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COLLABORATION BETWEEN FINTECH FIRMS AND BANKS: AN OPPORTUNITY OR A CHALLENGE FOR THE EU BANK RECOVERY AND RESOLUTION LEGAL FRAMEWORK KEY OBJECTIVE?

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Abstract[2]

This article discusses the trend of collaboration between FinTech firms and banks, reactions of public authorities at the global and the EU levels, and potential opportunities and challenges such collaboration could bring to banks, supervisory and resolution authorities when applying and implementing the provisions of the bank recovery and resolution legal framework and aiming to ensure one of the key resolution objectives – the continuity of bank's critical functions essential to the real economy and financial stability.

Keywords: G20; financial law; FinTech; banking supervision, recovery, resolution; critical functions.

Introduction

"By enabling technologies and managing risks,

we can help create a new financial system for a new age…

under the same sun[3]"

Since 2009, many legal measures in the field of banking supervision and resolution were enacted both at the global and the EU levels. The new bank recovery and resolution legal framework (e.g. EU Bank Recovery and Resolution Directive; Single Resolution Mechanism Regulation; national implementing measures transposing the provisions of the Directive such as UK Banking Act etc.) is aiming to deal with the 'too big to fail' problem by introducing legal instruments which should help to reach a paradigm-changing objective – to resolve failing bank by ensuring the continuity of bank's critical functions which are essential to the real economy and financial stability[4]. The legal framework aims to reach this objective

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2 Disclaimer: The views and opinions expressed in this article are those of the author and do not necessarily reflect the official policy or position of any institution of the European Union.

3 CARNEY, M. The Promise of FinTech – Something New Under the Sun? Speech by the Chair of the Financial Stability Board. Deutsche Bundesbank G20 conference on "Digitising finance, financial inclusion and financial literacy". Wiesbaden, 25 January 2017. P.14. [accessed on 15 September 2018] <http://www.fsb.org/wp-content/uploads/The-Promise-of-FinTech-—-Something-New-Under-the-Sun.pdf>

4 See more on the legal concept of critical functions: BALČIŪNAS, L. The Legal Concept of Bank's Critical Functions, Implementation Challenges and the Role in the EU Bank Recovery and Resolution Framework. In Teisės viršenybės link. Vilnius University, Faculty of Law. Vilnius, 2019.

by requiring supervisory and resolution authorities, among other things, to ensure bank's resolvability through the preparation of recovery and resolution plans were critical functions and core business lines should be mapped, checking how non-critical services could be separated from critical etc.

In recent years we have seen unprecedented growth of investment to the financial technologies (FinTech). For example, FinTech firms around the world have raised a record $39.57 billions of investment from venture capital firms in 2018, an increase of 120% from 2017[5]. Collaboration between FinTech and incumbent banks has been increasing, and a new generation FinTech banks are evolving as well. This raises the questions what kind of opportunities and challenges such collaboration could bring to the application and implementation of the bank recovery and resolution legal framework provisions and ensuring one of the key '*after crisis*' bank recovery and resolution legal framework objectives – to ensure the continuity of failing bank critical functions which are essential to the real economy and financial stability.

The paper consists of three parts. The first part discusses trends and the drivers for collaborations between FinTech firms and banks. The second part provides an overview of reactions from regulators and public authorities at the global and the EU levels. The third part discusses specific opportunities and challenges which such collaboration could bring to the continuity of bank's critical functions, and aspects which should be considered by banks, supervisory and resolution authorities to adjust to changing reality when applying the legal provisions of the bank recovery and resolution legal framework. Finally, based on the performed analysis, the conclusions are provided.

1. Drivers for collaboration between FinTech firms and banks

Since 2000 investments in FinTech have grown dramatically (see figure 1), and it is expected that such a trend will remain strong with the continuous growth of investors' interest[6]. The customer-first approach that FinTech's have, continue to facilitate and advance financial inclusion, and are re-imagining products and propositions tailored to changing needs. So, will banks disappear? No, but they will be different.

