IN THE COMPETITION APPEAL TRIBUNAL **Case No. 1266/7/7/16**

BETWEEN:

WALTER HUGH MERRICKS CBE

Class Representative

- and –

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE S.P.R.L.
('*Mastercard*')

Defendants

REJOINDER

Introduction

1. In this Rejoinder, save where necessary to distinguish between them, the Defendants will be referred to collectively as "**Mastercard**".

2. Save where the contrary appears, all paragraph references are to the relevant numbered paragraphs in the Re-Re-Amended Reply dated 18 January 2023 (the "**RRA Reply**").

3. For convenience, save where the contrary is stated, this Rejoinder adopts the definitions and headings used in the RRA Reply; however, this is without prejudice to the substance of this Rejoinder.

4. The matters raised by the RRA Reply go back many years. Mastercard has pleaded to the RRA Reply to the best of its ability given the passage of time. It reserves the right to develop and/or amend its case as its investigations of relevant matters continue and as more information becomes available.

5. This Rejoinder responds only to the new matters added by the Class Representative by re-re-amendment in his RRA Reply. Save insofar as it consists of admission or as is otherwise admitted herein, Mastercard joins issue with the re-re-amendments.

Limitation and Applicable Law

English Law

6. Paragraph 3A is noted, and Mastercard repeats paragraphs 23-24 below.

7. In relation to the new matters pleaded in paragraph 4(b):

   a. The pleas of deliberate concealment of relevant facts and deliberate breach of duty under section 32 of the Limitation Act 1980 are said to be advanced by the Class Representative "*on the basis of the information presently available to him*" pending disclosure and factual evidence (paragraph 4(b)(ii)).

   b. However, the Class Representative has wholly failed to particularise (i) which fact or facts are said to have been (deliberately) concealed by Mastercard; and (ii) which of those facts are said to be relevant facts for the purpose of section 32(1)(b) i.e. facts which are essential for a claimant to prove in order to establish a *prima facie* case and without which a claimant could not plead a complete cause of action ("**relevant facts**").

   c. Instead, the RRA Reply refers generically to concealment of the "*levels*", "*methodology for setting*", and "*rules relating to*" the EEA MIF: (paragraph 4(b)(iii)), without identifying what facts are said to have been concealed or explaining why such facts are essential and a claim could not have been pleaded without them. Instead, the Class Representative recites purported evidence without any particularisation of the context, purpose or relevance of the materials to which he refers, nor any explanation

of their application to the specific facts relevant to the rights of action allegedly held by the persons represented by him.

d. In the premises, the pleading is seriously defective. An allegation of deliberate concealment and/or deliberate breach must be clearly pleaded, since it involves an allegation of conscious wrongdoing.

e. By paragraph 14 of the Order of the Tribunal dated 10 February 2023 (the "**Directions Order**"), the Tribunal directed that, following disclosure, the Class Representative shall, if so advised, file and serve a Re-Re-Re-Amended Reply on 18 September 2023. At paragraph 15, the Directions Order made provision for Mastercard to file and serve an Amended Rejoinder.

f. In the premises, this Rejoinder pleads as far as Mastercard is currently able to do in circumstances where: (a) paragraph 4(b) of the RRA Reply is, as it currently stands, embarrassing for lack of particularity; and (b) Mastercard's response in this Rejoinder is necessarily limited as a result.

g. Mastercard will plead further in relation to any allegation if and when it is properly particularised.

8. The summary allegation at paragraph 4(b)(i) is denied for the reasons set out below. On the basis that the allegation appears to be that Mastercard concealed the "*levels*", "*methodology for setting*", and "*rules relating to*" the EEA MIF (and without prejudice to the foregoing):

a. In relation to the allegation that Mastercard concealed the *"levels of the EEA MIF"*, Mastercard refers to and relies upon *Arcadia v Visa* [2014] EWHC 3561 (Comm) at paragraph 99, upheld by the Court of Appeal in *Arcadia v Visa* [2015] EWCA Civ 883. It is consequently denied that the exact levels of the EEA MIF were relevant facts. Mastercard also notes that information on the broad level of the EEA MIF was publicly available.

b. In relation to the allegation that Mastercard concealed the "*methodology*" for setting the EEA MIF, Mastercard refers to and relies upon *Arcadia v Visa* [2014] EWHC 3561

(Comm) at paragraph 97. It is consequently denied that the methodology for setting the EEA MIF was a relevant fact.

c. In relation to the allegation that Mastercard concealed the *"rules"* relating to the EEA MIF, Mastercard cannot plead to this allegation until the relevant "rules" are particularised. However, Mastercard refers to and relies upon *Arcadia v Visa* [2014] EWHC 3561 (Comm) at paragraph 97 in relation to the "scope" of the MIF arrangements. It is consequently denied that any of the rules relating to the EEA MIF were relevant facts.

