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EUROPEAN LEGAL STRATEGIES FOR PAYMENT SYSTEMS IN THE OPEN BANKING AGE

edited by

Alessandro Palmieri and Giuseppe Versaci

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Enrico Camilleri

Banks as platforms versus platforms as banks*

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1. *Thinking the unthinkable*. – ***Banking is necessary, banks not***: whether credibly attributed to Bill Gates[1] or not, such a sentence would have seemed little more than a provocation only a few years ago, especially when read in the light of the consensus on the development and functioning of the capitalist market system[2]; yet, it sounds almost like a looming prophecy when read through the lens of current times, in the light of the scenario that the 'digital disruption' has framed in the sector in question

Indeed, as we shall try to argue in this paper, the centrality of the banks in the financial system does not yet really seem to be in question, nor is it desirable that it be so in the future. The primacy still to be acknowledged to banking institutions does not rest on the single activities it performs – "money creation", payment intermediation and so on – but rather on how it performs them with regard to their bundling and, therefore, in particular, the linking of the collection of deposit and investment support through credit (maturity transformation), as well as in the abil-

* Written for the Studies in Honour of Rosalba Alessi.

[1] Q.v. E.S. Prasad, *The future of Money*, Cambridge-London, 2021, p. 97

[2] As for the systemic role played by banks as critical intermediaries between savings and loans to fuel investments, q.v., amongst others, P. Barucci, A. Pavarin, *Gli economisti italiani e la banca tra il Risorgimento e la Costituente*, in A. Cova, S. La Francesca, A. Moioli, C. Bermond (eds.), *Storia d'Italia*. Annali 23, Torino, 2008, p. 49 sbs, 66 ff.; E.S. Prasad, *The future of Money*, cit., p. 39: "***Banks thus serve a crucial function by bundling short-term deposits and matching them with financing of long-term projects that increase an economy's output and employment***".

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ity to mitigate information asymmetries between lenders and borrowers, thus fulfilling the function of credit magistrature[3].

However, the very fact that the role played by banks can itself be conceived as fungible reveals, to some extent, that profound transformations have taken place in the context of the banking sector and that an unprecedented scenario is also emerging within it, namely competition *for* the market between heterogeneous players. In other words, notwithstanding that the mere substitution – or even the substitutability – of banks by other actors is in reality nothing more than an option for the future, however dystopian, it is nevertheless undeniable that it is no longer as unrealistic as it once was; above all, the path towards it cannot but be marked by a growing conflict (at the moment still of low intensity)ì, but foreseeably, deeper and deeper). between incumbents and newcomers, on the one hand, as well as between different business models, on the other.

The synthesis of this dynamic, we believe, can be captured by the albeit provocative formula 'banks as platforms versus platforms as banks'; it seems a good starting point to emphasise some crucial aspects of the issues at stake, starting with the fact that the entire debate on the banking market and its characteristics oscillates between description and prediction (if not prevention) of facts, situations and behaviour. It is not yet entirely true that banks are becoming platforms, nor that platforms can already be considered 'banks' or behave as such; consequently, at least as far as competition issues are concerned, the storm is currently only probable, and it is indeed difficult to say to what extent and how close it is. This does not detract, however, from the fact that some prodromes, perhaps some 'forbearing' elements of the most destructive of conflict scenarios are already in place, and it is therefore worth focusing on these.

2. *The petrified forest and breaking the spell: the advent of new players in the banking sector and its implications*. – The first element to note to relates to the traditional characteristics of banking in general and banking sector as a market, more specifically.

It is widely recognized and it is also clearly described in the literature that the common features of banking systems in market economies have constituted – and, albeit with a declining intensity, still remain – a strong concentration, with tight regulation[4], barriers to entry, weak competitive dynamism and scarce technological innovation.

[3] See D. Awrey, *Unbundling Banking, Money, and Payments,* in *Georgetown L.J.,* 2022, 4, p. 716 ff.

[4] Related to the so-called public safety net.

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Besides the fact that the main side effect of all these factors is a significant competitive advantage for the incumbents, at the heart of such a set-up a clear business model may certainly be identified, traditionally shared by all players operating in the banking sector and, above all, maintaining stability over time.

Its basic characteristics can be summarised in its being offer-driven and product-centred, with a linear value chain, the bundling of products and services, not to mention the strong information asymmetries broadening the effect of customer capture: in a few words, the ingredients of a petrified forest[5]. And the spell – if I may still use the metaphor – has even strengthened, in the aftermath of the financial crisis, with a strong boost to concentrations dictated by prudential requirements[6].

The shock of 2008 did reinforce the factors of low dynamism and high concentration of the banking sector globally, mainly in relation to the tightening of regulatory profiles, to prevent moral hazards, to restore full confidence in the functioning of the financial system, along with the special status of the banking enterprise, safeguarded by the public safety net[7].

However, as soon as digital technologies – i.e. AI, APIs (application programming interfaces), algorithms, data analytics and machine learning – reached a maturity stage, their intersection with banking was fatal, by triggering considerable consequences for the overall structure of the entire banking sector. Digital technologies and applications, in fact, made

[5] See A. Argentati, *Le banche nel nuovo scenario competitivo. FinTech, il paradigma dell'Open banking e la minaccia delle big tech companies*, in *Merc. conc. reg.*, 2018, p. 441 ff., 448.

[6] For an extensive analysis of these aspects, q.v. P. Sironi, *Banks and Finthech on Platform Economies*, Croydon, 2022, p. 89 ss; E. Carletti, S. Claessens, A. Fatas-X Vives, *The Bank Business Model in the Post-Covid-19 World, The future of Banking, 2, Centre for Economic Policy research,* London, 2020, available at *https://cepr.org/publications/books-and-reports/barcelona-2-bank-business-model-post-covid-19-world*.

