Fintech

Contributing editors
Angus McLean and Penny Miller

2018

GETTING THE DEAL THROUGH

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Fintech 2018

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Simmons & Simmons

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CONTENTS

Preface

Fintech 2018

Second edition

Getting the Deal Through is delighted to publish the second edition of *Fintech*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Belgium, the Czech Republic, Indonesia, Korea, the Netherlands, Singapore, Spain, Sweden and the United Arab Emirates.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Angus McLean and Penny Miller of Simmons & Simmons, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
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Introduction

Angus McLean and Penny Miller
Simmons & Simmons

Since its emergence into the mainstream over the last few years, the financial technology (fintech) sector has captured the interest and imagination of entrepreneurs, investors, governments and regulators, not to mention incumbent financial services institutions. While those incumbent businesses have been working hard to evaluate the risks (and the potential benefits) created by the fintech revolution, lawyers and regulators around the globe have increasingly been grappling with the legal and regulatory issues thrown up by these new disruptive technologies and business models.

What is fintech?
The term 'fintech' is now used to describe a very broad range of business types. Peer-to-peer (or marketplace) lending, equity crowdfunding, remittance, payments, digital currency, personal finance and wealth management (including 'robo-advice') businesses are all commonly captured under the banner. However, the term is also used to refer to start-up and digital-only banks and software businesses that provide technology solutions to the financial services industry. This includes a growing number of 'regtech' businesses, which offer software to assist financial services businesses in complying with their growing regulatory obligations, and 'insurtech' businesses, which provide insurance products and technology solutions. The term is also increasingly synonymous with the plethora of businesses and consortia that are investigating ways in which distributed ledger (or 'blockchain') technology (the software system that underpins digital currencies like bitcoin) can be applied to other aspects of the financial services industry.

Regulatory impact
Each of these 'verticals' has its own unique set of legal issues, but there are important commonalities too; in particular, the impact of financial services regulation on the fintech industry. Despite many adopting the stereotypical trappings of Silicon Valley 'tech' start-ups (eg, jeans, trainers and the odd ping-pong table), fintech businesses are complex and very often operate in (or very close to) regulated areas. The burden of regulatory compliance is difficult for any business to manage, even banks with armies of legal, risk and compliance experts. An added complication for fintech businesses is that their new business models may well not fit squarely within the existing regulatory framework that is typically designed with traditional financial services businesses in mind. Increasingly new rules are also being introduced to regulate different areas of the fintech industry. It is little wonder, therefore, that many fintech businesses at all stages of their lifecycles cite regulatory compliance as their number one headache.

It is this issue that has, in part, led a number of regulators around the world, including in the UK, Australia, Singapore, Abu Dhabi, Hong Kong, Thailand, Indonesia, Japan, Canada and Bahrain, to announce or investigate the establishment of 'regulatory sandboxes'. These initiatives are intended to allow new fintech business models and technologies to be tested under the supervision of the regulator before they have received full authorisation. The relevant regulator can then evaluate the risks presented by the new business models and technologies and work out whether they should be regulated under any existing regimes or if new regulations are required.

Numerous regulators have also followed the UK's FCA and Australia's ASIC in setting up special support services that provide informal feedback to innovative fintech businesses on the regulatory implications of their business models. Still more regulators have established 'fintech bridges' with regulators in other jurisdictions, although the nature and benefit of these arrangements is not always clear. The extent and patchwork nature of these regulatory initiatives is now such that they are difficult to keep on top of. With this in mind, we have included a new question 16 in this edition of the guide (in addition to the previous question 15) to provide a snapshot of the current landscape of regulatory initiatives in this area. However, readers should be aware that the frequency with which regulators are launching new fintech initiatives means that the answers to these questions may well need to be checked because in certain jurisdictions they will inevitably become out of date relatively quickly.

Regulatory change driving new fintech business models
In addition to helping new fintech businesses navigate their regulatory regimes, many regulators are themselves providing the catalyst for new fintech business models to emerge through the new regulations they are promulgating. In Europe there is a host of businesses emerging to take advantage of opportunities created by new regulations that will come into force over the next 12 months. This includes a range of fintech businesses that are seeking to leverage the enhanced access to payment systems and customer financial data that will be enabled by the second Payment Services Directive (PSD2), coming into full force in January 2018. Other businesses are taking advantage of other regulations, such as the second Markets in Financial Instruments Directive (MiFID II) and the General Data Protection Regulation (GDPR), by developing technology solutions that help institutions comply with elements of those new regulations.

Pivots
Lawyers advising (and investors investing in) early-stage fintech businesses should also keep in mind that those businesses often change direction and business models (referred to in tech parlance as a 'pivot') several times during their first few years of operation. Therefore, legal documentation and regulatory permissions put in place at the outset of a business' lifecycle may soon become out of step with what the business is actually doing in practice.

This publication is intended to provide a user-friendly resource to help fintech entrepreneurs and their advisers and investors around the world navigate the often complex key legal and regulatory issues on which we are most often asked to advise.

In this second edition of the publication, we have made several changes to the questions covered by the guide to reflect the way in which the fintech sector has evolved in the 12 months that have passed since the first edition was published. However, even since we finalised the new questions for this edition significant new issues have arisen in areas such as digital currency (in particular the novel legal and regulatory issues thrown up by the emergence of initial coin offerings (ICOs)). Accordingly, we will inevitably have to update the questions when we turn our mind to the third edition, so we would very much value feedback on other areas that we should cover in the future as the sector continues to evolve. In the meantime, we hope this edition serves as a valuable reference point wherever you are on your fintech journey.

Australia

Peter Reeves
Gilbert + Tobin

Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

A person who carries on a financial services business in Australia must hold an Australian financial services licence (AFSL), or be exempt from the requirement to be licensed.

The Corporations Act 2001 (Cth) (the Corporations Act), which is administered by the Australian Securities and Investments Commission (ASIC), states that a financial services business is taken to be carried on in Australia if, in the course of the person carrying on the business, they engage in conduct that is intended to induce people in Australia to use the financial services they provide or is likely to have that effect, whether or not the conduct is intended, or likely, to have that effect in other places as well.

Broadly, financial services include the provision of financial product advice, dealing in financial products (as principal or agent), making a market for financial products, operating registered schemes and providing custodial or depository services.

A financial product is a facility through which, or through the acquisition of which, a person makes a financial investment, manages a financial risk or makes a non-cash payment. Examples of financial products include securities (eg, shares and debentures), interests in collective investment vehicles known as managed investment schemes (eg, units in a unit trust), payment products (eg, deposit products and non-cash payment facilities), derivatives and foreign exchange contracts.

The definitions of financial service and financial product under the Corporations Act are very broad and will often capture investment, marketplace lending, crowdfunding platforms and other fintech offerings.

Arranging (bringing about) deals in investments (ie, financial products), making arrangements with a view to effecting transactions in investments, dealing in investments as principal or agent, advising on investments, and foreign exchange trading may trigger the requirement to hold an AFSL if such activities are conducted in the course of carrying on a financial services business in Australia. Consumer credit facilities and secondary market loan trading are generally regulated under the credit licensing regime (discussed below), however arrangements that are established to facilitate investment or trading in such products (eg, marketplace lending or securitisation) may also trigger the requirement to hold an AFSL.

An AFSL is not required to be held in relation to advising on and dealing in factoring arrangements provided certain conditions are met, such as the terms and conditions of the factoring arrangement being provided to any retail client before the arrangement is issued and an internal dispute resolution system that complies with Australian standards being established and maintained.

Generally, an entity that takes deposits must, in addition to holding an AFSL, be an authorised deposit-taking institution (ADI). The Australian Prudential Regulation Authority (APRA) is responsible for the authorisation process (as well as ongoing prudential supervision).

A person who engages in consumer credit activities in Australia generally must hold an Australian credit licence (ACL), or be exempt from the requirement to be licensed.

2 Is consumer lending regulated in your jurisdiction? Describe the general regulatory regime.

Consumer lending is regulated under the National Consumer Credit Protection Act 2009 (Cth) (the NCCP Act) which is also administered by ASIC. The NCCP Act applies to persons or entities that engage in consumer credit activities, which includes the provision of a credit contract or lease, securing obligations under a credit contract or lease and providing credit services.

The NCCP Act only applies to credit services provided to natural persons or strata corporations, wholly or predominantly for personal, household or domestic purposes. However, it is anticipated that this regime will be extended to capture small business lending.

Where the NCCP Act applies, the credit provider must hold an ACL or be exempt from the requirement to hold an ACL.

In a retail marketplace lending context (as opposed to business to business), the regime under the NCCP Act and the obligations imposed mean that in Australia, the platform structure is not truly peer to peer.

ACL holders are subject to general conduct obligations, including:

- acting efficiently, honestly and fairly;
- being competent to engage in credit activities;
- ensuring clients are not disadvantaged by conflicts of interest;
- ensuring representatives are competent and comply with the NCCP Act;
- having internal and external dispute resolution systems;
- having compensation arrangements;
- having adequate resources (including financial, technological and human resources) and risk management systems; and
- having appropriate arrangements and systems to ensure compliance.

ACL holders are also subject to responsible lending obligations to make reasonable enquiries of consumers' requirements and objectives, verify consumers' financial situation and assess whether the proposed credit contract is suitable for consumers.

There are also prescriptive disclosure obligations relating to the entry into, and ongoing conduct under, consumer credit contracts and leases. Consumers are entitled to challenge unjust transactions, unconscionable interest or charges and apply for a variation on hardship grounds.

All ACL holders must submit annual compliance reports to ASIC disclosing any instances of non-compliance during the reporting period.

Consumer lending may also be subject to the consumer protection regime in the Competition and Consumer Act 2010 (Cth) (the Consumer Law).

3 Are there restrictions on trading loans in the secondary market in your jurisdiction?

If a secondary market is effected in a marketplace lending context, an AFSL may be required, and if the loans traded are consumer loans within the meaning of the NCCP Act, the offeror and acquirer of the loans may require an ACL.

Packaging and selling loans in the secondary market may also trigger the requirement to hold either or both an AFSL or ACL, depending on the structure of the product and whether the loans are consumer

loans (however, exemptions from the requirement to hold an ACL are available for securitisation and special purpose funding entities).

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would generally fall within the scope of any such regime.

Collective investment schemes in Australia can be 'managed investment schemes' (MIS) (which can be contract-based schemes, unincorporated vehicles (typically structured as unit trusts or unincorporated limited partnerships)) or bodies corporate (which are incorporated and typically structured as companies or incorporated limited partnerships).

Depending on the structure, a platform or scheme operated by a fintech company may fall within the scope of the Australian collective investment schemes regulations. They may also be subject to AFSL, ACL, Consumer Law and financial services laws relating to consumer protection under the Australian Securities and Investments Commission Act 2001 (Cth) (the ASIC Act).

Unincorporated structures

Generally, an MIS that is operated by a financial services firm or a promoter of MISs and that is open to retail clients, is required to be registered with ASIC. The operator of such an MIS (a responsible entity) will, typically, need to hold an AFSL covering the provision of general financial product advice and dealing services in relation to interests in the scheme and the financial products and assets held by the scheme, and to operate the scheme.

The responsible entity must also comply with licence conditions and financial services laws. There are specific requirements relating to the content of the scheme's governing document, compliance arrangements and offer documents, and there are obligations to report to ASIC and audit scheme accounts.

The responsible entity must be a public company with at least three directors (two of whom are ordinarily resident in Australia) and it generally must hold unencumbered and highly liquid net tangible assets of at least the greater of A$10 million or 10 per cent of the average responsible entity revenue, unless an external custodian is engaged.

If the MIS is not required to be registered, the licensing, compliance, disclosure and regulatory capital requirements are generally less onerous.

Incorporated structures

Australian companies are incorporated and regulated under the Corporations Act. Broadly, companies may be proprietary companies limited by shares or public companies limited by shares. All companies must have at least one shareholder, which can be another company. A proprietary limited company must have at least one director who ordinarily resides in Australia. A public company must have at least three directors, two of whom ordinarily reside in Australia. Directors have specific duties, including in relation to acting with care and diligence, avoiding conflicts of interest and avoiding insolvent trading, for which they may be personally liable in the event of non-compliance. All companies must report changes to its officers, and share capital and company details to ASIC. Large proprietary companies, public companies and foreign-controlled companies must lodge annual audited accounts with ASIC which are made publicly available.

Australian fintech companies may meet the criteria for classification as an 'early stage innovation company' (ESIC), which includes expenditure of less than A$1 million and assessable income of less than A$200,000 in an income year, having only recently been incorporated or commenced carrying on a business and being involved in innovation. Tax incentives are available for investors in ESICs.

Limited partnerships may be incorporated in some or all Australian states and territories (the incorporation process is broadly similar across jurisdictions). Once incorporated, a partnership must notify the relevant regulator of changes to its registered particulars. Incorporation is typically sought in connection with an application for registration as a venture capital limited partnership (VCLP), or early stage venture capital limited partnership (ESVCLP) under the Venture Capital Act 2002 (Cth) (VCA), which are partnership structures commonly used for venture capital investment (including investment in fintech) due to favourable tax treatment.

New structures

The government has proposed the introduction of two new collective investment vehicle (CIV) structures – a corporate CIV and a limited partnership CIV.

It is expected that the proposed CIVs will take a similar form to the corporate and partnership CIVs used in other jurisdictions (eg, in the United Kingdom under the Undertakings for Collective Investment in Transferrable Securities regime). The corporate CIV will likely involve a central investment company that manages underlying pooled assets, with investors holding securities in the company. The limited partnership CIV will likely involve investors joining as passive partners and assets managed by a managing partner.

The new structures will be required to meet similar eligibility criteria as managed investment trusts, including being widely held and engaging in primarily passive investment. Investors will be taxed as if they had invested directly in the underlying asset. It will be possible for the structures to be offered to both Australian and offshore investors, aligning with the proposed Asia Region Funds Passport (ARFP) initiative (see question 6).

At the time of writing, it is expected that corporate CIVs will be introduced by July 2017 and limited partnership CIVs by July 2018.

5 Are managers of alternative investment funds regulated?

There is no separate regime for alternative investment funds in Australia. Australian investment funds, and fund managers, are all generally subject to the same regulatory regime. However, funds offering particular asset classes may be subject to specific disclosure requirements (eg, property or hedge fund products).

6 May regulated activities be passported into your jurisdiction?

Australia has cooperation (passport) arrangements with the regulators in the United States, the United Kingdom, Germany, Hong Kong, Singapore and Luxembourg, which enable foreign financial service providers (FFSP) regulated in those jurisdictions to provide financial services to wholesale clients in Australia without holding an AFSL.

Passport relief is available subject to the FFSP satisfying certain conditions, which include providing materials to ASIC evidencing registration under the laws of the provider's home jurisdiction, consenting to ASIC and the home regulator sharing information, appointing an Australian local agent and executing a deed poll agreeing to comply with any order made by an Australian court relating to the financial services provided in this jurisdiction.

Passport relief is only available in relation to the provision of financial services to wholesale clients, and the FFSP must only provide in Australia those financial services it is authorised to provide in its home jurisdiction. Before providing any financial services in Australia, the FFSP must disclose to clients that it is exempt from the requirement to hold an AFSL and that it is regulated by the laws of a foreign jurisdiction. The FFSP must also notify ASIC of the occurrence of any significant matters (eg, investigations or regulatory actions) applicable to the financial services it provides in Australia.

The instruments effecting passport relief were due to expire ('sunset') between 1 October 2016 and 1 April 2017. In late 2016, ASIC simultaneously repealed the passport relief instruments and extended the operation of the relief to 1 October 2018. During the transitional period, ASIC will review the framework for passport relief and intends to release a consultation paper in January 2018 with its proposals to remake relief.

Australia is also a founding member of the ARFP, which is a region-wide initiative to facilitate the offer of interests in certain collective investment schemes established in ARFP member economies. Once implemented, the ARFP will facilitate the offer of Australian registered MISs in member economies, subject to compliance with home economy laws relating to the authorisation of the scheme operator, host economy laws relating to the scheme's interaction with clients (eg, disclosure) and special passport rules relating to registration, regulatory control and portfolio allocation. The member economies are currently working towards implementing domestic arrangements and the ARFP is expected to be effective by the end of 2017.

7 May fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

A foreign company that carries on a business in Australia (including a financial services business) must either establish a local presence (ie, register with ASIC and create a branch) or incorporate a subsidiary. Certain activities will cause an entity to be deemed to be carrying on business in Australia. Generally, the greater the level of system, repetition or continuity associated with an entity's business activities in Australia, the greater the likelihood that the registration requirement will be triggered. An insignificant and one-off transaction will arguably not trigger the registration requirement; however, a number of small transactions occurring regularly, or a large one-off transaction, may.

Generally, if a company obtains an AFSL it will be carrying on a business in Australia and will trigger the registration requirement.

8 Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

Peer-to-peer or marketplace lending is regulated within the existing consumer protection, financial services and credit regulatory frameworks. Retail peer-to-peer or marketplace lending platforms are often structured as MISs and there will generally be an AFSL and ACL within the structure.

ASIC has published guidance on advertising marketplace lending products, which promoters should consider in addition to general ASIC guidance on advertising financial products. The guidance notes that references to ratings of borrowers' creditworthiness should not create a false or misleading impression that they are similar to ratings issued by traditional credit rating agencies and that it is not appropriate for comparisons to be made between marketplace lending products and banking products.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

In March 2017, the Corporations Amendment (Crowd-sourced Funding) Act (Cth) (the CSF Act) received royal assent, providing a regulatory framework for crowd-sourced equity funding (CSF) in Australia. The CSF Act, among other things, sets out requirements for eligible companies and eligible offers, requirements for how the offer must be made and obligations on CSF intermediaries (ie, the platform operators) in respect of platforms. The CSF Act includes the following features:

- the offers must be made by 'eligible CSF companies' – unlisted public companies with less than A$25 million in consolidated gross assets and less than A$25 million in annual revenue;
- the offer must meet certain requirements, including a fundraising cap of A$5 million in any 12-month period;
- the offer must be made via a 'CSF offer document' which will involve reduced disclosure requirements, and must be published on the platform of a single CSF intermediary;
- CSF intermediaries must be licensed to provide crowdfunding services; and
- investment caps for retail investors of A$10,000 per issuer per 12-month period.

As part of the Federal Budget 2017, the government moved to extend the reach of the CSF reforms to proprietary companies. Features of the draft legislation include:

- eligibility requirements: a CSF eligible company includes proprietary companies with at least two directors that also satisfy any other prescribed regulatory requirements;
- disclosure requirements: CSF offers must be made via a CSF offer document, which will involve reduced disclosure requirements; and
- CSF shareholders not to count towards member limit: a CSF shareholder, being an entity that holds securities issued pursuant to a CSF offer, is not counted towards the 50-member statutory limit for proprietary companies.

10 Describe any specific regulation of invoice trading in your jurisdiction.

Factoring arrangements generally require that the factor hold an AFSL; however, regulatory relief is available such that if certain conditions are met (around terms and conditions and dispute resolution processes) an AFSL is not required. However, Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (the AML/CTF Act) requirements (see below) generally apply in relation to factoring arrangements. The factor could also be taken to be carrying on business in Australia in relation to the factoring arrangements and could trigger the ASIC registration requirement described above.

Whether an invoice trading business is otherwise regulated within the existing consumer protection, financial services and credit regulatory frameworks will depend on the structure, including whether there are consumer debts being traded.

11 Are payment services a regulated activity in your jurisdiction?

Payment services are regulated across several pieces of legislation and industry regulations and codes.

Payment services may be regulated as financial services under the Corporations Act where such service relates to a:

- deposit-taking facility made available by an ADI in the course of carrying on a banking business; or
- facility through which a person makes a non-cash payment.

In such circumstances, the service provider must hold an AFSL or be exempt from the requirement to hold an AFSL.

Payment services relating to a deposit taking facility or a purchased payment facility must be provided by an APRA-regulated ADI. Payment systems and purchased payment facilities (eg, smart cards and electronic cash) are regulated under the Payment Systems (Regulation) Act 1998 (Cth) which is administered by the Reserve Bank of Australia (RBA).

Payment services are generally 'designated services' under the AML/CTF Act. The AML/CTF Act regulates providers of designated services, referred to as 'reporting entities'. Key obligations include enrolling with the Australian Transaction Reports and Analysis Centre (AUSTRAC); conducting due diligence on customers prior to providing any services; and adopting and maintaining an AML/CTF programme and reporting annually to AUSTRAC and as required on the occurrence of a suspicious matter, a transfer of currency with a value of A$10,000 or more, and all international funds transfer instructions.

There are a number of industry regulations and codes that also regulate payment services in Australia, including the regulations developed by the Australian Payments Clearing Association, the Code of Banking Practice and the ePayments Code. Although such codes are voluntary, it is common for providers of payment services to adopt applicable codes.

12 Do fintech companies that wish to sell or market insurance products in your jurisdiction need to be regulated?

Companies must be authorised by APRA in order to carry on an insurance business in Australia, and companies must hold an AFSL in order to market or sell insurance products in Australia.

13 Are there any legal or regulatory rules in your jurisdiction regarding the provision of credit references or credit information services?

The provision of credit references in Australia is subject to the Privacy Act 1988 (Cth) (the Privacy Act). The Privacy Act provides that only credit reporting agencies (corporations that carry on a credit reporting business) are authorised to collect personal information, collate such information in credit information files and disclose this information to credit providers. Credit reporting agencies must comply with obligations under the Privacy Act with regard to the use, collection and disclosure of credit information.

14 Are there any legal or regulatory rules in your jurisdiction that oblige financial institutions to make customer or product data available to third parties?

There are legal and regulatory rules that oblige financial institutions to make customer or product data available to third parties. For example, the AML/CTF Act requires an ordering institution (as defined in that act) to pass on certain information about a customer (a payer) and a transaction to other entities in a funds transfer, where such information may include customer and product data.

Legal and regulatory rules also require a financial institution to disclose customer or product data to regulators in certain circumstances (generally breach or likely breach of an applicable requirement).

15 Does the regulator in your jurisdiction make any specific provision for fintech services and companies? If so, what benefits do those provisions offer?

The ASIC Innovation Hub is designed to foster innovation that could benefit consumers by helping Australian fintech start-ups navigate the Australian regulatory system by providing access to informal assistance intended to streamline the licensing process for innovative fintech start-ups.

ASIC has implemented a regulatory sandbox, the features of which include a testing window that allows certain financial services and products to be provided without a licence; an ability for sophisticated investors to participate with a limited number of retail clients (within monetary exposure limits); and modified conduct and disclosure obligations.

As part of the Federal Budget 2017, the government announced plans to legislate an enhanced regulatory sandbox encouraging testing of a wider range of financial products and services without a licence. The regulatory sandbox will include an extended 24-month testing time frame, providing eligible businesses with a greater window to test their products.

ASIC has also released guidance on issues that providers need to consider when providing digital advice (which is advice that is produced by algorithms and technology).

AUSTRAC's newly established Fintel Alliance has announced an innovation hub targeted at improving the fintech sector's relationship with the government and regulators. The hub will test a regulatory sandbox for fintech businesses to test financial products and services without risking regulatory action or costs.

16 Does the regulator in your jurisdiction have formal relationships or arrangements with foreign regulators in relation to fintech activities?

ASIC has arrangements with the Hong Kong Securities and Futures Commission (SFC), the Monetary Authority of Singapore (MAS), the UK's Financial Conduct Authority (FCA), Canada's Ontario Securities Commission (OSC), the Capital Markets Authority of Kenya (CMA), Indonesia's Otoritas Jasa Keuangan (OJK), the Japan Financial Services Agency (JFSA) and the Malaysian Securities Commission (SC).

Under ASIC's agreements with CMA and OJK, the regulators have committed to sharing information in their respective markets relating to emerging market trends and the regulatory issues arising as a result of growth in innovation. Under ASIC's agreements with SFC, FCA, MAS, OSC, JFSA and SC, the regulators will be able to refer to one another innovative businesses seeking to enter the others' market.

Under ASIC's agreement with the FCA, innovative businesses will also be given help during the authorisation processes with access to expert staff and, where appropriate, the implementation of a specialised authorisation process. Following authorisation, the businesses will have a dedicated regulator contact for a year.

ASIC is also signatory to the IOSCO Multilateral Memorandum of Understanding, which has committed over 100 regulators to mutually assist and cooperate with each other, particularly in relation to the enforcement of securities laws.

17 Are there any local marketing rules applicable with respect to marketing materials for financial services in your jurisdiction?

Marketing financial services may itself constitute a financial service requiring an AFSL, or reliance on an exemption.

If financial services will be provided to retail clients, a financial services guide must first be provided, setting out prescribed information, including the provider's fee structure, to assist a client to decide whether to obtain financial services from the provider.

Generally, any offer of a financial product to a retail client must be accompanied by a disclosure document which satisfies the content requirements in the Corporations Act. There are exemptions from the requirement to provide a disclosure document in certain circumstances (eg, a small-scale offer) and where the offer is made to wholesale clients only.

Marketing materials (including advertisements) must not be misleading or deceptive and are expected to meet ASIC advertising guidance, including:

- advertisements should give a balanced message about the product;
- warnings, disclaimers and qualifications should be consistent and given sufficient prominence to effectively convey key information;
- fees or costs should give a realistic impression of the overall level of fees and costs a consumer is likely to pay;
- industry concepts and jargon should be avoided; and
- advertisements should be capable of being clearly understood by the audience and should not suggest the product is suitable for a particular type of consumer unless the promoter has assessed that the product is so suitable.

18 Are there any foreign exchange or currency control restrictions in your jurisdiction?

A person is restricted from transferring funds to a country or person who is the subject of a sanction law.

Although not a restriction, a person (typically an ADI) who sends or receives an international funds transfer instruction must report the details of such instruction to AUSTRAC. Such transfers are subject to AML/CTF Act compliance requirements imposed on the institutions effecting the transaction.

19 If a potential investor or client makes an unsolicited approach either from inside the provider's jurisdiction or from another jurisdiction, is the provider carrying out a regulated activity requiring a licence in your jurisdiction?

Generally, an offshore provider can address requests for information, pitch and issue products to an Australian investor if the investor makes the first approach (ie, there has been no conduct designed to induce the investor, or that could be taken to have that effect) and the service is provided from outside Australia.

If the unsolicited approach relates to credit activities that are regulated under the NCCP Act (broadly, consumer credit), the provider is required to hold an ACL irrespective of the unsolicited approach.

20 If the investor or client is outside the provider's jurisdiction and the activities take place outside the jurisdiction, is the provider carrying out an activity that requires licensing in its jurisdiction?

A provider is generally not required to hold an AFSL or ACL if the financial service or consumer credit activity is undertaken outside Australia. However, if the provider otherwise carries on a financial services or consumer credit business in Australia, the provider cannot avoid the requirement to hold the relevant licence by structuring the service such that the relevant activity is undertaken or effected offshore.

21 Are there continuing obligations that fintech companies must comply with when carrying out cross-border activities?

Fintech companies must comply with the Australian financial services and credit legislation, including when carrying out cross-border activities, where such activities relate to the provision of financial services or credit in Australia or its external territories.

The conduct of a fintech company offshore may also impact on the company's compliance with its obligations under the Australian regulatory framework. For example, misconduct by a representative that occurs in another jurisdiction may cause ASIC to investigate the licensee's compliance with local obligations.

The Privacy Act applies to the cross-border activities of an Australian organisation to whom the act applies (see question 41 for further details). The AML/CTF Act also has cross-border application where designated services are provided by a foreign subsidiary of an Australian company and such services are provided at or through a permanent establishment of the subsidiary in a foreign jurisdiction.

22 What licensing exemptions apply where the services are provided to an account holder based outside the jurisdiction?

Generally, there are no licensing exemptions that specifically apply where the services are provided in Australia through an offshore account. However, this may affect the nature of the authorisations required.

Distributed ledger technology

23 Are there any legal or regulatory rules or guidelines in relation to the use of distributed ledger (including blockchain) technology in your jurisdiction?

Currently, there are no legal or regulatory rules or guidelines relating to the use of distributed ledger technology (DLT) in Australia. However, in March 2017 ASIC released guidance to inform businesses considering operating market infrastructure or providing financial or consumer credit services using DLT of how ASIC will assess compliance by the provider with applicable licence conditions.

Digital currencies

24 Are there any legal or regulatory rules or guidelines in relation to the use of digital currencies or digital wallets, including e-money, in your jurisdiction?

Currently, digital currencies are generally unregulated in Australia. The RBA, ASIC and AUSTRAC have each made statements confirming virtual currencies are (at this point in time), in and of themselves, outside their existing areas of concern or legal definitions that form their regulatory functions. However, several Australian regulators (including those listed, and the Australian government more broadly) are considering expanding the scope of regulation to include virtual currencies, and we expect this to be on the regulatory agenda for 2017.

The facilitation of payment by virtual currencies may require that the facilitator hold an AFSL or be entitled to rely on an exemption.

Digital currencies are subject to the general consumer protection provisions, whereby providers must not make false or misleading representations or engage in unconscionable conduct.

The Australian Taxation Office (ATO) has released public rulings on the tax treatment of digital currencies, including capital gains tax when using digital currency for investment or business purposes, income tax on the profits of businesses providing an exchange service, buying, selling or mining digital currency, and fringe benefits tax applicable to remuneration paid in digital currency where there is a valid salary sacrifice arrangement. In relation to the GST treatment of digital currencies, please refer to question 45.

In relation to digital wallets, depending on the nature of the wallet, the person providing the wallet may be required to hold an AFSL or ACL, or be exempt from the requirement to be licensed, and may have obligations under the AML/CTF Act. Depending on the data captured by the wallet, the person providing the wallet may also need to comply with the Privacy Act.

Securitisation

25 What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

The requirements for executing loan or security agreements are generally set out in the underlying document. A lender has the right to enforce its contractual claim for repayment, and may sue for repayment in the courts. A secured lender may also have enforcement rights under the Personal Property Securities Act 2009 (Cth), in addition to contractual rights.

There is a risk that loans or securities originated on a peer-to-peer or marketplace lending platform are not enforceable on the basis the underlying agreement is invalid.

26 What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected?

Generally, the assignment of a loan (including loans originated on peer-to-peer lending platforms) is effected by a deed of assignment, which is perfected by the assignee taking control of the loan. No additional steps are required to perfect the assignment. If the assignment is not effected by a valid deed, the assignment may constitute a deemed security interest and is perfected by the assignee registering the interest on the Personal Property Securities Register. Failure to register may mean that the security interest is void as against a liquidator and an unperfected security interest will 'vest' in the grantor on its winding up, which means that the relevant secured party will lose any interest they have in the relevant collateral the subject of the unperfected security interest.

27 Is it possible to transfer loans originated on a peer-to-peer or marketplace lending platform to the purchaser without informing the borrower? Does the assignor require consent of the borrower or are the loans assignable in the absence of a prohibition?

Loans originated on a peer-to-peer lending platform may be transferred to a purchaser without informing or obtaining consent from the borrower. The assignee must provide a copy of its credit guide to the borrower as soon as practicable after assignment.

28 Would a special purpose company for purchasing and securitising peer-to-peer or marketplace loans be subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

A company that purchases or securitises peer-to-peer loans must comply with the Privacy Act, to the extent the act applies to the company and its conduct. The company must also comply with any duty of confidentiality in the underlying loan or security agreement.

Intellectual property rights

29 Which intellectual property rights are available to protect software, and how do you obtain those rights?

Copyright in software (including source code) is automatically protected by legislation. An owner may also apply to IP Australia for software to be registered or patented.

Software can also be protected contractually through confidentiality agreements between parties.

30 Is patent protection available for software-implemented inventions or business methods?

Patent protection is available for certain types of software (eg, computer operating systems and computational methods). Patents are not available for source code, which is usually protected by copyright legislation.

31 Who owns new intellectual property developed by an employee during the course of employment?

The employer generally owns new intellectual property rights developed in the course of employment, unless the terms of employment contain an effective assignment of such rights to the employee.

32 Do the same rules apply to new intellectual property developed by contractors or consultants? If not, who owns such intellectual property rights?

The consultant or contractor generally owns new intellectual property rights developed in the course of engagement, unless the terms of engagement contain an effective assignment of such rights to the company.

33 Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

Generally, joint ownership restricts a single owner from using, licensing, charging or assigning a right in intellectual property without the agreement of the other joint owner(s), subject to any pre-existing agreement with the other joint owner(s).

34 How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

Trade secrets are considered proprietary and confidential, and are automatically protected. An owner of trade secrets can pursue a discloser for a breach of confidentiality; however, the owner must be able to demonstrate it has made 'reasonable efforts' to protect such information (eg, by requiring employees to sign confidentiality agreements).

A party can apply to a court to make an order to close or clear the court where the presence of the public would frustrate or render impracticable the administration of justice. Australian courts have a power to close a court to protect trade secrets or confidential commercial information in certain exceptional circumstances.

35 What intellectual property rights are available to protect branding and how do you obtain those rights?

A brand can be protected by registering a:
- business name by applying to ASIC;
- domain name by applying to the desired hosts; and
- trademark by registering with IP Australia.

In relation to trademarks, registration will provide the owner with exclusive rights throughout Australia to the mark within the designated classes of goods or services, and provides the owner with rights and remedies in the event of misuse.

36 How can new businesses ensure they do not infringe existing brands?

New businesses can search a publicly available register of business names. New businesses can also conduct web searches to determine the availability of domain names.

IP Australia maintains publicly available registers of patents, trade marks and designs. However, due to the complexity of the various classes and categories of registration, most businesses will engage a law firm or service provider to conduct searches of these registers.

There is no repository of copyright works or trade secrets. New businesses should conduct their own due diligence on existing brands.

37 What remedies are available to individuals or companies whose intellectual property rights have been infringed?

The available remedies depend on the nature of the infringement and the applicable legislation. Available remedies typically include injunctions and damages.

38 Are there any legal or regulatory rules or guidelines surrounding the use of open-source software in the financial services industry?

Generally, there are no legal or regulatory rules or guidelines surrounding the use of open-source software.

Data protection

39 What are the general legal or regulatory requirements relating to the use or processing of personal data?

The Privacy Act regulates the handling of personal information by Australian government agencies, Australian Capital Territory agencies and private sector organisations with an aggregate group revenue of at least A$3 million. The Privacy Act has extraterritorial operation and extends to an act done outside Australia where there is an 'Australian link'.

The Privacy Act comprises 13 Australian Privacy Principles (APPs) that create obligations on the collection, use, disclosure, retention and destruction of personal information. The APPs include:
- open and transparent management of personal information;
- disclosure to a person that their personal information will be collected;
- restrictions on the use and disclosure of personal information;
- obligations to ensure the accuracy of collected personal information; and
- obligations to protect personal information.

Fintech companies may collect tax file numbers (TFNs) from customers for a number of reasons in the ordinary course of their business. TFNs may only be collected when required for the purposes of a tax, personal assistance or superannuation law. Recipients must ensure that they inform individuals of the reason that they are collecting the TFN, and may only use the TFN for the purpose of complying with such a law. Where a TFN is no longer required, a recipient must take reasonable steps to securely destroy or permanently de-identify the information.

40 Are there legal requirements or regulatory guidance relating to personal data specifically aimed at fintech companies?

Fintech companies are subject to the same legal requirements and regulatory guidance relating to personal data as any other company. However, the application of existing privacy and confidentiality laws to fintech companies is the subject of current discussion and review so we can expect developments in this area.

Update and trends

The Australian government and regulators have generally been responsive to facilitating the development of fintech, for example with the creation of an A$1.1 billion National Innovation and Science Agenda promoting commercial risk taking and encompassing tax incentives for early stage investment in fintech companies, changes to the venture capital regime, the crowd-sourced funding regime, and the establishment of the FinTech Advisory Group to advise the Treasurer and the ASIC Innovation Hub.

Further policy considerations relating to fintech include enabling better access to data, the development of more efficient and accessible payment systems, the need for comprehensive credit reporting, the proposed treatment of digital currency as money and the implications of big data. The government has also become a 'participant' via its 'digital transformation office' seeking to provide better access to government services online and looking to create a digital marketplace for start-ups to deliver digital services to government.

The Federal Budget 2017/18 specifically targeted fintech businesses with a range of initiatives (as outlined throughout this chapter), which is further proof of the emergence of fintech as a force in both Australian business and the Australian economy more broadly. Many of these initiatives address gaps or issues in the existing regulatory framework, which have been identified by industry participants and communicated to regulator stakeholders in the context of a recent trend towards encouraging industry consultation and dialogue.

The final Productivity Commission Inquiry Report into Data Availability and Use was handed down in May 2017, considering ways to increase data availability in Australia with a view to boosting innovation. Following its release, the government announced an inquiry to recommend the best approach to implement an open banking regime forcing banks to share data with fintech companies.

41 What legal requirements or regulatory guidance exists in respect of anonymisation and aggregation of personal data for commercial gain?

The APPs require personal information to be de-identified, including to enable information to be disclosed in a form that does not contravene the Privacy Act.

Guidance published by the Office of the Australian Information Commissioner on de-identifying personal information includes removing or modifying personal identifiers and aggregating information.

Cloud computing and the internet of things

42 How common is the use of cloud computing among financial services companies in your jurisdiction?

The most current data available on the use of cloud computing indicates nearly one in five businesses report using paid cloud computing (reported by the Australian Bureau of Statistics for the financial year ended 30 June 2014).

43 Are there specific legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

There are no specific legal requirements on the use of cloud computing in the financial services industry. From a risk and compliance perspective, the same requirements, tests and expectations apply to cloud computing as would apply to other functions and operations (including those that are outsourced) in a financial services business. In this context APRA has commented that it is not readily evident that public cloud arrangements have yet reached a level of maturity commensurate with usages having an extreme impact if disrupted. ASIC has released regulatory guidance indicating its expectations for licensees' cloud computing security arrangements.

44 Are there specific legal requirements or regulatory guidance with respect to the internet of things?

There are no specific legal requirements with respect to the internet of things.

In 2015, the Australian Communications and Media Authority (ACMA) undertook an assessment of how existing regulation can be used to facilitate and enable Australian businesses and citizens to benefit from internet of things innovations. ACMA released an issues paper on its findings, which included priority areas for regulatory attention. At the time of writing, there are no plans to develop or implement these priority areas.

Tax

45 Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

State and local governments provide ad hoc discretionary tax incentives to technology-based ventures, and require significant investment in the particular government area. More formally, the Australian and certain state governments have introduced a number of incentives to encourage innovation by, and investment in, the Australian fintech sector.

Incentives for investors

ESIC incentives

Incentives are available for eligible investments made in ESICs. Broadly, a company is an ESIC if it:

- was incorporated within the last three income years, or was incorporated within the last six years and for the last three of those income years it and its wholly owned subsidiaries had total expenses of A$1 million or less;
- had assessable income of A$200,000 or less and expenses of A$1 million or less in the previous income year;
- does not have interests listed on a stock exchange; and
- is undertaking an 'eligible business' (ie, a business with scalability, potential for growth and engaged in innovation, with several tests used for innovation, including research and development (R&D)).

Investments of 30 per cent or less in an ESIC would generally qualify for a non-refundable tax offset equal to 20 per cent of the investment (capped at A$200,000 per investor). Investments of 30 per cent or less are also exempt from capital gains tax (CGT) if disposed of within 10 years.

Eligible VCLPs

Fintech investments may be made through VCLP or ESVCLP structures, both of which receive favourable tax treatment. Specific registration and eligibility requirements apply.

For VCLPs, benefits include tax exemptions for foreign investors from CGT on their share of profits made by the partnership. For ESVCLPs, income tax exemptions apply to both resident and non-resident investors, and a 10 per cent non-refundable tax offset is available for new capital invested.

While there is currently some legislative uncertainty as to whether the VCLP and ESVCLP tax concessions apply to investments in fintech companies, the government has announced plans to amend the legislation to specifically bring fintech investments within the scope of those concessions.

Incentives for fintechs

The R&D tax incentive programme is available for entities incurring eligible expenditure on R&D activities.

Claimants under the R&D tax incentive programme may be eligible as follows:

- for most small businesses with less than A$20 million aggregated turnover: a 43.5 per cent refundable tax offset; and
- for other businesses: a 38.5 per cent non-refundable tax offset.

Broadly, eligible R&D activities include experimental activities whose outcome cannot be known in advance and are undertaken for the purposes of acquiring new knowledge (known as core R&D activities), and supporting activities directly related to core R&D activities (known as supporting R&D activities).

GST

The Australian government has introduced draft legislation (in the form of an Exposure Draft), which, if passed, will align from 1 July 2017 the GST treatment of digital currency (such as Bitcoin) with money to ensure that consumers are no longer subject to 'double taxation' when using this digital currency.

Under the previous regime, the ATO considered that Bitcoin was neither money nor a foreign currency, and the supply of digital currency was not a financial supply but rather may be taxable on the basis that a supply of such currency in exchange for goods or services is a barter transaction. Consequently, consumers who used digital currencies as payment could effectively be liable to GST twice: once on the purchase of the digital currency and again on its use in exchange for other goods or services.

This recent Budget measure has ensured purchases of digital currencies will, upon passage of the legislation, no longer be subject to GST. Removing double taxation on digital currencies has in that regard removed an obstacle for the fintech sector to grow in Australia.

Stamp duty

There are stamp duty exemptions provided in certain jurisdictions for securitisation transactions. These exemptions were introduced to foster the growth of the securitisation industry in Australia and are administered broadly by each relevant revenue authority. The exemptions apply to the typical transactions that would occur in the securitisation context, such as the transfer of the mortgages to the securitisation vehicle (typically, a unit trust) and the issue of units and debt securities by the securitisation trust.

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Competition

46 Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction or that may become an issue in future?

There are no specific competition issues that exist with respect to fintech companies.

As part of the Federal Budget 2017, the government introduced a series of proposed measures to boost competition particularly for fintech companies in the banking sector. These include reduced barriers to entry to establishing a bank and carrying on a banking business in Australia.

Financial crime

47 Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

To the extent a fintech company provides a designated service under the AML/CTF Act (for example, by factoring a receivable, providing a loan, or issuing or selling securities), the company will be a reporting entity for the purposes of that act and will have obligations to enrol with AUSTRAC; conduct due diligence on customers prior to providing any services; adopt and maintain an AML/CTF programme; and report annually to AUSTRAC and as required on the occurrence of a suspicious matter, a transfer of currency with a value of A$10,000 or more, and all international funds transfer instructions.

For fintech businesses engaging in digital currency exchanges, the Attorney-General's office has recently closed consultation on amending the AML/CTF Act to 'regulate activities relating to convertible digital currency, particularly activities undertaken by digital currency exchange providers'. The government is aiming to draft legislative proposals later this year.

A fintech company, like any other company, is required to comply with Australia's anti-bribery legislation, which includes a prohibition on dishonestly providing or offering a benefit to someone with the intention of influencing a Commonwealth public official in the exercise of their duties.

48 Is there regulatory or industry anti-financial crime guidance for fintech companies?

Not at the time of writing.

Belgium

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

A large number of financial activities trigger licensing requirements in Belgium. The following providers of financial services are regulated (among others): credit institutions, certain lenders, stockbroking and investment firms, fund management companies, payment institutions, e-money institutions, and insurance and reinsurance firms.

The supervision of financial institutions in Belgium is organised according to a 'twin peaks' model, by which the competences are shared between two autonomous supervisors: the National Bank of Belgium (NBB) and the Financial Services and Markets Authority (FSMA). Each regulator has a specific set of objectives. The NBB is the principal prudential supervisor for (among others) banks, insurance companies, stockbroking firms, payment and e-money institutions, on both a macro- and micro-level. The FSMA is responsible for supervising the financial markets and the information circulated by companies, certain categories of financial service providers (including investment firms and fund management companies) and intermediaries, compliance by financial institutions with conduct of business rules and the marketing of financial products to the public. The Federal Public Services Economy, small and medium-sized enterprises (SMEs), Self-Employed and Energy (FPS Economy) also has certain supervisory powers (consumer credit, payment services).

Only credit institutions may receive deposits from the public in Belgium or solicit the public in Belgium in view of receiving deposits. Credit institutions are regulated by the Belgian Act of 25 April 2014 relating to the status and supervision of credit institutions and stockbroking firms. Besides deposit taking, the majority of the activities listed under Annex I of the Capital Requirements Directive may only be carried out by licensed entities and/or are subject to specific regulations.

Certain lenders are also subject to local supervision (eg, consumer lenders, consumer mortgage lenders). Commercial lending (on a stand-alone basis) does not require a licence but specific rules of conduct apply where lending to SMEs. These rules of conduct include a duty of rigour, a duty of information and a right of prepayment for the enterprise. SMEs are individual or legal entities pursuing an economic purpose in a sustainable manner or liberal professions (lawyers, notaries, etc) that have no more than one of the following criteria on their last and penultimate closed financial year: (i) 50 employees on an annual basis; (ii) annual turnover of €9 million; and (iii) total balance sheet of €4.5 million.

All investment services contemplated by the Markets in Financial Instruments Directive (MiFID) are regulated and may only be carried out by duly licensed entities. Investment services include reception and transmission of orders, execution of orders, proprietary trading, portfolio management, investment advice, underwriting and placing of financial instruments and operation of multilateral trading facilities, where they are carried out in respect of financial instruments such as transferable securities (shares, bonds, puts or calls on shares or bonds, etc), money market instruments, units in collective investment undertakings, derivative contracts and instruments. Dealing in foreign exchange spot and forward contracts (on one's own account or as agent) is also regulated in Belgium. Investment services are carried out by (Belgian or foreign) investment firms. Belgian investment firms can be set up either as stockbroking firms (subject to the Act of 25 April 2014) or portfolio management and investment advice firms (subject to the Act of 25 October 2016).

The Act of 3 August 2012 has implemented the Undertakings for Collective Investments in Transferable Securities Directives and regulates UCITS funds, UCITS management companies and funds investing in receivables. The Act of 19 April 2014 has implemented the Alternative Investment Fund Managers Directive and regulates alternative investment funds and their managers.

Payment services institutions and e-money institutions are regulated by the Act of 21 December 2009, which implemented the Payment Services Directive in Belgium.

Insurance and reinsurance companies are ruled by the Act of 13 March 2016. Insurance contracts are regulated by the Act of 4 April 2014.

Intermediaries in banking and investment services, insurance intermediaries and consumer credit intermediaries are also subject to local supervision.

It is an offence to carry out any of the above regulated financial services in Belgium without being duly licensed by or registered with the regulator (NBB or FSMA), subject to applicable EU passporting rules.

2 Is consumer lending regulated in your jurisdiction? Describe the general regulatory regime.

Consumer lending is a regulated activity in Belgium under Book VII of the Belgian Code of Economic Law. 'Consumer' means any individual acting for purposes that do not fall within his or her trade, business, craft or professional activity.

A licensing requirement applies to consumer lenders (including consumer mortgage lenders) and intermediaries in consumer lending. Certain (limited) exemptions are available. In addition, there are ongoing requirements that have to be complied with by the lenders (provision of information, documents and statements, form and content of the credit agreement itself, etc).

3 Are there restrictions on trading loans in the secondary market in your jurisdiction?

Provided that (i) the borrowers do not qualify as consumers (see question 2 for the definition); and (ii) the loan itself is being traded and not a loan instrument, there are in principle no restrictions on trading (receivables in respect of) loans in the secondary market in Belgium. However, the loan agreement must not prohibit the assignment and civil law requirements may have to be complied with to ensure the enforceability of the transfer of the loan (and, as the case may be, the security rights attached thereto) vis-à-vis third parties.

Receivables in respect of consumer loans may only be transferred to a limited number of assignees (including credit institutions, regulated lenders, credit insurers and a specific category of collective investment scheme designed for making investments in receivables, the *société d'investissement en créances* (SIC) or *vennootschap voor belegging in schuldvorderingen* (VBS)). The transfer of consumer mortgage loans is also subject to specific rules.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would generally fall within the scope of any such regime.

Collective investment schemes (CISs) and the management of collective investment schemes are regulated entities and activities respectively in Belgium. Broadly, a CIS is any entity whose purpose is the collective investment of financial means collected from investors through an offer of financial instruments. The persons participating in the scheme (the investors) must not have day-to-day control over the management of the property. Furthermore, the contributions of the participants and the profits or income out of which payments are to be made to them are pooled and the property is managed as a whole.

Whether a fintech company will fall within the scope of this regime will depend on its business. For example, fintech companies that manage assets on a pooled basis on behalf of investors should give particular consideration to whether they may be operating a CIS. Fintech companies that, for example, are geared more towards providing advice or payment services may be less likely to operate a CIS, but should nonetheless check this and have regard to their other regulatory obligations.

5 Are managers of alternative investment funds regulated?

Managers of alternative investment funds are regulated in Belgium under the Alternative Investment Fund Managers Directive, which has been implemented in Belgium by the Act of 19 April 2014 relating to alternative investment funds and their managers, implementing royal decrees and circulars and guidance issued by the Belgian regulator (FSMA).

6 May regulated activities be passported into your jurisdiction?

All financial services benefiting from European passporting rights may be provided by EEA firms licensed in their home country under one of the EU single market directives (Banking Consolidation Directive, Capital Requirements Directive, Solvency II, MiFID, Insurance Mediation Directive, Insurance Distribution Directive, Mortgage Credit Directive, Undertakings for Collective Investment in Transferable Securities Directive, Alternative Investment Fund Managers Directive, Payment Services Directive, E-Money Directive) either on a cross-border basis without a permanent establishment in Belgium or through a Belgian branch.

In order to exercise this right, the firm must first provide notice to its home regulator. The directive under which the EEA firm is seeking to exercise passporting rights will determine the conditions and processes that the firm has to follow.

Furthermore, under certain conditions and limits, non-EEA firms may be authorised to provide investment services (as defined under MiFID) either on a cross-border basis in Belgium or through a Belgian branch.

7 May fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

The Belgian regulator only grants licences to companies established in Belgium. However, as set out in question 6, EEA fintech firms may exercise passporting rights to provide services in Belgium. Under certain conditions and limits, non-EEA firms may also be authorised to provide (MiFID) investment services on a cross-border basis in Belgium or through a Belgian branch.

8 Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

There are currently no (consumer) peer-to-peer lending platforms operating in Belgium. The Belgian regulatory framework does not currently authorise direct lending by consumers to consumers. The main legal obstacles are, first, that the Belgian prospectus regulations prevent individuals from raising funds publicly, even with the intervention of a platform. In practice, this means that an individual cannot solicit the public to lend him or her money. Secondly, consumer lenders must be approved by the FSMA and only approved lenders have access to the Central Individual Credit Register (in respect of which please see question 13).

However, alternative ways to structure this type of lending are possible, for example by using an indirect lending model whereby a legal entity is interposed between the lenders and the borrowers. In such indirect model, there is no direct relationship between the lenders and the borrowers. The legal entity must be approved by the FSMA as (consumer) lender and grants the loans to the borrowers. In order to finance the loans, the legal entity issues notes, which typically replicate the repayment characteristics of the underlying loans and can be subscribed by the lenders (in principle based on a prospectus approved by the FSMA).

For lending-based crowdfunding, see question 9. Peer-to-peer lending mainly differs from lending-based crowdfunding by the fact that the borrowers are individuals or consumers borrowing for private purposes. See question 2 for the definition of 'consumer'.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

Belgium adopted a law on crowdfunding platforms on 18 December 2016, which entered into force on 1 February 2017 and creates a legal framework for crowdfunding and alternative types of funding. The Belgian Crowdfunding Act is applicable to both lending-based and equity-based crowdfunding platforms.

The Belgian Crowdfunding Act only regulates financing by the crowd of a business or a professional project. It is not applicable to platforms that only offer or provide alternative funding services to the following investors or lenders: legal entities, (MiFID) professional investors or fewer than 150 persons.

Crowdfunding platforms are defined as any natural or legal persons that offer or provide alternative funding services in the Belgian territory through a website or any other electronic means, and which are not regulated companies. The financing is raised by the issuance of 'investment instruments', which can be issued directly by 'issuers-entrepreneurs' (enterprises carrying out business, trade, craft, profession or real estate activities), or through start-up funds or funding vehicles. For these purposes, 'investment instruments' include (i) transferable securities (such as shares and transferable debt instruments), (ii) units issued by start-up funds, and (iii) standardised loans (ie, loans for which the duration, interest rate and general conditions are not negotiable; only the invested amount can vary). The marketing of investment instruments can be carried out in the context of a public or private offering and may not involve the provision of any investment service other than, as the case may be, investment advice or reception and transmission of orders.

Crowdfunding platforms offering these types of alternative funding services must be authorised by the FSMA and are subject to rules of conduct. Regulated entities (credit institutions and investment firms) do not, however, need an additional licence to provide alternative funding services, but they must notify the FSMA and comply with the same rules of conduct as the platforms.

If the investment exceeds certain thresholds, a prospectus must be issued and approved by the FSMA. No prospectus is required where the project remains below €300,000 (per project) and €5,000 (per investor).

10 Describe any specific regulation of invoice trading in your jurisdiction.

Factoring (on a stand-alone basis) is not a regulated activity. In Belgium, factoring is based on the transfer of ownership of the accounts receivable. It is the activity whereby the factor (the buyer of the receivables) pays an agreed percentage of approved debts in exchange for the transfer of the related receivables by the client (the seller of the receivables). A distinction is made between 'non-recourse' factoring (where credit protection is part of the factoring agreement) and 'with recourse' factoring (where the credit risk on the debtors of the receivables remains with the seller). Some factoring contracts (also referred to as 'invoice discounting') permit the client to manage the receivables on the factor's behalf. The contract generally provides that this option can be switched off if the client does not comply with its obligations with due and proper care.

11 Are payment services a regulated activity in your jurisdiction?

Yes. Payment services are regulated in Belgium by the Act of 21 December 2009, which implemented the Payment Services Directive in Belgium. A firm that provides payment services in or from Belgium as

a regular occupation or business activity (and is not exempt) must apply for registration as a payment institution.

The E-Money Directive has been implemented in Belgium by the same Act of 21 December 2009, which relates to both payment and e-money institutions.

12 Do fintech companies that wish to sell or market insurance products in your jurisdiction need to be regulated?

Yes. Insurance intermediaries must be licensed by the FSMA before starting their activities as broker, agent or sub-agent. Intermediaries who only act as 'introducers' (ie, who only provide general information without interfering with the practical execution of insurance contracts or with the handling of claims) are not subject to licensing requirements.

Insurance intermediaries must prove to the FSMA that they have sufficient professional knowledge and adequate experience, and they have to comply with ongoing requirements. Furthermore, Belgian law has introduced MiFID-like conduct of business rules in the insurance sector, which include rules on suitability assessment and inducements.

13 Are there any legal or regulatory rules in your jurisdiction regarding the provision of credit references or credit information services?

There are two credit information registers: the Central Individual Credit Register (CICR) and the Central Corporate Credit Register (CCCR), which are both operated by the central bank, the NBB.

The CICR records information relating to all consumer credits and mortgage loans contracted by natural persons for private purposes as well as any payment defaults resulting from these loans. The sharing of credit data is an obligation for regulated financial institutions (including banks, firms specialising in consumer credit or mortgage loans and credit card issuers). Furthermore, regulated lenders have an obligation to consult the CICR in the process of assessing the borrower's creditworthiness. Credit data to be reported in the CICR include the (co-)debtor's identification details, the characteristics of the credit contract and the details of the overdue debt.

The CCCR records information on credits granted to legal persons (enterprises) and natural persons (individuals) in connection with their business activity. Participation in the CCCR is mandatory for some financial institutions, including credit institutions established in Belgium and licensed by the NBB (also branches incorporated under foreign law established in Belgium), finance-lease companies established in Belgium and licensed by the Federal Public Service Economy, factoring companies established in Belgium, and insurance companies established in Belgium and licensed for classes 14 (guarantee insurance) and 15 (credit insurance) by the NBB. Participants have to report each month to the CCCR all information on any current contract (granted amounts) and non-repayments. Participants, debtors as well as other central credit offices abroad may consult the data recorded in the CCCR.

14 Are there any legal or regulatory rules in your jurisdiction that oblige financial institutions to make customer or product data available to third parties?

There are no such rules yet under Belgian law. However, pursuant to the second Payment Services Directive (PSD2), which entered into force on 12 January 2016 and will apply from 13 January 2018, financial institutions that are holding 'payment accounts' (current accounts, credit card accounts, prepaid card accounts, etc) will be required to allow, for free, access to their customers' account information to third-party payment service providers. From a technical point of view, third-party payment service providers could get either direct access to the account or indirect access through a dedicated interface, such as an application programming interface (API).

15 Does the regulator in your jurisdiction make any specific provision for fintech services and companies? If so, what benefits do those provisions offer?

Both the NBB and the FSMA offer fintech companies the opportunity to enter into direct contact with them through a dedicated 'fintech portal' available on their website. The purpose of the Fintech Contact Point is to support a dialogue between the regulator and fintech companies whereby the regulator aims to get back to the firms within three business days and to assist them in understanding the applicable regulatory framework. This facility can be used, for example, for any project relating to crowdfunding, distributed ledger technology, virtual currencies, APIs or alternative distribution models.

16 Does the regulator in your jurisdiction have formal relationships or arrangements with foreign regulators in relation to fintech activities?

No. However, a Belgian fintech platform called B-Hive was launched in January 2017 to support fintech start-ups. The Belgian federal government – by means of the federal investment fund – and a number of major banks, insurers and market infrastructure players support the project. B-Hive has recently set up hubs in New York, London and Tel Aviv.

17 Are there any local marketing rules applicable with respect to marketing materials for financial services in your jurisdiction?

Financial products (such as investment products, savings products and insurance products)

Marketing materials for financial products are governed by the Royal Decree dated 25 April 2014 and FSMA guidance, which regulate the advertising of financial products where distributed to retail clients. 'Marketing materials' means any communication designed specifically to promote the acquisition of the product, irrespective of the medium used or the method of dissemination (eg, announcements in the press, teasers, posters on advertising boards in bank agencies, posters along public routes and in public buildings, letters to investors, factsheets, TV spots, radio spots, PC banking messages, emails, online magazines, banners and other web postings, advertisements on social network (Facebook, Twitter, etc), text messages sent to mobile phones, slides that are used as part of a 'road show' open to retail clients or likely to be given to retail clients, etc).

The general requirements are that:

- the information included in the marketing materials shall not be misleading or incorrect;
- only information relevant for the Belgian market should be presented;
- it is recommended to translate the marketing materials into French and/or Dutch as there is a general requirement that the marketing materials must be understandable by a retail investor; also, technical terms should be avoided or, if it is impossible to avoid using technical terms, their signification should be explained in a way that is easily understandable for a retail client, in places where these terms appear;
- the marketing materials shall not emphasise the potential benefits of the product without also giving a fair, balanced and visible indication of the risks, limits or conditions applicable to the product; in practice, it means that the product risks, limits or conditions must always be written legibly and in a font size that is at least identical to the font used for presenting the advantages;
- the marketing materials shall not disguise, mitigate or conceal important items, mentions or warnings;
- the marketing materials shall not highlight characteristics that are not relevant or that are of little relevance for a sound understanding of the nature and the risks of the product;
- the information conveyed in the marketing materials shall be in line with the information held in the prospectus or any other contractual or pre-contractual information; and
- any advertisement shall be clearly recognisable as such.

Furthermore, detailed guidance is provided by the FSMA in order for the marketing materials to comply with the non-misleading information principle. Detailed content requirements apply. The presentation of performance figures is also highly regulated.

Consumer credit

The Belgian Code of Economic Law contains provisions on advertising, (pre-contractual) information requirements, misleading and aggressive commercial practices and unfair contract terms.

All advertising setting out the interest rate or the costs of the credit must be drafted in a clear, summarised and explicit way, and contain specific legal information that must be illustrated by a representative example. Advertising must also include the warning: 'Be aware, borrowing money costs money.' Some advertising practices are also

prohibited, for example encouraging consumers to regroup their existing credits, emphasising the ease and speed by which credit can be obtained, etc.

18 Are there any foreign exchange or currency control restrictions in your jurisdiction?

No.

19 If a potential investor or client makes an unsolicited approach either from inside the provider's jurisdiction or from another jurisdiction, is the provider carrying out a regulated activity requiring a licence in your jurisdiction?

Yes. An approach made by a potential client or investor on an unsolicited and specific basis will not avoid triggering a licensing requirement. However, the situation will change partially in respect of investment services with the entry into force of MiFID II and MiFIR on 3 January 2018, which provide that third-country firms may freely provide investment services in an EU member state in situations where eligible counterparties or per se professional clients seek out investment services or activities at their own 'exclusive initiative'.

20 If the investor or client is outside the provider's jurisdiction and the activities take place outside the jurisdiction, is the provider carrying out an activity that requires licensing in its jurisdiction?

In principle, only activities carried out in Belgium fall within the Belgian licensing regime. However, soliciting or taking deposits from the public outside the territory of Belgium also requires a licence in Belgium if carried out from the Belgian territory by persons or enterprises established in Belgium.

21 Are there continuing obligations that fintech companies must comply with when carrying out cross-border activities?

The (MiFID) conduct of business rules apply to a locally licensed firm, and, with some exceptions, to EEA firms establishing a branch in the jurisdiction. In addition, fintech companies carrying on activities on a cross-border basis in Belgium will be subject to certain Belgian mandatory laws (eg, consumer and retail investor protection rules, fair competition and trade practices rules, etc).

22 What licensing exemptions apply where the services are provided to an account holder based outside the jurisdiction?

A locally authorised and regulated provider can passport services benefiting from European passporting rights in other EEA countries through a branch or on a cross-border basis.

Distributed ledger technology

23 Are there any legal or regulatory rules or guidelines in relation to the use of distributed ledger (including blockchain) technology in your jurisdiction?

Distributed ledger technology is in a developmental phase and, as a consequence, it is not yet subject to specific legal or regulatory rules or guidelines. Several legal and regulatory issues need to be carefully considered relating to the clearing, settling and recording of payments, securities, derivatives or other financial transactions. The impact of various rules and regulations must be analysed and may be relevant in respect of digital transformation initiatives, such as the Central Securities Depositories Regulation, the Settlement Finality Directive, the European Market Infrastructure Regulation, MiFID, etc. Outsourcing arrangements also need to be carefully reviewed where regulated firms outsource technology innovations to third parties.

Data protection requirements and customer data protection also need detailed analysis due to the transparency of transactions, which is inherent to the blockchain technology, and the fact that once data is stored it cannot be altered.

Given that the nodes on a blockchain can be located anywhere in the world, the determination of the data controller, applicable law and competent courts in case of litigation and the drafting of appropriate contractual provisions in that respect are also essential.

A particular point of attention relates to the status of the decentralised autonomous organisations (DAOs) that are used to execute smart contracts, recording activity on the blockchain.

Digital currencies

24 Are there any legal or regulatory rules or guidelines in relation to the use of digital currencies or digital wallets, including e-money, in your jurisdiction?

Although they are both stored electronically, a distinction must be made between e-money and other digital currencies. According to the second E-Money Directive (2009/110/EC) as implemented in Belgian law, e-money means 'monetary value as represented by a claim on the issuer which is stored electronically, issued on receipt of funds of an amount not less in value than the monetary value issued, and accepted as a means of payment by undertakings other than the issuer'. Virtual currencies (such as bitcoins) do not fall under this definition as they do not represent a claim on the issuer, which is not obliged to exchange them back to real money. Furthermore, they are purely digital and not necessarily linked to the real funds upon which they were issued.

E-money regulation is not applicable on virtual currencies (such as bitcoins). Virtual currencies are currently not regulated under Belgian law. No licence is required to issue virtual currencies and they are not subject to regulatory supervision. Virtual money does not benefit from legal protection. The FSMA has issued several warnings advising the Belgian public against the risks of virtual currencies (eg, the risk of considerable currency fluctuations, the risk of losing the virtual money if the trading platform is hacked, etc).

Securitisation

25 What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

As a general rule, there are no documentary or execution requirements applicable to loan and security agreements (other than security over real estate and business pledges), which can be signed by private contract and in counterparts (with as many originals as there are parties to the agreement). The nature of the collateral will determine the type of security that can be granted and the formalities required to make it enforceable vis-à-vis third parties. Worth noting is the expected revision of the legal regime applicable to security interests in moveable assets (which should become effective in 2018), whereby it will become possible to perfect such security by way of filing in a central register. Consumer loans, however, are subject to specific formal and content legal requirements.

In the current Belgian market, peer-to-peer loans (see questions 8 and 9) generally do not involve security agreements as they operate outside the traditional banking network, for smaller amounts, at lower costs but with higher yields than bank loans. As long as all the required formalities are fulfilled, however, it should be possible to structure secured loans.

26 What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected?

The formalities for assignment will depend on how the lending is structured (via a loan agreement or a debt instrument and through a direct or an indirect model (see questions 8 and 9)).

As a general rule and in the absence of any contractual provisions prohibiting the transfer, the transfer of a loan agreement by the lender requires the express prior consent of the borrower (as an agreement involves both rights and obligations for both parties). Such consent may be granted in the loan agreement itself. Alternatively, the lender can transfer only its rights (ie, its receivable vis-à-vis the borrower) without the express consent of the borrower. Indeed, according to article 1690 of the Belgian Civil Code, the transfer of a receivable or right is valid between parties (transferor and transferee) and enforceable vis-à-vis all third parties other than the assigned debtor(s) (ie, the borrower) by the mere conclusion of the transfer agreement. However, the transfer will only become enforceable vis-à-vis the borrower once the transfer

is notified to it or once the borrower has acknowledged the transfer. In practice, if (and as long as) the assignment is not perfected, this means that repayment is validly made to the initial lender. The latter can act as servicer for the receivables, which in practice avoids having to notify the borrowers up front.

The transfer of consumer loans is subject to specific rules. If security rights are attached to the loans, additional formalities may also be required.

The formalities to transfer a debt instrument depend on the type of instrument (bearer, registered or dematerialised) and whether the latter is freely negotiable or not.

If the applicable transfer formalities are not fulfilled, the transfer could be held to be unenforceable towards the borrower and possibly third parties.

27 Is it possible to transfer loans originated on a peer-to-peer or marketplace lending platform to the purchaser without informing the borrower? Does the assignor require consent of the borrower or are the loans assignable in the absence of a prohibition?

See question 26.

28 Would a special purpose company for purchasing and securitising peer-to-peer or marketplace loans be subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

The entity assigning loans to the special purpose vehicle (SPV) must ensure that there are no confidentiality requirements in the loan documents that would prevent it from disclosing information about the loans and the relevant borrowers to the SPV and the other securitisation parties. If there are such restrictions in the underlying loan documentation, the assignor will require the consent of the relevant borrower to disclose to the SPV and other securitisation parties the information they require before agreeing to the asset sale. In addition, the SPV will want to ensure that there are no restrictions in the loan documents that would prevent it from complying with its disclosure obligations under Belgian and EU law (such as those set out in the Credit Rating Agency Regulation). Again, if such restrictions are included in the underlying loan documents, the SPV would be required to obtain the relevant borrower's consent to such disclosure. In addition, if the borrowers are individuals, the SPV, its agents and the peer-to-peer platform will each be required to comply with the statutory data protection requirements under Belgian law (see questions 39 to 41).

Intellectual property rights

29 Which intellectual property rights are available to protect software, and how do you obtain those rights?

Under Belgian law, computer programs (or software) are protected by copyright (article XI.294-XI.304 of the Belgian Code of Economic Law) and assimilated as literary works in the meaning of the Berne Convention. The copyright protection also covers the source code, object code, architecture of the software and preparatory design materials (provided that they can lead to a computer program). Ideas and principles that underlie any element of a program, including those that underlie its interfaces, are, however, excluded from the copyright protection.

The author of the software owns the rights as soon as it is created provided that the software is original. No registration is required to benefit from the protection. For evidentiary purposes, it is, however, useful to include the name of the author and the creation date in the code of the software and to file it with a public notary or the Benelux Office for Intellectual Property.

If the software code has been kept confidential it may also be protected as confidential information. No registration is required, but confidentiality agreements are recommended if third parties have access to it.

30 Is patent protection available for software-implemented inventions or business methods?

No, computer programs and business methods are explicitly excluded from patent protection. The exclusion from patentability is, however, limited to the software as such and it is possible to grant a patent to an invention implemented by or including a piece of software.

31 Who owns new intellectual property developed by an employee during the course of employment?

Unless otherwise provided in writing, where a computer program is created by an employee in the execution of his or her duties or following the instructions given by his or her employer, the employer shall be exclusively entitled to exercise all economic rights in the program so created. This means that the IP rights on a computer program are automatically transferred to the employer when an employee has developed the software in the framework of his or her employment contract. This automatic transfer only applies to the economic rights, not the moral rights of the author.

32 Do the same rules apply to new intellectual property developed by contractors or consultants? If not, who owns such intellectual property rights?

No, the rights are owned by the author of the software if he or she is a contractor or a consultant. The fintech company will only own the economic rights if they have been explicitly transferred in writing (even if the fintech company has commissioned the software).

33 Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

No.

34 How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

Belgium will have to implement the Trade Secrets Directive (EU) 2016/943 by 9 June 2018. At the time of writing, the agenda to implement the Directive is still unclear. The biggest difference between existing Belgian law and the regime that member states have to adopt to comply with the Directive is the introduction of a definition of what qualifies as a protectable trade secret. Indeed, Belgian law does not currently have any specific provisions on the protection of a trade secret, except – to a certain limited extent – from a criminal and employment law perspective. The Directive requires member states to provide protection for information that:

- is secret, in the sense that it is not generally known among, or readily accessible to, persons within the circles that normally deal with the kind of information in question;
- has commercial value because it is secret; and
- has been subject to reasonable steps by the holder of the information to keep it secret.

If a competitor legally obtains the trade secrets or confidential information of a company, it is in principle free to use it. It is therefore highly recommended to be prudent regarding the persons to whom one discloses confidential information and to enter into proper confidentiality agreements with those persons. Such confidentiality agreements should include provisions such as the definition of confidential information, the duration of the confidentiality obligations (knowing that under general Belgian civil law, it is always possible to terminate an obligation for an indefinite term against 'reasonable' notice, meaning that a fixed term should be provided in the confidentiality agreement), the limited use of trade secrets and confidential information regarding the purpose of a specific project, etc.

Legal proceedings are in principle public, so it would be possible to hear trade secrets and confidential information during hearings or pleadings. In addition, the Belgian Judicial Code does not restrict access to documents including trade secrets – it provides for principles of collaboration as regards production of evidence in court proceedings and the requirement for any party to submit all documents to the other party, without specifications or exceptions concerning trade secrets.

In practice, however, it appears that Belgian (commercial) courts may weigh up the protection of trade secrets against the interests at stake in a proceeding. In other words, depending on the interest that is considered most relevant, they may choose to limit the production of evidence to certain elements or even block access to or disclosure of trade secrets (eg, if there is no sufficient evidence of a breach) or, on the

contrary, consider that such secrets are to be disclosed (eg, for the right of the defence, for the sake of transparency or pursuant to the principle of the right to a fair hearing). In order to achieve full implementation of the Trade Secrets Directive this practice will need to evolve. The Trade Secrets Directive aims to ensure that trade secrets are not disclosed during court proceedings and sets out certain measures to be complied with (eg, restricting access to hearings in which trade secrets are disclosed to a limited number of persons).

35 What intellectual property rights are available to protect branding and how do you obtain those rights?

Brands can be protected by a Benelux trademark (covering the Benelux territory) or by an EU trademark (covering the EU territory). Registration is required to obtain a trademark right (with the Benelux Office for Intellectual Property for Benelux trademarks or with the European Union Intellectual Property Office (EUIPO) for EU trademarks).

Brands can also be protected by market practices if they have acquired sufficient goodwill in the market and another undertaking tries to take advantage of the reputation or market position of the brand.

Brands in the form of logos or slogans can also be protected by copyright as artistic works (provided they are original) or by (Benelux or EU) design and models rights (provided that they are new and have specific character).

36 How can new businesses ensure they do not infringe existing brands?

The Benelux Office for Intellectual Property and EUIPO have public databases that can be consulted in order to check the availability of a design or trademark. It is highly advisable for new businesses to conduct trademark and design searches to check whether earlier registrations exist that are identical or similar to their proposed brand names. It may also be advisable to conduct searches for any unregistered trademark rights that have gained sufficient distinctiveness on the market that may prevent use of the proposed mark. Specialised companies offer services to carry out such searches.

37 What remedies are available to individuals or companies whose intellectual property rights have been infringed?

The following remedies and proceedings can be considered:

- (unilateral) primary injunction;
- cease-and-desist action;
- damages; and
- application with custom authorities for border detention.

38 Are there any legal or regulatory rules or guidelines surrounding the use of open-source software in the financial services industry?

No.

Data protection

39 What are the general legal or regulatory requirements relating to the use or processing of personal data?

In Belgium, the processing of personal data is governed by the Data Protection Act of 8 December 1992 (the Belgian Data Protection Act) implementing the Directive 95/46/EC. The Belgian Data Protection Act provides how data controllers (the natural person or legal person, which, alone or jointly with others, determines the purposes and means of the processing of personal data) may process personal data of living individuals (data subjects). The Belgian Data Protection Act requires that businesses may only process personal data where that processing is done in a fair and lawful way.

Businesses must also ensure that they rely on a valid ground to process personal data. The most common grounds used in the financial services field are the following: the consent of the data subject, the legitimate interest of the company (eg, to cover marketing activities, provided that the interests of the data subject are not unduly affected), to comply with a legal requirement, or to perform or enter into a contract with the data subject.

The Belgian Data Protection Act also provides a set of rights for the data subjects, including the right to information, the right to access to their personal data, to correct their personal data should they be inaccurate, and the right to oppose, upon request and free of charge, the processing of their personal data for marketing purposes.

The Belgian Privacy Commission is the body that controls compliance with the Belgian Data Protection Act by businesses. Data subjects or competitors can file a complaint with the Privacy Commission, which can inform the public prosecutor of any breach of the Data Protection Act (which is criminally sanctioned).

The Belgian Data Protection Act is due to be replaced as from 25 May 2018 by the new General Data Protection Regulation (GDPR). The GDPR shall have direct effect in Belgium. The GDPR broadly reinforces the existing regime provided by the Belgian Data Protection Act, with some additional requirements added to strengthen the obligations on businesses to protect personal data.

40 Are there legal requirements or regulatory guidance relating to personal data specifically aimed at fintech companies?

No. Belgium does not have any specific rules governing the processing of personal data in fintech companies. The Belgian Data Protection Act will have to be complied with by fintech companies.

41 What legal requirements or regulatory guidance exists in respect of anonymisation and aggregation of personal data for commercial gain?

The Royal Decree of 13 February 2001 implementing the Belgian Data Protection Act provides that anonymous data are 'data that cannot be linked to an identified or identifiable person and that are thus not personal data' in the meaning of the Belgian Data Protection Act. Personal data that have been fully anonymised or aggregated in such a way that it is no longer possible to match the data with an individual do not fall within the definition of personal data. The Act will therefore not apply to those data that can be processed without any restrictions.

The Belgian Privacy Commission is of the opinion that, when the data controller must take unreasonable means in order to identify one or several data subjects from anonymous or aggregated data and when the risk of identification becomes so marginal, the data must be considered as anonymous data.

Cloud computing and the internet of things

42 How common is the use of cloud computing among financial services companies in your jurisdiction?

Cloud computing is widely used among financial services companies in Belgium.

43 Are there specific legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

There are no specific legal requirements with respect of the use of cloud computing in the financial services industry, but the outsourcing of cloud computing by regulated entities falls under regulatory supervision. The use of cloud computing is checked from both a data protection and an IT security perspective.

44 Are there specific legal requirements or regulatory guidance with respect to the internet of things?

No.

Tax

45 Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

In support of the 'Digital Belgium' action plan, the Belgian federal government has introduced a number of tax incentives that are available to fintech companies and investors subject to certain conditions being met, among others:

- the Belgian tax shelter regime for start-ups, which provides for a tax benefit for persons who invest in start-ups, has been extended to investments via approved crowdfunding platforms. The tax reduction amounts to up to 30 or 45 per cent of the invested amount (45 per cent if the start-up is a micro-enterprise). The investment (shares) must be retained for at least four years to benefit from the tax shelter;

- the provision of loans via a crowdfunding platform is encouraged fiscally by a withholding tax exemption on the interest of the loans up to the first bracket of €15,000. This withholding tax exemption is subject to the loans having a minimum maturity of four years and is only applicable if the loans have been provided to start-up companies;
- start-up companies can benefit from reduced labour costs; and
- SMEs can benefit from a deduction for investment in digital assets.

Competition

46 Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction or that may become an issue in future?

Competition law (ie, Book IV of the Belgian Code of Economic Law and the EU competition rules in case of an effect on trade between the EU member states) applies to all undertakings carrying out business in Belgium, irrespective of their sector. Hence, the competition law rules (such as the prohibition of anticompetitive agreements, the prohibition of abuse of dominance and merger control) equally apply to fintech companies.

Competition authorities in all jurisdictions, including Belgium, face a range of potentially complex competition law issues in relation to fintech offerings. These are likely to include:

- the extent to which a fintech solution has or obtains (through growth, acquisition or joint venture) market power and the consequences of this;
- the risks that the definition of any technical standards involved in any jointly developed fintech solution result in other third parties being excluded;
- the extent to which there can be any exclusivity between the finance and technology providers of a fintech offering; and
- the limits of any specified tying or bundling.

The role of 'big data' as a potential source of market power is an important topic currently being considered by various competition authorities throughout the EU. In 2015, the Belgian Competition Authority fined the Belgian National Lottery slightly less than €1.2 million for abuse of dominance regarding a database acquired in the context of its monopolistic activity. This type of decision is likely to be relevant in relation to fintech companies.

Financial crime

47 Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

There is no legal or regulatory requirement for fintech companies to have anti-bribery or anti-money laundering procedures unless the company is a licensed financial institution (eg, a payment services institution) or carries out business that is subject to the Belgian anti-money laundering regulations. Specific customer due diligence/know your customer (CDD/KYC) obligations apply to e-money products. Fintech companies, regardless of whether they are authorised, ought to have appropriate financial crime policies and procedures in place as a matter of good governance and proportionate risk management.

48 Is there regulatory or industry anti-financial crime guidance for fintech companies?

There is no anti-financial crime guidance specifically for fintech firms. The general rules and standards set out for regulated financial institutions apply, particularly the circulars issued by the Belgian regulator (NBB and FSMA). These documents are helpful for non-authorised fintech firms and may inform their own internal financial crime policies and procedures.

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

The following activities are regulated and trigger a licence requirement:

- securities brokerage;
- securities investment consultancy;
- financial advising relating to securities trading or investment;
- securities underwriting and sponsorship;
- proprietary account transactions;
- securities asset management;
- taking in deposits from the general public;
- handling domestic and foreign settlements;
- handling, accepting and discounting of negotiable instruments;
- issuing financial bonds;
- acting as an agent for the issue, honouring and underwriting of government bonds;
- buying and selling government bonds and financial bonds;
- offering and providing discretionary investment management services;
- buying and selling foreign exchange, and acting as an agent for the purchase and sale of foreign exchange;
- fund management services;
- fund custodian services; and
- derivative products transaction.

2 Is consumer lending regulated in your jurisdiction? Describe the general regulatory regime.

Consumer lending is a regulated activity and is governed by the General Rules of Loans and the Law of the People's Republic of China on Commercial Banks. The General Rules of Loans require that the lenders are approved by the People's Bank of China (PBOC) to engage in lending business, hold a financial legal person licence or a financial institution business licence issued by the PBOC, and be approved and registered by the Administration for Industry and Commerce.

3 Are there restrictions on trading loans in the secondary market in your jurisdiction?

Trading loans between the financial institutions in the secondary market is subject to regulatory supervision of the China Banking Regulatory Commission (CBRC). (The financing institutions shall report the required information to the CBRC. The transfer of loans shall be subject to the consent of the borrower and the guarantor (if any). All outstanding principal and interest must be transferred as a whole. The parties are prohibited from making any direct or indirect repurchase arrangements. If the lender is from a consortium, other members of the consortium shall have the right of first refusal for such transfer.) Trading loans between non-financial institutions is generally not subject to mandatory regulatory restrictions.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would generally fall within the scope of any such regime.

The establishment and operation of securities investment funds within China via public and non-public raising of funds are regulated by the Securities Investment Fund Law of the People's Republic of China. Securities investment funds are funds managed by fund managers, placed in the custody of fund custodians and used in the interest of the holders of the fund units for investment in securities.

The primary regulatory body of funds in China is the China Securities Regulatory Commission (CSRC). Generally speaking, the regulation on public raising funds (retail funds) is more detailed and restrictive than for private funds. Retail funds and retail fund managers must be registered with the CSRC. Fundraising, fund custodian and investment activities are strictly regulated by the CSRC. Agencies that engage in sales, sales payment, unit registration, valuation service, investment consulting, rating, information technology system service and other fund services related to publicly raised funds are subject to registration or record filing in accordance with the requirements of the CSRC. Private funds and private fund managers must register with the Asset Management Association of China (AMAC), an industry self-disciplinary body under the supervision of the CSRC.

China is in the process of formulating its regulatory regime for fintech companies. There have been some piecemeal regulations on peer-to peer lending, crowdfunding platforms and non-banking online payment services, etc. It is likely that fintech companies will be under the supervision of the same financial regulatory authorities for their respective business types, such as the PBOC, CSRC and CBRC, but will be subject to separate regulatory and licensing requirements.

5 Are managers of alternative investment funds regulated?

Managers of alternative investment funds that raise capital from a number of investors and invest it in accordance with a defined investment policy for the benefit of those investors are regulated. This is broadly defined as asset management services, and may be conducted by securities companies, trust companies and fund management companies and their subsidiaries. Managers are under different regulation regimes depending on the specific form of such alternative investment funds.

6 May regulated activities be passported into your jurisdiction?

Regulated activities cannot be passported into China.

7 May fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

In our experience, a licence for regulated activities would only be granted to an entity that has a local presence. Therefore, it is unlikely that Chinese regulators, including the CSRC and CBRC, would grant a licence for regulated activities to an entity that was not permanently established in China. Under special circumstances, foreign securities companies may conduct certain activities within China subject to the approval of the CSRC. Foreign institutions may provide financial information services without a local presence in China subject to the approval of the State Council Information Office.

8 Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

The Interim Measures for the Administration of Business Activities on Online Lending Information Intermediary Agencies promulgated by the CBRC on 17 August 2016 (the Online Lending Rules) specifically

target the activities of peer-to-peer lending between individuals through an internet-based platform. The Online Lending Rules require that the peer-to-peer lending platforms register with the local branch of the CBRC, and shall only act as information intermediaries between parties. Peer-to-peer lending platforms must not conduct fundraising activities for themselves, or provide security or guarantee arrangements for lenders. The Online Lending Rules also set out detailed requirements for information disclosure, protection of lenders and borrowers, and risk control measures.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

The Guideline Opinion on Promoting the Healthy Development of Internet Finance has defined equity-based crowdfunding as public equity financing in small amounts through an internet-based platform. The Opinion provides that equity crowdfunding shall be conducted through an agency platform such as a website or other digital medium, and that the CSRC will be the regulatory authority of equity crowdfunding business. In 2016, the CSRC issued an action plan for risk control of equity-based crowdfunding, prohibiting the establishment of private equity funds or public offering of securities through crowdfunding.

There is no specific regulation for other types of crowdfunding.

10 Describe any specific regulation of invoice trading in your jurisdiction.

There is no specific regulation of invoice trading or invoice trading platforms in China. Depending on how the business is structured, a firm that operates an invoice trading platform may be carrying on a number of different regulated activities for which it must have permission.

11 Are payment services a regulated activity in your jurisdiction?

Payment services provided by non-financial institutions (payment services providers) in China are primarily regulated by the PBOC under the Administrative Measures for the Payment Services Provided by Non-financial Institutions.

Payment services refer to any of the following transfer services provided by non-financial institutions as the intermediaries between the payer and the payee: online payment; issue of prepaid cards; acceptance of payment using a bank card; and any other payment services determined by the PBOC.

A payment service provider is required to obtain a payment service licence issued by the PBOC in order to provide payment services in China. For cross-border payments, payment services providers will need to obtain a licence from the foreign exchange authority, in addition to the payment licence issued by the PBOC.

In October 2016, 14 departments including the PBOC issued the Implementing Scheme of Risk Rectification of Non-financial Payment Institutions, requiring non-financial payment institutions to deposit customer reserve funds in accounts with the People's Bank or qualified commercial banks in order to protect the funds.

12 Do fintech companies that wish to sell or market insurance products in your jurisdiction need to be regulated?

Yes. Internet insurance companies are obliged to comply with, in addition to the general insurance laws and regulations, the Interim Measures for the Supervision of Internet Insurance Business and Implementation Rules for the Information Disclosure of Internet Insurance Business issued by the China Insurance Regulatory Commission (CIRC). Insurance companies and brokers shall be CIRC licensed to carry out their business. They are permitted to conduct internet insurance business on their own online platforms or through third-party online platforms (such third-party online platforms are not required to be CIRC licensed because all the insurance-related activities are, and shall be, conducted by the licensed insurance companies and brokers, instead of the platform operator).

13 Are there any legal or regulatory rules in your jurisdiction regarding the provision of credit references or credit information services?

Yes. The Administrative Regulations on the Credit Reporting Industry promulgated in 2013 are the primary piece of regulation for credit references and credit information services. The providers of corporate credit information services are subject to filing with the PBOC, while the providers of individual credit information services are subject to prior approval from the PBOC and stricter qualification requirements.

14 Are there any legal or regulatory rules in your jurisdiction that oblige financial institutions to make customer or product data available to third parties?

The Commercial Bank Law, the Anti-money Laundering Law, the Criminal Law and the Notice of the PBOC on Urging Banking Financial Institutions to Protect Personal Financial Information prohibit financial institutions from disclosing to third parties personal financial data and financial product data collected in the course of their operations without prior consent unless stipulated by the law.

Financial institutions may be obliged to provide customer or product data and other necessary technical assistance as a result of requests from relevant authorities investigating activities concerning national security and potential terrorism financing under the National Security Law and the Anti-Terrorism Law.

15 Does the regulator in your jurisdiction make any specific provision for fintech services and companies? If so, what benefits do those provisions offer?

Yes. Authorities including the State Council, the PBOC and the Ministry of Industry and Information Technology jointly issued the Guiding Opinions on the Healthy Development of Fintech Business (the Opinions) in 2015.

The Opinions set out, among other things, the principle that the fintech industry will be regulated by different authorities and rules depending on the specific activities carried out. For example, online payment is regulated by the PBOC, peer-to-peer lending and internet consumer finance are regulated by the CBRC, equity crowdfunding and fund sales are regulated by the CSRC, and internet insurance is supervised by the CIRC.

The National Development and Reform Commission (NDRC) sought comments on the Internet Market Access Negative List (the First Batch, for Trial Implementation) in October 2016, which also cast light on the regulatory trend of the fintech services in China.

16 Does the regulator in your jurisdiction have formal relationships or arrangements with foreign regulators in relation to fintech activities?

China and the UK established the 'Fintech Bridge' in 2016 in the hope of closer governmental corporation and stronger business ties among fintech companies of China and the UK.

17 Are there any local marketing rules applicable with respect to marketing materials for financial services in your jurisdiction?

Yes. In relation to securities-related services, for example, securities companies are required to obtain sufficient knowledge about the investors and recommend suitable products and services based on the situation of each investor. Securities companies shall ensure that investors understand the risks clearly and each investor must sign a risk disclosure statement. Securities companies are not allowed to promise guaranteed profits to the investors or make up for loss in promoting or marketing financial products.

For insurance services, internet insurance institutions must not make any misrepresentations, exaggerate previous track records, or promise guaranteed profits as part of the marketing process. Information concerning insurance products, services, premiums, etc, must be clearly presented to the customers.

In relation to peer-to-peer lending, internet platforms must comply with the information disclosure obligations and must not present fraudulent records, misleading representations, or make major omissions when communicating with customers.

18 Are there any foreign exchange or currency control restrictions in your jurisdiction?

Yes. The Chinese foreign exchange system distinguishes between current account transactions (ie, ordinary transactions) and capital account transactions (ie, loan and investment).

Current accounts pertain to foreign exchange settlements for the purpose of trade, provision of labour service and unilateral transfers in

an international payment context. Under a current account, renminbi is fully convertible into a foreign currency.

Capital accounts pertain to the increase or decrease of capital and liabilities in the balance of payments, resulting from the outflow and inflow of capital, including direct investment, loans and investment in securities. China still has an extensive capital control regime in place but it is being 'liberalised' in a cautious manner. In most cases, constraints on capital inflows and outflows have been loosened but not entirely eliminated. Receipts and payments under the capital account are generally subject to approval or filing requirements by a foreign exchange authority or banks authorised by the foreign exchange authority.

Since late 2016, China has tightened its foreign exchange control for overseas investment activities. Overseas investment projects and capital outflows are subject to greater scrutiny and law enforcement, but foreign exchange movements are still permitted in relation to current accounts.

19 If a potential investor or client makes an unsolicited approach either from inside the provider's jurisdiction or from another jurisdiction, is the provider carrying out a regulated activity requiring a licence in your jurisdiction?

Yes. The test for regulated activities is whether such activities are carried out in China, regardless of whether an approach is made by a potential client or investor on an unsolicited and specific basis.

20 If the investor or client is outside the provider's jurisdiction and the activities take place outside the jurisdiction, is the provider carrying out an activity that requires licensing in its jurisdiction?

The licensing regime for regulated activities applies to activity carried out in China. Accordingly, no licence is required in China in relation to activity that is provided to persons outside China where the regulated activities also take place outside China.

21 Are there continuing obligations that fintech companies must comply with when carrying out cross-border activities?

There are no specific rules imposing a continuing obligation on fintech companies beyond the licensing and regulatory obligations of regulated activities.

22 What licensing exemptions apply where the services are provided to an account holder based outside the jurisdiction?

There are no licence exemptions as long as the regulated activities are conducted within China.

Distributed ledger technology

23 Are there any legal or regulatory rules or guidelines in relation to the use of distributed ledger (including blockchain) technology in your jurisdiction?

There are no regulatory rules specifically in relation to the use of distributed ledger technology.

Digital currencies

24 Are there any legal or regulatory rules or guidelines in relation to the use of digital currencies or digital wallets, including e-money, in your jurisdiction?

Virtual currency trading is generally prohibited in China.

Securitisation

25 What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

There are no specific legal requirements for executing loan agreements or security agreements in China. Such agreements must be executed in accordance with the requirements in the articles of association of the company.

The CBRC issued the Online Lending Rules on 17 August 2016 (see question 8). The Online Lending Rules provide that online lending platforms are designated as information intermediaries for borrowers and lenders and must not provide credit enhancement or security or guarantee arrangements for the loan transactions by itself.

Therefore, a peer-to-peer lending platform is merely an information exchange, and loan and security agreements cannot be entered into on the peer-to-peer marketplace itself. Accordingly, the use of a peer-to-peer marketplace does not impact the legal effectiveness and enforcement of loan agreements or security agreements.

26 What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected?

According to the Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Private Lending Cases dated 2015 and the Contract Law of the People's Republic of China dated 1999, the legal assignment of a loan by the assignor (ie, the lender) to the assignee (ie, the purchaser) will be perfected providing that:

- the following circumstances are not applicable to the assignment: the rights may not be assigned in light of the nature of the contract, according to the agreement between the parties and according to the provisions of the laws;
- a notice of the assignment has been given to the party liable to pay the loan (the debtor or obligor). Such notice by the assignor to assign its rights shall not be revoked, unless such revocation is consented to by the assignee;
- the assignor absolutely assigns the receivable to the assignee; and
- where the laws or administrative regulations stipulate that the assignment of rights or transfer of obligations shall undergo approval or registration procedures, such provisions shall be followed.

If the assignment is not perfected, it may still constitute an equitable assignment (in contrast to a legal assignment), which is still recognised by Chinese courts. However, the disadvantage of an undisclosed assignment is that, in the event of taking any legal action against the borrower for payment, the assignee would have to join the assignor in any such legal action against the borrower (in contrast to being able to sue in its own name in the case of legal assignment) and the assignee may be vulnerable to, among other things, certain competing claims and other set-off rights that may otherwise have been halted by the serving of notice on the borrower.

27 Is it possible to transfer loans originated on a peer-to-peer or marketplace lending platform to the purchaser without informing the borrower? Does the assignor require consent of the borrower or are the loans assignable in the absence of a prohibition?

It is not possible to transfer loans to the purchaser without informing the borrower. The Contract Law explicitly provides that the obligee shall notify the obligor when assigning its rights, otherwise the assignment shall not be binding against the obligor.

The assignor is not required to obtain consent from the borrower. Loans are assignable in the absence of a prohibition on such assignment.

28 Would a special purpose company for purchasing and securitising peer-to-peer or marketplace loans be subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

It is legally required that the peer-to-peer platform operator shall keep the lender's and borrower's information confidential, and further processing activities of data from the subjects in China shall be carried out in China. However, there is no mandatory rule in China requiring that a purchaser of the relevant loans shall be subject to specific data protection liabilities (although in practice they are most likely contractually bound so).

