Case No: 1266/7/7/16

IN THE COMPETITION APPEAL TRIBUNAL

BETWEEN:

WALTER HUGH MERRICKS CBE

Applicant/Proposed Class Representative

and

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

Respondents/Proposed Defendants

MASTERCARD'S RESPONSE TO THE APPLICATION FOR A COLLECTIVE PROCEEDINGS ORDER

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[1] Mastercard Europe S.P.R.L. became Mastercard Europe S.A. in 2015.

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PART I: INTRODUCTION

1. Mastercard submits that the Tribunal should refuse the application by Mr Merricks (the "Applicant") for a collective proceedings order.

2. These are early days for the collective proceedings regime and it is important that solid foundations should be set in place to allow it to work effectively in the future.

3. This does not mean that applications should be approved regardless of their suitability; it is important for the future operation of the regime that inappropriate applications should not be allowed.

4. The present application seeks to group together the disparate claims of an estimated 46.2 million claimants over a claim period of around 16 years. For the reasons set out below, Mastercard submits that it is inappropriate to grant certification in respect of these claims.

PART II: OUTLINE OF MASTERCARD'S RESPONSE

5. This response sets out the following:

   a. the reasons why the application for certification should be refused in its entirety;

   b. alternatively, the reasons why the certification of quantum issues should be refused;

   c. an explanation of the basis upon which Mastercard contends that claims relating to the period prior to 20 June 1997 are time-barred;

   d. the need for clarification of the proposed class;

   e. an Annex on Other Jurisdictions; and

   f. a Confidential Annex on Funding Issues.

6. The Annex on Other Jurisdictions attached to this response contains a description of some relevant aspects of collective proceedings in other jurisdictions. It does not purport to be an exhaustive description of all aspects of collective proceedings in those jurisdictions. As one might expect, the jurisprudence on these issues is most developed in the U.S..

7. The Annex on Other Jurisdictions is included by way of background because the Tribunal may wish to be informed of how collective proceedings operate in other jurisdictions. However, it is important to recognise that those schemes are not the same as the UK one. Mastercard submits that the UK collective proceedings regime must be interpreted and applied by reference to domestic legal principles.

8. All the underlying materials referred to in this response are set out in the enclosed bundle made up of three parts:

a. Part A: General;

b. Part B: UK and EU legal authorities; and

c. Part C: Foreign law materials.

9. References to the materials in the bundle are provided in the following format: [***bundle/tab/page***]

PART III: CERTIFICATION SHOULD BE REFUSED IN ITS ENTIRETY

10. Mastercard's primary submission is that the Tribunal should refuse to certify the proposed collective proceedings for the following reasons:

    a. First, the Collective Proceedings Claim Form (the "Claim Form") seeks an award of aggregate damages and accepts that any other form of award would be "impracticable". However, an award of aggregate damages in this case would be inimical to the compensatory nature of damages and impossible to assess on any reliable basis.

    b. Second, the proposed distribution mechanism to individual members of the class would also be inimical to the compensatory nature of damages as the amounts received by individuals would bear no reasonable relationship to their actual loss.

A: FUNDAMENTAL PRINCIPLES OF TORT LAW

(a) Basis of liability

11. The most appropriate domestic cause of action for a follow on damages claim for breach of Article 101 TFEU [**B/1/2**] is breach of statutory duty.[2]

12. This is the basis upon which the proposed claims are brought. Para 2 of the Claim Form states:

> "The claims which it is proposed to combine in these collective proceedings are so-called "follow-on" claims under section 47A of the Act. They are claims for damages caused by the proposed Defendants' breach of statutory duty in infringing Article 101 TFEU…".

13. In the proposed collective proceedings, the relevant individual claims collected together must therefore satisfy the legal requirements for a breach of statutory duty.

[2] See *Garden Cottage Foods v Milk Marketing Board* [1984] AC 130, per Lord Diplock at 141E-F [**B/20/218**].

Each claim must therefore prove not only that the relevant statutory duty has been broken, but also that the breach has caused loss to each claimant represented in the collective proceedings; see *Clerk & Lindsell on Torts*, (21st edition) paras 9-04 and 9-60 to 9-61 [**B/37/1076-1078**].

(b) Basis of damages

(i) General principle for assessment

14. It is a general principle that damages for tort are compensatory in nature;

a. *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, per Lord Blackburn at 39 [**B/15/157**]:

> "I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

b. *Knauer v Ministry of Justice* [2016] UKSC 9, [2016] AC 908 at para 1 [**B/31/659**]:

> "It is the aim of an award of damages in the law of tort, so far as possible, to place the person who has been harmed by the wrongful acts of another in the position in which he or she would have been had the harm not been done: full compensation, no more but certainly no less."

(ii) Method of assessment

15. The fact that it is not possible for a claimant to prove the exact sum of his/her loss is not a bar to recovery. Restoration by way of compensation is often accomplished by "sound imagination" and a "broad axe".[3]

16. This does not mean that the assessment of damages relies on pure guesswork on the part of the judge. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done.[4]

17. However, the fundamental premise remains untouched; damages are awarded to compensate for loss suffered. Damages are not at large and in the court's discretion.[5]

B: LEGAL FRAMEWORK FOR COLLECTIVE PROCEEDINGS

(a) Eligible claims

18. Section 47B(1) of the Competition Act 1998 (the "1998 Act") [**B/8/28**] provides:

> "…proceedings may be brought before the Tribunal combining two or more claims to which section 47A applies…".

19. The combined effect of sections 47A(2) and (3) are that section 47A applies to "a claim for damages", "which a person who has suffered loss or damage may make in civil proceedings brought in any part of the United Kingdom" [**B/8/26**].

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[3] *Watson Laidlaw & Co Ltd v Pott Cassells and Williamson* [1914] S.C (H.L.) 18, per Lord Shaw at 29-30 [**B/18/192-193**]; *Devenish Nutrition Ltd & Ors v Sanofi-Aventis SA & Ors* [2007] EWHC 2394 (Ch); [2008] 2 WLR 637, per Lewison LJ at paras 27-29 [**B/28/505-506**] and [2008] EWCA Civ 1086; [2009] Ch 390, per Arden LJ at para 110 and Longmore LJ at para 159 [**B/29/607 and 619**].

[4] *Ratcliffe v Evans* [1892] 2 QB 524, per Bowen LJ at 532-533 **[B/16/171-172]**; *Devenish*, supra, per Lewison J at para 30 [**B/28/547**].

[5] Where the court is compelled to wield the broad axe because of a lack of specific evidence as to the harm suffered by a claimant, it should err on the side of under-compensation to (a) reflect the uncertainty as to the loss actually suffered and (b) give the defendant the benefit of any doubts in the calculation. See *SPE International Ltd v Professional Preparation Contractors (UK) Ltd* [2002] EWHC 881 (Ch), per Rimer J at para 87 [**B/24/332]**; approved by the Court of Appeal in *Blayney (t/a Aardvark Jewelry) v Clogau St David's Gold Mines Ltd* [2002] EWCA Civ 1007, [2003] F.S.R. 19, per Sir Andrew Morritt V.-C. at paras 31-34 [**B/23/310-311**].

20. The Tribunal may make a collective proceedings order only in respect of claims which are eligible for inclusion in collective proceedings; section 47B(5)(b) of the 1998 Act [**B/8/28**].

21. Eligible claims include individual claims for damages which a person who has suffered loss or damage may make in civil proceedings brought in any part of the UK; section 47B(1) and sections 47A(2) and (3)(a) of the 1998 Act [**B/8/26**].

22. In accordance with these provisions of the 1998 Act, para 6.3 of the Tribunal's 2015 *Guide to Proceedings* (the "Guide") [**B/36/1053**] confirms:

> "…collective proceedings are a form of procedure and do not establish a new cause of action."

23. It therefore follows that, as a matter of law, in order to be eligible for inclusion in collective proceedings, each individual claim must satisfy the legal requirements for liability set out above, i.e. that the breach of duty has caused loss to that individual.

(b) Criteria for certification

24. Rule 79(1) of the Competition Appeal Tribunal Rules 2015 (the "2015 Rules") [**B/12/110**] provides that, before it may certify claims as eligible for inclusion in collective proceedings, the Tribunal must be satisfied that the claims *inter alia* raise common issues and are suitable to be brought in collective proceedings.

25. Rule 79(2) of the 2015 Rules [**B/12/110**] states that, in determining whether the claims are suitable to be brought in collective proceedings, the Tribunal shall take into account all matters it thinks fit, including:

    a. whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;

    b. the costs and the benefits of continuing the collective proceedings;

c. the size and nature of the class; and

d. whether the claims are suitable for an aggregate award of damages.

C: AGGREGATE AWARD OF DAMAGES

26. The Tribunal may make an "aggregate award of damages":

a. Section 47C(2) of the 1998 Act [**B/8/31**] provides that:

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

b. Rule 73(2) of the 2015 Rules [**B/12/105**] defines such an award of damages as an "aggregate award of damages".

27. The power to make an aggregate award of damages does not mean that the Tribunal may award damages which do not reflect losses actually suffered, nor may it award damages to represented parties who have in fact suffered no loss. As para 6.78 of the Guide provides [**B/36/1068**]:

> "In awarding damages in collective proceedings, the Tribunal is not required to assess how much each represented person may recover in respect of their claim. Rather, the Tribunal may make an "aggregate" award of damages as defined in Rule 73(2). ***An aggregate award determines the amount the class as a whole is entitled to*** and is designed to be a practical and proportionate method of assessing damages in collective proceedings. For example, the Tribunal may calculate the damages on a class-wide basis; this could be [by] way of a lump sum award against the defendant, or by using a formula to determine each represented person's claim without requiring individual proof. This type of award is likely to be more suitable where its calculation can be made without information from the class members, such as where the defendant's records are sufficient, or ***where there is a large class with largely identical individual claims***." (Emphasis added.)

28. Rule 92(1) of the 2015 Rules provides that, where the Tribunal makes an aggregate award of damages, it shall give directions for assessment of the amount that may be claimed by individual represented persons out of that award. Rule 92(2) states that the

directions given may include a method or formula by which such amounts are to be quantified [**B/12/114**].

29. The power of the Tribunal to make an award of aggregate damages therefore does not give it power to award damages without loss having to be proved. On the contrary, it gives the Tribunal power to make an award in respect of loss that has been proven to have been suffered ***by the class as a whole***, without having to establish, and then add together, the losses suffered by each individual member of the class.

30. Furthermore, the Tribunal has a discretion whether to award aggregate damages or not. The suitability of a proposed claim for an award of aggregate damages is a matter that can, and should, be taken into account by the Tribunal, in deciding whether to certify collective proceedings. Aggregate damages are a means by which losses can be proved on a collective basis; they are not a means for claimants to recover damages where they cannot prove what loss, if any, they have suffered.

D: THE LAW ON PASS-ON

31. To date there has only been one case which has substantively considered the English law in relation to pass-on, i.e. the Tribunal's judgment in *Sainsbury's Supermarkets Ltd v MasterCard*.[6]

32. The *Sainsbury's* judgment included the following findings on the law [**B/34/997**]:

    a. Para 484(3):

> "We agree with the submissions of MasterCard, that the pass-on "defence" is no more than an aspect of the process of the assessment of damage. The pass-on "defence" is in reality not a defence at all: it simply reflects the need to ensure that a claimant is sufficiently compensated, and not over-compensated, by a defendant. The corollary is that the defendant is not forced to pay more than compensatory damages, when considering all of the potential claimants."

[6] [2016] CAT 11 [**B/34/723**].

b. Para 484(4)(i): "the pass-on defence is only concerned with identifiable increases in prices by a firm to its customers."

c. Para 484(4)(ii): "the increase in price must be causally connected with the overcharge, and demonstrably so."

d. Para 484(5): "the pass-on "defence" ought only to succeed where, on the balance of probabilities, the defendant has shown that there exists another class of claimant, downstream of the claimant(s) in the action, to whom the overcharge has been passed on."

33. The *Sainsbury's* judgment included the following findings on the facts:

a. Para 434: When faced with an unavoidable increase in cost, an enterprise can do one or more of four things:

i. it can make less profit;

ii. it can cut back on what it spends money on (e.g. marketing, advertising, capital investment, staff);

iii. it can reduce its costs by negotiating with suppliers and/or employees;

iv. it can increase its own prices, and pass the costs on to its purchasers.

b. Para 457: Sainsbury's operated in a highly competitive market.

c. Para 457: The UK MIF was an industry-wide cost.

d. Para 458: The UK MIF was one of a multitude of individual cost items that Sainsbury's had to consider in its Budget. Indeed, although the UK MIF was a significant amount, there were many more significant costs that the Sainsbury's enterprise had to bear and to account for.

e. Para 459: Sainsbury's did not operate on a "cost-plus" basis.

f. Para 460: Sainsbury's would be concerned to ensure that its prices remained in-line with those of its rivals. That might well mean that Sainsbury's would not be able to pass-on all of the UK MIF to its customers, depending on what its rivals did (or, indeed, if Sainsbury's was minded to try to steal a march on its rivals).

g. Para 461: Sainsbury's efforts to reduce costs and spending decisions would not be capable of being related back to any given cost, whether that cost is the UK MIF or some other cost.

h. Para 463: As a last resort, Sainsbury's would make less profit. It is to be inferred that this did not in fact occur over the claim period.

i. Para 464:

> "We therefore conclude that exactly how Sainsbury's dealt with the costs that constituted the UK MIF is unknowable, but that (viewing matters at a high level of abstraction) Sainsbury's would have passed on to consumers what it could, made whatever cost-savings it could and – to the extent that its draft Budget returned a profit that was different to market expectations – adjusted its spending (e.g. by cutting back on or expanding capital projects) so as to return the expected profit. This approach, we find, is exactly what one would expect of a complex business selling multiple product lines in a competitive market."

j. Para 465:

> "Because the way in which the costs constituting the UK MIF were dealt with is unknowable, it is our conclusion that it is impossible to say what proportion of this cost was *(i)* passed on in the form of higher prices; or *(ii)* paid out of cost-savings; or *(iii)* paid for by reducing expenditure and so service levels."

