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The fallout from the forex cartels: what legacy for foreign exchange regulation?

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ABSTRACT

This article analyses infringement and settlement decisions issued by the European Commission in recent years in relation to cartels in the foreign exchange ('forex' or 'FX') sector, assesses what these decisions tell us about the susceptibility of the forex sector to anticompetitive behaviour and proposes how these risks might be reduced. This includes a focus on addressing the lack of transparency that characterises the sector. It is argued that preventing similar abuses occurring in future cannot be left to competition law alone, but rather requires greater ex ante regulation of the forex sector. As such, a crucial first step is the need for greater data gathering and analysis in relation to the purposes for which most forex trading is undertaken and it is proposed that there should be a stronger division between traders' market-making activities and proprietary trading to try to minimise opportunities for collusive conduct and reduce information asymmetries.

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Introduction

In the last few years, the European Commission has imposed fines totalling approximately GBP 1.4 billion on a number of large banking groups in respect of three cases of cartels concerned in the unlawful sharing of information and fixing of foreign exchange ('forex' or 'fx') rates.[1] Specifically, the actions of the members of the cartels were held to infringe Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Article 53 of the Agreement on the European Economic Area (EEA). The banks that participated in the cartel have also been subject to additional fines imposed by other regulators acting under separate regulatory regimes, including the Financial Conduct Authority (FCA) in the UK and the Office of the Comptroller of the Currency in the US.[2] The

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[1]Decisions of the Commission of 16 May 2019 in Case AT.40135 *FOREX ('TWBS)* C(2019) 3631 final and AT.40135 *FOREX ('Essex Express')* C(2019) 3621 final; Ordinary decision of the Commission of 2 December 2021 in Case AT.40135 – *FOREX* ('*Sterling Lads*') C(2021) 8612 final; Settlement decision of the Commission of 2 December 2021 in Case AT.40135 – *FOREX* ('*Sterling Lads settlement*') C(2021) 8613 final.

[2]FCA Press Release, 'FCA fines five banks £1.1 billion for FX failings and announces industry-wide remediation programme' (12 November 2014) <https://www.fca.org.uk/news/press-releases/fca-fines-five-banks-%C2%A311-billion-fx-failings-and-announces-industry-wide-remediation-programme> accessed 7 July 2023. It is therefore important to

fallout from the conduct sanctioned by the Commission is very much evident in terms of ongoing group damages actions against financial institutions involved in the cartels. But while the infringement decisions themselves and the subsequent litigation have drawn attention to the rather opaque world of forex trading, what does this tell us about existing problems with the forex trading sector generally and what, if anything, has been done and can be done to address these issues and to prevent repetitions of the infringements found to have occurred in future? This article will attempt to summarise what the Commission infringement decisions reveal about the nature of the cartels, before briefly discussing the ongoing follow-on litigation in relation to the cartels. There will then be some analysis of key features of the forex sector, some of which are put into focus by the Commission's decisions. It will be argued that certain features of the forex sector make it highly susceptible to conduct that breaches competition law as well as other regulatory regimes. It will then be submitted that in order to better regulate the forex sector and prevent abusive behaviour of the type seen in the Commission decisions discussed here, in the first place, focus should be placed on two areas. First, it is argued that there needs to be much greater data gathering and analysis in order that a better overview and understanding can be built up of the activities of the forex sector, the purposes for which most forex trading is undertaken and whose interest the forex sector fundamentally serves. Second, it will be argued that certain specific steps need to be taken to make the forex sector more transparent and to separate market-making and proprietary activity. Taking these steps will render the forex sector less susceptible to the types of anticompetitive behaviour found to have occurred by the Commission, but moreover, it will address the current disparity in access to market information between forex traders and other market players including consumers, which is in itself problematic. The main focus in this regard shall be on the existing FX Global Code,[3] on the basis that amendments to this code may represent the most realistic route to addressing these issues.

The Commission's Infringement Decisions

The forex cartels

The European Commission has issued four decisions in relation to fixing of forex spot rates in recent years, two of them in 2019[4] and two towards the end of 2021, the latter two relating to one infringement.[5] These decisions were labelled respectively as the '*Three Way Banana Split*' ('*TWBS*'), the '*Essex Express*' and the '*Sterling Lads*' (both of the 2021 decisions relating to the *Sterling Lads* cartel), in each case referring to the name given to one of the unlawful chatrooms in which communications between traders held to infringe Article 101 TFEU and Article 53 EEA were carried out.

note that the conduct of the banks in question is not only seen as problematic from a competition law perspective and the intention here is to consider what ex ante steps might be taken to prevent this type of conduct occurring in future. Clearly this is a question that does not just concern competition regulators but also financial and market regulators.

[3] Global Foreign Exchange Committee, FX Global Code <https://www.globalfxc.org/docs/fx_global.pdf> accessed 7 July 2023.

[4] *TWBS* and *Essex Express* (n 1).

[5] *Sterling Lads* and *Sterling Lads settlement* (n 1).

The Commission's investigation resulted from an application under the Commission's leniency procedure by one of the cartel members, UBS AG.[6] The fines levied on the parties by the Commission (after reductions to take account of their cooperation with the procedure and in the case of UBS AG full immunity from fines under the Commission's Leniency Notice[7]) came to a total of approximately EUR 811 m for the *Three Way Banana Split* infringement,[8] EUR 258 m for the *Essex Express*[9] and EUR 344 m for the *Sterling Lads*.[10] These are in addition to fines imposed by national regulators on the banks concerned over the last decade, including fines equivalent to USD 1.7 billion by the UK Financial Conduct Authority in 2014[11] and USD 1.4 billion and USD 700 million in the US by the Commodity Futures Trading Commission and the Office of the Comptroller of Currency respectively.[12] In the US in 2015, yet more fines were imposed, first fines totalling USD 2.5 billion by the US Department of Justice following guilty pleas to felony charges by most of the banks[13] and secondly, fines amounting to more than USD 1.8 billion by the Federal Reserve.[14]

Although the periods of membership of the cartels and duration of the illegal communications, as well as the precise content of the communications, varied between the chatrooms to which the Commission's decisions related, the nature of the infringing behaviour was very similar in each case. Essentially, the cartels were concerned in the exchange of sensitive information in relation to forex spot trading,[15] meaning currency trades agreed at the current exchange rate to be executed within a short time of the agreement (typically two days), as opposed to agreements for a trade to be executed at a forward or future price. The infringements concerned the trading of 11 currencies,[16] collectively known as the G10 currencies[17] and were effected by way of sharing commercially sensitive information in private chatrooms.[18] There were a number of facets and features to the illegal exchanges of information.

[6]Commission Press Release, 'Antitrust: Commission fines UBS, Barclays, RBS, HSBC and Credit Suisse €344 million for participating in a Foreign Exchange spot trading cartel' (2 December 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6548> accessed 7 July 2023.

