

**Response to the CPSS and the Technical Committee
of the IOSCO's Consultative Report on Principles
for Financial Market Infrastructures from Financial
Competitive Regime Perspective**

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- 1. All views in this submission are presented on behalf on the writer, and may not necessarily be construed as those of the People's Bank of China.**
- 2. For the writing tradition and reading convenience, this paper is drafted in English and Chinese. The meaning shall be construed as the same.**

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July 2011

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从金融竞争制度视角评述国际支付结算体系委员会和国际证监会组织技术委员会联合公布的
《金融市场基础设施准则》征求意见稿

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- 1、 本文仅代表作者个人观点，并不必然代表中国人民银行观点。
- 2、 考虑到行文传统和阅读方便，文章以英文和中文书写，核心内容一致。

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I. Preface

I welcome the opportunity to provide comments on the March 2011 consultative report on **Principles for financial market infrastructures** issued by the CPSS and the technical committee of the IOSCO.

In contemplating the Financial Crisis, the international communities have reached many conclusions. The consultative report of **Principles for financial market infrastructures** will play an important role in the sustainable development of international financial market. Unfortunately, although the report covers many principles related directly or indirectly to financial market competition, **it neglects the indispensable role of the Financial Competitive Regime (FCR) in the financial market infrastructures.**

This article provides comments and suggestions on pertinent materials in the consultative report from the FCR perspective, and introduces briefly Chinese FCR. It is hopeful that the CPSS and the technical committee of the IOSCO can consider them in issuing the final document of **Principles for financial market infrastructures.**

II. Overview of Principles and Responsibilities

There are many principles in FMI closely correlated with the competition, which can be guaranteed by the implementation of the FCR.

Legal basis in principle 1 should specify the FCR as the legal basis. **Public interest** in principle 2 should include financial market competition ensured by the FCR regime. **Concentration limits** in principle 5 can be adjusted effectively by enforcing the FCR, which may weaken the high concentration of credit in specific industry, so as to diversify credit risk. **Wind-down and reorganisation** in principle 15, generally as the aftermath of competition, require regulation in the manner of the FCR. **Access** in principle 18 is one of the key components of the FCR because it provides explicit access conditions for eligible entities to enter financial market. **Efficiency** in principle 21 is usually caused and enhanced by competition. **Communication** in principle 22 would be hindered from anti-competitive practices, such as collusion and abuse of dominant position. **Disclosure of rules and procedures** in principle 23 contributes to the transparency enhancement resulting in the promotion of financial market competition.

1. Introduction

1.1. Public policy objectives: safety and efficiency

Footnote 15 describes “...competition policy... investor or consumer protection... are generally beyond the scope of this and previous reports.”

Comment: Actually, in order to guarantee safety and efficiency in the financial industry, it is necessary to change the approach to achieve public policy objectives, e.g. the implementation of the FCR to foster the financial competitive culture. Not only can the effective enforcement of such regime guard against the occurrence of too-big-to-fail institutions and assure the financial security¹, but also it may increase the market efficiency.

1.2. Achieving the public policy objectives

Paragraph 1.16 describes “In addition, factors... may limit competition. ...excessive competition between FMIs does not lead to a competitive lowering of risk standards.”

Comment: In order to avoid the competitive lowering of risk standards, the FCR with uniform standards should be established at

¹ Zhen Li, “Response to Basel Committee’s Consultative Proposals to Strengthen the Resilience of the Banking Sector from Financial Competitive System Perspective”, April 2010. Available at: <http://www.bis.org/publ/bcbs165/zhenli.pdf>

Zhen Li, “Response to Basel Committee’s Consultative Document of Countercyclical Capital Buffer Proposal from the Perspective of Financial Competitive Regime”, September 2010. Available at: <http://www.bis.org/publ/bcbs172/zhenli.pdf>

the international level.

1.3. Scope of the principles for FMIs

Paragraph 1.19 describes “...some principles establish a minimum requirement to ... provide for a level playing field.”

Comments: Most of these principles keep close relationship with the regulatory areas of the FCR, such as access and exit.

2. Overview of key risks in financial market infrastructures

2.1. Centralised activities

Paragraph 2.1 describes “By performing centralised activities, however, FMIs concentrate risks and create interdependencies between and among FMIs and financial institutions.”

Comment: These interdependencies, based on strong effect of network in financial market, require sufficient regulation. The FCR acts as an effective method to avoid monopoly and anti-competitive practices within FMIs and their participants.

2.2. General business risk

Paragraph 2.7 describes “Such impairment may be a result of...ineffective response to competition....”

Comment: Such competition might come true legitimately under the FCR.

3. Principles for financial market infrastructures

3.1. Principle 1: Legal basis

Paragraph 3.1.2 describes “In some cases, competition, consumer, and investor protection laws and regulations may also be relevant.”

