

Report

Licensing of FinTech business models



Table of Contents

1	Executive Summary	3
2	Introduction	5
2.1.	Rationale of the mandate from the EC	5
2.2.	Surveys' scope and objectives	6
2.3.	Legal framework	7
2.4.	Principles of proportionality and flexibility	7
2.5.	The key areas that NCAs reported as warranting attention of the EC are addressed by separate workstreams.....	8
2.5.1	ICOs and crypto-assets	8
2.5.2	Innovation Facilitators.....	9
2.5.3	Cyber Security and Cloud Outsourcing.....	11
2.6.	NCAs did not identify and report areas that would require new EU financial services legislation.....	11
3	Key Findings of January 2018 Survey	12
3.1	Regulated and unregulated FinTech firms.....	12
3.2	Potential regulatory gaps and issues observed in the jurisdictions	16
3.2.1	Definition of financial instruments and the legal nature of crypto-assets.....	16
3.2.2	Need to clarify the eligibility of crypto-assets for regulated funds.....	18
3.2.3	New activities to regulate: brokerage and asset management of crypto-assets	18
4	Key Findings of January 2019 Survey	18
4.1	Mapping: Fintech and traditional business models	18
4.2	Mapping: Innovative business models	19
4.2.1	Crypto-assets, ICOs and DLT	21
4.2.2	Marketplace lending	21
4.2.3	Digital ID verification.....	21
4.2.4	Investment fund units	22
4.2.5	Other business models.....	22
4.2.6	Crowdfunding.....	22
4.3	Proportionality under the EU legislative framework.....	22
4.3.1	Flexibility	22
4.3.2	National specificities for authorising/licensing innovative business models.....	25



4.3.3	Modalities of licensing	26
4.3.4	De Minimis threshold under which no authorisation is required	27
4.3.5	Ensuring the level playing field	28
4.3.6	Business models that do not require authorisation at any level	29
5	Conclusions.....	29
6	Annexes	32
6.1	Annex 1	32
6.2	Annex II.....	33

1 Executive Summary

This Report addresses one of the five action points of the European Commission ('EC') FinTech Action plan, namely ESMA's mandate 'to map current authorising and licensing approaches for innovative FinTech business models in Europe'.

ESMA conducted two Surveys to gather evidence from national competent authorities (NCAs) on the licensing regimes of FinTech firms in their jurisdictions. The first conducted in January 2018, sought to identify potential gaps and issues in the existing EU regulatory framework, assess how the existing national regimes diverge and, if identified, propose recommendations to adapt the EU legislation to the emerging innovations. The second, launched one year later attempted to identify the ways in which NCAs employed the concepts of 'proportionality' and 'flexibility' when licensing FinTech firms.

The Surveys confirmed that NCAs do not typically distinguish between FinTech and traditional business models in their authorising and licensing activities since they authorise a financial activity and not a technology. ESMA presents in this Report the key findings of the Surveys:

1. The primary area where regulatory gaps and issues have been identified by NCAs and where FinTech firms do not fit neatly within the existing rules is related to crypto- assets, ICOs and DLT. NCAs called for more clarity at the EU level with respect to the definition of financial instruments and the legal nature of crypto-assets. The NCAs' responses served to confirm ESMA's Crypto Asset Advice, that certain tokens are financial instruments and subject to the full attendant regulation, while those tokens that are not deemed financial instruments should be subject to some minimal level of regulation. ESMA continues to foster supervisory convergence on the topic of crypto assets across Member States.
2. The Surveys also identified the need for greater clarity around the governance and risk management processes associated with both cyber security and cloud outsourcing. The Joint ESA Advice on the need for legislative improvements relating to Information and Communication Technology risk management requirements in the European Union financial sector and the Joint ESA Advice on the costs and benefits of a coherent cyber resilience testing framework for significant market participants and infrastructures within the EU financial sector address many of these issues.
3. There are a direct link and interdependencies between the innovation facilitators and authorising approaches for innovative FinTech business models. Innovation facilitators play a central role in mapping approaches applied to FinTech and in identifying the areas where the legislation and licensing requirements need changes and adaptation. Moreover, innovation facilitators, especially regulatory sandboxes, may have an impact on the licensing regime for FinTechs and may allow for divergence from other

jurisdictions. In response, ESMA jointly with the EBA and EIOPA published the Report on FinTech: Regulatory Sandboxes and Innovation Hubs in January 2019. In addition, the European Forum of Innovation Facilitators established in April 2019 aims at fostering convergence in this area.

4. Further, there was the ongoing discussion as to the need for an EU wide holistic crowdfunding regime, in particular for crowdfunding based on non-MiFID II instruments. The regulation for crowdfunding service providers is under the scrutiny of the European Parliament and the Council and is expected to enable the level playing field for cross-border service providers.

Based on the evidence gathered, we conclude that at present most innovative business models can operate within the existing EU rules. Therefore, ESMA reiterates its conclusions made in the recent reports regarding crypto-assets/ICOs/DLT, cyber security and innovation facilitators, and does not put forward additional recommendations for changes in EU regulation at this stage, in line with the EBA and EIOPA conclusions in their respective reports. Nonetheless, further considerations may be needed to further adapt the EU legislative framework to emerging innovations.

2 Introduction

1. To foster a more competitive and innovative European financial sector, in March 2018 the EC adopted the FinTech Action Plan. In this Plan the EC asked ESMA and the other ESAs to conduct several actions, one of which is to map current authorising and licensing approaches for innovative FinTech business models in MSs. This mandate includes exploring how NCAs apply proportionality and flexibility in the financial services legislation and presenting recommendations to the EC on any need to adapt EU financial services legislation.
2. This Report provides an overview of the work ESMA conducted in cooperation with NCAs to map and assess the licensing approaches, divergences in national licensing regimes and identify whether there is a need to adapt EU financial services legislation to emerging innovative business models.

2.1. Rationale of the mandate from the EC

3. The EC explains in the Action Plan the importance of identifying diverging licensing requirements that affect FinTech firms in the areas of ESA's supervision and regulation. In the financial services sector, firms are authorised and supervised based on their activities, services or products, regardless of whether they use traditional or innovative means to deliver those services. Firms can be authorised and regulated under EU or national law, or for some not be subject to any financial specific regulation. The purpose of the regulator is to establish uniform operating conditions enabling EU financial services firms that are duly authorised and supervised by their home MS to benefit from a European passport that would give these firms the possibility to scale-up into the entire EU Single Market. At present, it appears that most innovative business models operate under existing EU rules, given that the EU legislative framework provides room to apply proportionality in the authorisation process.
4. As in licensing regimes in general, in licensing innovative business models there are risks that supervisors may take different approaches to identify the applicable EU legislative framework and apply differing levels of proportionality. For new financial services that do not fall under the existing EU regulatory framework MSs can adopt bespoke regimes and these regimes may vary across MSs that in turn would hamper the development of a Single Market. Crowdfunding and crypto-assets/ICOs are examples of areas where a lack of a common EU framework may hinder service providers and investors.
5. To address these risks the EC requested the ESAs to map existing authorising approaches, and, if necessary, clarify the applicable EU legislative framework for financial services. The ESAs may also propose an EU framework to cover new innovative business models or provide guidance to national supervisors to ensure more convergence between national regulatory regimes, with the goal to enable innovative business models to scale-up across the EU through clear and consistent licensing requirements.

