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Finansinspektionen's response at the webb-survey, to the Commission Consultation on FinTech

1.3 Is enhanced oversight of the use of artificial intelligence (and its underpinning algorithmic infrastructure) required? For instance, should a system of initial and ongoing review of the technological architecture, including transparency and reliability of the algorithms, be put in place? What could be effective alternatives to such a system?

The need for enhanced oversight is very likely. The use of artificial intelligence raises obvious concerns about operational risks, and, as is the case with FinTech in general, this may result in changes in how financial intermediation is structured as well as changes in how financial risks are distributed between the various stakeholders. It may also raise macroprudential issues, e.g. concerning procyclicality.

When it comes to consumer protection, we believe in general that financial actors should comply with the same regulatory requirements whether or not they use FinTech elements in connection with consumer-related activities. This is the case for businesses in Sweden that offer automated financial advice. However, in our role as the NCA, we must follow the technological development in order to understand associated risks. The complexity of the technological applications and AI when placed into a context of ordinary consumers' disadvantaged position in financial industry indicates a need for a more thorough process for licencing and supervision. In this process, the NCA functions as a sort of fourth line of defence against unattended consumer risks. As a minimum, the level of the main assumptions and constraints (e.g. preventing customers who express an interest in low-risk products from being offered high-risk products) must be reviewed.

A related issue is that supervisors need to continuously enhance their own

understanding of the FinTech business models, risks, new technologies and associated risks in order to be able to conduct risk-based supervision and avoid crucial gaps due to the lack of competence and skills. NCAs may need to develop new supervisory techniques to supervise algorithms and artificial intelligence, and ESAs could play an important role in this development as knowledge centers.

1.4 What minimum characteristics and amount of information about the service user and the product portfolio (if any) should be included in algorithms used by the service providers (e.g. as regards risk profile)?

Finansinspektionen would like to emphasise how important it is that regulation is technology-neutral. Our answer to this question is therefore that the minimum characteristics and amount of information should be the same, regardless of whether or not AI is used.

1.6 Are national regulatory regimes for crowdfunding in Europe impacting on the development of crowdfunding? In what way? What are the critical components of those regimes?

The lack of a common European regulatory regime for crowdfunding creates barriers for cross border expansions of successful crowdfunding services. What is considered a regulated activity in one country cannot be passported to another country without burdensome legal requirements, if at all due to prohibitions.

Crowdfunding provides new ways of providing financial services and challenges the traditional financial market. However, like traditional financial businesses, crowdfunding also introduces risks for consumers, other users and the society. This raises concerns for financial regulators, and in the absence of a common European regulatory regime countries must take their own steps to manage these risks. Because crowdfunding has the potential to grow fast in terms of volume, there is an understandable urgency to get control over it. Work is currently underway in Sweden in this area. A government inquiry will present recommendations for a national crowdfunding regulation later this year. However, national regulation means that there will be barriers to cross-border expansion of successful services.

1.7 How can the Commission support further development of FinTech solutions in the field of non-bank financing, i.e. peer-to-peer/marketplace lending, crowdfunding, invoice and supply chain finance?

Finansinspektionen supports the continued initiatives by the Commission to identify and assess the benefits and risks associated with crowdfunding. By efficiently linking investors to projects that need capital, crowdfunding has the

potential to make it both easier and cheaper for new and small companies to raise capital.

However, the regulatory frameworks are currently divergent across the EU and often not adapted to the many crowdfunding models that enter the market. This impedes crowdfunding from realizing its full potential and creates unnecessary risks for consumers.

In order to enable further growth of the crowdfunding sector while at the same time ensuring appropriate consumer protection, we believe there to be a need for a clear and harmonized regulatory framework in the EU. Such a legal framework would support convergence. However, such a legal framework must also give sufficient flexibility to address jurisdiction-specific risks. Additional jurisdiction-specific requirements must be accompanied by an appropriate degree of transparency to simplify cross-border provision of financial services. Because national financial markets differ, we do not believe that it is the ESAs that should license and supervise crowdfunding. Licencing and supervision should stay within the scope of the NCAs since they have greater possibilities than the ESAs to fine-tune licencing and supervision to the circumstances surrounding the crowdfunding undertaking. The role of the ESAs should instead be to foster a common level of supervisory practice. We believe this would stimulate both market growth and cross-border activity.

