Legal foundations of crowdlending: from mutual agreement to lending via online platforms

Fundamentos jurídicos del *crowdlending:* del mutuo acuerdo al préstamo vía plataformas *online*

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Abstract

Technological innovation in the field of finance requires in-depth study of both technology and law. To contribute to this field, this paper proposes to analyse crowdlending, a procedure that allows the conclusion of loan agreements in which intermediaries disappear and online platforms participate. This procedure presents numerous legal challenges to which we must respond, and response requires analysing our legal foundations. As everything has its precedent, meeting the legal challenges of regulating crowdlending requires study of its antecedents and, thus, analysis of the loan agreement. We have found as a legal precedent the contract of mutual (mutuum) of the Roman Law because this system configures the loan contract also without intermediaries. We studied it to check the problems it raised and what were its solutions. This is the starting point to face the analysis of crowdlending.

Keywords: crowdlending, lending, law, P2P, loan, Law, history.

Resumen

La innovación tecnológica en el campo de las finanzas requiere un estudio profundo, tanto de la tecnología como del derecho. Para contribuir a dicho campo, en este trabajo se propone analizar el *crowdlending,* un procedimiento que permite la celebración de contratos de préstamo en los que desaparecen los intermediarios y participan las plataformas *online*. Tal procedimiento presenta numerosos desafíos jurídicos a los que debemos responder, y esta respuesta conlleva analizar nuestros fundamentos jurídicos. Y, como todo tiene su antecedente, enfrentarse a los desafíos legales para regular el *crowdlending* requiere el estudio de sus antecedentes y, por ende, el análisis del contrato de préstamo. Hemos encontrado como precedente legal el contrato de mutuo *(mutuum)* del derecho romano porque, en este sistema, se configura el contrato de préstamo también sin intermediarios. Lo estudiamos para comprobar los problemas que planteaba y cuáles eran sus soluciones. Este constituye el punto de partida para afrontar el análisis del *crowdlending*.

Palabras clave: *crowdlending,* préstamo, ley, P2P, derecho, historia.

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1 Introduction

Technological innovation in the financial sector must be accompanied by a high level of consumer protection and high security standards. We must also ensure market stability:

> Financial technology (FinTech) is a policy priority for the European Commission. It can and will play an important role in achieving the objectives related to the development of the single market, banking union, capital markets union and retail financial services (European Commission Press release, European Commission launches EU Blockchain Observatory and Forum, Brussels, February 1, 2018).

As everything has its precedent, meeting the legal challenges of regulating crowdlending requires study of its antecedents and, thus, analysis of the mutual contract. The mutual contract, regulated by Roman Law, has the same legal configuration as crowdlending. Both contracts are characterized by the fact that they do not have intermediaries, but are entered into between individuals, which is called «peer-to-peer» (P2P).

The purpose of this paper is to contribute to the study of the loan contract, to highlight the challenges and problems we face, while considering our historical Law. We do this by using both the methodology of legal history, the legal historical method, and the method of the legal sciences to study positive Law and make proposals of *lege ferenda.*

2 Historical and legal foundations of the loan agreement

To study the loan agreement, one must first study obligations, contracts, and real contracts.

We begin by analysing these agreements in ancient Rome, turning first to loans. The person who is the lender (the creditor) has the power to demand from another, the borrower (debtor), a specific behaviour, the return of what was lent (the performance). An *obligatio,* thus, arises from loan agreements (Arias Ramos 1974, pp. 535 and 536). From the dawn of classical jurisprudence, the term *obligatio* has been used to refer to a debt relationship. Every *obligatio* implies a debt, or *debitum,* of one person towards another. Following D'Ors, *debere* means etymologically «to have from another»: *de-habere. Debere* presupposes a *capere,* a taking «from» another, whether, or not, the owner agrees; that is, whether the taking is a loan or a theft. Theft and loan are thus the two original causes of *debitum.* In early classical jurisprudence, perfection of the loan requires the balance and the bronze, *per aes et libram.*

According to D'Ors, however, this ceremony represents a potential abdication of freedom before a creditor from whom the loaned amount is received. This abdication would be an advance subjection through subjection, *nexum,* to a possible *manus iniectio* (D'Ors 1960, p. 255).

Although, Roman Law lacks a theory of contract (Arias Ramos 1974, p. 576), Classical Roman Law distinguishes four types of contracts: verbal, literal, real, and contractual. This classification was in force for a long time, as it was extended under Code of Justinian. Our study will focus on real contracts, exploring the question of which contracts are real. Real contracts are those that combine the parties' consent with delivery of the thing: the *datio rei.*

Let us now analyse real contracts.