[7] See R.A. Posner, *Un fallimento del capitalismo. La crisi finanziaria e la seconda Grande depressione*, Torino, 2011, p. 174. It's however worth noting that, at least with regard to Italy, the traits of strong concentration in the same sector had already been determined well before the appearance of the black swan at the beginning of the millennium. I am referring in particular to the fact that the progressive refinement of financial instruments alternative to the classic lending channels – particularly the spread of leasing and factoring operations- had already led to weakening the phenomenon of multi-credit facilities on the corporate customers' side – i.e. the tendency to open several credit lines with several intermediaries – in favour of its opposite, represented by the relationship-banking model: see F. Cesarini, *Il sistema bancario nell'ultimo decennio: i nuovi assetti*, in *Storia d'Italia*, Annali 23, cit., pp. 874 and 883. Slightly different is the case, on the other hand, of the large enterprise, which is rather inclined to deal frequently with the different offers – of credit and other banking services – available on the market (so-called transactional banking).

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it possible to tailor services more closely to customers' demand, by lowering costs and prices and by promoting innovation and efficiency.

Even though technological advancement, at the very beginning, did mainly affect payments services, they quickly started dealing with capital market activities, in general, as well as credit extension and deposit collection. On the other hand, along with the new technologies, new players have also come arrived: FinTechs first, and BigTechs (also known as GAFAM) later on[8], so that the spell was suddenly broken, and the "forest" (banking sector) began to come alive with new life, being populated by new subjects.

As we shall see, the two groups of afore-mentioned new entrants, differ in many respects, first and foremost as to their size; moreover, many of their distinguishing features raise different issues with respect to the banking sector, its competitive dynamic and, therefore, the type of interference – cooperation or rivalry – between incumbents and newcomers[9]. It is by the way significant to note that there is a common thread linking them since they are involved in classic banking activities.

The term FinTech or TechFin is in fact taken up in literature as a 'catch-all neologism'[10], capable of alluding in a holistic way to new business models that, structured around digital technologies, affect the physiognomy of financial services, i.e. the way in which these services are carried out individually and the overall market in which they are placed.

One can therefore appreciate the importance of such a unifying, albeit generic, datum in order to more easily mark the distance from the classic business model of the banking sector and the way in which the incumbents have carried out – precisely in an aggregate manner – the classic activities of maturity transformation and payment intermediation; on the other hand, that unifying formula risks being misleading to the extent that it is assumed as the main premise of a syllogism that aligns problems, probabilistic scenarios and also solutions referring to both FinTech and Big Tech.

[8] See D.A. Zetzsche, W.A. Birdthistle, D.W. Arner, R.P. Buckley, *Digital Finance Platforms: Toward a New Regulatory Paradigm,* in *Univ. Pennsylvania J. Business L.*, 2020, p. 273.

[9] See E. Feyen, J. Frost, L. Gambacorta, H. Natarajan, M. Saal, *Fintech and the digital transformation of financial services: implications for market structure and public policy*, BIS Paper n. 117, available at *https://www.bis.org/bispapers/index.htm?m=1027*; J. Frost, L. Gambacorta, Y. Huang, H. Song Shin, P. Zbinden, *BigTech and the changing structure of financial intermediation*, BIS Working Papers n. 77, April 2019, available at *https://www.bis.org/wpapers/index.htm.*

[10] See E.S. Prasad, *The future*, cit., p. 61.

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By referring to the above-mentioned features so far, it is then possible to say that the banking sector has certainly gone from being uniform and homogeneous to becoming heterogeneous, even promiscuous, as well as fragmented. These different adjectives are prompted by considerations regarding the nature of the players now involved, as well as their business models, beside the existing relationship between them and the typical activities attributable to this sector.

From a subjective point of view, the incumbents and the newcomers differ from each other as to their legal status, the former being financial institutions, and the latter non-financial ones[11]. Moreover, such promiscuity also reveals an unprecedented heterogeneity within the entire sector, if one only pays attention to the business models used.

Maturity transformation, payment services and (soft/hard) information-processing have traditionally been performed in an integrated way by classic banks. Banks do, in fact, procure short-term funding to grant long-term loans to households and businesses and, given their role in providing liquidity to customers, they are also best placed to offer payment and transaction services. Both functions – differently systemic – rely on the processing of information, both hard – verifiable and codifiable – and soft, the latter based on long term relationships and therefore irreducible to a numerical value or to a code. In processing, these information banks ensure an *ex-ante* screening of alleged borrowers and an *ex-post* control, consisting of monitoring borrowers' behaviour.

From a complementary point of view, it can be argued that the attainment of economies of scope have justified the internalisation and amalgamation of all these key services within the confines of a single institution and provided the fundamental reason for the banks' existence. After all, as noted before, the business model of classic banks is supply-oriented and product-centred, with a linear value chain and the bundling of many products, services and activities, so that long-term banking relationships almost naturally stand out as critical intangible assets[12].

Well, the business model that FinTechs and BigTechs actually rest on does diverge from the afore-mentioned classic one.

They have given proof of a remarkable capacity to replace long-stand-

[11] See widely EBA, *Report on the Use of Digital Platforms in the EU Banking and Payments sector*, 2021 EBA/REP/2021/26, available at *www.eba.europa.eu*. For a reliable albeit vague definition of which entities can – and which cannot – be assumed as "financial institution", see Id., *op. cit.*, p. 12, fn. 9.

