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

Re-Amended Defence pursuant to the Order of Mr Justice Roth made on 6 June 2023.

Case No: 1266/7/7/16

IN THE COMPETITION APPEAL TRIBUNAL

BETWEEN:

WALTER HUGH MERRICKS CBE

Class Representative

and

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE SA (formerly Mastercard Europe S.P.R.L)

Defendants

RE-AMENDED DEFENCE

CONTENTS

Introduction

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

2. Save where the contrary appears, all paragraph references are to the relevant numbered paragraphs in the Re-Re-Amended Collective Proceedings Claim Form (the "Claim").

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

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

Summary of Defence

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

Scope of the Claim

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

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

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

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

Limitation

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

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

Exemption

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

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

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

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

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

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

UK Domestic interchange fees

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

18. In relation to UK domestic debit card transactions, it is now accepted by the Class Representative that there is no scope for a claim ~~while paragraph 113 acknowledges that there is no claim in respect of schemes which were not operated under Mastercard's~~

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

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

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

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

Claim for damages

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

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

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

lower MSCs for small and medium merchants and large merchants with an annual card turnover below £50 million. Alternatively, the extent and timing of any pass-through of any reduction in interchange fees into MSCs is likely to have varied substantially between different categories and sizes of merchants, between different geographic areas and across the 18 ~~16~~-year claim period and the Class Representative is put to strict proof of the relevant pass-on rates and the timing of any such pass-on. To the extent that interchange fees had a delayed impact on MSCs after the relevant period (which is denied), credit must be given for an equivalent delayed impact at the start of the claim period (after taking account of limitation), which will offset (in full or part) the claim in respect of the two-years to 21 June 2010.

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

d. Furthermore, if the Mastercard scheme had been forced to operate with significantly lower or zero interchange fees, particularly lower or zero UK interchange fees, during the relevant period or in the year to 21 June 2009, merchants would have received an inferior Mastercard scheme. If issuing banks could not obtain adequate remuneration in return for the cost of the valuable services which they provided to merchants, including a guarantee against fraud and cardholder default and immediate payment, then they would not have been willing to provide these services and the scheme rules would have been altered accordingly

to remove or alter these services. The net effect of these changes would have been to offset (in full or part) the value to the merchant of any reduction in MSCs, both during the relevant period and in the two-years to 21 June 2010. This would again have resulted in merchants receiving no (or only limited) actual savings.

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

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

no claim is available to the extent that title to bring all or part of a claim has passed outside the Class, e.g. to trustees in bankruptcy.

g. Further, any quantification of loss must give credit for benefits received by Represented Persons as a result of interchange fees being higher than would otherwise have been the case. Interchange fee revenue was an important income stream for issuing banks. If this income stream was substantially reduced, it is likely that a substantial part (and potentially 100%) of this loss of revenue would have been passed-on by Mastercard issuing banks to Mastercard cardholders in the form of reduced benefits and/or higher fees or interest. These additional benefits offset in full (or in part) any disadvantage to Represented Persons from higher prices.

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

Proper Law/Limitation

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

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

24. Insofar as the Class Representative intends to pursue claims in relation to transactions at merchants which were based outside the UK at the relevant time (as suggested at

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

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

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

PART I

The Class Representative

27. Paragraphs 11 and 12 are noted.

The Defendants

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

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

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

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

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

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

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

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

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

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

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

PART II

Description of Class

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

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

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

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

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

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

35. In relation to paragraph 23(b)(ii), Mastercard notes that the Class Representative intends to make claims in relation to goods or services purchased by individuals resident in the UK from merchants which had a physical presence in another Member State but not in the UK and where the good or service was purchased remotely from the UK, e.g. through the internet, mail order or via telephone shopping:

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

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

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

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

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

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

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

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

36. In relation to paragraph 23(b)(iii), Mastercard does not have records of which businesses accepted Mastercard cards during the relevant period (or for which periods

and durations) save for the information provided to the Class Representative on 4 November 2016, since it is an inherent feature of the four-party payment card model that Mastercard, as the scheme operator, does not have direct contractual relationships with merchants.

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

Estimate of the number of class members

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

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

PART III

The EC Decision

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

41. In relation to paragraph 55:

a. It is admitted that the operative part of the EC Decision (i.e. the Commission's conclusion as to the nature and duration of the infringement, as set out in Articles 1 to 3 of the EC Decision) is binding on Mastercard and the Tribunal. The effect of the provisions pleaded in footnote 5A is admitted.

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

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

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

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

context of the present claim, it is denied that Mastercard or the Tribunal are bound by generalisations in the EC Decision which do not fully reflect changes to the Mastercard scheme over the period 1992 to 2007 or which do not accurately reflect the position in relation to the UK either generally or at particular times, since they are not part of the essential basis for the operative part of the EC Decision.

Operative part of the EC Decision

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

The Mastercard payment organisation

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

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

45. In relation to paragraph 59:

    a. The first sentence is admitted.

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

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

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

i. A "Cross-Border Transaction" occurs where a card issued by a bank in one country is used at a POS in another country. In the context of the present claim, the only relevant cross-border transaction is one where a card issued by a bank in one EEA Member State was used at a POS in another EEA Member State.

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

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

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

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

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

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

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

47. In relation to paragraph 61:

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

b. In relation to the EEA MIFs:

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

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

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

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

d. In relation to footnote 18:

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

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

48. In relation to paragraph 62:

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

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

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

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

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

The subject of the EC Decision

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

50. In relation to paragraph 65:

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

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

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

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

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

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

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

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

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

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

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

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

The Four-party / open payment card system

54. In relation to paragraph 69:

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

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

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

55. In relation to paragraph 70 and MSCs:

a. Consistent with recital 247 to the EC Decision, in the UK during the relevant period, MSCs were typically a percentage of the transaction value for credit and charge card transactions and a fixed fee for debit card transactions.

b. In relation to debit card transactions, Mastercard notes that during the relevant period: (i) both interchange fees and MSCs were typically a fixed fee for debit card Domestic Transactions in the UK even though the EEA MIFs were wholly or primarily a percentage of the transaction value; and (ii) ~~that~~ the weighted average interchange fees for UK Maestro debit card transactions were substantially lower than the weighted average EEA MIFs for Maestro and Debit Mastercard, respectively, save in relation to the period from 21 June 2008 to 1 July 2009, during which period the Maestro and Debit Mastercard EEA MIFs were set at zero following the EC Decision. This confirms that the EEA MIFs were not a floor which guaranteed a minimum interchange fee either for debit card Domestic Transactions in the UK or for UK domestic transactions generally during the relevant period.

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

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

ii. Alternatively, the Commission made no finding that acquiring banks gave the same level of consideration to all types of interchange fee. It is denied that UK acquiring banks gave any significant consideration to Mastercard's EEA MIFs since those interchange fees were only applicable to a small percentage of transactions (the EEA MIFs, on average, represented only 5% of Mastercard transaction volumes in the UK in 2000). This is particularly in circumstances where acquiring banks were often setting a single blended

MSC for Mastercard and Visa where the importance of Mastercard's interchange fees would be further reduced (since Visa had the majority of both the credit card and debit card markets in the UK during the relevant period) and particularly in setting MSCs for small and medium sized merchants where the MSC would be a multiple of any applicable interchange fee.

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

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

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

banks 100%) of merchants a blended MSC for Visa and Mastercard[3]. Since the volume and value of payment card transactions in the UK grew substantially between 1992 and 2004, merchants had a greater incentive to negotiate unblended MSCs in 2004 than would have been the case in earlier years and it is likely that blended MSCs were even more ubiquitous in that part of the relevant period prior to 2004.

Relevant Market(s)

56. In relation to paragraph 72:

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

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

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

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

57. In relation to paragraph 73:

    a. The information and evidence provided by the IATA referred to in recital 464 of the EC Decision related to the migration by issuing banks of consumer cards to commercial cards in order to benefit from the higher interchange fees available on commercial cards. However, the findings in the EC Decision were ultimately

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

limited to the EEA MIFs for *consumer* cards and, therefore, the information and evidence referred to in recital 464 is not part of the essential basis for the operative part of the EC Decision.

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

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

Decision by an association of undertakings

58. In relation to paragraph 74:

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

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

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

Restriction of competition

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

EC Decision: "7.2.1 The object of the MIF"

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

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

62. In relation to recital 405:

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

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

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

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

63. In relation to paragraph 77:

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

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

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

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

64. In relation to paragraph 78:

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

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

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

d. In any event, recital 411 only concludes that customers are "likely" to have to bear "some part" of the cost of the EEA MIFs and makes clear that this "may" occur

depending on the competitive situation. Recital 411 does not, therefore, assist the Class Representative in establishing that UK MSCs or UK retail prices (or MSCs or retail prices in any of the other 29 countries potentially relevant to the Claim under paragraph 23(b)(ii)) were higher than they would otherwise have been or the extent of any such differential(s) during the 18 ~~16~~-year claim period.

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

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

66. In relation to paragraph 81:

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

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

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

67. In relation to paragraph 82:

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

   i. The EC Decision only concludes at recital 421 that *"some"* of Mastercard's member banks view EEA MIFs *de facto* as a minimum starting point and that, as a result, the EEA MIFs *"may act"* as a minimum benchmark for setting the level of domestic interchange fees.

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

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

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

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

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

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

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

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

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

68. In relation to paragraph 83:

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

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

c. In relation to the first analysis:

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

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

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

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

d. In relation to the second analysis:

i. This was conducted based on 2002 data obtained from the Commission from 17 acquiring banks in 15 Member States. Since the data in the EC Decision is

anonymised, it is not possible to tell which, if any, of these Banks were in the UK.

ii. The Commission compared the weighted average EEA MIFs to the weighted average MSCs of the top and bottom decile of each acquiring bank's respective client base. The Commission concluded that this showed that all 17 acquiring banks charged small merchants MSCs above the weighted EEA MIFs (with the EEA MIF representing an average 45.97% of the MSC, although the data showed that this fell to as low as approximately 30% for some acquiring banks) and that 12 acquiring banks charged large merchants MSCs above the weighted EEA MIFs.

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

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

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

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

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

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

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

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

g. In relation to the Commission's response to Mastercard's arguments referred to in paragraph 83(b), the Commission did not make any findings in relation to the extent to which prices paid by merchants and subsequent customers would have been lower in the absence of the EEA MIFs. The Commission's findings do not, therefore, assist the Class Representative in establishing that the Represented Persons have suffered loss or the amount of that loss.

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

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

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

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

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

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

71. In relation to paragraph 86:

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

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

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

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

Appreciable effect

73. In relation to paragraph 88, it is admitted that Mastercard and the Tribunal are bound by the finding that the EEA MIFs had an appreciable effect on competition in "most EEA Member States". The Commission did not, however, identify the specific EEA Member States in question. As a result, the EC Decision does not make any binding findings in relation to the actual effect of the EEA MIFs on the UK acquiring market either generally or in relation to any part of the 16-year ~~claim~~ relevant period (or the two-years to 21 June 2010).

Effect on trade between Member States

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

Conclusion on Article 101(1)

75. In relation to paragraph 90:

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

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

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

Article 101(3) TFEU

76. In relation to paragraph 91:

    a. It is admitted that the Commission concluded in the EC Decision that Mastercard had failed to establish with appropriate evidence that the first three conditions of

Article 101(3) were met in relation to the EEA MIFs then in force, including for the reasons quoted.

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

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

Breach of statutory duty

77. In relation to paragraphs 92 and 95:

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

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

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

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

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

in particular limitation, that the period relevant to this claim is 22 May 1992 to 21 June 2008 (the "relevant period").

Joint and several liability

80. In relation to paragraph 96, insofar as the claims are governed by English law (and/or Northern Irish and/or Scots law), if (which is denied for the reasons set out below) the Represented Persons have suffered any loss as a result of the Infringement, it is admitted that the Defendants would be jointly and severally liable for such loss, subject to the other matters raised in this Defence, including in particular limitation.

