Fintech

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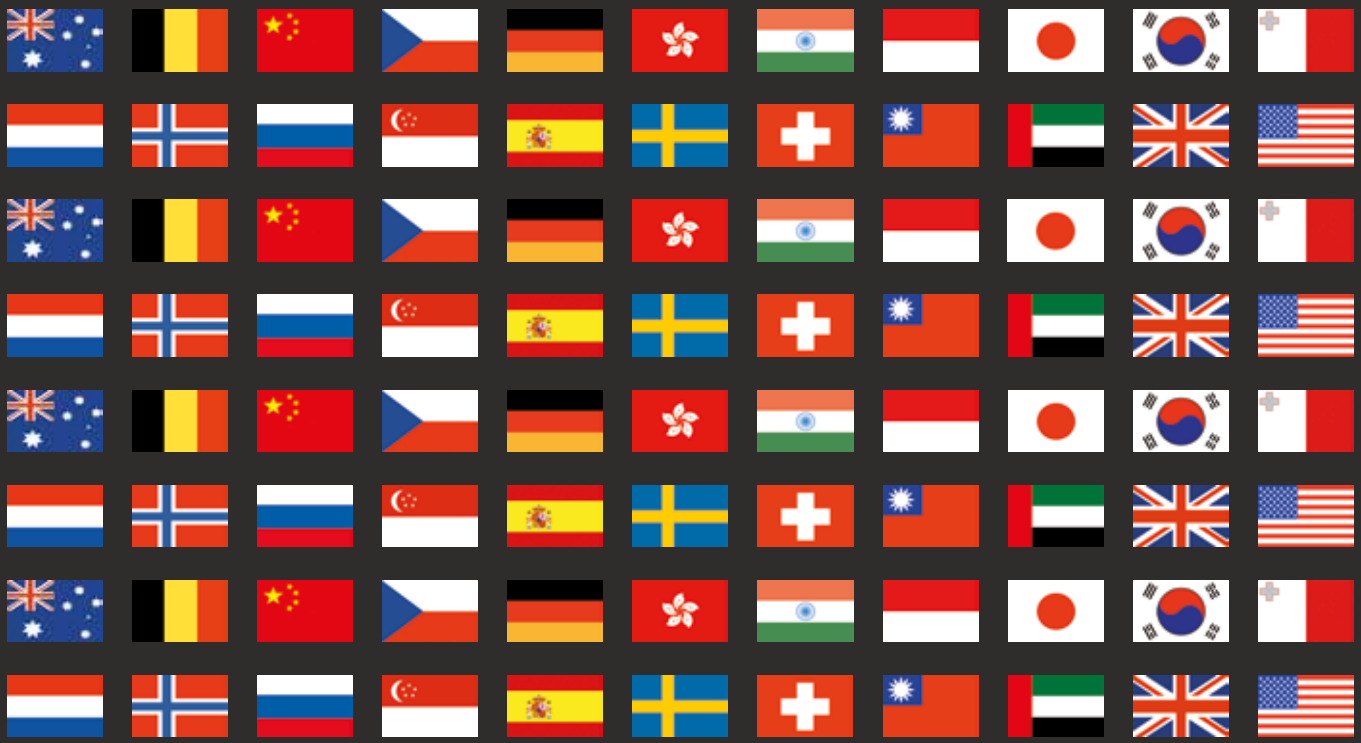

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GETTING THE DEAL THROUGH

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Fintech 2019

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Fintech 2019

Third edition

Getting the Deal Through is delighted to publish the third 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 continued assistance with this volume.

GETTING THE DEAL THROUGH

London
August 2018

Malta

Olga Finkel, Ruth Galea, Gaby Zammit and Erika Micallef

WH Partners

Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

In Malta, financial services are primarily regulated under the Financial Institutions Act, Chapter 376 of the Laws of Malta (the Financial Institutions Act); Banking Act, Chapter 371 of the Laws of Malta (the Banking Act); and Investment Services Act, Chapter 370 of the Laws of Malta (the Investment Services Act). The Malta Financial Services Authority (MFSA) is the single regulator of the financial services industry and is responsible for licensing, regulating and supervising all licensable financial services.

Under the Investment Services Act, activities consisting of reception and transmission of orders in relation to one or more instruments, acting to conclude agreements to buy, sell or subscribe for one or more instruments on behalf of other persons, management of investments belonging to another person, trading against proprietary capital resulting in conclusion of transactions in one or more instruments and the provision of investment advice constitute licensable activities. Foreign exchange trading and binary option trading would fall within the scope of the Investment Services Act.

The Financial Institutions Act regulates quasi-banking activities, and while it regulates payment services activities (by transposing the provisions of the EU Payment Services Directive (2015/2366/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 borrowing or raising money from the public with the purpose, in either case, of lending it in whole or in part to others.

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

Consumer lending is a regulated activity under the Maltese law that requires a licence under the Financial Institutions Act or, if such activity is financed from deposit-taking activities, under the Banking Act. Both Acts regulate lending without distinguishing between consumer and commercial lending.

