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Fintech in South Africa

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General climate and trends

General innovation climate

What is the general state of fintech innovation in your jurisdiction, including any notable trends, innovations, innovators and future prospects?

The outlook for fintech innovation is promising in South Africa, driven by the market demand for innovative products and services, the proven capacity of innovators and suppliers to respond to the demand and an inquisitive regulatory approach. Much activity is centred on payment systems, exchange control and applications (mobile or otherwise) that obviate the need to hold, or transact via, a bank account. The South African regulators (particularly the South African Reserve Bank (SARB)) are taking a keen interest in fintech developments and, although no bespoke fintech regulation exists, they have a fintech programme that is pro-fintech innovation.

Key technologies

Have there been any particular developments – regulatory or commercial – in any of the following fintech sectors?

Distributed ledger technology and digital currencies (eg, blockchain, smart contracts and Bitcoin)?

Yes, there is significant industry-led activity around distributed ledger technology (DLT) and digital currencies. Various start-ups have developed products backed by digital currencies (eg, contracts for differences that reference cryptocurrencies as an underlying product). The number of cryptocurrency exchanges has increased and existing ones expanded to offer new cryptocurrencies.

Virtual currencies are currently not regulated and any transactions conducted are solely at the end-user's risk. That said, the regulatory authorities have a positive attitude towards fintech in general. SARB has recently established the FinTech Programme to strategically assess the emergence of fintech in a structured and organised manner and consider its regulatory implications. The main goal of the programme is to track and analyse fintech developments and assist policymakers in formulating frameworks in response to these emerging innovations. According to the media statement issued by SARB on February 13 2018, the programme will focus on three primary objectives:

- review SARB's position on private cryptocurrencies to inform an appropriate policy framework and regulatory regime,
- investigate and decide on the applicability of innovation facilitators for SARB; and
- launch Project Khokha, which will experiment with distributed ledger technologies.

Alternative lending platforms?

South Africa is one of the leading African markets for peer-to-peer consumer and business lending, and there is strong growth potential in this space. Although lending is dominated by platforms hosted outside Africa, a notable South African platform is RainFin.

Interest in the lending of cryptocurrencies for a return is growing, and the firm recently advised a start-up planning a crypto-lending platform to which investors would transfer their bitcoin for on-lending.

The lending of digital currencies is not regulated in South Africa and no material changes in legislation are anticipated. Existing legislation is broad enough to regulate any form of lending involving legal tenders regardless of the underlying platform. Cryptocurrencies are not considered as legal tender and accordingly are not subject to current legislation.

Digital payments, remittances and foreign exchange?

Many foreign nationals living in South Africa regularly remit funds within the country or across borders. This can be costly and risky, especially for cash transactions. Even so, the take-up rate for alternative technologies and platforms has been low because of:

- limited cost savings achieved;
- providers' reliance on traditional financial infrastructure (eg, bank accounts and automated teller machines); and
- low levels of financial and digital literacy.

Digital payments

The payment industry is comprehensively regulated in South Africa. Bank and non-bank participants must have formal authorisation from SARB or the Payment Association of South Africa (PASA). Fintech providers that facilitate digital payments involving legal tender are considered systems operators or third-party service providers, depending on their business activities, and must have PASA authorisation. In its Position Paper on Cryptocurrencies, issued in 2014, SARB pointed out that virtual currencies are not legal tender in South Africa and should not be used as payment for the discharge of any obligation in a manner that suggests that they are a perfect substitute of legal tender. Despite its criticism of payments using virtual currencies, SARB does not prohibit or regulate them.

Remittances and foreign exchange

The anonymity of transactions in digital currencies has the potential to result in exchange control circumvention according to SARB. South African residents who choose to acquire digital currencies do so at their own risk and without recourse to the authorities. Further, SARB does not consider requests for cross-border trade in these currencies.

Alternative financing (including crowdfunding)?

Alternative financing through digital platforms is growing significantly in South Africa. The main focus is on funding small businesses and supporting charitable causes. In cryptocurrency-based financing, there have been a few token sales and initial coin offerings by South African ventures, but no distinct trends have emerged in the way that they are structured.

