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**10 years on from the Financial Crisis: Co-operation between Competition Agencies
and Regulators in the Financial Sector**

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10 years on from the Financial Crisis: Co-operation between Competition Agencies and Regulators in the Financial Sector

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The paper discusses how financial regulators and competition agencies have co-operated to implement a regulatory and competitive framework that delivers a stable system in which innovative and efficient firms can thrive to the benefit of consumers. To do this, the paper starts by describing the classic trade-off between financial stability and competition and then analyses the different practices across OECD jurisdictions in terms of allocation of responsibilities for financial stability and competition. Attention is also paid to new policies and new developments both in financial regulation and financial markets, such as consumer protection, new transparency and disclosure requirements as well as of initiatives favouring the development of financial innovation, such as Fintech.

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Abbreviations

APRA	Australian Prudential Regulation Authority
CADE	Conselho Administrativo de Defesa Econômica (BRA)
CFPB	Consumer Financial Protection Bureau (US)
CMA	Competition and Markets Authority (UK)
CRD	Capital Requirements Directive
DNB	Dutch National Bank
DoJ	Department of Justice (US)
EBA	European Banking Authority (EU)
EIOPA	European Insurance and Occupational Pensions Authority (EU)
ESA	European Supervisory Authority (EU)
ESFS	European System of Financial Supervisors (EU)
ESMA	European Securities and Markets Authority (EU)
ESRB	European Systemic Risk Board (EU)
FCA	Financial Conduct Authority (UK)
FSA	Financial Services Authority (UK), active until 2013
IOSCO	International Organization of Securities Commissions
KNF	Komisja Nadzoru Finansowego (Polish Financial Supervision Authority)
PRA	Prudential Regulation Authority (UK)
SSM	Single Supervisory Mechanism (EU)

1. Introduction

1. The financial crisis has led to important changes in financial regulation as well as in the financial architecture across many jurisdictions. In addition to new prudential rules and regulations oriented at making the banking and financial system more stable, a key innovation lies on the institution-governance side. With the proliferation of regulatory aims -systemic stability, consumer protection, investor protection, protection of critical functions, increasing banks' resilience and so forth- a number of new institutions have been created, reflecting the complex balancing act involved in finding the socially optimal balance in the pursuit of these various objectives.

2. These developments pose a number of challenges for the role of competition policy in the financial sector and for the interaction between financial regulators and competition authorities within their respective roles in oversight. Competition policy in the financial sector -similarly to regulation- seeks to facilitate robust markets, that is markets which are efficient, effective, inventive and adaptable to change through the right mix of incentives, business freedom and rules, this notwithstanding the question of whether there is a trade-off between competition and financial stability. The introduction of new financial regulations poses further the question of whether the new rules have consequences in terms of competition and to the extent that is the case, whether the institutional framework allows a role for competition policy in the setting of financial regulations.

3. The proliferation of new financial regulators in the aftermath of the crisis has further complicated the oversight of the financial system and, consequently, the interaction between financial regulators and competition authorities. Furthermore, in some jurisdictions strengthened financial supervisors are charged with ensuring both the stability and efficiency of the banking system though their powers and interventions in the market.¹ This, however, does not necessarily mean that a competition assessment by a sector-specific authority would be the same as that of a competition authority.

4. The complexity of financial regulation, as well as its granularity, require co-operation between authorities also in areas of competition policy enforcement to ensure consistence. Terms on which co-operation takes place are crucial in this regard; the modalities of interaction between competition and resolution authorities differ significantly across jurisdictions and policy areas. The post-crisis framework therefore requires a flexible engagement by competition authorities, as well as the building up of sector-specific expertise.

5. This paper focuses on the role of competition policy and competition authorities in the banking industry in the aftermath of the financial crisis. It starts by briefly recalling the objectives of financial regulation and competition policy and revisiting the perceived trade-off between financial stability and competition in the financial industry. Competition has long been thought to reduce stability by exacerbating risk and reducing banks' incentives to behave prudently. This negative belief has recently been countered by the argument that competition in the loan market may reduce the risk of banks' portfolios; in addition, the predictions of negative effects of competition on systemic risk are not robust.

¹ Nouy (2017).

6. Even withstanding a potential trade-off between “excessive” competition and stability, this does not imply that competition in the financial industry has to be restricted; rather it points to the importance of regulating away such a trade-off with an appropriate regulatory and institutional environment.² In other words, competition and stability policies should be seen as complementary and competition authorities and financial regulators should interact and coordinate in the achievements of their respective objectives to ensure consistency of incentives.

7. In considering how effectively competition agencies and regulators have worked together since the immediate crisis subsided, two different areas for interaction and co-operation between financial and competition authorities need to be distinguished. The first area concerns prudential regulation itself. While set with the objective of pursuing financial stability, prudential rules can have important competitive effects, for example in terms of market structure by affecting entry conditions and in terms of level playing field by favouring certain market players over others. Measures oriented at protecting financial stability, which curb competitive forces (e.g. those facilitated by cross-border capital flows), can lead to losses in efficiency and good innovation in the long-term.³ Thus, while it is important to pursue financial stability, it is also necessary not to curb competition excessively in the long-term. It is essential, therefore, to develop a framework where prudential regulation and competition are treated as complements even in the process of designing and implementing new prudential rules. The complementarity between the two forms of public intervention in the markets can be harnessed most effectively through co-operation between competition authorities and sectoral regulators, including prior consultation where appropriate. In particular, competition authorities should have an advocacy role in the making of prudential rules.⁴

8. The second area of interaction between competition and financial authorities concerns competition policy enforcement, such as in cases of merger control and cartels. The institutional arrangements in this area are more institutionalised but vary significantly across jurisdictions for example with regard to which institution has the “final say” over the procedures –this responsibility can also fall on a third party, such as the government. This is the case especially in merger control, where assessment of competition effects is linked also with assessment of whether the new entity continues to meet requirements for authorisation under the prudential rules. In some instances, the competition and financial authorities share responsibilities, through joint or parallel procedures, while in others only one authority is in charge of enforcement. Furthermore, in some jurisdictions prudential concerns may override competition concerns for public interest or stability reasons, while in others competition authorities have veto power over proposed mergers. All in all, evidence suggests that merger control in the financial sector is beneficial for the profitability and efficiency of the industry, especially where there is transparency in the overall process of assessment of the transaction by the authorities, as transparency facilitates optimal policy implementation by better aligning incentives of market participants and authorities.⁵

9. Differently from merger control, the enforcement of competition policy in the area of cartels remains generally the exclusive competence of competition authorities.

² Vives (2016).

³ See Carney emphasizing this point in the context of crisis reforms (2017).

⁴ OECD (2011).

⁵ Carletti, Hartmann and Ongena (2015).

Important cartel cases in the financial industry have been examined in the recent years concerning price fixing. In all these cases, the interaction between competition and financial authorities occurred via exchanges of information and data processing, while the cartel was examined with the sole objective of removing its anticompetitive effects. The experience shows that co-operation allows for better access to information of competition authorities, simultaneously focusing the attention of competition authorities on enforcement of competition policy rather than other misconduct issues. This shows the importance of establishing formal co-operation arrangements between financial and competition authorities to provide better certainty to the undertakings and achieve better policy implementation of both regulatory and competition rules.

10. New challenges are emerging for the interaction between financial and competition authorities in the aftermath of the financial crisis due to the implementation of new prudential rules, but also due to market and innovation developments, for example in the form of Fintech. Competition authorities can play an important role alongside other relevant regulators in advocating regulation that allows beneficial new competition to emerge, while taking due account of key rationales for financial market regulation.

11. The paper proceeds as follows. Section 2 outlines the key reforms implemented in the banking sector following the financial crisis across a number of jurisdictions. Section 3 briefly explains the specialness of the financial sector and its vulnerability to instability, recalling the relationship between competition and stability in banking. Section 4 outlines the divergent institutional architectures for financial oversight which have emerged after the crisis. Section 5 considers the competitive impact of recent financial regulation and discusses the role of competition authorities in designing new legislative and regulatory frameworks, taking Fintech as an example. Section 6 considers the growing challenges in co-operation in consumer protection. Section 7 finally discusses the co-operation between competition authorities and regulators in established areas of competition policy, in particular mergers and cartels.

2. Financial regulation after the financial crisis

12. Given the central role which the financial systems play in modern economies, the Great Financial Crisis brought to the fore the imperative to limit the occurrence of crises, their severity and the associated costs for the taxpayers. In order to achieve that, regulatory reforms were implemented in a number of jurisdictions and supported by global initiatives such as the Basel Committee or the G20's Financial Stability Board. These reforms aimed specifically to curb the banks' and sovereign countries' risk-taking incentives, which are the sources of instability in the banking sector. New explicit objectives of financial regulation have also emerged such as a new focus on systemic stability, protection of critical banking functions and eliminating the negative feedback loop between the balance sheets of banks and sovereign countries during crisis.

13. Part of the reform efforts build on existing regulation: major strides have been made in increasing the capital requirements imposed on banks. Basel III accord is a set of reforms to strengthen the resilience of banks through a range of measures. In Europe, it is implemented via the so-called CRD IV package (Credit Requirements Directive and Credit Requirements Regulation), whose main objectives are to improve the stability and resilience of the banking system and individual institutions, creating a level playing field across countries, by strengthening capital regulation, liquidity regulation and activity restrictions. Further regulations seek to strengthen banks' corporate governance

arrangements, better align incentives of bank management, as well as regulate bank conduct. These regulations are coupled with strengthened micro-prudential supervision; that is the powers of authorities to oversee and direct individual bank behaviour, thus addressing idiosyncratic risks. In addition, the new tool of macro-prudential policy entails a number of rules to ensure the stability of the banking sector as whole, the logic being that tools to tackle failures and risk of individual institutions might differ from those required when the system as a whole is considered (e.g. in the context of build-up of bubbles). To this end, macro-prudential policy is tasked with identifying, monitoring and addressing systemic risk, taking into account the financial cycle, as well as the direction and scale of cross-border capital flows. In many jurisdictions these tasks are delegated to the central bank empowered with specific tools such as the power to require banks to implement countercyclical buffers or set loan-to-value ratios for mortgages.