Pursuant to the Financial Institutions Act, any person who regularly or habitually carries out the activity of lending (see question 1), in or from Malta falls under the definition of a 'financial institution' and must therefore be in possession of a licence granted by the MFSA and is subject to ongoing supervision by the MFSA.

Credit institutions regulated under the Banking Act may also engage in consumer lending however, unlike financial institutions, they can also accept deposits from the public. These deposits are then employed in funding the lending activity. Similarly, to financial institutions, the MFSA is responsible for issuing credit institution licences and supervising the banks.

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

Save for any applicable standard procedural requirements on the assignment or transfer of loan agreements, there are no restrictions on trading loans in the secondary market under Maltese law.

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

The Investment Services Act establishes the regulatory framework for collective investment schemes (CISs) while the Investment Services Rules, which are issued by the MFSA pursuant to the Act, set out the basic principles that licensed collective investment schemes must adhere to and this includes what service providers the scheme must appoint; the investment restrictions that are applicable to the type of scheme; and the requirements concerning the issue of an offering document or prospectus.

Until recently, CISs were regulated by a different framework under which there were 13 CIS regulatory frameworks available to promoters. The MFSA has now consolidated the regulatory regime for CISs so as to improve the Maltese frameworks for CISs. The revised fund regime provides for three principal categories of funds, namely:

- Retail CISs (consisting of undertakings for collective investment in transferable securities (UCITS) and retail alternative investment funds (AIFs));
- Qualifying professional investor funds (PIFs) (promoted to qualifying investors having a minimum investment requirement of €100,000 and who satisfy other conditions); and
- AIFs that may be marketed to professional investors as defined under the Markets in Financial Instruments Directive (MiFID) or to qualifying investors (as above) (with notified AIFs being the only subcategory).

Whether the activities of fintech companies providing alternative finance products or services would fall within the scope of current CIS legislation depends on the nature of their operations and particularly on whether the product or service offered falls within the definition of a CIS. Generally, fintech companies providing alternative finance products or services do not fall within the scope of the regime.

The Investment Services Act defines 'investment service' as 'any service falling within the First Schedule when provided in relation to an instrument: Provided that the service of Management of Investments in terms of the First Schedule shall also include the collective portfolio management of assets of a collective investment scheme when provided in relation to an asset that is not an instrument within the meaning of the Second Schedule'. Thus, Maltese law allows room for manoeuvre for alternative finance products provided by fintech companies to be managed and fall under the scope of the CIS regime, even if their alternative product does not fall under the Second Schedule definition of an instrument.

In Malta, there are two types of CISs that are more geared towards making alternative investments. These CISs are PIFs and AIFs. The regulations surrounding PIFs and AIFs make it possible for these funds to operate and trade their units exclusively via the services of a fund marketplace platform that is licensed and regulated by the MFSA.

Similar to exchange traded funds, the aim of the AIF or PIF could be to purchase and store virtual currencies or invest in equity of crowdfunding start-ups. AIFs and PIFs, which are promoted to professional and qualifying investors, have the flexibility of investing in assets that are not defined as instruments within the meaning of the Second Schedule of the Investment Services Act.

The services that are authorised to be offered to PIFs and AIFs are administration, management and custody. The entities that offer these services may outsource fintech companies that provide them with alternative services, but the administrator, manager and custodian would not generally be classified as fintech companies.

In 2017, the MFSA issued a consultation document that was later followed by a feedback statement in 2018 on the proposed regulation of CISs investing in virtual currencies (VCs) which was then followed by specific supplementary rules applicable to CISs investing in VCs. These supplementary rules apply to PIFs, whether investing in VCs directly or indirectly through a trading company or trading company/special purpose vehicle (SPV) for investment purposes.

5 Are managers of alternative investment funds regulated?

Managers of AIFs operating in or from Malta are regulated under the Investment Services Act, subsidiary legislation and the Investment Services Rules which transpose the Alternative Investment Fund Managers Directive (2011/61/EU) (AIFMD). Investment managers who manage AIFs can be divided into two categories depending on the types of investment funds they manage: de minimis fund managers (not subject to the AIFMD) and AIF managers (subject to the AIFMD).

De minimis fund managers are managers whose assets under management do not exceed the thresholds provided for under the AIFMD (€100 million, including assets acquired through use of leverage; or €500 million when the portfolio of AIFs managed consists of AIFs that are not leveraged and have no redemption rights exercisable during a period of five years following the date of the initial investment in each AIF).

The regulatory framework prescribes licensing requirements, operating conditions and obligations of fund managers. De minimis fund managers are subject to less stringent regulatory requirements compared with 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, in 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 instance, 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 required. 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 (P2P) lending is not specifically regulated in Malta. As the existing financial services regulatory framework predates the emergence of P2P 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 P2P lending. Accordingly, to date, there are no clear rules bringing P2P lending within the scope of the regulatory framework. However, P2P 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 automated investment advice in your jurisdiction.

