



ICLG

The International Comparative Legal Guide to:

Fintech 2019

3rd Edition

A practical cross-border insight into fintech law

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General Chapters:

1	Artificial Intelligence in Fintech – Rob Sumroy & Ben Kingsley, Slaughter and May	1
2	Cross-Border Financing of Fintech: A Comparison of Venture and Growth Fintech Financing Trends in Europe and the United States – Jonathan Cardenas, Stanford Law School	7

Country Question and Answer Chapters:

3	Australia	Gilbert + Tobin: Peter Reeves	14
4	Austria	PFR Attorneys-at-law: Bernd Fletzberger	21
5	Bermuda	Walkers Bermuda: Natalie Neto & Rachel Nightingale	26
6	Brazil	Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados: Larissa Lancha Alves de Oliveira Arruy & Fabio Ferreira Kujawski	31
7	Canada	McMillan LLP: Pat Forgione & Anthony Pallotta	37
8	Cayman Islands	Appleby: Peter Colegate & Anna-Lise Wisdom	44
9	China	Links Law Offices: David Pan & Xun Yang	49
10	Colombia	Lloreda Camacho & Co: Santiago Gutierrez & Juan Sebastián Peredo	55
11	Cyprus	Democritos Aristidou LLC: Christiana Aristidou	60
12	Czech Republic	FINREG PARTNERS: Ondřej Mikula & Jan Šovar	67
13	Denmark	Gorrissen Federspiel: Morten Nybom Bethe & Tue Goldschmieding	72
14	France	Bredin Prat: Bena Mara & Vincent Langenbach	78
15	Germany	Gleiss Lutz: Dr. Stefan Weidert & Dr. Martin Viciano Gofferje	85
16	Gibraltar	Triay & Triay: Javi Triay & Jay Gomez	91
17	Hong Kong	Slaughter and May: Benita Yu & Jason Webber	97
18	Iceland	BBA: Stefán Reykjálín & Baldvin Björn Haraldsson	105
19	India	Trilegal: Kosturi Ghosh & Adhunika Premkumar	112
20	Indonesia	Walalangi & Partners (in association with Nishimura & Asahi): Luky I. Walalangi & Hans Adiputra Kurniawan	119
21	Ireland	A&L Goodbody: Claire Morrissey & Peter Walker	124
22	Israel	Goldfarb Seligman & Co.: Ariel Rosenberg & Sharon Gazit	134
23	Italy	BonelliErede: Federico Vezzani & Tommaso Faelli	140
24	Japan	Anderson Mōri & Tomotsune: Ken Kawai & Kei Sasaki	146
25	Kenya	Anjarwalla & Khanna: Sonal Sejpal & Dominic Rebelo	152
26	Korea	Kim & Chang: Jung Min Lee & Samuel Yim	157
27	Liechtenstein	König Rebholz Zechberger Attorneys at Law: Dr. Helene Rebholz & MMag. Degenhard Angerer	164
28	Luxembourg	Bonn Steichen & Partners: Pierre-Alexandre Degehet	169
29	Malaysia	Shearn Delamore & Co.: Timothy Siaw & Christina Kow	174
30	Malta	GVZH Advocates: Dr. Andrew J. Zammit & Dr. Kurt Hyzler	181
31	Mexico	Galicia Abogados, S.C.: Claudio Kurc & Arturo Portilla	186
32	Morocco	Hajji & Associés: Nihma Elgachbour & Ayoub Berdai	192
33	Netherlands	De Brauw Blackstone Westbroek: Björn Schep & Willem Röell	197
34	New Zealand	Hudson Gavin Martin / The Blockchain Boutique: Andrew Dentice & Rachel Paris	204

Continued Overleaf →

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Country Question and Answer Chapters:

35	Nigeria	Udo Udoma & Belo-Osagie: Yinka Edu & Tolulope Osindero	210
36	Norway	BAHR: Markus Nilssen & Vanessa Kalvenes	216
37	Peru	Vodanovic Legal: Ljubica Vodanovic & Alejandra Huachaca	223
38	Philippines	Gorriceta Africa Cauton & Saavedra: Mark S. Gorriceta	229
39	Poland	Traple Konarski Podrecki & Partners: Jan Byrski, PhD, Habil. & Karol Juraszczyk	234
40	Portugal	Uría Menéndez – Proença de Carvalho: Pedro Ferreira Malaquias & Hélder Frias	242
41	Russia	QUORUS GmbH: Maxim Mezentsev & Nikita Iovenko	250
42	Singapore	AEI Legal LLC: Andrea Chee & Law Zhi Tian	258
43	Slovenia	Schoenherr: Jurij Lampič	265
44	South Africa	ENSafrica: Angela Itzikowitz & Ina Meiring	271
45	Spain	Uría Menéndez: Leticia López-Lapuente & Isabel Aguilar Alonso	278
46	Sweden	Mannheimer Swartling: Anders Bergsten & Martin Pekkari	286
47	Switzerland	Bär & Karrer: Dr. Daniel Flühmann & Dr. Peter Ch. Hsu	292
48	Taiwan	Lee and Li, Attorneys-at-Law: Robin Chang & K. J. Li	300
49	Thailand	Silk Legal Co., Ltd.: Dr. Jason Corbett & Don Sornumpol	306
50	Turkey	Erciyas Law Office: Nihat Erciyas & Miraç Arda Erciyas	311
51	Ukraine	Evris Law Firm: Sergii Papernyk & Alexander Molotai	317
52	United Kingdom	Slaughter and May: Rob Sumroy & Ben Kingsley	322
53	USA	Shearman & Sterling LLP: Reena Agrawal Sahni & Eli Kozminsky	329

EDITORIAL

Welcome to the third edition of *The International Comparative Legal Guide to: Fintech*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of fintech.

It is divided into two main sections:

Two general chapters. These chapters provide an overview of artificial intelligence in fintech, and of the recent trends and challenges in the financing of cross-border fintech start-ups.

Country question and answer chapters. These provide a broad overview of common issues in fintech laws and regulations in 51 jurisdictions.

All chapters are written by leading fintech lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Rob Sumroy and Ben Kingsley of Slaughter and May for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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1 The Fintech Landscape

- 1.1 Please describe the types of fintech businesses that are active in your jurisdiction and any notable fintech innovation trends of the past year within particular sub-sectors (e.g. payments, asset management, peer-to-peer lending or investment, insurance and blockchain applications).**

Like in most European countries, laws and regulations have significantly increased over the last year, leading to an increasing number of obligations to be complied with by financial actors, including those in Luxembourg. Consequently, the regtech sector – which was intended to release the burden of companies active in the funds industry and professionals in the financial sector – has evolved importantly.

Similarly, considering the leading position of Luxembourg in the insurance sector, insurtech companies have been very active and increasing in the past year, as well as payment services businesses.

Finally, we have noted a considerable increase from clients or potential clients for the implementation of cryptocurrency-related businesses and particularly those related to cryptocurrency exchange platforms, and a constantly growing interest in initial coin offerings and initial coin offerings-related businesses.

- 1.2 Are there any types of fintech business that are at present prohibited or restricted in your jurisdiction (for example cryptocurrency-based businesses)?**

Luxembourg has not prohibited any fintech business *per se*. The legal framework is mainly constituted by existing laws and rules, such as the law of November 10th 2009 on payment services, as amended (**Law 2009**), the law of April 5th 1993 on the financial sector, as amended (**Law 1993**) and the regulations or circulars issued by the Luxembourg financial supervisory authority (*Commission de surveillance du secteur financier, CSSF*) related thereto. The CSSF strives to fit new fintech businesses (such as cryptocurrency businesses) into those existing rules.

Regarding cryptocurrencies and ICOs, the CSSF has, for the time being, been very cautious not to take any position, by issuing warning statements aimed at warning investors against the risks associated with cryptocurrencies and ICOs, based on European Securities and the Market Authority's statements. Even though cryptocurrencies are not *per se* regulated under Luxembourg law, the CSSF will monitor any ICO or cryptocurrency initiative on a case-by-case basis. In addition, it should be specified that in any

case, and with any company, cryptocurrency businesses and ICOs remain subject to rules regarding, for example, anti-money laundering.

In conclusion, although there is no prohibition *per se*, there is uncertainty on the final position of the CSSF hereto, which is likely to evolve over time.

