Rules of the Tribunal 32(1)(b), 38 and 74 dated 20 September 2022

Re-Amended Reply pursuant to paragraph 8 of the Order of Mr Justice Roth made on 14 October 2022

Re-Re-Amended Reply pursuant to the Order of Mr Justice Roth made on 12 January 2023

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

Re-Re-Re-Re-Amended Reply pursuant to the Order of Mr Justice Roth made on 10 February 2023

Case Number: 1266/7/7/16

IN THE COMPETITION APPEAL TRIBUNAL

B E T W E E N:

WALTER HUGH MERRICKS CBE

Class Representative

-and-

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

Defendants

RE-RE-RE-RE-AMENDED REPLY

INTRODUCTION

1. In this Re-Re-Re-Re-Amended Reply, unless otherwise indicated:

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

   (b) Except where otherwise indicated, defined terms have the same meaning as in the Re-Re-Amended Collective Proceedings Claim Form dated 7 June 2023 ~~20 September~~ ~~9 March~~ 2022 (the "**Claim**") or Re-Amended Defence, as appropriate.

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

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

3. The structure of this Re-Re-Re-Re-Amended Reply is as follows:

(a) Limitation and applicable law;

(b) Represented Persons;

(c) The EC Decision;

(d) Exemption;

(e) Cross-Border Transactions;

(f) UK Domestic Interchange Fees;

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

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

(i) Account must be taken of benefits;

(j) Quantum; and

(k) Interest.

3AA. The primary purpose of the permission granted on 6 June 2023 to re-re-re-amend this Reply was to enable consequential amendments arising from the re-re-amendments in the Claim and Mastercard's response thereto, in advance of the trial of the Causation Issue and Volume of Commerce Issue (as defined in the Order of the Tribunal dated 14

October 2022). Accordingly, the Class Representative has adopted a limited and proportionate approach to the scope of the re-re-re-amendments and reserves the right to apply to further amend this Reply as the claim progresses, including in respect of matters concerning factual and legal causation and the related counterfactual analysis (which are outside the scope of the Causation Issue), and matters going to other issues such as overcharge and pass-on that are still to be determined.

3AB. The primary purpose of the permission granted on 10 February 2023 to re-re-re-re-amend this Reply was to enable amendments arising out of the disclosure relevant to certain issues of English law limitation, which the Defendants were ordered to provide in the course of May-June 2023. Accordingly, the Class Representative has adopted a limited and proportionate approach to the scope of the re-re-re-re-amendments and reserves the right to apply to further amend this Reply as the claim progresses, in particular in respect of issues other than limitation.

LIMITATION AND APPLICABLE LAW

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

3A. Paragraphs 4-9 below are to be read subject to (and, to the extent necessary, in the alternative to) paragraphs 9A-9F.

Limitation under English law

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

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

   (b) alternatively, the six-year limitation period pursuant to s.2 and/or 9 of the Limitation Act 1980 was suspended under s.32 of the Limitation Act 1980. In particular:

(i) A fact, or facts, relevant to the Represented Persons' rights of action was, or were, deliberately concealed from them by Mastercard, either by way of active or passive concealment (under s.32(1)(b) Limitation Act 1980) or, in relation to the facts involved in the breach of Article 101 TFEU, by way of deliberate commission of that breach of duty in circumstances in which it was unlikely that it would be discovered for some time (under s.32(2) Limitation Act 1980)

(ii) The Class Representative reserves the right to plead further in relation to deliberate concealment, following disclosure~~[1]~~ and factual evidence, but on the basis of the information presently available to him he relies on the following facts and matters:

(1) Mastercard fostered a culture of secrecy, non-transparency and non-disclosure in relation to interchange fees, ~~in particular for present purposes~~ including but not limited the Intra-EEA MIF.

(a) Until at least 26 June 1998, Mastercard (i) treated domestic interchange fees applicable in one EEA Member State as confidential from Mastercard member banks in other EEA Member States and (ii) declined to provide information on domestic interchange fees in a given Member State when requested by member banks in another EEA Member State on the basis that such information was confidential.

(b) Associate members of MasterCard were not given access to all of the information concerning interchange fees that was available to full members, such that there was a disparity of information regarding interchange fees even amongst MasterCard members.

(c) With effect from April 1995, Mastercard introduced Europay Membership Rule ("**EMR**") 12.1, which provided in relevant part: "*An applicant for membership must sign a confidentiality*

~~[1] Disclosure in relation to the UK domestic IFs (in particular the Mastercard Members Forum and the OFT file) was received on 28 October 2022, whereas disclosure in relation to the EC File was received only on 9 December 2022. Further, there may be further documents, specific to concealment of the Intra EEA MIFs (in particular in the period 1992 - 1997), which have not yet been disclosed.~~

agreement prior to receiving any confidential information from Europay. The Member must secure the confidentiality of all confidential information received as a result of its membership of Europay." The EMR defined "*confidential information*" to include "*the Rules*",[1A] which the Class Representative avers was intended to apply broadly so as to capture all scheme information provided to the member banks, including Operations Bulletins which were the "*primary vehicle for communicating operational changes to Europay Members*" and through which Intra-EEA MIFs were, from time to time, communicated by Mastercard to member banks. EMR 12.1 was in force in materially unamended form until at least January 1998.

(d) Prior to April 1995, whether formally or informally, Mastercard (through the rules that applied to member banks in the EEA prior to EMR or otherwise) imposed the same or materially similar confidentiality obligations that had equivalent effect to EMR 12.1.

(e) At all relevant times from 1992 until at least 20 June 1997, the effect of EMR 12.1 and earlier applicable rules, policies or practices having similar or equivalent effect to EMR 12.1, was to prohibit or restrict member banks from disclosing to merchants or consumers in the EEA, including the United Kingdom, the levels of Intra-EEA MIFs, their structure, the methodology for setting them, their relationship with and influence upon the interchange fees for domestic transactions within, *inter alia*, the United Kingdom, and/or any other details or information regarding them.

(f) The Commission's Statement of Objections to Mastercard dated 24 September 2003 stated at recital 104 that "*Mastercard's rules on business secrets also prevent acquiring banks from disclosing the level of its MIFs and its composition to*

[1A] The Class Representative understands that the "Rules" to be kept confidential include, but are not limited to, those pleaded at paragraph 102C-102P of the Re-Re-Amended Claim Form.

merchants…" It is, accordingly, inferred by the Class Representative that a rule, policy or practice applicable to the members of the scheme having similar or equivalent effect to EMR 12.1, remained in force until at least September 2003.

(g) Mastercard did not, until at least 20 June 1997, publish or make publicly available information regarding the structure or setting of the Intra-EEA MIF and its relationship to and influence upon interchange fees for domestic transactions within the United Kingdom (in particular, the fact that the Intra-EEA MIFs acted under the relevant rules as a fallback or default rate for UK domestic interchange fees). It did not publish or make publicly available Intra-EEA MIF levels until May 2004: see paragraph 4(b)(ii)(4)(d) below.

(h) Mastercard did not publish or make publicly available UK domestic MIFs until some time after November 2005. Without prejudice to the generality of the foregoing, bilateral interchange fees negotiated between banks in the United Kingdom were kept confidential as between the two banks to which they applied.

(i) With effect from around 1993, there were Mastercard transparency rules which required issuers to provide cardholders (but not make public more generally) limited information regarding certain card costs (such as currency exchange costs). However, these transparency rules did not require or permit member banks to provide cardholders with information regarding interchange fees, such information continuing to have to be treated as confidential by the member banks.

(j) For the avoidance of doubt, such details of Mastercard's notifications to the European Commission as were available to the public until at least 20 June 1997 did not include the level and structure of the Intra-EEA MIF, the methodology for setting the Intra-EEA MIF and/or its relationship with the UK domestic interchange fees.

