THE FINANCIAL TECHNOLOGY LAW REVIEW

Fifth Edition

Editor
Thomas A Frick

THE LAWREVIEWS

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PREFACE

This fifth edition of *The Financial Technology Law Review* is published after a roller coaster year for crypto in particular, but also for many other fintech projects.

Bitcoin, and with it many other cryptocurrencies, soared to all-time highs in 2021, but dropped to half their value later in the year. This may cause problems for a country like El Salvador, whose president, Nayib Bukele, declared Bitcoin as an official currency of the country (together with the US dollar). On the other hand, China and Russia moved against independent cryptocurrencies such as Bitcoin; and Facebook (or now Meta) sold off its Libra (later known as Diem) project to a finance company; while Paypal intends to set up its own stablecoin. At the same time, more than 50 central banks worldwide researched or even implemented blockchain-based central bank digital currencies (CBDC), from Iran to the United States, the EU and China. The Bahamas may have been the first to launch, in 2020, a CBDC, but it will not remain the only country to do so.

In addition to CBDCs and the metaverse, media attention focused on non-fungible tokens and decentralised finance (DeFi). While many DeFi projects build on the initial Bitcoin dream of creating a decentralised, trustless financial ecosystem, it remains to be seen whether DeFi will be able to impact traditional financial market participants significantly.

Global fintech funding reached new records in 2021, more than doubling the figure of 2020 and accounting for more than 20 per cent of overall venture funding. Growth rates are impressive in Latin America and Africa, although the United States remains the leader, followed by Asia and Europe. Crypto exchanges started to list at traditional exchanges, and in many countries there are now well-established investment products focused on cryptocurrencies, DeFi projects or fintech start-ups. Hence, fintech may claim to have become an established part of the financial ecosystem from an investment perspective also.

In addition to many start-ups presenting new ideas and products, however, nearly all major participants in financial markets now support one or several major fintech initiatives. Progress with implementing fintech projects was made, in particular, in areas such as insurtech and commodity trade finance, but many projects also focus on regtech (sometimes linking up with legaltech), aiming ultimately to automate parts of the regulatory and supervision process. Some states have projects to support this by making their regulation more machine-reading friendly.

Hence, the outlook for 2022 promises further developments in areas in which enterprises see immediate business opportunities or cost-saving possibilities. At the same time, grand projects such as the metaverse, artificial intelligence-based financial services or DeFi may provide some surprises.

While the response of governments and regulators to this new dynamism was slow at the start, many new regulatory initiatives are now close to implementation. It is worth

watching out for new opportunities that these regulations will create. In spite of initiatives to harmonise the approach (in particular, in anti-money laundering), national solutions will continue to vary considerably between jurisdictions. Hence, a structured collection of overviews of certain aspects of fintech law and regulation such as *The Financial Technology Law Review* continues to be valuable not only for the international practitioner, but also for anyone who looks for inspiration on how to deal with hitherto unaddressed and unthought-of issues under the national law of any country.

The authors of this publication are from the most widely respected law firms in their jurisdictions. They each have a proven record of experience in the field of fintech; they know both the law and how it is applied. We hope that you will find their experience invaluable and enlightening when dealing with any of the varied issues fintech raises in the legal and regulatory field.

The emphasis of this collection is on the law and practice of each of the jurisdictions, but discussion of emerging or unsettled issues has been provided where appropriate. The views expressed are those of the authors and not of their firms, the editor or the publisher. In a fast-changing environment, every effort has been made to provide the latest intelligence on the current status of the law.

Thomas A Frick
Niederer Kraft Frey
Zurich
April 2022

Chapter 12

PORTUGAL

Tiago Correia Moreira, Conceição Gamito, Helena Correia Mendonça and David Paula[1]

I OVERVIEW

The regulatory treatment of fintech-related matters in Portugal greatly depends on the legal qualification of the different types of fintech companies or the products and services being offered.

The main legal and regulatory fintech concerns are those related to payment services and e-money-related activities, as well as crowdfunding platforms and cryptoassets. The two current main categories of fintech companies are payment services institutions and e-money issuers, both of which are regulated under Decree-Law No. 91/2018 of 12 November 2018, enacting the Payment Services and E-Money Legal Framework (PSEMLF), which transposed Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 (PSD II) to the Portuguese legal framework. The PSEMLF also created the necessary regulation for third-party providers such as payment initiation service providers (PISP) and account information service providers (AISP) to enter the Portuguese market. Crowdfunding platforms are regulated by Law No. 102/2015 of 24 August 2015 and Law No. 3/2018 of 9 February 2018, as well as by the Portuguese Securities Market Commission (CMVM) Regulation 1/2016.

Since 1 September 2020, the Bank of Portugal (BoP) has been the competent authority for registering and verifying compliance with the applicable legal and regulatory provisions governing the prevention of money laundering and terrorist financing (ML/TF) by the entities that carry out certain activities involving virtual assets. However, it should be clarified that the BoP's responsibility is limited to ML/TF prevention, and does not cover other domains of prudential banking conduct.