2 Funding For Fintech

- 2.1 Broadly, what types of funding are available for new and growing businesses in your jurisdiction (covering both equity and debt)?**

As one of the top countries in Europe as regards the financial sector, Luxembourg is dedicated to creating a favourable environment for fintech start-ups. As a matter of consequence, various options exist regarding both public and private funding.

First of all, the Ministry of the Economy of Luxembourg has set up, in partnership with private entities, the Digital Tech Fund which invests, in particular, in the fields of cybersecurity, fintech, big data, digital health, the media and next-generation communication networks, digital learning, the internet of things or telecommunications and satellite services. The Digital Tech Fund is managed by Expon Capital.

Furthermore, the European Investment Fund (**EIF**) and the *Société Nationale de Crédit et d'Investissement (SNCI)* also created a fund called the Luxembourg Future Fund, investing in innovative sectors, which is designed as an incentive for existing innovative companies from other countries to set up their business in Luxembourg. Moreover, LuxInnovation, which is a public entity promoting Luxembourg as a country in particular regarding innovative technologies, offers packages designed for start-ups at different stages of their development.

- 2.2 Are there any special incentive schemes for investment in tech/fintech businesses, or in small/medium-sized businesses more generally, in your jurisdiction, e.g. tax incentive schemes for enterprise investment or venture capital investment?**

From a mere tax perspective, investments in tech/fintech businesses are treated similarly to other investments in “regular” companies. Moreover, to the best of our knowledge, there are no specific incentive schemes for investors in tech/fintech.

2.3 In brief, what conditions need to be satisfied for a business to IPO in your jurisdiction?

Depending on the choice of the targeted market (i.e., regulated or non-regulated, such as Euro MTF in Luxembourg), different sets of rules and various requirements will apply. Admission to listing and trading of shares on Euro MTF is less cumbersome than on the regulated market operated by the Luxembourg Stock Exchange (LSE). In such case, the rules and regulations of the LSE (R&R LSE) and the Regulation (EU) No 596/2014 of the European Parliament and of the Council of April 16th 2014 on market abuse (MAR) will apply. Trading and listing on the regulated market of the LSE assumes compliance (among others) with (i) the R&R LSE, (ii) the Luxembourg law of July 10th 2005 on prospectuses for securities (the **Prospectus Law**), and (iii) the Luxembourg law of January 11th 2008 on transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (the **Transparency Law**).

In order to be admitted to trading and listing on the Luxembourg regulated market, an issuer shall respect the following requirements:

- Corporate form: public limited liability company (*société anonyme*) or partnership limited by shares (*société en commandite par actions*).
- Existence: at least three financial years.
- Capital: foreseeable stock market capitalisation of the shares or, if this cannot be assessed, the capital, including the results from the last financial year, which must amount to at least EUR 1 million (or equivalent in any other currency).

Requirements relating to the shares:

- Free negotiability: no transfer restrictions.
- Fungibility: same features within the same class.
- Capability to trade in a fair, orderly and efficient manner:
 - clear and unambiguous terms;
 - a reliable and publicly available price;
 - correlation between the price of the shares and the price of the underlying assets;
 - transparent value; and
 - adequate settlement and delivery procedures (in case of settlement in kind).
- Distribution to public: the shares must represent at least 25% of the subscribed capital of the issuer.
- Application must cover all shares of the same category already issued.

2.4 Have there been any notable exits (sale of business or IPO) by the founders of fintech businesses in your jurisdiction?

To the best of our knowledge, we are not aware of any such sale of business or IPO by the founders of fintech businesses in Luxembourg for the time being.

3 Fintech Regulation

3.1 Please briefly describe the regulatory framework(s) for fintech businesses operating in your jurisdiction, and the type of fintech activities that are regulated.

As a general rule, as mentioned above, fintech businesses in Luxembourg are likely to fall into the scope of Law 2009 or Law

1993 whether they operate in payment services, electronic money, disruptive financial services or the cryptocurrency sector.

Most fintech businesses will be considered by the CSSF as falling within the scope of application of existing laws or regulations; therefore, it is very unlikely that some fintech businesses would be considered to be operating unregulated fintech activities.

