A BRIEF ANALYSIS OF THE NEW PORTUGUESE EQUITY CROWDFUNDING REGIME

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Abstract: Crowdfunding is an alternative source of financing that allows entrepreneurs to raise funds from a multitude of potential investors through the use of Internet-based electronic platforms. Amongst the different models of crowdfunding, equity crowdfunding in particular has been growing in popularity with smaller European firms. Several European Union Member States have begun to enact sets of rules specifically aimed at encouraging its development as a financing model that is both attractive for small companies and safe for investors – with Portugal recently joining their ranks. This article discusses whether Portugal has been able to design an equity crowdfunding regime capable of ensuring its sustainable growth as a viable funding alternative for its growing market of small and medium-sized enterprises, without compromising the safety of Portuguese investors.

Title: A Brief Analysis of the New Portuguese Equity Crowdfunding Regime.

Keywords: crowdfunding, digital platforms, investors, equity.

Resumen: El crowdfunding es una fuente de financiación alternativa que permite a los empresarios recaudar fondos de una multitud de potenciales inversores mediante el uso de plataformas digitales. Entre los diferentes modelos de crowdfunding el equity crowdfunding es el que, en particular, se ha popularizado entre las empresas europeas más pequeñas. Varios Estados Miembros de la Unión Europea –entre los que se encuentra Portugal– han comenzado a promulgar un conjunto de normas destinadas específicamente a fomentarlo. En este artículo se analiza si Portugal ha sido capaz de diseñar un régimen capaz de garantizar su crecimiento sostenible como alternativa de financiación viable para su creciente mercado de pequeñas y medianas empresas, sin comprometer la seguridad de los inversores portugueses.

Título: Análisis sucinto del nuevo régimen jurídico del micromecenazgo portugués.

Parabas clave: micromecenazgo, plataformas digitales, inversores, equidad.
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1. Introduction

Crowdfunding is an alternative source of financing that allows entrepreneurs to raise funds from a multitude of potential investors through the use of Internet-based electronic platforms. Recently, crowdfunding and, particularly, equity crowdfunding (a specific type of crowdfunding) have been capturing the attention of firms, academics, and regulators around the world.

The volume of financing raised through crowdfunding campaigns has been growing considerably at a global level with very significant economic consequences. The popularity of this tool can be explained by the fact that some firms (particularly small and medium-sized start-ups) can experience significant difficulties in accessing more typical sources of financing, such as banks, the capital markets, or venture capital financiers (like investment funds and business angels). Crowdfunding acts as a substitute for these sources of financing – and one that allows a venture looking to raise finance to depend solely on its ability to demonstrate potential for generating profit: the identity and geographical location of potential investors become essentially irrelevant.

The use of Internet-based platforms to secure funding has not only contributed to decreasing business dependency from traditional sources of financing: crowdfunding also offers unique advantages to individual investors, allowing them to access community experiences supported by social networks (which act as vehicles for establishing effective information channels between entrepreneurs and investors), as well as to get involved in projects that are especially meaningful to them, even in

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3 This idea of ‘substitution’ is illustrated by Agrawal et al in ibid.

4 See Belleflamme, Lambert and Schwienbacher (n 3); Lambert and Schwienbacher (n 3); Schwienbacher and Larralde (n 3).
instances where they are not in a position to make more than a relatively modest contribution to the crowdfunding campaign.

While any entrepreneur or investor engaged in this type of campaigns has access to the advantages described above, some of the benefits coming from crowdfunding are exclusively associated to particular sub-types of crowdfunding; this allows for the differentiation between crowdfunding models according to the diverse nature of the benefits enjoyed by participating agents. One of these crowdfunding models in particular – ‘equity crowdfunding’ – has recently been garnering interest from regulators.

In fact, while equity crowdfunding – where investors acquire participation rights in the capital of funded firms in exchange for the financing provided – is becoming an increasingly popular model of crowdfunding, it has also become linked with a series of unique risks for participating investors. As such, regulators around the world have begun to enact specific equity crowdfunding regulations in the hopes of encouraging its development as a financing model that is both attractive for small companies and safe for investors.

In Portugal, the Parliament recently enacted a crowdfunding act entitled ‘Regime Jurídico do Financiamento Colaborativo’ (the ‘Crowdfunding Act’), this Act was later complemented by a regulation issued by the Portuguese financial securities regulator

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5 It is estimated that, in 2015, the total volume of financing raised by equity crowdfunding campaigns was around $2.56bn (see Massolution (n 3)).


7 While there is no available data regarding the volume of the equity crowdfunding industry in Portugal, the fact that the country is home to a very significant number of small and medium-sized companies (accounting for more than 2/3 of total value added compared with an average of 57% in the EU) means that equity crowdfunding could have a very significant role to play in Portugal (see European Commission, ‘2016 SBA Fact Sheet - Portugal’ (Internal market, industry, entrepreneurship and SMEs 2016) <http://ec.europa.eu/DocsRoom/documents/22382/attachments/28/translations/en/renditions/native> accessed 31 March 2017). This role seems to have been acknowledged by the Portuguese Government, which has recently entered into an agreement with Seedrs and Portugal Ventures to promote equity crowdfunding in Portugal (see Cristiana Faria Moreira, ‘Estado Junta-Se Ao “crowdfunding” Da Seedrs Para Investir Em Startups Portuguesas’ (Observador, 30 March 2017) <http://observador.pt/2017/03/30/estado-junta-se-ao-crowdfunding-da-seedrs-para-investir-em-startups-portuguesas/> accessed 31 March 2017).

8 Lei nº 102/2015, de 24 de agosto – Regime Jurídico do Financiamento Colaborativo.
‘Comissão para o Mercado de Valores Mobiliários’ (the ‘CMVM’): CMVM Regulation 1/2016 (the ‘Crowdfunding Regulation’).\(^9\)

This article discusses whether the Portuguese Parliament and financial securities regulator have been able to design a legal and regulatory regime capable of ensuring the sustainable growth of equity crowdfunding as an alternative source of financing for Portuguese small and medium-sized enterprises (‘SME’s’), without compromising the safety of Portuguese investors.

2. Regulating equity crowdfunding in the European Union

2.1. Regulating equity crowdfunding

The particular configuration of most equity crowdfunding regimes around the world seems to rest on the search for a balance between two (apparently) conflicting values: the stimulation of the economy and investor protection.\(^10\)

This tension can roughly be described as follows: on the one hand, the absence of regulation, or the adoption of less rigid rules tend to stimulate the use of crowdfunding tools and the growth of the real economy (to the extent that the imposition of obligations on the beneficiaries of crowdfunding makes is more expensive – or outright impossible – to turn to this form of financing); on the other hand, the introduction of harsher crowdfunding regulations might be crucial to ensure the protection of investors (insofar as they benefit from the duties imposed on entrepreneurs and crowdfunding platforms).

