NOTICE OF FILING

Details of Filing

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File Title:	AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v ETORO AUS CAPITAL LIMITED ACN 612 791 803
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.

Form 17
Rule 8.05(1)(a)

Amended Statement of claim

Filed pursuant to orders made by Nicholas J on 17 April 2024

No. NSD 805 of 2023

Federal Court of Australia
District Registry: New South Wales
Division: Commercial and Corporations

Australian Securities and Investments Commission
Plaintiff

eToro Aus Capital Limited (ACN 612 791 803)
Defendant

A THE PARTIES

1. The Plaintiff, the Australian Securities and Investments Commission (**ASIC**):

   a. is a body corporate established by section 7 of the *Australian Securities and Investments Commission Act 1989* (Cth) and continued in existence by section 261 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**); and

   b. is entitled to sue in its corporate name by reason of s 8 of the ASIC Act.

2. The Defendant (**eToro**):

   a. is a corporation duly incorporated under the *Corporations Act 2001* (Cth) (**Corporations Act**);

   b. is able to be sued in its corporate name and style; and

   c. at all material times, was the holder of Australian Financial Services Licence No 491139 (**eToro AFSL**).

B OBLIGATIONS AS A FINANCIAL SERVICES LICENSEE

3. During the period from 5 October 2021 to 11 March 2024 (**Relevant Period**), pursuant to s 912A(1)(a) of the Corporations Act, as a financial services licensee, eToro was required

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do all things necessary to ensure that the financial services covered by the eToro AFSL were provided efficiently, honestly and fairly.

4. During the Relevant Period, pursuant to s 912A(5A) of the Corporations Act, if eToro contravened s 912A(1)(a), then it also contravened s 912A(5A).

C RETAIL PRODUCT DISTRIBUTION CONDUCT

5. During the Relevant Period, eToro was the issuer of financial products known as contracts for difference (**CFD Product**).

6. During the Relevant Period, eToro issued the CFD Product to retail clients.

7. During the Relevant Period, the CFD Product was on offer for acquisition by issue to, or for regulated sale to, retail clients.

8. During the Relevant Period, the CFD Product was a “derivative” within the meaning of ss 761D and 764A(1)(c) of the Corporations Act.

9. During the Relevant Period, the CFD Product was a “financial product” within the meaning of s 12BAA of the ASIC Act and s 763A of the Corporations Act.

10. During the Relevant Period, eToro:

    a. had on issue a product disclosure statement for the CFD Product, as required by Part 7.9 of the Corporations Act (**CFD PDS**); and

    Particulars

    The CFD PDS is entitled “ETORO AUS CAPITAL LIMITED PRODUCT DISCLOSURE STATEMENT”. During the Relevant Period, there was a version of the CFD PDS which had an “Issue Date” of 21 June 2021 and a version which had an “Issue Date” of 24 July 2023. Except where expressly stated in this claim, there are no relevant differences between the two versions of the CFD PDS for the purposes of this pleading, and they are collectively referred to as the CFD PDS.

    b. gave the CFD PDS to retail clients.

11. During the Relevant Period, eToro engaged in retail product distribution conduct (within the meaning of s 994A(1) of the Corporations Act) in relation to the CFD Product, by:

    a. dealing in the CFD Product in relation to retail clients; and, or alternatively

    b. under Part 7.9 of the Corporations Act, giving a product disclosure statement for the CFD Product to retail clients (being the CFD PDS),

(the **Retail Product Distribution Conduct**).

D THE DESIGN AND DISTRIBUTION OBLIGATIONS

12. The design and distribution obligations in Part 7.8A of the Corporations Act came into effect on 5 October 2021.

13. During the Relevant Period, pursuant to s 994B of the Corporations Act, eToro was required:

    a. to make a target market determination (within the meaning of s 994B(1) of the Corporations Act) (**TMD**) for the CFD Product; and

    b. to do so before it engaged in Retail Product Distribution Conduct.

Particulars

Sections 994B(1) and (2) of the Corporations Act.

14. During the Relevant Period, pursuant to s 994B(5)(b) of the Corporations Act, when making a TMD for the CFD Product, eToro was required to describe the class of retail clients that comprised the target market (within the ordinary meaning of the term) for the CFD Product.

15. During the Relevant Period, pursuant to s 994B(5)(c) of the Corporations Act, when making a TMD for the CFD Product, eToro was required to specify any conditions and restrictions on retail product distribution conduct in relation to the CFD Product (**Distribution Conditions**), other than a condition or restriction imposed by or under another provision of the Corporations Act.

16. During the Relevant Period, for the purposes of s 994B(5)(c) of the Corporations Act, there were no conditions or restrictions imposed by or under another provision of the Corporations Act, relevant to the present claim.

17. During the Relevant Period, pursuant to s 994B(8)(a) of the Corporations Act, when making a TMD for the CFD Product, eToro was required to ensure that the TMD was such that it would be reasonable to conclude that, if the CFD Product were to be issued (or sold in a regulated sale) to a retail client in accordance with the Distribution Conditions, it would be likely that the retail client was in the target market described in the TMD.

18. During the Relevant Period, pursuant to s 994B(8)(b) of the Corporations Act, when making a TMD for the CFD Product, eToro was required to ensure that the TMD was such that it would be reasonable to conclude that, if the CFD Product were to be issued (or sold in a regulated sale) to a retail client in the target market, it would likely be consistent with the likely objectives, financial situation and needs of the retail client.

19. During the Relevant Period, pursuant to s 994E(1) of the Corporations Act, where eToro made a TMD for the CFD Product, it was required to take reasonable steps that would, or

would be reasonably likely to, result in retail product distribution conduct in relation to the CFD Product (other than excluded conduct) being consistent with the TMD.

20. During the Relevant Period, pursuant to s 994E(3) of the Corporations Act, if:

a. eToro made a TMD; and

b. the financial product to which the TMD related was on offer for acquisition by issue (or for regulated sale) to retail clients; and

c. a regulated person engaged in retail product distribution conduct in relation to the product; and

d. the regulated person failed to take reasonable steps that would have resulted in, or would have been reasonably likely to have resulted in, the retail product distribution conduct being consistent with the determination,

then the regulated person contravened the section unless the retail product distribution conduct was excluded conduct.

21. During the Relevant Period, eToro was a regulated person within the meaning of s 994A(1) of the Corporations Act, in relation to the CFD Product.

22. During the Relevant Period, for the purposes of ss 994E(1) and (3) of the Corporations Act, there was no excluded conduct which was relevant to the present claim.

E THE CFD PRODUCT

Trading in the CFD Product

23. During the Relevant Period, the CFD Product could be traded by retail clients on an online trading platform.

Particulars

The online trading platform included trading through the use of an app.

24. During the Relevant Period, the online trading platform upon which the CFD Product could be traded by retail clients was operated by or at the direction of eToro.

25. During the Relevant Period, when a retail client traded in the CFD Product:

a. they could “open” a CFD position by buying a contract which corresponded with buying or selling an underlying instrument, with the buy or sell price (bid/ask price) of the CFD being set by eToro with reference to the underlying instrument;

b. they could “close” the open position (unless that open position had already been closed out by eToro), thereby realising a profit or loss having regard to whether the market had moved for or against the open position (and after costs, fees and charges charged by eToro had been deducted).

Particulars

See CFD PDS at section 2.5 – “Nature of the CFDs”; section 3.2 – “Opening a CFD”. The buy and sell prices offered by eToro were not necessarily the same as those quoted for the underlying instrument in the relevant underlying market – see CFD PDS at section 3.4 – “Pricing – Bid/Ask spread”.

Underlying instruments

26. The underlying instruments for the CFD Product were indices, commodities, shares, exchange traded funds, cryptocurrencies and foreign currencies.

Particulars

See the CFD PDS at section 2.6 – “Types of CFDs”.

27. When trading the CFD Product, a retail client was exposed to movements in the value of an underlying instrument, without having an interest in the underlying instrument (as set by eToro).

Trading with leverage

28. During the Relevant Period, when a retail client traded the CFD Product, they could trade with leverage, which meant they could open a position by only paying a percentage of the full-face value of the underlying instrument (as set by eToro).

29. If a retail client traded with leverage:

a. they were exposed to the full amount of any movement in the value of the underlying instrument (as set by eToro) until their position was closed out; and

b. they were exposed to a greater level of risk for a smaller initial outlay, increasing the potential risks and rewards for that client.

