

International Comparative Legal Guides



Fintech 2021

A practical cross-border insight into fintech law

Fifth Edition

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Expert Analysis Chapters

- 1** **The Collapse of Cryptography? Considering the Quantum Threat to Blockchain**
Ben Kingsley & Emily Bradley, Slaughter and May
- 4** **AIFC's Initiatives for Emerging Venture Capital in Central Asia**
Kairat Kaliyev, Arslan Kudiyar, Nazgul Baitemirova & Aigerim Omarbekova, Astana International Financial Centre (AIFC)
- 8** **Fintech SPAC Transactions in Europe and the United States**
Jonathan Cardenas, Chair, Financial Services Technology Joint Subcommittee

Q&A Chapters

- 14** **Australia**
Gilbert + Tobin: Peter Reeves, Richard Francis & Emily Shen
- 22** **Austria**
PFR Attorneys at Law: Bernd Fletzberger
- 29** **Belgium**
Janson Baugniet: Muriel Baudoncq
- 34** **Brazil**
Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados: Pedro Eroles & Marina Procknor
- 41** **British Virgin Islands**
Appleby: Rebecca Jack
- 47** **Canada**
McMillan LLP: Pat Forgione & Anthony Pallotta
- 55** **Colombia**
Lloreda Camacho & Co.: Santiago Gutiérrez & Adriana Galeano
- 61** **Cyprus**
Christiana Aristidou LLC: Christiana Aristidou & Evdokia Marcou
- 69** **Czech Republic**
FINREG PARTNERS: Ondřej Mikula & Jan Šovar
- 74** **Denmark**
Gorrissen Federspiel: Tue Goldschmieding & Morten Nybom Bethe
- 80** **France**
Bredin Prat: Bena Mara & Ariel Axler
- 88** **Germany**
Bird & Bird LLP: Dr. Michael Jünemann, Jörg-Alexander Paul & Dr. Barbara Geck
- 94** **Gibraltar**
Triay Lawyers: Javi Triay & Jay Gomez
- 101** **Hong Kong**
Slaughter and May: Peter Lake & Mike Ringer
- 112** **Iceland**
BBA/Fjeldco: Stefán Reykjalin
- 119** **India**
AZB & Partners: Srinath Dasari, Vipul Jain & Rachana Rautray
- 125** **Indonesia**
Walalangi & Partners (in association with Nishimura & Asahi): Sinta Dwi Cestakarani, Andhika Indrapraja & Indira Setyowati
- 131** **Ireland**
A&L Goodbody: Kevin Allen, Peter Walker & Chris Martin
- 143** **Isle of Man**
DQ Advocates Limited: Adam Killip & Andrew Harding
- 148** **Italy**
DDPV Studio Legale: Luciano Vasques & Chiara Sciarra
- 156** **Japan**
Anderson Mōri & Tomotsune: Ken Kawai, Kei Sasaki & Takeshi Nagase
- 163** **Jersey**
Carey Olsen Jersey LLP: Peter German, Chris Griffin & Huw Thomas
- 172** **Korea**
Lee & Ko: Jongsoo Yoon & Hyun Koo Kang
- 178** **Lithuania**
Ellex: Ieva Dosinaitė & Julija Šlekonytė
- 184** **Malaysia**
Shearn Delamore & Co.: Christina Kow & Timothy Siaw
- 192** **Mexico**
Lazcano Sámano, S.C.: Alfredo Lazcano & Andrea Avedillo
- 197** **Netherlands**
De Brauw Blackstone Westbroek: Willem Röell & Christian Godlieb
- 205** **Nigeria**
Udo Udoma & Belo-Osagie: Yinka Edu, Joseph Eimunjeze & Pamela Onah
- 213** **Norway**
Advokatfirmaet BAHR AS: Markus Nilssen & Eirik Basmo Ellingsen