Broadly speaking, investor protection might be seen as a goal that is at least partly achieved at the cost of imposing more obligations on the beneficiaries of crowdfunding and, indirectly, at the cost of economic development.

The relationship between the values of stimulating business activity and ensuring investor protection is not, however, as antagonistic as it may appear at first. Investor confidence is, in fact, a necessary condition for economic growth: the existence of unreasonable information asymmetries between entrepreneurs and investors leads to suboptimal equilibria and to the formation of markets for lemons, ie, to market failure scenarios where investors set the terms of the financing based on the premise that

\(^9\) Regulamento da CMVM nº 1/2016 – Financiamento Colaborativo de Capital ou por Empréstimo.

they have very little information about the object of their investment; this leads to adverse selection problems and encourages the disproportionate appearance of ventures of substandard quality, as well as the tendency for an overall inefficient allocation of funds.\(^{11}\)

In other words: crowdfunding can only become a viable means of financing – and one that is capable of stimulating the economy – if investors feel safe and informed, and if rules to minimise instances of fraudulent behaviour are implemented. To the extent that entrepreneurs may not have the incentives or the means needed to ensure an appropriate level of investor protection, this role might fall upon regulators.\(^{12}\)

Before assessing how equity crowdfunding has been approached by the Portuguese regulators, it is important to first understand how this model of crowdfunding has been allowed to develop under the applicable European Union (‘EU’) rules.

### 2.2. The development of equity crowdfunding within the European Union

The development of equity crowdfunding within the EU seems to have been the product of three concurring factors: (i) the inexistence of a unified EU regime specifically applicable to equity crowdfunding; (ii) the significant degree of freedom granted to Member States by the EU Prospectus Directive in regard to small volume public offers; and (iii) the fact that most Member States long hesitated to make use of that freedom to regulate equity crowdfunding.\(^{13}\)

Equity crowdfunding was thus permitted to flourish in a legal vacuum that allowed for its growth through the development of a variety of crowdfunding structures.\(^{14}\)

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\(^{12}\) In particular, it is important to note that any spontaneous signals given by crowdfunding beneficiaries will only be efficient if they are observable by investors, and if these can distinguish them from false signals. For that reason, the cost of producing these signals is not always outweighed by the benefits of signalling (see Gerrit KC Ahlers and others, ‘Signaling in Equity Crowdfunding’ [<http://ssrn.com/abstract=2161587> accessed 31 March 2017]).


\(^{14}\) Included in these different funding models are simple profit/revenue sharing schemes, structures where a third party acquires shares on behalf of one or more investors, structures where the shares are directly bought by the investors without any intermediation by third parties, a participation model where one or more investors enter into a contract with a third party who invests on their behalf, and structures that make use of convertible bonds, where debt is converted into equity when certain conditions are met – for example, when the company enters into a second financing round (see Space Tex Capital Partners, ‘Crowdfunding Innovative Ventures in Europe: The Financial Ecosystem and
However, the last few years have witnessed a rising consensus that the benefits associated with this source of finance are counterbalanced by an array of very significant risks: while the growth of equity crowdfunding can be very beneficial to the economy, the absence of regulation – especially to the extent that it leads to fraudulent behaviour – can quickly turn this growth into failure.

For this reason, several EU Member States gradually started to fill the legal vacuum in which equity crowdfunding had been allowed to operate thus far – with Portugal recently joining the ranks of Member States that have opted to enact specific equity crowdfunding regulations.

2.3. Defining the legal vacuum

It is true that the European Commission seems to have been aware of the potential benefits and risks associated with equity crowdfunding for some time now; however, it never decided to target this crowdfunding model with a specific EU-based regulatory regime. As such, at a EU level, equity crowdfunding is currently only constrained by the directives and regulations generally applicable to capital raising within the EU, regardless of whether it is done through electronic or non-electronic platforms.

Two pieces of legislation are especially important to illustrate the set of EU rules generally applicable to most fund-raising activities (and, for that reason, potentially applicable to equity crowdfunding campaigns and the electronic platforms hosting them): the Markets in Financial Instruments Directive (‘MiFID’), applicable to

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16 The Capital Requirements Regulation could also be relevant to crowdfunding platforms but it seems that most (if not all) platforms may fall under the exclusion in Article 4 (1) (2) (c): ‘firms which are not authorised to provide the ancillary service referred to in point (1) of Section B of Annex I to Directive 2004/39/EC, which provide only one or more of the investment services and activities listed in points 1, 2, 4 and 5 of Section A of Annex I to that Directive, and which are not permitted to hold money or securities belonging to their clients and which for that reason may not at any time place themselves in debt with those clients.’ For the notion that Article 4 (1)(2) (c) could be used as the basis for the creation of a pan-European crowdfunding passport, see Dirk A Zetzsche and Christina Preiner, ‘Cross-Border Crowdfunding – Towards a Single Crowdfunding Market for Europe’ (Social Science Research Network 2017) SSRN Scholarly Paper ID 2991610 <https://papers.ssrn.com/abstract=3031837> accessed 31 March 2017.

investment firms, and the Prospectus Directive, applicable to funding campaigns that are addressed to a multitude of potential investors and which, for that reason, are classified by the Prospectus Directive as public offers.

Crucially, the application of the Prospectus Directive to public offers knows some exceptions. For the purposes of this analysis, it is important to note, in particular, that this directive does not apply to securities included in an offer with a total value of less than €5,000,000 (calculated over a 12-month period). This means that EU Member States have significant leeway to determine the obligations imposed on issuers of public offerings with a value lower than €5,000,000.

Insofar as the benefits associated with equity crowdfunding relate to the financing of small enterprises that do not have access to traditional means of financing, it is precisely these offers of less than €5,000,000 that should be targeted by a special regime capable of allowing access to financing unconstrained by the harsher obligations proposed by the Prospectus Directive, without failing to ensure a minimum level of investor protection.

In the end, it seems clear that the national equity crowdfunding regimes successively enacted by Member States thus originated as complementary rules to the regime generally applicable to public offers of more than €5,000,000 under the (generally more demanding) Prospectus Directive. The remainder of this article discusses the Portuguese equity crowdfunding regime that was allowed to develop in the absence of specific EU-level rules.

3. The Portuguese solution

3.1. The Portuguese Securities Code

In Portugal, the MiFID and the Prospectus Directive have essentially been transposed by the Portuguese Securities Code (‘Código dos Valores Mobiliários’ or ‘CVM’). The

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18 See Article 4 (1) (1) of MiFID.
20 According to Article 2 (1) (d) of the Prospectus Directive, an ‘offer of securities to the public’ means a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to these securities.’
21 See Article 1 (2) (h) Prospectus Directive.
22 Still, under Article 3 (1) (e) of the Prospectus Directive, Member States are not allowed, under any circumstances, to apply the obligation to publish a prospectus to investors making offers of securities with a total consideration of less than €100,000, calculated over a period of 12 months.
rules in the Portuguese Securities Code effectively serve as the background to the more specific equity crowdfunding rules recently enacted by the Portuguese Parliament and financial securities regulator.

