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**

SURREJOINDER OF THE O'HIGGINS PCR
dated 11 June 2021

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A. INTRODUCTION

1. These submissions by the O'Higgins PCR are served pursuant to paragraph 8 of the Tribunal's Order of 15 January 2021. They reply to the Respondents' Joint CPO Rejoinder dated 4 June 2021 (the "**Rejoinder**"). Paragraph references are to the Rejoinder unless otherwise indicated.

2. Save where expressly stated, the O'Higgins PCR maintains its case as set out in its claim form and in its CPO submissions dated 23 April 2021 (the "**O'Higgins CPO Submissions**"). Defined terms are the same as in that document. Failure to address a point made by the Respondents should not be treated as an admission and the O'Higgins PCR does not repeat points where they are already made in those previous submissions.

3. In the Rejoinder, the Respondents appear to accept that a CPO should be made – they go so far as to say that it is an "*eminently suitable case*" for certification, at paragraph 5 – but maintain their case that the certification should be on the basis of opt-in proceedings, rather than opt-out proceedings. They do so on the basis of two mistaken premises, mentioned at paragraph 5 of the introduction:

   (1) The idea that there is a general preference in favour of opt-in proceedings, which the Respondents seem at points to elevate to a presumption. This proposition is wrong, as explained in section B of the O'Higgins CPO Submissions, and further in section B below.

   (2) The suggestion that the proposed class is "*comprised overwhelmingly of professional FX users such as hedge funds, asset managers and large and/or sophisticated corporations with high value claims*". This statement wholly fails to account for (a) the diversity within the class, including the fact that many do not trade FX as a profession and are simply ordinary FX market users from many different industries, which means that a substantial portion of the class is likely to be difficult to contact and/or persuade to opt in, and (b) the fact that the class very likely includes some members with high-value claims, but there will also be a very long 'tail' of class members with claims which may still be worth thousands of pounds but which it may not make sense to pursue on an opt-in basis, especially against opponents like the Respondents.

4. There is one short answer to the Respondents' contentions. At paragraph 6(b), they suggest that the PCRs "*conspicuously do not say that they will not attempt to bring an opt-in claim, should the Tribunal find that to be more appropriate*". That significantly understates the evidence in fact given on behalf of the O'Higgins PCR:

   (1) Mr O'Higgins confirmed his view, at paragraph 33 of O'Higgins 3, that an opt-in claim "*would ultimately not be an economically viable means of proceeding on behalf of the Proposed Class*". He further explained at paragraph 32 that his motivation was to represent all members of the proposed class and that he regards class members who suffered comparatively small losses as just as entitled to compensation as class members who suffered large losses. His motivation is not to bring an *Allianz*-style claim[1] on behalf of the small proportion of the class which is particularly sophisticated and suffered particularly large losses. He wants to represent everyone wronged by the Respondents' cartels.

   (2) Mr Purslow, of Therium, the O'Higgins PCR's funders, confirmed at paragraph 6 of Purslow 2 that "*from Therium's perspective, opt-in proceedings would, in the present case, be likely to be impracticable*"; he concluded at paragraph 17 by saying that, on the present information, he does not think that he would get approval from Therium's Investment Committee to fund an opt-in claim.

5. Accordingly, the Tribunal should not assume, as the Respondents invite them to do, that failure to certify an opt-out claim will lead to an opt-in claim being brought. It is over two years since the Commission Decisions, yet no such claim has been proposed. That option is not on the table – for very good reason, as Mr Purslow explains carefully and in detail in his second witness statement. The CPO should be granted on an opt-out basis for all the reasons given in the O'Higgins CPO Submissions and elaborated on below in response to the Rejoinder.

6. Finally, it may be observed that if the Tribunal were to decline to certify on an opt-out basis and instead merely indicate that it would be prepared to certify the claim on an opt-in basis, as it is urged to do by the Respondents, it would of course be at odds with the

[1] The standalone proceedings being pursued in the High Court in respect of the FX cartels: *Allianz Global Investors GmbH & ors v. Deutsche Bank AG London & ors* (Claim no. CL-2020-000736).

international position: opt-out collective/class action proceedings are proceeding in each of Canada,[2] the US and Australia, and are proposed in Israel.[3] Even in the unlikely event that an opt-in claim were subsequently advanced at all, it would be liable to consist in a limited number of well-funded class members who have particularly large claims (analogous to the standalone *Allianz* litigation being pursued in the High Court);[4] indeed, the Respondents themselves contend that such entities would form the core of any opt-in class. The effect of the Respondents' position would be that very many class members, with claims which may still worth thousands of pounds, would be excluded from recovery; the Respondents, by contrast, would have been allowed to perpetrate a years-long cartel without having to compensate its victims. That would be to perpetuate an outcome deprecated by Lord Briggs in *Merricks v. Mastercard* [2021] Bus LR 25, at [53], discussing the issue of assessment of damages: "*the perception that anti-competitive conduct may never be effectively restrained in the future if wrongdoers cannot be brought to book by the masses of individual consumers* [here, ordinary FX market participants] *who may bear the ultimate loss from misconduct which has already occurred*".

7. Strikingly, the Respondents have chosen to adduce no witness or expert evidence whatsoever in support of their case, let alone submit any statement of truth. They also overlook key evidence given by the O'Higgins PCR's own witnesses, including in relation to the size and characteristics of the proposed class.

8. These submissions now address:

   (1) the Respondents' case on the 'opt-in vs. opt-out' question (sections B and C);

   (2) the Respondents' diminished enthusiasm for their case on data availability (section D);

   (3) the Respondents' miscellaneous observations on the 'strength of the proposed claims' (most of which focus on the Evans PCR) (section E); and

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2 *Mancinelli v. Royal Bank of Canada* 2020 ONSC 1646 – a decision of Perell J, a very experienced class action judge, who certified a wide range of issues common to the class including damages.

3 See Annex A to the Joint CPO Response.

4 See generally Purslow 2, esp. paragraph 14.

(4) the two further additional points raised, belatedly, by the Respondents: the question of whether compound interest should be certified as a common issue (section F), and the issue of defunct companies and deceased persons (Section G).

B. LEGAL FRAMEWORK ON OPT-IN VS. OPT-OUT

9. The Respondents suggest that there are two main points of legal principle at issue:

(1) Is the Tribunal entitled to consider whether the proceedings should be opt-in, in circumstances where this is not an option on the table?

