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U.S. and EU Antitrust Enforcement: What Role In A More Heavily Regulated Financial Sector?

Todd Fishman, Olivier Fréget, & David Gabathuler[1]

I. INTRODUCTION

The 2008 global financial crisis has given rise to a new set of supervisory and prudential rules and regulations governing the banking and finance industry. Regulators and legislators in the US[2] and in the EU,[3] in particular, have been proposing and introducing a raft of legislative and regulatory measures to address apparent market failures and to improve regulatory enforcement.

The increasing convergence and complementarity of competition law and regulation across many regulated sectors, and the perceived commonality in interest, should mean that the antitrust authorities in the United States and the EU are strongly positioned to play an active and wide-ranging role alongside the financial regulators.

At least in the United States and the EU, there is no consensus on whether unfettered competition in the banking sector will produce an optimal outcome in terms of financial stability.[4] Some believe that intense competition may be detrimental to stability by causing excessive risk taking, while others argue that too much oversight into the financial industries will chill investment activities and stifle the markets.

The apparent conflict between competition policy and a fundamental aim of financial regulation may explain, in part, why there has been historically a resistance to allowing competition policy overly to intervene in the financial services sector. In particular, there are concerns regarding the ability of antitrust rules to address quickly and effectively conduct connected with deficiencies in market structure and transparency.

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[2] President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. Res. 4173, 111th Cong., 124 Stat. 1376 [hereafter the "Dodd-Frank Act"] in July 2010 to reduce risk, increase transparency, and promote market integrity within the financial system.

[3] The EU created three new European Supervisory Authorities: the European Banking Authority ("EBA"), the European Insurance and Occupational Pensions Authority ("EIOPA") and the European Securities and Markets Authority ("ESMA").The EU is also reviewing and revising a number of Directives and Regulations to, among other things, strengthen prudential requirements, improve internal risk management, and increase the level of available information. Measures are also being taken to improve transparency and adapt regulation to the innovation occurring in the financial markets.*See* EU paper on Regulating financial services for sustainable growth, progress report of February 2011. Extensive information is *available at* the Commission's website: http://ec.europa.eu/internal_market/finances/index_en.htm.

[4] B.Casu, C. Girardone, &P. Molyneux,*Is there a conflict between competition and financial stability?*, RESEARCH HANDBOOK FOR BANKING AND GOVERNANCE (J.R. Barth, C. Lin,& C. Wihlborg, eds.) (2011).

In the United States, the application of antitrust laws to regulated industries, such as the financial services industry, has sometimes been expressly excluded by statute or implicitly by the courts. U.S. courts, for instance, paid strong deference to traditional securities market regulators. At the EU level, the exclusion of the competition rules is generally not foreseen, but the EU Merger Regulation specifically provides for the competition assessment to be overruled by the need to protect other legitimate interests, in particular "prudential rules."[5] At the national level, a number of EU Member States appeared slow to grant the competition authorities unrestricted access to the banking sector.[6]

The damaging effects of the 2008 financial crisis on the industry and the rest of the economy substantially weakened the position of stakeholders advocating greater antitrust enforcement in the sector since competition was perceived as detrimental, at least in the short term, to resolving the crisis. This led a number of important policymakers to highlight in 2009 the benefits of maintaining and enforcing the competition rules.[7]

Now that the crisis appears to have peaked, there seems to be a renewed appetite on the part of the antitrust authorities, both in the United States and the EU, to use competition law instruments to challenge, in particular, suspected abuses of market power. The EU, for example, is examining whether the control and dissemination of financial market information by alleged dominant players unlawfully forecloses the market and distorts competition.[8] In the United States, Obama and his administration pledged early in the presidency to increase antitrust enforcement in regulated industries.[9]

It can be questioned, however, whether the introduction of a more robust financial regulatory scheme and the apparent resurgence of concerns about competition potentially weakening financial stability and even possibly impeding effective regulation will not have damaging consequences for competition law enforcement in the financial sector, and the banking industry in particular.

This paper takes a comparative approach and discusses whether the enforcement of the competition rules in the United States and in the EU could be constrained—on conflict grounds—by broadly based rules and regulations addressing perceived market failures in the

[5]Council Regulation 139/2004/EC of 20 January 2004 on the control of concentrations between undertakings, Article 21(4) provides that Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by the Merger Regulation. *See* S. Kerjean, The legal implications of the prudential supervisory assessment of bank mergers and acquisitions under EU law, European Central Bank, Legal Working Paper Series No 6/June 2008 for a discussion on prudential interests and European merger control rules. Available at http://www.ecb.int/pub/pdf/scplps/ecblwp6.pdf.

