IN THE COMPETITION APPEAL TRIBUNAL
IN THE MATTER OF PROPOSED COLLECTIVE PROCEEDINGS
UNDER SECTION 47B OF THE COMPETITION ACT 1998
RELATING TO FOREIGN EXCHANGE RATES

THE O'HIGGINS APPLICATION (Case no. 1329/7/7/19)

BETWEEN:-

MICHAEL O'HIGGINS FX CLASS REPRESENTATIVE LIMITED
("THE O'HIGGINS PCR") **Applicant**

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) NATWEST GROUP PLC
(13) UBS AG **Respondents**

and

(1) MUFG BANK LTD
(2) MITSUBISHI UFJ FINANCIAL GROUP INC. **Proposed Objectors**

THE EVANS APPLICATION (Case no. 1336/7/7/19)

BETWEEN:-

MR PHILLIP EVANS
("THE EVANS PCR") **Applicant**

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) MUFG BANK, LTD
(8) MITSUBISHSI UFJ FINANCIAL GROUP, INC.
(9) J.P. MORGAN EUROPE LIMITED
(10) J.P. MORGAN LIMITED
(11) JP MORGAN CHASE BANK, N.A.
(12) JPMORGAN CHASE & CO
(13) NATWEST MARKETS PLC
(14) NATWEST GROUP PLC
(15) UBS AG **Respondents**

REPLY OF THE O'HIGGINS PCR TO THE RESPONDENTS' RESPONSES
dated 23 April 2021

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A. INTRODUCTION

1. For the reasons explained below, the objections to the O'Higgins Application advanced by the Respondents in their Response are devoid of substance.

2. The Respondents do not contest that some form of CPO should be granted. The principal matter raised by the Respondents in objection is the contention, in summary, that there is a strong statutory presumption in favour of 'opt-in' proceedings and that 'opt-out' proceedings can only be certified where the applicant can demonstrate that 'opt-in' proceedings would be impracticable. Such a contention is wrong in law. There is no statutory default position that favours opt-in proceedings and no such burden lies upon the applicant.

3. Regardless of there being no such burden, opt-in proceedings would, in this case, be impracticable. There are a number of factors that render it most unlikely that the present claims could viably be brought as opt-in proceedings. The class is numerous and heterogenous. Its members are not easy to identify. For many members of the class the amounts involved will be small. There would be an understandable reluctance on the part of customers actively to participate in proceedings against their own banks.

4. Further, the claims proposed by the O'Higgins Application are 'follow-on' claims based upon damage that flows from two Commission decisions (the "**Settlement Decisions**"), which are themselves based on settlement submissions by the Respondents. The claims are backed by plausible methodologies put forward by very distinguished experts. They are, on any view, strong *prima facie* claims.

5. The attempt by the Respondents to persuade the Tribunal to insist that the proceedings be transformed into opt-in proceedings is an attempt to delay and undermine these proceedings. It is a transparently self-interested tactic substantially to reduce the size of the class and thereby to reduce the Respondents' long overdue obligation to disgorge some part of their ill-gotten gains by compensating their victims. It should be rejected without hesitation.

6. None of the other objections raised by the Respondents, even if they were justified, would constitute a reasonable ground to refuse certification.

B. THE DECISION BEFORE THE TRIBUNAL

7. The Tribunal has before it two applications for CPOs on an opt-out basis. Neither PCR has suggested being in a position to bring a CPO on an opt-in basis. The decision so far as the Tribunal is concerned is, therefore, binary: should there be opt-out collective proceedings, or no collective proceedings at all?

8. The Respondents posit in their Response that:

   (1) There is a duty on the Tribunal "*proactively*" to consider whether the proposed action should be opt-in or opt-out under Rule 79(3) of the CAT Rules as part of the certification process, even where there is no such choice before the Tribunal (para. 12(a)); and

   (2) "*There is … a preference in favour of opt-in proceedings, and it is for the PCR to persuade the Tribunal if it wishes to proceed on an opt-out basis instead*" (para. 9).

9. The O'Higgins PCR disagrees with both propositions. It is inappropriate and unnecessary for the Tribunal to consider whether opt-in proceedings might be more appropriate where that option is not available. In any event, the legislation does not indicate any preference or presumption in favour of opt-in proceedings: to the extent that there is any decision to be made between these two options, there should be no presumption either way.

10. The reason why the Respondents seek to transform the application into opt-in proceedings is obvious. As the Respondents well know, any opt-in CPO would result in a dramatically smaller class size (by several orders of magnitude) and thereby render the size of any damages award against them correspondingly far smaller. Put another way, the result of opt-in proceedings would be that a large number of claimants who have suffered loss owing to the Respondents' long-term cartel behaviour will go uncompensated and the Respondents will be permitted to escape (yet again) with the proceeds of their unlawful and dishonest cartel conduct. Moreover, the immediate effect is that neither of the CPO applications as currently formulated will be able to proceed at all, since neither PCR has applied to bring an opt-in CPO application (other than allowing non-UK-domiciled entities to opt in following certification of the opt-out claim). The Respondents' self-serving motivation for their position is transparent and the Tribunal should not hesitate to reject it.

11. The O'Higgins PCR's position is as follows:

    (1) The determination under CAT Rule 79(3) of "*whether collective proceedings should be opt-in or opt-out proceedings*" only arises where there is a genuine choice between those two forms of proceedings. Such a genuine choice will arise: (i) where Tribunal is presented with alternate bases (opt-in or opt-out); or (ii) an applicant acknowledges that its application currently formulated as opt-out could viably be brought on an opt-in basis. If neither of these circumstances pertains, the issue under CAT Rule 79(3) simply does not arise or would only arise in circumstances well removed from those of the present applications.

    (2) In the present case, the opt-in option is not before the Tribunal. For the reasons given below, opt-in proceedings would be impracticable for these claims. The PCRs have for good reason not applied to bring them, even in the alternative. There is therefore no genuine choice to be made between opt-in and opt-out proceedings and so no need to assess the practicability of opt-in proceedings. Put simply, opt-in proceedings are not an option.

    (3) Further, contrary to the Respondents' suggestion, there is no threshold question requiring a PCR to demonstrate that an opt-in procedure would be "*impracticable*" in order to be granted an opt-out CPO. Even in a case where both the opt-in and opt-out options are available, the question is only which one is preferable. For all the reasons given by the O'Higgins PCR's claim form and expanded upon below, even if there were a choice, the opt-out procedure would plainly be preferable.

12. The Respondents appear to accept in the Response that a CPO of some sort is appropriate. Their remaining objections are half-hearted and misguided.

13. Accordingly, the CPO should be granted on an opt-out basis, as applied for by the O'Higgins PCR.

B1. Legal principles

14. The statutory framework for certification is described authoritatively in *Merricks v. Mastercard* [2021] Bus LR 25 at [19]-[29].

15. In explaining the background to the regime, at paragraph 20 of his judgment, Lord Briggs first notes that "[a]*lthough now forming part of the Competition Act 1998, the statutory part of the structure for collective proceedings was introduced, by amendment, in two stages. The first was in the Enterprise Act 2002, but it only permitted opt-in proceedings and was unsuccessful*." To identify the overall aim of the amendments to the Act, Lord Briggs then quotes from the paper of the Department for Business, Innovation and Skills published in April 2012, highlighting the following (emphasis in original):

> "*At paragraph 3.6 under the heading "Aims" the paper stated:*
>
> > *"The aim of these proposals is therefore two-fold:*
> >
> > - ***Increase growth,*** *by empowering small businesses to tackle anti-competitive behaviour that is stifling their business.*
> >
> > - ***Promote fairness,*** *by enabling consumers and businesses who have suffered loss due to anti-competitive behaviour to obtain redress."*
>
> *Under the heading "Why is reform needed?" the paper recognised, at paragraph 3.11, the widespread view that private actions were the least satisfactory aspect of the competition regime, so that there was wide recognition of the need to improve "access to redress and dispute resolution". At paragraph 3.12 it stated:*
>
> > *"Currently it is rare for consumers and SMEs to obtain redress from those who have breached competition law, and it can be difficult and expensive for them to go to court to halt anti-competitive behaviour."*
>
> *At paragraph 3.13 it continued:*
>
> > *"A further difficulty is that competition cases may involve large sums but be divided across many businesses or consumers, each of whom has lost only a small amount. This means that a major case, with aggregate losses in the millions or tens of millions of pounds, can nevertheless lack any one individual for whom pursuing costs makes economic sense."*
>
> *Paragraph 3.14 contained a brief review of the shortcomings of the then current procedural frameworks, including the representative action under the English and Welsh Civil Procedural Rules. Under the heading "Proposals" the paper proposed both the establishment of the CAT as a major venue for competition actions across the UK and to:*
>
> > *"**Introduce an opt-out collective actions regime for competition law** to allow consumers and businesses to collectively bring a case to obtain redress for their losses."* "

16. Section 47B of the Competition Act 1998 (cited by Lord Briggs at [22]) is the governing provision. Subsections (5)-(6) provide the key criteria for the making of a CPO:

> "*(5) The Tribunal may make a collective proceedings order only -*
> *(a) if it considers that the person who brought the proceedings is a person who, if the order were made, the Tribunal could authorise to act as the representative in those proceedings in accordance with subsection (8), and*
> *(b) in respect of claims which are eligible for inclusion in collective proceedings.*
>
> *(6) Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings.*"

17. Section 47B(7) stipulates what a CPO must contain:

> "*A collective proceedings order must include the following matters—*
> *(a) authorisation of the person who brought the proceedings to act as the representative in those proceedings,*
> *(b) description of a class of persons whose claims are eligible for inclusion in the proceedings, and*
> *(c) specification of the proceedings as opt-in collective proceedings or opt-out collective proceedings (see subsections (10) and (11)).*"

18. Subsections (10) and (11) supply the definitions of opt-in and opt-out collective proceedings respectively.

19. Accordingly, the only statutory requirement relating to whether the proceedings are opt-in or opt-out is that the Tribunal must specify in the body of the CPO whether the proceedings are opt-in or opt-out. The statute does not mandate the Tribunal to consider any possibility which is not before it. Nor does the statute indicate any preference as between opt-out and opt-in proceedings, where both are possible.