2.2. Surveys' scope and objectives

6. To accomplish the EC objectives, ESMA conducted two Surveys (in January 2018 and in January 2019) with the goal of collecting information from NCAs on the licensing regimes of FinTech firms in their jurisdictions, identify potential gaps and issues in the existing EU regulatory framework (gaps that would leave certain risks unaddressed or issues that would prevent those innovations to reach their full potential) and assess how the existing national regimes might diverge.
7. The first Survey was focused on collecting information from NCAs about the number and nature of regulated and unregulated FinTech firms in the MSs, how the business models of these FinTech firms fit within the existing rules and whether MSs considered any regulatory action at national level necessary to accommodate the business models of the firms (e.g. changes to the existing rules or bespoke rules). The second Survey was conducted one year later to update our knowledge about the FinTech market in MSs and clarify how the proportionality and flexibility in the financial services legislation are applied by national authorities. The Survey questions are provided respectively in Annexes 1 and 2.
8. In the Surveys ESMA used the FSB definition of FinTech - 'technology-enabled innovation in financial services that could result in new business models, applications, processes or products with an associated material effect on the provision of financial services'¹. The FSB organises FinTech activities into five categories of financial services, namely (i) payments, clearing and settlement, (ii) deposits, lending and capital raising, (iii) insurance, (iv) investment management and investor services and (v) market support.
9. In line with ESMA's mandate, the scope of the Surveys conducted was limited to those FinTech firms that provide the economic functions of (i) clearing and settlement, (ii) capital raising, (iii) investment management and investors services or (iv) market support, as defined by the FSB. Those firms that provide only the economic functions of deposits, lending, insurance or payment were excluded from the scope of the Survey to avoid overlap with the work of the EBA and EIOPA.
10. Crowdfunding platforms and robo-advisors were also excluded from the scope of the Survey given the work ESMA had previously done in these areas. For the second Survey ESMA noted that ICOs/Crypto-Assets were not in the scope of the Survey because they are addressed by a separate ESMA workstream and a dedicated ESMA led NCA task force. Nonetheless, the relevance and importance of crypto-assets, ICO and DLT issues was deemed of such urgency that MSs still provided comments on licensing of these activities.

¹ https://ec.europa.eu/info/publications/180308-action-plan-fintech_en and FSB, 'Financial Stability Implications from FinTech', 27 June 2017

2.3. Legal framework

11. MiFID II sets out the applicable regime to the granting of authorisation to investment firms. In particular, Title II of Chapter I of MiFID II sets out the conditions and procedures for authorisation including requirements for authorisation, scope of authorisation, procedures for granting and refusing requests for authorisation, withdrawal of authorisations. Relevant provisions of the Directive have been further developed in Commission Delegated Regulation (EU) 2017/1943 and Commission Implementing Regulation (EU) 2017/1945. Both these Regulations are based on technical standards submitted by ESMA to the Commission. The MiFID II regime in this area is of maximum harmonisation and has entered into force on 3 January 2018.
12. In the area of investment management, Chapter II, Section 1 of Chapter III and Section 1 of Chapter V of the UCITS Directive as well as Chapter II of the AIFMD set out conditions and procedures for the authorisation of UCITS, UCITS management companies, self-managed UCITS investment companies, external AIFMs and internally managed AIF. This includes conditions for taking up business activities, the application procedures, conditions for granting authorisation, initial capital and own funds requirements as well as the rules relating to changes or withdrawal of authorisation. In this context, the UCITS/AIFMD authorisation regimes provide UCITS management companies and external AIFMs with the possibility to obtain the authorisation to provide the MiFID services listed under Article 6(3) of the UCITS Directive and Article 6(4) of the AIFMD. Moreover, Section 3 of Chapter 2 of the Commission Delegated Regulation (EU) 231/2013 includes Level 2 measures in relation to the additional own funds and professional indemnity insurance requirements set out in the AIFMD Level 1. These provisions are based on technical advice provided by ESMA to the European Commission (ESMA/2011/379).

2.4. Principles of proportionality and flexibility

13. The second Survey ESMA conducted was specifically focused on the application of principles of proportionality and flexibility. Both principles are broad concepts underpinning the functioning of the European Union. There are references to these principles in the EU legislation without a precise definition of these interdependent principles.
14. Article 5 (4) of the TFEU² specifies however that ‘under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties’. In other words, the content and form of the action must be in keeping with the aim pursued. On the one hand, this principle prevents the unlimited use of legislative and administrative powers so that an administrative authority may only act to the extent that is needed to achieve its objectives. On the other hand, the principle

² the Treaty on the Functioning of the European Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>

of proportionality doesn't imply allowing any entity to be exempt from its legal obligations but only to allow for their proportionate application.

15. Flexibility, in turn, allows MSs to consider unique aspects of individual FinTech models, as well as the risks they may introduce to consumers and the financial system, through authorization and supervision. However, across the MSs this discretion is based on common understanding and transposition of EU regulation and convergence towards its consistent implementation. It also means that when the EC and the co-legislators choose directives as the legislative instrument, they should ensure that enough consideration is given to the need for flexibility for national authorities regarding their implementation. More proportionate and less burdensome provisions provide MSs flexibility to take a proportionate approach to implement EU legislation designing regimes that would embrace emerging innovative models and consider unique national market conditions.
16. Typically, when describing proportionality as a general principle of EU law, a reference to Case C -62/14 Peter Gauweiler and Others v Deutscher Bundestag is made. It states that "the Union must always observe the principle of proportionality when exercising its competences deriving from the principle of conferral (Article 5(4) TEU)"³. In addition, it explains that "the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not go beyond what is necessary in order to achieve those objectives"⁴.
17. In the Surveys to NCAs, ESMA provided the above clarifications as to the principles of proportionality and flexibility to reach a common understanding of the objectives of the Survey by NCAs and collect relevant evidence.

2.5. The key areas that NCAs reported as warranting attention of the EC are addressed by separate workstreams

2.5.1 ICOs and crypto-assets

18. NCAs reported that FinTech firms in their jurisdictions are authorised for the financial services activity they are undertaking, regardless of the technology used. Therefore, NCAs do not usually distinguish in their authorising and licensing activities between the fintech business models and traditional business models. The overall approach to authorising and licensing FinTechs is in line with the approach that NCAs take in authorising and licensing any firm in financial services regardless of the use of an innovative technology. The evidence collected from the NCAs confirmed that most innovative business models could work under existing EU rules. Some caveats and

³ Para 161 of the Opinion advocate General Cruz Villalon <http://curia.europa.eu/juris/document/document.jsf?text=&docid=161370&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1034301>

⁴ Para 67 of the Judgment of the Court <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014CJ0062&from=EN>

observations are further developed in the Report including the following three statements.

19. First, almost all NCAs in their responses referred to the area of crypto-assets and ICOs as the areas that need to be addressed at the EU level. NCAs reported the lack of clarity with respect to the definition of financial instruments and the legal nature of crypto-assets and related activities. A timely and coherent response from the EC to the uncertainties in the crypto area could prevent divergencies in national regimes and favour a consistent approach across MSs.
20. To address concerns and issues related to crypto-assets and ICOs and to coordinate this work ESMA established an ICO/Crypto-Asset Task Force under the Financial Innovations Standing Committee at the beginning of 2018. Furthermore, in January 2019, ESMA published an Advice on ICOs and crypto-assets to the EU institutions⁵. The Advice sets out the issues that exist in the current EU regulatory framework when applied to crypto-assets and advises the EU legislators to consider and, if relevant, address these issues. In particular, the Advice discusses the circumstances under which crypto-assets may qualify as financial instruments and the challenges that arise when applying the existing rules to these novel instruments. It also highlights the need for a bespoke regime when crypto-assets do not qualify as financial instruments.

2.5.2 Innovation Facilitators

21. Second, the evidence gathered from NCAs confirmed that FinTech presents opportunities and challenges for regulatory compliance and supervision. Striking the balance between fostering the scaling up of innovation and ensuring a high level of consumer and investor protection together with the resilience and the integrity of the financial system is a challenge. The FinTech business models scale-up very quickly and regulators and supervisors need to understand their nature, map and assess opportunities and risks, authorise and supervise their activities under the existing regulatory framework while ensuring a level playing field and how best to allocate resources.
22. To gain experience in this field and to respond efficiently to the challenge of promoting innovation, the majority of NCAs have established innovation facilitators in the form of innovation hubs and in several cases regulatory sandboxes. These initiatives are designed to promote greater engagement between competent authorities and firms with regard to financial innovations: to support firms in understanding the regulatory and supervisory expectations and, at the same time, to increase the knowledge of competent authorities about innovations and the opportunities and risks posed.
23. The innovation facilitators collect questions from FinTech firms relative to the application of regulatory and supervisory requirements to innovative business models, financial products, services and delivery mechanisms. The innovation facilitators provide firms with non-binding guidance on the regulatory boundaries of their proposed business

⁵ https://www.esma.europa.eu/sites/default/files/library/esma50-157-1391_crypto_advice.pdf

models, including aspects relating to the regulatory perimeter (specifically, whether the proposition would include regulated activities for which authorisation is required). Once this information is gathered, the innovation facilitators play a central role in mapping approaches applied to FinTech and in identifying the areas where the legislation and licensing requirements need changes and adaptation and where national regimes can diverge.