- 221** **Philippines**
DivinaLaw: Danny E. Bunyi, Jay-R C. Ipac,
Emma Ruby J. Aguilar & Shiela Camile S. Esquivel
- 227** **Portugal**
Uría Menéndez – Proença de Carvalho:
Pedro Ferreira Malaquias & Hélder Frias
- 236** **Romania**
Furtună și Asociații / VD Law Group: Mihai Furtună &
Sergiu-Traian Vasilescu
- 242** **Russia**
QUORUS GmbH: Maxim Mezentsev & Nikita Iovenko
- 250** **Saudi Arabia**
Hammad & Al-Mehdar: Suhaib Adli Hammad
- 257** **Senegal**
LPS L@W: Léon Patrice Sarr
- 263** **Singapore**
RHTLaw Asia LLP: Ch'ng Li-Ling & Aaron Lee
- 269** **Spain**
Uría Menéndez: Leticia López-Lapuente,
Isabel Aguilar Alonso & Carolina Albuérne González
- 278** **Sweden**
Mannheimer Swartling: Anders Bergsten &
Carl Johan Zimdahl
- 285** **Switzerland**
Bär & Karrer: Dr. Daniel Flühmann & Dr. Peter Ch. Hsu
- 295** **Taiwan**
KPMG Law Firm: Kelvin Chung & Lawrence Ong
- 301** **Thailand**
Chandler MHM Limited: Wongsakrit Khajangson &
Nuanporn Wechsuanarux
- 307** **United Arab Emirates**
Afridi & Angell: James Bowden, Zaid Mahomed &
Alex Vromans
- 314** **United Kingdom**
Slaughter and May: Rob Sumroy, Ben Kingsley,
Natalie Donovan & Selmin Hakki
- 323** **USA**
Shearman & Sterling LLP: Reena Agrawal Sahni

Digital Edition Chapter

- 331** **Pakistan**
RIAA Barker Gillette: Mustafa Munir Ahmed &
Saira Khalid Khan

Portugal

Uría Menéndez – Proença de Carvalho



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1 The Fintech Landscape

1.1 Please describe the types of fintech businesses that are active in your jurisdiction and the state of the development of the market, including in response to the COVID-19 pandemic. Are there any notable fintech innovation trends of the past year within particular sub-sectors (e.g. payments, asset management, peer-to-peer lending or investment, insurance and blockchain applications)?

Although the FinTech market in Portugal is maturing, with more and more FinTech-related initiatives, businesses, events and non-profit organisations emerging in the market, the data regarding its players and numbers is still very fragmented and inaccurate.

According to public sources, the largest segments of the Portuguese FinTech market are digital payments, alternative financing and crypto and blockchain. However, there are also relevant players in other FinTech segments in Portugal, such as personal finance management, mobile-first banks, RegTech, etc. As for crowdfunding, the legal framework applicable to equity-based and lending-based crowdfunding activities entered into force on 10 February 2018.

Lastly, the Portuguese Government, the supervisory and regulatory authorities of the financial sector and the private sector have been very committed to supporting the emerging start-up ecosystem in Portugal. Lisbon has been the host city of the annual Web Summit since 2016 (which is scheduled to remain in Lisbon until 2028), and initiatives such as incumbents' accelerators, SIBS API Market, the Portuguese Government's tech programmes and the Lisbon Investment Summit, just to name a few, are a clear testimony of this commitment.

The 2020 Portugal Fintech Report highlights that Portuguese FinTechs have been growing, overcoming the COVID-19 pandemic constraints. In 2020, this trend of growth was registered both by the pre-existing FinTechs, which achieved international expansion and grew funding, as well as by new companies that have emerged. Moreover, an increase of international FinTechs moving to Portugal has been detected, some as a second office and others as a way of expanding into Europe. In terms of the ecosystem, in particular regarding distribution per vertical, the 2020 Portugal Fintech Report also depicts that Portuguese FinTechs demonstrate a tendency towards Payments and Money Transfers, InsurTech and Blockchain and Crypto. In respect of their stage, almost half of the companies are seed.

1.2 Are there any types of fintech business that are at present prohibited or restricted in your jurisdiction (for example cryptocurrency-based businesses)?

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.

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 Portuguese Government launched, in the last few years, several initiatives with the aim of offering alternatives to traditional sources of funding to start-ups in general, including FinTech businesses. Those initiatives range from (i) the funding of daily expenses of entrepreneurs, (ii) the funding of the acquisition of professional incubation services, (iii) the sponsoring of the participation of start-ups in international events, and (iv) 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.

The 2020 Portugal Fintech Report contains data on funding, mentioning that the top 30 FinTechs have raised over EUR 275 million to date. Almost half of the funding consists of alternative funding. In addition, Portugal ranks first in the top three regions in terms of funding, with 61%, in contrast to the United States, which occupies second place, with only 22%.

