Case Number: 1266/7/7/16

IN THE COMPETITION APPEAL TRIBUNAL

BETWEEN:

WALTER HUGH MERRICKS CBE

Class Representative

-and-

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

Defendants

REPLY

INTRODUCTION

1. In this Reply, unless otherwise indicated:

   (a) Paragraph references are to paragraphs in the Defence.

   (b) Except where otherwise indicated, defined terms have the same meaning as in the Amended Collective Proceedings Claim Form dated 9 March 2022 (the "**Claim**") or Defence, as appropriate.

   (c) Insofar as this Reply adopts definitions and headings used in the Defence, it does so without making any admissions thereby.

2. There is obvious information asymmetry between the Class Representative and Mastercard. Much of the Defence is pleaded by reference to facts and matters which are outside the knowledge of the Class Representative. Accordingly, the Class Representative will only be in a position properly to reply thereto following disclosure, factual evidence and expert evidence. Save as set out below, the Class Representative joins issue with Mastercard in relation to its Defence. Except as specifically indicated below, the Class Representative requires Mastercard to prove the matters set out in the Defence and no admissions are made in relation thereto.

3. The structure of this Reply is as follows:

(a) Limitation and applicable law;

(b) Represented Persons;

(c) The EC Decision;

(d) Exemption;

(e) Cross-Border Transactions;

(f) UK Domestic Interchange Fees;

(g) Did businesses which accepted Mastercard incur higher costs;

(h) Pass-on to consumers via higher prices;

(i) Account must be taken of benefits;

(j) Quantum; and

(k) Interest.

LIMITATION AND APPLICABLE LAW

[Paragraphs 9-10, 22-26 and 77(a) and (c)]

Limitation under English law

4. The Class Representative denies that claims to which English law applies and which are based upon an infringement having occurred prior to 20 June 1997 are time-barred. In particular:

(a) these collective proceedings combine claims which arose before 1 October 2015, but were made on or after 1 October 2015. Accordingly, pursuant to Rule 119 of the 2015 Tribunal Rules, Rules 31(1)-(3) of the Tribunal Rules 2003 apply in respect of the time limit for making a claim, and the claims were all made in time. Mastercard's reliance on Rule 31(4) in paragraph 25 is wrong as a matter of law, since Rule 31(4) does not apply.

(b) alternatively, the six-year limitation period pursuant to s.2 and/or 9 of the Limitation Act 1980 was suspended under s.32 of the Limitation Act 1980. The reasonable typical consumer would not have recognised that they had a worthwhile claim prior to June 1997 (nor indeed subsequently, including up to the date of the Statement of Objections in 2006, and including up to the date of the EC Decision in 2007).

Applicability of, and limitation under, Scots law and Northern Irish law

5. As is clear from the Claim Form generally and paragraph 95 in particular, the Class Representative's case is that: for loss suffered in England and Wales, the applicable law is the law of England and Wales; for loss suffered in Scotland, the applicable law is Scots law; and for loss suffered in Northern Ireland, the applicable law is the law of Northern Ireland. For the avoidance of doubt, as to the correct legal test for determining applicable law within the United Kingdom, paragraph 8 below is repeated *mutatis mutandis*. It is accordingly not open to Mastercard to "*admit*" in paragraph 9 that, insofar as the claim relates to transactions at merchants in the UK, it is governed by English law.

6. Insofar as the claims are governed by Scots law, although paragraph 25 is embarrassing in its want of particularity, it is understood that Mastercard intends to assert that claims which are based on infringing conduct before 20 June 1998 are time-barred (on the same basis as the claims to which English law applies, modified only to the extent of the applicable time period). That is denied. In particular:

(a) the Class Representative repeats paragraph 4(a) above;

(b) alternatively:

(i) pursuant to s.11(1) of the Prescription and Limitation (Scotland) Act 1973 (the "**1973 Act**"), Mastercard's obligation to make reparation became enforceable on the date when the loss, injury or damage occurred, subject to s.11(2);

(ii) pursuant to s.11(2), where as a result of a continuing act, the loss, injury or damage occurred before the cessation of the act, the loss, injury or damage shall be deemed for the purpose of s.11(1) to have occurred on the date when the act, neglect or default ceased.

(iii) Accordingly, in the present case, all loss caused by the Infringement is deemed to have been suffered on 21 June 2008, namely the date of the cessation of the continuing act, at which point Mastercard's obligation became enforceable. The five-year prescription period under s.6 of the 1973 Act began to run on that date.

(c) alternatively, the five-year prescription period pursuant to s.6(1) of the 1973 Act was suspended pursuant to s.6(4) of the 1973 Act, applying the test in *Glasgow City Council v VFS Financial Services Limited* [2020] CSOH 92 (in which it was held by Lord Tyre, in comparison to s.32 of the Limitation Act 1980, "*I am not persuaded that a materially different approach should be taken in Scotland to the question of what information is required to bring the operation of section 6(4) to an end*").

7. Insofar as the claims are governed by the law of Northern Ireland, although paragraph 25 is embarrassing in its want of particularity, it is understood that Mastercard intends to assert that claims which are based on infringing conduct before 20 June 1997 are time-barred (on the same basis as the claims to which English law applies, with the limitation period under the law of Northern Ireland being six years, as in England). That is denied. In particular:

(a) the Class Representative repeats paragraph 4(a);

(b) alternatively, the six-year limitation period pursuant to article 6 of the Limitation (Northern Ireland) Order 1989 was suspended under article 71 of the Limitation (Northern Ireland) Order 1989, because the reasonable typical consumer would not have recognised that they had a worthwhile claim prior to June 1997 (nor indeed subsequently, until the date of the Statement of Objections in 2006 at the very earliest).