Fintech businesses are regulated by the general legal and regulatory provisions relating to credit institutions, financial institutions, investment services and insurance. All of these financial services activities have witnessed technological developments that have created innovative fintech business propositions. Malta has not yet promulgated any specific regulation in the sector of robo-advice and artificial intelligence. Malta's parliamentary secretary announed earlier this year that a legal framework to regulate artificial intelligence and internet-of-things devices that is in line with anti-money laundering and Know Your Customer regulations will be issued in the coming months.

11 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.

12 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 Revised Payment Services Directive (2015/2366EC) repealing Directive 2007/64/EC ('PDS1') into Maltese law, by the Financial Institutions Rules issued by the MFSA and partly by a Directive issued by the Central Bank of Malta, which implements the substantive parts of the Payment Services Directive. Regulated payment services are defined under the Act, which definition mirrors the provisions of the Payment Services Directive and includes services enabling cash to be placed on, or withdrawn from, a payment account as well as all the operations required for operating a payment account, execution of payment transaction, issuing or acquiring of payment instruments and the provision of money remittance services.

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

The MFSA regulates financial services in Malta by licensing entities according to the service they provide or activity they carry out. The Insurance Business Act is the primary legislation that regulates insurance services and activities in Malta. 'Business of insurance' means the effecting and carrying out of contracts of insurance of such class or classes of long-term business or class or classes or part classes of general business. The Second Schedule of the Insurance Business Act lists nine classes of long-term business, namely: life and annuity, marriage and birth, linked long term, permanent health, tontines, capital redemption, pension fund management, collective insurance and social insurance.

Part 1 of the Third Schedule of the Insurance Business Act lists 18 classes of general business, namely: accident, sickness, land vehicles, railway rolling stock, aircraft, ships, goods in transit, fire and natural forces, other damage to property, motor vehicle liability, aircraft liability, liability for ships, general liability, credit, suretyship, miscellaneous financial loss, legal expenses and assistance. The business of insurance would also include the effecting and carrying out, by a person not carrying on business of banking, of:

- contracts for fidelity bonds, performance bonds, administration bonds, bail bonds or customs bonds or similar contracts of guarantee;
- capital redemption contracts based on actuarial calculation;
- contracts to manage the investments of pension funds, and, in relation to contracts to manage the investments of pension funds, the expression 'a person not carrying on business of banking' includes 'a person not carrying on investment services';
- any business carried on in connection with or ancillary to the business of insurance; and
- the business of reinsurance.

'Selling or marketing' insurance products is regulated by the Insurance Business Act, Subsidiary Legislation 330.07 – Distance Selling (Retail Financial Services) Regulations, the Insurance Rules – Conduct of Business and general consumer protection legislation. If a fintech company sells or markets insurance products as defined in the Insurance Business Act, then it falls under the scope of the Insurance Business Act and thus, would be regulated in the same manner as a non-fintech company. If, on the other hand, the role of the fintech company is such that it does not fit into the definition of 'selling or marketing' the 'insurance' product then, even if the service relates to such product, the fintech company would not be regulated as an insurance seller or marketer.

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

EC Regulation 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit-rating agencies (the CRA Regulation) is the principal EU legislation relating to credit-rating agencies (CRAs). The CRA Regulation was subsequently amended by the CRA II Regulation (Regulation 513/2011) which shifted responsibility for the supervision of EU CRAs to the European Securities and Markets Authority (ESMA) and by the CRA III Regulation (Regulation 462/2013), which dealt with problems concerning the reliance of firms on external credit ratings, sovereign debt ratings, competition in the CRA industry, the civil liability of CRAs and the independence of CRAs.

The CRA Regulation is directly applicable in Malta without the need for transposition. However, the CRA Regulation provides for national implementation including to deal with matters such as penalties, enforcement procedures and appeals against registration decisions. The Financial Markets Act (Credit Rating Agencies) Regulations 2014 provides the general framework for the regulation of CRAs that may be established in Malta. The CRA Regulation introduces a harmonised approach to the regulation of credit-rating activities in the EU and creates a registration regime for CRAs that are established in the EU.

In terms of the CRA Regulation, the term 'regulatory purposes' means the use of credit ratings for the specific purpose of complying with EU law, as implemented by the national legislation of the member states. In Malta, the above-mentioned requirement that sets conditions on the use of credit ratings for regulatory purposes applies to credit institutions licensed in terms of the Banking Act 1994; investment services licence holders in terms of the Investment Services Act 1994; insurance companies carrying out general business in terms of the Insurance Business Act 1998; insurance companies carrying out the business of reinsurance in terms of the Insurance Business Act 1998; and CISs licensed in terms of the Investment Services Act 1994 and which qualify as UCITS Schemes and Occupational Pension Schemes registered in terms of the Special Funds (Regulation) Act 2002.

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

Maltese legislation obliges financial institutions to make customer or product data available to third parties. This is evident when one refers to the Financial Institutions Act and the Prevention of Money Laundering Act.

The Financial Institutions Act places an obligation on the financial institution to submit to the MFSA, as the MFSA may require, any relevant information, documentation or records of a licence holder relating or pertaining to the financial institutions licensable activities, or otherwise falling under its supervisory or regulatory functions, or any regulations and rules issued thereunder or any other law. The Financial Institutions Act also states that a 'financial institution shall submit to the Central Bank such information as the Central Bank may require in the discharge of its duties'.