Comment: International communities should break through the restriction from traditional financial legal system, and further introduce the FCR. Because it may preserve effective financial market competition and protect the legal rights and interests of consumers and investors.

Paragraph 3.1.5 describes “The legal basis should clearly define the rights and interests of”

Comment: The rights and interests should include those for potential entrants to take part in financial market competition.

Paragraph 3.1.11 describes “...an FMI could apply activity limits and, in extreme circumstances, restrict access....”

Comment: Activity limits and access restriction would undermine the competitive balance within and among financial markets. As a result, in the course of determining how to take the above actions, regulatory agencies should thoroughly evaluate the anti-competitive effect caused by the practices.

3.2. Principle 2: Governance

Key consideration 2 describes “objectives...explicitly support financial stability and other relevant public interests.”

Comment: Financial competition should be explicitly supported in the Principle 2 as well.

Paragraph 3.2.2 describes “Supporting the public interest is a broad concept that includes fostering fair and efficient markets”.

Comment: The competition guaranteed by the FCR promotes the establishment of fair and efficient markets.

Paragraph 3.2.6 describes “Where there is competition with private-sector systems, a central bank should also be careful to ... avoid its misuse”

Comment: It is essential to preclude any provision of competitive advantage to a central bank over private participants in FMI, and to strictly enforce the FCR to prevent a central bank from abusing dominant position and avoid competitive distortion in financial market.

Paragraph 3.2.9 describes “Conflicts of interest include, for example, circumstances in which a board member has material competing business interests with the FMI”.

Comment: Such *competing business interests* require the modification by executing the FCR.

3.3. Principle 3: Framework for the comprehensive management of risks

Paragraph 3.3.2 describes “Typically these include legal risk...”

Comment: Especially the legal risk to violate the FCR.

3.4. Principle 5: Collateral

Concentration limits of collateral

Comment: Along with the implementation of exit rule, the enforcement of the FCR can mitigate the excessive concentration in financial market, and prevent the emergency of too-big-to-fail institutions, which may reduce financial institutions’ incentives to concentratedly hold certain collateral from the very beginning, and furthermore reduce the possibility of moral hazard.

3.5. Principle 7: Liquidity risk

Paragraph 3.7.7 describes “...seek to manage or diversify...liquid resources to avoid an excessive concentration with one entity”.

Comment: One of the key sources of excessive concentrated financial risk lies in the excessive or high concentration in the financial industry, which can be avoided or minimized by effectively implementing the FCR as an innovative method.

Paragraph 3.7.14 describes “Stress testing should be performed ...

when the size or concentrations of positions held by its participants increase significantly.”

Comment: Besides stress testing, the competitive review should be conducted periodically.

3.6. Principle 9: Money settlements

Paragraph 3.9.5 describes “...through the use of multiple commercial settlement banks and the use of concentration limits.”

Comment: The objective of both uses is to decrease excessive and high concentration, which falls into the regulated scopes of the FCR.

3.7. Principle 14: Segregation and portability

Paragraph 3.14.4 describes “...protects the interest of a participant’s customers and achieves a high degree of legal certainty under applicable law”.

Comment: By enforcing pertinent regime to maintain financial market competition is an effective tool to protect the interest of a participant’s customers. Therefore, legal system to strongly advocate and rigorously supervise financial market competition should be established.²

² In the second session of 11th NPC in March 2009, Deputy Yang Xiaoping submitted **Proposal on Establishing Financial Competitive Supervision**. The registered number of proposal is 8003 (2009).

3.8. Principle 15: General business risk

Paragraph 3.15.1 describes “...an ineffective response to competition....”

Comment: Such competition should be performed legitimately under the FCR.

3.9. Principle 17: Operational risk

Access

“In general, an FMI should establish appropriate access policies....”

Comment: In practice, access policies consist in the scopes regulated by the FCR.

3.10. Principle 18: Access and participation requirements

Key consideration 1 and key consideration 3 describes “fair and open access” and “orderly exit” respectively.

Comment: Access to and exit from the financial market are key components of the FCR.

Paragraph 3.18.2 describes “Fair and open access to FMI services encourages competition among market participants...”, and “As a result, participation in an FMI may have a significant influence on the competitive balance among market participants”.

Comment: Fair and open access requirements to FMI are embodied in the FCR, the implementation of which will preserve the competitive equilibrium in financial market.

Paragraph 3.18.4 describes some requirements for TRs' behaviors.

Comment: These behaviors are rigorously regulated under the FCR.³ For example, non-compete employment agreement widely applicable in financial institutions is a case in point.

Paragraph 3.18.5 describes "... possible conflicts of laws"

Comment: It requires execution of the FCR with uniform standards and in an international playing field.

