IN THE COMPETITION APPEAL TRIBUNAL

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

Case No. 1329/7/7/19: **MICHAEL O'HIGGINS FX CLASS REPRESENTATIVE LIMITED v BARCLAYS BANK PLC AND OTHERS**

MR EVANS' SKELETON ARGUMENT
ON CERTIFICATION
for the CPO hearing commencing on 12 July 2021

References: are to the electronic bundles in the form **[Bundle prefix / Tab / page number (if relevant)]**. Bundle prefixes are: (i) letters **A** to **H** for joint bundles; (ii) "**EV**" for the Evans CPO application bundle; and (iii) "**MOH**" for the O'Higgins PCR's CPO application bundle.

A. INTRODUCTION AND SUMMARY OF SUBMISSIONS

1. The sole certification issue raised by the Proposed Defendants is their contention that the proposed collective proceedings should "*only be permitted to proceed, if at all, as opt-in actions*": ¶3, Proposed Defendants' Joint CPO Rejoinder. **[A/1/4-5]**

2. Neither Mr Evans nor the O'Higgins PCR makes an application to bring collective proceedings on an opt-in basis. Both seek to bring opt-out collective proceedings (and that is the basis for all elements of their case preparation, from funding to distribution). Mr Evans is seeking to bring (in his words) "*the Proposed Collective Proceedings on an opt-out basis in order to vindicate the right of all class members to compensation and to bring about the added public benefit of enhancing the incentives for compliance with competition laws*" (emphasis added): Evans 2, ¶42. **[D/8/13]** This accords with the twin statutory objectives of vindicating claimants' rights and dis-incentivising unlawful anti-competitive behaviour (*Mastercard v Merricks* [2020] UKSC 51, per Lord Briggs at [2] and [53]).

3. As developed below, opt-in proceedings would be a poor alternative. Impracticable at best, impossible at worst, they would on any view present a victory only for the Proposed Defendants. The strategy of the Proposed Defendants is plain: unable properly to resist the applications for a collective proceedings order (**"CPO"**) on any other basis, they are deploying the phantom prospect of opt-in proceedings, in the knowledge that (if acceded to by the Tribunal) this would lead either to no collective proceedings at all, or (if feasible, which is to be strongly doubted) to some attenuated and limited opt-in proceedings on behalf of a handful of entities.

4. In Mr Evans' submission, this transparent attempt to stymy his CPO application – and the vindication of the rights of the proposed class members (**"PCMs"**), and the corresponding dis-incentivisation of wrongdoing – should be dismissed.

5. In this skeleton argument, Mr Evans focuses on the key reasons that his proposed collective proceedings should proceed on an opt-out basis for UK-domiciled persons, and addresses the key points on which he and the Proposed Defendants join issue. The Tribunal of course has his various submissions (in particular his Reply to the Proposed Defendants' Joint CPO Response **[A/3]** (**"Evans Reply"**) and his Response to their Joint

CPO Rejoinder **[A/8]** (**"Evans Response"**)) and he relies on the arguments made therein in full. In outline:

(a) It would not be practicable to bring these proceedings on an opt-in basis, having regard to the considerations such as the features of Mr Evans' proposed classes, the estimated average claim values per PCM and Hausfeld's first-hand experience of trying to bring an opt-in action. (***Section C***) In particular:

  (i) The likely size and composition of the proposed classes is such that an opt-in action would be impracticable: Evans Reply, ¶¶85-95. **[A/3/25–26]**

  (ii) It is estimated that the average claim value for over 80% of all PCMs would be less than £16,000. Moreover, the average claim value for 43.5% of PCMs is likely to be less than £10,000: Ramirez 3, Table 5. **[C/10/14]**

  (iii) Hausfeld's experience of trying to build an opt-in action over several years confirms that such an action would be very difficult, if not impossible, to bring. The time, burden, cost and risk of joining a collective action were sufficient to deter most of the potential claimants that were contacted: Maton 4, ¶¶6-33. **[D/9/3–14]**

  (iv) Mr Evans' funder, Bench Walk, has confirmed that the funding structure was prepared specifically for opt-out proceedings and therefore would not be viable for opt-in proceedings: Chopin 4, ¶15. **[D/13/4]** Although it is not possible for Bench Walk to say, in the abstract, whether it would be able to fund an opt-in claim instead, any such decision would have to take into account the fact that the book-building process would necessarily add significant upfront expenditure and delay: Chopin 4, ¶¶16-20. **[D/13/4]**

(b) The Proposed Defendants' assertions based on data unavailability are either unfounded or can be appropriately addressed by the Tribunal doing its best on the evidence that is likely to be available. (***Section D***)

(c) Contrary to the Proposed Defendants' attempts to suggest otherwise, Mr Evans submits that his proposed claims are plainly of sufficient strength to justify the bringing of opt-out proceedings. (***Section E***)

6. Finally, Mr Evans is mindful that the Tribunal must be satisfied that a CPO should be granted, taking particular account of the best interests of the classes (whose interests the Proposed Defendants can scarcely be taken to represent). Mr Evans submits that the Tribunal should be so satisfied (***Section F***), and of course stands ready to assist the Tribunal in this regard at the hearing.

