



# A legal approach to real estate crowdfunding platforms

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## A legal approach to real estate crowdfunding platforms

Rosa M. Garcia-Teruel

*Abstract.* In the context of a financial and housing crisis, accompanied by credit constraints, a new alternative has recently emerged for those wanting to invest in real estate markets: real estate crowdfunding. Crowdfunding, which was originally intended to fund social projects through donations or loans from a large pool of individuals –via Internet platforms–, has developed into a more sophisticated method of financing. This is the case of real estate crowdfunding, a type of equity crowdfunding that aims to make housing investment available to retail investors, although several hazards have been detected that make these investments less secure. This paper addresses these hazards, analyses the information provided by five Spanish crowdfunding platforms to retail investors and determines whether or not real estate crowdfunding platforms in Spain, as a sharing economy mechanism, are making a contribution to the development of the housing market.

*Keywords:* real estate, crowdfunding, housing, platforms, collaborative economy

### 1. Crowdfunding as a new way to finance housing development

The 2007 financial crisis showed that investing in real estate was not completely safe and that housing prices do not always rise<sup>1</sup>. This has been especially true in those countries that based their economy mainly on the construction sector and that promoted homeownership, such as Spain, the USA, Ireland or the Netherlands. The bursting of the housing bubble in 2007 led not only to a decrease in housing prices and to a general loss of investments in this sector, but also to a spate of mortgage foreclosures due to excessive household debt (in Spain, between 2010-2015 there were a total of approximately 210,377 home evictions due to mortgage arrears and a total of approximately 206,109 evicted tenants<sup>2</sup>), something that revived the continuous debate about whether housing should be considered as an asset or as a fundamental right<sup>3</sup>. Moreover, the aforementioned country has a degraded housing stock, since more than 2 million properties would need renovations before they could be deemed to in compliance with energy saving guidelines<sup>4</sup>, and more than 16 per cent of the population live in dwellings with deficient living conditions<sup>5</sup>.

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<sup>1</sup> BAKER, D. (2008). The housing bubble and the financial crisis. *Real-world economics review*, No. 46, pp. 73-81.

<sup>2</sup> NASARRE AZNAR, S. and GARCIA-TERUEL, R.M. (2018). Evictions and homelessness in Spain 2010-2017. Kenna, P., Nasarre, S., Sparkes, P., and Schmid, C. (eds.). *Evictions and homelessness in Europe*. Cheltenham: Edward Elgar, pp. 292-332.

<sup>3</sup> NASARRE AZNAR, S. (2014). La vivienda en propiedad como causa y víctima de la crisis hipotecaria. *Teoría y Derecho*, No. 16, pp. 10-37.

<sup>4</sup> IDAE. *Rehabilitación energética. Una oportunidad para todos*. Available at: <http://www.idae.es/noticia/rehabilitacion-energetica-una-prioridad-y-una-oportunidad-para-todos> (retrieved: 19.7.2018).

<sup>5</sup> Eurostat (2016). Total population living in a dwelling with a leaking roof, damp walls, floors or foundation, or rot in window frames of floor (Country: Spain).

In the interim, the sharing economy emerged as a consequence of the crisis, the lack of confidence in the financial sector and the growing concern about the environment<sup>6</sup>. Although the concept of a sharing economy is still under discussion<sup>7</sup>, it describes the phenomenon by which peers share access to under utilised goods and services<sup>8</sup>. This concept is often interchangeably used with the term ‘collaborative economy’, which is defined by the EU Commission<sup>9</sup> as ‘(...) the business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods and services often provided by private individuals’. The sharing economy is affecting people's access to several goods and services, such as transport (Uber, Blablacar) and tourism (Airbnb), not only reducing information asymmetries<sup>10</sup> and transaction costs through direct peer-to-peer (P2P) contact, but also creating new challenges for lawmakers<sup>11</sup>. The sharing economy also includes an alternative method to access to financial services: crowdfunding, in which several individuals fund a certain project by means of the Internet, and which ultimately contributes to a more geographically balanced allocation of resources<sup>12</sup> while facilitating the access to credit for those start-ups, small and medium enterprises (SME) and individuals excluded from traditional lenders<sup>13</sup>. Moreover, in this field, an alternative to traditional investments in the housing market has been created: real estate crowdfunding, considered a mechanism that makes real estate development possible with funding from a crowd.

Real estate crowdfunding platforms originated in the United States and were boosted by the 2012 Jumpstart Our Business Startups Act (JOBS Act), which relaxed the restrictive regulations for raising capital in that country<sup>14</sup>. Since then, more than 125 real estate crowdfunding platforms have been created<sup>15</sup>, such as Fundrise, iFunding, Patch of Land or CrowdStreet, promoting more than 733

<sup>6</sup> HAMARI, J. et al (2016). The sharing economy: Why people participate in collaborative consumption. *Journal of the Association for Information Science and Technology*, Vol. 67, No. 9, pp. 2047-2059.

<sup>7</sup> In March 2017 the first COST Action on this topic was created to discuss this concept and the impact of the collaborative economy (COST Action 16121 “From sharing to caring”).

<sup>8</sup> CHENG, M. (2016). Sharing economy: A review and agenda for future research. *International Journal of Hospitality and Management*, No. 57, pp. 60-70. This concept is also known, by some literature, as the peer-to-peer economy or collaborative consumption, according to KOOPMAN, C. MITCHELL, M. and THIERER, A. (2015). The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change. *The Journal of Business, Entrepreneurship and the Law*, Vol. 8, Iss. 2, pp. 528-545.

<sup>9</sup> The EU Commission confirms that collaborative economy involves three actors: service providers, users and intermediaries that connect –via an online platform– providers with users. European Commission (2016). *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European agenda for the collaborative economy*, SWD(2016) 284 final, Brussels, 2 June 2016, p. 3. Note, however, that a disintermediated collaborative economy is every time more present thanks to technologies such as distributed ledgers or blockchain.

<sup>10</sup> DOMÉNECH-PASCUAL, G. (2015). Economía colaborativa y Administración local. *Anuario de Gobierno Local*, No. 1, pp. 35-66.

<sup>11</sup> RANCHORDÁS, S. (2015). Does sharing mean caring: Regulating innovation in the sharing economy. *Minn. JL Sci. & Tech.*, No. 16, pp. 413-475. One example of the convenience of regulating some sharing economy practices is the conflict between the taxi sector and platforms such as Cabify or Uber. Taxi drivers in several Spanish cities started demonstrations in July 2018 to ask for a better regulation of these platforms and to demand that the drivers are not provided with more licences. New York has capped licenses for ride-hailing services (August 2018). <https://www.publico.es/sociedad/huelga-taxistas-uber-cabify-suspenden-temporalmente-actividad-barcelona-agresiones-manifestacion-taxistas.html> and <https://www.nytimes.com/2018/08/08/nyregion/uber-vote-city-council-cap.html> (retrieved: 10.8.18).

<sup>12</sup> Indeed, crowdfunding projects might be financed from anywhere through the Internet. However, certain limitations may still exist to obtain funding from international crowd-lenders due to the information asymmetry. See KIM, H. and KIM, J. (2017). Geographic proximity between lender and borrower: how does it affect crowdfunding?. *Review of Accounting and Finance*, vol. 16, Iss. 4, pp. 462-477.

<sup>13</sup> LEHNER, O.M. GRABMANN, E. and ENNSGRABER, C. (2015), Entrepreneurial implications of crowdfunding as alternative funding source for innovations. *Venture Capital*, Vol. 17 No. 1/2, pp. 171-189.

<sup>14</sup> SCHWEIZER, D. and ZHOU, T. (2016). Do principles pay in real estate crowdfunding?. *SSRN*, working paper, p. 9.

<sup>15</sup> According to Clark, referring to the Crowdfund Capital Advisors’ data. CLARK P. (2016). Inside the Real Estate Crowdfunding Land Rush, 9.5.2016 *Bloomberg*.

projects. In fact, several investment stakeholders<sup>16</sup> are confirming that real estate crowdfunding allows for the democratisation of real estate investment, since it enables developers to solicit funding from the crowd<sup>17</sup> and any kind of investor might enter the real estate market with this mechanism, something difficult in REITs or other types investment funds which usually require a higher minimum investment.