(2) Is there a general preference in favour of opt-in proceedings where practicable?

10. As to the legal framework overall, the O'Higgins PCR maintains its position as set out in the O'Higgins CPO Submissions at paragraphs 7 to 53, in particular:

(1) The Tribunal is not mandated to consider whether the proceedings should be opt-in unless the decision is before it. As the O'Higgins CPO Submissions explained at paragraph 11(1), there is only a decision to be taken where the applicant has expressly presented its application on alternative bases (as UK Trucks Claim Ltd. did in the *Trucks* proceedings[5]), or otherwise expressly acknowledges that an opt-in basis would be viable. Paragraph 27 also acknowledged that there might be such a choice where it is manifest or obvious that the claim could be brought on an opt-in basis. That is not this case. All that the Tribunal has is contentions from the Respondents in legal submissions (unsupported by any evidence) that it might be possible to marshal an opt-in claim formed of the most sophisticated class members with the highest-value claims. It is not at all clear that such a claim would be possible – and in any event, that outcome would leave the vast majority of class members uncompensated.

(2) The legal background, including the decision of the Supreme Court in *Merricks* and a proper interpretation of the CAT Rules, supports the approach taken by the O'Higgins PCR.

[5] Case 1282/7/7/18.

(3) The legislative background materials relied on by the Respondents in an attempt to suggest that the collective proceedings regime is intended to be only or primarily for the benefit for consumers are of dubious admissibility.

(4) In any event, when one does consider those materials, it is clear that collective proceedings were to be made available for the benefit of businesses as much as consumers, and, further, that opt-out proceedings ought if anything to be the norm. Under the previous regime, only opt-in proceedings were available. They were widely regarded as a failure and hardly used; after putting together the only opt-in claim brought over the ten years during which that regime applied, the consumer body *Which?* stated that it would never bring another.

(5) The collective proceedings case law and experience from other jurisdictions likewise support the position of the O'Higgins PCR and not the Respondents.

11. The O'Higgins PCR does not repeat those submissions here but addresses certain new points made in the Rejoinder in relation to each issue.

B1. Is the Tribunal entitled to consider whether the proceedings should be opt-in at all?

12. The Rejoinder suggests at paragraph 11 that the submission of the O'Higgins PCR that the Tribunal is only mandated to consider whether an opt-in approach would be preferable to an opt-out approach where the decision is presented to it "*produces arbitrary results, depending on whether one or more PCRs put forward an opt-in proposal*". There is no arbitrariness:

(1) In each case, applicants will take a view on whether the claim is more viable as an opt-out action or an opt-in action, and will formulate their applications accordingly. The fact that more opt-out actions are brought than opt-in may indicate that opt-in actions are often impracticable (as the experience of *Which?* shows). Nonetheless, where the claim is of a type which could sensibly be brought as an opt-in, this may be volunteered – as the RHA did in its *Trucks* claim,[6] having regard to its privileged position as a trade organisation with privileged access to members of the proposed

[6] Case 1289/7/7/18.

class, and as has happened in one other of the 12 CPO applications filed with the Tribunal to date (see paragraph 46 of the O'Higgins CPO Submissions[7]). If an applicant does not volunteer an opt-in claim, it is reasonable to assume that is because it has taken the view that the opt-out claim is more appropriate. That result is anything but arbitrary: to the contrary, it is the result of careful consideration by the applicant who seeks to represent the class in their best interests.

(2) As the O'Higgins CPO Submissions noted at paragraphs 11(1) and 27, even where an opt-in proposal is not formally presented to the Tribunal, it may be that it is in fact an option because the applicant concedes as much or because an opt-in claim would manifestly be viable. In such circumstances the Tribunal may consider it appropriate to consider the question, and this removes any possible arbitrariness in cases where an opt-in proceeding really would be the very plainly preferable option. There is no cause for doing so on the basis of the thought experiment posited by the Respondents – that opt-in proceedings *may* be practicable and preferable to opt-out proceedings.

13. It is no doubt for this reason that, in the opt-out proceedings considered to date, the Tribunal has simply considered the question of whether an opt-out claim is suitable, rather than conducting an artificial exercise of considering whether an opt-in claim might in theory have been a plausible option. There is no stage in the analysis of the Supreme Court in the *Merricks* case where it was thought necessary to consider the question whether the proceedings might have been brought as an opt-in instead, or even to gesture towards such a question. The same was true in the *Gibson* case, as explained at paragraph 48 of the O'Higgins CPO Submissions.

14. As to the submissions concerning the proper reading of the 1998 Act and the Tribunal's rules at paragraph 12 of the Rejoinder, these points have likewise been dealt with in the O'Higgins CPO Submissions. In short:

(1) The ultimate order authorising collective proceedings to go ahead will of course have to state in it whether the proceedings are opt-out or opt-in proceedings. That is all that is mandated by section 47B(7).

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[7] One CPO application has been filed since, also seeking an opt-out CPO (case 1403/7/7/21).

(2) The main test which the Tribunal is to apply under Rules 77 and 79 of the Tribunal Rules is a comparative one: are the proceedings more appropriately brought as collective or individual proceedings? Rule 79(3), addressing the factors relevant to an opt-out vs. opt-in decision, does not mandate that the Tribunal must specifically consider these factors in every case in order to determine which type of proceedings to certify, but rather sets what factors are relevant where such a decision is necessary. Such a decision is not necessary here. The mere fact that the Respondents would prefer the proceedings to be opt-in (because it would result in both CPO applications failing, and, if an opt-in claim were to go ahead on some other basis or brought by some other applicant, a vastly reduced class size and significantly less to pay in damages) does not mean that the Tribunal has to waste its time considering this question.

15. As to paragraph 13 of the Rejoinder, the question of the circumstances when it might be appropriate for the Tribunal to consider the possibility of opt-in proceedings in the alternative have already been addressed at paragraph 12 above.

16. Further, as set out at paragraph 4 above, the O'Higgins PCR has submitted clear evidence explaining: (a) Mr O'Higgins views an opt-in claim as not being economically viable, and further it would not fulfil his goal of representing all members of the proposed class, including those with relatively modest claims, rather than only sophisticated entities with high-value claims who might have the wherewithal to opt in; and (b) it is not likely that an opt-in claim could even be funded, as Mr Purslow explains.