14. Another central post-crisis innovation has been the introduction of resolution as a distinct set of rules and procedures for dealing with failing banks.⁶ This is because uncontrolled market exit of a bank due to -for example- insolvency, is linked with significant damage to the system as a whole at a high social cost and with a significant destruction of value. Resolution laws aim to enable restructuring or liquidation of financial institutions in an orderly manner, limiting contagion effects on the financial system, and decreasing taxpayers' exposure to losses from bailouts, while maintaining continuity of banks' critical economic functions. They work, therefore, to make bank exit "safe." To this end, new loss-absorption requirements have been imposed on financial institutions, such as bail-in rules, which require that subordinated creditors contribute to the costs of bank resolution before other safety nets -including public funds- are resorted to. This is intended to bolster the monitoring of the bank by creditors, in addition to shareholders. Resolution entails specific tools which seek to build up *ex ante* resilience of credit institutions through resolution planning, that is preparation of so-called "living wills" detailing the course of action should a bank be faced with a deteriorating financial situation.

15. Institutional arrangements within which public authorities pursue objectives of financial regulation are discussed in Section 4. What should be evident already is that the various types of post-crisis financial regulation pursue distinct aims. At the policy implementation level, this implies the need for balancing a number of trade-offs, such as concerns for banks' short-term profitability and their long-term resilience.

16. Post-crisis reforms seek to limit vulnerability to runs, moral hazard and risk-taking problems as well as the build-up of systemic risk in the banking sector. It has been argued however, that the current structure of financial regulation does not seem to address specific market failures, but is rather a response to specific issues that emerged in past crises.⁷ Looking back at the past hundred years, a historical pattern emerges: regulation becomes stricter following periods of instability and looser following periods of stability. Starting from the Great Depression, many countries adopted a whole range of regulatory measures and some like France and Italy even nationalized their financial institutions. These measures were successful in containing instability and, in the period from 1945 to 1970s, there were almost no financial crises. However, the costs in terms of reduced credit provision and financial innovation motivated a process of financial liberalisation in

⁶ FSB (2011).

⁷ Beck, Carletti and Golstein (2017).

the 1970s, which led to a revival of crises around the world and culminated with the 2007 financial crisis.

17. The regulation of financial markets should (i) put in place incentives to ensure that market participants act in a prudential manner; (ii) and -in particular- curb excessive risk-taking; (iii) have the capacity to address financial innovation; and (iv) be coupled with effective monitoring/supervision by the authorities. While the post-crisis regulatory reform direction follows these principles, excessively complex and granular regulation, which does not consider its impact on market incentives in the long-term, would risk losing the benefits of competition.

3. Competition policy and financial regulation objectives – a false trade-off?

18. The interaction between competition policy and bank-specific policy objectives is complicated due to the particular characteristics of the banking sector. The discussion pivots in particular around the potential trade-offs with financial stability.⁸

19. In principle, competition in banking should produce the same effects as competition in other sectors; that is to improve efficiency and foster innovation, thus leading to a greater variety of products, lower prices, wider access to finance and better service. However, several features of the financial sector make it depart from the textbook competition models. These include high barriers to entry (also as a result of regulation), asymmetric information in corporate relationships, high switching costs, network effects and elements of non-price competition that can be used as strategic variables and sources of rents. Of course, many other sectors of the economy share these features to a greater or lesser extent.⁹ What makes banks special is the fact that people hold a non-negligible share of their wealth in bank deposits, as well as their role in funding investment in the real economy. At the same time, banks can be more vulnerable to instability than firms in other sectors. Instability in banking can originate from the liability side or the asset side of banks. The former is related to runs and systemic crises; the latter to the excessive risk that banks can take in their investment decisions because of high leverage and opaque assets. Deposit insurance can disincentivise monitoring by depositors, making deposit rates insensitive to banks' risk exposure. Furthermore, systemic risks contribute to banking instability, e.g. the degree of interconnectedness within the sector exacerbates crises through contagion. The combination of these unusual -but not necessarily unique- features of banking makes analysing competition in the sector a challenging task.

20. At the same time, competition in banking improves the monitoring incentives of better quality institutions which reduce the incentives for banks to take excessive risks. Effective competition can force the exit (or reduce the size and systemic importance) of inefficient banks, where inefficient regulation and supervision can have the opposite effect. This is particularly relevant in times of crisis, as at that point bank exit can have significant negative consequences for the system as a whole, given interconnectedness and contagion effects, requiring that authorities step in to prevent a disorderly exit (see Section 2). Finally, competition policy enforcement is also warranted, firstly as the sector is becoming increasingly concentrated, and secondly because collaborative agreements are frequent in the industry and these can be either pro-competitive, e.g. in the context of

⁸ OECD (2009), OECD (2010), Carletti and Vives (2008), Vives (2016).

⁹ OECD (2009).

payment systems, or collusive in nature, and so competition policy plays an important role in distinguishing between the two.¹⁰

21. Regulation can affect the financial stability-competition relationship in multiple ways. Although historically it has been argued that competition is destabilising,¹¹ more recent scholarship points to more nuance, e.g. by showing regulation which realigns risk-taking can create an environment within which competition can flourish. Furthermore, effective competition can decrease risk-taking by borrowers, thus aligning the objectives of regulation and competition). At the same time, “more” regulation is not necessarily anticompetitive: Boot and Marinc (2007) discuss the impact of capital regulation on entry and bank monitoring, with the insight that when banks are heterogeneous in quality and compete for market share, increasing capital requirements (i.e. imposing higher prudential requirements) leads to more entry into banking, by reducing market power of lower quality banks.¹²

22. Providing liquidity transformation, creating private information and operating in payment systems make banks and markets critical for modern economies and economic growth. The same activities make banks and other financial institutions fragile, as they force a high degree of interconnectedness and create substantial externalities from the failure of an individual institution. Importantly, this suggests that the growth benefits are not obtainable without a certain degree of fragility and risk-taking in the financial system. Thus, the focus should be more on the optimal degree of risk-taking and -what is more feasible- on minimizing the repercussions of bank failure for the overall financial system and the real economy. Furthermore, preventing banks from taking any risk often leads to inefficient credit provision and limits financial innovation. In other words, regulation should aim at tackling the market failures and inefficiencies that prevent the system from reaching the efficient levels of risk-sharing, as well as of credit provision to firms and households. Critically, financial stability is not an objective in itself, but rather a condition for the sustainability of an efficient and market-supporting financial system.¹³ Both competition and financial stability policies are oriented at improving the efficiency of the banking system in the long term, in order to achieve the goal of fostering growth and supporting the real economy.

23. All in all, although excessive instability is not beneficial, regulating away fully the fragility and risk in banking business is neither possible nor desirable as these are inherent features of the functions banks perform in the economy. The purpose of financial regulation, then, should not be minimising fragility per se, but rather finding an optimal balance between fragility and the provision of credit and risk-sharing.

24. In the light of the complex relationship between competition and financial regulation policy in banking, and given the high degree of regulatory complexity after the financial crisis, as well as the broadening of regulatory mandates, the key challenge going forward concerns establishing the modalities of co-operation between competition and financial regulators or “new rules of engagement.”¹⁴ This reflects also the specific role which competition plays in promoting long-term efficiency of the financial sector. To this

¹⁰ Carletti and Vives (2008).

¹¹ Keeley (1990).

¹² See Carletti and Vives (2008) for why competition policy has a key role in keeping financial markets open.

¹³ Beck, Carletti and Golstein (2017).

¹⁴ Angeloni (2016).

end, institutional arrangements can be used to alleviate tensions between regulation (financial stability oriented) and competition policy enforcement.¹⁵ Practices, however, differ considerably across jurisdictions and policy areas (see Sections 5, 6 and 7). Emerging challenges point to the need for a well-defined role of competition policy enforcement in the financial sector, albeit flexible enough to engage with the complex institutional framework of financial sector oversight which emerged in a number of jurisdictions after the financial crisis.

4. Financial regulation - Institutional framework

25. The institutional architecture for financial regulation varies significantly across countries, partly as a reflection of the multiplicity of objectives, partly as a result of historical experiences and the size and development of the financial sector. Institutional design defines the position and modalities of co-operation between regulators, thus structuring the process of balancing between various policy objectives. In addition to financial regulation policy objectives, competition policy tasks can be conferred on financial regulators (see Section 7). Nevertheless, already the institutional framework of financial regulation can have implications for competition in the banking market, and in the financial markets more broadly, through the incentives it creates, and also where it establishes a hierarchy between regulatory objectives.

26. Traditionally, three models of institutional architecture have been distinguished: sectoral ('institutional'), functional ('by objectives') and integrated.

Models of financial sector oversight¹⁶

4.1. Sectoral approach

27. The sectoral model follows the traditional dividing lines of the financial sector, i.e. separate supervisors exist for banking, insurance and securities markets (see Box 1, on EU's oversight approach, also Italy and Spain). This can be contrasted with an integrated model where oversight over prudential supervision of all market segments is delegated to one authority (e.g. financial supervisors in Poland, Romania Sweden). A sectoral model has advantages in terms of following regulatory and legislative frameworks, which in most jurisdictions regulate different types of business activity separately. For example, insurance, banking and money market activities entail specific requirements pertaining to authorisation, governance or capital requirements. In the global context, a sectoral approach is adopted by international fora such as Basel (for banking) and IOSCO (for securities markets).

28. The sectoral model allows for specialisation and build-up of activity-specific expertise. Still, in the light of the blurring of lines between different activities in the market (e.g. *bancassurance* firms which combine banking and insurance activities) and in the absence of structural separation requirements (such as the rule which require separation between different types of banking activity, e.g. commercial and investment banking), this approach poses the risk of inadequate oversight over the interconnections between different market activities, even if separate bodies for coordination and

¹⁵ Vives (2016).

¹⁶ Masciandaro and Quintyn (2016), BIS (2015).

supervision of specific common areas -such as financial conglomerates or anti-money laundering provisions- can be put in place.

Box 1. Sectoral approach of EU's European Supervisory Authorities (ESAs)

A sectoral approach has been adopted for the EU's system of financial oversight, which is composed of EIOPA (for insurance and pensions), EBA (for banking) and ESMA (for securities markets); the three authorities are even located in three distinct locations, Frankfurt, London and Paris respectively. Their powers and tasks pertain to drafting standards and guidelines supplementing the EU regulatory framework. ESMA enjoys some direct supervision powers (e.g. with regard to Credit Rating Agencies).

