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Fintech 2021

A practical cross-border insight into fintech law

Fifth Edition

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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)?

Mirroring the global trend, Spain's financial sector has faced disruptive changes over the past few years due to the entrance of a considerable number of fintech businesses. Although growth has not slowed down in the past year (it was estimated that there were 50 fintech companies in 2013, which have increased to 408 as at September 2020 – source: Map of the Fintech Ecosystem in Spain, by Abanca Innova), the fintech business in Spain is expected to go through a consolidation stage in the medium term.

The fintech market in Spain is maturing, with progressively more fintech-related initiatives, businesses and events emerging in the market. The Spanish government, the supervisory and the different regulatory authorities of the financial sector and the private sector have been very committed to supporting the emerging start-up ecosystem by negotiating and approving measures such as the approval of a regulatory sandbox, which, once approved, intends to facilitate the innovative process in developing technology applicable to financial services.

Fintechs are present in all financial sectors, providing a wide array of services to both final clients and traditional financial entities. They are particularly active in sectors where intermediation between parties is fundamental, including in lending, FX, brokerage and investment services such as investment advice and portfolio management. In those sectors, the development of platforms and big data, robotics and artificial intelligence tools represent the most recent trends in innovation (to date, mainly crowdfunding, crowdlending platforms and robo-advisors). Fintechs are also highly involved in the Spanish payments sector, in which they have recently played a key role in developing online and mobile payments. The so-called third-party providers ("**TPPs**") under PSD2 have been active in the Spanish market for some years now. TPPs mainly focus on offering customers mobile account information services and personal finance-management solutions; however, they are expected to expand into new, unexpected business areas in the near future.

On 24 September 2020, the European Commission published its proposed regulation on Markets in Crypto-assets ("**MiCA**"), which forms part of a wider set of publications on Europe's Digital Finance Strategy. MiCA will apply to any person who provides cryptoasset services or issues cryptoassets in or into Europe. It will also apply to any cryptoasset that is not already subject to EU regulation. This includes utility tokens, payment tokens, stablecoins (or asset-referenced tokens) and a newly defined e-money token (a token that is not e-money in the traditional sense, but has all the hallmarks of traditional e-money). The ICO market is expected to develop further in Spain in the coming years, especially after MiCA is approved. Apart from the above, the main disruption in the global financial sector is still expected to result from ledger technologies such as blockchain. Although this type of technology is not yet widespread, it is expected to emerge in Spain in many areas, not just cybersecurity and cryptocurrencies.

In brief, the fintech sector is having a profound effect on the Spanish financial, investment and insurance sectors, encroaching on the *status quo* of traditional entities. As a natural result of the above, and in response to recent consumer patterns, the traditional model that financial institutions created is being pushed towards introducing new fintech elements into their product portfolio. For this reason, Spanish financial institutions substantially increased their investment in fintech in 2020. Meanwhile, fintech businesses face significant challenges in connection with the provision of financial services, both regulatory (as detailed in question 3.1) and, in some specific cases, regarding their activity's compatibility with that of the owner of the data required for it to operate.

The Spanish authorities have not approved any specific measures for the fintech industry in response to the COVID-19 pandemic. However, from a financial point of view, various measures have been adopted, including a three-month mortgage payment moratorium (which may be extended) for especially vulnerable borrowers. The government has also implemented measures to foster liquidity through several mechanisms, such as a government-backed guarantee scheme and by increasing the net borrowing capacity of the Official Credit Institute. Other aid plans have also been adopted, including extraordinary insurance coverage and a guarantee line for financial institutions that grant financing to companies and self-employed workers.

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

The feasibility of setting up and operating a fintech or insurtech business in Spain should be analysed on a case-by-case basis. Although no fintech or insurtech business is prohibited or restricted in Spain *per se*, specific regulatory licences and compliance with regulatory and AML requirements may apply in the financial and insurance sectors. However, except as explained in our response to question 3.1, to date, fintech or insurtech companies are not expressly regulated in Spain.

Regarding cryptocurrencies, Spain has not yet regulated this sector as it awaits MiCA to be approved. Therefore, for now, cryptocurrencies are neither prohibited or restricted in Spain nor accepted as legal currency. Please refer to question 3.2 for more information.

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)?

Spanish law imposes no restriction on the ability of fintechs to be founded via equity or debt. Nevertheless, fintechs are now usually financed through equity financing rounds at different stages or convertible loans, supported by an array of investors (private equity and venture capital houses, angel investors, and even specific institutions).

Crowdfunding has also grown of late as a source of funding for fintech companies, and there are also growing fintech incubators (some financed by financial entities) and accelerators.

Traditional bank financing is also available, although, in practice, fintech companies at early stages of development usually find it difficult to prove their required credit standing reliability based on a reliable business case.

