Fintech 2022

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Getting The Deal Through

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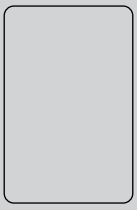

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Lexology Getting The Deal Through is delighted to publish the sixth edition of *Fintech*, which is available in print and online at www.lexology.com/gtdt.

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

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Mexico and the United States.

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

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

LEXOLOGY
Getting The Deal Through

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FINTECH LANDSCAPE AND INITIATIVES

General innovation climate

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

During its long history of fintech innovation, Sweden has produced companies such as Klarna, iZettle, Trustly, Lendify, BehavioSec and Safello, just to name a few. Innovation is diverse, and fintech products span areas such as banking services, payment and payment settlement services, lending, biometrics and cryptocurrency. The private equity industry has a great appetite for Swedish fintech companies and the Swedish fintech industry is still growing rapidly. Multiple fintech companies have emerged within, inter alia, consumer lending and the Swedish housing credit market. This phenomenon may indicate a structural change for loan origination in Sweden and a reduced market share for Sweden's largest banks. However, the Swedish Financial Supervisory Authority (SFSA) has indicated plans to introduce additional regulations in this area, and the longevity of the new market actors remains to be seen. The SFSA has recently increased its focus on consumer lending and credit assessment.

Government and regulatory support

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

The Swedish government has on several occasions expressed interest in supporting and promoting the development of the Swedish fintech sector. While the former Minister for Financial Markets supported the idea of setting up regulatory sandboxes where fintech start-ups may develop in an unregulated environment or only comply with a regulation-light regime, but the SFSA disagreed and proposed the introduction of an SFSA Innovation Centre. The Innovation Centre was opened in 2018 and serves to act as a point of contact for fintech companies and to facilitate a dialogue with the SFSA. Furthermore, the Innovation Centre is intended to provide guidance on applicable regulations for new financial services products and fintech start-ups.

FINANCIAL REGULATION

Regulatory bodies

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

The Swedish Financial Supervisory Authority (SFSA) generally acts as the competent regulator responsible for ongoing supervision of fintech products and services and for the issuance of supplementary regulations and formal guidance. The SFSA is responsible for ensuring that the business of (regulated) fintech companies is carried out in accordance with applicable laws and regulations, and the SFSA publicly announces when it is investigating a particular company for possible infringements.

All marketing activities that have the purpose of furthering the sale of any product in Sweden, including fintech products of various nature, are subject to the Swedish Marketing Practices Act (2008:486) (MPA), which requires, for example, that marketing is carried out in accordance with generally accepted marketing practices. The Swedish Consumer Agency, which includes the Consumer Ombudsman, is the primary authority responsible for ensuring that marketing material is compliant with the MPA.

The Swedish Authority for Privacy Protection (SAPP) is the supervisory authority responsible for monitoring compliance with EU General Data Protection Regulation (GDPR) and supplementing regulations related thereto. The SAPP issues guidelines and regulations for the usage and processing of personal data and has become increasingly important for fintech companies as fintech services are often data-heavy. The SAPP's mandate includes all GDPR-related issues in Sweden. The SAPP may inspect companies and can issue fines under the GDPR.

Regulated activities

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

The following activities could trigger a licensing requirement:

- consumer lending and mediation;
- mortgage lending, mediation or advising;
- lending, factoring and invoice discounting in combination with accepting repayable funds from the public;
- deposit-taking;
- management of alternative investment funds (AIFs) or undertakings for collective investment in transferable securities (UCITS);
- insurance mediation;
- provision of payment services; and
- activities under Capital Requirements Regulation No. 575/2013.

Furthermore, a licence is required for offering the services and products covered by Markets in Financial Instruments Directive 2014/65/EU (MiFID II), such as the reception and transmission of orders in relation to one or more financial instruments, the execution of orders on behalf of clients, dealing on own account, portfolio management, advising on investments in financial instruments, underwriting of financial instruments or placing of financial instruments on a firm commitment basis, and placing of financial instruments without a firm commitment basis.

The following activities could trigger a registration requirement:

- currency exchange;
- management or trading in virtual currencies;
- lending and mediation of credits to non-consumers as well as leasing and provision of guarantees and similar commitments (if not combined with accepting repayable funds from the public);

- issuing of means of payments;
- participating in securities issues;
- providing economic advice;
- safe custody services;
- operating a cryptocurrency trading platform; and
- foreign exchange trading.

Consumer lending

5 | Is consumer lending regulated in your jurisdiction?

Yes, consumer lending is regulated through, inter alia, the Swedish Consumer Credit Act (2010:1846), which includes relevant provisions relating to, among other things, sound lending practices, marketing of consumer loans, credit assessments, information prior to the conclusion of and in relation to documentation of loan agreements, interest, fees and repayment of loans.

