



# Fintech

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Quick reference guide enabling side-by-side comparison of local insights into fintech innovation and government / regulatory support; regulatory bodies and regulated activities; cross-border regulation; regulation of sales and marketing and of changes of control; financial crime; peer-to-peer and marketplace lending; artificial intelligence, distributed ledger technology and crypto-assets; data protection and cybersecurity; outsourcing and cloud computing; intellectual property, competition, tax and corporate immigration considerations; and recent trends.

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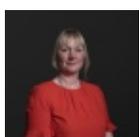
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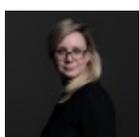
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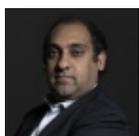
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## FINTECH LANDSCAPE AND INITIATIVES

### General innovation climate

#### What is the general state of fintech innovation in your jurisdiction?

The United Kingdom has been at the forefront of innovation in technology and finance for many years. Despite the disruption caused by the UK's departure from the European Union and the effects of the covid-19 pandemic, this remains the case today. As the worlds of technology and finance become increasingly linked, London, in particular, has the unique advantage of being the national centre of government and finance and having many world-class universities nearby. Fintech businesses also benefit from the UK's time zone, language and legal system. Unlike the European Union and the United States, the United Kingdom has a small number of regulators, with central government setting the overall framework and able to take decisive action that allows legislators and regulators to react to the fast-moving technology sector.

The United Kingdom still dominates the European market in terms of fintech investment and was second only to the United States in terms of level of capital raised in 2021.

According to data from the UK's fintech trade association, Innovate Finance, in 2021 fintech companies in the United Kingdom attracted US\$11.6 billion in investment capital. That represented a 217 per cent increase from 2020 and meant that in 2021, the UK fintech sector attracted more investment than France, Germany, Sweden and the Netherlands combined.

Perhaps mindful of the potential effect of Brexit, the government has been keen to promote the United Kingdom as a fintech-friendly jurisdiction. As part of this policy objective, in July 2020, the UK Chancellor asked Ron Kalifa OBE to conduct an independent review to identify priority areas to support the UK's fintech sector. The resulting report, the Kalifa Review, was published in February 2021 and provided a five-point plan to allow the United Kingdom to extend its competitive advantage over other fintech hubs by creating a framework for innovation and supporting UK fintech firms to scale up. Recommendations included:

- amendments to UK listing rules to make the United Kingdom a more attractive location for initial public offerings;
- improvements to tech visas to attract global talent and boost the fintech workforce;
- creation of a regulatory fintech scalebox to provide additional support to growth-stage fintechs; and
- establishment of a centre for finance, innovation, and technology, to strengthen national coordination across the fintech ecosystem to boost growth.

We are starting to see progress on the recommendations, particularly around policy and regulation initiatives with the government's focus on fintech further endorsed in April 2022 by the Economic Secretary to the Treasury, John Glen MP. In his speech to the Innovate Finance Global Summit during UK Fintech Week, Glen restated the government's desire to make the United Kingdom a pro-innovation jurisdiction, which is attractive to inward investment, and to fintech firms that do not have a settled base. For the first time, Glen also outlined the government's interest in fostering a supportive environment for cryptoasset businesses, saying that the government wants to make the United Kingdom 'the very best place in the world to start and scale crypto-companies'. It remains to be seen whether the new legislation being proposed by the government in relation to the regulation of cryptoasset businesses and the approach of the UK regulators in applying those regulations is consistent with these policy statements.

*Law stated - 19 July 2022*

## Government and regulatory support

Do government bodies or regulators provide any support specific to financial innovation? If so, what are the key benefits of such support?

In addition to the overall policy support articulated by the government described in relation to the UK's regulatory bodies have established numerous initiatives and services to support fintech companies over the years.

In particular, the Financial Conduct Authority (FCA) started Project Innovate in 2014 to encourage innovation and promote competition. The support offered by Project Innovate has evolved over time. Currently, Project Innovate includes six initiatives:

- the Regulatory Sandbox allows businesses to test innovative propositions in the market with real consumers. Historically, the FCA allowed firms to participate in a series of cohorts that were open for applications in specific windows, but since 2021 the Sandbox has been open for applications at any time;
- Innovation Pathways helps innovative firms to understand and navigate the UK's regulatory regime. Support via Innovation Pathways is available to both new and established businesses and includes the provision of a dedicated FCA case manager to provide guidance on whether new business models require authorisation and how to apply for authorisation or a variation of existing permissions. Innovation Pathways combines the support historically provided by the FCA through its Direct Support programme and the Advice Unit, which provided feedback to firms developing automated advice and guidance models;
- the Digital Sandbox, which provides fintech companies with access to online tools and high-quality synthetic data to test and develop their propositions at the proof-of-concept stage;
- Tech Challenges that are designed to allow the FCA to play a more active part in driving innovation in an area where the FCA sees clear benefits to UK consumers and markets. To date, the FCA has run two Green FinTech Challenges to support firms developing innovative solutions to assist in the UK's transition to a net-zero economy;
- TechSprints, also known as 'hackathons', are events that allow the FCA to gather participants from across the financial services industry and beyond to develop technology-based ideas and discuss specific industry challenges. The most recent TechSprint was the Crypto Sprint in May 2022, which was aimed at promoting new solutions and discussing regulatory concerns in the cryptoasset industry. Previous TechSprints have covered diverse topics from model-driven machine executable regulatory reporting to women's economic empowerment; and
- Showcase Days for regtech firms to demonstrate their technology solutions to internal market experts within the FCA.

Fintech and regtech firms that would like to participate in any of these initiatives need to apply to the FCA via the FCA Innovation Hub pages on the FCA's website at [www.fca.org.uk/firms/innovation](http://www.fca.org.uk/firms/innovation).

The FCA is also the founder member and chair of the Global Financial Innovation Network (GFIN). Formed in 2019, GFIN is an international group of 70 financial regulators and related organisations that are committed to supporting financial innovation in the interest of consumers on an international basis. GFIN was formed to provide a framework for cooperation between financial services regulators on innovation-related topics, sharing different experiences and approaches.

The Bank of England (BoE), is responsible for supervising financial firms such as banks, building societies, credit unions, major investment firms and insurers as well as financial market infrastructure providers and acting as settlement agent for payments systems and setting monetary policy in the United Kingdom. The BoE is also active in

exploring how developments in fintech might both impact and support its mission to maintain monetary and financial stability. Among other initiatives, the BoE worked with the FCA to establish the Artificial Intelligence Public-Private Forum in 2020 to create further dialogue on AI innovation between the public and private sectors. The BoE has also announced that it intends to work with the FCA to launch a new Financial Markets Infrastructure Sandbox in 2023 to support firms wishing to use new technology such as distributed ledger technology to provide infrastructure services to the financial markets. Separately, the BoE works directly with fintech businesses on proof of concept trials of technology that could be used by the BoE itself.

*Law stated - 19 July 2022*

## FINANCIAL REGULATION

### Regulatory bodies

Which bodies regulate the provision of fintech products and services?

The Financial Conduct Authority (FCA) is the financial services regulator for most regulated activities and services that a fintech would provide. The Prudential Regulation Authority covers the prudential regulation of banks and insurers in the United Kingdom with the FCA regulating conduct matters (making banks and insurers dual-regulated entities). The FCA and the Payment Services Regulator (PSR) – which has a focus on competition and innovation – are the main regulators of payment systems and the financial institutions that participate in them.

Other relevant regulators that fintechs will need to be aware of are HM Revenue and Customs (HMRC) (the relevant regulator for money service businesses) and the Information Commissioner's Office.

*Law stated - 19 July 2022*

### Regulated activities

Which activities trigger a licensing requirement in your jurisdiction?

There are a large number of activities (specified activities) that, when carried on in the United Kingdom by way of business in respect of specified kinds of investments, trigger licensing requirements in the United Kingdom. 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:

- accepting deposits: this is mainly carried out 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';
- arranging deals in investments (this is split into two activities and 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 that is a security or contractually based investment;
- establishing, operating or winding up a CIS;
- certain lending activities: entering into a regulated mortgage contract or a regulated (consumer) credit agreement

(or consumer hire agreement) as lender, together with various ancillary activities such as credit broking and debt collection;

- certain insurance activities: effecting a contract of insurance as principal and carrying out a contract of insurance as principal; and
- electronic money: issuing electronic money (as a bank).

Payment services and e-money activity have separate regulatory regimes under the Payment Services Regulations 2017 and Electronic Money Regulations 2011 respectively, both of which are derived from EU legislation.

The government has proposed introducing a new regulated activity relating to the custody, or arranging the custody, of a stablecoin as part of its approach to establishing a bespoke regulatory framework for this type of digital asset. If the firm provides or arranges custody for stablecoins and is recognised as 'systemic' then under the current proposals, the firm will be dual regulated by the FCA and the Bank of England (BoE).

## Consumer Duty

Consumer Duty is a new regulatory requirement, driven and regulated by the FCA, due to be implemented, which will 'set higher expectations of firms driving a cultural reset that leads to enhanced confidence in financial markets and future gains from innovation'. The Duty deals with information asymmetries and consumer cognitive and behavioural biases. It is applicable across multiple regulated activities and should be considered in a wide range of circumstances where firms have exposure to retail clients.

The Consumer Duty will require firms to review all UK products, services and communications aimed at retail customers. Firms will also need to design appropriate data-gathering and Management Information as the FCA expects a firm's board (or similar body) to consider whether it is acting to deliver good customer outcomes. The FCA has been clear that it is now a data-led regulator, and it is likely to look at this management information carefully as part of its assessment of whether firms have implemented the Consumer Duty in the way the FCA intended.