IPOs on the Spanish Stock Exchanges and, particularly, on the Spanish Alternative Stock Exchange (requiring less stringent conditions for IPOs) represent additional, highly efficient financing alternatives for fintech businesses that have also grown significantly in the market. In addition, the Alternative Bond Market (*Mercado Alternativo de Renta Fija*) constitutes an alternative financing source for fintech companies that have overcome an initial stage.

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 following represents the main tax incentive schemes for investment in tech or fintech businesses generally applicable in Spain: (i) the Spanish "patent box" regime and the research, development and innovation tax credit potentially applicable to Spanish resident companies engaged in tech/fintech activities, when dealing with advanced registered software; (ii) the corporate income tax benefits for start-ups (e.g. a 15% rate for the start-up's first two tax years, instead of the general 25% rate) and Spanish-resident venture-capital entities (*entidades de capital riesgo*); and (iii) tax credits for "business angels" in specific start-ups (subject to specific conditions).

Proper structuring is essential for investors in these companies to mitigate any Spanish tax leakage applicable to investments in tech/fintech companies.

In addition, a law on promotion of the start-up's ecosystem is expected to be passed in the coming months, which may include additional incentive schemes for investment in start-ups and scale-ups, regardless of their industry.

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

Spanish legislation establishes the principle of freedom to issue and offer securities in Spain; nevertheless, the admission of securities to trading on official Spanish Stock Exchanges (i.e. a regulated market supervised by the National Securities Exchange Commission "**CNMV**") or on a multilateral trading facility (currently, the Alternative Stock Market, *Mercado Alternativo Bursátil* ("**MAB**"), a self-regulated entity that has grown significantly in recent years) is subject to verification of specific eligibility and information requirements.

While distinct requirements apply for an IPO on the official Spanish Stock Exchanges as opposed to a listing on the MAB, common listing requirements include the following, among others: (i) the issuer must be a validly incorporated and currently existing public limited company (*sociedad anónima*), or its equivalent under a foreign law; (ii) the securities to be listed must meet all applicable legal requirements, and must be freely transferrable, represented in book-entry form, and grant the same rights to all holders in the same position; (iii) admission to trading is conditional upon submitting specific documentation to the appropriate regulator evidencing compliance with the legal framework applicable to the issuer and the securities, the issuer's audited financial statements and a public offering or listing prospectus or informative document; and (iv) the application for admission to listing must cover all securities of the same class, and a minimum volume and a minimum distribution of the securities among the public are required.

In general, the MAB provides an alternative for small and medium-sized companies to access capital markets through a less burdensome legal framework. As opposed to the Spanish Stock Exchanges, the MAB does not require a minimum activity period (i.e. business projections are permitted even if the fintech business has performed activities for fewer than two years). Also, while the official Spanish Stock Exchanges require a minimum capitalisation of EUR 6 million, only EUR 2 million is required for an IPO on the MAB. Thus, this may be an attractive, less onerous platform for growing fintech businesses to access capital markets.

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

No IPOs for fintech businesses were launched in Spain in 2020. But there have been a couple of notable exits. The London-based IMAN Capital purchased Crealsa Investments (a fintech that currently operates a web-based origination and underwriting platform) in February 2020 and Square purchased Verse (a Spanish peer-to-peer payment app), although the terms of the deal were not disclosed. Verse had raised USD 37.6 million from Spark Capital, eVentures, Greycroft Partners and other investors; purchasing this company will allow Square, a USD 27 billion American fintech whose founder and CEO is Jack Dorsey, to access the EU market.

It is worth noting that Allfunds, a Spanish fintech that managed EUR 1.2 trillion worth of assets at the end of 2020, has this month confirmed its IPO in Euronext Amsterdam. It is expected to be valued at around EUR 7 billion and to sell at

least the 25% of its equity. The company is currently owned by Hellman & Fridman (40.672%), the Singaporean sovereign wealth fund GIC (22.878%), BNP Paribas (22.5%) and Credit Suisse (13.95%).

The fintech market has been affected by the increase in non-banking financing caused by the pandemic, from which companies such as the Spanish Novicap have clearly benefited (with an increase in revenue of 50% in 2020). Also, the upsurge in cryptocurrencies, the increasing digitalisation and new investment models have positively affected the growth of fintech businesses.

That said, some companies listed on the MAB provide services that are ancillary to the financial industry (e.g. Lleida.net and Facephi).