34. In light of its findings on the fact and the law, the Tribunal concluded (at para 485):

> "It follows that MasterCard's pass-on defence must fail. No identifiable increase in retail price has been established, still less one that is causally connected with the UK MIF. Nor can MasterCard identify any purchaser or class of purchaser of Sainsbury's to whom the overcharge has been passed who would be in a position to claim damages."

35. The Tribunal has refused Mastercard's application for permission to appeal.[7] Mastercard will now apply for permission to appeal to the Court of Appeal. Nothing in the proposed appeal detracts from the need recognised by the Tribunal to consider pass-on on the basis of the evidence available in relation to the particular merchant(s) concerned. Whatever the merits of Mastercard's arguments on appeal, it is plainly not appropriate to adopt a global approach for all the merchants in the UK as a whole.

E: THE CLAIM FORM

36. The Claim Form seeks an aggregate award of damages. Para 120(d) states that the relief sought includes an aggregate award of damages and further explains that it is the Applicant's view that any other basis of awarding damages would be unworkable.

37. Para 46 of the Claim Form further explains:

> "The claims are suitable for an aggregate award of damages. An individual assessment of damages suffered by each member of the proposed class would be impracticable. For example, such assessment would require (i) the determination of the actual purchases of goods and/or services made by each member of the class during the infringement period…, by whatever means of payment (including cash) and (ii) the assessment of the extent to which each of the businesses from which those purchases were made passed on the higher charges resulting from the proposed Defendants' infringement of Article 101 TFEU. In fact, the only practicable way of proceeding is by way of an aggregate award of damages. The expert report on common issues explains at Section 5 how it is proposed that such an award will be calculated."

38. It follows from this that, unless the Tribunal is satisfied that an aggregate award of damages would be appropriate in this case, it should refuse to certify the proposed collective proceedings.

39. The current application relies on an expert report on common issues (the "Expert Report").[8] Sections 5 and 6 of the Expert Report set out the proposed approach to quantification. The Experts propose three steps:

[7] [2016] CAT 23 [**B/35/1029**].
[8] "Independent expert report on common issues prepared by Dr Cento Veljanovski of Case Associates and Mr David Dearman of Mazars LLP", 6 September 2016.

a. Step 1: quantify the total volume and value of all relevant Mastercard transactions accepted by businesses selling in the UK in the Full Infringement Period, referred to as the value of commerce ("VOC").

b. Step 2: quantify the extent to which the VOC was subject to the Overcharge in respect of the Mastercard Domestic or Cross-Border MIFs.

c. Step 3: quantify the proportion of Overcharge that was "*passed-on*" to the proposed class as well as a consideration of interest. There are said to be two aspects of pass-on:

   i. the "MIF Pass-On" by acquirers to merchants as part of the MSC; and

   ii. the "MSC Pass-On", i.e. the extent to which the MIF was passed-on through retail prices charged by businesses to consumers.

40. In relation to the MSC Pass-On, para 6.2.1 of the Expert Report states:

> "In our opinion, in the absence of evidence to the contrary, it is appropriate to assume a single, but not necessarily constant over time, weighted average MSC Pass-On rate across the United Kingdom economy. This approach is consistent with the approach adopted in the MasterCard and Visa Undertakings. The averaging of the MSC Pass-On rate takes account of any data limitations and the computational complexity of determining MSC Pass-On across the United Kingdom economy for over one and a half decades."

41. The approach proposed is therefore to seek to estimate a single, but not necessarily constant over time, weighted average MSC Pass-On rate across the UK economy.

42. Para 6.3.1 states that the experts' "starting position is that during the Full Infringement Period, it is likely that there was full pass-on of the MIF (including the Overcharge) to members of the proposed class." The report states that it relies on a number of statements and findings, including the pleadings and expert evidence relied

upon by Mastercard in the claim brought against it by Sainsbury's.[9] Elsewhere, the Expert Report makes express references to the *Sainsbury's* judgment, e.g. at para 1.4.1(b)(ii) and (iii).

43. Given that the experts were aware of the Tribunal's *Sainsbury's* judgment[10] and referred to it in their report, it is surprising that they do not make any reference or take any account of the Tribunal's conclusion on pass-on in that case, i.e. that none had been proven. This conclusion directly contradicts the stated assumption in the Expert Report that there was full pass on by all merchants throughout the Full Infringement Period. The failure of the Expert Report to make any reference to this finding of the Tribunal is a blatant disregard of the duty of independence owed by the experts to the Tribunal in this case. Moreover, it raises concerns about the plausibility of the proposed methodology in the Expert Report, as discussed further below.

44. In considering whether the approach suggested in the Expert Report to an award of aggregate damages is appropriate, the following facts, recognised in the report, are significant:

a. Para 1.4.1(b)(i):

> "Given the prevalence of MasterCard card acceptance in the United Kingdom, we consider that all members of the proposed class will have bought goods and services ***from many different Businesses*** that accepted MasterCard cards over what is a long infringement period". (Emphasis added.)

b. Para 6.3.6:

> "There is a large body of empirical evidence on pass-on of input costs, such as sales taxes, foreign exchange fluctuations, interest rates, merger cost economies etc. This empirical evidence, ***as one would expect***, shows a variety of cost pass-on rates ranging from low to many orders of magnitude of the cost increase." (Emphasis added.)

[9] The claim began in the High Court but was transferred to the Tribunal.
[10] [2016] CAT 11 [**B/34/723**].

F: INAPPROPRIATENESS OF AN AGGREGATE DAMAGES AWARD

45. Mastercard submits that an aggregate damages award in this case, on the bases tentatively suggested by the Expert Report or otherwise, would be clearly inappropriate for the following reasons.

46. An assessment of compensatory damages for each individual class member would require the Tribunal to take account *inter alia* of the following factors.

47. First, as recognised at Claim Form para 46, the extent to which different merchants passed on any MIF overcharge to final customers in their retail prices. As is clear from the Tribunal's *Sainsbury's* judgment, it is necessary and appropriate to conduct an analysis of the available evidence about specific merchants' rate of pass-on. The rate of pass-on will vary between different categories of merchants and individual merchants within those categories. As recognised at para 6.3.6 of the Expert Report, there is "a large body of empirical evidence on pass-on of input costs" which "shows a variety of cost pass-on rates ranging from low to many orders of magnitude of the cost increase".

48. Second, the rate of pass-on for each merchant is likely to have fluctuated over the 16 year claim period.[11]

49. Third, as recognised at Claim Form para 46, the loss suffered by each individual consumer would depend on their purchasing history. This would include which merchants they made purchases from, how much they purchased from those merchants and when, during the 16 year claim period, those purchases were made.

50. Fourth, when assessing the extent of any loss suffered by an individual consumer as a result of the MIF, it would be necessary, in accordance with established case-law, also to take account of any benefit received by that consumer as a result of the MIF; see *Hodgson v Trapp* [1989] A.C. 807, per Lord Bridge at 819E-G [**B/22/279**].

51. In the present case, the Expert Report fails to take account of the two-sided nature of the market and benefits which cardholders obtain as a result of the MIF. In short:

[11] Claim Form para 94(d) defines the "Full Infringement Period" as running from 22 May 1992 until 21 June 2008.

a. Card payment systems are "two-sided" markets. The more consumers who hold Mastercard cards, the more attractive it is to merchants to accept those cards. The more merchants who accept Mastercard cards, the more attractive it is to consumers to carry those cards.[12]

b. Mastercard sets the MIF taking account of multiple factors and diverse interests. One important factor is that, the higher the MIF, the more attractive Mastercard cards will be to issuing banks, because it is the issuing banks who receive the MIF. The level of the MIF thus allows Mastercard to compete with rival payment schemes, including Visa and Amex. However, the MIF must not be set so high that it leads to merchants refusing to accept MasterCard cards.[13]

c. In a competitive market, issuing banks must compete with each other to attract consumers to sign up to their payment cards. As a result of this, issuers compete on the terms upon which cards are offered to consumers, e.g. the level of fees and the availability of rewards.

d. There is a consistent body of evidence which establishes that a higher MIF will lead to greater benefits or lower costs for cardholders (and a lower MIF will lead to lower benefits or higher costs). For example:

    i. The experts in *WM Morrison Supermarkets Ltd & Ors v MasterCard* in the Commercial Court (judgment awaited) agreed that there would be some pass through of the MIF from issuers to cardholders in the form of lower costs or higher benefits.[14] In cross-examination, Mr Dryden, the Claimants' expert, said that he thought it likely that "a significant proportion" of the MIF is passed through by issuers to cardholders.[15] Dr Niels, Mastercard's expert, thought that the level of pass through to cardholders would be "substantial".[16]

[12] See paras 70-71 of the *Sainsbury's* judgment **[B/34/774-775]**.
[13] See para 102 of the *Sainsbury's* judgment **[B/34/794-800]**.
[14] Joint Expert Statement, issue 32 [**A/9/99**].
[15] Transcript Day 10, p.71, lines 9-14 [**A/10/104**].
[16] Joint Expert Statement, issue 66 [**A/9/101**].

ii. Evans, Change and Joyce conducted a study in relation to the effect of the reduction in debit card interchange fees in the US. The authors concluded that under "plausible assumptions", the study indicated that issuers passed 80% of the decreased debit interchange fee through to cardholders.[17]

iii. Charles River Associates carried out an analysis of the effect of the Reserve Bank of Australia's reduction in credit card interchange fees which concluded that issuers had passed on 74% of the decreased credit card interchange fee through to cardholders.[18] A similar level of pass-through was observed in Spain following interchange fee regulation.[19]

iv. The OFT's MasterCard 2005 Decision contained the following (in Annex 7):[20]

1. **Para 3:** "The OFT asked six banks to provide information on card products which fall into the categories of affinity cards and credit cards offering loyalty schemes as an incentive to card use. […] A majority of the banks submitted that they offer affinity cards and they all offer loyalty schemes. One bank submitted that it currently uses the majority of its merchant income from the cash-back range of credit cards to fund the customer cashback reward scheme.[…] The OFT asked the respondents to calculate the amount spent by their respective banks on affinity cards and loyalty schemes. The value of expenditure on such schemes for these six banks, excluding affinity partners' costs, amounted to more than £50 million for MasterCard cards alone."

2. **Para 5: "**While the OFT accepts that affinity and loyalty schemes may be subsidised by revenue streams other than the MMF MIF, it appears that some issuers are funding their schemes through MIF revenue, at least in part."

[17] "The Impact of the US Debit Card Interchange Fee Regulation on Consumer Welfare: An Event Study Analysis", Chicago Institute for Law and Economics Working Paper No 658, at p.47 [**A/7/61**].
[18] "Regulatory intervention in the payment card industry by the Reserve Bank of Australia" (2008), Charles River Associates International [**C/41/1041**].
[19] Iranzo Juan, Fernandez Pascual, Matias Gustavo, Delgado Manuel, "The effects of the mandatory decrease of interchange fees in Spain" October 2012 [**B/42/1153**].
[20] OFT Decision No. CA98/05/05, dated 6 September 2005, on the Investigation of the Multilateral Interchange Fees Provided for in the UK Domestic Rules of MasterCard UK Members Forum Limited (formerly known as MasterCard/Europay UK Limited), Annex 7, p.238 [**A/11/110**].

3. **Para 5** "PwC has also reported that most of the interchange income generated by cards with attached reward programmes is given back to the cardholder, resulting in an overall loss for the issuer."

v. Professor Jean Tirole, one of the leading academic economists in relation to interchange fees, confirms: "A higher IF on credit cards for example leads to cheaper credit cards for the consumers and encourages them to hold and carry such a card."[21] This confirms the relationship between the level of the MIF and the benefits received by cardholders.

52. It follows that, in relation to class members who were holders of Mastercard payment cards, assessment of their loss would have to take into account of the benefits that they obtained as a result of the MIF. Indeed, once the value of such cardholders benefits is taken into account, it is likely to result in a finding that some class members will not have suffered any net loss.

53. This is therefore a further factor that renders quantum unfit to be determined as a common issue. The Expert Report does not even recognise this important point, let alone suggest any means of taking account of it.

54. It is common ground that an assessment of compensatory damages for each individual class member would be impracticable, indeed impossible.

55. The crucial question is therefore whether an aggregate assessment of the loss suffered by the class as a whole is likely to be both practicable and sufficiently accurate to comply with the compensatory principle of damages.

56. Mastercard submits that the approach proposed in the Expert Report is inappropriate for the following reasons.

[21] Tirole, "Payment card regulation and the use of economic analysis in antitrust", Toulouse School of Economics Notes, No. 4 (March 2011) at pp.10-11 [**A/8/85-86**].

57. **Suggested approach** The approach suggested by the Expert Report is so high level that it is unlikely to bear any meaningful relationship to the loss actually suffered by the class.

58. Para 6.2.3(a) of the Expert Report states that the experts will refer to "market studies, competition authority decisions and other research as described in Section 6.3 below". Para 6.3.1 of the Expert Report states that, relying on these sources, "it is likely that there was full pass-on of the MIF (including the Overcharge) to members of the proposed class." Such materials were before the Tribunal in the Sainsbury's trial, when, as explained above, the Tribunal found that **no** pass-on had been proven in respect of Sainsbury's.

59. Para 6.2.3(b) of the Expert Report suggests that the experts will also refer to:

> "evidence and analysis filed by the different Businesses that are bringing similar damages claims against MasterCard. ***Assuming the MSC Pass-On rate is consistent across Businesses operating in the same sector***, which we consider is a reasonable economic assumption at this preliminary stage, then, based on the evidence from those claims, it ***may be possible*** to estimate the MSC Pass-On across key sectors such as food and drink, clothing, household goods, motoring, entertainment, travel and other retailers. This covers approximately 70% of all payments processed with a card in the United Kingdom (see **Appendix 3**);". (Emphasis added.)