The proposed implementation period gives firms until 30 April 2023 to implement this Duty.

*Law stated - 19 July 2022*

## Consumer lending

Is consumer lending regulated in your jurisdiction?

The general position is that lending by way of business to consumers is regulated in the United Kingdom. The FCA is responsible for authorising and regulating consumer credit firms.

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.

HM Treasury (HMT) has proposed to regulate buy-now-pay-later (BNPL) credit and, potentially, certain forms of short-term interest-free credit under the RAO. HMT has also proposed amending the running-account exemption of section 60F(3) of the Financial Services and Markets Act 2000 (FSMA). Legislation is expected in mid-2023.

The government has also proposed reforming the CCA following the recommendations of the FCA's retained provisions report and the Woolard Review . Current proposals include bringing some of the substantive elements of the CCA into the direct remit of the FCA. Further details are expected.

The CONC chapter in the FCA Handbook sets out detailed rules that regulated consumer credit firms must comply with and covers areas such as the 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.

Failing to comply with the requirements of the CCA may result in those agreements being unenforceable against borrowers and the FCA imposing financial penalties on the firm in question.

Entering into a regulated mortgage contract 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 United Kingdom; and
- at least 40 per cent of that land is, or is intended to be, used:

*Law stated - 19 July 2022*

## Secondary market loan trading

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.

*Law stated - 19 July 2022*

## Collective investment schemes

Describe the regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would fall within its scope.

Establishing, operating or winding up a CIS is a regulated activity in the United Kingdom for which firms must be

authorised by the FCA.

The definition of a CIS is set out in section 235 of the FSMA. 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 falls within the scope of this regime will depend on the nature of its business. For example, fintech companies that manage assets on a pooled basis on behalf of investors should consider carefully whether they may be operating a CIS. On the other hand, fintech companies that only provide advice or payment services may be less likely to operate a CIS. Certain cryptoassets or platforms that offer cryptoasset staking, in particular, may be exposed to the risk of being categorised as a CIS, but this analysis is fact-dependent. Fintech companies are advised to seek legal advice on this subject and to have regard to their other regulatory obligations.

The management of two forms of regulated collective investment schemes, undertakings for the collective investment in transferable securities and alternative investment funds, are also regulated activities. Peer-to-peer or marketplace lenders or crowdfunding platforms are regulated separately under their own regimes.

*Law stated - 19 July 2022*

## Alternative investment funds

Are managers of alternative investment funds regulated?

Managers of alternative investment funds are regulated in the United Kingdom under the Alternative Investment Fund Managers Directive, which has been implemented in the United Kingdom by the Alternative Investment Fund Managers Regulations 2013 and rules and guidance contained in the FCA Handbook. In a key divergence with the European Union, the United Kingdom has not implemented similar legislation to the EU's Cross-Border Distribution of Funds regime regarding the marketing of funds. Instead, certain elements are covered by the UK's financial promotion regime.

*Law stated - 19 July 2022*

## Peer-to-peer and marketplace lending

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

Peer-to-peer (P2P) lending is a term that generally refers to loan-based crowdfunding. In the United Kingdom, the FCA regulates loan-based crowdfunding platforms.

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 that 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 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 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. 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.

The rules governing P2P lending are found in the Conduct of Business Sourcebook and Senior Management Arrangements, Systems and Controls, and include:

- enhanced requirements for platform governance arrangements including in relation to credit risk assessment, risk management and fair valuation practices;
- strengthening rules on wind-down planning in the event of platform failure;
- setting out the minimum information that a platform should provide to investors; and
- introducing a requirement to monitor the investors that can use a platform, including that platforms assess investors' knowledge and experience of platform lending where no advice has been given to them. Firms are required to ensure that retail clients:

In January 2022, the FCA consulted on strengthening financial promotion rules for high-risk investments. One of the proposed changes would be to categorise P2P lending as a 'restricted mass-market investment', however, there are no changes proposed to the current restrictions on financial promotions in relation to P2P investments to retail customers.

*Law stated - 19 July 2022*

## Crowdfunding

Describe any specific regulation of crowdfunding in your jurisdiction.

In the United Kingdom, 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) are not currently regulated in their own right.

Equity-based crowdfunding is where investors invest in shares in, typically, new businesses. Equity-based crowdfunding is not specifically regulated in the United Kingdom (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.

In the FCA's policy statement on P2P lending, investment-based crowdfunding platforms were also covered. Recent work has focused on restrictions on the types of clients these platforms can market to and how this is managed.

*Law stated - 19 July 2022*

## Invoice trading

Describe any specific regulation of invoice trading in your jurisdiction.

Currently, there are no regulations relating specifically to invoice trading.

However, depending on how the business is structured, a firm that operates an invoice-trading platform may be carrying on regulated activities for which it must have permission, including:

- establishing, operating or winding up a CIS; and
- managing an alternative investment fund.

There is also a possibility that the firm may need to register with the FCA as an Annex 1 financial institution because it carries on commercial lending. As an Annex 1 financial institution, the firm would need to comply with all the detailed anti-money laundering requirements under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 .

*Law stated - 19 July 2022*

## Payment services

Are payment services regulated in your jurisdiction?

Payment services are regulated under the PSRs, which implement the second Payment Services Directive (PSD2) in the United Kingdom. Following, and relating to, Brexit the FCA published an updated version of its Approach Document setting out guidance for payment and e-money firms to reflect certain required amendments. Payment services include:

- services enabling cash to be placed on a payment account and all the operations required for operating a

payment account;

- services enabling cash withdrawals from a payment account and all the operations required for operating a payment account;
- the execution of the following types of payment transaction:
- the execution of the following types of payment transaction where the funds are covered by a credit line for the payment service user:
- issuing payment instruments or acquiring payment transactions;
- money remittance;
- 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 services that are intended to provide consolidated information on one or more payment accounts held by the payment service user with another one (or more) payment service provider).

The PSRs broaden the scope of transactions governed by its provisions, narrow the scope of certain exclusions, amend the conduct of business requirements and introduce security requirements.

To provide payment services in the United Kingdom, a firm must fall within the definition of a 'payment service provider'. Payment service providers include authorised payment institutions, small payment institutions, credit institutions, e-money institutions, the post office, the BoE and government departments and local authorities.

A firm that provides payment services in or from the United Kingdom as a regular occupation or business activity (and is not exempt, or a bank) must apply for authorisation or registration as a payment institution.

E-money institutions are regulated under the Electronic Money Regulations 2011 (SI 2011/99) . They must be authorised or registered to issue e-money and undertake certain payment services. The FCA's Approach Document provides useful guidance for e-money institutions alongside explanations of most requirements in the FCA Handbook.

The European Commission has launched several initiatives assessing the status of PSD2, including proposing changes to the regulatory oversight of certain delegated models, a simplification of the payments regime, and a central database to record sanctions across EU member states. There have been no similar proposals from UK regulators, but such changes may influence the development of the PSR.

Key upcoming UK regulatory initiatives include proposals on bringing systemically important firms in payments chains under BoE regulation, creating rules and standards for Account to Account Payments, and the implementation of Confirmation of Payee services and other measures to tackle the rise in authorised push payment fraud.

*Law stated - 19 July 2022*

## Open banking

Are there any laws or regulations introduced to promote competition that require financial institutions to make customer or product data available to third parties?

Open Banking has been operational since 2018 and has been driven by the United Kingdom's competition authority (the Competition and Markets Authority (CMA)) and the Open Banking Implementation Entity operating under the CMA's Retail Banking Market Investigation Order 2017 , together with the implementation of PSD2.

Following its investigation into the retail and small and medium-sized enterprise (SME) banking sectors between 2013 and 2016, the 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 to improve competition, efficiency and stimulate innovation. The open APIs 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, the PSRs require banks to allow third-party payment service providers to initiate payments from their customers' accounts.

In March 2022, the CMA provided an update on Open Banking and highlighted the following three items that required implementation:

- variable recurring payments for sweeping (due July 2022);
- enhanced management information submission mechanisms (due July 2022); and
- certain consent and access dashboard standards (due September 2022).

With regards to future regulations, HMT, the CMA, the FCA and PSR have issued a Joint Statement on the future of Open Banking, recommending a Joint Regulatory Oversight Committee to be led by the FCA and the PSR, which will agree and implement next steps.

*Law stated - 19 July 2022*

## **Robo-advice**

Describe any specific regulation of robo-advisers or other companies that provide retail customers with automated access to investment products in your jurisdiction.

There are no specific regulations to cover robo-advisers. The rules applying to investment advisers or arrangers and discretionary investment managers are technology-neutral and cover face-to-face as well as online or automated services. Therefore, a licence would generally be required, and robo-advisers would be subject to the usual conduct of business requirements, for example, suitability assessments, disclosure of costs and charges, and marketing (which must be fair, clear and not misleading). The FCA provides some specific guidance for firms developing an automated advice or guidance proposition through a dedicated FCA Advice Unit . The FCA also evaluated the status of automated advice within the UK market in 2020, but with limited substantive action taken.

*Law stated - 19 July 2022*

## **Insurance products**

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

Effecting or carrying out a contract of insurance, arranging contracts of insurance, or dealing in insurance as an agent are regulated activities and fintech companies that wish to do this must be regulated. Key regulation includes the retained EU law version of Regulation (EU) No. 1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) and has been applied since the end of the Brexit transition period. 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. For example, exemptions may be available for communications to high net worth individuals, companies, sophisticated individuals and other investment professionals.

