Fintech

Contributing editors
Angus McLean and Penny Miller

2017

GETTING THE DEAL THROUGH

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Fintech 2017

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Simmons & Simmons

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Fintech 2017

First edition

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

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

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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

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

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

GETTING THE DEAL THROUGH

London
September 2016

Introduction

Angus McLean and Penny Miller
Simmons & Simmons

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

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

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

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

At least two regulators, the UK's Financial Conduct Authority and the Australian Securities and Investments Commission (in the form of their Innovation Hubs) have also established special support services that provide informal feedback to innovative fintech businesses on the regulatory implications of their business models.

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

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

As this is the first edition of the publication, we would very much value feedback on other areas that we should cover in the future. In the meantime, we hope the first edition serves as a valuable reference point wherever you are on your fintech journey.

Australia

Peter Reeves
Gilbert + Tobin

Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

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

The Corporations Act 2001 (Cth) (Corporations Act), which is administered by the Australian Securities and Investments Commission (ASIC), states that a financial services business is considered to be carried on in Australia if, in the course of the person carrying on the business, they engage in conduct that is intended to induce people in Australia to use the financial services they provide or is likely to have that effect, regardless of whether the conduct is intended, or likely, to have that effect in other places as well.

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

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

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

Arranging (bringing about) deals in investments (ie, financial products), making arrangements with a view to effecting transactions in investments, dealing in investments as principal or agent, advising on investments, and foreign exchange trading may trigger the requirement to hold an AFSL if such activities are conducted in the course of carrying on a financial services business in Australia. Consumer credit facilities and secondary market loan trading are generally regulated under the credit licensing regime (discussed in question 2); however, arrangements that are established to facilitate investment or trading in such products (eg, marketplace lending or securitisation) may also trigger the requirement to hold an AFSL.

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

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

A person who engages in consumer credit activities in Australia generally must hold an Australian credit licence (ACL) or be exempt from the requirement to be licensed (see question 2).

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

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

The NCCP Act only applies to credit services provided to natural persons or strata corporations, wholly or predominantly for personal, household or domestic purposes. An ACL is not required where credit services are provided wholly or predominantly for business or investment purposes. However, it is anticipated that this regime will be extended to capture small business lending.

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

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

ACL holders are subject to general conduct obligations, including:

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

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

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

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

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

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

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

Packaging and selling loans in the secondary market may also trigger the requirement to hold either or both an AFSL or ACL, depending on the structure of the product and whether the loans are consumer loans (however, exemptions from the requirement to hold an ACL are available for securitisation and special purpose funding entities).

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies would generally fall within the scope of any such regime.

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

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

Unincorporated structures

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

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

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

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

Incorporated structures

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

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

Limited partnerships may be incorporated in some or all Australian states and territories (the incorporation process is broadly similar across jurisdictions). Once incorporated, a partnership must notify the relevant state or territory regulator of changes to its registered particulars.

Incorporation is typically sought in connection with an application for registration as a venture capital limited partnership (VCLP) or early stage venture capital limited partnership (ESVCLP) under the Venture Capital Act 2002 (Cth), which are partnership structures commonly used for venture capital investment (including investment in fintech) owing to favourable tax treatment.

New structures

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

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

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

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

5 Are managers of alternative investment funds regulated?

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

ASIC has entered into 29 supervisory cooperation agreements with European Union securities regulators to allow Australian fund managers to manage and market alternative investment funds to professional investors in the EU under the rules of the AIFMD.

6 May regulated activities be passported into your jurisdiction?

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

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

Passport relief is only available in relation to the provision of financial services to wholesale clients and the FFSP must only provide those financial services in Australia if it is authorised to provide them in its home jurisdiction. Before providing any financial services in Australia, the FFSP must disclose to clients that it is exempt from the requirement to hold an AFSL and that it is regulated by the laws of a foreign jurisdiction. The FFSP must also notify ASIC as soon as practicable, and in any event within 15 business days, of the occurrence of any significant matters (eg, investigations or regulatory actions) applicable to the financial services it provides in Australia.

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

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

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

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

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

Peer-to-peer or marketplace lending is regulated within the existing consumer protection, financial services and credit regulatory frameworks. In Australia, a retail peer-to-peer or marketplace lending platform is often structured as an MIS and there will generally be an AFSL and ACL within the structure.

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

9 Describe any specific regulation of crowdfunding in your jurisdiction.

Crowdfunding is currently regulated within the existing consumer protection (Consumer Law and ASIC Act) and financial services regulatory framework. Equity crowdfunding platforms can be structured as MIS or non-MIS platforms. In either case, the operator will usually hold an AFSL or an AFSL holder will be retained for the purposes of the structure.

In late 2015, a regulatory framework to facilitate crowdsourced equity funding in Australia was proposed. The draft legislation aimed to reduce the regulatory barriers to investing in small and start-up businesses; however, it has been criticised because of the restrictive rules around the type of company that could raise funds, the amount that could be raised and the amount investors could invest. The draft legislation lapsed upon the dissolution of Parliament in May 2016.

As both major Australian political parties broadly support the objectives of the proposed regulatory framework, it is generally expected that draft legislation will be reintroduced (although perhaps not in its previous form); at the time of writing, however, nothing has been formally proposed.

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

As noted in question 9, factoring arrangements generally require that the factor must hold an AFSL; however, regulatory relief is available such that if certain conditions are met (around factoring terms and conditions and dispute resolution processes) an AFSL is not required. However, AML and CTF requirements (see question 11) generally apply in relation to factoring arrangements. The factor could also be taken to be carrying on business in Australia in relation to the factoring arrangements and could trigger the ASIC registration requirement (described in question 7).

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

11 Are payment services a regulated activity in your jurisdiction?

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

Payment services may be regulated as financial services under the Corporations Act where such service relates to a: deposit-taking facility made available by an ADI in the course of carrying on a banking business; or facility through which a person makes a non-cash payment.

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

Payment services relating to a deposit-taking facility or a purchased payment facility must be provided by an APRA-regulated ADI.

Payment systems (ie, any funds transfer systems that facilitate the circulation of money) and purchased payment facilities (eg, smart cards and electronic cash) are regulated under the Payment Systems (Regulation) Act 1998 (Cth), which is administered by the Reserve Bank of Australia.

Payment services are generally 'designated services' under the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (the AML/CTF Act). The AML/CTF Act regulates providers of designated services, referred to as 'reporting entities'. Key obligations include enrolling with the Australian Transaction Reports and Analysis Centre (AUSTRAC), conducting due diligence on customers prior to providing any services, adopting and maintaining an AML/CTF programme and reporting annually to AUSTRAC and as required on the occurrence of a suspicious matter, a transfer of currency with a value of A$10,000 or more, and all international funds transfer instructions.

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

12 Are there any restrictions on cold-calling investors or clients in your jurisdiction?

Australian law restricts: sending unsolicited commercial electronic messages, including emails and SMS; making unsolicited commercial calls to telephone numbers listed on the Do Not Call Register; and making unsolicited offers to a retail client to acquire a financial product.

13 Does the regulator in your jurisdiction make any specific provision for fintech services and companies?

ASIC has established an innovation hub to foster innovation that could benefit consumers by helping Australian fintech start-ups navigate the Australian regulatory system. The innovation hub provides tailored information and access to informal assistance intended to streamline the licensing process for innovative fintech start-ups.

ASIC has also proposed a regulatory sandbox, the features of which include: a testing window, allowing certain financial services and products to be provided without a licence; the ability for sophisticated investors to participate with a limited number of retail clients with separate monetary exposure limits; consumer protection (external dispute resolution and compensation arrangements would typically apply in the retail environment); and modified conduct and disclosure obligations. Industry consultation on the proposed regulatory sandbox closed on 22 July 2016. At the time of writing, ASIC expects to finalise guidance and the exemption conditions by the end of 2016.

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

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

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

Generally, any offer of a financial product to a retail client must be accompanied by a disclosure document, typically a prospectus or product disclosure statement (depending on the product type) that satisfies the content requirements in the Corporations Act. There are

exemptions from the requirement to provide a disclosure document in certain circumstances (eg, a small-scale offer) and where the offer is made to wholesale clients only.

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

Advertisements should give a balanced message about the product.

Warnings, disclaimers and qualifications should be consistent and given sufficient prominence to effectively convey key information.

Where fees or costs are referred to, such reference should give a realistic impression of the overall level of fees and costs a consumer is likely to pay.

Comparisons should only be made between products that have sufficiently similar features and differences should be made clear. All comparisons should be current, complete and accurate.

Terms and phrases should not be used in a way that is inconsistent with the ordinary meaning commonly recognised by consumers. Industry concepts and jargon should also be avoided.

Advertisements should be capable of being clearly understood by the audience and should not suggest the product is suitable for a particular type of consumer unless the promoter has assessed that the product is suitable in this way.

Advertisements should be consistent with disclosure documents.

Photographs, images and diagrams should not be used in a way that detracts from warnings, disclaimers or qualifications, and graphs should not be overly complicated or ambiguous.

Advertisements should not create unrealistic expectations about what a service can achieve.

15 Are there any regulator-imposed temporary restrictions on financial products in place that are relevant to fintech companies in your jurisdiction?

There is currently no product intervention power in Australia. Such a power was proposed as part of the 2014 Financial System Inquiry and the government response indicated that it would consider the proposal. However, at the time of writing, no formal plans have been proposed.

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

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

Although not a restriction, a person (typically an ADI) who sends or receives an international funds transfer instruction must report the details of such instruction to AUSTRAC within 10 business days after the day on which the instruction is sent or received. Such transfers are subject to AML/CTF Act compliance requirements imposed on the institutions effecting the transaction.

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

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

18 Are there licensing requirements that would be triggered where the investor or client is a temporary resident in your jurisdiction?

Generally, if the investor or client is a temporary resident in Australia (including its external territories) the AFSL or ACL requirements will still apply, except if the service relates to products issued by the provider and there has been no conduct by the provider designed to induce any investor, or that could be taken to have that effect (including any active solicitation) in relation to such products.

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

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

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

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

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

The Privacy Act 1988 (Cth) (the Privacy Act) applies to the cross-border activities of an Australian organisation to which the act applies (see question 41). The AML/CTF Act also has cross-border application where designated services are provided by a foreign subsidiary of an Australian company and such services are provided at or through a permanent establishment of the subsidiary in a foreign jurisdiction.

21 Does a third-party referral qualify as an unsolicited approach in your jurisdiction?

Generally, no.

22 What licensing exemptions apply where the services are provided through an offshore account in your jurisdiction?

Generally, there are no licensing exemptions that specifically apply where the services are provided in Australia through an offshore account. However, it may affect the nature of the authorisations required to be held and the additional obligations associated with such authorisations (eg, regulatory capital).

23 What licensing exemptions apply where the services are provided through a nominee account in your jurisdiction?

See question 22; the same applies to a nominee account.

24 What licensing exemptions apply where the services are only ancillary or incidental to other core activities or services in your jurisdiction?

An AFSL is not required to provide financial services in relation to a financial product where such product is merely an incidental part of a facility that does not have managing a financial risk, making a non-cash payment or making a financial investment as its primary purpose.

There is no equivalent exemption for ancillary or incidental credit activities.

25 What licensing exemptions apply when dealing with clients that are duly licensed in in your jurisdiction?

A product issuer, or a related body corporate, is not required to hold an AFSL to provide general financial product advice to an AFSL holder, where the AFSL holder is authorised to provide such advice. Also, a person who is not in Australia is not required to hold an AFSL to provide financial services to a client who is an AFSL holder, unless that client is acting on behalf of someone else.

There are no equivalent exemptions available from the requirement to hold an ACL when dealing with clients that are duly regulated.

26 What licensing exemptions apply to specific types of client in your jurisdiction?

An AFSL is not required to provide financial services to clients that are related bodies corporate of the provider or commonwealth, state or territory bodies.

Although not an exemption to the requirement to hold an AFSL, reduced disclosure obligations apply to financial services provided to wholesale (including professional) clients.

In relation to credit activities, an ACL is not required where such activities are provided to a customer who is a body corporate (other than a strata corporation), or a commonwealth, state or territory body.

Securitisation

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

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

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

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

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

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

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

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

A company that purchases or securitises peer-to-peer loans must comply with the Privacy Act, to the extent the act applies to the company and its conduct (see question 41). The company must also comply with any duty of confidentiality in the underlying loan or security agreement.

Intellectual property rights

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

Software (including source code) is automatically protected under the Copyright Act 1968 (Cth). An owner may also apply to IP Australia for software to be registered under the Designs Act 2003 (Cth) or patented under the Patents Act 1967 (Cth).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

40 Are there any high-profile examples in your jurisdiction of fintech companies enforcing their intellectual property rights or defending their intellectual property rights against a third party?

In 2012, proceedings began between competing high-frequency trading firms, Optiver Australia Pty Ltd and Tibra Trading Pty Ltd. The matter concerned a number of former Optiver employees who had left the company to establish Tibra, a competitor. Optiver alleged that Tibra had copied all or a substantial part of Optiver's computer program used

Update and trends

In Australia, fintech is a focal point for economic growth and it is generally accepted that policy and reform in the financial services sector will be driven by fintech innovations. The Australian government and regulators have generally been responsive to facilitating the development of fintech. More broadly, Australia has seen the A$1.1 billion National Innovation and Science Agenda promoting commercial risk-taking and encompassing tax incentives for early stage investment in fintech companies, changes to the venture capital regime, insolvency law reforms, the establishment of the FinTech Advisory Group to advise the Treasurer, the ASIC innovation hub and the proposed expansion of the crowd-sourced equity funding regime (yet to commence) to include debt funding. ASIC has also recently completed its consultation in relation to a proposed regulatory sandbox.

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

A recently released ASIC report in relation to financial market infrastructure providers and cyber-resilience expresses ASIC's intention to work to assist other organisations in Australian financial markets to enhance their cyber-resilience framework and environment. ASIC has provided examples of good practices identified across the financial services industry and some questions board members and senior management of financial organisations should ask when considering what cyber resilience they have. Cyber resilience will be a regulatory focus given the rapid innovation Australia is experiencing in the fintech space and the interplay between fintech products and new technologies. In particular, blockchain and smart contract solutions are now being tested and developed at institutional and SME and fintech levels. In addition to the regulatory challenges and developments associated with these solutions, developments are expected in the governance frameworks that are necessary to facilitate the adoption of such solutions and also the roles played by traditional intermediaries.

to conduct its business and had divulged confidential information. The matter was ultimately settled out of court for a reported A$10 million.

Data protection

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

The Privacy Act regulates the handling of personal information by Australian government agencies, Australian Capital Territory agencies and private sector organisations with an aggregate group revenue of at least A$3 million. The Privacy Act has extraterritorial operation and extends to an act undertaken outside Australia and its external territories where there is an 'Australian link' (ie, where the organisation is an Australian citizen or organisation) or carries on a business in Australia and collects or holds personal information in Australia.

The Privacy Act comprises 13 Australian Privacy Principles (APPs) that create obligations on the collection, use, disclosure, retention and destruction of personal information. The APPs include:

- open and transparent management of personal information;
- disclosure to a person that their personal information will be collected;
- restrictions on the use and disclosure of personal information;
- obligations to ensure the accuracy of collected personal information; and
- obligations to protect personal information.

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

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

The government has requested the Productivity Commission to consider ways to increase data availability in Australia with a view to boosting innovation, which will be particularly important for fintech innovators. In particular, the Commission will examine whether big banks should be forced to share more data on customer transactions with fintech companies.

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

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

The Office of the Australian Information Commissioner, which administers the Privacy Act, has published guidance on de-identifying personal information. The guidance describes methods for de-identification, which may include removing or modifying personal identifiers and aggregating information.

Cloud computing and the internet of things

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

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

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

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

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

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

In 2015, the Australian Communications and Media Authority (ACMA) undertook an assessment of how existing regulations can be used to facilitate and enable Australian businesses and citizens to benefit from internet of things innovations. ACMA released an issues paper on its findings, which included priority areas for regulatory attention, managing network security and integrity, supporting the interoperability of devices and information through standards-setting, and supporting Australian business and consumers to develop stronger digital technology capabilities. Currently, there are no plans to develop or implement these priority areas.

Tax

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

The government has introduced a number of incentives to encourage innovation by, and investment in, the Australian fintech sector.

Start-ups and growing Australian fintech companies may qualify as ESICs, which entitles investors to certain tax incentives. These include providing eligible investors with:

- a 20 per cent non-refundable carry-forward tax offset on amounts invested in qualifying ESICs, with the offset capped at A$200,000 per investor per year (on an affiliate-inclusive basis); and

- a 10-year exemption on capital gains tax for investments held as shares in an ESIC for at least 12 months, provided that the shares held do not constitute more than a 30 per cent interest in the ESIC.

Fintech investors are often structured VCLPs or ESVCLPs, and receive favourable tax treatment for venture capital investment. The government has also announced plans to amend the ESVCLP regime so that it specifically allows the tax concession available for investments made through ESVCLPs to apply to investments in fintech companies, as this is not clear in existing legislation.

In relation to crowdfunding, the Australian Taxation Office, which is responsible for administering Australia's taxation laws, has released guidance setting out its current view of the tax implications for crowdfunding arrangements. Broadly, if a person earns or receives any money through crowdfunding, some or all of it may be assessable income, which must be declared, and some of the costs related to gaining or producing that income may be allowable deductions.

Competition

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

There is a proposal to replace the existing misuse of market power provisions in the Competition and Consumer Act 2010 (Cth) (CCA), which currently adopts a purpose test, with an effects test. The proposed change will require the Australian Competition and Consumer Commission (ACCC) – which administers the CCA – and courts to have regard to whether the relevant conduct enhances efficiency, innovation, product quality or price competitiveness and if it prevents, restricts or deters the potential for competitive conduct or new entry. The chairman of the ACCC has announced the effects test 'must be strong enough to protect emerging start-ups from anticompetitive behaviour from the big four banks'. The proposed legislation is expected to be introduced to Parliament in late 2016.

Financial crime

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

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

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

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

At the time of writing, no.

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

The following activities are regulated and trigger a licence requirement:

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

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

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

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

Secondary market loan trading is not a regulated activity in China.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies would generally fall within the scope of any such regime.

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

Fund managers must be approved by the China Securities Regulatory Commission (CSRC) and fund custodians must be approved by either the CSRC or China Banking Regulatory Commission (CBRC) (depending on the nature of the fund custodian).

The public raising of capital for a fund shall be registered with the CSRC. Non-publicly raised funds shall be registered with the Asset Management Association of China. Without registration, no entity or individual may use the words 'fund' or 'fund manager', or any similar words, to conduct securities investment activities.

Agencies that engage in sales, sales payment, unit registration, valuation service, investment consulting, rating, information technology system service and other fund services related to publicly-raised funds are subject to registration or record filing in accordance with the provisions of CSRC.

Whether a fintech company falls within the scope of this regime will depend on its business; careful analysis of the specific circumstances and the way in which the fintech company participates in investment fund activities will be required.

5 Are managers of alternative investment funds regulated?

Managers of collective investment undertakings that raise capital from a number of investors and invest it in accordance with a defined investment policy for the benefit of those investors are carrying out regulated activities. Fund managers must be approved by the CSRC in order to provide an asset management service.

6 May regulated activities be passported into your jurisdiction?

Regulated activities cannot be passported into China.

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

In our experience, a licence for regulated activities would only be granted to an entity that has a local presence. Therefore, it is unlikely that Chinese regulators, including the CSRC and CBRC, would grant a licence for regulated activities to an entity that was not permanently established in China.

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

Currently, there is no specific law or regulation applicable to peer-to-peer or marketplace lending. On 12 December 2015, the CBRC published a draft notice on the 'Interim Measures for Administration of the Business Activities on Network-based Lending Information Intermediary Agencies' for soliciting public comments, which intends to regulate the activity of direct lending between individuals through an internet-based platform.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

The Guideline Opinion on Promoting the Healthy Development of Internet Finance has defined equity-based crowdfunding as public equity financing in small amounts through an internet-based platform. The Opinion provides that equity crowdfunding shall be conducted through an agency platform such as a website or other digital medium, and that the CSRC will be the regulatory authority of equity crowdfunding business.

There are is no specific regulation of other types of crowdfunding.

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

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

11 Are payment services a regulated activity in your jurisdiction?

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

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

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

12 Are there any restrictions on cold-calling investors or clients in your jurisdiction?

PRC law has not specifically prohibited cold-calling per se. However, PRC law prohibits employees of securities companies and insurance companies from engaging in any 'improper solicitation behaviours' towards potential and actual investors or clients, which could be interpreted as including cold-calling, depending on the specific approach taken in conducting the cold-calls.

13 Does the regulator in your jurisdiction make any specific provision for fintech services and companies?

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

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

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

Yes. The respective regulator (as mentioned in question 13) provides rules with respect to marketing materials. In relation to securities-related services, for example, the securities companies are required to obtain sufficient knowledge about the investors and recommend suitable products and services based on the situation of each investor. The securities companies shall make sure that investors understand the risks clearly and each investor must sign a risk disclosure statement. The securities companies are not allowed to promise guaranteed profits to the investors or make up for loss in promoting or marketing financial products.

The practitioners in the securities industry are required to obtain the necessary qualification to provide professional services to investors. They shall safeguard the interests of investors with loyalty and diligence in promoting financial products and services. They shall accurately reveal the risks open to investors and are prohibited from providing misleading information.

15 Are there any regulator-imposed temporary restrictions on financial products in place that are relevant to fintech companies in your jurisdiction?

Yes. China has tightened its regulation of internet finance businesses because of increasing fraud cases and illegal fundraising activities revealed in the past few years. China has recently suspended new registrations of finance companies nationwide in a campaign conducted by a task force made up of a number of government departments to identify and crackdown on illegal activities carried out during or in relation to internet finance, aiming to establish a monitoring and warning system against financial risks. Since April 2016, internet loan firms have been banned from lending money for down payments.

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

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

Current accounts pertain to foreign exchange settlements for the purpose of trade, provision of labour service and unilateral transfers in an international payment context. Under a current account, renminbi is fully convertible into a foreign currency.

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

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

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

18 Are there licensing requirements that would be triggered where the investor or client is a temporary resident in your jurisdiction?

Yes. The test for regulated activities is whether such activities are carried out in China, regardless of whether the investor or client is a temporary resident in China.

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

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

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

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

21 Does a third-party referral qualify as an unsolicited approach in your jurisdiction?

There is no specific meaning of an 'unsolicited approach' in China.

22 What licensing exemptions apply where the services are provided through an offshore account in your jurisdiction?

There are no such licensing exemptions.

23 What licensing exemptions apply where the services are provided through a nominee account in your jurisdiction?

There are no such licensing exemptions.

24 What licensing exemptions apply where the services are only ancillary or incidental to other core activities or services in your jurisdiction?

The regulated activities that a company can carry out need to be approved by the respective regulators and set out in the business scope of the company. If the ancillary or incidental activities are also regulated activities and not covered in the business scope of a company, prior approval from the respective regulator will be required before the company can carry out such activities.

25 What licensing exemptions apply when dealing with clients that are duly licensed in in your jurisdiction?

There are no such licensing exemptions.

26 What licensing exemptions apply to specific types of client in your jurisdiction?

There are no such licensing exemptions.

Securitisation

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

There is no legal mandate for executing loan agreements or security agreements. Such agreements shall be executed in accordance with the requirements in the articles of association of the company.

There is risk associated with entering into loan agreements or security agreements on a peer-to-peer or marketplace lending platform because no guarantees can be provided to lenders.

The CBRC issued the highly anticipated draft rules for online lending on 28 December 2015. The draft rules state that online lending platforms are designated as information intermediaries for borrowers and lenders and a transaction should not be entered into by any other means.

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

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

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

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

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

It is specifically prohibited by Chinese law to transfer loans to the purchaser without informing the borrower. Pursuant to article 80 of China's Contract Law (1999): 'Where the obligee assigns its rights, it shall notify the obligor. Such assignment will have no effect on the obligor without notice thereof.'

The assignor will need to obtain consent from the borrower. According to article 84: 'Where the obligor delegates its obligations under a contract in whole or in part to a third party, such delegation shall be subject to the consent of the obligee.'

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

Yes, it would, if the special purpose company obtains confidential information relating to the borrowers from the purchase, it is considered to be data processing, therefore the general principles shall apply; see question 41.

According to section 17 of the Guiding Opinions on Promoting the Sound Development of Internet Finance issued by Chinese authorities: 'Professionals shall diligently raise the level of technical security, appropriately protect customers' documentation and exchange trading information, and they must not carry on trading outside the law, or divulge customers' personal information.'

Intellectual property rights

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

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

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

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

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

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

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

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

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

The copyright of works created mainly by using the materials and technical resources of the employer (and that were the employer's responsibility) shall belong to the employer. Otherwise, any works created during the course of employment shall belong to the employee who develops it. However, the employer has the priority right to exploit the work within the scope of its normal business operation. Furthermore, the author may not authorise a third party to use the work in the same

Update and trends

China has been moving at an impressive pace over the last decade to regulate all matters on financial services. Similarly, with digital financial services, the expectation now is that each competent regulatory body will continue to clarify and issue more regulations and guidelines on the relevant subjects.

manner in which his or her employer uses it, without the employer's consent, within two years of the work's completion.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

40 Are there any high-profile examples in your jurisdiction of fintech companies enforcing their intellectual property rights or defending their intellectual property rights against a third party?

No.

Data protection

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

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

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

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

The data processor (being a telecoms service provider, basic or value-added) shall take reasonable technical and other measures to ensure the safety of collected data and shall promptly notify and make remedies in case of data breach incidents. Telecoms service providers shall establish a compliant mechanism for data collection and processing, and provide data subjects access to their collected data and the right to correct such data.

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

There are no specific legal requirements aimed at fintech companies but there are a few regulations related to financial institutions.

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

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

Currently, there are no additional requirements on anonymisation and aggregation of personal data, except for the requirements set out in question 41. However the proposed draft Cybersecurity Law has included requirements on anonymisation of personal data for big data processing and application. The Cybersecurity Law is positioned as the basic law of cybersecurity, including data protection, and will reportedly be promulgated in 2016.

Cloud computing and the internet of things

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

It is quite common. Along with the trend of internet finance and 'Internet Plus' (see question 45), traditional and innovative financial service companies in China are using cloud computing as an important tool to better adapt to the huge data flows and facilitate the various needs of e-commerce. Ant Financial, the Chinese internet finance giant, launched a cloud-computing service called 'Ant Financial Cloud' to help financial institutions build IT structures that are efficient, stable and secure.

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

There are no specific legal requirements or guidance, but the State Council has issued the Guiding Opinions on Actively Promoting the 'Internet Plus' Action Plan, where the use of cloud computing in the financial sector and the use of online financial cloud service platforms is encouraged.

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

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

Tax

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

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

Competition

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

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

Financial crime

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

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

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

Peer-to-peer platform operators are not currently subject to a lot of regulation. However, this will soon change as a result of draft regulations that were released at the end of 2015 in response to the high level of fraud in the market. Under the proposed regulations, customer funds must be held in a bank, platforms must be registered and platforms are also banned from providing a number of other financial services, such as setting up asset pools and equity or real asset funding.

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

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

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

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

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

German law distinguishes mainly between the following providers of financial services: banks, financial services providers, investment management companies, payment services institutions, e-money institutions and insurance companies.

All of these require a licence from and are under the supervision of Germany's single financial regulator, the Federal Financial Supervisory Authority (BaFin) with offices in Bonn and Frankfurt. Certain supervisory tasks are being assumed by the German Central Bank and the European Central Bank.

Banking services include deposit taking, lending, custody, providing guarantees and issuance of securities, and are ruled by the Banking Act and EU directives and regulations such as the Capital Requirements Regulation.

The range of financial services is wide and covers all Markets in Financial Instruments Directive (MiFID) activities and other services, including reception and transmission of orders, placement of securities, investment advice, portfolio management and proprietary trading. Contemplated activities often must undergo a detailed analysis to determine whether they require a banking licence or whether a financial services licence will suffice. The main legal text for financial services is the Securities Trading Act.

The Capital Investment Code (KAGB) regulates both investment management companies and investment funds. It has implemented the Undertakings for Collective Investments in Transferable Securities (UCITS) and Alternative Investment Fund Managers directives and regulates the access of foreign funds and managers to the German market.

Payment services institutions and e-money institutions are regulated by the Payment Services Supervisory Act, which has implemented the Payment Services and E-Money directives. Besides the Banking Act (and, to a lesser extent, the Securities Trading Act), it is this regulation that, in practice, is most relevant to fintech companies.

Insurance Companies are ruled by the Insurance Supervisory Act.

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

In Germany, any lending to any person requires a banking licence. Lending to German residents or companies from abroad also triggers a licensing requirement.

Special requirements apply when lending is made to consumers. Besides statutory rules (stemming, eg, from the EU Consumer Credit Directive), there is substantial jurisprudence protecting the consumer. Any consumer lending contract or transfer of consumer loans therefore requires detailed attention to ensure its validity and enforceability.

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

Trading loans with a view to transferring the loan (or individual elements of the loan) is subject to the regulatory and civil law requirements described in questions 8 and 27–30. Otherwise, no specific restrictions are in place regarding the dealing mechanism (eg, between brokers, on platforms or exchanges), only general rules in respect of the relevant form of trading.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies would generally fall within the scope of any such regime.

The KAGB provides for the licensing and supervision of asset managers, stipulates certain types of investment funds and regulates the distribution of both domestic, EU and third-country investment funds. The activities of fintech companies typically do not fall within the scope of the KAGB; instead, such activities are considered to be within the remit of banking and payment services or financial services regulation.

5 Are managers of alternative investment funds regulated?

Managers of alternative investment funds (AIFs) are regulated in accordance with the KAGB (see questions 1 and 4). Fintech companies usually do not qualify as managers of AIFs.

6 May regulated activities be passported into your jurisdiction?

As Germany is a member of the European Union, all financial services benefiting from European passporting rights may be provided by EU and European Economic Area (EEA) licensed institutions there, either by way of cross-border activity without a permanent establishment in Germany or through a German branch.

Services covered by passporting rights include banking, financial services, investment management (both for UCITS and AIFs), payment services and e-money business. Passporting is to be notified to the home regulator who will then inform the BaFin. The supervision will mainly rest with the home regulator. The BaFin and the German Central Bank will be entitled to filings and monitoring local activities.

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

A licence from BaFin is only granted to companies with a permanent establishment in Germany. However, as set out in question 6, fintech companies that have obtained an adequate licence in another EU or EEA jurisdiction may conduct their licensable activities in Germany by making use of the passporting rights.

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

Lenders and borrowers

Participating as a lender may require a banking licence for lending, while purchasing an existing loan may constitute licensable factoring. Borrowers may engage in licensable deposit taking. Licensing under the Banking Act is, however, only triggered if the activity is conducted commercially or requires a business organisation. The BaFin deems the latter to be the case when a lender extends 100 loans or more than 20 loans with an aggregate amount of €500,000 or when a borrower takes out 25 loans or €12,500 in more than five loans.

Since special crowdlending legislation was enacted in 2015, loans and loan purchase agreements fall under the Investment Products Act with the consequence of multiple investor protection rules applying, including, for example, the requirement of a BaFin-approved sales prospectus to be produced by the borrower. Several exemptions are available, including the new crowdfunding exception that applies if, inter alia, investors (unless they are corporations) are limited to allocating

€10,000 per borrower and must, if allocating more than €1,000, have disposable assets of €100,000 or two net monthly salaries. The aggregate borrowing of any one borrower must also not exceed €2.5 million.

Platform organisers

The licensing of running a lending platform now depends on how it is structured: if the conclusion of a new loan is brokered, no financial regulatory licence is required and only a permit under the Trade Regulation may be needed. If, in contrast, the purchase of an existing loan is brokered, a financial instrument is involved and a licence for the reception and transmission of orders or placement business, for example, will be required. Usually, however, a licensing exemption will be available if the platform restricts its business to investment products under the Investment Products Act.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

As a subcategory of crowdlending (described in question 8), crowdfunding is subject to financial regulation generally and to the Investment Products Act specifically. The regulatory assessment depends on how the product and the platform are structured.

If no financial or equivalent consideration is due for the funding contribution (as with donation-based crowdfunding and often with reward-based crowdfunding), there are usually no financial regulatory implications.

Other forms of crowdfunding will usually be subject to financial regulation. Equity participations will typically constitute financial instruments and therefore attract financial regulation of both the product and the platform. This is why most German investment crowdfunding has traditionally been performed by way of subordinated or mezzanine debt. Since 2015, however, such debt also falls under the Investment Products Act and, under wider financial regulation, constitutes a financial instrument.

As a consequence, the issuer will typically be offering an investment product and will have to satisfy the requirements of the Investment Products Act (eg, a BaFin-approved prospectus) unless he or she can avail him or herself of an exemption (eg, the crowdfunding exception described in question 8).

Dealing with a financial instrument means that the platform may be engaged in the licensable business of, for example, the reception and transmission of orders or of placement. Here too, however, a licensing exemption will usually be available if the platform restricts its business to investment products under the Investment Products Act.

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

Invoice trading is not specifically regulated in Germany. It may, however, constitute a licensable financial service such as factoring.

11 Are payment services a regulated activity in your jurisdiction?

Yes. Payment services are a regulated activity in Germany – see questions 1 and 6.

12 Are there any restrictions on cold-calling investors or clients in your jurisdiction?

Cold-calling is considered prohibited marketing in Germany unless the service offered relates to the professional activities of the person who is contacted. Institutional investors and family offices can, therefore, generally be approached in this fashion.

13 Does the regulator in your jurisdiction make any specific provision for fintech services and companies?

While the BaFin shows a keen interest in fintech activities and aims to provide special support to fintech companies looking for regulatory guidance, no specific regulatory exemptions or privileges have been enacted in Germany to date.

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

Specific rules covering marketing materials for financial services have been enacted in Germany. Most of them detail on a national basis the general European requirements of the MiFID. Extensive requirements especially apply to marketing materials aimed at retail investors, for example, with respect to the explanation of risks, the presentation of past performance or formal aspects such as the required reference to a prospectus. Besides regulatory requirements, the general laws (eg, unfair competition rules) apply.

15 Are there any regulator-imposed temporary restrictions on financial products in place that are relevant to fintech companies in your jurisdiction?

The BaFin currently considers banning certificates linked to the solvency of individual companies from being marketed to retail investors but the potential impact, if any, on fintech companies appears to be very limited.

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

No foreign exchange or currency control restrictions other than certain declaration duties currently apply in Germany. When entering or exiting Germany, monies and securities exceeding a value of €10,000 must be declared at the border control post. When receiving or sending money transfers from abroad that exceed €12,500, German residents and companies must notify the German Central Bank and state the purpose of the transfer. The information is used for statistical purposes only.

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

The provider may answer such reverse solicitations (ie, solicitations of information or services by a client at his or her own initiative without any prompting by the service provider) and will not be considered to be conducting licensable business in Germany. This extends to providing services as described in question 19.

18 Are there licensing requirements that would be triggered where the investor or client is a temporary resident in your jurisdiction?

German regulation applies if services are offered or provided in Germany. If an activity targets the German market (with internet offers, the use of German language is an indicator) or is provided to any individual or company in Germany, licensing requirements may be triggered. This usually also applies if temporary residents are targeted.

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

Any provision of services that is exclusively performed outside of Germany is not licensable in Germany, even if the investor or client is resident or domiciled in Germany. Reverse solicitations (solicitations of services by a client at his or her own initiative without any prompting by the service provider) are recognised. However, non-EU or EEA services providers will typically be subject to certain disclosure requirements when servicing German clients, especially when these are categorised as retail clients.

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

Cross-border activities of fintech companies into Germany benefiting from a European passport give rise to periodical filing and ongoing compliance requirements in relation to the business conducted in Germany. Supervision otherwise rests with the home regulator.

German fintech companies providing cross-border services into other jurisdictions are required to comply with all German rules and regulations when conducting that business and are under the full supervision of the BaFin with regard to these activities.

21 Does a third-party referral qualify as an unsolicited approach in your jurisdiction?

An unsolicited approach must always be made by the client. The service provider cannot contact the client first based on the referral of a third party.

The motivation of the client for the approach may originate in the recommendation of a third party (such as an existing client of the service provider). However, if the third party acts on instruction or behalf of the service provider, its action will be attributed to the service provider and any following approach by the client will then not be considered 'unsolicited'.

22 What licensing exemptions apply where the services are provided through an offshore account in your jurisdiction?

Under German law, the location of such account would be irrelevant. The determining factors triggering German regulation are whether services are marketed or provided in Germany (see questions 18 and 19).

23 What licensing exemptions apply where the services are provided through a nominee account in your jurisdiction?

No exemptions are available when using nominee accounts, but a financial services provider holding client monies is subject to heightened regulatory requirements.

24 What licensing exemptions apply where the services are only ancillary or incidental to other core activities or services in your jurisdiction?

The Banking Act lists a number of specific exemptions both for restricted and for ancillary activities. These include the marketing of certain investment funds, the provision of investment advice and the conduct of financial transactions for own corporate purposes. An exact analysis of the specific activity to be undertaken is required as the exemptions are very limited in nature. While most exemptions apply per se, some require formal BaFin approval.

25 What licensing exemptions apply when dealing with clients that are duly licensed in in your jurisdiction?

While dealing with licensed clients can considerably reduce regulatory disclosure and compliance obligations (eg, when dealing with eligible counterparties in the meaning of the MiFID), licensing exemptions are generally not available based on the status of clients targeted.

26 What licensing exemptions apply to specific types of client in your jurisdiction?

None.

Securitisation

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

In general, any lending activity targeting the German market requires a banking licence (ie, loan origination or prolongation and restructuring of loans is restricted to banks). Consequently, peer-to-peer loans are normally originated by licensed banks (white labelling solution). (For further detail, see question 2.) BaFin may order the lender to terminate and revese the loans originated in violation of the licence requirement.

Certain formal legal requirements must be observed in relation to consumer loans (written form) and collateral agreements in relation to loans secured by land charges or shares in companies (notarisation). Agreements entered into in violation of the formal legal requirements are void.

Consumer loan agreements and any contractual arrangements entered into by means of distance marketing (eg, through an internet lending platform) are subject to certain consumer information requirements and trigger a statutory revocation right. In general, those restrictions are also applicable in case of peer-to-peer lending since the loan originator (the bank) is not a consumer, but this needs to be assessed on a case-by-case basis. Any infringement of the consumer information requirements and the revocation instructions may result in the agreements being revocable for an indefinite period.

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

The claims resulting from the loan originated by the bank will be assigned to the respective investor (possibly routed through an intermediary) by means of an assignment agreement. The investor and the lending platform enter into a distribution agreement. The investor and the lending platform (or an affiliate) enter into a service level agreement.

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

From a legal perspective, and save for any explicit exclusion of assignment in the relevant agreement, the mere assignment of claims resulting from a loan agreement does not require the consent of the borrower. However, since the concept of a lending platform entails the assignment of the loan, the borrower will normally be informed and agree that the loan is assigned to the investor. See question 30.

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

The bank that originated the loan will be subject to confidentiality and data protection requirements (banking secrecy). As a consequence, all personal data in relation to the loan must remain with the originating bank unless the borrower consents to any form transfer of his or her personal data. Certain exemptions apply in relation to defaulting borrowers.

In practice, the loan agreements normally foresee that the borrower will give consent for his or her personal data to be transferred to the lending platform or any affiliate that processes the loans pursuant to a service level agreement. Consequently, the obligation to comply with all confidentiality or data protection laws must be imposed on such third party.

Intellectual property rights

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

Software (including source code, object code and any other form) is protected under the provisions regarding ancillary rights in computer programs contained in the German Copyright Act, provided that the software is the result of the intellectual creation of the developer. Copyright protection applies at the moment of creation; registration is not required. Under these provisions, certain exploitation rights are exclusively allocated to the developer of the respective software; in particular, the rights to copy the software, translate (eg, decompile), modify or rearrange the software, distribute the software in any way or publicly display the software. Although German copyright law does not know the 'work-for-hire' doctrine, the exploitation rights in software developed by employees in the course of their employment are allocated to the employer and do not have to be transferred separately to him or her.

However, the user of the software is not required to obtain consent for any of the above use of the software if this use is necessary to make use of the software for its dedicated purpose or is (under certain conditions) inevitable in order to obtain interoperability with other computer programs.

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

Business ideas and programs for data processing devices (software) are explicitly excluded from the applicability of the German Patent Act and thus not protected. However, this exclusion only applies for the ideas or the program itself. Hence, obtaining patent protection for software is possible if the software is used for solving a specific technical problem beyond the sole processing of data. It is usually required that a general problem is solved by the use of a specific computer program. If this requirement is fulfilled, the regular patentability requirements have to be met as well; in particular, the software must be considered to be new and commercially usable.

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

In general (and unless provided otherwise between employer and employee), all intellectual property developed by an employee in the course of employment is allocated to the employee (unless otherwise provided for, eg, for rights in software (see question 31)). For inventions (in particular patents), there is a specific legal regime (German Employee Inventions Act) under which the employer has the exclusive right to make use of the rights in an invention made by an employee in the course of his or her employment but has to reimburse the employee appropriately.

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

For external contractors or consultants, the general rule applies that all rights are allocated to the person that develops any intellectual property. The owner of any intellectual property rights developed in the course of a service agreement will be the external contractor. Hence, a party contracting with any such external service provider has to make sure that all rights in intellectual property are transferred or licensed-in on a contractual basis.

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

Under German law, trade secrets and other confidential information are only protected under statutory provisions to a very limited extent. If an employee discloses business or trade secrets to a third party where such business or trade secrets were entrusted or disclosed to him or her during his or her employment or where such information was unlawfully obtained by him or her, such employee is subject to criminal prosecution. The same applies to a person who instigates an employee to carry out such conduct. If, on the other hand, a competitor legally obtains knowledge of another party's trade secrets it is, in general, free to use this information. Having said this, any party should carefully choose to whom it discloses confidential information and should contractually bind the receiving party to keep the information confidential and only use it for the purposes it has been disclosed for.

Court proceedings are generally open to the public and so are trade secrets disclosed during such a proceeding. However, it is possible for a party involved in court proceedings and that wishes to protect its trade secrets to apply for exclusion from the public audience. The court may also oblige the parties to the lawsuit to keep such trade secrets confidential. However, German law does not provide for any other statutory possibilities to protect trade secrets or other confidential information against the opposing party of a lawsuit. The judge may order any such measures only under very strict requirements (if at all).

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

Brandings such as names, logos and appearances of products and services are primarily protected under trademark law. To obtain protection under the German Trademark Act, a specific trademark has to be registered with the German Patent and Trademark Office and must meet certain requirements. A trademark must be sufficiently distinctive, not be fraudulent or deceiving and not represent a common description of a certain product. Upon registration, the trademark owner obtains exclusive rights to use the trademark in connection with its products and may prohibit third parties to use the trademark or confusingly similar representations for similar products. If a trademark is not used in public for the specific goods or services it is protected for within five years from registration, it may be subject to deletion claims. Trademark protection is granted for a period of 10 years and may be renewed for unlimited numbers of subsequent 10-year periods.

Certain brands may be protected under the German Design Act, provided that the design is new and has a specific character. Design protection requires registration with the German Patent and Trademark Office.

Furthermore, the German Act on Unfair Competition prohibits certain business practices that may deceive consumers regarding the origin of products or try to benefit from a competitor's market position.

Domain names are not protected by statutory law; however, upon registering a domain at the competent registrar, the owner obtains an exclusive claim to use the respective domain.

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

All registered trademarks and designs are available in public databases. When entering into a new business, the operator of the business should ensure (by searching these databases) that its product or service name, logo and appearance are not likely to be confused with products or services of an already existing trademark or design. Even if no similar trademark is found in the course of such research, third parties may have gained trademark protection for unregistered trademarks if these have been used for a considerable period of time and have thus gained certain distinctiveness in the market.