Moreover, both traditional banks and investors continue to invest significant and growing amounts in Spanish fintechs. Among the most notable investments are: Flywire (payment media), which in February 2020 received EUR 120 million from Goldman Sachs; Lana (alternative financing platform), which received EUR 12 million from Base10 Partners and Cathay Innovation; Bnext (payment media), which received EUR 11 million from DN Capital, Redalpine, Speedinvest, Founders Future and other investors; Fintonic (personal finance), which received EUR 10 million from ING Group and PSN; Belvo (open banking platform), which received EUR 9 million from Founders Fund and Kaszek Ventures; Kantox (currency exchange platform), which received EUR 8 million from BNP Paribas; and finally, in January 2021, Capchase raised EUR 50 million from i80 Group.

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.

As of today, fintechs are not expressly regulated in Spain. This is mainly because fintech businesses in Spain cover a vast range of activities.

In general, fintech businesses focused only on developing IT solutions to support financial entities in their provision of services by are not currently subject to any financial regulatory regime. However, fintechs that engage in financial activities such as payment services, deposit-taking activities, investment services, payment services and insurance are subject to the general regulatory regime that applies to any company operating in those sectors.

Cybersecurity and data protection regimes may also apply to certain fintech businesses, as well as other regulatory regimes, as described in section 4.

However, specific legal developments have already arisen in Spain in connection with some particular types of fintech businesses. This is the case with crowdfunding and crowdlending platforms, which are subject to Law 5/2015 of April 27 on the promotion of business financing, which, for the first time in Spain, regulates the activities of these platforms.

As mentioned, Law 5/2015 regulates crowdfunding and crowdlending platforms and the provision of their services. These activities require an authorisation from the CNMV (with the involvement of the Bank of Spain). Unlike other financial regulations in Spain, which are transpositions of European financial directives, Law 5/2015 is purely domestic. However, the Regulation on European Crowdfunding Service Providers ("**ECSP**") for business entered into force on 10 November 2020. Within the next 24 months of the entry into force of the Regulation, existing Spanish crowdfunding platforms may continue to operate under the national rule or adapt to the new requirements of the Regulation and apply to the CNMV to confirm that such requirements are aligned with the Regulation and thus be able to operate throughout the EU.

Apart from the above, the Spanish government approved Law 7/2020 of 13 November for the digital transformation of the financial system, which establishes a set of measures to accompany the digital transformation of the financial system and more importantly has established a controlled testing area or sandbox. Please refer to question 3.3 for more information.

Since Spain has no specific regulatory framework governing the marketing of fintech products and services (except for Law 5/2015), these entities must observe the marketing legislation applicable to any other company. Apart from the Spanish Consumers Law, which establishes certain principles on marketing, and the general law on publicity, other applicable publicity provisions are included in the Spanish laws on electronic commerce and distance marketing of financial services.

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

As mentioned in question 1.2, this sector is not yet regulated in Spain as it awaits EU regulation on the matter. Therefore, for now, cryptocurrencies are neither prohibited or restricted in Spain nor accepted as legal currency. This notwithstanding, certain cryptoassets, cryptocurrencies and ICOs may already qualify as financial instruments or fall within the scope of financial regulations, depending on how they are structured. In this regard, both the European Securities Market Authority (the "**ESMA**") and the CNMV have issued guidelines reminding firms involved in ICOs of their regulatory obligations in connection with the Prospectus Directive, MiFID, the AIFMD and the anti-money laundering legislation. The same rules apply to cryptoassets. In particular, Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (the "**Fifth AML Directive**") requires that custodian wallet providers (i.e. entities that provide services to safeguard private cryptographic keys on behalf of their customers, to hold, store and transfer virtual currencies) be registered.

On 24 September 2020, the European Commission published MiCA, which forms part of a wider set of publications on Europe's Digital Finance Strategy. MiCA introduces specific disclosure and transparency requirements, such as a requirement for a prospectus or white paper to be issued with a number of crypto-specific disclosures, and a requirement that issuers be established as legal entities and supervised effectively. Additional obligations will apply to issuers of asset-referenced tokens (or so-called "stablecoins"). MiCA is just a proposal that has yet to undergo the EU legislative process. This could take 18–24 months and the proposal may be amended in that time.

During the past years, the ESMA has been working with different national authorities (including the CNMV) in analysing the different business models of cryptoassets, their risks and potential benefits, and how they fit within the existing regulatory framework. Based on this work, the ESMA issued some advice on ICOs and cryptoassets in January 2019. This report identified the gaps in the existing regulatory framework in relation to ICOs and cryptoassets. We expect further regulation from the EU institutions based on this advice to address the gaps the ESMA identified. Also, the CNMV and the Bank of Spain have warned firms and investors regarding the regulations

and risks inherent to ICOs, cryptocurrencies and tokens. In April 2021, the CNMV launched a public consultation to regulate the publicity regime applicable to cryptoassets.

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?

