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# Antitrust in the Financial Sector

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## #2 Current International Issues in the Financial Sector: Payments Competition, Mass Actions, Enforcement Priorities

Webinar - 13 April 2021\*

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Graciela Miralles



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### Graciela Miralles

Graciela Miralles opened the discussion by reflecting on the connection between financial regulation and antitrust enforcement from a World Bank point of view. The World Bank Group thinks about competition policy in a broad way, which encompasses fostering competition in emerging markets and defining the role of the State in developing it. On the other hand, the financial sector is a regulated sector by nature -the question being: how to regulate it without restricting competition more than necessary? Over-regula-

tion can indeed create unnecessary burdens on market players. To refine regulation appropriately, impact assessment is a useful tool that is not so common in non-OECD member states.

The World Bank, when examining a financial market and its regulatory environment, usually looks for interventions that limit entry, facilitate collusion, or result in discriminatory treatment. These are common antitrust topics, but antitrust tools sometimes fall short to

tackle some of the market problems. For instance, tying practices have often been addressed using *ex ante* regulation instead of *ex post* enforcement -this might prove true for digital markets dynamics as well. There is a clear struggle in apprehending digital anticompetitive behaviors, and that is very much present in the financial sphere. Therefore, it is relevant to mention the issues that come with digital and fintech in terms of both antitrust policy and regulation policy. If one takes the example of open banking, it started as an antitrust remedy and has gained ground in many countries under different models -it is useful to promote competition and having an international dimension. But it also comes with some challenges, especially when implemented in less-developed economies and emerging markets. Regulating open banking typically means connecting with other specific regulatory frameworks such as data protection. This connection sometimes creates frictions and divergences between markets with consequences such as difference in models, reciprocity, and non-reciprocity rights. Implementing open banking

also has different costs depending on the size of the operators. Furthermore, regulation and competition in the field of open banking are connected by the major role of standard-setting organizations (which are sometimes private-sector-led). If these do not act with the necessary competition safeguards, this may result in challenges and struggles.

From a more institutional point of view, it should be pointed out that some countries have chosen to disjoin competition policy and financial regulation and to task different bodies with their enforcement, while others have opted for an integrated model where full powers are granted to financial regulators to ensure both economic and competition objectives. Egypt, for instance, has granted full powers to implement the competition mandate in finance to the central bank, carving out the industry from the mandate of the competition authority. In conclusion, Ms. Miralles highlighted the need to think broadly about competition, and what it can gain from working closely with financial regulation institutions.



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Maria Velentza



## Maria Velentza

Maria Velentza followed by providing insights on the European perspective in financial markets. First, digitalization is bringing disruption to the industry and has done so even more in the context of Covid-19. But this should be considered an opportunity in a sector where competition and innovation have traditionally been low. Fintechs and Big Techs are entering the market, partnering up with incumbents and bringing new services about – they are very welcome to do so, but it will be necessary to watch for anticompetitive conducts such as consumer lock-in, foreclosure and killer acquisitions. For instance, last year the European Commission launched an investigation into Apple Pay. National authorities are also taking steps. Recent developments have also underlined the vital importance of data in the industry, and the fact that those who hold it may turn into market gatekeepers. There is some perceived asymmetry in terms of access to data between fintechs/big techs and banks – open banking is conditioned by access to bank account data under certain conditions. Even though banks are subject to access obligations that are not imposed on fintechs, one should not rush towards concluding that the solution is across-the-board regulatory regimes. Data protection is another element of consideration – some competition authorities (such as the Bundeskartellamt in *Facebook*, 2019) have now started using data protection standards as a benchmark for assessing competition. Data-related practices -such as impediments

to access and portability- should be examined carefully, as they do not often look like mere prohibition. Network effects are also a new trend brought about by the platform's economy, which carries both customer value and competition concerns. The EU has strong tools for sanctions and *ex post* interventions, but it is also looking into advice and advocacy. It is also monitoring projects such as the European Payments Initiative.