The analysis of this new special legal regime must thus be preceded by a clear understanding of the rules in the Portuguese Securities Code that are likely to be relevant in the context of equity crowdfunding: (a) the rules pertaining to ‘public offers of securities’, as equity crowdfunding campaigns are likely to fall under this category; (b) the regime applicable to publicly-held companies, since most companies financed through equity crowdfunding will often be classified as publicly-held firms; and (c) the rules applicable to financial intermediation, as crowdfunding platforms typically pursue activities accessible only to duly licensed financial intermediaries.

a. Equity crowdfunding campaigns as public offers

The notion that equity crowdfunding campaigns might fall under the category of ‘public offers’ comes from Article 109 (1) of the Portuguese Securities Code: according to this provision, public offers are those ‘related to securities that are addressed, in whole or in part, to undetermined recipients’, with Article 109 (3) of the Portuguese Securities Code adding that an offer is also public when ‘it is preceded by or accompanied of... promotional advertising’, and, at any rate, when ‘it addresses at least 150 non-qualified investors residing or otherwise established in Portugal’.

To the extent that a crowdfunding campaign targets a set of undetermined recipients or, in any case, a specific number of recipients above 150, it will almost certainly be classified a public offer under the Portuguese Securities Code. Even if the number of (pre-determined) recipients targeted by an equity crowdfunding campaign is, for some reason, less than 150, the notion that an offer is public when it is preceded by or accompanied of promotional advertising has the effect of placing most equity crowdfunding campaigns within the category of ‘public offers’.

An entrepreneur hosting a campaign classified as a ‘public offer’ is usually forced to comply with the duties contained in Title III of the Portuguese Securities Code – and, in particular, with the especially exacting duty to issue a prospectus. Still, Article 111 (1) of the Portuguese Securities Code provides that certain offers are exempted from

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23 See Article 109 (1) of the Portuguese Securities Code.
24 See Article 109 (3) (b) of the Portuguese Securities Code.
25 See Article 109 (3) (c) of the Portuguese Securities Code.
26 If a crowdfunding campaign is exclusively addressed to qualified investors (listed in Article 30 of the Portuguese Securities Code) it might be qualified as a private offer under Article 110 of the Portuguese Securities Code – instead of falling under the category of public offer; however, most crowdfunding campaigns are likely to be classified as public offers.
27 Cf Articles 134-155 of the Portuguese Securities Code.
these duties. Amongst the exceptions listed in this article, there is one, in particular, that makes use of the freedom granted by the EU legislator and prescribes that the Prospectus Directive is not applicable to a public offering of securities valued at less than € 5,000,000. According to Article 111 (1) (i) of the Portuguese Securities Code, such offers are not covered by the harsher provisions of the Prospectus Directive, and are further exempt from the obligations set forth in Title III of the Portuguese Securities Code.

At the end of the day, it is clear that even if most equity crowdfunding campaigns do end up falling under the category of public offers, many of these offers – all those that do not exceed €5,000,000 – will actually be exempt from the duties included in Title III of the Portuguese Securities Code.

b. Companies financed through equity crowdfunding as publicly-held companies

The idea that most companies financed through equity crowdfunding will be classified as publicly held companies comes from Article 13 of the Portuguese Securities Code. According to this provision, a company will have become publicly-traded after it has been incorporated through a public offer for subscription, once it has issued securities that have been the object of a public offer, or, in any case, if more than 10% of its capital has ever been offered to the public.29

Enterprises that earn the classification of ‘publicly-held companies’ become subject to the duties listed in Chapter IV of the Portuguese Securities Code, with no exemptions available to companies specifically financed through equity crowdfunding.

c. Crowdfunding platforms as financial intermediaries

Finally, it is important to note that the activity pursued by equity crowdfunding platforms typically falls under the notion of ‘financial intermediation’30 put forth by Article 289 of the Portuguese Securities Code, insofar as such platforms provide ‘services and activities related to the investment in financial instruments’,31 including, crucially, the ‘reception and transmission of orders for the account of clients’,32 namely by ‘bringing together two or more investors with the purpose of executing a transaction’.

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28 See Article 1 (2) (h) of the Prospectus Directive.
29 See Article 13 (1) (a), (b) and (d) of the Portuguese Securities Code.
30 See Article 289 (1) (a) of the Portuguese Securities Code.
31 See Article 290 (1) (a) of the Portuguese Securities Code.
32 See Article 290 (2) (a) of the Portuguese Securities Code.
As financial intermediation activities can only be legally pursued by financial intermediaries,\textsuperscript{33} i.e., entities whose occupation includes the provision of investment services to third parties on a professional basis, or regularly dealing on own account, it seems certain that crowdfunding platforms need to register as financial intermediaries under Article 293 (1) of the Portuguese Securities Code\textsuperscript{34} and are, as such, subject to the duties contained in its Title VI (and which arise from the transposition of the MiFID).

\textbf{d. Setting the grounds for a Portuguese crowdfunding regime}

In the end, it is possible to conclude that (a) the majority of Portuguese equity crowdfunding campaigns will fall under the category of public offers (but, more likely than not, in the category of public offers that do not exceed €5,000,000 over a period of 12 months and that, as such, benefit from the exception that excludes them from the obligation to issue a prospectus), that (ii) companies financed through crowdfunding will, in may cases, become publicly-held companies (and thus become subject to their respective regime), and, finally, that (iii) crowdfunding platforms should register as financial intermediaries and obey the corresponding duties included in the Portuguese Securities Code.

Ultimately, all the aforementioned rules serve one of the two (apparently conflicting) goals described earlier: while the regime applicable to publicly-held companies and the duties arising from the status of ‘financial intermediary’ are geared towards investor protection, the exception that excludes offers of less than €5,000,000 (over a period of 12 months) from the general public offer regime contained in the Portuguese Securities Code – and, particularly, from the heavy duties prescribed in its Title III – creates the conditions for crowdfunding to become a viable financing alternative for SMEs.

At the end of the day, the legal vacuum created by the Prospectus Directive – and in which equity crowdfunding was allowed to develop within the EU – is not filled by the Portuguese Securities Code in any significant way: it is instead allowed to perpetuate. It was not until the approval of a new crowdfunding regime – comprised by the Crowdfunding Act and by the Crowdfunding Regulation (together the ‘Portuguese Crowdfunding Regime’) – that Portugal attempted to devise a set of rules specifically geared towards protecting investors in the particular context of equity crowdfunding campaigns. The remainder of this article seeks to evaluate whether the Portuguese Crowdfunding Regime succeeds in protecting such investors without

\textsuperscript{33} See Article 289 (2) of the Portuguese Securities Code.

\textsuperscript{34} This understanding is confirmed by Article 15 of the Crowdfunding Act.
compromising the viability of equity crowdfunding as an alternative source of financing, particularly for smaller enterprises.

