A Commentary on the Jurisdictional Challenges in the Rand-Dollar Exchange Manipulation "Cartel": *Competition Commission of South Africa v Bank of America Merrill Lynch International Designated Activity Company* [2023] ZACT 26 (30 March 2023)

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Abstract

Cartels are the most egregious of competition law transgressions, because they entail a concerted effort on the part of cartel members to deliberately distort the market through price fixing, bid rigging, market allocation and constraining the supply of goods and services. Despite efforts by national competition authorities in various countries to combat cartelism, cartels have proved to have long tentacles, often extending beyond borders and morphing into "cross-border cartels". This contribution discusses one of the major challenges that cross-border cartels poses to competition authorities, that of prosecutorial and penal jurisdiction. The note focusses on the "banking cartel" that has been and still is the subject of contentious litigation. In March 2023 the Competition Tribunal (the Tribunal) handed down judgment in the matter of the *Competition Commission of South Africa v Bank of America Merrill Lynch International Designated Activity Company* [2023] ZACT 26 (30 March 2023). There were several questions in the matter, including the jurisdiction of the South African competition authorities to investigate and prosecute firms not incorporated or operating in South Africa (pure peregrini). The Competition Commission (the Commission) had initiated proceedings in the Tribunal against a host of banks for alleged cartel conduct, and some of the respondent banks raised objections and exceptions relating to the jurisdiction of the South African competition authorities.

The note observes that while national competition authorities may have prosecutorial jurisdiction against cross-border cartels, there is still a challenge in enforcing an order where cartels are non-resident in the country. The contribution also notes potential challenges to cartel enforcement on the African continent in light of the establishment of the African Continental Free Trade Area (AfCFTA). Due to the removal of various trade barriers, there is likely to be a rise in cross-border competition issues, including cross-border mergers and cross-border cartels. The note therefore discusses a pertinent issue, that of jurisdiction, which may well be a challenge within the AfCFTA.

Keywords

Cartels; competition authorities; competition law; cooperation; cross-border cartels; African Continental Free Trade Area; jurisdiction.

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1 Introduction

Cartels have been designated as the most egregious of competition law violators because the violations involve a coordinated effort on the part of cartel members to distort the market deliberately – and, in turn, deprive consumers of their welfare.[1] A cartel, in the simplest form, occurs when producers or suppliers of goods and services collude to distort the market by fixing prices, constraining production or dividing markets between themselves.[2] In South Africa, while the term "cartel" is not expressly used in the *Competition Act*,[3] what constitutes cartel conduct is regulated by the Act, which prohibits certain restrictive horizontal practices.[4] The Act prohibits "any agreement between, or concerted practice by firms or a decision by an association of firms to fix prices, divide markets or engage in collusive tendering."[5] In terms of section 4(1)(b) of the Act, such conduct is *per se* prohibited, meaning there can never be justification for engaging in cartel conduct.

A cross-border cartel (CBC) is a cartel that involves multiple members from different countries.[6] The existence of a CBC creates a major challenge regarding investigatory, prosecutorial and penal jurisdiction. This challenge was illustrated in the recent Tribunal decision in *Competition Commission v Bank of America Merrill Lynch International Designated Activity Company*,[7] wherein banks from multiple jurisdictions, spanning Europe, Africa, Australia and the United States of America (USA) were accused of conspiring to manipulate the South African Rand through information

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1 Kelly *et al Principles of Competition Law* 85-86; Neuhoff *et al Practical Guide to the South African Competition Act* 75; Whish and Bailey *Competition Law* 520-521.

2 Kelly *et al Principles of Competition Law* 85-93, Whish and Bailey *Competition Law* 530-547; Motta *Competition Policy* 138-142.

3 *Competition Act* 89 of 1998 (hereinafter "the Act" or the *Competition Act*).

4 Part A of the Act.

5 Section 4(1)(b)(i-iii) of the Act.

6 A cross-border cartel is one where the cartel members are located or based in different countries alternatively, the conduct takes place over multiple jurisdictions, or where the effects of the conduct are felt in more than one country. Cross-border cartels are also referred to as international cartels or transnational cartels. See Horna *Fighting Cross-Border Cartels* 5-7.

