



IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1517/11/7/22 (UM)

1266/7/7/16

BETWEEN:

UMBRELLA INTERCHANGE FEE CLAIMANTS

- v -

UMBRELLA INTERCHANGE FEE DEFENDANTS

(the “Merchant Interchange Fee Umbrella Proceedings”)

AND BETWEEN:

WALTER HUGH MERRICKS CBE

Class Representative

- v -

(1) MASTERCARD INCORPORATED

(2) MASTERCARD INTERNATIONAL INCORPORATED

(3) MASTERCARD EUROPE S.P.R.L.

Mastercard Defendants

(the “Merricks Collective Proceedings”)

ORDER

UPON paragraph 9 of the Future Conduct Order providing that a seven-week trial (“**Trial 2**”) to address acquirer and retail pass-on in the Merchant Interchange Fee Umbrella Proceedings and the Merricks Collective Proceedings shall commence in October or November 2024

AND UPON the letter from the Tribunal dated 10 August 2023 requesting that the parties liaise and provide the Tribunal with their proposed common dates for Trial 2, to fall within the windows of 11 November to 20 December 2024 and 17 to 28 March 2025

AND UPON reading the written evidence and submissions filed by (i) the Umbrella Interchange Fee Claimants represented by Humphries Kerstetter LLP, Scott+Scott UK LLP and Stephenson Harwood LLP, as well as Primark, Ocado and the Allianz claimants (together, excluding those represented by Humphries Kerstetter LLP, the “**Active Claimants**”); (ii) the Umbrella Interchange Fee Defendants (including, for the avoidance of doubt, the Mastercard Defendants) (together with the Active Claimants, the “**Active Parties**”) and (iii) the Class Representative

AND UPON hearing counsel for the same at a hearing on 23-25 May 2023

AND UPON the Tribunal handing down its Ruling (Evidence on Pass-on) [2023] CAT 60 on 5 October 2023 (the “**Ruling**”)

AND UPON the Active Parties and the Class Representative having agreed to the terms of this Order

AND UPON this Order being binding upon the Class Representative and all parties in the Merchant Interchange Fee Umbrella Proceedings (together, the “**Parties**”), including for the avoidance of doubt (i) those Claimants in the Merchant Interchange Fee Umbrella Proceedings whose claims are stayed pursuant to an Order of the Tribunal and (ii) those Claimants in the Merchant Interchange Fee Umbrella Proceedings who are not Active Claimants but whose claims are not stayed by Order of the Tribunal

IT IS ORDERED THAT:

RELEVANT FACTORS AND SECTORS

1. The Active Parties’ economics experts (the “**Experts**” and each an “**Expert**”) are to consider, seek to agree, or determine differences on:

- (a) A list of potentially relevant factors which might affect the fact or rate of pass-on by merchants (the “**Relevant Factors**” and each a “**Relevant Factor**”) and which therefore need to be tested for;
- (b) The options for gathering evidence to determine the causative effect of the Relevant Factors on the fact or rate of pass-on, by reference to the potential “top down” and “bottom up” options (as those terms are described in the Ruling) and the practical considerations that apply in this case; and
- (c) A list (of a proportionate and workable length) of sectors (the “**Relevant Sectors**” and each a “**Relevant Sector**”), by reference to the potential for the Relevant Factors to have different causative effects on pass-on rates in those Relevant Sectors.

METHODOLOGIES

- 2. The Parties may not adduce evidence in the proceedings that is, or is based on, simulation models.
- 3. The Experts shall assess and consider:
 - (a) Whether any pre-existing studies of pass-on might assist in resolving the pass-on issues and how such materials might be deployed for this purpose; and
 - (b) The availability and suitability of publicly available data and the potential use of industry experts in relation to each Sector.
- 4. Any Expert who considers that: (a) an econometric exercise which is meaningful can be carried out on a set of available data; and/or (b) pre-existing studies of pass-on are relevant as a proxy for the pass-on rate of the Overcharge, shall be permitted to seek the Tribunal’s permission to carry out such an econometric exercise and/or rely on such studies, provided that Expert sets out what is contemplated and why before such evidence will be permitted.
- 5. The Experts shall consider whether a sampling approach would be the most appropriate way to obtain evidence of the causative effect of a Relevant Factor or in any Relevant Sector on pass-on.

