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CONTENTS

Presentation of the special issue.....	1
---	----------

Marco Bodellini – Valerio Lemma

Commercial banking in transition: a cross country analysis.....	5
--	----------

Rosa M. Lastra

Fintech and the impact on the corporate governance of commercial banks.....	12
--	-----------

Valerio Lemma

Monetary devolution and the political economy of central bank digital currencies... ..	37
---	-----------

Leonidas Zelmanovitz - Bruno Meyerhof Salama

Environmental sustainability, business and banking: making the case for sensible regulation.....	67
---	-----------

Marco Bodellini

Navigating the complexities: challenges for banks in understanding and adapting to EU sustainability legislation.....	101
--	------------

Lela Mélon

Banking business and appealing myths: a critical review of fintech as a panacea for competition concerns.....	126
--	------------

Gabriella Gimigliano

International sanctions and geopolitical tensions: the impact on commercial banking...146

Christos Hadjiemmanuil

Conflict and economic sanctions and the impact on bank resilience and stability: a primer...175

Dalvinder Singh

BANKING BUSINESS AND APPEALING MYTHS: A CRITICAL REVIEW OF FINTECH AS A PANACEA FOR COMPETITION CONCERNS

Gabriella Gimigliano *

ABSTRACT: *This paper delves into the manner in which FinTech applications may address competition concerns within the EU legal framework governing commercial banks. The analysis aims to ascertain whether and how FinTech could either assist or challenge policymakers. Anchored in the findings of the 2007 Sector Inquiry Report, this chapter explores several critical questions within the context of EU regulations: (i) whether the social function of commercial banks has hindered the enforcement of competition law; (ii) whether FinTech innovations can enhance the capacity of European regulators to manage the costs and challenges associated with two-sided payment platforms; and (iii) ultimately, whether FinTech could facilitate the creditworthiness assessment and improve the analytical credit database.*

SUMMARY: 1. Introduction. - 2. The retail banking business and the concept of undertaking in the EU competition framework. – 3. Competition concerns and fintech challenges ahead. – 3.1. Price and non-price competition in the credit card industry. – 3.2. Connecting credit registers: the regulatory concerns of data sharing. – 4. Conclusions.

1. Given that in the last ten years the financial system has experienced a global financial crisis between 2007 and 2009, a sovereign crisis around 2011, and a pandemic health emergency between 2019 and 2021, no trade-off between efficiency and

* Senior Researcher in Economic Law, Business and Law Department, University of Siena. This paper is a revised and updated version of the chapter authored by Dr Gimigliano, in M Bodellini, G Gimigliano, and D Singh (eds), *Banking Business in Transition*, Palgrave-Springer, 2024, 39-57.

stability has had enough time to provide us with any valuable experience on the trade-off market and regulation in the banking sector¹.

With regard to competition, the European Union has since its inception provided primary rules applicable to any and all undertakings. Throughout the years, the Treaty provisions concerned have been renumbered, but no change has been made to their contents. In fact, arts. 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) still focus on cartels and abuses of dominant position. By contrast, the enforcement procedure was amended when Regulation n. 1/2003 replaced Regulation n. 17/1962². European policymakers leaned towards a more economic approach in the process of granting the art. 101(3) exemption, setting up a decentralized network of authorities. As for art. 107 TFEU, state aid has always been forbidden unless one of the exempting conditions listed in paragraphs 2 or 3 is met, but the financial and economic crises of recent years urged the Commission to temporarily revise the assessment approach in order to make it more flexible³.

It is worth mentioning that, generally speaking, there is no special competition legal framework for banks (or credit institutions, according to EU legal parlance). The concepts of undertaking, appreciable effect on trade between Member States, and the appreciable restriction of competition, are applied to the banking market with no material changes. The situation is slightly different for State aid, where soft rules have over time tailored the normative approach to the banks' features as middle-men in the operation of monetary function and the taking-up of reimbursable funds from the

¹ P. Massey – M. MacDowell, *EU competition law: an unaffordable luxury in times of crisis?* in *World Competition* 44, 2021 (n. 4), 405; X. Vives, *Competition and stability in banking*, Princeton University Press 2020; I. Kapsis, *Competition law and policy for the EU banking sector in a period of increased economic uncertainty*, in *International Journal of Law and Management*, (4) 2012, vol 54, 284-301

² European Parliament and Council Regulation n. 1 of 2003, OJ [1] 2003, 1, which replaced European Council Regulation n. 65 of 1962, OJ [204] 1962.

³ A. Canepa, *La regolazione al tempo della crisi tra salvaguardia del mercato unico e flessibilità delle regole sugli aiuti di Stato*, in *Banca Impresa Società* 2016, (3), 445.

public to extend credit⁴.

With the competition legal context in mind, this paper aims to critically review the idea of fintech innovations as a panacea for competition concerns⁵.

