

EBA Report

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18 July 2019

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# EBA Report

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on Regulatory perimeter, regulatory status and authorisation  
approaches in relation to FinTech activities

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# Abbreviations

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AI	artificial intelligence
AIFMD	Alternative Investment Fund Managers Directive (Directive 2011/61/EU)
AML	anti-money laundering
AMLD5	Anti-Money Laundering Directive 5 (Directive (EU) 2018/843)
CA	competent authority
CFT	combating the financing of terrorism
CRD IV	Capital Requirements Directive IV (Directive 2013/36/EU)
DLT	distributed ledger technology
EBA	European Banking Authority
ECB	European Central Bank
EIOPA	European Insurance and Occupational Pensions Authority
ESA	European supervisory authority
ESMA	European Securities and Markets Authority
Forex	foreign exchange
FinTech	financial technology
EMD2	Electronic Money Directive 2 (Directive 2009/110/EC)
ICO	initial coin offering
IT	information technology
KYC	know-your-customer
MCD	Mortgage Credit Directive (Directive 2014/17/EU)
MiFID II	Market in Financial Instruments Directive II (Directive 2014/65/EU)
NFC	non-financial counterparty
NPL	non-performing loan
PSD2	Payment Services Directive 2 (Directive (EU) 2015/2366)
POS	point-of-sale
SME	small or medium-sized enterprise

## Executive summary

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1. This Report illustrates the findings of an analysis carried out by the EBA on issues related to access to the market for financial firms with innovative business models and/or delivery mechanisms, referred to as FinTech firms. The analysis focused on (a) the monitoring of national developments on the regulatory perimeter; (b) the national regulatory status of FinTech firms; and (c) the approaches followed by CAs when granting authorisation under CRD IV, PSD2 and EMD2 and in particular the application of the principles of proportionality and flexibility.
2. The results of the monitoring exercise conducted in relation to the **regulatory perimeter** for activities and services relating to FinTech innovative business models or delivery mechanisms show a steady scenario with very little national legislative activity affecting the regulatory perimeter of the CAs under the EBA's remit.
3. The analysis of the national **regulatory status** of FinTech firms with innovative business models or delivery mechanisms shows two developments: (a) the move of certain activities – notably payment initiation services and account information services – from not being subject to any regulatory regime to being subject to PSD2 after its transposition into national law; and (b) with the exception of crowdfunding and to some extent activities related to crypto-assets, the ancillary/non-financial nature of the services and activities provided by FinTech firms not subject to any regulatory regime.
4. In the light of the above findings on the regulatory perimeter and regulatory status, the Report takes note of the current state of play. The EBA's view at this stage is to continue observing the activities in the market as part of its mandate to monitor innovation and the regulatory perimeter, the EBA also considers that it is not necessary to put forward any specific recommendation. In this latter regard, the EBA observes that significant issues relating to regulatory perimeter and regulatory status - like crowdfunding and crypto-assets - referred to in this Report are being considered in the context of on-going European work streams. In particular, as to crowdfunding, the European Commission submitted a Proposal for Regulation in 2018<sup>1</sup> which is under consideration of the European Parliament and of the Council; as to crypto-assets, the EBA published a Report on crypto assets in January 2019<sup>2</sup> and the follow-up actions set out therein are in the process of being implemented.
5. With regard to **authorisation approaches** under the current EU legal framework, the findings on the application of the principles of **proportionality** and **flexibility** under CRD IV and PSD2 suggest that there is consensus on considering the principle of proportionality to be embedded in the current EU legislative and regulatory framework. Similarly, there is consensus that the

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<sup>1</sup> European Commission Proposal of Regulation on European crowdfunding service providers, COM(2018)0113.

<sup>2</sup> <https://eba.europa.eu/-/eba-reports-on-crypto-assets>

principles of proportionality and flexibility are applied in the same way irrespective of whether the applicant presents a traditional or innovative business model and/or delivery mechanism.

6. With specific regard to PSD2, flexibility and proportionality are also expressly embedded in that legal act, for instance in (i) the national option under Article 32 for smaller payment institutions, (ii) the exemption for the providers of account information services offering solely that payment service and (iii) the specification of different levels of capital requirements depending on the particular services provided. With regard to supervisory practices, CAs apply the proportionality principle following a risk based approach and taking into account the nature, scale and complexity of the services (payment and/or e-money services), the size of the institution and the organisational structure (including the use of agents, outsource providers, foreign branches, number of employees). The EBA **will continue its monitoring activity** with regard to the application of the principle of proportionality, in particular to assess whether it is used to fast track applications from FinTech firms for authorisation as a payment or an e-money institution.
7. With respect to the **attachment of conditions, limitations and restrictions to the authorisation**, the findings show the existence of various practices consisting in the imposition of conditions precedent - such as amendment of the applicant's legal structure or articles of association - or of supervisory requirements to be met on an ongoing basis - such as limit on deposit taking, limitations regarding granting credits and loans to related parties etc ... Further work may therefore be needed to **ensure a fully level playing field in this area**, work that the EBA could carry out in the context of the mandate conferred by Directive (EU) 2019/878 amending the CRDIV, for the development of Guidelines to specify a common assessment methodology for granting authorisations under that Directive.
8. With regard to authorisation as a credit institution, additional monitoring and analysis may be carried out with regard to the national option relating to the **special regime** envisaged in Article 12(4) of the CRDIV allowing a lower **initial capital** of at least EUR 1 million, and its use in the context of applications by FinTech credit institutions. Based on the EBA findings, in the last 5 years in the whole EU, a total of 6 FinTech applicant credit institutions have been granted the authorisation based on such special regimes.

## Background information

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1. With a view to promoting a more competitive and innovative financial sector in the European Union, the European Commission adopted in March 2018 the FinTech Action Plan inviting the European Supervisory Authorities (ESAs) ‘to map current authorising and licensing approaches for innovative FinTech business models. In particular, they should explore how proportionality and flexibility in the financial services legislation are applied by national authorities’. The Action Plan also indicates that ‘[w]here appropriate, the ESAs should issue guidelines on approaches and procedures or present recommendations to the Commission on the need to adapt EU financial services legislation’<sup>3</sup>.
2. The EBA’s FinTech Roadmap<sup>4</sup> – in line with the Commission’s FinTech Action Plan – specifies ‘**monitoring the regulatory perimeter**, including assessing **current authorisation and licensing approaches** to FinTech firms’, as one of the EBA’s priorities for 2018/2019. In particular, the EBA’s FinTech Roadmap, building on the findings of the *Discussion Paper on the EBA’s approach to financial technology (FinTech)* (2017 FinTech Discussion Paper)<sup>5</sup>, refers to the need to ‘analyse in further detail the nature of the services being provided by FinTech firms pursuant to national regimes/no identified regime and [to] assess prudential requirements and conduct of business requirements’<sup>6</sup>. It also entrusted the EBA with the task of ‘[mapping] the authorisation and licensing approaches and procedures applied by competent authorities when authorising firms adopting innovative FinTech business models, in particular with a view to assessing how proportionality and flexibility are applied in the context of existing EU and national law’<sup>7</sup>.
3. This Report on the regulatory perimeter, regulatory status and authorisation approaches in relation to FinTech activities (‘Report’) is intended to fulfil the tasks described above.
4. The Report has been developed based on the results of two surveys addressed to CAs within the EBA’s remit pursuant to CRD IV, PSD2, EMD2 and the MCD, on further discussions of the relevant issues with the CAs and on the EBA’s research.
5. In line with the mandate received, the surveys focused on the following three areas:

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<sup>3</sup> The European Commission’s FinTech Action Plan ((COM)2018) 109 final, page 7); available at [https://eur-lex.europa.eu/resource.html?uri=cellar:6793c578-22e6-11e8-ac73-01aa75ed71a1.0001.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:6793c578-22e6-11e8-ac73-01aa75ed71a1.0001.02/DOC_1&format=PDF)

<sup>4</sup> EBA, *The EBA’s FinTech Roadmap – conclusions from the consultation on the EBA’s approach to financial technology (FinTech)*, 15 March 2018, available at <https://eba.europa.eu/documents/10180/1919160/EBA+FinTech+Roadmap.pdf>

<sup>5</sup> EBA, *Discussion Paper on the EBA’s approach to financial technology (FinTech)*, 4 August 2017, available at <https://eba.europa.eu/documents/10180/1919160/EBA+Discussion+Paper+on+Fintech+%28EBA-DP-2017-02%29.pdf>

<sup>6</sup> EBA 2017 FinTech Discussion Paper, paragraph 58.

<sup>7</sup> EBA 2017 FinTech Discussion Paper, paragraph 59.

- **monitoring of the regulatory perimeter** of FinTech activities and/or services with a view to assessing any amendment/extension consequent to any newly proposed or adopted national legislation or regulation;
  - **analysis of the regulatory status and actual activities and/or services provided by FinTech firms with innovative business models or delivery mechanisms that are subject to national authorisation or registration** with a view to assessing a potential unlevel playing field across the EU, **or that are not subject to any regulatory regime** (under either EU or national law and regulation), with a view to assessing whether they are actually not of a financial nature and therefore keeping them outside the regulatory perimeter is justified;
  - **application of the principles of proportionality and flexibility in the authorisation and licensing practices** of credit institutions, payment institutions and e-money institutions, with a view to analysing how the EU regime is applied in practice and whether it is adequate with respect to market access for firms with FinTech innovative business models or delivery mechanisms.
6. Responses to the surveys were submitted by 27 CAs (AT, BE, BG, CZ, DE, DK, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SI, SK and UK) and the ECB (only to the section on authorisation of credit institutions), thus providing a representative picture of the state of play in the EU. The responses are updated as of **22 March 2019**.