[6]For example, until the end of 2005, the Italian central bank, rather than the competition authority, applied the competition rules.And the Dutch banking sector was excluded from the application of the merger control regime in the national Competition Act for two years following its entry into force in 1998 since mergers between banking and insurance institutions were already regulated by sector specific legislation on the basis of a wider test applied by the Minister of Finance or, in specific situations, the Dutch Central Bank.

[7]*See* J. Fingleton, CEO, Office of Fair Trading, *Competition policy in troubled times*, (January 20, 2009) and N. Kroes, former Competition Commissioner, *The interface between regulation and competition*, (April 28, 2009).

[8]Commission's three investigations into the activities of (i) Standard & Poor, (ii) Thomson Reuters, and (iii) 16 investment banks and Markit (CDS market). Discussed in Commissioner Almunia's speech, *Competition policy issues in financial markets*, CASS Business School London, (May 16, 2011).

[9]*See* Christine Varney, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, *Vigorous Antitrust Enforcement in this Challenging Era*, Remarks as Prepared for the Center for American Progress, (May 11, 2009).

financial sector. It then concludes by discussing whether the apparent differences between the two systems may lead to divergent enforcement outcomes, in particular in terms of the level of scrutiny by the respective U.S. and EU antitrust authorities, and also highlights the risk of conflicts between financial regulation and antitrust.

II. THE U.S. POSITION

The application of U.S. antitrust laws to regulated industries, such as the banking and financial services industry, may be precluded in several ways. First, a regulatory statute may specifically state that it precludes the application of antitrust laws. Second, when a regulatory statute is silent with respect to the application of antitrust laws, a court may find that the regulatory regime implicitly precludes the application of the antitrust laws. Congress sometimes attempts to prevent implied antitrust preclusion by including a savings clause providing that a statute does not preclude the application of the antitrust laws.

The Supreme Court's latest word on the issue came in 2007 with the *Credit Suisse Securities (USA) LLC v. Billing* case involving a class action brought against securities underwriters.[10] The Supreme Court ruled that the securities laws displaced the antitrust laws and identified four factors to determine if "the securities laws are 'clearly incompatible' with the application of the antitrust laws," namely: (i) whether the underlying market activity is "an area of conduct squarely within the heartland of securities regulation;" (ii) whether there is "clear and adequate SEC authority to regulate" the conduct; (iii) whether the conduct has been subject to "active and ongoing agency regulation;" and (iv) whether a "serious conflict," or even a potential future conflict, exists between the antitrust and regulatory regimes.

Billing left unanswered the question of how to apply its four factors and whether all four must weigh in favor of the regulated entity. This ambiguity has been reflected in the lower courts' subsequent treatment of the *Billing* test, but the emerging consensus is that the conflict factor is decisive. The U.S. Court of Appeals for the Second Circuit addressed the issue in *Electronic Trading Group, LLC v. Banc of America Securities, LLC* where it found that all four factors weighed in favor of implied immunity.[11] In applying *Billing*, the Second Circuit explained that for cases involving regulated bodies, "[m]uch depends on the level of particularity or generality at which each *Billing* consideration is evaluated." The court concluded that the first three *Billing* factors are to be "evaluated at the level most useful to the court in achieving the overarching goal of avoiding conflict between the securities and antitrust regimes" and that the fourth factor "is evaluated at the level of the alleged anticompetitive conduct." It appears, therefore, that the critical factor for implied immunity is the conflict prong; where there is a conflict or the prospect of a conflict, the court is likely to find implied immunity to avoid a clash of the two federal statutory regimes.

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[10] Credit Suisse Securities LLC v. Billing, 551 U.S. 264 (2007). In *Billing*, the plaintiffs alleged that securities underwriters conspired to increase compensation for initial public offerings by inflating commissions and aftermarket prices under the pretext of the accepted practice of syndication.