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[5] Banking Tech. 4 February 2019. [accessed on 4 February 2019] <https://www.bankingtech.com/2019/02/fintech-investment-in-2018-soars-to-record-40bn/>

[6]. The pulse of FinTech – Q4 2017. KPMG, 2018. [accessed on 10 February 2019] <https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2018/02/pulse_of_fintech_q4_2017.pdf>

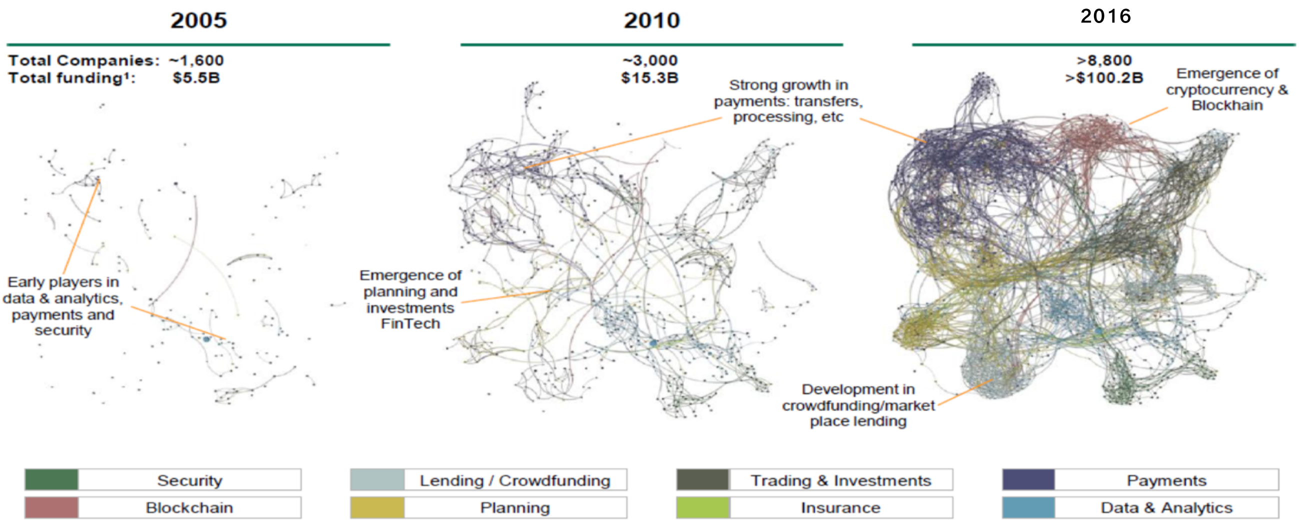

Figure 1. FinTech investment growth 2000 – 2016[7]

Customer habits and needs are changing as they get used to Google, Amazon, Apple and other user-friendly interfaces and are looking for something similar in banking. The adoption and use of internet-connected devices, computer and mobile-savvy millennials drives need for speed and convenience in financial services. However, banks' platforms are far from such experience as usually they are based on outdated, inflexible and legacy IT systems. FinTech firms aim to fill this gap. Data indicates that most investments in FinTech (usually developing products and solution based on technologies such as – data and analytics, cloud computing, artificial intelligence, and distributed ledger technology) are targeting namely retail banking[8].

