

Party: Applicant / Proposed Representative
Witness: Michael O'Higgins
Number of Statement: Fourth
Exhibit: MOH12
Dated: 11 June 2021

IN THE COMPETITION APPEAL TRIBUNAL

Case no. 1329/7/7/19

B E T W E E N : -

MICHAEL O'HIGGINS FX CLASS REPRESENTATIVE LIMITED

**Applicant /
Proposed Representative**

-and-

- (1) BARCLAYS BANK PLC
- (2) BARCLAYS CAPITAL INC.
- (3) BARCLAYS EXECUTION SERVICES LIMITED
- (4) BARCLAYS PLC
- (5) CITIBANK N.A.
- (6) CITIGROUP INC.
- (7) JPMORGAN CHASE & CO.
- (8) JPMORGAN CHASE BANK, NATIONAL ASSOCIATION
- (9) J.P. MORGAN EUROPE LIMITED
- (10) J.P. MORGAN LIMITED
- (11) NATWEST MARKETS PLC
- (12) THE ROYAL BANK OF SCOTLAND GROUP PLC
- (13) UBS AG

**Respondent /
Proposed Defendants**

EXHIBIT MOH12

This is the exhibit marked "MOH12" referred to in the fourth witness statement of Michael O'Higgins dated 11 June 2021.



Michael O'Higgins

Dated: 11 June 2021

**O'HIGGINS APPLICATION
GUIDANCE ON APPLYING THE CLASS DEFINITION**

Introduction

1. This Guidance is to help you understand the class definition and apply it to your situation.
2. In summary, to be in the class you need to have:
 - ✓ entered into an FX spot or outright forward transaction (see **section A** below),
 - ✓ relating to two currencies which are either G10 currencies or Danish Krone (see **section B** below),
 - ✓ during the period 18 December 2007 to 31 January 2013 (see **section C** below),
 - ✓ in the European Economic Area (see **section D** below),
 - ✓ with a “*Relevant Financial Institution*” (see **section E** below) or on an “*electronic communications network*” (see **section F** below),
 - ✓ which is not the subject of other court proceedings or settlements (see **section G** below),
 - ✓ other than as a broker or custodian engaged by another person to carry out the transaction (see **section H** below).
3. Certain persons are however excluded from the class (notably, the Relevant Financial Institutions and the cartel banks themselves) (see **section I** below).
4. If you fall within the class definition and are domiciled in the UK (see **section J** below), then you are automatically included in the class (unless you opt out). If you are domiciled outside the UK, you can opt in.

A. FX spot or outright forward transactions

5. A ‘spot’ transaction is in essence an agreement to exchange a specific amount of one currency for another, at an agreed rate, typically within two bank business days.
6. An ‘outright forward’ transaction (sometimes referred to as an ‘outright’ or a ‘forward’) is an agreement to exchange currency at an agreed rate on a specified value date usually more than two bank business days in the future.

7. The agreed rate need not be a set sum; it could be set by reference to a benchmark.
8. The transaction could be a price conditional transaction such as a limit or resting order (e.g. a “stop loss” or “take profit” order).
9. You may have entered into such a transaction:
 - ✓ By voice (e.g. by telephone).
 - ✓ By other means of communicating directly with the bank (such as by Bloomberg chatroom or Reuters messaging).
 - ✓ Through an electronic platform (also known as ‘electronic communication network’ or ‘ECN’). Further details about ECNs are given in section F below. They include:
 - ✓ single-bank platforms, such as Barclays’ ‘BARX’ or Deutsche Bank’s ‘Autobahn’, and
 - ✓ multi-bank platforms, such as HotSpot or Currenex.
10. This would include, for example:
 - ✓ Calling the trading desk at a bank on a bilateral basis to request a spot price and then execute a transaction on a currency pair (e.g. EUR-USD).
 - ✓ Using Currenex (a multi-dealer ECN) to execute an FX transaction with an anonymous counterparty by taking the price quoted on the platform.
 - ✓ Submitting an order via an electronic channel to a bank to execute a specified amount at the price established at the 4pm UK time WMR fixing.
11. The following are however not included:
 - ✗ Branch retail spot transactions – these are retail banking transactions such as foreign currency purchases at the “*travel money*” desk in a bank or the telephone/online equivalents.

- ✘ Branch retail transfers of funds denominated in different currencies across any two accounts – whether effected in a bank, by telephone or online.
- ✘ Electronic transactions using ATMs – also known as “*hole in the wall*” cash machines.
- ✘ Transactions executed in a foreign currency on a credit, debit, prepaid or stored value card.
- ✘ Spread betting – so trading spread betting products, for example through an online retail trading platform, would not be included.
- ✘ Contracts for difference (CFDs).
- ✘ Non-deliverable forwards (NDFs).

B. Currency pairs

12. The relevant currencies are:

- ✓ Euro (EUR)
- ✓ British Pound (GBP)
- ✓ US Dollar (USD)
- ✓ Japanese Yen (JPY)
- ✓ Swiss Franc (CHF)
- ✓ Canadian Dollar (CAD)
- ✓ Australian Dollar (USD)
- ✓ New Zealand Dollar (NZD)
- ✓ Swedish Krona (SEK)
- ✓ Norwegian Krone (NOK)
- ✓ Danish Krone (DKK).