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

The most important remedies in the event of the infringement of a person's intellectual property rights are to make a cease-and-desist claim (directed to any infringing conduct in the future) and to demand damages (for culpably infringing use in the past). Cease-and-desist claims are typically enforced by an initial warning letter connected with the request to give a respective cease-and-desist declaration subject to a contractual penalty in case of breach. In case the cease-and-desist declaration is not given this may justify a preliminary court order.

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

There are no specific statutory regulations regarding the use of open-source software in the financial sector. However, providers of financial services are closely supervised by the German Finance Authority, which conducts checks on regular intervals. The use of open-source software is checked in the course of the reliability and security of the IT systems of a provider of financial services.

40 Are there any high-profile examples in your jurisdiction of fintech companies enforcing their intellectual property rights or defending their intellectual property rights against a third party?

We are not aware of any prominent lawsuits in this field.

Data protection

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

According to the German Federal Data Protection Act, which lays down the basic principles for lawful collection and processing of data relating to a private individual, any collection of personal data has to be as restrictive as possible, lawful and may only be used for the purpose it has been collected for. Any collection, processing or use of personal data is only lawful if permitted by a specific statutory provision or the data subject has declared its unambiguous, freely given, informed consent. Statutory provisions permitting the collection, processing and use of personal data exist in the German Federal Data Protection Act itself and various specific provisions. To ensure that personal data is collected, processed or used in a manner that is as restrictive as possible, each act must appear strictly necessary to fulfil the (lawful) purpose the data collector is pursuing through collecting the data.

Update and trends

Until recently, innovative payment services comprised most fintech activities in Germany, dealing both with book money transfers and point-of-sale transactions. These activities were mostly pursued by innovatory start-up companies that were only sometimes financed by established banking institutions. With the advent of the blockchain concept, this picture is changing as traditional banks take a considerable interest in this development. From a regulatory perspective, the blockchain technology raises a considerable number of new issues, ranging from possible future special licensing requirements to issues such as data protection. Adapted regulation will probably only be discussed when the first commercially viable systems emerge.

If the intention is to transfer personal data to a company outside the EEA (including transfers to affiliates), further requirements have to be met to justify the data transfer. The transfer may be justified if the recipient of the personal data ensures an adequate level of data protection. While only very few countries are deemed to provide for such a level of data protection (eg, Argentina, Canada, Israel and Switzerland), this is not the case for the United States. Where the recipient cannot ensure an adequate level of data protection, the transfer of personal data may still be justified by consent of the data subject, if the transfer is strictly necessary for the performance of a contractual agreement between data subject and data controller or if the transfer is strictly necessary for the establishment, exercise or defence of legal claims. Apart from that, the data exporter in Germany and the data importer abroad may enter into specific model clauses provided for by the EU Commission or within a company group into binding corporate rules, provided that these rules ensure that the data importer is bound to process received personal data in accordance with legal provisions similar to the EU data protection regime. For US companies it is also possible to register at the US Chamber of Commerce under the EU-US Privacy Shield in order to legitimise data transfers from Germany to the US. The means to justify data transfers to the US are currently under review and may materially change in the future.

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

No specific statutory requirements exist regarding the collection, processing and use of personal data by fintech companies. However, financial institutions are also bound to the common law institute of 'bank secrecy' that prohibits disclosing any information relating to its customers unless required by law or upon the customer's consent.

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

Once personal data is totally and irreversibly anonymised or aggregated in a way that makes it impossible to match to a specific individual, this data does not qualify as personal data under the German Federal Data Protection Act anymore. It may be processed, used and shared without legal restrictions.

Anonymous data has to be distinguished from pseudonymous data, where the name (or other identifier) of an individual is replaced by a place holder but where it is still possible to trace the individual behind it. Whether this pseudonymised data qualifies as personal data (and the provisions of the German Federal Data Protection Act apply) depends on whether the individual behind the place holder can be traced by a data controller by its reasonable means.

Cloud computing and the internet of things

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

According to a recent survey of Bitkom (the leading German association for digital business companies), approximately 65 per cent of the German financial services providers use cloud services. Nonetheless, the use of (in particular) US cloud service providers is not very common, as many traditional financial services providers do not trust the security and reliability of such cloud services and prefer private cloud solutions with the data stored in Germany. The transfer of bank account data to providers in the US is generally considered problematic because of data protection requirements.

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

There are no specific statutory regulations regarding the use of cloud computing in the financial sector. However, providers of financial services are closely supervised by the German Finance Authority that conducts checks on regular intervals. The use of cloud computing is checked in the course of the reliability and security of the IT systems of a provider of financial services.

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

There are no specific legal requirements or regulatory guidance in this respect.

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Tax

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

No.

Competition

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

There are no specific provisions in German competition law dealing with the fintech sector. Fintech companies are without any modifications bound by competition law rules, in particular merger control filing duties, prohibition of anticompetitive agreements and concerted practices and, in case of a dominant position, certain limitations to their conduct of business.

Thus far, no specific competition issues have arisen in respect of fintech companies. This is in line with the fact that the industry is still young and is developing and providing new explorative products that still have to grow out of their niche and capture a sizeable market share. Competition issues will only arise when certain products have become mainstream services and the industry consolidates (eg, through mergers). Before this stage, however, it is likely that more competition issues will arise when fintech companies require access to established transaction systems (such as SWIFT); the established financial institutions should aim to block their access to protect their market position. A role model for the possible action of the competition authorities could be the past liberalisation of the telecom and energy markets.

Financial crime

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

Anti-money laundering (AML) policies are required if a fintech company is a licensed financial institution (eg, a payment services institution). Otherwise, like all other companies, they must comply with AML obligations in specific risk situations, for example, when handling large cash amounts.

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

There is no guidance specifically for fintech companies. The general rules and standards set for regulated financial institutions apply.

Hong Kong

Ian Wood

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

The following activities are regulated and trigger a licence requirement:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies would generally fall within the scope of any such regime.

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

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

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

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

Promoting a collective investment scheme may also constitute a regulated activity for which a licence is required (see question 1).

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

5 Are managers of alternative investment funds regulated?

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

6 May regulated activities be passported into your jurisdiction?

No.

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

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

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

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

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

9 Describe any specific regulation of crowdfunding in your jurisdiction.

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

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

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

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

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

11 Are payment services a regulated activity in your jurisdiction?

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

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

12 Are there any restrictions on cold-calling investors or clients in your jurisdiction?

In addition to any licensing requirement that may apply in relation to the offer of services or products (see question 1 on regulated activity) and the restriction on marketing of securities to the public, there are specific restrictions on cold-calling investors or clients in Hong Kong.

A licensed person may not as a consequence of an unsolicited call, whether made from Hong Kong or elsewhere, make or offer to make an agreement to acquire or dispose of securities or induce or attempt to induce another person to enter into such an agreement.

13 Does the regulator in your jurisdiction make any specific provision for fintech services and companies?

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

The establishment of these regulator contact points follows the publication by a government-established fintech steering group of a number of recommendations to promote Hong Kong as a fintech hub. Further developments are expected in the fintech area in response to these recommendations.

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

Yes, it is an offence in Hong Kong to issue any marketing material that contains an offer to the Hong Kong public to enter into an agreement to acquire or dispose of securities, unless an exemption applies. See questions 25 and 26 regarding relevant exemptions.

15 Are there any regulator-imposed temporary restrictions on financial products in place that are relevant to fintech companies in your jurisdiction?

No.

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

No.

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

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

Depending on the specific activity in relation to which the unsolicited approach is made, if the recipient is located outside of Hong Kong, they may be able to carry out a service that would constitute a regulated activity in response to such enquiry without a licence. This would

depend upon a number of factors, including whether the overseas entity was actively marketing its services to the public in Hong Kong. This is a complex area and advice should be sought on the specific circumstances of any particular case.

18 Are there licensing requirements that would be triggered where the investor or client is a temporary resident in your jurisdiction?

The application of the regulations and licensing regime are not affected by whether the investor or client is only temporarily resident in Hong Kong. The test for regulated activities is whether they are being carried out in Hong Kong.

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

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

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

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

21 Does a third-party referral qualify as an unsolicited approach in your jurisdiction?

There is no specific meaning of an 'unsolicited approach' in Hong Kong and this does not have significant bearing on the application of the regulations.

22 What licensing exemptions apply where the services are provided through an offshore account in your jurisdiction?

None, save where question 19 applies.

23 What licensing exemptions apply where the services are provided through a nominee account in your jurisdiction?

None.

24 What licensing exemptions apply where the services are only ancillary or incidental to other core activities or services in your jurisdiction?

In some cases, an entity that holds a licence for a particular regulated activity (eg, a Type 9 licence for asset management) will be able to carry out other regulated activities (eg, a Type 1 licence for dealing in securities), provided that this activity is carried out solely for the purposes of carrying out asset management.

There is no exemption from the licensing requirement for entities that do not hold a licence for any regulated activity, even if the regulated activity is incidental to the main activities of the entity.

25 What licensing exemptions apply when dealing with clients that are duly licensed in in your jurisdiction?

There are exemptions from obtaining a licence for dealing in securities (which would otherwise constitute a regulated activity), if such activity is carried out with certain classes of professional investors (including, eg, another corporation that is licensed). Such exemption is not available for all regulated activities and the availability of exemptions is a complex area for which legal advice should be sought.

It is also possible to issue marketing materials in relation to securities, structured products or collective investment schemes without breaching the marketing restrictions if such products are intended to be disposed of only to professional investors (which would include another licensed corporation).

26 What licensing exemptions apply to specific types of client in your jurisdiction?

There are exemptions from obtaining a licence for dealing in securities (which would otherwise constitute a regulated activity), if such activity is carried out with certain classes of professional investors. It is noteworthy that, for this particular case, 'professional investors' would not include high net worth companies or individuals, and as such it is not possible to avoid the licensing regime by only dealing with high net worth individuals. Such exemption is not available for all regulated activities and the availability of exemptions is a complex area for which legal advice should be sought.

It is also possible to issue marketing materials in relation to securities, structured products or collective investment schemes without breaching the marketing restrictions if such products are intended to be disposed of only to professional investors (which would, in this case, include high net worth companies and individuals).

Securitisation

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

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

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

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

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

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

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

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

If the assignment is not perfected, the assignment concerned may still constitute an equitable assignment (in contrast to a legal assignment), which is still recognised by the Hong Kong courts. However, the disadvantage of an undisclosed assignment is that if any legal action is taken against the borrower for payment, the assignee would have to

join the assignor in any such legal action (in contrast to being able to sue in its own name in the case of legal assignment) and the assignee may be vulnerable to, among other things, certain competing claims and other set-off rights that may otherwise have been halted by serving notice on the borrower.

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

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

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

Notification to the borrower of the assignment is not mandatory for the assignment to be effective. However, as noted in our response to question 28, there are a number of practical and legal difficulties that arise from an assignment without notice to the debtor (that is, an equitable assignment rather than a legal assignment).

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

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

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

Intellectual property rights

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

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

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

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

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

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

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

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

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

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

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

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

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

Confidential information can be protected against misuse, provided the information in question has the necessary quality of confidence, is subject to an express or implied duty of confidence, or no registration is necessary (or possible).

Confidential information can be kept confidential during civil proceedings with the permission of the court.

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

Brands can be protected as registered trademarks in Hong Kong. A brand can also be protected under the common law tort of passing off if it has acquired sufficient goodwill.

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

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

The HK Registry trademark database can be searched to identify potentially problematic trademarks that have been registered or applied for. It is highly advisable for new businesses to conduct trademark searches to check whether earlier registrations exist that are identical or similar to their proposed brand names. It may also be advisable to conduct searches of the internet for any unregistered trademark rights that may prevent use of the proposed mark.

Update and trends

As mentioned in question 13, a government established fintech steering group has recently published a number of recommendations to promote Hong Kong as a fintech hub. Further developments are expected in the fintech area in response to these recommendations.

The recommendations focus on developing Hong Kong as a hub for the provision of fintech solutions to existing financial institution activity, rather than promoting Hong Kong as a hub for consumer-based fintech activities. There is, therefore, a greater opportunity for fintech businesses that offer services or products to other businesses, including established financial institutions. We would like to see growth in fintech consumer services and products in Hong Kong, but given that the existing regulatory regime is complex and difficult for start-ups to navigate, it is likely that regulatory change is required for meaningful growth to occur.

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

Remedies include:
- preliminary and final injunctions;
- damages or an account of profits;
- delivery up or destruction of infringing products;
- disclosure orders; and
- costs.

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

There are no specific rules or guidelines on the use of open-source software; however, there are cybersecurity requirements that would be relevant.

40 Are there any high-profile examples in your jurisdiction of fintech companies enforcing their intellectual property rights or defending their intellectual property rights against a third party?

No.

Data protection

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

The Personal Data (Privacy) Ordinance (Chapter 486) (PDPO) protects the personal data of individuals. Personal data is information that relates to a living person and can be used to identify that person, where the data is in a form in which access or processing is practicable. Organisations that collect, use and disclose personal data (data users) must comply with, inter alia, six data protection principles, which include (subject to certain statutory exemptions):
- DPP1: personal data can only be collected for a purpose directly related to a function and activity of the data user in a lawful and fair manner, and that the amount of data to be collected must not be excessive; data subjects have to be informed of the purpose of the collection of data and how it will be used.
- DPP2: data users must take all practicable steps to ensure personal data remains accurate and is deleted after the purpose of collecting such data is fulfilled.
- DPP3: unless the data subject has given prior consent, personal data can only be used for the purpose for which it was originally collected or a directly related purpose.
- DPP4: data users must take all practicable steps to ensure that personal data is protected against unauthorised or accidental accessing, processing, loss or erasure.
- DPP5: data users should stipulate, publish and implement policies in relation to personal data that can generally be achieved by having a data privacy policy in place.
- DPP6: individuals have rights of access to and correction of their personal data. Data users should comply with data access or data correction requests within the requisite time limit, unless reasons for rejection prescribed in the PDPO are applicable.

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

The Hong Kong Privacy Commissioner has not published any guidance specifically aimed at fintech companies. However, it issued the 'Guidance on the Proper Handling of Customers' Personal Data for the Banking Industry' in October 2014.

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

The Hong Kong Privacy Commissioner has published an information leaflet – 'Matching Procedure: Some Common Questions' – that emphasises the importance of obtaining consent from all individual data subjects or the Privacy Commissioner if the process of aggregation of personal data for commercial gain constitutes a matching procedure under the PDPO, to ensure that the risk of potential harm to the relevant data subjects is minimised. A matching procedure is:
- a comparison of two data sets that were originally collected for different purposes;
- each comparison involves the personal data of 10 or more individuals;
- the comparison is undertaken by automated means (eg, by a computer analytics program), not manually; and
- the end result of the comparison may be used – immediately or subsequently – to take adverse action against any of the data subjects concerned. Adverse action includes anything that may adversely affect an individual's rights, benefits, privileges, obligations, interests or legitimate expectations.

Cloud computing and the internet of things

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

The use of cloud computing is quite common.

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

The Hong Kong Privacy Commissioner, the HKMA and the SFC have published guidelines on outsourcing and data privacy in connection with cloud computing.

The Hong Kong Privacy Commissioner has published various guidelines, circulars and information leaflets providing guidance on measures and best recommended practices that are pertinent to cloud services. These include having contractual arrangements between providers and customers of cloud services, to address the Privacy Commissioner's key concerns relating to loss of control, and the use, retention or erasure and security, of personal data when it is stored in the cloud. The recommended best practices touch on a number of risk areas, in particular: cross-border data transfers; subcontracting arrangements; use of cloud providers' standard contracts; service and deployment methods; and other outsourcing-related issues.

The HKMA's Supervisory Policy Manual sets out the key regulatory standards that the HKMA expects authorised institutions to follow, or else be prepared to justify non-compliance, for managing technology risks and cybersecurity, covering topics such as IT governance and oversight, system development and change management; information processing; communication network management; and management of technology service providers. Further precautions include: ensuring that service providers have the resources and expertise to comply with the authorised institution's IT control policies; performing independent assessments of the service provider's IT control environment for all critical technology outsourcing; ensuring sufficient contractual protection and safeguards; and conducting annual audits to confirm that service providers have an adequate IT control environment.

The SFC has endorsed the International Organisation of Securities Commissions' 'Principles on Outsourcing of Financial Services for Market Intermediaries' in relation to 'licensed corporations' outsourcing their activities. The SFC also issued guidelines that require licensed corporations to establish policies and procedures to ensure the integrity, security, availability, reliability and thoroughness of all information relevant to the licensed corporation's business, which extends to situations where data is stored in the cloud. Other best recommended

practices relevant to cloud computing include reviewing policies and procedures to manage, identify and assess cybersecurity threats and IT security controls; considering the cybersecurity controls of third-party service providers; and ensuring continuity of critical activities and systems.

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

None other than those set out in question 45.

Tax

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

There are no specific tax incentives applicable to fintech companies.

Competition

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

There is a competition regime in Hong Kong that applies to all entities carrying out business in Hong Kong. There are no particular aspects of this regime that would affect fintech businesses disproportionately to other businesses.

Financial crime

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

If the relevant entity is licensed for regulated activities, is licensed as a bank or operates a money service, it needs to comply with the Hong Kong legislation in relation to anti-money laundering and counter-terrorist financing, including establishing policies and procedures to identify clients and combat money laundering and terrorist financing.

The Hong Kong legislation in relation to the prevention of bribery would also apply and licensed corporations should have in place policies and procedures to prevent bribery.

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

There is no specific guidance for fintech companies, but there is guidance for licensed corporations and banks that would apply to fintech businesses that are licensed accordingly.

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

Indian law regulates various types of financial services. Advisory work relating to investments in Indian securities requires a licence as an investment adviser. Certain types of investment banking, such as assisting private companies in obtaining funding, are considered to be outside the scope of the licence. There are also licensed merchant bankers – for example, making a public issue on the stock exchanges or a public offer under the Takeover Code would need the support of a registered merchant banker. There are different categories of merchant bankers and the functions of each level of category vary. There are various other categories of agencies that require a licence, such as custodians, stock brokers, underwriters, portfolio managers, credit rating agencies, foreign institutional investors, venture capital funds, depositories and stock exchanges.

There are various categories of institutions that can engage in lending. These are banks that include scheduled commercial banks and non scheduled commercial banks, co-operative society banks, small finance banks, non-banking financial companies (NBFC) and money lenders. As regards deposits, there are various categories of institutions that can receive deposits. These are banks that include scheduled commercial banks and non-scheduled commercial banks, cooperative society banks, small finance banks, NBFCs that are authorised to receive deposits and payment banks. There is also a concept of a chit fund, which receives contributions from members and periodically conducts a lottery to pay the winner. Post offices can also receive deposits. There is a provident fund that is a pension scheme operated by the government. Mutual funds are also regulated.

Factoring can be undertaken by banks, NBFCs registered as factors with the Reserve Bank of India (RBI) and certain other government entities.

Invoice discounting can be undertaken by banks, NBFCs and corporates.

Bonds and debentures can be listed on stock exchanges as public offerings. Syndications of loans are generally not regulated unless they are converted into securitised instruments.

Payment services are also regulated and are particularly relevant to fintech (see question 11).

Entities in India can deal in foreign exchange trading only with permitted stock exchanges and banks in India. Other entities like fully fledged money changers are also permitted to deal with foreign exchange. It may be noted that Indian residents are not permitted to trade in foreign exchange through overseas trading platforms.

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

Yes, consumer lending is regulated. There are various types of institutions that are entitled to engage in consumer lending. These are banks that include scheduled commercial banks and non-scheduled commercial banks, NBFCs, cooperative society banks, small finance banks, microfinance institutions and money lenders. Regulations require lending agencies to maintain standards relating to capital adequacy, prudential norms, cash reserve ratio, statutory liquidity ratio, credit ceiling, know your customer guidelines, etc, though each of these norms would apply to each category of lending agency in a different manner. Each agency plays a different role in terms of the type of lending and the kind of borrower. For example, infrastructure NBFCs can extend credit facilities to entities in sectors of transport, energy, water and sanitation and communication. Loans and advances up to 2.5 million rupees are required to constitute at least 50 per cent of the loan portfolio of small finance banks.

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

Issuance and listing of debt securities and public offer and listing of securitised debt instruments is regulated in India. Trading of debt securities and securitised debt instruments in the secondary market is permitted after the debt securities or securitised debt instruments are listed on a recognised stock exchange.

Asset reconstruction companies or securitisation companies are permitted to securitise the acquired debt and sell the securitised debt only to qualified institutional buyers, which include banks, insurance companies and foreign institutional investors.

Risk participation, either funded or unfunded, is unregulated in India and banks or NBFCs rarely enter into domestic risk participation transactions.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies would generally fall within the scope of any such regime.

There are several categories of collective investment schemes. These are broadly mutual funds, alternative investment funds (AIFs) and collective investment schemes, all of which are required to be registered with the Securities and Exchange Board of India. Mutual funds are primarily focused on listed equity and debt instruments and anyone can participate in a mutual fund. AIFs are primarily focused on unlisted instruments and primarily institutional investors invest in AIFs due to a significant minimum investment by an investor. The regulations on collective investment schemes cover all other forms of collective investment schemes. The regulations are extremely stringent on collective investment management companies; for example, there are requirements for rating, insurance, appraisal, schemes to be close-ended, no guaranteed returns and restrictions on advertisement materials. Units subscribed to collective investment scheme are freely transferable. A fintech company would need to be registered as a collective investment management company to deal with collective investment schemes.

5 Are managers of alternative investment funds regulated?

Yes, managers of alternative investment funds are regulated. There are requirements as to their qualifications and minimum years of experience. The manager or sponsor of an AIF is also required to have a minimum investment in the fund of not less than 2.5 per cent or 50 million rupees, whichever is lower. There are requirements relating to disclosure of their investments.

6 May regulated activities be passported into your jurisdiction?

No, India does not allow passporting of regulated activities; that is, a financial service provider registered in one country is not entitled to engage in regulated financial services in India purely based on registration in a foreign jurisdiction and would need to obtain registration separately in India.

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

By and large, this would be difficult as obtaining a license for a regulated financial service is available only to agencies incorporated in India, or in the case of banks, having a presence in India. It is possible for a fintech company outside India to provide services outside India to Indian nationals, especially for investments outside of India. However, the scope for this is limited because exchange control restrictions may come in the way of making payments outside India for services rendered.

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

Peer-to-peer lending is so far unregulated in India. India's central bank, the RBI issued a consultation paper on the subject in April 2016. The paper envisages that P2P lending will be allowed and regulated and that P2P aggregators will be classified as NBFCs. It is proposed that such P2P institutions have a minimum capital of 20 million rupees and need to meet a minimum leverage ratio in order to participate in P2P lending. The consultation paper also proposes that the regulations would deal with issues such as governance, business continuity, customer interface and reporting requirements.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

To the extent that crowdfunding involves investments in equity or debt instruments, these would be regulated by company or securities law. A private company cannot access capital from the public and cannot have more than 200 shareholders. It also cannot accept deposits from the public. A public company would need to follow primary market processes for equity or debt funding. There are no regulations that deal directly with crowdfunding. For other types of funding, that is, those that are not debt or equity based, the law is not settled at the moment as all kinds of crowdfunding could be considered 'deposits'. We believe that crowdfunding that can be justified as an advance against purchase of a product would be permitted in India. For P2P lending to the extent that it is a type of crowdfunding, see question 8.

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

To enhance the ease of financing micro, small and medium enterprises in India, the RBI has provided its approval to three companies to set up invoice discounting platforms. The Trade Receivables Discounting System (TReDS) is a fintech platform where financers discount invoices due by corporates, government entities, etc. TReDS would need to have a minimum paid-up capital of 250 million rupees and entities, other than the promoters, are not permitted to maintain shareholding in excess of 10 per cent in TReDS.

11 Are payment services a regulated activity in your jurisdiction?

Yes, payment services are regulated under the Payment and Settlement Systems Act 2007. A payment system is defined as 'a system that enables payment to be effected between a payer and a beneficiary, involving clearing, payment or settlement service or all of them, but does not include a stock exchange'. These include credit cards, debt cards, smart cards and money transfers. The categories of payment providers are prepaid payment instruments, financial market infrastructure (clearing houses), retail payment organisations, card payment networks (Visa, Mastercard, etc), cross-border money transfers, ATM networks, white label ATM operators, instant money transfer and prepaid payment instruments.

There are three types of prepaid payment instruments: open payment instruments, which are payment instruments that can be used to make a payment to any merchant; semi-closed, which are payment instruments that can be used to make payment to a defined set of merchants; and closed, which are payment instruments of a merchant for payment only to that merchant. Open payment instruments can be issued only by banks. Cash withdrawal is permitted only in the case of open payment instruments. Only closed payment instruments do not require registration under the regulations.

It may be noted that e-wallets have gained huge popularity in India in the last few years and it is believed that there are as many as 100 million subscribers to e-wallets in India. E-wallets are frequently used for online purchase of goods and services. E-wallets have also gained popularity because of the requirement of a second authentication (such as Visa Verify or Mastercard SecureCode) for 'card not present' credit card and debt card transactions. This is difficult for services such as Uber. Accordingly, customers use payment wallets that allow for automatic debit without the need for a second authentication.

12 Are there any restrictions on cold-calling investors or clients in your jurisdiction?

There are no restrictions on cold-calling specific to the financial sector. Obviously, public issues and public offers need to have a prospectus and letters of offers that are highly regulated.

There are do-not-call regulations under telecoms laws that apply to all goods and services that would apply to the financial sector as well. One can register a mobile number with the do-not-call registry. There are certain exceptional categories for which one can select to receive calls and messages. One such category is 'banking/insurance/financial products/credit cards'. One can also send transactional messages; for example, a bank can send a message to a customer informing the customer of the amount withdrawn from the bank account. Telemarketers are required to be registered and must use specialised telecom resources. Telecom companies have backend integration with the do not call registry such that calls and messages to persons on the do not call registry would be automatically blocked. The regulations prescribe penalties for violation. On the sixth violation committed, the concerned telemarketer will be barred from receiving all forms of telecom resources for a period of two years.

13 Does the regulator in your jurisdiction make any specific provision for fintech services and companies?

There are few specific provisions relating directly to fintech services though several regulations are mostly related to fintech. For example, there are regulations on account aggregator services – an aggregator who markets financial products such as insurance, bank accounts, mutual funds or bonds. Payment settlement services also largely relate to prepaid payment instruments such as e-wallets. The RBI has issued a consultation paper on P2P lending and regulations on the same are expected to be issued shortly.

The RBI set up a working committee on fintech and digital banking in July 2016. The committee is yet to submit its report on the same.

The government of India has also launched the Startup India initiative that provides for various regulatory and tax benefits for start-ups, which would include start-ups in the fintech sector.

The government of India is also promoting financial inclusion and using unique payment methods to cover subsidy payments. It is also promoting Aadhar, a biometric identification system. It is proposed that these systems will ultimately act as platforms that private players can also use to authenticate identification and execute payments.

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

Rules on marketing materials for financial services is fairly limited. Information in prospectus and letters of offer for public and public offers respectively are regulated. The RBI also requires financial companies to use only registered telemarketers for telemarketing activity.

15 Are there any regulator-imposed temporary restrictions on financial products in place that are relevant to fintech companies in your jurisdiction?

There are no restrictions imposed on fintech products. If the relevant service requires a licence, the the same must be offered by a duly licensed organisation.

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

Yes, India has a extensive exchange control regime that is based on the Foreign Exchange Management Act 1999. Dealing in foreign exchange is a regulated activity. Current account transactions are permitted

except for specified restricted activities. Capital account transactions are, however, restricted. For example, purchase and sale of shares of Indian companies between Indian residents and non-residents are subject to minimum and maximum valuation requirements and filing requirements. Exports are required to be realised in the form of freely convertible foreign currency within nine months of the export. However, export proceeds against specific exports may also be realised in Indian rupees, provided it is through a freely convertible vostro account of a non-resident bank situated in any country other than a member country of Asian Clearing Union or Nepal or Bhutan. The Indian rupee is not a freely convertible currency. Indian companies are subject to restrictions on borrowing from overseas relating to all in cost interest rates, debt to equity ratio, minimum repayment period, eligibility to borrow, eligibility of lenders, etc. Individuals are allowed to remit up to US$250,000 per year in foreign exchange for any reason other than specified prohibited activities. There are restrictions on Indian businesses setting up joint ventures and wholly owned subsidiaries overseas and remitting money to fund such entities. Where transactions are not permitted because they do not meet the conditions prescribed, one can obtain discretionary approvals from the RBI for the same.

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

This would largely depend on the type of service being provided. The question of whether the service was solicited or not is by and large not relevant except that where the foreign provider is providing the service from outside India and contends that it is not bound by Indian law, providing services or marketing the service within India may bring the service provider within the Indian regime.

For example, if the service provider advises an Indian national on investments globally or perhaps even investments in India and the service provider is not based in India, one could reasonably contend that the service provider does not need to be a registered investment adviser.

On the other hand, there are many transactions that are required to be managed or certified by licensed service providers; for example, a public issue or public offer has to be managed by a licensed category 1 merchant banker. An investment banker from overseas that is not licensed in India could not engage in this service.

Indian exchange control regulations could also come in the way of overseas service providers providing services from overseas to the Indian market as payments made by the customer to the service providers overseas in foreign exchange may not be permitted or could be questioned by banks and the regulator.

Under Indian law, if the investor is a non-resident Indian or a person of Indian origin and is based outside India, an adviser of Indian securities to such non-resident Indians or persons of Indian origin would require registration.

18 Are there licensing requirements that would be triggered where the investor or client is a temporary resident in your jurisdiction?

Assuming the service can practically be provided by a foreign service provider or by a service provider who is not licensed in India, then if the investor or client is a temporary resident overseas, as a broad principle, he or she should be able to receive such service. It would, however, depend on what kind of service, as many services cannot be provided by a foreign service provider.

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

As a matter of principle, the foreign provider would not require licensing in India provided, however, that it relates to a service that can be performed in practice by a foreign service provider. Certain type of services cannot be performed by a foreign service provider since the relevant transaction itself requires accreditation or relevant agencies involved would not deal with an unlicensed service provider or exchange control restrictions would make payments to the foreign service provider difficult.

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

There are no specific obligations relating to fintech companies. India has extensive exchange control regulations and fintech companies would need to navigate through those regulations in order to carry out cross-border activities.

21 Does a third-party referral qualify as an unsolicited approach in your jurisdiction?

This issue is largely not relevant in India.

22 What licensing exemptions apply where the services are provided through an offshore account in your jurisdiction?

If the financial service is not provided in relation to the Indian market (eg, it does not relate to investment in shares of an Indian company on an Indian stock exchange), Indian laws are unlikely to apply. If the financial service is provided in relation to the Indian market (eg, portfolio managers managing a portfolio of Indian securities for client would need to be registered under Indian laws), then Indian laws would apply. However, there are limitations on the ability of Indian nationals to open offshore accounts and to make payments in foreign exchange overseas.

23 What licensing exemptions apply where the services are provided through a nominee account in your jurisdiction?

None.

24 What licensing exemptions apply where the services are only ancillary or incidental to other core activities or services in your jurisdiction?

There are some exemptions relating to services that are ancillary or incidental to other core activities. For example, a company may lend money to its affiliate provided that the company's financial assets do not constitute more than 50 per cent of its total assets and the company's income from financial assets does not constitute more than 50 per cent of its gross income.

25 What licensing exemptions apply when dealing with clients that are duly licensed in in your jurisdiction?

As a matter of principle, it is unlikely that a service provider would be able to avail of an exemption because the client is a registered service provider. However, certain investment advisers are exempt from registration (eg, advocates or law firms are exempt from registration for providing investment advice to their clients, incidental to their legal practice; advice provided to foreign nationals (other than persons of Indian origin or non-resident Indians) on Indian securities is exempt from registration).

26 What licensing exemptions apply to specific types of client in your jurisdiction?

As a matter of principle, there are no exemptions (see question 25).

Securitisation

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

Loan agreements and security agreements are required to be executed in accordance with the constitutional documents of the entity and the corporate authorisations executed by the entity. Under Indian laws, a mortgage deed, that is, relating to immoveable property, is executed by the mortgagor, attested by two witnesses and registered with the relevant land registry. Most security arrangements involving immoveable property relate to mortgage by deposit of title deeds. A mortgage by deposit of title deeds or an equitable mortgage would encompass a declaration provided by the mortgagor and a memorandum of entry in the records of the mortgagee that records the deposit of title deeds. There are other various formalities to ensure perfection of the security documents. This includes filing a form with the Company registry and registration of the charge with a central registry for security interest.

As long as the P2P lending contracts are properly executed, they would be enforceable. While Indian law broadly allows electronic

contracts, a key issue relates to stamp duty. Indian state governments are yet to introduce electronic stamping of documents. There is likely therefore, to be a need for physical contracts to be printed and stamped to comply with laws on stamp duty and in order for such contracts to be enforceable.

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

While there are some distinctions between assignment of rights versus obligations under a contract, it is preferable to state expressly in the contract whether the rights and obligations under the contract can be assigned, with or without the consent of the other party. A notice on the assignment to the counterparty is required in certain instances and is generally considered to be good practice.

There are certain contracts under which assignment is prohibited. Contracts where personal skill or qualifications are involved cannot be assigned. This primarily stems from common law.

It may also be noted that the assignor and the assignee may have to bear significant stamp duty on the assignment. If a document is not duly stamped, the document will not be admissible as evidence in court.

P2P lending platforms will be required to adhere to the same method of assignment as described above.

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

Under Indian law, for assignment of actionable claims, the assignment is required to be executed by an instrument in writing by the assignor in favour of the assignee. A notice of the assignment to the borrower is necessary to make the assignment binding against the borrower. For example: A owes money to B, who transfers the right to receive the dues to C; B then demands the debt from A, who, not having received notice of the transfer, pays B; the payment is valid, and C cannot sue A for the debt.

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

Under Indian banking laws, there is a central register maintained by the regulator relating to security being provided by borrowers. This register is accessible by any person upon payment of the prescribed fees. This law does not currently cover P2P lending but under the proposed rules, a P2P aggregator would be classified as an NBFC in which case, it is possible that security provided for P2P lending would also need to be registered.

Outside of this law, general laws on data protection and privacy would apply and a duty of confidentiality would apply. The law provides for payment of compensation on failure to exercise reasonable security practices and procedures to protect sensitive personal data or information (which includes financial information) that results in wrongful loss or gain, and a criminal penalty for disclosure of personal information in breach of contract or without consent of the data subject where such breach is done with the intention of or knowing that it is likely to result in wrongful loss or wrongful gain.

Intellectual property rights

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

Software can be protected under copyright law. The patent laws of India provide fairly limited protection for software, as it cannot protect software per se.

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

Under Indian law, a software programme per se cannot be registered as a patent. A software programme can be patentable but it requires a specific unit on which the software is dependable for it to be patentable. A business method cannot be patented in India.

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

In the case of copyright law, this would be the employer. In the case of patent law, it would be the inventor, who could be the employee. It may be noted that copyrights and patents can be assigned to the employer. In the case of patents, application for a patent must be accompanied by the assignment deed executed by the employee.

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

Under copyright law, if the individual is not an employer but a contract worker or consultant, then the concerned individual would be the owner of the copyright and not the employer or customer. In the case of patent law, whether an employee or a contractor or consultant, the concerned individual would own the patent if he was the inventor. However, agreements can be put in place whereby the contractors or consultants assign these rights to the employer or customer.

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

India does not have a specific law dealing with trade secrets. Trade secrets are protected under the common law remedy of breach of confidentiality. Confidentiality may be protected under contract or implied depending on the nature of the service.

Trade secrets are to be kept secret unless it is an inherent part of the court proceedings, in that case disclosure for the purpose of leading evidence is required. This has sometimes acted as a deterrent to many to enforce their trade secrets through the judicial process.

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

Branding is largely protected under trademark law, whereby one would need to register a trademark. One can file an action for infringement in case of a registered trademark or a passing off action in case of unregistered marks. Indian law also recognises the concept of transnational reputation of international trademarks. Trademark owners can also register their brands with customs authorities that could enable authorities to intercept goods they believe are counterfeits. The trademark owner can also claim prior use and strike down a registered owner's right, by seeking cancellation of mark. The trademark owner can also keep a watch and seek to oppose any new marks that are the same or similar to the one owned by it. One can also obtain a copyright registration over the copyright in a mark. However, registration is not mandatory for ownership of copyrights.

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

A new business can do a trademark search to determine whether a similar trademark has been registered. The trademark registry is online and one can do the search by accessing the website of the trademark registry. One can also do market studies or test marketing to see if similar unregistered marks are in use. A new business can also search domain name registries to determine if websites with similar domain names have been registered.

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

If a trademark, copyright or patent has been infringed, one would file a suit for infringement. In the case of trademark, one can also file a passing off action. In the case of copyright and trademark, one can also pursue criminal remedies in the case of infringement. The Copyright Act deals with offences of infringement of copyright or other rights conferred under this Act. It provides for imprisonment that ranges from six months to three years and a fine that ranges from 50,000 to 200,000 rupees. The trademarks Act 1999 also deals with criminal remedies against against infringement and passing off action. Search and seizure procedures can also be invoked to deal with infringement.

Update and trends

The RBI has recently launched a payment service, Unified Payment Interface (UPI) that will enable seamless peer-to-peer money transfers. UPI only requires the users to have a smartphone and to register with a bank for UPI by installing the mobile app. A unique virtual address is created for each user, which is mapped to the smartphone. UPI would permit transactions from 50 up to 100,000 rupees. This payment service can be used by private companies and is likely to be of use to fintech companies.

The government of India has notified all government entities to curb the passing on of merchant charges on credit and debit card payments to customers. This is line with the vision of the government of India and RBI to transition to a less-cash society.

The RBI has released a vision paper 2018 that aims to build the best payment and settlement systems for a 'less-cash' India. The broad outline of the paper regards coverage, convenience, confidence, convergence and cost. To achieve these, the paper focuses on four strategic initiatives: responsive regulation, robust infrastructure, effective supervision and customer centricity.

Finally, it should be noted that the concept of e-wallets has gained prominence in India in the recent past, along with a huge expansion of the e-commerce industry in India, and customers are increasingly using e-wallets to make online payments to e-commerce companies.

One can also engage in opposition proceedings in respect of trademarks and patents that are sought to be registered. There is a procedure for cancellation of marks. In addition, one can file actions with the company authorities in respect of companies registered with names that are similar to trademarks or other company names, though a trade name registration in no way confers trademark protection.

A unique aspect of Indian law is that one can file a case of copyright or trademark infringement not just where the cause of action arose or where the defendant resides or does business, but where the plaintiff resides and does business. One can obtain an *Anton Piller* order for appointment of a court commissioner to conduct an inspection, and it is possible to obtain injunctions.

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

No.

40 Are there any high-profile examples in your jurisdiction of fintech companies enforcing their intellectual property rights or defending their intellectual property rights against a third party?

No.

Data protection

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

There are two provisions, civil and criminal, on the use of personal data. A body corporate that has access to sensitive personal data or information (SPDI) will be liable to compensation if it is negligent in using reasonable security practices and procedures (RSPP) in protecting such SPDI and it results in wrongful loss or wrongful gain. SPDI includes:

- passwords;
- financial information such as bank account, credit or debit card or other payment instrument details;
- physical, physiological and mental health condition;
- sexual orientation;
- medical records and history; and
- biometric information.

RSPP refers to procedures determined by a law in force (there is none) or as agreed between the parties and in the absence of the same, the rules of the central government. Accordingly, it is open to an organisation to agree privacy policies and security standards with its customers, service providers, employees, etc. The central government rules are more in the nature of cursory privacy rules on collection, storage, transfer, etc, of SPDI. They prescribe no specific security standard.

Indian law also imposes criminal penalty on an organisation providing a service that is in possession of personal information if it discloses such information in breach of contract or without the consent of the data subject and does so with the intention of or knowing that it is likely to result in wrongful gain or wrongful loss.

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

There are some requirements in the financial sector. For example, the RBI mandates that data breaches should be reported to it. Organisations in the financial sector must use a 250-bit key encryption or higher to protect their systems. Credit information companies are governed by certain norms concerning protection and disclosure of personal information. The card-issuing entity should not reveal any information relating to customers obtained at the time of opening the account or issuing the credit card to any other person or organisation without obtaining their specific consent. The purpose for which the information would be used and the organisations with which the information would be shared is also required to be disclosed. RBI has frowned upon credit companies obtaining the consent of the customer for sharing their information furnished while applying for the credit card with other agencies, as part of the terms and conditions. The credit companies are required to provide the customer the option to decide as to whether he or she is agreeable for the credit company sharing the information with other agencies. The credit companies are also required to explicitly state and explain clearly to the customer the full meaning and implications of the disclosure clause.

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

There are no requirements on anonymisation or aggregation of personal data for commercial gain.

Cloud computing and the internet of things

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

The use of cloud computing is growing rapidly in India. Financial institutions are increasingly using cloud computer for access to software applications and data. Smaller fintech companies are perhaps moving faster to use cloud computing than compared to more established banks and financial institutions. The government of India has stated that as part of its GI cloud initiative (Meghraj) all governmental functions would be shifted to the cloud.

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

As of now there are no legal requirements or statutory guidance for use of cloud computing.

The Institute for Development and Research in Banking Technology, established by RBI, has a centre for cloud computing. The centre focuses on providing suitable cloud platforms to banks for testing, undertaking studies on security and scalability and building secure cloud storage, etc.

A working committee formed by RBI had published its report on the use of cloud computing by urban cooperative banks in 2012. The report tried to lay down the existing issues and the way forward for urban cooperative banks to establish a robust IT network that includes cloud computing.

There are various private players in the market offering their cloud computing services to banks and NBFCs. Banks and NBFCs in India are slowly accepting and moving towards such services.

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

There are no legal requirements relating to the internet of things as yet. The Ministry of Information Technology has issued a draft policy on the internet of things and the Department of Telecommunications has issued a road map for machine-to-machine technology that deals with the internet of things. These are, however, policy papers and do not provide any regulatory requirements.

The internet of things is still at a nascent stage and is generally governed under IT laws. Policy discussions are, however, underway.

Tax

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

There are no tax incentives specifically aimed at fintech companies. However, the fintech companies that qualify as start-ups may avail themselves of various benefits under the Startup India initiative launched by the Indian government. Tax benefits are also extended to units in a special economic zone.

Competition

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

There are none. Indian competition law in general relates to anti-competitive practices, monopolistic practices and merger control requirements.

Financial crime

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

India has a law on the prevention of corruption that penalises corrupt practices. There are no requirements on framing policies or conducting trainings.

The Prevention of Money Laundering Act 2002 prescribes strict criminal penalties on entities indulging in money laundering. It covers involvement with or concealment, possession, acquisition or use of proceeds of a claim or projecting or claiming such proceeds as untainted property.

RBI has also prescribed stringent know-your-customer norms, anti-money laundering standards and guidelines on combating the financing of terrorism to be adhered to by all banks, NBFCs, payment system operators, e-wallet companies, etc.

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

India has fairly detailed laws with regard to the prevention of money laundering, KYC requirements, insider trading and combating financing of terrorism. Depending on the services provided by the fintech companies, they may be governed by some or all of these regulations. There is also a heightened awareness of identity fraud and most financial institutions require a much higher level of identity proof from customers than is the case in many developing countries. Given the slow court process and inefficiencies of the investigative agencies, financial institutions also resort to a high level of protection compared with developed countries, such as through higher security cover, undated cheques, bank guarantees, personal guarantees and the appointment of nominee directors. Fintech companies would need to consider the optimal mix of these options to balance obtaining sufficient protection with ensuring business efficiency.

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

The Central Bank of Ireland (the Central Bank) is the regulatory body for all regulated financial services under Irish law. The principal categories of financial firms and services that are regulated as a matter of Irish law are those in respect of which regulation derives from EU directives, including:

- banking services (essentially deposit taking) and credit institutions;
- mortgage credit intermediaries under the EU (Consumer Mortgage Credit Agreements) Regulations 2016;
- Markets in Financial Services Directive (MiFID) firms and services;
- investment business and investment intermediary services and firms or the provision of investment advice under the Investment Intermediaries Act 1995;
- investment funds and management of investment funds;
- depositary and administration services for investment funds;
- insurers (life and non-life);
- payment services under the Payment Services Directive (PSD); and
- electronic money (e-money) issuance and services.

