Competition Law and the European Financial Services Sector: An Overview of Recent Developments

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The European Commission has recently been channelling more resources to the enforcement of competition in the financial sector in an effort to combat the financial industry’s continuing fragmentation. Contrary to the Commission, the European Court of Justice has taken an early interest in the application of antitrust rules to the activities of financial intermediaries. The purpose of this article is to provide an overview of the Commission’s recent financial sector-related competition enforcement decisions and initiatives and to examine some of the hitherto jurisprudence of the Court in this area. By way of comparison, and with a view to drawing some insights on the likely outcome of a financial services-related challenge of the concurrent application of antitrust and sector-specific regulation, this article will also briefly examine the situation across the Atlantic where a recent decision of the Supreme Court of the United States has emphatically rejected the applicability of antitrust rules to the financial services sector.

Introduction

Market integration and the enforcement of competition rules go hand in hand: their common objective is to open-up markets, with the ultimate aim of delivering efficiency gains and, ultimately, consumer welfare. Whilst the interplay between market integration and competition law is clear,3 it was only relatively recently that the European Commission, responsible for the application of competition rules within the European Union (EU), started taking its role more seriously in the financial services field. In line with the conclusions and the approach set out in its Green and White Papers on Financial Services Policy,4 the Commission has been showing

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2 A comparison of the respective aims of internal market and competition policy reveals their close interaction: the former seeks to guarantee a level playing field by making it possible for market players to compete on their own merits without being protected by artificial barriers whilst the latter seeks to ensure that the same market players will not behave in a manner that hampers the good functioning of the Internal Market.

3 ‘Efficient capital markets are essential for reaching the Lisbon strategy objectives of growth and employment. As competition can contribute to promoting this efficiency, the application of competition rules to this technically complex but economically very significant sector is a priority’ (European Commission, Report on Competition Policy 2005, 51).

signs of an unprecedented vigour in the enforcement of Articles 81 and 82 TEC (formerly Articles 85 and 86 TEC), applying these to an ever increasing number of financial sector-related cases.

The European executive’s non-systematic approach to the use of antitrust as a financial market integration tool is more attributable to the different policy priorities of previous Commissions than it is to a lack of Community-level case law in point: starting in the early 1980s, the European Court of Justice (ECJ) gradually developed a consistent jurisprudence that was to put to rest the idea that regulated financial services intermediaries, such as credit institutions and insurance service providers, might be insulated from Community competition law. The promotion and strengthening of competition in the financial services sector has nevertheless been pursued as much through the Commission’s and the ECJ’s competition-related decisions and judgments, respectively, as through a series of other, antitrust inspired legislative and non-legislative measures. This aspect of the EU’s interest in competition law and policy is *inter alia* exemplified in a recent Directive on mergers and acquisitions in the financial services sector,5 adopted further to financial sector-related anti-competitive behaviours in several European jurisdictions,6 as well as in the enactment of the Payment Services Directive 7 and, more recently, in the launch, in January 2008, of the first stage of the implementation of the Single Euro Payments Area (SEPA).8

This article seeks to provide an overview of the application of the Community competition policy in the financial services field, plotting the European institutions’ approach to the use of competition law as a financial market integration tool. This article is divided in three sections: the first section examines the Commission’s sector inquiries and recent, financial sector-specific enforcement action; the second section provides an overview of some of the ECJ’s competition-related jurisprudence in the field of financial services; finally, the third section inquires into some of the recent jurisprudence of the Supreme Court of the United States on the legitimacy of the concurrent application of sector-specific and competition rules, comparing the Supreme Court’s approach to that of the Commission and the ECJ. We conclude that

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6 The circumstances surrounding the recent takeover by ABN/Amro of Banca Antonveneta, illustrate the difficulties facing Member State banks interested in acquiring a controlling stake in credit institutions established elsewhere in the EU and the Community legal framework’s failure to encourage cross-border transactions in this field. For an account of the Banca Antonveneta case and of its lessons see L. Curran and F. Turitto, ‘Antonveneta: the challenge for cross-border acquisitions of banks in the EU’ (2006) 21(2) Butterworths Journal of International Banking and Financial Law, 79. Difficulties also arose in Poland from its Government’s demand that Italian bank UniCredit divests its shares in Polish bank BPH, despite the Commission’s earlier authorisation of UniCredit’s acquisition of BPH as part of its takeover of German bank HVB, a violation of Article 21 of the EU Merger Regulation, giving the Commission exclusive powers to take decisions on mergers of a Community dimension.


