

Fintech 2020

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Fintech

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Contributing editors**Angus McLean and Penny Miller****Simmons & Simmons**

Lexology Getting The Deal Through is delighted to publish the fourth edition of *Fintech*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria, Gibraltar, Ireland, Kenya and South Africa.

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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.

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



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FINTECH LANDSCAPE AND INITIATIVES

General innovation climate

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

Ireland has a very active fintech scene and is one of the leading jurisdictions for fintech start-ups and corporate innovation in Europe. In addition, as Brexit looms, many payments and e-money firms that previously provided services across the EU via a UK payments or e-money licence have sought to obtain authorisation by the Central Bank of Ireland (the Central Bank) so as to ensure continuity of operations. This has led to a very significant increase in the number of licensed payments and e-money firms, to 14 and eight respectively, and there are multiple further licence applications in the pipeline.

Ireland has won an outsized share of European investment in corporate innovation labs, with many global financial services groups establishing their innovation labs in Ireland. Accelerator programmes are also expanding their activities in Ireland, with Dublin being added as one of two accelerator locations by the NadiFin FinTech accelerator programme and the National Digital Research Centre expanding its activities outside Dublin to Waterford and Galway. Dublin remains the hub for fintech activities in Ireland, but other regional centres are also seeing growth.

Notwithstanding the burgeoning start-up scene, digital challenger banks have not penetrated the Irish market to any significant extent and there are currently no home-grown challenger banks. European digital operators have passported their services into Ireland but have not yet posed an existential threat to traditional Irish banking houses. Robo-advice has yet to make an appearance in the mainstream investments market. Many life and health insurers are now investigating the potential incorporation of wearable devices into insurance underwriting, and some of the main motor insurers have launched safe driving apps that provide telematics-based discounts for drivers.

Government and regulatory support

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

The government of Ireland is strongly supportive of fintech and in its recently revised Strategy for the International Financial Services Sector ('Ireland for Finance 2025') has stated its commitment to developing Ireland as a global leader in the financial services sector, creating an environment in which both indigenous and multinational firms can draw on key government incentives and supports to grow their businesses. The main state business and employment promotion agencies, IDA Ireland and Enterprise Ireland, provide a range of supports for fintech operations at all levels of development, and the state investment fund

(ISIF) has made multiple venture capital or equity investments in promising fintech start-ups.

On 20 April 2018, the Central Bank launched its Innovation Hub. This is a direct and dedicated point of contact for firms developing or implementing innovations in financial services based on new technologies. This was to accommodate greater interaction with the growing number of fintech businesses looking to set up operations in Dublin, or expand their existing operations both in the regulated and unregulated space.

FINANCIAL REGULATION

Regulatory bodies

3 | Which bodies regulate the provision of fintech products and services?

There is only one financial services regulator in Ireland, the Central Bank, which is responsible for authorising and supervising all providers of regulated financial services. The Central Bank is responsible for both prudential supervision and conduct of business supervision of regulated entities which it has authorised. Where a regulated firm has been authorised by a supervisory authority in another EU or EEA jurisdiction, the home state regulator will be responsible for prudential supervision but the Central Bank will be responsible for conduct of business supervision in Ireland. The Single Supervisory Mechanism at the European Central Bank also directly supervises significant credit institutions and has exclusive competence for the authorisation of credit institutions (other than branches of third-country credit institutions).

Regulated activities

4 | Which activities trigger a licensing requirement in your jurisdiction?

Whether a fintech business needs to hold a financial services authorisation will depend on the nature of the activities that the firm engages in. As far as investment-related activities are concerned, Directive 2014/65/EU (MiFID II) was transposed into Irish law by the European Union (Markets in Financial Instruments) Regulations 2017 (the Irish MiFID II Regulations). Engaging in any of the investment services and activities listed in MiFID II, such as providing investment advice or executing client orders, is a regulated activity requiring authorisation. Other parts of the MiFID II package also have direct effect in Ireland.

Engaging in banking business requires authorisation under the Central Bank Act 1971. The European Union (Capital Requirements) Regulations 2014 transposed the Capital Requirements Directive 2013/36/EU (CRD IV) into Irish law and the requirements for obtaining an Irish banking licence are based on the transposition of the CRD IV package. Other parts of the CRD IV package also have direct effect in Ireland. Banking business means taking deposits or other repayable

funds from members of the public and granting credit for own account. There is a restriction in the 1971 Act, in the absence of an exemption from the Central Bank, which prohibits anyone from using the term 'bank' in their name or holding themselves out as a bank without holding the necessary authorisation. Ireland also has a regime for authorising branches of credit institutions established in third countries (third country branches) under section 9A of the Central Bank Act 1971.

