IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1336/7/7/19: **PHILLIP EVANS v BARCLAYS BANK PLC AND OTHERS**

FURTHER SUBMISSIONS
ON MR EVANS' THEORY OF HARM

A. INTRODUCTION

1. These further submissions are served pursuant to:

    (a) The exchanges between the Tribunal and the parties during the CPO applications hearing, and in particular during the course of closing submissions on Friday 16 July 2021, concerning the theories of harm advanced by the Applicants; and

    (b) The Tribunal's letter of 20 July 2021 (the **"Tribunal's Letter"**).

2. They are structured as follows:

    (a) **Section B** contains some brief legal observations concerning the issue of strike out at the certification stage;

    (b) **Section C** provides further particulars of the claims that Mr Evans proposes to bring on behalf of members of the Proposed Classes[1]; and

    (c) **Section D** summarises Mr Evans' position in relation to the issues raised in point (8) of the Tribunal's Letter.

3. Mr Evans adopts the defined terms used in his Amended Collective Proceedings Claim Form (the **"Claim Form"**) **[EV/1]**.

B. LEGAL OBSERVATIONS ON THE ISSUE OF STRIKE OUT AT THE CERTIFICATION STAGE

4. The starting point on this issue is Lord Briggs' judgment in *Mastercard Inc v Merricks* [2020] UKSC 51 **[AUTH/34]**. In particular, at [59] **[AUTH/34/23]**, he said:

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[1] Mr Evans' proposed class definition is set out in an annex to his Claim Form: **[EV/5]**. It is also included in his draft CPO: **[EV/6]**.

"…the Act and Rules make it clear that, subject to two exceptions, the certification process is not about, and does not involve, a merits test. This is because the power of the CAT, on application by a party or of its own motion, to strike out or grant summary judgment is dealt with separately from certification. The Rules make separate provision for strike-out and summary judgment in rules 41 and 43 respectively, which applies to collective proceedings as to other proceedings before the CAT. There is no requirement at the certification stage for the CAT to assess whether the collective claim form, or the underlying claims, would pass any other merits test, or survive a strike out or summary judgment application, save that the CAT may, as a matter of discretion, hear such an application at the same time as it hears the application for a CPO: see rule 89(4). This is the first exception, but inapplicable in the present case because no such application was made." (emphasis added)

5. Mr Evans makes two observations in relation to the above paragraph:

(a) First, this is an emphatic rejection of any consideration of the merits at the certification stage, other than as part of a strike out or summary judgment assessment.[2]

(b) Second, the underlined words in the passage above mean that the Tribunal is not required to ask itself, at the time of certification, whether an application passes the strike out standard. Although the Tribunal does have power to consider strike out of its own initiative, Lord Briggs held in terms that satisfaction of this standard does not form part of the certification assessment. Accordingly, the concluding sentence of point (9) of the Tribunal's Letter – "*[o]bliging an Applicant to set out its case clearly is, in the Tribunal's view, consistent with Merricks and, indeed, necessary for the Merricks test to be properly applied*" – is, in Mr Evans' respectful submission, wrong in law. Lord Briggs held expressly that the certification regime does not contain this obligation and there is consequently no such thing as the "*Merricks test*".

6. Related to this is the Tribunal's observation at the hearing that opt-out proceedings are "*in danger of being oppressive*" **[Day 5/p.76/line 1]** with "*a very potent stick to wield against the respondents if certified to be defendants, because irrespective of the merits of the claim, what you can say is that if there is a recovery, the recovery is hugely leveraged because of the excess that will be unclaimed*" **[Day 2/p.76/lines 15-20]**. Point (7)(c) of the Tribunal's Letter makes a similar point: "*This is a very early example of an opt-out claim. Such claims raise particular issues as regards fairness between the putative parties; it is important that there is proper control of the procedure. Moreover,*

[2] Or, of course, under Rule 79(3): see [60] of Lord Briggs' judgment **[AUTH/34/23]**.

in this opt-out claim, the theory of harm is less evident than in a more classic cartel." In Mr Evans' submission, these observations are contrary to Lord Briggs' judgment in *Merricks*. In particular:

(a) These putative policy arguments formed a critical part of the reasoning of the minority in *Merricks*. Lords Sales and Leggatt even use the same language, referring to the "*risk that the enormous leveraging effect which such a class action device creates may be used oppressively or unfairly"* ([98]) **[AUTH/34/33]**, before turning to the "*control mechanism*" of the Tribunal at the certification stage ([99]) **[AUTH/34/34]**. This concern also features in [118] of their judgment, in which they reject the "*relative suitability*" approach of the majority, reasoning that "*as we have noted, collective proceedings confer substantial legal advantages on claimants and burdens on defendants which are capable of being exploited opportunistically*" **[AUTH/34/37-38]**.

(b) But of course they were in the minority; and it is plain that Lord Briggs (with whom Lords Kerr and Thomas agreed) disagreed with this line of reasoning. In [45] of his judgment, for example, he says that "*it should not lightly be assumed that the collective process imposes restrictions upon claimants as a class which the law and rules of procedure for individual claims would not impose*" **[AUTH/34/18]**. Further, it is central to Lord Briggs' majority judgment – and indeed to his "*relative suitability*" approach – that a claimant should face no greater hurdle when accessing the court in opt-out collective proceedings than he or she would face in individual proceedings.

(c) Accordingly, the observations in point (7)(c) of the Tribunal's Letter are wrong in law. Were it to take those policy concerns into account, the Tribunal would be departing from the binding judgment of the majority in *Merricks,* in favour of the views of the minority.

7. For the avoidance of doubt, Mr Evans accepts that the Tribunal is able, of its own initiative under Rule 41 of the Tribunal Rules, to consider striking out Mr Evans' application at the same time as considering certification. (In this connection, he notes that Rule 79(4) refers only to the ability of the Tribunal to hear an application by the defendants under Rule 41; but on balance the better view is that the Tribunal retains the Rule 41 power to raise strike out of its own motion at a certification hearing, even though

this is not referred to in Rule 79(4).) If the Tribunal were minded to take this course (having considered Mr Evans' submission above in relation to the proper role of strike out at the certification stage), in Mr Evans' submission his Claim Form passes the strike out test.

8. In particular, as to the law:

   (a) Mr Evans is concerned to see the reference in point (1) of the Tribunal's Letter to the *Nomura International* case. That case relates to abuse of process, which is distinct from mere defective pleading (see CPR 3.4(2)(a), as compared to CPR 3.4(2)(b)). Abuse of process requires the absence of known valid grounds for a claim, which brings with it absence of present intention to prosecute proceedings (*Nomura*, [37]). Mr Evans submits that on no reasonable view could this apply to his Claim Form (even if it were defectively pleaded which, in his submission, it is not).

