IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1443/7/7/22

BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS I LIMITED

Applicant /

Proposed Class Representative.

- v -

(1) VISA INC

(2) VISA INTERNATIONAL SERVICE ASSOCIATION

(3) VISA EUROPE SERVICES LLC

(4) VISA EUROPE LIMITED

(5) VISA UK LTD

(together "**Visa**")

Respondents /

Proposed Defendants

REASONED ORDER

UPON reading the Proposed Class Representative's collective proceedings claim form filed on 1 June 2022 and the Proposed Class Representative's application made on 1 June 2022 pursuant to Rule 31(2) of the Competition Appeal Tribunal Rules 2015 (the Tribunal Rules") for permission to serve the collective proceedings claim form on the First and Second Proposed Defendants

AND UPON reading the second witness statement of Mr Thomas Nathan Ross dated 1 June 2022 in support of the Rule 31(2) Application

IT IS ORDERED THAT:

1. The Proposed Class Representative be permitted to serve the First and Second Proposed Defendants outside the jurisdiction.

2. This order is without prejudice to the rights of the First and Second Proposed Defendants to apply pursuant to Rule 34 of the Tribunal Rules to dispute the jurisdiction of the Tribunal. Any such application should take account of the observations set out in *Epic Games, Inc v Apple Inc.* [2021] CAT 4 at [3].

3. Costs in the case.

REASONS:

(1) Background to the claim

4. This is one of four connected proposed claims brought by two Proposed Class Representatives (each, a "PCR") under the collective proceedings regime in the Tribunal pursuant to section 47B of the Competition Act 1998 ("the Act"). In each, the PCR is a special purpose vehicle which has been set up for the purpose of applying for collective proceedings orders pursuant to section 47B of the Act so as to enable the continuation of collective proceedings, claiming damages for loss suffered against Mastercard entities or Visa entities on behalf of a class of merchant claimants (the "Proposed Class Members").

5. The proposed claims are standalone claims under section 47A of the Act, and are claims for breach of statutory duty by infringing the Chapter I prohibition contained in section 2 of the Act and Article 101 of the Treaty on the Functioning of Europe ("TFEU"). The proposed claims concern two types of multilateral interchange fees ("MIFs"), which form part of the charging arrangements in each of Mastercard and Visa's four party card payment schemes. These are Inter-regional MIFs and Commercial Card MIFs.

6. Inter-regional MIFs on credit, debit and prepaid consumer card transactions are charges that apply specifically to transactions where the card issuer and location of use are in different scheme regions (for example, an Australian tourist using a card in Germany).

Commercial cards are generally given to staff by businesses to pay for things such as corporate entertainment and fuel. There are specific charging schedules for both Inter-regional MIFs and Commercial Card MIFs.

7. The four proposed claims by each of the two PCRs are made up as follows:

   (a) An opt-in claim against Mastercard.[1]

   (b) An opt-out claim against Mastercard.[2]

   (c) An opt-in claim against Visa (the present claim).

   (d) An opt-out claim against Visa.[3]

8. The proposed class members in the two opt-in claims are distinguished from those in the opt-out claims by size of turnover. Merchants who had an average turnover of £100 million or more between 2016 and 2019 are treated as proposed opt-in class members, while those whose turnover averaged below that figure over that period are included in the proposed opt-out class.

9. The background to the claims will be familiar to observers of a number of regulatory and litigation proceedings concerning MIFs in the UK and Europe over a number of years. In short, in each of the proposed claims, it is asserted that one or other of the Mastercard and Visa schemes have, since 1 June 2016 (representing the limitation period prior to the date of issue) and on a continuing basis, infringed Chapter I of the Act and Article 101 of the TFEU (up to 1 January 2021, the day after EU competition law ceased to apply in the UK). This infringement is said to arise from the rules of the respective card schemes and in particular the way in which the MIFs have been set, which amounts to a decision of an association of undertakings and/or an agreement and/or a concerted practice which restricted competition by establishing an effective

[1] Also brought by the PCR in the present claim: Case No: 1441/7/7/22 Commercial And Interregional Card Claims I Limited v Mastercard Incorporated & Others.
[2] Case No: 1442/7/7/22 Commercial And Interregional Card Claims II Limited v Mastercard Incorporated & Others.
[3] Case No: 1444/7/7/22 Commercial And Interregional Card Claims II Limited v Visa Inc. & Others.

minimum price which merchants were required to pay in order to accept card payments of the relevant type.

