

FINTECH

Netherlands



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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FINTECH LANDSCAPE AND INITIATIVES

General innovation climate

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

Fintech innovation in the Netherlands continues to develop. There has been a high level of activity in the fields of artificial intelligence, machine learning, blockchain, mobile and advanced analytics. The Dutch market is also adopting other innovations such as open banking (as a result of PSD2). Generally, diversification in the Dutch financial services sector is increasing as new entrants enter the market and incumbents (such as large Dutch banks) progress their own fintech initiatives.

In addition, despite the additional administrative and compliance costs of the Dutch registration regime for certain crypto service providers that has applied since May 2021, many large (and smaller) crypto service providers seem keen to enter and provide their services to the Dutch market.

Law stated - 31 May 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 2016, the Dutch Authority for the Financial Markets (AFM) and the Dutch Central Bank (DNB) set up the InnovationHub to provide new and existing firms with support in answering queries related to the regulation of innovative financial products and services. Within the InnovationHub, the AFM and DNB cooperate with the Dutch Authority for Consumers and Markets (ACM). The InnovationHub aims to offer easy access to supervisors and regulators for companies that provide innovative services or products, remove any unnecessary barriers to entry, gain more insight into the rapidly developing technological innovation within the financial sector, and improve knowledge, sharing and dialogue with all relevant stakeholders. The InnovationHub enables fintech companies to obtain a temporary banking licence, among other things.

The AFM and DNB have also set up the 'Regulatory Sandbox' for fintech companies to test and develop new products. If certain criteria are met, the Regulatory Sandbox can provide bespoke solutions for financial services companies that cannot reasonably meet specific policies, rules or regulations when marketing an innovative product, service or business model, but that do meet the underlying rationale of these policies, rules or regulations.

DNB also periodically organises the seminar 'Fintech meets the Regulator', during which relevant market participants and DNB share thoughts on current developments.

Additionally, in November 2019, DNB launched the iForum, a platform for joint initiatives intending to create value for the Dutch sector and DNB. Via the iForum, the Dutch sector and DNB can have a dialogue on the impact of technological innovations on the sector and develop joint pilots and experiments.

Furthermore, in April 2020, DNB stated that it has a favourable attitude towards central bank digital currency (CBDC). CBDC is money issued by a central bank and generally accessible to households and business. Therefore, DNB does not only support financial innovation, but also intends to play a leading role in certain financial innovation, such as the development of CBDC.

In October 2021, the ACM, the AFM, the Dutch Data Protection Authority (AP) and the Dutch Media Authority (CvdM) established the 'Digital Regulation Cooperation Platform' (SDT). The SDT wishes to gain more insight on the online use of personal data by algorithms, among other things, and will coordinate how to enforce (new) European rules and regulations on digitalisation. For example, this includes new rules and regulations on dealing with large technology

companies, the data economy and the platform economy (such as the Digital Services Act, the Digital Markets Act, the Data Governance Act, and the Artificial Intelligence Act).

There are no formal arrangements with foreign regulators that relate specifically to fintech companies. However, both the AFM and DNB maintain contact with other regulators in the Netherlands (such as the ACM, the AP and the CvdM), the EU and globally (such as the International Organization of Securities Commissions).

Law stated - 31 May 2022

FINANCIAL REGULATION

Regulatory bodies

Which bodies regulate the provision of fintech products and services?

There is no specific regulatory framework applicable to the provision of fintech products and services, besides the registration regime for certain crypto service providers. Such crypto-service providers are supervised by the Dutch Central Bank (DNB).

As such, depending on the nature and scope of products and services offered, the Dutch Authority for the Financial Markets (AFM) and DNB supervise compliance with conduct of business rules and prudential requirements respectively.

Law stated - 31 May 2022

Regulated activities

Which activities trigger a licensing requirement in your jurisdiction?

Depending on the nature and scope of services offered, licensing requirements under the Dutch Financial Supervision Act (FSA) and secondary legislation may apply.

The following activities are regulated under the FSA.

- Deposit-taking and extension of credit for one's own account: credit institutions (ie, institutions that attract repayable funds from the public in the Netherlands and that extend credit for own account) require a banking licence.
- Consumer lending: the extension of credit to consumers (natural persons acting outside their business or profession) requires a licence.
- Factoring, to the extent this would constitute consumer lending.
- Invoice discounting, to the extent this would constitute consumer lending.
- Payment services: all institutions carrying out payment services as described in the Annex to the Revised Payment Services Directive (PSD2), require a licence. A licence to act as a credit institution may also cover carrying out payment services.
- Investment services: a financial institution is required to have a licence if it intends to provide investment services. These can be split into the following services, carried out in pursuit of a business or profession:
 - Investment activities: a financial institution is required to have a licence if it intends to perform an investment activity. Investment activities can be split into three activities:
 - Clearing and settlement: acting as a clearing and settlement institution requires a licence.



- Secondary market loan trading.

The registration regime for certain crypto service providers follows from the Dutch Money Laundering and Terrorist Financing (Prevention) Act. This regime only applies to crypto service providers that provide exchange services between fiat currencies and virtual currencies and/or provide custodian wallet services for virtual currencies.

Law stated - 31 May 2022

Consumer lending

Is consumer lending regulated in your jurisdiction?

Under the FSA, consumer lending requires a licence and is considered a financial product. Advising a consumer on a financial product or providing intermediary services in relation to such a financial product is only permitted if the institution has obtained a licence from the AFM. Financial institutions may be exempted if they have another licence that permits consumer lending or advising consumers on financial products.

Before entering a loan agreement with a consumer, the financial institution must provide the consumer with relevant information relating to the financial product, so that the consumer is able to properly assess the product. In addition, credit assessment rules exist to prevent consumer over-indebtedness. These rules are part of the overarching requirement that lenders exercise due care when providing these services.

Law stated - 31 May 2022

Secondary market loan trading

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

Secondary market loan trading is only a regulated activity where it constitutes consumer lending.

Law stated - 31 May 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.

In the FSA, collective investment schemes can be an alternative investment fund, as defined in the Alternative Investment Fund Managers Directive (AIFMD), or an undertaking for collective investment in transferable securities, as defined in the Undertakings for Collective Investment in Transferable Securities Directive (UCITS).

Under the AIFMD, an alternative investment fund is a vehicle with or without legal personality, which raises capital from investors with a view to investing it in accordance with a defined investment policy for the benefit of those investors. The AFM has confirmed that firms offering units in funds that invest in cryptocurrencies require a licence as an AIFM.