   (b) As to the second sentence of point (1) of the Tribunal's Letter, which says that the general rule is that pleading precedes disclosure, Mr Evans notes that in competition cases in particular this is subject to well-established latitude where there are (as here) relevant and important information asymmetries between the parties: see *Media-Saturn Holding GmbH v Toshiba & Ors* [2019] EWHC 1095 (Ch), Barling J at [77]-[78] and authorities cited therein.

9. Mr Evans submits that his case on causation – which is the issue in relation to which the Tribunal has indicated it is considering striking out the claim – is properly pleaded.

10. That pleaded case is set out in ¶¶247-256 of his Claim Form **[EV/1/107-110]**, and incorporates by cross-reference parts of Rime 1 (see, for example, ¶¶249 and 251 of the Claim Form **[EV/1/108-109]**) and Knight 1 (see, for example, ¶251 of the Claim Form **[EV/1/109]**), with which the pleading should be read. The Tribunal will note that in footnote 200 **[EV/1/108]**, and in ¶¶254-255 **[EV/1/110]** of his Claim Form, Mr Evans refers to the need for further information in relation to the infringing conduct (and see the reference to associated latitude above). In any event, Mr Evans submits that his alleged causal mechanisms are set out with proper and sufficient particularity (and indeed none of the Proposed Defendants have taken the view that they do not understand the case which they have to meet).

11. In particular, Mr Evans respectfully rejects the Tribunal's view that it was necessary in the pleading to address the matters set out in point (8) of the Tribunal's Letter. In any competition case, which will be hard fought with voluminous disclosure and lengthy expert evidence at trial, there may be aspects of the economic picture which must be proved for the alleged harm to eventuate. It is not the case that, if those aspects are not pleaded at the initiation of the claim, it is to be struck out. Rather, they are properly a matter for expert economic and factual evidence at trial.

12. Accordingly, Mr Evans invites the Tribunal either: (a) not to consider the question of strike out; or if minded to consider the question, (b) to find that his Claim Form should not be struck out.

13. The following sections of this document, which provide further particulars of Mr Evans' proposed claims, and answer the questions raised in the Tribunal's Letter, are provided without prejudice to the submissions made in this section. Further, they may be relevant in any event to the carriage question (as noted in Tribunal's Letter at point (8)).

C. FURTHER PARTICULARS OF MR EVANS' PROPOSED PROCEEDINGS

14. This section provides further particulars of Mr Evans' proposed claims. It briefly addresses each of the three "*essential elements*" of the tort of breach of statutory duty identified in the Tribunal's Letter at point (2).

15. Where appropriate, these particulars cross-refer, and rely upon, material already set out in Mr Evans' Claim Form and/or the expert reports served in support of his proposed proceedings, which articulate his case in greater detail.

PARTICULARS OF BREACH OF DUTY

16. Mr Evans' case is that the Proposed Defendants' breach(es) of statutory duty are established by the Decisions. He will rely upon the Decisions at any trial for their full meaning and effect: see Claim Form, ¶174 **[EV/1/68]**.

17. Mr Evans has summarised the content of the Decisions on a non-exhaustive basis at ¶¶174-240 of his Claim Form **[EV/1/68-104]**. He has provided particulars of the Proposed Defendants' breach(es) of statutory duty at ¶¶241-246 **[EV/1/105-107]** and appropriately reserved his rights to provide further particulars in due course, following disclosure, along with exchange of factual and expert evidence: see ¶177 **[EV/1/69]**.

PARTICULARS OF ACTIONABLE DAMAGE

18. The Tribunal observed at point (3) of its Letter that: "*[a]s set out in BritNed Development Limited v. ABB [2018] EWHC 2616 (Ch) at [427], actionable harm in cases such as this is the relatively low threshold of an unlawful restriction in, or reduction to, consumer benefit. Actual monetary loss, even de minimis monetary loss, does <u>not</u> need to be pleaded by the claimants.*" (emphasis original)

19. Mr Evans' case is that the Proposed Defendants' breach(es) of statutory duty, consisting of their participation in the Infringements, has caused or materially contributed to loss and damage suffered by members of the Proposed Classes: Claim Form, ¶247 **[EV/1/107-108]**.

20. Specifically, as explained further in ¶¶26-72 below, Mr Evans' case is that the Infringements caused or materially contributed to the unlawful widening of bid-ask spreads applicable to FX Spot Transactions and FX Outright Forward Transactions, involving a G10 Currency Pair,[3] which are covered by Mr Evans' proposed claims. The effect of a widened bid-ask spread is twofold:

    (a) The bid price decreases, meaning that an FX Dealer pays less to purchase, and a customer receives less when selling, a particular currency; and

    (b) The ask price increases, meaning that an FX Dealer receives more when selling, and the customer pays more when buying, a particular currency.

    See Claim Form, ¶250 **[EV/1/108]**.

21. Footnote 200 explains that Mr Evans "*will say that the effect of the Infringements was that the average bid-ask spreads applicable to transactions involving G10 Currencies were wider than would otherwise be the case absent the Infringements, and the members*

[3] Mr Evans' proposed claims concern G10 Currency Pairs, as this reflects the scope of the Infringements, which concern trading in G10 currencies: Claim Form, ¶85 **[EV/1/30]**. For the avoidance of doubt, even if only some of the G10 Currency Pairs were discussed in the chatrooms (as appears to be suggested in TWBS Decision, recitals 45 and 178 **[EV/2/11, 37]** and EE Decision, recitals 44 and 177 **[EV/3/11, 36-37]**), Mr Evans' case is that harm would still have been suffered in respect of all G10 Currency Pairs. This is based on the evidence of Professor Rime, who explains that even if a subset of G10 Currency Pairs were discussed in the chatrooms, it is likely that the Infringements would have produced wider impacts across all of those currency pairs for the reasons given in Rime 1, section 5.3.3 and Appendix 3 **[EV/9/64-67, 85-86]**.

of the Proposed Classes suffered loss and damage, as further particularised in the paragraphs that follow." **[EV/1/108]**

22. Mr Evans therefore avers that the members of the Proposed Classes are entitled to the difference between the prices which they, in fact, paid or received when entering into FX Spot Transactions and/or FX Outright Forward Transactions and the price which they would have paid or received in the absence of the Infringements: see Claim Form, ¶248 **[EV/1/108]**. He seeks an aggregate award of damages on behalf of each of the Proposed Classes, and has provided a preliminary indication of the size of his proposed claims at ¶¶257-266 of his Claim Form **[EV/1/110-114]**.