We stated *ut supra* that real contracts, by definition, require agreement between the parties and delivery of the thing, which in Rome was called *datio rei.* In fact, the loan agreement is said to be the *datio* itself. The obligation of restitution is enforced by means of the *condictio,* an action in *ius concepta* in strict law (Wegmann Stockebrand 2018, p. 107):

> Ulpianus, Libro XXVI ad edictum.- «Certi condictio competit ex omni causa, ex omni obligatione, ex qua certum petitur, sive ex certo contractu petatur sive ex incerto: licet enim nobis ex omni contractu certum condicere, dummodo praesens sit obligatio: ceterum si in diem sit vel sub condicione obligatio, ante diem vel condicionem non potero agree» (D. 12, 1, 9).

Thus, a credit obligation arises only when there is an effective transfer of ownership: «Appellata est autem mutui datio ab eo, quod de meo tuum fit: et ideo, si non faciat tuum, non nascitur obligatio» (Paulus, book XXVIII *ad edictum,* D. 12, 1, 2.2).

One can never transfer another's thing:

> In mutui datione oportet dominum esse dantem, nec obest, quod filius familias et servus dantes peculiares nummos obligant: id enim tale est, quale si voluntate mea tu des pecuniam: nam mihi actio adquiritur, licet mei nummi non fuerint (D. 12, 1, 2.4).

The consumer loan is termed «mutual». It is a real contract, because it requires consent of the parties and delivery of the thing. It is also an unilateral, not a synallagmatic, contract, as it creates obligations for only one of the parties, in this case the lender. *Solvere* is to deliver to the creditor what is owed to him. This *solutio* comes from archaic law, specifically from the act of *nexi liberatio.* The debtor is the one who *solvit,* and *soluta* is the *res credita* that is returned (D'Ors 1960, p. 277). The consumer loan can be a contract both for profit and for consideration, depending on whether the borrower must pay interest or not.

Following Wegmann, who continues the ideas of Von Lübtow, transfer of ownership in the mutual loan is not a mere theoretical construction of the Romans but a necessary consequence of the function this business plays in legal transactions (Wegmann Stockebrand 2018, p. 108).

We find the following subjects in this contract:

— Mutual-creditor-lender

— Mutuary-debtor-borrower

The *mutuante,* thus, delivers the property of a quantity of money or fungible things *(mutua pecunia)* to the mutuary, who is obliged to return the same quantity of things, of the same kind and quality, after a certain period has elapsed. For D'Ors, the mutual is the prototype of the credit agreement (D'Ors 1960, p. 134). He defines it as the contract by which «a person called *mutuante* procures to another called *mutuario* the availability of an amount of money or another kind, with the obligation on the part of the one who receives to return another equal amount of the same kind» (D'Ors 1960, p. 283). In this case, it is the quantity that must be returned, since the identity of fungible things is found in their quantity, not their kind. In this order of things, the lender does not part with what is his/her property, but only converts it into a credit *(nomen)* that was previously a *tangible res.* This contract must thus be understood as a nominal contract.

When does this agreement loan come into being? It is an *obligatio re contracta* that arises the moment the lender or *mutuante* transfers the things to the *mutuary* or borrower. Until that moment, there is only the promise of contract; the contract does not exist until the delivery is made.

The requirements for the perfection of a loan agreement are:

a) The *mutuante* must be the holder of the right of ownership of that which is to be lent or, at least, hold the power to dispose of it.

b) The object of the loan agreement is fungible things:

> Re contrahitur obligatio mutui datione. Mutui autem datio consistit in his rebus, quae pondere numero mensurave constant, veluti vino oleo frumento pecunia numerata, quas res in hoc damus, ut fiant accipientis, postea alias recepturi eiusdem generis et qualitatis (Gaius, *Diary,* book II, D. 44, 7, 2).

That is, that they can be counted, measured, or weighed:

> Re contrahitur obligatio veluti mutui datione. mutui autem obligatio in his rebus consistit quae pondere, numero mensurave constant, veluti vino, oleo, frumento, pecunia numerata, aere, argento, auro, quas res aut numerando aut metiendo aut adpendendo in hoc damus ut accipientium fiant, et quandoque nobis non eaedem res, sed aliae eiusdem naturae et qualitatis reddantur. unde etiam mutuum appellatum sit, quia ita a me tibi datur, ut ex meo tuum fiat (Instituta 3, 14).

Paulus states that exchanging wine for wheat would not be mutual (Paulus, *Commentaries on the Edict,* book XXVIII, D. 10, 1, 2).

c) There must be an effective transfer of the things that are the object of the loan. This condition was interpreted in a broad sense. In some cases, a consumer loan agreement involves no direct delivery of the thing. This is the case where the object of the loan is achieved through an intermediate legal transaction, such as sale of a good:

> Rogasti me, ut tibi pecuniam crederem: ego cum non haberem, lancem tibi dedi vel massam auri, ut eam venderes et nummis utereris. Si vendideris, puto mutuam pecuniam factam (Ulpianus, book 26 *ad edictum,* D. 12, 1, 11).

d) If there is an agreement of wills, the will of the *mutuante* who gives a thing to be returned after a certain period and the will of the *mutuary* who receives it to return the same amount converge.