17. In these circumstances it would be a dereliction of duty for the Tribunal to refuse to certify either CPO application currently before it on the basis of the Respondents' 'thought experiment' of a wholly theoretical and non-existent opt-in alternative (contrary to paragraph 14 of the Rejoinder).

18. The Tribunal has no information about the costings, economic viability, class composition, or any other features of such a putative opt-in claim. The Tribunal is simply not in a place to give sensible consideration to the issue. It is for this reason that the O'Higgins PCR suggests that the question of considering the two alternatives can in principle only arise where the applicant concedes the viability of opt-in proceedings or it is manifestly possible for opt-in proceedings to be brought. Without such thresholds, or

some similar threshold, the Tribunal will be pulled into unedifying speculation. Save in exceptional cases, the Tribunal should deal with the applications (and choices) which are actually before it.

B2. Is there a general preference in favour of opt-in proceedings where practicable?

19. Leaving aside the foregoing, it is quite clear that there is and can be no general preference in favour of proceedings being opt-in as opposed to opt-out.

(a) Burden of proof

20. At paragraph 17 of the Rejoinder, the Respondents advance some further submissions concerning the burden of proof the logic of which is difficult to follow. In particular:

    (1) The Respondents' proposed test – that there is a general preference in favour of opt-in proceedings where they are practicable – does, by its nature, introduce the question of the practicability of opt-in proceedings as a threshold issue (the question of the 'general preference' logically cannot arise where opt-in proceedings are not practicable). The O'Higgins PCR had assumed that the Respondents were seeking to suggest that it was for the applicant to demonstrate that an opt-in procedure would be impracticable. It had seemed to attempt to place this burden on the PCRs at various points in its Response: see, e.g., paragraph 3(a). (It also seems to do so at various points in the Rejoinder, e.g., paragraph 47.)

    (2) However, the O'Higgins PCR notes that the Respondents have now disclaimed this submission at paragraph 17(a) of the Rejoinder, stating that they are not seeking to turn the question of practicability into a threshold issue. It follows, therefore, that in order to be able to rely on any general preference as they seek to do, the burden must be on the *Respondents* to show that opt-in proceedings would be practicable – as otherwise the question of the application of the purported general 'preference' would not seem to arise.

    (3) Indeed, it is right that, if the question is to be analysed at all in the way the Respondents suggest, the burden of proof *should* rest on the respondent to a CPO application to show *positively* that opt-in proceedings would be practicable, at least

where none are applied for. It would be obviously wrong for the Tribunal to refuse to certify an opt-out claim on the basis that the applicant had *failed* positively to demonstrate that an opt-in claim was *impracticable*. The Tribunal must make a *positive* finding to the effect that an opt-in claim would be *practicable* before it even considers refusing an opt-out application by saying that the applicant should proceed on an opt-in basis instead.

(4) The Respondents have, of course, wholly failed to discharge the burden of showing that opt-in proceedings would be practicable, as explained above and in the O'Higgins CPO Submissions – not least because they have failed to adduce any evidence to that effect (or to counter the evidence to the contrary adduced by the O'Higgins PCR and Evans PCR).

(5) By contrast, once that threshold question has been passed and the Respondents have succeeded in establishing that opt-in proceedings are practicable, the burden seems to shift again, according to the Respondents: this time, the 'general preference' comes into play and it is for the CPO applicant to 'counter' or 'outweigh' the general preference, as set out at paragraph 17(b). To use the language deployed at paragraph 35, this is said to be a "*general, but rebuttable, preference in favour of opt-out proceedings where they are practicable*".

21. The intricacies of applying these back-and-forth burdens of proof, and the evidential complications which arise, are, it is suggested, unlikely to assist the parties or the Tribunal in future CPO cases, and are a reason to disregard the Respondents' submission as to the existence of a 'general rebuttable preference' (whatever is meant by that).

22. The O'Higgins CPR respectfully suggests that a rather simpler approach is preferable:

(1) The analysis of 'opt-in vs. opt-out' should only be undertaken where the issue is properly before the Tribunal, i.e. where it is clear there is a genuine choice. As set out above, this can only happen where the applicants have expressly presented alternative opt-out and opt-in applications supported by evidence, or have conceded that opt-in proceedings would be practicable, or, in exceptional circumstances, where it is manifest that opt-in proceedings would be practicable. On this approach, no complicated burden of proof questions arise concerning the question whether opt-in proceedings would be practicable.

(2) Only then should the Tribunal consider the question of 'opt-in vs. opt-out', as a matter of its discretion. It benefits from a free hand in so doing and is not trammelled by unhelpful rebuttable presumptions or preferences.

(b) Rule 79(3)

23. The Respondents' argument thereafter proceeds from the alleged "*starting point*", Tribunal Rule 79(3), which mandates the Tribunal – when it is determining whether collective proceedings should be opt-in or opt-out – to take into account the factor "*whether it is practicable for the proceedings to be brought as opt-in proceedings*": see paragraph 19 of the Rejoinder.

24. As the O'Higgins PCR has noted (at paragraph 23 of the O'Higgins CPO Submissions), the reference to this factor in Tribunal Rule 79(3) in fact militates in precisely the opposite direction. As the history prior to the introduction of opt-out collective proceedings shows, opt-in proceedings are cumbersome and often not viable, including because they are so expensive to administer and because many fewer class members will opt in right at the start than will make themselves known at the end of the proceedings in order to collect from an existing damages pot (after costs have been taken from it). The Respondents have therefore misunderstood and hence misrepresented the position at paragraph 20 of the Rejoinder. A conclusion that opt-in proceedings might be practicable does not create a presumption or preference in favour of such opt-in proceedings. Rather, a conclusion that opt-in proceedings might be *impracticable* dictates a conclusion in favour of opt-out proceedings, for obvious reasons, such that it is appropriate to consider the question of the practicability of opt-in proceedings when the Tribunal is considering whether to make an order for a CPO on an opt-in basis.

(c) The Tribunal's Guide

25. The Respondents place significant weight on the Tribunal's Guide in their arguments in the Rejoinder in relation to the Tribunal's ability to consider opt-in proceedings where none are 'on the table'. The Tribunal's Guide is not binding. The Tribunal's discretion is granted and governed by the statute and by Tribunal Rules. To the extent that the Guide is relevant at all:

(1) The O'Higgins PCR maintains its position that the general preference referred to at paragraph 6.39 only arises where the Tribunal is actually required to choose between opt-in and opt-out.

