Fintech

Contributing editors
Angus McLean and Penny Miller

2018

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

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Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 2016
Second edition
ISSN 2398-5852

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Ireland

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Financial services regulation

1 Which activities trigger a licensing requirement in your jurisdiction?

The Central Bank of Ireland (the Central Bank) is the regulatory body for all regulated financial services under Irish law. The principal categories of financial services firms and services that are regulated as a matter of Irish law are those in respect of which regulation derives from European Union directives, including:

- banking services (essentially deposit taking) and credit institutions;
- mortgage credit intermediaries under the European Union (Consumer Mortgage Credit Agreements) Regulations 2016;
- Markets in Financial Services Directive (MiFID) firms and services;
- investment business and investment intermediary services and firms and/or the provision of investment advice under the Investment Intermediaries Act 1995 (IIA);
- investment funds and management of investment funds;
- depositary and administration services for investment funds;
- insurers (life and non-life);
- payment services under the Payment Services Directive (PSD) (and from January 2018, the Revised Directive on Payment Services (PSD2)); and
- electronic money ('e-money') issuance and services.

Ireland's approach to implementation of EU directives is generally consistent with the principle of maximum harmonisation and avoids gold-plating.

There are some financial services that are subject to domestic Irish legislation, including acting as a retail credit firm or servicer to a retail credit firm, as governed by Part V of the Central Bank Act 1997 (the 1997 Act)and the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 (the 2015 Act) respectively.

It is an offence to carry out any of the above regulated financial services in Ireland without the authorisation of the Central Bank (subject to applicable EU passporting rules).

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

Yes. Lending to natural persons is regulated, whereas lending to corporates (at an APR below 23 per cent) is not.

Consumer lending is regulated by the Consumer Credit Act 1995 and the Consumer Credit Directive Regulations 2010, which regulate the form and content of credit agreements. In addition, the 1997 Act regulates the provision of cash loans by retail credit firms. The Consumer Protection Code 2012 (CPC) is also applicable in this instance.

The CPC applies to financial services providers who are authorised, registered or licensed by the Central Bank, as well as financial services providers authorised, registered or licensed in another EU or EEA member state when providing services in Ireland on a branch or cross-border basis. The CPC essentially requires regulated entities to adhere to a set of general requirements such as to provide terms of business to consumers, conduct KYC, establish the suitability of the product, and adhere to lending and advertisement requirements.

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

In general, no. However, where an entity holds a regulated (ie consumer) loan, it will be required to be regulated as, or to appoint, a credit servicing firm in accordance with the 2015 Act.

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

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

Investment funds are authorised and regulated by the Central Bank, and may be regulated as:

- undertakings for collective investment in transferable securities (UCITS) in accordance with the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011 (as amended), which implement the UCITS Directives into Irish law, and the Central Bank (Supervision and Enforcement) Act 2013 (section 48(1)) (Undertakings for Collective Investment in Transferable Securities) Regulations 2015 (collectively, the UCITS Regulations); or
- retail investor alternative investment funds (RIAIFs) or qualifying investor alternative investment funds (QIAIFs) in accordance with the requirements of the Central Bank and the European Union (Alternative Investment Fund Managers) Regulations 2013 (as amended) (the AIFM Regulations), which implement the Alternative Investment Fund Managers Directive (AIFMD) into Irish law.

UCITS, RIAIFs and QIAIFs may be organised through a number of legal structures, the most popular of which are the Irish collective asset-management vehicle (ICAV), the investment public limited company ('investment company') and authorised unit trusts. It is an offence to carry on business as an ICAV, investment company or authorised unit trust unless authorised by the Central Bank.

The Central Bank also authorises and regulates depositaries and administrators of Irish authorised collective investment schemes.

Fintech companies, whether providing alternative finance products or otherwise, would not typically fall to be regulated as investment funds. However, fintech firms that fall within the definition of alternative investment funds (see question 5) would require authorisation.

Where fintech companies provide services to investment funds, they would not require authorisation, unless providing regulated depositary or administration services. Depositaries and administrators to investment firms may also engage fintech firms, in which case applicable Central Bank outsourcing requirements may apply, although in general, the fintech companies would not themselves require authorisation.