B. THE LEGAL PRINCIPLES ON OPT-IN vs. OPT-OUT

7. As to the pleadings, this issue was raised by the Proposed Defendants in the Joint CPO Response, ¶¶7-27 **[A/1/6-15]**, as to which see Mr Evans' Reply, ¶¶11-77 **[A/3/5-22]** and (in response to both Mr Evans and the O'Higgins PCR's Replies) the Proposed Defendants' Joint CPO Rejoinder, ¶¶8-45 **[A/6/4-21]**. Evans Response, ¶¶12-16 **[A/8/4-6]** on the legal principles maintained his position as set out in his Reply.

8. Despite the screeds devoted by the Proposed Defendants to this topic, seeking to persuade the Tribunal that it ought to interpret the legislation as laying down "*a general preference in favour of opt-in proceedings*" – i.e. a presumption against opt-out proceedings – the answer to their case is quite simple.

9. *In limine*, Mr Evans submits that the question of opt-in proceedings does not even arise because there is no such application before the Tribunal. In those circumstances, there is no statutory provision requiring the Tribunal to consider whether the proposed proceedings should be brought on an opt-in or opt-out basis as a hurdle that must be surmounted before collective proceedings can be opt-out. Imposing such a hurdle would run counter to the policy of the legislation which is to introduce and facilitate collective proceedings on an opt-out basis: see Evans Reply, ¶¶13(b)-14. **[A/3/6]**

10. If that submission is not accepted and the Tribunal does have to consider hypothetical opt-in proceedings – hypothetical because the reality is that opt-in proceedings are not practicable in these circumstances, as to which see Section C below – then it is submitted that the Proposed Defendants are seeking to impose what is simply an impermissible gloss on the statutory test: see Evans Reply ¶13(a). **[A/3/5]**

11. The primary legislation, which must be the starting point, makes no reference to any "*general preference*" for opt-in rather than opt-out proceedings: Evans Reply, ¶¶16-22. **[A/3/7-9**]

12. The legislative history of the primary legislation shows that the question of opt-in or opt-out is a matter of discretion for the Tribunal. In exercising that discretion, the Tribunal is directed by its Rules to have regard to specific considerations, but that does not come close to establishing any overriding "*general preference*", still less a presumption in favour of opt-in proceedings: Evans Reply, ¶¶38-56. **[A/3/13-17]**

13. The Government's decision on this issue was set out in the BIS Consultation Response cited at Evans Reply, ¶44. **[A/3/15]** This decision reflected conclusions previously reached in the field of collective actions by the Civil Justice Council of England and Wales (**"CJC"**) in its 2008 Report to the Lord Chancellor, *Improving Access to Justice through Collective Actions,* that the decision whether to certify collective claims as opt-in or opt-out should not be subject to any presumption, but should be left to the court's discretion having regard to relevant considerations. The CJC also observed that Lord Woolf had reached the same conclusion in his 1996 Final Report, *Access to Justice*. The CJC Report informed the Government's approach to the Consumer Rights Bill 2013 which led to the legislation amending section 47B of the Competition Act 1998 (the **"Act"**): Evans Reply, ¶¶51-56. **[A/3/16-17]**

14. The Proposed Defendants accept the relevance of the CJC Report but seek to deflect it by arguing that the concern of the CJC was that there should not be a presumption in favour of opt-out proceedings: Joint CPO Rejoinder, ¶31. **[A/6/14]** Mr Evans has made no such submission. The passage cited by the Proposed Defendants simply makes the point that certification is a matter for the court's discretion having regard to matters set out in rules and practice directions and that there should be no automatic right to bring collective opt-out proceedings, an uncontroversial proposition.

15. Nor is there any reference to a "*general preference*" in the Tribunal Rules – nor could there be in light of the primary legislation and its legislative history.

