Rules of the Tribunal 32(1)(b) and 74 dated 6 June 2023

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

Rules of the Tribunal 32(1)(b), 38 and 74 dated 9 March 2022

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1266/7/7/16 [ ]

BETWEEN:

WALTER HUGH MERRICKS CBE

Applicant / Proposed Class Representative

and

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

Proposed Defendants

RE-RE-AMENDED COLLECTIVE PROCEEDINGS CLAIM FORM

Summary

1. This is an application to commence the class representative's amended claim form for opt-out collective proceedings brought under section 47B of the Competition Act 1998 (the "**Act**"). The proposed class representative is Walter Hugh Merricks CBE.

2. The claims which it is proposed to are combined in these collective proceedings are so-called "follow-on" claims under section 47A of the Act. They are claims for damages caused by the proposed Defendants' breach of statutory duty in infringing Article 101 TFEU, as determined in a European Commission Decision (COMP/34.579 MasterCard, COMP/36.518 EuroCommerce and COMP/38.580

Commercial Cards) of 19 December 2007 (the "**EC Decision**"). A copy of the non-confidential EC Decision is enclosed at **Annex 1**.

3. The EC Decision will be relied on at trial for its full meaning and effect. In brief outline, however, the EC Decision establishes that the ~~proposed~~ Defendants infringed Article 101 TFEU (then Article 81 EC) from 22 May 1992 until 19 December 2007 "…*by in effect setting a minimum price merchants must pay to their acquiring bank for accepting payment cards in the European Economic Area, by means of the Intra-EEA fallback interchange fees for MasterCard branded consumer credit and charge cards and for MasterCard or Maestro branded debit cards…*" (Article 1). The three ~~proposed~~ Defendants, who were the addressees of the EC Decision, were ordered to end the infringement by no later than six months after notification thereof, to repeal the intra-EEA fallback interchange fees and to modify the Master~~C~~card association's network rules to reflect this order (Articles 2 and 3)[1].

4. The ~~proposed~~ Defendants brought an unsuccessful application for annulment of the EC Decision before the General Court of the European Union ("**GC**")[2], followed by an unsuccessful appeal to the European Union Court of Justice ("**CJEU**")[3]. Judgment was given by the CJEU on 11 September 2014.

5. The class members ~~of claimants~~, whose claims ~~it is proposed to~~ are combined, are ~~is~~: "*Individuals who between 22 May 1992 and 21 June 2008 purchased goods and/or services from businesses selling in the UK that accepted Master~~C~~card cards, at a time at which those individuals were both (1) resident in the UK for a continuous period of at least three months, and (2) aged 16 years or over; together with the personal/ authorised representative of the estate of any individual who meets that description and was alive on 6th September 2016, but subsequently died."*

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1 In the ~~non-~~confidential version of the EC Decision, there is a further ~~partially redacted~~ sentence in Article 3: "*They shall repeal all decisions taken by MasterCard's European Board and/or by Mastercard's Global Board and/or its delegate the President and CEO of MasterCard Incorporated and/or his designee the Chief Operating Officer or other persons in the association on ~~[REDACTED]~~ Intra-EEA fallback interchange fees on SEPA fallback interchange fees and on Intra-Eurozone fallback interchange fees*".

2 Case T-111/08, *MasterCard, Inc., MasterCard International, Inc. and MasterCard Europe v Commission*, ECLI:EU:T:2012:260.

3 Case C-382/12 P, *MasterCard Inc., MasterCard International Inc. and MasterCard Europe S.p.r.l. v Commission*, ECLI:EU:C:2014:2201.

6. These class members ~~proposed claimants~~ are consumers who suffered loss and damage as a result of paying prices to businesses that accepted Master~~C~~card cards which prices were higher than they would otherwise have been had the ~~proposed~~ Defendants not committed the infringement of Article 101 established by the EC Decision, or the representatives of the estates of such consumers where relevant.

7. ~~It is proposed that this action be an "opt-out" action. As pleaded further below, the large size of the class, the comparatively modest value of damages that are likely to be recovered on a per capita basis, and the complexity of the issues which require determination, mean that proceeding on an opt-out basis is the only practicable means by which consumers can recover in respect of their losses.~~

8. The ~~proposed~~ class representative has~~, thus far, only seen a non-confidential copy of the EC Decision. Moreover, he has~~ (and the members of the ~~proposed~~ class have) no direct knowledge of many of the issues in this claim. The class members simply bought goods and services at unlawfully inflated prices. In contrast to the ~~proposed~~ Defendants, and to businesses (various of whom have brought claims seeking damages arising from the ~~proposed~~ Defendants' illegal interchange fee agreements), the members of the ~~proposed~~ class ~~of claimants~~ have no first-hand knowledge of any aspect of the Master~~C~~card scheme or of the pass-on of the relevant overcharge by businesses to them. Accordingly, whilst this Claim Form is particularised as far as possible, the ~~proposed~~ class representative reserves his right to amend this Claim and/or to provide further particulars following disclosure and/or the preparation of expert reports and/or factual evidence.

9. The remainder of this Claim Form is split into three parts, as required by Rule 75 of the Competition Appeal Tribunal Rules 2015 ("**CAT Rules**") and paragraph 6.11 of the Tribunal's Guide to Proceedings:

   a. Part I sets out the information and statements to comply with Rule 75(2);

   b. Part II sets out the information and statements to comply with Rule 75(3)(a)-(e); and

   c. Part III sets out the information and statements to comply with Rule 75(3)(f)-(j).

9A. Some aspects of the original pleading are now redundant, in light of the certification of these collective proceedings by the Tribunal. These aspects have accordingly been struck-through. However, where any pleading related to certification remains

relevant, such as Mr Merricks' pleading in respect of class definition, those passages have been retained.

10. Accompanying this Claim Form are the following documents:

~~**a. annexed to the Claim Form is:**~~

a. In light of the certification of these collective proceedings by the Tribunal, some of the annexes to the original Claim Form are no longer relevant and have accordingly been struck-through. The documents that are now annexed to the Claim Form ~~is~~ are:

i. a copy of the non-confidential EC Decision (as per Rule 75(5)(a)) (**Annex 1**);

ii. a copy of the Commission document setting out the undertakings given by the ~~proposed~~ Defendants to the Commission to comply with the EC Decision (EC MEMO/09/143, 1 April 2009, '*Antitrust: Commissioner Kroes notes MasterCard's decision to cut cross-border Multilateral Interchange Fees (MIFs) and to repeal recent scheme fee increases – frequently asked questions*') (**Annex 2**).

iii. a copy of the Proposal for a Regulation of the European Parliament and of the Council on interchange fees for card-based payment transactions, COM (2013) 550 final ("**Commission's Proposal (IF Regulation)**") (**Annex 3**); and

iv. a copy of the European Commission's "*Final report on retail banking inquiry: Frequently Asked Questions*" (**Annex 4**)~~;~~.

v. ~~an expert report which is referred to in the Claim Form, that addresses the way the common issues identified in the Claim Form may be determined on a collective basis (as per Rule 75(5)(a) and paragraph 6.13 of the Guide to Proceedings) (**Annex 5**);~~

vi. ~~a draft Collective Proceedings Order (as per Rule 75(5)(b) and Rule 80) (**Annex 6**); and~~

vii. ~~a draft notice of the Collective Proceedings Order (as per Rule 75(5)(c) and Rule 81) (**Annex 7**).~~

b. ~~the following evidence is being lodged in support of the application for a CPO (as envisaged by paragraph 6.13 of the Guide to Proceedings):~~

i. ~~a witness statement from the proposed class representative addressing the considerations in Rule 78 (**Annex 8**). Exhibits to this statement include a collective proceedings litigation plan and a copy of the litigation funding agreement that demonstrates an ability to pay the proposed Defendants' reasonable costs (as per Rule 78(3)(c) and Rule 78(2)(d) respectively), if ordered to do so.~~

PART I

The Class Representative

11. The ~~proposed~~ class representative is Mr Walter Hugh Merricks CBE of a private residential address in London, United Kingdom[4]. *(Rule 75(2)(a)).*

12. Mr Merricks'~~s~~ legal representatives and address for service in the United Kingdom are: Willkie Farr & Gallagher (UK) LLP (Attention: Boris Bronfentrinker/Nicola Chesaites), Citypoint, 1 Ropemaker Street, London, EC2Y 9AW. ~~Quinn Emanuel Urquhart and Sullivan UK LLP (Attention: Boris Bronfentrinker / Kate Vernon), One Fleet Place, London, EC4M 7RA.~~ *(Rule 75(2)(b) and (c)).*

The ~~proposed~~ Defendants and service *(Rules 75(2)(d) and 75(7))*

13. The First ~~proposed~~ Defendant, Master~~C~~card Incorporated, is a United States stock corporation registered in the State of Delaware, having its principal executive offices at 2000 Purchase Street, Purchase, New York 10577, United States of America. The First ~~proposed~~ Defendant is the holding company of the Second and Third ~~proposed~~ Defendants.

14. The Second ~~proposed~~ Defendant is Master~~C~~card International Incorporated, a stock corporation registered in the State of Delaware having its principal executive offices at the same address as the First Defendant.

15. The Third ~~proposed~~ Defendant is Master~~C~~card Europe S.P.R.L., a private limited liability company incorporated in the Kingdom of Belgium under registered BCE number 0448038446, having its registered office at Chausée de Tervuren 198A, B1410, Waterloo, Belgium.

16. Solicitors for the ~~proposed~~ class representative have been informed that Freshfields Bruckhaus Deringer LLP, ~~65 Fleet Street,~~ 100 Bishopsgate, London ~~EC4Y 1HS~~ EC2P 2SR represent the ~~proposed~~ Defendants and are instructed to accept service of these proceedings on behalf of the First, Second and Third ~~proposed~~ Defendants.

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[4] The address for the Applicant will be provided confidentially to the Tribunal and the ~~proposed~~ Defendants, if required.

Application for a Collective Proceedings Order

17. The proposed class representative applies for a Collective Proceedings Order ("**CPO**"). *(Rule 75(2)(e))*

18. The application relates to proposed opt out proceedings. *(Rule 75(2)(f))*

Alternative dispute resolution *(Rule 75(2)(g))*

19. The proposed class representative instructed his solicitors on 22 June 2016, and by letter dated 27 June 2016 they notified the proposed Defendants, by way of letter to Jones Day LLP (the law firm whom the proposed class representative understood was acting for the proposed Defendants) of his intention to apply to commence collective proceedings.

20. On 11 August 2016, the proposed class representative's solicitors sent a letter before action to Jones Day LLP. The letter before action indicated that the proposed class representative was willing to explore alternative dispute resolution. On 25 August 2008 the proposed class representative's solicitors were informed by Freshfields Bruckhaus Deringer LLP that they, and not Jones Day LLP, were now the solicitors for the proposed Defendants. A further letter was sent by Freshfields Bruckhaus Deringer LLP on 31 August 2016, in which it was stated that the proposed Defendants were not in a position to provide a substantive response to the letter before action, including the offer of alternative dispute resolution, before the deadline for this Claim Form to be filed within the relevant limitation period.

Real prospect of success *(Rule 75(2)(h))*

21. The proposed class representative believes that the claims which he has sought to combine in the collective proceedings (collectively, the proposed "**Claim**") have a real prospect of success. In particular, the proposed Claim is a follow on action in which the liability of the proposed Defendants for an infringement of Article 101 TFEU has already been established by way of the EC Decision that is binding on this Tribunal and on the proposed Defendants. The proposed class representative believes that this infringement caused consumers within the proposed class to pay higher prices than would otherwise have been the case. Whilst the precise determination of such unlawful higher prices will be the subject of detailed disclosure, expert reports and factual evidence (and will be tested at trial, including by cross examination), the proposed class representative believes that consumers have a real prospect of recovering damages in the proposed Claim.

PART II

Description of the class *(Rule 75(3)(a))*

22. The ~~proposed~~ class is: "*Individuals who between 22 May 1992 and 21 June 2008 purchased goods and/or services from businesses selling in the United Kingdom that accepted Master~~C~~card cards, at a time at which those individuals were both (1) resident in the United Kingdom for a continuous period of at least three months, and (2) aged 16 years or over; together with the personal/authorised representative of the estate of any individual who meets that description and was alive on 6th September 2016, but subsequently died.*" All individuals who are living in[4A] the United Kingdom as at the domicile date, such date to be determined by the Tribunal in the CPO, and who meet this definition, are ~~proposed to be~~ included within the ~~proposed~~ class unless they (or the representative of their estate) choose to opt-out of the ~~proposed Claim~~ collective proceedings. All individuals who are living outside of the United Kingdom at the domicile date, but meet this definition, will be able to (or the representative of their estate will be able to) opt-in to the ~~proposed Claim~~ collective proceedings. On the basis that the domicile date is 6th September 2016, that domicile location is determined by reference to the consumers, not (in the case of those who subsequently die) by reference to the domicile of the representatives of their estates.

23. The purpose of the class definition is as follows:

    a. the ~~potential~~ claims~~, which it is proposed to combine,~~ are those that could be brought under s.47A of the Act by individual consumers who suffered loss and damage in the form of inflated retail prices caused by the ~~proposed~~ Defendants' unlawful conduct;
    b. this class definition contains the following criteria, all of which must be met in order for a claimant to fall within the class:

        i. members of the class must be individuals (i.e. natural persons), or where the class member is a personal/ authorised representative of an estate, then the deceased must have been a natural person. The intention of this criterion is to capture those individuals who purchased goods or services in their capacity as individual

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[4A] "*Living in*" is used as short-hand for the requirements of s.59(1B) Competition Act 1998, namely, that "*Sections 41,42,45 and 46 of the Civil Jurisiction and Judgments Act 1982 apply for the purpose of determining whether a person is regarded as "domiciled in the United Kingdom" for the purposes of this Part.*"

consumers (and not solely in the course, or for the purposes, of business) between 22 May 1992 and 21 June 2008;

ii. those goods or services must have been purchased from businesses selling in the United Kingdom. This criterion is intended to capture purchases made both from (a) businesses with a physical presence in the United Kingdom; and (b) businesses that sell in the United Kingdom through channels such as the internet, mail order, or via telephone shopping, and which have a physical presence in (at the material time) (an)other Member State(s);

iii. the goods or services must have been purchased by the consumer from a business that accepted Master~~C~~card cards. A list of such businesses, as provided to the class representative by the Defendants, will be provided to the class as part of the notification process; ~~A list of such businesses has been sought from the proposed Defendants by the letter before action of 11 August 2016, which the proposed class representative considers that the proposed Defendants ought to have. The proposed Defendants have indicated by letter of 31 August 2016 that they are ascertaining what data is available. Once obtained, the list will be notified to the proposed class;~~

iv. at the time that the consumer purchased the goods or services, s/he must have been resident in the United Kingdom for a continuous period of at least three months (or the purchase must have been made during the course of such a period of residency);

v. at the time that the consumer purchased the goods or services s/he must have been aged 16 years or over;

c. criteria (iv) and (v) above are designed to delimit the class using objective parameters which focus on that category of consumers that are likely to have suffered most loss and damage. These criteria are based on the reasonable assumption that all (or materially all) individuals of working age and resident in the United Kingdom over the period of the infringement (see paragraph 94 below) will, at some point, have purchased goods or services from a business that accepted Master~~C~~card cards. The

coverage/acceptance rate of payment cards in the United Kingdom in the claim period is not capable of being quantified as that information is not publicly available and, as of the date of this Claim Form, the ~~proposed~~ class representative does not have access to the necessary data. However, the ~~proposed~~ class representative understands that, at the material times, the coverage/acceptance rate of payment cards in the United Kingdom was high, with over 500,000 businesses accepting payment cards in 1998 and with that number rising to nearly 900,000 by 2008, and that the vast majority of relevant businesses (if not all) that accepted payment cards accepted Master~~C~~card cards. Further particulars will be provided following disclosure. On the basis of these understandings, the assumption that individuals of working age during the relevant period purchased goods and/or services from a business that accepted Master~~C~~card cards is reasonable. Further:

i. those consumers who were resident in the United Kingdom during the period in question are likely to have suffered more material loss than temporary visitors to the United Kingdom (hence the period of residency); and

ii. those consumers who were aged 16 or over are more likely to have suffered loss on their own account (i.e. they are more likely to have been spending their own money), given the working age in the United Kingdom;

d. the ~~proposed~~ class representative is aware that this class definition excludes some individuals who might have good claims, in particular, (i) individuals who were not continuously resident in the United Kingdom for three months or more, or were not aged over 16 years during the infringement period, but nevertheless purchased as an individual consumer goods and/or services from businesses selling in the United Kingdom that accepted Master~~C~~card credit and debit cards; (ii) consumers living in the United Kingdom who used their United Kingdom issued cards with businesses whilst abroad in Europe; and (iii) the estates of individuals who meet the ~~proposed~~ class definition but who passed away before the ~~domicile date~~ collective proceedings were issued on 6th September 2016. However, these exclusions are, in part, the consequence of seeking to create a clearly defined class, with parameters that can easily be understood by ~~potential~~ class members in order to determine whether they

are within the class.[4B] Further, it is important that these exclusions are designed to facilitate, in a proportionate manner, the assessment of damages and the administration of any damages that are received.

