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Global Practice Guides

FinTech

Law & Practice – Spain

Contributed by
Zunzunegui Abogados

2018

CHAMBERS AND PARTNERS

SPAIN

LAW AND PRACTICE: p.3

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

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Zunzunegui Abogados (Madrid - HQ) is a leading boutique firm mainly involved in financial regulation and securities law. The firm, which has practised law for more than 20 years, specialises in banking and financial services, including litigation, dispute resolution and regulatory compliance. It is at the forefront of securities litigation, handling individual and class action cases related to structured and derivative products, and offers independent advice on financial regulation. Zunzunegui Abogados's office is located in the heart of Madrid but the practice has a presence in the whole of Spain and the firm covers four areas: bankruptcy, litigation, financial advice and consulting service.

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1. FinTech Market

1.1 The Development of FinTech Products and Services

Spain is placed fifth in the world and the first in Europe among the countries where FinTech financial services providers are used the most (around 53%). Crowdfunding services took off in 2016 and, together with payment gateways and lending services to SMEs, it is one of FinTech's fastest growing specified activities. The number of FinTech companies in Spain is predicted to double in 2017. Spain attracts a large number of FinTech companies on account of its technological talent and highly skilled workers, and its low costs make it a competitive market. In April 2017 Sebastián Albella, the president of the National Securities Market Commission (CNMV), announced the intention to launch a supervised regulatory 'sandbox' so that FinTech companies can establish themselves in Spain, as has already happened in Australia and the United Kingdom. In view of these factors, experts believe that opportunities exist for Spain to stand out as a global FinTech hub. In fact, the Global FinTech Hubs Federation (GFHF) has identified Madrid, represented by the Spanish FinTech and Insurtech Association, *Asociación Española de FinTech e Insurtech* (AEFI), as one of the most important financial hubs in 2017.

1.2 The Market for FinTech Products and Services

There are 238 FinTech companies in Spain and 63 Insurtech companies. The numbers show an exponential growth of 300% in the last year and the industry has over 3,000 employees (based on data provided by AEFI). According to the register of participatory financing platforms, or crowdfunding, created by CNMV there are 20 registered platforms. In this regard, the rapid development of crowd equity and crowd-lending should be highlighted, not forgetting real estate crowdfunding (with over 35,000 clients), an activity that finds itself in legal limbo from a regulatory perspective.

Besides these, the GFHF has highlighted blockchain, big data and peer-to-peer (P2P) as some of the most innovative specified activities in Spain. The GFHF maintains that the most innovative areas in the future will be robo-advisors, payment methods (ie, PAYTPV, a virtual payment gateway registered as a payment entity in the Bank of Spain), retail banking, identity management and crowd-lending. Likewise, over the next 12 months it predicts a thriving evolution of the regulatory environment, as well as a rise in investment capital and a greater number of foreign companies operating in Madrid.

Other activities with significant capacity for development are insurance management apps, such as Coverfy, a company authorised by the *Dirección General de Seguros y Fondos de Pensiones* (General Directorate for Insurance and Pension Funds, or DGSFP) to operate as an insurance intermediary. It is a free app that allows users to check information and automatically analyse insurance coverage and prices to search for the best offers, with advisers to help to answer users' questions about accidents or any other emergency.

Javier Alonso, the deputy governor of the Bank of Spain, has emphasised the Spanish banking industry's role as a pioneer in the Eurozone for introducing payment methods via mobile devices.

Moreover, Spain stands out in the development of FinTech tools such as apps for mobile devices (eg, Fintonic, a tool that allows users to manage personal finance, with more than 360,000 users in Spain) and comparison tools (ie, Bankimia and Rastreator). In addition to these activities, neobanks are starting to appear (eg, Together Bank) that represent the second generation of FinTech products.

1.3 The Key Market Participants in the Specified Activities

The new undertakings are mainly start-ups led by entrepreneurs and are characterised by using technologies such as cloud computing, open-source software, mobile technologies, big data, advanced data analytics or social networks in a more efficient way than traditional banking institutions. Technological entrepreneurship in Spain is growing on a daily basis. In fact, the AEFI points out that if traditional banks want to be competitive in an industry in which FinTech plays a big role, they must adapt to a more flexible culture, to the new digital channels and think more like their clients. It is the start-ups that are reaching agreements with the traditional banking industry that are growing faster.

1.4 FinTech Technologies/Companies

Traditional banking corporations still monopolise the financial services market, although their reputation has been put at risk by the financial crisis. Users prefer the added value provided by FinTech and Insurtech companies. Younger clients, people who are most adept at using new technologies and those with greater buying power are more likely to use FinTech providers (46% have contracts with three or more FinTech providers). It is predicted that the concept of a single provider of financial services will diminish with time and having multiple specialised providers will become the norm. The advantage the traditional banks have is that they have the clients, whereas FinTech companies' advantage is their dynamic approach. In this sense, the new kids on the block can help traditional companies to analyse and use client data, and become more dynamic. It has also been stressed that traditional companies, especially within the insurance industry, are more product-focused and would like the consumer's behaviour to fit their product instead of the other way around. In this sense, new players are occupying more competitive market positions because they empathise more with younger clients.

Nevertheless, FinTech activities face difficulties in developing in rural areas and in reaching those at the top of the population pyramid.

1.5 Partnerships Between Traditional Institutions and FinTech Companies

Co-operation between financial institutions and FinTech companies is happening through start-up acquisition and/or technologies, by investing in them and supporting these small start-ups. FinTech companies have pointed out in several forums that banks and insurance companies are interested in working with them under the condition that they are given added value.

However, in the short term, predictions suggest the banking industry will end up integrating many of those FinTech companies into their own structures. Some absorptions have already occurred; for example, BBVA Bancomer's purchase of Openpay. The same bank has recently announced that it will invest about EUR34 million in increasing the capital of Atom, the United Kingdom's first exclusively mobile bank, to remain the main strategic investor and maintain its stake of about 29.5% in the entity.

Together with these M&A operations, we see other forms of collaboration. BBVA has become an official member of Hyperledger, the collaborative open-source consortium whose goal is to foster blockchain use in different economic and business industries. Meanwhile, Banco Santander has signed an agreement with The Valley Digital Business School (DBS) to launch a new initiative called *Cátedra Santander-The Valley*, which will help to identify talent and develop professional competences, as well as to identify business opportunities and promote innovation in the development of new business platforms in the FinTech environment. Banco Santander has also reached an agreement with Apple to market and sell the Apple Pay payment service. With similar plans, EVO Banco has an agreement with Finizens, the Spanish FinTech that specialises in online investment, with the aim of providing services to its clients in a 100% digitalised and automated way thanks to the use of robo-advising. Another example is Bankia FinTech, a FinTech incubator and accelerator.

1.6 Approach to FinTech Innovation

Spain is friendly to technological change, while financial services users, especially millennials, are widely receptive to FinTech activity. With regard to regulatory authorities, the CNMV is in favour of opening up the market to FinTech initiatives. On the other hand, the Bank of Spain and DGSFP are more traditional, limiting their openness to innovative tech projects carried out by traditional banks or financial institutions. In terms of regulatory development, Javier Alonso, the deputy governor of the Bank of Spain, says that the development of new FinTech services will require an "adjustment to the regulatory boundary," meaning that regulation should correspond to the risks that accompany these services in terms of customer protection as well as protecting the financial system's stability. In this regard, as mentioned already, the CNMV president, Sebastián Albella, announced the intention to start a regulatory sandbox so that FinTech companies can consolidate their progress in Spain.