Paragraph 3.18.6 describes "...should not discriminate unduly...", and "...introduce competitive distortions".

Comment: Discrimination and distortion are those areas governed by the FCR.

Footnote 112 describes "Antitrust".

Comment: It is necessary to consider incorporating antitrust into the current financial system, and eventually establish the Financial Antimonopoly Regime.⁴

Paragraph 3.18.7 describes "... the balance between open access

³ Zhen Li, "Response to Basel Committee's Consultative Document on Range of Methodologies for Risk and Performance Alignment of Remuneration from Financial Competitive Regime Perspective", December 2010. Available at: <http://www.bis.org/publ/bcbs178/zhenli.pdf>

Zhen Li, "Response to Basel Committee's Consultative Document on Pillar 3 disclosure requirements for remuneration from Financial Competitive Regime Perspective", February 2011. Available at: <http://www.bis.org/publ/bcbs191/zhenli.pdf>

⁴ Zhen Li, "Optimizing Chinese Anti-Monopoly Law in Financial Industry-Lessons from Lloyds Banking Group Merger and Acquisition", *Financial and Economic Law Review* 21, June 2010.

and risk”, and “... other operational arrangements that have the least-restrictive impact on access and competition that circumstances permit”.

Comment: In order to achieve above goals, policy makers should research and establish the sustainable FCR.

3.11. Principle 19: Tiered participation arrangements

Key consideration 2 describes “...to identify, monitor, and manage relevant concentrations of risk and important interdependencies.”

Comment: Concentrations of risk and important interdependencies are usually the results from excessive or high concentration in the financial industry, which can be controlled effectively through the FCR.⁵

3.12. Principle 21: Efficiency and effectiveness

Paragraph 3.21.1 describes “An FMI that operates inefficiently or functions ineffectively may distort financial activity and the market structure, increasing not only the financial and other risks of an FMI’s participants, but also the risks of their customers and end users”.

⁵ Zhen Li, “Response to Basel Committee’s Consultative Document on Range of Methodologies for Risk and Performance Alignment of Remuneration from Financial Competitive Regime Perspective”, December 2010. Available at: <http://www.bis.org/publ/bcbs178/zhenli.pdf>

Comment: Financial monopoly and financial competitive shortage, as typical examples of inefficient operations of FMI, not only affect financial stability deeply, but also harm the legal interests of customers. The competition in financial sector will bring high efficiency and effectiveness, i.e., lower prices, improved services and products, greater innovation, enhanced competitiveness, and exclusion of failed participants. As a result, reasonable regulation under the FCR will contribute to the society overall in the long term.

Paragraph 3.21.2 and paragraph 3.21.3 state respectively “An FMI should be efficient” and “Efficiency also involves cost control”.

Comment: Effective implementation of the FCR facilitates efficiency improvement, cost control, consumer protection and innovation in FMI.

3.13. Principle 22: Communications procedures and standards

Key consideration 1 and key consideration 2 state “... should use... internationally accepted communication procedures...”, and “... should use... internationally accepted communication standards....”

Comment: Anti-competitive practices such as collusion and abuse of dominant position in the course of communication should be prohibited by way of the internationally accepted FCR.

3.14. Principle 24: Disclosure of market data

Key consideration 1 states “... to enhance market transparency....”

Comment: Enhancing market transparency is an important tool to promote financial market competition and ensure a level playing field.

4. Responsibilities of central banks, market regulators, and other relevant authorities for financial market infrastructures

4.1. Responsibility A: Regulation, supervision, and oversight of FMIs

Paragraph 4.1.2 describes “(b) the number and type of participants”, “(d) the market share controlled”, and “(e) the interconnectedness with other FMIs and other financial institutions”.

Comment: These three aspects are governed by the FCR.

4.2. Responsibility B: Regulatory, supervisory, and oversight powers and resources

Key consideration 1 and paragraph 4.2.3 emphasize powers.

Comment: Because many authorities have statutory power to protect financial market competition, the competitive financial supervision comes out, which may lead to the supervisory arbitrage. It is prerequisite to specify the leading authority and its legal powers in the execution of the FCR. For instance, the People’s Bank of China is assumed to have the responsibility to enforce the FCR and to take on the leading role in cooperation with other competitive regulators or authorities in China.⁶

⁶ Zhen Li, “New Viewpoint on Chinese Financial Reform”, September 2010, Available at: <http://www.people.com.cn>

4.3. Complement

This consultative report does not specifically identify the responsibilities to maintain financial market competition as those of central banks, market regulators, or other relevant authorities.

The central bank should undertake enforcement of the FCR to preserve financial market competition and maintain a level playing field.