Although no legislative or governmental action has yet been taken, other than approving the laws to transpose PSD2 into Spanish law and regulate crowdfunding and crowdlending platforms, Spanish regulators have shown that they are receptive to fintech activities. For example, the CNMV has an informal communication space for financial entities and promoters of fintech businesses on its website through which the latter may discuss and propose initiatives and be continually informed on legal developments and issues that may affect their projects. The insurance regulator (*Dirección General de Seguros y Reaseguros*, "**DGSFP**") has also communicated to the industry the importance of the challenge that technology represents to the market.

On 14 November, Law 7/2020 on digital transformation of the financial system entered into force, which establishes and governs the sandbox that will offer a controlled testing environment to implement innovative technology projects in the financial services sector. The environment will be safe for participants to test new financial products and services, while ensuring that the stability of the financial system is maintained and potential risks are eliminated or adequately mitigated.

Project promoters (such as tech companies, financial entities, associations representing interests, public and private investigation centres) and regulators will enter into a protocol to establish the rules and conditions to which the projects and testing will be subject. Guarantees and protection will be afforded to sandbox participants, including informed written consent, personal data protection, rights of withdrawal, promotor liability, guarantees covering promotor liability, confidentiality and, for the regulators, the option to end testing in cases of unprofessional conduct or failures to comply with the protocol rules.

Also, entities that participate in the sandbox may have expedited access to regulatory authorisation.

Law 7/2020 offers an excellent opportunity for new entities to access the financial system via the recently approved sandbox. Some 67 projects have already been submitted in the first call of February. The fintech market will pay close attention to the outcome of those projects during the following months.

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?

Fintechs established outside Spain need not overcome any specific regulatory hurdles. These fintechs face the same entry barriers as those established in Spain, namely, those resulting from the provision of financial services that trigger licensing requirements. The current legal regime for the authorisation and passporting of financial institutions, which is established by reference to EU law, does not provide for a simplified procedure for businesses that only provide a limited range of services, except in some cases such as TPPs under PSD2, as is the case for many fintechs. Hence, as of today, fintechs providing regulated services such as payment or investment services need an authorisation in Spain or in their country of establishment to have access to customers.

Also, other requirements under other domestic legislation (e.g. those resulting from Spanish data protection laws) may create burdens on certain fintech businesses or activities that are designed to support the activities of financial companies, as described in section 4.

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?

Processing of personal data. The processing of personal data by fintech companies established in Spain is subject to certain data protection rules. At the EU level, Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC ("**General Data Protection Regulation**" or "**GDPR**") exists, which has been directly applicable to all Member States of the EU, including Spain, since 25 May 2018. Therefore, the GDPR sets out main rules that apply to the processing of personal data by fintech companies in Spain, including those regarding transparency of processing, consent and other legal bases for such processing, security duties, rules applicable to data breaches, appointment of data protection officers and other accountability duties. The GDPR aims to ensure a consistent and high level of protection of natural persons and to remove the obstacles to flows of personal data within the EU, which helps to homogenise privacy policies and compliance rules for those fintech business acting in other EU jurisdictions in addition to Spain.

That said, at a national level and in addition to the GDPR, certain local data protection rules exist in Spain. In particular, a local data protection law was passed in December 2018, i.e. Spanish Basic Law 3/2018 on Data Protection and Digital Rights Guarantees (*Ley Orgánica 3/2018 de Protección de Datos Personales y garantía de los derechos digitales* or "**LOPDGDD**"). The LOPDGDD formally repealed the previous national data protection regulations, of which the content was incompatible with the GDPR, and has adapted local rules for them to be compatible with the GDPR. The goal of the LOPDGDD is not the implementation or modification of the GDPR, but rather (i) harmonising the Spanish law to the provisions of the GDPR (which in any case has direct applicability in Spain), and (ii) providing specific data protection regulation in different fields that are not expressly covered by the GDPR, or that are covered by the GDPR but in relation to which the Member States are given some competence to enact a more detailed regulation. This means that certain specific examples of processing not specifically regulated by the GDPR (e.g., creditworthiness of shared files) have been provided with a more detailed regulation in the Spanish LOPDGDD. The LOPDGDD also includes some new content, including in particular a new set of rights of citizens in relation to new technologies, known as "digital rights". This set of new digital rights may impact the business of certain fintech companies since some rights regulate and grant additional privacy safeguards related to the use of technologies, such as digital rights granted to employees regarding the use by employers of IT tools for monitoring purposes in the workplace, the use of geolocation systems and CCTV-related processing.