2.2. What measures (if any) should be taken at EU level to facilitate the development and implementation of the most promising use cases? How can the EU play its role in developing the infrastructure underpinning FinTech innovation for the public good in Europe, be it through cloud computing infrastructure, distributed ledger technology, social media, mobile or security technology?

Finansinspektionen supports the continued initiatives by the Commission to identify and assess the benefits and risks associated with FinTech. However, the regulatory frameworks are currently divergent across the EU, which impedes FinTech from realizing its full potential and creates unnecessary risks for consumers.

In order to reap the benefits from FinTech while at the same time ensuring appropriate consumer protection, we believe there to be a need for a clear and harmonised regulatory framework in the EU. Finansinspektionen therefore takes a positive stance on the harmonisation of legislation and supervisory practices at the EU level to further support convergence.

However, the legal framework must also give sufficient flexibility to address jurisdiction-specific risks. Additional, jurisdiction-specific requirements must be accompanied by an appropriate degree of transparency in order to simplify cross-border provision of financial services. We consider one important risk to be the supervisory “race to the bottom”, which needs to be addressed by the

tools in the possession of the ESAs. Some issues that are highly relevant to the FinTech development will be addressed in the context of the Brexit preparations (e.g. agreeing on a single approach and common requirements to outsourcing). This would stimulate both market growth and cross-border activity.

The EU can encourage NCAs to exchange information and experiences with new regulatory tools aimed at supporting innovation at the EU and national levels. The ESAs can contribute by establishing a common regulatory view on what the challenges are with FinTech-related innovations. This could encompass privacy requirements and other consumer protection areas. In general, the ESAs could take a coordinating role and spread good examples from countries, both within and outside the Union, that have interesting experience from working with FinTech issues.

Cloud services as a driver of innovation and the increasing interest for the use of cloud outsourcing solutions within the banking industry are growing in importance. However, there is considerable uncertainty surrounding the supervisory expectations within the EU on outsourcing to cloud service providers, and this uncertainty has to some extent been considered a barrier to institutions using cloud services. In light of this development, Finansinspektionen takes a positive stance on the upcoming EBA recommendations on outsourcing to cloud service providers. These recommendations will provide the clarity needed for institutions that are in the process of adopting cloud computing, while ensuring that risks are appropriately identified and managed. The recommendations will also foster supervisory convergence regarding applicable expectations and processes for the cloud.

Cyber-attacks in the financial sector pose a growing threat to institutions and the financial system. Supervisory authorities are seeing a need for greater sharing of expertise when it comes to the supervision of cyber security. Finansinspektionen take a positive stance on the ongoing work within the EBA to analyse current supervisory cyber security practices and put forward proposals for further work to align these practices, where applicable, across EU Member States. The role of the ESAs in creating a coherent supervisory practice within the union is crucial.

2.5 What are the regulatory or supervisory obstacles preventing financial services firms from using cloud computing services? Does this warrant measures at EU level?

Overall, Finansinspektionen does not distinguish between the outsourcing of IT operations to cloud service providers and other outsourcing of IT operations. To date, Finansinspektionen has noted that many providers of cloud services often use standard contracts to regulate rights and obligations between the customer and the provider. These standard contracts have contained limitations

on the institution's, the auditor's and Finansinspektionen's possibilities to gain access to the provider's premises and obtain information about the outsourced operations. It is therefore positive that the EBA recommendations on outsourcing to cloud service providers will provide the clarity needed for institutions that are in the process of adopting cloud computing, while ensuring that risks are appropriately identified and managed.

2.6 Do commercially available cloud solutions meet the minimum requirements that financial service providers need to comply with? Should commercially available cloud solutions include any specific contractual obligations to this end?

During 2016 and 2017, Finansinspektionen has noted a positive shift from a compliance perspective in how contractual arrangements are agreed between institutions and cloud service providers as relates to the regulatory requirements with which institutions need to comply. As mentioned under 2.5, the upcoming EBA recommendations on outsourcing to cloud service providers will provide the clarity needed on the EU level.

2.10 Is the current regulatory and supervisory framework governing outsourcing an obstacle to taking full advantage of any such opportunities?

In respect of outsourcing, we do not think that legislative changes are of primary importance, and we do not see any evidence that the existing rules on outsourcing are excessively hindering innovation in financial services. Priority should be given to harmonisation of supervisory practices. ESAs can take the lead in this work by applying their existing convergence tools (opinions, peer reviews, focused studies, recommendations).