Furthermore, the Prevention of Money Laundering Act places an obligation on subject persons (which includes financial institutions) to submit to the Financial Intelligence Analysis Unit and the Attorney General any information and documentation that relates to the suspicion of money laundering and the funding of terrorism.

16 Does the regulator in your jurisdiction make any specific provision to encourage the launch of new banks?

The MFSA does not currently have a similar operation to encourage the launch of new banks. The Malta Stock Exchange has recently launched the MSX FinTech Accelerator Programme with the aim of supporting and giving start-up companies access to professional business services offering training centres, in-house accounting facilities and payroll services. The purpose of this programme is to provide a global hub where start-up companies are nurtured, supported and monitored. This programme is a step in the right direction especially with the fast-growing developments in Malta, placing it at the forefront of the fintech and blockchain industry. This programme has been carefully structured to reflect the current regulatory framework within the blockchain and fintech industry in order to ensure that entrepreneurs and start-ups are supported in this highly competitive industry.

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

In the context of credit and financial institutions, if as a result of an investment or acquisition by a third party, there is a 'change in control' (when the proposed acquisition would result in a qualifying holding of 50 per cent or more or where the target undertaking becomes a subsidiary of the proposed acquirer), the proposed acquirer has a duty to provide a business plan to the MFSA which include a strategic development plan, estimated financial statements of the credit institution, and the impact of the acquisition on the corporate governance and general organisational structure of the institution. The strategic development plan should include, amongst others, the rationale for the proposed acquisition; medium-term financial goals, which may be stated in terms of return-on-equity, cost-benefit ratio, earnings per share or in other indicators as appropriate; the possible redirection of activities, products or targeted customers; and the possible reallocation of funds or resources expected to impact on the institution.

A proposed acquirer is required to provide notification of a proposed acquisition to the competent authority as soon as a decision is made to acquire or increase a qualifying shareholding in a credit institution. Notification is also required if the shareholding held by the acquirer in the institution involuntarily reaches or exceeds 10 per cent, 20 per cent, 30 per cent or 50 per cent of the shares or voting rights in an institution. This may occur as a result of the repurchase by an institution of shares held by other shareholders, or in the event of an increase in capital in which existing shareholders do not participate. In such cases notification to the competent authority is still necessary upon becoming aware

that a shareholding reaches or exceeds one of the thresholds referred to above, even if the acquirer intends to reduce its level of shareholding so that it once again falls below the said thresholds.

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

There is currently no specific provision or initiative for fintech companies in Malta. Although the current Maltese regulatory framework caters for certain aspects of fintech businesses, in the interest of legal certainty, consultations with the industry and legislative initiatives are required to cater for the ongoing developments surrounding these businesses. In view of the increasing popularity of the industry, and the EU's action plan on consumer finance, published in March 2017 by the European Commission to regulate in the interest of European consumers, it is expected that the regulator in Malta will be taking necessary steps in the near future to address this segment of the financial services industry.

The Malta Digital Innovation Authority (MDIA) Bill was also presented in parliament on 24 April 2018 providing for the establishment of the Malta Digital Innovation Authority. This will act as a central regulator and will be responsible for the protection of users and consumers who interface or use distributed ledger technology (DLT) and for the promotion of legal certainty in the application of law to DLT businesses both nationally as well as in the case of cross-border activities.

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

The MFSA has many Memoranda of Understanding (MoUs) with EU and non-EU foreign regulators, but none are specifically related to fintech activities. The purpose of the majority of these MoUs is to establish a formal basis for cooperation, including the exchange of information and investigative assistance in the fields of banking; insurance; investment services and the provision of professional trusteeship and company management services; and the exchange of information on supervisory practices and techniques.

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

The Investment Services Rules lay down specific requirements that licence holders must adhere to when issuing marketing communications to retail clients or potential retail clients with a view to ensuring that the communications are 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.

21 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 typically triggered once the undertaking provides qualifying services in or from Malta. This licensing 'trigger' is not conditional on the solicitation of clients by the undertaking and therefore the provision of a regulated service resulting from unsolicited approaches by a potential client or investor, whether these are located inside or outside Malta, would still give rise to a licence requirement.

22 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 21. 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, should not provide an investment service in or from within a country outside Malta unless it is in possession of a valid investment services licence.

23 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.

Distributed ledger technology

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

In February 2018, a consultation document was published proposing three legislative instruments: the Malta Digital Innovation Authority (MDIA) Bill, the Technology Arrangements (TAs) Bill and the Virtual Currency (VC) Bill, which were approved by parliament in June 2018. This is a step in the right direction towards providing a comprehensive regulatory framework promoting DLT and blockchain technology. This holistic regulatory approach will render Malta a pioneer in this industry, attracting blockchain businesses and start-ups to Malta.