Crowdfunding is not specifically regulated. However, certain crowdfunding activities may trigger registration requirements under the National Credit Act 2005. In essence, where a credit transaction has an effect within South Africa, it may be regulated regardless of the medium used to provide the credit.

Investment, asset and wealth management?

Activity in this space has been minimal. However, clients have approached our firm for assistance in understanding the regulatory framework for distributed ledger technology and cryptocurrency-backed products. The most common enquiry is about structuring schemes that pool funds from clients (funds/collective investment schemes) and invest them in cryptocurrencies. The pooling of funds from members of the public for investment purposes (where the members share the risks and benefits of investment in proportion to their participatory interest in the pool) is a regulated activity in South Africa and requires a licence. However, a direct sale of cryptocurrencies (including initial coin offerings) in South Africa is currently not regulated and does not require a licence.

Robo-advice and artificial intelligence?

The use of robo-advisers in the South African financial services market is highly topical. Some financial services providers have invested in developing investment advice platforms driven by artificial intelligence. Itransact, an authorised financial services provider, has already launched its automated investment platform, ItransactGO.

The regulatory position around robo-advisers has been clarified to some extent by the Determination of Fit and Proper Requirements for Financial Services Providers 2017, which specifically provides for the regulator's expectations of advisers that provide automated advice. Cryptocurrencies are not financial products and therefore the provision of robo-advice on cryptocurrencies is not currently regulated.

Any other technologies?

N/A.

Regulatory issues*Regulatory approach***How would you describe the regulatory policy for fintech products and services in your jurisdiction?**

South African regulators have adopted a pro-innovation stance. The South African Reserve Bank (SARB) set the tone in 2009 by issuing a position paper on electronic money, stating that it welcomed innovative new technological developments, wished to familiarise itself with these and would continue to assess the benefits and use of such innovations to enhance financial access and efficiency. This was followed by a media statement in February 2018 in which SARB set out its approach to fintech innovations. In its statement, SARB indicated that it is taking a balanced approach to technological innovations in light of potential benefits and risks. SARB has recently established the FinTech Programme to strategically assess the emergence of fintech in a structured and organised manner and consider its regulatory implications. The main goal of the programme is to track and analyse fintech developments and assist policymakers in formulating frameworks in response to these emerging innovations. According to the media statement issued by SARB on February 13 2018, the programme will focus on three primary objectives:

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Have any fintech-specific laws or regulations been enacted in your jurisdiction? Are any envisaged?

There are currently no fintech-specific laws.

*Regulatory authorities***Which government authorities regulate the provision of fintech products and services?**

SARB, the Financial Services Board (which is to be replaced by the Financial Sector Conduct Authority) and the Financial Intelligence Centre have jurisdiction over different aspects of fintech-based products. However, these regulators have confirmed that they do not currently regulate digital currencies. In early 2018, the government established a multi-agency working group to engage the industry on various aspects of digital financial innovation, particularly cryptocurrency.

*Financial regulatory framework***Which laws and regulations governing the provision of financial services apply to fintech businesses?**

South African financial services legislation is wide enough to apply to most fintech products and services providers. The insurance acts already have broad deeming provisions that allow the regulator to require licensing. In the credit lending environment, the National Credit Act 2005 applies to credit transactions having an effect within South Africa. However, this does not mean that fintech businesses and products will be caught in all instances. For example, a cryptocurrency lending platform will not trigger any registration requirements under the National Credit Act.

Under what conditions are fintech businesses subject to licensing requirements? Are there any exemptions?

No licensing requirements apply specifically to fintech businesses in South Africa. Under the current framework, they must be licensed only if they provide fintech-based products or services essentially similar to regulated financial products or services. Examples are the insurance, financial services and credit lending industries.

Are any fintech products or services prohibited in your jurisdiction?

No, but South African regulators have warned the public about investing or transacting in perceived risky instruments such as digital currencies. On September 18 2014 SARB, the Financial Services Board and the Financial Intelligence Centre warned that as there are no specific laws or regulations on virtual currencies, there is no legal protection for users. This was echoed in a December 2014

position paper in which SARB pointed out that digital currency is unregulated and, therefore, participants engage in it at their own risk.

