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IN THE COMPETITION APPEAL TRIBUNAL

BETWEEN:	**Case Number: 1336/7/7/19**
PHILLIP EVANS	**Applicant / Proposed Class Representative**
- and -	
BARCLAYS BANK PLC & OTHERS	**Proposed Defendants**
(the "Evans Application")	
AND BETWEEN:	**Case Number: 1329/7/7/19**
MICHAEL O'HIGGINS FX CLASS REPRESENTATIVE LIMITED	**Applicant / Proposed Class Representative**
- and -	
BARCLAYS BANK PLC & OTHERS	**Proposed Defendants**
- and -	
MITSUBISHI UFJ FINANCIAL GROUP, INC. AND ANOTHER	**Proposed Objectors**
(the "O'Higgins Application")	

MR EVANS' REPLY TO THE PROPOSED DEFENDANTS' JOINT CPO RESPONSE

I. INTRODUCTION AND SUMMARY[1]

1. This is Mr Evans' Reply to the Proposed Defendants' Joint CPO Response (the "**Joint CPO Response**") dated 26 February 2021.

2. Mr Evans notes that despite the Proposed Defendants' request that "*the CPO applications should be dismissed in their current form*",[2] the Joint CPO Response accepts that the

[1] In these written submissions: (i) the "**Proposed Defendants**" refers collectively to the Proposed Defendants to the Evans Application and the O'Higgins Application; and (ii) groups of Proposed Defendants will be referred to by the shorthand name of their banking group.

[2] Joint CPO Response, ¶3.

Evans Application satisfies all but one of the requirements for granting a CPO, as set out in section 47B of the Competition Act 1998 (the "**CA 1998**") and in Rules 78 and 79 of the Competition Appeal Tribunal Rules 2015 (the "**Tribunal Rules**").

3. Accordingly, it is understood to be common ground that:

   a. It would be just and reasonable for Mr Evans to act as a class representative in these proposed collective proceedings for the purposes of sections 47B(5)(a) and 47B(8)(b) of the CA 1998 and Rule 78 of the Tribunal Rules; and

   b. Mr Evans' proposed collective proceedings contain claims which are eligible for inclusion in collective proceedings for the purposes of sections 47B(5)(b) and 47B(6) of the CA 1998 and Rule 79 of the Tribunal Rules.

4. The Proposed Defendants raise a single objection to the certification of the Evans Application. They submit that it should only be permitted to proceed, if at all, as an opt-in collective action.[3] This is the sole issue for the Tribunal to determine in relation to the certification of the Evans Application.

5. In support of their position, the Proposed Defendants raise three points:

   a. First, that it would be practicable for the Evans Application to proceed as opt-in collective proceedings (Section A of the Joint CPO Response).

   b. Second, that there are a "*number of limitations in the available data*"[4] that would be available from the Proposed Defendants concerning their FX transactions during the claim period. According to the Proposed Defendants, those limitations "*could not effectively be addressed in an opt-out claim but could be capable of resolution on an opt-in basis*" (Section B of the Joint CPO Response).[5]

   c. Third, that the claims covered by the Evans Application are of insufficient strength to be brought as part of opt-out collective proceedings (Section C of the Joint CPO Response).

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3 Joint CPO Response, ¶4.

4 Joint CPO Response, ¶3(b).

5 *Ibid.*

6. Mr Evans submits that each of these points is entirely misconceived. By way of summary:

   a. First, Mr Evans has demonstrated that opt-in proceedings would be neither practicable nor in the interests of justice. The Proposed Defendants have underestimated the time, effort, cost and risk in seeking to bring opt-in proceedings in this case. Before bringing this action, Mr Evans' legal representatives went to great lengths to contact more than 300 potential claimants. This was a meticulous, time-consuming and costly process. Notwithstanding these efforts, fewer than 5% of potential claimants were willing to explore a possible claim. Among the reasons why most of the potential claimants considered it not worth their while to bring, or join in, a claim is the fact that the loss suffered by many class members is estimated to be relatively small. For the reasons set out below, Mr Evans submits that this action is manifestly not suitable to be brought on an opt-in basis (**Section III** of this Reply).

   b. Second, the Proposed Defendants' objections based on data availability are either unfounded or can be appropriately addressed in the proposed quantum methodology for opt-out proceedings (**Section IV** of this Reply).

   c. Third, the proposed claims covered by the Evans Application are of sufficient strength to be brought on an opt-out basis. Those claims not only seek damages for the effects of the infringement covered by the Decisions but they are also anchored in sound and robustly based expert evidence. Their detailed criticisms of the merits of the claims are clearly unfounded and have been answered by Mr Evans' experts (**Section V** of this Reply).

7. It is submitted that the requirements for certification of the Evans Application are met and, subject to the determination of the carriage dispute, a CPO should be granted.

8. For the avoidance of doubt, Mr Evans strongly disputes the Proposed Defendants' suggestion that the proposed collective proceedings brought by Mr Evans and Michael O'Higgins FX Class Representative Limited (the **"O'Higgins PCR"**) are "*markedly similar*".[6] Indeed, the Proposed Defendants note a number of material differences

[6] Joint CPO Response, ¶2.

between the two CPO applications in the Joint CPO Response.[7] The important differences between the two applications will be addressed in Mr Evans' submissions on the carriage dispute, which will be filed at the same time as this Reply. Mr Evans will say that the differences between the two applications is a material factor to be considered in determining the carriage dispute.

9. The remainder of this Reply is structured as follows:

   a. **Section II** responds to the Proposed Defendants' submissions as to the legal principles concerning opt-in and opt-out collective proceedings, contained in ¶¶7–27 of the Joint CPO Response; and

   b. **Sections III to V** respond to the arguments put forward in each of Sections A to C of the Joint CPO Response in turn.

10. Served with this Reply are the following expert reports and witness statements on which Mr Evans relies:

   a. Professor Rime's second expert report dated 23 April 2021 ("**Rime 2**");

   b. Mr Ramirez's second expert report dated 23 April 2021 ("**Ramirez 2**");

   c. Mr Knight's second expert report dated 23 April 2021 ("**Knight 2**")

   d. Mr Evans' second witness statement dated 23 April 2021 ("**Evans 2**");

   e. Mr Maton's fourth witness statement dated 23 April 2021 ("**Maton 4**");

   f. Mr Chopin's third witness statement dated 23 April 2021 ("**Chopin 3**"); and

   g. Mr Bickford-Smith's first witness statement dated 23 April 2021 ("**Bickford-Smith 1**").

[7] See, for example, the sub-paragraphs to ¶2 and further at ¶¶55(a) (addressing the different ways in which the PCRs define when an FX trade is *"entered into*" in the EEA) and ¶¶63-66 (addressing exclusions from the proposed classes in the Evans Application, which the Proposed Defendants appear to support, and which are not present in the O'Higgins Application).

II. LEGAL PRINCIPLES ON OPT-IN VS. OPT-OUT COLLECTIVE PROCEEDINGS

Introduction

11. The Proposed Defendants submit at ¶3 of the Joint CPO Response that the proposed proceedings "*should only be permitted to proceed, if at all, as opt-in actions*". The basis for this submission is said to be at ¶3(a) that:

> "The Tribunal's Rules and Guide impose a general preference in favour of opt-in proceedings, with a key consideration being whether it is "practicable" for the action to proceed on this basis. The PCRs have not demonstrated that opt-in proceedings would be impracticable."

12. In support of this submission, the Proposed Defendants argue that the purpose of the opt-out regime is to facilitate claims brought on behalf of consumers and small- and medium-sized enterprises **("SMEs**") rather than businesses generally, and that therefore there is a "*general preference*" in favour of opt-in proceedings, by which the Proposed Defendants really mean a presumption against opt-out proceedings. Therefore, the Proposed Defendants submit that Mr Evans' proposed proceedings must be brought on an opt-in rather than an opt-out basis.

13. As explained below, Mr Evans submits that the Proposed Defendants' contentions are wrong for two main reasons:

    a. First, the submission that there is "*a general preference in favour of opt-in proceedings*" impermissibly glosses the statutory test. There is no "*general preference*" in the primary legislation or the Tribunal Rules. This approach is not supported by the legislative history to which the Proposed Defendants refer in which a presumption in favour of opt-in proceedings was considered as a legislative option but rejected. Although ¶6.39 of the Tribunal's Guide to Proceedings[8] (the "***Guide***") does refer to a "*general preference*", this is an inexact summary of the statutory test in Rule 79(3). That test does not express any preference as between opt-in and opt-out proceedings, but only sets out specific considerations for the Tribunal to take into account when faced with a choice between opt-in and opt-out proceedings.

[8] The *Guide* is a Practice Direction pursuant to Rule 115(3) of the Tribunal's Rules.

b. Second, and in any event, bringing the proceedings on an opt-in basis is simply not a practicable proposition, as is explained in Evans 2, Maton 4 and Chopin 3. Indeed, Mr Maton's firm went to considerable lengths to explore opt-in proceedings with potential claimants but to no avail. Therefore, Mr Evans does not make any application to proceed on an opt-in basis, whether in the alternative or at all.

14. Mr Evans submits at the outset that matters going to a choice between opt-in and opt-out proceedings do not arise for consideration at all. This is because there are no applications before the Tribunal for opt-in proceedings. In contrast to the statutory requirements that the Tribunal must consider ("*if it considers that the person who brought the proceedings is a person who…*" (section 47B(5)(a); "*if the Tribunal considers that they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings*" (section 47B(5)(b)), there is no statutory requirement that the Tribunal must consider – as a hurdle to be surmounted in any application for opt-out proceedings – whether the proceedings are suitable for opt-out as opposed to opt-in proceedings.[9] There is no basis for the grafting-on to the collective proceedings regime of this additional barrier to certification.

15. Mr Evans now turns to address the position should this submission not be accepted and the Tribunal does have to consider whether the proceedings should proceed on an opt-in or opt-out basis.

Legal principles on the availability of opt-out collective proceedings

Introduction

16. Mr Evans' claim is brought under section 47B of the CA 1998, which was substantially amended by the Consumer Rights Act 2015. As Lord Briggs stated in *Mastercard v Merricks* ("*Merricks*")[10] the starting point in interpreting the relevant provisions of the CA 1998 on collective proceedings is:[11]

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9 Indeed, the only reference to this issue in the statute is the neutral language used in s.47B(7), namely that the CPO must include "*specification of the proceedings as opt-in collective proceedings or opt-out collective proceedings*".

10 [2020] UKSC 51, [2021] Bus LR 25.

11 *Merricks,* [42].

> "the true construction of the UK legislation, set against the background of the common law and civil procedure against which it falls to be construed."

17. Lord Briggs observed at [45] that this involves:

> "setting the express statutory provisions of the Act and the Rules in their context as a special part of UK civil procedure, with due regard paid to their purpose."

18. The CA 1998 introduced opt-out proceedings as an alternative to opt-in proceedings (or representative claims or group litigation orders) in the interests of justice. As stated by Lord Briggs in *Merricks* at [53]:

> "justice requires that the damages be quantified for the twin reasons of vindicating the claimant's rights and exacting appropriate payment by the defendant to reflect the wrong done. In the present context that second reason is fortified by the perception that anti-competitive conduct may never be effectively restrained in the future if wrongdoers cannot be brought to book by the masses of individual consumers who may bear the ultimate loss from misconduct which has already occurred."

19. It is submitted that the same reasoning applies to bringing wrongdoers to book by collective proceedings on behalf of individual businesses.

The primary legislation

20. Section 47B is headed "*Collective proceedings before the Tribunal*" and provides as follows:

> "(1) Subject to the provisions of this Act and Tribunal rules, proceedings may be brought before the Tribunal combining two or more claims to which section 47A applies ("collective proceedings").
>
> (2) Collective proceedings must be commenced by a person who proposes to be the representative in those proceedings.
>
> (3) The following points apply in relation to claims in collective proceedings—
>
> > (a) it is not a requirement that all of the claims should be against all of the defendants to the proceedings,
> >
> > (b) the proceedings may combine claims which have been made in proceedings under section 47A and claims which have not, and
> >
> > (c) a claim which has been made in proceedings under section 47A may be continued in collective proceedings only with the consent of the person who made that claim.
>
> (4) Collective proceedings may be continued only if the Tribunal makes a collective proceedings order.
>
> (5) The Tribunal may make a collective proceedings order only—

> (a) if it considers that the person who brought the proceedings is a person who, if the order were made, the Tribunal could authorise to act as the representative in those proceedings in accordance with subsection (8), and
>
> (b) in respect of claims which are eligible for inclusion in collective proceedings.
>
> (6) Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings.
>
> (7) A collective proceedings order must include the following matters—
>
> (a) authorisation of the person who brought the proceedings to act as the representative in those proceedings,
>
> (b) description of a class of persons whose claims are eligible for inclusion in the proceedings, and
>
> (c) specification of the proceedings as opt-in collective proceedings or opt-out collective proceedings (see subsections (10) and (11)).
>
> (8) The Tribunal may authorise a person to act as the representative in collective proceedings—
>
> (a) whether or not that person is a person falling within the class of persons described in the collective proceedings order for those proceedings (a "class member"), but
>
> (b) only if the Tribunal considers that it is just and reasonable for that person to act as a representative in those proceedings.
>
> (9) The Tribunal may vary or revoke a collective proceedings order at any time.
>
> (10) "*Opt-in collective proceedings*" are collective proceedings which are brought on behalf of each class member who opts in by notifying the representative, in a manner and by a time specified, that the claim should be included in the collective proceedings.
>
> (11) "*Opt-out collective proceedings*" are collective proceedings which are brought on behalf of each class member except—
>
> (a) any class member who opts out by notifying the representative, in a manner and by a time specified, that the claim should not be included in the collective proceedings, and
>
> (b) any class member who—
>
> (i) is not domiciled in the United Kingdom at a time specified, and
>
> (ii) does not, in a manner and by a time specified, opt in by notifying the representative that the claim should be included in the collective proceedings.
>
> (12) Where the Tribunal gives a judgment or makes an order in collective proceedings, the judgment or order is binding on all represented persons, except as otherwise specified.
>
> (13) The right to make a claim in collective proceedings does not affect the right to bring any other proceedings in respect of the claim.
>
> (14) In this section and in section 47C, "*specified*" means specified in a direction made by the Tribunal."

21. On the face of the CA 1998, sections 47B(10) and 47B(11) provide for two forms of collective proceedings, namely opt-in and opt-out collective proceedings, without:

a. drawing any distinction between proceedings on behalf of businesses or consumers;

b. drawing any distinction between proceedings on behalf of SMEs and proceedings on behalf of larger enterprises; or

c. establishing any hierarchy between opt-in and opt-out proceedings or any presumption in favour of one over the other.

22. It follows that there is simply nothing in this express statutory provision, or for that matter, elsewhere in the Act, to support the "*general preference*" gloss that the Proposed Defendants seek to place upon it.

The Tribunal Rules and the *Guide*

23. Turning to the Tribunal Rules, as Lord Briggs stated in *Merricks* at [25]:

> "Section 47B(1) expressly makes the right to bring collective proceedings subject to the Rules. They provide, at rule 2(2), that the Rules are to be applied and interpreted in accordance with the governing principles in rule 4. Rule 4(1)-(2) states that cases are to be decided justly and at proportionate cost. This is a modified version of the well-known overriding objective enshrined in the Civil Procedure Rules of England and Wales and with parallels in most modern codes of civil procedure both in the UK and around the common law world, including Canada."

24. The Tribunal Rules applicable to collective proceedings were set out by Lord Briggs in *Merricks* at [27]-[28]:

> "[27]. Rules 75 to 81 make detailed provision for the commencement and certification of collective proceedings. For present purposes rule 77, headed "Determination of the application for a collective proceedings order" and rule 79, headed "Certification of the claims as eligible for inclusion in collective proceedings", are of primary importance. They provide as follows:
>
> > "77(1) The Tribunal may make a collective proceedings order, after hearing the parties, only -
> >
> > > (a) if it considers that the proposed class representative is a person who, if the order were made, the Tribunal could authorise to act as the class representative in those proceedings in accordance with rule 78; and
> > >
> > > (b) in respect of claims or specified parts of claims which are eligible for inclusion in collective proceedings in accordance with rule 79.
> >
> > (2) If the Tribunal makes a collective proceedings order it may attach such conditions to the order or give such directions as it thinks fit, including -

(a) directions for filing and service of the order, pleadings and any other document in relation to the collective proceedings; and

(b) directions regarding any class member who is a child or person who lacks capacity.

79(1) The Tribunal may certify claims as eligible for inclusion in collective proceedings where, having regard to all the circumstances, it is satisfied by the proposed class representative that the claims sought to be included in the collective proceedings -

(a) are brought on behalf of an identifiable class of persons;

(b) raise common issues; and

(c) are suitable to be brought in collective proceedings.

(2) In determining whether the claims are suitable to be brought in collective proceedings for the purposes of paragraph (1)(c), the Tribunal shall take into account all matters it thinks fit, including -

(a) whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;

(b) the costs and the benefits of continuing the collective proceedings;

(c) whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;

(d) the size and the nature of the class;

(e) whether it is possible to determine in respect of any person whether that person is or is not a member of the class;

(f) whether the claims are suitable for an aggregate award of damages; and

(g) the availability of alternative dispute resolution and any other means of resolving the dispute, including the availability of redress through voluntary schemes whether approved by the CMA under section 49C of the 1998 Act or otherwise.

(3) In determining whether collective proceedings should be opt-in or opt-out proceedings, the Tribunal may 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.

(4) At the hearing of the application for a collective proceedings order, the Tribunal may hear any application by the defendant -

(a) under rule 41(1), to strike out in whole or part any or all of the claims sought to be included in the collective proceedings; or

(b) under rule 43(1), for summary judgment.

> (5) Any member of the proposed class may apply to make submissions either in writing or orally at the hearing of the application for a collective proceedings order."
>
> [28]. A CPO is not either the beginning or the end of the measures whereby the CAT may case manage collective proceedings. Under rule 76(9) the CAT must convene a case management conference for the management of the application for a CPO. Rule 85 contains wide powers for the CAT to stay collective proceedings or to vary or revoke a CPO, including power to add, remove or substitute parties and power to order the amendment of the claim form. Rule 88 confers wide powers of case management, exercisable at any time, while rule 89 confers power to order disclosure, in the widest possible form. Finally, rule 115(3) empowers the president of the CAT to issue practice directions."

25. As with the provisions of the CA 1998, Rules 77 and 79 do not:

    a. draw any distinction between proceedings on behalf of businesses or consumers;

    b. draw any distinction between proceedings on behalf of SMEs and proceedings on behalf of larger enterprises; or

    c. establish any hierarchy between them or any presumption in favour of one over the other.

26. Rule 79(3) simply addresses the factors which arise for consideration when the Tribunal is "*determining whether collective proceedings should be opt-in or opt-out proceedings*".

27. Thus, if the factors arise for consideration because the Tribunal does have the power or the obligation – either as a requirement in all cases, or where the Proposed Defendants have taken the point – to determine that proposed opt-out proceedings should instead be brought as opt-in proceedings, Rule 79(3) provides that in exercising this power "*the Tribunal may take into account all matters it thinks fit*". This makes it clear that the exercise of this power is a matter for the Tribunal's discretion in accordance with the Tribunal Rules.

28. It is submitted that there is nothing in the wording of Rule 79(3) which leads to an inference of a presumption against opt-out claims. Any such presumption would be against the policy of the CA 1998, which is to introduce an opt-out regime as an alternative to the previous opt-in only regime.

29. Rule 79(3) identifies two relevant factors which are to be taken into account by the Tribunal as part of the exercise of this discretion.

30. The first is "*(a) the strength of the claims*". As to the reason for this factor, see paragraph 6.39 of the *Guide*. This explains at the first indent:

> "Given the greater complexity, cost and risks of opt-out proceedings, the Tribunal will usually expect the strength of the claims to be more immediately perceptible in an opt-out than an opt-in case, since in the latter case, the class members have chosen to be part of the proceedings and may be presumed to have conducted their own assessment of the strength of their claim. However, the reference to the "strength of the claims" 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. Rather, the Tribunal will form a high level view of the strength of the claims based on the collective proceedings claim form. For example, where the claims seek damages for the consequence of an infringement which is covered by a decision of a competition authority (follow-on claims), they will generally be of sufficient strength for the purpose of this criterion." (Emphasis added)

31. These proceedings are, of course, proposed to be brought as follow-on claims and this factor therefore points strongly in favour of certifying them as opt-out proceedings. This is addressed further in section V below.

32. The second relevant factor is "*(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*".

33. This is not a presumption against opt-out proceedings. It simply directs the Tribunal to consider the practicability of bringing the proceedings on an opt-in basis as part of a consideration of all the circumstances before it.

34. As to this factor, the second indent of paragraph 6.39 of the *Guide* states:

> "The Tribunal will consider all the circumstances, including the estimated amount of damages that individual class members may recover in determining whether it is practicable for the proceedings to be certified as opt-in. There is a general preference for proceedings to be opt-in where practicable. Indicators that an opt-in approach could be both workable and in the interests of justice might include the fact that the class is small but the loss suffered by each class member is high, or the fact that it is straightforward to identify and contact the class members."

35. The reference to a "*general preference for proceedings to be opt-in where practicable*" is an incorrect gloss on the Rule which is not supported by the wording of the Rule 79(3) and which is inconsistent with the policy of the CA 1998.

36. 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 into a presumption in favour of opt-in proceedings, nor could it as that would be to place a fetter on the Tribunal's discretion to "*consider all the circumstances*".

37. The application of this factor is considered in section III.A below in reply to Section A of the Joint CPO Response.

Legislative history

38. Now turning to the pre-legislative documents to which the Proposed Defendants refer, the key document is the government's response to its consultation on options for reform *Private Actions in Competition Law*, published by the (former) Department for Business Innovation and Skills[12] in January 2013 (the **"BIS Consultation Response"**). It is submitted that:

    a. Reference may be made pre-legislative external contextual documents as an aid to statutory interpretation;[13]

    b. Both the majority and minority judgments in *Merricks* referred to the BIS Consultation Response;[14] and

    c. The BIS Consultation Response supports Mr Evans' interpretation of the primary legislation, Tribunal Rules and *Guide*, and contradicts the gloss which the Proposed Defendants seek to add.

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12 Since July 2016, the Department for Business, Energy & Industrial Strategy.

