

EBA launches consultation process and publishes Discussion Paper detailing its approach to FinTech

What does the European Banking Authority's (EBA) FinTech Discussion Paper mean for existing and new entrants across the EU-27's banking sector?

On 4 August 2017, the EBA published its FinTech Discussion Paper¹ and launched a consultation period that will close on 6 November 2017. A public hearing will take place at the EBA's London premises on 4 October 2017². Registration for that hearing closes 12 September 2017. This Client Alert assesses the FinTech Discussion Paper and specific proposed reforms and how these interrelate to wider EU workstreams, notably the European Commission's on-going work on the Digital Single Market³ including the proposal to improve EU expertise on distributed ledger technology (DLT) by building a "Blockchain Observatory", and what this all might mean for existing and new entrants across the EU-27's banking sector.

The EBA's policy proposals, following the Discussion Paper and consultation process, will be announced in 2018. These proposals however might also begin to be reflected in the EBA's annual priorities and work plan, which are typically announced as early as 4Q 2017. In summary, the EBA's Discussion Paper marks a first step to a more common supervisory approach. It also marks a move to harmonising the individual FinTech components across the various workstreams of the EU-27, Capital Markets Union, Banking Union and Eurozone-19. Some of these may have "spillover effects" for "traditional" financial services activity.

Part of this harmonisation is also evidenced in the Discussion Paper's 'FinTech Clusters' (see Annex hereto). These build upon the EBA's FinTech 'mapping exercise' (see below). In some ways, the Clusters conceptually are a first move to a future quasi "regulatory Rosetta Stone". Such a conceptual translation tool might provide policymakers greater ease in translating FinTech commercial activity and solutions into existing supervisory and regulatory thematic areas and permission

¹ Available:

<http://www.eba.europa.eu/documents/10180/1919160/EBA+Discussion+Paper+on+FinTech+%28EBA-DP-2017-02%29.pdf>

² Details of the location and how to register for the public hearing are available here:

http://www.eba.europa.eu/news-press/calendar?p_p_auth=HWbvK7wE&p_p_id=8&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&_struts_action=%2Fcalendar%2Fview_event&_8_eventId=1919178

³ The EU's Digital Single Market aims to create a more harmonised Single Market with a boost in volume of e-commerce business, increased trust in and ease of access to e-commerce and greater digitisation. Like the Capital Markets Union project that reached the mid-way mark in 2017, the Digital Single Market review (available: <https://ec.europa.eu/digital-single-market/en/news/digital-single-market-commission-calls-swift-adoption-key-proposals-and-maps-out-challenges>) takes stock of progress, calls on legislators to act swiftly on all proposals already presented and outlines further actions on online platforms, data economy and cybersecurity to meet the delivery deadline of 2019.



groups, although it seems that some types of FinTech activity were not covered in the Clusters or as fully as they might have been.

In short, the EBA's lead on convergence in this area, coupled with the specific "Proposed way forward" points that are identified in the Discussion Paper are an exciting but also a transformative development. Certainly it will be one to watch, especially as a number of these specific points and policy proposals that the Discussion Paper puts out to consultation may themselves each have a number of 'spillover' effects and costs for the "traditional" non-FinTech driven sectors of financial services in the EU.

The EBA, as one of the pan-European Supervisory Authorities (**ESAs**) of the EU-27 have been monitoring FinTech and RegTech for some time. The EBA has also been liaising with its sister ESAs as well as the national authorities that collectively form the European System of Financial Supervision (**ESFS**). That being said, there is still no shared consensus amongst the EU-27, ESFS and Banking Union policymakers on what actually constitutes FinTech and/or RegTech as of yet.

The EBA, having launched its first EU-wide 'mapping exercise' on the subject as well as assessing who does what and with whom, received responses from 22 EU Member States and 2 EEA States. The mapping exercise found a high degree of fragmentation in standards, solutions and regimes that supervise, shape or otherwise aim to foster innovation and FinTech. This drives both FinTech 'fragmentation risk(s)' as well as FinTech 'specific risk(s)'.

The EBA Discussion Paper builds upon the mapping exercise and acts as a means towards a common view on FinTech and to drive forward supervisory convergence⁴.

