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Crowdfunding: a Brief Overview of the Swiss Legal Aspects

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ABSTRACT

Crowdfunding – Contract law – Corporate law – Private international law – Financial regulation

I. Introduction

The present article is based on the doctoral dissertation defended on 27 March 2018 at the University of Lausanne entitled «*Crowdfunding – Analyse de droit suisse du financement participatif*». It aims to shortly present the legal framework of crowdfunding in Switzerland, which is the core of said PhD thesis.¹ After having defined the concept of crowdfunding (I), we shall briefly explore some of the legal implications that a crowdfunding campaign has in private law (II) and in private international law (III). We then present the regulatory framework, which may vary according to the circumstances (IV).

II. The definition of crowdfunding

There is no definition of crowdfunding unanimously accepted by the academic community and therefore, every author is free to define it as he wants to.² Moreover, there is no legal definition of crowdfunding in Swiss law.³ In our opinion, many elements are characteristic of this financing method.⁴ The campaign must happen on the Internet, there must be an open call to the public, and some

financial contributions must be made to a specific project. Based on these elements, crowdfunding can be defined as a «*mode de financement impliquant un appel au grand public effectué sur Internet par une personne physique ou morale visant à inciter plusieurs autres personnes à verser une contribution afin de réunir le capital nécessaire à la réalisation d'un projet déterminé*».⁵

For a legal analysis, it is desirable to differentiate several types of crowdfunding depending on the reward offered by the project owner to the backers.⁶ The applicable law is indeed very different, according to the type of crowdfunding. This being said, some rules can apply to every type of crowdfunding, such as art. 3 para. 1 let. s Unfair Competition Act⁷, which provides a duty of information to the project owner.⁸ One should therefore distinguish between donation-based crowdfunding, reward-based crowdfunding, lending-based crowdfunding and investment-based crowdfunding.

III. The relationships between the parties in private law

Generally, the participation to a crowdfunding campaign presupposes the intervention of three parties⁹: (i) the project owner, who seeks to finance a project, (ii) the backer, who brings capital to the project, and (iii) the crowdfund-

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¹ PASCAL FAVROD-COUNE, *Crowdfunding – Analyse de droit suisse du financement participatif*, PhD thesis, Lausanne 2018. For a more detailed analysis and further information about the Swiss legal aspects of crowdfunding, we refer the reader to our PhD thesis.

² The most cited definition is the one written by THOMAS LAMBERT/ARMIN SCHWIENBACHER, *An Empirical Analysis of Crowdfunding*, 6 (available at <<https://wenku.baidu.com/view/2de46229b4daa58da0114ac8>>, accessed 7 May 2018).

³ PETER V. KUNZ, *Crowdfunding*, Jusletter 25.08.2014, n. 6; MARTIN POLETTI/KAISA MILLER/PATRIC EGGLEER/CLARA BODEMANN, *Überlegungen zur steuerlichen Behandlung des Crowdfundings in der Schweiz*, RF 2016, 820 et seqq., 821.

⁴ See FAVROD-COUNE (fn. 1), n. 165 et seqq.

⁵ FAVROD-COUNE (fn. 1), n. 175.

⁶ Same opinion, PASCAL SÖPPER, *Crowdfunding. Reward-Crowdfunding, Crowdlending und Crowdinvesting – eine Analyse aus schuld-, gesellschafts- sowie kapitalmarktrechtlicher Sicht*, PhD thesis, Münster 2016, 24 et seqq.

⁷ Loi fédérale contre la concurrence déloyale du 19 décembre 1986, RS 241.

⁸ See FAVROD-COUNE (fn. 1), n. 187 et seqq.

⁹ *Inter alia*, SIMONE BAUMANN, *Crowdinvesting im Finanzmarktrecht*, PhD thesis Zurich, Zurich/Basel/Geneva 2014, n. 54; AUDREY DURAND, *Questions choisies et aspects pratiques du crowdinvesting*, GesKR 2018, 21 et seqq., 21.

ing platform¹⁰, which connects the project owner and the backers.