[7]Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17.

[8]Commission Press Release, 'Antitrust: Commission fines Barclays, RBS, Citigroup, JPMorgan and MUFG €1.07 billion for participating in foreign exchange spot trading cartel' (16 May 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2568> accessed 9 July 2023.

[9]ibid.

[10]Commission Press Release of 2 December 2021 (n 6).

[11]FCA press release of 12 November 2014 (n 2).

[12]ibid.

[13]US Department of Justice Press Release,'Five Major Banks Agree to Parent-Level Guilty Pleas' (20 May 2015) <https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas> accessed 7 July 2023. A further USD 203 million fine was imposed on UBS AG, although this related mainly to fixing of the London Interbank Offered Rate (LIBOR) and breaching a previous non-prosecution agreement in respect of LIBOR.

[14]Federal Reserve, Press Release,'Federal Reserve announces fines totaling more than $1.8 billion against six major banking organizations for their unsafe and unsound practices in the foreign exchange (FX) markets' (20 May 2015) <https://www.federalreserve.gov/newsevents/pressreleases/enforcement20150520a.htm> accessed 10 July 2023. Further fines have been imposed by the New York State Department of Financial Services. See *inter alia* Department of Financial Services, Press Release, 'DFS fines Credit Suisse AG $135 million for unlawful, unsafe and unsound conduct in its foreign exchange trading business' (13 November 2017) <https://dfs.ny.gov/reports_and_publications/press_releases/pr1711131> accessed 10 July 2023.

[15]Commission Press Release of 16 May 2019 (n 8); Commission Press Release of 2 December 2021 (n 6).

[16]*Sterling Lads* (n 1) para 1.

[17]Meaning the US, Canadian, Australian and New Zealand Dollars, the euro, the Pound Sterling, the Swiss Franc, the Swedish, Norwegian and Danish Crowns and the Japanese Yen.

[18]Commission Press Release of 16 May 2019 (n 8).

Information that was exchanged

The information shared amongst the traders, comprised a range of data. These included: information on outstanding customers' orders, incorporating immediate orders or 'stop-loss' and 'take-profit' orders,[19] whereby a customer requests the purchase or sale of a currency when the exchange rate reaches a particular point; information on open risk positions i.e. positive or negative sums of currency held in the accounts of particular traders;[20] information on current or planned trading activities;[21] and information on bid-ask spreads for specific currency pairs.[22]

This information was considered sensitive from the perspective that it was confidential information either relating to outstanding customer orders, information on planned trading activity that was based on customers' orders, or information on traders' positions (bid-ask spreads or open-risk positions).[23] This was distinguished from communications required between traders 'in the ordinary course of their business'.[24] Furthermore, it was noted by the Commission that the mere exchange of information can constitute a concerted practice ' … if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted'.[25] While a finding of concerted practice does require 'conduct on the market resulting from the concertation and having a connection with it … '[26] it was pointed out that there is a rebuttable presumption of such conduct on the market and that this is ' … all the more so when the concertation occurs on a regular basis and over a long period'.[27] But the findings of the Commission were, in any case, that the conduct in this case went considerably beyond the mere sharing of information.

The 'understanding' and reciprocity

The Commission found that the exchange of sensitive information within the chatrooms was done in the context of a clear understanding between the traders in question. From the perspective of Article 101(1) TFEU and Article 53(1) EEA, such an underlying understanding can in itself be classified as an agreement.

In the *Essex Express* decision reference is made to an 'underlying understanding' whereby *inter alia* the information provided ' … could be used to the traders' respective benefit and in order to identify occasions to coordinate their trading'[28] and 'the traders would not disclose such shared information received from other chatroom participants to parties outside of the private chatrooms'.[29] Reciprocity was therefore an important

[19]*Essex Express* (n 1) para 54; *Sterling Lads* (n 1) paras 55–56; *TWBS* (n 1) para. 9.
[20]*Essex Express* (n 1) para 53; *Sterling Lads settlement*(n 1) para 54.
[21]*Essex Express* (n 1) paras 56–57; *Sterling Lads settlement*(n 1) paras 57–58.
[22]Meaning the difference between what a trader is prepared to sell a certain currency for and what they are prepared to pay for the same amount of currency. *Essex Express* (n 1) paras 58–59; *Sterling Lads settlement* (n 1) paras 59–60.
[23]*TWBS* (n 1) paras 52– 59, *Essex Express* (n 1) paras 52–59.
[24]See for example *TWBS* (n 1) para 46.
[25]*Sterling Lads settlement* (n 1) para 73, citing Case C-8/08, *T-Mobile Netherlands* EU:C:2009:343, para 35; see also *TWBS* (n 1) para 73 and *Essex Express* (n 1) para 73.
[26]*Sterling Lads settlement* (n 1), para 74; see also *TWBS* (n 1) para 74 and *Essex Express* (n 1) para 74.
[27]*Sterling Lads settlement* (n 1) para 74 citing Case C-199/92P, *Hüls v Commission* EU:C:1999:358, paras 161–166. See also *TWBS* (n 1) para 74 and *Essex Express* (n 1) para 74.
[28]*Essex Express* (n 1) para 46.
[29]ibid.

element of the infringements. In the *Essex Express* decision this is evidenced ' … from numerous chats' in which traders, amongst other things 'expressed gratitude when receiving certain current or forward-looking information'[30] and 'apologized to each other when they may have departed from the underlying understanding'.[31] It is held that ' … the Express chatrooms were based on the underlying understanding, an implied tacit agreement with rules, commitments and reciprocity, which, while not set out in detail, were understood by the participating traders'.[32] Similarly, in the *Sterling Lads* decision it is noted that the settling parties ' … agree that the participating traders involved in the private chatroom engaged in the exchanges of information and occasional trading coordination, expecting some degree of reciprocity',[33] with reference being made to ' … participating traders operating in a circle of trust, mutual expectations and benefits'.[34] In the *TWBS* decision it is noted that ' … the participating traders involved in the private chatrooms engaged in the exchanges of information and occasional trading coordination, expecting some degree reciprocity, without which the strategy would have been generally self-defeating'.[35]

Although both agreements and concerted practices are caught by Article 101 TFEU/ Article 53 EEA, the Commission characterised the underlying understanding described here as being sufficient to be classified as an agreement under Article 101 TFEU/Article 53 EEA. It is, of course, well established that to constitute an 'agreement' under Article 101 there is no requirement for a formal contract in the legal sense[36] and that the key point is that the 'undertakings should have expressed their joint intention to conduct themselves on the market in a specific way'.[37] That was the case here according to the Commission. The *Sterling Lads* chatroom was based ' … on the underlying understanding, an implied tacit agreement with rules, commitments and reciprocity, which, while not set out in detail, were understood by the participating traders'.[38]