Fintech has a broad meaning and ranges from decentralised ledger technology (DLT) to smart contracts, from artificial intelligence (AI) to crypto-assets, just to give a few examples⁶. Apart from the specific elements each individual fintech-based innovation features, it seems sensible to argue that they have some particular aspects in common. Indeed, they encourage fully integrated straight-through processing (of banking operations); undermine the middle-man function; and increase the quantity and the quality of data available in the contract relationship between service user and provider. This means that fintech is a driver of change of the banking business model, but it is not clear to what extent this may address competition concerns in the banking sector.

This legal analysis, based on the EU legal framework, focuses on competition concerns as dealt with by the last sector inquiry available, i.e., the 2007 retail banking report⁷. Therefore, it points to cartels and abuses of dominant position in retail banking, while State aid falls beyond the scope of this analysis, although it is a crucial aspect of recent regulatory development.

⁴ M. Maggolino, *EU State aid law in the banking sector: the story of a revelatory change*, in *Law and Economics Yearly Review*, 2019, 64 -124.

⁵ F. Capriglione, *Competition and stability in the digital paradigm*, in *Law and Economics Yearly Review*, 2023 (12), I, 3.

⁶ FinTech is described as “technology-enabled innovation in financial services, regardless of the nature or size of the provider of the services”. Commission, Consultation Document on “Fintech: a more competitive and innovative European financial sector”, 15 June 2017; its follow-up: COM (2020) 591 final; Expert Group on Regulatory Obstacles to Financial Innovation (ROFIEG), 30 Recommendations on regulation, innovation and finance, December 2019; COM (2018) 109 final. More in detail, see: R. Baskerville, F. Capriglione, N. Casalino, *Impact, challenges and trends of digital transformation in the banking sector*, in *Law and economic Yearly Review*, 2020 (9), II, 341; V. Lemma, *The regulation of fintech banks: questions and perspective*, in *Open Review of Management, Banking and Finance*, 2019 (2), 30.

⁷ COM (2007) 33 final.

The paper includes 3 further sections. Section 2 reminds us how the banking business is subsumed into the legal concept of “undertaking” as applied in EU competition law. Section 3 analyses the three competition concerns dealt with by the 2007 sector inquiry, namely, i) the fragmentation of payment systems, especially credit card payments; ii) the interoperability of credit registers; iii) collusive pricing policies at the national level, uncovering a high level of fragmentation along national lines. The legal investigation focuses on each of the above-mentioned aspects in order to scrutinize the extent to which FinTech may dispel competition concerns or raise new ones. It is worth remembering that, in the European legal framework, antitrust action has often been matched up with pro-competitive regulation aiming to build up a single market. Section 4 draws some conclusions.

2. The 2007 sector inquiry concerns the retail banking providing payment, savings, and lending services to consumers and small and medium enterprises.

The starting point of this legal analysis is the definition of credit institutions: these are defined by what they do, regardless of the business model or the legal form they take. Indeed, the “credit institution” concept comprises any “undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account”⁸. As we know, in compliance with the universal banking model credit institutions may operate not only the banking business and what are known as passported activities but also investment services, as long as they obtain an ad-hoc authorization, and they may distribute insurance products⁹.

⁸ European Parliament and the Council, Regulation (EU) no 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, in OJ [2013] L176/1 (Art 4, let. a). Annex I, European Parliament and the Council, Directive (EU) no 36/2013 of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, in OJ [2013] L176/238).

⁹ See J. H. Dahuisen, *Financial liberalisation and re-regulation*, in *European Business Law Review*, 2000, 373 – 380.

The positive harmonization process has consistently aimed to remove internal barriers and advancing liberalization. The First Banking Directive¹⁰, introduced in the late 1970s, defined credit institutions and treated banking as a regulated activity¹¹. Moreover, in an effort to keep under control any national attempt to protect national champions, this Directive established that the “economic needs of the market” may no longer work as a condition of authorization, with the consequence that the national competent authorities were no longer entitled to issue or refuse banking authorization on the grounds of “economic needs of the market”¹². The liberalization process continued quite swiftly in the following years, backed by a strict application of state aid prohibition. Recently, the situation has changed. The banking crisis management experience underscored the trickiness of applying the “market economy investor test”¹³, laid down in the Bank Recovery and Resolution Regulatory Package¹⁴. This test

¹⁰ First Council directive of 12 December 1977 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions, OJ [1977] L322/30.

¹¹ More details in: J Dalhuisen, *Home and Host Country regulatory control of trans-border banking services in the EU* 20 (Guido Alpa, Francesco Capriglione eds, Utet 2002); C Rossini, *Cross-border banking in the EC: host country under the Second Banking Directive*, in *European Review of Private Law* 4 (1995), 571-590.

