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Fintech

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Contributing editors**Angus McLean and Penny Miller****Simmons & Simmons**

Lexology Getting The Deal Through is delighted to publish the fourth edition of *Fintech*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria, Gibraltar, Ireland, Kenya and South Africa.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Angus McLean and Penny Miller of Simmons & Simmons, for their continued assistance with this volume.



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FINTECH LANDSCAPE AND INITIATIVES

General innovation climate

1 | What is the general state of fintech innovation in your jurisdiction?

Taiwan's law for the fintech regulatory sandbox, the FinTech Development and Innovation and Experiment Act (Sandbox Act), was promulgated on 31 January 2018 and took effect on 30 April 2018. At the time of writing, three applications have been approved by the Financial Supervisory Commission (FSC) to enter into the sandbox, one case relating to online credit card and credit facility businesses by means of mobile phone ID verification system, and the other two relating to outbound remittance by foreign workers through local convenience stores.

In addition to the sandbox mechanism described above, in 2018, the Taiwan government also supported fintech developments by, for example, establishing a 'FinTechSpace', which is a physical location situated in the city of Taipei with an aim to provide relevant assistance to fintech start-ups, such as acting as an intermediary between fintech start-ups and financial services entities (with respect to potential cooperation between the parties), a 'regulatory clinic' (ie, free preliminary advice provided by government officials regarding regulations), etc.

Government and regulatory support

2 | Do government bodies or regulators provide any support specific to financial innovation? If so, what are the key benefits of such support?

The regulatory sandbox offers a platform to test new applications of fintech technologies. According to the Sandbox Act, an applicant (who can be an entity or individual) needs to obtain an approval from the FSC before entering the sandbox and beginning the experiment. During the experiment period, the experimental activities may enjoy exemptions from certain laws and regulations (such as FSC licensing requirements and certain legal liability exemptions). After completion of the approved experiments, the FSC will analyse the results of the experiments. If the result is positive, the FSC may review the existing financial laws and regulations and explore the possibility of amending such existing rules that pose obstacles to the experimented financial innovation if put in the real world. Note, however, that, depending on the review result of the FSC, the sandbox entity or individual might still be required to apply for a relevant licence or approval from the FSC in order to formally conduct the activities as previously tested in the sandbox.

See also question 1 regarding the 'FinTechSpace'.

FINANCIAL REGULATION

Regulatory bodies

3 | Which bodies regulate the provision of fintech products and services?

In Taiwan, the FSC is the government body regulating all financial products and services. There are four bureaux established under the FSC:

- the Banking Bureau (BB);
- the Securities and Futures Bureau (SFB);
- the Insurance Bureau (IB); and
- the Financial Examination Bureau (EB) (collectively the Bureaux).

Each of the BB, SFB and IB is separately responsible for regulating the banking, securities and insurance industries. The EB is in charge of financial inspection and audits of financial institutions regulated by the FSC. Currently none of the four bureaux has been specifically designated to regulate fintech products and services. Therefore, it should depend on the nature of such products and services to determine which bureau would be the body regulating the relevant fintech products or services.

As to the mechanism of the regulatory sandbox described in question 1, the FSC is the competent authority; nonetheless, if the tested fintech product and service relates to the regulatory regime of other competent authorities (such as the central bank), the opinion of such relevant authority will also be consulted by the FSC.

Regulated activities

4 | Which activities trigger a licensing requirement in your jurisdiction?

In Taiwan, conducting finance-related activities generally requires a licence from the FSC. Such activities include, without limitation:

- Securities-related activities: securities underwriting, securities brokerage, securities dealing (ie, proprietary trading), securities investment trust (ie, asset management) and securities investment consulting.
- General consulting business, such as acting as financial advisers or agents to arrange investments or bring about merger or acquisition deals, does not require any licence. In addition, acting as principal in an investment deal does not require any licence as well (save for foreign investor should need a foreign investment approval and investment in regulated industries should need special approvals).
- Bank-related activities:
 - lending: lending activities do not fall within the businesses to be exclusively conducted by a local licensed bank. However, as no financing company may be registered in Taiwan, it is currently not possible for an entity to register as a financing company to carry on lending activities in Taiwan;

- factoring and invoice, discounting and secondary market loan trading: for more details, see question 6;
- deposit taking;
- foreign exchange trading;
- remittance; and
- electronic payment, credit cards and electronic stored-value cards: see question 12.

Consumer lending

5 | Is consumer lending regulated in your jurisdiction?