[12] See P, Sironi, *Banks and Finthech*, cit., 98.; J.M. Liberti, M.A. Petersen, *Information: hard and soft*, working paper available at *www.ssrn.com*.

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ing customer relationships with unrelated knowledge; they can forecast customers' expectations and preferences, propose customised products and services, without the need for either a long-standing or even a recent relationship with that customer. The new business model those players have shown to share seems, therefore, to be customer-centred and demand-driven, so as to mark the shift from an output economy to an outcome economy[13]; moreover, the un-bundling of activities is quintessential within this new framework.

However, it is precisely the disaggregation of classic banking activities that makes the overall environment rather fragmented. Not only since those activities are carried out by different actors and thus remain mainly separate from one another, instead of being part of the same business model; but above all because with the unbundling, or rather thanks to it, subjection to the sectoral regulatory framework no longer represents an automatic result for all the players involved. In other words, the disaggregation of services/activities allows for a sort of cherry picking from the main 'basket' of sectoral activities, so that a single actor – precisely a group member of the new entrants – is able to choose through which activities it can remain outside the limits of the regulatory boundaries.

Subsequent corollaries are at least twofold: within the same sector there will be some actors squeezed by heavy regulation and some other not, with understandable competitive distortions; on the other hand, within the same sector, there will be the breakup of the golden principle "same activity, same risks, same rules", the latter being a critical point in terms of regulations, not to mention the need to safeguard the level playing field between financial institutions and new market participants, as clearly underlined by the European Commission in its Communication on Digital Finance Strategy for the EU[14],

Such a description, however, is still partial and does not give an overall representation of what is going on in the banking sector. While itis clear that the reference framework of banking today is made more complicated

[13] See E. Carletti, S. Claessens, A. Fatas-X Vives, *The Bank Business Model,* cit., p. 55 ss.

[14] See COM(2020) 591 final, § 4.4: "Technology companies are therefore likely to become an integral part of the financial ecosystem, and most respondents to the public consultation expect risks to increase as a consequence. It is important to address all these risks, not only those affecting customers (policy-holders, investors and depositors) but also broader financial stability issues and competition in financial services markets. (…). In this context, regulation and supervision should be proportionate, based on the principle of "same activity, same risk, same rules" and pay particular attention to the risks of significant operators".

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than it was in the past, due to the advent of new figures within it, these being interpreters of a new business model; and while it is also clear that the very presence of these newcomers does increase dynamism, superseding the traditional flat calm of this market, it has also to be kept in mind that along with such a unprecedented dynamism, new problems do arise, both of a competitive and regulatory nature.

A real understanding of the kind of problems that have been raised, requires a more detailed level of analysis. In this way it emerges that the same class of new players is not in itself homogeneous, since, beyond the generic sharing of the same business model – the latter, as previously stated, different in many respects from that of the classic banks – FinTech and BigTech respectively present a different order of characteristic features and from that do depend either a different degree of competitive friction – actual or potential – with the incumbents, and a different degree of threat to the stability of the financial system.

3. *FinTech and BigTech: what opportunities, what risks for the banking sector*. – The differences between FinTechs and BigTechs, which is to say the two main subgroups composing the class of newcomers in the banking sector, are manifold. It is not just a matter of size, although FinTechs are small companies, especially when compared to the Titanic BigTechs; rather, it is a matter of how a different critical mass is reflected in the attitude to intercepting the new way of doing business in the banking sector; it deals, in other terms, with how to stay and innovate on the supply side and how to interpret and even exploit the needs emerging on the demand side.

Indeed, the question being asked is in essence a common one and, borrowing the title of a recent study focused mainly on the relationship between FinTechs and banks, but extending it to the overall relationship between incumbents and newcomers, it can be summarised as follows: Friends or Foes[15]? However, the question cannot be answered in the same way.

Beginning with FinTechs, it can be said that, by using Digital Technologies, they operate as a leaner business compared to banks, with no rigid legacy systems to allow faster adaptation to customers' preferences. Mainly focused – at least to date – on lending, through P2P lending platforms or crowdfunding platforms[16], they are adopting primarily an agency model, making money on fees but without retaining any risk from

[15] See G. Barba Navarretti, G. Calzolari, J.M. Mansilla-Fernandez, A.F. Pozzolo, *FinTech and Banking. Friends or Foes?*, in *European Economy. Banks, regulation and the real Sector*, 2017, 2, p. 9 ff.

[16] See Argentati, *Le banche*, cit., 448.

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the loan they intermediate[17]. The way in which they can provide some services, such as lending, looks much more efficient than usual: they can "more effectively screen candidate borrowers via statistical models based on big data, thereby overcoming the information asymmetries that are at the root of the banking business"; moreover, they can approve loans immediately, they need much less personnel, are able to carry on a targeted price discrimination and, finally, "can increase financial inclusion by opening the door to financial services for less developed countries as well as segments of population"[18].

Despite the potential erosion of incumbents' revenues, the benefits, in terms of new dynamism, economies of scope, efficiency, weakening of entry barriers, increased contestability of the banking sector and strengthened consumer protection[19], were found to prevail. Indeed, *FinTechs* have proven to do so in a more efficient – albeit unbundled – way of doing the same things that banks used to do, without, however, themselves constituting, rather than a threat to the latter, an opportunity to be exploited, within the framework of cooperative relationships. After all, the advantages mentioned above, which are appreciable in terms of greater dynamism and efficiency, come along with certain inherent limitations on FinTech's side.