The European Parliament and the European Council have proposed amendments to the Fourth Anti-Money Laundering Directive 2015/849 (4th AMLD). This with the purpose of subjecting the use of cryptocurrencies, especially virtual currencies, to anti-money laundering (AML) and counter terrorist financing (CFT) laws. The European Parliament has adopted a new directive strengthening the 4th AMLD. The 5th AMLD was adopted in April 2018 and is expected to be fully implemented into national law 18 months after the date on which it is published in the Official Journal. Among the changes being made, the 5th AMLD has provided a uniform definition of VCs. The VC Act will provide for a Financial Instrument Test that will determine whether a particular cryptocurrency constitutes a financial instrument.

Digital currencies

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

Digital currency simply means a digital representation of any currency. E-money is one of the sub-classes of digital currency. E-money represents fiat currency used to electronically transfer value denominated in fiat currency. The Financial Institutions Act transposes provisions of the E-Money Directive (Directive 2009/110/EC). There have also been consultation documents on the amendments proposed to the Financial Institutions Act and the Banking Act (Chapter 371) in order to transpose Directive 2015/2366 (PSD2) of the European Parliament and of the Council repealing Directive 2007/64/EC (PSD1). The Third Schedule

of the Act regulates financial institutions issuing electronic money. The Financial Institutions Act's obligations and statutory requirements are less onerous when compared with those included in the Banking Act.

Electronic money is defined by the Act, Third Schedule, article 1 as 'electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions . . . and which is accepted by a natural or legal person other than the financial institutions that issued the electronic money'.

The definition of electronic money covers electronic money held on a payment device in the possession of the electronic money holder (ie, a physical device) or stored remotely at a server and managed by the electronic money holder through a specific account for electronic money (ie, a non-physical device).

Consequently, e-money can generally be classified into two categories, namely:

- card or device-based e-money – permitting persons to make use of a portable card or electronic device as an e-wallet instead of using tangible cash for minor transactions. Card and device-based e-money is commonly known to have started regulatory development in the field; however, server-based e-money only became a more common practice a few years ago; and
- server-based e-money – e-money is stored remotely at a server that is normally accessed and administered by users.

26 Are there any rules or guidelines relating to the operation of digital currency exchanges or brokerages in your jurisdiction?

Three legal bills, which were approved by parliament in June 2018, have been designed to provide regulatory certainty for ICOs, blockchain technology, cryptocurrencies, as well as intermediaries and service providers operating within the sector. The Virtual Financial Assets Bill, the MDIA Bill, and the Technology Arrangements and Services Bill all seek to provide legal security for operators and investors while ensuring the continued development of the Maltese DLT and cryptocurrency sector.

Under the definitions of the Virtual Financial Assets Bill, a cryptocurrency may be classed as a Virtual Financial Asset (VFA) and provides a comprehensive set of rules that will both protect consumers and support the growth of the industry and its stakeholders. The Act will outline stringent requirements for those that are launching cryptocurrencies, as well as other service providers including brokerages, portfolio managers, custodian and nominee service providers, eWallet providers, investment advisers and, perhaps most crucially, cryptocurrency exchanges.

27 Are there legal or regulatory rules or guidelines in relation to initial coin offerings (ICOs) or token generating events in your jurisdiction?

The approved VFA Bill was proposed with the purpose of setting out a regulatory framework for initial coin offerings (ICOs) and token generating events (TGEs) as well as exchanges and the provision of cryptocurrency-related services. This Regulation together with the MFSA Financial Instruments Test, which was published in April 2018, will provide legal certainty in relation to ICSs, TGEs and cryptocurrency exchanges.

Securitisation

28 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 P2P 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.

29 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? May these loans be assigned without informing the borrower?

An assignment of loans originating on a P2P 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 P2P 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 affected in writing. The provisions of the Banking Act, the Financial Institutions Act and the Investment Services Act does not make any reference to P2P lending. However, assignment of loans originated on a P2P lending platform will be considered as a regulated activity.

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.

Typically, a transfer of a loan made under the standard rules for the assignment of rights under Maltese civil law acquire legal validity once the original debtor has either been notified by means of a judicial act or the debtor himself or herself has otherwise acknowledged the transfer of the original debt to a new creditor.

The fast-paced nature of the capital markets makes it unrealistic to notify the debtor upon the transfer of each contract for receivables to the securitisation vehicle. For this reason, Maltese securitisation law facilitates the process of debtor notification. It allows the notification to be carried out to the debtor directly in writing or alternatively to deem the debtor notified upon publication of a notice in a daily newspaper that is circulated in the jurisdiction where the debtor resides. Consent of the original borrower is never required in terms of Maltese law. The Securitisation Act permits the assignment of assets to the securitisation vehicle even where these are subject to contractual or statutory prohibitions.

30 Will the securitisation be subject to risk retention requirements?

The Securitisation Regulation (EU) No. 2017/2402 of the European Parliament and of the Council of 12 December 2017 entered into force on 17 January 2018 and applies directly in all member states from 1 January 2019 ('Securitisation Regulation'). The Regulation, which introduces a more transparent and standardised securitisation, states that the originator, sponsor or original lender of a securitisation will retain on an ongoing basis a material net economic interest in the securitisation of not less than 5 per cent which shall be measured at the origination and will be determined by the notional value for off-balance-sheet items. In fact, article 405 of Regulation (EU) No. 575/2013 on prudential requirements for credit institutions and investment firms (in relation to securitisation positions) generally provides that a credit institution or investment firm can only be exposed to the credit risk of a securitisation position if the originator, sponsor or original lender has explicitly disclosed that it will retain, on an ongoing basis, a material net economic interest in the securitisation position of at least 5 per cent.