5 Are managers of alternative investment funds regulated?

The Central Bank authorises and regulates Irish alternative investment fund managers (AIFMs) under the AIFM Regulations, as well as regulating UCITS management companies in accordance with the UCITS Regulations, and non-UCITS management companies (a residual category post-AIFMD).

Most fintech companies would be expected to fall outside the scope of the AIFM Regulations and the UCITS Regulations.

6 May regulated activities be passported into your jurisdiction?

Yes, where the regulated activity is covered by relevant EU legislation, the provider is authorised in another EU or EEA member state and subject to compliance with applicable notification procedures under relevant legislation.

As a general principle, where a financial institution authorised in another EU or EEA member state (the 'home state') passports its services into Ireland through the establishment of a branch in Ireland, or by providing its services on a cross-border services basis, the home state regulator retains responsibility for the prudential supervision of that entity. The regulator of the member state into which passporting is undertaken (the 'host state'), in this case the Central Bank, will supervise the passported entity's conduct of business in Ireland. The Central Bank does not adopt a gold-plating approach, and in general there are no additional onerous requirements to be met when passporting into Ireland.

7 May fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

Where a fintech company wishes to provide a regulated service, then, subject to the ability to passport into Ireland on a services basis where the fintech company is authorised in another EU or EEA member state, it is not possible to provide regulated financial services in Ireland unless the fintech company establishes a presence in Ireland and (unless passporting on a branch basis) is authorised by the Central Bank.

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

None, subject to the comments in question 2 above. A fintech or other company may, in providing a marketplace, be acting as a credit intermediary and would be required to register with the Competition and Consumer Protection Commission (but would not require an authorisation from the Central Bank).

QIAIFs may be established as loan originating investment funds, subject to certain requirements, including a prohibition on consumer lending.

9 Describe any specific regulation of crowdfunding in your jurisdiction.

Crowdfunding is not currently specifically regulated in Ireland, assuming it does not involve deposit-taking or equity investment.

Notwithstanding, while there are no financial services rules in Ireland designed specifically for crowdfunding, other legal rules may apply. In particular, when a company pitches equity investment to investors on a crowdfunding platform, such a pitch may be considered to be an 'offer to the public', to which prospectus rules (as far as the issuer is concerned) and financial promotion rules (as far as the issuer and platform are concerned) may apply. Reward-based crowdfunding may be considered as collective investment, depending on the structure used and the manner of its offering. MiFID may also be applicable if the crowdfunding platform engages in the receipt and transmission of orders.

Crowdfunding has been discussed in the Dail (Irish parliament) as an important future source of funding for charitable causes and community initiatives. However, there is currently no specific legislation or regulation proposed or under consideration in Ireland.

10 Describe any specific regulation of invoice trading in your jurisdiction.

None. However, there may be data protection issues and general contractual issues that need to be addressed.

11 Are payment services a regulated activity in your jurisdiction?

Payment services are regulated in Ireland pursuant to the European Communities (Payment Services) Regulations 2009 (the PSD Regulations), which implemented the PSD into Irish law. Ireland's implementation of the PSD through the PSD Regulations was consistent with the principle of maximum harmonisation and as such the PSD Regulations reflect the requirements of the PSD itself. It is expected that the same approach will be taken with regard to the implementation of the PSD2, which is due to be implemented in Ireland by 13 January 2018.

Under the PSD2, certain additional documentation must be submitted to the relevant national authority a part of the authorisation requirements. A security policy document must now be maintained by the payment service provider (PSP), containing a description of security control and mitigation measures taken to adequately protect payment service users against any risks identified.

In addition, there are domestic rules that apply to certain payment services. Part IV of the Central Bank Act 1997 regulates a money transmission business, which is defined as 'a business that comprises or includes providing a money transmission service to members of the public'. In this regard, a 'money transmission service' is defined as meaning a service that involves transmitting money by any means. Money transmission requires authorisation from the Central Bank. This is a legacy statute and only applies if the PSD Regulations do not apply. In practice it is difficult to think of practical situations where these rules would be relevant.