In respect of certain legal overlapping responsibilities assigned to different authorities for the protection of competition⁷, the supreme legislature could create the Financial Competitive Commission across ministries at the State Council level to dominate other authorities.⁸

⁷ In China, main competition regulators associated with financial sector are the People's Bank of China, China Banking Regulatory Commission, China Securities Regulatory Commission, China Insurance Regulatory Commission, National Development and Reform Commission, Ministry of Commerce, and State Administration for Industry and Commerce. In order to promote coordination and cooperation among these agencies, the creation of a uniform financial competition authority across ministries is the key to secure an effective financial competition.

⁸ Yang Xiaoping, "Proposal on Establishing Financial Competitive Regime", *Financial News*, March 11, 2011. Ou Yang and Dong Xiao, "Financial Representatives of NPC & CPPCC Discuss Over Domestic Issues", *Financial Analyst*, March 2011.

III. Annex

In annex A and annex B, CPSIPS, RSSS and RCCP take *legal basis* as the first priority, and some proposed principles on legal basis closely relate to the competition.

Suggestion 1: It is considered to establish the FCR on the basis of the existed legal system with the aim to maintain the competition, and to give the high priority to the FCR as the Financial Constitution.

Suggestion 2: It is perceived to add Competition Maintenance guaranteed by the FCR as a new principle in FMI.

Suggestion 3: It is advised to add the responsibility to supervise or regulate financial market competition as Responsibility F.

IV. Overview of Financial Competitive Regime in China

In 2010 China surpassed Japan as the world's second-largest economy, the implementation of regime with the aim to safeguard China to participate the global competition is inevitable. Even though the FCR is an unprecedented system, it gradually steps into the ken of national leaders nowadays.

Zhen Li submitted one proposal on establishing the FCR to the national decision makers in December 2010.⁹ Finance is the lifeline of the national economy, modern economy is institutional one, and sufficient and effective financial market competition will play a significant role in fulfilling national strategies such as containing inflation, transforming the mode of economic growth, macroprudential supervision, job creation and stepping out. In conclusion, in the coming economic development of the twelfth Five-Year Plan period, the FCR should be established as soon as possible. After three months, “The National Economic and Social Development twelfth Five-Year Plan Compendium” was promulgated. The compendium adopts Zhen Li's opinion and states the strategic principle of **Enhancing the Competition to Promote the Development.**

⁹ Zhen Li, “Enhancing the Financial Competition to Promote the Scientific Development in the 12th Five-Year National Plan”, *China Economic Herald*, December 21, 2010. Available at: http://www.ceh.com.cn:8080/epaper/ceh/20101221/B05/B05_56.htm

In March 2011, the fourth session of 11th NPC was convened in Beijing. During the period, Deputy Mr. Yang Xiaoping proposed to set up Financial Competitive Regime. Mr. Yang analyzed values of the FCR on Chinese economic development, suggested to amend the legal framework of the FCR, and sketched the new framework for the executive mechanism of the FCR.¹⁰

¹⁰ Yang Xiaoping, “Proposal on Establishing Financial Competitive Regime”, *Financial News*, March 11, 2011.
Ou Yang and Dong Xiao, “Financial Representatives of NPC & CPPCC Discuss Over Domestic Issues”, *Financial Analyst*, March 2011.

Reference

1. Zhen Li, “Response to Basel Committee's Consultative Proposals to Strengthen the Resilience of the Banking Sector from Financial Competitive System Perspective”, April 2010. Available at: <http://www.bis.org/publ/bcbs165/zhenli.pdf>
2. Zhen Li, “Response to Basel Committee's Consultative Document of Countercyclical Capital Buffer Proposal from the Perspective of Financial Competitive Regime”, September 2010. Available at: <http://www.bis.org/publ/bcbs172/zhenli.pdf>
3. Zhen Li, “Response to Basel Committee's Consultative Document on Range of Methodologies for Risk and Performance Alignment of Remuneration from Financial Competitive Regime Perspective”, December 2010. Available at: <http://www.bis.org/publ/bcbs178/zhenli.pdf>
4. Zhen Li, “Response to Basel Committee's Consultative Document on Pillar 3 disclosure requirements for remuneration from Financial Competitive Regime Perspective”, February 2011. Available at: <http://www.bis.org/publ/bcbs191/zhenli.pdf>
5. Zhen Li, “Enhancing the Financial Competition to Promote the Scientific Development in the 12th Five-Year National Plan”, *China Economic Herald*, December 21, 2010. Available at:

http://www.ceh.com.cn:8080/epaper/ceh/20101221/B05/B05_56.htm

6. Zhen Li, “Optimizing Chinese Anti-Monopoly Law in Financial Industry-Lessons from Lloyds Banking Group Merger and Acquisition”, *Financial and Economic Law Review* 21, June 2010.
7. Zhen Li, “New Viewpoint on Chinese Financial Reform”, September 2010, Available at: <http://www.people.com.cn>
8. Yang Xiaoping, “Proposal on Establishing Financial Competitive Regime”, *Financial News*, March 11, 2011.
9. Ou Yang and Dong Xiao, “Financial Representatives of NPC & CPPCC Discuss Over Domestic Issues”, *Financial Analyst*, March 2011.