(2) The fact that paragraph 6.38 requires submissions as to why opt-out proceedings would be more appropriate than opt-in proceedings is immaterial. This is relevant to satisfying the Tribunal that the applicant has properly considered the form of the proceedings (and so does away with the problem of adventitiousness or arbitrariness which the Respondents fear). It cannot be used to found any kind of general preference or presumption.

(d) Legislative background materials

26. In the O'Higgins CPO Submissions, the O'Higgins PCR had taken issue with the way in which the Respondents sought to deploy the legislative background materials. They cherry-picked certain quotations from them without explaining why they were admissible as interpretation aids, and without acknowledging the proper context in which the possibility of opt-out proceedings was introduced.

27. As to the question of admissibility:

(1) At paragraph 28(a) of the Rejoinder, the Respondents are confused in suggesting that the prevention of a proliferation of 'US-style' class actions can have been a 'mischief' at which the statute was aimed. The 'mischief' is and can only be a problem which pre-existed the statute in question and which the statute is trying to solve.

(2) As to paragraphs 28(b) and 28(d), the problem lies primarily with the way in which the Respondents seek to deploy the legislative background materials. Lord Briggs in *Merricks*, for example, refers only and briefly to the government consultation document which directly led to introduction of the possibility of opt-out proceedings by legislation (at [20]) and with a view to identifying the 'mischief' at which the statute was aimed. The Respondents, by contrast, refer to a plethora of documents and statements, including various statements made during the passage of the Bill, without explaining on what legal basis they might be admissible.

28. As to the content of the background materials, the O'Higgins PCR relies on the detailed submissions contained in the O'Higgins CPO Submissions, at paragraphs 36 to 46, noting that the legislative context of the failure of the previous opt-in regime is key when considering whether Parliament really intended a preference in favour of opt-in.

29. What the Respondents fail altogether to show, in their discussion of the materials at paragraphs 30 to 38 of the Rejoinder, is that there is any kind of general preference for opt-in claims as they contend. The O'Higgins PCR is not contending for a general preference *in favour* of opt-out proceedings, as the Respondents at times seem to assume. (See, for example, paragraph 31 of the Rejoinder, where the Respondents point triumphantly to a passage from the 2008 Civil Justice Council report recommending against a presumption in favour of opt-out proceedings.) It says simply that the question is one for the Tribunal's discretion, where it arises (which it does not here). For example, at paragraph 46 of the O'Higgins CPO Submissions, the conclusion was simply: "*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*".

30. The Respondents' argument culminates in the rather unproductive proposition, at paragraphs 30 and 35 of the Rejoinder, that the legislative materials indicate that the Tribunal's discretion should be guided by the Tribunal's Rules and the Guide. In this way, the Respondents fail to derive support for the 'general preference' in favour of opt-in proceedings from the legislative background materials themselves. As to the Rules and Guide, the Respondents rely on their previous submissions as to the import of these documents as set out above.

31. In short, the legislative background materials simply do not support the notion that there is a general preference in favour of opt-out proceedings, as suggested at paragraph 38 of the Rejoinder. To the contrary, they support the view of the O'Higgins PCR, which is that the Tribunal has a free hand, but that the very introduction of the opt-out regime in the face of the failure of the previous opt-in regime means that the Tribunal should not hesitate to exercise its discretion in favour of granting a CPO on an opt-out basis in an appropriate case.

(e) Other factors: sophistication of class members

32. At paragraphs 40 to 43 of the Rejoinder, the Respondents advance a detailed argument to the effect that the Tribunal is entitled to consider the sophistication of class members as part of its discretion, and that this is in particular relevant to the question of practicability.

33. The O'Higgins PCR of course agrees that the Tribunal can consider all matters it thinks fit under Tribunal Rule 79(3), which says as much on its face. The question of practicability is likewise to be determined in light of "*all the circumstances*" under Rule 79(3)(b), which must entitle the Tribunal to consider class member sophistication in principle. The O'Higgins PCR does not consider that the various legislative background materials on which the Respondents seek to place weight are helpful here in guiding the Tribunal's discretion: there is no ambiguity, and references to SMEs are, in any event, often about other matters (see paragraph 38 of the O'Higgins CPO Submissions).

34. The O'Higgins PCR does not, however, consider that the supposed sophistication of the class is likely to be of much assistance: the real focus when determining 'practicability' should be on the shape of the proceedings themselves, and whether opt-out proceedings are appropriate in view of factors such as: the sheer number of claimants; the ease of identifying and contacting them to persuade them to opt in; whether they are in fact likely to opt in (as compared with the much more attractive approach of requiring them to apply for money from a damages pot once obtained); the likely 'long tail' of still substantial but smaller losses suffered by a large number of class members; and the calculation of class-wide damages on an aggregate (as opposed to aggregated) basis. Indeed, if anything, the greater 'sophistication' of class members is likely to mean that only relatively high damages awards might tempt them to opt in, and so is a feature rendering opt-in claims less practicable, not more.

(f) Other factors: relevance of the merits

35. Paragraphs 44 to 45 of the Rejoinder address a point made at paragraph 25 of the O'Higgins CPO Submissions. The Rejoinder suggests that the O'Higgins PCR's submission was that the Tribunal may not take account of the merits of the claim at all when deciding whether proceedings should be opt-in or opt-out. This is not so. The point

was that *if* the Respondents are right, *then* every opt-out CPO application case would be a case where the Tribunal would have to decide between opt-out and opt-in and so consider the merits under Rule 79(3), whereas there is no hint of this in *Merricks*.

36. By their response, the Respondents confirm the position in relation to burden of proof, as set out at paragraph 20 above: they say that it was not necessary to consider these points in *Merricks* because the *Respondents* in that case had not sought to argue that the claim could practicably be brought on an opt-in basis. This is a further acknowledgement that on the Respondents' approach the Respondents bear the burden of proof in relation to showing that opt-in proceedings would be practicable. As the following section explains, they have wholly failed to discharge it.