16. The Proposed Defendants seek to elevate Rule 79(3)(b) – which identifies as a relevant factor for the Tribunal's exercise of discretion "*whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover*" – into a presumption against opt-out proceedings which it is not. It simply directs the Tribunal to consider the practicability of bringing the proceedings on an opt-in basis as part of the consideration of all the circumstances before it.

17. The Proposed Defendants seek to argue that the alleged "*general preference*" is the "*only logical inference*" from Rule 79(3)(b) because practicability of opt-in proceedings would be a factor against opt-out proceedings: Joint CPO Response, ¶20 **[A/6/9]**. But what the Proposed Defendants seek to do is to elevate it into the only factor that really matters, which is entirely inconsistent with the breadth of the Tribunal's discretion under Rule 79(3) to "*take into account all matters it thinks fit including the following matters additional to those set out in paragraph (2) – (a) the strength of the claims; and (b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover.*" Plainly, practicability is a relevant factor, which might very easily be countered by other relevant factors. Rule 79(3)(b) does not, however, give rise to a statutory preference or presumption.

18. The phrase "*general preference*" upon which the Proposed Defendants hang all of their case on this issue is only be found in paragraph 6.39 of the *Guide*. It is not used anywhere else. Mr Evans submits that this is an incorrect gloss on the Rule. It is not supported by the wording of Rule 79(3) and is inconsistent with the policy of section 47B of the Act. It could only be reconciled on the basis that it is made within the context of the *Guide* explaining that the Tribunal will "*consider all the circumstances*" in the exercise of its unfettered discretion under Rule 79(3). However, it does not turn a consideration of practicability of opt-in proceedings into a presumption in favour of opt-in proceedings.

19. Thus, the Proposed Defendants' attempt to introduce a presumption against opt-out proceedings under the guise of a "*general preference*" is entirely contrary to the primary legislation, underlying policy approach, as set out in the BIS Consultation Response in 2013 and before that the CJC Report in 2008 and is based on a forced, incorrect interpretation of the Tribunal Rules.

C. ANY OPT-IN PROCEEDINGS WOULD BE IMPRACTICABLE

20. The Proposed Defendants' case is that it would be practicable to bring these proposed proceedings on an opt-in basis in respect of UK domiciled class members: Joint CPO Response, ¶¶28–51 **[A/1/15–27]** and Joint CPO Rejoinder, ¶¶46–67 **[A/6/21–33]**.

21. Even if (contrary to the above) the Tribunal is entitled to consider whether proceedings should be opt-in or opt-out in this case, Mr Evans submits that any opt-in proceedings

would plainly not be practicable: Evans Reply, ¶¶78–153 **[A/3/22–39]** and Evans Response, ¶¶17–34. **[A/8/6–11]**

22. The Proposed Defendants put forward four reasons why these proceedings could practicably be pursued on an opt-in basis: Joint CPO Rejoinder, ¶47. **[A/6/22]**

    (a) The vast majority (if not all) of the PCMs are sophisticated and well-resourced parties, such as banks and hedge funds, that are readily capable of opting in to the proceedings.

    (b) The estimated value of the PCMs' claims is substantial and would be sufficient to incentivise them to opt in.

    (c) There is no reason to believe that the PCRs would be unable to reach out to potential class members to encourage them to opt-in to collective proceedings.

    (d) There is no cogent evidence that opt-in proceedings would not be economically viable.

23. None of these contentions stands up to scrutiny. Mr Evans briefly addresses each of them in turn below.

Features of the proposed classes

24. Mr Evans' proposed classes are described at ¶¶71–104 of his Amended Collective Proceedings Claim Form **[EV/1/25–43]** and ¶¶21–27 of the summary of Mr Evans' proposed collective proceedings ("**Evans Claim Summary**").

25. As Mr Evans explains, there will be a wide range of persons that fall within his proposed classes: Evans 2, ¶42(a). **[D/8/13]** This is because there is a wide range of persons who may enter into FX transactions for a variety of different purposes: from financial institutions trading large amounts of FX frequently, through to SMEs and High Net Worth Individuals trading small amounts infrequently: Evans Claim Summary, ¶27.

26. Mr Ramirez has provided further evidence on the expected composition of the classes. In particular:

    (a) **The proposed classes are large**: Mr Ramirez's preliminary estimate of the overall size of the proposed classes is that there are likely to be tens of thousands of

members: Ramirez 1, Table 4. **[EV/10/30]** He estimates that there would be 42,015 class members belonging to one or both classes, which is broken down into: (a) 18,154 financial institutions and (b) 23,861 non-financial customers.