These potential benefits promoted the spread of these platforms to other countries. For example, in France (through Homunity, Koregraf, Lymo, Wiseed, etc.), Germany (Immofunding), Austria (Crowdhouse), Switzerland (Crowdli), UK (Propertymoose, Housecrowd, PropertyPartner) and Spain (Housers, Inveslar), among many others. Thus, taking into account this new phenomenon and the increasing number of these platforms, the aim of this paper is to determine whether real estate crowdfunding is positively contributing to the development of the real estate market as a sharing economy mechanism, to analyse the legal framework and the information provided by five platforms that are operating in Spain, and to investigate the hazards that investors and final users of a property may encounter when using these platforms from a Spanish law perspective. This article finishes with some recommendations for the lawmaker to prevent some of the legal problems that retail investors may find when using these platforms.

## 2. How real estate crowdfunding platform work

Crowdfunding platforms, which were originally designed to fund social projects through donations or loans from a large pool of individuals via Internet-based platforms, have developed into a disruptive method of financing<sup>18</sup>. Indeed, in the context of ongoing credit constraints since 2007, crowdfunding emerged as a way to finance a project without involving traditional lenders. More than 22 per cent of US-citizens have used crowdfunding platforms, while this percentage reaches 30 per cent for people between 18 and 29 (the so-called *millennial* generation)<sup>19</sup>. And real estate investment is taking advantage of this mechanism in the context of restricted bank credit.

In general terms, there are five types of crowdfunding schemes, but hybrid-models may also be developed when mixing them:

- Donation-based crowdfunding: this mechanism aims to collect donations from a pool of individuals to fund a social project. The crowdfunding platform is an intermediary that usually does not obtain any fee for promoting them. People who contribute to these projects do not receive any kind of consideration for doing so. One example of a donation-based crowdfunding platform is Gofundme<sup>20</sup> or Generosity<sup>21</sup>.

<sup>16</sup> See FT Inversión. *Democratización de la inversión inmobiliaria en España. Crowdfunding inmobiliario*. 3.10.2017. Available at: <https://ftinversion.com/democratizacion-la-inversion-inmobiliaria-espana-crowdfunding-inmobiliario-ft-inversion/> (retrieved: 20.5.2018); and El Mundo. *Crowdfunding inmobiliario: la inversión en ladrillo llega a la calle*. 8.4.2016. Available at: <http://www.elmundo.es/economia/2016/04/08/57068deb22601d17468b459e.html> (retrieved: 20.5.2018).

<sup>17</sup> BAKER, C. (2015). Real estate crowdfunding: modern trend or restructured investment model? Have the SEC's proposed rules on crowdfunding created a closed-market system?. *Journal of Bus. Entrepreneurship and the Law*, Vol. IX, no. 21, 22-58.

<sup>18</sup> BRUMMER, C. (2015). Disruptive Technology and Securities Regulation. *Forham Law Review*, Iss. 3, Vol. 84, pp. 977-1052.

<sup>19</sup> Pew Research Center. *Shared, collaborative and on demand: the new digital economy*. May 2016. Available at: <http://www.pewinternet.org/2016/05/19/the-new-digital-economy/> (retrieved: 6.8.2018).

<sup>20</sup> [www.gofundme.com/](http://www.gofundme.com/) (retrieved: 6.8.2018).

<sup>21</sup> <https://www.generosity.com> (retrieved: 6.8.2018).

- Reward-based crowdfunding: the money obtained from the crowd is not considered an investment, but the promoter gives contributors a non-monetary reward instead. This reward might consist of a product before market entrance (pre-sales) or just an acknowledgement for the contribution (e.g. a thank-you note). The former is the case of Panda glasses<sup>22</sup>: the promoter offered a special offer for the first 100 investors; or Pebble watches<sup>23</sup>, which was one of the most funded projects in Kickstarter history at that time.
- Crowdlending: in this case, the money obtained from the investors is considered a loan, and so the promoter of a project has to return it after a certain time. Some real estate crowdfunding projects in Spain (Inveslar<sup>24</sup> and Housers<sup>25</sup>, see below) have been carried out following this type of crowdfunding, meaning that the developer of a building has to return the money loaned together with the payment of the agreed rate of interest. .
- Investment-based crowdfunding: in this case, contributors receive profits from a company (profit-sharing, in some cases through contractual instruments such as silent partnerships) or shares or bonds depending on their contributions (equity crowdfunding). Real estate crowdfunding platforms started off using this scheme (in particular, the equity crowdfunding variant).
- Invoice trading crowdfunding: in this case, companies discount invoices to a crowd in order to receive funds immediately, while the platform enhances the contact between company and contributors and also assesses the invoices' creditworthiness <sup>26</sup>.

Taking into account the different types of crowdfunding available, several real estate crowdfunding schemes are currently being offered to retail investors and so it is not a sole type of investment. However, one of the most common is the equity type <sup>27</sup>, by which the developer offers investors shares in a company.

Within the equity real estate crowdfunding scheme, three players are usually involved: the project promoter, i.e. the person/entity who has the idea of acquiring or renovating a certain building; the individuals (crowd) acting as investors (normally retail ones), who provide the savings needed to develop the building project; and, finally, the crowdfunding platform –the intermediary– that publishes the developers' projects and gives the mandatory information to investors, among other commitments, such as checking the viability of the project<sup>28</sup>. Once investors have granted the amount required to promote the building, an *ad hoc* corporation is created and crowdfunding investors receive shares in the said corporation. The single social purpose of this company is to buy a property, to renovate it when needed<sup>29</sup> and to rent it, until they can sell the property with a profit. As a consequence, crowdfunding investors will receive the returns obtained from renting the property and the value

<sup>22</sup> <https://wearpanda.com> (retrieved: 6.8.2018).

<sup>23</sup> <https://www.pebble.com> (retrieved: 6.8.2018).

<sup>24</sup> <https://inveslar.com/en/index> (retrieved: 6.7.2018)

<sup>25</sup> <https://www.housers.com/en> (retrieved: 6.7.2018)

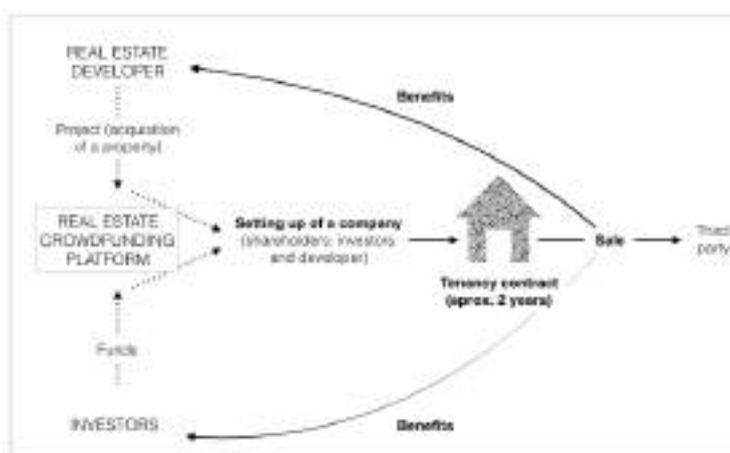
<sup>26</sup> BAECK, P. COLLINS, L. ZHANG, B. *Understanding alternative finance. The UK Alternative Finance Industry Report 2014*. University of Cambridge. Available at: [http://www.sbs.ox.ac.uk/sites/default/files/Entrepreneurship\\_Centre/Docs/OxEPR2/nesta-understaning-alternative-finance.pdf](http://www.sbs.ox.ac.uk/sites/default/files/Entrepreneurship_Centre/Docs/OxEPR2/nesta-understaning-alternative-finance.pdf) (retrieved: 28.5.18).

<sup>27</sup> HERNÁNDEZ SAINZ, E. (2017). Crowdfunding inmobiliario mediante contratos de cuentas en participación: una fórmula de inversión participativa ¿alegal o prohibida?. *Revista de Estudios Europeos*, No. 70, pp. 126-146.

<sup>28</sup> BAKER, C. (2015). Real estate crowdfunding: modern trend or restructured investment model?. Cit. p. 30.

<sup>29</sup> In Spain, real estate crowdfunding investments do not aim to build a property, but only to acquire it and, in some cases, to renovate it (the platform Privalore has some dwellings which will be renovated after the money is collected). However, in platforms based in other countries, developers propose projects to build them, in such a way that the housing stock increases. For example, this happens with the projects from Homunity (France).

assigned to their share rights upon the subsequent liquidation of the company when the building is sold.