60. Para 6.2.4 states:

> "If MSC Pass-On rates are ultimately found to be significantly different for different sectors of the United Kingdom economy, then we ***may*** be able to calculate a weighted average MSC Pass-On rate (weighted by reference to the VOC and pass-on rate associated with each sector during each year of the Infringement Period). ***This approach will depend on the availability of evidence and whether that evidence relates to the same period as the Full Infringement Period***." (Emphasis added.)

61. This approach will not lead to a quantum figure which bears any realistic relationship to the loss suffered by the class as a whole for the following reasons *inter alia*.

    a. Appendix 3 refers to claims already issued against Mastercard in the food and drink sectors, the motoring sector, the "other retailers" sector, the household

goods sector, the travel sector, the entertainment sector and the clothing sector. These sectors are said to represent "at least 70% of all card activity" during the Full Infringement Period. However, even on this approach, this leaves about 30% of all card activity in the Full Infringement Period in respect of which no evidence will be available. It cannot be assumed that pass-on rates for the remaining 30% will bear any relationship to whatever figures might be estimated for the 70%.

b. In any event, even with the seven specific sectors identified in the Expert Report, it clearly cannot be safely assumed that "the MSC Pass-On rate is consistent across businesses operating in the same sector.

c. The seven sectors identified are very broad.

   i. There are material differences ***within*** each of the seven specific sectors identified in the Expert Report; e.g.

      1. In the "other retailers" category, it cannot simply be assumed that the pass-on rates of John Lewis and WH Smith will be similar to each other, let alone to other merchants in that category.

      2. Similarly, in the entertainment sector, it cannot be assumed that the pass-on rates of HMV would be similar to those of Comet. Equally, it cannot be assumed that the pass-on rates of a cinema group would be similar to the pass-on rates of a retailer of electronic goods.

   ii. Pass-on rates may vary between merchants depending on their size, the importance of MSCs relative to their overall cost base, their profitability and margins, whether they trade online or in traditional shops, and their specific business model and practices. All the merchants identified in Appendix 3 to the Expert Report are very large

national and international businesses; they are not representative of the range of businesses to be found in the UK.

iii. Pass-on rates may vary throughout the UK depending on the degree of competition in a particular market, including local variations in competition.

d. As accepted in para 6.2.4 of the Expert Report, the approach suggested "will depend on the availability of evidence and whether that evidence relates to the same period as the Full Infringement Period." There is no realistic prospect of obtaining sufficient evidence from a sufficient number of different merchants for the Full Infringement Period, which runs from 1992 until 2008 (i.e. between 8 and 24 years ago).

62. Furthermore, as explained above, the Expert Report entirely fails to recognise the two sided nature of the Mastercard payment scheme and the fact that cardholders obtain benefits as a result of the MIF. Nor does the Expert Report advance any methodology capable of taking account of this fact.

63. This is not a case in which all that is required is disclosure in order to allow the experts to produce a robust quantum figure; it is an exercise in impossibility. Assessing the loss of a class of 46.2 million consumers who purchased from a large majority of all the merchants in the UK over a 16 year period ending 8 years ago is unrealistic. The claim is too overblown to give any realistic prospect of a sufficiently reliable quantum figure for the class as a whole ever being produced.

64. **Tribunal Guide** The claim for aggregate damages in the circumstances of this case is also inconsistent with the statement in para 6.78 of the Guide that an award of aggregate damages is more likely to be suitable *inter alia* "where there is a large class with largely identical individual claims." In this case, there is a proposed class of approximately 46.2 million people, each with very different individual claims (including some individuals who may have suffered no net loss and therefore should have no entitlement to any damages).

65. For these reasons, the award of aggregate damages would be inappropriate in the present case.

66. Given that the Claim Form seeks only an aggregate damages award and accepts that any other approach to damages would be impracticable, it follows that the Tribunal should refuse to certify the proposed collective proceedings.

G: PROPOSALS FOR DISTRIBUTION TO INDIVIDUALS

67. The Applicant's proposals for distribution of any award of aggregate damages is as follows:

a. Paragraph 39 of the Claim Form states:

"As indicated in the collective litigation action plan, in the interests of proportionality, practicability and efficiency, it is not proposed that there be an individualised assessment of damages for each member of the proposed class."

b. The Collective Proceedings Litigation Plan (the "Litigation Plan")[22] states:

i. Para 64: "…the proposed class representative does not intend to distribute any aggregate award of damages by reference to individual spend of the proposed class members."

ii. Para 79: "…the proposed class definition does **not** require a class member…to prove the amount spent by that individual during the period and on what goods or services."

iii. Para 80: "In relation to Rule 92 it is intended that at the appropriate time the proposed class representative's experts will put forward to the Tribunal a formula for the distribution of any aggregate award of damages to individuals that divides the total amount awarded by the number of people within the class for each separate year of the relevant period."

iv. Para 81: "…being conscious of the need to make the award of individual damages as compensatory as possible having regard to all the other factors, it is currently intended that each class member will be

[22] A copy of the Litigation Plan is at Exhibit WHM6 to Mr Merricks' first witness statement.

> entitled to claim an amount for each year that s/he was in the class (with no further distinctions being made)."

68. The Tribunal should refuse certification in light of these proposals because distribution on this basis will bear no relationship to the compensatory principle upon which the Tribunal may award damages in collective proceedings. As explained above, compensatory damages would have regard to the purchasing history of each consumer, including what they purchased, where they purchased and when they purchased. They would also take account of the benefits obtained by each individual cardholder as a result of the MIF. Given the difficulties in applying such an approach, the Applicants' proposed approach is simply to dole out "an amount" of money to any of the 46.2 million class members who ask for it. This will mean that almost all of the class will receive more or less than their actual loss (if any). Distribution of money on such a mechanical basis has nothing to do with compensation. This issue underscores the inappropriateness of collective proceedings on behalf of 46.2 million individuals over a 16 year period. Such a claim is unworkable and entirely divorced from the fundamental principle of compensatory damages.

69. The Tribunal should refuse certification for another reason.

70. Paragraph 10.5 of the Epiq/Hilsoft Plan (Annex 1 of the Litigation Plan) provides:

> "**Claim Validation:** It would be premature at this stage to set out in detail how claims will be validated. This will depend on the class definition approved by the Tribunal, the amount of any damages award, the number of opt-out and opt-in class members and the date at which this will be done, the duration of the claims period, and a number of other relevant considerations. However, at this stage it is likely that as part of the claim-filing process, the claimant will only be requested to provide information necessary to validate the claim and to process the payment."

71. Therefore, whilst it is proposed that distribution be made without any attempt to have reference to, or require proof of, actual losses, no alternative criteria have been suggested for distribution.

72. It would be unacceptable to allow a claim purporting to be for £14 billion to proceed without any clear proposal for distribution being put forward. The true position is that

because of the nature of this claim (46.2 million individuals over a 16 year period) and the acceptance that it would not be possible to assess individual losses, any distribution will be arbitrary. This goes against the requirement and the plain meaning that the proposed distribution method should be "an appropriate means for the fair and efficient resolution of the common issues" pursuant to rule 79(2)(a) of the 2015 Rules [**B/12/110**]. The current distribution mechanism is so vague that it cannot be assessed as to whether it would meet the test of "fairness" or not.

73. The Applicant cannot be permitted to avoid this fundamental flaw in the application for certification by simply seeking to postpone the issue to some unspecified later date.

H: FUNDING

74. In view of confidentiality concerns, Mastercard's submissions in relation to the proposed funding of these collective proceedings are set out in the Confidential Annex to this Response.

I: LIABILITY - STRENGTH OF THE CLAIM

(a) Relevance of strength of the claim

75. Rule 79(3)(a) of the 2015 Rules [**B/12/110**] expressly recognises the strength of the claims as a matter to be taken into account in deciding whether collective proceedings should be opt-in or opt-out.

76. Para 6.39, first bullet of the Guide [**B/36/1062**] states:

> "Given the greater complexity, cost and risks of opt-out proceedings, the Tribunal will usually expect the strength of the claims to be more immediately perceptible in an opt-out than an opt-in case, since in the latter case, the class members have chosen to be part of the proceedings and may be presumed to have conducted their own assessment of the strength of their claim. However, the reference to the "strength of the claims" does not require the Tribunal to conduct a full merits assessment, and the Tribunal does not expect the parties to make detailed submissions as if that were the case. Rather, the Tribunal will form a high level view of the strength of the claims based on the collective proceedings claim form. For example, where the claims seek damages for the

> consequence of an infringement which is covered by a decision of a competition authority (follow-on claims), they will generally be of sufficient strength for the purpose of this criterion."

77. Rule 79(2) [**B/12/110**], which addresses the issue of whether claims are suitable to be brought in collective proceedings at all, does not make express reference to the strength of the claims. However, it does provide that the Tribunal must take into account all matters it thinks fit. Mastercard submits that this can and should include consideration of the strength of the proposed claims.

(b) UK domestic interchange fees

78. The proposed claims are follow on claims based on the EC Decision. Article 1 of the EC Decision found that, from 22 May 1992 until 19 December 2007, the "Intra-EEA fall back interchange fees for Mastercard branded consumer credit and charge cards and for Mastercard or Maestro branded debit cards" ("the "Intra-EEA MIF") infringed Article 81 EC.

79. There was no finding of liability in respect of Mastercard's UK domestic MIFs (or UK domestic interchange fees set bilaterally) – "UK domestic IFs".[23]

80. As can be seen from the particulars of loss and damage at paragraphs 112(a) and 112(g) of the Claim Form, nearly 95% of the sums claimed in these proposed proceedings are based on UK domestic IFs.

81. In order to claim damages in relation to UK domestic IFs, the Applicant would have to prove that the level of the Intra EEA MIFs caused the level of Mastercard's UK domestic IFs, and ultimately prices charged to UK consumers, to be higher than they would otherwise have been; see paras 103-105 of the Claim Form.

82. The Applicant's argument that the Intra EEA MIF had an effect on UK domestic IFs is based on comments by the Commission in the Decision which, to say the least, are hesitant about any such effect. For example:

[23] While the Claimants refer to MIFs, it is important to note that for significant parts of the claim period (from 1992 to November 1997 for credit cards and throughout the claim period for Maestro debit cards), licensee banks were required to negotiate UK interchange fees bilaterally.

a. Recital 405, as quoted at para 76 of the Claim Form, states:

"Moreover, MasterCard's [Intra EEA] MIF also acts like a minimum price recommendation for transactions on a domestic level. By agreeing on specific interchange fees bilaterally or multilaterally member banks **may** take the Intra EEA fallback interchange fees into account as minimum starting point." (Emphasis added.)

b. Recital 421 as quoted at paragraph 82 of the Claim Form which states:

"Second, **some** of MasterCard's member banks view Intra-EEA fallback interchange fees de facto as a minimum starting point for setting the rates of domestic interchange fees. Due to MasterCard's network rules issuing banks have the certainty that in the absence of their consent to the adoption of the domestic MIF the Intra-EEA fallback interchange fees will always automatically apply as domestic MIF in their country. Issuing banks have no incentive to agree to domestic interchange fees below this default rate because interchange fees are revenue. Both the adoption of a domestic MIF and a bilateral agreement requires, however, the consent of the issuing banks (see section 3.1.1). Hence, even in countries where MasterCard's Intra-EEA fallback interchange fees do not apply as such as domestic MIF (see above), the cross-border interchange fees **may** act as a minimum benchmark for setting the level of domestic interchange fee rates." (Emphasis added.)

83. The Commission also referred (at Recital 416, as quoted at paragraph 81 of the Claim Form) to the Intra EEA MIF having a direct effect on domestic transactions in certain countries where local members neither agreed on bilateral interchange fees nor on a domestic MIF and so the EEA MIF in fact applied to domestic transactions. However, this was ***not*** the case in the UK at any time during the Claim Period.

84. The fact that the Intra EEA MIF was not in practice seen as a "minimum starting point" for UK domestic IFs is evidenced, as the Applicant accepts at paragraph 113 of the Claim Form, by the fact that UK domestic IFs for Maestro debit cards were set below the level of the Intra EEA MIF.[24] In fact, on average, UK domestic IFs for Maestro were around a third of the Intra EEA MIF.

[24] Paragraph 113 in fact refers to "United Kingdom Domestic MIFs" but the Applicant's solicitors have confirmed in correspondence that this should refer to "Intra EEA MIFs"; see Quinn Emanuel letter dated 9 November 2016.

85. Whether set bilaterally,[25] multilaterally[26] or by Mastercard itself[27], UK domestic IFs for credit and debit cards during the Claim Period were set based on UK specific cost studies and UK market conditions (including in particular the need to be competitive with the UK domestic IFs set by Mastercard's main competitor, Visa, which had the majority of the market for both credit and debit cards in the UK throughout the Claim Period). In the case of credit cards, the resulting UK domestic IFs happened to be higher than Mastercard's Intra EEA MIFs because both the results of the UK cost studies and Visa's UK domestic MIFs were higher than Mastercard's Intra EEA MIFs. Whereas for debit cards, the resulting domestic IFs happened to be lower than Mastercard Intra EEA MIFs, since both the results of the UK cost studies and Visa's UK domestic MIFs were lower than Mastercard's Intra EEA MIFs. This confirms the irrelevance of the Intra EEA MIF (which only applied to the approximately 3% of transactions which took place cross-border in the EEA) to UK domestic transactions (which constituted over 95% of transactions).