C. PRACTICABILITY

C1. Factors relevant to the 'practicability' question

37. It should be recalled that, as set out above, an important goal – *the* goal – of the opt-out regime is to permit those harmed by anticompetitive conduct to be compensated for their losses, and meanwhile to prevent the perception that wrongdoers who inflict losses from anti-competitive conduct cannot be brought to book (see the comments of Lord Briggs in *Merricks* referred to at paragraph 6 above). Accordingly, the question of practicability should not be drawn too narrowly. The mere fact that a small number of affected persons – like the claimants in the *Allianz* proceedings – might have the wherewithal and motivation to bring individual or opt-in claims does not demonstrate that the proceedings as a whole are practicable as opt-in proceedings. Such proceedings are wholly different in scope and in terms of which members of the class receive redress.

38. At paragraph 3.39 of the CAT Guide – the passage on which the Respondents place such reliance for their 'general preference' argument – an indication is given as to the factors relevant to the question of practicability:

> "*Indicators that an opt-in approach could be both workable and in the interests of justice might include the fact that the class is small but the loss suffered by each class member is high, or the fact that it is straightforward to identify and contact the class members.*"

39. As these factors indicate, the focus is on whether the characteristics of the class are such that the members can be identified and communicated with individually, so that it will be possible to locate class members, inform them about the opt-in date, and persuade them to opt in before it passes. In such circumstances, the closer links with the class forged by an opt-in action may be desirable, and will be set against only a small number of persons 'lost' from the class.

40. The group of those harmed by the Respondents' cartel conduct looks nothing like that. Huge numbers were affected over many years. The Respondents' conduct was pervasive; it affected a hugely disparate range of entities, from those who traded FX for a living in huge volumes to small corporates who made only one trade at the end of each month to balance their books. They cannot be identified from the Respondents' customer data (the Respondents have not volunteered that they can be, and anyway a very large number of those harmed will have done business with non-Respondent dealers but still suffered losses). They are busy with their businesses and will not necessarily hear about the claim or understand its relevance to them. Even if they do, they will not necessarily think it makes sense to take the time to register their name in an opt-in action in order to receive a mere chance to receive what might be a relatively modest sum (per claimant), particularly if they are concerned (whether rightly or wrongly) that the cost includes potentially harming their banking relationship.

41. In short, it should be readily apparent that an opt-in claim is not practicable, and that neither PCR has advanced such a claim for good reason.

42. The Respondents' approach is to attack each factor posited by the PCRs to explain why an opt-in claim is not plausible, and to offer essentially speculative reasons as to why the PCRs' fears might be overblown, or the (inevitable) loss of class members entailed by the factor in question might not be that many, in order to persuade the Tribunal that the opt-in thought experiment is a plausible one. Yet they offer no evidence and largely ignore the evidence put forward by the O'Higgins PCR (including from Mr Mitchell, who has 32 years' experience in the FX markets). No-one from the banks has come to give evidence about the nature of their FX customers. No-one from the banks has come forward even to deny the charge that there is a widespread perception that litigation against banks is risky because of the possibility of retaliation in the context of one's banking relationship. (For the avoidance of doubt, the O'Higgins PCR does not allege

that the banks would necessarily retaliate; the point is about customer concerns, not whether or not those concerns are well founded.)

43. The Tribunal should not be persuaded by this lawyers' case.

44. In any event, even if it reaches the conclusion that some core of the opt-out class might be persuaded to opt in, and is willing to speculate that someone might be found to fund such a claim – which will raise all of the same issues as, and so very likely be just as expensive as, the opt-out litigation – that should not lead to a conclusion that opt-in proceedings would be preferable to opt-out proceedings. All of the reasons advanced by the O'Higgins PCR to explain why an opt-in claim would be impracticable are equally powerful reasons militating in favour of an opt-out class being certified even if a genuine choice did exist between an opt-in and opt-out proceedings.

C2. Consideration of the factors

45. The speculative criticisms offered by the Rejoinder make no real dent in the explanations given in relation to each factor in the O'Higgins CPO Submissions. The responses can therefore be taken shortly.

(a) Features of the proposed class

46. As to the features of the proposed class, the Respondents continue to push the idea, at paragraphs 51 to 54 of the Rejoinder, that many class members will be "*sophisticated entities*" well placed to take decisions about opting in to an opt-in class. Of course, if the Respondents are right, it equally follows that the entities in question will be well placed to decide to opt out of an opt-out class, should that be more suitable for them, as the *Allianz* litigants have chosen to do in the US. This is accordingly at best a neutral factor.

47. In any event:

    (1) The Respondents fail to acknowledge the scale and market-wide impact of the cartels they perpetrated; these submissions amount to an attempt to minimise the seriousness of what they did. The cartels will have affected every single FX market participant who traded the relevant currencies in the relevant period, small or large, to a greater or lesser degree, from those who traded FX for a living in huge volumes

to pension funds to small corporates who made only one trade at the end of each month to 'balance' their books. This diversity is a feature which strongly militates against the class being certified on an opt-in basis and will make it difficult to bring the attention of the class to the need to opt-in by the opt-in date. As explained in the O'Higgins CPO Submissions at paragraph 64, the position is very different when it comes to advertising that a damages award is available for distribution.

(2) It is noted, however, that (apparently having tacitly accepted that they had mischaracterised Mr O'Higgins's evidence, as to which see paragraph 57 of the O'Higgins CPO Submissions), the Respondents now accept the point that a large number of class members will not participate in FX trading as part of their central day-to-day business, at paragraph 54 of the Rejoinder. This is a further reason why these assertions about 'sophistication' carry little weight.

(3) The claims about the class members' supposed sophistication are essentially an attempt by the Respondents to recycle their idea that the opt-out proceedings were introduced primarily for the benefit of consumers and SMEs, which (a) is not in fact a fair or complete reading of the legislative background materials, as explained at paragraphs 37 to 39 of the O'Higgins CPO Submissions, and (b) is anyway irrelevant since the legislation is clear that opt-out proceedings can be brought for the benefit of business of all types.

(b) Value of claims

48. As to the value of class members' individual claims, the Respondents do not seriously contest the proposition that it is likely that a very large number of class members will have damages claims in the low thousands of pounds. It is submitted that such claimants' rights to be compensated for the losses inflicted on them matter just as much the rights of those who have suffered larger losses.