Whether a fintech company qualifies as a collective investment scheme depends on the exact nature of its business. For example, fintech companies that manage assets on a pooled basis on behalf of investors should give particular consideration as to whether they qualify as a collective investment scheme. On the other hand, fintech companies that provide advice or payment services may be less likely to constitute a collective investment scheme. Peer-to-peer lenders, marketplace lenders or crowdfunding platforms could potentially fall within the scope of the AIFMD, to the extent they would qualify as (managers of) collective investment schemes.

Alternative investment funds

Are managers of alternative investment funds regulated?

Yes. Managers of alternative investment funds are regulated under the AIFMD, which has been implemented in the FSA.

Law stated - 31 May 2022

Peer-to-peer and marketplace lending

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

There is no specific regulation of peer-to-peer (P2P) or marketplace lending in the Netherlands. However, this activity might constitute a regulated activity under the FSA. For instance, if a platform facilitating P2P lending receives and transmits orders in financial instruments, it may be subject to a licensing obligation as an investment firm.

Law stated - 31 May 2022

Crowdfunding

Describe any specific regulation of crowdfunding in your jurisdiction.

As of 10 November 2021, the EU Crowdfunding Regulation applies. Among other things, this Regulation introduced a licensing regime for crowdfunding service providers (CSPs) that (1) facilitate granting of loans (excluding consumer credit) (loan-based crowdfunding); or (2) place without a firm commitment basis transferable securities and instruments issued by project owners or SPVs, and receive and transmit orders for crowdfunding purposes (equity-based crowdfunding). However, if crowdfunding offers made by a particular project owner exceed €5 million over a period of 12 months, then the licensing regime for investment firms under MiFID II applies instead.

CSPs that were permitted to provide crowdfunding services in the Netherlands before 10 November 2021 can avail themselves of a transitional regime under which they are permitted to continue doing so until 10 November 2022. After this date, they require a licence from the AFM under the EU Crowdfunding Regulation. Only existing CSPs that submitted a licence application with the AFM by 10 May 2022 at the latest can avail themselves of this transitional regime.

Law stated - 31 May 2022

Invoice trading

Describe any specific regulation of invoice trading in your jurisdiction.

There is no specific regulation of invoice trading in the Netherlands. However, depending on the exact services provided and the status of the parties involved, invoice trading may lead to either party qualifying as an intermediary of consumer credit or may amount to the extension of consumer credit.

Law stated - 31 May 2022

Payment services

Are payment services regulated in your jurisdiction?

Yes. In the Netherlands, payment services are regulated on the basis of PSD2, which has been implemented in the FSA. A licence is required to carry out all payment services listed in the Annex to PSD2. Payment services include:

- services enabling cash to be placed on a payment account or cash withdrawals from a payment account and all the operations required for operating a payment account;
- the execution of the following types of payment transactions:
- the execution of the following types of payment transactions 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 to provide consolidated information on one or more payment accounts held by the payment service user with another one (or more) payment service provider).

Law stated - 31 May 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?

The implementation in the FSA of the access-to-account rules, as included in the PSD2, requires financial institutions to provide access to the payment accounts of clients to payment initiation service providers and account information service providers. In general, data protection and privacy regulations should be considered prior to making client data available to third parties.

Law stated - 31 May 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.

Currently, there is no specific regulatory framework for robo-advisers in the Netherlands.

As such, there is no legal distinction between robo-advice and traditional investment advice in the Netherlands. Therefore, companies providing robo-advice must – in principle – fulfil the same legal requirements as companies providing traditional investment advice.

However, the AFM has issued two documents relating to robo-advice:

- the AFM's view on robo-advice, in which the AFM discusses the duty of care and points of attention specifically in relation to robo-advice on mortgage loans and occupational disability insurance (but also in relation to other high-impact financial products). In general, the AFM states that while robo-advice could be an opportunity to improve both access and the quality of investment advice, there are also specific points of attention to consider,

including:



- guidelines for (semi)-automated portfolio management, in which the AFM provides guidance regarding the (technique-neutral) duty of care of asset managers who offer semi-automatic investment advice and portfolio management. These guidelines are not legally binding but they do bring clarity for asset managers. The guidelines are aligned with Dutch law, MiFID II and suitability guidelines published by the European Securities and Markets Authority (ESMA) and set out, among other things, guidance on safety and the provision of information.

Additionally, on 1 July 2020, Dutch draft legislation on automated advice was published as part of a publication consultation. This legislation aims to introduce safeguards to ensure adequate provision of automated advice. In this context, the legislation:

- applies competence requirements to automated advice;
- requires that two individuals are responsible for the automated system and advice; and
- imposes rules on controls and systems.

This legislation targets automated advice on financial products in general and was submitted to Parliament in November 2021.

At this moment, there is no specific regulation of other companies that provides retail customers with automated access to investment products in the Netherlands. There is no legal distinction between companies providing automated access to investment products and companies that offer investment products in a traditional way.

Law stated - 31 May 2022

Insurance products

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

Yes. The sale of insurance products is regulated under the FSA and requires a licence.

Law stated - 31 May 2022

Credit references

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

The rules on credit rating agencies laid down in Regulation (EC) No. 1060/2009 on credit rating agencies (as amended) apply in the Netherlands. A credit rating agency is required to adopt, implement and enforce adequate measures to ensure that the credit ratings it issues are based on a thorough analysis of all the information that is available to it and is relevant to its analysis according to its rating methodologies.

Law stated - 31 May 2022

CROSS-BORDER REGULATION

Passporting

Can regulated activities be passported into your jurisdiction?

An EEA firm that has been authorised under one of the EU single market directives (the Capital Requirements Directive, Solvency II, the Markets in Financial Instruments Directive II, the Insurance Distribution Directive, the Mortgage Credit Directive, the Undertakings for Collective Investment in Transferable Securities Directive, the Alternative Investment Fund Managers Directive and the Revised Payment Services Directive) may, in principle, provide cross-border services into or establish a branch in the Netherlands. To exercise this right, in general, the firm must first provide notice to its home state regulator. The relevant directive under which the EEA firm is seeking to exercise its passporting rights as implemented in the Dutch Financial Supervision Act (FSA) will determine the conditions and processes that the EEA firm must follow. Crypto service providers registered elsewhere in the EEA for the provision of exchange services between virtual and fiat currencies, and custodian wallet services cannot passport their services into the Netherlands.

Law stated - 31 May 2022

Requirement for a local presence

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

To obtain a licence for any of the activities regulated pursuant to the FSA, in general, a local presence must be established, unless a firm can benefit from a European passport.

Law stated - 31 May 2022

SALES AND MARKETING

Restrictions

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

Depending on the regulatory status of the financial institution, different marketing rules may apply, including clientele restrictions. Advice should be sought on the specific circumstances of any particular case.