For now, the Spanish Promotion of Business Financing Act (*Ley de Fomento de la Financiación Empresarial*, or LFFE) meets the minimum objectives for creating legal certainty in the crowdfunding industry in Spain. Also, there are now two draft bills, one to amend Spanish legislation on payment methods in line with the EU Directive PSD2 (the second Payment Services Directive), and another for the law on the comparability of fees related to payment accounts, payment account switching and access to basic accounts. This new legislation will help FinTech companies to enter the market.

Furthermore, the CNMV has officially announced that it will help British FinTech companies to transfer to Spain following Brexit and has even provided an e-mail address to be able to deal with their enquiries promptly (welcome@cnmv.es).

1.7 Laws or Policy to Encourage Innovation

The crisis of confidence that is affecting the banking system provides an opportunity for new competitors to enter the market.

Mass fraud where public savings are concerned (preference shares, the IPO in Bankia, etc) and generalised unfair practices (floor clauses in mortgages) have affected banks' reputations (Edelman Trust Barometer for the financial services). In a context in which traditional banks' reputations are suffering, FinTech businesses see room for growth. They can easily engage users of traditional banks who have suffered as a result of their abusive practices.

On the other hand, there is great opacity in fee collection on the part of the traditional banking industry. Rebates are frequent and are a means of remunerating financial advisers and portfolio managers. As an alternative, FinTech initiatives have developed ways to engage unhappy users. For instance, a wide range of robo-advisers and automated portfolio management services have been growing successfully because of their reduced cost and fees transparency.

2. Regulation

2.1 Regulatory Regimes for Specified Activities or FinTech Companies

Crowdfunding is the only FinTech specified activity that has been regulated through a specific law that deals with both equity crowdfunding and loan-based crowdfunding. It is a cap regulatory scheme whereby Title V of LFFE establishes detailed regulatory requirements governing the platforms. Overall, it is an interventionist, oppressive framework and to a large extent serves to protect the banking industry's status quo. Participatory financing platforms (PFPs) are defined as "multifunctional participatory middlemen" by Spanish law. The legal framework allows them to provide payment gateways, perform debt collection services and to offer personal loans or act as a middleman for offering credit. To do so, they have to be registered with the CNMV as PFPs, but also have to be licensed by the Bank of Spain as hybrid payment entities, albeit with a more flexible status. Moreover, they have to comply with a legal framework, which is also flexible, in respect of consumer credit and credit intermediation. PFP companies have to respect restrictions set in favour of credit, payment or investment services institutions to carry out their activity. In this regard, they cannot receive cash or any other security from clients; they are also not able to grant credit, carry out clients' orders to operate in the market, manage the securities portfolios of investors in the platform or advise investors about the projects.

In essence, PFP companies constitute a new kind of financial middleman whose activity is conditional on securing authorisation and registration in a public register managed by the CNMV. Similar to other financial middlemen, these platforms have the benefit of legal reserve that comes with their activity and professional name, but with one special characteristic, which is that the Spanish regime has set out that not even credit institutions, which have the ability and capacity to provide all kinds of financial services, can carry out PFP activities. Together with crowdfunding regulation, the regulation of FinTech's payment gateway specified activity is in the making. The draft bills for amending the abovementioned law concerning payment services in line with community Directive PSD2 and the law on the comparability of fees related to payment accounts, payment account switching and access to basic accounts have already been published. The FinTech companies that provide these new services can access client banking data without restrictions, other than those derived from the general data protection regime.

2.2 Regulatory or Governmental Agencies for Specified Activities or FinTech Companies

The main FinTech regulatory body in Spain is the CNMV, which maintains a favourable stance where FinTech's development is concerned. The Bank of Spain, on the other hand, is more cautious about FinTech activities because of the effects they could have on traditional banking institutions. The CNMV supervises PFP companies with the same techniques as those used for investment services companies. This approach is aimed at protecting the client, particularly the layperson.

FinTech companies that provide new services regulated under PSD2 will continue to come under the supervision of the Bank of Spain.

There is no special supervision for FinTech companies, who are under the same regulatory standards as other financial institutions. Clients overall are protected by enhanced consumer protection, but no distinction is made between clients and consumers who operate within the FinTech activities and those who operate within the traditional banking scheme.

2.3 Capital and Liquidity Requirements
PFP companies must comply with very strict solvency requirements to be authorised. One of the financial requirements highlighted is the possibility to combine share capital with civil liability insurance, together with certain requirements for own capital that vary from EUR60,000 up to EUR2 million, depending on the volume of the project whose financing is being managed.

These companies must have as their sole corporate object the activities listed by the law. Furthermore, they should have their registered office within the EU, take the form of one of the capital companies, namely a public limited liability company (*sociedad anónima*, or SA) or a private limited liability company (*sociedad limitada*, or SL), comply with the financial requirements set out in Article 56 of LFFE, have qualified directors, have a sound organisational structure and have adequate means, as well as an internal code of conduct and plans to continue providing services after ceasing operations.

2.4 "Sandbox" or Other Regulatory "Neutral Zones"
The white paper on FinTech proposed a sandbox approach following the UK pattern on this issue. The CNMV president upholds this initiative. It is a question of permitting the launch of FinTech activities for a trial period without those initiatives facing the risk of being penalised. Nevertheless, these advantages are accompanied by certain legal restrictions, given that the creation of these privileged 'spaces' in which sanctions are not enforced in cases of non-compliance with the sector regulatory framework opposes the rule of law.

2.5 Change of Control Approval Requirements
The acquisition of a significant shareholding in the capital of PFP companies or payment institutions is subject to the same requirements for accessing the market as those imposed on other financial institutions. They have to be authorised by the regulatory authority, who must ensure the suitability of the potential stakeholders who could eventually take control of these companies. For PFP companies, "significant shareholding" is one that reaches, directly or indirectly, at least 10% of the share capital of the company or voting rights in the company, or that shareholding that allows taking over control of the company without reaching the said minimum.

2.6 Recent Developments or Notable Proposed/Forthcoming Regulatory Changes
The AEFI's white paper proposals are now in the process of being evaluated by the CNMV. The proposals are intended to achieve preferential treatment for FinTech companies and the aim is for financial authorities to become sponsors of the FinTech project in Spain, which would be a difficult course of action for these authorities to accept.

Financial authorities are more focused on bringing the traditional financial institutions closer to FinTech activity. The main objective is to extend the scope of financial activities to FinTech services to make the conditions in which they operate equal and to avoid unfair competition. The government's and the authorities' goal is to eliminate the grey areas that allow FinTech companies to operate without legal compliance. There are no plans to review the financial regulation system to adapt it to the new digital environment.

2.7 Burden of Regulatory Framework and Protection of Customers
The over-regulation that PFP companies face means development in this industry is complicated. The LFFE is about caps and provides detailed regulations on the status of PFP companies. There are still some limitations with regard to investment and codes of conduct that limit and make the business expensive.

Also, there is still quite a feeling of mistrust towards crowd financing through the internet. Participatory financing is considered disruptive and a threat to the financial system rather than an opportunity to finance entrepreneurship. It is somehow a defensive legislation. Instead of facilitating access to the industry and its development, it stops crowdfunding and appoints the CNMV as its custodian.

The legal framework is so thorough that it leaves no room for the development of entrepreneurial freedom, in what is still an early stage during which the most diverse business models exist side-by-side. It creates a strong burden of legal compliance, making the PFP industry more expensive, to the extent that it could mean it is no longer viable. Crowdfunding portals are more regulated than the stock market.