Particulars

See page 4 of the CFD PDS in section 2.2 under the heading “Key Benefits of our CFDs”.

30. During the Relevant Period, the leverage which could be selected by a retail client when trading the CFD Product could range from 1:1 to a high degree of leverage.

Particulars

See page 4 of the CFD PDS in section 2.2 under the heading "Key Benefits of our CFDs", which states that "*CFDs involve leverage which can be set by you within the range offered from time to time for each CFD. This could range from 1:1 to a high degree of leverage*". By a request for particulars dated 11 December 2023 directed to paragraph 11 of eToro's Concise Statement in Response, ASIC requested that eToro identify the leverage options available to eToro clients trading in CFDs. In a response dated 3 January 2024, eToro stated that this was not a proper request for particulars, that "the different levels of leverage available depended on the underlying instrument", and did not provide the particulars sought. Further particulars of the leverage which eToro offered to retail clients during the Relevant Period (including as to the "high degree of leverage" described in eToro's CFD PDS) may be provided during the course of this proceeding.

Margin requirements

31. During the Relevant Period, when trading in the CFD Product:

a. in order to open a CFD position, a retail client was required to pay at least an initial margin set by eToro;

b. the retail client was required to maintain a minimum amount of margin cover set by eToro in order to maintain their open position, as well as pay any margin call as set by eToro when required by eToro;

c. if the retail client did not maintain the required margin cover or did not pay a margin call by a required time, the open position could be closed out by eToro and the retail client was liable to pay for any remaining shortfall.

Particulars

See the CFD PDS – see section 2.1 – "Key Features of our CFDs"; section 2.3 "Key Risks of our CFDs"; section 3.13 – "Margin payments"; section 3.14 – "Margin Requirement obligation"; section 3.15 – "Margin policy". The maximum potential loss of a client was limited to the balance on all of their accounts with eToro. This was described as "Negative Balance Protection", and is explained at section 4.3 of the CFD PDS and in eToro's Financial Product Terms.

32. During the Relevant Period, when trading in the CFD Product, a retail client was exposed:

a. to paying eToro more margin or their margin requirements changing rapidly in response to changes in the market for the underlying instrument;

b. to their potential losses on CFDs exceeding the amounts they paid as margins for the contract.

Particulars

See the CFD PDS at section 2.3 – “Key Risks of our CFDs”.

33. During the Relevant Period, if the price of a CFD set by eToro moved against a retail client, or if eToro’s margin requirements changed, the client might need to provide eToro with significant additional funds to meet their margin requirement at short notice in order to maintain their open positions, and if they did not do so, eToro was entitled to close one or more or all of the client’s positions and the client alone would be responsible for any losses incurred as a result.

Particulars

See the “General Risk Disclosure” published on eToro’s website.

F SIGNIFICANT RISKS OF THE CFD PRODUCT

34. During the Relevant Period, where a retail client traded in the CFD Product:

a. there was a high degree of risk of losses;

Particulars

See the CFD PDS at section 2.4 – “Your suitability” (third bullet point).

b. there was a high risk that a client may lose all of their investment;

Particulars

See the Third TMD, in the row “Key features of the CFD Product”, and sub-row “Possible negative outcomes”.

c. there was a high risk of a retail client losing money rapidly after acquiring the CFD Product, and the level of risk was further increased if the underlying instrument itself was volatile or high risk;

d. the high degree of leverage offered in the CFD Product could work against the client;

Particulars

See the CFD PDS at “Section 4 – Significant Risks”, in the row “Loss from Leverage”.

e. there was a high risk of margin requirements changing and, at times, very rapidly;

Particulars

See the CFD PDS at “Section 4 – Significant Risks”, in the row “Margin risk”.

f. there was a high risk that a retail client would lose money rapidly when trading the CFD Product due to leverage.

Particulars

See the "General Risk Disclosure" published on eToro's website. That disclosure also stated that 74% of retail investor accounts lose money when trading CFDs with eToro.

35. During the Relevant Period, when a retail client traded the CFD Product with cryptocurrency as the underlying instrument (**eToro Cryptocurrency CFD**):

a. the retail client was trading in an extremely high risk investment;

Particulars

See the CFD PDS dated 21 June 2021 at section 4 – "Significant risks", in the row "Cryptocurrency CFD risks".

b. in the alternative to sub-paragraph (a), the retail client was trading in a high risk investment;

Particulars

See the CFD PDS dated 24 July 2023 at section 4 – "Significant risks", in the row "Cryptocurrency CFD risks".

c. the prices of the eToro Cryptocurrency CFDs quoted to the retail client were derived from price feeds from cryptocurrency exchanges or cryptocurrency hedge counterparties;

Particulars

See the CFD PDS at section 2.6.5 – "eToro Cryptocurrency CFDs".

d. the retail client could be exposed to fast and large changes to the value of their trading position and to their account with eToro, potentially triggering the need for more margin to be paid by that client, including at short or no notice;

Particulars

See the CFD PDS at section 2.3 – "Key Risks of our CFDs".

e. there was a risk of possible delays in closing out a trade due to underlying illiquidity, or volatility or early close out due to the underlying cryptocurrency;

Particulars

See the CFD PDS at section 2.3 – "Key Risks of our CFDs".

f. the prices available for cryptocurrencies could fluctuate significantly on any given day and over time, so that the pricing of the eToro Cryptocurrency CFDs could also fluctuate significantly and as often;

Particulars

See the CFD PDS at section 4 – "Significant risks", in the row "Cryptocurrency CFD risks".

g. there was no regulated market for cryptocurrencies, and this affected the pricing, liquidity and integrity of the markets and any exchange used for dealing in the cryptocurrencies which were the underlying instruments (where exchanges offering pricing for cryptocurrencies had little or no regulation or protections for users of them, affecting the pricing, liquidity and cost of transactions in cryptocurrencies, and correspondingly affecting the pricing of eToro Cryptocurrency CFDs);

Particulars

See CFD PDS at section 4 – "Significant risks", in the row "Cryptocurrency CFD risks".

h. cryptocurrencies relied upon technology inherent in the software for the cryptocurrency, nodes and mining of cryptocurrencies, none of which were regulated or backed by any government or voluntary institution, so there were additional risks inherent in cryptocurrencies, and their predictability was much more uncertain;

Particulars

See the CFD PDS at section 4 – "Significant risks", in the row "Cryptocurrency CFD risks".

i. it was possible that some cryptocurrencies may become worthless, leading to a retail client's eToro Cryptocurrency CFDs becoming worthless;

Particulars

See the CFD PDS at section 4 – "Significant risks", in the row "Cryptocurrency CFD risks".

j. under certain market conditions, the retail client might find it difficult or impossible to liquidate a CFD position, for example, when the market reached a daily price fluctuation limit and there is insufficient liquidity in the market;

Particulars

See the CFD PDS at section 4 – “Significant risks”, in the row “Cryptocurrency CFD risks”.

k. if the market moved against the retail client’s position, they might be called upon by eToro to provide a substantial amount of additional margin, on short notice, in order to maintain their position, and if they did not provide the required funds within the time required by eToro, their position might be liquidated at a loss;

Particulars

See the CFD PDS at section 4 – “Significant risks”, in the row “Cryptocurrency CFD risks”.

l. eToro allowed trading in eToro Cryptocurrency CFDs over the weekend, and where cryptocurrency exchanges might operate over weekends, there could be a significant difference between Friday’s close and Sunday’s open prices of eToro Cryptocurrency CFDs, which might result in not completing an order on a specific trading day or completing an order on a substantially less favourable price.

Particulars

See the CFD PDS at section 4 – “Significant risks”, in the row “Cryptocurrency CFD risks”.

36. During the Relevant Period, when a retail client traded the CFD Product calculated by reference to foreign exchange rates (**eToro FX CFD**):

a. the eToro FX CFDs were leveraged products which derived their prices from real time changes in the market price and exchange rates of foreign currencies;

Particulars

See the CFD PDS at section 2.3 – “eToro FX CFDs”.

b. the eToro FX CFDs were denominated in a foreign currency which could expose the retail client to fast and large changes to the value of their position and to their account with eToro, potentially triggering the need for more margin to be paid by the client, including at short or no notice.

Particulars

See the CFD PDS at section 2.3 – “Key Risks of our CFDs”.