The Dutch Financial Supervision Act states that, in general, relevant marketing activities:

- must be correct, clear and not misleading;
- must be recognisable as being of a commercial nature (where applicable); and
- may not contradict the information that is required to be made available pursuant to the Dutch Financial Supervision Act.

In addition, specific rules apply depending on the type of product offered or service provided and, in some cases, also on the type of client targeted. Some of these are summarised below.

Marketing materials for complex products (eg, participation rights in an open-ended collective investment scheme and investment objects) should include a risk indicator as prescribed by the Further Regulation on Conduct of Business Supervision of Financial Undertakings (the Further Regulation).

Marketing materials for credit offerings to consumers that refer to debit interest rates or other information regarding

costs should include (at a minimum) information regarding floating or fixed interest rates and other costs that form part of the total costs of the credit for the consumer, the total credit amount, the yearly cost percentage, identity and address of the provider or intermediary, and certain other information depending on the type of credit, all as prescribed in the Decree on Conduct of Business Supervision of Financial Undertakings. In addition, certain risk warnings are prescribed and certain prohibitions apply, such as the prohibition on including any references to the speed or ease with which the credit may be obtained.

For products other than complex products, general marketing rules included in the Further Regulation apply, including the obligation to include a warning that the value of an investment may fluctuate and that historical returns offer no guarantee for the future.

Depending on the medium used for marketing (print, TV, radio or internet) further rules apply, such as the relevant information to be included at a minimum (ie, the name of the provider, the regulatory status of provider, and where and how further information relating to the product or service can be obtained). Specific marketing rules have been introduced to facilitate marketing on social media. Furthermore, the Dutch Authority for the Financial Markets has imposed a ban on the selling, marketing or distribution of binary options to retail clients. It has also imposed restrictions with respect to the selling, marketing and distributing of contracts for differences to retail clients and turbos to retail clients (with respect to turbos, among others a leverage cap for such products with crypto as an underlying is imposed).

Law stated - 31 May 2022

CHANGE OF CONTROL

Notification and consent

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

If a qualifying holding (at least 10 per cent of the shares or voting rights, or both) is obtained in certain Dutch financial firms (such as settlement institutions, banks, managers of UCITS, investment firms, entities for risk acceptance, premium pension institutions, insurers, reinsurers, payment service providers and electronic money institutions), prior approval by the Dutch Central Bank (DNB) is required. In specific cases, increases of qualifying holdings above certain thresholds are also notifiable to or subject to approval from DNB. This also applies to any qualifying holdings in Dutch registered crypto service providers.

Law stated - 31 May 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?

There is no general framework under which fintech companies are required to have in place procedures to combat bribery or money laundering. However, as of 21 May 2020, certain crypto service providers fall with scope of the Money Laundering and Terrorist Financing (Prevention) Act .

This concerns companies, legal entities or natural persons that provide:

- services for the exchange between virtual and fiat currencies; and

- services offering custodian wallets (ie, services to safeguard private cryptographic keys on behalf of customers; consequently, 'soft wallets' do not fall within the scope).

These crypto service providers are required to register with the Dutch Central Bank (DNB), to the extent they provide exchange services between virtual and fiat currency or custodian wallet services 'in or from the Netherlands'. A crypto service provider is providing services 'in the Netherlands' if it has directed its activities to the Dutch market (eg, marketing, use of Dutch language, etc). Non-EEA crypto service providers are currently not eligible for registration. Requirements for such registration include (but are not limited to) having in place an adequate integrity policy to ensure ethical operation management. In this policy, an analysis of integrity risks, compliance with the Sanctions Act, transaction monitoring, reporting of unusual transactions to the Financial Intelligence Unit-Netherlands and customer due diligence must be covered. Furthermore, DNB applies a 'wallet verification requirement' in relation to incoming and outgoing transactions.

Other requirements for registration include, among others, that:

- the policymakers of crypto service providers are trustworthy and suitable; and
- the (directors of) holders of a qualifying holding in (at least 10 per cent of the shares or voting rights, or both) and ultimate beneficial owners of crypto service providers are trustworthy.

Law stated - 31 May 2022

Guidance

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

There is no regulatory or industry anti-financial crime guidance specifically for fintech companies. However, the Dutch Authority for the Financial Markets (AFM) and DNB have set up the InnovationHub to support market operators, such as fintech companies. Furthermore, DNB has published a brochure entitled 'Good practices fighting corruption' and the DNB website provides answers to questions regarding DNB's integrity supervision of crypto service providers. As regards anti-money laundering and combating financing of terrorism, DNB issued a comprehensive guidance in December 2020 titled 'Guideline on the Anti-Money Laundering and Anti-Terrorist Financing Act and the Sanctions Act' which also relates to trade sanctions.

In addition to the InnovationHub, the 'Regulatory Sandbox' was launched in 2017 by DNB and the AFM. While the InnovationHub is meant to facilitate fintech start-ups with qualifying their contemplated business model and assessing the applicability of financial regulatory laws on such business model, the Regulatory Sandbox is supposed to go a step further. The Regulatory Sandbox was created to further facilitate innovation and to enable enterprises to launch their innovative financial products without any hinderance. The Regulatory Sandbox enables fintech companies to discuss a customised approach if they experience disproportionate regulatory obstacles. In the Regulatory Sandbox, applicants can seek the assessment of the relevant regulator to assess whether innovative concepts comply with the underlying purposes of the applicable financial market regulations rather than the letter of the law, hereby creating a dialogue between a business and its applicable regulator.

After the success of the Regulatory Sandbox, DNB created an innovation forum with the name iForum. The iForum can be categorised as a hub for joint initiatives that create value for both DNB and supervised institutions, such as banks, insurers and pension funds.

Law stated - 31 May 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?

Loan agreements are not restricted to a certain form and can therefore be entered into and executed electronically. To create a security right (ie, a right of pledge or mortgage) a deed is required, which has to be in writing. Dutch law distinguishes between authentic deeds, which require the involvement of a civil law notary (and can therefore not be executed in electronic form), and private deeds (which will need to be disclosed to the relevant parties or be registered with the Dutch Tax Authority).

A private deed can be executed electronically provided its contents are stored for future reference during a minimum relevant period (depending on the nature of the deed) in such a way that they can be reproduced without alteration. For example, a deed of pledge can be executed electronically provided that the pledgee can store the deed during the duration of the loan agreement for which the pledge was issued. In addition, the deed still needs to be printed as the Dutch Tax Authority does not accept electronic copies of a deed.

