# Fintech 2022

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LEXOLOGY®
Getting The Deal Through

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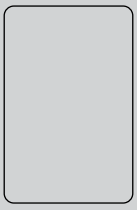

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Simmons & Simmons LLP

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.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

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.

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Getting The Deal Through

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# Japan

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Anderson Mōri & Tomotsune

## FINTECH LANDSCAPE AND INITIATIVES

### General innovation climate

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

In Japan, fintech innovation has been quite active in almost every area of finance. In particular cryptocurrency-based businesses, cashless payment or mobile payment services, financial account aggregation services, robo-advisers and crowdfunding are well known to the public. In response to the covid-19 pandemic, competition among mobile payment services has become fiercer than ever before.

In 2020, security tokens, or digital securities, have become a focus. Because of amendments to the relevant laws and regulations, a number of financial institutions are entering into this new market. Their main focus is on digital corporate notes and tokenised equity interests of real estate funds.

In late 2020, non-fungible token (NFT) related businesses became popular, especially in the online gaming sector. In addition, a couple of platforms for issuing and trading tokenised digital art have recently emerged.

Additionally, in June of 2020, the Act on Sales, etc. of Financial Instruments (ASFI) was amended, enabling the establishment of financial services intermediary businesses that are capable of intermediating the cross-sectoral banking, securities and insurance financial services under a single licence. The ASFI was renamed the Act on Provision of Financial Services (APFS) and will come into effect on 1 November 2021.

### 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?

Yes. Financial regulators and policymakers in Japan are supportive of fintech innovation and new technology-focused entrants in the regulated financial services markets. For instance, the Ministry of Economy, Trade and Industry has been supportive of the blockchain industry, and it hosted the Blockchain Hackathon in February 2019 as part of a broader effort for the social implementation of blockchain technologies.

In June 2018, the Japan Economic Revitalisation Bureau, under the auspices of the Cabinet Secretariat, opened a cross-government one-stop desk for the regulatory sandbox in Japan (the Regulatory Sandbox). The Regulatory Sandbox can be used by both Japanese and overseas companies, enabling them to apply and receive approval for projects, not yet covered by present laws and regulations, to conduct demonstrations under certain conditions without the need for a legal amendment to cover the project.

Tokyo Metropolitan Government has established X-HUB Tokyo, a platform that connects Tokyo with the global innovation ecosystem and accelerates the startups that will open up a new era. Its Inbound Program aims to support overseas start-up companies, including, fintech companies, in their expansion into Tokyo through the provision of opportunities to interact with Tokyo-based companies.

In early 2021, Osaka Prefectural Government established the Global Financial City OSAKA Promotion Committee to promote the city as a new international financial centre in Asia. The committee aims to realise an 'innovative financial region' through drastic deregulation in new financial technology fields such as fintech.

## FINANCIAL REGULATION

### Regulatory bodies

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

The Financial Services Agency (FSA) is the main regulatory body of fintech products and services that are regulated under the various financial regulations. The Ministry of Economy, Trade and Industry is also the regulatory body for certain payment services (eg, credit cards or other advanced payment services).

### Regulated activities

4 Which activities trigger a licensing requirement in your jurisdiction?

The arrangement of investment deals for an investment fund that invests mainly in securities or derivative transactions, constitutes a 'financial instruments business' under the Financial Instruments and Exchange Act (FIEA), and registration under the FIEA is required.

To arrange transactions for investments that mainly comprise securities or derivatives, registration under the FIEA is also required.

Dealing in investments as principal or agent, under which investments are made mainly in securities or derivative transactions, may also constitute a financial instruments business under the FIEA (in certain circumstances); thus, registration under the FIEA may also be required.

Giving advice on investments in relation to the value of securities or investment decisions on financial instruments under a contract for a fee may constitute an 'investment advisory business' under the FIEA, and registration is required.

Lending money is regarded as a 'moneylending business', which generally requires registration as a moneylender under the Moneylending Business Act.

There is no specific licensing requirement for factoring transactions and invoice discounting.

Secondary market loan trading does not trigger a licensing requirement.

Acceptance of deposits is generally prohibited without a banking licence under the Banking Act.

There is no licensing requirement for foreign exchange transactions.