3.2. The Portuguese Crowdfunding Regime

The recently enacted Portuguese Crowdfunding Regime is comprised by the Crowdfunding Act and by the Crowdfunding Regulation. Yet, while both pieces of legislation have now been passed and approved, equity crowdfunding in Portugal is actually still exclusively regulated by the Portuguese Securities Code, ie, the statute that transposed MiFID and the Prospectus Directive into Portuguese law.

This is because, pursuant to Article 25 of the Crowdfunding Act, the provisions of the act on equity crowdfunding will only come into force upon the entry of force of the Crowdfunding Regulation. This regulation, in turn, will only come into force once an additional piece of legislation concerning the violation of the provisions included in the Crowdfunding Regulation comes into force – which it has not.  

This article thus analyses the legal regime that is likely to govern equity crowdfunding in Portugal in the near future. For that reason, it is entirely unable to consider the effect that such a regime has had on the equity crowdfunding activity currently taking place in Portugal; it merely speculates whether the rules enacted will have a positive or a negative impact on entrepreneurs and investors.

a. Scope of application

The Crowdfunding Act defines the legal framework applicable to all forms of collaborative financing: donation-based, rewards-based, equity, and debt crowdfunding. The Crowdfunding Regulation, on the other hand, applies solely to equity and debt crowdfunding.

This article is exclusively focused on the rules within the Portuguese Crowdfunding Regime that apply to equity crowdfunding and in evaluating whether these rules can work as balanced measures for the protection of investors.

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35 See Article 21 of the Crowdfunding Regulation.
36 See Article 1 of the Crowdfunding Act.
37 See Articles 1 and 3 of the Crowdfunding Act.
38 This means that the Crowdfunding Act applies to all fundraising activities that fall under the (problematic) ‘crowdfunding’ definition included in its Article 2, ie, regardless of whether they raise any legal issues requiring specific legislative treatment, and regardless of whether such activities are also covered by the regime applicable to public offerings under the Portuguese Securities Code, namely because they do not fall within the ‘valued at less than €5,000,000’ exception.
39 See Article 1 (2) of the Crowdfunding Regulation.
b. Measures for the protection of investors

Investors participating in equity crowdfunding experience significant risks both during the campaign stage and throughout the life of the funded company: at the campaign stage, research shows that investors tend to be overly optimistic (despite the high degree of information asymmetry and the complexities of company valuation), as well as to engage in herding behaviour, particularly as the campaign starts accumulating capital or approaching its end; throughout the life of the funded company, investors face instead the governance problems arising from the dispersed shareholder base that typically results from the crowdfunding campaign (both in terms of holdings’ size and geographical dispersion), as well as difficulties in accessing information.

The Crowdfunding Act and the Crowdfunding Regulation attempt to protect investors from these risks through a set of measures that regulate (i) electronic crowdfunding platforms, (ii) the duties of the beneficiaries of equity crowdfunding campaigns, (iii) the content of the campaigns themselves, and (iv) investment in equity crowdfunding.

The next sections engage critically with the measures adopted under the Portuguese Crowdfunding Regime with the purpose of determining whether they are able to protect investors in equity crowdfunding – both as initial participants in the crowdfunding campaigns and as shareholders in the funded companies – while preserving equity crowdfunding as an attractive financing option for small businesses.

Regulating crowdfunding platforms

Both the Crowdfunding Act and Crowdfunding Regulation devote a series of specific provisions to the regulation of the activity of crowdfunding platforms. Particularly in what concerns platforms hosting equity crowdfunding campaigns, Article 15 (1) of the Crowdfunding Act imposes a duty to register with the CMVM as a precondition for operating, with paragraph (2) of the same article tasking the CMVM with supervising these platforms. Article 15 of the Crowdfunding Act further requires the registration of crowdfunding platforms as financial intermediaries under articles 289ff of the Portuguese Securities Code, endorsing the understanding that they must indeed be registered in this capacity (and that they are, as such, subject to the corresponding Portuguese Securities Code duties).

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40 Even though the Crowdfunding Act (unlike the Crowdfunding Regulation) often refers to the duties of crowdfunding platforms, such reference is a simplification. Under Portuguese law, these crowdfunding platforms do not have a separate legal personality and cannot be the subjects of rights and obligations. Such rights and obligations are, instead, applicable to the legal entities that manage the crowdfunding platforms. This article too, embraces this simplification and refers to ‘crowdfunding platforms’ even when it means the entities that manage them.
Once duly registered, crowdfunding platforms are included in a regularly updated list publicised through the CMVM website.\textsuperscript{41} From that moment on, registered platforms become subject to a series of obligations, including the duty to ensure that investors have access to all the information necessary to make informed investment decisions, as per Article 14 (2) of the Crowdfunding Act and Article 16 (3) of the Crowdfunding Regulation.\textsuperscript{42} For that purpose, crowdfunding platforms must specifically supply investors in crowdfunding campaigns with the information listed in Article 16 of the Crowdfunding Regulation.\textsuperscript{43}

Particularly in the case of equity crowdfunding, the beneficiaries of the crowdfunding campaigns must file yearly activity reports with the crowdfunding platforms that hosted their financing – and these platforms are then legally obliged to ensure that these reports are made available for consultation by the investors.\textsuperscript{44}

The Crowdfunding Act is also concerned with preventing potential conflicts of interest between crowdfunding platforms and investors:\textsuperscript{45} under Article 5 (2) of the Crowdfunding Act, crowdfunding platforms are specifically prohibited from providing advice or recommendations regarding investment in securities, from engaging in the management of investment funds, or from holding and trading securities on their own account.\textsuperscript{46} In addition, crowdfunding platforms have a general duty to comply with any regulations enacted by the CMVM with the purpose of preventing fraudulent behaviour,\textsuperscript{47} as well as with a series of rules on internal organisation and conduct.\textsuperscript{48}

All in all, it is clear that, under the Portuguese Crowdfunding Regime, all equity crowdfunding activity must be facilitated by a particular type of financial intermediary that is both subject to the duties generally applicable to financial intermediaries under Title IV of the Portuguese Securities Code, and to the additional duties contained in the Crowdfunding Regulation.