# 1. The regulatory perimeter and the regulatory status of FinTech firms

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## 1.1 Competent authorities' regulatory perimeter

1. As part of its tasks relating to ensuring a level playing field across the EU and the development of a Single Rulebook, the EBA regularly monitors the regulatory perimeter of the authorities under its remit. Previous reports have dealt with the regulatory perimeter in accordance with CRD IV<sup>8</sup> and in relation to investment firms<sup>9</sup>.
2. In accordance with the mandate set out in the Commission's FinTech Action Plan, the EBA has performed a monitoring exercise in relation to the regulatory perimeter of the CAs under the EBA's remit that are competent under CRD IV, PSD2, EMD2 and the MCD. The objective of this exercise was to identify any adopted national law or regulation having the effect of extending the CA's scope of competence to FinTech services and/or activities with innovative business models or delivery mechanisms. In order to capture forward-looking developments, the exercise also enquired about any proposed but not yet adopted change to the regulatory perimeter having the effect of creating a new activity within the scope of the CA's remit.
3. The monitoring of the regulatory perimeter was conducted by addressing specific questions contained in a survey to CAs, covering the period between 1 September 2017 and 22 March 2019.
4. Changes to the CAs' regulatory perimeter deriving from the implementation of European directives, such as PSD2 and MiFID II, were outside the scope of the monitoring exercise, since they reflect changes that have been introduced throughout the EU.
5. As an additional clarification, it is worth noting that changes to the CAs' regulatory perimeter are within national legislatures' competence rather than the outcome of CAs' self-regulation. CAs' responses to the specific questions in the survey are therefore based on their best knowledge of the ongoing legislative activity in their jurisdictions.
6. With regard to **adopted** changes in the last 18 months, only one CA reported the adoption in its jurisdiction of national legislation or regulation relating to FinTech activities or services with innovative business models or delivery mechanisms affecting the CA's regulatory perimeter<sup>10</sup>.

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<sup>8</sup> EBA, *Report to the European Commission on the perimeter of credit institutions established in the Member States*, 27 November 2014, available at <https://eba.europa.eu/documents/10180/534414/2014+11+27+-+EBA+Report+-+Credit+institutions.pdf>; this report focuses in particular on the notions of 'deposits' and 'repayable funds'.

<sup>9</sup> EBA, *Report on other financial intermediaries and regulatory perimeter issues*, 9 November 2017, available at <https://eba.europa.eu/documents/10180/1720738/Report+on+OFIs.pdf>

<sup>10</sup> MT adopted the Virtual Financial Asset Act, laying down a framework for the provision of services in relation to virtual financial assets, as well as for the offering to the public of such assets. Virtual Financial Asset Act of 1 November 2018, available at <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12872&l=1>



7. Having regard to **proposed** changes to the CAs' regulatory perimeter in the last 18 months, one CA reported one such initiative. The reported case relates to a proposal for a national law on crowdfunding pending with the legislature; the proposal envisages subjecting a crowdfunding service provider to an authorisation requirement under national law and to compliance with conduct requirements relating to controlling persons, approved persons, governance and remuneration.
8. For the sake of completeness, and with a view to obtaining a full picture of the adjustments to the regulatory perimeter within each jurisdiction, CAs were also asked to report any adopted or proposed legislative or regulatory change on the regulatory perimeter of any other financial authority within the Member State. To the best knowledge of each respondent, the regulatory perimeter of the other financial authorities within the same Member State can be broadly considered steady and not subject to significant changes in connection with FinTech services and/or activities. These conclusions are confirmed by the parallel monitoring exercises carried out by EIOPA<sup>11</sup>.
9. With a view to capturing trends in the financial services sector, the EBA also explored whether CAs (formally or informally) monitor any activity for which a requirement to be authorised or registered under EU or national law does not apply.
10. It is worth clarifying that activities carried out by entities that are not subject to a regulatory regime are typically outside the scope of CAs' remit; for this reason, CAs reported the absence of a formal 'monitoring mandate' for FinTech services/activities. Nonetheless, the analysis carried out shows the existence of various forms of non-regular monitoring by CAs, for instance in the context of innovation hubs, or via targeted surveys<sup>12</sup>, or in connection with the detection of fraud against consumers, or the imposition of sanctions in cases where regulated activities and/or services are carried out without the necessary authorisation or registration. Regular and targeted observation is carried out for financial stability purposes. With specific regard to innovation hubs, it is worth noting that according to the findings of the ESAs January 2019 Joint Report on regulatory sandboxes and innovation hubs<sup>13</sup>, CAs in 21 Member States and 3 CAs of EEA countries have established innovation hubs and regulatory sandboxes have been

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<sup>11</sup> EIOPA, Report on best practices on licencing requirements, peer-to-peer insurance and the principle of proportionality in an InsurTech context, March 2019, available at <https://eiopa.europa.eu/Publications/EIOPA%20Best%20practices%20on%20licencing%20March%202019.pdf>. Page 15: 'it was also stated that rather than automatically introducing new regulation to address new market developments, policymakers at EU and national level should review how the application of existing rules and policy approaches might be adapted in its practical application to address such developments'.

<sup>12</sup> IT, for instance, has launched a second survey exercise addressed to a sample of credit institutions, investment firms, and payment and electronic money institutions, aimed at understanding current incentives and constraints and monitoring investment programmes. The results of the first survey have been published in the report *FinTech in Italia: Indagine conoscitiva sull'adozione delle innovazioni tecnologiche applicate ai servizi finanziari*, December 2017, available at [https://www.bancaditalia.it/compiti/vigilanza/analisi-sistema/stat-banche-intermediari/Fintech\\_in\\_Italia\\_2017.pdf](https://www.bancaditalia.it/compiti/vigilanza/analisi-sistema/stat-banche-intermediari/Fintech_in_Italia_2017.pdf)

<sup>13</sup> ESAs Joint Report on Regulatory sandboxes and innovation hubs published on 7 January 2019, available at <https://eba.europa.eu/documents/10180/2545547/JC+2018+74+Joint+Report+on+Regulatory+Sandboxes+and+Innovation+Hubs.pdf>

established in 5 Member States. Since the publication of the report more innovation hubs and regulatory sandboxes have been established or are in the course of establishment. Innovation hubs and regulatory sandboxes (innovation facilitators) provide an excellent tool to help authorities monitor innovations and identify at any early stage regulatory and supervisory issues, including issues regarding the regulatory perimeter. In order to facilitate knowledge sharing on financial innovations, in April 2019 the European Forum for Innovation Facilitators was launched to promote coordination and cooperation among CAs and to foster the scaling up of innovation in the EU financial sector<sup>14</sup>. This forum can be used to discuss matters relating to the regulatory perimeter arising from innovations discussed or tested in the context of innovation facilitators.

11. Within the limits described above, the EBA found that the large majority of CAs are engaged in some way in monitoring the exercise of FinTech activities or services with innovative business models or delivery mechanisms, in particular via the innovation hubs. As to the types of activities that are monitored, some CAs are interested in all innovative activities, while others referred in particular to crypto-assets<sup>15</sup> and crowdfunding.

## 1.2 FinTech firms' regulatory status

### 1.2.1 Introduction: follow-up to the 2017 FinTech Discussion Paper

12. In line with the mandate in the Commission's FinTech Action Plan, this part of the Report explores issues relating to the regulatory status of FinTech firms that the EBA 2017 FinTech Discussion Paper identified as requiring additional investigation.
13. As background information, it is worth recalling that, to inform its 2017 FinTech Discussion Paper, the EBA issued a survey to CAs asking them to report on a sample of FinTech firms, namely on their regulatory status and activities. Based on the responses reported, the 2017 FinTech Discussion Paper observed:

'Firms in the sample may be regulated pursuant to EU law or national law, or may be unregulated ... . Of the firms in the FinTech sample, 18% are payment institutions under the PSD, 11% are investment firms under MiFID, 9% are credit institutions under the CRD and 6.5% are electronic money institutions under the EMD. 31% are not subject to a regulatory regime under EU or national law, 9% are subject to a national registration regime and 5% are subject to a national authorisation regime. The regulatory status of 8% of the FinTech firms [in the

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<sup>14</sup> [https://ec.europa.eu/commission/commissioners/2014-2019/dombrovskis/announcements/fintech-action-plan-keynote-speech-vp-dombrovskis-inaugural-event-european-forum-innovation\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/dombrovskis/announcements/fintech-action-plan-keynote-speech-vp-dombrovskis-inaugural-event-european-forum-innovation_en)

<sup>15</sup> NL, for instance, as a result of its monitoring and analysis has issued a recommendation to the national parliament to introduce, in the context of the transposition of AMLD5, a national licensing regime for crypto-asset exchange platforms and crypto-asset wallet providers in order to ensure more effective prevention of money laundering and terrorist financing; see the relevant press release, available at <https://www.dnb.nl/en/news/news-and-archive/Nieuws2019/dnb381599.jsp>

sample] could not be identified. No firms in the FinTech sample were classified as credit intermediaries under the MCD<sup>16</sup>.