Data protection and cybersecurity

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

The Protection of Personal Information Act 4/2013 will govern this. Certain provisions of the act are already in effect, but not the operative provisions on when and how personal information may be lawfully processed. These are expected to come into effect during 2018. That said, it is already common practice for businesses in South Africa to comply given common law and constitutional rights protecting personal information.

Anyone processing personal data will be bound by the Protection of Personal Information Act, including fintech providers. For example, personal information may be collected only for a specific, explicitly defined and lawful purpose, and kept only until that purpose has been served. There are restrictions on using data collected for electronic data marketing, including via email and text.

Data subjects have the right to know who is processing their personal information and why, and to prevent it from being used for direct marketing.

The Protection of Personal Information Act specifically prohibits the transfer of personal data to a third party in a foreign country unless that country has 'adequate' protections.

What cybersecurity regulations or standards apply to fintech businesses?

South Africa does not have a single, overarching legal and regulatory framework for cybersecurity. Cybersecurity is dealt with in various pieces of legislation, some with overlapping mandates.

This may change once the Cybercrimes and Cybersecurity Bill is passed. It was first tabled in Parliament in February 2017, but enactment has been delayed partly as a result of public and academic criticism that the bill is too broad. It will likely be enacted later in 2018, with far-reaching implications for individuals and organisations that process data, including fintech businesses.

Financial crime

What anti-fraud, anti-money laundering or other financial crime regulations govern the provision of fintech products and services?

No anti-fraud, anti-money laundering or other financial crime regulations specifically govern fintech products and services in South Africa. However, a fintech business may have to register as an accountable institution under the Financial Intelligence Centre Act 2001, South Africa's chief anti-money laundering (AML) legislation. An example is where a particular fintech-based product meets the definition of a 'financial product' under the Financial Advisory and Intermediary Services Act 2002.

Other acts that govern financial crime in South Africa include:

- the Prevention and Combating of Corrupt Activities Act 2004;
- the Prevention of Organised Crime Act 1998; and
- the Protection of Constitutional Democracy Against Terrorist and Related Activities 2004.

South Africa also belongs to the Financial Action Task Group and the Eastern and Southern Africa Anti-money Laundering Group.

No single law enforcement agency is charged with the investigation of financial crime in South Africa. Agencies with investigation powers include the South African Police Service, the National Prosecuting Authority and Asset Forfeiture Unit, the Public Protector and the Special Investigations Unit. The circumstances of each case determine who investigates it.

What precautions should fintech businesses take to ensure compliance with these provisions?

Fintech businesses should model their businesses on the regulatory regime that applies to similar, non-fintech businesses and products. For example, the Financial Intelligence Centre Act calls for certain know your client exercises and client verification procedures before conducting any transactions with clients. It also compels companies to report suspicious activity on clients'

accounts or transactions.

Fintech companies should be aware of how the compliance provisions of the Cybercrimes and Cybersecurity Bill will affect them.

They should have employees with AML expertise or access to specialist external AML advisers to ensure that new products and services comply with AML requirements.

Companies should also be aware of mandatory reporting obligations for certain frauds.

Consumer protection

What consumer protection laws and regulations apply to the provision of fintech products and services?

Just as the Consumer Protection Act 2008 applies to certain banking and financial service, it also applies to relevant fintech services. Its purpose is to promote fair business practices and protect consumers from trade practices that are unconscionable, unfair, unreasonable, unjust, deceptive, misleading or fraudulent.

Among other things, the Consumer Protection Act regulates unwanted direct marketing, the marketing of goods and services and the right to safe, good-quality goods.

Competition

Does the provision of fintech products or services in your jurisdiction raise any particular competition regulatory concerns?

No, generally speaking, fintech can be viewed as pro-competitive in the financial services market. One area where the Competition Act 1998 could conceivably affect fintech companies is merger control, such as when existing players acquire or merge with a fintech company or create a fintech joint venture with one or more other companies. The Competition Commission must be notified about a merger that exceeds certain financial thresholds and involves economic activity that has an effect within South Africa.

Cross-border regulation

Are there any particular regulatory issues concerning the cross-border provision of fintech products and services (eg, operating jurisdiction rules and currency controls)?