Intellectual property rights

29 Which intellectual property rights are available to protect software, and how do you obtain those rights?

Computer software is protected by copyright as an independent category of works. The subject of copyright is the code script of the software and not the operating process or results of the software.

Software copyright arises automatically upon completion of the code script. Although registration is not a mandatory requirement for the grant of copyright, there is a specific procedure of software copyright registration under Chinese laws. Copyrighters may apply to the China Copyright Protection Centre for the registration of software copyright, licence agreement and assignment agreement of the software copyright.

If the software code has been kept confidential it may also be protected as confidential information. No registration is required.

Thought it is not common, software can also be protected by patents as long as the software demonstrates novelty, creativity and applicability required by patent laws. Patents must be applied for, granted and registered before the competent patent office.

30 Is patent protection available for software-implemented inventions or business methods?

Business methods are excluded from patentability as they are considered 'rules and methods for intellectual activities' and are therefore expressly excluded from patentable subjects under Chinese law.

However, software-implemented business methods or inventions can be protected as patents if the inventions contain 'technical features' and achieve technical improvement over the business methods or inventions themselves. There have been successful cases where software-implemented business methods have been granted with patent rights as inventions.

31 Who owns new intellectual property developed by an employee during the course of employment?

The copyright of works created mainly by using the materials and technical resources of the employer (and that were the employer's responsibility) shall belong to the employer. Otherwise, any works created during the course of employment shall belong to the employee who develops it. However, the employer has the priority right to exploit the work within the scope of its normal business operation. Furthermore, the author may not authorise a third party to use the work in the same manner in which his or her employer uses it, without the employer's consent, within two years of the work's completion.

The patent right of an invention accomplished in the course of performing normal employee duties or mainly by using the material and technical resources of the employer shall be owned by the employer.

However, in practice, most employers, especially technology companies, will specify in the employment contract that all intellectual property rights of works and inventions developed during the course of employment or for the purpose of fulfilling a work assignment are owned by the employer.

32 Do the same rules apply to new intellectual property developed by contractors or consultants? If not, who owns such intellectual property rights?

No. Unless otherwise agreed, the intellectual property rights of inventions or works developed by contractors or consultants shall be owned by the contractors or consultants.

In practice, it is often provided in the commissioning contract that the commissioner owns the intellectual property rights of the work, or that the author owns the rights but shall grant the commissioner an exclusive and royalty-free licence to use the commissioned work for the purposes contemplated at the time of the commissioning.

33 Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

The joint owners of intellectual property rights shall negotiate and reach agreement upon the use, license and assignment of such intellectual property rights. If no such agreement exists, any joint owner has the right to use or grant a non-exclusive licence to third parties, and the licence fees collected shall be distributed among all joint owners. The grant of a sole or exclusive licence, and the charge, assignment or other disposal of the intellectual property rights shall be subject to the consent of all joint owners.

The joint owners of a trademark are not subject to the above restrictions. This is because usually the joint owners register the trademark under different classes and will not create confusion to customers. Each joint owner is entitled to use, license, charge or assign its right in the trademark without consent of the other joint owners.

34 How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

Trade secrets are protected against unauthorised disclosure, misuse and appropriation under competition laws in China. It is also provided in employment contract law that employees are responsible for keeping the trade secrets of their employer confidential. Trade secrets are defined as any technology information or business operation information that: is unknown to the public; can bring about economic benefits to the owner; has practical utility; and on which the owner has adopted security measures. Serious infringement of trade secrets can be deemed a criminal offence in China.

Trade secrets are kept confidential during court proceedings. Cases involving trade secrets can be heard in private if a party so requests.

35 What intellectual property rights are available to protect branding and how do you obtain those rights?

Brands can be protected as registered trademarks in China. Other branding factors such as trade names, commercial appearance, product packaging and decoration can be protected from plagiarism under competition laws in China.

Certain branding such as logos and stylised marks can also be protected by design rights and may also be protected by copyright as artistic works.

36 How can new businesses ensure they do not infringe existing brands?

All registered trademarks are publicly announced upon registration and recorded in the trademark database of the State Intellectual Property Office of China, and can be publicly searched. It is highly advisable for new businesses to conduct trademark searches to check whether earlier registrations exist that are identical or similar to their proposed brand names. It may also be advisable to conduct internet searches for any unregistered trademark rights that are also recognised and protected in China, which may prevent use of the proposed mark.

37 What remedies are available to individuals or companies whose intellectual property rights have been infringed?

Remedies include preliminary and final injunctions, damages or an account of profits, destruction of infringing products, and costs.

38 Are there any legal or regulatory rules or guidelines surrounding the use of open-source software in the financial services industry?

There are no specific rules on the use of open-source software, but there are several rules and guidelines specifying the security standard and selection procedures for the use of IT technology (including software and hardware) in the financial services industry.

Data protection

39 What are the general legal or regulatory requirements relating to the use or processing of personal data?

There is no codified legislation regarding data protection in China, only a few piecemeal regulations scattered among different sectors.

General principles of use and processing of personal data in China include:

- the data processor shall inform the data subjects of the purpose, method and rules of data collection and processing, and the type and scope of data that will be collected and processed;
- the data processor shall obtain the consent of data subjects prior to the processing;
- the data processor shall keep collected data confidential; and
- the data processor shall make use of collected data in accordance with the law and prior agreement with data subjects, and shall not sell or illegally provide a third party with such data.

The data processor (being a telecoms service provider, basic or value-added) shall take reasonable technical and other measures to ensure the safety of collected data and shall promptly notify and make remedies in

case of data breach incidents. Telecoms service providers shall establish a compliant mechanism for data collection and processing, and provide data subjects access to their collected data and the right to correct such data.

In addition, the Cybersecurity Law requires the personal data gathered and produced by the critical information infrastructure operators during their operations to be stored within the territory of China. Where it is necessary to provide such information and data to overseas owing to business demands, a security assessment must be conducted.

40 Are there legal requirements or regulatory guidance relating to personal data specifically aimed at fintech companies?

There are no specific legal requirements aimed at fintech companies. Personal data in the fintech sector is regulated in a similar manner as that in the financial sector.

Financial institutions shall not provide the personal financial information of citizens in China to any entity overseas, subject to exceptions made by the law. A credit rating entity shall not collect sensitive personal information relating to, for example, religion, gene information, fingerprints, blood type, diseases and other medical history, and other information prohibited by law.

41 What legal requirements or regulatory guidance exists in respect of anonymisation and aggregation of personal data for commercial gain?

Currently, there are no additional requirements on anonymisation and aggregation of personal data, except for the requirements set out in question 39. The Cybersecurity Law allows network operators to provide personal data to a third party without consent under exceptional circumstances where the personal data has been processed so that it cannot be used or recovered to identify a specific individual.

Cloud computing and the internet of things

42 How common is the use of cloud computing among financial services companies in your jurisdiction?

It is quite common. Along with the trend of internet finance and 'Internet Plus', traditional and innovative financial service companies in China are using cloud computing as an important tool to better adapt to the huge data flows and facilitate the various needs of e-commerce. Ant Financial, the Chinese internet finance giant, launched a cloud-computing service called 'Ant Financial Cloud' to help financial institutions build IT structures that are efficient, stable and secure.

43 Are there specific legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

Cloud computing is deemed a type of value-added telecommunication service and requires a telecoms service licence. There are no specific legal rules relating to the use of cloud computing in the financial sector, but the State Council has issued the Guiding Opinions on Actively Promoting the 'Internet Plus' Action Plan, where the use of cloud computing in the financial sector and the use of online financial cloud service platforms is encouraged.

44 Are there specific legal requirements or regulatory guidance with respect to the internet of things?

There are no specific legal requirements on the internet of things.

Tax

45 Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

There are no specific tax incentives applicable to fintech companies. However, there are some incentives and government support policies applicable to IT and high-tech companies. These industrial policies and incentives are found across the different regions and districts of China.

Competition

46 Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction or that may become an issue in future?

There is a competition regime in China that applies to all entities carrying out business in mainland China. However, there are no particular aspects of this regime that would affect fintech business disproportionately to other businesses.

Financial crime

47 Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

There is no legal or regulatory requirement for fintech companies to have anti-bribery or anti-money laundering procedures unless the company carries out business with licensed financial institutions. This means that financial institutions take most of the responsibility for combating bribery and money laundering rather than fintech companies.

China's central bank released new regulations for third-party payment transactions that have been in effect since July 2016. Under the new regulations, know-your-client (KYC) checks must be completed on clients for anti-money laundering purposes and there are annual limits on outgoing payments. Payment platform operators can offer three types of accounts that have escalating regulatory requirements. Accounts with lower annual limits have lower minimum KYC requirements and accounts with higher annual limits have more comprehensive KYC requirements.

Under the Online Lending Rules issued on 17 August 2016, client funds on peer-to-peer lending platforms must be held by the People's Bank of China or qualified commercial banks. On 22 February 2017, the CBRC further issued guidance on escrow services for online lending funds, which explicitly requires banks to comply with their anti-money laundering responsibilities.

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Furthermore, there are three parts to China's anti-money laundering legal regime. The first comprises laws passed by the National People's Congress, such as the Criminal Law and the Anti-Money Laundering Law. The second comprises the Executive Regulations issued by the State Council, including the regulation on the use of real names on individual savings accounts. The third comprises rules issued on order of the State Council by anti-money laundering departments and the PBOC, including the Financial Institutions (Anti-Money Laundering) Regulations, the Rules of Implementation of the Measures Governing Reporting of Large and Suspicious Foreign Exchange Transactions, and the Administrative Measures for Financial Institutions' Reporting of Large-sum Transactions and Doubtful Transactions.

These three regulations set the rules for anti-money laundering supervisory requirements for financial institutions with banking functions and clearly establish the basic framework in China for anti-money laundering reporting and an information monitoring system.

48 Is there regulatory or industry anti-financial crime guidance for fintech companies?

Yes. On 18 July 2015, several central government ministries and commissions jointly issued the Guideline on Promoting the Healthy Development of Internet Finance. The intention of these guidelines was to further the government's promotion of, and incentives given to, digital financial services and innovative platforms, while also establishing regulatory competences between different commissions.

Czech Republic

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

Providing investment services and activities (as defined in the Markets in Financial Instruments Directive 2004/39/EC (MiFID)) such as investment advice relating to financial instruments, dealing in financial instruments (including foreign exchange) on behalf of clients. Also for banking activities, such as lending (in particular lending to consumers) and deposit taking, a licence is generally required in the Czech Republic.

Payment services institutions and e-money institutions are regulated by a special law, the Payment System Act, which has implemented the Payment Services Directive (PSD) and E-Money Directive.

On the other hand, certain activities, such as general financial advice, advising on capital structure, invoice trading or secondary market loan trading, do not necessarily trigger a licensing requirement.

The Czech National Bank (CNB) is the regulatory body for all regulated financial and banking services in the Czech Republic, and the licensing requirements are generally consistent with those set out in relevant EU directives.

2 Is consumer lending regulated in your jurisdiction? Describe the general regulatory regime.

Yes, consumer lending is regulated in the Czech Republic.

The new Act on Consumer Loans, implementing the Mortgage Credit Directive, became effective in 2016 and imposed much stricter licensing requirements on non-bank providers of consumer loans; it also substantially extended the definition of a consumer loan.

3 Are there restrictions on trading loans in the secondary market in your jurisdiction?

There are no specific restrictions. However, there are some restrictions relating to the trading of consumer loans given the nature of such loans and their stricter regulation.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would generally fall within the scope of any such regime.

Collective investment schemes must, in particular, comply with the Act on Management Companies and Investment Funds, which implemented the Directive on Undertakings for Collective Investment in Transferable Securities (UCITS), and the Alternative Investment Fund Managers Directive (AIFMD). However, fintech companies providing marketplace lending or crowdfunding platforms usually do not fall within the scope of these regulations.

5 Are managers of alternative investment funds regulated?

Yes, managers of alternative investment funds are regulated in accordance with the AIFMD, as implemented into Czech law, and related regulations.

However, most fintech companies would be expected to fall outside the scope of the AIFMD and related regulations.

6 May regulated activities be passported into your jurisdiction?

Yes, as a general principle entities regulated in other EU or EEA member states may provide regulated services in the Czech Republic under the relevant passport based on (i) the freedom to provide cross-border services; or (ii) the freedom of establishment, without having to obtain a Czech licence or authorisation.

7 May fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

A fintech company that cannot passport its regulated activities into the Czech Republic, as described above, needs to establish a local presence in the Czech Republic and hold a relevant licence granted by the CNB if it wishes to conduct its regulated activities here.

8 Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

There is no specific regulation in this respect.

If lending to consumers was conducted commercially by an entrepreneur then that lender would need to comply with the new Act on Consumer Loans irrespective of the number of loans provided.

Providing a marketplace for lending where no other financial service is involved is not a regulated activity, and a simple trade licence should suffice.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

At this moment, crowdfunding is not specifically regulated in the Czech Republic, assuming it does not involve deposit-taking or offering investment securities to the public (subject to exemptions set out in the Prospectus Directive).

10 Describe any specific regulation of invoice trading in your jurisdiction.

There is no specific regulation relating to invoice trading. However, there may be certain data protection issues and general contractual issues that need to be addressed.

11 Are payment services a regulated activity in your jurisdiction?

Payment services are indeed regulated in the Czech Republic, and the PSD and the E-Money Directive have been implemented into Czech law. The PSD2 should also apply in the Czech Republic as of 2018.

12 Do fintech companies that wish to sell or market insurance products in your jurisdiction need to be regulated?

Yes, such fintech companies (or their individual employees, as the case may be) need to be regulated by the CNB in accordance with the Act on Insurance Intermediaries (which implemented relevant EU directives into Czech law). Legal or natural persons selling or marketing insurance products need to fulfil certain professional requirements and register with the CNB (as insurance intermediaries, brokers, tied agents, etc) unless (i) they provide such activities only on an incidental basis and as an ancillary activity to their core business; or (ii) they

provide only general information on insurance products and no client- or product-specific information.

13 Are there any legal or regulatory rules in your jurisdiction regarding the provision of credit references or credit information services?

There are no specific legal or regulatory rules, but there may be certain data protection issues that need to be addressed.

The CNB runs the Central Credit Register (CCR), an information system that pools information on the credit commitments of individual entrepreneurs and legal entities, and facilitates the efficient exchange of this information among the CCR's participants (banks).

There are a number of other (private) credit bureaus, both banking and non-banking, which provide information on potential borrowers to their members and co-founders.

14 Are there any legal or regulatory rules in your jurisdiction that oblige financial institutions to make customer or product data available to third parties?

Contracts of customers from the public sector have to be published in a special public registry. Otherwise, there are no legal or regulatory rules in the Czech Republic that would oblige financial institutions to make customer- or product-specific data available to third parties, with the exception of providing data for anti-money laundering (AML), tax evasion or statistical purposes to governmental bodies or agencies, financial offices, etc.

15 Does the regulator in your jurisdiction make any specific provision for fintech services and companies? If so, what benefits do those provisions offer?

Thus far the CNB has provided for no specific regulatory exemptions or privileges for fintech.

16 Does the regulator in your jurisdiction have formal relationships or arrangements with foreign regulators in relation to fintech activities?

No, there are no such 'fintech bridges' between the CNB and foreign regulators.

17 Are there any local marketing rules applicable with respect to marketing materials for financial services in your jurisdiction?

Certain marketing rules apply to various types of financial products and services in the Czech Republic; most stem from the general requirements of EU law, such as MiFID or UCITS. These requirements apply especially to marketing materials aimed at retail investors, for example, with respect to the explanation of risks, the presentation of past performance or formal aspects, such as the required reference to a prospectus or a key investor information document (KIID).

18 Are there any foreign exchange or currency control restrictions in your jurisdiction?

No. There are no foreign exchange or currency control restrictions in the Czech Republic.

19 If a potential investor or client makes an unsolicited approach either from inside the provider's jurisdiction or from another jurisdiction, is the provider carrying out a regulated activity requiring a licence in your jurisdiction?

No, the concept of 'reverse solicitation' is recognised in the Czech Republic. If a potential investor acting on its own initiative approaches a service provider, it would likely be concluded that the service provider is not providing financial services in the Czech Republic while discussing the banking, investment or other financial services with such potential client.

20 If the investor or client is outside the provider's jurisdiction and the activities take place outside the jurisdiction, is the provider carrying out an activity that requires licensing in its jurisdiction?

If the services are performed exclusively outside the Czech Republic then they would most likely not fall within the Czech licensing regime.

Assessing whether a financial service (or business in general) is carried out within or outside the Czech Republic depends on a number of criteria. According to an interpretative notice issued by the CNB the following elements would, in particular, tend to indicate that business is being carried out in the Czech Republic:

- the services are advertised in the Czech Republic (including via the internet or local intermediaries);
- local customers may interactively communicate with the service provider via the provider's website;
- the service provider's website is available in Czech or is otherwise focused on Czech customers;
- the relevant contractual documentation is governed by Czech law or the language used in such documentation is Czech; or
- the service agreement may be concluded with a service provider from the Czech Republic (including online).

21 Are there continuing obligations that fintech companies must comply with when carrying out cross-border activities?

If a fintech company is regulated in the Czech Republic and is operating cross-border under a European passport, the Czech prudential requirements and applicable conduct of business rules will continue to apply.

Conversely, if a fintech company provides cross-border activities under its European passport into the Czech Republic, its home state prudential and applicable conduct of business rules will apply to its passported business. That said, there are no specific continuing obligations that fintech companies must comply with when carrying out cross-border activities.

22 What licensing exemptions apply where the services are provided to an account holder based outside the jurisdiction?

There are no existing licensing exemptions.

Distributed ledger technology

23 Are there any legal or regulatory rules or guidelines in relation to the use of distributed ledger (including blockchain) technology in your jurisdiction?

There are no such legal or regulatory rules or guidelines relating to the use of distributed ledger technology in the Czech Republic.

Digital currencies

24 Are there any legal or regulatory rules or guidelines in relation to the use of digital currencies or digital wallets, including e-money, in your jurisdiction?

Payment services, including e-money, are regulated by the Payment Services Act, which has implemented the PSD and E-Money Directive. AML regulation also applies.

Securitisation

25 What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

The execution of a loan agreement requires nothing but an expression of will of both contractual parties and a specification of the basic parameters, such as the amount of the loan, interest, maturity, etc. For consumer loan agreements, a written form of the agreement is necessary.

To conclude a security agreement, the requirements are basically the same as when executing a loan agreement. If real estate is the subject of collateral (a mortgage), the agreement must be concluded in writing, and it does not become effective until the respective cadastre office registers the mortgage in the cadastre. Collateral consisting of an ownership interest in a limited liability company must be registered in the Commercial Register.

There might be a potential risk in distance contracts that lack a qualified electronic signature. Although the electronic execution of an agreement qualifies as a written form of an agreement, opinions differ on how the agreement must be signed. Rulings of Czech courts on this issue have repeatedly tended to prefer a qualified electronic signature to a simple electronic signature or just stating the name of the party in an email.

Furthermore, if the interest rate is determined to be unreasonably high there might be a risk of unenforceability of the interest or its part.

26 What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected?

Although the law does not require a written form, for the sake of legal certainty it is recommended to execute the assignment agreement in writing. The lender may assign the whole receivable, or its part, unless the agreement with the borrower prevents it from being assigned (eg, it is stated in the loan agreement that the subject receivables cannot be assigned).

In addition to assigning a receivable, Czech law allows for the assignment of an agreement as a whole. In this case, however, the assignment cannot be perfected without the explicit consent of the other party to the agreement (in this case the borrower).

27 Is it possible to transfer loans originated on a peer-to-peer or marketplace lending platform to the purchaser without informing the borrower? Does the assignor require consent of the borrower or are the loans assignable in the absence of a prohibition?

It is not necessary for the borrower to agree to the assignment of a receivable. However, the assignment is not effective towards the borrower until the assignor notifies the borrower of the assignment, or the assignee has proven the assignment to the borrower. In this case, the borrower may still fulfil its debt by repaying it to the original lender (the assignor).

The borrower's consent, as stated in the previous point, is required when assigning an agreement as a whole.

However, as an assignment typically entails a disclosure to the assignee of the borrower's personal data and possibly other confidential information, in practice loan agreements either contain the borrower's consent to a possible assignment in advance, providing that the lender is entitled to disclose all necessary data to the prospective assignee, or the borrower's consent has to be obtained.

28 Would a special purpose company for purchasing and securitising peer-to-peer or marketplace loans be subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

Such company would be subject to data protection laws, which apply to all natural and legal persons that collect and process personal data. The definition of personal data is quite broad and includes all data that could lead to the identification of a specific individual. Consent of the data subject to the processing is not required if the processing is necessary for the fulfilment of an agreement with the data subject; however, it would be required if personal data were being disclosed to a third party.

Intellectual property rights

29 Which intellectual property rights are available to protect software, and how do you obtain those rights?

The principal form of legal protection of software in the Czech Republic is copyright. Copyright is governed by Act No. 121/2000 Sb. (the Copyright Act). Copyright protection is informal (ie, without any formal registration). In addition, software may be protected as a trade secret if it fulfils the conditions required for a trade secret under Czech law. Trade secrets are regulated by Act No. 89/2012 Sb. (the Civil Code, section 2985). Protection of trade secrets is also informal. Software branding and external design are also protected under (other) provisions on unfair competition contained in section 2976 et al of the Civil Code.

Software may also be protected by several forms of industrial property rights protection in the Czech Republic (ie, protection that requires formal registration in order to become effective). Computer-implemented invention (CII) comprising software parts is generally patentable under Czech law if it represents a patentable invention under Act No. 527/1990 Sb. (the Patent Act), (see also question 30). Software might also be considered a utility model in accordance with Act No. 478/1992 Sb.

Update and trends

The Czech Republic is a developed EU member state, and as such it faces more or less the same standard trends as in Western European countries – increased focus on privacy versus big data analysis and monitoring, increased online services, introduction of new disruptive services, etc.

The external parts of software (design, user interface, website, etc) are protectable as registered designs under Act No. 441/2003 Sb. (the Registered Designs Act).

Titles and brands of software are protected as registered trademarks under Act No. 441/2003 Sb. (the Trademark Act). For the protection of company names, see question 35.

30 Is patent protection available for software-implemented inventions or business methods?

Novel and innovative CII is patentable under Czech patent law (the protection covers the invention and its compounds as whole, not as autonomous parts).

Business models are not protectable under Czech patent law.

31 Who owns new intellectual property developed by an employee during the course of employment?

If there is no agreement stating otherwise, all economic rights in intellectual property developed by employees during the course of their employment relationship are exclusively exercised by employers.

32 Do the same rules apply to new intellectual property developed by contractors or consultants? If not, who owns such intellectual property rights?

Yes, the rules that apply to employees also apply to contractors and consultants.

33 Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

As a general rule, joint owners of intellectual property exercise their rights jointly. If a co-author refuses without justification to provide his or her consent necessary to exercise rights to a jointly created intellectual property, other co-authors might apply to a common court to provide the necessary consent of such co-author. Any co-author has a right to independently exercise his or her right to fight against infringement or suspected infringement of his or her intellectual property.

34 How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

As mentioned above, trade secrets and confidential information are protected under Czech law under section 2985 of the Civil Code. Trade secrets are kept confidential during court proceedings.

35 What intellectual property rights are available to protect branding and how do you obtain those rights?

Brands are protectable in the Czech Republic, both informally under the provisions on unfair competition contained in the Civil Code (see question 29), or formally as registered trademarks under the Trademark Act. Trademarks must be registered with the Czech Industrial Property Office.

In addition, in the Czech Republic it is not possible to register a company name that is the same as another company name that has already been registered. The same applies to the registration of a domain name in .cz domains.

36 How can new businesses ensure they do not infringe existing brands?

It is recommended that searches for the same or confusingly similar titles or names be done by legal professionals due to the complexity of the legal rights related to the protection of brands. The Czech Industrial Property Office maintains a Czech national trademark registry. Domain name registrations in .cz can be searched in the list

maintained by the Czech Registry, CZNIC. Company names can be searched in the Czech Corporate Register. All of these registers are available online, free of charge.

37 What remedies are available to individuals or companies whose intellectual property rights have been infringed?

Czech law contains efficient remedies against infringement of intellectual property rights. Authors have a right to request:

- confirmation of authorship;
- prohibition of infringing activities;
- provision of information about infringement or suspected infringement;
- removal of the consequences of infringement;
- appropriate satisfaction in monetary and/or non-monetary form;
- prohibition of contributory infringement (ie, services enabling other persons to infringe intellectual property rights); and
- damages and/or an accounting of profits.

Holders of exclusive licences or persons exercising exclusive economic rights (for work made on hire) have a right to solely demand all the above-mentioned remedies except for confirmation of authorship and appropriate satisfaction.

Czech law also contains severe criminal sanctions for intentional breaches of intellectual property rights – several years of imprisonment and sanctions of up to hundreds of thousands of euros.

38 Are there any legal or regulatory rules or guidelines surrounding the use of open-source software in the financial services industry?

There are no legal regulations or rules governing the use of open-source software in the financial services industry. Ministries, the CNB as well as financial institutions used to have guidelines or internal rules governing such use for the purposes of internet banking, online payments, etc.

Data protection

39 What are the general legal or regulatory requirements relating to the use or processing of personal data?

Protection of personal data is generally governed by Act No. 101/2000 Sb. (the Data Protection Act). At present the Data Protection Act is subject to extensive legislative changes in order to adapt the Act accordingly to the provisions of EU Regulation No. 2016/679 (the General Data Protection Regulation (GDPR)).

40 Are there legal requirements or regulatory guidance relating to personal data specifically aimed at fintech companies?

No, there are no specific rules governing the processing of personal data by fintech companies. Nevertheless, this might change in the coming months once new Czech legislation implementing the proposed EU e-Privacy Regulation and PSD2 is adopted.

41 What legal requirements or regulatory guidance exists in respect of anonymisation and aggregation of personal data for commercial gain?

In short, Czech law will probably follow the recommendations of the Article 29 Data Protection Working Party on anonymisation techniques No. 05/2014, adopted on 10 April 2014.

Cloud computing and the internet of things

42 How common is the use of cloud computing among financial services companies in your jurisdiction?

Cloud computing is on the rise among financial services companies in the Czech Republic. More and more small and medium-sized enterprises as well as larger firms are using cloud services.

43 Are there specific legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

No, there are no specific rules governing the use of cloud computing in the financial services industry in Czech Republic. Nevertheless, ministries, institutions as well as larger corporations tend to have internal rules governing the use of cloud computing, mainly in relation to information security. The CNB has also issued several guidelines related to security that are relevant for clouds as well as for other technical methods and platforms.

44 Are there specific legal requirements or regulatory guidance with respect to the internet of things?

There are no specific legal requirements or regulatory guidance with respect to the internet of things, although there are several projects in their initial stages (eg, Industry 4.0 and e-Justice).

Tax

45 Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

We are not aware of any tax incentives specifically available for fintech companies in the Czech Republic.

Competition

46 Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction or that may become an issue in future?

At the moment we are not aware of any specific competition issues with respect to fintech companies in the Czech Republic. However, competition issues will most likely arise between banks and payment services companies after implementing the PSD2 into Czech law – this should happen within the next few months. In addition, there might be new competition issues between banks in relation to data portability concepts contained both in the GDPR and PSD2.

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Financial crime

47 Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

Yes. Fintech companies are subject to standard AML procedures described in Act No. 253/2008 Sb. on Certain Measures Against Legalisation of Proceeds from Criminal Activities and Financing Terrorism (the AML Act).

48 Is there regulatory or industry anti-financial crime guidance for fintech companies?

Yes. AML guidance is published by the Financial Analytical Office.

Germany

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

Pursuant to section 32(1) sentence 1 of the German Banking Act (KWG), anyone wishing to conduct banking business or to provide financial services in Germany commercially or on a scale that requires a commercially organised business undertaking requires a written licence from the German Federal Financial Services Supervisory Authority (BaFin). What constitutes banking business or financial services is set forth in section 1 paragraphs 1 and 1a KWG and comprises, inter alia:

- the provision of money loans (lending business);
- the brokering of business involving the purchase and sale of financial instruments (investment broking);
- providing customers or their representatives with personal recommendations in respect of transactions relating to certain financial instruments where the recommendation is based on an evaluation of the investor's personal circumstances or is presented as being suitable for the investor and is not provided exclusively via information distribution channels or for the general public (investment advice);
- the purchase and sale of financial instruments on behalf of and for the account of others (contract broking);
- the management of individual portfolios of financial instruments for others on a discretionary basis (portfolio management);
- dealing in foreign notes and coins (foreign currency dealing);
- the ongoing purchase of receivables on the basis of standard agreements, with or without recourse (factoring);
- the conclusion of financial lease agreements in the capacity of the lessor and the management of asset-leasing vehicles (financial leasing);
- the purchase and sale of financial instruments separately from the management of a collective investment scheme for a community of investors, who are natural persons, on a discretionary basis with regard to the choice of financial instruments (asset management); and
- the acceptance of monies from the public (deposit business).

In general it can be said that the investment services and activities listed in section A of Annex I to the Markets in Financial Instruments Directive 2004/39/EC and Annex I of Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms are licensable in Germany.

The provision of payment services is licensable based on the provisions of the German Act on the Supervision of Payment Services (ZAG).

Note that trading of claims deriving from fully drawn loan agreements does not trigger a licence requirement, provided that the claim is not amended. Amendments requiring a new credit decision, such as, for example, prolongation, can constitute licensable lending business.

2 Is consumer lending regulated in your jurisdiction? Describe the general regulatory regime.

With regard to consumer lending two different angles have to be considered. From a banking regulatory perspective, providing loans to consumers is licensable lending business, but does not trigger any additional scrutiny only based on the category of borrowers. Further, there is a civil law angle to consumer loans. The German Civil Code contains specific rules that have to be complied with by the lender and that generally focus on consumer protection. The civil law provisions contain an elaborate protection regime and require the borrower to comply with, inter alia, certain disclosure obligations and walk away rights for the borrowers.

3 Are there restrictions on trading loans in the secondary market in your jurisdiction?

The purchase and sale of claims deriving from fully drawn loans on the secondary market does not generally constitute licensable lending business in Germany. However, in case of amendments to the credit terms such activity could be considered as primary lending, which requires a banking licence (see question 1).

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would generally fall within the scope of any such regime.

The German Capital Investment Code (KAGB) provides the licensing and supervision regime for investment management companies and investment funds in Germany. In addition, the marketing of investment funds to investors in Germany is also regulated under the KAGB. The KAGB takes a holistic approach and provides the legal regime for all collective investment schemes (ie, alternative investment funds and undertakings for collective investments in transferable securities). The aim of the KAGB is to ensure an adequate supervision of collective investments, including the administration, marketing and compliance with investment rules.

However, crowdfunding platforms and peer-to-peer lending platforms are generally not viewed as collective investment schemes by the Federal Financial Supervisory Authority (BaFin). BaFin focuses on the lending aspect and indicates in guidance notes that, depending on the actual nature of the services provided, licensable lending business can be conducted. Further, the brokerage of loans requires a licence under the German Industrial Code (GewO) and, therefore, the operation of a peer-to-peer lending platform could trigger the requirement for a loan broker licence.

5 Are managers of alternative investment funds regulated?

Managers of alternative investment funds located in Germany are regulated under the KAGB. The same applies to a certain extent also to German branches of non-German managers of alternative investment funds. Alternative investment funds may only be marketed in Germany once they are registered or passported for distribution to investors in Germany. Germany has implemented the Alternative Investment Fund Managers Directive 2011/61/EU (AIFMD). Depending on the nature of their actual activities, fintech companies could fall outside the scope of the KAGB, if the activities such fintech companies are conducting would not constitute an investment fund. An investment fund is, pursuant to section 1(1) sentence 1 of the KAGB, any collective investment fund that raises capital from a number of investors, with a view to investing in accordance with a defined investment policy for the benefit of those investors and which does not constitute an undertaking operating outside of the financial sector. Such a number of investors shall be deemed to exist if the fund rules or the articles of association of the

collective investment fund do not limit the number of potential investors to a single investor.

6 May regulated activities be passported into your jurisdiction?

As Germany is a member of the European Union, institutions holding a licence to conduct regulated activities in any European Economic Area (EEA) country can apply for the notification ('passporting') of their licence from their home regulator to a host regulator within the EEA. Such passport would enable the licence holder to establish a physical presence in the form of a branch in the host country or to provide services on a cross-border basis.

7 May fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

A German financial services licence will only be granted to a fintech company if a physical presence has been established in Germany. However, as described in question 6, a fintech company with a financial services licence in another EEA country can apply for the notification of such licence to Germany and would, thus, be able to provide financial services in Germany through a branch or without a physical presence on a pure cross-border basis.

8 Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

Lender and borrowers

BaFin has published guidance on the question of when the participants of a peer-to-peer marketplace typically conduct lending or deposit business on a scale that triggers a licensing requirement. Pursuant to this guidance, investors (ie, persons lending on a peer-to-peer platform (unless they are corporations)) are limited to allocating per borrower €1,000 or €10,000 if the borrower has disposable assets of at least €100,000 or two net monthly salaries but not more than €10,000. Further, the aggregate borrowing of any one borrower must not exceed €2.5 million.

In addition, under certain circumstances crowd lending models are subject to the Act on Capital Investments (VermAnlG) so that several investor protection rules apply, such as the requirement to produce a sales prospectus, which must be approved by BaFin.

Peer-to-peer or platform operators

Whether the operation of a crowd lending platform requires a licence and which kind of licence depends on the actual services that are provided. Generally, it depends on the manner in which the contracting is designed on the platform. In cases where the operator of the platform merely provides the infrastructure, the licensable activities are more likely to be conducted by the users of the platform. If, on the other hand, the operator of the platform steps into each transaction and takes on its own credit risk, it is likely that the licensable activity will be conducted by the platform operator. However, the pure brokerage of loans would generally not be considered as banking, financial or payment services, so 'only' an authorisation under GewO may be required.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

There are several different kinds of crowdfunding platforms available in Germany. In a guidance note BaFin sets out four main crowdfunding models: donation-based and rewards-based crowdfunding, which is also referred to as crowd sponsoring, loan-based crowdfunding (crowd lending) and crowd investing. In the latter two types, the aim is to generate a financial return. BaFin does not apply specific regulatory regimes to different business models per se. BaFin rather focuses on the concrete activities undertaken by the users and the operators of the crowdfunding platforms and decides on a case-by-case basis and based on the facts at hand whether licensable activities are conducted and by whom.

10 Describe any specific regulation of invoice trading in your jurisdiction.

Invoice trading is generally not a regulated activity in Germany. However, in the event that the actual activities constitute a financial service (eg, factoring, which means the ongoing purchase of receivables on the basis of standard agreements, with or without recourse) such activity is regulated in Germany and requires a financial services licence (see question 1).

11 Are payment services a regulated activity in your jurisdiction?

Germany has implemented the Payment Services Directive and, thus, anyone wishing to conduct payment services as a payment institution commercially or on a scale that requires commercially organised business operations needs written authorisation from BaFin (see question 1). What constitutes payment services is set forth in the ZAG and comprises the same activities set forth in the Payment Services Directive.

12 Do fintech companies that wish to sell or market insurance products in your jurisdiction need to be regulated?

Fintech companies focusing on insurance are referred to as 'insurtechs', although no legal definition exists for such term. Insurtechs are subject to insurance supervision by BaFin if they conduct insurance business in Germany or the local chamber of industry and commerce if they act as insurance intermediaries in Germany.

13 Are there any legal or regulatory rules in your jurisdiction regarding the provision of credit references or credit information services?

In addition to the business registration requirement pursuant to section 38 GewO, the provisions of the German Federal Data Protection Act (BDSG) must be observed. These legal provisions regulate the collection, storage, modification and use of personal data.

14 Are there any legal or regulatory rules in your jurisdiction that oblige financial institutions to make customer or product data available to third parties?

Currently, there are no legal or regulatory rules in Germany that oblige financial institutions to make customer or product data available to third parties but there are likely to be in the future owing to the implementation of the Second Payment Services Directive (PSD2) into German law.

15 Does the regulator in your jurisdiction make any specific provision for fintech services and companies? If so, what benefits do those provisions offer?

BaFin has a keen interest in helping fintech companies to comply with the rules and regulations in Germany and considered whether such companies should be able to benefit from a 'regulatory sandbox' like in other jurisdictions. However, BaFin decided not to implement such model since the rules and regulations are applicable for every company if the requirements are triggered. BaFin has, however, publicly stated that it applies 'proportionate' supervision (ie, small businesses with low-risk positions are supervised differently from large businesses with large risk positions).

16 Does the regulator in your jurisdiction have formal relationships or arrangements with foreign regulators in relation to fintech activities?

BaFin currently has no formal relationships or arrangements with non-German regulators in relation to fintech activities.

17 Are there any local marketing rules applicable with respect to marketing materials for financial services in your jurisdiction?

Any marketing material that will be made available to clients in Germany must be in compliance with German regulatory law. Whereas marketing rules for institutional investors are rather limited in the sense that marketing material has to contain only true, clear and not misleading statements, the marketing rules for retail investors are very comprehensive and detailed BaFin practice exists.

18 Are there any foreign exchange or currency control restrictions in your jurisdiction?

There are no restrictions on the euro – it is freely convertible and exportable. There are equally no restrictions on the transfer of other capital or foreign exchange and no restrictions on German residents having offshore bank accounts.

There are no reporting requirements when operating on a cross-border basis (ie, not via a local entity or branch). However, there are reporting requirements that would be applicable to entities or persons located in Germany. Under section 66 of the Foreign Trade Ordinance (AWV), there is a general duty on the bank to notify the German Bundesbank of receivables and liabilities to foreigners exceeding €5 million at the end of a month. If such receivables and liabilities at the end of a quarter exceed €500 million, the bank has to notify the German Bundesbank of its receivables and liabilities arising under derivative financial instruments. Under section 67 AWV, the bank has to notify the German Bundesbank of payments received from foreigners (or from nationals for the account of foreigners) or made by it to foreigners (or to nationals for the account of foreigners) exceeding €12,500.

19 If a potential investor or client makes an unsolicited approach either from inside the provider's jurisdiction or from another jurisdiction, is the provider carrying out a regulated activity requiring a licence in your jurisdiction?

An approach made by a potential client on an unsolicited basis will avoid triggering the licensing requirement. The term 'unsolicited approach' is not defined under German regulatory law but an unsolicited approach is generally of a purely passive nature. The response must therefore be limited to the licensable activities covered by the unsolicited request and should be transaction-based rather than relationship-based. In order to prove that the request was unsolicited, keeping records of the paper trail is recommended.

20 If the investor or client is outside the provider's jurisdiction and the activities take place outside the jurisdiction, is the provider carrying out an activity that requires licensing in its jurisdiction?

No licensing requirement will generally be triggered where the client is located outside Germany and the activities take place outside Germany. However, if the non-German company attracts the German client to leave Germany to provide regulated services outside Germany, and therefore to circumvent the licensing regime in Germany, BaFin might take a different view.

21 Are there continuing obligations that fintech companies must comply with when carrying out cross-border activities?

If a non-German fintech company provides regulated services under the European passport on a pure cross-border basis into Germany, the home state regime applies.

22 What licensing exemptions apply where the services are provided to an account holder based outside the jurisdiction?

In general the passive freedom to provide services exemption applies within the EU and, hence, in cases where the customer requests the provision of services from a service provider outside its jurisdiction without prior solicitation the service provider is allowed to provide the requested services on a cross-border basis without holding a licence in the jurisdiction of the customer. However, it should be noted that BaFin only has jurisdiction in Germany and, hence, any activities outside Germany have to be judged pursuant to the laws of the jurisdiction where the services are provided.

Distributed ledger technology

23 Are there any legal or regulatory rules or guidelines in relation to the use of distributed ledger (including blockchain) technology in your jurisdiction?

No, there is no single regulation specifically addressing distributed ledger technologies (DLT) in Germany. However, use cases deploying DLT/blockchain technology in regulated markets (eg, securities markets) must comply with the existing legal framework applicable to the specific service and its providers. European requirements such as EMIR, MiFIR, CSDR, MiFID2, AIFMD and SFRT as well as the national implementations thereto must be regarded. For instance, a use case involving the clearing of assets by deploying DLT would have to fulfil the requirements of EMIR and MiFIR in terms of authorisation and regulated entities. BaFin has the power to prohibit unauthorised businesses. In addition, smart contracts and initial coin offerings are subject matters that are currently under close scrutiny by the supervisory authorities.

Digital currencies

24 Are there any legal or regulatory rules or guidelines in relation to the use of digital currencies or digital wallets, including e-money, in your jurisdiction?

Yes, BaFin publishes its view on digital currencies and e-money regulations on its web page. BaFin qualifies bitcoin (BTC) as a financial instrument in the form of 'units of account'. These units of account are similar to foreign currencies and not of legal tender. BTC is neither central bank money nor e-money under German law: it is not central money because it is not issued by the central bank, and it is not e-money because it is not issued by an issuer against whom a claim can be established. The distribution of BTC requires authorisation by BaFin if the distribution is performed on a commercial basis or requires a commercially organised business operation. If virtual currencies are bought and sold for third parties, this could be classified as 'proprietary trading' under the German Banking Act depending on the specific arrangements deployed, which requires a BaFin authorisation as well. In addition, e-money institutions must be authorised and subject to supervision by BaFin. Offering digital wallets online may require BaFin authorisation depending on the tokens and the wallet services being provided. BaFin has the power to prohibit any unauthorised business activities with immediate effect.

Securitisation

25 What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

There is no special legislation applicable in Germany in relation to peer-to-peer (P2P) lending (ie, the general regulatory and lending provisions are applicable).

A distinction needs to be made between direct and indirect P2P lending:

- In relation to direct P2P lending the agreement is concluded directly between the investor and the borrower. However, owing to regulatory limitations (ie, licence requirements for lending activity), this structure is not popular in Germany.
- In relation to indirect P2P lending (which is common in Germany) a cooperating licensed bank is involved. The licensed bank enters into a loan agreement with the borrower. Once the loan agreement between the bank and the borrower has been entered into, the bank assigns under a purchase and assignment agreement its claims under the loan agreement pro rata to the respective investor whereby often an affiliated company (intermediary) of the platform provider is interposed. Thus, there is no direct agreement between the borrower and the investor.

The bank cooperates with the platform provider under a cooperation agreement and the platform provider serves as loan broker under a loan brokerage agreement with the borrower. For the loan brokerage the platform provider needs a GewO permission. Further, the platform provider must not receive monies that are determined to have been forwarded, otherwise a licence would be required.

Generally, care should be taken in the documentation that the purchase of claims does not qualify as factoring, that the money laundering requirements have been complied with, and that the borrower consents to the transfer of the borrower's personal data to the investors.

With regard to loan agreements with consumers, consumer protection law needs to be taken into account (ie, special information and form requirements as well as revocation instructions are applicable). In the event that consumer information undertakings are not complied with, this can give rise to damage claims by the borrower; in the event that the form requirements are not complied with, the loan agreement can be void; or in the event that the consumer has not been instructed correctly on its revocation rights, the loan can become revocable for an indefinite period.

With regard to formal requirements for the execution of the loan and security agreements, written form is required; electronic form is permitted as well, save for certain security documents where a notarisation by a German notary is required (eg, land charge deeds, which include an immediate enforcement clause or share pledge agreements,

which relate to the pledge of shares in a German limited liability company (GmbH)).

26 What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected?

An assignment agreement would need to be concluded in relation to the assignment of the loan claims; there are no further perfection requirements. The assignment is also valid if it is not being disclosed to the borrowers.

27 Is it possible to transfer loans originated on a peer-to-peer or marketplace lending platform to the purchaser without informing the borrower? Does the assignor require consent of the borrower or are the loans assignable in the absence of a prohibition?

In case of a transfer of rights and obligations under a loan agreement, the borrower as both debtor and creditor would need to consent to the transfer. Usually the loan documentation would include provisions requiring the prior consent of the borrower to such transfer.

In case of an assignment of rights under a loan agreement, an assignment is generally possible without the consent of the borrower. In the event that an assignment of the rights under a loan agreement was explicitly excluded by a borrower in the loan documentation, the assignment would be void. However, in case of the indirect P2P lending structure, the loan documentation should already include the consent of the borrower to assign the claims under the loan agreement to the investor (or intermediary, as the case may be) (see question 25 regarding indirect P2P lending).

28 Would a special purpose company for purchasing and securitising peer-to-peer or marketplace loans be subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

Yes, the special purpose company would be subject to data protection laws regarding information relating to the borrowers. However, in case of the indirect P2P lending structure, the loan documentation should already include the consent of the borrower to share its information with the special purpose company (see question 25 regarding indirect P2P lending).

Intellectual property rights

29 Which intellectual property rights are available to protect software, and how do you obtain those rights?

According to German copyright law, computer programs shall be protected if they represent individual works in the sense that they are the result of the author's own intellectual creation. No other criteria, especially qualitative or aesthetic criteria, shall be applied. The protection granted shall apply to the expression in any form of a computer program. Ideas and principles underlying any element of a computer program, including the ideas and principles underlying its interfaces, shall not be protected. A copyrightable 'work' is protected as of the moment of creation, so no further administrative measures are needed. The German Copyright Act comprises specific stipulations concerning various uses of software, including de-compilation and rearrangement of software. While software as such is not patent-protectable, computer-implemented inventions may be if they show a 'technical effect' (see question 30).

30 Is patent protection available for software-implemented inventions or business methods?

Business methods and software as such are not patent-eligible; both the German Patent Act and the European Patent Convention say so explicitly. However, for practical purposes the patent eligibility of software very much depends on the claim drafting: if the invention can be presented as having a 'technical effect', patent protection may be available. The case law of both the Federal Court of Justice and the EPO Boards of Appeal provide useful guidance in this respect.

31 Who owns new intellectual property developed by an employee during the course of employment?

In Germany, intellectual property generated by an employee will not automatically become the gratuitous property of the employer as in most other jurisdictions. Rather, the German Act on Employees' Inventions provides a rather complex system according to which the employer merely has a right to claim an employee invention. In such case, the employer has to pay a certain remuneration, which is calculated in a rather complicated manner based on a number of factors and parameters.

32 Do the same rules apply to new intellectual property developed by contractors or consultants? If not, who owns such intellectual property rights?

These rules do not apply to independent contractors or consultants. If the intellectual property is based on a true cooperation, this can lead to complex legal situations, including the factual foundation of a private partnership. Accordingly, any such potential issues should be dealt with in a contract, clearly allocating the rights and obligations of all parties arising under such a cooperation or R&D project.

33 Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

Subject to contractual stipulations, co-ownership of inventions and patents are considered a simple company-like structure (*Gemeinschaft*). That legal form is dealt with in the German Civil Code, though only in rudimentary form. Each owner may use the invention (as a rule, without having to pay a licence fee to the others) or may sell its share in the invention. However, a licence may only be granted with the consent of all co-owners. Each co-owner can request that the *Gemeinschaft* be dissolved, which typically happens by way of selling the IP asset. This is another reason why co-owners should devise a contract early on rather than relying on statutory rights.

34 How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

Trade secrets are protected as know-how, namely against passing off and under criminal law. Germany needs to implement the Trade Secrets Directive (EU) 2016/943 by 9 June 2018. The Directive requires member states to protect information that meets all the following requirements:

- it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- it has commercial value because it is secret; and
- it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

In any event, care must be taken to ensure that trade secrets are kept secret. It remains to be seen whether the courts will place greater emphasis on the 'reasonable steps' taken to protect trade secrets and what 'reasonable steps' are in this context. In any case, the parties need to ensure confidential treatment of any such information and avoid accidental disclosure. As for protection of trade secrets in court proceedings, there is no 'in camera' proceeding and also no 'attorney's eyes only' treatment. The implementation of the Trade Secrets Directive may change this. It seeks to ensure that trade secrets are not disclosed during court proceedings and sets out certain measures that need to be taken to restrict access to documents containing trade secrets and hearings in which trade secrets are disclosed. Article 9(2)(3) stipulates that, while courts may take specific measures necessary to preserve the confidentiality of any trade secret, at least one natural person from each party and the respective lawyers shall have access to documents containing trade secrets. Arguably, however, the national legislature could implement tougher rules. Also, court hearings as a rule are open to the public. Accordingly, the parties may want to blacken any such parts of filed documents that may contain trade secrets and may not be relevant for the proceedings. Moreover, in the oral hearing the public may be excluded from parts of the oral hearing if so requested.

35 What intellectual property rights are available to protect branding and how do you obtain those rights?

Branding in the broad sense can be protected by trademark and design registrations but also via rules pertaining to passing off. As a rule, these are registered rights (ie, one needs to file an application with the competent offices to achieve this sort of protection). Having said that, there are also unregistered rights as an unregistered community design right or, in case of a famous designation, an unregistered trademark.

36 How can new businesses ensure they do not infringe existing brands?

Before entering a market with a designation (importantly including a trade or company name) each new market entrant should conduct due diligence on its brand. As a first step, this would include a Google search for identical designations. In a second step, the trademark registers and possibly commercial registers should be reviewed with regard to the designation, at the very least as far as identical applications are concerned. This can be done in-house but also via versed search companies and law firms.

37 What remedies are available to individuals or companies whose intellectual property rights have been infringed?

There are various measures against infringements of IP rights. The main goal of any action, including by way of preliminary injunction, is to stop the infringer from continuing to infringe. An injunction or preliminary injunction will achieve this aim. Apart from this, all the established IP remedies are available, including claims for damages (computed by lost profits, infringer's profits or licence analogy) and for rendering account. That way, the IP proprietor can follow the infringement to its roots.

38 Are there any legal or regulatory rules or guidelines surrounding the use of open-source software in the financial services industry?

We are not aware of any relevant legal or regulatory rules or guidelines surrounding specifically the use of open-source software in the financial services industry.

Data protection

39 What are the general legal or regulatory requirements relating to the use or processing of personal data?

Personal data, which are defined as any information concerning the personal or material circumstances of an identified or identifiable individual, is under specific legal protection. Processing such data is generally prohibited, unless it is permitted by law or any other legal provision or by prior consent of the data subject. The latter must be given freely and on an informed basis. In all cases data processing must be carried out properly, carefully and in accordance with the law. It must be adequate, relevant and not excessive.

When it comes to international data transfers a two-step-test has to be carried out. First, the legitimacy of an international data transfer has the same requirements as a national data transfer. An international data transfer can only be legitimate if an analogous transfer within Germany was legitimate, too. Second, an international data transfer is only legitimate if the country to which data are to be transferred provides for reasonable data protection legislation.

With a view to members of the European Union there are no specific rules as all members of the EEA provide for an adequate level of data protection. To transfer data to a country outside the EU or EEA it must be ensured that the country of destination also provides for an adequate level of protection. With regard to certain jurisdictions the European Commission has provided decisions on the adequacy of data protection. For example Canada, Argentina and Israel are considered to be safe countries. Another way of ensuring that adequate safeguards are provided is the use of one of the model contracts approved by the European Commission (standard contractual clauses (SCCs)). To date, the European Commission has already approved different types of model contracts. In addition, there is theoretically another solution that renders an assessment of the second step (legality of a data transfer to an entity in a country without an adequate level of data protection) unnecessary, namely corporate binding rules (CBRs). CBRs are codes of conduct and a set of rules a company can draft to allow data transfer outside the EU or EEA and to overcome some practical problems with SCCs. The main advantages of CBRs is that, unlike SCCs, which must be adopted exactly as drafted by the Commission, CBRs are bespoke and can be adapted to take into account the corporate structure, internal procedures, and legal and commercial requirements of a group.

From an EU perspective, the United States does not provide for adequate protection of personal data. For this reason, the European Commission has adopted a special decision in respect of the United States: an adequate level of protection shall be deemed to apply for those organisations that have registered under the EU-US Privacy Shield. Note, however, that financial institutions cannot register under the Privacy Shield.

40 Are there legal requirements or regulatory guidance relating to personal data specifically aimed at fintech companies?

German data protection authorities have not issued such specific guidance for fintech companies. That being said, banking secrecy, which applies to both corporate entities and individuals, has to be taken into consideration. Under this principle, all customer-related facts that a member of staff becomes aware of in connection with a bank business relationship are confidential. Such confidential data may only be transferred with the express consent of the customer concerned or where the transfer is in the legitimate interest of the controller or where the transfer is expressly ordered by law.

41 What legal requirements or regulatory guidance exists in respect of anonymisation and aggregation of personal data for commercial gain?

One very effective way to ensure data protection compliance is the avoidance of the processing of personal data. In this context, rendering data non-personal is possible by means of anonymisation. Data are anonymous data in the sense of German data protection law if the probability that it is possible to make the connection between a specific person and the data at hand is so small that according to the experience of life and technical state of art it is barely non-existent. In this context it should be noted that, in contrast to anonymisation, pseudonymised data is characterised by the fact that data can be connected to a specific individual by means of a denominator (ie, a 'key'), which is only known to one user (whereas with regard to any other user the likelihood of being able to make the connection between an individual and the data at hand is virtually non-existent). Such data is personal data for the party that knows the denominator, but non-personal data for any other person. In practice data are often pseudonymised by, for example, replacing the names of persons by a number code before transferring or processing the data.

Cloud computing and the internet of things

42 How common is the use of cloud computing among financial services companies in your jurisdiction?

The use of cloud computing among financial services companies is now quite popular. According to a recent study of Bitkom, the leading German association for digital business companies, approximately 71 per cent of German financial service providers are using cloud services. In general, financial service providers prefer cloud solutions where the data are hosted in a member state of the European Union, preferably in Germany. The reason for this is twofold: on the one hand, the EU has rigid data protection standards, the German data protection standard still being considered the gold standard; on the other hand, additional (eg, contractual) safeguards would have to be taken to establish an adequate data protection level, if personal data are transferred to a cloud computing provider outside the EU or EEA.

43 Are there specific legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

Sections 25a paragraph 1 and 25b KWG stipulate specific legal requirements relating to IT outsourcing and, as such, cloud computing in the financial services industry. Regulatory guidance is given in this context by the 'Minimum Requirements for Risk Management' (MaRisk). According to the MaRisk, any material outsourcing requires an outsourcing agreement in writing that fulfils minimum requirements, such

as stipulating audit rights (in favour of the financial services provider as well as the supervisory authority), data protection and exit management. New guidance, the 'Bank regulatory requirements relating to IT' (BAIT) is expected to come into effect later this year. This guidance will specify the MaRisk requirements relating to IT risk and information security management as well as the concrete IT operation, and therefore will also be relevant to cloud computing in the financial services industry. The banking supervisory authority is conducting regular checks relating to the IT infrastructure of banks and in case of outsourcing, whether an outsourcing agreement meets the aforementioned requirements.

44 Are there specific legal requirements or regulatory guidance with respect to the internet of things?

There are no specific legal requirements or regulatory guidance with respect to the internet of things.

Tax

45 Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

Even though there are no specific tax incentives available regarding the fintech environment, the following should be noted:

- The German Income Tax Act allows small and medium-sized businesses (ie, (i) taxpayers with business assets of not more than €235,000 if the taxable profit is calculated on an accrual basis; or (ii) taxpayers with profits of not more than €100,000 if the taxable profit is calculated on a cash-flow basis) to deduct up to 40 per cent of the anticipated costs for future acquisitions or productions of depreciable moveable fixed assets from their taxable income up to three fiscal periods before the capital asset is actually purchased (investment deduction, see section 7g of the German Income Tax Act). The maximum investment deduction amount is €200,000.
- Furthermore, the German Corporate Income Tax Act in principle foresees that the transfer of more than 25 per cent and up to 50 per cent of the shares in a German company results in a pro rata forfeiture of tax loss carry forwards and transfers of more than 50 per cent of the shares in a German company result in an entire forfeiture of tax loss carry forwards. However, according to an amendment of the German Corporate Income Tax Act, tax loss carry forwards (as well as interest carry forwards) will not forfeit in the event of a transfer of shares beyond such thresholds if the business operation is maintained unchanged by the seller since the establishment of the company (or at least from the beginning of the third fiscal period preceding the year of the transfer) and also by the acquirer until the end of the transfer year. Even though companies in all industries are entitled to benefit from such new rule according to the official justification of the new law, the amendment should serve in particular to increase the chances of IT start-ups to attract capital.

Competition

46 Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction or that may become an issue in future?

Fintech companies and the fintech sector are subject to the general competition law rules in Germany. There are no specific rules in competition law targeting the fintech sector. This means that the provisions prohibiting cartels, abuse of dominance and the merger control rules, and the general principles developed in other industries, are applied.

The enforcement activities of the Bundeskartellamt (FCO) so far do not indicate specific issues in relation to fintech companies. In this regard the FCO has not yet conducted extensive market studies in the same vein as, for example, those that have been conducted by the UK Financial Conduct Authority. However, cases relating to the financial sector indicate that the FCO is also intervening in this area. For example, the FCO found provisions in general banking terms and conditions introduced by the banking association that prevented customers from using their PIN and TAN in independent online payment procedures to infringe competition law in order to cause revisions to these general terms and also enhance new (technological) developments. Recently the FCO reviewed new payment systems that have been introduced as cooperation projects, such as a P2P payment function of paydirect or the 'Kwitt' payment function developed by the German saving banks, and did not raise competition concerns as these cooperation projects were found to improve the competitive situation. These cases show that the enforcement activity of the FCO is in favour of new developments that increase competition, but at the same time the German authority will intervene where restrictive practices are implemented.

One specific current development that may prove to be of relevance is the introduction of an additional merger control threshold in June 2017. In short, transactions have to be notified in Germany if the parties to the transaction achieved a combined worldwide turnover of more than €500 million, one participant had turnover of more than €25 million in Germany and another participant had turnover of more than €5 million in Germany in the last complete business year. Under the new rule, a transaction is also notifiable if one of the participants did not achieve a turnover of more than €5 million in Germany but the consideration is more than €400 million and the target has been active in Germany to a significant extent. This new threshold could mean that transactions relating to highly valued start-up fintech companies can trigger merger control proceedings even if the target company did not have high turnover levels.

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Financial crime

47 Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

All companies in Germany must comply with the anti-money laundering obligations set out in national anti-money laundering and criminal law. In addition, where a fintech company is a 'financial institution' it is under the obligation to set up an AML compliance system.

48 Is there regulatory or industry anti-financial crime guidance for fintech companies?

There is no specific guidance for fintech companies.

Hong Kong

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

The following activities are regulated and trigger a licence requirement:

- Type 1: dealing in securities;
- Type 2: dealing in futures contracts;
- Type 3: leveraged foreign exchange trading;
- Type 4: advising on securities;
- Type 5: advising on futures contracts;
- Type 6: advising on corporate finance;
- Type 7: providing automated trading services;
- Type 8: securities margin financing;
- Type 9: asset management; and
- Type 10: providing credit rating services.

For the purposes of the above categories, 'securities' are very widely defined and include stocks, shares, loan stock, bonds, debentures, all rights and interests in such securities, interests in collective investment schemes and structured products. However, shares and debentures of a private Hong Kong company do not constitute securities. Hong Kong private companies are companies incorporated in Hong Kong that restrict members' rights to transfer shares, limit the maximum number of shareholders to 50 and prohibit the making of an invitation to the public to subscribe for shares or debentures.

The licensing regime applies irrespective of whether the specified activities take place in Hong Kong or, if a person is actively marketing such activities to the public in Hong Kong, from outside Hong Kong.

The activities that are most relevant to fintech businesses are likely to be dealing in securities and advising on securities. Dealing in securities includes making or offering to make an agreement with a person, or inducing or attempting to induce another person to enter into an agreement to acquire, dispose, subscribe or underwrite securities. Advising on securities includes giving advice on whether, and the terms on which, securities should be acquired or disposed of and issuing analyses or reports for the purpose of facilitating decisions on whether to acquire or dispose of securities. It is also possible that some fintech platforms could constitute automated trading services, the operation of which requires a licence.

In addition to the above licensing requirements, if a business is undertaking banking activities, such as receiving money on a current, deposit, savings or similar account or paying or collecting cheques, such business is required to be licensed as a bank by the Hong Kong Monetary Authority (HKMA).

Certain other activities, such as moneylending, money exchange services, money remittance services and money broking services, also require licences from the HMKA or the Commissioner of Customs and Excise.

The operation of stored value facilities (such as prepay cards or prepay mobile apps) or designated retail payment systems is subject to a new licensing regime. Operators of such facilities now require a licence from the HKMA.

2 Is consumer lending regulated in your jurisdiction? Describe the general regulatory regime.

Under Hong Kong law, the offering and provision of consumer lending is not distinguished from primary lending.

Lending (consumer lending and primary lending) is a regulated activity in the jurisdiction and is governed by the Money Lenders Ordinance (Chapter 163) of the laws of Hong Kong. The Money Lenders Ordinance requires that all loans made available in Hong Kong are by licensed moneylenders or authorised institutions (ie, licensed banks, restricted licence banks and deposit taking companies under the Banking Ordinance (Chapter 155) of the laws of Hong Kong).

There are a number of exemptions that, if applicable, mean no formal licence is required. The loan and lending entity would need to satisfy one of the specified categories of exempted lenders and exempted loans in Schedule 1 of the Money Lenders Ordinance. Examples of exempted loans are: a loan made bona fide for the purchase of immoveable property on the security of a mortgage of that property and a loan made bona fide to refinance such a mortgage; a loan made by a company, firm or individual whose ordinary business does not primarily or mainly involve the lending of money in the ordinary course of that business; an intra-group loan; and a loan made to a company that has a paid-up share capital of not less than HK$1 million or an equivalent amount in any other approved currency.

3 Are there restrictions on trading loans in the secondary market in your jurisdiction?

Secondary market loan trading is not a regulated activity in itself in the jurisdiction but it constitutes primary lending regardless of whether the loan has been fully drawn and, therefore, the loan and lender are subject to the restrictions outlined in question 2.

However, secondary market loan intermediation is not a regulated activity, provided that it does not involve any lending or deposit-taking and provided that loans are not in the form of securities.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would generally fall within the scope of any such regime.

Broadly, a scheme is a collective investment scheme under Hong Kong law if it has the following four elements:

- it must involve an arrangement in respect of property;
- participants do not have day-to-day control over the management of the property even if they have the right to be consulted or to give directions about the management of the property;
- the property is managed as a whole by or on behalf of the person operating the arrangements or the contributions of the participants, or both, and the profits or income from which payments are made to them are pooled; and
- the purpose of the arrangement is for participants to participate in or receive profits, income or other returns from the acquisition or management of the property.

A collective investment scheme can cover any property and that property does not need to be located in Hong Kong for the scheme to be a collective investment scheme. 'Property' in this context is not limited to real property.

It is an offence in Hong Kong to issue any marketing material that contains an offer to the Hong Kong public to acquire an interest or participate in a collective investment scheme unless it has been authorised by the Securities and Futures Commission (SFC) or an exemption

applies. Promoting a collective investment scheme may also constitute a regulated activity for which a licence is required (see question 1). It is possible that certain fintech activity could constitute a collective investment scheme where the business concerned is managing assets on behalf of participants who have invested through a fintech platform (eg, investing in real estate or debt securities). Careful analysis of the specific circumstances and the way in which the platform permits investors to participate will be required to determine whether it constitutes a collective investment scheme.

5 Are managers of alternative investment funds regulated?

Management of securities or futures contracts or real estate investment schemes constitutes a regulated activity as it falls under Type 9: asset management. Accordingly, managers of alternative investment funds that invest in real estate or securities (note the wide definition referred to in question 1) or futures contracts require a licence to do so.

6 May regulated activities be passported into your jurisdiction?

No.

7 May fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

It is unlikely that the SFC would grant a licence for regulated activities to an entity that did not have a local presence. Equally, the HMKA is unlikely to provide a banking licence to an entity that does not have a presence in Hong Kong as it would be difficult to see how such an entity could comply with the obligations to which it would be subject as a bank.

8 Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

There are no specific regulations applicable to peer-to-peer or marketplace lending in Hong Kong. The SFC has issued a notice reminding potential peer-to-peer businesses that activity such as peer-to-peer lending might constitute a regulated activity, but much will depend on the precise structure of the platform. For example, it is likely that a platform offering debentures or loan stocks would constitute a regulated activity of dealing in securities.

Additionally, it is an offence in Hong Kong to issue any marketing material that contains an offer to the Hong Kong public to enter into an agreement to acquire or dispose of securities, unless an exemption applies.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

There are no specific regulations concerning crowdfunding. However, certain crowdfunding activity is likely to constitute a regulated activity. For example, equity crowdfunding is likely to constitute dealing in securities and possibly advising on securities, both of which are regulated activities in Hong Kong. As such, the operator of such platforms would need to be licensed by the SFC.

Additionally, it is an offence in Hong Kong to issue any marketing material that contains an offer to the Hong Kong public to enter into an agreement to acquire or dispose of securities unless an exemption applies.

10 Describe any specific regulation of invoice trading in your jurisdiction.

To the extent that an invoice is purchased, without risk of being recharacterised as a loan for the purposes of the Money Lenders Ordinance, with true sale there is no specific regulation on the buying and selling of invoices. This is common in factoring and invoice discounting arrangements.

However, in the event that invoices are opened to the public and crowdfunded then the operator of the trading platform needs to follow certain regulations, as described in questions 8 and 9. It is usually the case that in the event that a platform investor is classed as a professional investor, then much of the regulation around crowdfunded invoicing might not apply, depending on the platform structure.

11 Are payment services a regulated activity in your jurisdiction?

Payment services include a wide range of activities such as taking cash deposits, making cash withdrawals, executing payment transactions, issuing or acquiring of payment instruments, issuing and administering means of payment, making payments sent through the intermediary of a telecom, IT system or network operator, or even providing stored value cards or devices.

Payment services are regulated activities in Hong Kong and are subject to the Banking Ordinance, Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Chapter 615) of the laws of Hong Kong and Payment Systems and Stored Value Facilities Ordinance (Chapter 584) of the laws of Hong Kong (as applicable).

12 Do fintech companies that wish to sell or market insurance products in your jurisdiction need to be regulated?

Yes, both insurance companies and insurance intermediaries (such as agents) need to be authorised or registered, or both, with the Insurance Authority in Hong Kong.

13 Are there any legal or regulatory rules in your jurisdiction regarding the provision of credit references or credit information services?

The provision of credit ratings (opinions regarding the creditworthiness of entities other than an individual, securities and agreements to provide credit) is regulated, but the gathering, collating, dissemination or distribution of information concerning the indebtedness or credit history of any person is not regulated.

14 Are there any legal or regulatory rules in your jurisdiction that oblige financial institutions to make customer or product data available to third parties?

No.

15 Does the regulator in your jurisdiction make any specific provision for fintech services and companies? If so, what benefits do those provisions offer?

The SFC has recently established a Fintech Contact Point and the HKMA has recently established a Fintech Facilitation Office and, in each case, they are intended to facilitate the fintech community's understanding of the current regulatory regime and to work with market participants to support the sustainable development of the fintech industry.

The establishment of these regulator contact points follows the publication by a government-established fintech steering group of a number of recommendations to promote Hong Kong as a fintech hub.

In September 2016, the HKMA launched a Fintech Supervisory Sandbox, which permits existing authorised institutions to conduct pilot trials of fintech and technology initiatives involving banking services to a limited number of customers without the need to achieve full compliance with the usual supervisory requirements.

16 Does the regulator in your jurisdiction have formal relationships or arrangements with foreign regulators in relation to fintech activities?

The SFC has signed a cooperation agreement with the Financial Conduct Authority (FCA) in the UK. Under the agreement, the SFC and the FCA will cooperate on information sharing and referrals of innovative firms seeking to enter one another's markets.

The SFC has also signed a cooperation agreement with the Australian Securities and Investments Commission (ASIC). Pursuant to this agreement, the SFC and ASIC will cooperate to share information on emerging fintech trends, developments and related regulatory issues, as well as on organisations that promote innovation in financial services. In addition, the agreement provides for a bilateral mechanism for referrals of innovative firms seeking to enter one another's markets.

17 Are there any local marketing rules applicable with respect to marketing materials for financial services in your jurisdiction?

Yes, it is an offence in Hong Kong to issue any marketing material that contains an offer to the Hong Kong public to enter into an agreement to acquire or dispose of securities, unless an exemption applies.

18 Are there any foreign exchange or currency control restrictions in your jurisdiction?

No.

19 If a potential investor or client makes an unsolicited approach either from inside the provider's jurisdiction or from another jurisdiction, is the provider carrying out a regulated activity requiring a licence in your jurisdiction?

The recipient of an unsolicited approach who is located in Hong Kong will be subject to the licensing regime set out in question 1. Accordingly, such a recipient may not provide services that constitute a regulated activity without a licence.

Depending on the specific activity in relation to which the unsolicited approach is made, if the recipient is located outside Hong Kong, they may be able to carry out a service that would constitute a regulated activity in response to such enquiry without a licence. This would depend upon a number of factors, including whether the overseas entity was actively marketing its services to the public in Hong Kong. This is a complex area and advice should be sought on the specific circumstances of any particular case.

20 If the investor or client is outside the provider's jurisdiction and the activities take place outside the jurisdiction, is the provider carrying out an activity that requires licensing in its jurisdiction?

The licensing regime for regulated activities applies to activity carried out in Hong Kong or directed at the public in Hong Kong. Accordingly, no licence is required in Hong Kong in relation to activity that is provided to persons outside Hong Kong where the regulated activities also take place outside Hong Kong.

21 Are there continuing obligations that fintech companies must comply with when carrying out cross-border activities?

There are no specific continuing obligations that apply to fintech companies beyond the licensing and regulatory obligations of licensed businesses.

22 What licensing exemptions apply where the services are provided to an account holder based outside the jurisdiction?

The licensing regime for regulated activities applies to activity carried out in Hong Kong or directed at the public in Hong Kong. Accordingly, no licence is required in Hong Kong in relation to activity that is provided to persons outside Hong Kong where the regulated activities also take place outside Hong Kong.

Distributed ledger technology

23 Are there any legal or regulatory rules or guidelines in relation to the use of distributed ledger (including blockchain) technology in your jurisdiction?

There are no specific regulations or guidelines regarding the use of distributed ledger technologies (DLT). The HKMA has been encouraging industry to look at DLT in relation to the finance system in Hong Kong. It has collaborated with the Hong Kong Applied Science and Technology Research Institute as well as a number of financial institutions to develop a DTL-based trade finance system.

Digital currencies

24 Are there any legal or regulatory rules or guidelines in relation to the use of digital currencies or digital wallets, including e-money, in your jurisdiction?

In respect of common 'digital currencies' or 'digital wallets' such as bitcoin, the Hong Kong government considers that these are virtual commodities and do not qualify as digital currencies having regard to their nature and circulation in Hong Kong. In this regard, Hong Kong does not have any specific regulatory measures in respect of virtual commodities but the existing laws provide for protection against unlawful activities in general, for example anti-money laundering, fraud and terrorist financing.

Financial institutions dealing with virtual commodities are required to comply with regulations from time to time by the relevant financial regulators, the HKMA and the SFC. The HKMA, for example, issued a circular in January 2014 to all authorised institutions in Hong Kong requiring them to notify and discuss with the HKMA before offering products involving or linked to virtual commodities.

Securitisation

25 What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

A loan agreement does not need to be executed as a deed and accordingly, in respect of a Hong Kong company entering into a loan agreement, only the signature of the persons acting upon the company's authority (eg, the persons authorised in the board resolutions to sign) is required (under section 121 of the Companies Ordinance (Chapter 622) of the laws of Hong Kong).

A security agreement would typically be required to be executed as a deed. As such, in respect of the execution by a Hong Kong company, the deed shall be executed either with the common seal affixed in accordance with the requirements in the articles of association of the company, or in accordance with the Companies Ordinance, without the common seal affixed but signed by, in the case of a Hong Kong company with two or more directors, any two directors or any director and the company secretary or, in the case of a Hong Kong company with sole director, its sole director.

The key risk in respect of a peer-to-peer marketplace lending platform is that in respect of pure peer-to-peer lending involving companies or individuals lending via the lending platform, each such lending company and individual may be regarded as carrying on a business as a moneylender and thus subject to the licensing and regulatory restrictions mentioned in question 2, including the restrictions on the form of loan agreement, early payment, interest rate, moneylending advertisements and duty to provide information, etc, under the Money Lenders Ordinance.

26 What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected?

According to the Hong Kong Law Amendment and Reform (Consolidation) Ordinance (Chapter 23) of the laws of Hong Kong, the legal assignment of a loan by the assignor (ie, the lender) to the assignee (ie, the purchaser) will be perfected if:

- the assignor absolutely assigns the receivable to the assignee;
- the assignment is in writing and signed by the assignor in favour of the assignee; and
- a written notice of assignment is delivered to and received by the party liable to pay the loan (the underlying debtor, ie, the borrower).

Regarding the written notice of assignment above, although there is no time limit within which such notice of assignment has to be given, the notice should be given as soon as possible to complete the perfection of the assignment.

If the assignment is not perfected, the assignment concerned may still constitute an equitable assignment (in contrast to a legal assignment), which is still recognised by the Hong Kong courts. However, the disadvantage of an undisclosed assignment is that if any legal action is taken against the borrower for payment, the assignee would have to join the assignor in any such legal action (in contrast to being able to sue in its own name in the case of legal assignment) and the assignee may be vulnerable to, among other things, certain competing claims and other set-off rights that may otherwise have been halted by serving notice on the borrower.

27 Is it possible to transfer loans originated on a peer-to-peer or marketplace lending platform to the purchaser without informing the borrower? Does the assignor require consent of the borrower or are the loans assignable in the absence of a prohibition?

The lender (as assignor) need not obtain the consent of the borrower unless the loan agreement between the lender and the borrower contains a prohibition on the lender assigning certain or all of its rights under the loan agreement to a third party. In such cases, the lender would have to request the borrower to agree to a variation to the loan agreement to remove or vary the ban on assignment and permit the lender to assign the debts to the purchaser, or obtain a consent waiver from the borrower to the proposed assignment and confirmation from the borrower that it will not seek to rely upon the ban on assignment.

Failure to obtain the agreement to variation or consent waiver above means the borrower may disregard the notice of assignment given by the purchaser (if any) and decline to deal with the purchaser. The borrower can obtain good discharge of the debt by making payment to the lender instead of the purchaser.

Notification to the borrower of the assignment is not mandatory for the assignment to be effective. However, as noted in question 26, there are a number of practical and legal difficulties that arise from an assignment without notice to the debtor (that is, an equitable assignment rather than a legal assignment).

28 Would a special purpose company for purchasing and securitising peer-to-peer or marketplace loans be subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

The Personal Data (Privacy) Ordinance (Chapter 486) of the laws of Hong Kong governs the collection, use and dissemination of personal data of living individuals. This does not apply to information with respect to enterprises. The Personal Data (Privacy) Ordinance applies to anyone who collects or uses personal information that is capable of identifying an individual. In such circumstances, the 'data user', which would likely include a special purpose company for purchasing and securitising peer-to-peer loans, must comply with a number of data protection principles that are set out in Schedule 1 of the Personal Data (Privacy) Ordinance.

Data about or provided by obligors may also be protected by more general Hong Kong legal and regulatory principles that require the protection of confidential information. Largely, these apply irrespective of the legal structure of the obligor, but their precise application depends on the circumstances.

Intellectual property rights

29 Which intellectual property rights are available to protect software, and how do you obtain those rights?

Computer programs (and preparatory design materials for computer programs) are protected by copyright as literary works under the Copyright Ordinance. Copyright arises automatically as soon as the computer program is recorded. Registration of copyright is not required and is not possible in Hong Kong.

If the software code has been kept confidential it may also be protected as confidential information. No registration is required.

Although computer programs as such are expressly excluded from patentability under the Patents Ordinance, it is possible to obtain patent protection for software if it can be demonstrated that the program in question makes a 'technical contribution'. Registration formalities must be followed to obtain protection. In particular, 'standard' patents are based on patents applied for and granted by one of three designated patent offices, namely, in China, the UK and the European Patent Office (where the UK is designated). They have a maximum period of protection of 20 years from the filing date of the designated application.

30 Is patent protection available for software-implemented inventions or business methods?

Programs for computers, and schemes, rules or methods of doing business 'as such', are expressly excluded from patentability under the Patents Ordinance.

Notwithstanding these exclusions, it is possible to obtain patents for computer programs and business methods if it can be shown that the underlying invention makes a 'technical contribution' over and above that provided by the program or business method itself, such as an improvement in the working of the computer. Accordingly, a well-drafted patent may be able to bring a computer-based software or business method invention within this requirement, but this may be difficult to do and will not always be possible.

31 Who owns new intellectual property developed by an employee during the course of employment?

Copyright created by an employee in the course of his or her employment is automatically owned by the employer unless otherwise agreed.

An invention made by an employee belongs to the employer if it was made in the course of the normal duties of the employee or in the course of duties falling outside his or her normal duties, but specifically assigned to him or her, and the circumstances in either case were such that an invention might reasonably be expected to result from the carrying out of his or her duties; or if the invention was made in the course of the duties of the employee and, at the time of making the invention, because of the nature of his or her duties and the particular responsibilities arising from the nature of his or her duties he or she had a special obligation to further the interests of the employer's undertaking.

32 Do the same rules apply to new intellectual property developed by contractors or consultants? If not, who owns such intellectual property rights?

No. Copyright or inventions created by contractors or consultants in the course of their duties are owned by the contractor or consultant unless otherwise agreed in writing. However, the person who commissions a copyright work has an exclusive licence to exploit the commissioned work for all purposes that could reasonably have been contemplated by the author and the person who commissioned the work at the time the work was commissioned, and the power to restrain any exploitation of the commissioned work for any purpose against which he or she could reasonably take objection.

33 Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

If copyright is jointly owned (eg, copyright in respect of a computer program that has been co-written by two people) then all joint owners must consent to any act restricted by copyright (such as its use, licensing and assignment). As a result, the commercialisation of jointly owned copyright can be a challenge unless all owners consent to its use. It is advisable for the joint owners to enter into an agreement setting out how such rights should be exercised.

In respect of patents, each co-owner is entitled to an equal share in the patent and can do anything in respect of the invention for his or her own benefit without the consent or need to account to the other (in each case subject to any other agreement reached between the co-owners).

34 How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

Confidential information can be protected against misuse, provided the information in question has the necessary quality of confidence, is subject to an express or implied duty of confidence, or no registration is necessary (or possible).

Confidential information can be kept confidential during civil proceedings with the permission of the court.

35 What intellectual property rights are available to protect branding and how do you obtain those rights?

Brands can be protected as registered trademarks in Hong Kong. A brand can also be protected under the common law tort of passing off if it has acquired sufficient goodwill.

Certain branding such as logos and stylised marks can also be protected by design rights and may also be protected by copyright as artistic works.

36 How can new businesses ensure they do not infringe existing brands?

The HK Registry trademark database can be searched to identify potentially problematic trademarks that have been registered or applied for.

It is highly advisable for new businesses to conduct trademark searches to check whether earlier registrations exist that are identical or similar to their proposed brand names. It may also be advisable to conduct searches of the internet for any unregistered trademark rights that may prevent use of the proposed mark.

37 What remedies are available to individuals or companies whose intellectual property rights have been infringed?

Remedies include:
- preliminary and final injunctions;
- damages or an account of profits;
- delivery up or destruction of infringing products;
- disclosure orders; and
- costs.

38 Are there any legal or regulatory rules or guidelines surrounding the use of open-source software in the financial services industry?

There are no specific rules or guidelines on the use of open-source software; however, there are cybersecurity requirements that would be relevant.

Data protection

39 What are the general legal or regulatory requirements relating to the use or processing of personal data?

The Personal Data (Privacy) Ordinance (Chapter 486) (PDPO) protects the personal data of individuals. Personal data is information that relates to a living person and can be used to identify that person, where the data is in a form in which access or processing is practicable. Organisations that collect, use and disclose personal data (data users) must comply with, inter alia, six data protection principles, which include (subject to certain statutory exemptions):
- DPP1: personal data can only be collected for a purpose directly related to a function and activity of the data user in a lawful and fair manner, and the amount of data to be collected must not be excessive; data subjects have to be informed of the purpose of the collection of data and how it will be used.
- DPP2: data users must take all practicable steps to ensure personal data remains accurate and is deleted after the purpose of collecting such data is fulfilled.
- DPP3: unless the data subject has given prior consent, personal data can only be used for the purpose for which it was originally collected or a directly related purpose.
- DPP4: data users must take all practicable steps to ensure that personal data is protected against unauthorised or accidental accessing, processing, loss or erasure.
- DPP5: data users should stipulate, publish and implement policies in relation to personal data that can generally be achieved by having a data privacy policy in place.
- DPP6: individuals have rights of access to and correction of their personal data. Data users should comply with data access or data correction requests within the requisite time limit, unless reasons for rejection prescribed in the PDPO are applicable.

40 Are there legal requirements or regulatory guidance relating to personal data specifically aimed at fintech companies?

The Hong Kong Privacy Commissioner has not published any guidance specifically aimed at fintech companies. However, it issued the 'Guidance on the Proper Handling of Customers' Personal Data for the Banking Industry' in October 2014.

41 What legal requirements or regulatory guidance exists in respect of anonymisation and aggregation of personal data for commercial gain?

The Hong Kong Privacy Commissioner has published an information leaflet – 'Matching Procedure: Some Common Questions' – that emphasises the importance of obtaining consent from all individual data subjects or the Privacy Commissioner if the process of aggregation of personal data for commercial gain constitutes a matching procedure under the PDPO, to ensure that the risk of potential harm to the relevant data subjects is minimised. A matching procedure is:
- a comparison of two data sets that were originally collected for different purposes;
- each comparison involves the personal data of 10 or more individuals;
- the comparison is undertaken by automated means (eg, by a computer analytics program), not manually; and
- the end result of the comparison may be used – immediately or subsequently – to take adverse action against any of the data subjects concerned. Adverse action includes anything that may adversely affect an individual's rights, benefits, privileges, obligations, interests or legitimate expectations.

Cloud computing and the internet of things

42 How common is the use of cloud computing among financial services companies in your jurisdiction?

The use of cloud computing is quite common.

43 Are there specific legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

The Hong Kong Privacy Commissioner, the HKMA and the SFC have published guidelines on outsourcing and data privacy in connection with cloud computing.

The Hong Kong Privacy Commissioner has published various guidelines, circulars and information leaflets providing guidance on measures and best recommended practices that are pertinent to cloud services. These include having contractual arrangements between providers and customers of cloud services, to address the Privacy Commissioner's key concerns relating to loss of control, and the use, retention or erasure and security, of personal data when it is stored in the cloud. The recommended best practices touch on a number of risk areas, in particular: cross-border data transfers; subcontracting arrangements; use of cloud providers' standard contracts; service and deployment methods; and other outsourcing-related issues.

The HKMA's Supervisory Policy Manual sets out the key regulatory standards that the HKMA expects authorised institutions to follow, or else be prepared to justify non-compliance, for managing technology risks and cybersecurity, covering topics such as IT governance and oversight, system development and change management; information processing; communication network management; and management of technology service providers. Further precautions include: ensuring that service providers have the resources and expertise to comply with the authorised institution's IT control policies; performing independent assessments of the service provider's IT control environment for all critical technology outsourcing; ensuring sufficient contractual protection and safeguards; and conducting annual audits to confirm that service providers have an adequate IT control environment.

The SFC has endorsed the International Organisation of Securities Commissions' 'Principles on Outsourcing of Financial Services for Market Intermediaries' in relation to 'licensed corporations' outsourcing their activities. The SFC also issued guidelines that require licensed corporations to establish policies and procedures to ensure the integrity, security, availability, reliability and thoroughness of all information relevant to the licensed corporation's business, which extends to situations where data is stored in the cloud. Other best recommended practices relevant to cloud computing include reviewing policies and procedures to manage, identify and assess cybersecurity threats and IT security controls; considering the cybersecurity controls of third-party service providers; and ensuring continuity of critical activities and systems.

44 Are there specific legal requirements or regulatory guidance with respect to the internet of things?

None, other than those set out in question 43.

Tax

45 Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

There are no specific tax incentives applicable to fintech companies.

Competition

46 Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction or that may become an issue in future?

There is a competition regime in Hong Kong that applies to all entities carrying out business in Hong Kong. There are no particular aspects of this regime that would affect fintech businesses disproportionately to other businesses.

Financial crime

47 Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

If the relevant entity is licensed for regulated activities, is licensed as a bank or operates a money service, it needs to comply with the Hong Kong legislation in relation to anti-money laundering and counter-terrorist financing, including establishing policies and procedures to identify clients and combat money laundering and terrorist financing.

The Hong Kong legislation in relation to the prevention of bribery would also apply and licensed corporations should have in place policies and procedures to prevent bribery.

48 Is there regulatory or industry anti-financial crime guidance for fintech companies?

There is no specific guidance for fintech companies, but there is guidance for licensed corporations and banks that would apply to fintech businesses that are licensed accordingly.

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

Indian law regulates various types of financial services. Advisory work relating to investments in Indian securities requires a licence as an investment adviser. Certain types of investment banking, such as assisting private companies in obtaining funding, are considered to be outside the scope of the licence. There are also licensed merchant bankers – for example, making a public issue on the stock exchanges or a public offer under the Takeover Code would need the support of a registered merchant banker. There are different categories of merchant bankers and the functions of each level of category vary. There are other categories of agencies that require a licence, such as custodians, stock brokers, underwriters, portfolio managers, credit rating agencies, foreign institutional investors, venture capital funds, depositories and stock exchanges.

There are various categories of institutions that can engage in lending. These are banks that include scheduled commercial banks and non-scheduled commercial banks, cooperative society banks, small finance banks, non-banking financial companies (NBFCs) and money lenders. As regards deposits, there are various categories of institutions that can receive deposits. These are banks that include scheduled commercial banks and non-scheduled commercial banks, cooperative society banks, small finance banks, NBFCs that are authorised to receive deposits and payment banks. There is also the concept of a chit fund, which receives contributions from members and periodically conducts a lottery to pay the winner. Post offices can also receive deposits. There is a provident fund that is a pension scheme operated by the government. Mutual funds are also regulated.

Factoring can be undertaken by banks, NBFCs registered as factors with the Reserve Bank of India (RBI) and certain other government entities.

Invoice discounting can be undertaken by banks, NBFCs and corporates.

Bonds and debentures can be listed on stock exchanges as public offerings. Syndications of loans are generally not regulated unless they are converted into securitised instruments.

Payment services are also regulated and are particularly relevant to fintech (see question 11).

Entities in India can deal in foreign exchange trading only with permitted stock exchanges and banks in India. Other entities such as fully fledged money changers are also permitted to deal with foreign exchange. Note that Indian residents are not permitted to trade in foreign exchange through overseas trading platforms.

2 Is consumer lending regulated in your jurisdiction? Describe the general regulatory regime.

Yes, consumer lending is regulated. There are various types of institutions that are entitled to engage in consumer lending. These are banks that include scheduled commercial banks and non-scheduled commercial banks, NBFCs, cooperative society banks, small finance banks, microfinance institutions and moneylenders. Regulations require lending agencies to maintain standards relating to capital adequacy, prudential norms, cash reserve ratio, statutory liquidity ratio, credit ceiling, know-your-customer guidelines, etc, although each of these norms would apply to each category of lending agency in a different manner. Each agency plays a different role in terms of the type of lending and the kind of borrower. For example, infrastructure NBFCs can extend credit facilities to entities in the transport, energy, water and sanitation and communication sectors. Loans and advances of up to 2.5 million rupees are required to constitute at least 50 per cent of the loan portfolio of small finance banks.

3 Are there restrictions on trading loans in the secondary market in your jurisdiction?

Issuance and listing of debt securities and public offer and listing of securitised debt instruments are regulated in India. Trading of debt securities and securitised debt instruments in the secondary market is permitted after the debt securities or securitised debt instruments are listed on a recognised stock exchange.

Asset reconstruction companies or securitisation companies are permitted to securitise the acquired debt and sell the securitised debt only to qualified institutional buyers, which include banks, insurance companies and foreign institutional investors.

Risk participation, either funded or unfunded, is unregulated in India, and banks and NBFCs rarely enter into domestic risk participation transactions.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would generally fall within the scope of any such regime.

There are several categories of collective investment schemes. These are broadly mutual funds, alternative investment funds (AIFs) and collective investment schemes, all of which are required to be registered with the Securities and Exchange Board of India. Mutual funds are primarily focused on listed equity and debt instruments and anyone can participate in a mutual fund. AIFs are primarily focused on unlisted instruments and primarily institutional investors invest in AIFs due to a significant minimum investment by an investor. The regulations on collective investment schemes cover all other forms of collective investment schemes. The regulations are extremely stringent on collective investment management companies; for example, there are requirements for rating, insurance, appraisal, schemes to be closed-ended, no guaranteed returns and restrictions on advertisement materials. Units subscribed to collective investment schemes are freely transferable. A fintech company would need to be registered as a collective investment management company to deal with collective investment schemes. However, alternative finance services such as peer-to-peer (P2P) or marketplace lenders would not fall under the ambit of collective investment schemes. There are separate regulations governing these services, which a fintech company would have to comply with, as further explained in questions 8 and 9.

5 Are managers of alternative investment funds regulated?

Yes, managers of AIFs are regulated. There are requirements as to their qualifications and minimum years of experience. The manager or sponsor of an AIF is also required to have a minimum investment in the fund of not less than 2.5 per cent or 50 million rupees, whichever is lower. There are requirements relating to disclosure of their investments.

6 May regulated activities be passported into your jurisdiction?

No, India does not allow passporting of regulated activities; that is, a financial service provider registered in one country is not entitled to engage in regulated financial services in India purely based on registration in a foreign jurisdiction and would need to obtain registration separately in India.

7 May fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

By and large, this would be difficult as obtaining a licence for a regulated financial service is available only to agencies incorporated in India, or in the case of banks, having a presence in India. It is possible for a fintech company outside India to provide services outside India to Indian nationals, especially for investments outside India. However, the scope for this is limited because exchange control restrictions may come in the way of making payments outside India for services rendered.

8 Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

P2P lending is thus far unregulated in India. India's central bank, the RBI, issued a consultation paper on the subject in April 2016. The paper envisages that P2P lending will be allowed and regulated and that P2P aggregators will be classified as NBFCs. It is proposed that such P2P institutions have a minimum capital of 20 million rupees and need to meet a minimum leverage ratio in order to participate in P2P lending. The consultation paper also proposes that the regulations would deal with issues such as governance, business continuity, customer interface and reporting requirements.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

To the extent that crowdfunding involves investments in equity or debt instruments, these would be regulated by company or securities law. A private company cannot access capital from the public and cannot have more than 200 shareholders. It also cannot accept deposits from the public. A public company would need to follow primary market processes for equity or debt funding. There are no regulations that deal directly with crowdfunding. For other types of funding, that is, those that are not debt or equity based, the law is not settled at the moment as all kinds of crowdfunding could be considered 'deposits'. We believe that crowdfunding that can be justified as an advance against purchase of a product would be permitted in India. For P2P lending to the extent that it is a type of crowdfunding, see question 8.

10 Describe any specific regulation of invoice trading in your jurisdiction.

To enhance the ease of financing micro, small and medium-sized enterprises in India, the RBI has provided its approval to three companies to set up invoice discounting platforms. The Trade Receivables Discounting System (TReDS) is a fintech platform where financers discount invoices due by corporates, government entities, etc. TReDS would need to have a minimum paid-up capital of 250 million rupees and entities, other than the promoters, are not permitted to maintain shareholding in excess of 10 per cent in TReDS.

11 Are payment services a regulated activity in your jurisdiction?

Yes, payment services are regulated under the Payment and Settlement Systems Act 2007. A payment system is defined as 'a system that enables payment to be effected between a payer and a beneficiary, involving clearing, payment or settlement service or all of them, but does not include a stock exchange'. These include credit cards, debt cards, smart cards and money transfers. Any entity interested in commencing a payment system is required to obtain an authorisation from the RBI.

The categories of payment providers are prepaid payment instruments, financial market infrastructure (clearing houses), retail payment organisations, card payment networks (Visa, MasterCard, etc), cross-border money transfers, ATM networks, white label ATM operators, instant money transfer and prepaid payment instruments. There are three types of prepaid payment instruments: open payment instruments, which are payment instruments that can be used to make a payment to any merchant; semi-closed, which are payment instruments that can be used to make payment to a defined set of merchants; and closed, which are payment instruments of a merchant for payment only to that merchant. Open payment instruments can be issued only by banks. Cash withdrawal is permitted only in the case of open payment instruments. Only closed payment instruments do not require registration under the regulations.

E-wallets have gained huge popularity in India in the past few years, and it is believed that there are as many as 100 million subscribers to e-wallets in India. E-wallets are frequently used for online purchase of goods and services. E-wallets have also gained popularity because of the requirement of a second authentication (such as Visa Verify or MasterCard Secure Code) for 'card not present' credit card and debit card transactions. This is difficult for services such as Uber. Accordingly, customers use payment wallets that allow for automatic debit without the need for a second authentication.