Several contracts are concluded between the aforementioned parties, and we have to distinguish the main relationship, which is the one between the project owner and the backer (A), and the ones that involve the platform (B)

A. The legal relationship between the project owner and the backer

As indicated above, the applicable rules differ greatly depending on the type of crowdfunding and on the reward, thus every type of crowdfunding should be examined separately.

1. The donation-based crowdfunding

During a donation-based crowdfunding campaign, the concluded contracts are, in general, qualified as gifts with proviso (art. 245 CO).¹¹ The proviso is to affect the money to realize the project, but other provisos can also be conventionally agreed upon. Thanks to this qualification, the backer has the right to revoke the gift if the proviso is not fulfilled without good cause (art. 249 fig. 3 CO) and can bring action for fulfilment of the proviso (art. 246 CO). However, such rights can be difficult to exercise because of the information asymmetry existing in a crowdfunding project.¹²

2. The reward-based crowdfunding

The performance due by the project owner is of different nature according to the type of reward, which is essential to determine the rules applicable to the legal relationship. Indeed, this characteristic performance is, as essential terms (*«point objectivement essentiel»*), crucial to qualify the contract.¹³ Thus, it is not possible to determine a unique qualification for all contracts concluded during

a crowdfunding campaign because of the diversity of rewards that are offered by project owners in practice.¹⁴

That being said, a fair amount of campaigns aims to produce goods in great quantity¹⁵, in which case the contract is qualified as a contract of delivery of a work (*«contrat de livraison d'ouvrage»*, *«Werklieferungsvertrag»*)¹⁶, and therefore the rules of a contract for work and services (art. 363 et seqq. CO) are applicable.¹⁷ Quite a lot of legal provisions will apply, notably with regard to the payment of the work, to its delivery, to the default of the obligor, to the liability of defects, or to the right of withdrawal.¹⁸ Here, too, the information asymmetry can be an issue to exercise the rights and these rules are not always suitable in the context of a crowdfunding campaign.¹⁹

Another type of reward that is frequent in many reward-based crowdfunding campaigns is a good of little value in relation to the project (for instance a t-shirt, a mug or a chair with the logo of the project printed on it). In such situations, the contract can be defined as a mixed gift (*«donation mixte»*, *«gemischte Schenkung»*). To determine the applicable law to this contract, we need to find, according to the jurisprudence of the Federal Supreme Court, the centre of gravity of the contractual relationship (*«Regelungsschwerpunkt»*)²⁰, so that both the law of gifts and the law of sales can apply, depending on the legal issue.²¹

Finally, plenty other types of contracts can be concluded depending on the reward. As an example, we can mention the sponsoring contract, the live performance contract (*«contrat de spectacle»*, *«Vorstellungsbeteiligungsvertrag»*) or the catering contract. Another type of contract that is more and more frequent in practice is the sale of immovable property, when the reward is a co-ownership share of a real estate property. In this case, the main legal issue that arises is the respect of the public deed (art. 216

¹⁰ A platform is not necessary to undertake a crowdfunding campaign and it is possible to avoid using a platform, in particular by using a blockchain. About the concept of blockchain, see, *intra alia*, MARTIN HESS/PATRICK SPIELMANN, Cryptocurrencies, Blockchain, Handelsplätze & Co. – Digitalisierte Werte unter Schweizer Recht, in Reutter/Werlen (eds.), Kapitalmarkt – Recht und Transaktionen XII, Zurich/Basel/Geneva 2017, 145 et seqq.; ROLF H. WEBER, Blockchain als rechtliche Herausforderung, Jusletter IT 18.05.2017.

¹¹ For a discussion of this qualification and the distinction with other contracts, see FAVROD-COUNE (fn. 1), N 268 et seqq.

¹² FAVROD-COUNE (fn. 1), n. 284.

¹³ CR CO I-MORIN, Art. 2 n. 3.

¹⁴ FAVROD-COUNE (fn. 1), n. 291.

¹⁵ For instance, see the campaign of the Pebble watch, <<https://www.kickstarter.com/projects/597507018/pebble-e-paper-watch-for-iphone-and-android/description>>, accessed 7 May 2018.

¹⁶ For an analysis of the distinction between the contract of delivery of a work and the contract of the sale of a future good (*«contrat de vente d'une chose future»*, *«Lieferungskauf»*), see FAVROD-COUNE (fn. 1), n. 300 et seqq.