PARTICULARS OF CAUSATION

23. This section provides, in turn, further particulars of causation regarding the loss suffered by Class A and Class B on FX Spot Transactions. This is followed by further particulars regarding the loss suffered by members of both Proposed Classes on FX Outright Forward Transactions and on all methods of trading, including electronic trading.

24. Mr Evans' theory of harm has been comprehensively set out by Professor Rime in Rime 1 **[EV/9]**, and further elaborated upon in Rime 2 **[C/6]**. Accordingly, the further particulars provided below contain extensive cross-references to those reports, which are in any event relied on in full.

25. For the avoidance of doubt, in view of the limited information available at present regarding the nature, extent and functioning of the Infringements, Mr Evans maintains his reservation of rights to plead further on the issue of causation following disclosure and exchange of factual and expert evidence: see Claim Form, ¶¶254-255 **[EV/1/110]**.

CLASS A – DIRECT HARM

26. ¶249 of Mr Evans' Claim Form sets out his case on causation of loss to proposed members of Class A in respect of FX Spot Transactions entered into with the Proposed Defendants **[EV/1/108]**:

> "The effect of the Infringements was, at all material times, to enable the Proposed Defendants to unlawfully widen the bid-ask spreads applied to FX Spot Transactions involving G10 Currency Pairs beyond the bid-ask spreads that would have prevailed in the absence the Infringements. In particular, as explained further in section 5 of the Rime Report, the exchange of current and forward-looking commercially sensitive information on bid-ask spreads applicable to certain currency pairs and for certain trade sizes facilitated explicit

> and/or tacit coordination on the bid-ask spreads charged to members of Class A. This caused or materially contributed to bid-ask spreads being wider than would have been the case if the Proposed Defendants had competed to offer the best bid-ask spreads to their customers, as would have been the case absent the Infringements."

27. That paragraph cross-refers to, and relies upon, the theory of <u>direct harm</u> put forward by Professor Rime in section 5 of Rime 1 **[EV/9/45-67]**.

28. Mr Evans' further particulars of his case on causation of loss and damage to Class A in respect of FX Spot Transactions are as follows.

29. The starting point is the finding made by the Commission at recital 58 of both Decisions **[EV/2/14; EV/3/14]**. That recital finds that the participating traders occasionally discussed existing or intended bid-ask spread quotes of specific currency pairs for certain trade sizes (the "**bid-ask spread exchanges**"). Footnote 32 to that recital in both Decisions identifies, <u>by way of examples only</u>, multiple occasions on which these exchanges took place during the Infringements. The example dates from both Decisions have been compiled into a table at Claim Form, ¶215A **[EV/1/92-93]**.

30. The Decisions explain the importance of bid-ask spreads in FX spot trading. They note that traders compete specifically on prices quoted for specified currency pairs for certain trade sizes in relation to FX spot trading: recital 89 to the Decisions **[EV/2/21; EV/3/21]**. Similarly, they record that bid-ask spreads are an "*essential competition parameter in FX spot trading activity. Spreads affect the overall price paid by customers for trading currencies… The potential revenue earned by a trader is also affected by the spread.*": recital 59 to the Decisions **[EV/2/14; EV/3/14]**.

31. The bid-ask spread exchanges caused loss in the form of wider bid-ask spreads being charged to the proposed members of Class A in two main ways:

    (a) <u>First</u>, the bid-ask spread exchanges would have had an initial short-term impact resulting from each exchange; and

    (b) <u>Second</u>, the bid-ask spread exchanges would have had a longer-term impact resulting from their cumulative effects over time.

32. Each is supported by Professor Rime's expert opinion and the Commission's findings made at recitals 58 and 89 to the Decisions. They are explained further below.

<u>Impact from each instance of a bid-ask spread exchange</u>

33. The <u>first</u> way in which the bid-ask spread exchanges caused loss to members of Class A is via the short-term initial impact resulting from each instance of sharing bid-ask spread information. This causative link is based on Rime 1, section 5.1.2.1. **[EV/9/49-50]** and on the findings made in recitals 58 and 89 to the Decisions. Each instance of sharing bid-ask spread information would have the following effects:

(a) It would facilitate coordination of bid-ask spreads charged to a particular client. That is because the exchanges enabled the participating traders to discuss the bid-ask spread quoted for a particular trade with the same customer: Rime 1, ¶¶154-156 **[EV/9/49-50]**.

(b) The information revealed by the exchanges could remain useful for up to a few hours thereafter. It could therefore be used to inform the bid-ask spreads quoted for similar trades during that period: Rime 1, ¶¶157-158 **[EV/9/50]**.

34. Charging wider bid-ask spreads would be to the participating traders' collective self-advantage and to the disadvantage of customers: Knight 1, ¶¶91 and 95 **[EV/8/32-33]**.

<u>Cumulative impact of the bid-ask spread exchanges</u>

35. The <u>second</u> way in which the bid-ask spread exchanges caused loss to members of Class A is through the cumulative effect of exchanging such information over time, which facilitated tacit coordination of bid-ask spreads. This is based on Rime 1, section 5.1.2.2. **[EV/9/51-53]** In this regard, Professor Rime has explained:

(a) how the bid-ask spread exchanges would facilitate tacit coordination; and

(b) why the Proposed Defendants would have considered it possible, economically rational, and hence preferable, to adopt on a sustainable basis wider bid-ask spreads than they would have done in the absence of the Infringements.

Tacit coordination

36. The bid-ask spread exchanges facilitated tacit coordination because they enabled the participating traders to gain an insight into one another's pricing strategies. In particular, the cumulative effect of sharing information relating to bid-ask spreads over a sustained period, even on an occasional basis, would be to enable the participating traders to

discern (or infer with greater accuracy) each other's "baseline spreads". A baseline spread is the usual level of return that an FX dealer expects to earn on a given currency pair under normal market conditions.[4] Bid-ask spreads quoted to customers usually fluctuate around baseline spreads. Baseline spreads tend to remain relatively constant over time. Hence, the bid-ask spread exchanges enabled the participating traders to infer one another's baseline spreads and tacitly to coordinate the spreads charged to customers, namely the members of Class A: Rime 1, section 5.1.2.2. **[EV/9/51-53]**.

