

# **Abuse Regulation and the Financial Sector in the Wake of the Financial Crisis**

Lessons to Be Learned on Application of Competition  
Rules to Financial Institutions and Its Interplay with  
Regulation and Supervision of the Financial Sector

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## **ASCOLA PAPER**

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#### **I. Introduction**

It is customary to break the analysis of the financial sector into three sub-sectors, namely banking, insurance and capital markets. This exercise, which serves the analytical purpose of identifying the three major types of financial institutions and the corresponding financial services they provide – in spite of the growing interpenetration of such areas - is equally useful for the purpose of reviewing the application of competition rules to the financial sector.

The importance of the financial sector can hardly be overstated as recent events have once again reminded us. The financial crisis that broke out in 2007, first in the US triggered by subprime mortgage sector but rapidly extending to Europe, where its effects were compounded by real estate bubbles and excessive debt levels in certain Member States, leading somehow to a vicious circle of banking crises and sovereign debt crises that have threatened the existence itself of the Euro area, proved once again the economic importance of the financial sector. In fact, the 2007-2009 financial crisis has, to some extent, lasted to this day as a consecutive economic crisis, involving, in the EU, a crisis of sovereign debt markets intertwined with the crisis of the banking sector<sup>1</sup> and, in the US, at least in a first stage, slow growth, and, with the return to higher levels of growth, persistent high levels of unemployment.

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<sup>1</sup> See on these intertwined crises (banking crisis and sovereign debt crisis), Nicolas Véron, *The Challenges of Europe's Fourfold Union*, Bruegel Policy Contribution, August 2012.

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Although it would be beyond the scope of this article to delve into the causes of the financial crisis, there is one that is worth recalling as it connects directly to our topic: deficient and inadequate regulation and supervision of the financial sector – largely due to an insufficient perception of risks incurred by financial institutions - combined with a selective application of competition rules.

While the most dramatic stages of the banking crisis appear to be over and the need for remedial intervention, most notably under the shape of State aid, is rapidly subsiding, it comes as no surprise that the European Commission’s present focus is on preventing a repetition of the financial crisis. Part of the effort involves the introduction of a new regulatory framework<sup>2</sup>, but reinforcing or at least rethinking antitrust enforcement is an equally necessary step towards prevention.<sup>3</sup> The link between the financial crisis and antitrust infringements in the financial sector accounts for the renewed impetus of antitrust enforcement in the field of financial services. Antitrust enforcement is a much needed supplement to the new regulatory framework if one is truly committed – as the Commission seems to be – to bring about a radical change in the way the financial sector has operated so far.

Considering that lack of competition in the financial sector and antitrust infringements were part of the events leading up to the 2007 financial crisis, one may legitimately question whether it is all a question of more forceful antitrust enforcement. The alternative would be to argue that the matter is not simply one of quantity but also of

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<sup>2</sup> The new framework for the financial sector enacted in the wake of the financial crisis includes a plethora of regulatory instruments covering new capital rules for the banking sector, solvency rules for insurers, regulatory frameworks for previously unregulated sectors such as credit rating agencies and hedge fund managers, a clearing obligation for OTC derivatives, rules for short-selling and credit default swaps, bank resolution framework, improved investor and depositor protection, etc. On these points see Faull & Nikpay, *The EU Law of Competition*, third edition, Oxford, OUP, 2014 [henceforth ‘Faull & Nikpay (2014)’], pp. 1516-1517. In the course of this paper we shall be occasionally referring to the previous second edition of this work, which will be designated simply as ‘Faull & Nikpay (2007)’.

<sup>3</sup> See in general on the connections between the economic and financial crisis and competition law and policy, Luis Silva Morais, “Editorial - Competition Law and Policy in Times of Crisis and Economic Change”, *The Competition Law Review*, Volume 9 Issue 2 pp 81-90, July, 2013. See also the Articles included in the thematic file of the aforementioned number of *The Competition Law Review* on the economic crisis and competition law.

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quality, as the existing legal framework may not be sufficient to address all the challenges posed by the financial sector. The case in point is the need for reinforced interaction between regulation and supervision of the financial sector and the enforcement of competition rules applied to the latter. This paper will argue in favour of the second option.

While the general topic of this paper is the application of EU competition rules – most notably Articles 101 and 102 TFEU<sup>4</sup> – to the financial sector, it will nevertheless focus on the prohibition of abuse of dominance and its interaction with the regulation and supervision of the financial sector. Our purpose is to provide a general, albeit succinct, overview of the recent evolution of competition rules in the financial sector as it has emerged from a number of high-profile cases concerning the banking, insurance and capital market sub-sectors. This overview will serve as the background against which we propose to reappraise abuse regulation in the financial sector through a combined perspective of the applicable competition rules and the existing regulatory framework.

The paper is structured as follows: section II will set the stage by providing a general account of the evolution of the financial sector up to 2007 and in the aftermath of the financial crisis that broke out that year. In section III we will focus on the application of competition law in the three financial sub-sectors, namely (i) banking, (ii) insurance and (iii) capital markets. Section IV will narrow the focus to abuse regulation and serve as an introduction to section V, which will introduce a broader

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<sup>4</sup> With few exceptions, we will exclude any reference to State aid and to merger control (see, in general, on state aid in this field, K. Lannoo, K., C. Napoli, and A. Sutton (2010), Centre for European Policy Studies, *Bank State Aid in the Financial Crisis: Fragmentation or Level Playing Field?*, CEPS Task Force Report, October, 2010, CEPS, Brussels). As to State aid, the relevance of the subject in recent years combined with its exceptional nature (the recurrence of State aid in recent years should not detract from its singular position amidst competition policy) commends the subject as a topic on its own merit. As for merger control, we have chosen to exclude the topic so as to keep the paper within a reasonable size. See, anyhow, on this matter, J. Fingleton, (2009), *Competition Policy in Troubled Times*, Working paper, 20 January 2009, available at [www.ofc.gov.uk/shared\\_ofc/speeches/2009/spe0109.pdf](http://www.ofc.gov.uk/shared_ofc/speeches/2009/spe0109.pdf). ; OECD (2010), *Competition, Concentration and Stability in the Banking Sector*, Policy Roundtables: Competition Law & Policy.

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perspective comprising the interaction between competition rules and the reform of the regulatory framework of the financial sector. Section VI will summarise our main findings.

## **II. Specific features of the financial sector**

The primary function of financial markets consists in coordinating the demand and supply of capital while ensuring the efficient allocation of the latter amidst the economic agents. In order to bring together the demand and supply of capital, financial markets fulfil a threefold task: adjusting quantity, time and risk expectations between supply and demand of capital<sup>5</sup>.

The centrality of the financial system for the well-functioning of the economy as a whole highlights the importance of taking into due consideration a number of recurrent features. These are equally important when it comes to the development of an adequate regulatory policy and the enforcement of competition rules in the field of financial markets. Such features include the persistence of numerous asymmetries of information (in particular concerning risks); interconnectedness of market players, particularly in the banking subsector characterized by a unique feature associated with the high level of transactions between banks, relying on each other, *e.g.*, to access liquidity; dependence of certain transactions upon existing infrastructures (platforms); occasionally high switching costs; and complexity and abstraction of both financial products and financial transactions<sup>6</sup>.

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<sup>5</sup> On these points, see Monopolkommission, *Hauptgutachten XX: Eine Wettbewerbsordnung für die Finanzmärkte*, 2012/2013, p. 513, § 1333 (available online at: [http://www.monopolkommission.de/images/PDF/HG/HG20/HG\\_XX\\_gesamt.pdf](http://www.monopolkommission.de/images/PDF/HG/HG20/HG_XX_gesamt.pdf)).

<sup>6</sup> *Idem*, p 525, § 1375.

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The importance of the financial system is usually presented in connection with the idea of systemic relevance<sup>7</sup>, a concept that has taken the centre-stage with the 2007 financial crisis and which presides over the on-going regulatory reform of the sector. Although the concept has been prone to excessive use, the fact that a given financial institution enjoys systemic relevance usually means that were it to be forced to exit the market on financial reasons there would be serious consequences – a systemic risk, to be more precise – for the financial system as whole. Interestingly enough, systemic relevance does not rely on size, complexity or market power alone, but rather on the interconnectedness between financial institutions and between these and consumers<sup>8</sup>. This latter feature explains the concerns around possible spill-over effects that may be associated with the market exit on financial grounds of a systemic relevant institution. Although in itself a somewhat abstract concept, systemic relevance manifests itself in three concerns which reflect the above referred recurrent features: too big to fail; too connected to fail; and too many to fail<sup>9</sup>.