Causation and loss

81. In relation to paragraph 97:

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

b. Without prejudice to the foregoing:

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

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

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

iv. Alternatively, the Represented Persons' claim for damages is limited to the loss caused (if any) by the difference between the EEA MIFs actually set and the alternative EEA MIFs which could lawfully have been set during the relevant period (as to which see paragraphs 82 - 89 below). Furthermore, any consideration of whether any such loss was suffered (and, if so, the amount thereof) must give credit for benefits received by Represented Persons as a result of the EEA MIFs being set higher than the lawful level: see paragraphs 109-123 and 131-132 ~~82 – 89~~ below.

Exemption

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

a. The cost of processing transactions.

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

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

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

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

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

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

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

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

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

a. the costs avoided by merchants as a result of accepting Mastercard/Maestro credit/debit cards as compared to more expensive means of payment such as cash, cheques and American Express. Alternatively, the costs avoided as compared to accepting cash; and

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

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

88. Further or alternatively, Mastercard will contend that the Mastercard scheme could, in any event, in respect of the full relevant period, have lawfully adopted alternative EEA

MIFs which were based on the costs avoided by merchants as a result of accepting Mastercard/Maestro credit/debit cards as compared to more expensive means of payment such as cash, cheques and American Express. Alternatively, the costs avoided as compared to accepting cash. In particular, Mastercard will rely upon the Commission's press-release of 1 April 2009 and/or its letter of the same date notifying Mastercard of the Commission's acceptance of Mastercard's undertakings in which the Commission accepted that Mastercard's proposed new EEA MIFs (subsequently introduced from July 2009) which were set at 0.3% for credit card and 0.2% for debit cards (being lower than the additional cost of cash to merchants) were set in accordance with a reasonable benchmark for assessing a level of MIF which met the conditions for exemption.

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

Particulars of causation

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

Cross Border Transactions

91. In relation to paragraph 100:

    a. It is admitted that the EEA MIFs applied by default to Cross-Border Transactions and that they applied directly to virtually all Cross-Border Transactions without bilateral agreements being agreed in their place. In those circumstances, Mastercard does not plead to paragraph 100(c) since it does not arise.

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

    c. In relation to footnote 74A, paragraphs 42 - 44 of the Supreme Court judgment in *Sainsbury's v Visa* [2020] 4 All ER 807 do not address the factual question of

whether bilateral agreements did exist in the UK market during the period relevant to those proceedings (i.e. 2006 to 2015), but rather the~~an~~ hypothetical question of whether bilateral agreements would have existed during this period in a counterfactual world with a default MIF of zero. The Supreme Court did not endorse the findings of Popplewell J and Phillips J in this regard, but merely recorded that they were common ground. In relation whether bilateral agreements did exist for Domestic Transactions during the relevant period (or in the year to 21 June 2009), see paragraphs 95 - 100 below.

92. In relation to paragraphs 101 and 102:

a. It is denied that damages are to be assessed on the basis that there would have been no interchange fees payable by acquiring banks in relation to Cross-Border Transactions. Paragraph 93(iv) of the Supreme Court judgment and recital 410 of the EC Decision concern the appropriate counterfactual for assessing whether there is a restriction of competition contrary to Article 101(1). Nothing in this analysis prohibits Mastercard from establishing that alternative EEAs MIF would have met the criteria for exemption under Article 101(3): see paragraphs 82 - 89 above. As to the judgment of the Tribunal in [2023] CAT 15, Mastercard is seeking permission to appeal.

b. Furthermore, as accepted by the Tribunal in *AAM v Mastercard* [2021] CAT 16 as paragraphs 39 - 55, it is open to Mastercard to demonstrate, in the context of the counterfactual for damages, that if the EEA MIFs had been set at lower levels or at zero, other changes to the default scheme rules would have been made which offset some or all of the reduction in the interchange fee: see paragraphs 109 - 113 below.

Domestic Transactions

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

93A. As to paragraph 102A:

a. As to the first sentence, Mastercard has provided disclosure of the scheme rules as required by the Tribunal's order drawn on 14 October 2022 (as amended). To the extent that it is alleged that this disclosure exercise was deficient, any such allegation is entirely unparticularised and is denied. Without limitation to that

denial, Mastercard conducted reasonable and proportionate searches for scheme rules, and has disclosed the documents identified, as required. The searches undertaken included the collection and review of hard copy and electronic documents, and extensive inquiries with Mastercard's employees, covering several jurisdictions. The claim period extends back to 1992, involving multiple entities with records in different countries. In those circumstances, it is to be expected that full sets of documents may not be available.

b. As to the second and third sentences, any allegation (if made) that the Class Representative has not received proper disclosure is entirely unparticularised and is denied. It is denied that the Class Representative has any basis (arising from further disclosure or otherwise) for reserving his right to amend his case on causation further.

c. As to the fourth sentence, the indication that the Class Representative has only pleaded a case as to his core factual understanding of the operation of the Defendants' scheme rules at a high level is noted. The Class Representative is not permitted to advance any further case at trial by way of "detailed submissions" or otherwise.

93B. Paragraph 102B is understood to be a summary of the Class Representative's case as to the scheme rules governing interchange fees applicable to UK domestic transactions, and the manner in which the scheme applied in practice in the UK, as set out in paragraphs 102C to 102N. Mastercard pleads to those paragraphs below. For convenience, Mastercard adopts the definitions[4] and sub-headings used in the Claim, however, this is without prejudice to the substance of this Defence. Mastercard pleads further in relation to debit cards (paragraphs 95 to 97 below) and credit cards (paragraphs 98 to 100 below). Mastercard notes that the Claim only pleads (in paragraphs 102B to 102N) in relation to the scheme rules for Mastercard and not Maestro and Mastercard responds accordingly. Maestro is addressed specifically in paragraph 95 below.

[4] Save that the term "MCII Rules" is used rather than "MCI Rules", for consistency with terminology elsewhere in this Re-Amended Defence.

22 May 1992 until November 1996

93C. As to paragraph 102C, it is admitted that from 22 May 1992 until around November 1996, there were no scheme rules specific to the United Kingdom. Paragraph 93A above is repeated in relation to the disclosure complaints made. As to paragraph 102C(a)(ii), the 1993 Eurocard Rules were amended prior to 1996 (as Mastercard has previously informed the Class Representative).

93D. As to paragraph 102D:

a. As to sub-paragraphs (a) and (b), Eurocard's rules and MCII's rules during this period provided that interchange fees for domestic transactions had to be agreed by the members of the scheme (envisaging multilateral agreement between members, or bilateral agreements):

i. The 1989 MCII Rules stated: "*the interchange fee shall be that amount agreed to by the members doing Mastercard business within the country"* (Rule 11.09(b)(3)).

ii. The 1993 MCII Rules stated: "*the interchange fee(s) applicable to each such transaction will be the amount agreed to by the members doing Mastercard business within the country*" (Rule 11.09(iii), first para); and "*In the event members are unable, for legal reasons, to jointly agree on an intracountry interchange fee(s) as provided above, then the members shall establish the intracountry interchange fee(s) in a manner that complies with applicable law. (In some jurisdictions, for example, bilateral agreements between members are the only legally acceptable method of establishing intracountry interchange.)*" (Rule 11.90(iii), fifth para).

iii. The 1991 and 1993 Eurocard Rules stated: "*the amount of the interchange fee has to be agreed upon by the Members doing Eurocard-Mastercard business in the country*" (Rule E7.02.4(A) and (B)). The 1991 Eurocard Rules also stated that "*Nothing above shall be deemed to preclude bilateral agreements regarding interchange between two Eurocard-Mastercard Members*" (Rule E7.02.4(C)). The version of the 1993 MCE Rules that Mastercard holds is incomplete and does not include rule E7.02.4(C). The 1993 Eurocard Rules were amended in April 1994 to delete section E7.02.

iv. Mastercard's UK licensees did not adopt a domestic MIF prior to November 1997. As a result, the provisions of the scheme rules requiring agreement effectively meant agreement bilaterally.

b. Eurocard's rules and MCII's rules provided that where disputes arose as to domestic interchange fees (including where there was a dispute as to a multilateral interchange fee applying to all members), the dispute could be referred to arbitration. Eurocard's rules and MCII's rules provided for certain rates to apply as a fallback when a dispute was referred to arbitration, pending the result of the arbitration.

i. The 1989 MCII Rules provided for arbitration where the dispute concerned the "*then effective interchange fee*", and was referred by members having at least 10% of volumes within a country. It stated that pending the dispute, the "*then effective intracountry interchange fee*" shall apply (Rule 11.09(b)(3)). The 1989 MCII Rules accordingly did not identify the EEA MIF as a fallback in any circumstance. The 1989 MCII Rules also provided that Mastercard could order the preparation of cost studies for use in determining any dispute.

ii. As to the 1993 MCII Rules (see Rule 11.09(iii)):

1. These Rules provided for arbitration where the "*members within a country are unable to agree on the interchange fee(s) for such intracountry transactions*".

2. A dispute as to intracountry interchange fees was to be submitted, in the first instance, to the Regional Authority for the region in which the country was located. Provision was made for appeals from the Regional Authority to the Executive Committee of the Board of Directors of MCII.

3. Certain disputes could only be initiated, and appeals brought, where the member or members doing so had 10% or more of volumes. The Rules also provided that these volume requirements did not apply in some circumstances, namely in countries where members were unable for legal reasons to jointly agree on an intracountry interchange fee and bilateral agreements were required. In that circumstance, the Regional Authority and the Executive Committee were to continue to have authority to resolve disputes.

4. The Rules provided that pending the determination of a dispute by the Regional Authority and the Executive Committee, the "*then effective intracountry interchange fee(s) applicable to all members*" shall apply. In the event that there was no such effective intracountry interchange fee(s), the "*international interchange fee(s) applicable to transactions for such Mastercard region in which the country is located shall apply*" pending the determination of the Regional Authority or the Executive Committee.

iii. The 1991 and 1993 Eurocard Rules provided for arbitration:

1. In the circumstance where only one member was issuing Eurocard-Mastercard cards within a country and a new member was authorised to do business in that country also, the amount of the interchange fee "*has to be agreed*". Where the members were unable to agree, the dispute was to be notified to Eurocard. Pending determination of the dispute, "*the international fee will temporarily apply*" (Rule E7.02.4(A)).
2. Where a member issued Eurocard-Mastercard cards to cardholders within a country to effect a transaction at a merchant within the same country, the amount of the interchange "*has to be agreed*" with the members doing business in that country. Upon notification of a dispute to Eurocard, the interchange fee that would apply pending resolution of the dispute was the "*international interchange fee*" (Rule E7.02.4(B)). These provisions would cease to apply where a dispute was submitted for arbitration pursuant to rule 11.09 of the 1989 MCII Rules (1991 Eurocard Rules, rule E7.02.4(B), second para).
3. Rule E7.02 was deleted from the Eurocard Rules in April 1994.

c. It was the general expectation and understanding of UK member banks in this period that interchange fees had to be established through bilateral agreements, and that in the event of a dispute, this would be referred to arbitration.

d. Sub-paragraph 102D(c) is denied. Eurocard's rules and MCII's rules did not provide for any fallback rates to apply where no arbitration was initiated. Rather, fallback rates could only apply where a dispute had been notified and an arbitration was initiated and would then only apply until the conclusion of the arbitration. The contentions in paragraph 102D(c) that pursuant to the scheme rules a fallback rate

would apply "in the absence of bilateral arrangement", and in paragraph 102D(e) that pursuant to the scheme rules the EEA MIF applied as the fallback in the absence of bilateral agreements, are accordingly denied. It was also the general understanding of UK member banks (including the banks responsible for the largest volumes of transactions) in this period that a fallback rate could only apply where a dispute was submitted to arbitration. To Mastercard's knowledge, no disputes in relation to UK interchange fees were submitted to arbitration and/or no arbitrations took place in respect of UK interchange fees during this period.

e. Paragraph 102D(d) is denied:

i. The 1989 MCII Rules referred to the *"effective intracountry interchange fee"*. This is not a reference to the EEA MIF.

ii. The 1993 MCII Rules referred to the "*international interchange fee(s) applicable to transactions for such Mastercard region in which the country is located shall apply*". MCII had a practice at that time of establishing different inter-regional rates depending on the region in which one of the licensee banks was located. The reference in the 1993 MCII Rules to the fees applicable to transactions for such region is a reference to the inter-regional rate that would apply in respect of the region in question.

iii. The provision of the Eurocard Rules cited by the Class Representative refers to the "*international interchange fee*" (Rule E7.02.4). By contrast, the Eurocard Rules referred (in the same section) to the EEA MIF as the *"European Inter-Country Interchange Fee"* (Rule E7.02.3). Accordingly, the reference to the "international interchange fee" was to the inter-regional rate set by MCII and not the EEA MIF.

