

Unclassified**English - Or. English****30 November 2017****DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 2 on Competition and Regulation****Co-operation between Competition Agencies and Regulators in the Financial Sector
- Note by South Africa****4 December 2017**

This document reproduces a written contribution from South Africa submitted for Item 3 of the 64th meeting of the Working Part No. 2 on Competition and Regulation on 4 December 2017.

More documents related to this discussion can be found at:

www.oecd.org/daf/competition/cooperation-between-competition-agencies-and-regulators-in-the-financial-sector.htm.

Please contact Mr Chris PIKE if you have any questions about this document

[Email: Chris.Pike@oecd.org]

JT03423905

South Africa

1. Introduction

1. The Organisation for Economic Co-operation and Development (“OECD”) has invited the Competition Commission of South Africa to contribute to its round table on *“10 years on from the financial crisis: Co-operation between competition agencies and regulators in the financial sector”* that will be held on Monday 4 December 2017.

2. The Competition Commission of South Africa (“CCSA”) has had numerous cooperation with the financial regulators over a long time. In South Africa, National Treasury is responsible for policy formulation in the financial sector whilst the South African Reserve Bank (SARB) play an implementation and regulatory role. For simplicity, in this note, National Treasury and SARB will be collectively referred to financial regulators.

3. CCSA has extensive cooperation with the financial regulators in a number of areas. Firstly, cooperation takes place during investigations by the CCSA (abuse cases, mergers and acquisition cases, cartel cases involving the financial sector participants). For instance, SARB and CCSA collaborated recently on the creation of a new entity to acquire African Bank Limited. The SARB, the Public Investment Corporation and the 4 large banks, including Investec Bank and Capitec Bank, took up shareholding in the new entity. This process required both SARB and CCSA approval.

4. Secondly, cooperation takes place at policy development where CCSA’s role is to influence financial regulators to foster competition in policy formulation. Thirdly, cooperation takes place during drafting of legislation, either at the initial phase or by providing commentary on draft bills. Fourthly, in the recent past, CCSA participated in workshops and seminars organised by the financial regulators.

5. Given the various facets of cooperation between CCSA and financial regulators, for purposes of this note, CCSA will focus only on its collaboration with the financial regulators related to the implementation of the Banking Enquiry recommendations. The scope and historical perspective of the Banking Enquiry is discussed below.

6. The CCSA’s submission will address the following themes based on its experiences and interaction with the financial regulators and policy makers in the financial sector:

1. Successful co-operation to implement a regulatory and competitive framework that works for consumers;
2. Improved transparency on some of the financial products which assisted consumers to make informed choices and facilitated switching; and
3. Prudential regulation also taking into account the need for competition in the financial sector.

2. Background

7. Just before the advent of the financial crisis in 2008, CCSA held a market enquiry into the South African banking sector between 2006 and 2008 in terms of Section 21¹ of the Competition Act No.89 of 1998 (“Competition Act”) to examine certain aspects of competition in the retail banking sector. The Banking Enquiry was informed by two separate commissioned studies by CCSA and the National Treasury² whose findings created the basis for the enquiry.

8. The National Treasury report (“2004 Task Group Report”) was commissioned in May 2003, broadly to assess the competitiveness of South African banking industry. A specific recommendation arising from the report was that the CCSA should investigate the possibility of a complex monopoly in the governance and operation of the payments system. Consequently, the CCSA through FEASibility (Pty) Ltd conducted a more comprehensive and comparative study into the issues around the payment system and completed the report in March 2006. The concerns raised by both reports highlighted problems with access to the National Payment System (“NPS”), regulatory gap in terms of the rules of participation for non-banks in the NPS and lack of transparency concerning transaction fees and high penalty fees. This, together with a general perception at that time that bank charges were too high and excluded low income earners into the formal financial system and the level of concentration in the banking sector³ led to the CCSA launching a market enquiry into the banking sector focusing more specifically on consumer protection, interchange rate setting and access to the NPS.

9. The launch of the Banking Enquiry was met with skepticism from the financial sector as well as some of the key role players in the regulatory environment. The concerns raised were largely that the financial sector is complex and highly regulated and it is unlikely that a competition agency will be able to make meaningful recommendations due to the specialized and complex nature of the sector. The views expressed at that time were that even if deficiencies exist in this sector, it would be prudent that these issues be addressed by the financial regulators who have expertise and will balance the need for competition and financial stability. The Banking Enquiry commenced under these circumstances, but there was good participation from the sector.

