



# ICLG

The International Comparative Legal Guide to:

## Fintech 2017

**1st Edition**

A practical cross-border insight into Fintech law

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Global Legal Group Ltd.  
59 Tanner Street  
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Email: info@glgroup.co.uk  
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**GLG Cover Design**  
F&F Studio Design

**GLG Cover Image Source**  
iStockphoto

**Printed by**  
Ashford Colour Press Ltd  
May 2017

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**ISBN** 978-1-911367-49-9  
**ISSN** 2399-9578

**Strategic Partners**



## General Chapter:

1	<b>Artificial Intelligence in Fintech</b> – Rob Sumroy & Ben Kingsley, Slaughter and May	1
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## Country Question and Answer Chapters:

2	<b>Australia</b>	Gilbert + Tobin: Peter Reeves	6
3	<b>Brazil</b>	Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga Advogados: Renato Schermann Ximenes de Melo & Fabio Ferreira Kujawski	12
4	<b>Canada</b>	McMillan LLP: Pat Forgione & Jeffrey Nagashima	17
5	<b>China</b>	Haiwen & Partners: Jinen Zhang & Xixiang Lin	23
6	<b>Denmark</b>	Gorrissen Federspiel: Morten Nybom Bethe & Tue Goldschmieding	29
7	<b>Finland</b>	Roschier, Attorneys Ltd.: Niklas Östman & Sonja Heiskala	35
8	<b>France</b>	Bredin Prat: Mathieu Françon & Bena Mara	41
9	<b>Germany</b>	Hengeler Mueller Partnerschaft von Rechtsanwälten mbB: Dr. Christian Schmies & Dr. Susan Kempe-Müller	46
10	<b>Hong Kong</b>	Slaughter and May: Benita Yu & Jason Webber	52
11	<b>India</b>	Trilegal: Kosturi Ghosh & Preethi Srinivas	59
12	<b>Indonesia</b>	Hiswara Bunjamin & Tandjung (in association with Herbert Smith Freehills LLP): David Dawborn & Vik Tang	65
13	<b>Ireland</b>	A&L Goodbody: Claire Morrissey & Peter Walker	71
14	<b>Israel</b>	Herzog Fox & Neeman: Elad Wieder & Ariel Yosefi	78
15	<b>Italy</b>	BonelliErede: Federico Vezzani & Tommaso Faelli	85
16	<b>Japan</b>	Anderson Mōri & Tomotsune: Taro Awataguchi & Ken Kawai	90
17	<b>Kenya</b>	Anjarwalla & Khanna Advocates: Dominic Rebelo & Sonal Sejpal	96
18	<b>Korea</b>	Kim & Chang: Jung Min Lee & Samuel Yim	101
19	<b>Malaysia</b>	Shearn Delamore & Co.: Timothy Siaw & Elyse Diong	107
20	<b>Malta</b>	GVZH Advocates: Dr. Andrew J. Zammit & Dr. Michael Grech	112
21	<b>Mexico</b>	Galicia Abogados, S.C.: Mariana Islas & Claudio Kurc	117
22	<b>Netherlands</b>	De Brauw Blackstone Westbroek: Bart van Reeken & Björn Schep	122
23	<b>Nigeria</b>	Udo Udoma & Belo-Osagie: Yinka Edu & Tolulope Osindero	128
24	<b>Norway</b>	BA-HR: Markus Nilssen & Sondre Graasvoll	134
25	<b>Poland</b>	WKB Wierciński, Kwieciński, Baehr: Marcin Smolarek & Agnieszka Wiercińska-Krużewska	140
26	<b>Portugal</b>	Uría Menéndez – Proença de Carvalho: Pedro Ferreira Malaquias & Hélder Frias	146
27	<b>South Africa</b>	ENSAfrica: Prof. Angela Itzikowitz & Era Gunning	153
28	<b>Spain</b>	Uría Menéndez: Leticia López-Lapuente & Livia Solans	159
29	<b>Sweden</b>	Mannheimer Swartling: Martin Pekkari & Anders Bergsten	166
30	<b>Switzerland</b>	Bär & Karrer Ltd.: Eric Stupp & Peter Ch. Hsu	172
31	<b>Taiwan</b>	Lee and Li, Attorneys-at-Law: Robin Chang & Benjamin K. J. Li	179
32	<b>Turkey</b>	SRP-Legal: Dr. Çiğdem Ayözger	184
33	<b>United Kingdom</b>	Slaughter and May: Rob Sumroy & Ben Kingsley	189
34	<b>USA</b>	Shearman & Sterling LLP: Reena Agrawal Sahni & Sylvia Favretto	195

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## EDITORIAL

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Welcome to the first edition of *The International Comparative Legal Guide to Fintech*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of fintech.