7 *Competition Commission of South Africa v Bank of America Merrill Lynch International Designated Activity Company* [2023] ZACT 26 (30 March 2023) (hereinafter referred to as *CC v BOA*).

sharing on electronic and other platforms and through various coordination strategies when trading in the USD/ZAR currency pair.

The case is of significance to competition law jurisprudence as, apart from it having all the hallmarks of a scintillating international banking syndicate spectacle, it also highlights the challenges associated with the regulation of CBCs. The alleged conduct of the banks, if proven, would constitute cartel conduct in the form of price fixing and market division, thus violating the *Competition Act*.[8] However, before a determination by the Tribunal on whether the banks were guilty of the alleged conduct could be made, the issue of jurisdiction took centre stage in the matter. Several banks with no physical or operational presence in South Africa objected to and raised the exception that the South African competition authorities had no jurisdiction to prosecute them.[9]

The Tribunal found that it had jurisdiction to prosecute all the alleged cartel members.[10] The decision of the Tribunal is a welcome addition to competition law jurisprudence insofar as it seeks to create legal certainty concerning the extent of the Tribunal's jurisdiction over alleged cartel members not domiciled in South Africa.[11] However, a major question remains over how effective such a finding would be where the authorities lack jurisdiction or power to enforce their findings. The case that was before the Tribunal and its finding also serve as a warning to the challenges that CBCs may precipitate considering the removal of trade barriers owing to the

8 *Competition Act* 89 of 1998.

9 *CC v BOA* paras 6, 13, and 22.

10 *CC v BOA* paras 16-19; 281-356, in which the Tribunal dismissed the objections, exceptions and dismissal applications of the various banks; and section C of the Tribunal's order.

11 Special note must be taken of the fact that subsequent to the submission of this contribution, some of the banks approached the Competition Appeal Court (CAC) in *Competition Commission of South Africa v Bank of America Merrill Lynch International* (215/CAC/APR23) [2024] ZACAC 1 (8 January 2024) (hereinafter referred to as *CC v BOA 2024*) to appeal the Tribunal's findings. In the appeal, the CAC ruled in favour of the banks, which raised exception to the Tribunal's findings regarding jurisdiction, dismissing the Tribunal's ruling that the Competition Commission (the Commission) had jurisdiction to prosecute 17 banks (see *CC v BOA* 2024 paras 183-188). Following the CAC's finding, the Commission has approached the Constitutional Court for leave to appeal the CAC's decision. The Commission will appeal the dismissal of its case against 13 of the 17 banks (Pillay 2024 https://www.iol.co.za/news/rand-manipulation-competition-commission-approaches-concourt-to-appeal-banks-price-fixing-order-8b66a202-cb02-4f52-9787-7cb071aae896). Whereas the appeal may yet confirm the Commission's jurisdiction or the CAC's finding, the quintessence of this contribution remains the same: that of highlighting the challenge of first establishing prosecutorial jurisdiction and subsequently enforcing penal jurisdiction. The note will therefore not discuss the CAC's decision bar to mention its implications where relevant.

AfCFTA – making the African market more accessible, but at the same time, more susceptible to the emergence and prevalence of CBCs.

2 *Competition Commission of South Africa v Bank of America Merrill Lynch International Designated Activity Company* [2023] ZACT 26 (30 March 2023)

2.1 Background

The case dealt with exception, objection and dismissal applications from the respondents concerning several cases before the Tribunal. The applications emanated from proceedings initiated by the Commission, which alleged that between 2007 and 2013, at least 28 banks from multiple jurisdictions, including Europe, South Africa, Australia and the USA, had conspired to manipulate the South African Rand through information sharing on electronic and other platforms and through various coordination strategies when trading in the USD/ZAR currency pair.[12] According to the Commission, the alleged manipulation had harmed various aspects of the economy, including imports and exports, foreign direct investment (FDI), public and private debt, prices of goods, services and financial assets.[13] The discussion below traces the case's chronological development from referral to the judgment at hand and delineates the issues the note seeks to address.