The E-Money Directive (EMD) was implemented in Ireland by the European Communities (Electronic Money) Regulations 2011 (the EMD Regulations).

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

Generally, undertakings cannot sell or market insurance products or carry on a (re)insurance business in Ireland without authorisation from the Central Bank or, when conducting business in Ireland on a freedom of services basis, from another EU member state regulator. The European Communities (Insurance Mediation) Regulations 2005 (the IMD Regulations) provide that a person cannot purport to undertake (re)insurance mediation unless they have registered with the Central Bank as a (re)insurance intermediary or are exempt from such registration. In addition to authorising insurance companies to carry out the business of insurance, the Central Bank also maintains a register of authorised (re)insurance intermediaries in Ireland.

The IMD Regulations define 'insurance mediation' broadly as 'any activity involved in proposing or undertaking preparatory work for entering into insurance contracts, or of assisting in the administration and performance of insurance contracts that have been entered into (including dealings with claims under insurance contracts)'. Activities specifically excluded from the definition include an activity, undertaken by an insurer or an employee of such an undertaking in the employee's capacity, which involves (i) the provision of information on an incidental basis in conjunction with some other professional activity, so long as the purpose of the activity is not to assist a person to enter into or perform an insurance contract; (ii) the management of claims of an insurance undertaking on a professional basis, or loss adjusting; or (iii) expert appraisal of claims for reinsurance undertakings.

The IIA continues to apply to intermediaries despite the IMD Regulations, and therefore technically insurance intermediaries should continue to comply with the IIA as well as the provisions of the IMD Regulations.

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

The Credit Reporting Act 2013 provides for the establishment and operation of a statutory central credit register (CCR) system, established and operated by the Central Bank. Credit providers are required, from June 2017 in respect of individuals and June 2018 for corporate customers, to provide information to the Central Bank for entry onto the CCR. Until the introduction of the CCR, credit information has been managed by a private entity, the Irish Credit Bureau.

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

The PSD2, which must be transposed into Irish law by 13 January 2018, will require PSPs, such as financial institutions, to provide third-party payment providers with customer account information and access to the account itself, subject to customer consent.

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

No. However, the Central Bank has in the past 12 months refreshed and updated its authorisation process with a view to speeding up the review process. In addition, financial services, including specifically fintech, is a government priority, as reflected in its position paper, IFS2020, published in 2015.

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

No formal arrangements are in place.

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

There are no rules of general application. Specific rules may apply depending on the nature of the financial service and the nature of the customer.

For example, the Consumer Credit Act 1995 deals with the marketing of credit products to retail consumers, and specifies certain information that must be included in any advertisements for consumer credit, such as the annual percentage rate, the number and amount of instalments, and the nature of the contract. The Central Bank Act 2013 enforces similar rules for providing credit to small and medium-sized enterprises. The CPC also contains rules on marketing materials aimed at consumers, requiring such materials to be 'clear, fair, accurate and not misleading'.

Marketing may in certain instances fall foul of restrictions on the provision of, or holding out as providing, investment services and advice. Marketing and disclosure requirements are also contained in AIFMD, the Prospectus Directive and the UCITS regime.

Financial services advertising is also subject to general misleading advertising and consumer protection legislation, as well as the Advertising Standards Authority of Ireland Code of Standards. The European Communities (Directive 2000/31/EC) Regulations 2003 (the e-Commerce Regulations) also impose certain requirements in relation to electronic commercial communications.

18 Are there any foreign exchange or currency control restrictions in your jurisdiction?

No.

19 If a potential investor or client makes an unsolicited approach either from inside the provider's jurisdiction or from another jurisdiction, is the provider carrying out a regulated activity requiring a licence in your jurisdiction?

No, the provider is not carrying out a regulated activity requiring a licence in these circumstances. However, it may be necessary for the provider to demonstrate that the approach was unsolicited.

20 If the investor or client is outside the provider's jurisdiction and the activities take place outside the jurisdiction, is the provider carrying out an activity that requires licensing in its jurisdiction?