It is divided into two main sections:

One general chapter. This chapter provides an overview of Artificial Intelligence in Fintech.

Country question and answer chapters. These provide a broad overview of common issues in fintech in 33 jurisdictions.

All chapters are written by leading fintech lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Rob Sumroy and Ben Kingsley of Slaughter and May for their invaluable assistance.

The *International Comparative Legal Guide* series is also available online at [www.iclg.com](http://www.iclg.com).

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# Portugal

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## 1 The Fintech Landscape

- 1.1 Please describe the types of fintech businesses that are active in your jurisdiction and any notable fintech innovation trends within particular sub-sectors (e.g. payments, asset management, peer-to-peer lending or investment, insurance and blockchain applications).**

According to Statista.com, the transaction value processed in the Portuguese FinTech market is expected to amount to US\$ 5,580 million in 2017 and to show an annual growth rate of 17.2% resulting in the total amount of US\$ 10,538 million in 2021.

In 2017, the largest segment of the Portuguese FinTech market is expected to be payment, with both domestic and international players operating in the market and in different stages of the payment services value chain. Nonetheless, there are also relevant players in other FinTech segments in Portugal, such as peer-to-peer lending, personal finance management, mobile-first banks, financial, investment advisory and management, financial transactions safety, etc. As for crowdfunding, equity-based and lending-based crowdfunding activities are facing a deadlock: there is a specific legal framework in Portugal applicable to them, but it has not yet entered into force.

Lastly, although the Portuguese FinTech scene is still taking the first steps, with most of the start-ups (75.2%) in the seed or start-up stages and only *circa* US\$ 18.5 million in venture capital investments in 2016, the Portuguese Government and the private sector have been very committed to support the emerging start-up ecosystem in Portugal.

- 1.2 Are there any types of fintech business that are at present prohibited or restricted in your jurisdiction?**

As a general rule, there are no FinTech businesses prohibited or restricted in Portugal *per se*. Nonetheless, FinTech businesses that provide regulated financial services, such as payments, deposit-taking, investment, advisory and management, insurance, or other regulated activities are subject to the general regulatory regime that applies to any company providing those services in the Portuguese market.

Lastly, the specific legal framework enacted in Portugal in respect of equity-based and lending-based crowdfunding has not yet entered into force, thus the players from this segment have been reluctant to operate in the Portuguese market.

## 2 Funding For Fintech

- 2.1 Broadly, what types of funding are available for new and growing businesses in your jurisdiction (covering both equity and debt)?**

New and growing businesses may fund their activity in different ways, including both traditional (e.g. banks and IPOs in Alternext) and more *avant-garde* (e.g. business angels, venture capital firms, incubators, etc.) sources, and both in the form of equity and debt.

Additionally, the last year has seen several initiatives launched by the Portuguese Government with the aim of offering alternatives to traditional sources of funding to start-ups in general, including FinTech businesses. Those initiatives range from (i) funding of daily-expenses of entrepreneurs, (ii) to funding of the acquisition of professional incubation services, (iii) to sponsoring the participation of start-ups in international events, and (iv) to investment (through Portugal Ventures, which is the body responsible for public venture capital investment) and co-investment (with business angels and venture capital firms) schemes.

Lastly, equity-based and lending-based crowdfunding is not yet an alternative source for funding as the specific legal framework enacted in Portugal in this regard has not yet entered into force, which has prevented players in this sector from starting to operate in Portugal.

- 2.2 Are there any special incentive schemes for investment in tech/fintech businesses, or in small/medium-sized businesses more generally, in your jurisdiction, e.g. tax incentive schemes for enterprise investment or venture capital investment?**

The Portuguese tax framework includes tax benefits regarding investments in tech/FinTech businesses and in small and medium sized businesses (SMEs) and venture capital investment. These tax benefits may apply at the level of the investors and/or at the level of the FinTech business.

At the level of the FinTech business, provided that certain conditions are met and the company qualifies as a micro-entity, a simplified corporate income tax (CIT) regime may apply, according to which the taxable income is determined through the application of a coefficient which ranges from 0.04 to 1 (e.g. 0.1 on the income deriving from supplies of services, 0.75 on income deriving from professional activities established for personal income tax purposes and 0.95 on the income deriving from the assignment of industrial property (IP) rights).

SMEs benefit from a reduced CIT rate of 17% on the taxable income up to €15,000, being the exceeding income subject to the general 21% rate.

Furthermore, SMEs may also be granted with CIT credits corresponding to 10% of retained earnings up to an amount of €5 million, which are reinvested in eligible investments in the two tax years following the option to retain. The CIT credits are capped to 25% of the CIT due by the relevant company.