The Portuguese legislator and regulatory authorities' approach to fintech had been somewhat neutral, which resulted in the late transposition of PSD II (a delay of almost a year from the 13 January 2018 deadline). This is also true from a tax perspective, as no specific legal regime exists in Portugal for fintech-related tax incentives.

In 2021, the Portuguese government approved Decree Law No. 67/2021 of 30 July 2021, which establishes the legal framework and defines the governance model for the promotion of tech-based innovation through the creation of technological free zones (ZLTs). This act does not create ZLTs per se but establishes the basic conditions for their future creation by interested parties (each of which will require a separate act). While ZLTs are, in fact and in accordance with this Law, considered regulatory sandboxes, because the proper regulatory

1 Tiago Correia Moreira is a partner, Conceição Gamito is a senior adviser, Helena Correia Mendonça is a principal consultant and David Paula is a senior associate at Vieira de Almeida. The authors would like to thank Ana Falcão Afonso, a principal consultant in the IP department, for her assistance with the chapter.

authorities will directly and permanently monitor tests carried out in them, the aim is to go beyond the creation of disparate 'regulatory sandboxes', 'innovation spaces', 'experimental spaces' or 'living labs' that are set up for specific sectors and instead to adopt a cross-sector and integrated approach (i.e., that crosses more than one sector and may therefore be subject to different regulations and regulators, including the BoP and the CMVM) for experimentation activities, therefore reducing burdens and promoting a culture of experimentation.

In addition to the above, the Portuguese financial regulators (i.e., the BoP, the CMVM and the Insurance and Pension Funds Authority) implemented the Portugal FinLab programme (now in its third edition) with the purpose of establishing an easily accessible communication channel between entrepreneurs and emerging companies, on the one hand, and the financial regulators, on the other, aimed at supporting fintech businesses and companies in navigating the legal and regulatory challenges and concerns posed by the regulators. Additionally, regulators have shown increased interest in these matters, as demonstrated by their participation in fintech-related conferences and the disclosure on their websites of information released during these conferences.

II REGULATION

i Licensing and marketing

The PSEMLF sets out the applicable rules and requirements for the incorporation and licensing of payment institutions and e-money issuers as well as PISPs and AISPs, all being subject to the BoP's supervision. To that effect, specific mandatory legal documentation must be filed with the BoP, including draft by-laws, business plan, share capital commitment, corporate structure and beneficial ownership, the managers' identification and fit and proper documentation, as well as corporate governance and internal compliance models and procedures. The minimum statutory share capital requirement currently applicable to payment institutions ranges from a minimum of €20,000 to €125,000 (depending on the type of services provided) and a minimum of €350,000 for e-money institutions. PISPs must have a minimum statutory share capital of €50,000 and AISPs are required to acquire an insurance policy or other similar guarantee scheme covering their activity in the Portuguese territory in the case of a breach or unauthorised access to data.

All marketing and advertising carried out by these entities must abide by the general rules applicable to marketing and advertising by banks and other financial institutions. This means that, among other requirements, all marketing and advertisement products and materials must clearly identify the offering or advertising entity, while also ensuring that the main features and conditions of the marketed products or services are easily understood by targeted consumers.

The PSEMLF provides for an extensive list of products and services that may only be offered by payment or e-money institutions, as well as PISPs or AISPs. This means that, in practice, considering the nature and business model of most fintech companies and the services offered, they will have to qualify as one of these entities under Portuguese law (as an entity with an e-money licence ensures that it can render all services regulated under the PSEMLF, provided that it requests an authorisation to that effect when registering with the BoP), thus having to comply with its regulatory framework.

In what concerns crowdfunding platforms, Portuguese law sets out requirements and conditions applicable to the corporate entities managing these platforms, which are subject to the CMVM's supervision when they are either collaborative equity-based or loan-based

platforms. These management entities of crowdfunding platforms are subject to prior registry and authorisation with the CMVM. Their application must be accompanied by the required documentation, which includes the entity's corporate details, structure and beneficial ownership, the managers' identification and fit and proper documentation, business plan and model, and an indication of whether it should be considered a financial intermediary or an agent thereof, as well as evidence of compliance with the minimum financial requirements. Minimum financial requirements are either (1) a minimum share capital of €50,000; (2) an insurance policy covering a minimum of €1 million per claim, and a minimum of €1.5 million in aggregate claims per year; or (3) a combination of both (1) and (2) that ensures proper similar coverage.

In addition, entities that carry out any of the following activities involving virtual assets must be registered with the BoP for the purposes of verifying compliance with the applicable legal and regulatory provisions governing the prevention of money laundering and terrorist financing (ML/TF): (1) exchange services between virtual assets and fiat money or between one or more virtual assets; (2) virtual asset transfer services; and (3) services of safekeeping, or safekeeping and administration of virtual assets or of instruments that enable the control, ownership, storage or transfer of these assets, including private encrypted keys.