According to certain empirical researches, around 75% of FinTech firms cite collaboration with incumbent banks as their primary business objective[9]. FinTech firms are aiming to collaborate with banks as this enhances their visibility by partnering with the well-know brand bank, allows to achieve economies of scale, gain customer trust, access to capital, expertise in regulations, expertise in risk management and other[10]. On the other hand, collaboration is also expected to be a priority for banks. It is increasingly expected that moving forward banks will become product and service 'aggregators', retaining the interface with clients, but combing their products and services with those of other market participants[11]. Banks are aiming to partner with FinTech firms[12] as this is reducing cost and

[7] IOSCO Research Report on Financial Technologies (FinTech). International Organisation of Securities Commission (IOSCO), February 2017. P. 5. [accessed on 10 February 2019] <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD554.pdf>

[8] As a matter of fact, McKinsey already in 2016 estimated that 52% of FinTech investments will focus on retail banking. Impact of FinTech on Retail Banking. McKinsey & Company, Brussels, 2016. Presentation slide 5. [accessed on 15 March 2018] <https://www.financialforum.be/sites/financialforum.be/files/media/1695-3-marc-niederkorn.pdf>

[9] For example, The World FinTech report 2018. P. 41. [accessed on 15 March 2018] <https://www.capgemini.com/wp-content/uploads/2018/02/world-fintech-report-wftr-2018.pdf>

[10] Ibid.

[11] Global Financial Markets Association and Pwc. Technology and Innovation in Global Capital Markets. Current trends in technology and innovation and their impact on the Investment Bank of the Future. March 2019. P. 5. [accessed on 10 March 2019]

inefficiencies, improving client servicing, increasing revenue, maintaining business completeness and agility, meeting regulatory and compliance obligations, enhancing controls and catching up with the speed of the market[13]. Banks are also embracing new technologies to accelerate the commoditization of cost drivers[14]. Finally, considering that such collaboration brings business benefits for both sides, we could expect even greater symbiosis between FinTech firms and banks in the future. Such a trend will be stimulated by existing (e.g. Monzo, Revolut, Starling etc.) and emerging[15] FinTech banks[16] as well.

However, such collaboration brings not only new business models and opportunities for FinTech firms and banks themselves, but also raises questions how such collaboration may impact the existing prudential supervision, in particular, bank recovery and resolution legal framework, it's one of the key objectives and financial stability in general, and what are the reactions of regulators and public authorities.

2. Reactions of public authorities at the global and EU levels

At the global level, the Financial Stability Board (FSB) has a mandate to promote international financial stability; therefore, has a role to play as FinTech continues to evolve. Already in 2016, the FSB has highlighted that for regulators, it is essential to understand what FinTech developments will change the way financial markets operate[17]. In

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<https://www.afme.eu/globalassets/downloads/publications/afme-technology-and-innovation-in-global-capital-markets.pdf>

[12] The EBA identified as well that for banks the predominant way is partnership with new entrant FinTech firms and other firms that aim to actively follow and embrace FinTech developments. See: EBA Report on the Impact of FinTech on Incumbent Credit Institutions' Business Models. European Banking Authority, London, 3 July 2018. P. 25. [accessed on 3 July 2018] <https://eba.europa.eu/documents/10180/2270909/Report+on+the+impact+of+Fintech+on+incumbent+credit+institutions%27%20business+models.pdf>

[13] Global Financial Markets Association and Pwc. Technology and Innovation in Global Capital Markets. Current trends in technology and innovation and their impact on the Investment Bank of the Future. P. 7. [accessed on 10 March 2019] <https://www.afme.eu/globalassets/downloads/publications/afme-technology-and-innovation-in-global-capital-markets.pdf>

[14] European Central Bank. Guide to assessment of fintech credit institution licence applications. Frankfurt, March 2018. [accessed on 10 August 2019] <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.201803_guide_assessment_fintech_credit_inst_licensing.en.pdf>

[15] For example, in the UK the Bank of England has been receiving interest from a range of FinTech firms seeking authorisation in the UK as a bank. 6 firms with business models focused on providing banking services to customers digitally have already been authorised as banks since 2015. A further 16 FinTech firms are at pre-application or live application stage, compared with 26 non-FinTech firms. See: What are the business models of new FinTech firms in the UK? Bank of England, London, 29 March 2019. [accessed on 29 March 2019] <https://www.bankofengland.co.uk/bank-overground/2019/what-are-the-business-models-of-new-fintech-firms-in-the-uk?sf100451385=1>