**Figure 1:** Equity-based real estate crowdfunding. Source: own elaboration.

Although this equity scheme was the most common when real estate crowdfunding platforms started to operate in 2012, they are now experimenting with other crowdfunding models. Thus, the other models that are being offered to investors are:

1. Lending-based: in this case, the investors contribute to the project as lenders. The developer uses and collects this money to acquire a property, with the aim of selling it with a profit. After the sale, investors will receive their money back plus the agreed interest. Contrary to traditional bank lending, the promoter will not be required to encumber the property with a mortgage, which is usually required when granting a loan of a significant value. Therefore, the former will have a considerable reduction of costs (e.g. Land Registry costs<sup>30</sup>, property valuation), but crowdfunders might also have a reduction of rights, since the loan will not be secured by a mortgage.
2. Real estate crowdfunding through a REIT (called eREIT/iREIT): according to Hu<sup>31</sup>, iREITs are “a digital smart financial real estate Crowdfunding platform making the REITs accessible and affordable for anybody to invest anywhere and anytime with a promising return from the real-estate market, and without taking the risk of the volatile nature of the stock market”. This mechanism mixes crowdfunding and REITs and allows retail investors to participate directly in a REIT, which may be more secure since the returns do not depend on a sole property. Several platforms such as Fundrise (US) offer this possibility. Some Spanish platforms also offer a type of iREITs through SOCIMIs (*Sociedades Cotizadas Anónimas de Inversión en el Mercado Inmobiliario*), which are a type of public limited company with the only social purpose of renting properties<sup>32</sup>. Due to this purpose, they do not have to pay corporate income tax (*impuesto de sociedades*)<sup>33</sup>. The real estate crowdfunding platform Invesreal (<http://www.invesreal.com>) operates through a SOCIMI. Thus, investors contribute with a

<sup>30</sup> Note that in most EU countries, it is necessary to register the mortgage in the Land Registry to effectively create this security, such as in Germany, The Netherlands, Switzerland, Austria, Portugal or Spain. STÖCKER, O. and STÜRNER, R. *Flexibility, Security and Efficiency of Security Rights over Real Property in Europe. Volume III. 2<sup>nd</sup> edition.* Verband Deutscher Pfandbriefbanken, Berlin.

<sup>31</sup> Hu, S. (2017). Intelligent REIT’s in the information age. *Procedia Computer Science*, No. 111, pp. 329-338.

<sup>32</sup> NASARRE AZNAR, S. and RIVAS NIETO, E. (2009). Las nuevas sociedades anónimas cotizadas en el mercado inmobiliario (SOCIMI): ¿Solución para el alquiler de la vivienda en España?. *CEFLegal: revista práctica de derecho*. No. 105.

<sup>33</sup> See their legal framework in Act 11/2009, on limited investment companies in the real estate market. BOE No. 259, of 27.10.2009. Specifically, Art. 9, which establishes this reduction in corporation tax.

certain amount and they receive shares in a SOCIMI, a company that manages a portfolio of properties (and not only one property, as in other real estate crowdfunding schemes). The only difference between investing directly through a SOCIMI and this platform is that Invesreal allows retail investors to be shareholders of a SOCIMI without having a huge amount of savings.

3. Silent partnership (*cuentas en participación*). This is a type of investment-based crowdfunding<sup>34</sup>. Under Spanish Law (Art. 239 Commercial Code<sup>35</sup>), silent partnerships are a contract by which an investor contributes to the project of a company, without receiving part of the shares<sup>36</sup>, they have been used by real estate investors for several years. Investors may obtain profits depending on what they agree. The important fact about this type of contract is that, according to Art. 240 of the Commercial Code, no formalities are required (e.g. a public deed is not compulsory). This does not happen with equity crowdfunding, since a public deed from a Notary needs to be entered into the Commercial Registry (Art. 20 of Spanish Companies Law<sup>37</sup>).
4. Real estate crowdfunding 2.0 through an Initial Coin Offering (ICO): an ICO is a way to raise money from individuals using cryptocurrencies running on a blockchain (e.g. Ethers, Bitcoin), eliminating the traditional platform that intermediates in crowdfunding. The company issues a certain number of “tokens” through a smart contract and individuals may acquire them in exchange for cryptocurrency. Real estate crowdfunding developers, such Real<sup>38</sup>, Alt.estate<sup>39</sup> or Atlant<sup>40</sup>, started to operate with this model in approx. 2017.

### 3. Risks for retail investors and for prospective tenants

Real estate crowdfunding is a new type of financial investment, which, in principle, is considered attractive both for building promoters (they can finance their activity without having access to bank lending) and for retail investors (they can invest in the real estate market without substantial savings). Yet acquiring shares or providing loans *per se* may have several hazards. This was already mentioned by Vogel and Moll<sup>41</sup>, questioning “Why would reputable real estate firms with dependable financial backers go through the headaches of bringing the general public into their deals?”. And they added: “Crowdfunding seemed custom made for sleazy promoters to take advantage of naïve investors”. They indicate at least the following risks: the risk that investors overestimate their expertise; the unrealistic projections (in fact, Spanish real estate crowdfunding platforms offer between a 10 and 15 per cent return, see below); and the lack of a personal relationship with the project sponsor and with other investors. At the same time, Norvell<sup>42</sup> established that “landlords and developers might turn to

<sup>34</sup> EU Commission (2016). *Crowdfunding in the EU Capital Markets Union*. SWD(2016) 154, p. 32.

<sup>35</sup> RD of 22.8.1998. Spanish Gazette No. 289, of 16.10.1885.

<sup>36</sup> VICENT CHULIÀ, F. (2016). El contrato de cuentas en participación no es un contrato de sociedad. *Revista Aranzadi de derecho patrimonial*, No. 41, pp. 31-75.

See also HERNÁNDEZ SAINZ, E. (2017). Crowdfunding inmobiliario mediante contratos de cuentas en participación. Cit.

<sup>37</sup> Spanish Companies Law (*Real Decreto Legislativo 1/2010, de 2 de julio, por el que se aprueba el texto refundido de la Ley de Sociedades de Capital*). Spanish Gazette No. 161, of 3.7.2010.

<sup>38</sup> See the REAL whitepaper at: [https://www.real.markets/static/wp/en/REAL\\_Whitepaper.pdf](https://www.real.markets/static/wp/en/REAL_Whitepaper.pdf) (Retrieved: 20.7.18).

<sup>39</sup> See the Alt.estate whitepaper at: [https://alt.estate/upload/files/altestate\\_whitepaper.pdf](https://alt.estate/upload/files/altestate_whitepaper.pdf) (Retrieved: 20.7.18).

<sup>40</sup> See the Atlant whitepaper at: [https://atlant.io/static/docs/Atlant\\_WP\\_publish.pdf](https://atlant.io/static/docs/Atlant_WP_publish.pdf) (Retrieved: 20.7.18).

<sup>41</sup> VOGEL, J. and MOLL, B. (2014). Crowdfunding for Real Estate. *The Real Estate Finance Journal*, summer-fall, pp. 5-16.

<sup>42</sup> NORVELL, R. (2014). *Real Estate Crowdfunding Platform Receives Major Financial Boost* (Sept. 24, 2014). Available at: <http://www.mpamag.com/real-estate/real-estatecrowdfunding-platform-receives-major-financial-boost-19622.aspx>. (Retrieved: 20.7.18)

crowdfunding because they have failed to acquire financing from banks or other traditional sources, while investors might lack the knowledge necessary to scrutinize potential investments”.

