

Startups Funding Legal Regime

O regime jurídico do financiamento das *startups*

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ABSTRACT: Because of their characteristics, startups are generally unable to access traditional forms of funding, such as bank loans. However, the global digital and technological revolution of recent years has enabled other forms of funding to emerge, offering alternatives to bank loans. These have allowed startups to fund themselves and so develop their business. This paper sets out to look at the alternative, technology-driven forms of finance used by startups and how these funding arrangements are regulated in the Portuguese legal system and in the European Union.

KEY WORDS: startups; innovation; funding; crowdfunding; venture capital; Initial Coin Offerings; securities.

RESUMO: Por regra, as *startups* não conseguem, devido às suas características, aceder às formas de financiamento tradicionais como o recurso ao crédito bancário. Contudo, a revolução digital e tecnológica global dos últimos anos permitiu que outras formas de financiamento alternativas ao crédito bancário surgissem, permitindo às *startups* financiarem-se e, consequentemente, desenvolverem-se. Neste sentido, o presente estudo tem como objetivo analisar as formas de financiamento alternativas a que se recorrem as *startups* impulsionadas pelo desenvolvimento tecnológico e de que maneira estes meios de financiamento estão regulados no ordenamento jurídico português e ao nível da União Europeia.

PALAVRAS-CHAVE: *startups*; inovação; financiamento; *crowdfunding*; capital de risco; *Initial Coin Offerings*; valores mobiliários.

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*"The first step is to establish that something is possible;
then probability will occur."*

- ELON MUSK

1. Introduction

The digital revolution driven by rapid online technological progress and the global financial crisis of 2007-2008 - which restricted access to bank credit - has changed the business paradigm¹, and in particular changed the way businesses finance their operations.

While startups are typically innovative companies with great potential for growth, they also carry considerable risks, because it is very possible these ventures will fail. This makes credit institutions unwilling or reluctant to grant them access to loans or other types of funding, such as leasing or factoring². Moreover, in addition to the obstacles placed in the way of startups seeking bank finance, because of the risks they present, the high costs entailed by this traditional form of funding are likewise unsustainable for the startups themselves (at the early stage), because of the high rate of interest charged by the banks, the need to provide collateral and other associated factors and costs.

As a result of technological advances and growing internet use, new forms of funding have taken shape, offering alternatives to traditional bank finance that are affordable for startups³, because the costs are lower, and they are more accepting of their business risks. These include venture capital investment, crowdfunding platforms and, more recently, Initial Coin Offerings (ICOs). The emergence of these new alternative forms of funding has required new legal rules to be established (at national and European Union level), and it is these that we consider in this article. However, before we examine these legal rules on alternative finance, it is first necessary to explore what we actually mean by 'startup'.

2. Startups: concept and legal nature

Startups have emerged in the context of a technological revolution, and the term first came into use during the dot-com bubble of 1996 to 2001, in the United States of America, to refer to a group of people working on a distinctive, disruptive, and innovative idea, with a view to long-term profit and growth, irrespective of where the idea is developed and worked on⁴. There are other key features that identify startups, such as: (i) they tend to be connected to the

¹ Cfr. LUÍS ROQUETTE GERALDES and FRANCISCA SEARA CARDOSO, "Uma revolução chamada *crowdfunding*", in *IV Congresso do Direito das Sociedades em Revista*, Coimbra, Livraria Almedina, 2016, pp. 493-512 (p. 493); JOÃO VIEIRA DOS SANTOS, *Regulação de Formas de Financiamento Empresarial FinTech – em especial: o crowdfunding e as Initial Coin Offerings*, Coimbra, Livraria Almedina, 2022, p. 31.

² EUROPEAN COMMISSION, *Green Paper: Building a Capital Markets Union*, 18 February 2015, p. 13, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0063&from=EN>.

³ On Fintech, alternative financing and startups' funding, vide JOÃO VIEIRA DOS SANTOS, *Regulação de Formas...*, cit., pp. 50-60.

⁴ Cfr. JOÃO VIEIRA DOS SANTOS, "Aspetos Jurídicos das *Startups*", *Revista da Ordem dos Advogados*, Ano 77, Vol. I/II, Jan./Jun. 2017, pp. 241-279 (p. 243).

fields of technology, scientific or other research and development⁵⁻⁶, (ii) their embryonic character, and (iii) the risk associated with ventures of this type, insofar as startups typically present unbalanced balance sheets, they need alternative sources of finance - alternatives to bank finance - over a long period of time and are untrammelled by basic governance rules⁷.

However, these are just some of their characteristics, and we lack a definition that enables us to study this area with the necessary rigour. Indeed, this is the first difficulty faced by an analysis of the legal rules on startup finance: a strict definition of 'startup'.

Regarding the definitions of 'startup', MARIA ELISABETE RAMOS has pointed out that it is not just any company entering the market that can be considered as a startup (although the actual concept/definition is fluid). To be a startup, they must be innovative, demonstrate significant potential for growth and be connected to information technologies⁸. On the other hand, DIOGO PEREIRA DUARTE and JOÃO FREIRE DE ANDRADE draw attention to the fact that 'startup' only refers to companies at an early stage of their operations, setting out to develop an innovative business model that holds out the prospect of massive growth⁹.

In the Portuguese legal system, Ministerial Order no. 432/2012, of 31 December¹⁰ also fails to supply a precise definition of startup, and merely establishes the requirements for employment support subsidies, stating that a startup, among other characteristics, must: (i) be a natural or private legal person, duly incorporated and registered, must have been certified as an SME (small or medium-sized enterprise)¹¹, (ii) have started its business in the past 18 months and must demonstrate that it is a knowledge-based enterprise (with potential for growth - i.e., exports and/or international expansion), and (iii) have, on the date of submission of the application, less than 20 employees¹².

Concerning the distinction between a startup and a corporation, it is our view, in line with MARIA ELISABETE RAMOS, that a startup does not correspond to any specific legal form, as it can be merely "*a virtual enterprise owned by an individual person (the entrepreneur)*"¹³. Nonetheless, the entrepreneur may choose to incorporate a *sociedade por quotas* (company

⁵ Most startups emerge in an academic environment, at universities, a setting which is conducive to the process of enterprise, nurturing ventures that are innovative and heavily knowledge-based. Cfr. DANTE DI GREGORIO and SCOTT SHANE, "Why do some universities generate more start-ups than others?", *Research Policy*, Volume 32, Issue 2, 2003, pp. 209-227 (p. 209), available at <https://www.sciencedirect.com/science/article/abs/pii/S0048733302000975>.

⁶ Cfr. JOÃO VIEIRA DOS SANTOS, "Aspetos Jurídicos...", cit., p. 244.

⁷ Cfr. PAULO BANDEIRA, "Governance em Startups: equilíbrios societários entre fundadores e investidores", in PAULO CÂMARA (coord.), *Acionistas e Governação das Sociedades*, Coimbra, Livraria Almedina, 2019, pp. 233-257 (p. 233).

⁸ Cfr. MARIA ELISABETE RAMOS, *Direito das Sociedades*, Coimbra, Livraria Almedina, 2022, p. 91.

⁹ Cfr. DIOGO PEREIRA DUARTE and JOÃO FREIRE DE ANDRADE, "Breves notas sobre o financiamento de *start-ups* e a sua regulação", in ANTÓNIO MENEZES CORDEIRO, ANA PERESTRELO DE OLIVEIRA and DIOGO PEREIRA DUARTE (coord.), *Fintech II - Novos Estudos sobre Tecnologia Financeira*, Coimbra, Livraria Almedina, 2019, pp. 217-248 (p. 219). The EUROPEAN STARTUP MONITOR also refers to the defining traits of startups as businesses that have been in operation for less than ten years, and highly innovative in their business model or the technology they use. Another key feature identified by the European Startup Monitor is their ambition to achieve substantial growth in business. Cfr. EUROPEAN STARTUP MONITOR, *European Startup Monitor 2019/2020*, p. 4, available at <https://europeanstartupmonitor2019.eu/>.

¹⁰ This Ministerial Order created the Support Measure for the Hiring of Employees by Startups.

¹¹ Under the terms and for the purposes of Decree-Law no. 372/2007, of 6 November.

¹² Cfr. JOÃO VIEIRA DOS SANTOS, "Aspetos Jurídicos...", cit., p. 244.

¹³ Cfr. MARIA ELISABETE RAMOS, *Direito das Sociedades*, cit., p. 93.

by quota shares, single-member or otherwise), or opt for an alternative corporate form for his or her startup venture, provided it is permitted under Portuguese law¹⁴. In Portugal, the typical characteristics of startups (embryonic ventures with limited resources) mean that it is advisable for them to adopt the simpler corporate forms provided for in the Portuguese Companies Code¹⁵: a *sociedade por quotas* and variant forms (especially single-member companies by quota shares). This is the legal form predominantly adopted¹⁶, as indeed by around 90% of all enterprises in Portugal's business fabric¹⁷. The fact that startups in Portugal adopt more this legal form (*sociedades por quotas* - company by quota shares) was also driven by the implementation of Decree-Law no. 33/2011, of 7 March. This Decree-Law adopts measures to simplify the procedures for the incorporation of private limited companies and single-person limited companies, with the share capital being freely established by the shareholders (Article 1(a) of Decree-Law no. 33/2011, of 7 March). Through this 2011 reform, it was possible to create the so-called "one euro company" as, in the case of a single person limited company, its single shareholder may enter into the company with only EUR 1.00 (Article 219(3) of the Portuguese Companies Code)¹⁸.

However, it is also common for startups to take the form of a *sociedade anónima* in Portugal (public limited company), although this entails a more complex corporate structure, with a larger number of company boards/officers, which also makes this more expensive for entrepreneurs or startup founders¹⁹, when compared with the costs of setting up a *sociedade por quotas*. With regard to the costs of incorporating a public limited company in Portugal, it is important to note that the minimum amount of share capital required is EUR 50,000 (fifty thousand euros) under Article 276(5) of the Portuguese Companies Code, while in *sociedades por quotas* (private limited companies), as mentioned above, the shareholders are free to establish the amount of share capital as long as it is not less than EUR 1.00 (Article 1 of Decree Law no. 33/2011, of 7 March and 219(3) of the Portuguese Companies Code).

3. Startups funding

3.1. Introduction to startups funding cycle

Startups funding typically features a cycle of successive phases²⁰. The cycle starts with the (i) seedfunding stage: the initial startup phase, where funds are invested but no returns are

¹⁴ Cfr. MARIA ELISABETE RAMOS, *Direito das Sociedades*, cit., p. 93.

¹⁵ Decree-Law no. 262/86, of 2 September.

¹⁶ Cfr. JOÃO VIEIRA DOS SANTOS, "Aspetos Jurídicos...", cit., p. 247.

¹⁷ Cfr. PAULO BANDEIRA, "Governance em Startups...", cit., p. 233.

¹⁸ Cfr. MARIA ELISABETE RAMOS, *Direito das Sociedades*, cit., p. 92, vide also MARIA ELISABETE RAMOS, "Empresa de um euro" y responsabilidad civil sócios y gestores: Notas sobre el régimen portugués", *Revista de Derecho de Sociedades*, 38, 2012, pp. 589-598.

¹⁹ Cfr. PAULO BANDEIRA, "Governance em Startups...", cit., p. 239.

²⁰ On the financing cycle of companies (including startups), vide ANA PERESTRELO DE OLIVEIRA, *Desvinculação Programada do Contrato*, Coimbra, Livraria Almedina, 2021, pp. 391-399.

generated²¹, and where startups are funded by the 3 Fs (founders, family and friends, or family, friends and fools)²² and by Business Angels, followed by the (ii) *seed valley of death*, corresponding to the moment when startups need large cash injections in order to develop, but still lack sufficient income to do this²³, and then typically by the third, (iii) *break even* phase, where startups have managed to obtain enough revenues to cover all their monthly fixed costs and expenses, enabling them to move beyond phase (ii) and reach the point of equilibrium²⁴. These three phases are then followed by the (iv) *early stage*, once the startup is breaking even, meaning that, at this stage, startups become an attractive investment (or good investment) for institutional venture capital investors (what is called a “series A” investment)²⁵, and lastly, (v) the *final phase (triggering of exit mechanisms)*, which, assuming that the financing cycle has not ended in failure, ends with the sale of the startup to another company for a profit or an initial public offering (IPO) “when it opens up its capital to public investment through listing on the stock exchange (goes public)”²⁶. These are the best forms of disinvestment and of “ending the startup funding cycle”²⁷.

The level of risk varies from stage to stage – the risk is maximum at the initial, seedfunding stage, considering that most startups fail to reach the break even stage. Once they move beyond the Valley of Death stage, the risk gradually diminishes²⁸. On the other hand, the earlier funding is provided, the higher will be the rate of return on the investment²⁹.

3.2. Forms of startups funding

As we noted above when defining startups and their characteristics, most of these infant ventures are greatly in need of alternative external funding, as their founders lack sufficient capital³⁰ and also have difficulty in obtaining bank loans (which are the traditional way of funding new business enterprises)³¹.

²¹ Cfr. DIOGO PEREIRA DUARTE and JOÃO FREIRE DE ANDRADE, “Breves notas...”, cit., pp. 221-222.

²² Cfr. ANA PERESTRELO DE OLIVEIRA, “O papel das startups na FinTech e o ciclo de financiamento de startups”, in ANTÓNIO MENEZES CORDEIRO, ANA PERESTRELO DE OLIVEIRA and DIOGO PEREIRA DUARTE (coord.), *Fintech - Desafios da tecnologia financeira*, 2nd ed., Coimbra, Livraria Almedina, 2019, pp. 255-263 (p. 259); JOÃO VIEIRA DOS SANTOS, “Medidas de estímulo à inovação no âmbito das start-ups”, *Paper n.º 8/BD/iLab/Cedis/2017*, 2017, available at <http://ilab.cedis.fd.unl.pt/base-dogmatica/>, p. 7; PAULO BANDEIRA, “Estratégias de Saída”, *Revista de Direito das Sociedades*, Ano X, no. 3, 2018, pp. 591-605 (p. 592).