2.2 Referral

In February 2017, the Commission referred a complaint against the first 19 respondents for alleged price-fixing and market division in contravention of sections 4(1)(b)(i) and (ii) of the *Competition Act*.[14] In March 2017, most of the banks either filed exceptions or requests for further particulars, raising among other things, the Tribunal's lack of jurisdiction to hear the matter.[15] The exception relating to a lack of jurisdiction was mainly predicated on the fact that several of the banks had no presence in South Africa. In June 2019 the Tribunal handed down a judgment concerning the exceptions raised by several respondents. In doing so, the Tribunal divided the respondents into four different groups:[16]

- *Incola* banks – eight local banks in respect of which jurisdiction of the Tribunal was not disputed;
- *First class local peregrini* – five banks which had a South African Branch and were registered in terms of the *Banks Act* 94 of 1990;

12 *CC v BOA* para 2.
13 *CC v BOA* para 3.
14 *CC v BOA* para 11.
15 *CC v BOA* para 13.
16 *CC v BOA* para 16.

- *Second class local peregrini* – three banks that had a South African Representative Office and representative officer in terms of the *Banks Act*;[17] and
- *Pure peregrini* – twelve banks with no local presence or business activity in South Africa.

2.3 Legal question

The above classification of respondents raised a key legal question: whether the Tribunal had the jurisdiction to prosecute all the respondents jointly. Ancillary to the finding on the question of prosecutorial jurisdiction was the question of penal jurisdiction. If the Tribunal found that it had jurisdiction to prosecute and if it were found that the banks, including foreign banks, were guilty of cartel conduct, did the Tribunal have the power to impose sanctions on those pure peregrini banks as provided by the *Competition Act*?

2.4 Tribunal's finding

The Tribunal answered the above question by finding that it had subject matter jurisdiction over pure peregrini banks. Still, it lacked the personal jurisdiction to make a finding against them and could only make a declaratory order.[18] The Tribunal based its finding of having subject matter jurisdiction on the fact that the *Competition Act* applies to all economic activity within or affecting South Africa.[19] Considering that the Tribunal is a Tribunal of record with jurisdiction throughout the Republic,[20] entrusted with powers to adjudicate on any prohibited conduct[21] as well as to make any rulings or orders necessary for the performance of its functions,[22] including imposing penalties on transgressing parties, the Tribunal's assertion that it had subject matter jurisdiction cannot be disputed.

The Tribunal found that while it could not impose penalties on pure peregrini as envisaged by the Act,[23] it could issue a declaratory order confirming the peregrini's involvement in cartel conduct which could have reputational consequences. The Tribunal then dismissed the Commission's referral against the pure peregrini banks with the caveat relating to its power to make a declaratory order.[24]

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17 Section 34 of the *Banks Act* 94 of 1990.
18 *CC v BOA* para 17.
19 Section 3(1) of the *Competition Act*.
20 Section 26(1) of the *Competition Act*.
21 Section 27(1)(a) of the *Competition Act*.
22 Section 28(1)(d) of the *Competition Act*.
23 Section 59 of the *Competition Act*.
24 *CC v BOA* para 18.

2.5 Peregrini's demur

The pure peregrini banks lodged an appeal in the Competition Appeal Court (CAC) against the Tribunal's decision that it could issue a declaratory order against them, albeit that the order would be limited in effect. They argued that for the reason that the Tribunal had determined that it had no jurisdiction over them, it therefore did not possess the power to issue the declaratory order if the Commission were successful in its section 4(1)(b) case.[25] On the other hand, the Commission was not satisfied with the Tribunal's finding that it had only subject matter jurisdiction and not personal jurisdiction. As such, the Commission cross-appealed the Tribunal's finding, and amongst other things, the test used to determine jurisdiction over a peregrinus.[26] The CAC upheld the pure peregrini respondents' appeal against the Tribunal's order regarding the declaratory order, read in conjunction with the Tribunal's order dismissing the Commission's referral against them.[27]

The CAC also upheld the Commission's appeal and found that the common law on personal jurisdiction applied to section 3(1) of the Act and that the Tribunal could enjoy both personal and subject matter jurisdiction over the pure peregrini, provided that there were adequate connecting factors between the conduct of the foreign peregrini and the suit brought by the Commission to justify the assumption of such jurisdiction.[28] The CAC then

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25 *CC v BOA* para 22.