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

v. The understanding of MEPUK and of at least some UK member banks when bilateral agreements were agreed initially (including in particular in 1992 and 1993), was that where there was a dispute leading to arbitration, the temporary

fallback rate that would apply under the rules was the inter-regional rate set by MCII, not the EEA MIF. MCII also subsequently advised MEPUK that it considered that the inter-regional rate was the fallback. While some Eurocard representatives at times expressed the view that the fallback pending arbitration was the EEA MIF, the UK member banks (or at least some of them) did not accept this view and/or considered it questionable.

f. As to paragraph 102D(e), it is admitted that the scheme rules contained the text quoted in the first sentence. Mastercard's case on the meaning and general understanding of those rules is set out above. The second sentence is admitted. The third sentence is denied. As set out in paragraph 93D(d) and 93D(e) above, the scheme rules during this period provided for fallback rates to apply only where a dispute was submitted to arbitration and so, as no arbitrations occurred, there was no scope under the rules for the fallback rates to apply.

g. As to paragraph 102D(f), the allegation that in practice the EEA MIF would apply in the absence of bilateral agreements providing for a different rate being notified, is entirely unparticularised (at least insofar as it makes allegations that are not based on the content of the scheme rules). Without prejudice to the above:

   i. Banks were free to choose how to process their domestic transactions with the available processing options being in-house processing, First Data Resources ("FDR") and (from around mid-1993) Europay.

   ii. Although processing arrangements changed over the course of the 1990s, all Mastercard domestic transactions (save for on-us transactions) were processed by FDR until around 1993 and FDR continued carrying out the processing for Midland, Lloyds, RBS, and the National Australia Group (including Clydesdale and Northern Bank) throughout the 1990s. Barclays did its processing in-house. NatWest conducted its processing in-house from around 1996. On-us transactions were typically processed in-house.

   iii. It was only necessary to notify a domestic bilateral agreement to Europay if Europay was going to be involved in processing transactions under that bilateral agreement.

   iv. It is denied that, if a bilateral agreement was notified to Europay or FDR and provided for the same rate as the EEA MIF, the EEA MIF would apply. In such

circumstances, the bilateral agreement would determine the interchange fee applicable.

v. UK banks entered into bilateral agreements which applied to all, or almost all, transactions, in accordance with the scheme rules and the general expectation and understanding of member banks (as to which paragraph 93D(c) above is repeated). To the extent that there were any transactions that were processed by Europay but were not covered by a bilateral agreement, the volume of those transactions was not material.

vi. Save as aforesaid, the sub-paragraph is denied. Mastercard further addresses the operation of the scheme in practice in paragraphs 95 to 98 of this Re-Amended Defence below.

From November 1996 until October 1997

93E. Subject to the points made below as to the amendment of the UK Domestic Rules taking effect on 1 November 1997, and that the version of the UK Domestic Rules to which the Class Representative refers in sub-paragraph 102E(b) is not the final version as adopted or in effect in December 1997, paragraph 102E is admitted.

93F. As to paragraph 102F, it is admitted that the November 1996 UK Rules included (on their adoption) a rule in these terms. The operation of the scheme during the period in which this rule was in effect is addressed further below. The rules were amended pursuant to a decision of the MEPUK board taken in October 1997 and then implemented by Eurocard, with effect from 1 November 1997, to provide UK MIFs of 1.30% (standard) and 1.0% (electronic). These rates were described in October 1997 by the MEPUK board, and by MEPUK when corresponding with Eurocard, as the rates "*currently in adoption*".

93G. Paragraph 102G is denied. The UK domestic rules were amended to provide for UK MIFs with effect from 1 November 1997. Paragraph 93F above is repeated. It is admitted that the UK Rules in effect in December 1997 included provision for arbitration and for any arbitral decision to take effect from the date the arbitration request was submitted.

93H. As to paragraph 102H:

a. UK MIFs took effect on 1 November 1997, as set out in paragraph 93F above, and to the extent it is alleged in the first sentence that there was no UK MIF until December 1997 or subsequently, that is accordingly denied. The second sentence is admitted. The effect of the inclusion of the EEA MIF in Rule 13 is addressed below.

b. As to the third sentence:

   i. As set out above in paragraph 93D, and addressed further below, prior to the adoption of the UK Rules in November 1996, member banks had been required to make bilateral agreements and had done so. Such agreements continued to apply during this period, unless replaced or brought to an end. Those bilateral agreements (and in particular the bilateral agreements between the main UK banks which applied to the vast majority of transactions) generally provided for UK interchange fees of 1.30% (standard) and 1.0% (electronic). It is averred that there was no (or no material) instance of bilateral agreements terminating in this period and defaulting to the EEA MIF.

   ii. Further, UK member banks (or most of them) understood the effect of the scheme rules in the period November 1996 to October 1997 (after which a UK MIF took effect) as being to require interchange fees to be agreed bilaterally, failing which arbitration would occur. This understanding was consistent with the position under the 1993 MCII Rules, as set out above, which continued to apply. In the event that a bank wished to have the EEA MIF apply to domestic transactions to which it was party, a counterparty bank that did not agree to the EEA MIF applying could seek arbitration and/or use the threat of arbitration to negotiate a bilateral MIF at a different rate from the EEA MIF.

   iii. In practice, bilateral agreements in this period applied to all or the vast majority of UK domestic transactions. Those bilateral agreements (and in particular the bilateral agreements between the main UK banks which applied to the vast majority of transactions) were agreed by reference to factors having no connection with the EEA MIF, and generally provided for UK interchange fees of 1.30% (standard) and 1.0% (electronic). If, which is not admitted, any bilateral agreements were negotiated by reference to the potential application of the EEA MIF as a fallback, such negotiations had regard to other factors

also and in any event concerned a very small volume of transactions. To the extent that, in spite of the rules and/or the general understanding of member banks, any transactions took place other than under a bilateral agreement, the volume of these transactions was not material. Paragraph 93D(g) above in relation to the processing of transactions during this period is repeated.

iv. The operation of the scheme in this period is otherwise addressed further at paragraphs 98-99 below.

From November 1997 until the end of the Full Infringement Period

93I. As to paragraph 102I, the first sentence is admitted as a general summary. As to the sub-paragraphs:

a. Sub-paragraph (a) is admitted, save that the March 2000 Rules, the October 2000 Rules and the 2001 UK Rules were adopted and published by MEPUK, not Eurocard.

b. Sub-paragraphs (b) and (c) are admitted.

c. Sub-paragraph (d) is admitted as a summary, save that Mastercard notes that the version of the May 2009 rules that it holds and that it has disclosed is a draft, not in final form.

d. As to sub-paragraph (e), paragraph 93A above is repeated.

93J. As to paragraph 102J, the allegation that the scheme rules cited applied from around December 1997 onwards is denied, as the provisions of the rules referred to begin only in April 1999. As to the sub-paragraphs:

a. As to sub-paragraph (a), the first sentence is admitted. As to the second sentence, it is admitted that the evidence referred to contained those statements. That evidence was given in 2005. It is denied (if alleged) that the statements as to bilateral agreements contained in that evidence were made in respect of bilateral agreements in the UK in the 1990s when there were a much smaller number of UK licensees. As to the third sentence, it is denied that the scheme rules from April 1999 onwards required member banks to enter into bilateral agreements. The scheme rules stated that member banks had to '*make reasonable endeavours'* to agree commercially driven bilateral interchange fees. The allegation that member banks did not generally enter bilateral

agreements does not refer to any particular period. It is admitted that by 2005, most member banks did not enter bilateral agreements.

b. Sub-paragraph (b) is admitted.

c. Sub-paragraph (c) is admitted.

93K. As to paragraph 102K, insofar as any complaint is made about the disclosure received, it is denied that there are any proper grounds for complaint and paragraph 93A above is repeated. The paragraph is otherwise admitted.

93L. Paragraph 102L is admitted.

93M. As to the first sentence of paragraph 102M, the Eurocard rules were incorporated within the MCII bylaws and rules in October 2002 after the merger of Mastercard and Europay. After 2004, the UK domestic rule book did not provide for the determination of interchange fees. As to the second sentence, in November 2004, Mastercard revoked the authority of the UK member banks to set UK MIFs for credit cards. UK MIFs for credit cards thereafter were to be set by the President and CEO of MCII, or their delegate.

93N. As to paragraph 102N, insofar as this paragraph relates to the terms of the rules, it is admitted as a general summary. For the avoidance of doubt, it is denied that, if UK MIFs had not been set, the EEA MIF would then actually have been applied to UK domestic transactions. Mastercard addresses the position in the counterfactual, below.

93O. As to paragraph 102O, it is admitted that the Class Representative has been provided with copies of and/or extracts from the April 1999, January 2000, and March 2002 Eurocard scheme rules, and that those contain the provision referred to which was adopted by Europay in February 1999. As to footnote 76AG, as to the second sentence, insofar as it is alleged that there has been any deficiency in disclosure, paragraph 93A above is repeated. As to the third sentence of the footnote, Mastercard understands that the provision in question was first adopted by Europay in February 1999, taking effect in April 1999. There was not an analogous provision in the scheme rules prior to April 1999. Mastercard notes that, on occasion, Europay had informed MEPUK that it would recognise MEPUK so long as MEPUK remained representative of at least 90% of issuing and acquiring volumes of UK licensees.

93P. As to paragraph 102P: in relation to the period from April 1999 (when the 75% rule was introduced) until November 2004 (when the authority of the UK banks to set UK MIFs was revoked), consent was not withdrawn by any UK relevant bank. Withdrawal of consent would, upon Eurocard determining that the 75% threshold was no longer met, result in the UK domestic rule book no longer applying in its entirety. It is noted that the Class Representative does not suggest that a withdrawal of consent was threatened by any UK bank at any time. Subject to those points, the first sentence is admitted. As to the second sentence, insofar as this paragraph relates to the terms of the rules, it is admitted as a general summary. For the avoidance of doubt, it is denied that, if the UK domestic rule book had ceased to apply, the EEA MIF would then actually have been applied to UK domestic transactions. Mastercard addresses the position in the counterfactual, below.

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

95. In relation to Maestro debit cards:

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

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

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

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

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

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

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

h. In accordance with the Maestro UK Domestic Rules, from August 2002 until 21 June 2009 ~~the end of the relevant period~~ each issuing bank-acquiring bank pair in

the Maestro UK scheme agreed domestic interchange fees bilaterally, without needing to resort to arbitration. Consequently, the temporary domestic default interchange fee did not in fact apply to any transactions. So far as Mastercard is aware, this was also the case for the Switch (and Solo) debit card scheme both before and after 2002.

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

j. Furthermore, the average interchange fee on Maestro UK Domestic Transactions from 2002 until 21 June 20098 ~~the end of the relevant period~~ was significantly lower than the average Maestro EEA MIF for the same period. So far as Mastercard is aware, this was also the case for the Switch (and Solo) debit card scheme both before and after 2002. In relation to the period from 21 June 2008 to 1 July 2009, the Maestro EEA MIFs were set at zero following the EC Decision (which had no impact on interchange fees for Maestro UK Domestic Transactions).