Gapping risk

37. During the Relevant Period, when a retail client traded the CFD Product:

a. there was a risk that “gapping” may occur, meaning that a CFD could open at a much higher or lower price than the previous close;

b. when gapping occurred, the retail client might not be able to exit an existing position at a price they had specified, and instead their order might be filled at the next best price, which might be a worse outcome for them than the price they had specified.

Particulars

See the CFD PDS at section 2.3 – “Key Risks of our CFDs”.

Some key considerations as to suitability

38. During the Relevant Period, eToro considered that some key considerations as to the suitability of a retail client to deal in the CFD Product were:

a. whether the retail client has experience in trading in the underlying instrument; and

b. whether the retail client understands the terms of the CFD Product and how they work; and

c. whether the retail client accepts a high degree of risk in trading in the CFD Product; and

d. whether the retail client can monitor their investments and manage them in a volatile market; and

e. whether the retail client has the financial resources to provide more margin, especially on little or no notice; and

f. whether the retail client can bear substantial losses that might arise from trading in the CFD Product, especially the potentiality for unlimited losses.

Particulars

See the CFD PDS at “Section 2.4 – Your Suitability”.

Unsuitability for long-term investors

39. During the Relevant Period, the CFD Product was generally not suitable for a retail client who was a long-term investor, because:

a. if an investor held a CFD open over a long period of time, there would be significant associated costs, such as through the overnight fees charged by eToro;

Particulars

See the “General Risk Disclosure” published on eToro’s website. See also paragraph 41 below.

b. there was a risk that “gapping” might occur when the market was closed, causing a dramatic shift in the price of an underlying asset, and meaning the price on the underlying market might open at a significantly different level, and at a less advantageous price for the investor;

Particulars

See the "General Risk Disclosure" published on eToro's website.[4]

c. it was important that an investor in the CFD Product was able to monitor positions on their account at all times, particularly where the trading was leveraged and/or was with respect to a CFD for an underlying instrument which could have short term volatility, such that the retail client may be required to provide more margin on little or no notice and/or was exposed to the potential for significant and very quick losses.

Particulars

See the "General Risk Disclosure" published on eToro's website, and CFD PDS at "Section 2.4 – Your Suitability".

G REVENUES AND FEES DERIVED BY ETORO FROM CFD PRODUCT

40. During the Relevant Period, when retail clients traded in the CFD Product, eToro derived revenue from the "spread", being the difference between the price set by eToro for a retail client to buy the CFD, and the price set by eToro for a client to sell the CFD (where the prices offered by eToro might not be the same as those quoted in the relevant underlying market).

Particulars

See the CFD PDS at section 3.4 – "Pricing - Bid/Ask spread", and section 5.1 – "Fees – General".

41. When trading in the CFD Product, a retail client was also required to pay fees and charges to eToro, and eToro derived revenue from those fees and charges.

Particulars

The fees and charges included the following fees and charges described in Financial Product Terms issued by eToro:

(i) a "Transaction Fee", which was a fee or commission from time to time specified by eToro to be the amount payable to eToro in respect of a transaction;

(ii) a "Finance Charge" (also referred to as an interest charge or interest debit or an overnight fee), which was calculated daily on CFD positions held overnight and was dependent on the underlying market of the underlying instrument and rates decided by eToro.

See CFD PDS at section 5.

By a request for particulars dated 11 December 2023 directed to paragraph 13 of eToro's Concise Statement in Response, ASIC requested that eToro identify how the finance or interest charges were calculated by eToro, and asked eToro to identify any other fees and charges that eToro received from CFDs and how those fees and charges were calculated. eToro responded that this was not a proper request for particulars. Further particulars of the fees and charges which eToro receives from CFDs may be provided once ASIC obtains that information in the course of these proceedings.

H RETAIL CLIENTS TARGETED BY ETORO

42. During the Relevant Period, eToro marketed itself to retail clients through mass marketing.

Particulars

The marketing included entering into sponsorship agreements with sporting teams and celebrities, and advertising via social media, television, print~~, cinema~~ and on public transport.

Some of the marketing mentioned CFDs specifically, and some of it did not. By a request for particulars dated 11 December 2023 directed to paragraph 13 of eToro's Concise Statement in Response, ASIC requested that eToro identify the marketing/advertising performed by eToro during the Relevant Period which mentioned CFDs, and that which did not. eToro responded that this was not a proper request for particulars. Further particulars of the marketing performed by eToro may be provided as the proceeding progresses.

43. In the period from 5 October 2021 to 14 June 2023, eToro had approximately 113,940 CFD retail clients.

Particulars

The 113,940 figure is based on two spreadsheets produced by eToro (with document identification numbers ETR.0012.0002.0018 and ETR.0027.0001.0003).

Further, and for the avoidance of any doubt, ASIC does not intend these proceedings to only concern new clients from 5 October 2021 (contrary to the understanding asserted by eToro's Concise Statement in Response at [4]), nor does it accept that the number of clients to whom the TMD obligations apply are to be limited by reference to where ~~an~~ CFD was in fact received by a retail client resident in Australia (contrary to eToro's Concise Statement in Response at [16]).

44. In the period from 5 October 2021 to 14 June 2023:

   a. at least 33,584 retail clients opened accounts with eToro that were used to trade the CFD Product, of which accounts approximately 22,125 retail clients suffered losses, which losses totalled approximately AUD$-36,361,539.54 (USD$24,048,687.11 converted to AUD using exchange rate 1 AUD to 0.661377 USD on 12 March 2024); and

   b. the other approximately 80,356 retail clients who traded in the CFD Product during this period already had accounts with eToro which had been opened prior to 5 October 2021.

I THE PURPORTED TMDS AND ASSOCIATED SCREENING TEST

45. During the Relevant Period, eToro purported to make four TMDs for the CFD Product.

46. During the Relevant Period:

   a. for those retail clients who opened an account during the Relevant Period, eToro required the clients to take a screening test prior to them acquiring the CFD Product (the **Screening Test**);

Particulars

What is described in this Statement of Claim as the "Screening Test" is also referred to within eToro documentation from time to time as the "Appropriateness Test" or the "onboarding process".

   b. for those retail clients who opened an account prior to the Relevant Period (**Existing Clients**):

      i. eToro has indicated to ASIC to the effect that:

         1. prior to the Relevant Period, those clients took a test which eToro describes as the "ASIC Suitability Test" (described in paragraphs 54 to 55 below);

         2. in the period from 26 January 2022 to 11 May 2022, if an Existing Client made an update to their "Know Your Customer" profile with eToro, its "system…re-assess(ed)" the Existing Client using the Screening Test in place at that time;

3. on about 12 May 2022, its “system re-assessed” the Existing Client using the Screening Test in place at the time via what it describes as a “forced system recalculation”; and

ii. other than to the extent the “reassessments” described in (2) and (3) above amounted to an Existing Client taking the Screening Test (which is presently unclear to ASIC), Existing Clients were not required to take a Screening Test prior to them acquiring the CFD Product.

Particulars

As to sub-paragraphs (i)(2) and (i)(3), see ETR.0018.0001.0062 at the “timeline” tab, notes 1 to 3. See also eToro letter dated 28 June 2023 at ETR.0022.0001.0002. As ASIC understands it, the “reassessments” by the “system” described by eToro occurred automatically, in the sense that eToro did not require retail clients to answer any questions at the time of these “reassessments” using the Screening Tests. It is presently unclear to ASIC precisely what these “reassessments” entailed. Further particulars may be provided following disclosure and evidence.

47. The Screening Test was the means by which eToro purported to assess whether a retail client was likely to fall within the target market for the CFD Product as set out in the applicable purported TMD at the time.

48. Further or alternatively, passing the Screening Test was a purported Distribution Condition in relation to the CFD Product within the meaning of s 994B(5)(c) of the Act.

The First TMD and associated Screening Test

<u>Contents of the First TMD</u>

49. The first purported TMD was in place from about 5 October 2021 to 29 March 2022 (**First TMD**).

50. The First TMD described the target market for the CFD Product as follows:

… the target market for CFDs is a Client that falls within one (or more) of the below categories, noting there may also be some overlap between categories:

- ***Medium to High Risk Tolerance Traders*** *– Clients seeking to make a profit via speculation.*
- ***Risk Mitigation Investors*** *– Clients seeking to hedge potential risks from other investments in or exposures to Instruments.*

- ***Experienced Investors*** *– Clients who understand the risks of CFDs and the underlying investments upon which they are derived.*
- ***Clients with prior trading experience*** *- Clients with prior experience in financial markets and experience in trading leveraged financial products and who pass eToro's Trading Knowledge Assessment.*
- ***Appropriateness test*** *- Clients who pass the eToro Appropriateness test.*

Particulars

Section 3 of the First TMD.