Contents of the EBA Discussion Paper and the specific "Proposed way forward"

The EBA's Discussion Paper asks respondents to the consultation to comment on specific points on the "Proposed way forward" in relation to the following thematic areas:

1. authorisation and sandboxing regimes;
2. the impact on prudential and operational risks for firms regulated for EU purposes as any of the following: credit institutions, electronic money institutions and payment institutions;
3. the impact of FinTech (i.e., the disruptive effect) on the business models of these institutions that represent the bulk of the traditional EU banking sector as well as "neo-banks";
4. consumer protection and retail conduct of business issues - which is where the bulk of the specific actions in the "Proposed way forward" are set out;

⁴ Specifically the Discussion Paper refers to the EBA's mandate in Art. 1(5) of Regulation (EU) No 1093/2010, which is one of the EBA's founding documentation and which clarifies that the EBA is required to contribute to enhancing consumer protection, promoting a sound, effective and consistent level of regulation and supervision, ensuring the integrity, transparency, efficiency and orderly functioning of financial markets, preventing regulatory arbitrage and promoting equal competition. On top of this tall order of supervisory convergence comes the EBA's mandate that, per Art. 9(2) of the aforementioned Regulation that it must monitor new and existing financial activities and thus FinTech.

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5. impact of FinTech on the regulatory-led resolution of financial firms. This refers to the EU's recovery and resolution regime set out in the BRRD; and
6. the impact of FinTech on anti-money laundering, countering financial crime and terrorism financing (**AML/CFT**).

Comments are invited on the Discussion Paper itself as well as the specific questions set out in Chapter 4 thereof. Comments can be sent via the EBA website and the "send your comments" feature on the consultation page⁵.

The EBA Discussion Paper is split into four distinct Chapters:

- Chapter 1 provides a summary of the FinTech relevant work that has been conducted at the EU and at the international level. Chapter 1 describes a breadth of busy activity and sets the scene on the need for convergence. It does this by describing the issues that arise as a result of a high-degree of fragmentation and that this is being driven by an absence of coordination let alone standardisation channels amongst policymakers and stakeholders. The same is true in that a real EU action plan on FinTech, despite being mentioned, has yet to materialise;
- Chapter 2 provides factual information on the EBA's objectives and scope of its existing and/or on-going FinTech focused work. This is largely limited, given that the EBA's mandate in relation to FinTech, has historically been focussed on assessing FinTech's development and monitoring of activity in relation to the "traditional" banking sector. What is noteworthy is that the EBA does not comment on its own shortcomings or where it could have done more;
- Chapter 3 sets out the EBA's preliminary findings based on the mapping exercise it conducted. The key findings and takeaways here, based on the data/subjects sampled, include:
 - the four "Clusters" that are replicated in the Annex to this Client Alert. These Clusters form the first steps in mapping FinTech activity by "type" and this takes inspiration from or cross-refers to a number of existing types of activity that is regulated in the "traditional" banking sector. These Clusters could act as a basic form of a quasi regulatory Rosetta Stone between FinTech and the traditional banking sectors;
 - FinTech firms' classification in how they are regulated and supervised (by EU regulation, by national regulation or none at all) was found to evidence a high degree of fragmentation, with close to a third not subject to any regime at all but providing financial services of a kind described in all four Clusters. It may be noteworthy that the EBA's analysis may be slightly flawed, since it apparently did not examine whether the FinTech activity was conducted on a basis with client interaction or activity that acted only in the background or whether the FinTech provider had partnered with a regulated institution;
 - those firms and there FinTech activity that was supervised, are attributable to the Clusters. Most of this activity (again based purely on the data sampled by EBA) was found to be attributable to Cluster B (payments, clearing and settlement services), followed by activities

⁵ See: http://www.eba.europa.eu/news-press/calendar?p_p_id=8&_8_struts_action=%2Fcalendar%2Fview_event&_8_eventId=1919157

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falling within: Cluster A (credit, deposit and capital raising services), Cluster D (other financial-related services) and lastly Cluster C (investment services/investment management services);

- both regulated and non-regulated firms make use of FinTech yet the authorisation and supervisory scrutiny in respect of various FinTech firms vary in their characteristics;
 - the majority of FinTech firms are not required to maintain a recovery and resolution plan (**RRP**) and even where a jurisdiction, the United Kingdom, requires a RRP, the requirement is limited to peer-to-peer lenders and crowdfunding regimes. Equally 19 out of the 24 EU/EEA jurisdictions in the mapping exercise confirmed that FinTech firms, despite some limited examples of safeguards, the majority of such firms are not members of any deposit guarantee scheme, investor protection scheme or other compensation scheme protecting consumers; and
 - out of the jurisdictions surveyed, 46% had no sandboxing, innovation hub or similar regime in place, 8% offered sandboxing, 17% provided an innovation hub and 29% applied "other approaches". Where sandboxes and innovation hubs existed, the eligibility criteria to access the relevant sandbox/innovation hub differed across jurisdictions.
- Chapter 4 sets out the EBA's preliminary "Proposed way forward" points. Respondents to the Discussion Paper may comment on the entirety of the Discussion Paper or individual points in the "Proposed way forward".

Chapter 3's findings are the basis for the EBA's six thematic areas and the specific "Proposed way forward" points set out in Chapter 4 of the Discussion Paper. The EBA has confirmed that these points will be the subject of further analysis in 2017/2018 and they will likely translate through into EBA policy proposals and supervisory priorities.

Thematic area	"Proposed way forward" points - specific actions to be undertaken by the EBA include:
1. Authorisation and registration regimes and sandboxing /innovation hub approaches	<ul style="list-style-type: none"> ▪ producing a Report or Opinion comparing regulatory treatment of selected activities and provision of services with a view to reviewing the regulatory perimeter and whether to change how regulatory principles interact with one another and how these are shaped by FinTech; ▪ undertaking further assessment of the features of a sandboxing regime, innovation hub and similar regimes; ▪ conducting an assessment on the merits of converting EBA Guidelines on PSD2 authorisations into Regulatory Technical Standards; and ▪ reviewing the merits of harmonising how authorisation applications are reviewed in order to achieve more consistent supervisory practices including possibly looking at ESMA and/or Banking Union approaches for inspiration.

<p>2. Prudential risks and opportunities for credit institutions, payment institutions and electronic money institutions</p>	<ul style="list-style-type: none"> ▪ undertaking further work on identifying the prudential regulatory risks and opportunities for credit institutions, payment institutions and electronic money institutions using new technologies and FinTech and providing EBA supervisory Guidance to national supervisors in the ESFS (and possibly to the Banking Union) on how to coordinate supervisory approaches and identify systemic issues; ▪ assessing risks and use cases specific for the additional use of "blockchain" and other DLT-based solutions in the payments market and possibly include updates to supervisory warnings and Opinions on the use of virtual currencies; and ▪ continuing the development and implementation of security related products required under PSD2 and take remedial action where necessary.
<p>3. The impact of FinTech on the business models of credit institutions, payment institutions and electronic money institutions</p>	<ul style="list-style-type: none"> ▪ continued monitoring of FinTech's impact on existing business models and the strategic responses of firms; and ▪ monitoring the relationships between incumbent and new players is set to evolve in the financial sector and what this means for changes in the ownership of customer relationships, threats to business model viability and what new business and distribution chain models are emerging due to FinTech's evolution.
<p>4. Consumer protection and retail conduct of business issues</p>	<ul style="list-style-type: none"> ▪ assessing how to extend the regulatory perimeter to better protect consumers. The EBA may also propose specific new consumer protection measures; ▪ improving relevant deficiencies in clarity on whether the provision of financial services over the internet is acting under the freedom to provide services (as permitted under the respective licences) and whether this needs strengthening as part of the concurrent work of the Joint Committee of the three ESAs on cross-border supervision of retail financial services; ▪ deciding whether to update or upgrade relevant EBA Guidelines and relevant Regulatory Technical Standards within the EBA's mandate to improve supervision and information sharing within the ESFS; ▪ exploring the issuance of Guidelines and/or supervisory Recommendations addressed to relevant components of the ESFS and/or financial institutions to establish consistent efficient and effective supervisory practices and/or internal processes within supervised institutions on complaints handling (mostly relevant for retail clients); ▪ advancing further work to: <ul style="list-style-type: none"> ○ review barriers in EU legislation that restricts digitisation (by requiring physical presence, paper copies, wet ink i.e. handwritten signatures);

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	<ul style="list-style-type: none"> ○ assess how information should be assessed in the digital ecosystem and provision of banking systems through digital and mobile channels; ○ explore presence of regulatory gaps, specifically re disclosure relating to banking products and services provided by FinTech firms; ○ evaluate the need for standard information on risks (the Discussion Paper does not call for a FinTech "Key Investor Information Document" - which should cause a sigh of relief from most) that might take the form of non-text measures to ensure disclosure obligations are presented and digested as well as disclosure requirements that improve comparability; and ○ how to improve financial literacy and reduce financial exclusion by continuing to coordinate and foster national initiatives and promoting transparency and clarity of pre-contractual information.
<p>5. The impact of FinTech on the resolution of financial firms</p>	<ul style="list-style-type: none"> ▪ evaluating how to improve the prevalence of RRP plans as well as how to improve RRP regimes for FinTech firms; and ▪ reviewing how digitisation may also speed up the movements of deposits in times of crisis as well as how it changes behavioural patterns in relation to deposit runs.
<p>6. The impact of FinTech on AML/CFT</p>	<ul style="list-style-type: none"> ▪ working in conjunction with its sister ESAs: ESMA and EIOPA, the EBA will finalise an Opinion on the use of FinTech solutions for AML/CFT purposes and how to embed a more harmonised approach across the EU.