To offer or provide consumer loans, the relevant company is required to be authorised by the SFSA under the Swedish Consumer Credit (Certain Operations) Act (2014:275) (CCCOA) (should the company solely provide or act as intermediary in relation to consumer loans), the Swedish Banking and Financing Business Act (2004:297) (SBFBA) (should the company instead, given the operations carried out, be considered a credit institution (as defined in Capital Requirements Regulation No. 575/2013) or the Swedish Housing Credit Operations Act (2016:2014) (HCOA) (should the company solely provide, act as an intermediary in relation to or provide advice regarding consumer loans in the form of mortgages).

Sweden has rules regarding high-cost credits, which are defined as credits granted to consumers that have an interest rate of 30 percentage points above the reference rate according to the Swedish Interest Act (1975:635), as determined by the Swedish Central Bank, and that do not primarily relate to a credit purchase or residential immovable property.

The high-cost credits include certain caps where: (1) the maximum amount of interest, as well as any default interest, that may be charged under a credit agreement may not exceed 40 percentage points above the aforementioned reference rate; and (2) the maximum amount of fees under a credit agreement may not exceed the credit amount.

For the purposes of (2), fees are defined as costs for the credit (comprising the aggregate amount of interest rate, credit fees and other costs that the consumer is obliged to pay under the loan, inclusive of necessary costs for valuation but excluding notarisation fees), default interest and costs pursuant to the Swedish Compensation for Collection Costs Act (1981:739), comprising costs that the creditor has incurred for measures taken for the purposes of obtaining payment including, for example, payment reminders and collection demands.

The marketing of consumer credits is also subject to certain requirements regarding moderation and restraint. These rules include an explicit requirement for all such marketing to be moderate. This requirement is applicable to all types of consumer credits and, thus, not solely to high-cost credits (as defined above).

The authorities have paid more attention to the moderation requirement recently, and it is clear that a comprehensive assessment of all relevant circumstances will be made. In particular, the authorities and courts will assess:

- whether the credit is presented in a way that misleads the consumer about the financial consequences of the credit or brings the consumer to make an unfounded decision to enter into a credit agreement;
- whether the credit is presented as a carefree solution to the consumer's financial problems; and
- whether the credit is neutral in a way that enables the consumer to decide whether the credit is favourable or not.

Pursuant to the Swedish government preparatory works, it is stipulated that the marketing should be as neutral and factual as possible and may not be intrusive (by way of, for example, targeting certain types of possible consumers via digital means). The marketing should also be balanced in the sense that certain terms of the credit should not be disproportionately highlighted, thereby reducing the consumer's ability to make a well-founded decision.

On 1 July 2020, the SFSA introduced new consumer credit regulations that forbid payment service providers from presenting credit purchase as the first payment option, or to have it set as the default payment option for online purchases where an option to pay the goods or service directly is also available.

Secondary market loan trading

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

There are no particular restrictions on trading loans in the secondary market in Sweden. However, on 18 February 2021, the SFSA stated that lenders that fund their lending by issuing bonds must now apply for a financing business licence under the SBFBA unless the bonds are subject to a transfer restriction preventing them from being acquired by the public.

Collective investment schemes

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

Collective investment undertakings are regulated through the Swedish UCITS Act (2004:46), stipulating that the management of a Swedish UCITS, the sale and redemption of units in the fund and administrative measures relating thereto may only be conducted following authorisation from the SFSA (with foreign EEA management companies authorised in their respective home state being able to rely on passporting regulations to carry out operations in Sweden).

Fintech companies would generally not fall within the scope of the above-mentioned regulatory regime.

Alternative investment funds

8 | Are managers of alternative investment funds regulated?

Yes, managers of AIFs (AIFMs) are regulated through the Swedish Alternative Investment Fund Managers Act (2013:561) (AIFMA), implementing the Alternative Investment Fund Managers Directive 2011/61/EU (AIFMD). Small AIFMs (ie, AIFMs managing AIFs below the thresholds specified in article 3(2) of the AIFMD) may be exempted from the licensing requirements but must register with the SFSA and may not passport the registration into any other EU member state.

Similar to the case in relation to UCITS, fintech companies would generally not fall within the scope of the AIFMA.

Peer-to-peer and marketplace lending

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

Companies facilitating peer-to-peer or marketplace lending, comprising loan intermediation or brokering, are regulated by and require authorisation pursuant to the CCCOA (if the borrowers are consumers) or the HCOA (if the borrowers are consumers and the loans relate to purchases of residential immovable property). Both the CCCOA and the HCOA contains regulations on, for example, anti-money laundering

measures (AML), sound practices for loan intermediation operations, and ownership and management assessments.