24. ~~At present,~~ T~~t~~here is no possible sub-class ~~of claimants~~ envisaged *(Rule 75(3)(b))*. As further pleaded below, it is understood that (as a general rule) businesses did not generally charge different prices to consumers depending on the method by which the consumers paid for goods/ services (indeed, the ~~proposed~~ Defendants imposed a "no surcharge" rule, prohibiting surcharges for payment by Master~~C~~card cards, until at least 1 January 2005 [5]). Thi~~s~~ese ~~proposed Claim~~ collective proceedings do~~es~~ not, therefore, differentiate between different categories of individual consumers (e.g. cash purchasers versus card purchasers versus cheque purchasers).

Estimate of the number of class members *(Rule 75(3)(c))*

25. The estimated size of the ~~proposed~~ class, is ~~approximately 45,500,000~~ ~~46,200,000 million~~ 44,154,157 individuals. The basis for this estimate is publicly available information from the Office of National Statistics, Population Estimates Unit. This information provides the total population number in the United Kingdom annually and also specifies the size of the population that is over 16 years of age. Accordingly, in 1992 the number of individuals in the United Kingdom that were aged 16 and over was 45,792,882, to which has been added (for the purposes of ~~this~~ these ~~proposed Claim~~ collective proceedings) all those people under 16 years of age but who reached that age during the infringement period (see paragraph 94 below), as well as the number of immigrants entering the United Kingdom. A deduction was then made for all those individuals that have died from 1992 through to 6 September 2016. ~~2015 . (data for 2016 not being available).~~

26. Due to limitations on the public availability of data, no deduction has been made for any children under 16 years of age in the immigration number, which would have the effect of slightly reducing the size of the ~~proposed~~ class. However, limitations in the publicly available data also mean that it is not possible to limit the deductions for death to those individuals that meet the ~~proposed~~ class definition (i.e. the

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[4B] In relation to individuals who died before the collective proceedings were issued, the Tribunal held that they were not included in the class definition at the time of issue and that the Tribunal has no power to amend to include the claims on behalf of their estates, since such claims have become time-barred. See [2021] CAT 28.

[5] Recital 510 of the EC Decision. The Commission notes that the abolition of the rule was unlikely to have much impact.

deductions for death could include children who were born and died after 2008 or individuals who immigrated and died after 2008), which would have the effect of slightly understating the size of the ~~proposed~~ class.

~~Summary of the basis on which the proposed class representative seeks to be authorised to act in that capacity in accordance with Rule 78 of the CAT Rules~~ ~~*(Rule 75(3)(d))*~~

27. ~~The proposed class representative applies to be authorised to act in that capacity on the basis that such authorisation is just and reasonable (as per Rule 78(1)(b)).~~

28. ~~This application for a CPO is accompanied by a witness statement in which the proposed class representative addresses the considerations raised by Rule 78 of the CAT Rules (as envisaged by paragraph 6.13 of the Guide to Proceedings).~~

29. ~~As to the first consideration (as per Rule 78(2)(a)), namely, whether the proposed class representative would act fairly and adequately in the interests of the class members (which is to be assessed by reference to "all the circumstances", including those set out in Rule 78(3)), in summary:~~

    a. ~~although the proposed class representative is a class member, he is acting in the public interest, following a lifetime of professional service dedicated to legal and consumer interest affairs (paragraph 21 of Mr Merricks's witness statement);~~

    b. ~~he is well suited to manage the proceedings (as per Rule 78(3)(a)), in particular, due to his legal training, his previous experience of large scale consumer affairs and financial services litigation, his knowledge of consumer affairs issues, and his numerous positions of public responsibility, including as Chief Ombudsman of the Financial Ombudsman Service (paragraphs 21 to 23 of Mr Merricks's witness statement);~~

    c. ~~he, together with his legal and expert team, has prepared a plan for the collective proceedings (Exhibit WHM6 to Mr Merricks's witness statement), as per Rule 78(3)(c), that includes:~~

        i. ~~a method for bringing the proceedings on behalf of represented persons and for notifying represented persons of the progress of the proceedings (as per Rule 78(3)(c)(i));~~

ii. ~~a procedure for governance and consultation which takes into account the size and nature of the class (as per Rule 78(3)(c)(ii));~~

iii. ~~an estimate of, and details of arrangements as to, costs, fees or disbursements which the Tribunal orders that the proposed class representative shall provide (as per Rule 78(3)(c)(iii)).~~

30. ~~As to the second consideration (as per Rule 78(2)(b)), the proposed class representative does not have a material interest that is in conflict with the interests of class members. (paragraph 25 of Mr Merricks's witness statement)~~

31. ~~Neither Rule 78(2)(c) nor Rule 78(2)(e) applies. Accordingly, the third and final consideration (as per Rule 78(2)(d)) is whether the proposed class representative will be able to pay the proposed Defendants' recoverable costs, if ordered to do so. As set out in paragraph 29 of Mr Merricks's witness statement and in the litigation plan, the proposed class representative has sufficient funding arrangements in place to ensure that he will be able to do so. Taking into account that the proposed Defendants already have substantial knowledge of the factual and legal issues that will arise for determination in the proposed proceedings, adverse costs cover of £10~~

~~million is more than adequate. This level of adverse costs cover is comparable to the amount of costs that the proposed class representative has budgeted for his own legal and economic advisers. The proposed class representative has secured third party litigation funding that, in addition to covering any potential adverse costs up to the amount of £10 million, also provides for the litigation costs of his own team and the potentially substantial costs associated with the administration of the Claim in a combined amount of nearly £30 million.~~

~~Summary of the basis on which it is contended that the criteria for certification and approval in Rule 79 of the CAT Rules are satisfied~~ ~~*(Rule 75(3)(e))*~~

32. ~~Rule 79(1) sets out three requirements which must be satisfied in order for claims to be certified as eligible for inclusion in collective proceedings:~~

a. ~~the claims must brought on behalf of an identifiable class of persons (*Rule 79(1)(a)*);~~

b. ~~the claims must raise common issues (*Rule 79(1)(b)*);~~

c. ~~the claims must be suitable to be brought in collective proceedings (*Rule 79(1)(c)*).~~

33. ~~All three criteria are met in the present application.~~

~~The claims are brought on behalf of an identifiable class of persons~~ ~~*(Rule 79(1)(a))*~~

34. ~~The class has been defined in such a manner, *inter alia*, as to allow ready identification of its membership. As per paragraph 6.37 of the Guide to Proceedings, the parameters of the class are clearly delineated, thus determining who will be bound by any resulting judgment. In particular, when an individual is considering whether to opt out of, or opt in to, proceedings, that individual will be able to readily ascertain whether s/he is (otherwise) within the class. At the domicile date, individuals who are domiciled in the United Kingdom will be within the class, if they satisfy the clear definition. Those individuals who do not wish to participate in this Claim can opt-out. Those individuals who are not domiciled in the United Kingdom (but who otherwise meet the class definition) can opt in.~~

~~The claims raise common issues~~ ~~*(Rule 79(1)(b))*~~

35. ~~Common issues are defined in Rule 73(2) as the same, similar or related issues of fact or law, mirroring section 47B(6) of the Act. Paragraph 6.37 of the Guide to Proceedings states that the common issues, which it is contended can suitably be determined on a collective basis, must be identified in the Claim Form.~~

36. ~~In the present application, it is anticipated that every issue pleaded in Part III below will be common.~~

37. ~~As pleaded below, the issues arising in this proposed Claim are common to the proposed class. The proposed Claim is concerned with a single infringement of Article 101 TFEU that caused charges to be imposed upon businesses, which charges were higher than they would have been had it not been for the infringement, and those higher charges were then passed on by businesses to all individuals who purchased goods and/or services from them.~~

38. ~~Filed with this Claim Form is a report by experts instructed by the proposed class representative in respect of common issues. The report sets out the basis upon which issues of causation and quantum are common to the proposed class.~~

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

The claims are suitable to be brought in collective proceedings (*Rule 79(1)(c)*)

40. This requirement is expanded upon in Rule 79(2), which states that the Tribunal shall take into account all matters that it thinks fit, including seven specific considerations. Each of them is met in the present application. They are now addressed in turn.

(1): Collective proceedings are an appropriate means for the fair and efficient resolution of the common issues (Rule 79(2)(a))

41. In the present case, the only efficient and/or practicable way for the claims, which it is proposed to combine, to be pursued, is through collective proceedings that determine the common issues that arise for each member of the proposed class. In particular:

    a. the number of potential members of the proposed claimant class is so numerous that it would be inefficient to require each claim to be brought individually. It is inconceivable that requiring all members of the affected proposed class individually to pursue their claims would be an efficient use of the Tribunal's resources. As a matter of case management, individual claims would need to be dealt with together in any event. This reality strongly militates in favour of a collective proceedings approach;

    b. whilst the aggregate claim value is substantial and makes a collective proceeding economically viable, the *per capita* recovery, which it is currently anticipated will be no more than a few hundred pounds, makes individual claims uneconomic to pursue, relative to the costs of bringing the claim. Despite the time that has elapsed since the EC Decision became final, and although the numerous damages claims against MasterCard by merchants that have been filed are a matter of public record, no individual consumer claims have been brought against the well-resourced proposed Defendants. With the impending expiry of the Tribunal's limitation period, the proposed collective proceedings are the only means by which individuals will be able to obtain compensation for the loss that they have suffered as a result of the proposed Defendants' conduct;

c. ~~the common issues to be resolved are issues of mixed law, fact and expert evidence. For instance, the determination of (i) the counterfactual and (ii) pass-on of damage to the members of the proposed class are likely to be substantial and costly exercises that consumers could not reasonably be expected to undertake individually.~~

~~*(2): The costs and the benefits of continuing the collective proceedings (Rule 79(2)(b))*~~

42. ~~For the reasons set out above, collective proceedings present the best approach in terms of costs/benefits to determining the claims, both for the proposed class members and also for the proposed Defendants and the Tribunal.~~

~~*(3): Whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class (Rule 79(2)(c))*~~

43. ~~The proposed class representative knows of no other claim made by consumers (as opposed to claims by businesses).~~

~~*(4): The size and the nature of the class (Rule 79(2)(d))*~~

44. ~~The class is likely to be extremely large (estimated at 46,200,000 individuals) and is made up of consumers many of whom, individually, have modest value claims, and many of whom are unlikely to have the knowledge or wherewithal to bring individual claims.~~

~~*(5): Whether it is possible to determine in respect of any person whether that person is or is not a member of the class (Rule 79(2)(e))*~~

45. ~~The class definition has been formulated in a manner so as to ensure that any person can easily determine whether s/he is or is not a member of the proposed class.~~

~~*(6): Whether the claims are suitable for an aggregate award of damages (Rule 79(2)(f))*~~

46. ~~The claims are suitable for an aggregate award of damages. An individual assessment of damages suffered by each member of the proposed class would be impracticable. For example, such assessment would require (i) the determination of the actual purchases of goods and/or services made by each member of the proposed class during the infringement period (see paragraph 94 below), by whatever means of payment (including cash), and (ii) the assessment of the extent~~

to which each of the businesses from which those purchases were made passed on the higher charges resulting from the proposed Defendants' infringement of Article 101 TFEU. In fact, the only practicable way of proceeding is by way of an aggregate award of damages. The expert report on common issues explains at Section 5 how it is proposed that such an award will be calculated.

47. A determination will then need to be made as to how to allocate the aggregate award of damage to members of the class. The proposed class representative's present proposal is set out in the collective proceeding litigation plan (Exhibit WHM6 of Mr Merricks's witness statement).

(7): The availability of alternative dispute resolution and any other means of resolving the dispute, including the availability of redress through voluntary schemes whether approved by the CMA under section 49C of the Act or otherwise (Rule 79(2)(g))

48. The proposed Defendants have had a final and binding finding of infringement against them since 11 September 2014. The proposed Defendants have taken no steps to propose any form of voluntary redress scheme to compensate individual consumers, despite their case (in the business claims against them) being that the illegal overcharges were passed on to and borne by such individual consumers. Moreover, the proposed Defendants have vigorously defended the business claims for damages that have already been brought against them and have sought permission to appeal in the one claim that has, to date, gone to judgment. The proposed Defendants have shown little (if any) interest in alternative dispute resolution. The Applicant indicated in its letter before claim that it was willing to consider alternative dispute resolution. This proposal has not been taken up by the proposed Defendants.

The Collective proceedings should be opt-out proceedings *(Rule 79(4))*

49. Rule 79(4) provides that, in determining whether collective proceedings should be brought on an opt-in or opt-out basis, the Tribunal may take into account all matters that it thinks fit, including two further matters additional to those considered under Rule 79(2) (which are pleaded to in paragraphs 40 to 48 above). They are:

    a. the strength of the claims *(Rule 79(4)(i))*; and

b. ~~whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover *(Rule 79(4)(ii))*.~~

50. ~~Both these considerations, together with those factors considered under Rule 79(2)), support the proposed class representative's request that the proposed Claim should be certified to proceed on an opt-out basis.~~

~~*The strength of the claims (Rule 79(4)(i))*~~

51. ~~In opt-out proceedings, the Tribunal will usually expect the strength of the claims to be more immediately perceptible than in opt in proceedings (paragraph 6.38 Guide to Proceedings). The proposed class representative considers (as pleaded above, paragraph 21) that the proposed claims have a real prospect of success. Part III of this Claim Form is relied on in this regard. Further, this proposed Claim is a follow-on claim which "*will generally be of sufficient strength for the purpose of this criterion*" (paragraph 6.39 Guide to Proceedings) because liability is already established in a manner that binds the proposed Defendants and the Tribunal.~~

~~*Whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover (Rule 79(4)(ii))*~~

52. ~~Just as (for all the reasons pleaded above) it is impracticable for proceedings to be brought on an individual basis, it is impracticable for proceedings to be brought on an opt-in basis. The possible factors which might indicate that an opt-in approach would be workable and in the interests of justice (set out in paragraph 6.39 of the Guide to Proceedings) include that "*the class is small but the loss suffered by each class member is high*" or that it "*is straightforward to identify and contact the class members*". Neither factor applies here. The class is extremely numerous and the average loss suffered by each class member is not large enough to make it realistic for individuals to opt-in. The proposed class representative considers that the only fair and practicable approach to the proposed Claim is to bring it on an opt-out basis.~~

PART III

53. As required by Rule 75(3)(f) of the CAT Rules, the ~~proposed~~ class representative states that:

    a. the claims are brought in respect of an infringement decision within the meaning of section 47A(6)(c) of the Act,[5A] namely, the EC Decision; and

    b. the EC Decision became final[6] when the CJEU confirmed the infringement decision in Case C-382/12 P, *MasterCard and others v Commission*, on 11 September 2014.