Typically, offering a regulated service in or from Ireland requires authorisation in Ireland. So providing banking services from Ireland to persons outside Ireland would still require an Irish banking licence. Similarly offering a PSD payment services to customers in the EU or EEA from Ireland would trigger an Irish licensing requirement. On the other hand, offering cash loans to individuals outside Ireland does not trigger a requirement to be regulated as a retail credit firm in Ireland.

21 Are there continuing obligations that fintech companies must comply with when carrying out cross-border activities?

Where a fintech company is regulated in Ireland and operating on the basis of a passport, the prudential requirements and applicable conduct of business rules of the Central Bank will continue to apply.

Conversely, where the fintech firm is regulated in another EU or EEA member state and is passporting into Ireland, its home state prudential and applicable conduct of business rules will apply to its passported business. Central Bank conduct of business rules may also apply insofar as an inward passporting firm's activities are within Ireland (as the host state).

See also question 39 in relation to international transfers of personal data.

22 What licensing exemptions apply where the services are provided to an account holder based outside the jurisdiction?

None. The regulatory status of the provider is a matter for assessment in each jurisdiction. A provider can provide services on a freedom of services basis within the EU and so further licensing may not be required as the analysis then falls on the home rather than the host country.

Distributed ledger technology

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

Nothing specific at present.

Ireland is a participating member of the International Organization for Standardisation (ISO) new technical committee known as ISO/TC 307, which aims to create international standards for blockchain and distributed ledger technology.

Digital currencies

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

The EMD Regulations set out requirements for the taking up, pursuit and prudential supervision of e-money institutions, including the authorisation and registration process. The EMD Regulations also deal with the issuance and redeemability of e-money more generally. Digital wallets may also be subject to the PSD and PSD2, depending on how they are structured. However, digital currencies are not subject to specific regulation in Ireland at this point.

Securitisation

25 What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

For a loan agreement or security agreement to be binding, there has to be an offer, acceptance, consideration, intention to create legal relations and certainty as to terms. The application of these principles does not depend on the particular technology that is being used so that acceptance can be evidenced by clicking in a designated box on a peer-to-peer or marketplace lending platform website.

A deed is only necessary for certain types of transactions. These transactions include:

- the conveyance of land or of any interest in land, including a mortgage or charge;
- any mortgage or charge of land or other property if the mortgagee or chargee is to have the statutory powers of appointing a receiver and of sale and, in the case of a sale, the power to overreach subsequent mortgages and charges; and
- the gift or voluntary assignment of tangible goods that is not accompanied by delivery of possession.

Also, a party may insist on the use of a deed for a transaction because, for example, it is unclear whether valuable consideration is given, or to have the benefit of a longer limitation period that applies, in respect of a transaction under deed. It is common for security agreements to be executed as deeds.

An instrument executed by an individual will be a deed if it (i) makes clear on its face that it is intended to be a deed; (ii) is signed by or on behalf of the maker; (iii) is signed in the presence of an attesting witness; and (iv) is delivered. An instrument executed by an Irish company will be a deed if it (i) makes clear on its face that it is intended to be a deed; (ii) is sealed by the company in accordance with its constitution; and (iii) is delivered.

Clicking on a website button could also be considered to constitute a signature. Although the common understanding of a signature is the writing by hand of one's full name or initials and surname, other forms of

identification have been held to satisfy a signature requirement. Under Irish law, electronic contracts and signatures are accorded legal validity in accordance with the requirements of the Electronic Commerce Act 2000 and Regulation 910/2014 on electronic identification and trust services for electronic transactions.

26 What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected?

There are two main types of assignments of rights under Irish law: a legal assignment and an equitable assignment. To create a legal assignment of a debt, the conditions in section 28(6) of the Supreme Court of Judicature Ireland Act 1877 must be complied with. These are as follows:

- the assignment must be in writing and signed by the assignor;
- the assignment must be absolute (ie, unconditional and not merely by way of security); and
- express notice in writing must be given to the borrower from whom the assignor would have been entitled to receive the debt.