The development of those FinTech companies that reach agreements with traditional banking institutions is facilitated and these companies act as technical services providers or as client attractors. There is no policy aimed at developing FinTech that is not connected to the FinTech industry itself. Within the FinTech industry, associations are aimed more at forming partnerships with the local banking industry rather than acting autonomously in the market.

2.8 Regulatory Impediments to FinTech Innovation at Traditional Financial Institutions

Traditional banking entities (with a licence) maintain close relations with financial regulatory authorities and the government to facilitate their technological modernisation and protect their profitability from the 'threat' of FinTech companies. The new FinTech companies (without a bank licence) face restrictions to accessing financial infrastructures. The regulation of payment systems and securities settlement does not cover FinTech activities and there are no proposals to give them access. For example, credit PFP companies (loan-based crowdfunding) do not have access to the Risk Information Centre of the Bank of Spain (CIRBE) and this creates a competitive imbalance.

Difficulties in accessing market infrastructures constitute one of the major obstacles for development faced by FinTechs in Spain.

2.9 Regulatory Regime's Approach to Consumers and Small Business Customers

Case law tends to offer protection to the financial consumer compared to financial institutions' other clients; for example, SMEs do not enjoy this protection. Diverging views in Spain's Supreme Court case law, held by senior judge Francisco Orduña, are designed to extend consumer protection to all clients where a financial imbalance exists, including SMEs. In the medium term, customer protection, similar to that provided under the Markets in Financial Instruments Directive (MiFID), is envisaged for individuals and corporate entities. FinTech industry clients are not treated any differently to clients or consumers of traditional financial services, other than where the special regime governing PFPs is concerned.

PFPs must comply with principles and duties regarding conduct, similar to those regulating investment services companies. They must "conduct their activities in accordance with the principles of neutrality, diligence and transparency, and act in the best interests of the client." When providing services to investors, PFPs must make a distinction between "accredited" and "non-accredited" investors, in order to offer enhanced protection to the latter, the clients who are most vulnerable to the risks of participatory financing. This classification overlaps with the distinction between "professional" and "retail" clients made by the Spanish Securities Market Act (LMV) deriving from MiFID. The LFFE defines reputable investors and takes the view that any investor who fails to comply with the requirements that classify them as an accredited investor "will be deemed non-accredited." It is adopting the method used by MiFID whereby "anyone who is not a professional is considered to be a retailer."

Accredited investors, or professional investors de jure, as defined by the LMV, are those who invest in the shares of limited liability companies or in loans, with the proviso that the quantitative requirements of the companies are reduced. Thus, to be considered an accredited investor, it is sufficient to meet two out of the following three conditions: total assets amounting to EUR1 million, an annual turnover of EUR2 million or own capital amounting to EUR300,000. Meeting two of these three conditions is the "accounting threshold" that makes an entrepreneur an accredited investor.

This implies that MiFID considers some entrepreneurs to be non-professional clients owing to their accounting data, yet in terms of their investments in company shares or PFP lending, they are considered to be accredited investors. Furthermore, individuals who can prove they have an annual income over EUR50,000 or financial assets greater than EUR100,000, SMEs that are not a corporate entity and in general all corporate entities can ask to be treated as accredited investors when they invest in company shares or loans. The LFFE regime limits the amounts that a non-accredited investor can place at risk. This is a structured protection scheme intended to protect the most vulnerable investors from catastrophic losses. The limit is set at EUR3,000 per project and EUR10,000 annually for combined platforms. It is up to the investor to declare to the platform that he or she agrees to adhere to the annual EUR10,000 limit. Before operating the platform, all non-accredited investors must confirm receipt of the notification of the conditions under which they are operating, namely, that their prospectus is not registered with the CNMV, that they are operating outside the scope of the financial authorities' supervision, without any protective guarantee, and that they are aware of the risk of losing their capital and of illiquidity that places recovery of the funds invested at risk. The intention is to make absolutely clear that it is the investor who assumes the risks and is not protected by the financial regulatory authority's security network.

2.10 Outreach by Regulators or Government Authorities to Engage with FinTech Innovators

Only the CNMV has shown that it is amenable to promoting FinTech companies. The Bank of Spain takes an extremely cautious approach and merely sees FinTech's growth as a banking tool. The DGSFP has not made any pronouncement on the subject as it is too involved with delivering the community directives on solvency (Solvency II) and the Insurance Distribution Directive (IDD).

2.11 Unregulated Specified Activities

The majority of the specified activities and FinTech services are unregulated. The legal reserves are intended for traditional banking activities. FinTech divides up traditional banking activities, which means that they remain outside legal limitations, and since they are not restricted, they are allowed. Company freedom rules and no restrictions are imposed on economic initiatives. The regulatory authorities are studying the legal reserves with a view to increasing them to protect traditional banking practices. Thus, Javier Alonso, the deputy governor of the Bank of Spain, has put forward a proposal to extend the boundary of financial activities to address the challenge posed by FinTech.

Only the activities of PFPs are regulated and this will continue to be the case for the new FinTech services related to payment services that are regulated at community level, following the implementation of the EU directives. Other activities operate in a grey area that falls outside the remit of financial regulation and the scope of the regulatory authority's control. However, pressure from the traditional banking industry means the Bank of Spain is considering widening the regulatory and financial supervision boundaries to include FinTech companies that are gaining traction in the market. In turn, AEFI, FinTech's main representative body, is in favour of regulating these types of activities to obtain legal security and to be able to develop projects without the risk of unexpected sanctions.

2.12 Foreign FinTech Companies

There are no specific entry barriers or special limitations. Initiatives from EU member states benefit from freedom of establishment and provision of services. FinTech companies are not subject to discrimination and there is nothing to obstruct their access to the Spanish market on account of the business purpose being FinTech. Rather, due to the favourable culture surrounding technological innovation, the authorities are receptive to FinTech businesses and tend to treat them favourably, and see these types of initiatives as an opportunity for political gain.

2.13 Regulatory Enforcement Actions Against FinTech Companies

To date there have been no incidents concerning malpractice that have meant public exposure as far as FinTech companies are concerned. Accordingly, nor have there been any administrative inquiries involving sanctions. It is worth mentioning here that other than PFPs and specific payment services, most FinTech special activities are conducted outside the scope of financial activities and are therefore outside the control of the financial authorities. The financial authorities have no jurisdiction when it comes to these types of unregulated activities. Any breaches or failure to comply would fall under the competence of the autonomous communities' authorities who are competent in consumer affairs, but the regional authorities lack the means and know-how to supervise FinTech.

2.14 "Shadow Banking"

There is consensus between the Bank of Spain and the banking sector about the need to provide legal security to shadow banking. The monetary authorities and the banking sector want to avoid the risks associated with an unregulated banking industry. Likewise, entities that are acting in grey areas in the market want to legalise their activity and avoid being caught out by the regulatory authorities' precautionary measures. As far as crowdfunding is concerned, the first regulations have already been passed and could serve as a pilot. The LFFE tackles issues related to shadow banking such as securitisation and provides regulation for crowdfunding, the prime example of shadow banking at grassroots level. There is a great deal of discussion about the scope of the regulation that is appropriate for shadow banking and the technical difficulties involved in regulating it. A law already exists in Spain, the first in the world, that regulates how funds are raised via the internet and it can serve as a basis for determining how to regulate the other activities that make up shadow banking.

3. Form of Legal Entity

3.1 Potential Forms of Charter

There are two forms of regulated business activities within the FinTech environment. Firstly, PFPs, governed by a specific national law that classifies this activity as a financial infrastructure requiring a licence, and secondly, internet payment services that derive from implementation of an EU Directive.