10. In each of the proposed claims, it is asserted that Proposed Class Members have suffered loss and damage as a result of charges being higher than they would have been absent the alleged unlawful behaviour and an award of damages is sought against Mastercard and Visa respectively in relation to the relevant MIFs set in each of their schemes.

(2) The Parties

11. The PCR is a special purpose vehicle, incorporated as a limited company. The same vehicle is being used for both opt-in claims and another vehicle is being used for both opt-out claims.

12. The Proposed Defendants in the present claim are all part of the Visa group. The Fourth and Fifth Proposed Defendants have their registered addresses or principal places of business in England and Wales, so they may be served without the permission of the Tribunal.

13. The Third Proposed Defendant is a United States stock corporation registered in Delaware, but it is also registered in England and Wales as an overseas private corporation limited by shares, having its establishment office in London. On this basis, the PCR does not seek permission to serve the Third Proposed Defendant out of the jurisdiction.

14. In relation to the First and Second Proposed Defendants:

    (a) The First Proposed Defendant, Visa Incorporated, is a corporation registered in Delaware, in the United States. It operates as the holding company of the Second Proposed Defendant and acquired the Fourth Proposed Defendant on 21 June 2016.

(b) The Second Proposed Defendant, Visa International Service Association, is membership corporation registered under the laws of Delaware, in the United States.

(3) Application under Rule 31(2) of the Tribunal Rules

15. The PCR invites the Tribunal to find that the proceedings should be treated as proceedings in England and Wales for the purposes of Rule 18 of the Tribunal Rules. This is because:

(a) The PCR is based in England and Wales.

(b) The majority of the Proposed Class Members which suffered loss are businesses incorporated in England and Wales.

(c) The Fourth and Fifth Proposed Defendants have their registered offices or principal places of business in England and Wales.

(d) If the proposed claim continues, it is likely that the Proposed Defendants' legal representatives will be based in England and Wales.

16. I think it is likely, as the PCR contends, that the proceedings are to be treated as taking place in England and Wales. Accordingly, the Tribunal approaches service out of the jurisdiction on the same basis as the High Court by reference to the relevant principles in the Civil Procedure Rules 1998 ("CPR") (*DSG Retail Ltd and another v Mastercard Inc and others* [2015] CAT 7, at [17]-[18]).

(4) Legal principles

17. The relevant legal principles for applications to serve defendants out of the jurisdiction in Tribunal cases are summarised in *Epic Games Inc and others v. Apple Inc and Others* [2021] CAT 4 [78]. In short, they involve determinations of whether:

(a) There is a serious issue to be tried on the merits of the claim. This is a test of whether there is a real as opposed to fanciful prospect of success on the claim.

(b) There is a good arguable case that the claim falls within one of the "gateways" set out in CPR Practice Direction 6B at paragraph 3.1.

(c) In all the circumstances, England and Wales is clearly or distinctly the appropriate forum for the trial of the claim.

18. The burden is on the PCR to satisfy the Tribunal that all three requirements are satisfied.

(a) Serious Issue to be Tried

19. Although the proposed claim is brought as a standalone claim, it seeks to rely on decisions of UK and European courts and regulators to the effect that the manner in which MIFs have been set in both the Mastercard and Visa schemes is capable of amounting to an infringement under Chapter I and Article 101 TFEU and sounding in damages. This includes decisions of the European Commission ("the Commission") as to infringement in relation to the Mastercard scheme[4], commitments given separately by the Mastercard and Visa Schemes to the Commission[5] and judgments in the General Court and the Court of Justice of the European Union[6] and the UK Court of Appeal and Supreme Court[7] in relation to the Mastercard and Visa schemes.

20. The proposed claim in this case concerns types of MIF – Inter-regional and Commercial Card MIFs – which have not previously been the subject of an infringement decision in European Union or the UK. However:

(a) To the extent that the reasoning in infringement decisions concerning other types of MIF is capable of being read across to the types of MIF in this proposed claim, the Tribunal will have regard to it.

(b) There are commitments decisions of the European Commission, in respect of both Mastercard and Visa, which record findings of the Commission on the application of Article 101 TFEU to Inter-regional MIFs.

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[4] COMP/34.579 Mastercard, 19 December 2007.
[5] 29 April 2019 (C (2019) 3033 final), 29 April 2019 (C(2019) 3034 final).
[6] [2012] 5 CMLR 5 (GC), [2014] 5 CMLR 23 (ECJ).
[7] *Sainsbury's Supermarkets Limited v Mastercard Incorporated and others; Sainsbury's Supermarkets Limited v Visa Europe Services LLC and others* [2020] UKSC 24.