Companies that develop IP rights (independently or by subcontracting) and obtain income from the assignment of the temporary use of said IP rights are entitled to consider only 50% of the respective income for the purposes of assessing its taxable income. This benefit only applies if the assignee is not resident in a listed tax haven, uses the IP rights in a commercial, industrial or rural activity, and the results obtained by the assignee do not consist in the delivery of goods or supplies of services that create deductible costs at the level of the company that developed the IP rights or any related company.

A specific tax regime to support investment offers specific CIT credits to companies with activities in data processing, computing, information technologies, media and telecommunications. In this regard, provided that certain conditions are met and depending on the region of the Portuguese territory in which the eligible investments are made, companies investing in fixed tangible and intangible assets (e.g. patents, licences, know-how) may be granted CIT credits in an amount of 10% or 25% of investments up to €10 million, and up to an amount of 10% of the investment amounts exceeding €10 million. This deduction is capped to 50% of the CIT due in each tax year and in certain cases, there may be no cap to the deduction with reference to investments made in the first three years of activity. Other real estate transfer tax, real estate tax and stamp tax exemptions may apply.

Companies may also be granted with a notional CIT deduction of the company's taxable income, which corresponds to 7% of the amount of share capital contributed in cash by shareholders, or that resulted from the conversion of shareholders loans into share capital.

Finally, at the level of the investors, the Portuguese State Budget Law for 2017 introduced a programme called *Semente* (Seed) in order to encourage individuals investing in start-ups. According to this new regime, and provided that certain conditions are met, an individual may be granted with a personal income tax credit ranging between €2,500 and €25,000, depending in the amount invested in the relevant start-up. The credit is deducted up to an amount of 40% of the personal income tax due by the investor.

A special tax regime also applies to venture capital investment funds. Under this regime, the income derived by the fund is exempt from CIT, while the income obtained by resident entities with holding participation units is generally subject to withholding tax at a 10% rate, and exempt in case of non-resident unit holders (unless the non-resident unit holder is resident in a listed tax haven, in which case the 10% rate applies).

### 2.3 In brief, what conditions need to be satisfied for a business to IPO in your jurisdiction?

The listing of securities on a regulated market operating in Portugal requires the approval of the Portuguese Securities Market Commission, as well as the respective market management entity (Euronext Lisbon), for which certain conditions must be met (e.g. publication of a prospectus).

In addition, Euronext Lisbon regulations require that adequate clearing and settlement systems are available in respect of transactions in the shares. The listing requirements applicable

to the trading of shares in Alternext are more simple and flexible. While the procedural and documentation requirements are not very different from those applicable to the listing on Euronext Lisbon, the admission to trading on this MTF may be requested provided that shares representing at least €2.5 million are placed with a minimum number of three investors (which must not be related parties to the issuer), through either a public offering or a private placement of the shares. Accordingly, the issuer requesting the admission to trading of shares on Alternext may not only benefit from the possibility of not having to prepare and register a prospectus with the Portuguese Securities Market Commission, but will always be waived from complying with requirements related to any minimum mandatory free float (as a percentage of the company's share capital).

Lastly, foreign issuers intending to list shares on a regulated market operating in Portugal may be subject to additional requirements (such as public offer and listing prospectuses must be drawn up in a language accepted by the Portuguese Securities Market Commission; the Portuguese Securities Market Commission may ask for a legal opinion attesting the satisfaction of the general eligibility criteria concerning the shares and the valid existence of the issuer in accordance with its governing law; the foreign issuer must appoint a financial intermediary for liaising with the market where the securities will be admitted to trading).

### 2.4 Have there been any notable exits (sale of business or IPO) by the founders of fintech businesses in your jurisdiction?

No. Nevertheless, there are some notable investments from major traditional players. Those are the cases, for instance, of the undisclosed multi-million euros investment of Citigroup in Feedzai (which is a FinTech start-up that uses software to detect financial anomalies and fraud in banking and e-commerce in European and US companies); of the joint-venture between Banco CTT and an undisclosed Portuguese FinTech business to provide financial services through an app; and of the FinTech accelerator launched last year by SIBS (*SIBS Pay Forward*), one of the most important traditional players in the Portuguese payment services market.

## 3 Fintech Regulation

### 3.1 Please briefly describe the regulatory framework(s) for fintech businesses operating in your jurisdiction, and the type of fintech activities that are regulated.

FinTech, as such, is not subject to a specific legal framework in Portugal. The only exception is crowdfunding.