Business operators providing those services to borrowers that are not consumers are required to register its operations with the SFSA (by way of notification to the SFSA) in accordance with the Swedish Certain Financial Operations (Reporting Duty) Act (1996:1006) (CFORDA) and comply with provisions relating to, for example, AML, as well as undergo ownership and management assessments. Should the relevant company also be responsible for the transactions of funds between lenders and borrowers (including keeping funds on a client account, or similar), the operations would instead fall under and require authorisation pursuant to the Swedish Payment Services Act (2010:751) (PSA), which imposes additional requirements relating to, for example, own funds and information and technical processes relating to the execution of payment transactions.

Crowdfunding

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

While there is currently no specific regulation of crowdfunding services under Swedish law, certain crowdfunding schemes may fall within the scope of the general financial services framework. However, EU Regulation 2020/1503 on Crowdfunding Service Providers (the Crowdfunding Regulation) entered into force on 10 November 2020 and will apply from 10 November 2021, establishing a harmonised framework for crowdfunding service providers in the EU. Particular for the Swedish market as regards the Crowdfunding Regulation is that, due to the prohibition in the Swedish Companies Act (2005:551) for Swedish private companies or shareholders from attempting to sell shares or subscription rights in the company or debentures or warrants issued by the company to the public, shares in such companies would not be admitted instruments for crowdfunding purposes.

Invoice trading

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

In accordance with the CFORDA, a company participating in financing, for example, by acquiring claims (invoice trading), is required to register its operations with the SFSA (by way of notification to the SFSA), and it is further obliged to comply with provisions relating to, for example, AML, and to undergo ownership and management assessments.

Payment services

12 | Are payment services regulated in your jurisdiction?

Yes. Payment services are regulated under the Second Payment Services Directive (EU) 2015/2366 (PSD2), which has been implemented into Swedish law through the PSA. Money remittance, execution of payment transactions, acquisition of payment instruments, payment initiation and account information services are among the services currently regulated under the PSA.

Open banking

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

Yes. Payment services are regulated under the Second Payment Services Directive (EU) 2015/2366 (PSD2), which has been implemented into Swedish law through the PSA. Money remittance, execution of payment transactions, acquisition of payment instruments, payment initiation and account information services are among the services currently regulated under the PSA.

Robo-advice

14 | Describe any specific regulation of robo-advisers or other companies that provide retail customers with automated access to investment products in your jurisdiction.

There is no specific regulation of automated investment advice in Sweden. The SFSA defines automated investment advice as personal advice regarding financial instruments that is provided without, or with limited, human interaction. In Sweden, automated investment advice (eg, robo-advice) constitutes regulated investment advice under the Swedish Securities Markets Act (2007:528) (SMA), implementing MiFID II, and is consequently subject to all the substantive provisions of the Swedish MiFID II implementation, including the SFSA's regulations regarding investment services and activities (2017:2).

Insurance products

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

Yes, if the selling and marketing is classified as 'insurance distribution'. Insurance distribution is regulated under the Swedish Insurance Distribution Act (2018:1219) (IDA) implementing Directive (EU) 2016/97 on Insurance Distribution (IDD). The IDD is a minimum harmonisation directive, enabling member states to impose stricter regulation. The IDA includes the same definition of 'insurance distribution' and the same exemptions from regulation as the IDD. Typically, marketing that is not covered by the scope of the IDA is characterised by the fact that it is not possible for potential customer to, directly or indirectly, take out an insurance in connection with the marketing measure. If an insurance can be taken out in connection with the marketing measure, it will constitute insurance distribution unless the exemptions of ancillary insurance distribution apply. Sweden has imposed stricter regulations regarding third-party remunerations, conditions for providing advice on a fair and personal analysis, certain marketing prohibitions and information to a customer on remuneration. The stricter regulatory framework introduced by the IDD regarding insurance-based investment products also applies to the distribution of pension insurance that is exposed to market volatility.

Credit references

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

Yes. Credit references and credit information services are regulated under the Swedish Credit Information Act (1973:1173) and the Swedish Credit Information Regulation (1981:955). A licence from the SAPP is required when carrying out credit-rating operations in Sweden.

CROSS-BORDER REGULATION

Passporting

17 | Can regulated activities be passported into your jurisdiction?

Yes. An undertaking that has been authorised in its home EU member state may, as a general rule, passport such authorisation into Sweden, where the Swedish legislation is based on EU law.

Requirement for a local presence

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

An undertaking that has been authorised in its home EU member state may, as a general rule, passport such authorisation into Sweden, where the Swedish legislation is based on EU law. However, in relation to activities that fall under the Consumer Credit (Certain Operations) Act (CCCOA), a Swedish licence is required (ie, passporting is not available).

SALES AND MARKETING

Restrictions

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

Marketing of financial services falls under the Marketing Practices Act (2008:486 (MPA)), which applies to all marketing activities that have the purpose of furthering the sale of any product or service in Sweden, including, for example, the distribution of brochures and other marketing materials and electronic marketing activities (if primarily directed to Swedish entities or individuals). The MPA provides that all marketing must be consistent with good marketing practice and be fair and reasonable towards the person to whom or which it is directed.