12 Do fintech companies that wish to sell or market insurance products in your jurisdiction need to be regulated?

Selling and marketing of insurance products is regulated in India. The statutory authority regulating insurance products in India is the Insurance Regulatory and Development Authority of India (IRDAI). An insurer is required to justify the premium amount and terms and conditions of the insurance policy to be offered to customers to IRDAI. A fintech company cannot offer any insurance product for sale unless the fintech company is duly certified by IRDAI.

IRDAI has also issued guidelines on advertisement, promotion and publicity of insurance companies and insurance intermediaries. Fintech companies would need to comply with these guidelines with respect to marketing insurance products.

13 Are there any legal or regulatory rules in your jurisdiction regarding the provision of credit references or credit information services?

Companies carrying on the business of credit information services are regulated under the Credit Information Companies (Regulation) Act 2005. As per the provisions of the Act, every such company must obtain a certificate of registration from the RBI. Credit information companies are required to have a minimum issued capital of 200 million rupees.

14 Are there any legal or regulatory rules in your jurisdiction that oblige financial institutions to make customer or product data available to third parties?

The laws regarding disclosure of customer data to third parties are not very well established in India. Banks are required to adhere to the guidelines on information security, electronic banking, technology risk management and cyber fraud issued by the RBI to ensure data protection of customers. Under normal circumstances, disclosure of customer data requires prior written approval from the customer. This is usually obtained in the account opening forms or provided for in the terms and conditions. As per the current legal framework, financial institutions are only obligated to share this information where the disclosure is required by a court of law or where the disclosure is necessary for government agencies mandated under law to procure such information.

15 Does the regulator in your jurisdiction make any specific provision for fintech services and companies? If so, what benefits do those provisions offer?

There are few specific provisions relating directly to fintech services, although several regulations are mostly related to fintech. For example, there are regulations on account aggregator services – an aggregator who markets financial products such as insurance, bank accounts, mutual funds or bonds. Payment settlement services also largely relate to prepaid payment instruments such as e-wallets. The RBI has issued a consultation paper on P2P lending and regulations on the same, which is expected to be issued shortly.

The RBI set up a working committee on fintech and digital banking in July 2016. The committee is yet to submit its report on the same. The government of India has also launched the Startup India initiative that provides for various regulatory and tax benefits for start-ups, which would include start-ups in the fintech sector.

The government of India is also promoting financial inclusion and using unique payment methods to cover subsidy payments. It is also promoting Aadhar, a biometric identification system. It is proposed

that these systems will ultimately act as platforms that private players can also use to authenticate identification and execute payments.

16 Does the regulator in your jurisdiction have formal relationships or arrangements with foreign regulators in relation to fintech activities?

India currently has no formal relationships with foreign regulators in relation to fintech services. Recently, however, at the 9th UK-India Economic and Financial Dialogue, India and the UK agreed to deepen bilateral collaboration on fintech and explore the possibility of a regulatory cooperation agreement between the Financial Conduct Authority and the RBI in the second quarter of 2017. The aim of this collaboration is to enable the regulators to share information about financial services innovations in their respective markets, including emerging trends and regulatory issues. Both sides recognised the importance of fintech and also decided to explore the feasibility of a UK-India fintech bridge.

17 Are there any local marketing rules applicable with respect to marketing materials for financial services in your jurisdiction?

Rules on marketing materials for financial services are fairly limited. Information in prospectus and letters of offer for public and public offers respectively are regulated. The RBI also requires financial companies to use only registered telemarketers for telemarketing activity.

18 Are there any foreign exchange or currency control restrictions in your jurisdiction?

Yes, India has a extensive exchange control regime that is based on the Foreign Exchange Management Act 1999. Dealing in foreign exchange is a regulated activity. Current account transactions are permitted except for specified restricted activities. Capital account transactions are, however, restricted. For example, purchase and sale of shares of Indian companies between Indian residents and non-residents are subject to minimum and maximum valuation requirements and filing requirements. Exports are required to be realised in the form of freely convertible foreign currency within nine months of the export. However, export proceeds against specific exports may also be realised in Indian rupees, provided it is through a freely convertible vostro account of a non-resident bank situated in any country other than a member country of Asian Clearing Union or Nepal or Bhutan. The Indian rupee is not a freely convertible currency. Indian companies are subject to restrictions on borrowing from overseas relating to all-in cost interest rates, debt to equity ratio, minimum repayment period, eligibility to borrow, eligibility of lenders, etc. Individuals are allowed to remit up to US$250,000 per year in foreign exchange for any reason other than specified prohibited activities. There are restrictions on Indian businesses setting up joint ventures and wholly owned subsidiaries overseas and remitting money to fund such entities. Where transactions are not permitted because they do not meet the conditions prescribed, one can obtain discretionary approvals from the RBI for the same.

19 If a potential investor or client makes an unsolicited approach either from inside the provider's jurisdiction or from another jurisdiction, is the provider carrying out a regulated activity requiring a licence in your jurisdiction?

This would largely depend on the type of service being provided. The question of whether the service was solicited or not is by and large not relevant except that where the foreign provider is providing the service from outside India and contends that it is not bound by Indian law, providing services or marketing the service within India may bring the service provider within the Indian regime.

For example, if the service provider advises an Indian national on investments globally or perhaps even investments in India and the service provider is not based in India, one could reasonably contend that the service provider does not need to be a registered investment adviser.

On the other hand, there are many transactions that are required to be managed or certified by licensed service providers; for example, a public issue or public offer has to be managed by a licensed category 1 merchant banker. An investment banker from overseas that is not licensed in India could not engage in this service.

Indian exchange control regulations could also come in the way of overseas service providers providing services from overseas to the Indian market as payments made by the customer to the service providers overseas in foreign exchange may not be permitted or could be questioned by banks and the regulator.

Under Indian law, if the investor is a non-resident Indian or a person of Indian origin and is based outside India, an adviser of Indian securities to such non-resident Indians or persons of Indian origin would require registration.

20 If the investor or client is outside the provider's jurisdiction and the activities take place outside the jurisdiction, is the provider carrying out an activity that requires licensing in its jurisdiction?

As a matter of principle, the foreign provider would not require licensing in India, provided, however, that it relates to a service that can be performed in practice by a foreign service provider. Certain types of services cannot be performed by a foreign service provider since the relevant transaction itself requires accreditation or relevant agencies involved would not deal with an unlicensed service provider or exchange control restrictions would make payments to the foreign service provider difficult.

21 Are there continuing obligations that fintech companies must comply with when carrying out cross-border activities?

There are no specific obligations relating to fintech companies. India has extensive exchange control regulations and fintech companies would need to navigate through those regulations in order to carry out cross-border activities.

22 What licensing exemptions apply where the services are provided to an account holder based outside the jurisdiction?

If the financial service is not provided in relation to the Indian market (eg, it does not relate to investment in shares of an Indian company on an Indian stock exchange), Indian laws are unlikely to apply. If the financial service is provided in relation to the Indian market (eg, portfolio managers managing a portfolio of Indian securities for client would need to be registered under Indian laws), then Indian laws would apply. However, there are limitations on the ability of Indian nationals to open offshore accounts and to make payments in foreign exchange overseas.

Distributed ledger technology

23 Are there any legal or regulatory rules or guidelines in relation to the use of distributed ledger (including blockchain) technology in your jurisdiction?

There are no legal or regulatory rules currently in place in relation to the use of distributed ledger technology in India. The RBI has recently formally acknowledged blockchain technology and is exploring ways to further use this technology in financial treansactions.

In 2015, the RBI released a 'Financial Stability Report' detailing the possible impact of blockchain technology. The report recognises the need for the regulators and authorities to keep pace with developments, since many of the world's largest banks are said to be supporting a joint effort to set up a 'private blockchain' and build an industry-wide platform for standardising the use of the technology.

Certain Indian banks have successfully used blockchain technology in trade finance transactions with foreign banks. There are also reports on Indian banks looking to use blockchain technology to share know-your-customer (KYC) information through a private blockchain.

Digital currencies

24 Are there any legal or regulatory rules or guidelines in relation to the use of digital currencies or digital wallets, including e-money, in your jurisdiction?

Digital currencies are unregulated in India. Digital currencies are not covered under the legal definition of currency in India. However, there is currently no law in India restricting the rights of two contracting parties to accept digital currencies as the mode of consideration for a transaction.

The RBI has cautioned users, holders and traders of virtual currencies about the potential financial, operational, legal, customer

protection and security related risks that they are exposing themselves to. The RBI has also stated that it has not provided any licence or authorisation to any entity to operate such schemes or deal with virtual currencies. However, the RBI has not stated that the purchasing, selling and storing of virtual currencies would amount to an illegal activity.

In April 2017, the Department of Economic Affairs, Ministry of Finance, government of India constituted an Inter-Disciplinary Committee to examine and suggest measures for dealing with virtual and cryptocurrencies.

The regulatory framework on digital wallets is explained in question 11.

Securitisation

25 What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

Loan agreements and security agreements are required to be executed in accordance with the constitutional documents of the entity and the corporate authorisations executed by the entity. Under Indian laws, a mortgage deed, that is, relating to immoveable property, is executed by the mortgagor, attested by two witnesses and registered with the relevant land registry. Most security arrangements involving immoveable property relate to mortgage by deposit of title deeds. A mortgage by deposit of title deeds or an equitable mortgage would encompass a declaration provided by the mortgagor and a memorandum of entry in the records of the mortgagee that records the deposit of title deeds. There are other various formalities to ensure perfection of the security documents. This includes filing a form with the company registry and registration of the charge with a central registry for security interest.

As long as the P2P lending contracts are properly executed, they would be enforceable. While Indian law broadly allows electronic contracts, a key issue relates to stamp duty. Indian state governments are yet to introduce electronic stamping of documents. There is likely, therefore, to be a need for physical contracts to be printed and stamped to comply with laws on stamp duty and in order for such contracts to be enforceable.

26 What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected?

While there are some distinctions between assignment of rights versus obligations under a contract, it is preferable to state expressly in the contract whether the rights and obligations under the contract can be assigned, with or without the consent of the other party. A notice on the assignment to the counterparty is required in certain instances and is generally considered to be good practice.

There are certain contracts under which assignment is prohibited. Contracts where personal skill or qualifications are involved cannot be assigned. This primarily stems from common law.

It should also be noted that the assignor and the assignee may have to bear significant stamp duty on the assignment. If a document is not duly stamped, the document will not be admissible as evidence in court.

P2P lending platforms will be required to adhere to the same method of assignment as described above.

27 Is it possible to transfer loans originated on a peer-to-peer or marketplace lending platform to the purchaser without informing the borrower? Does the assignor require consent of the borrower or are the loans assignable in the absence of a prohibition?

Under Indian law, for assignment of actionable claims, the assignment is required to be executed by an instrument in writing by the assignor in favour of the assignee. A notice of the assignment to the borrower is necessary to make the assignment binding against the borrower. For example: A owes money to B, who transfers the right to receive the dues to C; B then demands the debt from A, who, not having received notice of the transfer, pays B; the payment is valid, and C cannot sue A for the debt.

28 Would a special purpose company for purchasing and securitising peer-to-peer or marketplace loans be subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

Under Indian banking laws, there is a central register maintained by the regulator relating to security being provided by borrowers. This register is accessible by any person upon payment of the prescribed fees. This law does not currently cover P2P lending but under the proposed rules, a P2P aggregator would be classified as an NBFC, in which case it is possible that security provided for P2P lending would also need to be registered.

Outside this law, general laws on data protection and privacy would apply and a duty of confidentiality would apply. The law provides for payment of compensation on failure to exercise reasonable security practices and procedures to protect sensitive personal data or information (which includes financial information) that results in wrongful loss or gain, and a criminal penalty for disclosure of personal information in breach of contract or without consent of the data subject where such breach is done with the intention of or knowing that it is likely to result in wrongful loss or wrongful gain.

Intellectual property rights

29 Which intellectual property rights are available to protect software, and how do you obtain those rights?

Software can be protected under copyright law. The patent laws of India provides fairly limited protection for software, as it cannot protect software per se: it requires something in addition to the mere software for it to be patentable (eg, an operating system is patentable).

30 Is patent protection available for software-implemented inventions or business methods?

Under Indian law, a software program per se cannot be registered as a patent. A software program can be patentable but it requires a specific unit on which the software is dependent for it to be patentable. A business method cannot be patented in India. A mathematical method or business method, or a computer program or algorithms, are not patentable under Indian law. However, if this resolves a technical problem and an apparatus or system is developed from it, then these would be patentable.

31 Who owns new intellectual property developed by an employee during the course of employment?

In the case of copyright law, this would be the employer. In the case of patent law, it would be the inventor, who could be the employee. Copyrights and patents can be assigned to the employer. In the case of patents, the application for a patent must be accompanied by the assignment deed executed by the employee.

32 Do the same rules apply to new intellectual property developed by contractors or consultants? If not, who owns such intellectual property rights?

Under copyright law, if the individual is not an employer but a contract worker or consultant, then the concerned individual would be the owner of the copyright and not the employer or customer. In the case of patent law, whether an employee or a contractor or consultant, the concerned individual would own the patent if he or she was the inventor. However, agreements can be put in place whereby the contractors or consultants assign these rights to the employer or customer.

33 Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

In the case of patents, the Patents Act 1970 provides that the share in the patent held by a co-owner cannot be licensed or assigned without the consent of the other owners. The same applies with all other intellectual property rights. The licensing, charge and right to use would be as per the agreement entered into, or will be equal among the joint owners. The Trademarks Act does not impose any such specific condition. However, it envisages that jointly owned trademarks cannot be used in rivalry or in competition against each other and there can only be one joint source as to the trademarks. Therefore in case of subsequent

Update and trends

On 8 November 2016, the government of India decided to demonetise the existing 500 and 1,000 rupee notes in circulation. The primary motive for this unexpected and unprecedented move was to curb and remove the black money in circulation and the counterfeit currency in these higher denomination value notes. The other reasons include promotion of a 'less-cash' India and promotion of paperless money transactions.

The RBI has recently launched a payment service, Unified Payment Interface (UPI), that will enable seamless P2P money transfers. UPI only requires users to have a smartphone and to register with a bank for UPI by installing the mobile app. A unique virtual address is created for each user, which is mapped to the smartphone. UPI would permit transactions from 50 up to 100,000 rupees. This payment service can be used by private companies and is likely to be of use to fintech companies.

The government of India has notified all government entities to curb the passing on of merchant charges on credit and debit card payments to customers. This is in line with the vision of the government of India and the RBI to transition to a less-cash society.

The RBI has released a vision paper 2018 that aims to build the best payment and settlement systems for a less-cash India. The broad outline of the paper regards coverage, convenience, confidence, convergence and cost. To achieve these aims, the paper focuses on four strategic initiatives: responsive regulation, robust infrastructure, effective supervision and customer centricity.

Finally, it should be noted that the concept of e-wallets has gained greater prominence in India recently, along with a huge expansion of the e-commerce industry in India, and customers are increasingly using e-wallets to make online payments to e-commerce companies.

rivalry, if any, between the co-owners, there cannot be two different owners of the trademarks.

34 How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

India does not have a specific law dealing with trade secrets. Trade secrets are protected under the common law remedy of breach of confidentiality. Confidentiality may be protected under contract or implied depending on the nature of the service.

Trade secrets are to be kept secret unless it is an inherent part of the court proceedings; in that case, disclosure for the purpose of providing evidence is required. This has sometimes acted as a deterrent to many from enforcing their trade secrets through the judicial process.

35 What intellectual property rights are available to protect branding and how do you obtain those rights?

Branding is largely protected under trademark law, whereby one would need to register a trademark. One can file an action for infringement in case of a registered trademark or a passing off action in case of unregistered marks. Indian law also recognises the concept of transnational reputation of international trademarks. Trademark owners can also register their brands with customs authorities that could enable authorities to intercept goods they believe are counterfeits. The trademark owner can also claim prior use and strike down a registered owner's right, by seeking cancellation of mark. The trademark owner can also keep watch and seek to oppose any new marks that are the same or similar to the one owned by it. One can also obtain a copyright registration over the copyright in a mark. However, registration is not mandatory for ownership of copyrights.

36 How can new businesses ensure they do not infringe existing brands?

A new business can do a trademark search to determine whether a similar trademark has been registered. The trademark registry is online and one can do the search by accessing the website of the trademark registry. One can also do market studies or test marketing to see if similar unregistered marks are in use. A new business can also search domain name registries to determine if websites with similar domain names have been registered.

37 What remedies are available to individuals or companies whose intellectual property rights have been infringed?

If a trademark, copyright or patent has been infringed, one would file a suit for infringement. In the case of trademark, one can also file a passing off action. In the case of copyright and trademark, one can also pursue criminal remedies in the case of infringement. The Copyright Act deals with offences of infringement of copyright or other rights conferred under this Act. It provides for imprisonment that ranges from six months to three years and a fine that ranges from 50,000 to 200,000 rupees. The Trademarks Act 1999 also deals with criminal remedies against infringement and passing off action. Search and seizure procedures can also be invoked to deal with infringement.

One can also engage in opposition proceedings in respect of trademarks and patents that are sought to be registered. There is a procedure for cancellation of marks. In addition, one can file actions with the company authorities in respect of companies registered with names that are similar to trademarks or other company names, though a trade name registration in no way confers trademark protection.

A unique aspect of Indian law is that one can file a case of copyright or trademark infringement not just where the cause of action arose or where the defendant resides or does business, but also where the plaintiff resides and does business. One can obtain an *Anton Piller* order for appointment of a court commissioner to conduct an inspection, and it is possible to obtain injunctions.

38 Are there any legal or regulatory rules or guidelines surrounding the use of open-source software in the financial services industry?

No.

Data protection

39 What are the general legal or regulatory requirements relating to the use or processing of personal data?

There are two provisions, civil and criminal, on the use of personal data. A body corporate that has access to sensitive personal data or information (SPDI) will be liable to compensation if it is negligent in using reasonable security practices and procedures (RSPP) in protecting such SPDI and it results in wrongful loss or wrongful gain. SPDI includes:

- passwords;
- financial information such as bank account, credit or debit card or other payment instrument details;
- physical, physiological and mental health condition;
- sexual orientation;
- medical records and history; and
- biometric information.

RSPP refers to procedures determined by a law in force (there is none) or as agreed between the parties and in the absence of the same, the rules of the central government. Accordingly, it is open to an organisation to agree privacy policies and security standards with its customers, service providers, employees, etc. The central government rules are more in the nature of cursory privacy rules on collection, storage, transfer, etc, of SPDI. They prescribe no specific security standard.

Indian law also imposes criminal penalty on an organisation providing a service that is in possession of personal information if it discloses such information in breach of contract or without the consent of the data subject and does so with the intention of or knowing that it is likely to result in wrongful gain or wrongful loss.

40 Are there legal requirements or regulatory guidance relating to personal data specifically aimed at fintech companies?

There are some requirements in the financial sector. For example, the RBI mandates that data breaches should be reported to it. Organisations in the financial sector must use a 250-bit key encryption or higher to protect their systems. Credit information companies are governed by certain norms concerning protection and disclosure of personal information. The card-issuing entity should not reveal any information relating to customers obtained at the time of opening the account or issuing the credit card to any other person or organisation without obtaining their specific consent. The purpose for which the

information would be used and the organisations with which the information would be shared is also required to be disclosed. The RBI has frowned upon credit companies obtaining the consent of the customer for sharing their information furnished while applying for the credit card with other agencies, as part of the terms and conditions. The credit companies are required to provide the customer with the option to decide whether he or she is in agreement with the credit company sharing the information with other agencies. The credit companies are also required to explicitly state and explain clearly to the customer the full meaning and implications of the disclosure clause.

41 What legal requirements or regulatory guidance exists in respect of anonymisation and aggregation of personal data for commercial gain?

There are no requirements on anonymisation or aggregation of personal data for commercial gain.

Cloud computing and the internet of things

42 How common is the use of cloud computing among financial services companies in your jurisdiction?

The use of cloud computing is growing rapidly in India. Financial institutions are increasingly using cloud computing for access to software applications and data. Smaller fintech companies are perhaps moving faster to use cloud computing as compared with more established banks and financial institutions. The government of India has stated that as part of its GI cloud initiative (Meghraj) all governmental functions would be shifted to the cloud.

43 Are there specific legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

At present there are no legal requirements or statutory guidance for use of cloud computing.

The Institute for Development and Research in Banking Technology, established by the RBI, has a centre for cloud computing. The centre focuses on providing suitable cloud platforms to banks for testing, undertaking studies on security and scalability and building secure cloud storage, etc.

A working committee formed by the RBI published a report on the use of cloud computing by urban cooperative banks in 2012. The report tried to lay down the existing issues and the way forward for urban cooperative banks to establish a robust IT network that includes cloud computing.

There are various private players in the market offering their cloud computing services to banks and NBFCs. Banks and NBFCs in India are slowly accepting and moving towards such services.

44 Are there specific legal requirements or regulatory guidance with respect to the internet of things?

There are no legal requirements relating to the internet of things as yet. The Ministry of Information Technology has issued a draft policy on the internet of things and the Department of Telecommunications has issued a road map for machine-to-machine technology that deals with the internet of things. These are, however, policy papers and do not provide any regulatory requirements.

The internet of things is still at a nascent stage and is generally governed under IT laws. Policy discussions are, however, under way.

Tax

45 Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

There are no tax incentives specifically aimed at fintech companies. However, the fintech companies that qualify as start-ups may avail themselves of various benefits under the Startup India initiative launched by the Indian government. Tax benefits are also extended to units in a special economic zone.

Competition

46 Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction or that may become an issue in future?

There are none. Indian competition law in general relates to anti-competitive practices, monopolistic practices and merger control requirements.

Financial crime

47 Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

India has a law on the prevention of corruption that penalises corrupt practices. There are no requirements on framing policies or conducting trainings.

The Prevention of Money Laundering Act 2002 prescribes strict criminal penalties on entities indulging in money laundering. It covers involvement with or concealment, possession, acquisition or use of proceeds of a claim or projecting or claiming such proceeds as untainted property.

The RBI has also prescribed stringent KYC norms, anti-money laundering standards and guidelines on combating the financing of terrorism to be adhered to by all banks, NBFCs, payment system operators, e-wallet companies, etc.

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48 Is there regulatory or industry anti-financial crime guidance for fintech companies?

India has fairly detailed laws with regard to the prevention of money laundering, KYC requirements, insider trading and combating financing of terrorism. Depending on the services provided by the fintech companies, they may be governed by some or all of these regulations. There is also a heightened awareness of identity fraud and most financial institutions require a much higher level of identity proof from customers than is the case in many developing countries. Given the slow court process and inefficiencies of the investigative agencies, financial institutions also resort to a high level of protection compared with developed countries, such as through higher security cover, undated cheques, bank guarantees, personal guarantees and the appointment of nominee directors. Fintech companies would need to consider the optimal mix of these options to balance obtaining sufficient protection with ensuring business efficiency.

Indonesia

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AKSET Law

Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

The Indonesian financial services sector is primarily under the authority of the Financial Services Authority (OJK) and the Central Bank of Indonesia (Bank Indonesia or BI). The following are the main activities that trigger licensing requirements in Indonesia.

Extending loans
Generally, entities wishing to provide a platform for lending require a licence. Lending (in various forms) is typically carried out by banking institutions, multi-finance companies, venture capital companies and microfinance institutions, subject to different licences from OJK. Savings and lending cooperatives may also engage in lending under licence from the Ministry of Cooperatives and Small Business Enteprises (MOCSBE). Recently, peer-to-peer lending companies (off-balance sheet lending) has been regulated by OJK and is subject to licensing requirements.

Deposit-taking
Acceptance of deposits from the public in the form of demand deposits, time deposits, deposit certificates, savings or equivalent forms may only be conducted by banking and microfinance institutions licensed by OJK. Savings and lending cooperatives may also engage in deposit-taking, based on a licence issued by MOCSBE.

Factoring
Factoring may be carried out by banks and licensed multi-finance companies, with or without recourse. A factoring platform may trigger an OJK licensing requirement.

Payment and transaction processing services
Banks may perform certain fund transfer and payment services. However, non-bank entities may also provide payment and transaction processing services, such as e-money, card-based payment instruments, e-wallet, payment gateways, fund transfers and switching operations, subject to the relevant licences from BI. Licensing of payment services is further discussed in question 11.

Dealing in investments or advising on investments (in the framework of financial services)
These activities fall mainly within the scope of capital markets. Securities companies operating as securities underwriters, securities trading brokers or investment managers are required to hold a licence from OJK. Individuals representing securities companies must also be licensed by OJK. Parties that provide advisory services on the sale or purchase of securities must obtain a licence from OJK as an investment adviser. General investment advisory services, such as financial advisory services for M&A transactions, does not fall under this licensing requirement.

Other financial services by non-bank institutions
Platforms providing other financial services, such as insurance and reinsurance companies and intermediaries, and pension fund institutions, also require specific licences from OJK.

2 Is consumer lending regulated in your jurisdiction? Describe the general regulatory regime.

Yes, consumer lending is a regulated activity in Indonesia. Consumer lending can be provided by banking institutions and multi-finance companies and is generally regulated under the prevailing laws and regulations on the relevant sectors.

3 Are there restrictions on trading loans in the secondary market in your jurisdiction?

Under Indonesian law, loans are generally transferable unless agreed otherwise by the parties. Notification to, or acknowledgment from, the borrower is required in transferring the loan. However, depending on the structure of the loan being traded, it may fall under the scope of securities subject to Law No. 8 of 1995 on Capital Markets (the Capital Markets Law) or commercial paper supervised by BI.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would generally fall within the scope of any such regime.

The Capital Markets Law and its implementing regulations recognise several categories of collective investment schemes, such as mutual funds, limited participation collective investments, asset-backed securities and real estate investment trusts. Companies managing collective investment schemes must possess a licence from OJK.

At present, there is no fintech company in Indonesia that is recognised by OJK as providing a collective investment scheme platform, but theoretically, such a company would be required to hold a licence.

5 Are managers of alternative investment funds regulated?

Investment managers are generally regulated under Head of the Capital Markets and Financial Institutions Supervisory Board Decree No. KEP-479/BI/2009 on Licensing of Securities Companies Conducting Business as Investment Managers. A party wishing to operate as an investment manager needs to obtain a business licence from OJK. Upon issuance of the business licence, the investment manager may carry out the following activities:

- management of securities portfolios for the interest of a particular investor, based on an individual and bilateral fund management agreement;
- management of collective investment portfolios through a vehicle or products regulated by OJK, such as mutual funds, limited participation collective investments, asset-backed securities and real estate investment trusts; and
- other activities in accordance with provisions set by OJK.

6 May regulated activities be passported into your jurisdiction?

No. Regulated activities may not be passported into Indonesia.

7 May fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

No. Any company planning to provide financial services in Indonesia must have legal entity status in Indonesia, which requires a presence

in Indonesia. Currently only two types of fintech activities have been regulated: payment systems by BI and peer-to-peer lending services by OJK, both of which require a legal entity status, a licence and a presence in Indonesia.

8 Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

To accommodate growing demand for a legal basis governing peer-to-peer lending, OJK issued OJK Regulation (POJK) No. 77/POJK.01/2016 on Information Technology-Based Lending Services (POJK 77/2016), which came into force on 29 December 2016.

Parties wishing to operate peer-to-peer lending must be in the form of a limited liability company (PT) or a cooperative. Foreign shareholders can only hold shares in operators formed as a PT, with direct or indirect foreign shareholding limited to 85 per cent.

The operator must register with OJK and apply for a licence within one year after being registered. At the time of registration, the minimum capital requirement (issued and paid-up capital for PTs, or owner's equity for cooperatives) for operators is 1 billion rupiah, which must be increased to 2.5 billion rupiah by the time of the licence application.

In operating peer-to-peer lending, operators are prohibited from (i) conducting any activities other than operating peer-to-peer lending services, as governed in POJK 77/2016; (ii) acting as a lender or borrower in their peer-to-peer lending platform; (iii) giving any forms of assurance; (iv) issuing bonds; (v) giving recommendations (eg, recommending certain loans, investments or investors); (vi) publicising false information; (vii) giving offers through personal communication without the consent of the user; and (viii) imposing any fees on users for complaints.

In peer-to-peer lending, the borrower must be an Indonesian national or legal entity, while the lender may be domestic or domiciled abroad.

Peer-to-peer lending is off balance sheet, meaning that operators may only provide an online platform that matches and passes third-party lenders to potential borrowers.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

There is currently none. However, as crowdfunding and similar types of activity have started to take off in Indonesia, OJK is expected to regulate this area in the near future.

10 Describe any specific regulation of invoice trading in your jurisdiction.

There is no specific regulation on invoice trading, although it may be recognised as a transfer of receivables (cessie) pursuant to the Indonesian Civil Code (ICC), which does not trigger a licensing requirement. Nevertheless, depending on the business structure, companies carrying out sale and purchase of receivables (eg, factoring businesses) may fall under a regulated activity that requires a specific licence.

11 Are payment services a regulated activity in your jurisdiction?

Yes. Payment services are primarily regulated under BI Regulation (PBI) No. 18/40/PBI/2016 on the Operation of Payment Transaction Processing (the PBI on Payment Processing), PBI No. 11/12/PBI/2009 on Electronic Money as lastly amended by PBI No. 18/17/PBI/2016 (the PBI on E-Money), and PBI No. 14/23/PBI/2012 on Transfer of Funds. The scope of regulated activities covers pre-transaction, authorisation, clearing, settlement and post-transaction activities.

The following payment service providers are generally required to obtain a licence from BI:

- principals;
- switching operators;
- card-based payment instruments and e-money issuers;
- acquirers;
- payment gateway operators;
- clearing operators;
- final settlement operators;
- fund transfer operators;
- e-wallet operators; and
- other payment service providers as determined by BI.

In providing payment services, the above-listed providers may cooperate with supporting operators (eg, companies that engage in payment personalisation, providing data centres or disaster recovery centres, terminal provision, technology support for contactless transactions, and card printing).

12 Do fintech companies that wish to sell or market insurance products in your jurisdiction need to be regulated?

Marketing of insurance products is generally regulated under POJK No. 23/POJK.05/2015 on Insurance Products and Marketing of Insurance Products, which allows insurance companies to sell and market insurance products through insurance agents, banks or non-bank institutions. Currently, there is no regulation governing the selling or marketing of insurance products specifically through fintech companies. Micro-insurance products, however, are allowed to be marketed and sold using information technology (eg, through websites).

13 Are there any legal or regulatory rules in your jurisdiction regarding the provision of credit references or credit information services?

Pursuant to PBI No. 9/14/PBI/2007 on Debtor Information Systems, as amended by PBI No. 18/21/PBI/2016, credit information services are currently managed by BI through the Debtor Information System (SID). The SID collects and records credit or loan facilities data submitted to BI by the members of BI's Credit Information Bureau in order to generate the credit information status of a person. Every financial institution that is a member of the Credit Information Bureau has 24-hour access to SID to obtain credit information.

Based on POJK No. 18/POJK.03/2017 on the Reporting and Requesting of Debtor Information through the Financial Information Services System (SLIK), SLIK, managed by OJK, will replace SID from 1 January 2018.

14 Are there any legal or regulatory rules in your jurisdiction that oblige financial institutions to make customer or product data available to third parties?

There are no legal or regulatory rules that govern such obligation at present.

15 Does the regulator in your jurisdiction make any specific provision for fintech services and companies? If so, what benefits do those provisions offer?

Yes. BI has established the Fintech Office with four main objectives: (i) to facilitate fintech innovation; (ii) to optimise the development of technology for the growth of Indonesia's economy; (iii) to increase the competitiveness of fintech in Indonesia; and (iv) to support the formulation of fintech regulations and policy. The Fintech Office provides a regulatory sandbox that makes it possible for fintech companies, especially small-scale start-ups that meet certain criteria as determined by BI, to carry out activities on a limited basis.

OJK also recently formed two new units – the Digital Financial Innovation Unit and the Fintech Licensing and Supervision Unit – as well as the Fintech Expert Forum. The Digital Financial Innovation Unit will handle research and the regulatory sandbox, while the Fintech Expert Forum will coordinate and facilitate inputs from various stakeholders in the fintech industry.

16 Does the regulator in your jurisdiction have formal relationships or arrangements with foreign regulators in relation to fintech activities?

Both BI and OJK have established cooperation with foreign regulators. For example, OJK recently entered into cooperation with the Australian Securities and Investments Commission for information exchange and an innovation hub in the field of financial services, including fintech. Additionally, OJK has formal relationships with other foreign regulators, including, among others, the Financial Services Agency of Japan, the China Banking Regulatory Commission and the Financial Supervisory Service of South Korea. Cooperation with foreign regulators is deemed important by the government, which is committed to introducing regulations that support the development of financial services as a strategic step in developing Indonesia's economy.

17 Are there any local marketing rules applicable with respect to marketing materials for financial services in your jurisdiction?

Yes. Rules on marketing are provided in POJK No. 1/POJK.07/2013 on Consumer Protection in Financial Services, and OJK Circular Letter (SEOJK) No. 12/SEOJK.17/2014 on Delivery of Information in the Framework of Financial Services and/or Product Marketing. Such regulations govern the information that may be contained in advertisements circulated by financial services institutions (FSIs), such as terms for the use of research data, refunds, the use of the words 'free of charge' and the use of superlatives. Moreover, in every promotion, FSIs are obliged to identify themselves and provide a statement that they are registered and under the supervision of OJK. This allows customers or prospective customers to distinguish offerings of financial products that are not supervised by OJK.

18 Are there any foreign exchange or currency control restrictions in your jurisdiction?

There are no foreign exchange or currency control restrictions in Indonesia. However, for the past few years, BI has been issuing policies and intensively monitoring foreign exchange market transactions. With regard to purchase of foreign currency against rupiah in Indonesia, PBI No. 18/18/PBI/2016 on Transactions of Foreign Currency Against Rupiah Between Banks and Domestic Parties requires domestic customers (Indonesian individuals or Indonesian legal entities) to provide banks with underlying documentation for the transaction, for any of the following foreign exchange transactions:

- purchase of more than US$25,000 or its equivalent per month through spot transactions (transaction with delivery of funds not more than two working days);
- purchase of more than US$100,000 or its equivalent per month through standard derivative transactions (plain vanilla);
- selling of more than US$5 million or its equivalent per transaction through forward transactions; and
- selling of more than US$1 million or its equivalent per transaction through option transactions.

In other words, the purchase of foreign exchange exceeding such thresholds may be conducted as long as the total amount of foreign currency purchased is equal to the amount indicated in the underlying document.

It is also important to note that pursuant to Law No. 7 of 2011 on Currency, rupiah shall be used in (i) transactions with payment purposes; (ii) settlement of obligations that must be met with money; and (iii) other financial transactions, any of which are performed in Indonesia. This obligation does not apply to international trade or financing transactions and bank savings in foreign currency, but domestic entities are still required to use rupiah for payments between them, even if the transactions are related to trade or financing. In this regard, BI further regulates through PBI No. 17/3/PBI/2015 on Mandatory Use of Rupiah that rupiah must be used in all transactions in Indonesia, except for certain exemptions.

19 If a potential investor or client makes an unsolicited approach either from inside the provider's jurisdiction or from another jurisdiction, is the provider carrying out a regulated activity requiring a licence in your jurisdiction?

Licensing and legal presence requirements may apply to providers carrying out activities in Indonesia, regardless of who makes the approach, within or outside Indonesia. However, a specific answer to this question may need to be formulated on a case-by-case basis, depending on certain factors such as the type of services being provided, and whether there are any specific requirements or restrictions on such services.

20 If the investor or client is outside the provider's jurisdiction and the activities take place outside the jurisdiction, is the provider carrying out an activity that requires licensing in its jurisdiction?

Under the current regime, licensing from Indonesian authorities is required for regulated activities performed in Indonesia. Further, certain compliance requirements may be required if the activities are targeted towards the Indonesian market. If the provider operates outside Indonesia, such provider is generally not subject to licensing requirements in Indonesia.

21 Are there continuing obligations that fintech companies must comply with when carrying out cross-border activities?

Currently, there are no regulations that govern continuing obligations for fintech companies in carrying out cross-border activities. Nonetheless, regulations on such obligations may be introduced in the future.

22 What licensing exemptions apply where the services are provided to an account holder based outside the jurisdiction?

There are no exemptions or special regulatory treatment.

Distributed ledger technology

23 Are there any legal or regulatory rules or guidelines in relation to the use of distributed ledger (including blockchain) technology in your jurisdiction?

Although awareness of distributed ledger technology (such as blockchain) has been increasing in Indonesia, there are currently no legal or regulatory rules or guidelines related to such use.

Digital currencies

24 Are there any legal or regulatory rules or guidelines in relation to the use of digital currencies or digital wallets, including e-money, in your jurisdiction?

Yes. E-money, which is governed under the PBI on E-Money, is defined as a payment instrument that fulfils the following elements: (i) issued based on the nominal value of money deposited in advance to the issuer; (ii) the nominal value of the money is stored electronically in a server; (iii) used as a payment instrument for merchants other than the issuer of the e-money; and (iv) the value of the e-money managed by the issuer does not constitute savings under the relevant banking law. Failure to fully fulfil those elements causes the payment instrument not to be considered as e-money.

Principals, issuers, acquirers, clearing processors and final settlement processors of e-money are required to obtain a licence from BI. Nevertheless, a non-bank institution that intends to act as an issuer is only subject to the licence requirement if: (i) the managed float funds have reached 1 billion rupiah; or (ii) the planned float funds will reach 1 billion rupiah, even though at the time of application, the value of float funds have not reached such value. Currently, BI has only issued e-money licences to issuers.

With regard to an e-wallet, or digital wallet, the PBI on Payment Processing defines an e-wallet as an electronic service to store payment instrument data such as payment instruments using cards or e-money, that may also store funds, for payment purposes. Funds stored in the e-wallet may only be used for purchases and paying bills. E-wallet operators are subject to licensing by BI only if the number of active users has reached or is planned to reach at least 300,000 users.

According to the PBI on Payment Processing, virtual currency or digital currency (eg, Bitcoin, BlackCoin, Dash, Dogecoin, Litecoin, Namecoin, Nxt, Peercoin, Primecoin, Ripple and Ven) is prohibited from being used in the processing of payment transactions in Indonesia.

Securitisation

25 What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

In principle, Indonesia adopts the principle of freedom of contract, whereby an agreement (including loan and security agreements) will be regarded as the law for its parties, as long as the agreement has fulfilled article 1320 of the ICC and does not contravene public order. Under article 1320 of the ICC, a valid agreement comprises the following conditions: (i) consent between the parties; (ii) legal capacity of the parties; (iii) the agreement is for a specific matter; and (iv) the agreement is based on a lawful cause.

With regard to peer-to-peer lending agreements (ie, agreement between a borrower and a lender or agreement between an operator and a lender), POJK No. 77/POJK.01/2016 on Information Technology-Based Lending Services (POJK 77/2016) provides that such agreements must be made in an electronic document containing at least the following:

- agreement number;
- date;
- identities of the parties;
- rights and obligations of each party;
- loan amount;
- interest rate;
- instalment value;
- term;
- security (if any);
- relevant costs (if any);
- terms on penalties (if any); and
- dispute settlement mechanism.

As long as the above requirements are fulfilled, the peer-to-peer lending agreement should be enforceable.

26 What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected?

While POJK 77/2016 does not specifically regulate the assignment of peer-to-peer loans, in general, assignment of rights and obligations under an agreement (including a loan agreement, usually in the form of receivables) is governed under article 613 of the ICC. Assignment (cessie) of receivables is required to be set out in a notarial deed or a private agreement. The debtor must be notified of the assignment. Failure to notify or to obtain a debtor's acknowledgement of the assignment will cause the assignment not to have any legal effect as to the debtor.

27 Is it possible to transfer loans originated on a peer-to-peer or marketplace lending platform to the purchaser without informing the borrower? Does the assignor require consent of the borrower or are the loans assignable in the absence of a prohibition?

As mentioned in question 26, as long as there is no contractual restriction, it is possible to transfer or assign loans or receivables, subject to the requirement to notify or receive acknowledgment from the borrower.

28 Would a special purpose company for purchasing and securitising peer-to-peer or marketplace loans be subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

Yes, a special purpose company in this case is subject to the rules on data protection. Based on Minister of Communications and Informatics (MOCIT) Regulation No. 20 of 2016 on Private Data Protection in Electronic Systems (MOCIT 20/2016), any party that obtains protected data or information from an electronic system operator (peer-to-peer operator) relating to their users (borrowers) is subject to the rules on data protection.

Intellectual property rights

29 Which intellectual property rights are available to protect software, and how do you obtain those rights?

Software is mainly protected by copyright under Law No. 28 of 2014 on Copyright (the Copyright Law). Although in principle copyright arises automatically when a work is realised in a tangible form, the Copyright Law provides procedures for voluntary registration. Registration is not required for a work to be recognised as copyrighted; it merely confers on the registrant the legal presumption that they are the creator of the work in the event of dispute.

30 Is patent protection available for software-implemented inventions or business methods?

Software per se is not patentable in Indonesia. Nevertheless, Law No. 13 of 2016 on Patents (the Patent Law) provides that computer programmes, both tangible and intangible, that have technical features and functions for problem-solving may be considered patentable inventions. Business methods that have no technical characteristics are outside the scope of patentability.

31 Who owns new intellectual property developed by an employee during the course of employment?

Ownership of intellectual property shall depend on the nature of the intellectual property. With regard to copyright, in the absence of express contractual provisions between the employer and the employee that provide otherwise, the employee owns the copyright because he or she is deemed the creator. However, if the work is designed by the employer, and the employee merely realises and performs his or her work under the guidance and direction of the employer who initially designed the copyrighted work, the employer will be regarded as the creator.

In relation to patents, intellectual property rights over inventions made by an employee in the course of employment shall be owned by the employer, unless otherwise agreed by both parties. This also applies to inventions developed by employees using data and/or facilities that are available due to their employment. In both cases, the employee, as the inventor, has the right to a reward based on the agreement of the parties, taking into account the economic benefits obtained from the invention.

32 Do the same rules apply to new intellectual property developed by contractors or consultants? If not, who owns such intellectual property rights?

In the course of engagement, contractors or consultants generally own the intellectual property developed by them, as according to the Copyright Law, the work developed based on the order of others shall be owned by the party who developed such work. Despite these rules, both parties may agree otherwise in a contract.

The Patent Law is silent on the case where the invention is made by a contractor or consultant. In practice, this scenario is commonly governed under a contract executed by the parties.

33 Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

Although, in general, the Indonesian laws related to intellectual property recognise joint ownership, limitations related to the rights to use, license, charge or assign specifically under such a joint ownership are not expressly provided. In practice, the parties under a joint ownership usually enter into an agreement to govern in detail the terms on the use, licensing and assignment of rights by them.

34 How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

In Indonesia, trade secrets are protected under Law No. 30 of 2000 on Trade Secrets (the Trade Secrets Law). The scope of protection covers methods of production, processing or sale, or any other information in the field of technology or business. To obtain protection, a trade secret must have economic value, must be unknown to the public, and its owner must take the necessary steps to maintain the confidentiality of the information. By holding the right of a trade secret, the holder is entitled to exclusive rights to use the trade secret, to grant a licence to or prohibit others from using the trade secret, and to disclose the trade secret to third parties for commercial purposes.

Disclosing, or breaching an agreed obligation to maintain the confidentiality of trade secrets, constitutes an infringement of trade secrets. Unlike the general rules of intellectual property that designate the commercial court as the relevant forum for dispute settlement, the Trade Secrets Law specifically provides that disputes related to trade secrets shall be settled by the district court. District courts allow closed proceedings in order to prevent the disclosure of trade secrets.

Update and trends

Indonesia is the largest economy and has the largest population in South East Asia. However, only 40 per cent of its 255 million people have access to financial services. The government supports the growth of fintech as a medium to increase access to financing across the archipelago. Based on the Masterplan of the Indonesian Financial Services Sector 2015–2019 issued by OJK, one of the objectives of the government is the optimisation of the use of information technology. The formulation of this objective corresponds to the development of the fintech industry in Indonesia.

As in many other jurisdictions, the challenge faced by Indonesian regulators is how to issue appropriate and effective regulations that are not too stringent, as these may hinder the growth of the fintech industry. Although at present, the only fintech sectors that are formally regulated are peer-to-peer lending services by OJK, and payment-related services by BI, both regulators are expected to formulate a number of new regulations in the near future. Despite the increase in regulations, fintech companies are beginning to adapt to the changing regulatory environment. It is hoped the recent establishment of special units and provision of the regulatory sandbox will boost the industry, creating sound fintech businesses that will contribute to the economy.

As the fintech industry moves with lightning speed, other than issuing regulations, regulators also need to make sure that they have adequate manpower and that they streamline the licensing process to accommodate the growing number of fintech companies that would like to comply with the regulations. Currently, there is no clear timing for the regulator to approve or deny a licensing application, and applicants have to go through excessively long processing times. This does not encourage the positive growth of the fintech industry.

35 What intellectual property rights are available to protect branding and how do you obtain those rights?

Brands are largely protected as trademarks under Law No. 20 of 2016 on Trademark and Geographical Indications (the Trademark Law). Trademarks not only cover conventional marks, such as words, letters, numbers, pictures and logos, but also non-conventional marks, such as three-dimensional objects, sounds and holograms. The rights of trademarks are obtained upon registration with the Ministry of Law and Human Rights (MOLHR).

The Trademark Law allows applications to be submitted with priority rights. With priority rights, an applicant may submit an application originating from any member state of the Paris Convention for the Protection of Industrial Property, or the Agreement Establishing the World Trade Organization, in order to obtain recognition that the filing date of the country of origin is the priority date in Indonesia, provided that the filing date of the application is made during the period prescribed in the treaty.

36 How can new businesses ensure they do not infringe existing brands?

All brands under registered trademarks are publicly announced and recorded in the trademark database managed by the MOLHR, available for public access online at http://e-statushki.dgip.go.id/. New businesses are highly recommended to do a trademark search to identify whether there are similar or identical trademarks that have been registered or that are currently under the registration process. It is best to note that applications for trademark registration will be rejected if the trademark has a similarity in an essential part or in its entirety with not only a registered trademark, but also a well-known trademark.

37 What remedies are available to individuals or companies whose intellectual property rights have been infringed?

In general, the owner of intellectual property rights (IPR) may file a civil lawsuit to claim for compensation or to force the termination of all actions related to the use of such IPR, or both. Such civil lawsuits shall be submitted to the commercial court for trademarks, copyrights or patents, or the district court in case of trade secrets. Alternatively, the parties may settle through arbitration or other alternative dispute settlement.

Criminal penalties are also applicable for the infringement of IPR.

38 Are there any legal or regulatory rules or guidelines surrounding the use of open-source software in the financial services industry?

There are none as yet.

Data protection

39 What are the general legal or regulatory requirements relating to the use or processing of personal data?

There are currently no general regulations that govern the use and processing of personal data. Consequently, MOCIT has proposed a Draft Bill on Personal Data Protection (the PDP Bill) for the House of Representatives, which will apply to any entity that stores or processes personal data by electronic or non-electronic means. The use or processing of personal data is governed by several regimes, depending upon its purpose, means, subject and object. For example, protection of personal data under the framework of electronic systems and transactions is regulated in MOCIT 20/2016.

Both the PDP Bill, if promulgated in its present substance, and MOCIT 20/2016 require prior written consent from the owners in order to obtain and collect personal data. In obtaining prior consent, the PDP Bill requires all system administrators to disclose the following information to the user:

- legality of the processing;
- purpose of the processing;
- types of personal data that will be processed;
- retention period;
- details on the information that will be collected;
- time period for processing and deletion; and
- rights of the owner to modify or withdraw their consent.

40 Are there legal requirements or regulatory guidance relating to personal data specifically aimed at fintech companies?

Fintech companies, depending on the services provided, may be subject to SEOJK No. 18/SEOJK.02/2017 on Governance and Information-Technology Risk Management for Technology-Based Lending Services (SEOJK 18/2017) (for peer-to-peer lending operators), BI Circular Letter (SEBI) No. 18/41/DKSP on Operation of Payment Transaction Processing, and SEBI No. 16/11/DKSP on Operation of Electronic Money, as amended by SEBI No. 18/21/DKSP (for payment system operators). Those regulations generally require the use of information technology systems that maintain the confidentiality of personal data. Compared to the other two regulations that are applicable for payment system operators, SEOJK 18/2017 provides more detailed requirements for peer-to-peer lending operators on the processing of personal data and information of their users.

41 What legal requirements or regulatory guidance exists in respect of anonymisation and aggregation of personal data for commercial gain?

There is none at present. Anonymised or aggregated data may be freely used for commercial gain. In principle, the definition of personal data governed in both the PDP Bill and MOCIT 20/2016 requires the individual to be identified, or at least, identifiable. Thus, as personal data that have been anonymised or aggregated are no longer identifiable, they are not under the scope of regulated personal data protection.

Cloud computing and the internet of things

42 How common is the use of cloud computing among financial services companies in your jurisdiction?

The use of cloud computing among FSIs is becoming increasingly prevalent.

43 Are there specific legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

At present, there are no specific legal requirements for such use. OJK, however, has issued Guidelines for the Use of Cloud Computing

Services by Financial Services Institutions to serve as guidance for FSIs in facing legal and operational issues arising from the use of cloud computing. Every FSI shall comply with the following:

- competence and reputation of the service provider;
- review, monitoring and control;
- audit;
- confidentiality and security standards;
- resilience and continuity of business;
- transparency of data location;
- restrictions on the use of data;
- separation or isolation of data;
- outsourcing requirements; and
- data termination requirements.

44 Are there specific legal requirements or regulatory guidance with respect to the internet of things?

There are no specific legal requirements or regulatory guidance on the internet of things as yet.

Tax

45 Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

There are currently no tax incentives specifically for fintech companies. However, there is a general corporate income tax reduction available for companies fulfilling certain requirements (eg, industries that are classified as 'pioneer' and having an authorised capital investment plan of minimum 1 trillion rupiah, or 500 billion rupiah if the company introduces high technology).

Competition

46 Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction or that may become an issue in future?

There are no specific issues on competition with respect to fintech companies. Competition in Indonesia is generally regulated in Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition, which applies to all business entities, including fintech companies. This regulation prohibits business entities from entering into agreements, or carrying out activities, that may give rise to monopolistic practices or unfair business competition.

Financial crime

47 Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

There is no regulatory requirement for fintech companies to have anti-bribery procedures. However, fintech companies are required to formulate and consistently implement written guidelines for anti-money laundering programmes and deliver the same to BI or OJK. Such guidelines must consider the factor of information technology, which could potentially be misused by money laundering perpetrators.

48 Is there regulatory or industry anti-financial crime guidance for fintech companies?

BI and OJK have issued several regulations and circular letters that serve as guidelines for fintech companies to implement anti-money laundering programmes, as well as prevention of terrorism financing. In general, such guidelines provide minimum standards for customer due diligence or enhanced due diligence, administration of documents, procedures for determination of user profiles, rejection and termination of business relations, and obligatory reporting to the Financial Transaction Reports and Analysis Centre.

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

The Central Bank of Ireland (the Central Bank) is the regulatory body for all regulated financial services under Irish law. The principal categories of financial services firms and services that are regulated as a matter of Irish law are those in respect of which regulation derives from European Union directives, including:

- banking services (essentially deposit taking) and credit institutions;
- mortgage credit intermediaries under the European Union (Consumer Mortgage Credit Agreements) Regulations 2016;
- Markets in Financial Services Directive (MiFID) firms and services;
- investment business and investment intermediary services and firms and/or the provision of investment advice under the Investment Intermediaries Act 1995 (IIA);
- investment funds and management of investment funds;
- depositary and administration services for investment funds;
- insurers (life and non-life);
- payment services under the Payment Services Directive (PSD) (and from January 2018, the Revised Directive on Payment Services (PSD2)); and
- electronic money ('e-money') issuance and services.

Ireland's approach to implementation of EU directives is generally consistent with the principle of maximum harmonisation and avoids gold-plating.

There are some financial services that are subject to domestic Irish legislation, including acting as a retail credit firm or servicer to a retail credit firm, as governed by Part V of the Central Bank Act 1997 (the 1997 Act)and the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 (the 2015 Act) respectively.

It is an offence to carry out any of the above regulated financial services in Ireland without the authorisation of the Central Bank (subject to applicable EU passporting rules).

2 Is consumer lending regulated in your jurisdiction? Describe the general regulatory regime.

Yes. Lending to natural persons is regulated, whereas lending to corporates (at an APR below 23 per cent) is not.

Consumer lending is regulated by the Consumer Credit Act 1995 and the Consumer Credit Directive Regulations 2010, which regulate the form and content of credit agreements. In addition, the 1997 Act regulates the provision of cash loans by retail credit firms. The Consumer Protection Code 2012 (CPC) is also applicable in this instance.

The CPC applies to financial services providers who are authorised, registered or licensed by the Central Bank, as well as financial services providers authorised, registered or licensed in another EU or EEA member state when providing services in Ireland on a branch or cross-border basis. The CPC essentially requires regulated entities to adhere to a set of general requirements such as to provide terms of business to consumers, conduct KYC, establish the suitability of the product, and adhere to lending and advertisement requirements.

3 Are there restrictions on trading loans in the secondary market in your jurisdiction?

In general, no. However, where an entity holds a regulated (ie consumer) loan, it will be required to be regulated as, or to appoint, a credit servicing firm in accordance with the 2015 Act.

There may be data protection issues and general contractual issues that need to be addressed, irrespective of the nature of the loans being traded.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would generally fall within the scope of any such regime.

Investment funds are authorised and regulated by the Central Bank, and may be regulated as:

- undertakings for collective investment in transferable securities (UCITS) in accordance with the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011 (as amended), which implement the UCITS Directives into Irish law, and the Central Bank (Supervision and Enforcement) Act 2013 (section 48(1)) (Undertakings for Collective Investment in Transferable Securities) Regulations 2015 (collectively, the UCITS Regulations); or
- retail investor alternative investment funds (RIAIFs) or qualifying investor alternative investment funds (QIAIFs) in accordance with the requirements of the Central Bank and the European Union (Alternative Investment Fund Managers) Regulations 2013 (as amended) (the AIFM Regulations), which implement the Alternative Investment Fund Managers Directive (AIFMD) into Irish law.

UCITS, RIAIFs and QIAIFs may be organised through a number of legal structures, the most popular of which are the Irish collective asset-management vehicle (ICAV), the investment public limited company ('investment company') and authorised unit trusts. It is an offence to carry on business as an ICAV, investment company or authorised unit trust unless authorised by the Central Bank.

The Central Bank also authorises and regulates depositaries and administrators of Irish authorised collective investment schemes.

Fintech companies, whether providing alternative finance products or otherwise, would not typically fall to be regulated as investment funds. However, fintech firms that fall within the definition of alternative investment funds (see question 5) would require authorisation.

Where fintech companies provide services to investment funds, they would not require authorisation, unless providing regulated depositary or administration services. Depositaries and administrators to investment firms may also engage fintech firms, in which case applicable Central Bank outsourcing requirements may apply, although in general, the fintech companies would not themselves require authorisation.

5 Are managers of alternative investment funds regulated?

The Central Bank authorises and regulates Irish alternative investment fund managers (AIFMs) under the AIFM Regulations, as well as regulating UCITS management companies in accordance with the UCITS Regulations, and non-UCITS management companies (a residual category post-AIFMD).

Most fintech companies would be expected to fall outside the scope of the AIFM Regulations and the UCITS Regulations.

6 May regulated activities be passported into your jurisdiction?

Yes, where the regulated activity is covered by relevant EU legislation, the provider is authorised in another EU or EEA member state and subject to compliance with applicable notification procedures under relevant legislation.

As a general principle, where a financial institution authorised in another EU or EEA member state (the 'home state') passports its services into Ireland through the establishment of a branch in Ireland, or by providing its services on a cross-border services basis, the home state regulator retains responsibility for the prudential supervision of that entity. The regulator of the member state into which passporting is undertaken (the 'host state'), in this case the Central Bank, will supervise the passported entity's conduct of business in Ireland. The Central Bank does not adopt a gold-plating approach, and in general there are no additional onerous requirements to be met when passporting into Ireland.

7 May fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

Where a fintech company wishes to provide a regulated service, then, subject to the ability to passport into Ireland on a services basis where the fintech company is authorised in another EU or EEA member state, it is not possible to provide regulated financial services in Ireland unless the fintech company establishes a presence in Ireland and (unless passporting on a branch basis) is authorised by the Central Bank.

8 Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

None, subject to the comments in question 2 above. A fintech or other company may, in providing a marketplace, be acting as a credit intermediary and would be required to register with the Competition and Consumer Protection Commission (but would not require an authorisation from the Central Bank).

QIAIFs may be established as loan originating investment funds, subject to certain requirements, including a prohibition on consumer lending.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

Crowdfunding is not currently specifically regulated in Ireland, assuming it does not involve deposit-taking or equity investment.

Notwithstanding, while there are no financial services rules in Ireland designed specifically for crowdfunding, other legal rules may apply. In particular, when a company pitches equity investment to investors on a crowdfunding platform, such a pitch may be considered to be an 'offer to the public', to which prospectus rules (as far as the issuer is concerned) and financial promotion rules (as far as the issuer and platform are concerned) may apply. Reward-based crowdfunding may be considered as collective investment, depending on the structure used and the manner of its offering. MiFID may also be applicable if the crowdfunding platform engages in the receipt and transmission of orders.

Crowdfunding has been discussed in the Dail (Irish parliament) as an important future source of funding for charitable causes and community initiatives. However, there is currently no specific legislation or regulation proposed or under consideration in Ireland.

10 Describe any specific regulation of invoice trading in your jurisdiction.

None. However, there may be data protection issues and general contractual issues that need to be addressed.

11 Are payment services a regulated activity in your jurisdiction?

Payment services are regulated in Ireland pursuant to the European Communities (Payment Services) Regulations 2009 (the PSD Regulations), which implemented the PSD into Irish law. Ireland's implementation of the PSD through the PSD Regulations was consistent with the principle of maximum harmonisation and as such the PSD Regulations reflect the requirements of the PSD itself. It is expected that the same approach will be taken with regard to the implementation of the PSD2, which is due to be implemented in Ireland by 13 January 2018.

Under the PSD2, certain additional documentation must be submitted to the relevant national authority a part of the authorisation requirements. A security policy document must now be maintained by the payment service provider (PSP), containing a description of security control and mitigation measures taken to adequately protect payment service users against any risks identified.

In addition, there are domestic rules that apply to certain payment services. Part IV of the Central Bank Act 1997 regulates a money transmission business, which is defined as 'a business that comprises or includes providing a money transmission service to members of the public'. In this regard, a 'money transmission service' is defined as meaning a service that involves transmitting money by any means. Money transmission requires authorisation from the Central Bank. This is a legacy statute and only applies if the PSD Regulations do not apply. In practice it is difficult to think of practical situations where these rules would be relevant.

The E-Money Directive (EMD) was implemented in Ireland by the European Communities (Electronic Money) Regulations 2011 (the EMD Regulations).

12 Do fintech companies that wish to sell or market insurance products in your jurisdiction need to be regulated?

Generally, undertakings cannot sell or market insurance products or carry on a (re)insurance business in Ireland without authorisation from the Central Bank or, when conducting business in Ireland on a freedom of services basis, from another EU member state regulator. The European Communities (Insurance Mediation) Regulations 2005 (the IMD Regulations) provide that a person cannot purport to undertake (re)insurance mediation unless they have registered with the Central Bank as a (re)insurance intermediary or are exempt from such registration. In addition to authorising insurance companies to carry out the business of insurance, the Central Bank also maintains a register of authorised (re)insurance intermediaries in Ireland.

The IMD Regulations define 'insurance mediation' broadly as 'any activity involved in proposing or undertaking preparatory work for entering into insurance contracts, or of assisting in the administration and performance of insurance contracts that have been entered into (including dealings with claims under insurance contracts)'. Activities specifically excluded from the definition include an activity, undertaken by an insurer or an employee of such an undertaking in the employee's capacity, which involves (i) the provision of information on an incidental basis in conjunction with some other professional activity, so long as the purpose of the activity is not to assist a person to enter into or perform an insurance contract; (ii) the management of claims of an insurance undertaking on a professional basis, or loss adjusting; or (iii) expert appraisal of claims for reinsurance undertakings.

The IIA continues to apply to intermediaries despite the IMD Regulations, and therefore technically insurance intermediaries should continue to comply with the IIA as well as the provisions of the IMD Regulations.

13 Are there any legal or regulatory rules in your jurisdiction regarding the provision of credit references or credit information services?

The Credit Reporting Act 2013 provides for the establishment and operation of a statutory central credit register (CCR) system, established and operated by the Central Bank. Credit providers are required, from June 2017 in respect of individuals and June 2018 for corporate customers, to provide information to the Central Bank for entry onto the CCR. Until the introduction of the CCR, credit information has been managed by a private entity, the Irish Credit Bureau.

14 Are there any legal or regulatory rules in your jurisdiction that oblige financial institutions to make customer or product data available to third parties?

The PSD2, which must be transposed into Irish law by 13 January 2018, will require PSPs, such as financial institutions, to provide third-party payment providers with customer account information and access to the account itself, subject to customer consent.

15 Does the regulator in your jurisdiction make any specific provision for fintech services and companies? If so, what benefits do those provisions offer?

No. However, the Central Bank has in the past 12 months refreshed and updated its authorisation process with a view to speeding up the review process. In addition, financial services, including specifically fintech, is a government priority, as reflected in its position paper, IFS2020, published in 2015.

16 Does the regulator in your jurisdiction have formal relationships or arrangements with foreign regulators in relation to fintech activities?

No formal arrangements are in place.

17 Are there any local marketing rules applicable with respect to marketing materials for financial services in your jurisdiction?

There are no rules of general application. Specific rules may apply depending on the nature of the financial service and the nature of the customer.

For example, the Consumer Credit Act 1995 deals with the marketing of credit products to retail consumers, and specifies certain information that must be included in any advertisements for consumer credit, such as the annual percentage rate, the number and amount of instalments, and the nature of the contract. The Central Bank Act 2013 enforces similar rules for providing credit to small and medium-sized enterprises. The CPC also contains rules on marketing materials aimed at consumers, requiring such materials to be 'clear, fair, accurate and not misleading'.

Marketing may in certain instances fall foul of restrictions on the provision of, or holding out as providing, investment services and advice. Marketing and disclosure requirements are also contained in AIFMD, the Prospectus Directive and the UCITS regime.

Financial services advertising is also subject to general misleading advertising and consumer protection legislation, as well as the Advertising Standards Authority of Ireland Code of Standards. The European Communities (Directive 2000/31/EC) Regulations 2003 (the e-Commerce Regulations) also impose certain requirements in relation to electronic commercial communications.

18 Are there any foreign exchange or currency control restrictions in your jurisdiction?

No.

19 If a potential investor or client makes an unsolicited approach either from inside the provider's jurisdiction or from another jurisdiction, is the provider carrying out a regulated activity requiring a licence in your jurisdiction?

No, the provider is not carrying out a regulated activity requiring a licence in these circumstances. However, it may be necessary for the provider to demonstrate that the approach was unsolicited.

20 If the investor or client is outside the provider's jurisdiction and the activities take place outside the jurisdiction, is the provider carrying out an activity that requires licensing in its jurisdiction?

Typically, offering a regulated service in or from Ireland requires authorisation in Ireland. So providing banking services from Ireland to persons outside Ireland would still require an Irish banking licence. Similarly offering a PSD payment services to customers in the EU or EEA from Ireland would trigger an Irish licensing requirement. On the other hand, offering cash loans to individuals outside Ireland does not trigger a requirement to be regulated as a retail credit firm in Ireland.

21 Are there continuing obligations that fintech companies must comply with when carrying out cross-border activities?

Where a fintech company is regulated in Ireland and operating on the basis of a passport, the prudential requirements and applicable conduct of business rules of the Central Bank will continue to apply.

Conversely, where the fintech firm is regulated in another EU or EEA member state and is passporting into Ireland, its home state prudential and applicable conduct of business rules will apply to its passported business. Central Bank conduct of business rules may also apply insofar as an inward passporting firm's activities are within Ireland (as the host state).

See also question 39 in relation to international transfers of personal data.

22 What licensing exemptions apply where the services are provided to an account holder based outside the jurisdiction?

None. The regulatory status of the provider is a matter for assessment in each jurisdiction. A provider can provide services on a freedom of services basis within the EU and so further licensing may not be required as the analysis then falls on the home rather than the host country.

Distributed ledger technology

23 Are there any legal or regulatory rules or guidelines in relation to the use of distributed ledger (including blockchain) technology in your jurisdiction?

Nothing specific at present.

Ireland is a participating member of the International Organization for Standardisation (ISO) new technical committee known as ISO/TC 307, which aims to create international standards for blockchain and distributed ledger technology.

Digital currencies

24 Are there any legal or regulatory rules or guidelines in relation to the use of digital currencies or digital wallets, including e-money, in your jurisdiction?

The EMD Regulations set out requirements for the taking up, pursuit and prudential supervision of e-money institutions, including the authorisation and registration process. The EMD Regulations also deal with the issuance and redeemability of e-money more generally. Digital wallets may also be subject to the PSD and PSD2, depending on how they are structured. However, digital currencies are not subject to specific regulation in Ireland at this point.

Securitisation

25 What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

For a loan agreement or security agreement to be binding, there has to be an offer, acceptance, consideration, intention to create legal relations and certainty as to terms. The application of these principles does not depend on the particular technology that is being used so that acceptance can be evidenced by clicking in a designated box on a peer-to-peer or marketplace lending platform website.

A deed is only necessary for certain types of transactions. These transactions include:

- the conveyance of land or of any interest in land, including a mortgage or charge;
- any mortgage or charge of land or other property if the mortgagee or chargee is to have the statutory powers of appointing a receiver and of sale and, in the case of a sale, the power to overreach subsequent mortgages and charges; and
- the gift or voluntary assignment of tangible goods that is not accompanied by delivery of possession.

Also, a party may insist on the use of a deed for a transaction because, for example, it is unclear whether valuable consideration is given, or to have the benefit of a longer limitation period that applies, in respect of a transaction under deed. It is common for security agreements to be executed as deeds.

An instrument executed by an individual will be a deed if it (i) makes clear on its face that it is intended to be a deed; (ii) is signed by or on behalf of the maker; (iii) is signed in the presence of an attesting witness; and (iv) is delivered. An instrument executed by an Irish company will be a deed if it (i) makes clear on its face that it is intended to be a deed; (ii) is sealed by the company in accordance with its constitution; and (iii) is delivered.

Clicking on a website button could also be considered to constitute a signature. Although the common understanding of a signature is the writing by hand of one's full name or initials and surname, other forms of

identification have been held to satisfy a signature requirement. Under Irish law, electronic contracts and signatures are accorded legal validity in accordance with the requirements of the Electronic Commerce Act 2000 and Regulation 910/2014 on electronic identification and trust services for electronic transactions.

26 What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected?

There are two main types of assignments of rights under Irish law: a legal assignment and an equitable assignment. To create a legal assignment of a debt, the conditions in section 28(6) of the Supreme Court of Judicature Ireland Act 1877 must be complied with. These are as follows:

- the assignment must be in writing and signed by the assignor;
- the assignment must be absolute (ie, unconditional and not merely by way of security); and
- express notice in writing must be given to the borrower from whom the assignor would have been entitled to receive the debt.

In addition, part of a debt, or other legal chose in action, may not be legally assigned; only the whole debt may be legally assigned. If any one or more of the above are not satisfied, the assignment would only take effect as an equitable assignment.

Some consequences of a legal assignment are as follows:

- all rights of the assignor in the relevant assets pass to the purchaser;
- the borrower must pay the outstanding amount under the receivable directly to the purchaser; and
- the purchaser has the right to take legal action in relation to the relevant assets against the borrower directly, without involving the assignor.

In contrast, some consequences of an equitable assignment are as follows:

- the purchaser can only sue the debtor by joining the equitable assignor in the action;
- the borrower will continue (and be entitled to continue) to pay the outstanding amount under the receivable to the equitable assignor rather than directly to the purchaser;
- the borrower can exercise any rights of set-off against the assignee even if they accrue after the date of the assignment;
- the purchaser's rights and interests in the transferred receivables will be subject to any prior equities that have arisen in favour of the borrower before the assignment; and
- where there is more than one assignment of a debt by the assignor, another purchaser acting in good faith with no notice of the assignment to the purchaser will take priority if notice is given to the borrower of that assignment.

27 Is it possible to transfer loans originated on a peer-to-peer or marketplace lending platform to the purchaser without informing the borrower? Does the assignor require consent of the borrower or are the loans assignable in the absence of a prohibition?

Assuming there is no prohibition on assignment without the consent of the borrower under the terms of the loan, Irish law would not require the borrower to be informed of the assignment. However, any such assignment without notice would take effect as an equitable assignment (see question 26).

28 Would a special purpose company for purchasing and securitising peer-to-peer or marketplace loans be subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

Where the special purpose vehicle is established in Ireland for the purposes of the DPA and it controls personal data, it will be subject to the full scope of the DPA, as outlined in question 39. Irish incorporated companies, partnerships or other unincorporated associations formed under the law of Ireland, and persons not falling within the aforementioned but who maintain in Ireland an office, branch or agency, or a regular practice, will be established in Ireland for these purposes. In addition, a controller established neither in Ireland nor in any other EEA member state making use of equipment in Ireland for processing data other than for the purpose of transit through the territory of Ireland, will fall within the scope of the DPA. Broader confidentiality provisions applicable to a special purpose vehicle would typically arise as a matter of contract, and the implied banker's duty of confidentiality is unlikely to apply.

Intellectual property rights

29 Which intellectual property rights are available to protect software, and how do you obtain those rights?

The principal intellectual property right that protects software is copyright (the right to prevent others from, among other things, copying the software). Under the Copyright Act 2000 (as amended), copyright vests in the author on creation.

Organisations should ensure that they have appropriate copyright assignment provisions in place in all agreements they have with employees or contractors to ensure that they obtain these rights.

30 Is patent protection available for software-implemented inventions or business methods?

Yes. Although software is not, of itself, patentable, processes or methods performed by running software are. Importantly, such processes or methods would need to bring about a technical effect or solve a technical problem in order to be patentable (see questions 31 and 32).

31 Who owns new intellectual property developed by an employee during the course of employment?

The default position under Irish law is that the employer owns intellectual property developed by an employee during the course of employment, unless it is otherwise stated in an agreement with the employee. However, this default position does not extend to intellectual property generated by an employee outside their employment (such as out of hours or off premises).

32 Do the same rules apply to new intellectual property developed by contractors or consultants? If not, who owns such intellectual property rights?

No. Contractors and consultants (who are not employees) are generally not subject to the default position described in question 31 and, unless the agreement between the contractor or consultant includes an assignment or other transfer of intellectual property to the customer, the contractor or consultant will own any intellectual property rights generated during the course of the work. Ownership of such intellectual property, if related to the subject matter of employment, may be addressed through contract.

33 Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

Yes.

Joint owners of patents cannot assign or grant a licence of an interest in a patent or a design right without the consent of all other joint owners.

Under the Trade Marks Act 1996 (as amended) a joint owner may sue another joint owner for trademark infringement where the trademark is used in relation to goods or services for which all joint owners have not been connected in the course of trade. On the basis of this legislation, we would expect that the consent of all joint owners is required for a licence of the trademark to be given.

Although the Copyright Act 2000 (as amended) is silent as to the rights of joint copyright owners, the current common law position appears to suggest that the consent of all co-owners is required for the grant of a licence to third parties.

34 How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

Trade secrets are not a stand-alone right and are not protected separately from confidential information under Irish law. Confidential information is protected either through a contractual agreement to keep certain information confidential, or through the common law obligation to keep information confidential (because of the nature of the relationship between the discloser and disclosee, the nature of the communication or the nature of the information itself).

There is no general rule that requires confidential information that is revealed during court proceedings to be kept secret. It is possible to obtain an order from a court limiting access to such confidential information, but such orders are given on a case-by-case basis and are typically considered difficult to obtain.

35 What intellectual property rights are available to protect branding and how do you obtain those rights?

The main intellectual property rights available to protect branding are registered and unregistered trade and service marks.

Registered trade and service mark rights only arise through registration, and can be applied for either in Ireland (in respect of Ireland only) or more broadly in the EU (as a Community trademark) or internationally. Trade and service mark rights give registered owners the right to prevent others using identical or confusingly similar trademarks to their registered mark.

Brand owners can also rely on unregistered trademark rights through the law of passing off. This allows the owner to prevent others from damaging their goodwill with customers by using branding or get-up that is identical or confusingly similar to their own.

For certain branding (particularly complex branding with artistic elements), copyright protection may also be available.

36 How can new businesses ensure they do not infringe existing brands?

New businesses should undertake preliminary searches of the trademark registers in the jurisdictions in which they intend to operate to ascertain whether any of the branding that is registered as a trademark could be identical or confusingly similar to what they intend to use. However, as existing brand owners may have certain unregistered rights, it would also be important for any new business to investigate the branding of their competitors in the market (eg, through searching industry registers, conducting online searches, etc).

37 What remedies are available to individuals or companies whose intellectual property rights have been infringed?

The exact remedies available to individuals or companies depends on the intellectual property right that has been infringed, but generally, for infringements of trademarks, patents, copyright and design rights under Irish law, the owner of the right may seek an injunction against further infringement, damages, an account of any profit made by the infringer from any articles incorporating the infringed intellectual property, and delivery up or destruction of those articles.

38 Are there any legal or regulatory rules or guidelines surrounding the use of open-source software in the financial services industry?

None as a matter of Irish law.

Data protection

39 What are the general legal or regulatory requirements relating to the use or processing of personal data?

Data protection in Ireland is currently governed by the DPA, which reflects the provisions of the EU Data Protection Directive, and which applies to both data controllers and data processors.

Under the DPA, a data controller is required to comply with the data protection principles, including, at a high level, requirements that personal data only be obtained and used for specified, explicit and legitimate purposes, and that the data not be irrelevant or excessive with regard to, or used in a manner incompatible with, those purposes. Processing of the data must also be legitimate within specified conditions set out in the DPA, and the data must be kept secure. In order for processing to be fair within the meaning of the data protection principles, certain information must be provided to the data subject by the data controller.

While not all data controllers are required to register with the Office of the Data Protection Commissioner (ODPC), financial institutions must register with the ODPC, and it is an offence to process personal data in the absence of a registration where the data controller is obliged to register.

Data processors are subject to the same security principles as data controllers, and will be required to register with the ODPC when processing for a controller that is required to register. The DPA mandates that there must be a written agreement in place between a data controller and any data processors appointed by it, and the contract must contain certain provisions relating to limitations on use and security.

The DPA prohibits the transfer of personal data from Ireland to a country outside the EEA unless one of a limited number of exemptions applies. These include data subject consent, contractual necessity in certain circumstances, and use of the European Commission (the Commission) approved standard contractual clauses (although a pending judgment of the Irish High Court may have an effect on the validity of the use of standard contractual clauses). Personal data may also be transferred to countries in respect of which the Commission has determined there is an adequate level of protection for personal data, and to US companies that have committed to comply with the new EU-US Privacy Shield (which is due to be reviewed in September 2017).

Both data controllers and data processors are subject to a statutory duty of care owed to data subjects. The DPA sets out a number of individual data subject rights, including rights to access and rectify personal data.

The General Data Protection Directive (Regulation 2016/679) (GDPR) will have direct effect in Ireland from 25 May 2018, and will replace the DPA. The GDPR is intended to further harmonise the data protection regimes within the EU, and will introduce a number of changes into the data protection regime, including:

- increased scope, to include focus on the residence of the data subject;
- lead regulatory authority for supervision;
- privacy by design and by default;
- additional focus on processors and processing arrangements;
- improved individual rights;
- mandatory breach reporting; and
- significantly increased sanctions for breach.

40 Are there legal requirements or regulatory guidance relating to personal data specifically aimed at fintech companies?

No.

41 What legal requirements or regulatory guidance exists in respect of anonymisation and aggregation of personal data for commercial gain?

Anonymisation and aggregation of data for commercial gain is governed by the DPA.

Aggregation of data for commercial gain will only be permissible where the collection, aggregation and commercial use of the data meets all the data protection principles, is legitimate and meets the fair processing disclosure requirements, as outlined in question 39. There may be somewhat greater flexibility in the use of anonymised data for commercial gain. However, it is generally accepted that the standard required for data to be truly anonymised (and therefore not be personal data) is a high one, and that anonymisation techniques can only provide privacy guarantees if appropriate techniques are used and the application of those techniques is engineered appropriately. An Article 29 Working Party opinion issued in 2014 considers effectiveness and limits of anonymisation techniques against EU data protection laws, and would likely have persuasive authority in Ireland.

In August 2016, the ODPC issued a guidance note on the use of data anonymisation and pseudonymisation, which detailed the effectiveness of anonymisation techniques and recommendations for organisations wishing to employ such techniques.

Cloud computing and the internet of things

42 How common is the use of cloud computing among financial services companies in your jurisdiction?

While the uptake of cloud computing by banks in particular has been slow to date, there have been recent signals of increased interest in cloud computing among regulated financial services firms, and it is expected that more will move to cloud computing in the medium term. The increased interest is partly driven by cost considerations, but also reflects a growing acceptance of cloud services. Data protection remains a concern, however.

Update and trends

Following the United Kingdom's vote to leave the EU ('Brexit') in June 2016, there has been a significant increase in the number of financial institutions, including fintech firms that undertake regulated activities, seeking authorisation in Ireland in order to protect passporting rights. The ESMA opinion setting out general principles aimed at fostering consistency in authorisation, supervision and enforcement related to the relocation of entities, activities and functions from the United Kingdom may be relevant in this context.

Distributed ledger technologies continue to attract attention as potential solutions within fintech, as exemplified by the work that Irish Funds, the industry body for the investment funds industry in Ireland, has undertaken on a blockchain proof of concept in the regulatory reporting space, and the February 2017 ESMA report on distributed ledger technology as applied to the securities markets, arising from its discussion paper on the same topic in 2016.

As a general comment, fintech has increasingly come into consideration from a regulatory perspective, as demonstrated in part by the Commission consultation paper of March 2017, 'FinTech: a more competitive and innovative European financial sector', which sought to gather first-hand information on the impact of new technology in the financial sector, with a view to assessing whether EU regulatory and supervisory rules are adequate and what future actions may be needed. The consultation was structured along four broad policy objectives that reflected the Commission's view of the main opportunities and challenges related to fintech, namely: (i) fostering access to financial services for consumers and businesses, such as through the use of artificial intelligence combined with big data analytics and crowdfunding; (ii) bringing down operational costs and increasing efficiency for the industry, for example by applying RegTech solutions or through the use of cloud computing; (iii) making the single market more competitive by lowering barriers to entry, such as the adoption of a uniform approach across EU member states to licensing requirements or the facilitation or the creation of regulatory sandboxes; and (iv) balancing greater data sharing and transparency with data security and protection needs, such as through the adoption of distributed ledger technology solutions.

Separately, in June 2017, the Central Bank published a discussion paper, 'The CPC and the Digitalisation of Financial Services', with the intent of obtaining input from stakeholders on whether the CPC is fit for purpose in light of the changes in financial services, particularly on whether the CPC addresses emerging risks from digitalisation, as well as to determine whether existing consumer protections need to be enhanced or adapted in the context of digitalisation. The discussion paper notes that although technological developments can change and improve the way consumers conduct their financial affairs, it also stresses the importance of a regulatory framework that seeks to mitigate the risks associated with technological advances and protect consumers, with the Central Bank's primary concern being to craft an approach to innovation that protects consumers' best interests and safeguards the consumer protection framework. The discussion paper is open for comment from all interested stakeholders until 27 October 2017.

43 Are there specific legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

There are no specific legal requirements or regulatory guidance in this respect. Generally, the DPA will apply. For regulated activities, the Central Bank may apply relevant outsourcing requirements, and will have a specific focus on security issues.

44 Are there specific legal requirements or regulatory guidance with respect to the internet of things?

See question 43.

Tax

45 Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

In addition to the attractive low Irish corporation tax rate of 12.5 per cent, there are a number of further Irish tax incentives that encourage innovation and investment in fintech in Ireland, including the following:

- A 25 per cent tax credit for qualifying R&D expenditure carried on within the EEA. This tax credit is in addition to the normal business deduction for such R&D expenditure (at the 12.5 per cent rate), thus incentivising expenditure on R&D at an effective rate of 37.5 per cent. These credits may also be surrendered by the company to key employees actively involved in R&D activities, thereby reducing the effective rate of Irish income tax for such employees.
- A best in class 'knowledge development box', which complies with the OECD's 'modified nexus' standard. This incentive reduces the rate of Irish corporation tax to 6.25 per cent for profits derived from certain IP assets, where qualifying R&D activity is carried on in Ireland. This incentive can also be claimed in conjunction with the R&D tax credit.
- Tax depreciation for certain intangible assets. Such assets can be 'amortised' for Irish corporation tax purposes either in line with their accounting treatment or on a straight basis over 15 years.
- The Employment and Investment Incentive (EII) and Start-up Refunds for Entrepreneurs (SURE) schemes, which allow individual investors in fintech companies to obtain Irish income tax relief (of up to 41 per cent) on investments made, in each tax year, into certified qualifying companies. Relief under the EII is available in respect of funding of up to €15 million and is available until 2020.
- Entrepreneurs relief, which allows for a capital gains tax rate of 10 per cent on the disposal of certain qualifying business assets up to a lifetime amount of €1 million.
- An extensive double tax treaty network, totalling 73 treaties, that prevents the taxation of the same portion of a company's income by multiple jurisdictions.
- Start-up relief, which provides for a reduction in corporation tax liability for the first three years of trading for certain size companies provided the company was incorporated on or after 14 October 2008 and began trading between 1 January 2009 and 31 December 2018. This relief can be claimed on both profits from trading and on capital gains.
- An attractive stamp duty regime that exempts the transfer of intellectual property from stamp duty.

Competition

46 Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction or that may become an issue in future?

There are no competition issues that are specific to fintech companies, nor do we expect that there will be any that will become an issue in the future. Any competition issues that are likely to arise will apply as a result of general competition law rules, and will be fact-specific.

Financial crime

47 Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

Unlike the position under English law, there are no specific provisions of Irish law that impose obligations on companies to have in place procedures to combat bribery. However, a company can be liable under Irish law for bribery or corruption offences that are committed by it or by persons acting on its behalf. In particular, the Prevention of Corruption Acts 1906 to 2010 (PCA) provide for both personal and corporate liability for corruption and bribery offences. Where a corruption offence was committed by a body corporate with the consent, connivance or on foot of neglect on the part of a person who is a director, manager, secretary or other officer of the body corporate, that person shall be guilty of an offence. Either or both the corporate and the individual can be prosecuted. The PCA applies in relation to both domestic corruption and also to corruption occurring outside the state where committed by Irish citizens or by persons or companies resident, registered or established in Ireland, or by the relevant agents of such persons. Protection for whistle-blowers who make reports in good faith of offences is provided for under the PCA and the Protected Disclosures Act 2014, with provision for redress for employees who have been penalised by their employers for whistle-blowing. Accordingly, it would be good practice

for fintech companies to adopt anti-bribery and corruption policies and procedures.

Any fintech company that is a designated body for the purposes of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (as amended) (CJA) will be obliged to comply with anti-money laundering (AML) and counter terrorist financing (CTF) obligations in accordance with the CJA. Certain entities that are designated bodies for the purposes of the CJA, such as leasing companies, or those providing factoring services, do not require authorisations or licences from the Central Bank, but are subject to AML and CTF obligations under the CJA. Fintech providers that are not regulated should therefore check on a case-by-case basis whether they are subject to the CJA.

48 Is there regulatory or industry anti-financial crime guidance for fintech companies?

There is no such guidance that applies specifically to fintech companies.

In line with other regulators, the Central Bank has generally increased its focus on cyberrisks across all regulated financial services. The Central Bank issued best practice guidance on cybersecurity within the investment firm and fund services industry in September 2015, followed by cross-industry guidance on information technology and cybersecurity risks in September 2016. The Central Bank will also expect relevant firms to apply European Banking Authority security guidelines.

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

Engaging in the arrangement of investment deals or making arrangements with a view to transactions in investments in either case for an investment fund that invests mainly in financial instruments, comprises an 'investment management business' under the Financial Instruments and Exchange Act (FIEA), and registration is required.

Engaging in the management of an investment fund that invests mainly in financial instruments also comprises investment management business under the FIEA regardless of whether such management is made as principal or agent, and registration is required.

Giving advice on investments under a contract for a fee comprises 'investment advisory services' under the FIEA, and registration is required.

Engaging in 'banking business' requires a banking licence under the Banking Act. 'Banking business' is defined as the acceptance of deposits or instalment savings, loan of funds (when conducted together with acceptance of deposits or instalment savings) or fund transfer services. Loan of funds, when not conducted with acceptance of deposits or instalment savings, is generally regarded as a 'money-lending business', which requires registration as a moneylender under the Money Lending Business Act.

If a factoring transaction is with recourse, such transaction can be deemed as a lending, and thus engaging in such transaction may require registration as a moneylender under the Money Lending Business Act.

Invoice discounting does not trigger a licensing requirement.

Secondary market loan trading does not trigger a licensing requirement.

Acceptance of deposits is prohibited without a banking licence under the Japanese Banking Act.

Some foreign exchange trading (such as foreign exchange margin trading transactions, non-deliverable forwards, forward rate agreements) comprises 'over-the-counter transactions of derivatives' under the FIEA and registration is required.

A bank may conduct fund transfer services with a banking licence. If not a bank, a registration under the Payment Services Act as a fund transfer service provider is needed before conducting payment services. Also, if the issuance of prepaid payment instruments is conducted, then under the Payment Services Act, registration is required (see question 24). If the payment service is provided as a later payment using a credit card, then registration under the Instalment Sales Act is required.

2 Is consumer lending regulated in your jurisdiction? Describe the general regulatory regime.

A lender conducting a consumer lending business (excluding the business of accepting deposits or instalment savings, which requires a banking licence under the Banking Act), has to register as a moneylender under the Money Lending Business Act. There is a limit on the total lending to any individual and a cap on the interest rate chargeable. The total lending limit is one-third of the borrower's annual income and the cap is 15 to 20 per cent per annum depending on the amount of the loan. The moneylender is required to appoint a chief of moneylending operations to each business office.

3 Are there restrictions on trading loans in the secondary market in your jurisdiction?

If a moneylender transfers loan claims, the transferee will be subject to the same restrictions under the Money Lending Business Act that apply to the original moneylender and the transferor must notify the operating transferee that those restrictions will also apply to the transferee. There is no such restriction for a bank under the Banking Act.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would generally fall within the scope of any such regime.

The FIEA requires those who engage in either the acceptance of applications for shares for subscription in collective investment schemes or investment management of assets collected through such subscription or contribution, in principle, to register as a financial instruments business operator. If a crowdfunding company raises funds for lending money to a company seeking funds through a form of silent partnership, an invitation to invest in the silent partnership would, in principle, be a collective investment scheme and so such crowdfunding company would need to be registered under the FIEA. If an investor makes a direct investment in a silent partnership established with respect to a company seeking funds and receives a share in the silent partnership, dealing with the issuance of such share could also be characterised as a collective investment scheme, subject to certain exceptions introduced in 2015. Under such exceptions, a company that deals with a small fundraising on the internet may register as Type I Small Amount Electronic Public Offering Business or Type II Small Amount Electronic Public Offering Business, and, if registered, some requirements that apply to a financial instruments business operator will be mitigated.

5 Are managers of alternative investment funds regulated?

Managing funds as investments in assets such as real estate (excluding rights in relation to negotiable securities and derivative transactions) are not subject to the FIEA. As such, those activities are not regarded as being a financial instruments business.

6 May regulated activities be passported into your jurisdiction?

Not applicable.

7 May fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

It will depend on the nature of the services the fintech company will provide. Under the Banking Act, a foreign bank that wishes to engage in banking in Japan must obtain a licence by specifying a single branch office that will serve as its principal base for banking in Japan. Overseas moneylenders cannot be registered under the Money Lending Business Act without having a place of business in Japan. Under the Payment Services Act, it is possible to register foreign funds transfer service providers, issuers of prepaid payment instruments and virtual currency exchange operators, if such foreign provider, issuer or exchange operator has a business office in Japan. A foreign company that wishes to establish what is defined under the FIEA as a 'financial instruments business', such as a securities brokerage or investment management

business, is required to have a business office in Japan for registration under the act, provided that, for registration of an investment advisory business, a business office in Japan is not required.

8 Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

A person who intends to engage in the business of lending money or acting as an intermediary for the lending or borrowing of money must be registered under the Money Lending Business Act. To avoid an investor being required to be registered as a moneylender under the act, marketplace lending in Japan generally takes the form of a *tokumei kumiai* (TK) partnership, under which a registered operator collects funds from TK partnership investors, then advances the funds to enterprises as loans. The operator then receives principal and interest payments from the enterprises and distributes the funds as dividends and return of capital to investors. In this structure, the operator is required to be registered both as a moneylender under the Money Lending Business Act (in order to provide the loans), and as a financial services provider under the FIEA in order to solicit TK partnership investors.

Usury law restricts the permitted interest rate to a maximum of between 15 per cent and 20 per cent depending on the loan amount.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

Crowdfunding in Japan is categorised as donation-based crowdfunding, reward-based crowdfunding and investment-based crowdfunding. Investment-based crowdfunding is further categorised as equity-based crowdfunding, fund-based crowdfunding and lending-based crowdfunding. In terms of regulation specific to lending-based crowdfunding, see question 8.

Equity-based crowdfunding and fund-based crowdfunding are regulated under the FIEA, which defines certain internet-based solicitations, etc as 'electronic solicitation handling services', different rules apply to electronic solicitation handling services for certain non-listed securities, etc from those that apply to ordinary solicitation handling services for securities. Special rules apply in particular when these electronic solicitation handling services are conducted entirely via a website, right through to application for the purchase of securities, referred to as 'electronic purchase-type solicitation handling services'. In order to encourage new market entrants, requirements for the registration of electronic solicitation handling services handling the issuance of securities with less than ¥100 million in the issuance volume and with ¥500,000 or less in the investment amount per investor are relaxed.

Reward-based crowdfunding is regulated by the Specified Commercial Transactions Act, which, in particular, restricts advertising and gives consumers a cancellation right.

10 Describe any specific regulation of invoice trading in your jurisdiction.

If an entity engages in invoice trading in Japan, there are some legal and regulatory issues to note. If there is an agreement between a supplier and a buyer to prohibit the transfer of invoices, there is a risk that a funder cannot acquire invoices pursuant to the Civil Code. Further, there is also a risk that a supplier will sell its invoices to another party outside the trading platform in addition to a funder via the platform. To ensure that the funder obtains the invoices, the debt transfer must be perfected by the buyer being notified of or approving the transfer pursuant to the Civil Code, or it must be registered in the debt transfer registration system. The invoice trading platform must not be detrimental to a supplier that is a subcontractor which is protected by the Act against Delay in Payment of Subcontract Proceeds, Etc. to Subcontractors.

There is some invoice trading business recourse for a supplier if there is no repayment from a buyer. If this is the case, the transaction may be characterised as secured lending and thus such business would be required to obtain a money-lending business licence under the Money Lending Business Act.

11 Are payment services a regulated activity in your jurisdiction?

Payment services may fall within the scope of exchange transactions and therefore fall within the definition of banking business and require a banking licence under the Banking Act. Obtaining this licence is quite onerous and it is unlikely that a fintech company would be eligible for one.

Other exchange transactions are not defined in the Banking Act, but according to a precedent set by a Supreme Court decision, 'conducting an exchange transaction' means accepting a request from a customer to transfer funds using the mechanism of transferring funds between parties at a distance without actually transporting cash, or accepting and actually carrying out the request. If payment services, something that many fintech businesses are involved in, fall into this definition, the operator could be required to obtain a banking licence or register under the Payment Services Act.

While the Banking Act regulates exchange transactions, the Payment Services Act allows non-banks registered thereunder to engage in exchange transactions in the course of their business even if not permitted under the Banking Act, provided that the amount of each exchange transaction is not greater than ¥1 million.

There is an argument over whether payment services, whereby funds will be deducted from each payer's bank account and transferred to the payment services provider's bank account and then collectively transferred to the payee's bank account, fall within the scope of 'exchange transactions' as regulated by the Banking Act and the Payment Services Act. While there is no clear answer to this issue, many such payment services businesses are currently conducted without licences.

12 Do fintech companies that wish to sell or market insurance products in your jurisdiction need to be regulated?

Yes. In Japan, when a fintech company carries out any of the following, it must register as an insurance agent as such actions correspond to 'insurance solicitation' under the Insurance Business Act: (i) soliciting the conclusion of insurance contracts; (ii) providing explanations of insurance products for the purpose of soliciting the conclusion of insurance contracts; (iii) accepting applications for insurance contracts; or (iv) acting as an intermediate or agent for the conclusion of other insurance contracts.