37. Mr Evans' case is that tacit coordination of bid-ask spreads would not be limited to the conduct of the traders participating in the Infringements. This is because there are a number of potential ways in which the information shared could have been used in a way that influenced the decisions of other traders outside of the chatrooms. In particular, and as explained in Rime 2, ¶¶70-72 **[C/6/38-39]**:

    (a) The participating traders held senior roles within the Proposed Defendants: Claim Form, ¶201A **[EV/1/79-81]**. This would normally entail providing guidance on trading decisions, directly intervening in other traders' pricing decisions, and having the most important trade decisions referred to them: see also Knight 2, ¶¶53-54 **[C/5/16]**. This provided an opportunity to influence the pricing decisions of other traders without disclosing the specific information that was exchanged in the chatrooms. Professor Rime's expert opinion is that it would have been rational to take that information into account when speaking about pricing and trading strategy with colleagues.

    (b) Trading desks at the time had a collegial nature. As Mr Knight explains, this included traders discussing "*market movements, ideas, news stories and trends throughout the trading day, and to assist one another with pricing. This is encouraged to promote the performance of the desk as a whole.*": Knight 2, ¶50 **[C/5/15]**. This is a further way in which the participating traders would have been able to influence the pricing of other traders on their desks.

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4 Mr Knight also explains baseline spreads based on his industry expertise in Knight 1, ¶¶92-94 and 139 **[EV/8/32, 48-49]**. In particular, he explains at ¶94 that a trader would adopt a baseline spread as his/her starting point in determining the price for an FX transaction **[EV/8/32]**.

38. Each of the conditions for tacit coordination to be sustainable is addressed in detail in section 4.1 of Rime 2 **[C/6/37-41]**.

39. The first condition (**sufficient degree of market power**) must take into account the structure of the market and the degree of market power possessed by the Proposed Defendants. Mr Evans relies on the following facts and matters in support of his contention that the Proposed Defendants held a sufficient degree of market power in order to sustain tacit coordination:

    (a) The combined market share of the Proposed Defendants participating in the Infringements at any given time was in the range of 24-48%: Rime 1, ¶¶43, 165 and ¶192 **[EV/9/18, 52-53, 61]**. This was a significant proportion of the market.

    (b) The next largest bank was Deutsche Bank (which was not involved in the Infringements). It had a market share of 12-19%: Rime 1, ¶192 **[EV/9/61]** and Rime 2, ¶74 **[C/6/39]**. This meant that just six banks accounted for 36-67% of the FX market during the Infringements.

    (c) By contrast, all other FX Dealers had much smaller market shares (i.e. single digit percentages): Rime 1, ¶192 **[EV/9/61]**.

    (d) The extent to which other FX Dealers could have constrained the widening of the Proposed Defendants' bid-ask spreads was weakened by the fact that the Infringements placed the other dealers at an information disadvantage vis-à-vis the Proposed Defendants when trading on the inter-dealer market and at an increased risk of adverse selection: Rime 2, ¶74 **[C/6/39]**. As is explained further in ¶65 below, increased adverse selection risks would have increased those dealers' costs of buying and selling currency to service customer trades and this would have caused them to adjust their pricing to customers as a result.

    (e) The participating traders were able to influence the pricing of other traders for the reasons set out at ¶37 above. This is why it is not appropriate to calculate market shares based on the participating traders' activities alone.

40. The second condition (**sufficient transparency**) entails an assessment of whether the conduct in question was sufficiently transparent to allow the firms to monitor to a sufficient degree whether other firms are deviating, and thus know when to retaliate.

When evaluating the level of transparency, the key element is to identify what firms can infer about the actions of other firms from the available information. There was sufficient transparency in order to sustain tacit coordination of the Proposed Defendants' bid-ask spreads because:

(a) The bid-ask spread exchanges themselves helped the traders to monitor each other's conduct. The Decisions also found that the exchange of information pursuant to the underlying understanding facilitated the participating traders, at times, to better predict each other's market conduct and potentially informed their subsequent decisions: recitals 49 and 94 to the Decisions **[EV/2/12, 21-22; EV/3/12, 21-22]**.

(b) Each of the participating traders was expected to disclose information – including on bid-ask spreads – and traders apologised when they failed to do so: recital 81 to the Decisions **[EV/2/19; EV/3/19]**.

(c) A customer seeking to negotiate a narrower bid-ask spread might inform a Proposed Defendant that they could obtain better prices from another participant in the Infringements: Rime 2, ¶46 **[C/6/21-23]**. Mr Evans addresses the extent to which customers may switch FX Dealers and/or maintain multiple banking relationships in ¶¶44-46 and 77 below.

(d) Each of the participating traders disclosed and received a wide range of other commercially sensitive information in addition to bid-ask spreads. These exchanges increased transparency about changing market conditions and, as such, enhanced the opportunity to price in a coordinated manner: Rime 1, ¶164 **[EV/9/52]**. For example, this information could enable the participating traders to better understand the market conditions under which others were setting bid-ask spreads. This may have assisted them in distinguishing between changes in bid-ask spreads as a reaction to changing market conditions and changes that deviated from the tacit coordination.

41. The third condition (**retaliation mechanism**) does not require a claimant to identify a specific retaliation mechanism involving a degree of severity, but the fact that deterrents exist, which are such that it is not worth the while of any of the coordinating firms to deviate from the coordination: see the judgment of the General Court in Case T-342/99

Airtours v Commission EU:T:2002:146, [195]. There were adequate deterrents that kept the tacit coordination of bid-ask spreads sustainable because:

(a) There was sufficient transparency to enable the participating traders to detect any deviation. In that regard, Professor Rime refers to several findings made in the Decisions: Rime 2, ¶¶42-45 **[C/6/22-23]**.

(b) The threat of being removed from the chatrooms would have been a credible sanction for non-compliance with the tacit coordination. Professor Rime's expert opinion is that the participating traders would have been deterred from deviation if they would risk losing access to a significant information advantage and expose themselves to a greater adverse selection risk: Rime 2, ¶47 **[C/6/23]**.

(c) The participating traders apologised to one another if they departed from the underlying understanding found by the Decisions. This suggests, in Professor Rime's view, that there was sufficient transparency about compliance with that understanding, which would have deterred deviation, at least to some extent: Rime 2, ¶45 **[C/6/22-23]**.

42. Mr Evans' case on tacit coordination is bolstered by the finding made by the Commission at recital 89 to the Decisions **[EV/2/21; EV/3/21]**. While that recital finds that the bid-ask spread exchanges "*may have facilitated occasional tacit coordination of those traders' spreads behaviour*" in certain circumstances only, it is relevant insofar as it confirms that tacit coordination was feasible in this market and as a result of the Infringements.