¹² That notwithstanding, where a Member State encountered technical and structural impediments within its national banking system that precluded the immediate abandonment of this criterion, the State was authorized to continue its application for a transitional period of seven years following the implementation of the directive. Where this temporary exception was employed, the First Banking Directive provided that the ‘economic needs’ criterion should be applied on the basis of general predetermined standards aiming to promote “i) security of savings, ii) higher productivity in the banking system; iii) greater uniformity of competition between the various the banking networks; iv) a broader range of banking services in relation to population and economic activity”. Article 3, lett. d), First Banking Directive.

¹³ A critical investigation in: C. Brescia Morra, *Gestione delle crisi bancarie e aiuti di Stato. Alla ricerca di un equilibrio difficile*, in *Banca Impresa Società*, 2020 (2), 191.

¹⁴ This regulatory package is made up of European Parliament and the Council, Directive (EU) No 59/2014 of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, in OJ [2014] L173/190 (hereafter, BRRD); European Parliament and the Council, Regulation (EU) No

“aims to look at whether public authorities act as a private investor under normal economic-market conditions would do”¹⁵. This is almost the same regulatory approach applied in the European Court of Justice case law for the construction of the concept of undertaking in the framework of arts. 101 and 102 TFEU. Indeed, an activity of an economic nature exists as long as it faces actual or potential competition from private entities or if private entities were to enter the market under the same corporate, financial, and organization conditions¹⁶.

However, due to their credit intermediation activity, banks are deemed to perform a primary social function¹⁷. This raises the question of whether this alone qualifies the banking business as a service of general economic interest (SGEI)¹⁸ and, consequently, what trade-off there should be between competition and regulation provided that, under art. 107 TFEU, competition law is also applicable to SGEI unless it becomes an obstacle to the fulfilment of their mission. To address this, it is important to review what SGEIs are.

According to the 2000 Commission Communication, SGEIs differ from ordinary

804/2014, of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, in OJ [2014] L225/1 (hereafter, SRMR).

¹⁵ See: G. Lo Schiavo, *State aids and credit institutions in Europe: what way forward?* in *European Business Law Review*, 2014, 427. Therefore, “in case of no private investor can be found in the market, public support qualifies as an economic advantage for the purpose of art 107 paragraph 1 TFEU”.

¹⁶ V. Louri, “Undertaking” as a jurisdictional element for the application of EC competition law, in *Legal Issues of Economic Integration*, 2002, 29(2), 143.

¹⁷ R. M. Lastra, *Multilevel governance in banking regulation*, in M. P. Chiti & V. Santoro (eds), *The Palgrave handbook of European Banking Union Law*, Palgrave-Macmillan, 2019, 4.

¹⁸ Similarly, banking activities listed as critical activities by the European Supervisory Risk Board were in no way considered services of general economic interest despite the fact that deposit-taking and lending activities, payment, clearing, settlement, cash, and custody services, capital markets and wholesale funding are considered businesses and operations “the discontinuance of which is likely in one or more Member States, to lead to the disruption of services that are essential to the real economy or to disrupt financial stability due to the size, market share, external and internal interconnectedness, complexity or cross-border activities of an institution or group, with particular regard to the substitutability of those activities, services or operations”.

services since “they need to be provided even where the market may not have sufficient incentives to do so” in order to promote social and territorial cohesion and enhance the overall competitiveness of European industry¹⁹. Therefore, SGEIs demonstrate the existence of a market failure: States entrust some undertakings to operate SGEIs as they are “services that all citizens should have access to at an affordable price because they are indispensable for their welfare”²⁰.

This aspect came under the attention of the European Court of Justice (ECJ) in the Züchner case²¹. The Court has not ruled out that certain banking activities could be considered SGEIs but held that “Although the transfer of customers' funds from one Member State to another normally performed by banks is an operation which falls within the special task of banks, particularly in connection with international movements of capital, that is not sufficient to make them undertakings within the meaning of Article 90 (2) of the Treaty unless it can be established that in performing such transfers the banks are operating a service of general economic interest with which they have been entrusted by a measure adopted by the public authorities”²². Therefore, the operation of banking businesses in terms of credit intermediation

¹⁹ COM (2000) 580 final. It is up to the Member States to establish whether an economic activity is to be considered a service of general interest, how it should operate and, in the case it is such a service, whether compensation may be provided, while the Union, through the Commission, is in charge of performing a check for manifest error. More recently: COM (2011) 900 final. However, it is crucial to understand that classification as a Service of General Economic Interest (SGEI) does not inherently exempt an undertaking from the application of competition law.

²⁰ See A. M. Collins, M. Martínez Navarro, *Economic activity, market failure and services of general economic interest: it takes two to tango*, in *Journal of European Competition Law & Practice*, 2021, vol. 12 (5), 380 – 386; L. Gyselen, *Services of general economic interest and competition under European law – A delicate balance*, in *Journal of European Competition Law & Practice*, 2010, vol. 1(6), 491 – 499.