Providing information on prospective customers to insurance companies and insurance agents without recommending or explaining insurance products, and the mere reprinting of information from insurance companies and insurance agents where the service's main purpose is to provide product information, such as comparison sites, do not in themselves constitute 'insurance solicitation'; however, these acts are 'solicitation related acts', and insurance companies and insurance agents who entrust such acts to other persons have an obligation to manage and supervise those persons to ensure that they do not violate insurance offering regulations.

13 Are there any legal or regulatory rules in your jurisdiction regarding the provision of credit references or credit information services?

In general, while credit references of individuals are subject to the Act on Protection of Personal Information, credit references of corporates are subject to confidentiality obligations under financial services regulations and confidentiality agreements between financial institutions and corporates.

In Japan, personal credit information agencies collect information on the ability of persons to make credit repayments and provide such information to financial institutions which are members of such agencies. Financial institutions using credit information services of such agencies may not use information on the ability of individuals to meet repayments ('personal credit information', which is part of the financial information provided by personal credit information agencies, for purposes other than the investigation of the ability of fund users to make repayments.

In addition, under Financial Services Agency (FSA) guidelines when financial institutions provide personal information to personal credit information agencies, they must state to their customers that they provide personal information to personal credit information agencies and obtain the consent from the customers.

The FSA's guidelines that regulate personal credit information agencies require that they ensure that their member financial institutions appropriately obtain and record personal credit information via such agencies, and that it is not used for purposes other than the investigation of the subject's repayment ability. To that end, personal credit

information agencies are required to take measures such as screening a financial institution's qualifications at the time it applies for membership, monitoring of members, and the imposition of sanctions for the improper use of personal credit information.

14 Are there any legal or regulatory rules in your jurisdiction that oblige financial institutions to make customer or product data available to third parties?

Yes. In order to encourage financial institutions to make customer data available to third parties, recent amendments to the Banking Act will come into force no later than 2 June 2018. Under the amendments, the FSA will develop a registration system for companies providing electronic instruction of remittance services, which is expected to be simpler than the existing system applicable to funds remittance business providers, to promote innovation and ensure user protection. In addition, the FSA is attempting to improve the current situation where it is extremely difficult for fintech companies using open API to share data or revenue with banks due to restrictions on bank agency businesses. The FSA's main aim is to enhance the effectiveness of open API by encouraging banks to develop their API systems and prohibiting discriminatory treatment among service providers. Discussions on the subject within the FSA are focused on the development of an open API-friendly environment in which, although fintech companies will still be subject to a registration system, will require the reorganisation of existing regulations and the development of systems by participating financial institutions.

15 Does the regulator in your jurisdiction make any specific provision for fintech services and companies? If so, what benefits do those provisions offer?

In December 2015, the FSA set up a 'fintech support desk' to provide a unified response to handle enquiries from the private sector and to exchange information regarding the fintech industry. This desk fields enquiries from a wide range of businesses operating or considering various fintech-related innovations, and specific business-related matters regarding the finance aspects of these plans. It also actively seeks public opinion, requests and proposals, and actively shares general information and opinions in relation to fintech innovation.

On 9 June 2017, the Cabinet approved the 'Growth Strategy 2017', which contains a regulatory sandbox scheme aimed to spur innovations such as AI, big data, distributed ledger technology, drones and self-driving vehicles.

16 Does the regulator in your jurisdiction have formal relationships or arrangements with foreign regulators in relation to fintech activities?

On 9 March 2017, the FSA announced that it had exchanged letters with the UK's FCA on a cooperation framework to support fintech companies. This arrangement provides a regulatory referral system for innovator businesses from Japan and the UK seeking to enter the other's market. The arrangement also encourages the regulators to share information about financial services innovation in their respective markets, reduce barriers to entry in a new jurisdiction and further encourage innovation in both countries.

On 13 March 2017, the FSA announced that it had established a framework with the Monetary Authority of Singapore (MAS) to enhance fintech links between Japan and Singapore. The framework enables the FSA and the MAS to refer fintech companies in their country to the other's markets, and outlines how the referred companies can initiate discussions with the regulatory bodies in the respective jurisdictions and receive advice on their regulatory frameworks. The framework also sets out how the regulators plan to share and use information on financial services innovation in their respective markets.

17 Are there any local marketing rules applicable with respect to marketing materials for financial services in your jurisdiction?

There are a number of important rules in relation to marketing materials for financial services. For example, the following financial services require licences under the respective laws listed, and these laws regulate the content and manner of advertisements conducted by firms licensed for those services:

- banking services – the Banking Act;
- services related to securities or derivatives (including securities offering (such as crowdfunding), investment management or advisory services) – the FIEA;
- lending-related services (to the extent not banking businesses) – the Money Lending Business Act;
- funds transfer services – if allowed as an exemption from regulation under the Banking Act by operating the businesses under a fund transfer service provider licence to the extent not exceeding limit of the amount for transfer – the Payment Services Act;
- credit card issuing services – the Instalment Sales Act;
- prepaid card issuing services – the Payment Services Act; and
- insurance services – the Insurance Business Act.

Although details of the regulations vary among the above laws, generally speaking they require that advertisements include certain information, such as names, licence numbers and contact information of the licensed firms, as well as certain other information that is specifically set out in the respective laws as being important to the customer in its decision-making, and also stipulate other matters regarding the form of any advertisement, such as minimum font size, etc.

In addition, the Specified Commercial Transaction Act sets forth certain requirements regarding advertisements for services provided by mail or online-order systems (whether a cooling-off period applies, etc). It is currently proposed by the government that the Consumer Protection Act be amended to regulate 'annoying' advertisements via email or internet (eg, pop-up messages warning of virus infection that cannot be closed until the user subscribes to the anti-virus software).

18 Are there any foreign exchange or currency control restrictions in your jurisdiction?

The Foreign Exchange and Foreign Trade Act requires (in many cases) post-transaction reporting or (in limited cases) pre-transaction notification to the relevant authorities (through the Bank of Japan) of inward or outward investments and post-transaction reporting by residents of Japan (including entities) to the Ministry of Finance (through the Bank of Japan) of a payment to or a receipt of payment from a non-resident of Japan, or a cross-border payment or receipt of such payment, exceeding ¥30 million. It also imposes economic sanctions with regard to sanctioned persons or activities (mainly by following sanctions imposed by the United Nations Security Council) by requiring permission for (effectively prohibiting) cross-border investments, payments or receipts of payments, importation or exportation of goods, provision of services, etc.

19 If a potential investor or client makes an unsolicited approach either from inside the provider's jurisdiction or from another jurisdiction, is the provider carrying out a regulated activity requiring a licence in your jurisdiction?

Yes.

20 If the investor or client is outside the provider's jurisdiction and the activities take place outside the jurisdiction, is the provider carrying out an activity that requires licensing in its jurisdiction?

As long as the banking corporation or securities firm that provides the service is a company established under the laws of Japan (or the Japanese branch of a foreign banking corporation), then yes. For example, if a Japanese company provides investment advice to a person outside Japan, the company is required to be registered under the FIEA.

As long as the banking corporation or securities firm that provides the service is a company established under the laws of a foreign jurisdiction (and without an office or branch in Japan), it is generally understood it will not require a licence in Japan.

21 Are there continuing obligations that fintech companies must comply with when carrying out cross-border activities?

In addition to licensing requirements, fintech companies must comply with various obligations applicable to the specific business. For example, banks, securities firms and certain other businesses are required to verify the identity of customers when facilitating cross-border transactions.

22 What licensing exemptions apply where the services are provided to an account holder based outside the jurisdiction?

Unless both the investor or client and the service provider are outside Japan, and unless the services provided take place outside Japan (see question 20), there is no licensing exemption applicable to services provided to an account holder based outside the jurisdiction.

Distributed ledger technology

23 Are there any legal or regulatory rules or guidelines in relation to the use of distributed ledger (including blockchain) technology in your jurisdiction?

Other than rules applicable to virtual currencies (see question 24), there are no legal or regulatory rules or guidelines specifically applicable to the use of distributed ledger (including blockchain) technology in Japan, though it is necessary to consider legal issues based on existing laws and regulations. Some self-regulating organisations are considering what kind of guidelines for use of distributed ledger technology they should have; however, at present, there are no guidelines that may be relied upon by operators in the field.

Digital currencies

24 Are there any legal or regulatory rules or guidelines in relation to the use of digital currencies or digital wallets, including e-money, in your jurisdiction?

The Payment Services Act is the principal law regulating the use of digital currencies or digital wallets.

Digital currencies or digital wallets (IC-type, server-type, or otherwise) may be categorised as 'prepaid payment instruments' under the Act. An issuer of prepaid payment instruments 'for own business' (ie, prepaid payment instruments that can only be used for the purpose of paying consideration for certain types of transactions with the issuer of the instruments, or those who have a close relationship with the issuer) is required to file a written notification with the local finance bureau when the total amount of the unused balances (the 'unused base date balance') arising from all such instruments exceeds ¥10 million on 31 March and 30 September (and, in certain exceptional cases, 30 June and 31 December) of any year.

Only a corporation that is registered with the relevant regulatory authority may issue prepaid payment instruments that are not 'for own business'.

An issuer of prepaid payment instruments (whether instruments 'for own business' or not) that does not comply with these requirements will be liable to criminal punishment. An issuer of prepaid payment instruments that has filed the written notification or is registered is also subject to other requirements (eg, when the unused base date balance exceeds ¥10 million, the issuer must make a security deposit in an amount equivalent to at least half the amount of the unused base date balance).

Virtual currencies such as bitcoin are not be categorised as 'prepaid payment instruments'. Businesses engaged in the sale and purchase of, or certain other transactions in, virtual currencies may be categorised as 'virtual currency exchange operators'. Those permitted to engage in such businesses are limited to (i) stock companies under Japan's Companies Act, and (ii) foreign companies that have a business office in Japan which has an individual domiciled in Japan as its representative in Japan, and which carry out that business in the course of trade in a foreign jurisdiction under a registration which is the equivalent to the registration under the Payment Services Act pursuant to the provisions of laws and regulations of that foreign jurisdiction equivalent to that Act. No person may engage in a 'virtual currency exchange operator' business unless registered with the relevant regulatory authority. A person who operates a business as a registered virtual currency exchange operator who does not comply with these requirements will be liable to criminal punishment.

In addition to the requirements above, both issuers of prepaid payment instruments who filed the written notification or are registered, and registered virtual currency exchange operators, must comply with other applicable laws, such as requirements for confirming the personal identity of customers, for compiling and retaining personal identification records and transaction records, and for notifying the authorities of suspicious transactions under the Act for Prevention of Transfer of Criminal Proceeds (see question 47).

Securitisation

25 What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

For loan agreements, pursuant to the Interest Rate Restriction Act, interest plus lending-related fees must generally not exceed 15 per cent per annum; an agreement by a borrower to pay interest or fees (or both) would be void to the extent exceeding the limit.

Regarding security agreements, a principle under the Civil Code is that a security interest grantee must be the holder of the secured obligation. This means that it would be difficult to adopt a structure in which a single security agreement is entered into by and between a security grantor and a single security grantee (eg, a security agent) to secure loans provided and held by multiple investors. Solutions for this issue can include: a lending platform provider receiving funds as a borrower from investors as lenders and then turning around and providing loans to target businesses in its own name; or multiple investors becoming direct lenders to target businesses, a 'parallel debt' corresponding to the loans being created and granted to the platform provider, with a security interest being granted to the platform provider to secure the parallel debt. The latter approach is, however, not well tested in peer-to-peer or marketplace lending practice so far.

Under Japanese law a blanket security arrangement covering all types of assets to be provided as collateral is not available; a separate security agreement is needed to be executed to create a security interest per asset. Typically, these might include a real estate mortgage, share pledge, pledge or security assignment of patents, trademarks, security assignment of trade receivables, security assignment of inventories, etc.

Methods of perfection of security interests differ depending on the asset. The following are some examples:

- real estate mortgage – registration;
- share pledge – receipt and holding of share certificates;
- pledge or security assignments of patents or trademarks – registration;
- security assignment of trade receivables – notice to or acknowledgement by debtors by a letter with a fixed date stamp on it, or registration; and
- security assignment of inventories – notice to or acknowledgment by debtors by a letter with an affixed date stamp on it, or registration.

There are no particular general requirements (such as use of 'deeds' or the like) under Japanese law for the execution of loan agreements and security agreements; how a Japanese party executes such an agreement would need to be examined in each case. Given these complexities, experienced legal counsel should be sought before starting up a peer-to-peer lending platform in Japan.

26 What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected?

Perfection of assignment of a loan originated on a peer-to-peer lending platform would most likely be made by notice to or acknowledgement by the borrower by a letter with an affixed date stamp on it.

If the assignment is not perfected, the borrower can be discharged from the loan by repayment to the loan assignor, and a third party that obtains an interest in the loan after the assignment (eg, a tax authority seizing the loan to collect tax from the loan assigner or a bankruptcy receiver of the loan assignee) can assert a position prioritised over the loan assignee.

27 Is it possible to transfer loans originated on a peer-to-peer or marketplace lending platform to the purchaser without informing the borrower? Does the assignor require consent of the borrower or are the loans assignable in the absence of a prohibition?

Loans originated on a peer-to-peer lending platform are transferable as long as there is no contractual restriction of transfer between the originator and the borrower or if such contractual restriction exists, upon obtaining consent from the borrower. See question 26 regarding notice requirements for perfection of a transfer.

28 Would a special purpose company for purchasing and securitising peer-to-peer or marketplace loans be subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

A special purpose company (SPC) is subject to the Personal Information Protection Act regarding personal information of individuals in relation to borrowing. This is Japan's main data protection law. The SPC may also be subject to a confidentiality obligation to the borrowers.

Intellectual property rights

29 Which intellectual property rights are available to protect software, and how do you obtain those rights?

Both copyright and patent protections are available for software. Software may be registered as a patent under the Patent Act if it can be deemed as a 'computer program, etc', which means a computer program or any other information that is to be processed by an electronic computer equivalent to a computer program. Registration as a patent (a prerequisite to receiving patent rights) takes time because the Patent Office conducts a detailed examination of the application. However, copyright protection is available without registration in the case of software that includes thoughts or sentiments expressed creatively; these rights can also be registered through the Software Information Center.

30 Is patent protection available for software-implemented inventions or business methods?

Business methods may be registered as patents in Japan if the method can be demonstrated to be a new 'highly advanced creation of technical ideas utilising the laws of nature'. However, the requirements for business method patent registration are stringent, and, as a practical matter, even once registered, the methods can often be reasonably easily imitated without infringement by sidestepping the patent. For these reasons, business method patent applications are rare. In practice, business methods are commonly protected through trademarks used in association with the methods and through a web of licensing and other agreements.

31 Who owns new intellectual property developed by an employee during the course of employment?

The Patent Act allows an employer to acquire the right to obtain a patent for an employee's invention created in the course of employment from the time that the invention is created, either by prior agreement with the employee, or by prior inclusion of the right in its employment regulations, etc. Any assignment by the employee of its right to obtain such a patent to a third party in breach of the employer's right is invalid.

The Copyright Act stipulates that where a computer program is created by an employee in relation to the business of the employer (if a legal entity), on the initiative of the employer, then the authorship of the program is attributed to the legal entity unless otherwise stipulated by contract, employment regulations or the like at the time of the creation of the work.

32 Do the same rules apply to new intellectual property developed by contractors or consultants? If not, who owns such intellectual property rights?

Contractors and consultants can acquire the right to obtain a patent or copyright for inventions developed by them unless the engagement contract provides for the acquisition of such intellectual property or licences by the client; the contract can be agreed either before or after the invention is created or the computer software is made.

33 Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

When a patent is jointly held, each of the joint owners may independently use the patent and seek damages or injunctions against infringing third parties. However, the sale or licensing of the patent requires the consent of the other joint patent holders.

When a copyright is jointly held, each of the joint owners may seek damages or injunctions from infringing third parties. The consent of other joint copyright holders is required for the sale, licensing and use by third parties of the copyrighted work.

34 How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

Trade secrets are protected under the Unfair Competition Prevention Act. A trade secret under the act is a production method, sales method, or any other technical or operational information useful for business activities that is controlled as a secret and is not publicly known. Separately from the legislation itself, administrative principles for interpretation of the Unfair Competition Prevention Act provide a flexible interpretation of what constitutes 'control' which will most likely impact future judicial rulings on the point. For example, the principles can be read as stipulating that strict restriction of access to information is not a prerequisite of 'control'.

During court proceedings for the infringement of business interests by unfair competition, trade secrets may be protected by protective order based on the Unfair Competition Prevention Act or an order with respect to Restriction on Inspection, etc for Secrecy Protection in Protection based on the Civil Procedure Act.

35 What intellectual property rights are available to protect branding and how do you obtain those rights?

Brands are usually protected by trademark. It is necessary to register a trademark with the Patent Office in order to enjoy protection as a trademark, although in some cases protection may also be available under the Unfair Competition Act for brands that are not registered as a trademark. Causing confusion between one's own products or services and those of another party (known as the 'act of causing confusion') or wrongly using a famous indication of another person as one's own, by displaying the name of a well-known product, etc of another party on similar or identical products, etc is prohibited. However, these cases are less successful than trademark cases because it must be proven that the product or indication is well known or famous.

36 How can new businesses ensure they do not infringe existing brands?

It is relatively easy to look up whether a brand is a registered trademark or a registered trade name. Registered trademarks can be looked up at www3.j-platpat.inpit.go.jp/cgi-bin/TF/TF_AREA_E.cgi?1470219956846. (Registered trade names can also be searched online.)

Some attorneys and most patent attorneys are accustomed to doing these searches.

37 What remedies are available to individuals or companies whose intellectual property rights have been infringed?

A patent holder or the exclusive licensee or copyright holder can claim for actual damages (but not punitive damages) from the infringer for losses incurred as a consequence of the infringement. The court can also be requested to issue an injunction order or take similar action.

In the case of injunctions, the requirements are the presence of protected rights and circumstances whereby an injunction is necessary to avoid irreparable damage. Japanese courts will require the claimant to post a security deposit before injunctive relief is ordered.

Although injunctive relief can expedite dispute resolution, Japanese courts, in principle, will not issue ex parte orders and will have one or more hearings to hear the arguments from both parties, which means both parties will be called to the hearings.

Patent invalidity is one of the most common defences; when the defendant raises the defence of patent invalidity, in approximately 60 per cent of cases the court has made a judgment on this point and approximately 70 per cent of past judgments have been against the patent holder.

The vast majority of intellectual property rights infringement remedies are civil, but in some cases criminal penalties can apply, especially in copyright and trademark cases.

38 Are there any legal or regulatory rules or guidelines surrounding the use of open-source software in the financial services industry?

There are no specific legal or regulatory rules or guidelines surrounding the use of open-source software.

Update and trends

As described in question 14, under the revised Banking Act, banks and other financial institutions are encouraged to introduce open APIs in order to facilitate connections to bank account information. While the revisions to the Banking Act will come fully into force no later than 1 June 2018, banks and other financial institutions have been asked to decide and announce their own policies on the introduction of open APIs before 2 March 2018.

Data protection

39 What are the general legal or regulatory requirements relating to the use or processing of personal data?

The Personal Information Protection Act applies to the handling and processing of data including personal information. The My Number Act sets out rules regarding the handling of numbers under the My Number system, which is used for tax and administrative procedures relating to employment. The Personal Information Protection Act and the My Number Act stipulate different requirements for entities in particular industries. Detailed guidelines for some industries, such as telecommunications, finance and healthcare, have been issued, and the guidelines for the fintech industry are described in question 40.

40 Are there legal requirements or regulatory guidance relating to personal data specifically aimed at fintech companies?

The Personal Information Protection Committee and the FSA have set out guidelines in relation to the Personal Information Protection Act, the 'Guidelines for Personal Information Protection in the Financial Field', which set out guidelines for the treatment of sensitive information, restrictions based on the purpose of use, supervision of trustees, etc and 'Practical Guidelines for the Security Policies Regarding the Personal Information Protection in the Financial Field'. The entities regulated under the Instalment Sales Act must comply with the 'Guidelines Regarding Personal Information Protection Regarding Credit Among Economic Industry'. The 'Guidelines for the Proper Handling of Specific Personal Information in the Finance Industry' apply to the My Number Act in the financial field.

41 What legal requirements or regulatory guidance exists in respect of anonymisation and aggregation of personal data for commercial gain?

Amendments to the Personal Information Protection Act added the concept of 'anonymised personal information', which is information regarding individuals, obtained by anonymising personal information or otherwise processing personal information so that it is no longer able to identify the particular individual. When processing anonymised personal information, it is necessary to release to the public the items regarding such anonymised personal information that have been created. When providing anonymised personal information to a third party, it is necessary to specify publicly the kinds of information that are provided to the third party, and inform the third party that the personal information is anonymised. Creators of anonymised personal information are prohibited from disclosing deleted items, methods of processing, or referencing the anonymised information against other information for the purpose of identifying the person related to the personal information used in the creation of the anonymised information, and the recipient is prohibited from acquiring such deleted items, methods of processing and references.

A recent amendment to the Banking Act stipulates that entities (such as fintech companies) that acquire bank account information in digital form from banks by electronic means are required to register with the FSA. In addition, under the amendment and in order to acquire such information from banks, such entities must enter into contracts with the supplying banks that contain clauses stipulated in the amendments before the grace period. Most of such entities have yet to enter into contracts with banks containing these provisions, and many fintech companies may find it difficult to obtain the banks' approval to do so.

Cloud computing and the internet of things

42 How common is the use of cloud computing among financial services companies in your jurisdiction?

The use of cloud computing is relatively widespread among major financial institutions and internet banks. In contrast, many small and medium-sized financial institutions are struggling to make use of cloud computing due to a lack of IT manpower and concerns over cybersecurity.

However, the Centre for Financial Industry Information Systems' 'FISC Security Guidelines on Computer Systems for Banking and Related Financial Institutions' (FISC Guidelines) were revised in March 2013. This revision was intended to spread the use of cloud computing, and the FISC has correspondingly promoted the use of cloud services, so it is likely that more financial institutions will come to use cloud computing more extensively.

43 Are there specific legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

The Banking Act and other legislation stipulates that financial institutions are obliged to carry out safety measures for their systems, etc. Based on such provisions, subordinate rules, guidelines, and inspection manuals describe the actions to be taken to comply with these obligations.

If inspectors find problems with an organisation's risk management systems in relation to information security they can require that the business be inspected further for conformity to the 'FISC Security Guidelines on Computer Systems for Banking and Related Financial Institutions'. These financial institutions therefore see these guidelines as a kind of regulation. The Report of the Council of Experts on the Usage of Cloud Computing by Financial Institutions serves as a useful reference as it formed the basis of the revision of the abovementioned guidelines.

44 Are there specific legal requirements or regulatory guidance with respect to the internet of things?

There is no specific legal requirement and regulatory guidance with respect to the internet of things.

Tax

45 Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

There are no tax incentives introduced especially for fintech companies. However, as of June 2016, there are some more general tax incentives available to fintech companies and investors as follows:

- Individual investors who invest in qualified small to medium-sized companies (start-ups) can deduct one of the following under certain conditions:
  - the amount invested in the start-up minus ¥2,000 from taxable income (maximum deduction is 40 per cent of total taxable income or ¥10 million, whichever is lower); or
  - the whole amount invested in the start-up from capital gains tax (there is no maximum amount).
- Individuals investing in an unlisted start-up who have a capital loss after the sale shares in the start-up can offset this against other capital gains and the loss can be carried forward for up to three years.
- Companies may elect to claim accelerated depreciation of the acquisition cost or a tax deduction if they purchase certain equipment under certain conditions.
- Eight per cent to 10 per cent (12 per cent for small to medium-sized corporations) of qualified research and development (R&D) expenses are deductible from annual corporate tax. Additional tax incentives are available for special, qualified R&D expenses, etc.

Competition

46 Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction or that may become an issue in future?

No.

Financial crime

47 Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

Two recent amendments have been made to the Act on Prevention of Transfer of Criminal Proceeds. The first, which came into force in October 2016, includes treating transactions between politically exposed persons as high-risk transactions. The second amendment, which came into force in April 2017, requires virtual currency exchange operators to confirm the personal identity of customers, to compile and retain personal identification records and transaction records, and to notify the authorities of suspicious transactions.

48 Is there regulatory or industry anti-financial crime guidance for fintech companies?

No.

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

No entity may engage in a 'financial investment business' (a defined term under the Financial Investment Services and Capital Markets Act (FSCMA), the primary capital markets law in Korea), which encompasses such activities as underwriting and the brokerage and dealing of securities or derivatives), without obtaining the requisite business licence from or being registered with, and subjecting itself to ongoing supervision by, the Financial Services Commission of Korea (FSC) under article 11 of the FSCMA. Generally, an investment dealing or brokerage licence is required in order to market, offer, sell or broker a financial investment product to Korean residents. Under the FSCMA, a product for which an investor is at risk of losing any portion of the principal amount invested therein would be treated as a financial investment product, which consists of securities and derivatives.

Without obtaining a banking licence pursuant to the Bank Act, a person cannot engage in banking business, including, among others, deposit taking, lending, guarantees and acquisition of notes, providing mutual instalment arrangements, and packaging or reselling commercial or trade notes under article 8 of the Bank Act.

To conduct foreign exchange business an entity must register with the Ministry of Strategy and Finance (MOSF) pursuant to the Foreign Exchange Transaction Law. Also, an approval from the FSC is required to engage in credit card business, which is regulated by the Credit Specialised Financial Business Act.

Various types of electronic financial business activities would trigger licensing or registration requirements under the Electronic Financial Transactions Act (EFTA), including electronic money, payment services, prepaid electronic payment means and debit cards, among others.

2 Is consumer lending regulated in your jurisdiction? Describe the general regulatory regime.

The Money Lending Business Registration and Consumer Protection Act (the Lending Business Act) applies to commercial lending transactions with borrowers domiciled in Korea. In general, the Korean loan market could be largely divided into lending by credit financial companies and lending by moneylenders. Credit financial companies, such as a bank or a credit specialty business with the requisite licence or registration, are not subject to separate registration under the Lending Business Act for lending or loan brokerage business. However, persons without a banking licence or other registration that engage in (i) the lending business, (ii) the business of acquiring claims arising from loan agreements and collecting them, or (iii) the loan brokerage business in Korea must register as a money-lending business or loan-brokerage business pursuant to the Lending Business Act.

For loans provided by credit financial companies and moneylenders, the maximum interest rate is limited by the Lending Business Act, and for all other entities, the maximum interest rate is regulated pursuant to the Regulation of Interest Act. The maximum interest rate is frequently revised depending on various factors, such as the domestic economic situation.

Interest rates that exceed the above maximum interest rates are nullified pursuant to the applicable laws.

3 Are there restrictions on trading loans in the secondary market in your jurisdiction?

Under the Lending Business Act, neither moneylenders nor credit financial institutions may transfer any loan claim to any person other than a credit financial institution, an entity registered for loan collection business, the Korea Housing Finance Corporation, or National Agricultural Cooperative Federation Asset Management Company. Any person who violates this provision shall be subject to criminal punishment (imprisonment of up to three years or a fine of up to 30 million won).

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would generally fall within the scope of any such regime.

The FSCMA defines the 'collective investment' scheme as an arrangement where a 'collective investment vehicle' pools funds from more than two investors, manages such funds at its discretion and distributes the earnings from such management to the investors.

Fintech companies are regulated completely separately from collective investment business entities under the FSCMA. Peer-to-peer lenders are regulated as online loan information brokers (P2P platform businesses) and online loan information related credit service providers (credit service businesses) under the Act on Credit Business, and crowdfunding platforms are regulated as online small-sized investment brokers under the FSCMA.

There is a proposed amendment to the Enforcement Decree of the FSCMA with respect to investment advisory business and discretionary investment business in order to regulate robo-advisers that provide online asset management services using algorithms and big data analyses based on recent information that the client provides (investment tendency, asset size, investment experience, etc).

5 Are managers of alternative investment funds regulated?

Yes. Public offering fund collective investment business entities need to obtain approval from the FSC as a collective investment business after satisfying the approval requirements including minimum capital requirements, other personnel and facilities requirements, and major shareholder requirements. Hedge fund investment business entities that manage investment-type private equity funds (hedge funds) must be registered as a collective hedge fund investment business with the FSC, but the requirements are less strict. Also, there are different restrictions regarding investors and fund management depending on whether it is a public offering fund or a hedge fund.

6 May regulated activities be passported into your jurisdiction?

Regulated activities cannot be passported into Korea.

7 May fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

In general, licences and registration for financial services are available only to Korean companies or branches, with limited exceptions. For example, a local presence is not required for a foreign investment advisory business entity or a foreign discretionary investment business entity, if such business entity (i) runs business directly for Korean residents in a

foreign country; or (ii) runs investment advisory business or discretionary investment business via any means of telecommunication.

8 Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

Owing to the recent sharp increase in peer-to-peer borrowing in Korea, the Korean financial regulatory authorities published the P2P Loan Guidelines in February 2017, and it became effective as of 29 May 2017.

For ordinary individual investors who are peer-to-peer lenders, the P2P Loan Guidelines set a monetary limit of between 5 million and 40 million won, which varies depending on the income of the investor. But the P2P Loan Guidelines do not set a monetary limit for peer-to-peer lenders who are either corporate investors or individual expert investors. There is no loan amount limit for borrowers in peer-to-peer lending under the P2P Loan Guidelines. The P2P Loan Guidelines require segregation of the investment funds of investors from the proprietary assets of the peer-to-peer business.

The P2P Loan Guidelines are administrative guidance of the Financial Supervisory Services (FSS) and are not legally binding. However, the financial regulators plan to monitor the compliance by the financial companies that are partners of the peer-to-peer companies with the P2P Loan Guidelines and take corrective measures if necessary.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

The FSCMA was amended as of 25 January 2016 to legalise equity crowdfunding. This new legal framework requires that a company that wishes to conduct crowdfunding business in Korea must register as an online small-sized investment broker with the FSC.

Such online small-sized investment brokers can issue debt securities, equity securities or investment contract securities so long as they allow the exchange of comments between online small-sized securities issuers (those in need of funds) and investors (fund suppliers) and among investors through websites (including other similar means such as mobile applications and virtual spaces).

There are, however, certain restrictions on the issuance of equity for crowdfunding under the FSCMA. For instance, a single company can raise funds of up to 700 million won per year through crowdfunding. To raise funds exceeding 700 million won, conventional means of financing should be utilised. Moreover, under the FSCMA, the issuance of equity for crowdfunding is permitted for non-listed small to medium-sized companies with fewer than seven years of business operations.

Reward-based crowdfunding business entities may give out in-kind rewards by registering as mail order distributors under the Act on Consumer Protection in Electronic Commerce.

There are no laws or regulations that specifically regulate donation-based crowdfunding businesses.

10 Describe any specific regulation of invoice trading in your jurisdiction.

There is no specific regulation of invoice trading as invoice trading is not deemed to be moneylending business. However, if a transaction constitutes a secured loan transaction having an invoice loan as collateral (even if the transaction takes the form of invoice trading), such transaction would be deemed as moneylending business, which requires a licence if the party is not a credit financial institution.

11 Are payment services a regulated activity in your jurisdiction?

Yes. Payment services are regulated under the EFTA, and are subject to registration requirements and other obligations under the EFTA.

12 Do fintech companies that wish to sell or market insurance products in your jurisdiction need to be regulated?

Under article 83 of the Insurance Business Act, if a person wishes to solicit or market insurance or reinsurance products, it must register as one of the following:

- an insurance solicitor (the person must meet certain registration requirements, such as the completion of training sessions held by an appropriate insurance association);
- an insurance agent (the person must meet certain registration requirements, such as the completion of training sessions held by the Korea Insurance Institute); or
- an insurance broker (the person must pass the insurance broker examination and register him or herself with the FSS).

13 Are there any legal or regulatory rules in your jurisdiction regarding the provision of credit references or credit information services?

The Credit Information Use And Protection Act (the Credit Information Act) prohibits engaging in credit information business without obtaining the appropriate licence from the FSC. The Credit Information Law limits those who may be licensed to (i) an entity at least half of whose capital is invested by financial institutions and (ii) an entity at least half of whose capital is invested by the Korea Credit Guarantee Fund, the Korea Technology Finance Corporation, a credit guarantee foundation, the Korea Trade Insurance Corporation or a person who is licensed to engage in credit information business.

14 Are there any legal or regulatory rules in your jurisdiction that oblige financial institutions to make customer or product data available to third parties?

Local financial institutions are subject to periodic (quarterly and monthly) business reporting requirements. Such business reports are submitted to the FSC, but financial institutions are required to publicly disclose a summary of such report. Laws and regulations that apply to the disclosure of each financial institution vary, but financial institutions are generally not required to publicly disclose specific customer or product data.

Under the Credit Information Act, financial institutions are permitted to share their customer information via a centralised credit information collection agency approved by the FSC, Korea Credit Information Services. Such sharing of customer data is for the common benefit of financial institutions to manage the customer credit risk.

Sector-specific laws and regulations generally require the relevant financial institution to disclose product data. For instance, brokers and dealers are required to disclose their fees for specific products, and asset managers are required to disclose certain fund information through the industry association's (the Korea Financial Investment Association) website.

15 Does the regulator in your jurisdiction make any specific provision for fintech services and companies? If so, what benefits do those provisions offer?

There are not many specific provisions for fintech services and companies so far, but the Korean regulators recently allowed a limited regulatory sandbox for new services such as 'robo-advisers'. One recent development is the proposed amendment of the subordinate regulations of the FSCMA to introduce robo-advisers, an automated investment tool that provides algorithm-based portfolio advisory management functions. Although the amendment is not yet in force, the regulators are currently operating a 'regulatory sandbox' as a test bed for robo-advisers, which advise on or directly manage customer assets without the intervention of a human expert (which has to date been prohibited under the FSCMA and its subordinate regulations). Once the proposed amendment comes into force, robo-advisers that have been screened by the regulatory authorities via the regulatory sandbox will be able to start providing their services to the public.

16 Does the regulator in your jurisdiction have formal relationships or arrangements with foreign regulators in relation to fintech activities?

In 2016, the FSC approved the UK Financial Conduct Authority's 'fintech bridges', a regulatory cooperation agreement on sharing information about financial services innovations including fintech trends and regulatory issues. The FSC also signed a cooperation agreement with the Monetary Authority of Singapore in 2016. The cooperation agreements cover sharing information on the recent regulatory trends on fintech and pursuing joint projects, and do not offer specific benefits.

17 Are there any local marketing rules applicable with respect to marketing materials for financial services in your jurisdiction?

The FSCMA generally prohibits advertising for any business run by a financial investment business or for any financial investment instrument other than a financial investment business. A financial investment

business must include its name, the descriptions of financial investment instruments, the risks contingent upon the investment, etc, when advertising for investments. The FSCMA also provides that online small-sized investment brokers and online small-sized securities issuers cannot advertise for investment through any means other than the website opened by the online small-sized investment brokers.

Further, as general legislation on advertising, the Act on Fair Labelling and Advertising prohibits any of the following labelling or advertising that is likely to undermine fair trade order by deceiving or misleading consumers, or compel other business entities to do so: (i) false or exaggerated labelling or advertising; (ii) deceptive labelling or advertising; (iii) unfairly comparative labelling or advertising; or (iv) slanderous labelling or advertising.

In the event the Fair Trade Commission has justifiable grounds to conduct an ex officio investigation suggesting that a financial entity has violated the above, it will notify the FSC, and the FSC will lead the investigation.

18 Are there any foreign exchange or currency control restrictions in your jurisdiction?

The Foreign Exchange Transaction Law and its subordinate regulations (the FX Regulations) regulate the exchange rate system, foreign exchange operations and payment and receipt of foreign exchange. The FX Regulations provide for licensing, approval and reporting requirements for various types of foreign exchange business activities, capital transactions, commercial transactions and international trade. Where a person intends to conduct business activities that involve, for example, cross-border payment, money exchange or foreign exchange transactions, the person is required to obtain a business licence or complete registration under the FX Regulations. Also, in general, when there is a transaction between a Korean resident and a non-Korean resident, or the transaction involves foreign currencies, there are reporting or approval requirements, subject to certain thresholds in terms of size and duration.

19 If a potential investor or client makes an unsolicited approach either from inside the provider's jurisdiction or from another jurisdiction, is the provider carrying out a regulated activity requiring a licence in your jurisdiction?

The FSCMA exempts the licence requirement for 'financial investment business', as explained in question 1, for a foreign financial institution that is analogous to a Korean financial investment corporation and may engage, outside Korea, in dealing (including underwriting) or brokerage business vis-à-vis a Korean resident, without any solicitation or advertisement to such Korean resident, in response to an order from such Korean resident (article 7, paragraph (4), item 6(na) of the Presidential Decree of the FSCMA). The issue of whether or not there has been solicitation or marketing activities would need to be determined on a case-by-case basis, noting that the exemption would only be available where the Korean resident investor presents the terms of the relevant transaction for execution by the foreign entity to accept or reject without negotiation.

20 If the investor or client is outside the provider's jurisdiction and the activities take place outside the jurisdiction, is the provider carrying out an activity that requires licensing in its jurisdiction?

If the provider is 'doing business in Korea', licensing requirements would apply. There are no clear-cut guidelines as to what constitutes doing business in Korea. Marketing and solicitation activities aimed at Korean investors or clients are generally considered a clear sign of doing business in Korea. The scope of activities that may be considered 'marketing or solicitation towards Korean residents' is broad. In addition, there could be other factors such as the location of the server, bank accounts, counterparties to the transaction, volume of transactions by Korean residents, etc.

21 Are there continuing obligations that fintech companies must comply with when carrying out cross-border activities?

Yes. In addition to licensing requirements, fintech companies must comply with various obligations applicable to the specific business (eg, financial service business). A fintech company's legal obligations will not change regardless of whether the activities are actually carried out in Korea or not.

22 What licensing exemptions apply where the services are provided to an account holder based outside the jurisdiction?

Locally authorised and regulated financial institutions are generally permitted to provide services to an account holder based outside the jurisdiction. Pursuant to the FX Regulations, however, financial institutions may be subject to (i) a prior registration requirement as a foreign exchange business; and (ii) other reporting or approval requirements in providing financial services.

Distributed ledger technology

23 Are there any legal or regulatory rules or guidelines in relation to the use of distributed ledger (including blockchain) technology in your jurisdiction?

There are no laws, regulations or guidelines that directly regulate the use of blockchain in Korea. However, some financial institutions are considering the implementation of services using blockchain, particularly focusing on whether it is feasible to provide services using blockchain within the existing regulatory framework (with regard to privacy and cybersecurity aspects).

Digital currencies

24 Are there any legal or regulatory rules or guidelines in relation to the use of digital currencies or digital wallets, including e-money, in your jurisdiction?

In general, there are two types of digital currencies: (i) a currency that is based on blockchain technology such as a virtual currency (or a cryptocurrency such as bitcoin); and (ii) a currency that is issued by a specific issuer.

With regard to virtual currencies, there are no laws, regulations or guidelines that explicitly regulate virtual currency. However, the FX Regulations were amended in July 2017 to introduce a system for 'small foreign exchange remittance business' that regulates, among others, foreign remittances that are made using virtual currency.

According to the 22 June 2017 press release announced by the FSS, the FSS does not consider virtual currencies as national currencies, financial investment instruments, digital currencies or prepaid electronic payment means. However, the FSS press release fails to provide guidance on how to classify virtual currencies and the legal form of such virtual currencies. Further, other Korean regulatory authorities could have a different view on the classification of virtual currencies. The characterisation of virtual currencies from a legal perspective has just begun in Korea and will likely develop in the near future. At this time, the classification of virtual currencies from a legal perspective is far from settled.

On the other hand, with respect to digital currency issued by a specific issuer, the EFTA regulates digital currencies and prepaid electronic payment means. Digital currencies and prepaid electronic payment means refer to transferable monetary value that is electronically saved and issued as a voucher or information of that voucher. They are used when buying goods or services from a third party other than the issuer (eg, reward points, gift cards, etc). Digital currencies have a more general usage than prepaid electronic payment means, and they are different from prepaid electronic payment means in that they have monetary value and guarantee cash reimbursement from the issuer. In order to issue a digital currency, it has to be licensed by the FSC, and in order to issue prepaid electronic means it has to be registered with the FSC. Since there are more complex requirements for obtaining a licence for issuing digital currency, prepaid electronic payment means are more commonly used in Korea.

Securitisation

25 What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

In order to engage in moneylending business or loan brokerage business in Korea, a relevant entity has to register under the Money Lending Business Registration and Consumer Protection Act (the Money

Lending Business Act) and a licensed loan brokerage company can provide brokerage services only to registered moneylending companies and not to unregistered businesses. Because of this restriction, Korean peer-to-peer businesses (ie, platform businesses) often form a partnership with a moneylending company or financial institution to engage in moneylending or loan business. Therefore, in Korea, investors who are not licensed to engage in moneylending business or loan brokerage business cannot give out loans even through platforms, and they can only give out indirect peer-to-peer loans through financial companies. Accordingly, loan business is carried out in the following way: investors deposit their investment (or loan) money with the peer-to-peer platform business, and they buy the 'right to retrieve the principal and interest from the debtor' from the financial company that is partnered with the peer-to-peer platform business. The actual collection of principal and interest is enforced by the partner financial company, and that money is delivered to the investor through the peer-to-peer platform business.

26 What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected?

In Korea, peer-to-peer lending means that the partner financial company keeps the rights to loans in general, whereas the investor who provided the investment money only has the 'right to retrieve the principal and interest', which is only part of the rights to loans. Therefore, it would be difficult for the partner financial company or the investor to assign the loans to a third party. The P2P Loan Guidelines do not specifically mention whether it is lawful to assign the loans to a third party.

27 Is it possible to transfer loans originated on a peer-to-peer or marketplace lending platform to the purchaser without informing the borrower? Does the assignor require consent of the borrower or are the loans assignable in the absence of a prohibition?

As explained in question 26, it is unclear whether it is lawful to assign loans originated on a peer-to-peer or marketplace lending platform. Even assuming it is lawful to assign loans, assignment has to be made with notice to the debtor by the assignor or with the debtor's consent to the assignment, and there has to be a notice or consent of the assignment with a legally valid date to make claims against a third party besides the assignor and the assignee.

28 Would a special purpose company for purchasing and securitising peer-to-peer or marketplace loans be subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

Yes. When a company handles personal information for business purposes, it must comply with data protection laws such as the Personal Information Protection Act and the Credit Information Act. If a special purpose company buys a loan, it has the duty to handle and protect personal information related to borrowers in accordance with the laws.

Intellectual property rights

29 Which intellectual property rights are available to protect software, and how do you obtain those rights?

In Korea, IP rights such as patents, designs, copyrights and trade secrets are available to protect software. Korean law explicitly provides for the protection of patents under the Patent Act, designs under the Design Protection Act, copyrights including copyrights in computer software under the Copyright Act, and trade secrets under the Unfair Competition Prevention and Trade Secret Protection Act (UCPA).

Graphical user interfaces of software may be protected by registered designs. For example, images represented on a display portion of a product such as a display panel can be registered and protected as a design. Copyright protection is also possible upon creation of an original computer program without formal registration requirements.

The Korean Intellectual Property Office (KIPO) is responsible for registering patents and designs. Filing patent applications and design applications with KIPO is required for registration and protection in Korea. KIPO's website (www.kipo.go.kr) sets out detailed application procedures.

Copyright comes into existence from the moment a work of authorship is completed. Although a copyright registration is not a prerequisite for copyright protection, it provides certain advantageous statutory presumptions in enforcing the copyright. Copyright can be registered with the Korean Copyright Commission (KCC). The KCC's website (www.copyright.or.kr) provides guidance on the application procedure.

30 Is patent protection available for software-implemented inventions or business methods?

Under the Patent Act, inventions relating to software or business methods are generally patentable if they meet the statutory requirements such as patentable subject matter, novelty and inventiveness.

31 Who owns new intellectual property developed by an employee during the course of employment?

IP rights such as patents, utility models and designs initially belong to the employee who created such rights. Such employee may transfer his or her IP ownership right to the employer through an agreement.

For in-service inventions, there are two ways for the employer to obtain ownership rights to the in-service invention of its employee. First, the employer may enter into a pre-invention assignment agreement with an employee with a provision that the employee agrees to assign any and all future in-service inventions to the employer. Second, the employer may adopt an employment rule such as an invention remuneration policy that expressly provides for employee-inventors to assign any and all future in-service inventions to the employer and the employer to provide remuneration to such employee-inventors. In either case, if the employer chooses to acquire the ownership right to an in-service invention pursuant to the agreement or employment rule, the employee is entitled to 'reasonable compensation' from the employer.

Ownership of copyright initially belongs to the actual author or authors of a given work. In the context of an employer-employee or work-for-hire relationship, however, an employing legal entity, organisation or person may be deemed to be the 'author' of a work with ownership of copyright in the work. Under the Copyright Act, such employer is deemed to have copyright ownership of a work if (i) the work is created by an employee within the scope of employment and made public (computer programs do not need to be made public), subject to the employer's supervision; and (ii) there is no separate or particular contract or employment regulation providing that the status of the author of, or ownership of copyright in, the work-for-hire should belong to the employee.

32 Do the same rules apply to new intellectual property developed by contractors or consultants? If not, who owns such intellectual property rights?

Intellectual property rights created by an independent contractor or consultant are generally owned by the contractor or consultant.

However, where the contractor or consultant's duty is to research and develop on behalf of a company using equipment and facilities of the company under direction and supervision of the company, one cannot rule out the possibility that the inventions made by such individuals may also be deemed as in-service inventions by a court. This issue is at present not well settled in Korea.

To avoid a potential dispute over ownership of IP rights, it is generally recommended that the contract for the contractor or consultant's services include an agreement for assigning the IP right to the company.

33 Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

If an IP right is jointly owned, a joint owner may license or assign (transfer) the IP right only with the consent of all the other joint owners.

In the absence of any agreement to the contrary, each joint owner may work the jointly owned IP without the consent of the other joint owners.

34 How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

Trade secrets such as the source code of software may be protected under the UCPA. The UCPA defines a 'trade secret' to mean information of a technical or managerial nature that (i) is useful for business

activities; (ii) is generally unknown to the public; (iii) possesses independent economic value; and (iv) is maintained as a secret through substantial effort.

Specifically, the material must be maintained as a secret through substantial effort by the owner and be objectively recognisable as a secret by third parties. The requisite degree of maintenance will be determined on a case-by-case basis given the particular industry, number of employees, industrial practice, the nature and importance of the information, etc.

Trade secrets can be kept confidential during court proceedings, if the court issues protective orders to protect confidential information. The court may order parties to the lawsuit (including their counsel and employees) not to disclose the trade secrets to others who are not under the protective order or use the trade secrets for purposes other than for the lawsuit, if the following conditions are met: (i) the trade secrets are contained in briefs already filed or to be filed, or evidence already investigated or to be investigated; and (ii) the release of the trade secrets needs to be limited as it may interfere with the business of the party.

35 What intellectual property rights are available to protect branding and how do you obtain those rights?

Branding can be protected in Korea by trademarks and other marks under the Trademark Act (TMA). KIPO is responsible for registering trademarks. A trademark application may be based on an intent to use the mark and need not be based on actual use or proof of such intent to use. All trademark applications are subject to substantive examination by the Examination Division of KIPO before registrations or rejections are issued.

In addition to the TMA, well-known marks can be protected as source identifiers under the UCPA, even if they are not registered. To be successful in an unfair competition action, the claimant must prove that (i) his or her identifier is well known in Korea; (ii) the infringer's identifier is similar to his or her identifier; and (iii) the use of such an identifier by others would cause consumers confusion or dilution.

36 How can new businesses ensure they do not infringe existing brands?

To reduce the risk of infringement, businesses should conduct a trademark search for pre-existing marks that are identical or similar before using a trademark. Trademark searches can be conducted using KIPO's official computer database, KIPRIS, or commercial databases.

37 What remedies are available to individuals or companies whose intellectual property rights have been infringed?

As civil remedies in case of infringement of a patent, utility model, design and trademark right, the Korean statutes provide the following three types: (i) injunctive relief (preliminary and permanent); (ii) damages compensation; and (iii) restoration of injured business goodwill or reputation.

Typically, a claim for damages is made at the same time as a claim for permanent injunction. Unlike in the US, Korean courts do not grant punitive damages for infringement of IP rights. An infringer of IP rights can also be criminally prosecuted and penalised. However, depending on the infringed IP right and the complexity of the matter, criminal proceedings are not common.

Remedies available for infringement of copyright are (i) injunctive relief (preliminary and permanent); and (ii) damages. A criminal prosecution may be pursued for copyright infringement as well.

38 Are there any legal or regulatory rules or guidelines surrounding the use of open-source software in the financial services industry?

Currently, there is no legal or regulatory rule or guideline in Korea that specifically governs the use of open-source software in the financial services industry.

Data protection

39 What are the general legal or regulatory requirements relating to the use or processing of personal data?

The Personal Information Protection Act (PIPA) governs the use or processing of personal data that may apply to fintech businesses operating in Korea. The PIPA prescribes detailed measures for each of the stages involved in the processing of personal data such as the collection and use, provision to a third party, outsourcing and destruction. The PIPA must be followed by all personal information processing entities, which are defined as all persons, organisations, corporations and governmental agencies that process personal data for business purposes. Under the PIPA, data subjects must be informed of, and provide their consent to, the following matters before their personal data is collected or used: (i) the purpose of the collection and use; (ii) the items of personal information that will be collected; (iii) the duration of the possession and use of the personal information; and (iv) disclosure that the data subject has a right to refuse to give consent and the negative consequences or disadvantages that may result owing to such refusal.

In addition, there are various sector-specific privacy laws, such as the Credit Information Act and the Act on the Promotion of IT Network Use and Information Protection (the Network Act), that complement the PIPA. The Network Act regulates the processing of personal information in the context of services provided by online service providers (eg, personal information collected through a website). The Credit Information Act regulates and protects financial transaction information and credit information of individuals and entities. Both the Network Act and the Credit Information Act may also apply to fintech businesses operating in Korea.

40 Are there legal requirements or regulatory guidance relating to personal data specifically aimed at fintech companies?

To date in Korea there are no specific legal requirements or regulatory guidance relating to personal data specifically aimed at fintech companies.

41 What legal requirements or regulatory guidance exists in respect of anonymisation and aggregation of personal data for commercial gain?

On 30 June 2016, to facilitate the development of internet and communication technology, the Ministry of Interior and relevant authorities including the FSS issued a guideline on anonymisation and aggregation of personal data. Personal data that are anonymised according to the guideline would not be deemed as personal data and thus could be used in a big data analysis or any other appropriate use or provision.

Cloud computing and the internet of things

42 How common is the use of cloud computing among financial services companies in your jurisdiction?

To our knowledge, cloud computing is not widely used in the Korean financial sector, but there is an increasing interest in using cloud computing.

43 Are there specific legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

With regard to cloud computing in general, the Act on the Development of Cloud Computing and Protection of Its Users has been enacted. With respect to the use of cloud computing by financial companies, compliance with the EFTA and the Regulation on the Outsourcing of Information Processing of Financial Companies will be important. If a financial company engaging in electronic financial transactions processes data using cloud computing, the pertinent cloud system will have to comply with the regulations regarding data rooms and hacking prevention measures under the Regulation on Supervision of Electronic Finance (RSEF). In particular, the physical network separation regulation requires the physical separation of information processing systems located in the data room and terminals directly connected for operation, development and security purposes from any external network such as the internet, making it difficult for financial companies to use cloud computing services. Pursuant to a recent amendment to the RSEF, the physical network separation requirement is exempted when the information processing system is designated as a 'less-significant information processing system'. Nonetheless, an information processing system that processes unique identifiable information or personal credit information of individuals may not be designated as a 'less-significant information processing system', still making it difficult for financial companies to widely utilise cloud computing services. A financial company also

has to go through the procedures under the Regulation on Outsourcing of Information Processing of Financial Companies if it outsources its cloud computing services to a cloud computing company. There is also a guideline on cloud computing services for the finance industry.

44 Are there specific legal requirements or regulatory guidance with respect to the internet of things?

There are no regulations specific to the internet of things, but if personal information is processed through the internet, compliance with laws regarding personal information such as the PIPA, the Act on the Promotion of IT Network Use and Information Protection, and the Act on the Use and Protection of Location Information will be necessary.

Tax

45 Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

The Korean government offers special incentive schemes mainly in the form of tax incentives for tech and fintech businesses, and small and medium-sized businesses in Korea.

Small and medium-sized businesses established in certain areas of Korea that are not located in highly populated cities can receive 50 per cent corporate tax relief for up to five years on their business income.

Those companies identified as a 'venture business' by the Korean government, which many fintech companies may qualify as, may receive 50 per cent corporate tax relief even if they are located in highly populated cities in Korea.

Research and development (R&D) tax deduction is available for certain R&D costs (including labour costs and material costs) that satisfy certain legal requirements, which may be relevant to tech and fintech businesses or small and medium-sized businesses with R&D activities.

These special incentives are not specific to the tech and fintech sectors and small and medium-sized businesses as they are available to qualifying companies and investors in all sectors.

Competition

46 Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction or that may become an issue in future?

There are no specific competition issues that particularly pertain to fintech companies in Korea.

Financial crime

47 Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

Yes. The anti-money laundering regime in Korea is governed by the Act on Reporting and Using Specified Financial Transaction Information (also known as the Financial Transaction Reporting Act (FTRA)) and the Act on Regulation and Punishment of Criminal Proceeds Concealment (also known as the Proceeds of Crime Act (POCA)).

The FTRA regulates money-laundering activities committed through financial transactions by establishing a reporting mechanism to review certain financial transaction information. The FTRA specifically provides for the submission of suspicious transaction reports (STRs) and currency transaction reports (CTRs) by financial institutions, and the analysis and dissemination of STRs to relevant law enforcement agencies for further action. The FTRA, however, only applies to those financial institutions that are licensed under the Korean financial regulations; therefore, only fintech businesses that are regulated under the Korean financial regulations would be subject to these requirements.

The POCA criminalises money-laundering activities and imposes criminal penalties and seizure of assets relating to money-laundering activities. Under the POCA, fintech businesses that are licensed financial institutions are required to report transactions to law enforcement agencies if, among others, they became aware that transacted assets are criminal proceeds or that the counterparty is engaged in the crime of concealment of criminal proceeds.

While there are various anti-corruption statutes and regulations in Korea, they have not specifically required companies to have procedures to combat bribery or money laundering. The Act on the Prohibition of Improper Request and Provision/Receipt of Money and Valuables (the Anti-Graft Act), which became effective in 2016, however, applies to companies. A company would be subject to criminal liability when an employee provides a payment or a benefit to a public official in violation of the Anti-Graft Act, unless the company has exercised due care and supervision to prevent such violations. Therefore, to avoid or minimise the risk of criminal liability for an employee's violation of the Anti-Graft Law, fintech businesses are advised to establish and maintain procedures to comply with the Anti-Graft Law.

48 Is there regulatory or industry anti-financial crime guidance for fintech companies?

There is no specific regulatory or industry anti-financial crime guidance that particularly pertains to fintech companies in Korea yet, but depending on the type of business, certain fintech companies may be subject to anti-financial crime guidance based on general financial regulations.

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

In Malta, financial services are primarily regulated under the Financial Institutions Act, Chapter 376 of the Laws of Malta (the Financial Institutions Act); Banking Act, Chapter 371 of the Laws of Malta (the Banking Act); and Investment Services Act, Chapter 370 of the Laws of Malta (the Investment Services Act). The Malta Financial Services Authority (MFSA) is the single regulator of the financial services industry and is responsible for licensing, regulating and supervising all licensable financial services.

Under the Investment Services Act, activities consisting of reception and transmission of orders in relation to one or more instruments, acting to conclude agreements to buy, sell or subscribe for one or more instruments on behalf of other persons, management of investments belonging to another person, trading against proprietary capital resulting in conclusion of transactions in one or more instruments and the provision of investment advice constitute licensable activities. Foreign exchange trading and binary option trading would fall within the scope of the Investment Services Act.

The Financial Institutions Act regulates quasi-banking activities, and while it regulates payment services activities (by transposing the provisions of the EU Payment Services Directive (2007/64/EC)) and the issue of electronic money (by transposing the provisions of the EU E-Money Directive (2009/110/EC)), it also regulates other 'home-grown' licensable activities such as lending (including the granting of personal credits, mortgage credits, factoring with or without recourse and financing of commercial transactions), financial leasing, underwriting share issues and the granting of guarantees and commitments. Deposit-taking activities are regulated under the Banking Act where the 'business of banking' is defined as the business of accepting deposits of money from the public withdrawable or repayable on demand, after a fixed period or after notice, or who borrows or raises money from the public and in either case for the purpose of employing such money in whole or in part by lending to others.

2 Is consumer lending regulated in your jurisdiction? Describe the general regulatory regime.

Consumer lending is a regulated activity under the Maltese law that requires a licence under the Financial Institutions Act or, if such activity is financed from deposit-taking activities, under the Banking Act. Both Acts regulate lending without distinguishing between consumer and commercial lending.

Pursuant to the Financial Institutions Act, any person who regularly or habitually carries out the activity of lending (see question 1), in or from Malta falls under the definition of a 'financial institution' and must therefore be in possession of a licence granted by the MFSA and is subject to ongoing supervision by the said Authority.

Credit institutions regulated under the Banking Act may also engage in consumer lending but, unlike financial institutions, they can also accept deposits from the public. These deposits are then employed in funding the lending activity. Similarly to financial institutions, the MFSA is responsible for issuing credit institution licences and supervising the banks.

3 Are there restrictions on trading loans in the secondary market in your jurisdiction?

Save for any applicable standard procedural requirements on the assignment or transfer of loan agreements, there are no restrictions on trading loans in the secondary market under Maltese law.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would generally fall within the scope of any such regime.

The Investment Services Act establishes the regulatory framework for collective investment schemes while the Investment Services Rules, which are issued by the MFSA pursuant to the Act, lay down the basic principles that licensed collective investment schemes (CISs) must adhere to, including what service providers the scheme must appoint, the investment restrictions that are applicable to the type of scheme and requirements concerning the issue of an offering document or prospectus.

Under the regulatory framework that applied to CISs until only very recently, there were 13 CIS regulatory frameworks available to promoters. The MFSA has now consolidated the regulatory regime for CISs so as to improve the Maltese frameworks for CISs. Under the revised fund regime, there are now three principal categories of funds:

- retail CISs (consisting of undertakings for collective investment in transferable securities (UCITS) and retail alternative investment funds (AIFs));
- qualifying professional investor funds (PIFs) (promoted to qualifying investors having a minimum investment requirement of €100,000 and who satisfy other conditions); and
- AIFs that may be marketed to professional investors as defined under the Markets in Financial Instruments Directive (MiFID) or to qualifying investors (as above) (with notified AIFs being the only subcategory).

Whether the activities of fintech companies providing alternative finance products or services would fall within the scope of current CIS legislation would depend on the nature of their operations and particularly whether the product or service they offer would fall within the definition of a CIS. Generally fintech companies providing alternative finance products or services do not fall within the scope of the regime.

The Investment Services Act defines 'investment service' as 'any service falling within the First Schedule when provided in relation to an instrument: Provided that the service of Management of Investments in terms of the First Schedule shall also include the collective portfolio management of assets of a collective investment scheme when provided in relation to an asset that is not an instrument within the meaning of the Second Schedule'. Thus, Maltese law leaves an opening for alternative finance products provided by fintech companies to be managed and fall under the scope of the CIS regime, even if their alternative product does not fall under the Second Schedule definition of an instrument.

In Malta, there are two types of CISs that are more geared towards making alternative investments. These CISs are PIFs and AIFs. The regulations surrounding PIFs and AIFs make it possible for these funds to operate and trade their units exclusively via the services of a fund marketplace platform that is licensed and regulated by the MFSA. Similar to exchange traded funds, the aim of the AIF or PIF could be to purchase

and store virtual currencies, or invest in equity of crowdfunding start-ups. AIFs and PIFs, which are promoted to professional and qualifying investors, have the flexibility of investing in assets that are not defined as instruments within the meaning of the Second Schedule of the Investment Services Act.

The services that are authorised to be offered to PIFs and AIFs are administration, management and custody. The entities that offer these services may outsource fintech companies that provide them with alternative services, but the administrator, manager and custodian would not generally themselves be classified as fintech companies.

5 Are managers of alternative investment funds regulated?

Managers of AIFs operating in or from Malta are regulated under the Investment Services Act, subsidiary legislation and the Investment Services Rules, which transpose the Alternative Investment Fund Managers Directive (2011/61/EU) (AIFMD). Investment managers who manage AIFs can be divided into two categories depending on the types of investment funds they manage: de minimis fund managers (not subject to the AIFMD) and AIF managers (subject to the AIFMD).

De minimis fund managers are managers whose assets under management do not exceed the thresholds provided for under the AIFMD (€100 million, including assets acquired through use of leverage; or €500 million when the portfolio of AIFs managed consists of AIFs that are not leveraged and have no redemption rights exercisable during a period of five years following the date of the initial investment in each AIF).

The regulatory framework prescribes licensing requirements, operating conditions and obligations of fund managers. De minimis fund managers are subject to less stringent regulatory requirements when compared to alternative investment fund managers. Managers of AIFs are required to apply to the MFSA for a Category 2 Investment Services Licence, which authorises the licence holders to provide any investment service and to hold or control clients' money or customers' assets, but not to operate a multilateral trading facility or deal for their own account or underwrite or place instruments on a firm commitment basis. Once a licence is issued, managers of AIFs have to comply with a number of ongoing obligations and are subject to MFSA supervision.

6 May regulated activities be passported into your jurisdiction?

Regulated activities that are rooted in EU directives can be passported into Malta. Indeed, transposing the relevant EU directives, Maltese law has adopted the principles of mutual recognition and 'single passport', allowing the banks, financial institutions, CISs, investment managers and investment services businesses legally established in one member state to establish a branch or to provide their services in Malta subject to adherence with certain procedural requirements concerning the passporting process without being required to obtain a separate licence from the MFSA.

7 May fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

Depending on the particular regulatory regime that the fintech company would fall under, in terms of the current legislation there are different 'presence requirements' that apply to different segments of the financial services regulatory regime. For example, in terms of the Financial Institutions Act, entities wishing to carry on any of the licensable activities under the Act (such as the provision of payment services or lending activities) are required to comply with the 'four eyes principle', which requires the financial institution to be managed and directed in Malta by at least two individuals. The same requirement applies for investment service providers under the Investment Services Act, including fund managers. Such entities also need to appoint certain officers (such as a money laundering reporting officer and compliance agent) as applicable. The extent of the presence that the MFSA will expect from applicants and licence holders (on an ongoing basis) will also depend on the size of the operations.

8 Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

Peer-to-peer lending is not specifically regulated in Malta. As the existing financial services regulatory framework predates the emergence of peer-to-peer lending as an attractive source of funding, the provisions of the Banking Act, the Financial Institutions Act and the Investment Services Act make no direct reference to the peer-to-peer lending. Accordingly, to date, there are no clear rules bringing peer-to-peer lending within the scope of the regulatory framework. However, peer-to-peer lending platforms would still need to consider whether any of their activities could constitute provision of investment advice, payment services or other licensable activities. Furthermore, any person who, as a lender, regularly or habitually lends money through such platforms in or from Malta would arguably be carrying out a regulated activity.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

Maltese legislation does not include any specific regulation of crowdfunding. Out of the three main business models for crowdfunding platforms, there is a low risk that reward-based or donation-based crowdfunding models would trigger any licensing requirements under the existing legislative framework. On the other hand, the activities of loan-based and equity-based crowdfunding platforms may in theory fall within the parameters of the Financial Institutions Act and the Investment Services Act respectively. However, this position will remain unclear unless rules specifically regulating crowd-lending or equity-based crowdfunding models are enacted.

10 Describe any specific regulation of invoice trading in your jurisdiction.

The Financial Institutions Act regulates factoring as a form of lending and the carrying out of such activity would trigger a licensing requirement under this law. Invoice discounting as another form of invoice trading will also likely fall under the list of regulated activities under the same law.

11 Are payment services a regulated activity in your jurisdiction?

The carrying out of payment services on a regular or habitual basis in or from Malta is a regulated activity under Maltese law and requires authorisation from the MFSA. Payment services are regulated under the Financial Institutions Act which transposes the EU Payment Services Directive (2007/64/EC) into Maltese law, by the Financial Institutions Rules issued by the MFSA and partly by a Directive issued by the Central Bank of Malta, which implements the substantive parts of the Payment Services Directive. Regulated payment services are defined under the Act, which definition mirrors the provisions of the Payment Services Directive and includes services enabling cash to be placed on, or withdrawn from, a payment account as well as all the operations required for operating a payment account, execution of payment transaction, issuing or acquiring of payment instruments and the provision of money remittance services. The provisions of the Payment Services Directive II are to be transposed to Maltese law within two years from its adoption at EU level in October 2015.

12 Do fintech companies that wish to sell or market insurance products in your jurisdiction need to be regulated?

The MFSA regulates financial services in Malta by licensing entities according to the service they provide or activity they carry out. The Insurance Business Act is the primary legislation that regulates insurance services and activities in Malta. 'Business of insurance' means the effecting and carrying out of contracts of insurance of such class or classes of long-term business or class or classes or part classes of general business. The Second Schedule of the Insurance Business Act lists nine classes of long-term business, namely: life and annuity, marriage and birth, linked long term, permanent health, tontines, capital redemption, pension fund management, collective insurance, and social insurance.

Part 1 of the Third Schedule of the Insurance Business Act lists 18 classes of general business, namely: accident, sickness, land vehicles, railway rolling stock, aircraft, ships, goods in transit, fire and natural forces, other damage to property, motor vehicle liability, aircraft liability, liability for ships, general liability, credit, suretyship, miscellaneous financial loss, legal expenses and assistance. The business of insurance would also include:

- the effecting and carrying out, by a person not carrying on business of banking, of:

- contracts for fidelity bonds, performance bonds, administration bonds, bail bonds or customs bonds or similar contracts of guarantee;
- capital redemption contracts based on actuarial calculation; and
- contracts to manage the investments of pension funds, and, in relation to contracts to manage the investments of pension funds, the expression 'a person not carrying on business of banking' includes 'a person not carrying on investment services';
- any business carried on in connection with or ancillary to the business of insurance; and
- the business of reinsurance.

'Selling or marketing' insurance products is regulated by the Insurance Business Act, Subsidiary Legislation 330.07 – Distance Selling (Retail Financial Services) Regulations, the Insurance Rules – Conduct of Business and general consumer protection legislation. If a fintech company sells or markets insurance products as defined in the Insurance Business Act, then it falls under the scope of the Insurance Business Act and, thus, would be regulated in the same manner as a non-fintech company. If, on the other hand, the role of the fintech company is such that it does not fit into the definition of 'selling or marketing' the 'insurance' product, then, even if the service relates to such product, the fintech company would not be regulated as an insurance seller or marketer.

13 Are there any legal or regulatory rules in your jurisdiction regarding the provision of credit references or credit information services?

EC Regulation 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies (the CRA Regulation) is the principal EU legislation relating to credit rating agencies. The CRA Regulation was subsequently amended by the CRA II Regulation (Regulation 513/2011), which shifted responsibility for the supervision of EU CRAs to the European Securities and Markets Authority (ESMA), and by the CRA III Regulation (Regulation 462/2013), which dealt with problems concerning the reliance of firms on external credit ratings, sovereign debt ratings, competition in the CRA industry, the civil liability of CRAs and the independence of CRAs.

The CRA Regulation is directly applicable to Malta, and has full legal effect in Malta without requiring transposition. However, the CRA Regulation provides for national implementation, for example, to deal with matters such as penalties, enforcement procedures and appeals against registration decisions. The Financial Markets Act (Credit Rating Agencies) Regulations 2014 provides the general framework for the regulation of CRAs that may be established in Malta. The CRA Regulation introduces a harmonised approach to the regulation of credit rating activities in the EU and creates a registration regime for CRAs that are established in the EU.

In terms of the CRA Regulation, the term 'regulatory purposes' means the use of credit ratings for the specific purpose of complying with EU law, as implemented by the national legislation of the member states. In Malta, the above-mentioned requirement that sets conditions on the use of credit ratings for regulatory purposes applies to credit institutions licensed in terms of the Banking Act 1994; investment services licence holders in terms of the Investment Services Act 1994; insurance companies carrying on general business in terms of the Insurance Business Act 1998; insurance companies carrying on the business of reinsurance in terms of the Insurance Business Act 1998; CISs licensed in terms of the Investment Services Act 1994 and which qualify as UCITS Schemes and Occupational Pension Schemes registered in terms of the Special Funds (Regulation) Act 2002.

14 Are there any legal or regulatory rules in your jurisdiction that oblige financial institutions to make customer or product data available to third parties?

Maltese legislation obliges financial institutions to make customer or product data available to third parties. This is evident when one refers to the Financial Institutions Act and the Prevention of Money Laundering Act.

The Financial Institutions Act places an obligation on the financial institution to submit to the MFSA, as the MFSA may require, any relevant information, documentation or records of a licence holder relating or pertaining to the financial institutions licensable activities, or otherwise falling under its supervisory or regulatory functions, or any regulations and rules issued thereunder or any other law. The Financial Institutions Act also states that a 'financial institution shall submit to the Central Bank such information as the Central Bank may require in the discharge of its duties'.

Furthermore, the Prevention of Money Laundering Act places an obligation on subject persons (which includes financial institutions) to submit to the Financial Intelligence Analysis Unit and the Attorney General any information and documentation that relates to the suspicion of money laundering and the funding of terrorism.

15 Does the regulator in your jurisdiction make any specific provision for fintech services and companies? If so, what benefits do those provisions offer?

There is currently no specific provision or initiative for fintech companies in Malta. Although the current Maltese regulatory framework caters for certain aspects of fintech businesses, it is clear that in the interest of legal certainty, consultations with the industry and legislative initiatives are required to cater for the ongoing developments surrounding these businesses. In view of the increasing popularity of the industry, and the EU's action plan on consumer finance, published in March 2017 by the European Commission to regulate in the interest of European consumers, it is expected that the regulator in Malta will be taking necessary steps in the near future to address this segment of the financial services industry.

16 Does the regulator in your jurisdiction have formal relationships or arrangements with foreign regulators in relation to fintech activities?

The MFSA has many memoranda of understanding (MoUs) with EU and non-EU foreign regulators, but none are specifically related to fintech activities. The purpose of the majority of these MoUs is to establish a formal basis for cooperation, including the exchange of information and investigative assistance in the fields of banking, insurance, investment services and the provision of professional trusteeship and company management services, and the exchange of information on supervisory practices and techniques.

17 Are there any local marketing rules applicable with respect to marketing materials for financial services in your jurisdiction?

The Investment Services Rules lay down specific requirements that licence holders must adhere to when issuing marketing communications to retail clients or potential retail clients with a view to ensuring that the communications shall be fair, clear and not misleading. These rules include requirements concerning the prominent indication of any relevant risks and warnings in the communication, the requirements to follow where the communication compares investment services or instruments or where it includes an indication of past or future performance of an instrument.

In terms of the Investment Services Act, no investment advertisement may be issued by a person (not being a licence holder) unless this is approved by a holder of an investment services licence.

CISs are required to issue an offering document (in the case of PIFs or AIFs) or a prospectus and key investor information document (in the case of UCITS). These documents are to contain sufficient information for investors to make an informed decision about the investment proposed to them and must include, as a minimum, the information prescribed in the relevant Rules, which includes, in particular, detailed and clear indication of the principal risks associated with investing in the particular instrument.

Under Maltese law, the marketing of financial services is also directly regulated through the provisions of the Distance Selling (Retail Financial Services) Regulations. These Regulations, which implement Directive 2002/65/EC concerning distance marketing of consumer financial services, set out rules that govern marketing of financial services to retail consumers and prescribe minimum information that must be provided by financial services suppliers to consumers. Since these regulations particularly target marketing material of financial services products that is distributed online, these rules are of particular relevance to fintech companies. In addition, fintech companies are also bound to comply with marketing and advertising regulations found in general consumer protection legislation.

18 Are there any foreign exchange or currency control restrictions in your jurisdiction?

There are no foreign exchange or currency control restrictions in Malta. All exchange control restrictions were removed with the overhaul of the External Transactions Act, Chapter 233 of the Laws of Malta in 2003 as part of Malta's preparation to become a full member state of the EU in 2004. Under the Act, only in very limited and exceptional circumstances may the Minister of Finance make regulations imposing restrictions to preserve stability of the financial system in the event of crisis or to implement sanctions against specific countries, persons or group of persons in accordance with directives issued by international organisations of which Malta is a member.

19 If a potential investor or client makes an unsolicited approach either from inside the provider's jurisdiction or from another jurisdiction, is the provider carrying out a regulated activity requiring a licence in your jurisdiction?

Under Maltese law, licensing requirements for financial services providers are typical triggered once the undertaking provides qualifying services in or from Malta. This licensing 'trigger' is not conditional on the solicitation of clients by the undertaking and therefore the provision of a regulated service resulting from unsolicited approaches by a potential client or investor, whether these are located inside or outside Malta, would still give rise to a licence requirement.

20 If the investor or client is outside the provider's jurisdiction and the activities take place outside the jurisdiction, is the provider carrying out an activity that requires licensing in its jurisdiction?

See question 19. The Investment Services Act specifically provides that a body corporate, unincorporated body or association formed in accordance with or existing under the laws of Malta, shall not provide an investment service in or from within a country outside Malta unless it is in possession of a valid investment services licence.

21 Are there continuing obligations that fintech companies must comply with when carrying out cross-border activities?

Where a fintech company falls within the parameters of one of the financial services regulatory regimes, then when such entities are providing services on a cross-border basis to another EU member state, such entities would still need to comply with the ongoing regulatory requirements arising under the particular licence held (Investment Services Act, Financial Institutions Act or Banking Act). These include financial resources requirements, disclosure and reporting requirements and rules concerning marketing of services as described above.

22 What licensing exemptions apply where the services are provided to an account holder based outside the jurisdiction?

Generally, no licensing exemptions apply where services are provided to an account holder based outside the jurisdiction of Malta, if those same services are provided within or from Malta.

The Second Payment Services Directive (PSD2) is a maximum harmonisation directive, in which minimum flexibility is provided to member states when transposing the provisions into national law. Nevertheless, it provides some opportunities to member states to permit payment service providers (PSPs) to derogate from specific conduct of business rules, enforced on them by the home member state that licensed them, when services are provided to an account holder based outside its licensing jurisdiction. One example of Malta providing a licence exemption to PSPs could be seen in its application of article 63 of the PSD2. In line with article 63 of the PSD2, Malta has chosen to derogate from certain conduct of business rules that PSPs may reach an agreement with their payment service users in the instance of minimal-value payment instruments issued under a framework agreement.

Distributed ledger technology

23 Are there any legal or regulatory rules or guidelines in relation to the use of distributed ledger (including blockchain) technology in your jurisdiction?

At present, Malta has no regulatory framework in relation to the use of distributed ledger (including blockchain) technology. However, the European Parliament and the Council of the European Union have proposed amending the Fourth Anti-Money Laundering Directive 2015/849 (4th AMLD) to tackle terrorist financing risks linked to virtual currencies. The 4th AMLD is in the final stages of being transposed into Maltese law.

Virtual currencies are based on blockchain but are not defined as financial instruments under the Investment Services Act. To prevent their abuse for money laundering and terrorist financing, virtual currency exchange platforms (VCP) and custodian wallet providers (CWP) are brought under the scope of the proposed amendments – otherwise known as the Fifth Anti-Money Laundering Directive 2016/0208 (5th AMLD). With these proposed amendments VCP and CWP would have to apply customer due diligence controls. In fact, the definition of 'obliged entities' under the 5th AMLD is being proposed to be extended to:

- providers engaged primarily and professionally in exchange services between virtual currencies and fiat currencies;
- wallet providers offering custodial services of credentials necessary to access virtual currencies.

The 5th AMLD is still being revised for any further counter-proposal or approval between the EU Parliament and the European Council. It could take a number of months before an agreement is reached between the EU Parliament and the European Council. Nonetheless, it is anticipated that the 5th AMLD will be transposed into Maltese law, sooner rather than later.

Digital currencies

24 Are there any legal or regulatory rules or guidelines in relation to the use of digital currencies or digital wallets, including e-money, in your jurisdiction?

Digital currency simply means a digital representation of any currency. E-money is one of the sub-classes of digital currency. E-money represents fiat currency used to electronically transfer value denominated in fiat currency. The Financial Institutions Act transposes provisions of the E-Money Directive (Directive 2009/110/EC) and the Payment Services Directive (Directive 2007/64/EC). The Third Schedule of the Act regulates financial institutions issuing electronic money. The Financial Institutions Act's obligations and statutory requirements are less onerous when compared with those included in the Banking Act.

Electronic money is defined by the Act, Third Schedule, article 1 as 'electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions [...] and which is accepted by a natural or legal person other than the financial institutions that issued the electronic money.'

The definition of electronic money covers electronic money held on a payment device in the possession of the electronic money holder (ie, a physical device) or stored remotely at a server and managed by the electronic money holder through a specific account for electronic money (ie, a non-physical device).

Consequently, e-money can generally be classified into two categories, namely:

- card or device-based e-money – permitting persons to make use of a portable card or electronic device as an e-wallet instead of using tangible cash for minor transactions. Card and device-based e-money is commonly known to have started regulatory development in the field; however, server-based e-money only became a more common practice a few years ago; and
- server-based e-money – e-money is stored remotely at a server that is normally accessed and administered by users.

Securitisation

25 What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

In Malta, the constitution and enforcement of a loan and security agreements are governed by the Civil Code. To execute such agreements under the Maltese Code of Organisation and Civil Procedure, transaction parties resort to special summary proceedings to execute and enforce certain, liquid and due debts or demand the institution of

executive warrants. Since peer-to-peer or marketplace lending are not specifically regulated under Maltese law, it is likely that loans made through such a platform will be subject to the Civil Code (Chapter 16 of the Laws of Malta) rules on loans for consumption or mutuum. In addition, it should be noted that Malta has implemented the provisions of Directive 2002/47/EC on financial collateral arrangements.

26 What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected?

An assignment of loans originating on a peer-to-peer lending platform is subject to the standard rules for assignment of rights under the Civil Code. Under these rules, perfecting such an assignment requires an instrument in writing setting out the terms of the assignment and a notice made out to the original debtor, informing him or her of the assignment to a new creditor.

In the context of securitisation transactions, Malta's Securitisation Act, Chapter 484 of the Laws of Malta (the Securitisation Act) relaxes the requirements for the perfection of an assignment where this concerns the transfer of securitisation assets (which could be peer-to-peer loans) to the securitisation vehicle. It renders such a transfer of rights absolute and binding on all parties as soon as the assignment is made in accordance with the terms of the respective agreement and in terms of the applicable contract law. It is essential that the transfer is effected in writing.

An unperfected assignment could have very severe implications on the purchaser of the securitisation assets (ie, the securitisation vehicle), as this could prejudice the success of the asset-backed securities issue. If the rights related to the loans have not been completely removed from the originator's balance sheet, the originator's creditors might enforce their debts against the loan receivables that have been repackaged to form the asset pool in the securitisation transaction. If the originator's creditors were to successfully demonstrate that the assignment to the securitisation vehicle was not perfected, no payments on the receivables would be due to the vehicle and may cause it to default on interest payments due periodically to the note-holders.

27 Is it possible to transfer loans originated on a peer-to-peer or marketplace lending platform to the purchaser without informing the borrower? Does the assignor require consent of the borrower or are the loans assignable in the absence of a prohibition?

Typically, a transfer of a loan made under the standard rules for the assignment of rights under Maltese civil law acquire legal validity once the original debtor has either been notified by means of a judicial act or the debtor himself or herself has otherwise acknowledged the transfer of the original debt to a new creditor.

The fast-paced nature of the capital markets makes it unrealistic to notify the debtor upon the transfer of each contract for receivables to the securitisation vehicle. For this reason, Maltese securitisation law facilitates the process of debtor notification. It allows the notification to be carried out to the debtor directly in writing or alternatively to deem the debtor notified upon publication of a notice in a daily newspaper that is circulated in the jurisdiction where the debtor resides.

Consent of the original borrower is never required in terms of Maltese law. The Securitisation Act permits the assignment of assets to the securitisation vehicle even where these are subject to contractual or statutory prohibitions.

28 Would a special purpose company for purchasing and securitising peer-to-peer or marketplace loans be subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

Securitisation vehicles, together with all other parties involved in the securitisation transaction, are bound to adhere to data protection laws and professional secrecy and confidentiality rules. This is specified under the Securitisation Act, which provides that transfers of personal data between persons in the context of a securitisation transaction are to be considered as having been made for a purpose that concerns a legitimate interest of the transferor and transferees of the data, unless it can be shown that the transfer may violate the data subject's fundamental right to privacy.

Furthermore, transfers of personal data to a third country that does not ensure an adequate level of data protection will not require the typical authorisation of the Data Protection Commissioner as long as it can be shown that the data controller has adopted appropriate safeguards for the protection of data subjects' fundamental rights.

Intellectual property rights

29 Which intellectual property rights are available to protect software, and how do you obtain those rights?

Software, as a result of intellectual efforts of the human mind, is afforded copyright protection. Copyright protection is afforded under Chapter 415 of the Laws of Malta, the Copyright Act, where software is treated as a literary work. Copyright protects the expression of the idea and arises automatically by operation of the law from the moment in time that the idea has been reduced to a medium through which it has been expressed. To be protected by copyright, there is no action that needs to be carried out by the copyright holder and no registration, and no copyright protection sign is necessary in order for the protection to apply, as long as software qualifies as an 'original literary work'.

30 Is patent protection available for software-implemented inventions or business methods?

Patent protection does not apply to software-implemented inventions or business methods as such. In fact, Chapter 417 of the Laws of Malta, the Patents and Designs Act, explicitly excludes 'schemes, rules and methods for performing mental acts, playing games or doing business and programs for computers' from being regarded as inventions and therefore being eligible for patent protection. For patent protection to apply, and in addition to the originality and other requirements for the invention to be patentable, it is worth noting that the fact that software runs on a piece of technical equipment (computer, phone, etc) means that there must be some contribution to the technical field and, without such contribution, software as such is not patentable.

31 Who owns new intellectual property developed by an employee during the course of employment?

The owner of intellectual property created during the performance of a contract of employment, by a developer who is an employee, is the employer. In particular, with respect to where a computer program or database is made in such circumstances, the economic rights conferred by copyright are deemed to be transferred automatically to the author's employer, unless there is any agreement excluding or limiting such transfer between the parties.

32 Do the same rules apply to new intellectual property developed by contractors or consultants? If not, who owns such intellectual property rights?

Under the Copyright Act, the author is the beneficiary of the economic rights of the work created by him or her that is subject to copyright. Accordingly, in any situation other than an employer-employee relationship, where a contractor or a consultant is the author, the contractor or consultant is the holder of the copyright.

33 Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

Maltese law has transposed the European intellectual property framework to properly safeguard any patents, trademarks, industrial designs and copyright. Malta's principal IP law falls under:

- the Trademarks Act (Chapter 416 Laws of Malta);
- the Patents and Designs Act (Chapter 417 Laws of Malta);
- the Copyright Act (Chapter 415 of the Laws of Malta); and
- the Intellectual Property Rights (Cross-Border Measures) Act (Chapter 414 of the Laws of Malta).

The Trademarks Act, Patents and Designs Act and Copyright Act all place restrictions on a joint owner of intellectual property's right to either use, license, charge or assign its right in intellectual property.

Where a registered trademark or design is granted to two or more persons jointly, each of them is entitled, subject to any agreement to the contrary, to an equal undivided share in the registered trademark

or design respectively. Subject to any agreement to the contrary, each co-proprietor is entitled, personally or through his or her agents, to do for his or her own benefit and without the consent of or the need to account to any other co-proprietor, any act that would otherwise amount to an infringement of the registered trademark or design. Nonetheless a co-proprietor may not, without the consent of the other joint owners (i) grant a licence to use the registered trademark or design; or (ii) assign or cede control of his or her share in the registered trademark or design.

Where there are joint applicants of a patent application, each of them may, with or without the agreement of the others, separately assign or transfer by succession his or her share of the application, but the joint applicants may only act jointly to withdraw the application or conclude licence contracts with third parties under the application.

Furthermore, where there are joint proprietors of a patent, each of them may, with or without the agreement of the others, separately assign or transfer by succession his or her share of the patent or institute court proceedings for an infringement of the patent, but the joint owners may only act jointly to surrender the patent or conclude licence contracts with third parties under the patent. This paragraph shall be applicable only in the absence of an agreement to the contrary between the joint applicants or owners.

An assignment or licence of copyright granted by a joint author or an assignment or licence of a neighbouring right granted by a joint right holder shall have effect as if granted by the other joint authors or joint right holders respectively, provided that, where any other joint author in the case of copyright or joint right holder in the case of neighbouring rights is not satisfied with the terms on which such assignment or licence has been granted, he or she may, within three months from the day on which the said terms have been communicated in writing to him or her, apply to the Copyright Board for the determination by it of such terms as the Copyright Board may consider fair and reasonable. The Copyright Board, established by virtue of article 45 of the Copyright Act, is vested with the authority to approve requests for the establishment and operation of collecting societies in Malta, to approve the tariffs charged and any revisions thereof, as well as to revoke any authorisation to act as a collecting society.

34 How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

Currently, there is no specific law protecting trade secrets. Still, protection is afforded by means of other legal principles. For instance, the Civil Code provides that a person is subjected to a fiduciary obligation if he or she has received information from another person that he or she knew was confidential. Such obligations extend to third parties who receive information from a fiduciary. A recipient of the information who does not comply with the duty shall be liable for damages. Further protection is afforded by Chapter 9 of the Laws of Malta, the Criminal Code, which provides criminal sanctions applicable to persons misappropriating trade secrets.

In addition to the above, trade secrets are effectively protected by contract law. It is also common practice for an employment contract to contain provisions to prevent employees from disclosing trade secrets and confidential business information during, and sometimes after, the employment relationship and for owners of trade secrets to enter into a non-disclosure agreement to protect their confidential information in commercial transactions. Maltese courts have the power to issue precautionary measures, such as injunctions, against the unlawful infringement of trade secrets.

Further protection shall be provided in the near future in terms of a newly adopted EU Trade Secrets Directive, which must be transposed into Maltese law by 9 June 2018. The transposition of the Trade Secrets Directive into Maltese legislation means that trade secrets will be explicitly protected. Malta will be required to adopt various measures that would include the preservation of confidential trade secrets during the course of legal proceedings and the withdrawal from the market or destruction of the products that are infringing trade secrets. Further to this, an order to pay pecuniary compensation or damages to the injured party may also be made in certain cases.

35 What intellectual property rights are available to protect branding and how do you obtain those rights?

'Branding' of a business is taken to be a combination of various elements including the logo, trade dress, design, image and slogans, with respect to specified products or services. As such, various intellectual property rights are available for protection of the above-mentioned elements, even though there is no uniform protection for what is considered to be the totality of the elements constituting the brand itself. Logos, slogans and visual colour schemes can be protected by trademarks, as well as, in some cases, long-standing and widespread use.

Protection can be obtained by registering a word mark, figurative mark, with or without words, slogan or three-dimensional mark or design with the Maltese Intellectual Property Office (Maltese IPO). European Union trademarks (EUTMs) may be applied for in Malta and protection for the trademark may be extended to other territories, as opposed to limiting protection to Malta. Such a one-time procedure gives the owner an exclusive right, in the member states of the EU, to prevent any third party from illegally using the same or similar signs for identical or related goods or services as those that are protected by the EUTM in the course of trade. This is recommended for businesses that have the intention of operating in EU member states. Registering a trademark is a straightforward process that can be done by the proprietor of the trademark or his or her representative. An application may be filed online to the Maltese IPO at any time. A trademark application number will be immediately allotted for easy and quick reference. If multiple classes for the same mark need to be filed, this can be done simply by filing one online trademark application, in contrast to filing several applications manually.

36 How can new businesses ensure they do not infringe existing brands?

Businesses can prevent infringement of brand rights owned by third parties, by running detailed trademark searches for their logos, slogans, colour schemes and similar brand factors of the new business against previously registered trademarks. This will help to ensure that brands, which are developed and marketed, will not be liable to infringement proceedings brought by proprietors of previously existing brands or marks registered and used, with respect to similar or identical services provided by the business. Searches for trademarks and other brand rights may be carried out through the online database registers of the EU Intellectual Property Office as well as the TMView online database, which aggregates trademark registers from over 70 national trademark offices, as well as the World Intellectual Property Organization register.

37 What remedies are available to individuals or companies whose intellectual property rights have been infringed?

With regard to copyright, neighbouring rights and sui generis rights (eg, the right in a database), the Copyright Act states that the copyright owner or right holder may sue an infringer in the Civil Court for payment of damages or payment of a fine, and may also condemn the defendant to the restitution of all the profit derived from the infringement of such intellectual property right. In addition, the Court has the discretion of awarding any additional damage, taking into account the flagrancy of the infringement and any benefit accruing to the defendant.

Further to the above, the copyright owner or right holder has the option to request the court to order that all the infringing articles be destroyed.

In relation to trademarks, the Trademarks Act provides that where a person is found to have infringed a registered trademark, remedies range from the offending sign being erased, recalled from circulation within channels of commerce or destroyed from any infringing goods. The injured party can also claim damages. The court shall take into account the facts and circumstances of the case, and the damage suffered including the negative economic consequences on the injured party (eg, lost profits, unfair profits made by the infringer and moral prejudice caused to the proprietor). If the injured party would not have sufficiently proved damages, the court may still award damages using an alternative method to calculate damages that may involve a lump sum of damages payable including, for instance, the least amount of royalties or fees that would have been due had the infringer requested authorisation to use the trademark in this case.

The Enforcement of Intellectual Property Rights (Regulation) Act further provides that injunctions and declarations may be made, payment of pecuniary compensation to the injured party or payment of damages may also be awarded. There is also the possibility that the unsuccessful party shall pay the legal expenses incurred by the successful party. The applicant may also request the court to order appropriate

measures for the dissemination of the information concerning the decision at the expense of the infringer.

38 Are there any legal or regulatory rules or guidelines surrounding the use of open-source software in the financial services industry?

There are no rules or guidelines on open-source software specifically regulating its use in the financial services industry. However, the same rules on copyright apply to open-source software just as they do to software in general. This is, in particular, because copyright is the basis for the way in which open-source software is regulated. In fact, the person using open-source software and making later amendments and copies of the work must identify the original creator as the first author of the work (the original open-source software).

Data protection

39 What are the general legal or regulatory requirements relating to the use or processing of personal data?

The processing of personal data is mainly regulated by Chapter 440 of the Laws of Malta, the Data Protection Act, which lays out the requirements for processing, including that the personal data must be processed fairly and lawfully, in accordance with good practice, only collected for specific, explicit and legitimate purposes, and must be processed for a purpose that is in line with the reason for the information in question being collected. Personal data that is processed must be adequate and relevant taking into account the purposes for processing and only necessary personal data that is correct and kept up to date shall be processed. All reasonable measures must be taken to complete, correct, block or erase data to the extent that such data is incomplete or incorrect, and personal data must not be kept for a period that is longer than is necessary, always having regard to the purposes for which the data has been processed.

The Data Protection Act also lays out various criteria when processing personal data and provides that unambiguous consent needs to be given by the data subject for his or her data to be processed. Other criteria include that processing of data must be necessary for the contract performance; necessary for compliance with a data controller's legal obligation; or to protect the vital interest of the data subject. In addition, processing must be necessary for performance of an activity that is carried out in the public interest or in the exercise of an official authority vested in the controller or in a third party, or processing of personal data is necessary for a purpose that concerns a legitimate interest of the controller or third party to whom personal data is provided, except where such an interest is overridden by the interest to protect the fundamental rights and freedoms of the data subject and, in particular, the right to privacy.

Further restrictions apply to processing of personal data by means of electronic communications, including for the purposes of direct marketing, unsolicited commercial communications, use of geolocation data, and the use of cookies.

The introduction of the General Data Protection Regulation, which is due to come into force in 2018, will pose additional protection to individuals with respect to the processing of personal data.

40 Are there legal requirements or regulatory guidance relating to personal data specifically aimed at fintech companies?

There are no specific laws or guidelines explicitly regulating fintech companies' use of personal data. However, assuming that such companies will be processing personal data and it will be done by means of electronic communications, the rules applicable for such processing will apply.

41 What legal requirements or regulatory guidance exists in respect of anonymisation and aggregation of personal data for commercial gain?

As far as we are aware, no guidelines with respect to anonymised personal data and its aggregation exist in Malta. The Processing of Personal Data (Electronic Communications Sector) Regulations, however, provide that traffic data relating to subscribers and users, which has been processed for the purposes of the transmission of a communication and stored by an undertaking providing publicly available electronic communications services or public communications network shall be erased or made anonymous when no longer needed for the purpose of the transmission of a communication. The same Regulations state that where location data is processed, such data may only be processed when it is made anonymous or with the consent of the users or subscribers for the necessary duration for the provision of a value added service.

