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Fighting exclusivity clauses in the market for remittances

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During the last decade more than 20 countries that receive remittances have made exclusivity clauses illegal in the business of money transfers. Two money transfer companies impose such clauses on their agents worldwide, preventing them from working with other money transfer companies.
The countries that have opposed exclusivity clauses consider them abusive, since they restrict competition and increase prices, with a negative impact on the consumer. The purpose of this article is to provide a high-level view of the fight against abusive exclusivity clauses in money transfer through a general review of several cases. This text is a condensed and non-technical version of a detailed version to be published shortly.

In 2001 Russlavbank, a well respected Russian bank, was successfully operating a correspondents' network, called Contact. It was a cash to cash transfer system, like the ones operated by money transfer companies. Most of the Russian banks signed contracts to participate in Russlavbank's network. Thanks to this success, the network allowed customers to send money from one corner of Russia to the other and also outside of the country.
But on June 5th, 2001, one of the members of the network, the Independent Construction Bank, cancelled its contract with Russlavbank. The reason was "a categorical demand" [i] by a third party, Western Union LLC.
One day later, on June 6th 2001, another Russian bank, called Omskpromstroibank, requested that Russlavbank remove from its website any mention of the bank's name in relation to the activity of money transfer. Omskpromstroibank explained in writing that Western Union LLC considered this situation to be a violation of item 4.2.8 of a contract the bank signed with Western Union.
On July 18th, 2001 yet another bank, Mobiasbanka, cancelled its agreement on money transfers with Russlavbank for the same reason. And that same day, Agroimpuls sent Russlavbank a request to cancel their agreement on money transfers. Their reason for cancelling the agreement was a notice received from Western Union LLC. In the notice Western Union cancelled its agreement with

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Agroimpuls because the bank was a participant in the Contact system at the same time. The reason was, again, a violation of item 4.2.8 of its contract with Western Union.
After notifications from several other entities, Russlavbank had lost almost all the banks that participated in its Contact correspondents system and its business was on the brink of disappearing. Looking for a remedy, Russlavbank sought the protection of the Russian Ministry of Antimonopoly Policy, filing a claim against Western Union for violation of the antimonopoly legislation.
Russlavbank claimed that the clause 4.2.8 included in the contracts between Western Union and Russian banks was unlawful. This clause prohibited banks from cooperating with companies other than Western Union when offering cash to cash money transfer services. The clause granted Western Union the banks' exclusive collaboration. Russlavbak considered that Western Union LLC's behavior constituted what the Russian law defined as "unfair competition."
After a long investigation, the Commission of the Russian Ministry of Antimonopoly Policy published a ruling on September 10th, 2003. The Commission considered item 4.2.8 "as a contractual term aimed at the restriction of access to the market", and, "as a consequence, restriction of competition." Therefore, this item was "a violation of Art. 6 of the Federal Law "On Protection of Competition." In addition, it considered Western Union's inclusion of this exclusivity clause as an act of unfair competition. Finally, the competition authority asked Western Union "to terminate the violations of the antimonopoly legislation."
Although Western Union long ago standardized exclusivity clauses in Russia and other countries, it was the first time, as far as we know, that this policy was legally challenged.
Western Union reacted by appealing the ruling, first to the Moscow City Arbitration Court, which issued a decision in April 2004 dismissing the appeal and asking Western Union to pay full legal expenses. Again, Western Union appealed to the Federal Arbitration Court of the Moscow District, and it issued a ruling on October 7, 2004, dismissing the cassation claim.
Accordingly, all exclusivity clauses in contracts signed by Russian banks with Western Union were revoked. At that time, Western Union had such contracts with more than 200 banks in Russia[ii]. Thus, Russia became the first country in world where exclusivity clauses were declared illegal in money transfers. Today Russia "is recognized as the least expensive country in the G8" [iii] for sending remittances.