20. As Lords Briggs observes at [25], section 47B(1) expressly makes the right to bring collective proceedings subject to the CAT Rules. Lord Briggs observes at [27] that CAT Rules 77 and 79 are of "*primary importance*":

> "*77. (1) The Tribunal may make a collective proceedings order, after hearing the parties, only -*
> *(a) if it considers that the proposed class representative is a person who, if the order were made, the Tribunal could authorise to act as the class representative in those proceedings in accordance with rule 78; and*
> *(b) in respect of claims or specified parts of claims which are eligible for inclusion in collective proceedings in accordance with rule 79.*
> *(2) If the Tribunal makes a collective proceedings order it may attach such conditions to the order or give such directions as it thinks fit, including -*
> *(a) directions for filing and service of the order, pleadings and any other document in relation to the collective proceedings; and*
> *(b) ...*

...

79. (1) The Tribunal may certify claims as eligible for inclusion in collective proceedings where, having regard to all the circumstances, it is satisfied by the proposed class representative that the claims sought to be included in the collective proceedings -
(a) are brought on behalf of an identifiable class of persons;
(b) raise common issues; and
(c) are suitable to be brought in collective proceedings.
(2) In determining whether the claims are suitable to be brought in collective proceedings for the purposes of paragraph (1)(c), the Tribunal shall take into account all matters it thinks fit, including -
(a) whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;
(b) the costs and the benefits of continuing the collective proceedings;
(c) whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;
(d) the size and the nature of the class;
(e) whether it is possible to determine in respect of any person whether that person is or is not a member of the class;
(f) whether the claims are suitable for an aggregate award of damages; and
(g) the availability of alternative dispute resolution and any other means of resolving the dispute, including the availability of redress through voluntary schemes whether approved by the CMA under section 49C of the 1998 Act or otherwise."

21. As the Supreme Court has now clarified in *Merricks*, the test of suitability under CAT Rules 79(1)(c) and 79(2) is one of "*relative*" suitability – i.e., it involves a consideration solely of whether the proceedings are more suitable to be brought as collective proceedings by comparison with individual proceedings: see *Merricks*, [56] and [70].

22. The Respondents rely upon CAT Rule 79(3), which provides:

> "*(3) In determining whether collective proceedings should be opt-in or opt-out proceedings, the Tribunal may take into account all matters it thinks fit, including the following matters additional to those set out in paragraph (2)—*
> *(a) the strength of the claims; and*
> *(b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover.*"

23. As is clear from its terms and context, however, this provision sets out what the Tribunal will consider <u>in the event that it is called to determine</u> whether collective proceedings should be opt-in or opt-out proceedings. There is no suggestion that these criteria must be addressed in every case where a CPO has been applied for. Nor, again, is there any

suggestion that, when the Tribunal is called to determine on what basis a CPO should be granted, it must start from a presumption that opt-in proceedings are more appropriate, or should be ordered in preference to opt-out proceedings wherever "*practicable*". The practicability of opt-in proceedings is one consideration only (indeed the problem that opt-in proceedings may have problems of practicability where opt-out proceedings do not is one factor which ought generally to militate in favour of the latter).

24. Indeed, the Supreme Court confirmed in *Merricks* that the CAT Rule 79(3) criteria are relevant only to the opt-in vs. opt-out question and should not be imported into the certification process itself. This is plain from the terms of [59]-[60] of Lord Briggs's judgment:

> "*59. Moving away from the general background of the law and procedure for civil claims, the following points need emphasis about the statutory structure itself. First, the Act and Rules make it clear that, subject to two exceptions, the certification process is not about, and does not involve, a merits test. This is because the power of the CAT, on application by a party or of its own motion, to strike out or grant summary judgment is dealt with separately from certification. The Rules make separate provision for strike-out and summary judgment in rules 41 and 43 respectively, which applies to collective proceedings as to other proceedings before the CAT. There is no requirement at the certification stage for the CAT to assess whether the collective claim form, or the underlying claims, would pass any other merits test, or survive a strike out or summary judgment application, save that the CAT may, as a matter of discretion, hear such an application at the same time as it hears the application for a CPO: see rule 89(4). This is the first exception, but inapplicable in the present case because no such application was made.*
>
> *60. The second exception is that rule 79(3)(a) makes express reference to the strength of the claims, but only in the context of the choice between opt-in and opt-out proceedings. It does so in terms which, by the use of the words "the following matters additional to the matters set out in paragraph (2)", confirm that the factors relevant to whether the claims are suitable to be brought in collective proceedings do not include a review of the merits. By contrast with the conditions for certification in British Columbia, which do require that the pleadings disclose a cause of action, not even this basic merits threshold is prescribed in the UK by the Act or the Rules.*"

25. Accordingly, as Lord Briggs stressed, the 'strength of the claims' criterion under CAT Rule 79(3) applies "*only in the context of the choice between opt-in and opt-out proceedings*". *Merricks* itself was, of course, an opt-out claim. But the Supreme Court expressly held in no uncertain terms that the Tribunal was **not** entitled to apply any merits test at all (save potentially for the strike out/summary judgment test, where an application

has been made). If the Respondents' approach were correct in its contention that when an applicant seeks a CPO on an opt-out basis the Tribunal must consider the alternative of an opt-in and, in that context, evaluate the strength of the claims under CAT Rule 79(3), the Tribunal in *Merricks* would have been entitled to consider the merits in that case also. However, it clearly was not.

26. The starting-point for the Tribunal in the present case is that both PCRs have asked the Tribunal to make a CPO and to specify in the order that the proceedings are opt-out. As in *Merricks*, there is no opt-in possibility on the table and thus ostensibly no choice to be made between opt-in and opt-out.[1] The choice before the Tribunal is to make a CPO on an opt-out basis, or not at all. The opt-in option is on any view not "*practicable*", because it is not available: importantly, to date neither PCR (and neither PCR's funders) have indicated any willingness to support it. The Tribunal should therefore simply consider the application which is in front of it, and apply the Supreme Court's approach in *Merricks v Mastercard*, to grant an opt-out CPO.

27. The Tribunal could leave open the theoretical possibility that it might adopt a different approach in exceptional circumstances where, for example, an application for a CPO application were brought on an opt-out basis but it was manifest that it could be transformed into an application on an opt-in basis. This would be the case where, although the application was not expressly brought on an alternative opt-in basis, an applicant openly acknowledged that it could viably be reformulated on an opt-in basis. That is not this case. Nor is this a case in which it could even be said that it is obvious, or even likely, that it could viably be brought on an opt-in basis. The class is not small (it runs into thousands or even tens of thousands); the members of the class are not homogenous or easily identifiable/contactable by the proposed class representatives (especially so long after the events giving rise to the claim); and there are good reasons to suppose many, probably most, of the persons within the class would not opt in to claims against their bank. In these circumstances, it would be a dereliction of duty if the Tribunal were to delay certification on the basis of speculative and self-serving suggestions by these Respondents that a claim 'could' be reformulated on an opt-in basis.

[1] Contrast the rival Trucks CPO applications which are currently pending before the Tribunal, where there is a choice between opt-out and opt-in, and one of the claims is brought in the alternative.

28. Given its lack of foundation in either the statute or the CAT Rules, the Respondents' case as to the existence of a threshold question concerning the practicability of opt-in proceedings rests on: (a) snippets from the CAT Guide; and (b) certain legislative background materials said to be relevant to discerning the Parliamentary intention behind the amendments to the Competition Act 1998 which introduced the opt-out collective action regime.

29. As to the CAT Guide, the passage which the Respondents quote at Response para. 8(2) does not bear the weight which the Respondents seek to place on it at para. 9. In particular, the "*general preference for proceedings to be opt-in where practicable*" is irrelevant where no opt-in option is being offered. The CAT Guide, whilst it has the status of a Practice Direction, is subsidiary to the CAT Rules.[2] The CAT Guide is merely commenting on CAT Rule 79(3)(b) which applies only "*in determining whether collective proceedings should be opt-in or opt-out proceedings*", a determination which will ordinarily be unnecessary when there is no option before the Tribunal to have opt-in proceedings. Just as the Supreme Court has made clear in *Merricks v Mastercard* that the consideration in CAT Rule 79(3)(a) (strength of the claims) is not a relevant factor where the only realistic application before the Tribunal is for opt-out proceedings, so the remainder of CAT Rule 79(3) is inapplicable in such a case.

30. The Respondents' overly literal reading of the text in the CAT Guide would undermine the rationale for the collective proceeding regime, which is to facilitate compensation for breaches of competition law. It would also condemn potential class members by default to having to pay funders a portion of their recovery (being the usual position in opt-in proceedings, but not the position in opt-out proceedings where funders are paid from undistributed damages).

31. As to the legislative background materials, they cannot assist the Tribunal in interpreting the statute. They are of questionable admissibility, and on closer examination do not support the Respondents' case.

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[2] See CAT Guide, Introduction, para. 2.

B2. Legislative background: admissibility

32. Paras. 13-21 of the Response rely on the so-called "*travaux documents for the 2015 Act*" (that is, the Consumer Rights Act 2015, by which the Competition Act 1998 was amended to introduce the opt-out collective action regime). No attempt is made to explain why these documents are admissible material relevant to the construction of the statute, or for what specific purpose they are relied on.