Good marketing practice is defined in the MPA as generally accepted business practices or other established norms aimed at protecting consumers and traders in the marketing of products. Thus, all marketing must be designed and presented in such a way as to make it apparent that it constitutes marketing and the party responsible for the marketing shall be clearly indicated. Statements or other descriptions that are or may be misleading may not be used. Marketing that contravenes good marketing practice is regarded as unfair if it appreciably affects or probably affects the recipient's ability to make a well-founded transaction decision.

In relation to financial services, and to comply with 'good marketing practice' for the purposes of the MPA, among other things:

- placements of capital or returns should not be described in terms such as 'safe', 'guaranteed' or similar value judgements if it cannot be verified that it is guaranteed that an investor's capital will be repaid or that a given return will be earned;
- the return earned during a particular successful period on an investment product should not be highlighted in a way that gives a distorted overall impression of the performance of the investment product;
- words such as 'secure' and similar value judgements should not be used for marketing purposes if they are not placed in a relevant context;
- unconditional words expressing value, such as 'best', 'biggest' and 'leading', should not be used if the claim is not capable of verification; and
- if an investment product involves risk, it should always be made clear when marketing the product that an investment in the product involves risk.

In addition, marketing of funds is further specifically regulated through the Swedish Investment Fund Association's guidelines, which – albeit not being hard law – are considered as codifying good marketing practice in Sweden in respect of the marketing of undertakings for collective investment in transferable securities.

CHANGE OF CONTROL

Notification and consent

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

Consent from the Swedish Financial Supervisory Authority (SFSA) is required where a legal or natural person intends to directly or indirectly acquire a qualified holding in a regulated business.

The holding is considered qualified when the acquirer directly or indirectly receives 10 per cent or more of the votes or shares, or otherwise is enabled to exercise significant influence over the management of the regulated business. Additional consent is required if the ownership amounts to or exceeds 20, 30 or 50 per cent of the votes or shares.

The consent requirement, generally referred to as an 'ownership assessment', means that the SFSA will examine all qualified owners in the envisaged ownership chain. The process is rather extensive, and the exercise involves collating and producing a substantial amount of information (including documentation that supports the financing of the transaction). Each person included in the management body (comprising board members, the CEO and the deputies thereof) of an entity subject to assessment must complete and sign an application, including responding to questions regarding, for example, previous criminal proceedings.

SFSA consent must be obtained prior to the transaction. The SFSA has an expected processing period of the applications of 60 business days, with a possible extension of 20 business days if the SFSA requests additional information during the assessment process.

FINANCIAL CRIME

Anti-bribery and anti-money laundering procedures

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

Companies licensed by or registered with the Swedish Financial Supervisory Authority (SFSA) and a significant number of companies and other professionals outside the financial sector are obligated to prevent money laundering and financing of terrorism by complying with the Money Laundering and Terrorist Financing Prevention Act (2017:630) and subsequent regulations. Pursuant to the anti-money laundering (AML) regulations, companies are required to adopt internal AML procedures. Companies launching initial coin offerings would be subject to these requirements to the extent their operations would be covered by any of the relevant rules under, for example, the Certain Financial Operations (Reporting Duty) Act (CFORDA) and the Securities Markets Act (SMA).

The SFSA is tasked with ensuring that the financial companies adhere to the AML regulations. The County Administrative Board supervises companies and professionals outside the financial sector.

Bribery is criminalised under the Swedish Penal Code (1962:700), which is applicable to all types of Swedish companies. Most financial companies are required to adopt ethical guidelines setting out, inter alia, the company's procedures to combat bribery.

Guidance

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

Yes. The SFSA has adopted regulations and guidelines in respect of AML, setting out the detailed provisions applicable for relevant companies.

PEER-TO-PEER AND MARKETPLACE LENDING

Execution and enforceability of loan agreements

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

Loan and security agreements are subject to the general Swedish contract laws and principles. On a basic level both parties would therefore normally have to agree on the terms and conditions of the agreement in question. There are no rules hindering the execution of agreements electronically, but the Swedish Enforcement Agency does not accept electronic negotiable promissory notes as a basis for enforcement actions.

Assignment of loans

24 What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected? Is it possible to assign these loans without informing the borrower?

Perfection of an assignment against third parties depends on whether the loan is represented by a negotiable promissory note or a non-negotiable promissory note. In the former scenario, the promissory note must be transferred to the assignee, whereas in relation to non-negotiable promissory notes, the borrower must be notified of the assignment so that the debtor can solely make its payments to the assignee with discharging effect.

In the event the assignment is not perfected, the loan would be included in the bankruptcy estate of the assignor in relation to which the assignee would only have a non-secured claim.