This especially demanding set of duties seems to have the purpose of transforming crowdfunding platforms into gatekeepers of crowdfunding investment, entrusting

\begin{itemize}
\item[41] See Article 8 of the Crowdfunding Regulation.
\item[42] Cf Article 5 (1) (a) of the Crowdfunding Act.
\item[43] In fact, the Crowdfunding Regulation specifically makes crowdfunding platforms responsible for ensuring the authenticity and intelligibility of the information provided by the crowdfunding beneficiaries during the campaign phase; these platforms are also responsible for ensuring that investors receive and acknowledge all information disclosed (see Article 17 (1) of the Crowdfunding Regulation).
\item[44] See Article 17 (2) of the Crowdfunding Act.
\item[45] Article 11 of the Crowdfunding Act further states that the structure and organisation of crowdfunding platforms should allow them to identify and prevent possible conflicts of interests.
\item[46] See Article 5 (2) (a) and (c) of the Crowdfunding Act.
\item[47] See Article 16 of the Crowdfunding Act and Article 10 (1) (c) of the Crowdfunding Regulation.
\item[48] See Article 10 of the Crowdfunding Act and Articles 10 and 11 of the Crowdfunding Regulation.
\end{itemize}
them with a key role in protecting investors both during the initial phase of the crowdfunding campaign (where they are responsible for the truthfulness and completeness of the information provided by the crowdfunding beneficiaries) and during the day-to-day governance of the financed company (where they continue to receive, retain, and distribute yearly activity reports from these beneficiaries). For that reason, the legal regime imposed on crowdfunding platforms is one of the cornerstones that underpin the Portuguese Crowdfunding Regime – and one that can help investors throughout the entire life of their investment.

At the end of the day, the imposition of these added duties on crowdfunding platforms – information duties, conflict of interests duties, anti-fraud provisions and conduct and organisation rules – may lead to an increase in the costs inherent to this type of financing (to the extent that such costs are at least partially passed on to the entrepreneurs resorting to equity crowdfunding); however, these added duties might also turn the entities in the best position and with the greatest incentives to monitor the beneficiaries of equity crowdfunding – the crowdfunding platforms – into an effective defence bastion for investors.49

Regulating the duties of the beneficiaries of equity crowdfunding campaigns

The Crowdfunding Act and Crowdfunding Regulation also impose duties on the beneficiaries of equity crowdfunding campaigns, requiring them to fulfil certain obligations both towards crowdfunding platforms, directly, and towards the investors participating in such campaigns, indirectly.

Firstly, the Crowdfunding Act requires that the relationship between the beneficiaries of crowdfunding and crowdfunding platforms be governed by a written agreement50 and characterised by a continuous flow of information.51 This continuous flow of information should include the nature and identity of the beneficiaries of the

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49 Still, it should be noted that, even in the absence of any specific rules, a crowdfunding platform would always have the incentive to use its internal rules so as to maximise the number of transactions it intermediates; in other words, crowdfunding platforms would always have an incentive to achieve a satisfactory balance between the minimisation of the administrative costs of launching a crowdfunding campaign and investor protection (see Agrawal, Catalini and Goldfarb (n 4)). This incentive is further amplified by the fact that crowdfunding platforms compete amongst each other for the possibility to host a particular crowdfunding campaign (namely because each crowdfunding campaign can only be hosted by one single platform under Article 13 (2) of the Crowdfunding Act).

50 See Article 6 (1) of the Crowdfunding Act.

51 See Article 7 (2) of the Crowdfunding Act. Also according to Article 17 (1) of the Crowdfunding Act, the beneficiaries of equity crowdfunding campaigns must disclose to crowdfunding platforms and to the CMVM itself all relevant information regarding their identity (including their capital structure). Under this article, the beneficiaries of this particular model of crowdfunding must also inform the crowdfunding platforms of their compliance with any tax duties.
crowdfunding campaigns, a detailed description of the activities and projects that are being funded, the funding goal and deadline of each crowdfunding campaign, the subscription price of each security (or the mechanisms for determining such price), and any other elements that may be required by the CMVM.

This information must be communicated in advance — and in relation to each offer through a form addressed to the crowdfunding platform and entitled ‘Key Information for Investors in Equity Crowdfunding’ (‘Informações Fundamentais destinadas aos Investidores de Financiamento Colaborativo’ or ‘IFIFC’).

It should be noted that the IFIFC is required to contain all the elements necessary for someone to make an informed investment decision that adequately takes into account the characteristics and risks of a crowdfunding offer; it is then up to the crowdfunding platforms to make this document available to investors, along with a series of consumer warnings. Both the IFIFC and these warnings should specifically be mentioned in any promotional advertising of the campaign.

The continuity of this information flow extends beyond the campaign stage and the IFIFC: crowdfunding beneficiaries are subject to information duties that continue to apply throughout the life of the funded company; namely, these entrepreneurs have an obligation to submit yearly activity reports to the CMVM (which must then make them available to investors in the terms described above), as well as the general duty to provide crowdfunding platforms with continuous updates regarding their identity and legal status.

In the end, and despite the confusing wording of some of the articles devoted to regulating the information duties owed to investors by the beneficiaries of crowdfunding campaigns, it seems that several aspects of these duties constitute a welcome protection tool for investors in equity crowdfunding. In particular, adding a

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52 See Article 7 (2) of the Crowdfunding Act.
53 See Article 19 (1) of the Crowdfunding Act. According to paragraph (2) of the same article, the exact content of the information duty regarding the funding goal and deadline of the crowdfunding campaign is to be determined by the CMVM in future regulations. It is hard to understand the reason for this provision and, in truth, no provision in the Crowdfunding Regulation provides further detail on how this information duty might vary. Taking into account that such a duty seems to have a fairly objective content, it is difficult to phantom how this duty could actually vary (unless the legislator wanted to give the CMVM the opportunity to ask for information on value intervals, as opposed to exact values).
54 See Article 19 of the Crowdfunding Act.
55 See Article 16 (1) of the Crowdfunding Regulation.
56 See Article 16 (1) of the Crowdfunding Regulation.
57 See Article 17 (1) of the Crowdfunding Act and Article 16 (3) of the Crowdfunding Regulation.
58 See Article 16 (2) of the Crowdfunding Regulation.
59 See Article 18 of the Crowdfunding Regulation.
60 See Article 17 (2) of the Crowdfunding Act.
61 See Article 7(2) of the Crowdfunding Act.
duty to periodically update the information initially conveyed to investors (via the crowdfunding platforms) crucially addresses the problem of access to information typically experienced by minority shareholders throughout the life of companies with dispersed shareholding structures (which are likely to follow equity crowdfunding campaigns).  

The only problem arising from these information duties relates, of course, to the costs that such obligations may entail for the beneficiaries of crowdfunding campaigns, and a balance needs to be struck between the need to protect and inform investors and the need to keep the administrative costs of equity crowdfunding low.

In this respect, the balance achieved by the Portuguese regime appears to be satisfactory in that the information initially requested of crowdfunding beneficiaries is transmitted to the crowdfunding platform via a standardised form and is exempt from external certification. The use of a standardised form, in particular, not only reduces the costs of meeting the information duties that fall upon crowdfunding beneficiaries, but also gives investors an instrument that allows them to easily compare benefits and risks across crowdfunding campaigns.

Still – and even though the inclusion of specific consumer warnings in the IFIFC is a step in the right direction – the regulator could have gone further in its protection of unqualified investors in equity crowdfunding campaigns by taking a more active role in their education. For example, the CMVM could require that access to IFIFCs be preceded by the mandatory viewing of informative videos on equity crowdfunding, or by the mandatory answering of a questionnaire on the benefits and risks of this form of financing. Such measures could serve to combat the apathy usually associated with written notices and warnings, without substantially adding to the costs of crowdfunding campaigns.