Widened bid-ask spreads

43. Mr Evans' case is that the Proposed Defendants would have widened, rather than tightened, bid-ask spreads charged to proposed members of Class A as a result of the Infringements for the following reasons:

(a) As explained in Rime 2, ¶¶38-39 **[C/6/20-21]** widening spreads would benefit the Proposed Defendants by increasing their profit for each trade, which was potentially substantial given the volume of turnover they already had and the duration of the Infringements. By contrast, the benefits of tightening spreads in order to win more trades would be more uncertain and remote than the gains from wider spreads for two reasons:

(i) First, the increased revenue that the traders would receive from a greater volume of trades would need to be very large in order to offset the reduced revenue earned per trade.

(ii) Second, tacit coordination of narrower spreads could not ensure that each Proposed Defendant's market share increased (whether by a similar amount or at all) insofar as customers moved away from other FX Dealers. Put another way, tacit coordination of tighter spreads would be much less likely to be sustainable.

(b) As explained at ¶¶54-67 below, a further effect of the Infringements was to increase adverse selection risks for other FX Dealers (i.e., those not participating in the Infringements) when trading on the inter-dealer market. This would result in the widening of bid-ask spreads on that market, and FX Dealers would charge wider bid-ask spreads to their customers in consequence. This would reduce the competitive constraints on the participants in the Infringements, and Professor Rime considers that they would be likely to charge wider bid-ask spreads to their customers as a result: Rime 2, ¶¶49-50 **[C/6/24]**.

44. Further, any widened bid-ask spreads would not have been prevented or undermined by a sufficient number of customers switching between FX Dealers. That is because customers were generally not that responsive to changes in bid-ask spreads during the periods covered by the Infringements. In other words, the price elasticity of demand for FX transactions was relatively low. As Professor Rime explained at the Teach-in, many customers had a relationship with a single bank and did not switch that often: see Transcript of Teach-in on 21 June 2021, page 135, lines 13-15. There are a number of reasons that customers may not switch banks that often, for example:

(a) Customers typically use their banking relationship for other services in addition to FX. For a number of customers (particularly non-financial customers) FX trading was a relatively small proportion of a customer's portfolio of banking services and/or a relatively small proportion of a customer's corporate activities: see Professor Rime's comments at the Teach-in on 21 June 2021: Transcript page 117, lines 2-10, and Knight 2, ¶15(b) **[C/5/6]**. These customers may be less willing to switch banks in response to changes in bid-ask spreads, especially if they are not particularly active in the FX market, for example if they trade FX in smaller volumes and less frequently.

(b) There are a number of formalities involved in establishing a relationship with a new bank, such as completing the necessary credit, anti-money laundering and "know your customer" checks: Knight 1, ¶185 **[EV/8/62]**. This may act as a deterrent to switching.

(c) Customers build up long-standing relationships with a bank and may be less willing to switch as a result.

45. Mr Evans acknowledges that (as in most markets) the degree of price elasticity of demand will vary according to customer type. Accordingly, there would be some price-sensitive customers that would have been able and willing to switch in response to a price rise. In the present case, those customers would include larger financial customers that frequently traded FX instruments in large volumes. They are regarded as sophisticated customers, as they have a good understanding of the fair value of currency, and are relatively well informed about future price movements: see Professor Rime's comments at the Teach-in on 21 June 2021: Transcript, page 116, lines 11-20.

46. Those customers may also be more likely to have multiple banking relationships, which means they would be more able to switch in response to any wider bid-ask spreads. For example,[5] they may: (a) have a "panel" of banks with whom they regularly deal; and/or (b) use multi-bank platforms in order to trade with a range of banks[6]. However, even where a customer would be willing to switch FX Dealers, it may encounter bid-ask spreads that were affected by the Infringements. In particular, this is because:

(a) As explained further below, Mr Evans' case is that the Infringements affected the bid-ask spreads offered by FX Dealers that were not participating in the Infringements; and

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5 Mr Knight also provides an example of how a customer may use multiple banking relationships at ¶139(c) of Knight 1 **[EV/8/48]**.

6 Mr Ramirez notes that more sophisticated customers tend to trade more frequently via multi-bank platforms: see Ramirez 1, ¶116(b) **[EV/10/56-57]**.

(b) A customer might have switched to another Proposed Defendant who was participating in the Infringements, given that (as noted in ¶39 above) they were among the largest FX Dealers in the market.

CLASS B – INDIRECT HARM

47. ¶252 of Mr Evans' Claim Form sets out his case on causation of loss to proposed members of Class B in respect of FX Spot Transactions entered into with: (a) the Proposed Defendants (outside of their infringement periods); and/or (b) other FX Dealers identified in his class definition as Relevant Financial Institutions[7] **[EV/1/109-110]**:

> "Members of Class B entered into FX Spot Transactions and FX Outright Forward Transactions with persons who, so far as the Proposed Class Representative is aware, were not parties to the Infringements and/or did not implement the same. The effect of the Infringements was, at all material times, to cause or materially contribute to the unlawful widening of the bid-ask spreads applicable to those same transactions beyond the bid-ask spreads that would have prevailed in the absence of the Infringements. This effect shall be referred to hereafter as the **"Umbrella Effect"**. In particular, and as explained further in section 5.2 of the Rime Report, the Umbrella Effect arose in two ways:
>
> a. The Infringements significantly distorted, reduced or eliminated the competition between the Proposed Defendants and other FX Dealers that were not party to the Infringements and/or did not implement the same, in relation to bid-ask spreads applicable to FX Spot Transactions and/or FX Outright Forward Transactions. This, in turn, enabled those FX Dealers to charge wider bid-ask spreads than would have been the case absent the Infringements; and/or
>
> b. The overall effect of the Infringements was to increase the adverse selection risks prevailing in the inter-dealer market. This, in turn, resulted in FX Dealers:
>
> i. Increasing the price at which they would offer to sell G10 Currencies; and
> ii. Reducing the price at which they would offer to buy G10 Currencies.
>
> Consequently, this affected the prices that other FX Dealers would pay to acquire and sell currency in the inter-dealer market, meaning that they: (i) would pay more to acquire currency; and (ii) receive less when selling currency. Those costs were passed on to members of Class B in the form of wider bid-ask spreads."

48. That paragraph cross-refers to, and relies upon, the theory of <u>indirect harm</u> put forward by Professor Rime in section 5.2 of Rime 1 **[EV/9/53-62]**.

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7 The list of Relevant Financial Institutions included in Mr Evans' proposed claim is annexed to Mr Evans' class definition: **[EV/5/5]** The basis upon which they were identified and included is explained in ¶¶98-101 of the Claim Form **[EV/1/37-39]**. The FX Dealers covered by Class B (i.e. the Proposed Defendants outside of their infringement periods, and the Relevant Financial Institutions) shall be referred to collectively hereafter as the **"Class B FX Dealers"**).