49. The Respondents go on to make a series of piecemeal points and assertions about whether enough class members might nonetheless be found to opt in and make an opt-in claim viable:

(1) At paragraph 59(a) of the Rejoinder, the Respondents refer as a comparator to the £20 claim value of the JJB Sports football shirts action brought by *Which?* under the previous opt-in regime. As explained in the O'Higgins CPO Submissions at paragraphs 43 and 45, the JJB Sports football action was widely regarded as a failure precisely because it was too difficult to get class members to opt in. Reference is then made to the consumer opt-out actions in *Merricks* and *Gibson*. It is unclear what point is being made here. To the extent that the Respondents are trying to draw some sort of comparison with the quantum of damages sought in consumer actions, the O'Higgins PCR notes that it is reasonable to suppose that businesses in general – whose participation in any opt-in proceedings will consume the time of employees and advisers, which costs money and imposes an opportunity cost – may require a significantly higher damages threshold to be on offer in order to consider it worthwhile opting in to a claim compared with the damages threshold which might make a consumer opt-in claim viable. Mr Purslow explains this point at Purslow 2, paragraph 14(d)(ii).

(2) At paragraph 59(b), the suggestion is made that the proposed class members with higher claims will provide momentum for any opt-in proceedings. This is pure speculation. In particular, it cannot be expected that a sufficient number of these claimants with larger claims will be willing to stick their heads above the parapet and sue the banks. The 'default effect', as described at paragraph 58(2)(a) of the O'Higgins CPO Submissions, is powerful.

(3) As to the point made at paragraph 59(c) concerning the fiduciary duties owed by trusts and pension funds, it cannot seriously be suggested that the existence of fiduciary duties will nullify the significant practical difficulties which have been identified by the O'Higgins PCR as inhibiting the likely sign-up of class members for an opt-in claim. It could be entirely consistent with fiduciary duties to decide that committing resources and potentially risking damage to important banking relationships outweighs the possible benefits of litigation.

50. The Respondents do not address at all the point that the cost / benefit analysis for potential claimants deciding whether to opt in is undermined by the fact that the legal and funding costs of an opt-in claim come out of their damages, whereas in an opt-out action before the Tribunal the legal and funding costs are recouped from undistributed damages and

class members that claim can therefore expect to receive 100% of their damages: see Purslow 2, paragraph 14(e), and the O'Higgins CPO Submissions, paragraph 58(2)(d).

51. At paragraph 61 of the O'Higgins CPO Submissions, the O'Higgins PCR had explained that it will be easier to attract class members at the distribution stage of opt-out proceedings where a certain pot of money is on offer, compared with persuading them to opt in to opt-in proceedings at the start where the amount, if any, of ultimate damages on offer is necessarily speculative. That is simply an obviously true proposition, and one which militates in favour of opt-in proceedings. Paragraph 60 of the Rejoinder mischaracterises this as somehow suggesting doubt in the strength of the claim or overall prospects of success. As is clear from its terms, however, paragraph 61 of the O'Higgins CPO Submissions is discussing the confidence which class members may have in damages estimates at this early stage and not the O'Higgins PCR's confidence in the overall strength of the claim.

(c) Disinclination to sue banks

52. The O'Higgins CPO Submissions had explained, at paragraphs 58(1) and 58(3), the nervousness among many firms – particularly those in the financial services industry – about suing banks, because of a widespread perception that banks may retaliate against their customers who do this.

53. The Rejoinder does not deny that this widespread perception exists. The Respondents proffer no witness evidence on the point; instead, they suggest that the reason for any such perception is "*unclear*" (at paragraph 61(a)) and offer a convoluted denial, unbacked by any factual evidence, that they would treat a client adversely if the client opted in to an available action (at paragraph 61(e)).

54. The perception that retaliation is a real risk is supported by occasional press reports of precisely such retaliation happening. (For example, Bloomberg reported last year that Citigroup may be excluding from debt offerings certain investment firms who refused to return a mistaken payment made by Citigroup even though a US federal judge had ruled

that they were not legally obliged to do so.[8] The Law Society Gazette has also reported on the tactics of banks in precluding law firms from acting against them, which makes litigation against banks very difficult.[9]) It is also supported by the witness evidence given on behalf of the O'Higgins PCR by Mr O'Higgins and Mr Mitchell of 'Dsquare'. As to this:

(1) The Rejoinder notes at paragraph 60(b) Mr O'Higgins's experiences of speaking to prospective class members and their concerns about confidentiality and the risks of entering into litigation vis-à-vis the banks. All that the Respondents can say is that it is not clear that a majority or a materially significant number of proposed class members would not opt in to certified proceedings on this basis. Plainly, though, Mr O'Higgins's evidence (see O'Higgins 3, paragraph 24) demonstrates that this would have a significant chilling effect and is yet another factor militating in favour of an opt-out claim.

(2) The Rejoinder goes on at paragraph 60(c) to question the evidence of Mr Mitchell explaining his reluctance to participate in the US settlement, noting that he did eventually do so and is on the Advisory Committee for these proceedings. Mr Mitchell is in the process of winding down his company's FX trading operations (Mitchell 1, paragraph 23) so this risk is of less relevance to him now. In any event, the Respondents' criticisms are an example of survivorship bias. By definition, it is only possible for the O'Higgins PCR to put forward specific evidence from someone who is willing to stick their head above the parapet. Mr Mitchell explains the thought process and hesitations which even someone like him had when evaluating the US opt-out settlement. There will be many more who shared his concerns, and they will be much more cogent in the case of a decision to opt in to opt-in proceedings as opposed to a decision to participate in the distribution of a damages award pot which exists following the conclusion of opt-out proceedings.

55. As to the 'default effect' phenomenon explained at paragraph 58(2)(a) of the O'Higgins CPO Submissions and addressed at paragraph 63 of the Rejoinder, it is suggested that this is a powerful one and is significantly enhanced by the likely concerns many class

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8 https://www.bloomberg.com/news/articles/2021-03-09/citi-blocks-firms-that-kept-errant-revlon-payout-from-debt-deals.

9 https://www.lawgazette.co.uk/practice/conflicted-firms-unable-to-act-against-banks/5038933.article.

members would have about the banks retaliating against class members who actively opt in. To the extent that the 'default effect' is a factor in support of opt-out proceedings across the board, that is not surprising. As explained at paragraph 10(4) above, the possibility of opt-out proceedings was introduced precisely in order to counter the problem that the previous opt-in regime had not been successful as it was too difficult to identify class members and persuade them to opt in. For this reason, the Tribunal should not hesitate to exercise its discretion in favour of granting a CPO on an opt-out basis in an appropriate case.