33. As Lord Neuberger warned in a case where reliance was sought to be placed on a Law Revision Committee report and what was said in Parliament when the relevant bill was introduced (*Williams v. Central Bank of Nigeria* [2014] AC 1189, emphasis and sub-divisions added):

> "*104. However, one must not lose sight of four important factors in that connection.*
>
> *(1) First, the court's constitutional role in any exercise of statutory interpretation is to give effect to Parliament's intention by deciding what the words of the relevant provision mean in their context.*
>
> *(2) Secondly, it follows that, in so far as any extraneous material can be brought into account,* ***it is only as part of that context****.*
>
> *(3) Thirdly, before such material can be considered for the purpose of statutory interpretation,* ***certain requirements have to be satisfied*** *– see eg per Lord Mance in The Presidential Assurance Co Ltd v Resha St Hill [2012] UKPC 33, para 23 and per Lord Browne-Wilkinson in Pepper v Hart [1993] AC 593, 640.*
>
> *(4) Fourthly, even where those requirements are satisfied,* ***any court must be wary of being too ready to give effect to what appears to be the Parliamentary intention from what was said by the authors of a report*** *or by the sponsors of the relevant Bill: one cannot always be sure that what they say has been read or heard, or accepted, by the Parliamentarians who voted in favour of the provision in question.*
>
> *105. Having said that, I accept that, as was said in the Presidential Assurance case, at para 23, in principle, "assistance" in interpreting legislation "can ... be obtained as to the general background and as to the mischief which the legislation was addressing by looking at the reports of the proceedings in Parliament".*"

34. The "*requirements*" which must be satisfied before extraneous material can be consulted for the purposes of statutory interpretation, per the passages identified by Lord Neuberger, are:

(1) The material is being consulted in order to identify the "*mischief*" at which legislation was directed and its objective setting; or

(2) The material is being consulted for the purposes of the "*more radical separate principle*" in *Pepper v. Hart* [1992] AC 593, which (emphasis added):

> "*only allows a court to have regard to go further in looking at statements in Parliament where (a) legislation is* ***ambiguous or obscure or leads to absurdity****, (b) the Parliamentary material relied upon consists of one or more statements by a minister or other promoter of a bill together with such other statements and material as are necessary to understand such statements* ***and*** *(c) the statements relied upon are clear.*"[3]

35. In this case:

(1) The Response goes well beyond attempting to identify the "*mischief*" at which the 2015 Act's reforms were directed (broadly speaking, the fact that the law as it stood did not "*allow consumers and businesses to easily achieve redress for losses they have suffered as a result of breaches of competition law*", which may require the availability of an opt-in regime in appropriate cases – see the Explanatory Notes to the 2015 Act, [435]). They focus, instead, on the proper interpretation of the "*safeguards*" imposed on the use of the opt-out regime (see Response, para. 21). That has nothing to do with identifying the "*mischief*" but rather with identifying delimitations on the Tribunal's powers.

(2) Meanwhile, the legislation concerning the delimitations on the Tribunal's powers is not ambiguous, obscure or absurd. As the Respondents note, it is clear that businesses (of all types) may be class members in opt-out proceedings (Response, para. 18). That being the case, it is unclear what possible relevance the Respondents' references to pre-legislation materials mentioning consumers and small businesses are intended to have. Further, as explained above, there is nothing on the face of the legislation (or the secondary legislation – the CAT Rules) which requires the Tribunal to consider of its own motion whether a CPO sought on an opt-out basis ought instead to be certified on an opt-in basis. Nor is there anything in the legislation or secondary legislation to suggest any kind of presumption or preference in favour of opt-in as opposed to opt-out proceedings. There is no

[3] *Presidential Insurance Co. Ltd. v. Resha St. Hill* [2012] UKPC 33 at [23].

ambiguity requiring resort to the legislative '*travaux*' (whatever meaning that expression is supposed to have in relation to a wholly English statute).

(3) The two Hansard references put forward by the Respondents (at Response, paras. 16 and 18) do not qualify as admissible under *Pepper v. Hart*. They were made during debate in the Lords Committee stage in relation to an amendment proposing removal of what is currently s 47B(7)(c) of the Competition Act 1998. Baroness Hayter was not even a promoter of the bill but simply one speaker in the debate. Moreover, the references are unclear: the Response underlines the speakers' references to consumers and SMEs but, as noted, the Respondents themselves accept that Parliament intended that businesses generally could be class members in opt-out proceedings.

(4) In the circumstances, the '*travaux*' marshalled by the Respondents do not help with discerning Parliamentary intention. Of rather more relevance is the background cited by Lord Briggs which noted that the aim of the amendments to the 2015 Act, following the failed opt-in regime introduced by the Enterprise Act, was to "***Introduce an opt-out collective actions regime for competition law*** *to allow consumers and businesses to collectively bring a case to obtain redress for their losses.*"

(5) Other than that, the Tribunal must interpret the language of the Competition Act 1998 (as amended) and of the CAT Rules as they stand.

B3. Legislative background: relevance

36. In any event, the materials relied on by the Respondents are selectively quoted in the Response.

37. First, the Respondents make play of certain references to the protection of consumers and SMEs, but the materials do not support the conclusion that the goal of the introduction

of opt-out proceedings was only or even primarily the protection of the interests of consumers or SMEs as opposed to businesses generally.[4]

38. For example, para. 16 of the Response refers to the April 2012 consultation document[5] in support of the proposition that "*The primary justification for enabling opt-out actions was therefore to protect the interests of consumers, particularly in cases where "the amount of damages per claimant is very low", in which case "only an opt-out action is likely to succeed in delivering redress"*". The protection of the interests of specifically consumers is simply not the mischief identified by that document, which consulted on two principal sets of reforms, as set out in the executive summary (page 5). The first concerned procedural reform to the powers of the Tribunal, including the introduction of a fast-track private action procedure for SMEs in particular. The second concerned the proposed opt-out collective action regime, which was clearly intended to operate to the benefits of both consumers and businesses of all types:

> "*The Government is consulting on proposals to:*
>
> ***Establish the Competition Appeal Tribunal (CAT) as a major venue for competition actions in the UK**, to make it easier for businesses, especially SMEs, to challenge anticompetitive behaviour that is harming them. This will include allowing cases to be brought even when they have not first been investigated by the OFT, allowing the CAT to grant injunctions and introducing a fast track procedure for SMEs that will allow simpler cases to be dealt with much more quickly and cheaply.*
>
> ***Introduce an opt-out collective actions regime for competition law** to allow consumers and businesses to collectively bring a case to obtain redress for their losses. Breaches of competition law, such as price-fixing, often involve very large numbers of people each losing a small amount, meaning it is not cost-effective for any individual to bring a case to court. Allowing actions to be brought collectively would overcome this problem, allowing consumers and businesses to get back the money that is rightfully theirs – as well as acting as a further deterrent to anyone thinking of breaking the law.*"

39. It is in the context of this first proposal – in particular the proposal to introduce a fast-track procedure especially for SMEs – that many of the specific comments about SMEs in the January 2013 government consultation response mentioned at paras. 18 and 20 of

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4 In any event, some of the members of the proposed class are SMEs. Further, for very many of those which are not SMEs, FX trading is not central day-to-day business and their individual claims are small. For the reasons set out in the following section, in these circumstances they deserve protection and redress by way of opt-out proceedings even if they do not meet the 'SME' definition.

5 *Private Actions in competition law: a consultation on options for reform* (April 2012).

the Response are made, while other passing comments about the 2015 Act's potential to benefit small businesses do not evince an intention to exclude other types of business from protection where their claims are appropriate for being brought by collective action.

40. Secondly, and more centrally, the legislative background materials also do not show that it was Parliament's intention that in any case where an opt-out CPO is sought, the Tribunal must of its own motion (or on the basis of the Respondents' speculation) consider whether it would have preferred to certify an opt-in CPO instead, or even that there is in any sense a general preference for opt-in as opposed to opt-out actions.

41. Notably, the Respondents fail altogether to refer to the earlier documents which precipitated the recommendation in favour of opt-out collective action regimes in the first place – in particular, the Civil Justice Council's Final Report of November 2008 "*Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions*", which recommended the introduction of an opt-out collective action procedure and fed into the later consultation. This concluded at Key Finding 9 (pages 18-19):

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

42. The Civil Justice Council's report also identified the "*multi-faceted*" problems with the then-existing Competition Act 1998 opt-in procedure (pages 89-90), which was said to be:

    (1) resource intensive;

    (2) involve front-loading of costs;

    (3) require funding; and

    (4) have costs implications.

43. For all these reasons, as the Civil Justice Council explained, opt-in actions are particularly costly and difficult to fund. Meanwhile, they usually involve a very small take-up on the part of the opt-in group – as the consumer body *Which?* discovered to its cost when it brought the only opt-in claim under the pre-existing legislation: the Civil Justice Council's report summarises that this claim "*proved to be a considerable drain on the consumer organisation's resources, and of limited success in terms of the number of consumers compensated*" (page 88). The failure of the opt-in regime forms a key part of the legislative background context.

44. Further, the references to "*safeguards*" in certain of the materials referred to by the Respondents confirm that one of the reasons advanced for thinking that introduction of the opt-out regime would not lead to a 'US style' litigation culture was the fact that the Tribunal would have to certify any proceedings before they went ahead, including by certifying them as opt-out proceedings (see Response, para. 21). Other "*safeguards*" include general differences between the UK and US litigation environments, including in particular the application of the 'loser pays' costs rule in the UK, the non-availability of treble damages in the UK, and the fact that UK lawyers are not permitted to charge contingency fees in respect of collective proceedings: *Government Response to Consultations on Consumer Rights* (June 2013), page 54 (referred to at Response, para. 21). None of this means that the Tribunal is asked, as the Respondents suggest, to "*screen opt-out proceedings as part of the certification process, in order to assess whether the claim could more suitably be brought on an opt-in basis*". Nor does it mean that there is any kind of presumption or preference in favour of opt-in proceedings. There is no mention of this in the statute or the CAT Rules.

45. In fact, when one steps back and considers the legislative background in the round, it should be apparent that opt-out CPOs ought to be if anything the norm rather than the exception. The Respondents themselves identify, at para. 15 of the Response, the point already noted: that the previous opt-in regime, available since 2003 under the Enterprise Act 2002, was widely regarded as a failure (as noted above, Lord Briggs observed that it was "*unsuccessful*": *Merricks v. Mastercard*, [20]). Over the first ten years of its existence, the consumer body *Which?* had brought only one opt-in action on behalf of consumers under that regime, and had stated that it would not bring another. The other potential opt-in mechanism (a Group Litigation Order under the Civil Procedure Rules)

was not being used for competition damages cases.[6] The very reason for introducing the new opt-out regime was to address these failures, and to make it possible actually to recover compensation from cartelists and abusive monopolists – something which the previous regime was not achieving.