A bank licensed under the Banking Act may conduct funds transfer services (which will generally include payment services). Other than banks, registration under the Payment Services Act as a funds transfer service provider is required before conducting payment services. If the payment service is provided as a later payment option using a credit card, then registration under the Instalment Sales Act is required for the issuers.

Japan has specific regulations on crypto-assets (CAs). A company that provides its users with following services is required to undergo registration as a Crypto Asset Exchange Services Provider:

1 the sale and purchase of CAs in exchange for fiat currencies or the exchange of CAs for other CAs;
2 intermediary, agency or delegation services in respect of the acts listed in item (1) above;
3 management of customers' money in connection with the acts listed in items (1) and (2) above; or
4 management of CAs for the benefit of another person (ie, crypto-asset custody service).

**Consumer lending**

5 | Is consumer lending regulated in your jurisdiction?

A lender conducting consumer lending activities must register as a moneylender under the Moneylending Business Act. The total permissible lending amount is generally limited to one-third of the borrower's annual income if the borrower is an individual. The cap of the interest falls between 15 and 20 per cent per annum depending on the principal amount of the loan pursuant to the Interest Rate Restriction Act.

**Secondary market loan trading**

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

There is no specific licensing requirement for trading loans. If a moneylender transfers loan claims, the transferee will be subject to the same restrictions under the Moneylending Business Act that are applicable to the original moneylender, and the transferor must notify the operating transferee of the applicability of the restrictions.

**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.

Under the FIEA, the solicitation of subscription of shares in collective investment schemes or investment management of assets of collective investment schemes, in principle, are regarded as financial instruments businesses. Therefore, business operators who conduct those activities must be registered as financial instruments business operators.

If a crowdfunding company raises funds for investment in a company through a form of *tokumei kumiai* (TK) partnership, or if a social lending company raises funds for lending money to a company seeking funds through that form of partnership, the solicitation to invest in the partnership would, in principle, be considered as falling within the scope of a financial instruments business activity and must, thus, be registered under the FIEA.

**Alternative investment funds**

8 | Are managers of alternative investment funds regulated?

In Japan, there are no regulations that particularly focus on alternative investment fund managers. Under the FIEA, investment managers acting for alternative investment funds, such as hedge funds, private equity funds and real estate funds, are regulated in the same manner as those acting for investment funds similar to undertakings for the collective investment in transferable securities, which means they are not subject to the augmented regulations under the FIEA. However, additional licences may be required under other laws (apart from the FIEA) for such alternative investment fund managers who conduct the business of managing investors' funds by investing in real estate (not the beneficiary rights therein).

**Peer-to-peer and marketplace lending**

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

Marketplace lending in Japan generally takes the form of a TK partnership, under which a social-lending business provider collects funds from TK partnership investors. The social-lending business provider advances the funds to enterprises or individuals as loans. The operator then receives principal and interest payments from the enterprises or individuals and distributes the funds as dividends and returns to investors. In this structure, the operator is required to be registered both as a moneylender under the Moneylending Business Act (to provide the loans) and as a financial services provider under the FIEA to solicit the purchase of interests in TK partnerships to investors.

**Crowdfunding**

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

In Japan, crowdfunding is categorised as donation-based crowdfunding, reward-based crowdfunding and investment-based crowdfunding. Investment-based crowdfunding is further categorised as equity-based crowdfunding, fund-based crowdfunding and social-lending.

Reward-based crowdfunding involves sales and purchase agreement of the reward. It is not regulated under the FIEA.

Equity-based crowdfunding and fund-based crowdfunding are regulated under the FIEA, which defines certain internet-based solicitations, such as 'electronic solicitation handling services'. Certain special provisions apply to electronic solicitation handling services compared with those that apply to ordinary solicitation handling services for securities.

**Invoice trading**

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

There is no specific regulation that applies to invoice trading in Japan. If invoice-trading is with recourse to a supplier (ie, the seller of the invoice) when no repayment is forthcoming from the buyer, those transactions may be characterised as secured lending, and the business would be required to obtain a moneylending business licence under the Moneylending Business Act.

**Payment services**

12 | Are payment services regulated in your jurisdiction?

Payment services fall within the scope of funds remittance transactions, which generally require a banking licence under the Banking Act. The Payment Services Act permits non-banking entities registered thereunder to engage in funds remittance transactions in the course of their business, subject to certain restrictions. Pursuant to recent revisions to the Payment Services Act that came into effect on 1 May 2021, three types of fund transfer services have been established. Each of these

fund transfer services is regulated differently, in terms of the permitted amount per transaction, fund retention and other matters relevant to customer protection.

