LEGALINK

INTERNATIONAL BUT PERSONAL

EQUITY CROWDFUNDING & PEER-TO-PEER LENDING

2019 1ST EDITION

INTRODUCTION

Crowdfunding has already an established and proven recognition worldwide as a powerful alternative financing tool. Three main points should be signaled in this respect. On the one hand, the volume of the crowdfunding market keeps increasing sharply at global level. On the other hand, the crowdfunding market is very dynamic as new crowdfunding platforms have recently started to operate. Finally, the projects to be financed through crowdfunding platforms are more and more diverse.

In this context, at a time when crowdfunding regulation is subject to discussion around the globe (namely in the context of the Proposal for a EU Crowdfunding Regulation), is seems important to assess the legal responses from various relevant jurisdictions, in respect to Equity Crowdfunding and Peer to Peer Lending. Such is the purpose of this publication.

This book is dedicated to the memory of Georg Van Daal, Former Deputy Head of Legalink FinTech Forum. Georg was a brilliant lawyer and a partner at Ekelmans & Meijer from 2014 to 2018. He was key to the structuring and to the development of this project but unfortunately could not live to see its final form. He is dearly missed.

October 2019

Paulo Câmara
Managing Partner of Sérvulo & Associados
Leader of the Legalink FinTech Forum

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COLOMBIA
MTA

Equity Crowdfunding

For the purposes of the following, 'equity crowdfunding' means raising capital in an offering of shares (or instruments convertible into shares) through an online platform

1. Has your country introduced specific laws or regulations governing equity crowdfunding, or is it regulated under general securities or other laws?

Yes. Colombia has issued Decree 1357 of 2018, by means of which rules to carry out equity crowdfunding activities in Colombia were introduced.
Equity crowdfunding corporations are regulated and surveilled by the Financial Superintendence of Colombia.

2. If your country regulates equity crowdfunding, what are the names of the government agencies responsible for regulating it?

The Ministry of Finance and Public Credit is the principal governmental body that regulates and addresses finance matters in Colombia, having a special unit known as Unit of Normative Projection and Studies of Financial Regulation (URF) with the purpose of preparing the regulation for the financial activity in Colombia for matters that include equity crowdfunding.

On the other side, the Financial Superintendence is the governmental agency responsible for the supervision and surveillance of the financial sector in Colombia. It has as its principal purpose the preservation of the stability of the Colombian financial system. The Financial Superintendence has created a special unit dedicated exclusively to fintech matters (the RegTech Proyect), which also works in collaboration with the different actors in the financial environment and with the Ministry of Finance. Additionally, this entity has recently created Sandbox, a programme to promote and develop fintech innovations.

3. Are there limits on the amounts that can be raised by crowdfunding companies?

First, it is important to clarify that the limits on the amounts that can be raised for crowdfunding projects are applicable to the start-ups or companies promoting their projects and not to the crowdfunding companies in the strict sense. Therefore, Colombian regulations have established certain limits to the amounts that can be raised by the legal entities or natural persons that request financing for a project under a crowdfunding or collaborative financing mechanism.

Pursuant to Decree 1357, the limits on the amounts that can be raised by the companies or receivers through crowdfunding depends on whether the investors are qualified or non-qualified.

Qualified investors are those who comply with one or more of the following characteristics at the time the investment is made:

a) a patrimony equal to or greater than 10,000 minimum legal monthly salaries (SMLMV) (approximately USD 2,250,000)
b) an investment portfolio in securities, other than collaborative financing securities, equal to or greater than 5,000 SMLMV (approximately USD 1,275,000)
c) certification of market professional as an operator issued by a self-regulatory body of the stock market;
d) an entity supervised by the Financial Superintendence of Colombia, or
e) a foreign or multilateral financial agency.

On the other hand, non-qualified investors are those who do not comply with any of the aforesaid characteristics.