13 *R(CXF) v Central Bedfordshire Council* [2018] EWCA Civ 2852, [2019] 1 WLR 1862, *per* Leggatt LJ (as he then was) at [21]: "*The relevant context of a statutory provision is both internal and external to the statute. The internal context requires the interpreter to consider how the provision in question relates to other provisions of the same statute and to construe the statute as a whole. The external context includes other relevant legislation and common law rules, as well as any policy documents such as Law Commission reports, reports of Parliamentary committees, or Green and White Papers, which form part of the background to the enactment of the statute. When the strict conditions specified by the House of Lords in Pepper v Hart [1993] AC 593 are satisfied, reference may also be made to Parliamentary debates as reported in Hansard.*"

14 Lord Briggs at [20]; Lord Sales and Lord Leggatt at [85]-[86].

39. Question 11 of the Consultation Questions[15] asked: "*Should the right to bring collective actions for breaches of competition law be granted equally to businesses and consumers?*"[16]

40. The BIS Consultation Response records at ¶5.4 that:

> "Respondents had more mixed views on whether or not collective actions should be extended to businesses as well as consumers, with some respondents considering that such a regime should only apply to consumers, as businesses would be able to bring actions themselves, whilst others felt there was no reason that businesses should be barred. A number of respondents drew a distinction between SMEs and larger businesses, with the City of London Law Society, for example, saying, '*We are in principle supportive of collective actions being made available to businesses, provided, however, that they are only made available to businesses who would not otherwise have appropriate access to redress. In particular, we recognise that in some cases the barriers that hinder consumers from seeking redress will also apply to SMEs.*'"

41. Having considered these representations, the BIS Consultation Response explained at ¶5.21 that the Government had decided not to limit collective actions to consumers and not to draw a distinction between SMEs and larger enterprises:

> "The Government has therefore decided that collective actions should be available in both follow-on and standalone cases, with cases to be heard only in the Competition Appeal Tribunal, and may be brought on behalf of either consumers or businesses, or a combination of the two."

42. Question 14 of the Consultation Questions was:

> "The Government seeks your views on the relative merits of permitting opt-out collective actions, at the discretion of the CAT, when compared to the other options for collective actions."

43. A wide range of views were expressed in response. The BIS Consultation Response reported at ¶5.7 that:

> "Respondents were most sharply divided over the question of whether an opt-out approach was necessary. … [A]pproximately 40% of respondents supported opt-out with a similar number opposed. The remainder either did not express a clear preference …".

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15 Private Actions in Competition Law: A Consultation on Options for Reform, 24 April 2012.

16 BIS Consultation Response, ¶5.1.

44. After summarising at ¶¶5.8-5.10 the "[s]*trong arguments* [which] *were advanced by respondents on both sides of the debate*",[17] the BIS Consultation Response then sets out:

> "**The Government's Decision**
>
> 5.11. The Government recognises that there are strong and passionately held views on both sides of this debate. It recognises the concern of those respondents who worry about frivolous cases and has no wish to introduce a regime that would create a 'litigation culture'.
>
> 5.12. Equally though, it is very clear that the current system of collective redress does not work. Consumers are not currently getting redress for breaches of competition law. It appears unlikely that simply tinkering with the opt-in system would deliver the desired access to justice, nor would a system purely focused on ADR – though ADR, alongside collective actions, is vital and will be strongly encouraged. Consumer groups have been clear that they would not take another case under an opt-in system and that bodies such as the Law Society of England and Wales have said that an opt-out regime is essential if consumer cases are to be brought successfully. It is also clear that, as indicated in the consultation, there are some cases that could only ever be brought on an opt-out basis in practice.
>
> 5.13. The Government does, however, firmly agree that strong safeguards would be needed as part of an opt-out regime. The design details will therefore be critical and a range of safeguards, including certification, limited jurisdiction, no contingency fees or treble damages and limits on the type of bodies permitted to bring cases, are discussed further below. The Government further notes that opt-out regimes have been introduced into a range of countries such as Canada, Australia, Spain, Portugal, Poland and Norway, where they have not led to widespread abuses, and that an effective and proportionate opt-out regime can be of benefit for both UK businesses and consumers.
>
> 5.14. The Government has therefore decided to introduce a **limited opt-out collective actions regime, with safeguards, for competition law, with cases to be heard only in the Competition Appeal Tribunal**.
>
> 5.15. The Government does recognise that there may be some collective actions which would be more appropriately brought on an opt-in basis, such as a case brought by a small number of businesses all of whom are clearly identifiable.
>
> 5.16. **It has therefore decided that the CAT will be required to certify whether a collective action brought in the new regime is suitable for collective action and whether it should proceed under an opt-in or an opt-out basis.**" (Emphasis in the original)

45. The following points may be noted about this decision.

46. Contrary to what is contended on behalf of the Proposed Defendants, the Government did not express any preference for opt-in over opt-out collective proceedings.

47. Instead, the BIS Consultation Response recognises at ¶5.13 "*that an effective and proportionate opt-out regime can be of benefit for … UK businesses*". Such a regime requires "*a range of safeguards, including certification, limited jurisdiction, no contingency fees or treble damages and limits on the type of bodies permitted to bring*

[17] BIS Consultation Response ¶5.8.

cases", but none of those safeguards involve a presumption against opt-out proceedings as compared to opt-in proceedings.

48. As is clear from ¶5.16 of the BIS Consultation Response, the decisions whether to certify and whether to do so on an opt-in or opt-out basis are to be in the CAT's discretion, taking into account all relevant factors, including the two factors specifically identified at Rule 79(3)(a) and (b).

49. It is also to be noted that the example provided by the Government of a collective action that would "*more appropriately be brought on an opt-in basis*" was a "*case brought by a small number of businesses all of whom are clearly identifiable*" (emphasis added). That is consistent with one of the examples provided in the *Guide* at paragraph 6.39. For the reasons given below in reply to Section A of the Joint CPO Response, Mr Evans' proposed proceedings are not such a case.

50. In summary, therefore, the BIS Consultation Response does not support the Proposed Defendants' contentions. On the contrary, it demonstrates that the Government, after consulting on the design of the new collective proceedings regime, decided not to:

    a. draw any distinction between collective proceedings on behalf of businesses or consumers;

    b. draw any distinction between collective proceedings on behalf of SMEs and proceedings on behalf of larger enterprises; or

    c. establish any hierarchy between opt-in and opt-out collective proceedings or any presumption in favour of one over the other.

51. In reaching these conclusions, the BIS Consultation Response reflected conclusions previously reached in this field by the Civil Justice Council of England and Wales in its Report "*Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions*" (November 2008) which set out a series of recommendations to the Lord Chancellor.

52. The Civil Justice Council recommended the introduction of a general collective action regime. Recommendation 3 was that "*Collective claims may be brought on an opt-in or opt-out basis, subject to court certification.*" Recommendation 4 was that "*No collective*

claim should be permitted to proceed unless it is certified by the court as being suitable to proceed as such. Certification should be subject to a strict certification procedure."

53. Together with its recommendations, the report set out a number of "key findings". Key finding 9 was that:

> "There should be no presumption as to whether collective claims should be brought on an opt-in or opt-out basis. The Court should decide, according to new rules, practice directions and/or guidelines, which mechanism is the most appropriate for any particular claim taking into account all the relevant circumstances. In assessing whether opt-in or opt-out is most appropriate the court should be particularly mindful of the need to ensure that neither claimants' nor defendants' substantive legal rights should be subverted by the choice of procedure." (emphasis original)

54. The Civil Justice Council report also recalled:[18]

> "the recommendations of Lord Woolf in his Final Access to Justice Report [1996]. In Chapter 17 he addressed Multi-Party Actions: 46. The court should have powers to progress the MPS [Multi Party Situation] on either an 'opt-out' or an 'opt-in' basis, whichever is most appropriate to the particular circumstances and whichever contributes best to the overall disposition of the case. In some circumstances it will be appropriate to commence an MPS on an 'opt-out' basis and to establish an 'opt-in' register at a later stage." (emphasis original)

55. Lord Woolf's Report thus did not refer to any presumption in favour of opt-in over opt-out. His recommendation was for it to be a matter of judicial choice.

56. The Civil Justice Council report then informed the government's Consumer Rights Bill 2013. This was explained in a memorandum the Minister for Employment Relations and Consumer Affairs (Jo Swinson MP) wrote to Lord Boswell, the Chairman of the Select Committee on the European Union (in the context of EU collective redress proposals) on 9 November 2013:

> "As indicated in the Explanatory Memorandum, one of the key areas where we would want to ensure the ability to adopt 'opt-out' is for infringements of competition law. Although proposing to introduce an 'opt-out' regime through the draft Consumer Rights Bill, it is also worth noting that the Government is maintaining the 'opt-in' model already in place. There has however been extensive research carried out by the Office of Fair Trading and the Civil Justice Council, which supports that a more effective means to redress for parties affected by an infringement of competition law comes through an 'opt-out' approach. This is backed up by evidence gathered through the Government's own Impact Assessment and consultation on the draft Bill. An efficient means to redress within a competition regime is essential for making markets work."

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[18] Civil Justice Council report, Part 8, paragraph 30. See also Recommendation 3 at p.145.

57. Turning now to the other documents cited by the Proposed Defendants, to the extent any of them are relevant, none of these support the Proposed Defendants' submissions.

58. The references to Hansard at ¶¶16 & 18 of the Joint CPO Response are impermissible because the strict conditions specified by the House of Lords in *Pepper v Hart* [1993] AC 593 are not satisfied. These conditions were set out in the speech of Lord Browne-Wilkinson at page 640B-C:

> "(a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied upon are clear."

59. As Lord Bingham stated in *R v Secretary of State for the Environment, Transport and Regions ex p Spath Holme*, "*each of these conditions is critical*" [19] it is "*important that the conditions …should be strictly insisted upon*"[20].

60. None of the conditions are met here and so reference to Hansard is impermissible.

61. In any event, as to the substance of those statements, they are entirely irrelevant:

    a. As to the Minister's statement referred to at ¶16 of the Joint CPO Response, this is irrelevant because the Proposed Defendants acknowledge at the beginning of ¶18 opt-out claims are not limited to claims on behalf of consumers.

    b. As to the statement at ¶18, which the Proposed Defendants appear to rely on to suggest that opt-out claims should be limited to claims on behalf of SMEs, this is irrelevant as it is a statement made not by a minister promoting the Bill, but instead by a member of the opposition (the Shadow Spokesperson for Business, Innovation and Skills).

62. As to the Proposed Defendants' attempt to portray opt-out proceedings as being primarily concerned with consumer claims, the Proposed Defendants also refer to a House of Commons Consumer Rights Bill Research Paper (27 January 2014).[21] The passage relied

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19 [2001] 2 AC 349, at p.391E.

20 *Ibid,* p.392D-E.

21 According to its introduction, this paper was "*produced to inform the Second Reading debate on the Consumer Rights Bill, which was introduced to the House of Commons on 23 January 2014 and is due to have its Second Reading on 28 January 2014*".

upon is in fact a passage cited in the Paper at pages 43-44 from Explanatory Notes to the Bill. This passage does not appear in the Explanatory Notes to the Act. The passage commences:

> "The limited interference with the individual's ability to participate actively in the proceedings is justified by the legitimate aim of establishing effective access to justice for consumers and businesses who would not otherwise have any, or any effective, access to justice." (emphasis added)

63. To the extent it is relevant to have regard to a passage in Explanatory Notes to a Bill which are not then carried through to the Explanatory Notes to the Act, this passage does not support the Proposed Defendants' contention that the Government's concern was particularly about low value claims. It demonstrates that opt-out proceedings were introduced to establish effective access to justice, both for consumers and for businesses.

64. As to the Proposed Defendants' attempt to portray opt-out proceedings as being primarily concerned with claims by SMEs rather than all businesses – despite the fact as the Proposed Defendants concede at ¶20 of the Joint CPO Response that the Government specifically rejected such a distinction in the BIS Consultation Response – the Proposed Defendants refer to the Explanatory Notes to the Consumer Rights Act 2015 and place emphasis on the statement in ¶3 of the Notes, headed "*Summary and background*" that:

> "… the Act introduces easier routes for consumers and small and medium sized enterprises ("SMEs") to challenge anti-competitive behaviour through the Competition Appeal Tribunal ("CAT")."

65. However, SMEs are not referred to in that part of the Explanatory Notes addressing the new provisions on opt-out proceedings.[22]

66. Instead, SMEs are specifically referred to at ¶424 of the Explanatory Notes, concerning a new provision for:

> "rules to be made providing for a fast-track procedure for claims brought under s.47A of the CA. The purpose of this is to enable simpler cases brought by small and medium enterprises ("SMEs") to be resolved more quickly and at a lower cost."

67. SMEs are not referred to elsewhere in the Explanatory Notes. Instead, ¶434 of the Explanatory Notes states:

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[22] ¶¶434-445 of the Explanatory Notes.

> "The second aim is to introduce an opt-out collective actions regime and an opt-out collective settlement regime (both of which involve a case being brought forward on behalf of a group of claimants to obtain compensation for their losses). Cases would be able to be brought by representatives on behalf of individuals and/or businesses."

68. It is therefore clear from this context that the statement at ¶3 of the Notes was to summarise the new fast-track procedure and was not a gloss on opt-out proceedings. If that had been the intention, SMEs would have specifically been referred to when explaining the new opt-out regime. They were not referred to in the explanation for the new opt-out regime for the very good reason that that option had been considered and rejected in the BIS Consultation Response, and so no such distinction is drawn in the primary legislation, Tribunal Rules or *Guide*.

69. As to the final policy consideration to which the Proposed Defendants refer at ¶21 of the Joint CPO Response that "*'US-style' litigation involving numerous unwieldy class actions that were primarily motivated by large financial incentives for lawyers and funders*", these concerns do not arise in the present proceedings. Only one of the two applications for certification may go forward, not numerous actions. The implicit suggestion (which also appears to be made in ¶11) that the Proposed Defendants are being harassed is groundless and should not be accepted. These proceedings are being brought by Mr Evans in the interests of justice on a follow-on basis against Proposed Defendants who have confessed to their wrongful conduct. Their aim is to provide a remedy for that misconduct to businesses that otherwise would not be compensated. The claim is as targeted and precise as possible at this stage in proceedings.

70. As to financial incentives, Mr Evans has been entirely transparent about his funding arrangements. His litigation funding agreement, his ATE insurance policies and the priorities deed (which determines the order of payment out of undistributed damages) are all publicly available, so that they can be considered in detail by class members.[23] He has also provided details of the basis on which he has retained his lawyers in evidence.[24]

71. The payments which would be due to the funder, ATE insurers and legal team out of undistributed damages are summarised in ¶41 of Maton 4. Mr Evans has undertaken a detailed analysis of the division of damages and undistributed damages in a number of

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23 Evans 2, ¶¶81–82.

24 Evans 1, ¶73 and Maton 4, ¶41.

different scenarios, reflecting different levels of recovered damages, both following trial and on the basis of early settlement (in which it is assumed that 50% of Mr Evans' costs budget will have been incurred[25]). These scenarios assume three different take-up rates of damages by members of the proposed classes, namely, 35%, 42.5% and 50%. The analysis shows that, if there were a:

a. 35% take-up rate, damages would have to be less than 5% of the current projected claim value before this would impact on the returns to funders, insurers and lawyers if the claim was determined at trial or less than 3% with a settlement; and

b. 50% take-up rate, the damages required to ensure full payment of sums due out of unrecovered damages would be only 4.2% to 7.1% of the estimated value of the claim.

72. It follows that the Tribunal need have no concern that Mr Evans' funding arrangements will affect in any way the pursuit of the substantive claim or the distribution of damages to class members. Mr Evans confirms his commitment to acting solely in the interests of class members in both respects.[26]

73. As to the domestic case-law cited by the Proposed Defendants, namely *Merricks* and *Gibson*, both cases concerned proposed claims on behalf of consumers rather than businesses. Neither case concerned the issue now raised by the Proposed Defendants as to opt-out proceedings on behalf of businesses. Therefore, the observations relied upon by the Proposed Defendants do not assist this Tribunal.

74. The observations in *Merricks* of the Tribunal at [57] (cited at ¶22 of the Joint CPO Response) and Lord Briggs delivering the majority judgment in the Supreme Court (cited at ¶¶23(a)-(c)), as well as the Tribunal in *Gibson* at [22] (cited at ¶24) referring to claims by consumers and small businesses are simply not on point. The observations of the minority in the Supreme Court in *Merricks* cited at ¶23(d) are similarly not directed at the issue now before this Tribunal.

75. None of these judgments address the position of opt-out claims on behalf of businesses generally because that was not the issue before the Tribunal or the Supreme Court in

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25 Maton 4, ¶43.

26 Evans 2, ¶¶95–103.

those claims. The issue now raised by the Proposed Defendants was neither argued nor decided in any of these judgments, and so are not of any assistance to this Tribunal.

76. Finally, as to the other jurisdictions referred to in ¶27 of the Joint CPO Response (Canada, the US, Australia), none of these jurisdictions have opt-in class actions. As already noted above, the BIS Consultation Response stated at ¶5.13 that:

> "The Government further notes that opt-out regimes have been introduced into a range of countries such as Canada, Australia, Spain, Portugal, Poland and Norway, where they have not led to widespread abuses, and that an effective and proportionate opt-out regime can be of benefit for both UK businesses and consumers."

77. Accordingly, there is no good policy reason based on experience from the other jurisdictions to which the Proposed Defendants refer for adopting the unnecessarily restrictive interpretation for which they contend and which is not supported by the plain wording of the primary legislation, Tribunal Rules or *Guide*, or by the relevant legislative history.

III. THE IMPRACTICABILITY OF OPT-IN PROCEEDINGS

78. In Section A of the Joint CPO Response, the Proposed Defendants suggest that it would be practicable for the Evans Application to be brought on an opt-in basis in respect of UK domiciled class members.[27] They rely in particular on the following points:

a. There are said to be a "*number of features of the proposed class which make it inherently suitable for an opt-in action*" (¶32). In particular, the Proposed Defendants say that the members of the proposed classes are sophisticated (¶33), with access to legal advice and resources (¶¶34-37), and that the value of the claims is substantial (¶38). They add that the PCRs "*appear to believe that it would be practicable for class members not domiciled in the UK to opt in*" (¶40).

b. They rely on the PCRs' ability to publicise to class members (¶¶40-48). In particular, they rely on the fact that the PCRs are under an obligation to put in place a proper publicity plan (although they accept that this applies to both opt-out and opt-in proceedings) (¶44). They also assert that the diversity of the class should not be overstated (¶45) and that it would not be necessary to contact each class member

[27] The Evans Application proposes that non-UK domiciled class members may opt-in to the proposed proceedings, in accordance with section 47B(11) of the CA 1998.

up-front and individually (¶46). Finally, they rely on the opt-in nature of proceedings for non-domiciled class members and conclude by saying that, if distribution is possible, then the proceedings should be able to be brought on an opt-in basis (¶47).

c. They say that the right question is not whether proceedings could be brought individually, but rather whether they can be brought as opt-in collective proceedings (¶49).

d. They say that it is implausible to assert that opt-in proceedings would not be economically viable (¶50).

79. It will be immediately apparent that a number of these points are so bad as to be untenable. For example, the fact that Mr Evans' proposed proceedings fulfils the various requirements which any application to bring opt-out collective proceedings must meet – such as having a suitable publicity plan, or providing for non-domiciled class members to opt-in, or foreseeing that distribution to the class will be possible – plainly cannot stand as evidence that opt-out proceedings are unsuitable.

80. In respect of their other points, the Proposed Defendants are wrong. The *Guide* states that in determining whether it is practicable for proceedings to be brought as opt-in proceedings, the Tribunal "*will consider all the circumstances, including the estimated amount of damages that individual class members may recover*". It also provides examples of "*indicators that an opt-in approach could be both workable and in the interests of justice*", namely the fact(s) that:

a. The class is small but the loss suffered by each class member is high; or

b. It is straightforward to identify and contact the class members.

81. None of those indicators are present in the case of Mr Evans' proposed proceedings, as is explained in his Amended Collective Proceedings Claim Form.[28] The classes are large and the loss suffered by each class member is (at least for much of the class)

[28] See ¶170(c). In this regard, the Proposed Defendants' criticism of Mr Evans at ¶49 of the Joint CPO Response – namely that, in his Claim Form, he only compared his proposed opt-out collective proceedings with individual actions, and not with opt-in collective proceedings – is wrong.

comparatively low (see ¶97 below). It is not straightforward to identify and contact each class member. In fact, as explained below, and established by Evans 2, Maton 4 and Chopin 3, bringing these proposed proceedings on an opt-in basis would be neither efficient nor workable nor in the interests of justice. In particular, Maton 4 describes the detailed efforts made by a law firm with extensive experience in bringing antitrust claims in this jurisdiction to explore the feasibility of an opt-in style approach, even to the extent of contacting contact more than 300 potential claimants. It was found to be an unworkable proposition. That first-hand experience has informed Mr Evans' decision not to seek to bring opt-in proceedings.

82. The reality is that the Proposed Defendants know that opt-in proceedings are impracticable, especially since no application to bring such proceedings has been made by either PCR in the Proposed Proceedings. As a result, they are seeking to evade liability in this jurisdiction for the losses caused by their wrongdoing. That is obviously not in the interests of justice. In contrast, opt-out proceedings are clearly practicable, and would enable Mr Evans to obtain redress on behalf of the members of the proposed classes for the serious harm inflicted by the Proposed Defendants' admitted cartel conduct.

83. The rest of this section responds to Section A of the Joint CPO Response as follows:

    a. Section III.A addresses class size and claim value;

    b. Section III.B addresses Mr Evans' ability to identify and contact class members;

    c. Section III.C addresses the alleged sophistication of class members; and

    d. Section III.D addresses the economic viability of opt-in proceedings.

84. Finally, and in any event, the references to a "*presumption*" in favour of opt-in proceedings,[29] and the alleged need for Mr Evans to "*rebut*" that presumption,[30] are misconceived for the reasons given in Section II above. None of what follows should be taken as accepting the contrary view.

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29 Joint CPO Response, ¶¶28 and 31.

30 Joint CPO Response, ¶¶31.

III.A CLASS SIZE AND CLAIM VALUE

85. As to class size, Mr Evans' proposed opt-out classes A and B are not "small" and instead are estimated to run into tens of thousands of class members as Mr Ramirez explained in his Amended First Report ("**Ramirez 1**"):[31]

> "I have estimated on a preliminary basis a total of 42,015 class members which may fall within one or both of the classes. This estimate is based upon publicly available data sources on business populations. The class members can be broadly characterized as either financial institutions or non-financial customers. On the basis of publicly available market shares for the proposed defendants, I have estimated that Class A will broadly consist of between 14,201 and 42,015 class members, and Class B will include between 27,814 and 42,015 class members. These broad ranges are explained by the inability, at this stage of the proceedings, to ascertain the number of class members who belong to both classes on the basis of publicly available data. The ranges therefore reflect a maximal approach (which assumes that a class member belongs to both classes) and a conservative approach (which assumes that a class member only belongs to one of the classes);"

86. Moreover, these classes may well be larger in number. Ramirez 1 explained[32] that he took a "*perhaps conservative*" approach to estimating class numbers, by not taking into account "*smaller firms or certain HNWIs [High Net Worth Individuals] who did trade with FX dealers or through intermediaries*".[33] Thus "*[f]or example, if I had included small enterprises (those with 10-49 employees) in my estimate of non-financial class members, the estimated class size would increase to 102,594. Including a portion of these excluded customers would require a degree of speculation … these limitations will be rectified following disclosure of the proposed defendants' transaction data*".

87. Ramirez 2 responds in detail to the Proposed Defendants' submissions on class composition and claim value.[34]

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31 Ramirez 1, ¶19(b). See also ¶¶69-71 which explain the limitations of these class size estimates. NB: It should first be noted that the Proposed Defendants appear to have misread Ramirez 1 because they refer at ¶38 to "*an estimated class size of between 42,000 and 84,000 members*", presumably on the basis that each of Class A and B could have 42,000 members but that class membership does not overlap. This is not what Mr Ramirez concluded. This is clear at Ramirez 1 ¶68 where he states: "*[m]y analysis results in an estimate of 42,015 class members belonging to either Class A, Class B or both.*" His results are then set out in Table 4. A class member may be a member of both classes which is why the upper range of the estimate, 42,015, applies to both Class A and Class B.