46. Accordingly, far from indicating any kind of bias towards or preference for opt-in actions, the undistinguished history of such actions in fact indicates that opt-out actions are likely to be appropriate in very many cases and certainly that there should be no presumption against them. Notably, of the 11 CPO applications filed with the Tribunal to date, nine are purely opt-out, and a further one is brought as opt-out in the alternative.

B4. Case law on the collective proceedings regime

47. The Response next (at paras. 22-26) draws attention to various passing mentions by the Supreme Court in *Merricks v. Mastercard* and by the Tribunal in the *Gibson* mobility scooters claim to the effect that it is hoped that consumers and SMEs will be able to make use of the new collective proceedings regime. As above, the significance of these mentions is not understood given that it is common ground (and is clear on the face of the legislation) that collective proceedings can be used to obtain redress on behalf of businesses of all types.

48. It is submitted that it is much more significant that both *Merricks* and *Gibson* concerned applications for opt-out proceedings only (with no opt-in possibility in the alternative) – and in neither case was any view expressed that the starting-point ought to be opt-in. The Tribunal in *Gibson* only very briefly (at [2017] CAT 9, [123]-[124]) considered the "*strength of the claims*" issue, noting that it was significant that the case was a follow-on claim, and did not devote any space at all to considering whether an opt-in claim might have been "*practicable*" in principle, instead simply concluding that the case was one which justified an opt-out certification. And, as noted, the majority in *Merricks* specifically held that the "*strength of the claims*" criterion is relevant only to the opt-in vs. opt-out question, and did not even in passing suggest the existence of any requirement

[6] There were 68 GLOs as at the end of 2008. None was made in a competition case. See the list at: https://www.gov.uk/guidance/group-litigation-orders#list-of-all-group-litigation-orders.

to show first that opt-in proceedings are impracticable before opt-out proceedings can be brought.

B5. Opt-in/opt-out in other jurisdictions

49. Finally, the Response prays in aid at para. 27 the point that none of Canada, the US or Australia have an opt-in collective proceedings regime. The Canadian experience has in particular been recognised by the Supreme Court to be of "*persuasive*" authority (*Merricks*, [42]). Lord Briggs noted in this regard the "*substantial similarity of purpose underlying both their legislation and ours*" and did not suggest that anything turned on the fact that the UK legislation had retained the opt-in possibility.

50. The Respondents suggest, contrary to this indication from the Supreme Court, that analogies from other jurisdictions including Canada are of limited use, in particular because: "*one of the reasons for introducing an intermediate opt-in procedure in this jurisdiction was to avoid perceived problems with the opt-out regimes abroad, particularly in the US*" (Response, para. 27). However, as should be apparent from the above, that submission puts things precisely the wrong way around. The opt-in procedure was not "*introduced*" to temper possible excesses of the opt-out procedure. Rather, the opt-out procedure was introduced in recognition of the failure of the opt-in procedure, which had already been in existence for over a decade. Viewed in that light, the retention of the opt-in procedure in the UK, by contrast to other jurisdictions where only the opt-out procedure is available, is in large part a result of historical contingency and happenstance.

51. There is no support for the Respondents' apparent contention that the opt-in procedure should be viewed as a default and imposed wherever it might be practicable, even where no PCR is supporting it as a possibility. The Tribunal must consider the application which is in front of it, and grant it if it meets the criteria for certification.

B6. Relevance of the Respondents' submissions

52. In those circumstances, the majority of the Respondents' submissions are irrelevant, or proceed on a mistaken basis, since they are directed at a decision which the Tribunal is not required to make (opt-in vs. opt-out). In particular:

(1) Paras. 28-51 of the Response ("*Practicability of opt-in proceedings*") proceed on the basis that the PCRs must positively establish that "*an opt-in action would be impracticable*" – a test which has no basis in the legislation and could only be relevant if the Tribunal were being asked to choose between an opt-in possibility and an opt-out possibility.

(2) Paras. 52-83 of the Response ("*Data and information availability issues with opt-out proceedings*") are directed at showing that limitations in the available data mean that opt-in rather than opt-out proceedings would be more appropriate; the Respondents expressly, and correctly in light of *Merricks*, state that "*the Respondents are not arguing that certification should be refused on the basis that the PCRs have not identified adequate data to operate their methodologies*" (para. 52).

(3) Paras. 84-153 of the Response ("*The strength of the claims*") address the "*strength of the claims*" criterion under CAT Rule 79(3)(a), which, as noted above, is not a factor relevant to the primary question whether a CPO should be certified applying the criteria under CAT Rule 79(2). A merits criterion for certification cannot be smuggled back in by the back door of a speculative suggestion that the application could theoretically have been brought on an opt-in basis. In any event, para. 6.39 of the CAT Guide states: "*where the claims seek damages for the consequence of an infringement which is covered by a decision of a competition authority (follow-on claims)*" (as here) "*they will generally be of sufficient strength for the purpose of this criterion*".

53. Without prejudice to the foregoing central point, the rest of these submissions address the points made by the Respondents under each heading.

C. PRACTICABILITY OF OPT-IN PROCEEDINGS

54. The Respondents suggest, at para. 29 of the Response, that certain features of the proposed class members and their claims mean that an opt-in claim would be practicable in this case. (Whilst the Respondents at para. 30(b) state that it "*is not accepted*" that individual claims would be impracticable, no meaningful case is advanced on this; as noted, it is not altogether clear to what extent they resist the grant of the CPO altogether,

or say only that any CPO ought to be granted on an opt-in basis only. These points are, however, clearly related, and so they will be taken together.)

55. The O'Higgins PCR disagrees that an opt-in claim would be practicable in this case (if that is the legal test). For similar reasons, the O'Higgins PCR contends that an opt-out claim would in any event be more *desirable*, even if some theoretical opt-in claim might be practicable (contrary to the O'Higgins PCR's primary submission).

C1. Features of the proposed class

56. As the Response notes at para. 33(a), the proposed class definition "*is, in summary, intended to capture all the varieties of 'main customers' of FX traders referred to in recital 6 of each Settlement Decision … such as asset managers, hedge funds and corporations*". The Respondents suggest that these are "*sophisticated and well-resourced parties*" and so well placed to bring claims in their own right (paras. 33(d) and 34-37). In particular, the Respondents dismiss the possibility that there might be either economic or non-economic obstacles in place preventing members of the class from bringing claims either in their own name or by way of opt-in action (Response, para. 34).

57. There is first a dispute as to the make-up of the class and whether all of its members are likely to be as knowledgeable about the FX market as the Respondents claim:

    (1) Response para. 33(c)(ii) purports to quote Mr O'Higgins as stating that the class is "*likely to include members for whom FX transactions do not form part of their business*". This quotation is then used to suggest a difference of view between Mr O'Higgins (for the O'Higgins PCR) and Mr Ramirez (one of the experts for the Evans PCR).

    (2) In fact, what Mr O'Higgins actually said was that the proposed class is "*likely to include members for whom FX transactions do not form* ***a central*** *part of their business*" (O'Higgins 1, para. 27(a)). The Response omits the words "*a central*" when quoting Mr O'Higgins, with the effect of creating controversy where none exists.

(3) Properly quoted, Mr O'Higgins's statement is wholly correct.[7] Many large corporates will be forced to enter the FX market on a regular basis in order to engage in 'balancing' FX trades designed to reduce their FX exposure, precisely because FX trading is not part of their central, day-to-day business. The point being made by Mr O'Higgins is simply that the class will include many entities of this type, for whom FX trading is not a focus or an area of expertise, and who may have no idea that they are liable to have suffered losses from this trading until a CPO is publicised. Such entities will, of course, likely be aware that they have engaged in some FX trades, a point Mr O'Higgins also makes, and which does not create any contradiction as suggested at Response para. 37(a). This means that it should be possible to identify them for the purposes of distribution.

(4) Mr O'Higgins confirms his evidence in this regard, and his sources, in his Third Witness Statement ("**O'Higgins 3**"), paras. 26-28.

58. Second, and moreover, it is not the case that even the more sophisticated members of the class are well placed to bring a claim in their own name, or (for similar reasons) to opt in to a group claim:

(1) This claim is brought against a large number of the major banks. Claims against banks are unappealing for a multitude of reasons, not least the risk to a claimant's own banking relationship. The First Witness Statement of Mr Damian Mitchell ("**Mitchell 1**"), founder and managing director of FX trading company Dsquare, gives a first-hand account in this regard. He explains in particular the "*inherent nervousness*" in the financial services industry about suing banks,[8] the delicate reliance of firms like his on prime brokerage agreements with the banks (which can take months to set up),[9] and the reluctance of such firms to 'stick their heads above the parapet'.[10] Such reluctance of potential class members to be visibly involved in proceedings is supported by the testimony in the Second Witness Statement of Neil Purslow of the litigation funders Therium ("**Purslow 2**").[11] Mr O'Higgins'

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7 See, by way of support, Mitchell 1, para. 14. On the diversity of potential claimants, see also Purslow 2, para. 14(c).
8 Mitchell 1, para. 21.
9 Mitchell 1, para. 22.
10 Mitchell 1, para. 24.
11 Purslow 2, para. 14(d)(iii).

experience from speaking to potential class members is to like effect, as set out in O'Higgins 3.[12] It is mirrored in his solicitor's, as described in the Fourth Witness Statement of Belinda Hollway ("**Hollway 4**").[13]

(2) There are real differences between opt-in and opt-out claims in this regard. In particular:

(a) The so-called 'default effect', well recognised in the economic literature,[14] means that both class members and indeed the banks whom they are suing will be likely to view opting in to a group action as a more significant step than failing to opt out. From his role at the Pensions Regulator in the introduction of the pensions auto-enrolment system, Mr O'Higgins gives first-hand evidence of the phenomenon of people failing to take steps to opt in to beneficial activities, but being content to participate when automatically opted-in.[15]

(b) The default effect which applies generally is reinforced in the present case by the fact that, as noted above, banks' customers are likely to fear that taking a positive step could invite retaliation or resentment by the banks – on whom they may depend.