Considering the above, Section 2.41.3.1.2 of Decree 1357 establishes that the maximum amount of financing that each of the receivers can raise through collaborative financing mechanisms or crowdfunding cannot be greater than 10,000 SMLMV and, in no case, greater than 3,000 SMLMV (approximately USD 765,000) when the investors are only non-qualified.

It is important to bear in mind that the limits on the amount previously indicated must be applied regardless of the nature of the method of the crowdfunding applied in the project, whether it is equity crowdfunding or debt crowdfunding through securities.

4. Are there restrictions on the types of purchasers to whom shares can be offered?

As stated above, Decree 1357 establishes two types of purchasers or investors: qualified and non-qualified. In this sense, restrictions have been imposed on the limits applicable to the amounts that can be raised by the receivers through the crowdfunding companies for the projects.

Furthermore, Decree 1357 determines restrictions on the amounts of the investments that can be done by the non-qualified investors. In this sense, these purchasers are prohibited from investing though collaborative financing companies more than 20% of their annual income or their patrimony, whichever is greater.

In the case of qualified investors, the above restriction does not apply.

5. What information needs to be disclosed to potential purchasers, and are offer documents or marketing materials required to be registered or approved by your country's regulators?

There are different information requirements provided under Decree 1357.

Section 2.41.2.1.6 of Decree 2555 of 2010 modified by Decree 1357 of 2018 indicates that the following information needs to de disclosed to investors by the crowdfunding companies, without cost, through the websites of such companies or any other means that guarantees access:

a) the operating regulations of the financing activity carried out by the crowdfunding company, which must be approved by the Financial Superintendence;

b) the description in a non-technical language of each of the projects to be financed in order to provide the necessary information to allow an investor a well-founded judgement on the financing decision of the project, in accordance with article 2.41.3.1.1 of Decree 2555 of 2010;
c) the classification procedure of the projects;
d) the description of the main financing elements determined by the receiver, which, as a minimum, are related to:

(i) the amount, term and price of the issuance or placement rate of the financing, expressed in annual effective terms;
(ii) in the case of debt securities, the amortisation table with the amount, number and periodicity of the payments to be made by the recipient of the credit;
(iii) the penalties for default;
(iv) withdrawal and prepayment events;
(v) payment and collection mechanisms;
(vi) the procedure for events in which financing amounts are not met and mechanisms to return the amounts to the purchasers; and
(vii) the costs or expenses, including taxes, related to the return procedure aforesaid mentioned.

e) a warning that the crowdfunding company that performs the crowdfunding activity does not hold the status of credit establishment or securities intermediary;
f) the fees charged by the crowdfunding company and any other commission, charge or withholding that may apply;
g) the mechanisms for the collection of resources related to the financing of the project;
h) the procedures and systems established to maintain and distribute the funds of investments;
i) the financial information related to the evolution of the financing of each of the projects, indicating at least the number of purchasers, amounts financed and conditions of the financing; and
j) the procedures to process requests, questions and claims.

Also, crowdfunding companies have the legal duty to report to the financial information operators of Law 1266 of 2008 information regarding the origin, modification or termination of the obligations contracted by the receivers, including their amount and payment reports, in a maximum term of three days from the date of the event, the reception of the information or the moment in which the crowdfunding company became aware of it.

6. Please provide any additional information you feel is important to understanding the regulation of equity crowdfunding in your country.

In Muñoz Tamayo & Asociados we have been very active promoting crowdfunding activities in Colombia and have actively engaged with entrepreneurs to help in the development of this industry to provide alternative finance mechanisms for start-ups.

Nevertheless, the issuance of Decree 1357 of 2018 has not had the intended effects considered by the regulators, and has become, in a way, a barrier to the development of equity crowdfunding in Colombia.

Although the regulations address some of the biggest concerns about this mechanism such as public

offers and massive and usual collection of funds and establishes the rules to effectively avoid such risks, it determined that crowdfunding companies were obliged to incorporate themselves as stock companies and carry out an authorisation process before the Financial Superintendence and register before the National Agents Registry of the Stock Market (RNAMV, as per its name in Spanish). This regulatory burden has, to a certain extent, disincentivised the activity, which has not been able to consolidate as of today.