54. The following paragraphs set out the concise statements of fact and law relied upon (as per Rule 75(3)(g) and (h)).

The EC Decision

55. The EC Decision is binding on the Tribunal.[6A] ~~by virtue of Article 16 of Council Regulation 1/2003[7], which precludes the Tribunal from taking a decision running counter to a Commission decision.~~ The summary of the EC Decision pleaded below and the recitals referred to are non-exhaustive and the EC Decision will be relied upon for its full meaning and effect. ~~It is to be noted that the proposed class representative currently only has access to the publicly available, redacted, non-confidential version of the EC Decision.~~

Operative part of the EC Decision

56. The operative part of the EC Decision includes the following:

"*Article 1*

[5A] The EC Decision continues to be a relevant and binding infringement on which Mr Merricks can rely in bringing this follow-on claim in the Tribunal, despite the United Kingdom's departure from the European Union. This is the result of the combined effect of the transitional and saving provisions contained in Schedule 4, paragraphs 7(3), 7(4), 14(2), and 15 of The Competition (Amendment etc.) (EU Exit) Regulations 2019, as amended by The Competition (Amendment etc.) (EU Exit) Regulations 2020, per Regulations 36 and 39.

[6] Although rule 75(3)(f) refers to the claim becoming final "within the meaning of section 58A", section 58A does not apply to the present case. Rather, by virtue of new Rule 119 and old Rule 31, old Section 47(A)(8) applies. Proceedings in the CJEU were "determined" within the meaning of that provision on 11 September 2014.

[6A] Regulation 1/2003 was revoked by Schedule 3 Paragraph 1(f) of the Competition SI. However, as set out in footnote 5A above, the EC Decision continues to be binding on this Tribunal.

[7] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ (2003) L 1/1.

From 22 May 1992 until 19 December 2007 the MasterCard payment organisation and the legal entities representing it, that is MasterCard Incorporated, MasterCard International Incorporated and MasterCard Europe S.p.r.l., have infringed Article 81 of the Treaty and, from 1 January 1994 until 19 December 2007, Article 53 of the EEA Agreement by in effect setting a minimum price merchants must pay to their acquiring bank for accepting payment cards in the European Economic Area, by means of the Intra-EEA fallback interchange fees for MasterCard branded consumer credit and charge cards and for MasterCard or Maestro branded debit cards.

Article 2

The MasterCard payment organisation and the legal entities representing it shall bring to an end the infringement referred to in Article 1 in accordance with the subsequent Articles 3 to 5.

...

Article 3

Within six months after notification of this decision the legal entities representing the MasterCard payment organisation shall formally repeal the Intra-EEA fallback interchange fees ... . They shall moreover modify the association's network rules to reflect this order...".

The Master~~C~~card payment organisation

57. Master~~C~~card is a worldwide payment organisation that is represented by three legal entities, namely, the three ~~proposed~~ Defendants to ~~this proposed Claim~~ these collective proceedings [8].

58. Its structure and governance are set out in detail in section 2.1 of the EC Decision, but essentially:

[8] EC Decision recital 40; GC judgment, paragraph 1.

a. the Master~~C~~card payment organisation groups several thousand banks that issue cards and/or acquire businesses, referred to in the EC decision as merchants[9]. As to each of those activities:

   i. the bank which has the contractual relationship with a cardholder which allows for the provision and use of a payment card is referred to as the "issuing bank"[10];

   ii. the bank which has a contractual relationship with the merchant for [10]accepting a certain payment card at a Point of Sale ("**POS**")[11] is referred to as an "acquiring bank"[12];

b. only members (or "licensees"[13]) of the First ~~proposed~~ Defendant are granted a licence to issue Master~~C~~card branded payments cards and/or to sign up businesses for Master~~C~~card card acceptance[14];

c. by entering into the licence agreement, the member banks become subject to the Master~~C~~card network rules[15];

d. those rules include, amongst others, the setting of "multilateral interchange fees"[16]. As expanded upon below, an interchange fee is a fee paid by the acquiring bank to the issuing bank for a POS transaction made by a cardholder[17].

59. It is important to note that a distinction is drawn between interchange fees which apply to cross-border transactions and those which apply to domestic transactions. The glossary to the EC Decision provides that (1) a "*cross-border (payment card) transaction*" is "*a payment card transaction that occurs between an issuing bank*

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9 Recital 40. "Merchant" is defined in the glossary of the EC Decision as "an entity that accepts payments by means of cards. Merchants can be retailers but also other undertakings such as airlines".

10 EC Decision, glossary.

11 The glossary to the EC Decision provides that: POS means "*(typically) a merchant outlet with a terminal or (exceptionally) another facility that allows card payments via phone (mpayments) or the internet (e-payments). … POS card usage is to be distinguished from ATM card usage where a card is used for withdrawing money at an Automatic Teller Machine*".

12 EC Decision, glossary.

13 The terminology changed on 25 May 2006 with the IPO of Master~~C~~card Incorporated, but the EC Decision finds that this change had no material effect (recital 44).

14 Recitals 42-44.

15 Recital 43.

16 Recital 43.

17 EC Decision, glossary.

and an acquiring bank that are located in different countries", whereas (2) a "*domestic (payment card) transaction*" is one in which both banks are located "*in the same country*". These two types of transaction (which, as is pleaded to below, are treated differently in the Master~~C~~card rules) are referred to hereafter as "**Cross-Border Transactions**" and "**Domestic Transactions**" respectively.

60. One further distinction is between fees which are set multilaterally by a group of many banks (which are referred to as "**MIFs**" – multilateral interchange fees) as compared to fees which are set bilaterally between just the two banks involved in any given transaction. A MIF that applies specifically to Domestic Transactions is referred to below as a "**Domestic MIF**".

61. The EC Decision records that the Master~~C~~card network has a decentralised structure and decision-making process (section 2.1.2). Of importance for present purposes is that, until 25 May 2006, the power to set Intra-EEA fallback MIFs[18] was vested in Master~~C~~card's regional European Board (comprising delegates from its European member banks)[19]. From 25 May 2006, authority to set these Intra-EEA fallback MIFs was delegated from the European Board to a manager at MasterCard Incorporated ~~another MasterCcard entity (the name of which is redacted in the non-confidential version of the EC Decision)~~[20]. However, the ~~proposed~~ Defendants were each and all found liable for the setting of these Intra-EEA fallback MIFs.

62. Whilst the Master~~C~~card network rules allowed member banks to set up a country "forum" to agree specific national network rules, as the banks did in the United Kingdom, or otherwise to agree upon specific national network rules (without formally setting up a forum), the European Board retained "key" decision making powers[21]. The Third Defendant had authority to verify the compliance of domestic rules with the principles of the global network rules, if a member complained[22].

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18 As set out in recital 122 of the EC Decision, pleaded in paragraph 64 below, "Intra-EEA MIFs" apply as fallback for Cross-Border Transactions and also (if there is no relevant domestic MIF) as fallback for Domestic Transactions.

19 EC Decision, recitals 47 and 48. Recital 136.

20 Recital 54. ~~See also recitals 379 and 382, which indicate that the entity is connected with the Global Board.~~

21 Recitals 58 and 60.

22 Recital 61.

The subject of the EC Decision

63. Section 3 of the EC Decision sets out the "Subject of this Decision". The Commission states that:

> "*118. This decision addresses the MasterCard MIF. The MasterCard MIF is a decision of an association of undertakings comprising MasterCard's network rules and decisions of the organisation's bodies/managers ~~[REDACTED]~~ on Intra-EEA fallback interchange fees ... which apply to virtually all cross-border payment card transactions and to some domestic payment card transactions with MasterCard and Maestro branded payment cards in the European Economic Area. The scope of this decision excludes on the one hand bilaterally agreed interchange fees and on the other hand domestic fallback interchange fees, [...~~REDACTED~~]. The present decision moreover deals with certain aspects of MasterCard's "Honour All Cards" Rule which enhances the restrictive effects of the MasterCard MIF."*

64. The critical recitals for present purposes are 119-125. They bear setting out in full:

> "*119. The MasterCard MIF is anchored in the MCI Bylaws and Rules, the MCII Bylaws and Rules, the Interchange and Service Fees Manual as well as in the Maestro Global Rules that are all issued by MasterCard International Inc. These rules determine the principle that acquiring banks must pay issuing banks an interchange fee for each POS payment card transaction with a MasterCard or Maestro branded payment card, except if the banks involved in the transaction bilaterally agreed to clear and settle at other conditions. MasterCard does not dispute that in theory interchange fees could as well flow from issuing banks to acquiring banks.*
>
> *120. The level of interchange fees in the MasterCard organisation can be determined in several manners and the options available to member banks increased notably after the IPO of MasterCard Incorporated. As a general principle, issuing and acquiring banks can always agree upon interchange fees bilaterally. These fees then take precedence over any other fees that bodies of [MASTERCARD] within the organisation may set. However, in the absence of a bilateral agreement a "fallback" (also referred to as "default") interchange fee will apply to the transaction.*

121. MasterCard traditionally distinguishes several types of "fallback" interchange fees ranging from inter-*regional fees to* intra-*regional fees and* intra-country *fees with the more specific fees taking precedence over the others.*

122. Intra-EEA fallback interchange fees *in particular are multilateral interchange fees that apply as "fallback" to:*

> *i. cross-border MasterCard and Maestro card payments between EEA Member States in case no other interchange fees are defined through bilateral agreements; and to*
>
> *ii. domestic MasterCard and Maestro card payments within EEA Member States in case no other interchange fees are defined through bilateral agreements or through multilateral agreements between bank delegates (*"domestic MIFs"; *see right below).*

123. The level and the structure of Intra-EEA fallback interchange fees, which are the subject of this decision, are set out in Annex I.

124. In contrast, intra-country fallback interchange fees (hereafter "domestic MIFs") *apply to domestic card payments within EEA Member States. Issuing and acquiring banks holding MasterCard or Maestro licenses "*have the power" *to agree on fallback interchange fee programs applicable to* all *intracountry transactions. A decision to adopt such domestic fallback interchange fees requires the consent of banks representing 75% of each of the issuing and acquiring intra-country volumes ~~[REDACTED]~~. Those fees then replace Intra-EEA fallback interchange fees as relevant "fallback" for payment transactions in the country concerned. Being a mere "fallback", those domestic MIFs only apply in the absence of bilateral agreements.*

125. It is important to understand that MasterCard's "fallback mechanism" ensures that some *interchange fee* must *always apply to MasterCard/Maestro payment card transaction. As the level of intra-EEA interchange fees is a positive value, the fallback mechanism excludes the possibility that in the absence of an agreement between member banks on*

interchange fees a card transaction is cleared and settled at the face value of the claim ("at par")."

65. Accordingly, there was a hierarchy of interchange fees in the Master~~C~~card scheme, with the Intra-EEA fallback MIF acting as ultimate fallback for both Cross-Border and Domestic Transactions. It was the floor which guaranteed a minimum interchange fee, if no other agreements were in place.

66. Section 3.1.5 of the EC Decision further sets out "*the flow of payments*" in a typical transaction (see Diagram 3, page 48), showing that where a consumer hypothetically pays €100 to a business, in fact the consumer's bank (the "issuing bank") charges and retains €1 as an interchange fee, so the issuing bank transfers only €99 to the business's bank (the "acquiring bank"), which in turn passes on that €1 charge and charges and retains a further 50 cents itself, so ultimately transferring only €98.50 to the business. The First ~~proposed~~ Defendant processed the transaction between the banks, and verified that the correct interchange fee was deducted[23].

67. As to the structure and level of Intra-EEA fallback interchange fees, there were (at the date of the EC Decision) 27 such fees for Master~~C~~card branded cards and 5 for Maestro[24].

68. Section 3.1.8 of the EC Decision addresses the ~~proposed~~ Defendants' procedure for setting fallback interchange fees ~~(which section has significant redactions)~~. Section 3.1.9 sets out the Commission's findings.

The Four-party/ open payment card system

69. In section 5 of the EC Decision the Commission addresses the "four party" or "open" nature of the Master~~C~~card network in which the issuing bank may be different to the acquiring bank (so there are four parties involved: cardholder, issuing bank, acquiring bank and business). However, many issuing banks were also acquiring banks during the infringement period (see paragraph 94 below) because the ~~proposed~~ Defendants used to oblige acquiring banks also to issue cards until the

[23] Recital 141.
[24] Recital 142 and Annex 1.

abolition of the so-called "No Acquiring Without Issuing Rule" in 2005[25] (meaning that, on some occasions, only three parties were involved in a given transaction).

70. Importantly, the Commission sets out that:

> "*247. Acquirers charge merchants a fee per transaction for accepting payment cards. These fees ("merchant fee", "merchant service charge", "discount rate" or "disagio") typically are a percentage of the transaction value for credit and charge card transactions and a fixed fee for debit card transactions.*
>
> *248. In setting merchant fees, acquirers take into consideration interchange fees as common input costs. Interchange fees are normally fully included in the merchant fee and thereby passed on to merchants.*"[26]

71. In the remainder of this Claim Form the charge to businesses is referred to as the "**MSC**" (i.e. the "merchant service charge").

Relevant market

72. The relevant market for assessing the impact of the ~~proposed~~ Defendants' Intra-EEA fallback MIFs is the market for acquiring payment transactions, which market is national in scope[27].

73. The EC Decision also identifies effects of the ~~proposed~~ Defendants' illegal interchange fees in a further relevant market for issuing cards, which "*may contribute to the restrictive effects of the MIF in countries where banks 'migrate' cards carrying no or a relatively low MIF to cards carrying a higher MIF, thereby increasing the cost of card acceptance in the acquiring market*"[28]. The EC Decision refers to evidence of this migration phenomenon in the United Kingdom, relying on information and data provided by IATA[29].

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25 Recital 461 and footnote 518.
26 See also recitals 410 and 435, and also Article 1 ("in effect setting a minimum price merchants must pay to their acquiring banks")".
27 Recital 329; GC judgment, paragraph 173. Unchallenged on appeal, CJEU judgment, paragraph 178.
28 Recital 466.
29 Recital 464.

Decision by an association of undertakings.

74. The Commission found that the Master~~C~~card organisation was an association of undertakings[30] and that "…*the association's network rules that form part of the MasterCard MIF as well as decisions taken by the European Board and/or by MasterCard's President and CEO and/or his designee the COO of MasterCard Incorporated ~~[REDACTED]~~ which implement these rules by setting concrete levels and types of fallback interchange fees for MasterCard/Maestro payment card transactions in the EEA have been and still remain decisions of an association of undertakings within the meaning of Article [101(1)] of the Treaty…*"[31]. In response to the suggestion that changes to Master~~C~~card's governance schemes in 2006 altered this conclusion, the Commission held that "…*the* principle *that some multilaterally set fallback interchange fee will always apply 'as fallback' to a payment card transaction in the absence of bilateral agreements remains rooted in a network rule that was adopted before the IPO…*"[32].

Restriction of competition

75. The Commission found that the ~~proposed~~ Defendants' Intra-EEA fallback MIFs constituted a restriction of competition by effect[33]. Particularly pertinent sections and recitals of the EC Decision are as follows.

