

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 the European Union**

4 December 2017

This document reproduces a written contribution from the European Union 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]

JT03423859

European Union

1. EU competition law and regulation in financial services

1. The European Commission is very active in promoting effective and undistorted competition in financial services. It uses antitrust enforcement, state aid and merger control to address anti-competitive conduct and to ensure efficiencies and free and equal access to financial services.¹ While the financial crisis fundamentally challenged models of regulation and oversight in the financial sector, in the EU the application of competition rules, including State aid rules, were crucial for recovery. Since the crisis, the Commission applied State aid rules to numerous national measures supporting financial institutions, ensuring that the level playing field between aid recipients and their competitors is maintained: State aid control has forced the financial sector both to restructure and to share the burden of its rescue with taxpayers. State aid rules also limit the amount of public funding of failed financial institutions, requiring shareholders and hybrid capital holders to participate in restructuring costs. Burden sharing measures shall help to curtail moral hazard.

2. Competition rules and regulation in financial services have to ensure undistorted competition and, in State aid, financial stability through protection of the financial interests of investors and depositors.² In addition there is complementarity with the Commission's priority to create a genuine single EU capital market (Capital Markets Union) as part of a deeper and fairer internal market. The CMU shall address the fragmentation in EU financial services, where significant differences persist in financing conditions and market practices.

3. In the EU, the interaction between competition and regulation in financial services has to be considered in this context of further market integration. EU financial regulation is used to resolve systemic and structural problems of stability, to further market integration and to open up financial markets to competition. While this reduces the risk of competition issues, competition enforcement is necessary to ensure that markets are well-functioning, that all companies compete fairly on the merits and that companies do not circumvent sector rules.

4. EU financial regulation seeks to address all these key policy objectives simultaneously. For example, the Markets in Financial Instruments Directives (MiFID and MiFID II) aim at creating an integrated financial market, market stability through effective protection of investors, improved transparency and oversight, and enhanced competition for investment services and trading venues.

5. Competition enforcement addresses the harmful behaviour of market participants operating within this framework. At times, this enforcement may itself trigger new financial services regulation. EU competition policy and advocacy also ensure that the

¹ For an overview of the Commission's antitrust, merger, and state aid decisions in the financial services sector see http://ec.europa.eu/competition/sectors/financial_services/cases.html.

² The EU Merger Regulation allows protecting other legitimate interests such as public security, plurality of the media and prudential rules (Art 21(4)).

evolution of financial markets does not lead to structures that allow individual undertakings to harm market participants.

6. The European Commission thus uses competition law and policy in two ways to promote a pro-competitive Internal Market in financial services:

1. Enforcing EU competition law (see 2.) and
2. Promoting the integration of pro-competitive measures in legislative initiatives (see 3).

2. Examples of EU competition law enforcement in financial services

7. EU competition enforcement has played an important role in restructuring the sector for financial services across the single market. While it targets specific companies or groups of companies, it may also trigger general regulation. It focuses both on sanctioning of past behaviour, as well as on establishing rules for the future through negotiated remedies in mergers and commitments in antitrust.

8. Until 10 years ago, EU competition law enforcement in financial services had mainly focused on state aid and merger control.³ State aid control of support measures for financial institutions became even more crucial between 2008 and 2011 and the Commission approved aid to the financial sector for € 4.5 trillion. Antitrust enforcement also increased. While the antitrust cases primarily involved traditional infringements of antitrust rules, they also addressed crucial issues for the functioning of financial markets and deployed forward-looking remedies in line with the European regulator's internal market instruments.

9. Since 2011 the Commission has issued a number of prohibition decisions with significant fines in **cartels** involving financial benchmarks and related financial instruments, imposing liability for cartel infringements also on facilitators.⁴ In 2011, the Commission initiated an antitrust investigation into allegations of anticompetitive conduct by major investment banks in the market for credit default swaps⁵ which was right at the heart of the financial crisis.

10. In the **payments sector**, the Commission has addressed anti-competitive practices in payment cards adopting both prohibition decisions (*Morgan Stanley / Visa*, *Cartes Bancaires* and *MasterCard*⁶) and commitment decisions bringing swift remedies to the market (*Visa Europe* decisions of 2010 and 2014⁷). In this context, antitrust enforcement

³ There was one antitrust decision in 2004 in case 38096 *Clearstream* (relating to financial clearing) and a sector inquiry under Art 17 of Regulation 1/2003 on retail banking in 2005-2007.

