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Executive summary

1. The Netherlands Authority for Consumers and Markets (ACM) frequently engages with regulators in the financial services sector. Our objective is to ensure that the general interest of competition is balanced fairly and sufficiently against other general interests in the regulatory framework. We describe a few common themes we experienced while co-operating and interacting with financial sector regulators. First, promoting competition often coincides with, or does not stand in the way, of financial stability. By pointing this out, we were able to get support from policy makers and financial regulators. Second, sector regulators may have an advantage in terms of resources and available information compared to the competition authority, which may unintentionally result in an overemphasis on the interest that the sector regulator represents. One option to solve this asymmetry is to enable free exchange of information. The asymmetry may also exist on international level. There is not always a natural platform to discuss competition issues on the European level. Underlying these common themes are two issues. The first is that policy makers are trying to reach a large number of objectives at the same time. Regulations often introduce supervisory tasks for more than one regulator, which creates coordination challenges and the risk of less transparency. The second issue relates to the fact that regulation of financial markets is by its very nature highly political. Once a topic becomes politically charged, co-operation tends to suffer. Based on current trends, we suggest a number of future actions. First, fast emerging new digital technologies ask for a problem-solving approach, strong co-operation with stakeholders, more information exchange between supervisors, more knowledge on new technologies, and timely contributions to the policy agenda. Second, the trend that national borders are (slowly) disappearing increases the need to harmonise rules between European member states, intensify the co-operation between the national and European level, and the importance of having an international strategy. Finally, the trend of increasing competition between different sectors and technologies asks for activity-based, technology-neutral, and proportional regulation and supervision. Our conclusion is that the co-operation with financial regulators in the Netherlands is constructive. However, when issues become politically charged or general interests are (or seem to be) conflicting, co-operation cannot be taken for granted. Regulators need to continue to invest in joint activities to make co-operation an intrinsic part of supervising financial markets.

1. Introduction

2. The Netherlands Authority for Consumers and Markets (ACM) ensures fair competition between businesses, and protects consumer interests. To fulfil this mission, we frequently engage with regulators in the financial services sector. Our objective is to ensure that the general interest of competition is balanced fairly and sufficiently against other general interests (e.g., financial stability and privacy) in the regulatory framework.

3. After a brief explanation of the Dutch institutional framework and ACM's role in the financial sector, this submission first presents some of the common themes we

encountered while promoting competition in the financial sector. The second part combines these themes with current trends. This results in suggested future actions.

2. The Dutch institutional framework

4. The two main regulators in the Dutch financial sector are De Nederlandsche Bank (DNB) and the Dutch Authority for the Financial Markets (AFM). DNB's mission is to safeguard a stable financial system. AFM supervises the conduct of market players in the financial sector.

5. The mandates of DNB and AFM do not include a competition objective. In a letter¹ to the Dutch House of Representatives, the Dutch Minister of Finance explains why he does not intend to change that. The main reason is that the Minister expects that the addition of a competition objective would complicate achieving the primary objectives, especially financial stability and consumer protection. According to the Minister, requiring DNB and AFM to take competition into account could detract from prudential supervision and consumer protection. The Minister also mentions that the Netherlands already has a competition authority (ACM) with competition as its primary objective.

6. The financial crisis served to focus priorities on financial stability and integrity. Now that financial systems are recovering, the importance of competition is receiving more attention. As a result, the co-operation between the Dutch financial regulators and ACM is continuously improving. However, when issues become politically charged or general interest objectives are conflicting, co-operation cannot be taken for granted. It is thus of crucial importance that the regulators invest in joint projects so that co-operation becomes an intrinsic part of supervising financial markets.

3. ACM in the financial sector

7. ACM has three main tasks in the financial sector. First and foremost, ACM enforces the (general) competition law. Second, ACM enforces a small number of (specific) regulations in the payments sector. These include the supervision of specific sections in the European Interchange Fees Regulation² and PSD Directive³. The third task is more diverse, but can be summarised as advocacy. It should be clear that these are not separate tasks. Enforcement of law and regulations often include an advocacy component to improve possibilities for effective enforcement.

8. Because co-operation and interaction with financial sector regulators is predominant in the (third) advocacy task, the focus of this submission will be on our experiences while performing that task. There are multiple ways that ACM practices advocacy. These include (economic) research leading to recommendations to financial

¹ 'Toetredingsbrief', 9 June 2016, 2016-0000053236. <https://www.rijksoverheid.nl/documenten/kamerstukken/2016/06/09/kamerbrief-over-toetreding-financiele-sector-van-nieuwe-spelers>

² Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions.

³ Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market.

regulators or other stakeholders and co-operation and consultation with financial regulators on policy development and implementation.

4. Common themes

9. This section presents some common themes that we encountered while working on competition in the financial sector and with financial regulators. This is by no means an exhaustive list, but mainly serves as a background for the suggested future actions in the next section.