**Credit references**

Are there any restrictions on providing credit references or credit information services in your jurisdiction?

Providing credit information services and providing credit references are regulated activities for which firms must be regulated. A firm provides credit information services where it takes (or gives 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:

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.

In addition, the Small and Medium-Sized Business (Credit Information) Regulations 2015 (the SMB Regulations) require:

- designated banks to share specified credit information about SMEs with designated credit reference agencies (with the permission of the relevant SME); and
- designated credit reference agencies to provide this information to finance providers at the request of the SME and to the BoE.

While the provision of this information is not a regulated activity under the FSMA, the FCA does monitor and enforce compliance with the SMB Regulations.

As part of HMT's incoming changes to BNPL, it has proposed ensuring that BNPL providers carry out the relevant affordability checks in relation to users and that there is 'clear, consistent and timely credit reporting' across the credit reference agencies in relation to this.

**CROSS-BORDER REGULATION****Passporting**

Can regulated activities be passported into your jurisdiction?

Prior to Brexit an EEA firm that has been authorised under one of the EU single market directives was able to may provide cross-border services into the United Kingdom. For these purposes, the relevant single market directives include the:

- Capital Requirements Directive;

- Solvency II Directive;
- second Markets in Financial Instruments Directive (MiFID II);
- Insurance Distribution Directive;
- Mortgage Credit Directive;
- fourth Undertakings for Collective Investment in Transferable Securities Directive;
- Alternative Investment Fund Managers Directive;
- second Payment Services Directive; and
- Electronic Money Directive.

The right to passport into the United Kingdom from EEA jurisdictions ceased to exist after 31 January 2020.

*Law stated - 19 July 2022*

### **Requirement for a local presence**

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

No. With the removal of passport rights post-Brexit, any firm wishing to obtain a licence in the United Kingdom will need to establish a presence within the jurisdiction.

*Law stated - 19 July 2022*

## **SALES AND MARKETING**

### **Restrictions**

What restrictions apply to the sales and marketing of financial services and products in your jurisdiction?

The United Kingdom has a comprehensive set of rules relating to financial promotions. These are set out in Chapter 4 of the Financial Conduct Authority's (FCA) Conduct of Business Sourcebook (COBS).

The definition of a financial promotion is very wide and includes 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 the firm 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 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.

However, an exemption may be available to keep marketing materials outside the scope of the financial promotion rules. For example, exemptions may be available for communications to high-net-worth individuals, companies, sophisticated individuals and other investment professionals.

Even authorised firms are prohibited from the promotion of unregulated collective investment schemes, except in specific circumstances set out in the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 (SI 2001/1060) .

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 an unlawful financial promotion are unenforceable.

The FCA is consulting on changes to strengthen the financial promotion rules for high-risk investments, with a Policy Statement expected in the summer of 2022. The FCA has proposed rationalising the classification of high-risk investments, introducing a package of measures to slow consumer journeys into high-risk investments, strengthening the role of firms approving financial promotions and applying the financial promotion rules to 'qualifying crypto-assets'.

A further HM Treasury consultation confirms that a 'regulatory gateway' for approving financial promotions will be introduced, whereby all new and existing authorised firms will be prohibited from approving the financial promotions of unauthorised persons, with a requirement to apply to the FCA to have this prohibition removed either entirely (allowing them to approve all types of financial promotions), or partially (allowing them to approve certain types of financial promotions).

## Lending

In relation to lending, there is also a comprehensive set of rules and the position is similar, but not identical, to that set out in COBS.

In respect of credit agreements, the FCA's Consumer Credit Sourcebook 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 Mortgages and Home Finance: COBS applies. In addition to being clear, fair and not misleading, financial promotions must:

- be accurate;
- be balanced (without emphasising any potential benefits without also giving a fair and prominent indication of any relevant risks);
- be 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;
- be 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, be 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 provisions apply depending on the particular type of mortgage, covering, 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.

*Law stated - 19 July 2022*

## CHANGE OF CONTROL

### Notification and consent

Describe any rules relating to notification or consent requirements if a regulated business changes control.

Part 12 of the Financial Services and Markets Act 2000 sets out a strict system concerning changes of control of regulated firms, and failure to adhere to the appropriate statutory requirements can be a criminal offence, depending on the nature of the breach.

Controllers or potential controllers of Financial Conduct Authority (FCA)-authorised firms are required to make notifications to and obtain approval from the FCA when a change of control occurs. The notification must be made before a change of control takes place. A person who fails to obtain the appropriate FCA approval will be guilty of a criminal offence.

The notification process takes place under three parallel processes:

- each new controller submitting the appropriate controller notification form to seek the FCA's pre-approval;
- each exiting controller notifying the FCA of the change of control; and
- the FCA-regulated firm notifying the FCA of these changes.

In practice, a joint notification is usually made, coordinated by the FCA-regulated firm with the new controllers and exiting controllers. Any potential controllers must provide detailed information, including in respect of its group structure, senior management, commercial activities, any criminal or civil proceedings against the company, and details of the acquisition.

The FCA has a statutory assessment period of 60 working days to determine change-of-control applications. This can be interrupted for a period of 30 days. In practice, determinations are often delayed due to a lack of case officers. The FCA provides an estimate of the current delay on its webpage, at the time of writing this is at least 90 days. The FCA still recommends that all relevant information and documents are provided with the initial submission and reminds firms that it is a criminal offence to proceed with a transaction before it has decided on the notification (or before the statutory assessment period has expired). There is no application fee.

HM Treasury has stated that it, the PRA and FCA are considering revising change of control applications and it has been suggested that such changes could be focused on:

- the information provided by applicants to enable regulators to fully assess the risks of the proposal in a timely manner; or
- the currently limited statutory grounds on which the FCA or PRA can object to an application for a change of control.

*Law stated - 19 July 2022*

## FINANCIAL CRIME

### Anti-bribery and anti-money laundering procedures

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

Generally, fintech companies are only required to have anti-money laundering (AML) procedures if the company is authorised by the Financial Conduct Authority (FCA) or carries out business that is subject to the Money Laundering Regulations (MLRs) 2017. The United Kingdom implemented the Fifth Money Laundering Directive (5MLD) on 10 January 2020, by way of updates to the MLRs 2017 effected by the Money Laundering and Terrorist Financing (Amendment) Regulations 2019 (the 2019 Regulations). Under 5MLD, and the 2019 Regulations (in line with the 5MLD), the types of entities required to have money laundering procedures have been widened to include cryptoasset exchange providers and custodian wallet providers. The 2019 Regulations also capture peer-to-peer exchange providers, cryptoasset automated teller machines and the issuing of new cryptoassets (eg, an initial coin offering (ICO) or initial exchange offering).

Entities subject to UK money laundering regulations are required to, among other things:

- identify and assess the firm's exposure to money laundering risk by, for example, undertaking a risk assessment;
- perform customer due diligence to an adequate standard depending on the risk profile of the customer;
- keep appropriate records;
- monitor compliance with the AML regulations, including internal communication of policies and procedures; and
- report suspicious transactions.

HM Treasury (HMT) has updated the 2017 MLRs to exclude Account Information Service Providers from its scope.

As part of its review of FinTech Challenger Banks, the FCA has noted some concerns over the financial crime controls of these companies prompted by the view that criminals may be attracted to the fast onboarding processes that

challenger banks advertise and that the risk the information gathered through these fast processes is insufficient to identify higher-risk customers. The FCA noted that it expects financial crime control resources, processes and technology to be commensurate with a bank's expansion so that they remain fit for purpose.

With respect to anti-bribery policies and procedures, all companies (including fintech companies) that are incorporated in or carry on business, or a part of their business, in the United Kingdom, are subject to the Bribery Act 2010. While the Bribery Act does not require the implementation of policies or procedures to combat bribery, it creates a de facto requirement to do so. This is because a company charged with 'failing to prevent bribery' may rely on the statutory defence that the company had adequate policies and procedures in place designed to prevent bribery. It is not just large companies that need to be concerned with this law. The successful prosecution of Skansen Interiors Ltd (a company with fewer than 30 employees) for failing to prevent bribery in 2018 indicates that UK prosecutors will target smaller companies for such an offence.

HMT is consulting on proposed changes to the transfer of cryptoassets, and the 'travel rule' with the aim of bringing the United Kingdom in line with Financial Action Task Force Recommendation 16, regarding information sharing requirements for transferring cryptoassets. HMT is considering legislation that will require one of the originator's address, date, place of birth and passport number to be provided with a cross-border transfer of cryptoassets above €1,000.

*Law stated - 19 July 2022*

## Guidance

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

There is no anti-financial crime guidance issued by the FCA specifically for fintech firms. However, firms that are authorised by the FCA should comply with its 'Financial Crime Guide: A firm's guide to countering financial crime risks' and may find the FCA's outline to its supervision of cryptoassets helpful. In addition, the Joint Money Laundering Steering Group (JMLSG) issues detailed AML guidance for the financial sector, which includes a chapter of guidance specific to the cryptoasset sector (see Chapter 22 of Part 2 of the JMLSG Guidance).