[11] Electronic Trading Group, LLC v. Banc of America Secs., LLC, 588 F.3d 128 (2d. Cir. 2009). In this case, the short-seller plaintiff claimed that prime brokers charged "artificially inflated" borrowing fees to customers short-selling securities. The defendants allegedly designated securities arbitrarily as hard-to-borrow and fixed minimum borrowing fees for those securities.

A notable recent example of an antitrust savings clause can be found in the influential Dodd-Frank Act.[12] The Act enhances oversight and control on the financial sector by creating new recordkeeping, reporting, and execution requirements and giving regulatory bodies more power to make and enforce rules.

Billing would, therefore, suggest that the expansion in the agencies' role would make activities under the Dodd-Frank Act prime candidates for implied antitrust immunity. Section 6 of the Dodd-Frank Act, however, contains a general antitrust savings clause[13] patterned on a savings clause that the Supreme Court found in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*.[14] This clause barred implied preclusion of antitrust laws notwithstanding that the enforcement scheme set up by a telecommunications regulatory regime was "a good candidate for implication of antitrust immunity." Modelling the Dodd-Frank Act's antitrust savings clause on the *Trinko* clause indicates a legislative attempt to combat the effects of *Billing* by precluding immunity.

Antitrust considerations are also addressed elsewhere in the Dodd-Frank Act. For example, the Insurance Bill contains its own antitrust savings clause that expressly mandates application of the antitrust laws even where there is a conflict.[15] Regulators must, moreover, consider antitrust where the Dodd-Frank Act requires that actions conform with provisions from other Acts containing restrictions on anticompetitive behavior, such as Section 17A of the Securities Exchange Act of 1934.[16] By contrast, Title VII of the Dodd-Frank Act, which regulates the over-the-counter derivatives market and gives broad rulemaking powers to agencies, contains eight "Antitrust Consideration" provisions that place antitrust concerns behind those of the Dodd-Frank Act by allowing regulated entities[17] to engage in anticompetitive activities where "necessary or appropriate to achieve the purposes of [Dodd-Frank] ...."[18]

Notwithstanding its antitrust savings clause, it is an open question as to whether the U.S. courts will find that the Dodd-Frank Act precludes the application of antitrust laws. First, the courts may view the securities industry as a special area where deference to federal regulators is especially important and, therefore, distinguish the *Trinko* analysis[19] and find the antitrust savings clause inapplicable. Second, *Trinko* requires that, even if a statute contains a broad antitrust savings clause, a court "must always be attuned to the particular structure and circumstances of

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[12] *Supra* note 2.

[13] Dodd-Frank Act, § 6 ("Nothing in this Act, or any amendment made by this Act, shall be construed to modify, impair or supersede the operation of any of the antitrust laws, unless otherwise specified.").

[14] Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

[15] Dodd-Frank Act, § 541 ("Nothing in this subtitle or the amendments made by this subtitle shall be construed to modify, impair or supersede the application of the antitrust laws. Any implied or actual conflict between this subtitle and any amendments to this subtitle and the antitrust laws shall be resolved in favor of the operation of the antitrust laws.").

[16] *See*, e.g., Dodd-Frank Act, § 763 ("In reviewing a submission . . . , the Commission shall review whether the submission is consistent with section 17A.").

[17] The Antitrust Considerations apply to derivatives clearing organizations, swap data repositories, swap dealers, major swap participants, swap execution facilities, boards of trade, security-based swap execution facilities, swap data repositories, security-based swap dealers, and major security-based swap participants.

[18] *See*, e.g., Dodd-Frank Act, § 763.

[19] As Justice Thomas noted in his dissent in *Billing*, which was decided after *Trinko*, (*infra* note 20) it is arguable that the antitrust savings clause contained in the Securities Exchange Act should have been given the same weight as that considered in *Trinko*. The majority, however, rejected this argument.

the industry at issue" and weigh the costs and benefits of antitrust intervention accordingly.[20] This leaves open the possibility that antitrust claims asserted in the context of a regulated industry may not survive even in the face of a broad antitrust savings clause; indeed, the *Trinko* court ultimately found that the plaintiffs failed to state a valid antitrust claim.

III. THE EU POSITION

The position taken by the Supreme Court in the *Billing* case is very different from the approach adopted by the EU institutions, including the Court of Justice of the EU (the "ECJ"). The ECJ has been consistent in trying to ensure the broadest application of the competition rules in the EU Treaty and has very considerably limited the opportunity for parties to invoke a "regulatory defence" on the grounds of concurrent and conflicting application of sector-specific regulations and competition rules.