Consumer lending

5 | Is consumer lending regulated in your jurisdiction?

Subject to very limited exceptions, providing cash loans to individuals (not just consumers) in Ireland is a regulated activity requiring authorisation as a retail credit firm under the Central Bank Act 1997, unless the lender is otherwise authorised to provide such credit, for example, a bank. This is an Irish domestic licensing regime and does not derive from an EU law obligation.

Multiple aspects of consumer lending are also regulated (at a conduct-of-business level) under the Consumer Credit Act 1995 and the European Communities (Consumer Credit Agreement) Regulations 2010, which regulate the form and content of credit agreements. The 1995 Act and the 2010 Regulations implement the provisions of Directive 87/102/EEC as amended, and Directive 2008/48/EC.

The Central Bank's Consumer Protection Code 2012 and associated addenda (the CPC) are also relevant. The CPC applies to all 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 know-your-customer, to establish the suitability of the product and adhere to lending and advertisement requirements.

There are also separate requirements for mortgage lending to consumers, including the housing loan requirements under the Consumer Credit Act 1995, European Union (Consumer Mortgage Credit Agreements) Regulations 2016, implementing the provisions of Directive 2014/17/EU and the Central Bank's Code of Conduct on Mortgage Arrears.

Secondary market loan trading

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

Part V of the Central Bank Act 1997 regulates credit servicing, which includes holding the legal title to loans made by regulated financial services providers to individuals and small to medium-sized enterprises (SMEs). Credit servicing is a regulated activity requiring authorisation by the Central Bank of Ireland. Acquiring the beneficial interest in such loans is not, however, a regulated activity, although there are associated licensing requirements applicable to entities that provide administration or servicing in respect of such loans. Trading in non-SME corporate loans is not, generally speaking, a regulated activity in Ireland.

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

Collective investment schemes

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

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, 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 2019 (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 of the European Union (Alternative Investment Fund Managers) Regulations 2013 (as amended) (the AIFM Regulations), which implement the Alternative Investment Fund Managers Directive 2011/61/EU (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.

Fintech companies, whether providing alternative finance products or otherwise, would not typically fall to be regulated as investment funds. However, fintech firms that fall within the definition of alternative investment funds (see question 8) would require authorisation. Note that fintech companies that provide services to investment funds may require authorisation if they are providing regulated depositary or administration services. Depositaries and administrators to investment funds may also engage fintech firms, in which case applicable Central Bank outsourcing requirements may apply, although in general, the fintech service providers would not themselves require authorisation.

Alternative investment funds

8 | 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.

Peer-to-peer and marketplace lending

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

There is currently no distinct regulatory regime for peer-to-peer or marketplace lending in Ireland. Some of the regimes described in this chapter (eg, retail credit) may, however, be relevant depending on the nature of the specific activities engaged in and a regulatory analysis of the proposed process flow is therefore always advisable. See also question 10.

Crowdfunding

10 | Describe any specific regulation of crowdfunding in your jurisdiction.

Crowdfunding is not currently specifically regulated in Ireland, assuming it does not involve deposit-taking, which may attract banking regulation, or the promotion of equity investments, which may attract prospectus regulation. However, some of the other regimes described in this chapter (eg, payment services) may also be relevant depending on the nature of the specific activities engaged in and a regulatory analysis of the proposed process flow is therefore always advisable.

In March 2018, the European Commission presented a proposal for a regulation setting out a regulatory regime for crowdfunding service providers, which would apply to crowdfunding service providers involved in either peer-to-peer business lending where the investor has an expectation of a financial return or the investment crowdfunding model, where investors receive shares or bonds in return for their investments. If adopted, the regulation will allow in-scope platforms to apply for an EU passport based on a single set of rules. To complement the new regulation on crowdfunding, the European Commission has also proposed a directive amending MiFID II.

The Irish Department of Finance published a Consultation Paper on the Regulation of Crowdfunding in April 2017, followed by a feedback statement. The government's Ireland for Finance 2025 Strategy Paper in March 2019 included a proposal to regulate crowdfunding in Ireland and enact a domestic regulatory regime, in parallel with the European regulation, to ensure sufficient consumer protection for unsophisticated investors and to facilitate the growth of crowdfunding as an alternative source of finance for Irish SMEs.