²¹ EU Court of Justice, *Gerhard Züchner v. Bayerische Vereinsbank AG*, 14 July 1981, C-172/80. The defendant maintained that ‘by reason of the special nature of the services provided by such undertakings and the vital role which they play in transfers of capital they must be considered as undertakings (...) entrusted with the operation of services of general economic interest within the meaning of Article 90 (2) and thus are not subject, pursuant to that provision, to the rules on competition in Articles 85 and 86 of the Treaty’.

²² *Gerhard Züchner v. Bayerische Vereinsbank AG*, § 7-8.

function is not inherently deemed a service of general economic interest, despite its social significance. This legal conclusion was somewhat affirmed in the 1998 Commission Report to the Council of Ministers concerning the banking sector, which proposed further in-depth investigations. The promotion of small and medium enterprises, others focus on the provision of social loans or municipal financing, and still others emphasize the granting of guarantees for export credits²³.

However, the legal literature underscores that, whenever there is a SGEI, lawmakers generally impose duties to provide services, with or without compensation, setting out an organizational model subject to judicial review. This changes the dynamic relationship between the undertaking and the market, since the undertaking becomes a direct tool of public policy aimed at pursuing community welfare over the profit-making objective²⁴. With this in mind, the electronification process first, and fintech regulatory strategies later, cast new doubts on the above-mentioned conclusions. In other words, it seems that, with some degree of regulatory ambiguity, the banking business is treated as if it were an SGEI as far as monetary function is concerned.

Firstly, within the framework of the Payment Accounts Directive (PAD)²⁵, banks are bound to enter into a payment account contract with anyone who requires one, and provide a payment account with basic features in such cases free of charge or at a reasonable price, depending on the financial situation of the prospective holder²⁶. This

²³ Report of European Commission to the Council of Ministers: services of general economic interests in the banking sector, adopted on 17 June 1998. These results were also mentioned in the COM (2000) 580 final, 15.

²⁴ M. Dugato, *L'attività bancaria e il servizio pubblico*, in *Banca Impresa Società*, 2018 (1), 3.

²⁵ European Parliament and Council Directive, n. 92 of 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, OJ [2014] L/57.

²⁶ The PAD delineates the category of potential beneficiaries and the essential needs to be addressed. It specifies a particular category of payment service providers—namely, credit institutions—mandating them to provide certain services and defining the scope of their responsibilities. However, it delegates to the Member States the authority to determine the number of banks assigned to this task, ensuring comprehensive territorial coverage at affordable rates and under uniform conditions. U. Malvagna, Sub

initiative is underpinned by the recognition that the transition to electronic retail payment services has reversed the traditional balance between public money (cash) and private money (scriptural forms) within the internal market, now favouring the latter. This shift entails the possession of a payment account to access the payment system.

The right to a payment account is granted to any consumer legally residing in the Union, and this right can be exercised in any Member State, according to a regulatory mechanism that does not compensate the banks in any way²⁷. Indeed, the point is why banks must take on the operational risk or the litigation costs of payment account holders they have not chosen and that may have no or little familiarity with digital products, for the pursuit of a public good, namely, financial inclusion. Consequently, it sounds sensible to conclude that the provision of basic payment accounts is framed as an SGEI²⁸.

Second, there is the “framework for open banking” mechanism. Banks must allow trusted third parties access to the payment accounts free of charge to allow payment account holders to share transaction data in order to build up an internal market for data. Here, public policy makes a precise organizational choice: banks must take on the costs connected to investing in migration from access-to-account technologies to dedicated interfaces (Application Programming Interfaces, more

Art. 126-noviesdecies, in *Commentario al Testo Unico bancario*, Pacini: Pisa, 2021, 975.

²⁷ Article 17 PAD. It is consistently stated that “consumers (...) who do not hold a payment account in that Member State should be in a position to open and use a basic payment account in that Member State. In order to ensure the widest possible access to basic payment accounts, Member States should ensure that consumers have access to such an account in spite of their financial circumstances, such as unemployment or personal bankruptcy”. COM (2011) 4977 final (preamble 7).

²⁸ The same conclusions were raised by: José Luis Gómez-Barroso, Raquel Marbán-Flores, *Basic financial services: a new service of general economic interest?* in *Journal of European Social Policy* 2013, vol 23 (3), 332-339

commonly known as APIs)²⁹ as well as in managing said APIs, with no compensation³⁰.

Lastly, Regulation (EU) No. 751/2015 sets a price cap on the multilateral interchange fee (MIF)³¹ applicable to consumer debit and credit card payment transactions³², even if the payment service provider is not a bank. Since MIF triggers a spill-over effect in the acquirer-merchant relationship and in the merchant-consumer relationship³³, the MIF price cap *de facto* amounts³⁴ to a price regulation³⁴.

