting in particular, when deciding to invest in a highly innovative project which main value is covered by intellectual property rights, the project financer may wish to obtain some warranties on the validity of said rights, as well as on the effective ownership of these rights by the project developer. Such warranties may be obtained directly from the project developer through the conclusion of a contract, as in most cases, the platform operator will exclude any form of warranty on the project in its general terms and conditions, but there is no default warranty in favour of the project financer.

[Rz 18] It derives from the above that the question of intellectual property rights can arise in most crowdfunding projects, and at different stages of such project. However, almost all of the identified issues may be handled contractually among the parties: it can be specified in the terms and conditions of the platform that the project developer remains the owner of its intellectual property rights on the project, that the financing will not result in co-ownership, that the developer warrants that it owns all necessary rights on the project and that the project developer and the project financer will enter into a bilateral agreement that may include contractual warranties on that matter. The parties thus retain flexibility on that regard.

[Rz 19] This is not the case as regards the Swiss regulatory framework for financial services, which may apply to all forms of crowdfunding activities. Indeed, as regards such public law regulation, the various intervening parties to the crowdfunding process cannot simply contractually «opt out». The

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\(^{26}\) Some authors mentioned the possibility to make an unfair competition claim to prevent such exploitation, but for such claim to be successful, there are only a limited number of provisions of the Unfair Competition Act that could be invoked and established in the context of crowdfunding.
application of these regulations will be triggered as soon as their requirements are met. These rules were designed to apply to financial institutions (and not to the actors of the crowdfunding process) and may therefore hinder the implementation of certain projects, if the latter are not structured properly. The Swiss regulatory framework for financial services and institutions is currently subject to a complete overhaul and it is thus worthwhile to analyse how the current and future rules will impact upon crowdfunding activities in Switzerland.

2. Regulation of Crowdfunding in Switzerland

The current Swiss regulatory framework for financial activities does not contain any specific rules regarding crowdfunding activities. The regulatory status of the three main actors involved in a crowdfunding scheme, namely the platform operator, the project developer and the project financer, must therefore be assessed under the ordinary rules governing the provision of financial services in Switzerland.\[Rz 20\] As will be shown below, comparatively small changes to a crowdfunding scheme can trigger major implications from a regulatory perspective. In the course of this section, we will put special emphasis on crowdlending activities, which constitute an alternative to (regulated) banking financing.

I Current Regulatory Status of the Platform Operator

The regulatory status of the platform operator depends upon the structuring of the crowdfunding scheme.\[Rz 21\] Firstly, crowdfunding platforms that offer project financers the possibility to allocate funds directly to project developers are not subject to licensing requirements under Swiss rules.\[Rz 22\] Under this set-up, the funds are made available by the project financer directly to the project developer, without such funds being channeled through the platform. The same conclusion also applies when the funds are channeled through a third party (e.g., an escrow agent benefiting from a banking license) who is independent of the project developers, platform operator or project financers.\[Rz 23\] The regulatory situation is different when the funds made available by the project financers are booked on the accounts of the platform operator, before being made available to the project developers. From a Swiss banking regulatory perspective, the key issue is to determine whether these funds are to be characterized as «deposits from the public», which may only be taken on by entities benefitting from a banking license. If the platform operator accepts the funds from the project financers and immediately transfers the same to the project developers, the acceptance of the funds cannot be characterized as a «deposit», as the funds are not held by the platform, but are being passed on to the project developer. In turn, the longer the holding period at the platform, the higher the likelihood that the funds are characterized as «deposits» (which triggers the need to obtain a banking license). According to FINMA’s current practice, a holding period in excess of


\[29\] Jana Essebier and Rolf Auf der Maur (note 27), N 17.
three days may trigger a requirement to apply for a banking licence. The requirements to obtain a bank license are high, in particular in terms of capital adequacy and internal organization. It is unlikely that platform operators can obtain such a license whilst still maintaining sustainable business activities. Accordingly, it is critical to structure the platform operator in such a way that it does not fall within the ambit of banking regulations. The possibility of "pooling" the contributions at the level of the platform before the funds are passed on to the project developers is significantly restricted by this "short-holding-period" rule. As an alternative, platform operators may (i) obtain funding commitments from the project financers, which are only drawn upon once a certain level of committed funding is reached or (ii) cooperate with a regulated bank.