(2) This was deliberate because the less that merchants, cardholders and consumers knew about interchange fees, the weaker the constraints on Mastercard. For example:

a. As noted in §3.146 of the Cruickshank Report on "Competition in UK Banking", March 2000: "*Full membership of a payment scheme confers the benefit of more and better information. As a result, contact between payment schemes and their end users is discouraged. This means, for example, that credit and debit card schemes keep their rules secret from the retailers and customers who use their cards.*"

b. See further §D3.84 of the Cruickshank Report: "*Default interchange fees in Visa, Mastercard/Europay and Switch are ultimately determined by the Boards of these schemes. Thus, default levels of interchange fees are set collectively by the main suppliers of credit card issuing and acquiring services. Details of the process by which default levels of interchange fees are set are kept secret from non-members, particularly retailers. This process is far more likely to produce an outcome that suits the interests of the members of these schemes, than it is to produce an outcome that is in the wider public interest. In particular, members of card schemes have strong incentives to inflate default levels of interchange fees above socially desirable levels.*"

c. In the Commission's Statement of Objections (dated 24 September 2003) it stated that "*the Commission has made it clear both in its decision dated 24 July 2002 and in previous talks with Mastercard that the MIF levels and the cost elements of the MIF have to be disclosed to the consumers, in particular the merchants. Transparency is essential for merchants to be able to exert countervailing pressure towards the considerable upwards pressures inherent in Mastercard's current MIF-setting methodology. However, as shown above,* ***Mastercard's rules on business secrets currently prevent acquiring banks***

from disclosing the levels of its MIF and its composition to merchants" (emphasis added).

d. When considering "*whether market forces can sufficiently constrain*" the scheme, the Commission took into account the fact that "*the* ***hidden cost of interchange fees is not visible*** *either for consumers or for (the large majority of) merchants*" (recital 495, Commission Decision) (emphasis added).

(3) Mastercard insisted for as long as possible (far later than 1997) on secrecy in relation to the levels of the interchange fees, the structure and methodology for setting them and the relevant rules which applied. This is apparent in correspondence from Mastercard in relation to the contents of the Cruickshank Report (letters of 8, 16 and 18 February 2000), and further in a letter to the OFT from Jones Day (Mastercard's solicitors) dated 29 November 2004, in which they stated that "*Mastercard considers that* ***details relating to the MIF methodology***, ***rules,*** *market share and business operations are clearly to be characterised as* ***commercial information, the disclosure of which would, or might, significantly harm Mastercard's legitimate business interests***." (emphasis added)

(4) So far as the Intra-EEA MIF was concerned:

a. A critical aspect of "*the modified MIF scheme*" proposed by Visa (section 3.2.3, Visa Exemption Decision) was "*transparency*" (section 3.2.3.3). In particular, Visa would "*allow member banks to disclose to merchants both the level of the Visa EU intra-regional MIFs in force and the relative percentages of the three cost categories".*

b. Mastercard resisted this transparency into 2003, as demonstrated by the extensive redactions to sections 4.2.3, 4.2.4 and Annex I of the Statement of Objections (dated 24 September 2003) which essentially redact everything apart from the default nature of the Intra-EEA MIF.

c. "*In April 2004 Mastercard allowed acquirers to disclose at a merchant's request the level of Mastercard's cross-border*

interchange fees and the elements assessed in Mastercard's cost studies" (FN 189, Commission Decision).

d. *"In May 2004, Visa and MasterCard decided to publish their cross-border MIF rates on their websites. See Commission press release IP/04/616 of 7 May 2004"* (FN 25, Commission Decision). In that press release, the Commission said "*This development is intended to enhance retailers' ability to negotiate the fees with the banks that are part of the Visa and Mastercard card systems.*" The Commission further said that "*merchants have repeatedly complained to the Commission that their banks are reluctant to give full information on the MIF, although Visa allowed them to do so.*" This reluctance is consistent with a culture and/or policy of non-disclosure and secrecy.

(5) Further, it appears that – even ~~at this late date~~ in and around 2004 to 2006 – there was still non-disclosure, so far as merchants were concerned, of which fee applied to which transaction. See in that regard:

a. The comments of EuroCommerce during the oral hearing (on 14 and 15 November 2006: §26), recorded at FN 261 of the Commission Decision (focussing on surcharging): *"[H]ow would you impose a cost on [a] consumer when he does not know about the cost? …[W]hich MIF should we apply? How would we know it? This is still a business secret in many cases, even to the largest retailers."*

b. The Commission's finding that "*in practice merchants often pay one 'blended' fee for accepting both Mastercard and Visa payment cards. Thus, a merchant simply does not know which scheme to "sanction" by surcharging (or other methods of discouragement) if the merchant's bank announces an increase of the blended merchant fee*" (Commission Decision, recital 517).

(iii) The non-exhaustive particulars above are evidence of active concealment of at least: (a) the levels, structure, methodology for setting, and rules relating to the Intra-EEA MIF, (b) the levels, structure, methodology for setting, and rules relating to the UK domestic interchange fees and (c) the relationship between the Intra-EEA MIF and UK domestic interchange fees, including under scheme rules during the period up to, at least, 20 June 1997. Those are facts relevant to the Represented ~~Person's~~ Persons' rights of action, since:

(1) The "*decision of an association of undertakings*" is defined in recital 3 of the Decision as "*the European Board's, the Global Board's and the Chief Operating Officer's decisions on the level and structure of Intra-EEA fallback interchange fees and the related network rules adopted by the Global Board of Mastercard International Inc*". This was kept secret by Mastercard.

(2) The level of the Intra-EEA MIF, together with its function in relation to other types of transaction (i.e. the scheme rules), is relevant. In particular:

a. If the amount were to be *de minimis*, or impossible proportionately to litigate, the claim would be strike-able (under the *Jameel* jurisdiction).

b. Further, these facts go to appreciability and to effect on competition. Mastercard itself argued that "*the economic importance of its Intra-EEA fallback MIF was insignificant"* (recital 416), which the Commission rejected on the basis that the fees apply as a fallback to domestic card payments in eight EEA Member States and provide guidance to member banks in other Member States. Accordingly, the relationship between the Intra-EEA MIF and domestic IFs was relevant ~~in this way~~ to a claim for damages.

c. Indeed, it is in this context that the Court of Appeal's observations in *Arcadia Group Brands Ltd v Visa Inc* [2015] EWCA Civ 883 must be understood, namely that in a pleaded claim which alleges that "*the MIFs amounted to some 80% of*

the MSC", it was not necessary to know the levels of the MIF in order to plead the claim (see *Arcadia* at §§53, 57 and 59).

(3) Further, the levels of the Intra-EEA MIFs themselves were evidence of the restriction of competition (recitals 487-491).

(4) The Intra-EEA MIF's relationship with and influence upon UK domestic interchanges fees, including under the scheme rules, is relevant to causation and loss, as the Commission Decision finds an infringement with respect to the setting of the Intra-EEA MIFs, while some 90% of the loss claimed in these follow on proceedings flows from the charging of UK domestic interchange fees.

(5) The level of the UK MIF and, prior to December 1997, the UK domestic interchange fee, is relevant to establishing causation and loss caused to the Represented Persons.

(iv) ~~Further and in any event, consistent with Mastercard's secretive and concealing approach (as per §4(ii)(1) and (ii)(2) above), disclosure is likely to reveal further instances of active concealment, including as to matters relevant to causation and quantum. Such disclosure may further reveal that, whilst Mastercard considered itself realistically compelled to provide certain information to the merchants (given their comparative proximity to the Intra EEA MIF) no such considerations applied in the case of consumers.~~ Mastercard's disclosure further shows that, until at least 20 June 1997, Mastercard actively concealed from both merchants and consumers the level of, structure of, methodology for setting and rules governing Intra-EEA MIFs and UK domestic interchange fees, pursuant to its confidentiality rules and practices, including EMR 12.1 and earlier rules, policies or practices that had the same or equivalent effect.

(v) Alternatively, Mastercard passively concealed a fact, or facts, relevant to the Represented Persons' rights of action (as to which facts, §§4(iii)(ii)- (iv) above are repeated). In particular:

(1) Mastercard was under a duty to disclose all or any such facts to the Represented Persons. This duty arose as a combination of utility and

morality (alternatively arose as a matter of common sense, or in Limitation Act terms).