[16] FinTech bank is a business model in which the production and delivery of banking products and services are based on technology-enabled innovation. See: Guide to assessment of FinTech credit institution licence applications. European Central Bank, Frankfurt, March 2018. P. 3. [accessed on 10 August 2018] <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.201803_guide_assessment_fintech_credit_inst_licensing.en.pdf>

[17] ANDERSEN, S. Chatham House Banking Revolution Conference Global Regulatory Developments and their Industry Impact. Financial Stability Board, Basel, 3 November 2016. P.3. [accessed on 12 February 2019] <http://www.fsb.org/wp-content/uploads/Chatham-House-The-Banking-Revolution-Conference.pdf>

2017, M. Carney, Chair of the FSB, stated that “[b]y enabling technologies and managing risks, we can help create a new financial system for a new age… under the same sun[18]”. Thought, the Chair also highlighted that as risks form FinTech emerge, “authorities can be expected to pursue a more intense focus on the regulatory perimeter, more dynamic setting of prudential requirements, a broader commitment to resolution regimes <…>”.[19] The same year the FSB also issued a more specific analysis focusing on financial stability implications from FinTech and highlighting supervisory and regulatory issues that merit authorities’ attention[20]. In 2019, the FSB issued the report assessing FinTech market developments in the financial system and the potential implications for financial stability[21].

The Basel Committee also has performed some work linked to FinTech and bank supervision, not to mention that the Basel Committee’s Core Principles[22] are relevant for assessing innovation in banking and the interaction between banks and FinTech firms. Furthermore, in 2018, the Basel Committee issued the document summarising its main findings and conclusions on sound practices and implications of FinTech developments for banks and bank supervisors[23].

At the European Union (EU) level, in 2017 the European Commission (EC) published the Consumer Financial Services Action Plan[24] including some actions aimed at supporting the development of an innovative digital world in retail financial services[25]. Subsequently, in 2017 the European Parliament adopted the Report on FinTech[26] which among other things also highlighted that the legislation, regulation and supervision have to adapt to innovation and strike the right balance between incentives to innovative consumer and investor

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[18] CARNEY, M. The Promise of FinTech – Something New Under the Sun? Speech given by the Chair of the Financial Stability Board. Deutsche Bundesbank G20 conference on “Digitising finance, financial inclusion and financial literacy”. Wiesbaden, 25 January 2017. P.1. [accessed on 15 September 2018] <http://www.fsb.org/wp-content/uploads/The-Promise-of-FinTech-—-Something-New-Under-the-Sun.pdf>

[19] Ibid., P.14.

[20] Financial Stability Implications from FinTech. Supervisory and Regulatory Issues that Merit Authorities’ Attention. Financial Stability Board, Basel, 27 June 2017. [accessed on 28 June 2017] < http://www.fsb.org/wp-content/uploads/R270617.pdf>

[21] FinTech and Market Structure in Financial Services: Market Developments and Potential Financial Stability Implications. Financial Stability Board, Basel, 14 February 2019. [accessed on 14 February 2019] <http://www.fsb.org/wp-content/uploads/P140219.pdf>

[22] Core principles for effective banking supervision. Basel Committee on Banking Supervision, Basel, September 2012. [accessed on 2 October 2012] <https://www.bis.org/publ/bcbs230.pdf>

[23] Sound Practices. Implications of FinTech Developments for Banks and Bank Supervisors. Basel Committee on Banking Supervision, Bank for International Settlements, Basel, February 2018. [accessed on 1 March 2018] <https://www.bis.org/bcbs/publ/d431.pdf>

[24] Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions. Consumer Financial Action Plan: Better Products, More Choice. European Commission, Brussels, 2017. [accessed on 4 April 2017] <https://eur-lex.europa.eu/resource.html?uri=cellar:055353bd-0fba-11e7-8a35-01aa75ed71a1.0003.02/DOC_1&format=PDF>