24. Alongside innovation hubs, some MSs also operate 'sandboxes'. Sandboxes provide a framework which enables NCAs to provide regulatory clarity that certain FinTech firms need to develop and test their propositions before embarking on a full market launch. As well as providing regulatory feedback on a firm's technology and business model, sandboxes provide a monitored space in which authorities and firms can better understand opportunities and risks that selected innovations present and their regulatory treatment. The process involves a testing phase to assess the viability of proposed innovations, in terms of application and compliance with regulatory and supervisory requirements. Sandboxes may also involve the use of legally supported discretion by the relevant supervisor (depending on the relevant applicable EU and national law), while observing the baseline assumption that firms are required to comply with all relevant rules applicable to the activity they are undertaking. The intended result is that FinTech firms may find it easier to identify, and demonstrate compliance with, the regulatory requirements applicable to them in a jurisdiction that operates a regulatory sandbox or innovation facilitator than in one that does not.
25. It is worthwhile noting that a recent study conducted on the sandbox of the UK FCA⁶ concluded that the sandbox can become a device that influences both the regulation and the business models of FinTech. The study explains how the FCA establishes cooperation with the sandbox firms, enabling the FCA to provide regulatory feedback on technology and business models. The study also considers the effects in a jurisdiction that has established a sandbox compared to other jurisdictions, in terms of regulatory cooperation between the regulator and FinTech firms accepted into a sandbox.
26. These experiences stress the link between the FinTech licensing regime and innovation facilitators. ESMA jointly with the EBA and EIOPA conducted a study of innovation facilitators and submitted to the EC the Report on FinTech: Regulatory Sandboxes and Innovation Hubs⁷. Furthermore, the EC in cooperation with the ESAs established a European network of innovation facilitators (European forum for innovation facilitators) that is intended to provide a platform for supervisors to share their experiences from engagement with firms through innovation facilitators, to share technological expertise, and to reach common views on the regulatory and supervisory treatment of innovative products, services and business models, overall boosting bilateral and multilateral coordination. The network is intended to benefit both competent authorities and firms in

⁶ Renato Mangano "Recent developments: The Sandbox of the UK Financial Conduct Authority as Win-Win Regulatory Device?" / Banking and Finance Law Review, Volume 34, Number 1 (December 2018)

⁷ https://www.esma.europa.eu/sites/default/files/library/jc_2018_74_joint_report_on_regulatory_sandboxes_and_innovation_hubs.pdf

fostering a common supervisory response to technological innovations in the financial sector.

27. As innovation facilitators have been addressed in the Regulatory Sandboxes and Innovation Hubs Report and further work is planned to be conducted through the European forum for innovation facilitators, the present Report will not focus further on innovation facilitators while recognising the direct link and interdependencies between the innovation facilitators and authorising approaches for innovative FinTech business models.

2.5.3 Cyber Security and Cloud Outsourcing

28. Third, several NCAs referred in their responses to cyber security risks underlining FinTech business models and risks related to cloud outsourcing and called for prescriptive provisions addressing these risks at the EU level.
29. Under the Fintech Action Plan ESMA undertakes several initiatives in the areas of cloud services and cyber resilience. In cooperation with the EBA and EIOPA, in April 2019 ESMA published two Joint Advises: 1) on the need for legislative improvements relating to Information and Communication Technology risk management requirements in the European Union financial sector; and 2) on the costs and benefits of a coherent cyber resilience testing framework for significant market participants and infrastructures within the EU financial sector⁸.

2.6. NCAs did not identify and report areas that would require new EU financial services legislation

30. Based on the results of the Surveys described further in the Report and considering the links with separate workstreams (crypto/DLT, innovation facilitators and cyber security/cloud outsourcing), ESMA presents in this Report the key findings and analyses conducted and concludes that no additional regulatory gaps that would require new EU financial services legislation have been identified. This is in line with the EBA and EIOPA conclusions. Nevertheless, some NCAs have identified the areas where further examination is needed, such as the proportionality of MiFID II provisions, especially with regards to the licensing requirements for small-scale trading platforms which to date would fall under the definition of “multilateral system” and would therefore need to be licensed as a regulated market, a MTF or an OTF.
 - full cost-benefit analysis should be included in the final report so that the Commission has the full context against which our advice is made in one document.
 - Feedback statements should provide an analysis of responses to the previous stage of the consultation process. They should normally be neutral. Any views we have on developing

⁸ Both papers are available at <https://www.esma.europa.eu/press-news/esma-news/esas-publish-joint-advice-information-and-communication-technology-risk>

the technical proposals or advice should normally be contained in a discussion or consultation paper.

3 Key Findings of January 2018 Survey

31. In January 2018 ESMA launched a Survey with the objective to compile information on the licensing regimes of EU FinTech firms and to identify potential gaps and issues in the existing EU regulatory framework, e.g. gaps that would leave FinTech-related risks unaddressed or issues that would prevent those innovations to reach their full potential.
32. The Survey was divided into three parts. In Part I, NCAs were asked to identify the number of regulated and unregulated FinTech firms in their jurisdiction (by economic function, the innovations they employed, and legal regime applied). Part II asked for information on potential regulatory gaps and issues observed in their jurisdictions and if NCAs identified instances, where FinTech firms do not fit easily within the existing rules. NCAs were asked to differentiate between regulated and unregulated FinTech firms, and to provide information on where FinTech firms may fall outside of the regulated space and whether there are any regulatory impediments or gaps. Finally, in Part 3, NCAs were asked to provide details, if applicable, on any regulatory action taken in their jurisdiction with respect to FinTech firms.
33. ESMA addressed the Survey to the NCAs of 31 countries (MSs and three EFTA countries) in January 2018 and by March 2018 collected 29 answers. Of that number five NCAs reported they had no FinTech firms within the scope of the Survey or did not have reliable data on them. In July-August 2018 ESMA conducted several conference calls with a number of NCAs to clarify their responses to the Survey, update the collected information and gain a better understanding of existing practices in the MS.

3.1 Regulated and unregulated FinTech firms

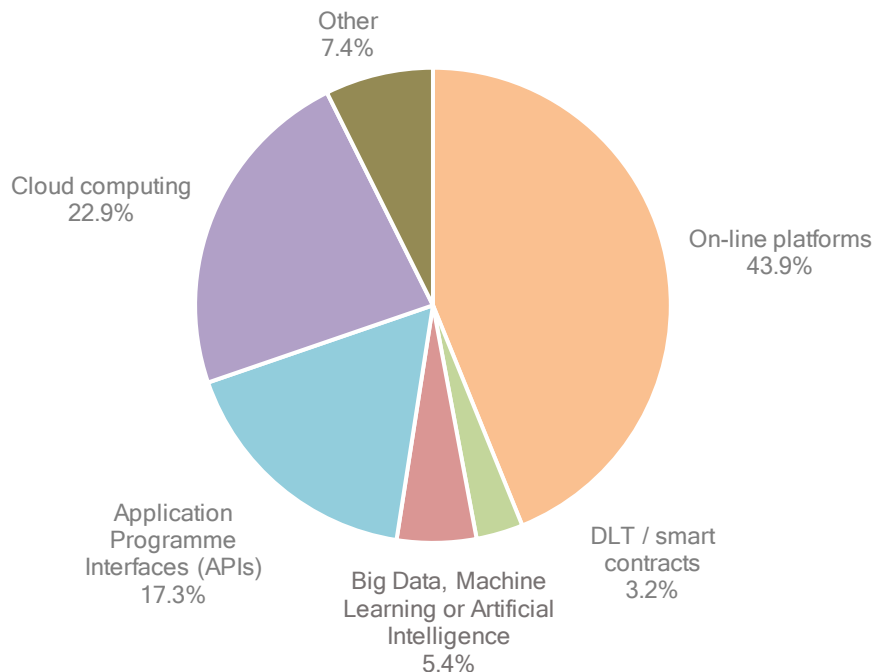
34. NCAs reported a total of 308 regulated and 328 unregulated FinTech firms. These figures do not include the UK, which at the time estimated the number of FinTech companies in its jurisdiction to be more than 1600. NCAs appear to count differently their regulated FinTech firms because they typically do not hold an internal definition of the term and do not regulate FinTech as such, but the financial activity the firms provide. Moreover, FinTech is only one area of innovation that NCAs supervise and regulate.
35. While some NCAs count incumbent firms undertaking FinTech activities as FinTech firms, for other NCAs such incumbents would not be considered as FinTechs. Many NCAs highlighted that the data on the number of unregulated FinTech firms in their jurisdictions cannot be reported because such firms remain outside the perimeter of their supervision. As such the number of unregulated firms is most likely understated. For example, one NCA reported the number of unregulated firms in their jurisdiction (250 out of all 328 unregulated firms reported by all NCAs) based on the number of inquiries that the NCA received on FinTech activities.