A local licensed bank may carry on consumer lending activities. Although lending activities do not fall within the businesses to be exclusively conducted by a local licensed bank, carrying out lending activities as one of a company's registered business activities is still not permitted in Taiwan.

Secondary market loan trading

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

The general principle under Taiwan's Civil Code is that any receivable is assignable unless:

- the nature of the receivable does not permit such transfer;
- the parties to the loan have agreed that the receivable shall not be transferred; or
- the receivable, in nature, is not legally attachable.

The receivable under loans, subject to (ii) above, are generally transferable. But a bank is subject to stricter rules that generally loans that remain performing cannot be transferred by a bank except for limited exceptions (such as for the purpose of securitisation). For this reason, Taiwan does not currently have an active secondary loan market.

Collective investment schemes

7 | Describe the regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would fall within its scope.

Local funds (securities investment trust funds)

The most common form of collective investment scheme in Taiwan is securities investment trust funds, which may be offered to the general public or privately placed to specified persons. Public offering of a securities investment trust fund needs prior approval or effective registration with the FSC or the institution designated by the FSC. No prior approval is required for a private placement of a securities investment trust fund; however, it can only be placed to eligible investors and within five days after the payment of the subscription price for initial investment offering, a report on the private placement shall be filed with the FSC or the institution designated by the FSC. Generally, the total number of qualified non-institutional investors under a private placement shall not exceed 99. Under current laws and regulations, public offering and private placement of securities investment trust funds may only be conducted by FSC-licensed securities investment trust enterprises (SITEs). Currently, the paid-in capital of a SITE should not be lower than NT\$300 million, and there exist certain qualifications for the shareholders of a SITE. A fintech company, which is not a SITE, will not be able to raise funds as a SITE does.

Offshore funds

Offshore funds having the nature of a securities investment trust fund may also be publicly offered (subject to FSC prior approval) or privately

placed (subject to post-filing with FSC or its designated institution) to Taiwan investors, subject to certain qualifications and conditions. An offshore fintech company, which does not have the nature of a securities investment trust fund, will not be allowed to be offered in Taiwan.

Alternative investment funds

8 | Are managers of alternative investment funds regulated?

Currently, only securities investment funds, real property trust funds and futures trust funds (which focus on investment in futures and derivatives) are permitted in Taiwan (except that SITEs and securities firms are now permitted to set up a subsidiary to act as the general partner of a private equity fund under the structure of limited partnership). These funds may only be offered and managed by FSC-licensed entities such as SITEs, banks or futures trust enterprises. A fintech company, which is not a SITE, a bank or a future trust enterprise, will not be allowed to manage such funds in Taiwan.

Peer-to-peer and marketplace lending

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

While to date there are no laws or regulations specifically regulating or governing peer-to-peer (P2P) lending, the Bankers Association of the Republic of China (Bankers Association), the self-disciplinary organisation of banking industry, has promulgated a Self-Disciplinary Rules of Business Cooperation between Member Banks of Bankers Association and Peer-to-Peer Lending Operators (P2P Self-Disciplinary Rules) and such P2P Self-Disciplinary Rules have been filed with the FSC for record.

According to the P2P Self-Disciplinary Rules, banks may work together with the peer-to-peer lending operators on the following businesses:

- providing fund custodian service by a bank;
- providing cash-flow service by a bank;
- providing credit review and rating services by a bank;
- extending facility by a bank to the customer (ie, the people-to-business model);
- advertising and marketing activities; and
- providing credit document custody service by a bank.

Crowdfunding

10 | Describe any specific regulation of crowdfunding in your jurisdiction.

Equity-based crowdfunding

The following two ways of fundraising are generally known as the equity-based crowdfunding platforms in Taiwan. Such ways of crowdfunding are exempted from the prior approval or effective registration normally required under the Securities and Exchange Act (SEA).

The Go Incubation Board for Start-up and Acceleration Firms of the Taipei Exchange

The Taipei Exchange (TPEX), one of the two securities exchanges in Taiwan, established the Go Incubation Board for Start-up and Acceleration Firms (GISA) in 2014 for the purpose of assisting innovative and creative small non-public companies in capital raising.

A company having innovative or creative ideas with potential for developments is qualified to apply for GISA registration with TPEX. After TPEX approves the application, the company will first start receiving counselling services from TPEX regarding accounting, internal control, marketing and legal affairs. After the counselling period, there would be another TPEX review to examine, among other things, the company's management teams, the role of board of directors, accounting and

internal control systems, and the reasonableness and feasibility of the plan for capital raising, and if the TPEX deems appropriate, the company may raise capital on the GISA. The amount raised by the company through the GISA may not exceed NT\$30 million unless otherwise approved. In addition, an investor's annual maximum amount of investment through the GISA should not exceed NT\$150,000, except for angel investors defined by TPEX or wealthy individuals with assets exceeding an amount set by TPEX and having professional knowledge regarding financial products or trading experience.