Applicability of, and limitation under, other laws

8. The Class Representative's case is that the law of England and Wales, Scotland, and Northern Ireland govern the whole claim, including in relation to claims for transactions at merchants which were based outside the United Kingdom. Paragraph 24 of the Defence is accordingly denied as is the apparent allegation at paragraph 22 that the findings made in *Deutsche Bahn* are binding or otherwise directly transposable in these proceedings; those findings will be a matter for legal submission. The Class Representative avers in relation to purchases by Represented Persons from businesses that sell in the United Kingdom (through channels such as the internet, mail order, or via telephone shipping) and which had at the material time a physical presence in another Member State:

a. In relation to the period from 1 May 1996 until the end of the claim period, in respect of which applicable law is to be determined by the Private International Law (Miscellaneous Provisions) Act 1995:

   i. the most significant element of the tort occurred where the loss or damage was suffered by the consumers, namely England and Wales, Scotland and Northern Ireland, and accordingly the law of that country applies (s.11(2)(c));

   ii. alternatively, should the most significant element of the tort be the place of the restriction of competition, i.e. where the merchant is based, it is substantially more appropriate for the applicable law to be the place in which the consumers were resident and in which they suffered the loss, the merchant having made the goods or services available for purchase in that country (s.12).

b. In relation to the period between 22 May 1992 and 1 May 1996, in respect of which applicable law is to be determined by the common law choice of law rules:

   i. the doctrine of double actionability is inapplicable as the *lex loci delicti* is the law of England and Wales, Scotland or Northern Ireland;

   ii. in the alternative, the exceptions to the double actionability rule disapplies the application of any foreign law in favour of the law of England and Wales, Scotland or Northern Ireland.

9. Without prejudice to the foregoing, if Mastercard seeks to allege that any different foreign law (or laws) applies, it must identify the relevant law (or laws) and plead the provisions of such law (or laws) on which it relies. The Class Representative denies that he bears the burden in this regard. Further, as pleaded in paragraph 12 below, the Class Representative's intention is not to pursue claims in relation to transactions with merchants which were based outside the United Kingdom unless the associated loss is more than *de minimis*. The Class Representative proposes to identify the EEA States in which merchants were based and in relation to which he does intend to pursue such claims, following which Mastercard may, if so advised, seek permission to plead that foreign law applies.

REPRESENTED PERSONS

[Paragraphs 20(f), 34-39, 133-135 and 149]

10. It is admitted that the Class Representative can only claim for loss suffered by Represented Persons. As to the categories pleaded in paragraph 134:

    (a) It is admitted and averred that the effect of the Class Definition and the Domicile Date is that the Claim does not include those persons identified in paragraphs 134(a), (b), (c), (d) and (f).

    (b) As to those persons identified in paragraph 134(e), as pleaded in paragraph 23(b)(i) of the Claim, the Class Definition includes all purchases made by natural persons as it is overwhelmingly likely that such purchases will not have been made solely in the course, or for the purposes, of business. Further, following disclosure from Mastercard, it should be possible to extract any purchases made using a Mastercard commercial card, which would include purchases made by natural persons using such a card.

    (c) The relevance or extent of the category of persons identified in paragraph 134(g) is not admitted. The Class Representative reserves the right to plead further to this in due course, including seeking permission of the Tribunal to amend the class definition to encompass trustees in bankruptcy and other successors in title, if so advised.

11. The exclusion of loss suffered by persons other than Represented Persons will be a matter for expert evidence in due course, as per paragraph 112(h) of the Claim which makes the same point in relation to deceased persons and persons who have opted out of, or into, the collective proceedings.

12. As to claims in relation to goods or services bought by a UK consumer from a merchant in another Member State, the class representative admits that it will be necessary to establish the loss suffered on those transactions. Otherwise, paragraph 35(c) is denied. Further, as pleaded in paragraph 9 above, it is not intended to pursue such claims where the loss suffered would be *de minimis*. The Class Representative reserves the right to plead further to this, following disclosure, factual evidence and expert evidence.

13. As to the element of the class definition which relates to sale or purchases having been made from a merchant who accepted Mastercard, the Class Representative does not admit Mastercard's assertion that it does not hold records of which businesses accepted

Mastercard during the relevant period. That assertion is contradicted by other evidence including footnote 134 of the EC Decision, in which the Commission found that Mastercard was responsible for processing the majority of transactions in the United Kingdom and the limited extracts of Mastercard's rules (or Europay's rules) served as annexes to its Defence, which suggest Mastercard was responsible for processing.

14. As to the present estimate of the size of the class, it is admitted that it does not reflect all exclusions from the class. It is denied that the class is necessarily inflated as a result, since the present estimate also over-excludes in some respects (as pleaded in paragraph 26 of the Claim). This is the case in relation to children who were born and died after 2008 and to immigrants who immigrated and died after 2008, whose deaths are excluded from the class numbers, even though they were never in the class. In any event, the Class Representative avers that the purpose of the class estimate in the Claim was to provide the best estimate (compiled on a proportionate and reasonable basis) at the time of pleading for the purposes of the application for a Collective Proceeding Order. The Class Representative will ask Mastercard to identify the publicly available data which Mastercard avers exists in order to further refine it.

15. It is denied that an accurate identification of the total number of members of the Class from time to time is necessary for aggregate damages to be calculated. As pleaded above in paragraph 10, the Class Representative admits and avers that it will be necessary, in due course, properly to exclude from the aggregate damages award the losses suffered by persons whose claims are not combined in these collective proceedings. Without prejudice to how that exercise will be conducted, plainly one possibility is that such exclusions take effect as a proportion of the aggregate damages award. That is not the same exercise as identifying the number of class members, since (pursuant to s.47C(2) of the Competition Act 1998) damages are being awarded without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person.

THE EC DECISION

[Paragraphs 40 – 76]

16. The Class Representative does not reply to paragraphs 40-76 in any detail. This is because his case remains as pleaded in the Claim; he relies on the EC Decision in its entirety, and he joins issues with Mastercard's Defence accordingly. The following is without prejudice to the foregoing.