(b) **Most PCMs will be small and medium-sized**: Mr Ramirez's estimates of the composition of the proposed classes indicate that at least 76.6% of the non-financial PCMs are likely to be small or medium-sized enterprises in the sense of having less than 250 employees (Ramirez 2, ¶19 **[C/7/9]**); 99.5% of the financial PCMs have a headcount of less than 250 employees (Ramirez 2, ¶15 and Table 1 **[C/7/7–8]**) and 86.4% have an annual turnover of less than £500,000 (Ramirez 3, ¶14 and Table 1 **[C/10/8])**.

(c) **Some PCMs will be high-net-worth individuals**: they account for approximately 3–4% of FX spot and outright forward volumes of non-financial PCMs during the infringement period: Ramirez 3, ¶23 and Table 2. **[C/10/11]**

27. It follows that many of the PCMs will be small and medium-sized and not nearly as sophisticated and well-resourced as the Proposed Defendants seek to suggest in their pleadings.

28. In any event, the Proposed Defendants' arguments regarding the alleged sophistication of proposed class members ignore the reasons why even so-called "sophisticated" class members may be unlikely to opt-in to collective proceedings. Maton 4, ¶19 **[D/9/8]** describes the main reasons why prospective claimants that his firm contacted (which included pension funds, banks, hedge funds and corporates) were reluctant to join a collective action that Hausfeld sought to bring in respect of FX misconduct. Their reasons included an understandable desire to avoid "*a legal fight with major banks for what seemed to them to be a modest to small level of potential damages*", regardless of the potential claimant's size or sophistication. The Proposed Defendants have not adduced any evidence to gainsay this.

Estimated value of the claims

29. Mr Evans' case is that the estimated average value of claim per PCM would plainly not be a sufficient incentive for the vast majority of class members to opt in. It should be noted, in this regard, that Rule 79(3)(b) draws express attention to this consideration: "*whether it is practicable for the proceedings to be brought as opt-in collective*

proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover."

30. Mr Ramirez's estimates indicate that the loss suffered by most PCMs would be relatively low. The average potential claim value (**"claim value"**) for PCMs is as follows:

    (a) 80.8% of PCMs have a claim value of below £16,000.

    (b) 43.5% of PCMs have a claim value of below £10,000.

    (c) Financial PCMs would have a claim value of £133,805; although 86.5% of them have a claim value of just £15,964.

    (d) Non-financial PCMs would have a claim value of £10,811; although 76.6% of non-financial PCMs have a claim value of just £3,409.

    See Ramirez 2, Table 4 **[C/7/15]** and Ramirez 3, Tables 4 and 5 **[C/10/14]**.

31. It follows that the facts are directly contrary to the situation in which "*the class is small but the loss suffered by each class member is high*", as per the *Guide*, paragraph 6.39. As is clear from the above, Mr Evans' proposed classes are relatively large, but the estimated loss suffered by most PCMs is relatively low.

32. Set against these considerations, the Proposed Defendants' only purported answer is to pray in aid the damages estimate of £2.1 billion for 1,414 of the 42,015 estimated PCMs (see Joint CPO Rejoinder, ¶59(b) **[A/6/26–27]**) and to emphasise the incentive, on the part of <u>those</u> class members, to opt-in to any proposed proceedings.

33. There are three answers to this:

    (a) The estimated size of claim values for a minority of PCMs does not alter the fact that a clear majority of PCMs will have average claim values of less than £16,000. Mr Evans says in his evidence that:

        > "There is a real risk that the remainder of the Proposed Classes would be either unable or unwilling to opt in and, as a consequence, the Proposed Defendants would be able to retain part of any damages that might otherwise be payable to the class members" (Evans 2, ¶41 **[D/8/13]**).

    (b) Mr Maton's evidence is that most PCMs will be reluctant to opt-in for reasons unrelated to the size of any potential claim: see ¶28 above.

(c) Even leaving aside these points, the Proposed Defendants have not established that the potentially large size of claims of the few would galvanise all other PCMs to opt-in: Mr Evans' Response, ¶29. **[A/8/9–10]**

Alleged ability to contact the proposed classes

34. The Proposed Defendants' argument that Mr Evans would be able to contact the proposed classes underestimates the large number and diversity of PCMs: Evans Reply, ¶108 **[A/3/29]** and ¶30 above.