4.1. Promoting competition often coincides with general interest of financial stability

10. Our experience is that the interests of the competition authority and financial (prudential) regulators more often than not coincide. A competitive environment provides the right incentives for banks to be efficient and to have flexibility to adjust their business to new circumstances. Financial regulators value these qualities as it enhances the resilience and stability of the financial system. This is in line with the strand of literature that states that competition can contribute to financial stability. This literature shows for example that competition would lower the lending rate charged to borrowers. This would raise borrowers' profits so they would have fewer incentives to take on new risks, which in turn also lowers banks' risk (Boyd and De Nicoló, 2005)⁴. This is contrary to the common perception of a trade-off between competition and financial stability, which is also supported by a theoretical strand of literature. In a nutshell, it is argued that increased competition for deposits would erode profits, lowering the market power of banks depressing their charter value. This decline in value of the bank would encourage banks' owners to expand and take on new risks. Some of these risks would be eventually shifted to depositors and/or the government (Keeley, 1990; Matutes and Vives, 1996; Hellmann, et al., 2000)⁵.

11. Where it is not clear if the interests of competition and financial stability, or another general interest⁶, coincide, it makes sense for the competition authority to focus on barriers to competition that have no apparent positive impact on other general interests. In ACM's 2014 study⁷ on entry barriers in the financial sector, we proposed nine recommendations that could be implemented without adverse effects on financial stability. These include 1) improving the effectiveness of the banking union, 2) striving for prudential laws and regulations that are better in line with the risk a bank forms for financial stability, 3) limiting and simplifying redundant regulations, and 4) evaluating the licensing system in terms of the length of the procedure and the ex-ante guidance that applicants need.

⁴ Boyd, J.H., and De Nicoló, G. (2005). The theory of bank risk-taking and competition revisited. *Journal of Finance* 60, 1329-1343.

⁵ Keeley, M.C. (1990). Deposit insurance, risk and market power in banking. *American Economic Review* 80, 1183-2000. Matutes, C. and Vives, X. (1996). Competition for deposits, fragility, and insurance. *Journal of Financial Intermediation* 5(2), 184-216. Hellmann, F., Murdock, K.C. and Stiglitz, J. (2000). Liberalization, moral hazard in banking and prudential regulation: are capital requirements enough? *American Economic Review* 90(1), 147-165.

⁶ For example, there may well be a trade-off between competition and consumer protection.

⁷ https://www.acm.nl/sites/default/files/old_publication/publicaties/13257_barriers-to-entry-into-the-dutch-retail-banking-sector.pdf

12. These recommendations are not easy to implement, because they often require changes in (European) laws and regulations. However, by pointing out that competition could be enhanced while not hurting financial stability, we were able to get support from the policy maker and financial regulators.⁸ This support has grown over the years and the policy maker and financial regulators in the Netherlands have become quite open to discuss competition-enhancing measures. This has also put us in a position where we are frequently invited to provide input to the policy maker, to ensure that competition gets sufficient attention when designing or adapting (new) policy. A good example is the request ACM received from the Ministry of Finance to advise on the introduction of financial standard products. ACM's report⁹ highlighted a number of risks relating to these products and advised the Ministry to do more (empirical) research. This research showed that financial standard products would have counterproductive consequences and that there are better solutions.

13. As a final note, it is worth mentioning that prudential regulators, just like competition authorities, have a special interest in the structure of the market. For prudential regulators that is mainly because they are concerned with the risk that some banks are too big to fail. However, market structure tends to be a poor indicator for competition. For prudential regulators, it could be more useful to look at the impact non-competitive behavior has on systemic risk. Marques Ibanez et al (2014)¹⁰ point to increased incentives to take on (systemic) risks when the competition in the loan markets increases. Banks with non-competitive behavior seem to be more vulnerable for these incentives than competitive banks. This is another example where competition authorities and prudential regulators may have coinciding objectives and where an open discussion is very useful.

4.2. Asymmetric position competition authority vs. financial sector regulators

14. Compared to the competition authority, sector regulators in general may have an advantage in terms of resources and available information about the sector they regulate. These advantages could unintentionally create a 'dominant' position for the sector regulator resulting in an overemphasis on the interest that the sector regulator represents. As a result, the interests of competition may not be balanced sufficiently against the interests of financial stability (or other general interests). This might lead to, for example, regulations that create disproportional barriers for entry and competition.

15. One option, to reach a better balance, would be to expand the mandate of sector regulators to include competition. Another, perhaps accompanying, option is to grant the competition authority regulatory powers. This would enable the competition authority to implement its competition-enhancing recommendations directly in the regulatory framework. It is interesting to see that other countries (most notably, the United Kingdom) have these kinds of frameworks in place. However, for the time being, this is not the case in many other countries (such as the Netherlands). In this situation, the competition authority could consider other actions.