The EC Decision: "7.2.1 The object of the MIF"

76. Although the Commission concluded that "…*given that it can be clearly established that the MasterCard MIF has the effect of appreciably restricting and distorting competition to the detriment of merchants in the acquiring markets it is not necessary to reach a definitive conclusion as to whether the MasterCard MIF is a restriction by object within the meaning of Article [101(1)] of the Treaty…*"[34], in this section of the EC Decision the Commission nevertheless records that:

> -"*MasterCard does not contest that the MIF will typically fix a floor for MSCs because – as MasterCard realises – it is reasonable to assume that the*

30 Recitals 345-367.
31 Recital 398.
32 Recital 373.
33 CJEU judgment, paragraph 186.
34 Recital 407.

interchange fees affect to some degree MSCs and that an MSC "typically reflects the MIF"… "[35];

- "*MasterCard's Intra-EEA fallback interchange fees are conceived as "default MIF". They apply "by default/as fallback" to a POS payment card transaction, that is only if a transaction is not yet subject to a bilateral agreement between the issuer and the acquirer concerned on the level of an interchange fee. In practice, however, Intra-EEA fallback interchange fees have been applied to virtually all cross-border payments with MasterCard's payment cards as well as to domestic payment transactions in eight ~~[REDACTED]~~ EEA Member States. For these transactions, MasterCard's MIF has the consequence of fixing to a large part the fees charged by acquirers to merchants (see section 7.2.3.1). Moreover, MasterCard's MIF also acts like a* ***minimum price recommendation for transactions on a domestic level****. By agreeing on specific interchange fees bilaterally or multilaterally member banks may take the Intra-EEA fallback interchange fees into account* ***as minimum starting point*** *(see section 7.2.3.1.2 bb)…"*[36] (emphases added).

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

77. Under this heading, the Commission finds that:

"*The assessment of MasterCard's MIF as a restriction of competition is based on its restrictive effects on competition in the acquiring markets. In the absence of a bilateral agreement, the multilateral rule fixes the level of the interchange fee rate for all acquiring banks alike, thereby inflating the base on which acquiring banks set charges to merchants. Prices set by acquiring banks would be lower in the absence of the multilateral rule ..."*[37].

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

78. Of particular relevance to this ~~proposed~~ collective action is the section entitled

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35 Recital 404.
36 Recital 405.
37 Recital 408 (Text omitted "and in the presence of a rule that prohibits ex post pricing" for the reasons in the next footnote).

"***7.2.3.1 Restriction of competition in the acquiring markets*".** In that section, the Commission found that:

> "410. *MasterCard's MIF constitutes a restriction of price competition in the acquiring markets. In the absence of a bilateral agreement, the multilateral "default" rule fixes the level of the interchange fee rate for all acquiring banks alike, thereby inflating the base on which acquiring banks set charges to merchants. Prices set by acquiring banks would be lower in the absence of this rule and in the presence of a rule that prohibits ex post pricing*[38]*. The MasterCard MIF therefore creates an artificial cost base that is common for all acquirers and the merchant fee will typically reflect the costs of the MIF. This leads to a restriction of price competition between acquiring banks to the detriment of merchants (and subsequent purchasers).*
>
> *411. A further consequence of this restriction of price competition is that* ***customers making purchases at merchants who accept payment cards are likely to have to bear some part of the cost of MasterCard's MIF irrespective of the form of payment the customers use****. This is because depending on the competitive situation merchants may increase the price for all goods sold by a small margin rather than internalising the costs imposed on them by a MIF"*[39] (emphasis added).

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[38] "Ex post pricing" means unilateral defining of a fee by issuing banks after the transaction (paragraph 11 CJEU judgment). The CJEU ruled that the GC erred in taking account of such a rule in its analysis of the effects of the MIFs on competition without explaining whether such a prohibition was likely to occur in the absence of the MIF: Case C-382/12 P, paragraph 169. However, the CJEU went on to hold that in fact such a prohibition on ex post pricing was "*plausible or indeed likely*" (paragraph 173).

[39] See, in respect of effect on end users, the GC judgment at paragraphs 29 and 30 and 166: *"[29]… the Commission found that the restrictive effects of the MIF did not operate only on the acquisition of cross-border transactions, but* ***also on the acquisition of domestic transactions****; it referred inter alia to the fact that MIFs… could serve as* ***a reference for setting domestic interchange fees*** *(recitals 412 to 424 to the [EC Decision]. [30] Moreover, the Commission deduced from some of the evidence that* ***the MIF set a floor under the MSC*** *(recitals 425 to 438j to the [EC Decision])…[166] the Court must also reject the applicants' arguments concerning the Commission's failure clearly to establish the effect of the MIF on the prices paid by the end user. First, it is* ***reasonable to conclude that merchants pass the increase in the amount of the MSC, at least in part, on to final consumers****. Secondly, such arguments are, in any event, entirely irrelevant since the fact that the MIF is capable of restricting the competitive pressure which merchants are able to exert on acquirers is sufficient to show that there are effects restrictive of competition for the purposes of Article [101 TFEU]"* (emphases added).

79. The Commission dealt first with the acquiring of cross-border payments, and then with the acquiring of domestic card payments.

80. First, under the heading *"**7.2.3.1.1 Restriction of price competition with respect to the acquiring of cross-border payments**"*, the Commission found as follows:

> "*The collective decision by the MasterCard organisation to set a MIF inflates prices charged by acquirers to merchants for acquiring cross-border credit and debit card transactions with MasterCard's payments cards*."

81. Then, under heading "***7.2.3.1.2 Restriction of price competition with respect to the acquiring of domestic card payments"***, the Commission found that the Intra-EEA MIF had effects on both the cross-border acquisition of domestic payments[40] and the domestic acquisition of domestic payments[41]. In respect of that latter category, namely, the domestic acquisition of domestic payments, the Commission found:

> *"MasterCard's [sic] finally also errs in contending that the economic importance of its Intra-EEA fallback interchange fees was insignificant because this MIF applied merely to cross-border transactions. MasterCard's Intra-EEA fallback interchange fees are* ***factually*** *not only a cross-border MIF but also a domestic MIF. These apply* as such *(that is to say as fallback) to domestic card payments in eight ~~[REDACTED]~~ EEA Member States where local members neither agreed on bilateral interchange fees nor on a domestic MIF.* ***Moreover, the fees also provide guidance to member banks for setting the rates of specific domestic interchange fees***"[42] (emphases added).

82. Having considered the application of the Intra-EEA fallback MIF directly to domestic transactions in Member States by virtue of its default function (i.e. where there are no bilateral fees or Domestic MIFs)[43], the Commission then turned to the situation in Member States in which there have been specific domestic MIFs set (as was the

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40 This sort of transaction is where a "central acquirer" (a bank) acquires transactions occurring outside its home country, but is bound (under the Master~~C~~card network rules) to respect the domestic interchange rules of the target country (i.e. where the transaction occurred). In other words, the central acquirer must pay any locally agreed domestic MIF. Recitals 413-415.

41 Recitals 416-424.

42 Recital 416.

43 Recital 417-420.

case in the United Kingdom during the infringement period (see paragraph 94 below). It entitled this section of the EC Decision "***Cross-border MIF acts as benchmark for setting specific domestic IFs***"[44], and found (*inter alia*) that:

> "*421. Second, some of MasterCard's member banks view Intra-EEA fallback interchange fee rates* ***de facto as a minimum starting point for setting the rates of domestic interchange fees****. Due to MasterCard's network rules* ***issuing banks have the certainty that in the absence of their consent to the adoption of a domestic MIF the Intra-EEA fallback interchange fees will always automatically apply as domestic MIF in their country. Issuing banks have no incentive to agree to domestic interchange fees below this default rate because interchange fees are revenue.*** *Both the adoption of a domestic MIF and of a bilateral agreement requires, however, the consent of the issuing banks (see section 3.1.1). Hence,* ***even in countries where MasterCard's Intra-EEA fallback interchange fees do not apply as such as domestic MIF (see above), the cross-border interchange fees may act as a minimum benchmark for setting the level of domestic interchange fee rates****."*[45] (emphases added).

83. In the remainder of the recitals addressing the effects of the Intra-EEA fallback MIFs:

a. the Commission set out two quantitative analyses "*to see whether and to what extent the Intra-EEA fallback interchange fees set a floor under the merchant fees*"[46]. It concluded that the first analysis "*shows that the Intra-EEA fallback interchange fee rates constitute a floor for the merchant fees*"[47] and the second "*shows that the MIF determines a floor under the MSC typically even for large merchants*"[48];

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44 Section 7.2.3.1.2bb.

45 See the summary of this finding in paragraph 29 of the GC judgment: "*the Commission found that the restrictive effects of the MIF did not operate only on the acquisition of cross-border transactions, but also on the acquisition of domestic transactions; it referred, inter alia, to the fact that MIFs were applied in some Member States because of the absence of bilateral or domestic interchange fees and could serve as a reference for setting domestic interchange fees.*"

46 Recital 425. Analysis: recitals 425- 436.

47 Recital 431.

48 Recital 436.

b. having set out *"further evidence from merchants*[49]", including from a United Kingdom supermarket chain, the Commission turned to an "*assessment of MasterCard's arguments why its MIF would not restrict competition between acquiring banks*"[50]. The Commission found the following:

~~iv.~~ i. whether merchants are charged a blended MSC (i.e. one which includes both domestic and cross-border charges) or different MSCs for different transactions does not matter, since "*in both alternatives, merchants and subsequent customers are harmed by the inflated cost base of merchant fees*"[51];

~~v.~~ ii. "*In the absence of MasterCard's MIF, the prices acquirers charge to merchants would not take into account the artificial cost base of the MIF and would only be set taking into account the acquirer's individual marginal cost and his mark up*"[52];

c. having considered the restriction of competition in the acquiring markets, the Commission also considered the effects of the MIF in the issuing markets (as noted in paragraph 73 above).

84. The Commission then turned to two further considerations[53]: ***"7.2.4 Inter-system competition increases anti-competitive effects in down-stream markets"***;[54] and ***"7.2.5 MIF not subject to constraints from acquirers or merchants"***.[55] The latter section included the finding that "*A MIF allows a payment organisation to raise the marginal cost of all acquirers alike in a collective manner which enables the acquirers to set a higher price for merchants*"[56]. The Commission also held, when considering merchants' demand elasticity, that "*merchants may pass the cost of the interchange fee on to their customers by raising the final price. When faced with an increase in interchange fees and consequently an increase in merchant fees, recovering that incremental cost through a small price increase for*

49 Recitals 437-438.
50 Recitals 439-460.
51 Recital 442.
52 Recital 459 and 460.
53 As was flagged in recital 409.
54 Recitals 467-496.
55 Recitals 497-521.
56 Recital 499.

all goods sold will normally lead to a smaller fall in turnover than ceasing to accept MasterCard cards[57]".

85. The Commission considered the impact of the Master~~C~~card Intra-EEA fallback MIFs combined with other network rules. Most relevantly, it considered the "no discrimination rule" (or "no surcharge rule") which prohibited businesses from passing on the costs of accepting Master~~C~~card cards in the form of a surcharge fee to card purchases, thereby meaning that all consumers bore the higher prices from the inflated costs imposed by businesses that accepted Master~~C~~card cards[58]. This rule was abolished on 1 January 2005, but the Commission held ~~that~~ that the abolition of this rule had no or limited impact on businesses' ability to surcharge[59].

86. Finally, the Commission concluded (in section "***7.2.6 MasterCard members exert market power through the MIF***") that:

> "*The 2 600 ~~[REDACTED]~~ members of the MasterCard payment organisation collectively have market power vis-a-vis merchants and their customers. The MIF allows them to exploit this collective market power by effectively putting a floor under the MSC charged to merchants. In the presence of a MIF the marginal costs of acquirers are inflated, thereby setting a floor under the merchant fee."*[60]

The MIF does not fall outside the Scope of Article 101 TFEU[61]

87. The Commission held that the Intra-EEA fallback MIFs and their restrictive effects on price competition between acquiring banks are "*not objectively necessary for the cooperation of banks in the MasterCard payment organization and the viability of the scheme*"[62]. In particular, the Commission referred to five payment card schemes in the EEA which successfully operated without a MIF[63].

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57 Recital 505.
58 Recital 510.
59 Recitals 511 – 521.
60 Recital 522~~87~~.
61 Section 7.3 EC Decision; Recitals 524 to 648.
62 Recital 648.
63 Section 7.3.4.3.

***Appreciable effect on competition*[64]**

88. The Commission found that the ~~proposed~~ Defendants' MIF appreciably distorted competition in most EEA Member States[65], including because "*Intra-EEA fallback interchange fees should not be seen in isolation as they form part of a set of similar interchange agreements within the MasterCard scheme that, together, determine the complete amount of costs loaded onto merchants and the price distortion that ensues*"[66]

***Effect on trade between Member States*[67]**

89. The Commission found that ~~proposed~~ Defendants' Intra-EEA fallback MIFs affected trade between Member States[68].

Conclusion on Article 101(1) TFEU

90. The Commission concluded that:

> "*664. [The MasterCard Intra-EEA fallback MIF] restricts competition between acquiring banks by inflating the base on which acquiring banks set charges to merchants and thereby sets a floor under the merchant fee. In the absence of the multilateral interchange fee the prices set by acquiring banks would be lower to the benefit of merchants and subsequent purchasers*."

***Article 101(3) TFEU*[69]**

91. The Commission found that the ~~proposed~~ Defendants had failed to establish that their Intra-EEA fallback MIFs contributed to technical or economic progress within the meaning of Article 81(3) of the EC Treaty (now Article 101(3) TFEU)[70]. As to allowing consumers a fair share of the resulting benefits, the Commission held that "*In setting a MIF the member banks of a card scheme must guarantee a fair share*

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64 Section 7.4.
65 Recital 650.
66 Recital 654.
67 Section 7.5.
68 Recital 662.
69 Section 8
70 Recitals 679 to 733.

of the benefit to all *customers, not only those that are on the side of the scheme which receives the MIF. In a scheme where the MIF is paid from the acquirer to the issuer, the efficiencies must in particular counterbalance the restrictive effects to the detriment of merchants (and subsequent purchasers)*"[71]. It held that the ~~proposed~~ Defendants had failed to show that it created objective efficiencies "*that benefit* all *customers, including specifically those that bear the cost of its MIF (merchants and subsequent purchasers)*"[72]. Having further held that the third condition for application of Article 81(3) EC (as it then was) was not met[73], the Commission concluded that the ~~proposed~~ Defendant had not demonstrated that any of the first three conditions under Article 81(3) EC (now Article 101(3) TFEU) applied[74].

Breach of statutory duty

92. In light of the matters referred to above and set out in the EC Decision, the ~~proposed~~ Defendants have each and all acted in breach of statutory duty.

Particulars of breach

93. The EC Decision is binding in its determination that the three ~~proposed~~ Defendants infringed Article 101(1) TFEU by, in effect, setting a minimum price that businesses must pay to their acquiring bank for accepting Master~~C~~card payment cards in the EEA by means of the Intra-EEA fallback interchange fees (the "**Infringement**").

94. As to the period of the Infringement:

a. Article 1 of the EC Decision is limited to the period from 22 May 1992 until 19 December 2007 (as the EC Decision is dated 19 December 2007) (the "Article 1 Infringement Period");

b. the subsequent Articles 2 and 3 mandate that the Infringement be brought to an end within six months of notification of the EC Decision;

c. in the event, the ~~proposed~~ class representative understands that the ~~proposed~~ Defendants did not make any change to the Intra-EEA fallback MIF arrangements referred to in the EC Decision until 21 June 2008;

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71 Recital 740.
72 Recital 743.
73 Recital 752.
74 Recital 753.

d. in light of the foregoing, the period from 19 December 2007 until 21 June 2008 forms part of the single continuous Infringement established by the EC Decision. The period of infringement is, therefore, 22 May 1992 until 21 June 2008 (the "Full Infringement Period");

e. alternatively, the period of infringement is the Article 1 Infringement Period and all references below to the Full Infringement Period are to be read in the alternative as meaning the Article 1 Infringement Period;

f. insofar as the period of the Infringement is properly the Article 1 Infringement Period, the supplemental period from 19 December 2007 until 21 June 2008 constitutes a period, relied upon by the ~~proposed~~ class representative, in which the Infringement continued to cause the ~~proposed~~ class loss of the same type and in the same manner as that caused by the Infringement established by the EC Decision.