36. Therefore, the major challenge we found in comparing the number of regulated and unregulated FinTech firms reported is the different approaches NCAs take to monitor the market, and to define and calculate the number of FinTech. Therefore, the number of FinTech firms and the following charts should be interpreted as estimates.
37. As to unregulated firms, NCAs were asked to provide an estimated number of such firms in their jurisdictions. Many of the NCAs reported that most of the unregulated companies in their jurisdictions operate in the crypto space such as exchange platforms, Virtual Currency (VC) brokers and firms raising capital through ICOs.
38. As for regulated firms, NCAs were asked to report the number by type of innovation used: on-line platforms, DLT, big data, application programme interfaces and others. NCAs reported that the most used innovative business model by regulated FinTech firms in their jurisdictions is online platforms (43.87%) followed by Cloud Computing (22.92%) and Application Programme Interfaces (APIs) (17.28%). As for "other" models, NCAs reported digital portfolio management, tools for algorithmic trading, digital ID verification, predictive/descriptive/prescriptive analytics, algorithmic trading tools and others. It should be noted that there is no standard definition of each of these innovations, so FinTech firms can combine different elements of these differing innovations. It also means that the same firm might have been reported under more than one innovation business model (Figure 1).

F.1.

2018 FinTech Licensing Regimes Survey

Innovations used by the regulated FinTech firms in NCAs jurisdictions.



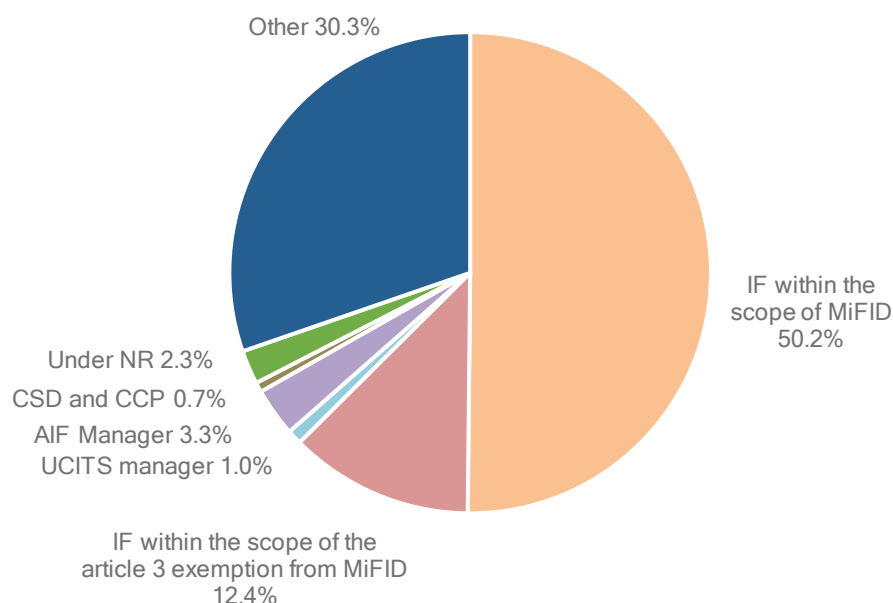
Note: Share of the innovation used by the (308) regulated firms reported by the NCAs in the survey, %.
 'Other' includes digital portfolio management, tools for algorithmic trading, digital ID verification, predictive/descriptive/prescriptive analytics, algorithmic trading tools.
 Sources: 2018 Fintech Survey, ESMA.

39. With reference to the type of authorisation granted (i.e. how many of them were authorised as investment firms within the scope of MiFID, UCITS managers, alternative investment fund managers (AIFM), central securities depositories (CSD), central counterparties (CCP) or other types), NCAs reported that one half of all regulated firms are authorised as MiFID investment firms, followed by firms operating within the scope of MiFID Article 3 exemption (12.38%). One NCA reported that 86 firms out of the total number of regulated firms in its jurisdiction (94) are technology providers that do not need a regulatory license. Other NCAs also commented that many FinTech firms in their jurisdictions provide technology services to regulated firms while are not in themselves undertaking any regulated financial services business and therefore not needing licenses. The regulatory responsibility remains with the companies to which the technology services are provided. Some NCAs argued that the EC might consider whether these technology providing companies should be somehow regulated but didn't develop their proposals (Figure 2).

F.2.

2018 FinTech Licensing Regimes Survey

Type of authorisation held by the regulated FinTech firms in NCAs jurisdictions.



Note: Share of different financial firms under different authorisation regime as reported by the NCAs in the survey, %. "IF" = Investment firm, "AIF" = alternative investment fund; "CCP" = Central Counterparty; "CSD" = Central Securities Depository; "NR" = National regime; "Other" compiles technology providers and other firms which provide financial services that do not need a regulatory license and e-money institutions.

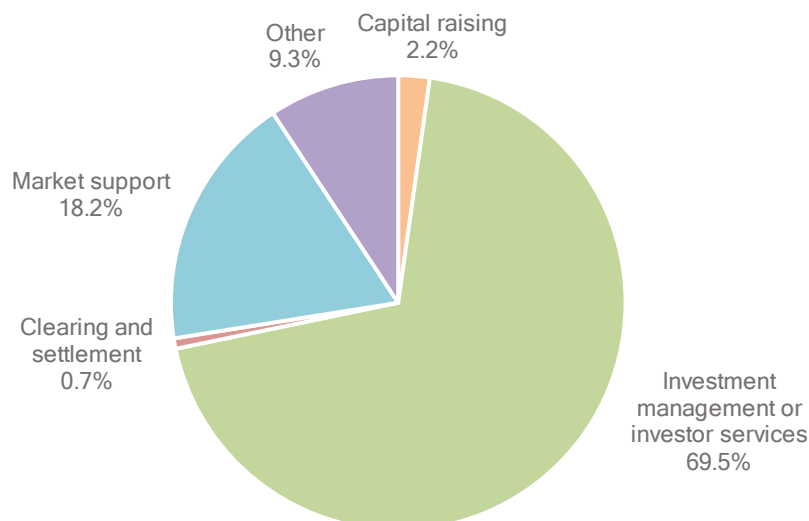
Sources: 2018 Fintech Survey, ESMA.

40. Concerning the economic function provided by the regulated firms (capital raising, investment management etc.), NCAs reported that the majority (69.52%) in their jurisdictions provide investment management or investor services. There are fewer companies that do market support (18.22%), capital raising (2.23%) and clearing and settlement services (1%). Some NCAs reported "other" economic functions (9.29%), e.g. Insure Tech (App-based insurance services providers), RegTech firms providing compliance, cybersecurity, etc (Figure 3).

F.3.

2018 FinTech Licensing Regimes Survey

Type of economic function by the regulated FinTech firms in NCAs jurisdictions.



Note: Share of the economic function provided by the (308) regulated firms reported by the NCAs in the survey. Investment management or investor services" includes trading portfolio management, financial advice, safekeeping; " Market support" includes cloud computing; "Other" includes RegTech firms providing compliance and cybersecurity, InsureTech (App-based insurance Services Provider).
Sources: 2018 Fintech Survey, ESMA.

3.2 Potential regulatory gaps and issues observed in the jurisdictions

41. To the question on regulatory gaps and issues observed in the jurisdictions and if there are instances where FinTech firms do not fit neatly with the existing rules, almost all NCAs referred to the crypto-assets area. NCAs claim that there is the lack of clarity with respect to the definition of financial instruments and the legal nature of crypto-assets.

3.2.1 Definition of financial instruments and the legal nature of crypto-assets

42. Almost all NCAs reported having difficulty in determining when crypto-assets are regulated and when they are not. NCAs raised the question on the legal nature of the crypto-assets and whether they fit into the definition of MiFID financial instruments, and,

more specifically, transferrable securities. NCAs explained that where crypto-assets qualify as financial instruments, crypto-assets related activities are likely to fall within the scope of MiFID, the Prospectus Regulation, CSDR, EMIR, UCITs or AIFMD. Where crypto-assets do not qualify as financial instruments, they would likely fall outside of the existing regulatory scope, although general consumer protection rules may still apply. NCAs called for clarity at the EU level on whether specific rules, if any, would need to be adopted to bring them into regulated space.