Once the loan agreement has been concluded, one of the borrower's obligations is to return the same amount that he was lent, but he is also required to return the same quality:

> Cum quid mutuum dederimus, etsi non cavimus, ut aeque bonum nobis redderetur, non licet debitori deteriorem rem, quae ex eodem genere sit, reddere, veluti vinum novum pro vetere: nam in contrahendo quod agitur pro cauto habendum est, id autem agi intellegitur, ut eiusdem generis et eadem bonitate solvatur, qua datum sit (Pomponius, book XXVII *ad Sabinum,* D. 12, 1, 3),

for in this contract what is lent is the value of the thing. «Mutual» means nothing more than the loan of value.

3
Banking contracts

In the 18th century, with the appearance of the first banks in Europe, credit spread. From that moment on, these contracts ceased to be entered into between private individuals and banking institutions now act as intermediaries. Nowadays, banking activity is subject to its own legal regime, which consists of traders, bankers and credit institutions performing a task of intermediation that enables making surplus money available to agents who need financing.

The discipline that studies credit intermediation is known as «banking law».

1. Who is involved in banking activity?

Spain's Law 10/2014 of June 26, 2014, on the regulation, supervision and solvency of credit institutions defines «credit institutions» as authorised companies whose activity consists of receiving deposits or other repayable funds from the public and granting credit for their own account. In other words, these institutions are intermediaries between subjects, raising funds from some to grant them to others. They also provide other types of services. The law defines «credit institutions» as banks, savings banks, credit cooperatives, and the Official Credit Institute (ICO). Due to their definition and characteristics, these institutions are subject to a special regime. Electronic money institutions and the Spanish Confederation of Savings Banks are also considered as «credit institutions». And although they are considered as such, Law 5/2015 has this categorisation from financial credit institutions; in other words, from companies (Art. 6):

— Banks: singular or special public limited companies, and the most important credit institutions. Banks are special public limited companies because they are under a special regime; for example, in addition to being registered in the Mercantile Register, they are also registered in the Bank of Spain's Register of Credit Institutions.

— Savings banks: institutions that have been reduced from playing a secondary role among credit institutions, as only a couple still survive. Since the restructuring in 2017, savings banks have either become or been absorbed by banks.

Savings banks are credit institutions with the character of a foundation and a charitable-social purpose. The territorial jurisdiction in which they may conduct their activity is limited. They cannot be national or autonomous or operate in more than 10 neighbouring provinces. Similarly, Law 26/2013 on savings banks and banking foundations stipulates that a «banking foundation» shall be understood as one that holds a direct or indirect stake in a credit institution, a stake of at least 10 % of the capital or voting rights of the institution, or that may appoint or dismiss a member of its governing body. The banking foundation must also have a social purpose and focus its main activity on care, social work, and proper management of its shareholding in a credit institution.

— Credit co-operatives: companies that meet the financing needs of their members and of third parties while performing the activities of credit institutions. If the central action of this activity is performed in rural areas, it may be called a «rural savings bank». These are the current players we have in the financial system, but this is going to change in our near future, because of technological applications.

— Electronic money institutions: institutions regulated by Law 21/2011, July 26, on electronic money. These entities will issue electronic money or perform services such as:

(a) Enabling deposit of cash in a payment account and all operations necessary for management of a payment account.

(b) Enabling withdrawal of cash from a payment account and all operations necessary for the operation of a payment account.

(c) Executing payment transactions, including transfer of funds, through a payment account with the user's payment service provider or other payment service provider.

(d) Executing payment transactions where the funds are covered by a credit line opened for a payment service user.

(e) Issuing payment instruments or acquiring payment transactions.

(f) Remitting money.

(g) Providing payment initiation services.

(h) Providing account information services.

— Other banking institutions include the Instituto de Crédito Oficial (ICO) and the Confederación Española de Cajas de Ahorro (CECA).

Regarding the supervisory bodies, one of the special characteristics of credit institutions is that they are subject to specific control procedures.

Historically, the Banco de España has been the institution dedicated to this supervisory task. However, the Banco de España —and with it all Central Banks— has lost preponderance to the European Central Bank.

What do we need?

1. Trust:

Both traditional financial market players and FinTech players must be trustworthy. Since the financial system is based on trust, any abuse of trust in the financial system must be punishable. All financial systems are based on trust. The Latin root of «fiduciary» means literally «one who holds something in trust». Technologies such as cryptography raise concerns among customers. Any innovation involving FinTech must thus be able to increase customer confidence.