PFPs adhere to an authorisation and registration procedure similar to the one that applies to other financial intermediaries. This process is handled by the CNMV on prior receipt of a binding report from the Bank of Spain about the platforms that manage projects that are financed by loans. To obtain authorisation they have to meet certain requirements that are also similar to those that apply to other financial intermediaries. The corporate object of these companies must be the activities as defined by the relevant Law. Furthermore, they should be a capital company (in which the liability of the company is limited to the capital contribution) and have their registered office within the EU, meet the necessary financial requirements, have qualified directors, have a sound organisational structure and have adequate means, as well as an internal code of conduct and plans to continue providing services after ceasing operations.

One of the financial requirements highlighted is the possibility of combining capital with civil liability insurance, as is the case with independent financial advisers (*empresas de asesoramiento financiero*, or EAFI). The requirements for own capital vary from EUR60,000 up to EUR2 million, depending on the volume of the project whose financing is being managed. Once they are authorised and following their incorporation and registration as a capital company at the Companies Registry, PFPs have to be registered on the CNMV's special register for these types of intermediaries.

Payment services are regulated by the Bank of Spain, which is more concerned about the soundness of financial institutions and the stability of the banking system than user protection.

Legislation governing PFPs and payment services falls under the exclusive jurisdiction of the State and forms part of the set of laws regulating credit and the banking sector (Article 149.1.6 CE). However, certain autonomous communities have a policy for promoting FinTech businesses. For example, the *Generalitat de Catalunya* is promoting FinTech activities through ACCIÓ, the Catalonia Trade and Investment body that promotes competitiveness among businesses that has signed a sponsorship agreement with eight Catalan companies to develop these financing instruments across the region's business network.

3.2 Key Differences in Form

The main type of entity used, and the most appropriate vehicle for conducting financial business in Spain, is the public limited liability company (s *ociedad anónima*). The economic crisis affecting savings banks that operated as foundations, or credit co-operatives acting as mutual funds, has highlighted the difficulties and risks of operating under these forms. Likewise, EAFIs who operate as non-corporate entities constantly face difficulties in meeting compliance regulations. Although the principle of proportionality operates in the financial sector, reality shows that in order to operate successfully in the financial services sector, it helps to be a larger company under the form of a *sociedad anónima*. All of the above applies to FinTech initiatives. They can start out as private limited liability companies (*sociedad limitada*), but a broadening of the scope of financial activities could force them to change to a *sociedad anónima*.

3.3 Recent Legal Changes

As a result of changes imposed by law, banking operations for saving banks, where applicable, have been transferred to the commercial bank model operating as a *sociedad anónima*. The obligatory legal form for PFPs is a capital company.

4. Legal Infrastructure (Non-regulatory)

4.1 Desirable Changes to Facilitate Specified Activities

The modification of the legal regime for limited liability companies means company shares can be traded in PFPs. Likewise, clarification of the legal regime for guarantees over personal property is a contributory factor in facilitating the growth of FinTech projects. There is a tendency to rely less on notary intervention, which means savings in costs and facilitates digitalisation as it cuts down on bureaucracy.

4.2 Access to Real-Time Gross Settlement Systems

The infrastructures of the financial services market operate under the control of the traditional banking industry. The payment and securities settlement systems are still infrastructures whose access is reserved for financial institutions that are registered with the financial regulatory authorities. Difficulty in accessing these infrastructures is one of the main obstacles preventing the development of FinTech projects.

4.3 Special Insolvency Regimes

The special regime for dealing with insolvency and the crisis experienced by financial institutions generally does not apply to FinTech companies because they operate without registering with the financial regulatory authorities. Unlike financial institutions, FinTech companies do not have any security network and operate without discretionary rules or solvency control procedures. They also lack a crisis management protocol and have no guarantee funds for their clients in the event of insolvency. Insolvency law applies to all Spanish companies.

PFPs are FinTech companies that are registered with the CNMV. They have to adhere to solvency rules and submit to supervision by the CNMV. As with other financial institutions, the LFFE incorporates provisions whereby PFPs resume normal activities if they breach the requirements for own capital, but they do not have to approve preventative plans to resolve their difficulties. Nor are they obliged to join a guarantee fund.

4.4 Electronic Signatures

An electronic signature is equivalent to a handwritten signature. The requirements for the validity of electronic signatures are established by law. A qualified electronic signature is considered to be an advanced electronic signature based on a qualified certificate that is generated via a secure signature creation device and has the same value in respect of data stated in electronic form as a handwritten signature in relation to data stated on paper.

4.5 Standards for Proving Identity in Electronic Transactions

An electronic certificate is a document signed electronically by an individual providing certification services that links signature verification data to a signatory and confirms their identity. The signatory is the person who uses the signature creation device and who is acting in his or her own name or in the name of another individual or corporate entity whom he or she is representing.

5. Data Privacy and Cybersecurity

5.1 Data Privacy and Cybersecurity Regulatory Regimes

The main new feature in terms of data protection is the entry into force of EU Regulation 2016/79 of the European Parliament and European Council of 27 April 2016 on the protection of natural persons in relation to the processing of personal data and on the free movement of such data. This EU law will apply directly from 25 May 2018.

Moreover, this regulation is particularly important for the FinTech EU-US sector. A Privacy Shield Framework has been designed by the US Department of Commerce and the EC to provide companies with a compliance mechanism for data protection requirements when personal data is transferred from the EU to the United States in the field of transatlantic commerce. On 12 July 2016, the EC approved the adequacy of the EU-US Privacy Shield Framework to enable data transfers under EU law, an agreement that particularly affects FinTech companies that usually count on the co-operation of American companies for issues such as development or web/mobile app support, or even the use of cloud services.

Of all the specified FinTech activities, the legal regime of data protection is of vital importance for big data as it involves considerable risk for the privacy of the users whose personal information largely forms the basis on which the whole system operates. The new EU Regulation on data protection contains no specific mention, although it introduces some restrictions on profiling. According to the new EU Regulation, the FinTech service will not be able to trace behavioural patterns without first having obtained an explicit, independent authorisation to do so and after informing the individual concerned about issues such as the identity of the party responsible, possible data recipients, the length of time the data will be kept, the purposes for which the data will be used and the existence of profiling. Moreover, FinTech services will not maintain collective statistical information that could help to identify the individuals whose data has been used for profiling if those purposes could be satisfied through the use of dissociated or anonymised information. Hence, FinTech services that wish to create collective behavioural patterns should anonymise all personal information adequately so it can be integrated into the study.

The new community regime will mean Spain is obliged to amend its legislation regarding data protection, which is currently included in the Spanish Personal Data Protection Act of 13 December 1999 (*Ley Orgánica 15/1999 de Protección de Datos de Carácter Personal*) and Royal Decree 1720/2007 of December 21st approving the Regulation to implement the same.

The Spanish Data Protection Agency (AEPD) and ISMS Forum Spain, an entity specialising in technology that promotes information security, have drafted a Code of Good Practice (available via the AEPD's website) aimed at creating a stable framework for all projects that work with big data using the big data tool by respecting the privacy of users of said data, taking as a reference the new European Regulation on the protection of data.