(d) Ability to contact the proposed class

56. Paragraphs 58(2)(e) and 64-65 of the O'Higgins CPO Submissions addressed the problem of publicising opt-in proceedings to the class. It is plain that the sheer diversity of victims of the cartels will make this an especially hard case to publicise for the purposes of engaging potential claimants to participate in a claim before any award is made. There are further factors at play; for example, Mr Purslow points out that it is especially difficult to book-build with a class of this type, since institutional and large corporate clients typically require much more individual contact than consumers who are generally more willing to sign up to a website without individual hand-holding: Purslow 2, paragraph 14(b). The significance of this is that class members will lose their ability to bring claims altogether.

57. In the face of the PCRs' comments that they will face difficulties in identifying and contacting proposed class members if the proceedings were certified on an opt-in basis, the Rejoinder is not seriously able to contend that this will not be a difficulty. They simply assert, at paragraph 64 of the Rejoinder, that the difficulties will not be such as to render opt-in proceedings impracticable. They also try to turn Mr O'Higgins's sterling efforts to date to discuss the proceedings with members of the class against him, at paragraph 64(b) of the Rejoinder. Plainly Mr O'Higgins has done an impressive job (including through the Covid-19 pandemic) of contacting class members in order to understand the scope and nature of these proceedings and inform as many as possible about their claims, but equally plainly, there is no prospect that he will have been able to contact them all.

(e) Economic viability

58. Finally, at paragraph 65 of the Rejoinder, the Respondents rely on an assertion that neither of the PCRs' funders state unequivocally that they would not fund opt-in proceedings were they to be certified. However, as noted at paragraph 4 above, this contention significantly understates the evidence in fact given on behalf of the O'Higgins PCR. Funder participation is essential in order to commence any substantial collective proceedings; opt-in proceedings additionally require willingness on the part of victims actively to participate in a process whereby the funder will take a slice of each participant's recovery.

(f) Calculation of damages

59. The O'Higgins PCR's experts' damages methodology (as addressed in further detail below) will calculate damages on a class-wide, aggregate basis. This is an effective and efficient way of identifying the class-wide harm caused by the Respondents' cartels. It will work effectively for an opt-out class but much less so for an opt-in class, which will likely instead require a 'ground-up', individualised approach to calculating aggregated (as opposed to aggregate) damages. This is less efficient and presents more problems in terms of the data required to be provided by opt-in class members (the provision of such data itself being a significant disincentive to class members considering whether to opt in).

60. In short, the O'Higgins Application and the damages methodology presented by its experts have been approached entirely on the basis that the goal is to identify the class-wide effect of the cartels. Conversion of the application into an opt-in application would not be practicable, and would not be in the interests of the class who would lose the benefit of being able to calculate damages in the effective and efficient way proposed by Professors Breedon and Bernheim.

61. These points are explained at paragraph 69 of the O'Higgins CPO Submissions. The Respondents do not even acknowledge them. That is because they are powerful ones to which there is no answer.

D. DATA AND INFORMATION AVAILABILITY

62. Having majored in their Joint CPO Response on the supposed lack of data and available information to support opt-out proceedings, devoting the whole of section B of that Response to the topic, the Respondents notably fail to address it at all in their Rejoinder. The Tribunal should conclude that they have no positive case in answer to the extensive expert evidence on the subject which accompanied the PCRs' Replies.

E. STRENGTH OF PROPOSED CLAIMS

63. The Respondents also fail to engage in their Rejoinder with most of the points made in section E of the O'Higgins CPO Submissions ("*Scope of the Settlement Decisions and the O'Higgins PCR's Methodology*").

64. Indeed, the section of their Rejoinder headed "*Strength of the Proposed Claims*" is almost exclusively concerned with criticising the Evans PCR's case theory. To the extent that they address aspects of the O'Higgins PCR's case theory, the O'Higgins PCR's experts respond in Bernheim 3 (section IV.A) and Breedon 3 (section 6). In summary:

    (1) As to the Respondents' suggestion in paragraph 85 of the Rejoinder that the "*limited market share accounted for by the individual participating traders*" casts doubt on increased adverse selection risk, Professor Bernheim explains in Bernheim 3, paragraph 86 why this demonstrates their misunderstanding of adverse selection risk and how it operates. The relevant consideration is the size of the difference between the individual dealer's market share and the cartel's collective market share, rather than simply the absolute size of the cartel's collective market share.

    (2) The Respondents' reference in paragraph 85 of the Rejoinder to adverse selection risk depending on a "*whole range of factors*" overlooks the detailed consideration of this topic in Bernheim 2. Whatever the causes of ambient adverse selection risk, the regular sharing of information on order flow among the Respondents would have materially improved their knowledge of the market, thereby materially magnifying adverse selection risk for their trading partners: see Bernheim 3, paragraph 87.

(3) As to the Respondents' reference in paragraph 87 of the Rejoinder to alleged "*disincentives for widening spreads*", Professor Bernheim responds in Bernheim 3, paragraphs 89 to 90. The Respondents demonstrate a misunderstanding of microeconomics. In any event, the viability and effectiveness of the cartels is an empirical question.

(4) As to the treatment of "*E-Commerce Transactions*", addressed in paragraphs 89 to 91 of the Rejoinder, Professor Breedon reaffirms his position in Breedon 3, paras. 6.7 and 6.8.

F. COMPOUND INTEREST

65. The Respondents' submissions to the effect that the assessment of compound interest cannot be a common issue rest on a misunderstanding of the effect of the decision in *Sempra Metals v. IRC* [2008] 1 AC 561 ("***Sempra Metals***") in the context of a collective action.

66. It is true that the House of Lords there held that the common law does not assume that delay in payment of a debt will of itself cause damage, and that loss must be proved.

67. However, as to how the loss must be proved, Lord Nicholls also stated in the same passage that the Respondents cite, at [95]:

> "*In the nature of things the proof required to establish a claimed interest loss will depend upon the nature of the loss and the circumstances of the case. … Whatever form the loss takes the court will, here as elsewhere, draw from the proved or admitted facts such inferences as are appropriate. That is a matter for the trial judge. There are no special rules for the proof of facts in this area of the law.*"

68. The "*circumstances of the case*" with which this Tribunal is concerned involve the collective proceedings regime. That regime was devised long after *Sempra Metals*. In creating it via the Consumer Rights Act 2015, Parliament declared in section 47C(2) of the Competition Act 1998 that:

> "*The Tribunal may make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person.*"

To require the Tribunal to undertake an assessment of the amount of compound interest recoverable in respect of the claim of each represented person would run a coach and horses through that provision.