Cloud computing and the internet of things

42 How common is the use of cloud computing among financial services companies in your jurisdiction?

The adoption of cloud computing is steadily becoming more prevalent in the local financial services industry. Increasing volumes of data in the financial services sector call for the adoption of such technologies. Despite this context, enterprises operating in this sector are likely to tread with caution because of concerns relating to data security, jurisdictional oversight and compliance, control and transfers to third countries, particularly in the light of the Court of Justice of the European Union's recent ruling in *Maximillian Schrems v Data Protection Commissioner*, which invalidated the *Safe Harbour* decision with immediate effect.

43 Are there specific legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

There are a number of initiatives that currently govern the evolution of cloud computing, although these are not necessarily tied to the financial services sector. Locally, the Malta Communications Authority, the regulatory body charged with the supervision and regulation of communications services in Malta, has issued a guidance document that highlights considerations to be taken by SMEs and microenterprises when assessing the suitability of the use of cloud computing within their firm.

On a wider macro level, some initiatives and policy guidance documents have been published by the institutions of the EU. As part of the EU's Digital Single Market Strategy, the European Commission launched a European Cloud Initiative in April 2016, which includes actions to address concerns and support the development and use of cloud services in all sectors of the economy. This builds upon a 2012 Commission Communication document addressed to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, entitled 'Unleashing the Potential of Cloud Computing in Europe', through which it identifies policy initiatives currently being taken that will impact different sectors that are in some way affected by cloud computing, and outlines key actions related to standardisation and certification for cloud computing.

44 Are there specific legal requirements or regulatory guidance with respect to the internet of things?

The internet of things (IoT) refers to the embedding of technological sensors in everyday items such as drones or wearables such as smartwatches or glasses, designed to process and collect a high volume of personal data to be used in innovative applications that analyse the data subject's habits or activities. Since the data collected usually refers to natural persons and aggregates a significant amount of data of varying sensitivity, the IoT raises challenging legal issues in the field of privacy and data protection law. In early 2014, the Article 29 Working Party, established by Directive 95/46/EC with the mission of imparting expert advice to EU member states regarding data protection and privacy matters, adopted an opinion on recent developments in the IoT. This opinion is not binding on member states; however, it identifies the main data protection risks that arise from the IoT and presents helpful guidance on how the EU legal framework should be applied in this context.

Tax

45 Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

Malta offers a highly attractive and competitive corporate tax regime that was approved by the EU in 2004. A company incorporated in Malta is subject to tax in Malta at the standard corporate tax rate of 35 per cent. Upon a dividend distribution to the shareholders of the Maltese company, the shareholders would be entitled to a refund of the Malta tax paid by the company. The tax refund in the case of a trading company

would be that of six-sevenths of the Malta tax paid by the Maltese company (ie, the shareholder gets 30 per cent of the tax paid back).

In addition to the beneficial corporate tax regime mentioned above, Malta also offers tax incentives, primarily in the form of tax credits to companies that qualify as innovative enterprises in line with Malta Enterprise Rules and Regulations. The Micro Invest Scheme is one such incentive, which aims to encourage start-ups and self-employed individuals to invest in, develop and expand their business through innovation. Support for successful applications is given through tax credits representing a percentage of the eligible expenditure and wages of newly hired employees.

Recently, the Maltese government launched the Seed Investment Scheme (Income Tax) Rules 2016. Through this Scheme investors who invest and provide financing to start-ups are eligible for tax credits up to a maximum €250,000 per year.

Competition

46 Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction or that may become an issue in future?

There are no specific issues.

Financial crime

47 Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

Fintech companies are not subject to mandatory rules that require the implementation of procedures to combat bribery. However, it may be noted that Chapter 527 of the Laws of Malta, the Protection of Whistleblowers Act, provides a framework for the protection of persons who expose dishonest or illegal conduct, such as bribery, within an organisation. The whistle-blower protection afforded through this piece of legislation applies to both internal disclosures made within an organisation, as well as to external disclosures made to a competent supervisory authority such as the MFSA.

Current anti-money laundering legislation imposes obligations intended to circumvent money laundering activities upon 'subject persons' carrying out a 'relevant activity' or 'relevant financial business'. A determination as to whether a fintech company will be considered as a subject person will depend on whether its activities are licensable or regulated under financial services legislation.

48 Is there regulatory or industry anti-financial crime guidance for fintech companies?

No regulatory or industry guidance has been issued in Malta that specifically targets fintech companies' financial crime risk.

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

There are a number of activities that trigger a licensing requirement under Dutch law. The requirements are set out in the Financial Supervision Act (FSA) and secondary legislation. While it is not practical to list them all, the most common and relevant in light of fintech are the following:

- Deposit taking and granting credits for own account: credit institutions (ie, institutions that attract repayable funds from the public in the Netherlands and that extend credit for own account) require a banking licence.
- Consumer lending: the extension of credit to consumers requires a licence.
- Payment services: all institutions carrying out payment services as described in the Annex to the Payment Services Directive (PSD), require a licence. Where an institution has a licence to act as a credit institution, this credit institution does not need a licence for carrying out payment services if this licence to act as a credit institution also covers carrying out payment services.
- Investment services: a financial institution is required to have a licence in the event it wishes to carry out investment services. These investment services can be split into the following services, carried out in pursuit of a business or profession:
  - receiving and transmitting client orders with regard to financial instruments;
  - executing client orders with regard to financial instruments;
  - management of an individual's capital;
  - providing advice with regard to financial instruments;
  - underwriting or placement with a firm commitment basis of financial instruments; and
  - placement without a firm commitment basis of financial instruments.
- Investment activities: a financial institution is required to have a licence in the event it wishes to perform an investment activity. Investment activities can be split into two activities:
  - trading for one's own account; and
  - operating a multilateral trading facility.
- Clearing and settlement: acting as a clearing and settlement institution requires a licence.

2 Is consumer lending regulated in your jurisdiction? Describe the general regulatory regime.

Pursuant to the FSA, consumer lending requires a licence and is to be considered as a financial product. Advising a consumer on a financial product or providing intermediary services in relation to such financial product is only allowed if the institution has obtained a licence from the Netherlands Authority for the Financial Markets (AFM). Financial institutions may be exempted if they have another licence on the basis of which it is allowed to offer consumer lending or advise consumers on financial products. Prior to the conclusion of a loan agreement with a consumer, the financial institution is obliged to provide the consumer with the relevant information relating to the financial product, so that the consumer is able to properly assess the product. In addition, certain specific rules regarding credit assessment apply to prevent over crediting. This is part of the obligation to exercise due care when providing services.

3 Are there restrictions on trading loans in the secondary market in your jurisdiction?

Secondary market loan trading is a regulated activity, but only where this activity is considered to constitute primary lending and it is carried out in conjunction with deposit taking or obtaining other repayable funds from the public in the Netherlands, or where it concerns consumer lending.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would generally fall within the scope of any such regime.

The definition of a collective investment scheme is set out in the FSA, which in its turn refers to the definition used in the Alternative Investment Fund Managers Directive 2011/61/EU (AIFMD). As such, a collective investment scheme can be a vehicle with or without legal personality, which raises capital from a number of investors with a view to investing it in accordance with a defined investment policy for the benefit of those investors. In principle, collective investment schemes are regulated in the Netherlands as undertakings for collective investments in transferable securities or alternative investment funds.

Whether a fintech company will fall within the definition of a collective investment scheme will depend on its business. For example, fintech companies that manage assets on a pooled basis on behalf of investors should give particular consideration to whether they potentially qualify as a collective investment scheme. Fintech companies that, for example, are geared more towards providing advice or payment services may be less likely to qualify as a collective investment scheme, but should nonetheless check this and have regard to their other regulatory obligations.

5 Are managers of alternative investment funds regulated?

Managers of alternative investment funds are regulated in the Netherlands under the AIFMD, which has been implemented in the FSA.

6 May regulated activities be passported into your jurisdiction?

An EEA firm that has been authorised under one of the European Union single market directives (Banking Consolidation Directive, Capital Requirements Directive, Solvency II, Markets in Financial Instruments Directive (MiFID), Insurance Mediation Directive, Mortgage Credit Directive, Undertakings for Collective Investment in Transferable Securities Directive, AIFMD and PSD) may provide cross-border services into or establish a branch in the Netherlands. In order to exercise this right, in general the firm must first provide notice to its home state regulator. The relevant directive under which the EEA firm is seeking to exercise its passporting rights as implemented in the FSA will determine the conditions and processes that the EEA firm has to follow.

7 May fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

In order to obtain a licence for any of the activities regulated pursuant to the FSA, in general, a local presence must be established.

8 Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

There is no specific regulation of peer-to-peer or marketplace lending in this jurisdiction. Any such activities will need to be reviewed taking the existing regulated activities as included in the FSA into account. As an example, if a platform facilitating peer-to-peer lending is – as part of these activities – receiving and transmitting orders in financial instruments, such platform may be subject to a licensing obligation as an investment firm. See question 9 for more detail.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

Crowdfunding as such is not defined in the FSA and there is no specific regulation of crowdfunding in the Netherlands. Depending on the type of crowdfunding (loan-based or equity-based) certain prohibitions (licensing requirements) of the FSA may be triggered (eg, prospectus requirement, banking or consumer credit licence, investment firm licence). The analysis for any particular platform will depend on the assessment of these variables and the status of the parties involved.

The rules pursuant to the FSA were recently adjusted so as to facilitate crowdfunding. Crowdfunding platforms are exempted from the general prohibition on performing activities as an intermediary in order to attract or obtain the disposal of repayable funds from the public. Furthermore, crowdfunding platforms having a licence to operate as an investment firm can be exempted from the prohibition on receiving commissions from third parties. In order to apply this exemption, the crowdfunding platform has to inform the AFM that it intends to receive and transmit orders.

The AFM is able to attach certain conditions to licences or individual exemptions and (in that way) regulate crowdfunding. An example is the condition that investors have the possibility to reclaim their investment within 24 hours. The AFM also introduced certain maximum investment amounts for consumers. The maximum (per consumer) for loan-based crowdfunding is €80,000 and €40,000 for equity-based crowdfunding.

10 Describe any specific regulation of invoice trading in your jurisdiction.

There is no specific regulation of invoice trading in the Netherlands. However, depending on the exact services provided and the status of the parties involved, invoice trading may lead to either party becoming an intermediary of consumer credit or being qualified as extending consumer credit.

11 Are payment services a regulated activity in your jurisdiction?

Yes, payment services are regulated on the basis of the PSD, which has been implemented in the FSA. A licence is required for carrying out all payment services listed in the Annex to the PSD.

12 Do fintech companies that wish to sell or market insurance products in your jurisdiction need to be regulated?

A company that wishes to sell or market insurance products is required to obtain a licence. To obtain such licence, the company has to comply with several provisions in the FSA (including rules regarding conduct of business and governance).

13 Are there any legal or regulatory rules in your jurisdiction regarding the provision of credit references or credit information services?

The rules on credit rating agencies laid down in Regulation (EC) No. 1060/2009 on credit rating agencies apply in the Netherlands. A credit rating agency is required to adopt, implement and enforce adequate measures to ensure that the credit ratings it issues are based on a thorough analysis of all the information that is available to it and that is relevant to its analysis according to its rating methodologies.

14 Are there any legal or regulatory rules in your jurisdiction that oblige financial institutions to make customer or product data available to third parties?

There are currently no rules in the Netherlands that oblige financial institutions to make customer or product data available to third parties. This will change with the implementation in the FSA of the access-to-account rules as included in the Second Payment Services Directive. In general, data protection and privacy regulations should be considered prior to making customer data available to third parties.

15 Does the regulator in your jurisdiction make any specific provision for fintech services and companies? If so, what benefits do those provisions offer?

The AFM and Dutch Central Bank (DNB) have set up the InnovationHub to support market parties such as fintech companies. According to the DNB, the InnovationHub offers new start-ups and incumbents the opportunity to submit questions about regulations directly to a supervisory authority, irrespective of whether they are currently subject to supervision. Depending on the subject matter, the question will be dealt with either by the AFM or the DNB. If the matter relates to a subject that applies across sectors, both regulators will review and discuss. The InnovationHub aims to offer easy access for companies that provide innovative services or products, remove any unnecessary barriers to entry, gain more insight into the rapidly developing technological innovation within the financial sector and improve knowledge sharing and dialogue with all relevant stakeholders.

In addition, the AFM and DNB have set up a regulatory sandbox for fintech companies to test and develop new products, subject to certain conditions. The regime operates from the principle that innovative solutions are considered against the rationale of the existing regulatory framework. It provides the possibility for tailored solutions within the existing regulatory framework (by using options available within the existing legislation) if the relevant innovative solution meets the aforementioned rationale or contributes to such rationale.

16 Does the regulator in your jurisdiction have formal relationships or arrangements with foreign regulators in relation to fintech activities?

The AFM and DNB maintain contact with other regulators both in the Netherlands (such as the Dutch competition authority, the Authority for Consumers & Markets (ACM), and the Data Protection Authority) and abroad, within the context of the European supervisory authorities, bilaterally and globally (eg, within the International Organization of Securities Commissions). However, no formal arrangements have been published that specifically relate to fintech companies.

17 Are there any local marketing rules applicable with respect to marketing materials for financial services in your jurisdiction?

Marketing activities subject to the FSA need to comply with the general rules, which state that marketing materials:

- may not undermine any information required to be made available to clients pursuant to the FSA;
- must be correct, clear and not misleading; and
- the commercial nature of the material must be recognisable as such.

In addition, specific rules apply depending on the type of product offered or service provided, and in some cases also on the type of client targeted.

Marketing materials for complex products (eg, participation rights in an open-ended collective investment scheme and investment objects) should include a risk indicator as prescribed by the Further Regulation on Conduct of Business Supervision of Financial Undertakings (the Further Regulation).

Marketing materials for credit offerings to consumers that refer to debit interest rates or other information regarding costs should include (at a minimum) information regarding floating or fixed interest rates and other costs that form part of the total costs of the credit for the consumer, the total credit amount, the yearly cost percentage, identity and address of the provider or intermediary, and certain other information depending on the type of credit, all as prescribed in the Decree

on Conduct of Business Supervision of Financial Undertakings (the Decree). In addition, certain risk warnings are prescribed and certain prohibitions apply, such as the prohibition on including any references to the speed or ease with which the credit may be obtained.

For products other than complex products, the more general marketing rules included in the Further Regulation apply; most notably, the obligation to include a warning that the value of an investment may fluctuate and that historical returns offer no guarantee for the future.

Depending on the medium used for marketing (print, TV, radio or internet) further rules apply, such as the relevant information to be included at a minimum (such as the name of the provider, the regulatory status of provider, and where and how further information, if applicable, relating to the product or service can be obtained).

18 Are there any foreign exchange or currency control restrictions in your jurisdiction?

There are no foreign exchange or currency control restrictions in the Netherlands.

19 If a potential investor or client makes an unsolicited approach either from inside the provider's jurisdiction or from another jurisdiction, is the provider carrying out a regulated activity requiring a licence in your jurisdiction?

An approach made by a potential client on an unsolicited and specific basis should not trigger a licensing requirement. This exemption is not explicitly set out in law, but is implicit by virtue of the law providing that for Dutch rules to apply, entities must be 'active in the Netherlands'. Currently, there are no specific provisions under Dutch law regarding the definition of an unsolicited approach. However, an approach of a Dutch client will generally be considered as having been made on a solicited basis, especially where the Dutch market is targeted specifically (eg, by use of Dutch mass media or use of a website specifically dedicated to the Dutch markets). In addition, a third-party referral will not qualify as an unsolicited approach.

If a potential client has made an unsolicited approach, the response by the fintech company must be limited to the licensable activities covered by the unsolicited request. This exemption is transaction-based (each transaction must be preceded by an unsolicited request). Finally, it is advisable to keep detailed records of any unsolicited request.

20 If the investor or client is outside the provider's jurisdiction and the activities take place outside the jurisdiction, is the provider carrying out an activity that requires licensing in its jurisdiction?

The trigger for application of the Dutch regulatory rules pursuant to the FSA is whether or not such activities are carried out 'in the Netherlands', which means that if the activity is aimed at residents of the Netherlands, the provider carrying out the activity requires a licence. However, services provided online from the Netherlands to other jurisdictions are also subject to the FSA.

21 Are there continuing obligations that fintech companies must comply with when carrying out cross-border activities?

This depends on the type of licence (and activities), what type of investor, customer or client is targeted, and whether the activities are performed on the basis of cross-border provision of services or via a branch in the Netherlands. In general, when activities are performed in the Netherlands pursuant to an EU passport on a cross-border basis, home state supervision applies and no additional FSA rules will need to be complied with. If, on the other hand, activities are performed via a Dutch branch, certain conduct of business rules and a number of prudential requirements may apply.

22 What licensing exemptions apply where the services are provided to an account holder based outside the jurisdiction?

See question 20. When activities are not performed in the Netherlands no licensing obligation applies. However, for some activities a licence is required when the financial institution has its seat in the Netherlands. Acting as a credit institution, for example (taking deposits and lending money), requires a licence in the event the financial institution has its seat in the Netherlands.

Distributed ledger technology

23 Are there any legal or regulatory rules or guidelines in relation to the use of distributed ledger (including blockchain) technology in your jurisdiction?

Other than the General Data Protection Regulation (GDPR), there is no specific legislation on blockchain or other distributed ledger technology (DLT). The use of DLT is subject to the existing regulatory legislation depending on its application in any particular case. DLT is a subject that has led to many questions in the InnovationHub (see question 15).

Digital currencies

24 Are there any legal or regulatory rules or guidelines in relation to the use of digital currencies or digital wallets, including e-money, in your jurisdiction?

Depending on the structure and the specific characteristics of the product, these activities could be qualified as payment services or electronic money institutions. In that case, such parties will either require a licence as a payment services provider (as implemented pursuant to the PSD) or an electronic money institution (as implemented pursuant to the E-Money Directive) or apply an exemption; certain prudential and conduct of business rules will be applicable.

Securitisation

25 What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

Loan agreements are not restricted to a certain form and can therefore be entered into electronically. In order to create a security right (ie, a right of pledge or mortgage) a deed is required, which has to be in writing. Dutch law distinguishes between authentic deeds, which requires the involvement of a civil-law notary, and private deeds.

A private deed can also be executed in electronic format, if the deed is executed in such a manner that its content can be saved in a way that it is accessible as long as the deed has a purpose and allows its contents to be reproduced without altering it.

An electronic deed will require an electronic signature. An electronic signature has the same value as a written signature provided that the method used to authenticate the signature is sufficiently reliable. This is assumed to be the case when, inter alia, the signature is connected to the signatory in a unique manner, the signatory can be identified by the signature, the signature has been perfected with sources only the signatory has in its possession and the signature is connected to the electronic file in such way that each modification afterwards can be detected.

26 What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected?

Under Dutch law, there is a distinction between the assignment of loans (ie, the receivables and the liabilities under a loan) and the sole assignment of receivables under the loans. As securitisations require that only the receivable is assigned, only the assignment of receivables is discussed here.

Assignment always requires that (i) the receivable is transferable, (ii) the seller holds legal title to the receivables, (iii) a valid title for the assignment (an agreement usually), and (iv) delivery of the receivables. Delivery can be perfected by way of an undisclosed assignment or disclosed assignment.

An undisclosed assignment requires an executed deed, either in notarial form or in private form, the latter to be registered with the Dutch Tax Authority. Perfection takes place the moment the deed is executed by the notary or at the time of registration with the Tax Authority. A limitation is that only receivables that (i) exist at the date of registration or execution of the deed of assignment, and (ii) future receivables directly resulting from an existing legal relationship existing at the date of assignment, can be transferred by way of undisclosed assignment.

A disclosed assignment requires that notification of the deed of assignment is given to the debtor.

If the (delivery of the) assignment is not perfected, the receivable has not been successfully assigned to the assignee. If the seller becomes insolvent before all conditions for the assignment have been perfected, the receivables can no longer be assigned and the insolvent seller remains the owner.

Until notification of the assignment, borrowers can only validly pay to the originator in order to validly discharge their payment obligation, and payments made prior to notification of the assignment but after the insolvency of the assignor has been declared will fall in the estate of the assignor.

27 Is it possible to transfer loans originated on a peer-to-peer or marketplace lending platform to the purchaser without informing the borrower? Does the assignor require consent of the borrower or are the loans assignable in the absence of a prohibition?

Assignment of receivables does not require consent. As mentioned above, assignment of receivables only requires notification in case of a disclosed assignment. A contractual non-assignment clause may prevent the transfer of receivables, depending on the exact wording of the clause.

28 Would a special purpose company for purchasing and securitising peer-to-peer or marketplace loans be subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

Yes, a special purpose vehicle that is based in the Netherlands will fall under the scope of such laws if it processes details of persons in relation to activities in the Netherlands.

Intellectual property rights

29 Which intellectual property rights are available to protect software, and how do you obtain those rights?

Computer programs (and preparatory materials) are protected by copyright. Copyright arises automatically as soon as the computer program is created. There is no registration required to obtain copyright. Copyrighted works are protected until 70 years after the death of the creator.

Databases underlying software programs may also be protected by copyright and, in certain circumstances, by database right. A database right is a stand-alone right that protects databases that have involved a substantial investment in obtaining, verifying or presenting their contents. The right automatically comes into existence upon creation and expires after 15 years.

Software may also be protected as confidential information by keeping the software code secret. There are no formal (registration) requirements.

Patent protection for software is possible if the inventor is able to demonstrate that the software makes a technical contribution. In order to obtain patent protection, registration is required with the relevant Dutch and European patent offices and the registration requirements must be followed. Patent protection is limited to 20 years starting from the date of filing the application.

30 Is patent protection available for software-implemented inventions or business methods?

Programs for computers and schemes, rules or methods of doing business as such are expressly excluded from patentability under the Dutch Patent Act 1995 and the European Patent Convention. If it can be shown that the underlying invention makes a novel and inventive technical contribution over and above that provided by the program or business method itself, it is possible to obtain patent protection for computer programs and business methods.

31 Who owns new intellectual property developed by an employee during the course of employment?

Copyrights and databases created by an employee during the course of his or her employment are automatically owned by the employer unless the parties have agreed otherwise.

Patents protecting inventions made by an employee in the course of his or her normal duties are owned by the employer. Any other patented inventions will be owned by the employee unless agreed otherwise.

32 Do the same rules apply to new intellectual property developed by contractors or consultants? If not, who owns such intellectual property rights?

No. Inventions or copyrights created by contractors or consultants in the course of their duties are owned by the contractor or consultant unless otherwise agreed. Database rights are owned by the person who takes the initiative and assumes the risk of investing in obtaining, verifying and presenting the data in question. Depending on the circumstances this is likely to be the business that has retained the contractor or consultant.

33 Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

Where two or more persons jointly own an intellectual property right, any one of them may use and enforce the right, unless otherwise agreed. Each joint owner may assign or charge its share of the intellectual property right without the other owners' consent. Exploitation of the intellectual property right, including the granting of licences and charging or assigning the intellectual property right, can only be done by the joint owners of the intellectual property right.

34 How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

In the Netherlands trade secrets are protected by the general law of tort (such as breach of the rules of fair competition). There are currently no specific statutory provisions in Dutch law dealing with the protection of trade secrets. The Netherlands will have to implement the Trade Secrets Directive (EU) 2016/943 by 9 June 2018. The biggest difference between existing Dutch law and the regime that member states have to adopt to comply with the Directive is the introduction of a definition of what qualifies as a protectable trade secret. According to the Directive, the definition must include information that:

- is secret, in the sense that it is not generally known among, or readily accessible to, persons within the circles that normally deal with the kind of information in question;
- has commercial value because it is secret; and
- has been subject to reasonable steps by the holder of the information to keep it secret.

Measures are available in the Netherlands to keep information confidential during civil procedures and these are similar to the measures mentioned in the Directive. In order to fully implement the Directive it is expected that these measures will be codified in statute.

35 What intellectual property rights are available to protect branding and how do you obtain those rights?

Brands can be protected as registered trademarks either in the Benelux alone (as a Benelux trademark) or across the EU (as an EU trademark). Certain branding such as logos and stylised marks can also be protected by design rights and may also be protected by copyright.

36 How can new businesses ensure they do not infringe existing brands?

The Benelux and European Union trademark databases can be searched to identify registered trademarks or applications for a trademark with effect in the Netherlands. It is highly advisable for new businesses to conduct trademark searches to check whether earlier registrations exist that are identical or similar to their proposed brand names.

37 What remedies are available to individuals or companies whose intellectual property rights have been infringed?

Remedies include:

- preliminary and final injunctions;
- damages or surrender of profits;
- delivery up or destruction of infringing products;
- orders to disclose certain information that relates to the infringement;

- publication orders; and
- reimbursement of costs, including court fees and costs of (patent) attorneys and experts.

38 Are there any legal or regulatory rules or guidelines surrounding the use of open-source software in the financial services industry?

There are no legal or regulatory rules or guidelines surrounding the use of open-source software in the financial services industry.

Data protection

39 What are the general legal or regulatory requirements relating to the use or processing of personal data?

Data processing in the Netherlands is subject to the Dutch Data Protection Act (DDPA), which implements the EU Data Protection Directive and applies to the (automated) processing of personal data by any legal entity in the Netherlands or, in the context of the activities of an establishment, by the controller in the Netherlands.

Personal data is any information relating to an identified or identifiable natural person. The DDPA refers to persons whose personal data are processed as the 'data subjects'. The dominant legal grounds that businesses may rely on to ensure that their processing of personal data is lawful are:

- to process data based on the 'legitimate interests' of the company undertaking the processing (provided that the interests of the individual are not unduly affected);
- to process in order for the company undertaking the processing to comply with a legal requirement (not a contractual requirement);
- to perform or enter into or execute a contract with the individual; and
- if none of the grounds above would apply, consent of the data subject.

Apart from the grounds that provide legitimacy to data processing activities, personal data may only be collected and used for legitimate purposes that have been communicated to the data subject in advance. Furthermore, data processing must be in proportion and relevant in view of the purpose(s) for which data were collected.

The DDPA also provides various rights for data subjects, including a right of access to the personal data that a company holds about them and a right to demand the correction of inaccurate personal data held by the data controller. The DDPA is enforced by the Data Protection Authority.

The DDPA will be replaced in May 2018 by the new GDPR, a European regulation having direct effect in the Netherlands. The GDPR broadly reinforces the existing regime provided by the DDPA, with some additional requirements to strengthen the obligations on businesses to protect personal data. However, an additional Execution Act GDPR will become effective, which will implement rules with regard to aspects of data protection and processing that are not governed by the GDPR, such as certain use of sensitive personal data, or that are typically member state related issues, such as the use of social security numbers. Furthermore, enforcement and appeal proceedings, including decisions to apply fines, typically fall under the exclusive discretion of the EU member states.

40 Are there legal requirements or regulatory guidance relating to personal data specifically aimed at fintech companies?

There are no legal requirements or regulatory guidance relating to personal data that are specifically aimed at fintech companies.

41 What legal requirements or regulatory guidance exists in respect of anonymisation and aggregation of personal data for commercial gain?

Data controllers must protect data subjects against accidental or unlawful destruction, loss, alteration and disclosure of personal data, in particular when processing involves data transmission by implementing the appropriate (technical) security measures. In case of a data breach, in many circumstances, the data controller is under an obligation to inform the Data Protection Authority. Financial institutions within the scope of the FSA are exempted from the obligation to inform data subjects in the event of data breaches.

Data controllers are under a general obligation (pursuant to the DDPA) to implement appropriate technical and organisational measures to protect personal data against accidental or unlawful access, destruction or accidental loss, alteration, unauthorised disclosure or access and against all other unlawful forms of processing. This obligation includes, in particular, measures to prevent unnecessary further collection or processing of personal data.

When a data subject is not identifiable on the basis of data, such data are not considered as personal data under the DDPA. A person is identifiable if the person's identity can be established, without disproportionate effort. In other words, it must somehow be possible to establish a connection between available data and a person. Typically, names, addresses and phone numbers are directly identifiable data. Further combinations of data, for example, work email address and picture or name of employer and a social security number, may lead to easy identification of a certain person. In that case too, the person is – indirectly – identifiable. Indirect identification depends on the possibilities to combine available data. Accordingly, for the data to have been effectively anonymised, the data subject must no longer be identifiable.

The Article 29 Working Party (a European body comprised of representatives from data protection regulators across the EU) has released Opinion 05/2014 on Anonymisation Techniques (the Opinion). The Opinion states that when assessing the robustness of an anonymisation technique, it is necessary to consider:

- if it is still possible to single out an individual;
- if it is still possible to link records relating to an individual; and
- if information can be inferred concerning an individual.

In relation to aggregation, the Opinion further states that aggregation techniques should aim to prevent a data subject from being singled out by grouping them with other data subjects.

Cloud computing and the internet of things

42 How common is the use of cloud computing among financial services companies in your jurisdiction?

Considering the regulator's attention to this subject over the past couple of years, our understanding is that cloud computing is used within the financial services industry in the Netherlands. Pursuant to information published by the DNB, it seems that mostly credit institutions are interested in using cloud computing.

43 Are there specific legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

In the event a financial institution wishes to make use of cloud computing it has to notify the DNB of its intention to do so. Before making actual use of cloud computing the financial institution is required to develop a risk analysis, which has to be presented to the DNB. Since the DNB qualifies cloud computing as a specific type of outsourcing, the rules on outsourcing apply. Outsourcing is not allowed in cases where the outsourcing would obstruct the supervision of the outsourced activities or where the internal audit function would be negatively affected by the outsourcing of the activities. Furthermore, the financial institution is required to have adequate policy, proper procedures and possible actions to properly outsource on a structural basis.

44 Are there specific legal requirements or regulatory guidance with respect to the internet of things?

Besides the E-Privacy Directive (2002/58/EC) and the GDPR, there are no specific legal requirements or regulatory guidance with respect to the internet of things.

Tax

45 Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

There are no specific tax incentives applicable to fintech companies. However, there are some tax incentives to 'innovative' companies. The key incentives are set out below:

- WBSO (R&D payroll tax credit) – allows an employer to obtain a payroll tax refund of 16 to 40 per cent of the salary costs for the part

of the salary costs that an employer has paid to its employees who conduct R&D activities;
- innovation box – allows companies to have profits derived from qualifying intellectual property taxed at an effective corporate income tax rate of 5 per cent instead of the regular corporate income tax rate of 20 to 25 per cent; and
- costs incurred in connection with the development of intangible assets may immediately be fully depreciated – instead of capitalised and depreciated over a number of years.

A number of conditions must be met to qualify for each incentive.

Competition

46 Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction or that may become an issue in future?

Competition law (ie, the Dutch Competition Act and the EU competition rules in case of an effect on trade between the EU member states) applies to all undertakings carrying out business in the Netherlands, irrespective of their sector. Hence, the competition law rules (such as the prohibition of anticompetitive agreements, the prohibition of abuse of dominance and merger control) equally apply to fintech companies.

The ACM continuously monitors compliance with competition law by companies active in the financial sector. It has established a specifically designated research body, the Financial Sector Monitor (FSM). The FSM carries out economic research into the operation of the financial markets and analyses the risks to competition. In the monitoring reports published by the FSM, the ACM does not issue formal decisions within the framework of enforcement of the Dutch Competition Act. The aim is to share knowledge and insights with all interested parties within and outside the financial sector. The FSM has, for example, conducted studies in relation to barriers to entry in the Dutch retail banking sector and standard financial products. In its latest study it examines fintech developments in money transfers. In particular, the FSM is looking into the barriers that fintech companies are confronted with when competing with existing service providers and the risk of dominant networks or platforms for money transfers.

Furthermore, the ACM has specific regulatory powers under the FSA. These powers relate to the conditions imposed by payment system providers and interchange fees.

Like the AFM, the ACM is a member of the Consultation Forum of Regulatory Bodies (MTB), along with other regulators that focus on the functioning of markets and the behaviour of market participants (such as the DNB and the Data Protection Authority). The objective of the MTB is to have regulators join forces to deal with joint topics and issues, to share knowledge and exchange experiences about shared topics.

Financial crime

47 Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

In the event a fintech company is considered to be an institution as described in the Money Laundering and Terrorist Financing (Prevention) Act (MLTFA), the obligations under the MLTFA apply to that fintech company. The Act contains provisions regarding customer screening, identification and verification of customers, and the reporting of unusual transactions. An institution is obliged to conduct client research prior to the service. Institutions should apply all client research measures, but the intensity can be tailored to the risk of a particular type of client, relationship, product or transaction. With regard to unusual transactions, institutions are required to report such transactions (both actual and intended) to the Netherlands Financial Intelligence Unit. A list of indicators is used to assess whether a transaction is unusual and must be submitted.

48 Is there regulatory or industry anti-financial crime guidance for fintech companies?

There is no regulatory or industry anti-financial crime guidance especially for fintech companies. However, as mentioned in question 15, the AFM and DNB have set up the InnovationHub to support market operators such as fintech companies. Furthermore, the DNB has published a brochure entitled 'Good practices fighting corruption'.

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

A licence to pursue 'financial activities', as defined in Norwegian law, is granted by the Norwegian Financial Supervisory Authority (FSA). The licensing requirements applicable under Norwegian law are to a large extent based on the common EU financial legislation, including EU licensing requirements pursuant to directives and regulations such as the Capital Requirement Directive IV (CRD IV)/Capital Requirements Regulation and Markets in Financial Instruments Directive (MiFID).

To operate as a Norwegian 'financial institution', an institutional specific licence must be obtained from the FSA. The term financial institution, within the context of Norwegian statutory law, covers institutions pursuing business as banks, credit institutions, financing institutions (ie, institutions that grant credit, including financial leasing and factoring and invoice discounting), insurance companies, pension funds, payment service institutions and electronic money institutions.

In some respects, Norwegian licensing requirements are stricter than in several other jurisdictions; for example, 'financing activity', as such, is a licensed activity. The activity of 'financing' is understood as the activity of granting credit and issuing guarantees for one's own account (including financial leasing) and intermediation of credit and guarantees, and otherwise participating in the financing of activity other than one's own. As a rule, financing activity may only be carried out by institutions licensed as banks, credit institutions and financing institutions. There are some exceptions applicable, set out in the Financial Undertakings Act, section 2-1, covering, inter alia, certain other regulated entities and activities such as seller credit, isolated cases of financing and activity as financial agent or consultant.

In addition, there is a separate set of licensing requirements, to a large extent equal to the corresponding EU legislation, applicable to other finance-related activities, including investment services provided by investment firms, management of securities funds, activity as alternative investment funds (AIFs) and debt collection.

2 Is consumer lending regulated in your jurisdiction? Describe the general regulatory regime.

Yes, in addition to institutional requirements and requirements related to supervisory processes, the contractual part of financing arrangements, including consumer lending, is regulated by Norwegian statutory law.

In particular, requirements relating to consumer lending and guarantees and other security interests granted by a consumer as security for repayment of credit, are regulated in the Norwegian Financial Contracts Act. The Act is invariably in favour of consumers and sets out several requirements that the lending financial institution will have to comply with (the Act incorporates the EU Consumer Credit Directive, among others). As regards consumer lending, Chapter 3 sets out several compulsory requirements, relating to the form and content of credit agreements, information obligations, secondary trading of loans, amendments to the terms of credit agreements, default interest, repayment and termination, etc.

In addition, other Norwegian legislation and background law will apply, such as legislation on distance marketing of consumer financial services (incorporating Directive 2002/65/EC) and general principles of contract law.

3 Are there restrictions on trading loans in the secondary market in your jurisdiction?

A creditor may, as a general rule under Norwegian law, freely transfer its creditor position to a third party. Such right may, however, be limited by agreement between the parties.

If the creditor transfers its creditor position, there is no requirement of the debtor's consent prior to the transfer. However, if the debtor has not been notified of the transfer, and has no particular reason to otherwise be aware of the transfer, the debt may be repaid to the former creditor without any obligation on the debtor of repayment to the new creditor. Furthermore, notification of the debtor is also needed to legally perfect the transfer of the creditor positions.

In Norwegian legislation there are several provisions that affect loan transfers between professional lenders, including institutional regulations, such as a requirement that the new creditor legally must have the right to do banking business in Norway. Additional restrictions include, for example, the requirement for consent from the financial authorities for certain portfolio transfers; in particular transfers that constitute a substantial part of the activity of the selling institution.

In the Norwegian financial contract legislation there are also restrictions applicable to transfers. These restrictions apply, in particular, to transfer of loans granted to consumer debtors, including detailed requirements relating to information, consent and applicability of financial contracts legislation subsequent to the transfer.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would generally fall within the scope of any such regime.

Collective investment schemes and the management of such schemes are regulated by the Norwegian Securities Funds Act, which implements Undertakings for Collective Investment in Transferable Securities IV (Directive 2009/65/EC). Companies managing such funds must, according to the Act, obtain a licence from the FSA.

In general, Norwegian financial regulation focuses on the types of services provided, and not the company itself. Whether a fintech company falls within the scope of collective investment schemes will be decided by the authorities on a case-by-case basis.

5 Are managers of alternative investment funds regulated?

Yes, managers of AIFs are regulated by the Norwegian AIF Act, which seeks to implement the Alternative Investment Fund Managers Directive (Directive 2011/61/EU). The AIF Act contains provisions such as requirements relating to licensing, corporate governance and day-to-day management, capital requirements and marketing and disclosure requirements.

6 May regulated activities be passported into your jurisdiction?

As a European Economic Area (EEA) country, Norway allows licensed financial activity to be passported into Norway by way of cross-border service from another EEA or EU member state or by establishment of branch offices in Norway in accordance with and to the extent provided for in the relevant EU legislation. This means that a financial institution licensed within an EU or EEA state generally may provide their services in Norway to the same extent as in their home country

under the primary supervision of their home supervisors after having completed certain application or notification procedures, and provided that the proposed activities are covered by the passporting rights prescribed in the EU and EEA legislation. Some specific Norwegian legal requirements will, however, apply – the relevant institution being notified of such requirements as part of the start-up process in the Norwegian market.

It is notable that these passporting rights only apply to licensed EU and EEA-based institutions and only cover the mutually recognised activities provided for in the EU and EEA legislation. The first of these restrictions is the most limiting as it means that entities situated outside the EU and EEA area, and entities having their place of establishment within the EU and EEA area but that do not fit the requirements for being a regulated entity with passporting rights in accordance with the EU and EEA regulation, cannot provide their services by way of a cross-border or branch office in Norway. Such entities generally have to establish a new Norwegian institution or a subsidiary of the main institution – in both instances, the institution or subsidiary will be subject to all Norwegian law requirements such as licensing, capital requirements and other corporate legislation.

7 May fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

See question 6. If the institution is licensed as an institution subject to EU and EEA passporting rights in an EU or EEA member state and wants to pursue mutually recognised activities in Norway, the institution can provide such financial services without obtaining a separate Norwegian licence and establishing a local presence in Norway (on a cross-border basis) after having completed the notification procedures described in the relevant EU and EEA regulation. The most relevant type of institution being credit institutions pursuant to CRD IV are electronic money institutions and payment institutions. If such requirements are not fulfilled, the institution will have to obtain a Norwegian licence as a Norwegian separate financial institution or subsidiary, as described in question 6.

8 Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

There is currently no specific regulation on peer-to-peer or marketplace lending in Norway. The applicable regulations and licensing requirements are decided by the Norwegian authorities on a case-by-case basis.

An example of such consideration is a decision of 6 January 2015 from the Ministry of Finance (Trustbuddy AB). In this case, the institution was registered in Sweden as a financial institution, but had no licence and was not under the supervision of the Swedish Financial Supervisory Authority. The institution requested consumers (members) to make deposits to be lent to other consumers or members (peer-to-peer lending). The question was whether the company could operate in the Norwegian market without a licence. The Ministry of Finance concluded that the company provided loan brokerage services. The services did not meet the requirements in the Financial Undertakings Act, section 2-18, including licence requirements. In addition, the Ministry concluded that peer-to-peer lending services can be considered on the basis of other provisions of financial law. Hence, the offer could require a full banking licence. Furthermore, the Ministry concluded that regulatory requirements should also be considered in relation to other forms of crowdfunding.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

Thus far no new legislation or changes in the existing framework to adjust to the new form of financing have been adopted. Hence, the legal considerations relating to crowdfunding are based on general financial and company legislation on a case-by-case basis. The Norwegian financial authorities stated in a decision of 6 January 2015 that crowdfunding could require a licence from the FSA – see question 8.

10 Describe any specific regulation of invoice trading in your jurisdiction.

There is no specific regulation of invoice trading platforms in Norway. The service will currently be considered on a case-by-case basis by the Norwegian financial authorities. Invoice trading can be considered to be within the scope of 'factoring', which is regulated in the Financial Undertakings Act, and requires a licence from the FSA.

11 Are payment services a regulated activity in your jurisdiction?

Yes, to provide payment services, undertakings must obtain a licence from the FSA according to the Financial Undertakings Act. The Norwegian payment services provisions thereunder correspond to EU legislation, including the Payment Services Directive and the Payment Account Directive.

Payment services activities requiring a licence also include cash deposits into accounts and cash withdrawal from accounts, debit or credit account transactions, issuance of payment instruments, money transfer and online payment transactions. In general, the licence from the FSA covers one or more of the services above. In addition, a limited licence can be obtained for companies operating with money transfer services only.

Furthermore, the Financial Contracts Act regulates the relationship between the undertaking and its customers. The provisions of the Act are mandatory when providing payment services to consumers.

12 Do fintech companies that wish to sell or market insurance products in your jurisdiction need to be regulated?

There are currently no specific provisions in Norway for fintech companies that wish to sell or market insurance products. However, the EU Insurance Distribution Directive will have to be implemented in Norwegian law by 23 February 2018 and may have an impact on fintech companies' sale of insurance products.

13 Are there any legal or regulatory rules in your jurisdiction regarding the provision of credit references or credit information services?

Yes, this is regulated in the Norwegian Personal Data Regulations (PDR), which have been adopted pursuant to the Norwegian Personal Data Act (PDA).

Credit information service providers must apply for a licence from the Norwegian Data Protection Authority (DPA). The licence sets out rules with respect to the activities carried out by the credit information agency that supplement the rules set out in the PDR, especially with respect to what kind of information can be held by the agency.

The main requirement in the PDR with respect to credit information services is that credit information shall not be disclosed unless the enterprise requesting such information has an objective need for the information. An objective need is typically categorised as the enterprise in question undertaking a substantial financial risk in connection with entering into an agreement with a customer. However, in practice, it is the enterprise requesting the credit information that must ensure it has an objective need and a legal basis for obtaining and using the information. The credit information agency shall, according to the licence, inform the enterprise requesting the credit information about the 'objective need' requirement.

Credit information agencies are obliged to send a copy to the person or enterprise for which the agency has disclosed credit information to a third party.

A peculiarity with respect to the Norwegian rules in this area of law is that the rules apply to both consumers and enterprises (ie, the requirements with respect to obtaining credit information about enterprises and consumers are the same).

14 Are there any legal or regulatory rules in your jurisdiction that oblige financial institutions to make customer or product data available to third parties?

The revised Payment Service Directive (PSD2), which will be in force from 13 January 2018, will require all financial institutions to offer open APIs and make product data available to third parties. Such rules will eventually have to be implemented in Norwegian law.

15 Does the regulator in your jurisdiction make any specific provision for fintech services and companies? If so, what benefits do those provisions offer?

There is currently no specific provision in Norway for fintech services and companies. However, IKT-Norge (the Norwegian interest group for the ICT sector) is currently drafting a report in respect of a potential

sandbox initiative, which shall be delivered to the Finance Ministry in Q4 2017.

16 Does the regulator in your jurisdiction have formal relationships or arrangements with foreign regulators in relation to fintech activities?

There are currently no formal relationships or arrangements with foreign regulators in relation to fintech activities in Norway.

17 Are there any local marketing rules applicable with respect to marketing materials for financial services in your jurisdiction?

Yes, there are several provisions on marketing of financial services in Norway. The marketing legislation applicable under Norwegian law is based on EU legislation, including the Directive on distance marketing of consumer financial services.

In particular, marketing of credit agreements is comprehensively regulated in the Financial Contracts Act corresponding to the EU Consumer Credit Directive, and contains information requirements on, among others, maturity, costs and prices. The information also has to be presented through a representative example. The provisions of the Act are mandatory for services provided to consumers. The legislation on marketing of investment services is regulated in the Securities Trading Regulations, including information requirements on costs and prices. The provisions largely correspond to EU legislation, including MiFID.

If the services are offered through distance marketing, there are relevant financial marketing provisions in the Norwegian Cancellation Act corresponding to Directive 2011/83/EU on Consumer Rights.

18 Are there any foreign exchange or currency control restrictions in your jurisdiction?

Norway has a deregulated currency market and there are presently no currency exchange restrictions in Norway. The Norwegian Currency Control Act still provides an option for the authorities to enact restrictions on currency exchange. However, there are currently no indications that would suggest such actions.

19 If a potential investor or client makes an unsolicited approach either from inside the provider's jurisdiction or from another jurisdiction, is the provider carrying out a regulated activity requiring a licence in your jurisdiction?

In the event of an unsolicited direct approach from an investor or client within Norway to a provider located outside of Norway, the provider is not considered to carry out a regulated activity in Norway that requires a licence in Norway pursuant to the non-statutory principle of 'first approach', as applied by the FSA.

20 If the investor or client is outside the provider's jurisdiction and the activities take place outside the jurisdiction, is the provider carrying out an activity that requires licensing in its jurisdiction?

If the Norwegian institution is providing cross-border services in another EU or EEA member state, the institution must notify the FSA, who in turn will notify the host member state according to the Financial Undertakings Act. If the Norwegian institution is providing services to a non-EU or EEA country, the Financial Undertakings Act contains requirements to obtain permission from the Ministry to establish a branch or subsidiary in the non-EU or EEA country. In addition, local legislation in the host country will apply.

From a data protection point of view, the provider will need a licence from the Norwegian DPA if there is an establishment in Norway carrying out activities which involve processing of personal data, irrespective of whether the data relates to Norwegian or foreign clients. The licence requirement only applies to 'controllers' in the sense of data protection law.

21 Are there continuing obligations that fintech companies must comply with when carrying out cross-border activities?

If a fintech company has obtained a licence for cross-border services from the FSA, the Authority will inform the company of all initial and continuing obligations. The Financial Undertakings Act sets out certain general obligations, including requirements on employment, remuneration and partialities of management and other employees, as well as customer confidentiality. In addition, ongoing obligations cover restrictions on transfer of portfolios, pricing, product packaging and information requirements.

22 What licensing exemptions apply where the services are provided to an account holder based outside the jurisdiction?

There are no specific licensing exemptions in Norway regarding offshore accounts. The deciding factor as to the applicability of the licence requirements are where the services are marketed and provided. Hence, if the offshore account is provided through a Norwegian institution, which intends to provide financial services in the Norwegian market, the licence will be required on the basis of these marketing and services intentions.

Distributed ledger technology

23 Are there any legal or regulatory rules or guidelines in relation to the use of distributed ledger (including blockchain) technology in your jurisdiction?

No.

Digital currencies

24 Are there any legal or regulatory rules or guidelines in relation to the use of digital currencies or digital wallets, including e-money, in your jurisdiction?

There are no legal or regulatory rules or guidelines in relation to the use of digital currencies or digital wallets (including e-money) in Norway. However, these products and services are partly covered and regulated by law and regulation applicable to electronic payment transfers and the payment system participants in general, such as (but not limited to) the Financial Contracts Act, the Financial Undertakings Act, the Payment System Act, the PDA and the Electronic Signature Act.

Securitisation

There is currently no Norwegian regulation on securitisation. As a consequence of this, the special purpose vehicles acquiring loans in a securitisation transaction will be subject to the general licensing requirements described above, provided the debtors are resident in Norway, irrespective of whether the special purpose vehicle is domiciled abroad.

25 What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

Executing loan agreements could in certain instances be considered to fall within the scope of providing credit, which requires a licence from the FSA. See questions 8 and 9.

There is currently no Norwegian regulation on securitisation.

26 What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected?

Not applicable.

27 Is it possible to transfer loans originated on a peer-to-peer or marketplace lending platform to the purchaser without informing the borrower? Does the assignor require consent of the borrower or are the loans assignable in the absence of a prohibition?

Not applicable.

28 Would a special purpose company for purchasing and securitising peer-to-peer or marketplace loans be subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

Not applicable.

Intellectual property rights

29 Which intellectual property rights are available to protect software, and how do you obtain those rights?

Software may be protected to a limited degree by patent protection through registration with the Norwegian Industrial Property Office. Software may be further protected by copyright (program codes, interfaces and documentation) if the software has originality (artistic features and distinctiveness). This protection is obtained when the originality requirement is fulfilled.

Software is also available for protection under the Circuit Designs Act if the software consists of circuit design that fulfils the requirements of being the creator's own intellectual effort and is not common within the industry. Software can also be protected as a trade secret, if it falls under the definition of trade secret (ie, information that derives independent economic value by virtue of not being generally known, and of which the owner takes reasonable measures to protect). Further, if a name is put on the software, the name can be registered as a trademark. Lastly, if the software is included in special displays, products or parts of products with distinctive appearance or form, it may be registered as a design and have design protection.

30 Is patent protection available for software-implemented inventions or business methods?

Yes, patent protection is available to a limited degree for software-implemented inventions. Software that controls physical processes or processes physical signals is regarded as a patentable invention. It is further possible to get patent protection for software that controls a technical function in order to make a computer faster, increase memory capacity or increase its security. This presupposes that the software fulfils certain criteria: the patentability requirements.

The patentability requirements are that the software is novel, involves an inventive step and that it is industrially useful (is of technical nature, has a technical effect and is reproducible). Patent protection is not available for business methods, unless they are used in an invention that fulfils the patentability requirements

31 Who owns new intellectual property developed by an employee during the course of employment?

In general, employees retain the rights to patentable inventions, regardless of whether they were developed during the regular course of employment. However, ownership rights may be allocated in accordance with the employee contract. The employee will always have a right to a reasonable remuneration when assigning patent rights. It is, however, noted that it is generally hard to predefine general remuneration schemes, as the potential value of a specific invention might render the employee's ordinary salary (or specifically pre-negotiated remuneration for one or more inventions) inadequate. As such, remuneration should be agreed between the employer and employee following (ie, after) the creation of each invention.

For copyrights created by an employer in the course of employment, the general rule is that the rights are allocated to the employer to the extent necessary to carry out the purpose of the employment. Any rights exceeding this threshold are retained by the employee. As with patents, rights may always be assigned by virtue of IPR clauses in the employment agreement (or other agreements). In particular for copyrights, it is important to encompass specific provisions pertaining to the employer's right to transfer, make changes, and use the materials in all mediums.

There is a special section in the Copyright Act relating to software created in the course of employment, in which there is a presumption that all rights are assigned to the employer, unless a contract between the parties states otherwise. As for designs, the general rule is that the employee retains all rights and any allocation to the employer must be regulated by contract.

32 Do the same rules apply to new intellectual property developed by contractors or consultants? If not, who owns such intellectual property rights?

In general, yes. When intellectual property is developed by contractors or consultants, the intellectual property rights stay with the contractor or consultant, unless transfer of rights is agreed upon in the contract.

33 Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

In the absence of an agreement stating otherwise, there are generally no restrictions on joint owners using the IPR for its intended (or current) purpose in accordance with the applicable ownership stake. The same applies in relation to assigning such stake. Normally, the majority holders (if more than two equal holders) may decide licensing and other particular (and irregular) uses of the IPR.

It is recommended to record licences and assignments with the Norwegian Intellectual Property Office (in relation to patents, trademarks and designs) to avoid issues with potential future third-party rights claims.

34 How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

Trade secrets are protected by statutory provisions, non-statutory principles and by competition clauses. Section 207 of the Criminal Code prohibits the use of trade secrets for the purposes of utilising them for the benefit of a competing company and for sharing it with someone else with the intent of enabling that person to take advantage of said trade secrets.

Trade secrets are also protected by sections 25, 28 and 29 of the Norwegian Marketing Control Act. Further, there is a non-statutory loyalty obligation that exists between parties in employment relationships, which requires the parties to be considerate of the party's business interests. Finally, competition and non-disclosure clauses in contracts are commonly used for protecting trade secrets. During court proceedings, trade secrets are kept confidential from parties that may benefit from accessing them.

35 What intellectual property rights are available to protect branding and how do you obtain those rights?

Norwegian trademark law protects brands (ie, product or business names, logos or slogans). Trademark rights are primarily obtained by submitting trademark applications with the Norwegian Industrial Property Office. Unregistered marks are also protected to the extent the trademark holder can prove acquired distinctiveness (ie, that a sufficient portion of the relevant consumer segment associates a particular product or service with a particular actor).

Design protection is available for certain designs through registration. In addition, the Norwegian Marketing Control Act provides protection from acts that are contrary to good business practice, including in the event of a risk of confusion between business concepts for concepts, ideas or methods that have been tested in practice.

36 How can new businesses ensure they do not infringe existing brands?

Businesses may check the Norwegian Industrial Property Office's online database for any public information related to Norwegian trademarks and trademark applications: https://search.patentstyret.no. Businesses may also check the Brønnøysund Register Centre to see whether the name is in use as a business name: www.brreg.no. It is possible to check whether a domain name is registered at www.norid.no.

On 16 March 2017, a new and separate service was unveiled (in joint cooperation between the .no domain registry (NORID), Brønnøysund Register Centre and the Norwegian Industrial Property Office) that enables businesses to concurrently check the status of domain names (.no), business names and trademarks; see www.navnesok.no.

Further, new businesses can contact the Norwegian Industrial Property Office and ask the office to carry out a confidential prior investigation, which involves a search for existing brands in national and international databases.

37 What remedies are available to individuals or companies whose intellectual property rights have been infringed?

The remedies available to the rights holder in civil cases regarding violations of intellectual property rights vary from injunctions (often temporary injunctions in order to stop the infringement as soon as possible) to compensation for economic losses. Persons violating third-party intellectual property rights may face imprisonment, fines or confiscation.

Update and trends

A trend in Norway is that instead of start-ups growing to become a threat to incumbents and compete head on with them, the incumbents instead team up with or acquire start-ups at an early stage. This has much to do with the start-ups needing to access customers and revenue rather quickly in order to survive. The incumbents have the customers and the revenue stream, and the start-ups get access to the customers by teaming up with the incumbents, and the incumbents do not have to be concerned about developing the technology internally.

We are also seeing the development of electronic payment apps where you can transfer funds directly to your friends (a peer-to-peer payment solution) online or use for in-store payments. A recent development in this market is that a large group of banks have dropped their own electronic payment app 'MCash' to join DNB in promoting their electronic payment app 'Vipps' as 'the whole of Norway's mobile wallet'.

Another trend that we have seen recently is that companies needing to carry out credit checks of their customers are no longer satisfied with obtaining information solely from traditional credit information agencies. It has, over the past few years, become common to establish in-house databases for prediction of financial risks associated with customers and to buy information from third parties specialising in big data. We can see an emerging trend of 'you pay as you live' as a consequence of the big data industry within the banking and finance sector.

38 Are there any legal or regulatory rules or guidelines surrounding the use of open-source software in the financial services industry?

No, there are no special legal or regulatory rules or guidelines regarding the use of open-source software in the financial services industry. However, the use of open-source software in the financial services industry will be a part of the risk analysis required by the Norwegian ICT Regulations.

Data protection

39 What are the general legal or regulatory requirements relating to the use or processing of personal data?

Norway has implemented the EU Data Protection Directive (95/46/EC). The Norwegian Personal Data Act sets out the general rules in this area and more detailed requirements are set out in a Regulation to this Act. Norway will implement EU Regulation 2016/679 (GDPR) in May 2018.

Sectorial laws sometimes specify or supplement the general data protection legislation. The future fate of existing sectorial laws and regulations is, however, uncertain because of the implementation of the GDPR.

Typical data protection requirements relate to having a legal basis for processing personal data, to ensure data is only processed for legitimate purposes, ensuring data quality and satisfactory information security, and that the controller is able to demonstrate compliance with basic data protection principles. The controller must also enter into necessary agreements when data is processed by a processor on behalf of the controller and if data is transferred to a country outside the EU and EEA.

40 Are there legal requirements or regulatory guidance relating to personal data specifically aimed at fintech companies?

The Norwegian ICT Regulations are central is this respect. The ICT Regulations apply to, inter alia, banks and financial enterprises, payment enterprises, e-money enterprises and other payment service systems, and is accordingly applicable to most fintech companies. The ICT Regulations supplement requirements in the general data protection legislation with respect to, in particular, information security obligations. In summary, the Regulation imposes more comprehensive obligations on the enterprises with respect to the implementation of procedures and documentation. The ICT Regulations set out additional requirements with respect to outsourcing of ICT systems. The enterprises must enter into an agreement with the supplier, giving both the enterprise and the FSA audit rights.

41 What legal requirements or regulatory guidance exists in respect of anonymisation and aggregation of personal data for commercial gain?

Big data and profiling has been a preferred area of the DPA. The DPA has issued two reports on the matter over the past five years; 'Big Data – privacy principles under pressure 2013' and 'The great data race 2016'. Both reports are available in English on the DPA's homepage (www.datatilsynet.no). In these reports, the DPA points out the risk of reidentification in relation to the use of big data sets, and requires enterprises to implement the necessary measures to protect data from misuse. The DPA highlights, among other things, privacy by design and procedures for robust anonymisation as adequate means to protect data from misuse and calls for action when it comes to providing consumers with a real choice to object to profiling, etc.

Cloud computing and the internet of things

42 How common is the use of cloud computing among financial services companies in your jurisdiction?

The use of cloud computing is increasingly common among financial services companies in Norway. Owing to strict legislation and practices from the DPA and the FSA, some enterprises have been reluctant to make use of cloud computing services. However, clarifications have been made over the past few years that have made it easier for financial service companies to use the cloud.

43 Are there specific legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

The Norwegian ICT Regulations are central in this respect. The ICT Regulations apply to the financial services industry and set out additional requirements (in addition to general data protection requirements) with respect to outsourcing of ICT systems (section 12). Enterprises covered by this Regulation must enter into an agreement with the supplier that gives both the enterprise and the FSA audit rights with respect to the activities carried out by the supplier under the agreement.

The use of cloud computing is generally subject to stricter requirements in the banking and finance sector compared to most other sectors. This is because of the amount of confidential information processed in this sector. The enterprise must carry out a risk assessment that shows that the risk associated with the outsourcing is acceptable. The DPA will generally require more of a risk assessment when considerable amounts of sensitive or confidential data is brought to the cloud.

44 Are there specific legal requirements or regulatory guidance with respect to the internet of things?

The internet of things challenges many basic data protection principles, including the consumers' right to control personal data about themselves and the use of consent as legal basis for processing personal data. There are, however, no specific rules relating to this matter, but the DPA has shown considerable interest in the subject and has published a report on the issue. (The report is unfortunately not available in English.) In the report, the DPA highlights the importance of transparency, but beyond that the report contains little practical guidance on the matter.

Tax

45 Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

There are no Norwegian tax incentives aimed specifically at fintech companies.

SkatteFunn is a tax incentive programme available in principle to all taxpayers – not just fintech companies – under which a tax credit is available for costs related to certain R&D projects that have been pre-approved by the Research Council of Norway. Approved projects may receive a tax deduction of up to 18 per cent (20 per cent for small and medium-sized enterprises) of eligible costs related to R&D activity. To qualify as R&D any activity must meet the definitions set out by the Research Council. If the tax deductions for the R&D expenses are greater than the amount the company is liable to pay in tax, the

remainder is paid in cash to the company. If the company has no tax payable the entire allowance is paid in cash. The maximum annual tax credit is 25 million kroner per year (50 million kroner in certain circumstances where the company procures R&D services produced by an external research institution which is approved by the Research Council).

New rules were introduced in 2017 whereby investors can claim tax deductions for long-term equity investments in start-ups. The rules apply to investors in all (qualifying) start-ups – not just fintech companies. According to the new rules long term investments by private individuals are tax-deductible in their ordinary taxable income, limited to an investment amount of 500,000 kroner per year. The tax deduction is available to the individual investor even of the investment is made through the investor's personal holding company. The investment is regarded as 'long term' when the shares are held for a minimum of three years after the end of the year in which the shares were acquired. To qualify as a start-up under the tax incentive scheme, the company (i) must have been incorporated no more than six years ago; (ii) must have fewer than 25 employees (and at least one); and (iii) both the annual operating income and the balance sheet amount must be less than 40 million kroner. A company may not receive more than 1.5 million kroner in tax-deductible investments per year.

Competition

46 Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction or that may become an issue in future?

To date, there have not been any fintech-specific antitrust cases in Norway. Payment card systems have been informally investigated by the Norwegian Competition Authority, but the case was pending the implementation of the EU Regulation on interchange fees for card-based payment transactions. This regulation was implemented in Norwegian law on 27 June 2016.

The Norwegian Competition Act (NCA) supplements the Payment System Acts (PSA) in addressing competition issues with respect to financial infrastructures. The PSA protects several objectives such as financial stability and competition. Competition is protected by, inter alia, certain provision regarding non-discriminatory access to financial infrastructures. The PSA is enforced by the Central Bank of Norway. As the Central Bank's main concern is financial stability, it could be speculated that competition might be sacrificed for the benefit of stability if these objectives are in conflict with the enforcement of the PSA.

As in the EU, and contrary to the US, there is no precedent stating that the competition law must give way in areas addressed by sector-specific regulations. Hence, there is a role for the Competition Authority to protect competition concerns in financial infrastructures. The NCA seems to be progressive in pursuing competition concerns in the financial sector. For instance, the Director General of Competition recently criticised the financial regulators for not harmonising bank capital requirements with EU levels.

As fintech companies are challenging established financial institutions, we expect to see competition cases when the established institutions take action to protect their market shares. Our opinion is that the Competition Authority will not hesitate to intervene in the financial sector to protect competition.

On 25 October 2016, the EFTA Surveillance Authority (ESA) decided to initiate proceedings against the banks DNB and Nordea, the industry organisation Finance Norway, including its subsidiary Bits AS, and BankID Norge AS. According to ESA's public fact sheet, the background of the investigations is a complaint from the Swedish provider of online payment solutions, Trustly. The involved companies had allegedly blocked Trustly from providing its payment initiation services in Norway. Trustly's services would allow customers to perform online payments directly from a bank account. The case is still pending.

Financial crime

47 Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

Financial institutions are required to comply with Norwegian money laundering laws (Money Laundering Act and Money Laundering Regulations) and EU directives. Currently, the government has established a committee that is considering new legislation in accordance with international recommendations and the expected EEA rules corresponding to the Fourth EU Anti-Money Laundering Directive. Furthermore, Norway is a member of the Financial Action Task Force (FATF). Norwegian regulations are based on recommendations from the FATF.

In Norway, the institutions are required to establish internal routines to prevent money laundering and terror financing. The institutions are also required to establish routines for reporting and internal control and communication procedures in accordance with the legislation.

48 Is there regulatory or industry anti-financial crime guidance for fintech companies?

The FSA has published a circular (Circular 8/2009) providing detailed information for institutions on anti-money laundering legislation (such as fintech companies) when carrying out customer due diligence.

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

Lending may be a licensable activity, depending on the type of loan facility (see question 2). Whereas 'credits' may only be provided by credit institutions, ordinary loans can be provided by any entity. However, there is a risk that the activity of issuing ordinary loans on a regular basis may be characterised as a professional activity requiring a credit institution licence or registration as a microfinance organisation.

Deposit-taking is a licensable activity which requires a credit institution licence.

Foreign exchange trading and foreign exchange dealing are licensable activities which require a credit institution licence and a professional securities market participant licence, respectively.

Certain payment services are licensable in the jurisdiction (eg, money transfer and settlement centre operations).

Dealing in investments may require a licence when the relevant operations can only be performed by a broker, dealer or another professional securities market participant.

2 Is consumer lending regulated in your jurisdiction? Describe the general regulatory regime.

Yes. Russian law distinguishes between two types of loan facilities: (i) 'credits', which can be provided exclusively by credit institutions; and (ii) loans, which can be provided by all entities generally.

Consumer credits and loans in the jurisdiction are credits and loans granted by credit institutions and non-credit financial organisations to individuals on a regular basis for purposes not connected with entrepreneurial activities. Consumer credits and loans are deemed to be provided on a regular basis if issued no less than four times during a calendar year (paragraph 5, section 3.1, Federal Law on Consumer Credit (Loans)). However, most provisions of the Federal Law on Consumer Credit (Loans) do not apply to consumer credits or loans secured by mortgage of immoveable property: the latter are regulated by mortgage-specific legislation. The law sets out particular requirements relating to the terms of a consumer credit or loan agreement (eg, the requirement to state the full cost of a consumer credit or loan to the borrower) and its form (eg, the requirement to present certain terms of the agreement in a consumer-friendly table format).

3 Are there restrictions on trading loans in the secondary market in your jurisdiction?

No.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would generally fall within the scope of any such regime.

Collective investment schemes under Russian law

Russian law recognises a number of collective investment schemes regulated by dedicated laws. The key vehicles used for the purposes of collective investment are: unit investment funds, joint-stock investment funds (both are regulated by the Federal Law on Investment Funds), non-state pension funds (regulated by the Federal Law on Non-State Pension Funds), and investment partnerships (regulated by the Federal Law on Investment Partnership).

Joint-stock investment funds and non-state pension funds are legal entities organised in the form of a joint-stock company. Both of these types of funds require a special licence issued by the regulator (Bank of Russia). The law specifies, among other things, the minimum amount of capital such funds must possess.

Unlike joint-stock investment funds and non-state pension funds, a unit investment fund is not a legal entity and consists of an isolated group of assets contributed by the founding parties.

An investment partnership is not a legal entity, but rather a joint undertaking by several organisations (not exceeding 50 in number) to combine their contributions and conduct agreed investment activities. Individuals cannot be parties to an investment partnership. Recent changes to the Federal Law on Investment Partnership added extra flexibility to this form of collective investment (inter alia, by extending the range of permissible investment activities) to increase its attractiveness among prospective investors.

Unit investment funds and joint-stock investment funds must at all times utilise a separate entity (manager) to manage the assets of the fund. Non-state pension funds must utilise a separate entity to act as the manager when investing in certain types of assets. The investment of funds contributed by the partners of an investment partnership is carried out by the managing partner.

Unit investment funds, joint-stock investment funds and non-state pension funds are subject to mandatory information disclosure and annual audit obligations.

Whether or not a fintech company falls under any of the above categories would depend on the particular company: for example, a legal entity will not qualify as a unit investment fund; similarly, a legal entity that is not organised as a joint-stock company under Russian law will not qualify as a joint-stock investment fund or a non-state pension fund.

Foreign collective investment schemes in Russia

While there is no specific regulation applicable to foreign collective investment schemes, non-Russian fintech companies should note the following general restrictions that might become relevant in accessing the local market:

- Foreign financial instruments may not be offered to the public (ie, to an unlimited number of persons), as well as to persons not falling into the category of qualified investors (as defined in Russian law), unless they meet the criteria for public placement or public distribution in the jurisdiction (section 51.1, Federal Law on the Securities Market).
- There is a general prohibition on non-Russian organisations (as well as their representative offices and branches in Russia) marketing the services of foreign financial organisations and/or distributing information about such organisations and their activities to the public in Russia (paragraph 6.1, section 51, Federal Law on the Securities Market). In the absence of statutory clarification, counsel are of the view that the term 'to the public' should cover all instances when information is made available in a manner that permits any person to access such information.

5 Are managers of alternative investment funds regulated?

Managers of Russian collective investment schemes are regulated: they must obtain a special licence issued by the regulator (Bank of Russia) and comply with additional requirements (eg, maintain a minimum capital). Managing partners of an investment partnership do not require a special licence to run the joint business of the partnership.

There is no specific regulation of managers of foreign collective investment schemes. Nonetheless, managers should note the general prohibition on the offering of financial services and distribution of corresponding information to the public by foreign organisations (see question 4). In addition, foreign organisations may not engage in activities of non-credit financial institutions (eg, discretionary investment management or management of Russian investment funds) on the territory of Russia (paragraph 6.1, section 51, Federal Law on the Securities Market).

6 May regulated activities be passported into your jurisdiction?

No.

7 May fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

No.

8 Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

There is no specific peer-to-peer or marketplace lending regulation in the jurisdiction. Standard provisions regulating lending activities should apply.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

There is no specific regulation of crowdfunding in the jurisdiction. However, the following provisions may impact crowdfunding activities in the jurisdiction.

Equity-based crowdfunding may be problematic due to the limited maximum number of participants in a limited liability company (50) and limited partners in a limited partnership (20), as well as other limitations and statutory obligations relating to various types of legal entities (eg, public disclosure rules).

While there are no instruments specific to reward-based crowdfunding, parties may rely on the principle of freedom of contract (section 421, Civil Code), the newly introduced concept of conditional performance of obligations (section 327.1, Civil Code), as well as existing legal constructs, such as loan agreement, purchase and sale agreement and services agreement.

Donation-based crowdfunding can utilise the concept of donation contract (sections 572 to 582, Civil Code). Among other things, the law prohibits donations exceeding 3,000 roubles when such donations (i) are made by persons under 14 years old or persons lacking legal capacity, or (ii) are between commercial legal entities.

10 Describe any specific regulation of invoice trading in your jurisdiction.

There is no specific regulation of invoice trading in Russia. Parties may rely on the general provisions of the Civil Code governing factoring transactions, which may be conducted either on a recourse or non-recourse basis (paragraph 3, section 827, Civil Code), and the principle of freedom of contract (section 421, Civil Code).

11 Are payment services a regulated activity in your jurisdiction?

Yes. The primary source of regulation is the Federal Law on the National Payment System.

12 Do fintech companies that wish to sell or market insurance products in your jurisdiction need to be regulated?

Insurance activities in Russia can be carried out only by licensed companies.

The term 'marketing' is not defined by Russian law, which instead uses the term 'advertising', defined as information, distributed in any way, form and by any means, which is addressed to the general public and designed to attract attention to an object of advertising, to form or maintain an interest in it or to promote it on the market.

Advertisement of banking, insurance and other financial services without a requisite licence, permission or accreditation for carrying out these activities is prohibited. Therefore, fintech companies that wish to market insurance products must hold the appropriate licence.

13 Are there any legal or regulatory rules in your jurisdiction regarding the provision of credit references or credit information services?

The Federal Law on Credit Histories regulates the formation and contents of credit histories in Russia, as well as the business of specialised entities authorised to form, process, store and provide access to credit histories – credit history bureaus. A credit history comprises information on individuals and legal entities relating to the performance of various obligations, such as loan repayments, communal and tenancy debts. The Bank of Russia maintains a registry of all credit history bureaus. The latter cannot operate unless included in such registry.

14 Are there any legal or regulatory rules in your jurisdiction that oblige financial institutions to make customer or product data available to third parties?

None.

15 Does the regulator in your jurisdiction make any specific provision for fintech services and companies? If so, what benefits do those provisions offer?

We are not aware of any fintech-specific provisions made by the regulator in the jurisdiction.

16 Does the regulator in your jurisdiction have formal relationships or arrangements with foreign regulators in relation to fintech activities?

The Bank of Russia has held a number of meetings with foreign regulators involving, among other things, fintech activities. However, we are not aware of any formal fintech-specific arrangements similar to the UK FCA's 'fintech bridges'.

17 Are there any local marketing rules applicable with respect to marketing materials for financial services in your jurisdiction?

There is an advertising prohibition in Russia applicable to all financial products and services the production or distribution of which requires a licence. If no licence is obtained for the production or distribution of such products or services, then no advertising of such products or services is allowed (paragraph 14, section 28, Federal Law on Marketing).

In addition, there is a general prohibition on non-Russian organisations marketing the services of foreign financial organisations or distributing information about such organisations and their activities to the public in Russia (paragraph 6.1, section 51, Federal Law on the Securities Market). In the absence of statutory clarification, the term 'to the public' should cover all instances when information is made available in a manner that permits any person to access such information.

18 Are there any foreign exchange or currency control restrictions in your jurisdiction?

There are no restrictions on the Russian national currency, the rouble: it is freely convertible and exportable. There are no restrictions on Russian residents having offshore bank accounts, other than that state officials cannot have accounts with foreign banks and certain disclosure obligations exist for holders of offshore bank accounts.

Foreign entities can freely make payments in local and foreign currencies from their accounts opened in local or foreign banks to the counterparties to their accounts opened in foreign or local banks.

Counterparties may use their accounts opened in licensed Russian banks or accounts opened in foreign banks for payments in local or any other currency from or to a foreign entity. Payments exceeding the equivalent of US$50,000 would trigger certain formalities if the payment is made via Russian banks (passport of a transaction).

FX contracts can only be entered into with the Russian licensed banks and non-banking licensed credit organisations.

Russian currency control legislation is effective in the territory of the Russian Federation and may be applicable to transactions of Russian residents (as defined in the Federal Law on Currency Regulation and Currency Control) regardless of the place of the relevant transaction.

However, Russian law provides certain restrictions on the use of foreign bank accounts by Russian residents. Russian currency control legislation provides for a limited list of legal grounds under which monetary funds may be credited to a bank account opened by a resident with a foreign bank. Such grounds are explicitly mentioned in the Russian currency control legislation. Russian residents are free to withdraw funds from their foreign bank accounts, provided these funds were lawfully credited to such bank accounts.

19 If a potential investor or client makes an unsolicited approach either from inside the provider's jurisdiction or from another jurisdiction, is the provider carrying out a regulated activity requiring a licence in your jurisdiction?

Russian legislation does not currently recognise the concept of 'unsolicited approach'. Therefore, if the relevant activity is licensable, then the provider of such activity will require a licence regardless of whether the potential investor or client approaches such provider first.

20 If the investor or client is outside the provider's jurisdiction and the activities take place outside the jurisdiction, is the provider carrying out an activity that requires licensing in its jurisdiction?

In this scenario the provider should not be deemed to be carrying out a licensable activity in the jurisdiction if each of the investor, the client and the provider is located outside the jurisdiction.

21 Are there continuing obligations that fintech companies must comply with when carrying out cross-border activities?

Fintech companies must comply with the marketing requirements (see question 17).

22 What licensing exemptions apply where the services are provided to an account holder based outside the jurisdiction?

None.

Distributed ledger technology

23 Are there any legal or regulatory rules or guidelines in relation to the use of distributed ledger (including blockchain) technology in your jurisdiction?

No.

Digital currencies

24 Are there any legal or regulatory rules or guidelines in relation to the use of digital currencies or digital wallets, including e-money, in your jurisdiction?

There are dedicated provisions in the legislation regulating transfer of money. Russian law uses the term 'electronic means of payment' to cover all methods of money transfer via electronic communication networks, electronic data storage devices (including payment cards) and other technical devices. This definition should cover mobile wallets.

Electronic means of payment can be used only on the basis of an agreement between the money transfer operator (a credit institution) and the client or an agreement between several money transfer operators.

Russian law sets out detailed provisions regulating the usage of electronic means of payment.

Securitisation

25 What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

Russian law distinguishes between two types of loan facilities: (i) 'credits', which can be provided exclusively by credit institutions; and (ii) loans, which can be provided by all entities generally.

The key requirements for executing credit agreements are: (i) written form (section 820, Civil Code); (ii) credit amount (paragraph 1, section 819, Civil Code); and (iii) term and manner of repayment (paragraph 1, sections 810 and 819, Civil Code). The key requirements for executing loan agreements are: (i) written form, when such agreements are made between individuals and the loan amount exceeds 1,000 roubles, or when loans are provided by legal entities; and (ii) term and manner of repayment (paragraph 1, section 810, Civil Code). If a credit or a loan is provided to a consumer, they must comply with additional detailed requirements, such as the layout of certain provisions and the stipulation of full price of the credit or loan (sections 5 and 6, Federal Law on Consumer Credit (Loans)).

Russian law recognises several types of security instruments, including but not limited to pledge (sections 334 to 358.18, Civil Code), suretyship (sections 361 to 367, Civil Code), independent guarantee (sections 368 to 379, Civil Code), down payment (sections 380 to 381, Civil Code), and agreed and liquidated damages (sections 330 to 333, Civil Code). All of these types of security instruments must be concluded in writing.

Failure to meet the above key requirements may result in such agreements and instruments (whether entered on a peer-to-peer or marketplace lending platform) being unenforceable. To comply with the written form requirement parties may exchange electronic documents; however, such exchange must be made through lines of communication that allow the party from which such documents originate to be reliably identified (section 434, Civil Code). The law does not currently provide clear guidance as to which means of communication meet such criteria.

26 What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected?

Assignment of loans (and credits) provided under a written contract must be made in writing (paragraph 1, section 389, Civil Code). In order to perform assignment, the assignor must ensure that: (i) the assigned claim has come into existence at the moment of its assignment, unless it is an assignment of a future claim; (ii) the assignor has the right to perform the assignment; (iii) the assigned claim has not been previously assigned to another person; and (iv) the assignor has not done and shall not do anything that can serve as a basis of the debtor's objection against the assigned claim (paragraph 2, section 390, Civil Code). Parties are free to agree to additional requirements for assignment of the relevant claims (paragraph 2, section 390, Civil Code).

Failure to comply with the written form of assignment does not invalidate the assignment as such, but does not allow parties, in case of dispute, to rely on witness evidence. In case of failure to meet the additional requirements listed in the previous paragraph the assignee has the right to claim from the assignor everything that has been transferred under the assignment agreement, as well as the right to claim the corresponding damages (paragraph 3, section 390, Civil Code).

27 Is it possible to transfer loans originated on a peer-to-peer or marketplace lending platform to the purchaser without informing the borrower? Does the assignor require consent of the borrower or are the loans assignable in the absence of a prohibition?

The borrower does not have to be informed about the assignment (section 385, Civil Code). The assignor does not require the debtor's consent to perform the assignment, unless the obligation to obtain such consent is provided for by the relevant agreement (paragraph 2, section 382, Civil Code). However, the debtor's consent is mandatory when it is substantially significant to the debtor that a particular person acts as the creditor (paragraph 2, section 388, Civil Code).

28 Would a special purpose company for purchasing and securitising peer-to-peer or marketplace loans be subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

Yes. Foreign operators of personal data that engage in activities directed at the territory of Russia are required, in the process of gathering personal data of Russian nationals, to ensure that the recording, systematisation, accumulation, storage, adjustment (updating,

amending) and extraction of such data is carried out through databases located in Russia, with certain exemptions (paragraph 5, section 18, Federal Law on Personal Data). In addition, all operators of personal data must comply with the confidentiality obligations in respect of personal data (section 7, Federal Law on Personal Data).

Intellectual property rights

29 Which intellectual property rights are available to protect software, and how do you obtain those rights?

Software, including source and object code, as well as user interface generated by the software, is generally protected on the same terms as literary works; however, a number of differences do exist.

For instance, while both software and other literary works are protected from their creation without the need to comply with any formalities, software developers enjoy the option of discretionary state registration of their creation, unless the product in question contains a state secret. Any transfer of IP rights in registered software is subject to registration with Russia's IP office, Rospatent (section 1262, Civil Code). Software can be licensed under a simplified licence, essentially a standard form contract (contract of adhesion), which are by default treated as free-of-charge licences (paragraph 5, section 1286, Civil Code).

Among the limitations that apply to software as compared with other literary works are the absence of the right of withdrawal (paragraph 2, section 1269, Civil Code) and, in case of an open licence, a different default licence term: the entire term of copyright protection as opposed to five years for other literary works (paragraph 3, section 1286.1, Civil Code).

One other difference that is particularly worth mentioning is that software licensees enjoy the statutory rights of decompilation and back-engineering of the software, though these are limited in scope (paragraphs 2–3, section 1280, Civil Code).

30 Is patent protection available for software-implemented inventions or business methods?

Both software and business methods are specifically excluded from the definition of 'invention'. However, if the software is not in itself the main object of a patent, it can be patented as part of an invention or utility model (paragraph 5, section 1350 and paragraph 5, section 1351, Civil Code). Rospatent has complex guidance in place for determining whether a piece of software is patentable, and each case should be considered on its own merits.

31 Who owns new intellectual property developed by an employee during the course of employment?

The default rule is that the employer owns new intellectual property developed by an employee during the course of employment, provided that the creation of intellectual property falls within the ambit of the employee's duties and there is no agreement to the contrary. If within three years the employer makes no use of the intellectual property, does not transfer the right in the intellectual property or does not notify the author that the intellectual property is to be kept secret, the title reverts to the employee (section 1295, Civil Code).

In case of patentable inventions, the term during which the employer is expected to apply for a patent, transfer the right to apply for a patent or notify the inventor that the invention will be kept in secret, is four months. After four months the right to apply for a patent reverts to the employee (paragraph 4, section 1370, Civil Code).

32 Do the same rules apply to new intellectual property developed by contractors or consultants? If not, who owns such intellectual property rights?

For software commissioned before 1 October 2014, the default rule was that the title in the software vested in the client.

The current default rule, subject to the parties' agreement to the contrary, is that whenever a third party is commissioned specifically to create a piece of intellectual property (including but not limited to software), the right in that property only vests in the client provided that the contractor or consultant is not him or herself the author of the work (section 1296, Civil Code). If an individual author is engaged directly, the agreement has to specify who owns the intellectual property (section 1288, Civil Code).

The default rule applicable to contracts where the software is not the primary object but merely a by-product of the commission is that the right in such intellectual property vests in the contractor (section 1297, Civil Code).

33 Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

Subject to joint owners' agreement to the contrary, every joint owner enjoys the freedom to use intellectual property, however, any disposition of the same (including licence, charge or assignment) must be consented to by all of the joint owners.

34 How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

Two main concepts are applied in the protection of sensitive information: trade secrets and know-how. These are closely intertwined and often appear indistinguishable.

Trade secrets encompass not the sensitive information of commercial nature itself, but rather the name of a confidentiality regime comprising a set of measures that a business can implement to protect qualifying sensitive information. To make use of the regime, the owner of a trade secret must keep a register of information under the trade secrets regime, regulate the access to and handling of such information by its employees and agents, and add an inscription in prescribed form onto information carriers containing qualifying sensitive information (paragraph 1, section 10, Federal Law on Trade Secrets).

Under the law, certain information does not qualify for trade secret protection. In order to qualify, the information must have an actual or potential commercial value by virtue of not being known to third parties (qualifying information) (paragraph 1, section 1, Federal Law on Trade Secrets). Qualifying information in respect of which the trade secret regime has been implemented is almost a verbatim definition of know-how.

Know-how is a term utilised by Russian intellectual property legislation and is granted protection as intellectual property, with rules applicable to employee-created intellectual property extending to it with minor exceptions (section 1465, Civil Code).

The protection lasts for as long as the information remains confidential, during which time know-how is capable of being licensed and alienated. Unlawful access to and use of information under the trade secrets regime and know-how may result in liability for civil damages, as well as administrative and criminal liability.

During court proceedings, a party may petition the court to have a closed hearing instead of a public one on the grounds of confidentiality of subject matter of the case (paragraph 2, section 11, Commercial Procedure Code; paragraph 2, section 10, Civil Procedure Code).

35 What intellectual property rights are available to protect branding and how do you obtain those rights?

Branding can be protected via various routes, the most common being trademark (service mark) registration. Logos and other forms of corporate identity – provided they satisfy the creativity requirement – can also be protected as images (ie, by copyright).

Russian law extends legal protection to company names. While trademarks are subject to a separate registration, a right in a company names arises once the company is registered with authorities at creation (section 1475, Civil Code). There have been disputes where a company was able to bring – and win – cybersquatting cases based on its entitlement to the company name alone.

Russia also recognises trade names as a separate intellectual property object. Trade names serve to identify enterprises (such as hotels, retail chains and business centres), as opposed to goods or services (section 1538, Civil Code). To qualify for legal protection, a trade name must be known to the public in the respective geographic area. Unlike trademarks, trade names are not registrable and cease to be protected after a year of disuse (paragraph 2, section 1540, Civil Code).

36 How can new businesses ensure they do not infringe existing brands?

There are various authoritative databases that can be searched prior to settling on a brand – most importantly, the trademark database

Update and trends

The Bank of Russia continues to develop the infrastructure in the financial sector. In January 2017 the Bank of Russia teamed with a number of prominent financial market players to create The Fintech Association, which aims to implement new technological solutions in support of the Russian financial market and pave the way for the digitalisation of the Russian economy. In October 2017, the Bank of Russia and the Fintech Association are due to hold Finopolis 2017, an innovative fintech forum.

In the realm of personal data protection, the revised section 13.11 of the Administrative Offence Code of the Russian Federation, in force since 1 July 2017, replaces the general offence against personal data safety with seven new offences, each bearing a different penalty. The penalties have increased dramatically, with the upper limit for the most serious offence increasing 7.5-fold as compared with the penalty found in the previous revision of the law.

maintained by Rospatent and the company register maintained by Russia's Tax Service.

A number of private agencies offer voluntary copyright registration and their databases may prove useful in case of a dispute.

37 What remedies are available to individuals or companies whose intellectual property rights have been infringed?

Russian legislation offers a range of civil remedies, such as an injunction preventing further use of the piece of intellectual property in question (for infringements on the internet, disabling of access to the website), damages, compensation and the right to challenge the legal protection of a trademark, company or trade name.

Depending on the extent of damages and on whether the act of infringement is, at the same time, that of unfair competition, administrative and criminal penalties are also available (in Russia, there is no corporate criminal liability).

38 Are there any legal or regulatory rules or guidelines surrounding the use of open-source software in the financial services industry?

No. The use of open-source software in general is regulated by the rules on open licences that have been in force for less than two years (section 1286.1, Civil Code).

Data protection

39 What are the general legal or regulatory requirements relating to the use or processing of personal data?

The umbrella term for the collection, storage, editing, transferring, etc, of personal data is 'processing'. The processing of personal data is permitted in limited number of circumstances, most relevantly when the data subjects' consent has been acquired or when the processing is necessary for the purposes of performing an agreement entered into by the data subject. In any case the scope of data being processed must be proportionate to the objective of the use (section 6, Federal Law on Personal Data). Entities that collect and make use of personal data must have and make publicly available a personal data protection policy, and they may have to notify Russia's personal data watchdog, Roskomnadzor, of their intention to collect and use personal data (section 22, Federal Law on Personal Data).

The law outlines personal data security measures to be adopted internally by entities processing personal data, such as the appointment of a personal data officer and restriction of access to the data.

Personal data of Russian nationals or Russia-based foreign nationals must be recorded, systematised, accumulated, stored and altered using databases located in Russia (paragraph 5, section 18, Federal Law on Personal Data).

40 Are there legal requirements or regulatory guidance relating to personal data specifically aimed at fintech companies?

While there is no regulatory guidance issued specifically for fintech companies, there are regulations directly applicable to the field.

Namely, Government Regulation No. 1119 dated 1 November 2012 'On the Approval of the Requirements Applicable to the Protection of Personal Data Processed in Information Systems' lists data security requirements applicable to the digitalised processing of personal data depending on the level of threat to the safety of the data.

Further to this Regulation, in December 2015, the Bank of Russia issued a decree detailing relevant types of threats.

If personal data is being collected via the internet, the personal data protection policy must be available online.

41 What legal requirements or regulatory guidance exists in respect of anonymisation and aggregation of personal data for commercial gain?

Russian law permits the processing (including aggregation) of personal data for statistic and research purposes, provided that the data is anonymised.

Roskomnadzor has issued guidance on the subject of personal data anonymisation. The guidance requires that the anonymised data be complete, structured, semantically coherent and matching the requisite level of anonymity (such as k-anonymity). There are also requirements applicable to the method of anonymisation: it must be reversible, capable of securing the requisite level of anonymity and show increased resistance to interference as the amount of data increases.

When personal data is collected for direct marketing purposes (ie, when data subjects are to be contacted about goods and services), the data subject's consent is essential for aggregation and further use of the data (section 15, Federal Law on Personal Data).

Cloud computing and the internet of things

42 How common is the use of cloud computing among financial services companies in your jurisdiction?

Use of cloud computing is common among start-ups and established companies alike. Many of Russia's fintech companies are cloud-based, for example First Online Accountancy, a service that enables online accounting based on Russia's leading 1C platform, or Revo Plus, a service offering sales financing solutions.

43 Are there specific legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

There are no specific legal requirements or regulatory guidance in this respect.

44 Are there specific legal requirements or regulatory guidance with respect to the internet of things?

There are no specific legal requirements or regulatory guidance in this respect.

Tax

45 Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

The are no specific tax incentives for fintech companies in Russia; however, Russian law provides for a range of preferential tax regimes for investors and residents of special economic zones (SEZs).

Regional tax incentives are typically provided in the form of reduction in regional component of profits tax (the maximum reduction is 4.5 per cent; profit tax rate may be reduced to zero in some regions) and property tax reduction or exemption. In some regions transportation and land tax reductions or exemptions are also available. To qualify for the incentives, the investment project should incorporate the regional business priorities and minimum investment amount determined by regional law. In some regions, the approval process requires the conclusion of the 'investment agreement' with the regional authorities, while in other regions, tax incentives are provided on a declarative basis with no pre-approval.

All currently established SEZs fall into one of four categories: manufacturing, technology and innovation, tourism and recreation, and port and logistics. If the activities of fintech companies qualify as technology and innovation, such companies may potentially benefit from SEZ tax incentives. Only Russian legal entities incorporated within an SEZ with no external branches or representative offices may apply for

SEZ resident status. The law may provide for a minimum amount of investment depending on the category of SEZ.

The following tax benefits apply for a technology and innovation SEZ:

- the profit tax rate payable to the federal budget may be reduced from 2 per cent to zero until 2018, with a 2 per cent tax payable to federal budget starting from 2018; a progressive reduced rate of tax payable to the regional budget is applied;
- property tax exemption for 10 years and land tax exemption for five years;
- 'free customs zone';
- reduced regressive social contributions rates in 2019; and
- accelerated depreciation and VAT exemptions are not available for this type of SEZ.

Research and development (R&D) tax incentives are available for companies from various industries conducting eligible R&D activities included in a government-approved list. Such activities must relate to the development of new products, the improvement of production processes and the development of new services. Companies conducting eligible R&D activities can apply for a 150 per cent super deduction of qualifying costs (eg, labour costs, depreciation of equipment and other costs, subject to certain limitations). Certain tax benefits are available to Russian companies that are residents of the Skolkovo Innovation Centre. Generally, a Russian company can become a Skolkovo resident if it conducts qualifying R&D and innovation activities, and complies with certain other requirements. The main tax benefits are: profits tax exemption for 10 years; social insurance contributions at a reduced rate of 14 per cent on annual remuneration up to 876,000 roubles and exemption for remuneration exceeding that cap; and a VAT exemption. Skolkovo targeted industries are energy efficient technologies, nuclear technologies, space technologies and telecommunications, biomedical technologies and information technologies.

Russian law also provides a special tax regime for companies located in the Far East and Siberia (territories of advanced social and economic growth (TASEG)). TASEG residents are eligible for:

- reduced profits tax rate 0–5 per cent for the first five years and 12–20 per cent for the next five years (depending on region);
- reduced mineral extraction tax for 10 years (not applicable to fintech companies but mentioned for the purpose of completeness);
- reduced regressive social insurance contributions rate for 10 years (7.6 per cent on annual remuneration up to 755,000 roubles, 6.1 per cent on annual remuneration between 755,000 roubles and 876,000 roubles, 0.1 per cent on annual remuneration exceeding 876,000 roubles); and
- regions may additionally provide property tax exemptions.

However, all the already established TASEGs have production, mineral extraction, tourism, logistics or agricultural specialisation and cannot be used by fintech companies. As of 1 January 2018, TASEGs can be established in all regions across Russia.

Competition

46 Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction or that may become an issue in future?

There is no specific fintech-related competition legislation in Russia; however, certain provisions of the Federal Law on the Protection of Competition listed below might be particularly relevant for fintech businesses.

Agreements with competitors to fix or maintain a certain price on goods or services are generally prohibited. Other agreements, including joint venture agreements with competitors, are also prohibited if they limit or may limit the competition. Whether or not there is (or may occur) a limitation of competition will be determined by the regulator (the Federal Antimonopoly Service) on the basis of a comprehensive analysis of the current market situation for the relevant goods or services. However, agreements between companies established by individuals and agreements between certain individual entrepreneurs (as well as agreements between such companies and such individual entrepreneurs) are generally permitted (with certain exceptions) if the total income received from the sale of goods or services by parties to such agreements over the preceding calendar year (ie, the year immediately preceding the year in which the relevant agreement is concluded) does not exceed 400 million roubles.

Certain joint venture agreements operating in Russia can only be entered into after prior approval by the regulator (the Federal Antimonopoly Service). Such approval is necessary if (i) the combined asset value of parties to such agreements (or their respective groups) exceeds 7 billion roubles; or (ii) the total income received from the sale of goods or services by parties to such agreements (or their respective groups) over the preceding calendar year (ie, the year immediately preceding the year in which the relevant agreement is concluded) exceeds 10 billion roubles.