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, if the relevant company qualifies as a micro-entity, a simplified corporate income tax (“CIT”) regime may apply provided that certain conditions are met (e.g. taxable income no higher than EUR 200,000). According to this simplified regime, 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 taxable income up to EUR 25,000, with exceeding income subject to the general 21% rate.

Furthermore, SMEs may also be granted CIT credits corresponding to 10% of retained earnings up to an amount of EUR 12 million, which are reinvested in eligible investments in the four tax years following the tax year in which the earnings were retained. The CIT credits are capped to 50% of the CIT due by the relevant company.

Companies that develop certain 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 the taxable income subject to CIT. 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 of 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.

There is a specific tax regime to support investment, which 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 EUR 15 million, and up to an amount of 10% of the investment amounts exceeding EUR 15 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 up to EUR 2 million, or that resulted from the conversion of credits into share capital.

Finally, a programme called “Semente” (“Seed”) is also available in order to encourage individuals investing in start-ups. According to this regime, and provided that certain conditions are met, an individual may be granted with a personal income tax credit ranging between EUR 2,500 and EUR 25,000, depending on 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 EUR 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 the 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 (for example: 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; or 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?

Yes. Raize successfully completed its IPO in July 2018.

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, 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, Law no. 3/2018, of 9 February, Ministerial Order no. 131/2018, of 10 May, 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 starting 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. It should be noted that the legal framework applicable to equity-based and lending-based crowdfunding activities only entered into force on 10 February 2018. The platforms may neither provide investment advice or recommendations, nor 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, if any FinTech business carries out a regulated activity, it will need to first obtain the necessary authorisation and/or registration with the competent regulatory authority(ies).

3.2 Is there any regulation in your jurisdiction specifically directed at cryptocurrencies or cryptoassets?

In Portugal, there are no specific regulations specifically directed at virtual currencies or the players in the virtual currencies market, such as virtual currency exchanges, virtual currency wallets, virtual currency miners or virtual currency issuers (virtual currency operators). This does not mean that virtual currencies or virtual currency operators are by all means unregulated. A case-by-case assessment in light of the specific characteristics of the relevant virtual currency or of the relevant virtual currency operator and the activities carried out by the latter in light of the existing legal and regulatory framework is required to reach any conclusions on whether the aforementioned activities constitute or not the pursuit of a regulated activity within the Portuguese territory.

Given the uncertainty surrounding the exact legal and regulatory framework applicable to virtual currencies and virtual currency operators, their potential financial impact, and the resemblance of virtual currencies or the operations or business models of some virtual currency operators with legal concepts, functions and business models to those found in specific financial sectors, the Portuguese regulatory and supervisory authorities of the financial sector have been alert to the virtual currencies phenomenon and have issued press releases highlighting the risks and uncertainties regarding virtual currencies and initial coin offerings ("ICOs").

3.3 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? Are there any regulatory 'sandbox' options for fintechs in your jurisdiction?

Yes. The Portuguese Government has been very committed to supporting the emerging start-up ecosystem in Portugal in general, including FinTech. The new agreement between the Portuguese Government and the Web Summit for at least 10 more years is just part of the momentum. In 2017, 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 the support of the internationalisation of start-ups.

Portugal has no sandbox options for FinTechs. However, in September 2018, the Portuguese regulatory and supervisory authorities of the financial sector and the Portugal Fintech association launched Portugal FinLab, an innovation hub, the purpose of which is to support the development of innovative solutions in FinTech and related areas through cooperation and mutual understanding. In January 2020, Portugal Fintech set up the Fintech House. This space is focused on the development of FinTech ecosystems and the promotion of financial and technological innovation, and brings together more than 30 start-ups and institutional partners, including banks, insurance companies, consulting firms and investors.

More recently, the Resolution of the Council of Ministers no. 29/2020, of 21 April, established the general principles for the creation and regulation of regulatory sandboxes, designated as Technological Free Zones ("ZLTs"), stating that it is essential to create a legal and regulatory framework that promotes and facilitates the testing of innovative technologies, services, products and processes. Such framework will contribute to the acceleration of research and testing processes and, consequently, to the country's competitiveness and attractiveness for foreign investment, as well as to the transition of new products and services to the market and their appropriate regulation.