Coordination between the authorities is limited to specific areas, such as financial conglomerates or anti-money launderings laws. It takes place within a Joint Committee of the three ESAs, which is required to meet at least twice a year and is responsible for settling of disputes between the authorities. The Committee however is not a separate institution, and is administratively served by the ESAs on a rotating basis.

Market Participants within the scope of ESAs¹⁷

ESA Scope of power

EBA	Credit institutions, financial conglomerates, investment firms, payment institutions and e-money institutions
EIOPA	Insurance undertakings, reinsurance undertakings, financial conglomerates, institutions for occupational retirement provision and insurance intermediaries
ESMA	Trading venues and post trading market infrastructures (including direct supervision of trade repositories), credit institutions and financial conglomerates (for their investment services activities), investment and asset managers, listed companies and Credit Rating Agencies (direct supervision).

4.2. Functional approach

29. Responsibility for banking sector oversight can be distributed following policy tools (micro-prudential supervision, macro-prudential supervision,¹⁸ resolution). One model is the so called 'twin-peaks' model,¹⁹ which separates micro-prudential regulation and supervision from market conduct (i.e. transparency and disclosure requirements). Another example is the so-called 'four peaks' model, according to which the supervisory objectives of microeconomic stability, investor protection, and efficiency and competition

¹⁷ European Parliament (2013).

¹⁸ See Section 2, see Claessens (2014) for overview of macro-prudential tools

¹⁹ Taylor (1995), Godwin et al. (2016). Jurisdictions which have adopted this model include Australia and Netherlands.

should be assigned to three distinct authorities, while the objectives of price and macroeconomic stability remain in the hands of the central banks. Notably, this model foresees that all competition policy enforcement should remain with a distinct (non-sector specific) competition authority.²⁰

30. In general, the different “peaks” in the functional model reflect distinct objectives, thus justifying the specific tools accruing to each authority. In this sense, this approach reflects the heterogeneity of objectives pursued by financial regulation (financial stability, protection of investors and consumers) and the trade-offs involved. Specialisation in the context of better defined objectives bolsters the regulators’ capacity to achieve them. However, it poses significant coordination problems as well as high compliance burden on the supervised entities.

31. Where multi-peak models are implemented, a number of techniques are used to ensure institutional separation between the authorities as well as co-operation and coordination. Independence granted to individual regulators can be used to insulate the financial regulator from political pressure, but also from the influence of other regulators. The legal basis on which the regulator is established has an impact on the degree of autonomy it enjoys within the architecture (e.g. EBA’s role in bank supervision is limited due to its status as an EU agency). In this context, different authorities can have different rule-making powers. In cases where different policy objectives are assigned to one institution (e.g. central bank), requirements of operational separation between divisions can be put in place. For example, following FSB’s Key Attributes (2011), article 3 of EU’s Bank Recovery and Resolution Directive (BRRD) requires operational separation between competition, resolution and prudential supervision. Operational independence as well as different powers exercised vis-a-vis regulated entities (e.g. with regard to investigation powers) can however lead to information asymmetries between regulators.

4.3. Integrated approach

32. In view of the deficiencies of the functional and sectoral models of supervision, a number of jurisdictions have followed an integrated or hybrid approach, where supervision is delegated to a single authority. Integrated models of supervision typically entail synergies in terms of capacity for swift action in times of crisis, as well as an informational advantage.²¹ Further regulatory burden is reduced and risk of over-enforcement decreased when firms are supervised through a “one-stop shop” approach. On the other hand, the costs of an integrated model include, for example, higher risk of capture. This increases forbearance risk and moral hazard, where no appropriate accountability mechanisms are put in place.

33. The integrated approach foresees a number of techniques to balance the different policy objectives of the comprehensive supervisor, including a variety of intra-institutional arrangements. Examples include the setting up of independent units, procedures for decision-making in management committees, coordination mechanisms through regular meetings, cross-department managerial committees and high-level working groups.²²

²⁰ Di Giorgio and Di Noia (2007).

²¹ De Haan (2015).

²² BIS (2015).

34. Integration of supervision and regulation is not necessarily symmetric across policy objectives, in particular in a cross-border context. For example, in the EU Banking Union micro-prudential supervision is centralized for significant banks, macro-prudential policy is shared between national authorities and the ECB (the supervisor),²³ while consumer protection remains in the domain of national authorities.

4.4. Co-operation and coordination between financial regulators

35. An analysis of different oversight models is helpful in understanding the dilemmas in the institutional design of financial sector oversight. The choice between different models is a reflection of a cost-benefit analysis that balances a number of factors, including: impact on compliance, economies of scale, risk of capture, accountability, consumer confidence, scope for coordination failures or decreased effectiveness of implementation due to objective conflicts' internalisation.²⁴

36. Establishment of new financial regulation objectives created a multi-dimensional, complex and dynamic institutional framework, where different authorities may have direct oversight over the same financial institution at different points in time. An example here is oversight of banks which are operating normally (under oversight of supervisors) or are failing or insolvent (and thus within the remit of resolution authorities charged with restoration of the bank's viability or liquidation). This implies that competition policy enforcers might have different "interlocutors" on the regulatory side in a number of different areas (e.g. mergers of solvent institutions and those of failing firms). Different modes of co-operation with these authorities may have to be developed, also in jurisdictions where different implicit or explicit provisions for competition policy enforcement or derogations are in place.

37. The crisis has made clear the importance of crisis management mechanisms and coordination, including public safety nets as well as special provisions related to liquidity provision by central banks.²⁵ The role of the central bank within the architecture is therefore a crucial factor affecting the symmetry of financial regulation oversight. Where prior to the crisis a trend to delegate prudential supervision to separate authorities was observed (e.g. FSA established in the UK in 1997), this trend now seems to have reversed with central banks influencing financial stability not only through the conduct of monetary policy, but also through exercise of supervisory tasks.²⁶ Finally, given the possible fiscal implications of bank failure and systemic instability, Ministries of Finance play an important role within the oversight architecture.

²³ This is in addition to the role which ESRB plays for macroprudential analysis and systemic risk identification in the EU.

²⁴ See Masciandaro and Quintyn (2016) for an overview of cost-benefit analysis of various governance arrangements.

²⁵ Singh and La Brosse (2008).

²⁶ Masciandaro and Quintyn (2016), in this context consider the addition of an explicit "financial stability" objective to the mandate of the Bank of England.

5. Emerging challenges in co-operation between bank regulators and competition authorities – financial regulation and FinTech

38. The financial crisis has triggered regulatory reforms as outlined in Section 2, but it also contributed to pressures on established bank business models, which -in a low interest rate environment- have dampened the profitability in the banking sector.²⁷ As the process of adjustment continues and new regulatory initiatives are put in place, the competitive structure of the banking sector is likely to be affected. Furthermore, new challengers in the market -in particular in the form of FinTech companies- are emerging. Optimal balance between the pursuit of competition and financial regulation objectives requires co-operation between authorities to ensure that complementary incentives are put in place (see Section 3). Still, the perspectives may well differ: competition policy being oriented at ensuring a dynamic process of effective competition is in place for the provision of financial services, and financial regulation approach informed by narrower, sector and business-activity specific concerns.

5.1. Involvement of competition authorities in financial regulation

39. It has been suggested that the trade-off between financial stability and competition could be regulated away by fine-tuning regulation in order to internalise the potential negative effects of competition when firms enjoy limited liability or face incentives to take risk.²⁸ However, financial regulation has an impact on competition in the sector in multiple ways: for example it can raise barriers to market entry or affect incentives by conferring an advantage on certain market actors due to their size or scope of activity through mandatory conduct requirements in a way that may not even enhance financial stability. That bank system structures and regulatory regimes have an impact of competition has already been well established; more competition has been found in jurisdictions with fewer barriers to entry and activity restrictions. Regulation can further impact on various measures of profitability and competition in the sector (e.g. net interest margin, NIM). Higher NIM is associated with tighter entry regulations and restrictions on bank activities for example.²⁹

40. In the absence of a formalised involvement of competition authorities in the regulatory process, the competition impact of new regulations and of any market development are likely to be incomplete in terms of an analysis of pre-reform competition in the given regulated market and a competition impact assessment. A formal role for competition authorities could be considered (e.g. consultation on regulatory rule-making), in order to ensure the long-term dynamic perspective of competition policy is integrated into the regulatory framework. Such arrangements are made for example in France, where the Autorité de la concurrence (AC) must be consulted where a law proposal can have a direct effect on competition. In any case, competition authorities -through market studies and targeted advocacy efforts- can play a role in shaping the regulatory landscape and policy dialogue (Section 5.2).³⁰

²⁷ Sarin and Summers (2016).

²⁸ See Vives (20116) for a discussion.

²⁹ Demisguc-Kunt and Laeven (2004).

³⁰ Van Loo (2017), Arner et al (2016), Minto et al (2017).

41. In addition, competition authority engagement in regulatory and supervisory processes can take place on an ongoing basis via exchanges of information and consultations. A recent survey conducted by the Bank of International Settlements, looks at collaborative engagements of prudential supervisors in areas which could have a significant impact on competition policy enforcement, e.g. market entry (licencing) or market studies (information on markets). The experience of co-operation between prudential banking supervisors and competition authorities in areas that are not specific to competition policy is quite uneven across jurisdictions. Out of the 33 jurisdictions covered, less than half of banking regulators receive comments from competition authorities on their regulations or guidelines. In about a third of the jurisdictions, information on concrete undertakings, market studies or complaints is shared. Cases of non-compliance with laws are shared across authorities in 11 of the surveyed jurisdictions. Furthermore, there is evidence of joint discussion of corrective measures. Notably, in 8 jurisdictions the competition agency is consulted prior to licencing a new market entrant more than any other authority (see Table 1). Collaborative engagements are typically more intensive however, with other sectoral regulators, such as consumer protection agencies or conduct authorities.³¹

Table 1. Prudential banking supervisor’s collaborative engagements with other authorities³²

	Number of responses	Consent prior to licencing	Comment on regulations or guidelines	Share information on market or types of providers	Share cases of non-compliance with laws	Share complaints information	Share information on a provider	Discuss corrective measures
Financial consumer protection/ market conduct agency	6	5	6	6	6	6	6	6
Cooperative agency	15	6	12	11	8	9	9	7
Finance ministry	15	6	13	11	10	8	9	10
Financial intelligence unit	21	8	17	10	14	11	13	11
Insurance supervisor	19	4	12	13	11	10	12	10
General consumer protection agency	16	2	9	4	5	6	5	6
Competition agency	33	8	16	12	11	11	13	9
Data protection agency	13	0	8	3	4	5	5	2
Tele-communications regulator	28	4	8	6	4	5	7	5

Source: Basel Consultative Group Range of Practice Survey (2013).