Equity-based crowdfunding on the platforms of securities firms

A securities firm may also establish a crowdfunding platform and conduct equity crowdfunding business. Currently, a company with paid-in capital of less than NT\$50 million may enter into a contract with a qualified securities firm to raise funds through the crowdfunding platform maintained by such securities firm, provided that the total amount of funds raised by such company through all securities firms' crowdfunding platforms in a year may not exceed NT\$30 million. The amount of investment made by an investor on a securities firm's platform may not exceed NT\$50,000 for each subscription, and may not exceed NT\$100,000 in aggregate in a year, except for angel investors as defined in the relevant regulations.

Non-equity-based crowdfunding

In 2013, TPEX established the 'Gofunding Zone' on its official website. This mechanism allows the non-equity-based crowdfunding platform operators, once approved by TPEX, to post the information regarding their proposals and projects on the Gofunding Zone. However, in May 2018, TPEX announced that due to the significant developments in the crowdfunding business, the phased task of TPEX to support such business has been completed, and thus it decided to close the Gofunding Zone and annulled relevant rules.

Invoice trading

11 | Describe any specific regulation of invoice trading in your jurisdiction.

See question 6 for the relevant rules on transfer or assignment of receivables. In general, no company may carry out the activities of receivable transfer for business. Purchase of accounts receivable may only be conducted by a licensed bank.

Payment services

12 | Are payment services regulated in your jurisdiction?

Yes. Traditionally payments by wire transfer can only be made through a licensed bank. Payments via cheques and credit cards are also run through banks.

Non-banks engaging in credit card-related business and issuance of electronic stored-value cards should also obtain approval from the FSC.

In 2015, the Act Governing Electronic Payment Institutions (E-Payment Act) was enacted. This E-Payment Act regulates the activities of an electronic payment institution, acting in the capacity of an intermediary between payers and recipients to engage, principally, in:

- (i) collecting and making payments for real transactions as an agent;
- (ii) accepting deposits of funds as stored value funds; and
- (iii) transferring funds between e-payment accounts.

According to the E-Payment Act, an electronic payment institution should obtain approval from the FSC unless it engages only in (i) above and the total balance of funds collected and paid and kept by it as an agent does not exceed the specific amount set by the FSC.

Open banking

13 | Are there any laws or regulations introduced to promote competition that require financial institutions to make customer or product data available to third parties?

While the FSC has the general power to request the provision of customer or product data by financial institutions to the FSC, in practice, the FSC's relevant regulations, directions or guidelines also require that financial institutions provide relevant customer and product data (such as data relating to credit extensions, credit cards, derivatives, etc) to the Joint Credit Information Center (JCIC) for banks' use of credit check in terms of credit extension.

In addition, in response to calls for 'open banking' from some industry experts and market players, the FSC has demanded that the Bankers Association set out relevant self-regulatory rules to implement the concept of open banking in Taiwan. According to relevant news articles, the FSC does not wish to set out mandatory rules requiring compulsory disclosure by the banks, but instead to ask the self-regulatory organisation (ie, the Bankers Association) to regulate the banks themselves. At the time of writing, the rules are still under discussion and have not been published yet.

Insurance products

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

In Taiwan, selling insurance products will be considered as conducting insurance business, which requires an insurance licence from the FSC. A fintech company is not permitted to sell any insurance products without an insurance licence from the FSC.

Credit references

15 | Are there any restrictions on providing credit references or credit information services in your jurisdiction?

Yes. Pursuant to the Banking Act and relevant regulations, an entity collecting credit-related information from financial institutions, processing such information and maintaining the relevant database and providing credit-related information and records to financial institutions for credit-checking purposes must obtain prior approval from the FSC. Currently, the JCIC is the only FSC authorised entity that offers such services. In practice, a bank would normally review the credit information or records provided by the JCIC as part of the bank's credit investigation on an applicant for a credit extension.

If an entity is not considered as offering such services, no FSC approval is required, but it will still be subject to the Personal Data Protection Act (PDPA) regarding its collection and use of any personal data. See question 31 for regulations on collection and use of personal data.

CROSS-BORDER REGULATION

Passporting

16 | Can regulated activities be passported into your jurisdiction?

