



**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No: 1287/5/7/18

BETWEEN:

- (1) ASDA STORES LIMITED  
(2) ARGOS LIMITED and others  
(3) WM MORRISON SUPERMARKETS PLC

Claimants

- v -

- (1) MASTERCARD INCORPORATED  
(2) MASTERCARD INTERNATIONAL INCORPORATED  
(3) MASTERCARD EUROPE SA  
(4) ~~MASTERCARD UK MEMBERS FORUM LIMITED~~  
(5) MASTERCARD/EUROPAY UK LIMITED

Defendants

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**ORDER**

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**UPON** the Tribunal's Order made on 16 December 2020 as varied by the Tribunal's Order made on 30 March 2021 (the "**Directions Order**")

**AND UPON** the application for specific disclosure made by the Defendants' solicitors dated 23 May 2022 (the "**Specific Disclosure Application**") and the response from the Claimants' solicitors dated 30 May 2022

**AND UPON** reading the skeleton arguments from the parties filed in advance of a case management conference ("**CMC**")

**AND UPON** the parties reaching agreement in respect of the Defendants' Specific Disclosure Application on the terms set out at paragraphs 4 to 6 of this Order

**AND UPON** the parties also reaching agreement on the terms set out at paragraph 1 of this Order

**AND UPON** hearing counsel for the respective parties at the CMC held on 13 June 2022

**AND HAVING REGARD TO** the Tribunal’s case management powers pursuant to Rule 53 of the Competition Appeal Tribunal Rules 2015 (the “**2015 Rules**”)

**IT IS ORDERED THAT:**

**Pleadings**

1. The Defendants shall be granted permission to amend their Fifth Amended Defences in the terms set out in paragraph 12 of their skeleton argument for the CMC to specifically plead the effect of corporation tax on the assessment of damages. They shall also have permission to amend paragraph 145 of their Fifth Amended Defences to the claims brought by the First Claimant (“**Asda**”) and the Third Claimant (“**Morrisons**”), and paragraph 147 of their Defence to the claim brought by the Second Claimant (“**Argos**”) to remove the words “*and a significant number of transactions would not have taken place at all*”. Sixth Amended Defences to each of the claims shall be filed within 3 days of this Order.
2. Asda and Argos, and Morrisons shall be granted permission to make consequential amendments to their Fourth Amended Replies and Fifth Amended Reply respectively, if so advised, by 11 July 2022.
3. As soon as practicable after the expiry of six weeks from the provision by the Claimants of all documents responsive to the Defendants’ Specific Disclosure Application, the Claimants shall have liberty to apply to strike out the Defendants’ Sixth Amended Defences insofar as they allege supplier pass-on unless by that date the Defendants:
  - (a) Provide the Claimants with a draft amended pleading containing further particulars of the Defendants’ case on supplier pass-on; or
  - (b) Withdraw those aspects of its pleaded case.

**Specific disclosure**

4. Each of the Claimants shall conduct searches for and provide disclosure by list of documents falling within the following categories:

*(i) Claimants' responses to changes in VAT*

(a) Documents covering the discussions, planning, recommendations and any subsequent actions taken by each of the Claimants responsive to the following changes in the applicable rate of VAT:

- (i) the fall from 17.5% to 15% on 1 December 2008, announced on 24 November 2008; and
- (ii) the rise from 17.5% to 20% on 4 January 2011, announced on 22 June 2010,

in each case limited to documents created or modified during the period from the date of the announcement of the change to three months following its effective date.

(b) The Claimants shall identify potentially relevant documents for review using the search terms listed in Annex 1 to this Order (the “**VAT Search Terms**”).

(c) The VAT Search Terms shall be applied to:

- (i) all documents and data already collected by the Claimants pursuant to the liability (“**Phase 1**”) and quantum (“**Phase 2**”) disclosure exercises (the “**Existing Data Set**”); and
- (ii) documents collected from the mailboxes of: (a) in Asda, the Vice President of Ambient, and the Category Directors of (i) Grocery and Impulse, and (ii) Alcohol; (b) in Morrisons, the Commercial Director of Ambient, and the Category Directors of (i) Grocery and Impulse, and (ii) Alcohol; and (c) in Argos, the Commercial Directors, and the Trading Directors in respect of (i) Electrical, and (ii) Furniture.