Ukraine takes the relay

The Russlavbank case opened the way for the involvement of the Ukrainian Competition Authority. In 2004 Ukraine's Antimonopoly Committee began an investigation related to the high prices Western Union was charging to send money to Ukraine. Although the exact details of the investigation were never disclosed, it is believed that it involved an allegation that the company held a monopolistic position on the inflow of remittances to Ukraine – a position obtained by means of exclusivity clauses with the banks that covered the last mile of these transactions, i.e., paying the remittances to the beneficiaries. One important aspect was that the company investigated was not based in Ukraine. It was the international arm of Western Union that signed the contracts with Ukraine banks, contracts based on international law. Therefore, the Ukrainian authorities did not have regulatory control over this entity. The investigations led to negotiations with the company. The results were made public in March 2005 through a Ukrainian government Press Release: "... as a result of this investigation, the Company reduced tariffs on money transfers from Russia from 15 to six percent." [iv] It seems that this

reduction in the price of transfers from Russia, undertaken in September 2004, was the first step of a wider reduction, since the head of the Antimonopoly Committee, Oleksi Kostusev, was quoted as saying that "Western Union will reduce tariffs on transfers from overseas countries to an economically substantiated rate, otherwise penalties will be applied to this Company."
According to Ukrainian press reports, the Antimonopoly Committee was ready to fine the company up to 350 million dollars. But the Committee finally agreed to close the case when the company made a commitment to reduce its fees by "no less than 40 percent." [v]
Of course, it is impossible to compare the Ukrainian and Russian investigations, which analyzed different facts from a very different legal point of view. In fact, Russia was investigating a Russian company based on Russian territory after another Russian company filed a claim. The Antimonopoly Committee of Ukraine was not investigating a Ukrainian company, while the process started as an internal investigation. It is not surprising that the subsequent processes were also different. But both cases had two things in common. The first is that exclusivity clauses were at the heart of the both processes. The second is the result in terms of the reduction of prices for remittances.

Ethiopia sets the model

A few months later the National Bank of Ethiopia issued Directive No. FXD/30/2006, with "provisions for International Remittance Services." This regulation stated in article 3.2.1 that "Remittances Services Providers shall arrange non-exclusive conditions when making agency agreements." And in order to keep control of those agreements it specified in article 3.2.4 that the National Bank of Ethiopia must approve agency agreements with international money transfer operators.
The National Bank's objectives with this regulation were "reducing remittance costs and increasing access to cost-effective, reliable, fast and safe services that benefit migrants."
With this provision Ethiopia resolved the thorny issue of how to regulate the market for incoming remittances, controlled by companies based outside the country and therefore outside their regulatory powers. The solution was to order the entities subject to its regulation not to sign agreements with them based on exclusivity and without prior consent of the Regulator.
This solution was going to be replicated in the coming years.

Reactions

Western Union viewed these events as a challenge to its business model. In a 2006 filing with the US Securities and Exchange Commission, in listing the risks that could affect the company, Western Union listed a very particular kind of risk related to "exclusivity". As the company explained, "virtually all of the Western Union branded agents offer our services on an exclusive basis—that is, they have agreed by contract not to provide any non-Western Union branded money transfer service." [vi] So the company considered that it was exposed to the risk of a sudden "inability to enforce our exclusivity rights under our contracts," adding that this "could adversely affect our operations and revenue."
And the company provided information about how this was already happening: "For example, Russia and Ukraine have each enacted laws that effectively prohibit payment service providers, such as money transfer companies, from agreeing to exclusive arrangements with banks in those countries."
Of course, the Russian and Ukrainian cases were based on laws, but not specifically targeting payment services providers. The key element in both cases was the competition authorities' interpretation of those laws.

The Company was considered the leading remittance services provider in the world at the time. On page 85 of the report the company stated that in 2005, it transferred $42 billion on behalf of its customers. This figure was roughly 20% of the total value of remittances sent by workers to developed and emerging regions. The Company estimated the total dimension of this market as "$249 billion in 2005" (page 84).

Another significant reaction came from two leading international institutions. The World Bank and the Bank for International Settlements (through its Committee on Payment and Settlement Systems) published a document titled General Principles for International Remittance Services. According to the fourth principle, "Competitive market conditions, including appropriate access to domestic payment infrastructures, should be fostered in the remittance industry." Among the possible actions concerning Principle 4, the document said that remittances services providers "could be discouraged from making exclusivity a condition of offering a remittance service." [vii] This reference was an implicit vindication of the pioneers in the fight against exclusivity clauses. It gave visibility to their cause and provided firmer ground for countries that were considering action in this regard.