95. For the avoidance of doubt:

a. insofar as the Infringement caused loss to be suffered in England and Wales, it constitutes a breach of EU law that was at all material times directly effective in England and Wales, namely, (what is now) Article 101 TFEU. The said Article is, or was at all material times, characterised as a statutory duty in England and Wales;

b. insofar as the Infringement caused loss to be suffered in Scotland, it constitutes a breach of EU law that was at all material times directly effective in Scotland, namely, (what is now) Article 101 TFEU. The said Article is, or was at all material times, characterised as a statutory duty in Scotland;

c. insofar as the Infringement caused loss to be suffered in Northern Ireland, it constitutes a breach of EU law that was at all material times directly effective in Northern Ireland, namely, (what is now) Article 101 TFEU. The said Article is, or was at all material times, characterised as a statutory duty in Northern Ireland.

Joint and several liability

96. The ~~proposed~~ Defendants are jointly and severally liable for the aforesaid breaches of statutory duty.

Causation and loss

97. The ~~proposed~~ Defendants' Infringement has caused loss and damage to consumers in the ~~proposed~~ class described above for the Full Infringement Period. The members of the ~~proposed~~ class are entitled to the difference between the prices which they, in fact, paid for goods and services and the prices which they would have paid for those goods and services in the absence of the unlawful Intra-EEA fallback MIFs. The Defendants' Infringement has further caused loss and damage to such consumers after the Full Infringement Period came to an end, as further pleaded to in particular in paragraphs 105A -105C below.

Particulars of causation

98. The Infringement caused the interchange fees paid by acquiring banks to issuing banks, on both Cross-Border Transactions and Domestic Transactions, to be higher than they would have been absent the Infringement (the "**Overcharge**"). The Overcharge was passed on by acquiring banks to businesses in the form of an MSC that was higher than it would have been absent the Infringement. The Overcharge was, in turn, passed on by those businesses to the consumers in the ~~proposed~~ class through higher prices for goods and services sold by those businesses.

99. The Overcharge was incurred by the ~~proposed~~ class members during the Full Infringement Period.

100. As to the effect of the Infringement on the interchange fees paid by acquiring banks, two situations fall to be distinguished, namely, (i) Cross-Border Transactions and (ii) Domestic Transactions.

Cross-Border Transactions

a. *First*, as regards Cross-Border Transactions, the illegal Intra-EEA fallback MIF applied by default, a fact that the Master~~C~~card member banks were aware of, resulting in acquiring banks paying, in either or both of the following scenarios, higher charges than they would have done absent the Infringement:

b. *application of the default Intra-EEA fallback MIF*: In practice, so far as the ~~proposed~~ class representative is currently aware, the default Intra-EEA

fallback MIFs were applied directly to virtually all Cross-Border Transactions with Master~~C~~card payment cards, without bilateral arrangements being agreed in their place. As set out in the EC Decision, and as pleaded in the following paragraph, the Infringement caused these default Intra-EEA fallback MIFs to be higher than they would have been absent the Infringement;

c. *bilateral arrangements*: Insofar as there were bilateral arrangements between banks in relation to Cross-Border Transactions (in relation to which the ~~proposed~~ class representative has no current knowledge, but it may be the case that there were no bilateral arrangments[74A], the effect of the Intra-EEA fallback MIF was that these bilateral arrangements were negotiated at a higher level than the Intra-EEA fallback MIF because the bilaterally negotiating banks knew that, without any bilateral agreement, the minimum interchange fee that the issuing bank would receive would be the default Intra-EEA fallback MIF. With no incentive on the part of issuing banks bilaterally to agree any MIFs lower than the default Intra-EEA fallback MIF, any bilaterally agreed MIFs (if any) were higher than the default Intra-EEA fallback MIF and, therefore, were higher than they would have been absent the Infringement.

101. Further as regards Cross-Border Transactions, absent the Infringement, in a lawful counterfactual world:

a. there would have been no interchange fees payable by acquiring banks, i.e. the correct counterfactual is "*no default MIF with settlement at par (that is, a prohibition on ex post pricing)*", as per paragraph 93(iv) of the Supreme Court's judgment in *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC and others; Sainsbury's Supermarkets Ltd and others v Mastercard Incorporated and others* [2020] 4 All ER 807, ~~and~~ as per recital 410 of the EC Decision, set out in paragraph 78 above, and as per paragraph 171(4) of the Tribunal's judgment in these proceedings [2023] CAT 15.~~;~~ ~~and/or~~

[74A] The Supreme Court in *Sainsbury's v Visa* [2020] 4 All ER 807 endorsed the findings of Popplewell J in *Asda v Mastercard* [2017] EWHC 93 (Comm) and Phillips J in *Sainsbury's v Visa* [2017] EWHC 3047 (Comm), namely, that bilateral agreements are unknown in the UK market (paras 42-44).

b. ~~a costs based and/or costs and benefits based approach would have been employed to set Intra-EEA fallback MIFs, or any interchange fees set bilaterally, at a materially lower level (including zero); and/or~~

c. ~~Intra-EEA fallback MIFs or any interchange fees set bilaterally would have been set using the merchant indifference test (the "**MIT**"), i.e. set at a level that a merchant would be willing to pay if it were to compare the cost of the customer's use of a payment card with the cost of non-card (cash) payments. This MIT methodology is adopted in the undertakings the proposed Defendants made to the Commission (on 1 April 2009, to comply with the EC Decision[75]) (the "**MasterCcard Undertakings**") and is also used in formulating Regulation 2015/751 on interchange fees for card based payment transactions[76] (the "**IF Regulation**"). Such fees would have been set at a materially lower level (including zero); and/or~~

d. ~~the Intra-EEA fallback MIFs or any interchange fees set bilaterally would have been set under a cap similar to the approach under the IF Regulation, beneath the level of the Intra-EEA fallback MIFs that were in fact set and limiting the maximum such Intra-EEA fallback MIFs that could be imposed. Such fees or any corresponding interchange fees set bilaterally would have been set at a materially lower level (including zero).~~

102. In light of the findings of the Supreme Court and the Tribunal identified in the preceding paragraph, the class representative's primary case is that the counterfactual identified in *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC and others; Sainsbury's Supermarkets Ltd and others v Mastercard Incorporated and others* [2020] 4 All ER 807 is the correct counterfactual. In the alternative, and irrespective of the Supreme Court's and/or Tribunal's findings, the class representative asserts that at par is the correct realistic counterfactual as a matter of fact. In the further alternative, t~~T~~he ~~proposed~~ class representative reserves the right to plead further to the proper Cross-Border counterfactual following disclosure and/or expert and factual evidence.

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75 ~~EC MEMO/09/143, 1 April 2009, 'Antitrust: Commissioner Kroes notes MasterCard's decision to cut cross-border Multilateral Interchange Fees (MIFs) and to repeal recent scheme fee increases – frequently asked questions'.~~

76 ~~Regulation (EU) No 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions, OJ (2015) L 123/1.~~

Domestic Transactions

102A. The class representative is yet to receive full disclosure of the different iterations of the Defendants' scheme rules which applied during the Full Infringement Period. The class representative's understanding of the operation and effect of the Defendants' scheme rules is therefore incomplete. The class representative accordingly reserves the right to plead further to these matters pending proper disclosure from the Defendants. Furthermore, detailed submissions on the proper construction and effect of the Defendants' scheme rules are a matter for trial; the class representative pleads his core factual understanding of the operation of the Defendants' scheme rules at a high level only. Paragraphs 102B to 105 are without prejudice to the foregoing.

102B The class representative's present understanding of the provisions in the Defendants' scheme rules governing the interchange fees applicable to Domestic Transactions, and the manner in which the scheme applied in practice, is set out at paragraphs 102C to 102N below. This is addressed in the following three time periods:

a. from 22 May 1992 until November 1996 (or around that time). During this period there were no scheme rules which were specific to the United Kingdom and there were no fallback United Kingdom Domestic MIFs;

b. from November 1996 (or around that time) until December 1997 (or around that time). During this period there were United Kingdom specific scheme rules but there were no fallback United Kingdom Domestic MIFs; and

c. from December 1997 (or around that time) to the end of the Full Infringement Period. United Kingdom Domestic MIFs were introduced pursuant to United Kingdom specific scheme rules in December 1997 (or around that time). The Domestic MIFs, as varied from time to time, applied until the end of the Full Infringement Period and thereafter.

22 May 1992 until November 1996 (or around that time)

102C. From 22 May 1992 until November 1996 (or around that time) there were no scheme rules which were specific to the United Kingdom. Instead, the scheme rules applicable to Domestic Transactions were published by the Third Defendant under the Eurocard brand ("**Eurocard Scheme Rules**") and by the Second Defendant under the Mastercard brand ("**MCII Scheme Rules**"). In particular:

a. The class representative has received partial extracts of the following versions of the Eurocard Scheme Rules which appear to have applied during this period:

i. the Eurocard Scheme Rules dated September 1991 (the "**1991 Eurocard Rules**"); and

ii. the Eurocard Scheme Rules dated May 1993 (the "**1993 Eurocard Rules**"). The Defendants have informed the class representative that the Defendants believe the 1993 Eurocard Rules were in effect until December 1996;

b. The class representative has received partial extracts of the following versions of the MCII Scheme Rules which appear to have applied during this period:

i. The MCII Scheme Rules dated November 1989 (the "**1989 MCII Rules**"); and

ii. the MCII Scheme Rules dated December 1993 (the "**1993 MCII Rules**");

c. The Defendants have: not disclosed any complete copies of the scheme rules applied during this period; disclosed draft versions of Eurocard Rules dated 1992 and MCII Rules dated 1995; and not disclosed copies and/or extracts of any MCII Scheme Rules dated 1992 or 1994.

102D. From 22 May 1992 until November 1996 (or around that time), the scheme operated in the following manner:

a. Member banks were permitted to reach bilateral arrangements regarding the interchange fees applicable between them (1991 Eurocard Rules, Rule E7.02.4(C); and 1993 Eurocard Rules, Rule E7.02.4(C)).

b. In the absence of bilateral arrangements, the applicable interchange fee was the fee "*agreed upon by the Members doing Eurocard-MasterCard business in the country*" (1991 Eurocard Rules, Rule E7.02.4(A); 1993 Eurocard Rules, Rule E7.02.4(A)) and/or the interchange fee "*agreed to by the members doing MasterCard business within the country*" (1989 MCII Rules, Rule 11.09(b)(3); 1993 MCII Rules, Rule 11.09(iii)). In other words,

the applicable interchange fee in the absence of bilateral arrangements was the Domestic MIFs (if any) agreed by member banks doing business within the United Kingdom. However, the class representative avers that, during this period, no such Domestic MIF was in fact agreed by member banks.

c. Where member banks had not reached agreement on a Domestic MIF, the Defendants' scheme rules provided for the fallback rate to be "*the international interchange fee*" (1991 Eurocard Rules, Rule E7.02.4(B); 1993 Eurocard Rules, Rule E7.02.4(B))[76AA] and/or "*the international interchange fee(s) applicable to transactions for such MasterCard region in which the country is located*" (1993 MCII Rules, Rule 11.09(iii)). Because there was no agreed United Kingdom Domestic MIF during this period, the relevant fallback interchange fee which applied to Domestic Transactions in the absence of bilateral arrangement between member banks was therefore the 'international interchange fee(s)'.

d. Although the 'international fee' or the 'international interchange fee' is not defined in any of the applicable Eurocard Scheme Rules and/or MCII Scheme Rules, it is averred that those terms refer to the unlawful Intra-EEA fallback MIFs. It follows that, during this period, where member banks did not enter into bilateral arrangements, the applicable fallback interchange fee was the unlawful Intra-EEA fallback MIFs, and the member banks were aware of this when they were negotiating bilateral agreements.

e. The Defendants' scheme rules further provided that, where member banks had submitted a dispute regarding a Domestic MIF to arbitration, "*the international fee will temporarily apply*" (1991 Eurocard Rules, Rule E7.02.4(A); 1993 Eurocard Rules, Rule E7.02.4(A)) and/or "*the international interchange fee(s) applicable to transactions for such MasterCard region in which the country is located shall apply*" (1993 MCII Rules, Rule 11.09(iii)).[76AB] The class representative avers that no such arbitration was initiated during this period and thus that these provisions were never

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76AA On 22 June 1994, the Board of the Third Defendant voted for the proposal to remove this provision from the 1993 Eurocard Rules on the grounds that the provision was "*redundant*" following the amendments to "*Section 11.09(b)(iii) of the MasterCard By-Laws and Rules*". The class representative avers that the deletion of Rule E7.02.4(B) was not intended to (and did not in fact) substantively change the interchange fees applicable to Domestic Transactions.

76AB Rule 11.09(b)(3) of the 1989 MCII Rules provided for the fallback rate to be "*the then effective intracountry interchange fee*". There was no such rate in force in the United Kingdom at that time. Accordingly, the fallback provision in the Eurocard Rules would have applied and the applicable fallback rate would have been the 'international interchange fee'.

engaged. Accordingly, the unlawful Intra-EEA fallback MIFs applied as the fallback rate in the absence of bilateral arrangements pursuant to the Defendants' scheme rules as pleaded at sub-paragraphs (a)-(d) above.

f. Further and in any event, in practice the unlawful Intra-EEA fallback MIFs applied to the settlement of United Kingdom Domestic Transactions in the absence of any notification from the relevant member banks of a different bilateral rate applicable to the relevant transaction.

From November 1996 (or around that time) until December 1997 (or around that time)

102E. From November 1996 (or around that time) until December 1997 (or around that time), there were scheme rules specific to the United Kingdom ("**UK Domestic Scheme Rules**") which were published by the Third Defendant under the Eurocard brand. In particular, the class representative has received copies of:

a. UK Domestic Rules dated November 1996 (the "**November 1996 UK Rules**"); and

b. UK Domestic Rules dated December 1997 (the "**December 1997 UK Rules**").

102F. Rule 13 of the November 1996 UK Rules provided:

> "*Bi-lateral Interchange Agreements are entered into and lodged with* [the Third Defendant] *to enable* [the Third Defendant] *to make settlement between members. In the absence of a Bi-lateral Agreement, Intra-Regional Rates will apply. …*"

102G. Rule 13 of the December 1997 UK Rules contained the same provision set out in the preceding paragraph and further stated:

> "*Where two UK Members cannot agree on the Interchange fee to be used, the dispute may be referred to MasterCard by either Member, for an arbitration decision. Members should refer to the MasterCard By-Laws and Rules*[76ACB]*, Chapter 11, sub-chapter 11.09….*

[76AC] The Defendants have not disclosed this document to the class representative and nor have the Defendants disclosed any copies and/or extracts of the MCII Rules enacted in 1996 or 1997.

During the arbitration process, in the absence of an existing Bi-lateral agreement, Intra-Regional Rates will apply. Once the arbitration decision has been made, the arbitrated figure will apply with effect from the date that the arbitration request was received by MasterCard."

102H. From November 1996 (or around that time) until December 1997 (or around that time), there was no agreed United Kingdom Domestic MIF and no interchange fee was ever set by an arbitration involving member banks doing business in the United Kingdom. Further, the 'Intra-Regional Rates' referred to in Rule 13 during this period were the unlawful Intra-EEA fallback MIFs. It follows that, where members did not enter into bilateral arrangements during this period, the applicable interchange fees were the unlawful Intra-EEA fallback MIFs, and the member banks were aware of this when seeking to negotiate bilateral arrangements.