8 The aim of the SEPA project (which is strongly supported by the European Central Bank and the Commission) is to harness the full potential of the benefits of a single currency through the creation, by 2010, of an integrated market for payment services where competition is effective and where (i) no distinction is made between domestic and cross-border credit transfers, (ii) consumers can use credit or debit payments cards across the euro-zone subject to the same conditions as domestically.
the recent Commission decisions and initiatives suggest a clear preference for a much more pro-active role in the enforcement of competition rules in the financial sector, which is why in-house counsels and company directors alike need to stay vigilant, constantly reviewing their business practices so as to correct failures and forestall enforcement action.

The Commission’s sector inquiries and enforcement of competition rules in the financial services field

Faced with evidence of price rigidity and low customer mobility, suggesting sub-optimal levels of competition, the Commission launched two parallel sector inquiries on 13 June 2005, one into cross-border competition in the EU retail banking market and another in connection with the EU business insurance market. After publishing two interim reports the Commission released its final report on retail banking on 31 January 2007. Using as a starting point a number of symptoms (inter alia, the sustained growth in EU banks’ profitability) pointing towards a lack of sufficiently robust competition in this particular sector, the report identified several factors tentatively confirming the existence of open competition issues, including high entry barriers, sustained market fragmentation along national borders and a high degree of concentration among payment cards’ issuers and acquirers. At the same time, the report found evidence of a pronounced convergence in the pricing policies of banks within individual Member States, suggesting less than perfect competition. Published on 25 September 2007, several months after the publication of an interim report in the same matter, the Commission’s final report on business insurance also detected a number of potential competition issues in this sector, including the alignment of insurance premia when coinsurance and reinsurance are purchased concurrently and pervasive, long-term contract market practices leading to cumulative foreclosure, as well as evidence of potential insurance brokerage market failures.

While the sector inquiries into retail banking and business insurance are key indicators of the Commission’s growing interest in the strengthening of competition in the financial services markets and in a more systematic analysis of their competition-related vulnerabilities, its commitment to making the application of EU antitrust rules to the financial services sector one of its main priorities is, above all, reflected in its recent antitrust enforcement record. Of the financial sector-related decisions adopted more recently, the ones standing out the most are those involving (i)

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9 The legal basis for the Commission’s initiative was Article 17(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, 1).
Clearstream Banking AG (‘Clearstream’),\textsuperscript{14} (ii) MasterCard Europe/International (‘Mastercard’),\textsuperscript{15} (iii) Groupement des Cartes Bancaires (France) (‘GCB’)\textsuperscript{16} and (iv) the VISA association (‘VISA’).\textsuperscript{17}

A cursory examination of the enforcement cases in question suggests that, notwithstanding the intensification of the Commission’s interest in the application of antitrust rules on the activities of financial service providers, its enforcement action remains focused on retail payment cards and clearing and settlement services: of the four enforcement cases cited above, three (namely, those involving MasterCard, GCB and VISA) related to the infringement of EU competition rules – notably, Article 81 TEC – by retail payment card issuers. Specifically, MasterCard’s multilateral interchange fee (‘MIF’) for cross-border transactions within the European Economic Area (EEA) involving the use of MasterCard and Maestro debit and consumer credit cards were deemed to be inconsistent with Article 81 TEC as they inflated the cost of card acceptance by retailers without contributing to technical or economic progress or benefiting consumers; GCB was found to have infringed Article 81 TEC through a pricing agreement, the purpose of which was to share out the French market for the issuance of CB cards, restrict competition from new entrants desirous of offering CB cards at a lower price and hamper technical innovation by limiting the issuance of ‘new generation’ CB cards; while VISA was found to have violated the same Treaty provision by excluding, without objective justification, Morgan Stanley from its VISA network by means of an internal rule entitling its board of directors to refuse membership to any applicant deemed to be a competitor. The Clearstream case, on the other hand, was neither a payment card systems nor an Article 81 infringement, arising, instead, from Clearstream’s refusal to supply Euroclear Bank SA with cross-border clearing and settlement services over registered shares issued under German law and from the former’s application of discriminatory prices to Euroclear’s detriment.