Ireland's approach to implementation of EU directives is generally consistent with the principle of maximum harmonisation and avoids gold-plating.

There are some financial services that are subject to domestic Irish legislation, including acting as a retail credit firm or servicer to a retail credit firm, as governed by Part V of the Central Bank Act 1997 (the 1997 Act)and the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 (the 2015 Act) respectively.

It is an offence to carry out any of the above regulated financial services in Ireland without the authorisation of the Central Bank (subject to applicable EU passporting rules).

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

Yes. Lending to natural persons is regulated, whereas lending to corporates (at an APR below 23 per cent) is not.

Consumer lending is regulated by the Consumer Credit Act 1995 and the Consumer Credit Directive Regulations 2010, which regulate the form and content of credit agreements. In addition, the 1997 Act regulates the provision of cash loans by retail credit firms. The Consumer Protection Code 2012 (CPC) is also applicable in this instance.

The CPC applies to financial services providers who are authorised, registered or licensed by the Central Bank, as well as financial services providers authorised, registered or licensed in another EU or EEA member state when providing services in Ireland on a branch or cross-border basis. The CPC essentially requires regulated entities to adhere to a set of general requirements such as to provide terms of business to consumers, conduct KYC, to establish the suitability of the product, and adhere to lending and advertisement requirements.

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

In general, no. However, where an entity holds a regulated (ie, consumer) loan, it will be required to be regulated as, or to appoint, a credit servicing firm in accordance with the 2015 Act.

There may be data protection issues and general contractual issues that need to be addressed, irrespective of the nature of the loans being traded.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies would generally fall within the scope of any such regime.

Investment funds are authorised and regulated by the Central Bank, and may be regulated as:

- undertakings for collective investment in transferable securities (UCITS) in accordance with the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011 (as amended), which implement the UCITS Directives into Irish law, and the Central Bank (Supervision and Enforcement) Act 2013 (section 48(1)) (Undertakings for Collective Investment in Transferable Securities) Regulations 2015 (collectively the UCITS Regulations); or
- retail investor alternative investment funds (RIAIFs) or qualifying investor alternative investment funds (QIAIFs) in accordance with the requirements of the Central Bank and the EU (Alternative Investment Fund Managers) Regulations 2013 (as amended) (the AIFM Regulations), which implement the Alternative Investment Fund Managers Directive (AIFMD) into Irish law.

UCITS, RIAIFs and QIAIFs may be organised through a number of legal structures, the most popular of which are the Irish collective asset-management vehicle (ICAV), the investment public limited company (investment company) and authorised unit trusts. It is an offence to carry on business as an ICAV, investment company or authorised unit trust unless authorised by the Central Bank.

The Central Bank also authorises and regulates depositaries and administrators of Irish authorised collective investment schemes.

Fintech companies would not typically be regulated as investment funds. Where fintech companies provide services to investment funds, they would not require authorisation, unless providing regulated depositary or administration services.

Depositaries and administrators may also engage fintech firms, in which case applicable Central Bank outsourcing requirements may apply, although in general, the fintech companies would not themselves require authorisation.

5 Are managers of alternative investment funds regulated?

The Central Bank authorises and regulates Irish alternative investment fund managers (AIFMs) under the AIFM Regulations, as well as regulating UCITS management companies in accordance with the UCITS Regulations, and non-UCITS management companies (a residual category post-AIFMD).

Most fintech companies would be expected to fall outside the scope of the AIFM Regulations and the UCITS Regulations.

6 May regulated activities be passported into your jurisdiction?

Yes, where the regulated activity is covered by relevant EU legislation, the provider is authorised in another EU or EEA member state and subject to compliance with applicable notification procedures under relevant legislation.

As a general principle, where a financial institution authorised in another EU or EEA member state (the 'home state') passports its services into Ireland through the establishment of a branch in Ireland, or by providing its services on a cross-border services basis, the home state regulator retains responsibility for the prudential supervision of that entity. The regulator of the member state into which passporting is undertaken (the 'host state'), in this case the Central Bank, will supervise the passported entity's conduct of business in Ireland. The Central Bank does not adopt a gold-plating approach and, in general, there are no additional onerous requirements to be met when passporting into Ireland.

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

Where a fintech company wishes to provide a regulated service, then, subject to the ability to passport into Ireland on a services basis where the fintech company is authorised in another EU or EEA member state, it is not possible to provide regulated financial services in Ireland unless the fintech company establishes a presence in Ireland and (unless passporting on a branch basis) is authorised by the Central Bank.

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

There is no specific regulation in this respect; see question 2. A fintech or other company may, in providing a marketplace, be acting as a credit intermediary and would be required to register with the Competition and Consumer Protection Commission (but would not require an authorisation from the Central Bank).

QIAIFs may be established as loan originating investment funds, subject to certain requirements, including a prohibition on consumer lending.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

Crowdfunding is not currently specifically regulated in Ireland, assuming it does not involve deposit-taking or equity investment.

Notwithstanding, while there are no financial services rules in Ireland designed specifically for crowdfunding, other legal rules may apply. In particular, when a company pitches equity investment to investors on a crowdfunding platform, such a pitch may be considered to be an 'offer to the public', to which prospectus rules (as far as the issuer is concerned) and financial promotion rules (as far as the issuer and platform are concerned) may apply. Reward-based crowdfunding may be considered as collective investment, depending on the structure used and the manner of its offering. MiFID may also be applicable if the crowdfunding platform engages in the receipt and transmission of orders.

Crowdfunding has been discussed in the Dail (Irish parliament) as an important future source of funding for charitable causes and community initiatives. However, there is currently no specific legislation or regulation proposed or under consideration in Ireland.

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

There is no specific regulation in this respect. However, there may be data protection issues and general contractual issues that need to be addressed

11 Are payment services a regulated activity in your jurisdiction?

Payment services are regulated in Ireland pursuant to the European Communities (Payment Services) Regulations 2009 (the PSD Regulations), which implemented PSD into Irish law. Ireland's implementation of the PSD through the PSD Regulations was consistent with the principle of maximum harmonisation and as such the PSD Regulations reflect the requirements of the PSD itself. It is anticipated that the same approach will be taken with regard to the implementation of the Revised Directive on Payment Services (PSD2), which is due to be implemented in Ireland by 13 January 2018.

In addition, there are domestic rules that apply to certain payment services. Part IV of the Central Bank Act 1997 regulates a money transmission business, which is defined as 'a business that comprises or includes providing a money transmission service to members of the public'. In this regard, a 'money transmission service' is defined as meaning a service that involves transmitting money by any means. Money transmission requires authorisation from the Central Bank. This is a legacy statute and only applies if the PSD Regulations do not apply. In practice, it is difficult to think of practical situations where these rules would be relevant.

The e-money Directive (EMD) was implemented in Ireland by the European Communities (Electronic Money) Regulations 2011.

12 Are there any restrictions on cold-calling investors or clients in your jurisdiction?

Yes. Under the CPC, there are restrictions on cold-calling both existing and prospective consumer customers of financial institutions to which the CPC applies.

The Data Protection Acts 1988 and 2003 (collectively the DPA) apply to the collection and use of personal data for, inter alia, marketing purposes. In addition, the European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 regulate the use of electronic communications for direct marketing purposes.

13 Does the regulator in your jurisdiction make any specific provision for fintech services and companies?

No. However, the Central Bank has in the past 12 months refreshed and updated its authorisation process with a view to speeding up the review process. In addition, financial services, including specifically fintech, is a government priority, as reflected in its position paper, IFS2020, published in 2015.

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

There are no rules of general application. Specific rules may apply depending on the nature of the financial service or the nature of the customer.

For example, the Consumer Credit Act 1995 deals with the marketing of credit products to retail consumers and specifies certain information that must be included in any advertisements for consumer credit, such as the annual percentage rate, the number and amount of instalments and the nature of the contract. The Central Bank Act 2013 enforces similar rules for providing credit to small and medium-sized enterprises. The CPC also contains rules on marketing materials aimed at consumers, requiring such materials to be 'clear, fair, accurate and not misleading'.

Marketing may in certain instances fall foul of restrictions on the provision of, or holding out as providing, investment services and advice. Marketing and disclosure requirements are also contained in AIFMD, the Prospectus Directive and the UCITS regime.

Financial services advertising is also subject to general misleading advertising and consumer protection legislation, as well as the Advertising Standards Authority of Ireland Code of Standards. The European Communities (Directive 2000/31/EC) Regulations 2003 also impose certain requirements in relation to electronic commercial communications.

15 Are there any regulator-imposed temporary restrictions on financial products in place that are relevant to fintech companies in your jurisdiction?

While the Central Bank has the powers to impose temporary restrictions on financial products issued by regulated financial service providers, we are not aware of any circumstances in which it has employed those powers.

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

No. There are no foreign exchange or currency control restrictions in Ireland.

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

No; the provider is not carrying out a regulated activity requiring a licence in these circumstances. However, it may be necessary for the provider to demonstrate that the approach was unsolicited.

18 Are there licensing requirements that would be triggered where the investor or client is a temporary resident in your jurisdiction?

No.

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

Typically, offering a regulated service in or from Ireland requires authorisation in Ireland. So providing banking services from Ireland to persons outside Ireland would still require an Irish banking licence. Similarly, offering a PSD payment services to customers in the EU or EEA from Ireland would trigger an Irish licensing requirement. On the other hand, offering cash loans to individuals outside Ireland does not trigger a requirement to be regulated as a retail credit firm in Ireland.

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

Where a fintech company is regulated in Ireland and operating on the basis of a passport, the prudential requirements and applicable conduct of business rules of the Central Bank will continue to apply.

Conversely, where the fintech firm is regulated in another EU or EEA member state and is passporting into Ireland, its home state prudential and applicable conduct of business rules will apply to its passported business. Central Bank conduct of business rules may also apply insofar as an inward passporting firm's activities are within Ireland (as the host state).

21 Does a third-party referral qualify as an unsolicited approach in your jurisdiction?

Yes, assuming that there is no payment in respect of the referral.

22 What licensing exemptions apply where the services are provided through an offshore account in your jurisdiction?

None.

23 What licensing exemptions apply where the services are provided through a nominee account in your jurisdiction?

None.

24 What licensing exemptions apply where the services are only ancillary or incidental to other core activities or services in your jurisdiction?

This will be case-specific and dependent on the nature of the core and ancillary or incidental activities and the relevant applicable legislation.

25 What licensing exemptions apply when dealing with clients that are duly licensed in in your jurisdiction?

Applicable licensing requirements will be a function of the regulated activity that is being undertaken, rather than the nature of the client as a licensed entity or otherwise. In general, there are no specific licensing exemptions that apply when dealing with clients that are duly authorised in Ireland or in another EU or EEA member state.

However, the extent and volume of the rules applicable to an Irish authorised entity when dealing with other licensed entities may be less than when dealing with unlicensed entities and consumers. For example, simplified customer due diligence under the Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010 and 2013 (collectively the CJA) will apply where an authorised entity is dealing with another designated body for the purposes of the CJA.

There is a limited exemption from MiFID requirements where a provider outside the EEA (not operating a branch in Ireland) provides certain services to non-individual Irish residents.

26 What licensing exemptions apply to specific types of client in your jurisdiction?

Applicable licensing requirements will generally be a function of the regulated activity that is being undertaken, rather than the nature of the client as a professional or retail client, etc. For the most part, there are no specific licensing exemptions that apply by reference to the status of the client. However, the extent and volume of the rules applicable to an Irish authorised entity may vary depending on whether the client is a professional or non-consumer client rather than retail or consumer client, and may be less in the case of the former. For example, the CPC does not apply to non-consumer clients (although it should be noted that certain small and medium-sized businesses may be consumers for the purposes of certain rules, including the CPC).

There is a limited exemption from MiFID requirements where a provider outside the EEA (not operating a branch in Ireland) provides certain services to non-individual Irish residents.

Securitisation

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

For a loan agreement or security agreement to be binding, there has to be an offer, acceptance, consideration, intention to create legal relations and certainty as to terms. The application of these principles does not depend on the particular technology that is being used so that acceptance can be evidenced by clicking in a designated box on a peer-to-peer or marketplace lending platform website.

A deed is only necessary for certain types of transactions. These transactions include:

- the conveyance of land or of any interest in land, including a mortgage or charge;
- any mortgage or charge of land or other property if the mortgagee or chargee is to have the statutory powers of appointing a receiver and of sale and, in the case of a sale, the power to overreach subsequent mortgages and charges; and
- the gift or voluntary assignment of tangible goods that is not accompanied by delivery of possession.

Also, a party may insist on the use of a deed for a transaction because, for example, it is unclear whether valuable consideration is given, or to have the benefit of a longer limitation period that applies, in respect of a transaction under deed. It is common for security agreements to be executed as deeds.

An instrument executed by an individual will be a deed if it makes clear on its face that it is intended to be a deed; is signed by or on behalf of the maker; is signed in the presence of an attesting witness; and is delivered. An instrument executed by an Irish company will be a deed if it makes clear on its face that it is intended to be a deed; is sealed by the company in accordance with its constitution; and is delivered.

Clicking on a website button could also be considered to constitute a signature. Although the common understanding of a signature is the writing by hand of one's full name or initials and surname, other forms of identification have been held to satisfy a signature requirement. Under Irish law, electronic contracts and signatures are accorded legal validity in accordance with the requirements of the Electronic Commerce Act 2000 and Regulation 910/2-14 on electronic identification and trust services for electronic transactions.

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

There are two main types of assignments of rights under Irish law: a legal assignment and an equitable assignment. To create a legal

assignment of a debt, the conditions in section 28(6) of the Supreme Court of Judicature Ireland Act 1877 must be complied with. These are as follows:

- the assignment must be in writing and signed by the assignor;
- the assignment must be absolute (ie, unconditional and not merely by way of security); and
- express notice in writing must be given to the borrower from whom the assignor would have been entitled to receive the debt.

In addition, part of a debt, or other legal chose in action, may not be legally assigned; only the whole debt may be legally assigned. If any one or more of the above are not satisfied, the assignment would only take effect as an equitable assignment.

Some consequences of a legal assignment are as follows:

- all rights of the assignor in the relevant assets pass to the purchaser;
- the borrower must pay the outstanding amount under the receivable directly to the purchaser; and
- the purchaser has the right to take legal action in relation to the relevant assets against the borrower directly, without involving the assignor.

In contrast, some consequences of an equitable assignment are as follows:

- the purchaser can only sue the debtor by joining the equitable assignor in the action;
- the borrower will continue (and be entitled to continue) to pay the outstanding amount under the receivable to the equitable assignor rather than directly to the purchaser;
- the borrower can exercise any rights of set-off against the assignee even if they accrue after the date of the assignment;
- the purchaser's rights and interests in the transferred receivables will be subject to any prior equities that have arisen in favour of the borrower before the assignment; and
- where there is more than one assignment of a debt by the assignor, another purchaser acting in good faith with no notice of the assignment to the purchaser will take priority if notice is given to the borrower of that assignment.

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

Assuming there is no prohibition on assignment without the consent of the borrower under the terms of the loan, Irish law would not require the borrower to be informed of the assignment. However, any such assignment without notice would take effect as an equitable assignment (see question 28).

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

Where the special purpose vehicle is established in Ireland for the purposes of the DPA and it controls personal data, it will be subject to the full scope of the DPA, as outlined in question 41. Irish incorporated companies, partnerships or other unincorporated associations formed under the law of Ireland, and persons not falling within the aforementioned but who maintain in Ireland an office, branch or agency, or a regular practice, will be established in Ireland for these purposes. In addition, a controller established neither in Ireland nor in any other EEA member state making use of equipment in Ireland for processing data other than for the purpose of transit through the territory of Ireland, will fall within the scope of the DPA. Broader confidentiality provisions applicable to a special purpose vehicle would typically arise as a matter of contract and the implied banker's duty of confidentiality is unlikely to apply.

Intellectual property rights

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

The principal intellectual property right that protects software is copyright (the right to prevent others from, among other things, copying the software). Under the Copyright Act 2000 (as amended), copyright vests in the author on creation.

Organisations should ensure that they have appropriate copyright assignment provisions in place in all agreements they have with employees or contractors to ensure that they obtain these rights.

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

Yes. Although software is not, of itself, patentable, processes or methods performed by running software are. Importantly, such processes or methods would need to bring about a technical effect or solve a technical problem in order to be patentable.

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

The default position under Irish law is that the employer owns intellectual property developed by an employee during the course of employment, unless it is otherwise stated in an agreement with the employee. However, this default position does not extend to intellectual property generated by an employee outside their employment (such as out of hours or off premises).

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

No. Contractors and consultants (who are not employees) are generally not subject to the default position described in question 33 and, unless the agreement between the contractor or consultant includes an assignment or other transfer of intellectual property to the customer, the contractor or consultant will own any intellectual property rights generated during the course of the work.

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

Trade secrets are not a standalone right and are not protected separately from confidential information under Irish law. Confidential information is protected either through a contractual agreement to keep certain information confidential or through the common law obligation to keep information confidential (because of the nature of the relationship between the discloser and disclosee, the nature of the communication or the nature of the information itself).

There is no general rule that requires confidential information that is revealed during court proceedings to be kept secret. It is possible to obtain an order from a court limiting access to such confidential information, but such orders are given on a case-by-case basis and are typically considered difficult to obtain.

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

The main intellectual property rights available to protect branding are registered and unregistered trade and service marks.

Registered trade and service mark rights only arise through registration and can be applied for either in Ireland (in respect of Ireland only) or more broadly in the EU (as a Community trademark) or internationally. Trade and service mark rights give registered owners the right to prevent others using identical or confusingly similar trade marks to their registered mark.

Brand owners can also rely on unregistered trademark rights through the law of passing off. This allows the owner to prevent others from damaging their goodwill with customers by using branding or get-up that are identical or confusingly similar to their own.

For certain branding (particularly complex branding with artistic elements), copyright protection may also be available.

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

New businesses should undertake preliminary searches of the trademark registers in the jurisdictions in which they intend to operate to ascertain whether any of the branding that is registered as a trademark could be identical or confusingly similar to what they intend to use. However, as existing brand owners may have certain unregistered

rights, it would also be important for any new business to investigate the branding of their competitors in the market.

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

The exact remedies available to individuals or companies depends on the intellectual property right that has been infringed, but generally, for infringements of trademarks, patents, copyright and design rights under Irish law, the owner of the right may seek an injunction against further infringement, damages, an account of any profit made by the infringer from any articles incorporating the infringed intellectual property, and delivery up or destruction of those articles.

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

There are no legal or regulatory guidelines in this respect in Irish law.

40 Are there any high-profile examples in your jurisdiction of fintech companies enforcing their intellectual property rights or defending their intellectual property rights against a third party?

Fintech companies often enforce their intellectual property rights in Ireland. However, such proceedings are frequently settled before proceedings reach the courts and we are not aware of any recent high-profile examples before the Irish courts.

Data protection

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

Data protection in Ireland is governed by the DPA, which reflects the provisions of the EU Data Protection Directive, and which applies to both data controllers and data processors.

Under the DPA, a data controller is required to comply with the data protection principles, including, at a high level, requirements that personal data only be obtained and used for specified, explicit and legitimate purposes, and that the data not be irrelevant or excessive with regard to, or used in a manner incompatible with, those purposes. Processing of the data must also be legitimate within specified conditions set out in the DPA and the data must be kept secure. In order for processing to be fair within the meaning of the data protection principles, certain information must be provided to the data subject by the data controller.

While not all data controllers are required to register with the Office of the Data Protection Commissioner (ODPC), financial institutions must register with the ODPC and it is an offence to process personal data in the absence of a registration where the data controller is obliged to register.

Data processors are subject to the same security principles as data controllers and will be required to register with the ODPC when processing for a controller that is required to register. The DPA mandates that there must be a written agreement in place between a data controller and any data processors appointed by it, and the contract must contain certain provisions relating to limitations on use and security.

The DPA prohibits the transfer of personal data from Ireland to a country outside the EEA unless one of a limited number of exemptions applies. These include data subject consent, contractual necessity in certain circumstances and use of the European Commission (the Commission) approved standard contractual clauses. Personal data may also be transferred to countries in respect of which the Commission has determined there is an adequate level of protection for personal data and to US companies that have committed to comply with the new EU-US Privacy Shield. See further comments in relation to data transfers in 'Update and trends'.

Both data controllers and data processors are subject to a statutory duty of care owed to data subjects. The DPA sets out a number of individual data subject rights, including rights to access and rectify personal data.

The General Data Protection Directive (Regulation 2016/679) (GDPR) will have direct effect in Ireland from 25 May 2018 and will replace the DPA. The GDPR is intended to further harmonise the data protection regimes within the EU and will introduce a number of changes into the data protection regime, including:

- increased scope, to include focus on the residence of the data subject;
- one stop shop for supervision;
- privacy by design and by default;
- additional focus on processers and processing arrangements;
- improved individual rights;
- mandatory breach reporting; and
- significantly increased sanctions for breach.

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

There are no legal requirements or regulatory guidance in this respect.

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

Anonymisation and aggregation of data for commercial gain is governed by the DPA.

Aggregation of data for commercial gain will only be permissible where the collection, aggregation and commercial use of the data meets all of the data protection principles, is legitimate and meets the fair processing disclosure requirements, as outlined in question 41. There may be somewhat greater flexibility in the use of anonymised data for commercial gain. However, it is generally accepted that the standard required for data to be truly anonymised (and therefore not be personal data) is a high one, and that anonymisation techniques can only provide privacy guarantees if appropriate techniques are used and the application of those techniques is engineered appropriately. An Article 29 Working Party opinion issued in 2014 considers effectiveness and limits of anonymisation techniques against EU data protection laws and would likely have persuasive authority in Ireland.

Cloud computing and the internet of things

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

While the uptake of cloud computing by banks in particular has been slow to date, there have been recent signals of increased interest in cloud computing among regulated financial services firms and it is expected that more will move to cloud computing in the medium term. The increased interest is partly driven by costs considerations, but also reflects a growing acceptance of cloud services. Data protection remains a concern, however.

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

There are no specific legal requirements or regulatory guidance in this respect. Generally, the DPA will apply. For regulated activities, the Central Bank may apply relevant outsourcing requirements, and will have a specific focus on security issues.

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

See question 45.

Tax

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

In addition to the attractive low Irish corporation tax rate of 12.5 per cent, there are a number of further Irish tax incentives that encourage innovation and investment in fintech in Ireland, including:

- A 25 per cent tax credit for qualifying research and development (R&D) expenditure carried on within the EEA. This tax credit is in addition to the normal business deduction for such R&D expenditure (at the 12.5 per cent rate), thus incentivising expenditure on R&D at an effective rate of 37.5 per cent. These credits may also be surrendered by the company to key employees actively involved in R&D activities, thereby reducing the effective rate of Irish income tax for such employees.

Update and trends

Industry trends

While disruption remains a key fintech buzzword, there is a growing trend towards collaboration in the fintech industry, as both incumbent financial institutions and start-ups recognise the mutual benefits of collaborating in certain areas, and of the significant market opportunities arising where fintech is at the centre of strategy. The continued dynamism of the fintech industry is also reflected in new and emerging subcategories of fintech, such as insurtech and regtech, and a corresponding rise in venture capital interest and investment in fintech. Irish financing vehicles have also been regularly used in peer-to-peer marketplace lending.

Current discernible trends across all elements of the fintech industry in Ireland include an ever-increasing focus on customer and user experience, with change being driven by customer expectations and requirements. Data analytics, and therefore data protection, are increasingly central to many fintech opportunities across a broad range of banking, payments, insurance and investment services. Use of automation and artificial intelligence within fintech is also garnering attention (eg, through robo-advisory services). Distributed ledger technology (eg, blockchain) continues to be viewed as a key opportunity, with the potential to change financial services models radically, although regulatory and collective adoption (within some sectors) remain challenges in the short to medium term. In the immediate term, however, payments and fund transfers appear to remain the financial services most directly impacted by fintech, and PSD2 is expected to give rise to additional opportunities for fintech companies in this space.

From a fintech perspective, the recent UK vote to leave the EU is also expected to present tangible opportunities for Ireland, in particular for fintech services requiring authorisation where providers intend to passport their fintech services throughout the EU.

Data transfers

The position in relation to cross-border transfers of personal data, an issue with the potential to impact many fintech providers, is under considerable scrutiny at present. In *Schrems*, delivered on 6 October 2015, the Court of Justice of the European Union (CJEU) declared the Safe Harbour regime invalid. Under Safe Harbour, personal data had been freely transferable from EU member states to US companies that had voluntarily signed up to Safe Harbour, despite an absence of federal US general data protection laws.

The newly adopted EU-US Privacy Shield replaces the Safe Harbour framework and places stronger data protection obligations and standards on US companies. The Privacy Shield is only applicable to data transfers between the EU and US, and was designed to address the shortcomings in the Safe Harbour identified by the CJEU in *Schrems*. In that regard, the Privacy Shield differs from Safe Harbour in its inclusion of written commitments from the US to protect European data when it leaves the EU and enters the US, including protection against indiscriminate mass surveillance and specific preconditions for access to such data. It also provides for a number of redress mechanisms for EU citizens.

It should be noted that the Privacy Shield is not immune to challenge or modification based on the CJEU's rationale in *Schrems*. Furthermore, with the recent request from the Irish Data Protection Commissioner to the Irish High Court (directly as a result of the decision in *Schrems*) that a case be stated to the CJEU concerning data transfers to the US based on the Commission-approved standard contractual clauses, concerns with regard to the validity of use of the Commission-approved standard contractual clauses are also being crystallised. The case before the High Court is due to be held in spring 2017.

- A best-in-class 'knowledge development box', which complies with the OECD's 'modified nexus' standard. This incentive reduces the rate of Irish corporation tax to 6. 25 per cent for profits derived from certain IP assets, where qualifying R&D activity is carried on in Ireland. This incentive can also be claimed in conjunction with the R&D tax credit.
- Tax depreciation for certain intangible assets. Such assets can be 'amortised' for Irish corporation tax purposes either in line with their accounting treatment or on a straight basis over 15 years.
- The Employment and Investment Incentive and Startup Refunds for Entrepreneurs schemes, which allow individual investors in fintech companies to obtain Irish income tax relief (of up to 41 per cent) on investments made, in each tax year, into certified qualifying companies. Relief is available in respect of funding of up to €10 million.

Competition

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

There are no competition issues that are specific to fintech companies and we do not expect that there will be any that will become an issue in future. Any competition issues that are likely to arise will apply as a result of general competition law rules and will be fact-specific.

Financial crime

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

Unlike the position under English law, there are no specific provisions of Irish law that impose obligations on companies to have procedures to combat bribery in place. However, a company can be liable under Irish law for bribery or corruption offences that are committed by it or by persons acting on its behalf. In particular, the Prevention of Corruption Acts 1906 to 2010 (collectively the PCA) provide for both

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personal and corporate liability for corruption and bribery offences. Where a corruption offence was committed by a body corporate with the consent, connivance or on foot of neglect on the part of a person who is a director, manager, secretary or other officer of the body corporate, that person shall be guilty of an offence. Either or both the corporate and the individual can be prosecuted. The PCA applies in relation to both domestic corruption and also to corruption occurring outside the state where committed by Irish citizens or by persons or companies resident, registered or established in Ireland, or by the relevant agents of such persons. Protection for whistle-blowers who make reports in good faith of offences is provided for under the PCA and the Protected Disclosures Act 2014, with provision for redress for employees who have been penalised by their employers for whistle-blowing. Accordingly, it would be good practice for fintech companies to adopt anti-bribery and corruption policies and procedures.

Any fintech company that is a designated body for the purposes of the CJA will be obliged to comply with anti-money laundering (AML) and counterterrorist financing (CTF) obligations in accordance with the CJA. Certain entities that are designated bodies for the purposes of the CJA, such as leasing companies or those providing factoring services, do not require authorisations or licences from the Central Bank, but are subject to AML and CTF obligations under the CJA. Fintech providers that are not regulated should therefore check on a case-by-case basis whether they are subject to the CJA.

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

There is no such guidance that applies specifically to fintech companies.

The Central Bank issued best practice guidance on cybersecurity within the investment firm and fund services industry in September 2015 and, in line with other regulators, has generally increased its focus on cyber risks across all regulated financial services. The Central Bank will also expect relevant firms to apply European Banking Authority security guidelines.

Japan

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

Engaging in the arrangement of investment deals or making arrangements with a view to transactions in investments in either case for an investment fund that invests mainly in financial instruments, comprises an 'investment management business' under the Financial Instruments and Exchange Act (FIEA), and registration is required.

Engaging in the management of an investment fund that invests mainly in financial instruments also comprises an investment management business under the FIEA regardless of whether such management is made as principal or agent, and registration is required.

Giving advice on investments under a contract for a fee comprises 'investment advisery services' under the FIEA, and registration is required.

Engaging in 'banking business' requires a banking licence under the Banking Act. Banking business is defined as the acceptance of deposits or instalment savings, loans of funds (when conducted together with acceptance of deposits or instalment savings) or fund transfer services. Loan of funds, when not conducted together with acceptance of deposits or instalment savings, is generally regarded as a 'money lending business', which requires registration as a moneylender under the Money Lending Business Act.

If a factoring transaction is with recourse, such transaction can be deemed as a lending, and thus engaging in such transaction may require registration as a moneylender under the Money Lending Business Act.

Invoice discounting and secondary market loan trading does not trigger a licensing requirement.

Acceptance of deposits is prohibited without a banking licence under the Banking Act.

Some of the foreign exchange trading (such as foreign exchange margin trading transactions, non-deliverable forwards, forward rate agreements) comprises an 'over-the-counter transaction of derivatives' under the FIEA and registration is required.

A bank may conduct fund transfer services with a banking licence. If not a bank, a registration under the Payment Services Act as a fund transfer service provider is needed before conducting payment services. Also, if the issuance of prepaid payment instruments is conducted, then under the Payment Services Act, registration is required. If the payment service is provided as a later payment using a credit card, then registration under the Instalment Sales Act is required.

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

A lender conducting a consumer lending business (excluding the business of accepting deposits or instalment savings, which requires a banking licence under the Banking Act), has to register as a moneylender under the Money Lending Business Act. There is a limit on the total lending to any individual and a cap on the interest rate chargeable. The total lending limit is one-third of the borrower's annual income and the cap is 15 to 20 per cent per annum depending on the amount of the loan. The moneylender is required to appoint a chief of money lending operations to each business office.

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

If a moneylender transfers loan claims, the transferee will be subject to the same restrictions under the Money Lending Business Act that apply to the original moneylender and the transferor must notify the operating transferee that those restrictions will also apply to the transferee. There is no such restriction for a bank under the Banking Act.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies would generally fall within the scope of any such regime.

The FIEA requires those who engage in either the acceptance of applications for shares for subscription in collective investment schemes or investment management of assets collected through such subscription or contribution, in principle, to register as a financial instruments business operator. However, in the case of funds targeting only professional investors, there is a simpler notification system to accelerate financial innovation. See question 26.

5 Are managers of alternative investment funds regulated?

Managing funds as investments in assets such as real estate (excluding rights in relation to negotiable securities and derivative transactions) are not subject to the FIEA, as such those activities are not regarded as being a financial instruments business.

6 May regulated activities be passported into your jurisdiction?

Not applicable.

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

It will depend on the nature of the services the fintech company will provide. Under the Banking Act, a foreign bank that wishes to engage in banking in Japan must obtain a licence by specifying a single branch office that will serve as its principal base for banking in Japan. Overseas moneylenders cannot be registered under the Money Lending Business Act without having a place of business in Japan. Under the Payment Services Act, it is possible to register foreign funds transfer service providers and issuers of prepaid payment instruments, if such providers or issuers have a business office in Japan. A foreign company that wishes to establish what is defined under the FIEA as a 'financial instruments business', such as a securities brokerage or investment management business, is required to have a business office in Japan for registration under the act, provided that, for registration of an investment advisery business, a business office in Japan is not required.

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

A person who intends to engage in the business of lending money or acting as an intermediary for the lending or borrowing of money must be registered under the Money Lending Business Act. To avoid an investor being required to be registered as a moneylender under the act, marketplace lending in Japan generally takes the form of a *tokumei kumiai* (TK) partnership, under which a registered operator collects funds from TK partnership investors, then advances the funds to enterprises

as loans. The operator then receives principal and interest payments from the enterprises and distributes the funds as dividends and return of capital to investors. In this structure, the operator is required to be registered both as a moneylender under the Money Lending Business Act (in order to provide the loans), and as a financial services provider under the FIEA in order to solicit TK partnership investors.

Usury law restricts the permitted interest rate to a maximum of between 15 per cent and 20 per cent depending on the loan amount.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

Crowdfunding in Japan is categorised as donation-based crowdfunding, reward-based crowdfunding and investment-based crowdfunding. Investment-based crowdfunding is further categorised as equity-based crowdfunding, fund-based crowdfunding and lending-based crowdfunding. In terms of regulations specific to lending-based crowdfunding, see question 8.

Equity-based crowdfunding and fund-based crowdfunding are regulated under the FIEA, which defines certain internet-based solicitations, etc, as 'electronic solicitation handling services', different rules apply to electronic solicitation handling services for certain non-listed securities, etc, from those that apply to ordinary solicitation handling services for securities. Special rules apply in particular when these electronic solicitation handling services are conducted entirely via a website, right through to application for the purchase of securities, referred to as 'electronic purchase type solicitation handling services'. In order to encourage new market entrants, requirements for the registration of electronic solicitation handling services handling the issuance of securities with less than ¥100 million in the issuance volume and with ¥500,000 or less in the investment amount per investor are relaxed.

Reward-based crowdfunding is regulated by the Specified Commercial Transactions Act that, in particular, restricts advertising and gives consumers a cancellation right.

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

Invoice trading platforms do not yet exist in Japan. If a person engages in invoice trading in Japan he or she should note some legal and regulatory issues. If there is an agreement between a supplier and a buyer to prohibit the transfer of invoices, there is a risk that a funder cannot acquire invoices pursuant to the Civil Code. Further, there is the risk that a supplier will sell its invoices to someone outside the trading platform as well as to a funder via the platform. To ensure that the funder obtains the invoices, the debt transfer must be perfected by the buyer being notified of or approving the transfer pursuant to the Civil Code or it must be registered in the debt transfer registration system. The invoice trading platform must not be detrimental to a supplier that is a subcontractor protected by the Act against Delay in Payment of Subcontract Proceeds, Etc. to Subcontractors.

11 Are payment services a regulated activity in your jurisdiction?

Payment services may fall within the scope of exchange transactions and therefore fall within the definition of banking business and require a banking licence under the Banking Act. Obtaining this licence is quite onerous and it is unlikely that a fintech company would be eligible for one.

Other exchange transactions are not defined in the Banking Act, but according to a precedent set by a Supreme Court decision, 'conducting an exchange transaction' means accepting a request from a customer to transfer funds using the mechanism of transferring funds between parties at a distance without actually transporting cash, or accepting and actually carrying out the request'. If a payments service, something that many fintech businesses are involved in, falls into this definition, the operator could be required to obtain a banking licence or register under the Payment Services Act.

While the Banking Act regulates exchange transactions, the Payment Services Act allows non-banks registered thereunder to engage in exchange transactions in the course of their business even if not permitted under the Banking Act, provided that the amount of each exchange transaction is not greater than ¥1 million.

12 Are there any restrictions on cold-calling investors or clients in your jurisdiction?

The Specified Commercial Transactions Act generally restricts cold-calling. For instance, under the Act, when a business operator receives an application from a consumer to enter into a contract, or executes a contract with a consumer, certain information must be provided in writing to the consumer. Amendments to the Specified Commercial Transactions Act will come into force within a year-and-a-half from 3 June 2016; these will expand the regulation to cover bonds and other monetary claims and shares, and will also allow consumers to rescind or cancel contracts or applications for contracts where the volume of the product (the subject of the contract) is far beyond what is ordinarily necessary for daily life, in which case administrative sanctions also apply to the business operator.

Under the FIEA, financial services providers are prohibited from telephoning investors that have not asked to be solicited for a certain category of financial instruments, and from soliciting investors to conclude a financial instruments transaction contract and disturbing investors with telephone solicitations at inconvenient times.

13 Does the regulator in your jurisdiction make any specific provision for fintech services and companies?

In December 2015, the Financial Services Agency (FSA) set up a 'fintech support desk' to provide a unified response to handle enquiries from the private sector and to exchange information regarding the fintech industry. This desk fields enquiries from a whole range of businesses operating or considering various fintech-related innovations, and specific business-related matters regarding the finance aspects of these plans. It also actively seeks public opinion, requests and proposals, and actively shares general information and opinions in relation to fintech innovation.

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

There are a number of important rules in relation to marketing materials for financial services. For example, the following financial services require licences under the respective laws listed, and these laws regulate the content and manner of advertisements conducted by firms licensed for those services:

- banking services – the Banking Act;
- services related to securities or derivatives (including securities offering (such as crowdfunding), investment management or advisery services) – the FIEA;
- lending-related services (to the extent not banking businesses) – the Money Lending Business Act;
- funds transfer services – if allowed as an exemption from regulation under the Banking Act by operating the businesses under a fund transfer service provider licence to the extent not exceeding limit of the amount for transfer – the Payment Services Act;
- credit card issuing services – the Installment Sales Act;
- prepaid card issuing services – the Payment Services Act; and
- insurance services – the Insurance Business Act.

Although details of the regulations vary among the above laws, generally speaking they require that advertisements include certain information, such as names, licence numbers and contact information of the licensed firms, as well as certain other information that is specifically set out in the respective laws as being important to the customer in his or her decision-making, and also stipulate other matters regarding the form of any advertisement, such as minimum font size.

In addition, the Specified Commercial Transaction Act sets forth certain requirements regarding advertisements for services provided by mail or online order systems (whether a cooling-off period applies, etc). It is currently proposed by the government that the Consumer Protection Act be amended to regulate 'annoying' advertisements via email or internet (eg, pop-up messages warning of virus infection that cannot be closed until the user subscribes to the antivirus software).

15 Are there any regulator-imposed temporary restrictions on financial products in place that are relevant to fintech companies in your jurisdiction?

There are no particular temporary restrictions relevant to fintech companies.

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

The Foreign Exchange and Foreign Trade Act requires (in many cases) post-transaction reporting or (in limited cases) pre-transaction notification to the relevant authorities (through the Bank of Japan) of inward or outward investments and post-transaction reporting by residents of Japan (including entities) to the Ministry of Finance (through the Bank of Japan) of a payment to or a receipt of payment from a non-resident of Japan, or a cross-border payment or receipt of such payment, exceeding ¥30 million. It also imposes economic sanctions with regard to sanctioned persons or activities (mainly by following sanctions imposed by the United Nations Security Council) by requiring permission for (effectively prohibiting) cross-border investments, payments or receipts of payments, importation or exportation of goods, provision of services, etc.

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

Yes.

18 Are there licensing requirements that would be triggered where the investor or client is a temporary resident in your jurisdiction?

As long as the banking corporation or securities firm that provides the service is a company established under the laws of Japan, no.

However, there may be licensing requirements if the banking corporation or securities firm, etc, that provides the service is a company established under the laws of a foreign jurisdiction. For example, a foreign company engaging in an investment advisery business in a foreign jurisdiction may conduct such business in Japan only for certain types of financial institutions unless the foreign company is registered under the FIEA. This would apply irrespective of the residency status of the investor or client, rather than being triggered only by their status as a temporary resident.

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

As long as the banking corporation or securities firm that provides the service is a company established under the laws of Japan (or the Japanese branch of a foreign banking corporation), then yes. For example, if a Japanese company provides investment advice to a person outside of Japan, the company is required to be registered under the FIEA.

As long as the banking corporation or securities firm that provides the service is a company established under the laws of a foreign jurisdiction, it is generally understood it will not require a licence in Japan.

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

In addition to licensing requirements, fintech companies must comply with various obligations applicable to the specific business. For example, banks, securities firms and certain other businesses are required to verify the identity of customers when facilitating cross-border transactions.

21 Does a third-party referral qualify as an unsolicited approach in your jurisdiction?

Yes, but it depends on the situation. Suppose an existing client of a Japanese securities firm refers a new client to the securities firm, the securities firm must not visit or call the new client as this would constitute an unsolicited approach; however, it may be permissible for the firm to send an email to the new client. It should be noted that sending emails may be illegal under other laws or regulations depending on the situation.

22 What licensing exemptions apply where the services are provided through an offshore account in your jurisdiction?

Unless both the investor and client and the service provider are outside Japan, and the services provided take place outside Japan (see question 19), there is no licensing exemption applicable to services provided through an offshore account.

23 What licensing exemptions apply where the services are provided through a nominee account in your jurisdiction?

There is no licensing exemption applicable to the services provided by a fintech company through a nominee account.

24 What licensing exemptions apply where the services are only ancillary or incidental to other core activities or services in your jurisdiction?

Even when the services are only ancillary or incidental to other core activities or services in Japan, there is no licensing exemption applicable to such services.

25 What licensing exemptions apply when dealing with clients that are duly licensed in in your jurisdiction?

Depending on the situation, a service provider may avoid licensing requirements. An example is shown in question 18.

26 What licensing exemptions apply to specific types of client in your jurisdiction?

Depending on the client type, exemptions may apply. For example, as long as there is at least one 'qualified institutional investor' (as defined under a Cabinet Office Ordinance, such as securities firms and other financial instruments specialists, banking corporations, certain financial institutions and persons and corporations meeting certain requirements) and fewer than 50 other investors that fall under certain categories (such as securities firms and other financial instruments specialists; those who have a close relationship with a fundraiser specified in a Cabinet Office Ordinance; corporations with paid-in capital of ¥50 million or more; companies the securities of which are listed on a stock exchange in Japan; corporations established under the laws of foreign jurisdictions; and individuals meeting certain criteria) (and certain other conditions are met), the fundraiser is not required to register under the FIEA with respect to its solicitation of those investors and its investment of funds invested by those investors, but the fundraiser must still make certain filings and comply with certain regulations. As a special rule to support start-ups, if more than 80 per cent of the collected funds are to be invested in unlisted shares and certain other securities, then the categories for the 50-investor limit for 'other investors' mentioned above is broadened somewhat.

Securitisation

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

For loan agreements, pursuant to the Interest Rate Restriction Act, interest plus lending-related fees must generally not exceed 15 per cent per annum; an agreement by a borrower to pay interest or fees (or both) would be void to the extent exceeding the limit. In other words, while the validity of the loan agreement (including the borrower's obligation to pay interest or fees, or both, up to the 15 per cent limit) is not otherwise affected, any borrower obligation to pay interest or fees above this limit is invalid.

Regarding security agreements, a principle under the Civil Code is that a security interest grantee must be the holder of the secured obligation. This means that it would be difficult to adopt a structure in which a single security agreement is entered into by and between a security grantor and a single security grantee (eg, a security agent) to secure loans provided and held by multiple investors. Solutions for this issue

can include: a lending platform provider receiving funds as a borrower from investors as lenders and then turning around and providing loans to target businesses in its own name; or multiple investors becoming direct lenders to target businesses, a 'parallel debt' corresponding to the loans being created and granted to the platform provider, with a security interest being granted to the platform provider to secure the parallel debt. The latter approach is, however, not well tested in peer-to-peer or marketplace lending practice so far.

Under Japanese law a blanket security arrangement covering all types of assets to be provided as collateral is not available; a separate security agreement is needed to be executed to create a security interest per asset. Typically these might include a real estate mortgage, share pledge, pledge or security assignment of patents, trademarks, security assignment of trade receivables and security assignment of inventories.