49. As summarised in that paragraph, Mr Evans relies on two causal mechanisms by which the Infringement caused loss and damage to Class B, namely: **less competitive market conditions** (reflected in point (a) above); and/or **increased adverse selection risks** (reflected in point (b) above).

50. Mr Evans' further particulars of his case on causation of loss and damage to Class B is set out below. Each of the two causal mechanisms is addressed in turn.

<u>Less competitive market conditions</u>

51. Mr Evans' case is that the Infringements caused loss and damage to Class B as a result of less competitive market conditions as follows:

(a) As set out in ¶¶26-46 above, Mr Evans avers that the effect of the bid-ask spread exchanges would be to facilitate tacit coordination between the Proposed Defendants which, in turn, resulted in the widening of bid-ask spreads charged to their customers.

(b) This tacit coordination would also have the effect of reducing the intensity of competition between the Proposed Defendants and other FX Dealers, including the Class B FX Dealers: Rime 1, ¶169 **[EV/9/54]**.

(c) This reduction in competition would enable Class B FX Dealers to widen the bid-ask spreads charged to their customers: Rime 1, ¶171 **[EV/9/54]**.

52. Mr Evans will say that Class B FX Dealers would have widened, rather than tightened, their bid-ask spreads in response to less competitive market conditions for the following reasons:

(a) As explained in ¶43 above, it is a more uncertain strategy to increase profitability by increasing market share because the revenue generated by a higher volume of trades will need to be sufficient to outweigh the profits that could be obtained by widening bid-ask spreads charged to existing customers. Narrowing spreads is also inherently risky to FX Dealers, as it leaves them more exposed to adverse future price moves against their current position: Rime 2, ¶54(b) **[C/6/26]**.

(b) In response to the Proposed Defendants' widening of bid-ask spreads charged to their customers during their infringement periods (as a result of the tacit coordination set out in ¶¶26-46 above), some of their customers would have reacted to the widening of bid-ask spreads by seeking more favourable prices from other FX Dealers (as Mr Evans acknowledges in ¶45 above). These FX Dealers would therefore experience an increase in demand for FX transactions, which would signal to them that they could increase their bid-ask spreads without the risk of losing customers: Rime 1, ¶133 **[EV/9/43]** and ¶¶170-171 **[EV/9/54]**; Rime 2, ¶54(c). **[C/6/26]**

53. The Court of Justice of the EU has recognised that third party suppliers may react to higher prices as a result of a cartel by increasing their own prices, and that Claimants must be able to seek damages in respect of those increased prices: Case C-557/12 *Kone AG and others v ÖBB-Infrastruktur AG* EU:C:2014:1317. See in particular the observations of Advocate General Kokott (EU:C:2014:45) at [46]-[48] and [50]-[51] which are particularly pertinent to the present case:

> "After all, in a market economy, it is common business practice for undertakings to keep a close eye on market trends and to take those trends duly into consideration when making their own commercial decisions. <u>Accordingly, the fact that persons not party to a cartel set their prices with an eye to the market behaviour of the undertakings belonging to the cartel is anything but unforeseeable or surprising, whether they are aware of the anti-competitive practices of the latter or not. Indeed, it is very much in the normal way of things</u>.
>
> This is particularly true where – as here – the cartel members cover a significant proportion of the relevant market, as evidenced by the large market share they jointly hold, and their anti-competitive practices, too, affect a significant proportion of that market, which in no way presupposes that they manipulate the lion's share of the market. <u>The stronger the cartel's position is on the market concerned, the more likely it is that the cartel will have a significant impact on pricing levels on that market as a whole and the less scope there is for an operator not party to the cartel to have any meaningful influence of his own over the market price</u>.
>
> <u>It is true that the more homogenous and transparent the relevant product market is, the easier it is for an operator not party to the cartel to be guided by the business practices of the cartel members when determining his own prices. This does not, however, support the converse inference that a cartel is unlikely ever to give rise to umbrella pricing on markets that are not homogeneous, that exhibit little transparency and where the products – such as some of the elevators and escalators in question here – are customised.</u> After all, even on markets such as these, operators tend to be acutely aware of the prevailing price level and of how the individual suppliers on the market are behaving.
>
> …
>
> An operator not party to a cartel who has some spare capacity may well be tempted to set his own prices below those charged by the cartel in order in this way to gain market share at the cartel members' expense. Even then, however, <u>there is still a considerable incentive for the operator not party to the cartel to charge his customers a higher price than would otherwise be possible under competitive conditions.</u> Assuming, for example, that the cartel price is 120 and the price achievable under competitive conditions would otherwise be 100, the operator

not party to the cartel could set his price at 110, for example. <u>Such behaviour would be far from unusual. It would be economically rational and anything but unforeseeable by the members of the cartel.</u>

Conversely, it is very important for the success of anti-competitive agreements between the members of a cartel that the prices of non-members should also rise and come close to those of the cartel members. After all, the more prices rise as a whole, the easier it is for cartel members to impose the prices they charge themselves on the market in the long run. For this reason, too, the obvious conclusion is that cartel members acting rationally and thinking their anti-competitive practices through to their logical conclusion will not be surprised by umbrella pricing. On the contrary, they must actually expect it. ÖBB-Infrastruktur was right to make this point." (emphasis added)

<u>Increased adverse selection risks</u>

Relevant market features/economic principles

54. The following features of, and economic principles applicable to, the FX market are relevant to Mr Evans' case concerning increased adverse selection risks.

55. <u>Two-tier market structure</u>: the FX market is described as having a two-tier structure, consisting of:

(a) **The inter-dealer tier (or "inter-dealer market")**: where FX Dealers trade with each other for three main reasons: (a) to obtain currency to service customer trades; (b) to manage their open currency positions (i.e. to deal with any currency they are holding as a result of customer trading); and/or (c) to engage speculative trading in order to make a profit: Knight 1, ¶¶120-123 **[EV/9/43-44]**; Rime 1, ¶46 **[EV/9/18-19]** and ¶62(b) **[EV/9/23]**.

(b) **The dealer-to-customer tier:** where customers trade with FX Dealers: Knight 1, ¶119 **[EV/8/43]**; Rime 1, ¶62(a) **[EV/9/23]**.

56. <u>Information is highly important to FX trading</u>: prices for currency pairs move generally in response to new information about their value. That information becomes embedded in the price as a result of the price discovery process. A range of information might affect the price of a currency pair, such as macroeconomic information and customer order flow information: Rime 1, sections 4.2.1. to 4.2.3. **[EV/9/31-38]**.