The Discussion Paper certainly sets a distinctive tone and one that takes the EU's debate on FinTech forward in a decisive manner. However, some of the contents and the "Proposed way forward" seems to be somewhat stuck consulting on issues, some of which are well known, as opposed to advancing actual "action" in advancing FinTech's supervision but also convergence of standards, rules, approaches and protections.

While it is certainly good to analyse risks posed by FinTechs, and to ensure regulation keeps track with technological development (e.g. the EBA Recommendation on internet based payments), any attempt to impose stricter rules on FinTechs than on "conventional" financial services could provide disincentives for innovation in the financial sector. The main area where the EBA seems to be definitive in advancing policy action is in relation to "extending the regulatory perimeter" in terms of capturing other financial services activity that due to loopholes or concepts not being captured remain unregulated and unsupervised activity. However, this may be driven by measures and motivations that are not necessarily triggered or related to FinTech.

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Then there are a number of areas that have not received sufficient coverage and may need stakeholders to stress the requisite amount of airtime during the consultation process so as to advance issues meaningfully in those areas. A key aspect in what has and has not been covered, is that there is quite a high degree of disparate regulation across the EU in what FinTech activity is regulated, how and by whom. This on the one hand may offer opportunities for regulatory arbitrage, but on the other hand severely restricts any international scale-up of business models, since then there is little, if any, certainty that the model, without modification, is usable across Europe. A harmonised approach would alleviate some of these issues.

Issues, themes and areas that do not receive much coverage in the EBA Discussion Paper

There are a range of issues that for a number of reasons seem to not have made it in to the Discussion Paper. These issues are set out below. As the Discussion Paper and policy stances develop following the consultation process it is conceivable that some of the below might be addressed:

- a. an interlink to data protection requirements and how this affects public DLT versus private DLT solutions offer data privacy compliance as an integral component of design - for a further discussion on this please see our white paper in collaboration with R3 "**Blockchains and Laws: are they compatible?**"
- b. how to make smart contracts truly "smart" and more "fit for purpose";
- c. proposals for joint sandboxes or innovation hubs;
- d. more in-depth consideration and coordination with the uses of RegTech for supervisors as well as how to supervise RegTech solutions for financial market participants beyond capturing this in either: "Cluster D3: Compliance services related to know your customer/AML", or "Cluster D4: Compliance services - other";
- e. definitive views, like those of U.S. regulators and policymakers, whether so-called "initial coin offerings"⁶ are a regulated activity and whether what is being offered constitutes e-money or financial instruments - despite this the EBA has tasked itself with reviewing the disclosure requirements relevant and needed in respect of virtual currency as well as review rules on e-money and the regulated activities of issuance, distribution and redemption of e-money (see Cluster B in Annex hereto);
- f. a tie-in to the European Commission's work on delivering the Digital Single Market strategy, plus the establishment of a dedicated expertise hub on

⁶ See also work by Manuel Lorenz on this development, notably: <http://www.bakermckenzie-kompass.de/539-2/>

DLT in the form of an EU "Blockchain Observatory and Forum"⁷ by 2019; and

- g. a more pronounced interlink with relevant Capital Markets Union and Banking Union workstreams both in terms of leveraging FinTech solutions to improve users' experiences and promote competition but also RegTech solutions to improve supervisory efficiency in terms of engagement and convergence.

Outlook and some next steps for firms affected by the EBA's Discussion Paper

Whilst the EBA Discussion Paper definitively advances the debate on the future of FinTech in the EU and how it is supervised, the spillover effects that the individual "Proposed way forward" action points might have for the rest of financial services are equally if not more important. Expanding the regulatory perimeter, assessing business model resilience and improving disclosure and consumer protection will all mean costs but also opportunities both for supervised institutions operating both in the traditional finance sector as well as established FinTech firms, but also increased competition on all fronts. It may also translate into more intrusive supervisory workstreams and protracted processing times.

Moreover, whilst the EBA has set a clear route and a vague desired end-state as to where it sees the EU on FinTech, ensuring that FinTech is able to grow in an environment that is inclusive and nurturing is key. This may require striking a balance to ensure regulation and supervision is proportionate and proactive of leveraging value in technology and that will require the support from all stakeholders. This will require time.

Such a shift may also mean a culture change for incumbent market participants, investors and consumers inasmuch as it will also mean patience and a culture change as certain technologies and business models conform to existing compliance principles and obligations. It will also likely require more open dialogue amongst FinTech providers (agreeing standards). It will also require engagement with traditional financial service providers, as users of FinTech solutions. Lastly, it will likely require deeper channels of communication between and amongst the traditional and FinTech financial service providers as well as consumer groups with policymakers and supervisors.