There is no concept of passporting right in Taiwan. To engage in regulated financial activities, a company needs to apply for the relevant licences to the FSC. Depending on the types of regulated activities, the applicant shall meet certain qualifications as required under relevant laws and FSC regulations.

Requirement for a local presence

- 17 | Can fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

No. Foreign companies cannot carry on regulated businesses (which include financial services) without a licence and the FSC licences required for providing financial services are not issued to foreign companies without establishing a subsidiary or a branch in Taiwan.

SALES AND MARKETING

Restrictions

- 18 | What restrictions apply to the sales and marketing of financial services and products in your jurisdiction?

The Financial Consumer Protection Act (FCPA) and its related regulations provide for the general marketing rules applicable to the marketing materials for financial services. In general, under the FCPA, when carrying out advertising, promotional or marketing activities, financial services providers should not falsify, conceal, hide or take any action that would mislead financial consumers and should ensure the truthfulness of the advertisements. In addition to the general marketing rules under the FCPA, the financial service providers may also be subject to additional marketing rules as specified in the laws and regulations governing the specific types of financial services or products.

CHANGE OF CONTROL

Notification and consent

- 19 | Describe any rules relating to notification or consent requirements if a regulated business changes control.

The rules relating to notification or approval requirements for change of control of a financial services company vary among the types of companies. For example:

- bank: a prior approval must be obtained from the FSC if an investor or its related parties has individually, jointly or collectively acquired or held more than 10, 25 or 50 per cent of the voting shares of a bank;
- securities firm: no prior approval from the FSC is required;
- SITE: if the professional shareholder of a SITE intends to transfer its shareholding in the SITE, the SITE should report to the FSC the transfer of shares before the transfer is conducted; and
- SICE: no prior approval from the FSC is required.

FINANCIAL CRIME

Anti-bribery and anti-money laundering procedures

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

Money laundering activities are mainly regulated by the Money Laundering Control Act (MLCA) (last amended on 7 November 2018) and its related regulations. Under the MLCA, in order to prevent money laundering activities, financial institutions are required to implement their own internal anti-money laundering (AML) guidelines and procedures and submit them to the FSC for record.

Guidance

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

No.

PEER-TO-PEER AND MARKETPLACE LENDING

Execution and enforceability of loan agreements

- 22 | 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?

There are no particular formality requirements for executing loan agreements. As to security agreements, under Taiwan law, different types of asset are subject to different formality requirements for perfection of a security interest created over them. The formality requirements for the most commonly seen security interests are as follows:

- Chattels: there must be a written agreement to create a chattel mortgage. The mortgagor needs not deliver the possession thereof to the mortgagee; however, a registration with the competent authority will be necessary in order for the mortgagee to claim the chattel mortgage against a bona fide third party.
- Real properties: security interest over real properties is taken by way of a mortgage registered with the relevant land registration offices. The parties must enter into a written agreement to agree on the creation of the mortgage and apply for registration of the mortgage before the mortgage can take effect.
- Shares: to create a pledge over shares, the pledgor and pledgee should enter into a written agreement. If the shares are represented by physical certificates, the pledged share certificates should also be duly endorsed by the pledgor and physically delivered into the pledgee's possession. A notice of pledge to the issuing company is also required. If the shares are listed and deposited to or registered with the local securities depository (ie, the Taiwan Depository and Clearing Corporation (TDCC)), the above endorsement, physical delivery of the shares and notification to the issuing company are not required; instead, a pledge registration of the shares in the TDCC's book-entry system in accordance with the TDCC's regulations will suffice.

No different rules apply to cases of peer-to-peer lending.

Assignment of loans

- 23 | 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? Is it possible to assign these loans without informing the borrower?

An assignment will not be effective against the borrower until the borrower has been notified of such assignment. If the borrower is not notified of such assignment, the borrower may still make the repayment to the assignor and discharge its repayment obligation by doing so.

Securitisation risk retention requirements

- 24 | Are securitisation transactions subject to risk retention requirements?

There are no mandatory risk retention requirements for securitisation as prescribed for in the Financial Asset Securitisation Act of Taiwan.

Securitisation confidentiality and data protection requirements

- 25 | Is a special purpose company used to purchase and securitise peer-to-peer or marketplace loans subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

Personal information is protected by the Personal Data Protection Act (PDPA) and the collection and use of any personal data is subject to notice and consent requirements. If a special purpose company, when purchasing and securitising loans, acquires any personal data, it will be subject to the obligations under the PDPA. See question 31 for regulations regarding collection and use of personal data.