[25] See Annex to Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions. Consumer Financial Action Plan: Better Products, More Choice. European Commission, Brussels, 2017. [accessed on 4 April 2017] <https://eur-lex.europa.eu/resource.html?uri=cellar:055353bd-0fba-11e7-8a35-01aa75ed71a1.0003.02/DOC_1&format=PDF>

[26] Report on FinTech: The Influence of Technology on the Future of the Financial Sector. Committee on Economic and Monetary Affairs, European Parliament, Brussels, 2017. [accessed on 2 May 2017] <http://www.europarl.europa.eu/doceo/document/A-8-2017-0176_EN.pdf>

protection and financial stability[27]. In 2017, the European Banking Authority (EBA) published a Discussion Paper[28] on its approach to FinTech[29]. This paper also raised questions concerning the impact of FinTech on the resolution of banks[30]. In 2018, as a follow-up to this paper, the EBA's FinTech roadmap was issued providing conclusions from the consultation on the EBA's approach to FinTech[31] which, among other things noted, that although resolution requirements are not typical for FinTech firms, there is a need to consider the interaction between FinTech firms and banks[32].

The Banking Union authorities, the European Central Bank (ECB) as a supervisory authority and the Single Resolution Board (SRB) as a resolution authority, are also progressively recognising the developments in the field of FinTech banking. In 2018, the ECB issued its guide to assessments of FinTech credit institution license applications[33]. The SRB noted that the transformation and digitalisation of financial services and the influence of FinTech firms on bank resolution would need to be considered and assessed in the Banking Union[34].

As it can be seen, both at the global and the EU levels FinTech topic is progressively getting more attention from regulators and public authorities. However, even though there is some attention and work done concerning potential opportunities and challenges to financial stability stemming from FinTech, there is no or minimal specific analysis on how collaboration between FinTech firms and banks could impact the application of legal provisions and the objectives of the bank recovery and resolution legal framework. In particular, what are opportunities and challenges from such collaboration for the implementation of relevant EU bank recovery and resolution statutory framework provisions and fulfilment of one of the key resolution objectives – the continuity of bank's critical functions which are essential to the real economy and financial stability.

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[27] Report on FinTech: the Influence of Technology on the Future of the Financial Sector. Committee on Economic and Monetary Affairs, European Parliament, Brussels, 2017. P. 5. [accessed on 2 May 2017] <http://www.europarl.europa.eu/doceo/document/A-8-2017-0176_EN.pdf>

[28] Discussion Paper on the EBA's approach to financial technology (FinTech). European Banking Authority, London, 4 August 2017. [accessed on 4 August 2017] <https://eba.europa.eu/documents/10180/1919160/EBA+Discussion+Paper+on+Fintech+%28EBA-DP-2017-02%29.pdf>

[29] Considering the EBA's statutory objective, which, among other things, requires the EBA to promoting a sound, effective and consistent level of regulation and supervision, preventing regulatory arbitrage and promoting equal competition, contribute to enhancing consumer protection, and its duty to monitor new and existing financial activities. Articles 1(5) and 2(2) of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC. OJ L 331, 15.12.2010.

[30] Discussion Paper on the EBA's approach to financial technology (FinTech). European Banking Authority, London, 4 August 2017. P. 54 [accessed on 4 August 2017] <https://eba.europa.eu/documents/10180/1919160/EBA+Discussion+Paper+on+Fintech+%28EBA-DP-2017-02%29.pdf>

[31] The EBA's FinTech Roadmap. Conclusions from the Consultation on the EBA's Approach to Financial Technology (FinTech). European Banking Authority, London, 15 March 2018. [accessed on 15 March 2018] <https://eba.europa.eu/documents/10180/1919160/EBA+FinTech+Roadmap.pdf>.

[32] The EBA's FinTech Roadmap. Conclusions from the Consultation on the EBA's Approach to Financial Technology (FinTech). European Banking Authority, London, 15 March 2018. P. 33.