Furthermore, the Financial Superintendence has not regulated the requirements for the constitution of minimum capital of equity crowdfunding companies. As such, as of today there are no requirements, but those could come to exist in the near future.

Nevertheless, the fact that Colombian regulators have addressed the matter, and the approach of the current government towards the promotion of the fintech sector, may provide opportunities to promote certain regulatory adjustments to allow this sector to thrive.

Also, it is important to note that article 2.41.1.1.5 of Decree 2555 of 2010 states that section 41 of the Decree will be applicable to entities that develop crowdfunding activities in Colombia and are residents of the country, as well as the receptors and contributors that participate in them, meaning that those receptors would have to be Colombian residents. In other words, such provisions would not apply to operations executed by Colombian residents through platforms or crowdfunding organisations domiciled or operating outside Colombia.

7. Please identify a point of contact at your firm for equity crowdfunding-related enquiries.

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Peer-to-Peer Lending

For the purposes of the following, 'peer-to-peer lending' means lending by individuals to businesses or other individuals where an online platform is used to match lenders with borrowers.

1. Has your country introduced specific legislation or regulations governing peer-to-peer lending, or is it regulated under generally applicable laws?

To date, peer-to-peer lending in Colombia is yet to be regulated and is therefore governed under generally applicable laws for civil and commercial matters.

2. If your country regulates peer-to-peer lending, what are the names of the government agencies responsible for regulating it?

Although it is not regulated as such, the main regulatory actor is the Financial Superintendence, which oversees issuing specific financial regulations.

3. Are there any limits on the amounts that can be lent?

Even though peer-to-peer lending in Colombia has not yet been regulated, the execution of loan contracts or the entering into passive and debt-related obligations has been limited by Colombian law in relation to massive and usual collection of money from the public.

In accordance with Decree 1981 of 1988 compiled through 1068 of 2015, it is understood that a massive and usual collection of money from the public happens when (i) an individual or company receives sums of money from over 20 different third parties, or, without regard for the number of parties, has entered into 50 or more obligations or debts that involve the return of money without providing a service or good in exchange; or (ii) when an individual or company has executed during three consecutive months over 20 mandate contracts with the purpose of administrating the money of its principal to (a) invest them in negotiable instruments or values, (b) sell credit or investment bonds in order to transfer the property of titles, or (c) freedom of all business administration.

In any of the cases stated above, there will be a massive and usual collection of money should the sum of all operations add up to more than 50% of the liquid assets of the individual or company, or if they are the result of a public or private offer to undetermined third parties, or the usage of any other system or mean with identical or like effects to those of receiving the funds.

As such, it must be understood that peer-to-peer lending platforms cannot be a stage for the execution of operations related to the exercise of activities that are exclusive to financial institutions controlled and surveilled by the Financial Superintendence of Colombia.

Therefore, activities such as collection of public resources and financial intermediation are not allowed for peer-to-peer lending platforms.

4. Are there any restrictions on the types of persons who can lend and/or borrow, or restrictions on the rate of interest that can be charged?

Yes, there are restrictions on the type of persons who can lend and on the rate of interest that can be charged. Those restrictions derive from (i) the type of loan contracts used, and (ii) the origin of the resources being lent.

Firstly, for the present case, the type of loan contracts would be either civil loans or regular commercial loans, which do not necessarily involve the need for approval, registry or the use of any specific corporate types.

In our opinion, and to the extent that there is no regulation on the matter, we do not consider that this would apply in the present case, as peer-to-peer lending is done by loaning an individual or company's own resources. This means that there would be no control by the Financial Superintendence and therefore, in general terms, would not require any specific corporate structure or authorisation.

As for the maximum interest rates, Colombian law regulates this matter for both civil and commercial types of loans.