Invoice trading

11 | Describe any specific regulation of invoice trading in your jurisdiction.

As mentioned above, holding title to loans advanced to consumers and SMEs can constitute credit servicing, requiring licensing under the Central Bank Act 1997 in certain circumstances. At a conduct of business level, the Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Lending to Small and Medium-Sized Enterprises) Regulations 2015 apply to regulated financial services providers and regulate the provision of credit by a regulated entity to micro, small and medium-sized enterprises in Ireland. 'Credit' is broadly defined as a deferred payment, cash loan or other similar financial accommodation, including hire purchase, invoice discounting and the letting of goods. There are no regulations specific to invoice trading, described as such, in Ireland.

Payment services

12 | Are payment services regulated in your jurisdiction?

Yes. The provision of payment services is a regulated activity requiring authorisation under the European Union (Payment Services) Regulations 2018 (the PSD Regulations), which transpose Directive 2015/2366/EU (PSD2) into Irish law. Ireland's implementation of PSD2 through the PSD Regulations was consistent with the principle of maximum harmonisation and as such the PSD Regulations reflect the requirements of PSD2 itself.

Where PSD2 does not apply, there is a domestic regime under Part V of the Central Bank Act 1997 which regulates 'money transmission business'. Money transmission business is defined as a business that comprises or includes providing a money transmission service to members of the public.

Open banking

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

Yes. One of the main aims of PSD2 was to increase competition in the payment sector, introduce open banking and facilitate access by third-party providers to a user's account held with their account servicing payment service provider (usually a bank). The Strong Customer Authentication requirements will come into effect in September 2019 and this has required account servicing payment service providers to develop and test APIs to facilitate open access by third-party providers.

Insurance products

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

Any entity that carries on insurance or reinsurance business in Ireland (ie, an insurance or reinsurance underwriter) requires an authorisation in accordance with the requirements of Directive 2009/138/EC (Solvency II) as implemented in Ireland by the European Union (Insurance and Reinsurance) Regulations 2015.

The European Union (Insurance Distribution) Regulations 2018 (the IDD Regulations) came into force on 1 October 2018 and transpose the Insurance Distribution Directive (EU) 2016/97 into Irish law. The IDD Regulations set out authorisation and ongoing regulatory requirements for any person engaged in 'insurance distribution' in Ireland. This is broadly defined to include advising on, proposing, or carrying out other work preparatory to the conclusion of contracts of insurance, of concluding such contracts, or of assisting in the administration and performance of such contracts. Any fintech firm that sells or markets insurance products in Ireland (as a broker or agent) is likely to require authorisation in accordance with the IDD Regulations.

Credit references

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

The provision of third-party credit referencing or credit information services is not specifically regulated in Ireland, but historically this activity has not been widespread – credit checking was conducted directly by lenders themselves. Reflecting the fragmented credit information formerly available in Ireland, the Credit Reporting Act 2013 and associated regulations provide for the establishment and operation of a statutory central credit register (CCR) system, established and operated by the Central Bank. Credit providers in Ireland are required to provide information to the Central Bank for entry to the CCR and are also obliged to make an enquiry in respect of relevant credit applications.

CROSS-BORDER REGULATION

Passporting

16 | Can 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 the 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 in general adopt a gold-plating approach, and in general local conduct of business rules are not excessively onerous.

Requirement for a local presence

17 | Can 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.

The Central Bank, as the regulatory body responsible for authorising firms providing regulated financial services in Ireland, applies minimum substance requirements depending on the nature, scale, complexity and risk profile of the firm and the proposed activities and customers.

SALES AND MARKETING

Restrictions

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

There is no cross-industry financial promotions regime under Irish law and the promotion, sale and marketing of particular financial services and products are governed by sector-specific requirements, for example under the IDD Regulations, the CPC or the Irish MiFID Regulations. These regimes set out rules in relation to offering financial services and products, disclosure and transparency requirements for advertising and rules relating to incentives for the sale of financial products and services to customers in Ireland, among other matters.

CHANGE OF CONTROL

Notification and consent

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

Most regulated businesses operating in Ireland are subject to change of control regimes that require direct and indirect acquisitions and disposals of 'qualifying holdings' (10 per cent or more) to be notified to relevant competent authority. For firms authorised in Ireland the notification is made to the Central Bank, which then has a specific time period to review the change of control and request further information, confirm no objection, or object to the change. For credit institutions, the European Central Bank also has a role in the assessment of change of control notifications.