32 Ramirez 1, ¶69.

33 Ramirez 1, ¶63.

34 Ramirez 2, section 3.1.

88. As to the composition of the Evans classes, these comprise two broad categories: (i) financial institutions and (ii) non-financial customers including SMEs and HNWIs.

89. The Proposed Defendants argued that the vast majority if not all of the class members falling into these categories, would be large, sophisticated and well-resourced parties and hence capable of deciding to opt-in to collective proceedings.

90. A proper examination of the composition of both categories shows that this is not the case. The vast majority of class members in both categories are not large businesses (250 or more employees), but instead are either medium sized enterprises (50-249) or micro/small sized enterprises (fewer than 50 employees).

91. As to (i) financial institutions, Ramirez 2 estimates 18,154 class members falling into this category. Such institutions in fact represent a diverse population of businesses ranging from the very large to SMEs. Ramirez 2 estimates that only 89 of these class members would have more than 250 employees, with the remainder having fewer than 250. Thus, 18,065 financial institution class members would be SMEs, which is over 99% of the Evans classes.

92. Turning to (ii) non-financial customers, Ramirez 2 estimates 23,861 class members falling into this category. Micro and small sized enterprises were excluded from class membership in Ramirez 1. Medium sized enterprises are estimated to number 18,274 class members (76.6%), while large sized enterprises account for 5,587 class members (23.4%).

93. As to high-net-worth individuals ("**HNWIs**"), these were not excluded, as a matter of principle, from membership of the proposed classes; Ramirez 1 and Ramirez 2 explains that there is evidence that supports HNWIs could be members.

94. There is, therefore, no basis for the Proposed Defendants' arguments as to size and sophistication across any category of class member.

95. Further, and in any event, in Mr Evans' submission the class numbers are plainly not the sort of small class size which the regime envisages in respect of opt-in proceedings.

96. As to claim value (namely the value of the claim of a class member brought individually or on an opt-in basis), the loss suffered by each class member will vary significantly between class members, due to a range of factors (such as volume of FX trading, relative

liquidity of currency pairs traded). This is reflected in Mr Evans' distribution proposals at ¶¶136-146 of his Litigation Plan.[35]

97. In outline, Ramirez 1 estimated – and Ramirez 2 confirms – that the average claim value per class member is £64,000, but, importantly, that varies as between (1) an estimated 18,000 financial institutions that would have an average claim value of £134,000 (accounting for 90% of the VoC)[36] and (2) an estimated 24,000 non-financial customers that would have an average claim value of £11,000 (accounting for the remaining 10% of the VoC).[37] So far as non-financial customers are concerned, which make up the preponderance of proposed class members, the average claim value of £11,000 is considerably below the figure of £31,000 to £62,000 relied upon by the Proposed Defendants at ¶38 of the Joint CPO Response (for the purposes of their argument that the claims are sufficiently substantial for 24,000 class members to opt in).

98. Ramirez 2 explains that not only does calculating the average claim value per class member across the entire Evans classes belie important distinctions between class members, it also fails to indicate the range of potential claim values among class members within each category of class member.

99. Using publicly available data, Mr Ramirez estimates that for (i) financial institutions, there are a range of average claim values which vary depending on the type of financial institution and size of the enterprise, ranging from an average of £16,000 to £91,000 for the small and medium institutions. Only the very largest institutions have claims running into six or seven figures.

100. As for (ii) non-financial customers, the average claim value for medium-sized enterprises is £3,500, and £35,000 for large enterprises.

101. Accordingly, the loss suffered by each class member will vary significantly between members of the proposed classes, and opt-in claims by SME class members, who comprise the vast majority of the classes, are not on any view a realistic prospect.

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35 See Exhibit PGE3 to Evans 1.

36 The total claim estimate is set out in Ramirez 1 at ¶161, Table 7.

37 This uses rounded figures; the precise figures for estimated numbers of class members are set out in Ramirez 1 at ¶68, Table 4.

102. As to *Hollick v Toronto (City)*[38] (cited at footnote 63 to ¶38 of the Joint CPO Response), this was a decision by the Supreme Court of Canada under the Ontario Class Proceedings Act 1992 (which has since been amended). The Supreme Court pointed out in that case that proposed class members (some 30,000 residents living in the vicinity of a landfill site operated by the City) instead of proceeding to claim in a *Rylands v Fletcher* class action could claim compensation on a no-fault basis for the atmospheric and noise pollution emitted from the site from a Small Claims Trust Fund set up for that purpose (with a limit of $5,000 per claim) but no claims had been made since the Fund had been established in 1983. It was in this context that the Court observed at [33]:

> "The central problem with the appellant's argument is that, if it is in fact true that the claims are so small as to engage access to justice concerns, it would seem that the Small Claims Trust Fund would provide an ideal avenue of redress. Indeed, since the Small Claims Trust Fund establishes a no-fault scheme, it is likely to provide redress far more quickly than would the judicial system. If, on the other hand, the Small Claims Trust Fund is not sufficiently large to handle the class members' claims, one must question whether the access to justice concern is engaged at all. If class members have substantial claims, it is likely that they will find it worthwhile to bring individual actions. The fact that no claims have been made against the Small Claims Trust Fund may suggest that the class members claims are either so small as to be non-existent or so large as to provide sufficient incentive for individual action. In either case access to justice is not a serious concern."

103. In *Hollick*, the Canadian Supreme Court was considering whether there was, in reality, any likelihood of breach giving rise to a requirement to compensate those affected. The lack of any claims under the no-fault Small Claims Trust Fund suggested not.

104. In the present case, the comparison is different. It is whether opt-in collective proceedings would be workable or practicable as a means of reparation for their cartel conduct to a large number of those affected by it, where infringement has already been established.

105. Accordingly, Mr Evans submits that the two classes which he seeks to represent cannot be characterised as small classes with high losses. To the contrary, the classes cover tens of thousands of members, including many with average losses of £11K. The claimants with those lower value claims form an important part of the classes, and it is unacceptable for the Proposed Defendants to urge upon the Tribunal an approach which would cut them adrift.

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38 [2001] 3 S.C.R. 158.

III.B MR EVANS' ABILITY TO IDENTIFY AND CONTACT CLASS MEMBERS

106. As the Proposed Defendants acknowledge at ¶42 of the Joint CPO Response, Mr Evans has identified concerns as to whether it will be practical to identify and contact all members of the proposed classes in order to inform and persuade them to opt-in to the proposed proceedings.[39] This is one of the reasons why it would not be practicable – or desirable – for these proposed proceedings to be brought on behalf of UK domiciled persons on an opt-in basis.

107. The *Guide* acknowledges that the feasibility of identifying and contacting class members is a relevant factor to consider in determining whether opt-in proceedings would be practicable. It states that: "*indicators that an opt-in approach could be both workable and in the interests of justice might include the fact that the class is small… or the fact that it is straightforward to identify and contact the class members.*" (emphasis added)

108. Mr Evans submits that, given the substantial size and diversity of the proposed class members, it would not be workable or straightforward to identify and contact the class members. That is why his Amended Collective Proceedings Claim Form pleads:[40]

> "It would not be practicable to identify and contact the class members. Indeed, as explained further in the Ramirez Report at paragraph 163 there are a wide range of individuals and entities that might form part of the Proposed Classes, making it unrealistic to identify and contact each member of the Proposed Class on an individual basis."

109. ¶¶43-48 of the Joint CPO Response argue that there is no reason to believe that Mr Evans would be unable to contact class members in the event that certification were granted on an opt-in basis. They seek to downplay the difficulties that would be inherent in contacting members of the proposed classes.

110. The viability of an opt-in claim in these proceedings is addressed in Maton 4 who explains that attempts to put together a claim on an opt-in basis were impracticable and unworkable. This supports Mr Evans' evidence cited by the Proposed Defendants at ¶42 that it is "*unrealistic to identify and contact each member of the Proposed Class[es] on an individual basis*".

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39 The O'Higgins PCR has raised similar concerns, as noted in ¶41 of the Joint CPO Response.

40 Amended Collective Proceedings Claim Form, ¶170(c).

111. As to the Proposed Defendants' first answer to this point at ¶44 of the Joint CPO Response, which refers to the Angeion Plan, this plan is predicated on an opt-out claim and does not address the practicability of carrying out an exercise "*to reach out meaningfully to potential class members if the claim were certified on an opt-in basis*". It is clear from the Angeion Plan that such an exercise would necessarily differ when proceeding on an opt-out basis. The Plan commences by advising at ¶3.4:

> "Given the nature of the class definition, it will not be possible to identify each and every Class Member at the outset of the Proposed Proceedings. While the plan we have formulated to notify Class Members, as described in Sections 4, 5, 6 and 8 (the "Notice Plan"), will include efforts to notify likely Class Members of the Proposed Proceedings directly (see Section 5B), it is necessary that the Notice Plan deploys a varied and over-inclusive media strategy specifically targeted at the Target Audience, based on their characteristics."

112. As to the Proposed Defendants' second answer at ¶45 of the Joint CPO Response, that "*it is important not to overstate the diversity of the class*", Mr Ramirez explains[41] that he took a "*perhaps conservative*" approach to estimating class numbers, by not taking into account "*smaller firms or certain HNWIs who did trade with FX dealers or through intermediaries*". Thus "*[f]or example, if I had included small enterprises (those with 10-49 employees) in my estimate of non-financial class members, the estimated class size would increase to 102,594. Including a portion of these excluded customers would require a degree of speculation … these limitations will be rectified following disclosure of the proposed defendants' transaction data*". Clearly, the proposed classes may well transpire to be far more diverse following disclosure by the Proposed Defendants of their transaction data.

113. The same point can also be made in response to the Proposed Defendants' third answer at ¶46 which assumes the proposed classes are limited to entities "*likely with access to their own legal advice, such as hedge funds, pension funds and multinational corporations.*" That fails to recognise that smaller enterprises may also be comprised within the class which cannot be assumed not to have such extensive resources. The Proposed Defendants nowhere address how such smaller enterprises can be expected to opt-in, rather than having their interests protected by Mr Evans bringing the claim on an opt-out basis.

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41 Ramirez 1, ¶69.

114. The last of the Proposed Defendants' answers at ¶47 contains two of the hopeless references to necessary elements of the opt-out regime: (1) that non-domiciled class members must opt-in (from which, they assert, it may be deduced that the whole proceedings should be on an opt-in basis); and (2) that distribution is possible (which, again, they say means that the proceedings should be opt-in).

115. As to the first of these, the Proposed Defendants argue, at ¶40, that:

> "… the PCRs appear to believe that it would be practicable for class members not domiciled in the UK to opt in, since this is an element of both of their proposed classes. Non-UK domiciled class members will in practice account for the majority of the class in terms of class membership and volume of commerce… If it is practicable for foreign class members to opt in to a class action, it stands to reason that it must be equally practicable (if not more so) for domestic class members to do so. The PCRs have not addressed this discrepancy in their Claim Forms at all." (emphasis original)

116. But it is not possible to bring claims on an opt-out basis on behalf of non-UK domiciled class members: see section 47B(11)(b)(i) of the CA 1998. If a class member is not domiciled in the UK, the only option available to them is to opt into the collective proceedings.[42]

117. The fact that non-UK domiciled class members have no choice but to opt into Mr Evans' proposed proceedings does not mean or imply that opt-in proceedings are more appropriate than opt-out proceedings (or that opt-in proceedings are practicable for all class members). This is no doubt why it is not identified as a relevant consideration in the second bullet of paragraph 6.39 of the *Guide*.

118. Instead, Mr Evans submits that the reason why non-UK domiciled class members may opt-in to collective proceedings is to ensure that they can seek effective redress for the loss they have suffered as a result of the Proposed Defendants' admitted cartel conduct. That is necessary and desirable, particularly in the circumstances of the present case since, as the Proposed Defendants state: "*while a large percentage of FX trading occurred in the UK during the relevant period, only a small percentage of customers entering into those trades would have been domiciled in the UK.*"[43]

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42 See Rule 82(1)(b)(ii) of the Tribunal Rules and paragraph 6.51 of the *Guide.*

43 Joint CPO Response, footnote 64.

119. For the avoidance of doubt, Mr Evans does not agree with the Proposed Defendants' assertion that non-UK domiciled class members "*will in practice account for the majority of the class in terms of class membership and volume of commerce*".[44] The extent to which the class membership is comprised of non-UK domiciled class members will inevitably depend on the number of persons opting-in to the proposed proceedings, which cannot be known at this stage of proceedings. Nevertheless, given that Mr Evans has estimated that, on a preliminary and conservative basis, the total number of UK-domiciled class members in Class A and Class B would be 42,015, it is inherently unlikely that the number of non-UK domiciled persons opting in would account for a majority of the classes.

120. As to the second of these, the Proposed Defendants say:[45]

> "Nor have the PCRs identified any anticipated difficulties in reaching out to proposed class members for the purpose of distributing aggregate damages… Again, if this is possible, it is unclear why it would not be possible to contact class members earlier in the process with a view to inviting them to opt in."

121. This is a bad point. Plainly, it cannot be the case that an ability successfully to distribute damages at the end of opt-out collective proceedings means that those proceedings must be brought on an opt-in basis.

III.C THE ALLEGED SOPHISTICATION OF THE CLASS MEMBERS

122. The Proposed Defendants place emphasis at ¶29 of the Joint CPO Response on proposed class members being "*sophisticated, well-resourced entities that traded substantial sums of FX*". Mr Evans doubts that such alleged sophistication is of any particular relevance to the assessment (and indeed there is no authority directly in support). But in any event the class is not only made up of the entities which the Proposed Defendants characterise as sophisticated and for SMEs, who comprise the vast majority of class members, the Proposed Defendants' submissions would (even if right) leave them out in the cold.

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44 Joint CPO Response, ¶40.

45 Joint CPO Response, ¶47(b).

The legal relevance of sophistication

123. There is no reference in the domestic materials to this factor. In ¶34 of their Response, the Proposed Defendants cite Canadian materials, New Zealand material and an academic paper. In Mr Evans' submission, none of these materials are of particular assistance in the present case.

Canada

124. *AIC Limited v Fischer*[46] was a decision by the Supreme Court of Canada under the Ontario Class Proceedings Act 1992 (which was amended in 2020) to uphold the class certification for an opt-out class action brought on behalf of investors suing mutual fund managers for breaching fiduciary duties to investors and negligence for failing to curb 'market timing' activities. The fund managers had been investigated by the Ontario Securities Commission (**"OSC"**) for these activities and had entered into settlement agreements to pay investors millions in compensation, but those settlements did not preclude claims being brought before the courts. As the headnote to the Supreme Court's report states:

> "The appeal focuses on one branch of the statutory requirement for certification, the requirement that "a class proceeding would be the preferable procedure for the resolution of the common issues": *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5(1)(d). The question is whether the proposed class proceeding, as compared to the non-litigation OSC proceedings, is preferable from the point of view of providing access to justice. It is clear that the preferability requirement is broad enough to take into account all reasonably available means of resolving the class members' claims including avenues of redress other than court actions.
> …
> There is no realistic litigation alternative in this case. The only alternative procedure that was advanced is the OSC proceedings and settlement agreements, the results of which are already known." (emphasis added)

125. Thus, the comparison under consideration was between opt-out class proceedings and non-court proceedings before the OSC. The original certification motion was refused because, as the Court stated at [9]:

> "The motion judge based his conclusion that the proposed class action was not the preferable procedure solely on the existence of the OSC proceedings and settlement agreements."

46 [2013] SCC 69, [2013] 3 RCS 949.

126. The Supreme Court reached the same conclusion as the Court of Appeal of Ontario which had upheld the Divisional Court which had overturned the motion judge's ruling and certified the class. In so doing, the Supreme Court was not considering a comparison with individual or opt-in claims (the latter not existing in Canada in any event), which is what is under consideration here. As the Court explained at [16]:

> "it is no longer disputed that the class action would be a fair, efficient and manageable proceeding or that it would be preferable to any litigation alternatives."

127. The Court's observations on the Ontario legislation and the comparison between court and OSC proceedings are simply not in point. The ultimate outcome, certification of the class of financial investors, in fact supports Mr Evans' application for collective proceedings to be certified on an opt-out basis.

128. *Abdool v Anaheim Management Ltd*,[47] cited at footnote 56 to ¶34 of the Joint CPO Response, is a decision by the Ontario Divisional Court, also under the original version of the Ontario Class Proceedings Act 1992. The Divisional Court considered a number of factors in upholding the decision of the motions judge to refuse certification.

129. The proposed class comprised individuals who purchased condominium units as tax-sheltered investments. They purchased the units on sales presentations which indicated that the units were tax shelters and that for a payment of $1,000 they would eventually acquire title to the units. The total sales price of each unit was $161,450. Allegedly, the sales presentation was that the mortgage and financing charges would be offset by income to be received from the units, which would not be occupied by the plaintiffs. The project was unsuccessful, and the plaintiffs were called upon to meet the financial obligations they had undertaken in the mortgages, promissory notes and other financial documents signed by them. The plaintiffs sued the developer and owner of the project, the developer's solicitors, the assignees of the trust company that financed most of the purchases; the real estate brokers who solicited the purchases, and the accounting firm that reviewed the financial forecast distributed to the plaintiffs.

130. The action was based on allegations of misrepresentation, negligence and breaches of statutory and fiduciary duties. Each plaintiff sought as against each defendant general

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47 (1995) 121 DLR (4th) 496.

and special damages not to exceed $300,000, punitive or exemplary damages, and rescission of contract which could be worth a further $150,000.

131. While the fact that each of the claims was sufficiently large (in excess of $500,000) to be brought in its own right was one factor against certification, it was not the only factor as implied by the Proposed Defendants at ¶34 of the Joint CPO Response.

132. A number of reasons were given in the judgments of O'Brien, Moldaver and Finn JJ for refusing certification. In particular, the issue of reliance on any misrepresentation did raise a very significant individual issue which required determination, involving disclosure and so it was not preferable for the claims to be certified.

New Zealand

133. *Southern Response Earthquake Services v Ross*,[48] cited at footnote 55 of ¶34 of the Joint CPO Response, is a case in which the New Zealand Supreme Court upheld the Court of Appeal's decision to certify on an opt-out basis, expressing at [108] its agreement with the Court of Appeal's reasons. As can be seen from [1] of the judgment, this is a decision under the New Zealand High Court rules on representative actions. New Zealand does not, as yet, have a specific class action regime.

134. The reasons why the Court of Appeal did so are referred to at [102]:

> "In determining that an opt out order should be made in this case, the Court of Appeal said that the factors favouring an opt out approach were present here. Those factors were the large size of the class (some 3,000 members) and the fact that many more of that number would have their claims heard and determined by the court and their rights effectively preserved until determined if an opt out order was made. The Court also considered there were "compelling access to justice factors" pointing towards an opt out approach."

135. These are relevant factors here, particularly the large size of the class and that opt-out rather than opt-in ensures reparation is made as fully as possible.

136. The passage to which the Proposed Defendants refer is [103]:

> "The Court could not see any factors peculiar to the case that would justify an opt in order. This was not a claim by a small group where early identification of the members was feasible and offered significant efficiency gains. Nor was there a disadvantage to a class member from being included as a represented claimant during stage one. Class members would mostly be individual homeowners rather than large and sophisticated commercial entities. The "social,

[48] [2020] NZSC 126.

> economic and psychological factors" causing individuals not to take active steps to protect their own interests were seen as likely relevant in this claim."

137. Similarly, here, we are not concerned with "*a small group where early identification of the members* [is] *feasible and* [offers] *significant efficiency gains*". Nor is there a disadvantage to inclusion of any class member as a represented claimant, and if there were, the class member could always opt-out.

138. The reference on which the Proposed Defendants rely to class members being "*individual homeowners rather than large and sophisticated commercial entities*" is made in relation to the facts of that case but it is not any form of litmus test as to whether proceedings should be on an opt-in or opt-out basis.

Academic authority

139. As to the extract cited from Professor Mulheron's 2004 work at ¶34 of the Joint CPO Response, this is from a chapter which discusses "*whether a class action is superior to other means of resolving the dispute between class members and the defendant*".[49] As is stated in the cited passage, this is not a statutory requirement in any of the jurisdictions examined by Professor Mulheron and it is difficult to see why this work is relevant to the interpretation of legislation passed some 11 years later.

140. In any event, it is submitted that opt-out collective proceedings are the best of way proceeding in the present case "*so as to provide the putative class members with some chance of remedy which, in the absence of class proceedings, would not exist*".[50]

141. Of considerably more direct relevance is the work in which Professor Mulheron subsequently took part through her role as a co-author of the final report by the Civil Justice Council of England and Wales "*Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions*" in November 2008 which set out a series of recommendations to the Lord Chancellor, as set out in Section II above, and which influenced the proposals consulted upon by DBEIS which ultimately found their way into the 2015 Act.

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[49] *The class action in common law legal systems: a comparative analysis* (Hart, 2004), p.219. The law was stated to be as at 1 December 2003: see p.viii.

[50] *Ibid*, p 234.

Consideration of the sophistication of the class members

142. Contrary to the impression the Proposed Defendants seek to portray at ¶33 of the Joint CPO Response, the proposed classes are not limited to large financial institutions. As explained above,[51] the vast majority of the members of the classes are SMEs, non-financial customers make up the preponderance of class members, HNWIs may also be class members; and some class members may trade FX infrequently. This, in itself, is enough to dispose of the point.

143. Moreover, the reality is that large financial institutions were approached during a book building exercise, but proceeding on an opt-in basis did not prove to be viable, as is explained in Maton 4.

144. The Proposed Defendants point to the proceedings brought by *Allianz*.[52] This is not an analogue of the present claim. That claim is brought by more than 170 claimant entities and involves different allegations and concerns over various different periods of time extending from 2003 until 2013.[53] A decision of a particular group of entities to bring High Court litigation is – without more – uninformative of the practicability of different entities opting into collective proceedings in the Tribunal. For example, it is consistent with many class members being unknowable, uncontactable, having small claims, weighing the cost-benefit assessment and declining to participate. It tells the Tribunal nothing, save as to the position of the 170+ claimants themselves.

III.D OPT-IN PROCEEDINGS WOULD NOT BE ECONOMICALLY VIABLE

145. The Proposed Defendants suggest at ¶50 of the Joint CPO Response that an opt-in claim would be economically viable in light of the overall level of potential damages, as that would create an incentive for enterprises to opt-in. This has been found not to be the case in practice. As is explained in Maton 4, his firm went to great lengths to contact more than 300 potential claimants. This was a meticulous, time-consuming and costly process. Notwithstanding these efforts, fewer than 5% of potential claimants were willing to explore a possible claim. Among the reasons why most of the potential claimants

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51 See ¶¶87–94 of this Reply above.

52 *Allianz Global Investors GmbH v Barclays Bank plc* [2021] EWHC 399 (Comm); it is understood that Allianz has appealed against the order giving effect to this judgment: see ¶222.c below.