5.2 Recent and Significant Data Privacy Breaches

Among the obligations contained in the new EU Regulation concerning data protection, the most notable is the requirement to communicate security breaches to the authorities. Companies should now establish an internal procedure to deal with data security breaches and those in charge of processing data should notify any security breach to those responsible for processing. Accordingly, those responsible for data processing must notify the breach to the AEPD immediately, if possible within 72 hours of the incident, unless it is clear that the breach does not imply a risk for the rights and liberties of individuals. Notification should include information regarding the nature of the breach, the extent of the breach in terms of people affected and the degree of sensitivity of the data, identifying the person in charge of data protection or who is responsible for managing the breach and liaising with the main authorities, a description of possible consequences of the breach and proposed measures to remedy the breach or mitigate its effects. Data holders should also be notified when the breach is likely to have affected their rights and liberties, and those responsible for data processing have not adopted any of the measures established by the law (for example, a technical measure such as encryption of data).

5.3 Companies Utilising Public Key Infrastructures or Other Encryption Systems

The basic legislation that applies to the use of public key infrastructures or other encryption systems is EU Regulation 910/2014 of the European Parliament and Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/CE; EU Regulation 2016/679 of the European Parliament and Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (effective from 25 May 2018); the Spanish Electronic Signature Act of 19 December 2003 (*Ley 59/2003 de Firma Electrónica*); the Spanish Personal Data Protection Act of 13 December 1999 (*Ley Orgánica 15/1999 de Protección de Datos de Carácter Personal*); and Royal Decree 1720/2007 of December 21st approving the Regulation for its implementation.

5.4 Biometric Data

Authentication based on user biometric data is regulated in the same way as electronic signature devices. Electronic signature is regulated by EU Regulation 910/2014 of the European Parliament and Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market, and the Spanish Electronic Signature Act of 19 December 2003. Thus, applicable legislation clearly establishes that these electronic signatures have legal effect and are admissible as evidence in judicial proceedings.

6. Intellectual Property

6.1 Intellectual Property Protection Regime

Software protection is one of the key issues for FinTech companies. Although not strictly speaking a 'software patent', patents can be granted for computer-implemented inventions that resolve a technical problem in an inventive way.

Software can also be protected by means of intellectual property, which is the most usual form of protection for original versions of computer programs.

Furthermore, databases, which are key to big data, can be protected by copyright, although this is difficult to achieve when demanding originality in the structure and availability of the contents. However, the so-called sui generis database right includes their content, thereby preventing extraction and reuse of data, and protecting the investment made by the database maker in compiling the data and making it available.

Other protectable assets of FinTech companies include know-how, which requires information of commercial value to be kept secret and that the willingness exists for it to remain secret, and the trademark to differentiate their financial services from those of their competitors.

6.2 Trade Secret Regime

The protection of the trade mark within the framework of intellectual property rights is limited to the source code and specific related documentation, and therefore does not extend to the algorithms on which they are based. In light of this, FinTech companies can employ the protection offered by trade secrets. An algorithm can be considered as know-how and as such could be protected under the Spanish Unfair Competition Act of 10 January 1991 (*Ley 3/1991 de Competencia Desleal*) (for the exploitation of trade or company secrets) and the Spanish Criminal Code (for unlawful acquisition or disclosure of trade secrets). EU Directive 2016/943 of the European Parliament and Council of 8 June 2016 on the protection of technical know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, which is to be transposed into the Spanish legal system by 9 June 2018, reinforces know-how protection.

6.3 Copyrights, Patents, Trade Marks

A study of the type of intervention used by the Spanish Patent and Trademarks Office shows it is essentially the same as that applied by the European Patents Office (EPO).

As stated above, although the term "software patent" is usually used, it is not correct. When using the term "software patents," the EPO is not referring to "patents for computer programs," but to "computer-implemented inventions." A "computer-implemented invention" is one that involves the use of a computer, a computer network or other programmable device in which one or more of its functions are carried out wholly or partially by a computer program. According to the European Patent Convention, a computer program or, to use its correct name, software is not a patentable invention. However, patents can be granted for computer-implemented inventions that resolve a technical problem in an inventive way. For this to happen, computer-implemented inventions must meet the set of criteria for patentability, which are that they must be of a technical nature, be new and make an inventive technical contribution to know-how available on the date on which the first request is made (that is, the priority date).

Therefore, software is normally protected by copyright for computer programs, regulated by Royal Legislative Decree 1/1996 of 12 April 1996 approving the consolidated text of the Spanish Intellectual Property Act (*Ley de Propiedad Intelectual*). However, the protection provided is limited to the source code and specific related documentation, and therefore does not extend to the algorithms on which they are based. In this regard, the algorithm contained in a computer program's source code benefits from the protection against copying conferred on software by the Intellectual Property Act, but, otherwise, the protection it provides is limited to the specific expression of the algorithm.

As far as the protection of trade marks is concerned, signs that are capable of graphical representation that are used in the market to distinguish the products and services of a FinTech company from those of others are protected under the Spanish Trademark Act of 7 December 2001 (*Ley 17/2001 de Marcas*) under the terms provided for by said Act.

6.4 Protection of Intellectual Property or Trade Secrets

As stated previously, the protection of algorithms provided by Spanish law is fairly limited as there are no specific laws that regulate this area, despite the fact that it is considered a principal asset for a number of companies, particularly FinTech companies. Accordingly, regulations on trade secrets provide FinTech companies with limited protection for algorithms, although this is generic and not specific to algorithms. In addition, FinTech companies can turn to the protection provided by the Intellectual Property Act, but this is limited to the specific source code and object code in which the algorithm is expressed, integrated into a larger software program. Therefore, it only protects against copying the computer code in which the algorithm is expressed, but it will not prevent third parties from using the same algorithm with another computer language.

The EPO has rejected the majority of requests for patents of methods based on algorithms. This is illustrated by the decisions made by the boards of appeal of the EPO; for example, case T-0931/95, "Pension Benefit System Partnership" (2000), which rejects the patentability of a method for calculating pension plans, as it was seeking protection for what amounted to mathematical formulas. Despite this, FinTech companies try to protect their special business model by obtaining patents. A case in point is a company called HOLVI, recently acquired by BBVA, which submitted an application for an international patent (which is yet to be granted) for a method for managing financial transactions on a database containing clients' account balances, in such a way that the latter can authorise deposits or even make cash withdrawals for transfer to other accounts over the internet. This database functions using a specific, faster method for ordering said data and completing transactions by using a central computer and specific software.

6.5 Joint Development of Intellectual Property

Royal Legislative Decree 1/1996 of April 12th approving the consolidated text of the Spanish Intellectual Property Act provides that where copyright in a work involving joint authorship is concerned, all authors are entitled to intellectual property rights over said work in the proportion that the authors themselves shall determine. Without prejudice to what has been agreed between the co-authors, each of them may exploit their contributions separately, provided this does not prejudice the joint exploitation. The consent of all the co-authors is required to publish and modify the work, although, once published, no co-author can unreasonably withhold their consent for its exploitation in the form in which it was published.

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6.6 Intellectual Property Litigation

Although intellectual property does not create a significant amount of litigation for FinTech companies, it is perceived as a potential source of contentious actions, mainly due to the need to adapt regulations in line with FinTech's development. In this regard, in its white paper, the AEFI proposes that Royal Legislative Decree 1/1996 of April 12th approving the consolidated text of the Intellectual Property Act is brought up to date to define the authorship rights of algorithms.

6.7 Open Source Code

Open-source code as such is not regulated in Spain, meaning that authors of works employ contracts, known as licences, to regulate the use of these works by internet users, thereby retaining ownership of the rights afforded them under intellectual property law. While software licences have been adapted to comply better with Spanish intellectual property legislation, Creative Commons, an organisation that provides free licences for sharing and use of creative work, seems to cast doubt upon the complete legality of some of the areas that the licences regulate. Moreover, public authorities are moving towards making the use of open-source formats more widespread in their relations with the general public.