Given the agreement established here classified as a restriction of competition by object, there was no requirement under Article 101 TFEU or Article 53 EEA to take account of the actual effects.[39]

The reasoning of the Commission in holding that the conduct described here constituted a restriction by object is particularly evident from the *Sterling Lads* ordinary decision i.e. the one of the four decisions that was not a settlement decision.[40] In that decision it was explained that the requirement of independence precludes ' … any direct or indirect contact between … operators … '[41] the object or effect of which is ' … either to influence conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate

[30]ibid para 49.
[31]ibid.
[32]ibid para 82.
[33]*Sterling Lads* (n 1) para 303.
[34]ibid para 163.
[35]*TWBS* (n 1) para 50.
[36]Case 41/69, *ACF Chemiefarma NV v Commission* EU:C:1970:71.
[37]Case C-306/20, *SIA 'Visma Enterprise v Konkurences padome* EU:C:2021:935, para 94 and *inter alia* Case 41/69, *ACF Chemiefarma v Commission* EU:C:1970:71, para 112, Case T-41/96, *Bayer AG v Commission* EU:T:2000:242 and C-2/01 P and C-3/01 P, *BAI and Commission v Bayer AG* EU:C:2004:2 paras 100 and 102.
[38]*Sterling Lads settlement* (n 1) para 82; *TWBS* (n 1) para 82; *Essex Express* (n 1) para 82.
[39]*Sterling Lads settlement* (n 1) para 86; *TWBS* (n 1) para 86; *Essex Express* (n 1) para 86,
[40]*Sterling Lads* (n 1).
[41]ibid para 316.

adopting on the market'.[42] Similarly, the Commission notes from previous caselaw that '[t]he exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question … '.[43] Furthermore, ' … an exchange of information which is capable of removing uncertainty between participants as regards the timing, extent and details of the intended conducts to be adopted by the undertakings concerned on the market, must be regarded as pursuing an anticompetitive object'.[44] Given that a spread in the forex market is essentially a price, the Commission had no difficulty in applying these existing principles from previous decisions of the EU courts to the conduct in question.

Coordination

Whereas, as discussed, the exchange of information between traders in a context of an underlying understanding in itself constituted an infringement of Article 101(1) TFEU and 53(1) EEA by object, the Commission found that on occasions the traders in question went beyond merely exchanging information and actually adapted their behaviour to assist each other. This seems to have manifested itself in two ways in particular. First, on occasion, parties appeared to engage in the practice of 'standing down',[45] described in the *Essex Lads* decision as situations whereby ' … traders refrained from trading as they otherwise had planned to undertake during a particular time window on account of another trader's announced position or trading activity'.[46] Secondly and perhaps most egregiously – albeit only occasionally in relative terms – attempts were made around the times of the setting of two particularly important benchmarks, namely the WM Reuters (WMR) and European Central Bank (ECB) indexes, to coordinate actions in such a way as to influence exchange rates.[47] Whereas these benchmarks aim to provide spot rates between currency pairs at specific moments in time (such as 4pm GMT) based on real-time market activity, actioning – or refraining from actioning – large currency transactions in the immediate run-up to the setting of such benchmarks can artificially affect the benchmark rates in question.

Regularity and duration

The information exchanges under the forex cartels were not sporadic or rare but rather regular and following something of a pattern. According to the *Sterling Lads* decision, the exchanges ' … were not random or limited … but followed a persistent pattern of recurrent and extensive contacts between the participating undertakings consistently held over time'.[48] This ' … allowed the participating undertakings to have a full picture

[42]ibid. Citing Cases 40/73 to 48/3, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and others v Commission* EU:C:1975:174, para 174.
[43]ibid para 388. Citing *inter alia* cases C-286/13P *Dole Food and Dole Fresh Fruit Europe v Commission* EU:C:2015:184, para 121; C-8/08 *T Mobile Netherlands and others v Raad van bestuur van de Nderlandse Mededingingsautoriteit* EU:C:2009:343, para 35.
[44]ibid para 389. Citing *inter alia* cases C-286/13P *Dole Food and Dole Fresh Fruit Europe v Commission* EU:C:2015:184, para 122; C-8/08 *T Mobile Netherlands and others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* EU:C:2009:343, para 41; T-105/17, *HSBC Holdings plc and Others v Commission* EU:T:2019:675, para 62.
[45]ibid paras 162 and 288.
[46]*Essex Express* (n 1) para 62–63 and 92; *TWBS* (n 1) paras 62–63; *Sterling Lads* (n 1) paras 62–63.
[47]*Essex Express* (n 1) paras 61 and 91. See also *TWBS* (n 1) paras 55, 61 and 91 and *Sterling Lads settlement* (n 1) para 90.

of what their competitors were doing and also what they were not doing while actually trading in the market'.[49] Similarly, according to the *TWBS* decision, ' … the participating traders maintained a consistent pattern of nearly daily communications where they had extensive and recurrent information exchanges pursuant to the underlying understanding … '.[50] Consequently, from the perspective of EU competition law, the conduct in question could properly be classed as single and continuous infringements of competition law that are a defining feature of cartels.[51]

In terms of duration, none of the cartels were short-lived affairs. The *TWBS* cartel was held to have lasted just over five years,[52] the *Essex Express* cartel around two and a half years and the *Sterling Lads* cartel just over a year.[53] While isolated acts can in themselves constitute infringements of Article 101(1) TFEU, the duration of the cartels is of significance both in terms of establishing the aforesaid patterns of behaviour that were characteristic of the cartels, but also in relation to the setting of fines, which are calculated by reference to the number of years that individual parties participate within cartels.[54]

Access to proprietary trading

Another notable point from the Commission forex decisions is the interplay between market-making activity and proprietary trading. Although the traders in question were mainly concerned in market-making in currency pairs i.e. trading one currency for another on behalf of clients, traders also had the ability to engage in proprietary trading.[55] So, according to the *Sterling Lads* infringement decision, traders could ' … further engage in trading activity on behalf of their own undertaking (proprietary trading) with respect to any G10 currency available in their books, which they also did to different extents during the relevant period, with a view to maximising the value of their respective holdings'.[56] Similarly, in the *TWBS* decision, it is stated that as well as market-making activity the mandate given to traders ' … authorised them to further engage in trading activity on behalf of their own undertaking with respect to any G10 currency available in their books, which they also did to different extents during the relevant period, with a view to maximising the value of their respective holdings'.[57] Crucially, then, the traders involved had the ability to use the information that they obtained from their market-making activity to inform proprietary trading in G10 currencies, although the extent to which the information exchanged was actually exploited in relation to proprietary trading is not known. Indeed, it is notable that although the fines imposed on the addressees were based on a formula that included a proxy figure for revenues obtained through 'trading on own account',[58] it is stated in the *TWBS* decision that 'none of the