ARTIFICIAL INTELLIGENCE, DISTRIBUTED LEDGER TECHNOLOGY AND CRYPTOASSETS

Artificial intelligence

- 26 | Are there rules or regulations governing the use of artificial intelligence, including in relation to robo-advice?

The Taiwan government announced the 5+2 Industrial Innovation Plan (5+2 Plan) in 2008, in which artificial intelligence played an important role. The 5+2 Plan mainly focuses on seven industries (ie, intelligent machinery, Asia Silicon Valley, green energy, biomedicine, national defence and aerospace, new agriculture and the circular economy), and is considered the core generator for Taiwan's next generation of industrial development. To facilitate the 5+2 Plan, the government also launched the AI Talent Programme, which aims to:

- cultivate 1,000 high-calibre talents in intelligent technologies;
- train 5,000 talents in practical intelligent technologies; and
- attract foreign professionals by the year 2021.

Nevertheless, the development of application of artificial intelligence in financial business in Taiwan is still at a preliminary stage. The main application involves correspondence with clients, such as Chatbot and 'Robo-Advisor Services' (defined below). In June 2017, the Securities Investment Trust and Consulting Association of Taiwan (SITCA), the self-disciplinary organisation of the asset management industry, issued 'Operating Rules for Securities Investment Consulting Enterprises Using Automated Tools to Provide Consulting Service (Robo-Advisor)' (the Robo-Advisor Rules), which was approved by the FSC. Pursuant to the Robo-Advisor Rules, securities investment consulting enterprises (SICEs) may provide online securities investment consulting services by using automated tools through algorithm (Robo-Advisor Services), and must comply with certain rules, which include, among others, the following:

- periodical review of the algorithm;
- relevant know-your-customer procedures should be conducted before provision of advice;
- a special committee should be established to supervise the adequacy of the Robo-Advisor Services; and
- customers should be informed of precautions before using Robo-Advisor Services.

Distributed ledger technology

- 27 | Are there rules or regulations governing the use of distributed ledger technology or blockchains?

No.

Cryptoassets

- 28 | Are there rules or regulations governing the use of cryptoassets, including digital currencies, digital wallets and e-money?

Digital currencies (such as virtual currencies or cryptocurrencies with the applications of blockchain technology), which are not linked or tied to the currency of any nation, are currently not accepted by the Central Bank of the Republic of China (Taiwan) (Central Bank) as currencies. In December 2013, both the Central Bank and the FSC expressed the government's position toward bitcoin by issuing a joint press release (2013 Release). According to the 2013 Release, the two authorities held that bitcoin should not be considered a currency, but highly speculative digital virtual commodity. In another FSC's press release in 2014 (2014 Release), the FSC ordered that local banks must not accept bitcoin or provide any other services related to bitcoin (such as exchange bitcoin for fiat currency). The FSC further issued a press release on 19 December 2017 (2017 Release), in which the FSC reiterated the government's positions as specified in the 2013 Release and 2014 Release. Other than the above and the press release on ICOs mentioned in question 27, no laws, regulations or rulings have been officially issued, promulgated or amended to specifically deal with the rise of digital currencies. However, see questions 30 and 45 regarding the proposed regulations governing ICO tokens having the nature of securities.

As to digital wallets, see question 12 regarding FSC approval that may be required for non-banks issuing electronic stored-value cards or acting as an electronic payment institution. Banks providing mobile payment services must comply with relevant FSC rules on, among others, security control.

Digital currency exchanges

- 29 | Are there rules or regulations governing the operation of digital currency exchanges or brokerages?

Further to question 28, so far no Taiwanese laws or regulations have been promulgated or amended to formally regulate the operation of digital currency exchanges or brokerages in Taiwan. However, see questions 30 and 45 regarding the proposed regulations governing ICO tokens having the nature of securities as well as the platform operator for such tokens.

Initial coin offerings

- 30 | Are there rules or regulations governing initial coin offerings (ICOs) or token generation events?

In response to the rising amount of ICOs and other investment activities regarding digital currencies and cryptocurrencies, the FSC also expressed the following views on ICO through the 2017 Release as mentioned in question 28:

- The classification of an ICO should be determined on a case-by-case basis. If an ICO involves offer and issue of securities, it should be subject to the Securities and Exchange Act (SEA). The issue of whether tokens in an ICO would be deemed securities under the SEA would depend on the facts of each individual case.
- If any misrepresentations with respect to technologies or their outcomes or promises of unreasonably high returns are used by the issuer of virtual currencies or an ICO to attract investors, the issuer would be deemed as committing fraud or illegal fund-raising.