10. Accordingly, the enquiry into the banking sector included a series of public hearings, and culminated 28 recommendations. A fully redacted Banking Inquiry report⁴ was publically released on the 12th of December 2008. The **Appendix** in the report provides a list of all 28 recommendations from the Banking Enquiry. The recommendations were broadly summarised into three categories:

¹ During this period, CCSA did not have formal powers to undertake market inquiries hence the use of the term “enquiry” as opposed to “inquiry”. However, formal powers came in effect in 2013 through the amendment of the Competition Act.

² The National Treasury manages national economic policy, prepares the South African government's annual budget and manages the government's finances.

³ The banking sector is it dominated by four large banks in South Africa.

⁴ Competition Commission of South Africa releases on the technical report of the banking inquiry can be found at <http://www.compcom.co.za/2008-media-releases/>.

- **Consumer protection** – the products highlighted in this analysis included high charges on rejected debit orders, the transparency and comparability of transaction fees, and the ability of customers to switch bank accounts;
- **Interchange setting**⁵ – this included the setting of ATM and card (including debit, credit and hybrid card) interchange rates with focus on the transparency and the governance of setting interchange rates; and
- **Access to the NPS** – assessed the restrictive rules placed on non-deposit taking banks, access to the payment system of non-banks and governance of the Payment Association of South Africa (“PASA”) that controls access into the national payment system.

3. Banking Enquiry recommendations and implementation process

11. After the release of the Banking Enquiry report in 2008, CCSA pursued an advocacy strategy to ensure that findings are communicated and also that stakeholders implement such recommendations. CCSA held numerous engagements with many stakeholders, such as the regulators, banks and banking associations to implement the recommendations. As such, most of these recommendations were implemented by financial regulators and policy makers such as the National Treasury, the Department of Trade and Industry (“DTI”)⁶, South African Reserve Bank (“SARB”)⁷, retail banks, the Banking Ombudsman, the Payments Association of South Africa (“PASA”)⁸ and the Banking Association of South Africa (“BASA”).⁹ The implementation process spanned for several years as governance structures had to be put in place for some of the recommendation. In addition, some of the recommendations required further analysis by the financial regulators and policy makers to ensure that implementation would not lead to threats on financial stability.

12. Furthermore, as a result of the Banking Enquiry, an interdepartmental steering committee between regulators, the National Treasury, the DTI, and the CCSA was initiated, together with policy input from the SARB in March 2009. The interdepartmental process was set-up to discuss the way forward in implementing the recommendations. The interdepartmental committee in 2010 decided to delegate the implementation of the recommendations to the National Treasury, wherein the Minister

⁵ ATM interchange refers to the fee that an issuing bank (the bank that issues the ATM card) pays the acquiring bank (the bank that owns the ATM infrastructure) when a customer performs an “off-us” transaction (i.e. withdraws money from a bank he or she does not belong to). The issuing bank then transfers the interchange fee to its customer. Card interchange refers to the fee that the issuing bank (belonging to the paying customer) charges the acquiring bank (the bank belonging to the merchant) for releasing the customer’s money. The acquiring bank then passes the interchange charge plus its own fee through to the merchant.

⁶ DTI is the department of the South African government with responsibility for commercial policy and industrial policy.

⁷ The South African Reserve Bank is the central bank of South Africa.

⁸ PASA is the payment system management body that organise, manage and regulate the participation of its members in the payment system.

⁹ BASA is an industry body representing all banks registered and operating in South Africa. Currently it has 31 member banks which include both South African and international banks.

of Finance held meetings with the banking industry to expedite the implementation of the recommendations. There has been frequent meetings since 2010 to date.

13. As part of its mandate to monitor the impact of its work in the economy, CCSA in 2014, undertook an impact assessment or a study to review the progress in the implementation of the Banking Enquiry recommendations. The evaluation involved getting views of stakeholders in the banking industry on the progress made on the implementation of the recommendations. The key issues discussed with stakeholders were related to the pricing of banking products, progress on financial inclusion from a consumer perspective and progress on access to the national payment system and the review of the governance structure of PASA. The study revealed that many but not all the recommendations were implemented. Justifications were provided by the financial regulators for the slow pace of implementation of some of the recommendations. Under each broad category, below is the summary of the outcome of the implementation of the recommendations.

3.1. Consumer protection recommendations

14. Most of the consumer protection recommendations were implemented by relevant public bodies and embodied into the Code of Banking Practice. For instance, in 2012, the Banking Association of South Africa (“BASA”) updated the Code of Banking Practice, which has allowed for more transparency in the banking pricing of products which consumers purchases and implemented a standardized switching code to simplify the account switching process. The Code of Banking Practice has gone further to standardize banking terminology into plain language and to have minimum requirements in which banks communicate certain information to customers. By way of example, it has explained to customers how to stop orders and displaying bank charges on a bank statement. Customers can now cancel debit orders at any time and rejected debit order penalty fees have declined significantly. Retail banks have agreed that the exceptionally high charges on rejected debit orders were unsubstantiated and have since reduced these charges significantly. Moreover, the no cash-back rule at point of sales has been reversed. Currently, customers can withdraw money from shopping tills at a cheaper rate. Restrictive card rules have been abolished.