[48] *Sterling Lads* (n 1) 396.
[49] ibid.
[50] *TWBS* (n 1) para 101.
[51] *Sterling Lads settlement* (n 1) paras 96 and 100; *TWBS* (n 1) paras 97–109; *Essex Express* (n 1) paras 97–113.
[52] *TWBS* (n 1) para 146.
[53] *Sterling Lads settlement* (n 1) para 141.
[54] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003 [2006] OJ C210/2, para 19.
[55] *Sterling Lads* (n 1) para 91; *TWBS* (n 1) para 4.
[56] *Sterling Lads* (n 1) para 91.
[57] *TWBS* (n 1) para 8.
[58] ibid para 171; *Sterling Lads settlement* (n 1) para 181; *Essex Express* (n 1) para 173.

parties has been able to provide the necessary data'.[59] Similarly in the *Sterling Lads* decision it is stated that ' … none of the Addressees has been able to provide the data necessary to estimate those trading revenues … '.[60]

The consequences of the Forex cartels

Inevitably, the identification of the forex cartels has brought about significant consequences for the participants, both in terms of the aforesaid hefty fines levied by the Commission (and other regulators) on participants, but also ongoing follow-on litigation. In one set of actions, 170 claimants, primarily investment funds, have brought a private damages action in the English courts against seven of the banks involved in forex fixing, with the Court of Appeal in 2022 refusing to allow the banks to avail themselves of the passing-on defence against the funds.[61] Elsewhere, in 2023, the UK Court of Appeal[62] overturned a decision of the Competition Appeal Tribunal[63] refusing to certify two 'opt-out' follow-on actions brought against the banks involved in the *TWBS* and *Essex Express* infringements. As such, the potential of significant damages awards against the defendant banks remains a distinct possibility.

On the flip side, it should be pointed out that in class proceedings in the US, in October 2022 a jury in New York found that Credit Suisse was *not* guilty of rigging the forex market, although this was after other banks in the same proceedings had reached settlements with the claimants running into billions of dollars.[64]

The overall picture, nonetheless, is one of regulatory fines running into billions and ongoing follow-on group litigation, reflecting regulatory decisions finding clear wrongdoing as detailed above. In this context, it is worth reflecting on the extent to which the forex industry should be considered a 'high-risk' sector for competition and market abuses and asking what, if anything, might be done to reduce the possibility of abuses occurring such as those uncovered under the Commission's decisions, going forward.

The problems that the forex cartels put into focus

The Commission's forex decisions put into focus the point that the forex trading sector is one with a number of ingredients that make it something of a 'perfect storm' in terms of vulnerability to abuse including abuses of competition law. Some of the main features will now be considered.

[59] *TWBS* (n 1) para 173, n 103.
[60] *Sterling Lads settlement* (n 1) para 182. See also *Essex Express* (n 1) para 174, n 96.
[61] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353, [2023] 1 All E.R. (Comm) 20. For discussion of this case see: G Stirling, 'Competition Law Damages Actions in Respect of Forex Rate Fixing Cartels: Where the Passing-on Defence Appears to Reach its Limits' (2022) 15 GCLR 97. Essentially the defendant banks argued that the funds should not be able to sue them (the banks) because the funds had, in turn, 'passed-on' any illegal overcharge from the price-fixing cartel to the funds' own customers.
[62] *Phillip Gwyn James Evans v Barclays Bank Plc & Others* [2023] EWCA Civ 876, [2024] 1 All. E.R. (Comm) 573.
[63] *Michael O'Higgins FX Class Representative Ltd v Barclays Bank Plc and Others*; *Phillip Evans v Barclays Bank Plc and Others* [2022] CAT 16, [2022] Bus. L.R. 1334.
[64] 'U.S. jury finds Credit Suisse did not rig forex market' (*CNBC*, 20 October 2022) <https://www.cnbc.com/2022/10/20/us-jury-finds-credit-suisse-did-not-rig-forex-market.html> accessed 7 July 2023. It should also be noted that Credit Suisse was not an addressee of the Commission's *Essex Express* or *TWBS* decisions (n 1).

The first is the sheer scale of forex trading. While gauging the precise level of forex trading is difficult, the most comprehensive estimate on this can be found in the Triennial Survey of the Bank for International Settlements (BIS), the last iteration of which was published towards the end of 2022.[65] This aims to provide a snapshot of the global situation in April 2022 and is based on data from central banks and other authorities in 52 jurisdictions, who, in turn, gathered data from over 1,200 banks.[66] This states that 'over the counter'[67] forex trading reached a level of USD 7.5 trillion per day in April 2022.[68] Clearly, the fact that such eye-watering sums are traded on a daily basis inevitably means that even seemingly very small manipulations in an exchange rate could have very significant financial consequences and therefore the potential to bring in big rewards for those who are successful in fixing the rate.

The second point, is that conversely, the Commission infringement decisions discussed above paint a picture of a relatively small number of institutions and individuals being responsible for currency trades amounting to billions of dollars. From the 2022 BIS Triennial Survey it is not possible to assess what level of trading is done by particular institutions or traders, but what is clear is that the counterparty in the vast majority of transactions is either a 'reporting dealer' (46%) or 'other financial institutions' (48%).[69] Furthermore, forex trading is very much dominated by a small group of financial centres, with 78% of all forex trading (by turnover) carried out via just five jurisdictions, namely the UK, the United States, Hong Kong, Singapore and Japan.[70] Amongst these, the UK is particularly dominant, handling 38% of the global forex turnover.[71]

Some of the national reports upon which the BIS Triennial Survey is based provide a bit more information on the concentration of the market. For example, the Foreign Exchange Joint Standing Committee of the Bank of England publishes a semi-annual report on the UK foreign exchange market. The February 2023 iteration of this refers to 27 participating institutions.[72] So, taking the percentage of forex trading done via the UK combined with the relatively small number of participants in the Bank of England report, it is easy to see how – as the aforementioned Commission decisions suggest – a small group of institutions (and probably quite a small group of individuals within those institutions) have the potential to manipulate exchange rates in a meaningful way, by transacting billions of dollars of currency exchanges on a daily basis. As Chaboud *et al*. summarise in a BIS working paper, ' … the liquidity provision in FX is concentrated among a relatively small number of global banks and non-bank liquidity providers'[73] and consequently ' … certain aspects of the FX market exhibit a high degree of concentration'.[74] Naturally,

[65]BIS; 'BIS Triennial Central Bank Survey: OTC foreign exchange turnover in April 2022' (27 October 2022) <https://www.bis.org/statistics/rpfx22_fx.htm> accessed 7 July 2023. For a good analysis of the 2002 survey and the FX market generally, see A Chaboud, D Rime and V Sushko, 'BIS Working Papers No 1094: The foreign exchange market' (April 2023) <https://www.bis.org/publ/work1094.pdf> accessed 7 July 2023.