Source: BIS, (number indicates number of responses of authorities that the banking supervisor engages with; total number of jurisdictions surveyed = 33).

³¹ BIS (2015).

³² BIS (2015), p. 25.

5.2. Competitive effects of post-crisis financial regulation – proportionality and market entry

42. Turning specifically to the post-crisis regulatory framework's impact on competition, the control of market entry through the authorisation process is the most direct way in which regulation influences competition in the banking market, in addition to threshold factors such as capital requirements. Authorisation requirements might include already prohibitively high corporate and governance requirements or contributions to deposit guarantee funds. While lowering barriers to entry has pro-competitive effects, it has been argued that lower required capital ratios can increase risk-taking. On the other hand, lower barriers can lead to a more diverse financial system, which can be valuable since the degree of interconnection and behavioural factors can stifle diversity.

43. While there has been evidence of opening up of market access on a cross-jurisdictional level, in particular with regard to entry by foreign firms,³³ the high threshold for obtaining a banking licence continues to disadvantage new entrants and raise costs of entry. As increased market concentration in the banking sector after the crisis becomes a concern, several countries have sought to make their entry requirements more flexible. Australia for example has recently sought to confer new discretionary powers to prudential supervisors to facilitate this process.³⁴ Specifically legislative measures will relax the legislative 15 per cent ownership cap. The prohibition on the term 'bank' by credit institutions with less than AUS 50 million in capital was proposed to be lifted by legislation to allow smaller institutions to benefit from the reputational advantages of the term. In addition, the Australian bank regulator (APRA) has proposed a phased approach to bank-licencing, in order to facilitate new entry.³⁵

44. Another concern is that prudential requirements, including those pertaining to regulatory capital, not only raise the entry barriers into the banking sector, but also have a differentiated impact on the different market players, thus reducing the level playing field in the market. For example, capital requirement regulations allow for flexibility between internal rating models and standardised models. Internal rating models are commonly used by large institutions, while smaller banks employ the standardised approach. This creates a key competitive advantage for bigger banks, particularly in light of the evidence that internal models have generated capital savings for the banks employing them.³⁶

45. Therefore, a further specific competitive concern with regard to the implementation of the new prudential regulations concerns the proportionality of the application of the rules. In particular, the high costs of compliance with new regulation pose the risk that small market players are pushed out of the market thus leading to market concentration but not necessarily to more stability. Because of this, some supervisors have called for a reduction in the operational burdens on small institutions.³⁷ However, there is a need to better understand the implications of crowding out of small institutions through financial regulation. In this respect a number of solutions have been

³³ Denk and Gomes (2017).

³⁴ Australian Treasury (2017).

³⁵ APRA (2017).

³⁶ See Behn et al. (2014).

³⁷ Dombret (2017).

adopted across major jurisdictions. For example, in Brazil, Japan and Switzerland banks are divided into specific categories according to their size and/or international activity. Banks in the same category are subject to a specific set of rules that differ from the ones applied to banks in other categories. By contrast, in the European Union, the United States and Hong Kong, rules corresponding to specific Basel standards are adjusted for banks meeting set criteria, e.g. market risk can be measured according to a simplified method for banks with a small trading book. These two different schemes are often applied in combination, meaning that specific exemptions can be granted in addition to the selection of banks into different regulatory categories.³⁸ A system for categorizing institutions in such a way, however, may create incentives/disincentives for growth and development of individual institutions.

46. In this respect, competition authorities may play a key role in assessing competition in banking markets and therefore also indirectly in assessing the impact of regulation through dedicated market studies and investigations followed by implementation of remedies where competition concerns are identified. Engagement between competition and financial regulators can facilitate the introductions of targeted measures oriented at removing inefficiencies. For example, CMA's investigation into the UK retail banking conducted on 2015-2017 highlighted the high barriers to entry into the sector. Subsequently, remedies imposed sought to open up retail banking markets, e.g. by promoting consumer access to information with the objective that consumer engagement results in new forms of competition that could lead to new entry and introduce additional supply-side constraints.³⁹ Furthermore, the prudential and conduct supervisors created a "New Bank Start-Up Unit" advising smaller and new entrants. There has been a marked increase in new entrants in the UK as a result. In 2005-2010 there was only 1 new UK retail bank authorisation, between 2010 and 2015 there were 5, whereas only in 2015 to 2017 9 new UK retail banks entered the market.⁴⁰

5.3. Regulating FinTech

47. Another key area of co-operation between regulators and competition authorities relates to regulating innovation and ensuring that new regulatory measures are oriented at ensuring an efficient and stable market as well as consistent with ensuring effective competition in the long-term. The evolving regulatory approaches to FinTech are informative in this regard.

48. FinTech is a broad term denoting the use of technology in finance in an innovative way. Although technological change has been part of financial services for decades, FinTech is associated specifically with the number of new market entrants as well as the speed of change.⁴¹ The term also covers new legal technologies such as block-chain as well as specific uses of the new innovations (e.g. cryptocurrencies such as Bitcoin). From a regulatory perspective, FinTech presents a challenge in terms of mitigating systemic risks associated with any financial activity;⁴² in addition concerns

³⁸ BIS (2017).

³⁹ CMA (2016).

⁴⁰ Woolard (2017).

⁴¹ PwC (2017).

⁴² FSB (2017).

regarding money laundering and financing of illegal activity have also been raised, as well as those relating to operational and cyber security risks.⁴³

49. FinTech -or rather the technology which underpins this type of financial innovation- has the potential to modify consumption patterns, attitudes and behaviours in the market. That it has the potential to reinvigorate the financial markets and increase competition has been broadly recognised.⁴⁴ The competitive impact of FinTech, with the consequences it brings for financial stability, underpins some of the new regulatory approaches. However, given the risks perceived to be posed by FinTech, the regulatory framework might lead to raising barriers to entry into the market (e.g. by introducing licencing regimes). For example in the EU, the ECB is considering drawing up a special FinTech licencing regime, while in the US the issue of which authority is competent for authorising FinTech activity has brought about a legal dispute between the state (New York) and federal regulators (Office of the Comptroller of Currency).⁴⁵ Furthermore, as outlined in Section 4, the multiplication of regulatory objectives in the banking sector has given rise to new authorities. Their approaches to regulating new technologies and innovations, such as FinTech, will accordingly differ depending on their mandate. For example, for a variety of reasons one regulator might be more active than others: in the US the CFPB has been proactive in developing the Bureau's own assessments of the impact of the new technologies on the basis of their mandate, that is consumer protection, in particular through setting up of the Project Catalyst dedicated to FinTech's impact on consumers (Box 2).

50. In order to assess the impact of FinTech on the financial markets a multidimensional analysis should be employed. First, FinTech affects the financial industry as a whole; however, it could have distinct competitive impact on different market segments. A number of categorisations can be suggested in this regard,⁴⁶ one suggesting looking at various "economic functions", which are affected by FinTech: payment systems (e.g. PayPal), lending and capital raising (e.g. crowd-funding), investment and trade (e.g. initial coin offerings - ICOs) or clearing and settlement. There might be a tendency to regulate the newly operating technology-driven financial innovations following the well-established regulatory lines (see Section 4.1 on sectoral approach to financial regulation). In each of those segments, FinTech technologies can be assessed differently from the perspective of their impact on financial stability, delivery of financial services such as access to finance or financial market development,⁴⁷ but also competition. Secondly, the type of FinTech innovation is relevant in this regard, that is whether it is disruptive in the sense of leading to creation of new markets which challenge the established market leaders, or whether it is a sustaining type of innovation, where FinTech technologies compete with, or are even adopted by incumbents.⁴⁸ At the same time, broader impact on banking markets should be considered, in particular where disintermediation and decentralisation effects come into play. Disintermediation effects of FinTech do not refer specifically to the type of financial innovation or market entrants,

⁴³ Carney (2017).

⁴⁴ ECB (2017), IMF (2017), FSB (2017).

⁴⁵ Reuters (2017).

⁴⁶ Arner et al (2015).

⁴⁷ E.g. in the context of emerging markets see Arner et al. (2015).

⁴⁸ PwC (2017).

but rather to the technologies of block-chain or distributed ledgers, which allow for validation of a transaction (or asset) by the network -reducing the need for central validation, settlement or intermediation. Although the technology is still considered with caution, it can be associated with significant efficiency gains in terms of facilitating transactions and decentralising market power within the financial systems. Alternatively FinTech could lead to adding a new layer to existing financial markets, for example by providing the customer with a technological financial product subsequently processed by the existing financial system. In either case, FinTech could lead to increasing interconnections and therefore network effects within the sector.⁴⁹

51. New approaches to regulating (disruptive) innovation are being tested in the context of FinTech; especially when financial innovation is still looked on with suspicion by some regulators.⁵⁰ These are so-called regulatory sandboxes for FinTech companies, which allow new companies to pursue their activities, without a licence, albeit with basic consumer protection safeguards, for a limited period of time under the watchful eye of the regulator (e.g. in the UK, the FCA is running the Project Innovate programme with the objective of clarifying regulatory expectations with respect to new market entrants). Such sandbox initiatives may subsequently lead to concrete regulatory measures, although they can also challenge the pre-existing regulatory approaches based on existing business modes and industry incumbents' perspective.