第一部分：序 言

非常感谢有机会就国际支付结算体系委员会和国际证监会组织技术委员会在 2011 年 3 月联合公布的《金融市场基础设施准则（征求意见稿）》进行评论。

在深刻反思此轮金融危机后，国际社会对金融业的改革达成了诸多共识，《金融市场基础设施准则（征求意见稿）》将对国际金融市场的可持续发展起到重要作用。然而，令人遗憾的是，尽管《征求意见稿》涵盖了与金融市场竞争直接或间接相关的多条准则，却忽略了金融竞争制度在金融市场基础设施中必将发挥不可或缺的作用。

本文从金融竞争制度视角就《征求意见稿》的相关内容进行评论并提出建议，此外还简要介绍了中国金融竞争制度。希望国际支付结算体系委员会和国际证监会组织技术委员会在最终颁布《金融市场基础设施准则》时能够采纳。

第二部分：准则和责任概述

金融市场基础设施准则中有不少与竞争密切相关，而有效的竞争依赖于金融竞争制度的实施。

准则 1 中的“法律基础”，应具体明确作为法律基础的金融竞争制度；准则 2 中的“公共利益”，以金融竞争制度确保的金融市场竞争应作为重要的公共利益；准则 5 中的“集中度限制”，可考虑通过实施金融竞争制度弱化特定行业信贷的高度集中，从而分散信贷风险；准则 15 中的“逐步关闭和重组”，通常是竞争所致，需要通过金融竞争制度来规范；准则 18 中的“准入”，为合格主体进入金融市场规定了具体的准入条件，这是金融竞争制度的重要组成部分；竞争带来并加强了准则 21 中的“效率”；准则 22 中的“沟通”，必须避免串谋、优势地位滥用等反竞争行为；准则 23 中的“规则和程序的公开”，有助于透明度的增强以促进金融市场竞争。

1. 介 绍

一、公共政策目标：安全和效率

脚注 15 指出：“……竞争政策、……投资者或消费者保护……，一般来说不在此报告和之前报告所涉及的范围。”

评论：事实上，为了保证金融业的安全和效率，有必要改变公共政策目标的实现路径，例如通过金融竞争制度的实施以培育金融竞争文化。金融竞争制度的有效实施不但能防范“大而不倒”金融机构的出现¹¹，确保金融安全，而且可提高金融市场的效率。

二、实现公共政策目标

段落 1.16 指出：“此外，……一些要素可能会限制竞争……。……金融市场基础设施之间的过度竞争并不导致风险标准的竞争性降低。

评论：为了避免风险标准出现竞争性降低，应在国际层面建立标准统一的金融竞争制度。

三、金融市场基础设施准则的适用范围

段落 1.19 指出：“……一些准则确立了……提供竞争平台的最低要求。”

评论：这些准则大都与金融竞争制度规制的范畴紧密相关，例如，准入与退出规定。

¹¹ 李震，“从强化金融竞争制度视角入手对巴塞尔委员会公布的有关增强银行体系稳健性的一揽子政策建议草案提出改进建议”，载于“巴塞尔委员会”，2010年4月。网址：<http://www.bis.org/publ/bcbs165/zhenli.pdf>
李震，“从金融竞争制度角度对巴塞尔委员会颁布的《逆周期资本缓冲建议》进行评述”，载于“巴塞尔委员会”，2010年9月。网址：<http://www.bis.org/publ/bcbs172/zhenli.pdf>

2. 金融市场基础设施主要风险的概述

一、集中化行为

段落 2.1 指出：“然而通过采取集中化行为，金融市场基础设施集中了风险，产生了金融市场基础设施之间、金融机构之间以及设施与机构之间的相互依存。”

评论：这些相互依存是以金融市场强劲的网络化效应为基础，应通过制度进行必要的规范。而金融竞争制度是遏制金融市场基础设施及其参与者采用垄断或者反竞争行为的有效手段。

二、一般的商业风险

段落 2.7 指出：“这种损害可能是……对于竞争无效回应……的结果。”

评论：这种竞争应当在金融竞争制度下合法地进行。

3. 金融市场基础设施准则

一、准则 1：法律基础

（一）段落 3.1.2 指出：“在一些情况下，竞争保护法、消费者和投资者权益保护法及其规定也可以是相关的法律基础。”