Securitisation risk retention requirements

25 Are securitisation transactions subject to risk retention requirements?

Perfection of an assignment against third parties depends on whether the loan is represented by a negotiable promissory note or a non-negotiable promissory note. In the former scenario, the promissory note must be transferred to the assignee, whereas in relation to non-negotiable promissory notes, the borrower must be notified of the assignment so that the debtor can solely make its payments to the assignee with discharging effect.

In the event the assignment is not perfected, the loan would be included in the bankruptcy estate of the assignor in relation to which the assignee would only have a non-secured claim.

Securitisation confidentiality and data protection requirements

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

Provided that the company processes personal data as part of its operations it would, in respect of borrowers' personal data, be subject to the GDPR and Swedish data protection laws.

ARTIFICIAL INTELLIGENCE, DISTRIBUTED LEDGER TECHNOLOGY AND CRYPTO-ASSETS

Artificial intelligence

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

There is no specific regulation of automated investment advice in Sweden. The Swedish Financial Supervisory Authority (SFSA) defines automated investment advice as personal advice regarding financial instruments that is provided without, or with limited, human interaction. In Sweden, automated investment advice (eg, robo-advice) constitutes regulated investment advice under the Securities Markets Act (SMA) and is consequently subject to all the substantive provisions of the Swedish MiFID II implementation, including the SFSA's regulations regarding investment services and activities (2017:2). If the use of artificial intelligence would include decisions based solely on automated processing of personal data, including profiling, this would be subject to the requirements in article 22 of the GDPR.

Distributed ledger technology

28 Are there rules or regulations governing the use of distributed ledger technology or blockchains?

There are no rules or guidelines specifically addressing the use of distributed ledger technology, but general rules and regulations, such as anti-money laundering regulations and consumer protection, where applicable, must be complied with. The SFSA has, in a report from March 2016, identified distributed ledger or blockchain technology as an area of interest for the supervisor and where it is expected that rules and regulations need to be adopted in the future. If the distributed ledger technology or blockchains include personal data, general requirements under the GDPR and Swedish data protection laws will be applicable.

Crypto-assets

29 Are there rules or regulations governing the use of crypto-assets, including digital currencies, digital wallets and e-money?

There is currently no generally accepted definition of crypto-assets in Swedish regulations, nor is there a generally applicable regulatory framework available. Furthermore, the Swedish legislator is unlikely to introduce a more comprehensive national framework given the thorough regulations proposed in the European Commission's Regulation of Markets in Crypto-assets.

The Swedish Certain Financial Operations (Reporting Duty) Act (1996:1006) (CFORDA) does, however, contain some provisions explicitly covering certain activities with virtual currencies that would generally encompass crypto-assets. Pursuant to the preparatory works of the CFORDA, virtual currencies shall generally be understood as they are defined in the Fifth Anti-Money Laundering Directive (EU) 2018/843, namely, a digital representation of value that is not issued or guaranteed by a central bank or a public authority, not necessarily attached to a legally established currency and not possessing a legal status of currency or money, but that is accepted by natural or legal persons as a means of exchange and that can be transferred, stored and traded electronically. The SFSA has stated on its website that this would include Bitcoin and Ether.

The activities covered by the CFORDA are the management of or the trading in virtual currencies. This would, for example, be the exchange of virtual currencies for fiat currencies or for other virtual currencies, or the provision of custodian wallets for virtual currencies. The significance is that these activities would be subject to a registration

requirement, mainly so that they would be covered by the Swedish AML regime. However, an assessment would also need to be made to determine whether the activities and crypto-assets involved would qualify for any of the other regulatory frameworks available. As such, depending on the activities and the nature of the crypto-assets involved, the SMA, the Electronic Money Act (2011:755) (EMA) or the PSA could apply.

The SFSA has shown an increased interest on the subject of crypto-assets lately and has warned consumers from acquiring such assets twice during 2021, as well as produced a report about financial instruments with crypto-assets as underlying assets (tracker certificates), due to the risks involved for consumers in investing in such assets. Therein, the SFSA has highlighted that there is a current lack of protection for consumers in transactions involving crypto-assets as most of those are unregulated. In addition, the SFSA arranged for a meeting with market participants during May 2021 to have a dialogue regarding the development of the market of crypto-assets and what possibilities and challenges are associated therewith. The SFSA's interest in the subject is only likely to increase going forth as trading in crypto-assets increase.

Digital currency exchanges

30 Are there rules or regulations governing the operation of digital currency exchanges or brokerages?

There is no specific regulation of digital currency exchanges or brokerages but activities involving the exchange of virtual currencies for other virtual currencies or fiat currencies would normally be subject to the CFORDA. Where the provider of the digital currency exchange performs payment services as part of the exchange, the PSA would also be applicable. Depending on the activities provided and the nature of the digital currency involved, the activities could also be encompassed by the SMA or the EMA.

Initial coin offerings

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

As with crypto-assets, there is no general Swedish framework governing ICOs. Similar to crypto-assets, the SFSA has shown an increased interest in ICOs lately and has warned consumers about the risks involved with ICOs, in May 2018 and in a report published in the spring of 2021, as ICOs are normally not subject to a prospectus requirement and in general do not have any other more thorough information requirements.