The Full Infringement Period

17. The Class Representative notes Mastercard's admission in paragraphs 8, 41(c) and 79 that the Class Representative can make a claim in relation to the Intra-EEA MIFs in force during the period 19 December 1997 to 21 June 2008

The binding nature of the EC Decision

18. It is admitted that only the operative part of the EC Decision, together with those recitals (or parts of recitals) which constitute the essential basis for the operative part of the EC Decision, are binding on the Tribunal. The Class Representative disputes Mastercard's characterisation of the majority of the recitals on which he relies as non-essential, and further disputes Mastercard's characterisation of other recitals on which it relies as essential. However, this is properly a matter for submission in due course. The Class Representative will further contend that relevant recitals (or parts of recitals), to the extent not binding on the Tribunal, should nonetheless be accorded significant weight.

Disclosure

19. The Class Representative is not currently in possession of either the confidential version of the EC Decision or the materials in the EC file, despite having sought this material from Mastercard on 24 May 2022, 8 June 2022 and 23 June 2022. This is necessary in order for him to address the EC Decision, not least since Mastercard expressly relies, in its Defence, on recitals which are partially redacted.

20. Further, it is apparent from the paragraphs of the Defence which address the EC Decision, as it is elsewhere, that Mastercard should have an abundance of other material for disclosure. By way of example, in paragraph 51(e), Mastercard avers that it (or Europay in relation to the period to 2002 for transactions within Europe) processed cross-border payment transactions, "*which included checking that acquiring banks were not claiming the wrong interchange fee rates*". This must bring with it a rich body of data. In paragraph 55(a), Mastercard avers *that "in the UK during the relevant period, MSCs were typically a percentage of the transaction value for credit and charge card transactions and a fixed fee for debit card transactions*", from which (unsurprisingly) it can be inferred that Mastercard holds data in relation to the MSCs charged. So too (again unsurprisingly) must Mastercard hold data in relation to the volume of transactions which bore each type of interchange fee (paragraphs 55(b) and 55(c)(ii)). Further, in that connection, the Class Representative notes that Mastercard avers that "*the operation of the Mastercard scheme during the relevant period*" is such that the relevant MIF was determined by the location of the Point

of Sale rather than the location of the acquiring bank (paragraph 45), in relation to which Mastercard is put to strict proof. This is not an exhaustive list, but instead an indication of the degree of information asymmetry and the extent of data which is in Mastercard's possession.

Mastercard's approach to the EC Decision

21. Without prejudice to the detailed legal submissions and analysis of each recital which will follow in due course (aided in particular by (i) the confidential version of the EC Decision, and (ii) the materials in the EC file), the Class Representative will say that Mastercard is wrong in law in its approach to the EC Decision. In particular, Mastercard seeks in paragraph 41(e):

    (a) to assert that *"the factual background and analysis in the recitals to the EC Decision primarily relates to the period from 2002 onwards*", as an alleged basis for contending that it is of no or reduced application to earlier periods.

    (b) to assert that, because the Commission held that the Intra-EEA MIFs restricted competition in "*most EEA Member States*", without identifying the UK, this is an alleged basis for contending that it is of no or reduced application to the UK.

    (c) to assert in that connection that neither the Tribunal nor Mastercard are bound "*by generalisations in the EC Decision which do not fully reflect changes to the Mastercard scheme over the period 1992 to 2007 or which do not accurately reflect the position in relation to the UK either generally or at particular times, since they are not part of the essential basis for the operative part of the EC Decision.*"

22. This is a prohibited attempt to circumvent the binding effect of the EC Decision, and the binding judgments of the General Court and the Court of Justice (which appeals gave Mastercard ample opportunity to challenge the EC Decision). So too are similar attempts in paragraphs 49.

23. The Class Representative will further submit that Mastercard's proposed interpretation of the EC Decision includes untenable attempts to omit words from or mischaracterise the meaning of various recitals. By way of example:

    (a) In paragraph 65, having accepted that the Commission's finding in recital 412 that the MIF "*inflates prices charged by acquirers to merchants*" is binding, Mastercard seeks to advance an argument that the Commission "*made no findings in relation to* *whether, …, prices set by acquiring banks for acquiring cross-border transactions would have been lower"*. That is not an available reading of the recital. If prices are inflated in the factual, they are lower in the counterfactual.

(b) In paragraph 66(a), which relates to cross-border acquisition of domestic payments and the proper construction of recitals 413-415, Mastercard asserts that "*since the UK is not one of the countries*" listed, those recitals are irrelevant. But the Commission expressly recognised that the list of countries to which it referred was non-exhaustive. It found that the "*situation*" in which the intra-EEA MIF effectively determines a floor for the merchant fees which the central acquirer can offer to local merchants "*is prevalent in at least*" Sweden, France, Spain, and the Netherlands (recital 413).

(c) As to paragraph 67(a)(i), the fact that the Commission found that "*some*" member banks view the Intra-EEA MIF *de facto* as a minimum starting point for setting the rates of domestic interchange fees does not mean that this is of no relevance in relation to UK member banks. There is no exclusion of UK banks and plainly "some" banks might include UK banks.

(d) In paragraph 55(c)(ii), Mastercard asserts that UK acquiring banks gave no significant consideration to the Intra-EEA MIF when using "blended fees" (described in recital 249). But the Commission found that, whether a fee is discreet or blended, "*in both alternatives, merchants and subsequent customers are harmed by the inflated costs base of merchant fees*" (recital 442). Further, in recital 444: "*the fact that merchant fees may be blended for cross-border and domestic transactions (or, for that matter, for payments made using different card types or card brands) does not alter the restrictive and distortive effect of Mastercard's cross-border interchange fees in the acquiring markets, since in both situations (blending/ no blending) the costs are passed on to merchants and the MIF is a significant element of the price paid by merchants for card acceptance".*

24. The above examples are non-exhaustive not least because as already pleaded; Mastercard has failed so far to disclose the confidential EC Decision and EC file to allow the Class Representative to assess such matters as alleged. The Class Representative will say they are symptomatic of an approach which seeks to minimise and undermine the binding scope of the EC Decision, a decision which has been upheld by each of the General Court and the Court of Justice.