14. The 2017 FinTech Discussion Paper therefore underscored the need for further investigation as regards (a) firms subject to a national authorisation or registration regime given the potential for divergences in the treatment of such FinTech firms across the EU and (b) the activities of the high number (31%) of FinTech firms in the sample reported to not be subject to any regulatory regime. This additional analysis would aim to assess the 'rationale for the different regulatory treatment and to identify if there are any regulatory arbitrage or uncovered consumer protection risks'<sup>17</sup>.
15. The following sections therefore describe the results of the additional investigation that has been conducted via the survey and subsequent interaction with the CAs on the actual activities carried out by the entities included in the 2017 sample of FinTech firms reported to be subject to authorisation or registration under national law or to not be subject to any regulatory regime.

### **1.2.2 FinTech firms subject to authorisation under national law**

16. As noted in the 2017 FinTech Discussion Paper, 5% of firms in the 2017 FinTech sample were subject to authorisation under national law.
17. Based on the responses and clarifications provided by the CAs for the purpose of this Report, these firms provide a variety of activities, such as crowdfunding, consumer credit (also with the support of robo advice), financial intermediation services as multiple agent, comparison services and credit reference services.

### **1.2.3 FinTech firms subject to registration under national law**

18. As noted in the 2017 FinTech Discussion Paper, 9% of the sample of FinTech firms were subject to registration requirements under national law.
19. Based on the responses and clarifications provided by the CAs for the purpose of this Report, these firms undertake a variety of activities, such as crowdfunding, peer-to-peer lending, credit intermediation, including consumer credit intermediation, consumer credit (also with the support of robo advice), comparison services, money broking, and portfolio management and advice.
20. It is also worth noting that some activities, for instance crowdfunding, are reported as subject to authorisation in some jurisdictions and to registration in others<sup>18</sup>. Potential risks of

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<sup>16</sup> EBA 2017 FinTech Discussion Paper, page 20.

<sup>17</sup> EBA 2017 FinTech Discussion Paper, page 21.

<sup>18</sup> Similar considerations apply with regard to comparison services and to firms providing consumer credit; as to the latter, Article 20 of Directive 2008/48/EC on credit agreements for consumers leaves it to national law to determine the

regulatory arbitrage (if any) are expected to be minimised by the adoption of a harmonised EU regime on crowdfunding service operators that lays down mandatory authorisation requirements and conduct rules for crowdfunding service providers operating cross-border<sup>19</sup>. While the current proposal addresses only cross-border service providers, a harmonised EU regime applicable to all crowdfunding operators, cross-border and domestic alike, would ensure uniform rules on consumer protection and on AML/CFT.

21. Finally, it should be noted that some firms operating within the scope of PSD2 were reported as subject to registration rather than authorisation requirements in accordance with the simplified regime set out in Article 32 of PSD2.

#### 1.2.4 FinTech firms not subject to any regulatory regime under national law

22. As noted in the 2017 FinTech Discussion Paper, 31% of the firms in the 2017 FinTech sample were not subject to any regulatory regime under national or EU law.

23. For the purpose of this Report, particular attention has been devoted to this category of firms with a view to:

**a) recording any shift among the FinTech sample firms from not being subject to any regulatory regime to being subject to a regulatory regime;**

**b) gaining a better understanding of the specific type and nature of unregulated activities or services** provided in order to better assess whether there are any gaps in the perimeter. In this regard, the analysis focused on understanding whether the activities and/or services provided by firms in this category are of a **financial nature** or rather relate to **ancillary/non-financial aspects** of the financial business.

- a. **Shift from not being subject to any regulatory regime to being subject to a regulatory regime**

24. The transposition of PSD2, which has extended its scope of application to payment initiation services and account information services previously outside its scope, has affected the regulatory status of firms identified in the 2017 FinTech sample as not being subject to any regulatory regime. Depending on the type of activity exercised, they are not subject to an authorisation or, in the cases expressly envisaged in PSD2, a registration requirement. Depending on the business model, an entity can be subject to regulatory requirements in relation to the carrying out of regulated financial services; for other activities that are not regulated financial services, the entity may or may not be subject to regulatory requirements<sup>20</sup>.

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applicable licensing or regulatory regime, which may therefore vary across jurisdictions. Article 20 provides that 'Member States shall ensure that creditors are supervised by a body or authority independent from financial institutions, or regulated. This shall be without prejudice to Directive 2006/48/EC'.

<sup>19</sup> European Commission, Proposal for a regulation of the European Parliament and of the Council on European crowdfunding service providers (ECSP) for business (COM(2018) 113 final).

<sup>20</sup> See, for example, the tools to regulate these 'other' business activities in Section 4.2 of the EBA's January 2019 crypto-asset report, referred to in paragraph 31 of this Report.

This is the case, for instance, for activities relating to crypto-assets, such as sale and exchange of crypto-assets into fiat currencies, which are unregulated in most Member States, where the firm, however, is authorised to execute payments in fiat after the exchange has occurred.

25. Other changes in the regulatory status of firms in the 2017 FinTech sample may depend on changes in the business model, which may have determined changes in the regulatory status, making the firm fall within the scope of application of the national law on crowdfunding, or be authorised as an e-money institution or as an investment firm. Finally, cases of cessation and of liquidation were also reported.

**b. Specific type and nature of the unregulated activities or services**

26. Based on the responses and the clarifications provided by the CAs for the purpose of this Report, the firms in this category, namely those not subject to any regulatory regime, undertake a variety of activities, a summary of which, organised by type of activity/service, is provided in the textbox below.

**Textbox – Types of activities performed by firms in the 2017 FinTech sample that are not subject to regulatory regime under EU or national law<sup>21</sup>**

**Crypto-assets:** see Textbox, paragraph 31

**Technical services providers:** POS systems; virtual POS systems; enablers of NFC payment.

**Technological support:** apps for mobile payments; software companies that develop computer-assisted stock strategies used in portfolio management advice; providers of software solutions/RegTech firms for online identity verification for KYC/AML compliance services; technical platforms for mobile wallets and payments; technical services providers; development of apps used by associated banks; software for apps; apps for transferring money to savings account of the same customer within a specific bank; systems allowing ordering of goods online and paying in cash at a shop; providers of technical compliance services; biometric technology; technology tools for the provision of integrated solutions, consulting and software management for financial entities; technological support for crowdfunding platforms; software providing innovative banking solutions to customers; apps for the management of personal finances.

**RegTech** firms using AI to extract content from financial documents; Big Data Analysis; platforms using machine learning to prevent fraud; firms using AI for credit risk analysis.

**Other services relying on or provided via technology:** apps for company valuation (through ratios relating to profit per share, debt, risk premium, risk-free rate, unlevered beta and

<sup>21</sup> The description of the activities and business models is reported on a best-knowledge basis and does not purport to be complete. It does not constitute a supervisory assessment.

expected profit growth); handling of changes in current accounts (transaction analysis, closing an old account and opening a new account, notification to account payees).

**Platform-based services:** e.g. peer-to-peer lending; crowdfunding.

**Platform-based marketplace services:** platforms connecting businesses within a territorial region to facilitate their sales and purchases; platforms connecting businesses with investors to solve working capital needs for a fee; online marketplaces for global stock and forex trading strategies; automated trading marketplaces; platforms connecting SMEs that, through the use of algorithms, provide matching and clearing services for SMEs' invoices and the netting of mutual invoices (no cash/e-money flows within the system).

**Intermediation services:** credit intermediaries as per Article 4(5) of the MCD; factoring brokers (operating IT systems for intermediation between businesses and a factoring bank for the payment of a fee by the business).

**Credit reference services:** e.g. credit data gathering and sharing platform.

**Comparison services**

27. Based on the findings summarised above, the EBA has formed the view that the activities carried out by the firms that are not subject to any regulatory regime are – broadly speaking – of an **ancillary nature** or relate to **non-financial aspects of the financial business** and for this reason are not subject to any regulatory regime.
28. Such activities and services are, for instance, limited to the provision of technical support such as apps, IT systems and solutions for the performance of actual financial activities by other entities (e.g. online payments). Similarly, services or activities provided by RegTech firms are outside the scope of the regulatory perimeter, since they offer technology-based innovation tools and solutions for regulatory compliance services to financial institutions.
29. Similarly, 'big data analytics' services provided to financial institutions for the performance of their financial activities are not captured by regulation. Firms providing technological tools for big data analytics, such as firms providing technical support or AI tools to perform the analysis or providing robo advice, are also included within this category. Obviously, a regulatory regime would apply were the big data analytics developed by a non-regulated firm to actually be used for providing financial advice to the firm's own clients.
30. Some firms included in the 2017 FinTech sample provide crowdfunding services, including peer-to-peer-lending, an activity subject to national regulation in some Member States but unregulated in others. Unlike the services listed above, **crowdfunding should be considered a proper financial service rather than an ancillary or non-financial activity**<sup>22</sup>. The existence of

<sup>22</sup> See Commission Proposal for Regulation of European crowdfunding service providers, COM(2018)0113,

differences in regulatory status across the EU is undesirable from a level-playing-field perspective and is a source of market fragmentation. As mentioned in paragraph 20, risks of regulatory arbitrage are expected to be levelled out by the adoption of a harmonised EU regime applicable to crowdfunding service providers operating cross-border. The application of a harmonised EU regime to all, including domestic, crowdfunding service operators would ensure the application of uniform rules on consumer protection and on AML/CFT.