It is important for fintech firms to understand the concerns and policy drivers that financial institutions have with respect to their fintech clients. In June 2018, the FCA sent a 'Dear CEO' letter to financial institutions, advising them to take 'reasonable and proportionate measures to lessen the risk of your firm facilitating financial crimes that are enabled by cryptoassets'. This will have a consequential effect on fintech companies, as financial institutions are likely to apply the FCA's guidance when conducting due diligence on and monitoring their relationships with crypto-businesses as a result of this letter. While not addressed to fintech companies, they may also find this guidance helpful in mitigating financial crime risks in their own relationships with individuals and entities whose wealth, funds or revenue derives from crypto-related activities. More recently, the FCA issued a notice to all regulated firms reminding them of their existing obligations when interacting with or exposed to cryptoassets and related services (FCA Statement published 24 March 2022).

*Law stated - 19 July 2022*

## PEER-TO-PEER AND MARKETPLACE LENDING

### Execution and enforceability of loan agreements

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?

Provided the essential elements of a contract are present, loan agreements governed by English law can be executed in the form of agreements by signatories of the respective parties with due authority.

The execution requirements for an English law security agreement will depend on the form of security agreement. However, most English law security agreements will be executed in the form of a deed to ensure that no challenge can be made on the grounds of a lack of consideration or owing to the form of property being secured. It is also common for a security agreement to grant the lender a power of attorney, which must be executed as a deed to be enforceable. Certain formalities are required for the execution of a deed:

- the deed must be in writing;
- it must be clear on its face that it is intended to take effect as a deed;
- it must be validly executed as a deed, the requirements of which will vary according to the executing party (eg, whether it is an individual or a company). In particular, if the executing party is a company and if the deed is signed by a director (rather than through the affixing of the company seal or the signature of two authorised signatories), the signature of such director must be attested by a witness (in other words, an individual must observe the execution of the deed and record, on the deed itself, that he or she has made such observation); and
- 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 (P2P) 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, subject to complying with regulatory requirements (eg, in respect of regulated lending). 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) or clicking an 'I accept' (or similar) icon on a web page. Certain limitations on e-signing generally need to be borne in mind:

- English law prohibits e-signing in respect of certain types of contract, including but not limited to documents required to be registered at HM Land Registry;
- there may be restrictions within a company's articles of association that may restrict or forbid the use of e-signing, and these should be checked prior to any signing; and
- 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.

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.

On 3 September 2019, the Law Commission published Law Com report No. 386 concerning e-signatures. Of particular importance, the Law Commission confirmed that e-signing is capable in law of being used to execute documents (including deeds), provided that:

- the executing party 'intends to authenticate' the document, which it clarified as the same as intending to be bound; and
- any formalities relating to the execution of such document are satisfied.

With respect to the attestation requirement, however, the Law Commission's views are that the physical presence of a witness is required, even when both the signatory and the witness are executing or attesting the document using e-

signature. The Law Commission was not satisfied that the witness's 'virtual' or 'remote' presence would suffice, and this is also the position that is followed by the HM Land Registry. These views, and the law in respect of physical witness, remain unchanged since the beginning of the covid-19 pandemic.

*Law stated - 19 July 2022*

### **Assignment of loans**

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? Is it possible to assign these loans without informing the borrower?

To perfect a legal assignment of loans originated on a P2P 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 P2P 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 P2P account.

If the assignment does not comply with the above criteria for a legal assignment, it may nevertheless take effect as an equitable assignment. One of the key distinctions 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.

*Law stated - 19 July 2022*

### **Securitisation risk retention requirements**

Are securitisation transactions subject to risk retention requirements?

Yes, the risk retention requirements set out in Regulation (EU) 2017/2402, as it forms part of the domestic law of the United Kingdom by virtue of the European Union (Withdrawal) Act 2018 (as amended by the European Union (Withdrawal Agreement) Act 2020), as amended by the Securitisation Regulations 2018 (SI 2018/1288) and by the Securitisation (Amendment) (EU Exit) Regulations 2019 (SI 2019/660) (referred to as the UK Securitisation Regulation) apply:

- directly to the 'originators', 'sponsors' and 'original lenders' of a 'securitisation' transaction (as each such term is defined in the UK Securitisation Regulation) where any of the originator, sponsor or original lender is established in the United Kingdom; and
- indirectly to originators, sponsors and original lenders of securitisation transactions that are offered to 'institutional investors' (as defined in the UK Securitisation Regulation) regulated by the Financial Conduct Authority (FCA) or Prudential Regulation Authority (PRA) (as it is incumbent upon institutional investors in securitisation transactions to ensure that the retention requirements under the UK Securitisation Regulation have been complied with).

If any party to a securitisation is established outside of the United Kingdom, or any investor is regulated by a competent authority other than the FCA or the PRA, it will also be necessary to consider the regulatory regimes in the other jurisdictions applicable to such party or investor. For example, if any securitisation is offered to an 'institutional investor' (as defined in the EU Securitisation Regulation) regulated by a competent authority of an EU member state, the risk retention requirements set out in Regulation (EU) 2017/2402 (the EU Securitisation Regulation) will apply indirectly to the originators, sponsors and original lenders of that P2P securitisation (notwithstanding that each of them may be established in the United Kingdom, rather than the European Union), as the EU Securitisation Regulation also requires such investors to ensure that the retention requirements under the EU Securitisation Regulation have been complied with.

Each of the UK Securitisation Regulation and the EU Securitisation Regulation require the originator, sponsor or original lender in respect of a securitisation to retain on an ongoing basis a material net economic interest in such securitisation of not less than 5 per cent using one of five prescribed risk retention methods, including (among other things) retention of:

- the most subordinated tranches, so that the retention equals no less than 5 per cent of the nominal value of the securitised exposures;
- 5 per cent of the nominal value of each of the tranches sold to investors; or
- randomly selected exposures equivalent to no less than 5 per cent of the nominal value of the securitised exposures:

Typically, a P2P lending platform will not qualify as the 'sponsor' or 'original lender' of a P2P securitisation. However, it may qualify as an 'originator' if it was (either itself or through related entities) directly or indirectly involved in the original agreement that created the P2P loans being securitised. Whether or not the P2P lending platform comprises an originator will ultimately be a question of fact, but it is likely that some P2P lending platforms in the market will (by virtue of their documentation structure and role as operator of the platform) comprise originators for the purposes of the UK Securitisation Regulation and (or) the EU Securitisation Regulation. If this is the case, any such P2P lending platform will be required to retain a 5 per cent economic interest in any securitisation of loans originated on their platform unless the originator, sponsor or original lender have agreed between them that another entity will retain.

If a P2P lending platform does either not qualify as an originator or does qualify as an originator but does not wish to retain, another entity with the capacity to retain will need to be identified and this entity will need to agree to retain in accordance with the terms of the UK Securitisation Regulation and (or) the EU Securitisation Regulation (as applicable). Any entity that retains in the capacity of 'originator' is expected to be an entity of substance, and each of the UK Securitisation Regulation and the EU Securitisation Regulation expressly provide that an entity will not be considered an originator where it has been established or operates for the sole purpose of securitising exposures. Neither the UK Securitisation Regulation nor the EU Securitisation Regulation specifies in what circumstances an entity will be considered to have been established for the sole purpose of securitising exposures and it is expected that this will be considered in secondary legislation taking the form of 'binding technical standards' (in the case of the UK Securitisation Regulation) or 'regulatory technical standards' (in the case of the EU Securitisation Regulation). At the time of writing, no binding technical standards or regulatory technical standards relating to risk retention have been adopted by the United Kingdom or the European Union (as applicable) or have come into force. However, in the Final Draft Regulatory Technical Standards relating to risk retention (published on 1 April 2022 pursuant to article 6(7) of the EU Securitisation Regulation), the European Banking Authority (EBA) proposed that an originator will not be considered to have been established with the 'sole purpose' of securitising exposures if it satisfies certain conditions, including that:

- it has a strategy and the capacity to meet payment obligations consistent with a broader business model that

involves material support from capital, assets, fees or other sources of income, by virtue of which the entity does not rely on the exposures to be securitised, on any interests retained or proposed to be retained in accordance with the EU Securitisation Regulation or on any corresponding income from such exposures and interests as its sole or predominant source of revenue; and

- the responsible decision-makers have the necessary experience to enable the entity to pursue the established business strategy, as well as adequate corporate governance arrangements.

No equivalent draft binding technical standards have yet been published for review.

*Law stated - 19 July 2022*

### **Securitisation confidentiality and data protection requirements**

Is a special purpose company used to purchase and securitise peer-to-peer or marketplace loans 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 EU Securitisation Regulation and the Capital Requirements 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 P2P platform would each be required to comply with the statutory data protection requirements under English law.

*Law stated - 19 July 2022*

## **ARTIFICIAL INTELLIGENCE, DISTRIBUTED LEDGER TECHNOLOGY AND CRYPTOASSETS**

### **Artificial intelligence**

Are there rules or regulations governing the use of artificial intelligence, including in relation to robo-advice?

There are not yet any significant rules or regulations that specifically govern the use of AI in the United Kingdom (including in respect of robo-advice). However, there are some limited regulatory provisions; most notably in the UK General Data Protection Regulation (UK GDPR) that set out requirements in respect of 'automated' decision-making (which would include AI and robo-advice) involving personal data. In particular, article 22 provides that a data subject has the right not to be subject to a decision based solely on automated processing except in certain circumstances (eg, with the data subject's explicit consent). Where those circumstances apply, articles 13(2) and 14(2) require the data controller to provide 'meaningful information about the logic involved'. Fintech businesses using personal data in AI (eg, in assessing loan applications) will therefore need to be able to explain how the AI system operates in that context. The Information Commissioner's Office has released detailed guidance on compliance with data protection law when using AI (including the explainability provisions noted above) in its Guide to Data Protection and in its AI and Data

Protection Risk Toolkit. The Information Commissioner's Office has also issued guidance specifically on explaining decisions made with AI in conjunction with the Alan Turing Institute.