An examination of the preceding cases also reveals an ominous keenness on the part of the Commission to impose (or to threaten with imposing) heavy fines on financial institutions found guilty of infringing competition rules. This point is illustrated, in particular, from the Commission decisions in the MasterCard and VISA cases: in the former, the Commission decision required MasterCard to withdraw its MIF within six months or face daily penalty payments of no less that 3.5% of its\textsuperscript{18} daily global turnover while, in the latter, the Commission fined VISA EUR 10.2 million for its exclusion of Morgan Stanley from its network,\textsuperscript{18} despite Morgan Stanley’s withdrawal of its complaint after its admission into VISA’s network in September 2006.\textsuperscript{18} At the same time, the Commission’s reluctance to impose a fine on Clearstream on account of the lack of ECJ jurisprudence or EU-wide studies on the competition analysis of clearing and settlement confirms the utility of sector inquiries similar to those already undertaken in the retail bank and business insurance sectors and underlines the urgency of further analysis being conducted in the

\textsuperscript{14} Case COMP/38096.
\textsuperscript{15} Case COMP/34579.
\textsuperscript{16} Case COMP/38606.
\textsuperscript{17} Case COMP/37860.
\textsuperscript{18} The Commission imposed no fine on GCB only because its measures were notified to it in December 2002 with a view to obtaining a decision on their compatibility with competition rules (a possibility which no longer exists since the entry of force of Regulation 1/2003).
The Court’s antitrust jurisprudence in the financial services field

The applicability of the Treaty competition-related prohibitions to financial institutions has not always been taken for granted. It was only after a series of judgments in the 1980’s and 1990’s set aside direct or indirect challenges to the coverage of financial services by Community competition rules that the position was clarified (although, as the final section of this article will suggest, future challenges, inspired from developments across the Atlantic, cannot be excluded).

The applicability of the Treaty provisions on competition to financial institutions was directly called into question by the defendant in Gerhard Züchner, a preliminary reference ruling on the interpretation of Articles 81 and 82 TEC which the plaintiff invoked as the legal basis for his challenge of a service charge imposed by a German bank for the transfer of a sum to a beneficiary in Italy. In its defence, the German bank inter alia argued that, by reason of the special nature of their services and their vital role in the transfer of capital, banking undertakings were to be considered as undertakings ‘entrusted with the operation of services of general economic interest’ pursuant to Article 86(2) TEC, exempt from the scope of application of Articles 81 and 82 TEC. Rejecting the argument, the ECJ ruled that the pivotal role of banks in the transfer of customers’ funds did not per se suffice to bring them within the ambit of Article 86(2) TEC; and that, absent conclusive evidence to the effect that, in performing such transfers, banking undertakings were operating a service with which they had been entrusted by a measure adopted by a competent public authority, these lied squarely within the ambit of the Treaty competition rules.

The Court’s view that Community competition rules are binding on financial institutions was affirmed in Verband der Sachversicherer e.V. v. Commission, an action for the annulment of a Commission decision refusing the applicants the benefit of an Article 81(3) TEC exemption in connection with their ‘non-binding’ recommendation to their members to coordinate their conduct on the insurance market. In support of its challenge the applicant inter alia contested the extent to which Article 81 TEC applied to the insurance industry, not as a matter of principle, as the defendant did in Gerhard Züchner but, instead, on account of the fact that the Council had yet to adopt special rules for its application to insurance, in accordance with Article 83(2)(c)

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21 Article 86(2) conditions the subjection of undertakings providing ‘services of general economic interest’ to the Community competition rules on their ability to perform the particular tasks assigned to them. For an account of the evolving notion of ‘services of general interest’, of which ‘services of general economic interest’ are a sub-set, see Colin Scott, ‘Services of General Interest in EC Law: Matching Values to Regulatory Technique in the Public and Privatised Sectors’ European Law Journal (2000) 6(4), 310.