The ECJ summarily dismissed initial attempts in the 1980s to argue that the EU competition rules did not apply to the financial sector. In *Züchner,*[21] the defendant sought to argue that the EU Treaty provisions on competition did not generally apply to banks due to "the special nature of the services provided by such undertakings and the vital role which they play in transfers of capital." In particular, the bank claimed that the financial activity (transfer of funds between Member States) should be treated as a service of general economic interest ("SGEI"[22]) falling outside the scope of the EU competition rules. The court firmly rejected this broad assertion and stated that it would need to be established that the bank(s) had been specifically entrusted by an act of a public authority with such an SGEI.[23]

A different challenge was equally firmly rejected by the court in *Verband der Sachversicherer.*[24] The property insurers' association tried to argue that the EU competition rules could not be applied to the industry since the EU Council had yet to adopt special rules making them applicable to the insurance industry.[25] The association considered that there was an "obligation on the Council to temper the rigour of the prohibitions contained in the Treaty in so far as is necessary to ensure the survival of certain areas of economic activity."[26] It sought to highlight that "unlimited competition would result precisely in an increased risk of some insurance companies going out of business in view of the special characteristics of the industry." [27]The ECJ emphasized that the Treaty contained no express derogation for the insurance industry and that the EU competition rules applied without restriction.

The presence of extensive (and increasing) EU and national rules and regulations addressing the financial sector creates, nonetheless, the opportunity for conflicts between regulatory provisions dealing with transparency and market conduct and EU antitrust rules which require free and open competition.

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[20] *Supra* note 14.

[21]Case 172/80 Gerhard Züchner v. Bayerische Vereinsbank AG, judgment of July 14, 1981.

[22]Services of general economic interest ("SGEI") are economic activities that public authorities identify as being of particular importance to citizens and that would not generally be supplied (or would be supplied under different conditions) if there were no public intervention (e.g. transport networks).

[23]*Züchner*, ¶¶ 6-9.

[24]Case-45/85 Verband der Sachversicherer e.V. v Commission, judgment of 27 January 1987.

[25]Article 87(2)(c) of the EEC Treaty [now Article 103(2)(c) TFEU] allows the EU Council to define, if need be, in the various branches of the economy the scope of the provisions of Articles 101 and 102 TFEU.

[26]*Verband der Sachversicherer*, ¶ 7.

[27]*Id*.

With regard to rules and regulations emanating from the EU institutions, the hierarchy of norms within the EU legal system—with Treaty provisions and general principles of law at the pinnacle above secondary legislation and implementing measures—places the competition rules enshrined in Articles 101 and 102 of the Treaty on the Functioning of the EU ("TFEU") in a privileged provision. Nonetheless, it is difficult to envisage EU legislative acts in the financial services area being readily challenged[28] before the General Court (formerly the CFI) or the ECJ on grounds of their lack of conformity with the competition rules in the TFEU.[29] In any event, internal screening[30] within the EU institutions and shared policy goals, including promotion of undistorted competition[31] within the Internal Market, is likely to substantially reduce the scope for conflicts between EU laws.

With regard to national laws and regulations, the ECJ has largely limited the options for invoking a regulatory defence to exclude the application of the EU competition rules. It has repeatedly stated that the EU competition rules are only inapplicable "if anti-competitive conduct is required of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part."[32] The EU competition rules would apply, however, if the national rules left open the possibility for competition and competition could be harmed by the autonomous conduct of the companies.[33] This would be especially the case if the national rules merely encouraged or made it easier for the companies to engage in the anticompetitive conduct.

The EU legal order also places strict limits on the ability of Member States and national authorities to introduce or maintain legislation and regulations that could render EU laws ineffective. It is established case law that the primacy of EU law requires any provision of

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[28] The legality of EU acts—producing legal effects vis-à-vis third parties—can be challenged directly before the General Court pursuant to Article 263 TFEU (and on appeal the ECJ). They can also be indirectly challenged via a reference from a national court for a preliminary ruling by the ECJ (Article 267 TFEU). The ECJ and the General Court have exclusive jurisdiction to determine acts of EU institutions invalid (Case 314/85 Foto-Frost v Hauptzollamt Lübeck-Ost, judgment of October 22, 1987).