2. Proximity:

Research has shown a relationship between proximity and difficulty in deceiving. It is more difficult to deceive the people closest to us, the people we see regularly or deal with on a regular basis. What does FinTech cause? Distance between subjects.

4
The FinTech revolution

Contraction of «financial technology», the term FinTech refers to the use of technology in financial services. It is the service through which technologies provide solutions to finance. FinTech ranges from means of payment to the emerging InsurTech industry. The services provided by FinTech companies' services reach both end customers (BtC) and other entities (BtB). The activities the term includes is open, as FinTech encompasses any use of technology in this field. It is extensive by definition and is constantly expanding. The European Parliament has thus stated that FinTech should be understood as a financial activity made possible by or offered through new technologies that affects the entire financial sector in all its elements, from banking to insurance, pension funds, investment advice, payment services and market infrastructures. The Parliament adds that «financial technology» means financial activity enabled by new technologies, encompassing the full range of financial services, infrastructures, and products. It also includes use of new technologies in the insurance sector (InsurTech) and application of new technologies for regulatory compliance (RegTech).

Among FinTech's recent technological advances are:

1. Artificial intelligence (AI): comprising machine learning, deep learning and artificial neural networks, natural language processing and knowledge representation.

2. Blockchain/distributed ledger technologies.

3. Smart contracts.

4. Internet of things (IoT).

5. Quantum computing.

Note also that FinTech is grounded in the most common technologies, termed «enabling and supplementary technologies». These are:

1. Cybersecurity technologies (biometrics, cryptographic algorithms, et cetera).

2. Data analytics applications (enabling technology based on machine learning and data science).

3. Cloud and software as a service (enabling platform technology paradigm).

4. NoSQL (enabling technology paradigm, including graph databases and other innovative ways to store and access data).

5. W3C Internet Standards, HTML, XML (XBRL), RDF, OWL, and SWRL SQL Technologies (Supplemental Technology Standard).

6. Data Lakes (Supplemental Technology).

7. Hadoop (Supplemental Technology).

8. Application Programming Interfaces (APIs) (supplementary technology).

The European institutions stress that financial technology is a fundamental pillar of the modern digital society and is necessary to compete with the rest of the world. In 2016, the European Commission created a Financial Technology Task Force to develop strategies to address the potential challenges posed by FinTech. In 2019, the United States also created a working group of leading experts to discuss these issues.

Technological innovation must go hand in hand with a high level of consumer protection, personal data protection and high security standards, while also ensuring market stability.

FinTech is a political priority for the European Commission, as it can and will play an important role in achieving goals related to development of the single market, the banking union, the capital markets union, and retail financial services.

The European Union has had a Consumer Financial Services Action Plan in place since 2017. One of the Plan's proposals is to determine what actions are needed to boost development of FinTech and a technology-based single market for financial services. Why? Because it sees great potential in financial services through innovation, technology, and removal of barriers to the cross-border sale and purchase of financial services. One of the plan's goals is to support development of an innovative digital world that would make it easier for the private sector to overcome some barriers to the single market while maintaining a high level of security. The European Commission has therefore set out to create an EU-wide regulatory and supervisory environment conducive to digital innovation. To this end, it adopted the Regulation on electronic identification, which enables cross-border recognition of electronic identification in public and trust services across the European single market. This regulation will also help businesses to develop digital customer relationships. A key goal for cross-border provision of financial services is to avoid customers having to come in person to identify themselves and sign contracts. Faced with the challenge of FinTech, the European Union is considering creation of a Financial Technology Laboratory, a neutral non-commercial financial technology laboratory to increase regulatory and supervisory capacities and knowledge of new technologies.

FinTech clearly has tremendous benefits, and institutions must promote it. The European Union Task Force has even categorised these benefits as follows:

— FinTech can enable market players to provide financial services at lower cost (disruption of traditional value chains, disintermediation, and increased automation resulting in more efficient processes).

— FinTech can enable market participants to develop a wider range of products and services, increasing choice for consumers and businesses and potentially offering them better financing opportunities (new and improved products and services, such as crypto-assets and P2P or B2B lending).

— FinTech can make certain products or services accessible to consumers or businesses that were previously excluded, through greater higher degree of customisation, broader product offerings, better pricing due to lower marginal cost and more accurate credit scoring.

— FinTech can be used for more effective regulation and enforcement of relevant market players (automated reporting, data analytics, and transaction monitoring).

If the benefits are so great, what is happening? In the current European market, market players cannot extract the maximum benefit from FinTech because regulation is either completely lacking or, where it exists, fragmented or opaque.