评论：国际社会应突破传统金融法律体系的禁锢，进一步引入金融竞争制度。因为该制度既能维护有效的金融市场竞争，又可保障消费者和投资者的合法权益。

（二）段落 3.1.5 指出：“法律基础应当清楚定义……的权益。”

评论：权益应当包括那些潜在进入金融市场参与竞争的人的相关权益。

（三）段落 3.1.11 指出：“金融市场基础设施能够实施行为约束，在极端情况下，可以限制准入……”

评论：行为约束和准入限制会破坏金融市场竞争的平衡。所以在决定如何采取这两种措施时，监管当局应充分评估它们所引致的反竞争影响。

二、准则 2：治理

（一）主要考虑 2 指出：“（制定准则的）目标……明确支持金融稳定和其它相关公共利益。”

评论：还应当准则 2 中提出明确支持金融竞争。

（二）段落 3.2.2 指出：“支持公共利益是一个宽泛的概念，

包括了培育公平有效的市场……”

评论：金融竞争制度保障的竞争促进了公平有效市场的形成。

（三）段落 3.2.6 指出：“在与私营部门竞争时，中央银行应当谨慎……以避免（优势）滥用。”

评论：有必要在金融市场基础设施中阻止向中央银行提供优于私人参与者的优势地位，并且严格实施金融竞争制度，禁止中央银行滥用优势地位，避免金融市场竞争遭受扭曲。

（四）段落 3.2.9 指出：“例如：利益冲突包括了董事会成员与金融市场基础设施有着实质性的竞争事务利益。”

评论：这种竞争事务利益需要通过金融竞争制度的实施来调节。

三、准则 3：全面风险管理的框架

（一）段落 3.3.2 指出：“典型地，这些包括法律风险……。”

评论：尤其是违反金融竞争制度而产生的法律风险。

四、准则 5：担保

（一）担保集中度限制

评论：除了实施退市规则外，金融竞争制度的实施可弱化金融市场过度集中，防止出现“大而不倒”的金融机构，从根源上有效减弱金融机构集中持有特定担保物的冲动，进而降低道德风险发生的几率。

五、准则 7：流动性风险

（一）段落 3.7.7 指出：“……寻找途径管理或者分散流动性资源……以避免过度集中于一家实体。”

评论：金融风险过度集中的重要根源之一在于金融产业过度集中或者高度集中，而避免或者降低金融产业过度集中的创新方式就是有效实施金融竞争制度。

（二）段落 3.7.14 指出：“……当参与者持有的规模或者集中度大幅增加时……实施压力测试”

评论：除了压力测试外，定期还应对市场和参与者进行竞争审查。

六、准则 9：货币结算

（一）段落 3.9.5 指出：“……通过使用多个商业结算银行和集中度限制”

评论：这两种方法的目的是为了降低过度集中和高度集中，属于金融竞争制度的规制范畴。

七、准则 14：隔离和可转移性

（一）段落 3.14.4 指出：“……保护参与者顾客的利益，在现有的法律体系下获得高度的法律确定性”

评论：保护金融市场基础设施参与者顾客利益的有效手段是实施维护金融市场竞争的相关制度。所以，应建立大力支持并严格监管金融竞争的法律制度。¹²

八、准则 15：常规商业风险

¹² 2009 年 3 月召开的十一届全国人大二次会议期间，杨小平代表提出了“建立金融竞争性监管的建议”。建议登记号：8003。

(一) 段落 3.15.1 指出：“……竞争的无效回应……”

评论：此类竞争应当在金融竞争制度的规范下合法进行。

九、准则 17：经营风险

(一) 准入

总体而言，金融市场基础设施应当确立适当的准入政策……。

评论：实际上，准入政策隶属于金融竞争制度规制的范畴中。

十、准则 18：准入和参与要求

(一) 主要考虑 1 和 3 分别指出：“公平、公开的准入”和“有序退出”。

评论：金融市场的准入和退出是金融竞争制度的重要组成内容。

(二) 段落 3.18.2 指出：“金融市场基础设施服务领域公平、公开的准入鼓励了市场参与者之间的竞争……”，“所以，参与金融市场基础设施服务可对市场参与者之间的竞争力平衡起到重要影响。”

评论：金融竞争制度包含了金融市场基础设施服务领域公平、公开的准入要求，该制度的实施将有助于确保金融市场竞争能力平衡。

(三) 段落 3.18.4 明确了交易资讯管理部门的一些行为要求。

评论：这些行为受到了金融竞争制度的严厉规制。例如，在

金融机构广泛适用的竞业禁止协议就是一个典型的例子。¹³

（四）段落 3.18.5 指出了“……可能的法律冲突”

评论：这需要在公平的国际竞争舞台上实施标准统一的金融竞争制度。

（五）段落 3.18.6 指出了“……不应当不正当地歧视……或者引起竞争扭曲”