52. The challenge in regulating FinTech by multiple financial sector regulators should be a key concern going forward, also in terms of competition policy. While competitive pressures from both within and outside the banking sector present challenges for banks to continue operating efficiently with their existing business models, they can also create opportunities to boost bank profitability and increase their efficiency. By embracing Fintech innovations and cooperating with Fintech start-ups, either by acquiring new companies or contracting their services, banks could increase operational efficiency through cost-cutting and benefit from new sources of revenue, possibly also protecting their current market shares and penetrate new markets. However, the means through which established market players are collaborating to use the technologies and developing their own uses may raise competitive concerns.⁵¹ Furthermore, supervisory focus on ensuring bank stability and profitability might encourage adoption or testing of FinTech technologies by incumbents, rather than encouraging market entry.

53. Competition authorities can therefore play an important role in advocating regulation that allows beneficial new competition to emerge, keeping the entry barriers low and a level-playing field in place, while taking due account of key rationales for financial market regulation.⁵² To this end, they can build up their understanding of the developments, e.g. through dedicated market studies, as in the case of Canadian competition authority (Competition Bureau), which in 2016 launched a study exploring the competitive impact that FinTech on the financial services industry, barriers to entry faced by companies, and whether there is a need for regulatory reform to promote greater competition while maintaining consumer confidence in the sector.⁵³ These engagements

⁴⁹ Minto et al. (2017).

⁵⁰ Nouy (2017).

⁵¹ FT (2017).

⁵² OECD (2015).

⁵³ Competition Bureau (2016).

are naturally in addition to competition authorities' established competition enforcement tools, in particular those prosecuting anticompetitive behaviour leading to foreclosure of markets to new entrants. An example in this regard, is a 2017 investigation by the European Commission in a number of EU countries, where banks and bank associations may have engaged in anti-competitive practices against new FinTech entrants by putting up barriers to challenger groups seeking access to customer account information when users have given their consent under the new EU data protection rules.⁵⁴

54. Furthermore, competition authorities can be involved in the process of designing new regulatory regimes, for example in the context of co-operation within dedicated Working Groups. For example, in Poland the FinTech Working Group is housed by the financial supervisor (KNF), but its membership includes the Competition and Consumer Protection Authority (UOKiK).

6. Growing challenges– consumer protection

6.1. Consumer protection authorities

55. In a number of jurisdictions the Great Financial Crisis has drawn attention to the particular vulnerability of financial consumers, which can be exacerbated by the high dependency on banking service provision in modern life. Consumer focus has two facets in post-crisis reforms. One is an emphasis on a competition policy which focuses on ensuring that the market is efficient and thus serves the consumer. In the UK, for example, the competition objective of the conduct regulator (FCA) has been framed in terms of harm to consumers and of ensuring effective competition to the benefit of consumers (not only in terms of price, but also choice, access to services and their quality, see Box 4). Second, the growing body of consumer protection regulation is increasingly concerned with asymmetries in the financial (retail) consumer relationship, seeking to regulate the behaviour understood to be to the detriment of consumers. Specifically, regulatory measures and initiatives have sought to increase consumer protection through increased disclosure, protection against unfair contract clauses and practices (such as mis-selling), as well as financial education, among others. In some jurisdictions, new consumer protection competences have been conferred on conduct regulators and competition authorities (e.g. FCA, see Box 4), while in others -most notably in the US- new dedicated institutions have been established (see Box 2). This specific mandate is in contrast with a number of jurisdictions, where consumer protection, both in terms of enforcement and financial education, is pursued by a joint competition and consumer protection agency (e.g. ACCC in Australia, UOKiK in Poland) or where, as happens in a number of other EU jurisdictions, financial consumer protection is within the remit of central banks (as is the case in Ireland).⁵⁵ An argument for specifically carving out consumer protection from the responsibilities of financial supervisors results from possible conflicts of interest between ensuring bank profitability and the treatment of consumers in an industry characterized by pronounced information asymmetries. Strengthening the role of the consumer, therefore, has achieved new prominence in financial regulation after the crisis both as part of competition enforcement and independently.

⁵⁴ FT (2017).

⁵⁵ EBA (2017).

Box 2. Consumer Financial Protection Bureau

The Dodd-Frank Act of 2010 created the Bureau of Consumer Financial Protection (CFPB), an executive agency tasked with regulating the offering and provision of consumer financial products or services under the Federal consumer financial laws (s. 1011 Dodd-Frank Act). The creation of the Bureau seems to have been the result of attention being drawn to the deficiencies of the consumer protection regime pre-crisis, which seem to have contributed to the scale of subprime mortgages. Furthermore, the fact that financial regulation is fragmented along the lines of business activity of the supervised institution, rather than the nature of the product provided to the consumer, called for a separate consumer protection regime.⁵⁶

The Bureau is specifically responsible for protecting and promoting consumers' interest by, inter alia, improving the quality of information provided by financial institutions and protecting consumers from unfair, deceptive, or abusive acts and practices and from discrimination. CFPB implements and consistently enforces federal consumer financial laws in order to ensure that everyone has access to consumer financial markets that are fair, transparent, and competitive. It has been actively using insights from behavioural economics in its work.⁵⁷ The Bureau has an explicit statutory objective to ensure that the markets for consumer financial products and services operate efficiently and transparently to facilitate access and innovation.

Since its creation in 2011 the Bureau has exercised its powers in a number of ways, including rule making (e.g. introducing new conditions for loan approval)⁵⁸, processing of complaints for misconduct, and leading enforcement actions for violations of consumer protection laws (including with sanction powers). In addition, the Bureau has implemented a number of forward-looking initiatives, looking to how transformations in the financial sector such as FinTech, may impact safety and benefit consumers (under the Project Catalyst launched in 2012, see Section 5.3 on FinTech).

6.2. Transparency

56. Increasing transparency/disclosure requirements is one way in which consumer protection has been enhanced, with a view also to increasing the confidence in the banking sector. However, the effects of transparency on competition are not unambiguous. For example, increased transparency can facilitate collusion allowing banks to have better knowledge of each other's margins and market strategies, and with this information serving as focal points, thus increasing the possibility for banks to observe and follow each other regarding pricing and discounts. This increases the risk of tacit coordination, a market outcome similar to that in which the banks were operating a cartel, but without the need for an agreement, and possibly even without the need for price signalling). This may ultimately lead to higher prices, i.e. the opposite of the

⁵⁶ Warren (2007).

⁵⁷ Vives (2016).

⁵⁸ See, e.g. Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), A Rule by the Consumer Financial Protection Bureau, (2013).

intended results.⁵⁹ On the other hand, greater transparency can increase competition by helping consumers to choose while also revealing some strategic information to potential market entrants and, thus, reducing the competitive advantage of the disclosing bank (known as “proprietary cost”). Furthermore, transparency can facilitate competition by acting on the demand side and lowering the costs of switching. Increased transparency to this end has been used as a remedy in the context of markets where competition authorities have identified inefficiencies resulting from insufficient competition. The pro-competitive effects depend, however, on the overall conditions of switching and consumer behaviour patterns. If consumers have a lower propensity for switching, regulation increasing transparency can have the effect of facilitating collusive behaviour despite aiding consumer choice.

57. To tackle the problem of “switching”, competition authorities have taken a number of steps across jurisdictions. For example in the Netherlands, the competition authority established a dedicated Monitor Financial Sector unit which analysed the rates and potential savings customer could make. Cooperative engagements with the regulator can include joint recommendations on issues of common concerns such as measures requiring banks to improve transparency on the costs incurred with respect to current accounts, as was the case in Italy.⁶⁰

58. At the same time, transparency of pricing can have a differentiated impact on different market actors (e.g. large incumbents and small banks) and is contingent on market structures. Furthermore, different types of transparency need to be distinguished; for example between information pertaining to bank risk management structures and audit procedures or more customer oriented disclosure (such as on prices). In the case of the former, recent research shows that the banking markets are less concentrated in countries with stricter disclosure requirements.⁶¹

6.3. Market caps

59. In light of the post-crisis focus on consumer protection, a number of jurisdictions have introduced or are contemplating price caps on specific products with both regulators and consumer authorities involved in the process. Two examples, the regulatory treatment of overdraft charges in the UK and mortgage cap proposal in Ireland, illustrate the controversial nature of such measures, but also the importance of the institutional context, i.e. which authority is responsible for implementing the remedies for market concerns.

60. In the UK, high charges for unarranged overdraft (costing consumers around GBP 1.2 billion per year according to the estimates by CMA) have been a problem for a long time and a key topic in the investigation carried out by CMA into retail banking in the UK in the years 2013-2016, where the FCA provided important initial input.⁶²

61. Remedies introduced by the CMA following the inquiry included a requirement that banks publish their maximum monthly fees for the unarranged overdraft service and alert customers of their intention to implement such a charge. These remedies were oriented at bolstering the position of the consumer by reducing information asymmetries

⁵⁹ Bikker and Spierdijk (2009).

⁶⁰ OECD (2014).

⁶¹ Andrievskaya and Semenova (2016).

⁶² CMA (2016).

and using technological solutions (Open Banking apps) to improve consumers' control and access to information. However, these remedies were deemed insufficient by the conduct regulator (FCA), which subsequently opened a separate inquiry into overdraft charges.⁶³ As outlined below (see Box 4), FCA's mandate includes competition policy enforcement, but also consumer protection and bank conduct. In 2017, the authority called for an overhaul of the unarranged overdraft system, with the possibility of market caps not excluded.

62. Although it took place within a different context, the discussion surrounding price caps in Ireland helps illustrate the controversies involved in consumer protection, as well as the importance of broader institutional context. One major point of the controversy in Ireland was the proposed conferral to the prudential supervisor, the Irish Central Bank (a member of EU's Single Supervisory Mechanism), of powers to introduce mortgage rate caps. Several concerns were expressed during the legislative process. For example, the ECB and the European Commission stressed the possible negative effect of the measure on the transmission of monetary policy competition and financial stability. Specifically, the ECB considered that the possibility of setting administrative limits on the profitability of a core business activity of the banking system might induce more risk-taking behaviour with banks engaging in alternative projects that do not reflect prudent risk-taking behaviour thus potentially leading to financial instability.⁶⁴ In a similar vein, the Irish Competition and Consumer Protection agency expressed serious concerns that the measure would "limit competition in the market for principal dwelling house mortgage loans, thereby acting to the detriment of the very consumers that it wishes to protect."⁶⁵

63. The two cases outline the political and social salience of price regulation in the banking sector from the perspective of consumer protection. They also make clear the different perspectives which authorities, supervisors, central banks, competition authorities and consumer protection agencies, bring to the table when discussing possible remedies to the problems identified. Competition authorities that do not have an explicit consumer protection mandate may have a different approach than those with a double-mandate. Consumer protection, however, is an area where the objectives of regulators and competition authorities can sometimes converge. Advocacy efforts of competition authorities are particularly important in the context of legislative proposals for controversial measures with ambiguous effects on competition. Any such advocacy effort, however, should be well-defined in scope.