(c) In an opt-out claim, class members have no active involvement until the distribution phase, in which the banks are not directly involved. By that time, there are already available funds for distribution.

(d) By contrast, the decision whether to participate in an opt-in claim is taken at an earlier stage, before it is apparent to the claimant whether there will be any recovery. That decision involves time and (often) legal costs, for claimants who may not be accustomed to instructing litigation lawyers. That is quite apart from the costs that may subsequently be incurred in gathering data to prove the claim (and it is doubtful that data will be readily available so long after the transactions which are the subject of the present proposed

12 O'Higgins 3, para. 24.
13 Hollway 4, paras. 20-22.
14 Bernheim 2, section II.B.
15 O'Higgins 3, paras. 20-22.

claim[16]). At that early stage, prospective class members in an opt-in claim have to agree to give a proportion of their potential damages to lawyers or a litigation funder in order to participate; in an opt-out claim there is no such sacrifice as the funder is paid from undistributed damages.[17] Potential claimants in opt-in proceedings may consider that the risks outweigh the speculative future rewards, or simply not bother to address their minds to the issue of participation at all.[18]

(e) There is also a real risk with opt-in proceedings that the claim will not come to the attention of potential claimants in time. The financial press is more likely to be interested in publicising a case when money is available to distribute than when it is at an early stage and recovery remains speculative. The financial press may also be reluctant to prejudice its own relationships with banks by encouraging claims against them. As to the role of trade associations, Mr Mitchell's evidence is that those in the FX arena have a limited membership compared with the size of the market as a whole.[19]

(3) The fact that there is a significant disincentive to being seen to stand alone in suing the banks also addresses the Respondents' point, at Response para. 40, concerning the practicability of having those who are not domiciled in the UK opt in to the claims. It is important to note that the claim is viable irrespective of whether those domiciled abroad in practice do or do not opt in and so this issue should not affect the Tribunal's conclusion either way. But it is clear that once there exists a large opt-out collective action in which persons domiciled in the UK are already enrolled, the barrier to entry for opting in will be reduced. Those domiciled abroad may be less concerned about suing banks in the UK. Also, the costs of the (foreign) publicity can more readily be justified when being conducted in conjunction with the publicity informing (domestic) class members of their right to opt out.[20]

(4) The fact that a small number of entities have launched independent claims in *Allianz Global Investors GmbH & ors v. Deutsche Bank AG London & ors* (Claim

16 See Hollway 4, paras. 23-27.
17 Hollway 4, paras. 28-29; Mitchell 1, para. 25.
18 Mitchell 1, paras. 33-36.
19 Mitchell 1, para. 41.
20 See further O'Higgins 3, para. 30.

no. CL-2020-000736) tells one nothing about the vast majority of the class. Almost all, if not all, of these entities also opted out of the US class action. It may be that certain additional individual claims which are of particularly high value might be capable of being brought on an individual basis by claimants who, for their own reasons, are less concerned about participating in litigation. But the remainder of the class should not be prejudiced simply because a handful of large entities out of thousands elected to bring their claims on an individual basis.

C2. Likely value of the claims

59. The Respondents next refer (Response, para. 38) to an average value of the claims in order to argue that opting in would be practicable. They suggest a mean damages figure of between £31,000 and £62,000 per class member, at Response para. 38.

60. Even if that figure were correct (which is not admitted), this mean amount ignores the likely large number of small claims which means that the median amount is likely to be significantly lower. Such a 'long tail' of small claims has been the experience in the comparable proceedings brought in the USA,[21] and it is also the expectation of the funders Therium for the UK.[22] Professor Bernheim also describes this 'rightward skew'.[23]

61. Further, any such figure ignores the substantial litigation uncertainty to which such an estimate must inevitably be subject at an early stage of a case; in contrast, the costs of opting in are not subject to material uncertainty. Accordingly, it is not appropriate to treat highly uncertain benefits as certain prospects facing class members if they were to opt in.[24]

62. In any event, the Response does not here make any suggestion that the sums referred to could justify the bringing of individual claims by most members of the class. The Respondents' equivocal approach to whether individual claims are viable seems to amount to an implied acceptance, at least at para. 38, that it would not be appropriate to

21 Hollway 4, paras. 17-18.
22 Purslow 2, para. 14(a).
23 Bernheim 2, para. 7.
24 Bernheim 2, paras. 6 and 8.

deny the CPO application altogether, hence their focus on arguing only for an opt-in CPO as opposed to an opt-out CPO.

63. But such figures are also not sufficient to overcome the disincentives against being seen to sue banks which make the opt-in approach undesirable, particularly bearing in mind the fact that different members of the class are likely to be in different positions and there may very well be a 'long tail' of class members who have suffered relatively small losses.

C3. The PCR's ability to publicise to class members

64. Para. 41 of the Response seeks to suggest that both PCRs' concerns about being able to contact class members for the purposes of an opt-in claim are overstated. With respect, these submissions miss the point, as does the idea that the fact that the PCRs have plans for the effective distribution of the damages award (at para. 47(b)) tells one anything about the practicability of an opt-in claim. There is – obviously – a fundamental difference between, on the one hand:

    (1) being able to advertise to class members that a damages award or settlement fund exists, the banks have paid out, and all that is needed is some details in order to determine distribution eligibility,

    and, on the other hand:

    (2) having to attract class members' attention to sign up for a claim which is prospective, contentious, against banks whom they are likely to be reluctant to sue, and likely to require more ongoing involvement and attention and possible disclosure of documents.

    The Respondents know very well that the number of class members, and the number of persons who will ultimately claim compensation, will be an order of magnitude smaller if the opt-in approach is adopted.

65. As to those domiciled outside the UK:

    (1) As noted, these are not the core of the claim. The O'Higgins PCR has, as set out in its litigation plan, proposals to publicise the opt-in element of the claim and it is

hoped that a substantial number may be persuaded to opt in, particularly with the 'momentum' of an opt-out claim in respect of those domiciled in the UK.[25]

(2) However, the key point is that the central 'opt-out' part of the claim is required to make the claim viable. It is facile for the Respondents to suggest that the mere fact that the PCRs have proposed that part of the claim should be opt-in (because there is no opt-out possibility under the rules) means that it is practicable for the entire claim to be opt-in.

C4. Whether an opt-in action would be economically viable

66. A fundamental problem with an opt-in action in the present case, which the Respondents wholly overlook, is the ability to obtain funding for it. Purslow 2 explains the risk assessment exercise which Therium conducts in deciding whether to fund collective proceedings on an opt-in or opt-out basis,[26] and why they concluded that the risk profile of the FX market meant that the present action was suitable to be run as an opt-out claim rather than an opt-in claim.[27] Therium has not committed to funding the case other than on that basis, nor does Mr Purslow consider that Investment Committee approval would be given for a switch to an opt-in model on present information.[28] Mr Purslow sets out in some detail the considerations which fed into Therium's risk assessment, in particular:

(1) the practicalities of identifying class members, leading to a likely small class size;

(2) the difficulties of obtaining accurate and complete FX trading data to assess damages; and

(3) the reluctance of potential class members to participate visibly in litigation against banks.[29]

67. In short, the reasons given above for explaining why the opt-in action would be impracticable are much the same which make it non-viable. It faces on the one hand

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25 See O'Higgins 3, para. 30.
26 Purslow 2, paras. 7-12.
27 Purslow 2, para. 13.
28 Purslow 2, para. 17.
29 Purslow 2, paras. 13-14.

difficulties of class size, in that the class size and hence damages recovery will be an order of magnitude smaller for an opt-in claim,[30] and on the other hand difficulties of costs and funding of the sort described by the Civil Justice Council (see paragraphs 42-43 above).[31]

C5. Whether the claims could be brought as individual actions

68. Para. 49 of the Response does not concern the practicability of opt-in proceedings as such, but rather contains a legal submission as to the applicable test. As to this, and as explained above:

    (1) The test is whether it is suitable to grant the O'Higgins PCR's CPO application in its current form, not whether a putative alternative 'opt-in' CPO might have been practicable (as explained in section B above); and

    (2) In any event, no alternative 'opt-in' CPO is practicable: none is on the table, and for good reason (as explained in sections C1 to C4 above).

    It is noted that the Respondents here suggest there are "*good reasons*" to believe that individual claims are possible but hasten to add that this is "*not the correct question*" and the real choice is between opt-in or opt-out proceedings. This again suggests that the Respondents accept that a CPO of some sort is appropriate, and their objection is only to its form.

C6. Damages calculation

69. It would plainly be more efficient for the experts to calculate damages for an opt-out class on a class-wide basis using the Respondents' datasets in the way proposed in their reports, than to have to do so for an opt-in class using multiple sets of data from opt-in claimants each with their own diverse systems. Provision of data would also be a

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30 The difficulties faced by attempts to bring GLO claims in the context of mass data breach claims underline the problems with bringing opt-in claims. See, for example, the British Airways GLO litigation, where even on optimistic assumptions and in the context of a well-publicised GLO where individuals will likely be aware of whether they have taken a British Airways flight, it is anticipated that only some 8% of potential total eligible claimants will sign up to the claim: *Weaver & ors v. British Airways Plc* [2021] EWHC 217 (QB) at [23].

31 For confirmation of Mr O'Higgins' position in this regard, see O'Higgins 3, paras. 31-33.

significant disincentive to opting-in. In this regard, Mr Mitchell's evidence refers to his own company's arduous experience of providing data for the purposes of participating in US class action proceedings.[32]

C7. Conclusions on practicability of opt-in proceedings

70. The Respondents focus on the "*practicability*" of theoretical opt-in proceedings in order to detract attention from the more pressing questions of whether they are *in fact* practicable given that no opt-in application is before the Tribunal, and even more importantly whether they are *desirable* given the manifest advantages of opt-out proceedings. In any event, for the reasons given, opt-in proceedings are in fact impracticable in this case. The CPO should be ordered on the opt-out basis.