In fact, it is the feature of interconnectedness that explains the circumstance that, in different circumstances, participants in financial markets can be both wholesalers and retailers, customers and suppliers: banks not only provide payment systems, but are also large-scale users of such systems; insurance companies and pension funds are amidst the users of stock exchanges and other securities markets, while supplying financial products that include securities; banks resort to insurance and insurance companies invest in banks and resort to financial services. Financial conglomerates are perhaps the most straightforward example of the multiple roles of market participants, with the different departments within a conglomerate providing services to each other and also to the public<sup>10</sup>.

The economic relevance of the financial sector signifies that the possibility of systemic risk is not to be taken lightly and that financial stability becomes a pressing

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<sup>7</sup> On this point, see the thorough analysis undertaken by the Monopolkommission at pp 528 ff, particularly in the context of the perverse incentives provided by State support (both at the national and EU level) to ailing financial institutions.

<sup>8</sup> *Idem*, pp 528-529.

<sup>9</sup> *Idem*, p 530.

<sup>10</sup> On this point, see Faull & Nikpay (2014), pp 1513-1514.

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concern including for competition law, at least to the extent that the application of competition law does not become a source of financial instability. To what extent concerns over systemic relevance have not dictated an excessively shy approach to competition law in the financial sector is a different subject...

The financial crisis which broke out in 2007 had profound implications in the financial services sector, more obviously on the regulatory framework but also on competition policy. It is true that, as far as the application of competition rules was concerned, the Commission resisted the temptation to relax or even suspend the enforcement of competition rules,<sup>11</sup> arguing instead that the full application of antitrust, merger control and State aid were a prerequisite for a return to stability while maintaining the functioning of the internal market and avoiding a massive wave of capital flight<sup>12</sup>. At the same time, explicit and implicit assurances were given to ailing financial institutions, most notably under the shape of state aid, which tended to perpetuate the kind of moral hazard that accounted for reckless financial behaviour<sup>13</sup>.

### **III. Competition law and the financial sector**

Perhaps counter-intuitively, it has been only recently that the economic importance of the financial sector has been matched by a more vigorous application of competition law. Against the Commission’s claim that competition rules were fully applicable to the banking and insurance industry<sup>14</sup>, representatives of the financial sector clinged to the idea that the financial sector was somehow unique and thus could not be fully exposed to competition rules<sup>15</sup>.

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<sup>11</sup> See, again, on this, Luis Silva Morais, “Editorial - Competition Law and Policy in Times of Crisis and Economic Change”, *The Competition Law Review*, cit.

<sup>12</sup> See ‘Competition Policy and the Crisis – the Commission’s approach to banking and beyond’, Commissioner Nelie Kroes, *Commission Competition Policy Newsletter* (2010) No 1.

<sup>13</sup> The point is developed in depth by the Monopolkommission in its *Hauptgutachten XX*, pp. 531 ff.

<sup>14</sup> See the *Report on Competition Policy 1972* (vol II), points 51-57.

<sup>15</sup> The underlying argument being that allowing competition to its fullest extent could be ‘ruinous’ to the financial sector and hence dangerous to the economic system. See, for example, the arguments

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As the Court would confirm in the *Züchner* case<sup>16</sup>, the argument that financial services should enjoy a special status under competition rules was without support in the Treaty. The case in point started as a referral for a preliminary ruling originating from a German court concerning a general service charge levied on transfers of capital and other payments between banks in the Common Market contrary to Arts. 101 and 102 TFEU (ex 85 and 86 EEC). The defendant, a German bank, raised the initial objection that the competition rules in the Treaty did not apply, to a large extent, to banks. The Court expressly rebutted such a claim, arguing that there was nothing in the Treaty that supported the argument that banks were subtracted from the scope of the competition rules.

In *Verband der Sachversicherer*<sup>17</sup>, the Court extended the same conclusion to the insurance sector, stating that “*where the Treaty intended to remove certain activities from the ambit of competition rules it made an express derogation to that effect*”. Since no such provisions existed, the Court concluded that “*the Community competition system, as set out in Articles [101] and [102] of the [TFEU] and in the provisions of Regulation No [1/2003], applies without restriction to the insurance industry*”.

Nevertheless, the financial sector has not been evenly subject to the application of competition rules. The initial focus of the Commission was the banking and insurance sector, with capital markets being a much more recent target of competition enforcement. The different pace of integration in each of these sub-sectors may well account for the benign neglect that capital markets enjoyed until recently. Within the three sub-sectors, banking has merited a particular attention from the Commission on account of the industry’s specific features and economic significance. Both elements are closely connected since banking plays a vital role in monetary creation – on

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presented by the applicant (an insurance company) in Case 45/85, *Verband der Sachversicherer v. Commission* [1987] ECR 00405.

<sup>16</sup> Case 172/80, *Gerhard Züchner v. Bayerische Vereinsbank A.G.* [1981] ECR 02021.

<sup>17</sup> Case 45/85, *Verband der Sachversicherer v. Commission* [1987] ECR 00405

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account of the ‘multiplier effect’ associated with its lending activity – and in intermediating between those who seek to invest and those who need to borrow.

Taking into account the importance of banking amidst the other financial services, it is somewhat surprising that competition rules applying to the industry – and indeed to all financial services – are no different from general competition law. And yet, as the recent financial crisis has again reminded us, the sheer importance of banking for consumers, undertakings and the economy as a whole would recommend early detection of anticompetitive conduct. The negative impact of anticompetitive conduct does not confine itself to the short-term impact on consumer welfare as it may well have a more detrimental medium-term impact as tolerance towards antitrust infringements may well be read as a (perverse) incentive to engage in financial risky conduct.

It is nevertheless telling that in some instances competition rules are complemented by regulation, as the former alone are deemed insufficient to deal with competition issues arising in the financial sector. The proposal for a Regulation on interchange fees for card-based payment transactions<sup>18</sup> and the proposed revision of the Insurance Mediation Directive<sup>19</sup> are two examples of regulatory interventions aimed at complementing the application of competition rules to the financial sector. We shall be referring to the former in more detail in the section on capital markets.

**a) Banking: payment systems (wholesale and retail) and other issues**

The financial services comprised in the banking sector include not only the banking industry but also payment services. The former includes three types of financial services, namely retail banking (for individual consumers), wholesale banking (for financial institutions) and corporate banking (for companies). Payment services

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<sup>18</sup> See <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0048+0+DOC+XML+V0//EN>

<sup>19</sup> See <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52012PC0360&from=EN>

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include inter-bank payment systems, corporate and retail payments and payment cards.

The enforcement of competition law in the banking sub-sector has so far targeted two main areas: hardcore restrictions amounting to price-fixing agreements<sup>20</sup>; and the rules of payment systems, which include pricing issues (pricing rules) and non-pricing issues (namely access). While the Commission’s interest in the former barely needs any justification since price-fixing agreements are traditionally considered one of the most serious antitrust infringements<sup>21</sup>, the relevance of the latter calls for some words of explanation as it will remain our main focus of attention.

Electronic payment systems involve massive flows of money and have become indispensable in modern banking to the extent that participation in banking markets is not possible without access to at least some electronic payment systems<sup>22</sup>. The relevance of payment systems for consumers, undertakings and the economy as a whole is, thus, evident, particularly as cash-payments give way to an ever-increasing use of electronic payments<sup>23</sup>. Electronic payment systems are supported by a technical infrastructure and, from a competition law perspective, rules governing the relation between the intervening parties (banks) that may very well amount to agreements between undertakings. The subject of such rules covers pricing issues, along with a

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<sup>20</sup> On these points, see Faull & Nikpay (2014), pp 1518 ff. Cartelistic price agreements outside payment systems are not particularly challenging in terms of competition law analysis and, for that reason, will remain largely outside the scope of our analysis. The Commission has addressed such issues on three occasions (in chronological order): the first involved an agreement (the ‘Helsinki Agreement’) entered into between several French banks that were also members of an organisation called Groupement des Cartes Bancaires, and Eurocheque International with the purpose of fostering the use of payment cards in France (see joined Cases T-39/92 and 40/92, *Groupement des Cartes Bancaires ‘CB’ and Europay International v Commission* [1994] ECR II-49); the second concerned an agreement involving several German banks for the purpose of the commissions charged on certain currency-exchange operations (see joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP, *Dresdner Bank AG and others v Commission* [2006] ECR II-03567); and the third was a cartel comprised of several Austrian banks which concerned numerous aspects of banking activity (see joined Cases T-259/02 to T-264/02 and T-271/02, *Raffaelsen Zentralbank Österreich AG and others v Commission* [2006] ECR II-05169).