[33] Guide to Assessments of FinTech Credit Institutions License Applications. European Central Bank, Frankfurt, March 2018. [accessed on 2 April 2018] <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.201803_guide_assessment_fintech_credit_inst_licensing.en.pdf>

[34] SRB Multi-Annual Planning and Work Programme 2018. Single Resolution Board, Brussels, 2018. P. 14. [accessed on 12 September 2018] <https://srb.europa.eu/en/content/work-programme>

3. Opportunities and challenges for the EU bank recovery and resolution legal framework and it's one of the key objectives – continuity of bank's critical functions

There are three main conditions set in the EU Bank Recovery and Resolution Directive[35] (BRRD) which have to be met by the institution that resolution authority could take resolution actions, namely: i) determination that the institution is failing or likely to fail[36]; ii) there is no reasonable prospect that any alternative private sector measures or supervisory actions would prevent the failure of the institution[37]; iii) a resolution action is necessary in the public interest[38]. While the first two conditions are more 'traditional' and were usually assessed by supervisory authorities when considering whether to put the bank under the insolvency, the third condition – public interest test – is a more specific and has introduced a new angle for the resolution paradigm[39].

The BRRD specifies that a resolution action should be treated as in the public interest if it is necessary for the achievement of and is proportionate to one or more of the resolution objectives and winding up of the institution under ordinary insolvency proceedings would not meet those resolution objectives to the same extent[40]. The continuity of critical functions is one of the key resolution objectives[41], therefore, forms an integral part of the public interest test[42]. The BRRD defines 'critical functions' as "activities, services or operations the discontinuance of which is likely in one or more Member States, to lead to the disruption of services that are essential to the real economy or to disrupt financial stability due to the size, market share, external and internal interconnectedness, complexity or cross-border activities of an institution or group, with particular regard to the substitutability of those activities, services or operation"[43].

Furthermore, it's important to note that the legal concept of critical functions is not only crucial for the public interest test and the determination of whether resolution objectives

[35] Directive 2013/36/EU Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC Text with EEA relevance. OJ L 176, 27.6.2013, p. 338–436.
[36] See Article 32 (1)(a)(4) of the BRRD.
[37] Article 32(1)(a) of the BRRD.
[38] Article 32(1)(c) of the BRRD.
[39] See more: BALČIŪNAS, L. The Legal Concept of Bank's Critical Functions, Implementation Challenges and the Role in the EU Bank Recovery and Resolution Framework. In Teisės viršenybės link. Vilnius University, Faculty of Law. Vilnius, 2019
[40] Article 32(5) of the BRRD.
[41] Article 31(2)(a) of the BRRD. Other objectives: ii) to avoid a significant adverse effect on the financial system, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline; iii) to protect public funds by minimising reliance on extraordinary public financial support; iv) to protect depositors covered by Directive 2014/49/EU and investors covered by Directive 97/9/EC; and v) to protect client funds and client assets. Article 31(2)(b)(c)(d)(e) of the BRRD.
[42] See more: BALČIŪNAS, L. The Legal Concept of Bank's Critical Functions, Implementation Challenges and the Role in the EU Bank Recovery and Resolution Framework. In Teisės viršenybės link. Vilnius University, Faculty of Law. Vilnius, 2019.
[43] Article 2(1)(35) of the BRRD. See more about the legal concept of critical functions: BBALČIŪNAS, L. The Legal Concept of Bank's Critical Functions, Implementation Challenges and the Role in the EU Bank Recovery and Resolution Framework. In Teisės viršenybės link. Vilnius University, Faculty of Law. Vilnius, 2019.

were met. This concept, in general, plays a key role in the EU bank recovery and resolution legal framework. Namely, each step, whether it was recovery planning[44], resolution planning[45], identification of resolution objectives or application of resolution tools[46] and powers[47], relates to the legal concept of critical functions and therefore the provisions of the EU bank recovery and resolution legal framework should be applied keeping in mind this concept[48].