EU initiatives, tools and educational priorities such as the proposed Blockchain Observatory, the work that will build upon the FinTech Clusters and this EBA consultation process are a step in that direction. So too is the work that the EBA has set itself to consult, engage and educate to ensure that all stakeholders have an opportunity to shape a resilient and sustainable future of EU financial services and the Digital Single Market. For FinTech firms the EBA Discussion Paper marks yet another step in a coming of age for this sector of financial services activity.

⁷ See: <https://ec.europa.eu/digital-single-market/en/news/eu-blockchain-observatory-and-forum>

Annex

FinTech Clusters⁸

Cluster	Financial Services Type
<p>Cluster A Credit, deposit and capital raising services</p>	<ul style="list-style-type: none"> ▪ A1: taking deposits; ▪ A2: taking other repayable funds (i.e. funds other than deposits); ▪ A3: lending, including inter alia, consumer credit, credit agreements relating to immovable property, factoring, with or without recourse, financing of commercial transactions (including forfeiting); ▪ A4: financial leasing; ▪ A5: guarantees and commitments; ▪ A6: credit intermediation under article 4(5) of the Mortgage Credit Directive (Directive 2014/17/EU); ▪ A7: money broking; or ▪ A8: any other financial services of a kind within this cluster.
<p>Cluster B Payments, clearing and settlement services</p>	<ul style="list-style-type: none"> ▪ B1: provision of payment accounts; ▪ B2: services enabling cash to be placed on a payment account as well as the operations required for operating a payment account; ▪ B3: services enabling cash withdrawals from a payment account as well as all the operations required for operating a payment account; ▪ B4: execution of direct debits including one-off direct debits; ▪ B5: execution of payment transactions through a payment card or a similar device; ▪ B6: execution of credit transfers; ▪ B7: issuing of payment instruments; ▪ B8: acquiring of payment transactions; ▪ B9: money remittance; ▪ B10: issuing and administering means of payment other than those referred to in Art. 4(3) of PSD (Directive 2007/64/EU); ▪ B11: services to initiate payment orders at the request of the payment service user with respect to a payment account held with another payment service provider; ▪ B12: services to provide consolidated information on one or more payment accounts held by the payment services user with another payment services provider.

⁸ See also page 18 of EBA Discussion Paper.

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	<p>NB: this may include "screen-scraping";</p> <ul style="list-style-type: none"> ▪ B13: operation of fa payment system; ▪ B14: ancillary services to payment and/or e-money services (see Art. 16(1)(a) PSD); ▪ B15: issuance of e-money; ▪ B16: distribution of e-money; ▪ B17: redemption of e-money; ▪ B18: currency exchange; or ▪ B19: any other financial services of a kind within this cluster.
<p>Cluster C Investment services/investment management services</p>	<ul style="list-style-type: none"> ▪ C1: Trading for own account or for account of customers in any of the items referred to in point 7 of Annex 1 to CRD IV (Directive 2013/36/EU); ▪ C2: participation in securities issues and provision of services relating to such issues; ▪ C3: advice to undertakings on capital structures, industrial strategy (as per Point 9 of Annex 1 to CRD IV); ▪ C4: portfolio management and advice; ▪ C5: safekeeping and administration of securities; ▪ C6: safe custody services; ▪ C7: advisory services (per Art. 7 of Mortgage Credit Directive); ▪ C8: any other financial services of a kind within this cluster.
<p>Cluster D Other financial related activities</p>	<ul style="list-style-type: none"> ▪ D1: credit reference services (as per Point 13 of Annex 1 to CRD IV); ▪ D2: comparison services; ▪ D3: compliance services related to know your customer/anti-money laundering; ▪ D4: compliance services - other; or ▪ D5: any other financial services of a kind within this cluster.

Many market participants might notice that the table above misses a number of business lines that might constitute regulated activity for purposes of a number other supervised sectors. Some of these fall within the mandate of EBA's sister authorities, ESMA and EIOPA. In order for the above to operate as a true tool of capturing what is happening in the FinTech world and what this might mean from an EU financial supervision perspective, this means taking the Clusters above and expanding them to capture all activity so that the table could operate as a more powerful regulatory Rosetta Stone going forward.

Hot Topics

If you would like to receive more analysis from our wider Eurozone Group or in relation to the topics discussed above, including what the EBA Discussion Paper might mean for specific market participant types within or looking to enter the EU and/or the Eurozone, then please do get in touch with any of our Eurozone Hub key contacts below.

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