Currently, there are three entities registered with the BoP in this respect.

ii Cross-border issues

Payment or e-money institutions based abroad may render their services in Portugal, subject to prior authorisation and registry with the BoP. The applicable requirements and procedures may vary according to the state of origin, as entities based in EU Member States can choose to render their services in Portugal through a branch registered in Portugal, through authorised agents based in Portugal (notably in what concerns e-money distribution) or under a licence granting them the freedom to provide services.

Should the applying entity be based in a third-country state, it shall incorporate a branch or, alternatively, incorporate a subsidiary legal entity in the Portuguese territory (by following the relevant, though more demanding, procedure).

III DIGITAL IDENTITY AND ONBOARDING

Portuguese citizens must have a citizenship card containing their relevant identification data, which includes a civil identification number, taxpayer number, healthcare user number and social security number (Law No. 7/2007 creating the citizenship card, as amended). The citizenship card proves the identity of its holder to any public or private authorities and entities, through two mechanisms:

a by the reading of the visible elements of the card, together with the optical reading of a reserved area of the card (this optical reading is mainly limited to state or public administration entities or services); and

b by means of electronic authentication.

The citizenship card further allows its holder to unambiguously authenticate authorship of electronic documents by means of an electronic signature. The card contains a chip where additional information is available, such as address and fingerprints – it is in this chip

that the certificates for secure authentication and for the qualified electronic signature are available. Hence, the holder of a Portuguese citizenship card has two digital certificates: one for authentication and another for e-signature.

Law No. 7/2007 expressly refers to Regulation (EU) 910/2014 on electronic identification and trust services for electronic transactions (the eIDAS Regulation), indicating that the provisions established therein apply to the certificates. However, when it comes to electronic identification and trust services, including e-signatures, electronic seals and time stamps, Decree-Law No. 12/2021 is the legislation that consolidates the Portuguese rules on electronic identification, including the probative value of e-signatures. There is a proposal for a Regulation amending the eIDAS Regulation under which EU Member States shall provide EU digital identity wallets free of charge, which can be used, for instance, as electronic national ID-cards, electronic passports or identification for online services or for signing digital agreements.

Furthermore, Law No. 37/2014, as amended, created the 'digital mobile key', which is an additional and voluntary means of: (1) authenticating electronic systems and internet sites; and (2) providing a qualifying e-signature in the terms indicated in the eIDAS Regulation. All citizens may request to associate their civil identification number with a mobile phone number or an email address. Foreign citizens without a civil identification number may also request this association, which is done through their passport number, their tax identification on residence permits (or other documents, as indicated in the regime for the entry, stay, exit and expulsion of foreigners from national territory) or their residence card. The digital mobile key is a secure authentication system comprising a permanent password and a numerical code issued for each use and generated by the system. Decree-Law No. 88/2021 of 3 November 2021 last amended Law No. 37/2014, noting the increasing use of the digital mobile key across several sectors (including in the banking sector), and the need to further develop mechanisms for accessing online digital services as a result of the covid-19 pandemic. This act, among other points, simplified the authentication process with the digital mobile key through mobile application and biometrics.

Financial service providers, including payment institutions and e-money institutions, may carry out fully digitised onboarding of clients, including, as of recently, by using videoconferencing procedures.

BoP Notice No. 2/2018 allows financial institutions to make use of remote onboarding procedures while complying with the know-your-customer (KYC) requirements set out under the applicable anti-money laundering (AML) framework. At present, the admissible remote onboarding procedures under applicable AML law and Notice No. 2/2018 are videoconferencing and other means of KYC and onboarding procedures carried out by qualified trust service providers (the latter being compliant with the framework set forth under Regulation (EU) 910/2014).

IV DIGITAL MARKETS, PAYMENT SERVICES AND FUNDING

Both payment and e-money institutions, as well as PISPs and AISPs and the management entities of crowdfunding platforms, are subject to licensing and registry requirements with either the BoP or the CMVM, respectively. A new regime has also been created for certain entities that pursue activities involving virtual assets to be registered with the BoP.

Crowdfunding schemes are gaining some traction. There are now six management entities of crowdfunding platforms registered with the CMVM, the majority of which operate

in the loan-based platforms sector. Further developments may arise in this field following the entry into force of the Regulation on European Crowdfunding Service Providers for Business and as the market develops and market players become more sophisticated and numerous, in which case movements towards the securitisation of loan portfolios originating from these platforms may begin to be noticed in the medium to long term.

Notwithstanding, current securitisation law (Decree Law No. 453/99, as amended) defines which entities may qualify as originators of receivables for securitisation purposes and these are currently limited to the Portuguese state and other public legal persons, credit institutions, financial companies, insurance firms, pension funds and pension fund management companies. However, entities that have their accounts of the previous three years legally certified by an auditor registered with the CMVM may also assign loans for securitisation purposes; this may open the door to crowdfunding entities being able to enter into securitisation and other structured finance transactions, which were traditionally reserved to banks and other incumbents. Nevertheless, owing to the nature of the entities resorting to crowd-lending platforms for funding, as well as those managing the platforms, the movement towards securitisation may still take some time.