The example of a transaction in Section 3.1.5

25. In paragraph 51, Mastercard purports to identify omissions in the example, relating to alleged benefits of the Intra-EEA MIFs. Those alleged omissions are irrelevant to the purpose of the example given in the EC Decision. Further, to the extent that Mastercard seeks to argue that the Intra-EEA MIFs should have been exempted, this is contrary to the binding nature of the EC Decision.

26. Mastercard is similarly constrained by the binding judgments of the courts of the European Union and of the courts in the United Kingdom. For example, in paragraph 51(c) Mastercard asserts that the scheme would not have been able to operate with a zero MIF or MIFs which were materially lower because it would not have been competitive. That argument has been rejected by the Court of Appeal and the Supreme Court respectively in *Sainsbury's*, which judgments are binding on the Tribunal, and it is not open to Mastercard to re-open it; see *Sainsbury's Supermarkets Ltd v MasterCard Inc and others; Asda Stores Ltd and others v MasterCard Inc and others; Sainsbury's Supermarkets Ltd v Visa Europe Services LLC and others* [2018] EWCA Civ 1536 ("***Sainsbury's CoA***") and *Sainsbury's Supermarkets Ltd v Visa Europe LLC and others; Sainsbury's Supermarkets Ltd and others v Mastercard Incorporated and others* [2020] 4 All ER 807 ("***Sainsbury's UKSC*** ").

Mastercard's procedures for setting Intra-EEA MIFs

27. In paragraph 53, Mastercard asserts that its procedure for setting the Intra-EEA MIFs is irrelevant to this claim. Pending disclosure, this is not admitted.

"On-us" transactions

28. Mastercard pleads to "on-us" transactions, namely where the same bank is both an issuer and acquirer in a particular transaction. It asserts that such transactions were not "*capable of being subject to any MIF*". It further pleads that "*a substantial percentage of Domestic Transactions*" were "*on us*". However, both of those averments appear to be inconsistent with paragraph 161 of the General Court decision, in which it was said that:

    (i) in an "*on us"* transaction "*it is true that the bank is not then liable to another bank for the amount of the interchange fee and that it is therefore much easier for it not to pass it on to the MSC*", rather than that such transactions were incapable of being subject to a MIF; and

(ii) "*in view of the very large number of financial institutions participating in the Mastercard system, it must be observed that such "on-us" transactions are likely to constitute only a fraction – and one that is difficult to predict – of all transactions carried out in a merchant's business.*"

29. Accordingly, at least pending disclosure and factual and expert evidence, paragraph 54(c) is denied. So too are paragraph 50(a), 51(d) and 139, to the extent relevant. Mastercard is put to strict proof in relation to the amount of "on-us" transactions and that there was no MIF on each and every "on-us" transaction within the relevant period.

Economic incentives

30. The economic incentives of acquiring banks and issuing banks (pleaded to in e.g. paragraphs 54(b), 54(c), 57(c), 67(a)(vi)(2)) will be the subject of disclosure, factual evidence and expert evidence. This will supplement recital 421 of the EC Decision. As to paragraph 67(a)(vi)(2), and "*market conditions*" in the UK market which allegedly bear upon the selection of an appropriate MIF, this paragraph is pleaded in a generalised and non-specific manner, which does not apparently relate to conditions in the UK market in particular. To the extent that this paragraph is premised on other card schemes being subject to lesser legal constraints than Mastercard, that is the *"asymmetric counterfactual*", in which Visa was not constrained in the same way that Mastercard (in the counterfactual) would have been. This was rejected by the Court of Appeal as "*completely unrealistic and improbable*" (*Sainsbury's CoA*, paragraph 203; *Asda Stores Limited and Others v Mastercard Incorporated and Others* [2021] CAT 16, paragraphs 32 and 33), that being a binding finding on the Tribunal.

EXEMPTION

[Paragraphs 11-16, 76, 81(b), 82-89 and 92(a)]

31. The Class Representative denies that the correct counterfactual for the purpose of causation and quantum is one in which Mastercard charged lawful alternative Intra-EEA MIFs.

No exemptible MIF counterfactual as a matter of law

32. Mastercard is precluded from advancing any counterfactual other than "*no default MIF with settlement at par (that is, a prohibition on ex post pricing)*", as per paragraph 93(iv) of the *Sainsbury's UKSC*. In particular, "*the correct counterfactual for schemes like the*

Mastercard and Visa schemes before us was identified by the CJEU's decision. It was "no default MIF" and a prohibition on ex post pricing (or a settlement at par rule). The relevant counterfactual has to be likely and realistic in the actual context (see the O2 Germany case at [68]-[71] and the CJEU's decision at [169]), but for schemes of this kind, the CJEU had decided that that test is satisfied." (paragraph 185 of *Sainsbury's CoA*). There is accordingly a legally binding determination of what would have been "*likely"* and "*realistic*" absent the infringing conduct, namely Mastercard's unlawful Intra-EEA MIFs in the period 1992-2008 (and Mastercard's domestic interchange fees, which the Supreme Court held in paragraphs 92 and 93 were not materially distinguishable). The Class Representative avers that the binding nature of those determinations means that they apply to the counterfactual for causation and loss, since that counterfactual asks a materially non-distinguishable question, namely what, on a balance of probabilities (i.e. realistic likelihood), would have happened absent the tort.

33. Further or alternatively, it is an abuse of process and/or inconsistent with public policy for Mastercard to seek retrospectively to be treated, for the purpose of causation and loss, as if it had in fact successfully sought an exemption in the period 1992-2008. To the extent that Mastercard's position is in effect that, if it had known that it would fail in its attempts to have its MIFs exempted by the Commission in the EC Decision, it would have tried a different course to obtain exemption (at a lower level, or on a different basis, or with different evidence), this is an obvious attempt at re-opening a process which has come to a binding conclusion.

34. Further or alternatively, Mastercard does not plead that it <u>would</u>, on the balance of probabilities, have sought an exemption of its EEA MIFs at any of the alternative levels which it pleads in paragraphs 82-89. Accordingly, it fails to meet the basic pleading standard for causation in any event. Without prejudice to the generality of the foregoing, it is impermissible for Mastercard to plead a range of MIFs which it could allegedly have lawfully adopted. This amounts to an invitation to the Tribunal to determine, and award damages on the basis of, the highest lawful alternative MIF. That is an illegitimate importation of "minimum performance" or "least onerous obligation" from the assessment of the contractual measure of damages into the assessment of the tortious measure of damages. If (which is denied) it is open to Mastercard to contend that the relevant counterfactual was anything other than no default MIF with settlement at par, it is required to plead and prove the intra-EEA MIFs it would in fact have adopted absent the infringement.

35. Further or alternatively, Mastercard cannot seek to have exempted the same level of MIF that, or higher level of MIF than, it sought to have exempted in the EC Decision (as it does in paragraph 89), because that would amount to re-opening the EC Decision and undermine its binding nature.

Alternatively, no exemption would have been granted to alternative MIFs

36. If the matters addressed in paragraph 32 above do not preclude Mastercard's reliance on counterfactual exemptible MIFs as a matter of law, they are nonetheless repeated here as relevant matters of fact or considerations which the Tribunal should take into account. The Class Representative will say that no such exemption would have been granted to Mastercard, alternatively a lower level of MIF would have been exempted.

37. Further:

    (a) In the real world, following the EC Decision, Mastercard reduced the MIFs to zero. In the counterfactual world in which Mastercard wished only to act lawfully, it too would have MIFs at zero until any higher MIFs were exempted.

    (b) This would have led to the Commission refusing to grant an exemption at any level, since Mastercard could operate its scheme with no MIFs.

38. Further, as to Mastercard's reliance on the Visa Exemption Decision, reliance on which is abusive for the reasons pleaded in paragraph 33 above, whilst the meaning and effect of that decision will be matter for legal submission in due course:

    (a) The exemption was forward-looking only and so is of no assistance for the period 1992-2002.

    (b) Further, the counterfactual must include a consideration of whether – on basis that a lawful counterfactual had been in place in the period 1992-2002 - the Visa Exemption Decision would have been granted. By way of example, the Commission said "*only a MIF which is the least restrictive of competition out of all the possible types of MIF could be considered as indispensable"* (recital 99). If Mastercard and/or Visa had operated their schemes with no default MIF in the preceding period (or even, which is denied, with significantly lower MIFs than in the real world), then this would have changed the Commission's analysis of indispensability.

    (c) The counterfactual must be lawful. To the extent that the Visa Exemption Decision is incompatible with subsequent legal authority, Mastercard cannot rely upon it. By way of example, it appears that the "fair share" analysis in recitals 92 to 95 is premised on an error of law, namely that the position of each of the two categories of users of the Visa system is relevant (recital 95), but the Supreme Court in *Sainsbury's* held that "fair share" should be assessed only by reference to the position of the merchants; see [171] of *Sainsbury's UKSC*, referencing the Commission Decision (recitals (740)-(743)) General Court ([228]-[229]) and CJEU's ([241]-[247]) judgments in *Mastercard*. That also infects the indispensability analysis (recital 103).

(d) As a matter of construction, the Visa Exemption Decision does not purport to set a test of general application for other schemes, most obviously Mastercard. For example, it says that "*the present exemption is granted on the basis of the present facts*" (recital 93). Further, it stresses the temporary nature of the exemption (recital 109). Further, differences between the Mastercard and Visa scheme may make any such read-across inappropriate in any event, and Mastercard is put to strict proof as to the basis for such read-across.

(e) Finally and in any event, the Commission imposed requirements for costs studies in Article 1 as a strict condition for the exemption.[1] Accordingly, even were Mastercard's reliance on the Visa Exemption Decision otherwise open to it, it cannot automatically read-across from the Visa Exemption Decision the same appropriate MIFs without adducing the same evidence and studies which Visa adduced as a condition of the exemption. The Class Representative does not accept that such evidence is available and Mastercard is put to strict proof in that regard.

39. As to Mastercard's reliance on Visa being lawfully able to charge MIFs set in accordance with the Visa Exemption Decision from 2002 onwards:

(a) Paragraph 38 above is repeated;

(b) Paragraph 58(b) is repeated; and

(c) Further, there is no prospect, alternatively a prospect of less than the balance of probabilities, of the Commission granting an exemption on the basis that a competitor scheme has an exemption.

1 See further, recitals (22)-(24) and (110).

40. Mastercard further relies on the "*costs avoided by merchants as a result of accepting Mastercard/Maestro credit/debit cards as compared to more expensive means of payment such as cash, cheques and American Express. Alternatively, the costs avoided as compared to accepting cash*". This is understood to be a reference to the "*merchant indifference test*" or the *"tourist test*". The Supreme Court in *Sainsbury's UKSC* held that this could not act as a substitute for the balancing test as a means of establishing efficiencies and benefits under Article 101(3): paragraph 135.

41. As to Mastercard's reliance on the benefits which merchants received as a result of accepting Mastercard/Maestro credit/debit cards, Mastercard should only be permitted to rely on the alleged benefits to merchants which would flow (on its case) from the level of alternative MIF which it is seeking to show would have been exempted in the counterfactual world. It cannot adopt a position in which, irrespective of the level of MIF which is under consideration, the alleged benefits are taken to be those which (on its case) existed in the real unlawful world. Further, no such benefits are admitted: see paragraph 56 below, and Mastercard is put to strict proof as to any alleged benefits that would have arisen in the counterfactual.

42. As to Mastercard's reliance on the levels set in its commitments (as set out in the Commission press release of 1 April 2009 and the Commission's letter to Mastercard of the same date), not only does this obviously post-date the Full Infringement Period, but further the Supreme Court in *Sainsbury's UKSC* held that "*it is important to bear in mind that these decisions are not instances of the application of article 101(3) but pragmatic means employed by the Commission to compromise outstanding investigations in return for commitments*" [134]. Accordingly, Mastercard would not have been granted an exemption in the period 1992-2008 by reference to this.

CROSS-BORDER TRANSACTIONS

[Paragraphs 91-92]

43. The Class Representative notes Mastercard's admission that the Intra-EEA MIFs applied by default to Cross-Border Transactions and that they applied directly to virtually all Cross-Border Transactions without bilateral agreements being agreed in their place (paragraph 91(c)).

44. The Class Representative avers that, as part of disclosure of data in relation to cross-border transactions, he will seek data in relation to purchases at merchants based in the

United Kingdom using Mastercard cards issued in other EEA Member States. That forms part of the Overcharge which was passed on to the Represented Persons.

45. Mastercard's allegation in paragraph 92(b) that it is open to Mastercard to demonstrate that, if the Intra-EEA MIFs had been set at lower levels or at zero, "*other changes to the default scheme rules would have been made which offset some or all of the reduction of the interchange fee*", is embarrassing as it fails to identify why or how any such "*offsetting"* should be made in a claim brought by consumers.

UK DOMESTIC INTERCHANGE FEES

[paragraphs 17-19, 93 – 101 and 150]

46. Save as pleaded below, the facts and matters pleaded therein are outside the knowledge of the Class Representative and, pending further elucidation by way of Responses to Requests for Further Information, disclosure, factual evidence and expert evidence, he makes no admissions thereto. Mastercard is put to strict proof in this regard.

47. As pleaded in paragraph 105(a) of the Claim, absent the Infringement, there would have been zero, or alternatively lower, United Kingdom Domestic MIF or United Kingdom bilateral interchange fees. Further or alternatively, such domestic interchange fees would have been set lawfully, either because this is (on the balance of probabilities) what would have happened as a matter of fact, or because as a matter of law the correct counterfactual is a lawful one. To the extent that the lawful level of United Kingdom Domestic MIF or United Kingdom bilateral interchange fee has been determined in other proceedings, the Class Representative will rely on such determination.

Maestro domestic debit transactions

48. As per paragraph 113 of the Claim, "*the Maestro United Kingdom domestic debit scheme transactions are excluded from the affected volume of commerce figures presented above and the calculation of loss and damages as the class representative understands that during the Full Infringement Period the interchange fees for the Maestro United Kingdom domestic debit scheme were set by Switch Card Services Limited and/or S2 Card Services Limited at a level below the Mastercard United Kingdom Domestic MIFs.*" Accordingly, without prejudice to the accuracy or otherwise of the facts and matters pleaded in paragraph 95, it is in any event common ground that Maestro domestic debit transactions are excluded from the claim.

49. Notwithstanding the above, it appears to be the intention of Mastercard to adduce facts and matters in relation to Maestro UK domestic debit transactions, in support of Mastercard's contention that the Intra-EEA MIFs did not act as a floor or benchmark for domestic interchange fees more generally: see paragraphs 19 and 97(d). The relevance of Maestro as a comparator is not admitted and Mastercard's proposed approached appears to be disproportionate and unnecessary.

How the domestic credit card interchange fees were set

50. In paragraphs 98-100, Mastercard pleads in detail to the differing ways in which, it says, the domestic credit card interchange fees were set. The Class Representative is presently unable to plead thereto, as set out in paragraph 46 above. However, for the avoidance of doubt, it is averred that the resulting domestic fees were higher than they would have been absent the Infringement and further particulars will be provided of the Class Representative's case in this regard following disclosure, factual evidence and any elucidation provided by Responses to Requests for Further Information.

51. As to the two principal bases which Mastercard relies on for the setting of fees in the period up until 2004 – namely costs studies and competitive considerations – the Class Representative will plead back to these in detail in due course, by way of preliminary observation only:

    (a) so far as competitive considerations are concerned, and most particularly reliance on the Visa fees, the Class Representative will say that it is wholly unrealistic to posit a counterfactual in which Visa was not constrained in the same way as Mastercard. This is the impermissible asymmetric counterfactual;

    (b) so far as costs studies are concerned, it is not understood how such studies interact with the studies which Mastercard relied upon in relation to the Intra-EEA MIF and its unsuccessful attempts to achieve exemption for those MIFs, and Mastercard is put to strict proof in this regard;

    (c) in any event, pending disclosure, factual and expert evidence, the Class Representative considers these do not undermine the connection and influence of the Intra-EEA MIF on U.K. domestic credit card interchange fees.

DID BUSINESSES WHICH ACCEPTED MASTERCARD INCUR HIGHER COSTS

[Paragraphs 20(b), (c) and (d), 102-123]

52. The Class Representative denies that it is relevant whether, absent the Infringement, merchants' costs overall would have been reduced by the amount of the Overcharge. Instead:

    (a) the question – so far as pass-on from acquiring banks to merchants is concerned – is whether, absent the Infringement, the MSC would have been lower, and if so whether it would have been lower by the full amount of the Overcharge or some different amount.

    (b) the question – so far as pass-on from merchants to Represented Persons is concerned – is whether, absent the Infringement, the prices for goods and services which were bought by the class of Represented Persons would have been lower, and if so whether they would have been lower by the full amount of the Overcharge or some different amount.

Acquirer pass-on

53. The extent of acquirer pass-on will be a matter for disclosure, factual evidence and expert evidence. Without prejudice to that:

    (a) The Class Representative avers that acquirer pass-on, via the MSC, is inherent in the Infringement, and constitutes a binding aspect thereof (see, in particular, recital 410 of the EC Decision). As per the Supreme Court in *Sainsbury's UKSC,* the "*essential factual basis upon which the Court of Justice held that there was a restriction on competition is mirrored in these appeals. Those facts include that: … (vi) in the counterfactual the whole of the MSC would be determined by competition and the MSC would be lower"* (paragraph 93). It went on to address the position if it had not been bound by the Court of Justice decision, and concluded that "*instead of the MSC being to a large extent determined by a collective agreement it is fully determined by competition and is significantly lower*" (paragraph 103).

    (b) To the extent that the Visa interchange fees are relevant (and no admission is made in this regard) to the question of acquirer pass-on, the proper counterfactual for the claim is one in which the Visa interchange fees were themselves reduced to the same extent as the Mastercard interchange fees.

(c) As to Mastercard's reliance on the Payment Systems Regulator's ("**PSR**") November 2021 Report:

(i) The PSR Report confirms that changes in the interchange fees are reflected in changes to the MSC.

(ii) A failure to reduce the MSC when interchange fees reduce is not inconsistent with that position. It is averred that the acquiring banks pass on cost increases, but retain cost savings for their own benefit.

(d) Further and in any event, Mastercard admits that there was pass-on of interchange fees through the MSC so far as merchants on an "Interchange Plus Plus" contract were concerned.

54. Finally, as to burden and proof, whilst the Class Representative admits that it bears the legal burden in relation to acquirer pass-on, to the extent that Mastercard is in possession of relevant evidence in that regard it is Mastercard which bears a heavy evidential disclosure burden. Accordingly, where Mastercard makes an assertion as to a certain state of affairs – such as that there is a certain volume of affected transactions (paragraph 104(a)), or that "*acquiring banks generally charge one single blended MSC"* (paragraph 104(b)), or "*for small and medium sized merchants, MSCs would often be multiples of the relevant interchange fee*" (104(e)) – Mastercard must give disclosure of the relevant evidence it has relied upon as the purported basis for such assertion.

55. More broadly, the Class Representative denies that Mastercard is able to put him to strict proof in relation to acquirer pass-on, as Mastercard purports to do in paragraph 107. When it is Mastercard which holds much of the evidence relevant to this issue, it is for Mastercard to provide that evidence and a failure to do so will invite adverse inferences to be drawn.

Changes to merchant benefits

56. Paragraphs 109-113 are legally opaque. Mastercard asserts that, "*had the Mastercard scheme been required to operate with substantially lower (or zero) interchange fees*", then there would have a corresponding reduction in the rules in relation to (a) fraudulent transactions, (b) payment where the cardholder defaults and (c) when the issuing bank is required to make payment. Even if that is factually accurate (which is not admitted) Mastercard does not plead to why this would be relevant to the present collective proceedings which combine claims brought by indirect consumer purchasers in respect of higher prices they paid for goods and services sold by merchants. It is only said that there

would have been "*offsetting*" at the level of the acquiring banks (paragraph 102(b)) and that "*when account is taken of*" such alleged benefits "*the Represented Persons have no claim for damages*" (paragraph 113). Mastercard's pleading in that regard is embarrassing for want of particularity and pending responses to any Requests for Information, it is denied that the issue of benefits received by merchants is relevant to the loss or damage of the Represented Persons. To the extent that Mastercard relies on what the banks would have done, they are put to strict proof.

Transaction Volumes

57. Even if it were to be accurate (which is not admitted) that volumes for Mastercard transactions would have reduced in the counterfactual, in itself – and without switching to other mechanisms of payment – this would either be irrelevant to the loss caused to the Represented Persons (if the counterfactual interchange fees were at zero (or no default MIF) rather than the levels that were passed on to Represented Persons) or it would increase their loss (because the counterfactual interchange fees would be multiplied by a lower VoC). Accordingly, where Mastercard contends that there would simply have been fewer transactions, at paragraph 118 and 123, this is either neutral or increases the loss suffered.

58. Mastercard also says that there was not only a volume reduction in Mastercard transactions, but also a switch to other methods of payment, which caused other loss to the class of Represented Persons, which it is legally proper to take into account. This appears to be Mastercard's argument in paragraphs 115 and 116, although the pleading is legally opaque. Further, so far as switching to Visa is concerned:

    (a) The judgment of Mr Justice Popplewell in *AAM v Mastercard* [2017] EWHC 93 (Comm) at paragraphs 220-251 is not good law, having been overturned in the Court of Appeal. Mastercard asserts that there was no dispute, as a matter of fact, in relation to switching to rival card schemes, but (even if that summary is accurate) plainly that agreed factual position is not binding on the Class Representative.

    (b) Mastercard purports to rely upon the Visa Exemption Decision as a basis for distinguishing the Court of Appeal's conclusion that switching to Visa should not be taken into account for Article 101(1) purposes. As to this:

        (i) This argument is of no application until 2002.

(ii) From 2002 onwards, if Mastercard was unable lawfully to set default MIFs, the other comparable scheme should be similarly constrained. Accordingly, in the counterfactual Visa would have been unable to set default MIFs.

59. The Class Representative denies that switching to rival card schemes or other payment methods is a relevant consideration for the purpose of damages. It is insufficiently causally connected and too remote. Further and in any event, such switching (including switching to Visa, as pleaded to in the preceding paragraph) is not admitted, and Mastercard is put to strict proof in that regard.

PASS-ON TO CONSUMERS VIA HIGHER PRICES

[Paragraphs 20(e), 37, 124 -130]

60. As held by the President in his judgment of 6 July 2022 in the present proceedings, together with Case No: 1517/11/7/22 *Merchant Interchange Fee Umbrella Proceedings:*

(a) It is necessary to regard the present collective proceedings and the claims brought by merchants in the round, so that – to the extent practically possible – consistency of outcome is achieved in the broadest sense (paragraph 16).

(b) Although the Supreme Court's indication of the four principal options for a merchant faced with the imposition of a cost is to be treated with the greatest of respect, it is not binding and the definitional question of what constitutes pass-on is live (paragraphs 33 and 34).

(c) In the present collective proceedings, quite clearly the Class Representative contends that Option (iv) is the case, namely increase in price thus passing on the loss to consumers. This aligns the contentions of the Class Representative with the contentions of Mastercard in the Merchant Interchange Fee Proceedings (paragraph 35).

(d) Where factual causation is made out, legal causation is straightforward (paragraph 50(2)).

(e) It is *prima facie* appropriate and correct to use a counterfactual and econometric approach, relying on existing studies of pass on rates, to pleading and proving pass-on in the Merchant Interchange Fee Proceedings (paragraphs 58 and 61(1)). The Tribunal has refused Mastercard permission to rely upon specific fact evidence to make good its pass-on defence, although it would be sympathetic to some form of tightly controlled, expert-lead disclosure, provided that it was focussed, cost-effective and proportionate (paragraph 61(3)).

61. The rulings set out in paragraphs 60(a) - 60(d) above are made in the present collective proceedings. Paragraph 60(e) brings the evidential and methodological approach to pass on in the Merchant Interchange Fee Proceedings into line with the approach of the Class Representative in this proceedings (as endorsed by the Supreme Court in *Merricks v Mastercard*). The Class Representative will seek appropriate orders to allow pass-on to be determined jointly across both sets of proceedings.

62. Further and in any event, so far as paragraph 125 of the Defence is concerned:

(a) It is denied that the correct premise is that "*merchants did incur higher overall costs as a result of the EEA MIFs*" (as per paragraph 125; and the heading of the previous section in the Defence). As pleaded in paragraph 52(b) above, the correct premise is simply whether the Overcharge was passed-on to the merchants from the acquiring banks via the MSC.

(b) It is further denied, if this be the intention of the words *"rather than*" in parentheses at the end of paragraph 125, that the Class Representative needs to prove that the Overcharge did not result in reduced profits or enhanced losses and/or merchants reducing discretionary expenditure and/or merchants seeking to reduce their costs by negotiation with suppliers. If Mastercard seeks positively to allege that the Overcharge did so result, such allegation is liable to be struck out, pursuant to *NTN Corporation & Ors v Stellantis N.V. & Ors* [2022] EWCA Civ 16.

Surcharging

63. So far as surcharging is concerned, the Class Representative notes Mastercard's reliance, in paragraph 37, on the Credit Cards (Price Discrimination) Order 1990. The proper meaning and effect of the Order will be a matter for legal submission in due course. However, and in any event, whilst the extent to which there was surcharging in the UK market will be a matter for evidence, the Class Representative further relies on the EC Decision, in particular recitals 510- 521, which find that surcharging is uncommon even when allowed.

64. Further, as for the various factual assertions in paragraphs 37 and 127(b), Mastercard is put to strict proof in that regard. It is noted that there appears to be a tension between

Mastercard's asserted lack of knowledge in relation to which merchants accepted Mastercards (paragraph 36) and its asserted familiarity with differing pricing practices of those merchants.

Pass-on rates

65. As pleaded in paragraph 60- 61 above, pass-on rates will be proved on the basis of a counterfactual and econometric approach, using pre-existing reviews, public data and limited and targeted disclosure.

66. Further and in any event, if the intention of the words "*Mastercard has always accepted that passing–on is a matter for evidence and will depend on the specific features of an individual business and its competitors in the relevant market and time period*" (paragraph 126(e) Defence) is to plead that – in these collective proceedings – pass-on must be determined on a merchant by merchant basis, or any other granular individualised basis, such a plea is not open to Mastercard. Any such plea would be contrary to the Supreme Court judgment in *Merricks v Mastercard* which endorsed the Class Representative's proposed sectoral approach, and has been rejected by the Tribunal in the judgment pleaded to in paragraphs 60-61 above.

WHETHER ACCOUNT MUST BE TAKEN OF BENEFITS

[Paragraphs 20(g), 51(d), 81(b)(iv) and 131-132]

67. So far as Mastercard cardholders are concerned, as set out in paragraph 51(d) of the Class Representative's Reply for the application for a CPO (dated 15 December 2016):

    (a) Whether higher interchange fees do in fact give rise to cardholder benefits compared to the counterfactual (in particular, whether such benefits may have been offered to incentivise card use in any event) must be determined on the evidence. No admission is made in that regard and Mastercard is held to strict proof.

    (b) The application of the principles in *Hodgson v Trapp* [1989] AC 807 and *Parry v Cleaver* [1970] AC 1, in relation to when receipts flowing from the tort should be deducted from damages, is a matter for legal submission. No admission is made in that regard.

(c) Were Mastercard to prevail on both fact and law, any resulting deduction should be deducted from the aggregate damages award (with, if appropriate, distribution being modified so that the reduction is borne differently within the class).

QUANTUM

[Paragraphs 136 -149 and Annex 1, Tables 1-3]

68. Mastercard asserts that the figures pleaded in paragraph 112 of the Claim are "inflated and incorrect" (paragraph 136) and instead relies on Annex 1, Tables 1-3. The Class Representative does not have access to the material underpinning Mastercard's pleaded case, despite the Class Representative having repeatedly sought the provision of the relevant data. Pending disclosure, factual evidence and expert evidence, it is not admitted. Mastercard is put to strict proof in that regard.

69. Without prejudice to the above, as to paragraph 139 and "on us" transactions:

(a) As pleaded to in paragraph 28 above, the Class Representative does not presently know the extent to which interchange fees were charged on such transactions, or the alleged costs otherwise recovered from the merchants.

(b) Even were Mastercard to be correct that no interchange fee was charged on such transactions, the Class Representative does not know the extent to which any failure to do so is included within the "*weighted averages interchange fees*" set out in Table 2 of Annex 1. If they are so included (i.e. as relevant transactions at a 0% fee) then they should not be extracted from the VoC as well (contrary to paragraph 139). Mastercard is put to strict proof in that regard.

INTEREST

[Paragraphs 21, 115(d), 151(b)-(c)]

70. As to paragraph 151(b)-(c), it is denied that there is a "*general presumption in relation to private individuals is that the appropriate rate of interest is the investment rate.*" The question of the appropriate rate of interest to be applied is to be approached broadly and the Tribunal is required to consider the position of persons with the general attributes when determining that rate.

71. As to paragraph 115(d), Mastercard's characterisation of the attributes of the class is incorrect. This matter will be the subject of evidence and legal submissions in due course.

RELIEF SOUGHT

72. Paragraph 152 is denied. The Class Representative repeats paragraphs 120 and 121 of the Claim.

MARIE DEMETRIOU QC

VICTORIA WAKEFIELD QC

ALLAN CERIM

BRICK COURT CHAMBERS

ANNELIESE BLACKWOOD

MONCKTON CHAMBERS

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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. I believe that the facts stated in this Reply are true.

Full Name: Walter Hugh Merricks

Signed:________________________

Class Representative

Dated this 15 July 2022