**Regulating the content of equity crowdfunding campaigns**

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62 According to Ahlers, the success of equity crowdfunding crucially depends on companies making prospective information available, namely regarding their financial prospects, relevant risk factors and internal governance mechanisms. Investors will be especially concerned with the credentials of the management team, as well as with the availability of pre-planned exit strategies (see Ahlers and others (n 11)).

63 A study by Ahlers shows that the external certification of information disclosed in a crowdfunding campaign does not significantly impact its success (see ibid).

64 Bradford (n 12).

65 See Agrawal, Catalini and Goldfarb (n 4).

66 See Ahlers and others (n 14).

67 This goal could be achieved particularly to the extent that such videos and questionnaires can be standardised.
The information duties that fall upon crowdfunding platforms and beneficiaries are far from being the only sort of protection measures that investors in equity crowdfunding are able to enjoy under the Portuguese Equity Crowdfunding Regime. In fact, both the Crowdfunding Act and the Crowdfunding Regulation complement these information duties with a series of rules that govern the actual content of the offers that are the object of equity crowdfunding campaigns.

Crucially, Article 18 of the Crowdfunding Act establishes that the value of the offers made available through equity crowdfunding campaigns should be subject to certain ceilings. Article 19 of the Crowdfunding Regulation then defines these value ceilings in the following way.⁶⁸

<table>
<thead>
<tr>
<th></th>
<th>Offers made to a) legal persons or b) natural persons with a yearly income of ≥ €70,000</th>
<th>All other offers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Per offer</td>
<td>€5,000,000</td>
<td>€1,000,000</td>
</tr>
<tr>
<td>Per activity/ product (over a period of 12 months and potentially including more than one offer)</td>
<td>€5,000,000</td>
<td>€1,000,000</td>
</tr>
</tbody>
</table>

According to the explanatory note that accompanies the Crowdfunding Regulation, the option to limit the amount that can be raised through crowdfunding platforms to a number between €1,000,000 and €5,000,000 (depending on the profile of the offer recipients) has the purpose of ‘limiting the access to equity crowdfunding campaigns to those investors who are in the best position to access this type of investment’.

It seems right to regulate the access of investors to equity crowdfunding campaigns – namely by limiting the amount that each individual investor is allowed to contribute to the campaign – but it is harder to understand how limiting the overall amount that can be gathered using equity crowdfunding fulfils that purpose; that is, instead, the role of the mechanisms included in article 20 of Crowdfunding Act (and which are discussed in the next sub-section of this chapter).

The limits established by the Portuguese Crowdfunding Regime in regard to the amount of financing that can be obtained through equity crowdfunding campaigns have, instead, two other effects that contribute little, if anything, to the purpose established in the explanatory note that supplements the Crowdfunding Regulation: on the one hand, (1) the effect of limiting the number of crowdfunding campaigns legally

⁶⁸ See Article 19 (2) and Article 12(2) of the Crowdfunding Regulation.
admissible, and, on the other hand (2) the effect of altogether preventing smaller or (arguably) less sophisticated investors from participating in generally larger crowdfunding campaigns:

(1) Limiting the number of legally admissible crowdfunding campaigns

First, it is important to note that Article 2 of the Crowdfunding Act (somehow inaccurately) defines crowdfunding as all financing amassed through online electronic platforms;\(^{69}\) for that reason, and in all rigour, the effect arising from Article 18 of the Crowdfunding Act is actually that of limiting the admissibility of offers intermediated by online electronic platforms to those with a value inferior to €5,000,000 (or, in some cases €1,000,000) – ie, to those offers that are exempted from the duties listed in Title III of the Portuguese Securities Code.

As a consequence of Articles 2 and 18 of the Crowdfunding Act, no public offer with a value higher than €5,000,000, ie, no offer subject to the duties included in Title III of the Portuguese Securities Code, can be intermediated by an online electronic platform – regardless of whether that online electronic platform is, in fact, a registered financial intermediary and regardless of whether such offer effectively complies with the duties listed in Title III of the Portuguese Securities Code (including the obligation to issue a prospectus).

It is hard to phantom why it has been decided to prohibit these offers when the only thing that distinguishes offers intermediated by an online electronic platform (typically equity crowdfunding campaigns) from other public offers of similar value is the nature of the agent that intermediates the offer, ie, the fact that such offers are intermediated by online electronic platforms; this is particularly puzzling when such platforms are, in fact, subject to a more demanding regime\(^{70}\) than that which is applicable to the generality of financial intermediaries under Article 113 of the Portuguese Securities Code.

The fact that an offer is intermediated by an online electronic platform does not pose – in itself – a particular risk for investors or, in any case, a risk that justifies the outright prohibition of offers valued at more than €5,000,000, especially to the extent that such offers also have to comply with the provisions included in Title III of the Portuguese Securities Code.

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\(^{69}\) For instance, the Crowdfunding Act’s definition of ‘crowdfunding’ entirely disregards that a crowdfunding campaign must include an invitation to a multitude of potential investors.

\(^{70}\) To the extent that their activity is governed both by the rules applicable to financial intermediaries in general and by the specific rules applicable to the electronic platforms that host equity crowdfunding campaigns under the Crowdfunding Act and the Crowdfunding Regulation.
Even more absurdly, the public offers with values between €1,000,000 and €5,000,000 that are made to natural persons whose yearly income is less than €70,000 are now entirely prohibited if they are made through an online electronic platform – but remain almost entirely unregulated if they are, instead, intermediated through any other agent (and thus evade the ‘crowdfunding’ definition in Article 2 of the Crowdfunding Act and, consequently, the scope of the prohibition included in its Article 18).

These incoherent consequences are the product of an inaccurate understanding of how crowdfunding should be regulated. ‘Crowdfunding’ is not a legal concept that can be reduced to a definition and regulated through a specific legal regime anchored in that definition – it is, instead, an existing factual reality that was born in a legal vacuum in need of regulation: that of public offers with a value of less than €5,000,000. As such, even through the appearance and development of these smaller offers has been encouraged by the existence of Internet-based platforms – and even though it is right that these platforms be required to register as financial intermediaries – the regulation applicable to the offers themselves should not vary with the identity of the agent chosen to intermediate them.71

(2) Banning smaller/less sophisticated investors from investing in large crowdfunding campaigns

The second effect arising from the limits established by the Portuguese Crowdfunding Regime in regard to the amount of financing that can be obtained through equity crowdfunding campaigns is that of altogether banning certain investors from participating in crowdfunding campaigns of a particular size, in function of the investor’s profile.