(2) That duty crystallised either when the British Retail Consortium made its complaint against Mastercard on 30 March 1992 (recital 15, Commission Decision) or when Mastercard notified the Commission of the Intra-EEA MIFs on 22 May 1992 and May 1993 (recital 16) or such other date prior to 20 June 1997 as the Tribunal shall determine. At that point, the likelihood that Mastercard had caused consumers loss and damage was sufficiently concrete that Mastercard was under a duty to disclose all relevant facts to those persons (at least if Mastercard wished subsequently to benefit from a Limitation Act time-bar). The Class Representative repeats paragraph 4(b)(ii)(2)(c) pleaded above regarding Mastercard having a duty to disclose.

(3) In terms of what was required by such a duty, it is relevant that Mastercard was not in a direct relationship with the Represented Persons. Accordingly, on the premise that the duty is (at least in this case) only to take all reasonable steps to disclose, the duty could have been fulfilled – for example – by pursuing a public relations or communications strategy which targeted and reached the general public.

(4) In breach of that duty, Mastercard undertook no such reasonable steps to disclose the relevant facts until well after 20 June 1997. It is to be assumed that, if Mastercard wished to point to any such public communication, it would be included in the Joint Statement of Facts dated 25 November 2022. Paragraph 4(ii)(1)(g) and (h) above are repeated.

(5) Mastercard knew, or was reckless as to whether, it was in breach of duty in not disclosing the relevant facts. As to recklessness, this means that Mastercard realised that there was a risk that its failure to disclose was in breach of duty and that, in the circumstances, it was not reasonable for it to take that risk. Pending further disclosure and factual evidence, the best particulars which the Class Representative can give of such recklessness is Mastercard's secretive and concealing conduct with respect to interchange fees, including, in

particular EMR 12.1 and earlier rules, policies and practices having the same or equivalent effect as well as the extensive confidentiality claims made to the Commission and other regulators investigating Mastercard. It is inferred that extensive confidentiality and secrecy obligations were maintained for the purpose of avoiding public scrutiny of Mastercard's practices.

(vi) In the further alternative, pursuant to s.32(2) Limitation Act 1980:

(1) Mastercard deliberately committed a breach of Article 101 TFEU.

a. As to the breach, the Class Representative relies on the Infringement in the Commission Decision, together with §§92-95 of his Claim Form.

b. As to its deliberate nature, Mastercard either knew or was reckless as to whether it was committing a breach of Article 101 TFEU. As to recklessness, this means that:

i. Mastercard realised that there was a risk that it was committing such a breach (alternatively restriction). The Class Representative relies in this regard on the fact of the BRC complaint and the Mastercard notifications; and

ii. In the circumstances, it was not reasonable for it to take that risk. The Class Representative will say that it was not reasonable for Mastercard to continue to commit the breach in circumstances in which its lawfulness was plainly doubtful.

(2) The breach was objectively unlikely to be discovered by the Represented Persons for some time. In the present case, this is because:

a. Mastercard concealed or kept secret the facts pleaded in §§4(b)(ii)-(iv) above.

b. It was unlikely that the breach would be discovered until this occurred as part of the Commission's investigation (which in the event only produced the Statement of Objections in 2003).

(3) Accordingly, the facts involved in the breach of duty were relevantly deliberately concealed under s.32(2) (and therefore for the purposes of s.32(1)).

(vii) The reasonable typical consumer would not have recognised that they had a worthwhile claim prior to June 1997 (nor indeed subsequently, including up to the date of the Statement of Objections in 20036, and including up to the date of the EC Decision in 2007).

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

5. As is clear from the Claim Form generally and paragraph 95 in particular, the Class Representative's case is that: for loss suffered in England and Wales, the applicable law is the law of England and Wales; for loss suffered in Scotland, the applicable law is Scots law; and for loss suffered in Northern Ireland, the applicable law is the law of Northern Ireland (subject to amended paragraph 7 below). For the avoidance of doubt, as to the correct legal test for determining applicable law within the United Kingdom, paragraph 8 below is repeated *mutatis mutandis*. It is accordingly not open to Mastercard to "*admit*" in paragraph 9 that, insofar as the claim relates to transactions at merchants in the UK, it is governed by English law.

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

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

(b) alternatively:

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

(ii) pursuant to s.11(2), where as a result of a continuing act, the loss, injury or damage occurred before the cessation of the act, the loss, injury or damage

shall be deemed for the purpose of s.11(1) to have occurred on the date when the act, neglect or default ceased.

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

(c) alternatively, the five-year prescription period pursuant to s.6(1) of the 1973 Act was suspended pursuant to s.6(4) of the 1973 Act, applying ~~the test in~~ *Glasgow City Council v VFS Financial Services Limited* ~~-~~ 2022 SC 133. The Inner House held in *Adams v Thorntons WS* (No.3) 2005 1 SC 30 that in order for prescription to be suspended under section 6(4)(a)(i) there are three issues which must be resolved, and, applying those to the present case, it must be established: first, that the Represented Persons were in error as to the scope of their remedies and because of that error refrained from pursuing a claim; second, that the error was induced by Mastercard; and, third, that the error could not have been discovered with reasonable diligence until a point in time after which the discovery was irrelevant to the running of prescription against him. In respect of those issues, reliance is placed on paragraph 4(b). ~~-[2020] CSOH 92~~ (~~in which it was held by Lord Tyre, in comparison to s.32 of the Limitation Act 1980, "I am not persuaded that a materially different approach should be taken in Scotland to the question of what information is required to bring the operation of section 6(4) to an end").~~

7. Insofar as the claims are governed by the law of Northern Ireland, although paragraph 25 is embarrassing in its want of particularity, it is understood that Mastercard intends to assert that claims which are based on infringing conduct before 20 June 1997 are time-barred (on the same basis as the claims to which English law applies, with the limitation period under the law of Northern Ireland being six years, as in England). That is denied. Further, the parties have agreed that claims which are governed by the law of Northern Ireland are to be treated as being governed by English law (there being no relevant material difference between those laws).[2] Accordingly, paragraph 4 above is repeated. ~~In particular:~~

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

[2] Willkie Farr & Gallagher's letter of 4 November 2022 and Freshfields Bruckhaus Deringer's response of 8 November 2022.

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

Applicability of, and limitation under, other laws

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

    aa. In relation to the period from 11 January 2009 until the end of the claim period, in respect of which applicable law is to be determined by Article 6(3)(a) of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40, the markets affected by the restriction of competition for the purposes of the Represented Persons' claims are the markets for the supply of goods or services to consumers within England and Wales, Scotland or Northern Ireland and accordingly the law of each such country applies respectively (subject, in the case of the law of Northern Ireland, to the agreement between the parties, to which reference is made in paragraph 7 above).

    a. In relation to the period from 1 May 1996 to 11 January 2009 ~~until the end of the claim period~~, in respect of which applicable law is to be determined by the Private International Law (Miscellaneous Provisions) Act 1995 (subject, in the case of Northern Ireland, to the agreement between the parties, to which reference is made in paragraph 7 above):

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

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

b. In relation to the period between 22 May 1992 and 1 May 1996, in respect of which applicable law is to be determined by the common law choice of law rules (subject, in the case of Northern Ireland, to the agreement between the parties, to which reference is made in paragraph 7 above):

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

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

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

Limitation periods as a matter of EU law

9A. As the Court of Justice held in Case C-267/20 *Volvo AB (publ.), DAF Trucks NV v RM* EU:C:2022:494:

(a) The rules applicable to actions for safeguarding rights which individuals derive from the direct effect of EU law must not make it practically impossible or excessively difficult to exercise rights conferred by EU law (§50).

(b) Legislation laying down the date on which the limitation period starts to run, the duration of that period, and the rules for its suspension or interruption must be adapted to the specificities of competition law and the objectives of the implementation of the rules of that law by the persons concerned, so as not to undermine completely the full effectiveness of Articles 101 and 102 TFEU (§53).