D. DATA AVAILABILTY

71. The Respondents do not deny for present purposes that the O'Higgins PCR has identified adequate data to operate its methodology, but they nevertheless submit that "*inherent limitations in the data held by [the Respondents] is a factor that weighs in favour of opt-in, rather than opt-out, proceedings*" (Response, para. 52).

72. It is striking that the Respondents seek to make this submission without adducing any factual evidence whatsoever as to the data which they do hold. Even if it were appropriate for the Tribunal in this case to decide as between opt-out certification and opt-in certification (which it is not, for the reasons given in section B above), the submission is misguided.

73. Disclosure is not required from the members of the opt-out class prior to the distribution phase. The aggregate award of damages can be adequately quantified without such information. The Supreme Court has endorsed in *Merricks v. Mastercard* that "*section 47C of the Act radically alters the established common law compensatory principle by removing the requirement to assess individual loss in an aggregate damages case*".[33] Provided there is an arguable claim of more than nominal loss to the class, the Tribunal

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32 Mitchell 1, paras. 20 and 28-32.

33 *Merricks v. Mastercard* [2021] Bus LR 25 at [76].

must proceed to quantify that loss by doing its best on the basis of the data and evidence available, however scanty, if necessary by "*informed guesswork*".[34]

74. The Respondents' submission that opt-out certification must be refused on the basis that individualised assessment and disclosure would lead to a more precise result defeats the purpose of opt-out proceedings and aggregate damages awards. As explained below, assessment of aggregate damages is possible in this case without such disclosure. Even if some degree of sampling were required (which is not admitted), this would not necessitate opt-in certification; the Tribunal is empowered to order non-party disclosure under CAT Rule 63.

75. As to the specific categories of data which the Respondents aver are needed:

D1. Geographical location of trades and class members

76. First, the Respondents observe that the O'Higgins PCR's proposed class is limited to Relevant Foreign Exchange Transactions "*priced and/or accepted by the Relevant Financial Institution or through the ECN within the European Economic Area*" (Response, para. 55(a), referring to draft collective proceedings order, para. 5(I)). The Respondents appear to be contending that disclosure will be needed to quantify aggregate damages, because otherwise the volume of commerce priced and/or accepted in this way will be difficult to ascertain. It would be surprising if the Respondents did not keep information as to the office through which they priced/accepted trades; they adduce no evidence to the contrary and it appears that desk location information has been supplied by them in the US class action proceedings.[35] Further, many members of the proposed class will typically trade with only one location.[36] The Respondents appear to be inappropriately tarring the O'Higgins PCR with the same brush as the Evans PCR, who uses a different test to ascertain whether a trade is entered into in the EEA which involves consideration of the domicile of the class member.

77. Secondly, the Respondents note that it is necessary to exclude from the class transactions which are the subject of existing litigation or settlement agreements (Response, para.

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34 *Ibid.* at [46]-[54] & [72]-[75].
35 Breedon 2, para. 4.10.
36 Breedon 2, para. 4.10.

55(b)). However, this can be adequately factored into the calculation of aggregate damages without disclosure from individual class members.

78. Thirdly, in respect only of transactions entered into before 11 January 2009, the Respondents suggest that the location of the trade will be necessary to determine the applicable law (and therefore limitation period) under the Private International Law (Miscellaneous Provisions) Act 1995 (Response, para. 55(c)). The point is scarcely relevant at this stage. Given the dates of the cartels, the proportion of any such transactions is small. Moreover, the burden would lie on the Respondents to plead and prove the applicability of foreign law and the existence of a potential limitation defence under any such law. Further, they do not even seek to explain why they contend that the location of the trade would be the determinative factor for the purposes of the test in sections 11 and 12 the 1995 Act, nor do they acknowledge the Tribunal's discretion to disapply the limitation period of the law so determined in the case of undue hardship under section 2(1)-(2) of the Foreign Limitation Periods Act 1984. In any event, it does not require an individualised assessment of each class member's position (and therefore disclosure from individual class members) in order to achieve a proportionate assessment of the aggregate damages in this case.

D2. Trades with non-Respondents

79. Response paras. 60-61 exaggerate the apparent difference between the preliminary estimates of the value of commerce with Respondents and Relevant Financial Institutions made by Professor Breedon (for the O'Higgins PCR) and by Mr Ramirez (for the Evans PCR). In particular:

    (1) The Respondents have converted Professor Breedon's estimate from USD into GBP, reportedly by using annual average Bank of England exchange rates (see Response footnote 88) but they have not provided these rates or how they were used. The GBP/USD exchange rate fluctuations during the period over which the cartels operated were substantial. Indeed, USD rose by almost 50% against GBP over this period. Professor Breedon explains why it is wrong to apply a multi-year average to the numbers in his report.

    (2) In any event, both figures are only estimates, based on pre-disclosure information.

(3) Further, the difference may simply reflect different parameters having been taken into account.[37]

D3. Exclusion of certain types of trades by Mr Evans

80. The Respondents' submissions at paragraphs 63 to 66 of the Response do not apply to the O'Higgins PCR. Unlike Mr Evans, the O'Higgins PCR does not seek to exclude benchmark transactions, limit orders or resting orders from the scope of the proposed action.[38] Indeed, Professor Breedon is of the clear opinion that they should be included.[39]

D4. Exclusion of claims by Intermediaries

81. The Respondents observe that their data does not "*consistently identify the basis on which parties were trading with them*" (Response, para. 67); they do not however deny that there is any relevant data on the subject. In the US FX class action proceedings, a discount factor for such transactions was applied. Alternatively, one could, as a starting point, separate the transactions carried out with intermediaries into a separate 'intermediary trade pot' within the aggregate damages calculation and then address this issue at distribution.[40]

D5. Jurisdiction

82. At Response, para. 68, the Respondents refer to the "*sampling exercise of trading contracts to enable the Respondents and O'Higgins to assess the extent to which trades within the proposed class are covered by foreign jurisdiction clauses.*" The result of that sampling exercise was to make clear that jurisdiction clauses are of no or *de minimis* relevance to this case.

83. As set out in Scott+Scott's letter to the Tribunal dated 4 February 2020:

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37 Breedon 2, paras. 4.12-4.13.
38 See further Bernheim 2, section III.A.
39 Breedon 2, para. 4.4.
40 Breedon 2, para. 4.15.

(1) 746 contractual documents were disclosed by the Respondents pursuant to paragraph 8 of the Tribunal's Order dated 6 November 2019.

(2) Only 33 of the 746 contracts (or fewer than 5%) contain even potentially relevant jurisdiction clauses.

(3) Of those 33 contracts, in almost every case, there is positive evidence on the face of the contract that the customer is unlikely to be domiciled in the UK.

(4) Only in one case, which contained a non-UK exclusive jurisdiction clause only from April 2012 (in circumstances where the infringing conduct was held to have terminated on 31 January 2013), is there some positive evidence that might suggest that the customer is domiciled in the UK (namely that certain of the addresses for the customer are in England).

(5) The O'Higgins PCR sought confirmation from the Respondents as to whether they contend that any of the customers who are party to these 33 contracts are domiciled in the UK. The Respondents were not willing to commit themselves as to the domicile of the customers, but did not contend that any are UK-domiciled.[41]

84. Accordingly, there is no need for disclosure of jurisdiction clauses by opt-out (i.e. UK-domiciled) class members in order to quantify aggregate damages in this case. It would be a disproportionate exercise.

D6. Pass-on

85. Professor Bernheim explains that in Response para. 72 the Respondents overstate the potential for class members to transfer higher FX trading costs to their upstream suppliers.[42]

86. If and to the extent that it becomes relevant to take into account the alleged pass-on scenarios set out at paragraph 72 of the Response when calculating aggregate damages (which is a question of law for a later stage as to which no admissions are made), there

[41] In one case, Barclays agreed that the customer is not expected to be domiciled in the UK.
[42] Bernheim 2, section III.B.

are viable methodologies for doing so without any need for disclosure by class members or opt-in certification.

87. Professor Bernheim explains his pass-on methodology in respect of financial institutions at section III.B.1 of his second report ("**Bernheim 2**"). He explains his pass-on methodology in respect of non-financial institutions at section III.B.2. He also includes an illustrative calculation at section III.B.3.

88. The Respondents' suggestions at Response para. 72 that class members may have reduced payments to service providers, including to those whose remuneration was contingent on fund value, or passed on the risk of FX transactions directly, are also exaggerated.[43]

D7. Interest

89. In paragraph 80 of the Response, the Respondents criticise the O'Higgins PCR for not proposing any methodology for calculating an aggregate award of damages comprising compound interest. Bernheim 2 now explains potential methodologies and data sources for quantifying the appropriate interest rate.[44]

D8. Tax

90. Lastly, in paragraph 82 of the Response, the Respondents briefly allude to an argument that: "*Savings in tax must be taken into account when assessing recoverable loss*".

91. It would be wholly disproportionate to refuse opt-out certification on this basis:

    (1) Some class members will have paid no tax at all on gains on foreign exchange transactions.[45]

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43 Bernheim 2, section III.C.

44 Bernheim 2, section III.D.

45 For example, under UK taxation law, transactions consisting of buying or selling of foreign currency are treated as "*investment transactions*" on which authorised investment funds (unit trusts and OEICs) are not subject to tax: see regulation 2(2)(f) of the Investment Transactions (Tax) Regulations 2014 (SI 2014/685), and (prior to that) regulation 14F(1)(f) of the Authorised Investment Funds (Tax) Regulations 2006 (SI 2006/964).

(2) Further, it is conceivable that, in some cases, damages received now will be taxed at a higher rate than the proceeds which the class members should instead have received at the time of the Respondents' wrongdoing. In other words, in some cases, the effect of taxation may be to increase damages not decrease them.