35. Mr Evans' position on this point is supported by:

(a) Mr Maton's evidence, which shows just how expensive and time-consuming it was to contact around 300 potential claimants to join a collective action: Maton 4, ¶¶13–15. **[D/9/5–7]**

(b) The fact that an opt-in action would require a significantly different approach to publicity to the one set out in Mr Evans' Notice and Administration Plan, which is calibrated to publicising an opt-out action: Evans Reply, ¶111. **[A/3/30]**

(c) The fact that a number of PCMs are unlikely to have either the resources or the inclination to engage with publicity about opt-in proceedings: Evans Reply, ¶¶87–94 and ¶142. **[A/3/25–26, 35]**

Economic viability

36. The Proposed Defendants contend that opt-in proceedings would be economically viable in light of the aggregate award of damages sought.

37. All available evidence is to the contrary. The real-world evidence of Mr Maton is that "*…the Proposed Defendants have completely underestimated (and indeed have no experience of) the time, effort, cost and risk in seeking to bring the proposed proceedings in the Evans application on an opt-in basis. On the contrary, there is a significant risk that only a limited number of members of the proposed classes may opt in to those proceedings*" (Maton 4, ¶¶23–33, in particular ¶23 **[D/9/10–14]**). Mr Chopin's evidence is that the current funding arrangements would not be viable on an opt-in basis and that, although unable to opine in the abstract on whether it might be possible to fund an opt-in action, he emphasises that the funding decision would need to reflect the budgetary

and timing implications of opt-in proceedings (see Chopin 3, ¶15 **[D/10/4]** and Chopin 4, ¶¶15–20 **[D/13/4–5]**). Further, Mr Chopin says that the funding structure would need to include thresholds or triggers, at which the funder can cease to fund the action if the aggregate claim value is insufficient (Chopin 3, ¶¶21-22 **[D/10/5]**).

Conclusion on impracticability of opt-in proceedings

38. In summary, Mr Evans submits that an opt-in action would be impracticable and would fail to vindicate the PCMs' rights to compensation (thus shielding the Proposed Defendants). By contrast, Mr Evans has carefully designed an opt-out action that seeks to maximise the PCMs' chances of securing redress.

D. DATA AVAILABILITY DOES NOT REQUIRE AN OPT-IN ACTION

39. The Proposed Defendants do not argue that certification should be refused on the basis that Mr Evans has not identified adequate data in support of his proposed claims: Joint CPO Response, ¶52. **[A/1/27–28]** Instead, the Joint CPO Response seeks to suggest that (putative) limitations in the Proposed Defendants' data favour opt-in proceedings: Joint CPO Response, ¶¶52–83. **[A/1/27–42]**

40. Mr Evans has previously addressed, in detail, each of the six matters identified by the Proposed Defendants as supposedly requiring data from each PCM, such that his proceedings should be brought on an opt-in basis: Evans Reply, ¶¶154–228. **[A/3/39–64]**

41. Mr Evans' case is, moreover, that the Tribunal must do its best on the evidence available: *Mastercard v Merricks* [2020] UKSC 51, [51]. Any inherent limitations of the Proposed Defendants' own data should not prevent an otherwise desirable opt-out action from going ahead: Evans Reply, ¶165. **[A/3/43]**

42. The Joint CPO Rejoinder conspicuously did not answer (nor even attempt to address) any of Mr Evans' points on data availability. It may be the case that the Proposed Defendants now see not only that their complaints are weak in substance, but moreover that requiring significant disclosure from class members would materially increase the unpalatability of "opting in": Evans Reply, ¶¶147-152. **[A/3/38]**

43. To the extent that data availability and information is still said by the Proposed Defendants to be relevant to any opt-in vs. opt-out issue, none of the six matters initially

raised by the Proposed Defendants weighs in favour of opt-in proceedings, as set out below.

44. **Geographical location of trades and class members**: the Proposed Defendants do not appear to dispute that they possess data showing where their traders entered into trades. Furthermore, Mr Knight's evidence is that the Proposed Defendants would have data on the domicile and location of counterparties: Knight 2, ¶¶22–23. **[C/5/9]** In particular, Mr Knight considers that FX dealers would have to obtain information about the location of a customer in accordance with anti-money laundering regulations and 'know your customer' checks. This evidence has not been rebutted. Mr Knight's position is also supported by the European Commission's use of G10 FX spot transactions entered into with counterparties located in the EEA when it calculated the fines imposed by the Decisions: Evans Reply, fn. 78, **[A/3/45]** and by the Schofield Decision, which implied that some of the banks do hold data about counterparties' domicile: Evans Reply, ¶¶169–179. **[A/3/44–49]**