²³ Cfr. ANA PERESTRELO DE OLIVEIRA, “O papel...”, cit., p. 259.

²⁴ Cfr. ANA PERESTRELO DE OLIVEIRA, “O papel...”, cit., p. 259. When a startup successfully passes through the Valley of Death phase and achieves break even point, this means, in accounting terms, that its revenues cover its fixed and variable costs and expenses.

²⁵ Cfr. ANA PERESTRELO DE OLIVEIRA, “O papel...”, cit., p. 259.

²⁶ Cfr. ANA PERESTRELO DE OLIVEIRA, “O papel...”, cit., p. 259.

²⁷ Cfr. ANA PERESTRELO DE OLIVEIRA, “O papel...”, cit., p. 260.

²⁸ Cfr. DIOGO PEREIRA DUARTE e JOÃO FREIRE DE ANDRADE, “Breves notas...”, cit., p. 222.

²⁹ Cfr. DIOGO PEREIRA DUARTE e JOÃO FREIRE DE ANDRADE, “Breves notas...”, cit., p. 222.

³⁰ Cfr. JOÃO VIEIRA DOS SANTOS, “Aspetos Jurídicos...”, cit., p. 248.

³¹ Cfr. DIOGO PEREIRA DUARTE e JOÃO FREIRE DE ANDRADE, “Breves notas...”, cit., p. 223.

As a result, startups tend to be financed by their founders, over the first few years, from their own capital or personal borrowing (seedfunding stage)³² and subsequently, when they move out of the Valley of Death phase (if they succeed) and on to the early stage, they then have recourse to venture capital investors in return for equity and/or to crowdfunding³³, and/or, more recently, to Initial Coin Offerings³⁴. These will be the three forms of alternative finance we examine in this article, focusing our analysis on the applicable law at national and European level.

3.2.1. Venture Capital

a) Introduction

Venture capital originated in American law³⁵, and the American Research and Development Corporation (founded in 1946 by GEORGES DORJOT) is regarded as the company that pioneered risk capital³⁶. Risk or venture capital arrangements take various forms: (i) private equity, (ii) buy-outs, and (iii) venture capital³⁷⁻³⁸. The last of these (venture capital) is what serves to support the early stages of enterprise, including, of course, startups, insofar this investment consists of “*subscription or acquisition of equity in a small or medium-sized enterprise or in an early stage startup with a view to establishing it in the market*”³⁹. This source of finance constitutes an important alternative to bank lending⁴⁰.

For startups, venture capital is therefore an alternative to bank borrowing, insofar as most of these enterprises start life with cash flow difficulties and are unable to afford the high rates of interest charged by banks, or to provide the collateral demanded, among other contractual

³² Cfr. ANA BAPTISTA GUAL, *Determinantes da Estrutura de Capital das Startups Portuguesas*, University of the Algarve, Faculty of Economics, 2014, p. 30, available at <https://sapientia.ualg.pt/bitstream/10400.1/8281/1/Disserta%C3%A7%C3%A3o%20de%20Mestrado.pdf>.

³³ Cfr. ANA BAPTISTA GUAL, *Determinantes da...*, cit., p. 30; JOÃO VIEIRA DOS SANTOS, *Aspetos Jurídicos...*, cit., p. 251.

³⁴ Cfr. JOÃO VIEIRA DOS SANTOS, “Aspetos Jurídicos...”, cit., pp. 253-255.

³⁵ Cfr. ANA PERESTRELO DE OLIVEIRA, *Manual de Corporate Finance*, reprint of 2nd ed. (2015), Coimbra, Livraria Almedina, 2018, pp. 74-81; PAULO CÂMARA, *Manual de Direito dos Valores Mobiliários*, 4th ed., Coimbra, Livraria Almedina, 2018, p. 935; STEVEN N. KAPLAN and JOSH LERNER, “It Ain’t Broke: The past, present, and Future of Venture Capital”, *Journal of Applied Corporate Finance*, Vol. 22, No. 22, 2010, pp. 36-47, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1649764.

³⁶ Cfr. PAULO CÂMARA, *Manual de...*, cit., p. 935. See, in depth, on the American Research and Development Corporation, DAVID H. HSU and MARTIN KENNEY, “Organizing Venture Capital: The Rise and Demise of American Research & Development Corporation, 1946-1973”, 2004, available at: <https://ssrn.com/abstract=628661>.

However, as PEDRO PAIS DE VASCONCELOS reminds us, the origins of “investment in venture capital is surprisingly ancient” and can be traced back in the Portuguese legal tradition to the old *comenda*, the “contract whereby a merchant found finance providers who put up capital for a given venture, and with whom he eventually shared the returns”. Cfr. PEDRO PAIS DE VASCONCELOS, “O acionista de capital de risco: dever de gestão”, in *II Congresso Direito das Sociedades em Revista*, Coimbra, Livraria Almedina, 2012, pp. 157-170 (p. 159).

³⁷ Cfr. PAULO CÂMARA, *Manual de...*, cit., p. 936.

³⁸ Venture capital is for an “enterprise at the startup stage”, whilst private equity is for companies undergoing “restructuring”. Cfr. ANA PERESTRELO DE OLIVEIRA, *Manual de...*, cit., p. 71; ANA NUNES TEIXEIRA, “A gestão dos fundos de capital de risco – Conflitos de interesses entre a entidade gestora e os participantes”, *Revista de Direito das Sociedades*, Ano X, no. 3, 2018, pp. 559-587 (pp. 561-562).

³⁹ Cfr. ANA NUNES TEIXEIRA, “A gestão dos...”, cit., pp. 561-562.

Also, on the distinction between private equity and venture capital, see ANA PERESTRELO DE OLIVEIRA, *Manual de...*, cit., p. 71.

⁴⁰ Cfr. CMVM Annual Report on Venture Capital Activity, 2017, p. 6.

requirements⁴¹. This form of finance enables startups to secure the resources they need to develop their technology and to grow their business⁴². However, although this type of arrangement has the advantage that startups may benefit from the strategic advice and know-how of their investors⁴³, it may have the (potential) drawback of entailing a degree of loss of control over the startup by its founders⁴⁴. It may also be noted that enterprises which are not startups, such as Microsoft, Apple and Google (among others), have also made use of venture capital on countless occasions and likewise have to live with the advantages and drawbacks of funding themselves using this alternative to bank loans⁴⁵.

On the subject of recourse by startups to venture capital investors, special attention should be drawn to the important role of Business Angels (informal venture capital sector)⁴⁶ which have helped startups to establish themselves in the market, by supplying not just funds, but their networks of contacts, sources of knowledge, and valuable advice (smart money)⁴⁷⁻⁴⁸. Unlike the banks, which only provide funding to enterprises that can offer guarantees of business viability (which in a startup, more often than not, is impossible, as the venture is at a very early stage), Business Angels fund startups whilst still in their infancy, motivated not by the viability of this type of venture (which is uncertain), but by other factors, such as confidence in the founders and their abilities, their ethical standards, and/or the innovative nature of their business projects, meaning they are more tolerant of financing risks than the banks⁴⁹.

PAULO CÂMARA defines and characterises venture capital finance as encompassing “*corporate financing or acquisition operations, involving a degree of management influence and of acceptance of the risk of the venture acquired or funded, aiming to grow in value and subsequent disposal of holdings*”⁵⁰, whilst also involving, on a secondary basis, the “*provision*

⁴¹ Cfr. ANA PERESTRELO DE OLIVEIRA, *Manual de...*, cit., p. 71.

⁴² Cfr. CMVM Annual Report on Venture Capital Activity, 2017, p. 6.

⁴³ Cfr. CMVM Annual Report on Venture Capital Activity, 2017, p. 6; ANA PERESTRELO DE OLIVEIRA, *Manual de...*, cit., p. 71; ANA NUNES TEIXEIRA, “A gestão dos...”, cit., p. 560; JOÃO VIEIRA DOS SANTOS, “Aspetos Jurídicos...”, cit., pp. 248-249.

⁴⁴ Cfr. ANA PERESTRELO DE OLIVEIRA, *Manual de...*, cit., p. 71; ANA PERESTRELO DE OLIVEIRA, “O papel...”, cit., p. 263.

⁴⁵ Cfr. STEVEN N. KAPLAN and JOSH LERNER, *It Ain't...*, cit., p. 38.

⁴⁶ In the informal venture capital sector, investors are called *business angels*, and these are individual investors whose rationale for investing in this type of venture may be financial (depending on the startup's potential, for example), but not exclusively so. The term 'angel' originated on Broadway where, in the late nineteenth and early twentieth centuries, certain theatregoers invested large sums in theatrical and musical productions, motivated by the chance to rub shoulders with artists and performers they admired (this phenomenon could also be observed in literature and other areas), and the expression 'business angels' later came to apply to individuals who invested in the same way, but in the business world. The following have been identified as the characteristics of investors of this type: (i) high-income individuals, who (ii) invest their own money, (iii) invest directly and not through intermediaries, (iv) take an active role in the venture in which they invest, (v) invest in unlisted companies, (vi) seek not only financial gain: their aims are sometimes in the realm of personal self-realisation or are altruistically inspired. Cfr. VELAND RAMADANI, “Business Angels – Who They Really Are?”, *Strategic Change: Briefings on Entrepreneurial Finance*, Vol. 18, Nos. 7-8, 2009, pp. 249-258, available at <https://ssrn.com/abstract=1300422>; ANA PERESTRELO DE OLIVEIRA, *Manual de...*, cit., pp. 72-73; ANA RITA SIMÕES MAIA, *O Capital de Risco como meio de financiamento das Sociedades Comerciais*, Master's Thesis, University of Coimbra, 2018, p. 40. In the formal or institutional venture capital sector, investors may be venture capital firms, venture capital fund managers, European venture capital funds or others. Cfr. ANA NUNES TEIXEIRA, “A gestão dos...”, cit., pp. 563 et seq..

⁴⁷ Cfr. JOÃO VIEIRA DOS SANTOS, “Aspetos Jurídicos...”, cit., pp. 250-251; MARIA ELISABETE RAMOS, *Direito das Sociedades*, cit, p. 93; PAULO BANDEIRA, “Estratégias de...”, cit., p. 593.

⁴⁸ A common feature is an investment agreement between investors and the startup founders, stipulating the following: (i) the type of company to be adopted by the startup, (ii) membership of boards and quora for meetings and resolutions, (iii) investor information rights, (iv) transfer of shares, (v) non-compete and exclusivity obligations on investors, among other clauses. Cfr. MARIA ELISABETE RAMOS, *Direito das Sociedades*, cit., p. 93-94.

⁴⁹ Cfr. JOÃO VIEIRA DOS SANTOS, “Aspetos Jurídicos...”, cit., p. 251.

⁵⁰ Cfr. PAULO CÂMARA, *Manual de...*, cit., p. 935.

of assistance services in upgrading, reorganising, promoting or streamlining the business structure or operations"⁵¹. Another feature of this type of financing is that it is regarded, as a rule, as a temporary, short-term investment (taking the business world of the United States as the benchmark, this generally means a 10-year investment⁵²), and success is dependent on a well-judged exit strategy⁵³.

In operational terms, PAULO CÂMARA explains that recourse to venture capital "*divides into a series of legal and material acts in order to achieve the objectives of the funding operation*"⁵⁴, and generally falls into five main stages: (i) a preparatory phase, (ii) negotiation of the contractual framework for the capital investment, (iii) a bookbuilding phase, (iv) application of the investment programme, and, lastly, (v) the disinvestment phase⁵⁵.

In brief and practical terms, (i) the preparatory phase for obtaining venture capital finance involves detecting the business opportunity and developing the respective plan, which is followed by the (ii) negotiation of the contracts for the operation, i.e., for the transfer or subscription of equity securities, loan contracts, any amendments that may be required to the articles of association, negotiation of shareholders' agreements and other documents⁵⁶. The third stage consists of (iii) negotiation of the investment, potentially through club deals involving a large number of venture capital institutions as co-founders, as well as plans for injecting funds into the venture capital institutions through loan agreements⁵⁷, and (iv) application of the investment programme, which may itself divide into several stages, or capital calls, depending on the type of investment⁵⁸. Lastly, the withdrawal or disinvestment phase may take the form of disposing of holdings directly or on the market, and "*when this involves disposal to another venture capital institution, this is called a secondary transaction*"⁵⁹.

b) Legal Regime

As a form of finance offering an alternative to bank loans, venture capital tends to be subject to comparatively light-touch regulation, precisely to encourage and promote this form of business funding⁶⁰. It is nonetheless subject to legal rules, at national and European Union level.

⁵¹ Cfr. PAULO CÂMARA, *Manual de...*, cit., p. 935.

⁵² On the similar workings of venture capital in Portugal and the United States, see ANA PERESTRELO DE OLIVEIRA, *Manual de...*, cit., pp. 76-77.

⁵³ Cfr. ANA PERESTRELO DE OLIVEIRA, "Estratégias de Saída no Capital de Risco", in CMVM (coord.), *Cadernos do Mercado de Valores Mobiliários – 20 Anos do Código dos Valores Mobiliários*, Coimbra, Livraria Almedina, 2021, pp. 823-854 (p. 824); Cfr. JOÃO VIEIRA DOS SANTOS, "Aspetos Jurídicos...", cit., p. 248.

⁵⁴ Cfr. PAULO CÂMARA, *Manual de...*, cit., p. 936.

⁵⁵ Cfr. PAULO CÂMARA, *Manual de...*, cit., p. 937.

⁵⁶ Cfr. PAULO CÂMARA, *Manual de...*, cit., p. 937.

⁵⁷ Cfr. PAULO CÂMARA, *Manual de...*, cit., p. 937.

⁵⁸ Cfr. PAULO CÂMARA, *Manual de...*, cit., p. 937.

⁵⁹ Cfr. PAULO CÂMARA, *Manual de...*, cit., p. 937.