In June 2019, Regulation (EU) 2019/1150 of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services came into force, placing certain obligations upon providers of online intermediation services, simultaneously (1) constituting information society services,[2] (2) allowing business users to offer goods or services to consumers, and (3) provided to business users on the basis of contractual relationships (such as platforms' terms of use). Obligations include transparency and intelligibility requirements for platforms' terms and conditions, duties of notification to business users concerning changes to those terms and conditions, limitations on the restriction, suspension and termination of online intermediation services, explanation of ranking parameters (when the online intermediation services include these rankings), transparency with respect to the differentiated treatment of business users and the service provider's access to personal data through the platform, and the setting up of an internal complaint-handling system with specific characteristics (without prejudice against the possibility of business users resorting to mediation).

V CRYPTOCURRENCIES, INITIAL COIN OFFERINGS (ICO) AND SECURITY TOKENS

Blockchain or distributed ledger technology is not subject to specific regulation in Portugal as a technology. Indeed, the regulation brought by blockchain has been essentially focused on the banking and finance sector, including cryptocurrencies and ICOs, notably in what concerns

2 In this respect, it is noteworthy that Directive (EU) 2015/1535 of the European Parliament and of the Council, which defines and sets out rules for information society services, states that this Directive shall not apply to rules relating to matters covered by EU legislation in the field of financial services, as non-exhaustively listed in Annex II to this Directive. This may ultimately raise some doubts about the applicability of Regulation (EU) 2019/1150 to the provision of online intermediation services relating to financial services. The Regulation also states that it 'shall not apply to online payment services . . . which are not provided with the aim of facilitating the initiation of direct transactions and which do not involve a contractual relationship with consumers', without prejudice to EU law applicable in the areas of judicial cooperation in civil matters, competition, data protection, trade secrets protection, consumer protection, electronic commerce and financial services.

investor protection and fraud prevention. There is currently no regulation on the tokenisation of assets in general (and securities in particular, such as bonds or shares), although nothing in the law seems to generally prohibit it. As such, in principle we see no impediment to the tokenisation of assets or credits, provided that the parties involved in a given transaction agree on the dematerialisation of the agreement or title and the underlying assets (and the corresponding representation of the assets by tokens). Notwithstanding, in principle it would not be applicable to those assets subject to special registration or notarisation formalities (such as real estate assets) as this would additionally entail formal legal recognition by the governmental or registration authorities.

However, in Portugal the approach in this sector has been to generally exclude cryptocurrencies from being qualified as tender or 'legal currency' and not to issue specific regulations dealing with them. As far back as 2013,[3] the BoP issued a clarification under which it considered that Bitcoin cannot be considered secure currency, given that its issuing is carried out by non-regulated and non-supervised entities. In addition, the BoP clarified this and stated that users bear all the risk, as there is no fund or protection scheme guaranteeing depositors' or investors' funds. This approach closely follows the position of the European Banking Authority (EBA). Despite the lack of regulation and supervision, the BoP has indicated that the use of cryptocurrencies is not a forbidden or illegal act. Hence, this entity is so far more focused on a preventive and educational approach, by means of alerting to the risks of cryptocurrencies.

Both the BoP and the CMVM share this understanding and – like the majority of European regulators – have been pursuing a wait-and-see approach towards regulation at the European level, which has culminated in the proposal for regulations contained in the Digital Finance Package (notably the proposal for a Regulation on Markets in Crypto-assets (MiCA)), which will bring a broader and harmonised European framework applicable to both cryptoassets and blockchain technology.

Until these regulations are effectively enacted and come into force, a different case-by-case approach should be taken regarding those assets qualifying as securities, such as security tokens or other hybrid tokens comprising some security-like traits, pursuant to the European Securities and Markets Authority (ESMA) advice dated 9 January 2019,[4] whereas cryptoassets qualifying as transferable securities (or another type of financial instrument under the Markets in Financial Instruments Directive (MiFID) II criteria) should be subject to the broader EU financial rules in this respect (including MiFID II and the Prospectus and Market Abuse Directives). Although the definition of what qualifies as a 'security' has been mostly committed to national regulation implementing EU legislation, we would expect to see the CMVM adopt the same approach as ESMA and to decide on the applicability of the legal framework applicable to securities (including that of public offerings, in the case of ICOs) on a case-by-case basis. An example of this approach was seen in 2018 in the context of the Bityond ICO, where the CMVM decided not to apply the public offerings regime

3 Following a study carried out by the European Central Bank on 'Virtual Currency Schemes', from October 2012. In 2014, the Bank of Portugal also reiterated that the use of virtual currency brings risks to consumers and, in 2015, it advised banks to abstain from buying, detaining or selling virtual currencies (Circular Letter 011/2015/DPG of 10 March 2015).

4 See ESMA, 'Advice: Initial Coin Offerings and Crypto-Assets', published on 9 January 2019 (ESMA50-157-1391).

(and the securities legal framework as a whole) after having analysed the white paper and the token's configuration and associated rights and obligations, which did not present traits similar to those of tradeable securities.