<sup>21</sup> For a wider discussion of the topic albeit from the US perspective, Louis Kaplow, *Competition Policy and Price Fixing*, Princeton, Princeton University Press, 2013.

<sup>22</sup> See Faull & Nikpay (2014), p 1519.

<sup>23</sup> For statistical data on the subject, see CapGemini/RBS, *World Payments Report 2014*

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number of other issues that may raise competitive concerns such as exchange of information, conditions of access, obligations of the parties, cooperation, etc.<sup>24</sup>

The range of pricing issues in the context of payment systems involves not only prices paid by end-users of the system – consumers and merchants – but also ‘wholesale’ prices (fees) arranged between system participants. While the former involves pricing and access issues at the retail level – namely the so-called ‘no-discrimination rule’ –, the latter concerns interbank fees or interchange fees arranged in the context of four-party payment systems<sup>25</sup>. The latter’s rise to prominence with the *Visa II*<sup>26</sup> and *MasterCard*<sup>27</sup> decisions justifies that we start with wholesale pricing issues before addressing retail pricing (and access) issues.

#### **i) Payment systems: wholesale pricing issues**

The setting-up and functioning of four-party systems requires that banks agree on a number of issues pertaining access to the system, technical requirements, operational rules and fees charged to end-users. All these issues are of potential concern to competition law under Articles 101 and 102 TFEU since they may involve an agreement between competitors having as its object or effect a restriction of competition<sup>28</sup> or the adoption of conduct that amounts to an abuse of dominance<sup>29</sup>. Since interbank fees – usually referred under the acronym MIFs (Multilateral

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<sup>24</sup> See, in more detail, the Communication from the Commission “Sector Inquiry under Article 17 of Regulation (EC) No 1/2003 on retail banking (Final Report)” – COM(2007) 33 final.

<sup>25</sup> In a four-party system the debtor/cardholder/payer and the creditor/merchant/payee are normally customers of different banks, respectively the issuing bank and the acquiring bank, whilst in a three-party system the debtor and the creditor are usually customers of the same bank. On these points, see European Commission, ‘Survey on merchant’s costs of processing cash and card payments’, Final Results – March 2015, p 13, available online at: <[http://ec.europa.eu/competition/sectors/financial\\_services/dgcomp\\_final\\_report\\_en.pdf](http://ec.europa.eu/competition/sectors/financial_services/dgcomp_final_report_en.pdf)>

<sup>26</sup> Decision of 24 July 2002 (OJ 2002 L318/17).

<sup>27</sup> Decision of 19 December 2007 (OJ 2009 C264/8).

<sup>28</sup> See also on potentially problematic agreements inherent to the organizations that manage several payment cards systems, comparing – within certain limits – such organizations to joint ventures (albeit with no joint control given the high number of participants), Luís Silva Morais, *Joint Ventures and EU Competition Law*, Hart Publishing, 2013, Chapter 3.

<sup>29</sup> Competition issues are less likely to arise in the context of three-party systems since the latter do not involve competing undertakings in the banking market. However, the possibility of infringements under Article 102 TFEU is not to be ruled out.

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Interchange Fees)<sup>30</sup> – are agreed between the two banks participating in the completion of the payment transaction banks, in particular, have been the source of careful scrutiny by the Commission.

Four-party payment systems are not only the ones that give rise to a wider number of concerns from a competition law perspective, but also those that of greater relevance in Europe. In fact, the issue has been taken up by the Commission in two landmark decisions: *Visa II*<sup>31</sup> and *MasterCard*<sup>32</sup>. Although the former has been superseded by the latter, it is nevertheless useful to address both decisions with the aim of capturing the Commission’s stance on competitive issues arising from four-party systems.

In *Visa II* the Commission had the opportunity to fully articulate the reasons why it sided with those in the economic literature<sup>33</sup> that suspect the anticompetitive impact of MIFs. This meant that, in the Commission’s view, interchange fees were tantamount to a price and MIF’s were nothing less than collective price-fixing agreements that determined the most important input cost for acquiring banks. In fact, the Commission referred to MIF as “*an agreement between competitors, which restricts the freedom of banks individually to decide their own pricing policies, and distorts the conditions of competition on the Visa issuing and acquiring markets*” (§ 66). Although the Commission fell short of openly qualifying MIF as price cartels, it did not concede to the argument that the card payment system was in fact a production joint-venture or a necessary ancillary restriction for the functioning of the Visa system as the defendants had argued<sup>34</sup>.

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<sup>30</sup> For an in-depth account of the economic implications of MIFs, see European Commission, ‘Survey on merchant’s costs of processing cash and card payments’ (March 2015).

<sup>31</sup> Decision of 24 July 2002 (OJ 2002 L318/17).

<sup>32</sup> Decision of 19 December 2007 (OJ 2009 C264/8).

<sup>33</sup> See A. S. Frankel and A. L. Shampine, ‘The Economic Effects of Interchange Fees’ (2006) 73 Antitrust LJ 627. For additional references, see Faull & Nikpay (2014), p 1525, fn 45.

<sup>34</sup> Faull & Nikpay (2007), pp 1321-1322 refer to certain fluctuations in the Commission’s position vis-à-vis the analysis of MIFs under Article 101(3) TFEU (ex 81(3) EC) distinguishing four main phases: individual exemptions under ex 81(3) EC with no, or very few, conditions on indispensability grounds (the alternative to default MIFs being a plethora of bilateral agreements between banks); statement of objections concerning the MIFs in the eurocheque system (1990), complemented by a supplementary statement of objections (1992); statement of objections sent to Visa and Mastercard linking non-discrimination rules with MIFs, but nevertheless allowing their exemption of MIFs in four-party card systems on the basis of certain conditions, primarily the exclusion of non-discrimination rules (1999); and the statement of objections concerning Visa MIF (2000), followed by the *Visa II* decision (2002).

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The duopolistic nature of the market for international card payment systems, the fact that interchange fees were the source of considerable revenues for issuing banks, as well as the undisclosed level of the such fees were additional elements that reinforced the Commission’s concerns. Such concerns were expressed in the following passage of the *Visa II* decision:

(80) Prior to the modifications described above in section 3.2.3 the Visa MIF was considered by the Commission (in its Supplementary Statement of Objections of 29 September 2000) as not satisfying in particular the second condition of Article 81(3), notably because the Visa EU Board was free to set the MIF at any level it wished, independently of the costs of the specific services provided by issuing banks to the benefit of merchants. Furthermore, because the MIF was a business secret, those who in the end pay the MIF, that is the merchants, could not know its level and therefore could therefore not effectively negotiate the merchant fee. The Commission found that there were upward pressures on the level of the previous MIF, in particular, the fact that most banks were members of both Visa and the competing Eurocard/Mastercard system, and therefore were likely to issue whichever of the two brands of card had the higher interchange level and brought them the most revenue. The possibility of merchants ceasing to accept Visa cards if the Visa MIF was too high was not sufficiently strong to constrain this upward pressure, as long as the MIF did not reach exceedingly high levels. This was due to the fact that once a merchant already accepts Visa cards, when faced with an increase in the MIF, and consequently an increase in merchant fees, recovering this cost increase through a very small price increase for all goods sold will normally lead to a smaller fall in turnover than ceasing to accept Visa cards. There was thus a possibility that the previous MIF could have been set at a revenue-maximising, output-limiting level, rather than the level maximising the output of the Visa system. These concerns have been mitigated by the revised Visa MIF, as explained below.” [emphasis added]

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The Commission decided, nevertheless, to exempt the MIF under ex 81(3) EC upon the commitment by Visa to address three issues: gradual reduction of the MIFs for various types of consumer cards; capping of MIFs at the level of costs for transaction processing, payment guarantee and free funding period; and disclosure of MIFs levels and the relative percentage of the three cost categories.

With the *MasterCard* decision the Commission addressed MIFs applicable to cross-border payment card transactions with MasterCard and Maestro consumer debit and credit cards in the European Economic Area (EEA). The decision found that MasterCard MIFs violated Article 101 TFEU in that they restricted competition between acquiring banks and inflated the cost of card acceptance by retailers without leading to proven efficiencies under Article 101(3) TFEU. The decision was affirmed on appeal both by the General Court<sup>35</sup> and by the Court of Justice<sup>36</sup>.

The *MasterCard* decision does not depart from the anticompetitive appraisal of MIFs already anticipated in the *Visa II* decision, but rather elaborates extensively on two issues that were only partially addressed in the latter. The first was the question whether MIFs were to be considered a restriction of competition by object or by effect. The second issue was the hypothetical characterisation of MIFs as ancillary restraints justified by objective necessity.