Cookies, e-commerce and direct marketing activities by electronic means. In addition to data protection rules, the processing of personal data for marketing purposes through electronic means and the use of cookies (and similar technologies) are governed at the EU level by a different set of rules, which include (i) Directive 2000/31/EC of the European Parliament and of the Council, of 8 June 2000, on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("**E-Commerce Directive**"), and (ii) Directive 2002/58/EC of the European Parliament and of the Council, of 12 July 2002, concerning the processing of personal data and the protection of privacy in the electronic communications sector ("**E-Privacy Directive**"). These EU Directives have been implemented in Spain through national rules. In particular, at a national level, the use of cookies and the processing of personal data for marketing purposes through electronic means are governed in Spain by Law 34/2002 of 11 July on information society services and e-commerce (*Ley 34/2002 de 11 de julio, de servicios de la sociedad de la información y comercio electrónico*). Thus, the use of cookies or the direct marketing activities carried out by fintech businesses established in Spain must meet the requirements of these national rules, which, in the majority of cases, replicate without significant changes the rules set out in the relevant EU Directives.

In addition, guidelines and opinions issued by the Spanish Data Protection Authority (*Agencia Española de Protección de Datos*), as well as those issued by the European Data Protection Board (the "**EDPB**"), must be taken into account by fintech companies, since they interpret and clarify specific matters in the data protection regulations, whether European or national.

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?

Extraterritorial scope. The GDPR and LOPDGDD apply to businesses located in Spain, regardless of the corporate form of such business (e.g. company, branch or establishment). Moreover, the extraterritorial scope of EU data protection rules set out in article 3 of the GDPR applies in Spain. Thus, non-EU fintech businesses offering goods or services to data subjects in Spain or monitoring their behaviour as far as their behaviour takes place within Spain would be subject to GDPR rules. Also, and even though the LOPDGDD does not provide for rules regarding territorial scope, it should be understood that such non-EU business would also fall within the scope of the LOPDGDD. These non-EU companies should have to appoint a representative in the EU and this representative may be held liable under data protection rules for the processing carried out by the non-EU business.

International transfers of personal data. The transfer of personal data from Spain to territories or organisations located outside the EU is subject to the rules regarding international transfers of data set out in the GDPR (articles 44 to 50). The LOPDGDD does not provide additional relevant rules for Spain to those set out in the GDPR. In general terms, international transfers of personal data may be carried out to the extent that the recipient is subject to an adequacy decision by the EU Commission if appropriate safeguards have been adopted (e.g. Binding Corporate Rules or Model Clauses), or if the transfer falls within one of the derogations listed in article 49 of the GDPR (e.g., explicit consent of data subjects).

In addition, in June 2020, the Court of Justice of the European Union (the "**CJEU**") stipulated, in the *Schrems II* judgment, stricter requirements for the transfer of personal data based on the use of Model Clauses. In this regard, the CJEU set out that in order to ensure that data subjects are granted with a level of protection essentially equivalent to that guaranteed by the European data protection regulations, entities must analyse whether such level of protection is possible depending on the country to which the data will be transferred to. If such level of protection cannot be achieved with the execution of Model Clauses, the CJEU established that additional guarantees should be adopted. In line with this idea, the EDPB submitted guidelines (which are still pending of definitive approval) with examples of additional guarantees that could be applied by entities (i.e. contractual, technical and organisational measures).

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

The sanctioning regime for failing to comply with the GDPR and LOPDGDD is the one set out in the GDPR (i.e., fines up to EUR 20 million, or in the case of an undertaking, up to 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher). That said, the LOPDGDD provides for more detail when it comes to the classification of severity of infringements. In particular, the LOPDGDD sets out three categories of data protection infringements (minor, serious and very serious infringements). For each of these categories, the LOPDGDD sets out the list of acts or omissions that could fall within such category. The list under each of these three categories is quite detailed.

The LOPDGDD also provides for a statutory period for each category. According to it, administrative liability for minor infringements shall expire within one year, while the expiry for serious infringements is set at two years and at three years for very serious infringements.

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

The applicable European regulation concerning this matter is Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union ("**NIS Directive**"), which requires local implementation in each Member State. The NIS Directive provides measures aimed at achieving a high common level of security of network and information systems in the EU so as to improve the functioning of the internal market. In Spain, the NIS Directive was implemented in 2018 by Royal Decree-Law 12/2018 of 7 September on security of networks and information systems [*Real Decreto-ley 12/2018, de 7 de septiembre, de seguridad de las redes y sistemas de información* ("**RDL 12/2018**")] and the regulation developing such law, Royal Decree 43/2021 of 26 January by which the Royal Decree-Law 12/2018 of 7 September on security of networks and information systems is developed. As it happens, in the NIS Directive, the RDL 12/2018 mainly (i) regulates and establishes requirements to ensure the security of networks and information systems used for the provision of the essential services and the digital services, and (ii) establishes a system to notify cybersecurity incidents. The RDL 12/2018 has a quite broad scope and will be subject to a future development by means of ancillary regulations. Also, the RDL determines which are the competent bodies for cybersecurity matters in Spain (such as the Department of State for the Development of Digital Technology (*Secretaría de Estado para el Avance Digital*) of the Ministry of Economy and Business (*Ministerio de Economía y Empresa*) or the INCIBE-CERT). In Spain, the competent authority has, among other functions, powers to impose sanctions.