7. Known challenges - co-operation between regulators and competition authorities in competition policy enforcement

64. Competition policy enforcement in the banking sector has historically not been as straightforward as in other sectors, because of banks' central role in the economy and the risks of spill overs from bank failures. The industry has not only been heavily regulated in the past but, in many countries has also long been exempted from rigorous enforcement of competition policy. The argument for this position has been that vigorous competition

⁶³ Smith (2017).

⁶⁴ Kelpie (2016).

⁶⁵ Reddan (2017).

could be detrimental to financial stability.⁶⁶ More recently, alongside wider banking liberalization in the 1970s and 1980s and newer research showing a positive link between competition and stability, greater attention has been paid to the enforcement of antitrust and competition rules in the banking sector. However, it remains the case that special provisions for banking regulation often limit the extent of these efforts. In some cases this means full exemption from competition rules (e.g. certain type of agreements in securities markets in the US⁶⁷), otherwise a derogation from competition laws is put in place based on particular circumstances (such as public interest). In particular, in a number of jurisdictions, enforcement of parts of competition policy (such as mergers) is either delegated to prudential regulators, or prudential carve-outs are in place, allowing for behaviour or transactions considered anti-competitive to be cleared on financial stability grounds.

65. Changes in the financial regulatory oversight across major jurisdictions in the aftermath of the financial crisis have had different consequences for the framework of co-operation between regulators and competition authorities.⁶⁸ Over the course of the financial crisis competition policy in some areas acted as substitute for financial regulation and supervision in the absence of an adequate regulatory framework (e.g. role of state aid in the European Union over the course of the financial crisis, see Box 9).⁶⁹ In its aftermath, the general trend has been to confer traditional competition policy enforcement competences to regulators in parallel with competition authorities, as well as to make explicit across a number of jurisdictions the financial stability derogation to competition policy enforcement (e.g. in mergers). This is in contrast to pre-crisis phase, when the trend has been to tighten merger control regulation in terms of assessment criteria, separate enforcement of decisions, removing the ability of politicians to overturn the decision and streamlining notification requirements.⁷⁰ These developments make co-operation between authorities important for a number of reasons. First, where there is duplication of enforcement powers or parallel mandate, co-operation seeks to ensure consistency of enforcement. Secondly, where particular bank conduct is assessed from both competition and prudential perspective, the modalities of co-operation between regulators and competition authorities in the banking sector have been identified as key factors to ensure an optimal balance between different objectives, for example by aligning incentives.⁷¹

7.1. Overlapping competition mandates and coordination of policy implementation tools

66. The optimal form of co-operation between competition authorities and regulators is contingent on the financial regulation oversight regime put in place (see Section 4), as well as the repartitioning of powers between authorities: that is whether there are parallel administrative procedures, and whether there is scope for prudential or other public interest objectives to override a competitive assessment. Different models have been

⁶⁶ See Section 2 for discussion on this point.

⁶⁷ See Angeloni and Lenihan (2015), p. 99.

⁶⁸ Angeloni and Lenihan (2015).

⁶⁹ OECD (2009).

⁷⁰ Carletti et al. (2015).

⁷¹ Vives (2016).

adopted by various jurisdictions. One possibility is that the enforcement of competition policy is conferred to the supervisor (i.e. the supervisor is made responsible for the approval of mergers). Secondly, regulators might engage in parallel (but connected) assessment of the transaction within their respective mandates (see Section 7.2). Thirdly, both competition and supervisory authorities can be competent for the enforcement of competition policy (so-called ‘concurrent powers’, see Box 4 outlining UK ‘twin-peaks’ model). Finally, a supervisor’s mandate may encompass competition and efficiency objectives as a secondary objective (for example, PRA in the UK). In the case of PRA, the secondary objective is to guide the policy choices in the implementation of tools oriented at the pursuit of the primary objective; that is the safety and soundness of credit institutions. The secondary objective is frequently phrased, however, in terms of competitiveness and market development, rather than competition in the market *per se*. Different arrangements can be in place for different competition policy tools, such as for mergers and cartels.⁷²

67. Alternatively, competition and financial regulation enforcement can be separated, with no prescribed or institutional arrangements for a structured interaction. In such cases the onus for ensuring compliance of a given transaction or behaviour with relevant prudential and competition policy is placed on the regulated undertaking. Good administration principles, however, require that the overall framework is consistent, and as such co-operation between authorities is necessary.

68. In cases of overlapping or concurrent mandates, co-operation between regulators and competition authorities can facilitate optimisation of the trade-offs between various objectives, thereby optimising policy implementation.⁷³ A number of factors affect the effectiveness of co-operation. Clearly defined responsibilities can support co-operation and prevent inter-institutional “turf wars”. In both rule- and principle-based systems, the primary legislative framework has an important role in ensuring clarity through repartitioning of responsibilities and determining which authority has the “final say” (where legislation foresees a hierarchy of objectives). Co-operation can furthermore be required by relevant legislation in the form of consultations or opinion-giving (e.g. on the initiation of a merger assessment or the opening of an investigation into an anti-competitive conduct). Precise procedural modalities can be elaborated in dedicated Memoranda of Understanding (see e.g. CMA & FCA 2016). Informal and ad hoc cooperative techniques are employed by competition authorities and regulators to facilitate knowledge exchange (training courses, staff exchanges etc.). Co-operation between regulators and competition authorities can be issue specific, in the form of dedicated working groups (see Section 5.3 on FinTech).

69. The availability of resources, including for the conduct of studies, procurement of expertise and conducting investigations, is another factor affecting co-operation. Furthermore, soft factors such as leadership play a role. Governance literature identifies “reputational uniqueness” as underpinning successful co-operation within complex regulatory architectures, suggesting that the way (organizational) actors present themselves to, and are in turn perceived by, a wider set of audiences, including the undertakings they supervise, is important for successful intra-agency co-operation.⁷⁴

⁷² Angeloni and Lenihan (2015).

⁷³ Carlton and Picker (2006).

⁷⁴ Busuioc (2016).

Box 3. UK concurrent powers for regulators and competition authorities

The oversight of the banking market in the UK is divided between the Bank of England's Prudential Regulator Authority (PRA) and Financial Conduct Authority (FCA), following a twin peaks model separating prudential supervision from conduct supervision (see Section 4.1). PRA is mandated with ensuring safety and soundness of authorised entities (e.g. credit institutions, insurers)⁷⁵, while FCA's operational objectives span consumer protection, integrity and competition.⁷⁶ UK legislator specified that FCA's competition objective relates to "promoting effective competition in the interests of consumers in the markets" and that consumers to this end should be understood as "persons who use regulated financial services, have relevant rights or interests in relation to any of those services, or are an investor (see also Section 6.1 on consumer protection)

To this end, since 2015 FCA has concurrent powers for enforcement of competition policy with the Competition and Markets Authority (CMA), including powers to enforce the prohibitions on anti-competitive behaviour under relevant competition law and the powers to carry out market studies in relation to the provision of financial services in the UK. These same concurrent powers regime applies across a number of other sectors, such as energy or telecommunications. Merger control is not covered by concurrency, and remains with the CMA (albeit with a possibility for intervention by the government – see section 7.2.1 on merger control).

Under the legal framework, the FCA is first to consider use of powers conferred to it under competition law, before resorting to other regulatory instruments.⁷⁷ Furthermore, in cases where FCA has specific competition concerns, it can make a Market Investigation Reference (MIR) to CMA.⁷⁸ In 2017, the FCA referred to CMA a market investigation on investment consultants, where weak demand side, relatively high levels of concentration and relatively stable market shares, barriers to expansion, and vertically integrated business models in the market, in its assessment curtailed competition and warranted further intervention by the competition authority. The use of MIR by sectoral regulators has been limited in the past, consequently such a referral by the FCA indicates that co-operation between the regulator and the CMA will develop further, as well as that the regulator recognises the competition-specific expertise.⁷⁹ The CMA has the power to impose a broad range of remedies to improve competition, including forcing investment consultants to impose structural remedies. In another case, FCA conducted its own market study into asset management activity, finding weak price competition and that the level of charges faced by consumers had a fundamental effect on value of long-term investments and pensions.⁸⁰

⁷⁵ Section 2A Financial Services and Markets Act (FSA) 2000.

⁷⁶ Section 1B FSMA 2000.

⁷⁷ Section 243K FSMA 2000.

⁷⁸ Market investigations entail more incisive investigatory powers than market studies.

⁷⁹ FCA (2017b).

⁸⁰ FCA (2017a).

The CMA's Concurrency Guidance⁸¹ sets out the allocation of powers and procedures. FCA published its approach to enforcement of its powers in its own Guidance in 2015⁸². It will further publish a document outlining its approach to competition in late 2017. While competition infringements may be transferred between the concurrent authorities, only one authority can pursue a case at a given time. The general principle is that the regulator that is best placed to do so will be responsible for a case. If an agreement cannot be reached, the CMA may determine which authority should exercise the power. A Memorandum of Understanding (MOU) lays down the principles for co-operation.⁸³ Specifically, the MoU seeks to maximise the complementary skills of the CMA and the FCA, including through: (a) promoting co-operation and coordination between the CMA and the FCA when dealing with cases of suspected anti-competitive behaviour for which they have concurrent powers; (b) promoting co-operation and coordination between the CMA and the FCA when dealing with market studies and market investigation references for which they have concurrent powers; (c) facilitating the efficient and effective handling of cases of suspected anticompetitive behaviour within the financial services markets in the UK; (d) avoiding duplication of activity, wherever possible; and (e) ensuring transparency as to the respective roles of the CMA and the FCA for individuals and consumers affected. Although the practice of concurrency between FCA and CMA is still in its early days, experience to date, suggests an intensive albeit procedurally framed co-operation.