53 Amended Collective Proceedings Claim Form, ¶149(a).

considered it not worth their while to bring, or join in, a claim is the fact that the loss suffered by many class members was estimated to be relatively small.

146. It is also evidenced by the fact that no alternative opt-in claim for UK-domiciled businesses has been advanced before the Tribunal.

147. One plainly related issue is to the Proposed Defendants' suggestion that the decision to opt in to collective proceedings as a "*relatively straightforward, and economically rational, step*".[54] That beguiling description is, however, at odds with the Proposed Defendants' own description of how they expect an opt-in procedure might work in practice. For example, ¶54 of the Joint CPO Response avers that:

> "… the proposed claims cannot fairly or effectively be determined without the class members providing at least some data relating to (1) the geographical location of their trades, (2) their transactions with non-Respondents, (3) the nature of their trades, (4) whether their trades were conducted through (or as) Intermediaries, (5) their trading agreement(s) with the Respondent(s), and (6) pass-on, tax and interest…"

148. Later, the Proposed Defendants go as far as to suggest that quantification could only reliably be done by reference to information obtained from opt-in class members.[55]

149. Mr Evans does not accept that disclosure from individual class members would be reasonably necessary or proportionate to resolve the issues that are likely to be in dispute. The Tribunal can, and should do, justice on the basis of the available data from the Proposed Defendants in accordance with the broad axe principle.[56] Accordingly, he reserves his position as to the merits of any disclosure application which the Proposed Defendants might seek to make, and in particular as to whether any disclosure sought would be in accordance with the Tribunal's Rules and practice.[57]

150. The critical point for present purposes is that the Proposed Defendants have intimated that they envisage seeking substantial disclosure from members of the proposed classes if these proceedings were brought on an opt-in basis. This means that a class member's

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54 Joint CPO Response, ¶38. Later in that paragraph, the Proposed Defendants refer to it as a "*comparatively simple step*" when compared with the alternative of bringing individual actions.

55 Joint CPO Response, ¶79.

56 Mr Evans addresses the (putative) limitations of the Proposed Defendants' data in section IV below.

57 See e.g. *Ryder Limited & anor v MAN SE & ors* [2020] CAT 3, at [35].

decision to opt in would require careful consideration of the potential benefits of opting-in weighed up against the potential risk that it may have to incur the costs, time and effort involved in retrieving, collating, reviewing and providing any disclosure that might be subsequently required (which is, of course, a continuing obligation).

151. It follows that the decision to opt in would not be as straightforward as filling out a form and then waiting for a payment of compensation. Instead, it is the Proposed Defendants' case that members of the proposed classes would have to provide data because they do not possess sufficient, or sufficiently reliable data, to calculate overcharge and pass-on. The extent of disclosure envisaged by the Joint CPO Response would be neither a modest nor inexpensive exercise. The Proposed Defendants say that each claimant should provide details about the nature and location of their FX trades with each of the Proposed Defendants, other FX dealers and intermediaries over several years. The burden and cost of providing that disclosure is likely to be significant, to put it mildly.

152. It follows that the decision to 'opt in' is nowhere near as straightforward as it is depicted to be in some parts of the Joint CPO Response. If the Proposed Defendants are right in what they now say about the data required from claimants, then plainly that would have a significant impact on the costs/benefit assessment for any class member.

III.E CONCLUSION ON IMPRACTICABILITY OF OPT-IN PROCEEDINGS

153. Mr Evans submits that the Proposed Defendants have come nowhere near to establishing the practicability of Mr Evans' application for collective proceedings being brought on an opt-in basis. To the contrary, these are precisely the sorts of proceedings which should go ahead on an opt-out basis, by reference in particular to numbers in the class, size of individual claims and ability to communicate with the class.

IV. DATA AND INFORMATION AVAILABILITY

154. In Section B of the Joint CPO Response, the Proposed Defendants submit that "*opt-out proceedings would be impracticable, would make it difficult or impossible to identify all class members, and would produce unreliable estimates of any losses, due to inherent limitations in the available data.*"[58]

[58] Joint CPO Response, ¶52.

155. Therefore, they contend that the claims in Mr Evans' proposed proceedings "*cannot be fairly or effectively determined*" without class members providing at least some data relating to: (a) the geographical location of their trades; (b) their transactions with non-Proposed Defendants; (c) the nature of their trades; (d) whether their trades were conducted through (or as) Intermediaries; (e) their trading agreement(s) with the Proposed Defendants; and (f) pass-on, tax and interest. In effect, this would require substantial disclosure from class members.

156. It is essential to note at the outset three limitations in the Proposed Defendants' submissions on this issue.

157. First, the Proposed Defendants have confirmed that they are "*not arguing that certification should be refused on the basis that the PCRs have not identified adequate data to operate their methodologies.*"[59] That is obviously right. Mr Ramirez has conducted substantial work in identifying appropriate data sources for operating his proposed methodology for calculating an aggregate award of damages,[60] which comfortably exceeds the applicable threshold for certification. Instead, the Proposed Defendants' case is that the limitations in their data "*is a factor that weighs in favour of opt-in, rather than opt-out, proceedings, since many of these limitations can be overcome by data that could be supplied by class members.*"[61]

158. Second, and relatedly, the alleged deficiencies in the available data that the Proposed Defendants pray in aid are asserted limitations in their own data. In Mr Evans' submission, the Proposed Defendants have an obvious self-interest in asserting that this evidence is inadequate and that it does not allow for claims successfully to be brought against them in an "opt out" form.

159. The Tribunal will note, in this regard, that a number of the alleged deficiencies in the Proposed Defendants' data are set out in the Joint CPO Response by way of bare assertions, and with a considerable degree of generality and imprecision. For example, in respect of the geographical location of trades, the Proposed Defendants assert: "...

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59 Joint CPO Response, ¶52.

60 See Ramirez 1, sections 5 and 6.

61 Joint CPO Response, ¶52. See also ¶83: "*Inherent limitations in the Respondents' available data are therefore a substantial obstacle to the proposed actions proceeding on an opt-out basis"*.

dealer banks do not hold universally accurate data on their counterparties' domicile, and generally their trading data would not enable the Tribunal accurately to identify the operating location of their counterparties."[62] (emphasis added)

160. These unhelpfully vague statements do not enable Mr Evans or the Tribunal to ascertain the extent of any alleged deficiencies in the Proposed Defendants' data and their implications (if any) for the calculation of damages. It is striking that the Proposed Defendants have chosen to set out the alleged deficiencies upon which they rely in such high-level terms, without accompanying evidence supported by a statement of truth, when those matters are plainly within their own knowledge. This has inhibited Mr Evans' ability to respond to the Proposed Defendants' arguments, in view of the obvious information asymmetry that exists between the parties prior to disclosure.

161. Third, and in any event, the Proposed Defendants' arguments disregard the principles reaffirmed in *Merricks*, whereby the courts quantify damages notwithstanding any limitations in the available data. These principles mean that the alleged limitations of the Proposed Defendants' data do not, and should not, point in favour of opt-in rather than opt-out proceedings.

162. In particular, Lord Briggs' judgment contains a detailed analysis of the general principles relevant to the quantification of damages.[63] The following key points emerge, which are relevant in this case:

    a. In order to do justice, the court must do its best on the evidence available to quantify damages. This 'broad axe' or 'broad brush' principle is fully applicable in competition cases.[64]

    b. This principle of entitlement to quantification of damages notwithstanding forensic difficulty has stood the test of time.[65]

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62 Similarly vague statements can be observed in respect of the Proposed Defendants' data regarding limit orders, resting orders and benchmark trades at ¶63, and concerning the identification of intermediaries at ¶67.

63 See [46]-[55], [58] and [72]-[75].

64 *Merricks,* [51] and [64(d)].

65 *Merricks,* [49].

c. There is nothing in the CA 1998 which suggests, expressly or by implication, that this principle is in any way watered down in opt-out collective proceedings.[66]

d. Resort to "*informed guesswork rather than (or in aid of) scientific calculation*" is of particular importance when (as in *Merricks* and this case) the court has to proceed by reference to a hypothetical or counterfactual state of affairs.[67]

e. The incompleteness of data and the difficulties of interpreting what survives are frequent problems with which the civil courts and tribunals wrestle on a daily basis. The likely cost and burden of disclosure may require skilled case-management. But neither justifies the denial of practicable access to justice to a litigant or class of litigants who have a triable cause of action, merely because it will make quantification of their loss very difficult and expensive.[68] It is of course highly relevant in this regard that there is no conceivable set of "opt-in" proceedings on the table (even after careful consideration by Mr Evans' legal representatives[69]), and so the outcome of the Proposed Defendants' submissions would be a denial of access to justice.

163. Likewise, the European Commission's Practical Guide on Quantifying Harm in Actions for Damages based on Articles 101 and 102 recognises that quantification of harm in competition cases is, by its very nature, subject to considerable limits as to the degree of certainty and precision that can be expected.[70] Accordingly, a court can be reasonably expected to arrive at best estimates of the harm suffered, relying on assumptions and approximations and the practice of the broad axe.[71]

164. While the Proposed Defendants properly accept that the PCRs have identified adequate data to operate their methodologies, they contend, however, that (putative) limitations of

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66 *Merricks,* [54], i.e. that claimants who have suffered more than nominal loss by reason of the defendants' breach should have their damages quantified by the court doing the best it can on the available evidence.

67 *Merricks,* [48].

68 *Merricks,* [74].

69 Maton 4, ¶¶7-18.

70 C (2013) 3440, ¶¶16-17, cited with approval by Lord Briggs in *Merricks,* [52].

71 *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2008] EWCA Civ 1086, [110], cited with approval by *Britned Development Ltd v ABB AB* [2019] EWCA Civ 1840, [23]; see also [57].

available data mean the actions should only be permitted to proceed, if at all, on an opt-in basis.

165. In overview, Mr Evans submits as follows:

a. There is no support in the statutory scheme, guidance or case-law for the Proposed Defendants' approach – there is not a single provision which requires the availability of data to be a reason in favour of an opt-in proceeding.

b. The correct interpretation of the principle of entitlement to quantification notwithstanding forensic difficulty is that it applies to both opt-out and opt-in proceedings. In all proceedings, the Tribunal's task, as emphasised in *Merricks* is, consistent with its duty to the represented class, to do the best it can with the evidence that eventually proves to be available. It may be that gaps in the data will in some cases be able to be bridged by techniques of extrapolation or interpolation; gaps may be unbridgeable in other cases and, to that extent, nothing would be recovered.[72]

c. The principles summarised above mean that any (putative) deficiencies in the available data can and should be addressed by the Tribunal wielding a broad axe or conducting a broad-brush assessment of damages. Those principles mean that any forensic difficulties can and will be addressed at trial after: (a) full disclosure by the Proposed Defendants,[73] (b) evaluation of all the available data by the parties' experts and (c) assessment by the Tribunal, assisted by the experts, making use of the best evidence available. Any inherent limitations of the Proposed Defendants' data do not justify the denial of practicable access to justice offered by opt-out proceedings to the class members in this case.

166. The Proposed Defendants can derive no support from the alleged deficiencies of their own data to favour these proceedings being brought on an opt-in basis.

167. In the alternative, even if the Tribunal were minded to take into account the alleged limitations of the Proposed Defendants' own data, this matter should be given very

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72 *Merricks,* [74].

73 It is very easy for a proposed defendant to criticise the utility of its own data, and much more difficult for the PCRs and the Tribunal to verify those criticisms and to know the universe of available data at the certification stage, especially when no disclosure has been provided.

limited weight. The quantity and quality of data should not militate in favour of either type of collective proceeding where, as here, it is common ground that there is adequate data for Mr Evans to operate his methodology. Instead, greater weight should be given to the comparison of the costs, benefits and practicality of bringing the proceedings on an opt-in or opt-out basis, and therefore which procedure is likely to be in the best interests of the class members and in the interests of justice.

168. Without prejudice to the points made above, Mr Evans addresses each of the alleged deficiencies in the Proposed Defendants' data in turn (as best he can, having regard to the issues identified above), in order to demonstrate that, in any event, these points are misconceived.

Geographical location of trades and class members

169. In ¶¶55-59 of the Joint CPO Response, the Proposed Defendants' suggest that it will not be possible, in opt-out proceedings, to decide with any reasonable accuracy which trades with class members were "*entered into the EEA*".[74]

170. Mr Evans submits that there are good reasons to believe that sufficient data will be available in order to satisfy his definition of *"entered into in the EEA*". As explained at ¶¶87–95 of his Amended Collective Proceedings Claim Form, a FX Spot Transaction or FX Outright Forward Transaction is defined as being entered into the EEA where either (a) the Proposed Defendant or Relevant Financial Institution is located in the EEA;[75] and/or (b) where the class member is domiciled in the EEA. As to those conditions:

a. The Proposed Defendants do not dispute that they have data that will identify the location of part of the Proposed Defendant (i.e. the individual representative, sales desk or other business unit) that entered into the FX transaction.

b. The Proposed Defendants claim only (and in unacceptably vague terms) that "*dealer banks do not hold universally accurate data on their counterparties'*

[74] Joint CPO Response, ¶58.

[75] A Proposed Defendant or RFI is considered located in the EEA where their individual representative, sales desk or other business unit (such as an agency, branch or office) entering into the transaction is located in the EEA. See Mr Evans' proposed class definition at Annex 3 to his Amended Collective Proceedings Claim Form.

domicile" (emphasis added) and, therefore, implicitly accept that at least some (if not all) of them hold accurate data for their respective counterparties.[76]

c. Mr Knight's evidence on this issue is clear: in his experience, he would expect the Proposed Defendants to possess data to identify the domicile of the counterparty (from trading desk systems) and the domicile and location of the counterparty (from client management systems).[77] Indeed, Mr Knight believes 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.

d. The Schofield Decision (the US certification ruling, relied upon in ¶56 of the Joint CPO Response, and addressed below) implicitly acknowledges that certain banks did maintain data regarding counterparties' domiciles.

e. When calculating the fines imposed by the Decisions, the European Commission used a proxy for the value of sales which was based on the revenues from G10 FX spot transactions entered into with counterparties located in the EEA. This was based on information that had been provided by the Proposed Defendants.[78] This presupposes that the Proposed Defendants possessed data which enabled them to ascertain the location of the counterparty.

171. The Proposed Defendants rely solely on the Schofield Decision to support their assertions regarding the inadequacies in their data.[79] In principle, the Schofield Decision is not

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76 Joint CPO Response, ¶56; see also Annex A, ¶6(a): "… *the database of the defendants' transactions relied upon by the claimants only contained, at most, the class members' domicile locations*". Mr Evans notes that the Proposed Defendants do not explain the position in respect of their own data.

77 Knight 2, ¶¶ 22–23.

78 See: (a) TWBS Decision, recital 161 and EE Decision, recital 162 (referring to the Commission taking "*as reference the annualised notional amounts traded by the concerned undertaking in the G10 FX spot transactions entered into with a counterparty located in the EEA*"); (b) TWBS Decision, recital 178 and EE Decision, 179 (noting that "*given that the infringement covered the entire EEA, the Commission considers it appropriate that the proxy for the value of sales is based on the G10 FX spot transactions entered into with counterparties located in the EEA*" and (c) Mr Evans' Amended Collective Proceedings Claim Form, ¶93(b)(iv).

79 Joint CPO Response, ¶56.

admissible evidence to prove a fact in issue or a fact relevant to an issue in these proceedings.[80] In any event, it is to be noted that:

a. The US District Court noted that certain banks did not maintain data regarding counterparties' domiciles and/or trading locations. This implies that certain banks did hold such data (otherwise the Court would have said none of the banks held data on this issue). Moreover, the Schofield Decision does not specify which banks did not hold this data, bearing in mind that the database compiled data from 16 settling defendant banks. It is unclear which of the Proposed Defendants are among the banks referred to in that judgment.

b. The Plan of Distribution of the settlement fund in the US proceedings states that one method of distribution would be based on the settling defendants' transaction data which "*includes data on where the transaction occurred*."[81] This indicates that the US transaction database contained sufficient location information in order to ascertain whether a given person fell within the relevant class definition.

c. Similarly, the sworn evidence adduced in the US proceedings describes the US data as follows: "*Collectively, Defendants produced data from over 30 different trading systems, each with its own structure and naming conventions for data fields*" and expressly states that the data fields included "*geographic information (such as the location of where the trade was executed and where the client was located)*".[82]

d. Furthermore and in any event, the US database was prepared in order to identify members of the class of over-the-counter customers for FX spot, forward, and/or swap trades, who were domiciled in the US or traded in the US.[83] This means it is entirely possible (and, indeed, likely) that the data did not relate to transactions in the EEA. Any limitations of the US data should not pre-empt the disclosure of *different* data for the EEA that would be relevant to the issues in these proceedings.

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80 See e.g. *Hollington v Hewthorn* [1943] KB 587; *Land Securities v Westminster City Council* [1993] 1 WLR 286, 288E-F.

81 Plan of Distribution, fn. 4. The Plan of Distribution was approved by an Order of US District Court Southern District of New York dated 6 August 2018, ¶4.

82 Joint Declaration of Christopher M. Burke and Michael D. Hausfeld of 12 January 2018, ¶74.

83 The US database was compiled on the basis of data from 16 settling defendants using (unidentified) 30 different bank systems for an unidentified period: Schofield Decision, fn. 7.

172. With these points in mind, Mr Evans turns to the Proposed Defendants' three reasons as to why the location of trades and domicile of class members must be identified:[84]

    a. First, to determine which trades fall within the proposed classes because they were entered into in the EEA.

    b. Second, to determine which trades fall outside the proposed classes because they are already covered by existing litigation or settlements elsewhere.

    c. Third, to decide which law applies to the claims prior to 11 January 2009.

173. Mr Evans submits that he will be able to gather sufficiently reliable data to address each of these issues in the course of the proposed opt-out collective proceedings.

174. First, as set out above, there is sufficient data to determine which trades fall within the proposed classes, not least since:

    a. The Proposed Defendants do not dispute that they possess data relating to the location of the relevant part of their business that serviced an FX transaction; and

    b. There is likely to be sufficient data that identifies the domicile of the class members, given, in particular, the Proposed Defendants' AML and KYC checks for the location of a customer and the Commission's ability to determine G10 FX spot transactions entered into with counterparties in the EEA.[85]

175. It follows that Mr Evans' class definition is workable in opt-out proceedings.

176. Second, Mr Evans' proposed classes exclude transactions that are subject to existing litigation and settlements.[86] This requires the identification of certain transactions executed by (a) class members domiciled or operating outside the EEA and (b) UK-domiciled entities with the Proposed Defendants' trading desks outside the EEA.[87] Mr Evans has already explained why he considers that sufficient data would be available to identify the domicile of class members. Moreover:

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84 As set out in ¶55 of the Joint CPO Response.

85 See ¶170 of this Reply above.

86 Draft Collective Proceedings Order, Schedule, ¶4(i).

87 As noted by the Proposed Defendants at ¶55(b) of the Joint CPO Response.

a. Class members domiciled outside the EEA would have to opt in to the proposed proceedings. They would have to provide their FX transaction records, which would enable trades that fall within existing litigation and settlements to be excluded.[88]

b. The Proposed Defendants do not dispute that they hold data relating to the part of their business which serviced a particular transaction. Moreover, Mr Knight expects the Proposed Defendants to possess data that enables transactions executed by UK-domiciled entities with trading desks outside the EEA to be identified.[89]

177. Third, the issue of applicable law raised by the Proposed Defendants is relevant to a small part of one of the infringements at issue in the proposed proceedings. It is relevant to the infringement found by the TWBS Decision, and will be governed by the Private International Law (Miscellaneous Provisions) Act 1995 insofar as the relevant facts occurred between 18 December 2007 (the start of that infringement) until 10 January 2009 (the day before the Rome II Regulation entered into force). Given that the infringement is a tort whose elements may occur in different countries, it is governed by the law of "*the country in which the most significant element or elements of those events occur*": see section 11(2)(c) of the 1995 Act.[90]

178. Mr Evans submits that the choice of law can be determined in opt-out proceedings on the basis of the domicile of: (a) the Proposed Defendants; (b) the traders participating in the infringement; and (c) the members of the proposed classes.[91] The location of a class member's trader (if any) and the operating location of a class member (if different from domicile) are not obviously necessary to identify the location of the events constituting the tort.[92] In any event, it would be disproportionate to refuse to certify the action as opt-out collective proceedings to obtain information that is not clearly relevant to the

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88 Ramirez 1, ¶88; Mr Evans' Litigation Plan, ¶43 and Notice and Administration Plan, ¶7.7.

89 Knight 2, ¶25.

90 See *VTB Capital plc v Nutritek International Corp* [2013] 2 AC 337, at [198]–[199] per Lord Clarke of Stone-cum-Ebony JSC.

91 Applying a similar approach to the one discussed in *iiyama (UK) Ltd v Samsung Electronics Co Ltd* [2018] EWCA Civ 220, [48]–[59] per Henderson and Asplin LJJ.

92 Mr Evans notes that the Proposed Defendants say simply that the location of the trade "may require knowing" these matters: Joint CPO Response, ¶55(c).

governing law for just the 13 months of the six-year TWBS infringement, and which is irrelevant to the EE infringement.

179. The Proposed Defendants also suggest that the issues addressed above are *"more acute in respect of trades between non-Respondents and class members, where the Respondents will not hold any information about domicile or operating location, and those carried out through intermediaries.*" This is misconceived. In addition to the points above:

    a. Mr Ramirez has proposed a methodology for estimating VoC for Mr Evans' class B (which includes RFIs) that takes account of the location of the transaction;[93] and

    b. Mr Evans addresses the position in relation to intermediaries in ¶¶193–199 below.

Trades with non-Respondents

180. In ¶¶60-62 of the Joint CPO Response, the Proposed Defendants appear to suggest that the inclusion of transactions with RFIs in Mr Evans' proposed proceedings means that the whole claim should proceed on an opt-in basis. However, it is striking that they do not raise any issue(s) with the specific methodology proposed by Mr Ramirez to calculate harm on transactions entered into with RFIs, still less do they give any reason why that methodology would be unsuitable for opt-out collective proceedings.

181. Instead, the sole issue raised by the Proposed Defendants in this regard concerns the differences between Mr Evans' and the O'Higgins PCR's preliminary estimates of VoC for the entirety of their respective proposed classes (i.e. transactions entered into with the Proposed Defendants and RFIs). The Proposed Defendants state that "*O'Higgins and Mr Evans have… attempted to estimate the value of relevant trades with non-Respondents based on a complex analysis of publicly available data. Their attempts to do so have produced radically different results, in terms of estimating the overall volume of commerce within the proposed class*".[94] As a result, they assert that "*[t]he scale of this disparity reveals an unacceptable margin of error. Such a degree of approximation can only be avoided by using actual trade data.*"

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93 Ramirez 1, section 5.2.

94 Joint CPO Response, ¶60.

182. However, this argument is not a valid basis to suggest that Mr Evans' proposed proceedings should proceed on an opt-in basis.