51. Under the First TMD, a retail client fell within eToro's target market for the CFD Product if they satisfied any one (or more) of the listed categories.

Particulars

By way of example, if a retail client had a medium risk tolerance, they fell within the target market, even if they were not an experienced investor, had no understanding of the risks of CFDs and the underlying investments upon which they were derived, had no prior trading experience in financial markets or leveraged products, and had failed eToro's "Appropriateness test".

52. The description of the target market in the First TMD referred to a "Trading Knowledge Assessment" and an "Appropriateness Test", but did not describe any elements, content, criteria or scoring requirements for successful completion of the "Trading Knowledge Assessment" or the "Appropriateness test".

Particulars

See section 3 of the First TMD, as extracted at paragraph 50 above.

53. The First TMD purported to refer to Distribution Conditions, but did not specify the content, meaning or application of those purported Distribution Conditions.

Particulars

The First TMD, under the heading "Distribution conditions" in section 6.2, referred to "distribution criteria" and "eligibility requirements determined by eToro", but did not specify the content, meaning or application of those purported Distribution Conditions.

<u>"ASIC Suitability Test"</u>

54. In the period prior to 5 October 2021, retail clients wishing to trade in the CFD Product were required by eToro to take a test described by eToro as the "ASIC Suitability Test".

Particulars

The questions and scoring which formed the "ASIC Suitability Test" are set out in ETR.0018.0001.0062 at the tab "ASIC Suitability".

55. The test which eToro described as the "ASIC Suitability Test":

a. was provided by eToro to retail clients prior to 5 October 2021;

b. was not directed to assessing whether a retail client would be likely to fall within the target market for a CFD Product;

c. was not directed to assessing whether the CFD Product would likely be consistent with the likely objectives, financial situation and needs of retail clients; and

d. was not a Distribution Condition.

<u>Screening Test in place from about 5 October 2021 to 25 January 2022</u>

56. During the period from about 5 October 2021 to 25 January 2022:

a. new retail clients wishing to trade the CFD Product were required to pass a Screening Test which was described as "RM-1";

b. Existing Clients could continue to trade the CFD Product without passing, on or after 5 October 2021, the Screening Test.

57. With respect to RM-1:

a. the questions, answers and individual scores comprising that test were the same as those contained in RM-2, as set out in paragraph 60 below;

Particulars

See ETR.0018.0001.0062 at tabs "Restricted Market" and "RM1". The RM-2 questions are referred to in the particulars to paragraph 60 below.

b. if a client scored 5 or more out of a total possible score of 41 on the RM-1 test, the client was permitted to trade in the CFD Product;

Particulars

A score of less than or equal to 4 out of 41 constituted a "fail", a score of 5 to 20 constituted a "borderline pass" (meaning that the client had to view a risk disclaimer before trading), and a score of 21 or greater out of 41 constituted a "pass". If the client scored from 5 to 20, they were required to view a risk disclaimer before commencing trading.

c. the test was wholly inadequate to assess whether the retail client fitted within the target market as described in the First TMD, and the application of the test would inevitably capture retail clients for whom the CFD Product would not be consistent with their objectives, financial situation and needs.

Particulars

There are many different permutations by which a retail client could score 5 or more and be permitted to trade the CFD Product - see ETR.0018.0001.0062 at tabs “Restricted Market” and “RM1”.

By way of example, a retail client might have previously traded 1 stock (an answer worth 5 points alone) and therefore be permitted to trade the CFD Product, despite achieving no other points, having no experience trading cryptocurrency or tokens, having never traded leveraged products, having answered “I have no financial knowledge” when asked about trading knowledge, and having failed eToro’s “Complex Products Knowledge Assessment”.

<u>Screening Test in place from about 26 January 2022 to 29 July 2023</u>

58. During the period from about 26 January 2022 to 29 July 2023, eToro used 2 tests in assessing whether to exclude a retail client from trading the CFD Product, which it described as:

  a. the “Trading Test”; and

  b. the “Risk Test”.

Particulars

The questions comprising the Trading Test were those corresponding to the yellow boxes in column E of the “Negative Market” tab of ETR.0018.0001.0062, namely rows 4 to 24.

The questions comprising the Risk Test were those corresponding to the orange boxes in column E of the “Negative Market” Tab of ETR.0018.0001.0062, namely rows 30 to 61.

The Trading Test and Risk Test were applied to new clients. The extent to which they were applied to Existing Clients in this period is presently unclear to ASIC – see paragraph 46.b above.

59. During the period from about 26 January 2022 to 29 July 2023:

  a. eToro only excluded retail clients from trading the CFD Product if they failed either the Trading Test or the Risk Test (or both);

b. a retail client would only fail the Trading Test if they provided the following combination of answers:

   i. they had never traded in equities (being an answer which only factored into whether the client passed the test in the period from 26 January 2022 to 17 April 2023); and

   ii. they had never traded in crypto assets; and

   iii. they had no leveraged investing experience; and

   iv. they had no financial knowledge; and

   v. they failed the Complex Products Knowledge Assessment;

Particulars

The Complex Products Knowledge Assessment, and the fact that it was very difficult to fail, is described further at paragraph 60.b below.

c. if the retail client did not provide every response set out in (b) above, they passed the Trading Test;

Particulars

By way of example, in the period from 26 January 2022 to 17 April 2023, a retail client who indicated they had traded in equities passed the Trading Test, even though they answered that they had never traded in crypto assets, had no leveraged investing experience, and had no financial knowledge, and they failed the Complex Products Knowledge Assessment.

d. a retail client would only fail the Risk Test if they provided the following combination of answers:

   i. their trading strategy purpose was “future planning” or “saving for home”; and

   ii. their attitude to risk was “+5% / -3%” (being the lowest of 5 risk options available for selection); and

   iii. their net annual income was less than $200,000; and

   iv. their total cash and liquid assets were less than $200,000;

e. if the retail client did not provide every response outlined in (d) above, they passed the Risk Test;

Particulars

By way of example, a retail client who indicated they were planning to save for a home, had a low risk attitude and had a net income of less than $200,000, nevertheless passed the Risk Test if they indicated they had $200,000 in cash and liquid assets.

f. if a retail client passed the Trading Test and the Risk Test, they could trade the CFD Product;

g. if a client passed the Trading Test but not the Risk Test, the client was not permitted to trade CFDs with leverage unless and until they changed their answers such that they passed the Risk Test;

h. if a client passed the Risk Test but not the Trading Test, they could trade the CFD Product with leverage once they had completed 5 non-CFD trades and 30 days had passed;

i. retail clients were permitted unlimited attempts at passing eToro's Screening Test;

j. for these reasons, eToro's Screening Test was wholly inadequate to assess whether the retail client fitted within the target market as described in the purported TMDs in place during that period, and the application of it would inevitably capture retail clients for whom the CFD Product would not be consistent with their objectives, financial situation and needs.

60. During the period from about 26 January 2022 to 29 July 2023, eToro also had in place the following further "tests", neither of which was used to exclude retail clients from trading the CFD Product:

a. a test described as "RM-2", which involved assigning a retail client a score based on answers given in the Trading Test, to determine whether that client would be given a "risk warning alert" before trading the CFD Product;

Particulars

The questions comprising RM-2 are at Tab "RM-2" of ETR.0018.0001.0062. The overlap with the Trading Test is evident from a comparison with the questions comprising the Trading Test in the yellow boxes in column E of the "Negative Market" tab of ETR.0018.0001.0062.

b. the "Complex Products Knowledge Assessment", which was a reference to a subset of the Trading Test, and comprised certain questions which formed part of the Trading Test.

Particulars

The "Complex Products Knowledge Assessment" was also known as the "Trading Knowledge Assessment" – see the images of the screens displayed in the "NM-2" tab of the same spreadsheet. That the Complex Products Knowledge Assessment formed part of the Trading Test is apparent from the "Negative Market" tab of ETR.0018.0001.0062 at rows 23 to 24. (It also formed part of RM-2 – see the RM-2 tab at rows 23 to 24.)