⁴ These included in particular the LIBOR-related investigations, see Cases 39914 *Euro Interest Rate Derivatives*, 39861 *Yen Interest Rate Derivatives*, 39924 *Swiss Franc Interest Rate Derivatives – LIBOR* and 39924 *Swiss Franc Interest Rate Derivatives – Bid Ask Spread Infringement*. For facilitator liability, see e.g. fine imposed on ICAP in YIRD, upheld on appeal in case T-180/15 ICAP (judgment of 10 November 2017).

⁵ Case 39745 *CDS Information Market*.

⁶ Cases 37860 *Morgan Stanley Dean Witter / Visa*, 38606 *Groupement des Cartes Bancaires* and 34579 *MasterCard I*, upheld by judgment of the European Court of Justice of 11.9.2014 (C-382/12 P).

⁷ Commission Decisions of 8.12.2010 C(2010) 8760 final and of 26.2.2014 C(2014) 1199 final.

has triggered additional sector-specific regulation on market abuse, benchmarks and interchange fees (see 3. below).

11. In order to provide access to financial services information and the availability of market data, the Commission has also employed forward looking remedies in line with the regulatory internal market objectives, to avoid alleged anticompetitive behaviour for the future. In the *Standard and Poor's* and *Thomson Reuters* cases⁸ access to such information were mandated in concentrated market context and in the *CDS* case, access to essential inputs for CDS exchange trading was mandated.

12. In insurance, the European Commission's Insurance Block Exemption Regulation (IBER) lapsed on 31 March 2017 and antitrust compliance will now have to be assessed individually. The IBER had exempted from antitrust scrutiny co-operation between insurers on data aggregation and joint (re)insurance in pools. The exemption was no longer warranted, as the 2011 Commission Guidelines on horizontal cooperation offer sufficient guidance to assess conformity and the exemption for pools was little used.

13. **Merger** control continues to play an important role. The proposed merger between Deutsche Börse and NYSE Euronext had to be prohibited because of significant harm in the market for exchange-traded derivatives.⁹ Another proposed merger between *Deutsche Börse* and *London Stock Exchange* would have significantly reduced competition by creating a de facto monopoly in the market for clearing of fixed-income instruments. It therefore had to be prohibited by the Commission in March 2017.¹⁰

14. **State aid** enforcement continues to play a crucial role since the financial crisis (detailed discussion of State aid in general and crisis emergency measures is reserved for a future OECD forum). In the absence of regulation enabling the orderly winding up of banks without endangering financial stability, it was only because of the State aid rules that massive distortions of competitions were prevented that would otherwise have resulted from bank rescues.

3. Procompetitive financial services legislation

15. The financial sector shows that regulation can be a valuable tool to facilitate competition and a level playing field. It also addresses counterproductive incentives generated by lack of effective regulation, which had motivated financial institutions not to compete on the basis of the best long-term business models and rather to pursue excessive risk-taking for short-term gains.

16. In addition to the enforcement of competition rules, very close co-operation between competition enforcement and regulation on financial services issues is facilitated at EU level by the fact that the relevant regulatory and enforcement entities pursue the same overarching EU objectives, in particular a deeper and fairer internal market, to which competition enforcement contributes. The relevant Directorates General can greatly benefit from sharing their respective experience and cooperation.

⁸ Cases 39592 *Standard and Poor's* and 39654 *Reuters Instrument Codes*.

⁹ Case M.6166 *Deutsche Börse / NYSE Euronext*.

¹⁰ Commission Decision of 29 March 2017 in case M.7995 *Deutsche Börse / London Stock Exchange*.

17. Competition advocacy contributed to the major overhaul of the **securities and derivatives trading markets** rule-book, addressing the lack of transparency in trading derivatives and financial instruments. This relates in particular to the new Markets in Financial Instruments Directive (**MiFID II**), which improves conditions for competition in the trading and clearing of financial instruments, introduces a market structure framework ensuring that trading takes place on regulated platforms, increases equity market transparency and aims at preventing market abuse. It also relates to the European markets infrastructure regulation (**EMIR**), which will foster competition in the OTC derivatives market.