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

In general, fintech businesses providing services that are catalogued as financial, investment or insurance-related services (including payment entities and electronic money institutions, currency exchange services and transfer of funds services) and the related intermediation services are subject to AML and prevention of terrorist-financing requirements. Those regulations impose various obligations, although they primarily entail identifying the beneficial owner of any legal or natural person with whom they intend to do business, adopting simplified or enhanced due diligence measures with prospective clients and completely and accurately reporting certain details about the transactions to the competent authorities.

The Fifth AML Directive was published in June 2018 and it has included under its scope the providers engaged in exchange services between virtual currencies, fiat currencies and custodian wallet providers. Although this directive should have been implemented in Spain by early 2020, no information on when this is expected to happen has been made public to date. Therefore, cryptocurrencies will not be subject to the Spanish AML regulations until the directive is implemented.

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

Apart from the financial regulatory frameworks already addressed in question 2.1 above, along with data protection and AML regulations, other regulatory regimes may also apply to Spanish fintech businesses. One notable instance is Royal Legislative Decree 1/2007 of 16 November, which approves the revised text of the general Consumer Protection Law. This regulation establishes guiding principles that apply to relationships with consumers (understood as legal or natural persons acting in a context that falls outside entrepreneurial or professional activities) and entrepreneurs. Also of note is Law 34/2002 of 11 July on services of the information society and e-commerce, which is especially important for online businesses, as it establishes a regulatory regime for electronic agreements (e.g. the information to be provided to the contracting parties before and after the agreement is executed, the conditions that make electronic agreements valid, as well as other obligations applicable to electronic providers). For the financial sector in particular, another notable instance is Law 22/2007 on distance marketing of consumer financial services, which sets out the rules for electronic agreements and e-marketing communications.

In view of the above and of the highly complex financial regulatory environment to which fintech companies may be subject (see section 3), the growing regtech business sector in Spain should not be ignored (i.e. businesses that, based on big data or blockchain technologies, are creating solutions to facilitate other companies' regulatory compliance). The regtech roadmap evolved especially in 2020, with regtech companies having diversified in different areas, such as risk management, client identification, reporting, big data and cybersecurity.

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?

Although Spanish employment law is composed of numerous employment provisions, issued by different bodies and with different priorities, the basic legal framework for hiring and dismissing staff in Spain is found in the Statute of Workers ("**SW**") and the Social Security Law.

The SW is the most important law in connection with employment matters and contains the basic and general employment-law framework for ordinary employees (e.g. employment rights and obligations, types of employment contracts, wages, worktime, dismissals, employee representatives). The SW was approved by a consolidated text passed by Royal Legislative Decree 2/2015 of 23 October. The Social Security Law was approved by a consolidated text passed by Royal Legislative Decree 8/2015 of 23 October and contains the basic regulations governing social security contributions and social security benefits (e.g. retirement, unemployment, disability benefits).

In general, some employment and social security requirements need to be fulfilled to hire employees in Spain (e.g. registering employees with the Social Security, notifying the Social Security of their employment, health and safety and work obligations, registering employment contracts).

As to dismissing workers, Spanish law recognises the "stability in employment" principle, according to which contracts are essentially indefinite (i.e. the SW provides specific causes for temporary contracts), which makes dismissals complicated and expensive for employers. Pursuant to the SW, an employee can only be dismissed: (i) on disciplinary grounds as a result of serious, wilful non-compliance with his or her duties; or (ii) for objective reasons based on the need to eliminate specific positions for economic, technical, production or organisational reasons. Under Spanish labour law, an employee can only be dismissed for those specific reasons. Therefore, if an employee files an unfair dismissal claim and the reasons set out above are not proven or are deemed not to be sufficiently serious, the court will likely declare the dismissal to be unfair and the employee will be entitled to a severance pay equal to 33 days of salary per year of service, up to a maximum limit of 24 months of salary. Moreover, some employees are legally protected against dismissal. In this regard, employee representatives may not be dismissed for exercising their representation duties and have a right to keep their job where the company needs to suspend or terminate employment relationships for economic, technological, production or economic reasons. Employees in certain maternity or paternity-related circumstances are also specially protected against dismissal.