(c) The bringing of actions for damages on account of infringements of EU competition law requires, in principle, a complex factual and economic analysis (§54).

(d) Account should also be taken of the fact that disputes concerning infringements of EU competition law and national competition law are characterised, in principle, by information asymmetry to the detriment of the injured party, which makes it more difficult for that person to obtain the information necessary to bring an action for damages than for the competition authorities to obtain the information necessary for exercising their powers to apply competition law (§55).

(e) In that context, it must be considered that the limitation periods applicable to actions for damages for infringements of the competition law provisions of the Member States and of the European Union cannot begin to run before the infringement has ceased and the injured party knows, or can reasonably be expected to know, the information necessary to bring his or her action for damages (§56). Otherwise, the exercise of the right to claim compensation would be rendered practically impossible or excessively difficult (§57).

(f) As regards the information necessary for bringing an action for damages, it should be recalled that it is apparent from the settled case-law of the Court that any person is entitled to claim compensation for the harm suffered where there is a causal relationship between that harm and an infringement of EU competition law (§58).

(g) The existence of an infringement of competition law, the existence of harm, the causal link between that harm and that infringement, and the identity of the perpetrator of the infringement are among the necessary elements which the injured party must have in order to bring an action for damages (§60).

(h) It must be considered that the limitation periods applicable to actions for damages for infringements of the competition law provisions of the Member States and of the European Union cannot begin to run before the infringement has ceased and the injured party knows, or can reasonably be expected to know, (i) the fact that it had suffered harm as a result of that infringement and (ii) the identity of the perpetrator of the infringement (§61).

9B. The present proceedings concern the accrued EU law rights of the Represented Persons. Accordingly, the Tribunal should have regard (under s.6(2) European Union (Withdrawal) Act 2018) to the articulation of the correct legal approach to limitation by the Court of Justice in *Volvo,* as pleaded in the preceding paragraph. Further or alternatively, that articulation is in any event consistent with EU case-law decided prior to IP Completion Day and which is binding on the Tribunal as retained EU law (under s.6(3) and (7) European Union (Withdrawal) Act 2018).

9C. Accordingly, in the present proceedings, no limitation periods, under any applicable law of any EU Member State (or part thereof), began to run before the Infringement had ceased, i.e. 19 December 2007.

9D. Further or alternatively, no limitation periods, under any applicable law of any EU Member State (or part thereof), began to run before the Represented Persons knew, or could reasonably be expected to know:

(a) The existence of the Infringement;

(b) The existence of harm suffered by the Represented Persons;

(c) The causal link between that harm and the Infringement; and

(d) The identity of the perpetrators of the Infringement.

9E. For the avoidance of doubt, there is no requirement that there be deliberate concealment in order for §9D to apply.

9F. As to the relevant date, as per §4(b)(vii) above, the reasonable typical consumer would not have recognised that they had a worthwhile claim prior to June 1997 (nor indeed subsequently, including up to the date of the Statement of Objections in 2003, and including up to the date of the EC Decision in 2007).

REPRESENTED PERSONS

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

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

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

    (b) As to those persons identified in paragraph 134(e), as pleaded in paragraph 23(b)(i) of the Claim, the Class Definition includes all purchases made by natural persons as it is overwhelmingly likely that such purchases will not have been made solely in the course, or for the purposes, of business. Further, ~~following disclosure from Mastercard, it should be possible to extract any~~ appropriate adjustments have been made in respect of purchases made using a Mastercard commercial card in the expert report of Mr Justin Coombs dated 17 May 2023 regarding the volume of commerce ("**Coombs VoC**")~~, which would include purchases made by natural persons using such a card~~.

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

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

12. As to claims in relation to goods or services bought by a UK consumer from a merchant in another Member State, the class representative admits that it will be necessary to

establish the loss suffered on those transactions. Otherwise, paragraph 35(c) is denied. Further, as pleaded in paragraph 9 above, it is not intended to pursue such claims where the loss suffered would be *de minimis*. The countries included within the claim are set out in the table at Annex 1 Class Representative reserves the right to plead further to this, following disclosure, factual evidence and expert evidence.

13. As to the element of the class definition which relates to sale or purchases having been made from a merchant who accepted Mastercard, the Class Representative does not admit Mastercard's assertion that it does not hold records of which businesses accepted Mastercard during the relevant period. That assertion is contradicted by other evidence including footnote 134 of the EC Decision, in which the Commission found that Mastercard was responsible for processing the majority of transactions in the United Kingdom and the limited extracts of Mastercard's rules (or Europay's rules) served as annexes to its Re-Amended Defence, which suggest Mastercard was responsible for processing.

14. As to the present estimate of the size of the class, this is 44,154,162 as set out in Coombs VoC it is admitted that it does not reflect all exclusions from the class. It is denied that the class is necessarily inflated as a result, since the present estimate also over excludes in some respects (as pleaded in paragraph 26 of the Claim). This is the case in relation to children who were born and died after 2008 and to immigrants who immigrated and died after 2008, whose deaths are excluded from the class numbers, even though they were never in the class. In any event, the Class Representative avers that the purpose of the class estimate in the Claim was to provide the best estimate (compiled on a proportionate and reasonable basis) at the time of pleading for the purposes of the application for a Collective Proceeding Order. The Class Representative will ask Mastercard to identify the publicly available data which Mastercard avers exists in order to further refine it.

15. The overall sums claimed by way of aggregate damages in the Claim Form are based on the methodology, adjustments, and exclusions set out in Coombs VoC It is denied that an accurate identification of the total number of members of the Class from time to time is necessary for aggregate damages to be calculated. As pleaded above in paragraph 10, the Class Representative admits and avers that it will be necessary, in due course, properly to exclude from the aggregate damages award the losses suffered by persons whose claims are not combined in these collective proceedings. Without prejudice to how that exercise will be conducted, plainly one possibility is that

~~such exclusions take effect as a proportion of the aggregate damages award. That is not the same exercise as identifying the number of class members, since (pursuant to s.47C(2) of the Competition Act 1998) damages are being awarded without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person~~.

THE EC DECISION

[Paragraphs 40 – 76]

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

The Full Infringement Period

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

The binding nature of the EC Decision

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

Disclosure

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

20. Further, it is apparent from the paragraphs of the Re-Amended Defence which address the EC Decision, as it is elsewhere, that Mastercard should have an abundance of other material for disclosure. By way of example, in paragraph 51(e), Mastercard avers that it (or Europay in relation to the period to 2002 for transactions within Europe) processed cross-border payment transactions, "*which included checking that acquiring banks were not claiming the wrong interchange fee rates*". This must bring with it a rich body of data. In paragraph 55(a), Mastercard avers *that "in the UK during the relevant period, MSCs were typically a percentage of the transaction value for credit and charge card transactions and a fixed fee for debit card transactions*", from which (unsurprisingly) it can be inferred that Mastercard holds data in relation to the MSCs charged. So too (again unsurprisingly) must Mastercard hold data in relation to the volume of transactions which bore each type of interchange fee (paragraphs 55(b) and 55(c)(ii)). Further, in that connection, the Class Representative notes that Mastercard avers that "*the operation of the Mastercard scheme during the relevant period*" is such that the relevant MIF was determined by the location of the Point of Sale rather than the location of the acquiring bank (paragraph 45), in relation to which Mastercard is put to strict proof. This is not an exhaustive list, but instead an indication of the degree of information asymmetry and the extent of data which is in Mastercard's possession.

Mastercard's approach to the EC Decision

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

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

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

    (c) to assert in that connection that neither the Tribunal nor Mastercard are bound "*by generalisations in the EC Decision which do not fully reflect changes to the Mastercard scheme over the period 1992 to 2007 or which do not accurately*

reflect the position in relation to the UK either generally or at particular times, since they are not part of the essential basis for the operative part of the EC Decision."