For the case of civil loans, the first relevant provision derives from article 2232 of the Civil Code, and it states that should the parties not specify the interest rate that will be charged, the legal interest rate will apply (levied at 6% per year).

The second provision found in article 2231 states that, should the interest rate be specified by the parties, said stipulation cannot exceed 1.5 times the Current Banking Interest rate.

On the other hand, should the loan contract be considered commercial under the frame of mercantile operations contained in articles 20 to 25 of the Colombian Commercial Code, the maximum interest rate will be 1.5 times the Current Banking Interest rate, which varies depending on the type of credit being executed. These rates are determined monthly in Colombia by the Financial Superintendence. The Current Banking Interest annual rate for the month of June 2019 for consumption credits is 19,30%, and 28,95% annual rate for the usury rate.

Lending money at higher rates than the maximum ones provided by law attracts both economic sanctions like losing the amount charged in excess, along with a penalty of double the amount, and criminal liability.

5. Is there any requirement for the online platform and/or the lenders to be licensed or registered or to comply with any particular rules?

Usually, there would be no requirements for the online platform and/or the lenders to obtain a licence or be registered, nor would they have to comply with particular rules.

The only case in which there would be a need for an online platform or lender to comply with any requirements would be one where the lenders pursue types of lending that require Financial Superintendence approval and specific corporate structures.

Nevertheless, in our opinion it would not be the case for peer-to-peer lending, as it would regularly

structure itself around civil and commercial loan contracts through the loaning of an individual or company's own resources.

As for the online platform, other platforms in the transportation and service industries already operate in Colombia, whose purpose is not to provide a direct service as such in those industries, but rather to connect individuals who offer a service with those who require it.

Since peer-to-peer lending is yet to be regulated, the Financial Superintendence does not have specific requirements for those types of services to date. However, Colombia would still face the regulatory risk of having rules implemented that may affect a particular business model in the sector.

6. Are there any requirements applicable to marketing and promotional documents and activities?

In Colombia there are no requirements for marketing and promotional documents and activities specifically for this type of service, other than the common provisions and laws. This means in general the prohibition on supplying false advertisements, compliance with offers made to the public, and regulations regarding use of public space and media, veracity of information and others.

Mainly, the provisions that could affect peer-to-peer lending and create requirements would be those around the information and transparency of the service given to users, as well as the need to review and verify the origins of funds to ensure that no illegal activities such as massive and usual collection of money from the public, money laundering or finance to terrorism is being made through the platform, in order to avoid sanctions for facilitation of illicit activities.

As such, platforms that ensure this could freely market their services without sanctions from government authorities.

7. Are there any particular consumer protection provisions that apply?

Should the services provided be considered financial consumer-related matters, by stating that platforms for peer-to-peer lending must be controlled and regulated by the Financial Superintendence, all the provisions included in Law 1328 of 2009 regarding the protection of financial consumers would be applicable.

Those include, but are not limited to, the need for education and adequate explanations on the functioning of the system and type of service provided, the markets, the ability to pay interest rates and credits of under 800 minimum legal wages in anticipation, and others. This would require reports to and authorisation from the Financial Superintendence for the lenders, alongside other specific provisions for attention centres, response programmes and financial backings.

In the case that those regulations do not apply, the other potential regulation would be the Consumer Protection Statute and its different provisions on quality of services, adequate advertisements and guarantees for products or services, and all other rights and obligations contained in the statute.

8. Please provide any additional information you feel is important to understanding the regulation of peer-to-peer lending in your country.

In recent years, the Colombian Congress and different actors have been actively discussing the need to issue specific regulations for fintech companies and business models.

As such, there are non-governmental agencies like Colombia Fintech that are working together with the Financial Superintendence, reviewing the possibility of starting sandbox regulation processes on peer-to-peer lending operations in order to determine how to best structure the norms that govern it, making it favourable and friendly for final users.

9. Please identify a point of contact at your firm for enquiries related to peer-to-peer lending.

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