The questions comprising the "Complex Products Knowledge Assessment" were set out at the "NM-2" tab of ETR.0018.0001.0062. There was a change to these questions in about December 2022 – see ETR.0018.0001.0062 at Tab "Timeline" – being the questions described as the "new" questions at Tab NM-2.

From 26 January 2022 to about December 2022, the Complex Products Knowledge Assessment required a retail client to select 1 "correct statement" out of 5 about trading in CFDs. The 5 statements are set out at ETR.0018.0001.0062 Tab "NM-2" columns B – J.

From about December 2022, the Complex Products Knowledge Assessment required a retail client to mark whether each of 5 statements were correct, 2 of which were "correct" and 3 of which were "wrong". The client would only fail if it made the incorrect selection for 4 or more of the 5 statements and it was therefore very difficult to fail. By way of example, if the client selected all 5 statements it passed. If the client selected only 1 statement it passed, even if the statement it selected was a "wrong" statement. The 5 statements are set out at ETR.0018.0001.0062 Tab "NM-2" columns M - U.

<u>Failure of the First TMD (and related Screening Test) to meet the requirements of the Corporations Act</u>

Section 994B(5)(b)

61. By reason of the matters set out in paragraph 52 above, the First TMD, by purporting to define the target market by reference to undisclosed or inadequately disclosed criteria (being, the "Appropriateness test" and the "Trading Knowledge Assessment"), did not describe the class of retail clients that comprised the target market for the CFD Product as required by s 994B(5)(b) of the Corporations Act.

Section 994B(8)(b)

62. By reason of the matters set out in paragraphs 52 and 61 above, it was not possible to reasonably or rationally conclude from the First TMD whether the CFD Product would likely be consistent with the likely objectives, financial situation and needs of retail clients in the target market.

63. The definition of the target market in the First TMD was so broad as to inevitably capture retail investors for whom the CFD Product would not likely be consistent with their likely objectives, financial situation and needs, given:

    a. the matters set out in paragraph 51 above;

    b. the nature, complexity and risks of the CFD Product as set out in paragraphs 23 to 41 above;

    c. the nature of the Screening Test during the period of the First TMD as set out in paragraphs 56 to 60 above.

64. The First TMD did not exclude from the target market retail clients with a low or medium risk tolerance, where having regard to the nature, complexity and risks of the CFD Product as set out in paragraphs 23 to 41 above, the CFD Product was not likely to be consistent with the likely objectives, financial situation and needs of such a retail client.

65. The First TMD did not exclude from the target market retail clients who could not afford to lose some or all of an investment in the CFD Product without significant detrimental effect on their standard of living, where having regard to the nature, complexity and risks of the CFD Product as set out in paragraphs 23 to 41 above, the CFD Product was not likely to be consistent with the likely objectives, financial situation and needs of such a retail client.

66. The First TMD did not exclude from the target market retail clients who did not understand the risks of trading in the CFD Product, where having regard to the nature, complexity and risks of the CFD Product as set out in paragraphs 23 to 41 above, the CFD Product was not likely to be consistent with the likely objectives, financial situation and needs of such a retail client.

67. The First TMD did not limit the target market to retail clients with a short-term investment timeline, where for the reasons set out at paragraph 39 above, the CFD Product was not likely to be consistent with the likely objectives, financial situation and needs of a retail client with a longer-term investment timeline.

68. The First TMD did not exclude from the target market retail clients who had the CFD Product as the standalone or core component of their portfolio, where having regard to the nature, complexity and risks of the CFD Product as set out in paragraphs 23 to 41

above, the CFD Product was not likely to be consistent with the likely objectives, financial situation and needs of such a retail client.

69. By reason of one or more of the matters set out in paragraphs 62 to 68 above, and in the circumstances set out in paragraphs 23 to 41, 49 to 53 and 56 to 60 above, the First TMD was not such that it would be reasonable to conclude that, if the CFD Product were to be issued or sold in a regulated sale to a retail client in the target market for the First TMD, the product would likely be consistent with the likely objectives, financial situation and needs of the retail client as required by s 994B(8)(b) of the Corporations Act.

Section 994B(5)(c)

70. Further or in the alternative to paragraphs 61 to 69 above, in the circumstances set out in paragraph 53 above, the First TMD contained purported Distribution Conditions that were of unstated and uncertain content, meaning and application, such that the purported TMD did not specify or properly specify conditions and restrictions on retail product distribution conduct in relation to the CFD Product as required by s 994B(5)(c) of the Corporations Act.

Section 994B(8)(a)

71. Further or in the alternative to paragraphs 61 to 70 above:

    a. the fact that the purported Distribution Conditions were of unstated and uncertain content, meaning and application (see paragraph 70 above) meant that it was not possible to reasonably or rationally conclude from the purported TMD whether, if the CFD Product were to be issued (or sold in a regulated sale) to a retail client in accordance with the Distribution Conditions, it would be likely that the retail client was in the target market;

    b. to the extent the purported Distribution Conditions in the First TMD comprised or included the Screening Test, the Screening Test for the First TMD, having the features set out in paragraphs 56 to 59 above was:

        i. wholly inadequate to assess whether the retail client fitted within individual categories set out in the target market as described in the purported TMDs;

        ii. very difficult to fail and was therefore of little or no real utility as a Distribution Condition;

        iii. not applied to some retail clients at all in the circumstances set out in paragraph 46.b above;

    c. by reason of the matters set out in (a) and/or (b) above, it would not be reasonable to conclude that, if the CFD Product were to be issued to a retail client (or sold in a regulated sale) in accordance with the Distribution Conditions, it would be likely that the retail client was in the target market as required by s 994B(8)(a) of the Corporations Act.

Section 994B(2)

72. In the premises, the First TMD was not a TMD for the purposes of s 994A of the Act, and eToro has engaged in retail product distribution conduct with respect to the CFD Product without having made a target market determination during the period from about 5 October 2021 to 29 March 2022, in contravention of s 994B(2) of the Corporations Act.

73. In the premises:

   a. by reason of s 1317QA of the Corporations Act, eToro is taken to have committed a separate contravention of s 994B(2) in respect of each day on which it contravened s 994B(2);

   b. further or in the alternative to (a), eToro has engaged in a separate contravention of s 994B(2) in respect of each occasion that it issued (or sold in a regulated sale) a CFD Product to a retail client without having made a target market determination with respect to the CFD Product.

The Second TMD

<u>Contents of the Second TMD</u>

74. The second purported TMD was in place from about 30 March 2022 to 5 February 2023 (**Second TMD**).

75. The Second TMD described the target market for the CFD Product as follows:

   … the target market for CFDs is a Client that falls within one (or more) of the below categories, noting there may also be some overlap between categories:

   - ***Medium to High Risk Tolerance Traders** – Clients seeking to make a profit via speculation.*
   - ***Experienced Investors** – Clients who understand the risks of CFDs and the underlying investments upon which they are derived.*
   - ***Clients with prior trading experience** - Clients with prior experience in financial markets and experience in trading leveraged financial products and who pass eToro's Trading Knowledge Assessment.*
   - ***Appropriateness test** - Clients who pass the eToro Appropriateness test.*

Particulars

Section 3 of the Second TMD.

76. Under the Second TMD, a retail client fell within eToro's target market for the CFD Product if they satisfied any one (or more) of the listed categories.

Particulars

By way of example, if a retail client had a medium risk tolerance, they fell within the target market, even if they were not an experienced investor, had no understanding of the risks of CFDs and the underlying investments upon which they were derived, had no prior trading experience in financial markets or leveraged products, and had failed eToro's "Appropriateness test".

77. The description of the target market in the Second TMD referred to a "Trading Knowledge Assessment" and an "Appropriateness Test", but did not describe any elements, content, criteria or scoring requirements for successful completion of the "Trading Knowledge Assessment" or the "Appropriateness test".

Particulars

See section 3 of the Second TMD, as extracted at paragraph 75 above.

78. The Second TMD purported to refer to Distribution Conditions, but did not specify the content, meaning or application of those purported Distribution Conditions.

Particulars

The Second TMD, under the heading "Distribution conditions" in section 6.2, referred to "distribution criteria" and "eligibility requirements determined by eToro", but did not specify the content, meaning or application of those purported Distribution Conditions.

<u>Screening Test</u>

79. During the period from about 30 March 2022 to 5 February 2023, the Screening Test which was in place was that set out in paragraphs 58 to 60 above.