183. First, the Proposed Defendants' argument overlooks the point that both PCRs have made clear that their estimates were only intended to provide an preliminary indication of the size of the claims advanced on behalf of the proposed classes.[95] Such an estimate is required by rule 75(3)(i), which states that the collective proceedings claim form shall contain the relief sought in the proceedings, including "*where applicable, an estimate of the amount claimed in damages, including whether an aggregate award of damages is sought, supported by an explanation of how that amount has been calculated*". Those estimates were not intended to constitute a comprehensive assessment of the harm suffered by each PCR's respective proposed classes, nor would such an assessment be possible at this early stage in proceedings. As Mr Ramirez explains in section 4 of Ramirez 2, the difference between the estimates is attributable to the different approaches adopted by the PCRs' experts in arriving at those indicative estimates.

184. Second, and in any event, Mr Ramirez has explained that his methodology for calculating the VoC for transactions entered into with RFIs would be different at a later stage in the proceedings, following disclosure by the Proposed Defendants. As explained in section 4.3.3 of Ramirez 2, his methodology involves the use of multiple data sources to calculate VoC. Specifically, he intends to use detailed statistics on FX transaction volumes from the BIS and BoE; and he will employ market share data in conjunction with the Proposed Defendants' transaction data in order to sense check and refine his VoC estimates.[96]

185. It follows that the disparities between the PCRs' preliminary estimates of VoC are irrelevant to the question of whether Mr Evans' proposed proceedings should proceed on an opt-out basis.

186. Finally, Mr Evans notes that the Proposed Defendants make two further points which mirror arguments already made in Section A of the Joint CPO Response, namely:

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95 See Mr Evans' Amended Collective Proceedings Claim Form, ¶¶258-262 and 272 (and in particular ¶272 which refers to an "*indicative estimate of the size of the claim*") and the O'Higgins PCR's Re-Amended Collective Proceedings Claim Form, ¶¶79-81 (and in particular at ¶81 referring to Professor Breedon's "*very rough estimate of the overall aggregate award*").

96 This methodology is detailed in section 5.2 of Ramirez 1.

a. As Mr Evans anticipates obtaining class members' transaction records at the distribution stage, there is "*no reason why they should not be able to provide them at an earlier stage*". But that materially overstates Mr Evans' position in respect of distribution. As set out in ¶¶136-144 of his Litigation Plan, he intends to put forward a proposed method for distribution to the Tribunal at the proper time (¶141). He sets out, on an indicative basis only, some of the principles which might apply (¶142), including that class member might provide data (¶¶143-144). He is keen to minimise the burden on class members, and, so far as possible, he would allow for class members' entitlements to be determined on the basis of data from the Proposed Defendants (¶145). Further, and in any event, there is plainly a difference between the "chilling effect" of a requirement to provide data in order to opt-in to proceedings (with an uncertain ultimate outcome) compared to the likely appetite to provide data in order to receive a share of a quantum award; and

b. Similarly, since Mr Evans anticipates obtaining trading records for class members domiciled outside the UK, there is "*no reason of principle why class members domiciled in the UK should not equally be required to provide their trade data.*" But, as set out in Section III, Mr Evans has no other option so far as non-domiciled class members are concerned. It cannot be inferred from this that opting-in is otherwise sensible or desirable.

Exclusion of certain types of trades from Mr Evans' proposed classes

187. Mr Evans notes that the Proposed Defendants agree that benchmark transactions, limit orders and resting orders (the **"Excluded Trades"**) should be excluded from his proposed proceedings.[97] That is a material point of distinction from the class proposed by the O'Higgins PCR, which proposes to include such trades in its claim. Mr Evans will explain why the inclusion of such trades is inappropriate in his submissions on the carriage dispute.

188. Nevertheless, the Proposed Defendants contend that they do not hold data "*which enables those transactions to be reliably identified across the claims period.*"[98] As with other claims made by the Proposed Defendants regarding their transaction data, this is

97 Joint CPO Response, footnote 92.

98 Joint CPO Response, ¶63.

unacceptably vague. For example, it is unclear whether the Proposed Defendants are alleging that: (a) only some of them hold data identifying the Excluded Trades; (b) all of them hold data relating to the Excluded Trades but only for certain parts of the periods covered by the claims; (c) some combination of (a) and (b); or (d) something else altogether. Furthermore, to the extent that the Proposed Defendants rely on the Schofield Judgment as the basis for their assertion, that comparison is inapposite for the reasons given at ¶171 above.

189. Mr Knight's evidence, as an expert in this field, remains that FX dealers, including the Proposed Defendants, would be likely to record data about the type of order a customer placed.[99] In particular, in Knight 2, he explains that there are important reasons why resting orders and benchmark trades are likely to be recorded by FX dealers:

    a. When an FX dealer receives a resting order from a customer, it would be recorded in an order book, along with the conditions agreed with the customer. This enables the dealer to record, monitor and manage the orders which customers have placed. Recording resting orders is especially important in order to minimise the risk that the execution of a resting order (which is triggered once a specified price is reached) would be missed.[100] Once the order is executed, it would be recorded in the FX dealer's systems.[101]

    b. Identifying and recording benchmark trades is important to an FX dealer as it enables an understanding of its net position[102] before the relevant benchmark is fixed. This enables the dealer to manage its inventory accordingly in order to mitigate risk. Furthermore, because benchmark trades are transacted at specific times (i.e. at the time the benchmark is set), this could also be used as a basis to identify them.[103]

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99 Knight 2, ¶29.

100 Knight 2, ¶30.

101 Knight 2, ¶31.

102 That is, whether it has a net position to buy or sell a given currency pair at the benchmark fixing time.

103 Mr Ramirez also notes this as a potential approach to identifying benchmark trades in footnote 73 of Ramirez 1.

190. In any event, even if it transpires that the Proposed Defendants do not maintain sufficient data to enable the Excluded Trades to be identified (or that data was somehow insufficient to permit appropriate inferences to be drawn or extrapolations to be made while wielding the broad axe), Mr Ramirez has proposed ways to address this on an aggregate basis.[104]

191. The Proposed Defendants do not appear to take issue with this as a methodology for calculating damages. Instead, they state:

> "In any event, Mr Ramirez's proposed method for removing benchmark trades, limit, and resting orders on an aggregate basis, would not resolve the issue of class membership, i.e. the issue of whether any given entity only entered into transactions falling within these three categories, and no other categories, during the period of the Infringements. Such an entity would not fall within Mr Evans' proposed class at all. The only solution to this issue is therefore disclosure by individual class members."

192. The suggestion that this issue requires disclosure by class members in an opt-in claim is misconceived. Mr Evans of course accepts that – if there are entities which entered only into Excluded Trades – then they should not be class members. However, as a matter of substance this can be adequately addressed at the distribution stage. This is because, as proposed by Mr Ramirez, the quantum of aggregate damages would take into account the exclusions from the proposed classes. If it transpires, at the stage of distribution, that a given entity only traded by way of Excluded Trades, then they will have no entitlement to any part of the award of aggregate damages, since their relevant FX trades will not be covered by Mr Evans' proposed claims. This is a proportionate and sensible way of addressing this issue.

Exclusion of claims by intermediaries

193. As the Proposed Defendants note at ¶67 of the Joint CPO Response, Mr Evans excludes from his proposed classes "*[t]ransactions that the class member entered into as an Intermediary.*"[105] The Proposed Defendants seek to rely on alleged deficiencies in their

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104 See Ramirez 1, footnotes 73, 116, 129 and 142.

105 Mr Evans' proposed class definition is contained at Annex 3 to his Amended Collective Proceedings Claim Form. An intermediary is defined as "any person entering into an FX Spot Transaction and/or an FX Outright Forward Transaction on behalf of a third party."

data concerning intermediaries to suggest that Mr Evans' proposed proceedings should be brought on an opt-in basis.

194. Once again, the Proposed Defendants assertions regarding their data are set out in unclear and heavily caveated terms. They say that:[106]

    a. "*The Respondents' data reflects <u>many</u> transactions with these types of Intermediaries, but does not <u>consistently</u> identify the basis on which parties were trading with them (i.e. as an Intermediary agent on behalf of the customer or as a principal in its own right).*" (emphasis added) They do not provide any further information about the extent to which this information is recorded in their data.

    b. By way of a particular example, the Proposed Defendants note that "*when an entity acts as an Intermediary on behalf of an 'ultimate' customer but concludes the transaction in its own name (i.e. the Intermediary is the direct contractual party on a trade with a Respondent), it <u>will not always be apparent</u> from the Respondents' data that the entity was not acting as a principal in its own right.*" (emphasis added) However, this is followed by a footnote, which acknowledges that "*this ambiguity may not arise when an entity which acts as an Intermediary concludes transactions in the name of the 'ultimate' customer.*"

195. The Proposed Defendants assert that these alleged deficiencies are significant because "*[t]he only way to conclusively determine whether an entity is an 'ultimate' customer (rather than an Intermediary) is to obtain disclosure by class members (or their Intermediaries) of their trading activities. Without such information, it will be impossible to ascertain whether any given trade falls inside or outside the proposed class.*"

196. This argument is based upon a misapprehension as to the reasons why transactions with intermediaries are excluded from the proposed classes. Mr Evans has pleaded that those transactions are excluded because "*[t]he proper claimant in respect of such transactions will be the ultimate customer on whose behalf the Intermediary is acting, as they will have suffered the loss and damage particularised… below.*"[107]

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106 Joint CPO Response, ¶67.

107 Mr Evans' Amended Collective Proceedings Claim Form, ¶103(b).

197. Accordingly, it is not the case that those trades are excluded from the proposed classes altogether, but instead they are properly to be considered claims of the ultimate customer, rather than the intermediary. The ultimate customer is included in Mr Evans' proposed proceedings, since the definition of his proposed Class A and Class B both encompass "*[a]ll persons who entered into one or more FX Spot Transaction(s) and/or FX Outright Forward Transaction(s) where each of those same transaction(s)… (a) was entered into, directly or indirectly via an Intermediary*".

198. Since those transactions remain within the scope of Mr Evans' claim, there is no need (as the Proposed Defendants suggest) for disclosure from class members in this regard, and therefore this cannot constitute a valid reason that Mr Evans' proposed proceedings should be brought on an opt-in basis.

199. For completeness, Mr Evans of course accepts that it will be necessary to ascertain, at the stage of distributing any aggregate award of damages, that each individual claimant entered into trades as the ultimate customer, rather than as an intermediary. That can be addressed by requiring appropriate evidence as part of that process.

Jurisdiction

200. At ¶68 of the Joint CPO Response, the Proposed Defendants contend that "*the jurisdiction issue remains live*" and that "*it is impossible to see how this could be resolved in the context of an opt-out action where the identity of the class members is not even known.*"

201. The "*jurisdiction issue*" is a reference to the applications made by all of the Proposed Defendants, save for Barclays,[108] to contest the jurisdiction of the Tribunal.[109] Those

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[108] Barclays has confirmed that it does not "*intend to file an application to contest jurisdiction*". See Baker McKenzie's letters to the Tribunal dated 27 December 2019 (on behalf of the First, Third and Fourth Proposed Defendants) and 17 January 2020 (on behalf of the Second Proposed Defendant). In each letter, it is stated that Barclays reserves its position in relation to the class definition and distribution sought by way of the application. Those points are not, however, relevant to the jurisdiction of the Tribunal.

[109] These applications were made as follows: (a) in respect of Citi, by application notices dated 10 January 2020 (on behalf of the Fifth Proposed Defendant, the **"Citibank N.A. Application"**) and 7 February 2020 (on behalf of the Sixth Proposed Defendant, the "**Citigroup Inc. Application"**); (b) in respect of MUFG, by an application notice dated 10 January 2020 (the **"MUFG Application"**); (c) in respect of JP Morgan, by application notices dated 10 January 2020 (on behalf of the Ninth, Tenth and Eleventh Proposed Defendants, the "**UK JPMorgan**

applications are, in summary, founded upon the assertion that certain class members may have entered into agreements concerning their FX trading which contain arbitration or exclusive jurisdiction clauses in favour of courts outside the UK.

202. The suggestion that the "*jurisdiction issue*" is "*live*" is not an accurate description of the position, at least so far as the Mr Evans' CPO application is concerned.

203. When filing their applications, the Relevant Proposed Defendants each stated that their application was filed on a protective and/or provisional basis.[110] They suggested that the Tribunal should only be required to determine their applications after any CPO was granted.[111]

204. In response, Mr Evans stated that:[112]

    a. He did not consider any of the jurisdiction applications to be well-founded, and he would resist any application that the Relevant Proposed Defendants might pursue in due course.

    b. Nevertheless, he agreed that the appropriate time for the Tribunal to hear any application(s) to contest jurisdiction would be after his CPO application has been determined and in the event that a CPO were made in his favour. He accepted that determining any jurisdiction challenge could potentially be generative of wasted costs in the event that a CPO were not granted or were to be granted on the basis of amendments to the definition of his proposed classes.

    c. Therefore, the appropriate time to determine any application(s) would be as a preliminary issue shortly after any CPO being made. He made clear that at that

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Application") and 7 February 2020 (on behalf of the Twelfth Proposed Defendant (the **"JPMorgan Chase & Co Application"**); (d) in respect of NatWest/RBS, by an application notice dated 10 January 2020 (the **"RBS Application"**); and (e) in the case of UBS, by an application notice dated 10 January 2020 (the **"UBS Application"**).

110 See Citibank N.A. Application and Citigroup Inc. Application, ¶1; MUFG Application, ¶9; UK JPMorgan Application, ¶¶1, 10 and 17; JPMorgan Chase & Co Application, ¶¶1, 12 and 19; RBS Application, ¶8; and UBS Application, ¶¶8 and 14.

111 See Citibank N.A. Application, ¶10; Citigroup Inc. Application, ¶11 and ¶¶13-14; Herbert Smith Freehills' letter of 10 January 2020; UK JPMorgan Application, ¶11; JPMorgan Chase & Co Application, ¶12; RBS Application, ¶12; and Gibson Dunn's letter of 10 January 2020.

112 See Hausfeld's letters to Allen & Overy, Slaughter and May, Macfarlanes, Gibson Dunn and Herbert Smith Freehills, each dated 20 January 2020.

stage, it would be incumbent upon the Relevant Proposed Defendants to properly identify and particularise any exclusive jurisdiction and/or arbitration clauses which they allege would be applicable to the claims in these proceedings. Following any judgment on those application(s), appropriate amendments could be made to the class definition, if this were deemed necessary.

205. Mr Evans confirmed that he would be content to agree that the Relevant Proposed Defendants' jurisdiction challenges be stayed until after the determination of his CPO application and in the event that a CPO is granted. The Relevant Proposed Defendants responded noting Mr Evans' agreement that their jurisdiction applications should be determined after his CPO application.[113]

206. Accordingly, it is not open to any of the Proposed Defendants to seek to re-introduce the jurisdiction applications and deploy them as a reason that Mr Evans' proposed proceedings should not be certified on an opt-out basis. It is common ground between the parties to his application that any jurisdiction challenges should not be determined prior to certification.

207. For completeness, Mr Evans does not accept that it would be "*impossible*" for any jurisdiction applications to be resolved in the context of opt-out collective proceedings. The Relevant Proposed Defendants have identified no convincing reason why this would be the case. Instead, their bare assertion that it would be impossible "*where the identity of the class members is not even known*" overlooks the following points:

    a. The parameters of Mr Evans' proposed classes are clear in identifying the scope of the persons that would be included in the class. The Proposed Defendants have not sought to call this into question in the Joint CPO Response. Accordingly, and bearing in mind that the Relevant Proposed Defendants' jurisdiction applications seek to rely on contracts entered into with their own customers, they ought to be able to identify the extent to which members of the proposed classes might have

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113 See Gibson Dunn's letter dated 24 January 2020; Herbert Smith Freehills' letter dated 27 January 2020; Macfarlanes letter dated 27 January 2020, ¶2; Slaughter & May's letters of 28 January 2020, ¶10 and 20 March 2020, ¶12; and Allen & Overy's letter of 11 March 2020, ¶4. See also ¶14 of the Citigroup Inc. Application, stating that "*it is therefore common ground between the Proposed Class Representative and the Sixth (and Fifth) Proposed Defendant(s) that this Application to contest jurisdiction should be made and determined after the hearing of the CPO Application*"

entered into an exclusive jurisdiction and/or arbitration clauses, in order to properly particularise their challenges.

b. Mr Evans notes that none of the Relevant Proposed Defendants sought to suggest that identifying class members would be impossible when filing their jurisdiction challenges. Instead, some of them suggested that it would be disproportionate and burdensome to conduct further investigation into this matter at this early stage of proceedings, and particularly in circumstances where a CPO may not be granted (or may be granted on the basis of amendments to the class definition.[114]

c. Moreover, the Proposed Defendants (save MUFG[115]) were able to identify relevant contractual documentation when providing a sample of contracts in the O'Higgins Application, since they were stored in databases that could be queried and/or filtered accordingly.[116]

d. The Relevant Proposed Defendants' jurisdiction applications can have no application to his proposed Class B. This is because this class comprises persons making claims for losses suffered as a result of the "umbrella" effects of the infringements. It follows that any exclusive jurisdiction and/or arbitration clause upon which Relevant Proposed Defendants might seek to rely cannot apply to such claims, as by definition those claims concern the unlawful conduct of non-contracting parties.

208. Further, and in any event, Mr Evans considers that any jurisdiction challenges by the Relevant Proposed Defendants are very unlikely to have any merit. In particular, there is clear authority to the effect that standard form exclusive jurisdiction clauses are unlikely to apply to (tortious) competition law claims for damages. Indeed, the CJEU has held that national courts must regard a clause which abstractly refers to all disputes arising

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114 Citibank N.A. Application, ¶16; Citigroup Inc. Application ¶¶18-19 and ¶21; UK JPMorgan Application ¶¶14-16; JPMorgan Chase & Co Application, ¶¶16-18; RBS Application, ¶12; and UBS Application ¶¶12-13.

115 MUFG did not participate in the contract sampling exercise as it is not a party to the O'Higgins Application.

116 The process of querying or filtering the Proposed Defendants' databases is set out in: (a) Baker McKenzie's letter of 6 December 2019 (Barclays); (b) Allen & Overy's letter of 18 December 2019 (Citi); the First Witness Statement of Josef Woerdemann dated 4 December 2019 (JP Morgan); (c) Macfarlanes' letter of 6 December 2019 (RBS/Natwest); and Gibson Dunn's letter of 4 December 2019.

from a contractual relationship as not extending to a dispute relating to the tortious liability that one party incurred as a result of its participation in an unlawful cartel.[117] Instead, a jurisdiction clause must clearly cover competition law claims in order for it to have effect.[118]

209. It follows from the foregoing that the Proposed Defendants' arguments concerning jurisdiction are irrelevant to the question of whether Mr Evans proposed proceedings should be brought on an opt-in or an opt-out basis.

Pass-on, interest and tax

210. ¶¶69-82 of the Joint CPO Response address pass-on, interest and tax. Mr Evans notes at the outset that the Proposed Defendants do not contend that the issues of pass-on, interest and tax fail to satisfy the test of commonality of issues. Instead, they simply say that an opt-in structure would be better suited to obtaining information to address these matters.

211. Mr Evans submits that there is likely be sufficient information to address these issues in a suitable manner in opt-out proceedings; they do not necessitate an opt-in procedure.

Pass-on

212. Mr Evans submits that the issue of pass-on raised at ¶¶71–79 of the Joint CPO Response is premature and, in any event, has been properly addressed for present purposes.

213. It is premature given the Proposed Defendants have not filed their defences.[119] Nor have they indicated how they propose to discharge their burden of proof in this context,[120] other than to say that pass-on will necessarily be a relevant consideration and to postulate "*possible*" pass-on routes "*by way of example only*".[121] Mr Evans does not know the precise case he will have to meet in respect of pass-on at this stage. He is entitled, however, to plead as the *prima facie* measure of the class members' loss the pecuniary

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117 Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV and others* EU:C:2015:535, at [69]-[70]; *Ryanair Ltd v Esso Italiana Srl* [2013] EWCA Civ 1540.

118 See *CDC* at [71]-[72].

119 Nor are they required to do so pursuant to Rule 76(11) of the Tribunal Rules.

120 *Sainsbury's Supermarkets Ltd & Ors v Visa Europe Services LLC & Ors* [2020] UKSC 24, [2020] Bus LR 1196, at [216].

121 Joint CPO Response, ¶¶70 and 72.

loss measured by the overcharge.[122] That being so, it is submitted that it would be appropriate to wait until there are pleaded defences before addressing the appropriate methodology and disclosure for possible pass-on routes.

214. In any event, Mr Evans rejects the Proposed Defendants' contention that his experts have given only cursory consideration to this issue.[123] On the contrary, they have set out a workable plan to deal with the issue of pass-on to customers.[124] In outline, Mr Ramirez proposes to use Mr Knight's evidence, data from the BIS Triennial Survey and the Bank of England in order to assess pass-on for categories of financial and non-financial members of the proposed classes.[125] Mr Ramirez's preliminary view is that academic economic literature can be used to assess the existence and extent of pass-on for these different groups of class members. These pass-on rates could then be averaged, weighted by the class members' respective VoC, in order to estimate pass-on on a class-wide basis.[126] The application of the broad axe to pass-on supports this approach.[127]

215. The Proposed Defendants state, however, that Mr Ramirez's approach would attain a materially more reliable estimate of pass-on if the proceedings were opt-in.[128]

216. In reply, Mr Evans submits that Mr Ramirez's approach could generate a sufficiently reliable estimate of pass-on on a class-wide basis as part of opt-out proceedings. He addresses each of the observations in ¶¶74–78 of the Joint CPO Response in turn below.

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122 *Sainsbury's Supermarkets Ltd & ors v Visa Europe Services LLC & ors* [2020] UKSC 24, [2020] Bus LR 1196, at [199]; see also [217]: "*The common law takes a pragmatic view of the degree of certainty with which damages must be pleaded and proved*".

123 Joint CPO Response, ¶74.

124 Ramirez 1, ¶¶162–185. Mr Ramirez notes, however, that pass-on will not be relevant to those class members who do not have customers: see ¶165, ¶170 (proprietary trading firms) and ¶185 (high net worth individuals).

125 Ramirez 1, ¶¶162–185.

126 Ramirez 1, ¶164.

127 *Sainsbury's Supermarkets Ltd & ors v Visa Europe Services LLC & ors* [2020] UKSC 24, [2020] Bus LR 1196, at [224]–[225].

128 Joint CPO Response, ¶74.

217. First, the Proposed Defendants express some concern about the information that would be needed to divide VoC for corporate customers into four activities.[129] In response, Mr Ramirez has identified sufficient data for the purpose of this allocation.[130]

218. Second, the Proposed Defendants also asked how Mr Ramirez would calculate the rates of pass-on for each of the four activities of corporate customers identified in ¶174 of Ramirez 1.[131] Mr Ramirez's answer is that he has identified examples of the types of literature that will help him to carry out that task.[132]

219. Third, the Proposed Defendants note that some of the literature identified by Mr Ramirez refers to an industry-level analysis of pass-on rates.[133] Mr Ramirez considers that he can assess the need for any industry-level analysis after the Proposed Defendants have proposed methodologies and datasets for assessing pass-on. For present purposes, he has identified OECD data that would enable him to estimate industry-level pass-on rates for non-financial members of the proposed classes if that were deemed necessary.[134]

220. Fourth, Mr Ramirez has responded to the Proposed Defendants' query about the existence of literature on the position financial institutions in his second report.[135]

221. Fifth, the Proposed Defendants argue that Mr Evans has tacitly recognised that the identity of the class members and nature of their trades could practicably be obtained because it is envisaged that those details will obtained at the distribution stage.[136] That argument is misconceived for the reasons set out above.[137]

222. Separately, the Proposed Defendants deprecate any downplaying of the significance of pass-on.[138] They refer to a judgment at first instance in *Allianz Global Investors GmbH*

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129 Joint CPO Response, ¶74(b).