(3) Information about marginal statutory tax rates is readily and publicly available. No further information about tax rates should be required. However, to the extent reasons emerge for considering aspects of the tax system other than the marginal statutory rate, the economic literature provides methods that would be suitable for computing industry-level average tax burdens.[46]

(4) In any event, the law does not permit an unreasonable insistence on precision to defeat the justice of compensating a claimant for infringement of rights. The Tribunal may simply have to recognise the principle that legal proceedings should be dealt with at proportionate cost and apply a broad axe.[47]

E. SCOPE OF THE SETTLEMENT DECISIONS AND THE O'HIGGINS PCR'S METHODOLOGY

92. The Respondents argue (at Response, paras. 87-108) that there is a "*fundamental disjuncture*" between the infringements found in the Settlement Decisions and the theory of harm on which the O'Higgins PCR's application is based. It is said: (a) that the Infringements found in the Settlement Decisions were extremely limited in nature; and (b) that the proposed methodology put forward by Professors Breedon and Bernheim proceeds on a series of false assumptions as to the nature of the collusion found by the Commission. In consequence, the Respondents contend that the O'Higgins PCR's proposed claim extends "*well beyond the findings in the Decisions*" (para. 102), on which "*any follow-on claim must properly be based*" (para. 105(b)).

93. These arguments are misconceived. They distort both the Settlement Decisions and the expert reports of both Professors Breedon and Bernheim. On proper analysis, it is evident that the proposed claim which the O'Higgins PCR seeks to bring goes no further than the

46 See Bernheim 2, section III.E.

47 See: *Sainsbury's Supermarkets Ltd. v. Mastercard Inc.* [2020] 4 All ER 807 at [217]-[223]; *Merricks v. Mastercard* [2021] Bus LR 25 at [51] and [122].

four corners of the Settlement Decisions and, furthermore, that its proposed methodology captures the core of the unlawful conduct found in the Settlement Decisions.

94. Furthermore, the Respondents have not filed any expert evidence of their own and so have no evidential basis on which to gainsay the opinions of Professors Breedon and Bernheim. As the Court of Appeal cautioned in *Merricks*, the Tribunal should be wary of giving only "*minimal weight to the [proposed class representative's] experts' own (albeit preliminary) assessment*" (see [2019] Bus LR 3025 at [53]). In any event, the scope for interrogation of expert evidence on a CPO application is limited: as Lord Briggs said in *Merricks*, the "*questioning and cross-examination of experts both should and will be a rare occurrence at certification hearings*" ([2021] Bus LR 25 at [79]).[48]

E1. Scope of the Infringements found in the Settlement Decisions

95. The O'Higgins PCR explained the nature of the infringements found by the Commission at length in its Re-Amended Collective Proceedings Claim Form (see, in particular, para. 58). As set out there, the collusion between the Respondents comprised two essential limbs:

(1) First, there was an extensive and recurrent exchange of information. As the Settlement Decisions record, the traders at issue "*participated in nearly daily communications*", as part of which "*they engaged in extensive, recurrent and reciprocal exchange of information … relating to different aspects of FX spot trading of G10 currencies*" (Three Way Banana Split Settlement Decision, recital 45; Essex Express Settlement Decision, recital 44, emphasis added). This recurrent and extensive information exchange covered four different types of information, namely: (i) open risk positions (see recital 53 of both Settlement Decisions); (ii) outstanding customers' orders including stop-loss orders, take-profit orders, orders for the fix and immediate orders (see recitals 54 and 55 of both Settlement Decisions); (iii) other details of current or planned trading activities (see recital 57 of both Settlement Decisions); and (iv) information relating to existing or intended bid-ask spreads (see recitals 58 and 59 of both Settlement Decisions). The information exchange took place pursuant to an "*underlying understanding*" that:

[48] Note also the observations of the minority in the Supreme Court at [113] that holding a mini-trial at the point of certification would be "*wholly inappropriate*".

(a) such information could be used to the traders' respective benefit and in order to identify occasions to coordinate their trading; (b) such information would be shared within the private chatrooms; (c) the traders would not disclose such shared information received from other chatroom participants to parties outside of the private chatrooms; and (d) such shared information would not be used against the traders who shared it (see recital 47 of the Three Way Banana Split Settlement Decision and recital 46 of the Essex Express Settlement Decision).

(2) Second, there were instances of coordination facilitated by the exchange of information, which "*took place with a view to benefiting the participating traders' returns or to avoiding trading against each other's interest*" (see recital 60 of both Settlement Decisions). The Commission found that there were two specific types of coordination: first, coordinated trading with a view to affecting a fix (i.e. benchmark manipulation) and second, coordinated trading whereby traders refrained from trading as they otherwise would have done on account of another trader's announced position or trading activity (a practice referred to by the Commission as standing down) (see recitals 61-63 of both Settlement Decisions). The Commission also found that the exchange of information on bid-ask spreads "*may remain useful for the other traders for a window of up to a few hours depending on the market's volatility at the time, and could enable coordination of spreads to that client*" (recital 58 of both Settlement Decisions) and "*may have facilitated occasional tacit coordination of those traders' spreads behaviour, thereby tightening or widening the spread quote in that specific situation*" (recital 89 of both Settlement Decisions).

96. The Commission went on to find that these activities in which the Respondents participated constituted a series of unlawful agreements and/or concerted practices contrary to Article 101(1) TFEU and Article 53 of the EEA Agreement. Importantly, the Commission did not seek to characterise all the conduct in which the Respondents engaged as exclusively either an agreement or a concerted practice. Rather, it found (in accordance with well-established case law) that a "*cartel may … be an agreement and a concerted practice at the same time. Article 101 of the Treaty lays down no specific category for a complex infringement of the present type*" (recital 76 of both Settlement Decisions). Thus, whilst the underlying understanding pursuant to which the

information exchange above took place was specifically found to constitute an agreement contrary to Article 101(1) TFEU (see recital 83 of both Settlement Decisions), the information exchange and coordination in which the Respondents participated constituted a series of "*[o]ther agreements and/or concerted practices*" (see recitals 84 and 85 of both Settlement Decisions). Further, as they are Settlement Decisions, the Respondents have clearly and unequivocally acknowledged liability for their participation in the cartels, and must be taken to agree with the findings contained in the Settlement Decisions. In such circumstances, it would be an abuse of process for the Respondents to seek to resile from any of the Commission's findings (see *AB Volvo (Publ) & Others v. Ryder Limited & Others* [2021] 4 CMLR 7).

97. Against that backdrop it is evident that the repeated assertions made by the Respondents to the effect that the scope of the Infringements they participated in were "*narrow*" or "*limited*" are misplaced. In particular, it is wrong to suggest that each infringement "*concerned*" only the underlying understanding (as is implied at Response, para. 89(a)). As above, the underlying understanding was only one aspect of the Infringements found by the Commission. The O'Higgins PCR also notes, in this context, that the proceedings are at an extremely early stage. It has had no sight of the actual communications between the Respondents which underlie the Commission's findings of anti-competitive conduct.

E2. No "*false assumptions*" about the scope of the Infringements

98. Before turning to the specific "*false assumptions*" which the Respondents suggest that the O'Higgins PCR has made, the O'Higgins PCR notes that both Professors Breedon and Bernheim set out a detailed analysis of the conduct described in the Settlement Decisions in their respective expert reports, which has not been criticised by the Respondents: see Bernheim 1, paras. 37-48, and Breedon 1, paras. 3.5-3.10. It cannot therefore be said that the O'Higgins PCR's experts have failed to have firmly in mind the precise nature of the infringing conduct found by the Commission.

99. As for the specific "*false assumptions*" on which the Respondents rely, none of them has merit for the following reasons.

100. First, it is said that Professor Breedon proceeds on the basis of a false assumption that there was "*an actual agreement*" between the Respondents to widen spreads (see Response, paras. 90-91). However:

(1) As noted above, the Settlement Decisions make clear that there were "*extensive and recurrent*" information exchanges in which the Respondents participated and which included information about bid-ask spreads which may have enabled coordination.

(2) The statement at para. 4.4 of Breedon 1 that "*there is an implicit agreement within the FX Cartels to keep spreads wide*" was not intended to be a factual or legal assertion as to the existence of such an agreement within the meaning of Article 101(1). Rather, this statement appears in the context of an analysis of the information exchange aspect of the infringement found by the Settlement Decisions. Para. 4.4 itself starts by pointing out that the "*colluding group have an informational advantage*" and paras. 4.6-4.9 are squarely focussed on "*potentially market moving information*". Given the information exchange in which the Respondents participated, it was clearly justifiable to regard it as economically equivalent to an "*implicit*" agreement.

101. Second, it is said that Professor Breedon wrongly proceeds on the basis of an assumption that any coordination which did occur on bid-ask spreads would "*necessarily have resulted in wider quoted spreads to customers*" (see Response, paras. 94-96). This is incorrect. As the Respondents themselves recognise, at para. 98 of their Response, Professor Breedon expressly notes in his first report that "*colluding market markers in principle could charge narrower spreads as a result of [the] informational advantage*" they obtained from exchanging information on bid-ask spreads. The Respondents say that this "*contradicts and undermines*" the O'Higgins PCR's "*assumption that collusion with the Infringements would necessarily lead to wider spreads*" (para. 98). That is a contrivance; in reality, it shows that no such assumption has been made.

102. Rather:

(1) As above, Professor Breedon has recognised that in principle bid-ask spreads might have been tightened. It is his opinion that in practice, bearing in mind what else is

known about the unlawful conduct in which the Respondents participated, they would likely have widened: see para. 3.19 of his second report ("**Breedon 2**").

(2) Professor Breedon does not assume that the conduct necessarily widened bid-ask spreads. Instead, he proposes a regression-based approach designed to estimate the impact of the conduct on bid-asks spreads, while accounting for relevant factors not influenced by the cartels.