They lack a loyal customer base, have limited access to information and above all suffer from a lack of reputation and brand recognition. For this reason, they are not able to compete head-to-head with the incumbent, not to mention the fact that, being small, they do not pose a threat

[17] See J.J. Cortina Lorente, S. Schmukler, *The Fintech Revolution: A Threat to Global Banking?*, World Bank Research and Policy Briefs No. 125038, March 1, 2018, available at SSRN: *https://ssrn.com/abstract=3255725*; see E. Feyen, J. Frost, L. Gambacorta, H. Natarajan, M. Saal, *Fintech and the digital transformation,* cit.; see also the FSB report 2019a *FinTech and market structure in financial services: Market developments and potential financial stability implications,* Feb. 2019, available at *www.fsb.org*.

[18] See OECD, *Digital Disruption in Banking and its impact on Competition*, 2020, pp. 12-13, available at *www.oecd.org*. It is worth noticing that there is, till now, extensive evidence about the fact that some FinTechs are targeting "unbanked" customers, both in developed and developing countries: see G. Barba Navarretti, G. Calzolari, J.M. Mansilla-Fernandez, A.F. Pozzolo, *FinTech and Banking*, cit., p. 25.

[19] See O. Borgogno, G. Colangelo, *Consumer Inertia and Competition-sensitive Data Governance: The Case of Open Banking,* in *EuCML*, 2020, p. 143 sbs, according to which "Instead of playing catch-up on market failures by means of ex post remedies, policy makers have started to curb information asymmetries and the lack of consumer awareness by opening up the financial markets to real time data access and tailored comparison tools. In this regard, the introduction of access-to-account rules as well as API standardisation enshrined in the PSD2 and in the UK Open Banking project highlight the rise of a new regulatory paradigm strongly focused on consumer engagement" (p. 150).

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to financial stability. As a result of these elements, the prevailing scenario has been – until now – the cooperative one: when they are not being acquired by the big banks, Fin Techs tend to become partners of the incumbents. As noted in 2019 by Financial Stability, "incumbents often outsource some of their lending activities to FinTechs, while FinTechs benefit from access to the incumbents' customer base and reputation"[20]. Ultimately, limited to this pithy subset of new entrants, there are several items of evidence of a mutual benefit scenario with respect to financial institutions in the proper sense.

Quite different and potentially much more critical, however, is the scenario related to the advent of BigTechs as providers of bank-like services[21], although even in this case we have not yet undergone extensive penetration in the banking sector as a whole, but once again a cherry picking of segments of it, thus remaining on the fringes of the regulatory perimeter.

First of all, it might be worth focusing better on what we mean by the "BigTechs" formula. They are large existing companies, whose main activity is to provide digital services, not financial ones, through the use of platforms[22]; the latter point is, by the way, crucial as it anticipates a key feature in predicting strategies and risks related to this category of (atypical) banking sector players.

The Big Techs have a barycentre focused on activities other than proper banking, so that, whatever the bank-like service they provide, – from payments to small loans up to some sort of savings collection – it is to be read through the lens of the enrichment of a basket of other services/activities, dealing with third core-businesses, other than banking. As well as being stressed in literature, each of these companies creates its own digital ecosystem – that of online searches, the product marketplace and so on – so that the segments of activity in the banking context must be read in terms of increasing the added value of it[23].

[20] Q.v. FSB report 2019a, F*inTech and market,* cit., p. 11.

[21] Again in its report 2019a, F*inTech and market structure in financial services,* FSB still seemed to allude to the advent of BigTechs as part of a scenario in the making: "In some jurisdictions, large, well-established technology firms have recently entered financial services markets. These firms can provide financial services as part of the products or services that they normally provide" (p. 12).

[22] For a wider analysis and a more comprehensive survey of literature on the issue, see K. Croxson, J. Frost, L. Gambacorta, T. Valletti, *Platform-based business models and financial inclusion*, BIS working paper n. 986, Jan. 2022, available at *www.bis.org*.

[23] See M. Jacobides, I. Lianos, *Ecosystems and competition law in theory and practice*, in *Industrial & Corporate Change*, 2021, p. 1199 ss.; V. H.S.E. Robertson, *Antitrust market definition for digital ecosystems*, in *Concurrences*, 2021, p. 3 sbs.

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We shall be returning later to the competitive implications that this ancillarity of banking-like activities, with respect to a different core-business, generates.

In the meantime, it must be said that, collateral or instrumental as it may be, the interest the BigTechs have shown in certain segments of the banking sector is growing day by day; from the intermediation of payments and digital wallets in general – suffice it to mention Alipay, Google Pay, Apple Pay or Amazon Pay[24] – to microcredit – e.g. Amazon Lending or Google Store Financing; from the experimentation of forms of crypto-currency – Amazon coins or Meta's Lybra project – up to the more recent deposit account agreement signed by Apple and Goldman Sachs[25].

As the number of classic, banking-type activities that BigTechs are beginning to undertake is increasing, the fact remains that they maintain an ancillary role, so to speak, compared to a core-business that remains centred on something else, from which, however, corollaries of non-negligible importance derive. It becomes clear that their main objective, for instance through digital portfolios or microcredit activities, is not to make a profit on their own, but to increase the core profits they make by doing something else, by reinforcing the network effects and the added value of the ecosystem they orchestrate; so, it is for this reason that they can provide these 'collateral' services at almost zero marginal costs and prices.

However, it would certainly be unjustified to disregard the fact that these topic traits are accompanied by potentially positive elements in themselves, appreciable once again in terms of greater dynamism in the offer of new products and services at more competitive prices, as well as greater financial inclusion in favour of individual or professional counterparts, even those who are not banked. However, as soon as we take into account the impact that BigTechs' "size" and main features may have on how they can even provide only the limited set of services just mentioned, multiple concerns soon arise.