*(ii) Claimants' responses to price changes by suppliers*

- (d) Documents (including records of discussions and negotiations with individual suppliers) covering the discussions, planning, recommendations, and any subsequent actions taken by each of the Claimants responsive to price “shocks” as follows:
- (i) in respect of the increase in the price of coffee beans of approximately 120% between 3 May 2010 and 1 April 2011, and within the date range of 3 May 2010 to 30 September 2011, Asda shall search for documents collected from the mailboxes of the Vice President of Ambient, and the Category Directors of Grocery and Impulse; and Morrisons shall search for documents collected from the mailboxes of the Commercial Director of Ambient, and the Category Directors of Grocery and Impulse; and
  - (ii) in respect of the decrease in the price of sugar of approximately 40% between 1 January 2010 and 1 April 2010, and within the date range of 1 January 2010 to 30 September 2010, Asda shall search for documents collected from the mailboxes of the Vice President of Ambient, and the Category Directors of Grocery and Impulse; and Morrisons shall search for documents collected from the mailboxes of the Commercial Director of Ambient, and the Category Directors of Grocery and Impulse.
- (e) The Claimants shall identify potentially relevant documents for review using the search terms listed in Annex 2 to this Order (the “**Shock Search Terms**”). In the event that the Shock Search Terms yield a disproportionate number of documents, the parties shall liaise cooperatively to refine the search terms further.

*(iii) Submissions to the Competition and Markets Authority*

- (f) In respect of Asda, any responses submitted by it to the Competition and Markets Authority referring to profitability margins, competition and pass-on during the proposed Sainsbury's/Asda merger in 2018/2019.

*(iv) Claimants' responses to the IFR*

- (g) Documents created or modified in the period 4 November 2014 to 9 March 2016 covering the discussions, planning, recommendations and any subsequent actions taken by each of the Claimants responsive to Mastercard's voluntary and required MIF reductions during that period.
- (h) The Claimants should identify potentially relevant documents for review using the search terms listed in Annex 3 to this Order (the "**IFR Search Terms**"), which should be applied to the Existing Data Set.
5. In the event that no mailbox data is available throughout the relevant period for at least one individual in each of the roles identified in paragraphs 4(c)(ii), 4(d)(i) or 4(d)(ii), the relevant Claimant will instead search for documents in the relevant period held by other custodians in the roles identified in paragraphs 4(c)(ii), 4(d)(i) or 4(d)(ii) within another of the product categories identified in the Defendants' Specific Disclosure Application.
6. Lists of documents and the underlying documents to be disclosed by reference to the above categories shall be served by the Claimants on the Defendants' solicitors by no later than 4pm on 11 July 2022.

**Witnesses of fact**

7. The Claimants shall be granted permission to file and serve further witness statements as follows:
- (a) addressing the incidence of tax, if so advised, by 11 July 2022; and

- (b) addressing supplier pass-on, if so advised, within four weeks of receiving the Defendants' Sixth Amended Defences.
8. Reply witness statements (if any) shall be filed and exchanged simultaneously by 4pm on 15 July 2022.
  9. Unless otherwise ordered, witness statements shall stand as evidence in chief of the witness at the Phase 2 trial.
  10. No party shall be permitted to adduce oral evidence at the Phase 2 trial from a witness whose statement has not been served in advance, except with permission from the Tribunal.
  11. By 14 October 2022, the Claimants shall notify the Defendants of which of the Defendants' witnesses, who gave oral evidence as part of Phase 1 of these proceedings and have not provided a further witness statement in Phase 2, they wish to recall for further cross-examination at the Phase 2 trial, setting out the specific topics to be covered and the expected length of time required. In the event of the Defendants objecting, the Tribunal shall resolve any dispute either on the papers or at the PTR.

### **Expert evidence**

12. The parties shall each have permission to adduce expert evidence in the disciplines of competition economics and accountancy, if so advised, to address issues in dispute relating to (i) pass-on, (ii) cost of finance / interest, (iii) tax, and (iv) overcharge / counterfactual assessment issues. The parties shall have permission each to rely on evidence from a maximum of three experts and there shall be no duplication between the evidence of each party's experts.
13. Signed reports of experts are to be filed and exchanged simultaneously by 4pm on 29 July 2022.
14. Any rebuttal or supplemental experts' reports are to be filed and exchanged simultaneously by 4pm on 7 October 2022.