**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?

The Banking Act regulates electronic payment intermediate service providers in relation to the open application programming interface. Electronic payment intermediate service providers are defined to include intermediaries between financial institutions and customers, such as entities using IT to communicate payment instructions to banks based on entrustment from customers, or entities using IT to provide customers with information of their financial accounts held by banks. Entities providing financial account aggregation services are also categorised as electronic payment intermediate service providers. They are required to register with the FSA.

**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.

A robo-adviser that provides retail customers with automated access to investment products must be registered as an investment manager (if it provides discretionary investment management services) or an investment adviser (if it provides non-discretionary investment advisory services) under the FIEA. If the robo-adviser accepts the customers' assets, it must also be registered as a Type I financial instruments business operator under the FIEA.

**Insurance products**

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

Yes. In Japan, a company (including a fintech company) that conducts insurance solicitation (ie, acts as an agency or intermediary for insurance contracts) must be registered as an insurance agent or insurance broker under the Insurance Business Act. Further, under the Act on Provision of Financial Services (this being the proposed new name of the current Act on Sales, etc. of Financial Instruments), which will come into effect on 1 November 2021, a person who is registered to conduct financial services intermediary business may, as an insurance intermediary service, intermediate the conclusion of certain life insurance and non-life insurance contracts.

**Credit references**

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

In general, while credit references of individuals are subject to the Act on Protection of Personal Information, credit references of corporations are subject to confidentiality obligations under financial services regulations (such as the Corporate Information under the Moneylending Business Act) and confidentiality agreements between financial institutions and corporations.

In Japan, personal credit information agencies collect information on the ability of persons to make credit repayments and provide the information to financial institutions that are members of those agencies. Financial institutions (banks or moneylenders) may not use information on the ability of individuals to meet repayments (personal credit information) for purposes other than the investigation of the ability of fund users to make repayments.

## CROSS-BORDER REGULATION

**Passporting**

17 | Can regulated activities be passported into your jurisdiction?

In most cases, no.

Japan is a member of the Asia Region Funds Passport (ARFP), which allows for a fund to be 'exported' to another participating economy, provided that it complies with the regulations of the jurisdiction in which the fund is registered, the applicable regulations relating to the offer in the host jurisdiction and the ARFP passport rules.

**Requirement for a local presence**

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

It depends on the nature of the services that the foreign fintech company intends to provide; however, generally speaking, foreign fintech companies will be required to have a subsidiary or a business office to obtain a licence under applicable laws.

## SALES AND MARKETING

**Restrictions**

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

Providers of financial products and services should pay attention not only to their respective regulating laws and regulations and the guidelines issued by their regulatory or self-regulatory bodies, but also to the general customer protection legislation, such as the Act against Unjustifiable Premiums and Misleading Representations, the Consumer Contract Act and the Act on Specified Commercial Transactions, when advertising, selling and marketing financial products and services.

In respect of investment products and services, such as securities, derivatives, 'deemed securities' (eg, limited partnership interests) and investment advisory and management services, only registered financial instruments business operators or financial institutions (FIBOs) are permitted to sell and market such investment products or services under the Financial Instruments and Exchange Act (FIEA). As a general rule, a FIBO is prohibited from soliciting investment products or services that are not suitable for an investor in light of his or her knowledge, experience, financial conditions and purpose of investment. A FIBO is required to deliver an explanatory document on the details of investment products or services to investors in advance.

In respect of insurance products, only insurance agents or brokers are permitted to sell and market insurance products for their affiliated insurance company under the Insurance Business Act. As a general rule, an insurance company, agent or broker must provide information regarding insurance contracts to customers. An insurance company, agent or broker must understand each customer's intention, recommend and explain the insurance product meeting the customer's intention, and offer to the customer an opportunity to reconfirm whether the recommended product meets the customer's intention. The rules on advertising, sales and marketing of investment products and services under the FIEA apply mutatis mutandis in respect of variable annuity and insurance products and certain foreign currency-denominated insurance products.