It is not clear, however, what purpose was served with this ban: the goal of limiting the access to equity crowdfunding to certain investors is already accomplished by Article 20 of the Crowdfunding Act (which will be analysed later). The only effect arising from the distinction made by Article 18 of the Act is rather to encourage the beneficiaries of crowdfunding to exclude less sophisticated recipients from campaigns whose goal is to raise more than €1,000,000; it seems to assume that campaigns that raise higher amounts of capital entail greater risks for investors.

71 A slightly less harmful variation of this idea could include limits on equity crowdfunding offers that would not depend on the total amount of capital amassed over a given period (but would apply to individual offers instead): such a provision would at least encourage crowdfunding beneficiaries to become repeat players – and the repeated interactions between crowdfunding beneficiaries and investors might have the effect of discouraging opportunistic behaviour (see Agrawal, Catalini and Goldfarb (n 4)).
It is true that if one assumes that the contributions typically made by participants in crowdfunding campaigns remain more or less fixed irrespectively of the total target of the campaign, Article 18 could actually have the effect of preventing the participation of unsophisticated investors in the excessively dispersed shareholding structures that often characterise companies financed through equity crowdfunding (and which might make it harder for investors to coordinate or care). However, if this was the true goal of this provision, there seem to exist more effective (or at least more direct) ways of achieving it, namely by imposing a minimum floor on the individual contributions made to such campaigns (which could, in turn, vary according to the total amount of funding sought).

In any case, the benefits from preventing the formation of companies with dispersed shareholding structures might be quite insignificant when compared to the drawbacks of preventing less sophisticated investors from participating in larger crowdfunding campaigns: by preventing the participation of these investors in undertakings that do not seem to involve any particularly increased risk (at least not by virtue alone of the amount being raised), the regulator is narrowing the array of circumstances where two agents with complementary interests are allowed to an agreement — without actually having a very strong reason to interfere.

And even if it were to be admitted that the limits described above serve indeed a useful purpose, one of the differentiation criteria adopted in this provision leaves something to be desired: while it is true that income differences are commonly used as a proxy for financial sophistication (and it is generally assumed that an investor earning a higher level of income will be in a better position to cope with the consequences from failed investments), the distinction drawn between natural persons and legal persons can effortlessly be defrauded via the (relatively straightforward) incorporation of a new legal person — particularly to the extent that the application of Articles 19 (2) and 12 (2) (a) of the Crowdfunding Regulation does not depend on whether that new legal person has limited liability.

In the end, it seems that the ceilings applicable to the value of crowdfunding campaigns should altogether be excluded abandoned by the Portuguese Crowdfunding Regime. Ultimately, Portugal should not have defined the application scope of the

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72 It could instead be argued that to the extent that any agreement following an equity crowdfunding campaign will cease to operate if the campaign is unable to collect the amount of funding requested (cf Article 9 (1) of the Crowdfunding Act), any attempt to raise more than €1,000,000 might actually be seen as a powerful sign that the entrepreneurs seeking finance are convinced of their company’s potential.

73 It is so because the lack of financial knowledge can generally be overcome through the hiring of professional financial advice.

74 According to Bradford, the ability to withstand financial loss is a better criteria to differentiate between investors than yearly income (as a proxy for financial sophistication) (see Bradford (n 9)).
Crowdfunding Act by resorting to a definition of ‘crowdfunding’ and then limited the amount that can be raised in campaigns that fall under that very wide definition; it would have been preferable to specifically regulate public offers raising less than €5,000,000 – with public crowdfunding offers raising more than that amount falling only under the scope of the CVM. Such rules could then be complemented by a set of provisions specifically applicable to electronic platforms hosting public offers (regardless of volume).  

Still – and in spite of all its shortcomings – the Portuguese Crowdfunding Regime does have the merit of containing limitations to the terms in which crowdfunding offers can be made (other than those regarding their target amount) that may actually play a useful role in protecting investors: one of those rules provides that if a crowdfunding campaign fails to reach its target amount any funds originally pledged are returned to the investors (Article 9 (1) of the Crowdfunding Act); another states that crowdfunding offers must be made available through a single crowdfunding platform (Article 18 (3) of the Crowdfunding Act).

The first limit ensures that investors do not end up financing companies and projects that cannot amass the financing that they need in order to succeed (while, at the same time, mitigating the effects coming from investors’ natural reluctance to participate in the early stages of a crowdfunding campaign); the second limit might encourage competition amongst platforms, forcing them to provide better conditions for both the beneficiaries and the investors in equity crowdfunding campaigns (which can hopefully lead to the creation of safer investment environments).

Regulating investment in equity crowdfunding

While the limits imposed on the content and configuration of equity crowdfunding campaigns generally seem to contribute very little to investment protection, other limits included in the Portuguese Crowdfunding Regime – limits specifically targeted at investment in equity crowdfunding campaigns – might play a more significant role in protecting the backers of such campaigns.

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75 One could speculate that these limits are the product of the careless copying of the US crowdfunding regulation model: the model seen in the Jumpstart Our Business Start-ups Act, of 5 April 2012 (the ‘JOBS Act’). The reason why the JOBS Act relies on these limits is because crowdfunding regulation in the US has a different starting point than the EU’s: in the US, equity crowdfunding was entirely prohibited until it became admissible under the JOBS Act, with the limits under the JOBS Act being used to define its application scope; within the EU, equity crowdfunding campaigns of less than €5,000,000 enjoyed the legal vacuum created by the Prospectus Directive and were thus generally allowed even before the first crowdfunding-specific regimes started being enacted by the different Member States.

76 See Agrawal, Catalini and Goldfarb (n 4).
Article 20 of the Crowdfunding Act, in particular, stipulates that certain investors are subject to investment ceilings that limit how much they can channel to equity crowdfunding. These ceilings are applicable both to the amount of money a single investor can put into a single crowdfunding campaign and to the amount of money that a single investor can devote to equity crowdfunding in general over a given period of time.\textsuperscript{77}

According to Article 12 (1) and (2) of the Crowdfunding Regulation, non-qualified investors who are natural persons and who have a yearly income of less than €70,000 cannot pledge more than €3,000 to a single crowdfunding campaign, nor can they invest more than €10,000 in crowdfunding campaigns over a period of 12 months. The Crowdfunding Act further requires investors to declare, upon subscription, that they are aware of the conditions of the offer that they are accepting – and, particularly, of the risks associated with this type of investment\textsuperscript{78} – as well as to disclose how much they spent in crowdfunding campaigns in the previous year\textsuperscript{79} and how much they earn approximately.\textsuperscript{80}

These barriers to individual investment in equity crowdfunding seem to eliminate – or at least significantly reduce – the possibility of investors experiencing catastrophic losses as a consequence of their investment: the losses suffered by investors will hopefully be sufficiently small so that they can be covered by the individual’s yearly income.

Still, Article 12 of the Crowdfunding Regulation deserves some criticism. Firstly, it can be criticised for its imprecision: it is unclear whether the aforementioned limits refer to every amount invested in crowdfunding campaigns or whether they apply only to the funding of equity crowdfunding campaigns.