On the first question, the Commission came close to qualifying MIFs as restrictions by object based on the fact that “*MIF typically determines a floor for the price which merchants must accept for accepting payments with cards*” and hence “*an indication that MasterCard’s MIF may by its very nature have the potential of fixing prices*” (§ 405)<sup>37</sup>. The Commission further added that:

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<sup>35</sup> Case T-111/08, *MasterCard Inc. and MasterCard Europe v Commission* [2012] nyr.

<sup>36</sup> Case C-382/12 P, *MasterCard Inc. and MasterCard Europe v Commission* [2014] nyr.

<sup>37</sup> It would seem that the General Court tended to concur with the Commission’s view of MIF as restrictions by object, although abstaining from explicitly stating it; see §§ 139-141 of Case T-111/08, where the Court pursued this line of reasoning.

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“MasterCard’s Intra-EEA fallback interchange fees are conceived as “default MIF”. They apply “by default/as fallback” to a POS [*point of sale*] payment card transaction, that is only if a transaction is not yet subject to a bilateral agreement between the issuer and the acquirer concerned on the level of a interchange fee. In practice, however, Intra-EEA fallback interchange fees have been applied to virtually all-cross border payments with MasterCard payment cards and as well as to domestic transactions in [*deleted business secret*] EEA Member States. For these transactions, MasterCard’s MIF has the consequence of fixing to a large part the fees charged by acquirers to merchants. Moreover, MasterCard’s MIF also acts like a minimum price recommendation for transactions on a domestic level. By agreeing on specific interchange fees bilaterally or multilaterally member banks may take the Intra-EEA fallback interchange fees into account as minimum starting point.” (§ 405)

However, the Commission shunned an explicit qualification of the MasterCard MIF as restrictions by object, considering instead that, although such a concern could not be discarded<sup>38</sup>, it was enough to consider that the MIF in point had the effect of appreciably restricting and distorting competition to the detriment of merchants in the acquiring markets (§ 407)<sup>39</sup>.

As to the second question – whether MIFs were objectively necessary for the operation of the MasterCard’s scheme –, the Commission rejected MIF’s as objectively necessary default transaction settlement procedures arguing that the problems raise by MasterCard could be addressed by other less restrictive means, namely:

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<sup>38</sup> “The concern cannot therefore be discarded that the MasterCard MIF may have as its object the restriction of price determination through competition.” (§ 406).

<sup>39</sup> This issue was revisited in the proceedings against Visa Europe, which followed the expiry of an exemption decision in December 2007 and the adoption of the *MasterCard* Decision. Visa Europe adopted a initial set of commitments made binding by Decision C(2010) 8760 final of 8 October 2010 followed by an additional set of commitments made binding by Decision C(2014) 1199 final of 16 February 2014. In both Decisions the Commission referred to the statement of objections in which it expressed concerns that the MIFs have as their object and effect the restriction of competition in the acquiring markets to the detriment of merchants and, indirectly, their customers.

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“a network rule that is less restrictive of competition than MasterCard’s current solution that, by default, a certain level of interchange fees applies. The alternative solution would be a rule that imposes a prohibition on ex post pricing on the banks in the absence of a bilateral agreement between them. The rule would oblige the creditor bank to accept any payment validly entered into the system by a debtor bank while prohibiting each bank from charging the other bank in the absence of a bilateral agreement on the level of such charges. That solution to “protect” acquirers if issuers should indeed abuse their power under an HACR [*the Honour All Cards Rule*] is less restrictive of competition than a MIF as it does not set a minimum price level on either side of the scheme” (§ 554)

MasterCard’s arguments were again rejected on appeal, where the General Court not only seconded the Commission’s view as to the existence of less restrictive alternatives to the MIFs as default transaction procedures<sup>40</sup>, but also added that:

“It must be observed that the existence of such revenues and benefits [*generated by credit and debit cards*] makes it unlikely that, without a MIF, an appreciable proportion of banks would cease or significantly reduce their MasterCard card issuing business or would change the terms of issue to such an extent as to be likely to result in holders of those cards favouring other forms of payment or turning to cards issued under three-party schemes, which might affect the viability of the MasterCard system.” (§ 109)

## **ii) Payment systems: retail pricing and access issues**

Restrictions of access to payment systems constitute a significant barrier to entry on banking markets given the former’s economic importance. As we have seen, such barrier may affect interbank payments at the wholesale level, but it may equally

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<sup>40</sup> See §§ 94-99 of Case T-111/08.

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interfere with payments on behalf of customers and thus affect consumers and merchants<sup>41</sup>.

Pricing and access issues are intertwined to the extent that restrictions of access may consist on the adoption of specific rules and criteria that limit the possibility of accessing the payment system, but may also comprise rules on pricing and fees that produce the same restrictive effect. An example of a barrier to entry involving the adoption of internal rules is the so-called “no-discrimination rule” (NDR) which inhibits merchants adhering to a specific card from collecting a ‘surcharge’ to consumers for paying with that card rather than opting for other means of payment<sup>42</sup>. The Commission has tackled with access-related issues in a number of decisions.

In *SWIFT/La Poste*<sup>43</sup> the issue at stake was the rejection of *La Poste*’s application to SWIFT and the fact that the latter reserved full access to its services only to its shareholding members. SWIFT is a cooperative owned by over 2,000 banks which operates a specific international telecommunication network offering reliable and secure data communication and processing to financial institutions located all over the world. The Commission argued that SWIFT was an essential facility on account of its monopolistic position in the market for international payment message transfer networks and that, by denying membership to an entity, it would in effect exclude it from the international transfer market. The Commission further took the view that SWIFT abused its dominant position on two accounts: by endorsing unjustified membership criteria to the extent that the latter did not relate to the applicants involvement in payment systems; and by applying its membership criteria, to a number of undertakings which included *La Poste*, in a discriminatory way. The Commission suspended action against SWIFT following the latter’s compromise to grant full access to any institution in the EU which provides cross-border payment

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<sup>41</sup> On these points, see Faull & Nikpay (2014), pp 1532 ff.

<sup>42</sup> In some cases the NDR also excludes the possibility of offering discounts for payments in cash. The Commission addressed the issue in the *Visa I* decision (Decision of 7 August 2001, [2001] OJ L293/24), where it cleared a number of non-pricing rules along with the NDR. It should be added that, the recognition of restrictive effects associated with NDR notwithstanding, the Commission’s negative clearance was granted on the grounds of lack of appreciable effect. On these points see Faull & Nikpay (2007), pp 1316-1317.

<sup>43</sup> Case IV/36.120 – *La Poste/SWIFT*.

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services to the public and fulfills the criteria laid down by the European Monetary Institute (or any successor organisation) for admission to domestic payment systems.

In another case – *Visa International and Visa Europe*<sup>44</sup> – the issue at stake was the refusal from Visa to take the company Morgan Stanley Dean Witter (MSDW) as a member of Visa Europe. It so happened that MSDW operated in the US a card-payment system called “Discover” which was in competition with the Visa system. Although MSDW withdrew the complaint following an agreement stricken with Visa Europe, the Commission decided nevertheless to impose a fine on Visa Europe and Visa International on account of the exclusion of MSDW from the UK acquiring market for a period of six-and-a-half years. On appeal from Visa Europe and Visa International the General Court<sup>45</sup> ruled in favour of the Commission, dismissing the applicants’ argument that MSDW could have entered the acquiring market by concluding a ‘fronting arrangement’ with a Visa member<sup>46</sup>.

In *Groupements des Cartes Bancaires*<sup>47</sup>, a case concerning barriers to entry to a card-related market created by the eponymous French group, the Commission was confronted with a complex fee structure arranged by the member banks to the GCB – though actually controlled by a few players corresponding to the major French banks that *de facto* controlled GCB – that had the effect of excluding new entrants to the French card payment market. The fact that the new fee structure was particularly detrimental to banks owned by major retailing chains and foreign banks – the main competitors of member banks to the GCB – fuelled the suspicion of anticompetitive

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<sup>44</sup> Case COMP/D1/37.860 *Morgan Stanley/Visa International/Visa Europe*.

<sup>45</sup> Case T-461/07, *Visa Europe and Visa International v Commission* [2011] ECR II-01729.

<sup>46</sup> A ‘fronting agreement’ refers “to circumstances in which the Visa member, the fronting partner, has withdrawn from the merchant acquiring business and acts as a mere interface between Visa and a third-party acquirer, also described as the *de facto* acquirer, which takes responsibility for virtually all elements of an acquiring service and bears the risk with respect to the merchant’s revenue stream” (§ 24). The Commission dismissed this possibility as being an inefficient alternative for an international bank such as Morgan Stanley (§ 24), a view that was supported by the Court’s findings (§§ 79 ff).