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

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

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

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

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

    (d) In paragraph 55(c)(ii), Mastercard asserts that UK acquiring banks gave no significant consideration to the Intra-EEA MIF when using "blended fees" (described in recital 249). But the Commission found that, whether a fee is

discrete ~~discreet~~ or blended, "*in both alternatives, merchants and subsequent customers are harmed by the inflated costs base of merchant fees*" (recital 442). Further, in recital 444: "*the fact that merchant fees may be blended for cross-border and domestic transactions (or, for that matter, for payments made using different card types or card brands) does not alter the restrictive and distortive effect of Mastercard's cross-border interchange fees in the acquiring markets, since in both situations (blending/ no blending) the costs are passed on to merchants and the MIF is a significant element of the price paid by merchants for card acceptance".*

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

The example of a transaction in Section 3.1.5

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

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

advance a counterfactual based on an alternative, exemptible Intra-EEA MIF pursuant to Article 101(3) TFEU and that the counterfactual Intra-EEA MIFs are therefore zero: [2023] CAT 15 (the **“Exemptibility Judgment”**).

Mastercard’s procedures for setting Intra-EEA MIFs

27. In paragraph 53, Mastercard asserts that its procedure for setting the Intra-EEA MIFs is irrelevant to this claim. ~~Pending disclosure, t~~This is denied ~~not admitted~~ for the reasons particularised in the Claim and below.

“On-us” transactions

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

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

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

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

Economic incentives

30. The economic incentives of acquiring banks and issuing banks (pleaded to in e.g. paragraphs 54(b), 54(c), 57(c), 67(a)(vi)(2)) will be the subject of disclosure, factual evidence and expert evidence. This will supplement recital 421 of the EC Decision. As to paragraph 67(a)(vi)(2), and “*market conditions*” in the UK market which allegedly

bear upon the selection of an appropriate MIF, this paragraph is pleaded in a generalised and non-specific manner, which does not apparently relate to conditions in the UK market in particular. To the extent that this paragraph is premised on other card schemes being subject to lesser legal constraints than Mastercard, that is the *"asymmetric counterfactual*", in which Visa was not constrained in the same way that Mastercard (in the counterfactual) would have been. This was rejected by the Court of Appeal as "*completely unrealistic and improbable*" (*Sainsbury's CoA*, paragraph 203; *Asda Stores Limited and Others v Mastercard Incorporated and Others* [2021] CAT 16, paragraphs 32 and 33), that being a binding finding on the Tribunal.

EXEMPTION

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

31. The Class Representative denies that the correct counterfactual for the purpose of causation and quantum is one in which Mastercard charged lawful alternative Intra-EEA MIFs and the Tribunal has so held in the Exemptibility Judgment. The issues raised in the following paragraphs have been resolved by Exemptibility Judgment and are retained only for completeness pending the resolution of Mastercard's intended appeal.

No exemptible MIF counterfactual as a matter of law

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

on a balance of probabilities (i.e. realistic likelihood), would have happened absent the tort.

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

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

35. Further or alternatively, Mastercard cannot seek to have exempted the same level of MIF that, or higher level of MIF than, it sought to have exempted in the EC Decision (as it does in paragraph 89), because that would amount to re-opening the EC Decision and undermine its binding nature. Mastercard has confirmed to the Tribunal that it will withdraw that part of paragraph 89 (transcript of 17 January 2023, page 92, line 4 to page 94, line 1).

Alternatively, no exemption would have been granted to alternative MIFs

36. If the matters addressed in paragraph 32 above do not preclude Mastercard's reliance on counterfactual exemptible MIFs as a matter of law, they are nonetheless repeated here as relevant matters of fact or considerations which the Tribunal should take into

account. The Class Representative will say that no such exemption would have been granted to Mastercard, alternatively a lower level of MIF would have been exempted.

37. Further:

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

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

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

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

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

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

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

(e) Finally and in any event, the Commission imposed requirements for costs studies in Article 1 as a strict condition for the exemption.[3] Accordingly, even were Mastercard's reliance on the Visa Exemption Decision otherwise open to it, it cannot automatically read-across from the Visa Exemption Decision the same appropriate MIFs without adducing the same evidence and studies which Visa adduced as a condition of the exemption. The Class Representative does not accept that such evidence is available and Mastercard is put to strict proof in that regard.

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

(a) Paragraph 38 above is repeated;

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

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

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

[3] See further, recitals (22)-(24) and (110).

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

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

Cross-Border Transactions

[Paragraphs 91-92]

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

44. The Class Representative avers that, as part of disclosure of data in relation to cross-border transactions, he will seek data in relation to purchases at merchants based in the United Kingdom using Mastercard cards issued in other EEA Member States. That forms part of the Overcharge (and, to the extent relevant, Run-Off Overcharge) which was passed on to the Represented Persons.

45. Mastercard's allegation in paragraph 92(b) that it is open to Mastercard to demonstrate that, if the Intra-EEA MIFs had been set at lower levels or at zero, "*other changes to the default scheme rules would have been made which offset some or all of the*

reduction of the interchange fee", is embarrassing as it fails to identify why or how any such "*offsetting"* should be made in a claim brought by consumers.

UK DOMESTIC INTERCHANGE FEES

[paragraphs 17-19, 93 – 101 and 150]

46. Save as pleaded in the Claim and below, the facts and matters pleaded therein are outside the knowledge of the Class Representative and, pending further elucidation by way of Responses to Requests for Further Information, disclosure, factual evidence (including oral evidence at the trial of the Causation Issue) and expert evidence, he makes no admissions thereto. Mastercard is put to strict proof in this regard. As stated at paragraph 102A of the Claim, detailed submissions on the proper construction and effect of the Defendants' scheme rules are a matter for trial. Without prejudice to the foregoing:

(a) From 22 May 1992 until November 1996 (or around that time) (the "**Early Period**"):

(i) The Intra-EEA MIFs were the fallback/default rate and would have applied to any Domestic Transaction if the relevant banks did not have in place a bilateral agreement which specified an alternative fee applicable to that transaction. This was reflected in the fact that the payment processing system operated by the Third Defendant had a hierarchy of applicable fees, pursuant to which the Intra-EEA MIFs would automatically apply to any transaction in the absence of an applicable bilateral or domestic multilateral interchange fee. The Class Representative notes Mastercard's averments in paragraph 93D(g) as to transactions which were not processed by the Third Defendant. To the extent that Mastercard alleges that a material number of transactions were not processed by the Third Defendant, the Class Representative puts Mastercard to strict proof of the same and notes that no adequate disclosure has been provided to substantiate any such claim.

(ii) As to Mastercard's contention that certain individuals believed during the Early Period that the fallback/default rate was the interregional rate, it is denied (if it is alleged) that any such confusion would have arisen in the counterfactual. In the factual world, the Intra-EEA MIFs and the interregional rate were set at comparable levels at the start of the Early

Period pursuant to the European exception (which applied a lower interregional rate of 1% to transactions involving a European bank). By contrast, in the counterfactual the applicable fallback/default under the Intra-EEA MIFs would have been zero and therefore at a significantly lower level than the interregional rate. In any event, it would be implausible to contend that sophisticated financial institutions would be unaware of the fact that the applicable fallback/default rate under the scheme was zero given the commercial importance of the applicable fallback in the context of bilateral interchange fee negotiations.

(iii) It is denied (if it is alleged) that all or most Domestic Transactions were covered by bilateral agreements. The Class Representative has not received sufficient disclosure from the Defendants presently to plead to the percentage of Domestic Transactions which were processed pursuant to bilateral arrangements in the Early Period. The Class Representative's right to seek such disclosure in due course is reserved. Without prejudice to the foregoing, the Class Representative avers that bilateral arrangements did not apply to a material proportion of Domestic Transactions which were therefore processed pursuant to the fallback/default Intra-EEA MIFs in the Early Period.

(iv) In any event, some bilateral agreements in the Early Period did not specify an interchange fee for every category of possible transaction. Further, some bilateral agreements provided that the fallback/default should apply to certain transactions. In such circumstances, the Class Representative avers that the Intra-EEA MIFs would have applied to certain transactions notwithstanding the existence of a bilateral agreement between the licensees in question. It follows that the existence of a bilateral agreement did not *ipso facto* prevent the Intra-EEA MIFs from applying to transactions between the parties to that agreement.