7.2. Role of regulators in merger control and antitrust enforcement competition policy enforcement

7.2.1. *The classic case of mergers*

70. There has been much debate both among academics and policy makers on the optimal institutional design of merger control in banking, including the division of competences between supervisors and competition authorities. Since the financial crisis the renewed financial stability concerns seem to have shifted the pendulum back to regulatory prominence in merger control as well. Mergers are subject to a supervisory control in order to ensure the soundness and stability of the newly created entities and that they continue to meet the requirements for authorisation. Such control requires that the new entity is well capitalized, has good quality of assets, good earnings performance, suitable shareholders etc. The main objective of merger control from a competition policy perspective is to prevent mergers that lead to a substantial lessening of competition, increased prices and reduced consumer welfare. Furthermore, recent research has shown that application of merger control to banking leads to efficiency-enhancing acquisitions by smaller banks, and by non-bank firms entering the banking market. Conversely, there is evidence that absent merger control, national regulators may prefer anti-competitive mergers, for example to support national champions or for reasons of economic nationalism.⁸⁴

⁸¹ CMA (2014).

⁸² FCA (2015).

⁸³ FCA & CMA (2015).

⁸⁴ Carletti et al. (2017).

71. The relationship between the supervisory and merger controls varies across jurisdictions. In most countries, the responsible agencies share the control in that each of them has to approve the transaction according to its respective mandate (see Box 4 and 5 for US and EU approaches). In others (e.g. the Netherlands), a third body, typically a minister or the government, decides upon any conflicts between the two responsible authorities. Yet, in some others (e.g. Canada and Switzerland), the supervisory control may prevail, particularly when the merger helps protect the interests of creditors or the general interests of the domestic financial sector.

72. In cases of shared competence for merger control, a proposed merger is typically to be notified either to both the regulator and the competition authority or to one of them if co-operation agreements are in place. The nature of the assessment is quite different for the two authorities, also in terms of transparency of the process. Where the competition authority typically publishes its decision and makes its assessment on the basis of a specific competitive impact test, the procedure and assessment of the supervisor is generally not released.⁸⁵ Research suggests that enforcement of competition policy and transparency of the merger control process are linked with higher bank valuations following the mergers. This can be explained as typically merger control is less discretionary, involves less scope of “wasteful decisions”, allows for accountability processes through “checks and balances” and creates more legal certainty.⁸⁶

⁸⁵ See Carletti et al. 2015 for data on the transparency of the supervisory control of mergers.

⁸⁶ Carletti et al. (2017).

Box 4. Bank mergers in the US

In the US, the review of bank mergers are overseen by the financial supervisor, while the Department of Justice (Antitrust Division, DoJ) continues to play a role in the process as a competition authority. The proposed merger is to be notified to the financial regulator (e.g. the Federal Reserve for banks falling under its competence), but the DoJ conducts a parallel assessment. The two reviews follow different approaches. For example, while the Fed uses predefined market definitions, the DoJ assesses the competitive effects of each transaction on a case-by-case basis. Specifically, the DoJ may use the Federal Reserve's pre-defined banking markets in its initial review, but it is not bound by those definitions. If the DoJ concludes that a transaction raises competitive concerns, it may bring a court action under antitrust laws against the merger. When this is the case, the approval of the transaction by the regulator is suspended until the competition issues are resolved. Bank regulator may not approve an interstate merger if the resulting insured depository institution would control more than 10% of deposits in the US (unless the transaction involved one or more bank in default or receiving support from the FDIC).⁸⁷

In any case, the Fed (or any other relevant financial supervisor) must take competition effects into account and shall not allow anticompetitive mergers, unless the uncompetitive effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served, such as the availability of banking services.

Despite the seemingly complicated procedure, the process is fairly transparent in terms of ex ante approaches (both DoJ and Fed have published their guidelines regarding bank mergers) and ex post decisions.⁸⁸ A 2016 case of a merger between Huntington Bancshares Incorporated and First Merit is a case in point. Both decisions of the Fed approving the transaction,⁸⁹ and the DoJ -including remedies⁹⁰- are available on the respective websites, referencing the two parallel procedures.⁹¹

73. The application of merger control in times of crisis is particularly controversial.⁹² The question is whether competition policy should be enforced consistently at all times or whether there is a need for a special merger competition framework or less strict enforcement in crisis times. An important example in this respect is the UK, where merger control law was modified in 2009 to clear the Lloyds/HBOS merger on public interest grounds by the Secretary of State for Business and Enterprise, even though the Office of Fair Trading concluded that the merger raised competition concerns and should

⁸⁷ Fed (2014).

⁸⁸ DoJ (1995).

⁸⁹ Fed (2016).

⁹⁰ DoJ (2016).

⁹¹ This apparent co-operation follows an extensive period of contention between in 1990s (See e.g. Calomiris and Karceski (2000)).

⁹² Kokkoris and Olivares-Caminal (2010).

be further investigated.⁹³ In Australia, by contrast, merger control is alleged to have been applied too leniently over the course of the crisis, even if enforced by the competition authority. For example, Westpac's (then Australia's third largest retail bank) acquisition of St George (then Australia's fifth largest bank and a well-placed challenger) and the Commonwealth Bank of Australia's (Australia's largest bank) acquisition of BankWest (another extremely active challenger bank) were both criticised on the grounds that neither would have been cleared in "more stable times", when the lack of urgency would also have made it possible to conduct a thorough investigation.⁹⁴

74. No explicit change of the rules was involved in the Australian cases. This raises the question of whether a special set of crisis rules for bank merger control is needed for crisis times or whether the existing rules should be adapted, allowing for flexibility and discretion of authorities, according to the circumstances. In the EU, for example, while merger control remains under the competence of the European Commission and National Competition Authorities in crisis times, prudential control under the Single Supervisory Mechanism (EU) does not apply to banks in resolution (on crisis application of merger control in the EU see Box 5).

⁹³ Where the amended Section 42 of the Enterprise Act 2002 gives the Secretary of State the power to give the Office of Fair Trading an intervention notice if he or she believes that the case raises public interest considerations.

⁹⁴ Cejnar and Duke (2013).

Box 5. Bank mergers in the EU

With the establishment of the Banking Union in the EU, the exclusive task of assessing the acquisition and disposal of qualifying holdings in credit institutions from a prudential perspective has been conferred on the ECB, except in the context of bank resolution.⁹⁵ The ECB can oppose an acquisition on the basis of the assessment criteria set out in the Union law. These include reputation of the proposed acquirer, fitness and propriety of the board members to be appointed by the proposed acquirer, financial soundness of the proposed acquirer, ability of the target to continue to comply with prudential requirements following the acquisition, increases in risks such as money laundering or financing of terrorism. Notifications of proposed mergers involving significant institutions have to be submitted to the ECB. Where national supervisors are tasked with the assessment of mergers from a competition policy perspective, this task remains with them.⁹⁶ In a number of EU jurisdictions while both competition authorities and regulators are tasked with assessment of mergers (e.g. in Italy), the regulator may request a merger to be approved for reasons of stability.⁹⁷

The relationship between the prudential assessment performed by the national competent authorities or the ECB and the competitive assessment by the Commission is governed by Article 21(4) of the Merger Regulation.⁹⁸ Article 21(4) permits “Member States [to] take appropriate measures to protect legitimate interests other than those taken into consideration by [the] Regulation”. Legitimate interests are specifically defined to include “prudential rules” (such as CRD IV). Therefore, a merger that fails to comply with the CRD IV prudential requirements will not be permitted, regardless of Commission approval on the basis of the Merger Regulation.⁹⁹

Consequently, in the case of significant institutions, any proposed merger between banking institutions has to be notified to both competition authority and the supervisor. No specific coordination procedure exists in this regard, except for the general obligation for the SSM to carry out its tasks subject to and in compliance with any relevant primary and secondary Union law, the Commission’s decisions in the areas of State aid, competition rules and merger control.

75. In a number of jurisdictions there is no specific framework for co-operation in the approval of mergers. Although the authorities can decide independently, lack of clarity can also result in ‘turf wars’ but also in lengthy competence disputes. This was the case in Brazil, where a controversy between the competition authority (CADE) and the Central Bank of Brazil concerned who should judge merger transactions in the banking industry. According to a 2014 preliminary decision of the Brazilian Federal Supreme Court,

⁹⁵ See recital 22, Arts. 4(1)(c) and 15 SSM Regulation, following Art. 23 CRD IV.

⁹⁶ ECB (2017).

⁹⁷ See Art. 20 Law no. 287 of October 10th 1990, art. 57 Consolidated Banking Act, see proceedings 26658 on the approval of acquisition of Veneto Banca and Banca Popolare Vincenza by Intesa San Paolo by Italian Competition Authority

⁹⁸ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

⁹⁹ Johnson (2015).

mergers among financial institutions do not have to undergo the competition approval of CADE. Prior to that, CADE could impose conditions on mergers between financial institutions whenever it assessed that the competition in any segment of banking services would be threatened. As the matter continues to be unresolved, CADE exercises merger control in the banking sector still.¹⁰⁰ Financial institutions are therefore not only obliged to submit antitrust filings before CADE, but also before the Central Bank. Furthermore, in August 2017 CADE and the Central Bank of Brazil (BCB) established a Working Group (GT in its acronym in Portuguese) aimed at developing studies about competition defence in the National Financial System (SFN in its acronym in Portuguese). These studies encompass the methods and the limits of competencies of both institutions and co-operation between the agencies. Developing forms of co-operation between financial supervisors and competition authorities can therefore overcome lack of legislative clarity with regard to respective competences.

¹⁰⁰ OECD (2017b).

Box 6. Santander/Banco Popular merger

In force from January 2015, the European Union's Single Resolution Mechanism (SRM) is the new system of bank resolution comprising the Single Resolution Board (SRB) and National Resolution Authorities (NRAs) of the participating Member States of the Banking Union. The SRM constitutes one of the pillars of the Banking Union. Together with the Single Supervisory Mechanism (SSM), which is the supervisory authority, the SRM has the goal of ensuring a safer banking system in the Eurozone countries and other participating States. In particular, the SRM's mission is to ensure an orderly resolution of failing banks and banking groups, with minimum impact on the real economy and public finances.