Methods of perfection of security interests differ depending on the asset. The following are some examples:

- real estate mortgage – registration;
- share pledge – receipt and holding of share certificates;
- pledge or security assignments of patents or trademarks – registration;
- security assignment of trade receivables – notice to or acknowledgement by debtors by a letter with a fixed date stamp on it, or registration; and
- security assignment of inventories – notice to or acknowledgement by debtors by a letter with an affixed date stamp on it, or registration.

There are no particular general requirements (such as use of 'deeds' or similar) under Japanese law for the execution of loan agreements and security agreements; how a Japanese party executes such an agreement would need to be examined in each case. Given these complexities, experienced legal counsel should be sought before starting up a peer-to-peer lending platform in Japan.

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

Perfection of assignment of a loan originated on a peer-to-peer lending platform would most likely be made by notice to or acknowledgement by the borrower by a letter with an affixed date stamp on it.

If the assignment is not perfected, the borrower can be discharged from the loan by repayment to the loan assignor, and a third party that obtains an interest in the loan after the assignment (eg, a tax authority seizing the loan to collect tax from the loan assigner or a bankruptcy receiver of the loan assignee) can assert a position prioritised over the loan assignee.

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

Loans originated on a peer-to-peer lending platform are transferable as long as there is no contractual restriction of transfer between the originator and the borrower or if such contractual restriction exists, upon obtaining consent from the borrower. See question 28 regarding notice requirements for perfection of a transfer.

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

A special purpose company (SPC) is subject to the Personal Information Protection Act regarding personal information of individuals in relation to borrowing. This is Japan's main data protection law. The SPC may also be subject to a confidentiality obligation to the borrowers.

Intellectual property rights

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

Both copyright and patent protections are available for software. Software may be registered as a patent under the Patent Act if it can be deemed as a 'computer program, etc', which means a computer program or any other information that is to be processed by an electronic computer equivalent to a computer program. Registration as a patent (a prerequisite to receiving patent rights) takes time because the Patent Office conducts a detailed examination of the application. However, copyright protection is available without registration in the case of software that includes thoughts or sentiments expressed creatively; these rights can also be registered through the Software Information Center.

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

Business methods may be registered as patents in Japan if the method can be demonstrated to be a new 'highly advanced creation of technical ideas utilising the laws of nature'. However, the requirements for business method patent registration are stringent and, as a practical matter, even once registered, the methods can often be relatively easily imitated without infringement by sidestepping the patent. For these reasons, business method patent applications are rare. In practice, business methods are commonly protected through trademarks used in association with the methods and through a web of licensing and other agreements.

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

The Patent Act allows an employer to acquire the right to obtain a patent for an employee's invention created in the course of the employment from the time that the invention is created, either by prior agreement with the employee or by prior inclusion of the right in its employment regulations, etc. Any assignment by the employee of its right to obtain such a patent to a third party in breach of the employer's right is invalid.

The Copyright Act stipulates that where a computer program is created by an employee in relation to the business of the employer (if a legal entity), on the initiative of the employer, then the authorship of the program is attributed to the legal entity unless otherwise stipulated by contract, employment regulations or the like at the time of the creation of the work.

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

Contractors and consultants can acquire the right to obtain a patent or copyright for inventions developed by them unless the engagement contract provides for the acquisition of such intellectual property or licences by the client; the contract can be agreed either before or after the invention is created or the computer software is made.

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

Trade secrets are protected under the Unfair Competition Prevention Act. A trade secret under the Act is a production method, sales method or any other technical or operational information useful for business activities that is controlled as a secret and is not publicly known. Separate from the legislation itself, administrative principles for interpretation of the Unfair Competition Prevention Act provide a flexible interpretation of what constitutes 'control', which will most likely have an impact on future judicial rulings on the point. For example, the principles can be read as stipulating that strict restriction of access to information is not a prerequisite of 'control'.

During court proceedings for the infringement of business interests by unfair competition, trade secrets may be protected by protective order based on the Unfair Competition Prevention Act or an order with respect to Restriction on Inspection, etc. for Secrecy Protection in Protection based on the Civil Procedure Act.

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

Brands are usually protected by trademark. It is necessary to register a trademark with the Patent Office to enjoy protection, although in some cases protection may also be available under the Unfair Competition Act for brands that are not registered as a trademark. Causing confusion between one's own products or services and those of another party (known as the 'act of causing confusion') or wrongly using a famous indication of another person as one's own, by displaying the name of a well-known product, etc, of another party on similar or identical products is prohibited. However, these cases are less successful than trademark cases because it must be proven that the product or indication is well known or famous.

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

It is relatively easy to look up whether a brand is a registered trademark or a registered trade name. Registered trademarks can be looked up at https://www3.j-platpat.inpit.go.jp/cgi-bin/TF/TF_AREA_E.cgi?1470219956846 (registered trade names can also be searched online). Some attorneys and most patent attorneys are accustomed to conducting these searches.

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

A patent holder or the exclusive licensee or copyright holder can claim for actual damages (but not punitive damages) from the infringer for losses incurred as a consequence of the infringement. The court can also be requested to issue an injunction order or take similar action.

In the case of injunctions, the requirements are the presence of protected rights and circumstances whereby an injunction is necessary to avoid irreparable damage. Japanese courts will require the claimant to post a security deposit before injunctive relief is ordered.

Although injunctive relief can expedite dispute resolution, Japanese courts, in principle, will not issue ex parte orders and will have one or more hearings to hear the arguments from both parties, which means both parties will be called to the hearings.

Patent invalidity is one of the most common defences. When the defendant raises the defence of patent invalidity, in approximately 60 per cent of cases the court has made a judgment on this point and approximately 70 per cent of past judgments have been against the patent holder.

The vast majority of intellectual property rights infringement remedies are civil, but in some cases criminal penalties can apply, especially in copyright and trademark cases.

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

There are no specific legal or regulatory rules or guidelines surrounding the use of open-source software.

40 Are there any high-profile examples in your jurisdiction of fintech companies enforcing their intellectual property rights or defending their intellectual property rights against a third party?

There are no particularly high-profile examples in Japan at present.

Data protection

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

The Personal Information Protection Act applies to the handling and processing of data including personal information. The My Number Act sets out rules regarding the handling of numbers under the My Number system, which is being used for tax and administrative procedures relating to employment. The Personal Information Protection Act and the My Number Act stipulate different requirements for entities in particular industries. Detailed guidelines for each industry or business type are established by the competent ministry with administrative responsibility for that industry or business type. The applicable guidelines in the case of fintech are described in question 42. The guidelines are likely to change as the Personal Information Protection Act is due to be revised; it is expected that the revisions will come into effect in stages and will be completed by September 2017.

Update and trends

Japan's Personal Information Protection Act is being revised in light of the vast and increasing volume of personal information being collected and analysed locally and globally. The changes will facilitate the more efficient usage of anonymised personal information and enable extraterritorial application of the Act's data protection regime. It is expected that the revisions will come into effect in stages and will be completed by September 2017.

Following the declaration made at the G7 Summit in Elmau in June 2015 and the related Financial Action Task Force guidance addressing anti-money laundering and countering the financing of terrorism, Japan's Act for Prevention of Transfer of Criminal Proceeds has been revised; the revisions are due to take effect by June 2017.

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

The FSA has set out guidelines in relation to the Personal Information Protection Act – the 'Guidelines for Personal Information Protection in the Financial Field' – for the fintech companies that it regulates, which address the treatment of sensitive information, restrictions based on the purpose of use, supervision of trustees, etc, and 'Practical Guidelines for the Security Policies regarding the Personal Information Protection in the Financial Field'. Entities regulated under the Instalment Sales Act must comply with the 'Guidelines Regarding Personal Information Protection Regarding Credit Among Economic Industry'. Other entities must comply with 'Guidelines Targeting Economic and Industrial Sectors Pertaining to the Act on the Protection of Personal Information'. The 'Guidelines for the Proper Handling of Specific Personal Information in the Finance Industry' apply to the My Number Act in the financial field.

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

None at present, but amendments to the Personal Information Protection Act will add the concept of 'anonymised personal information', which is information regarding individuals, obtained by anonymising personal information or otherwise processing personal information so that the individual in question can no longer be identified. When processing anonymised personal information, it will be necessary to release to the public the items regarding such anonymised personal information that has been created. When providing anonymised personal information to a third party, it will be necessary to specify publicly the type of information that is being provided and inform the third party that said information will be anonymised. Creators of anonymised personal information are prohibited from disclosing deleted items, methods of processing or referencing the anonymised information against other information for the purpose of identifying the person whose personal information has been anonymised, and the recipient will be prohibited from acquiring the deleted items, methods of processing and references.

Cloud computing and the internet of things

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

The use of cloud computing is relatively widespread among major financial institutions and internet banks. In contrast, many small and medium-sized financial institutions are struggling to make use of cloud computing owing to a lack of IT manpower and concerns over cybersecurity.

However, the Centre for Financial Industry Information Systems' 'FISC Security Guidelines on Computer Systems for Banking and Related Financial Institutions' (FISC Guidelines) were revised in March 2013. This revision was intended to spread the use of cloud computing, and the FISC has correspondingly promoted the use of cloud services, so it is likely that more financial institutions will come to use cloud computing more extensively.

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

The Banking Act and other legislation stipulates that financial institutions are obliged to carry out safety measures for their systems. Based on such provisions, subordinate rules, guidelines and inspection manuals describe the actions to be taken to comply with these obligations.

If inspectors find problems with an organisation's risk management systems in relation to information security, they can require that the business be inspected further for conformity to the FISC Guidelines. These financial institutions therefore see these Guidelines as a kind of regulation. The Report of the Council of Experts on the Usage of Cloud Computing by Financial Institutions serves as a useful reference as it formed the basis of the revision of the above-mentioned guidelines.

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

There is no specific legal requirement and regulatory guidance with respect to the internet of things.

Tax

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

There are no tax incentives introduced especially for fintech companies. However, as of June 2016, there are some more general tax incentives available to fintech companies and investors as follows:

- Individual investors who invest in qualified small to medium-sized companies (start-ups) can deduct one of the following under certain conditions:
  - the amount invested in the start-up minus ¥2,000 from taxable income (maximum deduction is 40 per cent of total taxable income or ¥10 million, whichever is lower); or
  - the whole amount invested in the start-up from capital gains tax (there is no maximum amount).
- Individuals investing in an unlisted start-up who have a capital loss after the sale shares in the start-up can offset this against other capital gains and the loss can be carried forward for up to three years.
- Companies may elect to claim accelerated depreciation of the acquisition cost or a tax deduction if they purchase certain equipment under certain conditions.
- 8 per cent to 10 per cent (12 per cent for small to medium-sized corporations) of qualified research and development (R&D) expenses are deductible from annual corporate tax. Additional tax incentives are available for special, qualified R&D expenses, etc.

Competition

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

No.

Financial crime

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

Two recent amendments have been made to the Act for Prevention of Transfer of Criminal Proceeds. The first, which comes into force in October 2016, includes treating transactions between politically exposed persons as high-risk transactions. The second amendment was made in May 2016 and will come into force by June 2017. This will require virtual currency exchange operators to confirm the personal identity of customers, to compile and retain personal identification records and transaction records, and to notify the authorities of suspicious transactions.

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

No.

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

In Malta, financial services are primarily regulated under the Financial Institutions Act, Chapter 376 of the Laws of Malta (Financial Institutions Act); Banking Act, Chapter 371 of the Laws of Malta (Banking Act); and Investment Services Act, Chapter 370 of the Laws of Malta (Investment Services Act). The Malta Financial Services Authority (MFSA) is the single regulator of the financial services industry and is responsible for licensing, regulating and supervising all licensable financial services.

Under the Investment Services Act, activities consisting of reception and transmission of orders in relation to one or more instruments, acting to conclude agreements to buy, sell or subscribe for one or more instruments on behalf of other persons, management of investments belonging to another person, trading against proprietary capital resulting in conclusion of transactions in one or more instruments and the provision of investment advice constitute licensable activities. Foreign exchange trading and binary option trading would fall within the scope of the Investment Services Act.

The Financial Institutions Act regulates quasi-banking activities, and while it regulates payment services activities (by transposing the provisions of the EU Payment Services Directive (2007/64/EC)) and the issue of electronic money (by transposing the provisions of the EU E-Money Directive (2009/110/EC)), it also regulates other 'home-grown' licensable activities such as lending (including the granting of personal credits, mortgage credits, factoring with or without recourse and financing of commercial transactions), financial leasing, underwriting share issues and the granting of guarantees and commitments.

Deposit-taking activities are regulated under the Banking Act where the 'business of banking' is defined as the business of accepting deposits of money from the public withdrawable or repayable on demand, after a fixed period or after notice, or who borrows or raises money from the public and in either case for the purpose of employing such money in whole or in part by lending to others.

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

Consumer lending is a regulated activity under the Maltese law that requires a licence under the Financial Institutions Act or, if such activity is financed from deposit-taking activities, by the Banking Act. Both Acts regulate lending without distinguishing between consumer and commercial lending.

Pursuant to the Financial Institutions Act, any person who regularly or habitually carries out the activity of lending (see question 1), in or from Malta falls under the definition of a 'financial institution' and must therefore be in possession of a licence granted by the MFSA and is subject to ongoing supervision by the said Authority.

Credit institutions regulated under the Banking Act may also engage in consumer lending but, unlike financial institutions, they can also accept deposits from the public. These deposits are then employed in funding the lending activity. Similarly to financial institutions, the MFSA is responsible for issuing credit institution licences and supervising the banks.

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

Save for any applicable standard procedural requirements on the assignment or transfer of loan agreements, there are no restrictions on trading loans in the secondary market under Maltese law.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies would generally fall within the scope of any such regime.

The Investment Services Act establishes the regulatory framework for collective investment schemes while the Investment Services Rules, which are issued by the MFSA pursuant to the Act, lay down the basic principles to which licensed collective investment schemes (CISs) must adhere to in the operation of the CIS, including what service providers the scheme must appoint, the investment restrictions that are applicable to the type of scheme and requirements concerning the issue of an offering document or prospectus.

Under the regulatory framework that applied to CISs until only very recently, there were 13 CIS regulatory frameworks available to promoters. Today, the MFSA is in the process of consolidating the regulatory regime for CISs as the first phase of a project aimed at improving the Maltese frameworks for CISs. Under the revised fund regime, there will be three principal categories of funds:

- retail CISs (consisting of undertakings for collective investment in transferable securities (UCITS) and retail alternative investment funds (AIFs));
- qualifying professional investor funds (PIFs) (promoted to qualifying investors having a minimum investment requirement of €100,000 and who satisfy other conditions); and
- AIFs that may be marketed to professional investors as defined under the Markets in Financial Instruments Directive (MiFID) or to qualifying investors (as above) (with notified AIFs being the only subcategory).

The MFSA has informed the industry that as of 3 June 2016 it will no longer be accepting applications for licensing of CISs under those regimes that are no longer included under the new (revised) fund framework.

Whether the activities of fintech companies would fall within the scope of current CIS legislation would depend on the nature of their operations and particularly whether they would fall within the definition of a CIS.

5 Are managers of alternative investment funds regulated?

Managers of AIFs operating in or from Malta are regulated under the Investment Services Act, subsidiary legislation and the Investment Services Rules, which transpose the Alternative Investment Fund Managers Directive (2011/61/EU) (AIFMD). Investment managers who manage AIFs can be divided into two categories depending on the type of investment funds they manage: de minimis fund managers (not subject to AIFMD) and AIF managers (subject to AIFMD).

De minimis fund managers are managers whose assets under management do not exceed the thresholds provided for under the the AIFMD (€100 million, including assets acquired through use of leverage; or €500 million when the portfolio of AIFs managed consists of

AIFs that are not leveraged and have no redemption rights exercisable during a period of five years following the date of the initial investment in each AIF).

The regulatory framework prescribes licensing requirements, operating conditions and obligations of fund managers. De minimis fund managers are subject to less stringent regulatory requirements when compared to alternative investment fund managers. Managers of AIFs are required to apply to the MFSA for a Category 2 Investment Services Licence, which authorises the licence holders to provide any investment service and to hold or control clients' money or customers' assets, but not to operate a multilateral trading facility or deal for their own account or underwrite or place instruments on a firm commitment basis. Once a licence is issued, managers of AIFs have to comply with a number of ongoing obligations and are subject to MFSA supervision.

6 May regulated activities be passported into your jurisdiction?

Regulated activities that are rooted in EU directives can be passported into Malta. Indeed, transposing the relevant EU directives, Maltese law has adopted the principles of mutual recognition and 'single passport', allowing the banks, financial institutions, CISs, investment managers and investment services businesses legally established in one member state to establish a branch or to provide their services in Malta subject to adherence with certain procedural requirements concerning the passporting process without being required to obtain a separate licence from the MFSA.

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

Depending on the particular regulatory regime that the fintech company would fall under, in terms of the current legislation there are different 'presence requirements' that apply to different segments of the financial services regulatory regime. For example, in terms of the Financial Institutions Act, entities wishing to carry on any of the licensable activities under the Act (such as the provision of payment services or lending activities) are required to comply with the 'four eyes principle', which requires the financial institution to be managed and directed in Malta by at least two individuals. The same requirement applies for investment service providers under the Investment Services Act, including fund managers. Such entities also need to appoint certain officers (such as a money laundering reporting officer and compliance agent) as applicable. The extent of the presence that the MFSA will expect from applicants and licence holders (on an ongoing basis) will also depend on the size of the operations.

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

Peer-to-peer lending is not specifically regulated in Malta. As the existing financial services regulatory framework predates the emergence of peer-to-peer lending as an attractive source of funding, the provisions of the Banking Act, the Financial Institutions Act and the Investment Services Act make no direct reference to the peer-to-peer lending. Accordingly, to date, there are no clear rules bringing peer-to-peer lending within the scope of the regulatory framework. However, peer-to-peer lending platforms would still need to consider whether any of their activities could constitute provision of investment advice, payment services or other licensable activities. Furthermore, any person who, as a lender, regularly or habitually lends money through such platforms in or from Malta would arguably be carrying out a regulated activity.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

Maltese legislation does not include any specific regulation of crowdfunding. Out of the three main business models for crowdfunding platforms, there is a low risk that reward-based or donation-based crowdfunding models would trigger any licensing requirements under the existing legislative framework. On the other hand, the activities of loan-based and equity-based crowdfunding platforms may in theory fall within the parameters of the Financial Institutions Act and the Investment Services Act respectively. However, this position will remain unclear unless rules specifically regulating crowd-lending or equity-based crowdfunding models are enacted.

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

The Financial Institutions Act regulates factoring as a form of lending and the carrying out of such activity would trigger a licensing requirement under this law. Invoice discounting as another form of invoice trading will also likely fall under the list of regulated activities under the same law.

11 Are payment services a regulated activity in your jurisdiction?

The carrying out of payment services on a regular or habitual basis in or from Malta is a regulated activity under Maltese law and requires authorisation from the MFSA. Payment services are regulated under the Financial Institutions Act which transposes the EU Payment Services Directive (2007/64/EC) into Maltese law, by the Financial Institutions Rules issued by the MFSA and party by a Directive issued by the Central Bank of Malta, which implements the substantive parts of the Payment Services Directive. Regulated payment services are defined under the Act, which definition mirrors the provisions of the Payment Services Directive and includes services enabling cash to be placed on, or withdrawn from, a payment account as well as all the operations required for operating a payment account, execution of payment transaction, issuing or acquiring of payment instruments and the provision of money remittance services. The provisions of the Payment Services Directive II are to be transposed to Maltese law within two years from its adoption at EU level in October 2015.

12 Are there any restrictions on cold-calling investors or clients in your jurisdiction?

Cold-calling is not a prohibited practice; however, under the newly proposed rules that the MFSA has recently issued for consultation, the proposed position is for such unarranged calls to be avoided unless otherwise requested by the client. There are several standards that should be met when such a call is made to potential and actual investors or clients, including that the caller's identity and purpose must be divulged, no undue pressure is to be put on clients by an investment firm's staff, staff are to be civil and considerate and no deception or artificiality is permitted. In addition, the MFSA has recommended that calls during certain unsocial hours are to be avoided. Further, cold-calling is allowed as long as high-risk instruments are not promoted and no deals are agreed on solely based on the call, unless arrangements had been made with the client prior to the call. These principles are reflected in the proposed rules described above.

13 Does the regulator in your jurisdiction make any specific provision for fintech services and companies?

There is currently no specific provision or initiative for fintech companies in Malta. Although the current Maltese regulatory framework caters for certain aspects of fintech businesses, it is clear that in the interest of legal certainty, consultations with the industry and legislative initiatives are required to cater for the ongoing developments surrounding these businesses. In view of the increasing popularity of the industry, and the upcoming EU action plan on retail financial services expected to be published in 2016, it is expected that the regulator in Malta will be taking necessary steps in the near future to address this segment of the financial services industry.

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

The Investment Services Rules lay down specific requirements that licence holders must adhere to when issuing marketing communications to retail clients or potential retail clients with a view of ensuring that the communications shall be fair, clear and not misleading. These rules include requirements concerning the prominent indication of any relevant risks and warnings in the communication, the requirements to follow where the communication compares investment services or instruments or where it includes an indication of past or future performance of an instrument.

In terms of the Investment Services Act, no investment advertisement may be issued by a person (not being a licence holder) unless this is approved by a holder of an investment services licence.

CISs are required to issue an offering document (in the case of PIFs or AIFs) or a prospectus and key investor information document (in the case of UCITS). These documents are to contain sufficient information for investors to make an informed decision about the investment proposed to them and must include, as a minimum, the information prescribed in the relevant Rules, which includes, in particular, detailed and clear indication of the principal risks associated with investing in the particular instrument.

Under Maltese law, the marketing of financial services is also directly regulated through the provisions of the Distance Selling (Retail Financial Services) Regulations. These Regulations, which implement Directive 2002/65/EC concerning distance marketing of consumer financial services, set out rules that govern marketing of financial services to retail consumers and prescribe minimum information that must be provided by financial services suppliers to consumers. Since these regulations particularly target marketing material of financial services products that is distributed online, these rules are of particular relevance to fintech companies. In addition, fintech companies are also bound to comply with marketing and advertising regulations found in general consumer protection legislation.

15 Are there any regulator-imposed temporary restrictions on financial products in place that are relevant to fintech companies in your jurisdiction?

The Malta Financial Services Authority Act (Chapter 330), the statute that establishes the MFSA as Malta's single financial services regulator, grants it the power to monitor and supervise financial services offerings to consumers in Malta. Accordingly, it is charged with promoting the general interests of consumers and promotion of fair competition and consumer choice in consumer services, and may take measures against financial services products that may be deemed unfair, harmful or detrimental to consumers of financial services in Malta. Therefore, pursuant to such authority, the MFSA may impose such temporary restrictions on fintech products should it consider such products to constitute a detrimental market practice. However, no such restrictions have been imposed to date.

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

There are no foreign exchange or currency control restrictions in Malta. All exchange control restrictions were removed with the overhaul of the External Transactions Act, Chapter 233 of the Laws of Malta in 2003 as part of Malta's preparation to become a full member state of the EU in 2004. Under the Act, only in very limited and exceptional circumstances may the Minister of Finance make regulations imposing restrictions to preserve stability of the financial system in the event of crisis or to implement sanctions against specific countries, persons or group of persons in accordance with directives issued by international organisations of which Malta is a member.

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

Under Maltese law, licensing requirements for financial services providers are typical triggered once the undertaking provides qualifying services in or from Malta. This licensing 'trigger' is not conditional on the solicitation of clients by the undertaking and therefore the provision of a regulated service resulting from unsolicited approaches by a potential client or investor, whether these are located inside or outside of Malta, would still give rise to a licence requirement.

18 Are there licensing requirements that would be triggered where the investor or client is a temporary resident in your jurisdiction?

See question 17. Where an investor or client is located in Malta the licensing requirement would be triggered.

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

See question 17.

The Investment Services Act specifically provides that a body corporate, unincorporated body or association formed in accordance with or existing under the laws of Malta, shall not provide an investment service in or from within a country outside Malta unless it is in possession of a valid investment services licence.

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

Where a fintech company falls within the parameters of one of the financial services regulatory regimes, then when such entities are providing services on a cross-border basis to another EU member state, such entities would still need to comply with the ongoing regulatory requirements arising under the particular licence held (Investment Services Act, Financial Institutions Act or Banking Act). These include financial resources requirements, disclosure and reporting requirements and rules concerning marketing of services as described above.

21 Does a third-party referral qualify as an unsolicited approach in your jurisdiction?

Yes; a third-party referral would qualify as an unsolicited approach.

22 What licensing exemptions apply where the services are provided through an offshore account in your jurisdiction?

There are no specific licensing exemptions in this respect.

23 What licensing exemptions apply where the services are provided through a nominee account in your jurisdiction?

There are no specific licensing exemptions in this respect.

24 What licensing exemptions apply where the services are only ancillary or incidental to other core activities or services in your jurisdiction?

The provision of investment services that is only provided in an ancillary or incidental manner is exempted from licensing, upon fulfilment of the conditions specified in the Investment Services Act (Exemption) Regulations. The licensing exemption will apply where the service is provided in the course of a professional activity that is regulated or subject to a code of ethics that governs the profession and the provision of such an investment service is not excluded by the regulations that govern the profession. Furthermore, the investment service will only be deemed as provided in an incidental manner where no remuneration is received for the service, where the professional does not hold himself or herself out as providing this service and does not solicit members of the public to take such services.

25 What licensing exemptions apply when dealing with clients that are duly licensed in in your jurisdiction?

The Investment Services Act (Exemption) Regulations (subsidiary legislation 370.02), provide for various exemptions from the requirement to be in possession of an investment services licence including where a person resident outside Malta provides services of management of investments, investment advice or where such person acts as a trustee or custodian to a CIS qualifying as a PIF, where the MFSA is convinced that such a person is of sufficient standing and repute. Where such CIS does not qualify as a PIF, certain additional requirements apply, including that the service provider is to be regulated in the country of residence to the satisfaction of the MFSA.

In addition to the above, a person resident outside Malta providing administrative services to a CIS need not comply with the requirement to obtain recognition from the MFSA, as long as he or she is providing services to a CIS qualifying as a PIF, and in the case that the CIS does not qualify as a PIF, it must be adequately regulated in the person's country of residence to the satisfaction of the MFSA.

26 What licensing exemptions apply to specific types of client in your jurisdiction?

The regulatory framework distinguishes between retail and professional clients and in so doing stipulates more stringent requirements for activities targeting retail clients (thereby providing higher levels of investor and client protection) as opposed to professional clients.

Under the investment services regime a professional client is a client that possesses the experience, knowledge and expertise to make its own investment decisions and properly assess the risks that it incurs. In line with MiFID, the relevant investment services rules provides a list of entities deemed to be professional clients and includes credit institutions, investment firms, other authorised or regulated financial institutions and CISs and management companies of such CISs.

The distinction between retail and professional clients is important for investment firms that need to comply with client classification requirements and assessments of suitability and appropriateness among other requirements. Similarly, CISs targeting professional or qualifying investors are subject to a 'lighter touch' regulation than CISs marketed to a retail audience.

Securitisation

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

In Malta, the constitution and enforcement of a loan and security agreements are governed by the Civil Code. To execute such agreements under the Maltese Code of Organisation and Civil Procedure, transaction parties resort to special summary proceedings to execute and enforce certain, liquid and due debts or demand the institution of executive warrants. Since peer-to-peer or marketplace lending are not specifically regulated under Maltese law, it is likely that loans made through such a platform will be subject to the Civil Code (Chapter 16 of the Laws of Malta) rules on loans for consumption or mutuum. In addition, it should be noted that Malta has implemented the provisions of Directive 2002/47/EC on financial collateral arrangements.

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

An assignment of loans originating on a peer-to-peer lending platform is subject to the standard rules for assignment of rights under the Civil Code. Under these rules, perfecting such an assignment requires an instrument in writing setting out the terms of the assignment and a notice made out to the original debtor, informing him or her of the assignment to a new creditor.

In the context of securitisation transactions, Malta's Securitisation Act, Chapter 484 of the Laws of Malta (the Securitisation Act) relaxes the requirements for the perfection of an assignment where this concerns the transfer of securitisation assets (which could be peer-to-peer loans) to the securitisation vehicle. It renders such a transfer of rights absolute and binding on all parties as soon as the assignment is made in accordance with the terms of the respective agreement and in terms of the applicable contract law. It is essential that the transfer is effected in writing.

An unperfected assignment could have very severe implications on the purchaser of the securitisation assets (ie, the securitisation vehicle), as this could prejudice the success of the asset-backed securities issue. If the rights related to the loans have not been completely removed from the originator's balance sheet, the originator's creditors might enforce their debts against the loan receivables that have been repackaged to form the asset pool in the securitisation transaction. If the originator's creditors were to successfully demonstrate that the assignment to the securitisation vehicle was not perfected, no payments on the receivables would be due to the vehicle and may cause it to default on interest payments due periodically to the note-holders.

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

Typically, a transfer of a loan made under the standard rules for the assignment of rights under Maltese civil law acquire legal validity once the original debtor has either been notified by means of a judicial act or the debtor himself or herself has otherwise acknowledged the transfer of the original debt to a new creditor.

The fast-paced nature of the capital markets make it unrealistic to notify the debtor upon the transfer of each contract for receivables to the securitisation vehicle. For this reason, Maltese securitisation law facilitates the process of debtor notification. It allows the notification to be carried out to the debtor directly in writing or alternatively to deem the debtor notified upon publication of a notice in a daily newspaper that is circulated in the jurisdiction where the debtor resides.

Consent of the original borrower is never required in terms of Maltese law. The Securitisation Act permits the assignment of assets to the securitisation vehicle even where these are subject to a contractual or statutory prohibition.

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

Securitisation vehicles, together with all other parties involved in the securitisation transaction, are bound to adhere to data protection laws and professional secrecy and confidentiality rules. This is specified under the Securitisation Act, which provides that transfers of personal data between persons in the context of a securitisation transaction are to be considered as having been made for a purpose that concerns a legitimate interest of the transferor and transferees of the data, unless it can be shown that the transfer may violate the data subject's fundamental right to privacy.

Furthermore, transfers of personal data to a third country that does not ensure an adequate level of data protection will not require the typical authorisation of the Data Protection Commissioner as long as it can be shown that the data controller has adopted appropriate safeguards for the protection of data subjects' fundamental rights.

Intellectual property rights

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

Software, as a result of intellectual efforts of the human mind, is afforded copyright protection. Copyright protection is afforded under Chapter 315 of the Laws of Malta – the Copyright Act (CA) – where software is treated as a literary work. Copyright protects the expression of the idea and arises automatically by operation of the law from the moment in time that the idea has been reduced to a medium through which it has been expressed. To be protected by copyright, there is no action that needs to be carried out by the copyright holder and no registration, and no copyright protection sign is necessary in order for the protection to apply, as long as software qualifies as an 'original literary work'.

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

Patent protection does not apply to software-implemented inventions or business methods as such. In fact, Chapter 417 of the Laws of Malta, Patents and Designs Act explicitly excludes 'schemes, rules and methods for performing mental acts, playing games or doing business and programs for computers' from being regarded as inventions and therefore being able to be eligible for patent protection. For patent protection to apply, and in addition to the originality and other requirements for the invention to be patentable, it is worth noting that the fact that software runs on a piece of technical equipment (computer, phone, etc) means that there must be some contribution to the technical field and, without such contribution, software as such is not patentable.

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

The owner of intellectual property created during the performance of a contract of employment, by a developer who is an employee, is the employer. In particular, with respect to where a computer program or database is made in such circumstances, the economic rights conferred by copyright are deemed to be transferred automatically to the author's employer, unless there is any agreement excluding or limiting such transfer between the parties.

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

Under the CA, the author is the beneficiary of the economic rights of the work created by him or her that is subject to copyright. Accordingly, in any situation other than an employer-employee relationship, where a contractor or a consultant is the author, the contractor or consultant is the holder of the copyright.

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

Currently, there is no specific law protecting trade secrets. Still, protection is afforded by means of other legal principles. For instance, the Civil Code provides that a person is subjected to a fiduciary obligation if he or she has received information from another person that he or she knew was confidential. Such obligations extend to third parties who receive information from a fiduciary. A recipient of the information who does not comply with the duty shall be liable for damages. Further protection is afforded by Chapter 9 of the Laws of Malta – the Criminal Code – that provides criminal sanctions applicable to persons misappropriating trade secrets.

In addition to the above, trade secrets are effectively protected by contract law. It is also common practice for an employment contract to contain provisions to prevent employees from disclosing trade secrets and confidential business information during, and sometimes after, the employment relationship and for owners of trade secrets to enter into a non-disclosure agreement to protect their confidential information in commercial transactions. Maltese courts have the power to issue precautionary measures, such as injunctions, against the unlawful infringement of trade secrets.

Further protection shall be provided in the near future in terms of a newly adopted EU Trade Secrets Directive, which must be transposed by Malta within the next two years. The transposition of the Trade Secrets Directive into Maltese legislation means that trade secrets will be explicitly protected. Malta will be required to adopt various measures that would include the preservation of confidential trade secrets during the course of legal proceedings and the withdrawal from the market or destruction of the products that are infringing trade secrets. Further to this, an order to pay pecuniary compensation or damages to the injured party may also be made in certain cases.

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

'Branding' of a business is taken to be a combination of various elements including the logo, trade dress, design, image and slogans, with respect to specified products or services. As such, various intellectual property rights are available for protection of the above-mentioned elements, even though there is no uniform protection for what is considered to be the totality of the elements constituting the brand itself. Logos, slogans and visual colour schemes can be protected by trademarks, as well as, in some cases, long-standing and widespread use.

Protection can be obtained by registering a word mark, figurative mark, with or without words, slogan or three-dimensional mark or design with the Maltese Intellectual Property Office (Maltese IPO). European Union trademarks (EUTMs) may be applied for in Malta and protection for the trademark may be extended to other territories, as opposed to limiting protection to Malta. Such a one-time procedure gives the owner an exclusive right, in the member states of the EU, to prevent any third party from illegally using the same or similar signs for identical or related goods or services as those that are protected by the EUTM in the course of trade. This is recommended for businesses that have the intention of operating in EU member states.

Registering a trademark is a straightforward process that can be done by the proprietor of the trademark or his or her representative. An application may be filed online to the Maltese IPO at any time. A trademark application number will be immediately allotted for easy and quick reference. If multiple classes for the same mark need to be filed, this can be done simply by filing one online trademark application, in contrast to filing several applications manually.

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

Businesses can prevent infringement of brand rights owned by third parties, by running detailed trademark searches for their logos, slogans, colour schemes and similar brand factors of the new business against previously registered trademarks. This will help to ensure that brands, which are developed and marketed, will not be liable to infringement proceedings brought by proprietors of previously existing brands or marks registered and used, with respect to similar or identical services provided by the business. Searches for trademarks and other brand rights may be carried out through the online database registers of the EU Intellectual Property Office as well as the TMView online database, which aggregates trademark registers from over 70 national trademark offices, as well as the World Intellectual Property Organisation register.

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

With regard to copyright, neighbouring rights and sui generis rights (eg, the right in a database), the CA states that the copyright owner or right holder may sue an infringer in the Civil Court for payment of damages or payment of a fine, and may also condemn the defendant to the restitution of all the profit derived from the infringement of such intellectual property right. In addition, the Court has the discretion of awarding any additional damage, taking into account the flagrancy of the infringement and any benefit accruing to the defendant.

Further to the above, the copyright owner or right holder has the option to request the Court to order that all the infringing articles be destroyed.

In relation to trademarks, Chapter 416 of the Laws of Malta – the Trademarks Act – provides that where a person is found to have infringed a registered trademark, remedies range from the offending sign being erased, recalled from circulation within channels of commerce or destroyed from any infringing goods. The injured party can also claim damages. The court shall take into account the facts and circumstances of the case, and the damage suffered including the negative economic consequences on the injured party (eg, lost profits, unfair profits made by the infringer and moral prejudice caused to the proprietor). If the injured party would not have sufficiently proved damages, the court may still award damages using an alternative method to calculate damages that may involve a lump sum of damages payable including, for instance, the least amount of royalties or fees that would have been due had the infringer requested authorisation to use the trademark in this case.

The Enforcement of Intellectual Property Rights (Regulation) Act further provides that injunctions and declarations may be made, payment of pecuniary compensation to the injured party or payment of damages may also be awarded. There is also the possibility that the unsuccessful party shall pay the legal expenses incurred by the successful party. The applicant may also request the court to order appropriate measures for the dissemination of the information concerning the decision at the expense of the infringer.

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

There are no rules or guidelines on open-source software specifically regulating its use in the financial services industry. However, the same rules on copyright apply to open-source software just as they do to software in general. This is, in particular, because copyright is the basis for the way in which open-source software is regulated. In fact, the person using open-source software and making later amendments and copies of the work must identify the original creator as the first author of the work (the original open-source software).

Update and trends

Given the fast-paced nature of developments and growth in the fintech industry, and also in view of the upcoming EU Financial Services Action Plan expected to be published in 2016, it is anticipated that in the next few months and over the coming years the local financial services sector will experience a positive shake-up. It is widely expected that Malta's regulatory approach will assist fintech firms in adopting consumer-friendly and innovative models and identify risks before they emerge. Since digitalisation in financial services has such great potential, industry participants and legal practitioners will be keeping a keen eye on regulatory developments as they unfold.

40 Are there any high-profile examples in your jurisdiction of fintech companies enforcing their intellectual property rights or defending their intellectual property rights against a third party?

We are not aware of any fintech companies enforcing their intellectual property rights or defending such in Malta.

Data protection

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

The processing of personal data is mainly regulated by Chapter 440 of the Laws of Malta – the Data Protection Act (DPA) – that lays out the requirements for processing, including that the personal data must be processed fairly and lawfully, in accordance with good practice, only collected for specific, explicit and legitimate purposes, and must be processed for a purpose that is in line with the reason for the information in question being collected. Personal data that is processed must be adequate and relevant taking into account the purposes for processing and only necessary personal data that is correct and kept up to date shall be processed. All reasonable measures must be taken to complete, correct, block or erase data to the extent that such data is incomplete or incorrect, and personal data must not be kept for a period that is longer than is necessary, always having regard to the purposes for which the data has been processed.

The DPA also lays out various criteria when processing personal data and provides that unambiguous consent needs to be given by the data subject for his or her data to be processed. Other criteria includes that processing of data must be: necessary for the contract performance; necessary for compliance with a data controller's legal obligation; or to protect the vital interest of the data subject. In addition, processing must be necessary for performance of an activity that is carried out in the public interest or in the exercise of an official authority vested in the controller or in a third party, or processing of personal data is necessary for a purpose that concerns a legitimate interest of the controller or third party to whom personal data is provided, except where such an interest is overridden by the interest to protect the fundamental rights and freedoms of the data subject and, in particular, the right to privacy.

Further restrictions apply to processing of personal data by means of electronic communications, including for the purposes of direct marketing, unsolicited commercial communications, use of geolocation data, and the use of cookies.

The introduction of the General Data Protection Regulation, which is due to come into force in 2018, will pose additional protection to individuals with respect to the processing of personal data.

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

There are no specific laws or guidelines explicitly regulating fintech companies' use of personal data. However, assuming that such companies will be processing personal data and it will be done by means of electronic communications, the rules applicable for such processing will apply.

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

As far as we are aware, no guidelines with respect to anonymised personal data and its aggregation exist in Malta. The Processing of Personal Data (Electronic Communications Sector) Regulations, however, provide that traffic data relating to subscribers and users, which has been processed for the purposes of the transmission of a communication and stored by an undertaking providing publicly available electronic communications services or public communications network shall be erased or made anonymous when no longer needed for the purpose of the transmission of a communication. The same Regulations state that where location data is processed, such data may only be processed when it is made anonymous or with the consent of the users or subscribers for the necessary duration for the provision of a value added service.

Cloud computing and the internet of things

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

The adoption of cloud computing is steadily becoming more prevalent in the local financial services industry. Increasing volumes of data in the financial services sector call for the adoption of such technologies. Despite this context, enterprises operating in this sector are likely to tread with caution because of concerns relating to data security, jurisdictional oversight and compliance, control and transfers to third countries, particularly in the light of the Court of Justice of the European Union's recent ruling in *Maximillian Schrems v Data Protection Commissioner*, which invalidated the *Safe Harbour* decision with immediate effect.

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

There are a number of initiatives that currently govern the evolution of cloud computing, although these are not necessarily tied to the financial services sector. Locally, the Malta Communications Authority, the regulatory body charged with the supervision and regulation of communications services in Malta, has issued a guidance document that highlights considerations to be taken by SMEs and microenterprises when assessing the suitability of the use of cloud computing within their firm.

On a wider macro level, some initiatives and policy guidance documents have been published by the institutions of the EU. As part of the EU's Digital Single Market Strategy, the European Commission launched a European Cloud Initiative in April 2016, which includes actions to address concerns and support the development and use of cloud services in all sectors of the economy. This builds upon a 2012 Commission Communication document addressed to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, entitled 'Unleashing the Potential of Cloud Computing in Europe', through which it identifies policy initiatives that are currently being taken that will impact different sectors that in are in some way affected by cloud computing, and outlines key actions related to standardisation and certification for cloud computing.

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

The internet of things (IoT) refers to the embedding of technological sensors in everyday items such as drones or wearables such as smartwatches or glasses, designed to process and collect a high volume of personal data to be used in innovative applications that analyse the data subject's habits or activities. Since the data collected usually refers to natural persons and aggregates a significant amount of data of varying sensitivity, the IoT raises challenging legal issues in the field of privacy and data protection law. In early 2014, the Article 29 Working Party, established by Directive 95/46/EC with the mission of imparting

expert advice to EU member states regarding data protection and privacy matters, adopted an opinion on recent developments in the IoT. This opinion is not binding on member states; however, it identifies the main data protection risks that arise from the IoT and presents helpful guidance on the how the EU legal framework should be applied in this context.

Tax

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

Malta offers a highly attractive and competitive corporate tax regime that was approved by the EU in 2004. A company incorporated in Malta is subject to tax in Malta at the standard corporate tax rate of 35 per cent. Upon a dividend distribution to the shareholders of the Maltese company, the shareholders would be entitled to a refund of the Malta tax paid by the company. The tax refund in the case of a trading company would be that of six-sevenths of the Malta tax paid by the Maltese company (ie, the shareholder gets 30 per cent of the tax paid back).

In addition to the beneficial corporate tax regime mentioned above, Malta also offers tax incentives, primarily in the form of tax credits to companies that qualify as innovative enterprises in line with Malta Enterprise Rules and Regulations. The Micro Invest Scheme is one such incentive, which aims to encourage start-ups and self-employed individuals to invest in, develop and expand their business through innovation. Support for successful applications is given through tax credits representing a percentage of the eligible expenditure and wages of newly hired employees.

Recently, the Maltese government launched the Seed Investment Scheme (Income Tax) Rules 2016. Through this Scheme investors who invest and provide financing to start-ups are eligible for tax credits up to a maximum €250,000 per year.

Competition

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

There are no specific issues.

Financial crime

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

Fintech companies are not subject to mandatory rules that require the implementation of procedures to combat bribery. However, it may be noted that Chapter 527 of the Laws of Malta – Protection of Whistleblowers Act – provides a framework for the protection of persons who expose dishonest or illegal conduct, such as bribery, within an organisation. The whistle-blower protection afforded through this piece of legislation applies to both internal disclosures made within an organisation, as well as to external disclosures made to a competent supervisory authority such as the MFSA.

Current anti-money laundering legislation imposes obligations intended to circumvent money laundering activities upon 'subject persons' carrying out a 'relevant activity' or 'relevant financial business'. A determination as to whether a fintech company will be considered as a subject person will depend on whether its activities are licensable or regulated under financial services legislation.

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

No regulatory or industry guidance has been issued in Malta that specifically targets fintech companies' financial crime risk.

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

A licence to pursue 'financial activities', as defined in Norwegian law, is granted by the Norwegian Financial Supervisory Authority (FSA). The licensing requirements applicable under Norwegian law are to a large extent based on the common EU financial legislation, including EU licensing requirements pursuant to directives and regulations such as the Capital Requirement Directive IV (CRD IV)/Capital Requirements Regulation and Markets in Financial Instruments Directive (MiFID).