⁸ Following our report, the Ministry of Finance investigated ways to decrease the administrative burden for small financial companies. Furthermore, the licensing procedures have been evaluated and further improved.

⁹ <https://www.acm.nl/en/publications/publication/14046/The-effects-of-financial-standard-products-on-the-functioning-of-financial-markets>

¹⁰ Marques Ibanez, D. , Y. Altunbas and M. van Leuvensteijn (2014), Competition and bank risk: the effect of securitization and bank capital, ECB Working paper 1678.

16. Free exchange of information between the competition authority and sector regulators will help to solve a potential information asymmetry. In the Netherlands, there are only limited possibilities to exchange confidential information. Therefore, within the context of the implementation of the revised Payment Services Directive (PSD2)¹¹ in the Netherlands, ACM has strongly advocated for legal measures that ensure free sharing of information with financial regulators. We are working together to reach agreement on this, which again proves that policy makers and financial regulators value co-operation with the competition authority.

17. The asymmetry may not only exist on national level, but also on international level. From the crisis on, the main concern in the financial sector has been financial stability. As a response to the crisis, European prudential regulators have become more integrated. The co-operation between national authorities has been institutionalized in the European System of Central Banks (ESCB) and the Single Supervisory Mechanism (SSM). This development is not matched by an equal integration between European and national competition authorities, with a European Competition Network where national authorities are loosely organized and DG Competition that is both active in law enforcement and lawmaking. This may have resulted in an unequal (influential) position between national competition authorities and DG Competition on one side and a fully integrated ESCB with the European Central bank on the other side.

4.3. National markets, European rules

18. Our experience with financial markets is that some barriers on national markets can be removed by adapting European regulation. ACM's 2014 report on entry barriers in the financial sector (see above) contains a number of recommendations that need to be tackled on the European level. Another example is our 2016 study on account number portability¹². With this report we have contributed to the cost-benefit analysis of EU-wide account number portability that the European Commission will carry out in 2019. The recommendations in this report were mainly focused at DG FISMA of the European Commission, as implementation of account number portability is most efficient at the European level.

19. As a national competition authority, it is important to be able to reach European policy makers. However, as discussed before there is not always a natural platform to discuss competition issues in the financial sector on the European level. In other sectors, e.g., energy and telecom, such platforms do exist because regulation is more focused on improving competition and innovation. Because these are not present in the financial sector, a national competition authority needs to find other ways to get its message across on the international stage.

4.4. Conclusion on common themes

20. In these common themes we see two underlying issues. The first is that policy makers are trying to reach a large number of general interest objectives in the financial sector at the same. The financial system needs to be stable, safe for consumers, sustainable, competitive, etc. As a result, European and national regulations often

¹¹ Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market.

¹² <https://www.acm.nl/nl/publicaties/publicatie/15947/ACM-studie-naar-EU-brede-betalrekening-nummerportabiliteit>

introduce supervisory tasks for more than one regulator. This creates coordination challenges and the risk of less transparency for market parties. The PSD2 is a good example, because in the Netherlands several regulators are involved in supervising its regulations. The second issue relates to the fact that regulation of financial markets is by its very nature highly political. Once a topic becomes politically charged, co-operation tends to suffer.

5. Current trends and future actions¹³

21. We expect that current trends in the financial services sector will only make the common themes in the previous section more prominent. We describe a few of these trends and explain which future actions a competition authority may want to consider to stay ahead of the game.

5.1. Trend: Fast emerging new digital technologies

22. Several ‘big’ emerging developments (e.g., big data, blockchain, algorithms) can fundamentally change the financial landscape. They may also shift the emphasis between different general interests. For instance, new technologies may lower entry barriers and increase competition, provide more transparency of transactions and reduce counterparty risks due to faster clearing and settlement systems. Therefore, when designing a regulatory framework, policy makers should facilitate this new drive for innovation and ensure that regulation is not hampering this development towards more competition. This requires the competition authority to be in a position where it can advise, assist and support policy makers. For this purpose, competition authorities may consider to:

- **Adopt a co-operative approach.** Be pro-active and work together with other stakeholders to get the competition perspective on board. For example, ACM has worked together with the Dutch financial regulators in writing a common response to the recent FinTech consultation of the European Commission. Another example is that the Dutch financial regulators and ACM organized a conference together where FinTech companies could meet with the supervisors.
- **Build knowledge on new technologies.** Be knowledgeable about the issues at hand. To be able to make a meaningful contribution to the debate, it may even be necessary to hire specialists in the field. New technologies as blockchain and algorithms can be complex and their impact on competition difficult to predict.
- **Strike while the iron is hot.** The importance of a timely contribution to the policy debate can be easily underestimated. There is not much point in trying to change regulations that have just been adopted. To be on time requires the competition authority to be aware of the agenda of national and international policy makers and to be visible enough to get invited to the table. The implementation of the PSD2 is a good example of regulation where you need to be on time to make a difference.
- **Stimulate information exchange with financial regulators.** The information flows that are available in real time in the economy have increased and will continue to increase in the coming years. This also implies that information exchange between regulators has to be intensified. Free flow of information