26 *CC v BOA* para 25.

27 *CC v BOA* para 26.

28 *CC v BOA* para 27. It is worth noting here that central to the establishment of personal jurisdiction was the concept of a single overarching conspiracy (SOC). In the *CC v BOA 2024* appeal, CAC was tasked with determining whether the Commission had proved that there was a SOC among the banks, thereby linking them to the alleged cartel conduct and granting the Commission jurisdiction to prosecute them. It was noted that a SOC comprised three elements, to wit "a common anti-competitive objective, being the existence of an overall plan pursing a common economic objective; participation, being each firm's 'intentional' contribution by its own conduct to the common objectives pursued by all the participants; and knowledge, being that the firm was either aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or it could reasonably have foreseen it and that it was prepared to take the risk" (*CC v BOA 2024* para 28). The Commission was therefore required to show a common anti-competitive objective, that is an overall plan in which all of the respondent banks participated to pursue a common economic objective. It was required to show that each firm had made an intentional contribution by its own conduct to the common objectives pursued by all of the participants to the SOC. It further was required to show that each respondent bank was aware of the actual conduct planned or put into effect by the other undertakings in pursuit of these objectives; that is to perpetuate a SOC or that each respondent bank could reasonably have foreseen that it participated in the SOC and that it was prepared to take the risk (*CC v BOA 2024* para 176). The CAC found that the Commission's reference to occasional participation in a chatroom without any additional evidence and where there was no link to any South African bank was inadequate to show a SOC (*CC v BOA 2024* para 185).

allowed the Commission to establish adequate connecting factors between the respondent parties and the jurisdiction of the Tribunal to establish personal jurisdiction in addition to proving the requirements of subject matter jurisdiction on facts which may be set out in the fresh referral affidavit.[29] The Commission filed its revised referral in June 2020, to which the respondents filed exceptions, objections, applications for dismissal and strikings-out of the referral and the Commission's application to join further respondents.[30] One of the grounds on which the respondents raised an exception was the same objection they had had to the 2017 referral, that of the Tribunal's lack of jurisdiction.[31] After extensive pondering, the Tribunal found that it had subject matter and personal jurisdiction as envisaged by section 3(1) of the Act and confirmed by the CAC. It dismissed the respondents' objection to its jurisdiction.[32]

3 Discussion of the case

3.1 Determination of jurisdiction

In analysing the submissions regarding jurisdiction or the lack thereof, the Tribunal reiterated the incontrovertible fact that it had jurisdiction over any contravention of the Act concerning prohibited practices, including conduct under section 4(1)(b).[33] The above refers to subject matter jurisdiction, which was not in dispute; however, regarding extra-territorial conduct, jurisdiction must be established in terms of section 3(1) of the Act. Section 3(1) provides that the Act applies to all economic activity within or affecting the Republic. On a plain reading one would be inclined to conclude that because the alleged conduct of the banks (including the peregrini) affected various parts of the South African economy, the Act would automatically apply, and the Tribunal would have *de facto* jurisdiction over the peregrini.

The Tribunal was swift to point out the CAC's decision in *ANSAC*,[34] wherein it was found that section 3(1) did not automatically confer subject matter jurisdiction over extra-territorial firm conduct on the competition authorities.[35] Rather, section 3(1) of the Act provided for the "qualified effects test", which envisioned that for the Act to apply to extra-territorial conduct, the conduct must have had "direct and foreseeable substantial" consequences in the regulating country. To this end, *ANSAC* is fundamental

29 *CC v BOA* para 28.
30 *CC v BOA* para 37.
31 *CC v BOA* Part A (paras 61-105).
32 *CC v BOA* Part C of the Order (Objection Applications).
33 *CC v BOA* para 65.
34 *American Soda Ash Corporation CHC Global (Pty) Ltd v Competition Commission of South Africa* (12/CAC/Dec01) [2003] ZACAC 6 (30 October 2003) (hereinafter referred to as *ANSAC*).
35 *CC v BOA* para 67.