To conclude, as far as the monetary function is concerned, the banking business works as an SGEI despite the fact that *it is not one*. There are three duties of note: to make a contract and provide a payment account service, to invest in API infrastructures, and to become a price taker (MIF). These duties suggest a regulatory approach typical of SGEI. However, there is no formal entrustment, there is no

²⁹ API is “a way for two computer applications to talk to each other over a network using a common language that they both understand”. M Zachariadis, P Ozcan, ‘The API economy and digital transformation in financial services: the case of open banking’ (1) Swift Institute Working Paper Series, 10-11 (2016). The Authors explain how “For example, APIs can be used by firms *internally*, to integrate diverse systems and allow for the exchange of data across different departments by performing API “calls” or sending queries to an API server. (...) Such *external* APIs can provide further integration with company partners and allow third parties to consume organisational data and lead to cross-selling and upselling opportunities down the line”.

³⁰ The UK fintech strategy does not seem too different from the European approach: N. Divissenko, Open banking in the UK: a co-opetition scenario for innovation and evolution in the UK retail banking sector, in M. Bodellini, G. Gimigliano, D. Singh (eds), Commercial banking in transition. A cross-country analysis, Palgrave-Macmillan, 2024, 243; O. Borgogno, G. Colangelo, *Consumer inertia and competition-sensitive data governance: the case of open banking*, in EuCML 2020 (4), 143.

³¹ Essentially, the MIF is a fee that acquirers pay to issuers for the services the issuers provide to merchants, despite there being no direct contractual relationship between the issuers and the merchants.

³² European Parliament and the Council, Regulation (EU) n 751 of 2015 on interchange fees on card-based payment transactions, OJEU [2015] L123/1. With regard to the interaction between antitrust enforcement and regulation, see: G. Colangelo, M. Maggiolino, *Sistemi di pagamento e mercati a due versanti: gli insegnamenti dei casi MasterCard e American Express*, in *Mercato Concorrenza Regole*, 2017 (2), 215; V. Falce, *Il mercato integrato dei sistemi di pagamento a dettaglio tra cooperazione e concorrenza (Primi appunti ricostruttivi)*, in *Banca e borsa* 2008, vol. 61(5), I, 558.

³³ R. Pardolesi, *La concorrenza nell’industria delle carte di credito*, in *Dir. Banc.*, 2006, 3.

³⁴ S. Vaccari, *Le tariffe dei servizi pubblici tra teoria economica e regolazione amministrativa*, in *Rivista della Regolazione dei Mercati*, 2020 (2), 367.

administrative authority in charge of dynamically adjusting MIF tariffs³⁵, and the allocation of API-based costs remains unclear, while the framework for the provision of payment account services may deliver race-to-the-bottom incentives since the harmonization process has covered the product (payment account with basic features) rather than the conduct of service providers³⁶.

3. Although it may seem odd, the last banking sector inquiry dates to 2007. The Commission found that there were several indications that competition was not working properly in the banking market. For this reason, the Commission carried out (ex art. 17, reg. 1/2003) a sector inquiry that confirmed fears of fragmentation along national lines and with regard to entry barriers. In the end, the sector inquiry identified two main areas of concern regarding competition: payment systems and credit registers.

3.1. The 2007 sector inquiry into card-based payment systems highlighted significant disparities among Member States in their approaches to inter-bank, cardholder, and merchant fee structures and levels. The European Commission identified these discrepancies as indicative of market fragmentation within the EU. Furthermore, the Report noted that in several Member States—such as Belgium, Denmark, Finland, Hungary, Ireland, and Italy—membership criteria and governance frameworks restricted the issuance and acquisition rights exclusively to credit and/or financial institutions and their subsidiaries. In contrast, other countries, including France and Spain, required associate members to disclose business-sensitive

³⁵ G. Iannantuoni, *Il ruolo strategico delle autorità di regolazione*, in *Rivista della Corte dei Conti. Quaderni*, 2022, n. 1, 1.

³⁶ J. Hoffmann, *Implementation of the Payment Accounts Directive (PAD)*, in *ERA Forum*, 2019 (20), 237.

information to principal members, without any reciprocal obligation for data sharing³⁷.

Concerns regarding both price and non-price competition focus on the role of intermediaries or "matchmakers" within the payment systems. The regulatory challenge at the EU level is to assess whether and to what extent decentralized ledger technology (DLT) could offer a viable alternative for coordinating these systems.