<u>Failure of the Second TMD (and related Screening Test) to meet the requirements of the Corporations Act</u>

Section 994B(5)(b)

80. By reason of the matters set out in paragraph 77 above, the Second TMD, by purporting to define the target market by reference to undisclosed or inadequately disclosed criteria (being, the "Appropriateness test" and the "Trading Knowledge Assessment"), did not describe the class of retail clients that comprised the target market for the CFD Product as required by s 994B(5)(b) of the Corporations Act.

Section 994B(8)(b)

81. By reason of the matters set out in paragraphs 77 and 80 above, it was not possible to reasonably or rationally conclude from the Second TMD whether the CFD Product would likely be consistent with the likely objectives, financial situation and needs of retail clients in the target market.

82. The definition of the target market in the Second TMD was so broad as to inevitably capture retail investors for whom the CFD Product would not likely be consistent with their likely objectives, financial situation and needs, given:

    a. the matters set out in paragraph 76 above;

    b. the nature, complexity and risks of the CFD Product as set out in paragraphs 23 to 41 above;

    c. the nature of the Screening Test during the period of the Second TMD as set out in paragraphs 58 to 60 above.

83. The Second TMD did not exclude from the target market retail clients with a low or medium risk tolerance, where having regard to the nature, complexity and risks of the CFD Product as set out in paragraphs 23 to 41 above, the CFD Product was not likely to be consistent with the likely objectives, financial situation and needs of such a retail client.

84. The Second TMD did not exclude from the target market retail clients who could not afford to lose some or all of an investment in the CFD Product without significant detrimental effect on their standard of living, where having regard to the nature, complexity and risks of the CFD Product as set out in paragraphs 23 to 41 above, the CFD Product was not likely to be consistent with the likely objectives, financial situation and needs of such a retail client.

85. The Second TMD did not exclude from the target market retail clients who did not understand the risks of trading in the CFD Product, where having regard to the nature, complexity and risks of the CFD Product as set out in paragraphs 23 to 41 above, the CFD Product was not likely to be consistent with the likely objectives, financial situation and needs of such a retail client.

86. The Second TMD did not limit the target market to retail clients with a short-term investment timeline, where for the reasons set out at paragraph 39 above, the CFD Product was not likely to be consistent with the likely objectives, financial situation and needs of a retail client with a longer-term investment timeline.

87. The Second TMD did not exclude from the target market retail clients who had the CFD Product as the standalone or core component of their portfolio, where having regard to the nature, complexity and risks of the CFD Product as set out in paragraphs 23 to 41

above, the CFD Product was not likely to be consistent with the likely objectives, financial situation and needs of such a retail client.

88. By reason of one or more of the matters set out in paragraphs 81 to 87 above, and in the circumstances set out in paragraphs 23 to 41, 58 to 60 and 74 to 79 above, it would not be reasonable to conclude that, if the CFD Product were to be issued (or sold in a regulated sale) to a retail client in the target market for the Second TMD, the product would likely be consistent with the likely objectives, financial situation and needs of the retail client as required by s 994B(8)(b) of the Corporations Act.

Section 994B(5)(c)

89. Further or in the alternative to paragraphs 80 to 88 above, in the circumstances set out in paragraph 78 above, the Second TMD contained purported Distribution Conditions that were of unstated and uncertain content, meaning and application, such that the purported TMD did not specify or properly specify conditions and restrictions on retail product distribution conduct in relation to the CFD Product as required by s 994B(5)(c) of the Corporations Act.

Section 994B(8)(a)

90. Further or in the alternative to paragraphs 80 to 89 above:

    a. the fact that the purported Distribution Conditions were of unstated and uncertain content, meaning and application (see paragraph 89 above) meant that it was not possible to reasonably or rationally conclude from the purported TMD whether, if the CFD Product were to be issued to a retail client (or sold in a regulated sale) in accordance with the Distribution Conditions, it would be likely that the retail client was in the target market;

    b. to the extent the purported Distribution Conditions in the Second TMD comprised or included the Screening Test, the Screening Test for the Second TMD, having the features set out in paragraphs 58 to 59 above was:

        i. wholly inadequate to assess whether the retail client fitted within individual categories set out in the target market as described in the purported TMDs; and

        ii. very difficult to fail and was therefore of little or no real utility as a Distribution Condition;

        iii. not applied to some retail clients at all (or not applied to some clients until about May 2022) in the circumstances set out in paragraph 46.b above;

c. by reason of the matters set out in (a) and/or (b) above, it would not be reasonable to conclude that, if the CFD Product were to be issued (or sold in a regulated sale) to a retail client in accordance with the Distribution Conditions, it would be likely that the retail client was in the target market as required by s 994B(8)(a) of the Corporations Act.

Section 994B(2)

91. In the premises, the Second TMD was not a TMD for the purposes of s 994A of the Act, and eToro has engaged in retail product distribution conduct with respect to the CFD Product without having made a target market determination during the period from about 30 March 2022 to 5 February 2023, in contravention of s 994B(2) of the Corporations Act.

92. In the premises:

a. by reason of s 1317QA of the Corporations Act, eToro is taken to have committed a separate contravention of s 994B(2) in respect of each day on which it contravened s 994B(2);

b. further or in the alternative to (a), eToro has engaged in a separate contravention of s 994B(2) in respect of each occasion that it issued (or sold in a regulated sale) a CFD Product to a retail client without having made a target market determination with respect to the CFD Product.

The Third TMD

<u>Contents of the Third TMD</u>

93. The third purported TMD was in place from about 6 February 2023 to 29 July 2023 (**Third TMD**).

94. The Third TMD described the target market for the CFD Product as follows:

The target market for CFDs includes clients who:

- *understand the risks and benefits of trading in CFDs*
- *invest only a proportion of their available funds in CFDs*
- *have prior trading experience*
- *have a medium to high risk tolerance*
- *have a diversified portfolio*
- *have a suitable level of income or wealth*
- *can afford to lose all their investment in CFDs without a significant detrimental effect on their standard of living*

Particulars

See the heading “eToro’s Target Market for CFDs” in the Third TMD.

95. The Third TMD was intended and understood by eToro as incorporating a retail client who satisfied any one (or more) of the characteristics listed at paragraph 94 above.

96. The Third TMD stated to the effect that:

a. eToro’s assessment of appropriateness was based on a number of different tests, one of which included an overall score, determined from a client’s response to onboarding questions together with knowledge and experience tests, which tests might be reperformed during the client’s lifetime of trading with eToro in accordance with its Terms and Conditions;

Particulars

See the heading “eToro’s Target Market for CFDs” in the Third TMD.

b. clients who failed the eToro negative market test were not appropriate for CFD trading.

Particulars

See the heading “Excluded Classes of Client” in the Third TMD.

97. Further or in the alternative to paragraphs 94 and 95 above, and to the extent the Third TMD should be read as describing the target market for the CFD Product as being or including persons who passed the tests set out in paragraph 96 above and/or the Screening Test for the Third TMD (which is denied), the Third TMD did not describe the content, criteria or scoring requirements of those tests.

98. The Third TMD purported to refer to Distribution Conditions but did not specify the content, meaning or application of those purported Distribution Conditions.

Particulars

The Third TMD referred to “distribution criteria” that had been “overlaid” to be reasonably likely to only reach clients in the target market, governing distribution and promotion of CFDs. The Third TMD also referred to the “tests” set out in paragraph 96 above as conditioning appropriateness. However, the Third TMD did not specify the content, meaning or application of these purported Distribution Conditions.

<u>Screening Test</u>

99. During the period from about 6 February 2023 to 29 July 2023, the Screening Test which was in place was that set out in paragraphs 58 to 60 above.

<u>Failure of the Third TMD (and related Screening Test) to meet the requirements of the Corporations Act</u>

Section 994B(5)(b)

100. By reason of the matters set out in paragraphs 96 and 97 above, to the extent the Third TMD should be read as describing the target market for the CFD Product as being or including persons who passed the tests set out in paragraph 96 above and/or the Screening Test for the Third TMD (which is denied), the Third TMD~~.~~ by purporting to define the target market by reference to undisclosed or inadequately disclosed criteria, did not describe the class of retail clients that comprised the target market for the CFD Product as required by s 994B(5)(b) of the Corporations Act.

Section 994B(8)(b)

101. The definition of the target market in the Third TMD, as intended and understood by eToro in the manner set out in paragraph 95 above, was so broad as to inevitably capture retail investors for whom the CFD Product would not likely be consistent with their likely objectives, financial situation and needs, in particular given the nature, complexity and risks of the CFD Product as set out in paragraphs 23 to 41 above.