An acquisition of a failing bank by another entity is one way in which bank resolution can take place, and as such it is a relevant example of co-operation between regulators (supervisors and resolution authorities) and competition authorities. A pioneering example is the takeover of Spanish Banco Popular Español S.A (BPE) by Santander in 2017.

In June 2017 the liquidity situation of Banco Popular rapidly deteriorated and on 6 June 2017 the bank was declared failing or likely to fail by the SSM. EU resolution law foresees three alternatives in such cases: (a) a private sector measure; (b) normal insolvency of the bank; or (c) resolution by authorities. In the case of Banco Popular, a buyer was found (Banco Santander). Then, the SRM adopted the resolution scheme of the bank, which provided for the transfer of the failing bank to Santander for EUR 1, inclusive of BPE's liabilities.

The acquisition fell within the scope of EU Merger Regulation given the size and scope of activity of the banks concerned, thereby requiring that both resolution and competition policy be applied by relevant EU authorities. In the light of the urgency of the transaction to ensure the continuity of the critical functions performed by Banco Popular, in a decision dated 6 June 2016 the Commission allowed the merger to go ahead before its final approval ("the derogation"). Only a preliminary market assessment was performed by the European Commission (DG COMP) at that stage, which considered that the market share of the joint new entity would be below 20-30% in the market for credits, consumer funds or in terms of number of branches and close to 20-30% in the area of SMEs lending.

The derogation was conditional on Santander submitting a complete notification of the transaction. The acquiring bank was required to take only actions that were necessary to restore Banco Popular's viability and to ring-fence BPE's business until the final decision by the European Commission was taken. The acquisition was approved under EU Merger rules on 8 August 2017 without objections. The EC's investigation concluded that the transaction would not raise competition concerns, as the parties' combined market shares would generally remain limited (below 25%) and strong competitors would remain in all affected markets.¹⁰¹ The transaction was therefore cleared unconditionally. Pursuant to the transaction, however, Santander holds the biggest market share in Spain for SME market share (25%), loans (19.5%), and customer funds (18.8%).

The case represents a success story in terms of cooperation between the supervisor and

¹⁰¹ European Commission (2017).

the resolution authority across the national and EU level within the architecture framework of the Banking Union; both financial stability and competition policy related assessments were mandatory and carried out by the respective authorities. The preempting of an in-depth and comprehensive competition assessment in this case did not prove costly, and the strength of the ring-fence was not tested, however it cannot be ruled out that this might raise problems in future.

7.2.2. Cartels

76. In contrast to merger control where issues of co-operation between authorities pivot around procedures put in place as well as degrees to which prudential derogations to merger control apply, the enforcement of competition policy related to cartels remains in the hands of competition authorities with different arrangements for co-operation, both formal and informal, existing across jurisdictions. A cross-jurisdictional comparison of two high profile cartel cases in the US and the EU (Box 7), helps draw attention to divergent degrees of transparency in the co-operation between regulators and competition authorities, which can be made public (e.g. through press releases, official comments) even in the absence of formal co-operation frameworks or remain implicit (or in any case unobservable).

Box 7. Banking cartels: EU and US

In the EU, anticompetitive agreements are prohibited under Art. 101 TFEU. The article prohibits any agreement between companies that prevents, restricts or distorts competition in the EU and that has the potential to affect trade between Member States. In 2011, the European Commission opened an investigation into possible price-fixing by companies active in financial derivative products linked to the Euro Interbank Offered Rate (EURIBOR) in certain Member States. Having proved the existence of a cartel restricting competition, the European Commission reached a settlement with Barclays, Deutsche Bank, RBS and Société Générale in December 2013, with fines imposed totalling almost EUR 1.5 billion.¹⁰²

Notwithstanding the scale of the infringement, which presumably had consequences also for the prudential supervision side in the sense that price fixing facilitated risk concentration and mispricing of risk distorting investment decisions and incentives, the Commission's decision does not make any reference to co-operation with regulators in the case. Nevertheless, in response to this high profile case, a new EU Regulation on benchmarks was adopted in 2016. The Regulation establishes a more stringent regulatory framework according to which the manipulation of benchmarks, such as EURIBOR, has to be considered as a clear violation of capital markets rules. In this respect, the Regulation reinforces the investigative and sanctioning powers of financial regulators.¹⁰³ This implies that a specific framework for co-operation between the European Commission and financial regulators will have to be developed even where, as Commissioner Vestager stated "banks have to respect EU competition rules just like any other company operating in the Single Market."¹⁰⁴ However, no specific formal arrangements are in place thus far.

In 2015 the Department of Justice prosecuted a case of benchmark manipulation in the US by five major banks: Citicorp, JPMorgan Chase & Co., Barclays PLC, The Royal Bank of Scotland plc and UBS AG. The allegation was the manipulation of the price of U.S. dollars and euros exchanged in the foreign currency exchange (FX) spot market. As a result of the investigation, the five banks agreed to pay criminal fines totalling more than USD 2.5 billion.

The firms were prosecuted by the Department of Justice under US antitrust law. However, the public announcement of the plea agreement reached, explicitly mentioned the assistance provided by the relevant financial regulators, including the Office of Comptroller of the Currency, Securities and Exchange Commission and Federal Reserve Board.¹⁰⁵ In addition, the Fed concurrently supplemented the fine imposed by the DoJ for

¹⁰² European Commission (2013).

¹⁰³ Though the Regulation makes specific provisions concerning the scope of competition law, in particular Art. 22 requires "without prejudice to the application of Union competition law, when providing a critical benchmark, the administrator shall take adequate steps to ensure that licences of, and information relating to, the benchmark are provided to all users on a fair, reasonable, transparent and non-discriminatory basis.", Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014.

¹⁰⁴ European Commission (2016).

¹⁰⁵ DoJ (2015).

anticompetitive agreements with additional fines in the order of USD 1.8 billion, requiring the five banks to correct deficiencies in their oversight and internal controls over traders who buy and sell U.S. dollars and foreign currencies for the organizations' own accounts and for customers, specifically their unsafe and unsound practices.¹⁰⁶ Special task forces between various agencies are created in the US in such cases to facilitate coordination between authorities on an ad hoc basis

77. In the aftermath of the financial crisis, an increase in the frequency of bank price-fixing cartels has been observed. This suggests that cartels are an area where co-operation between financial regulators and competition authorities may become central in the future.¹⁰⁷ The US case shows that co-operation and exchange of information in the investigatory phase of cartel investigation allows the competition authorities to access data that would not be easily obtainable otherwise due to the opaqueness and complexity of the financial markets. Moreover, co-operation in early stages of the investigation allows the authorities to clarify which aspects of the undertakings' behaviour fall under the respective purviews of the authorities – thereby contributing to legal certainty for the undertakings and also enhancing the effectiveness of policy implementation. Transparency in the assessment can further facilitate loyal co-operation between authorities. Furthermore, given the global scope of the operations of the cartel offenders, co-operation should be developed on a cross-border level.

78. Co-operation involving exchange of confidential information however is contingent on confidentiality and business information laws. Therefore, establishing frameworks for exchanges of information is key to optimal policy implementation in complex cases involving harmful anti-competitive conduct.

79. Where cartel behaviour may raise particular prudential and regulatory concerns, appropriate conduct rules can be put in place subsequently (as in the EU). Where such regulations have pro-competitive aims as well, they should provide for a framework for co-operation between authorities in terms of investigation of anticompetitive agreement, prosecution and imposition of corrective measures (sanctions and remedies).

¹⁰⁶ Fed (2015).

¹⁰⁷ Connor (2014).

Box 8. State aid

The well-established practice of the European Commission in the area of state aid has allowed for a specific co-operation procedure between authorities to be developed over the course of the financial crisis. In particular, the framework provides for specific information to be exchanged between the supervisor and the competition authority.

The so-called New Banking Communication of 2013 emphasizes that “coordination between the Commission and the competent supervisory authorities is of importance” in the context of the assessment of the advantage conferred on the beneficiary bank through the public subsidy.¹⁰⁸ The authorities jointly determine the bank’s capital shortfall. The supervisor transmits to DG COMP information concerning the assessment of capital raising measures and confirms that rescue aid is necessary for reasons of financial stability; this being an essential condition for the application of the derogation Art. 107(3)(b) TFEU allowing for state aid to be granted is that the bank failure without aid would result in an ‘exceptional disturbance to the economy.’ This arrangement implies that the European Commission relies on the assessment of the ECB/national supervisors or central banks for the understanding of the market position of the undertaking under examination.

Outlining of modes of co-operation allows authorities to have clearly defined roles in the procedure. It can also facilitate exchange of information, but also show in which areas co-operation is most desirable and increase the transparency of the process. This seems to be most required with regard to complex assessments of the bank’s capital position and the role of the entity in the financial system more broadly, i.e. its financial stability and systemic relevance.

8. Conclusions

80. The Great Financial Crisis in a number of jurisdictions has reframed the aims of financial regulation, and therefore also the terms of engagement between different financial regulators and competition authorities. The much-discussed trade-off between financial stability and competition has become more nuanced, by recognition that optimal implementation of policies can be ensured through institutional design, that is, a clear repartitioning of responsibilities and appropriate procedures. It is now well recognised that both policies -notwithstanding different tools and enforcement mechanisms- are both to serve the same objectives of establishing efficient banking markets that serve consumers. At the same time, even as financial stability concerns became paramount, new competition policy-related competences have been granted to supervisors. Co-operation and engagement between regulators and competition authorities are in this context a precondition for policy coherence and consistency.

81. The complex post-crisis architecture of financial oversight with numerous new authorities as well as new regulatory objectives raises concerns from the perspective of high barriers to entry and differentiated impact of regulation on market actors. The challenge of ensuring contestability of financial markets as well as a level playing field

¹⁰⁸ European Commission, 2013b

remains a key concern from a competition point of view in emerging areas such as FinTech, growing challenges such as consumer protection as well as established fields such as competition policy enforcement. Different forms of engagement allowing competition authorities to play their role are required, including through the build-up of sector-specific expertise, advocacy and participation in the rule-making processes through policy engagement.

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