An electronic deed will require an electronic signature. An electronic signature can constitute proof of the intention of the signatory to agree with the contents of a certain document in the same way a written signature does if the method used to authenticate the electronic signature is sufficiently reliable. The Dutch courts assess the reliability of this method in view of all the circumstances of the relevant case.

There is no specific risk that loan agreements or security agreements will not be enforceable when entered into on a P2P or marketplace lending platform.

Law stated - 31 May 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?

Under Dutch law, there is a distinction between the transfer of loans (ie, the receivables and the liabilities under a loan) and the sole assignment of receivables under the loans. As securitisations require that only the receivable is assigned, only the assignment of receivables is discussed here.

Assignment always requires that: (1) the receivable is transferable; (2) the seller holds legal title to the receivable; (3) there is a valid title for the assignment (an agreement usually); and (4) the receivable is delivered. Delivery can be perfected by way of an undisclosed assignment or disclosed assignment.

An undisclosed assignment requires an executed deed, either in notarial form or in private form, to be registered with the Dutch Tax Authority. Perfection takes place the moment the deed is executed by the notary or at the time of registration with the Dutch Tax Authority. Receivables may only be transferred by way of undisclosed assignment if they: (1) exist at the date of registration or execution of the deed of assignment; or (2) are future receivables directly resulting from a legal relationship existing at the date of assignment.

A disclosed assignment requires that notification of the assignment is given to the debtor.

If the (delivery of the) assignment is not perfected, the receivable has not been successfully assigned to the assignee. If the seller becomes insolvent before all conditions for the assignment have been perfected, the receivables can no longer be assigned and the insolvent seller remains the owner.

Until notification of the assignment, borrowers can only validly pay to the assignor in order to validly discharge their payment obligations, and payments made prior to notification of the assignment but after the assignor has been declared insolvent will fall in the estate of the assignor.

Assignment of receivables does not require the consent of the borrower or informing the borrower. Assignment of receivables only requires notification to the borrower in the case of a disclosed assignment. A contractual non-assignment clause may prevent the transfer of receivables, depending on the exact wording of the clause.

Law stated - 31 May 2022

Securitisation risk retention requirements

Are securitisation transactions subject to risk retention requirements?

The risk retention rules as set out in the EU Securitisation Regulation apply to P2P securitisations that are offered to European banks, investment firms, alternative investment funds or insurers. Under these risk retention rules, certain investors (such as credit institutions, Markets in Financial Instruments Directive-regulated firms and alternative investment fund managers) are subject to higher regulatory capital charges where they invest in securitisation positions that do not comply with the risk retention rules. Those rules require that either the sponsor, originator or original lender in respect of the securitisation explicitly discloses to the investor that it will retain, on an ongoing basis, a material net economic interest in the securitisation (which in any event is not less than 5 per cent) using one of five prescribed retention methods. Those methods include (among others) retention of:

- the most subordinated tranche or 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.

Definitions of 'sponsor', 'originator' and 'original lender' are set out in the EU Securitisation Regulation. Furthermore, there is a direct requirement on the sponsor, originator and original lender to agree on an entity that will act as retention holder and to ensure compliance with the retention requirement. In the absence of agreement as to who will be the retention holder, the originator shall be the retention holder.

The EU Securitisation Regulation does not explicitly set out the jurisdictional scope of the 'direct' retention obligation, but there is a helpful note in the Explanatory Memorandum to the European Commission's original proposal for the EU Securitisation Regulation that the intention is that the 'direct' approach does not apply to securitisations (including P2P securitisations) where none of the originator, sponsor or original lender is 'established in the EU'. The European Banking Authority (EBA) has stated that the 'direct' obligation applies only to originators, sponsors and original lenders established in the EU as suggested by the Commission in the explanatory memorandum.

'Establishment' is typically described by reference to the jurisdiction in which the legal entity is incorporated or has its registered office. Therefore, the non-EU subsidiary of an EU entity may not be subject to the 'direct' retention obligation because a subsidiary is typically a separate legal entity, whereas a non-EU branch of an EU entity may be caught within this provision because a branch is typically not a separate legal entity. Market participants are still seeking clarity on this and it is expected that this point will be raised as part of the ongoing EBA consultation on risk retention.

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?

Yes, a special purpose vehicle that is based in the Netherlands will fall under the scope of these laws if it processes personal data in relation to activities in the Netherlands.

Law stated - 31 May 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?

Currently, there is no specific regulatory framework for the use of artificial intelligence (AI). However, on 21 April 2021, the European Commission published a draft Regulation on the use of AI. The purpose of this Regulation is to lay down rules for the development, marketing and use of AI.

Furthermore, at the moment there is no specific regulation on automated investment advice. However, the Dutch Authority for the Financial Markets (AFM) has issued guidelines regarding the duty of care of asset managers who offer semi-automatic portfolio management (and investment advice). These guidelines are not legally binding but they do bring clarity for asset managers. The guidelines are aligned with Dutch law, MiFID II and suitability guidelines published by the European Securities and Markets Authority (ESMA) and set out, among other things, guidance on safety and the provision of information.

The AFM has published its views on robo-advice more generally, stating that while robo-advice could be an opportunity to improve both access and the quality of investment advice, there are also specific points of attention to consider.

However, on 1 July 2020, Dutch draft legislation on automated advice was published as part of a publication consultation. This legislation aims to introduce safeguards in order to ensure adequate provision of automated advice. In this context, the legislation:

- applies competence requirements to automated advice;
- requires that two individuals are responsible for the automated system and advice; and
- imposes rules on controls and systems.

This legislation targets automated advising on financial products in general and was submitted to Parliament in November 2021.

Law stated - 31 May 2022

Distributed ledger technology

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

Other than the General Data Protection Regulation, currently no specific rules or regulations apply that govern the use of distributed ledger technology (DLT) or blockchain. The use of DLT is subject to the existing regulatory legislation depending on its application in any particular case. DLT is a subject that has led to many questions in the InnovationHub.

However, as of 23 March 2023, the EU Regulation on a pilot regime for infrastructures based on DLT will apply. This Regulation aims to lay down requirements on multilateral trading facilities and securities settlement systems using DLT.

Law stated - 31 May 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)?

The Dutch Central Bank (DNB) and the AFM have stated that digital currencies do not constitute a financial product (such as e-money or a financial instrument) and do not qualify as legal tender. Therefore, in principle, the Dutch Financial Supervision Act (FSA) does not apply to digital currencies.

However, digital currencies may fall within the scope of the FSA on the basis of activities provided in relation to these currencies. For example, this would be the case when the holder of a digital wallet is able to convert its digital currency holdings into cash holdings held with the crypto service provider.

Furthermore, depending on the structure and the specific characteristics of the digital currency or digital wallet, the relevant services could be considered to constitute payment services or services provided by electronic money institutions. In these circumstances, unless an exemption applies, the relevant activities trigger a licence requirement and certain prudential and conduct-of-business rules will apply.

Additionally, crypto service providers that provide exchange services between virtual and fiat currency or custodian wallet services in or from the Netherlands are required to register with DNB.

On 24 September 2020, the European Commission published a draft Markets on Crypto-assets (MiCa) Regulation. Under the MiCa Regulation, currently out-of-scope assets and service providers will be regulated. Under this MiCa Regulation, crypto-assets are categorised as utility tokens, asset-referenced tokens or e-money tokens. This categorisation also covers stablecoins. Crypto-assets that are currently regulated (for example as financial instrument or e-money) will not fall within scope of the MiCa Regulation.

Furthermore, the MiCA Regulation will regulate certain crypto-asset services, including:

- custody services;
- the operation of a crypto trading platform;
- the operation of a crypto exchange;
- crypto-to-crypto transactions;
- the execution of client orders in crypto-assets;
- placing of crypto-assets;
- the transfer of crypto-assets;
- the receipt and transmission of client orders in crypto-assets;
- providing advice on crypto-assets;
- the exchange of crypto-assets for financial instruments; and

- the provision of portfolio management on crypto-assets

Among other things, the MiCa Regulation introduces a licensing regime for crypto asset service providers (CASPs) and issuers of crypto-assets. Furthermore, issuers of crypto-assets will be required to publish a White Paper setting out the core information on these crypto-assets.

In March 2022, the European Parliament published the latest draft of the MiCa Regulation. It is the expectation that the MiCa Regulation will enter into force not later than by 2024.

Law stated - 31 May 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?

DNB and the AFM have stated that digital currencies do not constitute a financial product (such as e-money or a financial instrument) and do not qualify as legal tender. Therefore, in principle, the FSA does not apply to digital currencies. However, digital currencies may fall within scope of the FSA on the basis of activities provided in relation to these currencies.

Furthermore, crypto service providers that provide exchange services between virtual and fiat currency (for example by operating a crypto exchange) in or from the Netherlands are required to register with DNB. Additionally, digital currency exchanges, crypto-brokers and issuers may fall within scope of the future MiCa Regulation.

Law stated - 31 May 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 General Data Protection Regulation (GDPR) came into force with direct effect across the entire EU. It 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 six lawful bases for processing. The most commonly used lawful basis for processing (outside an employment relationship) is 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 on what their personal data is being used for, which is a crucial change to the previous regime under which disclosure did not need to be so transparent. Other lawful bases for processing data (and commonly used in case of the processing of employee data) include where that processing is necessary for the business to perform a contract it has with the data subject, or where required to comply with the legal obligations of the business.

The GDPR further differs from the previous regime in that it places a significantly increased compliance burden on businesses, including, for example, mandatory requirements to notify regulators of data breaches, obligations to keep

detailed records on processing and requirements for most entities to appoint a data protection officer. Businesses that infringe the GDPR may be subject to administrative fines of an amount up to €20 million or 4 per cent of global turnover, whichever is higher.

Recital 26 of the GDPR states that where data has been processed such that it is truly anonymised, the principles within the GDPR do not apply to the processing of that data. However, for the data to have been effectively anonymised, the data subject must no longer be identifiable – which is a question of how far businesses have to go to ensure true anonymisation.

The Article 29 Working Party has released Opinion 05/2014 on Anonymisation Techniques (in the context of the previous EU data protection regime). This Opinion discusses the main anonymisation techniques used – randomisation and generalisation (including aggregation). The Opinion states that when assessing the robustness of an anonymisation technique, it is necessary to consider:

- if it is still possible to single out an individual;
- if it is still possible to link records relating to an individual; and
- if information can be inferred concerning an individual.

In relation to aggregation, the Opinion further states that aggregation techniques should aim to prevent a data subject from being singled out by grouping them with other data subjects. While aggregation will avoid the risk of singling out, it is necessary to be aware that linkability and inferences may still be a risk with aggregation techniques.

The position on anonymisation taken from the Article 29 Working Party's Opinion is broadly unchanged in the GDPR. The GDPR itself also 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 technological developments that may take place.

There are no legal requirements or regulatory guidance relating to personal data that are specifically aimed at fintech companies.

Law stated - 31 May 2022

Cybersecurity

What cybersecurity regulations or standards apply to fintech businesses?

The Revised Payment Services Directive (PSD2) includes provisions relating to measures that should be implemented by payment institutions, such as securing the payment service user's personal security data and agreeing on how to manage operational and security risks. Annually, payment service providers must file a report to the Dutch Central Bank (DNB). The report needs to contain an assessment on operational and security risks relating to the payment services provided. In addition, the report needs to address the adequacy of the financial institution's mitigating measures and control measures.

Secondly, payment service providers must notify DNB as to any grave operational or security incidents within four hours after detection. If the incident (possibly) impacts the financials of the users, the payment service must notify them about the incident, without undue delay. Last but not least, the payment service provider must inform users of the measures taken to mitigate damaging effect of the incident.

In addition to the PSD2, the Security of Network and Information Systems Act requires that certain fintech firms report serious digital security incidents to the National Cyber Security Centre (NCSC). These are fintech firms that have at

least 50 or more employees and/or generate a revenue of at least €10 million and provide essential services (eg, energy, banking, financial markets infrastructure). Finally, the GDPR includes a few provisions relating to the security of processing, such as the requirement for the controller to, both at the time of the determination of the means for processing and at the time of the processing itself, implement appropriate technical and organisational measures that are designed to implement data protection principles in an effective manner and to integrate the necessary safeguards into the processing to meet the requirements of the GDPR and protect the rights of data subjects. The controller and the processor must also implement these measures to ensure a level of security appropriate to the risk, which may include, among other things:

- the pseudonymisation and encryption of personal data;
- the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services;
- the ability to restore the availability and access to personal data in a timely manner in the event of a physical or technical incident; and
- a process for regularly testing, assessing and evaluating the effectiveness of technical and organisational measures for ensuring the security of the processing.

Law stated - 31 May 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?

Where a financial services company outsources a material aspect of its business, it remains responsible for the outsourced activities. Furthermore, outsourcing must not obstruct supervision by the authorities, and outsourcing by financial firms of critical or important functions must be notified to the regulator. If a financial service provider plans on using a third party for activities for which a licence is required, this can only be done where both parties have a licence for these activities. For certain activities (such as fund management, investment services, payment services and required activities under the Dutch Money Laundering and Terrorist Financing (Prevention) Act) further detailed outsourcing provisions apply.

Law stated - 31 May 2022

Cloud computing

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

If a financial institution wants to make use of cloud computing, it must notify the Dutch Central Bank (DNB) of its intention to do so. Before using cloud computing, the financial institution is required to develop a risk analysis, which must be presented to the DNB. Because the DNB qualifies cloud computing as a specific type of outsourcing, the rules on outsourcing apply. Outsourcing is not allowed in cases where it would obstruct the supervision of the outsourced activities or where the internal audit function would be negatively affected by the outsourcing of the activities. Furthermore, the financial institution is required to have adequate policies and proper procedures to manage outsourcing risks.

Law stated - 31 May 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 materials) are protected by copyright. Copyright arises automatically as soon as the computer program is created, registration is not required. Copyrighted works are protected until 70 years after the death of the creator.

Databases underlying software programs may also be protected by copyright and, in certain circumstances, by database right. A database right is a stand-alone right that protects databases that have involved a substantial investment in obtaining, verifying or presenting their contents. The right automatically comes into existence upon creation and expires after 15 years.

Software may also be protected as confidential information or as a trade secret by keeping the software code secret. There are no formal (registration) requirements other than that a trade secret holder needs to take reasonable measures to protect its secret and it needs to have commercial value.

Programs for computers and schemes, rules or methods of doing business as such are expressly excluded from patentability under the Dutch Patent Act 1995 and the European Patent Convention. However, patent protection for software may be possible if the inventor is able to demonstrate that the software makes a novel and inventive technical contribution over and above that provided by the program or business method itself. To obtain patent protection, registration is required with the relevant Dutch and European patent offices and the registration requirements must be followed. Patent protection is limited to 20 years starting from the date of filing the application.

Law stated - 31 May 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?

Copyrights and databases created by an employee during the course of his or her employment are automatically owned by the employer unless the parties have agreed otherwise. Patents protecting inventions made by an employee in the course of his or her normal duties are owned by the employer. Any other patented inventions will be owned by the employee unless agreed otherwise.

Inventions or copyrights created by contractors or consultants in the course of their duties are owned by the contractor or consultant unless otherwise agreed. By contrast, 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 - 31 May 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?

Where two or more persons jointly own an intellectual property right, any one of them may use and enforce the right, unless otherwise agreed. Each joint owner may assign or charge its share of the intellectual property right without the other owners' consent. Exploitation of the intellectual property right, including the granting of licences and charging or assigning the intellectual property right, can only be done by the joint owners of the intellectual property right.

Law stated - 31 May 2022

Trade secrets

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

In the Netherlands, trade secrets are protected by the general law of tort (such as breach of the rules of fair competition) and by the Dutch Trade Secrets Act, which entered into force on 23 October 2018 and implements the EU Trade Secrets Directive (Directive 2016/943/EU). The Trade Secrets Act provides more specific rules for the protection for trade secrets. The Trade Secrets Act defines a trade secret as information that:

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

The Trade Secret Act contains measures and remedies to enforce trade secrets. The secret holder can claim an injunction against further use or disclosure of a trade secret. This includes injunctions against infringing goods, which are goods, the design, characteristics, functioning, production process or marketing of which significantly benefits from trade secrets unlawfully acquired, used or disclosed. The Trade Secret Act includes the possibility for the court to grant the winning party a full cost award of all reasonable and equitable legal costs and other costs.

Measures are available in the Netherlands to prevent public disclosure of trade secrets during court procedures. For example, the court may order oral hearings be conducted 'behind closed doors' and hand down decisions in which confidential information is redacted. The current Trade Secret Act proposal includes a new rule introducing the option for the court to impose a confidentiality club, limiting the access to trade secrets.

Law stated - 31 May 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 either in the Benelux alone (as a Benelux trademark) or across the EU (as an EU trademark). Certain branding, such as logos and stylised marks, can also be protected by design rights and may also be protected by copyright. Design rights and trademarks are obtained by registering the design or trademark with the relevant authority (eg, the Benelux Office for Intellectual Property, World Intellectual Property Organization or European Union Intellectual Property Office).

The Benelux and EU trademark databases can be searched to identify registered trademarks or applications for a trademark with effect in the Netherlands. It is highly advisable for new businesses to conduct trademark searches to check whether earlier registrations exist that are identical or similar to their proposed brand names.

Law stated - 31 May 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 (preliminary injunctions are available cross-border);
- damages or surrender of profits;
- delivery up or destruction of infringing products;
- orders to disclose certain information that relates to the infringement;
- publication orders; and
- reimbursement of costs, including court fees and costs of (patent) attorneys and experts (cost orders in Dutch intellectual property litigation are based on guidelines that provide fee caps for compensation that can be awarded in different types of proceedings. The highest fee cap is for highly complex patent litigation in first instance, for which the fee cap is €250,000. In special circumstances, the courts may deviate from the fee caps in the guidelines).

Law stated - 31 May 2022

COMPETITION

Sector-specific issues

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

The Dutch Authority for Consumers and Markets (ACM) continuously monitors compliance with competition law by companies active in in all sectors and including therefore also the financial sector. By means of the Financial Sector Monitor (FSM), the ACM carries out economic research into the operation of the financial markets and analyses the risks to competition. In previous years, the ACM presented its findings on competition in this respect. Furthermore, the ACM has specific powers regarding payment system providers and interchange fees.

In 2016, the ACM called for public input on how it can help to boost fintech companies' contribution to competition in the financial sector whereby it indicated it would pay special attention:

- to barriers to entry that prevent the fintech sector from reaching its full potential; and
- to risks involved with rapid technological change which may have adverse effects on competition and innovation.

Following this communication, the ACM has so far looked into the following two specific issues:

- whether regulatory costs constitute barriers to entry for fintech companies. The ACM ordered a study from EY that concluded that such regulatory costs do not constitute obstacles for new providers in the financial sector; and
- whether banks are limiting access of fintech companies – front-end providers and end-to-end providers – to bank accounts and thereby hinder competition in the payment market.

The ACM identified in respect of front-end providers a risk of foreclosure of front-end providers. As a result, the ACM announced that it will actively monitor the behaviour of banks and how they deal with requests for access. In addition, the ACM:

- proposed that, where possible in light of PSD2 and the European Commission's Regulatory Technical Standards (RTS), further national implementation of EU law regarding access to bank accounts should enable such access;
- indicated that a system of free access could result in the banks refusing access (which implies that the ACM proposes to allow the banks to ask compensation for the costs related to providing access); and
- proposed that a light version of the banking licence could be created for fintech companies so that they can offer payment accounts.

As regards end-to-end providers, the ACM considered that the risks of foreclosure were limited. Nevertheless, it proposed to cut the red tape – in addition to the above-mentioned light banking licence:

- by defining objective permit criteria that are related to the actual risks posed by end-to-end providers; and
- by making sure that, in the development of instant payments infrastructures in Europe, fintech companies are able to directly participate in the systems and arrangements for clearing and settlement of payments under non-discriminatory and objective condition.

In 2020, the ACM – on request of the Ministry of Finance – conducted a market study into the role of Big Tech (Apple, Amazon, Ant Group, Facebook, Google and Tencent) in the Dutch payment market and more specifically on the segments counter payments, online payments and payments between consumers. In this study, the ACM concluded that the presence of Big Tech at the time was limited but that it is growing and that Big Tech primarily offered consumers innovative means of payment (citing the use of smartphones for payment or the recent entry of Apple Pay on the counter payments segment). The ACM expected the presence of Big Tech, as well as the use of such payment methods by consumers, to increase in years to come and noted that these companies choose to offer payment services in order to reinforce their ecosystems, rather than being driven by the introduction of PSD2.

The ACM identified the following competition risks:

- access restrictions for new innovative players such as Big Tech and fintechs; and
- Big Tech leveraging their dominant market position in neighbouring markets to tip the payment market (through self-preferencing).

The ACM concluded that an amendment of PSD2 may be in order to ensure that it also applies to Big Tech that are gatekeepers to ensure a level playing field for competitors and a free choice for consumers. The ACM in this respect also fully supports the European Commission's proposed Digital Markets Act, which, once adopted, will create various obligations and prohibitions for certain digital services companies (gatekeepers).

In 2021, after having received complaints from dating-app providers, the ACM concluded that Apple abused its dominant position. The ACM determined that if an app provider offers digital content or services within the app for a fee, the app provider is required to agree to additional contractual conditions set by Apple. These conditions mandate the app provider to use Apple's payment system for the processing of payments and stipulate that app providers are not allowed to refer within their own apps to payments options outside the app, for example to alternative payments options that app providers offer on their websites. According to the ACM, this constituted an abuse of a dominant position.

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?

There are no specific tax incentives applicable to fintech companies. However, there are certain tax incentives available to 'innovative' companies. The key incentives are:

- WBSO (R&D payroll tax credit) – allows an employer a payroll tax refund of 16 per cent to 32 per cent of the salary costs that an employer has paid to its employees who conduct R&D activities;
- innovation box – allows companies to have profits derived from qualifying IP income taxed at an effective corporate income tax rate of 9 per cent instead of the regular corporate income tax rate of 15 per cent to 25.8 per cent; and
- costs incurred in connection with the development of intangible assets may be depreciated [amortised] at an accelerated rate – instead of capitalised and depreciated over the technical or economic life span of the asset.

A number of conditions must be met in order to qualify for each tax incentive scheme. In general, directors (or employees) who also hold a substantial interest in a company (at least 5 per cent) should receive (or if not actually received, are deemed to receive) an annual salary from their company of at least €48,000 (in respect of which payroll taxes are payable) unless it can be demonstrated that others performing similar activities earn less. For a start-up company, the deemed salary may be lowered to the minimum wage in the Netherlands (€1,756.20 a month as of 1 July 2022) as a result of which less payroll taxes are payable.

On 31 May 2021, a Dutch legislative proposal was published with respect to the taxation of holders of stock options. Under the proposal, other than under the normal rule whereby income is recognised upon exercise of an option, options can still be exercised but income taxation can be deferred until the moment the stock becomes tradeable. This offers a solution to the problem that tax may be paid at a time when insufficient liquidity is available. However, at the employee's discretion, taxation can still take place at the moment of exercise of the stock options. The proposal would become effective on 1 January 2023.

Law stated - 31 May 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?

There are no new or proposed tax laws or guidance that could significantly increase tax or administrative costs for fintech companies.

Law stated - 31 May 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?

The following are the most common corporate immigration schemes in the Netherlands (of course, only relevant for non-EU, EEA and Swiss nationals – ‘third-country nationals’ – since all EU, EEA and Swiss nationals are free to reside and perform any activities in the Netherlands as long as they wish since there is free movement of workers within the EU, which is expanded to the EEA and Switzerland).

- Knowledge migrant scheme (highly skilled migrant scheme): this has nothing to do with knowledge as such, but everything with the gross monthly salary (exclusive of holiday allowance, normally 8 per cent of the salary) that is consistent with Dutch salary standards and with thresholds for 2021 that vary from €2,497 to €4,752, depending on age or graduation date in the past three years before applying for such a residence permit from a Dutch or top 200 university from a masters or PhD (if graduation is from a university in the Netherlands then bachelor level is also allowed). These salary thresholds are indexed each year. Next to that, the formal employer in most cases needs to be recognised as a sponsor for the purpose of regular labour and knowledge migrants. If the employer is not such a recognised sponsor, the employer can apply for that or make use of a payroll company that is recognised as such a sponsor. The formal employer would ‘borrow’ their recognised sponsorship, in which case the payroll company would be the formal employer and second the employee to the factual employer.
- Intra-corporate transfer scheme (Directive 2014/66/EU): if the employee is a specialist, manager or trainee and remains on the payroll of his or her employer outside the EU, and the employee was already employed at that entity outside the EU within the same group of companies, he or she may be transferred to the Netherlands under the intra-corporate transfer scheme for up to three years for a specialist or a manager and for up to one year for a trainee (after which he or she can return to the country from where he or she was seconded, or the residence permit can be changed into, for example, a residence permit as a knowledge migrant. A residence permit as an intra-corporate transferee cannot be prolonged if, with that prolongation, the maximum duration of one (trainee) or three (specialist or manager) years is exceeded). No salary thresholds are applicable, albeit that the salary needs to be in conformity with the prevailing market and, of course, complies with the Dutch minimum wage Act. Also, no recognised sponsorship is required, but is nevertheless advisable for a faster procedure. As a recognised sponsor, the application procedure should just take two weeks. Some form of intra-EU mobility is possible for a long or a short term, which for a short term would not lead to needing another work permit in the other EU country where the employee is temporarily transferred within the same group of companies. This scheme takes precedent over other schemes if the application or situation falls within the scope of the directive. There is also a national intra-corporate transfer scheme; however, with this Directive and the national knowledge migrant scheme, the national intra-corporate transfer scheme is not used that often as there are more requirements to be met.
- EU Blue Card scheme (Directive 2009/50/EC): the EU version of the Dutch knowledge migrant scheme but with a higher salary threshold, and where specific education requirements apply. The salary threshold in the Netherlands is €5,567 gross per month, exclusive of holiday allowance for 2021. This salary threshold is indexed each year. Recognised sponsorship is not required but is nevertheless advisable due to the more rapid application procedure. This scheme remains unpopular in the Netherlands due to the much more flexible national knowledge migrant scheme. The Blue Card does have one advantage: if an employee has a Blue Card that is valid for at least 18 months in another EU country, that employee is already allowed to start working in the Netherlands under the condition that within one month of arrival in the Netherlands a Dutch EU Blue Card is applied for.
- International trade regulation: a relatively new scheme that may come in handy in certain situations where larger and mostly lower paid groups of third-country nationals have to come to the Netherlands in the framework of a