3.2. Recommendations relating to interchange

15. Most of the interchange related concerns were addressed by the South Africa Reserve Bank (“SARB”) through the “*Interchange Determination Project*” in which the SARB has become the setter of ATM and card interchange rates. New ATM interchange rates were set for the first time on the 4th of September 2013 and new card interchange rates also were set for the first time on the 11th of March 2014. In addition, in 2016, the CCSA provided inputs to the SARB in terms of the proposed publication of the Payment System Information Return Industry report, to avoid, if any anti-competitive outcomes from the publication of the report.

3.3. Recommendations relating to access to the National Payment System

16. PASA has appointed a new independent CEO. However, the new CEO does not have independence in deciding on entry into the NPS. As such, there is on-going advocacy engagements relating to the implementation of the access to the NPS recommendations. The main reason for the slow pace of implementation is the

fundamental considerations around financial stability raised by the SARB. Despite access to the NPS remaining limited, restrictive card rules have been removed and access to the payment system as clearing non-bank participants have been implemented.

17. Although these changes in the regulatory framework will probably improve consumer protection, many of the concerns, particularly those that relate to access to the payment system, would require further engagement with the relevant stakeholders through advocacy.

18. With the implementation of the recommendations from Banking Enquiry, there has been structural regulatory policy reforms within the banking sector, which are discussed below.

4. Policy developments in the banking sector after the Banking Enquiry

19. In February 2011, the National Treasury released a document titled “*A safer financial sector to serve South Africa better*” which introduced the Twin Peaks model to improve financial stability. The Twin Peaks is a comprehensive and complete system for regulating the financial sector. It represents a decisive shift away from a fragmented regulatory approach to reduce the possibility of regulatory arbitrage or forum shopping and close gaps in the regulatory system.¹⁰ “**Twin Peaks**” model was proposed in which the SARB through the new Prudential Authority (“PA”), would be managing systemic risk concerns and the Financial Sector Conduct Authority (“FSCA”) would be responsible for the market conduct regulation and supervision of the financial sector (focus on customer protection).

20. The work of the CCSA through the Banking Enquiry and the lessons from the global financial crisis provided motivation for financial sector reforms in South Africa. The Banking Enquiry identified a major gap in the market conduct regulatory regime which was summarised as:

“There is no regulator that oversees the market conduct practices of the retail transactional banking sector. While the National Credit Regulator oversees the credit business of banks, it is clear that regulatory oversight needs to be extended to cover the entire banking sector, including retail banking. National Treasury strongly supported the sterling efforts of the CCSA in highlighting the weakness and opacity in market conduct practices, and is therefore proposed that as part of the shift to a twin-peak model of regulation, the market conduct role of the Financial Services Board (FSB) will be expanded by creating a dedicated banking services market conduct regulator within the FSB, which will work closely with the National Credit Regulator.”¹¹

21. The implementation of Twin Peaks reform is a multi-year project, with a two-phase process envisioned. The first phase covered the drafted Financial Sector Regulation Bill (“FSR Bill”). As a result, in December 2013, the National Treasury published the first draft of the FSR Bill for public comment. Following public comments, on the first

¹⁰ See National Treasury Media Statement, 11 December 2014. Twin Peaks: Second draft of Financial Sector Regulation Bill and draft Market Conduct Policy Framework discussion document published for comment.

¹¹ National Treasury (2011) - “A safer financial sector to serve South Africa better”

draft, the final draft of the FSR Bill incorporated major inputs from the CCSA, which was passed in the National Assembly. The incorporated inputs from the CCSA ensures that competition is promoted within the financial sector.

22. In terms of fostering collaboration, the FSR Bill has specific expectations for the CCSA as outlined below.

1. Collaboration with the Prudential Authority (SARB) and Financial Sector Conduct Authority (FSCA) to foster competition;
2. Participation in the Financial System Council of Regulators (FSCR) – the objective of FSCR is to facilitate co-operation and collaboration, and, where appropriate, consistency of action, between the institutions represented on the FSCR by providing a forum for senior representatives of those institutions to discuss, and inform themselves about, matters of common interest. The FSCR has many role players such as SARB, National Treasury and also include CCSA; and
3. Independent evaluation of effectiveness of co-operation and collaboration -The CCSA will be expected to participate in the Inter-Ministerial Council which will include financial sector regulators, the SARB, the Financial Intelligence Centre, the Council for Medical Schemes and CCSA.