(v) It is denied (if it is alleged) that the Intra-EEA MIFs only applied as the fallback/default rate if an arbitration had been initiated by at least one of the relevant banks. Mastercard required all acquiring member banks to accept any card issued by any other licensee of Mastercard's scheme even if those banks did not have bilateral arrangement in place between them. Accordingly, the operation of Mastercard's scheme necessitated the

existence of a fallback/default rate which applied automatically and notwithstanding whether an arbitration had been initiated. Otherwise, transactions between licensees would fail for want of certainty where no interchange fee was applicable pursuant to a bilateral arrangement concluded between, and no arbitration had been initiated by, the licensees in question. Further, the Class Representative avers that arbitration was only available to UK members which had at least 10% of domestic volume (pursuant to Rule 11.09(b)(3) of the 1989 MCII Rules and Rule 11.09(iiii) of the 1993 MCII Rules and as pleaded at paragraph 93D(b)). An automatically applicable fallback/default rate was therefore required under Mastercard's scheme in any event because arbitration was not available to all UK licensees.

(vi) The proportion of Domestic Transactions which were processed pursuant to the Intra-EEA MIFs will need to be the subject of disclosure (including transaction data) in due course. On the basis of the limited disclosure to date, the Class Representative denies that *"the volume of those transactions was not material"* (as alleged at, for example, paragraphs 93D(g)(v) and 93H(b)(iii)).

(vii) In any event, any bilateral agreements which existed in the factual would not have existed (alternatively would have been set at a lower level) in the counterfactual. In circumstances where the fallback/default under the Intra-EEA MIFs was zero, the banks would have acted entirely differently. In particular, the Class Representative avers that in the counterfactual where the Intra-EEA MIFs were set at zero, net acquirers would not have agreed bilateral arrangements above zero (alternatively, significantly above zero).

(viii) It is denied (if it is alleged) that the levels of bilaterally agreed interchange fees were determined by 'reference rates' published by MPEUK. In particular, it is denied that the levels of bilaterally agreed interchange fees could have been determined by MEPUK's reference rates without a formalised method of recording and disseminating to Mastercard's licensees the level at which those rates had been set. The Class Representative puts Mastercard to strict proof as to the means by which member banks were informed of any reference rates set by MEPUK. Further or alternatively, Mastercard's allegation at paragraph 98(jb) and (l)

that MEPUK's reference rates operated as a "*practical fallback*" is too vague and/or inadequately particularised for the Class Representative to plead back to. The Class Representative requires Mastercard to particularise its allegation that reference rates operated as a 'practical fallback' within Mastercard's scheme,

(ix) It is denied (if it is alleged) that MEPUK's reference rates and/or bilateral arrangements were determined by EDC's cost studies. The Class Representative avers that EDC's cost studies were commissioned in Europe in response to regulatory scrutiny in circumstances where interchange fees had already been in operation for some time. After EDC commenced its cost study work in Europe, interchange fees were not in fact set at the level of costs reported by EDC. Nor was there any correlation between the results of EDC's cost studies and the levels at which interchange fees were set. Further, the EDC cost studies were insufficiently rigorous for either MEPUK or member banks to have relied on their results to determine interchange fees. In any event, if (which is denied) EDC cost studies determined the level of interchange fees in the factual, it is denied that they would have had a similar effect in the counterfactual in circumstances where the Intra-EEA MIFs were zero.

(x) Further or alternatively, the Class Representative avers that, to the extent MEPUK set reference rates, such rates were influenced by the applicable fallback rate, *viz*. the Intra-EEA MIFs. In particular, the Third Defendant indicated to MEPUK in the Early Period that its authority to develop UK Domestic Scheme Rules was subject to the condition that MEPUK remained representative of banks with 90% or more of issuing and acquiring volumes of UK licensees (Mastercard's allusion at paragraph 93O to the Third Defendant's ruling in this regard is noted). The Class Representative avers that MEPUK would therefore not adopt reference rates materially higher than the Intra-EEA MIFs so as to avoid losing the support of net-acquirers with 10% or more of the volume of Domestic Transactions. Further or alternatively, to the extent MEPUK adopted reference rates which materially departed from the Intra-EEA MIFs, such (non-binding) rates would have been disregarded by UK licensees when negotiating bilateral arrangements. Accordingly, in the counterfactual where the intra-EEA MIFs were set at zero, MEPUK's reference rates would also

have been set at zero (alternatively, at close to zero) and/or would have been disregarded by UK licensees when negotiating bilateral arrangements.

(b) From November 1996 (or around that time) until December 1997 (or around that time) (the "**Middle Period**"):

(i) Sub-paragraphs 46(a)(i)-(x) above apply *mutatis mutandis* to the Middle Period and are repeated.

(ii) The allegation in paragraph 93H(b)(iii) that bilateral agreements in this period covered all or the vast majority of Domestic Transactions is denied. In particular, the Class Representative avers that the interchange fees paid on the vast majority of transactions processed by the Third Defendant were at the fallback/default Intra-EEA MIFs rather than fees which applied pursuant to bilateral arrangements. The Class Representative further avers that the majority of transactions were processed by the Third Defendant. Accordingly, the interchange fees paid on the majority of transactions were the Intra-EEA MIFs. The Class Representative reserves the right to seek further disclosure, including transaction data, regarding both the proportion of transactions processed by the Third Defendant and the proportion of transactions processed at the Intra-EEA MIFs.

(iii) The allegation in paragraph 99(ai) that it was widely understood by the UK banks that the Intra-EEA MIFs would only apply to non-MEPUK licensees is too vague and/or inadequately particularised for the Class Representative to plead back to. Without prejudice to the foregoing, the Class Representative puts Mastercard to strict proof as to both (1) the understanding of UK banks during the Middle Period as to the applicable fallback rate and (2) whether there was any formal and/or practical distinction between the fallback rate applicable to MEPUK and non-MEPUK licensees.

(iv) As prefaced at sub-paragraph 46(a)(x) above, the Third Defendant's approval of the UK Domestic Scheme Rules developed by MEPUK in the Middle Period was subject to the condition that MPEUK remained representative of banks with 90% or more of issuing and acquiring volumes of UK licensees. The Class Representative avers that MPEUK was aware

of the risk of ceasing to satisfy this criterion and would have refrained from any act which have led it do so. In particular, to the extent (which is denied) that MEPUK set reference rates which determined bilaterally agreed interchange fees, the Class Representative avers that MEPUK would not have set such rates materially above the fallback/default Intra-EEA MIFs because to do so would have led to net-acquirers withdrawing support of MEPUK. Accordingly, in the counterfactual where the Intra-EEA MIFs were set at zero, the Class Representative avers that reference rates set by MEPUK (if any) would also have been set at zero (or alternatively close to zero).

(c) From December 1997 (or around that time) until the end of the Full Infringement Period (the "**Later Period**"):

(i) The Class Representative notes Mastercard's allegation at paragraph 93E that the 1997 UK Rules quoted in the Claim Form are "*not the final version as adopted or in effect in December 1997*". This is inconsistent with the position Mastercard has taken in correspondence where Mastercard has referred to the 1997 UK Rules as a finalised version of the UK Domestic Scheme Rules. Further, the Class Representative notes Mastercard's denial at paragraph 93J that the provisions of the UK Domestic Scheme Rules quoted at paragraph 102J of the Claim Form applied before April 1999. The Class Representative puts Mastercard to proof as to which version of the UK Domestic Scheme Rules applied from the end of Middle Period in December 1997 until the 1999 UK Rules took effect on or around April 1999.

(ii) As to paragraph 93O, 93P and 100(g):

(1) The Class Representative notes Mastercard's admission at paragraph 93O that the provision pleaded at paragraph 102O of the Claim Form (the "**75% Rule**") was first adopted by Europay in February 1999. From the beginning of the Later Period until February 1999 (or around that time) the Class Representative avers that the Third Defendant's implementation of the UK Domestic Scheme Rules (and the United Kingdom Domestic MIFs contained therein) was conditional on MEPUK remaining representative of banks with 90% or more of issuing and acquiring volumes of UK licensees. From

February 1999 until November 2004 (or around that time), MEPUK and/or MMF's authority to set United Kingdom Domestic MIFs was conditional on the 75% Rule being satisfied.