[66]BIS Triennial Central Bank Survey (n 65).

[67]Essentially meaning trading done directly between parties rather than via an exchange.

[68]BIS Triennial Central Bank Survey (n 65).

[69]ibid 6. 'Reporting Dealers' are essentially classed as ' … institutions that actively buy and sell currency and OTC derivatives both for their own account and/or in meeting customer demand' (18).

[70]ibid 7.

[71]ibid 8.

[72]Bank of England, 'Results of the Semi-Annual FX Turnover Surveys in October 2022' <https://www.bankofengland.co.uk/markets/london-foreign-exchange-joint-standing-committee/results-of-the-semi-annual-fx-turnover-survey-october-2022> accessed 7 July 2023.

[73]Chaboud, Rime and Sushko (n 65) 2.

of all forms of forex trading, spot trading is particularly vulnerable to abuse given the immediacy of the trades and therefore their ability to impact exchange rates.

The third factor is that detecting collusion amongst currency traders (as opposed to legitimate parallel behaviour that one might ordinarily expect)[75] could prove very difficult. In the absence of having actual knowledge of collusion via a whistle-blower – along with necessary evidence (such as messages in illegal chatrooms as happened in the above cases) – it would be very tricky to identify potential abuses simply by looking at particular sets of currency transactions (unlike, for example, unexplained or suspicious price rises in the cost of particular commodities). Furthermore, even if there were any 'anomalous' transactions, they would likely be 'hidden' amongst the huge numbers of currency transactions executed every day and the massive amounts of currency involved. But beyond the fact of currency manipulation being difficult to identify in the first place, tracing the actual damage from such manipulation once it has been identified may be nigh on impossible. This difficulty in quantifying losses and the diffuse nature of any losses may contribute to manipulations of forex rates being seen by potential infringers as presenting the opportunity for the commission of a 'victimless crime'.

The fourth point that makes forex trading a 'high risk' area from a competition perspective is the distance that the sector enjoys from public consciousness and the consequent lack of attention paid to the sector by members of the public. The 2022 BIS report states that in only 6% of forex trades is the counterparty a non-financial institution[76] – and one presumes that only a small percentage of this 6% will constitute private consumers. Consequently, the sector enjoys a high level of distance from the consciousness of the average consumer, whose only interactions with foreign currency transactions will probably typically come when they embark on foreign travel. So, whereas, for example, the energy sector is very much in public consciousness due to its manifest effects on the prices end-consumers pay for their monthly bills, this is not the case with foreign exchange.

This brings us to the fifth factor: that the forex sector is one which offers virtually limitless possibilities for speculative trading. Indeed, one thing that is very difficult to assess from the BIS triennial surveys is the proportion of trading that could be classed as truly 'speculative'. By 'speculative' here is meant trading the primary aim of which is simply to make a profit on currency fluctuations, as opposed to comprising transactions strictly linked to import/export activity, or transactions that are in any case designed to hedge against risks from other activities involving currency exchange. The BIS Survey does provide a breakdown of forex market turnover by instrument, so this reveals that by some distance, the largest value of transactions (51%) as a proportion of turnover comprise FX swaps.[77] Such transactions generally involve agreeing to buy (or sell) a specific

[74]ibid. It is generally accepted in competition theory that markets with relatively few operators and high levels of concentration are more vulnerable to collusion. For example, it is stated in the Commission Guidelines on the applicability of Article 101 that 'tight oligopolies can facilitate a collusive outcome on the market as it is easier for fewer companies to reach a common understanding on the terms of coordination and to monitor deviations. A collusive outcome is also more likely to be sustainable with fewer companies'. See Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C11/01, para 79.

[75]The difficulties of identifying and differentiating collusive conduct from legitimate parallel behaviour are well known, particularly in certain types of oligopolistic markets where a degree of parallel behaviour is to be expected. See in particular Case 48/69, *ICI v Commission* EU:C:1972:70 and Case C-89/85, *Ahlström v Commission (Wood Pulp II)* EU:C:1993:120.

[76]BIS Triennial Central Bank Survey (n 65).

amount of currency on one date and selling (or buying) the same amount of currency back on a future date. FX swaps can be used by importers and exporters for managing currency or for the purposes of hedging currency risks, but equally they can also be used as a means of simply speculating on a particular currency. The second largest group of transactions after FX swaps were spot transactions,[78] which represent straightforward currency swaps – but again, such transactions can be entered into for a variety of purposes. One point that Chaboud *et al*. have highlighted, is that based on the BIS Triennial Survey, the proportion of total FX trading carried out by dealers with non-financial customers – as opposed to financial customers or other dealers – has declined to less than 10%.[79] By contrast, trades with financial customers – including the likes of hedge funds, asset managers and those associated with more speculative, risky forms of investment – have risen to over 50% of all forex trades.[80] This preponderance of dealers and financial institutions as counterparties to forex trades strongly implies a large volume of speculative trading and underlines the point that there are no obvious limits on the purposes for which currency can be traded – or indeed the volume of currency that can be traded.

The sixth point is, perhaps, a familiar one when it comes to the financial sector generally and that is the information disparity between large institutions active in forex trading and end-consumers – or indeed businesses – at large. While it is inevitable that large currency traders will enjoy economies of scale in forex trading that are not available to consumers or smaller market players, large forex traders also have a much greater knowledge of what is happening on the market due to their market-making activities – which can then potentially be used to inform their own dealing.[81] This is something that comes across from the forex cartels discussed above. For example, in the *Sterling Lads* decision the point is made that when receiving private orders from informed end-customers, a trader has access to ' … information that gives him/her a hint on FX rates tendencies' and that it ' … provides the trader with a considerable informational advantage in the determination of the key competition parameters in FX trading'.[82]

The final point worthy of mention, is that despite all of the dangers of forex trading outlined here, the forex sector is one that remains characterised by little transparency and regulation. While certain states have their own regulatory requirements for institutions to be active in the forex sector[83] and international banking rules may have certain collateral impacts on forex trading, there is no bespoke international regulation of the sector as such. The closest that there is to any such 'regulation' is probably the FX Global Code[84] a set of ' … global principles of good practice in the foreign exchange