Increasing collaboration between FinTech firms and banks could provide direct as well as indirect opportunities and benefits linked to the EU bank recovery and resolution framework one of the key objectives – the continuity of bank's critical functions. For example, decentralisation and diversification across critical services and functions providers may dampen the effects of financial shocks in some circumstances as the failure of a single bank may be less likely to shut down a market as there would be other providers of critical services and critical functions.

Furthermore, technological solutions provided by FinTech firms may increase efficiency in bank's operations, improve bank's ability to manage risk and in this way support the stable business model of the bank which subsequently would contribute to overall efficiency gains in the financial system and the real economy. FinTech firms could also help to improve bank's ability to extract and aggregate specific information, as well as monitoring and reporting processes and systems what would, as a result, help to deal with the operational continuity issues. Smart management information systems could ensure that the resolution authorities are able to gather precise and complete information about the bank's core business lines, critical services, operations supporting critical functions what would facilitate to make informed and rapid decisions. Ability to instantly extract accurate information on financial contracts[49], or the assets (their place and eligibility as collateral) and liabilities of the bank could speed-up, for example, valuation exercise or decision to provide liquidity support.

However, such collaboration brings not only opportunities for the application and implementation of bank recovery and resolution framework legal norms and objectives, it also brings direct and indirect challenges. Increasing collaboration between FinTech firms and banks may result in an increased number of critical services[50] which will be provided by

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[44] Title II, Chapter I, Section 2 of the BRRD.
[45] Title II, Chapter I, Section 3 of the BRRD.
[46] Title IV, Chapter IV of the BRRD.
[47] Title IV, Chapter VI of the BRRD.
[48] See more: BALČIŪNAS, L. The Legal Concept of Bank's Critical Functions, Implementation Challenges and the Role in the EU Bank Recovery and Resolution Framework. In Teisės viršenybės link. Vilnius University, Faculty of Law. Vilnius, 2019.
[49] Art. 2(1)(100), Art. 71(7)(8) of the BRRD.
[50] Critical services - the underlying operations, activities, services performed for one (dedicated services) or more business units or legal entities (shared services) within the group which are needed to provide one or more critical functions. BALČIŪNAS, L; et all. Technical advice on the delegated acts on critical functions and core business lines. European Banking Authority, London, 6 March 2015. P. 4. [accessed on 6 March 2015] <https://www.eba.europa.eu/documents/10180/983359/EBA-Op-2015-05+Technical+Advice+on+critical+functions+and+core+business++++.pdf>; Recital 8 of Commission Delegated Regulation (EU) 2016/778 of 2 February 2016, supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to the circumstances and conditions under which the payment of extraordinary ex post contributions may be partially or entirely deferred, and on the criteria for the determination of the activities, services and operations with regard to critical functions, and for the determination of the business lines and associated services with regard to core business lines. OJ L 131, 20.5.2016, P. 41-47. *For more details on the concept of critical services see: BALČIŪNAS*, L. The Legal Concept of Bank's Critical Functions, Implementation

FinTech firms to banks and which are needed to provide one or more critical functions which are essential to the real economy and financial stability. This brings to the question whether the resolution authorities will be able to use their resolution powers ((e.g. stay power) and tools effectively, as the role of third parties providing essential specialised services to banks will increase. On the other hand, banks reliance of third-party service providers raises questions whether they will be able to ensure business and operation continuity once faced with the difficulties as technological solutions (e.g. based on distributed ledger technology[51]) may not be in their control. This will require to continuously discuss and think how legal provisions set expectations for the way banks should engage third parties, to mitigate operational continuity issues which could be stemming from the increased interconnectedness and/or technological complexity of banks.

Furthermore, in order to avoid legal arbitrage and ‘grey’ zone, not only relevant bank recovery and resolution legal framework provisions aiming at ensuring operational continuity and continuity of bank’s critical functions, but also more general bank supervision legal framework provisions, for example, dealing with the outsourcing risk management, will need to be considered in order to have a common and up to date approach on expectations how banks should engage third parties.