9. Without prejudice to the foregoing, the Class Representative's allegations of deliberate concealment of relevant facts, and of the deliberate commission of a breach of duty in circumstances where the breach would be unlikely to be discovered for some time, are incompatible with the following:

a. Mastercard notified its scheme rules (including the EEA MIFs and associated rules) to the European Commission pursuant to Article 15(5) of Regulation 17/62 on 22 May 1992, as recorded in recital 16 to the Commission Decision. Further notifications were made over time. Notification of an agreement to a competition regulator is the opposite of deliberately committing a breach of duty in circumstances where the breach is unlikely to be discovered for some time.

b. There was considerable publicity before and during the period of the claim regarding interchange fees (including the EEA MIFs) and their potential effect on merchants' costs and on prices paid by consumers. This included publicity regarding the complaint submitted by the British Retail Consortium to the European Commission on 30 March 1992.

c. Mastercard refers, *inter alia*, to the media and official reporting on these matters, as set out in the Agreed Statement of Facts filed on 25 November 2022[1] ahead of the

[1] The agreed statement of facts filed in accordance with: (i) the Order of the Chairman dated 14 October 2022; and (ii) the draft Order of the Tribunal dated 18 November 2022 which extended the deadline for filing the agreed statement of facts to 25 November 2022 (the ***Agreed Statement of Facts***).

preliminary issue trial on the Limitation and Applicable Law Issues[2] held in the Proceedings on 12-17 January 2023 (the ***Preliminary Issue Trial on Limitation***). As a result of this publicity, sufficient information was available about Mastercard and the EEA MIFs to allow a claimant to plead a claim.

d. While Mastercard (like any business) kept commercially sensitive information about its business confidential, none of the detailed information that Mastercard kept confidential (such as the specifics of different EEA MIF rates and the exact internal mechanism by which the EEA MIFs were set) was necessary for a claimant to plead a claim.

e. Mastercard did not commit a deliberate breach of competition law. On the contrary, Mastercard had good reasons to believe during the 1990s that the EEA MIFs were lawful:

    i. Ibanco Ltd (subsequently renamed Visa International) had notified various rules and regulations governing the Visa association and its members (including rules in relation to interchange) to the European Commission on 31 January 1977, but over 15 years later the European Commission had not challenged Visa's EEA MIFs.

    ii. The US Federal court had considered the legality of interchange fees at a nine-week trial in *National Bank Corp (Nabanco) v Visa USA*, 596 F. Supp 1231 and held that interchange fees which were reasonably cost-related were pro-competitive and so lawful. This decision was affirmed by the United States Court of Appeals, Eleventh Circuit in 1986. In accordance with *Nabanco*, from the early-mid 1990s Mastercard adopted a practice of calculating the costs of interchange for cross-border intra-EEA transactions using cost studies that were prepared by external consultants. Those cost studies were taken into account by Mastercard in setting the EEA MIFs and the EEA MIFs were

[2] The Limitation / Applicable Law Issues are the issues set out in paragraphs 1-3 of Annex A to the Order of the Chairman dated 14 October 2022.

typically set at levels below the calculation of costs. The Commission endorsed the cost study methodology in its 2002 Visa Exemption Decision.

iii. The UK Monopolies and Mergers Commission ("**MMC**") published two reports in the 1980s which analysed the UK domestic and cross border payment card markets and how the card schemes operated within them. The first, published in 1980, was titled "Credit Card Franchise Services, A Report on the Supply of Credit Card Franchise Services in the United Kingdom". The second, published in 1989, was titled "Credit Card Services, A report on the supply of credit card services in the United Kingdom". Both reports considered submissions from retailers that interchange fees distorted competition and should be abolished, but neither report upheld these contentions.

iv. Mastercard further considered that its interchange fees produced benefits and efficiencies for cardholders and merchants, that would (in any event) outweigh any allegedly restrictive effects of its interchange fees, such that they would be exempt.