Indeed, the CSSF clearly and repeatedly stated that even though an innovative financial activity may seem unregulated at first sight, it would actually be covered by existing legal provisions (i.e., likely Law 2009 or Law 1993). Therefore, all fintech businesses should proceed to a thorough analysis of the contemplated activity from a legal standpoint and contact the CSSF prior to starting any activity in Luxembourg.

3.2 Is there any regulation in your jurisdiction specifically directed at cryptocurrencies or cryptoassets?

As in other EU Member States, Luxembourg does not yet provide for specific regulation regarding cryptocurrencies. However, this situation is likely to evolve rapidly. In this context, a recent new law dated March 1st 2019 adopted by the Luxembourg legislator aims to extend the scope of the 2001 law on the circulation of securities, in order to allow account holders to hold securities accounts and to register securities by means of secure electronic recording devices (DLTs), including registers or distributed electronic databases of the blockchain type. This new law operates a legal fiction essential for its proper functioning by recognising that successive registrations of securities in a blockchain have the same effects as those resulting from transfers between securities accounts. For the sake of legal certainty, it expressly confirms that the maintenance of securities accounts within DLTs or the recording of securities in securities accounts through such DLTs does not affect the fungibility of the securities concerned.

3.3 Are financial regulators and policy-makers in your jurisdiction receptive to fintech innovation and technology-driven new entrants to regulated financial services markets, and if so how is this manifested? Are there any regulatory 'sandbox' options for fintechs in your jurisdiction?

Luxembourg aims to develop a genuine start-up ecosystem. Considering its past and present reputation as a leading financial centre, the country has focused its efforts on the development of fintech start-ups by creating subsidies programmes, launching public-private initiatives (e.g., the Luxembourg House of Financial Technology) and encouraging the major financial and banking actors to develop their own initiatives.

As a result, Luxembourg now has a full ecosystem dedicated to start-ups, but more precisely to fintech start-ups with numerous incubators, awards and both public and private initiatives. However, there is no regulatory sandbox option as of yet in Luxembourg.

Major companies from the banking and financial sectors are increasingly investing in fintech technologies and supporting the newly created ecosystem.

3.4 What, if any, regulatory hurdles must fintech businesses (or financial services businesses offering fintech products and services) which are established outside your jurisdiction overcome in order to access new customers in your jurisdiction?

If the company is established in an EU Member State and has a licence for regulated fintech businesses, it can apply to obtain the European passport for such regulated services before the CSSF.

Once the passport has been obtained, the said company (acting through a Luxembourg subsidiary) may provide such fintech business regulated services in Luxembourg. On the contrary, should the company be established outside the EU and would like to provide fintech business regulated services in Luxembourg, it should incorporate a company that will apply for a specific licence before the CSSF in order to validly operate in Luxembourg. In both cases, the said companies will be subject to all other applicable laws and regulations in Luxembourg. Application for an EU passport is less cumbersome to obtain in comparison with the entire process regarding the obtaining of the licence.

4 Other Regulatory Regimes / Non-Financial Regulation

4.1 Does your jurisdiction regulate the collection/use/transmission of personal data, and if yes, what is the legal basis for such regulation and how does this apply to fintech businesses operating in your jurisdiction?

Like all other EU Member States, Luxembourg is subject to the application of the EU Charter of fundamental rights which states that all EU citizens have a right to the protection of their personal data. Personal data has been a widely discussed subject over the last few years, in particular due to the increase of all new innovative technologies that have an impact on companies and customers. Thus, the legal framework of personal data protection has been moving over the past years.

Today, Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (**GDPR**) has applied since May 25th 2018. Additionally, the law dated May 30th 2005 applies concerning the specific provisions for protection of the individual in respect of the processing of personal data in the electronic communications sector (the **E-Privacy Law**).

The GDPR will apply to the processing by an individual, company or an organisation of personal data relating to individuals in the EU. Considering that data has become increasingly valuable for companies in general, it necessarily impacts fintech companies to which the collection and processing of customers' data is of tremendous importance.

4.2 Do your data privacy laws apply to organisations established outside of your jurisdiction? Do your data privacy laws restrict international transfers of data?