The Final Report of the Financial Conduct Authority (FCA) and Bank of England's (BoE) Artificial Intelligence Public-Private Forum (AIPPF) published in February this year and two papers published by the FCA on AI in 2019 – 'Explaining why the computer says no' and 'Artificial Intelligence in the boardroom' – also emphasise that financial institutions (including their board members) should be able to explain AI-based decisions, particularly in sensitive contexts (eg, in consumer loan applications).

Outside of this data privacy and explainability context, fintech businesses using AI (whether for robo-advice or otherwise) may still be subject to the FCA and (or) Prudential Regulatory Authority's (PRA) existing regulatory regimes. At the most general level, businesses must have regard to the high-level requirements of the FCA's Principles for Businesses and (or) PRA's Fundamental Rules when using AI. For example, the FCA requires firms to communicate with clients in a way that is clear, fair and not misleading and to have adequate risk management systems. More specific regulation may also apply, for example, relating to individual accountability under the Senior Managers and Certification Regime or on operational resilience and outsourcing. Certain activities may also be subject to specific regulation, for example, investment advice provided by robo-advisers would be subject to conduct of business requirements, such as suitability assessments and disclosure of costs and charges, and systems involved in high-frequency trading decisions would be subject to detailed rules on algorithmic trading.

Although these are existing requirements, their application to the use of AI by businesses requires careful consideration in light of the unique characteristics of AI. One of the main purposes of the AIPPF was to identify such risks in financial services in the key areas of governance, data management, and model risk management and it set out in its Final Report examples of best practices of how to address and mitigate these risks. Building on the work of the AIPPF, the FCA and PRA will publish a Discussion Paper on AI later this year to address how existing regulation and legislation may be applied to AI.

In addition to the regulatory considerations detailed above, businesses using AI should also be aware of the National Security and Investment Act (NSI), which came into force on 4 January 2022. The NSI gives the government powers to scrutinise and intervene in business transactions in sensitive areas, including AI, to protect national security. Transactions, including acquisitions, minority investments, and intra-group transactions, involving businesses active in AI may trigger a mandatory requirement to notify the government. In the context of a transaction, such businesses (and any investors) may need to consider whether the transaction triggers a mandatory notification requirement as well as ensuring that any potential implications are reflected in deal timelines and documents to manage the risks of delay and (or) government intervention.

As the regulatory initiatives referenced above suggest, AI and its use by businesses is an issue attracting increased regulatory and governmental attention. Unsurprisingly, then, the law and regulation governing the use of AI is set to change. At the end of 2021, the government published its National AI Strategy, which included the commitment to publish later in 2022 a white paper setting out its position on the governance and regulation of AI. Meanwhile, in the European Union, the draft AI regulation (AI Act), once implemented, will impose obligations on developers and users of AI systems, particularly those systems classified as 'high risk' under the AI Act. While the AI Act does not specifically target AI use in the financial services sector, fintech businesses could still find themselves subject to potentially onerous obligations under the AI Act, for example, if they use AI in the context of human resources or employment.

*Law stated - 19 July 2022*

## **Distributed ledger technology**

Are there rules or regulations governing the use of distributed ledger technology or blockchains?

Regulators in the United Kingdom in general seek to adopt a technology-neutral stance, regulating the outputs of

systems rather than how they operate in the background. For example, the FCA in 2017 undertook a review of distributed ledger technology and its use in the financial services industry and concluded that no technology-specific regulation is required to govern its use. HM Treasury (HMT) has examined the potential role of distributed ledger technologies and has noted that:

A Financial Markets Infrastructure Sandbox is due to commence in 2023 which, in part, is aimed at giving the industry the opportunity to use distributed ledger technologies to provide financial markets infrastructure services (and be able to test in the market) with appropriate regulatory oversight.

However, some rules and regulations applicable in the United Kingdom indirectly have an effect on the deployment of distributed ledger technologies and blockchains as a result of the nature of the operation of these types of systems. For example, the GDPR generally requires personally identifiable information to be capable of erasure once it is no longer needed, which causes difficulties for those seeking to use distributed ledger technology to govern the use of that type of data, given the technology's generally 'immutable' (ie, unchangeable) nature. Another example is the Centralised Securities Depository Regulation (an EU-level regulation applicable in the United Kingdom), which requires dematerialised securities to be settled through a centralised securities depository, which is a hurdle to be overcome for those fintech businesses seeking to settle securities via distributed ledger technologies (security tokens).

*Law stated - 19 July 2022*

## Cryptoassets

Are there rules or regulations governing the promotion or use of cryptoassets, including digital currencies, stablecoins, utility tokens and non-fungible tokens (NFTs)?

In the United Kingdom, there are specific rules relating to the operation of certain types of crypto-businesses in the United Kingdom, requiring the following businesses to be registered with the FCA:

- those that provide a facility to enable the exchange of one cryptoasset for another or the exchange of fiat currency for cryptoassets (or vice versa), or any business that makes arrangements with a view to any such exchange;
- those that provide custodial cryptoasset wallet services;
- any business that issues new cryptoassets (eg, a business conducting an initial coin offering); and
- businesses that operate cryptoasset automated teller machines.

Prior to operating any such business, the business must first register with the FCA. The registration process is complex and requires the submission of a number of different information requirements. Once a complete application has been submitted, the FCA has three months to consider the application and accept or reject it as it sees fit.

There have proven to be significant challenges in the registration of cryptoasset firms to date. Other regulatory processes regarding cryptoassets continue in other areas. These follow on from the FCA, BoE and HM Treasury's Crypto Assets Task Force report of 2018, which announced the intention to launch a series of consultations on regulation of the cryptoassets industry, including on:

- the transposition of the Fifth Anti-Money Laundering Directive into UK law (which resulted in the registration requirements mentioned earlier);
- guidance around the application of existing financial services regulation to the cryptoassets market;

- the potential extension of the FCA's regulatory perimeter to encompass certain assets and activities within the cryptoassets sector (which, as of the date of writing, has not yet been published); and
- a potential ban on the offering of derivative products to retail customers, where those products reference cryptoassets (which was published in 2019, and confirmed in 2020).

The FCA's guidelines include a taxonomy covering 'exchange tokens' (decentralised assets such as bitcoin), 'security tokens' (blockchain-traded products that have similar characteristics to traditional regulated securities), and 'utility tokens' (blockchain-traded products or other items that do not have similar characteristics to traditional regulated securities).

Therefore, in broad terms, the approach in the United Kingdom to the regulation of cryptoassets at present varies with:

- unregulated tokens (classic exchange tokens such as bitcoin and utility tokens) are unregulated, although to offer services concerning them, a business may need to be registered with the FCA;
- e-money tokens (cryptoassets that have the characteristics of e-money) are regulated as if they were e-money, and businesses dealing in them need to be properly authorised by the FCA as appropriate under the Electronic Money Regulations and the Payment Services Regulator (PSRs); and
- security tokens (cryptoassets that have the characteristics of regulated financial products) being regulated in the same way as the type of security that the cryptoasset shares characteristics with, and any businesses dealing in them need to be properly authorised by the FCA as appropriate.

E-money institutions that do not issue e-money tokens, but which provide payment services in connection with a cryptoasset (whether or not the cryptoasset is regulated), may need to be registered under the PSRs for these payment services.

## Stablecoins

In relation to stablecoins, HMT is consulting on bringing certain stablecoins within the scope of the UK regulatory perimeter. Specifically, it seeks to regulate 'payment crypto-assets' (although this name is not yet confirmed), which would cover any:

This is intended to cover all fiat currency-backed stablecoins, but exclude those that stabilise their value by referencing other assets (eg, commodities). This will lead to new regulated activities, including the issuing of stablecoins, providing custody for stablecoins, and providing payment services in relation to stablecoins. The FCA will be the regulator for these activities, and firms will need to be authorised. HMT has also proposed an amended Financial Market Infrastructure Special Administration Regime to address the risks posed by the possible failure of systemic Digital Settlement Assets (which would include stablecoin) firms. Further details are awaited.

## Financial promotions

HMT has announced that the promotion of cryptoassets to UK consumers is to be regulated and will broadly fall within the FCA's existing financial promotions regime under the Financial Services and Markets Act 2000 (FSMA). The FCA is, at the time of writing, consulting on these changes within the broader context of strengthening the financial promotion rules for high-risk investments.

The proposals include a broad definition of cryptoassets that would capture a significant range of currently unregulated tokens – it would not capture NFTs. It will cover financial promotions from overseas firms marketing in the United Kingdom, as well as firms that are based in the United Kingdom (even if not authorised by the FCA). For communications originating outside the United Kingdom, the restriction applies to the extent that the communication is capable of having an effect in the United Kingdom.

Promotions to governments and central banks, certified sophisticated investors (a specifically defined class of investor), and high-net-worth companies would, however, be exempt. Common retail exemptions on the other hand would not apply, including promotions to high-net-worth individuals or sophisticated investors.

Together the proposals would mean significant restrictions on the promotion of cryptoassets – financial promotions in relation to these assets would, among other requirements, need to be fair, clear, and not misleading, include a prescribed risk warning, and be approved by a relevant FCA-authorized firm.