10. Paragraph 4(b)(ii)(1) is denied. At paragraph 1.1 of the Class Representative's Response to Mastercard's Request for Further Information dated 8 February 2023 (the "**RFI Response**"), the Class Representative states that the facts and matters relied upon in support of this allegation are those pleaded at paragraphs 4(b)(ii)(2), (3), (4) and (5). In the premises, Mastercard repeats paragraphs 11-14 below.

a. In relation to the alleged "*culture of secrecy, non-transparency and non-disclosure*", it is not clear what (if any) distinction is drawn between alleged "*secrecy*", "*non-transparency*" or "*non-disclosure*", or how many different allegations Mastercard faces. By paragraph 1.2 of the RFI Response, the Class Representative states that these terms have "*overlapping meanings*" but it has refused to explain the difference (if any) between their use in its pleading.

b. The allegation that Mastercard "*fostered*" a "*culture*" is unparticularised and consequently Mastercard has no specific case which it can address.

c. At paragraph 1.3 of the RFI Response, the Class Representative states that the existence of a ""*culture of secrecy*" is "*supported*" by "*the fact that the banks were reluctant to provide the cross-border MIF rates to merchants even once Visa (and, it is to be inferred, Mastercard) permitted them to do so, and so Mastercard and Visa needed to publish their cross-border MIF rates on their websites: §4(b)(ii)(4)(d)*". This contradicts the Class Representative's case, since this is an allegation that third party banks acted independently to restrict the provision of information to merchants.

d. The allegation that Mastercard fostered the alleged culture in relation to "*in particular*" the EEA MIF is not understood. These are follow-on proceedings which relate only to the infringement established by the EC Decision which was limited to the EEA MIF. Any alleged culture of secrecy (the existence of which is denied) which applied to interchange fees other than the EEA MIF is consequently irrelevant:

i. At paragraph 1.4 of the RFI Response, the Class Representative states that it "*may*" prove Mastercard's deliberate concealment of matters relating to the EEA MIF by demonstrating Mastercard's deliberate concealment of "*matters relating to other interchange fees, in particular domestic interchange fees*" and that this "*may particularly be the case where the motivation(s) for concealment are the same across all interchange fees, for example anticompetitive benefit, maintenance of market power, or supposed commercial sensitivity*".

ii. This is wholly speculative. The Class Representative does not identify any fact or matter to support an allegation that matters relating to other interchange fees support its case that there was deliberate concealment in relation to the EEA MIF.

e. Paragraph 9 above is repeated.

11. The matters pleaded in paragraph 4(b)(ii)(2) are not relevant to an allegation of deliberate concealment of relevant facts. Rather, the allegation advanced in this paragraph appears to be that Mastercard would have received some general commercial advantage from

merchants, cardholders and consumers having (unspecified) less information about (unidentified) interchange fees. Further:

a. The allegation does not appear to be limited to the EEA MIF: Mastercard repeats paragraph 10d above.

b. As to the speculative allegations made to the effect that Mastercard was motivated to conceal information about interchange fees, Mastercard repeats paragraph 9 above.

c. As to paragraphs 4(b)(ii)(2)(a)-(b), the Cruickshank Report is a 367-page report which addressed the entire UK banking industry. The purpose, context, methodology, reliability and relevance of the Cruickshank Report to the rights of action allegedly held by the persons represented by the Class Representative is not pleaded and it is denied (insofar as it is alleged) that the two paragraphs cited support a case that Mastercard deliberately concealed a fact or facts in relation to the EEA MIF without which a claimant could not plead a claim (i.e. relevant facts). Further:

    i. The paragraphs cited do not refer to the EEA MIF.

    ii. Paragraph 3.146 does not name Mastercard. The rest of the passage (which is omitted by the Class Representative), states that "*Visa [i.e., not Mastercard] is particularly secretive*".

    iii. The paragraphs cited only refer to the non-disclosure of unspecified "*rules*" and the general "*process*" by which default levels of interchange fees were set. None of these are "relevant facts" for the purpose of section 32. Paragraph 8 above is repeated.