From December 1997 (or around that time) until the end of the Full Infringement Period

102I. From December 1997 (or around that time) until the end of the Full Infringement Period there were scheme rules specific to the United Kingdom. In particular, the class representative has been provided with partial extracts and/or copies of the following UK Domestic Scheme Rules:

a. the Third Defendant published the following UK Domestic Scheme Rules under the Eurocard brand:

   i. the UK Domestic Rules dated April 1999 (the "**1999 UK Rules**");

   ii. the UK Domestic Rules dated March 2000 (the "**March 2000 UK Rules**");

   iii. the UK Domestic Rules dated October 2000 (the "**October 2000 UK Rules**"); and

   iv. the UK Domestic Rules dated May 2001 (the "**2001 UK Rules**");

b. MasterCard/Europay U.K. Limited published the following UK Domestic Scheme Rules:

   i. the UK Domestic Rules dated February 2002 (the "**February 2002 UK Rules**"); and

ii. the UK Domestic Rules dated October 2002 (the "**October 2002 UK Rules**");

c. MasterCard UK Members Forum Limited ("**MMF**") published the following UK Domestic Scheme Rules:

i. the UK Domestic Rules dated March 2003 (the "**March 2003 UK Rules**"); and

ii. the UK Domestic Rules dated November 2003 (the "**November 2003 UK Rules**");

d. Following the November 2003 UK Rules, the class representative avers that MMF published further UK Domestic Scheme Rules dated June 2005, October 2006, April 2007, April 2008, May 2009 and December 2009. However, in November 2004 (or around that time), MMF's authority to set the interchange fees applicable to Domestic Transactions was revoked by the Second Defendant. Thereafter until the end of the Full Infringement Period, the UK Domestic Scheme Rules published by MMF did not contain provision for the determination of interchange fees applicable to Domestic Transactions;

e. The 1998 UK Rules provided by the Defendants are incomplete and in draft form. The class representative has requested that the Defendants produce the full 1998 UK Rules as enacted. Further, the Defendants have not disclosed any UK Domestic Scheme Rules enacted in 2004. The class representative has requested that the Defendants produce these scheme rules.

102J. From December 1997 (or around that time) until the end of the Full Infringement Period, the applicable UK Domestic Scheme Rules provided in material part for the interchange fees payable on Domestic Transactions to be determined as follows:[76AD]

a. "*The scheme {requires/encourages} members to make reasonable endeavours to agree commercially driven bilateral rates, but in the absence of a Bilateral Interchange Agreement, Domestic fallback rates will apply. …*"

[76AD] Words appearing in {…} parentheses indicate phrasing which appears in certain scheme rules but not in others. Variations between captialisation and hyphenation are not reflected in the quoted text

(April 1999 UK Rules, Rule 13.1; March 2000 UK Rules, Rule 13.1; October 2000 UK Rules, Rule 4.3; May 2001 UK Rules, Rule 4.4; February 2002 UK Rules, Rule 4.5; October 2002 UK Rules, Rule 4.6; March 2003 UK Rules, Rule 4.6; November 2003 UK Rules, Rule 4.6). The Second and Third Defendants' evidence before the Tribunal in Mastercard's appeal against Decision No. CA/05/05 of the Office of Fair Trading was that, although bilaterally agreed rates are "*possible under the MasterCard Rules*", they are "*relatively rare in practice*" because it is costly and impractical for member banks to negotiate such agreements (witness statement of Robert William Selander dated 2 November 2005, paragraphs 40 and 45). The class representative accordingly avers that, the vast majority of member banks did not reach bilateral agreements regarding interchange fees notwithstanding being 'required' or 'encouraged' to do so;

b. "*In those cases where the issuer and the acquirer have not entered into a bilateral interchange arrangement, the following fallback interchange categories and fees will apply…*" (April 1999 UK Rules, Rule 13.3; March 2000 UK Rules, Rule 13.3; October 2000 UK Rules, Rule 4.4; May 2001 UK Rules, Rule 4.5; February 2002 UK Rules, Rule 4.6; October 2002 UK Rules, Rule 4.7; March 2003 UK Rules, Rule 4.7; November 2003 UK Rules, Rule 4.7). The UK Domestic Scheme Rules further specified the levels of the applicable fallback United Kingdom Domestic MIFs (op. cit.). Accordingly, in the absence of bilateral arrangements between member banks, the interchange fee applicable to Domestic Transactions was the fallback United Kingdom Domestic MIFs set out in the UK Domestic Scheme Rules;

c. "*Where two UK Members have been unable to agree on the Bilateral Interchange fee to be used, the dispute may be referred to* [the Third Defendant] *… for an arbitration decision. … During the arbitration process, in the absence of an existing Bilateral Interchange Agreement, {UK Domestic Interchange Fee Fallback Rates/Domestic Fallback Interchange Fees} will apply…*" (April 1999 UK Rules, Rule 13.2; March 2000 UK Rules, Rule 13.2; October 2000 UK Rules, Rule 4.3.1; May 2001 UK Rules, Rule 4.4.1; February 2002 UK Rules, Rule 4.5.1; October 2002 UK Rules, Rule 4.6.1; March 2003 UK Rules, Rule 4.6.1; November 2003 UK Rules, Rule 4.6.1).

102K. Further, the class representative has been provided with partial extracts and/or copies of Eurocard Scheme Rules which contained the following provision (namely, the Eurocard Scheme Rules dated April 1999, Rule 6.2.4; January 2000, Rule 6.2.2; December 2001, Rule 6.2.2.3; and March 2002, Rule 6.2.2.3):[76AE]

> "***Order of Precedence***
>
> *Bilaterally agreed interchange fees always prevail over fallback interchange {and service} fees.*
>
> *In the absence of a bilaterally agreed interchange {and service} fee{s}, the fallback interchange {and service} fee{s} for the country must be applied to domestic Eurocard-MasterCard transactions.*
>
> *In the absence of either a bilaterally agreed interchange {and service} fee{s} or a fallback interchange {and service} fee{s}, the intra-European interchange fee must be applied to domestic Eurocard-MasterCard transactions.*"

102L. A materially similar provision to that set out in the preceding paragraph was further contained in certain MCII Scheme Rules disclosed to the class representative (namely, the MCII Scheme Rules dated October 2004, Rule 18.B.2.6.2 and October 2005, Rule 18.B.1.2.2.2).[76AF] That provision was deleted by the MCII Scheme Rules dated February 2008. However, the MCII Scheme Rules applicable from February 2008 (or around that time) until the end of the Full Infringement Period provided to the same effect (in Rule 9.5.2 of the MCII Scheme Rules dated February 2008):

> "***Intraregional Fees***
>
> *In the event that no bilaterally agreed interchange fee or service fee applies and no default interchange fee or service fee has been otherwise*

76AE See note 76AD above as to the words appearing in {…} parentheses. The Eurocard Scheme Rules were discontinued in 2002. The Defendants have only disclosed partial extracts and/or notices summarising revisions of the Eurocard Scheme Rules enacted in 1997, 1998, 2000 and 2001. The class representative has requested that the Defendants disclose the complete copies of all of these Eurocard Scheme Rules.

76AF There were no substantive changes to the MCII Scheme Rules dated October 2005 until February 2008 (or around that time). The Defendants have not disclosed any MCII Scheme Rules enacted in 1998, 2001 and 2002. Further the Defendants have only disclosed partial extracts of the MCII Scheme Rules enacted in 2000 and 2003. The class representative has requested that the Defendants disclose complete copies of these MCII Scheme Rules.

established pursuant to these Rules, the applicable intraregional fee or if none, the interregional fee, applies to Intracountry Transactions and intracountry cash disbursements."

102M. From October 2004 (or around that time) until the end of the Full Infringement Period, the MCII Scheme Rules were the Defendants' only scheme rules which contained provision for the determination of the interchange fees applicable to Domestic Transactions. The class representative avers that during this period the levels of the United Kingdom Domestic MIFs were set by the Second Defendant.

102N. Pursuant to the provisions referred to at paragraph 102K and 102L above, if the UK Domestic Scheme Rules and/or the Second Defendant had not specified fallback United Kingdom Domestic MIFs, the interchange fee applicable to Domestic Transactions would be the "*intra-European interchange fee*", i.e. the unlawful Intra-EEA fallback MIFs. Accordingly, from December 1997 (or around that time) until the end of the Full Infringement Period, the Defendants' scheme rules provided for the unlawful Intra-EEA fallback MIFs to apply by default to Domestic Transactions in the absence of bilateral arrangements between member banks or the setting of a United Kingdom Domestic MIF.

102O. Further, the class representative has been provided with partial extracts and/or copies of Eurocard Scheme Rules which contained the following provision (namely, the Eurocard Scheme Rules dated April 1999, January 2000 and March 2002):[76AG]

> "*Any domestic rules applicable to all domestic transactions in a country… must be agreed by a group of Members… representing, during the year preceding the agreement, at least 75% of each of the Eurocard-Mastercard issuing and acquiring domestic volumes in the country. … If domestic rules are challenged because the group of Members agreeing to them no longer meets the 75% threshold, the international rules will apply in their place, as from the date when Europay has determined that the 75% threshold is no longer met."*

[76AG] See, to similar effect, the Eurocard Rules dated April 1999, Rule 6.2.4(b), January 2000, Rule 6.2.2(b), December 2001, Rule 6.2.2.1(b) and the MCII Rules dated October 2004, Rule 18.B.1 and 18.B.2.6.1. Mr Merricks has not identified any analogous provision in the Defendants' scheme rules prior to April 1999 (albeit the Defendants' disclosure of those scheme rules has been incomplete). Nevertheless, Mr Merricks avers that a substantially similar and/or analogous provision to that pleaded in paragraph 102O applied prior to April 1999.

102P. Pursuant to the provision set out in the preceding paragraph, member banks representing more than 25% of the total acquiring and/or issuing domestic volume in the United Kingdom could withdraw their consent to UK Domestic Rules with the result that there would be no United Kingdom Domestic MIF. As pleaded at paragraph 102N above, the unlawful intra-EEA fallback MIFs would then apply by default to Domestic Transactions in the absence of bilateral arrangements pursuant to the Eurocard Rules and/or the MCII Rules.

The effect of the Infringement on Domestic Transactions

103. ~~Secondly, the proposed class representative understands that a United Kingdom Domestic MIF (or MIFs) applied to all United Kingdom Domestic Transactions throughout the Full Infringement Period. Consequently, A~~as regards Domestic Transactions, the effect of the Infringement on the interchange fees paid by acquiring banks was as follows:

a. throughout the Full Infringement Period, the ~~proposed~~ Defendants' scheme rules provided for the illegal Intra-EEA fallback MIFs to apply by default to Domestic Transactions absent either (i) bilateral arrangements between banks, or (ii) the setting of a Domestic MIF;

aA. from on or around 22 May 1992 until December 1997 (or around that time) there were no Domestic MIFs and the illegal Intra-EEA fallback MIFs applied by default to Domestic Transactions in the absence of bilateral arrangements between banks pursuant to the scheme rules set out at paragraphs 102C to 102H above (and in any event in practice). Thereafter until the end of the Full Infringement Period, United Kingdom Domestic MIFs were established and applied by default to Domestic Transactions absent bilateral arrangements between member banks;

b. the causative effect of those arrangements, as found in the EC Decision as aforesaid, was that the Intra-EEA fallback MIFs operated as a floor and/or guidance and/or a benchmark and/or a minimum price recommendation and/or a minimum starting point and/or a minimum level for the setting of either bilateral domestic arrangements ~~(if any)~~ or the Domestic MIFs, including in the United Kingdom for United Kingdom Domestic Transactions. The ~~proposed~~ class representative relies in particular on recitals 405, 416 and 421 of the EC Decision, as set out above;

bA. further, the causative effect of those arrangements from 22 May 1992 until December 1997 (or around that time) was that the unlawful Intra-EEA Fallback MIFs applied directly to at least certain transactions (i.e. the interchange fees on those transactions were processed and charged by reference to the unlawful Intra-EEA Fallback MIFs), namely transactions which occurred in circumstances where bilateral arrangements between member banks had not in fact been entered into and lodged with the Third Defendant to enable settlement between member banks at bilaterally agreed rates and where there was no United Kingdom Domestic MIF in operation;

c. further or alternatively, the weighted voting in the relevant decision-making bodies that had the authority to set the United Kingdom Domestic MIFs was in favour of the issuing banks. The issuing banks, who are (and were) profit-maximising undertakings, had ~~no~~commercial incentives not to~~, and did not in fact,~~ accept ~~a~~ United Kingdom Domestic MIFs that ~~was~~were lower than the Intra-EEA fallback MIFs, and would not ordinarily have done so (unless there were countervailing commercial or regulatory reasons), because they knew that the Intra-EEA fallback MIFs applied, and would have applied, in the absence of any agreement on ~~a~~ United Kingdom Domestic MIFs. To the extent that issuing member banks in fact accepted a United Kingdom Domestic MIF which was lower than the unlawful Intra-EEA fallback MIFs during the latter part of the Infringement Period, the class representative infers that they did so, in whole or in part, due to concerns about regulatory scrutiny from the Office of Fair Trading but with a view to trying to apply the smallest possible reduction from the unlawful Intra-EEA fallback MIFs;

d. it follows that, even though Domestic MIFs were agreed in respect of United Kingdom Domestic Transactions, absent the Infringement, the interchange fees paid by acquiring banks (whether on a bilateral or a multilateral basis) in respect of United Kingdom Domestic Transactions would have been lower than they were because they would have been set in the absence of, and without reference to, an unlawfully high floor and/or starting point and/or benchmark~~.~~;

e. further or alternatively, if the unlawful intra-EEA fallback MIFs had been set at a lawful level (i.e. zero), net-acquirers would have withdrawn their consent to the application of the United Kingdom Domestic MIFs in order to

ensure that the substantially lower intra-EEA fallback MIFs would apply as the relevant fallback rate. Alternatively, in the counterfactual where the unlawful intra-EEA fallback MIFs were set at a lawful level, banks favouring lower United Kingdom Domestic MIFs would have used their power to withdraw consent to the application of the United Kingdom Domestic MIFs to obtain lower levels of interchange fees. In the counterfactual where the intra-EEA fallback MIFs was set at a lawful level, there would therefore have been no United Kingdom Domestic MIFs and/or the United Kingdom Domestic MIFs would also have been set at zero and/or at a level lower than their factual level (and fees set pursuant to bilateral arrangements, if any, would also have been lower than their factual level);

f. further or alternatively, the relevant decision making bodies which set the first United Kingdom Domestic MIF applicable from December 1997 (or around that time) did so by reference to the interchange fees which previously applied. As pleaded at sub-paragraphs (a)-(b) above, the illegal Intra-EEA fallback MIFs operated as a floor and/or guidance and/or a benchmark and/or a minimum price recommendation and/or a minimum starting point and/or a minimum level for the setting of interchange fees during the period before December 1997 (or around that time). Accordingly, when the United Kingdom Domestic MIF was first set the illegal Intra-EEA fallback MIFs had a causative effect on the level at which it was set. Thereafter, each successive United Kingdom Domestic MIF was influenced by the level of the United Kingdom Domestic MIFs which were previously applicable. The United Kingdom Domestic MIFs were therefore infected by the illegal Intra-EEA fallback MIFs from December 1997 (or around that time) until the end of the Full Infringement Period (alternatively for a run-off period of several years). The precise quantum by which Domestic MIFs post-dating December 1997 were inflated by the initial infection, and the duration of that effect, will be a matter for detailed evidence (including expert evidence) having regard to the full circumstances of a counterfactual stripped of all illegality;

g. further, cost studies prepared by Edgar Dunn & Co ("**EDC**") were not the cause of the interchange fees adopted by the member banks and/or relevant decision making bodies during the Full Infringement Period. The methodology of EDC's cost studies was insufficiently rigorous and/or the data underlying EDC's cost studies of insufficient quality for those studies

to act as such a reference point. Further, interchange fees were not in fact set at the level of the costs identified by EDC. In light of the foregoing, and the prominence given to cost studies in the Defendants' attempts to justify interchange fees to competition regulators, the class representative infers that a key motivation for the preparation of the EDC cost studies was to provide a basis for resisting any regulatory concerns rather than for the setting of United Kingdom interchange fees. Further, the class representative relies on the findings in recitals 174 and 175 of the EC Decision that cost studies were "*merely a tool for estimating the willingness of merchants to pay*" which served only to pre-empt "*serious acceptance problems*" where merchants refuse to accept the Defendants' products;

h. VISA's United Kingdom interchange fees did not negate the causative effect of the illegal Intra-EEA fallback MIFs particularised at sub-paragraphs (a) to (e) above. Further or alternatively, in the lawful counterfactual world VISA's interchange fees would have been materially lower than they in fact were during at least the majority of the Full Infringement Period. Accordingly, it is not open to the Defendants to rely on VISA's actual historic interchange fees in the counterfactual. The Defendants cannot therefore contend that its domestic interchange fees would not have been materially lower in the counterfactual on the grounds that it would have sought to maintain approximate parity with VISA's actual historic interchanges fees;

i. further or alternatively, the causative impact of the illegal Intra-EEA Fallback MIFs on merchants and therefore consumers who are in the class, was an enduring one, which would have attenuated only very gradually, because any reduction in the interchange fees paid by acquiring banks was not reflected in the MSCs charged by acquiring banks to merchants. Instead, those MSCs remained at the higher levels caused by the illegal Intra-EEA Fallback MIFs, unless acquiring banks were required to pass-on any reductions to merchants. As pleaded at paragraph 105A(a) below in relation to the Run-Off Overcharge, the extent to which reductions in the interchange fees were not passed on to merchants in the MSCs will *inter alia* depend on the contractual arrangements between particular merchants and acquiring banks.