Interactions between regulation and enforcement tools are typical in the financial industry: for instance, the Payment Services Directive has enhanced competition by granting data access to payment services providers beyond banks. In other cases, notably interchange fees, legislation (the Interchange Fee Regulation) interacts/complements case law (the prominent cases *Visa* and *Mastercard*). In terms of data protection, the wide scope of GDPR applies across the board in terms of data protection irrespective of economic activities. The proposed Digital Markets Act, currently under negotiation, regulates certain platforms which act as “gatekeepers” and provides for some “dos and don'ts”. A new Regulation on Crypto assets is another way to ensure security and market integrity while embracing innovation. All these initiatives illustrate the necessary conciliation of competition with other concerns such as financial stability and security – regulatory frameworks must integrate all of them if they are to allow markets to flourish.

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## Dennis Davis

Dennis Davis highlighted that the South African Competition Commission (“SACC”) has been anxious to address digital developments in the markets and has expressed it in two recent papers on the subject. However, it remains difficult for developing countries to deal with gargantuan digital companies. One of the challenges competition policy faces is balancing inclusivity and innovation – this is a crucial issue in developing countries aiming at promoting small and medium-sized businesses. Another challenge is the digital market’s tendency towards concentration, which creates the need for proactive action and strategies to prevent entrenchment before it becomes irreversible. Digital markets also spread on different levels, and consumers should be allowed to choose at each of them with speed and accuracy.

In 2008, the SACC launched a full inquiry into the banking sector. In its conclusion, it recommended consumer protection ceilings (as opposed to competition law) to protect fee levels, debit orders cancellation and minimum standards for information disclosure. It pointed out that banks should, for instance, not be allowed to discriminate in ATM charges. It commented on nonbanks entry into financial markets, which was limited by the South

African Reserve Bank. Payment systems are a major concern in South Africa, which has 48,8 million cards for 59 million people, because of the dominance of Mastercard and Visa. One of the possible remedies would be a domestic card scheme to enhance competition. South Africa also had to deal with a case where banks around the world were involved in allegedly shorting the rand. The SACC started cartel proceedings that ended up litigated before the Competition Appeal Court, but this case illustrated the difficulties developing countries meet in enforcing competition law -particularly in finance- considering the global context. In this case, there was a jurisdiction problem as some of the banks had no presence whatsoever in South Africa. The Court found that, given the substantive effect that the alleged conduct would have on South Africa, it was possible to assume jurisdiction and that the South African Competition Authority could try a case. This ruling accommodates the ideas that national silos do not exist in companies’ activity, therefore restrictions to competition should not go unpunished by simply fiddling around with jurisdiction. In the end, the case provides an interesting insight into the broader dilemma of regulation in sectors that are not confined to domestic borders.

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Dennis Davis



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## Ademir Antonio Pereira Jr.

Ademir Antonio Pereira Jr. warned that we should be careful in the analysis of the interplay of antitrust tools and *ex ante* regulation. Taking the example of the payments industry, he explained that it used to be heavily concentrated in Latin America, but a combination of regulation and innovation brought about a more competitive state of play. In Brazil, the former competition agency (SDE) and the central bank published a joint report in 2009 on the payments industry. It shed light on exclusivity provisions between schemes and acquirers as a key issue and initiated several measures to put an end to them. That was an important step – it made it possible for acquirers to work with different schemes/platforms, increasing competition among platforms and acquirers. Following this, in 2013, Congress passed into law a bill that increased interoperability, transparency and nondiscrimination in payment platforms, while reinforcing the regulating powers of the central bank. However, the central bank was somehow slow in exercising these new powers and in enforcing the regulation. In 2015, firms that were willing to enter the market but felt there were key barriers brought their complaints to the competition agency (CADE) - the latter reacted by launching

three investigations focused on vertical integration and restraints in payments. In the meantime, the Central Bank also continued to look into the industry and enacted specific regulation. Key stakeholders decided to settle those cases and entered consent decrees to amend the conducts at hand. These settlements allowed a decrease in interchange fees and in the end a betterment of competition. While there was no formal cooperation between the competition agency and the central bank, the two of them going in the same direction helped push forward reasonable solutions.