31. Activities and services performed by firms reported to not be subject to any regulatory regime relate to crypto-assets, in particular the operation of platforms for crypto-asset trading, the exchange of crypto-assets into fiat/other crypto-assets, and custodian services. The regulatory status of crypto-assets and proposals for the way forward were extensively covered in the EBA's Report on crypto-assets of 9 January 2019<sup>23</sup>, to which reference is made, and for this reason this subject is not explored further in this Report.

#### **Textbox – Crypto-assets**

Crypto-assets depend primarily on cryptography and DLT as part of their perceived or inherent value<sup>24</sup>.

In the early years, crypto-assets in the form of so-called virtual currencies (e.g. Bitcoin<sup>25</sup>) were most prominent, but the characteristics and uses of crypto-assets have evolved rapidly to include now three broad categories: exchange tokens, securities tokens issued as an alternative means of capital raising (ICOs and STOs)<sup>26</sup>, and utility tokens used to access DLT. There are now more than 2000 privately issued crypto-assets and some public authorities are actively considering piloting the issuance of crypto-assets<sup>27</sup>.

In the light of these developments, the European Commission tasked the EBA and ESMA with carrying out an assessment of the applicability and suitability of current EU law to crypto-assets. The ESAs reported their findings in January 2019, with the EBA reporting on issues relating to banking, payments, e-money and AML/CFT requirements, and ESMA reporting on ICOs and securities and markets laws (including MiFID)<sup>28</sup>. These reports build on earlier reports and advice

<sup>23</sup> EBA, *Report with advice for the European Commission on crypto-assets*, 9 January 2019, available at <https://eba.europa.eu/documents/10180/2545547/EBA+Report+on+crypto+assets.pdf>

<sup>24</sup> FSB, *Crypto-asset markets: potential channels for future financial stability implications*, October 2018, available at <http://www.fsb.org/2018/10/crypto-asset-markets-potential-channels-for-future-financial-stability-implications/>

<sup>25</sup> Nakamoto, S. (2008), Bitcoin: a peer-to-peer electronic cash system, available at <https://bitcoin.org/bitcoin.pdf>

<sup>26</sup> For further information, see ESMA, *Advice: initial coin offerings and crypto-assets*, January 2019, available at [https://www.esma.europa.eu/sites/default/files/library/esma50-157-1391\\_crypto\\_advice.pdf](https://www.esma.europa.eu/sites/default/files/library/esma50-157-1391_crypto_advice.pdf)

<sup>27</sup> See, for example, BCBS, *Annual economic report*, Chapter 5, 'Crypto-currencies: looking beyond they hype', June 2018, available at <https://www.bis.org/publ/arpdf/ar2018e5.htm>

<sup>28</sup> See EBA *Report with advice for the European Commission on crypto-assets*, 9 January 2019, available at <https://eba.europa.eu/documents/10180/2545547/EBA+Report+on+crypto+assets.pdf>; and ESMA, *Advice: initial coin*



from the ESAs and previous warnings to consumers and financial institutions about risks arising from activities involving virtual currencies<sup>29</sup>.

As set out in the EBA's report, crypto-assets typically fall outside the scope of current EU financial services regulation. For those crypto-assets that do fall within it (e.g. those that qualify as financial instruments within the meaning of the MiFID or as electronic money pursuant to the second Electronic Money Directive) certain associated activities are subject to financial regulation<sup>30</sup>.

The European Commission is now taking forward further analytical work based on the reports and advice of the EBA and ESMA.

### 1.2.5 Key findings of the analysis of regulatory status

32. The analysis of the activities carried out by the firms in the 2017 FinTech sample shows that such firms provide a wide range of activities. The EBA devoted special attention to those firms in the sample that in the 2017 FinTech Discussion Paper were found to not be subject to any regulatory regime, with a view to better understanding the activities and services actually provided and to assessing whether it is justifiable that they are not regulated.
33. Based on the findings summarised in Section 1.2.4 and in particular in the Textbox in paragraph 26, the EBA is of the view that the majority of activities and services provided by firms in the sample not subject to any regulatory regime are of an **ancillary nature** or relate to **non-financial aspects of the financial business**. These findings support the view that the firms providing such activities and services do not need to be subject to financial regulation. The regulatory status of FinTech firms will be part of the **EBA's continuous monitoring of the regulatory perimeter**, including its monitoring of the nature of ancillary services.
34. The findings also show that some firms are engaged in **crypto-asset related activities**, many aspects of which are currently not captured by regulation and are under both national and EU regulatory scrutiny to devise a way forward. The matter has been dealt with by the EBA in the ad hoc Report on crypto-assets published in January 2019, laying down the next steps, and no additional action is suggested in this Report in this regard.

*offerings and crypto-assets*, January 2019, available at [https://www.esma.europa.eu/sites/default/files/library/esma50-157-1391\\_crypto\\_advice.pdf](https://www.esma.europa.eu/sites/default/files/library/esma50-157-1391_crypto_advice.pdf)

<sup>29</sup> See EBA, 'EBA warns consumers on virtual currencies', 13 December 2013, available at <http://www.eba.europa.eu/-/eba-warns-consumers-on-virtual-currencies>, and EBA opinions on virtual currencies, July 2014 and August 2016, available respectively at <https://eba.europa.eu/documents/10180/657547/EBA-Op-2014-08+Opinion+on+Virtual+Currencies.pdf> and <https://www.eba.europa.eu/documents/10180/1547217/EBA+Opinion+on+the+Commission's+proposal+to+bring+virtual+currency+entities+into+the+scope+of+4AMLD>; ESMA, *Report: the distributed ledger technology applied to securities markets*, February 2017, available at [https://www.esma.europa.eu/system/files\\_force/library/dlt\\_report\\_-\\_esma50-1121423017-285.pdf](https://www.esma.europa.eu/system/files_force/library/dlt_report_-_esma50-1121423017-285.pdf); and joint ESAs warning, 'ESMA, EBA and EIOPA warn consumers on the risks of virtual currencies', February 2018, available at <https://www.eba.europa.eu/documents/10180/2139750/Joint+ESAs+Warning+on+Virtual+Currencies.pdf>

<sup>30</sup> For further information, see EBA, *Report with advice for the European Commission on crypto-assets*, 9 January 2019, available at <https://eba.europa.eu/documents/10180/2545547/EBA+Report+on+crypto+assets.pdf>



35. The analysis also indicates that **crowdfunding** services and **peer-to-peer lending** are carried out by firms within the sample that are not subject to any regulatory regime. As a general remark, such activities present features of financial services and activities and it is opportune that they are regulated to ensure consumer protection and AML/CFT controls. From an EU perspective, it is desirable to level the playing field and avoid internal market fragmentation with a view to enabling service providers to fully reap the benefits of the internal market. Such distortions are meant to be remedied by the Proposal for a Regulation on Crowdfunding service providers conducting cross-border business that is currently pending before the EU legislature. The EBA notes that extending the **application of harmonised consumer protection rules and AML/CFT to all crowdfunding service providers, including domestic**, would better ensure consumer protection and AML/CFT controls across the EU.

### 1.3 Challenges posed by innovative business models and/or delivery mechanisms to the current EU framework

36. In addition to further exploring the business models of the FinTech firms included in the 2017 FinTech Discussion Paper, the EBA enquired whether, outside that sample, CAs have encountered challenges in reconciling innovative business models with existing EU law and regulation.
37. Based on the responses collected, characterisation issues have been reported to arise from innovative business models and/or delivery mechanisms in relation to **PSD2** and **EMD2** and to a lesser extent to **CRD IV**<sup>31</sup>.
38. In line with the findings of the analysis of the activities and services performed by the sample of FinTech firms included in the 2017 FinTech Discussion Paper, the EBA found that some innovative activities or business models do not fall within the scope of any authorisation or registration regime under the CAs' remit<sup>32</sup>. For instance, depending on the specific business model at stake, **deposit marketplace** activities – that is, platforms enabling customers to place deposits with credit institutions at various interest rates across Europe – may also be outside the regulatory perimeter and not subject to any regulatory regime. Of note is that marketplace activities are on the rise and business models are evolving and potentially expanding to additional areas such as NPLs. In the light of this, the EBA is of the view that it should carry out **continuous monitoring** to ensure the appropriate level of regulation of marketplace-related activities.

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<sup>31</sup> In addition to issues linked to crypto-asset business models (see text box in paragraph 31), cases giving rise to questions about the applicability of PSD2 include business models relating to online platforms that facilitate consumer-to-merchant transfers and instances requiring clear identification of the role of a start-up (i.e. whether it is a mere technology provider to the payment service institutions or the payment institution itself).