57. Information is of particular importance in FX trading because there is low transparency in FX markets (see Rime 1, section 4.1. **[EV/9/27-29]**) and information is dispersed. Therefore, market participants will seek to find their own information in order to inform

their trading decisions. In particular, they will strive to find an information advantage which enables them to predict the future direction of the market with greater certainty and exploit it ahead of others before it becomes embedded in the price of a particular currency pair: Rime 1, section 4.2. **[EV/9/30-39]**.

58. Order flow information is particularly important to FX Dealers: from the perspective of FX Dealers, among the most important sources of information are customer order flows. These provide an important insight into the supply and demand dynamics prevailing in the market, and provide a means of interpreting other information. FX Dealers use order flow information to inform their trading and pricing decisions, as it has been shown to strongly predict exchange rate movements: Rime 1, section 4.2.2.2. **[EV/9/33-37]** and ¶115 **[EV/9/39]**.

59. FX markets are characterised by asymmetric information: where, as in the case of the FX market, information is dispersed, each participant strives to obtain more information in order to gain an advantage. This results in a market characterised by asymmetric information, where some participants are more informed than others: Rime 1, ¶¶116-118 **[EV/9/39]**.

60. Asymmetric information gives rise to increased adverse selection risks: this constitutes the risk that a counterparty may trade with a better-informed counterparty, and that the transaction may prove to be disadvantageous to the former. Adverse selection risks arise in a number of markets. The seminal example of such risks focuses on the sale of a used car; insurance markets are also beset with such risks: Rime 1, ¶¶120-124 **[EV/9/40-41]**. Adverse selection risks also arise in financial markets: Rime 1, ¶125 **[EV/9/41]**.

61. In the FX context, FX Dealers will be concerned about adverse selection risks arising from trading with counterparties that have superior information about the FX market, resulting in trades where the counterparty benefits at the expense of the FX dealer: Rime 1, section 4.3. **[EV/9/39-41]**.

62. Increased adverse selection risks result in wider bid-ask spreads: increased adverse selection risks are commonly mitigated through pricing. For example, insurers may increase their prices in order to reflect increased risks inherent in dealing with customers: Rime 1, ¶¶123-124 **[EV/9/40-41]**. FX Dealers seek to address increased adverse selection risks in their pricing by widening the bid-ask spread in order to mitigate the risks

associated with dealing with better-informed counterparties. This observation is firmly rooted in research into FX market microstructure (including that conducted by Professor Rime) which observes that as adverse selection risks increase, bid-ask spreads widen: Rime 1, ¶¶128-129 **[EV/9/41-42]**.

63. Adverse selection risk increases relative to the size of the informational advantage and the relative market power of the counterparty with the informational advantage: adverse selection risk is therefore referred to as a "continuous" variable. Similarly, it follows that the response to adverse selection risk via pricing is likely to be proportional to the size of the risk and the market power of the counterparty: Rime 1, ¶130 **[EV/9/42]**.

64. Adverse selection risks are assessed on an overall basis: FX Dealers will review on average whether their trading has been affected by adverse selection risks, rather than assessing whether any particular transaction has given rise to losses. In particular, an FX Dealer may not be able to identify which of its counterparties are the better informed (or, similarly, when they are better informed). As a result, adverse selection risks are assessed by reference to the overall likelihood of trading against a more informed counterparty and suffering losses as a result of the information disadvantage: Rime 1, ¶¶131-132 **[EV/9/42-43]**.

Causation of loss and damage to Class B

65. Mr Evans' case is that the Infringements caused loss and damage to Class B as a result of increased adverse selection risks as follows:

    (a) The traders participating in the chatrooms shared, on an extensive and recurrent basis, certain current or forward-looking commercially sensitive information about certain of their trading activities. That information included:

        (i) Information on outstanding customers' orders: recitals 54-55 to the Decisions **[EV/2/13; EV/3/13]**. This would constitute order flow information and (as noted above) would have been particularly valuable in assessing future exchange rate movements: Rime 1, ¶¶184-186 **[EV/9/59-60]**.

        (ii) Information on: (a) open risk positions: recital 53 to the Decisions **[EV/2/13; EV/3/13]**; and (b) current or planned trading activities: recitals 56-57 to the

Decisions **[EV/2/14; EV/3/14]**. This would provide an important insight into future trading that might take place: Rime 1, ¶188 **[EV/9/60]**.

(b) This exchange of information provided each of the participating traders with an information advantage, which could be used in their trading activities: Rime 1, ¶182 **[EV/9/59]**. This is supported by the findings made by the Decisions, which record that the information shared in the chatrooms informed the trading decisions of the participating traders: recitals 94 and 101 **[EV/2/21-23; EV/3/21-23]**.

(c) The use of this information advantage would enable traders to make more informed trades on the inter-dealer market. This would have created increased adverse selection risks for other FX Dealers, including Class B FX Dealers, when trading in that same market: Rime 1, ¶¶184-186 and ¶188 **[EV/9/59-60]**.

(d) In response to identifying an increase in adverse selection risks (for example as a result of reviewing their trading in the way described in ¶64 above), those other FX Dealers would seek to protect themselves against such increased risks by adjusting their own pricing. They would: (a) increase the price at which they are willing to sell currency (i.e. increase the ask price); and (b) reduce the price at which they are willing to buy currency (i.e. reduce the bid price). As a result, bid-ask spreads would widen in the inter-dealer market: Rime 1, ¶187 **[EV/9/60]**.

(e) Wider bid-ask spreads on the inter-dealer market would result in wider bid-ask spreads being charged on trades with customers. This is because prices to customers are typically set at a mark-up to the inter-dealer prices. Indeed, the effect of wider bid-ask spreads on the inter-dealer market is to increase the costs at which FX Dealers could buy and sell currency to service customer trades, and those costs would be passed on to customers: Rime 1, ¶¶189-191 **[EV/9/61]**.

(f) Accordingly, increased adverse selection risks on the inter-dealer market resulting from the Infringements would result in Class B FX Dealers charging wider bid-ask spreads to customers than would have been the case absent the Infringements. This caused loss and damage to proposed members of Class B.

66. As noted in ¶63 above, the harm created by adverse selection risks increases relative to both the size of the information advantage and the market power of the person(s) with that advantage. In this regard, Mr Evans relies on the facts and matters set out in ¶39

above concerning the Proposed Defendants' market shares and relative market power: see also Rime 1, ¶192 **[EV/9/61]**.