ESMA has identified a number of concerns regarding the current financial regulatory framework as applies to cryptoassets. These concerns and 'gaps' fall under two categories:

a for cryptoassets that qualify as financial instruments under MiFID, there are areas that potentially require interpretation or reconsideration of specific requirements to allow for an effective application of existing securities and financial regulations; and

b where these assets do not qualify as financial instruments, the absence of applicable financial rules leaves investors exposed to substantial risks. At a minimum, ESMA believes that AML requirements should apply to all cryptoassets and activities involving cryptoassets. There should also be appropriate risk disclosure in place, so that consumers can be made aware of the potential risks prior to committing funds to cryptoassets.

The CMVM also issued an alert to investors in November 2017 on ICOs, indicating that most ICOs are not regulated – in which case investors are unprotected because of the high volatility and lack of funds, potential of fraud or money laundering, inadequate documentation (most ICOs have no prospectus, only a white paper) and risk of loss of the invested capital. Still, the CMVM has paved the way for regulation according to their specific circumstances.

Considering the above, the usual distinction between different types of tokens (or rather, the rights and obligations that their issuance and possession entail) underlying the transactions may prove useful. Where tokens are used mainly as a means of payment, the approach taken by the BoP and the EBA is the one to look at. Conversely, where tokens share more similarities with securities, the approach taken by the CMVM and ESMA is the one to take note of.

Despite a slight lack of regulatory clarity, some progress appears to have been made in acknowledging this situation, considering the recent proposals for the MiCA regulations and for a pilot regime for market infrastructures based on distributed ledger technology, under the Digital Finance Package, which is expected to see further material developments in the near future.

Law No. 58/2020 of 31 August 2020 transposed the recent AML Directive changes, extending its scope of application to virtual currencies (namely, to crypto exchanges and wallet providers offering custodial services) and imposing an obligation to register with the BoP and to comply with KYC and AML procedures with respect to their clients and the transactions taking place in their exchanges or wallets.

With respect to tax treatment, the Portuguese regime has not been updated to consider the use of blockchain or cryptocurrencies.

Despite the tax law being silent, the Portuguese Tax Authority (PTA) has already issued binding rulings on the value added tax (VAT) and personal income tax (PIT) implications of transactions with cryptocurrencies.[5]

5 Binding Rulings 12904 of 15 February 2018 and 14763 of 28 January 2019.

With regard to VAT, and in line with the Court of Justice of the European Union (CJEU) interpretation of the VAT treatment of transactions with cryptocurrencies,[6] the PTA has ruled that transactions such as the exchange of cryptocurrency for traditional currency (and vice versa) and mining activities should be exempt from VAT.[7]

Following the CJEU's judgment, which should apply in all Member States, binding rulings issued by the PTA have been an important step forward in the definition of the VAT treatment of cryptocurrency transactions. With these binding rulings, entities exchanging cryptocurrencies, start-ups and users are now operating in a safer environment in Portugal from a VAT perspective. Buying, selling, sending, receiving, accepting and spending cryptocurrencies in exchange for legal tender currency (and vice versa) will not trigger a VAT liability, thus allowing economic agents to deal with cryptocurrencies as they would with legal tender currency or other types of money.

For PIT purposes, the PTA has also ruled that any gains derived from the exchange of cryptocurrency for legal tender currency (and vice versa) should not be considered income for PIT purposes, to the extent that this activity does not constitute a business or professional activity.[8] Indeed, the PTA concluded that gains derived from the sale of cryptocurrency would not fall under the concept of capital gains or investment income as defined by the Portuguese PIT Code and, consequently, those gains are not covered by the taxable base of the Portuguese PIT. The PTA was, however, silent on the criteria to qualify the exchange of cryptocurrency as a trading activity that amounts to a business or professional activity.

However, binding rulings only bind the PTA in relation to the taxpayer who raised the ruling request and only as to the specific facts presented, and questions raised, in the ruling request. The PTA is not bound to other taxpayers or in respect of facts or questions other than those presented in the ruling request. The taxpayer who raised the ruling request is not strictly bound by the ruling.

Tax issues related to blockchain-based transactions, despite posing very complex challenges such as the allocation of taxing rights for income and VAT purposes, the relevance of (identifying) the place of human and technical resources and the qualification of tokens for tax purposes, have not yet been addressed by the Portuguese legislator or by the PTA.

6 Court of Justice of the European Union (CJEU) Case C-264/14, 22 October 2015 (*Skatteverket v. David Hedqvist*). In this case, the CJEU decided that the exchange of Bitcoin for traditional currency qualifies as a supply of services for VAT purposes. As to the question of whether these transactions should be regarded as exempt supplies, the CJEU pointed out that Bitcoin, being a contractual means of payment, cannot be regarded as a current account or a deposit account, a payment or transfer. Moreover, unlike a debt, cheques and other negotiable instruments referred to in Article 135(1)(d) of the VAT Directive, Bitcoin is a direct means of payment between the operators that accept it. Therefore, the CJEU ruled that transactions such as the exchange of cryptocurrency for traditional currency, and vice versa, should be exempt from VAT under the provision of Article 135(1)(e) of the VAT Directive. The CJEU did not expressly address the subject of whether the exchange of, for example, Bitcoin for a different cryptocurrency should also be regarded, for VAT purposes, as an exempt supply of services under Article 135(1)(e) of the VAT Directive. However, in our view, the same reasoning applies and the answer should therefore be the same.