In addition, part of a debt, or other legal chose in action, may not be legally assigned; only the whole debt may be legally assigned. If any one or more of the above are not satisfied, the assignment would only take effect as an equitable assignment.

Some consequences of a legal assignment are as follows:

- all rights of the assignor in the relevant assets pass to the purchaser;
- the borrower must pay the outstanding amount under the receivable directly to the purchaser; and
- the purchaser has the right to take legal action in relation to the relevant assets against the borrower directly, without involving the assignor.

In contrast, some consequences of an equitable assignment are as follows:

- the purchaser can only sue the debtor by joining the equitable assignor in the action;
- the borrower will continue (and be entitled to continue) to pay the outstanding amount under the receivable to the equitable assignor rather than directly to the purchaser;
- the borrower can exercise any rights of set-off against the assignee even if they accrue after the date of the assignment;
- the purchaser's rights and interests in the transferred receivables will be subject to any prior equities that have arisen in favour of the borrower before the assignment; and
- where there is more than one assignment of a debt by the assignor, another purchaser acting in good faith with no notice of the assignment to the purchaser will take priority if notice is given to the borrower of that assignment.

27 Is it possible to transfer loans originated on a peer-to-peer or marketplace lending platform to the purchaser without informing the borrower? Does the assignor require consent of the borrower or are the loans assignable in the absence of a prohibition?

Assuming there is no prohibition on assignment without the consent of the borrower under the terms of the loan, Irish law would not require the borrower to be informed of the assignment. However, any such assignment without notice would take effect as an equitable assignment (see question 26).

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

Where the special purpose vehicle is established in Ireland for the purposes of the DPA and it controls personal data, it will be subject to the full scope of the DPA, as outlined in question 39. Irish incorporated companies, partnerships or other unincorporated associations formed under the law of Ireland, and persons not falling within the aforementioned but who maintain in Ireland an office, branch or agency, or a regular practice, will be established in Ireland for these purposes. In addition, a controller established neither in Ireland nor in any other EEA member state making use of equipment in Ireland for processing data other than for the purpose of transit through the territory of Ireland, will fall within the scope of the DPA. Broader confidentiality provisions applicable to a special purpose vehicle would typically arise as a matter of contract, and the implied banker's duty of confidentiality is unlikely to apply.

Intellectual property rights

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

The principal intellectual property right that protects software is copyright (the right to prevent others from, among other things, copying the software). Under the Copyright Act 2000 (as amended), copyright vests in the author on creation.

Organisations should ensure that they have appropriate copyright assignment provisions in place in all agreements they have with employees or contractors to ensure that they obtain these rights.

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

Yes. Although software is not, of itself, patentable, processes or methods performed by running software are. Importantly, such processes or methods would need to bring about a technical effect or solve a technical problem in order to be patentable (see questions 31 and 32).

31 Who owns new intellectual property developed by an employee during the course of employment?

The default position under Irish law is that the employer owns intellectual property developed by an employee during the course of employment, unless it is otherwise stated in an agreement with the employee. However, this default position does not extend to intellectual property generated by an employee outside their employment (such as out of hours or off premises).

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

No. Contractors and consultants (who are not employees) are generally not subject to the default position described in question 31 and, unless the agreement between the contractor or consultant includes an assignment or other transfer of intellectual property to the customer, the contractor or consultant will own any intellectual property rights generated during the course of the work. Ownership of such intellectual property, if related to the subject matter of employment, may be addressed through contract.

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

Yes.

Joint owners of patents cannot assign or grant a licence of an interest in a patent or a design right without the consent of all other joint owners.

Under the Trade Marks Act 1996 (as amended) a joint owner may sue another joint owner for trademark infringement where the trademark is used in relation to goods or services for which all joint owners have not been connected in the course of trade. On the basis of this legislation, we would expect that the consent of all joint owners is required for a licence of the trademark to be given.

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

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

Trade secrets are not a stand-alone right and are not protected separately from confidential information under Irish law. Confidential information is protected either through a contractual agreement to keep certain information confidential, or through the common law obligation to keep information confidential (because of the nature of the relationship between the discloser and disclosee, the nature of the communication or the nature of the information itself).