An independent assessment on a case-by-case basis is required to discern whether the ICO would be subject to any of the existing regulatory frameworks. Depending on the nature of the coins or tokens offered they could be subject to the CFORDA, the SMA, the PSA, the EMA or the Prospectus Regulation (2017:1129).

DATA PROTECTION AND CYBERSECURITY

Data protection

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

The GDPR and the Swedish Act on Supplementary Provisions to the GDPR (2018:218) generally apply to the processing of personal data by data controllers established in Sweden. The main requirements relating to the processing of personal data include the following.

- Personal data may only be processed (ie, collected, used and stored) if there are legal grounds (ie, consent) for the processing. However, there are several exemptions from the requirement of consent (eg, where the processing is necessary to fulfil a contract or a legal obligation or is necessary to pursue a legitimate interest of the data controller, unless this interest is overridden by the interest of the registered person to be protected against undue infringement of privacy).
- Certain fundamental requirements must be met (eg, personal data must be adequate, relevant and non-excessive in relation to the purpose of the processing and must not be kept longer than necessary).
- Data subjects must, as a general rule, be informed of the processing of their personal data, and data subjects have certain rights (eg, right of access, rectification, erasure and data portability).
- Processing of sensitive personal data and criminal offence data may only be performed in limited circumstances. In general, consent from the person concerned is required for sensitive data. As a general rule, it is prohibited to process criminal offence data (there are a few exemptions, for example, regarding whistle-blowing systems, where it is permitted to process criminal offence data under certain conditions).
- There are specific requirements that must be met in case of export of personal data to countries outside the European Union or the European Economic Area (eg, consent or model clause agreements may justify such export).
- A data controller must take appropriate technical and organisational measures to protect personal data. Data processing agreements must be entered into with data processors.
- The GDPR also includes requirements regarding, inter alia, appointment of data protection officers, personal data breaches, data protection by design and by default, records of processing activities, data protection impact assessments, consultation and cooperation with the data national protection authority.
- The GDPR applies to pseudonymised data but not to fully anonymised data (ie, where it is not possible to directly or indirectly identify an individual by any means).

Cybersecurity

33 What cybersecurity regulations or standards apply to fintech businesses?

Under the GDPR, controllers must have 'appropriate technical and organisational measures' in place to ensure a level of security appropriate to the risk. There is, therefore, no prescribed level of security, but an analysis must be carried out to ascertain what level of security is appropriate to the type of processing of personal data being carried out.

The NIS Directive (EU) 2016/1148 on security of network and information systems has been implemented into Swedish law (2018:1174) and supplemented by a regulation (2018:1175). These acts impose cybersecurity requirements for digital services providers and operators of essential services. Companies in the financial industry that are deemed as operators of essential services within the banking or financial market infrastructure are covered by these acts and are, therefore, obliged, among other things, to:

- notify the Swedish Financial Supervisory Authority (SFSA) immediately;
- demonstrate a systematic and risk-based approach to matters regarding information security; and
- report incidents to the Swedish Civil Contingencies Agency.

OUTSOURCING AND CLOUD COMPUTING

Outsourcing

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

There are multiple legal and regulatory requirements in respect of outsourcing by financial services companies, including, inter alia, the Swedish Banking and Financing Business Act (2004:297) (SBFBA), the Swedish Consumer Credit (Certain Operations) Act (2014:275) (CCCOA), the Swedish Securities Markets Act (2007:528) (SMA), the Swedish Electronic Money Act (2011:755 (EMA)), the Swedish Payment Services Act (2010:751) (PSA), the Swedish Financial Supervisory Authority (SFSA) regulations, detailed provisions set out in Delegated Regulation (EU) 2017/565 and the European Banking Authority (EBA) Guidelines on Outsourcing Arrangements (EBA/GL/2019/02), as well as questions and answers provided by the SFSA on the application of the EBA guidelines.

The provisions are subject to some variation, but in general impose that financial services companies are required to exercise the requisite skill, care and diligence when entering into, managing and terminating outsourcing arrangements. Furthermore, the rights and obligations of the financial services company and the services provider must be clearly documented in an outsourcing agreement. If the financial services company intends to outsource a significant part of the licensed operations, or activities that have a natural connection with financial operations or their support functions, the financial services company is required to notify the SFSA thereof in advance and also provide the SFSA with a copy of the relevant outsourcing agreement.

The SFSA requires outsourcing agreements to be in writing and to regulate clearly the rights and obligations of the financial services company and the third-party service provider. The SFSA further expects the financial services company to be able to assess and monitor how well the third-party service provider is carrying out its duties and to terminate the agreement should the third-party service provider lack the skills, capacity and authorisations required by law to reliably and professionally perform the outsourced duties and manage risks related to these duties.