⁶⁰ Cfr. PAULO CÂMARA, *Manual de...*, cit., p. 939.

In Portugal, the first reference in law to venture capital dates back to 1986, and the approval of Decree-Law no. 17/86, of 5 February. This provided for the formation of venture capital companies to “*support and promote investment and technological innovation in ventures or undertakings through a temporary holding in their equity*” - Article 1(1). Today, this area is governed by Law no. 18/2015, of 4 March (Legal Framework for Venture Capital - RJCR)⁶¹⁻⁶², which in Article 3(1) defines the concept of venture capital investment as “*acquisition of equity instruments and debt instruments in companies with high development potential, as a way of benefiting from growth in their value*”. The RJCR was subsequently amended by Decree-Law no. 56/2018, of 9 July⁶³, by Decree-Law no. 144/2019, of 23 September, by Law no. 25/2020, of 7 July and by Decree-Law no. 72/2021, of 16 August.

At European Union level, “the regulatory framework for venture capital”. is established by the AIFMD (Alternative Investment Fund Managers Directive)⁶⁴, which includes venture capital investment undertakings in the wider group of alternative collective investment undertakings⁶⁵. The system of European sources relating to alternative collective investment undertakings also included the European Venture Capital Funds Regulation⁶⁶.

Under Article 1(1) of the RJCR, the business of venture capital investment may be carried on by the following entities: (i) venture capital companies (VCC), (ii) venture capital fund management companies (VCFMC), (iii) venture capital investment companies (VCIC), (iv) venture capital funds⁶⁷ (VCF), (v) venture capital investors (VCI), (vi) social entrepreneurship companies, (vii) social entrepreneurship funds, (viii) specialised alternative investment companies, (ix) specialised alternative investment funds, and (x) European Union long-term investment funds, known as 'ELTIF'.

Venture capital companies, venture capital fund management companies and social entrepreneurship companies are subject to oversight by the Portuguese Securities Market Commission (*Comissão do Mercado de Valores Mobiliários*, CMVM)⁶⁸. In the Portuguese legal system, venture capital companies are public limited companies (*sociedades anónimas*) in

⁶¹ This Decree-Law partially transposes Directives 2011/61/EU, of the European Parliament and of the Council, of 8 June, and 2013/14/EU, of the European Parliament and of the Council, of 21 May, which implement in the internal legal system Regulations (EU) 345/2013 and 346/2013, of the European Parliament and of the Council, of 17 April, and was last amended by Decree Law no. 72/2021, of 16 August.

It should also be noted that the amendment made by Decree-Law no 56/2018, of 9 July, introduced references to Regulation (EU) 2015/760 of the European Parliament and of the Council, of 29 April, which, as stated in Article 1(1), contains “uniform rules on the authorisation, investment policies and operating conditions of EU alternative investment funds (EU AIF) or compartments of EU AIFs that are marketed in the Union as European long-term investment funds (ELTIF)”.

⁶² On 10 December 2021, the Portuguese Securities Market Commission (CMVM) launched a Public Consultation (No. 2/2021) with the draft diploma for the new Asset Management Regime (RGA), which merge the General framework for Collective Investment Undertakings (Law no. 16/2015, of 24 February) and the RJCR.

⁶³ About this Decree-Law, *vide* PAULO CÂMARA, “O novo regime jurídico de capital de risco em Portugal na DL n.º 56/2018, de 9 de julho”, in *Revista Española de Capital Riesgo*, no. 1, 2019, pp. 39-46.

⁶⁴ Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) 1060/2009 and (EU) 1095/2010.

⁶⁵ Cfr. PAULO CÂMARA, *Manual de...*, cit., p. 936; PAULO CÂMARA, “O novo...”, cit., p. 40.

⁶⁶ Regulation (EU) 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds.

⁶⁷ These include European venture capital funds, also known as 'EuVECA's', governed by Regulation (EU) 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds.

⁶⁸ Articles 67 of the RJCR and 359(1)(p) of the Portuguese Securities Code.

which the capital is represented by registered shares, under Article 11 of the RJCR⁶⁹, and these companies may act as or be direct investors or mere managers of venture capital funds, under Article 17(2) of the RJCR, provided they comply with the share capital threshold of 125.000 euros (Article 11(3) of the RJCR)⁷⁰.

The concept of venture capital investors seeks to accommodate the idea of Business Angels⁷¹, and in the Portuguese legal system these take one of the corporate sub-types established in company law: that of the single-person company by quota shares (*sociedade unipessoal por quotas*) (Article 14(1) of the RJCR)⁷², "allowing the single shareholder to enjoy limitation of liability"⁷³. Under Article 14(2) of the RJCR, the sole shareholder must be a natural person⁷⁴.

As regards the players in the Portuguese venture capital scene, it is interesting to note that, at the end of 2020⁷⁵, the country's venture capital sector comprised 56 venture capital companies (VCCs and VCFMCs) and 166 venture capital funds. Concomitantly, there was an increase of 9.8% in assets under management⁷⁶ in the venture capital sector and the value under management⁷⁷ increased by 7.1%, to 5.3 billion euros.

On the matter of the legal exit mechanisms (which are regarded as the reward for the large sums that venture capital investors put into startups and which do not correspond directly to the corporate rights attributed to them)⁷⁸, the investment contracts signed between startup founders and venture capital investors tend to make careful and detailed provisions⁷⁹, as they also do concerning the appropriate structure of future "liquidity events"⁸⁰, which are generally the following: (i) transfer of shares in the company representing more than 50% of its share capital or voting rights, or a merger, (ii) winding up or other form of liquidation, (iii) sale of business, or (iv) "admission of the company's shares to trading on a regulated market approved by general meeting, following on from a public offering or distribution resulting in dispersal of the company's shares among the public"⁸¹.

The traditional exit route from investment in a startup is to sell full ownership of its share capital to a new investor or business group, although this disposal normally takes place at a more advanced phase in the startup's life, "*when the venture capital investment has made it*

⁶⁹ Cfr. PAULO CÂMARA, *Manual de...*, cit., p. 943.

⁷⁰ Cfr. PAULO CÂMARA, *Manual de...*, cit., p. 943.

⁷¹ Cfr. PAULO CÂMARA, *Manual de...*, cit., p. 943.

⁷² Cfr. Articles 270-A et seq., of the Portuguese Companies Code (rules on single-person companies by quota shares).

⁷³ Cfr. PAULO CÂMARA, *Manual de...*, cit., p. 944.

⁷⁴ *A contrario*, this means that, by law (Article 14(2), RJCR), this category of venture capital investors is barred to legal persons.

⁷⁵ Cfr. CMVM, CMVM Annual Report on Venture Capital Activity, 2020, available at <https://www.cmvm.pt/pt/EstatisticasEstudosEPublicacoes/Publicacoes/CapitaldeRisco/Documents/CMVM-Relat%C3%B3rio%20Anual%20de%20Capital%20de%20Risco-2020.pdf>.

⁷⁶ This is calculated as "the sum of the accounts for equity holdings, other lending, liquidity, derivative positions (options) and other assets". Cfr. CMVM, CMVM Annual Report on Venture Capital Activity, 2020, p. 8.

⁷⁷ This figure is "calculated as the sum of the accounts for equity holdings, other lending, liquidity, derivative positions (options) and other assets, from which borrowing and other liabilities are subtracted." Cfr. CMVM, CMVM Annual Report on Venture Capital Activity, 2020, p. 8.

⁷⁸ PAULO BANDEIRA, "Estratégias de...", cit., p. 605.

⁷⁹ Concerning the reasons for careful definition of exit mechanisms, see PAULO BANDEIRA, "Estratégias de...", cit., p. 596.

⁸⁰ Cfr. PAULO BANDEIRA, "Estratégias de...", cit., p. 596.

⁸¹ Cfr. PAULO BANDEIRA, "Estratégias de...", cit., p. 596.

possible to prove the concept and to scale up the venture"⁸², and when profits are already significant. It is also interesting to note that, for example, it is unusual for technology-based startups to dispose of their business establishment (*trespasse*) or to license commercial operation of their intellectual property rights, although this is common for biomedical startups (where pharmaceutical companies are more interested in acquiring the technology developed and respective patents, rather than the actual business of the startup)⁸³.

3.2.2. Crowdfunding

a) Concept and types

Another alternative to bank loans for startups in need of finance is crowdfunding, which may be defined as "a form of financing projects and ventures, generally arranged online⁸⁴, by inviting the public (crowd) to invest"⁸⁵. This type of alternative finance using online platforms first emerged in the context of a non-inflationary depression and the reputational crisis in the financial sector (largely caused by the global financial crisis of 2007-2008)⁸⁶. In the years that followed, "crowdfunding platforms have enabled enterprises to secure funding, by appealing online for investment by members of the public" and have established themselves as "the ultimate form of disintermediation and democratisation in access by small investors to the world of investment"⁸⁷.

Crowdfunding can be described as an evolving method for using an online platform to access financial contributions from internet users with a view to financing businesses or ventures⁸⁸. Another key feature of this alternative method of financing is its simplicity, as it entails no complex structures, dispenses prospectuses (below a given threshold) and with any role for intermediaries, and the operation presents lower costs than those associated with traditional

⁸² Cfr. PAULO BANDEIRA, "Estratégias de...", cit., p. 597.

⁸³ Cfr. PAULO BANDEIRA, "Estratégias de...", cit., p. 597.

⁸⁴ The internet was the driving force behind crowdfunding because it offered a fast and effective communication channel between crowdfunding platforms, the project owners/founders and investors. Cfr. SANDRA CAMACHO CLAVIJO, "La naturaleza jurídica de la financiación participativa en las modalidades de crowdfunding", in *Las plataformas de financiación participativa crowdfunding*, Thomson Reuters Aranzadi, 2018, pp. 31-58 (p. 35).

⁸⁵ Cfr. JOÃO VIEIRA DOS SANTOS, "Aspectos Jurídicos...", cit., p. 251; JOÃO VIEIRA DOS SANTOS, "Crowdfunding como forma de capitalização das sociedades", *Revista Electrónica de Direito*, n.º 2, 2015, pp. 1-39 (p. 7), available at https://cjie.up.pt/client/files/000000001/8_676.pdf; DIOGO PEREIRA DUARTE, "Financiamento colaborativo de capital (*equity-crowdfunding*)", in ANTÓNIO MENEZES CORDEIRO, ANA PERESTRELO DE OLIVEIRA and DIOGO PEREIRA DUARTE (coord.), *Fintech - Desafios da tecnologia financeira*, 2nd ed., Coimbra, Livraria Almedina, 2019, pp. 265-321 (p. 266); LUÍS ROQUETTE GERALDES and FRANCISCA SEARA CARDOSO, "Uma evolução...", cit., p. 493.

However, although the use of online platforms is a relatively recent phenomenon, crowdfunding is in fact nothing new, insofar as long before the emergence of the internet many business ventures were funded by an appeal to the public for investment. In the eighteenth century, Alexander Pope (who translated Homer's *Iliad* into English), Mozart and Beethoven (for the composition for their works), made use of public subscription to finance their creative labours. Cfr. JOÃO VIEIRA DOS SANTOS, "Regime jurídico do Crowdfunding", *Revista de Direito das Sociedades*, Ano IX, no. 3, 2017, pp. 643-676 (p. 647); KYLE LESLIE SIM, *Equity Crowdfunding Dissertation*, 2014, p. 7, available at <https://pt.scribd.com/doc/235496297/Equity-Crowdfunding-Dissertation>.

⁸⁶ Cfr. JOÃO VIEIRA DOS SANTOS, "Regime jurídico...", cit., p. 645.

⁸⁷ Cfr. JOÃO VIEIRA DOS SANTOS, "Financiamento colaborativo e sociedades por quotas", *Revista do Direito das Sociedades*, Ano XIII, no. 2, 2021, pp. 177-197 (p. 178).

⁸⁸ Cfr. A. BARRETO MENEZES CORDEIRO, *Manual de Direito dos Valores Mobiliários*, reprint of 2nd ed. (2018), Coimbra, Livraria Almedina, 2019, p. 380; DIOGO PEREIRA DUARTE, "Financiamento colaborativo...", cit., p. 266.

means of funding (involving bank loans)⁸⁹. These characteristics explain the “*strong connection between crowdfunding and small and medium-sized enterprises, for which this type of financing is easier and imposes less requirements*”⁹⁰. In Portugal, this phenomenon has been even more significant because the country's business fabric consists largely of small and medium-sized enterprises (statistics point to their representing 99% of Portugal's business fabric)⁹¹ which have difficulty in obtaining finance from traditional credit institutions.

When the project owners/founders opt for crowdfunding, they first make a pitch, by posting a video explaining the business idea on the online platform, and appealing to the online community, or crowd, for investment⁹². If the campaign is successful, investors will send funds to the online platforms, which will in turn hand them over to the project owners/founders⁹³. It is the way that crowdfunding works that makes it most attractive to startups, as this is a form of funding that can reduce the business risk of ventures of this type, as the disclosure of information can serve as mere “market research” and as a low-cost online marketing tool, as well as making it possible to “mitigate the information asymmetries between startups and investors through these platforms”⁹⁴.

In terms of the parties involved, all forms of crowdfunding are structured around a three-way relationship between: (i) the project or business owners (in the case of startups, their founders), (ii) finance providers/investors, and (iii) the online platforms that function as intermediaries between the project owners/founders and the investors⁹⁵. These platforms are essential for creating an online community, insofar as they permit beneficiaries to communicate with investors and to publicise the actual venture for which they seek funding⁹⁶.