Regarding price competition concerns, the central issue revolved around the Multilateral Interchange Fee (MIF)³⁸. This fee, established by the governing body of VISA, was applied by default in the absence of a bilateral agreement between the financial institutions representing the cardholder and the merchant. In the 2002 decision, the Commission determined that the MIF could be considered a restriction of competition based on its effects, given its impact on the market dynamics³⁹. More specifically, the Commission stated that for the provision of card payment services, it was necessary to set "a remuneration paid between banks who must deal with each other for the settlement of a card payment transaction and thus have no choice of partner. The absence of some sort of default rule on the terms of settlement could lead to abuse by the issuing bank, which is in a position of monopsony as regards the acquiring bank for the settlement of an individual payment transaction. Thus, some kind of default arrangement is necessary, but the question of whether it qualifies for exemption or not will depend on the details of the arrangement".⁴⁰ Consequently, the

³⁷ COM (2007) 33 final, 4 ff.

³⁸ According to VISA rules, MIF was nothing more than a "transfer between undertakings that are cooperating in order to provide a joint service in a network characterized by externalities and joint demand". VISA argued that the Multilateral Interchange Fee (MIF) should not be subject to competition concerns. However, the European Commission did not fully align with VISA's perspective. The Commission acknowledged that the MIF agreement might not constitute a restriction of competition by object because it enhanced inter-system competition (between four-party and three-party payment platforms) and contributed to the stability and efficiency of card payment markets. Nevertheless, following its 2002 decision, the Commission determined that the MIF could be considered a restriction of competition by its effects, given its impact on the market dynamics.

³⁹ Commission decision of 24 July 2002, OJEC [2002] L318/17 (thereafter, VISA 2002).

⁴⁰ VISA 2002, § 79.

Commission provisionally authorized the revised Multilateral Interchange Fee (MIF) scheme under Article 101(3) of the Treaty on the Functioning of the European Union (formerly Article 81(3) of the Treaty of the European Community)⁴¹.

Regarding non-price competition restrictions, a significant case is the antitrust proceeding involving *Groupement Cartes Bancaires*. The Court of Justice provided some guidance in its ruling on *Groupement Cartes Bancaires v Commission*, offering an initial interpretation but leaving the broader question open to further legal and regulatory development⁴². Indeed, the Third Chamber of the Court held that the multilateral agreement setting the card issuing/acquisition of merchants ratio may not be considered a restriction of competition by object since any measures should be analysed with regard to “the nature of the services at issue, as well as the real conditions of the functioning and structure of the markets – of the economic or legal context in which that coordination takes place”. As for network industries or multi-sided markets, interactions between sides in the system must be analysed by antitrust and judicial authorities in terms of their own effects⁴³.

One key aspect that both pricing and non-pricing arrangements share is the pivotal role played by card platforms, such as VISA, a privately-held for-profit corporation. These platforms act as intermediaries to internalize the indirect and two-sided network externalities inherent in payment services. Specifically, the platform is established as a common locus (whether virtual or physical) designed to facilitate interactions between the two market sides and to minimize transaction costs⁴⁴. Since the platform's governing body possesses the authority to determine membership

⁴¹ The following Commission decision sticks with the same regulatory approach.

⁴² Judgement of the European Court of Justice of 11 September 2014, Case C-67/13 P (hereafter, 2014 *Cartes Bancaires*). More specifically: J. Ruiz Calzado, A. Scordamaglia-Tousis, *Groupement des Cartes Bancaires v Commission: shedding light on what is not a ‘by object’ restriction of competition*, in *Journal of European Competition Law & Practice* 2015, 1 – 3.

⁴³ 2014 *Cartes Bancaires*, § 86.

⁴⁴ See D. S. Evans and R. Schmalensee, *Markets with two-sided platforms*, in 1 *Issues in Competition Law and Policy* 667 (ABA Section of Antitrust Law 2008), 674 ff.

criteria, fees, and the structure and level of Multilateral Interchange Fees (MIFs)⁴⁵. These decisions can significantly affect the characteristics and costs of services offered to end users, as well as overall market efficiency. At the same time, such arrangements may restrict access to new products, services, or potential members, thereby impacting the competitive dynamics between established participants and new entrants (intra-system competition).

In the context described, a key question arises: can FinTech supplant the traditional platform-based coordination model, thereby addressing the competition issues inherent in the role of intermediaries like VISA? Considering decentralized ledger technology (DLT), particularly public DLT⁴⁶, FinTech has the potential to replace conventional matchmakers. These intermediaries, such as VISA, currently facilitate market coordination by bringing together issuers and acquirers, as well as cardholders and merchants, to enable payment services. In a public and permissionless DLT system, each network node is authorized to access information and validate transactions by solving an algorithm. This decentralized validation mechanism could potentially perform many functions traditionally managed by matchmakers like VISA. These functions include the exchange of payment information, clearing activities, and the settlement of payment transactions⁴⁷.