## CHANGE OF CONTROL

### Notification and consent

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

A shareholder holding more than 5 per cent but less than 20 per cent of the voting rights held by all the bank's shareholders (a major holder of bank's voting rights) must file a notification with the Financial Services Agency (FSA) within five business days. A shareholder who intends to hold, whether individually, jointly or as a group, 20 per cent or more of the voting rights (a bank's major shareholder) must obtain authorisation from the FSA in advance. Moreover, a bank's major shareholder holding more than 50 per cent may be ordered to submit the relevant bank's business improvement plan.

A shareholder of an insurance company is subject to substantially the same rules as those applicable to a major holder of bank's voting rights and a bank's major shareholder, as outlined above.

A shareholder holding, in principle, 20 per cent or more of the voting rights held by all of the Type I financial instruments business operator's or investment manager's shareholders (a major shareholder) must file a notification with the competent Local Finance Bureau without delay. A major shareholder who comes to hold 50 per cent or more of the voting rights (a Specified Major Shareholder) must file a further notification without delay.

## 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?

A person who gives, or offers or promises to give, a bribe to a domestic or foreign public officer can be subject to a criminal penalty under the Criminal Code or, as the case may be, the Unfair Competition Prevention Act. Although fintech companies are not explicitly required by law to put in place anti-bribery procedures, they are expected to do so as a part of their effective internal control.

The Act on Prevention of Transfer of Criminal Proceeds (APTCP) requires 'specified business operators' (most financial service providers are included therein) to:

- verify each customer's identity, purpose of transaction, occupation and, in the case of a corporate customer, identity of its representatives and ultimate owners and its purpose of business;
- verify each customer's financial condition in the case of a high-risk transaction;
- create and keep a record of verification and transaction reports; and
- report any suspicious transaction to the competent authority.

A fintech company falling under a specified business operator is required to put in place anti-money laundering procedures under the APTCP and the Financial Services Agency's Guidelines for Anti-Money Laundering and Combating the Financing of Terrorism.

### Guidance

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

No.

## PEER-TO-PEER AND MARKETPLACE LENDING

### Execution and enforceability of loan agreements

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?

In terms of a peer-to-peer or marketplace lending platform in Japan, it had been construed that each lending participant would be required to be registered as a moneylender under the Moneylending Business Act unless there were multiple anonymised borrowing participants. However, the Financial Services Agency published its interpretation that each lending participant is not required to be so registered if:

- all the borrowing participants are corporations;
- the platform is formed as a *tokumei kumiai*, which is an agreement under the Commercial Code to be entered between the platform operator registered as a moneylender and each lending participant; and
- the agreement prohibits each lending participant from contacting any borrowing participants for the purpose of collecting money.

In terms of enforceability of loans, the portion of any interests (including lending-related fees) exceeding 15 per cent or higher (or up to 20 per cent) of the loan principal amount shall be null and void under the Interest Rate Restriction Act.

### 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?

As a general rule, a loan claim may be assigned by an agreement between the transferor and the transferee and can be perfected by notice to or acknowledgement by the borrower with an instrument bearing a fixed date stamp.

However, it is less likely that the loan claims are assigned or perfected in a peer-to-peer or marketplace lending platform.

### Securitisation risk retention requirements

25 Are securitisation transactions subject to risk retention requirements?

Financial institutions subject to the Basel Capital Accord in Japan are subject to risk retention requirements in respect of their securitisation exposures, while the originators or sponsors are not directly subject to the same requirements. The financial institution is required to apply an increased regulatory capital risk weighting (ie, three times higher than that otherwise applied to the compliant securitisation exposure, up to 1,250 per cent) to its securitisation exposure unless it can confirm that:

- the originator retains at least 5 per cent of the aggregate credit risk of the relevant securitised assets in any of the prescribed ways; or
- the relevant securitised assets are not inappropriately originated based on the originator's involvement in or the quality of the relevant assets, or any other circumstances.

However, it is less likely that the risk retention requirements should be considered in a peer-to-peer or marketplace lending platform.

**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?

While it is less likely that a special purpose company is used to purchase and securitise peer-to-peer or marketplace loans, a lending platform operator extending loans to the borrowing participants must comply with the Personal Information Protection Act, which is one of the primary data protection laws in Japan.

## 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?

No. A robo-adviser using artificial intelligence is regulated under the Financial Instruments and Exchange Act (FIEA), generally in the same way as an ordinary investment adviser or manager.

**Distributed ledger technology**

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

No.