FINANCIAL CRIME

Anti-bribery and anti-money laundering procedures

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

The Criminal Justice (Corruption Offences) Act 2018 (the Act) overhauled Irish anti-corruption laws and introduced a number of new offences, including a corporate liability offence that allows for a corporate body to be held liable for the corrupt actions committed for its benefit by

any director, manager, secretary, employee, agent or subsidiary. The single defence available is demonstrating that the company took all reasonable steps and exercised all due diligence to avoid the offence being committed. Many firms are now implementing robust procedures and delivering training to staff on anti-bribery and corruption rules as a result.

Any fintech company which is a 'designated body' for the purposes of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (CJA) will be subject to anti-money laundering (AML) and counter-terrorist financing (CTF) requirements. 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 and are required to register with the Central Bank for that purpose. Fintech providers that are not regulated should therefore check on a case-by-case basis whether they are subject to the CJA.

The current position is that digital currencies or assets are not generally recognised as being 'money' for AML purposes, which triggered the amendments set out in the Fifth Money Laundering Directive (EU) 2018/843 (MLD5), to bring digital currency custodian wallet providers, and providers engaged in exchange services between digital currencies and fiat currencies, within its scope. MLD5 is expected to be transposed into Irish law by January 2020.

Guidance

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

There is nothing specific to fintech companies. In line with other regulators, the Central Bank has generally increased its focus on AML/CFT and cyber risks across all regulated financial services. The Central Bank issued best practice guidance on cyber security within the investment firm and fund services industry in September 2015, followed by cross-industry guidance on information technology and cybersecurity risks in September 2016. The Central Bank will also expect relevant firms to apply European Banking Authority (EBA) guidelines and technical standards published under PSD2 and other specific regimes, as applicable. There are also AML/CFT guidelines applicable to fintech business that are 'designated persons' for the purposes of the CJA (see question 20).

PEER-TO-PEER AND MARKETPLACE LENDING

Execution and enforceability of loan agreements

22 | 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.

There are additional requirements for specific types of loan agreement, for example under the European Communities (Consumer Credit Agreements) Regulations 2010, the Consumer Credit Act and the European Union (Consumer Mortgage Credit Agreements) Regulations 2016.

A deed is necessary for certain types of transactions, including property-related transactions. Deeds made by individuals must be signed, and Irish law recognises electronic contracts and signatures in accordance with the requirements of the Electronic Commerce Act 2000

and Regulation 910/2014 on electronic identification and trust services for electronic transactions.

Assignment of loans

- 23 | What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected? Is it possible to assign these loans without informing the borrower?

There are two main types of assignments of legal rights under Irish law: a legal assignment and an equitable assignment. Irish law is similar to English law in this regard. The distinction can be important at point of enforcement and in general terms, a legal assignment is preferable. To create a legal assignment of a debt, 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. Part of a debt, or other legal chose in action, may not be legally assigned; only the whole debt may be legally assigned.

The CPC requires a regulated entity to provide two months' notice before transferring any part of its regulated activities (including loans) to a third party. This obligation only applies to a regulated entity, which would include regulated lenders and also regulated credit servicing firms appointed to hold the legal title to, or service, the loans. Assuming there is no prohibition on assignment without the consent of the borrower under the terms of the loan, Irish law would not otherwise require the borrower to be informed of the assignment. However, any such assignment without notice would take effect as an equitable assignment (see above).

Securitisation risk retention requirements

- 24 | Are securitisation transactions subject to risk retention requirements?

The Securitisation Regulation (Regulation EU 2017/2402), which became directly applicable across the EU on 1 January 2019, applies in Ireland. It requires institutional investors to ensure that the originator, sponsor or original lender of a securitisation retains at least a 5 per cent net economic interest in the securitisation.

Securitisation confidentiality and data protection requirements

- 25 | Is a special purpose company used to purchase and securitise peer-to-peer or marketplace loans subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

Where the special purpose vehicle is established in Ireland and controls personal data, it will be subject to the full scope of Ireland's data processing laws, as outlined in question 31. Irish incorporated companies, partnerships or other unincorporated associations formed under the law of Ireland, and persons not falling within the foregoing but who maintain in Ireland an office, branch or agency, or a regular practice will be established in Ireland for these purposes. Data controllers that make use of equipment in Ireland for processing data can also fall within the scope of Ireland's data processing laws in certain circumstances. 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 at common law is unlikely to apply.