<sup>47</sup> *Groupement des Cartes Bancaires* has thus been involved in three separate cases: a first case involved the Helsinki Agreement (see *supra* fn ); a second case corresponding to ; and the

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conduct, which was later confirmed by the General Court as constituting a restriction by object<sup>48</sup>.

Finally, the *European Payments Council*<sup>49</sup> case concerned a standardisation process for payments over the Internet (e-payments) undertaken by the European Payments Council (EPC)<sup>50</sup>. The Commission was particularly concerned that the standardisation process could involve, *inter alia*, the exclusion of new entrants and payment providers who are not controlled by a bank and thus limit market entry or innovation. The investigation was closed following EPC’s announcement that it would desist from developing the ongoing standardisation initiative as well as any other that would have the same object or effect.

#### **b) Insurance**

The place of insurance amidst the other financial sub-sectors is somewhat special. Being primarily an instrument of risk management, insurance involves considerable cash flows generated by premiums paid by clients which can be invested and used to subsidise premiums charged to clients<sup>51</sup>.

Unlike banking and capital markets, exchange of information between insurers is a traditional trait of the industry and one that may serve a number of legitimate purposes, such as calculating risk associated with a particular type of event, settling claims that involve more than one insurer or covering large risks. The need and usefulness for such collaborative effort has been recognised by competition law thus making the distinction between legitimate collaboration and unlawful collusion occasionally hard.

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<sup>48</sup> Case T-491/07, *Groupement des Cartes Bancaires v Commission* [2012] nyr. GCB’s appeal to Court of Justice is currently pending.

<sup>49</sup> Case COMP 39.876 – *Payment Network/EPC*.

<sup>50</sup> The EPC is the decision-making and coordination body of the European banking industry in relation to payments.

<sup>51</sup> On the topic see Faull & Nikpay (2014), pp 1565 ff.

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Insurance is also a special case when it comes to market definition. Instead of relying on the traditional criterion that departs from demand substitution, market definition takes into consideration the uniqueness of each risk insured and takes supply substitution as its point of departure.

While the first antitrust case dates from 1984<sup>52</sup>, there have been very few formal antitrust decisions, with most involving the wholesale and corporate insurance sectors (as opposed to retail insurance for individuals). Part of the reason for this is that insurance markets – especially retail insurance relying heavily on local networks of insurance mediators – remain largely national, which makes national competition authorities the best placed authorities to address possible competition issues.

On the other hand, insurance is one of the few economic sectors to benefit from a sector-specific block exemption Regulation. The version currently in force is Commission Regulation (EU) No 267/2010 of 24 March 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector<sup>53</sup>. The block exemption Regulation has played an important role in clarifying whether certainly widely spread practices in the insurance sector that would normally amount to unlawful restrictions of competitions may be acceptable in the insurance sector.

We will restrict our attention to cases involving antitrust infringements in the insurance sector, which have come to address a number of practices. *Verband der Sachversicherer*<sup>54</sup> and *Lloyd’s*<sup>55</sup> were both about agreements on prices: in the first case, a non-binding recommendation issued by the German Property Insurers

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<sup>52</sup> Case COMP/M6883 – *Cana Life/Irish Life* and Case COMP/M.6521 – *Talanx International/Meiji Yasuda Life Insurance/Warta*.

<sup>53</sup> OJ 2010 L83/1. The current block exemption Regulation incorporates the insights gathered during the sector inquiry in business insurance, conducted by the Commission in 2007 (see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Sector Inquiry under Article 17 of Regulation (EC) No 1/2003 on business insurance (Final Report) {SEC(2007) 1231). A new study on co(re)insurance pools and on ad-hoc co(re)insurance agreements on the subscription market (July 2014) is to serve as basis for the future review of Regulation (EU) No 267/2010.

<sup>54</sup> *Fire Insurance*, OJ 1985 L35/20; Case 45/86, *Verband der Sachversicherer* [1987] ECR 405.

<sup>55</sup> *Lloyd’s Underwriter’s Association and The Institute of London Underwriters*, OJ 1993 L4/26.

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Association concerning increases in commercial premiums for industrial fire and consequential loss insurance; in the second case, pricing agreements concerning marine hull insurance.

Exchange of information is particularly relevant in the insurance sector, especially in what concerns statistical data conveyed by compilations, tables and studies. Although the issue is nowadays covered by the block exemption Regulation (Articles 2-4), two cases predating the original block exemption Regulation have been cleared by the Commission on account of the specific features of the insurance sector: *Nuovo CEGAM*<sup>56</sup> and *Concordato Incendio*<sup>57</sup>.

Co-insurance and co-reinsurance pools<sup>58</sup> are matters covered by the current block exemption Regulation (Articles 5-7) as well. According to the definition provided in the same Regulation:

“4. ‘co-insurance pools’ means groups set up by insurance undertakings either directly or through brokers or authorised agents, with the exception of ad-hoc co-insurance agreements on the subscription market, whereby a certain part of a given risk is covered by a lead insurer and the remaining part of the risk is covered by follow insurers who are invited to cover that remainder, which:

- (a) agree to underwrite, in the name and for the account of all the participants, the insurance of a specified risk category; or
- (b) entrust the underwriting and management of the insurance of a specified risk category, in their name and on their behalf, to one of the insurance undertakings, to a common broker or to a common body set up for this purpose;

5. ‘co-reinsurance pools’ means groups set up by insurance undertakings either directly or through broker or authorised agents, possibly with the assistance of one or

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<sup>56</sup> OJ 1984 L99/29.

<sup>57</sup> OJ 1990 L15/25. This case also dealt with standard policy clauses, which are model insurance policies widely used in the industry and used to be covered by the block exemption Regulation up until the current version. On this point, see Faull & Nikpay (2014), pp 1573-1574.

<sup>58</sup> The topic is partially addressed in the new study on co(re)insurance pools and on ad-hoc co(re)insurance agreements on the subscription market mentioned in fn 49.

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more reinsurance undertakings, with the exception of ad-hoc co-reinsurance agreements on the subscription market, whereby a certain part of a given risk is covered by a lead insurer and the remaining part of this risk is covered by follow insurers who are then invited to cover that remainder in order to:

- (a) reinsure mutually all or part of their liabilities in respect of a specified risk category; incidentally accept, in the name and on behalf of all the participants, the reinsurance of the same category of risks;”

The Commission has had the opportunity to deal with these issues on several occasions, namely in the *TEKO*<sup>59</sup> and *Assurpot*<sup>60</sup> decisions – both decided prior to the first block exemption Regulation – and, more recently, in the *P&I Clubs*<sup>61</sup> decision.

A final word on the insurance sector to mention the only decision to date concerning insurance distribution. The investigation was triggered by a complaint concerning a network of agreements between German insurance companies and tied agents and which included exclusivity provisions and non-compete clauses. Contrary to the allegations of the complainant, the Commission did not find that such agreements produced a cumulative foreclosure effect, namely because of the declining importance of tied agents as a distribution channel for insurance. As a result, the complaint was withdrawn.

### **c) Capital markets**

Capital markets are arguably the financial area where the effort to build a single market has progressed at a slower pace<sup>62</sup>. For this reason, the application of

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<sup>59</sup> OJ 1990 L13/34.

<sup>60</sup> OJ 1992 L37/16.

<sup>61</sup> OJ 1999 L125/12. There is a prior decision involving the same entity (OJ 1985 L376/2). For details on these rather unique cases – P&I clubs are mutual non-profit associations which provide their members with insurance for their contractual third party liability –, see Faull & Nikpay (2014), pp 1575-1577.

<sup>62</sup> On this point, see Monopolkommission, *Hauptgutachten XX*, pp 523-525.

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competition rules should be viewed in tandem with the enactment of a regulatory framework aimed at creating an integrated capital market at the European level<sup>63</sup>. The complementary and interdependent nature of regulation and competition law was summarised by former Vice-President Almunia:

“The regulatory measures taken by the European Commission will shed more light into the way financial markets operate and will prevent a dangerous accumulation of risk. But regulation alone is not enough. Whereas regulation tackles broad structural market failures, you need competition policy to tackle the harmful behaviour of individual market participants. Competition control should ensure that the actual evolution of the market does not lead to structures that harm users and legitimate market participants.”<sup>64</sup>

The interest of DG Competition for capital market dates back to the 2006 to the “Issues Paper on competition in securities trading and post-trading”<sup>65</sup> and has been considerably – and understandably – enhanced by the events following the 2007 financial crisis.

The focus of the Commission’s antitrust enforcement in the area of capital markets has been on financial infrastructure, particularly the trading, clearing and settlement of securities (equities, bonds and derivatives)<sup>66</sup>.