104. ~~Pending disclosure, the proposed class representative does not know the detailed~~

~~models/methods/policies/principles by reference to which the proposed Defendants' (and their member banks')~~ Given the deficiencies in the disclosure provided by the Defendants, in relation to the mechanism for agreeing the United Kingdom Domestic MIF ~~(which he understands applied in the United Kingdom during the Full Infringement Period)~~, or any interchange fees set bilaterally[76A], ~~was or were, in fact, agreed and does not yet have access to materials that cast light upon how the proposed Defendants (and/or their member banks, multilaterally or bilaterally) would have set lawful interchange fees for United Kingdom Domestic Transactions in the counterfactual world. T~~ the ~~proposed~~ class representative, ~~therefore,~~ reserves the right to plead further to the issue of causation following further disclosure and expert evidence ~~(both factual and expert)~~.

105. Without prejudice to the foregoing:

a. ~~the proposed class representative relies, as regards United Kingdom Domestic Transactions, upon the same counterfactual(s) identified at paragraph 101; and/or;~~ the unlawful intra-EEA fallback MIFs were applied directly to certain Domestic Transactions (as set out at paragraph 103.aA above); and

b. ~~further or alternatively,~~ given that the unlawful intra-EEA fallback MIFs operated as a floor and/or benchmark and/or a minimum price for the setting of the Domestic MIFs or any domestic interchange fees set bilaterally (further alternatively, given that the United Kingdom Domestic MIFs from December 1997 (or around that time) were infected by the prior influence of the Intra-EEA fallback MIFs), the United Kingdom Domestic MIFs or any bilaterally agreed domestic interchange fees for the United Kingdom, would have been negotiated and/or set from a lower starting point, resulting in a zero, or lower United Kingdom Domestic MIF or United Kingdom bilateral interchange fees, had the Intra-EEA fallback MIFs been set ~~at~~ in a lawful manner and therefore, at ~~a lower level~~ zero ~~(or indeed at some lower level than they were)~~. The class representative will plead further to this issue following disclosure and/or factual and expert evidence.

Run-Off Overcharge

105A The Infringement continued to cause loss to class members after the Full Infringement Period came to an end, i.e. after 21 June 2008. In particular, the

[76A] In this regard, as set out in footnote 70 above, it appears that there were no bilateral agreements in the UK market.

Infringement caused the following overcharges, which were then passed on to consumers (as pleaded to further below):

a. Reductions in the interchange fees paid by acquiring banks on both Cross-Border Transactions and Domestic Transactions were not reflected (or not fully reflected) in the MSCs charged by acquiring banks to merchants. Instead, those MSCs remained at inflated levels as compared with the levels at which they would have been charged absent the Infringement (the "**MSC Run-Off Overcharge**"). The extent to which reductions in the interchange fees were not passed on to merchants in the MSCs (and, therefore, the extent of the MSC Run-Off Overcharge) will inter alia depend on the contractual arrangements between particular merchants and acquiring banks and it is recognised that the MSC Run-Off Overcharge may not have been incurred, or may have been incurred to a significantly smaller degree, in relation to purchases from merchants subject to IC++ pricing arrangements. Following disclosure of the various contractual arrangements, the Class Representative will provide further particulars of the claim in respect of the MSC Run-Off Overcharge.

b. Further or alternatively, to the extent that, as averred by Mastercard at paragraph 100(f)(iv) of its Defence, the UK domestic interchange fees did not fall after June 2008 when the Intra- EEA fallback MIFs were reduced to zero between 12 June 2008 and July 2009 and then set at a substantially reduced level from July 2009 to date, those UK domestic interchange fees remained at the inflated levels which were caused by the Infringement (as pleaded in paragraphs 0 to 105 above), and continued to be higher than they would have been absent the Infringement (the "**Domestic IFs Run-Off Overcharge**").

Together, the MSC Run-Off Overcharge and the Domestic IFs Run-Off Overcharge are referred to below as the "**Run-Off Overcharge**".

105B As to the duration of the Run-Off Overcharge, pursuant to the order of the Tribunal made on 20 September 2022:

a. the MSC Run-Off Overcharge is limited to the period of two years after the Full Infringement Period came to an end, namely until 21 June 2010; and

b. the Domestic IFs Run-Off Overcharge is limited to the period of one year after the Full Infringement Period came to an end, namely until 21 June 2009.

105C The Class Representative further avers that it will be necessary to ensure that there is consistency, and in particular no double-counting, between the two types of Run-Off Overcharge.

105D For the avoidance of doubt, if the causative effect of the unlawful intra-EEA fallback MIFs is found to have ceased at any point in time prior to the end of the Full Infringement Period, the class representative relies on the Run-Off Overcharge from any such date.

Pass on of the Overcharge and Domestic IFs Run-Off Overcharge to businesses via MSC

106. The Overcharge and the Domestic IFs Run-Off Overcharge were ~~was~~ passed on in total (or near total) via the MSC by acquiring banks to businesses that accepted Master~~C~~card cards during the Full Infringement Period and, for the Domestic IFs Run-Off Overcharge, during the relevant Run-Off period as pleaded in paragraph 105B above. The class representative relies in particular on recitals 248, 404, 405 and 425-436 (together with Article 1 itself) of the EC Decision.

Incurring of the MSC Run-Off Overcharge by Merchants

106A The MSC Run-Off Overcharge was incurred by Merchants that accepted Mastercard cards during the relevant Run-Off period (as pleaded in paragraph 105B above) and paid inflated MSCs, as pleaded in paragraph 105A(a) above.

Pass on to consumers via higher prices

107. The Overcharge, MSC Run-Off Overcharge and Domestic IFs Run Off Overcharge were~~was, in turn,~~ passed on by those businesses to consumers in full or in part. Consequently, the prices of goods and/ or services purchased by consumers in the ~~proposed~~ class from businesses that accepted Master~~C~~cardcards were higher than they would have been absent the Infringement. The ~~proposed~~ class representative relies *inter alia* on:

a. Recitals 410, 411, 442, 505, 664 and 740 of the EC Decision;

b. the GC's conclusion that "*it is reasonable to conclude that merchants pass the increase in the amount of the MSC, at least in part, on to final consumers*" (paragraph 166);

c. Regulation 2015/751 on interchange fees for card-based payment transactions[76B] ~~the IF Regulation~~, which includes in its preamble *"(10)… Interchange fees are a main part of the fees charged to merchants by acquiring payment service providers for every card-based payment transaction. Merchants in turn incorporate those card costs, like all their other costs, in the general prices of goods and services…"*. Similar statements are to be found in the *travaux preparatoires* (see e.g. the Commission's Proposal (IF Regulation) of July 2013)[77];

d. the Commission's inquiry into retail banking in January 2007 which included findings such as: *"…the interchange fee becomes the floor to the merchant fee, which is then passed on to consumers in the form of higher retail prices, paid not only by card users by also by customers paying in cash…"*[78];

e. the ~~proposed~~ Defendants' stance in its ongoing and concluded litigation in the United Kingdom with businesses. For example, in *Sainsbury's Supermarkets Ltd v MasterCard Incorporated & Ors* [2016] CAT 11, the ~~proposed~~ Defendants argued and presented evidence that "*Accepted economic theory indicates that there will have been pass on of between 50 and 100% in the present case. There is overwhelming factual evidence that pass on by Sainsbury's will have been at the high end of this scale, i.e. closer to 100% than 50%."* (as recorded in paragraph 466 of the judgment)[79]. The ~~proposed~~ Defendants also agreed that the MSC is comparable to a tax on retail transactions "*given that they were viewed and treated very much*

[76B] Regulation (EU) No 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions, OJ (2015) L 123/1.

[77] Proposal for a Regulation of the European Parliament and of the Council on interchange fees for card-based payment transactions, COM (2013) 550 final, pages 2, 3 and 15.

[78] European Commission Final report on retail banking inquiry: Frequently Asked Questions.

[79] See the Expert report of Gunnar Niels, dated 28 August 2015, in which he states: "*Based on these analyses, I conclude that there is a strong economic presumption that the rate of passon of UK MIF (and hence any overcharge on MIF) is very high. My findings from the market structure analysis and the Sainsbury's data are consistent with Mr Harman's assessment of how Sainsbury's sets its prices and deals with MSC/MIF costs*" (at paragraph 8.8), and "*Based on my economic analysis of the available evidence and data, I conclude that there is a strong economic presumption that the rate of pass-on by Sainsbury's of its MSC/UK MIF (and hence any overcharge on the UK MIF) is very high.*" (at paragraph 8.105).

like a goods tax such as VAT" and that *"they are effectively a common cost which is passed on to all customers in prices"*[80];

f. the stance and knowledge of the British Retail Consortium, which represents the vast majority of retailers in the United Kingdom and which was the body that initiated the original complaint to the Commission in 1992, which stated (Director General Stephen Robertson) on 24 May 2012: "…*I applaud the European Court for holding firm on its decision to end this* ***unjustifiable tax on customers****. This is a historic and highly significant decision on card charges for transactions between European nations but what comes next is crucial. And that should be* ***fairer costs for customers*** *and retailers whenever they pay by card…*" (emphases added). The Consortium also stated on 15 June 2010: "…*Retailers are seriously concerned that banks plan to make the higher debit card charging regime the norm for the emerging contactless and mobile phone payment methods. If that happens, retailers would face huge increases in their costs as these new ways of paying replace cash – particularly for low value purchases. Inevitably,* ***those extra costs would have to be passed on to customers through higher prices. If charges for every payment method were as low as they are for cash, over 480 million in cost savings would be passed on to customers through lower shop prices****...*" (emphasis added)~~.~~;

g. the stance and knowledge of EuroCommerce, which represents leading multinational retailers, national retail trade associations in 31 countries and affiliated trade federations, amounting to some 5.4 million businesses across Europe, as stated on 7 December 2020, is that "most retailers make on average less than 1%-3% net margin and are thus forced to pass on to consumers increases in the fees unilaterally imposed on them by an unavoidable trading partner like the card schemes."[80A]

108. The Overcharge caused by the Infringement in the context of Cross-Border Transactions and the Overcharge caused by the Infringement in the context of

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80 See the Expert report of Brian Dirck Carroll, dated 28 August 2015, at paragraph 26.

80A N. McMillan and V. Yhuello, 'Benefit of Interchange Fee Regulation now nullified by fee increases", EuroCommerce, Brussels, Belgium, 7 December 2020, https://www.eurocommerce.eu/media/194485/2020.12.07_-_ifr_study_pr.pdf (accessed 10 December 2021).

United Kingdom Domestic Transactions, as well as the Run-Off Overcharge, were passed on to all consumers in the ~~proposed~~ class without distinction based on:

a. whether the consumers in question were themselves engaged in Cross-Border or United Kingdom Domestic Transactions; and/or

b. how the consumers paid for the goods and/or services that they purchased.

109. The ~~proposed~~ class representative relies *inter alia* on recitals 510-521 of the EC Decision in this regard.

110. The determination of the extent of pass-on to the represented class will be complex and will be a matter for expert evidence at trial in light of any appropriate disclosure and factual evidence ~~(as to which, the proposed class representative relies upon the relevant proposals set out in the collective proceedings litigation plan)~~.

111. For the avoidance of doubt, (i) all the loss claimed is of a reasonably foreseeable type and (ii) relevant domestic law principles for recovery of damages must be read consistently with the EU law principle of effectiveness, in particular as it applies to claims for compensation for breach of Article 101 TFEU.

Particulars of loss and damage

111A In the circumstances, Mr Merricks seeks an aggregate award of damages in respect of the Overcharge and Run-Off Overcharge arising as a result of the Infringment.

112. Without prejudice to the foregoing and to the class representative's right to provide further particulars of loss and damage following any further disclosure, any further factual evidence and expert reports, the following estimates ~~indicative figures~~ of the loss caused by the Overcharge have been prepared ~~at this current early stage of proceedings,~~ using two alternative sets of quarterly transaction data disclosed by Mastercard (namely, issuing quarterly Mastercard reporting data, referred to as "**Issuing QMR data**" and acquiring quarterly Mastercard reporting data, referred to as "**Acquiring QMR data**") and weighted average interchange fee data also disclosed by the Mastercard.[80B] ~~with an estimate for the actual average MIFs applied by the proposed Defendants of: 1.1% for Cross-Border Transactions using credit cards; 1.3% for United Kingdom Domestic Transactions using credit cards; 0.6% for CrossBorder Transactions using debit cards; and 0.70% for United~~

[80B] The weighted average interchange fee data was provided to Mr Merricks in the letter from Freshfields Bruckhaus Deringer to Willkie Farr & Gallagher (UK) LLP dated 4 May 2023.

~~Kingdom Domestic Transactions using debit cards (the "Indicative MIFs"):~~ In respect of the Run-Off Overcharge for Domestic Transactions it is assumed for the purposes of the calculations pleaded below that the weighted average interchange fees between 22 June 2008 to 21 June 2010 (the "**Run-Off Period**") were equal to the weighted average interchange fees in 2008. In respect of the Run-Off Overcharge for Cross-Border Transactions, the calculations pleaded below use the levels of the intra-EEA MIFs as provided by the Defendants.[80C]

a. the ~~total~~ aggregate loss in respect of the Overcharge and the Run-Off Overcharge ~~(not including loss caused by the Run-Off Overcharge)~~, excluding interest, is provisionally assessed as between the following amounts:

~~Actual MIF~~	~~Counterfactual interchange fee~~	~~Cross-border £m~~	~~Domestic £m~~	~~Total £m~~
~~Indicative MIF~~	~~Zero~~	~~525~~	~~6,683~~	~~7,208~~
~~Indicative MIF~~	~~MasterCard Undertakings~~	~~380~~	~~5,126~~	~~5,507~~

i. using Issuing QMR data

Overcharge				
Actual interchange fee	**Counterfactual interchange fee**	**Cross-border £m**	**Domestic £m**	**Total £m**
Weighted average interchange fees	Zero	277	3,592	**3,869**

Run-Off Overcharge[80D]			
Actual interchange fees	**Cross-border £m**	**Domestic £m**	**Total £m**
Weighted average interchange fees (for 2008 only, in respect of domestic IFs run-off overcharge)	5	521	**526**

ii. using Acquiring QMR data

Overcharge

[80C] The levels of the Intra-EEA MIFs were pleaded in the Amended Defence at paragraphs 88 and 100(f)(iv).