[29]Articles 101 and 102 TFEU are directed at the conduct of private undertakings and the duty of "sincere co-operation" in Article 4(3) of the Treaty on European Union (formerly Article 10 EC Treaty) is principally addressed to the Member States. Article 4(3) of the Treaty on European Union acts as the catalyst to challenge the legality of national measures on grounds that they undermine the effectiveness of EU law which can include the application of the EU competition rules. The duty of sincere co-operation doesn't appear as far-reaching in relation to actions of the EU Institutions and it has been held that this overarching duty does not apply to legislative measures adopted by the EU Council (Cases C-63/90 and C-67/*90 Portugal and Spain v Council*, judgment of October 13,1992,¶ 53). Article 7 TFEU which provides that "[t]he Union shall ensure consistency between its policies and activities, taking all of its objectives into account …" does not seem a sufficiently precise alternative catalyst to challenge EU legislation on grounds of their lack of conformity with the EU competition rules.

[30]There is extensive consultation, including inter-service consultation within the Commission, whenever the EU proposes to introduce new laws and regulations. EU legislative and policy proposals are subject to an Impact Assessment, which includes an assessment of the possible competition impacts. See *Better Regulation : A Guide to Competition Screening* available on DG Competition's website at: http://ec.europa.eu/competition/publications/legis_test.pdf.

[31]The reference to "ensuring the competition is not distorted" is now included in a Protocol to the TFEU (No. 27) rather than in the Preamble of the Treaty. Nonetheless, this change in position is not expected to fundamentally alter the importance of achieving free competition in the EU since a protocol has equal force as the rest of the Treaty.

[32]Case-359/95 and C-379/95 Commission and France v. Ladbroke Racing, judgment of 11 November 1997, paragraph 33.

[33]*Ladbroke Racing,* ¶ 34.

national law that contravenes EU law, including the EU antitrust rules, to be disapplied by national courts and administrative bodies regardless of whether the provision in question was adopted before or after the EU provision. In circumstances where national rules and regulations conflict with the EU competition rules, the EU rules are given pre-eminence, although penalties cannot be imposed by the antitrust authorities in respect of past conduct required by national law.[34] To reduce further the scope of divergence and ensure unity of interpretation of EU law, the ECJ will also give rulings on provisions of national law (outside the EU sphere) that refer to the content of provisions of EU law or adopt the same solutions as those found in EU law.[35]

Direct conflicts between national rules and regulations and related provisions in EU law are, in any event, becoming less common due to the greater convergence between European legal systems and the increasing harmonization of legal norms in the EU, especially in relation to the internal market. However, opportunity for conflict in interpretation and application remains, especially in heavily regulated sectors.

The ECJ and the General Court have considered in recent years the extent to which intervention by national regulators in the telecoms sector could be used by companies as a defense to findings of antitrust infringement.

In the *Deutsche Telekom*("DT") case,[36] the company argued on appeal before the General Court, and subsequently before the ECJ, that there could not be abusive pricing in the form of a margin squeeze since the charges were imposed by the German regulator (RegTP). However, the General Court ruled, "the fact that the applicant's charges had to be approved by RegTP does not absolve it from responsibility under Article 82 EC [now Article 102 TFEU]."[37] Both courts noted that the attribution of any infringement to DT depended on whether it had sufficient scope to fix its charges at a level that would have enabled it to end or reduce the margin squeeze. The courts found that DT had responsibility under Article 102 TFEU, despite national regulatory approval, as it had sufficient scope to end or reduce the margin squeeze within the limits imposed by regulation (i.e. in this instance by increasing the retail prices within the price cap). The ECJ upheld the General Court's finding that DT had failed to exercise this discretion by not increasing its retail access prices.

A similar question has arisen in relation to the Commission's 2007 margin squeeze decision concerning the Spanish incumbent telecoms operator Telefónica. Rather surprisingly, however, the Spanish government has itself appealed the decision on a number of grounds, including that the decision impinged on the regulatory framework in force in Spain (a framework grounded in EU law and policed by the Commission), that it resulted in an *ex post* change to the

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[34]Case C-198/01 Consorzio Industrie Fiammiferi (CIF) v. Autorita Garante della Concorrenza e del Mercato, judgment of September 9, 2003.

[35]Joined Cases C-297/88 and C0197/89 Dzodzi v. Belgium, judgment of October 18, 1990.