2.11 Are the existing outsourcing requirements in financial services legislation sufficient? Who is responsible for the activity of external providers and how are they supervised? Please specify, in which areas further action is needed and what such action should be.

As mentioned under 2.10, Finansinspektionen considers the existing outsourcing requirements in the financial regulation to be sufficient. What should be prioritised is the work to harmonise supervisory practices. Here, the ESAs play a central role.

Financial institutions are ultimately responsible for managing their risks, including risks related to outsourced activities provided by external providers. It is a fundamental prerequisite for institutions not to enter into contractual obligations that would limit the possibilities of the institutions, auditors and national authorities to exercise any needed risk management, control practices and supervision.

3.1 Which specific pieces of existing EU and/or Member State financial services legislation or supervisory practices (if any), and how (if at all), need to be adapted to facilitate implementation of FinTech solutions?

Finansinspektionen takes a positive stance on the harmonisation of legislation and supervisory practices at the EU level to further support convergence. One relevant topic is crowdfunding. The legal framework must also give sufficient flexibility to address jurisdiction-specific risks. Additional, jurisdiction-specific requirements must be accompanied by an appropriate degree of transparency to simplify cross-border provision of financial services.

The overall approach to facilitating financial innovation should rest on the same pillars as any other policies which favour development, but stop short of protectionism or "industrial support measures" (picking and supporting "national champions"). Such an approach should be based on predictable supervisory policies and processes, an open dialogue, public supervisory methodologies and rulebooks, legal certainty (well-reasoned and consistent decisions over time) and reasonable response times. By doing this, we will per definition enable innovation and the use of new technologies.

The approach when regulating FinTech should be technology-neutral. It means, for instance, that lower standards should not apply in cases where the same services are outsourced, compared to when they are delivered by the firm itself. The same applies to the use of the technology: identical regulatory requirements should apply to the provision of services irrespective of the technological platform. It is the provided financial service that should be regulated and not the method providing it. If certain platforms are associated with idiosyncratic risks, these risks need to be assessed as well and may imply changes to supervisory practices. Given this background, we are skeptical about having a separate supervisory category for "Fintech Activities".

Furthermore, there is a need to explore the application of the principle of proportionality so the regulatory burden on smaller or niched players is proportionate. In some cases, it may be sufficient to change the supervisory approach, but in other cases the legal requirements may need to be changed. Simple business models and uncomplicated new services may warrant shorter licensing periods. ESAs may play important roles toward supervisory convergence.

3.2 What is the most efficient path for FinTech innovation and uptake in the EU? Is active involvement of regulators and/or supervisors desirable to foster competition or collaboration, as appropriate, between different market actors and new entrants. If so, at what level?

The development of FinTech raises a broad range of policy issues and will probably require action from different parts of the public sector, of which the financial regulation and supervision is one important component. However, financial regulation and supervision should stick to the fundamental goals of financial stability and consumer protection and avoid being drawn into "industrial policy", e.g. actively promoting innovation, etc., if there is no clear link to financial stability and consumer issues. There may be good arguments for public support of technical innovation, but authorities other than financial supervisors should take the lead on this matter.

The preferred path in this case would be collaboration between EU countries. This would ensure equal treatment of innovators, both smaller tech-companies and established insurance undertakings and equal treatment of undertakings with domicile in different EU countries, and it would hinder regulatory arbitrage within the EU. At the same time, it is important not to hinder the development of methods to support the FinTech industry at the national level by assigning all development in this area to the EU level. Setting up regulatory sandboxes could be one way for regulators to better understand FinTech and increase the opportunities to reap the benefits. However, we stress that such sandboxes should not be restricted to FinTech, but enable a playing field for all types of new innovations. Since the financial markets differ between Member States, this sandbox exercise is best done at the national level.

A more harmonised regulatory environment minimises compliance costs, thus enabling more resources to be spent on business development and innovation. Future legislation should be designed in such a manner as to prevent innovation and development of new business models and entrepreneurship in this field (i.e. be technology neutral). The development of innovative services is desirable, but it is also important to monitor this development to prevent the emergence of new FinTech-related risks. The role of regulators should be to offer neutral tools without compromising financial stability and consumer protection. These "tools" should also be applied in proportion to the business models, size and systemic significance of the various institutions. However, enabling innovation is an important starting-point.

