



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

Case No: 1266/7/7/16

BETWEEN:

**WALTER HUGH MERRICKS CBE**

Class Representative

- v -

**(1) MASTERCARD INCORPORATED**

**(2) MASTERCARD INTERNATIONAL INCORPORATED**

**(3) MASTERCARD EUROPE SA (formerly Mastercard Europe S.P.R.L)**

Defendants

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**ORDER**

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**UPON** the Tribunal's Order of 14 October 2022 directing a trial of the Causation Issue and the Volume of Commerce Issue (as defined in that Order) (the "**VoC and Causation Trial**")

**AND UPON** the Class Representative's applications for:

- (a) the Tribunal to exercise its discretion to waive the requirements of a direction under Rule 57(1)(a) of the Competition Appeal Tribunal Rules 2015 ("**CAT Rules**") in respect of his failure to comply with the deadline to file and exchange factual witness statements by 17 March 2023 pursuant to paragraph 2(a) of the Order of the Tribunal dated 18 January 2023 or to file reply evidence by 19 April 2023 pursuant to paragraph 2(b) of the Order, as amended by the Order of the Tribunal dated 16 March 2023;
- (b) permission to submit a witness statement of fact under Rule 55(1)(g) and (2) of the CAT Rules, namely the first witness statement of Mr Leon Dhaene, served in draft on 30 May 2023 ("**Dhaene 1**"); and

- (c) permission to adduce evidence from an “industry expert” under Rule 21(1)(d) and/or Rule 55(1)(d) and (2) of the CAT Rules in the form of part of Dhaene 1 (together referred to as the “**Further Evidence Application**”)

**AND UPON** the Class Representative serving draft amendments to the Re-amended Collective Proceedings Claim Form on 5 June 2023 (the “**Draft RRACPCF**”)

**AND UPON** a Case Management Conference taking place on 6 June 2023 and a further Case Management Conference taking place on 22 June 2023

**AND UPON** hearing leading counsel for the Class Representative and leading counsel for the Defendants at each of the Case Management Conferences

**AND UPON** the Tribunal issuing a written judgment on the Further Evidence Application ([2023] CAT 39)

### **FURTHER EVIDENCE APPLICATION**

1. The Class Representative shall have permission to call Mr Dhaene as a witness of fact and in part as an industry expert at the trial, on condition that Dhaene 1 is refiled, with a list of the documents that Mr Dhaene has referred to or been referred to for the purpose of providing the witness statement.
2. The Further Evidence Application be granted, save that the following parts Dhaene 1 filed with the Further Evidence Application shall not be admitted as evidence:
  - (a) paragraphs 15–17;
  - (b) the last sentence of paragraph 59;
  - (c) the first sentence of paragraph 60;
  - (d) sub-paragraph 63(a), save to the extent it forms part of paragraph 62;
  - (e) sub-paragraphs 63(b)–(c);
  - (f) the last sentence of paragraph 68;
  - (g) paragraph 80;
  - (h) paragraph 83, unless the witness clarify that it is made on the basis of his knowledge of working at MasterCard and not on a general expectation from his study of the payment-cards and/or payment-services industry; and

- (i) paragraph 96, save for its first sentence.
3. The Class Representative re-file and re-serve Dhaene 1 amended in accordance with paragraphs 1–2 of this Order by 4 pm on 9 June 2023.
  4. Mastercard have permission to file and serve factual evidence responsive to Dhaene 1, if so advised, by 4 pm on 19 June 2023, save that Mastercard’s application for an extension of time to file and serve the witness statement of Mr Patrick van den Bergh by midnight on 20 June 2023 is granted.
  5. Mastercard search for the technical manuals referred to in para. 51 of the version of Dhaene 1 filed with the Further Evidence Application, and undertake a separate, search for documents in relation to the processing systems of Europay International S.A. from 1992–97 (with such searches to be limited to reasonable and proportionate searches, and limited to documents already collected), and provide any further disclosure by 4 pm on 23 June 2023.
  6. The Class Representative pay 50 percent of Mastercard’s costs of attending the hearing of the Further Evidence Application (but not including any costs incurred prior to the hearing of the Further Evidence Application), with the balance of the costs of the Further Evidence Application being costs in the case.

## **AMENDMENTS**

7. The Class Representative have permission to amend the Re-amended Collective Proceedings Claim Form in the form of the Draft RRACPCF. The Class Representative file and serve the Re-Re-Amended Collective Proceedings Claim Form by 4 pm on 7 June 2023 (the ‘RRACPCF’).
8. Mastercard have permission to file and serve a Re-Amended Defence, in the form of the document filed with the Tribunal on 13 June 2023, on condition that as regards Annex 1, Table 2, the amended weighted average interchange fee figures for 1992 and 1993 are not used for the purposes of cross-examination in the VoC and Causation Trial.

9. The Class Representative has permission to make consequential amendments to his Re-amended Reply by 4 pm on 20 June 2023, with liberty to apply for further time if necessary.
10. Mastercard have permission to file and serve factual evidence in respect of the amendments to the pleadings, if so advised, by 4 pm on 19 June 2023.

### **Supplementary expert report**

11. The Class Representative has permission to file a supplementary report from Mr Justin Coombs, specifically in relation to the weighted average interchange fees for 1994 contained in Annex 1, Table 2 of the Re-Amended Defence, by 3 July 2023.
12. Mastercard pay the costs of and occasioned by the supplementary report of Mr Coombs.

### **CAUSATION AND VOC TRIAL**

13. The Causation Issue to be determined at the VoC and Causation Trial is limited to the question whether there is a causal link as a matter of fact, without recourse to any counterfactual enquiry. The VoC and Causation Trial will not consider what the UK MIFs might have been had the EEA-MIFs been significantly lower.
14. The parties are to seek to agree a list of the questions to be addressed at the VoC and Causation Trial, drawn from the pleaded cases, and file (so far as an agreement is reached) an agreed list ahead of the trial.
15. The Class Representative and the Defendants each have permission to file and serve opening submissions of up to 60 pages in length for the VoC and Causation Trial. The Class Representative is to file and serve his opening submissions by 4 pm on 26 June 2023, and Mastercard is to file and serve its opening submissions by 4 pm on 30 June 2023 (and paragraph 2(f) and (g) of the Tribunal's order drawn on 18 January 2023 is amended accordingly).

### **COSTS**

16. Save as ordered otherwise, costs in the case.

**The Honourable Mr Justice Roth**  
Chair of the Competition Appeal Tribunal

Made: 3 July 2023  
Drawn: 3 July 2023