102. The Third TMD did not exclude from the target market retail clients with a low or medium risk tolerance, where having regard to the nature, complexity and risks of the CFD Product as set out in paragraphs 23 to 41 above, the CFD Product was not likely to be consistent with the likely objectives, financial situation and needs of such a retail client.

103. The Third TMD did not exclude from the target market retail clients who could not afford to lose some or all of an investment in the CFD Product without significant detrimental effect on their standard of living, where having regard to the nature, complexity and risks of the CFD Product as set out in paragraphs 23 to 41 above, the CFD Product was not likely to be consistent with the likely objectives, financial situation and needs of such a retail client.

104. The Third TMD did not exclude from the target market retail clients who did not understand the risks of trading in the CFD Product, where having regard to the nature, complexity and risks of the CFD Product as set out in paragraphs 23 to 41 above, the CFD Product was not likely to be consistent with the likely objectives, financial situation and needs of such a retail client.

105. The Third TMD did not limit the target market to retail clients with a short-term investment timeline, where for the reasons set out at paragraph 39 above, the CFD Product was not likely to be consistent with the likely objectives, financial situation and needs of a retail client with a longer-term investment timeline.

106. The Third TMD did not exclude from the target market retail clients who had the CFD Product as the standalone or core component of their portfolio (in circumstances where for the Third TMD, only one of the relevant criteria in the target market needed to be satisfied), where having regard to the nature, complexity and risks of the CFD Product as set out in paragraphs 23 to 41 above, the CFD Product was not likely to be consistent with the likely objectives, financial situation and needs of such a retail client.

107. Further or in the alternative to paragraphs 101 to 106, by reason of the matters set out in paragraphs 96, 97 and 100 above, to the extent the Third TMD should be read as describing the target market for the CFD Product as being or including persons who passed the tests set out in paragraph 96 above and/or the Screening Test for the Third TMD (which is denied):

   a. it was not possible to reasonably or rationally conclude from the Third TMD whether the CFD Product would likely be consistent with the likely objectives, financial situation and needs of retail clients in the target market;

   b. the target market was so broad as to inevitably capture retail investors for whom the CFD Product would not likely be consistent with their likely objectives, financial situation and needs, given the nature, complexity and risks of the CFD Product as set out in paragraphs 23 to 41 above, and the nature of the Screening Test during the period of the Third TMD as set out in paragraphs 58 to 60 above.

108. By reason of one or more of the matters set out in paragraphs 101 to 107 above, and in the circumstances set out in paragraphs 23 to 41, 58 to 60 and 93 to 99 above, it would not be reasonable to conclude that, if the CFD Product were to be issued (or sold in a regulated sale) to a retail client in the target market for the Third TMD, the product would likely be consistent with the likely objectives, financial situation and needs of the retail client as required by s 994B(8)(b) of the Corporations Act.

Section 994B(5)(c)

109. Further or in the alternative to paragraphs 100 to 108 above, in the circumstances set out in paragraph 98 above, the Third TMD contained purported Distribution Conditions that were of unstated and uncertain content, meaning and application, such that the purported TMD did not specify or properly specify conditions and restrictions on retail product distribution conduct in relation to the CFD Product as required by s 994B(5)(c) of the Corporations Act.

Section 994B(8)(a)

110. Further or in the alternative to paragraphs 100 to <u>109</u> above:

a. the fact that the purported Distribution Conditions were of unstated and uncertain content, meaning and application (see paragraph 109 above) meant that it was not possible to reasonably or rationally conclude from the purported TMD whether, if the CFD Product were to be issued (or sold in a regulated sale) to a retail client in accordance with the Distribution Conditions, it would be likely that the retail client was in the target market;

b. to the extent the purported Distribution Conditions in the Third TMD comprised or included the Screening Test, that Screening Test, having the features set out in paragraphs 58 to 59 above was:

   i. wholly inadequate to assess whether the retail client fitted within individual categories set out in the target market as described in the purported TMDs; and

   ii. very difficult to fail and was therefore of little or no real utility as a Distribution Condition;

c. by reason the matters set out in (a) and/or (b) above, it would not be reasonable to conclude that, if the CFD Product were to be issued (or sold in a regulated sale) to a retail client in accordance with the Distribution Conditions, it would be likely that the retail client was in the target market as required by s 994B(8)(a) of the Corporations Act.

Section 994B(2)

111. In the premises, the Third TMD was not a TMD for the purposes of s 994A of the Act, and eToro has engaged in retail product distribution conduct with respect to the CFD Product without having made a target market determination during the period from about 6 February 2023 to 29 July 2023, in contravention of s 994B(2) of the Corporations Act.

112. In the premises:

a. by reason of s 1317QA of the Corporations Act, eToro is taken to have committed a separate contravention of s 994B(2) in respect of each day on which it contravened s 994B(2);

b. further or in the alternative to (a), eToro has engaged in a separate contravention of s 994B(2) in respect of each occasion that it issued (or sold in a regulated sale) a CFD Product to a retail client without having made a target market determination with respect to the CFD Product.

The Fourth TMD

Contents of the Fourth TMD

113. The fourth purported TMD was in place from about 30 July 2023 to the end of the Relevant Period (**Fourth TMD**).

114. The Fourth TMD described the target market for the CFD Product as follows:

The target market for CFDs includes clients who:

- *understand the risks and benefits of trading in CFDs*
- *aim to speculate or to hedge*
- *have a high risk tolerance*
- *can afford to lose all their investment in CFDs without significant detrimental effect on their standard of living*
- *have a sufficient level of income and/or wealth*

Particulars

See the heading "eToro's Target Market for CFDs" in the Fourth TMD.

115. While unclear from the face of the Fourth TMD, ASIC understands that eToro's position is that a client will fall within the target market if all of the listed characteristics listed in paragraph 114 above are met.

116. The Fourth TMD stated to the effect that before a client could trade in the CFD Product, the client needed to complete a series of questions to determine whether they were likely to fall within the target market described in the Fourth TMD.

Particulars

See the heading "eToro's Target Market for CFDs" in the Fourth TMD.

117. In the alternative to paragraphs 114 and 115 above, to the extent the Fourth TMD should be read as describing the target market for the CFD Product as being or including persons who completed the questions set out in paragraph 116 above and/or the Screening Test for the Fourth TMD (which is denied), the Fourth TMD did not describe any elements, content, criteria or scoring requirement for that series of questions.

118. The Fourth TMD purported to refer to Distribution Conditions but did not specify the content, meaning or application of those purported Distribution Conditions.

Particulars

The Fourth TMD referred to "distribution criteria" that had been "overlaid" to be reasonably likely to only reach clients in the target market, governing distribution and promotion of CFDs. The Fourth TMD also referred to the "series of questions" set out in paragraph 116 above as conditioning appropriateness. However, the Fourth TMD did not specify the content, meaning or application of these purported Distribution Conditions.

Screening Test for the Fourth TMD

119. During the period from about 30 July 2023 to the end of the Relevant Period, eToro had in place a revised Screening Test which it described as a "Revised Onboarding Process", a feature of which was that:

a. if a retail client selected that their attitude to risk was "+5% / -5%" (being the lowest of 5 risk options available for selection), their application was automatically rejected, but if a client selected any of 4 other risk options, their application was not automatically rejected; and

b. if a retail client selected that their primary purpose of trading CFDs was "Saving for home", their application was automatically rejected, but if a client selected that their primary purpose of trading with eToro was "future planning (save for kids education / retirement)", their application was not automatically rejected.

Failure of the Fourth TMD (and related Screening Test) to meet the requirements of the Corporations Act

Section 994B(5)(b)

120. By reason of the matters set out in paragraphs 116 and 117 above, to the extent the Fourth TMD should be read as describing the target market for the CFD Product as being or including persons who completed the questions set out in paragraph 116 above and/or the Screening Test for the Fourth TMD (which is denied), the Fourth TMD, by purporting to define the target market by reference to undisclosed or inadequately disclosed criteria, did not describe the class of retail clients that comprised the target market for the CFD Product as required by s 994B(5)(b) of the Corporations Act.

Section 994B(8)(b)

121. The Fourth TMD did not limit the target market to retail clients with a short-term investment timeline, where for the reasons set out at paragraph 39 above, the CFD Product was not likely to be consistent with the likely objectives, financial situation and needs of a retail client with a longer-term investment timeline.