96. In relation to Debit Mastercard:

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

b. The ~~is~~ UK MIFs for Debit Mastercard were ~~was~~ not set by reference to the EEA MIFs for Debit Mastercard or Maestro, but by reference to the competitive conditions in the UK market, in particular the need for Debit Mastercard to be competitive with Visa Debit.

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

d. Mastercard then subsequently changed the UK MIFs for Debit Mastercard in 2007 so that with effect from 1 March 2008 they were ~~it was~~ solely charged on a fixed fee basis, since the ad valorem element of the previous MIFs was not acceptable to merchants, resulting in merchants refusing to accept Debit Mastercard.

e. ~~The first Debit Mastercards were issued in the UK in 2008.~~ There was no material volume of Debit Mastercard transactions in the UK prior to ~~21 June 2009~~ mid-2007~~the end of the relevant period~~.

f. ~~If any material volume of Debit Mastercard transactions had taken place in the UK prior to 21 June 2009~~~~the end of the relevant period~~~~, the~~ The average interchange fee on Domestic Transactions for Debit Mastercard were significantly lower than the average Maestro EEA MIF for the~~ same period, save in relation to the~~ period ~~from~~ to 21 June 2008. In relation to the period from 21 June 2008 ~~onwards when~~ to 1 July 2009, the Maestro EEA MIFs and Debit Mastercard EEA MIFs were ~~was~~ set to zero following the EC Decision. The reduction in the EEA MIFs to zero had no impact on UK interchange fees for Debit Mastercard.

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

a. No relevant UK Domestic Transactions on debit cards took place in material volumes pursuant to a UK MIF ~~at any point during the relevant period~~ before mid-2007.

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

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

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

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

98. In relation to Mastercard credit cards:

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

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

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

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

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

f. From before the commencement of the claim period in May 1992 until the introduction of the UK Domestic Rules in November 1996~~, and thereafter (until a UK MIF was introduced as an automatic fallback in 1999 as described below)~~, the combined effect of the MCII and Eurocard rules that applied to the UK ~~(and from 1996 the UK Domestic Rules)~~ was that UK issuing banks and acquiring banks were required to agree domestic interchange fees bilaterally. In the event that two licensees were unable to do so, the dispute was to be referred to arbitration. This was also the general understanding of member banks. Paragraph 93D above is repeated.

g. The separate dispute resolution provisions in the MCII and Eurocard scheme rules provided for resolution of disputes between banks who failed to agree a bilateral rate, and as to the rate that would apply pending arbitration. Paragraph 93D(b)-(f) above is repeated. ~~At the beginning of the claim period (in May 1992):~~

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

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

h. [NOT USED] ~~MEPUK sought clarification from MCII in 1992 as to how any dispute would be resolved, including what interchange fee would apply in the interim period pending an arbitration decision. In June 1992, MCII advised that the then effective intra-country rate would apply pending arbitration, and that any arbitration would be handled as quickly as possible.~~

i. In December 1993, the MCII rules were revised. Paragraphs 93D(a)(ii), 93D(b)(ii), 93D(d), and 93D(e)(ii) above are repeated. ~~The December 1993 MCII rules provided that where members were unable to agree on interchange fees, the disagreement would be submitted to the regional Mastercard organisation (in this case, MCE) for determination in the first instance. Where the dispute was between members with more than 10% of volumes, the dispute could be appealed to the Executive Committee of the board of MCII. Mastercard could order the preparation of cost studies for use in determining any dispute. Pending a decision on a dispute, "*the then effective intracountry interchange fee applicable to all members*" was to~~

~~apply, or if there was no such fee, the international interchange fee applicable to transactions for that region was to apply~~.

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

ja. Prior to 9 December 1991, Visa decided to alter its UK domestic MIFs for Visa credit cards from a single UK MIF of 1% for all transactions so as to adopt different UK MIFs for electronic and standard (i.e. non-electronic) transactions. The new standard UK MIF was to be introduced on a staggered basis at 1.1% from 1 April 1992 and then at 1.3% from 1 April 1993, with the electronic UK MIF remaining at 1%. Since they were also Visa licensees, Mastercard's UK licensees were aware of these planned changes by no later than December 1991. To the best of Mastercard's knowledge, Visa's UK MIFs stayed at 1.3% (standard) and 1% (electronic) until at least 1998.

jb. MEPUK's board also determined "reference rates" that were used as a practical fallback and/or reference point by banks that were members of MEPUK (and may have been used, in at least some instances, by licensee banks that were not MEPUK members) in their bilateral negotiation of UK interchange fees. MEPUK's board determined such reference rates taking account of the UK costs studies and UK market conditions, including in particular competition from the Visa scheme. The reference rates were always below the results of the EDC studies following consideration of market factors, including in particular consideration of Visa's UK

MIFs and competitive factors. To the best of Mastercard's knowledge, the MEPUK reference rates were 1.3% standard and 1% electronic by mid-1994 (and possibly earlier). Reference rates of 1.3% standard and 1% electronic were also agreed by MEPUK in 1995 and 1996. These were at the same level as Visa's UK MIFs from April 1993.

k. So far as Mastercard is aware, prior to May 1992, as required under the rules applicable to the UK and consistent with the general expectation and understanding of member banks, ~~all~~ Mastercard licensees had bilateral interchange arrangements between them that applied to all, alternatively the vast majority of, domestic transactions. ~~and interchange fees were on average higher than the EEA MIF in place at the time~~. Although Mastercard does not have details of the bilateral interchange fees agreed by Mastercard licensees during this period, it is likely that prior to May 1992 all or most of the bilateral arrangements agreed interchange fees at or around 1% i.e. the same rate as the inter-regional rate set by MCII (based on EDC cost studies prepared for MCII) and Visa's UK MIF, although from mid-1991 onwards account would also have been taken of the results of the first UK cost study.

ka. In the period from May 1992 to November 1996, as required under the rules applicable to the UK and consistent with the expectation and understanding of member banks, Mastercard licensees had bilateral arrangements that applied to all, alternatively the vast majority of, domestic transactions. The pleadings below as to the negotiation of bilateral agreements are made on that basis. In the event that in the period from May 1992 to November 1996 there were any domestic transactions between Mastercard licensees that were (despite the scheme rules) not covered by bilateral agreements, Mastercard avers that the volume of those transactions was not material. Paragraph 93D(g) above is repeated.

l. Following the completion of the first EDC UK cost study for 1991 (and periodically thereafter) Mastercard's licensees negotiated bilateral agreements (in the knowledge that they could arbitrate in the event of a dispute). When negotiating bilateral agreements, licensees took ~~using~~ account of the reference rates (as a practical fallback, alternatively a point of reference) and/or the UK cost study rates ~~as a key point of reference~~. Mastercard understands that ~~at least some banks~~ licensees would also take account of competitive and commercial considerations

in negotiating bilateral agreements; for example, ensuring Mastercard's rates were competitive with Visa so as to increase levels of acceptance of Mastercard by merchants directly and/or or indirectly through the reference rates.

m. UK cost studies were carried out using data for 1991, 1992, and then every two years from and including 1993. The total costs calculated by these UK costs studies were higher than the EEA MIFs in force at the time. For example, the 1993 UK cost study calculated costs of 1.44% standard and 1.20% electronic. These costs were higher than the standard EEA MIF then in force of 1%, with lower rates of 0.5% for electronic ~~all~~ transactions and petrol (subject to certain conditions), and lower rates for standard transactions (where a merchant adopted a lower 'floor limit' for the authorisation of transactions).

n. Throughout the ~~this~~ period from May 1992 to 1994, bilateral agreements as to UK domestic interchange fees established rates ~~were agreed on a bilateral basis at rates~~ which were on average higher than the EEA MIFs in place at the time. By (at the latest) ~~June~~ August 1994, the vast majority of Domestic Transactions took place pursuant to bilateral agreements with rates of 1.3% (standard) and 1.0% (electronic) i.e. at the MEPUK reference rates which were the same as Visa's UK MIFs.

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

oi. By 1995, to the best of Mastercard's knowledge, most bilateral agreements (and in particular the bilateral agreements between the main UK banks which applied to the vast majority of transactions) provided for rates of 1.3% (standard) and 1.0% (electronic). This was consistent with the MEPUK reference rates, which were the same as Visa's UK MIFs. These rates were materially different from the EEA MIF. After 1 April 1995, the structure and levels of the EEA MIF changed (introducing further differences with the prevailing rates on UK transactions), to 1.15% (base), 0.90% (electronic) and 0.75% (secured electronic). Most bilateral agreements provided for higher UK interchange fees, and a small number of bilateral agreements, particularly those involving smaller issuing banks and Irish banks, provided for interchange fees that had not been increased and so remained at 1%

for all transactions, resulting in interchange fees for some standard domestic transactions which were below the level of the EEA MIF for 'base' transactions of 1.15%, applying from 1 April 1995.

p. In around November 1996, a UK domestic rule book was adopted (and approved by Europay ~~MCE~~). As to the content of the scheme rules and the general understanding of member banks as to their effect, paragraphs 93E – 93H above are repeated. This required UK issuing banks and acquiring banks to agree domestic interchange fees bilaterally. In the event that two licensees were unable to do so, the dispute was to be referred to arbitration. By 1996, the MEPUK board had agreed reference rates (of 1.3% (standard) and 1.0% (electronic)) for several years. At least some licensees at this time considered that these reference rates constituted an "interim intracountry interchange fee", identified under the MCII rules as a fallback pending arbitration. The domestic rule book provided that in the absence of a bilateral agreement, the EEA MIF would apply (such as in the event a dispute was referred to arbitration). Since all of the major banks already had bilateral agreements with each other, it was the general understanding of licensees (or most of them, represented in MEPUK) that, in practice, the EEA MIF would only have potential application as a fallback in the case of non-MEPUK licensees. The EEA MIF was otherwise irrelevant to bilateral agreements. ~~The initial version of the domestic rule book provided that the EEA MIF was to apply as a temporary default pending arbitration.~~

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

r. In practice, in the period from November 1996, until the adoption of the UK MIF on 1 November 1997, to Mastercard's knowledge, UK licensees (and in particular main UK banks) (or most of them) continued to apply existing bilateral agreements and/or agree new bilateral agreements with domestic interchange fees

predominantly at rates of 1.3% (standard) and 1.0% (electronic). Paragraph 93H(b)(iii) above is repeated. Interchange fees at those levels were the same as the reference rates, and the same as Visa's UK MIFs. These rates were significantly different (in level and structure) from the EEA MIFs at this time, which were 1.15% (paper), 0.90% (electronic) and 0.75% (secured electronic). These bilateral arrangements applied to all, alternatively the vast majority of, domestic transactions. To the extent that in the period from November 1996 to 30 October 1997 there were any domestic transactions between Mastercard licensees that were not covered by bilateral agreements, Mastercard avers that the volume of those transactions was not material.

s. In October 1997, MEPUK concluded that these existing UK rates (1.30% standard and 1.0% electronic) should apply in the absence of bilateral agreement and be adopted as the temporary default pending arbitration from 1 November 1997, although the arbitration award would then be back-dated, and requested that Eurocard amend the UK Domestic Rules accordingly. The UK MIFs adopted in 1997 reflected the reference rates, the bilateral rates which had been applied by (at least) the main UK Mastercard licensees for a number of years, and were the same as Visa's UK domestic MIFs at the time.

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

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

v. It is denied that the EEA MIFs acted as a floor, starting point or benchmark for bilateral interchange fees or the UK MIF. The setting of the rates took account of, *inter alia*, the reference rates, UK cost studies, and competitive considerations. The rates adopted were the same or similar to those applicable under the Visa scheme in the UK. The UK MIFs were the same as the reference rates that had been agreed by MEPUK for several years and the prevailing bilateral rates between UK

licensees (including in particular the main UK banks who processed the vast majority of transactions). The UK MIFs (of 1.3% standard and 1% electronic) were higher than the EEA MIFs then in force (1.15% standard, 0.9% electronic and 0.75% secured electronic).