7 Under Article 9(27)(d) of the Portuguese VAT Code (which corresponds to the transposition of Article 135(1)(e) of the European VAT Directive).

8 Binding Ruling 5717/2015 of 27 December 2016.

In the field of automatic exchange of information in tax matters, the PTA has reported the release of the initial impact assessment of the European Commission's proposal for an amended Directive on Administrative Cooperation (DAC 8) on taxation of cryptocurrencies and electronic money.

In 2021, the European Commission launched a public consultation to collect data and evidence needed to evaluate the need for new rules on the reporting and exchange of information for tax purposes on e-money and cryptoassets as well as new rules on penalties and compliance measures for the various reporting obligations under the DAC framework and the potential scope of those provisions. The consultation gathered the views of stakeholders on: the use of e-money and cryptoassets; the type of information that is available on customers, transactions and investments; and which reporting mechanisms may be used. The outcome of the public consultation is now available[9] and an impact assessment for an amendment of the DAC is awaited.

VI OTHER NEW BUSINESS MODELS

The Portuguese fintech market has recently been experiencing great dynamism, with the entry of new players and stakeholders offering new types of services and products. We believe this dynamism will increase further when the new proposals for regulations under the EU's Digital Finance Package come to light, encouraging the continued growth of the market already fostered by the transposed PSD II and opening up new business opportunities for emerging companies in the areas of open banking services, neo-banks and all other innovation-driven solutions being developed in the banking and financial sector today.

However, in the meantime, new fintech companies offering innovative services may struggle with the burdensome procedures imposed by the applicable laws and regulations mentioned above (including the licence and registration procedures or AML-related issues), as well as the process of registering certain virtual assets activities with the BoP.

Despite the above, services resorting to smart contracts do seem to have some legal comfort. Indeed, since 2004, Portugal has had a specific provision dealing with contracts executed by means of computers without human intervention, in its E-Commerce Law (Decree-Law No. 7/2004). This provision applies contract law to these types of contracts and further applies the doctrine of mistake to programming errors, malfunctions and distorted messages. Although self-executing or smart contracts are a step further from contracts concluded without human intervention, it appears that they are permitted under Portuguese law; what is more, the above provision may be applicable to them. Indeed, there is a general principle in Portuguese law that, unless otherwise provided, contracts are not subject to a specific form. However, no specific legal framework exists on smart contracts.

The past year has seen an increasing number of partnerships between banks and other non-regulated entities constituting consumer and merchant-friendly business models, working together on achieving the best consumer experience while at the same time working through the applicable legal and regulatory requirements on credit granting.

9 Summary Report, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12632-Strengthening-existing-rules-and-expanding-exchange-of-information-framework-in-the-field-of-taxation-DAC8-/public-consultation_en.

VII INTELLECTUAL PROPERTY AND DATA PROTECTION

The protection of fintech can be carried out through several means. The protection of software seems to be the most relevant, as fintech technology usually translates into computer systems and applications. Software is protected in Portugal under the same legal rules that apply to copyright protection (according to Decree-Law No. 252/94, which transposed Directive 91/250/CEE, later repealed by Directive 2009/24/CE, on computer programs, as amended). Copyright of a computer program belongs to the employer if the software is created by an employee in the execution of his or her duties or following instructions given by the employer. Copyright does not require registry to exist, but this can be done in the General-Inspection for Cultural Activities. Software can also be protected by patent in cases where it meets the criteria to be considered a computer-implemented invention (i.e., an invention whose implementation involves the use of a computer, computer network or other programmable apparatus). In addition, computer-implemented business models can also be patented, to the extent that they are claimed as a technical solution for a technical problem (e.g., automating a response to the data collected) and involve technical considerations (e.g., the reading of a database). Otherwise, business models are not patentable. All in all, a case-by-case analysis is necessary to determine if protection by patent is feasible.

Technology developed in the context of a fintech business can also be protected as a trade secret. Trade secrecy protects against any act of a person who accesses, appropriates or copies (or any other conduct that, under the circumstances, is considered contrary to honest commercial practices), without consent, information that is secret, that has a commercial value because of that fact and that has been subject to reasonable steps, by the person lawfully in control of the information, to keep it secret (for instance, the execution of non-disclosure agreements). Current national legal provisions on trade secrecy are included in the Industrial Property Code, approved by Decree-Law No. 110/2018 of 10 December 2018, as reviewed following the transposition of Directive (EU) 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

A computer platform usually comprises a set of data, as well as visual interfaces. This data may also be protected as a database if the requirements set forth by law (namely, Decree-Law No. 122/2000, which transposed Directive 96/9/CE, as amended, on the protection of databases) are met. Interfaces can be further protected by copyright under the Copyright Code (approved by Decree-Law No. 63/85, as amended) in what respects their look and feel, screen display and individual visual elements, if they all meet the criteria to be protected (mainly, are 'creative'). Copyright protection, in this case, belongs to the employer or the person that ordered the creation, if so established or if the name of the creator is not referred to in the work. In this case, the creator may require special compensation if the creation exceeds the performance of the task set or when the creation is used in a way or brings benefits not included or foreseen in the creator's remuneration.