    iv. The paragraphs cited do not set out the evidence upon which the Cruickshank Report relied in making these statements and constitute bare assertion which is (insofar as it includes any allegation relevant to the Class Representative's case on deliberate concealment) denied. In these circumstances, it is denied that these assertions are to be given any evidential weight.

d. As to paragraph 4(b)(ii)(2)(c), the Commission's Statement of Objections is not binding on the Tribunal or Mastercard. It is in any event denied that a claimant needed to know either the exact levels of different EEA MIFs or the cost elements of the EEA MIF in order to plead a claim. Mastercard refers to and relies upon *Arcadia v Visa* [2014] EWHC 3561 (Comm) at paragraphs 97 and 99.

e. As to paragraph 4(b)(ii)(2)(d), Recital 495 of the EC Decision this does not support an allegation of deliberate concealment of any relevant fact in relation to the EEA MIF. Recital 495 is concerned with the extent to which card payment schemes are constrained by market forces. It does not refer to or consider whether Mastercard deliberately concealed any relevant fact in relation to the EEA MIF.

12. Paragraph 4(b)(ii)(3) fails to plead the fact or facts which Mastercard is alleged to have deliberately concealed or explain why these are alleged to be relevant facts. It is not clear which "*interchange fees*" are being referred to or which aspects of the "*structure*" and "*methodology*" for setting them or the "*relevant rules*" are said to have been deliberately concealed. As set out above, only the EEA MIF is relevant to this claim. As to the correspondence cited, Mastercard refers to paragraph 9 above. The fact that Mastercard (like any business) sought to keep commercially sensitive information about its business confidential, does not mean that Mastercard concealed (whether deliberately or otherwise) relevant facts about the EEA MIFs.

13. As to paragraph 4(b)(ii)(4), the allegation (insofar as it is being made) that redactions from the Commission's Statement of Objections demonstrates Mastercard's deliberate concealment of relevant facts is denied. The redaction process is an entirely separate exercise and only information which the Commission accepts is commercially sensitive will be redacted. Paragraph 9 above is otherwise repeated.

14. As to paragraph 4(b)(ii)(5), it is denied that the fact that some merchants agreed to pay blended MSCs and consequently did not know exactly what interchange fee applied to a particular transaction means that any relevant facts were concealed. Mastercard refers to and relies upon *Arcadia v Visa* [2014] EWHC 3561 (Comm) at paragraphs 97 and 99. In any event, the charging by acquiring banks of a single blended MSC for Mastercard and Visa

transactions was not (and is not alleged to have been) Mastercard's decision or responsibility. Further, Mastercard did not prevent acquiring banks from offering unblended MSCs if they wished to do so. Many retailers (including in particular large retailers) had merchant services agreements with their acquirers (referred to as "interchange plus", or "interchange plus plus") that allowed them to see the relevant interchange fees.

15. In the premises, paragraph 4(b)(iii) is denied and Mastercard repeats paragraphs 7-13 above. Furthermore:

    a. In relation to paragraph 4(b)(iii)(1), in order to plead a claim it was only necessary for a claimant to know that the EEA MIF was set by Mastercard, which was an association of undertakings. It was not necessary for a claimant to know the internal mechanisms by which the EEA MIFs were set.

    b. As to paragraph 4(b)(iii)(2):

        i. It is denied that it is necessary for a claimant to know the exact level of the EEA MIF. At most it would be necessary for a claimant to know that the EEA MIFs were not *de minimis* and this information was publicly available.

        ii. It is not clear what the phrase "*together with its function in relation to other types of transaction*" refers to. At paragraph 11 of its RFI Response, the Class Representative has refused to identify the "*transaction(s)*" to which its pleading refers. Mastercard cannot plead to this allegation until this is made clear.

        iii. It is denied that a claimant would need to know that the EEA MIF applied as a fallback to domestic card payments in a number of EEA Member States or the identity of these states in order to plead a claim. Mastercard refers to recital 651 of the EC Decision which held that: "*Due to the substantial number of MasterCard and Maestro cards in circulation and the high number of merchants accepting them in the EEA, a restriction of price competition between member banks of such a scheme cannot but be considered to be appreciable.*"

c. As to paragraph 4(b)(iii)(3), it is denied that the fact that the Commission concluded that the evolution of the EEA MIFs (i.e. how the levels of the EEA MIFs changed over time) was itself evidence of a restriction of competition means that the exact levels of the EEA MIFs are relevant facts. In any event, the Commission relied on this as additional evidence rather than as the basis for its finding that the EEA MIF restricted competition.