Crypto-asset regulation in the United Kingdom continues to be a developing area and the final requirements of the HMT and FCA proposals may change following further consultation.

*Law stated - 19 July 2022*

### **Token issuance**

Are there rules or regulations governing the issuance of tokens, including security token offerings (STOs), initial coin offerings (ICOs) and other token generation events?

Any firm that issues a digital token in the United Kingdom needs to be registered with the FCA. The registration process is complex and requires the submission of a number of different information requirements. Once a complete application has been submitted, the FCA has three months to consider the application and accept or reject it as it sees fit.

Beyond the registration requirement noted earlier, there are no rules or regulations specifically governing the issuance of digital tokens. If the token meets the definition of regulated cryptoassets or any other regulated product (even if in tokenised form), FSMA and FCA regulations will apply around authorisation and compliance to the same extent that they would apply to traditional assets.

Regulation around cryptoassets in the United Kingdom is undergoing some change at the time of writing including bringing cryptoassets within scope of the UK's financial promotion regime. This will include promotions in relation to the issuance of tokens.

*Law stated - 19 July 2022*

## **DATA PROTECTION AND CYBERSECURITY**

### **Data protection**

What rules and regulations govern the processing and transfer (domestic and cross-border) of data relating to fintech products and services?

On 25 May 2018, the EU General Data Protection Regulation (GDPR) came into force with direct effect across the entire European Union. In the United Kingdom, the Data Protection Act 2018 came into force at the same time as the GDPR and supplemented the GDPR as it applied in the United Kingdom. Following Brexit, the GDPR took effect in the United Kingdom as the 'UK GDPR', which is the retained EU law version of the GDPR as amended by various data protection EU exit regulations. The Data Protection Act 2018 now supplements the UK GDPR. The government has published Keeling Schedules showing the changes (in redline form) to the EU GDPR and the Data Protection Act 2018 made by the data

protection EU exit regulations. These schedules are not law but are a useful guide to how the UK GDPR and the Data Protection Act 2018 now look.

Going forward, for any entity in the United Kingdom, one or both of the UK GDPR or EU GDPR (together the GDPR) may apply, depending on what activities that entity carries out, and it will need to be established whether any entity is subject to one or both regimes. Currently, the UK GDPR and EU GDPR obligations continue to be very similar or the same, but this should be kept under constant review.

The GDPR governs the storage, viewing, use of, manipulation and other processing by businesses of data that relates to a living individual. In summary, the GDPR requires that businesses may only process personal data where that processing is done in a lawful, fair and transparent manner, as further described in the GDPR.

The GDPR requires that any processing of personal data must be done pursuant to one of the available lawful bases for processing. One of the most commonly used lawful bases for processing is to obtain the consent of the data subject to that processing – in relying on this lawful basis, the business must ensure that the consent is freely given, specific, informed and unambiguous, and capable of being withdrawn as easily as it is given. This places a significant burden on businesses to ensure that their customers are fully informed as to what their personal data is being used for. Other lawful bases for processing data include where that processing is necessary for the business to perform a contract it has with the data subject, where the business has a 'legitimate interest' in processing the personal data (which is not overridden by the 'fundamental rights and freedoms' of the data subject) or where required to comply with an obligation the business has at law (not a contractual obligation).

The GDPR does not apply to personal data that has been truly anonymised – as anonymised data cannot, by definition, be personal data. However, to ensure that GDPR does not apply to a certain data set, that data set must be truly anonymised. The GDPR itself gives limited guidance on anonymisation in Recital 26, requiring data controllers to consider a number of factors in deciding if personal data has been truly anonymised, including the costs and time required to de-anonymise, the technology available at the time to attempt de-anonymisation and further developments in technology.

Businesses that infringe the GDPR may be subject to administrative fines of an amount up to €20 million under the EU GDPR (£17.5 million under the UK GDPR) or 4 per cent of global turnover, whichever is higher. If an entity is subject to both the UK GDPR and the EU GDPR, it is possible for the entity to be fined under both regimes for the same breach.

The oversight of UK businesses' compliance with the UK GDPR and related legislation, and enforcement of them, is carried out by the UK regulator, the Information Commissioner's Office. If a UK business has operations in the European Union that mean it is subject to the EU GDPR, it may need to appoint a representative in the EU member state in which those operations are most significant, and the oversight of UK businesses' compliance with the EU GDPR and related legislation, and enforcement of them, generally will be led by the relevant regulator in that EU member state.

There are restrictions under both the EU GDPR and the UK GDPR on transfers of personal data to non-EU or UK countries that are not deemed to offer a standard of protection by the European Commission or UK government (as applicable). Unless a derogation under article 49 of the GDPR is available, a suitable data transfer mechanism will be needed to legitimise such transfers. The most common method of legitimising these transfers is the entry into 'standard contractual clauses', as approved by the European Commission or UK government (as applicable). Following the Schrems II judgment, businesses are now also required to carry out a 'transfer impact assessment', which requires businesses to review whether any supplementary measures are needed to ensure that transfers relying on the standard contractual clauses (or 'binding corporate rules') provide adequate data protection for the personal data in practice.

In June 2022, the government published its long-awaited plans to reform the UK Data Protection Act 2018, following the Queen's Speech in May 2022, in which it announced that it saw the bill as an opportunity to create a more 'pro-growth and pro-innovation data regime whilst maintaining the UK's world-leading data protection standards'. We will have to wait and see the details of the bill once published, but there will be a difficult balance for the government to strike between creating something that provides the change that has been promised, while maintaining UK's adequacy

status in the European Union and, in turn, the free-flow of personal data between the United Kingdom and European Union.

There are no rules or regulations in the United Kingdom relating to personal data that are specifically aimed at fintech companies.

*Law stated - 19 July 2022*

## Cybersecurity

### What cybersecurity regulations or standards apply to fintech businesses?

There are no rules or regulations in the United Kingdom that provide cybersecurity requirements for fintech businesses specifically. More generally, the GDPR imposes requirements on businesses in the United Kingdom to ensure a high standard of security over personal data that they process, including the general obligation to have in place reasonable technical and organisational measures to ensure the security of that data, compliance with which requires measures relating to cybersecurity to be put in place.

Further, for Financial Conduct Authority (FCA)-regulated businesses, the FCA has significant powers of oversight and enforcement in respect of those businesses' internal systems and controls relating to the protection of confidential client information. The FCA actively manages and oversees these requirements and, in recent years, has imposed significant fines on entities that have failed to meet these requirements.

*Law stated - 19 July 2022*

## OUTSOURCING AND CLOUD COMPUTING

### Outsourcing

#### Are there legal requirements or regulatory guidance with respect to the outsourcing by a financial services company of a material aspect of its business?

The position on regulation of outsourcing by financial services companies in the United Kingdom is a complex picture, encompassing a number of different requirements that apply in different ways, depending on the type of financial services business in question.

The most important of these requirements are the European Banking Authority (EBA) guidelines. On 25 February 2019, the EBA published revised (final) guidelines on outsourcing arrangements (the Guidelines) for credit institutions and certain investment firms as well as payment and e-money institutions. The Guidelines amend and finalise previously published draft guidelines in light of extensive consultation responses from the industry and industry bodies. Therefore, the Guidelines are consistent with, and build upon, the previous Senior Management Arrangements, Systems and Controls Chapter 8 (SYSC 8) requirements (which now operate mostly as guidance rather than as requirements); however, they apply to a broader set of businesses than SYSC 8 – most noteworthy is the inclusion of payment and e-money institutions, which are not subject to SYSC 8.

In broad terms, the Guidelines provide more granular detail around requirements that relevant businesses must comply with when carrying out outsourcing (including in relation to internal processes and procedures), compared to the SYSC 8 requirements.

The Guidelines took effect on 30 September 2019 and have been adopted in the United Kingdom. All new outsourcing contracts entered into after this date should be compliant with the Guidelines, and relevant institutions are expected to review and update any internal processes and procedures to meet the Guidelines' requirements. Companies that did not finalise remediations of existing contracts by 31 March 2022 are obliged to inform the Financial Conduct Authority

(FCA), as the FCA confirmed that the original hard deadline set by the EBA of 31 December 2021 no longer applied in the United Kingdom. The Guidelines support the harmonisation of existing regulation and guidance applicable to different types of financial services firms.

The Prudential Regulation Authority (PRA) and FCA have also published supervisory statements (Statements) that build on the Guidelines and set out the PRA and FCA's expectations as to how UK firms will implement outsourcing regulation and manage outsourcing risks, as well as certain other material or high-risk third-party arrangements that are outside the scope of the Guidelines. The Statements make up part of the PRA and FCA's wider focus on operational resilience and aim to ensure firms have robust structures and processes in place to manage third-party risk.

Firms that are regulated by the PRA are expected to comply with the expectations in the PRA Statement by 31 March 2022, mirroring the deadline set by the FCA. These expectations are broadly in line with the Guidelines but expand the scope to certain third-party arrangements.

On 14 April 2021, the Bank of England published three consultation papers on the requirements that must be met for outsourcing and third-party arrangements for Financial Market Infrastructure (FMI) entities, which appears to extend the expectations under the PRA Statement to FMI entities. The consultation closes on 14 July 2022 and the final guidance is likely to be published within the coming year.

*Law stated - 19 July 2022*

## Cloud computing

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

There are no specific legal requirements in the United Kingdom regarding the use of cloud computing in the financial services industry. However, there does exist a body of guidance on the subject and a number of legal requirements that apply to indirectly regulate the use of cloud computing in financial services.