(2) The Class Representative avers that if either of these criteria were not met the United Kingdom Domestic MIFs would have ceased to take effect within Mastercard's scheme. Pursuant to the provisions of Mastercard's scheme rules pleaded at 102K and 102L of the Claim Form, the applicable fallback/default interchange fees would then have been the Intra-EEA MIFs.

(3) Accordingly, the Class Representative avers that: (1) net-acquirers responsible for a sufficient share of the volume Domestic Transactions had the power from December 1997 (or around that time) until November 2004 (or around that time) to abolish the United Kingdom Domestic MIFs and replace them with the Intra-EEA MIFs; and (2) net-acquirers would in the counterfactual have used this power to abolish the Domestic MIFs or, alternatively, to obtain Domestic MIFs at the same level or a similar level to the Intra-EEA MIFs. The Class Representative thus denies the allegation at paragraph 100(g) that net-acquirers would not have used their power in this regard to obtain lower interchange fees. In that regard, the Class Representative avers that the 75% Rule was in fact relied upon in the factual in at least one other European jurisdiction during the Full Infringement Period (notwithstanding that the Intra-EEA MIFs were set at a high level in the factual).

(iii) The Class Representative avers that the majority of the Board of MEPUK/MMF was appointed by net-issuing banks. The Board of MEPUK/MMF was therefore de facto controlled by net-issuing banks. Those banks understood that, in the absence of United Kingdom Domestic MIFs, the fallback/default rate would have been the Intra-EEA MIFs. Accordingly, all things being equal, those banks would not accept United Kingdom Domestic MIFs which were set below the Intra-EEA MIFs. However, as pleaded at sub-para (ii) above, net-issuing banks could not increase the levels of United Kingdom Domestic MIFs significantly above the Intra-EEA MIFs because this would risk net-acquirers withdrawing their

consent to the application of the United Kingdom Domestic MIFs. It follows that the levels of United Kingdom Domestic MIFs in fact gravitated towards the levels of the Intra-EEA MIFs (i.e. the balance of interests, incentives, and bargaining power meant they would not be significantly different to the Intra-EEA MIFs). As pleaded at paragraph 103(c) of the Claim, the Class Representative infers that to the extent that issuing member banks in fact accepted a United Kingdom Domestic MIF which was lower than the Intra-EEA MIF, they did so, in whole or in part, due to concerns about regulatory scrutiny. The Class Representative avers that, in the counterfactual where the Intra-EEA MIFs were set at zero, the United Kingdom Domestic MIFs would therefore also have been zero (or close to zero) or alternatively the Intra-EEA MIFs would have applied in their stead.

(iv) Further or alternatively, the Class Representative avers that the United Kingdom Domestic MIFs were first set by reference to the prevailing domestic interchange fees in the Middle Period. As pleaded at sub-paragraph (b) above, those interchange fees were 'infected' by the Intra-EEA MIFs. Accordingly, the United Kingdom Domestic MIFs were similarly 'infected' by the Intra-EEA MIFs thereafter. The extent of any such infection will be a matter for expert evidence in due course. For present purposes, the Class Representative notes that the two categories of United Kingdom Domestic MIFs were unchanged for several years following their introduction in December 1997 (or around that time). In particular, the 'Electronic' category was set at 1.00% from 1997 until 2003 and the 'Standard/Base' category was set at 1.30% from 1997 until 2005. For the avoidance of doubt, the Class Representative avers that additional categories of United Kingdom Domestic MIFs which were introduced after 1997 were set by reference to the levels of 'Electronic' and/or 'Standard/Base' categories and were therefore similarly 'infected' by Intra-EEA MIFs. Accordingly, in the counterfactual world where the Intra-EEA MIFs were set at zero, the United Kingdom Domestic MIFs would have first been introduced at zero (or close to zero) and any new categories of the United Kingdom Domestic MIFs would similarly have been set at zero (or close to zero).

(v) As pleaded at sub-paragraphs (ii)-(iv) above, the Class Representative avers that the Intra-EEA MIFs influenced the levels of the United Kingdom

Domestic MIFs from December 1997 (or around that time) until at least November 2004 (or around that time) when MEPUK/MMF ceased setting United Kingdom Domestic MIFs. The Class Representative avers that, because the United Kingdom Domestic MIFs were so influenced prior to November 2004 (or around that time), they will have continued to be 'infected' by the Intra-EEA MIFs thereafter.

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

Maestro domestic debit transactions

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

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

How the domestic credit card interchange fees were set

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

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

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

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

(c) in any event, as pleaded in paragraph 103(g) and (h) of the Claim ~~pending disclosure, factual and expert evidence~~, the Class Representative considers these do not undermine the connection and influence of the Intra-EEA MIF on U.K. domestic credit card interchange fees.

THE RUN-OFF OVERCHARGE CLAIM

[Paragraphs 19, 100(f)(iv), 101A-B]

51A. As to the Domestic IFs Run-Off Overcharge claim:

(a) In paragraph 101A(a)(i), Mastercard alleges that the fact the UK domestic interchange fees did not fall over the period 22 June 2008 to 21 June 2009

despite the Intra-EEA MIFs being reduced to zero during this period (i) demonstrates that the Intra-EEA MIFs had no causative effect on the UK domestic interchange fee, and (ii) is inconsistent with the Class Representative's allegation that the Intra-EEA MIFs operated as a floor. These allegations are denied. Whilst the relationship between the Intra-EEA MIFs and the UK domestic IFs (during the Full Infringement Period and during the following year) will be a matter for evidence, there is no inconsistency between the Class Representative's allegation of causation and the Domestic IFs Run-Off Overcharge claim. Without prejudice to the generality of the foregoing and by way of example only, it is entirely possible that the Intra-EEA MIFs caused the UK domestic IFs to be higher than they otherwise would have been for the period up to 22 June 2008 and that there was thereafter no commercial or regulatory incentive for Mastercard to reduce those fees.

(b) It is denied that, to the extent that the Intra-EEA MIFs prior to 21 June 2008 had a delayed impact on UK domestic IFs after the relevant period, credit must be given for an alleged equivalent delayed impact at the start of the claim period. There is no such automaticity or reciprocity. Further, whilst the relationship between the Intra-EEA MIFs and the UK domestic IFs from time to time will be a question of fact, for determination at trial, it is denied that there would be any such delay at the start of the Infringement since the start date of the Infringement does not reflect any factual change, and instead is simply the date on which Mastercard applied for an exemption. The same applies mutatis mutandis if Mastercard succeeds in relation to its limitation argument and so the claim period starts at 20 June 1997, since again there is no relevant factual change at that date.

51B. As to the MSC Run-Off Overcharge claim:

(a) As to Mastercard's reliance, in paragraph 101A(b)(i), on paragraphs 82-89 (in relation to exemption), paragraphs 93-101 (in relation to Domestic Transactions) and paragraphs 102-123 (in relation to the costs incurred by businesses which accepted Mastercard), the Class Representative relies on paragraphs 31-42, paragraphs 46-51 (above) and paragraphs 52-59 (below), respectively.

(b) As to paragraph 101A(b)(ii), it is denied that it is relevant whether, absent the Infringement, merchants' costs overall would been reduced (as per paragraph 52 below). Further, paragraph 101A(b)(ii) is embarrassing for want of particularity. It is pleaded that "consequently" on the matters pleaded to in paragraph 101A(b)(i),

even if the Intra-EEA MIFs prior to 21 June 2008 were set at a level higher than the lawful rate and resulted in increased costs for merchants in that period, no higher costs would have been suffered after 21 June 2008. No particulars are given for this allegation, to which the Class Representative accordingly cannot respond. It is noted that Mastercard pleads that, in the alternative, any such effect would have been limited and temporary, without providing any particulars or explanation.