However, although it was advised in the 2017 Release that offering and issuance of any tokens with the nature of securities (ie, STO) should be subject to the SEA, currently the SEA and its related regulations have not set out the relevant rules governing the filing for such prior

approval or registration. In other words, at the time of writing, no regulatory process is available in Taiwan for the said prior approval or registration. Given this, in order to respond to advocates from the blockchain and cryptocurrency industries, we understand that the FSC is planning to promulgate relevant regulations governing STOs to fill the void and such regulations are still under discussion and yet to be published. For this purpose, the FSC held a public hearing on 12 April 2019, inviting views and opinions from industry experts on the proposed STO regulations. According to relevant news articles, it was expected that such regulations would be announced in June 2019.

Other than the above, no laws, regulations or rulings were officially issued, promulgated or amended to specifically deal with the rise of ICOs.

DATA PROTECTION AND CYBERSECURITY

Data protection

31 | What rules and regulations govern the processing and transfer (domestic and cross-border) of data relating to fintech products and services?

In Taiwan, personal data is generally protected by the Personal Data Protection Act (PDPA). Under the PDPA, unless otherwise specified under law, a company is generally required to give notice to (notice requirement) and obtain consent from (consent requirement) an individual before collecting, processing or using any of said individual's personal information, subject to certain exemptions. To satisfy the notice requirement, certain matters must be communicated to the individual, such as the purposes for which his or her data is collected, the type of the personal data and the term, area and persons authorised to use the data.

Cybersecurity

32 | What cybersecurity regulations or standards apply to fintech businesses?

Different cybersecurity regulations or standards may apply to different types of financial service entities or their products or services. For example, if a type of fintech business is considered to fall within the scope of electronic banking business, in addition to the relevant licensing requirements under certain financial regulations, it should also comply with the rules governing the security control for such business.

With respect to the regulatory sandbox under the Sandbox Act, relevant description regarding the information system and security control is required for application for entering the sandbox.

Note that the Cyber Security Management Act (CSMA) was enacted in June 2018. According to the CSMA, financial services firms would be required to comply with relevant obligations (including, among others, requirements for meeting a specific security level, setting up relevant internal rules for implementing plans for maintaining information security, reporting to the government in case of any cybersecurity incident, etc) under the CSMA if they are designated by the Taiwan government as the critical infrastructure provider (CIP) under the CSMA. While we think that no specific fintech business would be designated as a CIP, the CSMA would still apply to fintech businesses if the types of financial service entities carrying out such fintech business activities are considered FSC-regulated entities and are designated as CIP by the Taiwan government.

OUTSOURCING AND CLOUD COMPUTING

Outsourcing

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

The legal requirements with respect to the outsourcing by a financial services company vary among the types of companies. For example, a bank's outsourcing must comply with the Regulations Governing Internal Operating Systems and Procedures for the Outsourcing of Financial Institution Operation (Banks Outsourcing Regulations), under which only the activities enumerated in the Banks Outsourcing Regulations can be outsourced (subject to relevant requirements such as supervision of the outsourced party, the contract with the outsourced party, etc), and outsourcing of some activities would require prior approval from the FSC.

As for other financial services companies, there exists no single regulation that governs their outsourcing activities, and generally outsourcing is allowed only if the FSC has issued any ruling permitting it. For example, a SITE is permitted to outsourcing its operation of evaluating fund assets, calculation of a fund's net worth and fund accounting to a professional institution, subject to applicable requirements specified under the relevant FSC rulings.

See question 34 as to the FSC's proposed revision to the Banks Outsourcing Regulations to address the circumstance where the outsourced parties are cloud service providers.

Cloud computing

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

When the use of cloud computing involves outsourcing the operations of a financial institution, relevant laws and regulations governing outsourcing activities should be complied with. In general, an outsourcing activity should follow the internal rules and procedures of the financial institutions, and in certain circumstances, prior approval from the FSC would be required. The use of cloud computing should also comply with the PDPA as described in question 31.

Note that the FSC is now contemplating revising the Banks Outsourcing Regulations; at the time of writing, according to relevant news reports, the FSC has convened two public hearings to discuss the proposed revisions. It is generally expected that the revisions would focus on banks' outsourcing activities where cloud-related services are sought, and some additional requirements would be incorporated into the revisions, such as the banks' risk control measures and information security, obligations to supervise and audit the cloud service provider, ownership to the data, location of the data deposited, etc. At the time of writing, relevant revisions are still under discussion and yet to be published.