Additionally, it seems that exempting legal persons from these limits – regardless of how they are incorporated and whether they enjoy limited liability regimes – again provides an easy way for investors to evade them.

Finally, it is argued that its limits could be a bit more nuanced: maybe investors could choose between the absolute limit included in Article 13 (€3,000 per offer or €10,000 throughout a 12-month period) and a variable limit, calculated as a percentage of their yearly income. This would allow for a greater degree of differentiation between investors with varying yearly incomes of less than €70,000 and potentially allow for

\textsuperscript{77} See Article 20 of the Crowdfunding Act.
\textsuperscript{78} See Article 8 of the Crowdfunding Act.
\textsuperscript{79} See Article 20 (4) of the Crowdfunding Act and Article 12 (3) of the Crowdfunding Regulation.
\textsuperscript{80} See Article 20 (4) of the Crowdfunding Act.
more funds to be channelled to equity crowdfunding (yielding an overall increase of allocative efficiency).

3.3. Evaluation of the Portuguese Crowdfunding Regime and suggested alternatives

In light of the analysis of the various investor protection mechanisms included in the Portuguese Crowdfunding Regime, it is now time to take a stance regarding its overall merits, as well as to discuss some of the alternative regulatory avenues that could have been pursued by the Portuguese regulator.

Firstly, it should be noted that many of the measures implemented under the Portuguese Crowdfunding Regime do have the potential to fulfil the dual purpose of protecting investors in equity crowdfunding campaigns and preserving the viability of equity crowdfunding as an alternative form of financing. In this respect, the information duties applicable to crowdfunding beneficiaries – which can be complied with by submitting standardised forms and which extend beyond the period of the initial campaign – are particularly laudable. The imposition of gatekeeping duties on crowdfunding platforms and their categorisation as financial intermediaries are also steps in the right direction, turning these platforms into an important mechanism for the defence of investors in equity crowdfunding campaigns.

The aspects of the Portuguese Crowdfunding Regime that deserve the most criticism are its over-reliance on a ‘crowdfunding’ definition and the imposition of limits to the amounts that can be raised in public offers intermediated by electronic platforms. At the end of the day, the Portuguese regulator should have refrained from enshrining a definition of ‘crowdfunding’ in the law and rather have devised a legal regime generally applicable to (all) public offers of less than €5,000,000 – even if such regime would (as it should!) take into account the idiosyncrasies of equity crowdfunding (as a de facto reality), or be complemented by a set of rules specifically governing crowdfunding platforms.

Generally, it also seems that the Portuguese Equity Crowdfunding Regime could have shown a higher overall regard for the risks run by equity crowdfunding investors in their quality as future shareholders of the funded company.

The risks incurred by investors in equity crowdfunding are not limited to the initial campaign stage – but instead extend over the life of the funded company, whose governance mechanisms are often insufficient to allow for the adequate monitoring of the management by the dispersed shareholder structure that often characterises companies financed through equity crowdfunding.
Regulatory alternatives capable of dealing with this particular type of risk could include the creation of additional monitoring obligations for crowdfunding platforms, who, as gatekeepers and intermediaries in the relationship between investors in equity crowdfunding campaigns and the beneficiaries of such campaigns, are in a privileged position to carry out this additional monitoring.

Additionally, the legislator could require crowdfunding platforms to provide investors in equity crowdfunding with a forum where they could communicate and coordinate with other investors in the same campaign; maintaining open communication channels between investors for the exchange of information and ideas would enable investors to monitor the companies financed by them more effectively – particularly beyond the initial fundraising phase.

Finally, it might also be worth requiring companies financed through equity crowdfunding to provide their investors with clear exit strategies, such as mandatory tag along rights where the sale of shareholdings by one of the company’s founding shareholders would allow minority shareholders to sell their holdings under similar conditions.

4. Conclusion

In recent years, equity crowdfunding has found itself under the spotlight of academics, regulators, and firms. On the one hand, it appears to be growing and effectively fulfilling its potential as a viable alternative for small and medium sized companies looking to raise capital; on the other hand, there is an increasing awareness of the risks run by investors in equity crowdfunding campaigns.

Equity crowdfunding thus represents a legislative challenge that is both urgent and complex: urgent because regulatory apathy might give way to the first scandal capable of dictating a premature end to this source of financing, and complex because an excessively harsh regulatory regime can also contribute to the early demise of equity crowdfunding.

The regulation of equity crowdfunding must thus strike a satisfactory balance between preserving its usefulness for companies that do not have easy access to other financing alternatives and protecting those that invest in equity crowdfunding campaigns. But that is not enough: a satisfactory equity crowdfunding regime should also encourage companies financed in this way to develop a solid corporate governance model.

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81 According to Agrawal, even though the information coming from crowds is sometimes just noise, in some circumstances – particularly in the context of crowdfunding – the value of such information should not be undermined (see Agrawal, Catalini and Goldfarb (n 4)).

82 Bradford (n 12).
capable of supporting their growth, especially as additional rounds of funding become necessary.

In the end, it is argued that while the Portuguese Crowdfunding Regime does include some meritorious investor protection mechanisms, it could nevertheless be further improved – in particular through the adoption of regulatory measures aimed at ensuring the long-term sustainability of companies funded through equity crowdfunding.

Still, it is to be expected – and it might, to a degree, be desirable – that the regulation of equity crowdfunding will be the result of many successive adjustments attempting to keep up with a reality that is quite recent and that is still evolving. It is hoped that these (predictable) adjustments will lead to a better and more sustainable balance between promoting crowdfunding and ensuring the protection of equity crowdfunding investors both at the campaign stage and throughout the life of the funded company. Such balance will be key to turning equity crowdfunding into a true vehicle for economic development.

Still, limiting the role of equity crowdfunding to that of being an alternative financing source for small and medium-sized companies that is (hopefully) also safe for investors might be narrow-minded: the benefits of equity crowdfunding are not limited to its financing role. Crowdfunding is, first and foremost, a sub-set of crowdsourcing – an alternative mechanism for solving problems by leveraging the unique capacities of crowds.83

With the right regulatory regime, equity crowdfunding might give rise to new dynamics between entrepreneurs and crowds of small investors that want to use the Internet to influence the future of projects that they are passionate about, in contrast with traditional notions of rational apathy. With the right set of rules, even larger companies or more traditional financial agents might want in on the crowdfunding game.84

It is true that the main goal for any equity crowdfunding regime should be to ensure that it becomes a viable, accessible, and safe funding alternative; for that reason, the main focus of this article was to evaluate whether the Portuguese Crowdfunding


84 See Space Tex Capital Partners (n 16).
Regime has been able to accomplish that goal. Still, it is also argued that regulating equity crowdfunding without attempting to preserve what makes it unique and, namely, without encouraging its imminently social aspects is ultimately wasteful. Hopefully, future research efforts (in the field of Law or elsewhere) may influence the regulation of equity crowdfunding in ways that will eventually allow it to release its full potential.
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