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

As mentioned, the SW is the basic legal regulation on all matters related to employment of ordinary employees and sets out the minimum conditions that their employment contracts must respect. Moreover, Spanish law provides that agreements entered into between employers and employees may, when they meet certain requirements regarding content and the representative authority of the negotiating parties, bind all employers and employees – including those not directly represented by the negotiators – within certain economic areas, thus making such collective bargaining agreements ("**CBAs**") mandatory. Among other matters, the CBAs regulate matters concerning employment relationships such as salary structure, working hours, overtime, allowances, job description, benefits, prevention of occupational hazards, remuneration, duties, holidays, productivity, or the disciplinary framework. Employment contracts can establish provisions on working conditions, but may only improve on

the conditions established in the SW and in the applicable CBA. In sum, employees cannot waive the mandatory rights that the SW and applicable CBA confer on them.

Since on the whole employment law, including CBAs, is mandatory, contractual freedom in employment matters is rather narrow. Taking all this into account, the main mandatory employment provisions are the following:

- The SW provides an "interprofessional" minimum annual, monthly, or daily wage that the central government determines annually taking into consideration the next year's forecasts for several financial indexes. For 2020, the minimum wage has been set at EUR 950.
- The maximum statutory work schedule is 40 hours of effective work per week, calculated on an annual basis. Workdays of more than nine hours are not permitted, unless the applicable collective agreement or, failing that, agreements between the employer and the employee representatives, establish a different distribution of the workday. In all cases, employees must be given a minimum 12-hour break between the end of one workday and the beginning of the next. They are also entitled to a weekly uninterrupted rest period of one and a half days (generally, Saturday afternoons or Monday mornings and the whole of Sunday).
- Annual leave is regulated in the applicable CBA or individual employment contract. Nevertheless, employees are mandatorily entitled to annual leave of at least 30 calendar days. In addition, employees in Spain enjoy 14 days each year as official paid bank holidays.
- In general, employees who have, adopt or foster a child, are entitled to 16 weeks of paid leave. Furthermore, employees who apply for legal custody of a child under 12 years of age, or a physically or mentally handicapped relative who is unable to perform a remunerated activity, are entitled to a reduction of between one-eighth and half of their working time, in which case their wages will be reduced proportionally.

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?

Individuals do not need to follow a particular procedure to obtain permission to work in fintech businesses. On the one hand, according to EU and domestic regulations, citizens of EU/EEA Member States can exercise the rights of entry and exit, free movement, residence, and work in Spain. Ordinary registration certificates and residency cards may be required. On the other hand, foreign non-EU/EEA citizens must obtain a residence and work authorisation by filing the required documentation with the labour authorities.

6 Technology

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

We refer separately to inventions (which generally include innovations) and other intellectual works.

Inventions are typically the result of research. That result may essentially be protected by patents, utility models or, if such protection is not available or the parties do not wish to request it, inventions can also enjoy a certain degree of protection as "know-how" or as a "trade secret":

- Spanish patents provide protection for inventions for 20 years as of the filing date.
- Spanish utility models protect inventions of lower inventive rank than patents, and are granted for 10 years.
- Once the referred protection periods have expired, the invention will enter the public domain and any person can use it freely.
- Confidential information may enjoy protection as a trade secret as long as: (i) it is secret (i.e. not generally known or easily accessible in the relevant sector); (ii) it is valuable because it is secret; and (iii) it has been subject to reasonable steps by the rightful holder in order to maintain its confidentiality. Therefore, as opposed to patents, it is a matter of contract (confidentiality agreements) and of fact (other protective measures adopted) that the invention remains valuable.

Certain intellectual works, such as software (which in Spain would not be patentable as such, although computer-implemented inventions are patentable, provided that they meet the patentability requirements), may be protected by copyright (*derecho de autor*) from the very moment they are created, provided they reach a certain degree of creativity. Registration is not necessary for these intellectual works to be protected as copyright. Registering these intellectual works with the copyright registry or their deposit before a notary public or an escrow agent (only in the case of software) would only provide a presumption of authorship when they are registered/deposited. As a rule, the exploitation rights in a copyrighted work will run for the life of the author and survive 70 years after his or her actual or declared death.

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

Again, the rules applicable to the ownership of inventions and of other intellectual works should be analysed separately.

These are the default rules under Spanish law to attribute ownership of inventions:

(a) Absent other applicable rules, the natural person who creates the invention (i.e. the inventor) is the owner.

(b) If the inventor is an employee (private or public) or a services provider:

(1) if the invention results from his or her work for a company, pursuant to the terms of his or her employment or services agreement or to the instructions received from the company, then the company owns the rights to the invention; or

(2) if the invention results from his or her independent work but he or she used knowledge obtained from a company or the company's premises, then the company can claim ownership of the invention or a right to use it, subject to paying fair compensation.