Similar restrictions regarding exposure to securitisation positions also apply to alternative investment fund managers and insurers that are subject to either:

- Directive 2011/61/EU on alternative investment fund managers (AIFM Directive); or
- Directive 2009/138/EC on the taking-up and pursuit of the business of insurance and reinsurance (Solvency II Directive).

To date, this has not really had an effect on the securitisation market in Malta.

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

Securitisation vehicles, together with all other parties involved in the securitisation transaction, are bound to adhere to data protection laws and professional secrecy and confidentiality rules. This is specified under the Securitisation Act, which provides that transfers of personal data between persons in the context of a securitisation transaction are to be considered as having been made for a purpose that concerns a legitimate interest of the transferor and transferees of the data, unless it can be shown that the transfer may violate the data subject's fundamental right to privacy.

Furthermore, transfers of personal data to a third country that does not ensure an adequate level of data protection will not require the typical authorisation of the Data Protection Commissioner as long as it can be shown that the data controller has adopted appropriate safeguards for the protection of data subjects' fundamental rights.

Intellectual property rights

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

Software, as a result of intellectual efforts of the human mind, is afforded copyright protection. Copyright protection is afforded under Chapter 415 of the Laws of Malta, the Copyright Act, where software is treated as a literary work. Copyright protects the expression of the idea and arises automatically by operation of the law from the moment in time that the idea has been reduced to a medium through which it has been expressed. To be protected by copyright, there is no action that needs to be carried out by the copyright holder and no registration, and no copyright protection sign is necessary in order for the protection to apply, as long as software qualifies as an 'original literary work'.

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

Patent protection does not apply to software-implemented inventions or business methods as such. In fact, Chapter 417 of the Laws of Malta, the Patents and Designs Act, explicitly excludes 'schemes, rules and methods for performing mental acts, playing games or doing business and programs for computers' from being regarded as inventions and therefore being eligible for patent protection. For patent protection to apply, and in addition to the originality and other requirements for the invention to be patentable, it is worth noting that the fact that software runs on a piece of technical equipment (eg, computer, phone, etc) means that there must be some contribution to the technical field and, without such contribution, software as such is not patentable.

34 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.

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

Under the Copyright Act, the author is the beneficiary of the economic rights of the work created by him or her that is subject to copyright. Accordingly, in any situation other than an employer-employee relationship, where a contractor or a consultant is the author, the contractor or consultant is the holder of the copyright.

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

Maltese law has transposed the European intellectual property framework to properly safeguard any patents, trademarks, industrial designs and copyright. Malta's principal IP law falls under:

- the Trademarks Act (Chapter 416 of the Laws of Malta);
- the Patents and Designs Act (Chapter 417 of the Laws of Malta);
- the Copyright Act (Chapter 415 of the Laws of Malta); and
- the Intellectual Property Rights (Cross-Border Measures) Act (Chapter 414 of the Laws of Malta).

The Trademarks Act, Patents and Designs Act and Copyright Act all place restrictions on a joint owner of intellectual property's right to either use, license, charge or assign its right in intellectual property.

Where a registered trademark or design is granted to two or more persons jointly, each of them is entitled, subject to any agreement to the contrary, to an equal undivided share in the registered trademark or design respectively. Subject to any agreement to the contrary, each co-proprietor is entitled, personally or through his or her agents, to do for his or her own benefit and without the consent of or the need to account to any other co-proprietor, any act that would otherwise amount to an infringement of the registered trademark or design. Nonetheless, a co-proprietor may not, without the consent of the other joint owners (i) grant a licence to use the registered trademark or design; or (ii) assign or cede control of his or her share in the registered trademark or design.

Where there are joint applicants of a patent application, each of them may, with or without the agreement of the others, separately assign or transfer by succession his or her share of the application, but the joint applicants may only act jointly to withdraw the application or conclude licence contracts with third parties under the application.

Furthermore, where there are joint proprietors of a patent, each of them may, with or without the agreement of the others, separately assign or transfer by succession his or her share of the patent or institute court proceedings for an infringement of the patent, but the joint owners may only act jointly to surrender the patent or conclude licence contracts with third parties under the patent. This paragraph shall be applicable only in the absence of an agreement to the contrary between the joint applicants or owners.

An assignment or licence of copyright granted by a joint author or an assignment or licence of a neighbouring right granted by a joint right holder will have effect as if granted by the other joint authors or joint right holders respectively, provided that, where any other joint author in the case of copyright or joint right holder in the case of neighbouring rights is not satisfied with the terms on which such assignment or licence has been granted, he or she may, within three months from the day on which the said terms have been communicated in writing to him or her, apply to the Copyright Board for the determination by it of such terms as the Copyright Board may consider fair and reasonable. The Copyright Board, established by virtue of article 45 of the Copyright Act, is vested with the authority to approve requests for the establishment and operation of collecting societies in Malta, to approve the tariffs charged and any revisions thereof, as well as to revoke any authorisation to act as a collecting society.