(c) There are claims in progress in which Inter-regional and Commercial Card MIFs have been argued to be unlawful on the same basis as already established for other MIFs. See, for example, *Dune Group Limited v Mastercard; Dune Shoes Ireland Limited v Visa* [2021] CAT 35, in which the Tribunal considered summary judgment applications by the merchant claimants in respect of, inter alia, Inter-regional and Commercial Card MIFs. In that case, the merchants argued that these MIFs were indistinguishable from other types of MIFs for which liability had already been established in other proceedings. The Tribunal rejected the application, finding there was a serious issue to be tried, but the case suggests that the claims were considered to be serious ones, worthy of investigation at trial.

21. It should be noted that the Interchange Fee Regulation[8] ("IFR") introduced caps on certain MIFs which came into force in 2015. Mastercard and Visa have argued in other cases that these regulations are relevant to the question of infringement in respect of MIFs charged in compliance with the cap. However, it is pleaded by the PCR that the caps imposed by the IFR do not apply to transactions involving Inter-regional or Commercial Card MIFs.

22. It is apparent from the similar claims against Mastercard and Visa which have progressed in the Tribunal and High Court (including those which have been the subject of scrutiny in the Court of Appeal and Supreme Court) that there are many issues involved in resolving those cases. However, I am satisfied, from the contents of the claim form taken with the regulatory and court proceedings referred to above, that there is a serious issue to be tried in relation to the subject matter of the proposed claim.

(b) The jurisdictional "gateways" under CPR Practice Direction 6B ("PD6B")

23. The PCR relies on a number of "gateways" under CPR PD6B:

(a) Paragraph 3.1(9), which concerns claims in tort where damage was or will be sustained in the jurisdiction.

[8] (Regulation (EU) 2015/751)

(b) Paragraph 3.1(3)(b), which concerns claims where a person is a necessary and proper party to a claim. The PCR relies additionally on the Proposed Defendants being liable on a joint and several basis.

(c) Paragraph 3.1(4A), which concerns claims arising out of the same or closely connected facts as a claim which is subject to certain parts of paragraph 3.1 (in this case, 3.1(9) as referred to above, along with the claims brought as of right against the Third to Fifth Proposed Defendants).

24. I am satisfied that there is a good arguable case that paragraph 3.1(9) of PD6B applies to the proposed claim, given that a significant number of Proposed Class Members are likely to be businesses based in this jurisdiction and to have sustained damage here.

25. It is not therefore necessary to determine the application of paragraphs 3.1(3)(b) or 3.1(4A), but for completeness, I note that:

(a) All the Proposed Defendants are part of the same corporate group and are likely to be regarded as part of the same economic entity for competition law purposes. They are also all alleged to have participated in unlawful activity, including through the allegation of a concerted practice. There is therefore a good arguable case that they will be found to be jointly and severally liable tortfeasors. On that basis, paragraph 3.1(3)(b) is likely to apply.

(b) It appears to be the case that the proposed proceedings will involve claims against the First and Second Proposed Defendants which arise from the same infringement as the claims against the Third to Fifth Proposed Defendants, all of which are permitted under paragraph 3.1(9). On that basis, they are the proper subjects of a single investigation – see *Eurasia Sports Ltd v. Aguad* [2018] EWCA Civ 1742 at [63].

(c) Appropriate Forum

26. I am also satisfied for the purposes of Rule 31(3) of the Tribunal Rules that the UK (and this Tribunal) is the proper place in which to bring the proposed collective proceedings.

The proposed class is likely to include a very substantial number of merchants based in the UK. The claim is based on UK and EU competition law. It seems likely that the proposed collective proceedings will proceed in this jurisdiction against the Third to Fifth Defendants in any event. In relation to the First and Second Proposed Defendants, it appears likely that the proposed collective proceedings could not be brought in the United States in the way currently envisaged by the claim form. In particular, and despite being brought on a standalone basis, the proposed claims rely on the binding effect in England and Wales of the Commission decisions noted above, which would not be possible in the United States.

27. I therefore conclude that the UK (and this Tribunal) is clearly and distinctly the appropriate forum for the trial of this claim and the Tribunal ought to exercise its discretion to permit service of proceedings out of the jurisdiction.

Ben Tidswell Made: 28 July 2022

Chair of the Competition Appeal Tribunal Drawn: 28 July 2022