in restricting the bounds of the effects test, determining that "section 3 envisaged that the Act applied to all economic activity outside South Africa where the conduct complained of had 'direct and foreseeable' substantial consequences in South Africa."[36]

While the respondents argued that the Commission's referral fell short of meeting the qualified effects test, the Tribunal found that for the purposes of establishing jurisdiction, the enquiry did not involve a consideration of the positive or negative effects on competition in the regulating country but merely whether there were sufficient jurisdictional links between the conduct and the consequences.[37] The Tribunal was not concerned with merits at this stage. All the Commission needed to do was to satisfy the *prima facie* requirements of the test – whether the Commission's referral shows the alleged conduct to satisfy contravention of section 4(1)(b) and whether the referral *prima facie* showed that the likely effects of the conduct were direct, substantial and foreseeable.[38]

Further, and relating to the respondents' submissions that the Commission's referral lacked "connecting factors" to establish extra-territorial jurisdiction, the Tribunal referenced the CAC's development of the common law of personal jurisdiction to section 3(1) to ensure that extra-territorial egregious conduct which might have anti-competitive effects on the South African economy does not escape the reach of the Act.[39] To that end the Tribunal found that it had to consider all connecting factors and not only those contained in the Commission's pleadings.[40] This wide interpretation and development of the common law by the Tribunal and the CAC is consistent with the promotion of the spirit, purport and objects of the Bill of Rights as envisaged by the Constitution[41] insofar as the attainment of justice is generally concerned, and the protection of consumers' socio-economic rights is specifically concerned.[42] It is also consistent with international best practice if one considers the Australian Competition and Consumer Commission's (ACCC) successful prosecution of the Valve Corporation and the court's finding that it had jurisdiction in terms of the *Competition and Consumer Act*,[43] in whatever "territory where there was 'carrying on of

36 *ANSAC* paras 54-58.
37 *CC v BOA* para 84; see *ANSAC* para 18.
38 *CC v BOA* para 87.
39 *CC v BOA* para 92.
40 *CC v BOA* para 102.
41 *Constitution of the Republic of South Africa*, 1996.
42 Section 27 of the Constitution; for a detailed discussion on the nexus between the *Competition Act* and the realisation of socio-economic rights see Tavuyanago and Mpofu 2024 *JAL* paras125-136
43 See ss 2A, 2B, 2BA and 2C of the *Competition and Consumer Act*, 2010 (Act No 51 of 1974 as amended).

business' which involved acts within the relevant territory that amounted to or were ancillary to, transactions that make up or support the business".[44]

Ultimately, determining whether the Commission had proved a *prima facie* link between conduct and effects to found extra-territorial jurisdiction in section 3(1) of the Act was up to the Tribunal's discretion. This discretion had to be exercised through a balancing of several factors that did not constitute a closed list.[45] The Tribunal exercised this discretion and found it had subject matter and personal jurisdiction over the peregrini.[46]

The decision to dismiss the respondents' exceptions and objections to the Tribunal's jurisdiction is laudable for two reasons. First, it creates certainty regarding extra-territorial jurisdiction in section 3(1) of the Act. Further, it asserts the competition authorities' attitude to fighting CBCs and the authorities' commitment and refusal to be bullied by "big business" from more developed jurisdictions.[47] However, it raises the question of whether half jurisdiction is better than none. This is because the decision in its order dismissing the exceptions remained silent on the recourse available to the competition authorities where the alleged conduct was to be proven. Is it then to be imputed from the reading of the order dismissing the peregrini's objection that the Tribunal can both find against a peregrinus and penalise it as well? If so, how are the practical implications of enforcing a sanction on a non-resident perpetrator to be dealt with?