**Crypto-assets**

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

While the use of crypto-assets is not directly regulated, a service provider who deals with digital currencies, digital wallets or e-money may be regulated as a crypto-asset exchange service provider, a prepaid payment instruments issuer or, as the case may be, a fund transfer service provider under the Payment Services Act (PSA).

A crypto-asset exchange service provider is defined as an entity that, as a business:

1 purchases, sells and exchanges crypto-assets;
2 acts as a broker, intermediary or agent with regard to the transactions listed in (1);
3 maintains users' money or crypto-assets in relation to the transactions listed in (1) or (2); or
4 holds crypto-assets in custody for and on behalf of another person, unless otherwise licensed to do so under the applicable laws.

A prepaid payment instruments issuer is a person who issues prepaid payment instruments for its own or a third party's business. In order to issue e-money, which falls within the definition of 'prepaid payment instruments for a third party's business', the issuer is required to undergo registration under the Payment Services Act.

Issuing e-money that is redeemable in cash constitutes a fund transfer service, which triggers a requirement to be licensed or registered under the Banking Act or the Payment Services Act.

**Digital currency exchanges**

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

Yes. It is regulated as a crypto-asset exchange service.

**Initial coin offerings**

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

It had not been clear whether initial coin offerings or any other methods of token generation were governed by the PSA or the FIEA, or both. In 2020, the FIEA introduced the concept of electronically recorded transferable rights (ERTRs) to clarify the scope of tokens governed by the FIEA. The PSA clarifies that ERTRs do not fall under the category of 'crypto-assets' governed by the PSA.

Tokens generated in security token offerings will constitute ERTRs if they meet the three requirements of 'collective investment scheme interests' under the FIEA (mentioned below) and are represented by proprietary value transferable by means of an electronic data processing system. Collective investment scheme interests are deemed to be formed if:

- investors contribute cash or other assets (including crypto-assets) to a business;
- the cash or other assets so contributed are invested in the business; and
- investors have the right to receive dividends of profits generated from investments in the business.

ERTRs may be subject to the disclosure rules under the FIEA. Offering of ERTRs will need to be handled by a Type I financial instruments business operator registered under the FIEA.

On the other hand, tokens that do not fall under the definition of ERTRs but are used as payment instruments are likely to constitute crypto-assets or prepaid payment instruments governed by the PSA.

## 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 Personal Information Protection Act (PIPA) applies to any person (or company) who processes and transfers personal data. General and industry-specific guidelines (including the financial services industry guideline) regarding protection of personal information are issued by the Personal Information Protection Committee and the relevant government authority (including the Financial Services Agency (FSA)). However, the guidelines issued by the Committee and relevant government authorities do not focus in particular on the fintech industry.

The PIPA requires that any person who handles a personal information database in the course of business (a Personal Information Handling Business Operator (PIHBO)) must, generally:

- not handle any personal information beyond the minimum scope necessary for achieving the purpose of use;
- not transfer any personal data to a third party without obtaining the prior consent of the relevant data subject;
- keep the personal data accurate and updated;
- put in place necessary and appropriate measures to store and handle the personal data in a safe manner;
- disclose all personal data held about a relevant data subject to that subject whenever requested; and

- correct, and delete or cease to use, any personal data they hold if the relevant data subject so requests with reasonable grounds. (Hereafter, collectively, the General Rules).

If personal data is transferred within Japan, as an exception to the General Rules, a PIHBO may transfer personal data (excluding sensitive personal information) to a third party without obtaining prior consent of the relevant data subject. This is only if the PIHBO notifies the matters prescribed by the PIPA to the relevant data subject and the Personal Information Protection Committee. However, from April 2022, illegally acquired information and information acquired via this exception must be handled in accordance with the General Rules.

If personal data is to be transferred to a third party located overseas, a PIHBO must adhere to the following special rules:

- the PIHBO must obtain the relevant data subject's prior consent to the transfer of personal data to a third party located overseas;
- the relevant third party must be located in a jurisdiction that has an equivalent personal information protection framework to the PIPA; or
- the relevant third party must put in place equivalent personal information protection measures to those required of a PIHBO under the PIPA.

The General Rules do not apply in respect of anonymised data. Instead, the PIPA requires a PIHBO to comply with the standard prescribed by the PIPA and the relevant government guidelines when creating and handling anonymised data to ensure that it is impossible to identify any specific individual or extract personal information from that data. A person who handles anonymised data in the course of business must, when transferring it to a third party, notify the third party of the types of information relating to individuals contained within and clearly state that the information to be transferred remains anonymised.