To operate as a Norwegian 'financial institution', an institutional specific licence must be obtained from the FSA. The term financial institution, within the context of Norwegian statutory law, covers institutions pursuing business as banks, credit institutions, financing institutions (ie, institutions that grant credit, including financial leasing and factoring and invoice discounting), insurance companies, pension funds, payment service institutions and electronic money institutions.

In some respects, Norwegian licensing requirements are stricter than in several other jurisdictions; for example, 'financing activity', as such, is a licensed activity. The activity of 'financing' is understood as the activity of granting credit and issuing guarantees for one's own account (including financial leasing) and intermediation of credit and guarantees, and otherwise participating in the financing of activity other than one's own. As a rule, financing activity may only be carried out by institutions licensed as banks, credit institutions and financing institutions. There are some exceptions applicable, set out in the Financial Undertakings Act, section 2-1, covering, inter alia, certain other regulated entities and activities such as seller credit, isolated cases of financing and activity as financial agent or consultant.

In addition, there is a separate set of licensing requirements, to a large extent equal to the corresponding EU legislation, applicable to other finance-related activities, including investment services provided by investment firms, management of securities funds, activity as alternative investment funds (AIFs) and debt collection.

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

Yes, in addition to institutional requirements and requirements related to supervisory processes, the contractual part of financing arrangements, including consumer lending, is regulated by Norwegian statutory law.

In particular, requirements relating to consumer lending and guarantees and other security interests granted by a consumer as security for repayment of credit, are regulated in the Norwegian Financial Contracts Act. The Act is invariably in favour of consumers and sets out several requirements that the lending financial institution will have to comply with (the Act incorporates the EU Consumer Credit Directive, among others). As regards consumer lending, Chapter 3 sets out several compulsory requirements, relating to the form and content of credit agreements, information obligations, secondary trading of loans, amendments to the terms of credit agreements, default interest, repayment and termination, etc.

In addition, other Norwegian legislation and background law will apply, such as legislation on distance marketing of consumer financial services (incorporating Directive 2002/65/EC) and general principles of contract law.

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

A creditor may, as a general rule under Norwegian law, freely transfer its creditor position to a third party. Such right may, however, be limited by agreement between the parties.

If the creditor transfers its creditor position, there is no requirement of the debtor's consent prior to the transfer. However, if the debtor has not been notified of the transfer, and has no particular reason to otherwise be aware of the transfer, the debt may be repaid to the former creditor without any obligation on the debtor of repayment to the new creditor. Furthermore, notification of the debtor is also needed to legally perfect the transfer of the creditor positions.

In Norwegian legislation there are several provisions that affect loan transfers between professional lenders, including institutional regulations, such as a requirement that the new creditor legally must have the right to do banking business in Norway. Additional restrictions include, for example, the requirement for consent from the financial authorities for certain portfolio transfers; in particular transfers that constitute a substantial part of the activity of the selling institution.

In the Norwegian financial contract legislation there are also restrictions applicable to transfers. These restrictions apply, in particular, to transfer of loans granted to consumer debtors, including detailed requirements relating to information, consent and applicability of financial contracts legislation subsequent to the transfer.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies would generally fall within the scope of any such regime.

Collective investment schemes and the management of funds are regulated by the Norwegian Securities Funds Act, which implements Undertakings for Collective Investment in Transferable Securities IV (Directive 2009/65/EC). Companies managing such funds must, according to the Act, obtain a licence from the FSA.

In general, Norwegian financial regulation focuses on the types of services provided, and not the company itself. Whether a fintech company would fall under the scope of collective investment schemes would be decided by the authorities on a case-by-case basis.

5 Are managers of alternative investment funds regulated?

Yes, managers of AIFs are regulated by the Norwegian AIF Act, which implements the Alternative Investment Fund Managers Directive (Directive 2011/61/EU). The AIF Act contains provisions such as requirements relating to licensing, corporate governance and day-to-day management, capital requirements and marketing and disclosure requirements.

6 May regulated activities be passported into your jurisdiction?

As a European Economic Area (EEA) country, Norway allows licensed financial activity to be passported into Norway by way of cross-border service from another EEA or EU member state or by establishment of branch offices in Norway in accordance with and to the extent provided for in the relevant EU legislation. This means that a financial institution licensed within an EU or EEA state generally may provide their services in Norway to the same extent as in their home country under the primary supervision of their home supervisors after having

completed certain application or notification procedures, and provided that the proposed activities are covered by the passporting rights prescribed in the EU and EEA legislation. Some specific Norwegian legal requirements will, however, apply – the relevant institution being notified of such requirements as part of the start-up process in the Norwegian market.

It is notable that these passporting rights only apply to licensed EU and EEA-based institutions and only cover the mutually recognised activities provided for in the EU and EEA legislation. The first of these restrictions is the most limiting as it means that entities situated outside the EU and EEA area, and entities having their place of establishment within the EU and EEA area but that do not fit the requirements for being a regulated entity with passporting rights in accordance with the EU and EEA regulation, cannot provide their services by way of a cross-border or branch office in Norway. Such entities generally have to establish a new Norwegian institution or a subsidiary of the main institution – in both instances, the institution or subsidiary will be subject to all Norwegian law requirements such as licensing, capital requirements and other corporate legislation.

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

See question 6. If the institution is licensed as an institution subject to EU and EEA passporting rights in an EU or EEA member state and wants to pursue mutually recognised activities in Norway, the institution can provide such financial services without obtaining a separate Norwegian licence and establishing a local presence in Norway (on a cross-border basis) after having completed the notification procedures described in the relevant EU and EEA regulation. The most relevant type of institution being credit institutions pursuant to CRD IV are electronic money institutions and payment institutions. If such requirements are not fulfilled, the institution will have to obtain a Norwegian licence as a Norwegian separate financial institution or subsidiary, as described in question 6.

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

There is currently no specific regulation on peer-to-peer or marketplace lending in Norway. The applicable regulations and licensing requirements are decided by the Norwegian authorities on a case-by-case basis.

An example of such consideration is a decision of 6 January 2015 from the Ministry of Finance (*Trustbuddy AB*). In this case, the institution was registered in Sweden as a financial institution, but had no licence and was not under supervision of the Swedish Financial Supervisory Authority. The institution requested consumers (members) to make deposits to be lent to other consumers or members (peer-to-peer lending). The question was whether the company could operate in the Norwegian market without a licence. The Ministry of Finance concluded that the company provided loan brokerage services. The services did not meet the requirements in the Financial Undertakings Act, section 2-18, including licence requirements. In addition, the Ministry concluded that peer-to-peer lending services can be considered on the basis of other provisions of financial law. Hence, the offer could require a full banking licence.

Furthermore, the Ministry concluded that regulatory requirements should also be considered in relation to other forms of crowdfunding.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

In Norway, the legislation on crowfunding is under development. So far no new legislation or changes in the existing framework to adjust to the new form of financing has been adopted. Hence, the legal considerations relating to crowfunding are based on general financial and company legislation on a case-by-case basis. The Norwegian financial authorities stated in a decision of 6 January 2015 that crowdfunding could require a licence from the FSA – see question 8.

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

There is no specific regulation of invoice trading platforms in Norway. The service will currently be considered on a case-by-case basis by the Norwegian financial authorities. See questions 8 and 9.

Invoice trading can be considered to be within the scope of 'factoring', which is regulated in the Financial Undertakings Act, and requires a licence from the FSA.

11 Are payment services a regulated activity in your jurisdiction?

Yes, to provide payment services, undertakings must obtain a licence from the FSA according to the Financial Undertakings Act. The Norwegian payment services provisions correspond to EU legislation, including the Payment Services Directive and the Payment Account Directive.

As regards payment services, activities requiring a licence include cash deposits into accounts and cash withdrawal from accounts, debit or credit account transactions, issuance of payment instruments, money transfer and online payment transactions. In general, the licence from the FSA covers one or more of the services above. In addition, a limited licence can be obtained. In the case of a limited licence, only money transfer services can be provided.

Furthermore, the Financial Contracts Act regulates the relationship between the undertaking and its customers. The provisions of the Act are mandatory when providing payment services to consumers.

12 Are there any restrictions on cold-calling investors or clients in your jurisdiction?

In general, it is prohibited in Norway to direct marketing communications to consumers who have placed themselves on a specific register to avoid telemarketing. However, telemarketing is allowed if the consumer has expressly requested to be contacted by telephone or if the consumer is a customer of the company, in this case the financial institution.

There are several marketing requirements in Norwegian legislation that apply when providing financial services by telephone. The EU Directive on distance marketing of consumer financial services is implemented in the Norwegian Cancellation Act. Relevant requirements in the Act include, for example, that the trader shall confirm the offer in writing on a durable medium subsequent to the telephone conversation. The consumer is not bound until the offer has been accepted in writing and the trader shall inform the consumer of this fact in the confirmation. The trader must document the consumer's acceptance. Furthermore, the Act sets out detailed information requirements prior to an agreement.

13 Does the regulator in your jurisdiction make any specific provision for fintech services and companies?

There is currently no specific provision in Norway for fintech services and companies.

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

Yes, there are several provisions on marketing of financial services in Norway. The marketing legislation applicable under Norwegian law is based on EU legislation, including the Directive on distance marketing of consumer financial services.

In particular, marketing of credit agreements is comprehensively regulated in the Financial Contracts Act corresponding to the EU Consumer Credit Directive, and contains information requirements on, among others, maturity, costs and prices. The information also has to be presented through a representative example. The provisions of the Act are mandatory for services provided to consumers. The legislation on marketing of investment services is regulated in the Securities Trading Regulations, including information requirements on costs and prices. The provisions largely correspond to EU legislation, including MiFID.

If the services are offered through distance marketing, there are relevant financial marketing provisions in the Norwegian Cancellation Act corresponding to Directive 2011/83/EU on Consumer Rights.

15 Are there any regulator-imposed temporary restrictions on financial products in place that are relevant to fintech companies in your jurisdiction?

In recent years there has been a focus on strengthening consumer protection and the Norwegian legislation on consumer protection corresponds to a large extent to EU legislation. For example, MiFID II and the Packaged Retail and Insurance-based Investment Products Regulation, including provisions on product intervention, are expected to be implemented in Norwegian law.

Without specifically referring to fintech companies, the FSA has in recent years, on numerous occasions, opined that financial products with a complex structure (eg, structured products) are not suited for consumers.

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

Norway has a deregulated currency market and there are presently no currency exchange restrictions in Norway. The Norwegian Currency Control Act still provides an option for the authorities to enact restrictions on currency exchange. However, there are currently no indications that would suggest such actions.

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

In the event of an unsolicited direct approach from the investor or client, the provider is not considered to carry out a regulated activity that requires a licence in Norway pursuant to the non-statutory principle of 'first approach', as applied by the FSA.

18 Are there licensing requirements that would be triggered where the investor or client is a temporary resident in your jurisdiction?

The deciding factor in relation to the application of the licence requirements is where the services are marketed and provided. Regardless of a temporary residence of the investor or client, the FSA will consider the institution's intended audience, location of the marketing and where the services are intended to be provided. For example, marketing specifically targeted towards Norwegian customers, (ie, marketing in the Norwegian language) will trigger a licence requirement.

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

If the Norwegian institution is providing cross-border services in another EU or EEA member state, the institution must notify the FSA, who in turn will notify the host member state according to the Financial Undertakings Act. If the Norwegian institution is providing services to a non-EU or EEA country, the Financial Undertakings Act contains requirements to obtain permission from the Ministry to establish a branch or subsidiary in the non-EU or EEA country. In addition, local legislation in the host country will, of course, apply.

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

If a fintech company has obtained a licence for cross-border services from the FSA, the Authority will inform the company of all initial and continuing obligations. The Financial Undertakings Act sets out certain general obligations, including requirements on employment, remuneration and partialities of management and other employees, as well as customer confidentiality. In addition, ongoing obligations cover restrictions on transfer of portfolios, pricing, product packaging and information requirements.

21 Does a third-party referral qualify as an unsolicited approach in your jurisdiction?

This question is not specifically regulated in Norwegian law. Referral from a third party would most likely qualify as an unsolicited approach.

22 What licensing exemptions apply where the services are provided through an offshore account in your jurisdiction?

There are no specific licensing exemptions in Norway regarding offshore accounts. The deciding factor as to the applicability of the licence requirements are where the services are marketed and provided. Hence, if the offshore account is provided through a Norwegian institution, which intends to provide financial services in the Norwegian market, the licence will be required on the basis of these marketing and services intentions.

23 What licensing exemptions apply where the services are provided through a nominee account in your jurisdiction?

There are no specific licensing exemptions in Norway; the deciding factor regarding the licence requirements are where the services are marketed and provided. See question 22.

24 What licensing exemptions apply where the services are only ancillary or incidental to other core activities or services in your jurisdiction?

The Norwegian Financial Undertakings Act contains certain licensing exemptions that could be applicable in these circumstances, for example, if the service is provided only once or in a few instances. See question 1. However, this must be considered on a case-by-case basis.

25 What licensing exemptions apply when dealing with clients that are duly licensed in in your jurisdiction?

There are no general licensing exemptions when dealing with clients that are duly licensed under Norwegian legislation.

26 What licensing exemptions apply to specific types of client in your jurisdiction?

There are no licensing exemptions in Norway that relate to specific types of clients.

Securitisation

There is currently no Norwegian regulation on securitisation. As a consequence of this, the special purpose vehicles acquiring loans in a securitisation transaction will be subject to the general licensing requirements described above, provided the debtors are resident in Norway, irrespective of whether the special purpose vehicle is domiciled abroad.

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

Executing loan agreements could in certain instances be considered to fall within the scope of providing credit, which requires a licence from the FSA. See questions 8 and 9.

There is currently no Norwegian regulation on securitisation.

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

Not applicable.

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

Not applicable.

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

Not applicable.

Intellectual property rights

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

Software may be protected to a limited degree by patent protection through registration with the Norwegian Industrial Property Office. Software may be further protected by copyright (program codes, interfaces and documentation) if the software has originality (artistic features and distinctiveness). This protection is obtained when the originality requirement is fulfilled.

Software is also available for protection under the Circuit Designs Act if the software consists of circuit design that fulfils the requirements of being the creator's own intellectual effort and is not common within the industry. Software can also be protected as a trade secret, if it falls under the definition of trade secret. Further, if a name is put on the software, the name can be registered as a trademark. Lastly, if the software is included in special displays, products or parts of products with distinctive appearance or form, it may be registered as a design and have design protection.

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

Yes, patent protection is available to a limited degree for software-implemented inventions. Software that controls physical processes or processes physical signals is regarded as a patentable invention. It is further possible to get patent protection for software that controls a technical function in order to make a computer faster, increase memory capacity or increase its security. This presupposes that the software fulfils certain criteria: the patentability requirements.

The patentability requirements are that the software is novel, involves an inventive step and that it is industrially useful (is of technical nature, has a technical effect and is reproducible). Patent protection is not available to business methods, unless they are used in an invention that fulfils the patentability requirements.

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

For patentable inventions developed by an employee during the course of employment, the employee has, as a point of departure, the right to his or her invention. However, the employer has a right to take over the employee's patentable rights in accordance with the employee contract and depending on the employee's assignments. The employee has a right to a reasonable remuneration when the employer overtakes the employee's rights.

For copyrights created by an employer in the course of employment, the general rule is that the rights fall to the employer to the extent necessary to carry out the purpose of the employment, otherwise the employee owns the rights. For software created in the course of employment, the special rule applies that the copyright to the software goes to the employer, unless something else is agreed upon. For design rights the employee has developed, the point of departure is that the employee has the rights and any assignment of the rights must be regulated in an agreement.

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

No. When intellectual property is developed by contractors or consultants, the intellectual property rights stay with the contractor or consultant, unless something else is agreed upon in the contract.

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

Trade secrets are protected both by statutory provisions, non-statutory principles and in competition clauses. Section 207 of the Criminal Code prohibits the use of trade secrets for the purposes of utilising them for the benefit of a competing company and for sharing it with someone else with the intent of enabling that person to take advantage of it.

Trade secrets are also protected by sections 25, 28 and 29 of the Norwegian Marketing Control Act. Further, there is a non-statutory loyalty obligation that exists between parties in an employment relationship, which implies that the parties must respect each other's interests. Finally, competition clauses in contracts are commonly used for protecting trade secrets. During court proceedings, trade secrets are kept confidential from a party that may benefit from accessing them.

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

Trademark protection is available for the protection of branding (ie, the name of a product or a business, logo or slogan). Such rights are obtained by trademark registration with the Norwegian Industrial Property Office. Trademark protection is available when the sign in question has a distinctive stamp, enabling the consumer to recognise the sign as offering a certain product or service.

Design protection may be available for concrete designs through registration. The Norwegian Marketing Control Act provides protection from acts that are contrary to good business practice, including in the event of a risk of confusion between business concepts for concepts, ideas or methods that have been tested in practice.

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

They can check the Norwegian Industrial Property Office's online database for all public information related to Norwegian trademarks and trademark application. They can also check the Brønnøysund Register Centre to check whether the name is in use as a business name. It is possible to check whether a domain name is registered at www.norid.no.

Further, new businesses can contact the Norwegian Industrial Property Office and ask the office to carry out a confidential prior investigation, which involves a search for existing brands in national and international databases.

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

The remedies available to the rights holder in civil cases regarding violations of intellectual property rights vary from injunctions (often temporary injunctions in order to stop the infringement as soon as possible) to compensation for economic losses. Persons that violate others' intellectual property rights may face imprisonment, fines or confiscation.

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

No, there are no special legal or regulatory rules or guidelines surrounding the use of open-source software in the financial services industry. However, the use of open-source software in the financial services industry will be a part of the risk analysis that shall be carried out in accordance with the Norwegian ICT Regulation.

40 Are there any high-profile examples in your jurisdiction of fintech companies enforcing their intellectual property rights or defending their intellectual property rights against a third party?

To date, there are no such examples.

Data protection

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

Norway has implemented the EU Data Protection Directive (95/46/EC). The Norwegian Personal Data Act sets out the general rules in this area and more detailed requirements are set out in a Regulation to this Act. Sectorial laws sometimes specify or supplement the general legislation.

The regulatory requirements especially relate to having a legal basis for processing of personal data, to ensure data is only processed for legitimate purposes, ensuring data quality and satisfactory information security, and that the controller is able to demonstrate compliance with basic data protection principles. The controller must also enter into necessary agreements when data is processed by a processor on behalf of the controller and if data is transferred to a country outside the EU and EEA.

Update and trends

A trend that we have seen is that large banks tend to either acquire small fintech companies or partner with them rather than developing their own proprietary technology. It would appear that the banks realise the benefits of collaboration with fintech companies compared with commencing lengthy development projects. In addition, several technology companies have developed technology that may change the way that payments can be made with debit or credit cards, such as biometry on card solutions. It is too early at this stage to say which application or solution will be the most successful.

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

The Norwegian ICT Regulation is central is this respect. The ICT Regulation applies to, inter alia, banks and financial enterprises, payment enterprises, e-money enterprises and mere payment service systems, and is accordingly applicable to most fintech companies.

The ICT Regulation supplements requirements in the general data protection legislation with respect to, in particular, information security obligations. In summary, the Regulation imposes more comprehensive obligations on the enterprises with respect to the implementation of procedures and documentation. The ICT Regulation sets out additional requirements with respect to outsourcing of ICT systems (section 12). The enterprises must enter into an agreement with the supplier who gives both the enterprise and the FSA audit rights.

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

Big Data and profiling has been a preferred area of the Norwegian Data Protection Inspectorate. The Inspectorate has issued a report on the matter, 'Big Data – privacy principles under pressure', which is available in English on their homepage (www.datatilsynet.no/globalassets/global/04_planer_rapporter/big-data-engelsk-web.pdf).

In this report, the Inspectorate points out the risk of reidentification in relation to the use of big data sets, and requires enterprises to implement the necessary measures to protect data from misuse. The Inspectorate highlights, among other things, privacy by design and procedures for robust anonymisation as adequate means to protect data from misuse.

Cloud computing and the internet of things

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

The use of cloud computing is increasingly common among financial services companies in Norway. Owing to strict legislation and practices from the Norwegian Data Protection Authority and the FSA, some enterprises have been reluctant to make use of cloud computing services. However, clarifications have been made over the past few years that have made it easier for financial service companies to use the cloud.

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

The Norwegian ICT Regulation is central in this respect. The ICT Regulation applies to the financial services industry and sets out additional requirements (in addition to general data protection requirements) with respect to outsourcing of ICT systems (section 12). Enterprises covered by this Regulation must enter into an agreement with the supplier who gives both the enterprise and the FSA audit rights with respect to the activities carried out by the supplier under the agreement.

The use of cloud computing is generally subject to stricter requirements in the banking and finance sector compared to most other sectors. This is because of the amount of confidential information processed in this sector. The enterprise must carry out a risk assessment that shows that the risk associated with the outsourcing is acceptable. The Data Protection Inspectorate will generally require more of a risk assessment when considerable amounts of sensitive or confidential data is brought to the cloud.

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

The internet of things challenges many basic data protection principles, including the consumers' right to control personal data about themselves and the use of consent to processing of personal data. There are, however, no specific rules relating to this matter, but the Norwegian Data Protection Inspectorate has shown considerable interest in the subject and has published a report on the issue. (The report is unfortunately not available in English.) In the report, the Inspectorate highlights the importance of transparency, but beyond that the report contains little practical guidance on the matter.

Tax

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

There are no Norwegian tax incentives aimed specifically at fintech companies. The Norwegian Tax Act contains, however, a general reserach and development (R&D) tax credit and incentive scheme, which is also available to fintech companies. Generally, the R&D tax credit could be available to a fintech R&D project when the aim of the project is to develop a new or improved product, service or production process and the project follows a progress plan with a clear objective and a defined scope. In order to qualify, the project has to be approved by the Research Council of Norway.

Under the tax incentive scheme, up to 18 per cent (20 per cent for small and medium-sized undertakingss) of R&D expenses are allowed as a tax credit – in addition to having tax deductible costs in accordance with the general provisions of the Tax Act. If the tax credit for the R&D expenses is greater than the amount that the company is liable to pay in tax, the remainder will be paid out in cash to the company. The cost ceiling for R&D projects using in-house R&D resources is 20 million kroner per year. The cost ceiling for R&D projects also using external pre-approved R&D resources is 40 million kroner per year. Total costs for in-house and external resources will not qualify to the extent that they exceed 40 million kroner.

Competition

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

To date, there have not been any fintech-specific antitrust cases in Norway. Payment card systems have been informally investigated by the Norwegian Competition Authority, but the case was pending the implementation of the EU Regulation on interchange fees for card-based payment transactions. This regulation was implemented in Norwegian law on 27 June 2016.

The Norwegian Competition Act (NCA) supplements the Payment System Acts (PSA) in addressing competition issues with respect to financial infrastructures. The PSA protects several objectives such as financial stability and competition. Competition is protected by, inter alia, certain provision regarding non-discriminatory access to financial infrastructures. The PSA is enforced by the Central Bank of Norway. As the Central Bank's main concern is financial stability, it could be speculated that competition might be sacrificed for the benefit of stability if these objectives are in conflict with the enforcement of the PSA.

As in the EU, and contrary to the US, there is no precedent stating that the competition law must give way in areas addressed by sector-specific regulations. Hence, there is a role for the Competition Authority to protect competition concerns in financial infrastructures. The NCA seems to be progressive in pursuing competition concerns in the financial sector. For instance, the Director General of Competition recently criticised the financial regulators for not harmonising bank capital requirements with EU levels.

As fintech companies are challenging established financial institutions, we expect to see competition cases when the established institutions take action to protect their market shares. Our opinion is that the Competition Authority will not hesitate to intervene in the financial sector to protect competition.

Financial crime

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

Financial institutions are required to comply with Norwegian money laundering laws (Money Laundering Act and Money Laundering Regulations) and EU directives. Currently, the government has established a committee that is considering new legislation in accordance with international recommendations and the expected EEA rules corresponding to the Fourth EU Anti-Money Laundering Directive. Furthermore, Norway is a member of the Financial Action Task Force (FATF). Norwegian regulations are based on recommendations from the FATF.

In Norway, the institutions are required to establish internal routines to prevent money laundering and terror financing. The institutions are also required to establish routines for reporting and internal control and communication procedures in accordance with the legislation.

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

The FSA has published a circular (Circular 8/2009) providing detailed information for institutions on anti-money laundering legislation when carrying out customer due diligence.

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

Lending can be a licensable activity depending on the type of loan facility (see question 2). 'Credits' may only be provided by credit institutions; ordinary loans can be provided by any entity. However, there is a risk that the activity of issuing ordinary loans on a regular basis may be characterised as a professional activity requiring a licence of a credit institution or registration as a microfinance organisation.

Deposit-taking is a licensable activity, which requires a licence of a credit institution.

Foreign exchange trading and foreign exchange dealing are licensable activities that require a licence of a credit institution and a licence of a professional securities market participant respectively.

Certain payment services are licensable in the jurisdiction, for example, money transfer and settlement centre operations.

Dealing in investments may require a licence when the relevant operations can only be performed by a broker, dealer or another professional securities market participant.

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

Yes. Russian law distinguishes between two types of loan facilities: 'credits', which can be provided exclusively by credit institutions and loans, which can be provided by all entities generally.

Consumer credits and loans in Russia are credits and loans granted by credit institutions and non-credit financial organisations to individuals on a regular basis for purposes not connected with entrepreneurial activities. Consumer credits and loans are deemed to be provided on a regular basis if issued no less than four times during a calendar year (paragraph 5, section 3.1, Federal Law on Consumer Credit (Loan)). However, most provisions of the above-mentioned Law do not apply to consumer credits or loans secured by mortgage of immoveable property; the latter are regulated by mortgage-specific legislation. The law sets out particular requirements relating to the terms of a consumer credit or loan agreement (eg, the requirement to state the full cost of a consumer credit or loan to the borrower) and its form (eg, the requirement to present certain terms of the agreement in a consumer-friendly table format).

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

There are no such restrictions.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies would generally fall within the scope of any such regime.

Collective investment schemes under Russian law

Russian law recognises a number of collective investment schemes regulated by dedicated laws. The key vehicles used for the purposes of collective investment are: unit investment funds, joint-stock investment funds (both are regulated by the Federal Law on Investment Funds), non-state pension funds (regulated by the Federal Law on Non-State Pension Funds) and investment partnerships (regulated by the Federal Law on Investment Partnership).

Joint-stock investment funds and non-state pension funds are legal entities organised in the form of a joint-stock company. Both of these types of funds require a special licence issued by the regulator (Bank of Russia). The law specifies, among other things, the minimum amount of capital such funds must possess.

Unlike joint-stock investment funds and non-state pension funds, a unit investment fund is not a legal entity and consists of an isolated group of assets contributed by the founding parties.

An investment partnership is not a legal entity, but rather a joint undertaking by several organisations (not exceeding 50 in number) to combine their contributions and conduct agreed investment activities. Individuals cannot be parties to an investment partnership. Recent changes to the Federal Law on Investment Partnerships added extra flexibility to this form of collective investment (inter alia, by extending the range of permissible investment activities) to increase its attractiveness among prospective investors.

Unit investment funds and joint-stock investment funds must at all times utilise a separate entity (manager) to manage the assets of the fund. Non-state pension funds must utilise a separate entity to act as the manager when investing in certain types of assets. The investment of funds contributed by the partners of an investment partnership is carried out by the managing partner.

Unit investment funds, joint-stock investment funds and non-state pension funds are subject to mandatory information disclosure and annual audit obligations.

Whether a fintech company falls under any of the above categories would depend on the particular company, for example, a legal entity would not qualify as a unit investment fund; similarly, a legal entity that is not organised as a joint-stock company under Russian law will not qualify as a joint-stock investment fund or a non-state pension fund.

Foreign collective investment schemes in Russia

While there is no specific regulation applicable to foreign collective investment schemes, non-Russian fintech companies should note the following general restrictions that might become relevant in accessing the local market:

Foreign financial instruments may not be offered to the public (ie, to an unlimited number of persons), as well as to persons not falling into the category of qualified investors (as defined in Russian law), unless they meet the criteria for public placement or public distribution in the jurisdiction (section 51.1, Federal Law on Securities Market).

There is a general prohibition on non-Russian organisations (as well as their representative offices and branches in Russia) marketing the services of foreign financial organisations or distributing information about such organisations and their activities to the public in Russia (paragraph 6.1, section 51, Federal Law on Securities Market). In the absence of statutory clarification, the term 'to the public' should cover all instances when information is made available in a manner that permits any person to access such information.

5 Are managers of alternative investment funds regulated?

Managers of Russian collective investment schemes are regulated – they must obtain a special licence issued by the Bank of Russia and comply with additional requirements (eg, maintain a minimum capital), which should be no less than 80 million roubles. Managing

partners of an investment partnership do not require a special licence to run the joint business of the partnership.

There is no specific regulation of managers of foreign collective investment schemes. Nonetheless, managers should note the general prohibition on the offering of financial services and distribution of corresponding information to the public by foreign organisations (see question 4). In addition, foreign organisations may not engage in activities of non-credit financial institutions (eg, discretionary investment management or management of Russian investment funds) on the territory of Russia (paragraph 6.1, section 51, Federal Law on Securities Market).

6 May regulated activities be passported into your jurisdiction?

No; regulated activities cannot be passported into Russia.

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

No. Fintech companies cannot obtain a licence to provide financial services in Russia without establishing a local presence.

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

There is no specific regulation of peer-to-peer or marketplace lending in Russia. Standard provisions regulating lending activities should apply.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

There is no specific regulation of crowdfunding. However, the following provisions may have an impact on crowdfunding activities.

Equity-based crowdfunding may be problematic because of the limited maximum number of participants in a limited liability company (50) and limited partners in a limited partnership (20), as well as other limitations and statutory obligations relating to various types of legal entities (eg, public disclosure rules).

While there are no instruments specific to reward-based crowdfunding, parties may rely on the principle of freedom of contract (section 421, Civil Code of the Russian Federation (Civil Code)), the newly introduced concept of conditional performance of obligations (section 327.1, Civil Code), as well as existing legal constructs, such as loan agreement, purchase and sale agreement and services agreement.

Donation-based crowdfunding can utilise the concept of donation contract (sections 572–582, Civil Code). Among other things, the law prohibits donations exceeding 3,000 roubles when such donations are made by persons under 14 years old or persons lacking legal capacity, or are between commercial legal entities.

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

There is no specific regulation of invoice trading in Russia. Parties may rely on the general provisions of the Civil Code governing factoring transactions, which may be conducted either on a recourse or non-recourse basis (paragraph 3, section 827, Civil Code), and the principle of freedom of contract (section 421, Civil Code).

11 Are payment services a regulated activity in your jurisdiction?

Yes. The primary source of regulation is the Federal Law on the National Payment System.

12 Are there any restrictions on cold-calling investors or clients in your jurisdiction?

Investors must give prior consent to the provision of marketing information (other than generic information) (section 18, Federal Law on Marketing). This restriction does not apply to postal communications. In the case of a telephone call, consent can be obtained at the start of the call by asking whether it is acceptable to provide the information. The marketing entity must be able to prove that consent has been obtained.

13 Does the regulator in your jurisdiction make any specific provision for fintech services and companies?

We are not aware of any fintech-specific provisions made by the Bank of Russia.

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

There is an advertising prohibition in Russia applicable to all financial products and services that cannot be produced or distributed without a licence. If no licence is obtained for production or distribution of such products or services, then no advertising of such products or services is allowed (paragraph 14, section 28, Federal Law on Marketing).

In addition, there is a general prohibition on non-Russian organisations marketing the services of foreign financial organisations or distributing information about such organisations and their activities to the public in Russia (paragraph 6.1, section 51, Federal Law on Securities Market). In the absence of statutory clarification, the term 'to the public' should cover all instances when information is made available in a manner that permits any person to access such information.

15 Are there any regulator-imposed temporary restrictions on financial products in place that are relevant to fintech companies in your jurisdiction?

None, to our knowledge.

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

There are no restrictions on the Russian national currency (rouble); it is freely convertible and exportable. There are no restrictions on Russian residents having offshore bank accounts, other than that state officials cannot have accounts with foreign banks and certain disclosure obligations exist for holders of offshore bank accounts.

Foreign entities can freely make payments in local and foreign currencies from their accounts opened in local or foreign banks to the counterparties to their accounts opened in local or foreign banks.

Counterparties may use their accounts opened in licensed Russian banks or accounts opened in foreign banks for payments in local or any other currency from or to a foreign entity. Payments exceeding the equivalent of US$50,000 would trigger certain formalities if the payment is made via Russian banks (passport of a transaction).

Forward exchange (FX) contracts can only be entered into with the Russian licensed banks and non-banking licensed credit organisations.

Russian currency control legislation is effective in the territory of Russia and may be applicable to transactions of Russian residents (as defined in the Federal Law on Currency Regulation and Currency Control) regardless of the place of the relevant transaction.

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

Russian legislation does not currently recognise the concept of 'unsolicited approach'. Therefore, if the relevant activity is licensable, then the provider of such activity will require a licence regardless of whether the potential investor or client approaches such provider first.

18 Are there licensing requirements that would be triggered where the investor or client is a temporary resident in your jurisdiction?

The licensing requirements do not change if the investor or client is a temporary resident in Russia.

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

The provider would not be deemed to be carrying out licensable activities in Russia if the investor, the client and the provider are all located outside Russia. If the provider is located in Russia and the client or investor are outside Russia, the provider may still be deemed to be carrying out licensable activities.

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

Fintech companies must comply with the marketing requirements outlined in question 14.

21 Does a third-party referral qualify as an unsolicited approach in your jurisdiction?

No; see question 17.

22 What licensing exemptions apply where the services are provided through an offshore account in your jurisdiction?

No licensing exemptions apply.

23 What licensing exemptions apply where the services are provided through a nominee account in your jurisdiction?

No licensing exemptions apply.

24 What licensing exemptions apply where the services are only ancillary or incidental to other core activities or services in your jurisdiction?

No licensing exemptions apply.

25 What licensing exemptions apply when dealing with clients that are duly licensed in in your jurisdiction?

FX contracts can only be entered into with Russian licensed banks and non-banking licensed credit organisations. Therefore, if the counterparty to an FX contract holds an appropriate licence, the other party does not have to be licensed as well.

26 What licensing exemptions apply to specific types of client in your jurisdiction?

No licensing exemptions apply.

Securitisation

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

Russian law distinguishes between two types of loan facilities: credits, which can be provided exclusively by credit institutions and loans, which can be provided by all entities generally.

The key requirements for executing credit agreements are: written form (section 820, Civil Code); credit amount (paragraph 1, section 819, Civil Code); and term and manner of repayment (paragraph 1, section 810, and section 819, Civil Code). The key requirements for executing loan agreements are: written form, when such agreements are made between individuals and the loan amount exceeds 1,000 roubles or when loans are provided by legal entities; and term and manner of repayment (paragraph 1, section 810, Civil Code). If a credit or a loan is provided to a consumer, it must comply with additional detailed requirements, such as the layout of certain provisions and the stipulation of full price of the credit or loan (sections 5–6, Federal Law on Consumer Credit (Loan)).

Russian law recognises several types of security instruments, including, but not limited to: pledge (sections 334–358.18, Civil Code); suretyship (sections 361–367, Civil Code); independent guarantee (sections 368–379, Civil Code); down payment (sections 380–381, Civil Code); and agreed and liquidated damages (sections 330–333, Civil Code). All of these types of security instruments must be concluded in writing.

Failure to meet the above key requirements may result in such agreements and instruments (whether entered on a peer-to-peer or marketplace lending platform) being unenforceable. To comply with the written form requirement, parties may exchange electronic documents; however, such exchange must be made through lines of communication that allow reliable identification of the party from which such documents originate (section 434, Civil Code). The law does not currently provide clear guidance as to which means of communication meet such criteria.

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

Assignment of loans (and credits) provided under a written contract must be made in writing (paragraph 1, section 389, Civil Code). In order to perform assignment, the assignor must ensure that:

- the assigned claim has come into existence at the moment of its assignment, unless it is an assignment of a future claim;
- the assignor has the right to perform the assignment;
- the assigned claim has not been previously assigned to another person; and
- the assignor has not done and shall not do anything that can serve as a basis of the debtor's objection against the assigned claim (paragraph 2, section 390, Civil Code).

Parties are free to agree to additional requirements for assignment of the relevant claims (paragraph 2, section 390, Civil Code).

Failure to comply with the written form of assignment does not invalidate the assignment as such, but does not allow parties, in case of dispute, to rely on witness evidence. In case of failure to meet the additional requirements listed above, the assignee has the right to claim from the assignor everything that has been transferred under the assignment agreement, as well as the right to claim the corresponding damages (paragraph 3, section 390, Civil Code).

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

The borrower does not have to be informed about the assignment (section 385, Civil Code). The assignor does not require the debtor's consent to perform the assignment, unless the obligation to obtain such consent is provided for by the relevant agreement (paragraph 2, section 382, Civil Code). However, the debtor's consent is mandatory when it is substantially significant to the debtor that a particular person acts as the creditor (paragraph 2, section 388, Civil Code).

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

Yes. Companies handling personal data (including not only Russian companies, but also foreign companies engaging in activities directed into the Russian territory) are required, in the process of gathering personal data of Russian nationals and Russia-based foreign nationals, to ensure that the recording, systematisation, accumulation, storage, adjustment (updating, amending) and extraction of such data is carried out through databases located in Russia, with certain exemptions (paragraph 5, section 18, Federal Law on Personal Data). In addition, all operators of personal data must comply with the confidentiality obligations in respect of personal data (section 7, Federal Law on Personal Data). See questions 41 to 43.

Intellectual property rights

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

Software, including source and object code, as well as user interface generated by the software, is generally protected on the same terms as literary works; however, a number of differences do exist.

For instance, while both software and other literary works are protected from their creation without the need to comply with any formalities, software developers enjoy the option of discretionary state registration of their creation, unless the product in question contains a state secret. Any transfer of IP rights in registered software are subject to registration with Russia's IP office, Rospatent (section 1262, Civil Code).

Software can be licensed under a simplified licence, essentially a standard form contract (contract of adhesion), which are by default treated as free-of-charge licences (paragraph 5, section 1286, Civil Code).

Among the limitations that apply to software as compared with other literary works are the absence of the right of withdrawal (paragraph 2, section 1269, Civil Code) and, in case of an open licence, a different default licence term: the entire term of copyright protection as opposed to five years for other literary works (paragraph 3, section 1286.1, Civil Code).

One other difference that is particularly worth mentioning is that software licensees enjoy the statutory rights of decompilation and back-engineering of the software, though these are limited in scope (paragraphs 2–3, section 1280, Civil Code).

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

Both software and business methods are specifically excluded from the definition of 'invention'. However, if the software is not in itself the main object of a patent, it can be patented as part of an invention or utility model (paragraph 5, section 1350 and paragraph 5, section 1351, Civil Code). Rospatent has complex guidance in place for determining whether a piece of software is patentable, and each case should be considered on its own merits.

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

The default rule is that the employer owns new intellectual property developed by an employee during the course of employment, provided that the creation of intellectual property falls within the ambit of the employee's duties and there is no agreement to the contrary. If within three years the employer makes no use of the intellectual property, does not transfer the right in the intellectual property or does not notify the author that the intellectual property is to be kept secret, the right reverts to the employee (section 1295, Civil Code).

In case of patentable inventions, the term during which the employer is expected to apply for a patent, transfer the right to apply for a patent or notify the inventor that the invention will be kept in secret, is four months. After four months the right to apply for a patent reverts to the employee (paragraoh 4, section 1370, Civil Code).

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

The current default rule, subject to the parties' agreement to the contrary, is that whenever a third party is commissioned specifically to create a piece of intellectual property, the right in that property vests in the client. This is only the case when the contractor or consultant is not him or herself the author of the work (section 1296, Civil Code). Conversely, the default rule applicable to contracts where the software is not the primary object but merely a by-product of the commission, is that the right in such intellectual property vests in the contractor (section 1297, Civil Code).

If an order for the creation of intellectual property is placed with an individual author, there is no default rule, and the agreement has to specify who owns the intellectual property (section 1288, Civil Code).

For software created under contracts made before 1 October 2014, the default rule was the same as above, regardless of whether the contractor was the author him or herself.

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

Two main concepts are applied in the protection of sensitive information: trade secrets and know-how. These are closely intertwined and are often indistinguishable.

Trade secrets encompass a confidentiality regime that encompasses technical measures that a business can implement to protect qualifying information. To make use of the regime, the owner of a trade secret must keep a register of information under the trade secrets regime, regulate the access and handling of such information by its employees and agents, and add an inscription in prescribed form onto information carriers containing trade secrets (paragraph 1, section 10, Federal Law on Trade Secret).

While certain information is barred by law from being treated as a trade secret, the general rule is that in order to qualify, the information must have an actual or potential commercial value by virtue of not being known to third parties (qualifying information) (paragraph 1, section 1, Federal Law on Trade Secret). Therefore, information under the trade secrets regime is qualifying information in respect of which the regime of trade secrets has been implemented. This is almost a verbatim definition of know-how.

Know-how is a term utilised by Russian intellectual property legislation and is granted protection as intellectual property, with rules applicable to employee-created intellectual property extending to it with minor exceptions (section 1465, Civil Code).

The protection lasts for as long as the information remains confidential, during which time know-how is capable of being licensed and alienated. Unlawful access to and use of information under the trade secrets regime and know-how may result in liability for civil damages, as well as administrative and criminal liability.

During court proceedings, a party may petition the court to have a closed hearing instead of a public one on the grounds of confidentiality of subject matter of the case (paragraph 2, section 11, Commercial Procedure Code; paragraph 2, section 10, Civil Procedure Code).

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

Branding can be protected via various routes, the most obvious one being trademark (service mark) registration. Logos and other forms of corporate identity – provided they satisfy the creativity requirement – can also be protected as images (ie, by copyright).

Russian law extends legal protection to company names. While trademarks are subject to compulsory registration, a right in a company names arises once the company is registered with authorities at creation (section 1475, Civil Code). There have been cases where a company was able to bring – and win – cybersquatting cases based on its entitlement to the company name alone.

Russia also recognises trade names as a separate intellectual property object. Trade names serve to identify enterprises (such as hotels, retail chains and business centres), as opposed to goods or services (section 1538, Civil Code). To qualify for legal protection, a trade name must be known to the public in the respective geographic area. Unlike trademarks, trade names are not registrable and cease to be protected after a year of disuse (paragraph 2, section 1540, Civil Code).

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

There are various authoritative databases that can be searched prior to settling on a brand – most importantly, the trademark and registered software databases maintained by Rospatent and the company register maintained by Russia's Tax Service.

A number of private agencies offer voluntary copyright registration and their databases may prove useful.

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

Russian legislation offers a range of civil remedies, such as an injunction preventing further use of the piece of intellectual property in question (for infringements on the internet, disabling of access to the website), damages, compensation and the right to challenge the legal protection of a trademark, company or trade name.

Depending on the extent of damages and on whether the act of infringement is, at the same time, that of unfair competition, administrative and criminal penalties are also available (in Russia, there is no corporate criminal liability).

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

No. The use of open-source software in general is regulated by the rules on open licences that have only been in force for less than two years (section 1286.1, Civil Code).

40 Are there any high-profile examples in your jurisdiction of fintech companies enforcing their intellectual property rights or defending their intellectual property rights against a third party?

In 2011, Alpari Trademark Holding House Limited secured an injunction preventing Broco Investments Inc from mentioning PAMM-accounts in connection with the respondent's services, as the words 'PAMM-account' had been registered by the claimant as trademark. However, the court rejected the claim for compensation in the amount of 30 million roubles.

In 2015, a former employee of Yandex, an affiliate of Yandex.Money, was convicted for two years (suspended) for the theft of the search engine's source code, which was being protected as a trade secret.

