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' RESPONSE TO THE PROPOSED DEFENDANTS' JOINT CPO REJOINDER

I. INTRODUCTION AND SUMMARY[1]

1. This is Mr Evans' response to the Proposed Defendants' Joint CPO Rejoinder (the **"Joint CPO Rejoinder"**) dated 4 June 2021.

[1] In this Response, unless otherwise stated, Mr Evans adopts the defined terms used in his Reply to the Proposed Defendants' Joint CPO Response dated 23 April 2021.

2. In accordance with the Chairman's indications at the CMC in January 2021 (the **"January CMC"**),[2] this Response is limited in scope. Mr Evans should, of course, not be taken to accept those points which he does not address here. Instead, he joins issue with the Proposed Defendants and relies on his Reply to the Proposed Defendants' Joint CPO Response dated 23 April 2021 (**"Mr Evans' Reply Submissions"**).

3. In outline, Mr Evans submits that, as with the Joint CPO Response, the points raised in the Joint CPO Rejoinder fall far short of establishing that these proceedings should be brought on an opt-in basis. On the contrary, both the impracticability of opt-in proceedings and the strength of his proposed claims support Mr Evans' position that his proposed proceedings should proceed on an opt-out basis insofar as UK-domiciled persons are concerned.

4. Mr Evans addresses certain specific points raised in the Joint CPO Rejoinder as follows:

   a. **Section II** responds to some of the submissions at ¶¶8-45 of the Joint CPO Rejoinder regarding the disputed points of legal principle between Mr Evans and the Proposed Defendants;

   b. **Section III** addresses the salient parts of ¶¶46-67 of the Joint CPO Rejoinder in relation to whether it would be practicable to bring Mr Evans' proposed proceedings on an opt-in basis; and

   c. **Section IV** replies to specific points made at ¶¶68-95 of the Joint CPO Rejoinder in relation to the strength of Mr Evans' proposed claims.

5. In addition, the Proposed Defendants raise, for the first time, two further objections to the certification of the Evans Application, namely that:[3] (a) compound interest should not be certified as a common issue;[4] and (b) the class definition should exclude defunct companies and deceased persons.

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2 See transcript of the hearing on 15 January 2021 (the **"January CMC Transcript**"), page 73 (lines 14-19).

3 Joint CPO Rejoinder, ¶7.

4 Although the Proposed Defendants raised compound interest in ¶¶80-81 of the Joint CPO Response, this was in the context of their submissions as to whether the proposed proceedings should be brought on an opt-in or opt-out basis: "*assuming (which is not accepted) that compound interest could be calculated on a class-wide basis, an opt-in structure would self-evidently be*

6. These new points have been brought forward by the Proposed Defendants at a very late stage, which affords the PCRs extremely limited time to address them. These new points are also contrary to the Tribunal's direction that Proposed Defendants file "*any reply to the material served by the O'Higgins PCR and Evans PCR…*"[5] (emphasis added). Even assuming that these are points of law, which did not previously occur to the Proposed Defendants but which should properly be raised once they have occurred to them, the Proposed Defendants have delayed in raising them. In particular, the Proposed Defendants refer to these points being raised in *Merricks* (the hearing was on 25-26 March 2021) and *Trucks* (the hearing was between 19 and 27 April 2021).[6] The Proposed Defendants had ample time since those hearings in which to notify the PCRs and the Tribunal of these objections before now, but failed to do so.

7. Nevertheless, Mr Evans' response to those points is set out in **Section V and VI** below. In short, he considers that:

   a. compound interest should be determined as a common issue;

   b. his proposed class definition properly includes claims where the loss was suffered by companies or persons who have since become defunct or deceased; and

   c. nevertheless, the just and efficient way to determine both issues would be to await judgment on them in *Merricks* and *Trucks*. This would obviate the risk of inconsistent judgments being given in those cases and this case.

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

   a. Mr Ramirez's third expert report dated 11 June 2021 (**"Ramirez 3"**);

   b. Mr Maton's fifth witness statement dated 11 June 2021 (**"Maton 5"**); and

   c. Mr Chopin's fourth witness statement dated 11 June 2021 (**"Chopin 4"**).

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better suited to obtaining basic information from class members, in a practicable way, to assess compound interest accurately for the purposes of aggregate damages". Mr Evans responded to this objection in ¶226 of his Reply Submissions, and Mr Ramirez addressed this issue at ¶¶79-80 of Ramirez 2.

5 Order of the Tribunal made on 15 January 2021, ¶7.

6 Joint CPO Rejoinder, ¶7.

Preliminary point: no basis for the Proposed Defendants' putative reservation of rights to make further points in response to the Mr Evans' Reply Submissions

9. As a result of the Proposed Defendants' attempts to introduce new objections to the Evans Application at a late stage, Mr Evans wishes to lay down a marker in respect of the (putative) reservation of rights at ¶2 of the Joint CPO Rejoinder, in which it is stated: "*[t]he Respondents should therefore not be taken to have accepted any of the arguments contained in the Replies, and reserve the right to make further submissions on those points in their skeleton arguments and in oral submissions.*"

10. This reservation is inappropriate, since the Proposed Defendants have already had a fair and ample opportunity to bring out the points that they want to bring. The Chairman made clear at January CMC that the 4 June 2021 deadline afforded "*a great deal of time, more than enough, for a proper and full response to be produced to [the material served on 23 April 2021] by the respondent banks*".[7]

11. It follows that the appropriate moment for the Proposed Defendants to make any arguments that they wished to make in response to Mr Evans' Reply Submissions was the Joint CPO Rejoinder. Further responsive points should not be raised in the Proposed Defendants' skeleton arguments and/or oral submissions for the first time.

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

12. At ¶¶8-45 of the Joint CPO Rejoinder, the Proposed Defendants address the disputed points of legal principle as between them and the PCRs. Mr Evans maintains his position on those issues for the reasons set out in Section II of his Reply Submissions.

13. This section addresses a specific point in the Joint CPO Rejoinder relating to the extent to which the alleged "*sophistication*" of class members is a relevant factor in determining whether proceedings should be brought on an opt-in or opt-out basis.

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[7] See the January CMC Transcript, page 73 (lines 11-14). See further the Chairman's observations at page 71 (lines 22-26) and page 72 (line 1).

The relevance of the alleged "sophistication" of class members

14. At ¶¶40-41 of the Joint CPO Rejoinder, the Proposed Defendants suggest that Mr Evans "*appears to dispute that the Tribunal should take into account the fact that… class members in these proceedings would be sophisticated entities*"[8] and that "*[h]e merely points out that there is no express reference in the domestic legislation to this factor.*"[9]

15. This suggestion is not correct. Mr Evans said:[10]

> "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."

16. To be clear, Mr Evans' case is <u>not</u> that the Tribunal cannot take into consideration the "*sophistication*" of the proposed class members. Mr Evans doubts that their alleged sophistication would bear on whether his proposed proceedings should be brought on an opt-in or opt-out basis. It certainly does not have the significance that the Proposed Defendants seek to ascribe to it for two main reasons:

    a. <u>First</u>, there are a range of persons that could trade FX (and may do so infrequently) and would therefore fall within his proposed classes. Therefore, as Mr Evans explained in his Reply Submissions, his proposed classes will be made up of a range of individuals and entities from large financial institutions through to SMEs and high-net worth individuals.[11] It follows that the Proposed Defendants are wrong to suggest that his proposed classes comprise "*sophisticated*" class members such as "*hedge funds, assets managers, pension funds and large corporations*".[12]

    b. <u>Second</u>, and in any event, Mr Evans considers that an assessment of the alleged sophistication of proposed class members <u>without more</u> is unlikely to be of assistance in determining whether the proceedings should be brought on an opt-in

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8 Joint CPO Rejoinder, ¶40.

9 Joint CPO Rejoinder, ¶41.

10 Mr Evans' Reply Submissions, ¶122.

11 See Mr Evans Reply Submissions at ¶¶85-94 and 142.

12 Joint CPO Rejoinder, ¶40. The Proposed Defendants make similar points about the composition of his proposed classes ¶¶42 and 43 with which he also joins issue.

basis. Indeed, Maton 4 explains why even those class members which the Proposed Defendants consider to be "*sophisticated*" may be unlikely to opt-in to collective proceedings.[13] Those reasons are among the matters that the Tribunal can and should take into account under Rule 79(3). The Proposed Defendants conspicuously fail to grapple with Mr Maton's evidence in this respect.

III. PRACTICABILITY

17. Notwithstanding the dispute between Mr Evans and the Proposed Defendants regarding the approach to practicability as a matter of law, he accepts that it is one of the factors which the Tribunal may take into account in any assessment under Rule 79(3). To that end, he has explained in Section III of his Reply Submissions why opt-in proceedings are not practicable.[14] He maintains his position in this regard.

18. In ¶¶46-67 of the Joint CPO Rejoinder, the Proposed Defendants seek to contend that "*the PCRs' Replies do not demonstrate that opt-in proceedings would be impracticable, as opposed to comparatively less attractive to their legal teams and funders than opt-out proceedings.*"[15] Mr Evans responds to certain of those points below in order to show that the Proposed Defendants' contentions are without merit.

Features of the proposed classes

19. It appears to be common ground (or, at the very least, not disputed by the Proposed Defendants) that a preponderance (76.6%) of the non-financial customers that are likely to be within Mr Evans' proposed classes will be medium-sized.[16]

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13 Maton 4, ¶¶19-24. Similarly, Mr Ramirez also states at ¶27 of Ramirez 2 that "*I disagree with the proposed defendants' apparent conclusion that the level of sophistication and financial standing of potential class members are determining factors in whether they decide to opt-in to the Evans action. It is conceivable that a number of sophisticated traders of FX may assess their volumes against the direct costs (and opportunity costs) of opting into the class and decide that their expected return from opting in is insufficient to offset these costs. In my view, the factor more likely to be determinative is the potential class member's expected claim value, adjusted for the probability of a favorable outcome in the Evans action.*"

14 In any event, it is to be noted that even taking the Proposed Defendants' case at its highest, their "*general preference*" in favour of opt-in proceedings only arises where opt-in proceedings are practicable (see, e.g., Joint CPO Rejoinder, ¶¶17 and 35). If, as Mr Evans contends, opt-in proceedings are not practicable, the "*general preference*" falls away.

15 Joint CPO Rejoinder, ¶49.

16 Joint CPO Rejoinder, ¶52, Ramirez 2, ¶¶19-20 and Ramirez 3, ¶19.

20. The Proposed Defendants object, however, to the estimate of 99.5% of financial class members being SMEs based on employee headcount. They say that headcount is not a good proxy for sophistication in the financial industry; a financial institution may have few employees, but have a high turnover or be asset rich.[17]

21. In response, Mr Evans notes the following points:

    a. First, Mr Ramirez does not simply consider headcount. He also indicates that 86.4% of financial class members have an annual turnover of less than £500,000.[18] Accordingly, Mr Ramirez does not consider that most of the financial class members can plausibly be regarded as "*asset rich*" in those circumstances.[19]

    b. Second, Mr Ramirez does not say that headcount is a good proxy for sophistication in the financial industry. Rather, he says that the level of sophistication of a given class member is likely to matter less to its decision whether to opt-in than the expected value of the claim (which is addressed at ¶¶24-30 below).[20] Mr Evans has already explained at ¶¶14-16 why he also doubts that the alleged sophistication of proposed class members would bear on whether these proceedings should be brought on an opt-in or opt-out basis.

    c. Third, the Proposed Defendants have adduced no evidence at all to substantiate any of their assertions about the degree of sophistication of particular enterprises.

22. The Proposed Defendants also posit that high-net-worth individuals ("**HNWIs**") within the proposed classes will be sophisticated, well-resourced and well-placed to decide whether to opt-in. HNWIs are estimated to account for 3% of FX spot and 4% of FX forward transactions during the infringement period.[21] Mr Ramirez does not claim that HNWIs would be unsophisticated; instead, he says that:

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17 Joint CPO Rejoinder, ¶52(a).

18 Ramirez 2, Appendix B and Ramirez 3, ¶¶15–16 and Table 1.

19 Ramirez 3, ¶16.

20 Ramirez 2, ¶27 and Ramirez 3, ¶18.

21 Ramirez 3, ¶23 and Table 2.

> "[i]t is conceivable that substantially all of the UK's HNWIs with assets exceeding USD 500 million employ wealth managers who transact with FX dealers, or these HNWIs do not transact FX at all because their investment strategies center on wealth preservation."[22]

23. The reason that Mr Ramirez does not indulge in the same kind of speculation put forward by the Proposed Defendants is that HNWIs are a diverse group with respect to their asset base: their assets range from $1 million to $1 billion and the potential value of their claims are likely to vary accordingly.[23]

Value of claims

24. Mr Evans joins issue with the Proposed Defendants as to whether he has shown that the estimated value of claims would be a sufficient incentive for class members to opt in.

25. Mr Evans draws attention to the following estimates which support his position:[24]

    a. 18,274 non-financial class members are estimated to have an average claim value of just £3,409.[25] ¶57 of the Joint CPO Rejoinder refers to this figure without demur.

    b. 15,684 financial class members are estimated to have an average claim value of £15,964.[26]

    c. 80.8% of all proposed class members have an average claim value of below £16,000.[27]

    d. 43.5% of all proposed class members have an average claim value of below £10,000.

26. The contention at ¶58 of the Joint CPO Rejoinder that Mr Ramirez's estimates mean that over half of the class members have claims worth £10,000s is to no avail. That statistic is largely attributable to the 15,684 financial class members with an expected claim of

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22 Ramirez 1, ¶63.

23 Ramirez 1, Table 3 and Ramirez 3, ¶26.

24 Ramirez 3, Tables 4 and 5.

25 Ramirez 2, ¶36.

26 Ramirez 3, Table 4.

27 Ramirez 3, ¶29.

£15,964.[28] It also ignores the fact that the overwhelming majority of the proposed classes have an average expected claim below £16,000.[29]

27. ¶59 of the Joint CPO Rejoinder then makes three points in a bold attempt to suggest that an opt-in action would be practicable for claims in the single thousands of pounds. These are all misconceived.

28. First, the Proposed Defendants claim that Mr Ramirez's estimates are very far from those in *JJB Sports*, *Gibson* and *Merricks*. This comparison is mistaken for the following reasons:

    a. It ignores the fact some 18,274 non-financial class members have an expected average claim value of just £3,409.

    b. The sums at issue in *JJB Sports* (£20),[30] *Gibson* (up to £195)[31] and *Merricks* (£300)[32] do not provide a meaningful benchmark for determining whether the value of claims warrant opt-out proceedings. Those figures were only estimates (or, in the case of *JJB*, an out-of-court offer by the defendant). Those figures also reflected the facts of those cases, which, of course, are very different from this case.

    c. In any event, whether or not opt-in proceedings are practicable does not depend solely upon the estimated claim values; Mr Maton has explained that there are several other reasons, such as disrupting an ongoing relationship with their bank and the possible burden and costs of disclosure, as to why an opt-in action is not feasible in this case.[33]

29. Second, the Proposed Defendants pray in aid the idea that higher value claims will provide "*momentum*" for opt-in proceedings.[34] However, the Proposed Defendants provide no evidence and give no convincing reasons as to why class members with much

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28 *Ibid*.

29 Ramirez 3, ¶¶28–29.

30 *The Consumers' Association v JJB Sports plc* [2009] CAT 2, at [13].

31 *Dorothy Gibson v Pride Mobility Products Ltd* [2017] CAT 9, at [22].

32 *Mastercard Inc v Merricks* [2020] UKSC 51, at [17].

33 Maton 4, ¶¶19–20 and 23–33.

34 Joint CPO Rejoinder, ¶59(b).

smaller claims would be cajoled by those with much higher value claims deciding to opt-in. The conscientious efforts of any PCR to recruit class members takes matters no further: Mr Maton's evidence shows that extensive recruitment efforts are unlikely to achieve viable opt-in collective proceedings in this case.[35]

30. Third, the Proposed Defendants invoke the fiduciary duties owed by proposed class members to their members, beneficiaries or shareholders.[36] The fiduciary duties are to act in the best interests of another person. They would require class members to weigh up *(a)* the anticipated benefits of opting in (which will be small for a significant number of class members) against *(b)* the downsides of opting in (which include the cost, time and effort of opting in[37]). Mr Maton's evidence is that the downsides of opting in are likely to dissuade many class members from doing so.

Other matters affecting incentives of proposed class members to opt-in

31. ¶61 of the Joint CPO Rejoinder disputes the O'Higgins PCR's evidence that class members would be reluctant to sue the Proposed Defendants for fear of damaging their ongoing relationship with them. The Rejoinder does not address Mr Maton's evidence in this regard.[38]

Ability to contact the proposed classes

32. The size and diversity of the proposed classes are indicators that an opt-in approach would not be workable in this case.[39] ¶64(c) of the Joint CPO Rejoinder appears to have no answer to this concern, other than to urge caution in respect of the number of small enterprises. That note of caution is misconceived for the reasons set out at ¶¶19-21 above.

Economic viability

33. ¶65(a) of the Joint CPO Rejoinder suggests that Mr Chopin has tacitly recognised that opt-in proceedings may be economically viable albeit on different terms. There is no

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35 Maton 4, section A.

36 Joint CPO Rejoinder, ¶59(c).

37 Maton 4, ¶¶23-25 and 29-33

38 Maton 4, ¶19(a) and ¶23(b).

39 See Mr Evans' Reply Submissions, ¶108 and Ramirez 1, ¶163. The latter is not addressed in the Joint CPO Rejoinder.

basis for that suggestion. The funder cannot be expected to engage in speculation as to the requirements for funding a claim in a world that never was.[40] Rather, Bench Walk properly focused on whether the current funding arrangements would be viable on an opt-in basis. The answer is clearly no.[41]

34. ¶67 of the Joint CPO Rejoinder contends that Maton 4 is not informative as to the economic viability of opt-in collective proceedings. In fact, the converse is true. Mr Maton describes not only the lengths Hausfeld went to in order to identify potential claims and claimants but also that it considered GLOs and representative actions, both of which are opt-in actions.[42] Mr Maton also explains why any such proceedings would not be viable given many potential claimants were reluctant to contemplate litigation.[43] That experience underpinned Mr Maton's view that:[44]

> "… the Proposed Defendants have completely underestimated (and indeed have no experience of) the time, effort, cost and risk in seeking to bring the proposed proceedings in the Evans Application on an opt-in basis. On the contrary, there is a significant risk that only a limited number of members of the proposed classes may opt in to those proceedings …"

IV. STRENGTH OF THE PROPOSED CLAIMS

35. Mr Evans maintains his position, set out in Section V of his Reply Submissions, that the Proposed Defendants' criticisms of the strength of the claims he seeks to bring involve a detailed form of merits assessment that goes well beyond the high level analysis permitted by Rule 79(3)(a). In any event, his claims comfortably satisfy any analysis of the merits required by that Rule, and the Proposed Defendants' contentions to the contrary are without merit.

36. In ¶¶68-95 of the Joint CPO Rejoinder, the Proposed Defendants make further submissions focusing on: (a) the standard of review to be applied to any merits

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40 Chopin 4, ¶¶15-20 explains that it is not possible for him to say, in the abstract, whether Bench Walk would be able to fund an opt-in action. He notes, however, that the bookbuilding required for an opt-in action would add significant upfront expenditure and significantly increase the required budget.

41 Chopin 3, ¶15.

42 Maton 4, ¶¶9-10. It follows that the fact that Hausfeld worked between 2014 and 2018, prior to the Decisions, is irrelevant given it considered the possibility of bringing other types of opt-in proceedings.

43 Maton 4, ¶19.

44 Maton 4, ¶23.

assessment for the purposes of Rule 79(3)(a); and (b) Mr Evans' case on causation. Mr Evans addresses certain of those submissions in turn.

Standard of review

37. It is common ground that the Tribunal can assess the merits of Mr Evans' claim at a high level for the purposes of Rule 79(3).[45]

38. Mr Evans disagrees, however, with the Proposed Defendants' suggestion that the "*weaknesses which [they] have identified go to fundamental aspects of the PCRs' proposed claims, as opposed to matters of detail not appropriate for the Tribunal's review at this stage*."[46] That suggestion is belied by the nature and extent of the submissions on merits made by the Proposed Defendants: they have made detailed criticisms of the expert reports served in support of Mr Evans' proposed claims.

39. The Proposed Defendants' submission that the Tribunal can "*reach a conclusion on these matters without having to conduct a detailed merits assessment or consider disputed evidence*"[47] (emphasis added) is plainly wrong. They do dispute the evidence of Mr Evans' experts on a wide range of detailed matters including:

    a. the existence and extent of adverse selection risks resulting from the infringements identified in the Decisions (alleged causation error 3);

    b. the links between voice and E-Commerce Trading (alleged causation error 4); and

    c. the precise explanatory variables that should be controlled for in a regression analysis (section C3 of the Joint CPO Response).

40. The attempt in ¶69 of the Joint CPO Rejoinder to minimise this by saying that the Proposed Defendants' "*challenge to the PCRs' proposed claims is, at this stage, confined to manifest failings in the PCRs' case and does not rely on responsive factual or expert evidence*" is unavailing. Indeed, rather than electing to serve factual and/or expert evidence in support of their putative criticisms, the Proposed Defendants have sought to make them by way of bare assertions in submissions.

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45 Joint CPO Rejoinder, ¶69.

46 *Ibid*.

47 *Ibid.*

41. Turning next to ¶¶72-74 of the Joint CPO Rejoinder, the Proposed Defendants make various criticisms of Mr Evans' approach to the high level merits test. Mr Evans addresses each of them in turn below.

42. First, ¶72 of the Joint CPO Rejoinder begins and ends with seemingly uncontroversial points, i.e., that the Proposed Defendants are entitled to contest the merits at some level for the purposes of Rule 79(3) and that an assessment of the merits is not deferred entirely until trial.[48] As the Proposed Defendants acknowledge, it is common ground that any assessment of the merits must be at a high level.[49] The four propositions in the middle of ¶72 are, however, an inaccurate caricature of Mr Evans' case on strength of his proposed claims. Mr Evans addresses each proposition in turn:

    a. Mr Evans does not seek to prove the strength of the claims by reference to the "*mere existence of expert evidence*". Rather, he relies on the cogent and comprehensive content of the expert evidence supporting his proposed claims.

    b. Nor has Mr Evans relied on the "*bare assertion*" that these are follow-on claims; he has clearly and carefully explained why this is the case (and why the Proposed Defendants' contentions to the contrary are unfounded) in both the Amended Collective Proceedings Claim Form and Mr Evans' Reply Submissions.[50]

    c. Mr Evans does not rely on the mere "*possibility that material may emerge from disclosure which happens to support the proposed claims*". Instead, Professor Rime and Mr Ramirez have carefully identified the specific issues in respect of which documents can reasonably be expected to be available following disclosure.[51] That approach is tailored to the certification stage.

    d. Mr Evans does not rely solely on "*the possibility that some future regression analysis may yield favourable results*." He has set out clear and sound theories of harm. Moreover, Mr Ramirez has proposed a sound methodology for estimating

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48 This follows from *Mastercard Inc v Merricks* [2020] UKSC 51, per Lord Briggs at [59]-[60].

49 Joint CPO Rejoinder, ¶69.

50 Mr Evans' Reply Submissions, ¶¶249-285.

51 See further ¶¶44-45 below.

harm to Mr Evans' proposed classes. By contrast, the Proposed Defendants have put forward no evidence to cast doubt on Mr Ramirez's methodology or estimates.

43. Second, ¶73 of the Joint CPO Rejoinder merely summarises the Proposed Defendants' contentions as to whether there is a connection between Mr Evans' proposed claims and the infringements found by the Decisions. Mr Evans joins issue with them in this regard for the reasons given in his Reply Submissions.[52]

44. Third, the assertion in ¶74 of the Joint CPO Rejoinder is incorrect. Mr Evans has explained how disclosure from the Proposed Defendants will be relevant to the objections raised in the Joint CPO Response. For example, he has explained fully and precisely that:

    a. Disclosure of the transcripts of the online Bloomberg chatrooms will be essential in order to provide a full picture of the nature and extent of the unlawful conduct.[53] These transcripts will be relevant to assessing the effects of the infringements,[54] the way in which they caused harm to members of the proposed classes[55] and the possible punishment mechanisms to sustain tacit coordination.[56]

    b. Disclosure of documents relating to the likely operation of pricing algorithms would be appropriate in order to further understand the links between voice trading and E-Commerce Trading.[57]

    c. Disclosure of transaction data from the Proposed Defendants will be relevant to identifying the precise variables that explain and predict changes in spreads and should therefore be used in Mr Ramirez's regression analysis.[58]

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52 See further ¶¶47-64 below.

53 Mr Evans' Reply Submissions, ¶254.

54 *Ibid*.

55 Mr Evans' Reply Submissions, ¶289.

56 Rime 2, ¶118.

57 Mr Evans' Reply Submissions, ¶314; both Knight 2, ¶38 and Rime 2, ¶99 properly acknowledge that they are not in a position to know the exact inputs that would be used in a pricing algorithm.

58 Mr Evans' Reply Submissions, ¶324 and ¶326; see also Ramirez 1, ¶112.

45. The Proposed Defendants provide two examples that are said to support their view that Mr Evans has not explained how disclosure will meet their merits objections. Neither example is well-founded:

    a. First, Mr Evans has explained why he refutes the criticism that his proposed claims do not follow-on from the Decisions.[59]

    b. Second, Professor Rime has explained how, and in what respect, disclosure could be relevant in respect of his theory of harm relating to tacit collusion.[60] For example, he has explained that compliance monitoring and/or punishment mechanisms will be clearer once he has reviewed the chatroom transcripts.

46. In summary, therefore, Mr Evans does not seek to sidestep an appropriate, high-level assessment of the merits at the certification stage. He has addressed each of the Proposed Defendants' criticisms and has shown them to be unfounded.

Response to the Proposed Defendants' points on causation

47. Mr Evans now turns to certain points raised by the Proposed Defendants concerning the alleged causation errors. He does not address alleged "*Error no.2: no general reduction in competition across all banks*" as the Joint CPO Rejoinder does not raise any points independent of those canvassed in respect of alleged error 1.[61]

Alleged error 1: sustained tacit collusion between the Proposed Defendants

48. Mr Evans joins issue with the Proposed Defendants as to whether there is a viable basis for alleging that the three conditions for tacit collusion are satisfied in the present case.

49. As to the first condition (**degree of market power**) the Proposed Defendants deny that they had such power, albeit without adducing any factual or expert evidence in support of their position. Instead, the Proposed Defendants make two core points:[62]

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59 Moreover, disclosure of the evidence cited in the footnotes to the Decisions and on the Commission's file is likely to be relevant to determining the nature, scope and operation of the infringements.

60 Rime 2, ¶¶42 and 77.

61 Joint CPO Rejoinder, ¶83.

62 Joint CPO Rejoinder, ¶79 refers to E-Commerce Transactions, which is addressed at ¶¶60-64 below.

a. First, they reiterate that their joint market share was less than 50%.[63] This ignores, however, the fact that the remaining part of the market was atomistic: all bar one of the other FX dealers had market shares of less than 10%.[64] The Proposed Defendants make much of the position of Deutsche Bank (that had a 12-19% share during the infringements). But they seemingly have no answer to Professor Rime's expert opinion[65] that Deutsche Bank's ability to compete would have been constrained by its information disadvantage vis-à-vis the participating traders.

b. Second, the Proposed Defendants emphasise that the participating traders agreed not to share the information acquired in the chatrooms with anyone else.[66] The answer to this contention is that Mr Knight (as an expert in FX trading) and Professor Rime (as an expert in FX market microstructure) are firmly of the view that the participating traders could influence other traders' pricing without having to reveal the exact content of their chats.[67] The Proposed Defendants' case to the contrary is no more than bare assertion.

50. The Proposed Defendants' submissions in respect of the second condition (**sufficient degree of transparency)** overlook two points:

a. First, they fail to acknowledge that the Decisions found that the participating traders monitored compliance with the infringements[68] (which, according to the first sentence of ¶81 of the Joint CPO Rejoinder, is what the theory of tacit collusion requires).

b. Second, the Proposed Defendants' points relating to the monitoring of spread levels ignore the clear findings in the Decisions that the "*the participating traders provided current or forward-looking information to one another on the level of spread quotes*",[69] which, by its nature, created transparency about spreads. The

63 Joint CPO Rejoinder, ¶77(a) and ¶80.

64 Rime 2, ¶74.

65 Rime 2, ¶74.

66 Joint CPO Rejoinder, ¶77(b) and 78.

67 Mr Evans' Reply Submissions, ¶294.

68 Mr Evans' Reply Submissions, ¶294(b) and footnotes 221-222.

69 TWBS Decision, recital 89 and EE Decision, recital 89.

Commission also found that these exchanges "*may have facilitated occasional tacit coordination of those traders' spreads behaviour*",[70] which also suggests that there was sufficient transparency for tacit coordination.

51. As to the third condition (**a deterrent mechanism**) the Proposed Defendants do not appear to contest Mr Evans' case that the abundance of information exchanges identified in the Decisions would have helped to sustain tacit coordination.[71] Nor do they address Mr Evans' observation that, as noted in the Decisions, the participating traders would apologise to each other if they departed from the underlying understanding. Instead, their sole objection is to Professor Rime's view that the threat of being excluded from the chatrooms would have been an effective punishment mechanism.[72] Tellingly, however, the Proposed Defendants do <u>not</u> deny the existence of such overt or implicit threats. They mischaracterise Professor Rime's view as being mere supposition. On the contrary, he gives reasons for his view – exclusion from a chatroom would be an effective punishment because "*a non-compliant member would risk losing access to a significant information advantage held by being part of one of the Cartels and would risk exposing itself to being adversely selected when trading with the remaining members of the Cartels on the interdealer market*."[73] Furthermore, Professor Rime properly acknowledged that this would become clearer if he is able to review the transcripts of the chatrooms.[74]

52. Mr Evans therefore maintains that the infringements facilitated tacit coordination on the levels of bid-ask spreads quoted to customers.[75]

<u>*Alleged error 3: universal adverse selection risk effects across all Relevant Financial Institutions*</u>

53. As part of their response to Mr Evans' submissions concerning the increased adverse selection risks resulting from the infringements identified in the Decisions, the Proposed Defendants repeat a number of points that Mr Evans has already addressed in his Reply

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70 *Ibid*.

71 Mr Evans' Reply Submissions, ¶294(c).

72 Rime 2, ¶47; Joint CPO Rejoinder, ¶82.

73 Rime 2, ¶47.

74 Rime 2, ¶¶41, 77.

75 Rime 1, ¶152 and Rime 2, ¶¶70–76.

Submissions. These submissions concern: (a) the participants in the chatrooms;[76] (b) the alleged market power of other FX dealers such as Deutsche Bank;[77] and (c) the relevance of the combined market shares of the Proposed Defendants which employed the participating traders[78]. Mr Evans maintains his position on those issues, and instead addresses the three additional points raised in ¶¶84-88 of the Joint CPO Rejoinder.

54. First, the Proposed Defendants seek to downplay the relevance of the frequency of the information exchanges in the chatrooms by suggesting that the only relevant chats are those concerning specific exchanges about spreads. They say "*what is relevant is not how frequently four or five named participating traders exchanged information in two chatrooms. Rather, it is how frequently the subset of those chats which involved specific exchanges about spreads (which the Commission found occurred only "occasionally") would have caused non-Respondent banks: (1) to sustain material losses (or materially reduced profits); (2) to perceive that they were doing so; and (3) in turn, to adopt a commercial strategy of increasing spreads across the board.*" This contention is misconceived for at least two reasons:

    a. It is based upon a fundamental misunderstanding of Mr Evans' case in respect of adverse selection risk. As Professor Rime has explained, increased adverse selection risks would have resulted from a range of commercially sensitive information being exchanged in the chatrooms and not just that relating to spreads.[79] In particular, he notes that the information relating to outstanding customer orders, open risk positions and other current or planned trading activities would result in an information advantage, which gives rise to increased adverse selection risks.[80] The Commission made a clear finding in the Decisions that this information was exchanged on an extensive and recurrent basis.[81]

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76 Joint CPO Rejoinder, ¶¶84 and 86(a). Mr Evans has addressed these points in his Reply Submissions at ¶¶294(a) and 304.

77 Joint CPO Rejoinder, ¶86. Mr Evans has addressed these points in his Reply Submissions at ¶302.

78 Joint CPO Rejoinder, ¶¶85 and 86(b). Mr Evans has addressed these points in his Reply Submissions at ¶¶280 and 294(a).

79 Rime 1, ¶¶172–193 and Rime 2, ¶¶86-89.

80 Rime 1, section 5.2.2.

81 See recital 101 to the TWBS and EE Decisions.

b. In any event, even if the Proposed Defendants' contentions had any force, Professor Rime has also explained that adverse selection risks are assessed on an aggregate basis, and are therefore not conditioned on how frequently information is shared.[82]

55. Second, it is asserted that Mr Evans has "*not even attempted to address [the] disincentives for widening spreads, even in the face of increased adverse selection risks.*"[83] That assertion is also wrong. Mr Evans has addressed the Proposed Defendants' contention that RFIs would have responded to the infringements by maintaining or narrowing their bid-ask spreads in ¶¶272-276 of his Reply Submissions, which the Proposed Defendants themselves have not addressed in the Joint CPO Rejoinder.

56. Third, the Proposed Defendants criticise Mr Evans' contention that the existence and extent of any increase in spreads by RFIs could be the subject of a future regression analysis, adding that "*[a]t this stage of the proceedings the PCRs must establish a sufficiently strong case on the merits to justify the costs and risks of a large opt-out claim. This cannot be done on the basis of an unsubstantiated hope that future economic analysis will support their cases.*"[84]

57. This criticism mischaracterises Mr Evans' submissions. He does not simply rely on an "*unsubstantiated hope*" that Mr Ramirez's analysis will support his contention that the infringements identified in the Decisions would cause harm via increased adverse selection risk. On the contrary, he has put forward a cogent theory of harm based on the expert evidence of Professor Rime.

58. However, in response to the Proposed Defendants' contention (in the Joint CPO Response) that Mr Evans had not suggested that there is evidence to support the contention that RFIs detected increased adverse selection risks as a result of the infringements, and increased their spreads in response,[85] both Professor Rime[86] and Mr Evans[87] explained that the purpose of Mr Ramirez's proposed methodology for

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82 Rime 1, ¶193.

83 Joint CPO Rejoinder, ¶87.

84 Joint CPO Rejoinder, ¶88.

85 The Proposed Defendants make a similar criticism in ¶86(a) of the Joint CPO Rejoinder.

86 Rime 2, ¶¶92-94.

87 See Mr Evans' Reply Submissions, ¶¶306-308.

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.

59. It follows from the foregoing that the Proposed Defendants additional criticisms of Mr Evans' case on adverse selection are unfounded.

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

60. As to the Proposed Defendants' submissions regarding the 'spillover' effects between voice trades and those on electronic platforms, the critical point to note is that the Proposed Defendants now accept that there is some relationship between the two types of trades. At ¶94 of the Joint CPO Rejoinder, the Proposed Defendants helpfully confirm that "*contrary to what Professor Rime (and Mr Evans) appear to assume, the Respondents do not contend that there is no relationship between trades in voice and electronic venues. Rather, the Respondents dispute that there is a "close" relationship between such trades, and dispute that a change in spreads for voice trades would directly impact spreads for E-Commerce Transactions during the relevant period.*" (emphasis original)

61. It follows that the Proposed Defendants do not appear to dispute that a change in spreads for voice trades might (at least) indirectly impact spreads on E-Commerce Transactions. This basic proposition underlies Mr Evans' claim in respect of E-Commerce Transactions, and is nowhere answered in the Joint CPO Rejoinder.

62. Instead, the Proposed Defendants' position is that the causal link between the two types of trades is not strong enough to justify the inclusion of E-Commerce Transactions in opt-out proceedings:[88]

> "Professor Rime's abstract contention that there are "*connections*" between voice and E-Commerce Transactions falls far short of demonstrating a sufficiently strong causative link to justify the inclusion of the latter in opt-out proceedings, given: (1) differences in the services provided to voice and E-Commerce customers; (2) the incentive to narrow spreads in order to gain volume; (3) the lower costs associated with E-Commerce Transactions; and (4) the fierce competition between providers of E-Commerce Transactions. As a result of these factors, market makers offering E-Commerce Transactions almost invariably have the lowest FX spreads on the market, and the level of those spreads will not be materially influenced by the wider spreads applicable to voice transactions (whereas the narrower spreads on electronic transactions are capable of constraining those on voice transactions i.e.,

[88] Joint CPO Rejoinder, ¶49.

> it is likely that there is a direction of causality between the two types of transaction). Professor Rime's responses to these points depend on an untenable view that no market participant, in any venue, would have had incentives to narrow spreads and capture volume."

63. However, given that the existence of such a causal link now appears to be common ground, the assessment of the extent of any such link plainly involves a level of analysis that goes well beyond the high level merits assessment required by Rule 79(3). Indeed, it would require, in particular, consideration of a number of detailed aspects of the operation of electronic trading, having regard to the four points raised by the Proposed Defendants in the extract of the Joint CPO Rejoinder above. In any event, Mr Evans has already addressed those points in his Reply Submissions, and he has explained why there is a sufficiently strong causal link between trades conducted via voice and electronic venues, which is supported by the evidence of Mr Knight and Professor Rime.[89]

64. It follows that the Proposed Defendants' submission that Mr Evans' claims in respect of E-Commerce Transactions are of insufficient strength to be included in opt-out proceedings is without merit.

V. COMPOUND INTEREST

65. The Proposed Defendants submit that any CPO should specify that compound interest is not a common issue.[90] Their central contention is that each individual class member is obliged to prove that the infringements caused it to suffer compound interest losses, and that this will be unique to each class member.[91] This appears to flow from a combination of: (a) the House of Lords' judgment in *Sempra Metals Ltd v Inland Revenue Commissioners*;[92] and (b) a construction of s.47C(2) of the 1998 Act which is said to be "*limited to the quantification of loss; it does not sweep away the requirement that, in order to be recoverable, any losses must be shown to have been caused by the relevant infringement*".[93]

66. In response, Mr Evans' case is that:

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89 See Mr Evans Reply Submissions, ¶¶309-320.

90 Joint CPO Rejoinder, ¶96.

91 Joint CPO Rejoinder, ¶102, ¶105 and ¶106.

92 [2008] 1 AC 561.

93 Joint CPO Rejoinder, ¶103.

a. The award of compound interest is a common issue within the meaning of s.47B(6) of the Act.[94]

b. The Proposed Defendants' position in the Rejoinder is manifestly inconsistent with the radical[95] new provision in s.47C(2) of the Act. Where, as here, an aggregate award of damages is sought, that provision dispenses with any requirement to prove causation and quantum in respect of each proposed class member on an individual basis. Lord Sales and Lord Leggatt (with whom the majority seemingly agreed on this point) confirmed the position in *Mastercard v Merricks*:[96]

> "Section 47C(2) is phrased in broad terms and is properly read as dispensing with the requirement to undertake "an assessment of the amount of damages recoverable in respect of the claim of each represented person" for all purposes antecedent to an award of damages, including proof of liability as well as the quantification of loss. Such an interpretation better accords both with the language used and with the statutory objective of facilitating the recovery of loss caused to consumers by anti-competitive behaviour."

c. Further, the Proposed Defendants' position undermines the approach taken to the principal sum.[97] Where that sum is calculated on an aggregate class-wide basis, under s.47C(2), it makes no sense – and is contradictory to the collective proceedings regime – to then work out what the actual principal loss was on a class member by class member basis, in order then to resolve the question how that class member reacted to a loss of that magnitude (e.g. by borrowing more). Further, that exercise would, in the majority of cases, be so impracticable as to be impossible.

d. Finally, the Proposed Defendants' position ignores the fact that the loss suffered by the classes will inevitably have been compounded. This is well-recognised, including in *Sempra Metals* ("*We live in a world where interest payments for the use of money are calculated on a compound basis. Money is not available commercially on simple interest terms. … If the law is to achieve a fair and just*

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94 Mr Evans' Amended Collective Proceedings Claim Form, ¶142(k).

95 *Mastercard Incorporated v Merricks* [2020] UKSC 51, at [58]

96 *Merricks*, at [97]; Lord Briggs (with whom Lord Kerr and Lord Thomas agreed) proceeded on the same basis: *ibid*, at [58].

97 The process envisaged by the Proposed Defendants would be futile because the Supreme Court held that it is legitimate to distribute to the aggregate award on a per capita basis to the class: *ibid*, [76] and [149].

outcome when assessing financial loss it must recognise and give effect to this reality."[98]). An approach to the collective proceedings regime which essentially barred all claims for compound interest would be unfair and unjust.

e. In the premises, Mr Ramirez's proposed computation of a weighted average interest rate for the proposed classes is appropriate.[99]

67. In any event, the Proposed Defendants note that the same issue as to whether compound interest is a common issue was raised by Mastercard during the remittal hearing in *Merricks*.[100] Mr Evans notes that his approach is on all fours with Mr Merricks. That being so, he suggests that it would be prudent to await judgment in *Merricks* (and in *Trucks*[101]), rather than this Tribunal addressing the same issue at the same time as the panel in those cases and running the real risk of conflicting approaches.

VI. DEFUNCT COMPANIES AND DECEASED PERSONS

68. The Proposed Defendants submit that the class definitions should exclude defunct companies and deceased persons.[102] They say, in particular, that civil claims are a nullity if the claimant is either dead or non-existent at the time when the proceedings are commenced.[103] This means, they say, that such claims could not be brought under s.47A of the 1998 Act and therefore cannot form part of collective proceedings under s.47B.

69. In response, Mr Evans confirms that his intention is to include within the collective proceedings claims where the company has become defunct or the person has died. His intention is to include such claims both where the class member died or became defunct *prior to* proceedings being commenced (which category is, in his understanding, the focus of the Proposed Defendants' submissions), and where the class member died or became defunct *after* proceedings were commenced (whether that has already happened or happens in the future).

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98 [2008] 1 AC 561, per Lord Nicholls at [52].

99 Cf. Joint CPO Rejoinder, ¶110.

100 Joint CPO Rejoinder, ¶7.

101 It is understood that similar issues arise in *Trucks*, which accords with the understanding set out in the Joint CPO Rejoinder, ¶96.

102 Joint CPO Rejoinder, ¶113.

103 Joint CPO Rejoinder, ¶115.

70. Mr Evans' position is that the class definitions, as presently drafted, properly include those claims. In essence, his submission is that the words "*claims to which s.47A applies*" in s.47B do not import with them all the preconditions to the making of a s.47A claim (for example, that a person lacking mental capacity has a litigation friend). Instead, the effectiveness of the regime is promoted by an approach in which the class definition identifies those who suffered the loss, rather than those who, from time to time, hold title to sue for that loss.

71. Mr Evans understands that the PCR in *Merricks* has adopted the same approach in respect of deceased persons.[104] The Tribunal may be aware that the Tribunal panel in *Merricks* is currently considering: (a) whether this approach is acceptable as a matter of law; and (b) if not, whether and how the class definition can be amended to include those claims (in particular, so far as persons who died before proceedings were issued are concerned, whether those claims can be added under Rule 32(2)(a) of the Tribunal Rules). These raise important questions of statutory construction and therefore it makes sense to await the judgments in *Merricks* and in *Trucks*, rather than proceed to hear and determine these issues in parallel with risk of divergent judgments. This is consistent with the approach he has also suggested (at ¶67 above) it would be prudent to follow in respect of the Proposed Defendants' arguments concerning compound interest.

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Brick Court Chambers

11 June 2021

[104] It is understood that similar issues arise in relation to companies in *Trucks*, which accords with the understanding set out in the Joint CPO Rejoinder, ¶113.