Whatever the core business, BigTechs' activity rests on the using of digital platforms, more precisely multi-sided platforms, which entail network effects and economies of scales and scope. Furthermore, they do not suffer the same weaknesses as FinTechs: while the latter have limited access to soft information and cannot rely on a loyal customer base, the

[24] See D. Gammaldi, C. Iacomini, *Mutamenti del mercato dopo la PSD2*, in F. Maimeri, M. Mancini (eds.), *Le nuove frontiere dei servizi bancari e di pagamento fra PSD2, criptovalute e rivoluzione digitale*, Banca d'Italia-Quaderni di Ricerca Giuridica, n. 87, 2019, p. 125 sbs.

[25] See, for a first overview, FSB 2019b report, *Big tech in finance. Market developments and potential stability implications*, Dec. 2019, available at *www.fsb.org*; see also J. Frost, L. Gambacorta, Y. Huang, H. Song Shin and P. Zbinden, *BigTech*, cit., p. 6 sbs.

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former enjoy broad access to a mess of information, count on a tremendous, critical customer base and, above all, do not suffer from any lack of reputation or visibility.

As deservingly noted, "Big Tech platforms have most of the advantages of FinTech firms with practically none of the drawbacks (…) [they] already have a captive ecosystem, with high switching costs for customers and can exploit economies of scope and efficient technologies to provide financial services[26]"; to sum up, the threesome of "platforms – network effects – big data[27]" does encapsulate their pros and cons, making them, in the end, potentially much more disruptive actors for the traditional banking system.

4. *Big Techs and banks: are current transformations a prelude to a coming upheaval?* – The structural connotations, along with the business model connotations of the biggest new entrants in the banking sector, go well beyond the scope of a simple descriptive analysis. Rather, they are relevant in the sense of condensing within themselves all the criticalities and destructive potential to which (unlike whatever cannot be precisely detected or predicted for the FinTechs) the progressive insertion of large platforms in segments of typical banking activities can give rise.

Focusing primarily on risks, we can distinguish between concrete and foreseeable risks.

This distinction overlaps with a further distinction regarding subject matter, between risks that directly affect or threaten to affect consumers and risks to the relevant market as such, and to financial stability.

Indeed, most of the concerns that have already emerged relate to consumer protection, the protection of personal data and privacy, the handling of the privacy paradox, and so on. As far as the future is concerned, however, the main uncertainties relate to competitive scenarios, the future shape of the banking market and the impact on its contestability, i.e. the shape of the banking market, the competitive dynamism – if any – within it; and, again, the likelihood that Big Tech will once again implement their classic cuckoo's nest strategy[28]. We will dwell on these aspects in the following few pages.

It is likely that the BigTechs will seek to engage in a number of activi-

[26] See OECD, *Digital Disruption*, cit., p. 15.

[27] See J. Padilla, *Big techs "Banks", financial stability and regulation*, April 2020, available at *www.ssrn.com*; T. Smith, D. Geradin, *Maintaining a level playing field when Big tech disrupts the financial services sector*, June 2021, available at *www.ssrn.com*.

[28] Cfr. F. Vitali Gentilini, *La strategia del cuculo. I giganti digitali vogliono prendersi tutto*, in *Limes*, 2018, p. 45 sbs; Id., *Mobile payment e identità elettronica: le nuove sfide per la supremazia commerciale epilitica*, in *Nomos & Khaos*, Rapporto Nomisma 2012-2013 sulle prospettive economico-strategiche - osservatorio scenari strategici e di sicurezza, p. 311 sbs.

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ties to consolidate their presence and market power in the banking sector, leveraging the great power they already enjoy within the ecosystem they respectively 'orchestrate'; and although, in the short term, this might also trigger competition, in the medium term it might influence and reduce it. After all, this has already happened and could happen again[29].

BigTechs' common features –network effects, cross subsidization, economies of scale and so on[30] – do favour such an outcome; and there are also further tools specific to the banking sector.

The first crucial aspect to be emphasised concerns the regulatory asymmetry in general. The tech giants are in a favourable position to operate a sort of cherry picking of banking services, choosing which activities/services may strengthen their own ecosystem. Such an ability to selectively penetrate adjacent markets (in our case, the banking one) is propitiated by the fact that a platform can leverage the enormous mass of data it has at its disposal and can unceasingly extract from its own digital ecosystem: this makes it possible for a platform to have access to "its own first party data from its direct consumer relationship in the upstream and downstream markets, as well as access to its potential competitors' data"[31].

The leverage effect, just described, which has to be conceived as inherent to the proper characteristics of large platforms and their business model, may however also be facilitated by certain fault lines in the regulatory frameworks themselves. This is certainly the case for the payment system in the European.

It is widely known that, Directive 2015/2366/(EU) (better known as 'PSD2'), in order to promote competition and innovation in the retail payments sector, has not only adjusted the regulatory framework but, above all, encouraged new operators to enter the market; more specifically, in conformity with its recital 33, the Directive has allowed the so called 'third-party providers' (or 'TPPs'[32]) to have access to the payment

[29] Q.v. Smith and D. Geradin, *Maintaining a level playing*, cit., p. 14; J. Padilla, *Big techs*, cit., pp. 4-5. See also OECD, *Digital Disruption*, cit., p. 15 for references to the experiences that have already occurred in the less developed banking markets, for example in China, Latin-America or Africa.

[30] Q.v. amongst many, A. Ezrachi, M.E. Stucke, *Virtual competition. The promise and perils of the Algorithm-driven Economy*, Harvard, 2016, *passim*; M. Libertini, *Digital Markets and competition Policy. Some remarks on the suitability of the antitrust toolkit*, in *Orizzonti del Diritto Commerciale*, 2021, p. 337 ff.; L. Zingales, *Regulating Big tech*, BIS working paper n. 1063, Dec. 2022, available at *www.bis.org*.