(3) This is entirely consistent with recital 89 of both Settlement Decisions which says that the coordination of traders' spread behaviour may have resulted in the "*tightening or widening the spread quote in that specific situation*".

(4) The Respondents say, in this regard, that the Settlement Decisions make no specific findings of punishment mechanisms. But fundamental to the underlying understanding was the agreement that shared information would not be used against the traders who shared it. Recital 81 in both Settlement Decisions also makes clear that there was monitoring: "*the extensive exchange of information helped in monitoring compliance with the underlying understanding*".

(5) Professor Breedon is clear that his proposed methodology does not proceed on any assumption that effective/quoted spread widening in fact occurred; to the contrary, whether or not this is the case is an empirical question which will be tested and captured by his proposed methodology.[49]

103. Third, it is said that Professor Breedon wrongly assumes that non-colluding banks would also have widened their spreads in response to the collusion between the Respondents (see Response, paras. 99-102). Again, however, this is not an assumption made by Professor Breedon but rather his expert assessment of what the response of non-colluding banks would likely have been to the unlawful conduct of the Respondents and in light of the well-established economic principle of 'adverse selection'. The reasons for that are explained in Breedon 1 (para. 4.4) and in Bernheim 1 (paras. 39-41). Professor Breedon makes clear in Breedon 2 that whether or not this was in fact the case is a matter that will fall to be tested empirically following disclosure.[50] It bears noting in this context that the Respondents have not adduced any expert evidence of their own, in order to gainsay the

[49] Breedon 2, paras. 3.11-3.13.
[50] Breedon 2, para. 3.15.

opinions of Professors Breedon and Bernheim. They point (at para. 101 and footnote 165 of the Response) to one item of academic commentary on this point. However, this article only serves to support his analysis.[51] It shows that higher market shares led to greater information advantage. The ability or willingness of a bank with a small market share to become one with a large market share by offering loss making spreads is not addressed. It seems an improbable strategy.

104. Fourth, it is said that Professor Breedon has proceeded on a false understanding as to the extent of the infringing conduct found by the Commission in the Settlement Decisions. This goes nowhere, however. The argument proceeds on a distorted reading of the Settlement Decisions that ignores the "*extensive*" and "*recurrent*" nature of the information exchange in which the Respondents participated. Further:

    (1) As Professor Breedon explains in his second report, and contrary to the suggestion at paras. 104-105 of the Response, the market shares of the Respondents are a relevant factor because larger market shares confer access to more information.[52]

    (2) His model of adverse selection explains how the profits made through any information advantage will have both direct and indirect effects on other market participants.[53]

105. Lastly, the Respondents say that Professor Breedon has not explained how he might apportion loss between the two infringements (if that becomes necessary). This topic and a methodology are addressed at Breedon 2, paras. 3.30-3.34.

106. For these reasons, the suggestion that the O'Higgins PCR's expert methodology is advanced on a series of false assumptions about the scope of the infringements found by the Commission is without merit.

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51 Breedon 2, fn. 23.
52 Breedon 2, para. 3.25.
53 Breedon 2, para. 3.26.

E3. O'Higgins PCR's case on causation

107. At Response paras. 109 to 134, the Respondents contend that the PCRs' cases on causation are weak. To the extent that these paragraphs concern the O'Higgins PCRs' case, the contentions are denied:

(1) The criticisms at Response paras. 114 to 120 are made against the Evans PCR only.[54]

(2) The criticism of the adverse selection risk mechanism, set out at Response paras. 121 to 127, is rebutted in section IV.A of Bernheim 2. The criticism is rooted in the claim that information exchanges among cartel members were too "*episodic*" to materially and systemically impact adverse selection risk; this description mischaracterises the factual narrative that appears in the Settlement Decisions.

(3) Response paras. 128 to 134 criticise the PCRs (but principally the Evans' PCR's expert) for "*attempts to extend their claims to E-Commerce Transactions*". As to this:

(a) The Settlement Decisions do not use the term "*E-Commerce Transactions*", which is the Respondents' creation. They relevantly state as follows:

> "*The case does not concern FX spot e-commerce trading activity understood as FX spot trades that are automatically booked by, or executed by either the relevant bank's proprietary electronic trading platforms or computer algorithms. These transactions take place without the intervention of any trader.*"[55]

(b) The O'Higgins PCR recognises that its claim is confined to a follow-on claim based on the Settlement Decisions. However, it does not accept the Respondents' reading of the above passage from the Settlement Decisions. The O'Higgins PCR considers that the definition appears to exclude only those transactions which take place without the intervention of any trader, not (as the Respondents appear to think) all trades executed electronically. Professor Breedon sets out his opinion on the likely interpretation of the Commission's exclusion at Breedon 2, paras. 3.38-3.41, namely that it

54 Breedon 2, para. 3.37.
55 Three Way Banana Split Settlement Decision, fn. 6; Essex Express Settlement Decision, fn. 6.

appears to be confined to single bank platforms' algorithms matching trades automatically.

(c) In any event, it is Professor Breedon's view that, whatever the scope of e-commerce trading excluded from the Settlement Decisions, the infringement is likely to have had an impact on the pricing of all trading in the relevant currencies. However, the extent to which it did is an empirical issue requiring analysis of data from the Respondents.[56]

(d) It is accordingly premature for the Tribunal to carve out any such transactions from the proposed claim.

E4. O'Higgins PCR's quantum methodology

108. Response paras. 135 to 152 seek to criticise the regression-based approach proposed by the PCRs. These criticisms are rebutted in section IV.B of Bernheim 2:

(1) For the reasons explained in section IV.B.1 of Bernheim 2, paragraphs 137 to 139 rely on a flawed understanding of regression models. By mis-stating some of the properties that a well-specified regression model must satisfy, they thereby create a misleading impression that if a regression fails some of these properties, it is necessarily unreliable.

(2) For the reasons explained in paragraphs 64 to 69 of Bernheim 2, paragraphs 140 to 151 are mistaken in claiming that it is a deficiency in the modelling that the PCRs cannot plausibly control for the eight factors there listed in any regression analysis. In particular:

(a) By employing the "*prediction approach*", the analysis can be immunised against concerns that the omission of these variables might bias estimates of the cartels' effects.

[56] Breedon 2, para. 3.39-3.41.

(b) The Respondents provide no supporting evidence for the implicit assertion that these eight factors materially affect FX spreads, and/or that the effects are large enough to merit their inclusion in the regressions.

(c) Regression analysis does not necessarily require precise measurement of causal factors.

(d) The Respondents provide no reason, let alone evidence, to think there are systematic relationships between the eight factors they identify and the cartels' conduct.

(e) The Respondents' list includes some factors that the cartels' conduct may have affected.

(f) Professor Breedon explains how he plans to draw on the existing academic literature to identify key factors and alternative data sources that can be used to model those factors if necessary.[57]

(3) As explained in section IV.B.2 of Bernheim 2, the Respondents mischaracterise the role of heterogeneity in regression modelling.

(4) The Respondents also mischaracterise the nature of Professor Bernheim's prediction approach.[58]

109. The O'Higgins PCR's proposed methodology has the significant advantage of capturing all the core aspects of the anti-competitive conduct found by the Commission.

110. As noted above, the collusion found by the Commission in section 4.1.2.3 of both Settlement Decisions related to the twin practices of benchmark manipulation and standing down. Taking those in turn:

(1) Collusion on benchmark manipulation is captured by the expert methodology proposed by Professor Breedon because it employs the measure of Realised Spreads and Realised Half-Spreads. The 'Realised Spread' measures the difference between the exchange rate paid for a given trade and the prevailing market price

[57] Breedon 2, para. 3.46.
[58] Bernheim 2, section IV.B.3.

for the opposite trade for the relevant instrument at a point in time *shortly after* the trade's execution (Breedon 1, para. 6.18(a)) (in contrast to the 'Effective Spread' which measures that difference at the point of execution). Likewise, the 'Realised Half-Spread' measures a dealer's revenue by comparing the price at which the dealer and client dealt at the point of execution with the prevailing market mid-point sometime *after* the trade was executed (Breedon 1, para. 6.18(b)). Professor Breedon's use of Realised Half-Spreads means that he is able to account "*for post-trade movements*" and "*measure the change in per-trade revenue obtained from collusive activities such as front running by the Dealer*" (Breedon 1, para. 6.19). Worked illustrations of this point are provided at paras. 61-73 of Bernheim 1. As Professor Bernheim states at para. 72:

> "*The realized half spread also captures the impact on transactions influenced primarily by coordinated price manipulation. For example, the EC Decisions indicate that coordinated price manipulation may have been especially likely around the time of benchmark "fixes". Transactions arising from orders at benchmark prices execute at the same fixing price, regardless of whether the order is a buy or sell, and thus are not subject to widened effective spreads. However, those transactions would be subject to the price-impact component of the realized half-spread*".

(2) Professor Breedon's methodology also captures the effects of standing down. This point is explained at paras. 6.30-6.33 of Breedon 1. As is made clear there: "*the effect of certain Dealers refraining from trading is similar to an explicit agreement to quote wider spreads and should result in wider Effective and Realised Half Spreads*" (Breedon 1, para. 6.32; see also Bernheim 1, para. 48). The effects of standing down practices will therefore be captured by Professor Breedon's proposed methodology insofar as it will compare Realised Half Spreads during the Cartel Period with Realised Half Spreads in the post-Cartel Period (Breedon 1, para. 6.33).

111. Thus, whilst the Respondents' complaint (at para. 89(d) of the Response) that the PCRs' claims "*are primarily concerned with bid-ask spreads*" which was "*not the primary focus of the Decisions*" may be true of the Evans PCR's expert methodology, it is not applicable to the O'Higgins PCR's expert methodology. This is a point to which the O'Higgins PCR returns in section F of its Submissions on the Carriage Issue dated 23 April 2021 where the respective approaches of the O'Higgins and Evans PCRs are further addressed.

F. CONCLUSION

112. For all the above reasons, the Respondents raise no valid objections to the CPO sought by the O'Higgins PCR, which the Tribunal is respectfully requested to grant.

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