45. **Transactions with non-Respondents**: there is no need for data to be obtained via an opt-in action in order to calculate the overall VoC covered by those PCMs who transacted with RFIs (i.e., Mr Evans' Class B). That is because Mr Ramirez has identified the data needed to operate his methodology for quantifying the loss suffered by PCMs on trades with RFIs: Ramirez 1, ¶¶79–87. **[EV/10/35–38]**

46. **Excluded trades**: Mr Evans and the Proposed Defendants agree that it is appropriate to exclude benchmark transactions, limit orders and resting orders from the proposed claims: Joint CPO Response, fn. 92 **[A/1/32]** and Amended Collective Proceedings Claim Form, ¶103(c)–(d). **[EV/1/41]** According to Mr Knight's evidence (again uncontested by the Proposed Defendants) FX dealers would be likely to record data about the type of order placed by a customer, including resting orders and benchmark trades: Knight 2, ¶29. **[C/5/10]** In any event, even if the Proposed Defendants do not maintain sufficient data to enable these trades to be identified (or their data does not permit appropriate inferences to be drawn while wielding a broad axe), Mr Ramirez has proposed ways to address this on an aggregate basis: Evans Reply, ¶190. **[A/3/53]**

47. **Transactions with Intermediaries**: there is no need to obtain data from PCMs in order to exclude these transactions. On the contrary, these transactions give rise to claims of

the ultimate customer, rather than the intermediary and, as such, fall within the scope of Mr Evans' proposed claims: Evans Reply, ¶¶193–199. **[A/3/53–55]**

48. **Jurisdiction**: the Proposed Defendants' jurisdiction challenges can be resolved satisfactorily in the context of opt-out proceedings: Evans Reply, ¶¶200–209. **[A/3/55–59]**

49. **Pass-on, tax and interest**: there is likely to be sufficient information to address these issues in a suitable manner in opt-out proceedings; they do not necessitate an opt-in procedure. Mr Ramirez has put forward a methodology for estimating pass-on to customers insofar as it is relevant to the determination of the proposed claims: Ramirez 1, section 8 **[EV/10/75–82]** and Ramirez 2, section 3.2.4 **[C/7/22–29]**. Mr Ramirez has also identified available data for his methodology to be applied on a sufficiently sound basis as part of opt-out proceedings: Evans Reply, ¶¶212–224. **[A/3/59–63]** The same is true of compound interest and tax: Evans Reply, ¶¶225–228. **[A/3/63–64]** These issues can all be reliably assessed as part of opt-out proceedings.

E. THE PROPOSED CLAIMS ARE SUFFICIENTLY STRONG TO BE ADVANCED IN OPT-OUT PROCEEDINGS

50. The Tribunal is entitled to take into account the strength of the claims in determining whether collective proceedings should be opt-in or opt-out: Rule 79(3)(a).

51. Mr Evans and the Proposed Defendants agree that any assessment of the merits must be high level: Evans Reply, ¶237 **[A/3/67]** and Joint CPO Rejoinder, ¶69. **[A/6/33–34]** This is confirmed both by the first bullet of paragraph 6.39 of the *Guide* and the Tribunal's judgment in *Gibson v Pride Mobility* [2017] CAT 9, at [123].

52. Whilst the Proposed Defendants subscribe to a high-level merits review in theory, their approach is materially different in practice. They have made a series of detailed and far-reaching challenges to Mr Evans' proposed claims and his experts' analyses. These challenges go way beyond an appropriate review of the merits at the certification stage. The correct approach is for the Tribunal to form a high-level view of the strength of the claims based on the collective proceedings claim form: Evans Reply, ¶¶237–243. **[A/3/67–69]** The Tribunal should be astute to resist the Proposed Defendants attempts to introduce a detailed merits analysis, especially since the *Guide* states in terms that: "*the reference to the "strength of the claims" [in Rule 79(3)(a)] does not require the Tribunal*

to conduct a full merits assessment, and the Tribunal does not expect the parties to make detailed submissions as if that were the case."

53. The Proposed Defendants' case is that there are a number of weaknesses in the proposed claims, which are a further reason for rejecting an opt-out action: Joint CPO Response, ¶¶84–152 **[A/1/42–70]** and Joint CPO Rejoinder, ¶¶68–95. **[A/6/33–43]**

54. Mr Evans' case is that his proposed claims are plainly of sufficient strength to justify opt-out proceedings for the reasons given in ¶¶229–327 of his Reply **[A/3/64–96]** and ¶¶35–64 of his Response. **[A/8/11–21]** In outline:

    (a) Mr Evans obtained non-confidential versions of the Decisions so that he could plead, fully and precisely, follow-on claims. Such claims are generally of sufficient strength for the purpose of permitting opt-out proceedings when making a CPO: see the first bullet point in paragraph 6.39 of the *Guide*.