23. As noted above, CCSA now forms part of formalised structures in the financial sector and some of these structures are part of the legislative framework as indicated above. The efforts by CCSA has ensured that collaboration with the financial sector regulators continues. Due to effective stakeholder engagement, the initial scepticism experienced at the launch of the Banking Enquiry no longer exists.

24. In light of the foregoing, the Banking Enquiry was successful in informing changes in the South African banking sector with most of the recommendations implemented by relevant financial regulators. Continuous collaboration and engagement with mutual agreement between the CCSA and the relevant financial regulators will address any outstanding issues and ensuring that the financial sector promotes competition, stability and inclusiveness in the economy.

5. Conclusion

25. As noted, the CCSA conducted a Banking Enquiry by assessing existing and potential competition concerns and understanding the market structure of the South African banking sector with intentions of improving competition, reducing bank fees and creating a more inclusive banking environment in South Africa. The Banking Enquiry recommendations ensured that there is continuous engagement with many stakeholders to facilitate implementation of the recommendations.

26. In addition, due to changes in the regulatory environment emanating from the financial crisis, CCSA now forms part of formalised structures in the financial sector and some of these structures are part of the legislative framework as indicated above. The efforts by CCSA has ensured that collaboration with the financial sector regulators continues. Due to effective stakeholder engagement, the initial scepticism experienced at the launch of the Banking Enquiry no longer exists and has been replaced by effective collaboration.

Appendix

Table 1. Consumer protection recommendations

Category	Number	Recommendation
Consumer protection concerns	1	Reduce penalty fees on rejected debit orders. Cap the penalty fee at R5.
	2	Consumers should be able to cancel debit orders at any time.
	11	The honour all products rule requiring merchants to accept debit and credit cards, for example, should be abolished but the no surcharging and honour all cards (issued by all banks) rules should be left in place
	20	Minimum standards for disclosure of product and price information should be included in the code of banking practice
	21	The Banking Association should encourage lower prices for banking services to be applied particularly to low income consumers
	22	Customer profiles should be developed to facilitate comparative shopping
	23	A centralised fee calculator should be put in place
	24	The Competition Commission should advocate with the Department of Trade and Industry to allow for comparative advertising
	25	If recommendations regarding improving comparisons are not put in place within 2-3 years, the Competition Commissioner should consider obliging the banks to put in place a "basic banking product"
	26	A switching code should be developed to ease account switching
	27	A Financial Intelligence Centre Act (FICA) information hub should be developed and put in place by Treasury to ease account switching
	28	The Banking Ombud's role should be expanded to include overseeing rules on information disclosure and account switching

Error! Reference source not found. below summarises the recommendations that related to the interchange.

Table 2. Recommendations relating to interchange

Category	Number	Recommendation
Interchange	3	Direct charging should replace interchange for Automated Teller Machines (ATMs)
	4	Issuers of ATM cards should charge consumers directly for off-us transactions under ATM direct charging
	5	Banks should not be allowed to discriminate in their direct ATM charges between issuers of ATM cards
	6	If direct charging is not implemented within a reasonable period the Commission should initiate a section 4 investigation into carriage fees
	7	Further research is required to assess whether direct charging should be implemented for mini-ATMs and cash back at point of sale (POS)
	8	An independent, transparent process should be implemented for determining interchange rates
	10	Card schemes should abolish the rule preventing cash back at point of sale (POS)
	12	The Commission should consider initiating a complaint into the charging of interchange for Electronic Fund Transfer (EFT) transactions
	13	If interchange for EFT transactions is necessary, it should be included in the transparent process set out in recommendation 8
	14	Interchange for Early Debit Order (EDO) transactions should also be brought into the transparent process set out in recommendation 8

Error! Reference source not found. below summarises the recommendations that related to the NPS.

Table 3. Recommendations relating to access to the NPS

Category	Number	Recommendation
Access	9a	The Visa requirement to restrict acquirers to deposit taking (settlement) institutions should be abolished.
	9b	The rule or practice restricting acquiring to institutions that issue card schemes on a significant basis should be abolished.
	15	An access regime for non-banks should be put in place to allow them to participate in both clearing and settlement activities for low-value or retail payment streams.
	16	National Payments System (NPS) Act should be revised to allow for non-bank clearing and settlement participants, and this should be followed by a revision of the Banks Model position paper and the e-money, system operator and third party payment provider directives.
	17	Membership and governance of the Payments Association of South Africa (PASA) should be revised to include qualified non-bank participants.
	18	The CEO of PASA, rather than incumbent members of individual payments clearing houses (PCHs) should make decisions about entry.
	19	A payments system Ombudsman should be established to adjudicate on disputes regarding access to the payments system.