Perhaps the Tribunal had pre-empted its lack of power in the 2017 finding where it found that it had jurisdiction but only insofar as issuing a declaratory order was concerned.[48] If this is to be accepted to be the case, it then raises the serious risk of relegating the current judgment to being only of academic relevance. What is the point of all the contentious litigation and the lengths the Tribunal went to establish that it had jurisdiction if that jurisdiction is limited to prosecutorial and not penal jurisdiction? Confirmation of jurisdiction and issuing a declarator is one thing, but what of the actual enforcement? How does the Tribunal issue an administrative fine against a pure peregrini who is "non-existent" as it is neither physically in South Africa nor doing business in South Africa?

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44 *Valve Corporation v Australian Competition and Consumer Commission* [2017] FCAFC 224 (22 December 2017) paras 148-150.

45 *CC v BOA* para 103.

46 *CC v BOA* paras 221, 226, 287-344 and 356.

47 For the need of young and developing agencies to mount a robust fight against cartels as well as recommendations on how to achieve the same, see Horna 2013 https://www.law.ox.ac.uk/sites/default/files/migrated/david_goliath_-_how_young_competition_agencies_can_succeed_in_fighting_cross-border_cartels_-_cclp_l_45.pdf 8-9.

48 *CC v BOA* paras 17-18.

It is also worth noting that the determination of whether the alleged conduct was in contravention of section 4(1)(b) of the *Competition Act*, which was the primary purpose of the 2017 referral, is still in abeyance as the authorities have been dealing with exceptions, objections, dismissal applications, appeals and cross-appeals relating to the citation and joinder of respondents. The Tribunal still needs to make a ruling to that effect and may yet be taken on appeal to the CAC and beyond. The delay in dealing with the merits and deciding on the alleged conduct, as well as the potential for future appeals and delays, perhaps proves another arrow in the cartelise quiver – the fact that they can litigate a matter almost in perpetuity. The perverse consequence of this delay and delays of this nature in similar cases is that while all this is ongoing, innocent consumers are the ones that feel the effects of the alleged cartel members' conduct.

3.2 CBCs and the AfCFTA

As indicated in the introductory section, this note does not seek to provide an in-depth discussion of the AfCFTA's competition regime. However, this note is alive to the fact that the challenges faced by the South African competition authorities regarding CBCs may also be faced by the AfCFTA competition authority. It is therefore necessary to highlight how the challenge of jurisdiction may manifest in the AfCFTA. Despite the aspirations of the *AfCFTA Agreement*,[49] namely the free movement of people, goods and services, its implementation will not be without challenges.[50] In the competition law domain the concern of CBCs is real. To understand the reality of the challenge of CBCs, one has only to look at recent examples of CBCs that have been the centre of attention for national competition authorities across Africa, which include the following:

- The Liquefied Petroleum Cartel (2015) affecting Angola, DRC, Kenya, Malawi, Uganda, Mozambique and Zambia;
- The Packaging Paper Cartel (2016) affecting Zimbabwe, Zambia, Botswana and others;
- The Edible Oils cartel (2017) affecting greater Africa;
- The Banking Cartel (2019) affecting South Africa, Namibia and possibly more; and

[49] The African Continental Free Trade Area, established by the *Agreement Establishing the African Continental Free Trade Area*. See African Union date unknown https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area (hereinafter "the Agreement").

[50] See Art 3 of the Agreement establishing the AfCFTA for a comprehensive list of objectives.

- The Automotive Components Cartel (2020) affecting South Africa and COMESA.[51]

Considering the above, as well as the opening of Africa for trade, it is not a matter of "if" but of "when" CBCs will entrench and increase, and in that eventuality the question becomes whether the AfCFTA is equipped to deal with this scourge. To provide for effective competition regulation, including the regulation of cartels, the AfCFTA Agreement provided for Phase II Negotiations, which included establishing a competition policy.[52] The envisaged competition policy culminated in enacting the *Protocol to the Agreements, establishing the African Continental Free Trade Area on Competition Policy* (the *Competition Protocol*).[53] The objectives of the *Competition Protocol* include ensuring that gains from AfCFTA trade liberalisation are not negated or undermined by anti-competitive practice.[54] One of the anti-competitive practices that the Competition Protocol seeks to regulate is that of cartel conduct. The Protocol prohibits horizontal business practices such as:

- the fixing of prices or trading conditions;
- restraints on production or sale, including by quota or output restriction;
- collusive tendering or bid-rigging;
- market or customer allocation;
- concerted refusal to purchase or supply; and
- the collective denial of access to an arrangement, or association, which is crucial to competition.[55]

The Article proceeds to provide that any agreement, decision by associations of undertakings or concerted practice is prohibited if it has the effect of distorting, preventing or restricting competition in the market unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect.[56] In terms of the institutional framework, the Protocol establishes the Competition Authority,[57] the Competition Board[58] and the

51 See Ratshisusu, Ramokgopa and Maroge 2021 *Antitrust Bulletin* 538.
52 Article 7 of the Agreement establishing the AfCFTA.
53 See Bilaterals.org date unknown https://www.bilaterals.org/IMG/pdf/en_-_draft_afcfta_protocol_on_competition_policy.pdf (hereinafter "Competition Protocol").
54 Article 2 of the *Competition Protocol*.
55 Article 6(1) of the *Competition Protocol*.
56 Article 6(2) of the *Competition Protocol*.
57 Article 13 of the *Competition Protocol*.
58 Article 14 of the *Competition Protocol*.

Competition Tribunal[59] to implement the provisions of the Protocol. To ensure compliance the *Competition Protocol* provides sanctions for the infringement of any of its provisions, including the contravention of provisions relating to restrictive horizontal practices.[60] Be that as it may, of relevance to this note is the matter of the jurisdiction of the competition authorities. Concerning the scope of the application of the Protocol, it applies to "all economic activities by persons or undertakings within or having a significant effect on competition in the Market"[61] and "conduct with continental dimension and having a significant effect on competition in the Market."[62] The provisions mirror those in section 3(1) of the South African *Competition Act* as they provide for jurisdiction based on the "effects" of the conduct.

As illustrated by the above discussion of *CC v BOA* regarding establishing jurisdiction, the AfCFTA authorities may face the same challenge as the South African authorities regarding penal jurisdiction. When it comes to the identification, investigation and prosecution of CBCs, the process is by no means easy. As a point of departure, the competition authority for the country or regional block where the alleged cartel conduct occurred must establish that it has jurisdiction over the alleged cartelists.[63] This is done by establishing whether the alleged conduct influences the market – which means that the "market" must first be delineated, and only then can the effects test be applied to conduct in that market. After these hurdles have been cleared and it has been found that the competition authority has jurisdiction, attention then shifts to whether that jurisdiction is prosecutorial, penal or both.[64] Judging by the vehement objections and exceptions raised by the respondent banks in *CC v BOA*,[65] it can be anticipated that any foreign firm charged under the auspices of the AfCFTA's *Competition Protocol* will follow a similar path of objection and avoidance of responsibility.

This note has recorded two challenges in CBC enforcement. First, while prosecutorial jurisdiction, which is the jurisdiction to investigate and prosecute CBCs, may be straightforward to establish, the challenge of penal jurisdiction often hampers CBC investigations. Second, with the opening of

59 Article 24 of the *Competition Protocol*.
60 Article 17 of the *Competition Protocol*.
61 Article 3 (1)(a) of the *Competition Protocol*.
62 Article 3(1)(b) of the *Competition Protocol*.
63 See Art 20(1) of the *Competition Protocol.*
64 It is conceivable that with the retention of certain powers by national and regional competition authorities in terms of Art 20(1) of the *Competition Protocol*, it may be necessary to establish subject-matter jurisdiction in the "home country" and cede penal jurisdiction to the supranational competition authority. However, such an investigation falls beyond the scope of this note.
65 *CC v BOA* para 2.

borders and the free movement of goods, people and services as envisioned by the AfCFTA, CBCs may find a fertile ground for proliferation in the AfCFTA unless decisively dealt with.