86. In any event, the potential mechanism identified by the Commission for the Intra EEA MIF having an effect on domestic IFs (namely that issuers would not agree to domestic IFs below the Intra EEA MIF since the Intra EEA MIF would automatically apply in default of agreement) was never relevant in the UK:

    a. For credit cards from 1992 to November 1997 (and for Maestro debit cards throughout the Claim Period), issuers were required to negotiate interchange fees bilaterally, with the interchange fee to be determined by arbitration in default of agreement. UK-specific cost studies were produced around every two years from 1990 to inform those negotiations and, if necessary, the arbitrators. There was consequently no scope for issuers to default to the Intra EEA MIF. In fact, in the period 1992 to October 1996, the Intra EEA MIF had no role at all in relation to the UK for credit cards, with the International MIF[28] applying as a temporary default pending arbitration. While the Intra EEA MIF applied as a temporary default from October 1996 to November 1997, this was only pending arbitration and had no effect on the level of

[25] For credit cards between 1992 and 1997 and for debit cards throughout the claim period.
[26] For credit cards between 1997 and November 2004.
[27] For credit cards from November 2004 onwards.
[28] The MIF set by Mastercard International which applied to Intra-Regional transactions.

interchange fees agreed bilaterally, which remained at the same level as prior to October 1996.

b. For credit cards from November 1997 to November 2004, there was a UK domestic MIF set by UK member banks. This was originally set based on the average interchange fees set bilaterally by UK banks (which as set out above, were not based or dependent on the Intra EEA MIF). Once the UK MIF was established, there was no scope for issuers to default to the Intra EEA MIF. In the absence of agreement on a new UK MIF, the existing UK MIF would simply continue to apply. In any event, far from being unwilling to reduce interchange fees, the UK member banks (including issuers) agreed to a number of reductions in interchange fees as UK market conditions dictated.

c. For credit cards from November 2004 onwards, the UK domestic MIF was set by Mastercard. There remained a UK MIF in place, so again there was no scope for issuing banks to default to the Intra EEA MIF and UK issuing banks had no involvement in setting the UK domestic MIF.

87. Unless the Applicant can establish that the Intra EEA MIF caused UK domestic IFs to be higher than they otherwise would have been, even on the Applicant's figures (which are materially inflated for the reasons explained below), the value of the claim drops from over £14 billion to less than £1 billion.[29] In such circumstances, even on the Applicant's best possible case, the average per capita recovery would fall from the "few hundred pounds" suggested at para 41(b) of the Claim Form to less than £25 per person.

88. Mastercard does not ask the Tribunal to decide these issues at the CPO hearing. However, it is clear that the question of whether there was any loss in relation to UK domestic IFs is far from clear cut. If such liability is not established, the claims will be limited to cross-border transactions to which Intra EEA MIFs applied, and the value overall would be dramatically reduced. If certification is granted, then the issue of causation would appear to be ripe to be determined as a preliminary issue.

[29] Claim Form at paragraph 112(g).

(c) UK debit card MIFs

89. Mastercard further submits that, in any event, there are no viable claims in respect of UK domestic debit card interchange fees. The Applicant acknowledges at paragraph 113 of the Claim Form that he cannot make any claim in relation to domestic transactions on the UK Maestro scheme. However, domestic debit card transactions with a value of over £36 billion are included within his calculation of damages, which appears to result in a claim quantified at around £250 million, plus interest (see paragraph 112(b) of the Claim Form) – a total of around £400 million (on the basis of the compound interest claimed).

90. The Applicant has confirmed in correspondence that this part of the claim relates to transactions on Solo debit cards.[30] Solo debit cards were a sister card to the UK Switch/Maestro cards which provided limited functionality and were issued to minors and people with poor credit history. In the Claim Period, the same interchange fees set in the same way applied to Solo debit cards as applied to UK Switch/Maestro cards, therefore, this claim is no more viable than the Maestro claim which the Applicant has already accepted cannot be pursued. This reduces the value of the claim by around £500 million.

J: INFLATED VALUE OF THE CLAIM

91. In addition to the points set out above, the value of the claim is inflated in at least two other respects.

(a) Inflated value of the Intra-EEA Claim

92. Even if all of the other assumptions made by the proposed class representative were correct, the value of a claim based only on transactions to which the Intra EEA MIF applied is far smaller than that claimed by the proposed class representative in respect of the Intra EEA MIF. As is apparent from footnote 81 to the Claim Form, the cross-border claim is presently calculated based on the value of transactions by UK cardholders **outside** the UK. Such transactions will have no impact on the retail prices paid by consumers in the UK. It therefore appears that transactions by UK cardholders

[30] See Quinn Emanuel letter dated 9 November 2016 [**A/5/9-10**].

outside the UK are being used as a proxy for transactions **in** the UK to which the Intra EEA MIF applied, e.g. foreign cardholders visiting the UK. This proposed proxy overstates the value of any Intra EEA claim for, *inter alia*, the following reasons:

a. The claim in respect of the Intra EEA MIF can only apply to spending by EEA tourists in relation to the UK which are subject to the Intra-EEA MIF. However, the proxy used by the Applicant is for **all** transactions by UK cardholders outside the UK - both in Europe (which will be subject to the Intra EEA MIF) and also transactions outside Europe (which were not subject to the Intra EEA MIF).

b. The UK is a net exporter of tourism and so spending by UK consumers abroad will be much higher than spending by foreign tourists in the UK.

c. In the UK, consumers had much higher levels of card holding and usage, particularly for credit cards, than in most other EEA states during the Claim Period. A proxy based on card usage by UK consumers will therefore overstate the volume of card usage by EEA consumers.

d. Due to technical features of the UK Switch debit card scheme – the predecessor of UK Maestro, which remained present for all or most of the Claim Period, most UK merchants that accepted Maestro could not generally accept foreign Maestro cards.

(b) Scope of the class

93. In addition to the other difficulties addressed above, the figures proposed by the Applicant assume that the entire overcharge was borne by the proposed class. However, even assuming that 100% of the overcharge was passed-on in higher prices, a substantial proportion of purchases of goods and services in the period 1992 to 2008 would have been by people/entities which would be outside the scope of the proposed class including:

a. businesses, charities and government bodies or individuals purchasing in the course of business[31];

b. persons who are now deceased. The Expert Report suggests at Table 4.1, based on data from the Office of National Statistics, that 8% of people who were members of the class in 2008 had died by the end of 2015. Using the same ONS data, 32% of the people who were members of the class in 1992 are now dead;

c. anyone not resident in the UK for the required three month period, including tourists.

d. purchases made by non-residents at UK retailers by mail order, telephone or online.

e. individuals under 16; and

f. anyone no longer resident in the United Kingdom, who will only be part of the claim on an opt-in basis.

94. These considerations will materially reduce the value of the claim. No proposals have been put forward to deal with these issues by the Applicant or his experts.

K: CONCLUSION

95. In light of the above, Mastercard submits that the Tribunal should refuse to certify the proposed collective proceedings.

96. It is important to note that it is not open to the Applicant to suggest that these claims should be certified in order to ensure that Mastercard does not retain any financial benefit as a result of the MIF. Collective proceedings are concerned with compensating **claimants**, not punishing or stripping profits from **defendants**. In any

[31] The Claim Form makes clear at para 23(b)(i) that the class is only intended to capture individuals purchasing goods or services in their capacity as consumers rather than for business purposes.

event, as noted in Annex 3 of the Expert Report, Mastercard is already facing numerous claims from merchants. Furthermore, the MIF is not received by Mastercard. It is received by issuing banks.

PART IV: CERTIFICATION OF QUANTUM ISSUES SHOULD BE REFUSED

97. If, contrary to Mastercard's primary position, the Tribunal is minded to make a collective proceedings order, Mastercard submits that the Tribunal should not order quantum to be tried as a common issue.

A: RELEVANT LEGAL PROVISIONS

98. Rule 74(6) of the 2015 Rules [**B/12/106**] states:

> "A collective proceedings order and a collective settlement order may be limited to only some parts or issues in the claims to which it relates."

99. Rule 73(2) of the 2015 Rules [**B/12/41**] defines "common issues" as "the same, similar or related issues of fact or law".[32]

100. Para 6.37, second bullet of the Guide [**B/36/1061**] states:

> "The core notion of collective proceedings is that they group together similar claims which raise common issues. Common issues are defined in Rule 73(2) as the same, similar or related issues of fact or law, mirroring section 47B(6) of the 1998 Act. It is accordingly important that the claim form identifies the common issues which it is contended can suitably be determined on a collective basis.
>
> Although the claims must raise common issues to satisfy the criteria for approval, the final resolution of the claims will often require the assessment of individual issues. The existence of such individual issues is not fatal to an application for a CPO. For example, the determination of liability for an infringement may raise common issues of fact and law which justify a CPO, while causation and the quantification of any damages may not be common to the class. In such circumstances, the Tribunal may decide to approve collective proceedings in relation to only part of the claims (Rule 74(6)). Once a judgment in those proceedings on the common issues is given, if an aggregate award of damages is inappropriate the claims will continue thereafter on an individual basis."

[32] This mirrors the wording of section 47B(6) of the 1998 Act [**B/8/28**].

B: PASS THROUGH/PURCHASING HISTORY

101. For the reasons already explained above, the differences in pass through rates of any MIF overcharge from merchants to consumers, the differences in consumers' purchasing histories and the extent to which they received any advantages by being a cardholder mean that quantum is not a common issue and should not be certified.

C: COMPOUND INTEREST

102. Para 112 of the Claim Form indicates that the claim including compound interest results in a claim around £2.4 billion greater than a claim based on simple interest.

103. Even if, contrary to the above, the Tribunal were minded to certify issues of pass through and purchasing history as common issues, Mastercard submits that the claim for compound interest is patently unfit for certification.

104. As a matter of legal principle, compound interest may be claimed where it has been suffered as an actual loss. It must be pleaded and proved in the same way as any other head of loss.[33]

105. Para 5.5.2 of the Expert Report states:

> "Individuals in the proposed class who used the money either to decrease their borrowings or to increase their savings and/or investments will have suffered loss on a compound basis. Member of the proposed class are likely to fall into one of these two principal categories and therefore on this basis compound interest is also a common issue. Even if it is not a common issue for the whole of the proposed class it will be a common issue for at least part of it."

106. The two suggested bases for compound interest are further explained at para 114 of the Claim Form as follows:

> "a. those proposed class members, who effectively borrowed money and/or increased their borrowings in order to pay, and/or as a result of paying, the Overcharge (whether by using overdraft facilities, using credit cards, or using

[33] *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34; [2008] 1 AC 561, per Lord Hope at para 17; Lord Nicholls at pars 94 and 96; Lord Scott at para 132 [**B/27/446**].

other forms of credit) suffered charges on a compound interest basis (as well as other financing costs) on those borrowed sums;

b. those proposed class members who were in credit at any bank or savings institution lost, on a compound basis, the return on investment on the credit sums that they would have saved but which, instead, were used to pay the Overcharge (including by being unable to save that money in a bank account attracting interest, or by investing that money elsewhere);

c. both groups set out above were kept out of and denied the use of their money, on a compound basis, either to decrease their borrowings or to increase their savings/investments;

d. for the avoidance of doubt, some proposed class members may have fallen into both categories above (either sequentially or concurrently), although it is averred that all class members will fall at least in to one or other of the categories above."

107. Para 115 of the Claim Form states that:

> "The nature of the proposed Claim and the numbers of the proposed class members involved means that it is not possible or proportionate to particularise the detail of each such loss on an individual basis. Instead, the proposed class representative will adduce evidence (both expert and factual) in respect of such losses on an aggregate average basis…".

108. No further explanation is given of how such assessment on "an aggregate average basis" might be carried out.

109. Mastercard submits that the claim for compound interest is clearly unsuitable for certification as a common issue for the following reasons.

110. First, the majority of the proposed class are unlikely to have suffered any compound interest losses at all. Para 41(b) of the Claim Form suggests that the *per capita* recovery will be no more than "a few hundred pounds". If this is spread over the 16 year period of the claim, this means that the average overcharge passed through to the consumer would be in the order of £12 to £25 per annum, i.e. a few pence per week. This will simply have been absorbed in cash-flow by most consumers. It will not have caused actual compound interest losses.

111. Second, the Claim Form demonstrates on its face that this is not a common issue by virtue of the two suggested categories of alleged loss, which are very different in nature (i.e. charges for increased borrowing versus interest foregone on investments).

112. Third, even if any members of the class did suffer actual compound interest losses (which is not admitted), the loss profile of each member would be radically different depending on their own personal circumstances. Even the Claim Form admits that "some proposed class members may have fallen into both categories above (either sequentially or concurrently)". In fact, the profile of each and every claimant will be different. This is not a common issue. Nor is it a matter that can be resolved by establishing sub-classes, as suggested in the Applicant's List of Common Issues. Each individual's position will be different.

D: CONCLUSION

113. In light of the above, quantum is not fit to be certified as a common issue, alternatively compound interest is not fit to be certified as a common issue.

PART V: LIMITATION

114. Mastercard submits that the claims which are proposed to be covered by a collective proceedings order are time-barred insofar as they relate to the period prior to 20 June 1997.

A: PROCEDURE

115. The Tribunal has directed that the limitation issue should be determined after the CPO hearing, if certification is granted. It is nonetheless appropriate at this stage for Mastercard to inform both the Applicant and the Tribunal of the nature of its case. Until the nature of the Applicant's response has been made clear, it not possible to say whether this issue would be best dealt with by way of strike out/summary judgment or preliminary issue.

B: APPLICABLE LIMITATION RULES

116. Any claims brought in the Tribunal prior to 1 October 2015 would have been time-barred in respect of the period prior to 20 June 1997 pursuant to rule 31(4) of the Competition Appeal Tribunal Rules (the "2003 Rules"). Rule 31(4) stated [**B/11**]:

> "No claim for damages may be made if, were the claim to be made in proceedings brought before a court, the claimant would be prevented from bringing the proceedings by reason of a limitation period having expired before the commencement of section 47A."

117. Rules 31(1) to (3) of the 2003 Rules [**B/11/62-63**] established specific limitation rules for claims in the Tribunal.

118. Section 47A (of the Competition Act 1998) commenced on 20 June 2003. Under s.2 of the Limitation Act 1980 [**B/4/9**], the limitation period for a damages claim based on breach of statutory duty is six years. Therefore, on 19 June 2003, any damages claim of the sort raised in the Claim Form that had accrued prior to 19 June 1997 was time-barred under the Limitation Act 1980. It further follows that it would also have

been time-barred for the purpose of proceedings in the Tribunal under section 47A of the Competition Act 1998 by reason of rule 31(4) of the 2003 Tribunal Rules.