The promotion and development of ZLTs was defined as one of the priorities under the Action Plan for the digital transition. Therefore, the Portuguese Government considers that the approach to be adopted in Portugal should seek to go beyond the creation of disparate regulatory sandboxes. It should also go beyond sectors or pre-defined areas, by creating a common vision for testing and experimentation in a real environment in the country, which facilitates the testing of cross-cutting and integrated models, which cross more than one sector and may therefore be subject to different regulations and regulators, thus reducing burdens. Accordingly, after the creation of a legislative framework, specific sectors, such as the financial sector, are expected to be subject to specific analysis and, possibly, a new legal framework.

Still in this context, but from a private initiative perspective, euPago, a Portuguese payments institution supervised by the Bank of Portugal, specialised in online payments, has completed an investment of EUR 2 million to create office74. The goal is to create the largest FinTech hub in Portugal and to function as a sandbox for third parties to test innovative ideas on the market. This should be done by welcoming other FinTechs to office74, and enabling them to use the resources of this payment institution for new business opportunities in the payment systems sector in Portugal.

3.4 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, and the type of services it provides and its jurisdiction, there can be one of three scenarios:

- **A FinTech business established in an 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; and consumers' and employees' protection, etc.

- **A 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 the general terms of law, including, but not limited to: legislation governing marketing materials; data protection; and consumers' and employees' protection, etc.
- **A FinTech business established outside Portugal and wishing to provide its services, which are not subject to a specific regulatory framework, in Portugal:** must comply with general terms of law, including, but not limited to: legislation governing marketing materials; data protection; and consumers and employees' protection, etc. As the FinTech business is not carrying out a regulated activity, it does not have to comply with any specific regulatory framework. However, 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 CIT provisions.

Considering the proposals of the OECD regarding the taxation of digital companies, currently under public discussion, any development on the tax framework applicable to FinTech businesses should be carefully monitored.

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, the Charter of Fundamental Rights of the European Union, article 35 of the Portuguese Constitution, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Data Protection Regulation) (the "GDPR"), which repeals Directive 95/46/EC and Law no. 58/2019, of 8 August ("Law 58/2019"). Law no. 58/2019 formally repealed the former existing Portuguese Data Protection Law (Law 67/98, of 26 October) and provides specific data protection rules in areas that are covered by the GDPR but over which the Member States are given some authority to enact more detailed regulations (for example, in the areas of employment or video surveillance). On this particular topic it is relevant to point out that the Portuguese Data Protection Authority (the "CNPd", as it is known in Portuguese), on 3 September 2019, issued Deliberation 2019/494 (the "Deliberation"), which establishes that several

provisions of Law no. 58/2019 contravene the GDPR and will, therefore, not be applicable by the regulator in its decision-making process in future cases.

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 amended by Law no. 46/2012 of 29 August, which transposed Directive 2009/136/EC (the "Ecommerce Directive"), also contains relevant rules regarding the sending of unrequested communications for direct marketing purposes by electronic means as well as rules on the use of cookies. Similarly, with what occurred with Directive 95/46/EC, the Ecommerce Directive is currently undergoing reform. On 10 February 2021, the Council of the European Union announced it has adopted a consolidated version of a draft Regulation concerning the respect for private life and the protection of personal data in electronic communications. This new e-privacy Regulation will repeal the Ecommerce Directive and create a comprehensive set of rules for electronic communications and protect the privacy of end users, the confidentiality of their communications, and the integrity of their devices. In addition to this legal framework, the opinions and guidelines issued by the European Data Protection Board must also be taken into consideration by FinTech companies.

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?

Article 3 of the GDPR sets out its extraterritorial applicability. Moreover, Law no. 58/2019 also contains additional provisions regarding its extraterritorial applicability which, according to the Deliberation, compromise the application of procedural rules and the distribution of powers between national supervisory authorities of Member States, whenever dealing with cross-border processing, therefore contravening the GDPR and the one-stop-shop mechanism. As a consequence, these additional criteria to apply Law no. 58/2019 outside the Portuguese territory will not be taken into consideration by the CNPD (and only the rules from the GDPR apply). This means that non-EU companies must appoint a representative in the EU and this EU representative may be held liable under the applicable rules for the processing carried out by such non-EU businesses.