69. The "*rules for the proof of facts*" in relation to aggregate damages in collective proceedings are as clarified by the Supreme Court in *Merricks v. Mastercard*. The Tribunal must have in mind the "*broad axe*" principle and that "*even where the loss suffered by a claimant is purely financial and is in principle a precise sum of money, determining this sum accurately may be practically impossible or achievable only at disproportionate cost. The law does not require unreasonable precision from the claimant.*"[10] Having assessed the principal sum on an aggregate basis, it would plainly be disproportionate to assess the fraction of that principal sum which is the interest rate on an individualised basis. Individualised determination is unrealistic.

70. The requirement in *Sempra Metals* that a claimant must prove its *actual* loss from loss of the opportunity to receive compound interest is no more stringent than the ordinary requirement that any claimant must prove its actual loss in the case of a tort or breach of contract. When applied to collective proceedings in which aggregate damages are sought across the whole class, what must be proved is actual damages to the class in the aggregate. There is no requirement to prove actual damages to each *individual* claimant and nor is there any requirement to prove *exact* or *precise* quantification of such aggregate loss.

71. The test for commonality that the Tribunal should apply in any case to resolve whether to certify the assessment of compound interest on an aggregate basis as a common issue is, in principle, no different from the test it should apply to resolve whether the assessment of ordinary damages on an aggregate basis should be properly resolved as a common issue. In both cases, it is whether the Tribunal is persuaded that there is a methodology that offers a realistic prospect of establishing and quantifying the aggregate loss (whether of damages or interest) on a class-wide basis and that there is some evidence of the availability of the data to which the methodology is to be applied.[11]

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10 *Merricks v. Mastercard* [2021] Bus LR 25 at [122], citing *Sainsbury's Supermarkets Ltd. v. Visa Europe Services LLC* [2020] Bus LR 1196 at [217]-[223].

11 *Ibid*. at [40].

72. Similarly, the test the Tribunal should apply in determining whether it is suitable that compound interest should be resolved on a collective basis is the same test of relative suitability that applies more generally.[12] In this regard, there can be little doubt that, having awarded damages on an aggregate basis, it would be more suitable to resolve the extent of compound interest due on such sums to each of the many thousands of individual class members on a collective, rather than an individual, basis.

73. In section IV.B of Bernheim 3, Professor Bernheim clarifies his proposed approach to assessment of compound interest on a class-wide basis. In its Claim Form, the O'Higgins PCR has reserved the right to ask for the creation of sub-classes in due course in order to apply the appropriate methodology.[13]

G. DEFUNCT COMPANIES AND DECEASED PERSONS

74. At paragraph 113, the Respondents seek to incorporate by reference arguments made by the respondents to the *Merricks* and *Trucks* collective proceedings that the class definitions in those cases should exclude defunct companies and dead persons. As the Respondents do not elaborate the arguments themselves, and to avoid a risk of inconsistent judgments, the Tribunal is invited to give the parties to the present proceedings an opportunity to make submissions on the effect of any judgment of the Tribunal in those other cases before deciding this issue.

75. As to defunct companies:

(1) The Respondents are incorrect to maintain in paragraphs 115 and 116 of the Rejoinder that civil claims commenced by a defunct company are a nullity if by that they mean that such claims cannot be commenced or continued. As the notes in the White Book 2021 state:

> "*If it is discovered, after proceedings have been commenced, that a company named as a party has been dissolved or struck off the Companies Register, the court has a discretion to stay the proceedings pending an application to the Companies Court for the restoration of the company to the Register under (what is now) s.1029 of the Companies Act 2006 (*Steans Fashions Ltd v Legal & General Assurance Society Ltd *[1995] 1 B.C.L.C. 332). Section 1032 of the Act provides that an order*

[12] *Ibid*. at [56].
[13] Re-Amended Collective Proceedings Claim Form, fn. 7.

*of restoration may (according to its terms) retrospectively validate any claim which was purportedly commenced by the company after it had been dissolved or struck off (*Joddrell v Peaktone Ltd *[2012] EWCA Civ 1035; [2013] 1 All E.R. 13).*"[14]

(2) Accordingly, a claim by a defunct company may retrospectively be validated by its restoration to the register (within the prescribed time limits for such application[15]).

(3) Further, it is conceivable that a company which is now defunct may have assigned the benefit of its claim to another prior to its dissolution. Its dissolution would not in principle affect a legal assignee's ability to claim for its loss.

(4) To clarify the position in relation to defunct companies and the proposed claim, the O'Higgins PCR asks that the following paragraph be added to the CPO:

"*Where a company which falls within the Class Definition has been dissolved, the provisions in paragraphs [X] of this Order on opting out and opting in are modified such that the time specified for the purpose of assessing whether the company as a person satisfying the Class Definition is domiciled within or outside the UK is immediately prior to its dissolution.*"

(5) If it becomes necessary to estimate the number of defunct companies within the proposed class, there are methods of doing so: see Breedon 3, paragraph 6.10.

76. As to deceased persons:

(1) The O'Higgins PCR anticipates that only a negligible proportion of the members of the proposed class would be individuals domiciled in the UK, so the exclusion of such persons who are now deceased would be unlikely to make a significant difference. If necessary, the Respondents' own client data could be used to assess this: see Breedon 3, paragraph 6.10.

(2) However, in an attempt to avoid any issue as to whether the estates of deceased persons may benefit from the proposed claim, the O'Higgins PCR asks that the following paragraph be added to the CPO:

"*Where someone who falls within the Class Definition is deceased:*

[14] White Book 2021, para. 19.8.4.
[15] As to UK companies, see Companies Act 2006, ss. 1024(4) and 1030.

(a) *it is his or her estate's claim which is hereby declared eligible for inclusion in the proceedings for the purposes of section 47B(7)(b) of the Competition Act 1998; and*

(b) *the provisions in paragraphs [X] of this Order as to opting out and opting in are modified such that:*

(i) *the time specified for the purpose of assessing whether the deceased as a person satisfying the Class Definition is domiciled within or outside the UK is immediately prior to death; and*

(ii) *it is the personal representative(s) of the deceased who may exercise the right to opt out or opt in (as the case may be)*".

H. CONCLUSION

77. For all the above reasons, the O'Higgins Application is maintained.

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11 June 2021