Data protection

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

The umbrella term for the collection, storage, editing, transferring, etc, of personal data is 'processing'. The processing of personal data generally requires data subjects' consent. This requirement is waived in a limited number of circumstances, including when the personal data is indispensable for the due performance of an agreement with the data subject. In all cases the scope of data being used must be proportionate to the objective of such use (section 6, Federal Law on Personal Data).

Entities that collect and make use of personal data must have a personal data protection policy in place, and they may have to notify Russia's personal data watchdog, Roskomnadzor, of their intention to collect and use personal data (section 22, Federal Law on Personal Data).

Personal data of Russian nationals or Russia-based foreign nationals must be recorded, systematised, accumulated, stored and altered using databases located in Russia (paragraph 5, section 18, Federal Law on Personal Data).

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

While there is no regulatory guidance issued specifically for fintech companies, there are regulations directly applicable to the field. Namely, Government Regulation N1119 dated 1 November 2012 'On the Approval of the Requirements Applicable to the Protection of Personal Data Processed in Information Systems' lists data security requirements applicable to the digitalised processing of personal data depending on the level of threat to the safety of the data.

Further to this Regulation, in December 2015, the Bank of Russia issued a decree detailing relevant types of threats.

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

Russian law permits the processing (including aggregation) of personal data for statistic and research purposes, provided that the data is anonymised.

Roskomnadzor has issued guidance on the subject of personal data anonymisation. The guidance requires that the anonymised data be complete, structured, semantically coherent and matching the requisite level of anonymity (such as k-anonymity). There are also requirements applicable to the method of anonymisation: it must be reversible, capable of securing the requisite level of anonymity and show increased resistance to interference as the amount of data increases.

When personal data is collected for direct marketing purposes (ie, when data subjects are to be contacted about goods and services), the data subject's consent is essential for aggregation and further use of the data (section 15, Federal Law on Personal Data).

Cloud computing and the internet of things

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

Many of Russia's fintech start-ups are cloud-based. These include: Moe Delo, a popular online accounting and bookkeeping service; ProfitOnTime, a service offering cash-flow evaluation based on reliable market data; and Cassby, a service that replaces cash registers with a cloud-based point-of-sale system.

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

There are no specific legal requirements or regulatory guidance in this respect.

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

There are no specific legal requirements or regulatory guidance in this respect.

Tax

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

The are no specific tax incentives for fintech companies in Russia; however, Russian law provides for a range of preferential tax regimes for investors and residents of special economic zones (SEZs).

Regional tax incentives are typically provided in the form of reduction in regional component of profits tax (the maximum reduction is 4.5 per cent; profit tax rate may be reduced to zero in some regions) and property tax reduction or exemption. To qualify for the incentives, the investment project should incorporate the regional business priorities and minimum investment amount determined by regional law.

In some regions, the approval process requires the conclusion of the 'investment agreement' with the regional authorities, while in other regions, tax incentives are provided on a declarative basis with no pre-approval.

All currently established SEZs fall into one of four categories: manufacturing, technology and innovation, tourism and recreation, and port and logistics. If the activities of fintech companies qualify as technology and innovation, such companies may potentially benefit from SEZ tax incentives. Only Russian legal entities incorporated within an SEZ with no external branches or representative offices may apply for SEZ resident status.

The following tax benefits apply for a technology and innovation SEZ:

- maximum profits tax rate may be reduced from 20 per cent to zero until 2018;
- property tax exemption for 10 years;
- 'free customs zone';
- reduced regressive social contributions rates until 1 January 2018 (14 per cent on annual remuneration up to 718,000 roubles, 12 per cent on annual remuneration between 718,000 roubles and 796,000 roubles and 4 per cent on annual remuneration exceeding 796,000 roubles); and
- accelerated depreciation and VAT exemptions are not available for this type of SEZ.

Research and development (R&D) tax incentives are available for companies from various industries conducting eligible R&D activities included in a government-approved list. Such activities must relate to the development of new products, the improvement of production processes and the development of new services. Companies conducting eligible R&D activities can apply for a 150 per cent super deduction of qualifying costs (eg, labour costs, depreciation of equipment and other costs, subject to certain limitations).

Certain tax benefits are available to Russian companies that are residents of the Skolkovo Innovation Centre. Generally, a Russian company can become a Skolkovo resident if it conducts qualifying research and development and innovation activities, and complies with certain other requirements.

The main tax benefits are: profits tax exemption for 10 years; social insurance contributions at a reduced rate of 14 per cent on annual remuneration up to 796,000 roubles and exemption for remuneration exceeding that cap; and a VAT exemption.

Skolkovo targeted industries are energy efficient technologies, nuclear technologies, space technologies and telecommunications, biomedical technologies and information technologies.

Russian law also provides a special tax regime for companies located in the Far East and Siberia (territories of advanced social and economic

growth (TASEG)). So far, only nine TASEGs have been established and five more are expected by 2017. TASEG residents are eligible for:

- reduced profits tax rate 0–5 per cent for the first five years and 12–20 per cent for the next five years (depending on region);
- reduced mineral extraction tax for 10 years (not applicable to fintech companies but mentioned for the purpose of completeness);
- reduced regressive social insurance contributions rate for 10 years (7.6 per cent on annual remuneration up to 718,000 roubles, 6.5 per cent on annual remuneration between 718,000 roubles and 796,000 roubles, 0.1 per cent on annual remuneration exceeding 796,000 roubles); and
- regions may additionally provide property tax exemptions.

However, all of the already established TASEGs have production, mineral extraction, tourism, logistics or agricultural specialisation and cannot be used by fintech companies. As of 1 January 2018, TASEGs can be established in all regions across Russia.

Competition

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

There is no specific fintech-related competition legislation in Russia; however, certain provisions of the Federal Law on the Protection of Competition listed below might be relevant for fintech businesses.

Agreements with competitors to fix or maintain a certain price on goods or services are generally prohibited. Other agreements, including joint venture agreements with competitors, are also prohibited if they limit or may limit the competition. Whether there is (or may occur) a limitation of competition will be determined by the regulator (the Federal Antimonopoly Service) on the basis of a comprehensive analysis of the current market situation for the relevant goods or services. However, as of 4 July 2016, agreements between companies established by individuals and agreements between certain individual entrepreneurs (as well as agreements between such companies and such individual entrepreneurs) are generally permitted (with certain exceptions) if the total income received from the sale of goods or services by parties to such agreements over the preceding calendar year (ie, the year immediately preceding the year in which the relevant agreement is concluded) does not exceed 400 million roubles.

Certain joint venture agreements operating in Russia can only be entered into after prior approval by the Federal Antimonopoly Service. Such approval is necessary if the combined asset value of parties to such agreements (or their respective groups) exceeds 7 billion roubles or the total income received from the sale of goods or services by parties to such agreements (or their respective groups) over the preceding calendar year (ie, the year immediately preceding the year in which the relevant agreement is concluded) exceeds 10 billion roubles.

Prospective parties may submit to the Federal Antimonopoly Service a draft of the future agreement for the purposes of verifying compliance with the competition legislation. Following the review of each submitted draft agreement the regulator prepares an opinion stating whether the relevant draft complies with the competition rules. A positive opinion is valid for one calendar year.

In addition, certain transactions involving shares, units and rights in Russian commercial organisations exceeding statutory thresholds can only be entered into with prior approval of the Federal Antimonopoly Service.

Update and trends

While there is currently no fintech-specific regulation in Russia, the local banking and securities regulator, the Bank of Russia, has been actively analysing the development of the financial technology sector.

In February 2016, the Bank of Russia set up a special fintech working group in cooperation with the market participants, and in April 2016 it created a separate internal division (the Department of Financial Technologies, Projects and Organisation of Processes) focusing on financial technology.

In July 2016, the Bank of Russia announced the establishment of a new blockchain consortium in cooperation with major banks and technology companies. This consortium aims to test the regulator's prototype service based on distributed ledger technology. These recent actions of the Bank of Russia demonstrate the regulator's increasing interest in the fintech field and may lead to further regulatory action in the near future.

Other recent initiatives include the presentation in June 2016 of the Concept of the Legal Aspects of the Internet of Things at the IoT Summit Russia – an unofficial proposition regarding the core principles of the regulation of the internet of things.

Financial crime

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

While there is no specific anti-bribery law for fintech companies, they are required to have procedures to combat bribery and money laundering on general terms pursuant to the Federal Law on Countering Corruption. For instance, all companies have to implement internal counter-bribery measures of their choice.

Companies processing financial transactions are generally required by the Federal Law on Countering the Legalisation of Illegal Earnings to, among other things:

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- implement internal anti-money laundering measures and keep records of suspicious transactions;
- identify the client and the client's beneficial owner and keep this information up to date;
- notify the regulator of any transactions triggering compulsory control requirement;
- freeze the assets of a client on an official extremist or terrorist watch list; and
- share records with the authorities on demand.

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

There is no specific anti-financial crime guidance for fintech companies; however, the Bank of Russia has issued various pieces of industry-specific guidance for financial companies.

Switzerland

Michael Isler and Thomas Müller
Walder Wyss Ltd

Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

In general terms, Swiss law and regulation distinguishes between the following regulated financial institutions that require a licence from the Swiss Financial Market Supervisory Authority (FINMA):

- banks;
- domestic and foreign securities dealers;
- insurance companies;
- fund management companies and asset managers of Swiss or foreign investment funds; and
- independent asset managers, acting exclusively in their clients' names based on powers of attorney.

Banks are defined as entities that are active mainly in the area of finance and in particular, but in a non-exclusive understanding, those who accept deposits from the public on a professional basis or solicit these publicly to finance in any way, for their own account, an undefined number of unrelated persons or enterprises (ie, more than 20 clients), with which they form no economic unit, or who refinance themselves to a substantial degree from third parties to provide any form of financing for their own account to an undefined number of unrelated persons and institutions. Substantial financing by third parties is given if more than five banks provide loans or other ways of financing to the company in the amount of at least 500 million Swiss francs (as average over the last year). Many fintech companies or platforms limit the number of clients providing financing to 20 in order not to qualify as a bank.

Securities dealers are natural persons, entities or partnerships who buy and sell securities in a professional capacity on the secondary market, either for their own account with the intent of reselling them within a short time period or for the account of third parties; make public offers of securities on the primary market; or offer derivatives to the public.

Independent asset managers may not: act in their own names; hold omnibus accounts; or manage the assets of their clients by accepting them in their books and opening mirror accounts (in which case they will be viewed as securities dealers).

As a rule, the first four categories need to obtain authorisation licence from FINMA before starting business activities in or from Switzerland. The fifth category of independent asset managers is, in principle, not required to obtain an authorisation from FINMA for such limited activities, but is subject to anti-money laundering regulations.

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

Consumer lending is a regulated activity in Switzerland. The respective Swiss law aims to protect consumers with rules about the form and content of consumer lending contracts; norms providing transparency in this field; and by providing for a statutory right to withdraw from the contract by the consumer. The lender is obliged to verify the creditworthiness of interested contracting parties following a specific procedure and a central database shall prevent over-indebtedness or at least its aggravation. A consumer lending company has to obtain a licence from the cantonal authorities and has to hold own assets in the amount of 8 per cent of the issued consumer loans.

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

Trading loans in the secondary market is not a regulated activity. In the event the investment company is buying and selling securities in a professional capacity, in the secondary market, either for their own account with the intent of reselling them within a short time period or for the account of third parties, such company is required to obtain a securities dealer licence from FINMA.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies would generally fall within the scope of any such regime.

Along with banks and securities dealers, FINMA supervises collective investment schemes. The Authority is responsible for the authorisation and supervision of all collective investment schemes set up in Switzerland and the distribution of shares or units in collective investment schemes in and from Switzerland.

Domestic collective investment schemes and any party responsible for managing such a scheme (ie, fund management companies, asset managers and distributors) or for safekeeping the assets of a collective investment scheme (ie, custodian banks) require a licence and are supervised by FINMA. The investment products distributed by each collective investment scheme, including its related documents, require prior approval from FINMA. The different types of collective investment schemes provided by law are subject to investment and borrowing restrictions. The same rules apply for fintech companies. There are no specific regulations applicable for fintech companies in this respect.

5 Are managers of alternative investment funds regulated?

Switzerland is not a member state of the European Union. The Alternative Investment Fund Managers Directive (AIFMD) does not apply in Switzerland. In general, asset managers of Swiss or foreign collective investment schemes will have to obtain a licence from FINMA. To obtain the licence, the asset manager must, inter alia, demonstrate equity capital of at least 500,000 Swiss francs. Some exceptions regarding the duty to obtain a licence apply. For instance, asset managers of funds limited to qualified investors are excluded from the licensing requirement under one of three conditions: first, the assets under management (including assets acquired through the use of leverage) may not exceed 100 million Swiss francs; second, the assets are less than 500 million Swiss francs (provided that the managed portfolio is not leveraged and that investors do not have redemption rights exercisable for a period of five years following the date of the initial investment); or third, all investors belong to the same financial group as the asset managers. These provisions are in line with the de minimis rule introduced by the AIFMD, under which voluntary licensing by the asset manager remains possible. In addition, in certain justified cases FINMA may, on request, partially or completely exempt asset managers of foreign funds from the provisions of the applicable Swiss law and regulation.

6 May regulated activities be passported into your jurisdiction?

No, given that Switzerland is not part of the European Union, regulated activities may not be passported into Switzerland.

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

Providers of financial services can place their trans-border products in Switzerland without establishing a local presence. In fact, Switzerland acts with the physical presence test and the principle of home country supervision. According to these aspects, financial services providers without local presence undergo financial supervision in their home country and, therefore, essentially do not need a Swiss licence to provide financial services. An exception is the licensing requirement for public offering and managing of collective investment schemes. Switzerland is applying a liberal regime in admitting foreign financial services without establishing a local presence in comparison to international regulation.

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

Peer-to-peer and marketplace lending is subject to anti-money laundering regulation in Switzerland, provided that the respective fintech company is acting as lending company (and not as mere marketplace without accepting and forwarding any money). A company subject to anti-money laundering regulations has to submit itself to the supervision of FINMA or affiliate with a self-regulatory organisation for anti-money laundering purposes.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

Owing to a lack of specific norms in the field of fintech and crowdfunding, the general rules of Swiss law are applicable to the concept of crowdfunding; in particular, private law (especially contract law and company law), as well as financial market relevant supervision law.

Concerning the private law aspect, there is no general solution to the legal qualification of a crowdfunding system available under Swiss law. Depending on the specific arrangement of the regime, the crowdfunding system could contain a brokerage contract or a commercial agency contract (a simple agency contract) in terms of the relationship between the crowdfunding platform and the other parties. Regarding the relationship between provider and seeker of financial remedies, a classification as fixed-term loan, gifts or innominate contract might be adequate. For major crowdfunding programmes, it may even be reasonable to qualify the system as a simple partnership.

With regard to the aspect of financial market relevant supervision law, there are, again, no specific rules for crowdfunding available. As long as funds directly move from project financers to project developers, crowdfunding platforms would not be subject to licensing requirements under financial market legislation (even if the funds are channelled through a third party independent of the project developers, platform operator or project financers); but as soon as the financial remedies are channelled through the account of platform operators, they might need a banking licence (which is rather unlikely) and at the same time, they would be subject to anti-money laundering regulation.

In conclusion, as major insecurities exist in the field of crowdfunding and as the system is gaining in importance, adaptations of Swiss law may be expected in future. In particular, it is expected that the legislator will focus on working on coordination and harmonisation with foreign regulation, because the Swiss market on its own is too small to be attractive for crowdfunding.

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

There is no specific regulation applicable on invoice trading in Switzerland. A fintech company trading in invoices is, generally speaking, subject to anti-money laundering regulation.

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

Payment Services are subject to anti-money laundering regulation. A payment system (which clears and settles payment obligations based on uniform rules and procedures) requires authorisation from FINMA only should a supervision of such payment system be required for the proper functioning of the financial market or the protection of financial market participants and if the payment system is not operated by a bank. Other payment systems are subject to anti-money laundering regulation. Swiss law does not provide for specific rules on electronic money.

12 Are there any restrictions on cold-calling investors or clients in your jurisdiction?

Yes, investors or clients may restrict cold-calling by requesting a comment to be added to the telephone directory.

13 Does the regulator in your jurisdiction make any specific provision for fintech services and companies?

Currently, neither the legislature nor FINMA has implemented special regulation on fintech services and companies in Switzerland.

FINMA is supporting the introduction of a new licensing category with less stringent requirements for banks in order to facilitate the market entry of fintech companies (sandbox licence). This licensing category is intended for business models that carry out some banking activities but with limited acceptance of client assets and no lending activity. Therefore, FINMA is currently discussing different ideas with the banking sector and other authorities.

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

The distribution of financial products (ie, investment funds and structured products) is regulated in Switzerland. At present, Switzerland has not implemented a financial services act similar to the Markets in Financial Instruments Directive (MiFID) I or MiFID II, but a draft Financial Services Act has been proposed, which is unlikely to be implemented before 2018. When it comes to the marketing of financial products, the draft law follows the principles of Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC and the regulation on key information documents for packaged retail and insurance-based investment products but does not provide specific rules on the marketing material for financial services.

15 Are there any regulator-imposed temporary restrictions on financial products in place that are relevant to fintech companies in your jurisdiction?

There are no such restrictions.

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

No. Unrestricted amounts of liquid funds (ie, cash, foreign currency and securities (shares, bonds and cheques)) can be imported into Switzerland, brought through Switzerland in transit or exported from Switzerland. Further, the funds do not need to be declared.

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

No. The distribution of financial products based on reverse solicitation is not regulated in Switzerland. The provider must, despite any reverse solicitation, comply with anti-money laundering regulation.

18 Are there licensing requirements that would be triggered where the investor or client is a temporary resident in your jurisdiction?

No. Cross-border activities by a non-Swiss financial institution in Switzerland do not generally require authorisation or licensing from FINMA or from any other regulatory authority. Cross-border financial activities are permissible without a licence as long as the non-Swiss financial institution does not have a physical presence in Switzerland.

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

No. In the event the Swiss provider is licensed by FINMA, the Authority requires that the Swiss provider complies with applicable foreign law while providing financial services to an investor or client located outside of Switzerland.

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

There are no specific continuing obligations applicable on cross-border activities of a Swiss fintech company or a foreign fintech company doing business in Switzerland on a mere cross-border basis. Where a Swiss fintech company is subject to Swiss anti-money laundering regulation, it has to provide an anti-money laundering file for each client. The fintech company has to notify the Money Laundering Reporting Office Switzerland (MROS) if it is suspicious of money laundering.

21 Does a third-party referral qualify as an unsolicited approach in your jurisdiction?

Yes, provided that such third party has not been engaged by the provider and is not benefiting from any finder or trailer fees.

22 What licensing exemptions apply where the services are provided through an offshore account in your jurisdiction?

Providing services through an offshore account as such is not regulated in Switzerland. Generally speaking, such service is often being carried out by a bank that requires a licence given by FINMA. An asset manager managing an offshore account is subject to anti-money laundering regulation.

When investment funds are marketed through an offshore account, the general rules on the distribution of investment funds apply. Provided that the asset manager of the offshore account is a Swiss regulated financial intermediary (eg, a bank, securities dealer, fund management company or an asset manager subject to Swiss anti-money laundering regulation) and has entered into a written discretionary asset management agreement compliant with the Swiss standard, the management of the offshore account does not qualify as fund distribution and is, therefore, not regulated.

23 What licensing exemptions apply where the services are provided through a nominee account in your jurisdiction?

Generally, a Swiss company is not permitted to accept a client's money or securities to be held in the name of such company with a bank or a securities dealer. Only licensed banks and securities dealers may offer such nominee account structure to their clients. A fintech company is subject to this general rule. No banking licence or securities dealer licence is required provided that the number of clients of the respective fintech company engaging in such business does not exceed 20.

24 What licensing exemptions apply where the services are only ancillary or incidental to other core activities or services in your jurisdiction?

Accepting clients' money from the public or entering into securities transactions in the name of the provider for the risk of the client is a regulated activity in Switzerland. The licensing requirements apply regardless of whether such services are only ancillary or incidental to other core activities. This rule also applies in respect of the application of the anti-money laundering regulation. Only in the event that the company does not engage in business subject to anti-money laundering regulation (eg, asset management, paying services or lending), the anti-money laundering provisions do not apply.

25 What licensing exemptions apply when dealing with clients that are duly licensed in in your jurisdiction?

The sale and marketing of investment funds to licensed financial institutions is not subject to licensing requirements (the placement agent does not require a fund distribution licence and the investment funds do not require authorisation by FINMA and do not need to appoint a Swiss representative or payment agent).

A fintech company that solicits not more than 20 clients to provide financing would not qualify as a bank under Swiss law (eg, such company would not be permitted to accept deposits from the public).

26 What licensing exemptions apply to specific types of client in your jurisdiction?

Generally speaking, a securities dealer offering its services to institutional clients only (ie, companies with a professional treasury function whether licensed or not) are not subject to licensing requirements.

In respect of fund distribution, any offering to retail clients requires the investment fund to be authorised by FINMA and the appointment of a Swiss representative and paying agent. Fund distribution to qualified investors (eg, wealthy individuals and companies with a professional treasury function) require the appointment of a Swiss representative and paying agent by the fund only.

With respect to lending, no consumer credit licence is required for lending to professionals (who are not using the loan for consumer purposes).

Securitisation

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

Whereas no specific requirements apply for the execution of loan agreements (provided that the loan does not qualify as a consumer loan), the form requirement for security agreements depends on the required security. To perfect the security interest over the moveable asset, a physical transfer of possession to the lender is required (the borrower may not be in a position to solely exercise disposition (physically) over the asset). Provided that the perfection requirement for the respective security is complied with, there is no specific risk that the loan or security agreement would not be enforceable if entered into on a peer-to peer or marketplace lending platform. A marketplace lending platform may also act as a security agent for the lenders. Depending on the legal nature of the security interest, the security agent will either act in its own name (for the benefit of all secured parties) (in case of assignment or transfer for security purposes) or on behalf and in the name of all secured parties as direct representative (in the case of a pledge). If the security agent acts as a direct representative of the secured parties, it needs to be properly authorised and appointed by all other secured parties (such authorisation and appointment is usually included in the credit agreement or the terms of use of the marketplace lending platform). Such authorisation and appointment may have to be properly evidenced in writing in case of enforcement of the security.

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

The assignment of loans is perfected by a written agreement between the peer-to-peer lending platform and the assignee. An electronically concluded assignment agreement would not be compatible with the perfection requirements. Notice to the borrower is not required in order to perfect the assignment and can be given at a later stage (eg, upon enforcement). However, in the absence of notification, the borrower can pay the assignor and thereby validly discharge its obligations. It is likely, therefore, that the assignee will feel more secure if the borrower is notified (either immediately following the assignment or upon the occurrence of a specified trigger event) as it prevents a situation in which the borrower can validly discharge its obligation by payment to the assignor.

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

Yes. Notice to the borrower is not required in order to perfect assignment of the loan and can be given at a later stage (eg, upon enforcement). However, in the absence of notification the borrower can pay the assignor and thereby validly discharge its obligations. It is likely, therefore, that the assignee will feel more secure if the borrower is notified

(either immediately following the assignment or upon the occurrence of a specified trigger event) as it prevents a situation in which the borrower can validly discharge its obligation by payment to the assignor. In the event of a ban of assignment, the borrower has to consent to the transfer; otherwise the transfer would not be valid.

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

Swiss Data Protection Law places limitations on the scope of the collection and use of personal information, as well as other types of information. The definition of 'personal information' – which covers any information that refers to a specific legal or natural person capable of being specifically identified – is sufficiently broad that the disclosure of information relating to accounts receivable and other assets will be restricted or prohibited. Care must therefore be taken to ensure that the requirements of this Law (eg, the processing of personal data must be proportionate (ie, necessary for the intended purpose and reasonable in relation to the privacy interest) and personal data may only be used for the purpose intended at the time of collection) are met, while ensuring that the special purpose company will have access to the information required to enforce its claims under the loans. Data protection rights may be waived by the borrower (such waiver is usually contained in the documentation of a peer-to-peer lending platform).

Intellectual property rights

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

In line with the WIPO Copyright Treaty and the Agreement on Trade-Related Aspects of Intellectual Property Rights, computer programs are protected as copyrighted works under the Federal Act on Copyrights and Neighbouring Rights (Copyright Act). The copyright vests in the author immediately upon creation of the work; there is neither a requirement nor a possibility to register copyrights. It is presumed that copyright pertains to the person whose name, pseudonym or distinctive sign appears on the copies or in conjunction with the publication of the work.

Further, computer-implemented inventions are eligible to patent protection under limited circumstances (see question 32). The patent is obtained upon registration and is protected for a period of 20 years from the filing date or an earlier designated priority date. Domestic patent applications are to be filed with the Federal Institute of Intellectual Property. Applicants domiciled in Switzerland may also file European patent applications with the Institute, with the exception of divisional applications.

Utility patents for minor technical inventions do not exist in Switzerland. However, since the requirements of novelty and non-obviousness are not examined ex officio during the process of domestic patent applications, domestic patents may be relatively easy to obtain but are also easy to challenge as instruments of protection.

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

For an invention to be patentable, it must be of a technical character; namely, it must incorporate physical interaction with the environment. Consequently, claims merely containing characteristics of computer software as such or of business methods transposed to a computer network are not eligible for patent protection. This difficulty arises because the European Patent Convention stipulates that 'schemes, rules and methods for doing business' and 'programs for computers' are not patentable.

Hence, while an abstract algorithm (eg, for collating or analysing data) is not patentable, the practical application of an algorithm dedicated to a specific technical field and generating a specific technical effect might be patentable. An example of a computer-implemented invention in the financial sector that was awarded protection in Switzerland on the basis of a European application is MoneyCat's patent of an electronic currency, an electronic wallet and electronic payment systems, that has been asserted against PayPal in patent litigation in the United States.

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

Under Swiss law, the ownership of employee inventions depends on the type of intellectual property created.

By virtue of article 332, paragraph 1 of the Swiss Code of Obligations (CO), patentable inventions or designs made in the course of employment and in performance of the employee's contractual obligations vest in the employer. The employer may also claim inventions created in the course of employment but unrelated to the employee's tasks by written agreement (article 332, paragraphs 2 and 3, CO), provided that the employee receives equitable compensation in consideration for the assignment of the invention (article 332, paragraph 4, CO).

In contrast to patents, copyright vests in the natural person who has created the work (ie, the author). As an exception to the rule, the commercial exploitation rights in computer programs developed by an employee in the course of employment belong to the employer (article 17, Copyright Act). On the other hand, developments that are unrelated to the employee's job description are not subject to such statutory assignment. Employers are therefore well advised to stipulate unambiguous assignment clauses in their employment contracts.

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

The concept of 'work for hire' is not enshrined in Swiss patent or copyright law. Hence, as a matter of principle, the copyright or right to the patent belongs to the developer. It is therefore essential to provide for adequate intellectual property assignment clauses in any contracts for work or services.

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

There is no exclusive right conferred on trade secrets and other valuable confidential business information as such. However, unauthorised disclosure or exploitation of corresponding information is sanctioned by virtue of unfair competition and criminal law. Pursuant to articles 5 and 6 of the Federal Act Against Unfair Competition, the unfair exploitation of the achievements of others and the undue exploitation or disclosure of manufacturing or trade secrets are prohibited. Further, the unauthorised obtaining of electronically stored data and industrial espionage are criminal offences.

Any evidence brought into the proceedings by a party is, in principle, accessible by the opposing party. Again, there are a few exceptions.

Upon request, the court will take appropriate measures to ensure that taking evidence does not jeopardise the legitimate interests of any of the parties involved or a third party, for example, business secrets contained in offered evidence.

In the course of a pretrial description of a product or process allegedly infringing upon a patent, the court will take the necessary measures to safeguard manufacturing or trade secrets, for instance by conducting the description ex parte only.

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

The most important intellectual property right to protect branding is the trademark. Trademark protection can be obtained through national registration or designation in Switzerland via the Madrid System (Agreement and Protocol). Signs that belong to the public domain; are of a shape that constitutes the essential nature of the claimed goods or is otherwise technically necessary; are misleading; or are contrary to public policy, morality or the law are not susceptible to trademark protection. Recent examples of signs claiming trademark protection for financial services that were refused are Keytrader, which was admitted by the office but later nullified in civil proceedings for being descriptive, and the slogan 'Together we'll go far', because it was held to be overwhelmingly promotional and therefore insufficiently distinctive.

A trademark is valid for a period of 10 years from the date of application and may be renewed indefinitely for subsequent periods of 10 years each, provided that genuine use as a trademark has commenced, at the latest, five years after the date of registration. The trademark endows the owner with the exclusive right to prohibit others from using in commerce an identical or confusingly similar trademark.

Unregistered signs and trade dresses are capable of protection under unfair competition law, while company names benefit from a specific protection regime. Domain name registrations do not entail legal exclusivity rights per se, but earlier trademarks or trade names may constitute a claim for having a corresponding domain name transferred.

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

The most effective and reliable method to ensure non-infringement of existing brands is an availability search encompassing both trademarks and company names. However, even if no conflicting registration is found, a new business may still encounter an infringement of unregistered brands that have already acquired some distinctiveness in the market owing to their constant factual use.

New businesses should also consider that the assumption of factual use of a brand without trademark registration may result in possible infringement of a later registration. However, the earlier adopter is entitled to continue using the brand to the extent used prior to the later filing of the third-party application.

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

The remedies available to owners or exclusive licensees of intellectual property rights are more or less harmonised for all categories of intellectual property rights and encompass injunctive relief; disclosure of information on the origin and the recipients of infringing goods or services; and damages.

It is also possible to obtain preliminary injunctions, even ex parte, in case of urgency. If an ex parte injunction is granted, the defendant receives notice of such action upon service of the decision (article 265, paragraph 2, CPC), accompanied by either a summons to a hearing or an invitation to submit a writ in defence.

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

The use of open-source software in the financial services industry is widespread and not specifically regulated in Switzerland. Concerns with respect to ensuing source code disclosures have largely evaporated, since the vast majority of open-source software licences that do not foresee copyleft in case the software is operated as a cloud service and no programming code is conveyed.

40 Are there any high-profile examples in your jurisdiction of fintech companies enforcing their intellectual property rights or defending their intellectual property rights against a third party?

Apart from the trademark litigation referred to in question 36, there are no prominent examples of intellectual property rights enforcement activities in the fintech industry.

Data protection

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

The Swiss Federal Data Protection Act (FDPA) aims to protect personal data of both individuals and legal entities. The FDPA proclaims the following overarching principles of processing of personal data: transparency, purpose limitation, proportionality, data integrity and data security (article 7, FDPA). Notably, the FDPA does not per se require the data subject's consent or another justification for the processing of personal data. However, if personal data is being processed beyond said principles (eg, by way of collecting personal data without informing the data subject or despite his or her express objection), such activity infringes on the personality right of the data subject and consequently requires justification by an overriding public or private interest.

Update and trends

The advent of cryptocurrencies and the blockchain technology to process and secure value transactions in a decentralised ledger is attracting particular attention in Switzerland. This is partly because of the recent arrival of a few dozen fintech companies engaged in that field in the greater area of the city of Zug, which is, therefore, nicknamed the 'Swiss crypto-valley'. Established financial institutions are also investing heavily in blockchain research and development. An interesting field of innovation will be the adoption of blockchain technology to digital assets in general. This might overcome parts of the weakness and vulnerability characterising digital assets (such as unlimited reproducibility, uncertain legal allocation and unresolved long-term preservation) and enable reliable automated transactions on the internet of things, services and people.

In the Swiss financial regulations nomenclature, virtual money is treated merely as a conventional means of payment. In 2014, the Swiss government concluded that virtual currencies do not deserve any specific legislative intervention. Bitcoin exchanges and other platforms that entail the custody of cryptocurrencies and their interchange with legal tender are scrutinised under the existing regulatory framework, which is technology agnostic.

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

The FPDA does not specifically regulate financial information. In particular, financial data is not considered qualified sensitive data, in contrast to, for example, health information or information about criminal sanctions. Yet it is of particular importance that, according to case law, the information collected by a relationship manager in a bank's customer relationship management tool constitutes personal data, which the data subject is entitled to access at any time without having a specific interest.

Fintech companies regulated as banks are subject to a variety of requirements pertaining to the processing of customer-identifying data (CID). The same applies indirectly to fintech companies that are cooperating with banks and, as such, gain access to CID. First and foremost, every service provider in this field has to abide by the secrecy of bank customer data (article 47 of the Swiss Federal Law on Banks and Savings Institutions) and professional secrecy (article 43 of the Swiss Federal Act on Stock Exchange and Securities Trading). The applicable principles are further detailed in FINMA Circular 2008/21 regarding the operational risks of banks. Exhibit 3 of said Circular sets forth a number of principles and guidelines on proper risk management related to the confidentiality of CID stored electronically. For example:

- CID-related services must be provided from a secure environment;
- CID must be encrypted – if CID is stored or accessible from outside Switzerland, the ensuing risks must be mitigated expediently by way of anonymisation, pseudonymisation or at least effective encryption of the data;
- security breaches need to be investigated and notified to the regulator and customers as appropriate; and
- staff having access to CID must be identified and monitored, and roles and scope of access rights must be narrowly defined.

Exhibit 3 is currently under revision and FINMA strives to further tighten security requirements.

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

Anonymisation of personal data is a processing step that the data subject can, in principle, object to. However, the FDPA admits an overriding interest if personal data is being processed anonymously, in particular, but without limitation, for the purposes of research, planning and statistics. This ground for justification does not exclude data anonymisation and aggregation for commercial gain.

Cloud computing and the internet of things

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

The use of cloud computing by financial services companies is abundant, especially with small-sized innovators and, to a lesser extent, established financial institutions collaborating with fintech companies.

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

There is no specific regulation with respect to the use of cloud computing. However, two FINMA circulars need to be observed.

FINMA Circular 2008/07 applies to 'significant outsourcings'. If a bank complies with the requirements set forth in the Circular, it may outsource significant business segments without having to obtain an approval from FINMA. Several rules of Circular 2008/7 address cross-border outsourcing, where the emphasis is on the safeguarding of regulatory oversight by FINMA and on compliance with Swiss legislation relating to banking secrecy, data protection and data security.

Exhibit 3 of FINMA Circular 2008/21 sets forth a number of principles and guidelines on proper risk management related to the confidentiality of CID stored electronically (see question 42). In particular, the bank must know where CID is stored, by which applications and systems it is processed and through which channels it may be accessed.

These rules would generally be imposed contractually on fintech companies collaborating with banks.

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

Machine-to-machine data transmissions are regulated as telecommunications services. Depending on how these services are structured, a financial services company facilitating value transfers through the internet of things could be treated as a regulated service provider. Regulatory challenges arise in particular when Swiss addressing resources are predominantly used to cater for businesses abroad.

Tax

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

No tax incentives or other schemes are directed specifically at supporting or benefiting fintech companies and investors to encourage innovation and investment in the fintech sector. However, Swiss fintech companies generally benefit from a favourable tax environment with corporate income tax rates as low as just under 12 per cent (depending on the exact location within Switzerland) and an ordinary VAT rate of only 8 per cent. In addition, resident investors typically benefit from the following (general) exemptions provided for in the Swiss tax system:

- Swiss-resident corporate investors: capital gains from the sale of equity investments of at least 10 per cent held for at least one year are virtually tax-free for Swiss-resident corporate shareholders, under the participation exemption. The participation exemption also applies to dividends received from equity investments of at least 10 per cent or worth at least 1 million Swiss francs.
- Swiss-resident individual investors: gains realised on the sale (or any other disposition) of equity investments are generally tax-free for Swiss-resident individual shareholders. The same is true for (privately held) equity investments made through tax transparent collective investments vehicles (ie, funds) and non-commercial limited partnerships.

Competition

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

The focus of competition law in financial technology has traditionally been on agreements regarding the fixing of interchange fees in multilateral payment schemes involving several issuers and acquirers. It is likely that the principles established in the credit card sector will be transposed to other forms of cashless payment processing. According to the most recent practice of the Swiss Competition Commission (ComCo), the merchant indifference test prevails. Pursuant to this test, the benchmark for determining the amount of a uniformly applied interchange fee would be the transactional benefits enjoyed by merchants relative to cash payments (ComCo decision of 1 December 2014 regarding Credit Card Domestic Interchange Fees II).

Recently, an additional competition law topic surfaced in the mobile payments domain: owing to the entry of ApplyPay in Switzerland, third-party mobile payment solution providers are claiming access to iPhone's nearfield communication interface. Such access has so far been denied by Apple. ComCo has said that it will observe the further development of the market before taking any regulatory action.

Financial crime

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

Even though the implementation of internal procedures on bribery is not required, Swiss fintech companies are often subject to anti-money laundering regulation.

The Act on Combating Money Laundering and Terrorist Financing (AMLA) foresees obligations of diligence for any persons subject to its scope of application, including the independent asset manager. These obligations aim to prevent money laundering and include the verification of the identity of the contracting party and the identification of the economic beneficiary, the renewal of such verification of the identity and specific clarification duties. The fintech company must apply the

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respective regulation provided for by FINMA or the self-regulatory organisation it is affiliated with.

The AMLA also defines documentation and organisational responsibilities as well as an obligation to communicate money laundering suspicions to the MROS. Further obligations include blocking the client's accounts in suspicious cases and not informing the client of the communication to the MROS.

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

There is no specific regulatory or industry anti-financial crime guidance for fintech companies except for the general anti-money laundering regulation.

Taiwan

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

In Taiwan, conducting finance-related activities generally requires a licence from the Financial Supervisory Commission (FSC). Such activities include, without limitation:

- Securities-related activities: securities underwriting, securities brokerage, securities dealing (ie, proprietary trading), securities investment trust (ie, asset managment), and securities investment consulting. But general consulting business, such as acting as financial advisers to arrange investments or bring about merger or acquisition deals, does not require any licence.
- Bank-related activities:
  - lending: lending activities do not fall within the businesses to be exclusively conducted by a local licensed bank. However, as no financing company may be registered in Taiwan, it is currently not possible for an entity to register as a financing company to carry on lending actitivies in Taiwan;
  - factoring and invoice, discounting and secondary market loan trading: for more details, see question 3;
  - deposit taking;
  - foreign exchange trading;
  - remittance; and
  - electronic payment: see question 11.

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

A local licensed bank may carry on consumer lending activities. Although lending activities do not fall within the businesses to be exclusively conducted by a local licensed bank, carrying out lending activities as a business is still not permitted in Taiwan.

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

The general principle under Taiwan's Civil Code is that any receivable is assignable unless (i) the nature of the receivable does not permit such transfer; (ii) the parties to the loan have agreed that the receivable shall not be transferred; or (iii) the receivable, by nature, is not legally attachable. The receivable under loans, subject to (ii) above, are generally transferable. A bank is subject to stricter rules that generally loans that remain performing cannot be transferred by a bank except for limited exceptions (such as for the purpose of securitisation). For this reason, Taiwan does not currently have an active secondary loan market.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies would generally fall within the scope of any such regime.

Local funds (securities investment trust funds)
The most common form of collective investment scheme in Taiwan is securities investment trust funds, which may be offered to the general public or privately placed to specified persons. Public offering of a securities investment trust fund needs prior approval or effective registration with the FSC or the institution designated by the FSC. No prior approval is required for a private placement of a securities investment trust fund; however, it can only be placed to eligible investors, and within five days after the payment of the subscription price for initial investment offering, a report on the private placement shall be filed with the FSC or the institution designated by the FSC. Generally, the total number of qualified non-institutional investors under a private placement shall not exceed 35.

Under current laws and regulations, public offering and private placement of securities investment trust funds may only be conducted by FSC-licensed securities investment trust enterprises (SITEs). Currently, the paid-in capital of a SITE should not be lower than NT$300 million, and there exist certain qualifications for the shareholders of a SITE. A fintech company, which is not a SITE, will not be able to raise funds as a SITE does.

Offshore funds
Offshore funds having the nature of a securities investment trust fund may also be publicly offered (subject to FSC prior approval) or privately placed (subject to post-filing with FSC or its designated institution) to Taiwan investors, subject to certain qualifications and conditions. An offshore fintech company, which does not have the nature of a securities investment trust fund, will not be able to be offered in Taiwan.

5 Are managers of alternative investment funds regulated?

Currently, only securities investment funds, real property trust funds and futures trust funds (which focus on investment in futures and derivatives) are permitted in Taiwan. There are no laws or regulations regulating or governing investment funds on other assets. These funds may only be offered and managed by FSC-licensed entities such as SITEs, banks or futures trust enterprises. A fintech company, which is not a SITE, a bank or a future trust enterprise, will not be able to manage such funds in Taiwan.

6 May regulated activities be passported into your jurisdiction?

There is no concept of the 'passporting right' in Taiwan. To engage in regulated financial activities, a company needs to apply for the relevant licences to the FSC. Depending on the types of regulated activities, the applicant shall meet certain qualifications as required under relevant laws and FSC regulations.

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

No. Foreign companies cannot carry on regulated businesses (which include financial services) without a licence and the FSC licences required for providing financial services are not issued to foreign companies without establishing a subsidiary or a branch in Taiwan.

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

To date there are no laws or regulations specifically regulating or governing peer-to-peer lending. See 'Update and trends' for the prospective regulatory developments on this subject.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

Equity-based crowdfunding

The following two ways of fundraising are generally known as the equity-based crowdfunding platforms in Taiwan. Such ways of crowdfunding are exempted from the prior approval or effective registration normally required under the Securities and Exchange Act.

The 'Go Incubation Board for Startup and Acceleration Firms' (GISA) of the Taipei Exchange

The Taipei Exchange (TPEx), one of the two securities exchanges in Taiwan, established the GISA in 2014 for the purpose of assisting the innovative and creative small-sized non-public companies in capital raising.

A company with paid-in capital of less than NT$50 million and having innovative or creative ideas with potential for developments is qualified to apply for GISA registration with TPEx. After TPEx approves the application, the company will first start receiving counselling services from TPEx regarding accounting, internal control, marketing and legal affairs. After the counselling period, there would be another TPEx review to examine, among other things, the company's management teams, role of board of directors, accounting and internal control systems, and the reasonableness and feasibility of the plan for capital raising, and if the TPEx deems appropriate, the company may raise capital on the GISA. The amount raised by the company through the GISA may not exceed NT$30 million unless otherwise approved. In addition, an investor's annual maximum amount of investment through the GISA should not exceed NT$150,000, except for angel investors defined by TPEx or wealthy individuals with assets exceeding an amount set by TPEx and having professional knowledge regarding financial products or trading experience.

Equity-based crowdfunding on the platforms of securities firms

A securities firm may also establish a crowdfunding platform and conduct equity crowdfunding business. Currently, a company with paid-in capital of less than NT$30 million may enter into a contract with a qualified securities firm to raise funds through the crowdfunding platform maintained by such securities firm, provided that the total amount of funds raised by such company through all securities firms' crowdfunding platforms in a year may not exceed NT$30 million. The amount of investment made by an investor on a securities firm's platform may not exceed NT$50,000 for each subscription, and may not exceed NT$100,000 in aggregate in a year, except for angel investors as defined in the relevant regulations.

Non-equity-based crowdfunding

In 2013, TPEx established the 'Gofunding Zone' in its official website. This mechanism allows the non-equity-based crowdfunding platform operators, once approved by TPEx, to post the information regarding their proposals and projects on the Gofunding Zone. There are certain qualifications for the platform operator making such application, including (without limitation): the platform operator should have established mechanisms for reviewing and examining the business startup innovation proposals; the platform operator should have established control mechanisms for the operational procedures of funds payments and receipts for successfully funded business startup innovation proposals and for refunds for unsuccessful proposals; and the platform operator should have established control mechanisms for the information security of its crowdfunding website.

The Gofunding Zone provides information disclosure functions only, so that any persons who wish to sponsor a business startup innovation proposals presented on the Gofunding Zone should contact the respective platform operators directly.