There is no general rule that requires confidential information that is revealed during court proceedings to be kept secret. It is possible to obtain an order from a court limiting access to such confidential information, but such orders are given on a case-by-case basis and are typically considered difficult to obtain.

35 What intellectual property rights are available to protect branding and how do you obtain those rights?

The main intellectual property rights available to protect branding are registered and unregistered trade and service marks.

Registered trade and service mark rights only arise through registration, and can be applied for either in Ireland (in respect of Ireland only) or more broadly in the EU (as a Community trademark) or internationally. Trade and service mark rights give registered owners the right to prevent others using identical or confusingly similar trademarks to their registered mark.

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

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

36 How can new businesses ensure they do not infringe existing brands?

New businesses should undertake preliminary searches of the trademark registers in the jurisdictions in which they intend to operate to ascertain whether any of the branding that is registered as a trademark could be identical or confusingly similar to what they intend to use. However, as existing brand owners may have certain unregistered rights, it would also be important for any new business to investigate the branding of their competitors in the market (eg, through searching industry registers, conducting online searches, etc).

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

The exact remedies available to individuals or companies depends on the intellectual property right that has been infringed, but generally, for infringements of trademarks, patents, copyright and design rights under Irish law, the owner of the right may seek an injunction against further infringement, damages, an account of any profit made by the infringer from any articles incorporating the infringed intellectual property, and delivery up or destruction of those articles.

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

None as a matter of Irish law.

Data protection

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

Data protection in Ireland is currently governed by the DPA, which reflects the provisions of the EU Data Protection Directive, and which applies to both data controllers and data processors.

Under the DPA, a data controller is required to comply with the data protection principles, including, at a high level, requirements that personal data only be obtained and used for specified, explicit and legitimate purposes, and that the data not be irrelevant or excessive with regard to, or used in a manner incompatible with, those purposes. Processing of the data must also be legitimate within specified conditions set out in the DPA, and the data must be kept secure. In order for processing to be fair within the meaning of the data protection principles, certain information must be provided to the data subject by the data controller.

While not all data controllers are required to register with the Office of the Data Protection Commissioner (ODPC), financial institutions must register with the ODPC, and it is an offence to process personal data in the absence of a registration where the data controller is obliged to register.

Data processors are subject to the same security principles as data controllers, and will be required to register with the ODPC when processing for a controller that is required to register. The DPA mandates that there must be a written agreement in place between a data controller and any data processors appointed by it, and the contract must contain certain provisions relating to limitations on use and security.

The DPA prohibits the transfer of personal data from Ireland to a country outside the EEA unless one of a limited number of exemptions applies. These include data subject consent, contractual necessity in certain circumstances, and use of the European Commission (the Commission) approved standard contractual clauses (although a pending judgment of the Irish High Court may have an effect on the validity of the use of standard contractual clauses). Personal data may also be transferred to countries in respect of which the Commission has determined there is an adequate level of protection for personal data, and to US companies that have committed to comply with the new EU-US Privacy Shield (which is due to be reviewed in September 2017).

Both data controllers and data processors are subject to a statutory duty of care owed to data subjects. The DPA sets out a number of individual data subject rights, including rights to access and rectify personal data.

The General Data Protection Directive (Regulation 2016/679) (GDPR) will have direct effect in Ireland from 25 May 2018, and will replace the DPA. The GDPR is intended to further harmonise the data protection regimes within the EU, and will introduce a number of changes into the data protection regime, including:

- increased scope, to include focus on the residence of the data subject;
- lead regulatory authority for supervision;
- privacy by design and by default;
- additional focus on processors and processing arrangements;
- improved individual rights;
- mandatory breach reporting; and
- significantly increased sanctions for breach.

40 Are there legal requirements or regulatory guidance relating to personal data specifically aimed at fintech companies?

No.

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

Anonymisation and aggregation of data for commercial gain is governed by the DPA.