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

A Trade Secrets Bill was proposed with the object of implementing Directive 2016/943/EC on the protection of undisclosed know-how and business information (trade secrets), against their unlawful acquisition, use and disclosure. 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 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.

38 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.

39 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 TM View online database, which aggregates trademark registers from over 70 national trademark offices, as well as the World Intellectual Property Organization register.

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

With regard to copyright, neighbouring rights and sui generis rights (eg, the right in a database), the Copyright Act states that the copyright owner or right holder may sue an infringer in the Civil Court for payment of damages or payment of a fine and may also condemn the defendant to the restitution of all the profit derived from the infringement of such intellectual property right. In addition, the Court has the discretion of awarding any additional damage, taking into account the flagrancy of the infringement and any benefit accruing to the defendant.

Further to the above, the copyright owner or right holder has the option to request the court to order that all the infringing articles be destroyed.

In relation to trademarks, the Trademarks Act provides that where a person is found to have infringed a registered trademark, remedies range from the offending sign being erased, recalled from circulation within channels of commerce or destroyed from any infringing goods. The injured party can also claim damages. The court shall take into account the facts and circumstances of the case, and the damage suffered including the negative economic consequences on the injured party (eg, lost profits, unfair profits made by the infringer and moral prejudice caused to the proprietor). If the injured party would not have sufficiently proved damages, the court may still award damages using an alternative method to calculate damages that may involve a lump sum of damages payable including, for instance, the least amount of royalties or fees that would have been due had the infringer requested authorisation to use the trademark in this case.

The Enforcement of Intellectual Property Rights (Regulation) Act further provides that injunctions and declarations may be made, payment of pecuniary compensation to the injured party or payment of damages may also be awarded. There is also the possibility that the unsuccessful party will have to 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.

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

There are no rules or guidelines on open-source software specifically regulating its use in the financial services industry. However, the same rules on copyright apply to open-source software just as they do to software in general. This is, in particular, because copyright is the basis for the way in which open-source software is regulated. In fact, the person using open-source software and making later amendments and copies of the work must identify the original creator as the first author of the work (the original open-source software).

Data protection

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

The General Data Protection Regulation (GDPR) applies directly in all EU member states and applies even to those organisations which are not established within the EU but are processing personal data in order to offer goods or services, to data subjects in the EU, or monitoring their behaviour within the EU. The Data Protection Act (Chapter 586) (DPA) implements the GDPR and, in so doing, has repealed and replaced the previous Data Protection Act.

However, there are certain matters that have been left up to the member sates to regulate.In Malta's case, the DPA, along with its subsidiary legislation regulate such. The GDPR has imposed stricter rules on the processing of personal data and harsher fines, than its predecessor; Directive 95/46/EC. The GDPR lays out the principles and limitations for the collection and processing of personal data, including the requirements for processing, such as that 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 GDPR lays out various criteria when processing personal data and provides that processing of data must be necessary: for the contract performance; 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.

The GDPR also adds stricter rules with respect to consent and how such consent is obtained from a data subject. Such consent must be unbundled from any terms and conditions and must be specific, informed, unambiguous and freely given.

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. In January 2017, the European Commission issued its proposal for a draft e-Privacy Regulation which will supersede the current e-Privacy Directive (2002/58/EC) across the EU and will be directly applicable in all EU Member States harmonising data protection laws between the member states by aligning them with

Update and trends

Malta approved three distributed ledger technology and crypto-related bills in their second reading in parliament towards the end of June 2018. The approved bills include the Innovative Technology Arrangements and Services Bill, the Virtual Financial Assets Bill, and the Malta Digital Innovation Authority Bill. The first two bills provide for the regulation of digital ledger technologies – of which blockchain is one type – and virtual financial assets in Malta under the supervision of the Malta Digital Innovation Authority. Under the VFA Act, exhaustive requirements will be made applicable to legal entities that are offering VFAs to the public, including rules governing its marketing and advertisement, and the determination of any potential liability that might result from the activity therein. The VFA Act also provides clear guidelines on what information a White Paper should include, how collected funds may be used, and how due diligence on the individuals behind the fund-seeking entity is to be carried out. The Malta Digital Innovation Authority Bill establishes the organisation with the goal of promoting consistent principles for the development of visions, skills, and other qualities relating to technology innovation as well as support regulations for the sector.

the GDPR. The proposed e-Privacy Regulation, which came into force on 25 May 2018 with the aim of complementing the GDPR, will address the new approach in regard to consents and notifications required for cookies. Online businesses will be expected to comply with the new cookie regime providing streamlined requirements, reducing the need for consent buttons and pop-ups.

43 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, with respect to the processing of personal data, such companies will be subject to the GDPR and the DPA and its subsidiary legislation.