The primary legal requirements relevant to this question relate to the EBA Guidelines and other outsourcing requirements, which apply to financial services businesses when outsourcing material functions. In many different contexts, the use of cloud services will be of sufficiently significant importance to the business's operations to bring this requirement into scope and require the business to meet those outsourcing requirements in undertaking outsourcing. In particular, the European Securities and Markets Authority (ESMA) published guidelines on outsourcing to cloud service providers on 10 May 2021 (the ESMA Guidelines). The ESMA Guidelines are intended to ensure that firms and competent authorities identify, address, and monitor their cloud outsourcing arrangement risks. As with the EBA Guidelines, the ESMA Guidelines provide more granular detail around requirements that relevant businesses must comply with when carrying out outsourcing, with a particular focus on information security requirements in their internal policies, including the protection of confidential, personal, or otherwise sensitive data. The guidelines took effect from 31 July 2021 and apply to all cloud outsourcing arrangements entered into, renewed, or amended on or after this date, and firms should review and amend existing cloud outsourcing arrangements by 31 December 2022.

*Law stated - 19 July 2022*

## INTELLECTUAL PROPERTY RIGHTS

### IP protection for software

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 (see section 14(1) of the Copyright and Rights in Databases Regulations 1997 ). 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.

Programs for computers, and schemes, rules or methods of doing business 'as such', are expressly excluded from patentability under the Patents Act 1977 (PA 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. Registration formalities must be followed to obtain protection.

*Law stated - 19 July 2022*

## **IP developed by employees and contractors**

Who owns new intellectual property developed by an employee during the course of employment? Do the same rules apply to new intellectual property developed by contractors or consultants?

Copyright and database rights created by an employee in the course of their employment are automatically owned by the employer unless otherwise agreed (see section 11(2) of the Copyright, Designs and Patents Act 1988 ). 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 (section 39 of PA 1977).

However, copyright and inventions created by contractors or consultants in the course of their duties are owned by the contractor or consultant unless otherwise agreed upon 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.

*Law stated - 19 July 2022*

## **Joint ownership**

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 a 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 ). Each joint owner may assign their own interest, but consent is required for an assignment of the whole right. A joint copyright owner is also able to grant security over their interest.

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) of PA 1977). 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) of PA 1977).

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) of the Trade Marks Act 1994 (TMA 1994)), 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) of TMA 1994).

Given the variations in the rights and restrictions of joint owners, and given that the rights of joint owners also differ on a country-by-country basis, it is highly 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 earlier.

*Law stated - 19 July 2022*

## Trade secrets

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

Protection of trade secrets in the United Kingdom is regulated by the Trade Secrets (Enforcement, etc) Regulations 2018 (the Trade Secrets Regulations), which implemented the EU Trade Secrets Directive in the United Kingdom and came into force on 9 June 2018. Trade secrets are also protected by the law on breach of confidence, which provides broadly the same level of protection as is required under the Trade Secrets Directive. The Trade Secrets Regulations define what qualifies as a protectable trade secret, providing 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 (under the circumstances) by the holder of the information to keep it secret.

The Trade Secrets Regulations also implemented aspects of the Trade Secrets Directive that differed from, or added to, the existing law applying to the protection of confidential information. This includes specifying the limitation period for bringing a trade secrets claim and the rules regarding awarding damages and interim and corrective measures.

Confidential information (which may include non-public information that is not captured by the definition of 'trade secret') can be protected against misuse, provided the information in question has the necessary quality of confidence and is subject to an express or implied duty of confidence. In the case of both trade secrets and confidential information, no registration is necessary (or possible). Trade secrets and confidential information can be kept confidential during civil proceedings with the permission of the court.

*Law stated - 19 July 2022*

## Branding

What intellectual property rights are available to protect branding and how do you obtain those rights? How can fintech businesses ensure they do not infringe existing brands?

Brands can be protected as registered trademarks in the United Kingdom. Following Brexit, it is no longer possible to protect a brand in the United Kingdom via 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.

The UK database can all be searched to identify registered or applied for trademark rights with effect in the United Kingdom. It is highly advisable for fintech 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 the use of the proposed mark.

*Law stated - 19 July 2022*

## Remedies for infringement of IP

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.

*Law stated - 19 July 2022*

## COMPETITION

### Sector-specific issues

Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction?

Competition authorities in the United Kingdom (and elsewhere) face a range of potentially complex competition law issues in relation to fintech offerings. These include:

- the risks around the exchange of competitively sensitive information;
- the risks of a fintech firm or platform obtaining a dominant position in the market and any behaviour that could potentially exclude other market players;
- the development and participation in technical standards;
- exclusivity arrangements between parties to a fintech offering;
- the limits of any specified tying or bundling of products or services to the fintech solution; and

- issues around the anticompetitive use of algorithms and machine learning.

The Competition and Markets Authority (CMA), Financial Conduct Authority (FCA) and Payment Systems Regulator (all of which are concurrent competition law enforcement authorities in the United Kingdom) generally consider fintech to represent a pro-competitive force, leading to change in markets and encouraging innovation. For example, the FCA is an active participant in the Global Financial Innovation Network.

The CMA has been undertaking a number of initiatives to formulate its approach to the regulation of competition in the UK digital markets, with a view to focusing on the protection of the consumer. As well as undertaking an investigation into the retail banking market, seeking to implement open banking and improve the quality of the information provided to customers, the CMA has also taken advice from external experts, advocating a more involved approach to competition regulation. The CMA has been advised to perform more sophisticated analyses of digital mergers, consider the role of big data in creating barriers to entry, and take account of network effects to create more effective rules for large digital platforms (see the Furman and Lear reports for further information). As a result, the CMA issued 'The CMA's Digital Markets Strategy: June 2019', which is a vision for how it proposes to protect consumers in complex and rapidly-changing digital markets while continuing to protect innovation.

One concrete outcome of this has been the creation of a Digital Markets Taskforce, a dedicated unit with the role of monitoring developments in digital markets and advising the government on how best to approach them. In November 2020, the government announced the creation of a new unit, the Digital Markets Unit (DMU), housed in the CMA, which will focus on enforcing a new pro-competition regime covering online platforms with considerable market power.

The DMU was established within the CMA on 7 April 2021 to focus on operationalising and preparing for the new regulatory regime to be legislated.

On 9 March 2022, the government published its Plan for Digital Regulation, which aims to drive agile regulation, offering clarity and confidence to consumers and businesses. Regulation will be underpinned by three principles:

- actively promoting innovation,
- achieving forward-looking and coherent outcomes; and
- exploiting opportunities and addressing challenges in the international arena.

The Plan set out a timeline of strategy reviews and consultations that the government intended to undertake across three, six and 12 months including areas such as AI, cybersecurity, media literacy, innovation and national data.

In light of the above, there is proposed Digital Competition legislation that will soon be introduced to Parliament: the May 2022 Queen's Speech announced the government's plans to publish draft measures, and while this means a bill will not be introduced in the next parliamentary session (2022 to 2023), the government reconfirmed its intention to legislate as soon as parliamentary time allows. The intent of the legislation will be to designate firms that have strategic market status that will be subject to a mandatory code of conduct and pro-competitive interventions. This would formally also set up the DMU and set out its relevant powers and duties. Although it is operating to a degree since April 2021, its exact duties and the regime for which it will be monitoring compliance will be set out in the Digital Competition legislation.

The CMA has also taken an increasingly interventionist stance in UK merger cases. In part, this is probably a result of it having received more resources in preparation for Brexit; but also because of a growing feeling that it may have been missing transactions that have negatively impacted competition. This more interventionist approach has been present in all sectors to some extent, but it has been particularly noticeable in relation to fintech deals – a number of Phase II (in-depth) investigations have been related to transactions involving fintech players.

The future of fintech competition regulation will depend in some part on the UK's relationship with the EU post-Brexit.

The FCA has as one of its priorities the development of future bilateral arrangements with the European Union and the rest of the world to promote its expertise in fintech regulation.

*Law stated - 19 July 2022*

## TAX

### Incentives

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

The United Kingdom has introduced a wide range of tax incentives that are available to fintech companies and investors in such companies. 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 trading 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;
- business asset disposal relief (formerly 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 that allows other types of shareholders to benefit from the same relief as is provided under business asset disposal relief when they sell their shares. Unlike business asset disposal 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 individual savings account (ISA) eligibility: peer-to-peer (P2P) loans are eligible for inclusion in tax-free ISAs;
- tax relief for P2P bad debt: an income tax relief for irrecoverable P2P loans, or P2P bad debt; and
- P2P interest withholding tax exemption: P2P loan interest payments are exempt from UK withholding tax.

Subject to applicable lifetime limits, 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 (£10 million for knowledge-intensive companies) over 12 months from 'relevant investments', which includes investments under the SEIS and EIS and investments by VCTs. While financial activities are an excluded activity for the SEIS, EIS and VCT scheme, 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 assuming it meets the other conditions.

In addition, in 2021 the government published a Call for Evidence on the Enterprise Management Incentive (EMI) scheme, which allows small and medium-sized enterprise to offer tax advantages on the exercise of qualifying share options offered to employees as a form of remuneration. Under the scheme, EMI options can be offered to individual employees up to a value of £250,000 per employee in a three-year period. The total market value of unexercised qualifying share options a company may grant under EMI cannot exceed £3 million. To qualify for the EMI scheme, a company must, at the relevant time, have less than £30 million in gross assets, fewer than 250 full-time employees and

carry out a qualifying trade. In particular, the Call for Evidence will assess whether the government should expand the EMI scheme to support high-growth companies and how. Again, financial activities such as banking and insurance are excluded activities for the EMI scheme.