Indeed, the access to the crowdfunding activity, its supervision, the platforms, the beneficiaries, the investors, and the obligations, rights and formalities applicable to the relationships between all those parties are governed by Law no. 102/2015, of 24 August, the Ministerial Order no. 344/2015, of 12 October, and the Portuguese Securities Market Commission's Regulation no. 1/2016, of 25 May. This legal framework regulates four types of crowdfunding: (i) donation-based; (ii) reward-based; (iii) lending-based; and (iv) equity-based. Donation-based and reward-based crowdfunding platforms must notify the Consumer General Directorate (*Direção-Geral do Consumidor*) prior to start their business, and equity-based and lending-based crowdfunding platforms must register with the Portuguese Securities Market Commission and are subject to the latter's supervision and regulations. Nonetheless, the legal framework applicable to equity-based and lending-based crowdfunding activities has not yet entered into force. Moreover, the

platforms may not provide investment advice or recommendations, as well as manage investment funds or hold securities. In addition, crowdfunding platforms are subject to investment, capital, conduct, compliance and organisation restrictions and strict information duties.

Nevertheless, as mentioned, any FinTech business carrying out a regulated activity will need to first obtain the necessary authorisation and/or registration with the competent regulatory authority(ies).

**3.2 Are financial regulators and policy-makers in your jurisdiction receptive to fintech innovation and technology-driven new entrants to regulated financial services markets, and if so how is this manifested?**

Yes. The Portuguese Government has been very committed to supporting the emerging start-up ecosystem in Portugal in general, including FinTech, and the three-year deal with Web Summit is just part of the momentum. In fact, the Portuguese Government launched the “Startup Portugal Programme”, a four-year plan which focuses on three areas of operation: (i) ecosystem; (ii) funding; and (iii) internationalisation. This programme comprises initiatives of different spectrums, including the creation of a national network of incubators, fabrication laboratories (FabLabs) and makerspaces (Makers), the establishment of a free-zone for technology (promoting research, testing and creation of cutting-edge technologies), funding schemes (cash and services), a more favourable tax and social security regime for certain start-ups, and support for internationalisation of start-ups.

**3.3 What, if any, regulatory hurdles must fintech businesses (or financial services businesses offering fintech products and services) which are established outside your jurisdiction overcome in order to access new customers in your jurisdiction?**

As stated above, FinTech refers to a large heterogeneous group of businesses. Therefore, depending on the solutions and the business model used by the relevant FinTech business, the type of services it provides and its jurisdiction, we may have one of three scenarios:

- FinTech business established in a EU jurisdiction and wishing to provide its services, which are subject to a specific regulatory framework, in Portugal: assuming that the FinTech business is duly registered in its EU home State for the purpose of providing the relevant financial services, it may provide, market or promote its services in Portugal pursuant to either the freedom to provide services, or the establishment of a branch in the Portuguese territory. Furthermore, the FinTech business must comply with general terms of law, including, but not limited to, legislation governing marketing materials, data protection, consumers’ and employees’ protection, etc.
- FinTech business established outside of the EU and wishing to provide its services, which are subject to a specific regulatory framework, in Portugal: the FinTech business may not provide, market or promote its services to customers in Portugal, including online (either via a website or by email), unless it has obtained the licence, authorisation, registration or approval required to provide the relevant regulated services. Furthermore, the FinTech business must comply with general terms of law, including, but not limited to, legislation governing marketing materials, data protection, consumers’ and employees’ protection, etc.
- FinTech business established outside Portugal and wishing to provide its services, which are not subject to a specific regulatory framework, in Portugal: apart from having to comply with general terms of law, including, but not limited to, legislation governing marketing materials, data protection,

consumers and employees protection, etc., as the FinTech business is not carrying on a regulated activity it does not have to comply with any specific regulatory framework. Furthermore, from a tax perspective, depending on the structure under which the activities are being performed in Portugal, a permanent establishment may be deemed to exist.

In this case, the tax authorities may allocate profits to the permanent establishment and tax under the general corporate income tax provisions.

The pursuit of regulated activities within the Portuguese territory by a non-authorised entity is deemed as a serious administrative offence subject to heavy fines, plus ancillary sanctions.

**4 Other Regulatory Regimes / Non-Financial Regulation**

**4.1 Does your jurisdiction regulate the collection/use/ transmission of personal data, and if yes, what is the legal basis for such regulation and how does this apply to fintech businesses operating in your jurisdiction?**

The legal framework for the protection of personal data in Portugal is regulated by the Lisbon Treaty, article 35 of the Portuguese Constitution and Law no. 67/98 of 26 October that transposed Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data (the “Data Protection Law”) into the Portuguese legal system. These rules apply to the processing of personal data wholly or partly by automatic means, and to the processing other than by automatic means of personal data which form part of manual filing systems or which are intended to form part of manual filing systems. These rules do not apply to natural persons processing personal data in the course of a purely personal or household activity. As applicable from 25 May 2018, the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Data Protection Regulation), which repeals Directive no. 95/46EC, will also apply in Portugal.