43. A related issue that was reported is the current self-assessment of ICO issuers. Such issuers often qualify their crypto-assets as falling outside of the scope of financial regulation and define them as 'utility tokens'. NCAs however consider that some of the current financial legislation is likely to be applicable, but they see practical difficulties in how to adapt regulations to these new financial instruments. Amendments and adaptation of existing rules to new business models involving cryptos
44. Another crypto-asset issue identified is the potential need for amendments and adaptation of existing rules to new business models and activities that do not fit well within existing regimes such as MiFID or CSDR. For example, new type of prospectus, clearing and settlement on blockchain, authorisation of a CSD based on blockchain technology and others.
45. If it is determined that some crypto-assets are transferable securities, it might be useful to explore if the current Prospectus Directive can address the needs and issues specific to crypto-assets. If the current Prospectus Directive does not meet these needs and issues adequately, a new type of Prospectus regulation may be needed.
46. The above-mentioned clarification of the rules applicable to crypto-assets at the EU level also has implications on the classification of crypto-asset exchanges. Depending on the qualification of crypto-assets as financial instruments, crypto-asset exchanges could fit into some type of MiFID trading venues. It also means that there is a potential need for a bespoke regime for platforms that fall outside of MiFID and MAR.
47. It was pointed out by NCAs that once the legal nature of crypto-assets is clarified and, if it fits within the transferable securities definition, it should be clarified how a CSD based on blockchain may be NCA authorized, how it could comply with current regulation on post trading and how it would apply to blockchain based trading venues.
48. It was also stressed in the responses that exchanges offering exclusively crypto-to-crypto services do not fall under PSDII, because only the transfer of fiat-money falls under the regime of the PSDII. Therefore, the absence of a harmonized regime on the matter can be seen as an impediment on the issue of level playing field.
49. Examples of two companies were reported: one company provides clearing and settlement on shares of funds via an in-house blockchain; and another firm provides netting and settlement on swaps via an in-house blockchain. These activities do not fit easily within existing regimes under MiFID or CSDR. The same applies to companies providing clearing and settlement on an open blockchain.

50. NCAs also reported one company that puts clients in contact in the context of 'a name give-up processes' to execute contracts for difference on Ethers. The company is authorised as investment service provider for third-party order reception/transmission, but its activity does not fit well with investment services under MiFID, because it manages only the name give up process.

3.2.2 Need to clarify the eligibility of crypto-assets for regulated funds

51. Another issue raised by NCAs relates to the need for clarification on the status of crypto-asset custody, crypto-asset banks or eligible assets (and key concepts such as "trash ratio" or valuation methods). It includes the need for clarification on the eligibility of crypto-assets for regulated funds, valuation approaches for crypto-assets and respective liquidity requirements. One NCA suggested to supplement the existing framework applicable to investment companies with specific technological expertise requirements for those investment companies whose investment funds are made partially or totally of digital assets.
52. Related to the management of investments in crypto-assets, there is also a need to clarify how rules concerning safekeeping, and the manner and the means required for custodians would apply for digital assets funds. One NCA reported that one bank was seeking guidance for the activity of safekeeping of crypto-assets.

3.2.3 New activities to regulate: brokerage and asset management of crypto-assets

53. In addition, NCAs raised the need for creation of new regulated activities such as the brokerage and asset management related to crypto-assets. One NCA provided an example of companies that would like to manage crypto-assets under a discretionary mandate or provide brokerage services in crypto-assets. Others noted the existence of FinTech firms whose specific activity does not fit with the existing rules, such as "social trading". It is unclear whether this business model falls under the scope of MiFID II and whether the firm offers a MiFID service. These activities are not regulated to date, however the NCA believes that these activities need to be regulated.

4 Key Findings of January 2019 Survey

54. In January 2019 ESMA launched a Survey with the objective of clarifying how the principles of proportionality and flexibility provided by the EU are applied by the NCAs. The Survey was sent to the NCAs of 31 countries (MSs and three EFTA countries) and 26 NCAs provided their responses.

4.1 Mapping: Fintech and traditional business models

55. Almost all NCAs (25) that contributed to the Survey answered that they authorise/licence a financial activity, not a technology, therefore they do not distinguish between FinTech and traditional business models. Such distinction can occur if specific requirements are

applied (e.g. risk management), but overall licenses are granted for “traditional” business models under the relevant regulation.

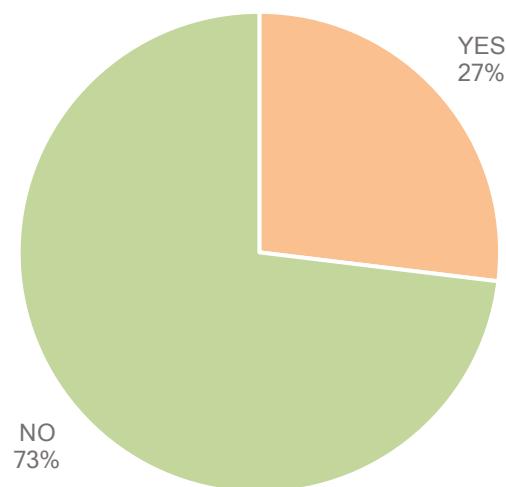
4.2 Mapping: Innovative business models

56. The majority of NCAs did not identify innovative business models in their jurisdictions that are not captured by the existing authorisation/licensing requirements, might present risks and therefore should be captured. Seven NCAs consider however that there are innovative business models that might represent risks and therefore should be captured at the EU level (Figure 4).

F.4.

2019 FinTech Licensing Regimes Survey

NCAs awareness of innovative business models that are not captured by the existing authorisation/licensing requirements but should be captured.



Note: Share of NCAs awareness of the existence of innovative business models, %. The information compiled in the chart was reported by 26 NCAs.
Sources: 2019 FinTech Survey.

57. Among the innovative business models not captured by the existing authorisation/licensing requirements and presenting risks the NCAs identified crypto-assets, DLT, investment fund units represented by crypto tokens, AI, marketplace lending, social trading/copy trading, corporate P2P lending platform, crowdfunding on

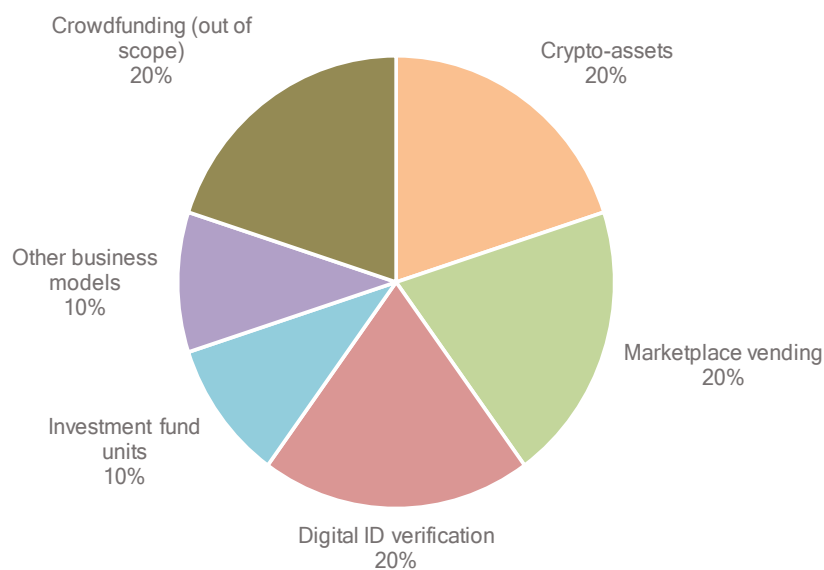
the basis of non-MiFIDII instruments, online identification, e-aggregators, paperless contracting.

58. The NCAs that reported such “unregulated” business models all agreed that these areas should be addressed at the EU level and some are already being addressed (e.g. crowdfunding regulation and related to this marketplace lending, social trading/copy trading). Several NCAs stressed that addressing these innovative financial activities at the EU level can ensure more convergence across national regulatory regimes (Figure 5).