With regard to authorisation under CRD IV, fewer issues have been reported, probably because of the lower number of FinTech firms applying to be authorised under CRD IV than under PSD2 and EMD2. One CA, for instance, reported the issue of whether the use of blockchain for mining purposes is compatible with CRD IV or whether it falls within the scope of other EU legislation such as the AIFMD.

<sup>32</sup> For considerations about activities related to crypto-assets, see Textbox in paragraph 31.

## 2. Authorisation approaches and application of the principle of proportionality

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### 2.1 Introduction

39. To illustrate CAs' practices in relation to and approaches towards the authorisation of FinTech activities and to explore whether the current framework provides sufficient adaptability for the assessment of applicants for authorisation with innovative business models and/or delivery mechanisms, the EBA collected information on practices followed by the CAs on these specific issues via a survey. Unlike the first section of the survey, which was aimed at collecting information on developments at the national level, the second section focused on the adequacy of the EU legal framework to cope with FinTech innovative business models and delivery mechanisms. For this reason, this section of the Report is limited to the analysis of authorisation approaches and processes under CRD IV, PSD2 and EMD2.
40. The issue considered in this section is whether FinTech innovative business models and/or delivery mechanisms give rise to specific challenges in terms of the application of the EU legal framework, which, at least in part, was adopted for traditional business models. In other words, the question is if and to what extent the use of innovative technology or delivery mechanisms makes 'traditional' regulatory criteria ill-suited to assessing innovative business models, or whether the current legal framework, via the application of the principle of proportionality, is sufficiently flexible for the assessment of authorisation applications with innovative aspects.
41. Initially, attention is drawn to the **authorisation process**, including its transparency and predictability, having regard to FinTech-specific aspects.
42. Subsequently, focus is placed on the application of the **principle of proportionality** in the authorisation process, both in general – that is, without distinguishing between traditional and innovative business models and/or delivery mechanisms – and with specific regard to innovative business models and delivery mechanisms. Given the differences between the legal frameworks and related activities, separate questions were included in the survey in relation to authorisation approaches under CRD IV and under PSD2/EMD2. Given the ECB's exclusive competence to grant authorisations as credit institution for the Banking Union, responses were submitted by the ECB.

### 2.2 Authorisation process

#### 2.2.1 Guidance on the authorisation process for credit institutions

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43. As part of the analysis of authorisation approaches, attention was paid to the predictability of the authorisation process and the transparency of the assessments of applications. As part of this exercise, the EBA enquired whether CAs provide guidance to applicants as regards the application process and assessment, including to applicants with FinTech innovative business models/delivery mechanisms.
44. As a general remark, it is worth noting that, with regard to authorisation as a **credit institution** under CRD IV, as implemented in national law, the EBA has developed regulatory technical standards on the information to be provided by applicants, the requirements applicable to shareholders and the obstacles that may prevent the effective exercise of supervisory functions, as well as implementing technical standards on standard forms, templates and procedures for the provision of information<sup>33</sup>. Both sets of standards have been submitted to the European Commission for endorsement and are not yet in force.
45. The ECB (for the Banking Union) and the CAs for CZ, HR, HU, PL, SE and UK (for the non-Banking Union countries) reported having published **guidance on the authorisation process for credit institutions** under CRD IV and provided relevant links.
46. In addition, the ECB (for the Banking Union) and the CAs for HU and PL (for the non-Banking Union countries) reported having in place **additional guidance for the authorisation of credit institutions with FinTech** innovative business models/delivery mechanisms.

## 2.2.2 Guidance on the authorisation process for payment institutions and e-money institutions

47. With regard to the provision of guidance to applicants for authorisation under PSD2 and EMD2, as a preliminary remark it should be noted that PSD2 lays down the applicable regime for granting authorisations. In particular, Article 5 sets out the information requirements for applications for authorisation. PSD2 lays down maximum harmonisation provisions, which are further specified in the EBA Guidelines on authorisation and registration under PSD2<sup>34</sup> ('EBA Guidelines on authorisation and registration'), developed in accordance with Article 5(5) of PSD2 and detailing the documentation that applicants are required to submit to CAs for the purpose of authorisation or registration. These EBA guidelines entered into force on 13 January 2018, which was the transposition date of PSD2.

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<sup>33</sup> Regulatory Technical Standards under Article 8(2) of Directive 2013/36/EU on the information to be provided for the authorisation of credit institutions, the requirements applicable to shareholders and members with qualifying holdings and obstacles which may prevent the effective exercise of supervisory powers; and Implementing Technical Standards under Article 8(3) of Directive 2013/36/EU on standard forms, templates and procedures for the provision of the information required for the authorisation of credit institutions, EBA/RTS/2017/08 and EBA/RTS/2017/05, 14 July 2017, available at <https://eba.europa.eu/documents/10180/1907331/Draft+RTS+and+ITS+on+Authorisation+of+Credit+Institutions+%28EBA-RTS-2017-08+EBA-ITS-2017-05%29.pdf>

<sup>34</sup> EBA, Final Report on the EBA Guidelines under Directive (EU) 2015/2366 (PSD2) on the information to be provided for the authorisation of payment institutions and e-money institutions and for the registration of account information service providers, EBA/GL/2017/09, 11 July 2017, available at <https://eba.europa.eu/documents/10180/1904583/Final+Guidelines+on+Authorisations+of+Payment+Institutions+%28EBA-GL-2017-09%29.pdf/f0e94433-f59b-4c24-9cec-2d6a2277b62c>

48. With regard to **payment institutions** under PSD2 and **e-money institutions** under EMD2, 19 CAs reported having published guidance on the authorisation process and made it available on their websites. Four CAs reported being in the process of updating or finalising such guidance. As a general remark, CAs reported that their guidance incorporates or makes reference to the EBA Guidelines on authorisation and registration.

## 2.3 Attachment of conditions, limitations and restrictions to the authorisation

49. In line with the Commission's FinTech Action Plan, as part of the investigation into authorisation approaches, specific attention was paid to the application of flexibility and to the principle of proportionality in the context of granting authorisations pursuant to CRD IV, PSD2 and EMD2. As part of this exercise, the EBA explored whether CAs are empowered to attach conditions, limitations or restrictions to an authorisation<sup>35</sup>.
50. It is worth noting that neither CRD IV nor PSD2 provides express guidance with regard to the possibility of CAs attaching conditions, limitations or restrictions to an authorisation or in connection with its issuance. In the absence of clear guidance in the EU legal framework, conditions, limitations or restrictions to authorisations could be imposed under national law. In such cases the Court of Justice has ruled that, in principle, a competent authority can impose conditions and/or obligations where EU law provides for maximum harmonisation, in cases in which an approval would otherwise be opposed<sup>36</sup>. In the light of this ruling, the ECB – in its capacity as the CA exclusively competent to grant authorisation as a credit institution in the Banking Union – concludes that, unless it is explicitly prohibited under national law, it may impose limitations, such as conditions or obligations, at the time of granting of authorisation, with a view to addressing any residual risk or shortcomings detected in the assessment (see paragraphs 52 and 53).

### 2.3.1 Empowerment to impose conditions, limitations and restrictions on authorisation as a credit institution and related examples

51. As regards authorisations to credit institutions, 16 CAs, including the ECB, are empowered to attach conditions, limitations or restrictions to an authorisation as a credit institution. Practices differ, however, depending on whether conditions, limitations or restrictions are ancillary to the approval of the authorisation, being conditions precedent for its activation, or limitations and restrictions of a supervisory nature, to be met on an ongoing basis. The findings also make clear that such practices cannot amount to an exemption from the fulfilment of mandatory

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<sup>35</sup> Reference to these expressions is meant to apply to current practices rather than to provide regulatory or legal definitions; for this reason, several broad terms are used in the text. Broadly speaking, the words 'conditions', 'restrictions' and 'limitations' refer to commitments or requirements undertaken or imposed by the CA on the applicant.

<sup>36</sup> See Court of Justice, 25 June 2015, CO Sociedad de Gestión y Participación v. DNB and Others, C-18/14, ECLI:EU:C:2015:419, and ECB, Guide to assessments of licence applications: Licence applications in general, 2nd revised edition, January 2019, available at [https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.201901\\_guide\\_assessment\\_credit\\_inst\\_licensing\\_appl.n.pdf?639083c1690b108e5a4a32fc90b110a6](https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.201901_guide_assessment_credit_inst_licensing_appl.n.pdf?639083c1690b108e5a4a32fc90b110a6)

criteria. Finally, it is worth noting that the analysis carried out by the EBA indicates that no distinction in the attachment of such conditions, limitations or restrictions is made by either the Banking Union or the non-Banking Union CAs based on whether the business model of the applicant credit institution is innovative or traditional.