13. The transaction must include two such currencies: for example, British Pound to Euro (or vice-versa), or US Dollar to Japanese Yen (or vice-versa).

C. *Time period*

14. The transaction must have been entered into between 18 December 2007 and 31 January 2013 inclusive.

D. *In the European Economic Area*

15. A transaction was entered into “*in the European Economic Area*” if it was priced¹ and/or accepted by the Relevant Financial Institution or through the ECN within the European Economic Area.

16. The European Economic Area at the relevant times included the following countries:

- ✓ Austria
- ✓ Belgium
- ✓ Bulgaria
- ✓ Croatia
- ✓ Republic of Cyprus
- ✓ Czech Republic
- ✓ Denmark
- ✓ Estonia
- ✓ Finland
- ✓ France
- ✓ Germany
- ✓ Greece

¹ Traders often use the word “*quoted*” to describe the pricing of a transaction.

- ✓ Hungary
- ✓ Iceland
- ✓ Ireland
- ✓ Italy
- ✓ Latvia
- ✓ Liechtenstein
- ✓ Lithuania
- ✓ Luxembourg
- ✓ Malta
- ✓ Netherlands
- ✓ Norway
- ✓ Poland
- ✓ Portugal
- ✓ Romania
- ✓ Slovakia
- ✓ Slovenia
- ✓ Spain
- ✓ Sweden
- ✓ United Kingdom.

17. The following common situations would therefore be included:

- (a) You were anywhere in the world when you agreed the trade by voice with someone in the EU/EEA. For example, you telephoned a bank in London or Frankfurt. [In

this situation, the Relevant Financial Institution has priced or accepted the transaction in the EEA.]

- (b) You were anywhere in the world when you agreed the trade using electronic communication with someone based in the EU/EEA. For example, you exchanged Bloomberg messages with a London-based employee of a bank. [In this situation, the Relevant Financial Institution has priced or accepted the transaction in the EEA.]
- (c) When accessing an electronic platform (also known as ‘electronic communication network’ or ‘ECN’) to enter into the transaction, you (or your representative using the platform) were physically located in the EU/EEA. For example, you (or your employee effecting the transaction) were sitting in Edinburgh when using a single-bank platform (e.g. Barclays’ ‘BARX’ or Deutsche Bank’s ‘Autobahn’) or a multi-bank platform (e.g. HotSpot or Currenex). [In this situation, the transaction was priced or accepted through an ECN operating in the EEA.]

E. Relevant Financial Institution

18. The Relevant Financial Institutions are the following banking groups:

- ✓ ABN Amro
- ✓ ANZ
- ✓ Bank of America
- ✓ Bank of America Merrill Lynch
- ✓ Bank of New York Mellon
- ✓ Bank of Scotland
- ✓ Bank of Tokyo-Mitsubishi UFJ / MUFG
- ✓ Barclays
- ✓ BNP Paribas

- ✓ Calyon
- ✓ Citigroup / Citibank
- ✓ Commonwealth Bank of Australia
- ✓ Crédit Agricole
- ✓ Credit Suisse
- ✓ Deutsche Bank
- ✓ Goldman Sachs
- ✓ HBOS
- ✓ HSBC
- ✓ Hypovereinsbank (HVB)
- ✓ ING
- ✓ JPMorgan Chase
- ✓ Lehman Brothers
- ✓ Lloyds Banking Group
- ✓ Lloyds TSB
- ✓ Merrill Lynch
- ✓ Morgan Stanley
- ✓ National Australia Bank
- ✓ Nomura
- ✓ Rabobank
- ✓ Royal Bank of Canada

- ✓ Royal Bank of Scotland
- ✓ Skandinaviska Enskilda Banken
- ✓ Société Générale
- ✓ Standard Chartered
- ✓ State Street
- ✓ Toronto Dominion
- ✓ UBS
- ✓ Unicredit
- ✓ Westpac

19. Please note that these are the names of banking groups. You may have dealt with them through a subsidiary or an entity using a different trading name.

F. Electronic communications network (ECN)

20. An “*electronic communications network*” (also known as an “*ECN*”) is an online platform that matches buy and sell orders for financial products including currencies.

21. Examples of ECNs are:

- ✓ single-bank platforms, such as:
 - ✓ Barclays’ ‘BARX’
 - ✓ Deutsche Bank’s ‘Autobahn’
- ✓ multi-bank platforms, such as:
 - ✓ HotSpot
 - ✓ Currenex.