[80D] The MSC Run-Off Overcharge is estimated assuming reductions in the interchange fees paid by acquiring banks on both cross-border and domestic transactions may not have been fully reflected in the MSCs charged by acquiring banks to merchants (see paragraph 112(d) below).

Actual interchange fee	Counterfactual interchange fee	Cross-border £m	Domestic £m	Total £m
Weighted average interchange fees	Zero	277	3,481	**3,758**

Run-Off Overcharge[80E]			
Actual interchange fees	**Cross-border £m**	**Domestic £m**	**Total £m**
Weighted average interchange fees (for 2008 only, in respect of domestic IFs run-off overcharge)	5	549	**554**

b. this total figure is reached by first assessing the "Volume of Commerce" ("**VoC**"), namely, the total value of commerce in the United Kingdom during the Full Infringement Period, in which a Master~~C~~card debit or credit consumer card was used, i.e. to which an interchange fee would have applied. This VoC is presently estimated at[81]:

~~Card type~~	~~Cross-Border £'000~~	~~Domestic £'000~~	~~Total £'000~~
~~Credit card~~	~~45,187,722~~	~~494,347,392~~	~~539,535,114~~
~~Debit card~~	~~4,689,663~~	~~36,593,395~~	~~41,283,058~~
~~**Total**~~	~~**49,877,385**~~	~~**530,940,787**~~	~~**580,818,172**~~

i. using Issuing QMR data

Overcharge			
Card Type	**Cross-Border £'000**	**Domestic £'000**	**Total £'000**
Credit Card	34,581,368	463,621,651	**498,203,019**

[80E] See footnote 80D above.

[81] ~~Due to the limitations in the publicly available data, the proposed class representative's experts have not been able to exclude from the VoC figures transactions made by the proposed class members whilst they were in another Member State and the transaction thereby incurred a cross-border interchange fee. To that end, the VoC is currently overstated. However, due to limitations in the publicly available data, the VoC does not currently include purchases made in the United Kingdom with foreign issued Master~~C~~card cards to which a cross-border interchange fee applied. To that end, the VoC is currently understated. The proposed class representative believes these matters will be capable of being addressed following disclosure from the proposed Defendants~~.

Debit Card	876,845	47,948	**924,793**
Total	**35,458,213**	**463,669,599**	**499,127,812**
MSC Run-Off Overcharge			
Credit Card	8,971,754	0	8,971,754
Debit Card	827,471	0	827,471
Total	**9,799,225**	**0**	**9,799,225**
Domestic IFs Run-Off Overcharge			
Credit Card	0	68,215,278	68,215,278
Debit Card	0	186,987	186,987
Total	**0**	**68,402,265**	**68,402,265**

ii. using Acquiring QMR data

Overcharge			
Card Type	**Cross-Border £'000**	**Domestic £'000**	**Total £'000**
Credit Card	34,581,368	449,394,531	**483,975,899**
Debit Card	876,845	50,054	**926,899**
Total	**35,458,213**	**449,444,584**	**484,902,798**
MSC Run-Off Overcharge			
Credit Card	8,971,754	0	8,971,754
Debit Card	827,471	0	827,471
Total	**9,799,225**	**0**	**9,799,225**
Domestic IFs Run-Off Overcharge			
Credit Card	0	71,869,344	71,869,344
Debit Card	0	197,251	197,251
Total	**0**	**72,066,595**	**72,066,595**

c. ~~the extent of the Overcharge is then calculated. It is presently estimated as follows:~~

~~i. using a counterfactual interchange fee of 0.3% for credit card transactions (both Cross-Border and United Kingdom Domestic Transactions) and 0.2% for debit card transactions (both Cross-Border and United Kingdom Domestic Transactions), reflecting the rates in the MasterCcard Undertakings, and as set out in the IF Regulation that applies a cap to interchange fees for Cross-Border and Domestic Transactions:~~

	Cross-border	Domestic
Indicative MIF	1.10%	1.30%
Counterfactual interchange fee	0.30%	0.30%
Credit card overcharge	**0.80%**	**1.00%**
Indicative MIF	0.60%	0.70%
Counterfactual interchange fee	0.20%	0.20%
Debit card overcharge	**0.40%**	**0.50%**

ii. alternatively, using a counterfactual of zero fees (as pleaded in paragraph 101.a and paragraph 105 above):

	Cross-border	Domestic
Indicative MIF	1.10%	1.30%
Counterfactual interchange fee	0.00%	0.00%
Credit card overcharge	**1.10%**	**1.30%**
Indicative MIF	0.60%	0.70%
Counterfactual interchange fee	0.00%	0.00%
Debit card overcharge	**0.60%**	**0.70%**

d. pass-on from acquiring banks to merchants is taken to be at 100% (as pleaded in paragraph 106 above); for the Full Infringement Period. For the Run-Off Period it is assumed that for merchants on IC++ pricing arrangements (estimated at 77% of the transaction value during the Run-Off Period) 100% of reductions in interchange fees were passed on via MSCs, whilst for the remaining 23% of the transaction value it is assumed for present purposes that 68% of the reductions in interchange fees were passed on via MSCs (subject to the reservation of rights at paragraph 112 above);

e. pass-on from merchants to consumers will be determined at trial (as pleaded in paragraph 110 above). For present purposes, and without prejudice to the pass-on that the class representative's experts may establish following disclosure and witness evidence, the figures in paragraph 112(a) above and 112(g) below are on the basis of 100% pass on. For the avoidance of doubt, at this stage in the proceedings, the class

representative is not in a position to plead which figures will ultimately be proved at trial;

f. multiplying the VOC by the Overcharges, and then adjusting for the different indicative downstream pass-on rates, and adjusting for the persons whose losses are not included within the claim, as set out at paragraph 112.h. below, gives the aggregate loss, excluding interest, as set out in paragraph 112.a above.;

g. adding simple interest to the aggregate loss at a rate to be determined by reference to the objective categorisation of the class, taking account, in particular, of the fact that the class members are consumers (or the representatives of the estates of consumers) who would have faced higher borrowing costs than commercial entities. The correct rate(s) will be the subject of evidence and legal submission, but for present purposes an indicative rate of ~~2~~ 5 percent above the prevailing Bank of England base.rate is used, which gives:

~~Actual MIF~~	~~Counterfactual interchange fee[82]~~	~~Cross-border £m~~	~~Domestic £m~~	~~Total £m~~
~~*Based on simple interest*~~				
~~Indicative MIFs~~	~~Zero~~	~~843~~	~~10,848~~	~~**11,692**~~
		~~1,207~~	~~15,524~~	~~**16,731**~~
~~Indicative MIFs~~	~~MasterCard Undertakings~~	~~611~~	~~8,324~~	~~**8,935**~~
~~*Based on compound interest*~~				
~~Indicative MIFs~~	~~Zero~~	~~999~~	~~13,099~~	~~**14,098**~~
~~Indicative MIFs~~	~~MasterCard Undertakings~~	~~724~~	~~10,053~~	~~**10,777**~~

i. using Issuing QMR data

Overcharge				
Actual interchange fee	**Counterfactual interchange fee**	**Cross Border £m**	**Domestic £m**	**Total £m**
Weighted average interchange fees	Zero	651	8,667	**9,318**

82 The ~~proposed~~ class representative's experts are presently unable to calculate a counterfactual interchange fee employing a costs based approach as, pending disclosure from the ~~proposed~~ Defendants, they do not have the necessary information.

Run-Off Overcharge[80F]			
Actual interchange fee	**Cross-border £m**	**Domestic £m**	**Total £m**
Weighted average interchange fees (for 2008 only, in respect of domestic IFs run-off overcharge)	9	937	**945**

[80F] See footnote 80D above.

ii. using Acquiring QMR data

Overcharge				
Actual interchange fee	**Counterfactual interchange fee**	**Cross Border £m**	**Domestic £m**	**Total £m**
Weighted average interchange fees	Zero	651	8,350	**9,000**

Run-Off Overcharge[80G]			
Actual interchange fee	**Cross-border £m**	**Domestic £m**	**Total £m**
Weighted average interchange fees (for 2008 only, in respect of domestic IFs run-off overcharge)	9	987	**995**

h. further, the class representative's experts has made ~~will make~~ adjustments to the aggregate damages sought to reflect: (i) individuals who suffered the relevant loss but who died before the collective proceedings were issued ~~and so,~~; and (ii) the persons identified at paragraphs 134(a), (b), (c), (d) and (f) of the Amended Defence whose losses the Class Representative admits and avers are not included within the claim.~~; and (ii)~~ Regarding the losses of class members who opted out of, or opted in to, the collective proceedings~~.~~, given the *de minimis* impact of the small number of such individuals, no adjustment has been carried out in respect of them. The means by which this adjustment will be done are a matter for expert evidence following the date for opting in or out, disclosure and witness evidence.

112A The Class Representative reserves the right to plead further as to the loss suffered as a result of the Run Off Overcharge following disclosure and/or expert and factual evidence.

113. The ~~proposed~~ class representative makes no claim in respect of any schemes that were not operated under the ~~proposed~~ Defendants' interchange network rules. Accordingly, the Maestro United Kingdom domestic debit scheme transactions are

[80G] See footnote 80D above.

excluded from the affected volume of commerce figures presented above and the calculation of loss and damage as the ~~proposed~~ 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.

Interest

114. ~~Compound interest, by way of damages, is claimed on the losses as set out in summary above. The members of the proposed class are entitled to full compensation for the loss and damage caused to them by the proposed Defendants' breach of statutory duty for the Full Infringement Period. In particular:~~

    a. ~~those proposed class members, who effectively borrowed money and/or increased their borrowings in order to pay, and/or as a result of paying, the Overcharge (whether by using overdraft facilities, using credit cards, or using other forms of credit) suffered charges on a compound interest basis (as well as other financing costs) on those borrowed sums;~~

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

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

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

115. ~~The nature of the proposed Claim and the numbers of the proposed class members involved means that it is not possible or proportionate to particularise the detail of each such loss on an individual basis. Instead, the proposed class representative will adduce evidence (both expert and factual) in respect of such losses on an aggregate average basis, i.e. compound interest will be treated as any other head~~

~~of loss in the proposed Claim (as per *Sempra Metals Ltd v Commissioners of Inland Revenue* [2008] 1 AC 561, paragraph 94). The proposed class representative reserves the right further to particularise its pleaded case accordingly.~~

116. ~~Alternatively,~~ Simple interest is claimed pursuant to s.35A of the Senior Courts Act 1981 and Rule 105 of the CAT Rules, on such sums and at such a rate as the Tribunal thinks fit. An award of interest on a simple basis on the indicative figures is set out in summary above (paragraph 112.g).

~~**Observations on the question in which part of the United Kingdom the proceedings are to be treated as taking place under Rule 18** *(Rule 75(3)(j))*~~

117. ~~The Tribunal has jurisdiction over the Third proposed Defendant by virtue of Article 7(2) of Regulation 1215/2012[83] (**"the recast Brussels Regulation"**), because the United Kingdom is the place where the damage for which the proposed Claim is made occurred, each and every time that members of the proposed class made purchases from businesses that accepted MasterCard cards during the Full Infringement Period. Further or alternatively, the damage caused by the Infringement occurred in each and/or all of England and Wales, Scotland and Northern Ireland. The First and Second proposed Defendants, are both necessary and proper parties to the claim pursued against the Third proposed Defendant and the Tribunal is the proper place to bring the claim (Rule 31(3)). As set out above, the proposed Defendants have agreed to accept service in the United Kingdom on their solicitors, Freshfields Bruckhaus Deringer LLP.~~

118. The Tribunal has ordered that these proceedings be treated as proceedings in England and Wales pursuant to Rules 18, 52 and 74.[83A] ~~Under Rule 18, the Tribunal may at any time determine whether any proceedings, or part of any proceedings, before it are to be treated, for all or any purpose, as proceedings in England and Wales, in Scotland or in Northern Ireland. In the circumstances of the present case, the Tribunal should order that England and Wales is the appropriate forum given, in particular: (i) the fact that the majority of the proposed class were habitually resident in England and Wales during the Full Infringement Period and remain so resident (as per Rule 18(3)(a)); (ii) the proposed class representative is habitually~~

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83 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ (2012) L 351/1.

83A Order of Mr Justice Roth, made 21 November 2016 and drawn 24 November 2016, at paragraph 1.

~~resident in England and Wales (as per Rule 18(3)(c)), as is his legal and expert team; and (iii) the legal team for the proposed Defendants is located in England and Wales.~~

119. ~~Alternatively, the Tribunal has the power to (and should) treat these proceedings as proceedings taking place (concurrently or sequentially) in England and Wales, and in Scotland and in Northern Ireland and determine each of those parts of the collective action in one location, namely, London, England.~~

Relief sought

120. In summary, as required by Rule 75(3)(i):

a. the amount claimed in damages in respect of the Overcharge, excluding any interest, is estimated at up to ~~£7,208,000,000~~ £3,757,812,152 (using Acquiring QMR data) or £3,869,010,791 (using Issuing QMR data);

b. there is also a further claim ~~for damages~~ in the form of interest, on ~~either a compound, alternatively~~ a simple~~,~~ basis, as pleaded above in respect of the Overcharge, which further claim is estimated at up to an additional amount of ~~£6,890,000,000 £9,523,000,000~~ £5,242,426,782 (using Acquiring QMR data) or £5,499,011,276 (using Issuing QMR data);

c. accordingly, the overall claim for damages, excluding damages in relation to the Run-Off Overcharge, is estimated at up to ~~£14,098,000,000 £16,731,000,000~~ £9,000,238,934 (using Acquiring QMR data) or £9,318,022,067 (using Issuing QMR data);

cA. further damages are claimed in respect of the Run-Off Overcharge, excluding interest, are ~~the amount of which will be~~ estimated ~~in due course~~ at up to £525,871,095 (using Issuing QMR data) or £553,690,879 (using Acquiring QMR data);

cB. there is a further claim in the form of interest, on a simple basis, as pleaded above in respect of the Run-Off Overcharge, estimated at up to ~~the amount of which will be estimated in due course~~ £419,308,878 (using Issuing QMR data) or £441,365,432 (using Acquiring QMR data);

cC: accordingly, the overall claim for damages in relation to the Run-Off Overcharge is estimated at up to £945,179,973 (using Issuing QMR data) or £995,056,311 (using Acquiring QMR data);

d. an aggregate award of damages is sought. It is the ~~proposed~~ class representative's view, as aforesaid, that any other basis of awarding damages would be unworkable;

e. the explanation of how that amount has been calculated is set out in summaryform in paragraphs 112 to 113 above;

f. there is no application for an injunction.

121. The relief sought further or alternatively includes:

a. costs; and/or

b. such further or other relief as the Tribunal may think fit.

PAUL HARRIS QC
MONCKTON CHAMBERS

MARIE DEMETRIOU QC
VICTORIA WAKEFIELD
BRICK COURT CHAMBERS

MARIE DEMETRIOU QC
VICTORIA WAKEFIELD QC
ALLAN CERIM
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ANNELIESE BLACKWOOD
MONCKTON CHAMBERS

MARIE DEMETRIOU KC
VICTORIA WAKEFIELD KC
ALLAN CERIM
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ANNELIESE BLACKWOOD
MONCKTON CHAMBERS

MARIE DEMETRIOU KC
CRAWFORD JAMIESON
BRICK COURT CHAMBERS

PAUL LUCKHURST
BLACKSTONE CHAMBERS

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-Amended Claim Form are true

Full name: Walter Hugh Merricks

Signed

Class Representative

Dated 7 June 2023