¹⁷ DFT 103 II 33, 35, JdT 1997 I 534, 537, c. 2a.

¹⁸ In detail, FAVROD-COUNE (fn. 1), n. 291.

¹⁹ FAVROD-COUNE (fn. 1), n. 358 et seqq.

²⁰ DFT 131 III 528, 532, c. 7.1.1.

²¹ See FAVROD-COUNE (fn. 1), n. 389 et seqq.

para. 1 CO) and the respect of the Federal Act governing the acquisition of real estate by persons abroad.²²

3. The lending-based crowdfunding

In case of a lending-based crowdfunding campaign, the concluded contracts are fixed-term loans within the meaning of art. 312 et seqq. CO.²³ Many rules will derive from the qualification regarding the potential interests and the use of the money in conformity with the objective of the project.²⁴

In certain circumstances, the contract may be qualified as a consumer credit within the meaning of art. 1 Consumer Credit Act (CCA).²⁵ For this to happen the project owner must be a consumer and the backer has to grant credits in a professional capacity.²⁶ If so, the CCA provides some rules relating to the conclusion of the contract and modifies the rights and obligations of the parties.²⁷

As only certain contracts are subject to the CCA, the rules applicable to the contracts concluded during a single lending-based crowdfunding campaign could be different, without a possibility for the project owner to know beforehand which type of contract he concludes, as it is complex to determine whether the backer acts professionally or not.²⁸ This regrettable situation should change in the future because the CCA is currently under parliamentary revision in order to take crowdfunding into account in its application scope.²⁹

4. The investment-based crowdfunding

As we have seen with the reward-based crowdfunding, it is the reward that is decisive to qualify the contract. In the Swiss investment-based crowdfunding practice, the reward is often composed of shares of a company limited by shares («*société anonyme*», «*Aktiengesellschaft*»), cryptographic tokens or some interests. The contract could hence be an investment and subscription agreement, a sale contract or a loan contract, which could possibly be a related-party loan («*prêt partiaire*», «*partiarisches Darlehen*»), a subordinated loan or a bond loan.³⁰ If those contracts are generally not problematic in practice, there is a fair amount of legal hurdles for the project owner.

When shares are offered, the project owner must comply with corporate law. From case to case³¹, he will face challenges regarding the deed of incorporation, the time limit of the ordinary increase in the share capital or the sum of the authorised increase in the share capital, the issue prospectus or the organization of the general meeting. The project of revision of the rules concerning the companies limited by shares and the adoption of the Financial Services Act (FinSA)³² will substantially modify the applicable rules to the crowdfunding sector in the future. While such changes are welcome, further improvement remains possible.³³

Another issue concerns the treatment of the – potentially plentiful – backers who became shareholders. The project owner must mainly handle their participation in the decision-making process, their prospective exit and their coordination.³⁴ In order to reach appropriate corporate governance, the project owner has a few legal solutions at its disposal. On the one hand, he can adapt the articles of association of the company³⁵, for example by issuing shares with privileged voting rights (art. 693 para. 1 CO), participation certificates (art. 656a CO) or preference shares (art. 654 et seqq. CO), by representing the backers to the board of directors (art. 709 CO) or by restricting the transferability of the shares (art. 685 et seqq. CO). On the other hand, the project owner can conclude shareholder agreements in order to organize the relationships between or with the backers.³⁶

Other problems arise when the project owner issues bonds. In addition to having to issue a prospectus

²² Loi fédérale sur l'acquisition d'immeubles par des personnes à l'étranger du 16 décembre 1983, RS 211.412.41. See DURAND (fn. 9), 25 et seqq.; FAVROD-COUNE (fn. 1), n. 418 et seqq.

²³ BSK OR I-SCHÄRER/MAURENBRECHER, Art. 312 n. 41d; ANDREAS SCHNEUWLY, Crowdfunding aus rechtlicher Sicht, PJA 2014, 1610 et seqq., 1614.

²⁴ See FAVROD-COUNE (fn. 1), n. 461 et seqq.; SCHNEUWLY (fn. 23), 1615 et seqq.

²⁵ Loi sur le crédit à la consommation du 23 mars 2001, RS 221.214.1.