52. With regard to the different modalities to imposing conditions, limitations and restrictions, the ECB specified for the Banking Union that conditions are ancillary provisions accompanying a positive decision to grant authorisation, requiring the applicant to refrain from or to undertake certain actions. They are conditions precedent, so that the authorisation will enter into effect only upon the fulfilment of the conditions. Conditions are linked to the authorisation criteria specified in national and Union law and are proportionate, that is, they do not go beyond what is necessary to ensure that the authorisation assessment criteria are met. On a case-by-case basis, conditions may be imposed in order to ensure that the authorisation criteria specified in national and Union law are fully met. Examples of conditions precedent include the provision of additional capital, a change in legal structure and the amendment of the articles of association. It is worth underscoring that conditions should not be and are not used to remedy the applicant's inability to meet one of the assessment criteria for authorisation under national and Union law and exempt the applicant from fulfilling one or more of the mandatory criteria. In such cases, the application should rather be rejected. The timeframe within which the condition has to be met should be clearly established and relatively short, given that the authorisation will be effective only once the condition has been fulfilled.
53. The ECB also specified that, similarly to conditions, obligations are ancillary provisions imposed on the applicant requiring the applicant to undertake or refrain from certain actions following the granting of the authorisation. Obligations may be imposed in relation to matters that are considered implementing measures, or in order to address potential issues after authorisation or impose further requirements on the licensed entity. Examples include a limit on deposit taking to, for example, EUR 100.000 per client; limitations regarding granting credits and loans to related parties; the conditionality of transfer, encumbrance or pledging of shares – regardless of the percentage at stake – upon the prior approval of a competent authority; additional reporting requirements with regard to the risks arising from new products that the authorised credit institution intends to offer under its business plan; and additional reporting requirements on the establishment of effective risk management and control functions. In contrast to conditions precedent, the non-implementation of obligations does not have an automatic effect on the authorisation decision, that is, does not prejudice the effectiveness of the authorisation. Non-compliance with obligations is a supervisory matter and may result in enforcement measures and the application of sanctions. Furthermore, non-compliance with obligations may lead to the withdrawal of the licence. Obligations can be imposed in cases where there are concerns about the fulfilment of the authorisation assessment criteria on an ongoing basis, but these concerns do not justify opposition to the authorisation.
54. With regard to the non-Banking Union countries, one CA (UK) clarified that limitations and restrictions can be attached to an authorisation as a credit institution. The need for these limitations and restrictions is assessed in accordance with the principle of proportionality, and

they have to be met on an ongoing basis. Such limitations and restrictions cannot waive the fulfilment of mandatory requirements. Furthermore, the UK CA clarified that the concept of conditional authorisation does not exist in the national framework; a firm is granted authorisation only once the relevant CA is satisfied that the threshold conditions have been met.

55. Another non-Banking Union CA (HU) specified that, based on the applicable national law, it may impose specific conditions or territorial limitations and, with respect to financial service activities, limitations on certain business lines or products.
56. In the light of this overview, it may be concluded that, on the one hand, the current EU legal framework incorporates **sufficient flexibility and proportionality** to adapt to specific situations; on the other hand, the **variety of approaches** might give rise to an unlevel playing field. The mandate conferred on the EBA by Directive (EU) 2019/878 amending CRDIV to develop Guidelines to specify a common assessment methodology for granting authorisations under that Directive, provides the opportunity to better assess such practices and **harmonise their application where necessary and appropriate**.

### 2.3.2 Empowerment to impose conditions, limitations and restrictions on authorisation as a payment and e-money institution and related examples

57. In the absence of specific provisions in PSD2, the EBA enquired whether CAs attach conditions, restrictions and limitations at the moment of granting the authorisation. The findings show that some CAs apply conditions, limitations and restrictions, whereas most CAs do not apply any conditions, limitations or restrictions to authorisations under PSD2.
58. As a general remark, it is worth clarifying that all requirements for granting authorisations have to be complied with and that the attachment of conditions, restrictions or limitations cannot waive mandatory requirements regardless of whether they are conditions precedent or restrictions and limitations to be fulfilled after the authorisation is granted.
59. Based on the analysis carried out, one CA appears to attach limitations and restrictions to the authorisation with a view to be fulfilled after the authorisation's approval, as a supervisory measure. Examples of post-authorisation conditions include the advice not to conduct activities not included in the institution's business model or to conduct an independent audit of the firm's IT arrangements 18 months after the authorisation.
60. In a very few cases, CAs are entrusted with general administrative powers to set conditions on the authorisation similar to those described in relation to authorisations for credit institutions (see paragraph 55); in one case, the relevant CA is empowered to set conditions on when or how the authorisation becomes effective and/or to correct deficiencies in applications in terms of authorisation requirements.
61. Furthermore, it is worth noting that CAs are empowered to impose restrictions and limitations -after the adoption of an authorisation - in going concern as a matter of supervisory practice.

## 2.4 Application of the principle of proportionality in granting authorisation as a credit institution

62. As part of the exercise, the EBA expressly explored whether CAs apply proportionality in the granting of an authorisation as a credit institution. The analysis targeted those specific requirements in relation to applications that are set out in the CRD IV provisions, notably the programme of operations and structural organisation, initial capital and the special regime, the effective direction of business, the location of the head office, and shareholders and members.
63. In general, the findings show that CAs apply proportionality when granting authorisation as a credit institution and, as a general rule, do not vary their approach depending on the traditional or innovative character of the business model but carry out a case-by-case assessment. There is consensus among the CAs on the use of a risk-based approach that includes proportionality considerations in line with the nature, scale and complexity of the applicant entity's activities, its intrinsic riskiness and its potential impact on the financial system or on the public at large, given the strict link with the real economy. The starting point for the assessment in most cases is the business model and the business plan, based on which proportionality considerations are calibrated. The case-by-case approach entails, however, that, depending on the specificities of the applicant, alternative starting points may be considered by the competent authority, including the applicant's ownership structure and financial soundness. Moreover, with regard to risks, innovative business models and/or delivery mechanisms may present features diverging from the standard risk typology that need to be assessed in a different manner.
- a. **Programme of operations and structural organisation (Article 10 of CRD IV)**
64. Under Article 10 of CRD IV, applications for authorisation have to be accompanied by a programme of operations setting out the type of business envisaged and the structural organisation of the credit institution. The EBA found that, with regard to the Banking Union, in compliance with the principle of proportionality, the ECB tailors the assessment of the application to the anticipated systemic importance and forecast risk profile of the applicant entity's business. In this regard, the assessment of programmes of operations submitted with applications involving novel, precedential or highly complex activities may require more scrutiny than applications involving solely straightforward or already known activities.
65. The EBA's analysis also shows that, according to the ECB, generally, there tends to be greater uncertainty with regard to FinTech credit institutions' business projections and the resulting capital requirements. Compared with traditional banks, it is often less clear how the business will develop, since it is more difficult to forecast the number of customers, level of sales, etc. It is also harder to predict the future level of external funding. In addition, the innovative nature of a FinTech credit institution may pose unknown risks to the business plan. For these reasons, FinTech bank applicants are encouraged to prepare an exit plan in order to identify how they can cease business operations on their own initiative, in an orderly and solvent



manner without harming consumers, causing disruption to the financial system or requiring regulatory intervention. From technical and operational perspectives, FinTech bank business models are likely to be driven by innovative technology and to employ technology at an early stage of maturity. In as much as innovative technology is a key component of these banks' business models<sup>37</sup>, the EBA notes that the ECB underscores the importance of applicants ensuring that they have specific controls in place to address related risks. This is also the case for, for instance, data management and data protection, given their potential links with reputational risk in cases of breach. Other areas requiring specific attention are IT system and outsourcing risks, given the greater use of outsourcing and cloud services by FinTech firms than by traditional firms.

#### b. Initial capital and the special regime (Article 12 and 12(4) of CRD IV)

66. Article 12 of CRD IV requires initial minimum capital of EUR 5 million for an applicant credit institution. The initial capital should be understood as a floor and the EBA notes that the ECB generally requires a level of own funds that is commensurate with the expected business plan of the applicant institution. In particular, the EBA observes that in the ECB's practice the capital required at authorisation has to guarantee not only 'point in time' compliance with the initial capital requirements but also the prospective compliance of the applicant with both own funds and initial capital requirements during its first years of business.
67. With specific regard to applicants with innovative business models, the EBA notes the ECB's consideration that the start-up phase of a FinTech credit institution could pose a greater risk of financial losses, which may progressively reduce the amount of own funds available. Therefore, the ECB assesses whether the applicant can demonstrate that it is able to hold in reserve sufficient capital to cover start-up losses in the first three years of activity and, where applicable, the costs associated with the possible execution of an exit plan.
68. With regard to the initial capital, CRD IV also envisages a national option, pursuant to which 'Member States may grant authorisation to particular categories of credit institutions the initial capital of which is less than EUR 5 million', provided that it 'is no less than EUR 1 million'. Based on the EBA's findings, the CAs making reference to the special regime in the context of the survey do not distinguish between traditional and innovative business models in relation to the application of the special regime. While three of these CAs reported that the special regime is rarely applied in practice to either traditional or innovative applicants, two CAs reported having authorised FinTech credit institutions under this national discretion, where the applicable conditions were met<sup>38</sup> (one CA in particular made reference to a digital-only retail bank). Based on the EBA findings, in the last 5 years in the whole EU, 6 FinTech applicant

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<sup>37</sup> EBA, *Report on the impact of FinTech on incumbent credit institutions' business models*, 3 July 2018, available at <https://eba.europa.eu/documents/10180/2270909/Report+on+the+impact+of+FinTech+on+incumbent+credit+institutions%27%20business+models.pdf>

<sup>38</sup> Based on EBA data, the following Member States have implemented the national option provided under Article 12(4) of CRD IV: CY, CZ, ES, HR, HU, IE, LT, PL, SE, SI and UK; see EBA, *overview of options and discretions set out in Directive 2013/36/EU and Regulation (EU) No 575/2013*, available at <https://eba.europa.eu/supervisory-convergence/supervisory-disclosure/options-and-national-discretions>



credit institutions have been initially granted the authorisation based on such national special authorisation regime.