119. The limitation rules applicable to Tribunal proceedings were amended by the 2015 Rules.

120. Rule 118 of the 2015 Rules [**B/12/129-130**] revokes the 2003 Rules.

121. Rule 119 of the 2015 Rules [**B/12/130**], a savings provision, states:

"**Savings**

119.—

(1) Proceedings commenced before the Tribunal before 1st October 2015 continue to be governed by the Competition Appeal Tribunal Rules 2003 (the "2003 Rules") as if they had not been revoked.

(2) Rule 31(1) to (3) of the 2003 Rules (time limit for making a claim) continues to apply in respect of a claim which falls within paragraph (3) for the purposes of determining the limitation or prescriptive period which would apply in respect of the claim if it were to be made on or after 1st October 2015 in—

(a) proceedings under section 47A of the 1998 Act, or

(b) collective proceedings.

(3) A claim falls within this paragraph if—

(a) it is a claim to which section 47A of the 1998 Act applies; and

(b) the claim arose before 1st October 2015.

(4) …".

122. Rule 119(2) of the 2015 Rules therefore indicates that the limitation period for a claim that *could have been* commenced prior to 1 October 2015, but was commenced *after that date* is to be determined by reference to rule 31(1)–(3) of the 2003 Rules [**B/11/62-63**]. However, no reference is made to rule 31(4) of the 2003 Rules.

123. The fact that rule 119(2) of the 2015 Rules makes no reference to rule 31(4) of the 2003 Rules raises the question of whether a claim which was time-barred under rule 31(4) of the 2003 Rules can now be brought under the 2015 Rules. Mastercard

submits that it cannot because it had an accrued right to rely on the limitation defence under rule 31(4) of the 2003 Rules.

124. First, accrued rights are protected by principles of statutory construction, both under s.16(1)(c) of the Interpretation Act 1978 [**B/3/7**] and at common law.

a. Section 16(1)(c) of the Interpretation Act 1978 states:

"Without prejudice to section 15, where an Act repeals an enactment, the repeal does not, unless the contrary intention appears,—

…

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment;

…".[34]

b. A similar canon of construction is recognised at common law; see the opinion of the Privy Council in *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553 at 558F [**B/19/201**]:

"Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past."

125. Second, an expired limitation period is an "accrued right" for these purposes; see *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553 at 563D-G [**B/19/205**]:[35]

"In their Lordships' view, an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable. Their Lordships see no compelling reason for concluding that the respondents acquired no 'right' when the period prescribed by the Ordinance of 1948 expired, merely because

[34] Pursuant to s.23(1) and (2), Interpretation Act 1978 [**B/3/8**], references to "enactments" are to be read as including enactments comprised in subsidiary legislation (such as the 2003 and 2015 Tribunal Rules).

[35] *Yew Bon Tew* was applied by the Court of Appeal in *Arnold v Central Electricity Generating Board* and the House of Lords then upheld the Court of Appeal as a matter of construction of the specific statutes, rather than any general principle of statutory construction; see [1988] AC 228, per Lord Bridge at 271H-272C [**B/21/262**].

> the Ordinance of 1948 and the Act of 1974 are procedural in character. The plain purpose of the Act of 1974, read with the Ordinance of 1948, was to give and not to deprive; it was to give to a potential defendant, who was not on June 13, 1974, possessed of an accrued limitation defence, a right to plead such a defence at the expiration of the new statutory period. The purpose was not to deprive a potential defendant of a limitation defence which he already possessed. The briefest consideration will expose the injustice of the contrary view. When a period of limitation has expired, a potential defendant should be able to assume that he is no longer at risk from a stale claim. He should be able to part with his papers if they exist and discard any proofs of witnesses which have been taken; discharge his solicitor if he has been retained; and order his affairs on the basis that his potential liability has gone. That is the whole purpose of the limitation defence."

126. It follows that the repeal of the 2003 Rules by the 2015 Rules did not have the effect of reviving claims which had been time-barred under the 2003 Rules.

127. The fact that the savings provisions in rule 119(2) of the 2015 Rules do not make express reference to rule 31(4) of the 2003 Rules cannot alter that position. It would be extraordinary and deeply unfair if a claim which had been time-barred since 20 June 2003, as in this case, could be brought back to life some twelve years later by repeal of a relevant provision in 2015. If such an effect were intended, it would require express wording on the part of the legislature. There is no such express wording in the 2015 Rules.

128. Mastercard therefore submits that the claims which are proposed to be covered by a collective proceedings order are time-barred insofar as they relate to the period prior to 20 June 1997.

PART VI: DEFINITION OF THE CLASS

129. If, contrary to the above, the Tribunal is minded to make a collective proceedings order, then the definition of the class proposed in para 5 of the Claim Form should be amended to reflect a clarification which has arisen in correspondence.

130. Rule 79(1)(a) of the 2015 Rules states that the Tribunal must be satisfied that claims "are brought on behalf of an identifiable class of persons" [**B/12/110**].

131. Para 6.37 of the Guide [**B/36/1060**] states:

> "It must be possible to say for any particular person, using an objective definition of the class, whether that person falls within the class."

132. Para 5 of the Claim Form proposes the following definition of the class:

> "Individuals who between 22 May 1992 and 21 June 2008 purchased goods and/or services ***from businesses selling in the UK*** that accepted MasterCard cards, at a time at which those individuals were both (1) resident in the UK for a continuous period of at least three months, and (2) aged 16 years or over." (Emphasis added.)

133. This definition is ambiguous because the words "from businesses selling in the UK" could include a claim arising from a purchase made outside the UK from a business which sold both inside and outside the UK. The solicitors acting for the Applicant have indicated that the proposed definition is not intended to include any purchases made outside the UK.[36]

134. The proposed class definition should therefore be amended to remove this ambiguity.

[36] See Freshfields' letter dated 13 September 2016 [**A/1/1**]; Quinn Emanuel's letter dated 15 September 2016 [**A/2/3-4**]; Freshfields' letter dated 16 September 2016 [**A/3/5**] and Quinn Emanuel's letter dated 16 September 2016 [**A/4/7-8**].

PART VII: ORDER SOUGHT

135. In light of the above, Mastercard submits that the Tribunal should dismiss the application for a collective proceedings order and order the Applicant to pay Mastercard's costs of the application.

Mark Hoskins QC
Tony Singla
Hugo Leith
Brick Court Chambers

Matthew Cook
One Essex Court

ANNEX: OTHER JURISDICTIONS

A: INTRODUCTION

136. As already indicated, Mastercard submits that the UK collective proceedings regime must be interpreted and applied by reference to domestic legal principles. However, insofar as the Tribunal has regard to other jurisdictions, Mastercard emphasises the following:

a. **United States** If a collective claim of the sort which the Applicant is seeking to have certified in the present case were brought in the US, it is clear from case-law that it would be dismissed on the grounds of remoteness before any question of class certification arose. Further and in any event, an award of aggregate damages would be unlikely given the inability to distinguish between the losses of individual members of the class.

b. **Australia** The position in Australian Federal and relevant State law is consistent with Mastercard's submissions as to the proper interpretation of the UK measures. In particular:

i. The collective proceedings rules are procedural, not substantive, in nature.

ii. The quantum of damages suffered by the group as a whole must be calculated by reference to the existing law.

c. **Canada** Under Canadian law, the power to award aggregate damages is also procedural, not substantive, in nature.

B: U.S. LAW

(a) Standing

137. Potential claimants for antitrust damages must satisfy the test of standing developed by the Supreme Court in *Associated General Contractors v Carpenters*.[37] The Supreme Court identified five factors for determining whether a plaintiff is asserting an injury which is too remote from an alleged antitrust violation to confer standing to recover damages, i.e.:[38]

    a. whether the plaintiff is a consumer or competitor in the allegedly restrained market;

    b. whether the injury alleged is a direct, first-hand impact of the restraint alleged;

    c. whether there are more directly injured appellants with motivation to sue;

    d. whether the damages claims are speculative; and

    e. whether the plaintiff's claims risk duplicative recoveries and would require a complex apportionment of damages.

138. This remoteness test has been applied at State level (where claims by indirect purchasers are permitted) in order to reject claims by consumers against Mastercard. For example, in *Kanne and Sherman v Visa U.S.A. and MasterCard International*,[39] the Supreme Court of Nebraska held that consumers lacked standing to bring a damages claim alleging that Visa and Mastercard's tying of credit card services to debit card services caused merchants to pay excessive fees for debit card processing services and that those costs were passed on to consumers. The Court applied the five factors identified in *Associated General Contractors* and held *inter alia*:

    a. "Second, appellants allege injuries that are derivative and remote. They allege that the "tying arrangements ... have forced *Merchants* to accept [Visa and MasterCard brand debit cards] and pay fees which are supra-competitive." (Emphasis supplied.) Thus, they claim to have been injured only derivatively,

[37] 459 U.S. 519, 103 S.Ct. 897 (1983) [**C/3**].
[38] 459 US 519, at 536-545, esp 545; 103 S.Ct. 897, at 908-912, esp 912 [**C/3**].
[39] 272 Neb. 489 (2006) [**C/10**].

because merchants allegedly raised the prices of all goods that they sold, thereby "pass[ing] those prices on to consumers in the for[m] of artificially-inflated and advanced prices for goods." Appellants do not allege that they were injured directly, or even indirectly, by purchasing debit processing services in a chain of distribution. Appellants, instead, assert a derivative injury based on a theory that merchants passed on the cost of an alleged tying of debit processing services to increase the prices of thousands of unrelated retail goods the merchants sold to consumers such as appellants.": 272 Neb., at 495 [**C/10/182**].

b. "Fourth, appellants' damages claims are speculative. Appellants do not and cannot allege that they overpaid for purchases of debit processing services from merchants. Instead, appellants assert that they paid an overcharge on every retail good that they purchased from every Nebraska merchant that accepted Visa or MasterCard, over the course of several years, regardless of the form of payment used to make their purchases. Like the claimed damages in *Henke Enterprises, Inc. v. Hy-Vee Food Stores*, 749 F.2d 488, 490 (8th Cir.1984), the claimed price increases over a period of years could have resulted "from myriad independent reasons" unrelated to the alleged violation of the Junkin Act": 272 Neb., at 496 [**C/10/182**].

c. "Moreover, apportioning damages would be a nightmare. Appellants' claims would require an apportionment of damages among each Nebraska merchant at which appellants shopped and among each item that each appellant purchased at each merchant-an incredibly complex task. None of the factors from *Associated General Contractors* weigh in favor of concluding that appellants' claimed injury is the type intended to be protected by antitrust laws. We conclude that appellants lack standing under *Associated General Contractors* to seek recovery for Visa and MasterCard's alleged violation of the Junkin Act." : 272 Neb., at 496 [**C/10/182**].

139. Similar claims were dismissed on similar grounds in a number of other States.[40] For example, in *Nass-Romero v Visa U.S.A. and MasterCard International*,[41] the Court of Appeals of New Mexico held *inter alia*:

a. "Plaintiff asserts that her damages are based on the overcharges she paid on every retail item she bought from every merchant in New Mexico that accepted Visa and MasterCard credit and debit cards over the course of several

[40] *Crouch v Crompton/Morris v Visa U.S.A. and MasterCard International*, 2004-2 Trade Cases P 74,601;2004 WL 2414027 (Superior Court of North Carolina) [**C/6/129**]; *Knowles v Visa USA* 2004-2 Trade Cases P 74,642; 2004 WL 2475284 (Superior Court of Maine) [**C/7/155**]; *Peterson v Visa USA* 2005 WL 1403761 (Superior Court of the District of Columbia) [**C/8/163**]; *Strang v Visa USA* 2005 WL 1403769 (Circuit Court of Wisconsin) [**C/9/171**]; *Southard v Visa U.S.A. and MasterCard International* 734 N.W.2D 192 (2007) Supreme Court of Iowa [**C/11/187**]; *Nass-Romero v Visa U.S.A. and MasterCard International* 279 P.3d 772 (2012) (Court of Appeals of New Mexico) [**C/14/221**].

[41] *Nass-Romero v Visa U.S.A. and MasterCard International* 279 P.3d 772 (2012) (Court of Appeals of New Mexico) [**C/14/221**].

years. By way of example, Plaintiff would ask a court to find that paying, say, $1.99 for a dozen eggs rather than $1.89 during a random shopping trip to a particular grocer was the indirect result of the excessive debit card transaction fees paid by the grocer to the member banks of Visa and MasterCard.": 279 P.3d 772, at 779 [**C/14/228**].

b. "Plaintiff would be alleging that for this particular purchase, and for the millions of small purchases made by "tens of thousands" of New Mexicans at dozens or perhaps hundreds of retail outfits throughout the state, the merchant chose not to absorb the debit card transaction fee but rather passed that cost on to the consumer. Such a calculation would ignore the countless considerations that go into the set price of any given product at any given store on any given day.": 279 P.3d 772, at 779 [**C/14/228**].

c. "To determine what portion of any overcharge was passed on by any given merchant, with respect to which products, and to which consumers is a task of monumental uncertainty and complexity. Depending on their other costs, their competitive position in the market, their profit margins, and the specific products they sold, some merchants could have absorbed a substantial portion of any overcharge instead of passing it on.": 279 P.3d 772, at 779 [**C/14/228**].

(b) Class actions

140. In the U.S., the procedure for bringing a class action in federal court is governed by Federal Rule of Civil Procedure 23 [**C/1/1**]. In such a case, the court will decide whether class certification is warranted and, if so, will designate a class representative and class counsel who are "empowered to bind the absent class members to their conduct and resolution of a class lawsuit." *McLaughlin on Class Actions: Law and Practice* ("*McLaughlin*") § 1:2 at 13 (12th ed. 2015) [**C/21/345**].[42]

141. In recent years the U.S. Supreme Court has held that courts should scrutinize the certification decision carefully, and conduct a "rigorous analysis" to determine whether the requirements of class certification are satisfied.[43]

142. Rule 23(a) – (b) provide the elements necessary for certification of the class. The person seeking certification carries the burden of establishing that the class satisfies each requirement under Rule 23(a) as well as at least one category under Rule 23(b).[44]

[42] *McLaughlin on Class Actions: Law and Practice* (12th ed. 2015) ("*McLaughlin*") § 1:2 at 13 [**C/21/345**].
[43] See *Wal-Mart* v. *Dukes* 131 S. Ct. 2541, 2551 (2011) [**C/13/208-209**].
[44] *McLaughlin* § 1:2 at 12–13 [**C/21/344-345**].