ARTIFICIAL INTELLIGENCE, DISTRIBUTED LEDGER TECHNOLOGY AND CRYPTOASSETS

Artificial intelligence

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

There are no specific rules governing the use of artificial intelligence, including in relation to robo-advice, in Ireland. However, a regulated financial service provider would need to comply with applicable conduct and regulatory requirements in applying artificial intelligence (and robo-advice) to its regulated activities and would also need to ensure that it complies with Irish equality legislation (the Equal Status Acts 2000–2015) when using such technology to determine access to services. The Central Bank has issued a discussion paper relating to the impact of such innovation on its CPC and the delivery of financial services to consumers in Ireland.

Distributed ledger technology

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

There are no specific rules governing the use of distributed ledger technology or blockchain in Ireland, but a regulated financial service provider would need to comply with applicable conduct and regulatory requirements in applying such technologies to its regulated activities. The Central Bank has issued a discussion paper relating to the impact of such innovation on its CPC and the delivery of financial services to consumers in Ireland.

Cryptoassets

- 28 | Are there rules or regulations governing the use of cryptoassets, including digital currencies, digital wallets and e-money?

Assuming the cryptoassets are not financial instruments or other form of collective investment, there is no regulatory framework governing cryptoassets in Ireland. When MLD5 is transposed into Irish law, this will impose AML/CFT requirements on cryptoasset exchanges and wallet providers.

Digital currency exchanges

- 29 | Are there rules or regulations governing the operation of digital currency exchanges or brokerages?

Assuming the digital currency is not linked to any financial instruments and the exchange is not engaging in any other regulated activity, there is no regulatory framework governing the operation of digital currency exchanges or brokerages. When MLD5 is transposed into Irish law, this will impose AML/CFT requirements on digital currency exchanges and providers who exchange fiat currencies for digital currencies.

Initial coin offerings

- 30 | Are there rules or regulations governing initial coin offerings (ICOs) or token generation events?

There are no laws specific to ICOs and offerings of digital assets in Ireland, and it is possible, depending on the nature of the digital assets, that the offering, holding or trading of such assets may fall outside current securities or prospectus law, financial services regulation and other laws.

DATA PROTECTION AND CYBERSECURITY

Data protection

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

The General Data Protection Directive (Regulation 2016/679) (GDPR) has had effect in Ireland since 25 May 2018, and is supplemented by the Data Protection Act 2018. The GDPR is intended to harmonise further the data protection regimes within the EU and a full account of its impact is outside the scope of this chapter. For fintech operators, anonymisation and aggregation of data for commercial gain may be important. Aggregation of data for commercial gain will only be permissible where the collection, aggregation and commercial use of the data meets GDPR requirements. 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. This is a complex area and any fintech operator considering engaging in such techniques should seek appropriate specialist advice.

Cybersecurity

- 32 | What cybersecurity regulations or standards apply to fintech businesses?

The Central Bank issued best practice guidance on cyber security within the investment firm and fund services industry in September 2015, followed by cross-industry guidance on information technology and cybersecurity risks in September 2016. The Central Bank will also expect relevant firms to apply relevant ESA guidelines, whether issued by the EBA or the European Securities and Markets Authority (such as the Guidelines on security measures for operational and security risks under PSD2 and other specific regimes, as applicable).

OUTSOURCING AND CLOUD COMPUTING

Outsourcing

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

There are multiple sector-specific requirements governing outsourcing, for example, under the MiFID II and Solvency II regimes. For credit institutions, payments and e-money firms, the EBA has issued extensive Guidelines as of February 2019. The Central Bank takes an active interest in compliance by regulated firms with outsourcing requirements and in November 2018, published a paper 'Outsourcing – Findings and Issues for Discussion', highlighting the most obvious and minimum supervisory expectations for regulated firms around the management of outsourcing risks.

Cloud computing

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

In December 2017, the EBA issued final guidance for the use of cloud service providers by banks, payment firms and e-money firms titled 'Recommendations on outsourcing to cloud service providers'. For other regulated activities, the Central Bank is likely to apply relevant

outsourcing requirements, and will have a specific focus on security issues.

INTELLECTUAL PROPERTY RIGHTS

IP protection for software

- 35 | 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.