Cloud computing

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

The EBA Guidelines, applicable for institutions, electronic money institutions and payment institutions, offer guidance in respect of outsourcing to cloud service providers and have integrated and replaced the previously issued EBA Recommendations on Outsourcing to Cloud Service Providers (EBA/REC/2017/03). On 18 December 2020, the European Securities and Markets Authority issued its Final Guidelines on Outsourcing to Cloud Service Providers for, inter alia, investment firms and credit institutions that carry out investment services and activities. They will enter into force on 31 July 2021.

INTELLECTUAL PROPERTY RIGHTS

IP protection for software

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

Computer programs are protected as copyrighted works in accordance with the Swedish Copyright Act (1960:729 (CA)). The copyright protection arises automatically, and there is, thus, no registration procedure for obtaining copyright protection.

Software-implemented inventions and business methods can be registered and protected as patents if they meet all the necessary requirements. Program code or mere business methods, however, cannot be patented in Sweden, but a technical invention that includes a business method, or which is implemented or can be implemented by a computer program, can be patentable.

IP developed by employees and contractors

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

In general, intellectual property developed during the course of employment vests with the employee unless explicitly transferred to the employer. However, the employer has a more or less extensive right to acquire or utilise the intellectual property depending on the category of intellectual property and the category of invention (see below) as well as the provisions in the applicable employment or collective bargaining agreements. There are also specific statutory provisions concerning certain intellectual property. Below is a summary of the general principles regarding an employer's rights to inventions developed by its employees.

According to the CA, copyright in a computer program created in the course of employment is automatically transferred to the employer unless otherwise agreed in, for example, the employment agreement. However, the scope of the concept of 'computer program' is not clear under Swedish law. Therefore, it is recommended that employers include an appropriate clause in the employment agreement that explicitly transfers all rights to the employer.

An employer has certain rights to patentable inventions developed by its employees. Those inventions are divided into three categories, and the employer's rights differ between the categories:

- inventions developed by employees that are employed to conduct research and development work, and which are developed within the scope of employment, may be acquired or utilised by the employer;
- inventions developed within the employer's line of business but developed by an employee that is not employed to conduct research and development work may be utilised by the employer, and the employer has priority over others in acquiring ownership of the invention; and
- inventions developed within the employer's line of business but developed without any connection to the employment may be acquired by the employer, with priority over others, if agreed upon with the employee.

Collective bargaining agreements (if applicable) may also contain provisions on employers' rights to intellectual property developed by employees similar to the three categories described above.

In relation to contractors and consultants, the main rule is that all rights in results vest in the originator. This means that a company must explicitly acquire the rights in those results through agreements with the originator. The inclusion of appropriate intellectual property clauses in the agreement with contractors and consultants are, thus, essential.

Joint ownership

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

The Swedish legislation does not fully regulate the matter of joint ownership of intellectual property. Only the CA regulates the matter explicitly, whereby the main rule is that co-authors have a joint right to the copyright-protected work. The same should reasonably also apply to the other categories of intellectual property.

Unless agreed otherwise between the co-owners, the Swedish Act on Joint Ownership (1904:48) (AJO) is applicable. The AJO states that consent from all co-owners is necessary for all decisions concerning the management of the jointly owned property. All co-owners are, however, entitled to sell their share in the jointly owned intellectual property without consent from the other owners.

In light of this, co-owners of intellectual property are restricted from utilising, licensing, charging or assigning the intellectual property in whole without the other co-owner's consent. The co-owners must, thus, settle the joint ownership and agree on how to use and manage the intellectual property to avoid uncertainty.

Trade secrets

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

Protection for trade secrets is granted through the Swedish Trade Secrets Act (2018:558) (TSA). For the purposes of the TSA, trade secrets are defined as information concerning business or operational circumstances in a trader's business, which is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question, which the trader has taken reasonable measures to keep confidential and the disclosure of which is likely to cause damage to the trader from a competition perspective. Trade secrets cannot be registered for protection, and the only statutory protection for such information is granted under the TSA.

Court proceedings, as well as all evidence and other information submitted to the court, are generally public in Sweden. However, for information concerning business or operational circumstances, the parties may request secrecy when submitting information or during the proceedings as well as afterwards. However, a Swedish court is not required to adhere to such request, and there is no way of knowing whether the court will grant a request of secrecy in advance.

Branding

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

The general provisions for protection of trademarks and trade symbols are provided in the Swedish Trademark Act (2010:1877). A trade symbol can be registered for protection in Sweden if it is distinctive (ie, capable of distinguishing goods or services of one business activity from those of another). A trademark registered for protection in the European Union also grants protection in Sweden. Exclusive rights to a trade symbol may also be obtained, without registration, if the symbol is considered established on the market. A trade symbol is deemed established on the market if it is known by a significant part of the relevant public as an indication for the goods or services that are being offered under it.