Further bans of exclusivity

In March 2008 Senegal's Minister "D'Etat" for Economy and Finance, Abdoulaye Diop, addressed a "lettre circulaire" to the managers of all Banks in the country. The letter head was "Contrats d'exclusivité relatifs aux transferts rapides d'argent." In this letter, the Minister made explicit that exclusivity clauses in the money transfer field were against the Competition Law. Therefore, the Minister asked banks' managers to make the contracts signed with money transfer companies agree with the laws of the country. This letter should be considered as a guidance document of a political nature, since it didn't have the executive form of a Law or a Decree. The letter didn't seem to have been immediately effective. Two years later, in 2010 the local press reported complaints from independent money transfer companies about other operators exerting pressure on banks to keep the exclusivity regime in effect[viii].
However, in the long run, the political measures taken by Senegal's government were extended to other countries of the West African Economic and Monetary Union (UEMOA). Those countries share the same currency, the Franc de la Communauté Financière Africaine and the same central Bank (BCEAO). Now all the countries belonging to the UEMOA are free of exclusivity clauses. (Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo).

In November 2008 the Central Bank of Nigeria was going to take action in this regard following the Ethiopian model and using language that would be echoed by other countries abroad. With the Directive BSD/DIR/CIR/GEN/VOL 2/017, dated November 20th, 2008 the Central Bank of Nigeria forbade all national banks to sign agreements that included exclusivity clauses with international money transfer operators. It also ordered a review of all existing agreements "to expunge such clauses." The Central Bank made this decision after finding that exclusivity clauses "constitute a restraint on competition and unnecessarily increase the cost of money transfer services to the users."

In September 2010 The Reserve Bank of India issued Circular 591/02.27.001 that forbids exclusivity agreements for In-bound Cross Border Money Transfer Service. The entity explained that "we are constrained to conclude that exclusivity arrangements limit competition, distort pricing and thereby act as a deterrent to a payment system from achieving the desired goal of efficiency, affordability and being ubiquitous."

In October 2011 the Central Bank of Liberia issued Directive 2/2011 that nullifies exclusivity clauses in the contracts between banks and money transfer companies. For the first time, the regulator specified that violators could be fined with not less than L$100,000 for each day of violation.
One year later, in June 2012, the National Bank of Rwanda issued Regulation 6/2012 that in Article 23 prohibits exclusivity agreements for Payment Services Providers.

In January 2013 the anti- exclusivity tide arrived on the shores of Mediterranean. In January, the Banque Centrale de la Tunisie ordered in its "Note aux intermédiaires agrees N°2013-01" to "expurger les clauses d'exclusivité" in the contracts signed with money transfer companies. The Banque Centrale found that "exclusivity clauses limit competition and increase the prices for Money Transfer services."

Finally, it is worth commenting on another process initiated by a competition authority.
In June 2011 Gambia's Competition and Consumer Protection Commission analyzed a claim where, for the first time, Western Union was indicted along with MoneyGram over exclusivity clauses. The case started in April 2010 when the Gambian company J-Financial Services Ltd., an agent of Money-Gram since 2008, filed a complaint to the Competition Commission[ix]. J-Financial was concerned about a clause in the agency agreement which it considered to be unfavorable. The clause prohibited J-financial from providing other money transfer services apart from MoneyGram's on their premises. "The Commission's investigation confirmed that the agreements between the major providers of money transfer services, Western Union and MoneyGram, and their representatives have an exclusivity clause that is restrictive and anti-competitive in nature, and goes against the provisions of the Competition Act 2007, thus calling for remediation." The Commission declared that "it strongly believes that the exclusivity clause in the agreements of Western Union and MoneyGram, respectively, is intended to protect the service provider from its competitors, and to consolidate its predominant position in the Gambian market." Therefore, the Commission declared that "the exclusivity clause is a serious impediment to growth and fair competition in the money transfer industry and, therefore, should be promptly expunged in both existing and future agreements."