69. The findings on the application of the special regime to FinTech applicant credit institutions suggest the need to monitor the application of this option with a view **to better assessing the specificities of the national special regimes and their application to FinTech applicants**. As a general remark, the subsequent analysis could also feed into the general discourse on the opportunity and impact on the fragmentation of the internal market of options and national discretions, stimulating considerations of whether the EU playing field should be made more level, in particular with regard to FinTech credit institutions or whether the intrinsic fragmentation of the internal market is not affected by such specificities.

**c. Effective direction of business and place of the head office (Article 13 of CRD IV)**

70. Under Article 13 of CRD IV, the competent authorities may grant authorisation to commence the activity of a credit institution only where at least two persons effectively direct the business of the applicant credit institution. Based on the EBA's findings, the CAs concur that there is no distinction between traditional applicants and applicants with innovative business models in terms of suitability requirements; in particular, members of the management body must have sufficient knowledge, skills and experience to fulfil their functions.
71. In this regard, the EBA notes that the ECB underscored that the principle of proportionality is inherently applicable to the assessment of the suitability of the proposed board members (with the exception of integrity and reputation requirements), as the level of experience required depends on the main characteristics of the specific function and of the institution. It also points out that, since innovative credit institutions often have technology-driven business models, technical knowledge, skills and experience can be as necessary as financial knowledge, skills and experience in enabling members of the management body to fulfil their tasks.

**d. Shareholders and members (Article 14 of CRD IV)**

72. Article 14 of CRD IV requires CAs to assess the applicant's shareholders with qualifying holdings or the 20 largest shareholders and members. The EBA's findings show that CAs concur that the applicable criteria are the same as those set out in Article 25 of CRD IV, as specified in the ESAs' Joint Guidelines on the prudential assessment of the acquisition of qualifying holdings<sup>39</sup>, and that there is no distinction between traditional and innovative business models in this regard.
73. In particular, the EBA notes that in the ECB's experience the shareholder structure of applicant credit institutions with innovative business models may consist of the founders and various providers of venture capital. Furthermore, in some cases a 'business incubator' may be the main shareholder of a FinTech applicant credit institution. In this respect, the ECB notes that, owing to the need for growth financing, investors at the licensing process stage are often

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<sup>39</sup> JC/GL/2016/01, 20 December 2016, available at [https://esas-joint-committee.europa.eu/Publications/Guidelines/JC\\_QH\\_GLS\\_EN.pdf](https://esas-joint-committee.europa.eu/Publications/Guidelines/JC_QH_GLS_EN.pdf)

providers of 'seed capital', and their shareholdings may be diluted by the addition of more investors at a later stage. Such future investors are not normally known at the time of authorisation. However, in some cases it may be apparent during the authorisation process that the existing shareholders will not retain their shareholdings in the institution in the long term. Generally, the financial soundness of shareholders should be sufficient to ensure the sound and prudent operation of the credit institution with an innovative business model for an initial period (usually three years).

## 2.5 Application of the principle of proportionality and flexibility to the assessment of elements set out in Article 5 of PSD2

### 2.5.1 General considerations

74. Similarly to the situation in relation to CRD IV, the EBA found that CAs concur that the application of the **principle of proportionality** is embedded in PSD2, as further specified in the Guidelines on authorisation and registration. In particular, the majority of CAs are of the view that the assessment of the application is risk based and that proportionality applies to take into account the type (payment or e-money) and size of the institution; the organisational structure (including the use of agents, outsource providers, foreign branches, number of employees); the nature, scale and complexity of the services provided; and the risks and turnover envisaged. The EBA also notes that proportionality may only entail a calibrated application of the regulatory requirements and not materialise exemptions from such requirements.
75. This is expressly provided in the Guidelines on authorisation and registration, where, for instance, Guideline 1.2 provides that 'the level of detail should be proportionate to the applicant's size and internal organisation, and to the nature, scope, complexity and riskiness of the particular service(s) that the applicant intends to provide'. This is also expressed in Article 11(4) of PSD2, according to which '[governance] arrangements, procedures and mechanisms shall be comprehensive and proportionate to the nature, scale and complexity of the payment services provided by the payment institution'.
76. PSD2 also gives a certain degree of **flexibility** by providing Member States with the option, when transposing PSD2 into national law, to allow CAs to exempt from the application of all or part of the authorisation procedure and all or some of the requirements those payment service providers that meet the criteria set out in Article 32 of PSD2. Such criteria relate to the total value of payments and to the absence of convictions for offences relating to money laundering or terrorist financing or other financial crimes by the persons responsible for the management or operation of the business<sup>40</sup>. The application of the exemption, however, entails that such

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<sup>40</sup> Article 32(1) of PSD2 sets out the following criteria: '(a) the monthly average of the preceding 12 months' total value of payment transactions executed by the person concerned, including any agent for which it assumes full responsibility, does not exceed a limit set by the Member State but that, in any event, amounts to no more than EUR 3 million; and (b) none of the natural persons responsible for the management or operation of the business has been convicted of offences relating to money laundering or terrorist financing or other financial crimes.'

payment service providers are subject to registration and are treated as payment institutions but may not provide cross-border services. Article 33 of PSD2 further exempts account information service providers, which provide only account information services, from some of the authorisation procedures and conditions<sup>41</sup>.

77. Other examples of **flexibility** enshrined in PSD2 include the application of different initial capital requirements depending on the specific payment service to be provided by the applicant (Article 7) and the specification in the authorisation of the payment services for which the applicant is authorised (Article 11(9)).

## 2.5.2 Examples of the application of the principles of proportionality and flexibility to specific elements

78. According to the EBA's findings, examples of the specific application of the principle of proportionality relate to the application of a proportionate approach to the requirements for internal controls, including the compliance function or AML processes; to the assessment of shareholders; and to the outsourcing of some functions, depending on the size, complexity and organisation of the entity<sup>42</sup>. A summary of the examples is reported in the Textbox below.

### Textbox – Examples of the application of proportionality and flexibility to the assessment of specific elements

**Organisational structure and internal control mechanisms:** a few authorities indicated that, depending on the nature, size and complexity of the organisation, the level of detail of the control mechanisms varies according to organisational structure and total number of the respective employees, and that the same level of detail may not be required for terms and frequency of controls (manual or automated). One CA reported that it may lower prudential requirements (including in relation to organisational arrangements) where institutions do not cross certain thresholds.

For institutions with highly automated processes and few personnel, one CA requires the framework of the process only and does not necessarily require details regarding the employees in charge of the control mechanisms. This is in contrast to the approach followed by the same CA for larger institutions with more complex organisational structures; for larger institutions, that CA requires that a set of controls is in place for each unit within the organisational structure and that there are mechanisms for the hierarchical notification of failures, including the principles of failure resolution.

<sup>41</sup> In line with the proportionality approach taken by the legislator, the EBA Guidelines on authorization and registration also provide for lower (and some cases for exemption from) information requirements for this type of entities.

<sup>42</sup> To note that the EBA Guidelines on outsourcing arrangements will apply from 30 September 2019 and it is expected that outsourcing arrangements will be compliant with the requirements set out therein, in accordance with the applicable timeline; EBA/GL/2019/02, 25 February 2019, available at <https://eba.europa.eu/documents/10180/2551996/EBA+revised+Guidelines+on+outsourcing+arrangements>

One CA explained that, in the case of money remittance services provided through a very limited network of agents (maximum of two agents), the requirement to have an in-house internal auditor might not apply.

One CA explained that payment institutions that are able to **passport** within the EEA and operate in markets outside the home Member State must have a higher number of suitable individuals in place to lead day-to-day activities than a small payment institution that wishes to offer local money remittance services within a single, small community within the home Member State.

One CA reported that, in relatively small institutions, the **compliance function** can be exercised by a member of the effective management. In such a case, a specialist can provide the support required for this function and the institution has to notify the regulator in advance. Another CA indicated that small institutions may outsource the compliance function.

Several CAs indicated that, depending on the size and complexity of the institution, certain internal control functions can be **outsourced**. One CA, for instance, made specific reference to the compliance function, while another made general reference to internal controls. Another CA also reported that FinTech institutions tend to make greater use of outsourcing and cloud services than traditional institutions and that the assessment of the outsourcing risks of FinTech applicants therefore requires particular attention.

**Shareholder assessment:** two CAs indicated that they apply a proportionate assessment to shareholders. One CA made reference to the criterion of financial soundness, having regard to the smaller amount of capital needed by payment or e-money institutions than by credit institutions. Another CA made reference to the management bodies or the members of the management bodies of shareholders, pointing out that, depending on the size and complexity of the organisation, only those bodies or managers engaged in day-to-day activities and decision-making may be assessed.