[31] T. Smith, D. Geradin, *Maintaining a level playing*, cit., p. 15.

[32] To be distinguished into PISPs (payment initiation service providers) who provide the payment order services and AISPs (account information service providers) (account information services (AIS).

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accounts of their customers, held with a different intermediary – typically a bank – the latter being required to contain such access and share such information[33]. There is thus a clear endorsement for the directive giving TPPs the ability to penetrate the information assets that banks hold, in the shadow of their customer relationships, in the function of a bank account.

However, as soon as we direct our attention to the GDPR, an asymmetry unfavourable to banks does clearly emerge; while the PSD2 mandates banks to provide third parties the data concerning their customers, under the General Data Protection regulation, TTPs, including BigTechs, are obliged to facilitate data portability only where it is technically feasible[34].

Further aspects, although to a certain extent they are variations on the theme of 'leveraging', concern the disaggregation of customer data and customer self-reference, i.e. the ability of large platforms to monitor what customers do and what they like, and to influence them in many ways[35].

The lack of interoperability, on the other hand, deserves special mention. It may be sufficient to recall the opening of the investigation by the European Commission, in June 2020, on Apple Pay and the Near Field Communication (NFC)[36], as well as the German case culminating with the adoption of Sect. 58A of the German Payment Services Supervisory Act (PSSA), the so called Lex Apple Pay, to understand how crucial a reduced interoperability from one service/operator to another[37] may be, for the best or a distorted functioning of platform economy.

It is precisely this set of elements that makes the prospect of a tipping effect ominous as looming, dangerously looming: part of these elements are intrinsic to the platforms and their business model – network effects, economies of scale – while part are the result of the multiplier effect, generated by certain features of the banking sector and its regulation.

It is, after all, a typical scenario of digital markets and the winner-takes-all mechanism within them; however, when referring to the banking sector, it is also aggravated by prospects of systemic relevance[38].

[33] Q.v. articles. art. 66, par. 4, lett. b) e c), 67, par. 3, lett. b. For a comprehensive analysis, q.v. V. Profeta, *I third party provider*, cit. p. 48 sbs.

[34] Q.v. art. 20, par. 2, Reg (EU) 2016/679.

[35] Q.v. Smith, D. Geradin, *Maintaining a level playing*, cit., p. 15.

[36] Case number AT.40452 (Apple - Mobile Payments - Apple Pay).

[37] See J.U. Franck, D. Linardatos, *Germany's 'Lex Apple Pay': Payment Services Regulation Overtakes Competition Enforcement,* Discussion Paper No. 173, Project B 05, June 2020, available at *www.ssrn.com*.

[38] L. Zingales, *Regulating Big tech,* cit., p. 7.

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In that context, in fact, it risks implying the distortion – or rather, the cancellation – of head-to-head competition between the most efficient BigTechs and the largest incumbents, with the consequence of thus reproducing – also in the banking market – the same kind of distortions that Ariel Ezrachi and Maurice Stucke described in their seminal book on Virtual competition, with regard to unilateral abuse, price discrimination and so on. In other words, the same scenario that, to employ a representative expression, those authors called "Frenemy- scenario"[39], referring to the relationship between super-platforms and apps, is now in danger of replicating itself between Big Tech and banks.

The likelihood of such a strategy – on the part of the BigTechs – coming into being and, more importantly, the extent of the impact its implementation may have in the banking sector depends, however, to a large extent on the further evolution of business models, both big platforms themselves (the newcomers) and the incumbent banks. This brings us once again from assumptions to facts.

5. *Ongoing and likely transformations in business models*. – Certainly, if the business model of the incumbents were to remain unchanged in its traditional terms, these players would probably assume the role of targets, easy prey to a winding-up manoeuvre of the kind described above, albeit perhaps of a selective kind, i.e. restricted to certain segments only among those classically referable to the banking market; if, on the other hand, the posture of the incumbents were to be much more "reactive", the final outcome could also be different.

In any case, one can hardly ignore the existence of a sort of external technological constraint that is no longer reversible, which attracts all operators, old as well as new, and which fatally turns out to be much more favourable for the latter and 'hostile' or difficult to scale for the former. We refer to the use of platforms.

One cannot fail to take into account how the financial sector, in general, and the banking sector, in particular, have for some time been at the centre of a movement, almost an overall reorientation towards the platform model, defined as a new form of interconnection between credit, payment and e-money institutions and non-financial institutions in the European Union, to quote the Eba Report on the use of digital platforms in the EU[40].

Financial institutions have progressively relied on digital platforms as

[39] A. Ezrachi, M.E. Stucke, *Virtual competition*, cit., p. 145 sbs.

[40] Q.v. EBA, *Report on the use*, cit.

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a means of marketing and, in some cases, concluding contracts with customers for their products and services[41]; and it is again by reading the Eba Report that it is possible to refer to a taxonomy of the different platforms potentially involving banks, which includes Comparators, Financial Institutions+[42], Platforms with banking/payments as a collateral service, Ecosystems[43] and Enablers[44].

That being the case, two extreme outcomes could then be hypothesised, as we would say differently improbable, and an intermediate one that appears to us to be the one with greater plausibility but no less risk.

The first extreme scenario sees the most efficient and largest banks deciding to engage in head-to-head competition with the newcomers and behave as platforms themselves, trying to attract 'on board' as many services as possible, even those not strictly related to banking services. Such a scenario is, however, rather difficult to realise, due to the switching costs involved in the heavy legacy systems that banks have to manage, as well as to the fact that they are classically match-makers between consumers and banks' products, i.e. they are generally customer magnets rather than producers.