Fintech businesses collect, control and process vast amounts of personal data (including KYC data) and, as a result, they are subject to the data privacy rules provided in the General Data Protection Regulation (GDPR), which applies not only to fintech companies established in the EU but also to companies established outside the EU if they have customers in the EU and the processing of the customers' personal data is made in the context of the offering of services to those data subjects, irrespective of whether a payment is required from the data subject. The European Data Protection Board (EDPB) has clarified, in its Guidelines 3/2018

on the territorial scope of the GDPR, adopted on 16 November 2018, that the intention to target customers in the EU is key to assessing whether entities established outside the territory of the EU are subject to the GDPR.

In some instances, the processing of personal data may require the customer's consent. Pre-ticked opt-in or opt-out boxes will no longer be allowed, as consent must be expressed through a statement or clear affirmative action. The GDPR places onerous accountability obligations on data controllers to evidence compliance, which constitutes a major paradigm shift in the data protection regime. This includes the conduct of data protection impact assessments for more risky processing operations (such as those involving the processing of personal data that could be used to commit financial fraud) and the implementation of data protection by design and by default.

These general data protection rules are complemented by banking secrecy and AML rules, which fintech companies will have to observe when providing services to their clients.

Bank secrecy rules determine that the disclosure of clients' personal data protected by banking secrecy (including cross-border transfers) is permitted only with the client's prior authorisation or if the disclosure is necessary to achieve one of the following:

a compliance with a legal obligation that expressly limits those secrecy duties;

b compliance with judicial authorities' requests in the context of criminal proceedings; or

c compliance with a disclosure obligation towards the BoP, the CMVM or the tax authorities, when these entities are acting pursuant to their respective attributions.

In the past, the Portuguese Data Protection Authority (CNPD) had ruled in a specific case that all personal data processed by a bank is subject to banking secrecy.

As regards the processing of clients' data for the purposes of AML reporting, the disclosure of specific relevant personal data is based upon the fulfilment of a legal obligation, and there is thus no need to obtain the data subject's consent. As the concept of 'client authorisation' under the PSEMLF and the financial institutions' legal framework differs from the concept of 'consent' under the GDPR, many banks and other financial institutions opt to collect clients' authorisation to disclose information covered by banking secrecy in the context of their general client terms and conditions.

Another important aspect of data processing in the context of fintech business is the definition of clients' profiles and business segmentation, as well as automated decision-making based on profiling. Automated decisions that produce effects concerning the data subject or that significantly affect him or her and are based solely on the automated processing of data intended to evaluate certain personal aspects relating to him or her are not permitted.

The GDPR has introduced new provisions to address the risks arising from profiling and automated decision-making. Mainly, under the GDPR, one may only carry out this type of decision-making where the decision is either necessary for the entry into or performance of a contract or authorised by the EU or Member State law applicable to the controller, or, finally, based on the individual's explicit consent. Where one of these grounds applies, additional safeguards must be introduced, as well as disclosure of specific information about automated individual decision-making to affected data subjects, concerning the logic, significance and envisaged consequences. In a January 2020 response to the Member of the European Parliament Sophie in 't Veld's letter on unfair algorithms, addressing whether the GDPR was sufficient to protect data subjects from unfair automated decision-making, the

EDPB stressed that 'controllers are obliged to consider all the potential risks that the use or creation of the specific algorithm can potentially pose to the rights and freedoms of natural persons and, if necessary, take measures to address these risks'.

There are also additional restrictions on using special categories of data (such as health-related data or biometric data) for any processing of personal data, which can ultimately impact the way fintech companies will implement strong customer authentication mechanisms under the PSD II Regulatory Technical Standards, as the Regulatory Technical Standards suggest the use of the payment service users' biometric data in that context. The CNPD has consistently ruled that financial data are sensitive data, in the sense that they reveal aspects of an individual's private life and, therefore, should be protected under the Portuguese Constitution. As financial data is also considered by the EDPB as data of a highly personal nature, this may ultimately influence the stringency of technical and organisational measures that data controllers and processors choose to implement to protect the data, as well as the need to undergo a data protection impact assessment (DPIA) before commencing processing activities on the data. The processing of financial data may, then, entail the need for a DPIA under the CNPD's Regulation 1/2018, which lists the processing activities that are subject to a mandatory DPIA, as the Regulation refers to the processing of data of a highly personal nature in four of its nine cases.