INTELLECTUAL PROPERTY RIGHTS

IP protection for software

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

Software can be protected by intellectual property rights such as patent, copyright or trade secret. As to patent, an inventor may file an application with Taiwan's Intellectual Property Office, and the patent right will be obtained once the application is approved. For copyrights and trade secrets, there are no registration or filing requirements for a copyright or a trade secret to be protected by law. However, there are certain

features that qualify a copyright or trade secret, such as 'originality' and 'expression' for copyright, and 'economic valuable' and 'adoption of reasonable protection measures' for trade secrets.

According to the Patent Act of Taiwan, the subject of a patent right is 'invention' and an invention means the creation of technical ideas, utilising the laws of nature. As a general rule, business methods are regarded as using social or business rules rather than laws of nature, and therefore may not be the subject of a patent right. As for software-implemented inventions, if it coordinates the software and hardware to process the information, and there is a technical effect in its operation, it might become patentable. For instance, a 'method of conducting foreign exchange transaction' would be deemed as a business method and thus unpatentable; however, a 'method of using financial information system to process foreign exchange transactions' might be patentable.

IP developed by employees and contractors

36 | Who owns new intellectual property developed by an employee during the course of employment? Do the same rules apply to new intellectual property developed by contractors or consultants?

Intellectual property developed by an employee during the course of employment

With regard to a patent, the right of an invention made by an employee during the course of performing his or her duties under employment will be vested in his or her employer and the employer should pay the employee reasonable remuneration unless otherwise agreed by the parties.

A trade secret is the result of research or development by an employee during the course of performing his or her duties under employment and it will belong to the employer unless otherwise agreed by the parties.

For copyright, where a work is completed by an employee within the scope of employment, the employee is the author of the work but the economic rights to such work will be enjoyed by the employer unless otherwise agreed by the parties.

Intellectual property developed by contractors or consultants

In respect of patent rights and trade secrets, the agreement between the parties will prevail, or such rights will be vested in the inventor or developer in the absence of such agreement. However, if there is a fund provider, the funder may use such invention.

In respect of copyright, the contractor or the consultant who actually makes the work is the author of the work unless otherwise agreed by the parties; the enjoyment of the economic rights arising from the work should be agreed by the parties, or such rights will be enjoyed by the contractor or the consultant in the absence of such agreement. However, the commissioning party may use the work.

Joint ownership

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

In respect of patents and trademarks, each joint owner may use the jointly owned rights at his, her or its discretion; however, a joint owner may not license or assign the jointly owned rights without consent of all the other joint owners. In respect of copyrights and trade secrets, each joint owner may not use, license or assign the rights without unanimous consent of the other joint owners, while the other joint owners may not withhold the consent without reasonable cause.

Trade secrets

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

Trade secrets are protected if they satisfy the following constituent elements: information that may be used in the course of production, sales or operations; having the nature of secrecy; with economic value; and adoption of reasonable protection measures.

To keep the trade secrets confidential during court proceedings, the court trial may be held in private if the court deems it appropriate or it is otherwise agreed upon by the parties. The parties and a third party may also apply to the court for issuing a 'confidentiality preservation order', and the person subject to such confidentiality preservation order should not use the trade secrets for purposes other than those related to the court trial or disclose the trade secrets to those who are not subject to the order.

Branding

39 | What intellectual property rights are available to protect branding and how do you obtain those rights? How can fintech businesses ensure they do not infringe existing brands?

The Trademark Act in Taiwan provides for the protection of brands. The rights of trademarks can be obtained through registration with Taiwan's Intellectual Property Office. The term of protection is 10 years from the date of publication of the registration and may be renewed for another 10 years by filing a renewal application.

Every registered trademark will be published on the official website maintained by the Intellectual Property Office and the trademark search system is accessible by the general public. On the search system, a fintech business may check whether an identical or similar trademark exists and who the proprietor of a registered trademark is.

Remedies for infringement of IP

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

Patent

With regard to infringement of an invention patent, the patentee may claim for damages suffered from such infringement. The amount of damages may be calculated by the damage suffered and the loss of profits as a result of the infringement; profit earned by the infringer as a result of patent infringement; or the amount calculated on the basis of reasonable royalties. If the infringement is found to be caused by the infringer's wilful act of misconduct, the court may triple the damages to be awarded. Patent infringements have been decriminalised since 2003.

Copyright

The damage suffered from copyright infringement may be claimed in the process of civil procedure. As for criminal liabilities, there are different levels depending on different types of infringement, ranging from imprisonment, of no more than three years, and detention to a fine of no more than NT\$750,000.