16. Paragraph 4(b)(iv) is noted. This is wild speculation unsupported by any evidence. In any event, it is denied that matters relevant to causation and quantum would be relevant facts.

17. Paragraph 4(b)(v) is denied and Mastercard repeats paragraphs 7-15 above. It is denied that Mastercard was under any duty specifically to disclose facts to consumers (including by embarking on a public relations or communications strategy targeted at consumers), particularly in circumstances where Mastercard has notified the EEA MIF to the European Commission. The allegation that a duty arose as a matter of "*utility*", "*morality*" or "*common sense*" is irredeemably vague and unsound in law.

18. Paragraph 4(b)(vi) is denied, and Mastercard repeats paragraphs 7-15 above. It is denied that Mastercard knew or was reckless as to whether it was committing a breach of Article 101 TFEU. Without limitation to that denial, paragraph 9 above is repeated.

19. As to paragraph 4(b)(vi)(2), it is denied that any deliberate breach was objectively unlikely to be discovered by those represented by the Class Representative for some time. Pending disclosure, Mastercard relies on Mastercard's notification of the EEA MIFs on 22 May 1992 and May 1993, the British Retail Consortium complaint of 30 March 1992 and the other facts and matters set out in the Agreed Statement of Facts for Preliminary Issue Trial on Limitation dated 25 November 2022.

20. As to paragraph 4(b)(vi)(3), it is denied that any relevant facts were deliberately concealed by Mastercard.

Scots Law

21. As to the Class Representative's reliance on paragraph 4(b) of the RRA Reply at paragraph 6(c), this is denied and Mastercard repeats paragraphs 7-20 above.

22. As to the Class Representative's reliance on *Adams v Thorntons WS* (No.3) 2005 1 SC 30 ("**Adams**") at paragraph 6(c), this constitutes legal submission which Mastercard will address in due course. Without prejudice to the generality of the foregoing, *Adams* concerns the consequences of a claimant's error rather than the consequences of a defendant's deliberate concealment or deliberate breach of duty.

EU law

23. The matters pleaded at paragraphs 9A-9E of the RRA Reply constitute legal submission which Mastercard will address in due course. Without prejudice to the generality of the foregoing:

    a. The judgment of the Court of Justice in Case C-267/20 *Volvo AB (publ.), DAF Trucks NV v RM* EU:C:2022:494 ("**Volvo**") was issued on 22 June 2022, after the end of the implementation period for the UK's departure from the European Union. It is therefore not binding on the Tribunal pursuant to section 6(1)(a) of the European Union (Withdrawal) Act 2018.

    b. The Courts have repeatedly held that the domestic law of limitation does not contravene EU principles of effectiveness and full compensation. Mastercard will refer to and rely on, *inter alia*, *Arcadia v Visa* [2015] EWCA Civ 883 at paragraphs 73-79.

    c. To the extent that *Volvo* contradicts that conclusion it is contrary to public policy and principles of legal certainty since it would remove the benefit of accrued limitation rights.

    d. In the premises, paragraphs 9C, 9D and 9E are denied.

e. Insofar as the Tribunal is minded to consider the Court of Justice's findings in *Volvo* at all, Mastercard will rely upon the full judgment rather than a summary of certain paragraphs from it.

24. Paragraph 9F is denied and Mastercard repeats paragraphs 18-19 above.

Sonia Tolaney KC
Matthew Cook KC
Hugo Leith
Daniel Benedyk

1 March 2023

STATEMENT OF TRUTH

Mastercard believes that the facts stated in this Rejoinder are true. I am duly authorised as Mastercard's legal representative to sign this statement of truth on behalf of Mastercard. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed:

Name: Mark Sansom

Date: 1 March 2023

Served by Freshfields Bruckhaus Deringer LLP of 100 Bishopsgate, London EC2P 2SR.
Solicitors for Mastercard.