Without prejudice to the above, Portuguese legislation implementing the GDPR entered into force on 8 August 2019. Law No. 58/2019 brings some additional adjustments and restrictions to the rules set out in the GDPR, notably regarding the processing of deceased persons' personal data, the applicable data storage periods and minors' consent for data processing. Most notably, and without prejudice to the GDPR's purpose limitation principle, Law No. 58/2019 allows controllers or processors to keep personal data until the expiry of any statutory limitation periods during which they may need to use the data to demonstrate compliance with legal or contractual obligations.

VIII YEAR IN REVIEW

There has been no material change to fintech-specific regulation during the past 18 months, and while new players might have been expected to appear in the short to medium-term, that does not seem to have been the case. This may be related to the fact that market players can opt for different jurisdictions in which to start their businesses and then passport their licences or rather act under the free provision of services in Portugal.

Additionally, the BoP's new registration regime in respect of certain entities that pursue activities involving virtual assets may attract entities operating in these core areas, and new players may appear through this route.

Portugal Fintech, a Portuguese association supporting the emerging fintech ecosystem, continues its mission to promote the Portuguese fintech market, by gathering fintech, regtech, insurtech and cybersecurity companies in Portugal and fostering their access to and visibility among legislators, start-ups, investors, consultants, banks, regulators and other relevant entities.

The Portugal FinLab, an acceleration programme providing a communication channel between new market players (or even established institutions with innovative tech-based financial projects or products) and the Portuguese regulatory authorities, is now in its

third edition. Through this programme, the regulators provide guidance and support to participants, without the usual hurdles, on how to navigate and operate in the existing regulatory system.

The Portuguese legal framework on ZLTs was approved in 2021, setting up the main principles and rules for the creation of ZLTs – regulatory sandboxes crossing more than one sector and that may be subject to different regulations and regulators (such as the BoP and the CMVM). ZLTs aim to facilitate testing and experimentation activities of new technologies, products, services and processes, therefore reducing burdens and promoting a culture of innovation in the country.

IX OUTLOOK AND CONCLUSIONS

The transposition of PSD II has approved a new and reformed legal framework for the majority of fintech companies currently operating in the Portuguese market, while simultaneously paving the way for new market players and new types of companies to enter the market and offer their products and services to both consumers and other businesses. It has also legally recognised third-party providers such as PISPs and AISPs, expanding the open banking ecosystem with the emergence of new companies, such as payment initiation and account information services.

It was expected that crowdfunding investment schemes would have increased in terms of both the number of entities operating in the market and the transaction volume associated with these types of investments, but that does not seem to be the case just yet.

The envisaged new regulation on the cryptocurrencies market (MiCA) is also promising, but its biggest challenge may be the jurisdiction cherry-picking process pursuant to which market entrants will make their decisions based on which regulator they expect to be the speedier and 'friendlier' one.

Finally, the Portuguese government is expecting ZLTs to boost international projects, attract foreign investment and position the country as an international research, development and innovation leader, which will surely benefit and contribute to the stimulation of the fintech ecosystem.

Appendix 1

ABOUT THE AUTHORS

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Tiago Correia Moreira joined VdA in 2003. He is a partner in the firm's banking and finance area, where he has been actively involved in several transactions, namely in securitisation deals and other banking transactions, and he also advises on the corporate restructuring of credit institutions.

He also has significant experience in fintech, payment services and blockchain/distributed ledger technology matters, having worked in advising payment and e-money institutions as well as crowdfunding platforms.

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Conceição Gamito joined VdA in 2002. She is a senior adviser in the firm's tax practice, where she leads the indirect tax group. Conceição represents VdA at the VAT Expert Group (European Commission, TAXUD).

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Helena Correia Mendonça joined VdA in 2007 and is currently a principal consultant integrated in the ICT practice area.

She has worked on different matters concerning information and communication technology, emerging technologies (AI, robotics, blockchain/distributed ledger technology), copyright and neighbouring rights, cybersecurity and aerospace/satellites and drones-related topics. She also advises on the implementation of e-commerce platforms, digital signatures and websites.

She has been involved in major operations in the technology field, including in outsourcing projects for major banks, cooperation and technology transfer projects, and in setting up media services and online platforms, as well as on the drafting of laws on electronic commerce, digital signatures, protection of software and cybercrime.

She also has experience in fintech, advising on mobile payments, payment services and e-money, as well as cryptoassets, and provides advice on contracts with suppliers, acquirers and final users, and on the set-up of virtual wallets and exchange platforms, among other things.

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David Paula joined VdA in 2016. He is a senior associate in the ICT practice. David has been actively involved in several complex B2B technology-related projects and transactions, advising Portuguese and international players across a range of industries and sectors, including technology and communications, banking and finance, insurance, media and entertainment, life sciences and sports.

In addition to his expertise in the drafting and negotiation of technology-related agreements, David also regularly advises on copyright matters, e-commerce and e-procurement, emerging technologies, including blockchain and distributed ledger technologies, non-fungible tokens, robotic processes automation, artificial intelligence and e-sports.

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