Although *Clearstream*<sup>67</sup> was not the first case involving capital markets handled by the Commission<sup>68</sup>, it was nevertheless the first formal decision adopted in the area of securities markets. The case revolved around Clearstream Banking AG, the German central securities depository (CSD), and its parent company Clearstream International

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<sup>63</sup> For background information on the regulation of the European capital market, see Rüdiger Veil (ed.), *Europäisches Kapitalmarktrecht*, second edition, Tübingen, Mohr Siebeck, 2014.

<sup>64</sup> Speech delivered at CASS Business School, London, on 16 May 2011 and available online at: <[http://europa.eu/rapid/press-release\\_SPEECH-11-337\\_en.htm?locale=en](http://europa.eu/rapid/press-release_SPEECH-11-337_en.htm?locale=en)>

<sup>65</sup> DG Comp, 24 May 2006, available online at: <[http://ec.europa.eu/competition/sectors/financial\\_services/securities\\_trading.pdf](http://ec.europa.eu/competition/sectors/financial_services/securities_trading.pdf)>

<sup>66</sup> On these points see Faull & Nikpay (2014), pp 1550 ff.

<sup>67</sup> Decision COM(2004) 1958 final of 2 June 2004.

<sup>68</sup> For references to previous cases, most of them ending with comfort letter being issued, see Faull & Nikpay (2007), pp 1332-1333.

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SA. The Commission found that Clearstream was dominant – in fact, a monopolist – in the in the post-transaction processing of securities issued under German law, a contention that was later challenged albeit unsuccessfully before the General Court<sup>69</sup>. Furthermore, the Commission identified two types of *abuse*: the refusal to supply certain clearing and settlement services (primary clearing and settlement services for registered shares) combined with discriminatory behaviour towards one of its customers; and application of discriminatory prices for primary clearing and settlement services to the same customer. The General Court also confirmed both points on the appeal lodged by Clearstream<sup>70</sup>.

Interestingly enough, the decision issued by the Commission came at a point when the infringements had already ceased. Nevertheless, the Commission found it necessary to adopt a decision that would provide guidance for undertakings active in the areas of clearing and settlement. For this reason, anyhow, the Commission decided not to impose fines taking into account the absence of previous cases dealing with clearing and settlement and the fact that these were evolving areas, particularly as regards cross-border transactions<sup>71</sup>.

More recent cases include investigations covering a number of issues in the sector of financial services data, such as access to information or services, standard setting, IP rights and interoperability between different products or services. The first of such cases concerned *Standard & Poor’s*<sup>72</sup> (S&P) practices of requesting licensing fees from financial institutions located in the EU for the use of US International Securities Identification Numbers (ISINs) and certain descriptive elements attached to the ISINs as a key identifier in order to access value-added financial information provided by information services providers.

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<sup>69</sup> See Case T-301/04, *Clearstream Banking AG and Clearstream International SA v Commission* [2009] ECR II-03135, §§ 47-74.

<sup>70</sup> Case T-301/04, §§ 97 ff.

<sup>71</sup> On these points, see Faull & Nikpay (2014), p 1554.

<sup>72</sup> Decision of 15 November 2001, C(2011) 8209 final in Case COMP/39.592 *Standard & Poor’s*.

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The Commission was concerned that S&P, being the only national numbering agency (NNA) for US ISINs, may have charged unfairly high prices<sup>73</sup> for their use and distribution in Europe, and thus abused its dominant position.

The investigation with a commitment decision that made binding the commitments offered by S&P as a response to the Commission's concerns. These commitments included abolishing the licensing fees that banks pay for the use of US ISINs within the European Economic Area (EEA). Moreover, for direct users, information services providers (ISPs) and service bureaus (i.e. outsourced data management service providers), S&P committed to distribute the US ISIN record separately from other added value information, on a daily basis for USD 15.000 per year, to be adjusted each year in line with inflation<sup>74</sup>.

A second case that also deals with competition issues arising from the financial services data is *Reuters Instruments Codes (RICs)*<sup>75</sup>. RICs are codes that identify securities, used by financial institutions to retrieve data from Thomson Reuters' real-time datafeeds. In this case the company Thomson Reuters, along with its subsidiaries and the companies were investigated on account of alleged practices of prohibiting the mapping of RICs with identifiers of alternative providers, thereby creating substantial barriers for customers that want to switch to a different provider of a consolidated real-time datafeed. The Commission was concerned with the possibility that Thomson Reuters' could be abusing its dominant position in the market for consolidated real-time datafeeds through its licensing practices (infringement of article 102 of the TFEU). These concerns arose from the fact that Thomson Reuters was prohibiting customers to use RICs for retrieving data from alternative data providers. Thomson Reuters prohibited its customers from cross-referencing RICs to identifiers used by other suppliers for sourcing their datafeeds (so-called 'mapping')

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<sup>73</sup> In particular with regard to the international organisation of standardisation (ISO) cost recovery principle.

<sup>74</sup> As rightly pointed in Faull & Nikpay (2014), p 1555, the idea of facilitating competition through the provision of financial input information at reasonable prices (informational efficiencies) was a pivotal element for triggering the intervention of the Commission.

<sup>75</sup> Commission Decision of 20 December 2012, C(2012) 9635 final in Case COMP/39.654 *Reuters Instruments Codes (RICs)*.

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and it prevented third parties from creating and maintaining mapping tables on behalf of customers. In the Commission view, these practices might create substantial barriers for customers to switch from Thomson Reuters to alternative providers for consolidated data feeds.

The investigation ended with the European Commission adopting a decision that rendered legally binding the commitments offered by Thomson Reuters to create a new license ("ERL") allowing customers, for a monthly fee, to use RICs for data sourced from Thomson Reuters' competitors (which somehow fits into the recent pattern of the Commission to conclude article 102 TFEU cases with commitments in detriment of further pursuing the cases towards final infringement decisions that may provide key precedents in this field).

A line of cases that feeds directly into the sort of financial disarray and lack of transparency that stood at the root of the 2007 financial crisis, are those concerning trading derivatives and financial services over the counter (OTC). Along with proposed improvements to the regulation of credit default swaps (CDS) and other OTC derivatives in the framework of the European market infrastructure regulation (EMIR) and proposals to revise the Markets in Financial Instruments Directive (MiFID) to further enhance transparency of OTC markets, the Commission complemented these regulatory measures with enforcement actions in the field of competition law. Two antitrust investigations concerning the CDS market<sup>76</sup> were opened by the Commission with the purpose of ascertaining whether banks infringed the EU competition rules by engaging in certain practices and behaviour which could have restrained the ability of service providers in this market to offer innovative products to customers and/or to enter into competition with established players.

The first antitrust investigation concerns 16 investment banks and Markit (the leading financial company in the CDS market), and involves the allegation that the former, while dealers in the CDS market, gave most of the pricing, indices and other essential daily data only to Markit. Although such behaviour may qualify either as collusion

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<sup>76</sup> See Faull & Nikpay (2014), p 1557.

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under Article 101(1) TFEU or as an abuse of a possible collective dominance under Article 102 TFEU, it may in any case have the effect of foreclosing the access to the valuable raw data by other information service providers.

The second antitrust investigation targets nine investment banks that are also dealers in the CDS market and ICE Clear Europe, the leading clearing house for the CDS market. These agreements were concluded at the time of the sale, by the dealers, of a company called “The Clearing Corporation” to ICE and they contain a number of clauses (such as preferential fees and profit sharing arrangements) which might create an incentive for the banks to use only ICE as a clearing house. These agreements may infringe Article 101 TFEU to the extent that they have as their effect that other clearing houses have difficulties successfully entering the market and that other CDS players have no real choice where to clear their transactions. An infringement of Article 102 TFEU is not ruled out by the Commission if proven that the fee structures used by ICE gives an unfair advantage to the nine banks, by discriminating against other CDS dealers.

#### **IV. Abuse regulation in the financial sector**

We now turn our attention more selectively to the application of Article 102 TFEU to the financial sector (regardless of abuse problems already covered in the preceding sections in connection with the key three sub-sectors of the financial system). The prohibition of the abuse of dominance has acquired some notoriety in the segment of payment systems (both in pricing and non-pricing issues) and in the segment of capital markets.