²⁶ FAVROD-COUNE (fn. 1), n. 440 et seqq.; ANNE-CHRISTINE FORNAGE, Vers un droit du crédit à la consommation plus responsable, JdT 2017 II 4 et seqq., 9.

²⁷ In detail, FAVROD-COUNE (fn. 1), n. 481 et seqq.

²⁸ FAVROD-COUNE (fn. 1), n. 450 and 502; SCHNEUWLY (fn. 23), 1618.

²⁹ See FAVROD-COUNE (fn. 1), n. 509 et seqq.; JÜRIG SCHÄR, Aufsichtrechtliche Herausforderungen im Zusammenhang mit FinTech, in: Sester/Brändli/Bartholet/Schiltknecht (eds.), Finanzmarktaufsicht und Finanzmarktinfrastrukturen, Zurich/St. Gallen 2018, 689 et seqq., n. 53.

³⁰ FAVROD-COUNE (fn. 1), n. 539.

³¹ See FAVROD-COUNE (fn. 1), n. 551 et seqq.

³² Loi fédérale sur les services financiers, which should be passed in 2018 and enter into force in 2019 or early 2020 at the latest.

³³ FAVROD-COUNE (fn. 1), n. 648 et seqq.

³⁴ FAVROD-COUNE (fn. 1), n. 651 et seqq.

³⁵ See FAVROD-COUNE (fn. 1), n. 670 et seqq.

³⁶ See FAVROD-COUNE (fn. 1), n. 755 et seqq.

(art. 1156 CO), the rules relating to bonds can be problematic with regards to the decision-making process and compliance with the regulation can be expensive.³⁷ As the bonds regulation is not adapted to the new technologies³⁸, it is doubtful that it is suitable for the project owner to issue bonds under Swiss law in the context of a crowdfunding campaign.³⁹

Lastly, when the project owner issues cryptographic tokens that are transferred to the backer as property, i.e. an initial coin offering (ICO), the problem lies in the legal insecurity in which the campaign is undertaken. From a private law standpoint, the legal status of tokens (either payment, utility or investment tokens⁴⁰) is indeed not clarified. To determine the appropriate legal framework, a task force has been recently created and their results are expected to be published by the end of 2018.⁴¹

B. The legal relationships with the crowdfunding platform

The crowdfunding platform concludes contracts both with the project owner and the backers.⁴² In each case, the contracts are qualified as mixed contracts. The contract concluded between the platform and the project owner includes at least a part of brokerage and a part of website hosting, but it can also include features of other contracts depending on the services offered by the platform. With respect to the contract concluded between the platform and the backer, it comprises an element of brokerage as well as an element of money transfer.⁴³

In its role of intermediary, the crowdfunding platform can act as gatekeeper and influence the relationship between the project owner and the backers.⁴⁴ Therefore, it could force the parties to adopt a complete transparency regarding the project and its progress, which would increase the effectiveness of the legal actions of the backers, help the project owner to protect his intellectual property or suggest some turnkey contracts for the parties.⁴⁵

IV. The issues related to international crowdfunding campaigns

Allowing to a large number of backers to participate in a crowdfunding campaign increases the chances to reach the financing target. Nevertheless, some issues may arise, in particular with regards to the jurisdiction of courts and the applicable law.

Pursuant to art. 5 Private International Law Act (PILA)⁴⁶ and 23 Lugano Convention (LC)⁴⁷, it is possible to choose a competent court in Switzerland. Furthermore, the parties can also choose the applicable law to their contract, according to art. 113 PILA. However, these choices are not possible at all for the contracts with every backer or are at least subject to specific conditions, notably when the backers are qualified as consumers (art. 114 para. 2 and 120 para. 2 PILA, art. 17 LC). As the project owner cannot know precisely the status of every backer before the end of his campaign, it is not possible to know beforehand unequivocally neither the applicable law to the contracts nor the competent jurisdictions.⁴⁸

It results from the above that the competent jurisdictions and the applicable law have to be determined by an objective connecting factor. As the concluded contracts during a crowdfunding campaign are of various types and

³⁷ FAVROD-COUNE (fn. 1), n. 866 et seqq.