Analysis

All the cases presented here have a striking point in common. All relate to countries that are or were receivers of remittances (as Russia was at the time). There is not a single remittance sending country, like France or Australia, on the list. In fact, to our knowledge, no sending country has made exclusivity clauses illegal in the money transfer market.
The reason may have to do with the general framework of the market as we will analyze below.
The case against exclusivity, in theoretical terms, rests on the notion that exclusivity harms competition and damages the consumer. Although antitrust laws are not standardized worldwide, they generally share the same principles. In very broad terms, a violation would arise if it is proved that one player, by using exclusivity clauses, has shut out its competitors from a substantial share of potential points of sale. It would not be necessary for this player to have created a monopoly through

exclusivity clauses. Just holding a substantial part of the market would be sufficient. The second requirement is proving that such practices have damaged the market. This could be shown by an increase of prices, damaging consumers who have to pay more for the service.

Regarding the first requirement, the money transfer market has a very different shape in the sending countries and the receiving countries, although both show a very large number of points of sale dedicated to money transfer.

Sending countries used to have wide networks composed of agents with a single location supplemented by a very small number of agents with multiple locations. One example is Spain, where the official number of payment institutions (the kind of entity allowed to undertake money transfer activities) at the end of 2013 was 56. Those entities offer their services through a network of 20,630 registered agents that operate a total of 31,914 different points of sale [x]. This represents an average of 1.5 points of sale per agent.

On the other hand, receiving countries have also a large number of points of sale to carry out money transfer operations. Their role is to pay the money to the beneficiary. So for them, there is a prerequisite: to have cash available to pay the transactions. In any receiving country there is just one category of entities that always complies with this prerequisite: banks. Of course, in purely theoretical terms there could also be supermarkets, gas stations or post offices. But most remittances are paid by banks in destination countries.

A typical example could be Tunisia, where according to the Association Professionnelle Tunisienne des Banques et Etablissements Financiers, at the end of 2012 there were 1,449 bank agencies all over the country managed by 21 banks [xi]. This represents an average of 69 branches per bank.

Therefore, in Spain the average agent has just 1.5 points of sale representing 0.004% of the market. But in Tunisia the average agent has 69 points of sale, or 5% of the total available points of sale. It is obvious that in Spain it would be necessary to sign a large number of exclusivity contracts in order to affect competition. But in Tunisia it would be easy to produce this effect with just a small number of contracts.

Another important element in this context is the nature of the agents. In the sending countries they are usually small retailers, normally family owned stores whose economic means are limited. And they also have very little, if any, knowledge of anti-trust regulation.

On the other side, in destination countries, the agents are banks, with a very sophisticated knowledge of regulation and the economic means necessary to undertake a legal proceeding. For instance, a complaint to the Competition Authority like the ones initiated in Russia and Gambia.

This situation may help to explain why all the countries that have forbidden exclusivity clauses in money transfers are receiving countries. But it doesn't mean that there are not grounds for similar actions in sending countries.

Take the case of France.

One of the players in the money transfer business is the post office, which has 17,151 branches all over the country [xii].

The French post office has signed an exclusivity contract with Western Union for the provision of money transfer services (they also maintain a joint venture for this purpose). This means that no other money transfer company offers its services in the French post office locations. So the exclusivity contract between the post office and Western Union has deprived competitors of a very substantial

share of potential points of sale. So substantial, in fact, that it allows one to wonder whether Western Union is the dominant player in the market.
Has this harmed consumers? The World Bank collects prices of remittances worldwide on a quarterly basis. The average price reported in its latest survey (1Q 2015) for a 140€ transfer from France to Morocco is 6.2€. The price reported for "La Poste via Western Union" is 18.7€, while the price reported for Western Union through other agents is between 8€ and 12€ [xiii].
We can find the same situation all over the European Union, where most postal services have signed exclusivity contracts with Western Union or MoneyGram. It must be noted, finally, that almost all post offices in Europe are still entities that are owned or at least controlled by the State. This fact suggests that the situation described could be compounded with what European Union regulation considers to be State Aid.

Conclusions

Migrants' remittances have been recognized as a key contributor to poverty reduction in receiving countries and a significant lever for development.
Remittances have also been recognized as especially expensive. Most international organizations have singled out price as one of the main policy issues regarding those flows. In 2009, during the L'Aquila Summit, the G-8 asked for "a reduction of the global average costs of transferring remittances from 10% to 5% in 5 years," and called this the 5x5 Objective. In 2011, the G20 supported this objective by formally including the "5x5 Objective" in the Cannes Summit Final Declaration "Building Our Common Future: Renewed Collective Action for the Benefit of All."