certain project that has been assessed and approved by the Dutch Employee Insurance Agency (UWV). The salary threshold is the Dutch statutory minimum wage, that on 1 July 2021 increased from €1,684.80 gross per month to €1,701 gross per month, exclusive of 8 per cent holiday allowance. To qualify for the international trade regulation, there must be a time-defined trajectory of initially a maximum of three years, and there must be a relationship between the company in the Netherlands and abroad. The workers (employees, clients or director-major shareholders) must come to the Netherlands to perform specialist or managerial duties. The work done may not be of a competitive nature (priority labour supply). This is assessed, among other things, on the basis of the nature, duration and value of the trajectory and nature of the work. Once the trajectory has been approved, the workforce only needs to be notified via a form of the UWV, and the workforce can start work immediately. No recognised sponsorship is necessary.

- Short-term knowledge migrant scheme: this has the same salary criteria as the above-mentioned criteria for the knowledge migrant scheme, but varying from €3,484 to €4,752 gross per month exclusive of holiday allowance and the job in the Netherlands must be a specialist-, key-, scientific- or managerial position. A work permit as a short-term knowledge migrant can be applied for by the employer, the recognised sponsor, for short-term assignments for a maximum duration of three out of six months, limited by the duration of the Schengen visa or the free-term requirements of a maximum of 90 out of 180 days.
- The delivery of goods including assemble, repair, install, amend and instructing on the use of those goods, which includes software: the name speaks for itself. This is an exemption in Dutch migration law. No work permit is needed for such work if that work is regarded as incidental labour. In this regard, incidental labour means that the work that needs to be done does not take longer than 12 consecutive weeks within 36 weeks. There is no specific salary criterion, but a salary must be consistent with Dutch salaries for similar work. Should the work, however, not fall within the scope of this exemption, there is also a single permit (that combines a work and residence permit) for the assembly and repair of equipment supplied by foreign companies. The personnel costs must, in that case, not be higher than the to-be-delivered goods, the work must not exceed a period of one year and the workers would need to have specific knowledge to finalise the delivery of the goods for the customer to be able to use the goods.
- Researcher (Directive 2016/801/EU): mostly for researchers and scientists working at universities and other research institutions and companies. A specific recognised sponsorship is necessary for the purpose of educational institution. The researcher will work as either a paid researcher, an unpaid researcher with a grant or as a PhD candidate and complies with the admittance requirements. Other specific requirements are applicable. The researcher must have at least €1,179.36 gross per month exclusive of holiday allowance as income (salary, scholarship or grant, or in his or her bank account) to comply with the sufficient means of subsistence requirement.
- Intra-EU service provision: exempted from the work permit obligation in the Netherlands if intra-EU service provision is performed under articles 56 and 57 of the Treaty on the Functioning of the EU. A residence permit obligation applies after 90 out of 180 days. It is specifically for third-country nationals living and working legally in EU member state A and temporarily performing services or work for their employer in member state B. No salary threshold applies and no recognised sponsorship is needed. Next to that, as of 1 March 2020, all cross-border service providers need to notify all their employees (including EU, EEA and Swiss nationals) via www.postedworkers.nl before starting to provide services in the Netherlands. Failure to notify on time will lead to a fine.
- Several specific training and trainee schemes. These are the most common schemes for corporate migration out of approximately 40 schemes available in the Netherlands, some based on EU-law, some purely based on national law. Every case needs to be assessed by an immigration specialist on an individual basis since a different scheme than stated above might suit the situation better. Next to that, there are several short-term work permit exemptions (incidental labour in the Netherlands), for example for business meetings, receiving training courses or instructions regarding the use of goods manufactured in the Netherlands and services to be provided in the Netherlands. Living legally in the Netherlands is totally different from working legally in the Netherlands; it is, in

principle, forbidden for a third-country national to perform any work in the Netherlands without a work permit, a work permit exemption or a Dutch residence permit with the suitable labour market annotation or single permit, very specific exemptions left aside. Sanctions in the case of non-compliance are high – normally an €8,000 fine per illegal working foreigner and per employer in the meaning of the Dutch Foreigners Employment Act – but in most cases of an administrative rather than a criminal nature additional sanctions may apply, up to shutting down the operations in the Netherlands up to three months.

Since 1 January 2021, UK nationals also need to fulfil the same criteria as any other non-EU, non-EEA citizen or non-Swiss national, as they have become third-country nationals.

Law stated - 31 May 2022

UPDATE AND TRENDS

Current developments

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

EU developments

Significant current developments relating to fintech currently seem to be driven on a European level, as a result of the European's adoption of the Digital Finance Package in September 2020. Among other things, this Digital Finance Package introduces the MiCA Regulation, the Regulation on a pilot regime for infrastructures based on DLT and the Regulation on digital operational resilience for the financial sector.

Furthermore, the European Commission published a draft Regulation on the use of AI in April 2021 and its AML/CFT Reform Package in July 2021. The latter will have a significant impact on crypto service providers.

Additionally, on 13 January 2022 the final phase for the set-up of the Unified Patent Court (UPC) commenced. The UPC will offer a single, specialised patent jurisdiction for participating EU member states. The UPC is expected to officially open its door in late 2022 or early 2023. With the UPC, patentees will also get the option for applying for Unitary Patents, which will have effect across all participating EU member states. So far 16 EU member states have ratified the necessary legislation, and 24 are expected to do so. The Unitary Patent may provide significant cost advantages and a significant reduction of administrative burdens for patentees that normally validate their patents in multiple EU countries.

Dutch developments

On 13 October 2021, the Dutch Minister of Finance published a report on the progress of the implementation of its national Fintech Action Plan. Key items highlighted in this Action Plan include:

- the development of legislation targeting automatic advice;
- increasing the attention for appropriate fees for new entrants (including fintech start-ups); and
- the statement that Dutch fintech companies should not be subject to stricter requirements than necessary.

Law stated - 31 May 2022

Jurisdictions

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