Alternative financing platforms allow non-institutional investors - the 'crowd' - to play a larger role in putting up capital to finance new business opportunities⁹⁷. This arrangement provides for more organic interaction with investors, in which the bottom line is not the only consideration. The most well-know alternative funding platforms use crowdfunding, where a large number of investors putting up small capital sums joins forces to finance a new venture. This approach has flourished on social media and on specific crowdfunding websites (such as Kickstarter⁹⁸ and Indiegogo). Globally, the first of this new generation of collaborative finance platforms emerged in the United Kingdom, in 2006⁹⁹. In the years that followed, this funding

⁸⁹ Cfr. LUÍS ROQUETTE GERALDES and FRANCISCA SEARA CARDOSO, “Uma evolução...”, cit., p. 494; JOÃO VIEIRA DOS SANTOS, “Financiamento colaborativo...”, cit., p. 179.

⁹⁰ Cfr. JOÃO VIEIRA DOS SANTOS, “Financiamento colaborativo...”, cit., p. 179.

⁹¹ Cfr. JOÃO VIEIRA DOS SANTOS, “Financiamento colaborativo...”, cit., p. 179.

⁹² For a detailed account of the crowdfunding process (applications and selection, contracts, exposure, subscription period, holding period and exit mechanisms), see INÉS DIAS LOPES, “Equity crowdfunding. A governação da sociedade financiada”, *Revista do Direito das Sociedades*, Ano X, no. 4, 2018, pp. 725-768 (pp. 730-733)

⁹³ Cfr. DIOGO PEREIRA DUARTE, “Financiamento colaborativo...”, cit., p. 266-267.

⁹⁴ Cfr. JOÃO VIEIRA DOS SANTOS, “Aspetos Jurídicos...”, cit., pp. 252.

⁹⁵ Cfr. JOÃO VIEIRA DOS SANTOS, “Regime jurídico...”, cit., p. 652; JOÃO VIEIRA DOS SANTOS, *Regulação de Formas...*, cit., pp. 293-296.

⁹⁶ Cfr. JOÃO VIEIRA DOS SANTOS, “Crowdfunding como...”, cit., p.9.

⁹⁷ Cfr. PAULO ALCARVA, *Banca 4.0 Revolução Digital: Fintechs, Blockchain, criptomoedas, robô advisers e crowdfunding*, Coimbra, Livraria Almedina, 2019, p. 139.

⁹⁸ Cfr. <https://www.kickstarter.com/>.

⁹⁹ Cfr. IOSCO, *Crowdfunding: An Infant Industry Growing fast*, 2014, p. 12, available at <https://www.iosco.org/research/pdf/swp/Crowd-funding-An-Infant-Industry-Growing-Fast.pdf>.

model spread to the United States and China, where it established itself firmly, and has since increasingly taken hold in mainland Europe¹⁰⁰. In Portugal, collaborative finance is still at an early stage, but there are already several examples of platforms that have attained levels of activity and volumes of financing that offer a glimpse of the potential of this funding model¹⁰¹, meaning that crowdfunding may fill another gap in the market (in the realm of alternative finance), given that it is able to “*provide startups with much larger sums of financing than Business Angels can muster, but still in sums smaller than those of interest to venture capital funds and companies*”¹⁰².

Lastly, the 'collaborative' tag used to designate this form of funding (or 'participative' as used in other legal systems, such as in Spain and France), should not mislead us as regards the mutualist element of the funding arrangement, or the fact that the underlying motivation involves a sense of social or interpersonal solidarity, causing the bottom line to fade in relative importance. The fundamental point that these descriptors seek to convey is that this funding model presupposes the bringing together (more or less directly, mediated by online platforms that tend to dispense with the traditional mechanisms of intermediation) of disparate members of the public to achieve common or reciprocal financing objectives¹⁰³.

b) Legal Regime

In Portugal, the process of legislating for crowdfunding started with Draft Law no. 419/XII presented on 30 April 2013. However, only in 2015, with the approval of Law no. 102/2015, of 24 August, was it possible to publish the definitive Legal Framework for Crowdfunding (“RJFC”)¹⁰⁴. The RJFC was first amended by Law no. 3/2018, of 9 February, which approved the rules setting penalties in relation to crowdfunding activities.

Article 2 of the RJFC defines “crowdfunding” as “*the type of funding of entities, or of their activities and ventures, through registration on online electronic platforms from where they raise funds invested by one or more individual investors*”¹⁰⁵.

¹⁰⁰ Cfr. IOSCO, *Crowdfunding: An Infant...*, cit., p.12.

¹⁰¹ Cfr. VASCO FREITAS DA COSTA, *A regulação jurídica do financiamento colaborativo ou «crowdfunding» – em especial, o caso português*, p. 7, available at <https://www.cmvm.pt/pt/Comunicados/ConferenciasdaCMVM/anexos/Documents/A%20regula%C3%A7%C3%A3o%20jur%C3%ADdica%20do%20financiamento%20colaborativo%20ou%20crowdfunding.pdf>.

¹⁰² Cfr. JOÃO VIEIRA DOS SANTOS, “Aspetos Jurídicos...”, cit., pp. 252.

¹⁰³ Cfr. VASCO FREITAS DA COSTA, *A regulação...*, cit., p.1.

¹⁰⁴ Cfr. JOÃO VIEIRA DOS SANTOS, *Regulação de Formas...*, cit., p. 309; FERNANDO BELEZAS, *Crowdfunding: Regime Jurídico do Financiamento Colaborativo*, 2nd ed., Coimbra, Livraria Almedina, 2019, p. 53.

¹⁰⁵ For an analysis of the concept of crowdfunding established in Article 2 of the RJFC. Cfr. MARGARIDA PACHECO DE AMORIM and JOÃO VIEIRA DOS SANTOS, “O Regime Nacional de Crowdfunding: que Crowdfunding?”, in CMVM (coord.), *Cadernos do Mercado de Valores Mobiliários – 20 Anos do Código dos Valores Mobiliários*, Coimbra, Livraria Almedina, 2021, pp. 623-638 (pp. 625-629); JOÃO VIEIRA DOS SANTOS, *Regulação de Formas...*, cit., p. 310. As A. BARRETO MENEZES CORDEIRO has pointed out, “[t]his is a broad definition accommodating the different varieties of collaborative finance”. Cfr. A. BARRETO MENEZES CORDEIRO, *Manual de...*, cit., p. 381.

The different types of crowdfunding are then listed in Article 3 of the RJFC¹⁰⁶⁻¹⁰⁷: (a) *crowdfunding by donation*, where the entity receives a donation, with or without giving non-monetary consideration in return¹⁰⁸, (b) *rewards-based crowdfunding*, where the entity financed is obliged to provide the product or service financed, in return for the funding obtained, (c) *equity crowdfunding (or investment crowdfunding)*, where the entity funded remunerates the financing obtained through a share in its equity, distribution of dividends or profit sharing, and (d) *peer-to-peer lending (or lending-based crowdfunding)*¹⁰⁹, where the entity financed remunerates the funding secured by paying interest at a rate fixed when raising the funds.

In terms of the legal rules governing these different forms, whilst the first two present no special difficulties, the same cannot be said of equity crowdfunding and peer-to-peer lending, in view of the intrinsic risks involved¹¹⁰. This is why equity crowdfunding and peer-to-peer lending platforms, and not other crowdfunding platforms, are subject to oversight and regulation by the Portuguese Securities Market Commission (CMVM) (cf. Article 15 RJFC)¹¹¹. The intermediation of equity crowdfunding or peer-to-peer lending, carried on by the managers of online platforms, is subject to prior registration with CMVM. This activity of crowdfunding intermediation between the project owners/founders and investors is carried on by online platforms, as we saw above, which can be described as facilitating this relationship, by “*providing a place (online) where people looking for investors and people looking to invest can meet*”¹¹².

The last two forms of crowdfunding listed in Article 3 RJFC (equity crowdfunding and peer-to-peer lending) are regulated in detail by the CMVM Regulation no. 1/2016 (“Equity crowdfunding or peer-to-peer lending”)¹¹³⁻¹¹⁴, and it is these which are relevant to the financing of startups. However, the entry into force of CMVM Regulation no. 1/2016 (Article 21) was conditional on the entry into force of the rules applicable to breach of the legal rules on equity crowdfunding or peer-to-peer lending, which were only approved by Law no. 3/2018, of 9 February¹¹⁵, meaning that the complex of legal rules applicable to these two forms of crowdfunding only

¹⁰⁶ On the different types of crowdfunding, see JOÃO VIEIRA DOS SANTOS, *Regulação de Formas...*, cit., 299-308.

¹⁰⁷ In relation to the advantages and drawbacks of these different types, see A. BARRETO MENEZES CORDEIRO, *Manual de...*, cit., p. 381.

¹⁰⁸ In Portugal, this variety of crowdfunding is offered by PPL, available at www.ppl.com.pt.

¹⁰⁹ See LUÍS ROQUETTE GERALDES, JOÃO LIMA DA SILVA and FRANCISCA SEARA CARDOSO, “P2P Lending”, in ANTÓNIO MENEZES CORDEIRO, ANA PERESTRELO DE OLIVEIRA and DIOGO PEREIRA DUARTE (coord.), *Fintech – Desafios da tecnologia financeira*, 2nd ed., Coimbra, Livraria Almedina, 2019, pp. 323-343.

¹¹⁰ Cfr. LUÍS ROQUETTE GERALDES and FRANCISCA SEARA CARDOSO, “Uma evolução...”, cit., p. 496.

¹¹¹ Article 15(1) of the RJFC: “*The taking up of the business of intermediation of equity crowdfunding or peer-to-peer lending is subject to prior registration of the management bodies of the online platforms with the Securities Market Commission (CMVM), which is responsible for regulation, oversight and inspection, and also for investigating any offences, conducting proceedings and applying fines and accessory penalties in connection with that activity*”.

¹¹² Cfr. MARGARIDA PACHECO DE AMORIM and JOÃO VIEIRA DOS SANTOS, “O Regime...”, cit., p. 630.

¹¹³ Regulations created in light of Article 369 of the Portuguese Securities Code.

¹¹⁴ In relation to the monetary limits established in Article 12(1) of the CMVM Regulation no. 1/2016, “[*t*his is a specific feature of crowdfunding for which there is no parallel in traditional securities law”. Cfr. A. BARRETO MENEZES CORDEIRO, *Manual de...*, cit., p. 383.

¹¹⁵ Establishes the system of penalties applicable to crowdfunding activities and makes the first amendment to Law no. 102/2015, of 24 August, approving the legal rules on crowdfunding.

took effect on 10 February 2018 (prior to this date, CMVM Regulation no. 1/2016 was not applicable)¹¹⁶.

Because they take a neutral role of intermediation¹¹⁷, under Articles 5(2), 11(1) and 21(3) of the RJFC and Articles 11 and 20 of the CMVM Regulation no. 1/2016, electronic platforms may not: (i) provide advice on investments to be made over the respective websites, (ii) reward their employees for the turnover in products offered on the website of the respective platform, (iii) promote their own offerings on the platform, and (iv) invest in offerings made over the platform. These and other measures are designed to ensure the neutrality of the online platforms in these types of crowdfunding¹¹⁸.

In connection with the Portuguese legal rules on equity crowdfunding and peer-to-peer lending, it is crucial to note that, since 10 November 2021, new European rules on crowdfunding were implemented - Regulation (EU) 2020/1503 of the European Parliament and of the Council, of 7 October 2020, which, under Article 8(4) of the Constitution of the Portuguese Republic, prevails over the RJFC and CMVM Regulation no. 1/2016¹¹⁹.

This Regulation has taken effect at a time when crowdfunding platforms are growing in importance in all Member States. As each Member State designed different legislative measures to regulate crowdfunding at national level, the European Commission decided, after investigating the matter¹²⁰, that the absence of harmonisation in this matter within the European Union created effective restrictions on the development of cross-border crowdfunding¹²¹.

In addition to the restrictions on development, it is important to note that the bespoke domestic legal regimes are “*tailored to the characteristics and needs of local markets and investors*”, diverging from the European Union rules as regards the conditions of operation of

¹¹⁶ Cfr. MARGARIDA PACHECO DE AMORIM and JOÃO VIEIRA DOS SANTOS, “O Regime...”, cit., p. 624.

¹¹⁷ This neutrality of online platforms is expressly mentioned in recital (26) of Regulation (EU) 2020/1503, of the European Parliament and the Council, of 7 October 2020 (Crowdfunding Regulation), where it is stated that, in order to avoid and prevent conflicts of interests, “certain requirements should be laid down with respect to crowdfunding service providers, their shareholders, managers and employees, and any natural or legal person closely linked to them by way of control”.

¹¹⁸ Cfr. MARGARIDA PACHECO DE AMORIM and JOÃO VIEIRA DOS SANTOS, “O Regime...”, cit., pp. 630-631.

¹¹⁹ Looking in depth at the European Crowdfunding Service Providers Regulation (ECSPR), see EUGENIA MACCHIAVELLO, “What to expect when you are expecting” a European crowdfunding Regulation: the current ‘Bermuda Triangle’ and future scenarios for marketplace lending and investing in Europe”, *EBI Working Paper Series*, no. 55, 2019, pp.1-33, also available in <https://ssrn.com/abstract=3493688>; PANAGIOTIS K. STAIKOURAS, “The European Union Proposal for a Regulation on Cross-Border Crowdfunding Services: A Solemn or Pie-Crust Promise?”, *European Business Law Review* 31, no. 6, 2020, pp. 1047-1122; EUGENIA MACCHIAVELLO, “The European Crowdfunding Service Providers Regulation: The Future of Marketplace Lending and Investing in Europe and the ‘Crowdfunding Nature’ Dilemma”, *European Business Law Review* 32, no. 3 (2021): pp. 557-604; KONSTANTINOS SERDARIS, “Behavioural Economic Influences on Primary Market Disclosure – The Case of the EU Regulation on European Crowdfunding Service Providers”, *European Company and Financial Law Review*, vol. 18, no. 3, 2021, pp. 428-463.

¹²⁰ Cfr. EUROPEAN COMMISSION, *Crowdfunding: Mapping EU markets and events study*, 30 September 2015, p. 75.

¹²¹ Cfr. Recital (6) of Regulation (EU) 2020/1503 of the European Parliament and of the Council, of 7 October 2020; MIGUEL RODRIGUES LEAL, “O Novo Regime Europeu dos Serviços de Financiamento Colaborativo (crowdfunding)”, *Actualidad Jurídica Uriá Menéndez*, 55, 2021, pp. 95-113 (p. 99), available at <https://www.uria.com/documentos/publicaciones/7435/documento/art04.pdf?id=12263>; JOÃO VIEIRA DOS SANTOS, “Financiamento colaborativo...”, cit., p. 181.

crowdfunding platforms, the scope of activities permitted and not permitted, and the authorisation requirements¹²².

This lack of legislative harmonisation could also pose an obstacle to the plans for the Capital Markets Union (CMU)¹²³. These factors, along with others¹²⁴, led to the conclusion that it was necessary to set legal rules on crowdfunding at European Union level (cf. recital (7) of the Regulation)¹²⁵.

As a result, in March 2018, the European Commission submitted its proposal for a Regulation on European crowdfunding service providers for business, which was approved, after undergoing changes in the Parliament and the Council¹²⁶, the final version resulting in Regulation (EU) 2020/1503 of the European Parliament and of the Council, of 7 October 2020 (referred to below as "Regulation"), implementing rules on crowdfunding platforms within the European Union¹²⁷.

¹²² Cfr. Recital (5) of Regulation (EU) 2020/1503 of the European Parliament and of the Council, of 7 October 2020.

¹²³ In order to pursue the CMU, the European Commission implemented in 2015 the first CMU action plan (cfr. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 'Action Plan on Building a Capital Markets Union', COM (2015) 0468 final). This European Union initiative was prompted by the financial crisis of 2007-2009 and by the banking sector crisis experienced in Europe from 2010 to 2013. This sequence of crises focussed minds in the European Union on the need to reform its regulatory strategy and its oversight arrangements in order to achieve the financial stability needed for economic development, and consequently to finance business. The European Union also realised that it was over-dependent on traditional funding arrangements (such as conventional bank loans), and this led it to consider developing other alternative finance systems, such as crowdfunding. Cfr. ANDRÉ SAPIR, NICOLAS VÉRON and GUNTRAM B. WOLFF, "Making a Reality of Europe's Capital Markets Union", *Policy Contribution*, Issue no. 7, Bruegel, 2018, pp. 1-13 (p. 2), available at <https://www.bruegel.org/wp-content/uploads/2018/04/pc-07-2018.pdf>, and Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee and the Committee Of The Regions, *Entrepreneurship 2020 Action Plan, Reigniting The Entrepreneurial Spirit In Europe*, Brussels, 09.01.2013, COM (2012), 795 final, pp. 8-18, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0795&from=EN>.

On 24 September 2020, in the wake of the crisis caused by the Covid-19 pandemic, the Commission implemented a new action plan for the CUM with the aim of: (i) supporting a green, digital, inclusive, and resilient economic recovery by making financing more accessible to European companies. This first objective will be achieved through six actions: 1. making companies more visible to international investors, 2. helping companies to access public markets, 3. helping companies to make more long-term investments, 4. incentivising institutional investors to provide long-term finance, 5. directing SMEs to alternative providers of funding, 6. helping credit institutions (such as banks) to lend to the real economy. (ii) making the EU an even safer place for individuals to save and invest long-term. This second objective is to be achieved through three actions: 7. investing in the financial literacy of citizens, 8. strengthening investor confidence in capital markets, 9. and supporting people in retirement. And also (iii) integrating national capital markets into a genuine single market, to be achieved by: 10. alleviating the tax associated burden in cross-border investment, 11. making the outcomes of cross-border investments more predictable as regards insolvency proceedings, 12. facilitating shareholder engagement in the capital markets, 13. development of cross-border settlement services, 14. providing consolidated data on prices and volume of traded securities in the European Union, 15. protecting and facilitating investment, and 16. lastly, an enhanced single rule-book in the European Union for market supervision. Cfr. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - *A Capital Markets Union for People and Businesses-New Action Plan*, Brussels, 24.09.2020, COM (2020) 590 final, pp. 1-15, available at https://eur-lex.europa.eu/resource.html?uri=cellar:61042990-fe46-11ea-b44f-01aa75ed71a1.0001.02/DOC_1&format=PDF. For further reading on the Capital Markets Union and the respective plan of action, see CRISTINA SOFIA DIAS, "União do Mercado de Capitais", in L. MIGUEL PESTANA DE VASCONCELOS (coord.), *III Congresso de Direito Bancário*, Coimbra, Livraria Almedina, 2018, pp. 147-188; JOÃO VIEIRA DOS SANTOS, *Regulação de Formas...*, cit., pp. 65-73.

¹²⁴ See MIGUEL RODRIGUES LEAL, "O Novo...", cit., p. 99.

¹²⁵ "In order to foster cross-border crowdfunding services and to facilitate the exercise of the freedom to provide and receive such services in the internal market, it is necessary to address the existing obstacles to the proper functioning of the internal market in crowdfunding services, and to ensure a high level of investor protection by laying down a regulatory framework at Union level."

¹²⁶ Cfr. MIGUEL RODRIGUES LEAL, "O Novo...", cit., p. 99.

¹²⁷ For more developments on this Regulation, JOÃO VIEIRA DOS SANTOS, *Regulação de Formas...*, cit., 327-341.

The material scope of this Regulation encompasses uniform rules on lending-based crowdfunding and equity or investment-based crowdfunding, insofar that *“those types of crowdfunding can be structured as comparable funding alternatives”*¹²⁸. This leaves out the traditional donation and rewards-based forms of crowdfunding¹²⁹ because, as follows from recital (1) of the Regulation, the intention was to restrict the European rules to the financial components of crowdfunding, as well as the fact that the main aim of introducing EU-wide legislation was to strengthen the common market in relation to an emerging source of finance which fills the gap in the funding of startups and of European small and medium-sized enterprises¹³⁰.

The Regulation's material scope of application also excludes regulation of crowdfunding services in the field of consumer credit within the meaning of Article 3(a) of Directive 2008/48/EC of the European Parliament and of the Council (cf. Article 1(2)(a) and recital (8) of the Regulation). These exclusions from the material scope of the Regulation mean that some areas of crowdfunding will continue to be regulated by national law¹³¹.

With regard to lending-based crowdfunding, the Regulation must be applied to crowdfunding services that consist of *“facilitation of granting of loans, including services such as presenting crowdfunding offers to clients and pricing or assessing the credit risk of crowdfunding projects or project owners”*¹³². In relation to lending-based crowdfunding (equity crowdfunding) *“transferability is an important safeguard in order for investors to be able to exit their investment since it provides the possibility for them to dispose of their interest on the capital markets. This Regulation therefore covers and permits crowdfunding services related to transferable securities. Shares of certain private limited liability companies incorporated under the national law of Member States are also freely transferable on the capital markets and should therefore not be prevented from being included within the scope of this Regulation”*¹³³.

It is important to note that, although the Regulation took effect on 10 November 2021, it established a transitional period of up to 10 November 2022, allowing providers of crowdfunding services, in accordance with the applicable national legislation (in the case of Portugal, CMVM Regulation no. 1/2016 and Law no. 3/2018, of 9 February), to continue providing services included within the scope of the Regulation until 10 November 2022 or until they are granted an authorisation under the Regulation (Article 48(1) of the Regulation)¹³⁴.

¹²⁸ Cfr. Recital (1) of Regulation (EU) 2020/1503 of the European Parliament and of the Council, of 7 October 2020.

¹²⁹ Cfr. MIGUEL RODRIGUES LEAL, “O Novo...”, cit., p. 100.

¹³⁰ Cfr. MIGUEL RODRIGUES LEAL, “O Novo...”, cit., p. 100.

¹³¹ Cfr. MIGUEL RODRIGUES LEAL, “O Novo...”, cit., p. 100.

¹³² Cfr. Recital (11) of Regulation (EU) 2020/1503 of the European Parliament and of the Council, of 7 October 2020.

¹³³ Cfr. Recital (13) of Regulation (EU) 2020/1503 of the European Parliament and of the Council, of 7 October 2020.

¹³⁴ According to the first part of recital 76 of the Regulation: *“in the interest of legal certainty and in view of the replacement of national rules by the rules set out in this Regulation insofar as types of crowdfunding services are concerned which are now included within the scope of this Regulation, it is appropriate to make transitional arrangements allowing persons providing such crowdfunding services in accordance with national law preceding this Regulation to adapt their business activities to this Regulation and to have sufficient time to apply for an authorisation thereunder. Such persons should therefore be able to continue to provide crowdfunding services*

During this transitional period (10 November 2021 to 10 November 2022), Article 48(2) of the Regulation allows Member States to establish special procedures whereby legal persons, authorised at national level to provide crowdfunding services, to convert their national authorisation into authorisations that comply with the requirements of the Regulation¹³⁵. In accordance with recital 77 of the Regulation, “*crowdfunding service providers who have failed to obtain authorisation in accordance with this Regulation by 10 November 2022 should not issue any new crowdfunding offers after that date*”, however “*after 10 November 2022 servicing of the existing contracts, including collecting and transferring receivables, providing asset safekeeping services or processing corporate actions, can continue in accordance with the applicable national law*”¹³⁶.

3.2.3. Initial Coin Offerings (ICOs)

a) Introduction

The most innovative form of startup funding is Initial Coin Offerings (ICOs)¹³⁷⁻¹³⁸, which consist of a public offering of cryptocurrencies “virtual currencies”¹³⁹, operated using blockchain technology¹⁴⁰⁻¹⁴¹. Cryptocurrencies have emerged as a form of funding “*through the issue and*

that are included within the scope of this Regulation in accordance with the applicable national law until 10 November 2022.”

¹³⁵ Cfr. JOÃO VIEIRA DOS SANTOS, “Financiamento colaborativo...”, cit., p. 182.

¹³⁶ For a detailed exploration of the Regulation's impact on the national forms of equity crowdfunding and peer-to-peer lending. Cfr. JOÃO VIEIRA DOS SANTOS, “Financiamento colaborativo...”, cit., pp. 182-197.

¹³⁷ According to the Portuguese Securities Market Commission (CMVM), “[t]he acronym ICO is used to designate an initial distribution offering of cryptoassets. An ICO is a way of raising funds from the public through cryptoassets using blockchain technology. In this operation, the issuer, which may be a natural or a legal person, issues cryptoassets that are paid in legal tender or other cryptoasset currencies”. Cfr. CMVM’s Questions and Answers for Investors on Cryptoassets, available at https://www.cmvm.pt/en/Investor_area/Faq/Pages/QAs-Cryptoassets_investors.aspx.

¹³⁸ In relation to the structure of ICOs and tokens, for further reading, see JOÃO VIEIRA DOS SANTOS, *Regulação de Formas...*, cit., pp. 445-450; JOÃO VIEIRA DOS SANTOS, “Regulação dos Criptoativos”, *Cadernos do Mercado de Valores Mobiliários*, no. 64, 2019, pp. 30-69 (pp. 41-44) and *Regulação de...*, cit., pp. 368-374; ANTÓNIO GARCIA ROLO, “As criptomedas como meio de financiamento e a qualificação dos tokens de investimento emitidos em ofertas públicas de moeda (ICO) como valores mobiliários”, in ANTÓNIO MENEZES CORDEIRO, ANA PERESTRELO DE OLIVEIRA and DIOGO PEREIRA DUARTE (coord.), *Fintech II - Novos Estudos sobre Tecnologia Financeira*, Coimbra, Livraria Almedina, 2019, pp. 249-297 (pp. 260-263); LUÍS ROQUETTE GERALDES, MARIANA SOLÁ DE ALBUQUERQUE and JOÃO LIMA DA SILVA, “ICOs: security tokens vs. utility tokens”, ANTÓNIO MENEZES CORDEIRO, ANA PERESTRELO DE OLIVEIRA and DIOGO PEREIRA DUARTE (coord.), *Fintech II - Novos Estudos sobre Tecnologia Financeira*, Coimbra, Livraria Almedina, 2019, pp. 327-361.

¹³⁹ Cfr. JOÃO VIEIRA DOS SANTOS, “Aspetos Jurídicos...”, cit., p. 253. We may note that “*unlike legal tender, cryptocurrency or “virtual currency” consists of a digital representation of value, which is accepted by natural or legal person as a means of exchange, which can also be transferred, stored and marketed electronically, but which is not issued or guaranteed by a central bank, nor by a public authority, and is neither tied to a legally established currency nor possesses the legal status of currency or money*”. Cfr. LUÍS GUILHERME CATARINO, “Ofertas públicas de criptomoedas: fintech, tokens, smart contracts, blockchain, and all that jazz...”, *Revista de Concorrência e Regulação*, Ano X, no. 40, Oct./Dec. 2019, pp. 15-89 (pp. 20-21), available at https://www.concorrencia.pt/sites/default/files/imported-magazines/CR_4002_PT.pdf. On the concept and characteristics of cryptocurrencies in general and in depth, see JOSÉ ENGRÁCIA ANTUNES, *A Moeda - Estudo Jurídico e Económico*, Coimbra, Livraria Almedina, 2021, pp. 177-216; and ANTÓNIO GARCIA ROLO, “As criptomoedas...”, cit., pp. 251-255.

¹⁴⁰ “The blockchain origin dates back to 2008 when one or more anonymous developers named Satoshi Nakamoto solved to fusing together public-private key cryptography, digital signatures, and peer-to-peer Technologies to create a new distributed database (blockchain). Nakamoto built a decentralized digital currency that could operate without the need for a centralized middleman”. Cfr. PRIMAVERA DE FILIPPI and AARON WRIGHT, *Blockchain and the Law: The Rule of Code*, Harvard University Press, 2018, p. 20.

¹⁴¹ Cfr. PAULO ALCARVA, *Banca 4.0...*, cit., p. 143; JOÃO VIEIRA DOS SANTOS, “Regulação dos...”, cit., p. 31.

*subsequent subscription of these tokens*¹⁴². This form of funding is highly attractive to startups¹⁴³ insofar as the buying and selling of cryptocurrencies takes place swiftly and rapidly. In other words, all startups must do is create the tokens that intend to issue, embedding in them a series of rights or obligations, and issue a white paper¹⁴⁴ where they outline their venture and business plan¹⁴⁵. What is more, ICOs are still not subject to European regulations on public offerings for distribution and sale¹⁴⁶. It should also be noted that “*ICOs can also be viewed as an alternative form of crowdfunding where the aim is to fund projects in a public blockchain*”¹⁴⁷.

According to FRANCISCO MENDES CORREIA, three common features can be identified in the majority of ICOs: (i) an offering is made to an indeterminate public, (ii) this offering is of tokens (i.e., digital representations of assets), and these (iii) operate using distributed ledger technology, based online¹⁴⁸.

Issuers of Initial Coin Offerings accept a cryptocurrency, such as *Bitcoin*¹⁴⁹ or *Ether*¹⁵⁰, or official currencies such as the euro or dollar, in exchange for a new coin or token, related to a specific enterprise or venture¹⁵¹. This means that investors who provide this type of funding receive digital coins which can be traded on the market (through sale or exchange for other cryptocurrencies) and whose value depends on the performance of the enterprise/venture being funded¹⁵².

¹⁴² Cfr. ANTÓNIO GARCIA ROLO, “As criptomoedas...”, cit., p. 250.

¹⁴³ Cfr. MADALENA PERESTRELO DE OLIVEIRA, “Os desafios na regulação dos *tokens* e dos *tokenized securities*”, in PAULO CÂMARA (coord.), *O Novo Direito dos Valores Mobiliários – Vol. 2. II Congresso sobre Valores Mobiliários*, Coimbra, Livraria Almedina, 2019, pp. 185-196 (p. 185).

¹⁴⁴ Cfr. FRANCISCO MENDES CORREIA, “Algumas Notas sobre Ofertas Públicas de Criptomoedas (*Initial Coin Offerings*)”, in PAULO CÂMARA (coord.), *O Novo Direito dos Valores Mobiliários – Vol. 2. II Congresso sobre Valores Mobiliários*, Coimbra, Livraria Almedina, 2019, pp. 175-183 (p. 177); JOSÉ ENGRÁCIA ANTUNES, *A Moeda...*, cit., p. 241.

As regards the white paper, FRANCISCO MENDES CORREIA draws attention to the fact that “*legal scholars have pointed to the very considerable distance between the quantity and quality of information contained in the vast majority of white papers and that which would legally and customarily be expected in the prospectus for a public offering of financial instruments*”. Cfr. FRANCISCO MENDES CORREIA, “Algumas Notas...”, cit., p. 177.

The same line is taken by TIAGO AZEVEDO BASÍLIO, warning of the information asymmetry to be found in this type of operation, considering that the information furnished in white papers, “*as well as non-binding, is overly technical and/or muddled*”. Another problem is that the capital raised in ICOs is not always used for the declared purposes. Cfr. TIAGO AZEVEDO BASÍLIO, “Investment (Security) Tokens: a captação de fundos através de Initial Coin Offerings e Token Sales”, *Revista de Direito Financeiro e dos Mercados de Capitais*, Vol. 1, No. 2, 2019, pp. 127-168 (pp. 138-139), available at <https://rdfmc.com/wp-content/uploads/2021/07/Vol.-1-2019-no.-2-Tiago-Azevedo-Basilio-Investment-security-tokens-a-captacao-de-fundos-atraves-de-initial-coin-offerings-e-token-sales.pdf>.

¹⁴⁵ Cfr. ANTÓNIO GARCIA ROLO, “As criptomoedas...”, cit., p. 260.

¹⁴⁶ Cfr. JOÃO VIEIRA DOS SANTOS, “Aspetos Jurídicos...”, cit., p. 254.

¹⁴⁷ Cfr. ANTÓNIO GARCIA ROLO, “As criptomoedas...”, cit., p. 259; IRIS BARSAN, “Legal Challenges of Initial Coin Offerings (ICO)”, *Revue Trimestrielle de Droit Financier (RTDF)*, no. 3, 2017, pp. 54-65 (p. 54), available at: <https://ssrn.com/abstract=3064397>.

¹⁴⁸ Cfr. FRANCISCO MENDES CORREIA, “Algumas Notas...”, cit., pp. 176-177.

¹⁴⁹ In depth on Bitcoin, see SATOSHI NAKAMOTO, “Bitcoin: A peer-to-peer electronic cash system” *Decentralized Business Review*, 2008, available at <https://bitcoin.org/bitcoin.pdf>; USMAN W. CHOCHAN, “A History of Bitcoin”, 2022, available at: <https://ssrn.com/abstract=3047875>; ANTÓNIO GARCIA ROLO, “As criptomoedas...”, cit., pp. 255-257.

¹⁵⁰ Cfr. FRANCISCO MENDES CORREIA, “Algumas Notas...”, cit., p. 177. About the Ether cryptocurrency see, ANTÓNIO GARCIA ROLO, “As criptomoedas...”, cit., pp. 257-258.

¹⁵¹ Cfr. CMVM Press release, *CMVM warns investors on Initial Coin Offerings (ICOs)*, 3 November 2017, available at <https://www.cmvm.pt/en/Comunicados/Comunicados/Pages/20180119.aspx>.

¹⁵² Cfr. PAULO ALCARVA, *Banca 4.0...*, cit., p. 143.

In ICOs, the persons or organisations offering the digitally represented assets (tokens) start by issuing a white paper¹⁵³, where they outline their project, their business plan and the rights and obligations assigned to those acquiring the cryptocurrency, which will be issued using blockchain and smart contracts technology¹⁵⁴. The white paper is then publicised on social media, and the cryptocurrency are issued using blockchain technology, and sold or distributed to interested buyers¹⁵⁵.

For their part, investors can sell their cryptocurrency on the secondary market (cryptocurrency trading platforms) in order to exchange them for euros, dollars or other previously issued cryptocurrencies, such as Bitcoin, and the startup, which makes the Initial Coin Offering, has merely the role of issuer of the cryptocurrency in question, and can carry on its business without there being any relationship with the cryptocurrency it has issued¹⁵⁶.

The use of Initial Coin Offerings has grown to the extent that, in 2017, this type of funding involved more than 3 billion dollars, jumping to more than 16 billion in 2018¹⁵⁷⁻¹⁵⁸, generating investor interest and also triggering concern on the part of regulators, insofar as most ICOs are unregulated, and may pose risks to investors¹⁵⁹.

In the European Union, the ESMA (European Securities and Markets Authority) issued an alert in 2017, warning of the risks of investment in ICOs by investors and companies¹⁶⁰. In Portugal, the CMVM manifested its concern about this new form of funding when it issued its press release of 3 November 2017, pointing to the risks of investing in/obtaining finance through ICOs. These included: (i) the lack of regulation, (ii) price volatility/lack of liquidity, (iii) the potential risk of fraud¹⁶¹/money laundering, (iv) inadequate documentation, insofar as, instead of a detailed prospectus, there is only a white paper, in which the information may not be objective, complete, clear or enlightening, (v) projects funded through ICOs are generally at

¹⁵³ Cfr. FRANCISCO MENDES CORREIA, "Algumas Notas...", cit., p. 177.

¹⁵⁴ Cfr. IRIS BARSAN, "Legal Challenges...", cit., p. 55; JOÃO VIEIRA DOS SANTOS, "Aspetos Jurídicos...", cit., p. 254. On the subject of Blockchain and Smart Contract technologies, see DIOGO PEREIRA DUARTE, "«Smart Contracts» e intermediação financeira", in ANTÓNIO MENEZES CORDEIRO, ANA PERESTRELO DE OLIVEIRA and DIOGO PEREIRA DUARTE (coord.), *Fintech II - Novos Estudos sobre Tecnologia Financeira*, Coimbra, Livraria Almedina, 2019, pp. 171-180; HUGO RAMOS ALVES, "Smart Contracts: entre a tradição e a inovação", in ANTÓNIO MENEZES CORDEIRO, ANA PERESTRELO DE OLIVEIRA and DIOGO PEREIRA DUARTE (coord.), *Fintech II - Novos Estudos sobre Tecnologia Financeira*, Coimbra, Livraria Almedina, 2019, pp. 181-216; MADALENA PERESTRELO DE OLIVEIRA, "Os desafios...", cit., pp. 193-196; JOÃO VIEIRA SANTOS, "Desafios jurídicos e regulatórios das *Initial Coin Offerings*", in ANTÓNIO MENEZES CORDEIRO, ANA PERESTRELO DE OLIVEIRA and DIOGO PEREIRA DUARTE (coord.), *Fintech II - Novos Estudos sobre Tecnologia Financeira*, Coimbra, Livraria Almedina, 2019, pp. 299-325; TIAGO AZEVEDO BASÍLIO, "Investment (Security)...", cit., pp. 131-135; JOÃO PEDRO FREIRE, *Blockchain e Smart Contracts - Implicações Jurídicas*, Coimbra, Livraria Almedina, 2021, pp. 15-124; and MICHELE GIACCAGLIA, "Considerazioni su Blockchain e smart contracts (oltre le criptoalute)", *Contratto e Impresa*, Padova, A.35, No. 3, 2019, pp. 941-970.

¹⁵⁵ Developers usually set up a company to carry on a given type of business and obtain funding through Initial Coin Offerings, and in most cases the projects financed are also based on blockchain technology, in order to take advantage of the benefits of uniformity throughout the process. Cfr. JOÃO VIEIRA DOS SANTOS, "Aspetos Jurídicos...", cit., pp. 254-255.

¹⁵⁶ Cfr. JOÃO VIEIRA DOS SANTOS, "Aspetos Jurídicos...", cit., p. 255.

¹⁵⁷ Cfr. JOÃO VIEIRA DOS SANTOS, "Regulação dos...", cit., p. 39.

¹⁵⁸ KODAKCoin was launched, in 2018, in the ICO related to the platform owned by Kodak (KodakOne). On this case, see TIAGO AZEVEDO BASÍLIO, "Investment (Security)...", cit., p. 130.

¹⁵⁹ By way of example, in the United States, Initial Coin Offerings are governed by applying the rules on securities and in China this type of funding and investment through cryptocurrencies is legally prohibited. Cfr. JOÃO VIEIRA DOS SANTOS, "Regulação dos...", cit., p. 39.

¹⁶⁰ Cfr. ESMA *Highlights ICO risks for investors and firms*, 13 November 2017, available at <https://www.esma.europa.eu/press-news/esma-news/esma-highlights-ico-risks-investors-and-firms>.

¹⁶¹ On the risk of fraud in ICOs, cfr. LUÍS GUILHERME CATARINO, "Ofertas públicas...", cit., pp. 31-32.

an early stage of development, and (vi) lastly, there is the risk of losing all the capital invested¹⁶². More recently, the CMVM has added further risks to its crypto-assets FAQs, including (i) no specific regulations to protect investors in crypto-assets that are not securities, (ii) the fact that most operators marketing crypto-assets are not based in Portugal, meaning that the resolution of any conflict may lay outside the jurisdiction of the national authorities, which may therefore leave Portuguese investors unprotected, and (iii) the risk of losing the access code to the crypto-assets, because once the access code is lost, it may be impossible to offload or transfer these assets¹⁶³.

On 17 March 2022, the CMVM issued a press release reiterating the warning sounded by the European Supervisory Authorities (EBA, ESMA and EIOPA – the ESAs) about the risks associated with crypto-assets¹⁶⁴⁻¹⁶⁵, pointing out that (i) consumers face the real possibility of losing all the money invested if they buy these assets, (ii) the prices of these assets may fall and rise rapidly in short periods of time, (iii) there are risks of misleading advertising, especially on social media and through influencers, which may create situations involving scams, fraud and operational errors. The European regulators have also alerted consumers to the absence of any rights of complaint or protection (and in particular the impossibility of consumers securing compensation), insofar as crypto-assets generally fall outside the scope of European Union rules on financial services¹⁶⁶.

Due to this concern of lack of regulation of crypto-assets at the European Union level, in September 2020 the European Commission presented a proposal for legislation on crypto-asset markets, amending Directive (EU) 2019/1937 (Regulation on Markets in Crypto-assets “MiCA”)¹⁶⁷, encompassing regulation and supervision of crypto-asset issuers and service providers, in order to protect consumers and the integrity and stability of the financial system.

¹⁶² Cfr. CMVM Press Release, *CMVM warns investors on Initial Coin Offerings (ICOs)*, 3 November 2017, available at <https://www.cmvm.pt/en/Comunicados/Comunicados/Pages/20180119.aspx>.

Regarding this Press Release, JOÃO VIEIRA DOS SANTOS, *Regulação de Formas...*, cit., pp. 457-459.

¹⁶³ Cfr. CMVM’s Questions and Answers for Investors on Crypto-assets, available at https://www.cmvm.pt/en/Investor_area/Faq/Pages/QAs-Cryptoassets_investors.aspx.

¹⁶⁴ Cfr. CMVM Press Release — “CMVM reiterates European Supervisory Authorities’ warning on risks associated with cryptoassets”, available at: <https://www.cmvm.pt/pt/Comunicados/Comunicados/Pages/20220317f.aspx?v=>.

¹⁶⁵ These warnings from the European Supervisory Authorities have been made public since 2013. On 12 December 2013, the EBA (European Banking Authority) issued a warning to consumers on virtual currencies (https://www.eba.europa.eu/sites/default/documents/files/documents/10180/598420/30043572-6454-45f9-8e8a-13776cd752da/EBA_2013_01030000_PT_TRA%20Rev_Vinay.pdf?retry=1). On 12 February 2018 the ESAs issued a warning to consumers on the risks of buying virtual currencies (<https://www.esma.europa.eu/press-news/esma-news/esas-warn-consumers-risks-in-buying-virtual-currencies>). On 17 March 2021, ESMA issued a press release pointing to the significant risks run by investors in unregulated cryptoassets (<https://www.esma.europa.eu/press-news/>).

¹⁶⁶ This further warning was issued in response to the growth observed by the ESAs in “*activity and interest in crypto-assets, including so-called virtual currencies and the emergence of new types of crypto-assets and related products and services, for instance so-called non-fungible tokens (NFTs), derivatives with crypto-assets as underlying, unit-linked life insurance policies with crypto assets as underlying and decentralised finance (DeFi) applications, that claim to generate high and/or fast returns. The ESAs are concerned that an increasing number of consumers are buying those assets with the expectation that they will earn a good return without realising the high risks involved*”. Cfr. ESAs Warning, “*EU financial regulators warn consumers on the risks of crypto-assets*”, available at: https://www.esma.europa.eu/sites/default/files/library/esa_2022_15_joint_esas_warning_on_crypto-assets.pdf.

¹⁶⁷ This proposal is part of the Digital Finance package, a package of measures to further enable and support the potential of digital finance in terms of innovation and competition while mitigating the risks. Cfr. European Commission, *Explanatory Memorandum of the proposal for a Regulation on Markets in Crypto-assets “MiCA”*, 24-09-2020, p. 1.

This is still a Proposal for a Regulation, meaning that investors and consumers will not benefit from any of the protections it envisages, insofar as the legislative process is currently in progress¹⁶⁸. It should also be noted that this proposal "MiCA" Regulation in its scope of application doesn't provide the regulation of all crypto-assets instruments, its Article 2(2)(a) stipulates that it does not apply to crypto-assets instruments that may be equated to financial instruments or securities within the meaning of Article 4(1), point (15) of MiFID II, thus excluding the regulation of equity/investment tokens and Article 2(2)(b) also excluding crypto-assets instruments equivalent to electronic money in terms of the Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009¹⁶⁹, however the definition of crypto-asset in Article 3(1)(2) of the Regulation "MiCA" proposal: *'crypto-asset' "means a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology"*, is very broad, which means that this definition puts the accent on "two key characteristics of crypto-assets: (i) they are digital representations of value, with no inherent value, and (ii) they have underlying a decentralised recording technology, the best known example is the blockchain technology, which defines the circumstances of creation and transmission of the respective crypto-asset, without the need for a central authority"¹⁷⁰.

In relation to ICO's specifically the only legislative initiative taking place at EU level is also the proposal for the MiCA Regulation which provides the regulation of the offer requirements (Article 4), the information that the white paper must contain to be considered (Article 5), among other provisions and requirements which are intended to protect investors (Article 6 et seq.). It is important to mention that the *"adoption of MiCA through a regulation and not a directive, unlike other EU financial regulations in the past (for payment services, e-money, etc.), makes it possible to minimise the risks of "forum shopping" between EU member states and facilitate the emergence of important regional players"*¹⁷¹. In this regard, *"for public offerings of crypto-assets in the EU, the main contribution of the MiCA Regulation is to provide for a mandatory, harmonised and uniform authorisation regime throughout the European Union"*¹⁷².

¹⁶⁸ Cfr. ESAs Warning, "EU financial regulators warn consumers on the risks of crypto-assets", available at: https://www.esma.europa.eu/sites/default/files/library/esa_2022_15_joint_esas_warning_on_crypto-assets.pdf. Specifically on the Proposal for this Regulation, DIRK A. ZETZSCHE/FILIPPO ANNUNZIATA DOUGLAS W. ARNER/ROSS P. BUCKLEY, "The Markets in Crypto-Assets Regulation (MiCA) and the EU Digital Finance Strategy", *EBI Working Paper Series*, no. 7, 2020, pp. 1-28; RÜDIGER VEIL, "Cryptoassets and DLT Market Infrastructures", in RÜDIGER VEIL (ed.), *European Capital Markets Law*, Oxford, Hart Publishing, 2022, pp. 133-142 (139-142); JOÃO VIEIRA DOS SANTOS, *Regulação de Formas...*, cit., pp. 468-482.

¹⁶⁹ Cfr. ANTÓNIO GARCIA ROLO, "A proposta de Regulamento europeu sobre mercados de criptoativos: breve sumário e análise", in *Revista de Direito das Sociedades*, Ano XIII, no. 2, 2021, pp. 285-300 (p. 287); FRANCISCO CHILÃO ROCHA, *Regime Jurídico dos Non-Fungible Tokens*, Coimbra, Livraria Almedina, 2022, p. 60.

¹⁷⁰ Cfr. ANTÓNIO GARCIA ROLO, "A proposta de Regulamento europeu...", cit., p. 287.

¹⁷¹ Cfr. STÉPHANE BLEMUS, *The proposal for an EU Regulation on Crypto-assets 'MiCA': 3 questions to Stéphane Blemus*, Sciences Po's Digital, Governance & Sovereignty Chair, 16-05-2022, available at: <https://www.sciencespo.fr/public/chaire-numerique/en/2022/05/16/interview-the-proposal-for-an-eu-regulation-on-crypto-assets-mica-3-questions-to-stephane-blemus/>.

¹⁷² Cfr. STÉPHANE BLEMUS, "The proposal for an EU Regulation on Crypto-assets...", cit.

b) Legal Regime

As mentioned above, ICOs are operations whereby funding is obtained from the public through the issue of tokens or coins which, as a rule, confer rights relating to the project they are intended to finance¹⁷³. In order to establish the legal rules governing ICOs, it is first necessary to establish categories in the world of cryptocurrencies. According to Francisco Mendes Correia, it is uncontroversial in both Portuguese¹⁷⁴ and foreign legal doctrine¹⁷⁵ that cryptocurrencies divide into three classes: (i) utility tokens, which are crypto tokens that can be redeemed for goods or services, (ii) currency tokens, which represent assets that perform the typical functions of money, such as measurement of value, means of exchange and store of value (for example, Bitcoin and Ether)¹⁷⁶, and (iii) equity/investment tokens, which represent a right to a financial flow, where the creditor is an issuer and which “*may consist of sharing in the profits generated by the issuer*”¹⁷⁷.

In Portugal, Law no. 58/2020, of 31 August¹⁷⁸ amended, among others provisions, the definition of virtual currency – “*a digital representation of value that is not necessarily attached to a legally established currency and does not possess a legal status of fiat currency, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically*” (Article 2(1)(II) of the Law no. 83/2017, of 18 August)¹⁷⁹.

In addition, it is in relation to investment tokens that legal scholars¹⁸⁰ have examined the possibility of these tokens falling within the concept of security, as established in Article 1(g) of the Portuguese Securities Code (“CVM”) (taking into account the broad wording of the law), which lays down that securities are deemed to comprise “*documents representing homogeneous legal situations that can be traded on the market*”. We may therefore note that it is possible to conceive of an investment token as a (i) document, (ii) which can be issued to

¹⁷³ Cfr. CMVM communication to entities involved in the launch of “Initial Coin Offerings” (ICOs) concerning the legal classification of tokens, 23 July 2018, available only in Portuguese at <https://www.cmvm.pt/pt/Comunicados/Comunicados/Pages/20180723a.aspx>.

¹⁷⁴ JOÃO VIEIRA DOS SANTOS, *Regulação de Formas...*, cit., pp. 450-453; MADALENA PERESTRELO DE OLIVEIRA, “Os desafios...”, cit., pp. 186-187; ANTÓNIO GARCIA ROLO, “As criptomoedas...”, cit., pp. 291 et seq.; LUÍS GUILHERME CATARINO, “Ofertas públicas...”, cit., pp. 48-55.

¹⁷⁵ See, for example, RÜDIGER VEIL, “Cryppoassets and DLT...”, cit., pp. 135-136; PHILIPP HACKER and CHRIS THOMALE, “Crypto-Securities Regulation: ICOs, Token Sales and Cryptocurrencies under EU Financial Law”, *European Company and Financial Law Review*, 2017, pp. 25-33, available at <https://ssrn.com/abstract=3075820>.

¹⁷⁶ Cfr. FRANCISCO MENDES CORREIA, “Algumas Notas...”, cit., p. 179.

¹⁷⁷ Cfr. FRANCISCO MENDES CORREIA, “Algumas Notas...”, cit., p. 179. So, an investment token will normally represent the right to a profit, as in the case of the DAO ICO, where investors subscribed the tokens, the proceeds were reinvested in certain ventures and the investors were to share in the profits generated by these investments through a smart contract. It should also be noted that certain investment tokens (such as in the DAO ICO) confer “political” rights, meaning they entitle the holder to be involved in the governance of the entity in the blockchain, by exercising voting rights. Cfr. ANTÓNIO GARCIA ROLO, “As criptomoedas...”, cit., p. 289.

¹⁷⁸ This Law transposed Directive (EU) 2018/843 of the European Parliament and the Council, of 30 May 2018

¹⁷⁹ On this broad concept of virtual currency that covers crypto-assets, *vide* João Vieira Santos, *Regulação de Formas...*, cit., p. 498.

¹⁸⁰ Cfr. JOÃO VIEIRA DOS SANTOS, “Regulação dos...”, cit., pp. 56 et seq.; ANTÓNIO GARCIA ROLO, “As criptomoedas...”, cit., pp. 267-292. Likewise in the US legal system, the issue of cryptocurrencies and ICOs has led the Securities Exchange Commission (US federal regulator) to examine the characteristics and nature of tokens, as the possibility was entertained of their representing legal property situations that fell within the concept of a security. Cfr. LUÍS GUILHERME CATARINO, “Ofertas públicas...”, cit., p. 59. Also on this subject, see: MADALENA PERESTRELO DE OLIVEIRA, “Os desafios...”, cit., pp. 187-188.

represent homogeneous rights, and (iii) may be transferred on the market, in abstract terms¹⁸¹.

Despite the possibility of their being classified in this way, it is important to note that the atypical nature of cryptocurrencies and crypto-assets, along with the great variety and potential particularities that may be found, has in all cases led “the various European regulators and European Union Authorities [to take] a cautious position on classifying them as securities”¹⁸².

According to the CMVM, in its press release of 23 July 2018¹⁸³, “tokens may therefore represent a fungible legal situation that can be traded on the market, without prejudice to any guidelines or measures which may be adopted in the light of the international debate under way on this matter”, which leads to the conclusion that, if the tokens offered constitute securities, the corresponding legal rules will apply. Given that the concept of security, as defined in Article 1(g) of the CVM, includes “documents representing homogeneous legal situations that can be traded on the market” it is possible to conclude that tokens issued in an ICO may constitute atypical securities. However, according to the regulatory authority, the classification of a token as a security, “will depend in all instances on analysis of the particular case, in view of the nature, complexity and variability of these arrangements”. By way of example, therefore, (i) a token will be a security if it is a document representing one or more legal situations of a private nature relating to property, or (ii) a token will be deemed a security if it is comparable to typical securities.

In view of all this, the CMVM has reached the following conclusion concerning the legal rules governing ICOs: “in the circumstance that an ICO is directed at investors resident in Portugal and the tokens constitute securities within the meaning of the Securities Code, the relevant national and European Union legislation shall apply, in particular, and without prejudice to other rules, (i) the rules on issue and representations, and also those on transfer, (ii) if applicable, the rules on public offerings, (iii) the rules on the marketing of financial instruments for the purposes of MiFID II, (iv) information quality requirements, (v) the rules on market abuse”¹⁸⁴.

So, if, in a particular case, an investment token is effectively deemed to be a security, this classification will have the consequence of subjecting the token to the rules of the CVM on the emission, transfer and form of representation of securities¹⁸⁵. ICOs will in turn be subject to the Portuguese legal system with regard to the public offerings provided for in Articles 108 et seq. of the CVM, and at a European level they will be subject to the European Prospectus

¹⁸¹ Cfr. FRANCISCO MENDES CORREIA, “Algumas Notas...”, cit., p. 180.

¹⁸² Cfr. LUÍS GUILHERME CATARINO, “Ofertas públicas...”, cit., p. 68.

¹⁸³ Cfr. CMVM communication to entities involved in the launch of “Initial Coin Offerings” (ICOs) concerning the legal classification of tokens, 23 July 2018, available only in Portuguese at <https://www.cmvm.pt/pt/Comunicados/Comunicados/Pages/20180723a.aspx>.

¹⁸⁴ Cfr. CMVM communication to the entities involved in the launch of “Initial Coin Offerings” (ICOs)..., cit..

¹⁸⁵ Cfr. ANTÓNIO GARCIA ROLO, “As criptomoedas...”, cit., p. 292. In relation to ICOs and public offerings of securities (with the consequent application of the CVM), JOÃO VIEIRA DOS SANTOS, *Regulação de Formas...*, cit., pp. 493-465.

Regulation¹⁸⁶, which means that the white paper that is required in ICOs will have to do more than give a brief summary of the rights and obligations attributed to those acquiring the cryptocurrency, and instead will have to include full information corresponding to the mandatory contents of a prospectus, which will then be approved by the CMVM¹⁸⁷, these being requirements that flow, naturally, from investor protection¹⁸⁸. However, FRANCISCO MENDES CORREIA has here warned of the difficulty of conciliating the rules in the CVM regulating public offerings with the reality of investment token ICOs, because of the in-built tendency to anonymity in this phenomenon, which places significant obstacles in the way of investor protection¹⁸⁹.

At an European Union level, there are also no regulations expressly governing ICOs, although it is possible, as we have seen, for ICOs to be deemed included in the category of public offerings of securities. However, it might be said that the first initiative to regulate ICOs at European level was the Directive (EU) 2018/843 of the European Parliament and the Council, of 30 May 2018¹⁹⁰, imposing registration and reporting duties on persons or organisations providing exchange services between virtual currencies and fiat currencies or custodian wallet providers¹⁹¹⁻¹⁹².

c) Crypto-assets as contributions in the share capital of startups

Finally, we will address, in summary terms, the question of whether or not cypto-assets may constitute a shareholders' contribution in a commercial company (public limited company or limited liability company) in the event the startup assumes this legal form and, furthermore, if so, which type of contribution (cash, non-cash (or in-kind) or industry¹⁹³) would be admissible under the Portuguese legal system.

