IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1441/7/7/22
1443/7/7/22

BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS I LIMITED

Applicant /
Proposed Class Representative

- v -

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE SA
(4) MASTERCARD/EUROPAY UK LIMITED
(5) MASTERCARD UK MANAGEMENT SERVICES LIMITED
(6) MASTERCARD EUROPE SERVICES LIMITED

Respondents /
Proposed Defendants

AND 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

Respondents /
Proposed Defendants

REASONED ORDER

UPON the Tribunal's Ruling issued on 13 January 2023 ([2023] CAT 1) (the "January Ruling") requiring the Proposed Class Representative ("CICC I") to provide certain generic information about the merchants who have been in contact with CICC I as part of its book building process

AND UPON CICC I providing an anonymised table of information regarding the merchants that have expressed interest in the proposed opt-in collective proceedings to the Mastercard and Visa Proposed Defendants on 25 January 2023, pursuant to the January Ruling (the "January Table")

AND UPON the application filed by the Mastercard Proposed Defendants on 16 February 2023 seeking an order from the Tribunal that CICC I be required to disclose the identities of the merchants that have expressed interest in the proposed opt-in collective proceedings (the "Mastercard Disclosure Application")

AND UPON the Visa Proposed Defendants filing observations on 20 February 2023 in support of the Mastercard Disclosure Application and seeking also an order that CICC I be required to disclose the identities of the relevant merchants

AND UPON the Tribunal's Order made on 21 February 2023 establishing a confidentiality ring in these two proceedings and Case Nos. 1442/7/7/22 and 1444/7/7/22 (the "Confidentiality Ring Order")

AND UPON considering the response filed by CICC I on 23 February 2023 and reply filed by the Mastercard Proposed Defendants on 28 February 2023 in respect of the Mastercard Disclosure Application

IT IS ORDERED THAT:

CICC I shall disclose to the Mastercard and Visa Proposed Defendants the identities of the merchants in the January Table. Such disclosure shall be made by 4pm on 10 March 2023 into the confidentiality ring established by the Confidentiality Ring Order.

REASONS

1. In my January Ruling[1], I ordered CICC I to disclose to the Mastercard and Visa Proposed Defendants certain information about merchants who, prior to 31 December 2022, had expressed interest in or registered to join these two proposed opt-in collective proceedings, or who had been approached and declined or failed to register to join the proceedings. This information was to be provided on an anonymised basis by 25 January 2023. I declined to order further disclosure, including the names of the merchants in question.

2. Having received the information on 25 January 2023 in the form of a table, which included some information about turnover and location but did not include the names of the merchants, the Mastercard Proposed Defendants, and subsequently the Visa Proposed Defendants, have made an application for disclosure of the identities of the merchants described in the January Table, into a confidentiality ring. This is on the basis that the information already provided has allowed the Proposed Defendants to determine that a significant proportion (said to be 20%) of the merchants in question have already settled their respective claims with the Proposed Defendants. The Proposed Defendants argue that:

    (a) CICC I has asserted in its collective proceedings order ("CPO") application that its contact with the relevant merchants demonstrates strong interest in the opt-in proceedings.

    (b) Whether or not this is correct is relevant to the determination of the CPO application, by reference to the requirement for the Tribunal to consider the suitability of claims to be combined in a collective action.

3. CICC I resists the application, on the basis that:

    (a) The identities of the merchants are confidential and disclosure would breach the basis on which engagement between CICC I and the merchants has taken place. This could have a chilling effect on merchant participation in these and other

[1] See section A of the January Ruling for a description of the proposed proceedings.

proceedings. There is also the potential for misuse of the information by the Proposed Defendants if they are in contact with the merchants directly (see section B(1) of the January Ruling).

(b) The information is not relevant as the alleged level of settlement is low, the relevant merchants are in any event only a small sample of the potential pool of class members and the Proposed Defendants have their own data about settlements which they can use to advance any point they wish to make about the extent to which settlements impact on the suitability of the proceedings. It is also not accepted that the settlements in fact have the effect contended for by the Proposed Defendants.