In addition to this, the provisions regarding the protection of personal data in the context of Law no. 41/2004 of 18 August on the protection and processing of personal data in e-communications, as recently amended by Law no. 46/2012 of 29 August, which transposed Directive no. 2009/136/EC, also contain relevant rules regarding the sending of unrequested communications for direct marketing purposes.

**4.2 Do your data privacy laws apply to organisations established outside of your jurisdiction? Do your data privacy laws restrict international transfers of data?**

The Data Protection Law also applies even when personal data is processed outside of Portugal: (i) in the context of activities of an establishment of the controller in the Portuguese territory; (ii) if, in the place where the processing is carried out, national laws apply by virtue of international public law; or (iii) when the controller is not established within the EU but makes use of equipment, automated or otherwise, situated in Portugal, unless such equipment is used only for purposes of transit through the EU.

As concerns transfers of data, the Data Protection Law states that whenever these transfers occur within the EU they are free of additional requirements. Transfers of personal data to any third countries may only take place provided that said third country ensures an adequate level of protection. Notwithstanding this general rule, the Portuguese Data Protection Authority (“CNPD”)

may authorise a transfer or a set of transfers of personal data to a receiving state that does not provide an adequate level of protection if the data subject has given clear consent to the proposed transfer, or if the transfer is: (i) necessary for the performance of a contract between the data subject and the controller, or the implementation of pre-contractual measures taken in response to the data subject's request; (ii) necessary for the performance or conclusion of a contract between the controller and a third party that is concluded, or to be concluded, in the data subject's interests; (iii) necessary or legally required on important public interest grounds, or to establish, exercise or defend legal claims; (iv) necessary to protect the data subject's vital interests; or (v) made from a register which is intended to provide information to the public and is open to consultation, either by the public or by any other person who can demonstrate a legitimate interest, provided the conditions laid down in law for consultation are fulfilled. In addition, the CNPD may also authorise a transfer or set of transfers of personal data to a State which does not ensure an adequate level of protection, provided the data controller adduces adequate safeguards particularly by means of appropriate contractual clauses (for example, the Model Standard Contractual Clauses approved by the European Commission).

#### **4.3 Please briefly describe the sanctions that apply for failing to comply with your data privacy laws.**

Non-compliance with the Data Protection Law is generally deemed an administrative offence and the penalty for each breach ranges between €1,500 and €15,000 (€3,000 and €30,000 when dealing with sensitive data). The data controller can also incur civil or criminal liability (with penalties ranging from one year of imprisonment or fines of up to 120 days (the daily rate for fines corresponds to an amount ranging between €5 and €500), plus ancillary sanctions).

Also, the violation of rules applicable to marketing communications and cookies set forth in Law 41/2004 of 18 August, as amended, constitute an administrative offence, punishable with fines ranging from €5,000 to €5,000,000 for legal entities.

#### **4.4 Does your jurisdiction have cyber security laws or regulations that may apply to fintech businesses operating in your jurisdiction?**

Yes, Law no. 109/2009 of 15 September implemented the Convention on Cybercrime and the Council Framework Decision no. 2005/222/JHA on attacks against information systems. In addition, Law no. 41/2004 of 18 August, amended by Law no. 46/2012 of 29 August, contains a specific obligation of companies providing publicly available electronic communication services to promptly notify the CNPD upon the occurrence of a personal data breach. Whenever the breach may adversely affect the personal data of users or subscribers (i.e. when it results, *inter alia*, in identity fraud, physical harm, significant humiliation or reputational damages), companies must also, without undue delay, notify the subscribers or the users of the breach so the latter can take the necessary precautions. The data breach notification shall be extended to all companies with the implementation of the General Data Protection Regulation and shall be carried out under the conditions set out therein.

The provision of the Data Protection Law regarding the obligation of the data controllers to implement security measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access and against all other unlawful forms of processing should also be considered when dealing with cybersecurity issues in the context of personal data.

#### **4.5 Please describe any AML and other financial crime requirements that may apply to fintech businesses in your jurisdiction.**

Law no. 25/2008, of 5 July, provides for the legal framework on the prevention of money laundering and the financing of terrorism, as has been complemented for a set of regulations and instructions issued by the national supervisory authorities ("AML Legal Framework"). This AML Legal Framework is applicable to a very significant set of institutions providing financial services in Portugal, including both institutions incorporated in Portugal and institutions acting through a branch in Portugal.

As to financial crimes, the Portuguese Criminal Code (Decree-Law no. 48/95), sets out that legal persons (e.g. companies) may be liable for certain criminal offences – identified in a closed catalogue (which comprises several financial crimes, such as embezzlement, counterfeiting of currency, money laundering, corruption, illegal taking of deposits and other repayable funds, insider trading, market manipulation, etc.) in case certain legal requirements are met.

