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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' WRITTEN SUBMISSIONS ON THE CARRIAGE DISPUTE

A. INTRODUCTION[1]

1. These are Mr Evans' written submissions, served pursuant to paragraph 4(c) of the Tribunal's Order of 15 January 2021. They address the issue of whether Mr Evans or Michael O'Higgins FX Class Representative Limited (the **"O'Higgins PCR**") would be more suitable to act as class representative for the purposes of rule 78(2)(c) of the Tribunal Rules (hereafter referred to as the **"carriage dispute"**).

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

2. These submissions are structured as follows:[2]

   a. **Section B** summarises Mr Evans' submissions.

   b. **Section C** addresses the relevant legal context. In particular, it outlines: (a) the test that the Tribunal should apply in determining the carriage dispute; and (b) the factors that the Tribunal should take into account in its assessment.

   c. **Section D** contains Mr Evans' submissions as to why he would be more suitable to act as class representative, by reference to each of the factors identified in the previous section.

B. SUMMARY OF MR EVANS' SUBMISSIONS

3. Mr Evans' case is that he would be the more suitable person to act as class representative for the purpose of Rule 78(2)(c). He is best placed to advance and protect the best interests of the proposed class members and appointing him as class representative will be fair to the Proposed Defendants.

4. In Section D below, Mr Evans presents his case in respect of each of the factors that are relevant to the Tribunal's consideration of the carriage dispute. Those factors are grouped into three categories. These categories, and Mr Evans' submissions, can be briefly summarised as follows.

5. The first category is the **relative merits of the claims**, which is one of the most important factors in determining the carriage dispute. That is because the claims which have been prepared in the more comprehensive manner, and have the greater prospects of success will be in the best interests of the class members. Mr Evans submits that his case theory is sound and robustly based; materially more comprehensive; supported by a greater breadth and depth of expert evidence; and is suitably tailored to the types of class-wide harm caused by the infringements found by the Commission in its Decisions (the **"Decisions"**). By contrast, the O'Higgins PCR puts forward a case theory that is incomplete, impracticable and inappropriate, given, in particular, that it intends to include claims in respect of conduct that did not cause class-wide harm. Mr Evans therefore

[2] These submissions do not contain a summary of the background to the carriage dispute as the Tribunal is already familiar with the relevant context. Some of that background is summarised in the Tribunal's *Judgment on the Timing of the Carriage Dispute* [2020] CAT 9 at [1]-[6].

submits that he is more likely to succeed than the O'Higgins PCR. His prospects of success are buttressed by both a carefully crafted definition of the proposed classes in his action and the way in which he has formulated and implemented his litigation plan to date.

6. The second category relates to the **relative quality of the proposed class representatives** ("**PCRs**"). This is a relevant and important consideration. Mr Evans submits that he is likely to be the stronger class representative in light of his extensive experience of managing complex, multi-party competition cases; his long-standing commitment to achieving collective redress; and the manner in which he has conducted the proposed proceedings as openly and as transparently as possible. The O'Higgins PCR and those involved in running the SPV (namely, Mr O'Higgins) do not match Mr Evans' experience.

7. The third category is the **relative quality of the PCR's legal teams**. Mr Evans submits that his legal team has the experience, resources and capability to pursue the proposed proceedings in the best interests of the proposed classes. He has also taken a careful and deliberate approach to the litigation. For example, he sought and obtained the Decisions before filing his action. While this meant that the O'Higgins PCR filed its CPO application before Mr Evans, in fact Mr Evans was the PCR that was ready first – he filed a fully pleaded claim in mid-December 2019, over one month before the O'Higgins PCR filed its heavily amended collective proceedings claim form. Since then, Mr Evans has sought to be as thorough and as transparent as possible in preparing for the hearing.

8. Mr Evans chose "*to bring the Proposed Collective Proceedings on an opt-out basis in order to vindicate the right of all class members to compensation and to bring about the added public benefit of enhancing the incentives for compliance with competition laws*."[3] In this way, Mr Evans submits that his action would achieve the central purpose of the statutory scheme to vindicate the rights of victims to compensation.[4]

C. LEGAL CONTEXT TO THE CARRIAGE DISPUTE

The statutory framework

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3 Second Witness Statement of Phillip Evans dated 23 April 2021 (**"Evans 2"**), ¶42.

4 *Mastercard Inc v Merricks* [2020] UKSC 51, at [54].

9. Section 47B of the Competition Act 1998 (the "**1998 Act**") enables proceedings to be brought before the Tribunal combining two or more claims to which section 47A of the 1998 Act applies ("**collective proceedings**"). Section 47A applies to individual claims for damages that a person who has suffered loss or damage may make in civil proceedings brought in any part of the UK: sections 47A(2) and (3)(a) of the 1998 Act.

10. Section 47B(4) provides that collective proceedings may only be continued if the Tribunal makes a collective proceedings order ("**CPO**"). In turn, section 47B(5) provides that the Tribunal may make a CPO only:

    a. If it considers that it is just and reasonable for the applicant to act as a representative in the collective proceedings: sections 47B(5)(a) and 47B(8)(b) of the 1998 Act (the **"Authorisation Condition"**); and

    b. In respect of claims which are eligible for inclusion in collective proceedings. 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: sections 47B(5)(b) and 47B(6) of the 1998 Act (the **"Eligibility Condition"**).

11. The Authorisation Condition is relevant to the carriage dispute and is addressed further in Rule 78(2) of the Tribunal Rules. Rule 78(2) sets out an exhaustive list of factors which the Tribunal "*shall consider*" when determining whether it is just and reasonable for the applicant to act as class representative. These include whether the applicant:

    a. "*would fairly and adequately act in the interests of the class members*" (Rules 78(2)(a) and 78(3));

    b. if there is more than one applicant seeking approval to act as the class representative in respect of the same claims, who "*would be the most suitable*" (Rule 78(2)(c)); and

    c. whether the applicant "*will be able to pay the defendant's recoverable costs if ordered to do so*" (Rule 78(2)(d)).

The test to be applied in the carriage dispute

12. The carriage dispute raises the following question for the Tribunal – which of Mr Evans or the O'Higgins PCR would be the more suitable to act as class representative within the meaning of Rule 78(2)(c)?

13. Mr Evans submits that this question should be answered by choosing the person whom the Tribunal considers would more effectively represent the best interests of all proposed class members. It should also arrive at a decision that is fair to the defendants.

14. Mr Evans' construction is supported by the wording of Rule 78, the Tribunal's Guide to Proceedings (the **"*Guide*"**), this Tribunal's *Judgment on the Timing of the Carriage Dispute*[5] (the "**Carriage Timing Judgment**") and the experience of the Canadian common law provinces:

    a. **Rule 78:** rule 78(2)(a) requires the Tribunal to consider whether each applicant "*would fairly and adequately act in the interests of the class members*". Since collective proceedings are brought on behalf of the class members, their interests ought to be paramount in deciding which class representative should be authorised.

    b. **The *Guide*:** the same focus on the interests of the class members can be seen in the *Guide*. Paragraph 6.32 states that, in resolving a carriage dispute, "*the Tribunal will seek to arrive at a decision which is in the best interests of all class members and is fair to the defendants*".

    c. **The Carriage Timing Judgment:** this Tribunal made clear that the "*whole point of the statutory test*" is to ensure that there will be "*an alignment between the interests of the class and the interests of the class representative*".[6]

    d. **The Canadian common law provinces:** the experience in Canada also points to the centrality of the best interests of the proposed class members in resolving carriage disputes. For example:

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5 [2020] CAT 9.

6 [2020] CAT 9, at [25].

i. In Ontario, the test to be applied on a carriage dispute is set out in section 13.1(4) of the Ontario Class Proceedings Act 2002[7]: "*[o]n a carriage motion, the court shall determine which proceeding would best advance the claims of the class members in an efficient and cost-effective manner*".

ii. In British Columbia, the test is "*which action is most likely to advance the interests of the class members, provide fairness to the defendants, and promote access to justice, behavior modification, and judicial economy*".[8] A similar test is also applied by courts in other Canadian common law provinces such as Manitoba[9] and Saskatchewan[10]. It has also been approved by the Canadian Federal Court of Appeal.[11]

15. As part of the assessment as to which of the PCRs will more effectively represent the best interests of the proposed class members, Mr Evans submits that it is appropriate, and indeed necessary, to compare the merits of the competing CPO applications. Indeed, as the Tribunal has pointed out, "*authorising the most appropriate representative is arguably the single most important issue for the represented class, since it directly determines the approach taken to the action that is being brought in their interests*."[12] It is axiomatic that the interests of the proposed class members will be affected by the strength of the claims that each PCR seeks to bring. It would not be in their best interests for the weaker of two sets of claims to go forward. Rather, their interests will be best served, and best represented, by the Tribunal granting a CPO to the PCR whose application has been prepared in the more comprehensive manner, and has the greater prospects of success.

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7 As amended in 2020, following the Law Commission of Ontario's Final Report *Class Actions: Objectives, Experiences and Reforms* in July 2019 to which the Tribunal referred in the Timing of Carriage Dispute Judgment.

8 *Wong v Marriott International Inc.,* 2020 BCSC 55 at [23].

9 *Thompson et al v Minister of Finance of Manitoba et al; Meeches et al v The Attorney General of Canada,* 2017 MBCA 71 at [24].

10 *Baumung v Bayer Inc. and others; Tluchak v Bayer Inc. and others,* 2016 SKQB 221 at [27].

11 *Laliberte and others v Day and another*, 2020 FCA 119 at [37].

12 Carriage Timing Judgment, [66].

16. It has been suggested, however, that the judgment of the Supreme Court in *Merricks* means that the Tribunal cannot assess the relative merits of the competing CPO applications in resolving a carriage dispute.[13] This suggestion is misconceived for at least two reasons:

    a. First, *Merricks* did not involve a carriage dispute, since there was only one proposed class representative.[14] Therefore, the Supreme Court did not (and did not purport to) address the proper approach to resolving a carriage dispute.[15]

    b. Second, such a suggestion would be contrary to the logic of the judgments in *Merricks*, which emphasise the importance of collective actions facilitating access to justice for claimants. A relative merits assessment furthers this central purpose, since access to justice is best served by the Tribunal certifying the application that has the best prospects of success.

17. With those preliminary points in mind, Mr Evans turns to the factors that the Tribunal should consider in determining in the present carriage dispute.

The factors to be considered in determining the carriage dispute

18. In determining which PCR would be more suitable to act as class representative for the purposes of rule 78(2)(c) of the Tribunal Rules, there are a number of factors that the Tribunal may consider. Mr Evans submits that they can be derived from three sources:

    a. **The *Guide*:** paragraph 6.32 states that the factors that are likely to be relevant to the assessment under rule 78(2)(c) include: (i) the proposed class definition and the scope of the claims; (ii) the quality of the litigation plan; and (iii) the experience of the lawyers of the competing PCRs. It also notes that the Tribunal "*will seek to arrive at a decision which… is fair to the defendants.*"

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13 This was the position adopted by the O'Higgins PCR at the CMC in January 2021 (the **"January CMC"**). See transcript, page 16 lines 24-26; page 17 lines 1-5; page 18 lines 22-26; and page 19 lines 1-5.

14 As the Chairman of this Tribunal rightly pointed out at January CMC, unlike the Proposed Proceedings, *Merricks* was "*a one-horse race*". See transcript, page 17, line 9.

15 The Court's reference at [59] to the certification process as not being about, and not involving, a merits test must be understood in the context of a single proposed class representative.

b. **Case law of the Canadian common-law provinces**: as the Tribunal identified at [40] of its Carriage Timing Judgment, the case law of the Canadian common law provinces has identified a list of up to 17 non-exhaustive factors that might be considered in determining which action is in the best interests of the class.[16] They are: (1) The Quality of the Proposed Representative Plaintiffs; (2) Funding; (3) Fee and Consortium Agreements; (4) The Quality of Proposed Class Counsel; (5) Disqualifying Conflicts of Interest; (6) Relative Priority of Commencement of the Action; (7) Preparation and Readiness of the Action; (8) Preparation and Performance on Carriage Motion; (9) Case Theory; (10) Scope of Causes of Action; (11) Selection of Defendants; (12) Correlation of Plaintiffs and Defendants; (13) Class Definition; (14) Class Period; (15) Prospect of Success: (Leave and) Certification; (16) Prospect of Success against the Defendants; and (17) Interrelationship of Class Actions in more than one Jurisdiction.

c. **Ontario Class Proceedings Act:** the approach to carriage disputes in Ontario has recently been reformed. While, fundamentally, the matters taken into account appear to be relatively unchanged, section 13.1(4) of the Ontario Class Proceedings Act now identifies four factors that are taken into account in a carriage dispute:[17]

> "On a carriage motion, the court shall determine which proceeding would best advance the claims of the class members in an efficient and cost-effective manner, and shall, for the purpose, consider,
>
> (a) each representative plaintiff's theory of its case, including the amount of work performed to date to develop and support the theory;
> (b) the relative likelihood of success in each proceeding, both on the motion for certification and as a class proceeding;
> (c) the expertise and experience of, and results previously achieved by, each solicitor in class proceedings litigation or in the substantive areas of law at issue; and
> (d) the funding of each proceeding, including the resources of the solicitor and any applicable third-party funding agreements as defined in section 33.1, and the sufficiency of such funding in the circumstances…"

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[16] The Tribunal also stated at [41] that "*[i]t is difficult to take issue with this list of factors: all are clearly relevant to the evaluation of the respective merits of the alternative claimants pressing for carriage of the dispute.*"

[17] Ontario had previously used the 17 factors identified in the previous sub-paragraph. See, e.g. *Winder v Marriott International, Inc. and others* 2019 ONSC 5766 at [51].

19. With one exception, each of the factors identified in the previous paragraph may be relevant to the determination of a carriage dispute.[18] Furthermore, the Tribunal mentioned the quantum of the competing claims as a potentially relevant factor in its letter of 12 January 2021.[19]

Mr Evans' proposed framework for the factors to be considered in a carriage dispute

20. Mr Evans considers that it is likely to be unhelpful simply to invite the Tribunal to have regard to the factors identified above without more. Instead, Mr Evans proposes a framework for the Tribunal's consideration of the factors to be taken into account, which is substantially similar[20] to the framework outlined in his Decision Matrix, submitted to the Tribunal on 13 January 2021.

21. The proposed framework is based on the factors identified above, modified in three main ways:

    a. The factors are grouped into three categories for ease of reference and to provide an overall summary of the subject-matter under consideration.[21]

    b. Given that there is a large amount of overlap between the factors identified in the three sources above (and even as between the 17 factors identified in the Canadian case law), a number of factors have been combined in order to reduce the amount of duplication.

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18 Namely, factor (17) in the list of factors identified in the case law of the Canadian common law provinces. This factor reflects a particular feature of the Canadian system, whereby class actions can be brought in more than one province.

19 See point (v)(c).

20 Mr Evans has amended the framework set out in his Decision Matrix such that the quality of each PCR's litigation plan is identified as a separate factor (rather than including it as part of the "preparation and readiness of the action" factor).

21 Indeed, it has been acknowledged that the 17 factors relate to three main issues. In *Wong,* Macdonald J noted at [25]: "*Different factors speak to different considerations on a carriage motion. As Perell J. explained in Rogers… It is useful to note that: factors (1) to (3) concern the qualifications of the proposed Representative Plaintiffs; factors (4) to (8) concern the qualifications of the proposed Class Counsel; and factors (9) to (17) concern the quality of the litigation plan for the proposed class action. Thus, nine of the factors are about or are connected to case theory, which is understandable, because at the very heart of the test for determining carriage is a qualitative and comparative analysis of the case theories of the rival Class Counsel.*"

c. The wording of some of the factors has been changed from the Canadian jurisprudence in order to reflect the issues which would arise in the UK's collective actions regime.[22]

CATEGORY 1: RELATIVE MERITS OF THE CLAIMS
(1) Case theory *This encompasses: (i) factor (9) in the Canadian case law; and (ii) point (a) in section 13.1(4) of the Ontario Class Proceedings Act.*
(2) Class definition *This encompasses: (i) the first part of the first factor identified in paragraph 6.32 of the Guide; and (ii) factors (13) and (14) in the Canadian case law.*
(3) Scope of causes of action *This encompasses: (i) the second part of the first factor identified in paragraph 6.32 of the Guide; and (ii) factor (10) in the Canadian case law.*
(4) Quality of the litigation plan *This encompasses the second factor identified in paragraph 6.32 of the Guide.*
(5) Selection of Defendants *This encompasses factors (11) and (12) in the Canadian case law.*
(6) Quantum *This is included in the Tribunal's letter of 12 January 2021.*
(7) Prospect of success against the Proposed Defendants *This encompasses: (i) factors (15) and (16) in the Canadian case law; and (ii) point (b) in section 13.1(4) of the Ontario Class Proceedings Act.*
CATEGORY 2: RELATIVE QUALITY OF THE PCRs
(8) Quality of the PCRs *This encompasses factor (1) in the Canadian case law.*
(9) Funding arrangements *This encompasses: (i) factors (2) and (3) in the Canadian case law; and (ii) point (d) in section 13.1(4) of the Ontario Class Proceedings Act.*
(10) Arrangements in respect of the Proposed Defendants' recoverable costs (including ATE insurance arrangements) *Mr Evans has included this factor in order to address the consideration of fairness to the Proposed Defendants, identified in paragraph 6.32 of the Guide. It would also encompass the points identified under factor (8) above.*
CATEGORY 3: RELATIVE QUALITY OF THE PCRs' LEGAL TEAMS
(11) The experience of the lawyers of the competing PCRs

[22] This in accordance with Lord Briggs' majority judgment in *Merricks,* at [42].

This encompasses: (i) the third factor identified in paragraph 6.32 of the Guide; (ii) factors (4) and (5) in the Canadian case law; and (iii) point (c) in section 13.1(4) of the Ontario Class Proceedings Act.
(12) Preparation and readiness of the action *This encompasses factor (7) in the Canadian case law.*
(13) Relative priority of commencement of the claim *This encompasses factor (6) in the Canadian case law.*
(14) Preparation and performance at the hearing of the carriage dispute *This encompasses factor (8) in the Canadian case law.*

22. Three further points should be noted about Mr Evans' proposed framework.

23. First, it is not intended to constitute a checklist of factors which must be considered in every carriage dispute.[23] It is also not intended to be an exhaustive list of factors; it is entirely possible that there will be further matters that arise in this and other carriage disputes that it may be relevant to consider, guided by the over-arching principle of reaching the decision which is in the best interests of the class (and, as a subsidiary concern, which is fair to the defendants).[24]

24. Second, if the Tribunal were to conclude, in respect of any given factor, that there were only minor or inconsequential differences between the PCRs, it may treat that factor as neutral or disregard it altogether.

25. Third, in relation to the factors identified in the Canadian common law provinces, Mr Evans submits that the content of, and weight to be accorded to those factors must be interpreted in a way that takes proper account of the particular features of the UK's collective actions regime.[25]

26. In particular, it must be borne in mind that carriage disputes in Canada are determined prior to certification, and at a much earlier stage in proceedings. The Tribunal has decided

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23 In this regard, it is to be noted that the Canadian courts discourage a "tick the boxes" approach to carriage disputes. See *Wong,* [26]. As summarised in a leading textbook on class actions in Canada: "*[u]ltimately, the court must engage in a balancing of the factors to determine which action best melds the cohesive with the comprehensive, and thereby best promotes and protects the identified class.*" See Branch, *Class Actions in Canada* (2nd ed., 2019) at ¶5.160.

24 There may also be some overlap between the factors, as the Federal Court of Appeal acknowledged in *Laliberte* at [42]: "*[n]ot only are these factors not exhaustive; they are also not watertight compartments… the factors "tend to overlap and interconnect.""*

25 This in accordance with Lord Briggs' majority judgment in *Merricks,* at [42].

not to take that approach in this case. That being so, factors which may have less relevance in a carriage dispute in Canada, owing to the stage at which carriage is determined, could have much greater relevance to this carriage dispute, and vice versa.

D. SUBMISSIONS ON THE CARRIAGE DISPUTE

27. In this section, Mr Evans details his submissions in support of his position that he would be more suitable to act as class representative in these proceedings for the purposes of rule 78(2)(c). The submissions are structured by reference to the framework identified in the previous section, and addresses each of the factors in turn. In respect of each factor, Mr Evans addresses:

    a. The content of, and weight to be accorded to, that factor; and

    b. How Mr Evans invites the Tribunal to evaluate that factor in this case.

CATEGORY 1: RELATIVE MERITS OF THE CLAIMS

(1) CASE THEORY

Content of/weight to be accorded to this factor

28. Mr Evans submits that case theory is one of the most important factors to be considered in determining the carriage dispute. The best interests of the proposed classes will be best served by the claim that has been prepared in the more comprehensive manner, with a stronger case theory, and therefore has the greater prospects of success.

29. Case theory is a factor that is taken into account in the Canadian common law provinces. For example, Ontario (following recent reform) takes into account "*each representative plaintiff's theory of its case, including the amount of work performed to date to develop and support the theory*" as one of the four factors that the court shall consider when determining a carriage motion.[26] A further, related factor is "*the relative likelihood of success in each proceeding, both on the motion for certification and as a class proceeding*".[27]

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[26] See section 13.1(4)(a) of the Ontario Class Proceedings Act, set out in paragraph 18.c above.

[27] *Ibid,* section 13.1(4)(b).

30. It is right to acknowledge that the case law in other Canadian common law provinces (and in Ontario prior to the recent reforms) has cautioned against a detailed assessment of the case theories of competing class actions on a carriage motion.[28] However, Mr Evans submits that case law should be distinguished on account of the fact that carriage motions in those provinces are determined at an early stage of proceedings, and prior to certification.[29] Where, as here, carriage and certification are heard together, the issue of carriage can only arise in the event that the Tribunal determines that both CPO applications pass the certification threshold. In those circumstances, it is plainly in the best interests of the proposed classes for the Tribunal to consider which claim has the stronger case theory and the better prospects of success.

31. Mr Evans submits an assessment of each PCR's case theory should encompass an analysis of the strengths and weaknesses of their: (a) theory of harm; and (b) proposed methodology for calculating damages. This assessment must reflect the fact that both PCRs are addressing these matters on a preliminary basis and at an early stage of the proceedings. Nonetheless, the Tribunal can and should form a view on the relative merits of each PCR's overall proposed approach based on the materials filed to date.

32. An analysis of each PCR's case theory should also include a qualitative assessment of the amount of work performed to date to develop and support that theory.[30]

Evaluation in the present carriage dispute

33. Mr Evans submits that case theory is a core differentiating factor between his CPO application and that of the O'Higgins PCR. As explained in this section, his case theory has been formulated in greater detail, with greater precision and has materially better

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[28] However, this is not an invariable approach. Prior to the recent reforms, courts in Ontario acknowledged that it may be appropriate to assess the merits of competing claims in some circumstances. See, for example, *Locking v Armtec Infrastructure Inc.*, 2013 ONSC 331 at [23] and [25] (noting that, when two actions are similar in their strengths, a more detailed analysis may be necessary).

[29] This has been acknowledged in some of the case law. For example, in *Wong*, MacDonald J said in respect of the case theory factor that: "*[t]his is not a certification hearing. At this stage it is neither possible nor appropriate for the court to embark on a detailed analysis of the merits of this class proceeding. The court should only consider whether there are "conspicuous or egregious problems" or "readily apparent advantages and disadvantages in the competing theories""*: see [82].

[30] This is also the approach taken in section 13.1(4)(a) of the Ontario Class Proceedings Act, as explained in paragraph 18.b above.

prospects of success. Indeed, he conducted a significant amount of work prior to filing his CPO application in order to develop and support a sound and robustly based case theory, and his theory of harm and quantum methodology seeks to be as thorough and as precise as possible at this stage of the proceedings, both to assist the Tribunal and best serve the interests of the proposed class members in the event his application is certified. This can be seen, in particular, from the level of detail contained in his experts' reports. By contrast, the O'Higgins PCR has opted for a more conceptual, high-level approach. Its theory of harm is flawed insofar as it includes claims in respect of harm that cannot be calculated on a class-wide basis. Its quantum methodology also contains significant omissions. In particular:

a. Mr Evans' **theory of harm** aptly focuses on the class-wide harm caused by the infringements, in the form of wider bid-ask spreads, and properly distinguishes between the means by which they could cause direct and indirect harm. By contrast, the O'Higgins PCR prefers a high-level theory of harm that: (i) does not sufficiently distinguish between direct and indirect harm; and (ii) seeks to include harm in respect of coordinated trading activities, even though this harm does not occur on a class-wide basis.

b. Mr Evans proposes viable and robust **quantum methodologies** for: (a) enumerating the members of his proposed classes; (b) calculating their VoC; and (c) estimating the harm caused by the Infringements. His methodologies properly take account of the differences between proposed Class A and Class B. Moreover, Mr Evans has set out each step of the proposed methodologies in detail, and he has identified a number of data sources that he may use. By contrast, the O'Higgins PCR's proposed methodology is presented with an appreciable degree of abstraction, and does not address important issues necessary to present a viable methodology to comprehensively quantify harm for all members of the proposed O'Higgins class. In particular, it does not present a robust methodology for calculating the VoC for the O'Higgins class; it uses a dependent variable to measure harm to class members (realised half-spreads) which is inappropriate and which would be difficult to implement in practice; and it has not presented a robust method for calculating indirect harm to the proposed O'Higgins class.

(1) Theory of harm

34. In support of their respective theories of harm, each PCR has served experts' reports which provide their preliminary views on the impact of the infringements identified in the Decisions. Specifically:

    a. Mr Evans has served a report of Professor Dagfinn Rime (**"Rime 1"**). Professor Rime is a Professor of Finance at the BI Norwegian Business School in Oslo, Norway. His central research interest and primary area of expertise is FX market microstructure.[31] Rime 1 also draws upon the report of Mr Richard Knight (**"Knight 1**"). Mr Knight is an expert in FX markets and trading with over 25 years' experience.

    b. The O'Higgins PCR has served a report of Professor Francis Breedon (**"Breedon 1"**). Professor Breedon is a Professor of Economics and Finance at Queen Mary University of London. Latterly, the O'Higgins PCR also served (in October 2020) a report of Professor B Douglas Bernheim (**"Bernheim 1"**). Professor Bernheim is a Professor of Economics at Stanford University. It is understood that Professors Breedon and Bernheim have relied on the expertise of a former FX trader, Mr Reto Feller of Velador Associates.[32] Mr Feller has not filed any evidence in support of the O'Higgins Application.

35. In summary, both PCRs' experts consider that the infringements identified in the Decisions, and in particular the exchange of commercially sensitive information relating to bid-ask spreads and other aspects of FX trading activities, would have resulted in wider bid-ask spreads being charged on FX Spot Transactions and FX Outright Forward Transactions involving G10 currency pairs. They are also of the view that the infringements would produce those effects on:[33]

    a. Transactions entered into with the Proposed Defendants during their relevant infringement periods (i.e. **"direct harm"**); and

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31 Indeed, Professor Rime's work is cited by both the O'Higgins PCR's experts (see, e.g. Breedon 1, footnote 30 and ¶5.6; and Bernheim 1, footnote 19) and the Proposed Defendants in their Joint CPO Response (see, e.g., footnotes 165, 235, 236, 241, 242, 243, 245 and 247).

32 Breedon 1, ¶1.6 and Bernheim 1, ¶13.

33 See, generally: Rime 1, section 5; Breedon 1, sections 4 and 5; and Bernheim 1, section II.

b. Transactions entered into with FX dealers (referred to by each PCR as **"Relevant Financial Institutions"** or **"RFIs"**[34]) that did not participate in the infringements (i.e. "**indirect harm"**).

36. However, as is explained further below, there are two key differences between the theories of harm identified by each PCR's experts:

a. Mr Evans' experts properly and carefully distinguish between the mechanisms by which the infringements identified in the Decisions cause direct and indirect class-wide harm.[35] The O'Higgins PCR's experts do not clearly or sufficiently distinguish between the two. This is significant because the O'Higgins PCR does not appear to propose a workable methodology for calculating harm that properly takes account of the potential difference between direct and indirect harm.

b. The O'Higgins PCR's experts consider that, in addition to wider bid-ask spreads, the infringements would have caused harm to the proposed class as a result of coordinated trading by the Proposed Defendants which sought to manipulate the price of currency pairs (in particular via the practice of "front-running" particular trades). However, as Professor Rime explains, any harm caused by coordinated trading would be short-term in nature and would only affect the specific customers that were transacting at the time of that conduct. Accordingly, this does not constitute harm that can be computed on a class-wide basis. It is therefore inappropriate, and not in the interests of the proposed class members, to seek to include this type of harm in proposed collective proceedings.

(a) Direct vs indirect harm

37. As Professor Rime explains in section 5 of Rime 1, and further in section 5.1 of Rime 2, he considers the infringements identified in the Decisions caused direct and indirect harm in different ways. Therefore, he carefully distinguishes between these types of harm in his reports. To summarise:

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[34] However, the RFIs included in the Evans Application and the O'Higgins Application are different. See paragraphs 90 – 94 below.

[35] This is also reflected in Mr Evans' approach to defining two distinct classes in his proposed proceedings. See paragraphs 76 – 78 below.

a. **Direct harm:** Professor Rime considers that the exchange of commercially sensitive information on bid-ask spreads between the Proposed Defendants would have facilitated coordination on the level of spreads, raising them in excess of the normal, competitive level. This would result in wider spreads being charged on transactions entered into with the Proposed Defendants during their relevant infringement periods.[36]

b. **Indirect harm:** Professor Rime considers that the infringements would cause indirect harm in two main ways:[37]

   i. On the basis that the impact of the infringements was to enable the Proposed Defendants (during their relevant infringement periods) to charge wider-bid ask spreads to their customers, this would, in turn, reduce the competitive pressures on other FX dealers[38]. This caused the wider market to become less competitive, meaning that there was less pressure on those FX dealers to quote competitive bid-ask spreads. As a result, those dealers were able to charge wider spreads to their customers.

   ii. The information exchanged between the participants in the infringements gave them an information advantage over other FX dealers in the inter-dealer market. This increased adverse selection risks, which increased the costs of buying and selling currency in that market. This would, in turn, increase the transaction costs of trading in the inter-dealer market, and FX dealers would pass these costs on to customers.

38. By contrast, the discussion in the reports of Professors Breedon and Bernheim focuses far more on the indirect harm caused by the infringements, in particular by way of increased adverse selection risks. As Professor Rime observes, Breedon 1 and Bernheim 1 contain very limited explanation as to how the infringements identified in the Decisions might cause direct harm to the customers of the Proposed Defendants during their

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36 Rime 1, ¶140(a), Rime 2, ¶115.a.

37 Rime 1, ¶140(b), Rime 2, ¶115.b.

38 This would include the Proposed Defendants outside of their relevant infringement periods.

respective infringement periods, and therefore do not distinguish clearly between direct and indirect harm.[39]

39. This is significant because the O'Higgins PCR does not appear to propose a workable methodology that properly takes account of the difference between direct and indirect harm. Instead, as explained further in paragraphs 65 – 69 below, Professor Breedon proposes (in the absence of any disclosure from RFIs) to calculate harm on the relevant transactions entered into with the Proposed Defendants and extrapolate that to the VoC for the entire O'Higgins class. In effect, this would assume that the direct and indirect harm caused by the infringements was the same throughout the period covered by the Decisions. This assumption is inappropriate since, as Professor Rime explains, the direct and indirect harm caused by the infringements occurred in different ways. It follows that the two types of harm are very likely to be different (or at the very least, it cannot be assumed that they will be the same).[40]

(b) Coordinated trading strategies

40. Mr Evans' proposed claim properly focuses on the (direct and indirect) harm caused by the infringements in the form of widened bid-ask spreads. This is the harm that would be common to the members of the proposed classes.[41]

41. While the O'Higgins PCR's claim also concerns widened bid-ask spreads, its experts further take the view that class members would have suffered harm as a result of actions taken by the Proposed Defendants to manipulate the prices of FX Spot Transactions. They consider that class members would have been harmed by coordinated trading strategies such as collusive front-running, limit order triggering, and benchmark

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39 Rime 2, ¶¶116-117.

40 Rime 2, ¶¶118-121. Indeed, as noted in Ramirez 2 at ¶94, it appears that Professor Bernheim does not necessarily support such an assumption, since he indicates at ¶93 that the impact of the infringements might in fact differ between transactions entered into with the Proposed Defendants and RFIs. This view is, however difficult to reconcile with Professor Bernheim's further statements that he agrees with Professor Breedon's proposed approach to calculating harm to the O'Higgins class (which employs such an assumption).

41 Professor Rime explains at ¶134 of Rime 2 that conduct which widens the bid-ask spread would have an impact on all customers that concluded FX Spot Transactions and FX Outright Forward transactions, albeit that the direct and indirect harm caused by the infringements may affect members of Class A and Class B differently.

manipulation.[42] Professor Bernheim criticises Mr Evans' application for not including these potential effects of the infringements in his claim.[43]

42. Professor Bernheim's criticism is misconceived. As Professor Rime explains, while it is clear from the Decisions that the Proposed Defendants engaged in conduct such as front-running and benchmark manipulation, this type of conduct would not have harmed all class members in a common or consistent way.[44] This is for the following reasons:

    a. First, the effects of coordinated trading are inherently transitory.[45] The purpose of strategies such as front-running or benchmark manipulation is to create a temporary movement in prices in advance of a particular trade (or trades) in order to benefit from favourable post-trade price movements.[46] It follows that any effects of front-running would only be experienced in the small window of time in which that conduct takes place.[47] Therefore, the only class members capable of suffering harm from coordinated trading strategies are those which traded that within that particular window.[48] While Professor Breedon and Professor Bernheim appear to acknowledge that the effects of such conduct would be transitory,[49] they do not explain how this could result in harm that could be reliably computed on a class-wide basis.

    b. Second, even if a class member did enter into a trade during a period in which coordinated trading in respect of that currency pair was taking place, it does not follow that they necessarily suffered loss.[50] In fact, conduct which manipulates prices of a given currency pair in advance of a particular transaction will harm those customers which are trading in the same direction as the targeted transaction,

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42 See Breedon 1 ¶¶6.19-6.20 and ¶¶6.24-6.30 and Bernheim 1, section II.A.2.b.

43 Bernheim 1, ¶¶136, 139, 142 and 145-146.

44 Rime 2, section 5.2.

45 Rime 2, ¶¶129-131; see similarly, in relation to the manipulation of the JPY LIBOR interbank reference rates, Case T-180/15 *Icap v Commission* EU:T:2017:795, at [222].

46 For example, it may consist of conduct that seeks to move the price of a currency pair lower in advance of a customer order to sell currency, with the aim that prices will rise after the trade.

47 Rime 2, ¶¶129-131.

48 Rime 2, ¶133.

49 Breedon 1, ¶6.24; Bernheim 1, ¶¶66 and 70.

50 Rime 2, ¶¶129-133.

whereas those trading in the opposite direction will obtain a benefit.[51] Again, while Professor Bernheim appears to acknowledge this problem,[52] he does not explain how he would solve the problem and identify only harm from this conduct on a class-wide basis.

43. It follows that the harm identified by Professors Breedon and Bernheim in respect of coordinated trading strategies could not be computed on a class-wide basis.[53] Instead, this conduct was only capable of causing harm to a limited subset of class members that were trading during the same time window and in the same direction as the trade (or trades) targeted by the coordinated trading strategy. It is therefore inappropriate, and would not be in the interests of the proposed class members, to include this in collective proceedings. The correct approach, as Professor Rime has identified, is to focus on the harm to bid-ask spreads which was cumulative, long-term and widespread, and is capable of being computed on a class-wide basis.[54]

(2) Quantum methodology

44. Mr Evans' methodology for calculating harm to the proposed classes is set out in the expert report of Mr John Ramirez of Econ One Research Inc. (**"Ramirez 1"**). Professor Rime has also commented on the appropriate methodology for calculating harm in section 6 of Rime 1.[55]

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51 For example, coordinated trading which seeks to reduce the price of a currency pair in advance of a customer order to sell currency would harm other customers with sell orders in the same window, but it would benefit those with orders to buy currency (i.e. because they would be able to purchase the currency pair at a lower price). Professor Bernheim expressly acknowledges this with respect to benchmark trades, as he states (at ¶142) that "*customers who transacted at benchmark prices may have been harmed by the cartels, depending on whether the customer traded with or against the price manipulation.*" (emphasis added)

52 Bernheim 1, ¶¶67-71.

53 Furthermore, as explained in paragraphs 49 – 64 below, Professors Breedon and Bernheim have not, in any event, proposed a viable methodology to compute harm in respect of any instance of coordinated trading.

54 Rime 2, ¶¶126-127.

55 As Professor Rime explains in footnote 32 of Rime 1: "*... as a large amount of research into FX market microstructure involves empirical research into market dynamics, I consider that I am also well placed to offer some brief comments on the appropriate methodology to be adopted. In particular, Mr Ramirez proposes to use regression analysis to quantify the impact of the Cartels, and I have regularly conducted regression analyses as part of my research.*" Mr Ramirez has therefore taken account of Professor Rime's expertise in this area in formulating his proposed methodology.

45. The O'Higgins PCR's methodology is principally set out in section 6 of Breedon 1. However, Professor Bernheim also addresses this in his report, as he was instructed to "*comment on the methodology to calculate damages for class members outlined by Professor Francis Breedon… In particular, I have been asked to evaluate… [w]hether the methodology is sound and, if so, whether and how I would be able to develop and assist in implementing it in practice*".[56]

46. In summary, both PCRs' experts propose to use multiple regression analysis in order to estimate the harm caused by the infringements identified in the Decisions. The key elements of that regression analysis are as follows:

    a. The dependent variable will be a measure of the half-spreads paid by class members. This variable is intended to represent the trade cost incurred by an individual class member on a given FX transaction, by comparing the class member's transaction price to a reference price for the currency pair traded.

    b. The multiple regression analysis will compare the half-spreads during the period covered by the infringements with spreads in an unaffected control period, after controlling for the explanatory variables (other than the infringements) which determine half-spreads.

    c. This will enable an assessment of the extent to which half-spreads were inflated as a result of the infringements, which constitutes the overcharge incurred by class members.

47. However, as explained further below, while the PCRs' overall approaches are similar, there are notable differences, which are important for their reliability and overall robustness:

    a. **Dependent variable:** Mr Ramirez intends to measure the effect of the infringements on the effective half-spread[57] as the dependent variable in his regression analysis. While the O'Higgins PCR's experts also appear to envisage using the effective half-spread in their analyses, they also suggest that they will use

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56 Bernheim 1, ¶9.

57 Mr Ramirez and Professor Rime referred to these as "*half-spreads*" in Ramirez 1 and Rime 1. However, as explained in Ramirez 2 at ¶85 and Rime 2 at footnote 218, the half-spreads referred to in their reports are also known as the effective half-spread.

the realised half-spread as a dependent variable, and appear to indicate a strong preference for the latter. Mr Evans submits that the use of realised half-spreads is flawed. In particular, it is well-established that the realised half-spread is a measure of dealer revenue rather than customer trading costs. It follows that use of the realised half-spread in a regression analysis would not accurately assess the harm suffered by class members as a result of the infringements on a class-wide basis.

b. **Methodology for calculating indirect harm:** unlike Mr Evans, the O'Higgins PCR has not proposed a workable and sufficiently reliable methodology for measuring indirect harm. Instead, it appears that, in the absence of disclosure of any data from RFIs, they intend to extrapolate (or scale) the harm measured on transactions entered into with the Proposed Defendants to the entire VoC for the proposed class in the O'Higgins Application. This approach is misguided. It wrongly assumes that the direct and indirect harm caused by the infringements would be the same. By contrast, Mr Ramirez proposes a methodology to measure the harm on transactions with RFIs that involves using third party data sources which he has confirmed would be commercially available. His analysis properly allows for the possibility that the harm on transactions entered into with RFIs might differ from those entered into with the Proposed Defendants, which is consistent with Professor Rime's analysis summarised in paragraphs 37 – 39 above.

48. Further, as explained in paragraph 70 below, Mr Ramirez has identified certain additional issues with the O'Higgins PCR's proposed methodology which call into question the viability of its proposed approach.

(a) Use of the realised half-spread as a dependent variable in the O'Higgins PCR's regression analysis

49. As noted above, Mr Ramirez (supported by Professor Rime) proposes to measure the impact of the infringements identified in the Decisions on the effective half-spread. The effective half-spread is calculated as the difference between: (i) the price agreed by a class member for a particular FX transaction (i.e. the transaction price, or exchange rate); and (ii) a reference price for the currency pair involved in that transaction (known as the **"market-wide reference price"** or **"market-wide mid-point"**). The market-wide mid-point is calculated based upon the difference between the best bid price, and best ask

price available on the inter-dealer market platforms Reuters and EBS at the time the transaction is concluded.[58]

50. While the O'Higgins PCR's experts also appear to envisage measuring the impact of the infringements on effective half-spreads,[59] they also intend to measure its impact on realised half-spreads. The realised half-spread is the difference between: (i) the price agreed by a class member for a particular FX transaction; and (ii) the market-wide mid-point calculated at some time after the transaction.[60]

51. Professors Breedon and Bernheim indicate a clear preference for using the realised half-spread in their proposed regression analysis. They state that because it accounts for post-trade price movements, it can be used to estimate the harm from coordinated trading activities such as front-running, and would therefore capture a greater proportion of the harm caused by the infringements than using the effective half-spread alone.[61] For example, Professor Breedon states:[62]

> "The Realised Half Spread methodology should, in principle, also capture the harm caused to the Class as a result of activities such as collusive front running, limit order triggering, and benchmark manipulation. This is because, in each case, the colluding Dealers seek to increase their revenues by causing a temporary movement of market prices in their favour, effectively causing the client to trade at a price further away from the 'true' or 'but for' market price. All else being equal, once the Dealers stop exerting pressure upon the market price so as to prompt this upward or downward movement (and potentially begin selling the asset they purchased to realise their gains), the market price should return to the level it would have occupied but for the temporary spike generated by this particular form of Anticompetitive Conduct. The Realised Half Spread measurement should capture this return to 'true' prices post execution."

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58 Ramirez 1, ¶94, Rime 1, ¶¶213-215.

59 See, e.g. Breedon 1 ¶6.20 and Bernheim 1, ¶17.

60 Breedon 1, ¶6.18, Bernheim 1, ¶33. Accordingly, the difference between the effective and realised half-spread is the time at which the market-wide mid-point is calculated: the effective half-spread compares the customer's transaction price to the market-wide mid-point at the same time the transaction is concluded, whereas the realised half-spread compares the transaction price to the market-wide mid-point at some point after the transaction is concluded.

61 Breedon 1, ¶¶6.14-6.21 and 6.24-6.29 and Bernheim ¶36 and sections II.A.2.b and II.A.3.b.

62 Breedon 1, ¶6.24.

52. Similarly, Professor Bernheim criticises Mr Ramirez for not measuring the impact of the infringements on realised half-spreads, and suggests that Professor Breedon's proposed methodology is superior because it does so.[63]

53. Professor Bernheim's criticisms are not accepted. Mr Evans submits that the use of the realised half-spread in any regression analysis is inappropriate and would not advance the interests of the proposed class members. This is for two reasons.

54. First, as Mr Evans has already explained in paragraphs 40 – 43 above, the harm created by coordinated trading activities cannot be computed on a class-wide basis, reliably or at all; and

55. Second, as detailed further below, Professor Breedon and Professor Bernheim's proposal to use the realised half-spread in order to calculate harm to the proposed class is both conceptually and practically flawed. Each of those two types of flaw is now addressed in turn.

(i) Conceptual flaws in the O'Higgins PCR's proposal to measure the impact of the infringements on realised half-spreads

56. The purpose of the regression analysis in this case is to assess the extent to which customers' trading costs (as represented by the appropriate measure of a half-spread) were inflated by the infringements identified in the Decisions.

57. Mr Evans' experts propose to measure the impact of the infringements on effective half-spreads, as they are a well-established and generally accepted measure of a customer's trade cost.[64] This is because the difference between a class member's transaction price and the market-wide mid-point can be viewed as the effective cost paid by the class member to buy or sell that currency pair.[65]

58. By contrast, the O'Higgins PCR's proposal to measure the impact of the infringements on the realised half-spread is conceptually flawed because it does not measure customer trading costs. Instead, by comparing the customer's transaction price to a market-wide

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63 Bernheim 1, ¶136, section IV.B, ¶145 and section IV.D.1.

64 Rime 2, ¶148.

65 Ramirez 1, ¶94.

mid-point some time after the trade, the realized spread captures the FX dealer's net revenue.[66] In other words, as Professor Rime explains, the realised spread measures the dealer's gross revenue at the time of the trade (represented by the effective spread), adjusted for any post-trade price movements.[67]

59. Furthermore, in the literature cited by Professors Breedon and Bernheim in support of using the realised half-spread, that spread metric is not used as a measure of transaction costs incurred by the customer. Rather, it is used to measure net dealer revenue.[68] It follows that their proposal to use the realised half-spread is not in accordance with the literature they cite, and does not constitute a valid method of measuring customer trade costs.

60. Accordingly, the realised half-spread cannot be used to measure harm to class members by the infringements identified by the Decisions. Specifically, it does not, as Professors Breedon and Bernheim suggest, enable an assessment of the harm caused by coordinated trading activities such as front-running. As Professor Rime explains, in order to determine the impact of coordinated trading, it would be necessary to compare the price that the customer would have paid in the absence of coordinated trading (i.e. the counterfactual price) as against the price that the customer did in fact pay. The market-wide mid-point at a time after the transaction would not be an accurate estimation of the counterfactual price, because other factors (unrelated to coordinated trading) may have influenced post-trade price movements.[69]

(ii) Practical flaws in the O'Higgins PCR's proposed use of realised half-spreads

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66 Professors Breedon and Bernheim appear to acknowledge that the realised spread is a measure of dealer revenue. See, for example, Breedon 1, ¶6.19 and 6.21 and Bernheim 1, ¶47. However, they appear to consider that the dealer's revenue and the customer's trading costs are the same thing. This is misconceived, as explained further below.

67 Rime 2, ¶149. Mr Ramirez has also identified, by reference to salient literature, that "*[w]hile the effective spread is a commonly applied measure for modeling customer trading costs, the realized spread is a more commonly applied measure for modeling dealer earnings*." See Ramirez 2, ¶138.

68 Rime 2, ¶149.

69 Rime 2, ¶¶151-153.

61. In addition, there are two significant practical flaws in the O'Higgins PCR's proposed use of realised spreads which make it unworkable as a methodology for calculating harm to the proposed classes.

62. First, while Professors Breedon and Bernheim have suggested that both the effective and realised half-spreads could be used to calculate harm to the proposed class,[70] they have not proposed a methodology as to whether, and if so when, one or both of them will be used as a dependent variable in the regression analysis. It is essential this is identified with as much precision as possible for at least the following reasons:

    a. If Professors Breedon and Bernheim intend to use both the effective and realised half-spread to measure harm on the same set of transactions, it is incumbent upon them to explain how this can be implemented without double-counting the harm to the O'Higgins class.[71]

    b. On the other hand, if they intend to use only one of the effective and realised half-spread to measure harm on particular transactions, it is essential to devise an objective methodology which explains when one or the other will be used. In particular, as Professor Rime explains, if the realised half-spread is used to calculate harm on transactions which are not the subject of coordinated trading, this could significantly underestimate the harm to proposed class members. This is because, in the absence of coordinated trading, post-trade price movements could result in the realised half-spread being smaller than the effective half-spread, even though the class member would be unaffected by any post trade price movements (instead, it would have paid the wider effective half-spread).[72] However, it is unclear how Professors Breedon and Bernheim would be able to distinguish between transactions which were or were not affected by coordinated trading.

63. Second, the O'Higgins PCR's experts have not proposed an objective and sufficiently reliable methodology for identifying the appropriate market-wide mid-point following a

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70 See Ramirez 2, section 4.3.2.1, summarising Breedon 1, ¶¶6.20, 6.23-6.24, 6.34, 6.59(a) and 8.10 and Bernheim 1, ¶17.

71 Ramirez 2, ¶135. As Mr Ramirez notes, this is because Professor Breedon and Professor Bernheim do not appear to suggest that the harm measured by the effective and realised half-spread would be mutually exclusive.

72 Rime 2, ¶¶155-157.

trade in order to calculate the realised half-spread. Instead, their proposed approach is set out in strikingly vague terms:

a. Professor Breedon states that a time horizon of between 1 and 30 minutes for calculating a realised half-spread is favoured by the literature,[73] but he does not identify any objective criteria to identify the specific time that will need to be used to calculate a realised half-spread. Professor Breedon simply says that "*[d]ifferent spreads will be calculated for different mid-prices, with timing ranging from t=0 to t=30 minutes after the trade.*"[74] As Mr Ramirez notes, this suggests that Professor Breedon proposes to calculate at least 30 different realised half spreads. Given that it is likely that there will be millions of transactions in the Proposed Defendants' data, it appears that Professor Breedon proposes to calculate tens of millions of realised half-spreads.[75] In the absence of any objective methodology for determining which of those realised half-spreads will be used to calculate harm to the proposed class, it is unclear how Professor Breedon plans to employ the tens of millions of realised half-spreads he will have calculated.[76]

b. Professor Bernheim similarly does not appear to propose a methodology to address this, and notes that "*[i]t should be possible to evaluate the appropriate length for the window by examining estimates of the price impact based on windows of differing lengths*" and that "*an exploration of price impact estimates for windows of varying durations can provide the guidance required to set the window length appropriately*".[77] Moreover, Professor Bernheim's approach appears to compound the issues identified with Professor Breedon's approach, since he states that he "*would not rule out the possibility of eventually selecting a window shorter than 1*

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73 Breedon 1, ¶6.44. However, as Professor Rime notes, the literature which Professor Breedon (and, indeed, Professor Bernheim) relies upon concerns the equities market and cannot be read-across into the FX market. Therefore, it would not assist in identifying an appropriate post-trade price window. See Rime 2, section 6.2.4.1.

74 Breedon 1, ¶6.44.

75 Ramirez 2, ¶139.

76 Ramirez 2, ¶139.

77 Bernheim 1, ¶123.

minute or longer than 30 minutes."[78] This would result in an even greater number of realised half-spreads being calculated.

64. The lack of clarity on the O'Higgins PCR's proposed approach is significant. As Professor Rime notes, if a wider time window is chosen for calculating a realised spread, it risks becoming increasingly unreliable.[79] This is because there is an increased chance that there will be multiple market events, unrelated to the infringements, which could move the relevant market-wide mid-price. This is especially likely in fast-paced markets such as FX. Professors Breedon and Bernheim have not proposed any methodology for addressing these difficulties and/or controlling for them in their regression analysis. This further contributes to the imprecision in their suggested approach.

(b) Methodology for calculating indirect harm on transactions entered into with RFIs

65. The other major difference between the PCR's methodologies for calculating harm to the proposed classes lies in their approach to calculating indirect harm on transactions entered into with RFIs.

66. Mr Ramirez has proposed a comprehensive methodology for calculating harm on transactions entered into by class members with RFIs. In summary, he proposes to conduct multiple regression analyses on a combination of third-party data sources, which will be adapted where necessary to take account of the differences between them.[80]

67. Mr Ramirez has also undertaken substantial work to identify appropriate data. The third-party data sources he has confirmed may be commercially available to him are:

a. **Multi-bank platforms**: Mr Ramirez confirmed in Ramirez 1 that data would be available from Cboe FX, which was formerly known as "Hotspot". This platform was one of the first electronic communication networks for the institutional FX marketplace.[81] A sample of that data is included in ¶137 of Ramirez 1.

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78 Bernheim 1, ¶123.

79 Rime 2, ¶165.

80 Ramirez 1, sections 6.2.2 and 6.2.3.

81 Ramirez 1, ¶137.

b. **CLS Bank International:** this institution was set up by a group of major FX market participants, known as the G20 banks, for settling FX transactions. By 2010, it settled roughly 43% of all spot transactions.[82] A sample of that data is included in ¶138 of Ramirez 1.

c. **Inter-dealer platforms (EBS and Reuters)**: Mr Ramirez has confirmed the availability of data from Reuters, and a sample is included in ¶103 of Ramirez 1. Furthermore, Mr Ramirez has confirmed that the experts in the class action proceedings in the United States had access to data from EBS.

68. By contrast, the O'Higgins PCR's experts have not proposed a viable methodology for calculating harm on transactions with RFIs:

a. Professor Breedon has not identified any third-party data sources that might be available to calculate harm on transactions entered into with RFIs. Instead, he states that he understands that "*third party disclosure from Dealers not involved in the Cartels may be available*." If so, this "*would enable me to estimate losses across a larger proportion of the market.*"[83] However, neither Professor Breedon nor the O'Higgins PCR have identified how they might obtain that data other than by referring to the possibly of making third party disclosure applications.[84] These applications are likely to be expensive and their outcome is inherently uncertain.

b. In the absence of such data, Professor Breedon proposes to rely on the harm he estimates from the Proposed Defendants' transaction data, and extrapolate that so it represents damages on all transactions covered by the O'Higgins class.[85] This would assume that the overcharge on the transactions entered into with the Proposed Defendants is the same as that on transactions entered into with RFIs (in

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82 Ramirez 1, ¶138.

83 Breedon 1, ¶6.51.

84 The O'Higgins PCR does not take a concrete position on this in its Re-Amended Collective Proceedings Claim Form. See ¶45(3): "*Third party disclosure applications could be made against other banks (who are not Proposed Defendants) for their trading data or organisations which gather transactional data including Nex and Refinitiv. At the current time, it is difficult to say whether such third party disclosure applications will be needed but it is clear that this is another potential source of data, should it be required, for which there is funding.*"

85 Breedon 1, ¶6.54 and 6.59. Professor Breedon states that extrapolation would be undertaken by reference to market share data.

other words, that the direct and indirect harm caused by the infringements is the same). As Professor Rime explains, such an assumption is inappropriate given that the ways in which the infringements would have caused direct and indirect harm is different.[86] Furthermore, since the transactions entered into by the O'Higgins class members could be up to 50-60% of their VoC, this cannot constitute a viable methodology. On the contrary, as Mr Ramirez observes, Professor Breedon's approach would assume more class-wide harm than it measures.[87]

c. Professor Bernheim has similarly not proposed a viable methodology to address this issue. While he notes the overcharge may vary between transactions entered into with the Proposed Defendants and other RFIs, and that it may be possible to include a dummy variable in his regression analysis to reflect transactions entered into with RFIs,[88] his proposed regression analysis relies on the Proposed Defendants' data only.[89] It follows that "*Prof Bernheim will not be able to implement his methodology to estimate a separate overcharge (or any overcharge) on transactions with non-defendant banks. This methodology is obviously unviable because one cannot measure an overcharge on a particular type of transaction (e.g., transactions with non-defendant banks) without data for those transactions.*"[90]

69. It follows that Mr Ramirez's proposed approach to calculating harm on transactions entered into with RFIs is far more comprehensive than that of the O'Higgins PCR and will result in a materially more accurate calculation of harm. In short, he has developed a clear and workable methodology for calculating this harm, and identified a number of

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86 See paragraphs 37 – 39 above.

87 Ramirez 2, ¶93.

88 Bernheim 1, ¶93.

89 Bernheim 1, ¶126. Professor Bernheim does not discuss or identify any other sources of data that he could obtain which would include transactions from RFIs. It is also to be noted that, as Mr Ramirez explains at ¶126 of Ramirez 2, even if transaction data were available from RFIs, there appears to be a conflict between Professor Breedon and Professor Bernheim's proposed approaches to calculating harm based on that data. Specifically, Professor Breedon appears to envisage a separate analysis to measure the overcharge on transactions entered into with RFIs, whereas Professor Bernheim appears to envisage incorporating that data into his existing analysis. Given the apparent incompatibility between their approaches, it is unclear which methodology would be applied if data from RFIs became available.

90 Ramirez 2, ¶126.

data sources that would be available to him, and which do not rely on seeking transaction data from RFIs.[91] Contrary to the O'Higgins PCR, his approach allows him to avoid making any assumptions on the level of the overcharge incurred on transactions entered into with RFIs, which will provide the Tribunal with an empirical basis for assessing harm on those transactions.

(c) Additional issues with the O'Higgins PCR's proposed methodology

70. Furthermore, Mr Ramirez has identified the following additional issues with the O'Higgins PCR's proposed methodology which do not arise in Mr Evans' proposed proceedings:

a. **Class size:** The O'Higgins PCR has not provided a proper estimate of the size of its proposed class.[92] This is surprising given that Rule 75(3)(c) states that "*[t]he collective proceedings claim form shall contain… (c) an estimate of the number of class and any sub-class members and the basis for that estimate*". Mr Ramirez has provided estimates of class sizes in section 4.3 of Ramirez 1 which have been incorporated in Mr Evans' Collective Proceedings Claim Form.

b. **VoC:** it appears that the O'Higgins PCR's experts do not intend to compute VoC in respect of transactions entered into with RFIs. Instead, they intend to calculate harm to the O'Higgins class on transactions entered into with the Proposed Defendants, and extrapolate this estimate of harm to cover the entire O'Higgins class using market share data. As such, the O'Higgins PCR has not detailed a methodology to compute VoC in respect of transactions which may comprise up to

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91 However, Mr Ramirez has confirmed that he could employ transaction data from RFIs into his analysis if it were made available to him during the course of these proceedings: Ramirez 2, ¶128. Nevertheless, his methodology does not depend on obtaining this data.

92 Ramirez 2, section 4.3.4. The description in the O'Higgins PCR's Re-Amended Collective Proceedings Claim Form is in very high level terms. See ¶36: "*It is difficult to estimate the size of the Proposed Class at this stage of proceedings. Nonetheless, the Proposed Representative's best estimate is that the class will be in the thousands or possibly the tens of thousands…*" This paragraph cites ¶27(a) of the first witness statement of Michael O'Higgins, which also takes a high level approach to estimating the size of the class in the O'Higgins Application: "*The Proposed Class is large. I note that in the first witness statement of Belinda Anne Hollway… it is said that the initial distribution in the US Proceedings… has led to over 27,000 US class members having already been paid compensation. Based on these numbers from the US, it seems reasonable to estimate that the number of members of the Proposed Class in the UK is likely to be in the thousands, if not the tens of thousands…*"

50-60% of VoC for its proposed class. In any event, Mr Ramirez considers that the O'Higgins PCR's proposed use of market shares would not be a robust methodology, since the market share data it proposes to rely on does not distinguish the location of the customer.[93] By contrast, Mr Ramirez has set out a detailed methodology for estimating VoC for both of Mr Evans' proposed classes in section 5 of Ramirez 1. First, it contemplates using third party VoC data from the Bank of International Settlements (**"BIS"**) and the Bank of England (**"BoE"**) which isolates VoC with UK customers; and second, he will employ market share data in conjunction with the Proposed Defendants' transaction data in order to sense check and refine his estimates.[94]

c. **Overcharge analysis:** it appears that Professor Bernheim would prefer to measure a separate overcharge via "*a separate cartel dummy variable for every moment in time at which trades occurred.*"[95] As Mr Ramirez observes, measuring a separate overcharge for every moment there is a trade during the infringement period would likely result in the estimation of millions of overcharge estimates. It is unclear whether such an approach is computationally feasible or whether the results would be reliable.[96]

(2) CLASS DEFINITION

Content of/weight to be accorded to this factor

71. The proposed class definition is identified in paragraph 6.32 of the *Guide* as one of the factors that is likely to be relevant to the assessment of the most suitable class representative pursuant to rule 78(2)(c). Similarly, the Canadian common law provinces consider both *"class definition*" and "*class period*" as relevant factors in a carriage dispute.

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93 Ramirez 2, ¶153. Instead, Mr Ramirez considers that a robust methodology would need to consider the possibility that banks' market shares differ depending upon the location of the customer.

94 Ramirez 2, ¶155.

95 Bernheim 1, ¶91. Professor Breedon's preferred approach is unclear, as Mr Ramirez notes in Ramirez 2, ¶147.

96 Ramirez 2, ¶147.

72. Mr Evans submits that the relative merits of the class definitions in each of the claims should be accorded substantial weight in determining the carriage dispute. As with the case theory factor, an assessment of the class definitions is directly relevant to the nature and scope of the claim that is brought on behalf of the proposed class members. It follows that it is an important consideration in determining which claim best promotes and advances their interests.

73. The substance of the assessment under this factor should involve an analysis of the extent to which each class definition appropriately reflects the harm alleged to have been caused by the infringements, and includes harm which has been caused (and can be properly assessed) on a class-wide basis. This includes considering whether the class definition is under or over-inclusive. In this regard, it is to be noted that the *Guide* expresses a preference for a more focused class definition, stating that: "*[t]he class should be defined as narrowly as possible without arbitrarily excluding some people entitled to claim. If the class is too board, the proposed collective proceedings may raise too few common issues and accordingly not be worthwhile.*"[97]

Evaluation in the present carriage dispute

74. The PCRs' proposed classes have some common features – they both relate to the FX Spot Transactions and FX Outright Forward Transactions entered into with the Proposed Defendants and certain RFIs[98] involving G10 currency pairs entered into the EEA[99] between 18 December 2007 and 31 December 2013.

75. Mr Evans' proposed class definitions were devised with care in order to reflect the scope of the class-wide harm caused by the infringements identified in the Decisions. They appropriately reflect the salient differences between class members as to the direct and indirect harm caused by the infringements. That being so, Mr Evans submits that there

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97 See ¶6.37. The case law in the Canadian common law provinces does not contain a clear preference for a broader or narrower claim: see Branch, *Class Actions in Canada* at ¶5.160. Instead, the appropriate scope of the class is assessed on a case-by-case basis in order to consider which approach best serves the interests of class members and will serve to secure the objectives of the class proceedings regime, such as the just, most expeditious and least expensive determination of the class proceedings.

98 Although the RFIs included in each claim are different, as is explained in paragraphs 90 – 94 below.

99 Although each PCR defines this concept in a different way, see paragraphs 86 – 89 below.

are four significant differences between the proposed class definitions, which demonstrate that Mr Evans' approach is more refined in comparison to that of the O'Higgins PCR, and therefore has materially better prospects of success.

Two classes

76. Mr Evans proposes to bring collective proceedings on behalf of two classes:

    a. Class A encompasses the direct harm on transactions entered into with the Proposed Defendants during their infringement periods; and

    b. Class B encompasses the indirect harm of the infringements, as it comprises persons making claims in respect of transactions entered into with: (a) the Proposed Defendants outside their infringement periods; and/or (b) the RFIs.

77. While the claims Mr Evans seeks to bring on behalf of both classes raise a number of common issues,[100] there are two important differences which necessitate defining two separate classes:

    a. **Theories of harm:** as explained in paragraphs 37 – 39 above,[101] Professor Rime considers that the way in which the infringements identified in the Decisions caused direct harm (to Class A) and indirect harm (to Class B) are different.

    b. **Methodologies for calculating harm:** in view of Professor Rime's opinion that the harm suffered by members of Class A and Class B would differ, Mr Ramirez considers that the approach to calculating harm suffered by the classes would also be different in two ways:[102]

        i. **Data sources:** different data sources would be used to calculate harm to members of the Proposed Classes. Specifically:

            1. The harm to Class A would be calculated on the basis of the Proposed Defendants' transaction data.

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100 The common issues arising in Mr Evans' proposed collective proceedings are identified and explained at ¶¶140-144 of his Amended Collective Proceedings Claim Form.

101 See also ¶75(a) of Mr Evans' Amended Collective Proceedings Claim Form.

102 See section 6 of Ramirez 1, and in particular ¶98 (Class A) and ¶¶130-131 (Class B).

2. The harm to Class B would be calculated from a combination of the following data sources: (i) the Proposed Defendants' transaction data to measure harm during their non-infringement periods (i.e. the Relevant Class B Periods); (ii) data from certain FX trading platforms, such as multi-bank platforms;[103] (iii) data from CLS Bank International;[104] and (iv) data from inter-dealer trading platforms, such as EBS and Reuters[105].

ii. **Regression analysis:** while Mr Ramirez intends to use multiple regression analysis to calculate the harm to both Class A and Class B, the regression models used will vary, because:

1. The harm to Class A will be based on a multiple regression analysis applied to the Proposed Defendants' transaction data.

2. The harm to Class B will be based on multiple regression analyses, applied to the different data sources identified above. Where necessary, the regression analyses will be adapted to take account of the differences between these sources. The overcharges calculated as a result of these analyses will be combined into a weighted average overcharge for Class B.

78. By contrast, the O'Higgins PCR proposes to define a single class of all persons affected by the direct and indirect harm caused by the infringements.[106] This is an inappropriate

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103 Those data sources are outlined in paragraph 67.a above.

104 CLS Bank International is described in paragraph 67.b above.

105 These platforms are discussed in paragraph 67.c above.

106 Furthermore, the O'Higgins PCR has confirmed that it does not presently propose any sub-classes in its proposed proceedings. See ¶34 of its Re-Amended Collective Proceedings Claim Form: "*At this stage, the Proposed Representative does not propose any sub-classes. The methodology proposed in the Breedon and Bernheim Reports does not distinguish between transactions in a way which would give rise to a need for sub-classes. The methodology seeks to estimate the average "cartel effect" for a given Relevant Foreign Exchange Transaction – i.e. whether, and if so to what extent, the price of Relevant Foreign Exchange Transactions was on average inflated during the Relevant Period as a result of the Proposed Defendants' anticompetitive conduct, as found by the Commission in the Settlement Decisions.*" Further, while ¶35 suggests that it is possible that sub-classes may in due course be appropriate if (for example) it appears that there are substantial differences in the likely impact of the infringements as between different groups of customers or transactions, however "*such distinctions are not considered necessary or appropriate at this stage in the proceedings.*"

approach because it fails properly to take account of the salient differences between direct and indirect harm.[107] This approach is also reflected in the O'Higgins PCR's proposed methodology, which does not distinguish clearly between the direct and indirect harm caused by the infringements.[108]

Excluded transactions

79. Mr Evans proposes to exclude from his proposed collective proceedings: (a) transactions to execute an FX Spot Transaction and/or an FX Outright Forward Transaction at a specific foreign exchange benchmark rate, such as the WM/Reuters Closing Spot Rates and the European Central Bank foreign exchange reference rates (the **"Benchmark Trades"**) and (b) transactions resulting from a class member leaving a limit order or a resting order (such as a "take profit" or a "stop loss" order).[109] Mr Evans will briefly explain why these transactions have been excluded, before addressing the deficiencies of including them in the O'Higgins PCR's action.

80. **Benchmark Trades:** these trades were excluded because they typically do not involve the application of a bid-ask spread. Accordingly, such transactions would not be affected by the unlawful widening of bid-ask spreads, which is the subject of Mr Evans' proposed proceedings. Furthermore, for the reasons given in paragraphs 40 – 43 above, Mr Evans does not consider that the infringements identified in the Decisions would cause harm to Benchmark Trades that is capable of being computed on a class-wide basis.

81. **Limit orders/resting orders:** these trades were excluded because: (a) a bid-ask spread may not be applied to a number of these transactions; and (b) these orders typically involve the customer specifying the price for the FX transaction. In view of this, it would be difficult to identify whether, and if so how, these transactions would be affected by any widened bid-ask spreads resulting from the infringements. Moreover, while Mr Evans recognises that at least some of these orders may have been affected by the infringements identified in the Decisions, that harm may not be consistent across all transactions. This is explained further in Mr Knight's second report (**"Knight 2"**), where

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107 Those differences are discussed in paragraphs 37 – 39 above.

108 See paragraphs 65 – 69 above.

109 See Mr Evans' Amended Collective Proceedings Claim Form at ¶¶103(b) and (c) and materials cited therein.

he states that there are different ways in which resting orders and limit orders are executed. In particular:[110]

a. In the case of some orders (such as take-profit orders) the customer may earn, rather than pay, a bid-ask spread. As a result, the customer may benefit, rather than be harmed, by the infringements identified in the Decisions;

b. In other cases (such as certain types of stop-loss order) the customer may be subject to an FX dealer's bid-ask spread, and would be harmed by the infringements; and

c. It is also possible that no bid-ask spread would be applied to some of these orders, such that they would not be affected by any widened bid-ask spreads resulting from the infringements.

82. The differences between the ways in which resting orders and limit orders are executed, and may therefore be harmed by the infringements identified in the Decisions, means that it would not be possible to identify and calculate the harm to these transactions on a class-wide basis. This is a further reason Mr Evans considers it appropriate to exclude these trades from his proposed collective proceedings.

83. The Proposed Defendants have indicated that they agree that Benchmark Trades, limit orders and resting orders are correctly excluded.[111]

84. By contrast, the O'Higgins PCR proposes to include the foregoing transactions in its proposed proceedings, and Professor Bernheim has criticised Mr Evans for his proposed exclusions.[112] Those criticisms are not well founded:

a. In respect of **Benchmark Trades**, Professor Bernheim contends these would have been harmed by the Proposed Defendants' coordinated trading strategies, and that harm could be measured by using the realised half-spread as the dependent variable in a regression analysis. However, as explained above: (a) the harm created by coordinated trading strategies (such as benchmark manipulation) did not occur, and

110 Knight 2, sections 6 and 7.

111 Joint CPO Response, footnote 92.

112 See section IV.C of the Bernheim Report.

cannot be reliably measured, on a class-wide basis;[113] and (b) the O'Higgins PCR's proposed use of realised half-spreads is a flawed methodology[114].

b. As to **resting orders (including limit orders)**, Professor Bernheim contends that they would be affected by widened bid-ask spreads,[115] based on a worked example provided in section II.A.3.ii of his report. There are two flaws vitiating this contention:

   i. As Mr Knight's second report explains, Professor Bernheim's worked example is incorrect in that it identifies the wrong trigger point for the resting order. Instead, in the example Professor Bernheim posits, the customer would actually have earned the spread (and therefore benefitted from any widened bid-ask spreads caused by the infringements) rather than paid the spread (and thereby suffered loss); and

   ii. In any event, as explained in paragraph 81 above, given the variety of ways in resting orders are executed, it would not be possible to establish harm to these trades on a class-wide basis.

85. It follows that the exclusion of Benchmark Trades, resting orders and limit orders is appropriate and would be in the best interests of the proposed classes.

Definition of FX transactions entered into in the EEA

86. As noted above, the scope of both claims is limited to FX transactions entered into in the EEA. However, both PCRs define this concept differently:

a. In Mr Evans' proposed proceedings, a transaction is entered into in the EEA where: (a) the Proposed Defendant or Relevant Financial Institution is located in the

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113 See paragraphs 40 – 43 above. In particular, any manipulation of a benchmark rate as a result of the infringements would have harmed those customers that were trading against the direction of the price movement, and would benefit those trading with the price movement.

114 See paragraphs 49 – 64 above.

115 Bernheim Report, ¶141.

EEA[116]; and/or (b) where the class member is domiciled in the EEA. This definition was carefully considered, in particular by reference to the terms of the Decisions.[117]

b. By contrast, the O'Higgins PCR states that a "*Relevant Foreign Exchange Transaction is entered into "in the European Economic Area" where the Relevant Foreign Exchange Transaction is priced and/or accepted by the Relevant Financial Institution or through the ECN within the European Economic Area.*"

87. Mr Evans submits that the O'Higgins PCR's definition, based on where a transaction is priced and/or accepted, is inherently ambiguous. This has two important implications:

a. It may be difficult for class members to consistently identify where their transactions were priced and/or accepted, in order to determine the extent to which they fall within the scope of the proposed class. In particular, it is not clear whether class members would be able to identify where their transaction is priced.

b. It is also unclear how the O'Higgins PCR would seek to apply this definition when calculating damages based on the available data from the Proposed Defendants. For example, it is not presently clear whether FX dealers, such as the Proposed Defendants, would necessarily maintain data as to where the price for a particular transaction is set.

88. By contrast, these difficulties do not arise in Mr Evans' proposed proceedings since the focus is on either the domicile of the class member or the location of the part of the Proposed Defendant that entered into the transaction with the class member. As to this:[118]

a. A definition based on the domicile of the class member is clear and workable, especially as they will already have identified this for the purposes of considering whether they are required to opt-in or opt-out of the proceedings; and

b. Where a class member dealt directly with a particular representative or sales desk, the location of the latter would be clear. Furthermore, it is anticipated that the

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116 A Proposed Defendant or Relevant Financial Institution is 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]*."

117 See the detailed explanation provided in ¶¶87-95 of Mr Evans' Amended Collective Proceedings Claim Form.

118 See further ¶¶92 and 94 of Mr Evans' Amended Collective Proceedings Claim Form.

Proposed Defendants' transaction records would record which sales desk serviced a particular transaction.

89. It follows that Mr Evans' approach to defining when a transaction is entered into in the EEA is to be preferred.

RFIs

90. Both proposed collective proceedings include claims in respect of the indirect (or umbrella) effects of the infringements, by including transactions entered into with entities forming part of certain RFIs listed in their class definitions. Mr Evans' proceedings includes 57 banking groups, whereas the O'Higgins PCR's claim includes 39.[119]

91. Mr Evans' list of 57 RFIs was compiled from two sources:

    a. Institutions which are or were (at any time between 2007 – 2009) "*participating financial institutions*" in the Bank of England Foreign Exchange Joint Standing Committee's semi-annual turnover survey. The "*participating financial institutions*" are said to be those "*financial institutions active in the UK foreign exchange market.*"[120]

    b. Institutions which participated in the Bank of England's submission to the BIS *Triennial Central Bank Survey of Foreign Exchange and Over-the-counter (OTC) Derivatives Markets* (the **"BIS Triennial Survey"**) as a "*reporting dealer*".[121] A reporting dealer is defined as:

> "*... mainly large commercial and investment banks and securities houses that (i) participate in the inter-dealer market and/or (ii) have an active business with large customers, such as large corporate firms, governments and non-reporting financial institutions; in other words, reporting dealers are institutions that are actively*

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119 The 57 RFIs include the 39 RFIs identified in the O'Higgins Application. Furthermore, Mr Evans notes that some of the RFIs included on his list would be included in the O'Higgins list of RFIs since they form part of a wider banking group included on the O'Higgins PCR's list. Specifically, both Adam & Co and Coutts & Co (included on Mr Evans' list) would be included in the O'Higgins PCR's claim as they are part of the RBS banking group.

120 See ¶99(a) of Mr Evans' Amended Collective Proceedings Claim Form and sources cited therein.

121 See ¶99(b) of Mr Evans' Amended Collective Proceedings Claim Form and sources cited therein. Mr Evans used the list of reporting dealers for 2016, as this is the only publicly available version that he has been able to identify.

> *buying and selling currency and OTC derivatives both for their own account and/or in meeting customer demand."*

92. Accordingly, the list of RFIs included in Mr Evans' claim reflects the main institutions offering FX trading services in the UK.[122]

93. By contrast, it is not entirely clear how the O'Higgins PCR assembled its list of RFIs. Its Re-Amended Collective Proceedings Claim Form explains at ¶33(1) that: "*Professor Breedon has used the Bank of England's list of reporting dealers as a means of identifying… market maker banks: see the Breedon Report at paragraphs 4.28 to 4.30.*" Those paragraphs of the Breedon Report rely solely on the FXJSC's list of participating financial institutions included in its April 2015 report to produce a list of 30 RFIs. It is not clear how the O'Higgins PCR identified the further 7 RFIs included in its claim.[123] Moreover, it is similarly unclear why the O'Higgins PCR relied only on that list, and did not consider other FXJSC publications during the period covered by the infringements. It also appears that the O'Higgins PCR was unable to identify a list of reporting dealers to the BIS Triennial Survey, which may explain why those reporting dealers were not included in its list of RFIs.[124]

94. In any event, it is submitted that Mr Evans' approach of including a larger number of RFIs is to be preferred, since it ensures the widest possible redress for the potential umbrella effects of the Proposed Defendants' conduct.

Summary

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122 As explained in footnote 70 of Mr Evans' Amended Collective Proceedings Claim Form, he has "*focussed on the UK since: (i) any other approach is liable to give rise to an unmanageable number of RFIs across the EEA and (ii) the centre of gravity of the proceedings (both due to the location of the Infringements and the domicile of the opt-out class members) is likely to be the UK.*"

123 At least some of these additional RFIs consist of affiliates or aliases of the banking groups listed in the FXJSC survey (such as in the case of "Lloyds Banking Group" and "Lloyds TSB").

124 See Breedon Report, ¶4.29: "*Although a clear list of Reporting Dealers is not provided in the Bank of England's BIS Triennial Survey of Foreign Exchange and Over-the-Counter Interest Rates Derivatives Markets in April 2013… I have identified a document from 2015 from Foreign Exchange Joint Standing Committee of the Bank of England.*" As noted above, Mr Evans was able to identify a list of Reporting Dealers for 2016 and reflected this in his list of RFIs.

95. In light of the foregoing, Mr Evans submits that his proposed class definitions have materially better prospects of success and will facilitate a more accurate assessment of the common issues arising for the proposed classes.

(3) SCOPE OF CAUSES OF ACTION

Content of/weight to be accorded to this factor

96. The *Guide* identifies the "*scope of the claims*" as a factor that is likely to be relevant to the assessment of which PCR would be most suitable for the purposes of rule 78(2)(c).

97. Similarly, the "*scope of causes of action"* is a factor assessed in the Canadian common law provinces. Class actions in Canada may involve a range of causes of action. This is because they are not limited to competition law claims, and instead may concern a variety of subject-matter. By way of an example, the carriage dispute in *Wong* concerned competing class actions resulting from unauthorised access to a guest reservation database maintained by Starwood Hotels & Resorts Worldwide, LLC, which contained personal and financial information for approximately 500 million individuals. A number of (differing) causes of action were alleged by the competing actions, including breach of contract, negligence, breach of statutory duty, the tort of intrusion upon seclusion, waiver of tort and breach of the British Columbia Privacy Act.[125] MacDonald J reviewed the different approaches to the causes of action alleged by each claim and placed "*some but little weight on this factor.*"[126]

98. Mr Evans submits that in the context of the UK's collective actions regime, the analysis of, and weight to be accorded to this factor is likely to vary depending on whether the claims are advanced on a follow-on or standalone basis:

    a. If the claims are advanced on a follow-on basis, there may be very little (if any) difference between the causes of action alleged by the competing PCRs. Typically, the claims will concern breach(es) of statutory duty, relying on the relevant infringement decision(s). However, there may be material differences between the PCRs' cases on causation and damages, which it may be relevant to consider under this factor. For example, the PCRs may advance different cases as to the scope and

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125 See the summary in *Wong* at [84]-[86].

126 *Wong,* [93].

extent of harm caused by the infringements and an analysis of those differences would be apposite in order to determine which approach more appropriately advances the interests of class members. Alternatively, any differences between the claims in this regard may be adequately addressed under the "case theory" or "class definition" factors above, such that no further analysis is required here.

b. If the claims are advanced on a standalone basis, there may be more material distinctions between the causes of action alleged, since the competing PCRs may advance different allegations regarding the infringements of competition law upon which their claims are based.[127] There may also be differences between the PCRs' cases on causation and damages in line with the observations above.

Evaluation in the present carriage dispute

99. Mr Evans submits that this factor should have limited weight in the present case. Both PCRs seek to combine follow-on claims for damages, relying on the Decisions, and allege that the Proposed Defendants' conduct constitutes a breach (or breaches) of statutory duty.

100. While there are material differences between the PCRs' cases on causation and damages, particularly as to the nature and scope of the harm caused by the infringements identified in the Decisions, Mr Evans submits these can differences are adequately addressed under the "case theory" and "class definition" factors, in line with his submissions above.

(4) QUALITY OF THE LITIGATION PLAN

Content of/weight to be accorded to this factor

101. The "*quality of the litigation plan*" is identified in the *Guide* as a factor that is likely to be relevant to the assessment of which PCR would be most suitable for the purposes of rule 78(2)(c). It is submitted that this should be treated as an important factor in determining the carriage dispute. The litigation plan is a key document whereby each PCR explains how it will advance their proposed collective proceedings in the best

[127] For example, competing PCRs may seek to combine claims alleging an abuse of a dominant position contrary to Article 102 TFEU/the Chapter II prohibition in the CA 1998, but they may allege different types of abusive conduct, or allege that the abuses occurred in different ways.

interests of the proposed class members. This is reflected in the description of a litigation plan in the *Guide*:[128]

> "The Tribunal will expect the proposed class representative to have prepared a plan for the collective proceedings which addresses the matters set out in the relevant sub-rule. Such a plan should be sufficiently detailed and comprehensive to correspond to the nature of the particular case. It should explain how the proposed class representative and its lawyers intend to ensure that the collective proceedings will be effectively and efficiently pursued in the interests of the class, referring to the issues likely to arise in the particular case…"

102. The case law in the Canadian common law provinces establishes the standard that a litigation plan must meet is not one of perfection. Rather, it should set out "*a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved*".[129] Mr Evans submits that the Tribunal should adopt the same approach when evaluating the PCRs' litigation plans.

103. An assessment of this factor should encompass the litigation plans as drafted and as implemented. This will provide the most accurate and comprehensive assessment of which PCR's approach to running the proposed collective proceedings is most likely to advance the interests of the proposed class members.

Evaluation in the present carriage dispute

104. Mr Evans submits that he has proposed and implemented a credible, robust and sufficiently detailed litigation plan, which would best advance the interests of the members of the proposed classes. Mr Evans also invites the Tribunal to find that his plan is more detailed, more transparent and better equipped to handle the proposed collective proceedings than the O'Higgins PCR's litigation plan.

105. Mr Evans will first address the litigation plans as filed with the Tribunal and then describe the steps he has already taken in order to give effect to his plan.

Litigation plans

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128 See paragraph 6.30, third bullet point. This extract is followed by a detailed list of the matters that may appropriately be set out in the litigation plan.

129 *Godfrey v Sony Corporation* 2017 BCCA 302, at [253].

106. Mr Evans acknowledges at the outset that the litigation plans of both PCRs cover the points specified by paragraph 6.30 of the Tribunal's *Guide*. He submits, however, that his plan is more detailed and more likely to be capable of managing the proceedings in the best interests of the proposed classes for the following reasons.

107. First, Mr Evans devised his litigation plan with a careful eye on the estimated size and composition of the proposed classes.[130] Unlike the O'Higgins PCR, who simply says the opt-out class "*is likely to be in the thousands, if not the tens of thousands*" of investors who engaged in FX transactions,[131] Mr Evans formulated his proposals on the basis of preliminary estimates of the likely size of the proposed classes and the different types of class members. Not only does this show that Mr Evans has conducted more detailed due diligence before filing his CPO application, it has also helped him to refine his methods of publicising his proposed proceedings and communicating with class members, as described in the next paragraph.

108. Second, Mr Evans has not only proposed to publicise the proposed proceedings using a dedicated website, emails, printed and online media announcements (as also envisaged by the O'Higgins PCR[132]), but also has proposed to contact: (a) several trade associations of entities that may have entered into FX transactions affected by the Infringements;[133] and (b) three global class actions firms that regularly assist investors of the type that may fall within the Proposed Classes.[134] These steps go above and beyond the use of mainstream media. They are carefully tailored to reaching as many of the putative class members as is likely to be reasonably practicable.

109. Third, Mr Evans is committed to being transparent about his work and his current and future engagement with the Proposed Classes. Paragraph 81 of his litigation plan states that he intends to operate openly and to communicate as clearly and as effectively as possible with the Proposed Classes. This can be seen from the number and range of materials placed on his claim website, which – unlike the O'Higgins PCR – provides a

130 Evans Litigation Plan, ¶¶16–19.

131 O'Higgins PCR Litigation Plan, ¶¶18–19.

132 O'Higgins PCR Litigation Plan, ¶30.

133 Evans Litigation Plan, ¶56(d) and Angeion Plan, ¶5.5.

134 Evans Litigation Plan, ¶56(e) and Angeion Plan, ¶5.8.

claim brochure and access to full funding and insurance documentation.[135] Moreover, Mr Evans was the first to publish key claim documents (such as the Collective Proceedings Claim Form, the Decisions, the Litigation Plan and witness evidence in support of his CPO application) on his website in full.[136] Mr Evans' website also provides various ways for members of the proposed classes to raise queries, including FAQs and a contact form[137].

110. Fourth, Mr Evans' costs budget and funding arrangements are to be preferred to those of the O'Higgins PCR for the reasons set out under factors (9) and (10) below.

111. Mr Evans notes that the O'Higgins PCR makes a lot of its lawyers' involvement in the US Class Action and the potential to seek data produced by the defendants in that action.[138] On closer inspection, however, Mr Evans submits that the PCRs' respective positions in relation to the US proceedings is a neutral factor for two reasons:

    a. Mr Evans' solicitors will be just as well-placed to seek such disclosure if that were to be the appropriate course, since their associate US firm, Hausfeld LLP, also acts as co-lead counsel for the plaintiffs in the US.[139]

    b. In any event, the discovery from 16 defendants to the US Class Action may turn out to be irrelevant to the specific pleaded issues in this case, bearing in mind that it related to claims by US domiciled entities and non-US domiciled entities to the extent that their FX trading was transacted through the US, all of which fall outside the scope of the Proposed Proceedings.

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135 Evans Litigation Plan, ¶52 and Evans 2, ¶66.

136 Evans 2, ¶66(a). Mr Evans published those documents on 12 May 2020. The O'Higgins PCR did the same on or around 31 July 2020. Mr Evans has also, more recently, updated his website to reflect that copies of the expert reports served in support of his CPO application are also available to class members on request.

137 Note the O'Higgins PCR's general enquiry email address sends an automated response directing the person to the FAQs on its website (see O'Higgins PCR Litigation Plan, ¶38), whereas Mr Evans' team responds to such queries on a case-by-case basis.

138 O'Higgins PCR Litigation Plan, ¶¶44-48 and Hollway 1, ¶¶16-19.

139 Maton 1, ¶24; Hausfeld created formal information barriers in order to make sure that no one can access or use the confidential documents and data disclosed in the US Class Action other than the members of the Hausfeld team working on the US Class Action: Maton 1, ¶¶25-26.

Mr Evans' implementation of his litigation plan

112. Mr Evans has made every effort to implement his Litigation Plan and the accompanying Notice and Administration Plan in the best interests of the members of the Proposed Classes.

113. First, Mr Evans sought to notify the members of the Proposed Classes of the proposed proceedings through a multi-faceted communications strategy.[140] He has sought to get the right message (publicising the action) to the right persons (the putative class members) using the right media (print, broadcast and online) at the right time (well before the CPO hearing). In particular, Mr Evans has:

a. created and regularly updated a dedicated website that provides user-friendly details of the claim, the proposed classes, the proposed class representative and the current status of the proceedings;

b. engaged a specialist PR firm to publicise the proposed proceedings far and wide, including disseminating a press release about Mr Evans' proposed proceedings to general and specialist, print and online media in 13 different countries (and in the languages of the countries of the G10 currencies covered by his proposed proceedings); and[141]

c. sought to engage directly with members of the proposed classes by making announcements on a dedicated LinkedIn group and a Twitter account.[142]

114. Second, Mr Evans went even further when he disseminated the Joint Publicity Notice earlier this year. In addition to using his website and the other media that had been used to publicise the launch of his proceedings, he wanted to maximise the probability that prospective class members would hear about the CPO applications and enable them to decide whether to participate at the CPO hearing. Accordingly, with the assistance of Coast Communications and Hausfeld, he sent the Joint Publicity Notice to:[143]

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140 Evans Litigation Plan, ¶49 and Angeion Plan, sections 4, 5 and 6.

141 Evans 2, ¶¶69–70.

142 Evans 2, ¶70(b).

143 Evans 2, ¶70(e)-(f).

a. a bespoke mailing list of 397 pension funds, hedge funds, mutual funds and other financial institutions who are likely to fall within the proposed classes;

b. a bespoke mailing list of 71 membership associations, which are likely to have corporate members who fall within the proposed classes; and

c. Institutional Shareholder Services Inc, Institutional Protection Services and Financial Recovery Technologies, each of which assists a large number of institutional investors in connection with class actions.

115. Third, Mr Evans has provided members of the Proposed Classes with updates about recent developments that affect the proposed proceedings. To that end, he co-authored several articles on the Supreme Court's judgment in *Merricks*, which were published in specialist magazines for finance directors and pension schemes.[144] He was also interviewed by Mr Maton about the past, present and future of the UK regime for collective redress, which drew upon his long-standing efforts to promote effective redress in the UK and is available on the claim website.[145]

116. Fourth, Mr Evans has sought and achieved a greater degree of transparency of his proposed proceedings than the O'Higgins PCR. This can be seen, for example, from their contrasting approaches to the disclosure of funding and insurance documentation to members of the Proposed Classes, which was a matter that the Chairman emphasised as important at the CMC in November 2019.[146] Copies of Mr Evans' funding and insurance documents have been available to putative class members on request since 16 September 2020, as envisaged by ¶37 of his litigation plan.[147] By contrast, as at the date of filing these submissions, the O'Higgins PCR's ATE insurance arrangements are not accessible to class members; they have been provided to members of the Joint Confidentiality Ring

144 See Evans 2, ¶71.

145 www.fxclaimuk.com/videos/.

146 Transcript of the CMC, 6 November 2019, p 19.

147 Maton 3, ¶19; see www.fxclaimuk.com/claim-documents/.

only.[148] Moreover, as noted in paragraph 109 above, Mr Evans was the first to publish key claim documents on his website.

117. In summary, for the reasons set out above, Mr Evans has put forward a thoughtful and thorough litigation plan, which is superior to the O'Higgins PCR's plan in certain material respects. Mr Evans has also carried out his plan in ways that were designed to maximise the awareness and engagement of the proposed classes. Thus, Mr Evans invites the Tribunal find that this factor favours him as the proposed class representative.

(5) SELECTION OF DEFENDANTS

Content of/weight to be accorded to this factor

118. The Canadian common law provinces consider both the selection of defendants and the "*correlation of plaintiffs and defendants*" as relevant factors in a carriage dispute.

119. As with the factor relating to "*scope of causes of action*" (i.e. factor (3) above), this factor may have limited weight in the context of the UK's collective actions regime. This is particularly the case for follow-on claims, where the Defendants will usually be the addressees of the relevant infringement decision(s). However, there may be more notable differences in a standalone claim which may prove to be a material point of distinction.

120. In either case, Mr Evans submits that where the PCRs propose to include different Defendants in their proposed proceedings, it would be relevant to consider whether there are any practical or procedural benefits for the proposed class members inherent in that choice.

Evaluation in the present carriage dispute

121. In the present carriage dispute, Mr Evans proposes to bring proceedings against all addressees of the Decisions, whereas the O'Higgins PCR has omitted the MUFG Proposed Defendants[149].

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148 The O'Higgins PCR belatedly removed its litigation funding agreement from the Joint Confidentiality Ring with effect in February 2021: see Scott+Scott's letter of 19 February 2021.

149 However, the O'Higgins PCR does include transactions entered into with MUFG in its proposed proceedings, since it forms part of the list of Relevant Financial Institutions included in its claim.

122. Mr Evans submits this should be a factor in his favour, albeit a minor one given the substantial overlap between the Proposed Defendants in the Proposed Proceedings. There are three advantages to his approach:

a. First, inclusion of all addressees of the Decisions ensures complete vindication of the class members' rights against those undertakings;

b. Second, it avoids any potential procedural difficulties (and associated costs) that might arise concerning MUFG's participation in the proceedings after certification. At present, MUFG are admitted in the O'Higgins Application as parties with an interest seeking to object to the CPO Application pursuant to Rule 76(10)(c) of the Tribunal Rules.[150] If the O'Higgins Application were to be certified, MUFG's participation in any future stages of those proceedings would fall for determination. For example, it may be joined as an Additional Defendant pursuant to Rule 39, or it may seek to intervene in the proceedings pursuant to Rule 16. Those issues would not arise in Mr Evans' proposed proceedings.

c. Third, the inclusion of MUFG ensures that Mr Evans is able to seek disclosure from them in respect of matters which will assist in advancing the proceedings. This is of particular importance since both PCR's methodologies propose to calculate harm to the proposed classes primarily based on an analysis of the Proposed Defendants' FX transaction data. Therefore, inclusion of all addresses of the Decisions, including MUFG, enables Mr Evans to seek FX transaction data from all participants in the infringements. This ensures the widest possible range of data is available to his experts in order operate his proposed methodologies to calculate harm to the proposed class members.[151]

(6) QUANTUM

Content of/weight to be accorded to this factor

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150 See paragraph 2 of the Tribunal's Directions Order made on 18 March 2020.

151 Mr Evans acknowledges that it would be open to the O'Higgins PCR to seek disclosure from MUFG, particularly if they were joined as an Additional Defendant after certification. However, given that MUFG's participation in the O'Higgins PCR's proposed proceedings would (as noted in paragraph 122.b above) fall for determination after certification, the exact route is not currently clear. It may be that, if MUFG is not joined to proceedings, an application for third party disclosure would be required, which would entail increased costs.

123. While quantum is not mentioned as a relevant factor in the *Guide* or in the Canadian common law provinces, the Tribunal indicated in its letter of 12 January 2021 at point (v)(c) that: "*[i]t would be particularly helpful at the CPO hearing to have short submissions as to the nature and impact of any respective differences between the Applicants/Proposed Class Representatives as regards (i) class definition and (ii) the quantum of damages that would be likely to realised if successful.*" Mr Evans has addressed the nature of any differences between the proposed classes in Evans Application and O'Higgins Application under factor (2) above.

124. Mr Evans respectfully submits that the Tribunal should be cautious in attributing much, if any, weight to the quantum of the claims in a carriage dispute. This is for two main reasons:

    a. At the present stage of the Proposed Proceedings, quantum is, by necessity, an estimate. Indeed, both PCRs are required to provide such an estimate by Rule 73(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*"; and

    b. The issue of quantum cannot be disassociated from an assessment of the prospects of the success of competing applications, since the amount claimed by a PCR, even on an indicative basis, must be viewed against the likelihood of recovering the amount sought.

Evaluation in the present carriage dispute

125. As explained in Mr Evans' Amended Collective Proceedings Claim Form, his overall claim for damages is estimated at £2.155 billion excluding interest, £2.633 billion inclusive of simple interest, and £2.687 billion inclusive of compound interest.[152]

[152] See ¶¶272-274.

126. For its part, the O'Higgins PCR estimates that an aggregate award could range between USD 643.66 million and USD 2.574 billion (or between USD 811.55 million and 3.246 billion when applying compound interest).[153]

127. However, consistently with the points made above, Mr Evans submits that the Tribunal should afford very little weight to the quantum estimates provided by each PCR. Indeed, both PCRs have stated that they were only intended to provide a preliminary indication of the size of the claims advanced on behalf of the proposed classes.[154] They 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.

128. For completeness, Mr Ramirez has conducted an analysis of the differences between the PCRs' preliminary estimates of the size of their claims in section 4.4 of Ramirez 2. He notes that while part of that difference is due to the scope of the claims (for example, the exclusion of certain transactions from Mr Evans' proposed proceedings, as explained under factor (2) above), a large amount of the variation can be explained by differences in the methodology adopted for calculating VoC on a preliminary basis. Mr Ramirez considers his approach to be more robust.

(7) PROSPECTS OF SUCCESS AGAINST THE PROPOSED DEFENDANTS

Content of/weight to be accorded to this factor

129. The case law in the Canadian common law provinces identifies both "*Prospect of Success (Leave and) Certification"* and "*Prospect of Success against the Defendants*" as relevant factors in determining a carriage motion. The first of those factors could not be applied

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153 See the O'Higgins PCR's Re-Amended Collective Proceedings Claim Form at ¶81. Professor Breedon's calculations are based on a range "*by indicating the likely overall award that would be generated if different percentage cartel effects are, in time, found and if different percentages of the FX trading through London are assumed to be by UK domiciled entities.*" By contrast, Mr Ramirez has used a single overcharge estimate, and a single VoC figure, for providing his indicative estimates.

154 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*").

in the present carriage dispute since the question of carriage only arises in the event that both applications meet the threshold for certification.

130. Similarly, the position in Ontario (following recent reform) is that "*the relative likelihood of success in each proceeding, both on the motion for certification and as a class proceeding*" is one of the four factors that the court shall consider when determining the carriage motion.[155]

131. Mr Evans submits this factor should be considered as the overarching consideration by reference to which the relative merits of the competing applications should be assessed, and in turn will determine which application best advances the interests of the proposed class members. It should therefore encompass an assessment of the matters raised under factors (1)-(5) above in the round, with a view to determining which CPO application has the greater prospects of success.

Evaluation in the present carriage dispute

132. In Mr Evans' submission, it is clear from the foregoing analysis under factors (1)-(5), which is not repeated here, that his application has materially better prospects of success.

CATEGORY 2: RELATIVE QUALITY OF THE PCRs

(8) QUALITY OF THE PROPOSED CLASS REPRESENTATIVES

Content of/weight to be accorded to this factor

133. Mr Evans submits this is a relevant and important consideration. It necessarily arises in determining which of the PCRs is the more suitable under Rule 78(2)(c) to act in the interests of the class members. Clearly, the stronger the quality of a PCR, the more likely the proceedings brought by that PCR are to be "*effectively and efficiently pursued in the interests of the class*"[156].

134. The assessment under this factor should encompass the experience of the PCRs, and in particular their suitability to manage large and complex litigation, in order to determine

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155 See section 13.1(4)(c) of the Ontario Class Proceedings Act, set out in paragraph 18.c above.

156 Paragraph 6.30 of the *Guide.*

the person that will run the claim most effectively in the interests of the proposed class members.[157]

Evaluation in the present carriage dispute

135. Mr Evans is an economist by training[158] and has taught at the London School of Economics, University of London and the University of North Carolina (London Programme). He also has a number of publications to his name in the field and has a number of professional appointments.

136. It is submitted that three consideration in particular mark Mr Evans out as a stronger quality PCR than Mr O'Higgins.

137. First, Mr Evans has substantial, direct and relevant personal experience in managing collective antitrust litigation and competition investigations.[159] In particular, he has substantial professional experience in the field of competition law:[160]

    a. From 1996 to 2005, he was Principal Policy Advisor at Which?, the largest private consumers' organisation in Europe. A significant part of his role involved advocating in respect of potential infringements of competition law in a number of sectors, including financial services.

    b. From 2009 to 2017, he was a Panel Member, and later an Inquiry Chair at the Competition and Markets Authority (formerly the Competition Commission). In this role, he was involved in conducting investigations into a wide variety of sectors and applying the relevant principles of competition law in a number of different (and often complex) situations.

138. As a Panel Member or Inquiry Chair, Mr Evans conducted a large number of inquiries into mergers, market investigations and regulatory reviews, which were often legally and factually very complex.

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157 The is in line with the factors which the Tribunal would take into account when determining whether it was just and reasonable for a PCR to act as a class representative under rule 78(2), as set out in paragraph 6.30 of the *Guide.*

158 As is Mr O'Higgins. See O'Higgins 1, ¶34(a).

159 See Evans 1, ¶¶34-57.

160 Evans 1, ¶36.

139. He was Inquiry Group Member in the following Competition Commission and Competition and Markets Authority cases between 2009 and 2016:[161]

    a. the Sports Direct International/JJB Sports merger inquiry (7 August 2009 to 16 March 2010, phase 2 clearance);

    b. the Stena AB/DFDS Seaways Irish Sea Ferries merger inquiry (8 February – 29 June 2011, phase 2 clearance);

    c. the Kerry Foods/Headland Foods merger inquiry (12 July – 2 December 2011, phase 2 clearance);

    d. the McGill's Bus Services/Arriva Scotland West merger inquiry (18 April – 21 September 2012, phase 2 clearance); and

    e. the Aggregates, Cement and Ready-mix Concrete market investigation (18 January 2012 – 13 April 2016, phase 2 adverse effect on competition leading to remedies).

140. He was Inquiry Chair in the following CMA cases between 2014 and 2017:[162]

    a. the Xchanging/Agencyport Software merger inquiry (30 September 2014 – 29 April 2015, phase 2 clearance);

    b. the Reckitt Benckiser/K-Y brand merger inquiry (27 October 2014 – 20 June 2016, phase 2 clearance with remedies);

    c. the Linergy/Ulster Farm By-Products merger inquiry (20 May 2015 – 6 January 2016, phase 2 clearance);

    d. the FirstGroup undertakings review (30 October 2015 – 20 April 2016, release of undertakings relating to the completed acquisition by FirstBus plc of SB Holdings Ltd in 1996);

    e. the Arriva Rail North/Northern Rail franchise merger inquiry (29 January – 22 December 2016, phase 2 clearance with remedies); and

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161 Evans 1, ¶48.

162 Evans 1, ¶49.

f. the Firmus Energy, energy licence modification appeal (28 December 2016 – 3 November 2017, appeal by Firmus against a decision by NIAUR (Northern Ireland Authority for Utility Regulation) to modify the conditions of Firmus' Licence).

141. Although the Inquiry process in these cases is inquisitorial rather than adversarial as in court proceedings, the skill and experience he developed in these cases is, it is submitted, directly relevant for and applicable to the management of complex and substantial competition litigation:[163]

a. In each of these inquiries, Mr Evans' role required effective management of multi-disciplinary teams of professionals, including legal and economic experts. He was also frequently required to synthesise a significant amount of information on unfamiliar and often technical matters in order to take key decisions that would shape the direction or outcome of the inquiry/investigation.

b. In particular, as an Inquiry Chair at the CMA, Mr Evans was directly involved in all material developments in the CMA's handling of each investigation by the case team. This included taking decisions on all relevant matters ranging from strategic issues to questions of disclosure of evidence to parties in each case, either as part of the Inquiry Group or on his own under delegated authority from the Inquiry Group.

c. A particularly important part of Mr Evans' Inquiry Chair role was to ensure that each inquiry was able to draw on the widest possible range of experience and expertise to take well-informed and effective decisions. This is, it is submitted, one of the most important parts of the role of a class representative: to provide effective oversight over the team of legal and expert representatives he has instructed in order to deliver the best possible outcome for members of the proposed classes.

142. Mr Evans' roles at Which? and the CMA also provided important experience of the litigation process. He frequently dealt with matters relating to litigation in his role at the CMA, in particular when their decisions were subject to challenge. [164]

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163 Evans 1, ¶¶51-53.

164 Evans 1, ¶54.

143. Accordingly, Mr Evans is used to managing complex and substantial competition law projects, especially involving participants from a range of different backgrounds.

144. By contrast, so far as Mr O'Higgins' involvement through his SPV is concerned, while he has occupied a number of financial services roles and did chair the (now disbanded) Channel Islands Competition and Regulatory Authorities,[165] it is submitted that he does not possess anything approaching the wealth of experience in running large scale in-depth competition investigations and litigation upon which Mr Evans can draw.

145. Second, Mr Evans has taken a number of steps personally to publicise the collective actions regime (both generally, by discussing and publicising developments relating to the regime, as well as specifically in relation to his proposed claims, via press articles, and interviews). This is explained in detail under factor (4) above.

146. In particular, he has brought these proposed proceedings taking as open and transparent an approach as possible. Indeed, Mr Evans was the first to take his funding documents out of the Joint Confidentiality Ring, and to make all of key claim documents available on his claim website.[166]

147. Third, Mr Evans has the support of and can draw upon the experience of an expert consultative panel.[167] The panel is led by Lord Carlile of Berriew CBE QC (a former chair of the Competition Appeal Tribunal among other positions). It also comprises:

    a. Professor Joseph Stiglitz, a Nobel Prize-winning economist, public policy analyst, and a professor at Columbia University. He is also a former Senior Vice President and Chief Economist of the World Bank and is a former member and Chairman of the (US president's) Council of Economic Advisers. Professor Stiglitz's seminal and fundamental contributions on various subfields of economics underpin some

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165 O'Higgins 1, ¶34. This organisation was set up by Jersey and Guernsey in 2010 to co-operate in applying their respective competition laws. By the time of its Annual Report in 2018 (Mr O'Higgins stepped down as chair before the 2019 Report), it comprised in addition to Mr O'Higgins, a chief executive, two executive and two non-executive directors and seven other members of staff (legal, regulatory and administrative). See: https://statesassembly.gov.je/assemblyreports/2019/r.77-2019.pdf. The co-operation was brought to an end at the instigation of Jersey and the organisation disbanded on 30 June 2020. See: https://www.gov.je/News/2020/Pages/CICRADemerger.aspx.

166 Evans 2, ¶66(d).

167 See Evans 1, ¶¶58-63 and further Evans 2, ¶79.

of the economic theories of the expert reports in these proceedings and those of the O'Higgins PCR;[168]

b. Mr David Woolcock, who holds a number of senior FX industry roles including as Chair of the Committee for Professionalism & Vice-Chair of the FXC at ACI – The Financial Markets Association. Mr Woolcock was appointed to replace Mr Keogan,[169] who had to step down from the panel due to work commitments;[170] and

c. Professor Philip Marsden, a professor of law and economics at the College of Europe, Bruges.

148. It is submitted that Mr Evans' consultative panel is at least as experienced as that which has been appointed to advise the O'Higgins SPV.

149. Accordingly, it is submitted that in light of his direct experience and expertise, Mr Evans is a substantially stronger candidate to be selected as a PCR compared to Mr O'Higgins.

(9) FUNDING ARRANGEMENTS

Content of/weight to be accorded to this factor

150. Mr Evans' position, in summary, is that, absent a point which would render one or other PCR unsuitable to be a class representative even if they were the only applicant, the Tribunal is unlikely to be assisted in determining the carriage dispute by a comparison of the rival PCRs' funding arrangements. Certainly, for the reasons set out below, the Tribunal should not favour – for that reason alone – the PCR with a greater budget or more ATE insurance. Such an approach could in fact be detrimental to the interests of class members and Proposed Defendants.

151. Mr Evans treats this particular factor as referring to the funding of a PCR's own costs. Adverse costs funding is addressed separately below. Two factors fall to be considered under the own costs heading: the cost of the funding and the quantity of funding.

Cost of funding

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168 Evans 2, ¶78.

169 Referred to in Evans 1, ¶60.

170 Evans 2, ¶¶76-77.

152. The cost of funding (success fees payable to the lawyers as well as sums payable to the funder) will not be of direct concern to the class members or the Defendants, because, in opt-out proceedings, they will only be payable out of undistributed damages.[171] Furthermore, the Tribunal has the power to limit the payments out of those damages.

153. Nevertheless, the level of return expected by the funder and lawyers may have an indirect effect on the class members and the Proposed Defendants, because a greater expected return requires a greater level of undistributed damages and there is the potential for that to affect judgements about how to pursue the claim (including acceptable levels of settlement) and the distribution of damages.

154. It may also be relevant if one PCR is prepared to put its funding agreements in the public domain and the other is not. A greater commitment to transparency should reassure the Tribunal that a PCR will at all times act in the best interests of the class members.

Quantity of funding

155. Once it is established that a PCR has funding which meets the threshold requirement of Rule 78, it is submitted that a comparison of the quantity of funding available to each PCR in absolute terms is unlikely to be of assistance. Indeed, placing significant weight on this factor would create perverse incentives to the potential detriment of class members and Defendants.

156. The PCR with the greater level of funding cannot necessarily be equated to the PCR which will best represent the interests of class members. The greater the level of committed funding, the greater the minimum return to the funder and hence the greater the undistributed damages required to pay that return. A greater level of funding could also be indicative of inefficiency or a lack of proper planning. Further, to favour a PCR only on the basis of a greater level of funding would be undermine the aims of the statutory regime as:

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[171] Contrast the Canadian cases, where the size of fees payable out of the damages before distribution (and therefore by the class members) has been a significant or sometimes the only factor in determining a carriage dispute: *Asquith v George Weston Ltd* 2018 BCSC 1557; *Chu v Parwell Investments Inc* 2019 ONSC 700.

a. it would allow a PCR to "buy" success in the carriage dispute simply by procuring a greater level of funding, whether or not it was in other respects the most suitable candidate;

b. it would create a perverse incentive to maximise rather than minimise the costs of the proceedings, to the detriment of Defendants as well as the efficient administration of justice generally;

c. as set out above in respect of the funding agreements, an approach which maximises the amounts which have to be paid out of undistributed damages could be detrimental to both class members and Defendants.

Evaluation in the present carriage dispute

Cost of funding

157. Overall, the cost of the funding available to each of the PCRs is broadly similar and Mr Evans does not advance this as a significant point of distinction. However, there are differences in the funding terms which may, in certain scenarios, make the O'Higgins PCR's funding more expensive.

158. Under the funding agreement between Mr Evans and Donnybrook Guernsey Limited (**"the Evans Funder"**) dated 8 July 2020 (**"the Evans LFA"**), upon success, the Funder is entitled (under clause 9.3 of the Evans LFA) to:

a. Twice the Funder's Outlay (in broad terms, the amount actually paid out by the Evans Funder: see clauses 1.2 and 1.24 of the Evans LFA); plus

b. the greater of the Funder's Outlay or the following percentages of Proceeds[172]: 20% of the first £500 million, 15% of the next £500 million, 10% of the next £500 million and 5% of the next £500 million[173]; plus

c. 15% interest per annum in return for the Evans Funder securing the Defendants' pre-CPO costs (see clause 8.13 of the Evans LFA). The amount of the security is £3 million (see clause 8.7 of the Evans LFA). This will not need to be held

[172] Defined as the total damages paid by the Defendants: clause 1.32 of the LFA

[173] If the Funder's Outlay is £18,654,088 in accordance with Mr Evans' budget, then that will be exceeded if the Proceeds are over £93,270,440.

following the grant of a CPO. Assuming it is held for a year and a half in total, this will amount to £675,000.

159. The funding agreement between the O'Higgins PCR and Therium dated 28 July 2019 **("the O'Higgins LFA")** provides in clause 3.1 that, upon success, Therium will receive:

    a. Its actual outlay under the O'Higgins LFA (see the definition of "Reasonable Costs Sum" in clause 1.1); plus

    b. the "Contingency Fee", which is defined (in clause 1.1) as the greater of (i) the applicable multiple of the total "Committed Funds" for all tranches of funding incepted and the "Applicable Contingency Fee Percentage" of the "Claim Proceeds". The "Claim Proceeds" are defined (in clause 1.1) as all payments made to the O'Higgins PCR, including costs as well as damages. The applicable multiple of the Committed Funds depends on the length of time since the date of the O'Higgins LFA, rising over time. Since two years will inevitably have passed before there is any prospect of Claim Proceeds being received, this will be the maximum multiple provided for, of 3 times. The Contingency Fee Percentages are 20% of Claim Proceeds up to £1 billion; 10% above £1 billion and 5% above £2 billion.[174]

160. The O'Higgins PCR's funding costs can therefore be seen to be greater than Mr Evans' in the following respects:

    a. The Contingency Fee as a multiple is calculated by reference to the total Committed Funds rather than the actual outlay. This could make a difference if the proceedings are resolved when a new tranche of £2.5 million has just been incepted.[175] Three times this sum would be £7.5 million.

    b. Where it is calculated as a percentage of the Claim Proceeds, the Contingency Fee under the O'Higgins LFA will include a percentage of the inter partes costs,

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174 If Therium's outlay is assumed to be £29,375,043 as per the budget, then the Contingency Fee Percentage will be greater if Claim Proceeds exceed £440,625,645.

175 Under the O'Higgins LFA, funding is provided in ten tranches, the first of £8 million, the next 8 of £2.5 million each and the tenth of £1,375,043.

whereas under the Evans LFA, a percentage is only chargeable on recovered damages.

c. The minimum return to the Evans Funder is three times the Funder's Outlay whereas the minimum return to Therium is three times the Committed Funds plus its actual outlay. This makes the O'Higgins PCR's funding more expensive with lower levels of recovery.

161. Further, being committed to transparency, Mr Evans has placed all of his funding arrangements in the public domain.[176]

Quantity of funding

162. It is acknowledged that the O'Higgins PCR has a larger budget – and hence a greater amount of committed funding – than Mr Evans. For the reasons set out above, it is submitted that that is of very limited significance.

163. The Defendants do not allege that Mr Evans' funding is inadequate. They must therefore be taken to accept that his funding arrangements make him suitable to be appointed class representative.

164. Mr Evans has in any event kept his budget under review and has produced an updated budget.[177] If the budget requires further revision in the future (whether in respect of Mr Evans' own costs or to purchase additional ATE insurance), there is no reason to think that such funding as may be required will not be available to him. His funder has already demonstrated its commitment to these proceedings by providing additional funding[178] and Mr Chopin expresses his confidence that whatever additional funding is required will be provided in Chopin 3, ¶¶25-27.

165. It is anticipated that the O'Higgins PCR will also revise its budget and detailed comparison of the two budgets (insofar as it assists the Tribunal) will have to await sight of the updated budget, but an important point can be made at this stage. The very significant expenditure by the O'Higgins PCR before issuing its application is indicative

176 See Evans 2, ¶81.

177 See Evans 2, ¶88.

178 See Evans 2, ¶95.

of inefficiency and wastefulness, because it results from the decision to make its application before it had seen the Decisions on which the application is based. This is addressed in more detail under factor (13) below.

(10) ARRANGEMENTS IN RESPECT OF THE PROPOSED DEFENDANTS' RECOVERABLE COSTS (INCLUDING ATE INSURANCE ARRANGEMENTS)

Content of/weight to be accorded to this factor

166. Once it is established that a PCR has – or is able to obtain – sufficient adverse costs insurance to be able to be authorised as class representative, then it is submitted that the precise level of insurance cover is of little or no relevance in determining a carriage dispute. This is for the following reasons:

a. There is no benefit to the class members or the Defendants in a PCR having ATE insurance for the sake of it.

b. A potential limit on a PCR's ability to obtain ATE insurance in advance of the carriage dispute will be market capacity. The determination of the carriage dispute will necessarily free up capacity, because the losing PCR's insurance should in principle be available to the successful PCR.

c. As with own side funding, a PCR should not be able to "buy" victory in the carriage dispute simply by acquiring more ATE insurance than another.

d. An approach which rewards a PCR simply for obtaining more insurance than another could have a distorting effect on the ATE insurance market and be detrimental to the interests of class members and Defendants. The acquisition of more ATE insurance requires the up-front funding of a greater level of deposit premiums and, in the event of success, greater payments of deferred and contingent premiums. The additional funding and additional premiums will both have to be paid for out of undistributed damages, which will need to be that much greater for the exercise to be commercially viable for the funder and insurers. Further, as the facts of this case demonstrate (see below), as market capacity diminishes, further ATE insurance is likely to become more expensive. The result is that purchasing as much insurance as possible before the carriage dispute is determined (at which point market capacity will be freed up) is likely to be less cost-effective than

awaiting the outcome of the carriage dispute and, post-certification, only acquiring ATE insurance which is actually needed. Still further, the response of the ATE market to a regime in which whichever PCR purchases more insurance will win the carriage dispute, may well be to create a premium bidding war between rival PCRs or simply to increase premiums across the board.

Evaluation in the present carriage dispute

167. It is acknowledged that the O'Higgins PCR has acquired a greater level of ATE insurance cover against post-CPO costs than Mr Evans (Mr Evans has £23 million of cover; the O'Higgins PCR has £33.5 million). However, in circumstances where the Defendants do not allege that either PCR's ATE insurance is insufficient to be authorised as class representative, for the reasons set out above, it is submitted that this is not a material factor in determining the carriage dispute.

168. In fact, as indicated above, analysis of the ratings applied by the various underwriters to the policies taken out by each of Mr Evans and the O'Higgins PCR bears out the submission that the O'Higgins PCR's additional insurance has come at greater relative cost.

Mr Evans' ATE Insurance

Layer	**Underwriter**	**Limit of indemnity**	**Maximum premium**[179]	**Rating**[180]
Primary	QLCC	£10m	£5.6m	56%
1st excess	PartnerRe	£4m	£4m	100%
2nd excess	HDI	£4m	£2.4m	60%
3rd excess	IGI	£5m	£3m	60%

O'Higgins PCR's ATE Insurance

Layer	**Underwriter**	**Limit of indemnity**	**Maximum premium**	**Rating**
Primary	Various	£6m	£3.9m[181]	65%
1st excess	Various	£15m	£9m	60%
2nd excess	Various	£5.5m	£3.1625m	57.5%
3rd excess	PartnerRe	£4m	£4m	100%

179 Excluding insurance premium tax

180 i.e. the ratio of net premium to cover

181 Ignoring the additional cost of the anti-avoidance endorsements which have been obtained

4th excess	Litica	£3m	£3m	100%

169. Mr Chopin confirms from conversations with brokers and insurers the natural assumption that, were the O'Higgins PCR's various underwriters to be released from their obligations, additional capacity would be available.[182] It is submitted that it is a reasonable assumption that there will be sufficient competition for what is likely to be an attractive prospect for insurers post-certification that additional insurance will be available at reasonable cost. Indeed, that is particularly likely to be so where the O'Higgins PCR's insurers of the excess layers will already have received substantial deposit premiums while in fact running no risk.

CATEGORY 3: RELATIVE QUALITY OF THE PCRS' LEGAL TEAMS

(11) EXPERIENCE OF THE LAWYERS OF THE COMPETING CLASS REPRESENTATIVES

Content of/weight to be accorded to this factor

170. The *Guide* expressly identifies "*the experience of the lawyers of the competing proposed class representatives*" as a factor that is likely to be relevant to the assessment of which PCR would be most suitable for the purposes of rule 78(2)(c). Mr Evans submits that it is clearly a relevant factor to be taken into account, since it goes to the quality of representation for the proposed class members.

171. This is also a factor taken into account in the Canadian common law provinces. In particular:

    a. The approach in Ontario (following recent reform) is that "*the expertise and experience of, and results previously achieved by, each solicitor in class proceedings litigation or in the substantive areas of law at issue*" is one of the four factors that the court shall consider when determining a carriage motion.[183]

    b. The "*Quality of Proposed Class Counsel*" is also among the list of factors identified in the case law in other Canadian common law provinces (including Ontario, prior to the aforementioned statutory reforms). In *Wong*, MacDonald J observed that the

182 Chopin 3, ¶27.

183 See 13.1(4)(c) of the Ontario Class Proceedings Act, set out in paragraph 18.c above.

quality of proposed counsel factor does not refer to "*which lawyers are the best*"[184] Nor should the quality of counsel "*devolve into a beauty contest but some comparison is inevitable*."[185] Rather, the legal teams' experience and expertise forms part of the court's overall assessment of the case that is likely to be in the best interests of the class.[186]

Evaluation in the present carriage dispute

172. Mr Evans submits that his legal team has the requisite experience, resources, and capability to advance the proposed proceedings in the best interests of the members of the proposed classes for the following reasons.

173. First, Mr Evans' solicitors, Hausfeld & Co LLP (**"Hausfeld"**), have substantial experience in competition litigation in Europe and especially the UK.[187] Hausfeld is a leading disputes-only specialist law firm. Its team comprises highly experienced litigators with a proven track record in competition and commercial litigation. It is one of the few claimant firms with substantive experience in preparing and pursuing multi-party actions for damages.[188] This experience includes acting for 1,300 claimants against *Mastercard*; the action was successfully settled out of court. The Hausfeld competition damages action team — the largest in Europe — has been involved in more recoveries than any other firm.[189]

174. Second, Hausfeld has been committed to the development of collective proceedings regime in the UK. In particular, it was instructed by Which? in order to intervene in Mastercard's appeal to the Supreme Court in *Mastercard v Merricks*. The purpose of Which?'s intervention was "*to ensure the regime achieves its purpose of providing real access to justice*".[190] This point was squarely accepted by Lord Briggs, who pointed out that: "*Collective proceedings are a special form of civil procedure for the vindication of*

184 *Wong,* [57].

185 *Ibid.*

186 *Wong,* [58].

187 Full details of that experience are set out in Hausfeld's firm profile, exhibited Maton 4 as AJM15.

188 Maton 1, Exhibit AJM3 and Maton 4, Exhibit AJM15.

189 See firm profile in Chambers & Partners 2021: https://chambers.com/law-firm/hausfeld-llp-uk-1:193727.

190 See Hausfeld Press Release of 13 May 2020.

private rights, designed to provide access to justice for that purpose where the ordinary forms of individual civil claim have proved inadequate for the purpose".[191]

175. Third, as Mr Maton explains in his first and fourth witness statements, Hausfeld has been involved in a number of high-profile collective actions, including representative actions in the High Court (e.g., *Jukes v Facebook*) and proposed collective proceedings in the Tribunal (e.g., *Gutmann v London & South Eastern Railway* and *Consumers' Association v Qualcomm*). This means that Mr Evans' legal representatives have both the capabilities and experience to advance and pursue Mr Evans proposed proceedings on behalf of the proposed classes.

176. Fourth, it is to be noted, for completeness, that Hausfeld's associate US firm, Hausfeld LLP was appointed co-lead Counsel in the US FX class action. Its co-counsel is Scott+Scott Attorneys at Law LLP, whose UK office is acting for the O'Higgins PCR. Accordingly, it is expected that the Tribunal will treat this as a neutral consideration as between the PCRs.

(12) RELATIVE PRIORITY OF COMMENCEMENT OF THE ACTION

Content of/weight to be accorded to this factor

177. The relative priority of commencement factor concerns the dates on which each CPO application was filed.

178. Mr Evans submits this factor should be of very limited (if any) relevance in determining a carriage dispute. Instead, competing PCRs should be judged on the quality of their CPO applications (and thereby their ability to represent the proposed class members) and not the speed of their filing.

179. It is anticipated that the O'Higgins PCR will submit that this factor should have substantial weight in determining a carriage dispute, relying on the approach adopted in Canada's sole civil law province: Québec, whose law is based on the *Code Napoléon*.[192] In Québec, the default position is to grant carriage to the class representative that is first

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191 [2020] UKSC 51, [45]; see also [54]: "*The evident purpose of the statutory scheme was to facilitate rather than to impede the vindication of those rights*".

192 It has already sought to do so, as can be seen in the Further Submissions of the O'Higgins PCR for the CMC on 15 January 2021, dated 14 January 2021, at ¶8.

to file their claim, but courts may depart from that principle where it would not be in the interests of the proposed class.[193]

180. Adopting a first-to-file approach to determining carriage disputes in the UK's collective actions regime would be inappropriate for five reasons.

181. First, there is no support for such an approach in the Tribunal's Rules and the *Guide.* On the contrary, the guidance on carriage disputes given in paragraph 6.32 of the *Guide* clearly emphasises the need for a qualitative assessment of the competing applications, having regard to considerations such as the proposed class definition and scope of the claims, the quality of the litigation plan, and the experience of the lawyers of the competing PCRs. There is no mention of a first-to-file approach.

182. Second, a first-to-file approach would be unprincipled. As noted above, the primary consideration in resolving a carriage dispute is the best interests of class members. The date on which a CPO application is filed is an unreliable indicator of whether or not that application will best advance their interests.

183. Third, a first-to-file approach risks creating perverse incentives. It encourages the filing of rushed applications, without undertaking the appropriate preparation and research, in order to gain an advantage in any carriage dispute that may follow. That is entirely contrary to the interests of the proposed class members.

184. Fourth, it is to be noted that the first-to-file rule is not used in any other province in Canada. As Edmond J stated in *Thompson*:[194]

> "… The Province of Quebec is the only province in Canada that has adopted a "first to file" rule. Courts in Ontario and in most jurisdictions across Canada have rejected that rule."

185. Indeed, while the approach to carriage disputes in Ontario has recently been the subject of statutory reform, a first-to-file approach was not adopted. The Law Commission of Ontario, in considering potential options for reform to carriage disputes, identified a number of problems with Québec's rule. It noted that "*the rule has distinct disadvantages*

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193 See, e.g., *Laliberte v Attorney General of Canada* 2019 FC 766 at [40].

194 *Thompson et al. v Minister of Justice of Manitoba et al.; Meeches et al. v The Attorney General of Canada* 2016 MBQB 169 (Court of Queen's Bench of Manitoba) at [52]. See also *Nelson v Merck; Harry et al. v Merck,* 2006 BCSC 1549 (Supreme Court of British Columbia) at [31].

in that it potentially promotes a race to the courthouse and hastily drafted, poorly researched actions."[195] It further stated that "*Québec's first to file rule is controversial. The Ontario-based stakeholders consulted by the [Law Commission of Ontario] universally rejected this approach, believing that this model encourages a "race to the courthouse" and bad judgment, without regard to the best interests of class members.*"[196] The rule was rejected when the Ontario legislature came to revise its Class Proceedings Act in 2020.

186. Fifth, the recent judgment of the High Court of Australia in *Wigmans v AMP Limited*[197] provides strong persuasive authority against a first-to-file approach. In that case, the majority of the High Court emphatically rejected Ms Wigmans' preferred first-in-time approach when considering how to manage five overlapping representative actions. Gageler, Gordon and Edelman JJ pointed out that such an approach "*leads to an "ugly rush" to the court door, including but not limited to the framing of causes of action and claims for relief as broadly as possible to gain so-called "juridical advantages"*.[198] As explained below, the application made by the O'Higgins PCR bear out these concerns.

187. For completeness, Mr Evans notes that when considering whether to order a stay of some of the competing actions, the High Court of Australia acknowledged that a first-in-time approach could be a relevant consideration, but it would be less relevant in cases where the competing proceedings within a short time of each other.[199] As explained at paragraph 189 below, Mr Evans filed his application only a short time after the O'Higgins PCR and indeed a short time before the O'Higgins PCR filed and served its Amended Collective Proceedings Claim Form (which, as also explained in paragraph 189 below, was amended to reflect the terms of the Decisions, whereas Mr Evans had already considered and incorporated the terms of the Decisions in his CPO application before it was filed).[200]

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195 The Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms*, Final Report: 2019 at page 25.

196 *Ibid.*

197 [2021] HCA 7.

198 *Ibid,* [86].

199 *Ibid,* [107].

200 It is also to be noted that the later filing of Mr Evans' application has not impacted on the progress of the Proposed Proceedings at all. See paragraph 191 below.

Evaluation in the present carriage dispute

188. Mr Evans submits the Tribunal should accord no weight at all to the fact that the O'Higgins PCR was first to file its CPO application. This is principally for the reasons given above. Moreover, there are two further reasons why the relative priority of commencement of the CPO applications should be considered irrelevant in the circumstances of this carriage dispute.

189. First, the disparity as to the dates on which each CPO application was filed reflects a fundamental difference in approach between the PCRs in preparing their applications. The O'Higgins PCR filed its CPO application prematurely, whereas Mr Evans adopted a far more prudent approach. This is addressed further under the factor (13) below, however the salient points for present purposes are as follows:

    a. The O'Higgins Application was filed on 29 July 2019, without sight of the Decisions on which its claim was based. Instead, the O'Higgins PCR relied on the press release issued by the Commission, which summarised the Decisions in high-level terms. As a result:

        i. Despite being a follow-on claim for damages, the application was not properly pleaded by reference to the exact terms of the Decisions,[201] and relied (inappropriately) on findings of other regulatory authorities;

        ii. The application was materially incomplete. For example, an important part of its class definition, concerning the currency pairs included in the claim, could not be identified until the O'Higgins PCR had reviewed the Decisions; and

        iii. Accordingly, the O'Higgins PCR was forced to file a substantially amended version of its CPO application, once it had sight of the Decisions. This took place on 28 January 2020, after the Evans Application had filed.

    b. By contrast, Mr Evans sought and obtained disclosure of the provisional non-confidential versions of the Decisions in advance of filing his CPO application on

[201] As the Proposed Defendants were forced to point out in correspondence, see paragraph 217 below.

11 December 2019. As such, it was fully pleaded by reference to the Decisions, and it has required minimal amendment thereafter.

190. In Mr Evans' submission, the differences in approach as between the PCRs in this case demonstrates clearly why it would be inappropriate to adopt a first-to-file approach in the UK's collective actions regime. It would incentivise conduct such as that of the O'Higgins PCR, whereby CPO applications are filed in a rushed and incomplete fashion, and require significant amendment thereafter.

191. Second, and in any event, the later filing of the Evans Application has not impacted on the progress of the Proposed Proceedings at all.[202] On the contrary, both applications could have been heard together at the hearing date originally fixed for March 2021.[203]

(13) PREPARATION AND READINESS OF THE ACTION

Content of/weight to be accorded to this factor

192. The "*Preparation and Readiness of the Action*" is a relevant factor in determining carriage motions in the Canadian common law provinces. As Chief Justice Strathy observed in *Mancinelli*, "*since only one firm will go into battle, it is not unreasonable to ask which has done the best job in preparing itself for battle and whether its preparation has yielded benefits for the class.*"[204]

193. On the facts of the carriage motion in *Mancinelli*, the Ontario Court of Appeal noted that the motion judge had concluded that the party granted carriage had conducted "*the more superior investigation and analysis of the issues herein and is more prepared… to assume carriage of this proceeding forthwith.*" He also found that the pleading of the party granted carriage "*demonstrated a more informed and sophisticated understanding of the underlying factual issues*", which was achieved through "*on-the-ground legal work*".[205]

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202 This is a relevant consideration in the Canadian jurisprudence. In *Laliberte* the Federal Court noted that while one action was filed before another "*it is of no great importance in the overall scheme of the litigation as the gap in timing does not appear to materially affect the progress of the respective actions.*" ([61]).

203 That date was originally fixed in the O'Higgins Application at the CMC in November 2019.

204 *Mancinelli v Barrick Gold Corporation* 2016 ONCA 571 at [52].

205 The motion judge's conclusions are summarised in [53]-[54], and described by Chief Justice Strathy as "*appropriate and supported by the evidence*" at [55].

194. Mr Evans submits that case preparation should be considered an important factor in determining a carriage dispute. It is axiomatic that the interests of the proposed class members will be best served by the claim which demonstrates a superior degree of preparation. The assessment should therefore focus on which PCR has prepared its claim in the more comprehensive manner, and whether that preparation has yielded benefits for the proposed class members.

Evaluation in the present carriage dispute

195. Each of the PCRs has taken a substantially different approach to preparing and advancing their CPO applications:

    a. Mr Evans' application has been carefully and comprehensively prepared following his decision to seek disclosure of the Decisions upon which his proposed claim is based. It has required minimal amendment after it was filed; and

    b. By contrast, the O'Higgins Application was filed prematurely, without sight of the Decisions. As a result, the O'Higgins PCR has been forced to amend and supplement its application on multiple occasions thereafter This has resulted in a lower-quality application which has required significant amendment on multiple occasions after it was filed, including so that it properly followed-on from the exact terms of the Decisions.

196. For the reasons set out below, Mr Evans submits this difference is one of the most important differentiating factors between the two CPO applications, and clearly favours his application. His approach to preparing and advancing his CPO application is plainly more efficient and best serves the interests of the proposed class members.

Mr Evans' approach to preparing and advancing his CPO application

Obtaining disclosure of the Decisions from the European Commission

197. As Mr Evans explains in ¶¶25-28 of Evans 1,[206] he considered that it was important to seek to obtain copies of the Decisions in advance of filing his CPO application, given that the claims would be advanced on a strictly follow-on basis. Obtaining copies of the

[206] See also Evans 2, ¶50.

Decisions would enable Mr Evans to set out the basis of his proposed claims as fully as possible, taking proper account of the exact terms of the Decisions.

198. Accordingly, Mr Evans' representatives sought to obtain copies of the Decisions directly from the Commission by invoking the EU Access to Documents Regulation (the **"Regulation"**).[207] A request was first made on 5 July 2019. It was anticipated that the Commission would provide copies of the Decisions in short order, as Article 7(1) of the Regulation provides that the Commission shall, within 15 working days of registration of an application for access to documents, either grant access to the document requested or state the reasons for a total or partial refusal of access.[208]

199. In the event, as explained in ¶¶14-15 of Maton 1, it took much longer than anticipated to obtain copies of the Decisions from the Commission, and non-confidential versions were finally provided on 1 October 2019.

200. A large amount of the delay was caused by the Commission's Directorate-General for Competition erroneously refusing to grant access to the Decisions by its decision on 29 July 2019. As a result, Mr Evans was forced to make a confirmatory request pursuant to Article 8 of the Regulation in order to ask the Commission to reconsider its position. That request was made on the same day (i.e. on 29 July 2019). As with the initial request under Article 7 of the Regulation, it was anticipated that the confirmatory request would be resolved relatively swiftly, given that Article 8(1) also provides that the Commission shall respond within 15 working days of that application.[209]

201. However, despite the diligent persistence of Mr Evans' representatives, the confirmatory application was not resolved until well after the deadline set out in the Regulation. Some 44 working days later, on 1 October 2019, the Commission overturned its previous

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207 Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2011 regarding public access to European Parliament, Council and Commission Documents. OJ L 145, 31.5.2001, pp.43-48.

208 While Article 7(3) of the Regulation provides that the time limit may be extended by a further 15 working days, this is only available in "*exceptional cases*, *for example in the event of an application relating to a very long document or to a very large number of documents*". It was therefore not anticipated the Commission would need to invoke this provision.

209 Article 8(2) of the Regulation provides for an extension of 15 working days under the same conditions as Article 7(3). For the same reasons as set out in the previous footnote, it was not anticipated that the Commission would need to invoke this provision.

decision and granted full access to the non-confidential versions of the Decisions. Mr Evans' application was filed 71 days later, on 11 December 2019.

Preparation of the Evans Application following disclosure of the Decisions

202. As Mr Evans observes in ¶28 of Evans 1: "*I consider it to be very beneficial to have obtained copies of the Decisions from the Commission, because it has enabled my legal team to set out the claims against the Proposed Defendants in much greater detail than would have been the case absent disclosure.*"

203. Indeed, Mr Evans' CPO application has been prepared in a careful and comprehensive manner prior to filling. In particular:

a. Mr Evans' claim is pleaded comprehensively by reference to the terms of the Decisions, and fully takes account of the infringing conduct identified therein;

b. He formulated all aspects of his claim, including his class definition, in full; and

c. The experts instructed by Mr Evans were able to consider the terms of the Decisions in providing their preliminary views on: (a) the harm caused by the infringements (in the case of Mr Knight and Professor Rime); and (b) a proposed methodology for calculating harm to the Proposed Classes (in the case of Professor Rime and Mr Ramirez).

204. Mr Evans submits that the detailed expert evidence he has served is a significant strength of his CPO application. It demonstrates that he has comprehensively investigated the case he seeks to bring on behalf of the members of the Proposed Classes. To that end:

a. The report of Mr Knight, an expert with decades of practical FX trading experience, provides important factual and conceptual information regarding the FX markets and the conduct identified in the Decisions;

b. The report of Professor Rime, a leading expert in the field of FX market microstructure, sets out his preliminary views on the impact of the infringements identified in the Decisions in detail, with reference to important underpinning economic theory; and

c. Mr Ramirez, an experienced economist with over 18 years' experience of competition matters in the United States, Europe and Asia, has (with the benefit of

Mr Knight and Professor Rime's experience) devised a detailed and robust methodology to calculate the harm to the proposed classes, and has identified a number of sources of available data.

205. This demonstrates the rigorous and diligent way in which Mr Evans has sought to prepare his CPO application. It is submitted that this comprehensive preparation has given rise to a better quality application, as is explained in Mr Evans' submissions concerning factors (1)-(5) above, and will produce significant benefits for the members of the proposed classes.

The Evans Application has only required minor amendments after it was filed

206. A further benefit of Mr Evans' significant preparatory work is that the Evans Application has required minimal amendment after it was filed. Indeed, the majority of the amendments made to the Evans Application were to reflect the terms of the confidential versions of the Decisions (the **"Confidential Decisions"**). The Confidential Decisions were disclosed to Mr Evans on 20 March 2020, and he filed and served an amended CPO application four weeks later, on 17 April 2020. OUTER CONFIDENTIALITY RING ("OCR") INFORMATION REDACTED

a. OCR INFORMATION REDACTED

b. OCR INFORMATION REDACTED

c. OCR INFORMATION REDACTED

d. Professor Rime made a minor amendment to ¶139 of his report to reflect that he has now read the Confidential Decisions.[210]

207. In addition to amendments consequential on the Confidential Decisions, Mr Evans made further minor amendments to his application, as follows:[211]

a. To reflect matters which had arisen since the Evans Application was filed, including an update in relation to Mr Evans' funding and insurance arrangements; and

b. To clarify certain matters in the application.

208. This approach is indicative of an efficient conduct of the litigation on behalf of the members of the Proposed Classes, which directly advances their interests.

The O'Higgins PCR's approach to preparing its CPO application

Work prior to the Decisions being issued

209. By contrast, the O'Higgins Application was prepared and filed without sight of the Decisions upon which its claim was based. Moreover, Mr Evans notes that it appears that the O'Higgins PCR conducted significant work on its application before the Commission announced the Decisions on 16 May 2019.

210. This is reflected in the O'Higgins PCR's litigation budget, which indicates that it spent some £2,143,143 before 9 May 2019. This is broken down as follows:

a. £436,882 on "*Barristers*";

b. £650,051 on *"[s]trategic claim structuring*"' and

c. £1,056,201 on "*Experts*".

211. Mr Evans does not understand how the O'Higgins PCR could have engaged in such substantial work, and incur such significant sums, without sight of the Decisions upon

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210 See Second Witness Statement of Anthony Maton dated 17 April 2020 (**"Maton 2"**) at ¶14(b).

211 These were explained in ¶¶16-17 of Maton 2.

which its (strictly follow-on) claim is based. It is entirely possible that some of those costs would have been wasted once details of the Decisions were published.

The O'Higgins PCR's decision to file without sight of the Decisions upon which its claim was based

212. The O'Higgins PCR's decision to file its CPO application without sight of the Decisions meant that it was constrained in the extent to which it could plead to the details of the infringements identified in the Decisions. This was expressly acknowledged at ¶4 of its original Collective Proceedings Claim Form.

> "… the Proposed Representative relies heavily on the contents of the Press Release below. Inevitably, however, the absence of publicly available versions of the Settlement Decisions has constrained the extent to which the Proposed Representative is able to plead to the details of the underlying infringement and the Proposed Defendants' breach of statutory duty. In due course, and in particular once non-confidential versions of the Settlement Decisions are made publicly available by the Commission or are disclosed by the Proposed Defendants to the Proposed Representative, the Proposed Representative anticipates that it may be necessary to amend this Collective Proceedings Claim Form in order to plead, in greater detail, to the nature of the infringements in question. The Proposed Representative fully reserves its position in this regard."

213. This created important practical difficulties for the O'Higgins PCR.

214. First, the O'Higgins Application was initially pleaded extensively by reference to findings from regulatory authorities in other jurisdictions. This was not an appropriate approach for a strictly follow-on claim, and the O'Higgins Application has subsequently required substantial amendment.

215. In its original Collective Proceedings Claim Form, the O'Higgins PCR acknowledged that its reliance on those regulatory findings was due to the *"paucity of information to which [the O'Higgins PCR] currently has access in relation to the Commission's findings.*" This is set out in detail at ¶¶53-55 as follows:

> "As explained above, public versions of the Settlement Decisions are not yet available. The Proposed Representative therefore relies on the Press Release, as providing a summary of the principal findings and facts of relevance to the present proceedings. The contents of the Press Release are considered at paragraphs 61 to 64 below.
>
> As has also been made clear, the claims sought to be combined in these Proposed Collective Proceedings are follow-on claims. Nevertheless, it is relevant to appreciate that the findings of the Commission – as set out in the Settlement Decisions and summarised in the Press Release – are merely the latest in a series of findings by numerous regulatory authorities around the world in relation to anticompetitive collusion in the global FX market, between 2007 and 2013.

> Given the paucity of information to which the Proposed Representative currently has access in relation to the Commission's findings, this section starts with a summary of certain of the findings of other regulatory authorities (both in the UK and globally). For the avoidance of doubt, these findings are relied upon as against the Proposed Defendants solely insofar as they contain narratives of relevant evidence and admissions made by the Proposed Defendants and their co-conspirators before the said regulators or authorities. Insofar as the findings may contain assessments by the regulators or authorities which are matters of opinion, the findings are pleaded only by way of support for the Proposed Representative's belief in the claims sought to be combined in these Proposed Collective Proceedings, prior to release of the full Settlement Decisions and prior to disclosure."

216. Paragraphs 56-60 contained a detailed summary of those findings, and ran to nine pages.

217. It is perhaps due to the O'Higgins PCR's initial reliance on those regulatory decisions that the Proposed Defendants to the O'Higgins Application observed in a letter dated 28 October 2019 that the O'Higgins Application would need to be repleaded following disclosure of the Decisions, since the Decisions were inconsistent with, and did not support, the claims as set out in the O'Higgins Application:[212]

> "The Proposed Class Representative has indicated its intent to amend its CPO Application. We consider that it should proceed to do so following receipt of the redacted confidential versions of the Settlement Decisions.
>
> The CPO Application is pursued within the constraints of the follow-on jurisdiction of the Tribunal under section 47A of the Competition Act 1998. This means that the Tribunal cannot adjudicate on whether there has been any infringement beyond those found in the operative parts of the Settlement Decisions, and cannot award damages beyond those caused by *those* infringements. You will of course be familiar with the decision of the Tribunal in *Dorothy Gibson v Pride Mobility Products* [2017] CAT 9.
>
> The Proposed Class Representative accordingly is required to identify how it might sustain the CPO Application in reliance on the Settlement Decisions and, if it cannot do so on a follow-on basis, withdraw.
>
> For the avoidance of doubt, the Proposed Defendants' position is that the Settlement Decisions are inconsistent with, and do not support, the follow-on claims as currently set out in the CPO Application.
>
> Please confirm when the Proposed Class Representative will be in a position to re-file an amended CPO Application (including supporting documents as necessary)." (emphasis added)

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[212] See Gibson Dunn's letter of 28 October 2019 at ¶¶4-8. This was also the position adopted by some of the Proposed Defendants in their skeleton arguments for the CMC in the O'Higgins Application in November 2019. See JPMorgan's skeleton argument at ¶7 and UBS's skeleton argument at ¶¶2.1 and 4-9.

218. Mr Evans understands the O'Higgins PCR was provided with the Decisions as follows:

    a. The provisional non-confidential versions of the Decisions were provided on 30 September 2019 (in the case of the TWBS Decision)[213] and 4 October 2019 (in the case of the EE Decision)[214].

    b. The confidential versions of the Decisions were provided on or around 17 December 2019.[215] They were disclosed into a confidentiality ring established in the O'Higgins Application.

219. The O'Higgins PCR filed an amended CPO application on 28 January 2020. As explained further below, the amendments to the application were substantial, and included removing the extensive summary of the regulatory findings in other jurisdictions.

220. Second, the O'Higgins PCR was unable to fully identify its proposed class definition in advance of disclosure of the Decisions. Specifically, it did not specify whether its proposed class would include transactions where one or both of the currencies exchanged in the transaction was a G10 currency. The reasons for this were explained in ¶34(9) of the original Collective Proceedings Claim Form as follows:

> "As to the identification of the affected currencies, this is based on the statement in the Press Release to the effect that eleven "currencies" were cartelised: the Euro, British Pound, Japanese Yen, Swiss Franc, US Dollar, Canadian Dollar, New Zealand Dollar, Australian Dollar, Danish Krone, Swedish Krona and Norwegian Krone. It is unclear at present whether the Commission has found that manipulation occurred in relation to currency pairs including merely one or more of those eleven currencies, or rather in relation to currency pairs comprised of two of those eleven currencies. To the extent that the Settlement Decisions when received clarify this aspect, the Class Definition will be adjusted accordingly. In practice, however, and as explained in Professor Breedon's report at paragraphs 3.28-3.30 the fact that there was manipulation on each of those eleven currencies (which comprise the "G10" currencies plus the Danish Krone) is likely to mean that the pricing of other currencies was also affected, possibly via the use of vehicle currencies. It follows that a trade may be affected by the anticompetitive conduct even if it does not involve the currencies identified by the Commission." (emphasis added)

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213 See A&O's letter of 30 September 2019.

214 See Baker McKenzie's letter of 4 October 2019.

215 Mr Evans understands from Slaughter & May's letter of 10 January 2020 at ¶5 that the confidential version of the TWBS Decision was provided to the O'Higgins PCR on or around 17 December 2019. He is not aware of the date on which the confidential version of the EE Decision was disclosed.

221. As part of the amended O'Higgins Application filed on 28 January 2020, the O'Higgins PCR clarified that, following its review of the Decisions, its class definition included currency pairs where both currencies were G10 currencies. This is in line with the approach taken in Evans Application, which had been filed in the intervening period. The relevant paragraph of the Collective Proceedings Claim Form (now ¶33(10)) was amended accordingly:[216]

> As to the identification of the affected currencies, ~~this is based on the statement in the Press Release to the effect~~ the Settlement Decisions identify that eleven ~~"~~currencies~~"~~ were cartelised: the Euro, British Pound, Japanese Yen, Swiss Franc, US Dollar, Canadian Dollar, New Zealand Dollar, Australian Dollar, Danish Krone, Swedish Krona and Norwegian Krone. ~~It is unclear at present whether~~ These eleven currencies comprise those commonly referred to collectively as the "G10" currencies, plus the Danish Krone. The Settlement Decisions make clear that the Commission has found that manipulation occurred in relation to currency pairs ~~including merely one or more of those eleven currencies, or rather in relation to currency pairs~~ comprised of two of those eleven currencies. ~~To the extent that the Settlement Decisions when received clarify this aspect, the Class Definition will be adjusted accordingly~~ (see, for example, recitals 45, 102 and 104 of the Three Way Banana Split Settlement Decision, and recitals 44, 102 and 105 of the Essex Express Settlement Decision, each of which refers to coordination occurring in respect of 55 combinations of the G10 currencies, albeit not necessarily all 55 combinations at the same time). In practice, however, and as explained in Professor Breedon's report at paragraphs ~~3.28-3.30~~ 4.21-4.23 the fact that there was manipulation on each of those eleven currencies is likely to mean that the pricing of other currencies was also affected, possibly via the use of vehicle currencies. It follows that a trade may be affected by the anticompetitive conduct even if it does not involve the currencies identified by the Commission. Nevertheless, for purposes of methodological simplicity, and in view of the difficulties in identifying vehicle trades, the Proposed Class is for the time being restricted to transactions between two of the eleven identified currencies. In due course, it may become appropriate to expand the class in this regard to include further currency pairs.
> ~~(which comprise the "G10" currencies plus the Danish Krone) is likely to mean that the pricing of other currencies was also affected, possibly via the use of vehicle currencies. It follows that a trade may be affected by the anticompetitive conduct even if it does not involve the currencies identified by the Commission.~~

222. This change also necessitated amendments to the estimated value of the overall claims,[217] which are reflected both in amendments to the Collective Proceedings Claim Form and to Breedon 1.

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216 The O'Higgins PCR has not shown amendments to its Collective Proceedings Claim Form in redlining in the conventional way. Instead, it has provided a "compare" showing the changes to the document. The redlining included in this paragraph has been reproduced from that compare.

217 The claim estimates were revised from USD 643.66 million – 3.148 billion (or USD 800.60 million – 3.916 billion when applying compound interest) (see ¶89 of the original Collective Proceedings Claim Form) to USD 643.66 million – 2.574 billion (or USD 811.55 – 3.246 billion when applying compound interest) (see ¶81 of the Amended Collective Proceedings Claim Form).

223. Third, the O'Higgins PCR was not aware of the exact addressees of the Decisions when it filed its CPO application, and had inferred their identities from material on the Commission's website. Therefore, on the same day the O'Higgins PCR filed its claim, it asked the Proposed Defendants to confirm whether it had correctly identified the addressees of the Decisions.[218] When it transpired that one of the Barclays entities (Barclays Capital Inc.) was an addressee of only one of the Decisions (the EE Decision), the O'Higgins PCR was required to correct its application for permission to serve its Collective Proceedings Claim Form out of the jurisdiction.[219]

224. Fourth, Professor Breedon had limited information in order to set out his theory of harm and proposed methodology for calculating harm to the proposed O'Higgins Class. In this regard, it is to be noted that Professor Breedon provisionally assumed that the information set out in other regulatory decisions referred to the conduct identified in the Decisions:[220]

> "In addition to reviewing the Press Release, I have also been provided with extracts from a number of decisions by other regulators relating to anticompetitive conduct in the FX market by the same banks who are addressees of the EC Decisions and which relate to the same time period ("Other Regulatory Decisions").
>
> These Other Regulatory Decisions appear to relate to the same or materially similar conduct as that identified in the Press Release. For the purposes of this Report, where the Other Regulatory Decisions provide additional detail in relation to the same type of conduct by the same banks and for the same time period as discussed in the Press Release, I have provisionally assumed that they refer either to the Anticompetitive Conduct as found by the Commission or to conduct which implemented that Anticompetitive Conduct."

225. It is unclear exactly which regulatory decisions Professor Breedon relied upon. In any event, it is submitted that it is inappropriate to rely, in a follow-on claim for damages, on any other regulatory decision in order to compensate for a lack of information in the Commission's Press Release. The very fact that Professor Breedon was required to rely upon other regulatory decisions demonstrates that the far more prudent course was that taken by Mr Evans, namely to seek access to, and consider, the exact terms of the Decisions before issuing a CPO application.

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218 See, for example, Scott+Scott's letter to Barclays of 29 July 2019 at ¶¶3.1-3.2.

219 See Scott+Scott's letter to the Tribunal dated 16 August 2019.

220 See ¶¶3.10-3.11 of Professor Breedon's original report dated 28 July 2019.

Subsequent amendments to the O'Higgins Application in consequence of the Decisions

226. As alluded to above, the O'Higgins Application required substantial amendment after it received disclosure of the Decisions. This is reflected in the "compare" versions of the O'Higgins PCR's Collective Proceedings Claim Form and Breedon 1. In summary, the main amendments were to: (a) properly plead to the findings in the Decisions; (b) to confirm the currency pairs covered by the proposed O'Higgins class; and (c) provide further information regarding the O'Higgins PCR's theory of harm. As to (c), Professor Breedon's report was amended to include further information regarding his views as to how the infringements identified in the Decisions caused harm to the proposed O'Higgins class, particularly in relation to the information advantages afforded to the participants in the infringements and the currency pairs which might be affected.

Further amendments to the O'Higgins Application and service of the Bernheim Report

227. Furthermore, in October 2020, the O'Higgins PCR chose on an *ad hoc* basis, to further supplement the evidence which it filed in support of its CPO application, by introducing Bernheim 1. This evidence was served with very limited prior warning. By way of summary:

    a. In the Parties' submissions filed in lieu of the CMC listed on 23 October 2020 (the **"October CMC"**), it was common ground that the appropriate point for each PCR to file its response to the other PCR's CPO application would be at the same time as it filed any reply to the Proposed Defendants' response(s) to its application.[221]

    b. However, around two hours before those submissions were filed and served, the O'Higgins PCR provided a draft Re-Amended Collective Proceedings Claim Form

[221] This is reflected the indicative timetables in the Parties' written submissions. See Mr Evans submissions at ¶14, the O'Higgins PCR's submissions at ¶11, and the Proposed Defendants' submissions at ¶17.

and draft Bernheim 1, and asked the Proposed Defendants to the O'Higgins Application to provide their consent the introduction of those documents.[222]

c. The O'Higgins PCR provided very limited prior notice that it intended to serve the Bernheim Report, and no information at all as to the matters which the report would address.[223] In particular, it provided no indication that the report would contain material that would be relevant to the Evans Application and the carriage dispute.

228. It transpires that the purpose of the Bernheim Report is twofold: (a) it comments upon the evidence served in support of the O'Higgins Application, and seeks to supplement it further; and (b) it introduces evidence relating to the carriage dispute by purporting to assess the relative merits of the evidence served in support of the Evans Application and the O'Higgins Application. This is reflected in Professor Bernheim's instructions:[224]

> "Solicitors for the Proposed Class Representative in this matter asked me to comment on the methodology to calculate damages for class members outlined by Professor Francis Breedon in his January 28, 2020 preliminary expert report. In particular, I have been asked to evaluate:
>
> 1. Whether the methodology is sound and, if so, whether and how I would be able to develop and assist in implementing it in practice;
>
> 2. Whether there is likely to be sufficient data available to implement the methodology outlined by Professor Breedon;
>
> 3. Any differences between and relative merits of the methodology outlined by Professor Breedon and that outlined by Mr. Ramirez in his December 9, 2019 expert report; and
>
> 4. Whether there is likely to be sufficient data and a methodology available to estimate the effect of any pass-on by members of the class such that an aggregate award of damages can be calculated."

229. Mr Evans submits that the O'Higgins PCR's decision to introduce Bernheim 1 was inappropriate, and not in the interests of the proposed class members, for three reasons.

230. First, it was not necessary to introduce expert evidence from Professor Bernheim as to whether Professor Breedon's proposed methodology is "*sound*". The viability of any

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222 See Scott+Scott's letter of 23 October 2020. The Proposed Defendants to the O'Higgins Application subsequently indicated their consent on 19 November 2019 and the O'Higgins PCR filed those documents at the Tribunal on 26 November 2020.

223 The first (and only) indication that the O'Higgins PCR provided of its intention to rely on the Bernheim Report was 10 days earlier. See Scott+Scott's letter of 13 October 2020.

224 Bernheim 1, ¶9.

proposed methodology is a matter for the Tribunal to assess. Instructing one expert to opine on the methodology of another expert instructed by the same party is a manifestly inefficient approach to litigation. Further, and in any event, Mr Ramirez has explained in Ramirez 2 why he does not consider Professor Bernheim's purported endorsement of Professor Breedon's methodology to be persuasive.[225]

231. Second, the O'Higgins PCR has provided no good reason as to why it was necessary to instruct a further expert, and to serve an additional expert report, seeking to supplement the O'Higgins PCR's theory of harm and proposed methodology for calculating damages to the proposed class. Those issues were already addressed in Breedon 1. If the O'Higgins PCR considered it necessary to amend or elaborate upon those matters, the proper course would be for Professor Breedon to amend or supplement his existing report.

232. The O'Higgins PCR's answer to this appears to be that Professors Breedon and Bernheim are experts in different fields.[226] However, this argument is unavailing. It ignores the point that Bernheim 1 and Breedon 1 are addressing the same substantive issues, namely the theory of harm and quantum methodology. This is acknowledged in the O'Higgins PCR's Re-Amended Collective Proceedings Claim Form, which states in terms that "*[t]he Proposed Representatives' proposal for quantification… is set out in detail in the Breedon and Bernheim Reports.*"[227]

233. Indeed, as a result of the introduction of Bernheim 1, it is now unclear the extent to which issues relating to the quantum methodology falls within the purview of Professor Breedon, Professor Bernheim, or both. This is significant for at least two reasons:

    a. There are certain matters relating to the O'Higgins PCR's proposed methodology which are only addressed by one of its experts. For example, the issue of pass-on is addressed in Bernheim 1 for the first time.[228] Until that point, the O'Higgins PCR

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225 See Ramirez 2, ¶108.

226 Namely, "*Professor Breedon is an FX microstructures expert whilst Professor Bernheim is a competition economics/industrial organisation expert.*" See Scott+Scott's letter of 4 November 2020 at ¶2.1.

227 See ¶28. See also ¶¶34, 45(2)-(4), 76 and 80.

228 By contrast, Mr Ramirez addressed the issue of pass-on in section 8 of Ramirez 1, which was filed with Mr Evans' application in December 2019. In short, Mr Ramirez set out his preliminary views as to how he might address this issue in the event that it was raised by the Proposed

had only addressed the issue of pass-on in high-level, conceptual terms, noting in its Collective Proceedings Claim Form (as re-amended) that:[229]

> "Whilst there is no legal requirement at the point of certification that common issues should predominate over individual issues, it is likely that they will do in the present claim. In particular, it is highly unlikely that the Tribunal will need to concern itself with individual issues arising out of pass-on defences. In this regard, it is important to note that many, if not most, of the Proposed Class (in particular, pension funds and hedge funds) will be 'end consumers' of the FX transactions and there could be no pass-on in the form of higher prices to any customers and, accordingly, no pass-on that it would be appropriate to take into account in law. As regards other members of the Proposed Class (such as corporates) it is not realistic to suppose that the Proposed Defendants could factually establish a "sufficiently close causal connection" between a supra-competitive price for currency transactions paid by a corporate and an increase in that corporate's end prices. If such defences were raised and considered to be realistic they could, in any event, be dealt with by way of the creation of a suitable sub-class for those claimants with potential pass-on issues that could be resolved in due course."

b. On the other hand, certain parts of Bernheim 1 appear to conflict with Breedon 1:

   i. As noted in paragraphs 68 – 69 above, in the absence of data from RFIs, Professor Breedon proposes to extrapolate the harm measured on transactions with the Proposed Defendants to the entire VoC for the proposed O'Higgins Class. This would assume that overcharge for both direct and indirect harm would be the same. While Professor Bernheim does not comment directly on the appropriateness of that approach, he appears to disagree with that underlying assumption as he opines that "*the cartel's impact might differ for trades conducted with non-defendant dealers*."[230] In light of this apparent disagreement as to how to measure the overcharge in respect of transactions with RFIs, it is unclear how Professor Bernheim can take the view that "*Professor Breedon adopts a conceptually sound approach for analyzing the FX cartels and the corresponding impact on class members*" and that "*I also concur that it is appropriate to measure cartel overcharges through regression analyses, and I agree with Professor Breedon's*

Defendants. The methodology proposed by Professor Bernheim is similar to that set out in Mr Ramirez's report.

229 See ¶46.

230 Bernheim 1, ¶93.

specific plan for deploying those methods. I also endorse Professor Breedon's method for computing damages based on estimated overcharges and measures of the relevant volume of commerce."[231]

ii. Similarly, there appears to be a disagreement (or, at the very least, a misunderstanding) between Professor Breedon and Professor Bernheim as to how they would calculate harm on transactions entered into with RFIs if data were available from them. In the section of Professor Breedon's report which outlines his proposed methodology to calculate class-wide harm, he states that "*[i]n the event that third party disclosure is sought and obtained, a similar analysis could be undertaken for any third party, non-defendant banks to reduce the proportion of the aggregate damages which are calculated by way of extrapolation.*"[232] (emphasis added) Professor Breedon does not state that he would include RFI data in his *existing* analysis to measure the overcharge on non-defendant bank transactions, but appears to envisage a separate analysis.[233] By contrast, Professor Bernheim's approach (which would entail including a cartel dummy variable in his regression analysis to estimate the overcharge on transactions with RFIs) would require the RFIs' data to be incorporated into Professor Breedon's existing analysis. As Mr Ramirez observes, "*[g]iven the apparent incompatibility of Prof Breedon and Prof Bernheim's approaches, it is unclear which approach constitutes the methodology that will be employed in the event that non-defendant bank data was available.*"[234]

iii. As noted in paragraph 63 above, Professor Breedon and Professor Bernheim appear to take different views on the appropriate time

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231 Bernheim 1, ¶17. In any event, as explained in paragraphs 68 - 69 above, Professor Bernheim does not present a viable methodology for measuring harm on transactions with RFIs.

232 Breedon 1, ¶6.55.

233 Ramirez 2, ¶126.

234 Ramirez 2, ¶126.

window that could be used to calculate the realised half-spreads to be used in the regression analysis.

234. Third, and in any event, it is inappropriate for the O'Higgins PCR to have instructed a separate expert to assume the role of assessing the relative merits of the evidence served in support of the Evans Application and the O'Higgins Application. Instead, the relative merits of that evidence, including any differences in views and approach as between experts, should be addressed by the experts currently instructed by way of appropriate responsive evidence. The decision to instruct a new expert to purport to conduct some form of adjudicative assessment between the methodology outlined by Professor Breedon and that outlined by Mr Ramirez risks, in Mr Evans' submission, going beyond the role of the expert and improperly trespassing into the role of the Tribunal.

235. Nevertheless, Professor Bernheim's purported criticisms of the Evans Application are unfounded, and have been addressed in full in sections 7 and 8 of Knight 2, section 7 of Rime 2, and section 4 of Ramirez 2. Furthermore, to the extent they are relevant to the carriage dispute, they have also been addressed in these submissions.

236. In sum, the O'Higgins PCR's decision to serve Bernheim 1 represents a belated and inappropriate attempt to supplement its CPO application. Moreover, the decision to instruct a further expert, and to serve separate expert evidence addressing to the O'Higgins PCR's theory of harm and methodology for calculating damages is inefficient and uneconomical. It has created unnecessary overlap between the matters addressed by those experts, and there are areas of conflict between the two experts' approaches that have not been properly resolved. This does not advance the interests of the proposed class members.

(14) PREPARATION AND PERFORMANCE AT THE CARRIAGE HEARING

Content of/weight to be accorded to this factor

237. The "*Preparation and Performance on Carriage Motion*" is a factor taken into account in the Canadian common law provinces. It is plainly a factor that could be taken into account by the Tribunal in determining which claim would be in the best interests of the proposed class members, since it may be relevant to the quality of their representation.

Evaluation in the present carriage dispute

238. Mr Evans submits that he has and will prepare diligently and thoroughly for the hearing and resolution of the carriage dispute. To that end, he has served factual and expert evidence and written submissions in relation to the factors identified in the Tribunal's *Judgment on the Timing of the Carriage Dispute* as being relevant to the resolution of the carriage dispute. In addition, at all times he has sought to be transparent about the arrangements for legal fees, funding and insurance, which are all matters that will affect the viability of the litigation and will be relevant to the carriage dispute.

E. CONCLUSION

239. For the reasons set out above, Mr Evans submits that he would the more suitable to act as class representative for the purposes of rule 78(2)(c).

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