G. Other court proceedings or settlements

22. Transactions which are the subject of other pending litigation or concluded settlements concerning the same cartel conduct are excluded from these proceedings. For example:

- ✘ The proceedings before High Court of England & Wales in *Allianz Global Investors GmbH & Ors v Barclays Bank PLC & Ors* (Claim no. CL-2018-000840).
- ✘ The proceedings before the High Court of England & Wales brought by the ECU Group Plc in separate actions against NatWest Markets Plc (Claim no. FL-2020-000045), Citibank N.A. (Claim no. FL-2020-000046), Deutsche Bank AG (Claim no. FL-2020-000047), Goldman Sachs International (Claim no. FL-2020-000048), Barclays Bank (Claim no. FL-2020-000049) and HSBC Bank Plc. (Claim no. CL-2017-000315).
- ✘ The Australian class action proceedings in *J Wisbey & Associates Pty Ltd v UBS AG & others*.
- ✘ The Israeli class action proceedings filed in the District Court - Centre in 2018 under case number CIA 29013-09-18.

23. Transactions which are the subject of the following cases are also expressly excluded:

- ✘ The US class action and/or the releases under the settlements in case *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, No. 1:13-cv-07789-LGS (S.D.N.Y.).
- ✘ The Canadian class actions and/or the releases under the settlements in cases CV-15-536174 (Superior Court of Ontario) and/or 200-06-000189-152 (Superior Court of Quebec).

H. Other than as an Intermediary

24. “Intermediaries” should not count transactions which they entered into as “Intermediaries”. An “Intermediary” means a broker and/or custodian engaged by another person to carry out a transaction.

25. So, for example:

- ✘ A brokerage firm that entered into FX transactions with dealer banks on behalf of corporates or individuals, charging those persons a fee for doing so.
- ✘ Multi-bank platforms that facilitate trading between customers and banks.

I. Excluded persons

26. The following are excluded from being class members:

- ✘ The banks which are addressees of the European Commission decisions which are the subject of the claim, and related entities (i.e. their subsidiaries, holding companies, subsidiaries of those holding companies, and any entity in which any of the addressees has a controlling interest).
- ✘ Officers, directors or employees of any of the companies referred to above, at any time since 18 December 2007.
- ✘ Relevant Financial Institutions and entities forming part thereof – such as a subsidiary of one of the banking groups listed in section E above.
- ✘ All members of the Defendants’ and Representative’s legal teams and all experts or professional advisors instructed by them in these proceedings.
- ✘ All members of the Tribunal panel assigned to these proceedings and any judge hearing any appeal in these proceedings.

J. Domicile in UK

27. A corporation or association has its domicile in the United Kingdom if (and only if):

- ✓ it was incorporated or formed under the law of a part of the United Kingdom and has its registered office or some other official address in the United Kingdom; or
- ✓ its central management and control is exercised in the United Kingdom.

28. An individual is considered domiciled in the UK if (and only if):

- ✓ he/she is resident in the UK; and

- ✓ the nature and circumstances of this residence indicate that he/she has a substantial connection with the UK (which would usually be the case where an individual is resident in the UK and has been so resident for the previous three months or more).
29. For the above reasons, even if a business operates from the UK, it may not be UK domiciled. For example, many hedge funds operating from London are legally domiciled in the British Virgin Islands.
30. If you are in any doubt as to whether you are domiciled in the UK, but you wish to participate in the collective proceedings, you are advised to opt in expressly.
31. If you are legally domiciled outside the UK (for example, if you are a UCITS fund legally domiciled in Luxembourg or Ireland, a hedge fund legally domiciled in the Cayman Islands or the Channel Islands, or a multinational based in Germany or Italy), but you otherwise meet the criteria above, you can actively opt in to the claim to seek to recover the losses which you suffered as a result of the banks' wrongdoing. If you are in this category and do not opt in, you will not be able to get any compensation from the collective proceedings.

K. Illustrative examples

32. We set out below a series of examples which we hope will assist you in assessing whether you fall within the class:
- (a) **The persons and types of trading in the following examples will all be automatically within the class:**
- ✓ A UK pension fund legally domiciled in the UK which purchased FX by telephone with the London sales desk of a Relevant Financial Institution.
 - ✓ A UK company legally domiciled in the UK which entered into FX transactions with a Relevant Financial Institution's sales desk by communicating via Bloomberg or email with an employee of a Relevant Financial Institution based in London.
 - ✓ An Italian citizen legally domiciled in the UK who entered into FX transactions on their own account by trading while in London on an ECN.

(b) **The persons in the following examples must opt in to the claim if they wish to seek to recover the losses which they suffered as a result of the banks' wrongdoing:**

- ✓ A German pension fund legally domiciled in Germany which entered into FX transactions in the EEA with a Relevant Financial Institution.
- ✓ A UCITS fund legally domiciled in Luxembourg which entered into FX transactions in the EEA through their custodian bank in London.
- ✓ A Dutch citizen legally domiciled in the Netherlands who entered into FX transactions on their own account by trading through an ECN while in Paris.

✗ **The persons and types of trading in the following examples would not be included in the class and could not opt in to it for these types of trading:**

- ✗ A French citizen domiciled in France who carried out their FX trading exclusively with the Tokyo and Singapore desks of a Relevant Financial Institution.
- ✗ A broker (or other intermediary) domiciled in the UK who entered into transactions with a Relevant Financial Institution in London on behalf of clients.
- ✗ A US-domiciled entity. (US-domiciled entities were compensated for their worldwide trading through the FX class action in the US, *In re Foreign Exchange Benchmark Rates Antitrust Litigation*.)