However, some challenges are still ahead: notably, the level of analytical sophistication that will prove necessary to tackle cases, which will likely demand a careful analysis of effects (i.e. in discrimination and MFN clauses). Understanding two-sided platforms will also be unmissable for enforcers. Second, as cases, in general, get more complicated, there is an increased risk of overenforcement which would chill innovation. Antitrust law should not be reshaped to deal with industry-wide questions. Sector-specific regulation such as open banking is simply more appropriate in some cases.

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Vivek Mani



## Vivek Mani

Vivek Mani commented on antitrust class or collective actions in financial markets, and the challenges they raise for economists. As financial markets are global, assessing misconducts or challenging regulatory initiatives typically means implications across jurisdictions. LIBOR, credit default swaps and incumbent bonds cases illustrate this. When focusing on antitrust class actions in Canada, the US and the UK, one can see that action regimes in these three jurisdictions are not aligned. The first stage in such litigation is to get permission to bring a class action on behalf of a specific set of claimants –in the US and Canada, plaintiffs start with a motion for class certification, in the UK with a collective proceedings order. The probatory thresholds that economists must fulfill to obtain class certification vary among these jurisdictions. In the US, economists must demonstrate “common

impact” based on empirical analysis. In other words, they have to put forward a common methodology that can be utilized to establish antitrust harm flowing from the alleged conduct for “all or virtually all” class members. In contrast to this, Canada’s standard is “one or more” class members. In the UK, things are also different. The recent *Merricks v. MasterCard* Supreme Court ruling appears to suggest that demonstrating a methodology to estimate “aggregate damages across all class members” is sufficient. These divergences between major jurisdictions will likely mean very different outcomes in these jurisdictions both in terms of the existence of harm or injury or damages for prospective class members as well as the “quantum of dam–ages”. They also have very important implications for how financial institutions will assess litigation risk across jurisdictions.

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**Competition issues in payments raise the question of who antitrust should be trying to protect: consumers in the round, particular classes of consumers, merchants, end-customers...?”**

Oliver Latham



## Oliver Latham

Oliver Latham discussed international divergence in the assessment of welfare effects in multisided markets. Multisidedness is pervasive in financial markets, but it is particularly obvious for payments systems that are multi-sided by nature due to the need to connect merchants and consumers. This is a challenge because multisidedness destroys many principles that economists rely on; in this type of environment, higher prices can increase output; higher output can be bad for welfare; prices below cost don’t need to signify a profit sacrifice or a predatory strategy; and prices above cost don’t have to indicate market power. More fundamentally, competition issues in payments raise the question of who antitrust should be trying to protect: consumers in the round, particular classes of consumers, merchants, end-customers...? Open banking initiatives are an example that raises these types of questions. Imposing a regulatory level of payment on account-to-account payment providers may enhance consumer’s safety and welfare (particularly if they suffer from behavioral biases that cause them to overlook payment

protection when choosing between payment methods) but it may also drive prices for merchants upwards. How willing should we be as policymakers to trade-off harm on one side against benefits on the other, and vice versa? The US, the EU and the UK have different answers to these questions: the US courts require this balancing to occur before intervention occurs, UK courts have taken the polar opposite view, and the EU stands somewhere in the middle of the spectrum. In the Q&A Dr Latham raised the question of how much regulation should be imposed on payment methods that are still emerging. While we have learned a lot from digital markets on the need to get in front of competitive effects and prevent tipping, there is also a case for allowing some of this innovation to play out and see what new innovators can do before imposing regulation. China is an example of a market that has moved significantly ahead in payments and consumer finance under a relatively “Wild West” regulatory model (albeit one which is now seeing a move towards regulation and antitrust intervention). ■