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

See question 3 for the relevant rules on transfer or assignment of receivables. In general, no company may carry out the activities of receivable transfer for business. Purchase of accounts receivable may only be conducted by a licensed bank.

11 Are payment services a regulated activity in your jurisdiction?

Yes. Traditionally payments by wire transfer can only be made through a licensed bank. The payments via cheques and credit cards are also run through banks.

In 2015, the Act Governing Electronic Payment Institutions (E-Payment Act) was enacted. This E-Payment Act regulates the activities of an electronic payment institution, acting in the capacity of an intermediary between payers and recipients to engage, principally, in (i) collecting and making payments for real transactions as an agent; (ii) accepting deposits of funds as stored value funds; and (iii) transferring funds between e-payment accounts. According to the E-Payment Act, an electronic payment institution should obtain approval from the FSC unless it engages only in (i) above and the total balance of funds collected and paid and kept by it as an agent does not exceed the specific amount set by the FSC.

12 Are there any restrictions on cold-calling investors or clients in your jurisdiction?

Whether cold-calling is permitted would depend on the types of the services or products. In general, cold-calling is permitted if the products or services may be offered to the general public. When there exists any restriction on the number of offerees on a particular service or product, the cold-calling may be challenged if the potential persons who received the call are more than the maximum number of investors under relevant regulations. In addition, cold-calling would not be permitted for certain services or products. For example, securities firms should not recommend trading of stocks listed on the Taiwan Stock Exchange or TPEx to unspecified persons (ie, the general public).

Certain provisions in the Fair Trade Commission (the competent authority in charge of antitrust and unfair competition) and the Personal Data Protection Act (PDPA) also provide that whenever a call receiver refuses the telemarketing call, the cold-caller should stop the call.

13 Does the regulator in your jurisdiction make any specific provision for fintech services and companies?

To promote the financial technology innovation service, the FSC established the Financial Technology Office (the Fintech Office) in 2015 and, on 12 May 2016, publicly announced the 'White Paper on FinTech' (the White Paper). The main tasks of the Fintech Office are promoting fintech innovation, supporting research including big data and analytics fintech policy reform and coordination across government and regulators. The White Paper outlines the principal fintech trends, including those related to financial services, innovation research, personnel training, risk management and infrastructure, and indicates the open-minded attitude of the FSC towards the development of fintech.

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

The Financial Consumer Protection Act (FCPA) and its related regulations provide for the general marketing rules applicable to the marketing materials for financial services. In general under the FCPA, when carrying out advertising, promotional or marketing activities, financial services providers should not falsify, conceal, hide or take any action that would mislead financial consumers, and should ensure the truthfulness of the advertisements.

In addition to the general marketing rules under the FCPA, the financial service providers may also be subject to additional marketing rules as specified in the laws and regulations governing the specific types of financial services or products.

15 Are there any regulator-imposed temporary restrictions on financial products in place that are relevant to fintech companies in your jurisdiction?

No. Currently there are no regulator-imposed temporary restrictions on financial products that are relevant to fintech companies in Taiwan. However, the FSC has the power to, from time to time, issue or release any regulations, rulings and guidance to regulate the FSC-supervised entites and regulated actitivies or to provide its opinion on interpretation of current financial laws and regulations that may be relevant to fintech companies.

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

Taiwanese company or Taiwan branch of a foreign company
Such company may, upon filing a report with the central bank, purchase foreign exchange with New Taiwan dollars and remit the same out of Taiwan for purposes other than trade or service-related payments, in an amount up to US$50 million per calendar year, without special approval from the central bank. Foreign exchange purchase for purposes other than trade or service-related payments exceeding the applicable ceiling would require special approval from the central bank; such approval is discretionary and would be decided by the central bank on a case-by-case basis.

Foreign company not having a branch in Taiwan
Such foreign company may, upon filing a report with the central bank, only purchase foreign exchange with New Taiwan dollars and remit the same out of Taiwan in an amount of up to US$100,000 for any single transaction.

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

Under current financial laws and regulations, no person is allowed to provide any financial services in Taiwan without obtaining prior approval or licence from the FSC. However, if the services or products are provided outside Taiwan without involvement of any Taiwanese employees or agents, such activity may not require any licence in Taiwan.

18 Are there licensing requirements that would be triggered where the investor or client is a temporary resident in your jurisdiction?

Whether any licence would be required (as described in question 1) generally depends on what activities the service provider conducts in Taiwan. In theory, it is irrelevant if the investor or client is only a temporary resident.

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

If the jurisdiction is Taiwan, Taiwan laws and regulations would not be applicable to the situation as described.

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

Currently there are limited laws and regulations applicable to fintech companies. If any such laws and regulations are applied, the obligations a fintech company must comply with will not change regardless of whether the activities are carried out in Taiwan.

21 Does a third-party referral qualify as an unsolicited approach in your jurisdiction?

Although the laws and regulations are silent on this issue, a reasonable interpretation would be that a third-party referral should be considered as an unsolicited approach as long as the service provider does not ask the third party to refer such new client and does not attempt to approach the new client before the referral.

22 What licensing exemptions apply where the services are provided through an offshore account in your jurisdiction?

As described in question 1, licensing requirements generally depend on the types of products and services to be offered in Taiwan. The relevant licensing requirements would not be exempted simply because the relevant financial services or products are provided through an offshore account held by the client.

23 What licensing exemptions apply where the services are provided through a nominee account in your jurisdiction?

See question 22. The same applies to a nominee account.

24 What licensing exemptions apply where the services are only ancillary or incidental to other core activities or services in your jurisdiction?

See question 22. The same applies to services that are only ancillary or incidental to the core activities or services triggering the licensing requirement.

However, a financial service provider is generally not permitted to provide any financial services not approved by the FSC or non-financial services, unless otherwise permitted by the FSC.

25 What licensing exemptions apply when dealing with clients that are duly licensed in in your jurisdiction?

For certain products or services, the regulations applicable to them may vary depending on the sophistication of the offerees. In general, however, there are no rules for licensing exemptions related to the category of client.

26 What licensing exemptions apply to specific types of client in your jurisdiction?

See question 25.

Securitisation

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

There are no particular formality requirements for executing loan agreements. As to security agreements, under Taiwan law, different types of asset are subject to different formality requirements for perfection of a security interest created over them. The formality requirements for the most commonly seen security interests are as follows:

- Chattels: there must be a written agreement to create a chattel mortgage. The mortgagor need not deliver the possession thereof to the mortgagee; however, a registration with the competent authority will be necessary for the mortgagee to claim the chattel mortgage against a bona fide third party.
- Real properties: security interest over real properties is taken by way of a mortgage registered with the relevant land registration offices. The parties must enter into a written agreement to agree on the creation of the mortgage and apply for registration of the mortgage before the mortgage can take effect.
- Shares: to create a pledge over shares, the pledgor and pledgee should enter into a written agreement. If the shares are represented by physcial certificates, the pledged share certificates should also be duly endorsed by the pledgor and physically delivered into the pledgee's possession, and a notice of pledge to the issuing company is also required. If the shares are listed and deposited to or registered with the local securities depository (ie, the Taiwan Depositary and Clearing Corporation; TDCC), the above endorsement, physical delivery of the shares and notification to the issuing company are not required; instead, a pledge registration of the shares in the TDCC's book-entry system in accordance with the TDCC's regulations will suffice.

No different rules apply to the cases of peer-to-peer lending.

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

An assignment will not be effective against the borrower until the borrower has been notified of such assignment. If the borrower is not notified of such assignment, the borrower may still make the repayment to the assignor and discharge its repayment obligation by doing so.

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

No consent is required from the borrower; see question 28.

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

Personal information is protected by the PDPA and the collection and use of any personal data is subject to notice and consent requirements. If a special purpose company, when purchasing and securitising loans, acquires any personal data, it will be subject to the obligations under the PDPA. See question 41 for regulations regarding collection and use of personal data.

Intellectual property rights

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

Software can be protected by intellectual property rights such as patent, copyright or trade secret.

As to patent, an inventor may file an application with Taiwan's Intellectual Property Office, and the patent right will be obtained once the application is approved. For copyrights and trade secrets, there are no registration or filing requirements for a copyright or a trade secret to be protected by law. However, there are certain features that qualify a copyright or trade secret, such as 'originality' and 'expression' for copyright, and 'economic valuable' and 'adoption of reasonable protection measures' for trade secrets.

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

According to the Patent Act of Taiwan, the subject of a patent right is 'invention' and an invention means the creation of technical ideas, utilising the laws of nature. As a general rule, business methods are regarded as using social or business rules rather than laws of nature, and therefore may not be the subject of a patent right. As for software-implemented inventions, if it coordinates the software and hardware to process the information, and there is technical effect of its operation, it might become patentable. For instance, a 'method of conducting foreign exchange transaction' would be deemed as a business method and thus unpatentable; however, a 'method of using financial information system to process foreign exchange transactions' may be patentable.

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

With regard to a patent, the right of an invention made by an employee during the course of performing his or her duties under employment shall be vested in his or her employer and the employer shall pay the employee reasonable remuneration unless otherwise agreed by the parties.

A trade secret is the result of research or development by an employee during the course of performing his or her duties under employment and it shall belong to the employer unless otherwise agreed by the parties.

For copyright, where a work is completed by an employee within the scope of employment, such employee is the author of the work but the economic rights to such work shall be enjoyed by the employer unless otherwise agreed by the parties.

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

In respect of patent rights and trade secrets, the agreement between the parties shall prevail, or such rights shall be vested in the inventor or developer in the absence of such agreement. However, if there is a fund provider, the funder may use such invention.

In respect of copyright, the contractor or the consultant who actually makes the work is the author of the work unless otherwise agreed by the parties; the enjoyment of the economic rights arising from the work shall be agreed by the parties, or such rights shall be enjoyed by the contractor or the consultant in the absence of such agreement. However, the commissioning party may use the work.

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

Trade secrets are protected if they satisfy the following constituent elements: information that may be used in the course of production, sales or operations; having the nature of secrecy; with economic value; and adoption of reasonable protection measures.

To keep the trade secrets confidential during court proceedings, the court trial may be held in private if the court deems it appropriate or it is otherwise agreed upon by the parties. The parties and a third party may also apply to the court for issuing a 'confidentiality preservation order', and the person subject to such confidentiality preservation order should not use the trade secrets for purposes other than those related to the court trial or disclose the trade secrets to those who are not subject to the order.

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

The Trademark Act in Taiwan provides for the protection of brands. The rights of trademarks can be obtained through registration with Taiwan's Intellectual Property Office. The term of protection is 10 years from the date of publication of the registration and may be renewed for another 10 years by filing a renewal application.

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

Every registered trademark will be published on the official website maintained by the Intellectual Property Office and the trademark search system is accessible by the general public. On the search system, a new business may check whether an identical or similar trademark exists and who the proprietor of a registered trademark is.

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

Patent

With regard to infringement of an invention patent, the patentee may claim for damages suffered from such infringement. The amount of damages may be calculated by the damage suffered and the loss of profits as a result the infringement; profit earned by the infringer as a result of patent infringement; or the amount calculated on the basis of reasonable royalties. If the infringement is found to be caused by the infringer's wilful act of misconduct, the court may triple the damages to be awarded. Patent infringements have been decriminalised since 2003.

Copyright

The damage suffered from copyright infringement may be claimed in the process of civil procedure. As for criminal liabilities, there are different levels depending on different types of infringement, ranging from imprisonment of no more than three years and detention, to a fine of up to NT$750,000.

Trademark

The damages suffered from trademark infringement may be claimed in the process of civil procedure. As for criminal liabilities, any person shall be liable to imprisonment for a period not exceeding three years or a fine not exceeding NT$200,000, or both, if he or she: uses a trademark that is identical to the registered trademark in relation to identical goods or services; uses a trademark that is identical to the registered trademark in relation to similar goods or services and hence there exists a likelihood of confusion on relevant consumers; or uses a trademark that is similar to the registered trademark in relation to identical or similar goods or services and there exists a likelihood of confusion for relevant consumers.

Trade secrets

The damage suffered from infringement of trade secrets may be claimed in the process of civil procedure. As for criminal liabilities, a person may be sentenced to a maximum of five years imprisonment and, in addition thereto, a fine between NT$1 million and NT$10 million if he or she (i) acquires a trade secret by an act of theft, embezzlement, fraud, threat, unauthorised reproduction or other wrongful means, or uses or discloses a trade secret that has been acquired; (ii) carries out an

Update and trends

Peer-to-peer lending is a well-developed or known practice in certain jurisdictions, but it is still rather new to the Taiwanese market. While lending activities do not fall within those exclusively required to be conducted by a local licensed bank, as no financing company may be registered in Taiwan, it is currently not possible for an entity to register as a finance company to carry on lending actitivies in Taiwan. Although the operators of the peer-to-peer lending platforms might argue that such platforms are simply intermediaries to match the needs of the indivdual lenders and borrowers (and the platform is neither the lender nor borrower) depending on the business models of the relevant platforms, the FSC might still have basis to challenge from the perspective of banking law and any other relevant laws and regulations.

In April 2016, the FSC issued a press release pointing out the regulatory issues that may arise from peer-to-peer lending activities. Specifically, if an interest is agreed between the platform and the lender, and the repayment of the principal is guaranteed by the platform, it is likely that such activities would be considered 'deposit taking', which is an activity exclusively allowed to be conducted by a local licensed bank. The relevant news published in local newspapers in May 2016 showed that the FSC was contemplating whether to enact a specific law to regulate peer-to-peer lending activities. However, at the time of writing, the news published on 29 June 2016 revealed that the FSC is not likely to make a new law in this regard but would issue certain rulings allowing cooperation between the banks and the platform operators with respect to peer-to-peer lending activities.

unauthorised reproduction of, or uses or discloses, a trade secret that he or she has knowledge or possession of; (iii) fails to delete or destroy a trade secret in his or her possession as the trade secret holder orders, or disguises it; or (iv) knowingly acquires, uses or discloses a trade secret known or possessed by others that is under the circumstances specified in points (i) to (iii) above.

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

There exists no specific law or regulation regarding the use of open-source software in Taiwan in the financial services industry. The relevant intellectual property law regulations are applicable.

40 Are there any high-profile examples in your jurisdiction of fintech companies enforcing their intellectual property rights or defending their intellectual property rights against a third party?

To our knowledge, there exists no such example.

Data protection

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

Under the PDPA, unless otherwise specified under law, a company is generally required to give notice to (notice requirement) and obtain consent from (consent requirement) an individual before collecting, processing or using any of said individual's personal information under the PDPA, subject to certain exemptions. To satisfy the notice requirement, certain matters must be communicated to the individual, such as the purposes for which his or her data is collected, the type of the personal data and the term, area and persons authorised to use the data.

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

There are no such requirements or regulatory guidance.

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

No such requirements or regulatory guidance exists in this respect.

Cloud computing and the internet of things

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

According to the White Paper, among all the industries, the financial industry has invested the most in IT and 21.1 per cent of the application systems of financial industries use cloud computing. The majority of banks and insurance companies have established information centres to provide a continual information service between their personnel and the clients, which means that a 'private cloud' has been developed. As for the public cloud, a type of cloud service rendered by the Financial Information Service Co, Ltd provides the link among the central bank and many banks, post offices, credit unions and ATMs throughout the nation. The application of such services include, among other things: a national e-Bill website, which allows payment of bill or taxes online through debit card or bank accounts; a centre for acquiring credit cards, which assists the banks in handling online credit card payments; and a platform that facilitates the individual's online personal banking services and the companies' payment through standard message forms such as extensible mark-up language or electronic data interchange.

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

When the use of cloud computing involves outsourcing the operations of a financial institution, relevant laws and regulations governing outsourcing activities should be complied with. In general, an outsourcing activity should follow the internal rules and procedures of the financial institutions, and in certain circumstances, prior approval from the FSC would be required. The use of cloud computing should also comply with the PDPA as described in question 41.

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

No such legal requirements or regulatory guidance exists.

Tax

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

Currently, there are no tax incentives specifically provided for fintech companies.

Generally, a company may credit up to 30 per cent of the corporate income tax payable for that year; up to 15 per cent of its total expenditure on research and development against its corporate income tax payable for that year; or up to 10 per cent of its total expenditure on research and development against its corporate income tax payable for each of the three years starting from that year, provided that it did not commit any material violation of any law on environmental protection, labour or food safety and sanitation in the past three years. In order to apply such tax credits a company must apply to and receive approval from the government.

Competition

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

As described in 'Update and trends', in April 2016, the FSC issued a press release pointing out the regulatory issues that may arise from peer-to-peer lending activities. According to such press release and the relevant news published in local newspapers, the FSC is of the view that: if it is arranged that the lender (as a member of the platform) splits the original credit into several parts and in turn allocates and 'sells' the divided parts to other 'members' for investment with high return, it might involve regulatory issues regarding multilevel marketing; or if the platform operators claim that the transaction has the nature of high return, low cost and low risk, it might constitute false or misleading advertising and would result in a violation of the Fair Trade Act. The above two issues are under the supervision of the Fair Trade Commission.

Financial crime

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

Money laundering activities are mainly regulated by the Money Laundering Control Act (MLCA) (last amended on 13 April 13 2016) and its related regulations. Under the MLCA, in order to prevent money laundering activities, financial institutions are required to implement their own internal anti-money laundering guidelines and procedures and submit the same to the FSC for record. Such guidelines shall include the operational and internal control procedures of anti-money laundering, periodical on-job training for anti-money laundering, designation of personnel in charge of the supervision and implementation of the guidelines and other matters required by the FSC.

Since the said requirements apply to financial institutions only, a fintech company should not be subject to such requirements unless it is an FSC-licensed financial institution.

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

No.

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

There are a large number of activities ('specified activities') that, when carried on in respect of specified kinds of investments, trigger licensing requirements in the UK. These are set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO). While it is not practical to list them all, the most common are the following:

- Accepting deposits: this is mainly carried on by banks and building societies. An institution will accept a deposit where it lends the money it receives to others or uses it to finance its business.
- Dealing in investments (as principal or agent): buying, selling, subscribing for or underwriting particular types of investments. In respect of dealing as principal, the specified investments are 'securities' and 'contractually based investments'. In respect of dealing as agent the specified kinds of investments are 'securities' and 'relevant investments'.

  Securities include: shares, bonds, debentures, government securities, warrants, units in a collective investment scheme (CIS) and rights under stakeholder and personal pension schemes.

  Contractually based investments include: rights under certain insurance contracts (excluding contracts of general insurance), options, futures, contracts for differences and funeral plan contracts.

  Relevant investments include the same investments as contractually based investments, but include contracts of general insurance.
- Arranging deals in investments: this is split into two activities:
  - arranging (bringing about) deals in investments, which applies to arrangements that have the direct effect of bringing about a deal; and
  - making arrangements with a view to transaction in investments, which is much wider and catches arrangements that facilitate others entering into transactions.

  Specified investments in respect of arranging include securities and relevant investments.
- Advising on investments: advising a person in their capacity as an investor on the merits of buying, selling, subscribing for or underwriting a security or relevant investment or exercising any right conferred by that investment to buy, sell, subscribe for or underwrite such an investment.
- Managing investments: managing assets belonging to another person, in circumstances involving the exercise of discretion, where the assets include any investment which is a security or contractually based investment.
- Establishing, operating or winding up a CIS: this is discussed in more detail in question 4.
- Certain lending activities: entering into a regulated mortgage contract or a regulated (consumer) credit agreement (or consumer hire agreement) as lender.
- Certain insurance activities: effecting a contract of insurance as principal and carrying out a contract of insurance as principal.
- Payment services: providing payment services.

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

The general position is that lending by way of business to consumers is regulated in the UK. Since 1 April 2014, the FCA has been responsible for authorising and regulating consumer credit firms (prior to 1 April 2014, this was the Office of Fair Trading).

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 Financial Conduct Authority (FCA) – unless the credit agreement is an 'exempt agreement'.

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 the agreement is exempt, 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).

The CCA broadly sets out the requirements lenders need to comply with in relation to the provision of information, documents and statements and the detailed requirements as to the form and content of the credit agreement itself.

The CONC chapter in the FCA Handbook sets out detailed rules regulated consumer credit firms must comply with and covers areas such as conduct of business, financial promotions, precontractual disclosure of information, responsible lending, post-contractual requirements, arrears, default and recovery, cancellation of credit agreements and agreements that are secured on land.

In addition to the CONC, authorised consumer credit firms must also comply with other applicable chapters of the FCA Handbook.

The consequences of failing to comply with the requirements of the CCA include agreements that are unenforceable against borrowers and the FCA imposing financial penalties on the firm.

Entering into a regulated mortgage contract (RMC) is a regulated activity. Such contracts are loans where:

- the contract is one under which a person (lender) provides credit to an individual or trustees (borrower);
- the contract provides for the obligation of the borrower to repay to be secured by a mortgage on land in the European Economic Area (EEA); and
- at least 40 per cent of that land is, or is intended to be, used:
  - in the case of credit provided to an individual, as or in connection with a dwelling by the borrower; or
  - in the case of credit provided to a trustees that is not an individual, as or in connection with a dwelling by an individual who is a beneficiary of the trust, or by a related person.

Conduct rules are set out in the FCA's Mortgages and Home Finance: Conduct of Business (MCOB) sourcebook.

There are exemptions where the borrower is acting wholly or predominantly for business purposes. Buy-to-let lending is not regulated, although 'consumer buy-to-let' lending is. A buy-to-let mortgage contract is defined as one that is entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower. Consumer buy-to-let lending is subject to conduct requirements set out in Mortgage Credit Directive Order 2015 (SI 2015/910).

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

Provided that the loan itself is being traded, and not the loan instrument (eg, an instrument creating or acknowledging indebtedness), then there are no restrictions on trading loans in the secondary market.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies would generally fall within the scope of any such regime.

Establishing, operating or winding up a CIS is a regulated activity in the UK and firms must be authorised by the FCA to carry on this activity.

The definition of a CIS is set out in section 235 of the Financial Services and Markets Act 2000. Broadly, a CIS is any arrangement with respect to property of any description, the purpose or effect of which is to enable the persons taking part in the arrangements to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income. The persons participating in the arrangements must not have day-to-day control over the management of the property. The arrangements must also have either or both of the following characteristics: the contributions of the participants and the profits or income out of which payments are to be made to them are pooled; or the property is managed as a whole by or on behalf of the operator of the scheme.

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

5 Are managers of alternative investment funds regulated?

Managers of alternative investment funds are regulated in the UK under the Alternative Investment Fund Managers Directive, which has been implemented in the UK by the Alternative Investment Fund Managers Regulations 2013 and rules and guidance contained in the FCA Handbook.

6 May regulated activities be passported into your jurisdiction?

An EEA firm that has been authorised under one of the European Union single market directives (Banking Consolidation Directive, Capital Requirements Directive, Solvency II, Markets in Financial Instruments Directive (MiFID), Insurance Mediation Directive, Mortgage Credit Directive, Undertakings for Collective Investment in Transferable Securities, Alternative Investment Fund Managers Directive and Payment Services Directive) may provide cross-border services into the UK.

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

Operating an electronic system that enables the operator to facilitate persons becoming the lender and borrower under an 'article 36H agreement' (see question 8) is not currently a passportable activity.

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

An EEA firm may exercise passport rights to provide services in the UK. Alternatively, in the case of a non-EEA firm or an EEA firm that is not undertaking an activity that can be passported into the UK, it must establish a local presence and obtain an appropriate licence. For example, an equity crowdfunding platform with the relevant permissions in another EEA state may be able to passport into the UK.

Operating an electronic system that enables the operator to facilitate persons becoming the lender and borrower under an article 36H agreement (see question 8) is not currently a passportable activity.

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

Peer-to-peer lending is a term that generally refers to loan-based crowdfunding. In the UK, the FCA regulates loan-based crowdfunding platforms. These regulations came into force on 1 April 2014.

Under article 36H of the RAO, operating an electronic system that enables the operator ('A') to facilitate persons ('B' and 'C') becoming the lender and borrower under an article 36H agreement is a regulated activity (and a firm will require FCA authorisation) where the following conditions are met:

- the system operated by A is capable of determining which agreements should be made available to each of B and C;
- A (or someone acting on its behalf) undertakes to receive payments due under the article 36H agreement from C and make payments to B which are due under the agreement; and
- A (or someone acting on its behalf) takes steps to procure the payment of a debt under the article 36H agreement and/or exercises or enforces rights under the article 36H agreement on behalf of B.

An article 36H agreement is an agreement by which one person provides another with credit in relation to which:

- A does not provide the credit, assume the rights of a person who provided credit or receive credit; and
- either, the lender is an individual or the borrower is an individual and the credit is less than £25,000, or the agreement is not entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower.

In addition to falling within the definition of an article 36H agreement, a loan may also constitute a regulated credit agreement, unless an exemption applies (see question 2) and so a lender may also be required to have permission to enter into a regulated credit agreement as lender.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

In the UK, reward-based crowdfunding (where people give money in return for a reward, service or product) and donation-based crowdfunding (where people give money to enterprises or organisations they wish to support) is not currently regulated in its own right.

Equity-based crowdfunding is where investors invest in shares in, typically, new businesses. Equity-based crowdfunding is not specifically regulated in the UK (in the same way as loan-based crowdfunding). However, a firm operating an equity-based crowdfunding service must ensure that it is not carrying on any 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 comply with restrictions on the type of investors they can market to.

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

There is currently no specific regulation of invoice trading in the UK. However, depending on how the business is structured, a firm that operates an invoice trading platform may be carrying on a number of different regulated activities for which it must have permission, including: establishing, operating or winding up a CIS; and managing an alternative investment fund.

11 Are payment services a regulated activity in your jurisdiction?

Payment services are regulated in the UK by the Payment Services Regulations 2009, which implemented the Payment Services Directive in the UK.

Payment services include:

- services enabling cash to be placed on a payment account and all of the operations required for operating a payment account;
- services enabling cash withdrawals from a payment account and all of the operations required for operating a payment account;
- the execution of the following types of payment transaction:
  - direct debits, including one-off direct debits;
  - payment transactions executed through a payment card or a similar device; and
  - credit transfers, including standing orders;
- the execution of the following types of payment transaction where the funds are covered by a credit line for the payment service user:
  - direct debits, including one-off direct debits;
  - payment transactions executed through a payment card or a similar device; and
  - credit transfers, including standing orders;
- issuing payment instruments or acquiring payment transactions;
- money remittance; and
- the execution of payment transactions where the consent of the payer to execute the payment transaction is given by means of any telecommunication, digital or IT device and the payment is made to the telecommunication, IT system or network operator acting only as an intermediary between the payment service user and the supplier of the goods or services.

To provide payment services in the UK, a firm must fall within the definition of a 'payment service provider'. Payment service providers include 'authorised payment institutions', 'small payment institutions', credit institutions, electronic money institutions, the post office, the Bank of England and government departments and local authorities.

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

12 Are there any restrictions on cold-calling investors or clients in your jurisdiction?

A 'cold call' is defined in the FCA Handbook as a financial promotion made in the course of a personal visit, telephone conversation or other interactive dialogue that was not initiated by the potential investor and does not take place in response to an express request from the investor.

The general position in respect of a retail client is that a firm must not make a cold call unless the investor has an established existing client relationship with the firm and the relationship is such that the investor envisages receiving a cold call or the cold call relates to certain limited types of financial products and investments.

In relation to non-written financial promotions, a firm can only make the financial promotion at an appropriate time of day, the person making it must identify themselves (and their firm) at the outset and make the purpose of the communication clear, clarify whether the investor would like to continue or terminate the call and give a point of contact to any investor with whom the caller arranges an appointment.

13 Does the regulator in your jurisdiction make any specific provision for fintech services and companies?

Yes. The FCA's Innovation Hub has been set up to provide support to innovative firms that the FCA thinks might benefit consumers. This includes: a dedicated team and contact for firms; assistance with understanding the FCA's regulatory framework as it applies to their business; assistance with the authorisation application process; and a dedicated contact for up to a year after the firm is authorised.

The FCA's 'regulatory sandbox' is designed to encourage innovation and provides a 'safe space' for firms (both regulated and unregulated) to test innovative products and services in a live environment. Firms may benefit in a number of ways, including the possibility of a tailored authorisation process (for new firms in the testing phase), guidance for firms testing new ideas that may not easily be categorised under the current regulatory framework and waivers in respect of enforcement action.

The FCA's Advice Unit aims to support firms that are developing 'robo-advice' models that seek to provide low-cost advice to investors. It will provide individual regulatory feedback to those firms and will also look to publish resources for all firms developing automated advice services.

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

Investment business

The UK has a comprehensive set of rules relating to financial promotions set out in chapter 4 of the Conduct of Business (COB) sourcebook. The definition of a financial promotion is very widely drafted and catches an invitation or inducement to engage in investment activity that is communicated in the course of business. Marketing materials for financial services are likely to fall within this definition.

The basic concept is that financial promotions must be fair, clear and not misleading. FCA guidance suggests that:

- for a product or service that places a client's capital at risk, it makes this clear;
- where product yield figures are quoted, this must give a balanced impression of both the short- and long-term prospects for the investment;
- where it promotes an investment or service with a complex charging structure or the firm will receive more than one element of remuneration, it must include the information necessary to ensure that it is fair, clear and not misleading and contains sufficient information taking into account the needs of the recipients;
- the FCA, Prudential Regulation Authority (PRA) or both (as applicable) are named as the firms and any matters not regulated by either the FCA, PRA or both are made clear; and
- where if it offers 'packaged products' or 'stakeholder products' not produced by the firm, it gives a fair, clear and not misleading impression of the producer of the product or the manager of the underlying investments.

There are, however, a number of exemptions that may be available in respect of marketing materials that take them outside of the scope of the financial promotion rules, including: communications to high net worth individuals and companies and sophisticated individuals; and communications to other investment professionals.

Only authorised persons may make financial promotions and it is a criminal offence for an unauthorised person to communicate a financial promotion. Any agreements entered into with customers as a result of such financial promotion are unenforceable.

Lending

In relation to lending, there is also a comprehensive set of rules and the position is similar, but not identical, to those set out in the COB sourcebook. In respect of credit agreements, the CONC 3.3 applies and provides that a financial promotion must be clear, fair and not misleading. In addition, firms must ensure that financial promotions:

- are clearly identifiable as such;
- are accurate;
- are balanced (without emphasising potential benefits without giving a fair and prominent indication of any relevant risks);
- are sufficient for, and presented in a way that is likely to be understood by, the average member of the group to which they are directed, or by which they are likely to be received;
- are presented in a way that does not disguise, omit, diminish or obscure important information, statements or warnings;
- present any comparisons or contrasts in a fair, balanced and meaningful way;
- use plain and intelligible language;
- are easily legible and audible (if given orally);
- specify the name of the person making the communication (or whom they are communicating on behalf of, if applicable); and
- do not state or imply that credit is available regardless of the customer's financial circumstances or status.

Various other detailed requirements apply depending on the type of credit (eg, peer-to-peer, secured, unsecured or 'high-cost short-term'

credit) and the type of agreement (eg, whether it is secured on land), which govern things such as:

- the requirement to include particular risk warnings and how those warnings must be worded;
- when and how annual percentage rates and representative examples must be included and displayed; and
- expressions that cannot be included in financial promotions.

In relation to mortgages, chapter 3A of the MCOB sourcebook applies. In addition to being clear, fair and not misleading, financial promotions must be:

- accurate;
- balanced (without emphasising any potential benefits without also giving a fair and prominent indication of any relevant risks);
- sufficient for, and presented in a way that is likely to be understood by, the average member of the group to whom it is directed, or by whom it is likely to be received;
- make it clear, where applicable, that the credit is secured on the customer's home;
- presented in a way that does not disguise, omit, diminish or obscure important items, statements or warnings; and
- where they contain a comparison or contrast, designed in such a way that the comparison or contrast is presented in a fair and balanced way and ensures that it is meaningful.

As with credit agreements, other detailed provisions apply depending on the particular type of mortgage, which cover, among other things, the inclusion and presentation of annual percentage rates and other credit-related information, points of contact and when and how financial promotions can be made.

15 Are there any regulator-imposed temporary restrictions on financial products in place that are relevant to fintech companies in your jurisdiction?

We are not aware of any current temporary restrictions on financial products imposed by the FCA.

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

The UK does not operate any foreign currency controls. However, when taking money from the UK it is important to understand the rules of the jurisdiction into which it will be transferred and the rules governing its transfer back out again (whether into the UK or another jurisdiction).

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

Yes. An approach made by a potential client or investor on an unsolicited and specific basis will not avoid triggering a licensing requirement.

18 Are there licensing requirements that would be triggered where the investor or client is a temporary resident in your jurisdiction?

Not applicable in respect of the UK.

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

No. Only activities carried on in the UK fall within the UK's licensing regime.

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

The conduct of business rules apply to a locally licensed firm, and, with some exceptions, to EEA firms establishing a branch in the jurisdiction. There are no further continuing obligations that fintech companies must comply with when carrying out cross-border activities.

21 Does a third-party referral qualify as an unsolicited approach in your jurisdiction?

Not applicable in respect of the UK.

22 What licensing exemptions apply where the services are provided through an offshore account in your jurisdiction?

Not applicable in respect of the UK.

23 What licensing exemptions apply where the services are provided through a nominee account in your jurisdiction?

Not applicable in respect of the UK.

24 What licensing exemptions apply where the services are only ancillary or incidental to other core activities or services in your jurisdiction?

Not applicable in respect of the UK.

25 What licensing exemptions apply when dealing with clients that are duly licensed in in your jurisdiction?

Not applicable in respect of the UK.

26 What licensing exemptions apply to specific types of client in your jurisdiction?

Not applicable in respect of the UK.

Securitisation

27 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?

Under statute, an agreement relating to a specified subject matter (including transfers of land, leases or powers of attorney) is required to take effect as a deed. The majority of loan agreements will not fall within these categories; whereas security agreements (which typically grant a lender a power of attorney and, in certain circumstances, may transfer an interest in land) will.

Under English law, simple contracts only require a single signature to be enforceable, but additional formalities are required for the execution of deeds. First, the deed must be in writing. Second, it must be clear on its face that it is intended to take effect as a deed. Third, it must be executed as a deed, the requirements of which will vary according to the legal personality of the executing party. Fourth, it must be delivered as a deed, which is to say that the parties must demonstrate an intention to be bound by the deed (which will often be presumed under statute by virtue of its execution). Additionally, a party's signature to a deed may also need to be attested by a witness. This will be the case where the executing party is an individual or, if the executing party is a company, where only one director signs.

Typically, peer-to-peer marketplace lending platforms require agreements to be entered into electronically ('e-signing'). The e-signing of simple contracts (such as loan agreements) is widely accepted as creating enforceable agreements. In relation to deeds, the position is less certain. Electronic signatures can take a range of forms, including: typing the signatory's name, signing through biodynamic software (ie, the signatory signing on screen or on a digital pad) and clicking an icon on a webpage. First, English law prohibits e-signing in respect of certain contracts, including deeds required by the English Land Registry, such as mortgage deeds. Second, questions arise as to whether the prescribed formalities for executing deeds can be satisfied by e-signatures. In particular, difficulties are likely to arise in satisfying the attestation requirement (where a deed is executed by an individual or single director and a witness) by wholly electronic means. Third, even if it is 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 an e-signature) may be preferable. As such, best practice is still for deeds to be executed with a wet-ink signature.

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

To perfect a legal assignment of loans originated on a peer-to-peer lending platform, various criteria must be met. Most importantly, notice of the assignment must be received by the other party to the loan agreement. In addition to this, the benefit under the loan that is being assigned must be absolute, unconditional and not purporting to be by way of charge only, the contract effecting the assignment of the loans must be in writing and signed by the assignor, and the assignment must be of the whole of the debt under the loan agreement.

Subject to certain exceptions, notice by email will comprise notice in writing under English law and, therefore, sending a notice to the other party to the loan agreement by email should not preclude it from being effectively delivered. However, a question remains over whether notice of assignment can be effectively delivered solely by updating the relevant party's account on the peer-to-peer lending platform. It is therefore best practice to notify the other party to the loan agreement of the assignment both by email and an update to their peer-to-peer account.

If the assignment does not comply with the above criteria for a legal assignment, it may nevertheless take effect as an equitable assignment. The key distinction between a legal and an equitable assignment is that, in the case of an equitable assignment, the person to whom the loan has been transferred would not be able to bring an action under the contract in their own name.

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

As set out in question 28, it is not possible to effect a legal assignment of loans originated on a peer-to-peer lending platform without informing the borrower. However, non-compliance with this requirement may not render the assignment ineffective, but rather equitable, which therefore provides weaker enforcement rights for the assignee.

Where a contract does not prohibit assignment, or is silent on the matter, the originator is free to assign their rights under the contract without the consent of the borrower. As such, consent of the borrower will only be required where this has been commercially agreed between the parties in the initial loan agreement.

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

The entity assigning loans to the special purpose vehicle (SPV) must ensure that there are no confidentiality requirements in the loan documents that would prevent it from disclosing information about the loans and the relevant borrowers to the SPV and the other securitisation parties. If there are such restrictions in the underlying loan documentation, the assignor will require the consent of the relevant borrower to disclose to the SPV and other securitisation parties the information they require before agreeing to the asset sale. In addition, the SPV will want to ensure that there are no restrictions in the loan documents that would prevent it from complying with its disclosure obligations under English and EU law (such as those set out in the Credit Rating Agency Regulation). Again, if such restrictions are included in the underlying loan documents, the SPV would be required to obtain the relevant borrower's consent to such disclosure. In addition, if the borrowers are individuals, the SPV, its agents and the peer-to-peer platform will each be required to comply with the statutory data protection requirements under English law (see questions 41 to 43).

Intellectual property rights

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

Computer programs (and preparatory design materials for computer programs) are protected by copyright as literary works. Copyright arises automatically as soon as the computer program is recorded. No registration is required.

Databases underlying software programs may also be protected by copyright and, in certain circumstances, by database right. Database right is a standalone right that protects databases that have involved a substantial investment in obtaining, verifying or presenting their contents. Both database copyright and database rights arise automatically without any need for registration.

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

Although computer programs 'as such' are expressly excluded from patentability under UK legislation, it is possible to obtain patent protection for software if it is possible to demonstrate that the program in question makes a 'technical contribution' (see question 41). Registration formalities must be followed to obtain protection.

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

Programs for computers, and schemes, rules or methods of doing business 'as such', are expressly excluded from patentability under the Patents Act 1977. These exclusions ultimately flow from the European Patent Convention.

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

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

Copyright and database rights created by an employee in the course of their employment are automatically owned by the employer unless otherwise agreed. Inventions made by an employee in the course of their normal duties (or, in the case of employees who owe a special obligation to further the interests of their employer's business, in the course of any duties) are automatically owned by the employer.

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

No. Copyright or inventions created by contractors or consultants in the course of their duties are owned by the contractor or consultant unless otherwise agreed in writing. Database rights are owned by the person who takes the initiative and assumes the risk of investing in obtaining, verifying and presenting the data in question. Depending on the circumstances this is likely to be the business that has retained the contractor or consultant.

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

Confidential information can be protected against misuse, provided the information in question: has the necessary quality of confidence; is subject to an express or implied duty of confidence; or no registration is necessary (or possible).

Confidential information can be kept confidential during civil proceedings with the permission of the court.

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

Brands can be protected as registered trademarks either in the UK alone (as a UK trademark) or across the EU (as an EU trademark). A brand can also be protected under the common law tort of passing off if it has acquired sufficient goodwill.

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

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

The UK and European Union trademark databases can all be searched to identify registered or applied for trademark rights with effect in the

UK. It is highly advisable for new businesses to conduct trademark searches to check whether earlier registrations exist that are identical or similar to their proposed brand names. It may also be advisable to conduct searches of the internet for any unregistered trademark rights that may prevent use of the proposed mark.

38 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.

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

No such legal or regulatory rules or guidelines exist.

40 Are there any high-profile examples in your jurisdiction of fintech companies enforcing their intellectual property rights or defending their intellectual property rights against a third party?

There are no high-profile examples.

Data protection

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

The Data Protection Act 1998 is the primary piece of legislation governing the storage, viewing, use of, manipulation and other processing by businesses of data that relates to a living individual. The Data Protection Act requires that businesses may only process personal data where that processing is done in a fair and lawful way, as further described in the Act.

The most common methods used by businesses to ensure that their processing of personal data is fair and lawful are: to obtain the consent of the relevant individual (known as the 'data subject') to the processing of their data; to process that data based on the 'legitimate interests' of the company undertaking the processing (provided that the interests of the individual are not unduly impacted); to process in order for the company undertaking the processing to comply with a legal requirement (not a contractual requirement); and to perform or enter into a contract with the individual.

The Data Protection Act also creates various rights for data subjects, including a right to see a copy of the personal data that a company holds about them and a right to require the correction of inaccurate personal data held by a company.

The oversight of UK businesses' compliance with the Data Protection Act and related legislation, and enforcement of them, is managed by the UK regulator, the Information Commissioner's Office (ICO).

The Data Protection Act 1998 is due to be replaced in May 2018 by the new General Data Protection Regulation (GDPR), a European regulation having direct effect in the UK. The GDPR broadly reinforces the existing regime provided by the Data Protection Act, with some additional requirements added to strengthen the obligations on businesses to protect personal data. However, the impact of the June 2016 'Brexit' referendum decision in the UK has thrown some uncertainty on the implementation of the GDPR within the UK. At the time of writing it remains to be seen whether the GDPR will become applicable in the UK, but many data protection commentators believe that, despite the fact that the UK will leave the EU, for various reasons it will choose to implement a data protection regime that is equivalent to the one detailed in the GDPR.

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

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

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

The Data Protection Directive 95/46/EC (which has been implemented in the UK by the Data Protection Act 1998) states at paragraph 26 that, where data has been anonymised, the principles of data protection do not apply and the definition of 'personal data' in the Data Protection Act requires the individual to be identifiable. Accordingly, for the data to have been effectively anonymised, the data subject must no longer be identifiable. Article 27 of this Directive redirects the user of the data to the relevant code of practice of their jurisdiction for more guidance on anonymisation.

The ICO's Code of Practice on 'Anonymisation: Managing data protection risk' sets out how to ensure that anonymisation is effective. Guidance is given on, among other things, when it is necessary to obtain consent, how to lawfully disclose anonymised data and how to ensure there are comprehensive governance structures that ensure anonymisation is effective. Appendix 2 is a guide to key anonymisation techniques that includes the aggregation of data. Aggregation is defined as being where 'data is displayed as totals, so no data relating to or identifying any individual is shown'.

The Article 29 Working Party (a European body comprised of representatives from data protection regulators across the EU) has released Opinion 05/2014 on Anonymisation Techniques. This Opinion discusses the main anonymisation techniques used – randomisation and generalisation (including aggregation). The Opinion states that when assessing the robustness of an anonymisation technique, it is necessary to consider: if it is still possible to single out an individual; if it is still possible to link records relating to an individual; and if information can be inferred concerning an individual. In relation to aggregation, the Opinion further states that aggregation techniques should aim to prevent a data subject from being singled out by grouping them with other data subjects. While aggregation will avoid the risk of singling out, it is necessary to be aware that linkability and inferences may still be risks with aggregation techniques.

Cloud computing and the internet of things

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

Among large, well-established financial services companies (such as large retail banks), cloud computing services have been adopted, but on a relatively small scale compared to the size of their IT functions. This is primarily owing to the ongoing desire within large financial services companies to maintain ultimate control of their infrastructure, alongside the cost of decommissioning existing legacy systems in favour of a move to cloud computing services.

Within smaller, earlier stage financial services companies, the take-up of cloud computing services in the UK is extremely high, particularly among the start-up community. The benefits of high availability, combined with low set-up and ongoing running costs, makes the use of cloud services extremely attractive for businesses that need to focus on generating revenue and scaling.