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

x. So far as Mastercard is aware, following the introduction of the UK MIF~~s as the automatic fallback~~ in ~~or around~~ November 1997 ~~1999~~, Mastercard's UK licensees chose to transact at these default rates rather than continuing to agree bilateral agreements (which had in any event already ~~largely~~ applied the same rates for several years in almost all cases), although the UK Domestic Rules continued to provide for arbitration in default of agreement and for the UK MIFs to apply as the temporary fallback rate pending arbitration. As a result, UK Domestic Transactions thereafter took place at the levels provided by the UK MIFs, which were the same as ~~by 1999 and onwards there was no material volume of transactions~~ the previous prevailing bilateral rates between UK licensees (including in particular the main UK banks who processed the vast majority of transactions) ~~pursuant to bilateral agreements~~.

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

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

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

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

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

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

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

ff. From October 2005, Mastercard began to make substantive changes by introducing new categories of UK MIFs. These MIFs were set below the level of the equivalent EEA MIFs. In April 2006, Mastercard ~~first~~ made further substantive changes to the UK MIFs withdrawing a number of categories, modifying other rates and also introducing higher UK MIFs for premium cards. Again, this included MIFs which were below the level of the equivalent EEA MIFs.

99. Consequently:

a. From prior to 1992 until around November 1996, the scheme rules required interchange fees to be agreed, with arbitration to take place where agreement was not reached, and this was also the general understanding of licensee banks. In this period, ~~1999,~~ interchange fees were agreed bilaterally between licensees in the knowledge that, in default of agreement, rates would be determined by arbitration and were likely to be based on UK-focused factors, including the rates from the UK cost studies. In practice, no arbitrations took place. The reference rates (which reflected competitive considerations, including Visa's UK MIFs, as well as cost studies), and competitive conditions (principally, Visa's UK MIFs) were the most significant influences on bilateral agreements. Most (and, in some periods, all or almost all) such bilaterally agreed ~~these interchange~~ fees were the same as ~~or similar to~~ the reference rates and the Visa UK MIFs ~~the interchange fees in the Visa~~

~~scheme~~. The Mastercard EEA MIFs were significantly different from these bilaterally agreed interchange fees ~~were materially lower~~ and had no impact on bilaterally agreed UK domestic interchange fees. To the extent that there were any transactions that were not covered by bilateral interchange fees, these were not material in volume.

ai. From November 1996 to October 1997, it continued to be widely understood by licensee banks that interchange fees had to be agreed and that where a dispute arose, arbitration would take place. The MCII Rules provided for arbitration and for fallback rates to apply pending arbitration, namely an "effective intra-country rate" (which at least some licensees considered would correspond to the reference rates agreed by MEPUK). The UK domestic rules provided that in the absence of a bilateral agreement, the EEA MIF would apply. It was also widely understood by the UK banks that the EEA MIF would only have potential application as a fallback in respect of non-MEPUK licensees (who represented a tiny proportion of UK domestic transactions). The EEA MIF was irrelevant to the negotiation of bilateral agreements between MEPUK members. In this period, bilateral agreements in respect of interchange fees continued to apply and/or be entered in respect of all or the vast majority of transactions. The reference rates (which took account of competitive considerations, including Visa's UK MIFs, as well as cost studies) and Visa's UK MIFs were the most significant influences on bilateral agreements. Most such bilaterally agreed fees (including in particular the bilateral agreements between the main UK banks which applied to the vast majority of transactions) were the same as the reference rates and the Visa UK MIFs.

b. Between 1 November 1997 ~~1999~~ and 2004, there ~~was a~~ were UK MIFs set by the UK licensee banks through their wholly owned subsidiaries. ~~This was~~ These MIFs were originally set in line with the levels at which domestic bilateral agreements had primarily been agreed over the previous years, which were the same as Visa UK MIFs from 1993 onwards and the MEPUK reference rates. ~~and was in line with the 1997 cost study.~~ The UK MIF was subsequently amended (and new categories introduced) to reflect ~~updates on UK costs resulting from UK cost studies and~~ the MEPUK board's views of market considerations, including changes made by Visa (which had a substantially larger share of the UK credit card market than Mastercard) to its UK MIFs. New categories of domestic MIFs introduced in 1999

had the same structure and levels as Visa's UK MIFs. Updates on UK costs resulting from UK cost studies were also taken into account. The EEA MIFs ~~were materially lower until October 2004 (when new UK MIFs were set, some of which were below the EEA MIFs) and~~ had no impact on these UK MIFs. The UK MIFs in this period had a different structure from the EEA MIFs, with several different categories applying to domestic UK transactions that did not apply to EEA transactions (and vice versa) and the various categories of MIF would apply to different types of transactions. There were also differences in levels. UK MIFs were generally higher than the EEA MIFs; but in 2004 the UK MIF for 'electronic' was set at a level lower than the EEA MIF for 'enhanced electronic' (the UK MIF being so set following a similar reduction in Visa's UK MIF for electronic transactions).

c. From November 2004, the UK MIFs were set by Mastercard. Mastercard set rates by reference to its assessment of commercial and ~~based on UK cost studies and~~ competitive conditions in the UK market, and also took account of UK cost studies. The EEA MIFs had no impact on these rates at all. Certain UK MIFs were set below the level of EEA MIFs: (i) the UK 'electronic' and 'secured electronic' MIFs were set below that of the EEA 'enhanced electronic' MIF (until 2007); (ii) the UK 'standard' MIF was below the EEA 'base' MIF in 2006; (iii) the UK 'merchant UCAF' MIF was below the EEA 'merchant UCAF' MIF from 2005 to 2008; and (iv) the UK 'full UCAF' MIF was below the EEA 'full UCAF' MIF from 2005 to 2008. In 2008, the EEA MIFs were set to zero, and UK MIFs were not changed at all.

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

a. As set out above, UK Domestic Transactions on Mastercard credit cards only took place pursuant to a UK MIF from 1 November 1997 (or some time after then) ~~1999~~ onwards. ~~The first sentence of paragraph 103 is accordingly denied.~~

b. As to the allegation in paragraph 103(a) that the scheme rules provided for the EEA MIF to apply by default, the operation of the scheme rules in the UK is addressed at paragraphs 93C – 93P, 98 and 99 above. Save as set out therein, paragraph 103(a) is denied.

bi. As to paragraph 103(aA), the first sentence is denied. In the period up until the adoption of the UK domestic rule book in 1996, the scheme rules did not provide and/or were not generally understood to provide, that the EEA MIF would apply in the absence of bilateral agreements. Fallback interchange fees would apply under the rules where an arbitration took place, and/or it was generally understood that the rules so provided. Following the adoption of the UK domestic rule book, it continued to be understood that interchange was to be agreed, with arbitration available where no agreement was reached. It was widely understood that the EEA MIF could have potential application as a fallback where no bilateral agreement was reached only in respect of non-MEPUK licensees (who represented a tiny proportion of UK domestic transactions). Mastercard's case as to the scheme rules (and the understanding of licensee banks of the rules) in this period is set out in paragraphs 93D – 93H, 98 and 99 above. The second sentence is admitted, and it is averred that UK MIFs were established with effect from 1 November 1997 (rather than December 1997).

c. The EEA MIFs did not act as a floor and/or guidance and/or a benchmark and/or a minimum price recommendation and/or a minimum starting point and/or a minimum level for the setting of either bilateral domestic interchange fees (alternatively the vast majority of bilateral domestic interchange fees) or the UK MIF, as particularly confirmed by the Maestro UK scheme and the Debit Mastercard scheme in the UK. The factors which were relevant to the level at which bilateral UK interchange fees were agreed and the UK MIFs were set are set out at paragraphs 98 and 99 above. In relation to recitals 405, 416 and 421 of the EC Decision, see paragraphs 62, 66 and 67 above. Save as aforesaid, paragraph 103(b) is denied.

ci. As to paragraph 103(bA), it is denied that where bilateral agreements were not entered into and lodged with the Third Defendant, the EEA MIF was then applied to all such transactions. Mastercard's case as to the arrangements that would apply where bilateral agreements could not be made is set out in paragraphs 98 and 99 above. Processing was provided by other entities in addition to the Third Defendant. To the extent that there were any transactions that occurred without bilateral agreements being in place, the volume of those transactions was not

material, and of those transactions, only some would have been processed by the Third Defendant.

d. The allegation in paragraph 103(c) as to weighted voting in MEPUK or MMF is too vague to plead to and no admissions are made. The roles of MEPUK and then MMF in the setting of UK domestic interchange fees and the matters which they took account in doing so are addressed above. Neither had any role in the setting of UK MIFs from November 2004 onwards. In any event, even if the weighted voting had been in favour of the issuing banks, this would contradict the contention that domestic interchange fees would have been agreed at a lower level absent the EEA MIFs, since there would have been no reason for the issuing banks to agree to this. As to the allegation that issuer banks only 'accepted' UK MIFs below the level of the EEA MIF in the latter part of the relevant period because of concerns over regulatory scrutiny by the OFT, in the period after November 2004 UK MIFs were set by Mastercard. Issuing banks had no role in the setting of UK MIFs in that period. The allegation is accordingly based on a false premise and is denied. As to the instance in which the UK MIF for electronic transactions was set (with effect from 1 October 2004) at 0.9%, below the level of the 'enhanced electronic' EEA MIF (of 0.95%), it is denied that this was caused by the EEA MIF in the way alleged or at all. The UK MIF for electronic transactions was reduced following a similar reduction in Visa's UK MIF for electronic transactions.

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

f. In the premises, paragraph 103(d) is denied. Further and in any event, even if the EEA MIFs had operated as a floor and/or guidance and/or a benchmark and/or a minimum price recommendation and/or a minimum starting point and/or a minimum level for UK domestic interchange fees for credit cards, it is denied that UK domestic interchange fees (including the UK MIFs once set) would have been agreed/set at a lower level either during the relevant period or in the year to 21 June 2009 if the EEA MIFs had been set at a lower level during the relevant period:

   i. In relation to the period prior to 2004 (when Mastercard took over setting the UK MIFs for Mastercard credit cards), domestic interchange fees were set/agreed taking account of UK domestic costs and the competitive conditions

in the UK market, including in particular the comparable domestic interchange fees for Visa and Access (the UK domestic credit card scheme) and the competitive threat posed by Visa Debit, Switch/Solo (the UK domestic debit card scheme), Amex, store cards and other payment methods, as well as reference rates (which took account of those factors also, particularly competition from Visa). The same factors would have applied even if alternative EEA MIFs had been set at a lower level and the same interchange fees would have been agreed/set by reference to these factors.

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

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

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

v. Furthermore, MIFs only apply in the absence of a bilateral agreement between an issuing bank-acquiring bank pair. However, if a much lower or a zero UK MIF had been in place, it is likely that some or all issuing bank-acquiring bank pairs would have entered into bilateral agreements on interchange fees rather

than applying a low or zero default interchange fees. The negotiation of bilaterals would have been incentivised by the fact that the alternative was for issuing banks to issue Visa, Access or American Express cards instead which would have resulted in the same or higher charges to acquiring banks (or their customers) in any event.

vi. As set out above, the Mastercard scheme rules provided for arbitration in default of bilateral agreement on alternative terms of dealing between issuing banks and acquiring banks. For the avoidance of doubt, while it is accepted that bilateral agreements on interchange fees largely ceased to exist once the UK MIF was adopted ~~as the automatic fallback~~ in ~~or around~~ 1997 (or some time thereafter) ~~1999~~, that was in the context of a UK MIF which was set at a competitive level, and would not have been the case with low or zero interchange fees. Mastercard will refer to and rely upon the fact that bilateral agreements were agreed by issuing banks and acquiring banks in the UK for the Mastercard scheme prior to around 1999 and for the Switch and subsequently UK Maestro debit card schemes until 2009.