Considering that the penalty of imprisonment cannot be applied to a legal person, the latter may be subject to the payment of heavy fines or even to its winding up, plus ancillary sanctions.

In this regard, it is worth mentioning that, although it has not yet entered into force, the Portuguese legal framework applicable to equity-based and lending-based crowdfunding platforms sets forth that these platforms must adopt written policies and procedures adequate and effective to prevent fraud, money laundering and financing of terrorism and that they must make such policies available in the platform's website.

#### **4.6 Are there any other regulatory regimes that may apply to fintech businesses operating in your jurisdiction?**

FinTech businesses cover a vast range of activities, thus a case-by-case assessment is imperative. In any case, taking into account the overall picture of the FinTech ecosystem in Portugal, we would say that the legislation more often put to the test is: (a) the Portuguese Banking Law; (b) the payment services act (Decree-Law no. 317/2009); (c) the consumer credit regime (Decree-Law no. 133/2009); (d) the Portuguese Securities Code (Decree-Law no. 486/99); (e) the distance marketing and conclusion of consumer services act (Decree-Law no. 95/2006, for financial services in particular, and Decree-Law no. 24/2014); (f) the data protection legal framework (Law no. 67/98, of 26 October, and Regulation (EU) no. 2016/679); (g) the electronic identification legal framework (Decree-Law no. 290-D/99, of 2 August, and Regulation (EU) no. 910/2014); (h) the unfair terms act (Decree-Law no. 446/85); (i) the e-commerce act (Decree-Law no. 7/2004); and (j) any consumer-protection regimes.

## **5 Accessing Talent**

#### **5.1 In broad terms, what is the legal framework around the hiring and dismissal of staff in your jurisdiction? Are there any particularly onerous requirements or restrictions that are frequently encountered by businesses?**

Under Portuguese law, there are two main types of employment agreements: employment agreements subject to a defined term (which may be fixed or unfixable); and employment agreements without term (open-ended agreements).

In addition, there are also several specific employment agreements governing particular activities, such as, professional sportsmen, domestic work, temporary agency work and employment agreements on service commission.

As per the Labour Code, employers may only validly terminate open-ended employment agreements by means of: (i) mutual agreement; (ii) termination during the trial period; (iii) permanent and absolute incapacity of the employee or the employer to render or receive the work; (iv) total and permanent closure of the company; (v) fair dismissal; (vi) collective dismissal; (vii) termination of the work position; (viii) inability of the employee to adapt; (ix) desertion of the employee; or (x) retirement for age or disability.

Term employment agreements, on the other hand, may be terminated under the general rules applicable to open-ended employment agreements and at the end of the relevant term.

In view of the above, save for certain exceptional situations, employers may only unilaterally terminate open-ended employment agreements on disciplinary grounds (which requires, among other aspects, a very serious breach of the employees' duties) or with recourse to redundancy procedures, which imply the existence of objective reasons and the payment of severance compensations. In both situations, somewhat complex legal procedures are required to be followed.

## 5.2 What, if any, mandatory employment benefits must be provided to staff?

The minimum national monthly wage for the year 2017 is of €557. All employees working on a full-time basis, regardless of their citizenship, are entitled to it (in the islands of Madeira and Azores the minimum wage for 2017 is of €568.14 and €584.85, respectively).

Furthermore, collective bargaining agreements usually set forth the minimum remuneration scale that has to be paid to the employees rendering duties inherent to the professional categories established therein.

## 5.3 What, if any, hurdles must businesses overcome to bring employees from outside your jurisdiction into your jurisdiction? Is there a special route for obtaining permission for individuals who wish to work for fintech businesses?

### European Union Citizens:

EU citizens may work in Portugal without a work permit. Nonetheless, certain formalities may have to be observed, depending on the duration of their stay and the nature of the activity.

### Non-European Union Citizens:

Most non-EU citizens who intend to enter Portugal must hold a recognised travel document that must be valid for at least three months more than the expected duration of their visit (for example, a valid passport) and must hold a valid visa that is appropriate for the purpose of his visit.

There is no special route for obtaining permission for individuals who wish to work for FinTech businesses.

## 6 Technology

### 6.1 Please briefly describe how innovations and inventions are protected in your jurisdiction.

The main Portuguese legal framework for industrial property rights

is found in the Industrial Property Code (*Código da Propriedade Industrial*, the "CPI"), as approved by Decree-Law 36/2003, of 5 March, as amended. The CPI includes the main legal provisions regarding invention patents, utility models (with a lower inventive rank than patents), registered designs and trademarks.