This objective depends on improvements in very different areas that range from the availability of better data on remittances, to improvements in the infrastructure of payment systems and the elimination of taxes that affect remittances. Among those areas, Competition Policy deserves to be singled out as an area where significant price reductions have been achieved in the past by banning abusive exclusivity clauses.

The techniques used to forbid exclusivity clauses are diverse, and they have different impacts. The most common way to ban exclusivity agreements has been through a decision of the regulatory authority for financial services. These authorities, normally central banks, have issued regulations that forbid local intermediaries to sign such clauses and/or nullify existing clauses (Ethiopia 2006; Nigeria 2008; India 2010; Liberia 2011; Rwanda 2013, Tunisia 2013). These regulations have been implemented swiftly, providing an immediate remedy.

In some cases the banning of exclusivity clauses has come about through a formal investigation by the competition authority that results in an order to nullify exclusivity clauses (Russia 2004; The Gambia 2011). In one case the competition authority's actions led to negotiations and a settlement (Ukraine 2005). All of those cases involved a formal investigation following a complaint. All of those cases were brought against Western Union, alone or with MoneyGram. All of those processes took a long time to produce the desired outcome, but that was because allegations were presented and the companies involved were allowed to defend themselves.

Finally, there are other cases in which governments have taken the initiative and through political actions have sought to limit the spread of exclusivity clauses (Senegal 2008, UEMOA/BCEAO 2012). However effective, this has been the slowest path to yield results.

In this article we survey the strategies that 18 countries have used in taking action against the exclusivity clauses that two money transfer companies employ to bind their agents to them.

However, there are many countries that still allow exclusivity clauses in agency contracts for money transfers. Clauses that can be as abusive and harmful to the consumer as the ones already banned.

Regulations and rulings quoted in the article

All documents are available for distribution upon request. admin@remesas.org

Federal Antimonopoly Service of the Russian Federation. Decision on case No. 2 06/121-03

National Bank of Ethiopia, Directive No. FXD/30/2006. June 2006

Senegal's Minister "D'Etat" for Economy and Finance, "lettre circulaire" on "Contrats d'exclusivité relatifs aux transferts rapides d'argent". March 2008

Central Bank of Nigeria, Directive BSD/DIR/CIR/GEN/VOL 2/017. November 2008

The Reserve Bank of India, Circular 591/02.27.001. September 2010

Central Bank of Liberia, Directive 2/2011. October 2011

National Bank of Rwanda, Regulation 6/2012. June 2012

Banque Centrale de la Tunisie, Note aux intermédiaires agrees N°2013-01. January 2013.

Gambia's Competition and Consumer Protection Commission. Investigation Report to Competition Commission on Exclusive Contracts in the Money Transfer Services in Gambia. June 2011

Article Timeline

2003: On September 10th the Federal Antimonopoly Service of the Russian Federation issues Decision on case No. 2 06/121-03. The Decision considers that the exclusivity clauses in the agency agreements of "LLC NPO Western Union" violate the antimonopoly legislation.

2004: October Federal Arbitration Court of the Moscow District dismisses the cassation claim of Western Union and confirms the ruling of the Federal Antimonopoly Service.

2005 March: The Ukrainian Government announces that the Antimonopoly Committee reached a settlement with Western Union to reduce the prices of its transfers to Ukraine from Russia.

2006 August: National Bank of Ethiopia issues the Directive No. FXD/30/2006 ordering Remittance Service Providers to arrange "non-exclusive conditions when making agency agreements."

2006 September: Western Union issues a report to the US Securities and Exchange Commission stating that "the inability to enforce our exclusivity rights under our contracts could adversely affect our operations and revenue".

2007 January. The World Bank and the Committee on Payment and Settlement Systems of the BIS publish the General Principles for International Remittance Services. Among the actions suggested, they discourage making exclusivity a condition for offering a remittance service.

2008 November: Central Bank of Nigeria orders banks to “expunge” exclusivity clauses from contracts with International Money Transfer companies.

2010 September; The Reserve Bank of India issues Circular 591/02.27.001 that forbids exclusivity agreements for In-bound Cross Border Money Transfer Service.