评论：歧视和扭曲都属于金融竞争制度规制的范畴。

（六）脚注 112 指出了“反托拉斯”

评论：有必要将反托拉斯融合进现行金融制度中以最终建立金融反垄断制度。¹⁴

（七）段落 3.18.7 指出了“……公开准入和风险的平衡”，“……对环境允许的准入及竞争存在最小限制性影响的其它运营安排。”

评论：为实现以上目标，政策制定者须研究建立可持续的金融竞争制度。

十一、准则 19：分层次的参与安排

（一）主要考虑 2 指出：“……识别、监测和管理相关风险集中及重要依存关系。”

评论：风险集中及重要依存关系常常是由于金融产业过度集中或者高度集中所致，可通过金融竞争制度有效控制金融产业的

¹³ 李震，“从金融竞争制度视角评述巴塞尔银行委员会拟颁布的《兼顾风险与绩效的薪酬制度》”，载于“巴塞尔委员会”，2010年12月。网址：<http://www.bis.org/publ/bcbs178/zhenli.pdf>

李震，“从金融竞争制度视角评述巴塞尔银行委员会公布的《支柱三中薪酬制度的披露要求》征求意见稿”，载于“巴塞尔委员会”，2010年2月。网址：<http://www.bis.org/publ/bcbs191/zhenli.pdf>

¹⁴ 李震，“完善中国大陆金融反垄断制度—劳埃德银行集团并购案启示”，《月旦财经法》第21期，2010年6月。

过度集中。¹⁵

十二、准则 21：效率和效果

（一）段落 3.21.1 指出：“运作无效或者功能无用的金融市场基础设施可能扭曲金融行为和市场结构，不但增加了市场参与者的金融风险和其它风险，还会增加客户和最终使用者的风险。”

评论：金融垄断或者金融竞争不足，作为金融市场基础设施运作无效的典型例子，不但会深刻影响金融稳定，而且会损害客户的合法利益。金融领域的竞争将带来高效率和好效果，也就是低廉的价格、优质的服务和产品、巨大的创新、强大的竞争力、以及优胜劣汰。所以，长远来看，金融竞争制度的合理规范将使社会全面受益。

（二）段落 3.21.2 和 3.21.3 分别指出：“金融市场基础设施应当具备效率”，“效率也包括了成本控制”。

评论：有效实施金融竞争制度有助于金融市场基础设施的效率提高、成本控制、消费者保护以及不断创新。

十三、准则 22：沟通程序和标准

（一）主要考虑 1 和 2 指出：“……应当使用国际接受的沟通程序”，“……应当使用国际接受的沟通标准”。

评论：在沟通过程中应实施国际认可的金融竞争制度以禁止串谋、优势地位滥用等反竞争行为。

十四、准则 24：市场数据公开

¹⁵ 李震，“从金融竞争制度视角评述巴塞尔银行委员会拟颁布的《兼顾风险与绩效的薪酬制度》”，载于“巴塞尔委员会”，2010年12月。网址：<http://www.bis.org/publ/bcbs178/zhenli.pdf>

(一) 主要考虑 1 指出“……增强市场透明度……”。

评论：增强市场透明度是促进金融市场竞争并保障公平竞争平台的重要手段。

4. 中央银行、市场监管者和金融市场基础设施其它相关监管当局的责任

一、责任 A：对金融市场基础设施的规制、监督和纠察

(一) 段落 4.1.2 指出：“(b)参与者的数量和类型”，“(d) 控制的市场份额”，“(e)与其它金融市场基础设施和其它金融机构的相互联系”。

评论：这三方面均可由金融竞争制度规范。

二、责任 B：规制、监督和纠察的权力和资源

(一) 主要考虑 1 和段落 4.2.3 都强调了监管权。

评论：由于多个部门都拥有维护金融市场竞争的法定权力，于是产生了竞争性金融监管，这可能导致监管套利。因此在实施金融竞争制度的过程中须明确牵头部门及其职权。例如：中国人民银行可承担执行金融竞争制度的责任，并与其它竞争监管部门或者当局合作时发挥牵头作用。¹⁶

三、补充

《征求意见稿》并未将维护金融市场竞争的责任具体地明确给央行、市场监管者或者其它相关当局。

建议将“执行金融竞争制度以维护金融市场竞争和保障公平的竞争平台”作为中央银行的责任。

鉴于不同监管部门竞争监管的部分法定职责存在重叠¹⁷，最

¹⁶ 李震，“中国金融改革新视角”，载于“人民网”，2010年9月。网址：<http://www.people.com.cn>

¹⁷ 在中国，负责监督与金融领域竞争相关的主要行政部门有中国人民银行、中国银行业监督管理委员会、

高立法机构应当在国家层面建立跨部门的金融竞争委员会以统领其它相关当局。¹⁸

中国证券业监督管理委员会、中国保险业监督管理委员会、国家发展与改革委员会、商务部和国家工商行政管理总局。为增强这些部门间的协调与合作，创设跨部级部门统一的金融竞争执法机构成为了确保高效金融竞争的关键。