F.5

2019 FinTech Licensing Regimes Survey

Types of non-regulated innovative business models.



Note: Share of the innovation used by non regulated innovative business models reported by 7 NCAs, %.
Sources: 2019 FinTech Survey.

4.2.1 Crypto-assets, ICOs and DLT

59. Two NCAs reported crypto-assets related activities as innovative unregulated business models⁹. One NCA explained that there are several innovative business models based on crypto-assets not qualified as financial instruments and to date not captured by the existing licensing requirements. The regulatory gaps should be addressed at the EU level, even with the existence on a national bespoke regime. Another NCA also mentioned cryptos/ICOs-related business and believes that the 2019 ESMA Advice on ICOs and crypto-assets¹⁰ is an example of how these business models should be addressed at the EU level.

4.2.2 Marketplace lending

60. Two NCAs referred to marketplace lending. One of these NCAs also mentioned e-aggregators and highlighted that addressing it at the EU level would ensure more convergence across national regulatory regimes.
61. Together with marketplace lending social trading and copy trading have also been mentioned. Marketplace lending is now being addressed through the proposed crowdfunding¹¹ regulation and in the initiative evaluating the effectiveness, efficiency, coherence, relevance and EU added value of the Consumer Credit Directive¹².
62. It has been reported that electronic platforms for student loans raised questions. Namely, it is not clear whether this activity of students lending through electronic platforms is covered by the scope of loan crowdfunding (marketplace lending). This is specifically relevant as the current proposals regarding Consumer Credit Directive and the European crowdfunding service providers expressly exclude credit lending from the scope of crowdfunding. Therefore, clarification at the EU level is welcomed.
63. Some questions as to social /copy trading have also been raised. Since it is not clear how this activity should be framed, it has been suggested to amend MIFIDII to address social/copy trading.

4.2.3 Digital ID verification

64. Two NCAs consider business models involving digital ID verification (also referred to as “online identification” and “remote identification without human involvement”) as not regulated but warranting legal certainty. One of those NCAs mentioned that if addressed at the EU level, there would be more convergence among national regulatory regimes.

⁹ We assume that there are more NCAs that consider the cryptos as an area that is not addressed by the existing EU regulation and calling for its attention, but it has been specified in the Survey that the crypto related topics were excluded from the scope of the Survey.

¹⁰ https://www.esma.europa.eu/sites/default/files/library/esma50-157-1391_crypto_advice.pdf

¹¹ European crowdfunding service providers (ECSP) for business, Procedure number [2018/0048\(COD\)](#). The status: is awaiting the first reading position/budgetary conciliation convocation.

¹² The revised version of the Consumer Credit Directive is planned for the fourth quarter of 2019 https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-3472049_en.

4.2.4 Investment fund units

65. One NCA believe that the business model where investment fund units are represented by crypto tokens should be addressed at the EU level.

4.2.5 Other business models

66. The following business models were also reported by NCAs as innovative and requiring EU regulation: paperless contracting, recommendation for mediator register, exemption handling in case of online SCA, corporate P2P lending platform, corporate factoring platform.

4.2.6 Crowdfunding

67. A few NCAs referred to crowdfunding in this section. It has been acknowledged that this topic is already being addressed at the EU level. It has also been reported that only crowdfunding based on non-MiFID II instruments raise qualifying questions.

4.3 Proportionality under the EU legislative framework

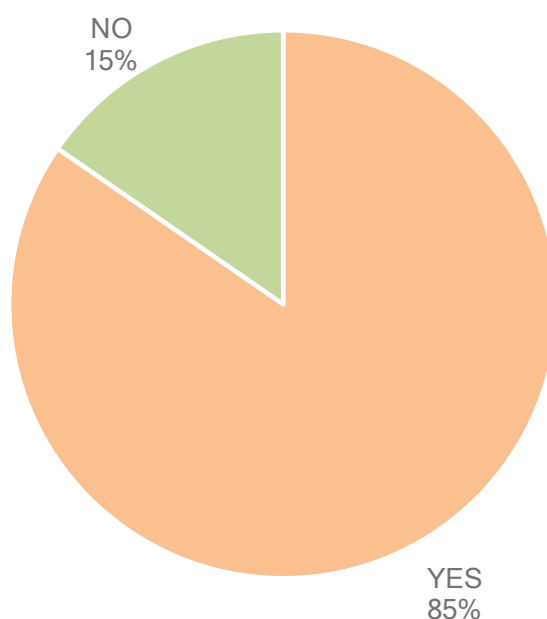
4.3.1 Flexibility

68. Most NCAs (22) believe that the EU legislative framework provides sufficient flexibility to apply licensing or authorisation requirements to emerging FinTech business models (services, products) in a proportionate manner. They added that they are in the position to adapt the regulation to national needs as warranted (Figure 6). Some commented on the areas where flexibility could be improved while others MSs argued that limited flexibility would be beneficial for a more efficient framework and greater supervisory and regulatory convergence.

F.6.

2019 FinTech Licensing Regimes Survey

EU legislative framework provides sufficient flexibility for NCAs to apply legislation.



Note: Share of NCAs that believe on the existence of sufficient felxibility in the EU legislative framework, %. The information compiled in the chart was reported by 26 NCAs. Sources: 2019 FinTech Survey.

69. Some NCAs explained that innovative business models were not considered when the current regulation was created, therefore the current framework is ill-suited for those models. A specific example is the challenges in applying the current framework to the interpretation and definition of financial instruments.
70. It has been argued that the classification of innovation should be considered when measuring the flexibility. The regulatory provisions for market infrastructures were referred as too burdensome for new entrants. For instance, the CSD and CCP license regimes are not adapted to the blockchain environment. Moreover, the regulation prevents any testing to determine to what extent the blockchain technology is mature enough to replace or complete existing infrastructures. Beyond blockchain-based projects, the NCA observed an increasing number of "marketplaces"/platform-type

projects which intend to facilitate corporate financing of non-listed assets. While recognising that such platforms could bring benefits (enhance liquidity), the known requirements for the MTF¹³ license, which were not designed with these types of business models in mind, may hamper the emergence of such platforms. Therefore, it has been argued that an increased proportionality for licensing of MTFs could help such platforms develop at the EU level and consequently facilitate SMEs' and corporate financing.

71. It has also been mentioned that new types of players do not fall neatly within the investment service list defined by MiFID, and that an increasing number of projects request the NCA to test while still in the process of obtaining regulatory approval.
72. Some NCAs reported that limited flexibility would be beneficial for a more efficient framework and greater supervisory and regulatory convergence. Although the principle of proportionality aims to grant flexibility, it may not be advantageous. Flexibility may create a gap while applying the existing requirements to licensing. For example, to address issues attached to DLT (governance, privacy and territoriality), new requirements need to be analysed and adopted at the EU level, while aware of cyber security risks. The cross-border nature of financial innovation and the objective of enhanced supervisory convergence amongst NCAs make uniform provisions at EU level with limited flexibility for NCAs a more efficient approach.
73. Some commented that there is enough flexibility but not in the case of secondary trading where MiFID does not allow proportionate application of MTF/RM rules¹⁴. The NCA further explained that the current legislation is designed for large platforms where reporting and capital requirements are disproportionate for small platforms and start-ups. Furthermore, MiFID does not allow a more proportionate interpretation of the rules, so that if a party brings together multiple interests in a financial instrument, it would then fall within the definition of a secondary trading platform.
74. In this light the same NCA argues for the amendment of the European regulatory framework to enable the offering and trading of cryptos that are comparable to shares or bonds. It implies more proportionate rules for small-scale trading, and requirements that do not unnecessarily hamper the infrastructural benefits of blockchain technology in the settlement and custody of cryptos.
75. One of the NCAs that supported that the current framework is proportionate and allows appropriate flexibility at the national level, also argued that there are potential benefits for EU authorities to explore further cross-border co-operation arrangements for innovation facilitators. The relevant development responding to this argument is the recent establishment of the European Forum for Innovation Facilitators (EFIF) aiming to improve cooperation and coordination in support of new technological developments in

¹³ MTF' for Multilateral Trading Facility

¹⁴ 'RM' for Regulated Markets

the EU financial sector and to provide a platform for national authorities to collaborate and share experiences from engagement with firms through innovation facilitators¹⁵.