67. Mr Evans has explained why he considers that Class B FX Dealers would have widened, rather than tightened, their bid-ask spreads as a result of increased adverse selection risks in ¶65 above. In addition, he relies on the facts and matters set out in ¶52 above, which apply *mutatis mutandis.*

FX OUTRIGHT FORWARD TRANSACTIONS

68. Mr Evans' case is that the Infringements would have caused or materially contributed to the unlawful widening of bid-ask spreads applicable to FX Outright Forward Transactions entered into by members of both Class A and Class B: Claim Form ¶¶251-252 **[EV/1/109-110]**.

69. This is based on the expert evidence of Mr Knight and Professor Rime. In particular, they explain that the price of an FX Outright Forward Transaction is partially based on the prevailing price for a FX Spot Transaction. This is because the price of an FX Outright Forward Transaction is determined by taking the price of the relevant FX Spot Transaction and adding "forward points" which reflect the interest rate differential between the two currencies concerned: Knight 1, ¶110 **[EV/8/38]**; Rime 1, ¶58 **[EV/9/22]**. Accordingly, any unlawful widening of bid-ask spreads applicable to FX Spot Transactions would, in turn, have resulted in the unlawful widening of bid-ask spreads applicable to FX Outright Forward Transactions: Knight 1, section 4.3.2 **[EV/8/38-39]**; Rime 1, section 5.3.2. **[EV/9/6]**.

METHODS OF TRADING (INCLUDING ELECTRONIC TRADING)

70. Finally, Mr Evans' case is that the effects of the Infringements set out above occurred irrespective of the method by which FX trading took place. In particular, while the Infringements concerned FX voice trading, the pricing of FX transactions concluded via voice trading is linked to the pricing set on other methods of trading, such as electronic trading platforms. Therefore, any unlawful widening of bid-ask spreads on voice transactions would have affected bid-ask spreads applied via electronic methods of trading: Claim Form, ¶253 **[EV/1/110]**.

71. This is based upon the expert evidence of Mr Knight and Professor Rime. Professor Rime considers that bid-ask spreads on electronic trading platforms would have been affected by the Infringements in two main ways:

(a) Prices on electronic trading platforms are usually set by algorithms, which are programmed to determine a price using a set of inputs (see also Knight 1, ¶¶181-182 **[EV/8/61-62]**). To the extent that any inputs into the pricing algorithms were affected by the Infringements, they would in turn have affected bid-ask spreads on electronic platforms. In particular, Professor Rime and Mr Knight consider it is likely that the pricing algorithms would have used prices on the inter-dealer market as an input: Knight 1, ¶181 **[EV/8/61]**; Knight 2, ¶39 **[C/5/12]**; Rime 1, ¶196 **[EV/9/62-63]**; and Rime 2, ¶¶99-102 **[C/6/48-49]**. Accordingly, any widening of bid-ask spreads on the inter-dealer market would, in turn, impact on prices set on electronic trading platforms: Rime 1, ¶196 **[EV/9/62-63]**; Rime 2, ¶¶101-102 **[C/6/48-49]**.

(b) The economic principle of equilibrium means that bid-ask spreads offered through different methods of trading (such as voice trading and electronic trading platforms) will, all other things being equal, remain consistent. This is because differences in bid-ask spreads will create changes in demand that will act to correct spreads back to equilibrium. In other words, customers of a particular FX Dealer may choose to use a different method of trading with that Dealer if they consider the pricing it provides is more competitive. For example, as Professor Rime explains, if the bid-ask spreads offered by a FX Dealer's electronic platform are perceived to be more competitive by its customers than voice trading, then some customers would choose to trade on the electronic platform rather than with voice traders. This increased demand on the platform would indicate that wider bid-ask spreads could be charged without losing customers: Rime 1, ¶197 **[EV/9/63]**; and Rime 2, section 4.4.2. **[C/6/49-51]**.

72. The Proposed Defendants now (correctly) accept that there is a relationship between voice and electronic trades: Joint CPO Rejoinder, ¶94 **[A/6/42]**.

D. RESPONSES TO POINT (8) OF THE TRIBUNAL'S LETTER

73. Point (8) of the Tribunal's Letter refers to questions asked by members of the Tribunal during the CPO hearing regarding the significance or otherwise of certain matters, namely: (a) the market concentration and market power of the Proposed Defendants; (b) the impact of the individuals participating in the infringements on the behaviour of the banks that employed them; and (c) elasticity of demand in the market.

74. Mr Evans has sought to address those points as part of his further particulars on causation above. Nevertheless, in order to assist the Tribunal, he summarises his responses on those specific points below.

75. **Market concentration and market power of the Proposed Defendants:**

    (a) A sufficient degree of market power held by the Proposed Defendants is a necessary part of Mr Evans' case concerning the loss and damage caused to Class A: see ¶39 above. Accordingly, it is also a necessary part of the first mechanism for loss and damage caused to Class B (i.e. less competitive market conditions), as this concerns the market-wide effects of the Proposed Defendants' tacit coordination: see ¶51 above.

    (b) A certain degree of market power possessed by the Proposed Defendants is <u>not</u> a precondition for the second mechanism of loss and damage caused to Class B (i.e. increased adverse selection risks). This is because an increase in adverse selection risks can even be caused by a person with limited degree of market power. However, the degree of market power is relevant to the extent of the adverse selection risks and, therefore, the quantum of such loss and damage: see ¶¶63 and 66 above.

    (c) The level of market concentration is relevant insofar as it sheds light on the salient issue of the degree of market power: see ¶39 above.

76. **Impact of the participating traders on the behaviour of the banks employing them:**

    (a) Mr Evans' case as to how the participating traders could have influenced the behaviour of the banks employing them is an important part of his case concerning the loss and damage suffered by Class A: see ¶36 above. It is therefore similarly relevant to his case concerning the loss and damage suffered by Class B as a result of less competitive market conditions: see ¶51 above.

(b) It is not a necessary part of his case concerning the loss suffered by Class B as a result of increased adverse selection risks. However, it may be relevant to the extent of any adverse selection risks and, therefore, the quantum of any such loss and damage: see ¶¶63 and 66 above.

77. **Elasticity of demand in the market:**

(a) Mr Evans' case is that the price elasticity of demand for FX transactions is relatively low. That being so, there was not sufficient elasticity of demand to prevent or undermine tacit coordination of bid-ask spreads during the periods covered by the Infringements: see ¶¶44-46 above.

(b) However, he acknowledges that certain customers would have switched in response to wider bid-ask spreads. This is particularly the case for sophisticated customers that held multiple bank relationships. Insofar as those customers would have switched in response to widened bid-ask spreads, this would be relevant to the first mechanism for loss and damage caused to Class B (i.e. less competitive market conditions): see ¶46 above.

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DAVID BAILEY

AARON KHAN

6 August 2021