Moreover, increased digitalisation and technological solutions in the field of payments, FinTech banking, mobile banking solutions and instant access to the bank account, progressively allow clients to move funds across accounts easier and speedier. This could enable depositors to speed-up outflows of deposits from the bank which faces difficulties and could create additional complications for authorities to stabilise the financial situation of the bank or to determine when the bank meets resolution conditions[52] (e.g. is failing or likely to fail[53]).

Finally, such collaboration could increase overall complexity of bank’s corporate structure what would as a result make it more complicated to resolve it or to segregate critical functions, core business lines, critical services from each other or the legal entity, what ultimately would complicate and/or make it impossible to achieve the continuity of those critical functions.

As it can be seen the collaboration between the FinTech firms and banks could bring not only opportunities but also challenges when implementing and applying the EU bank recovery and resolution legal framework and aiming to ensure one of its key objectives – the continuity of bank’s critical functions which are essential for the real economy and financial stability. It is expected that such collaboration will continuously grow. Therefore, this aspect will require increased attention from banks, supervisory and resolution authorities in future. This will also require to carefully consider such relationship when applying legal norms linked to recovery planning, resolution planning and assessment of resolvability to ensure that the continuity of banks’ critical functions and to avoid banks to become ‘too technologically complex and interconnected’ to be resolved.

Challenges and the Role in the EU Bank Recovery and Resolution Framework. In Teisės viršenybės link. Vilnius University, Faculty of Law. Vilnius, 2019.

[51] See more on the DLT: Technological Innovation. Distributed Ledger Technology: Challenges and Opportunities for Financial Market Infrastructures. European Central Bank, Frankfurt, 2016. [accessed on 7 May 2017] <https://www.ecb.europa.eu/pub/annual/special-features/2016/html/index.en.html>.

[52] Art. 32 of the BRRD.

[53] Art. 32(1)(a) of the BRRD.

Conclusions

1. In recent years, the speed and scale of investments to FinTech has increased rapidly. Collaboration between FinTech firms and banks is growing as both parties benefit from it. On the one hand, such collaboration brings new opportunities for customers and new business models for FinTech firms and banks themselves, on the other hand, it also impacts the application of existing bank prudential supervision, recovery and resolution legal framework and fulfilment of its objectives.

2. Both at the global and the EU levels FinTech topic is progressively getting more attention from regulators and public authorities. However, even though there is some attention and work done with regard to potential opportunities and challenges to supervision and financial stability stemming from FinTech, there is no or very limited specific analysis on how collaboration between FinTech firms and banks could impact the application of legal provisions and the objectives of the bank recovery and resolution legal framework.

3. The analysis shows that collaboration between FinTech firms and banks could create opportunities (e.g. improved data and risk management etc.) and challenges (e.g. bank's critical functions dependence on critical services supplied by FinTech firms etc.) in ensuring the continuity of bank's critical functions. Therefore, more attention from banks, supervisory (competent) and resolution authorities will be needed in order to balance those opportunities and challenges when applying and implementing the provisions of the EU bank recovery and resolution legal framework and ensuring that banks would not become 'too technologically interconnected and complex' to be resolved.

4. When preparing recovery plans, banks will need to consider their critical functions dependence from critical services supplied by FinTech firms, while supervisors, when reviewing those plans, will need progressively to draw more attention whether this aspect is adequately captured. When preparing the resolution plans, resolution authorities will need gradually to draw more attention to this aspect as well, as such collaboration could not only bring opportunities which could help to improve bank's resolvability, but also could bring challenges and potential impediments for bank's resolvability. Finally, if not adequately balanced, such collaboration may ultimately complicate the fulfilment of one of the key resolution objectives – the continuity of bank's critical functions which are essential to the real economy and financial stability.

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