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

g. Paragraph 103(e) is denied. Net-acquirers would not have withdrawn their consent to the UK domestic rules or used the threat of doing so to obtain lower interchange fees. Withdrawing consent would be highly disruptive, since it would mean that the entire domestic rule book would cease to apply. Net acquirers would have no incentive for a MIF of zero to apply instead. Without limitation to that point, acquirers' incentives would be for the scheme to be successful, as their revenues depend on transactions taking place on Mastercard cards. Net acquirers would be aware that a MIF of zero would lead to the scheme

collapsing, and materially lower MIFs would lead to scheme being significantly smaller. A net acquirer would also not gain any advantage over other acquirers through a MIF of zero (or a lower MIF) applying, as all acquirers would pay the same MIF. The factors set out in paragraph 100(f) above are repeated.

h. As to paragraph 103(f), as to the first and second sentences, the decision-making bodies that set the UK MIF taking effect on 1 November 1997 set the rates at levels described by MEPUK as being "in adoption", namely 1.3% (standard transactions) and 1.0% (electronic). Those rates applying prior to November 1997 were materially different (in structure and level) from the EEA MIF. The vast majority of bilateral agreements were the result of the reference rates, consistent with Visa's MIFs, and in view of the UK cost studies, and were not affected by the EEA MIFs in the ways alleged by the Class Representative (or at all). The third sentence is accordingly denied. The factors that caused the UK MIF to be set in November 1997 are set out above (in particular in paragraph 98(s) - 98(v), and paragraph 99(b)). They did not include the EEA MIF. In the premises, the fourth sentence is also denied. As to the fifth sentence, the allegation that the EEA MIFs prior to November 1997 "*infected*" all UK MIFs adopted thereafter is vague and unparticularised. Without prejudice to that point, the allegation is denied and Mastercard refers to the following. The UK MIF as set in November 1997 was not (for the reasons given above) affected by the EEA MIF, and after November 1997, new categories of transactions were introduced with different rates. The UK MIFs were periodically reviewed (and in some instances changed) by reference to the factors set out above. Mastercard also notes that the Class Representative is now seeking to advance a 12-year run-off period from November 1997, despite the Tribunal having previously ruled that the Class Representative could only reasonably contend for a one-year run-off period. Mastercard notes also that the Class Representative's expert considers that there was a "*structural break*" in interchange fees in 2001 to 2003. In addition to the matters set out, it is denied that the allegation that domestic MIFs set in 1997 and thereafter until 2009 were "*infected*" by the EEA MIF's influence on bilateral agreements before November 1997 is capable of constituting a relevant causal connection. The suggestion in the sixth sentence that the quantum of this alleged '*infection'* is a matter for expert evidence is noted and is rejected.

The Class Representative has impermissibly failed to provide any particulars of the extent of the alleged '*infection'*. Mastercard reserves the right to seek further information in respect of this allegation.

i. As to paragraph 103(g):

   i. As to the first sentence, the apparent suggestion that Mastercard contends that the EDC cost studies were "*the cause*" of the interchange fees adopted is incorrect. Mastercard's case is, as set out above, that the EDC cost studies were one of several factors.

   ii. As to the second sentence, insofar as it is alleged that the EDC cost studies were not taken into account as a reference point (in the manner alleged by Mastercard), that is denied. It is in particular denied that the cost studies lacked rigour in their methodology or that the underlying data were of insufficient quality. Mastercard will address the data collected and the methodology used in evidence.

   iii. As to the third sentence, it is admitted that interchange fees were (at least in most cases) not set at the levels calculated by the cost studies, but the relevance of this is not explained or understood. Mastercard's case is that interchange fees were set by reference to several factors, including in particular competitive considerations (and the interchange fees set in the Visa scheme), not only cost studies.

   iv. As to the fourth sentence, the Class Representative's case that cost studies were prepared in order to address regulatory concerns is noted. It is admitted that one reason for cost studies to be prepared and taken into account was to ensure that interchange fees were compliant with applicable laws and regulations and could be defended as such. This is consistent with Mastercard's case that cost studies were a factor taken into account.

   v. As to the fifth sentence, the Class Representative's reliance on those findings is noted. Those findings are not binding on the Tribunal and do not support the Class Representative's case on causation in any event. If (as the Class Representative appears to contend) cost studies were a means of estimating merchants' willingness to pay, then they provide an

indication of the level of interchange fees that would be accepted in the market. Market considerations were relevant to the setting of interchange fees.

j. As to paragraph 103(h), the first sentence ("*did not negate*") is impermissibly vague. In any event, Visa's MIFs were a particularly important factor in the setting of domestic interchange fees, as set out above. As to the second sentence, the allegation that Visa's MIFs would have been lower in the "lawful counterfactual" is unparticularised and unexplained and is, in any event, denied. Pending clarification of the Class Representative's case, Mastercard notes and avers that Visa's MIFs were not found to be unlawful by any regulatory investigation. In the premises, the third and fourth sentences are denied.

k. Paragraph 103(i) is vague and unparticularised. It does not advance any allegation in support of the Class Representative's case that the EEA MIF caused interchange fees on domestic transactions to be higher than they otherwise would have been. It does not specify the point at which it is said that an impact on MSCs occurred, or the time over which that impact attenuated. The allegation in the second sentence that acquirers would not pass on reductions in IFs to merchants unless "required" to do so is noted. That allegation is inconsistent with the Class Representative's case that, had interchange fees been lower, MSCs would have been lower also. As to the third sentence and the cross-reference to paragraph 105A(a), Mastercard refers to paragraph 101A(b) of this Re-Amended Defence (which pleads to paragraph 105A(a)). Save as aforesaid, pending clarification of the Class Representative's case, the paragraph is not admitted.

l. As to paragraph 104, the allegation of any deficiency in the disclosure provided to the Class Representative is denied. Paragraph 93A above is repeated. It is denied that the Class Representative has any basis (based on disclosure or otherwise) for reserving the right to amend further his case on causation.

m. As to paragraph 105:

i. As to the allegation in paragraph 105(a) that the EEA MIF applied directly to certain transactions, Mastercard repeats paragraph 100(bi) of

this Re-Amended Defence above (which pleads back to paragraph 103(aA), to which paragraph 105(a) cross-refers).

ii. Paragraph 105(b) is denied for the reasons set out above. Paragraph 100(c) - (g) of this Re-Amended Defence above is repeated.

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

The Run-Off Overcharge claim

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

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

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

21 June 2008 had any effect on Mastercard's UK domestic interchange fees during the period 22 June 2008 to 21 June 2009.

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

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

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

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

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

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

101C. In relation to paragraph 105D, Mastercard repeats paragraph 100(h) above.

Did businesses which accepted Mastercard incur higher costs

102. In relation to paragraph 106 and 106A: Even if (which is denied) the EEA MIFs were set at a level higher than the lawful rate and even if (which is denied) this had any effect on domestic interchange fees either in the relevant period or in the year to 21 June 2009,

it is denied that the effect of the breach is properly to be measured on the assumption that merchants' costs would have been reduced by the amount of any such reduction in interchange fees since:

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

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

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

Acquirer pass-on

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

104. Mastercard refers to the following:

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

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

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

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

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

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

105. Mastercard will refer to the Payment Systems Regulator's ("PSR") November 2021 report on the UK acquiring market which concluded that there was *"little or no pass-through"* of reductions in interchange fees as a result of the Interchange Fee Regulation into lower MSCs for both small and medium merchants and large merchants with an annual card turnover below £50 million. The PSR concluded that there was only clear evidence of pass-through in relation to those very large merchants which operated based on Interchange Plus Plus arrangements. Mastercard acknowledges that the PSR Report is dealing with a later period (i.e. 2014 to 2016) than the relevant period for this claim. However, since the changes which have taken place in the acquiring market since 1992 to June 2010 ~~2008~~ (including multiple new entrants, publication of interchange fee rates, the general prohibition on blended rates in the IFR, increased card usage (and so the importance of MSCs as a cost) and the growth of Interchange Plus Plus arrangements) have increased competition, they would be expected to promote pass-through of cost reductions, rather than the reverse. In addition, the IFR changes applied to both Mastercard and Visa, whereas any reduction in Mastercard's MIFs would have had a much smaller effect on acquiring banks' costs.

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

107. Alternatively, the extent and timing of any pass-through of any reduction in interchange fees into MSCs is likely to have varied substantially between different categories and sizes of merchants, between different geographic areas and across the 18 ~~16~~-year claim period and the Class Representative is put to strict proof of the relevant pass-on rates and the timing of any such pass-on. To the extent that interchange fees had a delayed

impact on MSCs after the relevant period (which is denied), credit must be given for an equivalent delayed impact at the start of the claim period (after taking account of limitation), which will offset (in full or part) the claim in respect of the two-years to 21 June 2010.

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

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

Changes to Merchant Benefits

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

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

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

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

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

111. Both the EEA scheme rules and the UK Domestic Scheme Rules in relation to each of these issues which were in place during the relevant period (and, in relation to the UK, were in place during the year to 21 June 2009) were determined in the context of the EEA MIFs or the UK MIFs (or bilateral interchange fees), respectively then in force which provided a contribution to the costs which issuing banks incurred in complying with these default rules. Had the Mastercard scheme been required to operate with substantially lower (or zero) interchange fees during the relevant period or in the year to 21 June 2009, then the default rules in relation to these issues would have been

materially different, since acquiring banks/merchants could not expect to receive the benefit of services to which they were not contributing and it would not be commercially viable for issuing banks to provide these services to merchants without any contribution to the costs of doing so from acquiring banks/merchants.

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

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

Transaction Volumes

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

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

116. Mastercard will refer to and rely upon the analysis and conclusions of Mr Justice Popplewell in *AAM v Mastercard* [2017] EWHC 93 (Comm) at paragraphs 220 – 251 that if Mastercard's interchange fees were not competitive with those of Visa, Mastercard would have lost its entire business to Visa. While the Court of Appeal

concluded that this was not a relevant consideration for the purpose of Article 101(1), there was no dispute about the accuracy of this analysis as a matter of fact and switching to rival card schemes (or other payment methods) is a relevant consideration for the purpose of damages. Mastercard notes that the Tribunal held in *AAM v Mastercard* [2021] CAT 16[5] that Mastercard could only rely on switching to Amex and not Visa. However, the CAT's reasons for concluding that in that case Mastercard could not rely on switching to Visa do not apply to the present case in circumstances where the Commission had made an exemption decision in 2002 in relation to Visa's EEA MIFs, so Mastercard is not relying on the operation of an unlawful scheme by a third party.

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

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

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

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

121. Since 1997, American Express has offered financial institutions the ability to issue American Express cards and has made payments to issuing banks for doing so which

[5] At paragraphs 13 - 37.

match or exceed those which issuing banks have received under the Mastercard/Maestro schemes through interchange fees. American Express also charges merchants MSCs which are typically substantially higher than those charged by acquiring banks of Visa or Mastercard/Maestro transactions and, as a result, has been able to offer cardholders and issuing banks substantial additional benefits/incentives.

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

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

Pass on to consumers via higher prices

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

125. Therefore, in relation to paragraph 107, even if (which is denied) merchants did incur higher overall costs during the relevant period and/or in the two-years to 21 June 2010 as a result of the EEA MIFs during the relevant period, in order to establish that the Represented Persons suffered loss and the amount of that loss, the Class Representative needs to show whether and (if so) the extent to which the retail prices charged by merchants during the relevant period and/or in the two-years to 21 June 2010 were higher than they would otherwise have been as a result of those higher costs being

passed on by merchants into retail prices (rather than resulting in reduced profits or enhanced losses and/or merchants reducing discretionary expenditure and/or merchants seeking to reduce their costs by negotiation with their suppliers).