On the other hand, we want to emphasize that financial technology favours inclusion and development. This is the case of Banco Maré in Brazil, which reaches excluded communities in the largest favela in Rio de Janeiro through a blockchain-based digital platform. Around 11 million people in Brazil live in favelas and are currently overlooked or underserved by traditional financial service providers. Banco Maré offers bill payments, top-ups, P2P transfers, or in-store payments. It becomes clear how digital platforms are technological structures that are going to bring great benefits and opportunities for financial market players. This contrasts with the shortcomings found in the current regulatory framework that led to situations of unprotection of users, which will lead us to convoluted legal situations.

We need to regulate the FinTech revolution.

5
Peer-to-peer lending

FinTech has brought back peer to peer lending contracts, just like in ancient Rome. We must start from the idea that credit is essential to the modern financial system. For many people worldwide, credit is just another part of life —think of credit cards or applying to banks to buy a property or start a business—. Lenders often measure the probability of repaying credit as a condition of granting it. The better the score, the lower the risk assumed. In the United States, the analytics company FICO (named after its creators, Bill Fair and Earl Isaac) established a method of scoring aspects of financial history such as bank accounts, existing debts, and payment history. Today, however, 25 % of the world’s population does not have a bank account and thus cannot access credit. For such people outside the financial system, FinTech could be the solution. Smartphones have created tremendous opportunities; for example, algorithms could be developed to determine the risk involved in granting a loan using information such as contacts on social networks like Facebook, people to whom one most frequently sends messages and other types of behaviour —what is known as «social credit», or a measure of subjects' reputation. China has in fact begun to develop this system and has already used it to ban 10 million people from travelling to China. Social credit could also be used to gain access to jobs or educational centres. This reputation system is gradually being implemented and has been incorporated into P2P platforms. In fact, one of the largest P2P platforms, Lending Club, which is listed on the stock exchange, began from a spin-off of a Facebook application.

Today's banks have incorporated new features, while retaining the traditional ones. Their original activity consisted of customers, depositors, and depositing their money in bank accounts. These early banks also made loans to individuals and companies —in other words, they functioned as intermediaries.

Why do people deposit their savings in banks? Trust. Depositors trust that the bank will return the money deposited. Trust also impacts the course of the economy and consumption, as banks lend to individuals and companies. Ensuring trust requires national banking supervisory bodies. And whom do these supervisors monitor? To protect customers (both depositors and borrowers), they must monitor dangers such as insolvency or lack of bank liquidity. To protect borrowers, they must ensure that borrowers' interests are respected and that they are not charged excessive interest. Finally, supervisors must ensure stability in the banking system.

What is happening today? Technology has landed, and non-financial companies are offering financial products through this kind of technology. This phenomenon, known as «shadow banking» and composed of non-banks (NBFIs), has given rise to new debates and concerns.

P2P lending is an alternative financing method, also known as «social lending» or «crowdlending». This method facilitates P2P lending, enabling individuals to borrow money from other individuals: the lenders. The most significant characteristic of this type of contract is that it eliminates the financial institution as an intermediary. P2P lending has been encouraged by the proliferation of websites that facilitate it. Although such lending is becoming increasingly common, the new financing model has received little study.

The financial intermediary disappears because the P2P platforms connect borrowers and investors. The website sets the rates and conditions of the contract (Kagan 2020), eliminating any formal intermediary. Who are the lenders? The investors, because they are actually individual investors who want to obtain a higher return on their cash savings than any bank could offer them *a contrario sensu.* The terms and rates of the loan thus depend on and are closely related to the creditworthiness of the borrower. In other words, P2P is a collective process in which a crowd gathers and lends money to unknown borrowers to earn interest.

Who are the parties to the contract?

There are two: the lenders are natural persons, investors. The borrowers can be natural persons or small and medium-sized enterprises (SMEs). The two parties are brought together through P2P lending platforms, online intermediaries whose role is to match the offer the lenders have made with the amount the borrowers are demanding. These platforms thus never create money but simply serve as intermediaries between lenders and borrowers. And, like any financial intermediary, they receive a fee for their services.

The first empirical study shows that the value of the intermediary in the United States does not appear to have declined significantly in recent years, but rather to have been increasing since 1980. Although contrary to expectations, this finding is a result of advances in information technology and changes in the organisation of the financial industry (Philippon 2015, p. 1435). The increase in recent decades could be due to regulatory shortcomings.

The first online intermediaries were the P2P lending platforms Zopa, Prosper and Lending Club, which were launched in the United Kingdom and the United States between 2005 and 2007. As this type of alternative finance has expanded, a large part of the lending has been financed not by individual lenders but by institutional investors. In the United States, «P2P lending» has evolved into a corollary, marketplace lending (MPL), while the volume of P2P lending is growing rapidly. In 2015, the flow of P2P/marketplace consumer credit accounted for 11% of traditional consumer lending in the US (Havrylchyk *et al.* 2017, p. 4). Currently, Lending Club and Prosper are the two main P2P lending platforms in the United States.