The GDPR, as a regulation, has applied since May 25th 2018 in all EU countries and thus supersedes any national legislation on the matter. As a matter of principle, the GDPR forbids any transfer of personal data outside the EU. That being said, it contains numerous exceptions such as (i) the transfer of data to non-EU countries considered as having an adequate level of protection of personal data, and (ii) the EU-US privacy shield and derogations (i.e. consent, legitimate interest, public interest, public register, vital interest, judicial proceedings, and contract).

The GDPR applies to the processing of personal data in the context of the activities of an establishment of a controller or processor in the EU, regardless of whether the processing takes place in the Union or not. The GDPR applies as well to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the EU, where the processing activities are related to: (a) the offering of goods or services, irrespective of whether a

payment of the data subject is required, to such data subjects in the EU; or (b) the monitoring of their behaviour as far as their behaviour takes place within the EU. The GDPR applies to the processing of personal data by a controller not established in the EU, but in a place where Member State law applies by virtue of public international law.

4.3 Please briefly describe the sanctions that apply for failing to comply with your data privacy laws.

Under the GDPR, sanctions are particularly severe, with administrative pecuniary sanctions up to EUR 20 million or 4% of the annual turnover of the previous financial year.

4.4 Does your jurisdiction have cyber security laws or regulations that may apply to fintech businesses operating in your jurisdiction?

The E-Privacy Law contains requirements regarding security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed in connection with the provision of a publicly available electronic communications service.

4.5 Please describe any AML and other financial crime requirements that may apply to fintech businesses in your jurisdiction.

The main law regarding AML in Luxembourg is the law dated November 12th 2004 regarding the fight against money laundering and terrorist financing, as amended from time to time (the **AML Law**) and supplemented by regulations and various CSSF circulars.

The AML Law fully applies to fintech businesses. Furthermore, payment services/electronic money institutions within the meaning of the 2009 Law, in particular, are subject to the strict control of the fulfilment of their AML/KYC obligations from the CSSF at both the application stage and in the course of their business.

In connection with Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (the **AML 4th Directive**), and Directive (EU) 2018/843 of the European Parliament and of the Council of May 30th 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (the **AML 5th Directive**), Luxembourg implemented on January 13th 2019 a law aiming at setting up a register of beneficial owners. This law creates a register of beneficial owners, which aims to preserve and make available information on the beneficial owners of the specific registered entities.

4.6 Are there any other regulatory regimes that may apply to fintech businesses operating in your jurisdiction?

This is not applicable.

5 Accessing Talent

5.1 In broad terms, what is the legal framework around the hiring and dismissal of staff in your jurisdiction? Are there any particularly onerous requirements or restrictions that are frequently encountered by businesses?

All employees employed in Luxembourg, whether they are residents,

border residents, European nationals or third-country nationals, are subject to the provisions of the Luxembourg labour law, which sets the standards aimed at governing both individual and collective labour relations. Due to its overall presence in everyday life, the Luxembourg labour law consists of a series of laws, Grand-Duchy regulations and ministerial decrees, making the entire process difficult to facilitate. To this end, the Ministry of Labour and Employment edited a labour code, the first version of which entered into force on September 2016.

There are two main categories of employment agreement. As a matter of fact, it is strongly recommended to evidence the labour relationship by the conclusion of a written employment agreement. A fixed-term contract can only be concluded in exceptional cases and must be in writing, otherwise it will be deemed as an indefinite employment agreement. As a general comment, labour law rules in Luxembourg offer a certain degree of protection to the employees.

5.2 What, if any, mandatory employment benefits must be provided to staff?

Remuneration as global compensation includes cash remuneration and any other benefits or accessory compensations (lunch voucher, transportation, etc.). There are no legal obligations for an employer to grant bonuses to its employees, which remains at the employer's sole discretion and are considered as a goodwill gesture. There are about 10 statutory public holiday days a year which are in addition to the minimum holiday entitlement. The legislation provides all employees with an annual paid vacation of at least 25 working days, which can occur after three months of uninterrupted work with the same employer.

The social security code makes it mandatory for all employees to be insured with the Social Security Services (Accident Insurance, Pension National Insurance, Health National Insurance).

5.3 What, if any, hurdles must businesses overcome to bring employees from outside your jurisdiction into your jurisdiction? Is there a special route for obtaining permission for individuals who wish to work for fintech businesses?