### Cybersecurity

**33 What cybersecurity regulations or standards apply to fintech businesses?**

A general regulation was introduced pursuant to the Basic Act on Cybersecurity from 2014. In addition, according to the upcoming policy for cybersecurity in the finance field, the FSA has strengthened its measures regarding cybersecurity.

In addition, the Centre for Financial Industry Information Systems publishes the FISC Security Guidelines on Computer Systems for Banking and Related Financial Institutions (the FISC Guidelines). The FSA refers to the FISC Guidelines when inspecting and monitoring fintech business operators.

The FSA's inspection manuals and supervisory guidelines show points of focus in connection with cybersecurity risk management.

## 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?**

Broadly speaking, financial services companies may outsource a part of their business to a third party but are required, for those purposes, to put in place any necessary measures to ensure the outsourced business will be appropriately performed pursuant to the relevant laws and regulations. Such measures include, without limitation, the:

- selection of an appropriate service provider that is eligible to perform the outsourced business;
- monitoring and supervision of outsourced service provider's performance of duties; and
- replacing or ceasing to retain the outsourced service provider if it is found that the outsourced service provider does not appropriately perform its duties.

### Cloud computing

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

No.

## INTELLECTUAL PROPERTY RIGHTS

### IP protection for software

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

Software may be protected by copyright or patent, or as a trade secret.

Computer program software can be protected by copyright under the Copyright Act of Japan (the Copyright Act) as a 'work of computer programming' without the need to undergo any application procedure if the computer program has the requisite creativity.

Under the Patent Act of Japan (the Patent Act), if the information processing by the software is concretely realised by hardware, a patent for the software-implemented invention may be obtained by filing an application with the Japanese Patent Office. Business methods by themselves are not patentable, and must be tied to a computer or computer network systems to be eligible for patent protection.

If the software meets the requirements of a 'trade secret' under the Unfair Competition Prevention Act (UCPA), which is, in essence, that the software is non-public knowledge, contains useful information and is kept secret, it may be protected as a trade secret without the need to file for registration.

### 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?**

Under article 15 of the Copyright Act, the employer is the author of any work created by an employee while performing his or her duties for the employer and that otherwise meets the legal requirements. Therefore, the copyright and moral rights to the work are retained by the employer as the author, unless separately agreed upon.

Under article 35 of the Patent Act, an invention made by an employee is deemed to be an 'employee invention' if it falls within the scope of the employer's business, and the act that led to the invention is part of the employee's current or past duties at the employer. If the employer has not established separate rules regarding the right to obtain a patent to an 'employee invention', the right will vest with the employee. If the employer has established rules that give ownership of the right to obtain a patent to 'employee inventions', the right will belong to the employer. In that case, the employee has a statutory right to receive reasonable compensation for the invention.

Independent contractors and consultants who are not employees are usually entitled to copyright and patent rights for works they create and inventions they develop, unless otherwise contractually agreed upon.

### 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?

Under article 65 of the Copyright Act, if a work is created and each creator's contribution to the work cannot be separated and used individually, the copyright is held jointly. If one of the joint copyright holders wants to assign, license or use the work, he or she can only do so with the consent of all the other joint copyright holders. Under article 73 of the Patent Act, when a patent is held jointly, each of the joint holders may use the patent independently. However, the consent of the other joint patent holders is required for the assignment or license of the patent to a third party.

In the event of infringement of copyright or patent rights, injunctive relief and claims for damages may be brought independently.

### Trade secrets

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

Trade secrets (including confidential information) can be protected by the Unfair Competition Prevention Act (UCPA). Under article 2 paragraph 6 of the UCPA, a protectable trade secret is defined as: (1) production methods, sales methods, and other technical or business information useful for business activities; (2) that are kept secret; and (3) are not publicly known. A court may, in a legal proceeding upon the motion of a party, issue a protective order, including prohibiting a party and its agents from disclosing the relevant trade secret to any other persons.

### 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?

Brands may be protected by a trademark under the Trademark Act of Japan (the Trademark Act . A trademark may be registered if an application is submitted to and approved by the Japan Patent Office. Applications can be submitted online. In addition, brands may be protected under article 2 paragraph 1 item 1 and 2 of the UCPA, regardless of whether or not they are registered, provided that it can be proven that the relevant product, or the product's indications, is well known or famous.