According to the CPI, any inventions may be the subject matter of patent protection, provided that they are new, inventive and have industrial application. It is further established that, if the above requirements are met, patent protection may be granted either for a process or a product, in any field of technology. The CPI expressly excludes from patent protection, amongst other matters, simple discoveries, scientific theories and mathematical methods. This means that software is subject to protection by copyright and not patent, unless the software in question is part of a process subject to patent protection *per se* (the so-called computer implemented inventions).

As concerns the duration of the indicated rights, Portuguese patents enjoy protection for 20 years as of the application date, and utility models are registered for a maximum period of 10 years as of the application date. Following these periods, inventions will enter the public domain and may be used freely by any person.

Trade secrets are not specifically regulated in the CPI. However, whenever there is a disclosure, acquisition or use of the business secrets of a competitor without its consent, provided that said information: (a) is secret in the sense that it is not common knowledge or easily accessible, in its totality or in the exact configuration and connection of its constitutive elements, for persons in the circles that normally deal with the type of information in question; (b) has commercial value based on the fact that it is secret; and (c) has been the object of considerable diligences on the part of the person with legal control over it, with a view to keeping it secret, this may constitute an act of unfair competition under the CPI.

The CPI also sets forth other industrial property rights which, depending on the purpose, may also be relevant for FinTech businesses, such as trademarks. In order for a certain commercial symbol to become a trademark it must be distinctive and capable of being graphically represented. Trademark registrations have a duration of 10 years as of the registration date and may be indefinitely renewed for identical periods of time.

The Portuguese Code of Copyright and Related Rights (*Código do Direito de Autor e Direitos Conexos* "CDADC") is applicable to intellectual creations in the literary, scientific and artistic fields which are original and exteriorised in some way. Copyright covers both moral and patrimonial rights of the authors and shall be recognised independently of registration, filing or any other formality. It exists from the moment the work is created. As a general rule, the patrimonial rights shall lapse 70 years after the death of the author of the work, even in the case of works disclosed or published posthumously.

### 6.2 Please briefly describe how ownership of IP operates in your jurisdiction.

The CPI specifically establishes that in order to be protected, an industrial property right (i.e., patents, utility models, designs and trademarks) must be registered either at a national, European or international level. Protection is granted generally on a first-to-file basis. The registration process is different depending on the industrial property right in question.

For patents and utility models, the ownership rules are as follows:

- (i) General rule: the right to patent shall belong to the inventor or his successors in title. If two or more persons have made an invention, any of them may apply for a patent on behalf of all the parties.



- (ii) Special rules: if an invention was made during the performance of an employment contract in which inventive activity is provided for, the right to the patent belongs to the company. In this case, if the inventive activity is not especially remunerated, the inventor is entitled to remuneration in accordance with the importance of the invention. Also, if an invention is part of the employee's activity, the company has a pre-emptive right to the patent in return for remuneration in accordance with the relevant of the invention importance of the invention and may assume ownership or reserve the right to its exclusive exploitation, the acquisition of the patent or the ability to apply for or acquire a foreign patent.

For copyrights and related rights, the ownership rules are as follows:

- (i) General rule: copyright shall belong to the intellectual creator of the work.
- (ii) Special rules:
- (a) ownership of copyright in a work carried out on commission or on behalf of another person, either in fulfilment of official duties or under an employment contract, shall be determined in accordance with the relevant agreement. In the absence of any agreement, it shall be deemed that ownership of copyright in a work carried out on behalf of another person belongs to the intellectual creator. However, where the name of the creator is not mentioned in the work or is not shown in the customary place, it shall be deemed that the copyright remains the property of the person or entity on whose behalf the work is carried out; and
- (b) in the event of joint co-authors, either:
- (1) all co-authors have equal exploitation rights, unless otherwise stipulated; or
  - (2) where a work of joint authorship is disclosed or published solely in the name of one or several of the authors, in the absence of any explicit indication by the remaining authors regarding some part of the work, it shall be presumed that the authors not mentioned have assigned their rights to the author or authors in whose name the work has been disclosed or published.

### 6.3 In order to protect or enforce IP rights in your jurisdiction, do you need to own local/national rights or are you able to enforce other rights (for example, do any treaties or multi-jurisdictional rights apply)?

Under Portuguese rules, industrial property rights (i.e. patents, utility models, designs, trademarks, trade secrets) are locally applicable rights, only enjoying protection in the country in which they were registered. For trademarks, the European Community and international registration systems allow the possibility of including a large number of countries within the scope of the trademark protection: the former to the 28 Member States of the EU, and the latter to the countries that form the Madrid Union.

As for patents, filing a European or international patent application allows the extension of protection of an invention to a large number of countries: a European patent is valid in the countries that are signatories to the Munich Convention, and an international patent is valid in the countries that are signatories to the Patent Cooperation Treaty.