¹³ This section is partly based on the Response of the Netherlands on the European Commission Consultation document “FinTech: A More Competitive and Innovative European Financial Sector”. This is a joint reaction of ACM, AFM, DNB and the Netherlands Ministry of Finance.

between regulators and the competition authority can be very useful to close the information gap and build mutual understanding of tasks and responsibilities. An example is that the financial regulator may have information on anti-competitive conduct, which falls outside the mandate of the regulator but is very useful for the competition authority.

- **Adopt a problem-solving approach.** Especially when dealing with complex new technologies, it is difficult to take all general interests into account simultaneously. A competition authority should focus its efforts on the issues that have a clear negative impact on competition and that have no apparent positive impact on other general interest objectives. An example that was mentioned earlier in this paper was the lack of ex-ante guidance for the licensing procedure. Improving that has a clear positive effect on competition, while not harming any other general interest.

5.2. Trend: National borders are (slowly) disappearing

23. New FinTech companies need scale to succeed, which requires them to offer their services cross-border. Many FinTechs see Europe or the entire world as their market, but are confronted with fragmented national laws and regulations. This makes it more difficult for them to successfully compete with well-established (multi-national) financial institutions. Some potential new players in the financial industry are already global players like Google, Apple and Amazon. Competition authorities should be aware of the fact that a lack of harmonisation can harm competition. To avoid this, competition authorities may consider to:

- **Facilitate harmonisation between member states.** Similar rules should apply to similar activities, regardless of the country where the activities take place or the country where the company is located. Differences in regulation can be justified (e.g. based on cultural differences) but should not lead to regulatory arbitrage. Competition authorities can play a stimulating and signaling role to achieve this goal.
- **Think and act beyond borders.** The emphasis of financial companies on national markets is disappearing. Competition moves beyond borders. This requires that a competition authority has the possibility to put the issues it encounters on an international agenda. The authority should think and act beyond borders: build an international network and strategy. For example, ACM is working to broaden and deepen its co-operation with DG FISMA and DG Competition of the European Commission.
- **Intensify coordination between the national level and European level.** Stronger coordination may require a network organisation among competition authorities on financial services that can act as a counterparty for European regulators on prudential supervision such as the SSM and ESCB.

5.3. Trend: Competition between different sectors and technologies

24. Financial services are no longer the exclusive domain of traditional financial institutions. For example, telecom and IT/tech companies are entering the market. Fair competition needs a level playing field between sectors and technologies. For this purpose, the competition authority may consider to:

- **Advocate activity-based regulation and supervision.** Regulation and supervision should be more activity-based as opposed to entity-based: where appropriate similar rules should apply to similar activities, regardless of the entity or sector (collective of entities) performing the activities. For example, a FinTech that falls within the definition of a bank, should not automatically have to comply with all the regulations that apply to other (much larger) banks. This should depend on the activities of this FinTech.
- **Advocate technology-neutral regulation and supervision.** Equal protections must be afforded to clients and users regardless of the type of technology or methods used. Furthermore, regulations should not inadvertently or unnecessarily pose barriers based on the type of technology or methods used.
- **Advocate proportionate regulation and supervision.** Regulation and supervision must reflect necessary, reasonable and suitable actions to achieve a legitimate aim. This requires a more principle-based (as opposed to a rules-based) approach to regulation. Principle-based regulation provides regulators and supervisors with more freedom to achieve proportionate regulation and supervision, because it defines principles that companies have to follow (instead of strict rules). However, more principle-based regulation could lead to more uncertainty among market players. Providing transparency on supervision practices, e.g. in the form of guidance documents, could fix that.

6. Concluding remarks

25. ACM tries to diminish unnecessary barriers to competition. At the same time ACM is aware that most regulation serves a purpose, which may be a different general interest than competition. In this situation, the focus should be on finding the right balance between the different general objectives. Co-operation between policy makers, financial regulators and competition authorities is instrumental in achieving this balance.

26. In the Netherlands, we regard this co-operation as constructive. It provides a good base for co-operation and consultation among the different regulators. Furthermore, the Dutch Ministry of Finance actively seeks the views of ACM and other relevant stakeholders when designing new policies. However, when issues become politically charged or general interests are (or seem to be) conflicting, co-operation cannot be taken for granted. Regulators need to continue to invest in joint activities to make co-operation an intrinsic part of supervising financial markets.