Aggregation of data for commercial gain will only be permissible where the collection, aggregation and commercial use of the data meets all the data protection principles, is legitimate and meets the fair processing disclosure requirements, as outlined in question 39. There may be somewhat greater flexibility in the use of anonymised data for commercial gain. However, it is generally accepted that the standard required for data to be truly anonymised (and therefore not be personal data) is a high one, and that anonymisation techniques can only provide privacy guarantees if appropriate techniques are used and the application of those techniques is engineered appropriately. An Article 29 Working Party opinion issued in 2014 considers effectiveness and limits of anonymisation techniques against EU data protection laws, and would likely have persuasive authority in Ireland.

In August 2016, the ODPC issued a guidance note on the use of data anonymisation and pseudonymisation, which detailed the effectiveness of anonymisation techniques and recommendations for organisations wishing to employ such techniques.

Cloud computing and the internet of things

42 How common is the use of cloud computing among financial services companies in your jurisdiction?

While the uptake of cloud computing by banks in particular has been slow to date, there have been recent signals of increased interest in cloud computing among regulated financial services firms, and it is expected that more will move to cloud computing in the medium term. The increased interest is partly driven by cost considerations, but also reflects a growing acceptance of cloud services. Data protection remains a concern, however.

Update and trends

Following the United Kingdom's vote to leave the EU ('Brexit') in June 2016, there has been a significant increase in the number of financial institutions, including fintech firms that undertake regulated activities, seeking authorisation in Ireland in order to protect passporting rights. The ESMA opinion setting out general principles aimed at fostering consistency in authorisation, supervision and enforcement related to the relocation of entities, activities and functions from the United Kingdom may be relevant in this context.

Distributed ledger technologies continue to attract attention as potential solutions within fintech, as exemplified by the work that Irish Funds, the industry body for the investment funds industry in Ireland, has undertaken on a blockchain proof of concept in the regulatory reporting space, and the February 2017 ESMA report on distributed ledger technology as applied to the securities markets, arising from its discussion paper on the same topic in 2016.

As a general comment, fintech has increasingly come into consideration from a regulatory perspective, as demonstrated in part by the Commission consultation paper of March 2017, 'FinTech: a more competitive and innovative European financial sector', which sought to gather first-hand information on the impact of new technology in the financial sector, with a view to assessing whether EU regulatory and supervisory rules are adequate and what future actions may be needed. The consultation was structured along four broad policy objectives that reflected the Commission's view of the main opportunities and challenges related to fintech, namely: (i) fostering access to financial services for consumers and businesses, such as through the use of artificial intelligence combined with big data analytics and crowdfunding; (ii) bringing down operational costs and increasing efficiency for the industry, for example by applying RegTech solutions or through the use of cloud computing; (iii) making the single market more competitive by lowering barriers to entry, such as the adoption of a uniform approach across EU member states to licensing requirements or the facilitation or the creation of regulatory sandboxes; and (iv) balancing greater data sharing and transparency with data security and protection needs, such as through the adoption of distributed ledger technology solutions.

Separately, in June 2017, the Central Bank published a discussion paper, 'The CPC and the Digitalisation of Financial Services', with the intent of obtaining input from stakeholders on whether the CPC is fit for purpose in light of the changes in financial services, particularly on whether the CPC addresses emerging risks from digitalisation, as well as to determine whether existing consumer protections need to be enhanced or adapted in the context of digitalisation. The discussion paper notes that although technological developments can change and improve the way consumers conduct their financial affairs, it also stresses the importance of a regulatory framework that seeks to mitigate the risks associated with technological advances and protect consumers, with the Central Bank's primary concern being to craft an approach to innovation that protects consumers' best interests and safeguards the consumer protection framework. The discussion paper is open for comment from all interested stakeholders until 27 October 2017.

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

There are no specific legal requirements or regulatory guidance in this respect. Generally, the DPA will apply. For regulated activities, the Central Bank may apply relevant outsourcing requirements, and will have a specific focus on security issues.

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

See question 43.