It is worth mentioning the creation of the *Centro Nacional de Desarrollo Curricular en Sistemas no Propietarios*, the government-appointed body (pursuant to ministerial Order EDU/2341/2009 of 27 August 2009), dependent on the Spanish Ministry of Education, Culture and Sport for the design, development and promotion of digital educational materials for specific education groups. It focuses on promoting and using strategies aimed at making digital content and resources developed using non-proprietary software available to schools.

7. Tax Matters

7.1 Special Tax Issues, Benefits or Detriments

FinTech specified activities do not receive any special tax treatment in Spain. Therefore, FinTech companies and those who use them will face a tax liability deriving from their financial activities (loans, credits, payments, gifts, etc) and they do not benefit from any special treatment on account of their technological business model.

The AEFI, the association that represents the FinTech sector, is working to obtain certain tax benefits for FinTech companies to promote their competitiveness against traditional banking activity.

8. Issues Specific to the Specified Activities

8.1 Additional Legal Issues

P2P lending platforms, rapid loan companies operating on the internet and other FinTech companies that operate in the credit market are subject to the law that prohibits usury (the Azcárate Law of 1908), with no exceptions. In its white paper, the AEFI requested that fast credit FinTech companies be exempt from the scope of the law on usury. However, it is unlikely that special treatment will be granted. There are proposals to segment credit operations to take into consideration the specific characteristics of each operation when implementing the prohibition of usury. In its statistics, case law takes as its reference the segmentation of credit operations made by the Bank of Spain, where the only distinction made is between three types of credit.

Bitcoin is not regarded as money for legal purposes and is not recognised by the Bank of Spain. Collection of this virtual currency is not restricted by the rule whereby the collection of deposits or other repayable funds from the public is reserved for banks alone.

Trends and Developments

Contributed by KPMG Abogados

KPMG Abogados professionals have in-depth knowledge of the sector's strategic keys, particularly in transactions, asset purchase and sale, risk management, as well as accounting, regulatory, tax and legal matters inherent to a constantly changing sector.

Authors

Francisco Uría is head of the legal practice, the financial services line of business in Spain and the regulatory-financial services practice. Francisco has extensive experience in financial regulation — particularly in banking, capital markets and insurance — and specialises in antitrust law. He manages the core team focused on financial and regulatory advice for financial institutions, and has experience in financial advisory services relating to the integration of credit entities, the due diligence of financial entities, banking and insurance contractual advice, capital markets advice and the implementation of regulations. Francisco is a government lawyer (currently on leave of absence) and has held key positions in the Department of the Economy, the Spanish Tax Authority and the State Legal Service. He has also been the technical general secretary of the Infrastructure Ministry and the Finance Ministry, and deputy secretary of the Finance Ministry.

Abraham Carpintero has wide experience in the financial regulatory framework, especially in matters related to the banking sector, the stock markets and the insurance sector. He is also an expert in the sanctioning regime of administrative law and the regulatory framework applicable to public procurement. Abraham has in-depth experience in the implementation of projects related to the internal governance of credit institutions; the implementation of the Markets in Financial Instruments Directive (MiFID) II; compliance with European Market Infrastructure Regulation (EMIR) in different entities; and projects relating to the resolution and restructuring of credit institutions, and to the remuneration of certain groups of employees. Abraham has also led projects concerning banking and insurance contracts, and issues related to capital markets. Abraham is a government lawyer (currently on leave of absence) and took up his position at the Ministry of Development.

Pilar Galán Gavilá is a former Spanish Securities Market Commission (CNMV) official who has worked at the General Directorate of Entities (Supervision and Registry), where she acquired experience in business conduct rules supervision and MiFID matters. She specialises in financial law, with in-depth experience in the Insurance Distribution Directive, the Market Abuse Directive, anti-money laundering (AML), EMIR, the Undertakings for Collective Investment in Transferable Securities, the Alternative Investment Fund Managers Directive, e-payments, FinTech and crowdfunding regulations, as well as corporate governance and compliance. She has provided advice on mercantile and regulatory matters such as the reorganisation of financial entities, authorisation to provide financial services, the opening of branches and representative offices, cross-border activities, the distribution of financial products, the structuring and setting-up of investment vehicles and the negotiation of transactions.

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Clarifying the Core Concepts

The first challenge facing any attempt to regulate FinTech and Insurtech activity lies in how to define it.

One definition might be "the phenomenon whereby the traditional activities of financial institutions (FinTech) or insurance companies (Insurtech) are pursued using technological resources."

This broad definition would take in the use of new technologies by the traditional operators (banks, insurance firms, etc) and the phenomenon of the new companies (for which the terms FinTech and Insurtech are usually reserved) that have emerged in recent years to provide financial services to consumers or offer their skills to the traditional players, under a peer-to-peer model. The major tech firms such as Amazon, Apple, Google, Facebook and Alibaba would also fall within this category.

Nonetheless, the terms FinTech and Insurtech tend for the most part to be used to refer to the new companies that have emerged as an alternative to the traditional financial service providers. This narrower definition allows for a clearer view of the need for new regulations, albeit at all times observing the principle of regulatory neutrality, thereby ensuring that companies pursuing the same activities operate on a level playing field.

The Need for New Regulations

The new phenomena of FinTech and Insurtech call for a new regulatory approach or, at least, an overhaul of the regulations currently in place, one that is able to cater for an array of concerns and interests as follows:

- the desire on the part of the new players to operate within a regulatory framework that offers them the requisite legal certainty;
- the (understandable) demand of the traditional players to ensure that these new service providers abide by the same regulations as them when pursuing comparable activities;
- the need to protect investors where such new players finance their activities, in one way or another, with funds raised from retail investors; and
- the desire on the part of the competent authorities to set in place a regulatory framework able to encourage (or at least not to get in the way of) the development of new products or technological innovation, without undermining the protection available to consumers and investors.

This call for regulatory 'neutrality' is only to be expected: the same activities must be afforded the same regulatory treatment, whoever is involved, and investors and consumers cannot be afforded different levels of protection depending on the nature of the regulations applicable to a particular service provider. It is hard to imagine that anyone might have serious objections to this position.

The problem lies in the fact that, at times, the nature and different scope of activity of one operator or another may yield a competitive edge. Where one such operator is a bank, and thus entitled to take deposits, and another is not, the bank will be 'penalised' by a host of rules and regulations applicable to it in such capacity, including those concerning capital and liquidity buffers or the new framework governing bank resolutions. While this is inevitable, such banks will, in turn, benefit from the confidence that clients and investors will take from the existence of that very same regulatory framework, the ever-present oversight on the part of banking supervisors and their financial solidity.

While seeking to ensure that different entities are subject to the same regulations may make every sense in terms of the rules governing the activities they pursue, the same cannot be said of the regulations that are applicable to them per se.

Another key FinTech-related concept has to do with its ability to widen access to credit to take in consumers and small businesses, as borne out not only by the reflections of the global regulatory community, but also by the EU's Single Capital Market initiative. This ability, which came to the fore during the harshest years of the financial crisis, together with FinTech's proven tack record of accelerating technological change and the digital transformation of companies and the traditional financial institutions have led the regulators to take a positive view of these new phenomena.

FinTech regulation must ensure, in the words of the Bank of England Governor, that it "develops in a way that maximises the opportunities and minimises the risks for society."