22 Gerhard Züchner, paragraphs 7– 9.

TEC, so as to ‘temper the rigour of the prohibitions contained in the Treaty in so far as necessary to ensure the survival’ of the insurance industry. Rejecting the claimants’ indirect challenge of the applicability of Community competition rules to insurance undertakings the ECJ reiterated its statement that ‘… where the Treaty intended to remove certain activities from the ambit of the competition rules it made an express derogation to that effect’, concluding that, since no Treaty provision excluding the application of its competition rules existed in respect of insurance, ‘the Community competition system … applied without restriction to the insurance industry’. By the late 1990s, when the ECJ handed down its ruling in Carlo Bagnasco and Others v. Banca Popolare di Novara and Cassa di Risparmio di Genova e Imperia SpA, the idea that financial institutions might be immune to the application of Community competition law was no longer entertained: it is telling that the applicability of the Treaty competition rules was not challenged in that case by the defendants - members of a banking association imputed with infringing Article 81 TEC through their standard banking conditions - nor was it otherwise examined by the Court which, instead, assessed the compatibility of the conditions in question with the Treaty only to find that these were not inconsistent with its competition-related prohibitions.

Of the more recent examples of the application by the Court of the ‘Community competition system’ to financial institutions the ones that stand out the most are the CFI’s rulings in the German banks case where the thrust of the hitherto jurisprudence of the Court was affirmed (notwithstanding that the rationale of the application of Articles 81 and 82 TEC on financial institutions was not examined as such). The case involved allegations that a group of eight Austrian credit institutions participated in a long-standing and elaborate price-fixing cartel covering a comprehensive range of banking products and services with a view to fixing deposit and lending rates as well as advertising conditions to the detriment of businesses and consumers in Austria. Applying Articles 81 and 82 TEC, the CFI imposed record fines, in excess of EUR124 million, reduced to reflect co-operation received from some of the banks and their decision not to contest the charges levelled against them by the Commission. What is nevertheless noteworthy is the former Competition Commissioner’s statement that ‘[B]anks should be in no doubt that they are subject to European Union competition rules just like any other sector’ and his observation that ‘maintaining competition in the banking sector is particularly crucial, considering the importance of the banking sector for consumers, businesses and the efficient allocation of resources in the economy as a whole’.

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24 Ibid, paragraph 7.
28 Joined Cases T-44/02 Dresdner Bank, T-54/02 Vereins und Westbank, T-56/02 Bayrische Hypo-und Vereinsbank, T-60/02 Deutsche Verkehrsbank, T-61/02 Commerzbank, not published in the ECR. The CFI annulled, for lack of sufficient evidence, the decision by which the Commission had found that a number of German banks had been involved in a price cartel concerning bank charges for exchanging eurozone currencies in the period leading up to the introduction of the euro as the single currency of the euro zone.
29 Joined Cases T-259/02 to 264/02 and T-271/02, Raiffeisen Zentralbank Österreich and Others v. Commission, not published in the ECR.
The legitimacy of the concurrent application of competition and sector-specific regulation: a US perspective

Without prejudice to the hierarchy of norms within the Community legal order or the primacy of Community over national law, there is no clear guidance in the Treaty on how to address substantive conflicts between the demands of competition law and those enshrined in other Community or national legal acts transposing these into national law. The primary law nature of Community competition rules, in particular, would not \textit{per se} appear to justify their near ‘constitutional’ status under the Treaty which is attributable more to the instrumentality of competition law to the attainment of the EU’s market integration objectives than it is to strictly legal considerations. This lacuna has, to some extent, been filled by the ECJ which has on several occasions addressed the issue of how to resolve conflicts between Community competition and non-competition legal acts and rules (Community or national).