⁴⁵ ‘The platform can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount’: J. C. Rochet & J. Tirole, Two-sided markets: a progress report, November 29, 2005. Available at: https://www.tse-fr.eu/sites/default/files/medias/doc/by/rochet/rochet_tirole.pdf

⁴⁶ The DLT is a data ledger that may be public, private or hybrid. In a public DLT, every node of the network is empowered to read and validate transactions over the ledger by means of a proof-of-work mechanism; in the fully private ledger there is a central-decision maker who releases write-permissions, while read-permissions may be public or restricted; in the middle, there are the hybrid cases. More details in: M. Pilkington, Blockchain technology: principles and applications, in X. Olleros, M. Zhegu (eds), Research handbook on digital transformation, Cheltenham: Edward Elgar, 2016, 1-39.

⁴⁷ In the future, we may learn from the ongoing experience of the pilot regime on DLT market infrastructures for tokenised financial instruments. European Parliament and the Council, Regulation (EU) n 858 of 2022 on a pilot regime on market infrastructure based on distributed ledger technology, OJ [2022] L151/1.

A significant aspect of permissionless blockchain – a subset of DLTs - is the presence of a complex and often opaque ecosystem of stakeholders, including software developers, validators, record keepers, and exchanges. Since this type of DLTs does not fit any existing legal category, one may question how a “group of people running a common system should be treated from a legal perspective. Should they all be individually responsible for the actions of the system? Should none of them be individually responsible for the actions of the systems, if there is not a single party with absolute control?”⁴⁸. The questions raised seem much more crucial in terms of legal reasoning, given that the EU is working toward the interoperability of payment networks, prioritizing intra-system over inter-system competition.

3.2. The 2007 Competition Sector Inquiry highlighted a significant issue: the lack of open and affordable access to high-quality credit data. Such access is essential for commercial banks aiming to offer lending products. The Report indicates that in several Member States, credit data markets remain underdeveloped. Furthermore, the operation of credit data registers by commercial banks is often considered non-compliant with competition law in certain jurisdictions.

Since 2007, regulatory advancements have predominantly addressed the supervisory dynamics between entities such as deposit-taking institutions, financial corporations, and asset management vehicles engaged in substantial lending activities, and central banks, including the European Central Bank. One notable example is AnaCredit, a granular analytical credit database operated by central banks to facilitate banking supervision. AnaCredit, akin to other central credit registers, supports supervisory functions by providing detailed credit data.

Conversely, in the context of the contractual relationship between

⁴⁸ A. Walch, *Deconstructing “decentralization”*, in C. Brummer, (ed), *Cryptoassets. Legal, regulatory, and monetary perspectives*, Oxford University Press: Oxford, 2019, 39 – 68.

consumers/borrowers and lenders/commercial banks, a regulatory gap persists. This gap could potentially be bridged by deploying an Artificial Intelligence (AI) system⁴⁹.

However, the deployment of Artificial Intelligence (AI) must strictly adhere to the limitations set forth by the General Data Protection Regulation (GDPR). Specifically, Article 22(1) of the GDPR⁵⁰, except as outlined in subsequent provisions, safeguards the rights of data subjects (i.e., individuals whose data is being processed) against the risks associated with automated decision-making processes that operate without human intervention. This regulation ensures that individuals are not subject to decisions solely based on automated processing unless specific conditions or exceptions apply.

This legal background came to the attention of the Court of Justice in the Schufa case. Schufa is a private German credit information agency that provides its contractual partners, such as credit and financial institutions, with data on the creditworthiness of individuals (the data subjects). Schufa generates a credit score using statistical and mathematical methods. In a notable case, a third party denied a loan application based on the Schufa score. This scenario raises several legal questions regarding the application of AI systems in assessing the creditworthiness of potential borrowers: a) whether the act of scoring constitutes a form of data processing under GDPR; b) whether generating a score equates to making a decision, considering the GDPR's apparent distinction between scoring and decision-making processes; c) to what extent a data subject's right under Article 14 of the GDPR—to obtain information from the controller (Schufa) about the existence of automated decision-making

⁴⁹ Artificial Intelligence is defined in the regulation proposal as a ‘software that is developed with one or more techniques and approaches listed in the Annex I and can, for a given set of human-defined objectives, generate outputs such as contents, predictions, recommendations, or decisions influencing the environments they interact with’. More in depth: L. Ammannati, G.L. Greco, *Il credit-scoring “intelligente”: esperienza, rischi e nuove regole*, in *Riv. dir. banc.*, 2023, 461.

⁵⁰ Art. 22(1) GDPR provides that “The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her”.

processes and the underlying logic—can be reconciled with the limitations imposed by commercial and industrial secrecy. These questions are crucial in determining the boundaries and compliance requirements for the use of AI systems in credit assessments within the framework established by the GDPR. The Court holds that art 22(1) GDPR is fully applicable to the case in point according to a teleological interpretation. In this case, the court was faced with balancing Schufa's trade secret, and on the other, Schufa's obligation to provide "meaningful information over the logic involved" as required under the GDPR. The court needed to carefully weigh these interests, as both are recognized within the GDPR framework. The court determined that protecting trade secrets or intellectual property could indeed justify not disclosing the specific algorithm used to calculate credit scores. However, the GDPR also mandates that data controllers must provide data subjects with "meaningful" information. This includes an overview of the factors considered in the decision-making process and their relative importance on an aggregate level. Such information is essential for the data subject to effectively challenge any decision under Article 22(1) of the GDPR.