In relation to the international transfer of data, Law no. 58/2019 does not provide any additional rules to the ones set out in the GDPR. This means that such transfers may be carried out in accordance with articles 44 to 50 of the GDPR.

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

The GDPR sets out that the failure to comply with its main provisions can lead to fines of up to EUR 20 million or 4% of the global annual turnover for the preceding financial year, whichever is the greater. In addition to this, Law no. 58/2019 provides further details regarding the severity of infringement (serious and very serious), as well as a list of acts or omissions which fit in the mentioned categories of infringement and also sets out additional criteria for determining the sanctions to apply in particular situations. On this particular topic, it is worth pointing out that the Deliberation considers that such additional criteria for determining the amount of the fines go beyond the scope of the GDPR and should, therefore, not apply. Moreover, Law no. 58/2019 also provides for a statutory period for each category of infringement; administrative liability for serious infringements will expire within two years, and very serious infringements will expire within three years.

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 which enacted the law on cybercrime in Portugal. 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 obligation of data breach notification now applies to all companies by virtue of the GDPR under the rules set forth therein.

Moreover, the provisions of the GDPR regarding the obligation of the data controllers to implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk 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. In Portugal, there is no mandatory list of security measures to be implemented.

Finally, Directive (EU) 2016/1148 concerning measures for a high common level of network security and information systems across the EU (the “NIS Directive”) which is the first piece of EU-wide legislation on cybersecurity was transposed into national law by Law no. 46/2018 of 13 August. The European Commission has submitted a proposal to replace the NIS Directive in December 2020 with the aim of strengthening the security requirements, address the security of supply chains, streamline reporting obligations, and introduce more stringent supervisory measures and stricter enforcement requirements, including harmonised sanctions across the EU. The proposed expansion of the scope covered by the NIS2, by effectively obliging more entities and sectors to take measures, would assist in increasing the level of cybersecurity in Europe in the longer term. This piece of legislation, together with the GDPR, marks the most important pieces of legislation in the context of cybersecurity.

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

Directive 2018/843 of the European Parliament and of the Council of 30 May 2018; Directive 2015/849/EU of the European Parliament and of the Council of 20 May 2015; and Directive 2016/2258/EU of the European Parliament and of the Council of 6 December 2016, on the prevention of the use of the financial system for the purposes of money laundering and terrorism financing and on the access to AML information by tax authorities, were implemented into Portugal by means of Law no. 83/2017, of 18 August, and Law no. 89/2017, of 21 August (“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.

In what concerns virtual assets, article 2(1)(ll) of Law no. 83/2017, of 18 August, establishes that “virtual asset” means “a digital representation of value which is not necessarily linked to a legally

established currency and which does not have the legal status of a fiduciary currency, but which is accepted by natural persons or legal entities as a means of exchange or investment, and can be transferred, stored and traded electronically”. Furthermore, article 2(1)(mm) of Law no. 83/2017, of 18 August, establishes that “activities with virtual assets” means any of the following economic activities, performed in the name or on behalf of a customer: (i) exchange services between virtual assets and fiduciary currencies; (ii) exchange services between one or more virtual assets; (iii) services whereby a virtual asset is moved from one address or portfolio (wallet) to another (transfer of virtual assets); and (iv) services to safeguard or safeguard and administer virtual assets or instruments enabling the control, holding, storage or transfer of such assets, including private cryptographic keys.

Entities carrying out activities with virtual assets in Portugal are subject to the provisions of Law no. 83/2017, of 18 August, which means that the virtual currency exchanges and custodian wallet providers will have: (i) to perform know your customer (“KYC”) and know your transaction (“KYT”) analyses regarding their customers (the users of those virtual currency exchanges and wallets) and their corresponding transactions; and also (ii) to report suspicious activities.

The Bank of Portugal is the supervisory authority responsible both for the registry and for verifying the compliance by these entities with the legal and regulatory provisions applicable on the prevention of money laundering and terrorist financing.

The registry with the Bank of Portugal shall first be subject to an assessment of suitability and appropriateness of the persons responsible for the management of the entities engaged in activities with virtual assets. Moreover, the registry with the Bank of Portugal entails the disclosure of the following information, namely: (i) the corporate name, registered office and corporate purpose; (ii) the type of activities with virtual assets which the applicant envisages to perform; (iii) the jurisdictions in which each of the activities with virtual assets that the applicant envisages to perform; (iv) the identification of the shareholders, including the ultimate beneficial owners; and (v) the identification of the members of the management and supervisory bodies and other persons occupying top management positions.