If the well established Commission practice of the concurrent application of sector-specific regulation and competition rules to conduct allegedly in breach of antitrust rules (although \textit{prima facie} consistent with sector-specific regulation) were to be followed also in the financial services field, the answer to how such conflicts should be resolved within the EU would, presumably, be clear: the subjection of financial institutions to a discrete regulatory regime, harmonised at the level of the EU, would not dispense them from complying with Community competition rules. While seemingly uncontroversial, the hitherto ‘European’ approach to the resolution of such conflicts is at odds with the one followed across the Atlantic where the recent Supreme Court decision in \textit{Credit Suisse} affirmed - also in the financial services field – the incompatibility of antitrust rules with sector-specific regulation. As the

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31 Appeal brought on 2 March 2007 by Erste Bank der österreichischen Sparkassen AG against the judgment of the Court of First Instance (Second Chamber) in Joined Cases T-259/02 to 264/02 and T-271/02 Raiffeisen Zentralbank Österreich AG and Others v. Commission of the European Communities concerning Case T-264/02 (Case C-125/07 P).

32 A notable exception is that of Article 36 TEC according to which one of the matters to be decided under the common agricultural policy is whether the rules on competition laid down in the Treaty are to apply to the production of, and trade in, agricultural products.

33 The ECJ has repeatedly stated that the Treaty competition rules are fundamental provisions essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market (see Case C-126/97, Eco Swiss China Time Ltd v. Benetton International NV [1999] ECR I-3055, paragraph 36).

34 See Joined Cases C-359/95 and C-379/95, Commission of the European Communities and French Republic v. Ladbroke Racing Ltd., [1997] ECR I-6265, paragraph 34 and cases referred to therein. At the time of writing there was no jurisprudential precedent to confirm the legitimacy of the concurrent application of competition and non-competition regulation to a financial services-related competition dispute.

35 The Deutsche Telekom case (Case COMP/37451) provides a good illustration of the scope of application of competition law where no sector-specific remedies exist to protect competition and of the Commission’s right of intervention where a prior national competition authority decision has failed to prevent the occurrence of competition law violations. For an account of the Deutsche Telekom case and of the Commission’s reasoning see Damien Geradin and Robert O’Donoghue ‘The concurrent application of Competition Law and Regulation: the case of margin squeeze in the telecommunications sector’, Journal of Competition Law and Economics (2005) 1(2), 355, 380-381.

Supreme Court decision in *Credit Suisse* allows instructive comparisons to be made between the European and the US antitrust models - that are not without interest for detecting their differences and for testing their conceptual integrity – *Credit Suisse* and its antecedents will be the subject matter of the final section of this article. The insights drawn from our comparison can be applied to predict how a challenge, before the Court, of the Commission’s ‘concurrent application’ practice, applied to a financial services-related dispute, would, in all likelihood, fare.

*Credit Suisse* was an antitrust class-action lawsuit where a group of investors imputed to the defendants – some of the largest US underwriters and institutional investors – a conspiracy to manipulate the after-market prices of several hundred technology stocks sold in initial public offerings (IPOs), in breach of federal and state antitrust rules. The defendants argued before the District Court that, even if the plaintiffs’ allegations could be substantiated, only securities laws – as opposed to antitrust laws – could provide a remedy; in an *amicus* brief the Securities and Exchange Commission (SEC) argued, for its part, that the application of antitrust rules in this context would conflict with and seriously disrupt its regulation of the securities offering process. The District Court dismissed the complaints, only to be reversed by the Second Circuit Court of Appeals which reasoned as follows: since Congress had not specifically considered and immunized the practices challenged by the plaintiffs, the defendants were not immune from antitrust claims based on breaches of securities laws. The Supreme Court handed down its ruling on 18 June 2007. Reversing the Second Circuit, the Supreme Court held (Justice Thomas dissenting) that the establishment of the SEC, an agency designed to administer securities markets regulation, implicitly exempted the regulated securities industry from antitrust lawsuits based on other, non-competition-specific laws; and that conduct occurring in highly regulated environments is implicitly immune from suit under the antitrust laws if the application of those laws would have the potential to conflict with the operation of the pre-existing statutory schemes that regulate these environments, *notwithstanding* that Congress had not specifically expressed its intent to immunize such conduct from the operation of antitrust laws.