(c) The issue has been dealt with in the January Ruling and the Proposed Defendants are re-litigating it.

4. Section 47B(5) of the Competition Act 1998 specifies that the Tribunal may make collective proceedings orders only in respect of claims which are eligible for inclusion in collective proceedings. Section 47B(6) explains that claims are only eligible for inclusion in collective proceedings if they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings.

5. Rule 79(2) of the Competition Appeal Tribunal Rules 2015[2] provides further guidance on the question of suitability, as follows:

> "(2) In determining whether the claims are suitable to be brought in collective proceedings for the purposes of paragraph (1)(c), the Tribunal shall take into account all matters it thinks fit, including—
>
> (a) whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;
>
> (b) the costs and the benefits of continuing the collective proceedings;
>
> (c) whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;
>
> (d) the size and the nature of the class;

[2] Unless otherwise stated, all references in this Reasoned Order to rules are to the Competition Appeal Tribunal Rules 2015.

(e) whether it is possible to determine in respect of any person whether that person is or is not a member of the class;

(f) whether the claims are suitable for an aggregate award of damages; and

(g) 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 1998 Act or otherwise."

6. Further, the Tribunal is required to consider the following matters under Rule 79(3) where there is any question about whether the proceedings should be opt-in or opt-out:

> "(3) In determining whether collective proceedings should be opt-in or opt-out proceedings, the Tribunal may take into account all matters it thinks fit, including the following matters additional to those set out in paragraph (2)—
>
> (a) the strength of the claims; 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."

7. The potential size and membership of the class are therefore relevant to a number of matters which the Tribunal is required to consider before granting a CPO, including whether claims might be more appropriately brought individually, rather than on a collective basis, taking into account fairness and efficiency, as well as anticipated costs and benefits.

8. I agree with the Proposed Defendants that the identities of the merchants is information which is both relevant and material to the question of suitability under Rule 79(2) and the determination under Rule 79(3) of whether the proceedings should be certified as opt-in proceedings. That is likely to be why CICC I relies on the interest shown by those merchants in the proposed opt-in proceedings. Where there is a credible basis to think that some of the merchants on which CICC I relies to demonstrate interest in the proposed proceedings may have settled their claims, and are therefore not eligible to be included in any proposed opt-in proceeding, the Tribunal is likely to find it helpful to know what the true position is.

9. It is correct, as CICC I says, that the Proposed Defendants are able to provide information about settlement levels themselves, and indeed they have done so in their response to the CPO application. However, the exercise which CICC I has carried out,

in contacting merchants with a view to "building a book" of potential opt-in class members, provides a different perspective, which may be useful for the Tribunal to consider at the joint CPO application hearing in April 2023. Given that CICC I expressly relies on the book building exercise to support its applications, it is difficult to see how it can dispute the relevance of the point. I agree with the Proposed Defendants that any question about the effect of settlements on the claims of relevant merchants can best be dealt with once the identities of the merchants are known.

10. In those circumstances, the position has changed since the January Ruling. There is no question of the January Ruling being re-litigated – and in fact the January Ruling records that I would not order further disclosure "at that stage", recognising that things might evolve.

11. I would be concerned if the disclosure of merchant identities should operate to discourage potential claimants to join these or any other proposed collective proceedings. However, that seems unlikely, given that the names will be disclosed into the confidentiality ring. In any event, the reliance by CICC I on the book building exercise and the questions that the Proposed Defendants now legitimately raise outweigh the general concerns that have been expressed by CICC I about the potential effect of ordering the names to be disclosed.

12. The Proposed Defendants have made it clear that they have no intention of contacting the merchants directly and, where they to do so, that would likely be a breach of Rule 102 and the Confidentiality Ring Order. I am satisfied that there is no real risk of misuse of the information.

13. Accordingly, I order CICC I to disclose to the Mastercard and Visa Proposed Defendants, into the confidentiality ring, the identities of the merchants in the January Table.

Ben Tidswell Made: 3 March 2023

Chair of the Competition Appeal Tribunal Drawn: 3 March 2023