We can assume that online P2P lending investors must first choose platforms that are reliable and trustworthy. Only then they will be able to analyse loan applications. This first task alone is difficult, however, as there are many alternative platforms.

On June 20, 2019, the European Union adopted Regulation 2010/1150 on promoting fairness and transparency for businesses using online intermediation services. This Regulation constitutes the legal framework for online intermediation services and forms the subject of this article.

6 What legal problems do we have?

Any analysis of crowdlending must consider the main issues we face:

1. Is choosing the platform like choosing which shop we will go to make a purchase? No. The difficulty is infinitely greater, due to the heterogeneity of platform types. We can differentiate platforms according to their nature. P2P lending platforms can be very different from each other. They can be classified by borrowers' profiles or by a series of other elements that one cannot assess, such as type of management. These characteristics are very important, as they shape the level of risk prospective investors will perceive. All these factors influence an investor to choose one platform over another, and this investor's behaviour in turn influences other investors.

2. Crowdlending involves great asymmetry of information. As stated above, individual investors transact directly with borrowers, who are often strangers, via a third-party online platform. This means that there is greater risk in transacting. Investors can base their decisions on two different issues: they can assess the reliability of the borrowers through the decisions made by previous investors, promoters of the financing, and credibility of the platforms. Yet this type of financing enjoys high digital visibility. What are the implications? Because investors can see both the actions of other investors and the historical transactions carried out by the platform, investors can learn from each other.

How can this risk be minimised? Regulation is essential to protecting investors. One example of regulation is the Jumpstart Our Business Startups (JOBS) Act, signed by President Barack Obama on 5 April 2012. This act seeks to encourage and boost crowdfunding by making it easier for companies to raise capital (Alpert 2019). The act seeks to encourage growth and development of smaller companies and start-ups, which in turn will encourage job creation. Granting legal certainty mitigates investor risk, and empirical studies show how government policy is very influential at market level.

3. The biggest problem is ensuring creditworthiness of the borrower. Crowdfunding platforms can assess creditworthiness, but legislation on which data they can use for this purpose is unclear. Although Spanish financial institutions must declare the risks, they assume on the Bank of Spain's Central Credit Register (CIRBE), crowdlending platforms are not required to do so (Cuena Casas 2019, p. 6). This lack of regulation is a symptom of the risk the investor or lender will assume.

From a legal point of view, triangular legal relationships are formed, in which the platforms are the main element and the most controversial too. Cuena Casas has asserted that in this type of assumptions the most relevant aspect is the horizontal relationship between the provider and the user, so it is relevant to include the on-demand economy in the collaborative economy (Cuena Casas 2020, p. 290). What would not be susceptible to be included within the collaborative economy is the access economy, since in such cases the platform does provide the service. Likewise, if it carries out a mere control activity, it would be considered a «service provider».

From the above we can deduce that the key point is to discern whether the platform adopts a role of mere intermediary or is a service provider. And the subject matter of the contract will be irrelevant, not the role played by the platform. The Organisation for Economic Co-operation and Development (OECD), for its part, defined this «intermediary role» as an action dedicated to bringing together or facilitating transactions between third parties on the Internet; also, providing access, hosting, transmitting, and indexing content, products and services originated by third parties on the Internet or providing Internet-based services to third parties (OECD 2010, p. 9).

This produces diverse situations: companies interacting with consumers (B2C), it also creates P2P relationships, both individuals interacting with each other (P2P) and companies contracting with each other (B2B). The supplier may even be the consumer and the customer or purchaser of the good or service may be a business (C2B). This situation has given rise to the term «prosumer», a word that refers to the possibility for a subject to act as both consumer and supplier of a good or service. This subject is characterized by the fact that, while providing the underlying service, he or she is also a demander of other services on the platform. And it is the platform's digital environment that enables him to act in this dual role, since he has the capacity to exercise both roles.

In conclusion, we are going to find subjects interacting with a platform, so it will be increasingly difficult to distinguish between the figure of the entrepreneur and the consumer. It is therefore going to be doubtful who is the weaker party in these contracts. Our current regulatory framework is insufficient and ineffective; we will find ourselves with relationships between users in which the entrepreneur will disappear, so we need a consumer law adapted to this new reality. A regulation is needed to protect contracts between individuals, since in this type of relationship the subjective scope for the application of Consumer Law is not met. *A contrario sensu,* we would apply the Civil Code or the Commercial Code.

While these issues are legally determined, we defend that, when this prosumer contracts a service with the platform, he/she has the same legal protection as consumer. Likewise, in the cases in which the prosumer intervenes as a service provider, other aspects must be considered, such as whether it is an occasional or one-off activity or, on the contrary, whether it is a frequent or professional activity. It should be noted that the diary for the collaborative economy already indicated that it could be exercised either occasionally or professionally. The consequences are relevant, as these circumstances will determine the applicable law since, if it is a context of the exercise of trade, consumer law will apply, and otherwise, contract law will apply.