4. This paper scrutinizes competition issues within the banking sector, drawing insights from the 2007 European Commission Sector Inquiry, and evaluates whether FinTech applications might address these challenges. The focus of this analysis is not to delve into the specifics of FinTech innovations themselves but rather to explore the current state of banking and competition law that these innovations will inevitably encounter.

The legal investigation is rooted in EU antitrust enforcement and the harmonization process for banking and payment systems. Initially, it examines whether banking activities, given the critical role of credit intermediation, qualify as a Service of General Economic Interest (SGEI). Landmark cases such as the Züchner

decision and the 1998 Commission Report to the Council on the banking sector suggest that there is no exemption from articles 101 and 102 TFEU. However, the application of some regulatory schemes in the harmonization process reveal inconsistencies and ambiguities: from the price cap set in the secondary rules rather than by an administrative independent authority, to the duty to provide and the duty to invest established by means of directive. The SGEI looks like the *elephant in the room* of the legal framework for banking business as far as the monetary function is concerned. The digital euro project spurs legal scholars to (re-)think how the subsidiarity principle designs the relationship between central bank and commercial banks as for the operation of the monetary function.

As a second step, the legal investigation focused on two types of competition concerns addressed by the 2007 Commission Sector Inquiry on retail banking. They concern the payment card industry and the interoperability of credit registers. The paper emphasized how fintech-based innovations such such permissionless blockchain and artificial intelligence could cope with some competition concerns but also raise some other regulatory concerns. This is the case of ambiguous internal governance of the permissionless blockchain and the clashes between automated creditworthiness assessment and personal data protection in the GDPR. This legal context is under review: European policymakers are collecting the first DORA⁵¹ experiences and, at the same time, they are working on the PSD3⁵² and the FIDA⁵³; both are still in the drafting phase, aiming to respectively rationalize and consolidate the legal framework for payment services and enabling consumers and firms to better control access to their financial data.

However, there are two further competition concerns that fall beyond the

⁵¹ European Parliament and the Council, Regulation n. 2554 of 2022, of 14 December 2022, on digital operational resilience for the financial sector, OJ [2022] L333/1.

⁵² PSD3 is the acronym for Payment Services Directive.

⁵³ FIDA is the acronym for Financial Data Access.

scope of the 2007 Competition Sector Inquiry but seem critical to a forward-looking approach.

The first concerns business models other than the vertically-integrated model that fintech innovations may bring about, namely, “beyond banking” and “bank-as-a-service (BaaS)”⁵⁴. The “beyond banking” model amounts to an attempt to organise the provision of banking services under a platform model. Indeed, banks are trying to be alternatives to Big Techs: such a business model entails “the creation of one-stop shops for the purchase of both banking products and goods” or, in a less ambitious way, “a limited extension of the ecosystem notion of products to include final needs close to the bank financial services actually provided. For example, in the field of mortgage banking, platform complementarity would dictate that banks not only provide loans, but also facilitate home owner’s insurance, house maintenance services, or even furniture”. By contrast, the BaaS model means a white-label form of banking and implies setting up cooperation between banks and fintech firms: “the delivery of BaaS consists in replacing the business capital that would normally underpin the provision of banking services with a contract that grants the right to have direct access to the flow of those services. More specifically, the capital at stake under BaaS is the banking licence and the services of a bank with their associated balance of rights and duties”⁵⁵. Both business models are based on fintech innovations and challenge the authorization and supervision rationale.

The second competition concern deals with consolidation risk at the expense of small and medium banks. This is the experience in China, where a leading role was played by the State rather than by the market. Indeed, the argument is that unlike big banks, small and medium banks do not have the necessary ability to raise the capital

⁵⁴ J. R. Martínez Resano, *Regulating for competition with BigTechs: banking-as-a-service and “beyond banking”*, Banco de España, 2021, available at: https://repositorio.bde.es/bitstream/123456789/21156/1/6_BigTechs_FSR41.pdf

⁵⁵ Op. cit.

required and finance the digitization process⁵⁶. The Chinese and other comparable experiences raise questions for European lawmakers on how to protect the pluralism of banking business models.

In any case, fintech is changing the banking market structure and challenging the consolidated approach to competition and to banking regulation.

⁵⁶ D. Chen, Chinese commercial banks and fintech-competition and cooperation, in M. Bodellini, G. Gimigliano, D. Singh, Commercial banking in transition. A cross-country analysis, Palgrave-Macmillan: Cham (Switzerland), 2024, 333.