[77]ibid.
[78]ibid. According to the 2022 Survey spot transactions accounted for 28% of forex transactions by turnover.
[79]Chaboud, Rime and Susko (n 65) 5.
[80]ibid.
[81]Some of the significant body of economic research on fx trading addresses the issue of information asymmetry, including the question of the extent to which the greater knowledge of traders may be priced in by other market players. See for example: A Ranaldo and F Comogyi, 'Asymmetric Information Risk in FX Markets' (2021) 140 Journal of Financial Economics 391; H Liu and Y Wang, 'Market Making with Asymmetric Information and Inventory Risk' (2016) 163 Journal of Economic Theory 73; LR Glosten and PR Milgrom, 'Bid, Ask and Transaction Prices in a Specialised Market with Heterogeneously Informed Traders' (1985) 14 Journal of Financial Economics 71.
[82]*Sterling Lads* (n 1) para 42.
[83]Such as regulation by the Financial Conduct Authority (FCA) in the UK.
[84]FX Global Code (n 3).

market'[85] issued by the Global Foreign Exchange Committee, an organisation established in 2017, constituting various central banks and private sector organisations.[86] This and other aspects of the regulatory response in recent years will now be briefly considered before attention turns to what realistically might be done further in terms of regulating forex trading. This is with a view not just to preventing repetitions of the abuses of competition law discussed in this article, but also to making the forex sector more transparent in general and to reduce the information disparities between forex traders on the one hand and other parties – not least consumers – on the other.

The FX Global Code

The FX Global Code is aimed at promoting a:

> … robust, fair, liquid, open, and appropriately transparent market in which a diverse set of Market Participants, supported by resilient infrastructure, are able to confidently and effectively transact at competitive prices that reflect available market information and in a manner that conforms to acceptable standards of behaviour.[87]

It is evident that the Global Code is *inter alia* aimed at avoiding the types of conduct that were uncovered under the aforesaid Commission decisions, such as illegal exchanges of commercially sensitive information and coordinated trading behaviour. For example, Principle 7 stipulates that 'Market Participants should have appropriate policies and procedures to handle and respond to potentially improper practices and behaviours effectively'.[88] Nonetheless, the Global Code, *is* merely a set of principles (55 in total), many of which are expressed in rather general terms. Principle 2, for example, holds that 'market participants should strive for the highest professional standards'[89] while Principle 5 states that 'market participants should embed a strong culture of ethical and professional conduct with regard to their FX Market activities'.[90] But beyond the generality of some of the principles, first and foremost the Global Code does not have anything approaching the status of law. Equally, though, in the absence of enforceable regulation, the Global Code constitutes an important statement of acceptable practice in the FX sector and it must be asked – having considered the various ways in which the forex sector appears very vulnerable to abuses of competition law – what, if anything, might potentially be done to reduce these risks going forward, including how the Global Code might be adapted.

Potential ways of mitigating risk of market abuses in the FX Sector

It has been noted above that there are various ways in which the forex sector appears to be vulnerable to unlawful conduct including anticompetitive behaviour and that the sector is still marked by a remarkable lack of both regulation and transparency. But what, if anything, can realistically be done to improve the situation? What follows are some possible suggestions, although it should be acknowledged that given the lack of

[85]ibid 1.
[86]ibid.
[87]ibid.
[88]ibid 11.
[89]ibid, principle 2.
[90]ibid, principle 5.

international law on this matter, bringing about any enforceable regulation at the international level would be unlikely to prove straightforward. As such, it is probably more realistic to focus on possible amendments to the FX Global Code and the introduction of regulation at the national level.

Increasing transparency on the purposes of currency trades

The FX Code frequently refers to 'transparency' and lays down some sensible principles in this regard, such as principle 9, which stipulates that 'market participants should handle orders fairly and with transparency in line with the capacities in which they act'.[91] But most of these relate to creating an audit trail in relation to individual transactions rather than rendering the activities of the sector as a whole more transparent. Given the huge sums of money that the forex sector turns over on a daily basis, it would be beneficial for the scrutiny of the industry generally, for greater data to be available on the activities of the sector. The aforementioned BIS Triennial Surveys gives us a very good indication of the overall level of currency trading, the location in which trades are executed, the main types of instrument being used, the currency pairs being traded and the types of institution that are involved. CLS Bank is another important source of macro data given the huge number of forex transactions that are executed via its settlement system.[92] But neither of these sources tell us a great deal about the purposes for which currency transactions are generally being entered into. In particular, it would be a big step forward to learn more about the percentage of forex trading that can be described as truly speculative, in the sense of essentially constituting 'bets' on or against particular currencies, as opposed to currency trading closely linked to import/export activity or hedging currency exposures.[93] It would also be useful to know which institutions are particularly active in such speculative trading activities.

The level of forex trading that is not closely related to trade in goods and services is assumed to be high.[94] For example, a BIS report referred to above by Chaboud *et al*. asserts that ' … FX trading for financial motives, such as investments in foreign denominated securities, far exceeds the transaction volume related to international trade'.[95] But even forex trading for the purposes of hedging investments in foreign denominated securities needs to be distinguished from purely speculative forex trading. Essentially it would be useful to have data providing a more nuanced picture of what is underpinning most forex trading. This is important, because it gets to the question of what motivates forex trading and consequently who the forex sector is fundamentally serving. While trade in currencies is both inevitable and necessary in terms of a global economy, it does not

[91]ibid, principle 9.

[92]For example, in May 2023, CLS handled a daily average of $1.89 trillion in transactions. See Keith Tippell, 'CLS FX Trading Activity: 23 May', <https://www.cls-group.com/news/cls-fx-trading-activity-may-23/> accessed 9 July 2023.

[93]For a good summary of the main purposes of FX swaps and currency swaps and an attempt to map the FX swap market, see A Ranaldo, 'Foreign Exchange Swaps and Cross-Currency Swaps', Swiss Finance Institute Research Paper No. 22–51, 16 June 2022, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4138134> accessed 7 July 2023. See also P McGuire, 'Dollar Debt in FX Swaps and Forwards: Huge, Missing and Growing' (December 2022) BIS Quarterly Review <https://www.bis.org/publ/qtrpdf/r_qt2212h.htm> accessed 7 July 2023.

[94]See for example A Schrimpf and V Sushko, 'Sizing Up Global Foreign Exchange Markets' (December 2019) BIS Quarterly Review <https://www.bis.org/publ/qtrpdf/r_qt1912f.htm> accessed 9 July 2023, at 23 which focuses on the 2019 BIS Triennial Survey.