Prospective parties may submit to the Federal Antimonopoly Service a draft of the future agreement for the purposes of verifying compliance with the competition legislation. Following the review of each submitted draft agreement the regulator prepares an opinion stating whether or not the relevant draft complies with the competition rules. A positive opinion is valid for one calendar year.

In addition, certain transactions involving shares, units and rights in Russian commercial organisations exceeding statutory thresholds can only be entered into with prior approval of the Federal Antimonopoly Service.

Financial crime

47 Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

While there is no specific anti-bribery law for fintech companies, they are subject to the general rules of combating bribery and money laundering pursuant to the Federal Law on Countering Corruption and

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respective secondary legislation. For instance, all companies have to implement internal counter-bribery measures of their choice.

Companies processing financial transactions face a long list of requirements under the Federal Law on Countering the Legalisation of Illegal Earnings and respective secondary legislation. Among other things, they must:

- implement internal anti-money laundering measures and keep records of suspicious transactions;
- identify the client and the client's beneficial owner and keep this information up to date;
- notify the regulator of any transactions triggering compulsory control requirement;
- freeze the assets of a client on an official extremist or terrorist watch list; and
- share records with the authorities on demand.

48 Is there regulatory or industry anti-financial crime guidance for fintech companies?

There is no specific anti-financial crime guidance for fintech companies; however, the Bank of Russia has issued various pieces of industry-specific guidance for financial companies.

Singapore

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

Depending on the nature and scope of services or products offered, licensing requirements under the Securities and Futures Act (Chapter 289) of Singapore (SFA) or the Financial Advisers Act (Chapter 110) of Singapore (FAA), or both, may apply.

The following activities are regulated under the SFA:

- dealing in securities;
- trading in futures contracts;
- leveraged foreign exchange trading;
- advising on corporate finance;
- fund management;
- real estate investment management;
- securities financing;
- providing credit rating services; and
- providing custodial services for securities.

The following activities are regulated under the FAA:

(i) advising others, either directly or through publications or writings, and whether in electronic, print or other form, concerning any investment product, other than:
  - in the manner set out in (ii); or
  - advising on corporate finance within the meaning of the SFA;

(ii) advising others by issuing or promulgating research analyses or research reports, whether in electronic, print or other form, concerning any investment product;

(iii) marketing of any collective investment scheme; and

(iv) arranging of any contract of insurance in respect of life policies, other than a contract of reinsurance.

The licensing requirements under the SFA and the FAA have extraterritorial effect.

Section 339 of the SFA and section 90 of the FAA provide that where a person does an act partly in and partly outside Singapore, which, if done wholly in Singapore, would constitute an offence against any provision of the SFA or the FAA (as the case may be), that person shall be guilty of that offence as if the act were carried out by that person wholly in Singapore, and may be dealt with as if the offence was committed wholly in Singapore.

In addition, section 339 of the SFA also provides that where a person does an act outside Singapore that has a substantial and reasonably foreseeable effect in Singapore and that act would, if carried out in Singapore, constitute an offence under the relevant provisions of the SFA, that person shall be guilty of that offence as if the act were carried out by that person in Singapore, and may be dealt with as if the offence were committed in Singapore.

The activity most relevant to fintech businesses is likely to be 'dealing in securities' under the SFA. 'Dealing in securities' means (whether as principal or agent) making or offering to make with any person, or inducing or attempting to induce any person to enter into or to offer to enter into, any agreement for or with a view to acquiring, disposing of, subscribing for, or underwriting securities.

In addition to the above licensing requirements, where the fintech business undertakes banking business such as receiving money on current or deposit accounts, such business is required to be licensed as a bank by the Monetary Authority of Singapore (MAS). Certain other activities such as moneylending will also require a moneylender's licence issued by the MAS, unless exempted.

Licensing requirements may differ depending on the nature and scope of activities contemplated, and advice should be sought on the specific circumstances of any particular case.

2 Is consumer lending regulated in your jurisdiction? Describe the general regulatory regime.

Under Singapore law, the offering and provision of consumer lending is not distinguished from primary lending. Lending (consumer lending and primary lending) is a regulated activity in the jurisdiction and is governed by the Moneylenders Act (Chapter 188) of Singapore.

The Moneylenders Act requires that all loans made available in Singapore are by licensed moneylenders or excluded moneylenders. Examples of excluded moneylenders are:

- any person regulated by the MAS under any other written law who is permitted or authorised to lend money or is not prohibited from lending money under that other written law;
- any person who lends money solely to his or her employees as a benefit of employment;
- any person who lends money solely to accredited investors within the meaning of section 4A of the Securities and Futures Act (Chapter 289) of Singapore; and
- any person carrying on any business not having as its primary object the lending of money in the course of which and for the purposes whereof he or she lends money.

3 Are there restrictions on trading loans in the secondary market in your jurisdiction?

The acquisition of a (funded) loan receivable and the holding of that loan receivable does not constitute moneylending unless, following the acquisition, additional loans are extended (in which case, the restrictions outlined in question 2 apply).

Secondary market loan intermediation is not a regulated activity, provided that it does not involve any lending or deposit taking and provided that loans are not in the form of securities.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would generally fall within the scope of any such regime.

Broadly, 'collective investment schemes' are arrangements in respect of any property that exhibit all of the following features:

- participants have no day-to-day control over management of the property;
- property is managed as a whole by or on behalf of the scheme operator;
- participants' contributions are pooled;
- profits or income of the scheme from which payments are to be made to the participants are pooled; and
- the purpose or effect of the arrangement is to enable participants to participate in profits arising from the scheme property.

'Property' is not defined in the SFA and could include, for example, securities, futures, money, goods and real estate, whether located in Singapore or elsewhere.

Generally, unless an exemption applies, it is an offence to make an offer of units in a collective investment scheme to the Singapore public unless the scheme is authorised or recognised by the MAS and the offer is made in or accompanied by an SFA-compliant prospectus.

The marketing of any collective investment scheme is also a regulated activity for which a licence is required under the FAA, unless an exemption applies (see question 1).

It is possible that certain fintech activity could constitute a collective investment scheme where the business concerned is managing assets on behalf of participants who have invested through a fintech platform. Careful analysis of the specific circumstances and the way in which the platform permits investors to participate will be required to determine whether it constitutes a collective investment scheme.

5 Are managers of alternative investment funds regulated?

Undertaking on behalf of a customer (whether on a discretionary authority granted by the customer or otherwise) (i) the management of a portfolio of securities or futures contracts; or (ii) foreign exchange trading or leveraged foreign exchange trading for the purpose of managing the customer's funds, but not including real estate investment trust management, is regulated as 'fund management' under the SFA (see question 1).

Accordingly, unless an exemption applies, managers of alternative investment funds generally require a licence to conduct business involving such activities.

6 May regulated activities be passported into your jurisdiction?

No.

7 May fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

It is unlikely that the MAS would grant a licence to an entity for carrying on business in any regulated activity if that entity did not have a local presence.

8 Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

There are no specific regulations applicable to peer-to-peer or marketplace lending in Singapore. Fundraising from the public through lending-based crowdfunding, or peer-to-peer lending, is regulated by the MAS under the SFA and the FAA. Therefore, such activity might constitute a regulated activity that requires a licence, but much will depend on the precise model.

Furthermore, in Singapore, any invitation to lend money to an entity is deemed to be an offer of debentures, which is a type of security. The entity offering the debentures is required to prepare and register an SFA-compliant prospectus with the MAS unless an exemption applies.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

There are no specific regulations applicable to crowdfunding in Singapore. Fundraising from the public through equity-based crowdfunding is regulated by the MAS under the SFA and the FAA. Therefore, such activity might constitute a regulated activity that requires a licence, but much will depend on the precise model.

10 Describe any specific regulation of invoice trading in your jurisdiction.

To the extent that an invoice is purchased, without risk of being recharacterised as a loan for the purposes of the Moneylenders Act, with true sale there is no specific regulation on the buying and selling of invoices. This is common in factoring and invoice discounting arrangements.

However, in the event that invoices are opened to the public and crowdfunded, the operator of the trading platform will need to follow certain regulations, as described in questions 8 and 9.

11 Are payment services a regulated activity in your jurisdiction?

Payment services include a wide range of activities such as taking cash deposits, making cash withdrawals, executing payment transactions, issuing or acquiring of payment instruments, issuing and administering means of payment, money remittance, making payments sent through the intermediary of a telecom, IT system or network operator, or even providing stored value facilities.

Payment services are regulated activities in Singapore including under the Payment Systems (Oversight) Act (Chapter 222A) of Singapore, the Banking Act (Chapter 19) of Singapore, and the Money-Changing and Remittance Businesses Act (Chapter 187) of Singapore.

12 Do fintech companies that wish to sell or market insurance products in your jurisdiction need to be regulated?

The marketing and sale of insurance products are regulated under the Insurance Act (Chapter 142) of Singapore and the Financial Advisers Act (Chapter 110) of Singapore.

13 Are there any legal or regulatory rules in your jurisdiction regarding the provision of credit references or credit information services?

Credit bureaus are recognised by the MAS under the Banking Act (Chapter 19) of Singapore to collect and disclose credit data to their members. A new credit bureau bill will soon be passed that will subject credit bureaus to formal supervision by the MAS as credit bureaus collect increasing (and more specifically detailed) amounts of data to facilitate more comprehensive credit assessments by their members. The bill will also allow consumers the right to access, review and rectify their credit records. The provision of credit ratings (opinions primarily regarding the creditworthiness of entities other than individuals, governments or securities) is also regulated.

14 Are there any legal or regulatory rules in your jurisdiction that oblige financial institutions to make customer or product data available to third parties?

No.

15 Does the regulator in your jurisdiction make any specific provision for fintech services and companies? If so, what benefits do those provisions offer?

The MAS recently established a fintech regulatory sandbox so that promising innovations can be tested in the market and have a chance for wider adoption, in Singapore and overseas. Financial institutions, or any interested firm, can apply to enter the regulatory sandbox to experiment with innovative financial services in the production environment but within a well-defined space and duration. The regulatory sandbox will also include appropriate safeguards to contain the consequences of failure and maintain the overall safety and soundness of the financial system. On 16 November 2016, the MAS published guidelines on the regulatory sandbox.

16 Does the regulator in your jurisdiction have formal relationships or arrangements with foreign regulators in relation to fintech activities?

Yes. The following relationships or arrangements have been established:

- The MAS and the Danish Financial Supervisory Authority (the Danish FSA) signed a fintech cooperation agreement on 29 June 2017, which aims to help fintech companies in Singapore and Denmark to expand into each other's markets. The agreement will enable both regulators to refer fintech companies to their counterparts. The MAS and the Danish FSA have also committed to exploring joint innovation projects together, and to share information on emerging market trends and their impact on regulation.
- The MAS and the Association of Supervisors of Banks of the Americas (ASBA) signed a memorandum of understanding (MOU) on 9 June 2017 to bolster fintech ties between Singapore and the Americas. The MOU provides a framework for fintech cooperation between Singapore and ASBA member countries. Under the framework, both parties can explore potential joint innovation projects on technologies such as blockchain and big data.

- The MAS and the International Finance Corporation, a member of the World Bank Group, signed a memorandum of cooperation on 23 May 2017 to agree to work together to establish and develop the ASEAN Financial Innovation Network (AFIN). The network aims to facilitate broader adoption of fintech innovation and development, and enhance economic integration within the ASEAN region.
- The MAS signed cooperation agreements with the Prudential Supervision and Resolution Authority (ACPR) and the Financial Markets Authority (AMF) of France on 27 March 2017 to enhance fintech cooperation between both countries. The cooperation agreement provides a framework under which the ACPR, the AMF and the MAS will share information about emerging fintech trends, potential joint innovation projects and regulatory issues pertaining to innovative financial services. The framework will also allow authorised fintech companies in Singapore and France to facilitate their understanding of regulatory requirements in each jurisdiction, so as to foster trades and flows across the two markets.
- On 13 March 2017, the MAS and the Financial Services Agency (FSA) of Japan established a cooperation framework to enhance fintech linkages between both countries. The framework enables the MAS and the FSA to refer fintech companies in their countries to each other's markets. It also outlines how companies can initiate discussions with the regulatory bodies in the respective jurisdictions and receive advice on their regulatory frameworks, such as the required licences.
- The MAS and Abu Dhabi Global Market (ADGM) signed a cooperation agreement on 8 March 2017 to foster closer cooperation on developments and initiatives that nurture fintech entrepreneurship and support innovation in financial services in both Singapore and Abu Dhabi. The agreement establishes a strategic framework for both regulators to assist start-ups and innovators to better understand the regulatory regime in each jurisdiction and provide support through the application and authorisation process. Both regulators will also undertake and explore joint innovation projects on the application of key technologies including digital and mobile payments, blockchain and distributed ledgers, big data, flexible platforms (APIs) and other new technologies.
- The MAS and the Korean Financial Services Commission (KFSC) signed a cooperation agreement on 24 October 2016 to foster greater cooperation in fintech. Under the agreement, the MAS and the KFSC will explore potential joint innovation projects on technologies such as big data and mobile payments. The MAS and the KFSC will also discuss issues of common interest, and share information on fintech trends and how existing regulations may be affected.
- The MAS and the government of Andhra Pradesh signed a fintech cooperation agreement on 22 October 2016 to promote innovation in financial services in their respective markets. Under the agreement, the MAS and the government of Andhra Pradesh will explore joint innovation projects on technologies such as digital payments and blockchain, and collaborate on the development of education programmes and curricula on fintech. The MAS and the government of Andhra Pradesh also agreed to discuss emerging fintech trends and exchange views on regulatory issues related to innovations in financial services.
- The MAS and the Swiss Financial Market Supervisory Authority (FINMA) signed a cooperation agreement on 12 September 2016 to foster greater cooperation on fintech. The cooperation agreement between the MAS and FINMA provides a framework for innovative fintech companies in Singapore and Switzerland to expedite initial discussions on introducing new fintech solutions in each other's markets and understand regulatory requirements, thus helping to reduce regulatory uncertainty and the time-to-market for these new fintech solutions. The agreement will help to create opportunities for fintech businesses from Singapore and Switzerland to expand into each other's markets.
- The MAS and the Australian Securities and Investments Commission (ASIC) signed an innovation functions cooperation agreement on 16 June 2016, which aims to help innovative businesses in Singapore and Australia in their foray into the respective markets. The agreement will enable innovative fintech companies in Singapore and Australia to establish initial discussions in each other's markets more quickly and receive advice on the required licences, thus helping to reduce regulatory uncertainty and time-to-market.
- The MAS and the UK Financial Conduct Authority (FCA) signed a regulatory cooperation agreement on 11 May 2016. The agreement will enable the regulators to refer fintech firms to their counterparts around the world. It also sets out how the regulators plan to share and use information on financial services innovation in their respective markets.
- The MAS and the Bank of Thailand (BOT) signed a fintech cooperation agreement and updated an existing memorandum of understanding on banking supervision on 11 July 2017. The fintech cooperation agreement enables the BOT and the MAS to share information on emerging market trends and their impact on regulations, as well as refer fintech companies to their counterparts.

17 Are there any local marketing rules applicable with respect to marketing materials for financial services in your jurisdiction?

Yes. Depending on the regulatory status of the financial institution, and whether relying on certain exemptions, different marketing rules may apply, including, for example, clientele restrictions. Advice should be sought on the specific circumstances of any particular case.

18 Are there any foreign exchange or currency control restrictions in your jurisdiction?

In general, there are no restrictions. There are restrictions on financial institutions in Singapore offering Singapore dollar credit facilities to non-resident financial institutions; these restrictions were introduced in an attempt by the regulatory authorities to stop speculation in Singapore dollars by restricting the flow of the currency outside of Singapore.

19 If a potential investor or client makes an unsolicited approach either from inside the provider's jurisdiction or from another jurisdiction, is the provider carrying out a regulated activity requiring a licence in your jurisdiction?

On the assumption that a genuine unsolicited approach is made and that no direct or indirect marketing has been conducted to any persons in Singapore, whether on a cross-border basis or otherwise, and the potential investor has approached the provider on his or her own initiative, there is a lower risk that the provider would trigger the licensing requirements.

It may be of some comfort to note that the MAS has in the past stated in certain guidelines pertaining to the extraterritorial effect of the licensing requirements under the SFA that 'it is not the MAS' policy to regulate activities that a foreign entity carries on wholly outside Singapore that involve persons in Singapore where the foreign entity is responding to unsolicited enquiries or applications from persons in Singapore.' For prudence, the provider may wish to document the unsolicited nature of the enquiry in its response to the relevant investor for record purposes and limit any such response to only providing information on factual matters that have been specifically requested.

This is a complex area and advice should be sought on the specific circumstances of any particular case.

20 If the investor or client is outside the provider's jurisdiction and the activities take place outside the jurisdiction, is the provider carrying out an activity that requires licensing in its jurisdiction?

No, provided that it the activities take place wholly outside the jurisdiction.

21 Are there continuing obligations that fintech companies must comply with when carrying out cross-border activities?

There are no specific continuing obligations that apply to fintech companies other than the licensing and regulatory obligations for regulated financial institutions in Singapore.

22 What licensing exemptions apply where the services are provided to an account holder based outside the jurisdiction?

Depending on the types of regulated activities conducted or the products offered, there may be various licensing exemptions that apply.

Separate advice should be sought on the specific circumstances of any particular case.

Distributed ledger technology

23 Are there any legal or regulatory rules or guidelines in relation to the use of distributed ledger (including blockchain) technology in your jurisdiction?

There are no legal or regulatory rules or guidelines in relation to the use of distributed ledger technology in Singapore. That said, the MAS is encouraging fintech experimentation with the introduction of a regulatory sandbox, in which a firm may apply to the MAS to relax specific legal and regulatory requirements prescribed by the MAS that the application firm would otherwise be subject to.

The MAS's stated policy is that any firm that is looking to apply technology in an innovative way to provide new financial services that are or are likely to be regulated by the MAS may make a sandbox application to the MAS. All applications are considered on a case-by-case basis. The MAS will adopt a risk-based approach to determine the most appropriate and effective form of regulatory support to facilitate the experimentation in the sandbox. The sandbox will be for a limited duration to be specified by the MAS.

Digital currencies

24 Are there any legal or regulatory rules or guidelines in relation to the use of digital currencies or digital wallets, including e-money, in your jurisdiction?

E-money is at present governed and regulated by the Payment Systems (Oversight) Act and its related regulations as a stored value facility (SVF). A multi-purpose SVF (ie, one that is or is intended to be used for the payment of goods or services provided by a service provider apart from the holder of that stored value facility) that exceeds a threshold limit of S$30 million is subject to approval from the MAS as well as the MAS's notices on anti-money laundering and counter-terrorist financing.

There are otherwise at present no legal or regulatory rules or guidelines in relation to the use of digital currencies or digital wallets in Singapore. However, in August 2016, the MAS proposed a new consolidated regulatory framework for payment service providers under the purview of a National Payments Council.

The new framework proposes to cover issuing and maintaining payment instruments (which will include digital wallets) as well as providing money transmission and conversion services (which will include digital currency intermediaries buying, selling or facilitating the exchange of virtual currencies).

The Proposed Payment Framework closed its public consultation on 31 October 2016, and the MAS has yet to issue its responses to the public feedback received. The public consultation was the first in a series of consultations, and it is envisaged that subsequent rounds of public consultation will seek feedback on specific policies and the draft legislation, which will include requirements and applicability to the various payment activities mentioned above.

Securitisation

25 What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

Loan agreements governed by Singapore law and evidencing appropriate consideration for the loan can be executed in the form of agreements by signatories of the respective parties having due authority.

The execution requirements for a Singapore law security agreement will depend on the form of security agreement. However, most Singapore law security agreements will be executed in the form of a deed to ensure that no challenge can be made on the grounds of consideration or owing to the form of property being secured. The execution requirements for deeds allow for three options: (i) signing by a director of the company and a secretary of the company; (ii) signing by at least two directors of the company; or (iii) signing by a director of the company in the presence of a witness who attests the signature.

The enforceability of peer-to-peer loan agreements and security agreements will depend on the precise model being applied. However, as a general observation, provided that any peer-to-peer model complies with any regulatory requirements as outlined above in Singapore (and in any other relevant jurisdiction), there should be no specific issues regarding the enforceability of the loan agreement or security agreement in Singapore.

26 What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected?

A legal assignment by way of security of the rights of the lender of a loan under a peer-to-peer or marketplace lending platform, under which the purchaser of that loan would be entitled to directly sue the borrower for repayment of the debt under the loan, requires notice of such assignment by way of security to be given by the assigning lender to the borrower under the loan agreement.

Where notice of the assignment by way of security is not given by the assigning lender to the borrower under the loan agreement, the security assignment would, in ordinary circumstances (and subject to due execution and other formalities), be characterised as an equitable assignment. An equitable assignment is still characterised as a security interest. However, any action by the purchaser to enforce rights under the loan agreement needs to be taken by the lender on behalf of the purchaser. This may delay the taking of action and impact on recoveries.

In the case of an equitable assignment, it may be possible to have a notice of security assignment executed by the lender prior to any enforcement action being taken and held, by the purchaser, pending any enforcement event occurring, at which time the notice of assignment could be delivered to the borrower, giving rise to a legal security assignment.

Any assignment, by way of security or otherwise, will be subject to the general provisions of the loan agreement including, without limitation, confidentiality restrictions, restrictions on the granting of security or transfers to third parties. As such, loan agreements for peer-to-peer or marketplace lending platforms that contemplate ease of assignment or transfer must be drafted to ensure that any such restrictions are kept to a minimum or excluded to the extent possible and subject to regulatory constraints applicable to lending to specific classes of borrowers.

27 Is it possible to transfer loans originated on a peer-to-peer or marketplace lending platform to the purchaser without informing the borrower? Does the assignor require consent of the borrower or are the loans assignable in the absence of a prohibition?

The ability to transfer rights and obligations in a loan under Singapore law (whether in respect of a peer-to-peer or marketplace lending platform or otherwise) will depend on the terms of the loan.

In the absence of any specific provisions regarding transfer of rights and obligations of a lender's position in a loan in the loan agreement, the borrower's consent would be required to transfer. It is quite common, however, for specific transfer provisions to be included in loan agreements to allow a lender to transfer its rights and interests in their position in a loan to a third party without borrower consent. Customarily, criteria will be specified as to what constitutes an eligible transferee. Save in certain structures, it would be necessary to notify the borrower of the transfer in order for the transfer to take effect even in circumstances where borrower consent was not required.

As indicated in question 26, any transfer would also need to comply with any related restrictions imposed under the terms of the loan agreement and under regulations applicable to particular classes of borrower.

28 Would a special purpose company for purchasing and securitising peer-to-peer or marketplace loans be subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

Possibly. More details on the data protection requirements imposed under Singapore law are set out in questions 39 to 41.

In addition, loan agreements may contain confidentiality provisions that any purchaser, including any special purpose company, is bound by. These would need to be carefully reviewed or drafted as part of any securitisation structure.

Intellectual property rights

29 Which intellectual property rights are available to protect software, and how do you obtain those rights?

Computer programs (and preparatory design materials for computer programs) are protected by copyright as literary works under the Copyright Act (Chapter 63). Copyright arises automatically as soon as the computer program is recorded. Registration of copyright is not required and is not possible in Singapore.

If the software code has been kept confidential it may also be protected as confidential information. No registration is required.

Patents for software (source code) are not currently applicable for patent registration and protection. The Intellectual Property Office of Singapore (IPOS) has issued the Examination Guidelines for Patent Applications at IPOS dated April 2017 (the IPOS Guidelines), which takes the view that '[c]laims to software that are characterised only by source code, and not by any technical features, is unlikely to be considered an invention on the basis that the actual contribution would be a mere presentation of information.'

30 Is patent protection available for software-implemented inventions or business methods?

Yes, provided the software-implemented invention or business method fulfils the statutory requirements of novelty, inventive step and industrial application. The IPOS Guidelines provide that for computer-implemented inventions, 'it must be established that said computer (or other technical features), as defined in the claims, is integral to the invention in order for the actual contribution to comprise said computer (or technical features).'

In this respect, patent claims relating to a computer-implemented business method would be considered an invention if the following two elements are fulfilled. The various technical features (eg, servers, databases, user devices, etc) must interact with the steps of the business method (i) to a material extent; and (ii) in such a manner as to address a specific problem.

The IPOS Guidelines also clarify that the use of a generic computer or computer system to perform a pure business method would constitute an interaction that would not be considered to be a material extent and that no specific problem is solved. Such a claim would not be a protectable invention.

31 Who owns new intellectual property developed by an employee during the course of employment?

Copyright created by an employee in the course of his or her employment is automatically owned by the employer unless otherwise agreed.

An invention made by an employee belongs to the employer if it was made in the course of the normal duties of the employee or in the course of duties falling outside his or her normal duties, but specifically assigned to him or her, and the circumstances in either case were such that an invention might reasonably be expected to result from the carrying out of his or her duties; or if the invention was made in the course of the duties of the employee and, at the time of making the invention, because of the nature of his or her duties and the particular responsibilities arising from the nature of his or her duties, he or she had a special obligation to further the interests of the employer's undertaking.

32 Do the same rules apply to new intellectual property developed by contractors or consultants? If not, who owns such intellectual property rights?

No. Save in certain narrow circumstances, copyright or inventions created by contractors or consultants in the course of their duties are owned by the contractor or consultant unless otherwise agreed in writing.

33 Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

Yes, unless amended by agreement, joint owners of a copyright hold their shares as tenants in common. Any use, licence, charge or assignment of the copyright must therefore be done by the joint owners as a whole or by one of the joint owners with the consent of the other joint owners.

However, this position is different for patents notwithstanding that these co-owners hold the ownership of the patent as tenants-in-common. Save where the statutory provisions have been amended by agreement between the joint owners, the Patents Act provides that a co-owner is entitled to do any otherwise infringing act for his or her own benefit, by him or herself or by his or her agents, without requiring the consent of (or the need to account to) any of the other co-owners.

Nevertheless, a co-owner may not, without the consent of the other co-owners, grant a licence under the patent or assign or charge a share in the patent.

34 How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

Confidential information can be protected against misuse, provided the information in question has the necessary quality of confidence, is subject to an express or implied duty of confidence, or no registration is necessary (or possible).

Confidential information can be kept confidential during civil proceedings with the permission of the court.

35 What intellectual property rights are available to protect branding and how do you obtain those rights?

Brands can be protected as registered trademarks in Singapore. A brand can also be protected under the common law tort of passing off if it has acquired sufficient goodwill.

Certain branding such as logos and stylised marks can also be protected by design rights and may also be protected by copyright as artistic works.

36 How can new businesses ensure they do not infringe existing brands?

The IPOS trademark database can be searched to identify potentially problematic trademarks that have been registered or applied for.

It is highly advisable for new businesses to conduct trademark searches to check whether earlier registrations exist that are identical or similar to their proposed brand names. It may also be advisable to conduct internet searches for any unregistered trademark rights that may prevent use of the proposed mark.

37 What remedies are available to individuals or companies whose intellectual property rights have been infringed?

Remedies include:

- preliminary and final injunctions;
- damages or an account of profits;
- delivery up or destruction of infringing products;
- disclosure orders; and
- costs.

38 Are there any legal or regulatory rules or guidelines surrounding the use of open-source software in the financial services industry?

There are no specific legal or regulatory rules on the use of open-source software in the financial services industry. However, companies should have regard to the MAS Technology Risk Management Guidelines on source code review as well as the Notice on Technology Risk Management.

Data protection

39 What are the general legal or regulatory requirements relating to the use or processing of personal data?

The Personal Data Protection Act 2012 (PDPA) establishes a general data protection law in Singapore that governs the collection, use and disclosure of individuals' personal data by organisations. The provisions of the PDPA govern, among other things, the following obligations of organisations:

- having reasonable purposes, notifying individuals of these purposes and obtaining their consent for the collection, use or disclosure of their personal data;
- allowing individuals to access and correct their personal data;
- taking care of personal data (which relates to ensuring accuracy), protecting personal data (including protection in the case of

international transfers) and not retaining personal data if no longer needed; and
- having policies and practices to comply with the PDPA.

Further, banks are also under a statutory obligation to protect their customer information and to disclose such information only in accordance with the law.

40 Are there legal requirements or regulatory guidance relating to personal data specifically aimed at fintech companies?

There are no legal requirements or regulatory guidance relating to personal data that are specifically aimed at fintech businesses. However, fintech companies may have regard to Chapter 7 on Online Activities of the Personal Data Protection Commission's (PDPC) Advisory Guidelines on the PDPA for Selected Topics.

41 What legal requirements or regulatory guidance exists in respect of anonymisation and aggregation of personal data for commercial gain?

Anonymised data (which includes aggregation of data as an anonymisation technique) is exempted from the PDPA as such data is not considered as personal data. As such, the use, collection and disclosure of anonymised data by an organisation would not be subject to the PDPA. The PDPC considers that data would not be considered anonymised if there is a serious possibility that an individual could be re-identified, taking into consideration both (i) the data itself, or the data combined with other information to which the organisation has or is likely to have access; and (ii) the measures and safeguards (or lack thereof) implemented by the organisation to mitigate the risk of identification.

Companies should have regard to Chapter 3 on Anonymisation of the PDPC's Advisory Guidelines on the PDPA for Selected Topics. In particular, the guidelines provide advice regarding the risks of re-identification. As a starting point for assessing risks of re-identification and the robustness of the anonymisation, the PDPC adopts the 'motivated intruder' test highlighted in the Information Commissioner's Office's code of practice, 'Anonymisation: managing data protection risk'.

Cloud computing and the internet of things

42 How common is the use of cloud computing among financial services companies in your jurisdiction?

The adoption of cloud computing among financial services companies is increasingly common, particularly following the 2016 MAS Guidelines on Outsourcing Risk Management, which define cloud services as a form of outsourcing.

43 Are there specific legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

Yes, financial institutions licensed by the MAS should have regard to the MAS Guidelines on Outsourcing Risk Management. The MAS considers cloud services operated by service providers to be a form of outsourcing. In this respect, the MAS also considers that the types of risks in cloud services that confront institutions are not necessarily distinct from that of other forms of outsourcing arrangements. As such, institutions should adhere to the guidelines and adopt a risk-based approach by performing the necessary due diligence and applying sound governance and risk management practices.

Nevertheless, to the extent that cloud services have certain typical characteristics such as multi-tenancy, data commingling and the higher propensity for processing to be carried out in multiple locations, institutions should take measures to address those risks, bearing in mind the materiality of those risks specific to each institution.

Alongside the Guidelines, the Association of Banks in Singapore (ABS), with support from the MAS, has also developed and released its own implementation guide for banks to use when entering into cloud outsourcing arrangements.

44 Are there specific legal requirements or regulatory guidance with respect to the internet of things?

None, other than those set out above.

Tax

45 Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

While there are no tax incentives specifically aimed at fintech companies and investors, Singapore currently has the Productivity and Innovation Credit (PIC) scheme, which are tax incentives targeted at promoting innovation, research and development and intellectual property management. These incentives also seek to attract new technologies into Singapore. Under the scheme, which was introduced in 2010, businesses can convert qualifying expenditure into a non-taxable cash payout. However, the scheme expires in 2018.

Competition

46 Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction or that may become an issue in future?

There is a competition regime in Singapore that applies to all entities carrying out business in Singapore unless otherwise exempted. There are no particular aspects of this regime that would affect fintech businesses disproportionately to other businesses.

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However, insofar as the MAS has statutory power to exempt entities from the prohibition of mergers that result in a substantial lessening of competition within the financial services market in Singapore, the MAS has taken measures to promote innovation among fintech firms. For example, see the regulatory sandbox approach mentioned in questions 15 and 23.

Financial crime

47 Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

There is no legal or regulatory requirement for fintech companies to have anti-bribery or anti-money laundering procedures unless the company is licensed by the MAS or carries out a money exchange or remittance business.

Fintech companies, regardless of whether they are licensed by the MAS, would nevertheless be required to file a suspicious transaction report to the Singapore Police Force's Suspicious Transaction Reports Office. Such reports must be filed when a person has reasonable grounds to suspect that any property may be the proceeds of crime and such knowledge came to his or her attention in the course of his or her trade, profession, business or employment. Failure to make such a report is an offence under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Chapter 65A). In any event, a fintech firm ought to have appropriate financial crime policies and procedures in place as a matter of good governance and proportionate risk management.

48 Is there regulatory or industry anti-financial crime guidance for fintech companies?

There is no specific guidance for fintech companies, but there is guidance for licensed companies and banks that would apply to fintech businesses that are licensed similarly.

Spain

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

Certain activities, when carried out in respect of financial instruments (as listed in the Spanish implementing text of the Markets in Financial Instruments Directive (MiFID)) trigger licensing requirements in Spain. The most common are (i) reception and transmission of orders in relation to one or more financial instruments; (ii) execution of orders on behalf of clients; (iii) portfolio management; (iv) investment advice; and (v) underwriting and/or placing of financial instruments.

In Spain, no entities or natural persons, without being passported or authorised and locally registered may professionally carry out these activities in relation to financial instruments, including currency transactions. In addition, marketing and canvassing of clients may only be professionally carried out by entities (or their agents) that are authorised to provide those services in Spain. Further, in Spain a licence is required for activities in relation to financial instruments, such as arranging (bringing about) deals in investments; making arrangements with a view to transactions in investments; dealing in investments as principal or agent; and advising on investments if specific recommendations are given to a client regarding transactions related to financial instruments, but not if only generic advice is given.

A similar regime applies to the provision of services that are typical activities of credit entities. In particular, the Spanish implementing text of the Credit Requirements Directive (CRD) expressly states that the activity of taking repayable funds from the public (whether in the form of deposits, loans or temporary transfers of financial assets; or other analogous actions) is a licensable activity that can only be carried out by credit entities that are authorised to operate in Spain and duly registered with the Bank of Spain. Taking repayable funds from the public using securities markets through the issuance and placement of instruments with the aim of giving credit is a reserved activity in Spain. Notably, the provision of loans in Spain does not trigger licensing requirements, even though it is a typical activity of credit entities. Thus, while the activity of extending credit is not a reserved activity in itself, it is usually connected to other regulated activities and it may therefore end up being regulated as well.

Regarding payment services, it is prohibited for entities or natural persons who are not payment service providers (apart from the exceptions derived from the Payment Services Directive (PSD)) to provide payment services in Spain on a professional basis.

2 Is consumer lending regulated in your jurisdiction? Describe the general regulatory regime.

Although it has traditionally been an activity carried out in Spain by credit institutions and financial credit establishments, in the case of a non-financial institution (ie, neither a credit institution nor a financial credit establishment) that is dedicated solely to the activity of granting consumer loans, such non-credit institution (formed as a company) may carry out such activity without a licence. Nowadays, many Spanish people prefer to get credit from non-financial institutions offering personal loans rather than other traditional means (eg, banking credit cards, banking loans, etc).

The general regulatory regime for consumer loans is governed by Law 1/2007 of 16 November for the Protection of Consumers and Users. Among the different types of personal loans, there is a special category with a special regulatory regime: consumer credit, which is regulated by Law 16/2011 of 24 June on Credit Consumer Agreements. This law is applicable to all contracts where entities or natural persons in the course of their business activity, profession or craft, grant or promise to grant a consumer credit under the form of a deferred payment, loan, opening credit or any other equivalent means of financing, with the aim of covering personal needs outside of his or her professional or business activity and amounting to at least €200. This regulation broadly sets out the requirements lenders need to comply with in relation to the provision of information, documents and statements, and the detailed requirements as to the form and content of the credit agreement itself, including advertising, information to consumers, content, form of the contracts, cases of null and void contracts, right of withdrawal and costs. Apart from the general and special regulatory regimes applicable to consumer lending in Spain, other Spanish supplementary regulations are applicable as well.

3 Are there restrictions on trading loans in the secondary market in your jurisdiction?

Provided that the loan itself is being traded, and not the loan instrument, there are no restrictions on trading loans in the secondary market.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would generally fall within the scope of any such regime.

The general regulatory regime for collective investment schemes (CISs) in Spain consists of the transposition of the Undertakings for Collective Investment in Transferable Securities Directive 2009/65/EC (the UCITS Directive) and the Alternative Investment Fund Managers Directive 2011/61/EU (AIFMD), as well as a particular regime applicable to Spanish CISs. CISs are a regulated product in Spain and must be locally registered. Management and distribution of CISs (eg, marketing, promotion and advertising) may only be carried out by licensed entities in Spain as these activities trigger licensing requirements. Marketing of CISs is defined as those activities aimed at raising funds from clients by way of any advertising activity for their investment into the CIS. It is expressly regulated where the advertising activity consists of targeting the public through telephone calls initiated by the CIS or its management company, home visits, personalised letters, emails or any other electronic media forming part of a dissemination, promotional or marketing campaign.

Whether a fintech company falls within the scope of this regime will depend on its business and the type of activity that is to be carried out.

5 Are managers of alternative investment funds regulated?

Managers of alternative investment funds are regulated in Spain under the AIFMD, which was implemented in Spain by Law 22/2014 of 12 November governing private equity entities, other closed-ended collective investment undertakings, and the management companies of closed-ended collective investment undertakings, which amended Law 35/2003 of 4 November on Collective Investment Schemes.

6 May regulated activities be passported into your jurisdiction?

An EEA firm that has been authorised under one of the European Union single market directives (Banking Consolidation Directive, CRD, Solvency II Directive, MiFID, Insurance Mediation Directive, Mortgage Credit Directive, UCITS Directive, AIFMD and PSD) may provide cross-border services into Spain. In order to exercise this right, the firm must (i) follow the passporting process established in the relevant directive and (ii) be incorporated into the official registry of the corresponding Spanish regulator (the Spanish Securities Market Commission (CNMV), the Bank of Spain or the Spanish General Directorate of Insurance and Pensions). The EEA firm must first provide notice to its home regulator, which will then communicate it to the host regulator. The directive under which the EEA firm is seeking to exercise passport rights will determine the conditions and processes to be followed.

7 May fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

An EEA firm may exercise passport rights to provide services in Spain. Alternatively, in the case of a non-EEA firm or an EEA firm that is not undertaking an activity that can be passported into Spain, it must establish a local presence, obtain an appropriate licence, or in some cases receive authorisation from the relevant regulator to operate on a cross-border basis.

8 Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

Peer-to-peer lending is considered as a crowdlending activity under Spanish legislation and is regulated in Law 5/2015 of 27 April on Promotion of Business Financing.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

In Spain, crowdfunding is regulated in Law 5/2015 of 27 April on Promotion of Business Financing. This law affects reward-based crowdfunding, equity crowdfunding and crowdlending, and governs, among other aspects, the normal operating model and regime of the platforms, the accreditation of the investor, and the limits established for the amount of the investment. These limits, which are one of the most restrictive elements established in the law, include limitations on (i) raising funds for start-ups to €5 million for accredited investors and €2 million for non-accredited investors; (ii) equity crowdfunding projects, which are capped and cannot exceed 125 per cent of the project's projected target; and (iii) platforms and projects to be invested in by non-accredited investors are capped at €10,000 and €3,000 respectively. It is expressly established that these types of investments are not covered by the guarantee fund.

10 Describe any specific regulation of invoice trading in your jurisdiction.

At present, invoice trading is not regulated in its own right. Notwithstanding this, the business structure of a firm engaged in invoice trading should be analysed in order to detect whether any other regulated activity is taking place for which permission is required.

11 Are payment services a regulated activity in your jurisdiction?

Payment services are regulated in Spain by Law 16/2009 of 13 November on Payment Services, and Royal Decree 712/2010 of 28 May concerning the legal framework for payment services and payment institutions, which implemented the PSD in Spain. Payment services include:

- services enabling cash to be placed on a payment account, as well as all the operations required for operating a payment account;
- services enabling cash withdrawals from a payment account, as well as all the operations required for operating a payment account;
- execution of payment transactions;
- transfers of funds on a payment account with the user's payment service provider or with another payment service provider;
- execution of payment transactions where the funds are covered by a credit line for a payment service user;
- issuing and acquiring of payment instruments;
- money remittance; and
- execution of payment transactions where the consent of the payer to execute a payment transaction is given by means of any telecommunication, digital or IT device, and a payment is made to the telecommunication, IT system or network operator, acting only as an intermediary between the payment service user and the supplier of the goods and services.

To provide payment services in Spain, a firm must fall within the definition of a 'payment service provider', which includes:

- credit entities;
- electronic money institutions;
- Sociedad Estatal de Correos y Telégrafos, SA (the national postal service of Spain);
- the Bank of Spain; and
- the Spanish general government administration, autonomous communities and local bodies.

A firm that provides payment services in or from Spain as a regular occupation or business activity (and is not exempt) must apply for registration as a payment institution. Sanctions may be imposed on any natural or legal person providing payment services not having being authorised to act in Spain as a payment service provider.

12 Do fintech companies that wish to sell or market insurance products in your jurisdiction need to be regulated?

Selling or marketing insurance products in Spain is a regulated activity and entities providing this service fall under the relevant Spanish regulation. In this regard, a fintech company must act under the form of a regulated entity (eg, insurance company, insurance intermediary as broker or agent, etc). The Spanish Fintech and Insurtech Association (AEFI) has recently published a white paper on fintech regulation in Spain, aimed at creating an adequate framework for these types of entities and to encourage alternatives to the existing Spanish regulations for financial services providers in Spain, including insurance services providers. In addition, there is draft legislation relating to the distribution of insurance products in Spain, which will incorporate significant changes to the insurance product market sector.

13 Are there any legal or regulatory rules in your jurisdiction regarding the provision of credit references or credit information services?

The Bank of Spain contains a specific department called the Centre of Risk Information (CIR), which collates the credit history of legal and natural persons in order to enable financial institutions to analyse their credit risk. In general terms, the declaring entities (credit institutions and other investment firms) have an obligation to report on direct risks relating to Spanish residents (for tax purposes), for an amount equal to or exceeding €6,000 in their Spanish business, or €60,000 in any other country. For non-residents (for tax purposes), the obligation to declare is triggered when the amount exceeds €300,000. The data declared enables the Bank of Spain to know the total number of credits granted, which facilitates its supervision of the credit risks of financial institutions. Entities declaring risks to the CIR receive monthly aggregated information from the Bank of Spain on the risks assumed by legal and natural persons for which a declaration has been made. Any entity is allowed to request information about a natural or legal person when a risky operation is about to take place. There are several legal texts stating the above-mentioned provisions, including Law 44/2002 of 22 November introducing measures to reform the financial system.

14 Are there any legal or regulatory rules in your jurisdiction that oblige financial institutions to make customer or product data available to third parties?

Entities are obliged to provide credit data to the CIR of the Bank of Spain, and any entity may ask for information about legal or natural persons if a risky operation is about to take place with any of these. In this regard, there are currently no legal provisions setting out the need to make the collected data available to third parties.

15 Does the regulator in your jurisdiction make any specific provision for fintech services and companies? If so, what benefits do those provisions offer?

Spanish regulators have not made specific provision for fintech services and companies, but the CNMV has expressly shown interest in promoting fintech initiatives in Spain and has accordingly launched an online forum with two aims in mind: (i) to assist promoters and financial corporations with aspects of securities market rules and regulations that have a bearing on their projects; and (ii) to create an informal space for exchanging information with promoters and financial entities on their initiatives in this domain. The CNMV has publicly made reference to the fact that there are business models under the fintech umbrella that already have their own regulatory treatment (as an example, debt or equity crowdfunding platforms). But a number of other business models comprising innovative processes, products or services also have a securities market focus (eg, automated advisory services or automated portfolio management, algorithmic trading, distributed ledger technology, alternative distribution channels applied to securities markets, big data, or other crowdfunding platforms). These business models may require CNMV authorisation. If promoters of these business models believe their projects engage in some fintech activity of securities market relevance, they may contact the CNMV to enquire about aspects of securities market legislation affecting their business and put forward suggestions or provide the CNMV with information on their projects, whereupon an appropriate response shall follow.

16 Does the regulator in your jurisdiction have formal relationships or arrangements with foreign regulators in relation to fintech activities?

As far as it is publicly known, Spanish regulators do not have formal relationships or arrangements with foreign regulators in relation to fintech activities.

17 Are there any local marketing rules applicable with respect to marketing materials for financial services in your jurisdiction?

Yes. The main legislation governing marketing material for financial services in Spain is as follows: Ministerial Order EHA/1717/2010 of 11 June on regulation and control of advertising of investment services and products; Ministerial Order EHA/1718/2010 of 11 June on regulation and control of advertising of banking services and products; and Circular 6/2010 of 28 September, of the Bank of Spain, to credit institutions and payment institutions on advertising for banking services and products. General provisions relate to the following aspects: (i) content of the advertising material must not contradict or play down the importance contained in the legal documents; (ii) advertising materials must be clearly recognisable as such; (iii) all information must be fair, unbiased, clear and sufficient; and (iv) materials should not cause a misrepresentation.

18 Are there any foreign exchange or currency control restrictions in your jurisdiction?

There are restrictions in relation to the physical movement of cash in and out of Spain. According to Spanish legislation, there is an obligation to make an official declaration when there is cash movement of a certain quantity. In particular, this declaration must be made before the movement takes place, when the amount of the means of payment being moved is equal to or greater than (i) €10,000 in the case of leaving or entering the national territory, or (ii) €100,000 in the case of movements within the national territory. This declaration (called Form S1), once fully completed, should be signed and presented by the person transporting the means of payment, irrespective of whether they are doing so for themselves or for a third party. The declaration presented shall be valid for carrying out one movement of means of payment on the date declared. Throughout the movement time, the means of payment should be accompanied by this declaration and should be transported by the person detailed on the form as carrying them. Failure to make this declaration, or lack of truthfulness of the data declared, may result in the Customs Service or the State Security Services detaining all of the means of payment found and initiating confiscation procedures. In addition, they are able to impose a fine, the minimum amount of which is €600, and the maximum amount of which may be up to half the economic value of the means of payment employed. In the case of means of payment found in a place or situation that shows a clear intention to hide them, or if the origin of the funds cannot be duly accredited, the fine may be up to the full amount of the means of payment.

19 If a potential investor or client makes an unsolicited approach either from inside the provider's jurisdiction or from another jurisdiction, is the provider carrying out a regulated activity requiring a licence in your jurisdiction?

An approach made by a potential client or investor on an unsolicited and specific basis could avoid triggering a licensing requirement if that action is not preceded by commercial or marketing actions initiated by the distributor or service provider. The practice commonly known in the market as reverse solicitation, reverse enquiry or unsolicited approach is not expressly included in Spanish legislation but commonly accepted as market practice. Spanish legislation does not expressly include these concepts, but it does contain a definition of the marketing of funds. Provided that actions carried out by entities do not fall under the definition of marketing, actions should not be prohibited. In most cases, it is not an easy task to determine whether the client has been proactive (direct client approach) or whether any kind of commercial communication has taken place prior to the client's approach.

20 If the investor or client is outside the provider's jurisdiction and the activities take place outside the jurisdiction, is the provider carrying out an activity that requires licensing in its jurisdiction?

In accordance with various Spanish provisions, when the investor or client is resident in Spain (in this context, the definition for tax residence should be considered), both activities carried out within and activities carried out outside Spain , concerning that Spanish resident, shall be deemed to be carried out in Spain and therefore a licensing requirement might be triggered.

21 Are there continuing obligations that fintech companies must comply with when carrying out cross-border activities?

Yes as far as a fintech company falls under the relevant regulation and the proper licence, authorisation or passport has been granted or exercised to operate in Spain. Otherwise, if the fintech company does not perform a regulated activity, in general terms no continuing obligations should exist. However, even if there are no specific regulations that apply to the fintech company in Spain, each particular case should be analysed on a case-by-case basis.

22 What licensing exemptions apply where the services are provided to an account holder based outside the jurisdiction?

It would depend on each particular scenario and whether the service provided may be considered as being provided in the Spanish territory.

Distributed ledger technology

23 Are there any legal or regulatory rules or guidelines in relation to the use of distributed ledger (including blockchain) technology in your jurisdiction?

There are no specific legal or regulatory rules or guidelines in relation to the use of distributed ledger (including blockchain) technology in Spain, but this does not mean that authorisation is not needed. In particular, the CNMV has expressly indicated that in certain cases, initiatives comprising innovative processes, such as distributed ledger technology, may require CNMV authorisation. If a company engages in some fintech activity of securities market relevance, it is recommended to contact the CNMV to enquire about aspects of securities market legislation affecting its business or even to put forward suggestions or provide the CNMV with information on the project.

Digital currencies

24 Are there any legal or regulatory rules or guidelines in relation to the use of digital currencies or digital wallets, including e-money, in your jurisdiction?

Spanish regulatory rules concerning these types of payment methods do not include limitations on their use other than their acceptance by other parties different from the issuer. Since 2011, the Spanish

regulatory framework has included a specific regime for e-money entities. In this regard, Law 21/2011 of 26 July on Electronic Money sets out the legal requirements for issuing e-money in Spain. The law defines e-money as any monetary value stocked by electronic or magnetic means that represents a credit for the issuer, that has been issued once funds are received with the purpose of making payments as per article 2.5 of Law 16/2009 of 13 November on Payment Services, and which is accepted by a legal or natural person other than the e-money issuer. The activity of issuing e-money in Spain is reserved and limited to certain entities listed in article 2 of the above-mentioned Law on Electronic Money such as, among others, credit institutions (or any authorised branch of foreign credit institutions in Spain), authorised e-money entities, and the Bank of Spain. The law contemplates a process for e-money entities to open branches or act under a free rendering of services across the EU, and also outside the EU. These entities will be regulated and supervised by the Bank of Spain.

Securitisation

25 What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

Spanish law does not generally impose any formal requirements for executing loans. An exception to this is that for consumer loans there is a requirement that the agreement has to be drawn up on paper or other durable medium. Electronically signed documents are recognised and are enforceable. The market practice, however, is that loan agreements are generally made in writing and are notarised by a Spanish public notary in order for the lenders to be able to enforce the loan through certain special summary foreclosure procedures for notarised agreements. Only loans of small amounts are not executed in this way.

Security agreements on the other hand are subject to strict formalities and they will not be enforceable if these formalities are not met. All security agreements (with the only exception of financial collateral arrangements) have to be notarised and certain other formalities are required depending on the type of security. Real estate mortgages have to be registered with the land registry. In the case of ordinary pledges, the possession of the charged asset has to be delivered to the creditor or to someone acting on its behalf. Pledges over shares, claims or bank accounts have to be notified to the company, the debtor or the account bank, respectively.

26 What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected?

Under Spanish law, the transfer of a loan requires only the agreement of the transferor and the transferee. The loan agreement could impose additional requirements that would then be required for the effectiveness of the assignment in relation to the borrower, but this is not customary except in large loans. The transfer is valid even if no notice is given to the borrower. However, until this notice is given or the borrower is aware of the transfer, the transfer is not effective against the borrower and he or she may discharge his or her obligations by payment to the transferor, without any liability to the transferee. In addition, the transfer will not be fully effective against third parties (including the transferor's creditors) unless the transfer agreement is executed and notarised with the intervention of a public notary. As a result, transfer agreements are usually notarised and the parties notify the transfer to the borrower as soon as it is effective.

Any security interest that secures the loan will transfer automatically with the loan and will secure the new creditor. In practice, however, it is necessary to carry out certain additional acts to put the security under the name of the new lender: in the case of mortgages it is necessary to register the transfer in the land registry; in the case of pledges over shares, claims or bank accounts, notice should be given to the company, the debtor or the account bank respectively.

27 Is it possible to transfer loans originated on a peer-to-peer or marketplace lending platform to the purchaser without informing the borrower? Does the assignor require consent of the borrower or are the loans assignable in the absence of a prohibition?

As indicated in the previous question, under Spanish law, the transfer of a loan does not require the consent of the borrower and the transfer is valid even if the borrower is not informed. However, until the borrower is informed or is aware of the transfer, it is not effective against him or her and the borrower may discharge his or her obligations by payment to the transferor, without any liability to the transferee.

28 Would a special purpose company for purchasing and securitising peer-to-peer or marketplace loans be subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

The special purpose vehicle may be subject to confidentiality obligations in several circumstances. If the originator is a credit institution, it will be subject to statutory confidentiality obligations. These obligations could also be imposed by the loan documents. In these cases, the originator will require the consent of the borrower to disclose any confidential obligation to the special purpose vehicle or any other persons taking part in the transaction. In addition, if the borrower is an individual, the originator will be required to inform him or her of the transfer of any personal data and the transferee will be required to comply with personal data protection laws and regulations.

Intellectual property rights

29 Which intellectual property rights are available to protect software, and how do you obtain those rights?

Computer programs are protected by copyright as literary works. Registration is recommended.

30 Is patent protection available for software-implemented inventions or business methods?

No. It is considered that software is not an invention that can be protected under a patent, but only as copyright. This rule comes from the European Patent Convention.

31 Who owns new intellectual property developed by an employee during the course of employment?

Copyright and database rights created by an employee in the course of his or her employment are owned by the employer.

32 Do the same rules apply to new intellectual property developed by contractors or consultants? If not, who owns such intellectual property rights?

Not in the case of software, unless agreed to the contrary. If no such agreement is made then the contractor shall own the copyright in the software.

In the case of a contractor or consultant developing a database for a client, the client will own the copyright; however, the contractor or consultant has the moral right to be identified as its author.

33 Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

Spanish law differentiates between works made in a collaborative way and collective works. The first is made by the collaboration of different authors and its division must be agreed by all the authors, although no author can unreasonably hold his or her consent for any exploitation once division has been agreed. Each author is able to exploit his or her part of the work unless it prejudices the common work. The collective work is made by different authors but under the initiative and coordination of another person, who has the rights over it.

34 How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

Confidentiality is mainly protected under the agreements or contracts that pertain to it, although its breach can be construed in certain cases as a criminal offence.

Update and trends

The CNMV has expressly shown interest in promoting fintech initiatives in Spain and has accordingly launched an online forum with two aims in mind: to assist promoters and financial corporations with aspects of securities market rules and regulations that have a bearing on their projects, and to create an informal space for exchanging information with promoters and financial entities on their initiatives in this domain (see question 15 for further details related to this initiative).

In addition, the AEFI has published a white paper on fintech regulation in Spain. The main aim of this white paper is to create a satisfactory and positive regulatory framework and to incentivise alternatives to the current Spanish regulations for financial services providers in Spain. In this regard, there are various proposed regulatory actions that could be launched in order to help achieve an adequate framework for the growing fintech sector in Spain, such as: (i) the relevant authorities should issue customised and temporary licences for rapid market access (procedures should be adapted to the new growing sector); (ii) exemptions should be added to the current financial rules of conduct and governance policies in order to increase competitiveness; (iii) a regulatory sandbox should be created following the model of other jurisdictions (special mention is made of countries where the fintech industry is consolidated and a great level of innovation has been tried); and (iv) establishing a fintech authority to govern each of the current financial sectors (banking, insurance and securities).

35 What intellectual property rights are available to protect branding and how do you obtain those rights?

Brands can be protected as registered trademarks either in Spain alone (as a Spanish trademark) or across the EU (as an EU trademark). Certain branding such as logos and stylised marks can also be protected by design rights and may also be protected by copyright as artistic works.

36 How can new businesses ensure they do not infringe existing brands?

The Spanish Patent and Trademark Office has a database that can be searched to identify which trademarks are already registered. In addition, the European Union trademark database can be searched to identify registered or applied-for trademark rights with effect in Spain.

37 What remedies are available to individuals or companies whose intellectual property rights have been infringed?

The main remedy is legal action with interim measures or preliminary measures. Both measures can be taken before filing a legal action, but this has to be filed within a certain period of time in order to keep the protection granted by them. There are no injunctions in Spanish law.

38 Are there any legal or regulatory rules or guidelines surrounding the use of open-source software in the financial services industry?

No.

Data protection

39 What are the general legal or regulatory requirements relating to the use or processing of personal data?

The Spanish Data Protection Act 15/1999 is the law governing the storage, viewing, use of, manipulation and other processing of personal data. The lawful processing of personal data is when the data subject has consented to the processing; when that data is processed for the 'legitimate interests' of the processor (provided that the interests of the individual are not unduly affected); when the process takes place in order for the processor to comply with a legal requirement (not a contractual requirement); or when it is done to perform or enter into a contract with the individual.

The Act also creates various rights for data subjects, known in Spain as ARCO rights, which are the rights to access the data processed, the right to promote the rectification of the data, the right to cancel or erase the data, and the right to oppose its processing. Compliance with, and enforcement of, the Data Protection Act and related legislation is managed by the Spanish Data Protection Agency.

The Data Protection Act is due to be replaced in May 2018 by the new General Data Protection Regulation (GDPR), a European regulation having direct effect in Spain. The GDPR broadly reinforces the existing regime provided by the Data Protection Act, with some additional requirements added to strengthen the obligations to protect personal data.

40 Are there legal requirements or regulatory guidance relating to personal data specifically aimed at fintech companies?

No.

41 What legal requirements or regulatory guidance exists in respect of anonymisation and aggregation of personal data for commercial gain?

If data is anonymised it is not considered personal data and therefore the Spanish Data Protection Act does not apply.

Cloud computing and the internet of things

42 How common is the use of cloud computing among financial services companies in your jurisdiction?

Cloud computing is not widely used among financial institutions in Spain.

43 Are there specific legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

Not at the Spanish level. The European Union Agency for Network and Information Security guidance entitled 'Secure Use of Cloud Computing in the Finance Sector' (December 2015) contains analysis of the security of cloud computing systems in the finance sector, and provides recommendations.

44 Are there specific legal requirements or regulatory guidance with respect to the internet of things?

Not at the Spanish level. There are reports and public consultations at European level.

Tax

45 Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

Spain has not yet approved any specific tax incentives for fintech companies or investors despite requests from different associations. However, Spain provides a number of tax incentives that may be relevant to fintech companies:

- the patent box regime – 60 per cent reduction of the income derived from the assignment of software, brands and other intellectual property assets if certain requirements are met;
- corporate tax reliefs – available for technological innovation, investigation or job creation;
- reduced tax rate – new entities may benefit from a reduced rate of 15 per cent for the first two tax years in which they obtain taxable profits;
- personal income tax relief for individuals investing in newly created companies – this relief is available for up to 20 per cent of the investment amount, capped at €10,000; and
- expatriates regime – employees moving to Spain may opt to be taxed at a flat rate of 24 per cent up to the first €600,000 of their personal income during the tax year in which the individual moves to Spain and the following five tax years.

Considering that this sector is becoming increasingly important for the Spanish economy, further tax incentives may be expected in the future, in line with other EU countries.

Competition

46 Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction or that may become an issue in future?

No.

Financial crime

47 Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

There is no specific legal or regulatory requirement for fintech companies to have anti-money laundering procedures. The Spanish Anti-Money Laundering Act is applicable to a number of regulated entities and persons carrying out certain type of activities. As far as a person or company carries out those activities (regulated or not), compliance with the Anti-Money Laundering Act (which includes an obligation to have appropriate policies and procedures in place to combat money laundering and terrorism financing) is compulsory. On the other hand, with regard to anti-bribery rules, the Spanish legislation does not regulate anti-bribery and corruption separately. These crimes are directly related to the liability of legal persons in Spain. The relevant regulation establishes control mechanisms to avoid illicit activity in organisations while also providing a huge range of sanctions, including the suspension of the activities and the dissolution of the company. There are also important reputational risks, for both the legal person and the board of directors. It is therefore important that fintech entities, regardless of whether they are regulated, adopt a proactive position to establish preventive criminal control measures and have appropriate policies and procedures in place as a matter of good governance and proportionate risk management.

48 Is there regulatory or industry anti-financial crime guidance for fintech companies?

There is no anti-financial crime guidance specifically for fintech firms. However, firms that are subject to the Anti-Money Laundering Act for carrying out certain types of activities subject to anti-money laundering controls should comply with it. In addition, these entities should follow the general recommendations for internal control to prevent money laundering and terrorism financing issued by the Spanish Executive Service of the Commission for the Prevention of Money.

Regulatory and financial crime rules would apply as far as the entities are subject to these regulations considering the type of activity or the type of entity (banks, insurance companies, asset managers, investment firms, etc). In this regard, there is an initiative (see 'Update and trends') proposing the creation of a specific regulatory framework for the fintech sector.

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

The following activities trigger a licensing requirement in Sweden: consumer lending, consumer credit mediation, lending in combination with accepting repayable funds from the public, factoring and invoice discounting (when combined with accepting repayable funds from the public), deposit taking (for deposits over 50,000 kronor), management of alternative investment funds (AIFs) or undertakings for collective investment in transferable securities (UCITS), foreign exchange trading, insurance mediation, provision of payment services and activities under the Capital Requirements Regulation No. 575/2013.

A licence is furthermore required for offering the services and products covered by the Markets in Financial Instruments Directive 2004/39/EC (MiFID), such as reception and transmission of orders in relation to one or more financial instruments, execution of orders on behalf of clients, dealing on own account, portfolio management, advising on investments in financial instruments, underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis, and placing of financial instruments without a firm commitment basis.

The following activities trigger a registration requirement in Sweden: currency exchange, deposit taking (for deposits up to 50,000 kronor), lending and credit mediation to non-consumers (if not combined with deposit taking).

2 Is consumer lending regulated in your jurisdiction? Describe the general regulatory regime.

Yes, consumer lending is regulated through, inter alia, the Swedish Consumer Credit Act (2010:1846), which includes relevant provisions relating to, among other things, sound lending practices, marketing of consumer loans, credit assessments, information prior to concluding of and in relation to documentation of loan agreements, interest, fees and repayment of loans. In order to offer or provide consumer loans, the relevant company is required to be authorised by the Swedish Financial Supervisory Authority (SFSA), under, for example, the Swedish Consumer Credit (Certain Operations) Act (2014:275 (CCCOA)) – should the company solely provide or act as intermediary in relation to consumer loans – or the Swedish Banking and Financing Business Act (2004:297 (SBFBA)) – should the company instead, given the operations carried out, be considered a credit institution (as defined in the Capital Requirements Regulation).

3 Are there restrictions on trading loans in the secondary market in your jurisdiction?

There are no particular restrictions on trading loans in the secondary market in Sweden.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would generally fall within the scope of any such regime.

Collective investment undertakings are regulated through the Swedish UCITS Act (2004:46), stipulating that the management of a Swedish UCITS, the sale and redemption of units in the fund, and administrative measures relating thereto may only be conducted following authorisation from the SFSA (with foreign EEA management companies authorised in their respective home state being able to rely on passporting regulations to carry out operations in Sweden). In relation to AIFs, see question 5.

Fintech companies, specifically those for crowdfunding investments, would generally not fall within the scope of the above-mentioned regulatory regime. The SFSA has, in a report published on 3 May 2016, however, recommended that the legislature should consider imposing consumer protection and authorisation requirements in relation to crowdfunding platforms in light of the market's rapid expansion.

5 Are managers of alternative investment funds regulated?

Yes, managers of AIFs are regulated through the Swedish AIFM Act (2013:561 (AIFMA)), implementing the Alternative Investment Fund Managers Directive 2011/61/EU (AIFMD). Small AIFMs (ie, AIFMs managing AIFs below the thresholds specified in article 3(2) of the AIFMD) may be exempted from the licensing requirements but must register with the SFSA and may not passport the registration into any other EU member state.

Similar as in relation to UCITS, fintech companies would generally not fall within the scope of the AIFMA.

6 May regulated activities be passported into your jurisdiction?

Yes – an undertaking that has been authorised in its home EU member state may, as a general rule, passport such authorisation into Sweden, where the Swedish legislation is based on EU law.

7 May fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

See question 6. However, in relation to activities that fall under the CCCOA a Swedish licence would be required (ie, passporting is not available).

8 Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

Companies facilitating peer-to-peer or marketplace lending, consisting of loan intermediation or brokering, are regulated by and require authorisation pursuant to the CCCOA (which contains regulations on, for example, anti-money laundering measures, sound practices for loan intermediation operations, and ownership and management assessments). Should the relevant company also be responsible for the transactions of funds between lenders and borrowers (including keeping funds on a client account, or similar), the operations would instead fall under and require authorisation pursuant to the Swedish Payment Services Act (2010:751 (PSA)), which imposes additional requirements relating to, for example, own funds and information and technical processes relating to the execution of payment transactions.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

There is no specific regulation of crowdfunding under Swedish law. Certain crowdfunding schemes may, however, fall within the scope of the general financial services framework. In the case of equity-based crowdfunding, the Swedish Companies Act (2005:551) prohibits a

private company or a shareholder thereof from attempting to sell shares or subscription rights in the company or debentures or warrants issued by the company to the public.

The SFSA has, in a report published 15 December 2015, concluded that parts of the activities on crowdfunding platforms are currently unregulated. In the report, as well as in its yearly Consumer Protection Report published in May 2016, the SFSA indicated that crowdfunding platforms may be subject to licensing requirements in the future. In July 2016, the Swedish government appointed a special committee to analyse the need for further regulations with regard to, and in order to improve the legal and regulatory opportunities for, peer-to-peer and grassroots financing in Sweden. The committee has not yet published any legislative proposals, but is expected to do so by the end of 2017.

10 Describe any specific regulation of invoice trading in your jurisdiction.

In accordance with the Swedish Certain Financial Operations (Reporting Duty) Act (1996:1006 (CFOA)), a company participating in financing, for example by acquiring claims (invoice trading) is required to register its operations with the SFSA (by way of notification to the SFSA), and is further obligated to comply with provisions relating to, for example, anti-money laundering, and undergo ownership and management assessments.

11 Are payment services a regulated activity in your jurisdiction?

Yes – payment services are regulated under the Payment Services Directive, which has been implemented into Swedish law through the PSA. Money remittance, execution of payment transactions and acquisition of payment instruments are among the services currently regulated under the PSA. With the entry into force of the Second Payment Services Directive (PSD2), payment initiation and account information services will be covered by the PSA. The transposition of PSD2 into national legislation is expected to occur in January 2018.

12 Do fintech companies that wish to sell or market insurance products in your jurisdiction need to be regulated?

Yes, insurance mediation is regulated under the Swedish Insurance Mediation Act (2005:405) implementing Directive 2002/92/EC on insurance mediation (IMD). The final draft proposal for the Swedish implementation of the Insurance Distribution Directive (IDD), Directive 2016/97/EU has not yet been published.

13 Are there any legal or regulatory rules in your jurisdiction regarding the provision of credit references or credit information services?

Yes, credit references and credit information services are regulated under the Swedish Credit Information Act (1973:1173) and the Swedish Credith Information Regulation (1981:955). A licence from the Swedish Data Protection Authority (DPA) is required when carrying out credit-rating operations in Sweden.

14 Are there any legal or regulatory rules in your jurisdiction that oblige financial institutions to make customer or product data available to third parties?

Through the implementation of PSD2 and subsequent regulations it is expected that financial institutions will be forced to make customer and product data available to third parties.

15 Does the regulator in your jurisdiction make any specific provision for fintech services and companies? If so, what benefits do those provisions offer?

There are no such provisions yet. Please note, however, that the Swedish Minister for Financial Markets has expressed great interest in the fintech sector and has commissioned the SFSA to produce a fintech report no later than by 1 December 2017. The SFSA is to survey existing fintech companies and start-ups and evaluate how the SFSA should work in order to meet the needs of the companies, as well as provide suggestions on any regulation necessary to adjust to the changing marketplace. The Minister for Financial Markets wishes to set up 'regulatory sandboxes' where fintech start-ups may develop in an unregulated environment or only comply with a 'regulation-light' regime. A first draft proposal of specific provisions for fintech companies is expected by Q1 2018 at the earliest.

16 Does the regulator in your jurisdiction have formal relationships or arrangements with foreign regulators in relation to fintech activities?

No, the SFSA does not currently have any such formal relationships or arrangements.

17 Are there any local marketing rules applicable with respect to marketing materials for financial services in your jurisdiction?

Marketing of financial services falls under the Swedish Marketing Practices Act (2008:486 (MPA)), which applies to all marketing activities that have the purpose of furthering the sale of any product or service in Sweden, including, for example, the distribution of brochures and other marketing materials and electronic marketing activities (if primarily directed to Swedish entities or individuals). The MPA provides that all marketing must be consistent with good marketing practice and be fair and reasonable towards the person to whom or which it is directed. Good marketing practice is defined in the MPA as generally accepted business practices or other established norms aimed at protecting consumers and traders in the marketing of products. Thus, all marketing shall be designed and presented in such a way as to make it apparent that it constitutes marketing and the party responsible for the marketing shall be clearly indicated. Statements or other descriptions that are or may be misleading may not be used. Marketing that contravenes good marketing practice is regarded as unfair if it appreciably affects or probably affects the recipient's ability to make a well-founded transaction decision.

In relation to financial services, and in order to comply with 'good marketing practice' for the purposes of the MPA, it can, for example, be noted that:

- placements of capital or returns should not be described in such terms as 'safe', 'guaranteed' or similar value judgements if it cannot be verified that it is guaranteed that an investor's capital will be repaid or that a given return will be earned;
- the return earned during a particular successful period on an investment product should not be highlighted in a way that gives a distorted overall impression of the performance of the investment product;
- words such as 'secure' and similar value judgements should not be used for marketing purposes if they are not placed in a relevant context;
- unconditional words expressing value, such as 'best', 'biggest' and 'leading' should not be used if the claim is not capable of verification; and
- if an investment product involves risk, it should always be made clear when marketing such product that an investment in the product involves risk.

In addition, marketing of funds is further specifically regulated through the Swedish Investment Fund Association's guidelines, which – albeit not being 'hard law' – are considered as codifying good marketing practice in Sweden as regards the marketing of UCITS.

18 Are there any foreign exchange or currency control restrictions in your jurisdiction?

No.

19 If a potential investor or client makes an unsolicited approach either from inside the provider's jurisdiction or from another jurisdiction, is the provider carrying out a regulated activity requiring a licence in your jurisdiction?

No – provision of regulated activities following a true reverse solicitation request is generally considered to fall outside the scope of the Swedish financial services regime. It should, however, be noted that the SFSA has adopted a strict interpretation of the meaning of a 'true' reverse solicitation request.

20 If the investor or client is outside the provider's jurisdiction and the activities take place outside the jurisdiction, is the provider carrying out an activity that requires licensing in its jurisdiction?

(For the purpose of responding to the question we have assumed that the provider is situated in Sweden.)

Regulated activities carried out in their entirety outside Sweden and where the investor or client is outside Sweden would not normally trigger any licensing requirement, regardless of whether the investor or client is a Swedish citizen or resident. It is, however, important that no part of the service takes place in Sweden.

21 Are there continuing obligations that fintech companies must comply with when carrying out cross-border activities?

Yes. Generally, companies providing financial services in Sweden or to Swedish investors (on a cross-border basis) following passporting of the relevant authorisation into Sweden are required to adhere to Swedish regulations in relation to, for example, marketing practices and consumer protection. In addition, compliance with potential reporting requirements and supervisory provisions implemented by the SFSA may also be required. The obligations applicable to a specific financial service are set out in the specific law or other regulation governing the particular financial service.

22 What licensing exemptions apply where the services are provided to an account holder based outside the jurisdiction?

No licensing exemptions apply.

Distributed ledger technology

23 Are there any legal or regulatory rules or guidelines in relation to the use of distributed ledger (including blockchain) technology in your jurisdiction?

There are no rules or guidelines specifically addressing the use of distributed ledger technology. The SFSA has, in a report from March 2016, identified distributed ledger/blockchain technology as an area of interest for the supervisor and where it is expected that rules and regulations need to be adopted in the future.

Digital currencies

24 Are there any legal or regulatory rules or guidelines in relation to the use of digital currencies or digital wallets, including e-money, in your jurisdiction?

Digital currencies, digital wallets and e-money are regulated under the PSA and the Swedish Electronic Money Act (2011:755), the SFSA's regulations regarding institutions for electronic money and registered issuers (2011:49) and the SFSA's regulations and general guidelines regarding institutions for electronic money and registered issuers (2010:3).

Securitisation

25 What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

Loan origination is regulated under the SBFBA and in subsequent regulations and guidelines issued by the SFSA and the Swedish Consumer Agency (SCA). The SFSA and the SCA have recently raised demands on lenders' investigation of creditworthiness prior to entering into loan agreements with consumers.

The risk that loan agreements entered into on a peer-to-peer or marketplace lending platform would not be enforceable under Swedish law is minimal.

26 What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected?

Perfection of an assignment against third parties depends on whether the loan is represented by a negotiable (physical) promissory note or a non-negotiable promissory note. In the former scenario, the promissory note must be transferred to the assignee, whereas in relation to non-negotiable promissory notes, the borrower must be notified of the assignment, so that the debtor can solely make its payments to the assignee with discharging effect.

In the event the assignment is not perfected, the loan would be included in the bankruptcy estate of the assignor, in relation to which the assignee would only have a non-secured claim.

27 Is it possible to transfer loans originated on a peer-to-peer or marketplace lending platform to the purchaser without informing the borrower? Does the assignor require consent of the borrower or are the loans assignable in the absence of a prohibition?

See question 28. Loans originated on a peer-to-peer lending platform may only be transferred without informing the borrower where the loan is represented by a negotiable promissory note.

28 Would a special purpose company for purchasing and securitising peer-to-peer or marketplace loans be subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

Yes. Provided that the company's operations consist of providing credit to consumers (by way of purchasing loans), the company would generally have to be authorised by the SFSA, in accordance with, for example, the CCCOA, which would entail that a duty of confidentiality (similar to bank secrecy) would be imposed. Provided that the company processes personal data as part of its operations, it would further, with respect to borrowers' personal data, be subject to Swedish data protection laws.

Intellectual property rights

29 Which intellectual property rights are available to protect software, and how do you obtain those rights?

Computer programs are protected as copyrighted works in accordance with the Swedish Copyright Act (1960:729). The copyright protection arises automatically (ie, there is no registration procedure for obtaining copyright protection).

30 Is patent protection available for software-implemented inventions or business methods?

Computer programs are expressly excluded from patent protection according to the Swedish Patents Act. However, for the assessment of patentability, the Swedish Patent Office and Swedish courts adhere to European Patent Office (EPO) case law, and according to EPO case Nos. T 935/97 and T 1173/97, a computer program claimed by itself is not excluded from patentability if the program, when running on a computer or loaded into a computer, if the computer brings about, or is capable of bringing about, a technical effect that goes beyond the 'normal' physical interaction between the program (software) and the computer (hardware) on which it is run.

Further, a pure business method is not technical in nature and is, therefore, not an invention (ie, patentable according to the Swedish Patents Act). However, an invention that constitutes a business method, but which makes use of specially adapted technology in a way that the solution to the problem is purely technical, can be patentable.

31 Who owns new intellectual property developed by an employee during the course of employment?

In general the intellectual property developed during the course of employment vests with the employee. However, the employer has a more or less extensive right to take over or utilise the intellectual property right depending on category of invention (see below), and the applicable employment agreement or collective agreement.

Furthermore, there are specific statutory provisions concerning certain intellectual property rights:

- The copyright to a computer program created in the scope of employment is passed on to the employer, unless otherwise agreed (according to the Swedish Copyright Act).
- There are three categories regarding patentable inventions developed by employees:
  - inventions created by someone employed as an inventor and within the scope of such employment may be transferred to or utilised by the employer;
  - inventions created outside the scope of employment, yet in the employer's line of business, may be utilised by the employer. Transfer of ownership requires an agreement between the employer and the employee; and
  - inventions created within the employer's line of business but without any connection to the employment. If agreed upon, the employer then has the prior claim to acquire the patent.

In addition, any applicable collective agreement normally contains provisions on intellectual property rights similar to the three categories described above.

32 Do the same rules apply to new intellectual property developed by contractors or consultants? If not, who owns such intellectual property rights?

The intellectual property rights, including copyrighted works, normally stay with the contractor or consultant unless otherwise agreed between the parties.

33 Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

The Swedish legislation does not fully regulate joint ownership of intellectual property rights. Out of all the intellectual property laws, it is only the Swedish Copyright Act that explicitly regulates the issue by stating that the principle rule is that co-authors have a joint right to the copyrighted work. Although the same should to some extent be applicable when it comes to the other intellectual property rights, it is important to note that copyright differs from the other intellectual property rights when it comes to the co-owners' right to individual exploitation of the asset. Thus, if there is no agreement between the co-owners, as a comparison some conclusions could be drawn from the Swedish Act on Joint Ownership (1904:48) and from the Partnership and Non-registered Partnership Act (1980:1102), both stating that an unanimous agreement between co-owners is necessary. Following this, the owners have to settle the ownership and agree on how to use the intellectual property, in order to avoid uncertainty.

34 How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

Trade secrets are covered by the Swedish Act on the Protection of Trade Secrets (1990:409). For the purposes of the Act, trade secrets are defined as information concerning business or operational circumstances in an undertaking's business, which the undertaking keeps confidential and the disclosure of which is likely to cause damage to the undertaking from a competition perspective. Such trade secrets cannot be registered for protection.

Normally, court proceedings in Sweden are public. However, for information concerning business or operational circumstances parties may request secrecy during the proceedings and also afterwards (although a Swedish court is not required to adhere to such request).

35 What intellectual property rights are available to protect branding and how do you obtain those rights?

The general provisions for the protection of marks and trade symbols are laid down in the Swedish Trademarks Act (2010:1877). A trade symbol can be registered for protection throughout Sweden if it is deemed distinctive (ie, capable of distinguishing goods or services of one business activity from those of another). Also, exclusive rights in a trade symbol may, without registration, be obtained by way of the symbol being considered established on the market. A trade symbol is deemed established on the market if it is known by a significant part of the relevant public as an indication for the goods or services that are being offered under it.

In addition, EU trademarks cover Sweden (and the rest of the EU).

36 How can new businesses ensure they do not infringe existing brands?

New businesses can perform searches in relevant databases (eg, the Swedish Patent and Registration Office's database, which covers both Swedish and EU trademarks) in relation to brands they intend to use.

37 What remedies are available to individuals or companies whose intellectual property rights have been infringed?

There are numerous remedies available when suing an alleged infringer in court. For example, preliminary injunctions and damages for infringement and impaired goodwill are available in all Swedish intellectual property laws.

Update and trends

Sweden has a large and fast-moving fintech sector with well-known companies such as Klarna, Tink and Trustly. Relying on the grace period offered in the PSD2, several of the fintech companies are already offering account information services (AIS) and payment initiation services (PIS) on the Swedish market. This means that the new type of business that PSD2 is supposed to support to a relatively large extent is already a fact in Sweden, whereas the effects of the extended regulation to capture new companies as well is something that will be seen in Sweden following the PSD2's implementation in 2018.

38 Are there any legal or regulatory rules or guidelines surrounding the use of open-source software in the financial services industry?

No – there are no rules or guidelines especially targeting the use of open-source software in the financial services industry. The SFSA has issued regulations and general guidelines regarding information security, IT operations and deposit systems applicable to credit institutions (banks and credit market companies) and securities firms. The rules and guidelines apply irrespective of the software used.

Data protection

39 What are the general legal or regulatory requirements relating to the use or processing of personal data?

The Swedish Personal Data Act (1998:204) generally applies to processing of personal data by data controllers established in Sweden. The main requirements relating to the processing of personal data include:

- Personal data may only be processed (ie, collected, used, stored) if there is legal ground (ie, consent) for the processing; however, there are several exemptions from the requirement of consent (eg, where the processing is necessary in order to fulfil a contract or a legal obligation or necessary to pursue a legitimate interest of the data controller, unless this interest is overridden by the interest of the registered person to be protected against undue infringement of privacy).
- Certain fundamental requirements must be met (eg, personal data shall be adequate, relevant and non-excessive in relation to the purpose of the processing and shall not be kept longer than necessary).
- Data subjects shall, as a general rule, be informed of the processing of their personal data.
- Processing of sensitive personal data and criminal offence data may only be performed in limited circumstances. In general, consent from the person concerned is required for sensitive data. As a general rule, it is prohibited to process criminal offence data (there are a few exemptions, for example, regarding whistle-blowing systems, where it is permitted to process criminal offence data under certain conditions).
- There are specific requirements that must be met in case of export of personal data to countries outside the EU or EEA (eg, consent or model clause agreements may justify such export).
- A data controller must take appropriate technical and organisational measures in order to protect personal data. Data processing agreements must be entered into with data processors.

There exists a general duty to inform the Swedish regulatory agency, the Data Inspection Board, about processing of personal data. However, there exist certain exemptions from the notification requirement.

40 Are there legal requirements or regulatory guidance relating to personal data specifically aimed at fintech companies?

No.

41 What legal requirements or regulatory guidance exists in respect of anonymisation and aggregation of personal data for commercial gain?

Anonymised and aggregated data (ie, data that cannot directly or indirectly be used to identify an individual by any means) are not considered as personal data under the Swedish Personal Data Act and will not be subject to the requirements set forth therein.

Cloud computing and the internet of things

42 How common is the use of cloud computing among financial services companies in your jurisdiction?

Software-as-a-service and private cloud solutions are to some extent used by financial services companies in Sweden. Public cloud solutions are normally not used for sensitive and financial data.

43 Are there specific legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

The Swedish Data Protection Authority has issued general guidance with respect to the use of cloud computing. According to the guidance, the data controller must, for example:

- adopt a position regarding whether there is a risk that personal data may be processed for purposes other than the original ones;
- adopt a position regarding whether the cloud service provider may disclose personal data to a country outside the EU or EEA and whether, in such a case, the transfer can be justified under the Personal Data Act;
- carry out a risk and impact assessment in order to assess whether it is possible to appoint the cloud service supplier for processing of the envisaged personal data, what security level is appropriate and what security measures have to be taken in order to protect the personal data that is processed;
- ensure that a detailed data processor agreement is entered into with the cloud provider; and
- consider other legislation, such as confidentiality legislation.

The SFSA requires outsourcing agreements to be in writing and clearly regulate the rights and obligations of the financial service company and the third-party service provider. The SFSA further expects the financial service company to be able to assess and monitor how well the third-party service provider is carrying out its duties and to terminate the agreement should the third-party service provider lack the skills, capacity and authorisations required by law to reliably and professionally perform the outsourced duties and manage risks related to these duties.

44 Are there specific legal requirements or regulatory guidance with respect to the internet of things?

Personal data processed in connection with the internet of things (eg, IP addresses, MAC addresses and RFID) will be subject to the general requirements in the Swedish Personal Data Act.

Tax

45 Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

There are no special Swedish tax incentives for fintech companies or investors to encourage innovation and investment in the fintech sector in Sweden.

Competition

46 Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction or that may become an issue in future?

The rapid growth of the Swedish fintech industry in recent years has given rise to many new payment solutions and increased competition between the old and the new. For instance, we have lately seen issues relating to the interoperability between the traditional banking systems and the new digital solutions. Further, while it is hoped that new regulation, such as PSD2 and the Payments Account Directive, will result in lower transaction fees and spur further growth and competition, it may also lead to an increased focus on compliance, which could negatively affect innovation in the industry.

Financial crime

47 Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

Companies that are licensed by or registered with the SFSA and a significant number of companies and other professionals outside the financial sector are obligated to prevent money laundering and financing of terrorism (AML) by complying with the Swedish Money Laundering and Terrorist Financing Prevention Act (2009:62) and subsequent regulations. Pursuant to the AML regulations, companies are required to adopt internal AML procedures.

The SFSA is tasked with ensuring that the financial companies adhere to the AML regulations. The County Administrative Board supervises companies and professionals outside the financial sector.

Bribery is criminalised under the Swedish Penal Code (1962:700), which is applicable to all types of Swedish companies. Most financial companies are required to adopt ethical guidelines setting out, inter alia, the company's procedures to combat bribery.

48 Is there regulatory or industry anti-financial crime guidance for fintech companies?

Yes, the SFSA has adopted regulations and guidelines with respect to AML, setting out the detailed provisions applicable for relevant companies.

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

In general terms, Swiss law and regulation distinguishes between the following regulated financial institutions that require a licence from the Swiss Financial Market Supervisory Authority (FINMA):

- banks;
- domestic and foreign securities dealers;
- insurance companies;
- fund management companies and asset managers of Swiss or foreign investment funds; and
- independent asset managers, acting exclusively in their clients' names based on powers of attorney.

Banks are defined as entities that are active mainly in the area of finance and in particular, but in a non-exclusive understanding, those who accept deposits from the public on a professional basis or solicit these publicly to finance in any way, for their own account, an undefined number of unrelated persons or enterprises (ie, more than 20 clients), with which they form no economic unit, or who refinance themselves to a substantial degree from third parties to provide any form of financing for their own account to an undefined number of unrelated persons and institutions. Substantial financing by third parties is given if more than five banks provide loans or other ways of financing to the company in the amount of at least 500 million Swiss francs (as average over the last year). Many fintech companies or platforms had limited the number of clients providing financing to 20 in order not to qualify as a bank. As of 1 August 2017, these rules have been amended. The revised Swiss Banking Ordinance no longer looks at the number of clients but the value of client assets held by a company. In the event deposits of not more than 1 million Swiss francs are held by a company, no banking licence will be needed. This amendment, often referred to as regulatory sandbox, shall allow fintech companies to access the market without bearing the regulatory burden on day one.

Securities dealers are natural persons, entities or partnerships who buy and sell securities in a professional capacity on the secondary market, either for their own account with the intent of reselling them within a short time period or for the account of third parties; make public offers of securities on the primary market; or offer derivatives to the public.

Independent asset managers may not: act in their own names; hold omnibus accounts; or manage the assets of their clients by accepting them in their books and opening mirror accounts (in which case they will be viewed as securities dealers).

As a rule, the first four categories need to obtain an authorisation licence from FINMA before starting business activities in or from Switzerland. The fifth category of independent asset managers is, in principle, not required to obtain an authorisation from FINMA for such limited activities, but is subject to anti-money laundering regulations.

2 Is consumer lending regulated in your jurisdiction? Describe the general regulatory regime.

Consumer lending is a regulated activity in Switzerland. The respective Swiss law aims to protect consumers with rules about the form and content of consumer lending contracts; norms providing transparency in this field; and by providing for a statutory right to withdraw from the contract by the consumer. The lender is obliged to verify the creditworthiness of interested contracting parties following a specific procedure and a central database shall prevent over-indebtedness or at least its aggravation. A consumer lending company has to obtain a licence from the cantonal authorities and has to hold own assets in the amount of 8 per cent of the issued consumer loans.

3 Are there restrictions on trading loans in the secondary market in your jurisdiction?

Trading loans in the secondary market is not a regulated activity. In the event the investment company is buying and selling securities in a professional capacity, in the secondary market, either for their own account with the intent of reselling them within a short time period or for the account of third parties, such company is required to obtain a securities dealer licence from FINMA.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would generally fall within the scope of any such regime.

Along with banks and securities dealers, FINMA supervises collective investment schemes. The Authority is responsible for the authorisation and supervision of all collective investment schemes set up in Switzerland and the distribution of shares or units in collective investment schemes in and from Switzerland to retail investors. Domestic collective investment schemes and any party responsible for managing such a scheme (ie, fund management companies, asset managers and distributors) or for safekeeping the assets of a collective investment scheme (ie, custodian banks) require a licence and are supervised by FINMA. The investment products distributed by each collective investment scheme, including its related documents, require prior approval from FINMA. The different types of collective investment schemes provided by law are subject to investment and borrowing restrictions. The same rules apply for fintech companies that manage an investment fund. There are no specific regulations applicable for fintech companies in this respect.

5 Are managers of alternative investment funds regulated?

Switzerland is not a member state of the European Union. The Alternative Investment Fund Managers Directive (AIFMD) does not apply in Switzerland. In general, asset managers of Swiss or foreign collective investment schemes will have to obtain a licence from FINMA. To obtain the licence, the asset manager must, inter alia, demonstrate equity capital of at least 500,000 Swiss francs. Some exceptions regarding the duty to obtain a licence apply. For instance, asset managers of funds limited to qualified investors are excluded from the licensing requirement under one of three conditions: first, the assets under management (including assets acquired through the use of leverage) may not exceed 100 million Swiss francs; second, the assets are less than 500 million Swiss francs (provided that the managed portfolio is not leveraged and that investors do not have redemption rights exercisable for a period of five years following the date of the initial investment); or third, all investors belong to the same financial group as the asset managers. These provisions are in line with the de minimis rule introduced by the AIFMD, under which voluntary licensing by the asset manager remains possible. In addition, in certain justified cases FINMA may,

on request, partially or completely exempt asset managers of foreign funds from the provisions of the applicable Swiss law and regulation.

6 May regulated activities be passported into your jurisdiction?

No. Given that Switzerland is not part of the European Union, regulated activities may not be passported into Switzerland.

7 May fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

Providers of financial services can place their transborder products in Switzerland without establishing a local presence. In fact, Switzerland acts with the physical presence test and the principle of home country supervision. According to these aspects, financial services providers without local presence undergo financial supervision in their home country and, therefore, essentially do not need a Swiss licence to provide financial services. An exception is the licensing requirement for public offering and managing of collective investment schemes. Switzerland is applying a liberal regime in admitting foreign financial services without establishing a local presence in comparison to international regulation.

8 Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

Peer-to-peer and marketplace lending is subject to anti-money laundering regulation in Switzerland, provided that the respective fintech company is acting as lending company (and not as mere marketplace without accepting and forwarding any money). A company subject to anti-money laundering regulations has to submit itself to the supervision of FINMA or affiliate with a self-regulatory organisation for anti-money laundering purposes.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

Owing to a lack of specific norms in the field of fintech and crowdfunding, the general rules of Swiss law are applicable to the concept of crowdfunding; in particular, private law (especially contract law and company law), as well as financial market relevant supervision law.

Concerning the private law aspect, there is no general solution to the legal qualification of a crowdfunding system available under Swiss law. Depending on the specific arrangement of the regime, the crowdfunding system could contain a brokerage contract or a commercial agency contract (a simple agency contract) in terms of the relationship between the crowdfunding platform and the other parties. Regarding the relationship between provider and seeker of financial remedies, a classification as fixed-term loan, gifts or innominate contract might be adequate. For major crowdfunding programmes, it may even be reasonable to qualify the system as a simple partnership.

With regard to the aspect of financial market relevant supervision law, there are, again, no specific rules for crowdfunding available. As long as funds directly move from project financers to project developers (the time frame for such transfer has recently been extended from seven to 60 days), crowdfunding platforms would not be subject to licensing requirements under financial market legislation (even if the funds are channelled through a third party independent of the project developers, platform operator or project financers); but as soon as the financial remedies are channelled through the account of platform operators, they might need a banking licence (which is rather unlikely) and at the same time, they would be subject to anti-money laundering regulation.

In conclusion, as major insecurities exist in the field of crowdfunding and as the system is gaining in importance, adaptations of Swiss law may be expected in future. In particular, it is expected that the legislator will focus on working on coordination and harmonisation with foreign regulation, because the Swiss market on its own is too small to be attractive for crowdfunding.

10 Describe any specific regulation of invoice trading in your jurisdiction.

There is no specific regulation applicable on invoice trading in Switzerland. A fintech company trading in invoices is, generally speaking, subject to anti-money laundering regulation.

11 Are payment services a regulated activity in your jurisdiction?

Switzerland does not have a regulatory framework similar to the European Payment Services Directive (PSD2). The PSD2 is applicable in the European Economic Area (EEA) but does not apply to cross-border payments from the EEA to Switzerland and vice versa. Needless to say, Swiss payment transaction providers will be exposed to PSD2 should they do business relating to EEA countries. Switzerland is part of the Single European Payments Area (SEPA). The rulebook of the SEPA does not require the implementation of the PSD2. In Switzerland, payment services are subject to anti-money laundering regulation.

12 Do fintech companies that wish to sell or market insurance products in your jurisdiction need to be regulated?

Yes. Given that there are no specific rules for fintech companies selling or marketing insurance products. All insurance companies operating in Switzerland are obliged to obtain a licence for their business activities from FINMA. With some exceptions Swiss law treats reinsurers in the same way as primary insurers.

13 Are there any legal or regulatory rules in your jurisdiction regarding the provision of credit references or credit information services?

FINMA has no supervisory authority over the rating agencies but it recognises certain rating agencies. Regulated financial institutions may of course use ratings to meet a number of regulatory requirements. Fintech companies often issue credit references, especially for borrowers, or offer credit information services and may do so without the need to obtain a licence.

14 Are there any legal or regulatory rules in your jurisdiction that oblige financial institutions to make customer or product data available to third parties?

No.

15 Does the regulator in your jurisdiction make any specific provision for fintech services and companies? If so, what benefits do those provisions offer?

The Swiss Federal Council decided to ease the regulatory framework for providers of innovative financial technologies in November 2016. As a result, the Federal Department of Finance (FDF) presented the 'FinTech Strategy Switzerland' as a form of deregulation with three supplementary elements:

- First, the deadline for holding (fiat) money in settlement accounts has been prolonged from seven to 60 days.
- Second, a company may now accept deposits in a total value of 1 million Swiss francs without the need to obtain a banking licence from FINMA (regulatory sandbox). These two fintech-related elements have been introduced as of 1 August 2017.
- Third, a banking licence 'light' should be introduced that allows a company to accept deposits of up to 100 million Swiss francs provided that the funds will not be invested nor subject to interest payments to the clients. This new licence should be paired with a loosening of the licensing process and account, auditing and regulatory capital requirements. Unfortunately, the implementation of this new licence category has been shelved. It is now only expected to be implemented with the Financial Services Act and the Financial Institution Act scheduled for 2019 (the Financial Services Act aims to introduce equivalent rules to the European Markets in Financial Instruments Directive).