143. Each certification requirement must be determined by a preponderance of evidence. Each fact necessary to meet those requirements must be "more likely than not". This requires a rigorous analysis of each factor and, in effect, the claim itself.[45]

144. **Rule 23(a)** There are four requirements under Rule 23(a), commonly referred to as "(1) numerosity, (2) commonality, (3) typicality, and (4) adequacy."[46]

a. To meet the numerosity requirement, a class must be "so numerous that joinder of all members is impracticable."[47]

b. To establish commonality, there must be "questions of law or fact common to the class."[48]

c. Typicality requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class."[49] Typicality does not require the claims to be identical. Rather, "a representative party's claim is typical if it arises from the same practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory."[50]

d. Finally, adequacy requires that "the representative parties will fairly and adequately protect the interests of the class."[51]

145. **Rule 23(b)** In addition to meeting all of the requirements under Rule 23(a), proponents of certification "must demonstrate with evidentiary proof that a class action is maintainable under any one of the three categories set forth in Rule 23(b)."[52] Rule 23(b) requirements depend on the category of the action:

[45] Reeves, *Class Certification – how the CAT might learn from Canada and the USA* [2016] Comp Law p.145 at p.151 [**B/38/1087**]; citing *Comcast v Behrend* 133 S Ct 1426 (2013) [**C/15/231**].
[46] *ABA Section of Antitrust Law, Antitrust Law Developments* ("*Antitrust Developments*") 845 (7th ed. 2012) [**C/19**].
[47] Fed. R. Civ. P. 23(a)(1) [**C/1/1**].
[48] Fed. R. Civ. P. 23(a)(2) [**C/1/1**].
[49] Fed. R. Civ. P. 23(a)(3) [**C/1/1**].
[50] *Antitrust Developments* 847 [**C/19/319**].
[51] Fed. R. Civ. P. 23(a)(4) [**C/1/1**].
[52] *McLaughlin* § 5:1 at 1060 [**C/21/362**].

> "The (b)(1) class action encompasses cases in which the defendant is obliged to treat class members alike or where class members are making claims against a fund insufficient to satisfy all of the claims. The (b)(2) class action, on the other hand, was intended to focus on cases where broad, class-wide injunctive or declaratory relief is necessary. Finally, the (b)(3) class action was intended to dispose of all other cases in which a class action would be convenient and desirable, including those involving large-scale, complex litigation for money damages."[53])

146. "The vast majority of antitrust class actions involve Rule 23(b)(3) certification."[54] Rule 23(b)(3) permits certification where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[55] In relation to the predominance inquiry, courts "must identify all issues involved in the case for which common evidence could suffice to make out a prima facie case for the class and determine whether they predominate" over those issues that rely on "evidence that varies from member to member."[56] In practice, the question of whether common issues "predominate" over individual issues is often the most significant aspect of certification.[57]

147. Rule 23(b)(3) includes a "non-exhaustive list of factors pertinent to the court's 'close look' at the predominance and superiority criteria." *McLaughlin* § 5:22 at 1186 (quoting *Anchem Products, Inc.* v. *Windsor*, 521 U.S. 591, 615–16 (1997). These include:

    a. the class members' interests in individually controlling the prosecution or defence of separate actions;
    b. the extent and nature of any litigation concerning the controversy already begun by or against class members;
    c. the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

[53] *McLaughlin* § 5:1 at 1060 [**C/21/362**], quoting *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 412 (5th Cir. 1998) [**C/5/106**].
[54] *Antitrust Developments* 855 [**C/19/327**]; *see also McLaughlin* § 5:22 at 1185 [**C/21/365**] ("In most cases predominantly seeking money damages, the inquiry under Rule 23(b)(3) is the keystone to certification analysis.").
[55] Fed. R. Civ. P. 23(b)(3) [**C/1/2**].
[56] *Antitrust Developments* 856 [**C/19/328**].
[57] *Antitrust Developments* 859 and footnote 754 [**C/19/331**].

d. the likely difficulties in managing a class action.[58]

148. In the antitrust context, "there are no hard and fast rules regarding the suitability of a particular type of antitrust case for class treatment . . . the unique facts of each case will generally be determinative."[59] Often the "critical inquiry" is whether an injury is "subject to generalized proof or an issue unique to each class member."[60]

(c) Aggregate damages

149. The requirement to show that common issues predominate over individual issues under Rule 23 encourages claimants to propose means for assessing loss and damage according to a common methodology that can be applied across the class and avoid individual determinations. If a common method can be shown, the predominance test is more likely to be met: *Newberg on Class Actions* (5th ed: 2013), §12:5 [**C/20/337**].

150. As the cases below indicate, Federal courts are concerned to ensure that where methodologies for the common or class-wide assessment of damages are proposed:

a. those methodologies provide an accurate measure of the actual loss suffered, even if exact measurement is not required; and

b. where losses will vary between individual members of the class, appropriate mechanisms can be applied to ascertain such variations.

151. The accuracy of a common methodology may be assessed by comparing it to the means by which damages would be assessed in an individual claim.

a. The Supreme Court in *Tyson Foods v Bouaphakeo* 136 S.Ct. 1036 (2016) [**C/18/295**] considered a methodology proposed by an expert for assessing the average time taken by workers to perform certain work-related tasks, for which they had wrongfully not been paid. The claim had been certified and

[58] Fed. R. Civ. P. 23(b)(3) [**C/1/2**].
[59] *Antitrust Developments* 857 [**C/19/329**] (quoting *Alabama* v. *Blue Bird Body Co., Inc*., 573 F.2d 309, 316 (5th Cir. 1978) [**C/2/29**]). *See also McLaughlin* § 5:31 at 1316 n.3 (citing same) [**C/21/368**].
[60] *Antitrust Developments* 856 [**C/19/328**].

following trial an aggregate award of damages for unpaid wages had been ordered. The question of distribution of that award among the claimants had not yet arisen and the Supreme Court held that consideration of that issue would be premature (136 S.Ct, at p.1050 [**C/18/303]**). The key question before the Supreme Court was whether the trial court was correct to accept the expert's methodology as a basis for assessing liability and the aggregate damages due, or whether individual assessment of time taken by workers would be necessary. The majority reasoned that the expert's approach – based on measuring a sample – was acceptable because the very same methodology could have been sufficient to establish an individual claim. As "the sample could have sustained a reasonable jury finding as to hours worked in each employee's individual action, that sample is a permissible means of establishing the employees' hours worked in a class action" (136 S.Ct., at p.1046-7).

b. *Vista Healthplan v Cephalon* (2015-1 Trade Cases P 79,203) [**C/17/263**] illustrates the scrutiny of class-wide methodologies both for accuracy of the aggregate damages figure overall, and for distinguishing between members of the claimant class who have, and have not, suffered loss. The case concerned an alleged overcharge arising from an unlawful conspiracy between innovative and generic pharmaceutical manufacturers. The claimant class comprised a range of claimants, including some who, it was accepted, would have suffered no loss. The District Court (Eastern District of Pennsylvania):

i. approved the common methodology based on averages for assessing aggregate damages, on the basis that this methodology had been shown (by reference to a sample) to produce the same results as would be given through individual assessment (at p.23 [**C/17/285**]):

> "Whether Dr. Hartman [the plaintiffs' expert] added up the overcharges individual-by-individual or took the average overcharge and multiplied it by the total number of class members, Dr. Hartman reached the same exact amount of total damages to the sample."

ii. but refused certification overall on the basis that there was no mechanism for excluding those persons that had suffered no loss from the class, other than through individual inquiry.

c. The need for a means of distinguishing claimants who have suffered loss from those who have not was emphasised by the Court of Appeals in *In re Nexium Antitrust Litigation* 777 F.3d 9 (2015) [**C/16/243**] – another case involving agreements between generic and innovative manufacturers, leading to an alleged overcharge for pharmaceuticals. The Court held that if a class includes persons who have not suffered loss, then the amount for which the defendant is held liable must – at the distribution stage – only be paid to injured parties: at 777 F.3d, pp. 18-19 [**C/16/247-248**]. Some mechanism for distinguishing claimants with a cause of action must be available to make this distinction: 777 F.3d, p. 19 [**C/16/247-248**]. The Court of Appeals upheld the first instance finding on the facts that such a mechanism would be available. That mechanism could use the same means that would be used to establish loss in an individual claim: at 777 F.3d, p.20 [**C/16/248**]. Therefore, the Court was able to conclude that "the defendants will not pay, and the class members will not recover, amounts attributable to uninjured class members, and judgment will not be entered in favor of such members" (at 777 F.3d, pp.21-22 [**C/16/248-249**]).

d. The need for the method of calculating class-wide damages to have a reasonable basis, and to avoid speculation, was explained in *Fleischman v Albany Medical Centre* (2008-2 Trade Cases P 76,274) [**C/12/199**]. The action alleged a conspiracy to suppress wages among registered nurses in a range of hospitals. The District Court (Northern District of New York) cited authority from the Court of Appeals (2nd Circuit) observing that "roughly estimating gross damages to the class as a whole and only subsequently allowing for the processing of individual claims would inevitably alter defendants' substantive right to pay damages reflective of their actual liability" (at p.6 [**C/12/199**]). The methodology proposed by the plaintiffs for assessing the degree of underpayment utilised a "single formula". The Court accepted the defendants' criticism, however, that "vast differences between types of

nurses preclude plaintiffs from calculating claimed damages by a common formula" (at p.7 [**C/12/200**]). An aggregate award of damages would risk inaccuracy in both the initial award and in allocation. It held that approving the methodology would offend the defendants' rights to due process, and exceed the *procedural* nature of the court's powers under the Federal Rules of Procedure (at p.7 [**C/12/200**]).

C: AUSTRALIA

152. The Federal Court of Australia Act 1976 (the "Federal Act") [**C/22/373**] establishes rules for the bringing of opt-out "representative proceedings". This is not limited to competition claims.

(a) Common issues

153. Section 33C of the Federal Act establishes certain threshold requirements for representative proceedings. In particular, section 33C(1) [**C/22/379**] states:

> "Subject to this Part, where:
> (a) 7 or more persons have claims against the same person; and
> (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
> (c) the claims of all those persons give rise to a substantial common issue of law or fact;
> a proceeding may be commenced by one or more of those persons as representing some or all of them."

154. There is no class certification process. If representative proceedings are brought, generally speaking it is for the respondent to raise any issue with respect to whether the threshold requirements have been met.

155. In relation to section 33C, case-law has established the following principles:

a. It is unnecessary for the common issue to resolve, wholly or to a large degree, the claims of all group members; *Wong v Silkfield* (1999) 199 CLR 255, at §§30-32 [**C/24/441-442**].

b. Factual variations do not mean an issue is not common; *Green v Barzen Pty Ltd* [2008] FCA 920, at §13 [**C/31/648**]; *Williams v FAI Home Security* [2000] FCA 726, at §12 [**C/28/647**].

c. A common issue need not be a large issue or of special significance. It rather must be "real or of substance"; *Wong v Silkfield* (1999) 199 CLR 255, at §§28, 31 [**C/24/441-442**].

d. However, where an issue "depend[s] upon an analysis of the circumstances relating to each individual group member" then it will not be a common issue;

Murphy v Overton Investments Pty Ltd [1999] FCA 1123, at §89 [**C/25/464]**; *Murphy v Overton Investments Pty Ltd* [1999] FCA 1673, at §14 [**C/26/478**].

e. Further, an important consideration, when the Court is determining whether a proceeding should continue as a representative proceeding for the purposes of s.33N of the Federal Act,[61] is whether resolution of a common issue will result in savings in the need for evidence, and what resolution of that issue will mean for determination of the claims overall; *Bright v Femcare* [2002] FCAFC 243, §136 [**C/30/635-636**].

156. Justice Wilcox of the Federal Court, writing extra-judicially,[62] commented on the words "same, similar or related circumstances" as follows (emphasis added):

> "The words 'same, similar or related' ... successively relax the standard from sameness to mere relatedness. Relatedness, therefore, becomes the minimum threshold for claimants to cross; but the burden of that requirement is difficult to state ... although the word 'suggests a connection wider than identity or similarity', it leaves the court to answer the crucial question 'whether the similarities or relationships between circumstances giving rise to each claim are sufficient to merit their grouping as a representative proceeding' by reference simply to practical judgments informed by the policy and purpose of the legislation. **At some point along the spectrum of possible classes of claim, the relationship between the circumstances of each claim will be incapable of definition at a sufficient level of particularity, or too tenuous or remote to attract the application of [Pt IVA]** … Where the court is not satisfied that the claimants' circumstances are sufficiently related, it has no power to allow the action to continue as a representative proceeding. The result is different to failure of the 'seven persons requirement' but it is logical … A reduction in the number of claimants to less than seven does not necessarily eliminate the possibility of complicated common issues … [but] an absence of 'relatedness' undermines the rationale of the proceeding; any hearing would necessarily degenerate into a jumbled trial of disparate actions".

[61] Section 33N of the Federal Act provides that the Court may order that a proceeding no longer continue as a representative proceeding if it is satisfied that it is in the interests of justice to do so because (a) the costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; (b) all the relief sought can be obtained by means of a proceeding other than a representative proceeding under this Part; the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or (d) it is otherwise inappropriate that the claims be pursued by means of a representative proceeding. [**C/22/383-384**].

[62] Hon Justice M R Wilcox, "Representative Proceedings in the Federal Court: A Progress Report", Australian Product Liability Reporter , Vol 8 No 5, 1997, pp 78–9; Australian Bar Review, Vol 91, 1996–97, pp 91–98 [**C/32/651-658**], cited in *Practice & Procedure High Court & Federal Court of Australia* at [34,820.45] [**C/33/659**].