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

At present, no specific guidelines with respect to anonymised personal data and its aggregation exist in Malta. However, the Information and Data Protection Commissioner (IDPC) has issued separate data protection guidelines together with the Malta Gaming Authority (MGA), in relation to the gaming sector, as well as with the Malta Bankers' Association, with respect to the banking sector. Anonymisation is touched upon in those guidelines and Opinion 5/2014 on Anonymisation Techniques issued by the Working Party (now the European Data Protection Board) is also referred to. Such Opinions, although non-binding, provide essential guidance on how the EU legal framework should be applied. 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 should 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.

Outsourcing, cloud computing and the internet of things

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

In relation to credit institutions, the legal requirements for outsourcing of financial activities is provided in the Banking Act. The Act specifically provides that no credit institution may outsource its material services or activities unless the outsourcing service provider is granted recognition by the MFSA. The written request made to the MFSA should include (i) the name and address of the outsourcing service provider; (ii) the material services or activities to be outsourced; (iii) the reasons for outsourcing such services or activities; and(iv) information on the regulatory status, if any, if the outsourcing service provider is authorised or licensed in a foreign jurisdiction.

In respect of outsourcing activities by authorised insurance and reinsurance undertakings, a written agreement between the insurance or reinsurance undertaking and the service provider must be entered into. The insurance or reinsurance undertaking must provide the MFSA with the details and any relevant information on the individual within the third-party service provider who is responsible for the outsourced activity. A written agreement is still required even if the engaged service provider is a legal entity within the same group.

According to the MFSA rules applicable to investment services licence holders, in regard to outsourcing, the licence holder has a duty to inform the MFSA of any outsourcing arrangements and should provide all the necessary information enabling the MFSA to carry out its supervisory role in order to ensure that the outsourced activities comply with the requirements of the investment services rules. Management functions, which include the setting of strategies and policies, operations and responsibility towards customers, should not be subject to outsourcing.

46 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 calls 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.

47 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 micro-enterprises when assessing the suitability of the use of cloud computing within their firm.

On a wider macro level, some initiatives and policy guidance documents have been published by the institutions of the EU. As part of the EU's Digital Single Market Strategy, the European Commission launched a European Cloud Initiative in April 2016, which includes actions to address concerns and support the development and use of cloud services in all sectors of the economy. This builds upon a 2012 Commission Communication document addressed to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, entitled 'Unleashing the Potential of Cloud Computing in Europe', through which it identifies policy initiatives currently being taken that will impact different sectors that are in some way affected by cloud computing, and outlines key actions related to standardisation and certification for cloud computing.

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

The internet of things (IoT) refers to the embedding of technological sensors in everyday items such as drones or wearables such as smartwatches or glasses, designed to process and collect a high volume of personal data to be used in innovative applications that analyse the data subject's habits or activities.

Since the data collected usually refers to natural persons and aggregates a significant amount of data of varying sensitivity, the IoT raises challenging legal issues in the field of privacy and data protection law. In early 2014, the Article 29 Working Party, established by

Directive 95/46/EC with the mission of imparting expert advice to EU member states regarding data protection and privacy matters, adopted an opinion on recent developments in the IoT. This opinion is not binding on member states; however, it identifies the main data protection risks that arise from the IoT and presents helpful guidance on how the EU legal framework should be applied in this context.

Tax

49 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

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

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

Financial crime

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

Fintech companies are not subject to mandatory rules that require the implementation of procedures to combat bribery. However, it may be noted that Chapter 527 of the Laws of Malta, the Protection of Whistleblowers Act, provides a framework for the protection of persons who expose dishonest or illegal conduct, such as bribery, within an organisation. The whistle-blower protection afforded through this piece of legislation applies to both internal disclosures made within an organisation, as well as to external disclosures made to a competent supervisory authority such as the MFSA.

The 5th AMLD (Directive (EU) 2018/843) published on 19 June 2018 aims at bringing further transparency with the aim of preventing money laundering and terrorist financing across the EU. This builds on and extends the scope of the 4th AMLD, which failed to address recent trends especially in regard to digital currencies and ICOs. The 5th AMLD responds to the risks of virtual currency exchanges by bringing virtual currency exchange platforms and custodian wallet providers within the scope of AML rules. This requires entities to apply customer due diligence measures when exchanging virtual currencies for fiat currencies. Competent authorities should be able, through obliged entities, to monitor the use of virtual currencies and thus ensure that no funding is directed towards the funding of criminal activities and this will be helped by the high degree of transparency.

The 5th AMLD will enter into force on 9 July 2018. EU member states will then have 18 months to implement the 5th AML Directive into national law.

52 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. Malta's main legislation regarding fraud, money laundering and other financial crimes are the Prevention of Money Laundering Act (Chapter 373), the Prevention of Money Laundering and Funding of Terrorism Regulations (S.L 373.01), and the National Coordinating Committee on Combating Money Laundering and Funding of Terrorism Regulations (S.L. 373.02). These legislative instruments must also comply with the 4th AMLD, which has been amended by the 5th AMLD. Additionally, the Implementing Procedures issued by the Financial Intelligence and Analysis Unit (FIAU) must also be adhered to. To date, the FIAU has not provided Implementing Regulations in relation to VCs.

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