Initial Response of the National Regulators

Initiatives have gradually been emerging across the globe in response to this renewed interest in furthering the acceleration of digital change and setting in place a secure environment in which FinTech activity can grow.

On the one hand, such initiatives take a positive approach, seeking, as detailed below, to promote the development of such companies in a bid to boost competition in the financial services market and foster innovation. On the other, the aim is to enhance investor and customer protection. The Spanish lawmakers have so far come down on the side of this second approach, which might be labelled 'conservative'.

In the US, the first steps towards regulating FinTech have been taken by the Federal Reserve. Among the causes of greatest concern, specifically as regards the use of cryptocurrencies and Bitcoin, is its potential use for money-laundering purposes.

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As Lael Brainard put it at a recent conference, "*FinTech has the potential to transform the way that financial services are delivered and designed, as well as the underlying processes of payments, clearing and settlement.*"

The Office of the Comptroller of the Currency (OCC) has also taken on a key role in this area, openly looking into the possibility of considering applications from FinTech firms to become 'special purpose' national banks. The reason cited, alongside the one referred to above, is the potential that FinTech firms have to expand financial inclusion.

Nonetheless, the complex structure of financial supervision in the USA, with a range of federal and state authorities, complicates the task of US FinTechs looking to roll out a national project, who find themselves forced to juggle various compliance models.

In Europe, the UK has without doubt been the country in which the most decisive action has been taken and where most progress has been made in the regulation of the FinTech world.

The FCA understood its general remit to promote competition in the field of financial services for the benefit of customers to include the obligation to encourage the development of technological innovation, thus setting in place a regulatory environment that clearly works in FinTech firms' favour.

Christopher Woolard, the FCA director of strategy and competition, made this approach clear when responding to a rhetorical question as to why the FCA concerns itself with innovation. "*Primarily, because of our duty to promote competition in the interests of consumers, one of the best ways we can promote competition is to foster disruptive innovation*," he said.

Among the most widely acclaimed initiatives is the creation of the so-called sandbox, a regulatory space in which companies can test new products and services aimed at specific customers during a particular period and under a temporary licence. To supplement this initiative, new FinTech operators have been offered financial regulation-related advice.

One of the ways in which such advice proves particularly relevant has to do with the assistance given to companies in identifying the changes that need to be made to their business models as a result of new technologies. The term 'Reg Tec' has been used to refer to this aspect.

A recent UK government paper explores this process further, noting that "regulators, including the European Banking Authority (EBA), Prudential Regulation Authority and the FCA, could establish a new relationship with financial services and FinTech companies [it is interesting to note that traditional financial service providers are not excluded from these initiatives] with the aim of open dialogue between regulators on regulatory aims and companies on observing regulatory requirements."

The same paper also acknowledges that "there is a possibility that financial regulation and requests for increasing amounts of data are hindering the capacity of traditional financial institutions to operate and more importantly innovate. Regulation and data requirements could benefit from being redesigned, simplified and automated. Harmonising financial regulation across multiple jurisdictions and creating new automated reporting and analytics standards could improve the financial services industry's efficiency, potentially reducing systemic risk and delivering economic benefits. This could be achieved through regulators collaborat[ing] with FinTech to see what kinds of data are being collected and new ways of collecting data."

The idea is not simply to bring the regulations into line with the changes brought about by the emergence of FinTech on the scene, but also the expertise and experience acquired with a view to facilitating the supervisors' task and ensuring that their requirements have no impact on the efficiency of the financial services provided.

Strictly speaking, these reflections go beyond the FinTech world. Traditional operators should also capitalise on changes that seek to facilitate digital change, in which they also have a role to play.

Similar initiatives have been unveiled in other countries, such as France, Germany, the Netherlands, Italy and Poland, and plans along similar lines have been announced by the Spanish Stock Exchange Commission in the form of the future creation of a sandbox.

This is by no means a purely Western phenomenon. As is only to be expected, Singapore (FinTech Office), Malaysia, China (Hong Kong), South Korea, India, Indonesia, Japan, Thailand and Australia are setting in place similar ventures, albeit at varying stages along the way.

Initial Steps Towards the 'Global' or 'Regional' Regulation of FinTechs

At a global level, at the Financial Stability Board meeting held in Cape Town in February 2017, the issue of the regulatory and supervisory challenges posed by FinTech firms from a financial stability standpoint was raised, an item that was also on the agenda in March 2017 at the meeting to prepare the G-20 summit staged in Germany, where the conclusions drawn supported the work performed by the FSB on identifying the key FinTech-related regulatory issues in terms of the stability guarantee proposed.

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The issue raised encompasses at least two interesting standpoints. On the one hand, the aim is to analyse the manner in which the new regulations and banking supervision should meet the challenge posed by digital transformation at credit institutions and the sudden emergence of FinTechs.

On the other hand, and this lies behind the 'understanding' approach taken by international financial regulators to the FinTech world, these new players have a proven track record of contributing to global economic growth by enabling the digital development of emerging economies to take place faster than would be the case with the expansion of the global financial sector. In short, FinTech firms have proven themselves capable of including populations hitherto untouched by the financial sector.

For its part, the International Monetary Fund has just announced the creation of a High Level Advisory Group on FinTech, again bearing out that an understanding of the effects of the emergence of these new operators has an increasingly pivotal role to play for the financial authorities.

Meanwhile, the Bank for International Settlements (BIS) has not been standing idly by. In a recent speech, the Bank's director, Jaime Caruana, put forward four areas to be taken on board by regulators and supervisors, as follows:

- developments in technological innovation must be followed with interest to understand their implications in the financial sector; supervisors must strengthen their capacity to monitor the changes brought about by technological innovation in the financial sector;
- FinTech operators include banks and other entities such as tech firms and network operators, which means that financial supervisors must co-operate more closely with one another; and
- financial technology and services have bypassed borders and international co-operation is therefore a must.

Europe has been no exception in this area and the EC has included the emergence of FinTech firms among the issues forming part of its Single Capitals Market initiative, in the firm belief that this may have a positive role to play in the economic development and digital transformation of European companies. Indeed, the Commission has acknowledged "the innovative potential of information technologies" and has announced that it will "work to develop a co-ordinated policy approach that supports the development of FinTech in an appropriate regulatory environment.

With a view to making further progress in this area, the EC has set up a FinTech Working Group with the aim of designing an all-purpose FinTech strategy. While the group is in its infancy, its work is likely to conclude with the drafting of recommendations that could in due course pave the way for the approval of new regulations with the clear goal of facilitating the development of FinTech.

A similar spirit underpins a unique piece of legislation, applicable only to one subset of FinTech firms, those deemed to constitute providers of aggregated information and payment initiation services; namely, Directive (EU) 2015/2366, of the European Parliament and of the Council, of 25 November 2015, on payment services in the internal market, approving the legislation known as PSD2, set to enter into force in January 2018.

The new PSD2 Directive suggests that the European regulators take a positive view of these new service providers, who will be allowed to access (in line with certain conditions and subject to the account-holder's consent) the bank accounts of their customers and their information, with the aim of furthering their development.

This piece of legislation stands as proof that the EU regulators find a connection with the spirit of the Single Capitals Market and the desire to facilitate SMEs' access to funding and stimulate the development of a Single Digital Market.

Although, as noted above, certain European countries have already made further headway in this area, rubber-stamping specific measures concerning the overall regulation of FinTech activities, there is no denying that there is political will within the EU to continue developing the sector, encouraging co-operation with the financial sector and, above all, with the banks at which its clients open their accounts.