    (b) Mr Evans' claims are based upon sound theories of harm that are grounded on detailed expert evidence of Professor Rime (an expert in FX market microstructure) and of Richard Knight (an expert in FX markets and trading with over 25 years of experience obtained via employment with major banks in various roles in FX sales between 1988 and 2013): Reply, ¶244(a) **[A/3/69]**; see also Evans Claim Summary, ¶12.

    (c) Mr Evans' experts have put forward a credible quantum methodology and have identified sufficient data available to operate the methodology: Reply, ¶244(b) **[A/3/69]**; see also Evans Claim Summary, ¶¶28–38.

    (d) Mr Evans' experts have already identified material, such as the chatroom transcripts and the Proposed Defendants' transaction data, which should be disclosed in order to refine and complete their analysis: Reply, ¶244(b) **[A/3/68–69]**; see also Evans Claim Summary, ¶¶9, 11, 20 and 38.

    (e) Mr Evans has answered each of the Proposed Defendants' detailed criticisms of his proposed claims and quantum methodology: Evans Reply, ¶¶249–327 **[A/3/70–96]**.

55. While the Proposed Defendants raise various objections under the heading of 'the merits', they appear to be advancing three main contentions:

(a) There are fundamental discrepancies between the scope of the Infringements found by the Decisions and Mr Evans' experts' theories of harm.

(b) The causal links between the Infringements and Mr Evans' proposed claims are tenuous.

(c) Mr Evans has not advanced a robust economic methodology that can reliably estimate any alleged overcharge.

56. Without prejudice to his primary position that these objections go well beyond any merits analysis foreseen or properly required by Rule 79(3)(a), Mr Evans has nevertheless addressed each of these points and explained why they are without merit. In outline:

(a) The Proposed Defendants are wrong to allege that Mr Evans' theory of harm makes "*false assumptions*" about the conduct subject to the Decision. In particular:

(i) Mr Evans does not assume that there was an express agreement to widen spreads. Rather, Professor Rime explains why, as a matter of theory and economic reality, he considers that the information shared in the chatrooms would have facilitated tacit coordination to widen bid-ask spreads: Evans Reply, ¶¶256–265. **[A/3/72–75]**

(ii) Mr Evans does not assume that any coordination necessarily resulted in wider bid-ask spreads. Rather, it is Professor Rime's opinion that the Infringements are more likely to have widened spreads, rather than tightened them: Evans Reply, ¶¶266–271. **[A/3/75–77]**

(iii) Mr Evans does not assume that RFIs would charge wider spreads. Professor Rime has explained how and why RFIs would be likely to do so faced with the adverse effects of the infringements identified in the Decisions: Evans Reply, ¶¶272–276. **[A/3/77–79]**

(iv) There is no inconsistency between Mr Evans' proposed claims and the extent of the infringing conduct found by the Decisions. As the Proposed Defendants state in terms: "*in each Decision, the Commission identified a "by object" infringement. It made no finding of anticompetitive effects*": Joint CPO Response, ¶89(f). **[A/1/46]** Mr Evans relies on the Commission's finding of a 'by object' infringement, but, in addition, he seeks to show that

it had anti-competitive effects that harmed the PCMs. Mr Evans' case is that the infringements affected not only trades with Proposed Defendants but also trades with RFIs and trades executed on electronic trading platforms: Evans Reply, ¶¶277–281 **[A/3/79–80]**.

(b) The Proposed Defendants are wrong to suggest that Mr Evans' case on causation is weak. They raise four concerns, all of which are unfounded:

(i) **Tacit coordination of spreads**: Professor Rime has explained why he considers that the Proposed Defendants had the ability and incentive to engage in tacit coordination on spreads to their customers, as they had a sufficient degree of market power, there was a sufficient degree of transparency, and there may well have been various 'deterrent mechanisms' in place: Evans Reply, ¶¶291–295 **[A/3/83–86]**; Evans Response, ¶¶48–52. **[A/8/15–17]**

(ii) **General reduction in competition across banks**: the Proposed Defendants' objections in this regard simply repeat those in relation to tacit coordination and, therefore, are also unfounded.