[Rz 24] In addition, each time the platform operator has the power to allocate the funds made available to it by the project financers, the platform operator is likely to be characterized as a «financial intermediary» within the meaning of the Swiss Anti-Money Laundering Act (AMLA). Such legal characterization means that the relevant entity must register with, and is subject to, the supervision of a self-regulated body recognized by FINMA. Where a financial intermediary is not affiliated to any self-regulated recognized body, it will be directly supervised by FINMA. The duties imposed on the financial intermediary are essentially KYC rules and procedures, as well as certain organizational requirements (e.g., internal controls, documentation, continuing education, etc.). In addition to these KYC rules and procedures, financial intermediaries must also comply with the duties to report and to block assets in the event they have knowledge or suspicion of criminal activity. The reporting duty presupposes that the financial intermediary is aware of or has reasonable suspicion as regards the criminal origin of the assets involved or their use for the financing of terrorism, or, since January 1, 2016, that the assets derive from a qualified tax offense.

A financial intermediary may incur a criminal liability should it fail to comply with these duties.

II Current Regulatory Status of the Project Developer

[Rz 25] Project developers may also fall within the ambit of the Swiss Banking Act. Indeed, the receipt of (i) deposits from the public (ii) on a professional basis is characterized as a «banking» activity in Switzerland. Conversely, the Swiss regulatory framework for banking activities is not triggered, at the level of the project developer, if one of these two cumulative requirements is not met:

- «Deposit from the public»?: As far as crowdfunding is concerned, one of the relevant exceptions is set forth in Article 5 (3) (b) of the Swiss Banking Ordinance, pursuant to which standardized notes in respect of which a prospectus meeting the requirements of Article 1156 SCO has been issued are not characterized as «deposits» under banking regulations. The issuance of a
prospectus is therefore an avenue to avoid being subject to the Swiss banking legislation. The preparation of such prospectus, however, triggers costs (see Section 1(ii)). In addition, every person involved in the preparation of the prospectus is subject to a prospectus liability.

- **«On a professional basis»?** Another exception available in the context of crowdfunding is set forth in Article 6 of the Swiss Banking Ordinance. Pursuant to this provision, an activity is deemed made on a «professional» basis, and thus subject to the regulatory requirements only if it involves the acceptance of more than 20 deposits (or if there is a public solicitation for deposits, even if the number of deposits is below 20). As a result, certain project developers have elected to restrict the number of lenders to a number which is below 20, so as to attempt to fall within the ambit of this regulatory safe harbor. This however negates the purpose of a crowdfunding scheme, which is aimed at a large number of investors. Furthermore, any public solicitation for deposits (even if the number of deposits obtained is below 20) is considered to be a «banking» activity. To the extent crowdfunding platform by nature aim at a large public, a limitation to 20 lenders is only an imperfect response to this regulatory risk.

### III Current Regulatory Status of the Project Financer

[Rz 26] The project financers act as mere investors. They should therefore not be subject to regulatory constraints in Switzerland in their capacity as investors.

[Rz 27] That being said, the loans granted to project developers in the context of a crowdlending platform could possibly be characterized as «consumer loans» within the meaning of the Swiss Consumer Credit Act. This applies only in instances where the loans sourced through a crowdfunding platform are used by the debtors for private (and not commercial) purposes. The grant of consumer credits on a professional basis is subject to an authorization requirement. The characterization of the investor as a «creditor of a consumer loan» will generally hinge upon the question as to whether or not the creditor is acting in a professional capacity. Acting «in a professional capacity» is not defined in Swiss law. It is however accepted that a part-time activity can be made «in a professional capacity». To the extent the cantonal authorities are in charge of the enforcement of the Swiss Consumer Credit Act, there is a risk that a person which extends funds on a regular basis on crowdfunding platforms falls within the framework of the Swiss Consumer Credit Act. This risk is however only of relevance if, as indicated above, the financed project is of a private (and not commercial) nature.