3.4 Should the EU introduce new licensing categories for FinTech activities with harmonised and proportionate regulatory and supervisory requirements, including passporting of such activities across the EU Single Market? If yes, please specify in which specific areas you think this should happen and what role the ESAs should play in this. For instance, should the ESAs play a role in pan-EU registration and supervision of FinTech firms?

No.

3.5 Do you consider that further action is required from the Commission to make the regulatory framework more proportionate so that it can support innovation in financial services within the Single Market? If so, please explain in which areas and how should the Commission intervene.

There is potential to further explore the application of the principle of proportionality so that the regulatory burden on smaller or niched players is proportionate. In some cases it may be sufficient to change the supervisory approach, but in other cases the legal requirements may need to be changed. Simple business models and new, uncomplicated services may warrant a shorter licensing period.

3.6 Are there issues specific to the needs of financial services to be taken into account when implementing free flow of data in the Digital Single Market? To what extent regulations on data localisation or restrictions on data movement constitute an obstacle to cross-border financial transactions?

Finansinspektionen takes a positive stance on the paradigm shift in relation to consumer financial data, so that consumers and not firms have full ownership of the data about a particular consumer. This means that consumers can allow other financial services providers to have access to their data. This shift should improve competition on the financial market.

However, it is important for consumers to be appropriately informed and aware of the consequences of their choices. It is also important to ensure that the liability for the use of data is clearly regulated by law, and that rights and responsibilities of financial firms (accessing, processing and storing data) in relation to consumer data under the new paradigm are clarified.

3.7 Are the three principles of technological neutrality, proportionality and integrity appropriate to guide the regulatory approach to the FinTech activities?

The Commission’s stance on the three principles is good, but there may be room for enhancements regarding equal treatment and harmonisation between Member States in order to prevent regulatory arbitrage. Here, the ESAs play a central role in fostering convergence. It is important not to use proportionality as an excuse for being exempt from regulation or supervision, and any tendencies toward a national supervisory “race to the bottom” should be avoided.

3.8 How can the Commission or the European Supervisory Authorities best coordinate, complement or combine the various practices and initiatives taken by national authorities in support of FinTech (e.g. innovation hubs,

accelerators or sandboxes) and make the EU as a whole a hub for FinTech innovation? Would there be merits in pooling expertise in the ESAs?

Ensuring that the NCAs and ESAs use the same terminology for what we mean with, for example, sandboxes, hubs and accelerators, is a good reason to start pooling resources.
The ESAs could take a coordinating role and spread good examples from countries, both within and outside the Union, that have interesting experiences from working with FinTech issues.

Going further, ensuring similar practices in this area could be another reason to start pooling resources. Here, the ESAs can take an active role in fostering convergence.

We consider there to be risks associated with centralising licensing, sandboxes, and supervision to the ESAs. For example, this could prolong the time-to-market for many products, thereby hindering competition in the EU.

3.10 Are guidelines or regulation needed at the European level to harmonise regulatory sandbox approaches in the MS? Would you see merits in developing a European regulatory sandbox targeted specifically at FinTechs wanting to operate cross-border? If so, who should run the sandbox and what should be its main objective?

In order to ensure equal treatment of insurance companies and other FinTech companies operating across national borders, it would be beneficial to harmonise the regulations related to the use of sandboxes in each MS. Because the financial markets differ between the Member States, sandboxes should be administered at the national level.

4.1 How important is the free flow of data for the development of a Digital Single Market in financial services? Should service users (i.e. consumers and businesses generating the data) be entitled to fair compensation when their data is processed by service providers for commercial purposes that go beyond their direct relationship?

Finansinspektionen takes a positive stance on the paradigm shift in relation to consumer financial data, so that consumers and not the firms have full ownership of the data about a particular consumer. This means that consumers can allow other financial services providers to have access to their data. This shift emphasizes the importance of consumers being appropriately informed and aware of the consequences of their choices.

It is also important for the regulation to clearly outline the liability related to the storage and use of data, and that the rights and responsibilities of financial

firms (accessing, processing and storing data) in relation to consumer data are clarified.

4.7 What additional (minimum) cybersecurity requirements for financial service providers and market infrastructures should be included as a complement to the existing requirements (if any)? What kind of proportionality should apply to this regime?

The regulation could be supplemented by principle-based guidance in order to improve flexibility and preventive management of this risk. Finansinspektionen takes a positive stance on the work currently underway within the EBA to analyse existing supervisory cyber security practices and propose further work to align these practices, where applicable, across EU Member States.