Trademark

The damages suffered from trademark infringement may be claimed in the process of civil procedure. As for criminal liabilities, any person shall be liable to imprisonment for a period not exceeding three years or a fine not exceeding NT\$200,000, or both, if he or she:

- uses a trademark that is identical to the registered trademark in relation to identical goods or services;

- uses a trademark that is identical to the registered trademark in relation to similar goods or services and hence there exists a likelihood of confusion on relevant consumers; or
- uses a trademark that is similar to the registered trademark in relation to identical or similar goods or services and there exists a likelihood of confusion for relevant consumers.

Trade secrets

The damage suffered from infringement of trade secrets may be claimed in the process of civil procedure. As for criminal liabilities, a person may be sentenced to a maximum of five years imprisonment and, in addition, a fine between NT\$1 million and NT\$10 million if he or she:

- acquires a trade secret by an act of theft, embezzlement, fraud, threat, unauthorised reproduction or other wrongful means, or uses or discloses a trade secret that has been acquired;
- carries out an unauthorised reproduction of, or uses or discloses, a trade secret that he or she has knowledge or possession of;
- fails to delete or destroy a trade secret in his or her possession as the trade secret holder orders, or disguises it; or
- knowingly acquires, uses or discloses a trade secret known or possessed by others that is under the circumstances specified in points (i) to (iii) above.

COMPETITION

Sector-specific issues

- 41 | Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction?

In April 2016, the FSC issued a press release pointing out the regulatory issues that may arise from P2P lending activities. According to this and other sources, the FSC is of the view that:

- if it is arranged that the lender (as a member of the platform) splits the original credit into several parts and in turn allocates and 'sells' the divided parts to other 'members' for investment with high return, it might involve regulatory issues regarding multilevel marketing; or
- if the platform operators claim that the transaction has the nature of high return, low cost and low risk, it might constitute false or misleading advertising and would result in a violation of the Fair Trade Act.

The above two issues are under the supervision of the Fair Trade Commission.

TAX

Incentives

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

Currently, there are no tax incentives specifically provided for fintech companies.

Generally, a company may choose to credit either up to 15 per cent of its total expenditure on research and development against its corporate income tax payable for that year; or up to 10 per cent of its total expenditure on research and development against its corporate income tax payable for each of the three years starting from that year, provided that the deduction amount should not exceed 30 per cent of the corporate income tax payable for the company in that year and that it did not commit any material violation of any law on environmental protection, labour or food safety and sanitation in the past three years. In order to



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apply such tax credits a company must apply to and receive approval from the government.

Increased tax burden

- 43 | Are there any new or proposed tax laws or guidance that could significantly increase tax or administrative costs for fintech companies in your jurisdiction?

Currently there are no such new tax laws or guidance and, to our understanding, currently there are no such proposals.

IMMIGRATION

Sector-specific schemes

- 44 | What immigration schemes are available for fintech businesses to recruit skilled staff from abroad? Are there any special regimes specific to the technology or financial sectors?

The Act for the Recruitment and Employment of Foreign Professionals, as enacted in 2017, aims to attract foreign talents to increase Taiwan's competitiveness. Although this Act was not specifically enacted for the area of fintech, we believe that fintech talents would be among those that Taiwan wants to attract. The key measures proposed under such act are listed as follows:

- relaxation of regulations on work, visa and residence;
- easing of provisions concerning stay or residence of parents, spouses and children; and
- providing benefits regarding retirement, insurance and tax.

UPDATE AND TRENDS

Current developments

- 45 | Are there any other current developments or emerging trends to note?

Further to question 30, the regulations governing STOs were expected to be announced by June 2019. The following points, among others, were initially proposed by the FSC to be stipulated in the regulations and are currently under discussion:

- to expressly approve security tokens as securities under the SEA;

- to set an upper limit of the total amount of an STO programme;
- to set qualifications for the buyers of security tokens;
- to require each STO to be conducted on a single platform, and the securities tokens to be traded on such platform; and
- to require that only FSC-licensed securities dealers may serve as STO platform operators.

In addition to the above, another update relates to AML. The latest amended Money Laundry Control Act (Taiwan AML Act) of Taiwan, which took effect on 7 November 2018, has brought cryptocurrency platform operators into the AML regulatory regime. However, at the time of writing, how it will be implemented and what requirements will be imposed by the FSC (which is the main regulator of the Taiwan AML Act) are not clear at this stage in terms of AML activities of cryptocurrency exchanges and platforms.

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