IP developed by employees and contractors

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

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).

Contractors and consultants (who are not employees) are generally not subject to the default position described above and, unless the agreement between the contractor or consultant includes an assignment or other transfer of intellectual property to the customer, the contractor or consultant will own any intellectual property rights generated during the course of the work. Ownership of such intellectual property, if related to the subject matter of employment, should be addressed through the relevant contract.

Joint ownership

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

Yes. Joint owners of patents cannot assign or grant a licence of an interest in a patent or a design right without the consent of all other joint owners. Under the Trade Marks Act 1996 (as amended) a joint owner may sue another joint owner for trademark infringement where the trademark is used in relation to goods or services for which all joint owners have not been connected in the course of trade. On the basis of this legislation, we would expect that the consent of all joint owners is required for a licence of the trademark to be given.

Although the Copyright Act 2000 (as amended) is silent as to the rights of joint copyright owners, the current common law position appears to suggest that the consent of all co-owners is required for the grant of a licence to third parties.

Trade secrets

- 38 | 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.

Branding

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

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 an EU trademark) or internationally. Trade and service mark rights give registered owners certain rights to prevent others using identical or confusingly similar trademarks to their registered mark.

Brand owners can also rely on unregistered trademark rights through the common law tort of passing-off. This allows the owner to prevent others from damaging their goodwill with customers by using branding or get up that is identical or confusingly similar to their own.

For certain branding (particularly complex branding with artistic elements), copyright protection may also be available.

Remedies for infringement of IP

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

The exact remedies available to individuals or companies depend 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.

COMPETITION

Sector-specific issues

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

There are no competition issues that are specific to fintech companies, nor do we expect that there will be any that become an issue in the future.

TAX

Incentives

42 | 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 Irish corporation tax rate of 12.5 per cent, there are a number of further Irish tax provisions that encourage innovation and investment in fintech in Ireland, including:

- a 25 per cent tax credit for qualifying R&D expenditure carried on within the EEA. This tax credit is in addition to the normal business deduction for such R&D expenditure (at the 12.5 per cent rate), thus providing relief for expenditure on R&D at an effective rate of 37.5 per cent. These credits may also be surrendered by the company to key employees actively involved in R&D activities, thereby reducing the effective rate of Irish income tax for such employees;
- a best-in-class 'knowledge development box' that complies with the OECD's 'modified nexus' standard. This can reduce 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 relief can also be claimed in conjunction with the R&D tax credit;
- tax depreciation for certain intangible assets. Such assets can be amortised for Irish corporation tax purposes either in line with their accounting treatment or on a straight basis over 15 years;
- the Employment and Investment Incentive (EII) and Start-up Refunds for Entrepreneurs (SURE) schemes, which allow individual investors in fintech companies to obtain Irish income tax relief (of up to 41 per cent) on investments made, in each tax year, into certified qualifying companies. Relief under the EII is available in respect of funding of up to €15 million and is available until 2020;
- entrepreneur relief, which allows for a capital gains tax rate of 10 per cent on the disposal of certain qualifying business assets up to a lifetime amount of €1 million;
- an extensive double tax treaty network, totalling 74 treaties, that prevents the taxation of the same portion of a company's income by multiple jurisdictions;
- start-up relief, which provides for a reduction in corporation tax liability for the first three years of trading for companies of a certain size provided the company was incorporated on or after 14 October 2008 and began trading between 1 January 2009 and 31 December 2018. This relief can be claimed on both profits from trading and on capital gains; and
- a stamp duty exemption for transfers of intellectual property.

Increased tax burden

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

There are currently no proposals at Irish national level to significantly increase tax or administrative costs for fintech companies in Ireland. The OECD has launched a new project on the tax challenges of digitalisation. Proposals in respect of this project should be made by the end of 2020.

IMMIGRATION

Sector-specific schemes

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

There are no specific immigration schemes available for fintech business, or the technology and financial sectors, in Ireland. The ordinary rules in relation to employment permit requirements apply.

UPDATE AND TRENDS**Current developments**

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

We expect Ireland to continue to develop as a leading domicile in this area. We also expect the Central Bank to follow best EU practice in its regulation of the sector and to adopt a relatively accommodating approach to fintech innovation, but we do not necessarily expect the Central Bank to introduce a specific sandbox regime in Ireland.

The logo for Matheson, featuring the word "Matheson" in a white serif font with a thin underline, set against a dark grey rectangular background.

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