[95]Chaboud, Rime and Susko (n 65) 3.

follow that *all* forex trading is necessary. Furthermore, the USD 7.5 trillion that is traded every day is money that 'belongs' to someone. So, it would be of public interest to know what most forex trading is really for, what level of it is truly speculative and which institutions are primarily partaking in such speculative trading. Recent litigation in the English courts involving Italian local authorities and banks in dispute over interest rate swap transactions, gives a good example of speculative transactions involving public money coming to light that will probably have raised a few eyebrows – albeit not specifically relating to forex trading.[96]

The FX Global Code already includes a principle under which market participants should keep a ' … timely, consistent, and accurate record of their market activity',[97] but this is rather open, stating that 'this record may include, but is not limited to … ' particular pieces of data relating to trades such as quantity, price and client identity.[98] It is submitted that this is inadequate and that the requirement to retain certain information on transactions should be more specific as to the information to be kept – as well as being put on a regulatory footing at the national level. In particular, there should be a requirement to record information on the purposes for which currency trades are executed, whether by financial institutions acting on their own account, or parties acting as market-makers. This should go beyond simply recording the type of forex transaction. Given the obligations of financial institutions in relation to anti-money laundering regulations,[99] routinely requesting such information would not seem unreasonable and could even be seen as complementing the types of enquiries required for anti-money laundering purposes. Furthermore, parties active in the forex market should be required to log such information – with counterparty identities anonymised where necessary – with the central bank or financial regulator, so that a richer data-set can be built up on the purposes for which particular types of forex trading are being used. Given the large volume of forex trading being carried out by financial institutions – many of which are public limited companies – it can be argued that both customers and shareholders of such institutions have a legitimate interest in having a greater understanding of how their investments are being used in currency trading, even if that is indirectly. Given the huge sums of currency traded every day, the public at large also have a right to know who is funding and who is profiting from this trade first and foremost – particularly the purely speculative aspect of the market. As has been suggested above, the shelter from public consciousness that the forex sector enjoys, is probably an important factor in its lack of regulation and its susceptibility to abusive conduct, so subjecting the market to greater public awareness and scrutiny would be a positive development.

[96] *Banca Intesa Sanpaolo SpA v Comune di Venezia* [2022] EWHC 2586 (Comm); [2023] Bus LR 384; *Deutsche Bank AG London v Comune di Busto Arsizio* [2021] EWHC 2706 (Comm)).
[97] FX Global Code (n 3) Principle 36.
[98] FX Global Code (n 3) Principle 36.
[99] See *inter alia* SI 2017/692, The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 and SI 2019/1511, The Money Laundering and Terrorist Financing (Amendment) Regulations 2019. Principle 37 of the FX Global Code (n 3) is also concerned with anti-money laundering.

Should there be greater internal segregation between the trading activities of market participants?

It was mentioned above that *prima facie* at least, large-scale forex traders enjoy a significant advantage over smaller market players and consumers because of the knowledge that they obtain from their market-making activity, which can then be utilised in their own proprietary trading activities. There is significant economic research on the extent to which and the ways in which information asymmetry can affect the forex trading market,[100] including some debate as to the respective significance of macroeconomic data and order flow as means of predicting exchange rate fluctuations.[101]

One question that arises in this context is whether it would be either desirable or realistic to introduce a clearer separation between market-making activities and proprietary activities. From one perspective this might be difficult to bring about, because it can be argued that it is the ability of currency traders to trade large volumes of currency that gives them the capacity to act as market-makers and specifically trading on their own account is necessary to hedge against risks that inhere in market-making activity. Indeed, the Commission's *TWBS* decision acknowledges this point, stating that it ' … considers that the concepts of market making revenues and trading revenues are inherently linked' and that each activity is effectively used to hedge against the other.[102] While this is true, it is submitted that there might be an argument for drawing a stronger distinction between trading activities that are genuinely carried out as a way of hedging exposures created by market-making activity or for maintaining currency inventory – and more speculative trading activity that is effectively harvesting the knowledge gained from market-making activity with a view to making a profit, without actually being contingent on specific market-making trades.

Certain principles included in the FX Global Code are not inconsistent with adopting the approach suggested here. Principle 3, which concerns conflicts of interest, states that where appropriate, the measures that market participants take to eliminate conflicts could include 'establishing information barriers' and gives the example of ' … physical segregation of certain departments and/or electronic segregation'.[103] This recommendation may refer to specific conflicts of interest, but nonetheless it does recognise the possibility of effectively erecting internal walls whether physical or operational within an organisation. As such, there is at least an acknowledgment that there are situations in which this will be both appropriate and feasible.

Perhaps more directly of relevance to the point being advocated here, though, is Principle 11, which declares that 'a Market Participant should only Pre-Hedge Client orders when acting as a Principal, and should do so fairly and with transparency'.[104] This makes sense from the perspective that when the market participant is acting merely as an agent for the client, it is the client rather than the market participant that bears the

[100]See for example: RK Lyons, 'Tests of Microstructural Hypothesis in the Foreign Exchange Market' (1995) 39 Journal of Financial Economics 321; D Rime and G Bjønnes, 'Dealer Behavior and Trading Systems in Foreign Exchange Markets' (2005) 75 Journal of Financial Economics 571.
[101]See for example: D Rime, L Sarno and E Sojli, 'Exchange rate forecasting, order flow and macroeconomic information' (2010) 80 Journal of International Economics 72; MD Evans and RK Lyons, 'Order Flow and Exchange Rate Dynamics' (2002) 110 Journal of Political Economy 170.
[102]*TWBS* (n 1) para 175.
[103]FX Global Code (n 3) Principle 3.
[104]ibid, Principle 11.

potential currency exposure. In an example scenario attached to the FX Code it is stated that ' … Confidential Information obtained from a Client is to be used only for the specific purpose for which it was given',[105] which means a market participant should not use that information to its own advantage in anticipation of the effect that a client order is going to have on a particular currency market.

Principle 17 is also of relevance here. This concerns the 'last look' practice, whereby a market participant has the option at the last minute to decline to execute a trade at a quoted price. As well as being transparent to clients as to how 'last look' is employed, under Principle 17 it is stipulated that market participants ' … should not conduct trading activity that utilises the information from the Client's trade request during the last look window'.[106]

Principle 19 is a further provision which relates to the topic of information disclosure, as this includes the guidance that with limited exceptions, 'Confidential Information obtained from a Client, prospective Client, or other third party is to be used only for the specific purpose for which it was given … '.[107] It is also stated that where market participants act as prime brokers,[108] they ' … .should have an appropriate level of separation between their prime brokerage business and their other sales and trading business'.[109]

But despite the principles cited here, it is submitted that certain ambiguities still remain around the relationship between market-making activity and proprietary trading activity. While it is clear that pre-hedging in the case where the trader is *not* acting as a principal and using information from a client order during the last-look window are both unacceptable practices, there still seems to be some ambiguity as to the circumstances under which knowledge of client orders – either individually or in aggregate – can be used immediately after the processing of orders, to inform trading activities.