(iii) **Adverse selection risks for RFIs**: As Professor Rime explains, the adverse selection risk resulting from the infringements is a cumulative risk, and is considered by FX dealers on an aggregate basis: Rime 2, ¶¶131–132. **[C/6/59–60]** This means that it would <u>not</u> be necessary for an FX dealer to be adversely selected on each trade in order to suffer an increase in adverse selection risk overall: Evans Reply, ¶¶300–305. **[A/3/87–90]**

(iv) **Spillover effects on e-transactions**: As Professor Rime explains, the infringements would have widened bid-ask spreads applied on electronic platforms for two reasons: first, to the extent that the inputs into any pricing algorithm (such as prices on the inter-dealer market) were themselves affected by the infringements, they would in turn have affected pricing on electronic platforms; and, secondly, the economic principle of equilibrium means that spreads offered through different methods of trading will, all other things being equal, remain consistent: Rime 1, ¶¶196–197; **[EV/9/62–63]** Knight 1, ¶181. **[EV/8/61]** Indeed, the Proposed Defendants now (correctly)

accept that there is some relationship between voice and electronic trades: Joint CPO Rejoinder, ¶94. **[A/6/42]**

(c) **Proposed methodology:** the Proposed Defendants argue that it will not be possible to identify and control for all relevant factors in order to produce a well-specified econometric model that can assess the effects of the infringing conduct: Joint CPO Rejoinder, ¶136. **[A/1/64]** The short answer to the Proposed Defendants' detailed criticisms is that Mr Ramirez has identified the explanatory variables that could be included in his regression analysis in as much detail as possible at this stage: Evans Reply, ¶324. **[A/3/95]** He will, of course, identify the variables that explain and predict changes in half-spreads once the Proposed Defendants have disclosed their transaction data: Ramirez 1, ¶112. **[EV/10/51–52]** Further and in any event, Mr Ramirez explains that he either proposes to control, or he can control, for each of the variables identified by the Proposed Defendants: Ramirez 2, §3.3. **[C/7/32–39]**

F. MR EVANS' APPLICATION OTHERWISE MEETS THE TESTS FOR A CPO TO BE GRANTED

57. Leaving the Proposed Defendants' submissions to one side, the Tribunal must itself be satisfied that Mr Evans' application meets the requirements for a CPO to be granted pursuant to section 47B(5) of the Act and Rule 77(1) of the Tribunal Rules. This is particularly important from the perspective of the members of the proposed classes (in relation to whom the Proposed Defendants' interests are directly opposed).

58. Mr Evans submits that his application for a CPO meets those requirements.[1] He relies on his Amended Proceedings Claim Form, **[EV1/1]** together with all the material filed in support (and as subsequently developed). He stands ready (individually and through his legal representatives) to assist the Tribunal at the hearing in relation to any questions the Tribunal may have, but in overview:

(a) His application satisfies the "eligibility criterion", as set out in section 47B(5) and (6), Rule 77(1)(b) and Rule 79. In particular, the claims:

(i) are brought on behalf of identifiable classes of persons (Rule 79(1)(a));

[1] Of course, for present purposes this leaves to one side (i) deceased persons, defunct companies and compound interest; and (ii) the issue of carriage.

(ii) raise common issues (Rule 79(1)(b)); and

(iii) are suitable to be brought in collective proceedings (Rule 79(1)(c)). As Lord Briggs held in *Mastercard v Merricks* [2020] UKSC 51 at [56], this means "*suitable in a relative sense: ie suitable to be brought in collective proceedings rather than individual proceedings*". Each of the factors listed in Rule 79(2) speaks in favour of the relative suitability of these claims being resolved in collective proceedings rather than individually.

(b) His application satisfies the "authorisation criterion", as set out in section 47B(5) and (8), and Rules 77(1)(a) and 78. In particular, it is just and reasonable for Mr Evans to act as class representative in the collective proceedings. He would fairly and adequately act in the interest of class members (Rule 78(2)(a); Rule 78(3)), with whom he has no conflict (Rule 78(2)(b)). The Tribunal will hear from Mr Evans at the beginning of the hearing on 12 July 2021, when he will endeavour to demonstrate to the Tribunal his commitment to achieving justice for the class members whom he wishes to represent.

G. CONCLUSION

59. Accordingly, the Tribunal is asked to give judgment in Mr Evans' favour, namely that (leaving the issues which have been held-over pending judgment in *Merricks* and *Trucks* to one side):

(a) Mr Evans' application to bring collective proceedings on an opt-out basis be granted; or

(b) if the O'Higgins PCR's application similarly meets the tests for certification, that the Tribunal so rules in respect of both applications, and then proceeds to consider the question of carriage.

AIDAN ROBERTSON QC

VICTORIA WAKEFIELD QC

DAVID BAILEY

AARON KHAN

5 July 2021