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

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

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

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

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

e. In relation to Mastercard's position in other litigation, Mastercard has always accepted that passing-on is a matter for evidence and will depend on the specific features of an individual business and its competitors in the relevant market and time period. Mastercard's position in the *Sainsbury's* litigation was based on analysis of detailed evidence in relation to Sainsbury's internal pricing methodologies in relation to the period 2007 to 2014, in the context of one of the largest companies in the UK which competed in the highly competitive supermarket sector against a number of similar very large businesses, all of which had interchange plus plus arrangements with their acquiring banks. The same analysis and conclusions would not apply to different businesses and different time periods. Furthermore, the Tribunal rejected Mastercard's submissions and held (at paragraph 465) that the way in which the UK MIF was dealt with by Sainsbury was *"unknowable"* so it was *"impossible"* to say what proportion of this cost was passed on in the form of higher prices. The Court of Appeal rejected Mastercard's appeal on this finding.

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

127. In relation to paragraph 108:

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

b. In the premises, even if merchants did incur higher costs during the relevant period and/or in the two-years to 21 June 2010 as a result of the EEA MIFs during the relevant period (which is denied), some merchants would have passed on those costs through higher charges to cardholders (including cardholders who are not

Represented Persons, such as commercial cardholders or consumer cardholders using their personal cards for transactions which were not for their personal benefit), rather than through higher retail prices generally.

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

129. Paragraph 110 is noted.

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

Account must be taken of benefits

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

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

Particulars of loss and damage

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

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

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

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

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

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

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

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

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

135. The Class Representative is put to strict proof of the extent to which any increase in retail prices was paid by Represented Persons (in the capacity in which they are represented) rather than these and any other third parties. In particular, Mastercard notes that, in relation to the claim in respect of the EEA MIFs paid on Cross-Border Transactions by UK cardholders through channels such as the internet, mail order or via telephone shopping from businesses with a physical presence in another EEA country, even if, which is denied, this cost was passed-on by acquirers in the relevant EEA countries and by the relevant merchants into higher retail prices, no material part of this cost would have been borne by Represented Persons, since nearly all purchases from merchants with a physical presence in another EEA country would have been made by non-Represented Persons (including individuals resident in that country).

The quantum figures in the Claim

136. In relation to paragraphs 111A and 112, it is denied that damages in respect of the alleged Overcharge are properly to be measured by calculating the total interchange fees paid by UK acquiring banks on Domestic and Cross-Border Transactions (or the total interchange fees paid by non-UK acquiring banks on remote Cross-Border Transactions by UK cardholders at merchants with a physical presence in another EEA country who sold in the UK through channels such as the internet, mail order or telephone shopping) for the reasons set out above. However, even if the total interchange fees paid by UK acquiring banks on Domestic and Cross-Border Transactions (and the total interchange fees paid by non-UK acquiring banks on remote Cross-Border Transactions by UK cardholders at merchants with a physical presence in another EEA country) were ~~was~~ relevant, the figures in paragraph 112 (and its sub-paragraphs) are inflated and incorrect. Mastercard has set out below and in **Annex 1** the best figures that are presently available to it, although Mastercard reserves the right to re-visit these figures following disclosure, factual evidence and expert reports.

137. In relation to paragraph 112(b), the figures in the table below paragraph 112(b) for the Volume of Commerce (VOC) in the UK during the relevant period in which a Mastercard debit or credit consumer card was used are inflated, ~~including~~ because they include on-us transactions – see paragraph 51d above.

~~a. No adjustment has been made to the figures for Domestic or Cross-Border Transactions in order to remove commercial card transactions, despite information~~

~~on commercial card transactions being available in the APACS UK Payment Statistics Report from which these figures were obtained.~~

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

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

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

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

Card type	**Cross-border by EEA cardholders £'000**	**Remote Cross-border by UK cardholders £'000**	**Domestic £'000**	**Total £'000**
Credit Card	~~26,224,764~~ 25,721,652	8,859,716	~~450,182,906~~ 387,776,334	~~476,407,669~~ 413,497,986
Debit Card	~~167,415~~ 173,423	703,422	~~£0[6]~~ 39,053	~~167,415~~ 212,476
Total	~~26,392,179~~ **25,895,075**	**9,563,138**	~~450,182,906~~ **387,815,387**	~~476,575,085~~ **413,710,462**

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

139. ~~In addition, in relation to the VOC, it will be necessary to t~~ There have been removed

~~[6] If a claim was available in relation to domestic transactions on Solo, the correct VOC figure would be £35,730,598,901.~~

from the above figures those transactions which were not subject to an interchange fee, namely "on-us" transactions: see paragraph 51d above. ~~Mastercard will identify the appropriate reduction once this information becomes available.~~

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

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

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

c. In relation to debit card Domestic Transactions, a claim is only made in relation to Debit Mastercard which was only introduced in 2006. ~~the Claim acknowledges at paragraph 113 that no claim can be brought in relation to Domestic Transactions on Maestro debit cards. Mastercard understands that no claim is pursued in relation to Switch (which was a domestic debit card scheme), but a claim is made in relation to Solo debit cards, although no such claim is in fact available for the reasons set out at paragraph 150 below. Therefore, no claim is available in relation to debit card Domestic Transactions. Without prejudice to the foregoing, the weighted average domestic interchange fees for Maestro and Solo debit cards were around 0.153% compared to the indicative rate of 0.7% used in the Claim~~.

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

141. Although it is denied that this is a relevant calculation for the reasons set out above, applying the approach adopted in paragraph 112(a) of the Claim of multiplying the VOC by the relevant weighted average interchange fees, on the basis of the best

information presently available on those matters as set out in paragraphs 137 - 140 above, gives the following figures:

Card type	**Cross-border by EEA cardholders £'000**	**Remote Cross-border by UK cardholders £'000**	**Domestic £'000**	**Total £'000**
Credit Card	~~267,914~~ 260,595	88,867	~~4,553,687~~ 3,903,823	~~4,821,601~~ 4,164,418
Debit Card	~~977~~ 970	4,105	~~0~~[7]102	~~977~~ 1,072
Total	**~~268,891~~ 261,565**	**92,972**	**~~4,553,687~~ 3,903,925**	**~~4,822,578~~ 4,165,490**

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

142. The effect of Mastercard's limitation defence (as pleaded at paragraph 25 above), is to reduce these figures as follows (subject to Mr Merricks establishing the extent of any Scottish transactions in relation to the period 1992 to 1997 which are not time-barred):

Card type	**Cross-border by EEA cardholders £'000**	**Remote Cross-border by UK cardholders £'000**	**Domestic £'000**	**Total £'000**
Credit Card	~~239,791~~ 233,245	76,590	~~3,747,683~~ 3,296,660	~~3,987,475~~ 3,529,905
Debit Card	~~977~~ 970	4,105	~~0~~[8]1 02	~~977~~1,072
Total	**~~240,768~~ 234,215**	**80,695**	**~~3,747,683~~ 3,296,762**	**~~3,988,452~~ 3,530,977**

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

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

corrected figures above.

144. In respect of Cross-Border Transactions, it is denied that that the Represented Persons have suffered any loss as alleged or at all, and in any event it is denied that the proper measure of loss is the amount of the EEA MIFs paid: see paragraphs 81 - 92 and 102 - 135 above. In particular, Mastercard repeats paragraph 135 above in relation to the claim in respect of the EEA MIFs paid on Cross-Border Transactions by UK cardholders through channels such as the internet, mail order or via telephone shopping from businesses with a physical presence in another EEA country. There is consequently no material claim in relation to these transactions.

145. In relation to paragraph 112(d), the assumed pass-on rate of 100% from acquiring banks to merchants is denied: see paragraphs 102 - 123 above. In particular, it is denied that the proportion of transactions which took place at merchants on IC++ pricing for the period 1992 to 2010 can be inferred from data from 2015. IC++ pricing was only introduced at the end of the 1990s and was only used by a small number of merchants during the Claim Period.

146. In relation to paragraph 112(e), the assumed pass-on rate of 100% from merchants to consumers is denied: see paragraphs 124 - 128 above. Without prejudice to the generality of the foregoing, the Class Representative's own expert in these proceedings has previously accepted that the starting position that "*it is likely that there was full pass-on of the MIF (including the Overcharge) to members of the proposed class*" is unsustainable.[9]

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

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

149. In relation to paragraph 112(g) regarding adjustments made by the Class Representative for the persons whose losses are not included within this claim, the adjustments made are incomplete, since no adjustments are made for the persons identified in paragraphs

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

134(e) and (g) above. Furthermore, while this will be a matter for expert evidence, it is denied that the appropriate adjustments have been made. Without prejudice to the generality of the foregoing, any proper adjustment in relation to the claim in respect of the EEA MIFs paid on Cross-Border Transactions by UK cardholders through channels such as the internet, mail order or via telephone shopping from businesses with a physical presence in another EEA country would result in a minimal claim. ~~Furthermore, the calculation in paragraph 112 makes no attempt to identify the extent to which this supposed aggregate loss was suffered by Represented Persons rather than third parties. It is for the Class Representative to plead and prove his case. While Mastercard notes paragraph 112(h) which states that the class representative will make adjustments in due course to reflect (i) individuals who died before the collective proceedings were issued; and (ii) class members who opt out of, or opt in to, the collective proceedings; this would be insufficient to establish the loss suffered by Represented Persons rather than third parties for the reasons set out at paragraphs 133 - 135 above. In relation to category (i), based on data from the Office of National Statistics, approximately 14.4 million people aged over 16 died in the UK from the beginning of the claim period to the Domicile Date of 8 September 2016, which amounts to approximately 24% of individuals who purchased goods and services in the UK during the claim period and were resident in the UK and aged 16 or over at the relevant time.~~

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

~~**Solo**~~

150. [NOT USED]. ~~In relation to paragraph 113:~~

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

b. ~~Despite these admissions, the Claim includes claims worth over £250 million (plus interest) in relation to Domestic Transactions on Solo debit cards.~~[10]

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

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

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

Interest

151. In relation to interest:

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

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

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

d. In particular, it is denied that "objective characterisation" of the Class (as pleaded at paragraph 112(g)) would justify a different rate. Any such characterisation would have to take account of the fact that, even if consumers did suffer loss, the majority of those consumers would not have funded any such losses through higher borrowing, but rather through lower spending (and so would not have incurred or received any interest) or lower saving (and so would have lost interest at

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

significantly lower investment rates, rather than borrowing rates). The Class Representative has not been able to identify any way of determining the proportion of Represented Persons that would have funded any such losses through higher borrowing costs nor the borrowing rates that they would have incurred in doing so. For the avoidance of doubt, it is also denied that consumers necessarily face higher borrowing costs than commercial entities, as a very large proportion of consumer borrowing takes place on a secured basis at rates which are often far lower than the rates for unsecured borrowing paid by commercial entities. Consequently, there is no basis for interest at any rate other than the investment rate.