18. Partly as a result of cartel enforcement in financial benchmarks and related instruments mentioned above, the EU enacted new rules against **market abuse** in commodity and related derivative markets in June 2014.¹¹ The new rules ban the manipulation of benchmarks such as LIBOR and reinforce the investigative and sanctioning powers of regulators. In 2016, a regulation further improved the governance and supervision of benchmarks.¹²

19. In the **payments sector**, regulatory co-operation has contributed to a more integrated and efficient European payments markets. **The Interchange Fee Regulation (IFR)** is a very specific example for the interface between competition enforcement and regulation in financial services.¹³ Despite competition enforcement and national regulation, the European cards market remained fragmented and interchange fees varied widely. On the basis of its competition case experience, the Commission therefore concluded that competition enforcement alone would not create an EU-wide level playing field and that only regulation would reduce fragmentation, promote competition and innovation and allow consumers and merchants to benefit from the efficiencies created. In addition, the new **Payment Services Directive (PSD 2)**¹⁴ takes account of new types of payment and bank account information related services (payment initiation and account information services). Providers of these services brought innovation and competition to the market, offering alternatives e.g. for internet payments. Banks will be obliged to allow unobstructed access to their customers' accounts through open application program interfaces, facilitating market entry of new financial service operators.

20. The interaction is also visible in the Regulation of Credit Rating Agencies (the CRA Regulation), aiming at stimulating competition in the credit rating industry by encouraging issuers and third parties to appoint a variety of agencies to rate their entities and financial instruments.

4. Continuing evolution in financial services

21. The financial services market is fast developing and undergoing significant transition, which requires continuous competition enforcement and advocacy. For example, in the fast developing **electronic payments** sector the Commission will monitor

¹¹ Market Abuse Regulation (EU) No 596/2014 and Market Abuse Directive 2014/57/EU.

¹² Benchmark Regulation (EU) 2016/1011.

¹³ Regulation (EU) 2015/751. Technical implementing measures on separation of card schemes and processing entities are in preparation.

¹⁴ Payment Services Directive (EU) 2015/2366.

whether traditional payment operators such as banks and card schemes violate competition rules by trying to maintain their gate-keeping position, or whether new operators (e.g. handset makers, operating system providers) leverage their market power to create new gate-keeping or monopolistic positions. Controlling large amounts of data should not become a way to shut rivals out of the market.¹⁵ The Commission is continuing its investigations in the MasterCard II and Visa MIF cases on (inter-regional) **interchange fees and cross-border acquiring**.¹⁶

22. The Commission is analysing how **Fintech**¹⁷ will shape financial services and launched a public consultation in spring 2017,¹⁸ in which policy options are explored for a more competitive and innovative European financial sector. Fintech firms capture market share in traditional banking fields like payments, lending, investments, and financial planning. It has to be ensured that appropriate checks and regulations apply, including the exploration of lean regulation concepts like regulatory sandboxes. A number of competition issues may arise, including prevention of barriers to entry, technology-neutral legislation, collaboration for interoperability and EU-wide adoption of new technologies. Participation in standard-setting should be unrestricted, procedures for adoption of standards should be transparent and access to standards should be granted on fair, reasonable and non-discriminatory terms to prevent foreclosure of new entrants.

23. Following the adoption of the 'Banking Union package', which intends to enhance regulatory requirements and the level of supervision in the EU as well as to establish a single resolution framework in the EU, the Commission will continue its **State aid** activities to control public support in the financial sector. It will enhance regulatory cooperation with regulators, supervisory and resolution authorities. The overall objective is to limit State support to the necessary minimum and to ensure that the cost of bank failures shifts to shareholders and creditors to minimise negative externalities.

24. The Commission experience shows that the combination of competition enforcement with regulatory action benefit system stability in financial services and generate tangible economic benefits, such as fostering innovation in payment systems.

¹⁵ Commissioner Vestager speech at Web Summit Lisbon, 7 November 2017.

¹⁶ See press releases of 9 July 2015 on *MasterCard* (http://europa.eu/rapid/press-release_IP-15-5323_en.htm) and of 3 August 2017 on *Visa* (http://europa.eu/rapid/press-release_MEX-17-2341_en.htm).

¹⁷ Fintech is used in a wide sense, including all technology-enabled financial services and innovation (social networks, artificial intelligence, machine learning, mobile applications, distributed ledger technology, cloud computing and big data analytics), regardless of the nature or size of the provider of the services for the entire financial sector, including front- and back-office activities, retail and wholesale.

¹⁸ Public consultation on FinTech: a more competitive and innovative European financial sector, https://ec.europa.eu/info/finance-consultations-2017-fintech_en