(c) As to paragraph 101A(b)(iii), the extent of pass-on for merchants on different contractual arrangements will be a matter for disclosure. The Class Representative notes that Mastercard does not plead to the position, in the period 22 June 2008 to 21 June 2010, for merchants on contractual arrangements other than Interchange Plus or Interchange Plus Plus arrangements.

DID BUSINESSES WHICH ACCEPTED MASTERCARD INCUR HIGHER COSTS

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

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

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

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

Acquirer pass-on

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

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

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

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

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

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

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

53A. As to the last sentence of paragraph 107, it is denied that, to the extent that interchange fees had a delayed impact on MSCs after the relevant period, credit must be given for an equivalent delayed impact at the start of the claim period. There is no such automaticity or reciprocity. Further, whilst the relationship between interchange fees and MSCs from time to time will be a question of fact, for determination at trial, it is denied that there would be any such delay at the start of the Infringement since the start date of the Infringement does not reflect any factual change, and instead is simply the date on which Mastercard applied for an exemption. The same applies *mutatis*

mutandis if Mastercard succeeds in relation to its limitation argument and so the claim period starts at 20 June 1997, since again there is no relevant factual change at that date.

53B. As to paragraph 107A, Mastercard denies the characterisation of the MSC Run-Off Overcharge as a free-standing loss and instead pleads that it is delayed pass-on of the Overcharge. This is denied, and its relevance is not understood. Whilst the relationship between the Intra-EEA MIFs and the UK domestic IFs and the setting of MSCs will be a matter for evidence, and without prejudice to the generality of the foregoing and by way of example only, it is entirely possible that the Intra-EEA MIFs and UK domestic IFs caused the MSCs to be higher than they otherwise would have been for the period up to 22 June 2008, and that there was thereafter no commercial incentive for the acquiring banks to reduce those MSCs.

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

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

Changes to merchant benefits

56. Paragraphs 109-113 are legally opaque. Mastercard asserts that, "*had the Mastercard scheme been required to operate with substantially lower (or zero) interchange fees*", then there would have a corresponding reduction in the rules in relation to (a) fraudulent transactions, (b) payment where the cardholder defaults and (c) when the issuing bank is required to make payment. Even if that is factually accurate (which is

not admitted) Mastercard does not plead to why this would be relevant to the present collective proceedings which combine claims brought by indirect consumer purchasers in respect of higher prices they paid for goods and services sold by merchants. It is only said that there would have been "*offsetting*" at the level of the acquiring banks (paragraph 102(b)) and that "*when account is taken of*" such alleged benefits "*the Represented Persons have no claim for damages*" (paragraph 113). Mastercard's pleading in that regard is embarrassing for want of particularity and pending responses to any Requests for Information, it is denied that the issue of benefits received by merchants is relevant to the loss or damage of the Represented Persons. To the extent that Mastercard relies on what the banks would have done, they are put to strict proof.

Transaction Volumes

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

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

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

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

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

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

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

PASS-ON TO CONSUMERS VIA HIGHER PRICES

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

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

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

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

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

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

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

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

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

(a) It is denied that the correct premise is that "*merchants did incur higher overall costs as a result of the EEA MIFs*" (as per paragraph 125; and the heading of the previous section in the Re-Amended Defence). As pleaded in paragraph 52(b) above, the correct premise is simply whether the Overcharge and/or Domestic IFs Run-Off Overcharge was passed-on to the merchants from the acquiring banks via the MSC (and/or whether the MSC was higher than it would have been absent the Infringement, i.e. the MSC Run-Off Overcharge).

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

Surcharging

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

64. Further, as for the various factual assertions in paragraphs 37 and 127(b), Mastercard is put to strict proof in that regard. It is noted that there appears to be a tension between Mastercard's asserted lack of knowledge in relation to which merchants accepted Mastercards (paragraph 36) and its asserted familiarity with differing pricing practices of those merchants.

Pass-on rates

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

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

WHETHER ACCOUNT MUST BE TAKEN OF BENEFITS

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

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

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

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

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

QUANTUM

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

68. Mastercard asserts that the figures pleaded in paragraph 112 of the Claim are "inflated and incorrect" (paragraph 136) and instead relies on Annex 1, Tables 1-3. ~~The Class Representative does not have access to the material underpinning Mastercard's pleaded case, despite the Class Representative having repeatedly sought the provision of the relevant data. Pending disclosure, factual evidence and expert evidence, it is not admitted. Mastercard is put to strict proof in that regard.~~ As regards Table 1 (volume of commerce), following the exchange of expert reports for the Volume of Commerce Issue, the principal difference between the parties relates to the inclusion or exclusion of "on us" transactions.

69. ~~Without prejudice to the above, a~~As to paragraphs 137 and 139 and "on us" transactions, the Class Representative avers that these should be included in the volume of commerce:

(aa) On us transactions led to MSCs being levied on merchants. In its 'Market review into card-acquiring services' dated November 2021, the Payment Systems Regulator stated at paragraphs 3.63 to 3.64 that over 95% of merchants had "standard pricing", which typically included a set fee per transaction, an *ad valorem* fee, or a combination of the two. The Class Representative infers that the position was similar during the Full Infringement Period. Such fees would

result in the same charge to the merchant for "on us" transactions irrespective of whether an interchange fee was in fact charged between the acquiring and issuing parts of a bank involved in the transaction.

(a) As pleaded to in paragraph 28 above, the Class Representative does not presently know the extent to which interchange fees were charged internally by banks on such transactions but infers that they were charged on all (alternatively some) "on us" transactions, or the alleged costs otherwise recovered from the merchants.:

(i) A study into interchange fees published by Retail Banking Research on 1 July 2002 stated at p.150 that *"interchange fees for on-us transactions simply move the profit from the acquiring to the issuing side of a bank"*.

(ii) As a matter of economic theory, it is likely that "on us" transactions carried an interchange fee. If the issuing business of a vertically integrated bank did not receive the same stream of income on its "on us" transactions, it would have been at a competitive disadvantage in the issuing market. Accordingly, it is likely that an amount equivalent to the interchange fee or internal transfer price would be paid within the bank from its acquiring to its issuing business.

(iii) Mastercard informed the Commission on 16 March 2004 that *"'On-us' transactions are processed in the exact same way as any other domestic or intra-regional transaction, through the same platform/gateway and with identical processes"*. Mastercard further explained that *"no **net** interchange fees are received"* (emphasis added). The Class Representative infers that interchange fees are paid in respect of on us transactions, albeit they are not 'net' interchange fees because they are merely transferred between the acquiring and the issuing parts of the bank.

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

69AA. As to Tables 2 and 3, the Class Representative reserves the right to plead further in due course following further disclosure and/or expert evidence.

69A As to paragraph 149A, it is denied that the Run-Off Overcharge could not properly increase the size of the claim. Paragraphs 51A(b), 53A and 53B are repeated.

INTEREST

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

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

71. As to paragraph 1~~4~~51(d), Mastercard's characterisation of the attributes of the class is incorrect. This matter will be the subject of evidence and legal submissions in due course.

RELIEF SOUGHT

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

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VICTORIA WAKEFIELD QC

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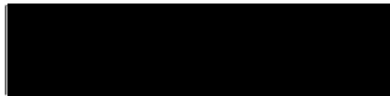
I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth. I believe that the facts stated in this Re-Re-Re-Re-Amended Reply are true.

Full Name: Walter Hugh Merricks



Signed: ____________________

Class Representative

Dated this 6 October 2023

ANNEX 1

Country	Years
Austria	1994, 1996-2010
Belgium	1992-2010
Czech Republic	2005-2010
Denmark	1992-2010
Finland	1994-2009
France	1992-2010
Germany	1992-2010
Hungary	2005-2010
Ireland	1992-2010
Italy	1992-2010
Netherlands	1992-2010
Norway	1994-2010
Poland	2005-2010
Portugal	1992-2006
Spain	1992-2010
Sweden	1994-2010