New businesses can either perform searches themselves in relevant public databases for trademarks identical or similar to the trademarks they intend to use (eg, in the Swedish Patent and Registration Office's database, which covers both Swedish and EU trademarks) or engage a trademark attorney to assist with such preliminary investigations.

General branding can be protected by the Marketing Practices Act (MPA). The Act protects unfair competition and can, thus, inter alia, protect a business against other business taking unfair advantage of the reputation associated with the first business, including its trademark, business name or other distinctive marks.

Remedies for infringement of IP

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

There are numerous remedies available when suing an alleged infringer in court. For example, preliminary injunctions and prohibitions under penalty of fine as well as damages for infringement, loss of profit and impaired goodwill are available in all Swedish intellectual property laws. Infringements committed intentionally or through gross negligence can also result in fines or imprisonment.

COMPETITION

Sector-specific issues

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

There are no specific competition rules for fintech companies. The general Swedish competition rules, which are based on EU competition law, apply. The rapid growth of the Swedish fintech industry in recent years has given rise to many new payment solutions and increased competition between the old and the new. Although we have seen issues relating, inter alia, to the interoperability between the traditional banking systems and the new digital solutions, case law regarding the application of the competition rules in the fintech industry is still limited.

TAX

Incentives

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

There are no special Swedish tax incentives for fintech companies or investors to encourage innovation and investment in the fintech sector in Sweden.

Increased tax burden

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

No.

IMMIGRATION

Sector-specific schemes

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

There are no specific immigration schemes available for fintech businesses to recruit skilled staff, nor are there any special regimes specific to the technology or financial sectors. Whether a work permit is required for the specific role is subject to a case-by-case assessment. The main rule under Swedish law is that for a citizen of a non-EU country to be able to work and reside in Sweden, a work permit and a residence permit is required. EU citizens are, however, entitled to work in Sweden without any kind of permit. Swiss citizens are entitled to work in Sweden without a work permit, but are still required to apply for a residence permit (if the stay is longer than three months).

Certain other categories of employees may also temporarily work in Sweden without a specific work permit, provided that certain requirements are fulfilled. For example, a work permit is not required for individuals employed by a multinational corporate group where the employees will undergo practical training, on-the-job training or other in-service training at a company in Sweden that is part of the group (a maximum aggregate period of three months over a period of twelve months). In the absence of any of the aforementioned exemptions, all non-EU citizens must obtain a work permit to be entitled to work in Sweden.

The application procedure is generally the same for all applicants regardless of occupation or industry. Applications are assessed by the Swedish Migration Agency (MA), and the application processing time varies. It currently takes six to nine months for the MA to examine a complete first-time application registered through the regular queue. There are, however, particular certified firms (such as certain law firms) with access to the MA's fast-track system when applying for work permits on behalf of a client company and its employees. Certified firms are entitled to a significantly shorter turnaround time (10 days for complete first-time applications). In cases where the employer is not bound by a collective bargaining agreement and the concerned Swedish trade union does not oppose the absence thereof, the official fast-track turnaround time is 60 days.

UPDATE AND TRENDS

Current developments

46 Are there any other current developments or emerging trends to note?

According to the Stockholm Fintech Guide, Stockholm received 18 per cent of all private placements in fintech companies across Europe between 2013 and 2018, and around 400 fintech companies are active in Stockholm, as compared to the end of 2017 when there were around 150.

The Swedish National Bank has, furthermore, owing to the marginalisation of cash usage in Sweden, initiated a pilot project to construct a technical platform for the e-krona, based on distributed ledger technology. A committee has been appointed to investigate a general transition towards the digitalisation of currency in Sweden and will publish its statement on 30 November 2022 at the latest. Sweden in general – and Stockholm in particular – are vibrant for fintech companies, and the coming years will likely provide for further developments on the Stockholm fintech scene.

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Coronavirus

47 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Sweden has introduced several measures to mediate the negative effects for business operators owing to the pandemic; however, none are specifically tailored to the fintech industry. The measures include financial support and lower requirements for companies whose employees are on sick leave or on temporary short-term work, the lowering of employer's social security contributions and the easing of the rules to carry out general meetings without physical attendance.

The Swedish government, the Swedish Financial Supervisory Authority and the Swedish Central Bank have, furthermore, presented a number of initiatives to avoid credit supply problems and to support business, including but not limited to the Central Bank making available up to 500 billion kronor in loans for Swedish banks to be used for on-lending to Swedish non-financial companies, the Central Bank's purchase of up to 300 billion kronor of securities (in government and municipal bonds, covered bonds and securities issued by non-financial companies) and state guarantees for 70 per cent of new bank financing of up to 75 million kronor in each case to otherwise viable small and medium-sized enterprises facing difficulties owing to the covid-19 pandemic.

Several of the governmental actions taken during the pandemic are now in the process of being dismantled.

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