130 Ramirez 2, ¶65.

131 Joint CPO Response, ¶74(b).

132 Ramirez 1, ¶180 and ¶183 and Ramirez 2, ¶62.

133 Joint CPO Response, ¶75(b).

134 Ramirez 1, ¶62 and Ramirez 2, ¶65.

135 Joint CPO Response, ¶75(c).

136 Joint CPO Response, ¶¶77–78.

137 See ¶186 of this Reply above.

138 Joint CPO Response, ¶73.

& ors v Barclays Bank plc & ors,[139] which refused to strike out the defendants' pleaded cases on pass-on. In response, Mr Evans makes the following points:

a. Judgment was handed down on the basis of not only the defendants' pleaded cases but also joint further particulars.[140] There are no such particulars in this action.

b. The learned judge did not find that pass-on occurred as a matter of fact. Rather, he simply held the allegation of pass-on in that case could not be shown to be impossible or bound in law to fail and should proceed to trial.[141]

c. It is understood that Allianz has applied to the Court of Appeal for permission to appeal against the order giving effect to the Judge's rulings. The outcome of that appeal could mean that the various pass-on routes identified by the Proposed Defendants would be unsustainable if it turns out that the relevant end-investors do not have such a cause of action.

223. Finally, the Proposed Defendants posit several other routes through which class members may have transferred increased costs[142] and criticise the Mr Evans' failure properly to address them.[143] As already noted, Mr Evans considers that the right approach is to wait until (at least) there are pleaded defences of pass-on. He notes that the Proposed Defendants appear to agree with this approach, since they consider the appropriate way to calculate pass-on is not a matter for argument at this stage.[144] Given this, Mr Evans briefly addresses the examples of possible pass-on routes:

a. It is inherently unlikely that non-financial class members would have mitigated their loss caused by the Infringements by negotiating lower prices with upstream suppliers in light of the size of the overcharge relative to the amount of currency exchanged.[145]

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139 [2021] EWHC 399 (Comm).

140 *Ibid*, at [2]–[3] and [5].

141 *Ibid*.

142 Joint CPO Response, ¶72.

143 Joint CPO Response, ¶74.

144 *Ibid*.

145 Ramirez 2, ¶¶76–77.

b. As for those class members structured as funds, Mr Evans has identified Mr Bickford-Smith, an expert in the field of funds,[146] who would be well placed to assist Mr Ramirez in analysing the pass-on routes adumbrated in ¶74 of the Joint CPO Response. Mr Ramirez considers that he would be able to estimate the rate of any pass-on through these routes on the basis of Mr Bickford-Smith's experience and other potential sources of data.[147] For example, Mr Ramirez describes a potential approach to pass-on in the context of redemptions and withdrawals: he would (1) disaggregate class members structured as funds into those with and those without end-investors; and then (2) calculate the damages incurred by those funds with end-investors that have not been withdrawn through redemptions. That approach is consistent with the European Commission's guidelines on pass-on,[148] which recognise that courts will have to resort to estimates in addressing this issue.

224. For the reasons given above, and in Mr Ramirez's reports, the quantification of an aggregate award of damages can be reliably done as part of opt-out proceedings.

Compound interest

225. The Proposed Defendants also reserve their position on entitlement to and calculation of compound interest.[149] Here too, their only point is that an opt-in structure would be better suited to yield information from class members to assess compound interest accurately.[150]

226. Mr Ramirez has proposed a credible methodology for assessing compound interest losses suffered by the proposed classes as a whole.[151] Using Bank of England statistics, he would compute a weighted average interest rate that would reflect (i) the likely mixture of savings and borrowings among the proposed classes and (ii) relevant differences in savings and borrowing interest rates among different types of class members. This

146 Bickford-Smith 1.

147 Ramirez 2, ¶¶68–74.

148 Commission's Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser, OJ [2019] C 267/07, ¶¶30–35.

149 Joint CPO Response, ¶80.

150 Joint CPO Response, ¶81.

151 Mr Evans' Amended Collective Proceedings Claim Form, ¶263.

method of calculation dispenses with the need to gather basic information from each proposed class member on an individual basis (which is not realistic in this case).[152]

Tax

227. It is common ground that any savings in tax must be taken account when assessing loss.[153] It is not accepted, however, that there were, in fact, any such tax savings. For present purposes, Mr Evans submits that an opt-out structure is capable of producing a sufficiently reliable estimate of savings in tax insofar as they might be relevant to assessing loss. These proposed proceedings do not need to be opt-in for this reason.

228. Mr Ramirez in his second report indicated his view that this issue is likely to be capable of resolution on a common basis.[154] In a nutshell, Mr Ramirez considers that the relevant tax rate(s) for the proposed classes could be determined by a tax expert and, based on his or her expert opinion, Mr Ramirez could disaggregate the class members' annual claim values using publicly available information on applicable tax rates. A degree of approximation of the tax consequences for the members of the proposed classes would be required, but that would involve a degree of approximation which the Tribunal was prepared to make in the context of an individual action for damages.[155] It follows that the proposed collective proceedings do not need to be opt-in in order to address this issue adequately.

V. THE STRENGTH OF THE CLAIMS

229. In Section C of the Joint CPO Response, the Proposed Defendants make certain criticisms regarding the strength of the claims which Mr Evans seeks to bring in these proposed proceedings, in order to suggest that they are more suited to opt-in rather than opt-out proceedings. In summary, the Proposed Defendants rely on three points:

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152 *Merricks*, at [97] per Lord Sales and Lord Leggatt; see also [58] and [76] per Lord Briggs.

153 Joint CPO Response, ¶82.

154 Ramirez 2, ¶¶81–83.

155 See e.g. *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2016] CAT 26, at [5]

a. There are said to be "*fundamental discrepancies*"[156] between the scope of the infringements identified in the Decisions and Mr Evans' theory of harm (Section C1);

b. It is alleged that Mr Evans' proposed proceedings include a "*large number of claims which are factually remote from the narrow Infringements found in the Decisions, and the causal links between the Infringements and such claims are tenuous*"[157] (Section C2); and

c. It is suggested that Mr Evans has not advanced a "*robust economic methodology which can reliably estimate any alleged overcharge*"[158] (Section C3).

230. Mr Evans' primary position is that these points are not relevant to the question of whether his proposed proceedings should proceed on an opt-in or an opt-out basis. Instead, the Proposed Defendants are seeking to engage in a form of detailed merits analysis that is not required or permitted by rule 79(3)(a) of the Tribunal Rules, and which would be inappropriate at this early stage of proceedings, prior to disclosure.

231. As explained in section V.A below, the proper application of rule 79(3)(a) entails the Tribunal forming a high level view of the strength of the claims based on the collective proceedings claim form. The claims in Mr Evans' proposed proceedings comfortably satisfy any merits analysis inherent in that rule, in particular since:

a. They involve follow-on claims relying on two infringement decisions issued by the European Commission finding that each of the Proposed Defendants participated in one or both of the FX spot trading cartels; and

b. They are supported by detailed expert evidence setting out cogent theories of harm and reliable methodologies for calculating damages, all of which are anchored in expert evidence about the nature of FX trading and markets.

232. While the Proposed Defendants may disagree with aspects of the proposed theories of harm and methodology, this does not mean that Mr Evans' proposed proceedings are

156 Joint CPO Response, ¶85(a).

157 Joint CPO Response, ¶85(b).

158 Joint CPO Response, ¶85(c).

more suited to opt-in rather than opt-out proceedings. Instead, any disagreements are matters to be properly ventilated at trial, after disclosure and the provision of factual and expert evidence.

233. If, however, the Tribunal considers (contrary Mr Evans' primary position) that it is necessary and appropriate to consider the Proposed Defendants' arguments, then Mr Evans submits that each of the three points raised by the Proposed Defendants is misconceived. They are addressed in turn in sections V.B to V.D below.

V.A THE STANDARD OF MERITS ANALYSIS REQUIRED BY RULE 79(3)(a)

234. Rule 79(3)(a) states that when determining whether collective proceedings should proceed on an opt-in or an opt-out basis, the Tribunal may take into account "*the strength of the claims*" as one of the potentially relevant factors. As the Proposed Defendants correctly state in ¶84 of the Joint CPO Response, this provision was identified by Lord Briggs in *Merricks* as one of the two exceptions to the general rule that the certification process is not about, and does not involve, a merits assessment.[159]

235. However, Rule 79(3)(a) does not entail a full merits assessment of the claims. The proper approach is clearly stated in the first bullet point of paragraph 6.39 of the *Guide*:[160]

> "Given the greater complexity, cost and risks of opt-out proceedings, the Tribunal will usually expect the strength of the claims to be more immediately perceptible in an opt-out than an opt-in case, since in the latter case, the class members have chosen to be part of the proceedings and may be presumed to have conducted their own assessment of the strength of their claim. However, the reference to the "strength of the claims" 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. Rather, the Tribunal will form a high level view of the strength of the claims based on the collective proceedings claim form. For example, where the claims seek damages for the consequence of an infringement which is covered by a decision of a competition authority (follow-on claims), they will generally be of sufficient strength for the purpose of this criterion." (emphasis added)

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159 The other exception relates to the Tribunal's power to grant strike out or summary judgment, see [59]. As with *Merricks*, this exception is not applicable in the present case because no such application has been made (nor, for the avoidance of doubt, could there be any basis for any such application).

160 Paragraph 6.39 was quoted by Lord Briggs (without demur) in *Merricks* at ¶29. Mr Evans notes that the Proposed Defendants quote selectively from paragraph 6.39 of the Guide at ¶10 of the Joint CPO Response, omitting by way of the second set of ellipses the following critical words: "*and the Tribunal does not expect the parties to make detailed submissions as if that were the case. Rather, the Tribunal will form a high level view of the strength of the claims based on the collective proceedings claim form.*"

236. In the present case, Mr Evans seeks to combine claims for damages caused by the infringements identified in the Decisions and, applying the above passage of the *Guide*, that should be of sufficient strength for the purpose of Rule 79(3)(a). This is supported by the Tribunal's decision in *Gibson v Pride Mobility Products Limited*, which treated the fact that the claims were advanced on a follow-on basis as a significant factor in favour of certification on an opt-out basis:[161]

> "Rule 79(3) of the CAT Rules 2015 provides that in determining whether collective proceedings should be opt-in or opt-out, the CAT may further take into account the strength of the claims. As made clear by the Guide at para 6.39, this does not require a full merits assessment but rather a high level view of the strength of the claims. Here, the fact that this is a follow-on case is significant, since the claimants do not have to establish a violation of competition law. Further, the finding in the Decision that the infringements had an effect on prices, whether or not binding, shows that the claim for loss cannot be dismissed as weak." (emphasis added)

237. To the extent that any further analysis of the strength of the claims in Mr Evans' proposed proceedings is deemed necessary, it is clear that this should not involve a full merits assessment. Instead, it entails the Tribunal forming a high level view of the strength of the claims based on the collective proceedings claim form.

238. Aside from clear statements to this effect in the *Guide* and by the Tribunal in *Gibson,* Mr Evans submits that conducting a high level analysis of the strength of the claims for the purposes of rule 79(3)(a) is the proper approach for three further reasons.

239. First, it would be consistent with the central purpose of the section 47B CA 98 regime. As explained in ¶18 above, the purpose of the statutory scheme is to facilitate rather than to impede the vindication of the rights of those who have suffered loss from infringements of competition law. A suitably high level analysis of the strength of the claims, based on the collective proceedings claim form will achieve that purpose, whereas the imposition of an overly high merits threshold may have the opposite effect.

240. Second, it would be consistent with the views expressed by both the majority and the minority of the Supreme Court in *Merricks* as to the standard of any merits analysis required at the certification stage. While their Lordships differed on the exact extent to which the merits of the claims and the methodologies advanced by the proposed class representative should be scrutinized, both judgments contain clear observations that the

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161 [2017] CAT 9 at [123].

certification process should not involve a detailed analysis of the merits of the claims that a PCR seeks to combine in collective proceedings.[162] This would encompass the "*strength of claim*" assessment under rule 79(3)(a), in particular if this assessment must be conducted in every case as part of the certification process (as the Proposed Defendants propose).

241. Third, such an approach would be appropriate in view of the fact that the analysis of the strength of the claims occurs at a very early stage in proceedings, and prior to any meaningful disclosure by the Proposed Defendants.[163] Indeed, the *Guide* makes clear that the Tribunal "*does not encourage requests for disclosure as part of the application for a CPO*", save that "*where it appears that specific and limited disclosure or the supply of information… is necessary in order to determine whether the claims are suitable to be brought in collective proceedings… the Tribunal may direct that such disclosure or information be supplied prior to the approval hearing*."[164]

242. In these circumstances, it would plainly be inappropriate to subject the claims that Mr Evans seeks to combine in collective proceedings to a detailed analysis of their strength in order to determine whether they are suitable to be brought on an opt-in or opt-out basis. This point applies with particular force to his case regarding the operation of the FX spot trading cartels identified in the Decisions and the means by which they caused loss to members of the proposed classes (i.e. issues of causation). While Mr Evans has sought to set out his claims in as much detail as possible, it remains the case that the only information available to him at this stage regarding the cartels is contained in the Decisions. Moreover, as the Decisions were adopted pursuant to the Commission's settlement procedure, they contain an abbreviated description of the infringements, giving less detail than would otherwise be the case in a full infringement decision. The detailed information regarding the operation of the cartels is within the knowledge of the Proposed Defendants, and the relevant evidence is within their possession.

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162 See [75] and [78]-[79] (per Lord Briggs) and [113]-[114] and [160] per Lord Sales and Lord Leggatt.

163 The Proposed Defendants have, to date, provided disclosure of: (a) the confidential versions of the Decisions; and (b) a sample of contracts entered into with their customers. [redacted] OUTER CONFIDENTIALITY RING INFORMATION REDACTED

164 See paragraph 6.29.

243. In this regard, an analogy can be drawn with the courts' well established approach to pleadings in non-collective competition law claims on applications for strike out or summary judgment. In view of the fact that cartels are, by their very nature, clandestine, the courts will tend to allow a more generous ambit for pleadings, prior to disclosure and evidence, where what is being alleged necessarily concerns matters which are largely within the knowledge of the defendants.[165] Mr Evans submits that those considerations should also be borne in mind by the Tribunal when considering the strength of the claims under rule 79(3)(a). It is submitted that, prior to disclosure – which will reveal the full nature and extent of the infringements, and enable a proper assessment of the criticisms that the Respondents have sought to raise – the Tribunal should exercise caution in classifying claims (especially follow-on claims) as being of insufficient strength to be brought in opt-out collective proceedings, particularly given the important benefits they entail for class members.

244. With those points in mind, Mr Evans submits that the strength of the claims he seeks to bring is readily apparent from his CPO application and comfortably satisfies any "*strength of claim*" analysis that might properly be required by rule 79(3)(a). In addition to the fact that the claims are advanced on a follow-on basis, he relies on the following further points in this regard:

    a. Mr Evans' claims are based upon cogent theories of harm which have been set out in detailed expert evidence relating to FX trading and markets. In particular the report of Professor Rime, an expert in FX market microstructure, explains at some length his preliminary views as to the impacts of the infringements established in the Decisions on members of the proposed classes, with reference to salient academic literature.

    b. Mr Ramirez, an experienced economist, has developed (with the input of Professor Rime) a credible and plausible methodology for calculating damages to the proposed classes in opt-out collective proceedings, and has identified a number of sources of available data in order to operate that methodology.

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165 See e.g. *Bord Na Mona Horticulture Limited and anor v British Polythene Industries Plc and ors* [2012] EWHC 3346 (Comm), at [30], *Toshiba Carrier UK Ltd v KME Yorkshire Ltd* [2012] EWCA Civ 1190, at [32] and *Cooper Tire & Rubber Co Europe Ltd v Shell Chemicals UK Ltd* [2010] EWCA Civ 864, at [43].

245. It follows that Mr Evans' proposed claims are plainly of sufficient strength to be brought as opt-out collective proceedings. Indeed, notwithstanding the paucity of information available, he has set out his claims in substantial detail. The material he has provided in support of his theory of harm is significantly in excess of that which would normally be required of any claimant bringing follow-on proceedings, prior to disclosure.

246. By contrast, the Proposed Defendants have sought to call into question the strength of his claims by raising a series of detailed criticisms regarding matters set out in the experts reports' served in support of his claim. Specifically, via the points raised in sections C1 to C3 of the Joint CPO Response, they criticise: (a) Mr Evans' case as to operation and/or effects of the infringements and the losses which he submits resulted therefrom; and (b) the matters which should be controlled for in the regression analysis that Mr Ramirez proposes to conduct in order to estimate the losses suffered by the proposed classes.

247. This close analysis and these detailed criticisms are both unwarranted and inappropriate. They stray well beyond the merits analysis that is envisaged by Rule 79(3)(a), and are directly contrary to the clear indication in the *Guide* that "*the reference to 'strength of the claims' 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.*" Instead, the Proposed Defendants are seeking to raise disputed matters of fact and/or expert opinion, which properly fall to be considered at any trial in the proposed proceedings, once they have provided disclosure, particularly regarding the operation of the infringements described in the Decisions.

248. Accordingly, Mr Evans submits that the Tribunal should have no regard to the points raised in section C of the Joint CPO Response in deciding whether his proposed proceedings should be brought on an opt-in or an opt out basis. Without prejudice to this primary position, he responds to each of the Proposed Defendants' (unfounded) criticisms below.

V.B THE CLASS MEMBERS' LOSSES ARE BASED ON THE CONDUCT IDENTIFIED IN THE DECISIONS

249. In Section C1, the Proposed Defendants allege that there is a "*fundamental disjuncture*" between the infringements identified in the Decisions and the theory of harm on which

Mr Evans' claim is based.[166] They submit that Mr Evans' experts' reports are "*premised on a series of false assumptions as to infringing conduct which are unsupported by and/or inconsistent with the Infringements found in the Decisions.*"[167]

250. As Mr Evans explains below, and as is addressed further in Rime 2, the Proposed Defendants' criticisms are misplaced. Mr Evans' theory of harm is correctly based on the infringements as identified in the Decisions, and has taken proper account of the range of effects that they may produce.

251. Instead, the Proposed Defendants' arguments seek to rely on an overly narrow or tendentious reading of the Decisions in order to seek to call into question the theories of harm put forward by Mr Evans' experts. Moreover, they disregard a claimant's right to allege and prove that the infringements produced actual anti-competitive effects (even though those effects had not been identified in the Decisions).[168] Indeed, the Proposed Defendants themselves expressly acknowledge the fact that the Commission found that the information exchanges had the object of restricting competition and did not find effects.[169] Yet that does not shut out a claimant from pleading and proving that the information exchanges did, in fact, lead to anti-competitive effects causing them to suffer loss. Insofar as the Proposed Defendants suggest to the contrary, that would substantially undermine the effectiveness of competition law.

The Proposed Defendants' description of the Decisions

252. At ¶¶88-89 of the Joint CPO Response, the Proposed Defendants purport to summarise the infringements identified in the Decisions. The description is incomplete, largely self-serving and seeks to minimise the seriousness of the Proposed Defendants' admitted cartel conduct.

253. For the avoidance of doubt, Mr Evans disagrees with the Proposed Defendants' putative summary of the infringements and the attempts to gloss the findings contained therein. However, since he has already pleaded extensively to terms of the Decisions in his Amended Collective Proceedings Claim Form, and has made clear that he relies on the

166 Joint CPO Response, ¶87.

167 Joint CPO Response, ¶87.

168 TWBS Decision, ¶93 and EE Decision, ¶93.

169 Joint CPO Response, ¶89(f).

Decisions for their full meaning and effect, he does not repeat that material here.[170] Instead, he will address the Proposed Defendants' arguments concerning the findings contained in the Decisions in the sections that follow, insofar as they are relevant to a specific criticism made of his CPO application.

254. For completeness, Mr Evans also notes that the seriousness or otherwise of the Proposed Defendants' admitted cartel conduct, and the effects that it may produce, are properly matters to be considered at trial once the Proposed Defendants have given proper and full disclosure of the evidence demonstrating their infringements. In particular, as the infringements identified in the Decisions took place in online Bloomberg chatrooms, disclosure of the transcripts of those chats will be essential in order to provide a full picture of the nature and extent of the unlawful conduct.

Mr Evans' theory of harm does not contain assumptions unsupported by and/or inconsistent with the Decisions

255. At ¶¶90-102 of the Joint CPO Response, the Proposed Defendants identify certain matters in Mr Evans' theory of harm which, it is alleged, contain assumptions unsupported by and/or inconsistent with the Decisions. Those submissions are misconceived. Each is addressed in turn.

Mr Evans does not assume an express agreement to widen spreads

256. At ¶¶90-91 of the Joint CPO Response, the Proposed Defendants criticise the O'Higgins PCR for alleging that the conduct identified in the Decisions entailed an express agreement to widen bid-ask spreads. They submit that the Commission made no such finding in the Decisions.

257. On the basis of the evidence available to Mr Evans at present, it appears that the conduct described in the Decisions did not entail an express agreement to widen bid-ask spreads. That is why (as the Proposed Defendants correctly acknowledge at ¶92 of the Joint CPO Response), Professor Rime expresses the view that:[171]

> "It is not clear from the Decisions whether members of the Cartels were involved in explicit coordination on the level of bid-ask spreads quoted to customers. This would become clear on reviewing the transcripts of the chatrooms. As a result, in this report I will refer to tacit

[170] See ¶¶174-240 of Mr Evans' Amended Collective Proceedings Claim Form.

[171] Rime 1, footnote 108.

> coordination only, and will update my report if I am provided with further information on the communications that took place in the chatrooms."

258. Nevertheless, Professor Rime considers that the information exchanged in the chatrooms identified in the Decisions would have facilitated tacit coordination on bid-ask spreads:[172]

> "the sharing of bid-ask spread information by participants in the chatrooms, as described in the Decisions, would have reduced uncertainty as to the spreads being charged by other members of the Cartels and the market conditions they were pricing under. This would facilitate tacit coordination on the levels of bid-ask spreads quoted to customers…"

259. At ¶¶92-93 of the Joint CPO Response, the Proposed Defendants seek to make two criticisms of Professor Rime's views.

260. First, it is submitted that Professor Rime's opinion that exchanging information on bid-ask spreads "*would*"[173] have facilitated coordination "*exceeds the bounds of the Infringements found in the Decisions, which merely found that such information exchange "could" or "may" have had such an effect.*"[174]

261. In the extracts of the Decisions referred to by the Proposed Defendants, the Commission states that coordination on bid-ask spreads was at least possible.[175] Professor Rime is therefore entitled to take the view that such coordination would, in fact, have occurred.[176] That is consistent with the potential outcome identified by the Commission, and in no way exceeds the bounds of the Decisions. The suggestion that "*would*" is somehow incompatible with "*could*" or "*may*" is therefore hopeless.

262. Second, the Proposed Defendants take issue with Professor Rime's view that "*where a trader shares information relating to bid-ask spreads applicable to a specific trade, other members of the Cartels would be able to use that information to inform their approach*

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172 Rime 1, ¶152. See also Rime 2, sections 3.1.1, 3.1.2, 4.1 and 4.2.

173 See, e.g. Rime 1 at ¶140(a), 152 and 156.

174 Joint CPO Response, ¶92.

175 That conditional wording is unsurprising since, as the Proposed Defendants acknowledge at ¶89(f) of the Joint CPO Response, "*the Commission identified a 'by object' infringement. It made no finding of anticompetitive effects.*" The Commission made no concrete statements as to the effects of the cartels identified in the Decisions as it was not required to do so for the purposes of establishing a 'by object' infringement.

176 Professor Rime reiterates that view in Rime 2 at ¶24.

to pricing similar trades within a similar timeframe"[177] They suggest this is "*inconsistent with the Commission's express finding in the Decisions that information exchange "where there is a specific live trade" could enable coordination of spreads "to that client" and that information exchange pursuant to the underlying understanding concerning spreads quotes "for a given client in a specific situation where there was a specific live potential trade" may have facilitated tacit coordination "in that specific situation.*"[178] Professor Rime's "*assumption of utility in relation to similar trades in a similar timeframe*" is therefore said to have "*no basis in the Decisions*".[179]

263. This assertion is based on a highly selective reading of the Decisions. It overlooks the statement in the Decisions that the knowledge of existing or intended bid-ask spread quotes of specific currency pairs for certain trade sizes, where there is a specific live trade, "*may remain useful for the other traders for a window of up to a few hours depending on the market's volatility at the time*".[180] Professor Rime's view that the information shared relating to bid-ask spreads could have informed the pricing of trades within a similar timeframe is therefore entirely consistent with the Decisions.[181]

264. It should also be noted that the Proposed Defendants themselves appear to acknowledge, in a later section of the Joint CPO Response, the possibility that trades entered into within a similar timeframe could have been affected by the information exchanges identified in the Decisions. In section C2 of the Joint CPO Response, they state that "*[e]ven if, as the PCRs allege, a wider set of transactions were capable of being affected, only those transactions which were entered into by the participating traders immediately or very shortly after such instances of information exchange could potentially have been so affected*" (emphasis added).[182]

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177 Rime 1, ¶158.

178 Joint CPO Response, ¶93.

179 Joint CPO Response, ¶93.

180 TWBS Decision, ¶58 and EE Decision, ¶58.

181 See also Rime 2, ¶¶25–29. For completeness, Mr Evans notes that Professor Rime also considers that there would also have been longer-term impact resulting from the cumulative effects of sharing information on bid-ask spreads on multiple occasions. See Rime 1, ¶152(b) and section 5.1.2.2.

182 Joint CPO Response, ¶111. At footnote 182, the Proposed Defendants state, for the avoidance of doubt, that they "*do not admit that such information exchanges caused actual effects on any particular Specific Live Trade or Proximate Transaction.*"

265. It follows that the Proposed Defendants' criticisms of Professor Rime at ¶¶92-93 of the Joint CPO Response are unfounded.

No false assumption that any coordination necessarily resulted in wider spreads quoted to customers

266. At ¶¶94-98 of the Joint CPO Response, the Proposed Defendants suggest that Professor Rime "*wrongly proceed[ed] on an assumption that any coordination – if it had occurred – would necessarily have resulted in wider quoted spreads to customers.*"[183] They make three main points in this regard.

267. First, the Proposed Defendants assert that Professor Rime's views[184] are "*fundamentally inconsistent*" with the finding in recital (89) to the Decisions.[185] That is wrong. As the Proposed Defendants acknowledge, recital (89) to the Decisions states that information exchanges may have facilitated occasional tacit coordination of traders' spread behaviour "*thereby tightening or widening the spread quote in that specific situation*" (emphasis added). Accordingly, Professor Rime's theory of harm proceeds on the basis of an outcome (i.e. the widening of spread quotes) that is expressly envisaged in that recital.

268. Second, the Proposed Defendants suggest that the participating traders could use the information exchanged as part of the infringements to "*undercut others' quoted bid or ask to customers and win more trades by offering a narrower spread.*" If that is the Proposed Defendants' case (which is not clear[186]) then that would be for them to evidence, and should be addressed at trial.[187] It is not a matter that should be relevant to

183 Joint CPO Response, ¶94.

184 As Professor Rime notes in ¶¶34–35 of Rime 2, the Proposed Defendants are incorrect to suggest (e.g. at ¶94 of the Joint CPO Response) that he assumed that the infringements would result in wider bid-ask spreads quoted to customers. Instead, he explains why, based on standard principles of economics and FX market microstructure, the infringements would lead to wider bid-ask spreads.

185 Joint CPO Response, ¶95.

186 The Proposed Defendants' position is not entirely clear since they state that "*[t]he participating traders could use the information exchanged"* in this way (at ¶97 of the Joint CPO Response) and refer to the "*possibility that dealers may have narrowed, not widened their quoted spreads*" (at ¶98 of the Joint CPO Response).

187 Indeed, the extent to which bid-ask spreads were widened (or tightened, as the Proposed Defendants seem to suggest) is an empirical question which can only be addressed at trial.

whether Mr Evans' proposed proceedings should proceed on an opt-in or an opt-out basis.

269. In any event, Professor Rime considers that the suggestion that the Proposed Defendants would have reduced their spreads (or, at least, that was the primary or overall effect of the information exchanged) is inherently unlikely.[188] In particular, he notes that:

    a. The tightening of bid-ask spread quotes would be beneficial to customers, and detrimental to FX dealers, since it amounts to reducing the potential revenue that the latter would earn on each individual FX transaction.[189]

    b. The benefit of widening bid-ask spreads is more immediate in that it results in an increased revenue and therefore profit for each trade. By contrast, the potential to benefit from narrower spreads (i.e. in order to "*win more trades*"[190]) is a far more remote and uncertain, since in order to be more advantageous than widening spreads, it would require the FX dealer to generate a sufficient increase in trades in order to offset any reduced revenue per trade.

270. In addition, while the Proposed Defendants suggest that the "*Decisions make no specific findings that the Infringements included punishment mechanisms to ensure compliance (whether the information was exchanged in contemplation of narrowing or widening quoted spreads, enabling skew of either bid or ask, or otherwise),*" that is not correct, as is explained further below.[191]

271. Third, and relatedly, the Proposed Defendants argue that the possibility that FX dealers may have narrowed, rather than widened their spreads is consistent with the logic which underlies Professor Rime's indirect theory of harm "*namely that an information disadvantage will cause the disadvantaged party to widen its quoted spread.*" They suggest that "*[t]he corollary is that an information advantage arising from information exchange will cause the advantaged party to narrow its spreads.*"[192] However, Professor

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188 Rime 2, ¶¶38–39 and 40–41.

189 Knight 1, ¶91 and ¶95 and Rime 1, ¶146.

190 As suggested in the Joint CPO Response at ¶97.

191 See also Rime 2 at ¶¶42–48. As Professor Rime notes, this would also be clearer upon review of the chatroom transcripts.

192 Joint CPO Response, ¶98.

Rime considers that the Proposed Defendants' corollary does not follow.[193] The impact of widened bid-ask spreads resulting from an information disadvantage would be to reduce the competitive constraints on those with the information advantage. In these circumstances, those with the information advantage would be unlikely to tighten their spreads in response, as this would be to forego the benefit created by their advantage. Instead, Professor Rime considers that the persons with the information advantage would be more likely to widen their bid-ask spreads.

No false assumption that Relevant Financial Institutions would charge wider bid-ask spreads

272. At ¶¶99-100 of the Joint CPO Response, the Proposed Defendants note that Professor Rime considers that FX dealers which were not party to the infringements identified in the Decisions would also have been able to charge wider-bid ask spreads. This would cause harm to Mr Evans' Class B. Professor Rime considers this harm would have occurred in two main ways:[194]

    a. The exchange of information on bid-ask spreads would facilitate tacit coordination which, in turn, resulted in the widening of bid-ask spreads charged by the parties to the infringements.[195] This would reduce the competition between those parties and other FX dealers. As a result, the wider market would become less competitive, meaning that there was less pressure on other FX dealers to quote competitive bid-ask spreads, such that they were able to charge wider spreads;[196] and

    b. The information shared as part of the infringements gave the participants an information advantage over other FX dealers in the inter-dealer market. This would result in an information asymmetry, which gives rise to increased adverse selection risks. FX dealers would respond to adverse selection risks by charging wider bid-ask spreads in the inter-dealer market. This would increase the transaction costs of trading in that market (i.e. because an increased bid-ask spread results in increased

193 Rime 2, ¶¶49–50.

194 See generally Rime 1, section 5.2.

195 As is explained in Rime 1, section 5.1.

196 Rime 1, ¶140(b)(i); see further section 5.2.1.

costs to buy and sell currency) and FX dealers would pass those costs on to customers.

273. The Proposed Defendants disagree with Professor Rime, suggesting that "*in either case, other market participants could very reasonably have responded by maintaining or narrowing their spreads in order to win more trades.*" However, that assertion is misconceived for three reasons:[197]

a. First, in a situation where the wider market has become less competitive as a result of the infringements (i.e. that described in paragraph 248.a above), FX dealers which quoted narrower spreads would experience an increase in demand. They would respond to this by widening their bid-ask spreads. Professor Rime explains why this is the case as follows:[198]

> "Some of the customers of members of the Cartels would have reacted to the widening of spreads by seeking more favourable (i.e. narrower) bid-ask spreads from other FX dealers. As the spreads offered by FX dealers that were not part of the Cartels were priced without the benefit of the information shared in the chatrooms, it is possible that the spreads offered might have been narrower than those offered by the members of the Cartels.
>
> Because customers of the members of the Cartels would seek quotes from other FX dealers, the latter would experience an increase in demand for FX transactions… the increased demand would signal to the FX dealers that were not members of the Cartels that they could increase their prices and increase revenues, without the risk of losing customers. This would result in the widening of bid-ask spreads on the part of those dealers, thus pitching their "ask" prices upward and their "bid" prices downward. This widening of bid-ask spreads would also be possible due to the reduction in competition resulting from the Cartels… because there would be reduced competitive pressure on the bid-ask spreads offered to customers."

b. Second, the Proposed Defendants' arguments in respect of adverse selection risks overlooks the point that an increase in adverse selection has the effect of increasing transaction costs of trading in the inter-dealer market in order to service customer trades. As Professor Rime explains, faced with such an increase in transaction costs, it would be illogical for an FX dealer to maintain or narrow its spreads in response, as this would reduce the revenue earned on each trade.[199]

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197 Rime 2, ¶¶54–55.

198 Rime 1, ¶¶170-171.

199 Rime 2, ¶54(a).

c. Third, as explained in ¶269.b above, the potential to benefit from narrower spreads is far more remote and uncertain than the benefits inherent in widening spreads, since the former would require the FX dealer to generate a sufficient increase in trades in order to offset any reduced revenue per trade.[200]

274. Furthermore, at ¶102 of the Joint CPO Response, the Proposed Defendants suggest that the "*Commission did not make any findings of anticompetitive conduct with respect to spreads on the interdealer market… Nor did it make any findings as to effects on that market. There was no suggestion of even the potential for tacit coordination in relation to spreads on the interdealer market.*" It is therefore suggested that "*the PCRs' assertions in this regard therefore extend well beyond the findings in the Decisions.*"

275. This contention mischaracterises Professor Rime's views. He did not suggest there was coordination on bid-ask spreads on the inter-dealer market. Instead, as summarised in ¶248.b above, he takes the view that the conduct identified in the Decisions would result in increased adverse selection risks, which in turn would result in the widening of bid-ask spreads on the inter-dealer market.[201]

276. There is, accordingly, no basis for the Proposed Defendants' suggestion that Professor Rime's views extend beyond the findings in the Decisions. On the contrary, his views are squarely based on the infringements identified therein, and he properly considers the effects which may flow from them.

No false assumption as to the extent of the infringing conduct

277. The Proposed Defendants also contend that Professor Rime's reliance upon the combined market shares of the Proposed Defendants wrongly assumes the existence of infringing conduct that is inconsistent with, or unsupported by, that found in the Decisions.[202]

278. Mr Evans submits that there is no such inconsistency. It appears that the Proposed Defendants have either misunderstood or mischaracterised Professor Rime's evidence.

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200 Rime 2, ¶54(b).

201 This is explained in Rime 1, section 5.2.2.

202 Joint CPO Response, ¶104.

279. ¶105 of the Joint CPO Response makes two points which seek to call into question Professor Rime's reliance upon market shares. Neither of them stands up to scrutiny.

280. The first point (at ¶105(a)) that the collusive conduct was carried out by a "*very limited subset of traders*" does not mean or imply that the effects of their conduct were limited to their own trades. As explained further below,[203] it is plausible, indeed likely, that the participating traders could and would have influenced the pricing of other traders. This would have been a consequence of the infringements found by the Decisions and, therefore, is not inconsistent with them.

281. The second point (at ¶105(b)), that the Decisions did not concern e-commerce transactions, is irrelevant. Professor Rime does not assume that the Decisions did concern such transactions. Rather, Rime 1 clearly explains how the conduct identified in the Decisions would likely have spill-over effects on trades executed on electronic trading platforms (given, in particular, that this conduct led to wider bid-ask spreads in the inter-dealer market that could affect prices set by the algorithms).[204] Such effects are not inconsistent with the Commission's findings. Rather, they follow on from those findings.[205] This issue is addressed in more detail at ¶¶309–320 below.

Distinguishing between liability and/or effects arising from separate infringement findings

282. At ¶107 of the Joint CPO Response, the Proposed Defendants suggest that Mr Evans has pleaded that all Proposed Defendants are jointly and severally liable for all losses caused by both infringements. They say that "*there is no pleaded basis to suggest that the two distinct Infringements are the subject of overarching joint and several liability and nor is it open to Mr Evans to advance such an allegation in the context of follow-on claims.*"

283. This criticism is based on a mischaracterisation of Mr Evans' case. He has not sought to suggest that the two infringements are the subject of overarching joint and several liability. His Amended Collective Proceedings Claim Form pleads at ¶246 that the

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203 See ¶294.a of this Reply below.

204 Rime 1, ¶¶195–196; Professor Rime also refers to the 'principle of equilibrium' that spreads across different methods of trading will (all else being equal) remain consistent, which is a further reason why he expects these spillover effects to have occurred as a result of the infringing conduct: ibid, ¶197.

205 Rime 2, ¶63(d) and ¶¶98–109.

Proposed Defendants are "*jointly and/or severally liable for the aforesaid breaches of statutory duty and for all loss and damage suffered by members of the Proposed Classes which was caused and/or materially contributed to by the Infringements, to the extent of the total period that each Proposed Defendant participated in one or both of the Infringements, as particularised in paragraph 244 above.*" (emphasis added)

284. Indeed, this is also reflected in the paragraph of his Amended Collective Proceedings Claim Form which immediately follows the extract above (i.e. ¶247), where Mr Evans pleads:

> "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. The said loss and damage was suffered by members of the Proposed Classes throughout the period covered by the Infringements, being 18 December 2007 - 31 January 2013."

285. This is followed by a footnote, which makes clear:

> "For the avoidance of doubt, the Proposed Class Representative's case is that the Proposed Defendants are jointly and/or severally liable for the said loss and damage, to the extent of the total period that each Proposed Defendant participated in one or both of the Infringements. Paragraph 246 is repeated."

V.C MR EVANS' CASE ON CAUSATION IS NOT WEAK

286. In Section C2 of the Joint CPO Response, the Proposed Defendants seek to criticise Mr Evans' case on causation. In doing so, they seek to downplay the effects of their admitted cartel conduct. In summary, they argue that:

a. The only transactions falling within the proposed classes identified by the Commission as capable of being affected by the exchanges of bid-ask spread information "*were the specific live potential trades to which the relevant information exchange related, to the extent such trades were in fact concluded **("the Specific Live Trades")***";[206]

b. Even if (as Mr Evans alleges) a wider set of transactions were capable of being affected, "*only those transactions which were entered into by the participating traders immediately or very shortly after such instances of information exchange*

[206] Joint CPO Response, ¶110.

could potentially have been so affected: such transactions are referred to… as ***"Proximate Transactions"***";[207] and

c. Most of the FX transactions in respect of which Mr Evans' proposed proceedings are concerned "*are factually remote from the information exchanges that formed part of the Infringements…*"[208]

287. The Proposed Defendants observe that Mr Evans must establish a causal link between the information exchanges that formed part of the infringements identified in the Decisions and the so-called "Remote Transactions". They suggest that Mr Evans has sought to do so "*by advancing a chain of causation based on a series of theoretical steps propounded by their experts*", and identify four alleged errors which they say "*render their cases on causation too weak to be brought as opt-out proceedings*".

288. As a preliminary point, Mr Evans submits that, as set out in section V.A above, such detailed scrutiny of his case on causation is unwarranted at this early stage in proceedings, and goes beyond the high-level analysis envisaged by rule 78(3)(a). Indeed, despite the paucity of information currently available to him, Mr Evans has set out his case on causation in substantial detail, including by serving comprehensive expert evidence from Professor Rime which is grounded in FX microstructure theory. That level of material is some way in excess of that which would normally be expected of a claimant in a follow-on damages claim, prior to certification, and easily satisfies any "strength of claim" analysis for the purposes of determining whether his proposed proceedings should be brought on an opt-out basis.

289. Instead, any detailed analysis of the causal mechanism by which the infringements identified in the Decisions caused harm to the proposed classes can only take place once the Proposed Defendants have given full disclosure relating to the infringements. In particular, since the infringement took place in online chatrooms, disclosure of those chat logs will be essential in order to fully analyse the way in which the infringements

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207 Joint CPO Response, ¶111.

208 Joint CPO Response, ¶112. All FX transactions which are not Specific Live Trades or Proximate Transactions are referred to in the Joint CPO Response as **"Remote Transactions"**.

operated and therefore caused harm to the proposed classes.[209] Moreover, the effects of the infringements are matters which are to be empirically analysed via the methodology proposed by Mr Ramirez. These are all matters which can and should be determined at a trial of Mr Evans' proposed claims.

290. Notwithstanding that preliminary point, Mr Evans submits that each of the Proposed Defendants' four points are misconceived for the reasons given below.

Alleged error 1: sustained tacit collusion between the Proposed Defendants

291. The first error alleged by the Proposed Defendants is that Professor Rime fails to consider properly whether the conditions for tacit collusion were sustainable among the participating traders.[210]

292. In response, Mr Evans submits that Professor Rime provides a sound and reliable assessment of how and why the sharing of bid-ask spread information by the participating traders, as described in the Decisions, would have reduced uncertainty as to their respective spreads and facilitated tacit coordination on wider bid-ask spreads quoted to customers.[211]

293. Mr Evans agrees with the Proposed Defendants as to the conditions for establishing tacit coordination.[212] Mr Evans also agrees that the Decisions identified the possibility of coordination of spreads, which shows that such coordination was viable.[213]

294. Mr Evans disagrees, however, with the Proposed Defendants' contention that none of these conditions apply to the unlawful conduct of the participating traders:

    a. As to the first (**degree of market power**), the Proposed Defendants make two points. The first is that the information exchanges involved the participating traders

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209 Professor Rime emphasises this in ¶30 of Rime 1, noting in particular in footnote 31 that "*as the Decisions are based upon conduct that took place in Bloomberg chatrooms, I consider that disclosure of the transcripts of these chats will be essential to enable me to further elaborate on the impact of the Cartels.*"

210 Joint CPO Response, ¶¶116–118.

211 Rime 1, ¶152.

212 Joint CPO Response, ¶116.

213 TWBS Decision, ¶¶49–52, 84 and 88–89 and EE Decision, ¶¶48–51, 84, 88–89; the Commission found, e.g., that "*Through their participation in nearly daily exchanges, the participating traders had the expectation of standing a better chance to coordinate behaviour opportunistically*."

only. Professor Rime explains, however, that these traders could and would have used the information that had been shared within the chatrooms (without them having to disclose it to parties outside the chatroom).[214] It would be rational for them to take into account one another's pricing for currency pairs when determining their own trading strategy and future conduct.[215] Moreover, the traders may have been able to influence the pricing of other traders without having to share the information revealed in the chatrooms given: (i) many of them held senior roles within the Proposed Defendants[216] and (ii) the collegial nature of trading desks at the time.[217] As a result, Professor Rime considers that the information exchanges would have informed the participating traders' approaches to discussions (e.g., in relation to pricing) and/or influenced other traders who would have wanted to imitate the success of the participating traders.[218] The Proposed Defendants' second point is that their combined overall market shares never exceeded 50% and that this is not consistent with them having significant market power. It is well-settled case-law, however, that, in assessing dominance (i.e., substantial market power) account must be taken of the "*highly significant indicator*" which is a firm's large market share and of the ratio between that market share and that of its nearest rivals.[219] Similarly, Professor Rime emphasises the need to consider the relative market shares when evaluating the Proposed Defendants' degree of market power. In this case, market shares of 24-48% are indicative of significant market power in this particular market, since all bar one of the other FX dealers have much lower market shares (in single digits).[220]

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214 Rime 2, ¶¶70–71.

215 Rime 2, ¶71; this is consistent with the case-law on horizontal exchanges of information see e.g. *Tesco Stores Ltd v OFT* [2012] CAT 31, ¶51; *Lexon (UK) Ltd v CMA* [2021] CAT 5, ¶187(6).

216 Mr Evans' understanding of the roles held by the participating traders is detailed in his Amended Collective Proceedings Claim Form, ¶201A.

217 Knight 2, ¶50, noting that traders discussed "market movements, ideas, news stories and trends throughout the trading day".

218 Rime 2, ¶¶71-72.

219 See e.g. Case 85/76 *Hoffmann-La Roche v Commission* EU:C:1979:36, at [48]; Case T-219/99 *British Airways v Commission* EU:T:2003:343, at [210]; Case T-340/03 *France Télécom v Commission* EU:T:2007:22, at [109].

220 Rime 2, ¶74.

b. As to the second (**sufficient degree of transparency**), the Proposed Defendants' assertion that there was no means by which participating traders could monitor compliance is wrong. On the contrary, the Decisions found that the extensive exchange of information helped the colluding traders to monitor compliance with the underlying understanding.[221] That is no doubt why the Commission decided that the exchanges of information, pursuant to the underlying understanding, facilitated occasional coordination among those traders.[222] It follows that the points made by the Proposed Defendants about the difficulty to observe the spreads quoted by participants go nowhere.[223]

c. As to the third (**a deterrent mechanism**), the Proposed Defendants' contention that there was no credible deterrent mechanism is plainly unfounded.[224] The Decisions found that the Proposed Defendants exchanged copious amounts of commercially sensitive information in the expectation of some degree of reciprocity from one another, which would have helped to sustain their coordination.[225] Added to this, Professor Rime considers that the potential threat of being excluded from the chatrooms would have been a credible sanction for non-compliance – since the participating traders would not want to miss out on benefits inherent in participating in the chatrooms.[226] Professor Rime also notes that, according to the Decisions, the participating traders appear to have complied with

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221 TWBS Decision, ¶81 and EE Decision, ¶80.

222 TWBS Decision, ¶¶49–52, 84 and 88 and EE Decision, ¶¶48–51, 84 and 88; the Commission found, for example, that "*Through their participation in nearly daily exchanges, the participating traders had the expectation of standing a better chance to coordinate behaviour opportunistically*."

223 Joint CPO Response, ¶117(b); see Rime 2, ¶¶43–46 and ¶76(a).

224 Joint CPO Response, ¶117(c).

225 TWBS Decision, ¶50 and EE Decision, ¶49; indeed, without this reciprocity, the Commission pointed out that the strategy would have been self-defeating.

226 Rime 2, ¶47 and ¶76(b). It is inconceivable that the Infringements lasted as long as they did if the participating traders did not realise that highly competitive action on their part designed to increase their market share would provoke identical action by the others. This is no doubt why they would apologise to another if they departed from the understanding: TWBS Decision, ¶¶50, 81 and EE Decision, ¶¶49, ¶81.

the underlying understanding and not undercut one another; this is another indication that there must have been adequate deterrents to cheating.[227]

295. Accordingly, Professor Rime's theory of tacit coordination is sound and Mr Evans' case on causation is credible and robustly based.

Alleged error 2: general reduction in competition across all FX dealers

296. Professor Rime has described how the infringing information exchanges led to tacit coordination among the Proposed Defendants, which, in turn, would weaken the competitive constraint they would otherwise have exerted on other FX dealers.[228]

297. By the second error alleged by the Proposed Defendants, they object to Professor Rime's analysis, relying solely upon their objections to his theory of tacit coordination. Given those objections are not well-founded, the derivative complaint about the ensuing reduction of competition falls away.

Alleged error 3: universal adverse selection risk effects across all Relevant Financial Institutions

298. The third error alleged by the Proposed Defendants relates to Professor Rime's view that the information exchanges forming part of the infringements gave the participating traders an information advantage over other FX dealers when trading in the inter-dealer market. This information advantage would, in his view, give rise to increased adverse selection risks, which in turn would result in the widening of the prevailing bid-ask spreads across the inter-dealer market.[229]

299. The Proposed Defendants assert that a "*universal and generalised increase in adverse selection risk for all non-Respondents (and Respondents outside the periods of their relevant Infringements) on the interdealer market as a result of such exchanges is not credible*."[230] They submit that the presence or size of an adverse selection risk will

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227 This is based on Professor Rime's review of the Decisions: Rime 2, ¶77; he notes, however, that this is a matter that would be clearer upon reviewing the transcripts of the chats: *ibid*.

228 Rime 1, ¶169.

229 See, e.g., Rime 1, ¶167(b).

230 Joint CPO Response, ¶120. The Proposed Defendants also refer to Professor Rime's view as an "*assumption*". That is incorrect. Rime 1 sets out Professor Rime's views as an expert in the field

depend on a "*large number of factors which will vary between pairs of counterparties and across time, including: (1) the relative market power of the counterparties; (2) the relative level of public and private information to which each counterparty has access; and (3) the importance of any information asymmetry to a given transaction.*" They suggest that Professor Rime does not take any, or any proper, account of those variables in three main ways detailed in ¶¶124-126 of the Joint CPO Response.

300. As a preliminary point, insofar as the Proposed Defendants seek to suggest that the harm from adverse selection risks occurs on an individualised, or per-transaction basis, that is wrong. As Professor Rime explains, adverse selection risks arise on a cumulative basis:[231]

> "Adverse selection risk is known in the economic literature as a "continuous" variable. This means that adverse selection risk increases relative to the size of the informational asymmetry and the relative market power of the counterparty with the informational advantage. 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.
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> In this regard, it is important to note that informational advantage is assessed on an overall basis. This is because FX dealers will review *on average* whether their trading has been affected by adverse selection risks, rather than assessing whether any one particular transaction is a "winning" or "losing" transaction. Indeed, an FX dealer may not be able to identify precisely which of its customers are the better-informed counterparties (or, similarly, when they are better informed), but instead will be aware that counterparties are more likely to trade when they have formed the perception that the FX dealer's prices do not reflect the information in their possession.
>
> It follows that adverse selection is a cumulative risk, which is assessed by reference to the overall likelihood that a less-well informed counterparty will trade against a more informed counterparty and suffer trading losses because of the information asymmetry." (emphasis original)

301. With that point in mind, Mr Evans addresses each of the Proposed Defendants' criticisms in turn.

302. First, it is submitted that a large and sophisticated non-Proposed Defendant FX dealer, such as Deutsche Bank, would be unlikely to face any adverse selection risks when transacting with a Proposed Defendant on the inter-dealer market. Instead, "*[g]iven the amount of order flow and customer information available to a party such as Deutsche*

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of FX market microstructure, based on the information contained in the Decisions, and informed by the relevant academic literature.

231 Rime 1, ¶¶131-132.

Bank, it may well have better information than the Respondent with which it is transacting."[232] This suggestion overlooks two points:[233]

a. In the present case, the market power of the parties with the information advantage (i.e. those participating in the infringements) was notably larger than other FX dealers, including Deutsche Bank. As Professor Rime explains: "*the combined market share of the Cartels ranged between 23.9% - 48.0%. By way of context, the largest FX dealer in the market during the period covered by the Cartels was Deutsche Bank, whose market share ranged between 12% and 19%. All other FX dealers had a much lower market share (i.e. single digit percentages).*"[234] It follows that Deutsche Bank could still be at a relative information disadvantage compared with the parties to the infringements, and therefore be subject to increased adverse selection risks.

b. Even there were certain circumstances in which a large FX dealer such as Deutsche Bank had better information than its counterparty, it could still experience an increase in adverse selection risk overall as a result of the infringements. This is because, as noted in ¶300 above, adverse selection risk is a cumulative risk, and is considered by FX dealers on an aggregate basis. This means it would not be necessary for an FX dealer to be adversely selected on each and every trade in order to experience an increase in adverse selection risk overall.

303. Second, the Proposed Defendants suggest that the "*information exchanges that formed part of the Infringements were too limited to cause non-Respondent dealers to enter into a sufficient number of transactions on the interdealer market which were "disadvantageous to them"*".[235] However, the characterisation of the information exchanges as "*limited*" is fundamentally at odds with the Commission's findings, namely that there was an extensive and recurrent exchange of commercially sensitive

232 Joint CPO Response, ¶124.

233 Rime 2, ¶¶83–84.

234 Rime 1, ¶192.

235 Joint CPO Response, ¶101.

information. Indeed, the frequency of those information exchanges, and the benefits they afforded to the participants, are summarised in the Decisions as follows:[236]

> "…[t]he participating traders maintained a consistent pattern of nearly daily communications where they had extensive and recurrent information exchanges pursuant to the underlying understanding and occasionally engaged in coordination of their trading activities including standing down, pursuant to an underlying understanding that being a member of the private chatrooms entailed such behaviour and each member could rely on the fact that the other members would act the same way. They were under the assumption that, by behaving recurrently in such way, they were increasing the knowledge with which they operated on the market and the probabilities to seize opportunities to their benefit. The traders' perception that this recurrent conduct was overall beneficial to them outweighed the fact that on a given transaction a number of traders had to be ready to serve the interests of only one of them, for instance by standing down, to increase the chances of that participating trader to seize an opportunity to obtain a better deal."

304. The Proposed Defendants also contend that: (a) any potential information asymmetry effects of the information exchanged could only have arisen in respect of Proximate Transactions only; and (b) Professor Rime has not explained how the information asymmetry effects, which are said to be "*confined to a small, closed group of traders within brief time windows*" were sufficient to inflict losses on all FX dealers operating on the inter-dealer market during the period covered by the infringements.[237] Those arguments are also misconceived. Professor Rime has explained clearly in section 5.2.2 of Rime 1[238] how the information exchanged by the participants in the infringements would have the cumulative effect of increasing adverse selection risks overall.[239] In particular, he notes that adverse selection effects do not depend on the specific impact of each piece of information shared, but instead they are assessed by FX dealers on an aggregate basis:[240]

> "… adverse selection effects do not depend on specific impact of each individual piece of information shared. This is because… adverse selection risks are assessed on an aggregate basis (and are not conditioned on how frequently information is shared). Indeed, other FX dealers will be unaware of exactly when members of the Cartels are sharing information, but instead their awareness of adverse selection risks will result from a more general concern that there are better informed counterparties in the market. In other words, since these FX dealers do not observe (or have no awareness of) the Cartels, they cannot respond to particular chats

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236 See recital 101 of the TWBS and EE Decisions.

237 Joint CPO Response, ¶101.

238 See also section 4.3.2 of Rime 2.

239 In addition, as explained in ¶88 of Rime 2, some of the information exchanged by the participants to the infringements may have provided insight into longer-term price movements.

240 Rime 1, ¶193.

> or information shared, but instead they will seek to protect themselves against the adverse selection risks created by information sharing in general, by adjusting the prices offered on the inter-dealer market (i.e. by increasing the ask price, and reducing the bid price), with the result that bid-ask spreads would widen."

305. It follows that the Proposed Defendants' arguments concerning the impact of each piece of information shared as part of the infringements are misplaced.

306. Third, the Proposed Defendants contend that Mr Evans has "*not suggested that there is evidence to support [his] contention that non-Respondent banks detected that they faced a relatively increased adverse selection risk as a result of the information exchanges that formed part of the Infringements, as opposed to other asymmetry of information that arises naturally in such a large market, and increased their spreads in response…*" However, the very purpose of Mr Ramirez's proposed methodology for calculating harm to the proposed classes is to measure (among other things) the extent to which the infringements identified in the Decisions would cause harm to members of the proposed classes via increased adverse selection risks.[241]

307. Indeed, this is also an answer to the Proposed Defendants' criticisms of Professor Rime's views on the impact of the infringements on adverse selection risks more generally: while the Proposed Defendants may disagree with Professor Rime as to the impact of the infringements on adverse selection risks, the purpose of Mr Ramirez's methodology is to assess the existence and extent of any such impact.

308. It follows from the foregoing that the Proposed Defendants' criticisms of Professor Rime's views on the adverse selection effects of the infringements are unfounded.

Alleged error 4: 'spillover' effects on E-Commerce Transactions

309. The fourth alleged error identified by the Proposed Defendants concerns Professor Rime's view that the infringements would produce certain "spillover" effects. Specifically, while the Decisions do not make any findings of infringement in relation to certain types of electronic trading,[242] Professor Rime's view is that "*the principle of*

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241 See section 6.2 of Ramirez 1.

242 That is reflected in footnote 7 of the Decisions, which states that: "*The case does not concern FX spot e-commerce trading activity [within the meaning of/understood as] FX spot trades that are automatically booked by, or executed by either the relevant bank's proprietary electronic trading*

*economic equilibrium would demand that spreads offered in the market would be consistent with each other (but not necessarily identical), regardless of the particular forum in which they are offered. This means that any changes to bid-ask spreads applied to voice trades would have affected electronic trades conducted through [Single-Bank Platforms (**"SBPs"**)] and [Multi-Bank Platforms (**"MBPs"**)].*"[243]

310. The Proposed Defendants dispute the reasons given by Professor Rime in support of his view.[244] They are addressed in turn below.

Pricing inputs into electronic trading platforms

311. The first way in which Professor Rime considers that any widened bid-ask spreads applied to voice trades would have affected prices on electronic trading platforms is via the inputs into any pricing algorithm. This is explained at ¶196 of Rime 1 as follows:

> "Pricing on these platforms is usually set by algorithms, although some trades above a certain threshold will nonetheless be priced by an individual trader or salesperson. The price-setting algorithms are created by individuals employed by the FX dealers, and they will determine the pricing methodology used by the algorithm. That methodology will take into account a range of factors. The most common starting point is to use the prices determined on the electronic platforms in the inter-dealer market, as this is the most liquid segment and where the main price discovery process takes place. The algorithms may use such prices as a starting point and add an appropriate mark-up, by way of a bid-ask spread, in order to set the prices charged to customers. As a result, any widening of bid-ask spreads on the inter-dealer market is likely to be reflected in the prices set by the algorithm on the electronic platform. In addition, the algorithm may also be programmed to take account of other pricing data, such as wider market pricing on other platforms. Therefore, to the extent that those prices were also affected by widened bid-ask spreads as a result of the Cartels, this would also be reflected in the prices set by the algorithm."

312. Professor Rime refers to the evidence of Mr Knight, where he explains that:[245]

> "Where a customer requests a quote for an FX transaction via an electronic trading platform, the price will, in most circumstances, be generated by the FX dealer's "price engine" which

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platforms or computer algorithms. These transactions take place without the intervention of any trader."

243 Rime 1, ¶195. Mr Evans notes that the Proposed Defendants do not appear to take issue with Professor Rime's views that the infringements would produce spillover effects into other types of instruments and currency pairs, as also set out in section 5.3 of Rime 1.

244 At ¶131, the Proposed Defendants note that Professor Rime's views depend on the premise that that the infringements led to a pervasive widening of bid-ask spreads across the inter-dealer market, and notes a number of criticisms of that premise which are made elsewhere in the Joint CPO Response. As Mr Evans has addressed those points in other parts of this Reply, he does not address them again in this section.

245 Knight 1, ¶181.

> is an algorithmic trading model. The algorithm will not receive direct pricing input from individual FX traders, but instead will be programmed to determine a price using a set of inputs and methodology defined by the system's creators. These may include but are not limited to: prices sampled from other electronic platforms (with EBS and Reuters predominant as they are seen as the primary source of liquidity), recent price history in the market; the size of trade request; history of outcome of trades from the counterparty requesting the price; recent trades through the system; and its own currency positions. Reference may also be made to spreads that the FX dealer would make through voice platforms so as not to compete with itself."

313. The Proposed Defendants take issue with Professor Rime's view on the basis that it "*involves several factual assumptions about how algorithms operated during the relevant time.*" In particular, they suggest that Mr Knight and Professor Rime's evidence does not establish those assumptions:

> "Those factual assertions are not, however, made out even on Mr Evans' own evidence. Professor Rime relies on paragraphs 181 and 182 of Mr Knight's report in this respect. But those paragraphs of Mr Knight's report do not establish that algorithms invariably or frequently use prices determined on the electronic platforms in the interdealer market "*as a starting point and add an appropriate mark-up, by way of a bid-ask spread, in order to set the prices charged to customers.*" Rather, Mr Knight states that algorithms were programmed to determine a price using a set of inputs and describes a range of possible inputs (one of which is "*prices sampled from other electronic platforms (with EBS and Reuters predominant as they are seen as the primary source of liquidity)...*"). But Mr Knight does not say: (1) that the algorithms used by market participants adopted a uniform approach; (2) that the prices set by algorithms were most commonly derived from prices observed on EBS and Reuters in the interdealer market; or (3) that it was invariably or frequently the case that prices were derived by marking-up the prices observed on EBS and Reuters in the interdealer market. Professor Rime's statement that voice spreads were determinative of the prices set by algorithms rests on assertion alone." (emphasis original)

314. Both Mr Knight and Professor Rime properly accept that they are not in a position to know the exact inputs that would be used in a pricing algorithm.[246] That is proprietary information which would be in the possession of each FX dealer (including the Proposed Defendants). It is to be noted that despite this information being within the knowledge of the Proposed Defendants, they have not sought to put forward any positive case about the operation of their pricing algorithms. To the extent that the Proposed Defendants dispute Professor Rime's views regarding the likely operation of pricing algorithms, this is a matter which can and should be addressed at trial, after the Proposed Defendants have given appropriate disclosure.

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246 Knight 2, ¶38 and Rime 2, ¶99.

315. Nonetheless, both Mr Knight and Professor Rime consider that it would be very difficult to maintain an algorithm that made no reference at all to the prices on the inter-dealer market.[247] This is because the inter-dealer market is where the main price discovery occurs. It follows that if an algorithm's pricing fell out of line with the inter-dealer market, it would be rapidly arbitraged until that difference no longer existed. Accordingly, Professor Rime remains of the view that any widening of bid-ask spreads on the inter-dealer market is likely to be reflected in the prices set by the algorithm on the electronic platform.[248]

The relationship between spreads on voice and electronic methods of trading

316. At ¶197 of Rime 1, Professor Rime explains that prices between voice and electronic trading would likely be consistent on account of the economic principle of equilibrium:

> "…the principle of equilibrium dictates that spreads offered through different methods of trading (such as voice trading and electronic platforms) will, all other things being equal, remain consistent. This is because… the differences in spreads will create changes in demand that will act to correct spreads back to equilibrium. For example, in the context of different trading methods, if the spreads offered by an FX dealer's SBP are perceived to be more competitive by customers than voice trading, then some customers would choose to trade on the SBP rather than with voice traders. Similarly, if an FX dealer is providing more competitive spreads via an MBP than the spreads offered through voice trading, then customers may find it more attractive to trade on the MBP. In both cases, increased demand on the electronic platforms would indicate that wider spreads could be charged without losing customers. The spreads on the platform would, therefore, move (i.e. widen) in response to that additional demand and move towards alignment with the voice dealers' spreads."

317. However, the Proposed Defendants submit that any suggestion of a close relationship between voice spreads and spreads for E-Commerce Transactions is "*groundless*". This assertion is surprising, as it is contradicted by the position taken in section C3 of the Joint CPO Response. In that section, the Proposed Defendants suggest that one of the factors which affects bid-ask spreads is:[249]

> "**Degree of competition in the market:** The degree of competition in the market has an effect on bid-ask spreads. Changes in competition over time, for example from the growth of electronic and algorithmic trading, or changes in market shares over time, would therefore need to be controlled in order to carry out a reliable regression analysis." (underlining added)

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247 Knight 2, ¶39 and Rime 2, ¶100.

248 Rime 2, ¶99–101, citing Rime 1 at ¶189 and ¶196.

249 Joint CPO Response, ¶145.

318. Similarly, the Proposed Defendants also note that "*[t]he advent of multi-bank trading portals has brought tighter spreads and less loyalty among customers.*"[250] It follows that any attempt to submit that there is no relationship between spreads charged via voice and electronic trading is contrary to the Proposed Defendants' own case.

319. For completeness, Mr Evans addresses each of the reasons given by the Proposed Defendants in ¶133 of the Joint CPO Response in support of their contention that there is not a close relationship between spreads charged via voice and electronic platforms:

    a. First, it is suggested that the services provided to voice customers and electronic trading customers are not the same. Instead, the transaction sizes are radically different and voice customers receive feedback from human traders, while customers on electronic platforms do not receive any such feedback.[251] However, both Professor Rime and Mr Knight consider that while there are some differences between voice and electronic trading, in terms of the transaction sizes and the services offered, the differences are not as stark as the Proposed Defendants suggest. Instead, a large number of customers are offered access to both methods of trading and could switch between the two.[252] Hence, Professor Rime's view is that there is a significant degree of substitutability between these two methods of transacting FX.[253]

    b. Second, the Proposed Defendants suggest that there are other features of electronic trading which mean that an increase in demand would not necessarily lead to an increase in spreads. ¶¶107–109 of Rime 2 explains, however, that Professor Rime does not agree that those factors would be sufficient to lead to market participants responding to an increase in demand by maintaining narrower spreads on e-commerce transactions.

320. In light of this, the Proposed Defendants' criticisms of Professor Rime's views regarding the spillover effects of the infringements identified in the Decisions are unfounded and

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250 Joint CPO Response, ¶150(b).

251 Joint CPO Response, ¶133(a).

252 Knight 2, ¶43 and Rime 2, ¶105.

253 Rime 2, ¶105.

do not constitute a factor in favour of certifying Mr Evans' proposed proceedings on an opt-in basis.

V.D MR EVANS' PROPOSED METHODOLOGY IS NOT DEFICIENT

321. In Section C3 of the Joint CPO Response, the Proposed Defendants contend that Mr Evans' quantum methodology is flawed. Specifically, they suggest:[254]

> "In the present case, the size of bid-ask spreads will have been affected by a large number of lawful, often individualised, factors, that are unrelated to the Infringements and will necessarily have changed over time. It will not be possible to identify and control for all relevant factors in order to produce a well-specified model, capable of isolating the effect of the infringing conduct of the limited individuals as identified by the Decisions on the spreads for the various transaction types the PCRs claim will have been affected."

322. At ¶¶142-151, the Proposed Defendants identify a number of factors which they allege will have affected bid-ask spreads, and which they say "*cannot plausibly be controlled for in the PCRs' proposed methodologies*."[255]

323. Mr Evans' response to this contention is two–fold:

324. First, it is entirely premature to raise criticisms regarding the matters that should be controlled for in a regression analysis in circumstances where Mr Evans has received no disclosure of transaction data from the Proposed Defendants. As Mr Ramirez has explained, "*[w]ithout the proposed defendants' transaction data, it is infeasible to identify the precise variables that best explain and predict changes in the proposed defendants' half-spreads.*"[256]

325. Notwithstanding the paucity of information presently available at this early stage of proceedings, Mr Ramirez has sought to identify the potential explanatory variables which could be included in his regression analysis in as much detail as possible.[257] He recognised that "*the selection of explanatory variables in a multiple regression analysis*

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254 Joint CPO Response, ¶136. See also ¶141.

255 The Proposed Defendants suggest that the factors which allegedly cannot be controlled for "*include (but are not limited to)*" the matters set out in ¶¶142-151. To state the obvious: Mr Evans and his experts cannot address any factors that the Proposed Defendants have not expressly identified.

256 Ramirez 1, ¶112. Mr Evans notes that the Proposed Defendants cite (but do not address) this extract of Mr Ramirez's report in footnote 231 of the Joint CPO Response.

257 See section 6.1.4 of Ramirez 1.

explaining half-spreads should be informed by the relevant FX literature." He therefore conducted a detailed summary of the academic literature to identify potential explanatory variables, noting that the "*literature identifies three broad categories of factors that determine half-spreads: (i) operating costs, (ii) inventory risk, and (iii) customer-specific factors.*" Mr Ramirez's report describes potential explanatory variables which relate to those factors, and notes that, from those variables, "*I will select those that best explain movements in half-spreads in a well specified multiple regression model that is robust to reasonable changes in the specification of the model.*"[258]

326. Mr Evans submits that, in those circumstances, any further examination of the additional explanatory variables which might be included in a regression analysis is both unnecessary and unwarranted. This type of close scrutiny of the experts' methodologies is inappropriate for determining whether the proposed proceedings should be brought on an opt-in or an opt-out basis. It goes well beyond the "*high level*" assessment envisaged in the *Guide.* Instead, matters regarding the appropriate variables to be controlled for in a regression analysis are plainly issues to be considered at trial, once the Proposed Defendants have provided disclosure of their transaction data.

327. Second, and in any event, Mr Ramirez has considered each of the variables identified by the Proposed Defendants and found that: (a) his proposed methodology already controls for these matters; and/or (b) it will be possible to control for them in due course, if it is necessary to do so.[259]

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258 Ramirez 1, ¶112.

259 Ramirez 2, section 3.3.

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23 April 2021