There may be certain tax and exchange control implications where fintech products and services are provided into South Africa on a cross-border basis. Payments for such products and services would require certain tax and exchange control approvals from the South African Revenue Services and the South Africa Reserve Bank (SARB), respectively. Assets (including cash and securities) cannot be transferred out of South Africa without SARB's prior approval. Therefore, the buying of cryptocurrencies from offshore exchanges or the purchase of goods and services using cryptocurrencies may raise tax, foreign exchange control and money laundering concerns from the authorities.

Financing, investment and government support

Government support

Does the government provide any incentives or support programmes to promote fintech innovation in your jurisdiction (eg, tax incentives, grants and regulatory sandboxes)?

The South African Reserve Bank (SARB) issued a media statement in February 2018 setting out its approach to fintech innovations. In its statement, SARB indicated that it is taking a balanced approach to technological innovations in light of potential benefits and risks. SARB has recently established the FinTech Programme to strategically assess the emergence of fintech in a structured and organised manner and consider its regulatory implications. The main goal of the programme is to track and analyse fintech developments and to assist policymakers in formulating frameworks in response to these emerging innovations. According to the media statement issued by SARB on February 13 2018, the programme will focus on three primary objectives:

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Has the government concluded any international cooperation agreements to promote and facilitate the cross-border expansion of fintech businesses?

No.

Financing and investment

What private financing and investment schemes are available and commonly used for fintech start-ups in your jurisdiction?

South Africa has experienced an increase in the introduction of pooling schemes. These are strictly limited to soliciting and accepting cryptocurrency as a participatory interest. The pooled cryptocurrencies are then further loaned to borrowers on cryptocurrency exchanges for a return.

Ancillary issues

IP rights

What forms of IP protection are available for fintech innovations?

Intellectual property in South Africa is protected as follows:

- copyright under the Copyright Act 1978;
- patents under the Patents Act 1978;
- registered designs under the Designs Act 1993;
- trademarks under the Trademarks Act 1993;
- trade names and business names under the common law, the Consumer Protection Act 2008 and Companies Act 2008;
- domain names under the common law and per agreements with the relevant domain name administrator; and
- confidential information, trade secrets and know-how under the common law against misappropriation and misuse of trade secrets.

What rules govern the ownership of IP rights to fintech innovations?

This will depend on the type of IP rights involved. The most relevant categories of intellectual property protecting fintech innovations will be copyright, patents and confidential information, trade secrets and know-how. When it comes to copyright, an important point is that copyright will vest in the employer if a work was created in the course and scope of an author's employment.

Patent rights vest in the holder of a patent registered under the Patents Act.

Confidential information, trade secrets and know-how are protected under the common law against misappropriation and misuse of trade secrets. A person who obtains information in confidence from another may not use it in a manner that is detrimental to the disclosing party. Parties usually rely on contractual undertakings to protect these rights.

Immigration

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

South African immigration is governed by the Immigration Act 2002. Briefly, the government supports skilled immigration in developing and expanding the economy. This policy is balanced against the need to address high unemployment levels and increase employment opportunities for local citizens.

The Department of Home Affairs controls, regulates and facilitates immigration to South Africa, and issues the following types of work visa:

- general work visa;
- critical skills visa; and
- intra-company transfer visa.

Alternatively, a company may apply for a corporate visa.

Foreigners intending to work in South Africa may alternatively apply for a Section 11(2) visitor's visa or a business visa if they meet the prescribed requirements.

What immigration schemes are available for foreign investors and entrepreneurs wishing to invest in or establish a fintech business in your jurisdiction?

There are no schemes specific to fintech businesses or innovation.

A foreign investor or entrepreneur may apply for a business visa if a minimum capital investment (currently R5 million) is invested in a business and the investor gives an undertaking that 60% of the employees in the business will be South African citizens or permanent residents.

Foreign investors and entrepreneurs need approval from the South African Reserve Bank (SARB) when investing in South Africa. Approval must be obtained before any transaction is concluded. In this way, when the investment matures, the investor will be able to repatriate the proceeds offshore without restrictions.

The general exchange control restrictions apply when foreign investors look to transfer capital offshore. Any transfers of assets must have SARB's prior approval.

Exchange control approval must be made through an authorised dealer (any of the large South African registered banks) to SARB's Financial Surveillance Department.

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