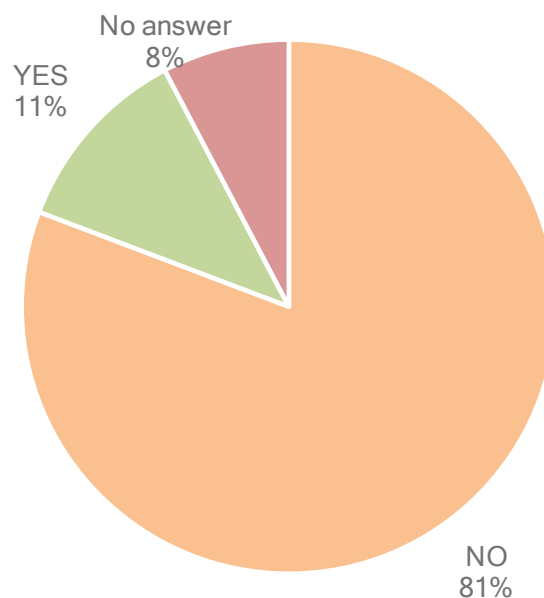
4.3.2 National specificities for authorising/licensing innovative business models

76. The vast majority of NCAs (21) did not report any national specificities in their authorising and licensing regimes for innovative models. A few NCAs (3) applied national specificities and two NCAs did not provide any answer to this question (Figure 7).

F.7.

2019 FinTech Licensing Regimes Survey

National specificities for authorising or licensing innovative business models.



Note: Share of NCAs that have specificities for authorising or licensing innovative business models, %. The information compiled in the chart was reported by 26 NCAs.
Sources: 2019 FinTech Survey.

77. One of the three NCAs with national specificities referred to crowdfunding although it is not in the scope of the Survey. Their national Crowdfunding Act in this jurisdiction lays down provisions on the disclosure obligations of crowdfunding recipients and obligations of crowdfunding intermediaries offering crowdfunding by means other than financial

¹⁵ <https://tokenpost.com/European-Commission-and-supervisory-authorities-launch-new-fintech-innovation-forum-1588>

instruments. The underlying principle is that investment-based crowdfunding with MiFID securities is regulated according to MiFID and loan-based crowdfunding (and investment-based crowdfunding with other instruments than MiFID securities) is regulated by their Crowdfunding Act.

78. Another NCA mentioned two national regulations that may make its national licensing framework differ from other jurisdictions. First, the regulation allowing the issuance and transfer of non-listed financial instruments (non-listed stocks, bonds, units or shares of funds and commercial papers) on a DLT. Second, the law establishing a framework for fundraising via the issuance of virtual tokens (ICO) and digital assets services providers (DASP).
79. One NCA highlighted that the national regime of a jurisdiction operating an innovation facilitator (especially a regulatory sandbox) may differ from jurisdictions that didn't establish innovation facilitators. The competent authorities reporting regulatory sandboxes emphasised that the sandbox does not allow the execution of regulated activities without authorisation, but still facilitate innovation development. These competent authorities also emphasised that their sandboxes do not provide a space for 'light touch' regulation and supervision. The reported regulatory sandboxes do not involve the disapplication of regulatory obligations that are required to be imposed as result of EU and/or national law (e.g. prudential standards) but can involve the exercise of supervisory powers or levers for proportionality that are already available to the competent authorities in relation to firms inside or outside the sandbox.¹⁶

4.3.3 Modalities of licensing

80. In line with the statement made earlier in the Report, NCAs confirmed that they do not have a specific licensing regime for innovative business models but authorise a financial activity.
81. Some NCAs explained that when taking the decision to grant a license, the NCA analyses the company holistically and it may happen that the authorisation is granted for just some and not all investment services asked by the entity. Moreover, special conditions can be attached to the granted license.
82. One NCA specified that they grant activity-specific authorisations for companies including UCITS and ManCos¹⁷ and that the Central Bank can also impose conditions of authorisation on firms.

¹⁶ More information is available in the Report on FinTech: Regulatory Sandboxes and Innovation Hubs https://www.esma.europa.eu/sites/default/files/library/jc_2018_74_joint_report_on_regulatory_sandboxes_and_innovation_hubs.pdf

¹⁷ Directive [2014/91/EU](#) of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions. ManCos refers to Management Companies. These are subjected to the European Market Infrastructure Regulation (EMIR). Regulation [648/2012/EU](#) of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

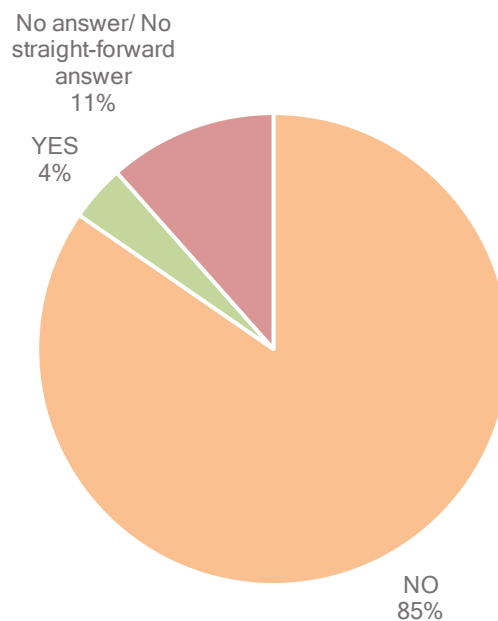
4.3.4 De Minimis threshold under which no authorisation is required

83. The majority of NCAs (22) do not apply de minimis thresholds below which authorisation is not required, but two NCAs reported doing so.
84. Some NCAs specified that they apply de minimis threshold regulation in line with the Prospectus regulation¹⁸ and AIFMD¹⁹. The overview of thresholds below which the obligation to publish a prospectus does not apply as established by Member States is provided on the ESMA web-site²⁰ (Figure 8).

F.8.

2019 FinTech Licensing Regimes Survey

Application of the minimis threshold under which no authorisation is required.



Note: Share of NCAs that apply the minimis threshold, %. The information compiled in the chart was reported by 26 NCAs.

Sources: 2019 FinTech Survey.

¹⁸ Exemption under Article 3(2) of the Prospectus Regulation (EU) 2017/1129

¹⁹ The thresholds of Article 3(2)(a) and (b) of the AIFMD (Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 and relevant Regulations)

²⁰ See https://www.esma.europa.eu/sites/default/files/library/esma31-62-1193_prospectus_thresholds.pdf

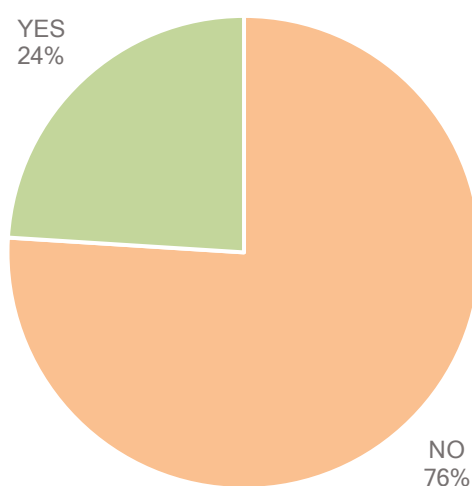
4.3.5 Ensuring the level playing field

85. The majority of NCAs (19) did not identify areas of financial innovation where prescriptive provisions at the EU level with limited flexibility for NCAs may be necessary to ensure a level playing field. Some NCAs (6) however identified the areas where an EU level framework can better ensure a fair environment (Figure 9).

F.9.

2019 FinTech Licensing Regimes Survey

Need of EU level perspective provisions for ensuring a level playing field.



Note: Share of NCAs that believe on the need of a EU level perspective, %. The information compiled in the chart was reported by 25 NCAs.
Sources: 2019 FinTech Survey.

86. Three NCAs referred to DLT and related to DLT activities. The existing legal requirement may not be easily applied and thus the risks inherent to this technology are left unaddressed. One NCA specifically highlighted the legal issues that may arise with regards to data protection and admissibility of evidence to court. The related cyber security risks were also highlighted in the responses.

87. Some NCAs highlighted the need to develop further guidance regarding the definitions of investment services, especially concerning the definition of investment advice, as this triggers the need to apply (or not) for a license.
88. It has also been emphasised in the responses that the area to focus on while adapting the EU framework to innovation developments is consumer protection, and that it may be adversely affected by legislative inconsistencies.
89. In addition, it has been reiterated by NCAs in this section that the capital requirements for MTFs and specific rules on compliance are too high and disproportionate and should be adapted to emerging innovations.