2011 June: Gambia Competition and Consumer Protection Commission orders Western Union and MoneyGram to expunge the exclusivity clauses in their respective agreements with their representatives.

2011: October: Central Bank of Liberia issues directive 2/2011 that nullifies exclusivity clauses in the contracts between Banks and Money Transfer companies. Violators can be fined not less than L$100,000 for each day of violation.

2012 June: National Bank of Rwanda issues Regulation 6/2012. Prohibits exclusivity agreements for Payment Services Providers.

2013 January: Tunisia: the Banque Centrale de la Tunisie asks in its Note aux intermédiaires N°2013-01 that they agree to “expurger des clauses d’exclusivité” in the Contracts signed between intermediaries and Money Transfer companies.

2013 September: Armenia central bank enacts Decision 221 to limit the market share of any one international money transfer operator to a maximum of 30 per cent.

2015: Although PSD derogates the mandatory exclusivity representation of agents, it is still considered as an option. Money transfer companies have exclusivity agreements with Post Offices all over the European Union as well with banks.

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[i] Federal Antimonopoly Service of the Russian Federation. Decision on case No. 2 06/121-03 of violation of the antimonopoly legislation.

[ii] World Bank Lowering the Cost of Remittances in 4 CIS Countries, Page 24 . Internet ref: http://siteresources.worldbank.org/ECAEXT/Resources/Section_3.pdf

[iii] World Bank, Remittance Prices Worldwide, ISSUE NO. 10 – JUNE 2014, World Bank, Remittance Prices Worldwide, ISSUE NO. 10 – JUNE 2014, page 1. Internet Ref: https://remittanceprices.worldbank.org/sites/default/files/rpw_report_june_2014.pdf

[iv] Money transfer tariffs via Western Union are solely protected, Antimonopoly Committee sources believe. Internet ref: http://www.kmu.gov.ua/control/en/publish/article?art_id=14293203&cat_id=24431520

[v] Kyivpost, article published on April 14, 2005. Western Union slashes money transfer rates. Internet ref: http://www.kyivpost.com/content/business/western-union-slashes-money-transfer-rates-22584.html

[vi] Western Union "INFORMATION STATEMENT OF THE REGISTRANT DATED SEPTEMBER 14, 2006", SEC reference EX-99.3. Page 21 and following. Internet ref: (http://www.sec.gov/Archives/edgar/data/1365135/000119312506192095/dex993.htm

[vii] The World Bank & Committee on Payment and Settlement Systems. General Principles for International Remittance Services. Page 38. January 2007. Internet ref: http://siteresources.worldbank.org/INTPAYMENTREMMITTANCE/Resources/New_Remittance_Report.pdf

[viii] Senegal Business. Après la levée de l'exclusivité sur le transfert d'argent : Certains opérateurs font des pressions sur les banques, accuse le patron de Money express. Internet ref: http://senegal-business.com/2010/12/apres-la-levee-de-l%E2%80%99exclusivite-sur-le-transfert-d%E2%80%99argent-certains-operateurs-font-des-pressions-sur-les-banques-accuse-le-patron-de-money-express/

[ix] Gambia's Competition and Consumer Protection Commission. Investigation Report to Competition Commission on Exclusive Contracts in the Money Transfer Services in Gambia. June 2011

[x] Banco de España, (, BOLETÍN ECONÓMICO, SEPTIEMBRE 2014 ENTIDADES DE PAGO Y ESTABLECIMIENTOS DE COMPRAVENTA DE MONEDA EXTRANJERA EN 2013, page. 67. Internet Ref http://www.bde.es/f/webbde/SES/Secciones/Publicaciones/InformesBoletinesRevistas/BoletinEconomico/14/Sep/Fich/be1409-art6.pdf

[xi] Association Professionnelle Tunisienne des Banques et Etablissements Financiers. Répartition des Agences, Succursales et Centres d'Affaires par Gouvernorat 2012. Internet ref: http://www.apbt.org.tn/telechargement.php?code=52

[xii] Internet ref: http://www.laposte.fr/particulier/bureaux-de-poste

[xiii] World Bank. Remittance Prices Worldwide database. Internet ref: https://remittanceprices.worldbank.org/es/corridor/France/Morocco