³⁸ For a more general critique, see RENÉ BÖSCH, Neues Prospektrecht gemäss E-FIDLEG: Schnittstellen – Gereimtes und Ungereimtes – Verpasste Chancen, in: Weber/Stoffel/Chen-Sethe (eds.), Aktuelle Herausforderungen des Gesellschafts- und Finanzmarktrechts Festschrift für Hans Caspar von der Crone zum 60. Geburtstag, Zurich 2017, 495 et seqq., 508 et seqq.

³⁹ Same opinion, BAUMANN (fn. 9), n. 572; KARIM MAIZAR/ARMIN KÜHNE, Crowdfunding – Ein neues Kapitel im Kapitalmarkt?, in: Reutter/Werlen (eds.), Kapitalmarkttransaktionen X, Zurich/Basel/Geneva 2016, 87 et seqq., 107.

⁴⁰ See the categories of tokens according to FINMA, Guidelines for enquiries regarding the regulatory framework for initial coin offerings (ICO), 16 February 2018, 4 et seqq.

⁴¹ Media release of the Swiss Federal Council of 18 January 2018 (available at <<https://www.admin.ch/gov/fr/accueil/documentation/communiques.msg-id-69539.html>>, accessed 7 May 2018).

⁴² KUNZ (fn. 3), n. 24; DIRK SPACEK, Online-Crowdfunding: Unterhaltungsindustrie und Start-Up-Unternehmen im Umbruch?, sic! 2013, 277 et seqq., 282. *Contra*, SCHNEUWLY (fn. 23), 1613.

⁴³ SPACEK (fn. 42), 282.

⁴⁴ FAVROD-COUNE (fn. 1), n. 940 et seqq. The influence has to be to the allowed extent by its role of broker for both parties. More specifically, the platform cannot advantage any parties to avoid possible conflicts of interest, see DFT 112 II 459, JdT 1987 I 82.

⁴⁵ To encourage platforms that have an activity in Switzerland to offer those services, the Swiss Crowdfunding Association could adopt a code of practice that they have to comply with.

⁴⁶ Loi fédérale sur le droit international privé du 18 décembre 1987, RS 291.

⁴⁷ Convention concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale (Convention de Lugano), RS 0.275.12

⁴⁸ FAVROD-COUNE (fn. 1), n. 1217; SIGNE A. VEST, Crowdfunding of SMEs: Geographical Implications and Private International Law Aspects in Europe, in: Bonomi/Romano (eds.), Yearbook of Private International Law, Volume 17 (2015/2016), Cologne 2016, 551 et seqq., 577 et seqq.

involve a great deal of parties, we can observe that many jurisdictions will be competent and many national laws may be applicable. Thus, undertaking a crowdfunding campaign might be complicated from the point of view of private international law. The only solution to simplify this issue would be to adopt an international convention that would regulate it.⁴⁹

V. The regulatory framework

There is no specific legislation that regulates crowdfunding in Switzerland.⁵⁰ Depending on the circumstances, any business model can fall under the scope of the Swiss financial markets laws.⁵¹ Hence, the organization of the platform as well as that of the crowdfunding campaign, in particular regarding the rewards, will be decisive to determine whether some legal provisions apply or not⁵² and a slight change in the organization can have far-reaching legal consequences.⁵³ As the case may be, many laws can apply.

A. The Banking Act (BA)

Complying with the BA⁵⁴ was the biggest barrier to entry concerning certain types of crowdfunding.⁵⁵ Thanks to the amendment to the Banking Ordinance (BO)⁵⁶ in order to ease the Swiss regulatory framework for FinTech-providers, the BA is now less likely to apply in the context of crowdfunding. Since 1 August 2017, crowdfunding platforms can indeed keep the monetary rewards for 60

days before transferring them to the project owner (art. 5 para. 3 let. c BO)⁵⁷, whereas they could only keep them for 7 days before the amendment.⁵⁸ With regard to the project owner of a lending-based crowdfunding campaign, he can now generally borrow up to CHF 1'000'000.– without having to comply with the banking regulation (art. 6 para. 2 BO).⁵⁹

Overall, these amendments must be welcomed, even though many improvements can still be made.⁶⁰ This is also the case regarding the new FinTech licence that is now in discussion at the Parliament.⁶¹