4.3.6 Business models that do not require authorisation at any level

90. Most of the NCAs (18) did not identify any innovative business model that does not require authorisation at EU or national level. Eight NCAs didn't provide answers to this question.
91. Some NCAs explained that technology firms that provide technology services to regulated firms or platforms are not subject to authorisation because they themselves do not undertake any regulated financial service business. Therefore, the liabilities remain with the regulated firms to which these technology firms provide services and technological solutions.
92. NCAs also mentioned comparison platforms and bulletin boards as business models that do not require authorisation at any level. One NCA specified that they do a case-by-case analysis when looking at the provision of investment services by a company rather than looking at the business model. It has been explained in the responses that the business models that do not require authorisation are business models that are based on unregulated activities. The reference can also be made to small firms operating below the threshold.
93. Analyses and qualifications of activities related to different platforms may raise questions, but there are no business models that would not require authorisation.
94. With the reference to RegTech firms and tech firms that offer data-driven services (AI, machine learning, big data), it was argued that regulators could monitor more closely the type of services these firms offer, as they may be used by a large number of market players.
95. Marketplace lending has also been mentioned as the business model that does not require authorisation.

5 Conclusions

96. Based on the evidence gathered through the Surveys, the primary area where regulatory gaps and issues have been identified by NCAs and where FinTech firms do

not fit neatly within the existing rules is related to crypto-assets, ICOs and DLT. The NCAs called for more clarity at the EU level with respect to the definition of financial instruments and the legal nature of crypto-assets. The NCA's responses served to confirm ESMA's Crypto Asset Advice, that certain tokens are financial instruments and subject to the full attendant regulation, while those tokens that are not deemed financial instruments should be subject to some minimum level of regulation.

97. The Surveys also identified the need for greater clarity around the governance and risk management processes associated with both cyber security and cloud outsourcing. The Joint ESA Advice on the need for legislative improvements relating to Information and Communication Technology risk management requirements in the European Union financial sector and the Joint ESA Advice on the costs and benefits of a coherent cyber resilience testing framework for significant market participants and infrastructures within the EU financial sector address many of these issues.
98. The results of the Surveys highlighted links and interdependencies between the innovation facilitators and authorising approaches for innovative FinTech business models. Innovation facilitators play a central role in mapping approaches applied to FinTech and in identifying the areas where the legislation and licensing requirements need changes and adaptation. In addition, innovation facilitators, especially regulatory sandboxes, may have an impact on the licensing regime for FinTechs and may allow for divergence from other jurisdictions.
99. NCAs do not typically distinguish between FinTech and traditional business models in their authorising/licensing activities since they authorise a financial activity and not a technology. The majority of NCAs did not identify risky innovative business models in their jurisdictions that are not captured by the existing authorisation/licensing requirements.
100. Some NCAs observed an increasing number of platform-type projects which intend to facilitate corporate financing of non-listed assets. Usually such platforms fall under the licensing requirements for a multilateral system (a regulated market, a MTF or an OTF) that may be disproportionate to the scope of such projects. Therefore, the MTF licensing requirements may need to be analysed from a proportionality standpoint. Such analyses may enable the emergence of platforms facilitating SMEs' financing needs.
101. Further, there was the ongoing discussion as to the need for an EU wide holistic crowdfunding regime. The regulation for crowdfunding service providers is under scrutiny of the European Parliament and the Council and is expected to enable a level playing field for cross-border service providers.
102. Considering the results of the both Surveys, ESMA reiterates the importance of work already conducted and unfolding in the field of crypto-assets/ ICOs/ DLT and cyber security/cloud outsourcing. ESMA also highlights the link between the FinTech licensing regime and innovation facilitators, where national innovation hubs and regulatory sandboxes can provide NCAs valuable evidence on how licensing regimes correspond to the FinTech developments and which changes are needed. More convergence can be achieved through the European forum for innovation facilitators that provide a



platform for supervisors to share their experiences when engaging with firms. Finally, in line with the conclusions of the EBA and EIOPA, ESMA does not put forward any specific recommendations to the EC on a need to adapt financial services legislation at this stage. Nonetheless, further considerations may be needed to further adapt the EU legislative framework to emerging innovations.

6 Annexes

6.1 Annex 1

Questions to NCAs in the February 2018 Survey

How many regulated FinTech firms are there in your jurisdiction? (*)

2. How many of these firms provide the following economic functions:
 - Capital raising;
 - Investment management or investor services (e.g., trading, portfolio management, financial advice, safekeeping);
 - Clearing and settlement;
 - Market support (e.g., cloud computing);
 - Other, please explain (e.g., RegTech).
3. How many of these firms use the following innovations:
 - On-line platforms;
 - DLT / smart contracts;
 - Big Data, Machine Learning or Artificial Intelligence;
 - Application Programme Interfaces (APIs);
 - Cloud computing;
 - Other, please explain.
4. How many of these firms are authorised as :
 - An investment firm within the scope of MiFID;
 - An investment firm within the scope of the article 2 exemption from MiFID;
 - An investment firm within the scope of the article 3 exemption from MiFID;
 - A UCITS manager;
 - An Alternative Investment Fund Manager;
 - A Central Securities Depository (CSD);
 - A Central Counterparty (CCP);
 - Under a national regime, please explain;
 - Other, please explain.
5. How many unregulated FinTech firms, e.g., VCs/ICO exchanges, on-line broker platforms, data aggregators, have you identified in your jurisdiction?
6. Have you identified instances where FinTech firms do not fit neatly with the existing rules?
7. Have you or are you considering any regulatory action at national level to accommodate FinTech firms (e.g., changes to the existing rules or bespoke rules)?
8. Please provide any additional comments that you would like to make.

6.2 Annex II

Questions to NCAs in the February 2019 Survey

Mapping Section

1. In your authorising and licensing activities, do you distinguish between the fintech business models and traditional business models?
2. If "Yes" to question 1:
 - 2.2. How do you distinguish between FinTech business models and traditional business models?
 - 2.3. How many licenses /authorisations you granted or /and refused in the past 5 years (or within the time frame available) for such FinTech business models? Please specify under which regime the authorisations were provided (e.g. MIFID, UCITS, etc)
 - 2.4. What are the types of FinTech business models for which you granted these licenses? (*)
 - 2.5. How many licenses/authorisations you granted for other "traditional" business models within the same time frame?
3. Are there innovative business models that you became aware of but that are not captured by the existing authorisation/licensing requirements and in your opinion present risks and therefore should be captured?
4. If "Yes" to question 3:
 - 4.2. Please describe the nature of these innovative business models.
 - 4.3. Do you believe that this issue should be addressed at the EU level?

(*) *Types of business models might include (but not limited to!) for example: RegTech/SupTech, digital ID verification, Big Data applications, e-aggregators, DLT applications/smart contracts, marketplace lending, mobile and web-based financial services, wearables IoT, e-trading, cloud computing applications.*

Proportionality Section

1. Do you believe that the EU legislative framework provides NCAs sufficient flexibility to apply licensing or authorisation requirements to emerging FinTech business models (services, products) in a proportionate manner?
2. If "No" to question 1: Please explain your answer.
3. Does the authorising and licensing regime for innovative business models in your jurisdiction have any national specificities?

4. If "Yes" to question 3:
 - 4.1. Please name and describe these specificities, especially in the areas of clearing and settlement, capital raising, investment management and investment services. What precise activities under these areas require a licence?
 - 4.2. How do you think they can make your regime diverge from the EU and other national regimes?
 - 4.3. How many firms asked for being authorised in your jurisdiction in the areas of clearing and settlement, capital rising, investment management and investor services and market support services in the past 5 years (or other period of time available)?
 - 4.4. Which requirements (prudential or organisational) are associated with the conditions for the license?
5. Is the licensing regime in your jurisdiction "binary" (i.e. can entities be licensed/authorised for just some activities or the authorisation is based on "all or nothing" principle)?
6. Does your NCA apply de minimis thresholds below which no authorisation is required? At what level are these thresholds set?
7. Following your experience, are there areas of financial innovation where prescriptive provisions at the EU level with limited flexibility for NCAs may be necessary to ensure the creation of a level playing field?
8. If "Yes" to question 7: What are these areas and why?
9. What business models do not require authorisation neither at EU nor at national level?