4 Conclusion

Because litigation is ongoing, the question of both prosecutorial and penal jurisdiction has not been closed. While the Tribunal did acknowledge the challenge of not being able to enforce an order extra-territorially,[66] there may yet be a different interpretation of the matter as the case unfolds in the protracted litigation. To illustrate the uncertain nature of the outcome of the case, it is noted that at the time of publication, some of the respondent banks had obtained a judgment in their favour in the CAC,[67] ruling that the Commission did not have jurisdiction to prosecute them. However, the Commission has since approached the Constitutional Court to appeal the decision of the CAC.[68] To that end, this note thus opens this question up for debate and by no means answers it. Further, and in the event that the CC finds that the Commission has prosecutorial jurisdiction over all the banks, the question of penal jurisdiction is one that still lingers. The determination of penal jurisdiction, therefore, is one that remains central to the future of cartel enforcement at the continental level in terms of the AfCFTA.

The solution for both the challenges identified above may be found in an age-old tradition between national enforcement agencies, including national, regional and continental competition authorities – cooperation. National and regional competition authorities from different territories have long cooperated on competition law matters, including cartel enforcement.[69] Where a CBC is concerned, countries may have different types of jurisdictions over different perpetrators of cartel conduct, and cooperation between the countries concerned may yield better results in the fight against CBCs. The need for cooperation between national and AfCFTA authorities was also mooted by Fox. She proffers that because many cartels, especially the most stable ones, involve state action and sometimes rogue state

66 *CC v BOA* paras 17-18.

67 See *CC v BOA 2024* paras 183-188, where the CAC dismissed charges against banks including Nedbank, FirstRand, Credit Suisse Group, Bank of America, Australia and New Zealand Banking, Commerz bank, Nomura, HSBC Bank USA, Macquarie Bank and Standard Americas.

68 Mahlaka 2024 https://www.dailymaverick.co.za/article/2024-02-06-competition-commission-presses-ahead-to-concourt-with-currency-manipulation-case-against-bank.

69 See International Competition Network 2007 https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_Cooperation.pdf; OECD 2014 https://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf; Tritell and Kraus 2013 https://www.ftc.gov/sites/default/files/attachments/international-competition/ftcintantiprogram.pdf.

officials, effective enforcement will require common work between AfCFTA officials who oversee the internal market, and with national prosecutors.[70]

Africa already has numerous successful national and regional competition enforcement agencies[71] and the Competition Protocol envisages cooperation among enforcement agencies, as it allows Regional Economic Communities (RECs) to maintain their jurisdiction as building blocks for an integrated competition regime in Africa.[72] One could, therefore, argue that the framework already exists for increased and effective cooperation in the AfCFTA to mount a robust fight against CBCs. What coordinated enforcement under the AfCFTA will look like is yet to be determined, and one can only speculate as to the successes or challenges CBC enforcement may face. However, what is abundantly clear is that coordination and cooperation among regional authorities will be cardinal if Africa as a continent is to stand a chance against the development and expansion of CBCs. There is potential and sound justification to use the existing framework in the AfCFTA and national regimes to encourage and promote cooperation while leveraging the experience of existing competition authorities across Africa to fight this scourge successfully, advance public interest and protect and enhance consumer welfare.

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70 Fox 2022 *Review of Industrial Organization* 318.

71 See Kigwiru 2017 http://www.compcom.co.za/wp-content/uploads/2017/09/CROSS-BORDER-ENFORCEMENT-IN-AFRICA.pdf. Some national competition authorities include the Competition Commission of South Africa, the Competition Tribunal of South Africa, the Competition and Tariff Commission of Zimbabwe, the Competition and Consumer Authority of Botswana, the Competition Authority of Kenya, the Federal Competition and Consumer Protection Commission of Nigeria; some regional competition authorities include the COMESA Competition Commission, the East African Community Competition Authority and the ECOWAS Regional Competition Authority.

72 Article 20(1) of the *Competition Protocol*.

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List of Abbreviations

ACCC	Australian Competition and Consumer Commission
AfCFTA	African Continental Free Trade Area
CAC	Competition Appeal Court
CBC	cross-border cartel
FDI	foreign direct investment
JAL	Journal of African Law
OECD	Organisation for Economic Cooperation and Development
SOC	single overarching conspiracy
USA	United States of America
USD	United States Dollar
ZAR	South African Rand