In order for fintech businesses to ensure that they do not infringe existing brands, they must conduct research on existing trademarks. They can utilise J-PlatPat, the database operated by the National Centre for Industrial Property Information and Trading, to conduct the initial screening.

### Remedies for infringement of IP

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

The holder of the intellectual property rights can claim actual damages arising from the infringement. As this is difficult to do in practice, the Patent Act, Copyright Act, Trademark Act, and UCPA each provide provisions that presume damages, such as reasonable royalties. The holder of intellectual property rights can also seek injunctions against infringing third parties, as well as actions required to prevent the infringement. In addition, they may seek relief to restore honour or credit. For example, under article 115 of the Copyright Act, a copyright holder may petition the court to issue an order compelling the infringer to issue a public apology. Infringing third parties may also be subject to criminal penalties as provided under the respective statutes.

## COMPETITION

### Sector-specific issues

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

In April 2020, the Japan Fair Trade Commission published fintech-related market research reports, including the Account Aggregation Service Report and the Cashless Payment Service Report, based on its extensive research through questionnaire surveys and hearing surveys.

The Account Aggregation Service Report found, among other things, that if a bank in a superior position unjustly refuses application programming interface access from an account aggregation service provider, then in light of normal business practice, the bank's conduct would be in violation of the Anti-monopoly Act (AMA).

The Cashless Payment Report identified the following potential issues, among others.

- Banks and fund transfer service providers are competitors in cashless payment, but such non-bank players must be connected to the user's bank account to provide their service. Accordingly, if a bank in a superior position unjustly refuses fund transfer service providers access, the bank's conduct would be in violation of the AMA.
- Interbank settlement charges when using Zengin System, a nationwide online network system for banks, have been fixed at high rate for many years. Banks must reconsider whether the level of the charges are reasonable.
- At present, Zengin-Net, the Zengin System operator, does not allow fund transfer service providers to access Zengin System. Zengin-Net should set reasonable conditions for access by fund transfer service providers.

## 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 tax incentives specifically targeting fintech companies and investors. That being said, the Japanese tax system contains provisions for statutory angel investors who invest to statutory unlisted corporations that were incorporated within the last 10 years with the following tax incentives:

- At the time of investment:
  - reduction of income tax for investment in the target a company that is than five years old; or
  - reduction in the capital gains from the transfer of shares for investment in a target company that is less than 10 years old .
- At the time of sale of the shares in the target company:
  - offset of capital losses against other capital gains and carry-over of such losses for three years after the sale.

Following recent tax reforms, a tax incentive to promote open innovation was made available from April 2020 to the end of March 2022. Under these tax measures, an income deduction equivalent to 25 per cent of the investment amount will apply to investments of at least ¥100 million in unlisted venture companies that are less than 10 years old, by domestic entities and corporate venture capital that intends to hold shares of such companies for five years or more.

In addition, a research and development tax incentive system has been adopted and will be frequently revised with the aim of maintaining and strengthening initiatives that support Japan's global competitiveness.

**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?

Foreign nationals recognised as 'highly skilled foreign professionals' will be given preferential immigration treatment. There are three categories of activities of highly skilled foreign professionals:

- advanced academic research activities;
- advanced specialised or technical activities; and
- advanced business management activities.

A person who is recognised as a highly skilled foreign professional can enjoy preferential treatment, including permission for multiple purposes of activities and grant of a five-year period of stay.

## UPDATE AND TRENDS

**Current developments**

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

At present, Japanese labour laws do not allow wages and salaries to be wire transferred to any account other than bank accounts. The Japanese government is now considering lifting the limitation so that wages and salaries can be paid to users' accounts held in fund transfer service providers.

It has been reported that the Bank of Japan (BOJ) has no plans to issue any central bank digital currency (CBDC). To ensure the stability and efficiency of the entire payment and settlement system, however, the BOJ has highlighted the importance of being well prepared to respond to changes. In line with this, in April 2021, the BOJ began exploring the technical feasibility of a general-use type of CBDC. In parallel with this, the BOJ also plans to study the institutional design aspects of CBDCs.

**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?

At the time of writing, no emergency legislation, relief programmes or other initiatives specific to fintech have been implemented to address the pandemic.

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