The starting point is to determine whether a crypto-asset can be considered a currency in the proper sense. As there is no definition of currency available in the Portuguese legal system,

¹⁸⁶ Cfr. Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC.

¹⁸⁷ Cfr. ANTÓNIO GARCIA ROLO, "As criptomoedas...", cit., p. 292.

¹⁸⁸ Cfr. FRANCISCO MENDES CORREIA, "Algumas Notas...", cit., p. 180.

¹⁸⁹ In further detail, see FRANCISCO MENDES CORREIA, "Algumas Notas...", cit., pp. 180-183.

¹⁹⁰ Amended Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, Directives 2009/138/EC and 2013/36/EU.

¹⁹¹ Cfr. LUÍS GUILHERME CATARINO, "Ofertas públicas...", cit., p. 67.

¹⁹² Recital (9) of this Directive explains the purpose of these reporting obligations: "[t]he anonymity of virtual currencies allows their potential misuse for criminal purposes. The inclusion of providers engaged in exchange services between virtual currencies and fiat currencies and custodian wallet providers will not entirely address the issue of anonymity attached to virtual currency transactions, as a large part of the virtual currency environment will remain anonymous because users can also transact without such providers. To combat the risks related to the anonymity, national Financial Intelligence Units (FIUs) should be able to obtain information allowing them to associate virtual currency addresses to the identity of the owner of virtual currency. In addition, the possibility to allow users to self-declare to designated authorities on a voluntary basis should be further assessed".

¹⁹³ Article 20(a) of the Portuguese Companies Code address the types of contributions.

we must densify the concepts of “legal tender”¹⁹⁴ (provided for in Article 550 of the Portuguese Civil Code) and discharging power, which are connected with the fact that the currency must necessarily be accepted by the other party¹⁹⁵, and this does not happen with crypto-assets¹⁹⁶. This means that even if crypto-assets are admitted as a form of performance of pecuniary obligations when there is an agreement with the creditor (Article 550, *in fine* of the Portuguese Civil Code)¹⁹⁷, it can never be considered as a type of legal tender.

Additionally, generally, crypto-assets are not considered electronic money¹⁹⁸. Exception made in Article 3(1)(4) of the MiCA, which provides the concept of the “e-money token”¹⁹⁹ - “a type of crypto-asset the main purpose of which is to be used as a means of exchange and that purports to maintain a stable value by referring to the value of a fiat currency that is legal tender”²⁰⁰.

After the legal qualification, it is important to analyse the regime of contributions in Portuguese commercial companies. Regarding crypto-assets, the discussion focuses on the first two types of contribution referred above: (i) cash, or (ii) non-cash.

As for the cash contribution, the currency used must be legal tender in Portugal²⁰¹ – which will be the Euro. This obligation seems to result from Article 14 of the Portuguese Companies Code- “*The amount of share capital must always and only be expressed in legal tender in Portugal*”. In these terms, foreign currencies (e.g., dollar, yuan, pound) cannot be considered as cash contributions, but rather as non-cash contributions, as they are not legal tender in Portugal²⁰². The same reasoning applies to crypto-assets in general. Doubts arise with regard to e-money tokens, which have by reference a currency with legal tender (for example, a cryptocurrency with reference to the Euro). Nevertheless, it is not the crypto-assets itself that

¹⁹⁴ Common definition in point 1 of Recommendation 2010/191/EU, of 22 March 2010 – “*Where a payment obligation exists, the legal tender of euro banknotes and coins should imply: (a) Mandatory acceptance: The creditor of a payment obligation cannot refuse euro banknotes and coins unless the parties have agreed on other means of payment. (b) Acceptance at full face value: The monetary value of euro banknotes and coins is equal to the amount indicated on the banknotes and coins. (c) Power to discharge from payment obligations: A debtor can discharge himself from a payment obligation by tendering euro banknotes and coins to the creditor*”.

¹⁹⁵ From the point of view of the dynamics of compliance, the discharging power of legal tender means that a creditor who refuses to comply is in delay. Cfr. VICTOR HUGO VENTURA, “Anotação ao artigo 550.º do Código Civil”, in *Comentário ao Código Civil – Direito das Obrigações*, Lisboa, Universidade Católica Editora, 2018, p. 519.

¹⁹⁶ JOÃO VIEIRA DOS SANTOS, *Regulação de Formas...*, cit., p. 499.

¹⁹⁷ In the law of obligations, the law requires that payment of monetary obligations must be made in legal tender, thus excluding the possibility of payment through the use of crypto-assets that are not recognised. However, this does not invalidate the fact that the creditor, at his own risk, does not accept payment by means of crypto-assets, operating here the regime of payment in execution that always depends on acceptance by the creditor. Cfr. VICTOR HUGO VENTURA, “Anotação ao artigo 550.º do Código Civil”, cit., p. 519.

This is also what the Court of Justice of the European Union has decided in Case C-264/14 - Skatteverket v. David Hedqvist (22-10-2015) that: “*Transactions involving non-traditional currencies, that is to say, currencies other than those that are legal tender in one or more countries, in so far as those currencies have been accepted by the parties to a transaction as an alternative to legal tender and have no purpose other than to be a means of payment, are financial transactions*”.

¹⁹⁸ JOSÉ ENGRÁCIA ANTUNES, *A Moeda...*, cit., p. 149.

¹⁹⁹ JOSÉ ENGRÁCIA ANTUNES, *A Moeda...*, cit., p. 149-150; JOÃO VIEIRA DOS SANTOS, *Regulação de Formas...*, cit., p. 501.

²⁰⁰ In Portugal, only electronic money institutions registered with the Bank of Portugal may issue electronic money, and entities wishing to issue e-money tokens must register accordingly (Articles 11, 14, 18 and 19 of the Legal Framework for Payment Services and Electronic Money - Decree-Law no. 91/2018, of 12 November). Cfr. JOÃO VIEIRA DOS SANTOS, *Regulação de Formas...*, cit., p. 501.

²⁰¹ ARMANDO MANUEL ANDRADE DE LEMOS TRIUNFANTE, *O regime das entradas na constituição das sociedades por quotas e anónimas*, Coimbra, Coimbra Editora, p. 44.

²⁰² ARMANDO MANUEL ANDRADE DE LEMOS TRIUNFANTE, *O regime*, cit., p. 45.

is legal tender in Portugal and e-money has conventional tender, given that “does not constitute *per se* a means of compliance with pecuniary obligations with mandatory acceptance and discharging power, but requires the voluntary acceptance or consent of third parties (“acceptors”): under the law, the creditor will only be obliged to accept an e-money payment, with the consequent exoneration of the debtor, if the acceptor and the holder are members of the issuer’s payment network”²⁰³.

As cash contributions are not admissible for crypto-assets as mentioned above, it will have to be ascertained whether these can be considered as non-cash contributions (contributions of goods other than cash). For this purpose, it is necessary to proceed to the interpretation of Article 20 of the Portuguese Companies Code, which provides in its paragraph a) the following: “every shareholder shall be obliged: (a) to enter into the company with assets liable to attachment or, in the types of company where this is permitted, with industry”.

However, assets liable to attachment are those that may be dispossessed by the debtor and thus guarantee third-party claims (i.e. these non-cash contributions could only be constituted by assets capable of guaranteeing third parties²⁰⁴), which, from a first analysis, would rule out the possibility of crypto-assets being considered as a non-cash contribution insofar as there is still no legal regulation that identifies crypto-assets as attachable assets, except for cases in which certain crypto-assets are considered to be securities (Article 82 of the Portuguese Securities Code and Article 774 of the Portuguese Code of Civil Procedure). The fact is that this rule (Article 20(a) of the Portuguese Companies Code) corresponds to an inaccurate transposition of Article 7 of the Second Company Law Directive²⁰⁵ which stated that “the subscribed capital may only consist of assets liable to economic evaluation”²⁰⁶. This leads us to adopt a position which does not generate conflicts between Portuguese law and European Union law and therefore it should be admitted that the capital contribution of a partner may consist of any asset susceptible of economic evaluation. This is the majority position of Portuguese doctrine, which means that through this interpretation crypto-assets (mainly those which are not considered as securities) can be considered as non-cash contributions as they are goods susceptible of economic valuation. In conclusion on this point: the contribution of a shareholder, in any type of company, does not necessarily have to consist of an asset liable to attachment, but should only be an asset that is susceptible to economic evaluation²⁰⁷, an interpretation that does not rule out crypto-assets as a form of non-cash contribution.

²⁰³ JOSÉ ENGRÁCIA ANTUNES, *A Moeda...*, cit., p. 154-155.

²⁰⁴ Cfr. PAULO TARSO DOMINGUES, “Anotação ao artigo 20.º do Código das Sociedades Comerciais”, in COUTINHO DE ABREU (coord.), *Código das Sociedades Comerciais em Comentário*, Volume I, Coimbra, Livraria Almedina, 2017, pp. 364-365; JOÃO DE CASTRO MENDES, *Direito Processual Civil – Acção Executiva*, Lisboa, AAFDL, 1980, p. 73.

²⁰⁵ Cfr. PAULO TARSO DOMINGUES, “Anotação ao artigo 20.º do Código das Sociedades Comerciais”, cit., p. 365.

²⁰⁶ Cfr. Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.

²⁰⁷ Cfr. PAULO TARSO DOMINGUES, “Anotação ao artigo 20.º do Código das Sociedades Comerciais”, cit., pp. 366; COUTINHO DE ABREU, *Curso de Direito Comercial, Das Sociedades*, Volume II, 7th ed., Coimbra, Livraria Almedina, 2021, pp. 260-261.

Therefore, taking into account that there is no prohibition on crypto-assets being part of the share capital of a company (Article 14 of the Portuguese Companies Code only requires their amount to be expressed in a currency that is legal tender in Portugal), crypto-assets may constitute non-cash contributions insofar as they have an economic value²⁰⁸.

4. Conclusions

As explored in this paper, in the context of the technology boom of recent years, startups have gained a foothold and consolidated their presence in the business fabric, in Portugal and worldwide, innovation is the most salient feature commonly found in ventures of this type. The first puzzle that this article sought to solve was that of the actual concept of startups, and their legal nature, where it was found that, rather than a specific legal form of enterprise, a startup can be no more than “*a virtual enterprise owned by an individual (the entrepreneur)*”. Despite this distinction between the concepts of startup and company, we looked in particular at the legal forms that startups tend to take in Portugal's business fabric, concluding that it is most advisable for them to be set up as companies by quota shares (*sociedades por quotas*) (especially in the variant of single-member companies by quota shares), because they are much simpler to incorporate than other legal forms such as public limited companies (*sociedades anónimas*), although there are countless startups based in Portugal that have adopted the latter form, despite the more complex structure, and the additional requirements - and costs - that this entails.

Having resolved this first issue, this article went on to examine the funding process for startups which, because of their typical characteristics, generally eschew bank loans. An assessment was made of the risks consistently identified in financing ventures of this type, which risks vary depending on the financing stage at which the startup finds itself. As startups have difficulty in accessing traditional forms of finance, they must look for alternatives, and so we then examined in depth these alternative means of funding, starting with recourse by startups to venture capital, then looking at the use of crowdfunding platforms and lastly at the most innovative means of funding startups: ICOs.

With regard to the use of venture capital, we concluded that this has been the most usual means of funding startups, of all the alternative means of funding, enabling them to develop their technology and grow their business. The great advantage of using venture capital is the strategic advice and know-how that investors can offer to startups and their founders (a real advantage for the enterprise), although it has the potential drawback that its founders

²⁰⁸ It should also be said that as regards the verification of non-cash contributions by the Statutory Auditor (Article 28 of the Portuguese Companies Code) when there is an agreement between the shareholders, he/she cannot refuse in his/her report that crypto-assets are a non-cash contribution, because of their volatility and instability, since there is no stability requirement nor any prohibition in the Portuguese Companies Code. With identical reasoning, but not specifically addressing the role of the statutory auditor under Spanish commercial law- Cfr. IGNACIO RABASA MARTÍNEZ, “Integración del Capital Social com Criptomonedas”, *Revista de Derecho de Sociedades*, 53, Mayo-Agosto 2018, pp. 289-321 (p. 299).

surrender some degree of control over the startup. We also found that, in this type of funding, the informal venture capital sector (where the players are Business Angels) takes a fundamental role. Unlike the banks, the angels are prepared to accept greater risks and their motivation extends beyond the mere business potential of the startup, in other words, they look beyond the bottom line and their expectations of returns.

Recent technology has also allowed another alternative type of funding to emerge. Crowdfunding is a way of securing funding from the public for a given project or venture, where investors are not necessarily professional, insofar as the purpose of crowdfunding platforms is to provide more democratic access to investment than permitted by traditional banking and what are called the “institutional” financial markets. Startups have increasingly opted to finance themselves through these online crowdfunding platforms, in view of the many advantages they offer: (i) it can diminish the risk of the actual venture, serving to publicise it as market research for its founders and as low-cost marketing for the venture itself, (ii) interaction between startup founders and investors over the online platforms is simple, as is the process of establishing a contract between them, (iii) the regulations are largely free of red tape and are designed and structured for the general public and for small and medium-sized businesses. and (iv) it fills a gap in the venture capital market.

The most important legal rules on crowdfunding - fundamental for startups and their founders - are obviously those contained in the new European Union Regulation (EU) 2020/1503 of the European Parliament and the Council, of 7 October 2020, which applies directly in the Portuguese legal system and now governs most equity crowdfunding and peer-to-peer lending, which are the key types of funding for startups that decide to use platforms of this type.

The last alternative means of funding considered in this article is Initial Coin Offerings, which are today the most innovative means of financing startups, considering the global interest that has been aroused by cryptocurrencies. Because of the varied types of tokens on the market, we have seen that regulators, in particular the ESMA and the CMVM, have expressed natural concerns and warned of the risks of ICOs and the growing difficulties of regulating them, issuing additional alerts for investors.

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