B. The Collective Investment Schemes Act (CISA)

Generally speaking, the CISA⁶² does not apply to crowdfunding activities. Indeed, art. 7 para. 1 CISA, which defines the collective investment schemes, provides notably that a third party manages the funds («*Fremdverwaltung*»). In practice, the platform does not act as such, but just act as an intermediary. Hence, the platform cannot be considered as a collective investment scheme.⁶³

With regard to the corporation of the project owner, it is generally not considered as a collective investment scheme because the corporations usually have a commercial or an industrial activity.⁶⁴ This conclusion leads to consider that a platform does not distribute collective investment schemes within the meaning of art. 3 para. 1 CISA.⁶⁵ This being said, however, if the project owner uses a holding company in order to pool the backers, it is likely that such a company may fall under the scope of the CISA.⁶⁶

⁴⁹ FAVROD-COUNE (fn. 1), n. 1215 et seqq.

⁵⁰ *Inter alia*, JULIETTE ANCELLE/PHILIPP FISCHER, Regulation of Crowdfunding Activities in Switzerland: Where do we Stand?, Jusletter 22.02.2016, n. 20; JANA ESSEBIER/ROLF AUF DER MAUR, Fidleg als Chance für die Schweiz als Crowdfunding-Standort, Jusletter 28.09.2015, n. 9.

⁵¹ FEDOR POSKRIAKOV, Crowdlending – swiss regulatory regime – Quo vadis?, Jusletter 17.03.2017, n. 10.

⁵² PATRICIA REICHMUTH/HANS CASPAR VON DER CRONE, Crowdlending als bewilligungspflichtige Entgegennahme von Publikumseinlagen, RSDA 2017, 253 et seqq., 260; HANS CASPAR VON DER CRONE/KASPAR PROJER, Privatplatzierung, Crowdfunding, OTC-Handel – Eine rechtliche Analyse alternativer Wege, in: Gericke (ed.), Private Equity V, Zurich/Basel/Geneva 2016, 19 et seqq., 29.

⁵³ ANCELLE/FISCHER (fn. 50), n. 20; ESSEBIER/AUF DER MAUR (fn. 50), n. 10.

⁵⁴ Loi fédérale sur les banques et les caisses d'épargne du 8 novembre 1934 (Loi sur les banques), RS 952.0.

⁵⁵ Same opinion, POSKRIAKOV (fn. 51), n. 25.

⁵⁶ Ordonnance sur les banques et les caisses d'épargne du 30 avril 2014 (Ordonnance sur les banques), RS 952.02.

⁵⁷ YVES MAUCHLE, Die regulatorische Antwort auf FinTech: Evolution oder Revolution? Eine Verortung aktueller Entwicklungen, RSDA 2017, 810 et seqq., 818; SCHÄR (fn. 29), n. 34 and 48.

⁵⁸ DURAND (fn. 9), 27; MAUCHLE (fn. 57), 816.

⁵⁹ FINMA, Fact Sheet Crowdfunding, 1 August 2017.

⁶⁰ See FAVROD-COUNE (fn. 1), n. 1300 et seqq.

⁶¹ See FAVROD-COUNE (fn. 1), n. 1434 et seqq.

⁶² Loi fédérale sur les placements collectifs de capitaux du 23 juin 2006 (LPCC), RS 951.31.

⁶³ BAUMANN (fn. 9), n. 437; MAIZAR/KÜHNE (fn. 39), 117; THOMAS WERLEN/JONAS HERTNER, Crowdfunding nach Schweizer Art, in: Gschwend/Hettich/Müller-Chen/Schindler/Wildhaber (eds.), Recht im digitalen Zeitalter, Zurich/St. Gallen 2015, 315 et seqq., 321.

⁶⁴ BAUMANN (fn. 9), n. 453; VON DER CRONE/PROJER (fn. 52), 37.

⁶⁵ VON DER CRONE/PROJER (fn. 52), 38.

⁶⁶ BAUMANN (fn. 9), n. 479 et seqq.; WERLEN/HERTNER (fn. 63), 322.