The rule in connection with other intellectual works is that the original owner of the rights to the work is the author or co-authors (or, in very specific and limited cases, an individual or a legal private or public entity who leads and coordinates personal contributions and publishes the result under its own name – usually in the case of software). The general rule is that the author is the owner of all moral and exploitation rights to the work. However, some specific legal presumptions and important exceptions apply:

(a) Regarding copyrightable work created by an employee under his or her employment agreement, Spanish law presumes that, unless otherwise agreed, all exploitation rights in the work have been assigned, on an exclusive basis, to the company for the purposes of its ordinary course of

business. As to software created by employees, the assumption is broader. If an employee has developed the software as part of his or her tasks under his or her employment agreement or following the employer's instruction, unless otherwise agreed, it is assumed that the employer will originally own the exploitation rights on that software.

(b) In the event of joint co-authors, either:
  (1) all co-authors have equal exploitation rights, unless otherwise agreed; or
  (2) the exploitation rights to the work correspond to the (legal or natural) person that assumes responsibility for the creation of the work and publishes it under the person's own name; in this case, if the work is software, unless otherwise agreed, such person will be considered the original author.

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)?

In relation to IP rights ("**IPRs**"), we refer to (i) trademarks, patents, utility models, designs, plant variety rights, know-how and business information (trade secrets), and (ii) copyright and related rights.

Under Spanish law, IPRs listed in point (i) above are enforceable IPRs if they have effects in Spain. This is the case, for instance, of: (a) domestic rights resulting from domestic applications with the Spanish Patent and Trademark Office; (b) European Union rights (e.g. European Union trademarks and designs); and (c) domestic rights resulting from an international application with regional/international IP offices (e.g. international trademark applications under the scope of the Madrid Agreement).

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 elements (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 EU), which are protected for three years following the date on which the design was first made available to the public (and only from uses resulting from its copy).

(c) Know-how and business information (trade secrets) may be protected if the requirements set out in the Spanish Trade Secrets and Unfair Competition Law and established by case law are satisfied.

As regards copyright and related rights, since no registration or formal requirements apply, the owner is entitled to enforce the right irrespective of its "local" or "national" nature. Given the territoriality of this category of rights, the *lex loci protectionis* principle applies. The Spanish Copyright Act directly applies not only to Spanish and EU citizens but also to nationals of third countries who are ordinarily residents of Spain, and even to nationals of third countries who are not ordinarily residents of Spain if their works have been published for the first time in Spain. Nationals of third countries must, in all cases, enjoy the protection available under the international conventions and treaties to which Spain is a party and, should there be none, must be treated in the same way as Spanish authors when Spanish authors are themselves treated in the same way as nationals in their country of origin, under the reciprocity principle. In the field of copyright, the main multi-jurisdictional treaty is the Berne Convention for the Protection of Literary and Artistic Works, which Spain and more than 170 countries have ratified.

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

In general, the holder of an IPR other than copyright or related rights may exploit the right: (i) directly; or (ii) through third parties by means of a licence. Note that, unless otherwise indicated, licences are understood to be non-exclusive, national, for the whole life of the IPR and must be registered with the appropriate office in order to be enforceable against third parties. In addition, licences for patents must be granted in writing.

Under Spanish law, the exploitation of all IPRs is subject to various limitations (most of which result from Spain being party to specific international treaties on industrial property). Those limitations include, but are not restricted to: (i) the exhaustion of IPRs; and (ii) the permitted uses for patents (e.g. private acts with no commercial purposes and acts carried out for experimental purposes).

With respect to copyright and related rights, the author/original right holder is granted the power to exploit the work in any form (and especially through reproduction, distribution, public communication and transformation). For some activities, the author only has a right to remuneration (e.g. private copying). The authors/original right holders may not be the ones who directly exploit the work, but they may transfer the exploitation right through an assignment/licence granted in writing to third parties, who may be specialised entrepreneurs. Note that, unless otherwise indicated, any assignment/licence of copyright and related rights is considered non-exclusive, national and for five years.

In terms of remuneration, Spanish law creates the specific presumption for authors that, unless otherwise agreed, an author's assignment/licence of rights for a price will grant him or her a proportional share in the assignee/licensee's income generated from the exploitation of the right. In certain circumstances, a lump-sum payment may be agreed. However, if the amount paid is unbalanced with respect to the income the assignee/licensee obtains, the amounts paid may have to be reviewed at the author's request. This prerogative expires 10 years after the assignment/licence is executed.

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 protected work without requiring permission from the author. In such cases, the author will not receive any remuneration, unless equitable compensation of some kind is appropriate, as set out by Spanish law.

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