(b) Aggregate damages

157. **Federal legislation** In relation to aggregate damages:

a. s.33Z(1) of the Federal Act [**C/22/390**] provides:

"The Court may, in determining a matter in a representative proceeding, do any one or more of the following:

…

(f) award damages in an aggregate amount without specifying amounts awarded in respect of individual group members."

b. s.33Z(3) [**C/22/390**] provides:

"…the Court is not to make an award of damages under paragraph (1)(f) unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment."

158. In *Australian Competition & Consumer Commission v Golden Sphere International Inc* (1998) 88 FCR 423; [1998] FCA 598, the Federal Court of Australia (O'Loughlin J) considered the application of these representative proceeding provisions in a claim brought by the ACCC in respect of a pyramid selling scheme. O'Loughlin J rejected an argument that the ACCC was obliged "to call every person who participated in the Golden Sphere scheme (other than those who have opted out) to prove the individual loss or damage of each such person." (at p.448:B) [**C/23/423**].

159. In relation to the reference in s.33Z(3) to the need for "a reasonably accurate assessment", O'Loughlin J stated (at p.448:G [**C/23/423**]):

> "The word *"assessment"* used in the phrase *"assessment of damages"* imports an element of judicial discretion: assessing damages is not the application of mathematical formulae. When it is qualified by the words *"reasonably accurate"* it can be said, with confidence, that the judicial discretion has been widely extended. I am satisfied that the legislature has intended that the practical application of the provisions of Pt IVA of the FCA is not to be read down through any evidentiary inability to identify every member of the group and the relevant amount of damage that each member has or may have suffered."

160. **State rules** Similar provisions at State level were considered by the Court of Appeal of Victoria in *Schutt Flying Academy v Mobil Oil Australia* [2000] 1 VR 545 [**C/27/483**]. This case concerned the legality of subordinate legislation made to permit representative proceedings.[63] The relevant rules reproduced the essentials of the regime laid down by the federal Act in State law.[64] The minority (Brooking J.A. and Winneke P) considered that the State rules were invalid because, on their proper construction, they would permit the Court to depart from the existing law on damages. The majority (Ormiston J.A., Philips J.A. and Charles J.A.) held that the rules were valid because they did not permit any departure from the existing law on damages.

a. Ormiston J.A. held [**C/27/496-497**]:

> "34. Additionally and arguably more importantly these damages rules are properly characterised as rules of practice and procedure. They do not, and do not purport to, change any principle as to the assessment of damages. The most they do is provide for what is hoped to be a simpler and less expensive way of paying properly calculated damages to each member of the class who chooses to claim. They are rules of practice and procedure because they prescribe "the mode of proceeding by which a legal right is enforced as distinguished from the law which gives or defines the right…
>
> 35. No provision in the new rules prescribes or even suggests that damages should be assessed other than according to recognised existing legal principles. Inasmuch as subpara (1)(f) permits an award of damages "in an aggregate amount", that refers only to the manner in which the defendant may be required to satisfy its obligations, not to the amount to which "individual group members will be entitled under the judgment", as referred to in para (4). Where the subsequent provisions refer to group members establishing their entitlements "to share in the damages", the assumption is that those entitlements will be calculated in accordance with the general law…
>
> 36. I would reach the same conclusion in relation to O.18A. What was said against that view was that, by permitting the alternative procedure of awarding "an aggregate amount" under subpara (f), the quantum of each claimant's entitlement was thereby either reduced or rendered capable of reduction if that aggregate award turned out to be too small. I cannot agree that thereby the measure of claimants' rights to damages is altered. I would concede that such an award may, I repeat may, result in claimants receiving somewhat less than the full measure of their entitlement on *some* occasions. But that would occur

[63] Paras 1-3 [**C/27/483-484**].
[64] Paras 12 and 24 [**C/27/487 and 492**].

only if the judge's "reasonably accurate assessment", which is a condition to such an award, turned out to be insufficient. That is not intended, for the rules (as does the federal Act) provide for the return of any surplus to the defendant: see r.26(5), which in turn ensures that defendants are not obliged to pay more than their legal obligations. It is not necessary to express any final opinion about O'Loughlin, J.'s broad-brush approach to the federal equivalent of r.26(3) in *ACCC v. Golden Sphere International Inc*., but, whatever was there in fact calculated, I would not read it as endorsement of the making of awards which are insufficient to enable group members to recover their full damages. If it were, I would respectfully disagree with it.

37. …As I would understand it, this particular procedure is not generally intended for large or complex claims, but rather for smaller claims where estimates may be more easily made."

b. Charles J.A. held (at para 55) [**C/27/502**]:

" …In terms rule 18A.25(3) requires the Court not to make an award of damages under paragraph (1)(f) "unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment", and thus far it is unexceptionable. A reasonably accurate assessment of damages is ordinarily no more and no less than can be made when unliquidated damages are sought, and it will be altogether different when liquidated damages are claimed. Uncertainty might arise in respect of the number of claimants, but the Court has the power to cope with that; for having adjudicated on the liability of the defendant in a general way, the Court has ample power under Order 18A to fix the number and identity of those who are claiming compensation and to make orders accordingly, calling if it wishes for more precise evidence of particular losses if such is considered necessary or desirable. There is even an express provision for refund to the defendant, should any fund established to answer the group's claims prove excessive: see rule 18A.26(5)."

161. A further challenge to the Victorian rules was brought in the High Court of Australia on different constitutional grounds in *Mobil Oil Australia v Victoria* [2002] HCA 27. The challenge was dismissed. Gleeson CJ confirmed, *obiter*, at para 23 [**C/29/549-550**]:

"there is nothing in s 33Z that requires damages to be assessed otherwise than in accordance with recognized legal principles".

D: CANADA

(a) Class proceedings

162. Class proceedings legislation has been enacted by all the provinces, save one.[65] The statutes in the common law provinces (i.e. all but Quebec) are essentially the same. This response makes reference to the Ontario Class Proceedings Act 1992 (the "CPA") [**C/34/661**]. Class proceedings are not limited to competition law claims.

163. Section 5(1) of the CPA sets out five requirements, each of which must be satisfied for an action to be certified as a class proceeding, as follows [**C/34/662**]:

> "(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
> (a) the pleadings or the notice of application discloses a cause of action;
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
> (c) the claims or defences of the class members raise common issues;
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
> (e) there is a representative plaintiff or defendant who,
> (i) would fairly and adequately represent the interests of the class,
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members."

164. Section 6 of the CPA then sets out certain factors, none of which may form the sole basis for a court's refusal to certify [**C/34/663**]:

> "The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:

[65] I.e., Prince Edward Island, where approximately 0.3% of the Canadian population resides.

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
2. The relief claimed relates to separate contracts involving different class members.
3. Different remedies are sought for different class members.
4. The number of class members or the identity of each class member is not known.
5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members."

165. The evidential burden at the certification stage is low. A plaintiff need only show "some basis in fact" to support a finding that the various requirements have been met.[66]

166. To be common, an issue must be capable of being resolved as to each class member on the basis of common proof. The underlying question is "whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis."[67]

167. In relation to the existence of common issues: [68]

a. The commonality question should be approached purposively.

b. An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.

c. It is not essential that the class members be identically situated *vis-à-vis* the opposing party.

d. It is not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.

[66] *Pro-Sys Consultants v Microsoft* [2013] 3 SCR 477, paras 99-105 [**C/36/751-754**].
[67] *Western Canadian Shopping Centres Inc. v. Dutton* [2001] 2 S.C.R. 534, para. 39 [**C/35/695**]; and *Pro-Sys Consultants v Microsoft* [2013] 3 SCR 477, para 108 [**C/36/755-756**].
[68] *Pro-Sys Consultants v Microsoft* [2013] 3 SCR 477, para 108 [**C/36/755-756**].

e. Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

168. At the certification stage, claimants must demonstrate that sufficient proof is available, for use at trial, to prove antitrust impact common to all members of the class.[69] It will then be a matter at trial as to whether there should be individual trials to determine each class member's entitlement or whether aggregate damages could be awarded.[70]

169. In *Watson v Bank of America & Ors*, class proceedings brought by merchants against various banks as well as Visa and Mastercard in relation to interchange fees were certified by the Supreme Court of British Columbia,[71] upheld by the Court of Appeal of British Columbia.[72] No claims have been brought by consumers.

(b) Aggregate damages

170. Section 24 of the CPA creates the possibility for an aggregate assessment of damages. In particular, section 24(1) [**C/34/667**] states:

> "(1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
> (a) monetary relief is claimed on behalf of some or all class members;
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members."

171. The equivalent to this power (as it appears in the British Columbia statute) was considered by the Supreme Court of Canada in *Pro-Sys v Microsoft* [2013] 3 S.C.R.

[69] *Pro-Sys Consultants v Microsoft* [2013] 3 SCR 477, para 115 [**C/36/757-758**].
[70] *Shah v LG Chem Ltd*, 2015 ONSC 6148 (CanLII), Perell J. at paras 58-70 [**C/39/983-986**].
[71] 2014 BCSC 532 [**C/37/773**].
[72] 2015 BCCA 362 [**C/38/893**].

477 at paras 127-135 [**C/36/762-766**]. However, the issue was not how aggregate damages should be assessed but rather whether those provisions were limited to the assessment of damages or also applied to proof of loss in order to establish liability. The Court held:

a. Para 131: "…The aggregate damages provisions of the *CPA* relate to remedy and are procedural. They cannot be used to establish liability…".

b. Para 133: "…The *CPA* was not intended to allow a group to prove a claim that no individual could. Rather, an important objective of the *CPA* is to allow individuals who have provable individual claims to band together to make it more feasible to pursue their claims."

CONFIDENTIAL ANNEX ON FUNDING ISSUES

A: INTRODUCTION

172. This Confidential Annex sets out Mastercard's submissions in relation to the proposed funding of these collective proceedings. In advance of the CPO application hearing, Mastercard invites the Applicant to indicate precisely over which parts of this Annex he claims confidentiality.

173. The Tribunal must be satisfied that it is appropriate for the Applicant to be authorised to act as the class representative.[73] This must include consideration of whether the Applicant would be able to fund the proceedings, were they to run their full course.

174. The Applicant's ability to fund the proposed proceedings depends entirely on the Prepaid Forward Purchasing Agreement (the "Funding Agreement", see Exhibit WHM 4 to 1st Merricks).

175. There are a number of issues in relation to the funding secured by the Applicant which make it inappropriate for him to be authorised to act as the class representative:

a. **The Funder's return** First, the Funding Agreement provides that the Funder's return should come from unclaimed damages. Such an arrangement is not permitted under the relevant legislation. The Funder therefore has a right to terminate the Funding Agreement.

b. **Conflict of interest** Second, the terms of the Funding Agreement create a conflict of interest between the Applicant and the proposed class.

c. **Insufficient cover** Third, the Funding Agreement does not make sufficient funds available to meet Mastercard's potential costs.

[73] Section 47B(5) and (8) of the 1998 Act [**B/8/28-29**] and Rule 78 of the 2015 Rules [**B/12/109**].

d. **Tribunal's power to make third party costs order** Fourth, there is uncertainty over whether the Tribunal has power to make a costs order against a third party funder.

B: THE FUNDER'S RETURN

(a) Legal framework

(i) The 1998 Act

176. Section 47C(5) of the 1998 Act [**B/8/31**] provides that any damages not claimed by the represented persons within a specified period must be paid to the prescribed charity.

177. Section 47C(6) of the 1998 Act [**B/8/31**] provides:

> "In a case within subsection (5) the Tribunal may order that all or part of any damages not claimed by the represented persons within a specified period is instead to be paid to the representative in respect or all or part of the costs or expenses incurred by the representative in connection with the proceedings."

(ii) The 2015 Rules

178. Rule 93(4)-(6) of the 2015 Rules [**B/12/115**] provides:

> "(4) Where the Tribunal is notified that there are undistributed damages in accordance with paragraph 3(b), it may make an order directing that all or part of any undistributed damages is paid to the class representative in respect of all or part of any costs, fees or disbursements incurred by the class representative in connection with the collective proceedings.
>
> (5) In exercising its discretion under paragraph (4), the Tribunal may itself determine the amounts to be paid in respect of costs, fees or disbursements or may direct that any such amounts be determined by a costs judge of the High Court…".
>
> (6) Subject to any order made under paragraph (4), the Tribunal shall order that all or part of the any undistributed damages is paid to the charity designated in accordance with section 47C(5) of the 1998 Act and a copy of that order shall be sent to that charity."

(b) Terms of the Funding Agreement

179. Section 2.5(b) of the Funding Agreement provides that:

> "In the event that the Litigation is successful or a collective settlement is approved…Seller will use his best endeavours to obtain orders from CAT that (i) the Total Investment Return be paid to the Purchaser and (ii) MasterCard pay the Seller's fees and costs in connection with the Litigation."

180. The "Seller" is the proposed representative. The "Purchaser" is the third party funder (the "Funder").

181. Section 1 defines "Total Investment Return" as:

> "…an amount of the Undistributed Proceeds and any Costs Award equal to the sum of; (a) the greater of (i) £135,000,000; or (ii) 30% of the Undistributed Proceeds up to £1billion plus 20% of the Undistributed Proceeds in excess of £1 billion; plus (b) the Late Payment Interest, if any. In calculating the Total Investment Return, credit will be given for any Costs Award that is paid by Seller to Purchaser."

182. Section 2.4(b)(iv) states:

> "If…CAT disapproves, or provides any negative commentary regarding, the transactions contemplated by this Agreement or the terms hereof, then, at any time thereafter and upon written notice to Seller, Purchaser may terminate Purchaser's obligations with respect to any unfunded portion of the Commitment, and permanently reduce the Commitment to the Purchase Price, although Purchaser will pay all Deployments owing as of the date of termination and will continue to cover Seller's liability for any costs related to defendant(s) or third parties in the Litigation, if any, incurred up to the date of termination."

183. Section 2.5(a) states:

> "Seller agrees to seek approval of this Agreement and the other Transaction Documents from CAT at the earliest opportunity in the Litigation although any failure to obtain a decision or any comment from CAT on approval or otherwise does not give rise to any breach of this Agreement or provide a basis for Purchaser to refuse to continue to comply with its obligations under this Agreement…".