[36]Case T-271/03 Deutsche Telekom v. Commission, judgment of April 10,2008; upheld on appeal in Case C-280/08 Deutsche Telekom AG v. Commission, judgment of October 14, 2010. These related to appeals from the Commission's decision to fine DT EUR 12.6 million for abusing its dominant position in respect of its local loop access pricing (Case COMP/37.451 – Price Squeeze local loop Germany, decision of 21 May 21, 2003).

[37]Case T-271/03 Deutsche Telekom v. Commission, ¶ 107.

regulatory framework, and that the matter had already been addressed by the Spanish regulator.[38]

The pending appeal provides the European courts with a further opportunity to rule on the interface between competition and regulation. It would, nonetheless, be unexpected for the General Court to depart from the ECJ's (and its own) previous case law and allow greater latitude for regulatory regimes to displace the EU competition rules.

IV. CONCLUSION

The emergence of a broad set of new rules and regulations governing market behavior by banks and financial institutions as well as the greater oversight of the sector by, in some cases, recently created supervisory agencies heightens uncertainty and increases the risk of substantive and jurisdictional conflicts between antitrust and financial regulation both in the United States and in the EU.

The mechanisms and prospects of resolving these concerns in the United States and in the EU seem very different. The U.S. system appears to be prepared to show greater deference to regulation and provides the possibility for the legislature or the courts to disapply the antitrust rules in the overarching interest of avoiding conflict between financial regulations and antitrust rules. In the EU, the incorporation of the competition rules in the EU Treaty and their role as instruments of market integration give them a quasi-constitutional aura, limiting the options for them to be overridden.

There are, however, a number of built-in safety valves in the EU system that are available to reduce the potential for conflicts. First, enforcement is primarily led by competition authorities, and these administrative bodies are likely to be more attuned to the risks associated with conflicting legal regimes than would be private litigants enforcing their rights through the courts. Second, it can be argued that the EU competition rules, and in particular Article 101(3) TFEU,[39] provide for public policy considerations to some extent to be factored into the antitrust assessment. Therefore, at least in terms of enforcement outcome, the difference between the U.S. system and the EU system is probably less pronounced than it appears from the underlying legal instruments and court precedents, especially as there is increasing coordination and commonality between antitrust authorities.

Conflicts in the financial sector may arise not only from a difference in antitrust enforcement by the U.S. and EU competition authorities but, instead, could flow from the diverging interests of financial regulators and competition authorities. In particular, financial regulators might not share the competition-first priorities of antitrust authorities and might view antitrust instruments as too unwieldy and blunt to be effective in the highly complex area of banking and finance. One can imagine that antitrust authorities' concerns about heightened entry barriers or increasing market transparency in certain highly concentrated financial markets may sit oddly with financial regulators' aims of strengthening prudential safeguards across the industry.

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[38]Case T-398/07 Kingdom of Spain v. Commission, pending.This relates to an appeal from the Commission's decision to fine Telefónica EUR 151 million for abusing its dominant position in the Spanish broadband market (Case COMP/38.784 – Wanadoo España v. Telefónica, decision of July 4, 2007).

[39]Arrangements restricting competition can be exempted provided they meet the cumulative conditions in Article 101(3) TFEU. The conditions are arguably broad enough to extend beyond pure economic efficiencies.

It should, however, be conceded that parallel activity of financial regulators and antitrust authorities will not always raise questions of conflicts; there are areas where dual enforcement may well be beneficial and not give rise to dispute. The complementarity of the two instruments was recently highlighted by the EU Commissioner for competition policy, Vice President Almunia. He emphasized that "regulation tackles broad structural market failures" and "you need competition policy to tackle the harmful behaviour of individual market participants."[40] Similarly, the Antitrust Division of the U.S. Department of Justice has been actively participating in the Financial Fraud Enforcement Task Force which, for instance, has pursued a wide-ranging investigation into price-fixing in the municipal bonds investment market.

Nonetheless, the increasing forays of antitrust into the heavily regulated area of financial services bring the possibility of conflict to the fore. Given the importance of the sector to the wider economy and the concerns about stability, contagion, and systemic risk, measures may need to be taken to ensure proper transparency of the role or authority of antitrust agencies with regard to their sphere of influence in the banking and financial services area.

[40] *Supra* note 8.