Apart from the abovementioned risks, we have detected numerous other dangers encountered when investing through these platforms, a selection is listed below:

- Governance of the company: the most common scheme used in real estate crowdfunding is when investors, in exchange of their contributions, receive a share of an *ad hoc* corporation (equity crowdfunding). The only social purpose of this corporation is to buy a property, to rent it for a number of years (normally between 1-2) and to sell it when it is most convenient. As a consequence, investors become the owners of the company, but they do not have any kind of right to use the property acquired. Also, depending on their personal interest, they may want to sell the property before the agreed time, which may cause discrepancies between them. For example, in 2016 a building is acquired through real estate crowdfunding, and, according to the information sheet, the property is to be sold in 2018. If in 2018 the housing market is not in the conditions that they expected, some of the shareholders may want to sell the property anyway, even though they are not going to obtain the estimated profits. On the other hand, other investors may want to retain ownership of the property for a few more years until the market rises. As one may see, these decisions may affect the final profits they obtain, and even the possibility of recovering the investment before the agreed term has elapsed.
- Profits are not guaranteed: the profits depend on the fluctuation of the real estate market: if the acquired property cannot be sold for a higher price, investors will not receive profits. In addition, retail investors may find it difficult to diversify the investments when the platform asks for a minimum investment of 1,000€ (see below). As a consequence, the profits depend only on the price of a certain building, which can be very risky. For example, the property can lose value if the neighbourhood becomes less secure or if the City Council decides to build a factory near it, something that does not happen with a REIT or even with eREITs since the returns depend on the value of all their properties.
- Lack of liquidity: one of the main risks of real estate crowdfunding is the lack of liquidity of the shares (equity crowdfunding) or the loans (crowdlending), something that happens in any kind of crowdfunding investment<sup>43</sup>. As we commented before, retail investors acquire part of the shares of a company that develops a building. This is a limited liability company and therefore the shares cannot be transferred freely (in Spain, see arts. 106 and 107 of the Companies Act<sup>44</sup>). Thus, they cannot recover their contributions until the agreed date, even if they need them for a justified reason. That is why some real estate crowdfunding platforms, such as Housers, decided to create their own market within the platform itself, to allow investors to exchange stocks. However, they are not agile markets and not all of the platforms offer this possibility (see below), a similar problem was already witnessed during the preferred shares scandal in Spain<sup>45</sup>.
- The position of retail investors in the company’s bankruptcy proceeding: investors can be affected in the event that the *ad hoc* corporation is the subject of an insolvency proceeding. According to art. 89.3 of the Spanish Bankruptcy Act <sup>46</sup>, investors have an “ordinary loan ” or

<sup>43</sup> According to Delivorias, “in the specific case of equity crowdfunding, the lack of an efficient secondary market where equity-based investors can re-sell their shares”. DELIVORIAS, A. (2017). *Crowdfunding in Europe. Introduction and state of play*. European Parliamentary Research Service.

<sup>44</sup> RDL 1/2010. BOE No. 161, of 3.7.2010.

<sup>45</sup> GARCIA-TERUEL, R.M (2014). Participaciones preferentes. Un producto complejo en manos de consumidores. *Revista Jurídica de Catalunya*, No. 2.

<sup>46</sup> Act 22/2003, on Bankruptcy. BOE No. 164, of 10.7.2003.

even a subordinate one<sup>47</sup>, and so they do not have preference when it comes to recovering their contributions, both in the case of equity real estate crowdfunding and in the case of crowdlending. In addition, if a mortgage loan is necessary to acquire the property, the bank would be paid with preference (Art. 90.1.1 Act on Bankruptcy). An example of this risk happened with the bankruptcy of two real estate crowdfunding developers in Germany in 2017. Zinlands was the platform where these two projects were posted, now the investors are involved in an insolvency proceeding, trying to recover the value of their subordinated loans<sup>48</sup>.

- Bankruptcy of the real estate crowdfunding platform: apart from the bankruptcy of the developer, the insolvency of the platform may also negatively affect investors. This is what happened with the USA-based platform iFunding in 2016<sup>49</sup>, when investors were unable to contact the platform, to get up to date information about their investments, and to receive their returns. In this case, not only investors are affected, but also developers, since the real estate crowdfunding platform is the means by which they contact current and potential investors.
- Crowdfunding 2.0 through ICOs: with this new trend, even more legal uncertainties and risks might appear. First, tokens may be acquired P2P without the intervention of an intermediary who assess the risks and benefits of these products (although some websites, taking into account these drawbacks, have started to assess ICOs<sup>50</sup>). Retail investors only have a whitepaper drafted by the entity interested in raising funds, which given that this is not an impartial source of information, might not provide an accurate explanation about possible risks. Second, the nature of “tokens” is still under discussion and they depend on the ICO<sup>51</sup>: are they an actual share of the property? Are they rights *in rem* (e.g. a usufruct, a “utility token”), which are not regulated by EU securities regulations? Or an actual type of security (“security tokens”)? In fact, a whitepaper issued by Alt.estate, a company that is offering this type of real estate crowdfunding, confirms that an SQM token “allows a token holder or joint group of token holders who own 100% of the tokens to use the underlying property at their own discretion (for example, live or work there)”. Even though this company clarifies the legal nature of the instruments they offer, some more questions may arise: how are investors going to decide who is going to use that property? Should investors have to pay the regular costs of having a property, e.g. taxes or renovations? What are the possibilities of transferring this right to other people? In fact, the European Securities and Markets Authority is warning investors of the high risk of losing their capital, defining ICOs as very risky and highly speculative investments<sup>52</sup>.

In addition, since the property acquired through crowdfunding is going to be rented for a certain period in most cases (except when using crowdfunding 2.0), there may be hazards for the prospective tenant that is going to live there. One should take into account that a real estate crowdfunding project is normally designed to last one or two years, and so the tenancy contract will not be long term. This may promote the use of short-term rentals, which offer less stability to the tenant (e.g. the tenancy for other

<sup>47</sup> When the retail investor has at least 10 per cent of the shares (Art. 93.2.1 of the Bankruptcy Act).

<sup>48</sup> See the Zinland press at: [https://s3.eu-central-1.amazonaws.com/zinsland-public/files/legal/presse/20171206-Presemitteilung-zinsland-conrem-insolvenz\(1\).pdf](https://s3.eu-central-1.amazonaws.com/zinsland-public/files/legal/presse/20171206-Presemitteilung-zinsland-conrem-insolvenz(1).pdf). See also Cash-online.de. *Zinsland zieht Bilanz und kündigt regulierte Produkte an*. Available at: <https://www.cash-online.de/immobilien/2018/zinsland-zieht-bilanz-und-kuendigt-regulierte-produkte-an/415224> (retrieved: 18.7.18).

<sup>49</sup> Crowdfundersider. End of line for iFunding? Real estate crowdfunding site may be done. Available at: <https://www.crowdfundersider.com/2017/08/120678-end-line-ifunding-real-estate-crowdfunding-site-may-done/> (retrieved: 18.7.18).

<sup>50</sup> E.g. <https://icobench.com> (retrieved: 4.9.18).

<sup>51</sup> HACKER, F. and THOMALE, C. (2017). *Crypto-Securities Regulation: ICOs, Token Sales and Cryptocurrencies under EU Financial Law*. *European Company and Financial Law Review* Forthcoming.

<sup>52</sup> <https://www.esma.europa.eu/press-news/esma-news/esma-highlights-ico-risks-investors-and-firms> (retrieved: 10.8.18).

uses under Art. 3 of the Spanish Urban Leases Act<sup>53</sup>, the fixed-term leases of §575 in the German Civil Code<sup>54</sup> or the English Assured Shorthold Tenancy of six months<sup>55</sup>). Moreover, the *ad hoc* company may try to avoid the application of the residential tenancy law, since it may afford protection for the tenant in disputes with the purchasers of the property (principle *emptio non tollit locatum*, e.g. §566 German Civil Code), or they may even try to allow less room for negotiation in case of rent arrears. Thus, allowing these companies to rent the crowd-funded housing to residential tenants may decrease their protection and foster the use of less secure contracts, which goes against recommendation No. 33 of the New Urban Agenda<sup>56</sup>, on the promotion of secure housing. At the end of the day, and referring to Nasarre-Aznar<sup>57</sup>, real estate crowdfunding might be contributing to speculation with this human right.

#### 4. Regulation of real estate crowdfunding platforms in Spain and the protection of retail investors

In the light of this new phenomenon, and taking into account the potential risks for investors and for prospective tenants, one of the important questions is whether these platforms should have to follow a specific set of regulations or if it ought to be compulsory for them to provide investors with certain obligatory information in accordance with strict guidelines and protocols.

At the present time (2018), real estate crowdfunding platforms do not have a specific legislation, and more taking into account that the regulation of crowdfunding platforms is not classified by the type of goods or services offered, but by the nature of the investment (in general, the regulatory attention is focused on equity and lending-based crowdfunding<sup>58</sup>). Although in 2018, the EU Commission proposed the regulation of cross-border European Crowdfunding Service Providers<sup>59</sup> to create a single European Crowdfunding Market, at the moment it is a matter that must be handled individually by each member state, so some of them have recently passed their own domestic regulations on equity crowdfunding and crowdlending, but they do not focus specifically on the real estate sector<sup>60</sup>.

In Spain, the regulation applicable to platforms in general is Act 5/2015<sup>61</sup>. Title V Spanish Act 5/2015 regulates equity crowdfunding and crowdlending platforms in general (*plataformas de financiación*

<sup>53</sup> *Ley de Arrendamientos Urbanos* (Act 29/1994, on 24.11.1994. *Boletín Oficial del Estado* No. 282, of 25.11.1994). See the distinction between tenancies for residential uses and for other types of use under Spanish law, at: GARCIA-TERUEL, R. M. (2017) Spanish law of residential leases: historical developments and current regulation and trends. *RED: Revista Electrónica de Direito*, No. 3, 23 pp.

<sup>54</sup> *Bürgerliches Gesetzbuch*. Published in the Reich Gazette on 24 August 1896.

<sup>55</sup> Chapter II of the Housing Act 1988.

<sup>56</sup> United Nations Conference on Housing and Sustainable Urban Development. *New Urban Agenda*, Quito, 17-20 October 2016.

<sup>57</sup> NASARRE AZNAR, S. (2018). Collaborative housing and blockchain. *Administration*, No. 2, pp. 59-82.

<sup>58</sup> RODRÍGUEZ DE LAS HERAS BALLELL, T. (2017) A Comparative Analysis of Crowdfunding Rules in the EU and U.S. *Stanford TTLF Working Paper Series*, No. 28, pp. 19-20.

<sup>59</sup> According to this proposal “the divergent frameworks, rules and interpretations of business models applied to crowdfunding service providers throughout the Union thus hinders the potential scaling up of crowdfunding activity at EU level”. Among other measures, this proposal regulates a single Union-wide authorisation to exercise their activity of delivering crowdfunding services. European Commission. *Proposal for a regulation of the European Parliament and of the Council on European Crowdfunding Service Providers (ECSP) for Business*. Brussels, 8.3.2018.

<sup>60</sup> See crowdfunding regulations at European Crowdfunding Network. *Review of crowdfunding regulation, 2017*. Available at: [http://www.wardynski.com.pl/wp-content/uploads/2017/10/ECN\\_Crowdfunding\\_Review\\_2017.pdf](http://www.wardynski.com.pl/wp-content/uploads/2017/10/ECN_Crowdfunding_Review_2017.pdf) (retrieved: 18.7.18).

<sup>61</sup> Act 5/2015, on the promotion of business financing. BOE No. 101, of 28.4.2015.

*participativa*), establishing some requirements and duties that they must abide by. The explanatory statement contained in this act highlights the need to regulate this type of investment against the background of credit constraints, which has affected the Spanish economy over recent years, being especially damaging for small and medium enterprises (hereafter, SME). The main features established by Act 5/2015 are basically the following:

- Crowdfunding platforms regulated by Act 5/2015 are defined as those intermediaries between a crowd (investors) and other natural or legal persons who promote a certain project (promoters), using electronic means. As a result, platforms neither have a special interest regarding the funded projects nor are they able to invest in them, being transparent, neutral and diligent (Art. 60 Act 5/2015). Only equity crowdfunding and crowdlending are included in Act 5/2015. Other types of crowdfunding, such as donation-based, zero interest loans and the sale of goods and services are specifically excluded from this regulation (Art. 46.2 Act 5/2015). Act 5/2015 only regulates platforms located in Spain, or ones offering their intermediation services to Spanish investors (Art. 47 Act 5/2015).
- According to Art. 50 Act 5/2015, equity crowdfunding may consist of the acquisition of shares in limited liability companies (this company has to be the promoter of the project) or in other corporations (public limited companies), provided that the emission of the shares does not require an information leaflet (i.e. it is not traded on the stock market). Thus, crowdfunding platforms can neither provide loans themselves, nor offer shares that must be traded in a regulated market or on a multilateral trading facility (Art. 49 Act 5/2015), being unable to provide MiFID<sup>62</sup> services (e.g. offering transferable securities). Therefore, MiFID directives do not affect the crowdfunding activity in Spain.
- The platform needs to be registered with and authorised by the *Comisión Nacional del Mercado de Valores* (CNMV), a Spanish government agency responsible for the regulation of securities in Spain. Once the platform has this authorisation, its corporate name can include the term “*plataforma de financiación participativa*” (PFP). Thus, authorised crowdfunding platforms have a reserved right to use that term as part of the company name, something which cannot be used by other real estate crowdfunding platforms when they do not have this authorisation. In any case, the company needs to have at least 60,000€ of capital or to have a liability insurance policy covering 300,000€ worth of damages.

Act 5/2015 also establishes some duties for these platforms in order to protect prospective investors, by making them aware of the possible risks mentioned above.

- Crowdfunding platforms should include the following information on their websites: information about the way the applied crowdfunding model works, about the risk of losing the investment, the risk of not receiving dividends, the fees charged by the platform, etc. According to Art. 61.2 Act 5/2015, this information should be accessible, permanent, free, updated and visible. In addition, the information about possible risks has to be highlighted. It is a serious infringement not to provide this information and so the platform can be fined (Art. 92.2 Act 5/2015).
- Art. 81 allows crowdfunding platforms to provide their services to two types of investors: qualified investors (*inversor acreditado*, who are experienced investors) and retail investors (those without investment experience). Depending on the type of investor, there may be a limit to the maximum amount they are allowed to invest. According to art. 82 Act 5/2015, retail investors cannot contribute with more than 3,000€ per project. In addition, they cannot invest

<sup>62</sup> Directive 2004/39/EC of the European Parliament and of the Council of Europe, 21 April 2004, on markets in financial instruments, amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC. Official Journal L 145, 30.4.2004.

more than 10,000€ per year in projects from the same platform. Note that qualified investors are:

- Credit institutions, public administrations, institutional investors, etc.
- Companies that meet at least two of these requirements:
  - Their assets have a value of more than 1m€.
  - Their annual turnover is higher than 2m€.
  - Their capital resources have a value of more than 300.000€.
- Natural persons that meet all the following requirements:
  - Have an annual income higher than 50,000€<sup>63</sup> or have financial assets with a value of more than 100,000€.
  - They have expressly applied to be considered a qualified investor.
- Act 5/2015 also seeks to ensure the protection of the investor through a code of conduct: crowdfunding platforms have to be neutral, diligent and transparent and include information about risks on their websites (Arts. 60, and 61 Act 5/2015). This is a way to protect retail investors from losing their assets on crowdfunding platforms, included real estate crowdfunding.

Although the aim of Act 5/2015 is to offer protection for investors, this regulation applies only when these crowdfunding services are “platforms” in a strict sense, thus operating as an independent intermediary between investors and promoters<sup>64</sup>. Therefore, if the real estate crowdfunding operator is not an intermediary and the campaigner collects funds directly, it is not considered a platform and, as a consequence, it does not need to follow the requirements of Act 5/2015<sup>65</sup>. In light of the difficulties of obtaining an authorisation from the CNMV<sup>66</sup>, several Spanish real estate crowdfunding operators are not working as an intermediary, but rather promoting their own projects to avoid this legislation<sup>67</sup>. At the present time, (17.11.2018), only three of them (Icrowdhouse<sup>68</sup>, Housers<sup>69</sup> and Civislend<sup>70</sup>) have CNMV authorisation<sup>71</sup>, while there exist at least seven more which do not follow this regulation.

<sup>63</sup> Which is not easy to earn it in Spain since the average yearly income in 2018 will be 23,156€. INE (2018). *Encuesta anual de estructura salarial*. Available at: [https://www.ine.es/dyngs/INEbase/es/operacion.htm?c=Estadistica\\_C&cid=1254736177025&menu=ultiDatos&idp=1254735976596](https://www.ine.es/dyngs/INEbase/es/operacion.htm?c=Estadistica_C&cid=1254736177025&menu=ultiDatos&idp=1254735976596) (retrieved: 10.8.18).

<sup>64</sup> According to RODRÍGUEZ DE LAS HERAS, platforms have a two-tiered architecture. First, a vertical dimension, in which users contract directly with the platform through a membership agreement. Second, an horizontal dimension, by which different types of users interact each other. This interaction is what differences a true platform from other service providers. See RODRÍGUEZ DE LAS HERAS BALLELL, T. (2017). The Legal Anatomy of Electronic Platforms: A Prior Study to Assess the Need of a Law of Platforms in the EU. *The Italian Law Journal*, vol. 03, No. 01, pp. 157-158.

<sup>65</sup> Note that in cases of real estate crowdfunding platforms, accessed through a Spanish REIT (iREITs), Act 11/2009 will also be applicable.

<sup>66</sup> This was the case of Housers, which after being authorised by CNMV usually took part in the projects and acquired some shares of the companies set up. According to CNMV, this was not a partial intermediary. However, this platform changed its way of functioning and, after that, they obtained the administrative permit to be a crowdfunding platform. See El Confidencial. *La CNMV da luz verde a Housers y propone cerrar el agujero legal del crowdfunding*. Available at: [https://www.elconfidencial.com/empresas/2017-04-03/la-cnmv-da-luz-verde-a-housers-y-propone-cerrar-el-agujero-legal-del-crowdfunding\\_1358646/](https://www.elconfidencial.com/empresas/2017-04-03/la-cnmv-da-luz-verde-a-housers-y-propone-cerrar-el-agujero-legal-del-crowdfunding_1358646/) (retrieved: 17.5.2018).

<sup>67</sup> For example, the Spanish platform Bricks&people is the promoter in all the projects. <https://www.bricksandpeople.com> (retrieved: 17.5.2018).

<sup>68</sup> <https://www.icrowdhouse.com> (retrieved: 17.5.2018).

<sup>69</sup> <https://www.housers.com/> (retrieved: 17.5.2018).

<sup>70</sup> <https://www.civislend.com> (retrieved: 17.5.2018).

<sup>71</sup> See all the equity and lending crowdfunding platforms with this authorisation in <https://www.cnmv.es/portal/consultas/Plataforma/Financiacion-Participativa-Listado.aspx> (retrieved: 17.5.2018). Note that only Icrowdhouse, Housers and Civislend are real estate crowdfunding platforms.

This circumstance results in two different structures of real estate crowdfunding: first, the ones that are indeed a platform, facilitating the contact between different parties (investors and promoters); and second, the other ones that are not platforms, in which prospective investors fund projects of the same real estate crowdfunding operator. It implies that the majority of real estate crowdfunding operators in Spain (7 out of 10) are not required to provide information to the investor, to act as a neutral party, or to have the CNMV's authorisation. It impacts on the rights of retail investors, who, at the end of the day, do not have the same protection depending on the real estate crowdfunding platform they use. In this case, investors can only be protected under consumer protection laws<sup>72</sup> and with the application of special provisions on electronic contracting<sup>73</sup>. Note that the proposal of the EU commission<sup>74</sup> for cross-border crowdfunding legislation aims to avoid these conflicts of interest, confirming that "(...) crowdfunding service providers should be prevented from having any financial participation in the crowdfunding offers on their crowdfunding platforms".

Some measures to also protect investors on crowdfunding platforms without CNMV authorisation should be taken in Spain. For example, the Estonian Creditors and Credit Intermediaries Act<sup>75</sup>, which is also applicable to crowdfunding platforms, does not take into consideration if they are an intermediary or not, and so all platforms have to follow the requirements; Title III of the JOBS Act (USA), which amended Section 4 of the Securities Act 1933, establishes that transactions through crowdfunding shall be "conducted through a broker or funding portal that complies with the requirements of section 4A(a)"; or the German lawmakers, who concluded that crowdfunding through subordinated profit-participating loans (*partiarische Nachrangdarlehen*) should be regulated: that is why *Kleinanlegerschutzgesetz*<sup>76</sup> regulates this mechanism, establishing that platforms are exempt from providing a prospectus, but nevertheless deeming that the rules on the protection of investors still apply<sup>77</sup>. Thus, there is no room for crowdfunding outside the legal requirements in these countries, as opposed to what happens in Spain.

## 5. Crowdfunding platforms in Spain: information provided and liability

### 5.1. Features

When analysing the protection of investors in real estate crowdfunding in Spain, one may see that the operators not subjected to Act 5/2015 are not properly informing retail investors about possible risks. In this section we analyse the information provided to individuals and the services of five of the ten real estate crowdfunding platforms currently operating in Spain<sup>78</sup>: Housers, Icrowdhouse, Privalore, Inveslar and Civislend, chosen for being the ones with most available properties. Note that only three of these platforms (Housers, Civislend and Icrowdhouse) have been granted an authorisation by the

<sup>72</sup> In Spain, under RDL 1/2007, on the Defence of Consumers and Users and other complementary rules. BOE No. 287, of 30.11.2007.

<sup>73</sup> Spanish Act 34/2002, on information society services and electronic contracting. BOE No. 166, of 12.7.2002. It transposes Directive 2000/31/EC.

<sup>74</sup> 19th recital and Art. 7 of the *Proposal for a regulation of the European Parliament and of the Council on European Crowdfunding Service Providers (ECSP) for Business*. Brussels, 8.3.2018.

<sup>75</sup> *Krediidiandjate ja -vahendajate seadus*. Passed on 18.2.2015.

<sup>76</sup> *Kleinanlegerschutzgesetz* (KASG) of 3.7.2015.

<sup>77</sup> Note that in 2017 German lawmakers discussed whether or not real estate crowdfunding platforms should be eliminated from this exemption, thus making it more difficult for them to raise money with the aim of preventing speculation and problems with the housing market. However, they decided not to proceed with the amendment. <https://www.tagesspiegel.de/wirtschaft/immobilien/kleinanlegerschutzgesetz-bundesregierung-schwaermt-nicht-fuer-den-schwarm/19792344.html> (retrieved: 10.8.18).

<sup>78</sup> See them in <https://www.brickfunding.com/es/plataformas> (retrieved 19.5.18).

CNMV. The other ones (Privalore, Inveslar, Alfabricks, Brickstarter, Bricks&People, Invesreal and Urbanitae) are not intermediaries between the developer and the investor, but property developers themselves. This is why they can work without being subjected to Act 5/2015, allowing them to disregard the requirements of this regulation and thus not afford investors with the safeguards that the law intended to provide for them<sup>79</sup>. All the data was obtained from their publicly available websites<sup>80</sup>.

**a) Type of crowdfunding:** None of the projects offered by these five platforms aim to build properties. The model is to acquire a given property and to sell it with a profit (they offer a return of between 4 per cent and a 17 per cent), although the platform Privalore also renovates some of the properties. Housers, Icrowdhouse and Civislend themselves work as intermediaries between promoters and investors. Regardless of the fact that some of the projects from Housers have been carried out through the equity-crowdfunding mechanism, the current investment opportunities are all based on lending-based crowdfunding, the same model used by Civislend. In addition, one of the Housers' projects is funded through "participatory loans" (*préstamos participativos*)<sup>81</sup>, i.e. a loan in which the interest rate depends on the profits made by the company. Note that, according to Art. 20.c) Act 7/1996, participatory loans are unsecured credits (*créditos ordinarios*) below the other unsecured loans regulated under the Spanish Bankruptcy Act. Thus, in an insolvency procedure, these loans have even less guarantees than the instruments connected with equity-crowdfunding (see above). Icrowdhouse establishes that the investor obtains a certain share for the contribution, as part of an equity crowdfunding scheme.

On the other hand, Privalore and Inveslar have their own buildings (meaning Act 5/2015 is not applicable to their investments), and investors can contribute under the silent partnership scheme (*cuentas en participación*) in Privalore, and under crowdlending or equity crowdfunding in Inveslar.

**b) Available properties and location.** Real estate crowdfunding platforms are just starting out in Spain, so they still do not have a representative amount of properties available for investment. Housers currently (July 2018) has only three available projects (located in Madrid; but they are now also operating in Portugal). Two out of the three are properties for housing purposes, and the other one is for commercial use. The financing of two of these properties costs less than 200,000€, but the other one will cost about 560,000€. Civislend also has three properties for housing purposes, with project costs ranging between 500,000€ and 600,000€. Icrowdhouse does not have any available property (it was founded in 2018). Privalore currently has two dwellings in Barcelona, but they have completed more than ten prior projects (prices ranging between 100,000-400,000€). Finally, Inveslar only has one available project to invest in: a villa on the Costa Brava (Begur) with an area of more than 400 sqm. The total value of the property is unknown, but they are asking the crowd to provide 201,000€ worth of funding.

**c) Fees:** not all platforms provide information about the fees when signing up. In addition, since Privalore and Inveslar are not subjected to Act 5/2015, their fees are not considered the price of an intermediation service, but the amount of money that they will receive directly for their role as promoters of a building. Housers has a general fee of 10 per cent of the money invested by any individual (as an intermediation service). Privalore charges a fee of 5.5 per cent of the value of the

<sup>79</sup> HERNÁNDEZ SAINZ, E. (2017). Crowdfunding inmobiliario mediante contratos de cuentas en participación. Cit. p. 139.

<sup>80</sup> Their websites are the following (Spanish versions): <https://www.housers.com/es>, <https://www.icrowdhouse.com>, <https://www.privalore.es>, <https://inveslar.com> and <https://www.civislend.com> (retrieved: 10.8.18).

<sup>81</sup> Regulated under Art. 20 RDL 7/1996, on urgent tax measures, the promotion and liberalization of business activity. BOE No. 139, of 8.6.1996.

property. The other two do not provide public data about charges, so the final amount depends on the type of project. Civislend charges a fee of 1 per cent of the annual investment of each investor.

**d) Target investors:** the five platforms allow both retail and qualified investors to contribute to the projects. Note that Housers, Civislend and Icrowdhouse limit the contributions made by retail investors, since they cannot invest more than 3,000€ per project according to Art. 82 Act 5/2015. The other two platforms (Privalore and Inveslar) do not have this limit, since they are not subjected to Act 5/2015.

One may also appreciate that these investments are targeted to retail investors because the minimum investment is quite low. Housers and Privalore establish a minimum investment of 50€. Civislend 250€. Icrowdhouse and Inveslar, 1,000€.

**e) Information about risks:** the information about possible risks associated with these investments and its presentation to individuals is quite different between platforms. Housers warns on several occasions about the risks of the investment, both in its main website and later in each of the available properties. Icrowdhouse informs you about the risks once you are registered in the platform. The first question the platform asks when registering is whether you are a retail or a qualified investor. If one chooses the option “retail investor”, the platform informs potential contributors about the possibility of losing their investment, the lack of guarantee funds to cover losses, the risk of not obtaining the profits advertised, etc. Civislend informs about the risks too, but in small print at the end of the webpage, even though it is supposed to follow Act 5/2015 requirements.

On the other hand, the only thing that Privalore warns potential investors about is that when the promoter makes a profit, the investors will make one too, otherwise the later may lose their contributions. Finally, Inveslar only points out that real estate crowdfunding has the same regular risks as other investments. The platform states that, as with any kind of investment, real estate crowdfunding can have risks, but in this case, the risk is mitigated by having a real object (the property) and it also claims that the platform selects all the projects carefully. In addition, only 3 of the platforms have their own secondary share market on their websites, to allow investors to transfer them: Housers, Inveslar and Civislend. Thus, they are not providing adequate information about the actual risks that investors may encounter, which may lead in the near future to class action suits against these platforms for not informing them about the risks of losing their money, as happened with other complex financial products that were marketed to consumers, such as swaps or preferred shares.

All this information about Spanish real estate crowdfunding platforms can be seen in the following table:

	HOUSERS	ICROWDHOUSE	PRIVALORE	INVESLAR	CIVISLEND
<b>Type of crowdfunding</b>	Lending-based crowdfunding. Some of them through participatory loans, so the benefits depend on the ones from the project. It works as an intermediary	Equity crowdfunding. It works as an intermediary	Through a silent partnership (profit-sharing) Investors do not have a share of a company. Privalore is the building developer itself. The profits depend on the total benefits of the project. The platform has its own portfolio of properties	Equity and lending-based crowdfunding. The platform has its own portfolio of properties	Lending-based crowdfunding. It works as an intermediary

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<b>Available properties</b>	3 (located in Madrid; they are now also operating in Portugal). Prices range from 200,000€ to 560,000€. Two for housing purposes	0 (they started in 2018)	2 (located in Barcelona). Prices range from 100,000€ to 400,000€. Both for housing purposes	1 villa (Begur, Costa Brava, Spain). Unknown price, but the crowd has to finance approx. 200,000€.	3 (Madrid and Seville). Prices range from 500,000€ to 600,000€. The three for housing purposes
<b>Does it have CNMV permit?</b>	Yes	Yes	No. The platform does not consider as an intermediary itself, since it has its own properties	No. The platform does not consider as an intermediary itself, since it has its own properties	Yes
<b>Fee</b>	10%	n/d	5,5% of the value of the property	n/d	1% every year (on the total investments)
<b>Target investors</b>	Retail / qualified investors	Retail / qualified investors	Retail / qualified investors	Retail / qualified investors	Retail / qualified investors
<b>Minimum investment</b>	50€, but they recommend at least 1.000€	1,000€	50€	Depending on the project, normally 1,000€	250€
<b>Does it have its own market?</b>	Yes (approx. 15 shares are currently being sold)	No	No	Only for loans	Yes (few options)
<b>Information about risks</b>	It is visible. Houser warns about the risks; it specifies that any kind of guarantee fund covers the investments; etc. It warns investors saying that, in a bankruptcy proceeding, they can be considered as subordinate creditors	Once an investor signs up, the platform asks them to select a category: retail or qualified investor. When one selects "retail", it warns about the possibility to lose the investment and the lack of a guarantee fund to cover losses. They also inform about the risk of not getting profits, etc.	The platform says that, when the promoter has benefits, the investor has them too. If not, investors can lose their contributions	The platform says: "as any kind of real estate investment, our investments can have risks, but we select the projects to minimise it. It is important to diversify".	It is not clearly visible (small print). Civislend warns about risks, since investments are not covered by any kind of guarantee fund.

**Table 1:** Comparative of real estate crowdfunding platforms in Spain. Source: own elaboration.

## 5.2. Liability of the platform and the promoter

Taking into account the lack of information provided by some of the real estate crowdfunding projects, this section analyses the possible liability of the platform or the promoter for not providing so. The liability depends on the type of crowdfunding and on the existence or not of a true platform that intermediates between the parties.

First model: real estate crowdfunding platforms that intermediate between investors and promoters (e.g. Housers, Civilend and Icrowdhouse). In this case, one might find different contractual relationships:

- a) The membership agreement between the platform and users (investors and promoters), which might be considered a service agreement. The obligations of these platforms might be either included in the contract, or the ones regulated by Act 5/2015. According to Spanish Act 5/2015, platforms are obliged, in any case, to select and to publish the projects and to develop, establish and exploit means of communication between promoters and investors (Article 51). The breach of any of the obligations included in this agreement might entail contractual liability from the platform, provided that this breach causes damages to the user. In real estate crowdfunding projects, this could be the situation when a platform stops operating and has not provided enough contact details of the promoter to allow investors to claim their loans. Moreover, there are some obligations that real estate crowdfunding platforms might voluntarily assume: for example, they might advice promoters, analyse the projects, and determine the level of risk of each proposal (Article 51.2 Act 5/2015). The breach of these last obligations due to a lack of diligence could also entail contractual liability of the platform. However, it is difficult to define the level of diligence that platforms should have, in particular, regarding the determination of the level of risk. As the platform cannot provide services reserved for credit institutions and investment firms (Article 52.1 Act 5/2015), they cannot legally<sup>82</sup> and materially (due to the high amount of projects received) provide a deep investment advice. It means that, if a real estate crowdfunding project is not successful and the investor does not receive the agreed return (e.g. dividends), platforms are not, in principle, liable for it<sup>83</sup>. On the contrary, if the real estate crowdfunding platform does not include the information required by Act 5/2015 (e.g. that the possible investment losses are not covered by a compensation fund), investors might claim the possible damages caused by this lack of information, which should be proved and assessed in any case (Article 1101 Spanish Civil Code or section III. 3:701 DCFR<sup>84</sup>). Lack of clear and transparent information on other costs of using the platform might not bound investors and promoters when they are considered consumers (Article 6.6 Directive 2011/83/EU<sup>85</sup> and Article 3 Directive 93/13/EEC).
- b) Second, a contract between investors and promoters, which might be a loan, a silent partnership or the acquisition of shares. In this case, the possible liability of the promoter depends on the type of contract and also the obligations included in it. For example, the promoter has to return the capital plus interests in lending-based crowdfunding schemes (Articles 311 and ff. Spanish Commercial Code, 1753 and ff. Spanish Civil Code and section IV.F.1:101 DCFR). When using a silent partnership, and due to its light regulation

<sup>82</sup> Article 52.2 Act 5/2015 confirms that platforms cannot “make personalised recommendations to investors about the crowdfunding projects”.