At the same time, a mirror scenario, that of 'platforms as banks', in which BigTech decides to use platforms to directly perform intermediation services in financial activities, is rather unlikely to be carried out to the end; this is also unlikely because it implies, among other things, that BigTech would have to bear the risks from which they usually try to escape, not to mention stricter sectoral regulation[45].

Therefore, neither are banks fully prepared to become platforms, nor platforms – more precisely, the large companies that control and regulate the largest platforms – to become banks. Nevertheless, platforms are and will long remain centre stage as an increasingly indispensable infrastructure; hence the very realisation of an intermediate scenario to the two previously hypothesised, a scenario that has been called BAAS – 'Banks As A Service' – in which the functioning of existing platforms is practically reinforced and in which services such as payments become collateral services.

[41] Q.v. Id., *op. cit.*, pp. 15 and 17.

[42] Which is to say platforms provided by financial institutions also providing access to third party products and services.

[43] Platforms acting as a single point of entry to multiple third party providers' financial and non-financial products.

[44] Platforms enabling access to payments and other services and leveraging data for service extension.

[45] For a more in-depth analysis on these aspects see P. Sironi *Banks and Finthech,* cit., *passim* but particularly pp. 126-127.

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It has already been described by some commentators as a positive development, harbinger of advantages for incumbents and newcomers alike, starting with the possibility of better intercepting customers' expectations "to have an end-to-end experience of digital services in a single window"[46]; there is, however, a dark side to this transformation, linked to the fact that it ends up once again fostering exploitation prospects by the BigTechs themselves, if only they decide to act as a marketplace.

In practice, what at first sight would appear to be a cooperative scenario also carries with it the risk of degenerating into a highly unbalanced relationship, if not actually one of outright vassalage, with traditional banks in a subordinate position. This scenario is perhaps less radical than the two mentioned earlier – banks as platforms or platforms as banks – but no less destructive and serious in its outcomes, being nothing but a different path to the 'Frenemy' outcome.

BigTechs would easily target the most profitable business segments of the incumbents, even excluding some intermediaries by imposing discriminatory prices and conditions on them; banks, on the other hand, would suffer significant margin erosion.

Consequently, traditional banks would be marginalised as providers of financial services primarily to platform customers. Moreover, without the triggering of true interoperability of data and systems, we might easily be faced with a landscape of single-home ecosystems and, with them, the need for banks to be part of as many platforms as possible in order not to lose a critical number of transactions.

New entrants may eventually succeed in monopolising the creation and distribution of loans to consumers and SMEs, forcing traditional banks to become 'low-cost producers' or 'restricted banks', having to accept deposits from the public only to invest them in products originating from, and distributed by, third parties[47].

The disruptive potential of such an outcome appears as high as it is multifaceted. On the one hand, the disaggregation of banking activities, coupled with the direct penetration capacity of large platforms in this sector, increasingly entails the risks of an emptying or, at any rate, a circumvention of sectoral regulation; on the other hand, the unfolding of a dynamic in which financial institutions are increasingly attracted to, and

[46] Q.v. L.K. Berber, A. Atabey, *Open Banking & Banking as a Service (BaaS): a delicate turnout for the banking sector*, in *Global Privacy L. Rev.*, 2021, p. 59 sbs, and in part. p. 71 sbs.

[47] Q.v. M. de la Mano, J. Padilla, *Big Tech Banking*, 2018, available at *www.ssrn.com*; J. Padilla, *Big techs "Banks"*, cit.

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locked in, large platforms that constitute the indispensable infrastructure for the functioning of an entire ecosystem headed by the platform provider – precisely as gatekeeper, within the meaning of Articles 2 and 3 of Regulation EU/2022/1925 – determines a significant erosion of financial institutions' profit margins[48].

Again, while it is true that increased competition can be beneficial for the banking sector as a whole, it is also true that "increased competition could also affect the ability of institutions to generate capital internally through retained earnings. It could also lead to potential mispricing of risk, e.g. if aggressive pricing were to cause interest rates on loans to be too low and encourage excessive borrowing'[49]: in other words, it could undermine financial stability, albeit indirectly.

6. *Levelling the playing field between competition and regulation.* – How can this degeneration be avoided? It is certainly not plausible to think of turning back the technological frontier and with it the "hands of history", giving rise to the most disparate hypotheses of obstacles to platformisation *per se*[50]. Incidentally, it is certainly true, as the Financial Stability Board points out, that it is not the role of regulators to protect financial institutions from competition, although they should pay more attention to "the impact of competition on the viability of business models and the nature of the competitive response of incumbents"[51].

The current prevalence of 'cooperative' relationships between BigTech and incumbents leads, at first glance, to a postponement of any intervention, in favour of a 'wait and see' approach, so as not to hinder technological innovation, not to disrupt a favourable sounding scenario for consumers and, from an antitrust point of view, not to incur the classic type I errors (false positives), but the lesson learnt from the Leman Brothers case should be recalled: competition in the banking sector must be tempered, given the general interests involved. Moreover, this lesson soon translates into the urgency of action if one considers that the completion of a rewinding strategy by BigTech is in danger of no longer being reversible, due to the tipping effects and network externalities; once the tipping effect is completed, one would have passed that critical point where the incumbent's advantage can no longer be challenged and replaced.

[48] Q.v. FSB *2019b report, Big tech*, cit., pp. 22-23.

[49] Q.v. FSB *2019b report, op. ult. cit.*, p. 24.