16 Does the regulator in your jurisdiction have formal relationships or arrangements with foreign regulators in relation to fintech activities?

The Swiss regulator FINMA has entered into memoranda of understanding with various foreign regulators and cooperates with foreign regulators on a regular basis. In respect of fintech, FINMA entered into a cooperation agreement with the Monetary Authority of Singapore in September 2016. As per the agreement, the two authorities intend to cooperate with the aim of encouraging and enabling innovation in their respective financial services industries and of supporting financial innovators in meeting the regulations in each others' jurisdictions as may be required to offer innovative financial services in the respective

financial markets. Both authorities aim to establish a specific fintech-friendly environment.

17 Are there any local marketing rules applicable with respect to marketing materials for financial services in your jurisdiction?

The distribution of financial products (ie, investment funds and structured products) is regulated in Switzerland. At present, Switzerland has not implemented a financial services act similar to the Markets in Financial Instruments Directive (MiFID) I or MiFID II, but a draft Financial Services Act has been proposed, and is being discussed in the Swiss parliament, which is unlikely to be implemented before 2019. When it comes to the marketing of financial products, the draft law follows the principles of Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC and the regulation on key information documents for packaged retail and insurance-based investment products but does not provide specific rules on the marketing material for financial services.

18 Are there any foreign exchange or currency control restrictions in your jurisdiction?

No. Unrestricted amounts of liquid funds (ie, cash, foreign currency and securities (shares, bonds and cheques)) can be imported into Switzerland, brought through Switzerland in transit or exported from Switzerland. Further, the funds do not need to be declared.

19 If a potential investor or client makes an unsolicited approach either from inside the provider's jurisdiction or from another jurisdiction, is the provider carrying out a regulated activity requiring a licence in your jurisdiction?

No. The distribution of financial products based on reverse solicitation is not regulated in Switzerland. The provider must, despite any reverse solicitation, comply with anti-money laundering regulation.

20 If the investor or client is outside the provider's jurisdiction and the activities take place outside the jurisdiction, is the provider carrying out an activity that requires licensing in its jurisdiction?

Providers of financial services having a physical presence in Switzerland require a licence in Switzerland even if they serve investors of clients outside of Switzerland or in the event the activities take place outside of Switzerland. The licensing requirements are triggered by the physical presence in Switzerland.

21 Are there continuing obligations that fintech companies must comply with when carrying out cross-border activities?

There are no specific continuing obligations applicable on cross-border activities of a Swiss fintech company or a foreign fintech company doing business in Switzerland on a mere cross-border basis. Where a Swiss fintech company is subject to Swiss anti-money laundering regulation, it has to provide an anti-money laundering file for each client. The fintech company has to notify the Money Laundering Reporting Office Switzerland (MROS) if it has reason to suspect money laundering is taking place.

22 What licensing exemptions apply where the services are provided to an account holder based outside the jurisdiction?

Providers of financial services having a physical presence in Switzerland require a licence in Switzerland even if they serve investors of clients outside of Switzerland or in the event the activities take place outside of Switzerland. The licensing requirements are triggered by the physical presence in Switzerland.

Distributed ledger technology

23 Are there any legal or regulatory rules or guidelines in relation to the use of distributed ledger (including blockchain) technology in your jurisdiction?

The use of distributed ledger technology is not specifically regulated in Switzerland. Essentially the existing regulatory framework applies, which is largely technology agnostic. Depending on the scope and purpose of the business model, authorisation requirements for central custodians of securities, securities settlement systems and payment systems under the regime of the Swiss Financial Market Infrastructure Act might be envisioned. Also, distributed ledgers operated in Switzerland or out of Switzerland generally qualify as a 'financial intermediaries' if they professionally accept or keep as a custodian foreign assets or help to invest or transfer them (article 2, paragraph 3 AMLA). Such blockchain operations are thus bound to heed Swiss anti-money laundering obligations.

Digital currencies

24 Are there any legal or regulatory rules or guidelines in relation to the use of digital currencies or digital wallets, including e-money, in your jurisdiction?

There is no bespoke regulation as to the use of e-money or virtual currencies in Switzerland. The Swiss Federal Council published a report on virtual currencies such as bitcoin in 2014, but it refrained from proposing specific regulation because of the marginal economic importance of bitcoin. FINMA, in its official statements, also focuses mainly on bitcoin and has issued a corresponding factsheet that provides some regulatory guidance, but tries hard to create a palatable environment for innovative business models. For instance, in contrast to a view adopted in the factsheet, FINMA would not consider the safekeeping of virtual currencies in account deposits or a wallet as an activity requiring a banking licence, as long as the private keys are deemed severable in a bankruptcy of the custodian. On the other hand, if the custodian was able to dispose of the virtual currency accounts without the beneficiaries' interaction, a banking licence would still be mandatory. Mere trading platforms matching sellers' and buyers' demands are not subject to regulatory oversight. In a recent statement, the Federal Council announced that it will swiftly pursue further regulatory measures in this field (ie, as to legal qualification at virtual currencies).

Securitisation

25 What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

Whereas no specific requirements apply for the execution of loan agreements (provided that the loan does not qualify as a consumer loan), the form requirement for security agreements depends on the required security. To perfect the security interest over the moveable asset, a physical transfer of possession to the lender is required (the borrower may not be in a position to solely exercise disposition (physically) over the asset). Provided that the perfection requirement for the respective security is complied with, there is no specific risk that the loan or security agreement would not be enforceable if entered into on a peer-to peer or marketplace lending platform. A marketplace lending platform may also act as a security agent for the lenders. Depending on the legal nature of the security interest, the security agent will either act in its own name (for the benefit of all secured parties) (in case of assignment or transfer for security purposes) or on behalf and in the name of all secured parties as direct representative (in the case of a pledge). If the security agent acts as a direct representative of the secured parties, it needs to be properly authorised and appointed by all other secured parties (such authorisation and appointment is usually included in the credit agreement or the terms of use of the marketplace lending platform). Such authorisation and appointment may have to be properly evidenced in writing in case of enforcement of the security.

26 What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected?

The assignment of loans is perfected by a written agreement between the peer-to-peer lending platform and the assignee. An electronically concluded assignment agreement would not be compatible with the perfection requirements. Notice to the borrower is not required in order to perfect the assignment and can be given at a later stage (eg, upon enforcement). However, in the absence of notification, the borrower can pay the assignor and thereby validly discharge its obligations. It

is likely, therefore, that the assignee will feel more secure if the borrower is notified (either immediately following the assignment or upon the occurrence of a specified trigger event) as it prevents a situation in which the borrower can validly discharge its obligation by payment to the assignor.

27 Is it possible to transfer loans originated on a peer-to-peer or marketplace lending platform to the purchaser without informing the borrower? Does the assignor require consent of the borrower or are the loans assignable in the absence of a prohibition?

Yes. Notice to the borrower is not required in order to perfect assignment of the loan and can be given at a later stage (eg, upon enforcement). However, in the absence of notification the borrower can pay the assignor and thereby validly discharge its obligations. It is likely, therefore, that the assignee will feel more secure if the borrower is notified (either immediately following the assignment or upon the occurrence of a specified trigger event) as it prevents a situation in which the borrower can validly discharge its obligation by payment to the assignor. In the event of a ban of assignment, the borrower has to consent to the transfer; otherwise the transfer would not be valid.

28 Would a special purpose company for purchasing and securitising peer-to-peer or marketplace loans be subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

Swiss Data Protection Law places limitations on the scope of the collection and use of personal information, as well as other types of information. The definition of 'personal information' – which covers any information that refers to a specific legal or natural person capable of being specifically identified – is sufficiently broad that the disclosure of information relating to accounts receivable and other assets will be restricted or prohibited. Care must therefore be taken to ensure that the requirements of this Law (eg, the processing of personal data must be proportionate (ie, necessary for the intended purpose and reasonable in relation to the privacy interest) and personal data may only be used for the purpose intended at the time of collection) are met, while ensuring that the special purpose company will have access to the information required to enforce its claims under the loans. Data protection rights may be waived by the borrower (such waiver is usually contained in the documentation of a peer-to-peer lending platform).

Intellectual property rights

29 Which intellectual property rights are available to protect software, and how do you obtain those rights?

In line with the WIPO Copyright Treaty and the Agreement on Trade-Related Aspects of Intellectual Property Rights, computer programs are protected as copyrighted works under the Federal Act on Copyrights and Neighbouring Rights (the Copyright Act). The copyright vests in the author immediately upon creation of the work; there is neither a requirement nor a possibility to register copyrights. It is presumed that copyright pertains to the person whose name, pseudonym or distinctive sign appears on the copies or in conjunction with the publication of the work.

Further, computer-implemented inventions are eligible to patent protection under limited circumstances (see question 30). The patent is obtained upon registration and is protected for a period of 20 years from the filing date or an earlier designated priority date. Domestic patent applications are to be filed with the Federal Institute of Intellectual Property. Applicants domiciled in Switzerland may also file European patent applications with the Institute, with the exception of divisional applications.

Utility patents for minor technical inventions do not exist in Switzerland. However, since the requirements of novelty and non-obviousness are not examined ex officio during the process of domestic patent applications, domestic patents may be relatively easy to obtain but are also easy to challenge as instruments of protection.

30 Is patent protection available for software-implemented inventions or business methods?

For an invention to be patentable, it must be of a technical character; namely, it must incorporate physical interaction with the environment. Consequently, claims merely containing characteristics of computer software as such or of business methods transposed to a computer network are not eligible for patent protection. This difficulty arises because the European Patent Convention stipulates that 'schemes, rules and methods for doing business' and 'programs for computers' are not patentable.

Hence, while an abstract algorithm (eg, for collating or analysing data) is not patentable, the practical application of an algorithm dedicated to a specific technical field and generating a specific technical effect might be patentable. An example of a computer-implemented invention in the financial sector that was awarded protection in Switzerland on the basis of a European application is MoneyCat's patent of an electronic currency, an electronic wallet and electronic payment systems, that has been asserted against PayPal in patent litigation in the United States.

31 Who owns new intellectual property developed by an employee during the course of employment?

Under Swiss law, the ownership of employee inventions depends on the type of intellectual property created.

By virtue of article 332, paragraph 1 of the Swiss Code of Obligations (CO), patentable inventions or designs made in the course of employment and in performance of the employee's contractual obligations vest in the employer. The employer may also claim inventions created in the course of employment but unrelated to the employee's tasks by written agreement (article 332, paragraphs 2 and 3, CO), provided that the employee receives equitable compensation in consideration for the assignment of the invention (article 332, paragraph 4, CO).

In contrast to patents, copyright vests in the natural person who has created the work (ie, the author). As an exception to the rule, the commercial exploitation rights in computer programs developed by an employee in the course of employment belong to the employer (article 17, Copyright Act). On the other hand, developments that are unrelated to the employee's job description are not subject to such statutory assignment. Employers are therefore well advised to stipulate unambiguous assignment clauses in their employment contracts.

32 Do the same rules apply to new intellectual property developed by contractors or consultants? If not, who owns such intellectual property rights?

The concept of 'work for hire' is not enshrined in Swiss patent or copyright law. Hence, as a matter of principle, the copyright or right to the patent belongs to the developer. It is therefore essential to provide for adequate intellectual property assignment clauses in any contracts for work or services.

33 Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

In the absence of an agreement regulating joint owners' exploitation rights in intellectual property, jointly owned intellectual property rights must not be prosecuted, used, licensed or otherwise disposed of without co-owners' consent. However, depending on the type of intellectual property right at stake, there are some exceptions:

- Each co-owner of a patent may independently transfer ownership of its share to a third party or institute proceedings against any infringer of the patent (article 33, paragraph 2, Patent Act).
- In the realm of copyright, co-owners must not unreasonably withhold their consent to the use of a collective work by a co-owner (article 7, paragraph 2, Copyright Act). If the contributions to a work are severable, each co-author may freely exploit his or her share, provided that the overall exploitation of the work is not negatively impacted thereby (article 7, paragraph 4, Copyright Act).

34 How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

There is no exclusive right conferred on trade secrets and other valuable confidential business information as such. However, unauthorised disclosure or exploitation of corresponding information is sanctioned by virtue of unfair competition and criminal law. Pursuant to articles 5 and 6 of the Federal Act against Unfair Competition, the unfair exploitation of the achievements of others and the undue exploitation or disclosure of manufacturing or trade secrets are prohibited. Further,

the unauthorised obtaining of electronically stored data and industrial espionage are criminal offences.

Any evidence brought into the proceedings by a party is, in principle, accessible by the opposing party. Again, there are a few exceptions.

Upon request, the court will take appropriate measures to ensure that taking evidence does not jeopardise the legitimate interests of any of the parties involved or a third party, for example, business secrets contained in offered evidence.

In the course of a pretrial description of a product or process allegedly infringing upon a patent, the court will take the necessary measures to safeguard manufacturing or trade secrets, for instance by conducting the description ex parte only.

35 What intellectual property rights are available to protect branding and how do you obtain those rights?

The most important intellectual property right to protect branding is the trademark. Trademark protection can be obtained through national registration or designation in Switzerland via the Madrid System (Agreement and Protocol). Signs that belong to the public domain; are of a shape that constitutes the essential nature of the claimed goods or is otherwise technically necessary; are misleading; or are contrary to public policy, morality or the law are not susceptible to trademark protection. Recent examples of signs claiming trademark protection for financial services that were refused are Keytrader, which was admitted by the office but later nullified in civil proceedings for being descriptive, and the slogan 'Together we'll go far', because it was held to be overwhelmingly promotional and therefore insufficiently distinctive.

A trademark is valid for a period of 10 years from the date of application and may be renewed indefinitely for subsequent periods of 10 years each, provided that genuine use as a trademark has commenced, at the latest, five years after the date of registration. The trademark endows the owner with the exclusive right to prohibit others from using in commerce an identical or confusingly similar trademark.

Unregistered signs and trade dresses are capable of protection under unfair competition law, while company names benefit from a specific protection regime. Domain name registrations do not entail legal exclusivity rights per se, but earlier trademarks or trade names may constitute a claim for having a corresponding domain name transferred.

36 How can new businesses ensure they do not infringe existing brands?

The most effective and reliable method to ensure non-infringement of existing brands is an availability search encompassing both trademarks and company names. However, even if no conflicting registration is found, a new business may still encounter an infringement of unregistered brands that have already acquired some distinctiveness in the market owing to their constant factual use.

New businesses should also consider that the assumption of factual use of a brand without trademark registration may result in possible infringement of a later registration. However, the earlier adopter is entitled to continue using the brand to the extent used prior to the later filing of the third-party application.

37 What remedies are available to individuals or companies whose intellectual property rights have been infringed?

The remedies available to owners or exclusive licensees of intellectual property rights are more or less harmonised for all categories of intellectual property rights and encompass injunctive relief; disclosure of information on the origin and the recipients of infringing goods or services; and damages. It is also possible to obtain preliminary injunctions, even ex parte, in case of urgency. If an ex parte injunction is granted, the defendant receives notice of such action upon service of the decision (article 265, paragraph 2, CPC), accompanied by either a summons to a hearing or an invitation to submit a writ in defence.

38 Are there any legal or regulatory rules or guidelines surrounding the use of open-source software in the financial services industry?

The use of open-source software in the financial services industry is widespread and not specifically regulated in Switzerland. Concerns with respect to ensuing source code disclosures have largely evaporated, since the vast majority of open-source software licences do not foresee copyleft effect in the event the software is operated as a cloud service and no programming code is conveyed.

Data protection

39 What are the general legal or regulatory requirements relating to the use or processing of personal data?

The Swiss Federal Data Protection Act (FDPA) aims to protect personal data of both individuals and legal entities. The FDPA proclaims the following overarching principles of processing of personal data: transparency, purpose limitation, proportionality, data integrity and data security (article 7, FDPA). Notably, the FDPA does not per se require the data subject's consent or another justification for the processing of personal data. However, if personal data is being processed beyond said principles (eg, by way of collecting personal data without informing the data subject or despite his or her express objection), such activity infringes on the personality right of the data subject and consequently requires justification by an overriding public or private interest. In the wake of the adoption of the General Data Protection Regulation in the European Union (GDPR), the FDPA is currently being fundamentally revised with the aim of living up to the enhanced requirements imposed by the GDPR. Yet there are still no plans to introduce a general consent requirement.

40 Are there legal requirements or regulatory guidance relating to personal data specifically aimed at fintech companies?

The FPDA does not specifically regulate financial information. In particular, financial data is not considered qualified sensitive data, in contrast to, for example, health information or information about criminal sanctions. Yet it is of particular importance that, according to case law, the information collected by a relationship manager in a bank's customer relationship management tool constitutes personal data, which the data subject is entitled to access at any time without having a specific interest.

Fintech companies regulated as banks are subject to a variety of requirements pertaining to the processing of customer-identifying data (CID). The same applies indirectly to fintech companies that are cooperating with banks and, as such, gain access to CID. First and foremost, every service provider in this field has to abide by the secrecy of bank customer data (article 47 of the Swiss Federal Law on Banks and Savings Institutions) and professional secrecy (article 43 of the Swiss Federal Act on Stock Exchange and Securities Trading). The applicable principles are further detailed in FINMA Circular 2008/21 regarding the operational risks of banks, which has undergone a substantial revision effective as of July 2017. Exhibit 3 of said Circular sets forth a number of principles and guidelines on proper risk management related to the confidentiality of CID stored electronically. For example:

- an inventory of the applications and infrastructure involved in the processing of CID must be kept and regularly updated;
- CID-related services must be provided from a secure environment;
- CID must be encrypted – if CID is stored or accessible from outside Switzerland, the ensuing risks must be mitigated expediently by way of anonymisation, pseudonymisation or at least effective encryption of the data;
- security breaches need to be investigated and notified to the regulator and customers as appropriate;
- staff having access to CID must be identified and monitored, and roles and scope of access rights must be narrowly defined; and
- the management is required to implement a cyber risk management concept, which also entails regular vulnerability assessments and penetration tests.

41 What legal requirements or regulatory guidance exists in respect of anonymisation and aggregation of personal data for commercial gain?

Anonymisation of personal data is a processing step that the data subject can, in principle, object to. However, the FDPA admits an overriding interest if personal data is being processed anonymously, in particular, but without limitation, for the purposes of research, planning and statistics. This ground for justification does not exclude data anonymisation and aggregation for commercial gain.

Update and trends

Given that the Swiss financial industry finds itself in the middle of far-reaching technological change, and since a dynamic fintech ecosystem may significantly contribute to the quality and the competitiveness of Switzerland's financial centre, the Swiss Federal Council decided to ease the regulatory framework for providers of innovative financial technologies in November 2016. As a result, the FDF presented the 'FinTech Strategy Switzerland' as a form of deregulation with three supplementary elements, of which the first two entered into force on 1 August 2017:

- First, the deadline for holding (fiat) money in settlement accounts will be prolonged from seven to 60 days. Credit balances on settlement accounts with the exclusive purpose of serving the settlement of client transactions, with no interest paid on the funds and provided that transfer is executed within seven days upon crediting of the funds, are not considered to be deposits under the banking regulation. Companies accepting funds for settlement on behalf of the clients do not require a banking licence (but are subject to anti-money laundering rules). For many years it has been unclear how long client money may remain on the settlement account before being transferred to the beneficiary. According to the latest ruling practice of FINMA, the time frame had been set to seven days, as stated above. The extension of the settlement time frame represents a significant advantage mainly for crowdfunding and crowdlending platforms.
- Second, a company may accept deposits in a total value of 1 million Swiss francs without the need to obtain a banking licence from FINMA (regulatory sandbox). As explained in question 1, a company, in the past, was able to accept deposits from up to 20 people without triggering banking licence requirements. The new regulation will now no longer look at the number of clients but the value of client assets held by such company. In the event deposits of not more than 1 million Swiss francs are held by a company, no banking licence will be required. Interestingly enough, this deregulation opens up more opportunities for lending platforms than for other fintech companies. In the past, FINMA has ruled that a private individual would be deemed a bank in the event he or she is taking out a consumer loan facing more than 20 investors that acquire a tranche of the loan via the lending platform. A lending platform could therefore split the loan among 20 investors only. Since 1 August 2017, a participation of the loan among an unlimited number of investors will be permissible provided that the loan amount will not exceed 1 million Swiss francs. It is noteworthy that the sandbox will only relieve from banking regulation but not from the requirement to comply with anti-money laundering regulation.
- Third, a banking licence 'light' should be introduced, which allows a company to accept deposits up to 100 million Swiss francs provided that the funds will not be invested nor subject to interest payments to the company. This new licence should be paired with a loosening of the licensing process and account, auditing and regulatory capital requirements.

Unfortunately, the implementation of the latter new banking licence 'light' has been shelved for the time being. It is now expected to be implemented with the Financial Services Act and the Financial Institution Act scheduled for 2019 (the Financial Services Act aims to introduce equivalent rules to the European Markets in Financial Instruments Directive). There are some doubts as to whether there will be demand for a licence category that allows for holding but not investing money. It would be welcomed if the National Council, which will debate the Financial Institution Act in the autumn of 2017, extended the permitted business activities of companies benefiting from this new option and turned it into a real fintech licence. Such fintech licence should, inter alia, allow for the creation and issuance of tokens against fiat money, investing in the creation of new protocols and having token holders benefiting from the returns without such payments being subject to Swiss withholding tax. If not structured properly, initial coin offerings (ICO) may trigger Swiss withholding tax of 35 per cent on payments to token holders should such ICO be deemed as collective fundraising under Swiss tax law.

Cloud computing and the internet of things

42 How common is the use of cloud computing among financial services companies in your jurisdiction?

The use of cloud computing by financial services companies is widespread, especially with small innovators and, to a lesser extent, established financial institutions collaborating with fintech companies.

43 Are there specific legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

There is no specific regulation with respect to the use of cloud computing. However, two FINMA circulars need to be observed.

FINMA Circular 2008/07 applies to 'significant outsourcings'. If a bank complies with the requirements set forth in the Circular, it may outsource significant business segments without having to obtain an approval from FINMA. Several rules of Circular 2008/7 address cross-border outsourcing, where the emphasis is on the safeguarding of regulatory oversight by FINMA and on compliance with Swiss legislation relating to banking secrecy, data protection and data security.

Exhibit 3 of FINMA Circular 2008/21 sets forth a number of principles and guidelines on proper risk management related to the confidentiality of CID stored electronically (see question 40). In particular, the bank must know where CID is stored, by which applications and systems it is processed and through which channels it may be accessed.

These rules would generally be imposed contractually on fintech companies collaborating with banks.

44 Are there specific legal requirements or regulatory guidance with respect to the internet of things?

Machine-to-machine data transmissions are regulated as telecommunications services. Depending on how these services are structured, a financial services company facilitating value transfers through the internet of things could be treated as a regulated service provider. Regulatory challenges arise in particular when Swiss addressing resources are predominantly used to cater for businesses abroad.

Tax

45 Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

No tax incentives or other schemes are directed specifically at supporting or benefiting fintech companies and investors to encourage innovation and investment in the fintech sector. However, Swiss fintech companies generally benefit from a favourable tax environment with corporate income tax rates as low as just under 12 per cent (depending on the exact location within Switzerland) and an ordinary VAT rate of only 8 per cent. In addition, resident investors typically benefit from the following (general) exemptions provided for in the Swiss tax system:

- Swiss-resident corporate investors: capital gains from the sale of equity investments of at least 10 per cent held for at least one year are virtually tax-free for Swiss-resident corporate shareholders, under the participation exemption. The participation exemption also applies to dividends received from equity investments of at least 10 per cent or worth at least 1 million Swiss francs.
- Swiss-resident individual investors: gains realised on the sale (or any other disposition) of equity investments are generally tax-free for Swiss-resident individual shareholders. The same is true for (privately held) equity investments made through tax transparent collective investments vehicles (ie, funds) and non-commercial limited partnerships.

Competition

46 Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction or that may become an issue in future?

The focus of competition law in financial technology has traditionally been on agreements regarding the fixing of interchange fees in multilateral payment schemes involving several issuers and acquirers. It is likely that the principles established in the credit card sector will be transposed to other forms of cashless payment processing. According to the most recent practice of the Swiss Competition Commission

(ComCo), the merchant indifference test prevails. Pursuant to this test, the benchmark for determining the amount of a uniformly applied interchange fee would be the transactional benefits enjoyed by merchants relative to cash payments (ComCo decision of 1 December 2014 regarding Credit Card Domestic Interchange Fees II).

Recently, an additional competition law topic surfaced in the mobile payments domain: owing to the entry of ApplyPay in Switzerland, third-party mobile payment solution providers are claiming access to iPhone's nearfield communication interface. Such access has so far been denied by Apple. ComCo has said that it will observe the further development of the market before taking any regulatory action.

Financial crime

47 Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

Even though the implementation of internal procedures on bribery is not required, Swiss fintech companies are often subject to anti-money laundering regulation.

The Act on Combating Money Laundering and Terrorist Financing (AMLA) foresees obligations of diligence for any persons subject to its scope of application, including the independent asset manager. These obligations aim to prevent money laundering and include the verification of the identity of the contracting party and the identification of the economic beneficiary, the renewal of such verification of the identity and specific clarification duties. The fintech company must apply the respective regulation provided for by FINMA or the self-regulatory organisation it is affiliated with.

The AMLA also defines documentation and organisational responsibilities as well as an obligation to communicate money laundering suspicions to the MROS. Further obligations include blocking the client's accounts in suspicious cases and not informing the client of the communication to the MROS.

48 Is there regulatory or industry anti-financial crime guidance for fintech companies?

There is no specific regulatory or industry anti-financial crime guidance for fintech companies except for the general anti-money laundering regulation.

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

In Taiwan, conducting finance-related activities generally requires a licence from the Financial Supervisory Commission (FSC). Such activities include, without limitation:

- Securities-related activities: securities underwriting, securities brokerage, securities dealing (ie, proprietary trading), securities investment trust (ie, asset management) and securities investment consulting. But general consulting business, such as acting as financial advisers to arrange investments or bring about merger or acquisition deals, does not require any licence.
- Bank-related activities:
  - Lending: lending activities do not fall within the businesses to be exclusively conducted by a local licensed bank. However, as no financing company may be registered in Taiwan, it is currently not possible for an entity to register as a financing company to carry on lending activities in Taiwan.
  - Factoring and invoice, discounting and secondary market loan trading: for more details, see question 3.
  - Deposit taking.
  - Foreign exchange trading.
  - Remittance.
  - Electronic payment, credit cards and electronic stored-value cards: see question 11.

2 Is consumer lending regulated in your jurisdiction? Describe the general regulatory regime.

A local licensed bank may carry on consumer lending activities. Although lending activities do not fall within the businesses to be exclusively conducted by a local licensed bank, carrying out lending activities as a business is still not permitted in Taiwan.

3 Are there restrictions on trading loans in the secondary market in your jurisdiction?

The general principle under Taiwan's Civil Code is that any receivable is assignable unless (i) the nature of the receivable does not permit such transfer; (ii) the parties to the loan have agreed that the receivable shall not be transferred; or (iii) the receivable, in nature, is not legally attachable. The receivable under loans, subject to (ii) above, are generally transferable. But a bank is subject to stricter rules that generally loans that remain performing cannot be transferred by a bank except for limited exceptions (such as for the purpose of securitisation). For this reason, Taiwan does not currently have an active secondary loan market.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would generally fall within the scope of any such regime.

Local funds (securities investment trust funds)

The most common form of collective investment scheme in Taiwan is securities investment trust funds, which may be offered to the general public or privately placed to specified persons. Public offering of a securities investment trust fund needs prior approval or effective registration with the FSC or the institution designated by the FSC. No prior approval is required for a private placement of a securities investment trust fund; however, it can only be placed to eligible investors and within five days after the payment of the subscription price for initial investment offering, a report on the private placement shall be filed with the FSC or the institution designated by the FSC. Generally, the total number of qualified non-institutional investors under a private placement shall not exceed 35.

Under current laws and regulations, public offering and private placement of securities investment trust funds may only be conducted by FSC-licensed securities investment trust enterprises (SITEs). Currently, the paid-in capital of a SITE should not be lower than NT$300 million, and there exist certain qualifications for the shareholders of a SITE. A fintech company, which is not a SITE, will not be able to raise funds as a SITE does.

Offshore funds

Offshore funds having the nature of a securities investment trust fund may also be publicly offered (subject to FSC prior approval) or privately placed (subject to post-filing with FSC or its designated institution) to Taiwan investors, subject to certain qualifications and conditions. An offshore fintech company, which does not have the nature of a securities investment trust fund, will not be able to be offered in Taiwan.

5 Are managers of alternative investment funds regulated?

Currently, only securities investment funds, real property trust funds and futures trust funds (which focus on investment in futures and derivatives) are permitted in Taiwan. There are no laws or regulations regulating or governing investment funds on other assets. These funds may only be offered and managed by FSC-licensed entities such as SITEs, banks or futures trust enterprises. A fintech company, which is not a SITE, a bank or a future trust enterprise, will not be able to manage such funds in Taiwan.

6 May regulated activities be passported into your jurisdiction?

There is no concept of the 'passporting right' in Taiwan. To engage in regulated financial activities, a company needs to apply for the relevant licences to the FSC. Depending on the types of regulated activities, the applicant shall meet certain qualifications as required under relevant laws and FSC regulations.

7 May fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

No. Foreign companies cannot carry on regulated businesses (which include financial services) without a licence and the FSC licences required for providing financial services are not issued to foreign companies without establishing a subsidiary or a branch in Taiwan.

8 Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

To date there are no laws or regulations specifically regulating or governing peer-to-peer lending. See 'Update and trends' for the regulatory developments on this subject.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

Equity-based crowdfunding

The following two ways of fundraising are generally known as the equity-based crowdfunding platforms in Taiwan. Such ways of crowdfunding are exempted from the prior approval or effective registration normally required under the Securities and Exchange Act.

The 'Go Incubation Board for Startup and Acceleration Firms' (GISA) of the Taipei Exchange

The Taipei Exchange (TPEx), one of the two securities exchanges in Taiwan, established the GISA in 2014 for the purpose of assisting the innovative and creative small-sized non-public companies in capital raising.

A company with paid-in capital of less than NT$50 million and having innovative or creative ideas with potential for developments is qualified to apply for GISA registration with TPEx. After TPEx approves the application, the company will first start receiving counselling services from TPEx regarding accounting, internal control, marketing and legal affairs. After the counselling period, there would be another TPEx review to examine, among other things, the company's management teams, the role of board of directors, accounting and internal control systems, and the reasonableness and feasibility of the plan for capital raising, and if the TPEx deems appropriate, the company may raise capital on the GISA. The amount raised by the company through the GISA may not exceed NT$30 million unless otherwise approved. In addition, an investor's annual maximum amount of investment through the GISA should not exceed NT$150,000, except for angel investors defined by TPEx or wealthy individuals with assets exceeding an amount set by TPEx and having professional knowledge regarding financial products or trading experience.

Equity-based crowdfunding on the platforms of securities firms

A securities firm may also establish a crowdfunding platform and conduct equity crowdfunding business. Currently, a company with paid-in capital of less than NT$30 million may enter into a contract with a qualified securities firm to raise funds through the crowdfunding platform maintained by such securities firm, provided that the total amount of funds raised by such company through all securities firms' crowdfunding platforms in a year may not exceed NT$30 million. The amount of investment made by an investor on a securities firm's platform may not exceed NT$50,000 for each subscription, and may not exceed NT$100,000 in aggregate in a year, except for angel investors as defined in the relevant regulations.

Non-equity-based crowdfunding

In 2013, TPEx established the 'Gofunding Zone' in its official website. This mechanism allows the non-equity-based crowdfunding platform operators, once approved by TPEx, to post the information regarding their proposals and projects on the Gofunding Zone. There are certain qualifications for the platform operator making such application, including (without limitation): the platform operator should have established mechanisms for reviewing and examining the business start-up innovation proposals; the platform operator should have established control mechanisms for the operational procedures of funds payments and receipts for successfully funded business start-up innovation proposals and for refunds for unsuccessful proposals; and the platform operator should have established control mechanisms for the information security of its crowd-funding website.

The Gofunding Zone provides information disclosure functions only, so that any persons who wish to sponsor a business start-up innovation proposal presented on the Gofunding Zone should contact the respective platform operators directly.

10 Describe any specific regulation of invoice trading in your jurisdiction.

See question 3 for the relevant rules on transfer or assignment of receivables. In general, no company may carry out the activities of receivable transfer for business. Purchase of accounts receivable may only be conducted by a licensed bank.

11 Are payment services a regulated activity in your jurisdiction?

Yes. Traditionally payments by wire transfer can only be made through a licensed bank. Payments via cheques and credit cards are also run through banks.

Non-banks engaging in credit card-related business and issuance of electronic stored-value cards should also obtain approval from the FSC.

In 2015, the Act Governing Electronic Payment Institutions (E-Payment Act) was enacted. This E-Payment Act regulates the activities of an electronic payment institution, acting in the capacity of an intermediary between payers and recipients to engage, principally, in (i) collecting and making payments for real transactions as an agent; (ii) accepting deposits of funds as stored value funds; and (iii) transferring funds between e-payment accounts. According to the E-Payment Act, an electronic payment institution should obtain approval from the FSC unless it engages only in (i) above and the total balance of funds collected and paid and kept by it as an agent does not exceed the specific amount set by the FSC.

12 Do fintech companies that wish to sell or market insurance products in your jurisdiction need to be regulated?

In Taiwan, selling insurance products will be considered as conducting insurance business, which requires an insurance licence from the FSC. A fintech company is not permitted to sell any insurance products without an insurance licence from the FSC.

13 Are there any legal or regulatory rules in your jurisdiction regarding the provision of credit references or credit information services?

Yes. Pursuant to the Banking Act and relevant regulations, an entity collecting credit-related information from financial institutions, processing such information and maintaining the relevant database and providing credit-related information and records to financial institutions for credit checking purposes must obtain prior approval from the FSC. Currently, the Joint Credit Information Center (JCIC) is the only FSC authorised entity that offers such services. In practice, a bank would normally review the credit information or records provided by the JCIC as part of the bank's credit investigation on an applicant for a credit extension.

If an entity is not considered as offering such services, no FSC approval is required, but it will still be subject to the Personal Data Protection Act (PDPA) regarding its collection and use of any personal data. See question 39 for regulations on collection and use of personal data.

14 Are there any legal or regulatory rules in your jurisdiction that oblige financial institutions to make customer or product data available to third parties?

Yes. While the FSC has the general power to request the provision of customer or product data by financial institutions to the FSC, in practice, the FSC's relevant regulations, directions or guidelines also require that financial institutions provide relevant customer and product data (such as data relating to credit extensions, credit cards, derivatives, etc) to the JCIC.

15 Does the regulator in your jurisdiction make any specific provision for fintech services and companies? If so, what benefits do those provisions offer?

To promote the financial technology innovation service, Taiwan's Executive Yuan (the cabinet of the Taiwan government) approved and submitted the draft 'Fintech Innovation and Experiment Act' (the Sandbox Act) to the Legislative Yuan (Taiwan's parliament) in May 2017. The Sandbox Act, the proposed law on regulatory sandbox for fintech, is to provide a safe environment for fintech companies to test their financial innovation under a 'safe space' without immediately triggering the normal regulatory requirements applicable for financial activities. The key points and benefits under the Sandbox Act include, among others: (i) an applicant, once approved by the FSC, may enter the sandbox to test its innovation for six months, which can be further extended for another six months if the FSC so approves; (ii) during the 'experimental period', relevant criminal and administrative liabilities arising from certain activities, such as those that may be deemed taking

deposits by a non-bank or offering securities without a FSC licence, would not apply to the experimental activities; and (iii) the FSC would contemplate whether to re-examine or make necessary amendments to any laws or regulations based on the results of the experiments. At the time of writing, the proposed Sandbox Act has not been passed by the Legislative Yuan.

16 Does the regulator in your jurisdiction have formal relationships or arrangements with foreign regulators in relation to fintech activities?

No.

17 Are there any local marketing rules applicable with respect to marketing materials for financial services in your jurisdiction?

The Financial Consumer Protection Act (FCPA) and its related regulations provide for the general marketing rules applicable to the marketing materials for financial services. In general under the FCPA, when carrying out advertising, promotional or marketing activities, financial services providers should not falsify, conceal, hide or take any action that would mislead financial consumers, and should ensure the truthfulness of the advertisements.

In addition to the general marketing rules under the FCPA, the financial service providers may also be subject to additional marketing rules as specified in the laws and regulations governing the specific types of financial services or products.

18 Are there any foreign exchange or currency control restrictions in your jurisdiction?

Taiwanese company or Taiwan branch of a foreign company
Such company may, upon filing a report with the central bank, purchase foreign exchange with New Taiwan dollars and remit the same out of Taiwan for purposes other than trade or service-related payments, in an amount up to US$50 million per calendar year, without special approval from the central bank. Foreign exchange purchase for purposes other than trade or service-related payments exceeding the applicable ceiling would require special approval from the central bank; such approval is discretionary and would be decided by the central bank on a case-by-case basis.

Foreign company not having a branch in Taiwan
Such foreign company may, upon filing a report with the central bank, only purchase foreign exchange with New Taiwan dollars and remit the same out of Taiwan in an amount of up to US$100,000 for any single transaction.

19 If a potential investor or client makes an unsolicited approach either from inside the provider's jurisdiction or from another jurisdiction, is the provider carrying out a regulated activity requiring a licence in your jurisdiction?

Under current financial laws and regulations, no person is allowed to provide any financial services in Taiwan without obtaining prior approval or licence from the FSC. However, if the services or products are provided outside Taiwan without involvement of any Taiwanese employees or agents, such activity may not require any licence in Taiwan.

20 If the investor or client is outside the provider's jurisdiction and the activities take place outside the jurisdiction, is the provider carrying out an activity that requires licensing in its jurisdiction?

If the jurisdiction is Taiwan, Taiwan laws and regulations would not be applicable to the situation as described.

21 Are there continuing obligations that fintech companies must comply with when carrying out cross-border activities?

Currently there are limited laws and regulations applicable to fintech companies. If any such laws and regulations are applied, the obligations a fintech company must comply with will not change regardless of whether the activities are carried out in Taiwan.

22 What licensing exemptions apply where the services are provided to an account holder based outside the jurisdiction?

As described in question 1, licensing requirements generally depend on the types of products and services to be offered in Taiwan. The relevant licensing requirements would not be exempted simply because the relevant financial services or products are provided to an account holder based outside Taiwan.

Distributed ledger technology

23 Are there any legal or regulatory rules or guidelines in relation to the use of distributed ledger (including blockchain) technology in your jurisdiction?

No.

Digital currencies

24 Are there any legal or regulatory rules or guidelines in relation to the use of digital currencies or digital wallets, including e-money, in your jurisdiction?

Digital currencies, which are not linked or tied to the currency of any nation, are currently not accepted by the central bank of Taiwan.

As to digital wallets, please see question 11 regarding FSC approval that may be required for non-banks issuing 'electronic stored-value cards' or acting as an 'electronic payment institution'. Banks providing mobile payment services must comply with relevant FSC rules on, among others, security control.

Securitisation

25 What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

There are no particular formality requirements for executing loan agreements. As to security agreements, under Taiwan law, different types of asset are subject to different formality requirements for perfection of a security interest created over them. The formality requirements for the most commonly seen security interests are as follows:

- Chattels: there must be a written agreement to create a chattel mortgage. The mortgagor need not deliver the possession thereof to the mortgagee; however, a registration with the competent authority will be necessary in order for the mortgagee to claim the chattel mortgage against a bona fide third party.
- Real properties: security interest over real properties is taken by way of a mortgage registered with the relevant land registration offices. The parties must enter into a written agreement to agree on the creation of the mortgage and apply for registration of the mortgage before the mortgage can take effect.
- Shares: to create a pledge over shares, the pledgor and pledgee should enter into a written agreement. If the shares are represented by physical certificates, the pledged share certificates should also be duly endorsed by the pledgor and physically delivered into the pledgee's possession. A notice of pledge to the issuing company is also required. If the shares are listed and deposited to or registered with the local securities depository (ie, the Taiwan Depositary and Clearing Corporation (TDCC)), the above endorsement, physical delivery of the shares and notification to the issuing company are not required; instead, a pledge registration of the shares in the TDCC's book-entry system in accordance with the TDCC's regulations will suffice.

No different rules apply to cases of peer-to-peer lending.

26 What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected?

An assignment will not be effective against the borrower until the borrower has been notified of such assignment. If the borrower is not notified of such assignment, the borrower may still make the repayment to the assignor and discharge its repayment obligation by doing so.

27 Is it possible to transfer loans originated on a peer-to-peer or marketplace lending platform to the purchaser without informing the borrower? Does the assignor require consent of the borrower or are the loans assignable in the absence of a prohibition?

No consent is required from the borrower; see question 26.

28 Would a special purpose company for purchasing and securitising peer-to-peer or marketplace loans be subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

Personal information is protected by the PDPA and the collection and use of any personal data is subject to notice and consent requirements. If a special purpose company, when purchasing and securitising loans, acquires any personal data, it will be subject to the obligations under the PDPA. See question 39 for regulations regarding collection and use of personal data.

Intellectual property rights

29 Which intellectual property rights are available to protect software, and how do you obtain those rights?

Software can be protected by intellectual property rights such as patent, copyright or trade secret.

As to patent, an inventor may file an application with Taiwan's Intellectual Property Office, and the patent right will be obtained once the application is approved. For copyrights and trade secrets, there are no registration or filing requirements for a copyright or a trade secret to be protected by law. However, there are certain features that qualify a copyright or trade secret, such as 'originality' and 'expression' for copyright, and 'economic valuable' and 'adoption of reasonable protection measures' for trade secrets.

30 Is patent protection available for software-implemented inventions or business methods?

According to the Patent Act of Taiwan, the subject of a patent right is 'invention' and an invention means the creation of technical ideas, utilising the laws of nature. As a general rule, business methods are regarded as using social or business rules rather than laws of nature, and therefore may not be the subject of a patent right. As for software-implemented inventions, if it coordinates the software and hardware to process the information, and there is a technical effect in its operation, it might become patentable. For instance, a 'method of conducting foreign exchange transaction' would be deemed as a business method and thus unpatentable; however, a 'method of using financial information system to process foreign exchange transactions' may be patentable.

31 Who owns new intellectual property developed by an employee during the course of employment?

With regard to a patent, the right of an invention made by an employee during the course of performing his or her duties under employment shall be vested in his or her employer and the employer shall pay the employee reasonable remuneration unless otherwise agreed by the parties.

A trade secret is the result of research or development by an employee during the course of performing his or her duties under employment and it shall belong to the employer unless otherwise agreed by the parties.

For copyright, where a work is completed by an employee within the scope of employment, such employee is the author of the work but the economic rights to such work shall be enjoyed by the employer unless otherwise agreed by the parties.

32 Do the same rules apply to new intellectual property developed by contractors or consultants? If not, who owns such intellectual property rights?

In respect of patent rights and trade secrets, the agreement between the parties shall prevail, or such rights shall be vested in the inventor or developer in the absence of such agreement. However, if there is a fund provider, the funder may use such invention.

In respect of copyright, the contractor or the consultant who actually makes the work is the author of the work unless otherwise agreed by the parties; the enjoyment of the economic rights arising from the work shall be agreed by the parties, or such rights shall be enjoyed by the contractor or the consultant in the absence of such agreement. However, the commissioning party may use the work.

33 Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

In respect of patents and trademarks, each joint owner may use the jointly owned rights at his, her or its discretion; however, a joint owner may not license or assign the jointly owned rights without consent of all the other joint owners.

In respect of copyrights and trade secrets, each joint owner may not use, license or assign the rights without unanimous consent of the other joint owners, while the other joint owners may not withhold the consent without reasonable cause.

34 How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

Trade secrets are protected if they satisfy the following constituent elements: information that may be used in the course of production, sales or operations; having the nature of secrecy; with economic value; and adoption of reasonable protection measures.

To keep the trade secrets confidential during court proceedings, the court trial may be held in private if the court deems it appropriate or it is otherwise agreed upon by the parties. The parties and a third party may also apply to the court for issuing a 'confidentiality preservation order', and the person subject to such confidentiality preservation order should not use the trade secrets for purposes other than those related to the court trial or disclose the trade secrets to those who are not subject to the order.

35 What intellectual property rights are available to protect branding and how do you obtain those rights?

The Trademark Act in Taiwan provides for the protection of brands. The rights of trademarks can be obtained through registration with Taiwan's Intellectual Property Office. The term of protection is 10 years from the date of publication of the registration and may be renewed for another 10 years by filing a renewal application.

36 How can new businesses ensure they do not infringe existing brands?

Every registered trademark will be published on the official website maintained by the Intellectual Property Office and the trademark search system is accessible by the general public. On the search system, a new business may check whether an identical or similar trademark exists and who the proprietor of a registered trademark is.

37 What remedies are available to individuals or companies whose intellectual property rights have been infringed?

Patent

With regard to infringement of an invention patent, the patentee may claim for damages suffered from such infringement. The amount of damages may be calculated by the damage suffered and the loss of profits as a result of the infringement; profit earned by the infringer as a result of patent infringement; or the amount calculated on the basis of reasonable royalties. If the infringement is found to be caused by the infringer's wilful act of misconduct, the court may triple the damages to be awarded. Patent infringements have been decriminalised since 2003.

Copyright

The damage suffered from copyright infringement may be claimed in the process of civil procedure. As for criminal liabilities, there are different levels depending on different types of infringement, ranging from imprisonment, of no more than three years, and detention to a fine of no more than NT$750,000.

Trademark

The damages suffered from trademark infringement may be claimed in the process of civil procedure. As for criminal liabilities, any person shall be liable to imprisonment for a period not exceeding three

Update and trends

Peer-to-peer lending
Peer-to-peer lending is a well-developed and well-known practice in certain jurisdictions, but it is still rather new to the Taiwanese market. While lending activities do not fall within those exclusively required to be conducted by a local licensed bank, as no financing company may be registered in Taiwan, it is currently not possible for an entity to register as a finance company to carry on lending activities in Taiwan. Although the operators of the peer-to-peer lending platforms might argue that such platforms are simply intermediaries to match the needs of the individual lenders and borrowers (and the platform is neither the lender nor borrower) depending on the business models of the relevant platforms, the FSC might still have basis to challenge from the perspective of banking law and any other relevant laws and regulations.

In April 2016, the FSC issued a press release pointing out the regulatory issues that may arise from peer-to-peer lending activities. Specifically, if an interest is agreed between the platform and the lender, and the repayment of the principal is guaranteed by the platform, it is likely that such activities would be considered 'deposit taking', which is an activity exclusively allowed to be conducted by a local licensed bank. The news published in 2016 revealed that the FSC decided not to make any laws or regulations specifically governing peer-to-peer lending but simply encouraged cooperation between the banks and the platform operators in this regard. For this purpose, in December 2016 the FSC issued a ruling, allowing a bank or a financial holding company to invest in companies operating peer-to-peer lending platforms.

Regulatory sandbox
Please see question 15.

years or a fine not exceeding NT$200,000, or both, if he or she: uses a trademark that is identical to the registered trademark in relation to identical goods or services; uses a trademark that is identical to the registered trademark in relation to similar goods or services and hence there exists a likelihood of confusion on relevant consumers; or uses a trademark that is similar to the registered trademark in relation to identical or similar goods or services and there exists a likelihood of confusion for relevant consumers.

Trade secrets
The damage suffered from infringement of trade secrets may be claimed in the process of civil procedure. As for criminal liabilities, a person may be sentenced to a maximum of five years imprisonment and, in addition thereto, a fine between NT$1 million and NT$10 million if he or she (i) acquires a trade secret by an act of theft, embezzlement, fraud, threat, unauthorised reproduction or other wrongful means, or uses or discloses a trade secret that has been acquired; (ii) carries out an unauthorised reproduction of, or uses or discloses, a trade secret that he or she has knowledge or possession of; (iii) fails to delete or destroy a trade secret in his or her possession as the trade secret holder orders, or disguises it; or (iv) knowingly acquires, uses or discloses a trade secret known or possessed by others that is under the circumstances specified in points (i) to (iii) above.

38 Are there any legal or regulatory rules or guidelines surrounding the use of open-source software in the financial services industry?

There exists no specific law or regulation regarding the use of open-source software in Taiwan in the financial services industry. The relevant intellectual property law regulations are applicable.

Data protection

39 What are the general legal or regulatory requirements relating to the use or processing of personal data?

Under the PDPA, unless otherwise specified under law, a company is generally required to give notice to (notice requirement) and obtain consent from (consent requirement) an individual before collecting, processing or using any of said individual's personal information under the PDPA, subject to certain exemptions. To satisfy the notice requirement, certain matters must be communicated to the individual, such as the purposes for which his or her data is collected, the type of the personal data and the term, area and persons authorised to use the data.

40 Are there legal requirements or regulatory guidance relating to personal data specifically aimed at fintech companies?

There are no such requirements or regulatory guidance.

41 What legal requirements or regulatory guidance exists in respect of anonymisation and aggregation of personal data for commercial gain?

No such requirements or regulatory guidance exists in this respect.

Cloud computing and the internet of things

42 How common is the use of cloud computing among financial services companies in your jurisdiction?

According to the White Paper (published by the FSC on 12 May 2016), among all the industries, the financial industry has invested the most in IT and 21.1 per cent of the application systems of financial industries use cloud computing. The majority of banks and insurance companies have established information centres to provide a continual information service between their personnel and the clients, which means that a 'private cloud' has been developed. As for the public cloud, a type of cloud service rendered by the Financial Information Service Co, Ltd provides the link among the central bank and many banks, post offices, credit unions and ATMs throughout the nation. The application of such services include, among other things: a national e-Bill website, which allows payment of bills or taxes online through debit card or bank accounts; a centre for acquiring credit cards, which assists the banks in handling online credit card payments; and a platform that facilitates the individual's online personal banking services and the companies' payment through standard message forms such as extensible mark-up language or electronic data interchange.

43 Are there specific legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

When the use of cloud computing involves outsourcing the operations of a financial institution, relevant laws and regulations governing outsourcing activities should be complied with. In general, an outsourcing activity should follow the internal rules and procedures of the financial institutions, and in certain circumstances, prior approval from the FSC would be required. The use of cloud computing should also comply with the PDPA as described in question 39.

44 Are there specific legal requirements or regulatory guidance with respect to the internet of things?

No such legal requirements or regulatory guidance exists.

Tax

45 Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

Currently, there are no tax incentives specifically provided for fintech companies.

Generally, a company may credit up to 30 per cent of the corporate income tax payable for that year; up to 15 per cent of its total expenditure on research and development against its corporate income tax payable for that year; or up to 10 per cent of its total expenditure on research and development against its corporate income tax payable for each of the three years starting from that year, provided that it did not commit any material violation of any law on environmental protection, labour or food safety and sanitation in the past three years. In order to apply such tax credits a company must apply to and receive approval from the government.

Competition

46 Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction or that may become an issue in future?

In April 2016, the FSC issued a press release pointing out the regulatory issues that may arise from peer-to-peer lending activities. According to such press release and the relevant news published in local newspapers, the FSC is of the view that: if it is arranged that the lender (as a member of the platform) splits the original credit into several parts and in turn allocates and 'sells' the divided parts to other 'members' for investment with high return, it might involve regulatory issues regarding multilevel marketing; or if the platform operators claim that the transaction has the nature of high return, low cost and low risk, it might constitute false or misleading advertising and would result in a violation of the Fair Trade Act. The above two issues are under the supervision of the Fair Trade Commission.

Financial crime

47 Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

Money laundering activities are mainly regulated by the Money Laundering Control Act (MLCA) (last amended on 28 December 2016) and its related regulations. Under the MLCA, in order to prevent money laundering activities, financial institutions are required to implement their own internal anti-money laundering guidelines and procedures and submit the same to the FSC for record. Such guidelines shall include the operational and internal control procedures of anti-money laundering, periodical on-job training for anti-money laundering, designation of personnel in charge of the supervision and implementation of the guidelines and other matters required by the FSC. The newly amended MLCA also requires certain non-financial institutions such as lawyers, accountants, and real estate brokers to, among others, check and verify the identity of a client, keep transaction records in archives, and report any suspected money laundering activities to the regulators.

Since the said requirements apply to financial institutions and certain types of non-financial institutions only, a fintech company should not be subject to such requirements unless it is an FSC-licensed financial institution or belongs to any type of the non-financial institution that are subject to the MLCA.

48 Is there regulatory or industry anti-financial crime guidance for fintech companies?

No.

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

The 'onshore' UAE regulatory regime is separate and different from the regulatory regime found in the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM). So when considering the UAE, it is important to first ask which specific jurisdiction and financial regulatory regime should apply.

As financial 'free zones', both the DIFC and the ADGM have their own common law-based commercial and civil legal and financial services regulatory frameworks, as well as their own dedicated courts. The Dubai Financial Services Authority (DFSA) is the financial services regulator for activities conducted in or from the DIFC and the Financial Services Regulatory Authority (FSRA) regulates financial services activities in or from the ADGM. The relevant federal 'onshore' UAE (ie, in the UAE but outside the DIFC and ADGM) financial regulators are the Securities and Commodities Authority (SCA), the UAE Central Bank and the Insurance Authority (IA). The UAE Central Bank is the prudential regulator for 'onshore' UAE and mainly regulates activities relating to banking and lending activities such as:

- deposit taking (including sweep deposit accounts);
- foreign exchange trading;
- guarantees and commitments;
- payment services (including the issuance of payment instruments and other means of payments);
- primary lending;
- factoring;
- invoice discounting;
- arranging primary loans;
- secondary market loan trading; and
- secondary market loan intermediation.

Outside a banking and lending context, the UAE Central Bank was historically the sole financial services regulator for 'onshore' UAE prior to the establishment of the SCA (in 2001) and the IA (in 2007). There are therefore some other areas of financial activity that the UAE Central Bank continues to regulate – such as, among other things, currency brokerage, money exchange and some activities that would be typically associated with investment banking.

Generally, the types of regulated activities in 'onshore' UAE, the DIFC and the ADGM include, among other things:

- the marketing and sale of securities;
- the provision of investment advice;
- dealing in products and investments (either as principal or agent);
- the underwriting and placing of financial products;
- the offering and providing of discretionary investment management services;
- the marketing or sale of funds (including the provision of investment advice);
- accepting deposits;
- providing credit;
- providing money services;
- arranging deals in investments;
- managing assets;
- managing a collective investment fund;
- advising on financial products; and
- insurance intermediation.

Securities and financial products that are regulated by the respective financial services regulators across 'onshore' UAE, the DIFC and the ADGM include, but are not limited to, equity securities, debt securities, linked products, derivatives, structured products, deposits, notes and warrants.

2 Is consumer lending regulated in your jurisdiction? Describe the general regulatory regime.

Yes. Article 114 of the Union Law No. 10 of 1980 concerning the Central Bank, the Monetary System and Organisation of Banking (the CB Law), defines a 'financial institution' as 'those institutions whose principal functions are to extend credit to carry out financial transactions, to take part in the financing of existing or planned projects, to invest in moveable properties, and such other functions as may be specified by the [UAE Central] Bank.'

Article 2(a)(1) of the Central Bank Board of Directors' Resolution No. 58/3/96 regarding the Regulation for Finance Companies, as amended (the 1996 CB Regulation) states that a 'finance company' (which is the same as a 'financial institution' referred to in article 114 of the CB Law, in the original Arabic language) can specifically engage in 'extending advances and/or personal loans for personal or other consuming purposes'.

Both the CB Law and the 1996 CB Regulation state that it is imperative to obtain a UAE Central Bank licence as a financial institution before engaging in the type of activities covered by such licence. Consumer lending is therefore a regulated activity that requires a licence as a 'finance company' by the UAE Central Bank. To the extent that such services are promoted within 'onshore' UAE but are not booked from the jurisdiction, a UAE Central Bank Representative Office licence can be sought under the Central Bank Board of Directors' Resolution No. 57/3/1996 regarding the Regulation for Representative Offices.

With regard to the provision and booking of such services 'in or from' either the DIFC or the ADGM, such activities would likely be considered as 'providing credit', which will require a licence from either the DFSA or FSRA respectively. To the extent that such services are only 'advised' on or 'arranged' from the same jurisdictions, an appropriate licence would also be required. If such services are merely promoted (with no 'advising' or 'arranging') 'in or from' either financial free zone, unless an exemption applies, a Representative Office licence would be required from either the DFSA or the FSRA respectively.

3 Are there restrictions on trading loans in the secondary market in your jurisdiction?

Secondary market loan trading is an activity regulated by the UAE Central Bank. It constitutes primary lending and is regulated whether or not the loan has been fully drawn. The trading of loans would also constitute a regulated financial services activity in the DIFC and the ADGM.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would generally fall within the scope of any such regime.

In 'onshore' UAE, there is a general prohibition on marketing unregistered collective investment schemes (ie, funds) unless they have been registered with the SCA accordingly (either for private or public promotion). However, 'onshore' UAE marketing prohibition does not apply to the promotion of foreign funds to a non-natural 'qualified investor'. A non-natural 'qualified investor' is defined in the SCA rules and includes the federal government, among others.

There is a private placement regime under the SCA rules, where if the potential investor is a natural person, foreign funds can be registered for private placement by an SCA licensed promoter subject to several conditions.

With regard to the DIFC, there is a prohibition on marketing unregistered funds in the DIFC except through a DFSA licensed intermediary with the appropriate type of licence. The prohibition on the offer or sale of a fund only applies where such activity is carried out 'in or from' the DIFC. It is not possible to register a foreign fund for distribution in the DIFC. Funds need only be registered with the DFSA if they are domiciled in the DIFC. There are currently relatively few funds domiciled in the DIFC and so most funds marketed in the DIFC are foreign (ie, non-DIFC domiciled) and therefore unregistered. However, all funds and collective investment schemes promoted 'in or from' the DIFC need to meet a fund eligibility criteria (see below).

Once a marketing entity holds the appropriate licence it may market foreign domiciled funds or DIFC domiciled funds, provided it only markets to investors within the scope of its licence, and in the case of any foreign fund either (i) the fund qualifies as a 'designated' or 'non-designated fund'; (ii) the marketing entity has a reasonable basis for recommending a fund as suitable to a particular client; or (iii) the fund has or intends to have 100 or fewer investors, is offered discreetly to persons who are professional clients and the minimum subscription per investor is US$50,000. Similar provisions exist with regard to the ADGM.

On 31 January 2017, the DFSA launched a consultation on its proposed framework for regulating loan-based crowdfunding platforms. The consultation was the first in a series of consultation papers that set out the DFSA's approach to the regulation of crowdfunding platforms and the fintech industry within the DIFC. The key proposals in the consultation paper included a tailored regime specifically designed for loan-based crowdfunding platform operators, minimum standards for systems and controls and appropriate safeguarding and segregation of client money. On 13 February 2017, the DFSA launched the next phase of consultations on its proposed framework for regulating crowdfunding platforms in the DIFC, detailing its approach to investment-based crowdfunding. This second consultation paper deals with the specific risks associated with investment-based crowdfunding. As a result of both consultation papers, the DFSA has updated its rules (which came into force on 1 August 2017) to specifically include 'operating a crowdfunding platform' as a regulated activity. See question 15 for an outline of the FSRA's position on regulating fintech in the ADGM.

With regard to 'onshore' UAE, while the UAE Central Bank has been reported to be in the process of drafting regulation relevant to crowdfunding, no specific regulatory regime has been issued. However, depending on the specific activities undertaken (ie, where the platform merely introduces two independently contracting parties or if the platform is actively establishing a fund or offering securities), the activity may potentially fall under existing UAE Central Bank or SCA regulation.

5 Are managers of alternative investment funds regulated?

Yes. See questions 1 and 4.

6 May regulated activities be passported into your jurisdiction?

There is currently no passport regime either 'into' the DIFC, the ADGM or 'onshore' UAE, or between the mentioned jurisdictions.

It was publicly announced in May 2017 that the Dubai Department of Economic Development, the relevant commercial registry for 'onshore' UAE within the Emirate of Dubai, and the DIFC Authority signed a memorandum of understanding to allow companies operating within DIFC and holding a commercial licence issued by the DIFC Registrar of Companies to obtain licences to operate in mainland Dubai. However, legislation and regulation to facilitate this has yet to be issued. Notwithstanding the efforts to create a facilitative cross-border regime between 'onshore' UAE within the Emirate of Dubai and the DIFC at a commercial licence level, passporting with regard to financial services between any of the 'onshore' UAE regulators and the DFSA or FSRA has yet to be formally announced.

7 May fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

It is possible for fintech companies to market on a cross-border basis into 'onshore' UAE without having to obtain a licence. If marketing activities are undertaken on a true cross-border basis (ie, by telephone, website or email from outside the UAE) they should not be subject to UAE regulation. To ensure that marketing activities are conducted on a true cross-border basis and not deemed to be 'conducting business' in the UAE, several guidelines should be followed, which include not having a physical or legal presence in the UAE, marketing is only directed towards non-natural 'qualified investors' (see question 4 for definition) and any subscription payment is made outside the UAE.

In relation to cross-border marketing into the DIFC, there are several guidelines that should be followed to reduce the risk of marketing activities being treated as having taken place 'in' the DIFC, such as not having a physical or legal presence in the DIFC, keeping marketing materials generic and only made to pre-identified 'professional clients' (as defined under the DFSA's Conduct of Business Rules) and performing all generic marketing from outside the DIFC.

With regard to regulated activities where a licence is required from a UAE financial services regulator (including the UAE Central Bank, SCA, DFSA or FSRA), a fintech company would need to be locally established in the relevant jurisdiction to obtain a licence. Note, however, that the initiatives launched by the ADGM and the DIFC (see question 15) require lighter regulatory oversight for qualified participants.

8 Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

Lending is a regulated activity whereby intermediary platforms are required to obtain approvals to operate from the UAE Central Bank, which would trigger compliance requirements on the platform including the proper vetting of borrowers and anti-money laundering checks.

While interest is prohibited under articles 409 to 412 of the Penal Code and is void under articles 204 and 714 of the Civil Code, it is permitted under articles 77 and 90 of the Commercial Code, provided it does not exceed 12 per cent. In any case, UAE Federal Supreme Court Decision No. 14/9 of 28 June 1981 permits the charging of simple interest (presumably as opposed to compound interest) in connection with banking operations.

The DFSA issued a consultation paper in early 2017 called 'Crowdfunding: SME Financing through Lending', which proposes a regulatory framework to operate loan-based crowdfunding platforms in the DIFC. In brief, the DFSA proposed that a regime whereby loan-based crowdfunding platforms in the DIFC: (i) benefit from a new financial activity and licence for operating such platform; (ii) apply appropriate prudential and conduct of business requirements for such platforms; (iii) disseminate appropriate risk warnings and disclosures to lenders and borrowers; (iv) conduct suitable due diligence on the borrowers as well as checks on lenders; (v) deploy a business cessation plan in the event that it ceases operations; and (vi) follow rules in relation to transfer of rights and obligations between lenders. More formal legislation and a more defined regime is set to emerge around DIFC-based peer-to-peer and marketplace lending platforms.

On 1 August 2017, changes to the DFSA rules announced on 15 June 2017 came into force that introduce rules relevant to crowdfunding (see question 4).

9 Describe any specific regulation of crowdfunding in your jurisdiction.

As mentioned in question 1, financial services in the UAE are regulated either by the UAE Central Bank, IA or SCA depending on the nature of the activity. In respect of financial free zones in the UAE, such activities are regulated by the DFSA in the DIFC, and the FSRA in the ADGM. In particular, issues of securities by UAE companies are regulated under the UAE Companies Law (Federal Law No. 2 of 2015) and regulations issued by the SCA. As such, under the UAE Companies Law, only public

joint-stock companies may offer securities by way of a public subscription through a prospectus; other companies, whether incorporated in the UAE ('onshore' or in a free zone) or in a foreign jurisdiction, are prohibited from advertising including the invitation to a public subscription without the approval of the SCA. In practice, private joint-stock companies are entitled to issue securities to sophisticated investors by way of a private placement. Accordingly, such regulatory limitation restricts the ability of limited liability companies, the legal form adopted by most SMEs in the UAE, from raising funds through equity-based crowdfunding.

See also question 4.

10 Describe any specific regulation of invoice trading in your jurisdiction.

Invoice trading currently falls within the activity of 'arranging credit' within the DIFC and is regulated as such by the DFSA. Similar provisions exist in the ADGM. With regard to 'onshore' UAE, invoice trading will require a form of regulatory licence either from the UAE Central Bank (if providing credit) or the SCA (if invoices were to be considered as a financial product falling within the SCA's Promoting and Introducing Regulations – Regulation 3/R.M of 2017). To the extent that services are merely promoted within 'onshore' UAE, the DIFC or the ADGM, a Representative Office licence in the respective jurisdiction would be required.

11 Are payment services a regulated activity in your jurisdiction?

Yes. On 1 January 2017, the UAE Central Bank published its Regulatory Framework for Stored Values and Electronic Payment Systems (the Digital Payment Regulation), which covers the following digital payment services:

- cash-in services; enabling cash to be placed in a payment account;
- cash-out services; enabling cash withdrawals from a payment account;
- retail credit and debit digital payment transactions;
- government credit and debit digital payment transactions;
- peer-to-peer digital payment transactions; and
- money remittances.

The Digital Payment Regulation does not apply to the following payment services or providers, although it states that the below list may be subject to other Central Bank laws and regulations:

- payment transactions in cash without any involvement from an intermediary;
- payment transactions using a credit or debit card;
- payment transactions using paper cheques;
- payment instruments accepted as a means of payment only to make purchases of goods or services provided from the issuer or any of its subsidiaries (ie, closed-loop payment instruments);
- payment transactions within a payment or settlement system between settlement institutions, clearinghouses, central banks and payment service providers (PSPs);
- payment transactions related to transfer of securities or assets (including dividends, income and investment services);
- payment transactions carried out between PSPs (including their agents and branches) for their own accounts; and
- technical services providers.

The Digital Payment Regulation specifies four categories of PSPs: 'retail PSPs', 'micropayment PSPs', 'government PSPs' and 'non-issuing PSPs'.

12 Do fintech companies that wish to sell or market insurance products in your jurisdiction need to be regulated?

Nothing in the current UAE legislation (whether 'onshore' UAE, DIFC or ADGM) specifically regulates fintech companies that wish to sell or market insurance products, and therefore the general regulation around the sale and marketing of insurance products in the relevant jurisdictions applies.

The IA was established under Federal Law No. 6 of 2007 (the Insurance Law). The IA, through the powers given to it under the Insurance Law, regulates insurance and reinsurance operations in 'onshore' UAE. Insurance operations include insurance activities such as life assurance and funds accumulation operations, properties insurance and life liability insurance.

Detailed financial regulations around insurance companies were published at the end of 2014. The IA has issued various guidance and circulars that affect the scope of regulation around the insurance industry in the UAE. Insuretech businesses looking at the UAE market will need to observe additional guidance from the IA.

13 Are there any legal or regulatory rules in your jurisdiction regarding the provision of credit references or credit information services?

The SCA has recently issued a draft resolution on the regulation of credit rating entities. The draft resolution addresses the rules and regulations of licensing an entity to perform credit rating activities in the UAE and the general obligations of credit rating entities. According to the draft resolution, a credit rating entity must have a minimum of 2 million UAE dirhams in capital to become licensed for credit rating operations as well as prior consent by the UAE Central Bank or the IA should the licence application be subject to their mandate.

In the DIFC, 'operating a credit rating agency' is a regulated activity that would require a DFSA licence. Similar provisions exist in the ADGM.

14 Are there any legal or regulatory rules in your jurisdiction that oblige financial institutions to make customer or product data available to third parties?

Other than in the context of a regulatory or official investigation, there is no specific obligation in UAE legislation to compel data disclosure to third parties; however, the Digital Payment Regulation (see question 11) preserves the Central Bank's rights to impose 'access regimes' and interoperability obligations on PSPs.

The general position is that financial institutions that are in a position to collect and store data from the public are bound by a duty of confidentiality, which, if breached could attract criminal liability under article 379 of the UAE Penal Code. Further, article 106 of the Banking Law also provides for the obligation to keep confidential all banking data submitted to the Central Bank.

15 Does the regulator in your jurisdiction make any specific provision for fintech services and companies? If so, what benefits do those provisions offer?

The UAE's financial services free zones (namely, the ADGM and the DIFC) each have their own regulators that have launched initiatives to enable fintech businesses to participate and test their solutions in environments with lighter-touch regulation.

In the ADGM, the FSRA has created a 'regulatory laboratory', or RegLab. Participants of the RegLab are not subjected to the full suite of authorisation regulation and rules from the outset; rather, a customised set of rules will be applied, which will depend on the business model, technology deployed and risk profile of the fintech participant.

Under the RegLab framework, fintech participants enjoy a two-year period to develop, test and launch their products and services in a controlled environment, after which fintech participants with viable business models will be transferred to the full authorisation and supervisory regime upon successful demonstration of compliance with the authorisation criteria. Firms that are not ready after the two-year period will exit the RegLab framework.

In the DIFC, the DFSA has created an innovation testing licence (ITL) that fintech companies can apply for to test an innovative product or service for six to 12 months. In exceptional cases, the DFSA will consider extending that period. If an ITL licensee has met the outcomes detailed in its regulatory test plan, and it can meet the full DFSA authorisation requirements, it will migrate to full authorisation. If it does not, the company will have to cease carrying on activities in the DIFC that need regulation.

16 Does the regulator in your jurisdiction have formal relationships or arrangements with foreign regulators in relation to fintech activities?

In 2005, the SCA and the DFSA entered into a memorandum of understanding (MOU) to further enhance regulatory cooperation and information sharing between the two regulators. The MOU promotes transparency and efficiency, and enhances the level of collaboration between the SCA and the DFSA. Similar general information-sharing

MoUs exist between the federal 'onshore' UAE regulators, the DFSA and the FSRA with several foreign financial services regulators.

From an international perspective, formal cooperation agreements between UAE-based regulators and their international counterparts are rapidly emerging. The ADGM and the Monetary Authority of Singapore signed the first such agreement, and subsequent agreements to collaborate on fintech initiatives have been signed between the ADGM and authorities in China, the Australian Securities and Investments Commission, the Kenya Capital Markets Authority, as well as industry associations (such as the Swiss Finance + Technology Association). Based on other initiatives (notably around data protection regulation in the DIFC and ADGM), there is already a degree of collaboration with a development objective for the UAE regulators, particularly with European regulatory counterparts.

17 Are there any local marketing rules applicable with respect to marketing materials for financial services in your jurisdiction?

With regard to activities regulated by the UAE Central Bank, without a UAE Central Bank licence, such as a Representative Office licence, the only types of marketing of services that can be conducted are in accordance with what are commonly referred to as the 'Tolerated Practices Guidelines'.

The Tolerated Practices Guidelines may be useful to mitigate against breaching the marketing prohibition when undertaking activities on a reach-in (ie, by phone and email) basis into the UAE. The Tolerated Practices Guidelines are an informal concept based on a general understanding of the UAE Central Bank's approach to licensing and enforcement and there is no specific published guidance that the Tolerated Practices Guidelines are based on. Advice should be sought from experience legal counsel on the Tolerated Practices Guidelines.

In relation to financial products regulated by the SCA, see the non-natural 'qualified investor' exemption outlined in question 4.

In relation to cross-border marketing into the DIFC, see question 7. In the DIFC, use of selling restriction language is a requirement of the DFSA for licensed entities. Similar provisions exist with regard to the ADGM. Both the DIFC and ADGM have Representative Office regimes that enable proactive marketing, in or from the DIFC or the ADGM, of financial services and products offered outside the respective jurisdictions.

18 Are there any foreign exchange or currency control restrictions in your jurisdiction?

There are no restrictions on the UAE dirham. It is freely convertible and exportable. Currency exchange and brokerage is a regulated activity by the UAE Central Bank by virtue of Central Bank Resolution 126/5/95 and Central Bank Resolution 153/5/97 regarding the Regulation for Financial and Monetary Intermediaries (Central Bank Resolution 126) and Central Bank Resolution No. 164/8/94 regarding the Registration for Investment Companies and Banking, Financial and Investment Consultation Establishment or Companies as amended by Central Bank Resolution No. 89/3/2000 (Central Bank Resolution 164). Central Bank Resolution 126 sets out the conditions for obtaining a brokerage licence for currencies within 'onshore' UAE. Central Bank Resolution 164 provides that the UAE Central Bank may license an 'investment company' to act as a broker to deal in foreign currencies and to provide banking, financial and investment consultations.

There are no currency exchange controls in the US dollar denominated DIFC jurisdiction. However, such foreign exchange activities are a regulated financial activity in both the DIFC and the ADGM. Regulated entities in the DIFC and ADGM are prohibited from accepting deposits from the 'onshore' UAE markets, accepting deposits in UAE dirhams or undertaking foreign exchange transactions involving the UAE dirham.

19 If a potential investor or client makes an unsolicited approach either from inside the provider's jurisdiction or from another jurisdiction, is the provider carrying out a regulated activity requiring a licence in your jurisdiction?

With regard to 'onshore' UAE, a response to an approach made by a potential investor on an unsolicited basis will not trigger a licensing requirement in respect of certain financial products (such as, among others, domestic and foreign shares, bonds, funds, derivatives and structured products), provided the request relates to a specified and individual product or service. It is a legal requirement for reverse solicitations to be capable of being evidenced and therefore written records evidencing the unsolicited nature of the approach must be maintained. The Tolerated Practices Guidelines as referred to in question 17 should also be adhered to.

With regard to the DIFC, an approach made by a potential investor on an unsolicited basis should avoid the licensing requirement under the DFSA 'exempt financial promotions' regime, provided that the responses to unsolicited requests for information are given on a cross-border basis and are not deemed to constitute 'doing business' in the DIFC. With regard to the ADGM, the Financial Services and Markets Regulations 2015 (as amended) provide for a number of 'exempt communications', which outline the conditions for responding to an unsolicited approach.

20 If the investor or client is outside the provider's jurisdiction and the activities take place outside the jurisdiction, is the provider carrying out an activity that requires licensing in its jurisdiction?

With regard to 'onshore' UAE, the provider will not be carrying out an activity that requires licensing where the activities are carried out outside the UAE, provided marketing materials are not distributed or an offer is not made or accepted in the UAE. With regard to services regulated by the UAE Central Bank, outside the Tolerated Practices Guidelines, a UAE Central Bank licensed Representative Office would only be able to promote services offered outside the jurisdiction proactively.

With regard to the DIFC, a licence would not be required if activities take place entirely outside the DIFC provided no offer is made in the DIFC, no materials are distributed in the DIFC or if the promotional activity constitutes an 'exempt financial promotion'. Outside of this, a DFSA regulated Representative Office would only be able to proactively market services offered outside the DIFC. Similar provisions exist within the ADGM.

21 Are there continuing obligations that fintech companies must comply with when carrying out cross-border activities?

There are no specific obligations for fintech companies per se; however, with regard to 'onshore' UAE, marketing material should not be tailored for the UAE market. Any contact details provided should refer to persons located outside the UAE and investors in the UAE should be provided with the same information as investors in other jurisdictions. The Tolerated Practice Guidelines referred to question 17 should be followed.

In 'onshore' UAE, the DIFC and the ADGM all marketing materials must be correct and not misleading.

22 What licensing exemptions apply where the services are provided to an account holder based outside the jurisdiction?

See questions 4 and 17.

Distributed ledger technology

23 Are there any legal or regulatory rules or guidelines in relation to the use of distributed ledger (including blockchain) technology in your jurisdiction?

There are currently no dedicated rules or guidelines in relation to the use or restrictions on the use of distributed ledger technology (DLT).

It is important to note that the UAE federal government and certain Emirate-level governments have publicly committed to the creation of problem statements and use cases to enable government services to benefit from DLT and, in particular, blockchain. Examples of this include the government of Dubai's public commitment to have all government services and transactions on the blockchain by 2020.

Unlike other areas of rapid technological adoption where law requires fundamental change, in the UAE, the domestic law appears to be broadly facilitative on the use of DLT: an example is article 12 of Federal Law No. 1 of 2006 on Electronic Commerce and Transactions, which seems to have foreseen 'smart contracts' by confirming the validity and enforceability of contracts formed through computer programs (defined as 'automated electronic agents') that include two or more electronic information systems preset and pre-programmed to carry out the transaction, even if no individual is directly involved.

Digital currencies

24 Are there any legal or regulatory rules or guidelines in relation to the use of digital currencies or digital wallets, including e-money, in your jurisdiction?

Virtual currencies are defined in the Digital Payment Regulation (referred to in question 11) as:

> *Any type of digital unit used as a medium of exchange, a unit of account, or a form of stored value. Virtual Currency is not recognised by this Regulation. Exceptions are made to a digital unit that: a) can be redeemed for goods, services, and discounts as part of a user loyalty or rewards program with the Issuer and; b) cannot be converted into a fiat / virtual currency.*

The Digital Payment Regulation contained a provision which expressly stated that 'all virtual currencies (and any transactions thereof) are prohibited.' A month after the Digital Payment Regulation was published, the Governor of the UAE Central Bank issued a statement to the state media to say that the regulations 'do not cover digital currency' but are under further review and likely to be subject to new regulations in due course. There remains a grey area around the specific legal status of virtual currencies (eg, bitcoin) in the UAE, which affects how they are treated and any restrictions around specific use.

Securitisation

25 What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

If any security is based within the UAE, the agreements should be entered into with a local security agent whereby the local security agent holds security on behalf of the service provider. Security may need to be perfected, depending on the type of asset to which the security relates.

In the DIFC, there is no licensing or registration requirement for a lender to take security over DIFC-based assets. Any real estate mortgages must be registered with the DIFC Register of Real Property without delay. For all other types of security interest, a security interest will be considered perfected if it has 'attached' and a financing statement has been filed with the DIFC Security Register. For security to 'attach', different procedures will need to be taken depending on the type of security interest under either the DIFC Real Property Law or the DIFC Law of Security (land, shares in a DIFC company, bank accounts, receivables, insurance, floating charges, etc). Similar protection requirements exist within the ADGM.

26 What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected?

In 'onshore' UAE, an assignment of rights requires only notification from the assignor to the counterparty, confirming the assignment to the assignee. Where this is not possible, the bank may require such income to be deposited into a collection account, which will be covered by an accounts pledge.

In the DIFC, an assignment is perfected when it attaches (ie, when it becomes enforceable against the debtor or third party). The position in the ADGM is similar.

Assuming there are no contractual restrictions on transfers, the position in each of the relevant jurisdictions is as follows:

'Onshore' UAE

Article 1109 of the UAE Civil Code (Federal Law No. 5 of 1985) provides that the assignor, the assignee and the borrower must consent for there to be a valid assignment. There are Federal Supreme Court judgments holding that, in commercial matters, the consent to the assignment by the borrower is not necessary, although evidence will be required that the borrower has been notified of the assignment.

UAE law does not generally recognise the concept of beneficial ownership. Accordingly, an assignee of certain rights otherwise than in accordance with the UAE will not be recognised as having a beneficial interest in the rights to be assigned.

DIFC

The DIFC makes a distinction between assignment of rights and assignment of obligations. The DIFC Contract Law No. 6 of 2005 (the DIFC Contract Law) sets out several limitations on assignments and delegations. Under section 94 of the DIFC Contract Law, a contractual right can be assigned unless the substitution of a right of the assignee for the right of the assignor would:

- materially change the duty of the borrower;
- materially increase the burden or risk imposed on the borrower by his or her contract;
- materially impair the borrower's chance of obtaining return performance; or
- materially reduce its value to the obligor.

A contractual obligation can be transferred unless the obligee has a substantial interest in having the obligor perform or control the acts promised.

While there are no explicit requirements under the DIFC Contract Law to notify borrowers of an assignment or transfer, it is advisable that the borrower be notified of such assignment or transfer.

ADGM

In the ADGM, as per the ADGM Application of English Law Regulations 2015, the principles of English law relating to the assignment of rights and transfer of obligations would apply. Under English law, an assignment is perfected once notice is given to the borrower. In the absence of such notice, the assignee's rights under the assignment become an equitable right. The transfer of an obligation would require the consent of the borrower.

27 Is it possible to transfer loans originated on a peer-to-peer or marketplace lending platform to the purchaser without informing the borrower? Does the assignor require consent of the borrower or are the loans assignable in the absence of a prohibition?

See question 26.

28 Would a special purpose company for purchasing and securitising peer-to-peer or marketplace loans be subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

There are likely to be contractual duties of confidentiality in the relevant local documentation that may require borrower consent prior to disclosure concerning the loans or the borrowers. Further, if the borrowers are data subjects for the purposes of the DIFC Data Protection Law, the special purpose vehicle is likely to be treated as a processor for the purposes of the DIFC Data Protection Law (see questions 39 to 41).

Intellectual property rights

29 Which intellectual property rights are available to protect software, and how do you obtain those rights?

Original computer programs and related software applications are protected by copyright as literary works. Databases underlying software programs can also attract copyright protection. Copyright arises automatically as soon as the relevant literary work is created, so when a computer program is recorded, software lines are coded or when a database is created. There is no requirement to register these rights in order to be able to have them recognised or enforce them against a third party in the UAE.

If the software code has been kept confidential, it may also be protected as confidential information and unauthorised disclosure can attract criminal sanctions. No registration is required.

Computer programs are, in principle, patentable in the UAE, as they do not appear in the list of inventions excluded from patentability under UAE legislation. Registration formalities must be followed to obtain protection.

30 Is patent protection available for software-implemented inventions or business methods?

As computer programs are not specifically excluded from patentability under UAE legislation, it is possible in principle to obtain patent protection for software-implemented inventions and business methods. It is

likely to be more difficult, however, for such inventions to meet the criteria of novelty, inventiveness and industrial applicability as required by UAE legislation.

31 Who owns new intellectual property developed by an employee during the course of employment?

Copyright in works created by an employee in the course of employment will not automatically be owned by the employer. Such a work will be owned by the individual employee or, if created alongside others, may be protected as a joint work. It may be possible for the employer to assert that a work created under the supervision or direction of the employer meets the conditions for protection as a collective work under the UAE legislation. In most cases, however, employers seeking to take ownership of copyright-protected works created by employees must do so by way of written assignment. Under the Copyright Law, a provision in a contract that purports to assign the copyright in more than five future works will be void.

In the context of patents, provided that an employee's role includes inventive activities, inventions created by an employee in the course of an employment contract are automatically owned by the employer, unless otherwise agreed. Different rules apply if the employee's role does not include inventive activities. In these cases, the employer may exercise an option to take ownership of the invention within four months of becoming aware of the invention and the employee is entitled to receive fair compensation.

32 Do the same rules apply to new intellectual property developed by contractors or consultants? If not, who owns such intellectual property rights?

The same rules that apply to employee creators of copyright-protected works apply in respect of works created by contractors and consultants. Such works will be owned by the individual creator or, if created alongside others, may be protected as joint works.

As against employee creators, different rules apply in respect of inventions created by a contractor or consultant during the course of a contract. In these cases, the contractor or consultant will own the invention, unless otherwise agreed.

33 Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

Joint owners of a copyright-protected work in which it is not possible to separate the contributions of each owner cannot exercise their rights to use, license or assign the work individually, unless otherwise agreed in writing. Where multiple authors contribute different kinds of art to a single work, they may each exploit their individual contributions provided that this does not damage the exploitation of the joint work. The legal position is less clear in relation to works that include contributions of the same kind of art from multiple contributors.

A joint owner of a patented invention may exploit or assign his or her rights independently of the other patentees. However, joint patentees may only license the exploitation of the patent jointly with the other patentees.

34 How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

The UAE legislation dealing with patents and industrial designs also includes specific protection for trade secrets and know-how. Employees have specific statutory duties to keep the commercial and industrial secrets of their employers confidential and may be criminally liable in cases of unlawful use or disclosure of information. Trade secrets and confidential information more broadly are commonly protected by way of contractual obligations.

Court proceedings in the UAE are not held in public and there is therefore less of a concern around maintaining the confidentiality of trade secrets in this context.

35 What intellectual property rights are available to protect branding and how do you obtain those rights?

Brands can be protected as registered trademarks in the UAE. An application for registration and other formalities must be pursued to obtain protection. A law recognising a unified trademark regime for the GCC countries has been decreed in the UAE but has not yet entered into force.

36 How can new businesses ensure they do not infringe existing brands?

The UAE trademark database can be used to identify registered trademark rights. The database is not available to the public but the law provides for a right to obtain a certified extract of the contents of a register upon payment of a fee. Applicants must pay a separate fee to search each class for existing trademark rights. It is highly advisable for new businesses, perhaps using the services of specialist trademark attorneys, to check whether the database enquiry results indicate earlier registrations that are identical or similar to their proposed brand names and marks. It may also be advisable to conduct internet searches for any unregistered trademark rights that may prevent use of the proposed mark.

37 What remedies are available to individuals or companies whose intellectual property rights have been infringed?

Remedies available to individuals or companies include:

- precautionary measures, including requirements to cease use of an infringing item;
- confiscation or destruction of infringing items;
- damages; and
- publication orders.

The UAE legislation dealing with intellectual property rights, including in respect of patents, designs, trademarks and copyright, provides for criminal liability in various cases of infringement.

38 Are there any legal or regulatory rules or guidelines surrounding the use of open-source software in the financial services industry?

There are no specific legal or regulatory rules or guidelines around the use of open-source software in the local financial services industry.

Data protection

39 What are the general legal or regulatory requirements relating to the use or processing of personal data?

The UAE does not have a specific, stand-alone data protection law. Instead, various general and sector-specific laws and regulations govern aspects of the processing of personal data in the UAE. For example, the UAE Constitution provides for a right to freedom and secrecy of communications; the Penal Code and Cybercrime Law provide for a range of criminal offences prohibiting the disclosure or publication of private information and the interception of personal communications; the Civil Code and Labour Law set out certain obligations on employers when dealing with employee information; another law governs the collection, processing and disclosure of credit-related information; and telecoms operators are subject to special regulations regarding the protection of subscriber information.

While there has been no formal confirmation or release, a draft data protection law is understood to be under consideration by the UAE government.

The ADGM and DIFC have each introduced stand-alone laws governing the processing of personal data by organisations operating in their respective zones. These laws share many common elements. Each law requires that personal data are processed in a manner that is fair, lawful and secure. The most common methods used by businesses in each free zone to ensure that their processing of personal data is fair and lawful are by obtaining the consent of the relevant individual to the processing of their data; by processing the data based on the 'legitimate interests' of the company undertaking the processing (provided that the interests of the individual are not unduly affected); by processing in order for the company undertaking the processing to comply with a legal requirement (not a contractual requirement); and by processing in order to perform or enter into a contract with the individual.

The ADGM and DIFC data protection laws also require organisations to provide specific information to individuals before collecting their personal data; create various rights for individuals, including rights to obtain a copy of personal data, to require the correction or deletion of personal data, and to object to the processing of personal

data, that a company holds about them; require organisations to implement appropriate security measures; and impose conditions around the disclosure of personal data to third parties and the transfer of personal data outside the respective free zone. The DIFC law is enforced by the Commissioner of Data Protection, while the Registrar is responsible for enforcing the ADGM law.

40 Are there legal requirements or regulatory guidance relating to personal data specifically aimed at fintech companies?

The Digital Payment Regulation (referred to in question 11) requires PSPs to keep users' identification and transaction data confidential and to only disclose such data to the relevant user, the Central Bank, another regulatory authority approved by the Central Bank, or by order of a UAE court. There is a separate requirement to ensure that personal data are only processed and shared for the purposes of compliance with anti-money laundering and terrorist financing legislation. The Digital Payment Regulation also provides for minimum retention periods for user and transaction data.

There are no other legal requirements or regulatory guidance relating to personal data that are specifically aimed at fintech companies.

41 What legal requirements or regulatory guidance exists in respect of anonymisation and aggregation of personal data for commercial gain?

There are no specific legal requirements or regulatory guidance in the UAE dealing with the anonymisation or aggregation of personal data used for commercial gain. This, and the absence of a specific data protection law in the UAE (outside the financial free zones), has the result that there is a wider scope for the commercial exploitation of data for commercial purposes in the UAE.

The definitions of 'personal data' in the ADGM and DIFC data protection laws each require the individual to whom the data relate to be identifiable. The guidance published by the DIFC Commissioner of Data Protection suggests that, as data that are stripped of all personal identifiers will no longer relate to an identifiable individual, the DIFC data protection law will no longer apply. The guidance cautions that complete anonymisation may be difficult to achieve in practice, since data will still be protected if it is possible to identify an individual 'indirectly' using the data. The guidance also reminds organisations that the act of anonymisation is itself an activity that must be conducted in compliance with the DIFC data protection law. The guidance published in respect of the ADGM data protection regime does not provide further comment on the anonymisation or aggregation of personal data.

In light of the restrictions on the processing of user and transaction data introduced by the Digital Payment Regulation (see question 40), PSPs seeking to use personal data for commercial gain will need to consider employing anonymisation and aggregation techniques in respect of the data they hold.

Cloud computing and the internet of things

42 How common is the use of cloud computing among financial services companies in your jurisdiction?

Privacy and data domiciliation concerns have played a part in the relatively slow adoption of cloud services in the UAE among major enterprises; however, adoption rates have increased particularly as high-quality local data centres have offered significant colocation capacity and related managed services. Increasingly critical applications are being migrated to various private and hybrid cloud solutions.

43 Are there specific legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

There are no specific legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry. There are regulations, however, which set parameters around the use of cloud computing in the context of outsourcings.

Organisations carrying out functions that are regulated by the DFSA (in the DIFC) or the FSRA (in the ADGM) have specific obligations in relation to material outsourcings, which in practice will include many cases of the use of cloud computing services. In respect of each material outsourcing, the organisation must implement policies and risk management programmes, enter into an appropriate contract with the service provider incorporating certain minimum terms, and notify the relevant regulator of the outsourcing arrangement.

The Digital Payment Regulation (referred to in question 11) regulates how PSPs (other than 'non-issuing PSPs') may outsource operational functions, which could include outsourcings to cloud service providers. In respect of each outsourcing, the PSP must obtain approval from the Central Bank. The outsourced services are required to be carried out in the UAE (outside the financial free zones). Special rules apply when an outsourcing is considered to relate to a 'material operational function'.

44 Are there specific legal requirements or regulatory guidance with respect to the internet of things?

There are currently no specific legal requirements or regulatory guidance with respect to the internet of things. To help facilitate Emirate-level Smart Cities and a regulatory environment to facilitate a big data and pro-internet of things landscape, the Dubai government has enacted 'Open Data' legislation (Dubai Law No. 26 of 2015), which requires, among other things, government ministries to share certain data sets.

Tax

45 Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

There are no special incentives. Although the UAE 'onshore', DIFC and ADGM are all currently low or zero-tax jurisdictions.

Competition

46 Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction or that may become an issue in future?

Since the enactment of Federal Law No. 12 of 2012, the UAE has had a stand-alone, federally applicable competition law that covers anticompetitive agreements, abuse of dominance and merger control; however, the law also has a list of sectors that are entirely excluded from its scope. One of these wholly excluded sectors is the financial sector. The list of excluded sectors and other important aspects of the competition regime in the UAE are within the discretion of the Ministry of Economy, and fintech businesses in the UAE will need to consider their specific competition law issues to assess their exposure. Looking ahead, there is expected to be increased consolidation in the banking sector and an expectation of greater collaboration, information sharing and other horizontal arrangements, all of which could give rise to competition law risks in the UAE.

Financial crime

47 Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

There are express restrictions on insider dealing and market abuse that would apply to UAE licensed counterparties.

For there to be an AML offence, there needs to be actual awareness that such funds are derived from an offence or misdemeanour.

In addition to various administrative penalties, the Federal UAE AML Law states that whoever commits or attempts to commit money laundering shall be punished by imprisonment for a term not exceeding 10 years, or by a fine of between 100,000 and 500,000 dirhams, or both.

In the DIFC, under article 71(1) of the DIFC Regulatory Law, the DIFC regime requires compliance with the federal regime. The federal legislation governing money laundering and terrorist financing is also applicable in the DIFC. The Anti-Money Laundering, Counter-Terrorist Financing and Sanctions Module to the DFSA Rulebook applies to entities in respect of their activities carried on in or from the DIFC. The procedures that must be put in place include applying a risk-based approach that is objective and proportionate to the risks, based on reasonable grounds, properly documented and reviewed and updated at appropriate intervals. Effective AML systems and controls must also be established and maintained to prevent opportunities for money laundering. A risk-based assessment must be undertaken for every customer in order to assign the customer a risk rating proportionate to

the customer's money laundering risks. Customer due diligence must be undertaken in order to verify the identity of the customer and the beneficial owner and understand the source of funds. This should be ongoing by monitoring transactions and complex and unusual transactions. A money laundering reporting officer must be appointed with responsibility for implementing and overseeing compliance; the officer must have an appropriate level of seniority and independence to act in the role and be resident in the UAE.