The Supreme Court’s decision in *Credit Suisse* that securities and antitrust law are *incompatible* and, perhaps more significantly, the *ratio* underlying its ruling – namely, that industries subject to active and sophisticated regulatory oversight may be immune from antitrust suits - must no doubt come as something of a surprise, not least for a Community competition lawyer familiar with the concurrent application of sector-specific regulation and competition rules to conduct that violates antitrust rules. However, to those familiar with the case law of the Supreme Court, this ruling is closer to an evolution than it is to a genuine revolution: this is because if *Credit Suisse* affirmed the Supreme Court’s established jurisprudence on the same issue it also modified slightly the Supreme Court’s position reflected in its recent ruling in another landmark case namely, *Verizon v. Trinko*, a consumer class-action lawsuit on behalf of New York City customers of AT&T against Verizon Communications (formerly, Bell Atlantic), the incumbent monopoly local exchange carrier. The thrust

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of the complaint in Verizon v. Trinko was that Verizon deliberately provided poor repair services to AT&T customers while giving preferential treatment to its own customers, compromising AT&T’s chances to provide a competitive service in violation of the Telecommunications Act of 1996 – designed to deregulate the historically monopolized local telecommunications industry and to introduce competition into local phone markets – and, significantly, §2 of the Sherman Act. Relying on the authority of Goldwasser v. Ameritech\(^{39}\) (where the Seventh Circuit held that similar allegations against another monopoly service provider failed to state a §2 claim) the District Court granted Verizon’s motion to dismiss. Reinstating the antitrust claim, the Second Circuit Court of Appeal found that the plaintiffs’ allegations could establish §2 liability, either under the essential facilities doctrine or under the monopoly leveraging doctrine, only to be reversed by the Supreme Court. One significant factor that weighed on the Supreme Court’s decision in Verizon v. Trinko was the existence, in this particular field, of a regulatory structure designed to deter and remedy anti-competitive harm (namely, the Telecommunications Act of 1996), with the Supreme Court having reasoned as follows: ‘Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. Where, by contrast, “there is nothing built into the regulatory scheme which performs the antitrust function”, the benefits of antitrust are worth its sometimes considerable disadvantages’.\(^{40}\) The qualitative step forward taken by the Supreme Court in Credit Suisse is clear: whilst in Verizon v. Trinko the Supreme Court conditioned the non-applicability of antitrust law on the existence of ‘a regulatory structure (specifically) designed to deter and remedy anti-competitive harm’ (ie on the existence of competition-preserving rules built into a non-competition-specific legal act) no such requirement was enunciated in Credit Suisse where the Supreme Court simply stated that the scope for anti-trust intervention was, as a matter of principle, limited in the context of regulated activities, without entering into an examination of whether the raison d’être of their sector-specific regime was to remedy competition-related defects or, instead, to achieve other, totally unrelated regulatory objectives.

The question raised by the Supreme Court’s ruling in Credit Suisse is to what extent its underlying rationale could be of relevance to a ‘European’ competition dispute and, if so, whether the application of the Supreme Court’s reasoning could exclude regulated markets – such as the EU banking, insurance of securities industries - from the ambit of Community antitrust rules. This question is of crucial importance in the field of financial services where sector-specific and competition law ‘co-exist’ and have been applied concurrently, both by the ECJ and by the Commission. While attractive, the reasoning of the Supreme Court in Credit Suisse should not be taken out of context, since the US institutional and regulatory set-up, against the background of which the Supreme Court’s ruling must be read, differ from its EU counterparties in a number of material respects.\(^{41}\) Thus, while sector-specific and antitrust rules are, in the US, embodied in secondary legislation, EC competition rules are based on primary law, meaning that secondary legislation cannot deprive them of their effectiveness, especially where no regulatory remedy has been adopted to address the stated concerns. Moreover, unlike in the US, where antitrust enforcement relies on a court-based system, EC competition law essentially

\(^{39}\) Reported at 222 F.3d 390 (7th Cir. 2000).