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36 JANA ESSEHIER AND ROLF AUF DER MAUR (note 27), N 16.
37 On these questions, see also JANA ESSEHIER AND ROLF AUF DER MAUR (note 27), N 22–25.
38 The Swiss Consumer Credit Act only applies to loans between CHF 500 and CHF 80'000 (Article 7 (1) (e) of the Swiss Consumer Credit Act). The loans made available through crowdlending platforms are however generally below this ceiling (see references made in JANA ESSEHIER AND ROLF AUF DER MAUR (note 27), N 25).
39 Article 39 of the Swiss Consumer Credit Act.
40 JANA ESSEHIER AND ROLF AUF DER MAUR (note 27), N 25.
41 The platform would then probably be characterized as a consumer credit intermediary (Article 39 (1) of the Swiss Consumer Credit Act).
IV Proposed Swiss Federal Financial Services Act and Swiss Federal Financial Institutions Act: What will Change for Crowdfunding in Switzerland?

[Rz 28] On November 4, 2015, the Swiss Government published the draft Swiss Federal Financial Services Act (the Draft FinSA) and the Swiss Federal Financial Institutions Act (the Draft FinIA). One of the aims of the Draft FinSA is to facilitate the emergence of crowdfunding activities in Switzerland. The draft Draft FinSA proposes to deal with this topic from the perspective of the prospectus requirement. Indeed, as indicated under Section 2(ii) above, the preparation of a prospectus (as the case may be on a simplified basis) constitutes a prerequisite to benefit from the carve-out as regards the regulatory definition of «banking activities».

[Rz 29] The prospectus requirement which is currently in force in Switzerland has a limited scope. Under the new regulatory regime proposed in the draft Draft FinSA, one would have to distinguish between (i) the prospectus and (ii) the basic information sheet. The proposed new rules can be summarized as follows:

- **Prospectus (to be approved by a specific supervisory body):** A prospectus requirement applies for all securities offered in or from Switzerland. The term «securities» comprises in particular (i) standardized certificates which are suitable for mass trading, (ii) rights not represented by a certificate but with similar functions and (iii) derivative instruments. The proposed prospectus requirement is substantially in line with the EU Prospectus Directive (2003/71/CE). An alleviated prospectus requirement would apply to small and medium enterprises.

- **Basic information sheet (equivalent of the Key Investor Information Document (KIID) required for collective investment schemes):** The requirement to prepare a basic information sheet applies to all financial instruments offered in or from Switzerland to private clients. The term «financial instruments» comprises in particular (i) equity and debt instruments, (ii) units in collective investment schemes, (iii) derivative instruments and (iv) structured products. The requirement to prepare a basic information sheet would not apply to the offering of equity instruments. The basic information sheet is to be presented in a uniform manner irrespective of the type of financial instrument and is to set out the key information on the financial product: the type and characteristics of the financial instrument, as well as its risk profile, its expected return and its costs. The purpose of the basic information sheet is to allow clients to compare various financial instruments.

[Rz 30] Notes issued in the context of a crowdlending scheme would, in all likelihood fall within the definition of «securities» and of «financial instruments». That being said, the Draft FinSA provides exemptions from the prospectus requirement, for example when the financing does not exceed CHF 100’000 over a 12-month period or when the issuance of securities is made for a...
non-commercial purpose\textsuperscript{46}. In turn, a basic information sheet would need to be prepared in every event, except if the instruments being issued qualify as «equity instruments»\textsuperscript{47}.

[Rz 31] The preparation of (i) a prospectus or (ii) a basic information sheet would have an impact on the characterization of the relevant set-up under the Swiss Banking Act (as proposed to be revised):

- As long as a prospectus or a basic information sheet is provided, the relevant financial instrument would not be deemed a «deposit» within the meaning of the Swiss Banking Act\textsuperscript{48}.
- Accordingly, the project developer who prepares a basic information sheet would fall outside of the scope of the Swiss banking regulations, even if the exemptions from the (more burdensome) prospectus requirement apply. Likewise, the platform operator should also benefit from increased flexibility as regards the holding of the funds contributed by the project financers, to the extent the entire process no longer involves «deposits from the public».

[Rz 32] In short, the alleviation of the regulatory requirements set forth in the Draft FinSA/FinIA hinges upon the requirement to prepare a basic information sheet, which, in turn, mitigates the risk that the crowdlending contributions be characterized as «deposits from the public». The proposed new rules thus create the somewhat paradoxical situation in which a new regulatory requirement (\textit{i.e.}, the duty to prepare a basic information sheet) leads to an alleviation of another one (\textit{i.e.}, the risk that the activities be deemed to constitute «banking» services).

3. Regulatory Frameworks Implemented Outside of Switzerland

[Rz 33] Certain jurisdictions outside of Switzerland have implemented a regulatory framework dedicated specifically to crowdfunding\textsuperscript{49}.

I United States

[Rz 34] In the U.S., the Crowdfunding Act entered into force in 2012, as a subcomponent of the JOBS (Jumpstart Our Business Startups) Act, which purpose is to facilitate the access of start-up enterprises to the capital markets. This act aims at facilitating the establishment of crowdfunding platforms and to provide for safety mechanisms for project financers. Pursuant to the Crowdfunding Act, platforms must register with the U.S. Securities and Exchange Commission as a «broker» or a «funding platform». Project developers are subject to a financial limit of USD 1 million per year. Project financers may not invest, per year, more than 10\% of their income (if such income is above USD 100’000 on a yearly basis) or not more than 5\% of their income (if such income is below USD 100’000 on a yearly basis).

\textsuperscript{46} Article 39 (i) Draft FinSA.
\textsuperscript{47} The requirement to prepare a basic information sheet does not apply to «equity instruments» (Article 61 (1) Draft FinSA).
\textsuperscript{48} See draft Article 1b (3) of the Swiss Banking Act, as modified by the Draft FinIA.
II European Union

[Rz 35] In the EU, the Commission has launched a study to gather and analyze data on crowdfunding markets across the EU. The latest version of this study has been published in November 201550. This study sheds light on the attempts made in three EU member states to regulate crowdfunding. As will be shown below, the regulator’s focus has been on (i) the types of services which can be offered through a crowdfunding platform and (ii) the types of investors entitled to access such platforms.

[Rz 36] In Italy, equity crowdfunding is regulated since June 2013 under Regulation 18592. The regulation permits equity crowdfunding platforms to operate subject to registration with the Comisión Nazionale per le Società la Borsa (CONSOB). The main regulatory requirements can be summarized as follows:

- Start-up businesses are able to raise up to EUR 5 million via an Italian equity crowdfunding platform. Investments can be made by both professional investors and retail investors.
- Platforms can only give access to investors that have confirmed that they have knowledge of the guidance published on the CONSOB website, attest that they are aware of the risks of investing in start-ups and make a declaration that they are able to withstand any economic loss that may arise from the investment.
- A minimum of 5% of the offered share capital must be subscribed by a professional investor as defined under Italian law and regulations.

[Rz 37] The UK adopted, on April 1, 2014, a new regulatory framework for crowdfunding (regulation PS14/4). The UK regulation of crowdfunding brought both loans and securities platforms into the scope of a new single regulation. Certain crowdfunding activities, including donation and rewards models, remain outside the scope of regulation. In becoming regulated, platforms have to comply with both the specific regulation and also broader considerations of becoming a firm regulated by the Financial Conduct Authority. The UK regulations have also implemented certain restrictions on investors entering into crowdfunding transactions. For investors into securities, specific limits were put in place in relation to retail investors. These are only applicable until an investor has become experienced at making crowdfunding investments. Retail investors are required to confirm that they will not invest more than 10% of their net investable assets in investments sold via investment-based crowdfunding platforms. No such limits were put in place in relation to lenders. The limits do not apply once investors are able to demonstrate that they are experienced.

[Rz 38] France adopted on May 30, 2014 a new crowdfunding regulation that entered into force as of October 1, 2014. Two new, optional, regulatory statuses were created, under which crowdfunding platforms can operate: (i) conseiller en Investissement Participatif (CIP) and (ii) Intermédiaire en Financement Participatif (IFP).

- Registration as a CIP requires platforms to satisfy a number of requirements. This includes adherence to a code of conduct and a restriction to focus on the issuance of ordinary shares and fixed rate bonds. The «staged access» rules require potential investors to first confirm their understanding of risks, and also test them on their understanding of the risk profile of

50 This study is available at: http://ec.europa.eu/finance/general-policy/crowdfunding/index_en.htm.
specific investments before they are made. While CIPs may provide some ancillary services\(^{51}\), they may not receive funds from investors (except for their own fees), nor receive securities from issuing companies.

- Registration as an IFP also requires platforms to satisfy a range of criteria including good repute and professional skills. IFPs are able to crowdfund loans to both incorporated entities and individuals; however, for interest-bearing loans, only individuals are able to act as lenders. If IFPs wish to implement transfers of funds between lenders and borrowers, they also need to hold a licence as a payment institution, under a simplified regime. Loans are restricted to a size of EUR 1 million.

4. Conclusions

[Rz 39] As many anticipated, Switzerland followed the path of the United States and of European countries and is now considering taking the opportunity of a complete overhaul of its financial regulations to adopt specific rules aiming at crowdfunding platforms. The adoption of a clear regulatory framework was indeed called for by many crowdfunding professionals in Switzerland\(^{52}\), who deplored the lack of certainty of the current regime and lobbied in favour of a clear framework as a necessity to favour the development of crowdfunding in Switzerland\(^{53}\). Some authors however warn that overregulating or adopting regulation that does not take into account the specificities of crowdfunding could backfire and result in stopping the current growth of crowdfunding activities in Switzerland\(^{54}\).

[Rz 40] In its current form, the proposed regulation appears to mainly address the risk of uncertainty of application of the banking regulation, and to provide for a «light» regulatory framework while ensuring a minimum protection of the project financers by setting forth an obligation to provide certain information on the project. Contrary to some of its neighbours, Switzerland thus did not choose to adopt a detailed regulation, limiting access to confirmed professionals or setting financial thresholds to protect both project developers and project financers.

[Rz 41] Although these measures proposed to clarify the current regime and to provide for a «light regulation» can be saluted as a first step to find balance between the necessary flexibility of crowdfunding and the protection of the interests of the project developers and financers, one cannot help but note that the regulatory framework may not be the only hurdle, preventing crowdfunding to develop in Switzerland.

[Rz 42] Indeed, one issue is in particular regularly raised in relation to crowdinvesting, and it concerns the lack of adaptation of the Swiss corporate legal environment to a digital world: a

\(^{51}\) Additionally, CIPs may also opt for the status of investment services provider (Prestataire en Services d’Investissement), enabling them to provide investment advice to customers, in which case they must be authorized by the Autorité de contrôle prudentiel et de résolution (ACPR).

\(^{52}\) Swiss Crowdfunding Association, White paper – Crowdfunding in Switzerland, 2015, p. 44; Yves de Montmollin, Le financement participatif, un modèle d’avenir, Le Temps, January 10, 2016.

\(^{53}\) A meeting between FINMA and the Swiss Crowdfunding Association took place in December 2015 following the release of the association’s White Paper, with the aim at opening a dialogue with the authorities on the regulatory issues faced by crowdfunding platforms and at discussing possible solutions that could be implemented, taking into account the specificities of crowdfunding; the detailed outcome of this meeting was not public on the date on which this contribution was published.

\(^{54}\) Andreas Dietrich and Simon Amrein, Crowdfunding monitoring Switzerland 2015, p. 28.
project financer cannot subscribe to new shares against his investment exclusively online, and the
management of his rights as new shareholder of the company will likely require the signing or
sending of signed documents over the years (sending of subscription forms, waivers, proxies, etc.).
Once the project developer realizes that he will need to deal with dozens of new shareholders
from whom to collect such documents, often from non-professional investors who are not familiar
with that type of documentation, such future management of future shareholders may appear as a
hurdle and may lead some project developers to simply renounce to raise funds via a crowdfunding
platform.

[Rz 43] So far, the Federal Council has rejected the possibility to adopt specific e-governance provi-
sions in relation to crowdfunding, and so, to address this lack of «digital-friendly» regulation55, one
measure that could be contemplated to facilitate such process could be for the relevant stakeholders
to discuss and adopt some «Best Practices» on that matter to which the crowdfunding platforms
could adhere: it could provide for mandatory appointment of a representative for shareholders
subsribing through crowdfunding, mandatory provisions in the articles of association to allow for
communication via email, or mandatory formation or explanations from the platform to ensure
that the project developers become familiar with the current legal environment. This would be a
form of «self-regulation» which has a long and relatively successful tradition in the Swiss financial
regulatory environment56.

[Rz 44] Other issues also emerged in relation to crowdfunding, such as the issue of «overfunding»,
which can arise when the platform operator allows the backers to continue funding a project
until the campaign closes, even when the financial objective has already been reached, and the
project developer will receive all funds raised, even the amounts above the initially set financial
threshold57. In such cases, the project developer may not be ready to handle the extra money, it
will unlikely result in a change of the reward that was originally offered58 while simultaneously, it
is likely to create higher expectations from the backers, for whom a simple signed T-shirt or thank
you note may suddenly become a very small reward compared to the amounts raised through the
campaign59. Here again, the protection of the interests of the project financers as well as of the
project developers, that may end up being sued by disappointed backers in such circumstances,
will likely not be solved through regulation but may also be addressed via the adoption of «Best
Practices» to which the platforms could adhere, such as providing for an obligation of the project

55 One noteworthy exception to the Swiss authorities reluctance to adopt «digital-friendly» regulations is the
draft circular released by the Swiss financial regulator FINMA on December 21, 2015 and seeking to esta-
blish a regulatory environment to facilitate client onboarding through digital channels. This draft circular, if
adopted, would however only apply to regulated financial intermediaries.
56 For further information, see the overview published by FINMA: https://www.finma.ch/en/documentation/
self-regulation/.
57 One example of overfunding is the example of the campaign for an adventure game, Double Fine adven-
ture, that launched a campaign on the Kickstarter for an amount of USD 400'000 and obtained over USD
3 million to back the project (https://www.kickstarter.com/projects/doublefine/double-fine-adventure/
description).
58 One recent exception is the case of Oculus rift, one of the most famous crowdfunding campaign for a virtual
reality headmounted display, where the original backers of the crowdfunding campaign showed unhappiness
and disappointment when the company was bought by Facebook for USD 2 billion; to address this disap-
pointment, the founders of the company announced in January 2016 that the original backers that invested
enough to receive a development kit will receive a free consumer kit when the product is launched, prior to
other customers, which was not originally planned in the first campaign; Adi Robertson, Oculus Rift Kick-
starter backers will get a free consumer edition, The Verge, January 5, 2016.
59 James Gurd, Implications of overfunding in crowdfunding (https://www.crowdshed.com/blog/implications-
of-overfunding-for-crowdfunding).
developer to include the possibility of overfunding in its business plan if it wants to benefit from such option.

[Rz 45] We will see how the proposed special crowdfunding regulation will be implemented and what impact it will have on the crowdfunding environment in Switzerland, but it will unlikely solve all legal issues relating to crowdfunding – nor should it do so – and additional responses or recommendations are likely to emerge in the near future.

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