Relief Sought

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

Joe Smouha KC

Matthew Cook KC

~~**Matthew Cook QC**~~

Hugo Leith

Stephen Donnelly

Matthew Cook KC

~~**Matthew Cook QC**~~

Hugo Leith

~~**Statement of Truth**~~

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

~~Signed:~~

~~Name: MARK SANSOM~~

~~Date: 9 May 2022~~

~~**Statement of Truth**~~

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

~~Signed:~~

~~Name: MARK SANSOM~~

~~Date: 28 October 2022~~

Statement of Truth

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

Signed:

Name: MARK SANSOM

Date: 13 June 2023

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

Annex 1

Table 1: VOC

	Credit Card - Domestic £'000	**Credit Card - Cross-border by EEA Cardholders £'000**	**Credit Card - Remote Cross-border by UK Cardholders £'000**	**Debit Card – Domestic £'000**	**Debit Card – Cross-border by EEA Cardholders £'000**	**Debit Mastercard - Domestic £'000**	**Debit Mastercard – Remote Cross-border by UK Cardholders £'000**	**Maestro Debit Card - Cross-border by EEA Cardholders £'000**	**Maestro Debit Card - Remote Cross-border by UK Cardholders £'000**	**Debit Mastercard - Cross-border by European Cardholders £'000**
1992	6,280,226 4,912,775	357,734 381,980	117,309	0	0	0		0		
1993	11,533,510 9,175,858	361,451 373,585	175,129	0	0	0		0		
1994	12,915,908 10,180,930	462,736 477,003	204,843	0	0	0		0		
1995	14,461,366 11,126,091	630,285 648,783	282,995	0	0	0		0		
1996	16,188,612 13,564,279	706,463 724,759	347,019	0	0	0		0		
1997	18,513,932 15,239,027	751,469 768,322	353,943	0 *(4,000)*[11]	0	0		0		
1998	20,302,798 16,965,935	778,654 793,498	383,214	0 *(221,000)*	0	0		0		
1999	22,638,005 18,845,773	980,995 1,002,640	433,415	0 *(610,000)*	0	0		0		
2000	24,803,664 21,100,476	1,268,320 1,079,930	449,194	0 *(1,085,000)*	0	0		0		
2001	27,124,199 22,827,250	1,679,537 1,285,524	691,232	0 *(2,124,000)*	3,321	0		3,321	27,122	
2002	28,106,062 25,321,659	2,173,053 2,084,995	690,817	0 *(2,884,000)*	6,385	0		6,385	42,343	
2003	32,548,176 28,306,677	2,780,692 2,880,884	897,016	0 *(4,768,000)*	9,861	0		9,861	64,006	
2004	38,984,992 33,084,223	3,217,833 3,269,536	750,896	0 *(6,195,000)*	7,828	0		7,828	82,046	
2005	42,689,528 37,563,672	3,088,634 3,140,720	782,820	0 *(4,848,000)*	11,178	0		11,178	105,701	
2006	47,536,797 41,522,672	3,524,380 3,536,314	830,275	0 *(4,482,000)*	30,794	0		30,974	81,400	
2007	55,983,631 49,982,580	2,585,676 2,469,596	875,860	0 *(5,657,000)*	57,746	4,287	632	57,746	188,584	1,127
2008	29,571,499 28,056,459	876,850 803,583	593,739	0 *(2,852,599)*	40,122	34,766	3,608	40,122	107,980	4,880
Total	**450,182,906 387,776,334**	**26,224,764 25,721,652**	**8,859,716**	**0 (35,730,599)**	**167,415**	**39,053**	**4,240**	**167,415**	**699,182**	**6,008**

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

Sources:

Based on ISS (MAST000010453) and ACQ (MAST00001079) QMR data sets. Domestic values are based on ISS and cross-border values are based on ACQ data. The period covered is 22 May 1992 to 21 June 2008.

Notes:

~~Commercial credit card figures have been removed from credit card figures. Credit card domestic data for 1992–1995 has been back-casted from 1996 figures.~~ Commercial credit and debit card transactions are not included. Commercial transactions are split out separately in the ISS data, but not in the ACQ data. To exclude commercial transactions from the ACQ data (which is used for estimation of the relevant cross-border VoC), the shares of consumer transactions from ISS are applied to the relevant ACQ data, assuming that the relative shares are equal. Data for 1992 and 2008 has been adjusted to reflect the start and end dates of the claim period, assuming that the transactions are distributed evenly during each quarter.

Table 2: Weighted average interchange fees

	Credit Card - Domestic[12]	**Credit Card - Cross-border by EEA Cardholders**[13]	**Debit Mastercard - Domestic**	**Maestro Debit Card - Cross-border by EEA Cardholders**	**Debit Mastercard - Cross-border by EEA Cardholders**	~~**Debit Card – Domestic**~~	~~**Debit Card - Cross-border by EEA Cardholders**~~
1992	1.07%[14] ~~1.18%~~	0.90%[15] ~~1.00%~~					
1993	1.16%[16] ~~1.18%~~	0.90% ~~1.00%~~					
1994	1.18%	0.90% ~~1.00%~~					
1995	1.15%	0.99%					
1996	1.12%	0.98%					
1997	1.11%	0.97%				~~0.153%~~	
1998	1.08%	0.94%				~~0.153%~~	
1999	1.08%	0.93%				~~0.153%~~	
2000	1.09%	0.97%		0.60%		~~0.153%~~	
2001	1.09%	1.02%		0.65%		~~0.153%~~	~~0.65%~~
2002	~~1.06%~~ 1.07%	1.04%		0.65%		~~0.153%~~	~~0.65%~~
2003	~~1.01%~~ 1.04%	~~1.04%~~ 1.05%		0.65%		~~0.153%~~	~~0.65%~~
2004	~~0.96%~~ 0.94%	~~1.04%~~ 1.05%		0.63%		~~0.153%~~	~~0.63%~~
2005	0.93%	~~1.04%~~ 1.03%		0.59%		~~0.153%~~	~~0.59%~~
2006	0.92%	~~1.04%~~ 1.02%[17]		0.57%		~~0.153%~~	~~0.57%~~
2007	0.91%	~~1.04%~~ 1.00%	0.26%	0.54%	1.00%	~~0.153%~~	~~0.57%~~
2008	0.90%	~~1.04%~~ 1.00%	0.26%	0.53%	1.00%	~~0.153%~~	~~0.57%~~

[12] Standard consumer credit cards only (excluding World Signia and World).
[13] Standard consumer credit cards only (excluding World Signia and World).
[14] Updated estimate based on the information now available about bilateral agreements applicable in 1992. This figure is the arithmetical average of figures available for 1992, based on MEPUK's submission to the OFT dated 8 April 2002 (MAST00001005), which concerns Barclays and RBSG (which includes NatWest).
[15] Updated estimates based on the information now available about the EEA MIF rates prior to 1 April 1995. Mastercard notes that there were various discounted MIFs applicable to cross-border intra-EEA transactions up until April 1995 which mean that the weighted average rate would have been between 0.50% and 1.0%: a rate of 0.50% for electronic transactions (where

Sources:

Domestic credit *is based on "MEPUK data from MEPUK response to s.26 notice dated 18 February 2002" (MAST00001005) from 1994 to 2001, on "MasterCard UK Members Forum Limited Minutes of the 10th Meeting of the Board of Directors on 6 May 2004" (MAST00000916) for 2003, on "MCI response to the OFT 3 March 2006"(MAST00005306) for 2004 to 2006 and on "Mastercard correspondence 19 February 2008 (MAST00010464) for 2008.*

Cross-border credit *is based on "MC response to EC SO 5 January 2004" (MAST00002582) for 1994 and 1996 to 2002, on "10th EIC - Pre-Read Item 4 - Intra-European MC Consumer POS MIF.doc" (MAST00009993) for 2003 to 2006 and on the "20th EIC" (MAST00010436) for 2007.*

Domestic Debit Mastercard *is based on "Mastercard correspondence 18 August 2006" (MAST00008885) for 2007.*

Cross-border Maestro debit *is based on "EC Decision Table 7"(MAST00007387) for 2000 to 2006, "MCE Board 27 October 2005" (MAST00008709) for 2007 and "Letter from Mastercard Worldwide to customers and press release 12 June 2008" (MAST00001051) for 2008.*

Cross-border Debit Mastercard *is based on the Standard Consumer Credit Card - Cross-border weighted average MIF (MAST00010436) in the absence of documents recording the weighted average MIF for Debit Mastercard since standard rates for cross-border EEA MIFs applied to cross-border Debit Mastercard when it was introduced in 2007 (MAST00007118).*

Notes:

Interchange fees are assumed to remain constant in the periods before and after any discrete datapoints are available. Where there is a gap between two periods of available datapoints, the change in interchange fees is assumed to follow a linear path *with the exception of data gaps prior to any reduction in MIF rates to zero, where the MIF is assumed to stay constant until it falls to 0%. The 2008 figures show the MIF rates that were applicable up to 21 June 2008. These were reduced to zero thereafter following the EC Decision. The available data on weighted average MIFs was collated from contemporaneous documents on a quarterly basis (to align with the QMR data), and the annual weighted average interchange fees above reflect a simple average over the four quarters of each year.*

100% of transactions were authorised) (MAST00003606); 0.50% for petrol transactions (MAST00007031); and a discounted rate for standard transactions (where a lower floor limit for authorisation was applied) (MAST00006057). See also MAST00007588. The re-amended figures for the average EEA MIF for 1992-1994 are indicative only and final figures will be addressed in expert evidence.

[16] Updated estimate based on the information now available about bilateral agreements applicable in 1993. This figure is the arithmetical average of figures available for 1993 from MEPUK's submission to the OFT dated 8 April 2002 (MAST00001005), which concerns RBSG (which includes NatWest), HSBC (which includes Midland) and Barclays.

[17] This is the correct figure, as set out in Freshfields' letter to Mr Merricks of 4 May 2023, pursuant to MAST00009993.

Table 3: VOC multiplied by weighted average interchange fees

	Credit Card - Domestic £'000	**Credit Card - Cross-border by EEA Cardholders £'000**	**Credit Card - Remote Cross-border by UK Cardholders £'000**	**~~Debit Card – Domestic £'000~~**	**Debit Mastercard – Domestic £'000**	**Debit Mastercard - Cross-border by EEA Cardholders £'000**	**Debit Mastercard - Remote Cross-Border by UK Cardholders £'000**	**~~Debit Card – Cross-border by EEA Cardholders £'000~~**	**Maestro Debit Card – Cross-border by EEA Cardholders £'000**	**Maestro Debit Card - Remote Cross-border by UK Cardholders £'000**
1992	52,567 ~~74,107~~	3,438 ~~3,577~~	1,056	~~0~~	0	0	0	~~0~~	0	0
1993	106,440 ~~136,095~~	3,362 ~~3,615~~	1,576	~~0~~	0	0	0	~~0~~	0	0
1994	120,135 ~~152,408~~	4,293 ~~4,627~~	1,844	~~0~~	0	0	0	~~0~~	0	0
1995	127,672 ~~165,944~~	6,423 ~~6,235~~	2,802	~~0~~	0	0	0	~~0~~	0	0
1996	151,581 ~~180,908~~	7,103 ~~6,923~~	3,401	~~0~~	0	0	0	~~0~~	0	0
1997	168,391 ~~204,579~~	7,453 ~~7,289~~	3,433	~~0 (6)[11]~~	0	0	0	~~0~~	0	0
1998	183,232 ~~219,270~~	7,459 ~~7,319~~	3,602	~~0 (338)~~	0	0	0	~~0~~	0	0
1999	203,534 ~~244,490~~	9,325 ~~9,123~~	4,031	~~0 (933)~~	0	0	0	~~0~~	0	0
2000	229,995 ~~270,360~~	10,475 ~~12,303~~	4,357	~~0 (1,660)~~	0	0	0	~~0~~	0	0
2001	249,388 ~~296,332~~	13,112 ~~17,131~~	7,051	~~0 (3,250)~~	0	0	0	~~22~~	22	176
2002	269,676 ~~297,573~~	21,684 ~~22,600~~	7,184	~~0 (4,413)~~	0	0	0	~~42~~	42	275
2003	294,389 ~~328,330~~	30,249 ~~28,919~~	9,419	~~0 (7,295)~~	0	0	0	~~64~~	64	416
2004	310,992 ~~373,769~~	34,330 ~~33,465~~	7,884	~~0 (9,478)~~	0	0	0	~~49~~	49	517
2005	349,342 ~~398,613~~	32,349 ~~32,122~~	8,063	~~0 (7,417)~~	0	0	0	~~66~~	66	624
2006	382,009 ~~436,914~~	36,070 ~~36,654~~	8,469	~~0 (6,857)~~	0	0	0	~~177~~	177	464
2007	454,841 ~~507,852~~	24,696 ~~26,891~~	8,759	~~0 (8,655)~~	11	11	6	~~329~~	312	1,018
2008	252,508 ~~266,143~~	8,036 ~~9,119~~	5,937	~~0 (4,364)~~	91	49	36	~~229~~	213	572
Total	**3,906,692** ~~4,553,687~~	**259,857** ~~**267,914**~~	**88,867**	~~**0 (54,668)**~~	**102**	**60**	**42**	~~**977**~~	**943**	**4,063**

Sources:

See Table 1 and Table 2.

Notes:

The figures above are the result of multiplying the VoC for each category by the weighted average interchange fees on a quarterly basis and then summing up the resulting values for each year.