The hiring possibilities regarding European citizens (including European Economic Space Member State citizens and Switzerland) or third-country nationals are different.

European citizens can reside, move and work freely in the European Union, while third-country nationals may enter Luxembourg for less than three months with a valid passport and a visa, if it is required. If a third-country national wishes to stay and work for more than three months in Luxembourg, he or she must apply to the Immigration Directorate of the Ministry of Foreign and European Affairs of Luxembourg for a (temporary) authorisation to stay (including an authorisation to work), prior to entering Luxembourg.

Notwithstanding the above, the Minister may grant a residence permit to a national qualified from a third country who proposes to work in a sector or profession characterised by recruitment problems. When the job requires a high degree of competence, a residence permit for a "highly qualified worker" may be granted under certain conditions.

6 Technology

6.1 Please briefly describe how innovations and inventions are protected in your jurisdiction.

Luxembourg law provides for a standard protection of innovations

and inventions mainly constituted by patent protection and design protection on one side, and copyright and related rights on the other side.

Registering a patent allows its holder to prevent others from using an invention for 20 years in exchange for the disclosure of the said invention. To be eligible for the registration of a patent, such invention shall be new, involve an inventive step and have an industrial application.

Design protection allows for the protection of a two-dimensional representation (i.e., design) or three-dimensional representation (i.e., model) related to a product's visual appearance. The protection lasts for a maximum of 25 years.

Copyright mainly protects works of literature, music or art but also, e.g., software, designs, maps, graphic elements, and plans, and as such contributes to the innovation protection legal framework in Luxembourg. The only two conditions are (i) originality, and (ii) taken form. Therefore, ideas are not protected by copyright (or by any other IP rights). That being said, ideas may be deposited within the i-DEPOT system which may prove very useful, as evidence, when the ideas turn into inventions or other innovations and may then be protected as such. The i-DEPOT shall be used at an early stage to secure as much as possible for the future invention or innovation which is still at the idea stage.

6.2 Please briefly describe how ownership of IP operates in your jurisdiction.

Please see question 6.1 above. Ownership of IP rights is proved by the deposit of the contemplated IP rights with the Benelux Office of Intellectual Property.

6.3 In order to protect or enforce IP rights in your jurisdiction, do you need to own local/national rights or are you able to enforce other rights (for example, do any treaties or multi-jurisdictional rights apply)?

As mentioned above in question 6.1, patent as well as design protection and copyright require a registration at national level in Luxembourg. That being said, an applicant may also file a European patent application which may cover up to 40 countries, or an international patent application under the Patent Cooperation Treaty, which has been signed by more than 130 countries around the world including Luxembourg. In both cases, with a single application, a patent may be requested in all Member States/signatory countries.

6.4 How do you exploit/monetise IP in your jurisdiction and are there any particular rules or restrictions regarding such exploitation/monetisation?

IP rights may be exploited directly by the owner of the said IP rights or by third parties, when the owner of such IP right has agreed to authorise its use by third parties. Such use is generally determined and limited by a contractual agreement to be signed between the owner of the IP right and the user, under certain terms and conditions, for a specific consideration (price payment determined by the parties). There are no particular restrictions under Luxembourg law for the exploitation or monetisation of IP rights, which are often set up through contractual agreements, except in case of non-respect of Luxembourg public order rules.

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Pierre-Alexandre is a Partner and a member of the Corporate M&A, Private Equity, Capital Markets, Banking & Financial Services practices. He created and developed the Startup & Fintech practice and he is Head of the French desk. In addition to general corporate law, he specialises in M&A, capital markets, stock exchange regulations and corporate governance involving listed and private companies. Pierre-Alexandre has participated in numerous stock exchanges transactions, hostile and friendly takeovers, equity investments in listed companies, contribution or demerger transactions, capital increases, public and private placements of equity and debt securities.

Additionally, Pierre-Alexandre has been involved in a number of capital markets transactions advising international and Luxembourg financial institutions and companies. He handles equity offering and listing matters.

In relation to the Startup & Fintech practice, Pierre-Alexandre handles matters related to fintech, blockchain and cryptocurrency assets, and financial regulatory issues relating to electronic money or payment services and banking.



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- Product Liability
- Project Finance
- Public Investment Funds
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms



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