Tax

45 Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

In addition to the attractive low Irish corporation tax rate of 12.5 per cent, there are a number of further Irish tax incentives that encourage innovation and investment in fintech in Ireland, including the following:

- A 25 per cent tax credit for qualifying R&D expenditure carried on within the EEA. This tax credit is in addition to the normal business deduction for such R&D expenditure (at the 12.5 per cent rate), thus incentivising expenditure on R&D at an effective rate of 37.5 per cent. These credits may also be surrendered by the company to key employees actively involved in R&D activities, thereby reducing the effective rate of Irish income tax for such employees.
- A best in class 'knowledge development box', which complies with the OECD's 'modified nexus' standard. This incentive reduces the rate of Irish corporation tax to 6.25 per cent for profits derived from certain IP assets, where qualifying R&D activity is carried on in Ireland. This incentive can also be claimed in conjunction with the R&D tax credit.
- Tax depreciation for certain intangible assets. Such assets can be 'amortised' for Irish corporation tax purposes either in line with their accounting treatment or on a straight basis over 15 years.
- The Employment and Investment Incentive (EII) and Start-up Refunds for Entrepreneurs (SURE) schemes, which allow individual investors in fintech companies to obtain Irish income tax relief (of up to 41 per cent) on investments made, in each tax year, into certified qualifying companies. Relief under the EII is available in respect of funding of up to €15 million and is available until 2020.
- Entrepreneurs relief, which allows for a capital gains tax rate of 10 per cent on the disposal of certain qualifying business assets up to a lifetime amount of €1 million.
- An extensive double tax treaty network, totalling 73 treaties, that prevents the taxation of the same portion of a company's income by multiple jurisdictions.
- Start-up relief, which provides for a reduction in corporation tax liability for the first three years of trading for certain size companies provided the company was incorporated on or after 14 October 2008 and began trading between 1 January 2009 and 31 December 2018. This relief can be claimed on both profits from trading and on capital gains.
- An attractive stamp duty regime that exempts the transfer of intellectual property from stamp duty.

Competition

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

There are no competition issues that are specific to fintech companies, nor do we expect that there will be any that will become an issue in the future. Any competition issues that are likely to arise will apply as a result of general competition law rules, and will be fact-specific.

Financial crime

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

Unlike the position under English law, there are no specific provisions of Irish law that impose obligations on companies to have in place procedures to combat bribery. However, a company can be liable under Irish law for bribery or corruption offences that are committed by it or by persons acting on its behalf. In particular, the Prevention of Corruption Acts 1906 to 2010 (PCA) provide for both personal and corporate liability for corruption and bribery offences. Where a corruption offence was committed by a body corporate with the consent, connivance or on foot of neglect on the part of a person who is a director, manager, secretary or other officer of the body corporate, that person shall be guilty of an offence. Either or both the corporate and the individual can be prosecuted. The PCA applies in relation to both domestic corruption and also to corruption occurring outside the state where committed by Irish citizens or by persons or companies resident, registered or established in Ireland, or by the relevant agents of such persons. Protection for whistle-blowers who make reports in good faith of offences is provided for under the PCA and the Protected Disclosures Act 2014, with provision for redress for employees who have been penalised by their employers for whistle-blowing. Accordingly, it would be good practice

for fintech companies to adopt anti-bribery and corruption policies and procedures.

Any fintech company that is a designated body for the purposes of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (as amended) (CJA) will be obliged to comply with anti-money laundering (AML) and counter terrorist financing (CTF) obligations in accordance with the CJA. Certain entities that are designated bodies for the purposes of the CJA, such as leasing companies, or those providing factoring services, do not require authorisations or licences from the Central Bank, but are subject to AML and CTF obligations under the CJA. Fintech providers that are not regulated should therefore check on a case-by-case basis whether they are subject to the CJA.

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

There is no such guidance that applies specifically to fintech companies.

In line with other regulators, the Central Bank has generally increased its focus on cyberrisks across all regulated financial services. The Central Bank issued best practice guidance on cybersecurity within the investment firm and fund services industry in September 2015, followed by cross-industry guidance on information technology and cybersecurity risks in September 2016. The Central Bank will also expect relevant firms to apply European Banking Authority security guidelines.

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THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

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