122. The Fourth TMD did not exclude from the target market retail clients who had the CFD Product as the standalone or core component of their portfolio (in circumstances where for the Fourth TMD, only one of the relevant criteria in the target market needed to be satisfied), where having regard to the nature, complexity and risks of the CFD Product as

set out in paragraphs 23 to 41 above, the CFD Product was not likely to be consistent with the likely objectives, financial situation and needs of such a retail client.

123. Further or in the alternative to paragraphs 121 to 122 by reason of the matters set out in paragraphs 116, 117 and 120 above, to the extent the Fourth TMD should be read as describing the target market for the CFD Product as being or including persons who passed the tests set out in paragraph 117 above and/or the Screening Test for the Fourth TMD (which is denied):

   a. it was not possible to reasonably or rationally conclude from the Fourth TMD whether the CFD Product would likely be consistent with the likely objectives, financial situation and needs of retail clients in the target market;

   b. the target market was so broad as to inevitably capture retail investors for whom the CFD Product would not likely be consistent with their likely objectives, financial situation and needs, given the nature, complexity and risks of the CFD Product as set out in paragraphs 23 to 41 above, and the nature of the Screening Test during the period of the Fourth TMD as set out in paragraph 119 above.

124. By reason of one or more of the matters set out in paragraphs 121 to 123 above, and in the circumstances set out in paragraphs 23 to 41 and 113 to 118 above, it would not be reasonable to conclude that, if the CFD Product were to be issued (or sold in a regulated sale) to a retail client in the target market for the ~~Third~~ Fourth TMD, the product would likely be consistent with the likely objectives, financial situation and needs of the retail client as required by s 994B(8)(b) of the Corporations Act.

Section 994B(5)(c)

125. Further or in the alternative to paragraphs 120 to 124 above, in the circumstances set out in paragraph 118 above, the Fourth TMD contained purported Distribution Conditions that were of unstated and uncertain content, meaning and application, such that the purported TMD did not specify or properly specify conditions and restrictions on retail product distribution conduct in relation to the CFD Product as required by s 994B(5)(c) of the Corporations Act.

Section 994B(8)(a)

126. Further or in the alternative to paragraphs 120 to 125 above:

   a. the fact that the purported Distribution Conditions were of unstated and uncertain content, meaning and application (see paragraph 125 above) meant that it was not possible to reasonably or rationally conclude from the purported TMD whether, if the CFD Product were to be issued (or sold in a regulated sale) to a retail client in accordance with the Distribution Conditions, it would be likely that the retail client was in the target market;

b. to the extent the purported Distribution Conditions in the Fourth TMD comprised or included the Screening Test, that Screening Test, having the features set out in paragraph~~s~~ 119 above, was unlikely to exclude retail clients who did not fall within the target market, such as clients who did not have a high risk tolerance and clients who were proposing to trade for reasons other than speculation or hedging;

c. by reason of the matters set out in (a) and/or (b) above, it would not be reasonable to conclude that, if the CFD Product were to be issued (or sold in a regulated sale) to a retail client in accordance with the Distribution Conditions, it would be likely that the retail client was in the target market as required by s 994B(8)(a) of the Corporations Act.

Section 994B(2)

127. In the premises, the Fourth TMD was not a TMD for the purposes of s 994A of the Act, and eToro has engaged in retail product distribution conduct with respect to the CFD Product without having made a target market determination during the period from about 30 July 2023 to the end of the Relevant Period, in contravention of s 994B(2) of the Corporations Act.

128. In the premises:

a. by reason of s 1317QA of the Corporations Act, eToro is taken to have committed a separate contravention of s 994B(2) in respect of each day on which it contravened s 994B(2);

b. further or in the alternative to (a), eToro has engaged in a separate contravention of s 994B(2) in respect of each occasion that it issued (or sold in a regulated sale) a CFD Product to a retail client without having made a target market determination with respect to the CFD Product.

Section 994E

129. Further or in the alternative to paragraphs 127 and 128, if the Fourth TMD did amount to a target market determination (which is denied), then:

a. the Screening Test for the Fourth TMD, having the features set out in paragraph 119 above, was unlikely to exclude retail clients who did not fall within the target market, such as clients who did not have a high risk tolerance, and clients who were proposing to trade for reasons other than speculation or hedging; and

b. the adoption of such a Screening Test amounted to eToro failing to take reasonable steps that would, or would be reasonably likely to, result in retail product distribution conduct in relation to the CFD Product being consistent with the purported Fourth TMD, in contravention of s 994E(1) and/or s 994E(3) of the Act.

Section 912A(1)(a) and 912A(5A)

130. Further or in the alternative, the financial services covered by the eToro AFSL included:

a. dealing in the CFD Product; and

b. making a market for the CFD Product.

131. In the provision of such financial services, during the Relevant Period, and by reason of the conduct set out above with respect to the purported TMDs and the application of the Screening Tests to screen retail clients from trading in the CFD Product, eToro failed to do all things necessary to ensure that the financial services covered by its AFSL were provided efficiently, honestly and fairly, in contravention of s 912A(1)(a) and s 912A(5A) of the Act, in circumstances where:

a. at all material times, eToro adopted a broad marketing strategy in targeting retail clients, as set out at paragraph 42 above;

b. with respect to the First to Third TMDs, eToro made no genuine or proper attempt to make an appropriate target market determination for the CFDs by reference to the likely objectives, financial situation and needs of retail clients;

c. retail clients who were Existing Clients as at 5 October 2021 were not subject to any Screening Test, except to the extent set out in paragraph 46(b) above;

d. the Screening Tests in place throughout the Relevant Period were inapt to exclude investors for whom the CFD Product would not likely be consistent with their likely objectives, financial situation and needs, with the result that many retail clients were able to trade the CFD Product where that product was unsuitable for them;

e. once clients passed the relevant Screening Test and acquired the CFD Product, there was a high likelihood that some clients would suffer significant financial harm, where the nature of the CFD Product was such that it was highly complex and exposed retail clients to significant risk, including the risk of losing much more money than their initial investment through leverage and the obligation to meet margin calls, and where the risks associated with the CFD Product were heightened where the underlying assets themselves had their own risks, and included extremely high risk and volatile products such as crypto-currencies;

f. the majority of consumers who acquired the CFD Product lost money when trading CFDs;

g. an ineffective Screening Test was in eToro's commercial interests because it increased the number of retail clients (including unsuitable retail clients) who were able to trade the CFD Product, which meant higher revenues for eToro including through fees and revenues at the expense of retail clients for whom the CFD Product was not appropriate;

h. a prospective client who passed the relevant Screening Test would (or might reasonably) form the view that there had been a proper assessment of whether the CFD Product was likely to be consistent with their objectives, financial situation and needs, when there had not been such an assessment; and, or alternatively

i. eToro was aware that there was a real likelihood that many retail clients for whom the CFD Product was unsuitable were trading the CFD Product.

Particulars

eToro was aware, or was in possession of facts from which it should reasonably be taken to be aware, that there was a real likelihood that retail clients for whom the CFD Product was unsuitable were trading the CFD Product. This awareness can be inferred, or is to be imputed to eToro, from the following matters which were known to eToro:

(i) the nature of its own CFD Product and the risks which it posed for clients (which were stated in eToro's own PDS, the Financial Product Terms and the General Risk Disclosure);

(ii) the contents of eToro's own purported TMDs;

(iii) the contents of eToro's own Screening Tests;

(iv) the responses which it received from clients to the Screening Tests;

(v) the fact that many Existing Clients traded the CFD Product without having taken any Screening Test.

ASIC alleges that it can be inferred eToro had such an awareness, but it does not presently know the identity of any individuals at eToro that were actually aware of this information. To the extent these are matters in dispute, ASIC may provide further particulars following evidence and/or discovery.

Relief sought from the Court

132. On the basis of the matters set out above, ASIC seeks the relief set out in the Amended Originating Process.

Date: 18 April ~~12 March~~ 2024

Signed by Stephen Johnson
Lawyer for the Plaintiff

This pleading was prepared by Andrew Harding SC and Timothy Kane of counsel

Certificate of lawyer

I Stephen Johnson, certify to the Court that, in relation to the statement of claim filed on behalf of the Plaintiff, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 18 April ~~12 March~~ 2024

Signed by Stephen Johnson
Lawyer for the Plaintiff