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

There are no specific legal requirements with respect to the use of cloud computing in the financial services industry; however, a large body of guidance does exist in the UK for financial services firms that are considering the procurement of cloud services. For example:

- The European Union Agency for Network and Information Security guidance entitled 'Secure Use of Cloud Computing in the Finance Sector' (December 2015) contains analysis of the security of cloud computing systems in the finance sector, and provides recommendations. Cooperation between financial institutions, national financial supervisory authorities and cloud service providers is encouraged. ENISA advocates a risk-based approach to developing cloud computing systems in the finance sector.
- The FCA guidance entitled 'Proposed guidance for firms outsourcing to the 'cloud' and other third-party IT services' (November 2015 – currently in consultation phase) outlines the FCA's risk-based

Update and trends

Brexit
The consequences of the UK's 'Brexit' vote is undoubtedly the single biggest issue on the immediate horizon for the UK's fintech sector. We will have to wait for the outcome of the UK government's negotiations with the European Union (which could take several years) to have a clear view of the full impact of the UK's decision to leave the EU. However, any changes to the UK's access to the European single market could have significant implications for the UK fintech sector. In particular, any curb on the ability of fintech businesses to operate in other EU member states on the basis of regulatory permissions granted in the UK ('passporting') could inhibit the growth of UK fintech businesses. Equally, given the reliance many fintech companies have on hiring software engineers from outside the UK, any restrictions that are placed on citizens from the EU moving to and working in the UK (the 'freedom movement of workers') could affect the growth rates of those companies.

FCA review of crowdfunding market
When the FCA introduced the UK's crowdfunding regulations in 2014, it committed to carrying out a full post-implementation review of the crowdfunding market and regulatory framework in 2016. That review process began in July 2016 with a call for input from interested parties. The call-for-input document identified a number of concerns about the UK crowdfunding market, some of which reflect concerns voiced by other commentators over recent months about some industry practices. In particular, the growing influence of institutional investors, promotion and disclosure practices, the practice of platforms pooling investor money and the use of provision funds are all identified as areas of focus for the FCA. The call for input also identified areas of interest in the equity crowdfunding market, which is not currently specifically covered by the UK's crowdfunding regulations. It will not be clear until the end of the consultation process whether any changes will be made to the UK's crowdfunding rules. However, the tone and scope of the call-for-input paper mean that it would not be surprising if the existing regulations are modified and, in some cases, strengthened following the review.

approach to outsourcing of cloud computing. The Guidance states that there is 'no fundamental reason why cloud services (including public cloud services) cannot be implemented, with appropriate consideration, in a manner that complies with our rules'. The guidance contains a table that sets out areas for firms to consider in outsourcing, including how firms should discharge their oversight obligations.
- The 'MiFID Connect Guidance on Outsourcing' (FCA-approved) provides guidance on how to comply with Senior management arrangements, Systems and Controls (SYSC) 8, setting out the relevant SYSC rules and additional information on how to comply with them.

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

There are no specific legal requirements with respect to the internet of things (IoT); however, a large body of guidance on this topic does exist in the UK. For example:
- The Body of European Regulators for Electronic Communications (BEREC) released a report on 'Enabling the IoT' (February 2016), which stated that it believed, in general, that no special treatment of IoT services or machine-to-machine communication is necessary, except for in the areas of roaming, switching and number portability. BEREC recognised the need for a careful evolution of existing EU data protection rules to keep pace with the IoT.
- The European Commission's 'Report on the Public Consultation on IoT Governance and Factsheets' (February 2013) described how the public consultation showed unambiguous consensus on the fact that IoT will bring significant economic and social benefits, in particular in healthcare, independent living, support for the disabled and social interactions, but that concerns persisted as to whether the legal framework could adequately keep up with the pace of development of IoT-enabled services.

Tax

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

The UK has introduced a wide range of tax incentives that are available to fintech companies and investors. The key incentives are set out below, although there are a number of conditions to be met to qualify for each scheme:
- seed enterprise investment scheme (SEIS) – 50 per cent income tax relief and exemption from capital gains tax for investors in high-risk start-up companies;
- enterprise investment scheme (EIS) – 30 per cent income tax relief and exemption from capital gains tax for investors in small high-risk trading companies;
- venture capital trust (VCT) scheme – 30 per cent income tax relief and exemption from capital gains tax for investors in venture capital trusts, which subscribe for equity in, or lend money to, small unquoted companies;
- entrepreneurs' relief – a reduced 10 per cent capital gains tax rate for entrepreneurs selling business assets (only available to directors and employees of businesses);
- investors' relief – the Finance Bill 2016 will extend entrepreneurs' relief to investors in unlisted trading companies, other than directors and employees (who will still benefit from entrepreneurs' relief);
- 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; and
- peer-to-peer loan ISA eligibility – peer-to-peer loans are eligible for inclusion in tax-free ISAs.

A company may raise up to £150,000 under the SEIS and up to a total of £5,000,000 under the SEIS, EIS and VCT schemes. While financial activities are an excluded activity for the SEIS, EIS and VCT schemes, as long as a fintech company is only providing a platform through which financial activities are carried out, such a fintech company should still qualify for those schemes.

Competition

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

Competition authorities in all jurisdictions, including the UK, face a range of potentially complex competition law issues in relation to fintech offerings. These are likely to include:
- the extent to which a fintech solution has or obtains (through growth, acquisition or joint venture) market power and the consequences of this;
- the risks that the definition of any technical standards involved in any jointly developed fintech solution result in other third parties being excluded;
- the extent to which there can be any exclusivity between the finance and technology providers of a fintech offering; and
- the limits of any specified tying or bundling.

The role of 'big data' as a potential source of market power is an important topic currently being considered by various competition authorities throughout Europe and is likely to be relevant in relation to fintech companies.

The FCA has concurrent competition law powers in relation to the provision of financial services, meaning that it has the power to investigate and enforce competition law in the same way as the Competition and Markets Authority, the UK competition authority, as well as being under a statutory general duty to promote competition. As part of this mandate, the FCA considers that it is obliged to create a regulatory environment that would allow innovators and new entrants to succeed. To date, the FCA has been one of the leading regulators at fostering these conditions through schemes such as Project Innovate launched in October 2014, which created the Innovation Hub and more recently the regulatory sandbox (discussed in question 13).

In the UK, the greater use of behavioural economics has become a recent feature of the application of competition law. This branch of economics recognises that it cannot always be assumed that consumers will make rational decisions when presented with choices. This has been found to be particularly relevant in relation to financial services and the UK may well see behavioural economics being applied in relation to the regulation of fintech products or services.

Given the recent Brexit vote there is uncertainty over the future relationship between the UK and the EU. It is difficult to speculate what the impact will be for UK-based fintech companies, but by way of example, the European Commission has outlined its strategy for 'A Digital Single Market for Europe', the terms of which may be more or less relevant depending upon any exit model adopted.

Financial crime

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

There is no legal or regulatory requirement for fintech companies to have anti-bribery or anti-money laundering procedures unless the company is authorised by the Financial Services Authority or carries out business that is subject to the Money Laundering Regulations 2007. Fintech companies, regardless of whether they are authorised, ought to have appropriate financial crime policies and procedures in place as a matter of good governance and proportionate risk management.

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

There is no anti-financial crime guidance specifically for fintech firms. However, firms that are authorised by the FCA should comply with its 'Financial crime: a guide for firms', which is part of the FCA Handbook (www.handbook.fca.org.uk/handbook/document/FC1_FCA_20150427.pdf). In addition the Joint Money Laundering Steering Group has issued guidance for the financial sector (www.jmlsg.org.uk/industry-guidance/article/jmlsg-guidance-current). These documents are helpful for non-authorised fintech firms and may inform their own internal financial crime policies and procedures.

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

There are several basic activities that often trigger licensing requirements in the United States.

Receiving and holding funds belonging to others

In general, any time an entity accepts or receives funds from a member of the public and holds such funds with the promise of making the funds available to the depositor at a later time or transferring the funds to a recipient designated by the depositor, that entity must be licensed.

The entities that receive and hold funds can fall into a wide range of categories. They include deposit-taking banks or credit unions; remittance companies; escrow companies; and bill payment companies. They can also include companies that establish payment accounts for customers, which allow the customer to fund an account that can later be used for shopping, bill payment, legal gambling or general savings.

Non-bank fintech companies that offer these payment services and receive customer funds – whether online, at the point of sale or via mobile applications – must usually obtain a 'money transmitter' or similar licence in each state in which they offer their services, even if the entities have no physical presence in the state. These are not uniform state laws and they are referred to under different names. Sometimes they are referred to as 'money services' licences or 'sale of check' licences. Currently, 48 states plus the District of Columbia require such licences. As a result of recent legislation, by the end of 2017, there will likely be 49 states with such laws and only one state, Montana, without a licensing requirement. For the purposes of this chapter, we will refer to all such entities as 'money transmitters' and such laws as state 'money transmitter' licensing laws. In addition, certain non-bank money service businesses, such as money transmitters, are required to register with the Department of Treasury's Financial Crimes Enforcement Network (FinCEN) for the purpose of assuring compliance with anti-money laundering (AML) rules.

Issuing payment instruments

Companies that issue payment instruments such as cheques, money orders, traveller's cheques and prepaid cards or payment applications also generally require licensing. These instruments are often 'bearer instruments', which means that the holder or possessor is the party that has rights to the funds. As a result, such instruments are often used to pay third parties who receive and rely upon the underlying promise of payment.

As with receiving and holding funds, a non-bank entity that issues or sells payment instruments must also obtain a state money transmitter licence in many states unless the entity comes under an exclusion; for example, entities that sell prepaid cards as agents of a licensed entity do not require licensing themselves.

Transaction processing

In some jurisdictions, companies that facilitate the movement of funds from payers' accounts to recipients' accounts are also required to be licensed, even though they may not actually hold the funds. These entities often receive payment instructions from the payers, format the instructions in accordance with payment network requirements and deliver the instructions so that the funds are moved to the appropriate designated recipient. Payment processors are examples of such entities. Historically payment processors, which generally serve in a back-office function, were not required to obtain licensing, since they were a vendor or agent of a principal such as a bank or a merchant. In recent years, however, regulators have decided that such entities have significant discretionary control over the movement of other people's money – and, therefore, licensing was deemed appropriate.

Entities that engage in the business of transferring funds (such as bill-payment companies or remittance companies) are required, in some jurisdictions, to obtain state money transmitter licences.

Extending credit

Credit has long been a licensed activity, especially consumer credit. The term 'credit' covers a wide range of potential payment products, from revolving credit cards to home mortgages to 'payday lending' to overdrafts and charge cards. Some jurisdictions define credit as any extension of time to pay; others only require licensing if the payment is made in instalments, or if finance charges or interest is charged for the extension of time to pay.

Every state has state laws that require licensing for non-banks that offer loans. The laws are not uniform and vary depending on the nature and size of the loan products.

Currency exchange

Some jurisdictions require licensing for foreign currency exchange or sale, including the exchange or sale of virtual or digital currencies such as bitcoin or etherium. Historically this was an activity that was not licensed because the exchange of currency was a contemporaneous exchange of value; unlike payment instruments or remittances, the payer immediately receives the value converted to a different currency. More recently, however, many states have determined that the currency exchanger holds a position of trust and licensing should be required.

Offering Securities

Securities offerings and transactions in the US are generally regulated at the federal level and not state by state. The definition of 'security' is quite broad and covers many types of financial instruments. The Securities Act of 1933 (1933 Act) requires all offers and sales of securities in interstate commerce to be registered with the Securities and Exchange Commission (SEC), unless an exemption from registration is available. Specifically, sections 5(a) and 5(c) of the 1933 Act generally prohibit any person from using any means of interstate commerce to sell or offer to sell, either directly or indirectly, any security unless a registration statement is in effect or has been filed with the SEC as to the offer and sale of such security or an exemption from the registration provisions applies. Accordingly, every sale of securities must be registered unless an exemption is available.

Frequently, issuers of securities in the US will rely on a 'private placement' exemption to avoid the registration requirements of the 1933 Act. Section 4(a)(2) of the 1933 Act provides that the registration requirements of the 1933 Act do not apply to transactions by an issuer that do not involve any public offering. Rule 506 of Regulation D under the 1933 Act provides a non-exclusive safe harbour for private offers of securities. An issuer that meets the requirements of Rule 506

is deemed to have made an offering that is exempt from registration under the 1933 Act under section 4(a)(2). Operating companies of various sizes and private pooled investment vehicles employing a variety of investment strategies have used the private placement exemption.

Selling and marketing securities
Any person selling securities in the US generally must be registered with the SEC as a broker, unless an exemption applies. Section 3(a)(4) of the Securities Exchange Act of 1934 (1934 Act) defines 'broker' as any person engaged in the business of effecting transactions in securities for the account of others. Section 15(a) of the 1934 Act makes it unlawful for brokers, among others, to use any means of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security unless such broker is registered with the SEC. In addition to being subject to regulations by the SEC, brokers in the US are subject to regulations adopted and administered by the Financial Industry Regulatory Authority (FINRA). FINRA is a self regulatory organisation that, among other things, regulates broker personnel engaged in selling securities. FINRA oversees and administers the Series 7 exam. General securities representatives of brokers must pass the Series 7 exam before selling securities.

Investment advice
Any person providing advice with respect to securities in the US (or providing advice to US persons) generally must be registered with the SEC or a state equivalent regulatory authority, unless an exemption applies. Subject to certain exclusions, section 202(a)(11) of the Investment Advisers Act of 1940 (the Advisers Act) generally defines an 'investment adviser' as any person who, for compensation, is engaged in the business of advising others on securities. Subject to certain prohibitions and exemptions, section 203(a) makes it unlawful for any investment adviser to make use of any means of interstate commerce in connection with its business as an investment adviser unless such investment adviser is registered with the SEC. Generally, investment advisers are prohibited from registering with the SEC unless it manages US$100 million in assets and these advisers must register at the state level.

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

Yes. As noted in question 1, consumer lending is extensively regulated. First, under federal law, the Truth-In-Lending-Act (TILA) and its implementing regulation, Regulation Z, impose significant requirements with respect to disclosures on credit cards and revolving credit accounts, including how the interest charges for loans are determined and displayed. States also have their own lending laws, often focused on smaller loans, such as payday loans, retail purchase loans and extensions of credit from non-banks. In addition, specialised loan laws apply (generally at the state level) to a range of activities including auto loans, home loans, equipment loans, small loans, business loans, and college and education loans.

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

In general, loans are freely transferable unless otherwise agreed by the parties. Nevertheless, there are still a number of considerations affecting transfer of loans. Loans are generally not considered securities that would be subject to US securities laws, although there may be special facts and terms for a specific loan that could warrant additional analysis about this characterisation. As a result, loan trading in the secondary market is governed by the terms of the loan documentation. Typically, loan agreements contain certain restrictions on the assignment of the loans, such as prior obligor consent under some circumstances and eligibility requirements for the loan purchaser to prohibit competitors of the obligors and their affiliates, including affiliated funds, from purchasing the debt. In addition to any restrictions contained in the loan documents, there are also provisions in the documentation prepared by the Loan Syndications and Trading Association for traders that may dictate the timing and other terms of settlement.

Any purchaser of a consumer loan would generally take the loan subject to any claims or defences that a borrower could assert against the originator of the loan. In some states, purchasers or servicers of loans are required to be licensed to engage in those activities. Some states, such as California, limit those to whom a licensed lender may sell loans.

4 Describe the general regulatory regime for collective investment schemes and whether fintech companies would generally fall within the scope of any such regime.

Investment companies
Any investment company making a public offering of its securities in the US must be registered with the SEC, unless an exclusion from the definition of 'investment company' applies. Subject to certain exclusions, section 3(a)(1) of the Investment Company Act of 1940 (1940 Act) generally defines an 'investment company' as an issuer of securities that is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing in securities, or 40 per cent of whose assets are 'investment securities'. Section 7(a) of the 1940 Act generally prohibits any investment company from making a public offering of its securities unless such investment company is registered under section 8 of the 1940 Act.

Exclusions from the definition of investment company
Frequently, issuers of securities in the US will rely on some combination of the private placement exemption and certain exclusions from the definition of investment company to avoid the registration requirements of the 1933 and 1940 Acts (such as Regulation D under the 1933 Act and section 3(c)(1) or 3(c)(7) under the 1940 Act).

Investment advisers
In general, investment companies are externally managed. This means that the investment adviser is a separate entity managing the day-to-day affairs and investments of the investment company. A minority of investment companies are internally managed where the investment company owns the investment adviser. All investment advisers to registered investment companies are required to be registered regardless of its assets under management. Investment advisers that only manage private funds, whether domiciled in the US or outside the US, may be eligible for one of the exemptions from registration, depending on the facts and circumstances.

Fintech
Whether a particular fintech company would fall within the ambit of regulations for investment companies or investment advisers depends on the facts and circumstances. For example, the Commodity Futures Trading Commission (CFTC) has taken the position that bitcoin and other virtual currencies are 'commodities' and, under US federal securities laws, commodities are not considered to be securities. Thus, an issuer who invests solely in virtual currencies is likely to be regulated by the CFTC and not subject to the 1940 Act (though the 1933 Act may still apply). However, notes and other evidence of indebtedness are securities, which raises the issue of investment companies investing in loans from peer-to-peer or marketplace lending platforms. The SEC has not issued guidance on this topic. Further, by design, investment companies rely heavily on third-party service providers. An emerging fintech issue is whether and to what extent distributed ledger technology such as blockchain will supplement or replace traditional service providers. The SEC has not issued guidance on this topic.

5 Are managers of alternative investment funds regulated?

Investment managers are regulated in the US under the Advisers Act. However, unlike the European Union, there is no specific regulation applicable to managers of alternative or private funds; any person providing investment advice may be subject to regulation. The Advisers Act provides an exemption from registration with the SEC for certain foreign private advisers. In addition, certain other investment advisers are exempt from registering with the SEC on the basis that private funds are the adviser's sole clients in the US.

6 May regulated activities be passported into your jurisdiction?

Generally, no. If the regulated activities are conducted by a national bank or federally chartered bank, then such banks, under the doctrine of federal preemption, are generally exempt from complying with state laws, including state licensing laws. The Supreme Court has ruled that these pre-emption rights do not extend to a bank's subsidiaries or agents and there is no pre-emption for state-chartered banks or state licensed money transmitters.

As for entities regulated under state money transmitter licensing laws, there is no 'passporting' permitted. However, there is 'reciprocity' language in a few states. The Uniform Money Services Act (UMSA) is a model money transmitter licensing law that was endorsed by the National Conference of Commissioners of Uniform State Laws (NCCUSL) in 2000. The UMSA includes reciprocity language that excludes licensing entities that have already been licensed in another jurisdiction that has adopted the UMSA legislation. Unfortunately, there are only a handful of states that have passed the UMSA and adopted the reciprocity language.

For entities that are required to register as 'brokers' in the US, there is no provision under the US federal securities laws for passporting a similar registration obtained in another jurisdiction into the US.

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

Yes and no. States that license money transmitters generally expect a licence applicant to have a locally incorporated entity in the US, but the entity does not have to have a physical presence within each state where it does business. It can select one state as its headquarters to operate from across the US.

If a foreign company is seeking a money transmitter licence in the US, it can incorporate in the US, but have its primary operations outside the US. Regulators will expect that there will be some US-based staff – especially in the area of compliance – that will oversee the operation's compliance with US laws, which will file necessary reports and will be available for audits and questions.

Non-US investment advisers and broker-dealers are permitted to register with the SEC without establishing a local office.

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

At this time there is no specific regulation addressing peer-to-peer lending or marketplace lending. Instead, state regulators will scrutinise these businesses to see if they trigger licensing under existing state laws. Even if the underlying individual lenders may not require licensing, there have been actions taken with respect to platforms that offer these services, especially if the regulators feel that the platforms do not provide clear or accurate disclosures. This is particularly true if the platform or marketplace has garnered a high level of consumer complaints.

The Consumer Financial Protection Bureau (CFPB) has enforcement powers over otherwise unlicensed providers of payment services, if they receive what they believe to be a significant level of consumer complaints about such providers.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

Issuers of securities that raise capital in the US, whether as part of a crowdfunding effort or not, are subject to the provisions of federal (and state) laws and regulations. Crowdfunding issuers have typically relied on exemptions from registration under the Securities Act of 1933 such as Regulation D (limiting sales to 'accredited investors,' among other conditions). Small issuers have also relied on registered offerings under Regulation A and many are considering offerings under new Regulation Crowdfunding.

Regulation Crowdfunding allows US issuers to raise up to US$1 million from the public in a 12-month period without going through the usual registration requirements for publicly offered securities. Investors are subject to statutory limits on the amount they can invest in a Regulation Crowdfunding offering. All offerings under Regulation Crowdfunding must be conducted either through a registered broker-dealer or a new type of entity called a 'funding portal' (which is exempt from registration as a broker-dealer). Funding portals are required to register with the SEC and become members of FINRA. Additionally, Regulation Crowdfunding contains special provisions for the registration of 'non-resident funding portals', which are those incorporated in or organised under the laws of a non-US jurisdiction, or having a principal place of business in any place not in the US or its territories. Registration of a non-resident funding portal is conditioned on requirements such as information sharing arrangements between the SEC and a foreign regulator of competent jurisdiction, a registered agent in the US to receive service of process, and an opinion of counsel that such portal can provide the SEC and FINRA with access to its books and records and submit itself to an onsite examination.

In addition, state regulators will scrutinise these businesses to see if they trigger licensing under existing state laws. For example, there are charitable donation laws that must be complied with by donation-based crowdfunding sites. Equity-based crowdfunding businesses must take care to comply with any applicable securities laws.

As with peer-to-peer lending, the CFPB has enforcement powers over otherwise unlicensed providers of payment services if they receive what they believe to be a significant level of consumer complaints about such providers.

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

In general, invoice trading will not trigger separate licensing requirements but could require licensing to the extent that the activity involves collecting consumer receivables, purchasing consumer receivables or, in some states, making loans secured by receivables. Purchases of invoices may be treated as a lending activity if the purchases are not treated as 'true sales' under US accounting rules.

11 Are payment services a regulated activity in your jurisdiction?

Yes, as discussed in question 1, financial services (such as remittances, prepaid cards, bill payments and processing) are all regulated activities. In addition, failure to obtain the necessary licences as discussed above may subject the entity to significant claims and penalties and even criminal liability under 18 USC 1960.

In addition, many of these services are subject to AML laws. FinCEN also requires registration as a money services business (MSB) for some of these activities and will require implementation of an effective AML compliance programme, including identification and verification of customers, monitoring and reporting suspicious activity, and screening customer against sanction lists. Failure to register as an MSB, or report suspicious transactions or to implement an effective AML compliance programme may subject the entity to significant claims and penalties and potentially criminal liability.

Finally, entities that provide payments or financial services that involve holding customer funds (such as remittances, prepaid cards or bill payments) are also likely to be subject to state-abandoned property laws. These laws require that customer funds that lay dormant and are not and have not been used for a designated period of time (often three to five years) must then be paid (or 'escheated') to the state where the entity's customer resides for 'safekeeping'. Failure to make payment of such dormant funds will subject the entity to significant claims and penalties.

12 Are there any restrictions on cold-calling investors or clients in your jurisdiction?

Yes, the US Federal Trade Commission and the US Federal Communications Commission enforce federal statutes and rules that regulate outbound telemarketing activities. In addition, fintech firms that are registered broker-dealers and members of FINRA are subject to FINRA telemarketing rules that require such firms to maintain and consult do-not-call lists, limit the hours of telephone solicitations and prohibit such firms from using deceptive and abusive acts and practices in connection with telemarketing.

13 Does the regulator in your jurisdiction make any specific provision for fintech services and companies?

There is very little governmental financial support for fintech services, although many major banking and financial institutions support fintech incubators. The CFPB has a programme entitled 'Catalyst', which provides a safe harbour to fintech companies experimenting with new and innovative payment services. The fintech company must apply for and receive a 'no action' letter from the CFPB before commencing its activities.

The Office of the Comptroller of the Currency (OCC), the regulator for most large US banks, has indicated a willingness to support 'responsible innovation' in a recent white paper and in requests for comment. This is consistent with the OCC's historical approach to innovation by banks.

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

Yes, general state and federal 'fair practices' and 'fair advertising' rules apply. The CFPB has applied rules to providers of financial services prohibiting unfair deceptive and abusive acts and practices. For certain financial products, for example, prepaid cards, there are specific state and federal requirements regarding what must be disclosed on the card, in this example, and accompanying materials.

In addition, the SEC and FINRA impose a number of requirements with respect to marketing investment management services, collective investment schemes and other financial products. For example, marketing materials distributed by registered broker-dealers are required to comply with specific FINRA rules regarding communications with the public and must file certain marketing materials with FINRA.

15 Are there any regulator-imposed temporary restrictions on financial products in place that are relevant to fintech companies in your jurisdiction?

We are unaware of any such temporary restrictions.

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

The US Department of Treasury Office of Foreign Assets Control (OFAC) restricts dealings from the US and by US persons, located anywhere, with certain individuals and entities and certain countries, including the banking systems of such countries. Accordingly, foreign exchange activities involving such a person or country or the currency of such a country presumably would be restricted. In addition, exports or imports of monetary instruments of more than US$10,000 must be reported to United States Customs and Border Protection. Moreover, certain states require licensing for foreign exchange activities. FinCEN also requires registration for this activity as described in question 11.

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

US federal securities regulations that govern the activities of investment advisers and broker-dealers do not provide exemption for 'reverse solicitations'. However, Rule 15a-6(a)(1) provides that registration as a broker-dealer is not required when a non-US broker-dealer effects and unsolicited trade with or for a US investor. The SEC views 'solicitation' broadly, and entities should carefully analyse whether this exemption would be available.

States that impose licensing requirements generally do so on the basis of activity involving residents of that state. Thus, any sale or loan made to a resident of a state will likely trigger licensing requirements, regardless of which party initiates contact.

18 Are there licensing requirements that would be triggered where the investor or client is a temporary resident in your jurisdiction?

This depends on the facts and circumstances. For example, an issuer relying on an exemption from registration under Regulation S (exemption for offshore offerings), may need to identify another exemption (or register the offering) if a non-US investor purchases the security while temporarily resident or located in the US.

States that impose licensing requirements on lenders do not distinguish between temporary residents and other residents. Such licensing requirements would be triggered based upon the status of the borrower when the loan is made.

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

US investment advisers are required to comply with all provisions of the Advisers Act, irrespective of the location of the client or investor. Non-US registered investment advisers, however, are only required to comply with the Advisers Act with respect to their relationships with US investors. US broker-dealers are required to comply with all provisions of the Exchange Act regardless of the location of their clients.

As noted in question 18, the residency of a borrower, as well as the location of the lender, dictate whether a licence for lending or related activities is required in a specific jurisdiction. Isolated or incidental contact from an investor or client from a third state will generally not trigger licence requirements in such a state.

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

The movement of payments across borders garners particular regulatory attention. If the business is a remittance business, whereby the payment company receives funds from individual consumers for purposes of delivering such funds to a designated recipient, such a business is highly regulated – requiring licences, and compliance with federal and state consumer protection laws, as well as AML laws.

Business customers moving funds may have less consumer protection obligations, but they too require compliance with AML laws and in many states, money transmitter licensing laws. In addition, as described in question 16, OFAC restricts dealings from the US and by US persons, located anywhere, with certain individuals and entities and certain countries. Also, in the case of persons included on the OFAC specially designated nationals (SDN) list, any property or interests in property of an SDN that comes into the possession or control of a US person must be blocked (frozen). Accordingly, a fintech company must assess whether any proposed cross-border activity is restricted by OFAC and involves property that is subject to blocking.

In consideration of the above requirements, all customers (consumers or businesses) and all other parties involved in any proposed cross-border activity should be screened through applicable sanctions lists, such as the SDN list, to ensure that the customer or any other party is not prohibited.

21 Does a third-party referral qualify as an unsolicited approach in your jurisdiction?

As noted in question 19, the concept of an unsolicited approach is not relevant in the US.

22 What licensing exemptions apply where the services are provided through an offshore account in your jurisdiction?

From an Advisers Act and Exchange Act perspective, the location of the account would generally not be relevant.

23 What licensing exemptions apply where the services are provided through a nominee account in your jurisdiction?

From an Advisers Act and Exchange Act perspective, the location of the account would generally not be relevant.

24 What licensing exemptions apply where the services are only ancillary or incidental to other core activities or services in your jurisdiction?

There are limited exemptions from registration as an investment adviser, where the investment advice is incidental in nature to other services being provided (eg, by a lawyer or an accountant). However, this is a fact-intensive analysis that must be reviewed closely.

25 What licensing exemptions apply when dealing with clients that are duly licensed in in your jurisdiction?

The licensing and regulatory obligations imposed on investment advisers and broker-dealers in the US apply regardless of whether their clients are also licensed.

26 What licensing exemptions apply to specific types of client in your jurisdiction?

As noted in question 17, sales of securities to certain types of investors may provide for an exemption from various federal securities laws. For example, a collective investment fund may be exempt from registration under the 1940 Act and the 1933 Act if sales are limited to 'qualified purchasers' as defined in the 1940 Act, who are also 'accredited investors' under Regulation D of the 1933 Act. However, there is no general

professional or sophisticated client exemption with respect to broker-dealer activity or with respect to the Advisers Act.

Securitisation

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

Six basic criteria must be satisfied in order for a contract to be legally enforceable: an offer; an acceptance; legal capacity to contract between the contracting parties; lawfulness of the subject matter of the contract; mutuality of obligation; and consideration. Consideration may be monetary or promissory. In the case of a loan agreement, the advance of funds and the promise to repay the loan with interest represent good consideration.

Marketplace loans (sometimes known as peer-to-peer loans) have generally not involved security agreements because they have traditionally been unsecured loans. Several marketplace lending platforms are trying to accommodate secured credit backed by personal property and real property. Under the Uniform Commercial Code, a security interest attaches to collateral when it becomes enforceable against the debtor. A security interest is generally enforceable against the debtor and third parties with respect to collateral if:

- value has been given;
- the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and either:
  - the debtor has executed a security agreement that provides a description of the collateral; or
  - the collateral is in the possession or control of the secured party pursuant to the debtor's security agreement.

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

Loan assignments and participations are governed by articles 3 and 9 of the Uniform Commercial Code of the applicable state. The steps required for perfection depend on the nature of the interest in the loan that is sold to an investor and also depend on whether the loan is secured or unsecured, and if secured what is the nature of the collateral.

If a whole loan is assigned to an investor, the sale of a promissory note is perfected automatically upon attachment, though it can also be perfected by possession and by filing of a UCC-1 financing statement in the appropriate filing office. The transfer of the promissory note vests in the purchaser such rights as the seller has therein. The attachment of a security interest in a promissory note is also attachment of a security interest in a supporting obligation for the promissory note. However, it would also be important to perfect an assignment of the underlying security interest in accordance with the law governing the security interest in the relevant collateral.

While marketplace lending platforms can and do sell whole loans, they also monetise these loans by depositing them into a trust that then issues pay-through obligations ('platform dependent notes') that are dependent on payments received by the marketplace lending platform on the underlying loans. Under the Uniform Commercial Code a platform dependent note would be considered to be a payment intangible (ie, a participation interest) in the underlying loan. The sale of a payment intangible is perfected automatically upon attachment, though it can also be perfected by filing of a UCC-1 financing statement in the appropriate filing office.

If the transfer is not perfected, an investor's right in the assets would potentially be subject to competing claims of other creditors of the platform. Furthermore, in the event that the platform becomes a debtor in a bankruptcy case the investor would only have an unsecured claim arising from the transfer of the loan or payment intangible to it.

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

In the absence of a contractual provision that requires notification of or consent to assignment, a loan may be assigned without the borrower's notification or consent. However, unless the borrower has received effective notification that the loan has been assigned, it is discharged of its obligations if it pays the lending platform rather than the assignee of the loan.

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

All entities that constitute a financial institution for purposes of the Gramm-Leach-Bliley Act (GLBA) have regulatory obligations with respect to the confidentiality and data security protection of non-public personal or personally identifying information (PII). Whether the special purpose company is a financial institution for the purposes of the GLBA depends on whether the following exception to the GLBA's definition of financial institution applies (see GLBA 15 USC, section 6809 (D)):

> *(D) Other secondary market institutions*
> *Notwithstanding subparagraph (A), the term 'financial institution' does not include institutions chartered by Congress specifically to engage in transactions described in section 6802(e)(1)(C) of this title, as long as such institutions do not sell or transfer nonpublic personal information to a nonaffiliated third party.*

Intellectual property rights

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

Software is protected by copyright as a work of authorship. This may include more than just code itself, such as documentation, user interface designs and other elements of the software. Whether copyright protects application interfaces (APIs) remains an area of active litigation in which the law continues to develop, so fintech companies that are considering using competitive APIs without permission should definitely seek legal counsel for an up-to-date view on this issue.

While registration when a work is created is not strictly required, registering a copyright with the US Copyright Office is required before bringing any enforcement action. Copyright registration is a relatively inexpensive and simple process. Moreover, if works are published, and a registration filing was not made within 90 days of first publication, many potential remedies that are available in an enforcement action for copyright infringement may no longer be available. Accordingly, for companies that rely heavily on copyrights, regular processes for filing for copyrights are often in place. For example, regular periodic registration (eg, quarterly) of new versions of software may be made.

Software (eg, source code) that is kept confidential can be protected both contractually and under federal and state trade secret laws. Reasonable steps must be taken to ensure that confidential software remains confidential in order to maintain trade secret protection.

Systems incorporating software or methods performed by software may also be protected by patents.

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

The US Supreme Court's *Bilski* and *Alice* decisions, and subsequent case law based on these decisions, have significantly reduced the scope of fintech-related inventions that can be patented in the software and business-method space. Many patents on financial services and business methods have been invalidated or are being challenged in the wake of these decisions. However, the exact contours of these limits are still being worked out in the US Patent Office and the courts. Things that look more like pure 'finance' or 'business' methods are unlikely to be patentable (or likely to be invalidated if they are already patented) as they are being found by the Patent Office and the courts to be unpatentable 'abstract' ideas. Technical innovations in fintech that can be characterised as improvements to how computers or networks operate, particularly if they appear technical or engineering in nature, are much more likely to still be patented and survive challenge. Such 'technical' inventions are being found by the courts to contain 'something more' than 'abstract' ideas. While the scope for patents is somewhat reduced compared to five or 10 years ago, the potential for patenting of

new inventions, and the need to avoid existing patents of competitors, remain issues for fintech companies.

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

The default rule regarding whether employers own intellectual property varies somewhat from state to state and is also dependent on the nature of the intellectual property. The copyright for software written by an employee as part of the employee's job is generally registered in the name of the employer as a 'work for hire'. However, in the absence of a contract, inventions, under the majority rule, often only belong to the employer if the employee was specifically 'hired to invent'. And the process for obtaining the title to such inventions without the employee's cooperation is complex and expensive, possibly requiring litigation. Accordingly, in practice, it is strongly preferred to put assignment agreements in place as part of the employment process. Such agreements assign all relevant intellectual property created by the employee in the course of employment to the employer.

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

The default rule is that intellectual property rights, such as copyrights or patents, are initially vested in their author or inventor. Accordingly, absent express contractual provisions, such rights may be initially vested in the contractor or consultant.

It is, therefore, quite important to have contracts in place with contractors or consultants that assign such rights.

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

Trade secrets are protected by state and federal law from misappropriation. Any sort of information that is not generally known or readily ascertainable that conveys an economic advantage may potentially be a trade secret; it need not be technical information. Customer or supplier lists and pricing information are often litigated non-technical examples. The trade secret owner must take reasonable steps to maintain the secrecy of the information. Misappropriation of a trade secret is a tort. Misappropriation includes improper acquisition, use or disclosure of a trade secret. In some more extreme cases, trade secret theft may be a crime.

Confidential information that is not a trade secret can still be protected by a contract that binds the recipient to keep the information confidential.

There are procedures in court proceedings for keeping trade secrets protected during litigation.

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

In the US, brands may be protected as trademarks and service marks.

The US has a federal trademark registration system administered by the US Patent and Trademark Office (USPTO). Having a valid registration gives mark owners much stronger rights and reduces the proofs required in an infringement action; therefore, registration is strongly recommended for any brands with business importance. However, unlike most jurisdictions, in the US rights in trademarks arise initially from use in commerce in the US, not from the registration itself. Use of the brand as a trademark or service mark in connection with the relevant products or services in commerce in the US is required to have enforceable rights, even if the mark is registered. Users of a mark who have not registered may have enforceable rights as well, under both state and federal law, although enforcement of such rights is generally more difficult than enforcing a registered mark. A registered mark where use has been abandoned is subject to cancellation. A declaration of use, attesting to continued use of the mark in commerce in the US, and specimen showing such use are required to renew federal trademark registrations periodically.

If use has not begun, a placeholder application based on 'intent to use' allows acquiring some blocking rights prior to beginning use. These rights are only perfected and enforceable after use begins, but they do block subsequent attempts to register the same or confusingly similar marks. An applicant has up to three years to begin use after their application has been allowed; otherwise they will generally lose the priority right they acquired based on the 'intent to use' application.

There are parallel state registration systems for trademarks as well, but they are not commonly used. For fintech users, state registrations are only something that must be checked when clearing a new brand.

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

In the US, a search of both registered trademarks and applications is strongly recommended. Appropriate search tools should be used because marks need not be identical to cause a problem – confusing similarity can be based on appearance, meaning or sound. As US law gives rights to unregistered prior users, a search for existing unregistered uses of the same or similar marks is also strongly recommended.

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

For patents, potential remedies include injunctions and monetary damages. Monetary damages may include both reasonable royalties and potentially lost profits of the patent holder, making for potentially very large awards when direct competitors assert patents against each other or when the amount of revenue associated with the patented invention is very large.

For copyrights, remedies include injunctions and either but not both of the copyright owner's actual damages (which may be trebled if wilful infringement is found) and any additional profits of the infringer; or statutory damages of between US$750 and US$150,000 per work infringed.

For trademarks, remedies include injunctions, the profits of the defendant and the damages caused to the trademark owner.

For patents, trademarks and copyrights, treble damages and attorneys' fees are potentially available (which is not the case in most US litigation).

For trade secrets and breach of confidentiality injunctions and monetary damages are available. It is possible to get a temporary or preliminary injunction against disclosure while a matter is pending. However, if a temporary or preliminary injunction is desired, a potential plaintiff must act quickly because delay in seeking a temporary or preliminary injunction can be a ground for denying the injunction.

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

The Federal Financial Institutions Examination Council agencies have issued guidance on use of open-source software entitled, 'Risk Management of Free and Open Source Software' (21 October 2004). This guidance applies only to deposit-taking institutions and requires such institutions to apply a risk management process to the use of open-source software.

40 Are there any high-profile examples in your jurisdiction of fintech companies enforcing their intellectual property rights or defending their intellectual property rights against a third party?

Financial services companies are involved in dozens of intellectual property litigations in the US. Two patent cases involving financial services intellectual property have gone to the US Supreme Court in recent years: *Alice Corp Pty Ltd v CLS Bank Intern*, 134 S. Ct. 2347 (2014) and *Bilski v Kappos*, 561 US 593 (2010). Although *Alice* arose out of an infringement lawsuit, the *Bilski* case arose from an appeal of the USPTO denying an applicant a financial services patent.

Data protection

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

There are several different regimes governing the use of personal data, depending upon whether the information is provided directly by the data subject, provided by a third party (eg, credit reporting bureau) or obtained in the course of providing services. Data other than consumer reports (ie, credit reports) cannot be shared with third parties without disclosures to the data subject and an opportunity to opt out

Update and trends

Fintech is in its infancy. It brings technical innovation to financial services, banking and investments to lower costs, increase market access and create new solutions. More an ecosystem than an industry, fintech comprises a broad array of services and products that are affected by legal and regulatory regimes, often in novel and unanticipated ways. Rapid evolution of the regulatory landscape and interdisciplinary regulatory schemes, both within the United States and across borders, will continue as a key trend in this large and fast-growing constellation of industries.

of information sharing. PII is subject to a number of protections; it has been defined as data that can be used to trace an individual's identity, such as their name, social security number, biometric records, etc, alone or when combined with other personal or identifying information. The GLBA requires financial institutions (rather broadly defined) to disclose to consumers what data is collected and for what purposes. Consumers can block usage of their PII for marketing purposes by opting out, but businesses can use PII for other appropriate purposes, such as completing a transaction or investigating fraud. Detailed disclosures regarding the consumer's privacy must be provided to consumers when they establish an account and on an annual basis.

Both federal law and state law impose security requirements and breach notification requirements, although federal data security breach notification requirements apply only to deposit taking institutions. Furnishers of consumer reports are subject to a variety of technical requirements, which are beyond the scope of this outline. Businesses that hold credit card or bank account data are also subject to PCI standards that often impose significant liability if the data is breached or hacked.

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

No. The applicable requirements have been in place for years and broadly impact both traditional and fintech companies. In addition, financial institutions such as registered broker-dealers and investment advisers are subject to Regulation S-P regarding the privacy of consumer financial information.

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

In the US, anonymised data can be used freely for commercial gain.

Cloud computing and the internet of things

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

Cloud computing is prevalent among financial services companies in the US and is becoming increasingly so. This is evidenced, in part, by examination manuals on the use of cloud computing services by federal bank regulators.

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

Use of cloud computing raises third-party vendor risk management issues for financial institutions and financial institutions are responsible for vetting and the ongoing monitoring of the cloud security measures in place. To the extent cloud computing systems are used by registered investment advisers and broker-dealers to create required books and records, such systems must comply with SEC requirements and guidance regarding electronic record-keeping systems.

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

There are currently no laws or regulations in the US that apply specifically to the internet of things. However, existing data privacy and data security laws and regulations would have equal application here as to online services and mobile devices generally. The internet of things is an area, however, that is getting the attention of regulators. Even without specific legislation, the Federal Trade Commission (FTC) (and other regulators) will have jurisdiction to bring actions against device manufacturers and service providers who engage in unfair or misleading acts and practices. Beginning in at least 2013, the FTC began holding workshops and its executives began making speeches on regulatory compliance issues, primarily data privacy and security issues, with respect to the internet of things. On 27 January 2015, the FTC issued a report on the results of its November 2013 workshop. In it, the FTC urges companies to employ the best practices discussed during the workshop, such as 'security by design' methods of manufacture and the use of security risk assessments. Further, companies should minimise the data they collect and retain and should test their security measures before their products are sold. While the report notes that the FTC does not propose specific data security legislation for the internet of things, it continued its call for Congress to enact general data security legislation.

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Tax

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

There are no federal tax incentives specifically earmarked for fintech investments or initiatives, but there are various US tax code provisions intended to stimulate investments in emerging growth companies. Additionally, there are state and local tax incentives that need to be considered on a case-by-case basis as to their applicability for particular fintech investments and businesses.

Competition

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

US antitrust laws, including the Sherman Act, the FTC Act, and state unfair and deceptive acts and practices laws, cover a wide variety of companies, including many fintech firms. Those laws regulate merger and acquisitions as well as commercial activity, and there is often an interplay with competition laws of other countries. While it is difficult to predict the future direction of competition law in the US with respect to fintech, it is instructive to note that the payment card networks have been frequently embroiled in antitrust litigation over their fees or other practices, with these suits sometimes resulting in consent orders and settlements imposing material limitations on their businesses.

Financial crime

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

Yes, depending on their business structure and product offerings, many fintech companies are required to register as a 'money services business' with FinCEN and to have an effective AML compliance programme. All licensed fintech companies will be required to have such a programme, which generally includes policies and procedures, transaction monitoring and reporting of suspicious transactions, identification collection and verification requirements, training, independent audits and the appointment of a chief compliance officer. Even if not technically required by law, it is considered a 'best practice' for any payments-related entity to at least have a voluntary AML compliance programme.

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

Yes. FinCEN maintains a website focused on non-bank 'money services businesses': www.fincen.gov/financial_institutions/msb/.

There are numerous trade associations that offer guidance to members regarding AML compliance, such as the Network Branded Prepaid Card Association (see http://nbpca.org) and the Electronic Transactions Association (see www.electran.org/about).

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