

Forex Trading Cross Border Cartel

Presentation for UNCTAD Cartels Working Group

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Forex Trading Cross-Border Cartel

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competition commission
south africa

South Africa forex trading cartel



- Can South African competition authorities act against foreign banks, that are not domiciled in South Africa but are found to have contravened South African competition laws through their cross-border conduct?
- Whether the competition authorities should be concerned with enforceability of their findings?

Background

- The cartel involves **28** local and foreign banks that trade on currency.
 - **8 *incola* banks** – local banks.
 - **20 foreign banks** – *peregrini* banks.
 - 8 local *peregrini*.
 - 12 pure *peregrini*.
- The above banks are accused of fixing the ZAR/USD Currency pair & dividing the market by allocating customers.
- Barclays / Absa was granted leniency. Citi Bank settled the matter. The rest are being prosecuted at the Competition Tribunal of South Africa (“Competition Tribunal”).

Background

- The South African respondents are: Standard Bank; Investec Limited; ABSA Bank Ltd; Investec Bank; Nedbank Group Limited; Nedbank Limited; RMB; and FirstRand.
- The local peregrini are Credit Suisse Group; Commerzbank; Bank of America NA, BNP Paribas; JP Morgan Chase Bank NA; Standard Chartered, Citi Bank and HSBC Bank plc.
- The pure peregrini banks are Bank of America Merrill Lynch; JP Morgan Chase & Co; Australia & New Zealand Banking Group; Standard Securities New York; Nomura; Macquarie; HSBC USA; Merrill Lynch Pierce; Credit Suisse USA; and Standard Americas Inc; Barclays Capital; and Barclays Bank plc.

The cartel conduct

- Period - 2007 to 2013.
- Agreement:
 - The dealer banks fix currency trades for bids, offers, bid-offer spreads for spot trades and terms of executing client orders at the FIX involving the USD/ZAR currency pair.
 - The dealer banks divide the markets through the allocation of customers in the USD/ZAR currency pair. For example, they will refrain from bidding for certain customers.
- Similar investigation by the US Department of Justice.

CCSA investigation & findings

- The investigation started in 2015.
- The CCSA's investigation found that between 2007 and 2013, the dealer banks had an agreement and/or concerted practice to collude on currency trades involving USD/ZAR currency pair.
- The traders at dealer banks directly fixed the bid-offer spreads for currency trades of certain sizes; manipulated the bids and offers through agreements to refrain from trading as well as creating fictitious bids and offers in order to assist each other to obtain best possible bid or offer price on the trading platform.

The jurisdictional challenge

Jurisdiction: power or competency of a court to hear and decide on an issue/dispute between the parties, and to give effect to the judgement (i.e., to have the power to compel the judgement debtor to pay/satisfy the judgment).

- S 3(1) of SA competition legislation provides that *“the Act applies to all economic activity within or having an effect in South Africa”*.
- The conduct of fixing forex in South African Rand (ZAR) is likely to have an effect in South Africa.
- The dealer banks challenged the extra-territorial application of s 3(1).
- Pure peregrini’s – we do not operate in SA & cannot be held liable.
- The local peregrini banks - denied that they are “a bank” and/or operate a “business of a bank” as defined in the Banks Act. If they do not conduct the business of a bank in terms of the SA Banks Act, they could not be held to conduct business in SA for the purposes of jurisdiction of the competition authorities.

Jurisdictional question

- Given that the subject matter jurisdiction (effect of the conduct in SA) is not in doubt, the principal questions the CCSA faced when dealing with the forex trading matter are:
- **Can South African competition authorities act against foreign banks, that are not domiciled in South Africa but are found to have contravened South African competition laws through their cross-border conduct?**
- **&**
- **How will the South African competition authorities enforce a judgement against foreign banks that have not submitted to their jurisdiction?**

Competition Appeal Court judgment

- The CAC dismissed the foreign banks applications to have the matter against them quashed and remitted the matter back to the Competition Tribunal for further prosecution.
- CAC used the effects doctrine as a jurisdictional trigger.
- Presence of sufficient nexus between the alleged conduct and its effect in South Africa (i.e., connecting factors). This is subject matter jurisdiction
- CCSA to show that conduct have a substantial, direct and foreseeable impact).
- Enforceability – no attachment to find/confirm jurisdiction given that foreign banks have no assets in SA. Would declaration that a prohibited practice has occurred (i.e., a name bank was involved in the manipulation of ZAR) be sufficient if they don't submit to our jurisdiction?

Questions



THANK YOU!

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