184. The remuneration mechanism provided for in the Funding Agreement is very different from the usual operation of third party funding arrangements[74], where the third party funder's reward is paid out of the damages recovered by the successful claimants. According to the Funding Agreement in this case, the Funder is not to be remunerated by taking a share of damages actually claimed; rather, any return for the Funder is dependent upon the Tribunal making an award out of ***unclaimed*** damages.

(c) The Tribunal's powers in respect of undistributed damages

185. The basic operation of the Funding Agreement therefore is that:

a. Any costs the Tribunal may award to the Applicant are to be paid over by the Applicant to the Funder (see definition of "Costs Award" and section 2.1 of the Funding Agreement). This is (or is intended to be) revenue neutral for the Funder – it is a repayment of sums the Funder will have deployed.

b. The Funder's "reward" is a lump sum or a percentage of unclaimed damages. It is therefore entirely dependent upon the Tribunal having power to approve a payment out of any unclaimed damages to the Funder – or more accurately to the Applicant for onward payment to the Funder.

186. However, the Tribunal does not have any power to make an order permitting unclaimed damages to be used to pay the Funder's contractual reward.

187. Section 47C(6) of the 1998 Act [**B/8/31**] only allows payment of all or part of unclaimed damages,

> 'in respect of all or part of the ***costs or expenses*** incurred by the representative in connection with the proceedings'. (Emphasis added.)

[74] See the description of such funding arrangements in Chapter 15, paragraph 1.1 of Sir Rupert Jackson's Review of Civil Costs, Preliminary Report [**B/39/1105**]. See also the description in the Court of Appeal's recent decision in *Excalibur Ventures LLC v Texas Keystone Inc* [2016] EWCA Civ 1144 [**B/33/691**]. Even the 'unusual' arrangement in that case was of a type where the funding 'reward' was to be met from Excalibur's damages if the claim was successful.

188. The scope of this power is then reflected in rule 93(4) of the 2015 Rules [**B/12/115**], which provides that the Tribunal:

> "may make an order directing that all or part of any undistributed damages is paid to the class representative in respect of all or part of any ***costs, fees or disbursements*** incurred by the class representative in connection with the collective proceedings." (Emphasis added.)

189. The power of the Tribunal is therefore limited to "costs or expenses" or "costs, fees or disbursements" incurred by a class representative.

190. Rule 104(1) of the 2015 Rules [**B/12/104**] states (insofar as relevant):

> "For the purposes of these rules "costs" means costs and expenses recoverable before the Senior Courts of England & Wales…"

191. The statutory basis for the award of costs in the Senior Courts of England and Wales is provided by section 51 of the Senior Courts Act 1981 [**B/5/11**]. Detailed rules for the exercise of this power are contained in the CPR. CPR rule 44.1(1) [**B/13/133-135**] states:

> ""costs" includes fees, charges, disbursements, expenses, remuneration, reimbursement allowed to a litigant in person under rule 46.5 and any fee or reward charged by a lay representative for acting on behalf of a party in proceedings allocated to the small claims track."

192. It is trite law that the costs of obtaining funding for litigation, as opposed to the actual costs of litigation, are not capable of being the subject of a costs award under s.51 of the Senior Courts Act 1981 or the CPR. See:

    a. Senior Costs Judge in *Claims Direct Test Cases* [2002] EWHC 9002 (Costs), [2003] Lloyd's Rep IR 69, at paragraph 171 [**B/25/363]**; upheld on appeal [2003] EWCA Civ 136, [2003] 4 All ER 508 at paragraphs 35-36 and 88-90 [**B/26/385 and 395-396**]:[75]

[75] See further, *In re Remnant* [1849] 11 Beav 603, at 613 [**B/14**]; *In re Buckwell and Berkeley* (1902) 2 Ch.D 596 at pp. 599-600 [**B/17**].

> "It has long been held that the cost of funding litigation is not a recoverable cost as between the parties:
>
> > "... by established practice and custom funding costs have never been included in the category of expenses, costs or disbursements envisaged by the statute [s.51 Senior Courts Act 1981] or RSC Order 62. To include them would constitute an extension of the existing category of "legal costs" which is not under the prevailing circumstances warranted."
> > (per Lord Justice Purchas, Hunt v R M Douglas (Roofing) Ltd, 18 November 1987, CA, unreported. This point was not taken in the subsequent House of Lords Appeal.)
>
> It follows from this that the only costs of funding litigation which are recoverable are those permitted by statute, in this case Section 29 of the Access to Justice Act 1999. Section 29 is specific and has been interpreted by the Court of Appeal in *Callery v Gray*. Anything falling outside the scope of the Section is not recoverable.[76]"

b. Court of Appeal in *Motto v Trafigura Ltd* [2011] EWCA Civ 1150, [2012] 1 WLR 657 at paragraphs 104 to 107 [**B/30/648-649**]. The payment to funders was not recoverable because it was not an item of costs or expense capable of being awarded pursuant to the Court's discretion under s.51 Senior Courts Act 1981.

c. In Sir Rupert Jackson's review of Civil Costs, when considering third party funding, he noted that:

> "One crucial difference between TPF and CFAs is that the payment made to third party funders is not recoverable from the other side, whereas the success fee paid under a CFA is so recoverable."[77]

193. A sole – and contentious – departure from the normal approach to civil costs was identified in *Essar Oilfields v Norscot* [2016] EWHC 2361 (Comm) [**B/32/675**] where it was held that reference in s.59 Arbitration Act 1996 to 'legal ***and other costs***'

[76] Success fees under Conditional Fee Agreements and After the Event Insurance premiums aside – both of which were subject to express statutory provision allowing them to be recovered as an item of cost, perhaps the most significant other inroad into this is the ability of the court to award interest on costs, itself the subject of express statutory provision under s.17 Judgments Act 1838 (as amended).

[77] Preliminary Report, Chapter 15, paragraph 4.4 [**B/39/1108-1109**]. CFAs is a reference to Conditional Fee Agreements. At the time of that report, success fees under CFAs were recoverable as an express statutory exception to the principle that funding costs were not recoverable, pursuant to s.58 Courts & Legal Services Act 1990. One of Sir Rupert's proposed reforms, which was enacted pursuant to s.44 Legal Aid, Sentencing & Punishment of Offenders Act 2012 [**B/9/53-54**], was to remove that statutory exception for the majority of cases, thereby rendering success fees irrecoverable. See also Chapter 11, paragraph 1.2(iii) of the Final Report [**B/40/1117**].

(emphasis added) allowed for recovery of funding costs. That judgment accepted the established position in relation to costs under s.51 Senior Courts Act 1981 and was wholly reliant on the fact that s.59 Arbitration Act 1996 was an entirely separate jurisdiction which contained an express jurisdiction to award costs "other than legal costs" as traditionally defined (see judgment, paragraph 51 [**B/32/683**]). That case is therefore of no assistance or relevance to the issues here.

194. It follows that the Tribunal does not have power, pursuant to section 47C(6) of the 1998 Act, to award the "reward" part of the "Total Investment Return" (as defined in section 1 of the Funding Agreement) out of unclaimed damages.

(d) Consequences

195. As the Tribunal does not have the power to authorise the reward part of the Total Investment Return, the Funder has a right to terminate the Funding Agreement pursuant to section 2.4(b)(iv) of that Agreement. The Funder will remain liable to cover the Applicant's liability for any costs related to Mastercard incurred up to the date of termination.

196. Section 2.5(a) of the Funding Agreement requires the Applicant to seek approval of the Funding Agreement from the Tribunal at the earliest opportunity.

197. Mastercard agrees with this approach. It is vital that the statutory construction of section 47C(6) of the 1998 Act be determined as soon as possible. This will permit the Funder to decide whether it wishes to continue to fund these proceedings, even though it will not receive any return from them (save for the payment of any costs awarded in the Applicant's favour).

198. If the Funder is not prepared to fund these proceedings, it is important that this is made clear as soon as possible. It would be unacceptable for all parties, and the Tribunal, if considerable time and costs were expended on this complex piece of litigation, only for the Funder to decide at some unspecified date in the future that it no longer wishes to continue to provide funding.

199. Mastercard therefore invites the Tribunal, as part of the CPO hearing, to determine the issue of whether the Tribunal has jurisdiction under section 47C(6) of the 1998 Act to authorise payment out of any unclaimed damages of the reward aspect of the Total Investment Return provided for in the Funding Agreement.

C: CONFLICT OF INTEREST

200. The suitability of the Applicant to be authorised as the class representative is also called into question by the terms of the Funding Agreement.

201. Pursuant to rule 78(2)(b) of the 2015 Rules [**B/12/109**], the Tribunal must consider whether the proposed class representative has "in relation to the common issues for the class members, a material interest that is in conflict with the interests of class members."

202. Section 2.5(b)(i) of the Funding Agreement states:

> "In the event that the Litigation is successful or a collective settlement is approved pursuant to Rule 94 of the CAT Rules, Seller will use his best endeavours to obtain orders from CAT that (i) the Total Investment Return be paid to Purchaser;…".

203. The unusual funding model chosen here therefore creates a conflict of interest between the Applicant and the class. Under the Funding Agreement, the Applicant is required to seek to ensure that the Total Investment Return is paid to the Funder. In order to do so, the Applicant therefore has an obligation to ensure that there is a sufficient amount of unclaimed damages so that the Funder will receive the Total Investment Return. This is in conflict with the interest of the class, which is to maximise the amount of damages which are claimed and distributed to them.

204. Again, the atypical funding model in these proceedings is at odds with the normal third party funding model, whereby the funder's return is paid out of damages awarded to the claimants. In such a scenario, the interests of the funder and the claimants are largely aligned – each wishing to ensure maximum recovery, from which the funder's reward will be paid as a percentage.

D: FUNDING AGREEMENT DOES NOT COVER MASTERCARD'S POTENTIAL COSTS

205. Under rule 78(2)(d) of the 2015 Rules [**B/12/109**], the Tribunal must consider whether a proposed class representative "will be able to pay the defendant's recoverable costs if ordered to do so."

206. Pursuant to section 2.1 of the Funding Agreement, the maximum aggregate amount that the Funder could be liable to pay to the Applicant is £43,442,250 (inclusive of VAT).

207. [redacted]

208. [redacted]

209. Para 29 of 1st Merricks states:

> "..I have arranged provision of after the event "ATE" insurance cover of up to £10 million in adverse costs. I am informed by my legal advisers that this level of cover should be sufficient to pay the proposed Defendants' recoverable costs, if ordered to do so."

210. Whilst the position is somewhat confused, it appears that there is no separate after the event insurance "policy"; only the provision for payment in respect of any recoverable adverse costs under the Funding Agreement.[78]

[78] See Quinn Emanuel letter dated 29 November 2016 [**A/6/11**].

211. It appears that the Applicant therefore has in place, under the Funding Agreement, a maximum of £10 million to cover Mastercard's legal costs (and/or those of any relevant third parties).

212. However, in the Costs Budget provided at Annex 2 to the Applicant's Collective Proceedings Litigation Plan, the Applicant's own estimated solicitors' costs are £8,575,000 and his estimated counsel costs are £3,830,000. This is a total of £12,405,000.

213. On the reasonable assumption that Mastercard's legal costs will be of the same order of magnitude as the Applicant's, the Applicant therefore has not shown that he would be able to pay Mastercard's costs if ordered to do so.

214. Indeed, the deficiency in the position is even worse, as Mastercard's recoverable costs would not be limited to those of the solicitors and barristers acting for it. In his Costs Budget, the Applicant has estimated that his experts' costs will be £2,250,000 and the costs of an external disclosure provider will be £1,000,000. Mastercard is likely to incur similar costs.

215. Mastercard therefore submits that the Applicant has failed to demonstrate that he "will be able to pay the defendant's recoverable costs if ordered to so", pursuant to rule 78(2)(d) of the 2015 Rules [**B/12/109**].

E: NO POWER TO MAKE COSTS ORDER AGAINST THE FUNDER?

216. In High Court proceedings, in the context of traditional third party funding, the other party to the claim has the safety of knowing that, if the litigation fails, the funder is exposed to being made directly liable to pay the adverse costs, up to the limit of the funding it has provided, pursuant to s.51 Senior Courts Act 1981 by way of third party costs order – see *Arkin v Borchard Lines* [2005] EWCA Civ 655, [2005] 1 WLR 3055 **[B/41/1125],** as recently (re) approved and applied in *Excalibur Ventures LLC* [2016] EWCA Civ 1144 [**B/33/691**].

217. This avoids any concern about the successful party having to pursue the representative and then rely on that representative's right to an indemnity from their funder. It avoids concerns about the funder being able to avoid its commitment by virtue of having no direct liability to the successful party.

218. However, it is not clear whether the Tribunal has the power to make a non-party costs order.

a. Rule 104(2) of the 2015 Rules **[B/12/123]** empowers the Tribunal to "make any order it thinks fit in relation to the payment of costs in respect of the whole or part of the Proceedings".

b. Para 8.1 of the Guide states:

> "Rule 104(2), which covers all proceedings before the Tribunal, provides that the Tribunal has discretion, at any stage of the proceedings, to make any order it thinks fit in relation to the payment of costs ***by one party to another*** in respect of the whole or part of the proceedings." (Emphasis added.)

219. The Guide therefore appears to envisage that the Tribunal may only make costs orders against parties.

220. Mastercard submits that the Tribunal should formally rule on whether it has power to make costs orders against non-parties.

221. If the Tribunal determines that it does not have such a power, this is another reason why certification should be refused. In such a situation, one of the fundamental safeguards identified by the Court of Appeal in *Arkin* as permitting the use of third party funding arrangements would not be available in the Tribunal. This would raise a material concern as to whether the Tribunal could be satisfied that the Applicant would be able to pay Mastercard's recoverable costs if ordered to do so.

F: CONCLUSION

222. Mastercard submits that these issues relating to funding make it inappropriate for the Applicant to be authorised to act as the class representative.