Apart from registered rights, protection is also granted to specific, unregistered rights, including: (a) well-known and reputed trademarks and tradenames, which are protected from unauthorised use by third parties that might take unfair advantage of their reputation or affect their distinctive character (in accordance with article 6 *bis* of the Paris Convention for the Protection of Industrial

Property); (b) non-registered European Union designs (if they have already been marketed in the European Union), which are protected for a period of three years following the date on which the design was first made available to the public (and only from uses resulting from its copy); and (c) know-how and business information (trade secrets) may be protected if the requirements set forth in the CPI on unfair competition are satisfied.

As concerns copyright and related rights, given the fact that they do not require registration to be valid and only depend on their exteriorisation, there is no formal recognition procedure. The Portuguese rules apply to Portuguese authors, but also to nationals of third countries who reside in Portugal. Also, works by foreign authors, or authors with a foreign country as their country of origin, shall enjoy the protection granted by Portuguese law, subject to reciprocity, and with the exception of any international convention to the contrary to which the Portuguese State may be bound. Additionally, works published for the first time in Portugal and where Portugal is the country of origin of the author of unpublished works shall enjoy protection under the CDADC.

### 6.4 How do you exploit/monetise IP in your jurisdiction and are there any particular rules or restrictions regarding such exploitation/monetisation?

Exploitation of industrial property rights can occur either directly by their owner or through a full or partial licence granted to third parties. Licence contracts must be drawn up in writing and unless otherwise expressly stipulated, the licence shall be understood to be non-exclusive. Also, in order for a licence to have *erga omnes* effects it must be registered at the National Industrial Property Institute (otherwise it will only have *inter partes* effects).

As regards copyright and related rights, the CDADC grants the author an exclusive right to enjoy and use his/her work, either in whole or in part, including, in particular, the right to disclose, publish and exploit it economically in any direct or indirect form within the limitations of the law. The powers related to the administration of copyright may be exercised by the owner of the copyright himself or through his/her duly authorised representative (which are generally national or foreign associations specifically established for the administration of a large amount of owners of copyright). As in other jurisdictions, exploitation rights are limited by a number of exceptions that allow the general public, or certain beneficiaries, to make specific, free use of the work without requiring permission from the author. In such cases, the author will not receive any remuneration, unless equitable compensation of some kind is deemed to be appropriate.

### Acknowledgment

The authors would like to acknowledge the assistance of their colleague Joana Mota (*Senior Associate*) in the preparation of this chapter. Joana Mota joined Uría Menéndez as a junior associate in February 2012 and became a senior associate in February 2014. Joana focuses her practice on the acquisition, protection and maintenance of national and international IP rights and has represented parties in related litigation proceedings. She has also advises companies on personal data protection issues. Joana has a postgraduate qualification in IP law, taught by the Portuguese Association of Intellectual Property Law in conjunction with the Faculty of Law of the Universidade de Lisboa. She also has an advanced qualification in data protection law from the Universidade de Lisboa.



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Pedro Ferreira (Partner) joined Uría Menéndez in 2004 when Vasconcelos, F. Sá Carneiro, Fontes & Associados – one of the most prestigious Portuguese law firms - integrated with Uría Menéndez and has been a partner of the firm since then. He currently heads the Finance Department in Portugal and is responsible for the areas of banking and insurance.

Pedro focuses on banking, restructuring and insurance law and has over 20 years of experience in:

- Banking: advice on all legal aspects related to retail and investment banks, including loans, credit facilities, guarantees, commercial paper and structured finance.
- Securities: advice on diverse areas of securities law, including financial intermediation, markets, settlement procedures, cross-border services, venture capital, and securities and bond issues. Legal advice on products such as repos, securities lending, derivative and transactions.
- Restructurings: advice on corporate and debt restructuring transactions across various sectors.
- Insurance: negotiation of insurance contracts on project finance and structured finance transactions, due diligences within the insurance field, advice on financial products and regulatory and supervision issues.

Since 1998, Pedro has worked as a legal consultant for the Portuguese Banking Association, and acts as their representative on the Legal Committee and on the Retail's Committee of the European Banking Federation.



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His practice is focused on banking, finance and insurance. Notably, he advises on M&A transactions involving financial institutions, bancassurance joint ventures, the transfer of insurance portfolios and on other regulatory matters related to these markets, including insurance and reinsurance intermediation.

Hélder frequently advises on regulatory and supervisory aspects of financial and insurance activities (including banking and financial intermediation services and payment services), such as lending, creation of security, factoring, sale and purchase of receivables, money laundering, venture capital and financial products and investment and retail banking and insurance instruments (capital redemption transactions and unit-linked life insurance agreements).

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