Similar to the DIFC, the federal legislation governing money laundering and terrorist financing also applies within the ADGM. The ADGM's AML rules are contained in the Anti-Money Laundering and Sanctions Rules and Guidance (AML) Module to the FSRA Rulebook (the ADGM AML Module). According to the ADGM AML Module, an entity must have policies, procedures, systems and controls that ensure compliance with the federal law, enable suspicious customers and transactions to be detected and reported, ensure the entity is able to provide an appropriate audit of trail of a transaction, and ensure compliance with any other obligations as contained in the ADGM AML Module.

48 Is there regulatory or industry anti-financial crime guidance for fintech companies?

There is no guidance specifically targeted at fintech companies. The regulatory guidance on financial crime is contained in the DFSA AML rules and the ADGM AML rules as described in question 47, as well as the applicable federal laws.

Further federal legislation in relation to financial crime regarding corporate and business fraud is contained in articles 399 to 402 of the UAE Penal Code (Federal Law No. 3 of 1987), provisions of the Dubai Recovery of Public Funds (Dubai Law No. 37 of 2009) and other specific offences set out in legislation including the UAE Cyber Crimes Law (Federal Law No. 5 of 2012) and the UAE Commercial Transactions Law (Federal Law No. 18 of 1993).

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

There are a large number of activities ('specified activities') that, when carried on in the UK by way of business in respect of specified kinds of investments, trigger licensing requirements in the UK. These are set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO). While it is not practical to list them all, the most common include the following:

- Accepting deposits: this is mainly carried on by banks and building societies. An institution will accept a deposit where it lends the money it receives to others or uses it to finance its business.
- Dealing in investments (as principal or agent): buying, selling, subscribing for or underwriting particular types of investments. In respect of dealing as principal, the specified investments are 'securities' and 'contractually based investments'. In respect of dealing as agent the specified kinds of investments are 'securities' and 'relevant investments'.
- Securities include: shares, bonds, debentures, government securities, warrants, units in a collective investment scheme (CIS) and rights under stakeholder and personal pension schemes.
- Contractually based investments include: rights under certain insurance contracts (excluding contracts of general insurance), options, futures, contracts for differences and funeral plan contracts.
- Relevant investments include the same investments as contractually based investments, but include contracts of general insurance.
- Arranging deals in investments (this is split into two activities):
  - arranging (bringing about) deals in investments, which applies to arrangements that have the direct effect of bringing about a deal; and
  - making arrangements with a view to transaction in investments, which is much wider and catches arrangements that facilitate others entering into transactions.
- Specified investments in respect of arranging include securities and relevant investments.
- Advising on investments: advising a person in their capacity as an investor on the merits of buying, selling, subscribing for or underwriting a security or relevant investment or exercising any right conferred by that investment to buy, sell, subscribe for or underwrite such an investment.
- Managing investments: managing assets belonging to another person, in circumstances involving the exercise of discretion, where the assets include any investment which is a security or contractually based investment.
- Establishing, operating or winding up a CIS: this is discussed in more detail in question 4.
- Certain lending activities: entering into a regulated mortgage contract or a regulated (consumer) credit agreement (or consumer hire agreement) as lender.
- Certain insurance activities: effecting a contract of insurance as principal and carrying out a contract of insurance as principal.
- Payment services: providing payment services.
- Electronic money: issuing electronic money.

2 Is consumer lending regulated in your jurisdiction? Describe the general regulatory regime.

The general position is that lending by way of business to consumers is regulated in the UK. Since 1 April 2014, the Financial Conduct Authority (FCA) has been responsible for authorising and regulating consumer credit firms (prior to 1 April 2014, the Office of Fair Trading was responsible).

There are two categories of regulated lending: regulated credit agreements and mortgages.

Any person ('A') who enters into an agreement with an individual (or a 'relevant recipient of credit', which includes a partnership consisting of two or three persons not all of whom are bodies corporate and an unincorporated body of persons that does not consist entirely of bodies corporate and is not a partnership) ('B') under which A provides B with credit of any amount must be authorised by the FCA – unless an appropriate exemption applies.

Two of the most common exemptions are: where the amount of credit exceeds £25,000 and the credit agreement is entered into wholly or predominantly for business purposes; and where the borrower certifies that they are 'high net worth' and the credit is more than £60,260.

Other complex exemptions are available that relate to, among other things, the total charge for the credit, the number of repayments to be made under the agreement and the nature of the lender.

If an exemption applies, the lender does not need to comply with the detailed legislative requirements that apply to regulated credit agreements contained in the Consumer Credit Act 1974 (CCA) (and secondary legislation made under it) and the FCA's Consumer Credit Sourcebook (CONC).

Broadly, the CCA sets out the requirements lenders need to comply with in relation to the provision of information, documents and statements and the detailed requirements as to the form and content of the credit agreement itself.

The CONC chapter in the FCA Handbook sets out detailed rules regulated consumer credit firms must comply with and covers areas such as conduct of business, financial promotions, pre-contractual disclosure of information, responsible lending, post-contractual requirements, arrears, default and recovery, cancellation of credit agreements and agreements that are secured on land.

In addition to the CONC, authorised consumer credit firms must also comply with other applicable chapters of the FCA Handbook.

The consequences of failing to comply with the requirements of the CCA include agreements that are unenforceable against borrowers and the FCA imposing financial penalties on the firm.

Entering into a regulated mortgage contract (RMC) is a regulated activity. Such contracts are loans where:

- the contract is one under which a person (lender) provides credit to an individual or trustee (borrower);
- the contract provides for the obligation of the borrower to repay to be secured by a mortgage on land in the European Economic Area (EEA); and
- at least 40 per cent of that land is, or is intended to be, used:
  - in the case of credit provided to an individual, as or in connection with a dwelling by the borrower; or
  - in the case of credit provided to a trustees that is not an individual, as or in connection with a dwelling by an individual who is a beneficiary of the trust, or by a related person.

Conduct rules are set out in the FCA's Mortgages and Home Finance: Conduct of Business (MCOB) sourcebook.

There are exemptions where the borrower is acting wholly or predominantly for business purposes. Buy-to-let lending is not regulated, although 'consumer buy-to-let' lending is. A buy-to-let mortgage contract is defined as one that is entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower. Consumer buy-to-let lending is subject to conduct requirements set out in Mortgage Credit Directive Order 2015 (SI 2015/910).

3 Are there restrictions on trading loans in the secondary market in your jurisdiction?

Provided that the loan itself is being traded, and not the loan instrument (eg, an instrument creating or acknowledging indebtedness), then there are no restrictions on trading loans in the secondary market.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would generally fall within the scope of any such regime.

Establishing, operating or winding up a CIS is a regulated activity in the UK and firms must be authorised by the FCA to carry on this activity. The definition of a CIS is set out in section 235 of the Financial Services and Markets Act 2000.

Broadly, a CIS is any arrangement with respect to property of any description, the purpose or effect of which is to enable the persons taking part in the arrangements to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income. The persons participating in the arrangements must not have day-to-day control over the management of the property. The arrangements must also have either or both of the following characteristics: the contributions of the participants and the profits or income out of which payments are to be made to them are pooled; or the property is managed as a whole by or on behalf of the operator of the scheme.

Whether a fintech company will fall within the scope of this regime will depend on its business. For example, fintech companies that manage assets on a pooled basis on behalf of investors should give particular consideration to whether they may be operating a CIS. Fintech companies that, for example, are geared more towards providing advice or payment services may be less likely to operate a CIS, but should nonetheless check this and have regard to their other regulatory obligations.

5 Are managers of alternative investment funds regulated?

Managers of alternative investment funds are regulated in the UK under the Alternative Investment Fund Managers Directive, which has been implemented in the UK by the Alternative Investment Fund Managers Regulations 2013 and rules and guidance contained in the FCA Handbook.

6 May regulated activities be passported into your jurisdiction?

Currently, an EEA firm that has been authorised under one of the European Union single market directives (Banking Consolidation Directive, Capital Requirements Directive, Solvency II, Markets in Financial Instruments Directive (MiFID), Insurance Mediation Directive, Mortgage Credit Directive, Undertakings for Collective Investment in Transferable Securities, Alternative Investment Fund Managers Directive and Payment Services Directive) may provide cross-border services into the UK.

In order to exercise this right, the firm must first provide notice to its home regulator. The directive under which the EEA firm is seeking to exercise passport rights will determine the conditions and processes that firm has to follow.

Operating an electronic system that enables the operator to facilitate persons becoming the lender and borrower under an 'article 36H agreement' (see question 8) is not currently a passportable activity.

7 May fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

An EEA firm may exercise passport rights to provide services in the UK. Alternatively, in the case of a non-EEA firm or an EEA firm that is not undertaking an activity that can be passported into the UK, it must establish a local presence and obtain an appropriate licence. For example, an equity crowdfunding platform with the relevant permissions in another EEA state may be able to passport into the UK without establishing a local presence.

Operating an electronic system that enables the operator to facilitate persons becoming the lender and borrower under an article 36H agreement (see question 8) is not currently a passportable activity. Therefore, peer-to-peer or marketplace lending platforms that are licensed under local rules governing peer-to-peer or marketplace lending in other jurisdictions (whether inside or outside the EEA) would have to establish a local presence and become appropriately regulated.

8 Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

Peer-to-peer lending is a term that generally refers to loan-based crowdfunding. In the UK, the FCA regulates loan-based crowdfunding platforms. These regulations came into force on 1 April 2014.

Under article 36H of the RAO, operating an electronic system that enables the operator ('A') to facilitate persons ('B' and 'C') becoming the lender and borrower under an article 36H agreement is a regulated activity (and a firm will require FCA authorisation) where the following conditions are met:

- the system operated by A is capable of determining which agreements should be made available to each of B and C;
- A (or someone acting on its behalf) undertakes to receive payments due under the article 36H agreement from C and make payments to B which are due under the agreement; and
- A (or someone acting on its behalf) takes steps to procure the payment of a debt under the article 36H agreement and/or exercises or enforces rights under the article 36H agreement on behalf of B.

An article 36H agreement is an agreement by which one person provides another with credit in relation to which:

- A does not provide the credit, assume the rights of a person who provided credit or receive credit; and
- either, the lender is an individual or the borrower is an individual and the credit is less than £25,000, or the agreement is not entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower.

In addition to falling within the definition of an article 36H agreement, a loan may also constitute a regulated credit agreement, unless an exemption applies (see question 2) and so a lender, through a platform authorised under article 36H, may also be required to have permission to enter into a regulated credit agreement as lender.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

In the UK, reward-based crowdfunding (where people give money in return for a reward, service or product) and donation-based crowdfunding (where people give money to enterprises or organisations they wish to support) is not currently regulated in its own right.

Equity-based crowdfunding is where investors invest in shares in, typically, new businesses. Equity-based crowdfunding is not specifically regulated in the UK (in the same way as loan-based crowdfunding).

However, a firm operating an equity-based crowdfunding service must ensure that it is not carrying on any other regulated activity without permission. Examples of regulated activities that equity-based crowdfunding platforms may carry on (depending on the nature and structure of their business) include: establishing, operating or winding up a CIS; arranging deals in investments; and managing investments.

Additionally, equity-based crowdfunding platforms must not market to retail clients unless an appropriate exemption applies.

10 Describe any specific regulation of invoice trading in your jurisdiction.

There is currently no specific regulation of invoice trading in the UK.

However, depending on how the business is structured, a firm that operates an invoice trading platform may be carrying on a number of different regulated activities for which it must have permission, including: establishing, operating or winding up a CIS; and managing an alternative investment fund.

11 Are payment services a regulated activity in your jurisdiction?

Payment services are regulated in the UK by the Payment Services Regulations 2009, which implemented the Payment Services Directive in the UK.

Payment services include:

- services enabling cash to be placed on a payment account and all of the operations required for operating a payment account;
- services enabling cash withdrawals from a payment account and all of the operations required for operating a payment account;
- the execution of the following types of payment transaction:
  - direct debits, including one-off direct debits;
  - payment transactions executed through a payment card or a similar device; and
  - credit transfers, including standing orders;
- the execution of the following types of payment transaction where the funds are covered by a credit line for the payment service user:
  - direct debits, including one-off direct debits;
  - payment transactions executed through a payment card or a similar device; and
  - credit transfers, including standing orders;
- issuing payment instruments or acquiring payment transactions;
- money remittance; and
- the execution of payment transactions where the consent of the payer to execute the payment transaction is given by means of any telecommunication, digital or IT device and the payment is made to the telecommunication, IT system or network operator acting only as an intermediary between the payment service user and the supplier of the goods or services.

The second Payment Services Directive (PSD2) must be implemented by 13 January 2018. PSD2 introduces two new regulated payment services:

- payment initiation services (initiating a payment order at the request of a payment service user with respect to an account held with another payment service provider); and
- account information services (online service to provide consolidated information on one or more payment accounts held by the payment service user with another one (or more) payment service provider).

Additionally, PSD2 broadens the scope of transactions governed by its provisions, narrows the availability of particular exclusions, amends the conduct of business requirements and introduces security requirements.

To provide payment services in the UK, a firm must fall within the definition of a 'payment service provider'. Payment service providers include 'authorised payment institutions', 'small payment institutions', credit institutions, electronic money institutions, the post office, the Bank of England and government departments and local authorities.

A firm that provides payment services in or from the UK as a regular occupation or business activity (and is not exempt) must apply for authorisation or registration as a payment institution.

12 Do fintech companies that wish to sell or market insurance products in your jurisdiction need to be regulated?

Effecting or carrying out a contract of insurance is a regulated activity and fintech companies that wish to do this must be regulated.

Companies that wish to market insurance products must either be regulated, have their marketing material approved by a regulated firm or fall within an applicable exclusion. See question 17.

13 Are there any legal or regulatory rules in your jurisdiction regarding the provision of credit references or credit information services?

Providing credit information services and credit references are regulated activities and firms carrying on either of these activities must be regulated.

Credit information services are taking any of the following steps (or giving advice in relation to any of the following steps) on behalf of an individual or relevant recipient of credit:

- ascertaining whether a credit information agency holds information relevant to the financial standing of an individual or relevant recipient of credit;
- ascertaining the contents of such information;
- securing the correction of, the omission of anything from, or the making of any other kind of modification of, such information; and
- securing that a credit information agency that holds such information:
  - stops holding the information; or
  - does not provide it to any other person.

Providing credit references involves providing people with information relevant to the financial standing of individuals or relevant recipients of credit where the person has collected the information for that purpose.

14 Are there any legal or regulatory rules in your jurisdiction that oblige financial institutions to make customer or product data available to third parties?

Following its investigation into the retail and small and medium-sized enterprise (SME) banking sectors between 2013 and 2016, the UK's competition authority (the Competition and Markets Authority (CMA)) ordered a number of remedies to help promote greater competition in the retail and SME banking markets. One of the core remedies ordered by the CMA requires the nine largest retail banks in Great Britain and Northern Ireland to develop and implement an open banking standard application programming interface (API) to give third parties access to information about their services, prices and service quality in order to improve competition, efficiency and stimulate innovation. The open APIs will also allow retail and SME customers to share their own transaction data with trusted intermediaries, which can then offer advice tailored to the individual customer. These measures are intended to make it easier for customers to identify the best products for their needs.

Additionally, PSD2 (see question 11) will require banks to allow third-party payment service providers to initiate payments from their customers' accounts.

15 Does the regulator in your jurisdiction make any specific provision for fintech services and companies? If so, what benefits do those provisions offer?

Yes. The FCA's Innovation Hub has been set up to provide support to innovative firms that the FCA thinks might benefit consumers. This includes: a dedicated team and contact for firms; assistance with understanding the FCA's regulatory framework as it applies to their business; assistance with the authorisation application process; and a dedicated contact for up to a year after the firm is authorised.

The FCA's 'regulatory sandbox' is designed to encourage innovation and provides a 'safe space' for firms (both regulated and unregulated) to test innovative products and services in a live environment. Firms may benefit in a number of ways, including the possibility of a tailored authorisation process (for new firms in the testing phase), guidance for firms testing new ideas that may not easily be categorised under the current regulatory framework and waivers in respect of enforcement action.

The FCA's Advice Unit aims to support firms that are developing 'robo-advice' models that seek to provide low-cost advice to investors. It will provide individual regulatory feedback to those firms and will also look to publish resources for all firms developing automated advice services.

16 Does the regulator in your jurisdiction have formal relationships or arrangements with foreign regulators in relation to fintech activities?

The FCA has opened 'fintech bridges' with regulators in other countries (including Australia, Belgium, Canada, China, Hong Kong, Japan, Singapore and South Korea).

Broadly, the arrangements enable the FCA to refer fintech businesses to the regulators in those jurisdictions, make it easier for fintech firms and investors to access the relevant markets and set out how the regulators will share and use financial services information.

The fintech bridges should also attract businesses and investors from those jurisdictions to the UK.

17 Are there any local marketing rules applicable with respect to marketing materials for financial services in your jurisdiction?

Investments

The UK has a comprehensive set of rules relating to financial promotions set out in chapter 4 of the Conduct of Business Sourcebook (COBS).

The definition of a financial promotion is very widely drafted and catches an invitation or inducement to engage in investment activity that is communicated in the course of business. Marketing materials for financial services are likely to fall within this definition.

The basic concept is that financial promotions must be fair, clear and not misleading. FCA guidance suggests that:

- for a product or service that places a client's capital at risk, it makes this clear;
- where product yield figures are quoted, this must give a balanced impression of both the short- and long-term prospects for the investment;
- where it promotes an investment or service with a complex charging structure or the firm will receive more than one element of remuneration, it must include the information necessary to ensure that it is fair, clear and not misleading and contains sufficient information taking into account the needs of the recipients;
- the FCA, Prudential Regulation Authority (PRA) or both (as applicable) are named as the firm's regulator and any matters not regulated by either the FCA, PRA or both are made clear; and
- where if it offers 'packaged products' or 'stakeholder products' not produced by the firm, it gives a fair, clear and not misleading impression of the producer of the product or the manager of the underlying investments.

There are, however, a number of exemptions that may be available in respect of marketing materials that take them outside of the scope of the financial promotion rules, including: communications to high net worth individuals and companies and sophisticated individuals; and communications to other investment professionals.

Only authorised persons may make financial promotions and it is a criminal offence for an unauthorised person to communicate a financial promotion. Any agreements entered into with customers as a result of such financial promotion are unenforceable.

Lending

In relation to lending, there is also a comprehensive set of rules and the position is similar, but not identical, to those set out in COBS.

In respect of credit agreements, CONC 3.3 applies and provides that a financial promotion must be clear, fair and not misleading. In addition, firms must ensure that financial promotions:

- are clearly identifiable as such;
- are accurate;
- are balanced (without emphasising potential benefits without giving a fair and prominent indication of any relevant risks);
- are sufficient for, and presented in a way that is likely to be understood by, the average member of the group to which they are directed, or by which they are likely to be received;
- are presented in a way that does not disguise, omit, diminish or obscure important information, statements or warnings;
- present any comparisons or contrasts in a fair, balanced and meaningful way;
- use plain and intelligible language;
- are easily legible and audible (if given orally);
- specify the name of the person making the communication (or whom they are communicating on behalf of, if applicable); and
- do not state or imply that credit is available regardless of the customer's financial circumstances or status.

Various other detailed requirements apply depending on the type of credit (eg, peer-to-peer, secured, unsecured or 'high-cost short-term' credit) and the type of agreement (eg, whether it is secured on land), which govern things such as:

- the requirement to include particular risk warnings and how those warnings must be worded;
- when and how annual percentage rates and representative examples must be included and displayed; and
- expressions that cannot be included in financial promotions.

In relation to mortgages, chapter 3A of the MCOB sourcebook applies. In addition to being clear, fair and not misleading, financial promotions must be:

- accurate;
- balanced (without emphasising any potential benefits without also giving a fair and prominent indication of any relevant risks);
- sufficient for, and presented in a way that is likely to be understood by, the average member of the group to whom it is directed, or by whom it is likely to be received;
- make it clear, where applicable, that the credit is secured on the customer's home;
- presented in a way that does not disguise, omit, diminish or obscure important items, statements or warnings; and
- where they contain a comparison or contrast, designed in such a way that the comparison or contrast is presented in a fair and balanced way and ensures that it is meaningful.

As with credit agreements, other detailed provisions apply depending on the particular type of mortgage, which cover, among other things, the inclusion and presentation of annual percentage rates and other credit-related information, points of contact and when and how financial promotions can be made.

18 Are there any foreign exchange or currency control restrictions in your jurisdiction?

The UK does not operate any foreign currency controls. However, when taking money from the UK it is important to understand the rules of the jurisdiction into which it will be transferred and the rules governing its transfer back out again (whether into the UK or another jurisdiction).

19 If a potential investor or client makes an unsolicited approach either from inside the provider's jurisdiction or from another jurisdiction, is the provider carrying out a regulated activity requiring a licence in your jurisdiction?

Yes. An approach made by a potential client or investor on an unsolicited and specific basis will not avoid triggering a licensing requirement.

20 If the investor or client is outside the provider's jurisdiction and the activities take place outside the jurisdiction, is the provider carrying out an activity that requires licensing in its jurisdiction?

No. Only activities carried on in the UK fall within the UK's licensing regime.

21 Are there continuing obligations that fintech companies must comply with when carrying out cross-border activities?

The conduct of business rules apply to a locally licensed firm, and, with some exceptions, to EEA firms establishing a branch in the jurisdiction. There are no further continuing obligations that fintech companies must comply with when carrying out cross-border activities.

22 What licensing exemptions apply where the services are provided to an account holder based outside the jurisdiction?

Not applicable in respect of the UK.

Distributed ledger technology

23 Are there any legal or regulatory rules or guidelines in relation to the use of distributed ledger (including blockchain) technology in your jurisdiction?

Currently, there is no specific regulated activity covering the use of distributed ledger technology. Rather, if distributed ledger technology is used in a financial services context, this should be examined in context to determine which regulatory rules (for example, the use of such technology may involve the carrying on of a regulated activity, issuing electronic money or carrying on payment services) apply.

Having said that, distributed ledger technology is subject to significant interest from regulatory bodies in the UK and the EU, focusing closely on the need for 'technology neutrality'. For example, in April 2017, the FCA launched a discussion paper on distributed ledger technology with a view to exploring the FCA's approach to these types of technology – the results of this discussion paper are likely to be published in the second half of 2017. Further reports and papers have been published by other entities such as the European Securities and Markets Authority, and the International Organization of Securities Commissions, both of which seek to review the state of certain markets and how distributed ledger technology might affect these.

Digital currencies

24 Are there any legal or regulatory rules or guidelines in relation to the use of digital currencies or digital wallets, including e-money, in your jurisdiction?

Issuing electronic money is a regulated activity and firms carrying on this activity must be either registered with, or authorised by, the FCA (depending on the nature of their business).

At present there are no distinct regulations or rules that apply to activities involving digital currency, although we understand that the FCA may soon be issuing consumer guidance regarding digital currency.

The UK tax authorities published guidance in 2014 on the tax treatment of income received from, and charges made in connection with, activities involving bitcoin and other similar cryptocurrencies for VAT, corporation tax, income tax and capital gains tax. Broadly the UK tax authorities are seeking to treat such currencies in the same way as other currencies from a UK tax perspective – the published guidance highlights various aspects of such treatment.

Securitisation

25 What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

In certain types of transaction, there is a statutory requirement for the parties to use a deed. Such transactions include transfers of land, the appointment of trustees, the creation of mortgages and charges, and the appointment of attorneys. The majority of loan agreements do not fall within these categories, whereas security documents (which typically grant a lender a power of attorney and, in certain circumstances, may transfer an interest in land) will.

Under English law, simple contracts require only a single signature to be enforceable. Additional formalities are required for the execution of deeds. First, the deed must be in writing. Second, it must be clear on its face that it is intended to take effect as a deed. Third, it must be executed as a deed, the requirements of which will vary according to the legal personality of the executing party (for example, whether it is an individual or a company). Fourth, the signature of the executing party must be attested (in other words, witnessed). Fifth, it must be delivered as a deed, which is to say that the parties must demonstrate an intention to be bound.

Typically, peer-to-peer marketplace lending platforms require agreements to be entered into electronically ('e-signing'). The e-signing of simple contracts (such as loan agreements) is accepted as creating enforceable agreements. E-signing can take a range of forms, including typing the signatory's name, signing through biodynamic software (ie, the signatory signing on a screen or on a digital pad) and clicking an icon on a web page. Certain limitations on e-signing generally need to be borne in mind. First, English law prohibits e-signing in respect of certain types of contract, including documents required to be registered at the (English) Land Registry. Second, questions arise as to whether the prescribed formalities for executing deeds can be satisfied by e-signing. In particular, difficulties are likely to arise in satisfying the attestation requirement (where a deed is executed by an individual or by a single director of a company in the presence of a witness) by electronic means. Third, even if it were possible to satisfy these formalities, there may be practical reasons (such as certainty and evidential issues) why executing a deed with a 'wet-ink' signature (rather than e-signing it) may be preferable. As such, best practice remains for deeds to be executed with a wet-ink signature.

26 What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected?

To perfect a legal assignment of loans originated on a peer-to-peer lending platform, various criteria must be met. Most importantly, notice of the assignment must be received by the other party to the loan agreement. In addition to this, the benefit under the loan that is being assigned must be absolute, unconditional and not purporting to be by way of charge only, the contract effecting the assignment of the loans must be in writing and signed by the assignor, and the assignment must be of the whole of the debt under the loan agreement.

Subject to certain exceptions, notice by email will comprise notice in writing under English law and, therefore, sending a notice to the other party to the loan agreement by email should not preclude it from being effectively delivered. However, a question remains over whether notice of assignment can be effectively delivered solely by updating the relevant party's account on the peer-to-peer lending platform. It is therefore best practice to notify the other party to the loan agreement of the assignment both by email and an update to their peer-to-peer account.

If the assignment does not comply with the above criteria for a legal assignment, it may nevertheless take effect as an equitable assignment. The key distinction between a legal and an equitable assignment is that, in the case of an equitable assignment, the person to whom the loan has been transferred would not be able to bring an action under the contract in their own name.

27 Is it possible to transfer loans originated on a peer-to-peer or marketplace lending platform to the purchaser without informing the borrower? Does the assignor require consent of the borrower or are the loans assignable in the absence of a prohibition?

As set out in question 26, it is not possible to effect a legal assignment of loans originated on a peer-to-peer lending platform without informing the borrower. However, non-compliance with this requirement may not render the assignment ineffective, but rather equitable, which therefore provides weaker enforcement rights for the assignee.

Where a contract does not prohibit assignment, or is silent on the matter, the originator is free to assign their rights under the contract without the consent of the borrower. As such, consent of the borrower will only be required where this has been commercially agreed between the parties in the initial loan agreement.

28 Would a special purpose company for purchasing and securitising peer-to-peer or marketplace loans be subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

The entity assigning loans to the special purpose vehicle (SPV) must ensure that there are no confidentiality requirements in the loan documents that would prevent it from disclosing information about the loans and the relevant borrowers to the SPV and the other securitisation parties. If there are such restrictions in the underlying loan documentation, the assignor will require the consent of the relevant borrower to disclose to the SPV and other securitisation parties the information they require before agreeing to the asset sale. In addition, the SPV will want to ensure that there are no restrictions in the loan documents that would prevent it from complying with its disclosure obligations under English and EU law (such as those set out in the Credit Rating Agency Regulation). Again, if such restrictions are included in the underlying loan documents, the SPV would be required to obtain the relevant

borrower's consent to such disclosure. In addition, if the borrowers are individuals, the SPV, its agents and the peer-to-peer platform will each be required to comply with the statutory data protection requirements under English law (see questions 39 to 41).

Intellectual property rights

29 Which intellectual property rights are available to protect software, and how do you obtain those rights?

Computer programs (and preparatory design materials for computer programs) are protected by copyright as literary works. Copyright arises automatically as soon as the computer program is recorded. No registration is required.

Databases underlying software programs may also be protected by copyright and, in certain circumstances, by database right. Database right is a standalone right that protects databases that have involved a substantial investment in obtaining, verifying or presenting their contents. Both database copyright and database rights arise automatically without any need for registration.

If the software code has been kept confidential it may also be protected as confidential information. No registration is required.

Although computer programs 'as such' are expressly excluded from patentability under UK legislation, it is possible to obtain patent protection for software if it is possible to demonstrate that the program in question makes a 'technical contribution' (see question 30). Registration formalities must be followed to obtain protection.

30 Is patent protection available for software-implemented inventions or business methods?

Programs for computers, and schemes, rules or methods of doing business 'as such', are expressly excluded from patentability under the Patents Act 1977. These exclusions ultimately flow from the European Patent Convention.

Notwithstanding these exclusions, it is possible to obtain patents for computer programs and business methods if it can be shown that the underlying invention makes a 'technical contribution' over and above that provided by the program or business method itself, such as an improvement in the working of the computer. Accordingly, a well-drafted patent may be able to bring a computer-based, software or business method invention within this requirement, but this may be difficult to do and will not always be possible.

31 Who owns new intellectual property developed by an employee during the course of employment?

Copyright and database rights created by an employee in the course of their employment are automatically owned by the employer unless otherwise agreed. Inventions made by an employee in the course of their normal duties (or, in the case of employees who owe a special obligation to further the interests of their employer's business, in the course of any duties) are automatically owned by the employer.

32 Do the same rules apply to new intellectual property developed by contractors or consultants? If not, who owns such intellectual property rights?

No. Copyright or inventions created by contractors or consultants in the course of their duties are owned by the contractor or consultant unless otherwise agreed in writing. Database rights are owned by the person who takes the initiative and assumes the risk of investing in obtaining, verifying and presenting the data in question. Depending on the circumstances this is likely to be the business that has retained the contractor or consultant.

33 Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

Restrictions on a joint owner's ability to use, license, charge or assign its right in intellectual property will depend on the intellectual property right in question. For example, the restrictions on a joint owner of a patent are different from those on a joint owner of copyright.

A joint copyright owner cannot copy, license or grant security over jointly owned copyright without the consent of the other joint owners (see sections 16(2) and 173(2) of the Copyright, Designs and Patents Act 1988). By analogy with the principles established in relation to other intellectual property rights, it is thought that the consent of other joint owners is also required to assign jointly owned copyright (although this is not settled law, since neither the relevant legislation nor current case law specifically address the question as to whether or not the consent of other joint owners is required).

In the case of UK patents and patent applications, a joint owner is entitled to work the invention concerned for his or her own benefit and does not need the consent of the other joint owners to do so (section 36(2) Patents Act 1977 (PA)). However, the consent of the other joint owners is required to grant a licence under the patent or patent application, and to assign or mortgage a share in the patent or patent application (section 36(3) PA).

The situation is similar for UK registered trademarks. Each joint owner is entitled to use the registered trademark for their own benefit without the consent of the other joint owners (section 23(3) Trade Marks Act 1994 (TMA)), but the consent of the other joint owners is required to grant a licence of the trademark and to assign or charge a share in the trademark (section 23(4) TMA).

Given the variations in the rights and restrictions of joint owners discussed above, and given that the rights of joint owners also differ on a country-by-country basis, it would be advisable in any situation where parties work together on a project to agree at the outset how the results are to be owned by the parties and their individual rights to exploit the results. In general, joint ownership of intellectual property should be avoided if possible because of the complexities described above.

34 How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

Confidential information can be protected against misuse, provided the information in question: has the necessary quality of confidence; is subject to an express or implied duty of confidence; or no registration is necessary (or possible). Confidential information can be kept confidential during civil proceedings with the permission of the court.

The UK will have to implement the Trade Secrets Directive (EU) 2016/943 by 9 June 2018. This is unaffected by the outcome of the Brexit referendum. At the time of writing, it is unclear whether the UK government will pass any implementing legislation because UK law already provides broadly the same level of protection as is required under the Directive through the existing law on breach of confidence. The biggest difference between existing UK law and the regime that member states have to adopt to comply with the Directive is the introduction of a definition of what qualifies as a protectable trade secret. The Directive requires member states to provide protection for information that:

- is secret, in the sense that it is not generally known among, or readily accessible to, persons within the circles that normally deal with the kind of information in question;
- has commercial value because it is secret; and
- has been subject to reasonable steps by the holder of the information to keep it secret.

Although the UK does not currently have a stand-alone definition of 'trade secret', the scope of information that UK common law recognises as protectable as confidential information is broadly the same as the scope of information covered by the definition in the Directive. The UK courts may well consider that it is sufficient for them to apply the new definition when determining breach of confidence (trade secrets) cases after 9 June 2018 without any need for separate implementing legislation.

35 What intellectual property rights are available to protect branding and how do you obtain those rights?

Brands can be protected as registered trademarks either in the UK alone (as a UK trademark) or across the EU (as an EU trademark). A brand can also be protected under the common law tort of passing off if it has acquired sufficient goodwill.

Certain branding such as logos and stylised marks can also be protected by design rights and may also be protected by copyright as artistic works.

36 How can new businesses ensure they do not infringe existing brands?

The UK and European Union trademark databases can all be searched to identify registered or applied for trademark rights with effect in the UK. It is highly advisable for new businesses to conduct trademark searches to check whether earlier registrations exist that are identical or similar to their proposed brand names. It may also be advisable to conduct searches of the internet for any unregistered trademark rights that may prevent use of the proposed mark.

37 What remedies are available to individuals or companies whose intellectual property rights have been infringed?

Remedies include:

- preliminary and final injunctions;
- damages or an account of profits;
- delivery up or destruction of infringing products;
- publication orders; and
- costs.

38 Are there any legal or regulatory rules or guidelines surrounding the use of open-source software in the financial services industry?

No such legal or regulatory rules or guidelines exist.

Data protection

39 What are the general legal or regulatory requirements relating to the use or processing of personal data?

The Data Protection Act 1998 is the primary piece of legislation governing the storage, viewing, use of, manipulation and other processing by businesses of data that relates to a living individual. The Data Protection Act requires that businesses may only process personal data where that processing is done in a fair and lawful way, as further described in the Act.

The most common methods used by businesses to ensure that their processing of personal data is fair and lawful are: to obtain the consent of the relevant individual (known as the 'data subject') to the processing of their data; to process that data based on the 'legitimate interests' of the company undertaking the processing (provided that the interests of the individual are not unduly impacted); to process in order for the company undertaking the processing to comply with a legal requirement (not a contractual requirement); and to perform or enter into a contract with the individual.

The Data Protection Act also creates various rights for data subjects, including a right to see a copy of the personal data that a company holds about them and a right to require the correction of inaccurate personal data held by a company.

The oversight of UK businesses' compliance with the Data Protection Act and related legislation, and enforcement of them, is managed by the UK regulator, the Information Commissioner's Office (ICO).

The Data Protection Act 1998 is due to be replaced in May 2018 by the new General Data Protection Regulation (GDPR), a European regulation having direct effect in the UK. The GDPR broadly reinforces the existing regime provided by the Data Protection Act, with some additional requirements added to strengthen the obligations on businesses to protect personal data. However, the impact of the June 2016 Brexit referendum decision in the UK has thrown some uncertainty on the longevity of the GDPR within the UK after Brexit. At the time of writing it remains to be seen whether the GDPR will remain applicable in the UK after Brexit, but many data protection commentators believe that despite the fact the UK will leave the EU, for various reasons it will choose to implement a data protection regime that is equivalent to the one detailed in the GDPR.

40 Are there legal requirements or regulatory guidance relating to personal data specifically aimed at fintech companies?

There are no legal requirements or regulatory guidance relating to personal data that are specifically aimed at fintech businesses.

41 What legal requirements or regulatory guidance exists in respect of anonymisation and aggregation of personal data for commercial gain?

The Data Protection Directive 95/46/EC (which has been implemented in the UK by the Data Protection Act 1998) states at paragraph 26 that, where data has been anonymised, the principles of data protection do not apply and the definition of 'personal data' in the Data Protection Act requires the individual to be identifiable. Accordingly, for the data to have been effectively anonymised, the data subject must no longer be identifiable. Article 27 of this Directive redirects the user of the data to the relevant code of practice of their jurisdiction for more guidance on anonymisation.

The ICO's Code of Practice on 'Anonymisation: Managing data protection risk' sets out how to ensure that anonymisation is effective. Guidance is given on, among other things, when it is necessary to obtain consent, how to lawfully disclose anonymised data and how to ensure there are comprehensive governance structures that ensure anonymisation is effective. Appendix 2 is a guide to key anonymisation techniques that includes the aggregation of data. Aggregation is defined as being where 'data is displayed as totals, so no data relating to or identifying any individual is shown'.

The Article 29 Working Party (a European body comprised of representatives from data protection regulators across the EU) has released Opinion 05/2014 on Anonymisation Techniques. This Opinion discusses the main anonymisation techniques used – randomisation and generalisation (including aggregation). The Opinion states that when assessing the robustness of an anonymisation technique, it is necessary to consider: if it is still possible to single out an individual; if it is still possible to link records relating to an individual; and if information can be inferred concerning an individual. In relation to aggregation, the Opinion further states that aggregation techniques should aim to prevent a data subject from being singled out by grouping them with other data subjects. While aggregation will avoid the risk of singling out, it is necessary to be aware that linkability and inferences may still be risks with aggregation techniques.

The position on anonymisation taken from the Article 29 Working Party's Opinion is broadly unchanged in the GDPR.

Cloud computing and the internet of things

42 How common is the use of cloud computing among financial services companies in your jurisdiction?

Among large, well-established financial services companies (such as large retail banks), cloud computing services have been adopted, but on a relatively small scale compared to the size of their IT functions. This is primarily owing to the ongoing desire within large financial services companies to maintain ultimate control of their infrastructure, alongside the cost of decommissioning existing legacy systems in favour of a move to cloud computing services.

Within smaller, earlier stage financial services companies, the take-up of cloud computing services in the UK is extremely high, particularly among the start-up community. The benefits of high availability, combined with low set-up and ongoing running costs, makes the use of cloud services extremely attractive for businesses that need to focus on generating revenue and scaling.

43 Are there specific legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

There are no specific legal requirements with respect to the use of cloud computing in the financial services industry; however, a large body of guidance exists in the UK for financial services firms that are considering the procurement of cloud services. For example:

- The European Union Agency for Network and Information Security (ENISA) guidance entitled 'Secure Use of Cloud Computing in the Finance Sector' (December 2015) contains analysis of the security of cloud computing systems in the finance sector, and provides recommendations. Cooperation between financial institutions, national financial supervisory authorities and cloud service providers is encouraged. ENISA advocates a risk-based approach to developing cloud computing systems in the finance sector.
- The FCA guidance entitled 'Guidance for firms outsourcing to the 'cloud' and other third-party IT services' (July 2016) outlines the

Update and trends

Brexit

The consequences of the UK's 'Brexit' vote is undoubtedly the single biggest issue on the immediate horizon for the UK's fintech sector. We will have to wait for the outcome of the UK government's negotiations with the European Union to have a clear view of the full impact of the UK's decision to leave the European Union. However, any changes to the UK's access to the European single market could have significant implications for the UK fintech sector. In particular, any curb on the ability of fintech businesses to operate in other EU member states on the basis of regulatory permissions granted in the UK ('passporting') could inhibit the growth of UK fintech businesses. Equally, given the reliance many fintech companies have on hiring software engineers from outside the UK, any restrictions that are placed on citizens from the European Union moving to and working in the UK ('freedom of movement for workers') could affect the growth rates of those companies.

Regulatory developments

The next 12 to 18 months will also see a number of significant new regulations come into force that will influence the development of the fintech sector in the UK. In particular, the second Payment Services Directive (PSD2) and Open Banking remedies ordered by the UK Competition and Markets Authority following its investigation into the retail banking industry will create greater opportunities for competition. However, they will also give rise to increased legal and regulatory risks, which will need to be carefully managed by all businesses affected by those new regulations. At the same time, the coming into force of the General Data Protection Regulation (GDPR) in May 2018 brings with it enhanced obligations (and potential liabilities) for companies that handle personal data, including those wishing to take advantage of the opportunities that PSD2 and the Open Banking remedies present. We are also waiting for the FCA's final report following its 2016 consultation on the UK's crowdfunding market. However, given the findings highlighted in the FCA's interim feedback from its call for input it would not be surprising if the existing regulations are modified and, in some cases, strengthened over the next 12 months.

FCA's risk-based approach to outsourcing of cloud computing. The Guidance states that there is 'no fundamental reason why cloud services (including public cloud services) cannot be implemented, with appropriate consideration, in a manner that complies with our rules'. The guidance contains a table that sets out areas for firms to consider in outsourcing, including how firms should discharge their oversight obligations.

- The 'MiFID Connect Guidance on Outsourcing' (FCA-approved) provides guidance on how to comply with Senior management arrangements, Systems and Controls (SYSC) 8, setting out the relevant SYSC rules and additional information on how to comply with them.

44 Are there specific legal requirements or regulatory guidance with respect to the internet of things?

There are no specific legal requirements with respect to the internet of things (IoT); however, a large body of guidance on this topic does exist in the UK. For example:

The Body of European Regulators for Electronic Communications (BEREC) released a report on 'Enabling the IoT' (February 2016), which stated that it believed, in general, that no special treatment of IoT services or machine-to-machine communication is necessary, except for in the areas of roaming, switching and number portability. BEREC recognised the need for a careful evolution of existing EU data protection rules to keep pace with the IoT.

The European Commission's 'Report on the Public Consultation on IoT Governance and Factsheets' (February 2013) described how the public consultation showed unambiguous consensus on the fact that IoT will bring significant economic and social benefits, in particular in healthcare, independent living, support for the disabled and social interactions, but that concerns persisted as to whether the legal framework could adequately keep up with the pace of development of IoT-enabled services.

Tax

45 Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

The UK has introduced a wide range of tax incentives that are available to fintech companies and investors. The key incentives are set out below, although there are a number of conditions to be met to qualify for each scheme:

- seed enterprise investment scheme (SEIS) – 50 per cent income tax relief and exemption from capital gains tax for investors in high-risk start-up companies;
- enterprise investment scheme (EIS) – 30 per cent income tax relief and exemption from capital gains tax for investors in small high-risk trading companies;
- venture capital trust (VCT) scheme – 30 per cent income tax relief and exemption from capital gains tax for investors in venture capital trusts, which subscribe for equity in, or lend money to, small unquoted companies;
- entrepreneurs' relief – a reduced 10 per cent capital gains tax rate for entrepreneurs selling business assets (only available to directors and employees of businesses);
- investors' relief – an additional reduced 10 per cent capital gains tax rate which allows other types of shareholders to benefit from the same relief as is provided under entrepreneurs' relief when they sell their shares. Unlike entrepreneurs' relief, this reduced rate is only available to investors who have not been officers or employees in the company whose shares are being sold;
- research and development tax credits – tax relief for expenditure on research and development;
- patent box regime – a reduced 10 per cent corporation tax rate for profits from the development and exploitation of patents and certain other intellectual property rights;
- innovative finance ISA eligibility – peer-to-peer loans are eligible for inclusion in tax-free ISAs;
- tax relief for peer-to-peer bad debt – an income tax relief for irrecoverable peer-to-peer loans, or peer-to-peer 'bad debt'; and
- peer-to-peer interest withholding tax exemption – peer-to-peer loan interest payments are exempt from UK withholding tax.

A company may raise up to £150,000 under the SEIS over a three-year investment period and up to a total of £5 million over 12 months under each of the SEIS, EIS and VCT schemes. While financial activities are an excluded activity for the SEIS, EIS and VCT schemes, as long as a fintech company is only providing a platform through which financial activities are carried out, such a fintech company should still qualify for those schemes.

Competition

46 Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction or that may become an issue in future?

Competition authorities in all jurisdictions, including the UK, face a range of potentially complex competition law issues in relation to fintech offerings. These are likely to include:

- the extent to which a fintech solution has or obtains (through growth, acquisition or joint venture) market power and the consequences of this;
- the risks that the definition of any technical standards involved in any jointly developed fintech solution result in other third parties being excluded;
- the extent to which there can be any exclusivity between the finance and technology providers of a fintech offering;
- the limits of any specified tying or bundling;
- the extent to which 'BigTechs' may exclude efficient competitors by using their market power from other markets; and
- the risk that the use of algorithms could lead to poor consumer outcomes or threaten market integrity.

The role of 'big data' as a potential source of market power is an important topic currently being considered by various competition authorities throughout Europe and is likely to be relevant in relation to fintech companies.

The FCA has concurrent competition law powers in relation to the provision of financial services, meaning that it has the power to investigate and enforce competition law in the same way as the Competition and Markets Authority, the UK competition authority, as well as being under a statutory general duty to promote competition. As part of this mandate, the FCA considers that it is obliged to create a regulatory environment that would allow innovators and new entrants to succeed. In this regard, the FCA has set the ambitious objective of making the UK the centre of innovation for financial markets. In keeping with this, to date, the FCA has been one of the leading regulators at fostering these conditions through schemes such as Project Innovate launched in October 2014, which created the Innovation Hub and more recently the regulatory sandbox (discussed in question 15). Moreover, for its 2017/18 business plan, the FCA has outlined its desire to strengthen domestic relationships through greater engagement with regional and Scottish fintech clusters.

In the UK, the greater use of behavioural economics has become a recent feature of the application of competition law. This branch of economics recognises that it cannot always be assumed that consumers will make rational decisions when presented with choices. This has been found to be particularly relevant in relation to financial services and the UK may well see behavioural economics being applied in relation to the regulation of fintech products or services.

Given the Brexit vote in June 2016 there is uncertainty over the future relationship between the UK and the EU. It is difficult to speculate what the impact will be for UK-based fintech companies, but by way of example, the European Commission has outlined its strategy for 'A Digital Single Market for Europe', the terms of which may be more or less relevant depending upon any exit model adopted. Moreover the European Banking Federation has proposed establishing a harmonised EU regulatory sandbox. If this proposal succeeds, it could potentially have implications for the current functioning of the UK regulatory sandbox.

The CMA's retail banking market investigation

On 9 August 2016 the CMA published the final report in its retail banking market investigation into the supply of retail banking services to personal current account (PCA) customers and to SMEs in the UK. To address the issues it had identified in the market, the CMA put forward a package of remedies designed to engage, empower and inform personal and business customers. These remedies are aimed at driving innovation and improving products and services, to disrupt the status quo in the market.

The remedies package consists of four elements:

- three foundation measures to underpin increased competition:
  - timely development and implementation of an API banking standard, which the CMA considers has the greatest potential to transform competition in retail banking (see question 14);
  - ensuring bank customers receive much better information on service quality than they do currently. The CMA's preferred measures of quality are based on a customers' willingness to recommend their bank to friends, family or colleagues; and
  - the receipt by personal and business customers of occasional reminders or prompts to encourage them to consider their current banking arrangements and shop around for alternatives;
- additional measures to make current account switching work better, including building on and improving the existing current account switching service (CASS);
- a set of measures aimed at PCA overdraft users, for example requiring banks automatically to enrol customers in an unarranged overdraft alert, informing customers about the opportunity to benefit from grace periods and generally seeking to increase customer engagement with overdraft features; and
- a set of measures aimed at specific problems in SME banking, seeking to improve information available to SMEs about loan and overdraft charges and eligibility, making it easier for customers to compare different providers and reducing the hold of the incumbent banks.

The CMA will use its legal powers to impose some of these measures by order, while others will be implemented by the CMA accepting legal binding undertakings from Bacs Payment Schemes Limited (which operates the CASS). The CMA is also working with the FCA and the relevant government departments to finalise the details of the remedies package.

Financial crime

47 Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

There is no legal or regulatory requirement for fintech companies to have anti-bribery or anti-money laundering procedures unless the company is authorised by the Financial Services Authority or carries out business that is subject to the Money Laundering Regulations 2017. However, fintech companies, regardless of whether they are authorised, ought to have appropriate financial crime policies and procedures in place as a matter of good governance and proportionate risk management.

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48 Is there regulatory or industry anti-financial crime guidance for fintech companies?

There is no anti-financial crime guidance specifically for fintech firms. However, firms that are authorised by the FCA should comply with its 'Financial crime: a guide for firms', which is part of the FCA Handbook (www.handbook.fca.org.uk/handbook/document/FC1_FCA_20150427.pdf). In addition the Joint Money Laundering Steering Group has issued guidance for the financial sector (www.jmlsg.org.uk/industry-guidance/article/jmlsg-guidance-current). These documents are also helpful for non-authorised fintech firms and may inform their own internal financial crime policies and procedures.

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United States

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

There are several basic activities that often trigger licensing requirements in the United States.

Receiving and holding funds belonging to others

In general, any time an entity accepts or receives funds from a member of the public and holds such funds with the promise of making the funds available to the depositor at a later time or transferring the funds to a recipient designated by the depositor, that entity must be licensed.

The entities that receive and hold funds can fall into a wide range of categories. They include deposit-taking banks or credit unions; remittance companies; escrow companies; and bill payment companies. They can also include companies that establish payment accounts for customers, which allow the customer to fund an account that can later be used for shopping, bill payment, legal gambling or general savings.

Non-bank fintech companies that offer these payment services and receive customer funds – whether online, at the point of sale or via mobile applications – must usually obtain a 'money transmitter' or similar licence in each state in which they offer their services, even if the entities have no physical presence in the state. These are not uniform state laws and they are referred to under different names. Sometimes they are referred to as 'money services' licences or 'sale of check' licences. Currently, 49 states plus the District of Columbia require such licences. As a result of recent legislation, only one state, Montana, is now without a licensing requirement. For the purposes of this chapter, we will refer to all such entities as 'money transmitters' and such laws as state 'money transmitter' licensing laws. In addition, certain non-bank money service businesses, such as money transmitters, are required to register with the Department of Treasury's Financial Crimes Enforcement Network (FinCEN) for the purpose of assuring compliance with anti-money laundering (AML) rules.

In December 2016, the Office of the Comptroller of the Currency (OCC) announced that it would move forward with considering applications from fintech companies to become special purpose national banks. In May 2017, the OCC released a Draft Licensing Manual for fintech bank charter applicants. This new fintech bank charter has come under attack by state regulators, who argue that the issuance of such a charter is outside the authority of the OCC. In April 2017, the Conference of State Bank Supervisors (CSBS) filed a lawsuit against the OCC arguing that the OCC does not have statutory authority to create a special purpose charter. That litigation is still pending.

Issuing payment instruments

Companies that issue payment instruments such as cheques, money orders, traveller's cheques and prepaid cards or mobile payment applications also generally require licensing. These instruments are often 'bearer instruments', which means that the holder or possessor is the party that has rights to the funds. As a result, such instruments are often used to pay third parties who receive and rely upon the underlying promise of payment.

As with receiving and holding funds, a non-bank entity that issues or sells payment instruments must also obtain a state money transmitter licence in many states unless the entity comes under an exclusion; for example, entities that sell prepaid cards as agents of a licensed entity do not require licensing themselves.

In some jurisdictions, companies that facilitate the movement of funds from payers' accounts to recipients' accounts are also required to be licensed, even though they may not actually hold the funds. These entities often receive payment instructions from the payers, format the instructions in accordance with payment network requirements and deliver the instructions so that the funds are moved to the appropriate designated recipient. Payment processors are examples of such entities. Historically payment processors, which generally serve in a back office function, were not required to obtain licensing, since they were a vendor or agent of a principal such as a bank or a merchant. In recent years, however, some regulators have decided that such entities have significant discretionary control over the movement of other people's money – and, therefore, licensing was deemed appropriate.

Entities that engage in the business of transferring funds (such as bill-payment companies or remittance companies) are also required, in some jurisdictions, to obtain state money transmitter licences.

Extending credit

Credit has long been a licensed activity, especially consumer credit. The term 'credit' covers a wide range of potential payment products, from revolving credit cards to home mortgages to 'payday lending' to overdrafts and charge cards. Some jurisdictions define credit as any extension of time to pay; others only require licensing if the payment is made in instalments, or if finance charges or interest is charged for the extension of time to pay.

Every state has state laws that require licensing for non-banks that offer loans. The laws are not uniform and vary depending on the nature and size of the loan products.

Currency exchange

Some jurisdictions require licensing for foreign currency exchange or sale, including the exchange or sale of virtual or digital currencies such as bitcoin or etherium. Historically this was an activity that was not licensed because the exchange of currency was a contemporaneous exchange of value; unlike payment instruments or remittances, the payer immediately receives the value converted to a different currency. More recently, however, many states have determined that the currency exchanger holds a position of trust and licensing should be required.

Offering securities

Securities offerings and transactions in the US are generally regulated at the federal level and not state by state. The definition of 'security' is quite broad and covers many types of financial instruments. The Securities Act of 1933 (1933 Act) requires all offers and sales of securities in interstate commerce to be registered with the Securities and Exchange Commission (SEC), unless an exemption from registration is available. Specifically, sections 5(a) and 5(c) of the 1933 Act generally prohibit any person from using any means of interstate commerce to sell or offer to sell, either directly or indirectly, any security unless a registration statement is in effect or has been filed with the SEC as to the offer and sale of such security or an exemption from the registration provisions applies. Accordingly, every sale of securities must be registered unless an exemption is available.

Frequently, issuers of securities in the US will rely on a 'private placement' exemption to avoid the registration requirements of the 1933 Act. Section 4(a)(2) of the 1933 Act provides that the registration requirements of the 1933 Act do not apply to transactions by an issuer that do not involve any public offering. Rule 506 of Regulation D under the 1933 Act provides a non-exclusive safe harbour for private offers of securities. An issuer that meets the requirements of Rule 506 is deemed to have made an offering that is exempt from registration under the 1933 Act under section 4(a)(2). Operating companies of various sizes and private pooled investment vehicles employing a variety of investment strategies have used the private placement exemption.

Selling and marketing securities

Any person selling securities in the US generally must be registered with the SEC as a broker, unless an exemption applies. Section 3(a)(4) of the Securities Exchange Act of 1934 (1934 Act) defines 'broker' as any person engaged in the business of effecting transactions in securities for the account of others. Section 15(a) of the 1934 Act makes it unlawful for brokers, among others, to use any means of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security unless such broker is registered with the SEC. In addition to being subject to regulations by the SEC, brokers in the US are subject to regulations adopted and administered by the Financial Industry Regulatory Authority (FINRA). FINRA is a self-regulatory organisation that, among other things, regulates broker personnel engaged in selling securities. FINRA oversees and administers the Series 7 exam. General securities representatives of brokers must pass the Series 7 exam before selling securities.

Investment advice

Any person providing advice with respect to securities in the US (or providing advice to US persons) generally must be registered with the SEC or a state equivalent regulatory authority, unless an exemption applies. Subject to certain exclusions, section 202(a)(11) of the Investment Advisers Act of 1940 (the Advisers Act) generally defines an 'investment adviser' as any person who, for compensation, is engaged in the business of advising others on securities. Subject to certain prohibitions and exemptions, section 203(a) makes it unlawful for any investment adviser to make use of any means of interstate commerce in connection with its business as an investment adviser unless such investment adviser is registered with the SEC. Generally, investment advisers are prohibited from registering with the SEC unless it manages US$100 million in assets and these advisers must register at the state level.

2 Is consumer lending regulated in your jurisdiction? Describe the general regulatory regime.

Yes. As noted in question 1, consumer lending is extensively regulated. First, under federal law, the Truth-In-Lending-Act (TILA) and its implementing regulation, Regulation Z, impose significant requirements with respect to disclosures on credit cards and revolving credit accounts, including how the interest charges for loans are determined and displayed. States also have their own lending laws, often focused on smaller loans, such as payday loans, retail purchase loans and extensions of credit from non-banks. In addition, specialised loan laws apply (generally at the state level) to a range of activities including auto loans, home loans, equipment loans, small loans, business loans, and college and education loans.

3 Are there restrictions on trading loans in the secondary market in your jurisdiction?

In general, loans are freely transferable unless otherwise agreed by the parties. Nevertheless, there are still a number of considerations affecting transfer of loans. Loans are generally not considered securities that would be subject to US securities laws, although there may be special facts and terms for a specific loan that could warrant additional analysis about this characterisation. As a result, loan trading in the secondary market is governed by the terms of the loan documentation. Typically, loan agreements contain certain restrictions on the assignment of the loans, such as prior obligor consent under some circumstances and eligibility requirements for the loan purchaser to prohibit competitors of the obligors and their affiliates, including affiliated funds, from purchasing the debt. In addition to any restrictions contained in the loan documents, there are also provisions in the documentation prepared by the Loan Syndications and Trading Association for traders that may dictate the timing and other terms of settlement.

Any purchaser of a consumer loan would generally take the loan subject to any claims or defences that a borrower could assert against the originator of the loan. In some states, purchasers or servicers of loans are required to be licensed to engage in those activities. Some states, such as California, limit those to whom a licensed lender may sell loans.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would generally fall within the scope of any such regime.

Investment companies

Any investment company making a public offering of its securities in the US must be registered with the SEC, unless an exclusion from the definition of 'investment company' applies. Subject to certain exclusions, section 3(a)(1) of the Investment Company Act of 1940 (1940 Act) generally defines an 'investment company' as an issuer of securities that is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing in securities, or 40 per cent of whose assets are 'investment securities'. Section 7(a) of the 1940 Act generally prohibits any investment company from making a public offering of its securities unless such investment company is registered under section 8 of the 1940 Act.

Exclusions from the definition of investment company

Frequently, issuers of securities in the US will rely on some combination of the private placement exemption and certain exclusions from the definition of investment company to avoid the registration requirements of the 1933 and 1940 Acts (such as Regulation D under the 1933 Act and section 3(c)(1) or 3(c)(7) under the 1940 Act).

Investment advisers

In general, investment companies are externally managed. This means that the investment adviser is a separate entity managing the day-to-day affairs and investments of the investment company. A minority of investment companies are internally managed where the investment company owns the investment adviser. All investment advisers to registered investment companies are required to be registered regardless of its assets under management. Investment advisers that only manage private funds, whether domiciled in the US or outside the US, may be eligible for one of the exemptions from registration, depending on the facts and circumstances.

Fintech

Whether a particular fintech company would fall within the ambit of regulations for investment companies or investment advisers depends on the facts and circumstances. For example, the Commodity Futures Trading Commission (CFTC) has taken the position that bitcoin and other virtual currencies are 'commodities' and, under US federal securities laws, commodities are not considered to be securities. Thus, an issuer who invests solely in virtual currencies is likely to be regulated by the CFTC and not subject to the 1940 Act (though the 1933 Act may still apply). However, notes and other evidence of indebtedness may be securities under a test (known as the 'Howey Test') which the United States Supreme Court developed in order to determine whether certain instruments or transactions qualify as 'investment contracts.' The Howey Test is relevant to investment companies investing in loans from peer-to-peer or marketplace lending platforms. On 25 July 2017, the SEC issued an investigative report concluding that tokens issued by the DAO in initial coin offerings (ICOs) were securities and providing guidance on the circumstances under which US securities laws may apply to offers, sales and trading of cryptocurrency tokens and other interests in virtual organisations.

The prevalence of ICOs in recent months has created a new category of issues for analysis under United States commodity laws and securities laws. A token issued in an ICO may be characterised as a security, a commodity or possibly something else depending on its terms.

Further, by design, investment companies rely heavily on third-party service providers. An emerging fintech issue is whether and to what extent distributed ledger technology such as blockchain will

supplement or replace traditional service providers. The SEC has issued guidance for investors and the financial services industry on the use of robo-advisers (ie, registered investment advisers that use computer algorithms to provide investment advisory services online with often limited human interaction). It has not otherwise issued guidance on the impact of new technology on service providers.

The CFTC, the SEC and the OCC have shown interest in fintech regulatory issues. In 2017 the CFTC approved the creation of LabCFTC, a new initiative aimed at promoting responsible fintech innovation to improve the quality, resilience and competitiveness of the markets the CFTC oversees. In 2017 the OCC issued a proposal for a special national bank charter for fintech companies. Those initiatives are at an early stage. The SEC hosted a forum to discuss innovation in the financial services industry on 14 November 2016 at its headquarters in Washington, DC. The SEC has hosted fintech forum panels that have discussed issues such as blockchain technology, automated investment advice or robo-advisers, online marketplace lending and crowdfunding, and how they may impact investors.

5 Are managers of alternative investment funds regulated?

Investment managers are regulated in the US under the Advisers Act. However, unlike the European Union, there is no specific regulation applicable to managers of alternative or private funds; any person providing investment advice may be subject to regulation. The Advisers Act provides an exemption from registration with the SEC for certain foreign private advisers. In addition, certain other investment advisers that advise exclusively venture capital funds and investment advisers solely to private funds with less than US$150 million in assets under management in the United States are exempt from registration with the SEC (but must pay fees to the SEC and report public information via the IARD/FINRA systems).

6 May regulated activities be passported into your jurisdiction?

Generally, no. If the regulated activities are conducted by a national bank or federally chartered bank, then such banks, under the doctrine of federal pre-emption, are generally exempt from complying with state laws, including state licensing laws. The Supreme Court has ruled that these pre-emption rights do not extend to a bank's subsidiaries or agents and there is no pre-emption for state-chartered banks or state licensed money transmitters.

As for entities regulated under state money transmitter licensing laws, there is no 'passporting' permitted. However, there is 'reciprocity' language in a few states. The Uniform Money Services Act (UMSA) is a model money transmitter licensing law that was endorsed by the National Conference of Commissioners of Uniform State Laws (NCCUSL) in 2000. The UMSA includes reciprocity language that excludes licensing entities that have already been licensed in another jurisdiction that has adopted the UMSA legislation. Unfortunately, there are only a handful of states that have passed the UMSA and adopted the reciprocity language.

For entities that are required to register as 'brokers' in the US, there is no provision under the US federal securities laws for passporting a similar registration obtained in another jurisdiction into the US.

7 May fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

Yes and no. States that license money transmitters generally expect a licence applicant to have a locally incorporated entity in the US, but the entity does not have to have a physical presence within each state where it does business. It can select one state as its headquarters to operate from across the US.

If a foreign company is seeking a money transmitter licence in the US, it can incorporate in the US, but have its primary operations outside the US. Regulators will expect that there will be some US-based staff – especially in the area of compliance – that will oversee the operation's compliance with US laws, which will file necessary reports and will be available for audits and questions.

Non-US investment advisers and broker-dealers are permitted to register with the SEC without establishing a local office.

8 Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

At this time there is no specific regulation addressing peer-to-peer lending or marketplace lending. Instead, state regulators will scrutinise these businesses to see if they trigger licensing under existing state laws. Even if the underlying individual lenders may not require licensing, there have been actions taken with respect to platforms that offer these services, especially if the regulators feel that the platforms do not provide clear or accurate disclosures. This is particularly true if the platform or marketplace has garnered a high level of consumer complaints.

The Consumer Financial Protection Bureau (CFPB) has enforcement powers over otherwise unlicensed providers of payment services, if they receive what they believe to be a significant level of consumer complaints about such providers.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

Issuers of securities that raise capital in the US, whether as part of a crowdfunding effort or not, are subject to the provisions of federal (and state) laws and regulations. Crowdfunding issuers have typically relied on exemptions from registration under the Securities Act of 1933 such as Regulation D (limiting sales to 'accredited investors,' among other conditions). Small issuers have also relied on registered offerings under Regulation A and many are considering offerings under new Regulation Crowdfunding.

Regulation Crowdfunding allows US issuers to raise up to US$1 million from the public in a 12-month period without going through the usual registration requirements for publicly offered securities. Investors are subject to statutory limits on the amount they can invest in a Regulation Crowdfunding offering. All offerings under Regulation Crowdfunding must be conducted either through a registered broker-dealer or a new type of entity called a 'funding portal' (which is exempt from registration as a broker-dealer). Funding portals are required to register with the SEC and become members of FINRA. Additionally, Regulation Crowdfunding contains special provisions for the registration of 'non-resident funding portals', which are those incorporated in or organised under the laws of a non-US jurisdiction, or having a principal place of business in any place not in the US or its territories. Registration of a non-resident funding portal is conditioned on requirements such as information sharing arrangements between the SEC and a foreign regulator of competent jurisdiction, a registered agent in the US to receive service of process, and an opinion of counsel that such portal can provide the SEC and FINRA with access to its books and records and submit itself to an onsite examination.

On 25 July 2017, the SEC issued an investigative report providing guidance on the circumstances under which broker-dealer registration may be necessary for offers, sales and trading of cryptocurrency tokens issued in ICOs.

In addition, state regulators will scrutinise these businesses to see if they trigger licensing under existing state laws. For example, there are charitable donation laws that must be complied with by donation-based crowdfunding sites. Equity-based crowdfunding businesses must take care to comply with any applicable securities laws.

As with peer-to-peer lending, the CFPB has enforcement powers over otherwise unlicensed providers of payment services if they receive what they believe to be a significant level of consumer complaints about such providers.

10 Describe any specific regulation of invoice trading in your jurisdiction.

In general, invoice trading will not trigger separate licensing requirements but could require licensing to the extent that the activity involves collecting consumer receivables, purchasing consumer receivables or, in some states, making loans secured by receivables. Purchases of invoices may be treated as a lending activity if the purchases are not treated as 'true sales' under US accounting rules.

11 Are payment services a regulated activity in your jurisdiction?

Yes, as discussed in question 1, financial services (such as remittances, prepaid cards, bill payments and processing) are all regulated activities. In addition, failure to obtain the necessary licences as discussed above may subject the entity to significant claims and penalties and even criminal liability under 18 USC 1960.

In addition, many of these services are subject to AML laws. FinCEN also requires registration as a money services business (MSB) for some of these activities and will require implementation of an effective AML compliance programme, including identification and verification of customers, monitoring and reporting suspicious activity, and screening customers against sanction lists. Failure to register as an MSB, or report suspicious transactions or to implement an effective AML compliance programme may subject the entity to significant claims and penalties and potentially criminal liability.

Finally, entities that provide payments or financial services that involve holding customer funds (such as remittances, prepaid cards or bill payments) are also likely to be subject to state-abandoned property laws. These laws require that customer funds that lay dormant and are not and have not been used for a designated period of time (often three to five years) must then be paid (or 'escheated') to the state where the entity's customer resides for 'safekeeping'. Failure to make payment of such dormant funds will subject the entity to significant claims and penalties.

12 Do fintech companies that wish to sell or market insurance products in your jurisdiction need to be regulated?

Sales of insurance products are governed on a state level. In New York State, fintech companies that wish to sell insurance products must be licensed under the Insurance Law, and if such a company (other than a licensed bank) wishes to engage in virtual currency business activity it must be separately licensed under New York State regulations relating to the conduct of business involving virtual currency. In other states it would be necessary to examine that state's regulations or any positions they may have taken with regard to fintech companies on an individual basis.

13 Are there any legal or regulatory rules in your jurisdiction regarding the provision of credit references or credit information services?

One of the primary points of concern that arises when a person provides credit references for an individual or credit information about that individual to a third party is the possibility that the person providing the reference or information could become a credit reporting agency (CRA) under federal or state law. CRAs have significant legal obligations. Those obligations are too numerous to outline here, but, under the federal Fair Credit Reporting Act (FCRA), those obligations include, by way of example, compliance with limits on the information that can be provided and limits on the circumstances in which the information can be provided to third parties. They also need to have procedures to provide copies of credit reports to consumers on request, to correct inaccurate information in reports, and to maintain identify theft alerts and active military duty alerts. They then have certain obligations to ensure that the persons to whom they provide the information also comply with the FCRA. Depending on the CRA's business and any other business it might engage in, the CRA also could be subject to licensing or registration in one or more states. No one wants to be a CRA unintentionally.

Whether you are a CRA is determined by federal and state law definitions. Under the federal FCRA, a CRA is, in general, any person that routinely provides 'consumer reports to third parties for compensation or on a cooperative nonprofit basis'. The part of this that might catch some companies off-guard is that 'consumer report' is very broadly defined to include information about an individual that bears on that individual's creditworthiness, character, general reputation or mode of living. While traditional credit reports are of course consumer reports, the definition is much broader than that.

However, a consumer report under the federal FCRA does not include information that is restricted to the information provider's actual transactions and experiences with the individual. For this reason, a person that merely tells others whether the individual routinely pays his or her bills with that person, or that the individual maintains large deposits with that person, will not ordinarily become a CRA under federal law. The key is that the information must relate solely to the provider's own experiences with the individual. If the shared information includes additional information that the provider learned only as a result of a credit application, for example, such as employment or income information or even publicly available information like criminal records or county recorder records, the provider of the information can become a CRA.

Finally, even if persons only share information relating to their own transactions and experiences with the individual, it is important for the information to be accurate so as to minimise risks of lawsuits.

14 Are there any legal or regulatory rules in your jurisdiction that oblige financial institutions to make customer or product data available to third parties?

Unlike the Second Payment Services Directive, which requires financial institutions to share certain data via application interfaces (APIs), there is no parallel requirement in the US. However, there are ways in which financial institutions are compelled to share information with the public or law enforcement.

For example, under the federal Truth in Lending Act, most larger credit card issuers must post their consumer credit card agreements on their publicly available websites and make them available to the Consumer Financial Protection Bureau (CFPB) for posting on its website. Card issuers with any business, marketing or promotional agreement with an institution of higher education in connection with issuing credit cards to college students must submit an annual report to the CFPB regarding certain aspects of those agreements, including the total dollar amount of any payment under such agreements from the card issuer to the institution of higher education. Those institutions must also publicly disclose their contracts made with creditors or card issuers for the purpose of marketing credit cards.

Under the Bank Secrecy Act, as amended by the USA PATRIOT Act, a law enforcement agency investigating terrorist activity or money laundering may request, through FinCEN, that any financial institution provide information to the agency regarding specified individuals, entities or organisations. The financial institution would then be required to search its records and provide to FinCEN specified information regarding the accounts maintained for, or transactions with, the designated persons.

All law enforcement agencies may request information from any financial institution through legal process.

15 Does the regulator in your jurisdiction make any specific provision for fintech services and companies? If so, what benefits do those provisions offer?

There is very little governmental financial support for fintech services, although many major banking and financial institutions support fintech incubators. The CFPB has a programme entitled 'Catalyst', which provides a safe harbour to fintech companies experimenting with new and innovative payment services. The fintech company must apply for and receive a 'no action' letter from the CFPB before commencing its activities.

The OCC, the regulator for most large US banks, has indicated a willingness to support 'responsible innovation' in a recent white paper and in requests for comment. In addition to the special purpose fintech bank charter noted above, the OCC has established an Office of Innovation, and announced in April that it would offer 'office hours' and one-on-one meetings relating to responsible financial services innovation.

In addition, this spring, the US Commodity Futures Trading Commission announced its support of an 'innovation lab' to give fintechs greater access to regulatory guidance.

These provisions generally provide access to information, regulatory guidance and assistance, but they fall short of the regulatory sandboxes one sees in the UK or Singapore. One reason that the US government has not established a fintech 'sandbox' is that there are multiple overlapping regulators, making such a sandbox concept difficult to implement.

Under state law, there may be greater opportunities for a 'sandbox'. A group of six New England states have announced that they are exploring the concept of a 'regional sandbox' that would allow fintech companies to experiment in a safe environment.

16 Does the regulator in your jurisdiction have formal relationships or arrangements with foreign regulators in relation to fintech activities?

At this time there are no formal relationships or arrangements between the US and other countries on FinTech issues. In 2016, a bill was introduced to US Congress requiring federal financial regulatory agencies to promote innovation in the financial industry by creating Financial

Services Innovation Offices (FSIOs). The bill would also establish the FSIO Liaison Committee comprising the directors of each federal agency's FSIO, and which would be responsible for coordinating the regulation of companies seeking to bring innovative financial technologies to market (covered persons). The bill provides that covered persons may request from regulators an alternative compliance plan under an 'enforceable compliance agreement' that furnishes the conditions under which covered persons may implement their financial innovation. The bill is focused on the US, namely the following federal regulatory agencies: Federal Reserve, CFPB, CFTC, HUD, Treasury, Farm Credit Administration, FDIC, FHFA, FTC, NCUA, OCC and SEC.

17 Are there any local marketing rules applicable with respect to marketing materials for financial services in your jurisdiction?

Yes, general state and federal 'fair practices' and 'fair advertising' rules apply. The CFPB has applied rules to providers of financial services prohibiting unfair deceptive and abusive acts and practices. For certain financial products, for example, prepaid cards, there are specific state and federal requirements regarding what must be disclosed on the card, in this example, and accompanying materials.

In addition, the SEC and FINRA impose a number of requirements with respect to marketing investment management services, collective investment schemes and other financial products. For example, marketing materials distributed by registered broker-dealers are required to comply with specific FINRA rules regarding communications with the public and must file certain marketing materials with FINRA.

18 Are there any foreign exchange or currency control restrictions in your jurisdiction?

The US Department of Treasury Office of Foreign Assets Control (OFAC) restricts dealings from the US and by US persons, located anywhere, with certain individuals and entities and certain countries, including the banking systems of such countries. Accordingly, foreign exchange activities involving such a person or country or the currency of such a country presumably would be restricted. In addition, exports or imports of monetary instruments of more than US$10,000 must be reported to United States Customs and Border Protection. Moreover, certain states require licensing for foreign exchange activities. FinCEN also requires registration for this activity as described in question 11.

19 If a potential investor or client makes an unsolicited approach either from inside the provider's jurisdiction or from another jurisdiction, is the provider carrying out a regulated activity requiring a licence in your jurisdiction?

US federal securities regulations that govern the activities of investment advisers and broker-dealers do not provide exemption for 'reverse solicitations'. However, Rule 15a-6(a)(1) provides that registration as a broker-dealer is not required when a non-US broker-dealer effects and unsolicited trade with or for a US investor. The SEC views 'solicitation' broadly, and entities should carefully analyse whether this exemption would be available.

States that impose licensing requirements generally do so on the basis of activity involving residents of that state. Thus, any sale or loan made to a resident of a state will likely trigger licensing requirements, regardless of which party initiates contact.

20 If the investor or client is outside the provider's jurisdiction and the activities take place outside the jurisdiction, is the provider carrying out an activity that requires licensing in its jurisdiction?

US investment advisers are required to comply with all provisions of the Advisers Act, irrespective of the location of the client or investor. Non-US registered investment advisers, however, are only required to comply with the Advisers Act with respect to their relationships with US investors. US broker-dealers are required to comply with all provisions of the Exchange Act regardless of the location of their clients.

The residency of a borrower, as well as the location of the lender, dictate whether a licence for lending or related activities is required in a specific jurisdiction. Isolated or incidental contact from an investor or client from a third state will generally not trigger licence requirements in such a state.

21 Are there continuing obligations that fintech companies must comply with when carrying out cross-border activities?

The movement of payments across borders garners particular regulatory attention. If the business is a remittance business, whereby the payment company receives funds from individual consumers for purposes of delivering such funds to a designated recipient, such a business is highly regulated – requiring licences, and compliance with federal and state consumer protection laws, as well as AML laws.

Business customers moving funds may have fewer consumer protection obligations, but they too require compliance with AML laws and in many states, money transmitter licensing laws. In addition, as described in question 18, the OFAC restricts dealings from the US and by US persons, located anywhere, with certain individuals and entities and certain countries. Also, in the case of persons included on the OFAC specially designated nationals (SDN) list, any property or interests in property of an SDN that comes into the possession or control of a US person must be blocked (frozen). Accordingly, a fintech company must assess whether any proposed cross-border activity is restricted by the OFAC and involves property that is subject to blocking.

In consideration of the above requirements, all customers (consumers or businesses) and all other parties involved in any proposed cross-border activity should be screened through applicable sanctions lists, such as the SDN list, to ensure that the customer or any other party is not prohibited.

22 What licensing exemptions apply where the services are provided to an account holder based outside the jurisdiction?

From an Advisers Act and Exchange Act perspective, the location of the account would generally not be relevant.

Distributed ledger technology

23 Are there any legal or regulatory rules or guidelines in relation to the use of distributed ledger (including blockchain) technology in your jurisdiction?

The use of distributed ledger technology (often referred to as 'the blockchain') has been growing in the US. Most do not view the technology platform as requiring specific laws or regulations. Instead, the laws or regulations focus on the applications that are offered or available via the blockchain, such as bitcoin.

A few states (such as Vermont) have passed state legislation clarifying that there is a presumption of authenticity for facts and records electronically registered and stored in a blockchain network. Other states (such as Illinois) have passed resolutions to create a task force to study the use of blockchain for record-keeping, and to save costs.

Digital currencies

24 Are there any legal or regulatory rules or guidelines in relation to the use of digital currencies or digital wallets, including e-money, in your jurisdiction?

Yes, there are federal AML laws that apply to digital currencies. FinCEN issued a Guidance in March 2013. A number of states have determined that digital currency wallets, or exchangers should be licensed as 'money transmitters'. New York developed a special licensing regime for digital currencies, called a 'bitlicense'.

Securitisation

25 What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

Six basic criteria must be satisfied in order for a contract to be legally enforceable: an offer; an acceptance; legal capacity to contract between the contracting parties; lawfulness of the subject matter of the contract; mutuality of obligation; and consideration. Consideration may be monetary or promissory. In the case of a loan agreement, the advance of funds and the promise to repay the loan with interest represent good consideration.

Marketplace loans (sometimes known as peer-to-peer loans) have generally not involved security agreements because they have traditionally been unsecured loans. Several marketplace lending platforms

are trying to accommodate secured credit backed by personal property and real property. Under the Uniform Commercial Code, a security interest attaches to collateral when it becomes enforceable against the debtor. A security interest is generally enforceable against the debtor and third parties with respect to collateral if:

- value has been given;
- the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and either:
  - the debtor has executed a security agreement that provides a description of the collateral; or
  - the collateral is in the possession or control of the secured party pursuant to the debtor's security agreement.

26 What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected?

Loan assignments and participations are governed by articles 3 and 9 of the Uniform Commercial Code of the applicable state. The steps required for perfection depend on the nature of the interest in the loan that is sold to an investor and also depend on whether the loan is secured or unsecured, and if secured what is the nature of the collateral.

If a whole loan is assigned to an investor, the sale of a promissory note is perfected automatically upon attachment, though it can also be perfected by possession and by filing of a UCC-1 financing statement in the appropriate filing office. The transfer of the promissory note vests in the purchaser such rights as the seller has therein. The attachment of a security interest in a promissory note is also attachment of a security interest in a supporting obligation for the promissory note. However, it would also be important to perfect an assignment of the underlying security interest in accordance with the law governing the security interest in the relevant collateral.

While marketplace lending platforms can and do sell whole loans, they also monetise these loans by depositing them into a trust that then issues pay-through obligations ('platform dependent notes') that are dependent on payments received by the marketplace lending platform on the underlying loans. Under the Uniform Commercial Code a platform dependent note would be considered to be a payment intangible (ie, a participation interest) in the underlying loan. The sale of a payment intangible is perfected automatically upon attachment, though it can also be perfected by filing of a UCC-1 financing statement in the appropriate filing office.

If the transfer is not perfected, an investor's right in the assets would potentially be subject to competing claims of other creditors of the platform. Furthermore, in the event that the platform becomes a debtor in a bankruptcy case the investor would only have an unsecured claim arising from the transfer of the loan or payment intangible to it.

27 Is it possible to transfer loans originated on a peer-to-peer or marketplace lending platform to the purchaser without informing the borrower? Does the assignor require consent of the borrower or are the loans assignable in the absence of a prohibition?

Absent a contractual provision that requires notification of or consent to assignment, a loan may be assigned without the borrower's notification or consent. However, unless the borrower has received effective notification that the loan has been assigned, it is discharged of its obligations if it pays the lending platform rather than the assignee of the loan.

28 Would a special purpose company for purchasing and securitising peer-to-peer or marketplace loans be subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

All entities that constitute a financial institution for purposes of the Gramm-Leach-Bliley Act (GLBA) have regulatory obligations with respect to the confidentiality and data security protection of non-public personal or personally identifying information (PII). Whether the special purpose company is a financial institution for the purposes of the GLBA depends on whether the following exception to the GLBA's definition of financial institution applies (see GLBA 15 USC, section 6809):

(D) Other secondary market institutions
Notwithstanding subparagraph (A), the term 'financial institution' does not include institutions chartered by Congress specifically to engage in transactions described in section 6802(e)(1)(C) of this title, as long as such institutions do not sell or transfer nonpublic personal information to a nonaffiliated third party.

Intellectual property rights

29 Which intellectual property rights are available to protect software, and how do you obtain those rights?

Software is protected by copyright as a work of authorship. This may include more than just code itself, such as documentation, user interface designs and other elements of the software. Whether copyright protects APIs remains an area of active litigation in which the law continues to develop, so fintech companies that are considering using competitive APIs without permission should definitely seek legal counsel for an up-to-date view on this issue.

While registration when a work is created is not strictly required, registering a copyright with the US Copyright Office is required before bringing any enforcement action. Copyright registration is a relatively inexpensive and simple process. Moreover, if works are published, and a registration filing was not made within 90 days of first publication, many potential remedies that are available in an enforcement action for copyright infringement may no longer be available. Accordingly, for companies that rely heavily on copyrights, regular processes for filing for copyrights are often in place. For example, regular periodic registration (eg, quarterly) of new versions of software may be made.

Software (eg, source code) that is kept confidential can be protected both contractually and under federal and state trade secret laws. Reasonable steps must be taken to ensure that confidential software remains confidential in order to maintain trade secret protection.

Systems incorporating software or methods performed by software may also be protected by patents.

30 Is patent protection available for software-implemented inventions or business methods?

The US Supreme Court's *Bilski* and *Alice* decisions, and subsequent case law based on these decisions, have significantly reduced the scope of fintech-related inventions that can be patented in the software and business-method space. Many patents on financial services and business methods have been invalidated or are being challenged in the wake of these decisions. However, the exact contours of these limits are still being worked out in the US Patent Office and the courts. Things that look more like pure 'finance' or 'business' methods are unlikely to be patentable (or likely to be invalidated if they are already patented) as they are being found by the Patent Office and the courts to be unpatentable 'abstract' ideas. Technical innovations in fintech that can be characterised as improvements to how computers or networks operate, particularly if they appear technical or engineering in nature, are much more likely to still be patented and survive challenge. Such 'technical' inventions are being found by the courts to contain 'something more' than 'abstract' ideas. While the scope for patents is somewhat reduced compared to five or 10 years ago, the potential for patenting of new inventions, and the need to avoid existing patents of competitors, remain issues for fintech companies.

31 Who owns new intellectual property developed by an employee during the course of employment?

The default rule regarding whether employers own intellectual property varies somewhat from state to state and is also dependent on the nature of the intellectual property. The copyright for software written by an employee as part of the employee's job is generally registered in the name of the employer as a 'work for hire'. However, in the absence of a contract, inventions, under the majority rule, often only belong to the employer if the employee was specifically 'hired to invent'. And the process for obtaining the title to such inventions without the employee's cooperation is complex and expensive, possibly requiring litigation. Accordingly, in practice, it is strongly preferred to put assignment agreements in place as part of the employment process. Such agreements assign all relevant intellectual property created by the employee in the course of employment to the employer.

Update and trends

The fintech marketplace is constantly changing. Everything from self-driving cars, to artificial intelligence, e-commerce, distributed ledger technologies, the shared economy and peer-to-peer (or crowdfunding) solutions are driving change. The new US administration and Brexit in Europe also constitute an unknown that will likely affect the speed and direction of regulatory and legal changes. Those practising law or offering products or services in this area must be vigilant to follow breaking developments and trends as they appear in the media, via governmental activity and in legal proceedings.

32 Do the same rules apply to new intellectual property developed by contractors or consultants? If not, who owns such intellectual property rights?

The default rule is that intellectual property rights, such as copyrights or patents, are initially vested in their author or inventor. Accordingly, absent express contractual provisions, such rights may be initially vested in the contractor or consultant.

It is, therefore, quite important to have contracts in place with contractors or consultants that assign such rights.

33 Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

Joint owners of both patents and copyrights may exploit their rights without the consent of the other joint owners unless otherwise prevented by contractual constraints or other legal duties, such as a fiduciary duty. However, it should be kept in mind that patents to not give any right to use: they are merely rights to exclude others from using the patented invention. Unlike patents, ownership of a copyright in an independently created work gives the owner of the work the right to use and publish the copyrighted work. Joint owners of copyrights have an obligation to account to their co-owners; joint owners of patents have no such duty. Absent contractual constraints, joint owners of patents and copyrights can freely assign their rights without the consent of the other owners.

34 How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

Trade secrets are protected by state and federal law from misappropriation. Any sort of information that is not generally known or readily ascertainable that conveys an economic advantage may potentially be a trade secret; it need not be technical information. Customer or supplier lists and pricing information are often litigated non-technical examples. The trade secret owner must take reasonable steps to maintain the secrecy of the information. Misappropriation of a trade secret is a tort. Misappropriation includes improper acquisition, use or disclosure of a trade secret. In some more extreme cases, trade secret theft may be a crime.

Confidential information that is not a trade secret can still be protected by a contract that binds the recipient to keep the information confidential.

There are procedures in court proceedings for keeping trade secrets protected during litigation.

35 What intellectual property rights are available to protect branding and how do you obtain those rights?

In the US, brands may be protected as trademarks and service marks.

The US has a federal trademark registration system administered by the US Patent and Trademark Office (USPTO). Having a valid registration gives mark owners much stronger rights and reduces the proofs required in an infringement action; therefore, registration is strongly recommended for any brands with business importance. However, unlike most jurisdictions, in the US rights in trademarks arise initially from use in commerce in the US, not from the registration itself. Use of the brand as a trademark or service mark in connection with the relevant products or services in commerce in the US is required to have enforceable rights, even if the mark is registered. Users of a mark who have not registered may have enforceable rights as well, under both state and federal law, although enforcement of such rights is generally more difficult than enforcing a registered mark. A registered mark where use has been abandoned is subject to cancellation. A declaration of use, attesting to continued use of the mark in commerce in the US, and specimen showing such use are required to renew federal trademark registrations periodically.

If use has not begun, a placeholder application based on 'intent to use' allows acquiring some blocking rights prior to beginning use. These rights are only perfected and enforceable after use begins, but they do block subsequent attempts to register the same or confusingly similar marks. An applicant has up to three years to begin use after their application has been allowed; otherwise they will generally lose the priority right they acquired based on the 'intent to use' application.

There are parallel state registration systems for trademarks as well, but they are not commonly used. For fintech users, state registrations are only something that must be checked when clearing a new brand.

36 How can new businesses ensure they do not infringe existing brands?

In the US, a search of both registered trademarks and applications is strongly recommended. Appropriate search tools should be used because marks need not be identical to cause a problem – confusing similarity can be based on appearance, meaning or sound. As US law gives rights to unregistered prior users, a search for existing unregistered uses of the same or similar marks is also strongly recommended.

37 What remedies are available to individuals or companies whose intellectual property rights have been infringed?

For patents, potential remedies include injunctions and monetary damages. Monetary damages may include both reasonable royalties and potentially lost profits of the patent holder, making for potentially very large awards when direct competitors assert patents against each other or when the amount of revenue associated with the patented invention is very large.

For copyrights, remedies include injunctions and either but not both of the copyright owner's actual damages (which may be trebled if wilful infringement is found) and any additional profits of the infringer; or statutory damages of between US$750 and US$150,000 per work infringed.

For trademarks, remedies include injunctions, the profits of the defendant and the damages caused to the trademark owner. For patents, trademarks and copyrights, treble damages and attorneys' fees are potentially available (which is not the case in most US litigation).

For trade secrets and breach of confidentiality injunctions and monetary damages are available. It is possible to get a temporary or preliminary injunction against disclosure while a matter is pending. However, if a temporary or preliminary injunction is desired, a potential plaintiff must act quickly because delay in seeking a temporary or preliminary injunction can be a ground for denying the injunction.

38 Are there any legal or regulatory rules or guidelines surrounding the use of open-source software in the financial services industry?

The Federal Financial Institutions Examination Council agencies have issued guidance on use of open-source software entitled, 'Risk Management of Free and Open Source Software' (21 October 2004). This guidance applies only to deposit-taking institutions and requires such institutions to apply a risk management process to the use of open-source software.

Data protection

39 What are the general legal or regulatory requirements relating to the use or processing of personal data?

There are several different regimes governing the use of personal data, depending upon whether the information is provided directly by the data subject, provided by a third party (eg, credit reporting bureau) or obtained in the course of providing services. Data other than consumer reports (ie, credit reports) cannot be shared with third parties without disclosures to the data subject and an opportunity to opt out of information sharing. PII is subject to a number of protections; it has been defined as data that can be used to trace an individual's identity, such as their name, social security number, biometric records, etc, alone or when combined with other personal or identifying information. The

GLBA requires financial institutions (rather broadly defined) to disclose to consumers what data is collected and for what purposes. Consumers can block usage of their PII for marketing purposes by opting out, but businesses can use PII for other appropriate purposes, such as completing a transaction or investigating fraud. Detailed disclosures regarding the consumer's privacy must be provided to consumers when they establish an account and on an annual basis.

Both federal law and state law impose security requirements and breach notification requirements, although federal data security breach notification requirements apply only to deposit taking institutions. Furnishers of consumer reports are subject to a variety of technical requirements, which are beyond the scope of this outline. Businesses that hold credit card or bank account data are also subject to PCI standards that often impose significant liability if the data is breached or hacked.

40 Are there legal requirements or regulatory guidance relating to personal data specifically aimed at fintech companies?

No. The applicable requirements have been in place for years and broadly impact both traditional and fintech companies. In addition, financial institutions such as registered broker-dealers and investment advisers are subject to Regulation S-P regarding the privacy of consumer financial information.

41 What legal requirements or regulatory guidance exists in respect of anonymisation and aggregation of personal data for commercial gain?

In the US, anonymised data can be used freely for commercial gain.

Cloud computing and the internet of things

42 How common is the use of cloud computing among financial services companies in your jurisdiction?

Cloud computing is prevalent among financial services companies in the US and is becoming increasingly so. This is evidenced, in part, by examination manuals on the use of cloud computing services by federal bank regulators.

43 Are there specific legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

Use of cloud computing raises third-party vendor risk management issues for financial institutions and financial institutions are responsible for vetting and the ongoing monitoring of the cloud security measures in place. To the extent cloud computing systems are used by registered investment advisers and broker-dealers to create required books and records, such systems must comply with SEC requirements and guidance regarding electronic record-keeping systems.

44 Are there specific legal requirements or regulatory guidance with respect to the internet of things?

There are currently no laws or regulations in the US that apply specifically to the internet of things. However, existing data privacy and data security laws and regulations would have equal application here as to online services and mobile devices generally. The internet of things is an area, however, that is getting the attention of regulators. Even without specific legislation, the Federal Trade Commission (FTC) (and other regulators) will have jurisdiction to bring actions against device manufacturers and service providers who engage in unfair or misleading acts and practices. Beginning in at least 2013, the FTC began holding workshops and its executives began making speeches on regulatory compliance issues, primarily data privacy and security issues, with respect to the internet of things. On 27 January 2015, the FTC issued a report on the results of its November 2013 workshop. In it, the FTC urges companies to employ the best practices discussed during the workshop, such as 'security by design' methods of manufacture and the use of security risk assessments. Further, companies should minimise the data they collect and retain and should test their security measures before their products are sold. While the report notes that the FTC does not propose specific data security legislation for the internet of things, it continued its call for Congress to enact general data security legislation.

Tax

45 Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

There are no federal tax incentives specifically earmarked for fintech investments or initiatives, but there are various US tax code provisions intended to stimulate investments in emerging growth companies. Additionally, there are state and local tax incentives that need to be considered on a case-by-case basis as to their applicability for particular fintech investments and businesses.

Competition

46 Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction or that may become an issue in future?

US antitrust laws, including the Sherman Act, the FTC Act, and state unfair and deceptive acts and practices laws, cover a wide variety of companies, including many fintech firms. Those laws regulate mergers and acquisitions as well as commercial activity, and there is often an interplay with competition laws of other countries. While it is difficult to predict the future direction of competition law in the US with respect to fintech, it is instructive to note that the payment card networks have been frequently embroiled in antitrust litigation over their fees or other

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practices, with these suits sometimes resulting in consent orders and settlements imposing material limitations on their businesses.

Financial crime

47 Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

Yes, depending on their business structure and product offerings, many fintech companies are required to register as a 'money services business' with FinCEN and to have an effective AML compliance programme. All licensed fintech companies will be required to have such a programme, which generally includes policies and procedures, transaction monitoring and reporting of suspicious transactions, identification collection and verification requirements, training, independent audits and the appointment of a chief compliance officer. Even if not technically required by law, it is considered a 'best practice' for any payments-related entity to at least have a voluntary AML compliance programme.

48 Is there regulatory or industry anti-financial crime guidance for fintech companies?

Yes. FinCEN maintains a website focused on non-bank 'money services businesses': www.fincen.gov/financial_institutions/msb/. Numerous trade associations that offer guidance to members regarding AML compliance, such as the Network Branded Prepaid Card Association (see http://nbpca.org) and the Electronic Transactions Association (see www.electran.org/about).

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