C. The Stock Exchanges and Securities Trading Act (SESTA) and the Financial Market Infrastructure Act (FMIA)

The platform does not normally fall under the scope of the SESTA⁶⁷ because it does not constitute a securities dealer pursuant art. 2 let. d SESTA.⁶⁸ With regard to the project owner, he has to comply with the SESTA's rules if he issues derivatives (art. 2 let. c FMIA⁶⁹). This might be the case when he issues investment tokens during an ICO.⁷⁰ He would therefore have to obtain a licence from FINMA (art. 10 para. 1 SESTA).

With respect to the FMIA, its rules generally do not apply to the crowdfunding platform because it is not qualified as a trading venue (art. 26 let. a FMIA) or an organized trading facility (art. 42 FMIA).⁷¹ The only situation when the FMIA could apply is when it organizes a secondary market for securities.⁷²

D. The Anti-Money Laundering Act (AMLA)

Pursuant to art. 2 let. a AMLA⁷³, this regulation applies notably to financial intermediaries. The platform can be qualified as a financial intermediary if it transfers itself the money from the backers to the project owner.⁷⁴ Hence, it has to be affiliated to a self-regulatory organization or obtain a licence from FINMA and to perform a due diligence process (KYC and KYT). Since 2016, this due diligence is easier to process for Internet-based businesses as it can be done online or by video.⁷⁵

The project owner can also be subject to the anti-money laundering regulation when, during an ICO, he issues

payment tokens.⁷⁶ By doing so, he issues a new means of payment referred to in art. 2 para. 3 let. b AMLA.

VI. Conclusion

Crowdfunding is a financing method that is strongly influenced by the practice. The legal framework, which is not unified, is quite complex to apprehend. The rules that apply are very different depending on the type of crowdfunding. This statement is true from a private law, private international law and regulatory viewpoint. The rewards offered by the project owner and the organization of the platform will be decisive for the applicable rules.

This article has presented in broad outlines some issues a project owner, a backer or a crowdfunding platform can encounter, and how the Swiss legal order apprehends it. Our doctoral dissertation was the opportunity to analyse every type of crowdfunding in great details and to find potential solutions, as well as to make many propositions. On the one hand, this work is destined to legal practitioners and people willing to get involved in crowdfunding by identifying the applicable rules and by offering possible legal solutions to organize campaigns and platforms. On the other hand, it criticizes the Swiss legal framework and suggests amendments *de lege ferenda*. Indeed, Switzerland is already an attractive country for people looking to finance a project and for backers, but its legal framework should be improved in a number of ways.

⁶⁷ Loi fédérale sur les bourses et le commerce des valeurs mobilières du 24 mars 1995 (LBVM), RS 954.1.

⁶⁸ BAUMANN (fn. 9), n. 497; PETER HETTICH, Finanzierungsquellen für KMU im Zeitalter von Crowdfunding, GesKR 2013, 386 et seqq., 394.

⁶⁹ Loi fédérale sur les infrastructures des marchés financiers et le comportement sur le marché en matière de négociation de valeurs mobilières et de dérivés du 19 juin 2015 (LIMF), RS 958.1.

⁷⁰ FINMA, Guidelines for enquiries regarding the regulatory framework for initial coin offerings (ICO), 16 February 2018, 5.

⁷¹ VON DER CRONE/PROJER (fn. 52), 43.

⁷² VON DER CRONE/PROJER (fn. 52), 43 et seqq.

⁷³ Loi fédérale concernant la lutte contre le blanchiment d'argent et le financement du terrorisme (LBA), RS 955.0.

⁷⁴ *Inter alia*, ANCELLE/FISCHER (fn. 50), n. 24; BAUMANN, (fn. 9), n. 532; ESSEBIER/AUF DER MAUR (fn. 50), n. 18.

⁷⁵ Circular-FINMA 2016/7, Video and online identification, Due diligence requirements for clients onboarding via digital channels, n. 1 et seqq.

⁷⁶ FINMA, Guide pratique pour les questions d'assujettissement concernant les *initial coin offerings* (ICO) du 16.02.2018, 6; VÄIK MÜLLER/VINCENT MIGNON, La qualification juridique des tokens: aspects réglementaires, GesKR 2017, 486 et seqq., 492.