\(^{41}\) In this regard see Geradin, supra note 38, 1548-1549.
relies on an administrative-based system, with the Commission at its centre: this difference is of crucial importance, considering that one of the arguments that the Supreme Court invoked to reach its decision in *Credit Suisse* was that courts are not experts in competition issues and risk making ‘unusually serious mistakes’ or drawing ‘reasonable but contradictory inferences’ through the simultaneous application to specific conduct of sector-specific and antitrust rules;\(^42\) this is not true of the EU where the Commission has the expertise to instruct antitrust cases, conduct the requisite market and competition impact analyses, assess the legitimacy of specific conduct and determine the appropriate penalties, meaning that the risk of erroneous or over-intrusive decisions through the parallel (mis)-application of sector-specific and competition rules is more limited here than it is across the Atlantic.

It follows that, while it cannot altogether be excluded that a resourceful applicant might, in the future, challenge the legitimacy of the Commission’s concurrent application of competition and sector-specific regulation, drawing arguments from the reasoning of the Supreme Court in *Credit Suisse*, the contextual differences between US and EU competition law and the hitherto jurisprudence of the ECJ leave relatively little room for doubt as to the likely outcome of such a challenge.

**Conclusion**

Responding to evidence of anti-competitive practices in the EU’s retail banking, securities and insurance segments, and demonstrating its will to use competition policy pro-actively, as a means of detecting and removing obstacles to the realisation of a genuine Single Market in financial services, the Commission has in recent years been enforcing Articles 81 and 82 TEC to a constantly growing circle of financial market players and conducts than ever before. The intensity of the Commission’s enforcement action and the severity of the fines that it has recently imposed, in conjunction with its apparent willingness to investigate more thoroughly and detect financial market competition vulnerabilities suggest the existence of a pattern that seems set to be continued in the foreseeable future. As the Commission’s recent approach is unlikely to be a transitory phenomenon (if anything, it seems likely to be intensified as more financial market segments become the subject of closer analysis) and since the likelihood of a successful challenge of the Commission’s and the ECJ’s concurrent application of competition and sector-specific regulation seems small, in-house counsels need to stay vigilant, drawing their clients’ attention to potentially anti-competitive business practices so as to forestall enforcement action and the fines that this can entail.\(^43\) Similarly, directors of intermediaries operating in the financial services sector need to ensure that their companies undertake competition law compliance reviews\(^44\) and establish a competition policy and compliance programme with a view to identifying problematic business practices and minimising the risk of competition law infringements.


\(^{43}\) Fines, however serious, are not the only possible consequence of an infringement of competition law. Companies may face civil damages from customers who claim to have suffered a loss as a result of the anti-competitive behaviour and, in certain circumstances, personal liability for the directors of the companies involved (ranging from disqualification to custodial sentences).

\(^{44}\) The importance of such reviews should not be underestimated: it is often the case that participants to anti-competitive conduct were unaware that they had been infringing competition law, having grown complacent after their conduct went unchallenged, for a long period of time.
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**Description of the ECB’s activities**

The ECB is the central bank of the euro, Europe’s single currency. It follows from Articles 105(1) and (2) TEC that the primary objective of the ESCB (of which the ECB is both the core and an integral part) is to maintain price stability in the euro area, comprising the 15 EU Member States which have adopted the single currency since 1999, and its basic tasks comprise the definition and implementation of the Eurosystem’s monetary policy, the conduct of foreign-exchange operations, the holding and management of the official foreign reserves of the participating Member States and the promotion of the smooth operation of payment systems. Moreover, according to Article 105(5)TEC, the ESCB contributes to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system. In the performance of its activities the ESCB is to act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources.