Amended Defence pursuant to the Order of Mr Justice Roth made on 14 October 2022 dated 28 October 2022

Case No: 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 SA (formerly Mastercard Europe S.P.R.L)

Defendants

AMENDED DEFENCE

CONTENTS

Introduction

1. In this Defence, 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-Amended Collective Proceedings Claim Form (the "Claim").

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

4. The matters raised by the Claim go back many years. Mastercard has pleaded to the Claim 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 may become available.

Summary of Defence

5. In relation to the Summary at paragraphs 1 - 10, Mastercard refers to this Summary of its Defence and the detailed Defence below.

Scope of the Claim

6. Since (as acknowledged at paragraphs 2 and 53 of the Claim) this is a follow-on action, the claim is limited to the infringement found in the EC Decision which related solely to Mastercard's consumer Intra-EEA fallback MIFs in force between 22 May 1992 and 19 December 2007 (the date of the EC Decision) ("the EEA MIFs")[1].

7. Mastercard accepts it is bound by the operative part of the EC Decision in relation to its subject matter and such parts of the recitals to the EC Decision as constitute part of the essential basis for the operative part of the EC Decision.

8. Furthermore, Mastercard does not dispute that, since Mastercard did not repeal the EEA MIFs until 21 June 2008 and there was no relevant change of circumstances in the period 19 December 2007 to 21 June 2008, the Class Representative can also make a claim in relation to the EEA MIFs in force during this period. In this Defence, Mastercard refers to the period 22 May 1992 to 21 June 2008 as the "relevant period".

[1] Where this Defence refers to consumer Intra-EEA fallback MIFs other than those in force during this period, they will be referred to as "alternative EEA MIFs".

Limitation

9. The Claim does not identify the law which is said to govern the claim. In the interests of narrowing the issues between the parties and reducing costs, Mastercard is prepared to admit for the purpose of this claim only that, to the extent that the claim relates to transactions at merchants in the UK, the entire claim is governed by English law, regardless of whether the relevant purchases took place in England, Wales, Scotland or Northern Ireland. Under English law, insofar as the claims are based on transactions at merchants based in the UK and upon an infringement having occurred prior to 20 June 1997, the claims are time-barred pursuant to Rule 31(4) of the Tribunal Rules 2003, the original section 47A of the Competition Act 1998 and the standard six-year limitation period pursuant to sections 2 and/or 9 of the Limitation Act 1980.

10. To the extent that the Class Representative seeks to pursue claims in respect of transactions at merchants based outside the UK (as suggested at paragraph 23(b)(ii) of the Claim), each such claim is governed by the national law of the country in which the relevant merchant was based on the relevant time, including the relevant foreign limitation rules. Pending particulars of the Member States in question, Mastercard cannot plead the relevant foreign limitation rules but it is likely that those rules will bar any such claims in their entirety.

Exemption

11. Although the EC Decision held that the EEA MIFs breached Article 101 in relation to the period 1992 to 2007, the EC Decision did not conclude that positive consumer Intra-EEA fallback MIFs could not satisfy the conditions for exemption under Article 101(3) in relation to this period, but only that Mastercard had not produced sufficient evidence to show that the conditions were met in relation to the EEA MIFs actually in force during this period. Furthermore, the Commission gave Mastercard six months to repeal the EEA MIFs in place, but expressly stated that this did not prevent Mastercard from setting alternative EEA MIFs at a level above zero which met the conditions for exemption.

12. It, therefore, remains open to Mastercard to demonstrate through appropriate evidence that the conditions of Article 101(3) would have been met in relation to alternative EEA MIFs set at a different level.

13. Mastercard will rely on the Commission's 2002 Exemption decision in relation to Visa Europe's consumer Intra-EEA fallback MIFs (which exempted MIFs which were set by reference to the costs of processing transactions, the interest-free period and the cost of the payment guarantee against fraud and cardholder default, subject to the weighted MIFs for credit cards falling over a five year period from 2002 to 2007 from levels similar to Mastercard's EEA MIFs to 0.7% and the weighted MIFs for debit cards not exceeding EUR0.28) as demonstrating the alternative EEA MIFs that would have met the criteria for exemption. Furthermore, the exemptable level of alternative EEA MIFs must be assessed on the basis that Visa was lawfully entitled to operate and did operate on this basis.

14. Alternatively, Mastercard will rely on the Commission's press-release of 1 April 2009 and/or its letter of the same date in which the Commission accepted that Mastercard's proposed alternative EEA MIFs were set in accordance with a reasonable benchmark for assessing a level of MIF which met the conditions for exemption.

15. Mastercard will seek permission to call expert evidence in relation to exemption and expects expert evidence to show that alternative EEA MIFs were above or close to the EEA MIFs actually set.

16. If the lawful alternative EEA MIFs were higher than the EEA MIFs actually set, the Represented Persons will not have a claim for damages. Alternatively, their claim for damages is limited to the loss (if any) caused to them by the difference between the EEA MIFs actually set and the alternative EEA MIFs which could lawfully have been set.

UK Domestic interchange fees

17. The EC Decision only relates to the EEA MIFs and expressly records that it did not make any findings in relation to bilateral interchange fees or domestic interchange fees. Despite this, the Class Representative contends that the EEA MIFs caused UK domestic interchange fees to be higher than they would otherwise have been (both during the relevant period and in the year to 21 June 2009) because the EEA MIFs during the relevant period acted as a "minimum starting point" for domestic interchange fees.

18. In relation to UK domestic debit card transactions, while paragraph 113 acknowledges that there is no claim in respect of schemes which were not operated under Mastercard's interchange network rules and consequently that no claim can be brought in relation to

Domestic Transactions on Maestro cards, the Claim includes claims for damages of over £250 million (plus interest) in relation to Domestic Transactions on Solo debit cards.[2] Solo debit was part of the UK Switch scheme – which was a separate domestic debit card. Solo debit did not operate under Mastercard's interchange network rules. Furthermore, so far as Mastercard is aware, during the relevant period, the same interchange fees set in the same way applied to Solo debit cards as applied to UK Switch/Maestro cards, i.e. average domestic interchange fees were significantly below Maestro's EEA MIFs. There is, therefore, no scope for a claim in relation to Domestic Transactions on Solo cards or for any allegation that the EEA MIFs acted as a 'minimum starting point' for those (lower) interchange fees. Accordingly, there is no scope for any claim in relation to Domestic Transactions on UK debit cards.

19. In relation to UK credit card Domestic Transactions, even if the EEA MIFs were set unlawfully high during the relevant period (which is denied), it is denied that this had any impact on the interchange fees applicable to such transactions either during the relevant period or in the year to 21 June 2009. In particular, the EEA MIFs did not operate as a "minimum starting point" for domestic interchange fees, as demonstrated by the operation of the Maestro scheme in the UK (as referred to above). In any event, lower domestic interchange fees would not have been agreed/set since UK domestic credit card interchange fees were set by reference to UK domestic costs and the competitive conditions in the UK market, including in particular the comparable domestic interchange fees for Visa and Access (the UK domestic credit card scheme) and the competitive threat posed by Visa, Access, Switch/Solo (the UK domestic debit card scheme), Amex, store cards and other payment methods. There is, therefore, no scope for a claim in relation to UK credit card Domestic Transactions in any event. Alternatively, any claim is limited to the loss caused (if any) by the difference between the actual UK domestic interchange fees and what UK domestic interchange fees would have been in the counterfactual and any such difference would have been minimal. Furthermore, the contention that the EEA MIFs prior to 21 June 2008 inflated UK domestic MIFs in the year to 21 June 2009 contradicts the primary claim of the Class Representative that the current EEA MIFs at any time operated as a floor to domestic MIFs. Alternatively, to the extent that the EEA MIFs prior to 21 June 2008 had a delayed impact on UK MIFs after the relevant period (which is denied), credit must be

[2] As confirmed in Quinn Emanuel's letter dated 9 November 2016.

given for an equivalent delayed impact at the start of the claim period (after taking account of limitation), which will offset (in full or part) the claim in respect of the year to 21 June 2009.

Claim for damages

20. In any event, it is denied that the Represented Persons have any claim for damages either in the sums alleged or at all:

    a. As set out above, the starting point for the assessment of any claim for damages is limited to the difference between the interchange fees actually applicable and the interchange fees which would have applied if alternative EEA MIFs had been set at a lawful level.

    b. Even if UK acquiring banks did pay higher interchange fees than would otherwise have been the case either during the relevant period or in the year to 21 June 2009 (both of which are ~~is~~ denied), in order to establish that the Represented Persons suffered loss and the amount thereof, it is necessary (but not sufficient) for the Class Representative first to show that UK Merchant Service Charges ("MSCs") for Mastercard transactions would have been lower if alternative EEA MIFs had been set at a lawful level and the amount of any such reduction over the course of the 18 ~~16~~-year claim period. Given the tiny percentage of transactions in relation to which the EEA MIFs were applicable, the prevalence of blended MSCs (where the same MSCs applied to Mastercard, Visa and domestic schemes), Visa's far greater market share and the fact that MSCs were multiples of interchange fees for such merchants, it is denied that MSCs either during the relevant period or in the two-years to 21 June 2010 would have been materially lower or alternatively materially lower for the vast majority of merchants if interchange fees had been lower during the relevant period and/or in the year to 21 June 2009. Mastercard will refer to the Payment Systems Regulator's November 2021 report on the UK acquiring market which concluded that there was *"little or no pass-through"* of reductions in interchange fees as a result of the Interchange Fee Regulation into lower MSCs for small and medium merchants and large merchants with an annual card turnover below £50 million. Alternatively, the extent and timing of any pass-through of any reduction in interchange fees into MSCs is likely to have varied substantially between different categories and sizes of merchants, between

different geographic areas and across the 18 ~~16~~-year claim period and the Class Representative is put to strict proof of the relevant pass-on rates and the timing of any such pass-on. To the extent that interchange fees had a delayed impact on MSCs after the relevant period (which is denied), credit must be given for an equivalent delayed impact at the start of the claim period (after taking account of limitation), which will offset (in full or part) the claim in respect of the two-years to 21 June 2010.

c. Furthermore, if the Mastercard scheme had operated with significantly lower or zero interchange fees, particularly lower or zero UK interchange fees, during the relevant period or in the year to 21 June 2009, issuing banks and/or cardholders would have migrated to (or remained with) other card schemes (including Visa, American Express and the UK domestic card schemes Access and Switch) or increased usage of other payment methods (e.g. cash and cheques) which are typically more costly to merchants. This would have led to a substantial reduction (potentially down to zero) in the number of transactions to which any lower MSCs would have applied, both during the relevant period and in the two-years to 21 June 2010, resulting in merchants receiving no (or only limited) savings. The Class Representative is put to strict proof of the proportion of transactions in the counterfactual which would have remained Mastercard transactions and taken place at lower or zero interchange fees, rather than other more expensive payment methods.

d. Furthermore, if the Mastercard scheme had been forced to operate with significantly lower or zero interchange fees, particularly lower or zero UK interchange fees, during the relevant period or in the year to 21 June 2009, merchants would have received an inferior Mastercard scheme. If issuing banks could not obtain adequate remuneration in return for the cost of the valuable services which they provided to merchants, including a guarantee against fraud and cardholder default and immediate payment, then they would not have been willing to provide these services and the scheme rules would have been altered accordingly to remove or alter these services. The net effect of these changes would have been to offset (in full or part) the value to the merchant of any reduction in MSCs, both during the relevant period and in the two-years to 21 June 2010. This would again have resulted in merchants receiving no (or only limited) actual savings.

e. Furthermore, even if merchants did incur higher overall costs as a result of the EEA MIFs during the relevant period and/or in the two-years to 21 June 2010 (both of which are ~~is~~ denied), in order to establish that the Represented Persons suffered loss and the amount of that loss, the Class Representative needs to show whether and to what extent the retail prices charged by merchants during the relevant period and/or in the two-years to 21 June 2010 were higher than they would otherwise have been as a result of those higher costs being passed on by merchants into retail prices (rather than resulting in reduced profits or enhanced losses and/or merchants reducing discretionary expenditure and/or merchants seeking to reduce their costs by negotiation with their suppliers). The existence, ~~and~~ extent and timing of any pass-on into retail prices is likely to have varied between different categories and sizes of merchants, between different geographic areas, and across the 18 ~~16~~-year time period covered by the Claim and the Class Representative is put to strict proof of the relevant pass-on rates and the timing of any such pass-on.

f. Even if purchasers did pay higher prices during the relevant period and/or in the two-years to 21 June 2010 (both of which are ~~is~~ denied), the Class Representative needs to show the extent to which those higher prices were paid by Represented Persons in respect of transactions for which they are represented. However, there are millions of purchasers who are not Represented Persons (or who are not Represented Persons in respect of some or all of their purchases) including individuals who died prior to 8 September 2016, tourists and temporary visitors, overseas purchasers (e.g. by telephone or over the internet), under 16s, individuals who have subsequently left the UK and have not opted in, business purchasers and non-natural persons (including government bodies, charities, religious organisations, trade unions, unincorporated associations and incorporated businesses). The damages methodology in the Claim provides no means of identifying for the purpose of the aggregate damages calculation the purchases made by Represented Persons, rather than non-Represented Persons. Furthermore, no claim is available to the extent that title to bring all or part of a claim has passed outside the Class, e.g. to trustees in bankruptcy.

g. Further, any quantification of loss must give credit for benefits received by Represented Persons as a result of interchange fees being higher than would otherwise have been the case. Interchange fee revenue was an important income

stream for issuing banks. If this income stream was substantially reduced, it is likely that a substantial part (and potentially 100%) of this loss of revenue would have been passed-on by Mastercard issuing banks to Mastercard cardholders in the form of reduced benefits and/or higher fees or interest. These additional benefits offset in full (or in part) any disadvantage to Represented Persons from higher prices.

21. In relation to interest, it is denied that there is any basis for claiming interest at the rate of 5% above the Bank of England base rate. In the context of a claim on behalf of essentially the entire adult population of the UK, the correct interest rate is the investment rate.

Proper Law/Limitation

22. In accordance with the findings made by Mr Justice Barling in *Deutsche Bahn v Mastercard* [2018] EWHC 412 (Ch), competition law claims relating to interchange fees are governed by the law of the country in which competition was affected (regardless of where any resulting damage was suffered), either in whole or alongside English law pursuant to the doctrine of double actionability in relation to the period prior to 1 May 1996 (since the claim is based on a wrong committed outside England, i.e. the setting of the EEA MIFs).

23. Since the EC Decision concludes that the EEA MIFs restricted competition in acquiring markets and that there is a separate national acquiring market in each country, it follows that the claims combined in these proceedings are governed by the law of the country in which the relevant merchant was based at the time of the transaction. In the interests of narrowing the issues between the parties and reducing costs, Mastercard is prepared to accept that claims in respect of transactions at merchants based in the UK are governed by English law throughout the relevant period.

24. Insofar as the Class Representative intends to pursue claims in relation to transactions at merchants which were based outside the UK at the relevant time (as suggested at paragraph 23(b)(ii) of the Claim), the relevant acquiring market affected would be the national market in which the merchant was based. The Class Representative will, therefore, need to establish the transactions which took place at merchants in each Member State and the claims in relation to each Member State will be governed by the national law of that state.

25. In relation to claims which are governed by English law (either in whole or in part pursuant to the doctrine of double actionability), insofar as the claims are based on an infringement having occurred prior to 20 June 1997, these claims are time-barred pursuant to Rule 31(4) of the Tribunal Rules 2003, the original section 47A of the Competition Act 1998 and the standard six-year limitation period pursuant to sections 2 and/or 9 of the Limitation Act 1980. Alternatively, insofar as the Class Representative wishes to pursue claims under Northern Irish or Scottish law, Mastercard will rely on the equivalent limitation provisions of these national laws, which impose limitation periods of 6 years (Northern Ireland) and 5 years (Scotland) respectively.

26. In accordance with *Deutsche Bahn v Mastercard* [2016] CAT 14, insofar as the claims are governed by any other foreign law in relation to any period (as to which see above), the relevant foreign limitation period applies pursuant to the Foreign Limitation Periods Act 1984. Pending particulars of the Member States in question, Mastercard cannot plead the relevant foreign limitation rules but it is likely that those rules will bar any such claims in their entirety.

PART I

The Class Representative

27. Paragraphs 11 and 12 are noted.

The Defendants

28. Until 2002, the single business now known as Mastercard consisted of the following businesses:

    a. The business owned by the Second Defendant, Mastercard International Incorporated ("MCII"), which owned the Mastercard brand. MCII was owned by and controlled by the banks which participated as principal members in its business worldwide.

    b. The business owned by the Third Defendant, Mastercard Europe SA (known as Europay International SA between September 1992 and 2002 and created by a merger between EuroCard International and Eurocheque International on 1 September 1992) ("MCE"), which owned the Eurocard brand. MCE was owned and controlled by the European banks which participated in its business.

c. There was a "strategic alliance" between MCII and MCE in respect of credit cards, whereby the latter benefited from an exclusive license for the Mastercard brand in Europe.

d. For debit cards, from around 1991 there was a joint venture between the same parties to develop the Maestro debit card brand, through a jointly owned Delaware company, Maestro International Inc ("Maestro Inc").

e. At the end of 2001, a merger of the businesses was agreed, with the First Defendant, Mastercard Incorporated ("MCI"), being incorporated in the United States as a holding company to own MCII and MCE.

29. From the end of 2001 to 25 May 2006, MCI was owned by the former shareholders of MCII and MCE, i.e. by their respective member banks. On 25 May 2006, MCI adopted a new ownership and governance structure, including an initial public offering ("IPO") of a new class of common stock. From 25 May 2006, MCI had two classes of common stock – shares of Class A common stock, with voting rights, which were held publicly and shares of Class B common shares, which were non-voting shares held by some Mastercard licensees.

30. Paragraph 13 is admitted, save that MCI was only incorporated on 9 May 2001 and became the holding company for the group at the start of 2002.

31. Paragraph 14 is admitted. Since 2002, MCII has been wholly owned by MCI which is the sole voting member of MCII.

32. Paragraph 15 is admitted. MCE became a fully consolidated subsidiary of MCI following the merger of Mastercard and Europay in 2002.

33. The above detail is necessary for an accurate understanding of the operation of the Mastercard, Eurocard and Maestro schemes, particularly in the period prior to the merger in 2002. Mastercard is not thereby seeking to dispute that each of the Defendants is liable for the setting of the EEA MIFs throughout the relevant period.

PART II

Description of Class

34. Mastercard notes the summary of the proposed Class in paragraph 22 and the stated purpose of the class definition in paragraph 23:

a. In relation to the proposed class definition, Mastercard will refer to the class definition in the Collective Proceedings Order to be made by the Tribunal.

b. As partially, but incompletely, acknowledged in paragraph 23(d), the class definition excludes millions of people and other entities who purchased goods and/or services from businesses selling in the UK who accepted Mastercard cards during the relevant period as well as large numbers of transactions made by individuals who are not Represented Persons in relation to those transactions. See paragraph 134 below in relation to the many other categories of non-Represented Persons who also purchased goods or services during the relevant period from merchants who accepted Mastercard credit or debit cards.

c. No admission is made as to the Class Representative's reasons for excluding these individuals/entities/purchases from the Claim or whether it is reasonable to assume that all (or materially all) individuals of working age and resident in the United Kingdom over the period of the infringement will, at some point, have purchased goods or services from a business that accepted Mastercard cards, particularly in circumstances where the Class Definition includes individuals who may only be Represented Persons in relation to a short period of residence in the UK.

d. However, the Class Representative can only claim for loss suffered by Represented Persons and the damages methodology in the Claim provides no means of identifying the purchases made by Represented Persons in the capacity in which they are represented, rather than non-Represented Persons, nor of excluding claims which the Represented Persons no longer have title to bring.

e. While Mastercard notes that the Class Representative indicates in paragraph 112(h) that he intends to make adjustments to the figures claimed to reflect deceased individuals and persons who opt-in or out of the claim, this is inadequate since it fails to take account of many other categories of non-Represented Persons who also purchased goods or services during the relevant period from merchants who accepted Mastercard credit or debit cards.

35. In relation to paragraph 23(b)(ii), Mastercard notes that the Class Representative intends to make claims in relation to goods or services purchased by individuals resident in the UK from merchants which had a physical presence in another Member State but

not in the UK and where the good or service was purchased remotely from the UK, e.g. through the internet, mail order or via telephone shopping:

a. In relation to proper law and limitation in relation to such claims, see paragraphs 9 - 10 and 22 - 26 above.

b. Mastercard does not hold information for the relevant period on where consumers were located at the time when remote transactions were conducted and is not aware of any publicly available information quantifying such remote transactions.

c. Furthermore, insofar as the Class Representative intends to pursue claims in relation to transactions at merchants which did not have a physical presence in the UK, the Class Representative will need to establish separately in relation to each category and location of the merchants in question:

   i. the percentage of transactions by value at that merchant which were subject to the EEA MIFs;

   ii. the extent to which any overcharge in respect of the EEA MIFs had an effect on the merchant's costs, including the effect on MSCs (which, for the vast majority of merchants, will have been blended MSCs applicable to both Mastercard, Visa and any available domestic schemes), the volume of transactions undertaken using Mastercard cards as opposed to other payment methods and the benefits available to the merchant;

   iii. the extent to which any such increase in cost had an effect on the merchant's retail prices; and

   iv. the transactions at that merchant undertaken by Represented Persons.

Given the substantial differences in banking and retail markets across the European Union during the relevant period, there are likely to be substantial differences between these factors for these merchants both amongst themselves and compared to similar merchants in the UK.

36. In relation to paragraph 23(b)(iii), Mastercard does not have records of which businesses accepted Mastercard cards during the relevant period (or for which periods and durations) save for the information provided to the Class Representative on 4 November 2016, since it is an inherent feature of the four-party payment card model

that Mastercard, as the scheme operator, does not have direct contractual relationships with merchants.

37. In relation to paragraph 24, in the UK, merchants were permitted to surcharge credit cards throughout the relevant period (and in the two-year period to 21 June 2010) pursuant to the Credit Cards (Price Discrimination) Order 1990. It is, therefore, denied that Mastercard prohibited surcharging in the UK during the relevant period (or in the two-year period to 21 June 2010). Depending on the date and sector, some UK merchants imposed surcharges on credit card transactions; some gave discounts for cash; some imposed minimum purchase limits; while others engaged in other discouragement behaviour (including asking for other payment methods). Therefore, insofar as it is suggested that no (or no material number of) UK merchants charged different prices depending on payment method used during the relevant period (or in the two-year period to 21 June 2010), this is denied.

Estimate of the number of class members

38. In relation to paragraph 25, the Class Representative's estimate of the size of the class is inflated, including because it makes no reduction for those individuals who would otherwise be within the class but were no longer resident in the UK on the domicile date, e.g. emigrants and temporary visitors who are no longer resident in the UK.

39. In relation to paragraph 26, it is denied that the information stated is not publicly available. An accurate identification of the total number of members of the Class from time to time is necessary for aggregate damages (if any) to be calculated.

PART III

The EC Decision

40. In relation to paragraph 53, since (as acknowledged at paragraph 2 of the Claim) this is a follow-on action, the claim is limited to the infringement found in the EC Decision which related solely to the EEA MIFs in force between 22 May 1992 and 19 December 2007 (the date of the EC Decision).

41. In relation to paragraph 55:

    a. It is admitted that the operative part of the EC Decision (i.e. the Commission's conclusion as to the nature and duration of the infringement, as set out in Articles

1 to 3 of the EC Decision) is binding on Mastercard and the Tribunal. The effect of the provisions pleaded in footnote 5A is admitted.

b. It is also admitted that such parts of the recitals to the EC Decision as constitute part of the essential basis for the operative part of the EC Decision are binding on Mastercard and the Tribunal.

c. Furthermore, Mastercard does not dispute that, since there was no relevant change of circumstances in relation to the period 19 December 1997 to 21 June 2008, the Class Representative can also make a claim in relation to the EEA MIFs in force during this period.

d. Save as aforesaid, it is denied that any other part of the EC Decision is binding on Mastercard or the Tribunal.

e. Furthermore, although the EC Decision found an infringement in relation to the period May 1992 to December 2007, the factual background and analysis in the recitals to the EC Decision primarily relates to the period from 2002 onwards. In addition, in reaching its decision, it was not necessary for the Commission to consider, and the Commission did not consider, the actual effects of the EEA MIFs on competition in each of the 30 countries which were then Member States of the European Union or within the European Economic Area ("EEA") – each of which the Commission concluded was a separate national market – either generally or throughout the period 1992 to 2007. This was because the Commission did not need to show that the EEA MIFs restricted competition in every national market throughout the entire period 1992 to 2007 for the EEA MIFs to infringe Article 101. As a result, for example, the Commission concluded in recital 650 that the EEA MIFs appreciably restricted competition in "most EEA Member States", without identifying the specific EEA Member States in question. As a result, the EC Decision includes generalisations which were correct in relation to some national markets or at particular times, but not necessarily universally true in relation to all national markets either generally or throughout the period 1992 to 2007. In relation to the UK, although the EC Decision refers in places to the UK, the Commission did not consider the UK national market in any detail. In the context of the present claim, it is denied that Mastercard or the Tribunal 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.

Operative part of the EC Decision

42. Paragraph 56 is admitted. It is admitted that these paragraphs are binding on Mastercard and the Tribunal.

The Mastercard payment organisation

43. Paragraph 57 is admitted in relation to the period from 2002 onwards. In relation to the period prior to 2002, see paragraph 28 above.

44. Save as follows, paragraph 58 is admitted. In relation to the period prior to 2002, as set out above at paragraph 28, Mastercard and Eurocard were separate businesses with different members, albeit that they had commercial links. Separate licences were issued by each of MCII and MCE (then known as Europay) to their members and each had separate network rules.

45. In relation to paragraph 59:

    a. The first sentence is admitted.

    b. In relation to the second sentence, although the glossary to the EC Decision defines these two terms in the ways stated, they do not fully reflect the operation of the Mastercard scheme during the relevant period or the way in which these terms are in fact subsequently used in the EC Decision. They are not therefore part of the essential basis for the operative part of the EC Decision and are not binding on Mastercard or the Tribunal.

    c. During the relevant period, the relevant Mastercard MIF (if any) was determined by the location of the point of sale ("POS") and the place of issue of the card rather than the location of the acquiring bank used by the merchant, since cross-border acquiring meant that some merchants (predominantly very large international merchants) contracted with acquiring banks located in a different country.

    d. For the purposes of determining the applicable interchange fee:

        i. A "Cross-Border Transaction" occurs where a card issued by a bank in one country is used at a POS in another country. In the context of the present claim,

the only relevant cross-border transaction is one where a card issued by a bank in one EEA Member State was used at a POS in another EEA Member State.

ii. A "Domestic Transaction" occurs where a card issued by a bank in one country is used at a POS in the same country. In the context of the present claim, the only relevant Domestic Transaction is one where a card issued by a UK bank is used at a POS in the UK.

e. Mastercard uses the terms "Cross-Border Transactions" and "Domestic Transactions" in accordance with these definitions.

f. Consequently, the UK MIFs (once introduced) applied to Domestic Transactions, i.e. transactions using a UK issued card at a POS in the UK even if the merchant chose to contract with a cross-border acquiring banks located in a different country.

46. In relation to paragraph 60, it is important for present purposes to distinguish between:

a. Default multilateral interchange fees set by Mastercard itself – the term "multilateral" in this context reflecting the fact that the fees applied on a default basis to multiple banks and not just two banks.

b. Default multilateral interchange fees set by a group of Mastercard licensee banks.

c. Bilateral interchange fees, being fees applicable between two banks, which could be set by agreement or determined by arbitration.

47. In relation to paragraph 61:

a. It is admitted and averred that until 2002 each of Mastercard and Eurocard and from 2002 the combined Mastercard business had a decentralised structure and decision-making process.

b. In relation to the EEA MIFs:

i. prior to 2002, MCE had the power to set the EEA MIFs;

ii. between 2002 and 25 May 2006, Mastercard's regional European Board (comprising delegates from its European member banks) had the power to set the EEA MIFs; and

iii. from 25 May 2006, MCI had the power to set the EEA MIFs.

c. It is admitted that the Defendants were each and all found liable for the setting of the EEA MIFs.

d. In relation to footnote 18:

i. It is admitted that the EEA MIFs applied as a fallback to cross-border transactions wholly within the EEA (i.e. where the card was issued and the POS was located within the EEA) throughout the relevant period.

ii. While the EEA MIFs applied as a fallback for Domestic Transactions in many EEA Member States at various times during the relevant period, whether the EEA MIF did in fact apply as a fallback for Domestic Transactions in a particular Member State in the absence of a Domestic MIF depended on the relevant network rules, which varied across the relevant period and between different countries. In relation to the position in the UK, see paragraphs 93 - 100 below.

48. In relation to paragraph 62:

a. The reference in recital 58 of the EC Decision to the European Board retaining "key" decision making powers related to the period after the IPO on 25 May 2006. Those decision-making powers are set out in the EC Decision at recital 52 and did not relate to interchange fees.

b. It is admitted that until 2002 Mastercard and Eurocard respectively and, from 2002 to the end of the relevant period, the combined Mastercard business allowed member banks to set up a country "forum" to agree national network rules, unless and until that authority was revoked by Mastercard. Mastercard revoked the UK member banks' authority to set the UK MIF for Mastercard credit cards in November 2004.

c. It is admitted that the UK banks which participated in the Mastercard (and until 2002 Eurocard) scheme(s) in the UK set up a country forum in 1989 to determine national network rules for the Mastercard/Eurocard credit card scheme in the UK (and Ireland). This forum ceased to have responsibility for Ireland in 1992.

d. It is also admitted that the UK banks which participated in the Maestro scheme in the UK set up a country forum in 2002 to determine national network rules for the Maestro debit card scheme in the UK.

e. As recorded in recital 61 to the EC Decision, there was no requirement for local banks to obtain endorsement or certification of their national network rules from any of the Defendants and the *"only authority"* that MCE exercised in relation to national network rules was dependent on a complaint being made by a member and even then was limited to verifying that the domestic rules complied with the principles laid down in the global network rules.

The subject of the EC Decision

49. In relation to paragraphs 63 and 64, it is admitted that these accurately record the quoted recitals from the EC Decision. As set out above, these recitals primarily reflect the position in the last few years leading up to the EC Decision and are generalisations which do not purport to address the position in relation to each national market and in particular the UK either generally or throughout the period 1992 to 2007. These recitals are not, therefore, part of the essential basis for the operative part of the EC Decision and are not binding on Mastercard or the Tribunal. Mastercard also notes that recital 118 expressly recognises that the EC Decision excludes bilaterally agreed interchange fees and Domestic MIFs.

50. In relation to paragraph 65:

a. It is admitted that the EEA MIF was the fallback for EEA cross-border transactions (i.e. where a card issued in one EEA state was used at a POS in a different EEA state) throughout the relevant period, save where the same bank was both the issuing bank and the acquiring bank (referred to as an "on-us" transaction).

b. Whether the Intra-EEA MIF applied as a fallback for Domestic Transactions within a particular state in the absence of a Domestic MIF depended on the relevant network rules, which varied across the claim period and between different countries.

c. In relation to the position in the UK during the relevant period, see paragraphs 93 - 100 below. Mastercard refers by way of example to the operation of the Maestro scheme in the UK which had average domestic interchange fees which were significantly below the Maestro EEA MIFs. It is consequently denied that the EEA MIF was a floor which guaranteed a minimum interchange fee for Domestic Transactions in the UK during the relevant period.

51. In relation to paragraph 66, it is admitted that Section 3.1.5 of the EC Decision includes a simplified example of the flow of payments in one type of transaction. However:

a. This example does not cover disputes about the transaction, fraud or cardholder default. While the issuing bank would normally receive payment of the transaction amount (£100 in the example) from the cardholder, if the transaction was fraudulent or the cardholder was insolvent, under the default scheme rules the issuing bank had no choice but to write off the amount (this is the payment guarantee offered by the issuing bank to the merchant). This payment guarantee gave rise to a substantial part of the costs of issuing banks. The interchange fee contributed to these costs.

b. The example also makes no reference to timing. The default scheme rules in relation to the timing of payments by issuing banks to acquiring banks provided for same day/next day payment. As a result, if the default rules applied, issuing banks were required to pay acquiring banks shortly after transactions took place. However, for credit card transactions, issuing banks will generally not receive payment from cardholders for an extended period (of which up to 60 days may be interest free), requiring the issuing bank to fund the transaction until payment. Again, the interchange fee contributed to these costs. Meanwhile, because acquiring banks received payments shortly after transactions took place, they could pay merchants shortly after transactions took place without incurring any funding costs.

c. The example only sets out the way in which the Mastercard scheme operated during the relevant period with interchange fees at the levels which applied. The scheme would not have been able to operate in this way if it had been required to operate with either a zero MIF or MIFs which were materially lower than those which have in fact applied because the Mastercard scheme would not have been competitive if issuing banks had to offer the same benefits without receiving interchange fee revenue contributing the costs involved in doing so and Mastercard would not, therefore, have maintained default rules requiring them to do so.

d. Furthermore, not all transactions proceeded on the basis in the simplified example. In relation to "on us" transactions, since the same bank is both the acquiring bank and the issuing bank, there is no transaction in the manner described and so interchange fees do not apply. During the claim period, a substantial percentage of

Domestic Transactions, particularly debit card transactions, were "on us" transactions. Since default interchange fees did not apply to "on us" transactions, there is no claim for damages in relation to these transactions.

e. In relation to the processing of transactions, as recorded in recital 141 of the EC Decision, Mastercard (or Europay in relation to the period to 2002 for transactions within Europe) processed cross-border payment transactions during the relevant period, which included checking that acquiring banks were not claiming the wrong interchange fee rates.

52. In relation to paragraph 67, as of the date of the EC Decision, there were in fact five EEA MIFs for Mastercard branded consumer credit cards and five EEA MIFs for Maestro branded debit cards. The other Intra-EEA fallback interchange fees identified in Annex 1 to the EC Decision either applied to types of cards which were not the subject of the EC Decision (e.g. commercial cards) or were not in force.

53. In relation to paragraph 68, Mastercard's procedure for setting the EEA MIFs is of no relevance to the present claim.

The Four-party / open payment card system

54. In relation to paragraph 69:

a. It is admitted that, until 2005, acquiring banks were also obliged to issue cards pursuant to the "No Acquiring Without Issuing Rule". The EC Decision did not make any finding that the "No Acquiring Without Issuing Rule" involved a breach of competition law.

b. It is also admitted that many issuing banks were also acquiring banks, although the ratio of issuing to acquiring business varied between banks. Insofar as it is suggested that this meant that acquiring banks did not have an incentive to negotiate lower interchange fees, this is denied. A bank with a larger portfolio of acquiring business than issuing business would have the same or a similar incentive to act in the best interests of its acquiring business as an acquiring bank without an issuing business. In particular, such an acquiring bank would have the same incentive to attempt to negotiate a lower interchange fee from the default fee, in order to reduce its own input costs, particularly since this would allow it to undercut other acquiring banks and increase the size of its acquiring business.

c. As set out above, the effect of many issuing banks also being acquiring banks was that, during the relevant period, a substantial percentage of Domestic Transactions, particularly debit card transactions, were "on us" transactions and were not, therefore, capable of being subject to any MIF.

55. In relation to paragraph 70 and MSCs:

a. Consistent with recital 247 to the EC Decision, 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.

b. In relation to debit card transactions, Mastercard notes that during the relevant period both interchange fees and MSCs were typically a fixed fee for debit card Domestic Transactions in the UK even though the EEA MIFs were a percentage of the transaction value and that the weighted average interchange fees for UK debit card transactions were substantially lower than the weighted average EEA MIFs. This confirms that the EEA MIFs were not a floor which guaranteed a minimum interchange fee for debit card Domestic Transactions in the UK during the relevant period.

c. In relation to recital 248 of the EC Decision:

i. It is denied that Mastercard or the Tribunal is bound by the generalisation in the EC Decision that because acquiring banks take interchange fees "into consideration" in setting MSCs this means that all acquiring banks always took all interchange fees into consideration in setting MSCs.

ii. Alternatively, the Commission made no finding that acquiring banks gave the same level of consideration to all types of interchange fee. It is denied that UK acquiring banks gave any significant consideration to Mastercard's EEA MIFs since those interchange fees were only applicable to a small percentage of transactions (the EEA MIFs, on average, represented only 5% of Mastercard transaction volumes in the UK in 2000). This is particularly in circumstances where acquiring banks were often setting a single blended MSC for Mastercard and Visa where the importance of Mastercard's interchange fees would be further reduced (since Visa had the majority of both the credit card and debit card markets in the UK during the relevant period) and particularly in setting MSCs for small and medium sized

merchants where the MSC would be a multiple of any applicable interchange fee.

iii. Furthermore, it is denied, if it be alleged, that acquiring banks taking interchange fees "into consideration" meant that MSCs would have correspondingly reduced if some Mastercard interchange fees had been set at a lower level.

iv. It is admitted that MSCs are normally set by acquiring banks at a higher level than interchange fees. However, it is denied that this is sufficient to constitute "passing on" in legal terms. In order for there to be "passing on" in legal terms, there must be an increase in price which is casually connected with the overcharge – see paragraph 484 of *Sainsbury v Mastercard* [2016] CAT 11 as clarified by the Court of Appeal in *Sainsbury v Mastercard* [2018] EWCA Civ 1536. For the avoidance of doubt, it does not follow from the finding in Article 1 of the EC Decision (as referred to in footnote 26) that EEA MIFs in effect set a minimum price merchants must pay to their acquiring banks that all MSCs would necessarily have been lower in the counterfactual, still less the amount of any such decrease.

d. Consistent with recital 249 of the EC Decision, in the UK during the relevant period, acquiring banks generally charged one single blended MSC which applied to all types of credit and charge card transactions (both domestic and cross-border) on both Visa and Mastercard (and also to the UK domestic credit card scheme, Access) and one single blended MSC which applied to all types of debit card transaction (both domestic and cross-border) on both Visa Debit and Maestro (and also to the UK domestic debit card scheme Switch). A survey conducted by the Office of Fair Trading of UK acquiring banks in 2004 showed that at that time the main UK acquiring banks charged at least 98% (and in the case of some acquiring banks 100%) of merchants a blended MSC for Visa and Mastercard[3]. Since the volume and value of payment card transactions in the UK grew substantially

[3] While a survey conducted by the Commission in 2004 of merchants showed a lower figure of 60% of the 218 merchants surveyed paying a single blended MSC for Visa and Mastercard, this survey is unlikely accurately to reflect the position in the UK at the relevant time, since the Commission's survey covered multiple countries, rather than just the UK and, as the Commission itself accepted, its merchant survey *"over represents large companies" "with a relatively high degree of market power vis-à-vis acquiring banks that small and medium merchants usually not have"* (sic) (see Annex 2 of the EC Decision).

between 1992 and 2004, merchants had a greater incentive to negotiate unblended MSCs in 2004 than would have been the case in earlier years and it is likely that blended MSCs were even more ubiquitous in that part of the relevant period prior to 2004.

Relevant Market(s)

56. In relation to paragraph 72:

a. The statement in recital 408 of the EC Decision that the EEA MIFs restricted competition was limited to the effect of the EEA MIFs on competition in the markets for acquiring payment cards (as defined by the Commission).

b. It is denied that the fact that the restriction finding in the EC Decision was limited in this way means that, in assessing whether the Represented Persons suffered a loss, the Tribunal is limited to looking at acquiring markets.

c. Acquiring markets are not the only markets relevant to these proceedings. Interchange fees also have a direct effect on: (a) issuing markets (i.e. the markets for transactions on payment cards as between cardholders and issuing banks); and (b) inter-scheme markets for the business of issuing banks. If interchange fees were not set at a competitive level, then issuing banks and/or cardholders would migrate to other card schemes or use other payment methods to a greater extent.

d. It is admitted that each market is national in scope. Consequently, the markets principally relevant to these proceedings are the national markets in the UK.

57. In relation to paragraph 73:

a. The information and evidence provided by the IATA referred to in recital 464 of the EC Decision related to the migration by issuing banks of consumer cards to commercial cards in order to benefit from the higher interchange fees available on commercial cards. However, the findings in the EC Decision were ultimately limited to the EEA MIFs for *consumer* cards and, therefore, the information and evidence referred to in recital 464 is not part of the essential basis for the operative part of the EC Decision.

b. There were no consumer cards in the UK during the relevant period which had a zero or relatively low MIF. There was, therefore, no scope for migration from zero or low MIF cards to Mastercard in the UK during the relevant period.

c. However, it is admitted and averred that issuing banks have an incentive to promote types of cards and card brands which yield higher total revenues and that higher interchange fees will be an important factor in that analysis. As set out below, this is an important consideration in relation to the Class Representative's contention that Mastercard domestic interchange fees would have been set at a lower level if alternative EEA MIFs had been set at a lower level (or zero).

Decision by an association of undertakings

58. In relation to paragraph 74:

a. Mastercard accepts it is bound by the finding in the EC Decision that it remained an association of undertakings in Europe in relation to the period from May 2006 to 19 December 2007 and does not dispute that, since there was no relevant change of circumstances, the same analysis applies in relation to the period from 19 December 2007 to 12 June 2008 during which the same EEA MIFs applied, i.e. the remaining part of the relevant period.

b. Mastercard also accepts it is bound by the finding in the EC Decision that the EEA MIFs were the product of a decision of an association of undertakings within the meaning of Article 101(1) until December 2007 and does not dispute that, since there was no relevant change of circumstances, the same analysis applies in relation to the period from 19 December 2007 to 12 June 2008, i.e. the remaining part of the relevant period.

c. In this light of these admissions, Mastercard does not plead to the detail of paragraph 74.

Restriction of competition

59. As to paragraph 75, it is admitted that the Commission found that the EEA MIFs in relation to the period 22 May 1992 to 19 December 2007 constituted a restriction of competition by effect and that this finding is binding on Mastercard and the Tribunal.

EC Decision: "7.2.1 The object of the MIF"

60. In relation to paragraph 76, since the Commission did not make any finding that the EEA MIFs were a restriction by object, it is denied that any part of the Commission's consideration of this issue at recitals 401 - 407 of the EC Decision is binding on Mastercard or the Tribunal.

61. In any event, in relation to recital 404, the issue that the Commission was considering was whether the EEA MIFs act as a floor under MSCs. All that Mastercard accepted, in the context of the operation of the payment card market in 2006, was that interchange fees "may sometimes" function as such a floor, while noting examples of countries where this had not been the case due to merchants' bargaining power, that it is reasonable to assume that interchange fees affect MSCs "to some degree" and that it can be "supposed" that the MSC "typically" reflects interchange fees as well as the acquiring bank's other costs. This does not assist the Class Representative in showing that if interchange fees had been set at a lower level in the UK throughout the relevant period, the full extent of any reduction in interchange fees would have been passed-on by all acquiring banks to all merchants through correspondingly lower MSCs. For the reasons set out at paragraphs 103 - 123 below, it is denied that this is the case.

62. In relation to recital 405:

    a. The Commission did not make any finding that the EEA MIFs applied to Domestic Transactions in the UK.

    b. In relation to whether the EEA MIFs acted as a minimum price recommendation, the Commission only stated that in agreeing on specific interchange fees bilaterally or multilaterally members banks "may" take the EEA MIFs into account as a minimum starting point. The Commission did not conclude that this in fact occurred in the UK throughout the period 1992 to 2007 (or at any time) or that any such "taking into account" would in any event have had a material effect on UK domestic interchange fees (or the extent of any such effect).

    c. Mastercard will rely on the fact that this was not the case in relation to the operation of the Maestro scheme in the UK, which had average domestic interchange fees that were significantly below the Maestro EEA MIFs.

EC Decision: "7.2.2. The effects of the MIF"

63. In relation to paragraph 77:

    a. In relation to recital 408 of the EC Decision, this is a conclusion arising from the detailed analysis in recitals 410 - 460 and cannot, therefore, be read in isolation.

b. Subject to the above, it is admitted that the Commission's finding in recital 408 that the EEA MIFs restricted competition in acquiring markets is binding on Mastercard and the Tribunal.

c. However, while the Commission found that prices set by acquiring banks would be lower in the absence of the EEA MIFs, the Commission made no findings in relation to which prices set by acquiring banks would be lower in the absence of the EEA MIFs or the extent or timing of any such reduction(s). Recital 408 does not, therefore, assist the Class Representative in establishing whether, and if so, the extent to which UK MSCs (or, for the purpose of the claim referred to in paragraph 23(b)(ii), the MSCs in the other 29 countries which were Member States of the European Union or within the EEA at the relevant time) were higher than they would otherwise have been during the 18 ~~16~~-year claim period.

EC Decision: "7.2.3. Restriction of competition in the acquiring markets and effects in the issuing markets"

64. In relation to paragraph 78:

a. It is admitted that recitals 410 and 411 of the EC Decision are in the terms quoted.

b. In relation to recital 410 of the EC Decision, this largely replicates the summary in recital 408, as to which see paragraph 63 above.

c. In relation to recital 411, it is denied that this recital is binding on Mastercard or the Tribunal, since it is not part of the essential basis for the operative part of the EC Decision.

d. In any event, recital 411 only concludes that customers are "likely" to have to bear "some part" of the cost of the EEA MIFs and makes clear that this "may" occur depending on the competitive situation. Recital 411 does not, therefore, assist the Class Representative in establishing that UK MSCs or UK retail prices (or MSCs or retail prices in any of the other 29 countries potentially relevant to the Claim under paragraph 23(b)(ii)) were higher than they would otherwise have been or the extent of any such differential(s) during the 18 ~~16~~-year claim period.

e. Nothing in the sections of the GC Judgment quoted in footnote 39 alters those matters set out above.

65. In relation to paragraph 80, it is admitted that the Commission concluded that the EEA MIFs restricted competition in relation to the acquiring of cross-border payments on the basis set out in the passage quoted from recital 412 and that this finding is binding on Mastercard and the Tribunal. However, the Commission made no findings in relation to whether, and if so which, prices set by acquiring banks for acquiring cross-border transactions would have been lower in the absence of the EEA MIFs or the extent or timing of any such reduction(s). The finding made by the Commission does not, therefore, assist the Class Representative in establishing that the Represented Persons have suffered loss or the amount of that loss.

66. In relation to paragraph 81:

a. It is admitted that the Commission found that the EEA MIF had effects on cross-border acquisition of domestic payments in relation to certain countries identified in recitals 413 and 415. Since the UK is not one of the countries listed, this conclusion is of no relevance to the present Claim.

b. It is also admitted that the Commission found (see recitals 416 - 420 of the EC Decision) that the EEA MIF had effects on domestic acquisition of domestic payments in certain specific countries where local members neither agreed on bilateral interchange fees nor on a Domestic MIF. Since the UK is not one of the countries listed, this conclusion is of no relevance to the present Claim. The arrangements for the domestic acquiring of domestic payments in the UK are addressed below.

c. In relation to the final sentence of recital 416, this is a summary of the detailed analysis in recitals 421 - 424 and must, therefore, be read in the context of those recitals.

67. In relation to paragraph 82:

a. In relation to whether the EEA MIFs acted as a benchmark for setting Domestic MIFs, it is denied that recitals 421 - 424 (or alternatively recital 421) are binding on Mastercard or the Tribunal, since they are not part of the essential basis for the operative part of the EC Decision. In any event:

i. The EC Decision only concludes at recital 421 that *"some"* of Mastercard's member banks view EEA MIFs *de facto* as a minimum starting point and

that, as a result, the EEA MIFs *"may act"* as a minimum benchmark for setting the level of domestic interchange fees.

ii. The Commission then made specific statements in relation to the EEA MIFs acting as a minimum benchmark for domestic bilateral interchange fees (incorrectly described as MIFs in recital 422) in relation to a single Member State, which was not the UK.

iii. The Commission's analysis does not, therefore, assist the Class Representative in establishing that Mastercard's UK member banks viewed the EEA MIFs *de facto* as a minimum starting point for Domestic MIFs or bilaterally agreed domestic interchange fees (either generally or at any particular time during the 16-year ~~claim~~ relevant period or during the year to 21 June 2009) in the UK or, even if this had been the case, that this resulted in domestic interchange fees being set at a higher level than would otherwise have been the case.

iv. Whether the EEA MIFs applied as a fallback for Domestic Transactions in a particular country at a particular time and whether issuing banks could be certain that the EEA MIFs would automatically apply if they did not consent to a Domestic MIF depended on the relevant network rules and the extent to which there was clarity about their application in practice, which varied across the relevant period and between different countries. In relation to the position in the UK, see paragraphs 93 - 100 below.

v. In any event, the argument that the EEA MIF provides "certainty" to domestic banks cannot apply where a Domestic MIF has been set, since once a Domestic MIF is set, the Domestic MIF then becomes the default for Domestic Transactions going forward in the absence of agreement on a different Domestic MIF.

vi. It is denied that UK issuing banks had no incentive during the relevant period to agree a UK MIF below the rate of the EEA MIF. The incentives of UK issuing banks in agreeing domestic interchange fees depended on a number of factors including:

1. The extent to which the main issuing banks were also acquiring banks and the relative size of their issuing and acquiring businesses. In the UK,

the main Mastercard issuing banks were also the main Mastercard acquiring banks for all (or almost all) of the relevant period. For example, in 1998, the main high street banks (NatWest, HSBC, Barclays, Lloyds TSB, RBS, BoS), all of which were Mastercard acquiring banks, together represented over 87% of Mastercard transactions by value. As to the incentives of such banks, see paragraph 54b above.

2. Market conditions, since the incentive for both issuing banks and acquiring banks in setting a Domestic MIF (regardless of its relative level compared to the EEA MIF) is to set a Domestic MIF which allows the Mastercard scheme to operate successfully in that country, particularly in the light of the competition faced from other card networks (in particular Visa, American Express and any relevant domestic scheme) and other payment methods. If the Domestic MIF is set too high, merchants will refuse to accept the card (or discourage its use) and the Mastercard scheme would be likely to operate at a substantially reduced scale and may even collapse. An issuing bank may, therefore, prefer a lower interchange fee to a higher interchange fee which will make the scheme uncompetitive, since this will result in higher total revenues as a result of the lower fee applying to a larger number of transactions. Similarly, if the Domestic MIF is set too low, issuing banks will be incentivised to issue other schemes' cards instead and cardholders will be incentivised to adopt and use other payment methods, including competing card schemes.

vii. In any event, the EC Decision does not address the position where the Domestic MIF was set by Mastercard (as opposed to member banks), which was the position in relation to the UK MIF for Mastercard credit cards from November 2004 onwards (see paragraphs 98ee - ff below).

viii. Furthermore, even if the EEA MIFs operated as a minimum benchmark for the UK domestic interchange fees for some periods (which is denied), it is denied that it follows from this that UK domestic interchange fees would have been set at a lower level if alternative EEA MIFs had been set at a lower level or zero. The same competitive considerations would have resulted in the same or similar domestic interchange fees in any event.

68. In relation to paragraph 83:

a. It is denied that any of the recitals referred to are part of the essential basis for the EC Decision and, therefore, binding.

b. In relation to paragraph 83(a), it is admitted that the Commission carried out two quantitative analyses in order to evaluate whether the EEA MIFs set a floor under MSCs.

c. In relation to the first analysis:

i. This was conducted in relation to certain Member States (none of which was the UK) where the EEA MIFs also applied to all Domestic Transactions based on data from acquiring banks for 2000 to 2002, 2001 to 2003 and 2002 to 2004 respectively.

ii. The Commission compared the average MSCs in each of these countries to the weighted average EEA MIFs and concluded that the average MSCs were substantially higher.

iii. The Commission concluded that this showed that the EEA MIFs set a floor under MSCs.

iv. However, the Commission did not obtain any information about the other costs incurred by the acquiring banks in these Member States or reach any conclusion about what average MSCs (or MSCs for different categories of merchants) would have been in these countries if the EEA MIFs had been set substantially lower or at zero.

d. In relation to the second analysis:

i. This was conducted based on 2002 data obtained from the Commission from 17 acquiring banks in 15 Member States. Since the data in the EC Decision is anonymised, it is not possible to tell which, if any, of these Banks were in the UK.

ii. The Commission compared the weighted average EEA MIFs to the weighted average MSCs of the top and bottom decile of each acquiring bank's respective client base. The Commission concluded that this showed that all 17 acquiring banks charged small merchants MSCs above the weighted EEA MIFs (with the EEA MIF representing an average 45.97% of the MSC, although the data

showed that this fell to as low as approximately 30% for some acquiring banks) and that 12 acquiring banks charged large merchants MSCs above the weighted EEA MIFs.

iii. Therefore, the data indicated that five of the 17 acquiring banks charged MSCs for large merchants which were lower than the weighted EEA MIFs. The Commission concluded that one possible explanation for this might be that these acquiring banks had absorbed some of the interchange fee cost.

iv. The Commission acknowledged, however, that the results of the analysis had to be "qualified" because the Commission used the EEA MIFs as a proxy for interchange fees in these Member States, including countries (which would include the UK) where Domestic MIF rates diverged from the EEA MIFs.

v. The Commission concluded that this showed that the EEA MIFs set a floor under MSCs "typically" even for large merchants.

vi. The Commission again did not obtain any information about the other costs incurred by these acquiring banks or reach any conclusion about what MSCs would have been either generally or for the bottom and top decile of merchants if the EEA MIFs had been set substantially lower or at zero.

e. Neither of these analyses, therefore, assists the Class Representative in establishing that the Represented Persons have suffered loss or the amount of that loss.

f. In relation to the "further evidence from merchants" referred to in paragraph 83(b):

i. This was limited to evidence from a 2004 survey which merchants knew was being carried out by the Commission for the purpose of investigating and potentially limiting interchange fees.

ii. The only conclusion which the Commission reached from this survey was that Mastercard's interchange fees determined a floor for MSCs in relation to "particularly large merchants".

g. In relation to the Commission's response to Mastercard's arguments referred to in paragraph 83(b), the Commission did not make any findings in relation to the extent to which prices paid by merchants and subsequent customers would have been lower in the absence of the EEA MIFs. The Commission's findings do not,

therefore, assist the Class Representative in establishing that the Represented Persons have suffered loss or the amount of that loss.

69. In relation to paragraph 84 and recitals 467 - 496 and 497 - 521 of the EC Decision:

a. It is denied that any of the recitals referred to are part of the essential basis for the EC Decision and, therefore, binding.

b. In relation to MSCs, the Commission did not reach any conclusions in relation to the extent to which prices paid by merchants would have been lower in the absence of the EEA MIFs.

c. In relation to retail prices, the Commission only concluded that merchants "may" pass the cost of the interchange fee on to their customers by raising the final price.

d. The Commission's analysis in these recitals does not, therefore, assist the Class Representative in establishing that the Represented Persons have suffered loss or the amount of that loss.

70. In relation to paragraph 85, see paragraph 37 above, in respect of surcharging in the UK.

71. In relation to paragraph 86:

a. Footnote 60 to paragraph 86 incorrectly refers to recital 587 of the EC Decision; paragraph 86 in fact quotes recital 522. In respect of recital 522, this repeats the Commission's conclusion that the EEA MIFs put a floor under MSCs.

b. Again, the Commission did not make any findings in relation to the extent to which prices paid by merchants (and in particular prices paid by UK merchants) would have been lower in the absence of the EEA MIFs or the timing of any such reductions.

The MIF does not fall outside the Scope of Article 101 TFEU

72. In relation to paragraph 87, it is admitted that Mastercard and the Tribunal are bound by the finding that the EEA MIFs were not objectively necessary for the operation of the Mastercard scheme.

Appreciable effect

73. In relation to paragraph 88, it is admitted that Mastercard and the Tribunal are bound by the finding that the EEA MIFs had an appreciable effect on competition in "most

EEA Member States". The Commission did not, however, identify the specific EEA Member States in question. As a result, the EC Decision does not make any binding findings in relation to the actual effect of the EEA MIFs on the UK acquiring market either generally or in relation to any part of the 16-year ~~claim~~ relevant period (or the two-years to 21 June 2010).

Effect on trade between Member States

74. In relation to paragraph 89, it is admitted that Mastercard and the Tribunal are bound by the finding that the EEA MIFs affected trade between Member States.

Conclusion on Article 101(1)

75. In relation to paragraph 90:

    a. It is admitted that Mastercard and the Tribunal are bound by the finding that the EEA MIFs restricted competition contrary to Article 101(1).

    b. The Commission did not make any findings in relation to whether and, if so, the extent to which prices paid by UK merchants or their customers would have been lower in the absence of the EEA MIFs or the timing of any such reductions.

    c. The Commission's findings do not, therefore, assist the Class Representative in establishing that the Represented Persons have suffered loss or the amount of that loss.

Article 101(3) TFEU

76. In relation to paragraph 91:

    a. It is admitted that the Commission concluded in the EC Decision that Mastercard had failed to establish with appropriate evidence that the first three conditions of Article 101(3) were met in relation to the EEA MIFs then in force, including for the reasons quoted.

    b. However, the Commission did not conclude that positive consumer EEA MIFs could not satisfy the conditions for exemption under Article 101(3) in relation to this period, but only that Mastercard had not produced sufficient evidence to show that the conditions were met in relation to the EEA MIFs then in force during this period.

c. Furthermore, while the Commission ordered Mastercard to repeal the EEA MIFs in force within 6 months, recital 13 to the EC Decision expressly stated that the requirement to repeal the EEA MIFs did not prevent Mastercard from adopting alternative EEA MIFs at a level which met the conditions for exemption.

Breach of statutory duty

77. In relation to paragraphs 92 and 95:

a. In relation to proper law, see paragraphs 22 - 24 above.

b. Insofar as the claims are governed by English law (and insofar as the Class Representative wishes to pursue claims in relation to transactions in Northern Ireland under Northern Irish law and/or transactions in Scotland under Scots law) it is admitted that, if (which is denied for the reasons set out below) the Represented Persons have suffered loss as a result of the Infringement, they would have directly effective claims for breach of statutory duty subject to the other matters raised in this Defence, including in particular limitation.

c. Insofar as any part of the claim is governed by foreign law, the Class Representative is put to strict proof of the relevant principles of each such foreign law.

78. Save that the Infringement is limited to the EEA MIFs for consumer cards, paragraph 93 is admitted.

79. In relation to paragraph 94, as set out above, although the Infringement found in the EC Decision is limited to the period 22 May 1992 to 19 December 2007, since Mastercard did not repeal the EEA MIFs until 21 June 2008 and there was no relevant change of circumstances in relation to the period 19 December 1997 to 21 June 2008, Mastercard accepts that a claim can also be made in relation to the EEA MIFs in force during this period and consequently, subject to the other matters raised in this Defence, including in particular limitation, that the period relevant to this claim is 22 May 1992 to 21 June 2008 (the "relevant period").

Joint and several liability

80. In relation to paragraph 96, insofar as the claims are governed by English law (and/or Northern Irish and/or Scots law), if (which is denied for the reasons set out below) the Represented Persons have suffered any loss as a result of the Infringement, it is admitted

that the Defendants would be jointly and severally liable for such loss, subject to the other matters raised in this Defence, including in particular limitation.

Causation and loss

81. In relation to paragraph 97:

a. For the reasons set out below, it is denied that the Represented Persons have suffered any loss as a result of the Infringement or have any claim for damages either in the sums alleged or at all, whether in relation to the relevant period or the two-year period to 21 June 2010.

b. Without prejudice to the foregoing:

i. Although the EC Decision held that the EEA MIFs breached Article 101 in relation to the period 1992 to 2007, the EC Decision did not conclude that positive consumer EEA MIFs could not satisfy the conditions for exemption under Article 101(3) in relation to this period, but only that Mastercard had not produced sufficient evidence to show that the conditions were met in relation to the EEA MIFs actually in force during this period. On the contrary, the European Commission expressly accepted that Mastercard could charge positive consumer Intra-EEA MIFs if they met the criteria for exemption and has permitted Mastercard to charge alternative EEA MIFs which are higher than zero since July 2009 expressly on the basis that they were set in accordance with a reasonable benchmark for assessing a level of MIF which met the conditions for exemption.

ii. It, therefore, remains open to Mastercard to demonstrate through appropriate evidence that the conditions of Article 101(3) would have been met in relation to alternative EEA MIFs set at a different level during the relevant period. As to that exemptible level, see paragraphs 82 - 89 below.

iii. If the lawful alternative EEA MIFs were higher than the EEA MIFs actually set, the Represented Persons will not have a claim for damages.

iv. Alternatively, the Represented Persons' claim for damages is limited to the loss caused (if any) by the difference between the EEA MIFs actually set and the alternative EEA MIFs which could lawfully have been set during the relevant period (as to which see paragraphs 82 - 89 below). Furthermore, any

consideration of whether any such loss was suffered (and, if so, the amount thereof) must give credit for benefits received by Represented Persons as a result of the EEA MIFs being set higher than the lawful level: see paragraphs 109-123 and 131-132 ~~82 – 89~~ below.

Exemption

82. Mastercard will contend that, in respect of the period prior to 31 December 2007 (which is the date of expiry of the 2002 exemption decision in relation to the interchange fee charged by Visa Europe), for the same reasons set out in that decision, the Mastercard scheme could have lawfully adopted alternative EEA MIFs based on:

    a. The cost of processing transactions.

    b. The cost of the free funding period for cardholders, i.e. for debit cards, the period between payment to the acquiring bank and the debiting of funds from the cardholder's current account and for credit/charge cards the period between payment to the acquiring bank and when payment must be made by the cardholder or the balance of the credit card bill rolled over into the extended credit facility.

    c. The cost of providing the "payment guarantee". While the Visa Europe exemption decision does not include a definition of the "payment guarantee", Mastercard will contend that this is properly to be understood as including the guarantee against fraud and cardholder default.

83. Mastercard will also contend, by analogy to the reasoning in the Visa Europe exemption decision, that the Mastercard scheme could have lawfully adopted alternative EEA MIFs based on the same categories of costs for the rest of the relevant period after 31 December 2007.

84. Alternatively, Mastercard will contend that it could have lawfully adopted alternative EEA MIFs based on these categories of costs subject to the caps in the Visa Europe exemption decision, i.e.:

    a. in and prior to 2002, weighted EEA MIFs at levels similar to Mastercard's EEA MIFs in force;

    b. for the period 2003 to 2007, alternative EEA MIFs which reduced on a straight-line basis over this period down to a weighted average of 0.7%; and

c. for debit cards, alternative EEA MIFs with a weighted average not exceeding EUR0.28.

85. Mastercard will rely on the fact that under the Visa Europe exemption decision Visa was lawfully entitled to operate and did operate on this basis of default consumer Intra-EEA MIFs set on this basis and that if Mastercard had not been able to operate with alternative EEA MIFs which were competitive with those set by Visa, Mastercard would have been unable to compete effectively with Visa in many national markets across Europe, resulting in reduced competition and choice for consumers.

86. Further or alternatively, Mastercard will contend that the Mastercard scheme could, in any event, in respect of the full relevant period, have lawfully adopted alternative EEA MIFs which were based on:

a. 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; and

b. the benefits which merchants received as a result of accepting Mastercard/Maestro credit/debit cards.

87. In relation to the benefits which merchants receive as a result of accepting Mastercard/Maestro credit/debit cards, Mastercard will contend that a proper account of these benefits should include the value of those features of the Mastercard scheme which would not have existed if the EEA MIFs had not been set at the levels in place during the relevant period (as to which see paragraphs 109 - 113 below).

88. Further or alternatively, Mastercard will contend that the Mastercard scheme could, in any event, in respect of the full relevant period, have lawfully adopted alternative EEA MIFs which were based 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. In particular, Mastercard will rely upon the Commission's press-release of 1 April 2009 and/or its letter of the same date notifying Mastercard of the Commission's acceptance of Mastercard's undertakings in which the Commission accepted that Mastercard's proposed new EEA MIFs (subsequently introduced from July 2009) which were set at 0.3% for credit card and 0.2% for debit

cards (being lower than the additional cost of cash to merchants) were set in accordance with a reasonable benchmark for assessing a level of MIF which met the conditions for exemption.

89. Mastercard will seek permission to call expert evidence to quantify each of these categories of costs/benefits in relation to the 16-year ~~claim~~ relevant period. Particulars of the relevant levels of interchange fee will be provided once permission for expert evidence is obtained and the expert has carried out their analysis. Mastercard expects expert evidence to show that the lawful alternative EEA MIFs were higher than the EEA MIFs actually set (or alternatively were close to the level actually set).

Particulars of causation

90. In relation to the summary of the case on causation at paragraphs 98 and 99, Mastercard refers to paragraphs 91 - 132 below. It is denied that the Represented Persons have suffered loss as alleged or at all.

Cross Border Transactions

91. In relation to paragraph 100:

    a. It is admitted that the 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. In those circumstances, Mastercard does not plead to paragraph 100(c) since it does not arise.

    b. As to the effect of this on the charges paid by Mastercard member banks, see paragraphs 102 - 123 ~~above~~ below.

    c. In relation to footnote 74A, paragraphs 42 - 44 of the Supreme Court judgment in *Sainsbury's v Visa* [2020] 4 All ER 807 do not address the factual question of whether bilateral agreements did exist in the UK market during the period relevant to those proceedings (i.e. 2006 to 2015), but rather th~~e~~an hypothetical question of whether bilateral agreements would have existed during this period in a counterfactual world with a default MIF of zero. The Supreme Court did not endorse the findings of Popplewell J and Phillips J in this regard, but merely recorded that they were common ground. In relation whether bilateral agreements did exist for Domestic Transactions during the relevant period (or in the year to 21 June 2009), see paragraphs 95 - 100 below.

92. In relation to paragraphs 101 and 102:

a. It is denied that damages are to be assessed on the basis that there would have been no interchange fees payable by acquiring banks in relation to Cross-Border Transactions. Paragraph 93(iv) of the Supreme Court judgment and recital 410 of the EC Decision concern the appropriate counterfactual for assessing whether there is a restriction of competition contrary to Article 101(1). Nothing in this analysis prohibits Mastercard from establishing that alternative EEAs MIF would have met the criteria for exemption under Article 101(3): see paragraphs 82 - 89 above.

b. Furthermore, as accepted by the Tribunal in *AAM v Mastercard* [2021] CAT 16 as paragraphs 39 - 55, it is open to Mastercard to demonstrate, in the context of the counterfactual for damages, that if the 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 in the interchange fee: see paragraphs 109 - 113 below.

Domestic Transactions

93. As set out above, the EC Decision only relates to the EEA MIFs and expressly records that it did not make any findings in relation to bilateral interchange fees or domestic interchange fees.

94. In relation to Domestic Transactions, it is necessary to address debit cards and credit cards separately.

95. In relation to Maestro debit cards:

c. Prior to 15 August 2002, there was no Mastercard domestic debit card scheme in the UK.

d. The predecessor to Mastercard's debit card scheme in the UK was the Switch domestic debit card scheme. The Switch scheme was introduced in 1988 and was owned and controlled (through a subsidiary, S2 Card Services Limited ("S2")) by a number of UK banks. From around 1997, the Switch scheme introduced a secondary product – the Solo debit card – which provided limited functionality and were issued to minors and people with poor credit history. Mastercard had no involvement in the UK operations of the Switch scheme (including Solo) and it did not operate domestically under Mastercard's interchange network rules.

e. Subsequent to Mastercard's introduction of Maestro as an international debit card scheme in 1992, issuers of Switch (and Solo) cards could obtain licences from Maestro Inc permitting them to co-brand Switch (and Solo) cards as Maestro, in order to allow them to be used outside the UK by making use of the Maestro network for cross-border transactions. Mastercard's involvement (through Maestro Inc) was limited to cross-border transactions on the limited proportion of Switch cards which were co-branded Maestro.

f. Between 15 August 2002 and at least the end of 2004, the members of the Switch scheme migrated many of their cards to the Maestro brand by issuing new Maestro cards to their Switch cardholders ("Maestro UK"). However, Mastercard continued to have no involvement in the domestic part of Maestro UK until July 2009. S2 (as the representative of the Maestro UK licensees) set the domestic rules for Maestro UK during this period – the Maestro UK Domestic Rules.

g. After August 2002, the Switch scheme continued to operate as a domestic debit card scheme for those Switch cards which had not yet been migrated to Maestro and for Solo cards, with its operations becoming increasingly limited to Solo cards as the migration of Switch cards to Maestro UK took place. The limited functionality of Solo cards meant they were generally not for use outside the UK, although some Solo cards were co-badged with Maestro. However, co-badged Solo cards only participated in the Maestro scheme in relation to Cross-Border Transactions. Domestic Transactions could only take place through the Switch scheme (and not Maestro UK).

h. From August 2002 until ~~the end of the relevant period~~ 21 June 2009, under the Maestro UK Domestic Rules set by S2 (as the representative of the Maestro UK licensees) all Maestro UK licensees were required to agree domestic interchange fees bilaterally. In the event two licensees were unable to do so, the dispute was to be referred to arbitration, with a temporary domestic default interchange fee applying pending the arbitration. That temporary domestic default interchange fee was set by S2 based on analysis and calculations carried out by an independent third party. Mastercard had no involvement in the setting of this temporary fee. Save for this temporary fee, no default fallback interchange fee was set in relation to Maestro UK during the relevant period.

i. So far as Mastercard is aware, these interchange fee arrangements and the methodology used by S2 for setting the temporary domestic default interchange fee were adopted directly from the Switch scheme prior to 2002 and S2 continued to apply the same arrangements, methodology and temporary fees to the residual Switch scheme, including Solo cards.

j. In accordance with the Maestro UK Domestic Rules, from August 2002 until 21 June 2009 ~~the end of the relevant period~~ each issuing bank-acquiring bank pair in the Maestro UK scheme agreed domestic interchange fees bilaterally, without needing to resort to arbitration. Consequently, the temporary domestic default interchange fee did not in fact apply to any transactions. So far as Mastercard is aware, this was also the case for the Switch (and Solo) debit card scheme both before and after 2002.

k. Those bilaterally agreed domestic interchange fees (and the temporary domestic default interchange fee) were charged on an entirely different basis from the Maestro EEA MIFs (i.e. a fixed fee per transaction, rather than an ad valorem charge).

l. Furthermore, the average interchange fee on Maestro UK Domestic Transactions from 2002 until 21 June 2009 ~~the end of the relevant period~~ was significantly lower than the average Maestro EEA MIF for the same period. So far as Mastercard is aware, this was also the case for the Switch (and Solo) debit card scheme both before and after 2002.

96. In relation to Debit Mastercard:

a. In July 2006, Mastercard announced it was introducing Debit Mastercard in the UK and set a UK MIF which would apply in default of bilateral agreements.

b. This UK MIF for Debit Mastercard was not set by reference to the EEA MIF, but to the competitive conditions in the UK market, in particular the need for Debit Mastercard to be competitive with Visa Debit.

c. The UK MIF set by Mastercard for Debit Mastercard was set on an entirely different basis from the Maestro EEA MIF – a part ad valorem and part fixed fee per transaction, rather than a pure ad valorem charge.

d. Mastercard then subsequently changed the UK MIF for Debit Mastercard in 2007 so it was solely charged on a fixed fee basis, since the ad valorem element of the previous MIF was not acceptable to merchants, resulting in merchants refusing to accept Debit Mastercard.

e. The first Debit Mastercards were issued in the UK in 2008. There was no material volume of Debit Mastercard transactions prior to 21 June 2009 ~~the end of the relevant period~~.

f. If any material volume of Debit Mastercard transactions had taken place in the UK prior to 21 June 2009 ~~the end of the relevant period~~, the average interchange fee on Domestic Transactions for Debit Mastercard would have been significantly lower than the average Maestro EEA MIF for the same period, save in relation to the period from 21 June 2008 onwards when the Maestro EEA MIF was set to zero following the EC Decision.

97. Therefore, insofar as paragraphs 103 - 105 relate to debit cards:

a. No relevant UK Domestic Transactions on debit cards took place pursuant to a UK MIF at any point during the relevant period.

b. There was no scope for any issuing bank or acquiring bank to default to the Maestro EEA MIF in relation to UK Domestic Transactions on debit cards at any point during the relevant period.

c. The EEA MIFs did not act as a floor and/or guidance and/or a benchmark and/or a minimum price recommendation and/or a minimum starting point and/or a minimum level for domestic interchange fees in relation to the Maestro UK scheme (or in relation to the Switch (and Solo) debit card scheme) or the Debit Mastercard scheme.

d. Furthermore, Mastercard will refer to and rely upon the operation of the Maestro UK scheme and the Debit Mastercard scheme in the UK as showing that the Class Representative is wrong to contend that the EEA MIFs acted as a floor or as a benchmark for domestic interchange fees generally.

e. Consequently, there is no scope for a claim in relation to UK Domestic Transactions on debit cards.

98. In relation to Mastercard credit cards:

a. Until approximately 1989, there was no domestic Mastercard credit card scheme in the UK.

b. The predecessor to the Mastercard credit card scheme in the UK was the Access domestic credit card scheme. This scheme was introduced in 1972 and was owned by The Joint Credit Card Company Limited (which was in turn owned by Lloyds Bank, Midland Bank, National Westminster Bank and Williams & Glyn Bank). Mastercard had no involvement in the UK operations of this scheme.

c. In order to allow Access cards to be used outside the UK by making use of the Mastercard network for cross-border transactions outside Europe and the combined Mastercard/Eurocard network for cross-border transactions within Europe, issuers of Access cards obtained licences from MCII and MCE respectively permitting them to co-brand Access cards as Mastercards and/or Eurocards. Mastercard's involvement was limited to cross-border transactions on those Access cards which were co-branded.

d. Between approximately 1989 and approximately 1996, the members of the Access scheme migrated their Access cards to Mastercard by issuing new Mastercard cards to cardholders.

e. Mastercard & Eurocard Members (UK and Republic of Ireland) Forum Limited was established in 1989 by Mastercard's main UK (and Irish) licensees as a forum for addressing issues relating to Eurocard/Mastercard in the UK and the Republic of Ireland, including the setting of UK domestic rules, including rules in relation to interchange. In 1992, the name was changed to MasterCard Europay UK Limited ("MEPUK") and it relinquished responsibility for the Republic of Ireland.

f. From before the commencement of the claim period in May 1992, and thereafter (until a UK MIF was introduced as an automatic fallback in 1999 as described below), the combined effect of the MCII and Eurocard rules that applied to the UK (and from 1996 the UK Domestic Rules) was that UK issuing banks and acquiring banks were required to agree domestic interchange fees bilaterally. In the event that two licensees were unable to do so, the dispute was to be referred to arbitration.

g. The separate dispute resolution provisions in the MCII and Eurocard scheme rules provided for resolution of disputes between banks who failed to agree a bilateral

rate, and as to the rate that would apply pending arbitration. At the beginning of the claim period (in May 1992):

i. Eurocard's rules provided that where two member banks failed to agree intra-country interchange fees bilaterally (as required by the rules), the dispute was to be notified to Eurocard. Eurocard was to arbitrate the dispute according to the outcome of a cost study. The "international fee" (i.e. the inter-regional rate set by MCII) was to apply temporarily following the notification of the dispute.

ii. MCII's rules provided that a dispute between members having at least 10% of the total (issuer and acquirer) volume for a country was to be submitted to the International Advisory Committee of the Board of Directors of MCII. In the period before any arbitration, "*the then effective intracountry interchange fee*" was to apply. MCII's rules also provided that, absent disagreement between members having at least 10% of the total UK Mastercard volume, "*the intracountry interchange fee in effect*" should apply.

h. MEPUK sought clarification from MCII in 1992 as to how any dispute would be resolved, including what interchange fee would apply in the interim period pending an arbitration decision. In June 1992, MCII advised that the then effective intra-country rate would apply pending arbitration, and that any arbitration would be handled as quickly as possible.

i. In December 1993, the MCII rules were revised. The December 1993 MCII rules provided that where members were unable to agree on interchange fees, the disagreement would be submitted to the regional Mastercard organisation (in this case, MCE) for determination in the first instance. Where the dispute was between members with more than 10% of volumes, the dispute could be appealed to the Executive Committee of the board of MCII. Mastercard could order the preparation of cost studies for use in determining any dispute. Pending a decision on a dispute, "*the then effective intracountry interchange fee applicable to all members*" was to apply, or if there was no such fee, the international interchange fee applicable to transactions for that region was to apply.

j. In order to inform the negotiation of bilateral agreements and any arbitration if required, from 1991 onwards, periodic costs studies were carried out for the UK by an independent third-party engaged by MCII (on the request of MEPUK), Edgar Dunn & Co. ("EDC"). EDC collated costs information from each UK member bank, which it kept confidential, and measured the member banks' overall costs for different types of transactions (e.g. standard or electronic), taking into account various different categories of costs, such as: processing; the interest-free period; the cost of fraud; and the cost of cardholder default. The purpose of these UK specific cost studies was to provide information which would allow bilateral negotiations to take place and inform any arbitration decision on interchange fees in the event arbitration was required to resolve a dispute. Between 1992 and 1997, MEPUK's board would consider and take note of the finalised UK cost study rates, which were also circulated to the members.

k. So far as Mastercard is aware, prior to May 1992, as required under the rules applicable to the UK, all Mastercard licensees had bilateral interchange arrangements and interchange fees were on average higher than the EEA MIF in place at the time.

l. Following the completion of the first EDC UK cost study for 1991 (and periodically thereafter) Mastercard's licensees negotiated bilateral agreements (in the knowledge that they could arbitrate in the event of a dispute) using the UK cost study rates as a key point of reference. Mastercard understands that at least some banks would also take account of competitive and commercial considerations in negotiating bilateral agreements; for example, ensuring Mastercard's rates were competitive with Visa so as to increase levels of acceptance of Mastercard by merchants.

m. UK cost studies were carried out using data for 1991, 1992, and then every two years from and including 1993. The total costs calculated by these UK costs studies were higher than the EEA MIF in force at the time. For example, the 1993 UK cost study calculated costs of 1.44% standard and 1.20% electronic. These costs were higher than the EEA MIF then in force of 1% for all transactions.

n. Throughout this period, UK domestic interchange fees were agreed on a bilateral basis at rates which were on average higher than the EEA MIFs in place at the time.

By (at the latest) June 1994, the majority of Domestic Transactions took place pursuant to bilateral agreements with rates of 1.3% (standard) and 1.0% (electronic).

o. In December 1994, the Director General of Fair Trading informed MEPUK that he did not intend to take any action against fallback interchange fee arrangements, since he considered them to be *"unavoidable to avoid disruption of the running of the card markets"*.

p. In around November 1996, a UK domestic rule book was adopted (and approved by MCE). This required UK issuing banks and acquiring banks to agree domestic interchange fees bilaterally. In the event that two licensees were unable to do so, the dispute was to be referred to arbitration. The initial version of the domestic rule book provided that the EEA MIF was to apply as a temporary default pending arbitration.

q. However, MEPUK wished to ensure that the result of any arbitration would take effect from the point at which a dispute between any members was submitted for arbitration. In or around June 1997, MEPUK amended the new UK Domestic Rules so that any arbitration award would have retrospective effect to the date on which the request for arbitration was received, thereby ensuring that the EEA MIFs could not apply in any substantive way to Domestic Transactions in the UK.

r. In practice, to Mastercard's knowledge, UK licensees continued to apply existing bilateral agreements and/or agree new bilateral agreements with domestic interchange fees predominantly at rates of 1.3% (standard) and 1.0% (electronic).

s. In October 1997, MEPUK concluded that these existing UK rates should be adopted as the temporary default pending arbitration, although the arbitration award would then be back-dated.

t. In or around 1999, MEPUK amended the UK Domestic Rules so that these rates (1.30% standard and 1.00% electronic) would apply automatically in the absence of bilateral agreement. This was the first time a default MIF was formally adopted for UK Domestic Transactions.

u. The UK MIF adopted in 1999 reflected the bilateral rates which had been applied by the main UK Mastercard licensees for a number of years, as well as the 1997 UK cost study rates which were 1.3% standard and 1.0% electronic.

v. It is denied that the EEA MIFs acted as a floor, starting point or benchmark for bilateral interchange fees or the UK MIF. The setting of the rates took account of, *inter alia*, the UK cost studies, and competitive considerations. The rates adopted were the same or similar to those applicable under the Visa scheme in the UK. The UK MIFs (of 1.3% standard and 1% electronic) were higher than the EEA MIFs then in force (1.15% standard, 0.9% electronic and 0.75% secured electronic).

w. Thereafter, the UK MIFs in the UK Domestic Rules were determined by MEPUK's board by reference to the rates calculated by the UK cost studies and also taking into account the MEPUK board's views of competitive conditions in the market.

x. So far as Mastercard is aware, following the introduction of the UK MIFs as the automatic fallback in or around 1999, Mastercard's UK licensees chose to transact at these default rates rather than continuing to agree bilateral agreements (which had in any event already largely applied the same rates for several years), although the UK Domestic Rules continued to provide for arbitration in default of agreement and for the UK MIFs to apply as the temporary fallback rate pending arbitration. As a result, by 1999 and onwards there was no material volume of transactions pursuant to bilateral agreements.

y. In April 1999, MEPUK introduced four new categories of UK MIF (with rates between 1.1% and 1.3%), alongside the existing UK MIFs in the UK Domestic Rules. These rates were identical to those offered by Visa in the UK. Each of the UK MIFs remained higher than the equivalent EEA MIFs then in force (which were between 0.75% and 1.15%).

z. In October 2001, MEPUK introduced a further new UK MIF for Chip transactions of 0.95% less a discount of 0.05% (which was intended to be temporary but was never repealed), giving an effective rate of 0.9%. Visa adopted a similar new rate at around the same time.

aa. Despite subsequent increases to the EEA MIFs in 2002 and 2003, the UK MIFs remained unchanged and higher than the EEA MIFs.

bb. In June 2002, the corporate entity which represented the UK banks changed from MEPUK to MasterCard UK Members Forum Limited ("MMF***"***). This did not alter the UK Domestic Rules or the UK MIFs.

cc. In October 2003, Visa reduced its UK MIFs.

dd. With effect from 1 October 2004, MMF introduced new UK MIFs, which largely mirrored the reductions implemented by Visa the previous year. This included MIFs which were below the level of the equivalent EEA MIFs.

ee. On 18 November 2004, Mastercard revoked the entitlement of UK licensee banks to set the UK MIF and began setting the UK MIF itself. Mastercard continued to set the UK MIF by reference to the UK cost study and Mastercard's view of market considerations.

ff. In April 2006, Mastercard first made substantive changes to the UK MIFs withdrawing a number of categories, modifying other rates and also introducing higher UK MIFs for premium cards. Again, this included MIFs which were below the level of the equivalent EEA MIFs.

99. Consequently:

a. From prior to 1992 until 1999, interchange fees were agreed bilaterally between licensees in the knowledge that, in default of agreement, rates would be determined by arbitration and were likely to be based on the rates from the UK cost studies. In practice, these interchange fees were the same as or similar to the interchange fees in the Visa scheme. The EEA MIFs were materially lower and had no impact on UK domestic interchange fees.

b. Between 1999 and 2004, there was a UK MIF set by the UK licensee banks through their wholly owned subsidiaries. This was originally set in line with the levels at which domestic bilateral agreements had primarily been agreed over the previous years and was in line with the 1997 cost study. The UK MIF was subsequently amended to reflect updates on UK costs resulting from UK cost studies and the MEPUK board's views of market considerations, including changes made by Visa (which had a substantially larger share of the UK credit card market than Mastercard) to its UK MIFs. The EEA MIFs were materially lower until October 2004 (when new UK MIFs were set, some of which were below the EEA MIFs) and had no impact on these UK MIFs.

c. From November 2004, the UK MIFs were set by Mastercard. Mastercard set rates based on UK cost studies and competitive conditions in the UK market. The EEA MIFs had no impact on these rates.

100. Therefore, insofar as paragraphs 103 - 105 relate to credit cards:

a. As set out above, UK Domestic Transactions on Mastercard credit cards only took place pursuant to a UK MIF from 1999 onwards. The first sentence of paragraph 103 is accordingly denied.

b. As to the allegation in paragraph 103(a) that the scheme rules provided for the EEA MIF to apply by default, the operation of the scheme rules in the UK is addressed at paragraph 98 above. Save as set out therein, paragraph 103(a) is denied.

c. The EEA MIFs did not act as a floor and/or guidance and/or a benchmark and/or a minimum price recommendation and/or a minimum starting point and/or a minimum level for the setting of either bilateral domestic interchange fees (alternatively the vast majority of bilateral domestic interchange fees) or the UK MIF, as particularly confirmed by the Maestro UK scheme and the Debit Mastercard scheme in the UK. The factors which were relevant to the level at which bilateral UK interchange fees were agreed and the UK MIFs were set are set out at paragraph 98 above. In relation to recitals 405, 416 and 421 of the EC Decision, see paragraphs 62, 66 and 67 above. Save as aforesaid, paragraph 103(b) is denied.

d. The allegation in paragraph 103(c) as to weighted voting in MEPUK or MMF is too vague to plead to and no admissions are made. The roles of MEPUK and then MMF in the setting of UK domestic interchange fees and the matters which they took account in doing so are addressed above. Neither had any role in the setting of UK MIFs from November 2004 onwards. In any event, even if the weighted voting had been in favour of the issuing banks, this would contradict the contention that domestic interchange fees would have been agreed at a lower level absent the EEA MIFs, since there would have been no reason for the issuing banks to agree to this.

e. In relation to the incentives of Mastercard's UK issuing banks, see paragraphs 54(b) and 67 above. Save as aforesaid, paragraph 103(c) is denied.

f. In the premises, paragraph 103(d) is denied. Further and in any event, even if the EEA MIFs had operated as a floor and/or guidance and/or a benchmark and/or a minimum price recommendation and/or a minimum starting point and/or a minimum level for UK domestic interchange fees for credit cards, it is denied that UK domestic interchange fees (including the UK MIFs once set) would have been

agreed/set at a lower level either during the relevant period or in the year to 21 June 2009 if the EEA MIFs had been set at a lower level during the relevant period:

i. In relation to the period prior to 2004 (when Mastercard took over setting the UK MIFs for Mastercard credit cards), domestic interchange fees were set/agreed taking account of UK domestic costs and the competitive conditions in the UK market, including in particular the comparable domestic interchange fees for Visa and Access (the UK domestic credit card scheme) and the competitive threat posed by Visa Debit, Switch/Solo (the UK domestic debit card scheme), Amex, store cards and other payment methods. The same factors would have applied even if alternative EEA MIFs had been set at a lower level and the same interchange fees would have been agreed/set by reference to these factors.

ii. In relation to the period after 2004, Mastercard continued to set the UK MIF by reference to UK domestic costs and competitive conditions in the UK market. The setting of alternative EEA MIFs at a lower level or zero would not have altered Mastercard's analysis of the UK MIFs required to be competitive in the UK market and consequently the UK MIFs set.

iii. Mastercard refers to paragraphs 114 - 123 below in relation to the effect on transaction volumes of Mastercard's UK domestic interchange fees being set at a materially reduced level. This demonstrates why UK domestic interchange fees would not have been set/agreed at a materially reduced level, since this would have led to issuing banks migrating to card payment schemes other than Mastercard (or remaining with competing schemes including Access and Switch) and the potential collapse of the Mastercard scheme in the UK.

iv. Mastercard will also refer to and rely upon the fact that UK domestic interchange fees did not fall after June 2008 despite the EEA MIFs being reduced to zero between 21 ~~12~~ June 2008 and July 2009 and then being set at a substantially reduced level from July 2009 to date. The contention in paragraph 105A(b) that the EEA MIFs prior to 21 June 2008 inflated domestic MIFs in the year to 21 June 2009 contradicts the primary claim of the Class Representative that the current EEA MIFs at any time operated as a floor to domestic MIFs.

v. Furthermore, MIFs only apply in the absence of a bilateral agreement between an issuing bank-acquiring bank pair. However, if a much lower or a zero UK MIF had been in place, it is likely that some or all issuing bank-acquiring bank pairs would have entered into bilateral agreements on interchange fees rather than applying a low or zero default interchange fees. The negotiation of bilaterals would have been incentivised by the fact that the alternative was for issuing banks to issue Visa, Access or American Express cards instead which would have resulted in the same or higher charges to acquiring banks (or their customers) in any event.

vi. As set out above, the Mastercard scheme rules provided for arbitration in default of bilateral agreement on alternative terms of dealing between issuing banks and acquiring banks. For the avoidance of doubt, while it is accepted that bilateral agreements on interchange fees largely ceased to exist once the UK MIF was adopted as the automatic fallback in or around 1999, that was in the context of a UK MIF which was set at a competitive level, and would not have been the case with low or zero interchange fees. Mastercard will refer to and rely upon the fact that bilateral agreements were agreed by issuing banks and acquiring banks in the UK for the Mastercard scheme prior to around 1999 and for the Switch and subsequently UK Maestro debit card schemes until 2009.

vii. Consequently, to the extent that parties were not voluntarily able to agree alternative interchange fee arrangements, a party who wished to deviate from the default interchange fee could have compelled such an outcome by applying for arbitration. The result of any such arbitration is likely to have been an interchange fee similar to the level of interchange fees which in fact applied since the interchange fees in fact adopted took account of the costs involved in providing the relevant payment card product and the competing rates available in the market and it is likely that any arbitration would have taken account of the same considerations.

101. There is, therefore, no scope for a claim in relation to UK Domestic Transactions in any event. Alternatively (and subject to the other matters set out below), any claim is limited to the difference between the actual UK domestic interchange fees and what UK

domestic interchange fees would have been in the counterfactual and any such difference would have been minimal.

The Run-Off Overcharge claim

101A. In relation to paragraphs 105A and 105B: For the reasons set out above and below, it is denied that the Represented Persons suffered any loss as a result of the Infringement during the relevant period or the two-year period to 21 June 2010 or have any claim for damages in relation to those periods:

a. In relation to the Domestic IFs Run-Off Overcharge claim (which logically arises prior to the MSC Run-Off Overcharge claim) which is limited to the period 22 June 2008 to 21 June 2009:

i. The fact that UK domestic interchange fees did not fall over the period 22 June 2008 to 21 June 2009 despite the EEA MIFs being reduced to zero during this period merely demonstrates that the EEA MIFs had no causative impact on UK domestic interchange fees. During the period 22 June 2008 to 21 June 2009, Mastercard continued to set the UK MIFs for Mastercard branded cards by reference to UK domestic costs and competitive conditions in the UK market. Neither the historic rates of the EEA MIFs prior to 21 June 2008 nor the fact that the EEA MIFs had temporarily been set to zero had any impact on Mastercard's analysis of the UK MIFs required to be competitive in the UK market and consequently the UK MIFs set. Furthermore, the contention in paragraph 105A(b) that the EEA MIFs prior to 21 June 2008 inflated UK domestic MIFs in the year to 21 June 2009 contradicts the primary claim of the Class Representative that the current EEA MIFs at any time operated as a floor to domestic MIFs. It is consequently denied that the EEA MIFs prior to 21 June 2008 had any effect on Mastercard's UK domestic interchange fees during the period 22 June 2008 to 21 June 2009.

ii. Alternatively, to the extent that the EEA MIFs prior to 21 June 2008 had a delayed impact on UK MIFs after the relevant period (which is denied), credit must be given for an equivalent delayed impact at the start of the claim period (after taking account of limitation), which will offset (in full or part) the claim in respect of the year to 21 June 2009.

b. In relation to the MSC Run-Off Overcharge claim which is limited to the two-year period 22 June 2008 to 21 June 2010:

i. Mastercard repeats paragraphs 82-89 above (in relation to exemption), paragraphs 93-101 above (in relation to Domestic Transactions) and paragraphs 102 - 123 below (in relation to the costs incurred by businesses which accepted Mastercards).

ii. It is consequently denied that the costs incurred by businesses which accepted Mastercard would have been any lower during the period 22 June 2008 to 21 June 2010 even if (which is denied) the EEA MIFs prior to 21 June 2008 were set at a level higher than the lawful rate and resulted in increased costs for businesses which accepted Mastercard during the relevant period. Alternatively, any such effect would have been limited and temporary given the many other factors which affected the level of MSCs.

iii. Alternatively, even if (which is denied) the costs incurred prior to 21 June 2008 by some or all businesses which accepted Mastercard were increased as a result of the EEA MIFs being set at a level higher than the lawful rate, it is admitted and averred that there would have been no continuing effect on costs in respect of the period 22 June 2008 to 21 June 2010 for merchants on Interchange Plus or Interchange Plus Plus arrangements.

101B. Without prejudice to the above, paragraph 105C is admitted and averred.

Did businesses which accepted Mastercard incur higher costs

102. In relation to paragraph 106 and 106A: Even if (which is denied) the EEA MIFs were set at a level higher than the lawful rate and even if (which is denied) this had any effect on domestic interchange fees either in the relevant period or in the year to 21 June 2009, it is denied that the effect of the breach is properly to be measured on the assumption that merchants' costs would have been reduced by the amount of any such reduction in interchange fees since:

a. MSCs would not have been materially lower or alternatively materially lower for the vast majority of merchants if Mastercard interchange fees had been lower;

b. there would have been changes to the benefits received by merchants which would have offset, either in whole or part, any reduction in interchange fees; and

c. transactions would have taken place in whole or in part through other schemes and payment methods and so merchants would have incurred the same or higher costs in any event.

Acquirer pass-on

103. Even if UK acquiring banks did pay higher interchange fees than would otherwise have been the case during the relevant period or the year to 21 June 2009 (both of which are ~~is~~ denied), the Class Representative needs to show that UK MSCs would have been lower if alternative EEA MIFs had been set at a lawful level during the relevant period and the amount of any such reduction over the course of the 18 ~~16~~-year claim period.

104. Mastercard refers to the following:

a. The EEA MIFs only applied to a tiny percentage of transactions in the UK – only 5% of Mastercard transaction volumes in the UK in 2000.

b. As set out at paragraph 55d above, in the UK during the relevant period, acquiring banks generally charged one single blended MSC which applied to all types of credit and charge card transactions (both domestic and cross-border) on both Visa and Mastercard (and also to the UK domestic credit card schemes Access) and one single blended MSC which applied to all types of debit card transaction (both domestic and cross-border) on both Visa and Mastercard (and also to the UK domestic debit card scheme Switch).

c. Visa had a much greater market share than Mastercard in the UK credit card market until at least 2005 and a much greater market share than Mastercard in the UK debit card market (rising to a market share of over 98%). Therefore, Visa's interchange fees were far more important than Mastercard's interchange fees in determining acquiring banks' costs.

d. Due to the concentration in the UK consumer banking market and in particular the dominance of the High Street Banks, there was limited competition between acquiring banks particularly for the business of small and medium sized merchants.

e. For small and medium sized merchants, MSCs would often be multiples of the relevant interchange fee.

f. Information on interchange fees was not publicly available throughout the relevant period (save that the EEA MIFs were published from around 2004 onwards).

105. Mastercard will refer to the Payment Systems Regulator's ("PSR") November 2021 report on the UK acquiring market which concluded that there was *"little or no pass-through"* of reductions in interchange fees as a result of the Interchange Fee Regulation

into lower MSCs for both small and medium merchants and large merchants with an annual card turnover below £50 million. The PSR concluded that there was only clear evidence of pass-through in relation to those very large merchants which operated based on Interchange Plus Plus arrangements. Mastercard acknowledges that the PSR Report is dealing with a later period (i.e. 2014 to 2016) than the relevant period for this claim. However, since the changes which have taken place in the acquiring market since 1992 to June 2010 ~~2008~~ (including multiple new entrants, publication of interchange fee rates, the general prohibition on blended rates in the IFR, increased card usage (and so the importance of MSCs as a cost) and the growth of Interchange Plus Plus arrangements) have increased competition, they would be expected to promote pass-through of cost reductions, rather than the reverse. In addition, the IFR changes applied to both Mastercard and Visa, whereas any reduction in Mastercard's MIFs would have had a much smaller effect on acquiring banks' costs.

106. In those circumstances, it is denied that UK MSCs would have been materially lower or alternatively materially lower for the vast majority of merchants during the relevant period or the two-year period to 21 June 2010 if interchange fees had been lower during the relevant period or in the year to 21 June 2009.

107. Alternatively, the extent and timing of any pass-through of any reduction in interchange fees into MSCs is likely to have varied substantially between different categories and sizes of merchants, between different geographic areas and across the 18 ~~16~~-year claim period and the Class Representative is put to strict proof of the relevant pass-on rates and the timing of any such pass-on. To the extent that interchange fees had a delayed impact on MSCs after the relevant period (which is denied), credit must be given for an equivalent delayed impact at the start of the claim period (after taking account of limitation), which will offset (in full or part) the claim in respect of the two-years to 21 June 2010.

107A. Insofar as it is alleged at paragraph 106A that there is a separate Overcharge incurred by Merchants which is distinct from the pass-on of the alleged Overcharge and Domestic IFs Run-Off Overcharge, this is denied. If (which is denied), interchange fees had a delayed impact on MSCs after the relevant period, this would be an example of delayed pass-on and not a freestanding loss.

108. In relation to recitals 208, 404, 405 and 425 - 436 of the EC Decision, see paragraphs 60 - 62 and 68 above.

Changes to Merchant Benefits

109. In addition to interchange, the Mastercard scheme rules included default rules (i.e. rules which apply in default of a bilateral agreement in relation to transactions where the issuing bank and acquiring bank are not the same legal entity) which determine:

a. when an issuing bank is required to make a payment to an acquiring bank even in respect of a fraudulent transaction;

b. when an issuing bank is required to make a payment to an acquiring bank even when the cardholder defaults on payment; and

c. when the issuing bank is required to make payment.

110. In summary, these default rules required issuing banks generally to make payments to acquiring banks even in respect of fraudulent transactions, to pay acquiring banks even when a cardholder defaulted and to make payment within a short period.

111. Both the EEA scheme rules and the UK Domestic Scheme Rules in relation to each of these issues which were in place during the relevant period (and, in relation to the UK, were in place during the year to 21 June 2009) were determined in the context of the EEA MIFs or the UK MIFs (or bilateral interchange fees), respectively then in force which provided a contribution to the costs which issuing banks incurred in complying with these default rules. Had the Mastercard scheme been required to operate with substantially lower (or zero) interchange fees during the relevant period or in the year to 21 June 2009, then the default rules in relation to these issues would have been materially different, since acquiring banks/merchants could not expect to receive the benefit of services to which they were not contributing and it would not be commercially viable for issuing banks to provide these services to merchants without any contribution to the costs of doing so from acquiring banks/merchants.

112. The extent of any changes which would have taken place depends upon the level of interchange fees that would have applied. However, Mastercard will contend that the effect of any changes made would have been to transfer additional costs to acquiring banks to an extent which would have offset (either in whole or part) the reduction in the interchange fee.

113. Any consideration of the impact of lower interchange fees on UK merchants must, therefore, take account of the value of these benefits which merchants would not have received in the counterfactual. Mastercard will contend that, when account is taken of these benefits, the Represented Persons have no claim for damages.

Transaction Volumes

114. Alternatively, if the Mastercard scheme had operated with significantly lower or zero interchange fees, particularly lower or a zero UK domestic interchange fees, during the relevant period or in the year to 21 June 2009, and was not able to make corresponding changes to other default rules, then the number of transactions to which the lower or zero interchange fees applied would have been substantially lower and potentially zero.

115. Instead, to the extent that issuing banks did not receive interchange fees comparable to those which they in fact received, it is likely that some or all issuing banks would have issued Visa, Access, Switch or American Express cards instead or in greater volumes, with the result that the same or similar MSCs would have applied in any event both during the relevant period and in the two-years to 21 June 2010. It is also unlikely that UK banks would have decided to move their credit card business from Access to Mastercard and from Switch to Maestro unless Mastercard and Maestro had been able to offer competitive interchange fees. Therefore, in the counterfactual, switching from these schemes would not have occurred.

116. Mastercard will refer to and rely upon the analysis and conclusions of Mr Justice Popplewell in *AAM v Mastercard* [2017] EWHC 93 (Comm) at paragraphs 220 - 251 that if Mastercard's interchange fees were not competitive with those of Visa, Mastercard would have lost its entire business to Visa. While the Court of Appeal concluded that this was not a relevant consideration for the purpose of Article 101(1), there was no dispute about the accuracy of this analysis as a matter of fact and switching to rival card schemes (or other payment methods) is a relevant consideration for the purpose of damages. Mastercard notes that the Tribunal held in *AAM v Mastercard* [2021] CAT 16[4] that Mastercard could only rely on switching to Amex and not Visa. However, the CAT's reasons for concluding that in that case Mastercard could not rely on switching to Visa do not apply to the present case in circumstances where the

[4] At paragraphs 13 - 37.

Commission had made an exemption decision in 2002 in relation to Visa's EEA MIFs, so Mastercard is not relying on the operation of an unlawful scheme by a third party.

117. Further or alternatively, it is likely that some or all cardholders would have moved to or remained with Visa, Access, Switch or American Express directly, since if issuing banks were recovering a smaller percentage of their costs from acquiring banks, they would have had to recover a larger percentage from Mastercard/Maestro cardholders or provided more limited benefits to them.

118. Even if cardholders did not move to Visa or American Express, it is likely that a reduction in interchange fees (and corresponding increase in cardholder costs) would have resulted in a reduction in their Mastercard/Maestro card usage. While part of this reduction may have been offset by an increase in transactions through other, more expensive, payment mechanisms, it is also likely to have resulted in an overall reduction in transactions, including cross-border transactions.

119. Mastercard notes that Visa, Access (until around 1996) and Switch (throughout the relevant period) offered comparable interchange fees to those offered by the Mastercard/Maestro schemes throughout the relevant period and consequently that Visa, Access and Switch cards in general offered cardholders similar benefits to those provided by Mastercard/Maestro cards.

120. Consequently, to the extent that issuing banks or cardholders moved to or remained with Visa, Access or Switch, merchants would have received no or limited savings as compared to the costs which they in fact incurred as a result of accepting Mastercard cards.

121. Since 1997, American Express has offered financial institutions the ability to issue American Express cards and has made payments to issuing banks for doing so which match or exceed those which issuing banks have received under the Mastercard/Maestro schemes through interchange fees. American Express also charges merchants MSCs which are typically substantially higher than those charged by acquiring banks of Visa or Mastercard/Maestro transactions and, as a result, has been able to offer cardholders and issuing banks substantial additional benefits/incentives.

122. Consequently, to the extent that issuing banks or cardholders moved to American Express, UK merchants would have incurred additional costs as compared to the costs which they in fact incurred as a result of accepting Mastercard/Maestro cards.

123. Mastercard will, therefore, contend that all or a substantial proportion of the transactions which in fact took place at UK merchants on Mastercard/Maestro cards during the relevant period and in the two-years to 21 June 2010 would have taken place at the same or higher cost in any event and a significant number of transactions would not have taken place at all. When account is properly taken of these matters, it is denied that merchants incurred any overcharge and, therefore, that the Represented Persons could in fact have suffered a loss in any event.

Pass on to consumers via higher prices

124. As set out by the Supreme Court in *Sainsbury's Supermarkets v Visa* [2020] UKSC 24 at paragraphs 205 - 206, there are four principal options for a merchant faced with the imposition of a cost: (i) a merchant can do nothing in response to the increased cost and thereby suffer a corresponding reduction of profits or an enhanced loss; or (ii) the merchant can respond by reducing discretionary expenditure on its business such as by reducing its marketing and advertising budget or restricting its capital expenditure; or (iii) the merchant can seek to reduce its costs by negotiation with its many suppliers; or (iv) the merchant can pass on the costs by increasing the prices which it charges its customers.

125. Therefore, in relation to paragraph 107, even if (which is denied) merchants did incur higher overall costs during the relevant period and/or in the two-years to 21 June 2010 as a result of the EEA MIFs during the relevant period, in order to establish that the Represented Persons suffered loss and the amount of that loss, the Class Representative needs to show whether and (if so) the extent to which the retail prices charged by merchants during the relevant period and/or in the two-years to 21 June 2010 were higher than they would otherwise have been as a result of those higher costs being passed on by merchants into retail prices (rather than resulting in reduced profits or enhanced losses and/or merchants reducing discretionary expenditure and/or merchants seeking to reduce their costs by negotiation with their suppliers).

126. The existence, ~~and~~ extent and timing of any pass-on into retail prices is likely to have varied between different categories and sizes of merchants, between different geographic areas, and across the 18 ~~16~~-year time period covered by the Claim ~~period~~ and the Class Representative is put to strict proof of the relevant pass-on rates and the timing of any such pass-on:

a. In relation to recitals 410, 411, 442, 505 and 664 of the EC Decision, see paragraphs 64, 68, 69 and 75 above. In relation to recital 740, Mastercard repeats paragraph 75 above, *mutatis mutandis*.

b. In relation to the General Court's conclusion that "*it is reasonable to conclude that merchants pass the increase in the amount of the MSC, **at least in part**, on to final consumers*" (emphasis added), neither the Commission nor the General Court made any findings in relation to extent to which merchants would pass on any increase in MSCs to final consumers or the timing of any such increase, still less whether this happened in the UK (and if so to what extent and over what timescale) either generally or throughout the 18 ~~16~~-year claim period. This paragraph does not, therefore, assist the Class Representative in establishing the extent to which UK retail prices during the relevant period and/or in the two-years to 21 June 2010 were higher (if at all) as a result of the EEA MIFs during the relevant period.

c. It is denied that the preamble to an EC Regulation (particularly one which is 23 years after the start and seven years after the end of the relevant period) is of any evidential value or can assist the Class Representative in establishing the extent to which UK retail prices during the relevant period and/or in the two-years to 21 June 2010 were higher (if at all) as a result of the EEA MIFs during the relevant period.

d. It is denied that a general assertion by the Commission made in an inquiry report is of any evidential value or can assist the Class Representative in establishing the extent to which UK retail prices during the relevant period and/or in the two-years to 21 June 2010 were higher (if at all) as a result of the EEA MIFs during the relevant period.

e. In relation to Mastercard's position in other litigation, 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. Mastercard's position in the *Sainsbury's* litigation was based on analysis of detailed evidence in relation to Sainsbury's internal pricing methodologies in relation to the period 2007 to 2014, in the context of one of the largest companies in the UK which competed in the highly competitive supermarket sector against a number of similar very large businesses, all of which had interchange plus plus arrangements with their acquiring banks. The same

analysis and conclusions would not apply to different businesses and different time periods. Furthermore, the Tribunal rejected Mastercard's submissions and held (at paragraph 465) that the way in which the UK MIF was dealt with by Sainsbury was *"unknowable"* so it was *"impossible"* to say what proportion of this cost was passed on in the form of higher prices. The Court of Appeal rejected Mastercard's appeal on this finding.

f. In relation to public statements of the British Retail Consortium and EuroCommerce, Mastercard notes that these are merchant representative bodies which have been seeking to reduce costs for their members and putting arguments on their behalf in the way which was most likely to attract catch the attention of regulators and garner public support. So far as Mastercard is aware, neither the BRC nor EuroCommerce has ever carried out any detailed analysis in relation to the pricing methodologies of its members, which are highly confidential matters which merchants would be reluctant to share with the BRC or Eurocommerce, since they include representatives of their competitors. It is, therefore, denied that statements made by these bodies are sufficient to establish passing-on into retail prices either generally or at any particular level.

127. In relation to paragraph 108:

a. Mastercard repeats in paragraph 37 above in relation to surcharging.

b. In the premises, even if merchants did incur higher costs during the relevant period and/or in the two-years to 21 June 2010 as a result of the EEA MIFs during the relevant period (which is denied), some merchants would have passed on those costs through higher charges to cardholders (including cardholders who are not Represented Persons, such as commercial cardholders or consumer cardholders using their personal cards for transactions which were not for their personal benefit), rather than through higher retail prices generally.

128. In relation to paragraph 109 and recitals 510 - 521 of the EC Decision, it is denied that these recitals are part of the essential basis for the operative part of the decision and, therefore, binding on Mastercard or the Tribunal. In any event, these recitals do not address the position in the UK and Mastercard repeats paragraph 37 above.

129. Paragraph 110 is noted.

130. Save that it is denied that the Represented Persons have suffered any loss, paragraph 111 is admitted.

Account must be taken of benefits

131. Interchange fee revenue was an important income stream for UK issuing banks during the relevant period. If that income stream was substantially reduced, it is likely that a substantial part (and potentially 100%) of this loss of revenue would have been passed-on by Mastercard issuing banks to Mastercard cardholders in the form of reduced benefits and/or higher fees or interest.

132. Any quantification of loss must give credit for the additional benefits received by Represented Persons as a result of interchange fees being higher than would otherwise have been the case. These additional benefits will offset in full (or in part) any disadvantage to Represented Persons from higher prices.

Particulars of loss and damage

133. Even if purchasers at retailers which accepted Mastercard cards did pay higher prices during the relevant period and/or in the two-years to 21 June 2010 (which is denied), the Class Representative needs to show the extent to which those higher prices were paid by Represented Persons rather than third parties.

134. Mastercard notes that the effect of the Class Definition and the Domicile Date is that the Claim does not include:

a. Claims on behalf of individuals who were under 16 years of age at the time when they purchased goods and/or services during the relevant period from UK businesses that accepted Mastercard cards and individuals who only turned 16 on or after 22 June 2008 (paragraph 23(d)).

b. Claims on behalf of individuals who purchased goods and/or services during the relevant period from UK businesses that accepted Mastercard cards at a time when they were not resident in the UK for a continuous period of at least three months, including visitors to the UK and individuals resident overseas who purchased from businesses with a physical presence in the UK through channels such as the internet, mail order or via telephone shopping (paragraph 23(b)(iv)), and those individuals who only became resident in the UK for a continuous period of at least three months on or after 22 June 2008.

c. Claims on behalf of individuals who were resident in the UK and over 16 years of age when they purchased goods and/or services during the relevant period from UK businesses that accepted Mastercard cards but who died prior to 8 September 2016 (paragraph 23(iii)).

d. Claims on behalf of individuals who were resident in the UK and over 16 years of age when they purchased goods and/or services during the relevant period from UK businesses that accepted Mastercard cards, but who were no longer resident in the UK on the Domicile Date (i.e. emigrants and temporary residents who have subsequently left the UK) and did not opt in (paragraph 22).

e. Claims on behalf of natural persons who purchased goods or services in the course, or for the purposes, of business, including sole traders and partners and also employees who purchased goods and services on behalf of or for reimbursement by their employer (paragraph 23(b)(i)).

f. Claims on behalf of non-natural persons, including government bodies, charities, trade unions, unincorporated associations and incorporated businesses, which purchased goods and/or services ~~during the relevant period~~ from UK businesses that accepted Mastercard cards (paragraph 23(b)(i)).

g. Claims on behalf of successors in title, e.g. trustees in bankruptcy in respect of individuals/claims that would otherwise fall within the class definition.

135. The Class Representative is put to strict proof of the extent to which any increase in retail prices was paid by Represented Persons (in the capacity in which they are represented) rather than these and any other third parties.

The quantum figures in the Claim

136. In relation to paragraphs 111A and 112, it is denied that damages in respect of the alleged Overcharge are properly to be measured by calculating the total interchange fees paid by UK acquiring banks on Domestic and Cross-Border Transactions for the reasons set out above. However, even if the total interchange fees paid by UK acquiring banks on Domestic and Cross-Border Transactions was relevant, the figures in paragraph 112 (and its sub-paragraphs) are inflated and incorrect. Mastercard has set out below and in **Annex 1** the best figures that are presently available to it, although Mastercard reserves the right to re-visit these figures following disclosure, factual evidence and expert reports.

137. In relation to paragraph 112(b), the figures in the table below paragraph 112(b) for the Volume of Commerce (VOC) in the UK during the relevant period in which a Mastercard debit or credit consumer card was used are inflated, including because:

a. No adjustment has been made to the figures for Domestic or Cross-Border Transactions in order to remove commercial card transactions, despite information on commercial card transactions being available in the APACS UK Payment Statistics Report from which these figures were obtained.

b. As acknowledged in footnote 81, in relation to Cross-Border Transactions for both debit and credit cards, the table uses the figures for transactions by UK cardholders overseas, rather than the figures for transactions in the UK by EEA cardholders. There were significantly fewer transactions in the UK by EEA cardholders than transactions by UK cardholders overseas.

c. Furthermore, in relation to debit cards, for technical reasons, many UK merchants could not accept foreign Maestro cards during the relevant period, resulting in transactions in the UK by EEA debit cardholders being only a tiny fraction of the transactions by UK debit cardholders overseas.

d. The table includes Domestic Transactions on Solo cards which are not properly the subject of the present claim for the reasons set out at paragraph 150 below.

138. On the basis of the best figures currently available to address these errors, the total VOC in the UK during the relevant period in which a Mastercard consumer credit or debit card was used is as follows:

Card type	**Cross-border by EEA cardholders £'000**	**Domestic £'000**	**Total £'000**
Credit Card	26,224,764	450,182,906	476,407,669
Debit Card	167,415	£0[5]	167,415
Total	26,392,179	450,182,906	476,575,085

Figures per annum are included in **Annex 1, Table 1**.

[5] If a claim was available in relation to domestic transactions on Solo, the correct VOC figure would be £35,730,598,901.

139. In addition, in relation to the VOC, it will be necessary to remove from the above figures those transactions which were not subject to an interchange fee, namely "on-us" transactions: see paragraph 51d above. Mastercard will identify the appropriate reduction once this information becomes available.

140. In relation to paragraph 112(c), it is denied that the proper measure of any Overcharge is the amount of the interchange fees paid. Mastercard refers to paragraphs 81 - 135 above. Furthermore, and in any event, the indicative figures for interchange fees paid used in the Claim are inflated. **Annex 1, Table 2** sets out the weighted average interchange fees paid by UK acquiring banks in each year during the relevant period based on the best information presently available to Mastercard:

a. In relation to credit card Domestic Transactions, weighted average interchange fees for consumer cards were between 0.90% and 1.18% compared to the indicative rate of 1.3% used in the Claim.

b. In relation to credit card EEA Cross-Border Transactions, weighted average interchange fees for consumer cards were between 0.93% and 1.04% compared to the indicative rate of 1.1% used in the Claim.

c. In relation to debit card Domestic Transactions, the Claim acknowledges at paragraph 113 that no claim can be brought in relation to Domestic Transactions on Maestro debit cards. Mastercard understands that no claim is pursued in relation to Switch (which was a domestic debit card scheme), but a claim is made in relation to Solo debit cards, although no such claim is in fact available for the reasons set out at paragraph 150 below. Therefore, no claim is available in relation to debit card Domestic Transactions. Without prejudice to the foregoing, the weighted average domestic interchange fees for Maestro and Solo debit cards were around 0.153% compared to the indicative rate of 0.7% used in the Claim.

d. In relation to debit card EEA Cross-Border Transactions, average interchange fees for consumer cards were between 0.57% and 0.65% compared to the indicative rate of 0.6% used in the Claim.

141. Although it is denied that this is a relevant calculation for the reasons set out above, applying the approach adopted in paragraph 112(a) of the Claim of multiplying the VOC by the relevant weighted average interchange fees, on the basis of the best information presently available on those matters as set out in paragraphs 137 - 140

above, gives the following figures:

Card type	**Cross-border by EEA cardholders £'000**	**Domestic £'000**	**Total £'000**
Credit Card	267,914	4,553,687	4,821,601
Debit Card	977	0[6]	977
Total	**268,891**	**4,553,687**	**4,822,578**

Figures per annum are included in **Annex 1, Table 3**.

142. The effect of Mastercard's limitation defence (as pleaded at paragraph 25 above), is to reduce these figures as follows:

Card type	**Cross-border by EEA cardholders £'000**	**Domestic £'000**	**Total £'000**
Credit Card	239,791	3,747,683	3,987,475
Debit Card	977	0[7]	977
Total	**240,768**	**3,747,683**	**3,988,452**

143. For the reasons set out in paragraph 93 - 101 above, it is denied that there is any scope for a claim in relation to Domestic Transactions. This would limit the claim to Cross-Border Transactions, which make up less than 6% of the sums claimed based on the corrected figures above.

144. In respect of Cross-Border Transactions, it is denied that that the Represented Persons have suffered any loss as alleged or at all, and in any event it is denied that the proper measure of loss is the amount of the EEA MIFs paid: see paragraphs 81 - 92 and 102 - 135 above.

145. In relation to paragraph 112(d), the assumed pass-on rate of 100% from acquiring banks to merchants is denied: see paragraphs 102 - 123 above.

146. In relation to paragraph 112(e), the assumed pass-on rate of 100% from merchants to

[6] If a claim was available in relation to domestic transactions on Solo, the relevant figure would be £54,667,816.
[7] If a claim was available in relation to domestic transactions on Solo, the relevant figure would be £54,664,941.

consumers is denied: see paragraphs 124 - 128 above. Without prejudice to the generality of the foregoing, the Class Representative's own expert in these proceedings has previously accepted that the starting position that "*it is likely that there was full pass-on of the MIF (including the Overcharge) to members of the proposed class*" is unsustainable.[8]

147. In relation to paragraph 112(f), it is denied that multiplying the VOC by the relevant weighted average interchange fees and then adjusting for the different down-stream pass-on rates results in a calculation of the total aggregate loss for the reasons set out above. Mastercard repeats paragraphs 81 - 135 above.

148. In relation to paragraph 112(g) regarding interest, Mastercard repeats paragraph 151 below.

149. Furthermore, the calculation in paragraph 112 makes no attempt to identify the extent to which this supposed aggregate loss was suffered by Represented Persons rather than third parties. It is for the Class Representative to plead and prove his case. While Mastercard notes paragraph 112(h) which states that the class representative will make adjustments in due course to reflect (i) individuals who died before the collective proceedings were issued; and (ii) class members who opt out of, or opt in to, the collective proceedings; this would be insufficient to establish the loss suffered by Represented Persons rather than third parties for the reasons set out at paragraphs 133 - 135 above. In relation to category (i), based on data from the Office of National Statistics, approximately 14.4 million people aged over 16 died in the UK from the beginning of the claim period to the Domicile Date of 8 September 2016, which amounts to approximately 24% of individuals who purchased goods and services in the UK during the claim period and were resident in the UK and aged 16 or over at the relevant time.

149A In relation to the references to Run-Off Overcharge in paragraphs 111A and 112A, it is denied that the inclusion of the Run-Off Overcharge could properly increase the size of the claim. Mastercard repeats paragraphs 101A(a)(ii), 107 and 107A above.

Solo

150. In relation to paragraph 113:

[8] *Merricks v Mastercard* [2017] CAT 16 at paragraph 76.

a. Mastercard notes that it is accepted that there is no scope for a claim in respect of schemes which were not operated under Mastercard's interchange network rules and that it is, therefore, accepted that there is no scope for a claim in relation to Domestic Transactions on Maestro UK. Although not expressly stated, it also appears to be accepted that there is no scope for a claim in relation to Domestic Transactions on Switch, which was a domestic debit card scheme.

b. Despite these admissions, the Claim includes claims worth over £250 million (plus interest) in relation to Domestic Transactions on Solo debit cards.[9]

c. As set out above, Solo debit was part of the UK Switch scheme – which was a separate domestic debit card. Solo debit did not operate under Mastercard's interchange network rules, save for a small number of Solo cards which were co-branded Maestro for cross-border functionality, which only operated under Mastercard's interchange network rules in relation to such cross-border transactions.

d. Furthermore, so far as Mastercard is aware, during the relevant period, the same interchange fees set in the same way applied to Solo debit cards as applied to UK Switch/Maestro cards, i.e. average domestic interchange fees were significantly below Maestro's EEA MIFs.

e. There is, therefore, no scope for a claim in relation to Domestic Transactions on debit cards.

Interest

151. In relation to interest:

a. It is denied that there is any basis for claiming interest at the rate of 5% above the Bank of England base rate.

b. The general presumption in relation to private individuals is that the appropriate rate of interest is the investment rate.

c. In circumstances where the Claim is brought on behalf of the entire adult population of the UK during the relevant period, there is no basis for displacing that general presumption, which necessarily applies.

[9] As confirmed in Quinn Emanuel's letter dated 9 November 2016.

d. In particular, it is denied that "objective characterisation" of the Class (as pleaded at paragraph 112(g)) would justify a different rate. Any such characterisation would have to take account of the fact that, even if consumers did suffer loss, the majority of those consumers would not have funded any such losses through higher borrowing, but rather through lower spending (and so would not have incurred or received any interest) or lower saving (and so would have lost interest at significantly lower investment rates, rather than borrowing rates). The Class Representative has not been able to identify any way of determining the proportion of Represented Persons that would have funded any such losses through higher borrowing costs nor the borrowing rates that they would have incurred in doing so. For the avoidance of doubt, it is also denied that consumers necessarily face higher borrowing costs than commercial entities, as a very large proportion of consumer borrowing takes place on a secured basis at rates which are often far lower than the rates for unsecured borrowing paid by commercial entities. Consequently, there is no basis for interest at any rate other than the investment rate.

Relief Sought

152. In the premises, it is denied that the Represented Persons are entitled to the relief claimed or to any relief.

Matthew Cook KC

~~**Matthew Cook QC**~~

Hugo Leith

~~**Statement of Truth**~~

~~Mastercard believes that the facts stated in this Defence 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: 9 May 2022~~

Statement of Truth

Mastercard believes that the facts stated in this Defence 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: 28 October 2022

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

Annex 1

Table 1: VOC

	Credit Card - Domestic £'000	**Credit Card - Cross-border by EEA Cardholders £'000**	**Debit Card - Domestic £'000**	**Debit Card - Cross-border by EEA Cardholders £'000**
1992	6,280,226	357,734	0	0
1993	11,533,510	361,451	0	0
1994	12,915,908	462,736	0	0
1995	14,461,366	630,285	0	0
1996	16,188,612	706,463	0	0
1997	18,513,932	751,469	0 (*4,000*)[10]	0
1998	20,302,798	778,654	0 (*221,000*)	0
1999	22,638,005	980,995	0 (*610,000*)	0
2000	24,803,664	1,268,320	0 (*1,085,000*)	0
2001	27,124,199	1,679,537	0 (*2,124,000*)	3,321
2002	28,106,062	2,173,053	0 (*2,884,000*)	6,385
2003	32,548,176	2,780,692	0 (*4,768,000*)	9,861
2004	38,984,992	3,217,833	0 (*6,195,000*)	7,828
2005	42,689,528	3,088,634	0 (*4,848,000*)	11,178
2006	47,536,797	3,524,380	0 (*4,482,000*)	30,974
2007	55,983,631	2,585,676	0 (*5,657,000*)	57,746
2008	29,571,499	876,850	0 (*2,852,599*)	40,122
Total	**450,182,906**	**26,224,764**	**0 (35,730,599)**	**167,415**

Notes: Commercial credit card figures have been removed from credit card figures. Credit card domestic data for 1992-1995 has been back-casted from 1996 figures. Data for 1992 and 2008 has been adjusted to reflect the start and end dates of the claim period.

[10] Domestic Transactions on Solo cards are not properly the subject of the present claim for the reasons set out at paragraph 150 above. However, if such a claim was available, the relevant VOC figure is stated in brackets in italics.

Table 2: Weighted average interchange fees

	Credit Card - Domestic	**Credit Card - Cross-border by EEA Cardholders**	**Debit Card - Domestic**	**Debit Card - Cross-border by EEA Cardholders**
1992	1.18%	1.00%		
1993	1.18%	1.00%		
1994	1.18%	1.00%		
1995	1.15%	0.99%		
1996	1.12%	0.98%		
1997	1.11%	0.97%	0.153%	
1998	1.08%	0.94%	0.153%	
1999	1.08%	0.93%	0.153%	
2000	1.09%	0.97%	0.153%	
2001	1.09%	1.02%	0.153%	0.65%
2002	1.06%	1.04%	0.153%	0.65%
2003	1.01%	1.04%	0.153%	0.65%
2004	0.96%	1.04%	0.153%	0.63%
2005	0.93%	1.04%	0.153%	0.59%
2006	0.92%	1.04%	0.153%	0.57%
2007	0.91%	1.04%	0.153%	0.57%
2008	0.90%	1.04%	0.153%	0.57%

Notes: Interchange fees are assumed to remain constant in the periods before and after any discrete datapoints are available. Where there is a gap between two periods of available datapoints, the change in interchange fees is assumed to follow a linear path.

Table 3: VOC multiplied by weighted average interchange fees

	Credit Card - Domestic £'000	**Credit Card - Cross-border by EEA Cardholders £'000**	**Debit Card - Domestic £'000**	**Debit Card - Cross-border by EEA Cardholders £'000**
1992	74,107	3,577	0	0
1993	136,095	3,615	0	0
1994	152,408	4,627	0	0
1995	165,944	6,235	0	0
1996	180,908	6,923	0	0
1997	204,579	7,289	0 (*6*)[11]	0
1998	219,270	7,319	0 (*338*)	0
1999	244,490	9,123	0 (*933*)	0
2000	270,360	12,303	0 (*1,660*)	0
2001	296,332	17,131	0 (*3,250*)	22
2002	297,573	22,600	0 (*4,413*)	42
2003	328,330	28,919	0 (*7,295*)	64
2004	373,769	33,465	0 (*9,478*)	49
2005	398,613	32,122	0 (*7,417*)	66
2006	436,914	36,654	0 (*6,857*)	177
2007	507,852	26,891	0 (*8,655*)	329
2008	266,143	9,119	0 (*4,364*)	229
Total	**4,553,687**	**267,914**	**0 (*54,668*)**	**977**

[11] Domestic Transactions on Solo cards are not properly the subject of the present claim for the reasons set out at paragraph 150 above. However, if such a claim was available, the relevant figures are stated in brackets in italics.