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 the Portuguese legal framework applicable to equity-based and lending-based crowdfunding platforms sets forth that these platforms must adopt written policies and procedures that are adequate and effective to prevent fraud, money laundering and financing of terrorism, and that they must make such policies available on 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. 91/2018); (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 (Regulation (EU) no. 2016/679); (g) the electronic identification legal framework (Decree-Law no. 12/2021 of 9 February, 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 other 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 three main types of employment agreements: employment agreements subject to a defined term (which may be fixed or unfixed); employment agreements without term (open-ended agreements); and service commission employment agreements (admissible for employees performing management or direction duties under the direct supervision of the company's board or second-line managers under the supervision of a general manager or country lead, as well as their personal assistants). The first two types are more common.

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

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) dismissal with cause; (vi) collective dismissal; (vii) individual redundancy; (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 turn, service commission employment agreements may be terminated by the employer by simply giving notice. In both these cases, termination by the employer entails the payment of severance compensation.

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 national minimum wage for the private sector in 2021 is EUR 665 per month in the Portuguese mainland. All employees working on a full-time basis, regardless of their citizenship, are entitled to this (in the islands of Madeira and the Azores the minimum wage for 2021 is EUR 682 and EUR 698.25, respectively).

Furthermore, collective bargaining agreements usually set forth minimum remuneration scales for employees rendering duties inherent to the professional categories established therein, as well as the payment of meal allowances and, in some cases, specific subsidies.

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 their visit.

Some companies may apply for certification under the Tech Visa programme, provided that they meet all legal requirements (such as carrying out a production of goods or provision of services activity subject to internationalisation; prove their technologic and innovative base by meeting some of the criteria laid down by law). Tech Visa is a certification programme addressed to companies that wish to attract highly qualified and specialised professionals to work in Portugal. Certified companies are able to recruit qualified personnel in a simpler way, although the programme is not easily applicable to all candidates. There is currently an ongoing tender process for companies' certification under the Tech Visa programme.

6 Technology

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

The main Portuguese legal framework for IP rights is found in the Industrial Property Code ("*Código da Propriedade Industrial*", the "CPI"), as approved by Decree-Law no. 110/2018 of 10 December, which repeals the prior existing CPI as approved by Decree-Law no. 36/2003 of 5 March and implements the Trademark Directive and the Trade Secrets Directive.

The CPI includes the main legal provisions regarding invention patents, utility models (with a lower inventive rank than patents), registered designs and trademarks and now also includes the legal framework regarding the protection of trade secrets and know-how applicable in Portugal.

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* (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 now regulated by the CPI. Under the new legal framework, trade secrets benefit, with some adaptations, from the civil enforcement procedures and measures provided for IP rights and there are specific rules of preservation of confidentiality of trade secrets in the course of legal proceedings.

The CPI also sets forth other IP 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 application date and may be indefinitely renewed for identical periods of time.

On the other hand, the Portuguese Code of Copyright and Related Rights (“*Código do Direito de Autor e Direitos Conexos*”, the “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 IP 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 IP 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 relevance and 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:
 1. 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

2. 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, IP 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 27 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 within the territory of the European Union (following which the protection cannot be extended); and (c) know-how and business information (trade secrets) now benefit, under the new rules of the CPI, of a specific enforcement framework (similar to the one applicable to the registered IP rights) which facilitates its protection.

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 IP 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 Institute of Industrial Property (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.

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Furthermore, in January 2015, after more than 20 years working in the region, the firm took a ground-breaking step creating the first Latin-American integration between leading local firms (Philippi in Chile, and

Prietocarrizosa in Colombia). In 2016 the firm integrated two Peruvian firms, Estudio Ferrero Abogados and Delmar Ugarte, becoming Philippi Prietocarrizosa Ferrero DU & Uría (PPU), the first major Ibero-American firm. The excellent results obtained by PPU in these past years confirms its status as a leading firm in the Pacific Alliance (Chile, Colombia, Mexico and Peru) as it is fast becoming a preeminent firm in Latin America.

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