6.1. To monitor or to regulate?

How can we remedy the problems identified? Supervision. Technology development is constantly producing new financial products, sometimes blurring the lines between the products and those who offer them. Separate supervisory bodies are needed, but they must be in constant and fluid communication with each other, or even the regulator itself. Supervision is nothing but the control governmental institutions have over financial institutions. Although supervisors may usually only use discretion in exceptional cases, each state must decide how much discretion supervisors may apply.

Banking supervision must be seen as a key element in pursuit of financial stability. No unanimity exists, however, on what characteristics are necessary for effective supervision, and studies have yet to reach decisive conclusions. Empirical analysis finds that supervision by a central bank is appropriate but can also be misleading. Moreover, establishing all supervisory bodies under the same parameters may benefit the financial system but be ineffective in another crisis. If a crisis occurs, who is to blame? Crises usually occur in countries without supervisory bodies. If a crisis occurs in a country with strong supervisory bodies, those who caused the crisis will be held accountable. Supervision has clear limitations; countries will be susceptible to crises even if they establish the appropriate supervisory institutions (Masciandaro & Quintyn 2013, p. 305).

Regulation generally aims to protect consumers, whereas supervision aims to ensure stability and security of the institution.

One study has shown that 66 out of 102 countries restructured their regulatory bodies between 1998 and 2008. Some countries have several regulatory bodies. In the United States, for example, banks are supervised by the Federal Reserve Board, the central bank of the United States. Two other United States banking bodies, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation, also cover banks with different types of banking licences.

What international regulatory bodies do we have today?

The Financial Stability Board is the main body for global financial policy. Its task is to coordinate with the other international regulatory bodies to develop a global financial policy. Other international regulatory bodies include the Basel Committee on Banking Supervision (BCBS), the International Organisation of Securities Commissions (IOSCO), the International Association of Insurance Supervisors (IAIS) (the international standard-setting body charged with developing and helping to implement principles, rules, and standards to supervise the insurance sector) and the Committee on

Payment and Market Infrastructures (CPMI) (a financial stability support body).

What is happening today? Most regulatory institutions observe that the number of non-bank entities is increasing. These entities assume risks like those of banks but are not subject to the supervisory apparatus that monitors banks.

There are currently more than 10,000 platforms in the European Union, 90% of which are small and medium-sized enterprises. European Union digital services currently must deal with 27 different national regulations. And, therefore, only the largest companies have the capacity to cope with the resulting compliance costs.

As the European market currently stands, its players cannot extract the maximum benefit from FinTech, as there is either a complete lack of regulation or, if regulation exists, it is fragmented or characterised by opacity. We must refer to the regulatory framework for online lending between individuals. For its part, on June 20, 2019, the European Union adopted Regulation 2010/1150 on promoting fairness and transparency for businesses using online intermediation services, which constitutes the legal framework for online intermediation services.

To overcome these difficulties (Martínez Nadal 2021), the European Commission has presented a proposal for a Digital Services Act and a Digital Markets Act. These regulatory proposals have been presented as the greatest legislative contribution to the sector in the last twenty years, with the aim of creating confidence in the market, ensuring the protection of digital rights, and establishing a level playing field to promote innovation and competitiveness.

It cannot be overlooked that, while technology is an enormous gift to society, it carries risks, which indicate that we need to be careful.

Most regulators note that there is a growing number of non-banks, which take similar risks to banks, but which are not subject to the supervisory system of banks.

This situation has given rise to new debates and concerns. Do these companies have the expertise and capacity to manage these risks? It also raises other questions: which firms or which activities need a regulator, or do we only need to be vigilant?

Regulation is generally aimed at protecting consumers, while supervision tends to ensure the stability and security of the institution. Well, the Digital Services Act opts for supervision. The proposed legislation is asymmetric: platforms reaching more than 10% of the European Union population, which would be about 45 million users, are interpreted as systemic in nature and will be subjected not only to their own obligations to control their specific risks, but also to a new supervisory structure. There will be a European Digital Services Board.

Each Member State will also have to appoint a Digital Services Coordinator, which will be an independent authority charged with overseeing the practices of these companies and will have the authority to sanction in the event of non-compliance.

7
Conclusions

The aim of this paper is to show how digital platforms are technological structures that will bring great benefits and opportunities for financial market players. We have analysed with a historical-legal study, with the aim of demonstrating that the contracts that are concluded using platforms have parallels with those concluded in Rome, as there were no intermediaries in both.

Today, the concept of «banking» has been challenged, as many things are changing, but there are two key factors at the heart of this change, namely the urgent need for new regulatory standards and the proliferation of digital channels.