Our present goal is not to review the cases involving the application of Article 102 TFEU, but rather to place them in context of the regulatory policy pursued by the Commission in the financial sector, also considering that in the wake of the financial crisis a number of key financial sector players may have greatly enhanced their

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market power (with the corresponding risks in terms of excessive market power and the inherent potential for abuse that derives from that). In fact, as we have already argued in the context of the discussion about possible shifts in competition law and policy induced by the financial crisis,<sup>77</sup> a possible paradox involving competition law and policy in the context of economic crisis has to do with the fact that the dynamic and volatility of the evolution of the economy and of the financial sector in the more recent years has led to the emergence of some winning entities *vis a vis* other players that exited the market or were constrained to drastically reduce their activity. Accordingly, a restricted group of some market players (particularly in the financial sector) have presented exceptional results (record results in some cases over the latest three years) that are bound to indicate a significant reduction of competitive pressure and a correlated reinforcement of market power, which requires enhanced attention on the part of Competition Authorities and corresponding strategies to monitor this reinforced market power and its possible effects.

On the basis of this relative paradox (arising from the interplay of competition law and policy and the economic crisis), we have to some extent expressed our dissent with the more optimistic view of John Fingleton in this domain,<sup>78</sup> according to which the economic crisis may promote vigorous long-term growth in productivity, eliminating inefficient firms that would have survived in periods of expansion and thus strengthening the production base and promoting innovation in subsequent periods. While this vision of ‘creative destruction’ may be true in some cases, given the seriousness and persistence of the economic crisis, there are, conversely, serious immediate risks to competition arising from the significant reinforcement of market power of some players (since the players eliminated or gravely constrained in a situation of protracted crisis are not inevitably the least efficient) – requiring as such enhanced attention and adequate monitoring strategies.

Along with pricing issues (interchange fees), the Commission has also invoked the application of Article 102 TFEU to issues relating to abusive contractual clauses or

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<sup>77</sup> See Luis Silva Morais, “Editorial - Competition Law and Policy in Times of Crisis and Economic Change”, *The Competition Law Review*, cit., p. 89.

<sup>78</sup> See John Fingleton, *Competition Policy in Troubled Times* – OFT, 20 Jan. 2009, cit.

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business in *MasterCard*<sup>79</sup> and *Visa*<sup>80</sup>. However, it is in the field of access-related issues that the application of Article 102 TFEU is more conspicuous as referred in cases such as *SWIFT/La Poste*<sup>81</sup>, *Visa International and Visa Europe*<sup>82</sup> and *European Payments Council*<sup>83</sup>, all of them involving refusal of access and the latter concerning a standardisation process of e-payments. We have also identified a number of cases involving the application of Article 102 TFEU in the field of capital markets relating to the financial infrastructure, and in particular to financial data (*Clearstream*<sup>84</sup>, *Standard & Poor's*<sup>85</sup>, *Reuters*<sup>86</sup>).

In fact, as regards financial data a pattern of abusive conduct seems to emerge periodically with a more recent case involving again Standard and Poor's. We refer here to a Statement of Objections that the Commission sent to S&P on November 16, 2009, concerning its potential abuse of dominant position. S&P as the sole-appointed National Numbering Agency for U.S. securities, financial institutions, and information service providers charges, as aforementioned in connection with a preceding case, a licensing fee for the use of International Securities Identification Numbers (ISINs). The charges were excessive and thus constituted an infringement of Article 102 of the TFEU, according to the European Commission. However, S&P agreed to stop charging licensing fees to banks for the use of ISINs within the European Economic Area and the Commission rendered the commitment legally binding, following its somehow debatable recent track-record of closing article 102 TFEU cases with commitment decisions<sup>87</sup> (an understandable practice up to a certain extent, given the difficulty of producing conclusive evidence in these abuse cases, but, in the medium term, an enforcement practice that may weaken a coherent policy of key precedents in this field).

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<sup>79</sup> Case COMP/40.049 – *MasterCard II*.

<sup>80</sup> Case COMP/39.398 – *Visa MIF*.

<sup>81</sup> Case IV/36.120 – *La Poste/SWIFT*.

<sup>82</sup> Case COMP/D1/37.860 *Morgan Stanley/Visa International/Visa Europe*.

<sup>83</sup> Case COMP/39.876 – *Payment Network / EPC*.

<sup>84</sup> Decision COM(2004) 1958 final of 2 June 2004

<sup>85</sup> Decision of 15 November 2001, C(2011) 8209 final in Case COMP/39.592 *Standard & Poor's*

<sup>86</sup> Commission Decision of 20 December 2012, C(2012) 9635 final in Case COMP/39.654 *Reuters Instruments Codes (RICs)*.

<sup>87</sup> See on this commitment, OJ C 31, 4.2.2012, p.8-9.

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At the same, interchange fees was the only segment where the Commission has pushed forward with a proposal of proposal of a Regulation on Interchange Fees for Card-based Payment Transactions<sup>88</sup> which has only recently been adopted by the European Parliament<sup>89</sup> and is now entering its ending stage before final approval. As a justification for resorting to regulation the Commission referred to the successful example provided by other jurisdictions (US and Australia) that opted for regulatory intervention, coupled with the insufficient results provided by the stand-alone application of competition law. In the latter regard, it was lamented that:

“In spite of this, the European cards market remains fragmented and interchange fees vary widely including for Visa and MasterCard (cf. below), often at a higher level than the one accepted by the Commission for Visa and MasterCard cross border transactions. Due to its nature, competition enforcement cannot address the current imbalances and obstacles for a level playing field to emerge in a comprehensive and timely way. A Regulation is therefore necessary.”<sup>90</sup>

The two core provisions of the proposed Regulation are Articles 3 and 4 which, respectively, set a cap of 0,2% (debit cards) and 0,3% (credit cards) per transaction on the applicable interchange fees. This solution can be described as a middle way approach to interchange fees, one that avoids both inaction and abolishing interchange fees altogether. The latter solution has been adopted in some countries, namely the US, with ambivalent results: on the one hand, banks have sought the losses suffered by increasing other fees or introducing new ones; on the other, the hope that merchants would pass on to consumers a percentage of their gains has not materialised at all (something that may fundamentally call into question the specific

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<sup>88</sup> Available online at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52013PC0550&from=EN>>

<sup>89</sup> Available online at: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0048+0+DOC+XML+V0//EN>>

<sup>90</sup> European Commission, *Memo – Payment Services Directive and Interchange Fees Regulation: Frequently Asked Questions*, Brussels, 24 July 2013, available online at: <[http://europa.eu/rapid/press-release\\_MEMO-13-719\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-719_en.htm)>

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regulatory intervention as an option favoured vis a vis ad hoc application of competition rules)<sup>91</sup>.

Regulatory intervention seems thus to be reserved for those areas that have displayed competition problems for a longer period, as attested by the duration of the investigations conducted on Visa’s and MasterCard’s interchange fees (however debatable the regulatory options ultimately adopted may be). In these areas experience has shown that competition alone may be insufficient to overcome the issues raised by the Commission on account of several factors: the duopolistic nature of the market, which causes upward pressure on MIF levels<sup>92</sup>; the nature of payment systems as two-sided markets<sup>93</sup>, which also contributes to keeping MIFs levels high; and the self-reinforcing impact of network effects associated with payment systems. This does not mean that interchange fees are necessarily a competition concern, but merely that competition alone may not suffice to overcome the situation if one considers that there is room for concern.

In other areas the rapid pace of innovation advises against regulatory intervention. This is, to an extent, the case of the market for payment systems as exemplified by the introduction of new payment over the internet methods<sup>94</sup> (take the example of Paypal) and even new payment systems (as illustrated by the introduction of Bitcoin) recommends caution. For these cases antitrust intervention based on Article 102 TFEU seems not only preferable but also sufficient.

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<sup>91</sup> See Monopolkommission, *Hauptgutachten XX*, p 728.

<sup>92</sup> This concern was expressed by the Commission in §§ 467-470 of the *MasterCard* decision and corresponds to the economic view that is rather critical of the competitive impact of MIFs; see Faull & Nikpay (2014), pp 1525-1526.

<sup>93</sup> “Two-sided (or more generally multi-sided) markets are *roughly* defined as markets in which one or several platforms enable interactions between end-users, and try to get the two (or multiple) sides “on board” by appropriately charging each side. That is, platforms court each side while attempting to make, or at least not lose, money overall” (Jean-Charles Rochet/Jean Tirole, “Two-Sided Markets: an Overview”, March 12, 2014, p 2, available online at: <[http://web.mit.edu/14.271/www/rochet\\_tirole.pdf](http://web.mit.edu/14.271/www/rochet_tirole.pdf)>).