[50] Q.v. R. Pardolesi, *Hipster antitrust e sconvolgimenti tettonici: «back to the future»?*, in *Merc. conc. reg.*, 2019, p. 81 and sbs.

[51] Q.v. FSB *2019b report, Big tech*, cit., p. 23.

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Levelling the playing field therefore appears to be crucial and cannot be postponed.

Many proposals have been put forward in this regard, under the banner, for instance, of the need for a regulatory response at the international level[52], or even just exploiting the potential of unbundling to avoid certain criticalities of the traditional system such as barriers to entry and too big to fail.

In our opinion, although there is an element of truth in each of these recipes, the most promising path remains that of valorising certain subjective characteristics of certain categories of actors, putting the brakes on some of their most dangerous behaviour, as well as, precisely defining certain profiles of the proprietary data regime, starting with the guarantee of continuous control over them, which is as good as maximising interoperability[53].

The European Commission seems to look favourably on this line. One may recall the Strategy for Digital Finance[54] and its key concepts, as well as the Public Consultation on the Review of the PSD Directive2[55], which emphasise the importance of open finance. Fatally, however, competition law is also looked at, albeit from a complementary perspective with regulatory instruments.

Indeed, competition law alone – which many scholars argue is the main tool for levelling the playing field – does not seem fully prepared to adequately interpret and address the distortions that can typically occur in digital markets. The antitrust toolkit needs an update of categories and concepts, starting with the definition of the relevant market. Above all, from the point of view of remedies, it needs a clearer determination of the area of impact of behavioural remedies, which would make it possible to make the current provision contained in Article 7 of Reg 1/2003/EC more incisive.

Hence the need precisely for a complementarity of regulatory segments, complementing the characteristic proscriptive and reactive intonation of antitrust with prescriptive and proactive measures.

This path was taken by the EU with the DMA, of which it is sufficient to cite Articles 5 and 6. These are *ex ante* prescriptions[56] (Articles 5 and

[52] L. Zingales, *Regulating Big tech*, cit.

[53] Q.v. A. Manganelli, A. Nicita, *Regulating digital platforms: The road ahead*, in *Concurrences*, 2021, pp. 15-20.

[54] COM(2020) 591 final, p. 16.

[55] Q.v. European Commission, *Targeted consultation on the review of the revised payment Services Directive (PSD2)*, 2022, p. 8: *PSD2 aims to contribute to a more integrated and efficient European payments market. The Directive also aims to facilitate competition and to improve the level-playing field for payment service providers (see also question 1) - including new players and FinTechs*.

[56] See Reg. 1925/20/UE.

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6), aimed at mitigating some of the most dangerous distortions of market dynamics that accompany the operation of large platforms, which can be qualified as gatekeepers, i.e. companies that provide a core platform service with a continuous or likely significant impact on the internal market, so as to represent gateways for business users to reach end users.

The specific aims of the DMA, namely fairness and contestability of the market, together with the adoption of *ex ante* (rather than *ex post*) provisions, make it a sort of hybrid instrument between regulation and competition. An instrument imposed to address a specific market scenario – the presence of gatekeepers – but intended to complement ordinary antitrust rules and to be applied in parallel with them.

The provisions of the DMA and an updated antitrust[57] – including a new focus on takeovers – may be a satisfactory answer to many of the issues raised by the platformisation of the banking sector. Of course, it is true that even a mixed approach, partly reactive and partly proactive, partly focusing on conduct and partly on its effects, can only be an answer and not the answer. Indeed, further specific, more stringent regulatory intervention may be needed; micro- and macro-prudential regulatory measures should be strengthened and their asset-based enforcement should at least be complemented by entity-based enforcement.

This is, however, the indispensable foundation from which to start. It is neither a question of barriers nor of protecting incumbents as such. Besides, an excessive degree of contestability is not necessarily desirable in the banking sector as it could make the market too liquid and fragmented, whereas a critical number of players is a source of stability.

The level playing field we need to promote should be very selective, the principle 'same business, same risks, same rules' further reinforced together with a series of upstream behavioural measures to tame the giants[58]. Ultimately, the market in question cannot be treated as an ordinary market, as it is systemic and involves general interests.

An authoritative and consistent statement was made a few years ago

57 See amongst the others P. Akman, *Regulating Competition in Digital Platform Markets. A Critical Assessment of the Framework and Approach of the EU Digital Markets Act*, in *European L. Rev.*, 2022 (available at *https://eprints.whiterose.ac.uk/181328/*), 4; see also M. Libertini, *The presumption of economic dependence in digital markets*. A comment to Article 33 of Law no. 118 of August 5th, 2022, 9 and sbs, who emphasises how, despite what one might be led to believe from a reading of Recital 11 od Reg. 1925, it is from the remedial point of vew - and not from the the teleological one - that the lack of overlap between the DMA and European competition law must be appreciated (at 14).

58 Q.v. M. Eifert, A. Metzger, H. Schweitzer, G. Wagner, *Taming the Giants: the DMA/DSA Package*, in *Common Market L. Rev.*, 2021, pp. 987-1028.

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by Richard Posner in the aftermath of the 2008 financial crisis, when he uttered the famous line that: "If you're worried that lions are eating too many zebras, you don't say to the lions, 'You're eating too many zebras.' You have to build a fence around the lions"[59]. Well, sticking to the zoological metaphor and looking at the banking sector, it is perhaps not so dystopian to think that some animals are more equal than others.

[59] Q.v. *https://www.huffpost.com/entry/judge-richard-posner-disc_n_188950*.

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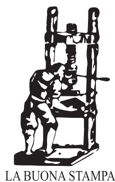

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