We have shown that the shortcomings we find in the current regulatory framework led to situations of lack of protection for users, which will provoke complex legal situations.

Technological innovation will enable us to create a genuine single market in financial services, but this will only be achieved by strong consumer protection and by minimising risks, which will be gotten by means of strict security rules that ensure market stability. European legislation is needed to protect users, and in this technological context it is necessary to determine the responsibilities of the parties and to catalogue their rights and duties.

When this is achieved, the resulting competitive pressure will benefit all consumers, including those who continue to buy financial services within their own country.

With this paper, we have studied the parallelism between the mutual contract that was celebrated in Rome and the one that we make through a P2P platform, since it goes back to the same configuration of the past that is achieved between individuals.

In short, technological innovation will allow us to create a genuine single market for financial services, but this will only be achieved with a strong consumer protection and by minimizing risks, which will be achieved with strict security standards to ensure market stability. European legislation is required to protect users, and, in this technological context, it is necessary to determine the responsibilities of the parties and catalogue their rights and duties.

When this is achieved, the resulting competitive pressure will benefit all consumers, including those who continue to purchase financial services within their own country.

8 References

ALPERT G (2019). Jumpstart Our Business Startups Act (JOBS). Investopedia, 13 November. https://www.investopedia.com/terms/j/jumpstart-our-business-start ups-act-jobs.asp, accessed December 6, 2022.

ARIAS RAMOS J (1974). Roman Law, II. Editorial Journal of Private Law, Madrid.

Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions. Consumer Financial Services Action Plan: Better Products, More Choice, Brussels, 23.3.2017 COM(2017) 139 final.

Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions. FinTech Action Plan: for a more competitive and innovative European financial sector, Brussels, 8.3.2018 COM(2018).

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2016. An European agenda for the collaborative economy, COM(2016) 356 final.

CUENA CASAS M (2019). Crowdlending or crowdfunding lending and the assessment of the creditworthiness of the promoter of the financing. Journal of Insolvency Law 47.

CUENA CASAS M (2020). La contratación a través de plataformas intermediarias en línea. Cuadernos de Derecho Transnacional, vol. 12 2.

D'ORS Á (1960). Elements of Roman Private Law. University of Navarra, Pamplona.

DELOITTE (2014). Banking Disrupted: How Technology Is Threatening the Traditional European Retail Banking Model.

DELOITTE (2017). Beyond FinTech: Eight Forces that Are Shifting the Competitive Landscape. World Economic Forum, Canada.

Documento de la sesión de la Comisión de Asuntos Económicos y Monetarios del Parlamento Europeo. Presenter: Cora van Nieuwenhuizen, April 28, 2017, Considerando A.

Expert Group on Regulatory Obstacles to Financial Innovation (ROFIEG), 30 Recommendations on Regulation, Innovation and Finance, Final Report to the European Commission – December 2019.

FERRARI R (2015). The end of Universal bank model? The FinTech Book.

FinTech Action Plan. April 3, 2020.

HAVRYLCHYK O, MARIOTTO C, VERDIER M, TALAL R (2017). The expansion of the peer-to-peer lending. Labex ReFi Policy Brief 02, 2-7.

KAGAN J (2020). Peer-to-Peer (P2P) Lending. Investopedia, 11 May. https://www.investopedia.com/terms/p/peer-to-peer-lending.asp, accessed December 6, 2022.

MARTÍNEZ NADAL A (2021). La Propuesta del Reglamento de Mercados Digitales («Digital Markets Act»), una aproximación jurídica. Plataformas digitales. Aspectos jurídicos. Aranzadi, Pamplona, pp. 115-134.

MASCIANDARO D, QUINTYN M (2013). The evolution of Financial Supervision: the continuing search for the holy grail. In: Balling M, Gnan E. The Evolution of Financial Supervision. Larcier for Suerf, pp. 263-318.

NÚÑEZ LAGOS R (1950). Stipulation in the Partidas and the Ordenamiento de Alcalá. Reception speech at the Real Academia de Jurisprudencia y Legislación. The Printing House of the Widow of Galo Sáez, Madrid.

OECD (2010). The Economic and Social Role of Internet Intermediaries.

PHILIPPON T (2015). Has the U.S. Finance Industry Become Less Efficient? On the Theory and Measurement of Financial Intermediation. American Economic Review 105(4):1408-1438.
Report on FinTech: the influence of technology on the future of the financial sector, (2016/2243[INI]).
VOLTERRA E (1986). Institutions of Roman Private Law. Civitas, Madrid.
WEGMANN STOCKEBRAND A (2018). On the idea of legal system and the construction of a general category of contract in Roman Law. Journal of Historical and Legal Studies XL:97-122.
ZIMMERMANN R (1996). The Law of Obligations. Roman Foundations of the Civilian Tradition. Oxford University Press, Oxford.