<sup>94</sup> On this point see Thomas F. Dappe/Anje Stobbe/Patricia Wruuck, ‘Die Zukunft des (mobile) Zahlungsverkehr: Banken im Wettbewerb mit neuen Internet-Dienstleistern’, DB Research, Aktuelle Themen Globale Finanzmärkte, 5 February 2013, available online at: <[http://www.dbresearch.de/PROD/DBR\\_INTERNET\\_DE-PROD/PROD000000000301018.pdf](http://www.dbresearch.de/PROD/DBR_INTERNET_DE-PROD/PROD000000000301018.pdf)>

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The application of competition law to capital markets is relatively recent and, for that reason, regulatory intervention would be ill-advised as there is no evidence of any persistent competitive issue that antitrust enforcement may not address (mainly through repression of abuse practices that may unduly restrict market entry of certain operators)

#### **V. A broader perspective**

If we try to put into perspective the key developments covered in the previous sections and the context of enforcement of competition rules to financial institutions in the wake of the international financial crisis, combined with the movement of reform of regulation and supervision of the financial sector (that gained momentum at the G20 level after the 2008 Lehmann Brothers crisis), a few overall considerations stand out.

To some extent, the intensity or pro-activity of enforcement of competition law to the financial sector is not inherently good or bad in the aftermath of the international financial crisis. The decisive factor will consist on finding the right combination between, on the one hand, the completion of a structural and comprehensive reform of the regulation and supervision of the financial sector - which is far from being finalised although there is the risk that the momentum for reform may be fading away after the more acute stage of the crisis has been overcome – and, on the other hand, a suitable level of enforcement of competition rules to all the sub-sectors of the financial system (something that is being apparently pursued at EU level with growing awareness of potential competition law problems in the sub-sector of capital markets, as evidenced in the preceding sections, in connection with competition issues experimented in the other sub-sectors that are largely interdependent between themselves).

An option that seems to be excluded, at least at the level of the EU, is the one towards a more relaxed competition policy and enforcement in the field of the financial sector

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and in the aftermath of the international financial crisis. The comprehensive framework that was quickly put together after the Lehman Brothers crisis, at the end of 2008, in terms of a more expedite and flexible state aid control to financial institutions in distress, cannot be read as a fundamental relaxation of competition policy. In fact, we have even maintained – and we re-state that overall assessment –<sup>95</sup> that, in a somehow paradoxical manner, in a period of hypothetical or supposed retreat of competition law and policy and of competition authorities, the EU Competition Authority (Commission) has been playing a decisive role on the incoming evolutions and prospects of the financial sector through its enhanced intervention in the scrutiny of multiple state aid packages to financial institutions in distress (under the specific framework largely relying on soft law that was created to the attribution of state aid to the financial sector in the context of the banking crisis).

Conversely, and in thesis, this may even imply risks or problems of a new type of overlap between the competition authority and Regulatory and Supervisory Authorities of the financial sector, somehow epitomized by statements of the former EU Competition Commissioner Neelie Kroes, referring a necessary intervention of the Commission, in its role of competition authority, in the area of financial stability and, as such, performing tasks that Regulatory and Supervisory Authorities of the financial sector failed to perform in a satisfactory manner.

Those risks of overlap between the Commission, as competition authority, and the Regulatory and Supervisory Authorities of the financial sector need not to materialize in the new stage we are currently entering of gradual phasing-out of state aid to financial institutions and a corresponding growing emphasis on restructuring plans of these institutions<sup>96</sup> (that gain to be assessed in a context of close cooperation between

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<sup>95</sup> See again Luis Silva Morais, “Editorial - Competition Law and Policy in Times of Crisis and Economic Change”, *The Competition Law Review*, cit.

<sup>96</sup> See on this new stage of possible phasing-out of state aid to financial institutions in the EU the articles comprehended in the special thematic file on competition law and the economic crisis published in *The Competition Law Review*, Volume 9 Issue 2 pp 81-90, July, 2013, cit., particularly the one authored by Gianni Lo Schiavo. This article justly emphasizes what we may designate as a still incomplete exit strategy from the temporary framework of massive public financial assistance of 2008-2010, and addresses three crucial and critical challenges for state aid control policy in the financial sector, comprehending (i) the interplay with a crisis management and resolution regime at EU level (in

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competition authorities and Regulatory and Supervisory Authorities of the financial sector)

In terms of dealing with market power or excessive market power of financial institutions (leading to potential situations of abuse or other related competition law distortions) the new enhanced policies and instruments of prudential control of Regulatory and Supervisory Authorities of the financial sector – arising from the Post-Larosière reforms in the EU and from Basel III, and oriented towards preventing the financial institutions from incurring in excessive risks, deficiently perceived or accounted for in the pre-crisis environment – can play a decisive role in avoiding market distortions related with such market power. That kind of more proactive prudential intervention may decisively contribute to prevent banks from riding on implicit and explicit guarantees (*e.g.*, deposit insurance, bailout policies) and engaging in unfair competition by undertaking excessive risks.<sup>97</sup>

Within such fields of action, reciprocal consultation or even coordination of monitoring and supervisory practices between Regulatory and Supervisory Authorities of the financial sector and Competition Authorities may decisively contribute to ensure an adequate level playing field and harness a sound degree of effective competition in the key sub-sectors of the financial system (removing or severely constraining operators that tend to distort or even destabilize the sensitive *equilibria* on which the financial sector is based).

The new important areas of enforcement of competition law that go beyond traditional infringement procedures and involve market studies and sector inquiries can also provide an important field for an active and productive interplay between financial regulators and supervisors and competition authorities (combining

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construction since 2012), (ii) a desirable fine-tuning of procedural aspects for aids to the banking sector and (iii) the establishment of an adequate and balanced content for a set of Restructuring Aid Guidelines applicable only to the financial sector (also bearing in mind, in general, the 2012 State Aid Modernization Communication).

<sup>97</sup> See on this, *e.g.*, Iftekhar Hasan, Matej Marinc, *Should Competition Policy in Banking Be Amended During Crisis? Lessons from the EU*, Bank of Finland Research Discussion Paper N.º 7/2013 (although we strongly dissent from the perspective these authors develop in favor of a more lenient competition policy during financial crises).

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prudential parameters and competition law considerations to conceive incentives and measures of reorganization of the key sub-sectors of the financial system that may foster financial stability as a whole and ensure the prevention of financial imbalances, as well as enhancing the overall levels of efficiency to consumers of financial services).

This potential area of interplay in the context of market studies or sector inquiries combined with new powers and forms of prudential intervention on the part of financial regulators and supervisors can also lead to better overall frameworks for dealing with specific operators that operate in niche areas on which the overall scrutiny of financial institutions is heavily dependent and which hold themselves significant market power, benefiting from extremely high degrees of concentration. This may happen, *e.g.*, as regards external auditors of financial institutions or rating agencies which have performed poorly in the recent financial crisis (and whose actions could be more effectively scrutinised and monitored from a double angle of competition law enforcement and regulation and supervision of the financial sector).

## **VI. Conclusion**

The economic importance of the financial sector is being increasingly matched by a comprehensive application of competition rules. Antitrust enforcement serves not only the purpose of repressing restrictions of competition but also that of addressing some of the failures that lay behind the 2007 financial crisis. Rather than being adversarial to financial stability, antitrust enforcement can have a decisive contribute the stability of the financial system by addressing at a sufficiently early stage anticompetitive conduct.

Accordingly, the financial sector would benefit from a closer cooperation between regulatory and supervisory policy and antitrust enforcement, provided that regulatory intervention is carefully crafted and designed. At some level, prudential considerations (within financial supervision) oriented towards financial stability as a

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whole and the prevention of financial imbalances of financial institutions may be adequately combined with competition law patterns of safeguarding of effective competition in these markets (putting an end to more traditional views of prudential supervision as somehow adverse to a more proactive enforcement of competition law to financial institutions that could supposedly create additional burdens and market pressures to these entities, thus enhancing the risk of financial imbalances or tensions).

A scenario of closer interaction as above contemplated may have arguably been the case of interchange fees, where regulation took into account the experience of other jurisdictions and the protracted enforcement of competition law against the two market players that control the market for financial systems (although the final balance of the regulatory intervention in the EU may be to some extent debatable, given the proven difficulties of ensuring, in the context of such regulatory intervention, the actual passing on of the economic margins withdrawn from financial institutions involved in payment schemes to consumers instead of its virtual concentration on merchants, with possible negative side-effects of limiting financial innovation and safety patterns on the part of the involved financial institutions).

The track-record of competition law in the three financial sub-sectors is somewhat mixed. While competition law alone was insufficient to solve malfunctions in the banking sector which called for the intervention of regulation, it has produced satisfactory results in the field of insurance which have consolidated into the different versions of the block exemption Regulation. As for capital markets, competition law seems to be still in its early age but, one would venture, with the prospect of maturing into a solid contribution to the stability of the financial sector.