15. In the event that the expert reports in any discipline disclose differences of opinion, the relevant experts shall meet on a without prejudice basis by 4pm on 28 October 2022 for the purpose of: (i) identifying the issues in dispute between them; and (ii) where possible, reaching agreement on those issues. In the absence of any equivalent Rule or paragraph contained in either the 2015 Rules or the Competition Appeal Tribunal's Guide to Proceedings 2015, paragraph 9 of the Civil Procedure Rules Practice Direction 35 shall apply to the preparation for, and conduct of, the meeting.
16. The Joint Memorandum of Experts in each discipline is to be filed by 4pm on 11 November 2022 showing: (i) those issues on which they did agree; and (ii) those issues on which they disagree and a summary of their reasons for disagreeing.
17. If the experts' reports cannot be agreed, the parties shall have permission to call and cross-examine expert witnesses at the Phase 2 trial, limited to those experts whose reports have been exchanged pursuant to paragraph 13 of this Order.

### **Pre-Trial Review**

18. A pre-trial review shall be listed to be held on the first available date after 21 November 2022. Among the issues to be considered at the pre-trial review will be whether oral expert evidence should be given concurrently or individually.

### **Pre-trial directions for Phase 2**

19. No later than by 2 November 2022 the Claimants shall send the Defendants a draft bundle index for the trial bundle.
20. The Defendants shall send any comments on the draft index to the Claimants no later than by 18 November 2022.
21. Trial bundles shall be prepared by the Claimants and shall be served and filed no later than 30 November 2022.

22. The Claimants shall file and serve a skeleton argument for trial by no later than 4pm on 7 December 2022.
23. The Defendants shall file and serve a skeleton argument for trial by no later than 4pm on 14 December 2022.
24. Authorities bundles shall be prepared by the Claimants and shall be served and filed no later than 21 December 2022.
25. As the parties have agreed to the use of electronic bundles at trial, the Claimants shall enquire with the Tribunal in advance of the deadline in paragraph 21 of this Order whether the Tribunal's preference is to have its trial and authorities bundles electronically and/or in hard copy.

### **Miscellaneous**

26. By agreement the parties may vary without further Order any deadline in this Order relating to supplemental disclosure, factual evidence or expert evidence by up to fourteen days provided that there is no impact to the Phase 2 trial date and they inform the Tribunal of such agreement in advance of the expiry of the relevant deadline.
27. Each party shall have liberty to apply to add or vary any directions set out in this Order.
28. Costs in the case.

**The Hon Mrs Justice Bacon**  
Chairwoman of the Competition Appeal Tribunal

Made: 13 June 2022  
Drawn: 15 June 2022



## **Annex 1 – VAT Search Terms**

"VAT" within 3 words of "change"  
"VAT" within 3 words of "reduction"  
"VAT" within 3 words of "rise"  
"VAT" within 3 words of "fall"  
"VAT" within 3 words of "increase"  
"VAT" within 3 words of "decrease"  
"VAT" within 5 words of "17.5%"  
"VAT" within 5 words of "15%"  
"VAT" within 5 words of "20%"  
"VAT" AND "22 June 2010"  
"VAT" AND "4 January 2011"  
"VAT" AND "1 December 2008"  
"VAT" AND "24 November 2008"

## **Annex 2 – the Shock Search Terms**

"coffee"  
"sugar"

## **Annex 3 – IFR Search Terms**

"IFR"  
"Interchange Fee Regulation"  
"0.3%" within 5 words of "Interchange"  
"0.2%" within 5 words of "Interchange"  
"REGULATION (EU) 2015/751"  
"MIF reduction"  
"MSC reduction"  
"interchange" within 3 words of "reduction"  
"0.3%" within 5 words of "card fee"  
"0.2%" within 5 words of "card fee"  
"30bps" within 5 words of "interchange"  
"20bps" within 5 words of "interchange"

"30bps" within 5 words of "card fee"

"20bps" within 5 words of "card fee"