<sup>83</sup> The causal link between the loss of investment and the level of risk determined by the platform would not be strong enough, since the platform cannot provide a thorough investment advice. See Pañeda Usunáriz, F. (2018). La responsabilidad de las plataformas de financiación participativa. MARTÍNEZ-ECHEVARRÍA, A. and PAÑEDA USUNÁRIZ, F. (dirs.). *Las plataformas de financiación participativa -crowdfunding-*. Cizur Menor, Thomson Reuters Aranzadi, pp. 123-141.

<sup>84</sup> Although not being directly applicable, quotations to the Draft Common Frame of Reference are done in this article to allow a comparative law analysis. VON BAR, C. et al (2009). *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference*. Sellier, Munich.

<sup>85</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

in Spain, the content of the contract is essential to determine a possible contractual liability of the promoter. However, as the investor in a silent partnership has only the right to get part of the agreed benefits (Article 239 Spanish Commercial Code), if the real estate development is not profitable (the price of the property when selling it is lower than the acquisition price), the investor will not receive any amount. In addition, when using investment-based crowdfunding for real estate, the investor receives shares of a limited liability company. But being a shareholder neither ensures to receive dividends (Article 273 Spanish Companies Law<sup>86</sup>), nor that their share rights upon the subsequent liquidation of the company have a certain value (Article 391 and ff. Spanish Companies Law), since it depends on the benefits and debts that the company has. In this case, however, the type of pre-contractual information that was delivered to the investor has to be assessed. The lack of information about the impossibility to claim a specific return in a silent partnership or in investment-based crowdfunding might entail defective consent due to misinformation and thus the avoidance of the contract (Article 1261 and 1300 Spanish Civil Code or section 7:201 DCFR<sup>87</sup>).

Second model: real estate crowdfunding operators that are not considered a platform for not being an intermediary between promoters and investors (e.g. Privalore, Inveslar, Alfabricks, Brickstarter, Bricks&People, Invesreal and Urbanitae). In this case, one might also find a membership agreement, by which the investor accepts the terms and conditions of the operator, so that a breach of one of these obligations might also be a ground for contractual liability. However, apart from this membership agreement, they both enter into an agreement for every investment (e.g. a loan, a silent partnership or the acquisition of shares). As happens in the case of the first model, if pre-contractual information showed that the investment was rather secure and the investor were not aware about possible risks, this misinformation might be the ground for a defective consent and thus for the avoidance of the contract. Moreover, one should take into account that provisions on consumer law might be applicable in this contract (as confirms Article 85 Act 5/2015). Therefore, any kind of unfair term included in the contract will not bind the consumer, provided that this term has not been individually negotiated, it is contrary to the requirement of good faith and it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer (Article 3 Directive 93/13/EEC).

## Conclusion and final recommendation

Real estate crowdfunding is a relatively new phenomenon that started in 2012 in the United States. However, as time goes by, more and more platforms are offering the possibility of investing in real estate through this mechanism and without the need of having a considerable amount of savings. In general, it works as equity or lending based crowdfunding. Therefore, it does not fund social projects, nor allow for the sharing of housing between a group of people, only for the obtainment of a profit from it. With the exception of a few specific cases, Spanish real estate crowdfunding projects do not involve building or renovating properties through this mechanism, in general, the only aim is to acquire

<sup>86</sup> It is only possible when the company has benefits.

<sup>87</sup> In this case, section 7:201 DCFR confirms that "A party may avoid a contract for mistake of fact or law existing when the contract was concluded if the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different terms and the other party knew or could reasonably be expected to have known this and (iii) caused the contract to be concluded in mistake by failing to comply with a pre-contractual information duty or a duty to make available a means of correcting input errors".

a residential property and resell it for a profit, something that is making real estate crowdfunding models be considered a type of “crowd-speculation” and which might negatively affect the prospective tenant who is going to live there. Indeed, real estate crowdfunding platforms are not a sharing economy mechanism: only three of them (Housers, Civislend and Icrowdhouse) allow P2P contact between promoters and investors, and the number of properties managed by these platforms at the present time is not significant (between them they only offer a total of six projects). Other platforms work as a true real estate promoter, with their own properties: the only difference is that they are not funded by traditional lenders, but by retail investors, who do not even have their loans secured by a mortgage with this scheme.

Moreover, real estate crowdfunding is not currently a secure type of investment for crowdfunders because of the lack of liquidity of the shares, possible bankruptcy procedures, and the fluctuations of the housing market. It can be also be difficult to decide together with other investors when the property should be sold. Moreover, only two of these platforms have their own market within the same platform where investors can transfer their shares, but they are not liquid markets, effectively meaning contributors have to keep the investment for the agreed term (normally two years). The experience of the Zinlands platform in Germany, showed us that these risks are possible and that retail consumers should understand them. And new trends in real estate crowdfunding through ICOs and smart contracts running on a blockchain are even more risky, as the European Securities and Markets Authority has confirmed.

To protect retail investors, Spanish Act 5/2015 obliged platforms to inform them about these risks and to limit their maximum investment to 3,000€ per project. However, some real estate crowdfunding platforms in Spain discovered how to work around these requirements: if they do not act as an intermediary but instead they promote their own projects, they do not need the authorisation of the CNMV and thus they do not have to provide the stipulated minimum amount of information or to limit the investments made by retail investors. Only three out of the ten real estate crowdfunding platforms operating in Spain have to meet these requirements; the retail investors on the other platforms are less informed and so are therefore less protected. Litigation for failed investments might increase in the coming years due to the potential liability of the operators for not informing crowdfunders about possible risks of these investments, a trend that has been confirmed through the analysis of the information provided in each website.

All in all, these platforms are not increasing or renovating the housing stock, and the majority of retail investors might be uninformed about the risks of their investments. Taking into account that in the context of credit constraints, they could help to renovate the housing market, further steps should be taken to prevent the abovementioned risks. Some of the recommendations applicable to any country that decides to regulate these platforms, might include the following:

- Fundraising should only be allowed for platforms that are intermediaries and for others that also abide by the established requirements (in Spain, Act 5/2015), as required by the JOBS Act in the USA or as the European Parliament is recommending in its proposal on European Crowdfunding Service Providers (2018). As we have seen, allowing some operators to avoid the specific regulations and not adequately inform retail investors may lead to some of these investors being left unprotected, taking into account that real estate crowdfunding may have several hazards. At the same time, if these operators are not working as an intermediary, this cannot be considered a sharing economy mechanism, but only a modern trend for real estate developers to obtain funding from the crowd instead of getting it from traditional lenders, which might be more costly and difficult for them.

- Real estate crowdfunding investments should be preferably limited to properties that are for purposes other than housing, in order to prevent the promotion of short-term and unsecure rental contracts, since investors may want to get more profits at the cost of reducing tenant's rights. Thus, two consumers might be confronted here: retail investors and the prospective tenants of the promoted housing. Even though the current number of real estate crowdfunding projects is not high enough to cause a negative effect on the housing market, the lawmaker should anticipate this situation in view of the growing trend and the emergence of new models, such as crowdfunding 2.0.
- Taking into account the possible risks, other real estate crowdfunding models should be promoted to reduce the risks of this investment, such as eREITs, since they allow a complete diversification of risk. Note that without a large amount of savings, this diversification might be difficult for retail investors to achieve in equity and lending crowdfunding.
- Finally, positive incentives should be given to real estate crowdfunding platforms or projects that aim to build or renovate properties, and not only to speculate with their value. This aim would allow them to make an actual positive contribution in those housing markets that have a lack of available properties or that have a housing stock that is not in a good state of repair.

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