¹⁸ 杨小平，“关于建立金融竞争制度的建议”，载于《金融时报》，2011年3月11日。

欧阳、冬晓，“金融界部分两会代表委员为‘十二五’建言献策”，载于《中国金融家》，2011年3月，第3期。

第三部分：附录

在《附录》A和B中，《系统重要性支付体系的核心原则》、《证券结算系统的操作建议》和《主要交易商的操作建议》均将法律基础定为第一位，而一些在法律基础方面建议的准则也与竞争密切相关。

建议一：考虑建立以现有法制为基础、以维护竞争为目标的金融竞争制度，突出其作为金融宪法的优先地位；

建议二：将以金融竞争制度保障的维护竞争作为金融市场基础设施的一项新准则；

建议三：增加监管或者规制金融市场竞争的责任为新责任F。

第四部分：中国金融竞争制度简况

2010年，中国超越日本跃升为世界第二大经济体，以制度来确保中国金融参与全球竞争已大势所趋。尽管金融竞争制度是一项前所未有的新制度，但目前已逐步进入了高层视野。

2010年12月，李震向国家决策层提交了建立金融竞争制度的建议。金融是经济的命脉，现代经济又是制度经济，而充分且有效的金融竞争对于遏制通货膨胀、转变经济发展方式、实施宏观审慎监管、增加就业、执行“走出去”等国家战略有着不可或缺的重要作用。所以，在经济发展的第十二个五年规划阶段，应尽快考虑建立金融竞争制度。¹⁹三个月后，《国民经济和社会发展规划第十二个五年规划纲要》出台，《规划纲要》采纳了李震的观点，明确了“以竞争促发展”的战略准则。

2011年3月，十一届全国人大四次会议在北京召开。其间，杨小平代表提出了建立金融竞争制度的建议。杨先生分析了金融竞争制度对于中国经济发展的现实价值，建议修改金融竞争制度的法制框架，并勾勒了金融竞争制度执法机制的框架。²⁰

¹⁹ 李震，“以金融竞争促‘十二五’科学发展”，载于《中国经济导报》，2010年12月21日，B05。网址：http://www.ceh.com.cn:8080/epaper/ceh/20101221/B05/B05_56.htm

²⁰ 杨小平，“关于建立金融竞争制度的建议”，载于《金融时报》，2011年3月11日。

欧阳、冬晓，“金融界部分两会代表委员为‘十二五’建言献策”，载于《中国金融家》，2011年3月，第3期。

参考文献

1. 李震，“从强化金融竞争制度视角入手对巴塞尔委员会公布的有关增强银行体系稳健性的一揽子政策建议草案提出改进建议”，载于“巴塞尔委员会”，2010年4月。网址：
<http://www.bis.org/publ/bcbs165/zhenli.pdf>
2. 李震，“从金融竞争制度角度对巴塞尔委员会颁布的《逆周期资本缓冲建议》进行评述”，载于“巴塞尔委员会”，2010年9月。网址：<http://www.bis.org/publ/bcbs172/zhenli.pdf>
3. 李震，“从金融竞争制度视角评述巴塞尔银行委员会拟颁布的《兼顾风险与绩效的薪酬制度》”，载于“巴塞尔委员会”，2010年12月。网址：<http://www.bis.org/publ/bcbs178/zhenli.pdf>
4. 李震，“从金融竞争制度视角评述巴塞尔银行委员会公布的《支柱三中薪酬制度的披露要求》征求意见稿”，载于“巴塞尔委员会”，2010年2月。网址：
<http://www.bis.org/publ/bcbs191/zhenli.pdf>
5. 李震，“以金融竞争促‘十二五’科学发展”，载于《中国经济导报》，2010年12月21日，第B05版。网址：
http://www.ceh.com.cn:8080/epaper/ceh/20101221/B05/B05_56.htm
6. 李震，“完善中国大陆金融反垄断制度—劳埃德银行集团并购案启示”，《月旦财经法》第21期，2010年6月。

7. 李震,“中国金融改革新视角”,载于“人民网”,2010年9月。
网址: <http://www.people.com.cn>
8. 杨小平,“关于建立金融竞争制度的建议”,载于《金融时报》,2011年3月11日。
9. 欧阳、冬晓,“金融界部分两会代表委员为‘十二五’建言献策”,载于《中国金融家》,2011年3月,第3期。