In short, while specific progress has yet to be made with the international regulation of FinTech, it is plain to see that this is a matter to which the international regulators and supervisors are set to pay increasing attention, both in terms of the potential destabilising effect on the economy and the positive knock-on effect on social inclusion.

Conclusion

The FinTech and Insurtech phenomenon is already bringing about sweeping changes to the business of finance in banking and insurance.

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With a view to facilitating digital transformation and innovation, global and domestic regulators are driving highly significant regulatory changes, noteworthy examples including the use of 'sandbox' arrangements or the creation of advisory units for the new operators concerning financial regulation-related matters.

The challenge lies in ensuring that the new FinTech regulations meet various equally important goals: allowing for development within a context of legal certainty, fostering technological innovation, guaranteeing the neutral application of such regulations across the board to all entities pursuing the same activity and upholding appropriate standards of protection for investors and consumers, who will benefit from new products, new services and, in all likelihood, lower prices.

Trends and Developments

Contributed by RdC Abogados

RdC Abogados specialises in the regulations applicable to providers of financial services, with a strong focus on FinTech companies. The firm, whose clients include entities based in Spain and outside the country, advises regulated and unregulated providers of financial services to Spanish residents, investment firms and credit entities falling under the scope of the Markets in Financial Instruments Directive II/the Capital Requirements Directive IV. It is developing strategies to assist FinTech industry players in establishing modes of co-operation to build up an industry profile, define standards of conduct for the common protection of investors and co-operate with regulators and supervisors in defining the modes of administrative intervention in an area where the only certainty so far is uncertainty.

Author

Maria Gracia Rubio de Casas is an expert in the regulation of crowdfunding platforms and other FinTech service providers, and frequently advises SMEs raising capital through those providers. She joined the Spanish financial markets authority (CNMV) when it was created in 1988 and left in 1994 to start a boutique law firm, which was absorbed by Baker McKenzie in 2001, before founding Rubio de Casas in 2015. Maria Gracia, who obtained an LLM from Harvard University in 1995 and teaches in several postgraduate programmes, has headed Baker McKenzie's Spanish financial services regulatory practice for over 13 years and advised the EC. She is one of the founders and the serving secretary of the Spanish Association of Crowdlending Platforms (ACLE), and has acted as an adviser to the Spanish FinTech/Insurtech Association (AEF).

FinTech in Spain: on the Verge of Change

Contrary to its image as a country where people enjoy extended lunch breaks, take siestas and stay up dancing half the night (thus being late and drowsy the morning after), Spain is actually an extremely lively centre of FinTech entrepreneurs.

From robo-advisers/managers to crowdfunding platforms, from mobile payments to online lenders, the Spanish financial scene is teeming with new initiatives. This effervescence on the industry side has been encouraged by the authorities: both the national financial services and markets supervisor, the Comisión Nacional del Mercado de Valores (CNMV), and the regulator, the Ministry of Economy.

The Challenge of FinTech Development

The CNMV has taken the initiative of setting up a Pintech Portal on its webpage, just under the "Welcome to Spain" sign. This association is not by chance, because Spain is making an energetic push to attract Brexiting firms, particularly in the FinTech area. The aim of the Pintech Portal is to guide and assist firms wanting to develop financial technology projects built around the provision of financial services or securities markets. The CNMV and the Ministry of Economy have floated the idea of putting in place a form of temporary authorisation, a so-called sandbox, where firms could explore the viability of their business model and their needs before applying for a full authorisation.

The FinTech industry has warmly embraced this possibility, because the existing approval process for FinTech firms has proven to be less than effective and is frustrating for the firms involved and the supervisor. Current regulations require that firms obtain a full authorisation – in financial services, Markets in Financial Instruments Directive-based (MiFID), or Payment Services Directive-based (PSD), or both, for crowd-lending platforms – before they can start offering their services to the public. The problem is that firms need to test their systems and internal controls to ensure their operability and effectiveness, and the only way to do that may be to test them in real life, rather than on the screen, by offering services to the public. So firms are required to apply for authorisation and file with the supervisor concerned (CNMV for MiFID-based services, Bank of Spain for PSD-based services) a detailed description of their systems and internal controls at a time when they have not been able to test them. Firms and supervisors engage then in an unhappy merry-go-round where the firm has to make changes to the project initially described and the supervisor has to review those changes only to find, once it has completed the review, that it has been necessary for the firm to introduce new alterations to the project. Under this set-up, the wonder is not that some FinTech projects are approved, rather, it is that FinTech entrepreneurs and CNMV/Bank of Spain officers are not screaming for each other's blood.

The writing of PSD2 into Spanish law, which ought to be finalised in January 2018, will be a major testing ground for this new supervisory approach to licences. PSD2 recognises new companies that offer business-to-customer or business-to-business services, based on access to information about payment accounts: account information services providers (APs), which allow customers to have an overview of their financial situation at any time; or payment initiation services providers (PiSs), which allow consumers without credit/debit cards to pay for their online purchases via simple credit transfer, while providing merchants with the assurance that the payment has been initiated, so that goods can be released or services provided without delay.

Spanish firms are already testing business models for APs and PiSs, which so far do not need a prior administrative authorisation, but will do so from February 2018. Having a sandbox procedure in place then would be beneficial for all concerned.

Crowdfunding and Robo-advice

Another section of the FinTech industry that seems poised for major change is crowdfunding. Spain was among the European precursors adopting a crowdfunding Act in 2015, the principal effect of which was to bring into the CNMV-supervised fold most of the platforms already operating in Spain. After some uncertainty, just those who crowdfunded receivables were left out, because the Bank of Spain deemed this activity to fall outside the scope of the 2015 Act.

Since 2015, however, the marketplace has suffered a profound upheaval and the 2015 Act has become an ill-fitting suit. Transformation has occurred at all levels. The 2015 Act considered loans and equity as suitable assets to be crowd-financed, provided that they relate to a business enterprise.

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A surge in real estate-based loans and equity raised difficult questions concerning whether real estate acquisition and transformation would be a business enterprise covered by the 2015 Act (thus requiring a prior administrative licence) or not, which would mean freedom in carrying out the activity. The answer was finally that a prior licence would be required, but not before a certain amount of lively discussion took place publicly among platforms.

Other friction points have emerged. The 2015 Act conceived crowdfunding platforms as entirely neutral intermediaries. However, the experience gained since then has evidenced that platforms need to adopt more roles if investors are to be protected. In the context of the insolvency of a borrower, investors will be better protected if the platform holds security on their behalf, which it cannot at present. In the context of a capital raise, investors will be better protected if they can regroup and speak with a single voice, and this regrouping will be made easier if the platform can create an appropriate vehicle – which it cannot either, at present – to name but two issues.

The experience gained since the 2015 Act was passed and the maturity of the crowdfunding market itself will hopefully shape a new regulation whose first drafts the government might already be considering. An interesting question is how long will the EU wait to take action concerning regulation of this industry.

The second area where FinTech firms have been particularly active has been robo-advice/robo-management, with four firms having already been granted a full authorisation at the time of writing. These firms are principally centred on passive investing through the use of exchange-traded funds and although the regulations in place (MiFID-based) do not leave much space for uncertainty or interpretation, experience is indicating fissures.

Conclusion

The FinTech industry cannot soar with its foundation in a 2002 Directive, or a patchwork of separate regulations on the services themselves (MiFID, PSD) and the protections of privacy. For the FinTech industry to develop, a framework offering legal certainty is needed and thus an integral review of existing regulations, not just Spanish ones, but Europe-wide. The Consumer Financial Services Action Plan recently launched by the EC is an encouraging step in that direction.