Following announcements made in the Autumn Budget 2021 and the 2022 Spring Statement, it is expected that from April 2023 qualifying expenditure for R&D tax relief will be expanded to include data and cloud costs and R&D supported by pure maths, though it will also be refocussed towards innovation carried out in the United Kingdom.

*Law stated - 19 July 2022*

## Increased tax burden

Are there any new or proposed tax laws or guidance that could significantly increase tax or administrative costs for fintech companies in your jurisdiction?

The headline rate of UK corporation tax is due to increase from 19 per cent to 25 per cent from April 2023.

The government continues its review of the UK funds regime that could result in wide-ranging changes to the tax and regulatory frameworks for investment funds in the United Kingdom. In addition, Budget 2020 announced a review of how financial services are treated for value added tax (VAT) purposes and the European Commission has also launched a similar review. Fintech companies are advised to keep an eye on what emerges from these reviews, given the potential impact on their tax position.

The digital services tax (DST) was introduced on 1 April 2020 following a government consultation. This 2 per cent tax applies to the revenues of search engines, social media services and online marketplaces, which derive value from UK users. The DST applies where a group's worldwide revenue from digital activities is more than £500 million and more than £25 million of the revenue is derived from the United Kingdom. As such, the tax is expected to impact a small number of large multinationals. Financial services providers are excluded from the online market places definition, meaning fintech companies should generally fall out of the scope of this tax. However, where there are unified platforms with social media, marketplace and search engine elements and the threshold conditions are met, then fintech companies could fall in scope for revenue from the social media and search engine income streams. It is expected that the UK DST will be replaced in the longer term by the introduction of multinational rules based on Organisation for Economic Co-operation and Development (OECD) Pillar One.

From April 2022, the government introduced rules requiring large businesses to notify HM Revenue and Customs when they take a tax filing position in relation to VAT, corporation tax or income tax (including pay as you earn) that is uncertain, based on a number of triggers and subject to a de minimis of £5 million. The rules apply to businesses with a turnover above £200 million or a balance sheet totalling over £2 billion.

The government is also consulting in a number of other areas that may impact fintech businesses, including:

- how decentralised finance loans – where holders of cryptoassets lend them out for a return – are treated for tax purposes; and
- expanding the investment manager exemption to cryptoassets, using the proposed OECD definition as a starting point, thus enabling the exemption to cover not just cryptocurrencies, but targeting the definition at digital assets held by way of investments more generally.

*Law stated - 19 July 2022*

## IMMIGRATION

## Sector-specific schemes

What immigration schemes are available for fintech businesses to recruit skilled staff from abroad? Are there any special regimes specific to the technology or financial sectors?

All non-UK nationals, save for Irish nationals, now need permission to work in the United Kingdom.

The Skilled Worker visa (formerly Tier 2) is most relevant. A candidate needs an offer from a licensed sponsor and the role must meet minimum skill and salary criteria. A lower salary may be paid where the worker is under 26, has a relevant PhD or science, technology, engineering and mathematics PhD or the role is a specified shortage occupation. IT business analysts, architects and system designers, programmers and software development professionals and cyber security specialists are currently shortage occupations but finance roles are not.

Licensed sponsors with linked overseas entities, may use the new Global Business Mobility (GBM) route, including the Senior and Specialist Worker category (formerly Tier 2 Intra-Company Transfer). The minimum skill and salary levels for the UK role are higher than for a Skilled Worker and the worker must have at least 12 months of service with the linked overseas employer unless they are a high earner.

The GBM Secondment Worker route is for those being seconded to the United Kingdom as part of a high-value contract or investment by their overseas employer. However, there are stringent financial thresholds that will limit the use of this route.

The GBM UK Expansion Worker route is the new route for those looking to set up a company in the United Kingdom. It can only be used by businesses that are not yet trading in the United Kingdom and requires the worker to be sponsored by a branch or wholly owned subsidiary of an established overseas business. The same minimum skill and salary criteria and overseas employment criteria apply as for the GBM Senior and Specialist Worker route.

Founders of an innovative scalable company in the United Kingdom may be eligible for a Start-Up visa subject to endorsement from a UK higher education institution or an organisation with a history of supporting UK entrepreneurs. An Innovator visa is an option for those seeking to establish a new business in the United Kingdom with at least £50,000 of funds available for investment and subject to endorsement from a UK-authorized endorsing body. A Global Talent visa (Digital Technology) is an option where an individual has technical or business skills in the digital technology sector and is endorsed as a leader in their field by Tech Nation.

The new High Potential Individual visa, reminiscent of the Tier 1 (General) visa is for recent graduates from institutions named on the UK Visas and Immigration Global Universities List. Crucially, no sponsorship is required, applicants do not need to have a job offer and can work in any capacity. This route is therefore particularly useful for employers who do not yet have a sponsor licence. For other graduates, there is the Graduate visa. Students, sponsored by a UK institution, who have completed a UK degree or other eligible course may apply. The employer does not need to sponsor the individual and they can work in any role.

*Law stated - 19 July 2022*

## UPDATE AND TRENDS

### Current developments

Are there any other current developments or emerging trends to note?

The authorities in the United Kingdom continue to develop their approach to the regulation of fintech businesses. Over the next 12 months, the UK legislative and regulatory authorities are expected to focus considerable attention on the regulation of cryptoassets and enforce new measures intended to encourage regulated firms to focus more on the

impact of their activities on consumers (Consumer Duty).

In May 2022, The Financial Conduct Authority (FCA) and the Bank of England (BoE) published their latest regulatory grid to help financial firms prepare for upcoming regulatory work planned by the UK's legislative and regulatory bodies, including the government, FCA, BoE, Competition and Markets Authority and the Payment Services Regulator. Upcoming regulatory developments relevant to the fintech sector include:

- the coming into force of the new Consumer Duty, which will apply to all regulated firms who either face retail clients or customers directly or manufacture products for such customers (including digital banks, robo-advisors and insurers as well as payments, electronic money and crypto firms) in August 2022, with the deadline for compliance being April 2023 (subject to any extensions);
- publication of the policy statement clarifying how the government intends to implement its proposal to bring certain cryptoassets into the scope of financial promotions regulation;
- the implementation of the new legislation announced by the government in April 2022 to bring certain stablecoins (specifically payment cryptoassets) within the UK regulatory perimeter;
- further consultation by the BoE on the potential introduction of a UK central bank digital currency, building on the paper published by the BoE on 24 March 2022 with the responses it received to its Discussion Paper on new forms of digital money;
- the launch of a new Financial Markets Infrastructure Sandbox to support firms wishing to use new technology such as distributed ledger technology to provide infrastructure services to the financial markets;
- an expected consultation on the proposed secondary legislation to bring buy-now-pay-later (or deferred) credit within the regulatory perimeter. The new legislation is expected to be introduced in 2023;
- a response to the consultation on the opportunities and risks arising from open finance and the FCA's role in ensuring that it develops in the best interests of consumers;
- publication of further measures to help prevent authorised push payment scams and the reimbursement regime for such scams;
- a consultation on reforming the BoE's regulatory perimeter governing systemic payments firms;
- publication of a joint discussion paper by the FCA, BoE and the Prudential Regulation Authority on the oversight of Critical Third Parties (CTPs), which will inform future regulatory proposals relating to CTPs in technically complex areas, such as resilience testing;
- publication of a consultation paper on incident and outsourcing reporting arrangements;
- collaboration with the Information Commissioner's Office Innovation Hub (the innovation support programme led by the UK data privacy regulator, the Information Commissioner's Office) to provide bespoke data protection by design support for firms accepted into the FCA's Innovation Pathways function, and Regulatory Sandbox;
- a new survey on the use of machine learning in UK financial services (rerunning a 2019 survey); and
- publication of a joint discussion paper by the FCA and BoE on artificial intelligence building on the work of the Artificial Intelligence Public-Private Forum.

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*Law stated - 19 July 2022*

## Jurisdictions

	<b>Belgium</b>	Simmons & Simmons
	<b>Canada</b>	Stikeman Elliott LLP
	<b>China</b>	Simmons & Simmons
	<b>Denmark</b>	Plesner Advokatpartnerselskab
	<b>Egypt</b>	Soliman, Hashish & Partners
	<b>France</b>	Kramer Levin Naftalis & Frankel LLP
	<b>Germany</b>	Simmons & Simmons
	<b>Hong Kong</b>	Simmons & Simmons
	<b>Indonesia</b>	SSEK Legal Consultants
	<b>Ireland</b>	Matheson
	<b>Japan</b>	Anderson Mōri & Tomotsune
	<b>Malta</b>	Ganado Advocates
	<b>Netherlands</b>	Simmons & Simmons
	<b>Nigeria</b>	Perchstone & Graeys
	<b>Singapore</b>	Simmons & Simmons
	<b>South Korea</b>	Bae, Kim & Lee LLC
	<b>Spain</b>	Simmons & Simmons
	<b>Sweden</b>	Vinge
	<b>Switzerland</b>	Homburger
	<b>Taiwan</b>	Lee and Li Attorneys at Law
	<b>Turkey</b>	SRP Legal
	<b>United Arab Emirates</b>	Simmons & Simmons
	<b>United Kingdom</b>	Simmons & Simmons
	<b>USA</b>	Seward & Kissel LLP
	<b>Vietnam</b>	YKVN