While the principles in the FX Code are commendable, what is advocated here is a stricter division between activities of market participants as agents, activities as principals – and then trading by market participants on their own account for purely speculative/profit making purposes. This is because the priority here surely has to be to try to minimise the advantages that major currency traders enjoy over other actors on the currency markets i.e. profits by currency traders should either be made via the commission or mark-up they charge on market-making activity, or via speculative trading on their own account – but any speculative trading should *not* be informed by information derived from market-making activities. Furthermore, maintaining a clearer separation between market-making and proprietary activities would make it more difficult for currency traders to exploit the types of exchanges of information found to have occurred in the above-mentioned Commission infringement decisions.

While the FX Code includes, as an annex, a voluntary 'statement of commitment' that currency traders can sign to signal their respect for and adherence to the principles contained in the Global Code,[110] it is suggested that this is inadequate. It is submitted that as a first step, it should be recommended that market participants produce a more specific

[105]ibid 55.
[106]ibid 22.
[107]ibid, Principle 19.
[108]Defined as 'an entity that provides credit intermediation to one or more parties to a trade based on pre-agreed terms and conditions governing the provision of such credit'. FX Global Code (n 3) 75.
[109]FX Global Code (n 3) Principle 19.
[110]ibid 76.

annual statement detailing *inter alia* what measures are in place internally to keep trading activities and market-making activities separate except where they require to be linked for legitimate hedging purposes. Consideration should also be given to introducing a regulatory requirement at the national level for the production of such a statement. But beyond this, there are further debates to be had as to what could be done to segregate market-making activity from speculative trading activity, including consideration of the viability of a complete separation between market-making and proprietary trading.

Benchmark setting and access to key real-time data

It was noted above that one aspect of the forex infringements uncovered by the Commission, concerned some – albeit occasional – attempts to manipulate two major benchmark exchange rates, by coordinating conduct in the run up to the setting of those benchmarks. The two exchange rates in question[111] – and indeed exchange rates between pairs of currencies more generally – aim to represent objective statements of the market price of those currencies at a particular moment in time, based on transactional data. In this sense, most foreign exchange rates are not as readily susceptible to manipulation as was the case with the (former) London Inter-Bank Offered Rate (LIBOR),[112] which was effectively based on the assessment of a small group of people of bank lending rates on the international markets on a daily basis.[113] Indeed, one advantage of foreign exchange rates is perhaps that there is *not* one index that can definitively claim to objectively state the precise exchange rate at any given point in time. But certain exchange rates carry great influence and the fact of being based on supposedly objective data does not mean that attempts to shift the exchange rate – as uncovered in the Commission's forex decisions – will be futile. Indeed, evidence has been found of increased volatility in forex trading in the period immediately preceding the setting of probably the most important forex benchmark, the WM/Reuters 4pm London fix.[114] While there may be other potential explanations than just attempts to move an exchange rate, such spikes in trading causing sudden shifts in particular exchange rates at the very least raise suspicions.

In this context, a question that arises for those setting FX benchmarks is whether to specifically employ methodologies that are proactively aimed at defeating artificial attempts to shift exchange rates. Guidance on the methodology used in compiling the WM/Refinitiv FX Benchmarks is freely available, albeit with the caveat that ' … certain portions of the methodology and related intellectual property are proprietary and confidential and are therefore not publicly disclosed'.[115] This guidance makes clear that ' … there is

[111]WM Reuters 4pm fix and the ECB exchange rates.

[112]Recently replaced by the Secured Overnight Financing Rate (SOFR).

[113]On this see *inter alia* A Dao, A Godwin and I Ramsay, 'From Enforcement to Prevention: International Cooperation and Financial Benchmark Reform' (2016) 16 Law and Financial Markets Review 83.

[114]See MDD Evans, 'Forex Trading and the WMR Fix' (2018) 87 Journal of Banking and Finance 233; L Vaughan and G Finch, 'Currency Spikes at 4 P.M. in London' (*Bloomberg*, 28 August 2013) <https://www.bloomberg.com/news/articles/2013-08-27/currency-spikes-at-4-p-m-in-london-provide-rigging-clues> accessed 9 July 2023.

[115]Refinitiv Benchmark Services Limited: WM/Refinitiv ('WMR') FX Benchmarks: Spot, Forward and NDF Rates Methodology Guide, January 2023, <https://www.refinitiv.com/content/dam/marketing/en_us/documents/methodology/wm-refinitiv-methodology.pdf> accessed 10 July 2023, at 5.

no solicitation process to obtain underlying data'[116] and that 'Refinitiv uses transactional data entered into on an at arm's length basis between buyers and sellers in that market, where that data is available and reflects sufficient liquidity'.[117] In reality, though, it would be very difficult and even problematic to exclude transactions from inclusion in data for the setting of a benchmark unless there was firm evidence to suggest something untoward in a particular transaction.

What is perhaps more realistic here – returning to the question of transparency and information asymmetry – is greater public access to the real-time transactional data to which those who compile benchmarks have access, so as to give a clearer picture of what is really going on to shift exchange rates at any given time rather than just the headline exchange rate figures. Given that forex trading is generally done 'over the counter' rather than via centralised exchanges, this would necessitate a notification requirement and therefore represent a major change to the *status quo*. While there is not the scope to examine the feasibility of such a proposal here, any such system could be limited to transactions above a certain level (or linked transactions reaching a certain aggregate amount) and naturally a certain level of anonymisation would need to be applied to publicly available data. Although such a system could be tricky to implement, the idea of applying a greater level of transparency to real time transactional data should not be dismissed and the practicalities of implementing a reporting system should at least be explored.

Conclusion

The aim of this article has been to analyse key aspects of the Commission's recent forex fixing decisions, attempt to extrapolate what the cartels tell us about the forex trading sector and its susceptibility to abuse, particularly infringements of competition law as well as to make tentative suggestions as to how the sector could be made more transparent. This is with a view not only to reducing the risk of future instances of anticompetitive conduct within the forex sector, but also to creating more of a level playing field than currently exists between a very small number of forex traders on the one hand and everyone else on the other. There is a clear and ironic disjuncture between the huge sums of currency turned over by the forex sector on a daily basis on the one hand and the high level of opaqueness of the sector on the other. Greater regulation of the sector may well be desirable, but before one can even approach the substance or the feasibility of introducing such regulation, there is a need for a much-enhanced understanding as to what is really underlying the forex trade, which in turn requires a much greater level of transparency. In the first instance, amendments to the FX Global Code aimed at increasing transparency could be a useful starting point and while the introduction of international regulation in the near future might seem unrealistic, some level of regulation at the national level in the main forex trading centres – of which the UK is the biggest – should at least be looked at. In particular, the feasibility of introducing a greater

[116]ibid 6.
[117]ibid 6. The Guidance cites the data sources for the benchmarks as the order matching platforms, Refinitiv Matching, EBS and Currenex.

division between the proprietary activity and market-making activity of traders should be considered to try to narrow the information asymmetry between large forex traders and smaller market players and to reduce the risk of future anticompetitive conduct amongst forex traders.

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