**AML:** one CA indicated that, with regard to the detection of unusual or suspicious transactions, money remittance providers are primarily required to incorporate AML provisions into their internal policies, whereas institutions operating payment accounts and/or issuing payment instruments are required to have in place more sophisticated systems able to record access to the payment accounts and the transactions made on the accounts (including failures to sign in), use of payments cards, etc. With regard to the AML officer requirement, one CA indicated that this requirement is not subject to proportionality and that it is mandatory regardless of the size of the institution. Where the institution, however, is authorised for all services set out in the PSD2 Annex, it is required to set-up a separate department in the organisational chart. The same applies to the audit and risk departments.

### 2.5.3 Application of the principle of proportionality to the evidence required from applicants under PSD2

79. The EBA explored how the evidence required from applicants varies when taking into account the principle of proportionality; the relevant findings show that the approach followed by the CAs in this context is the same as that applied to the assessment of the elements required for

the granting of an authorisation. Proportionality is applied following a risk-based approach and evidence is calibrated in a manner consistent with the type (payment or e-money) and size of the institution; the organisational structure (including the use of agents, outsource providers, foreign branches, number of employees); the nature, scale and complexity of the services provided; and the risks and turnover envisaged. One CA specified that it applies proportionality only where an assessment entails the exercise of discretion. The EBA notes that in general the CAs' view is that information relating to all elements has to be submitted, but the level of detail and the related assessment depend on the size and nature of operations.

80. It is worth noting that, in providing the relevant information, CAs generally made reference to the EBA Guidelines on authorisation and registration specifying PSD2 maximum harmonisation provisions on documents and information to be submitted by the applicant to the competent authority. In particular, the majority of CAs expressly indicated that they require the applicant to include **all** documents and information set out in the EBA Guidelines on authorisation and registration when submitting an application.

**Textbox – Examples of the application of proportionality and flexibility to the evidence required from applicants**

**Internal regulations, organigram and programme of operation:** calibrated to the nature, scale and complexity of the specific service provided or size of the applicant

**Viability of the business plan:** calibrated in a manner consistent with the activities performed. The business plan may be required to be more detailed and contain a mapping of the risks when the applicant intends to provide all services under PSD2.

With regard to **AML**, there are different information requirements depending on whether the applicant will operate via agents or via the internet only.

#### **2.5.4 Key findings from the analysis of the application of the principle of proportionality to authorisation approaches under PSD2**

81. The findings of the analysis carried out by the EBA on authorisation approaches under PSD2 show that PSD2 incorporates flexibility with respect to several aspects of its scope, such as the requirement for different levels of capital depending on the type of services provided, the national option relating to small payment service providers in accordance with Article 32 of PSD2 and the exemption for the providers of account information services offering solely that payment service.
82. Similarly, according to the EBA's findings, there is consensus that proportionality is embedded in PSD2, for instance as regards governance arrangements under Article 11(4), and as further specified in the EBA Guidelines on authorisation and registration. With regard to supervisory practices, CAs apply the proportionality principle following a risk based approach and taking

into account the nature, scale and complexity of the services (payment and/or e-money services) and the size of the institution; the organisational structure (including the use of agents, outsource providers, foreign branches, number of employees). In the light of these findings, the EBA **will continue its monitoring activity**, in particular to assess whether proportionality is used to fast track applications from FinTech firms for authorisation as a payment or e-money institution.

## 3. Conclusions and next steps

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1. This Report illustrates the results of the EBA's analysis relating to the law and practice with regard to access to the market for financial firms under the EBA's remit with innovative business models and/or delivery mechanisms, referred to as FinTech firms. The analysis focused on:
  - a) the monitoring of national developments on the **regulatory perimeter**;
  - b) the analysis of the national **regulatory status** of FinTech firms;
  - c) the **authorisation approaches** followed by the CAs under CRD IV, PSD2 and EMD2 from the perspective of the application of the principles of **proportionality and flexibility**; in this context, the practice of attaching conditions, limitations or restrictions to authorisations was also explored.
2. The findings of the monitoring exercise with regard to developments relating to the **regulatory perimeter** show a steady scenario where very little legislative activity has been undertaken at the national level that would expand the remit of the CAs under the EBA's remit. Based on the EBA's findings, the Report illustrates that only one Member State has adopted new national legislation relating to FinTech activities or services having the effect of extending the CAs' remit, specifically in relation to crypto-assets. In addition, based on the interaction with the CAs, it was found that in only one Member State was a legislative proposal pending that would extend the CA's regulatory perimeter, specifically in relation to crowdfunding service operators.
3. Based on these findings, the EBA observes that:
  - a) Activities related to **crypto-assets** have been thoroughly analysed by the EBA in an ad hoc report on crypto-assets, which also addresses next steps; therefore, no additional action is suggested by the Report in this regard.
  - b) The regulation of **crowdfunding service providers** has been laid down in the European Commission's Proposal for a Regulation, which is currently being considered by the European Parliament and the Council. This new legislation will have the merit of levelling the playing field for those crowdfunding service providers operating cross-border. The EBA notes, however, that there would be a benefit in introducing **harmonised consumer protection and AML/CFT rules that are applicable to all crowdfunding service providers** regardless of their scope of action, cross-border or domestic.
4. In the light of the above, as next steps, the **EBA will continue to monitor the regulatory perimeter as part of its core tasks**.
5. With regard to the **national regulatory status** of the FinTech firms that were the object of the analysis (the same firms as those considered for the purpose of the 2017 FinTech Discussion Paper), the focus was on those firms reported not to be subject to any regulatory regime, with a view to gaining a better understanding of their business models in order to assess whether

their regulatory status is satisfactory, having regard to the actual activities and services they provide.

6. The analysis has identified the following key findings: (a) since the entry into force of PSD2, payment initiation service providers and account information service providers have been brought within the scope of application of that Directive and are no longer unregulated; and (b) activities and services provided by the firms in the 2017 FinTech sample that are not subject to regulation are of an **ancillary nature** or relate to **non-financial aspects of the financial business**. These findings are consistent with the circumstance that the firms providing such activities and services are not subject to financial regulation. The regulatory status of FinTech firms will be part of the EBA's **continuous monitoring of the regulatory perimeter**, including the nature of ancillary services.
7. The analysis of the business models of the firms in the 2017 FinTech sample also shows that some of them are engaged in activities related to **crypto-assets** or **crowdfunding** services. In this regard, reference is made to the considerations set out in paragraph 3 above.
8. With regard to the analysis of the **authorisation approaches** followed by the CAs when granting authorisations under CRD IV, PSD2 and EMD2, and in particular in terms of the application of the principles of **proportionality** and **flexibility**, the key findings outlined below should be noted.
9. The EBA observes that there is consensus among the CAs that the relevant EU legal framework incorporates the principles of **proportionality** and **flexibility**. In the context of the authorisation approaches, this usually materialises in a risk based approach that allows the assessment to be calibrated on the basis of the applicant institution's size and complexity; the organisational structure; the nature, scale and complexity of the services provided; and the risks and turnover envisaged.
10. With specific regard to PSD2, proportionality and flexibility are expressly mentioned in the legislation and further specified in the EBA Guidelines on authorisation and registration, in relation, for instance, to the governance arrangements and the levels of capital required depending on the type of service provided. In general, the application of the principle of proportionality provides PSD2 CAs with a sufficient degree of flexibility in the practice of authorisation approaches. In the light of these findings, the EBA **will continue its monitoring activity**, in particular to assess whether proportionality is used to fast track applications from FinTech firms for authorisation as a payment or e-money institution.
11. As part of the monitoring exercise on authorisation approaches, the EBA explored if and how CAs **attach conditions, limitations and restrictions to authorisation**. The analysis was also prompted by the absence of specific guidance in the EU legal framework and the reliance on national law for this purpose. The findings show that, in particular in the context of granting authorisations to credit institutions, CAs make use of conditions, limitations and restrictions.



This practice confirms the sufficient degree of flexibility of the current framework and its adaptability to specific situations.

12. The results, however, also demonstrate that there are **divergent national practices**, with some CAs applying pre-authorisation conditions precedent, others making use of post-authorisation limitations or restrictions, and still others making reference to ordinary supervisory powers to be exercised as part of ongoing supervision. The EBA notes that this **variety of approaches** may give rise to an unlevelled playing field and that **further work needs to be done to ensure the convergence of practices**. The mandate conferred on the EBA by Directive (EU) 2019/878 to develop Guidelines to specify a common assessment methodology for granting authorisations under that Directive provides the opportunity to better assess such practices and **harmonise their application where necessary and appropriate**.
13. In addition, with specific regard to the national option envisaged by Article 12(4) of CRD IV relating to the **special regime for the initial capital of credit institutions**, the EBA notes that in the light of the reported use of such special regimes in the licensing of 6 FinTech applicant credit institutions in the past 5 years in the whole EU, additional monitoring of the application of this option could be undertaken with a view to better assessing the **specificities of the national special regimes and their application to FinTech applicants**. As a general remark, the analysis may feed into the general discourse on the opportunity and the impact on the fragmentation of the internal market of options and national discretions.