6. Where, following the process set out at paragraphs [1] and [3] above, any Expert considers that a sampling approach would be appropriate, they shall seek to agree with the other parties' Experts the persons or classes of person from whom it would be appropriate to collect data by sample for that purpose and the questions to be posed to the persons in any such sample.
7. The Experts are to further consider, seek to agree, or determine differences on:
 - (a) The relevance and utility of pricing strategies;
 - (b) Supplier pass-on (as further detailed at paragraph [13] – [14] below);
 - (c) The use of a perfect competition framework to identify and test for Relevant Factors; and
 - (d) Any other controversy which the Experts think is material.

JOINT EXPERT REPORTS

8. By **4pm on 15 December 2023**, the Experts shall produce a joint expert report setting out with precision those matters in paragraphs [1-7] above that are agreed.
9. By **4pm on 22 December 2023**, the Experts shall produce a joint expert report identifying those matters in paragraphs [1-7] above that are not agreed and a short summary of each Expert's position in respect of each area of disagreement.

QUESTIONNAIRE

10. Insofar as the information has not already been gathered from the Umbrella Interchange Fee Claimants or otherwise become available to the parties, the Parties shall agree a draft questionnaire (the "**Draft Questionnaire**") to be sent to the Umbrella Interchange Fee Claimants covering, for each Claimant in respect of the period covered by their claim:
 - (a) The Relevant Sector(s) to which each Claimant belonged during the claim period;

- (b) Whether, and if so for what period, each Claimant's prices included an express surcharge for payment by debit and/or credit card;
 - (c) The proportion of payments processed by each Claimant by debit card and/or credit card, on an annualised basis over the claim period;
 - (d) The identity of each Claimant's acquiring bank(s) throughout the claim period;
 - (e) Whether each Claimant's agreement with their acquiring bank for the MSC was on a blended fee, Cost+ or Cost++ basis; and
 - (f) Any other objective questions the Experts agree would be relevant and suitable for inclusion in the Draft Questionnaire.
11. By 22 December 2022, the Parties shall submit the Draft Questionnaire (showing the Parties' alternative proposals if necessary) to the Tribunal for approval.

ACQUIRER PASS-ON

12. To the extent they have not already done so, the Parties shall approach Barclaycard, Global Payments and Worldpay (each a relevant "**Acquirer**") and seek to obtain from each such Acquirer, data concerning: (i) blended rates charged to a representative sample of Retailers; and (ii) the corresponding MIFs charged to that Acquirer over the period covered by the Umbrella Interchange Fee Claimants' claims.

SUPPLIER PASS-ON

13. By 21 November 2023, the Mastercard Defendants' Expert shall provide to the other Parties' Experts:
- (a) A list of factors which the Mastercard Defendants' Expert considers relevant to the pleaded issue of supplier pass-on; and
 - (b) The methodology which the Mastercard Defendants' Expert proposes for the purposes of testing the impact of the factors identified in paragraph [13(a)] above on supplier pass-on and the evidence required to do so,

(the "**Supplier Pass-On Proposal**").

14. To the extent that the Supplier Pass-On Proposal is agreed by the other Parties' Experts, this is to be recorded in the joint expert report directed in paragraph [8] above. To the extent it is not agreed, the other parties' Experts shall respond and identify any points on which they disagree with the Mastercard Defendants' Expert and explain the reasons for any such disagreements in the joint expert report directed in paragraph [9] above.

FURTHER EVIDENTIAL HEARING

15. A two-day evidential hearing shall be listed to take place on 10 – 11 January 2024 before the Tribunal constituted for Trial 2 (the President, Mr Tidswell and Professor Waterson) at which the Experts shall give evidence to be sworn and give evidence on the matters covered by the reports described at paragraphs [8 and 9] above (the “**Further Evidential Hearing**”). The Tribunal may make further directions as to whether it would be assisted by hearing the evidence of the experts concurrently.
16. The Parties shall liaise to agree a proposed agenda for the Further Evidential Hearing which shall be prepared by the Umbrella Interchange Fee Claimants and filed by **4pm on 3 January 2024**.
17. The Parties shall liaise to agree hearing bundles (and, if appropriate, a separate authorities bundle) which shall be prepared by the Umbrella Interchange Fee Claimants and filed and served by **4pm on 3 January 2024**. The electronic bundles should be in single pdf form and should be indexed, bookmarked, paginated and fully searchable.
18. Skeleton arguments, in compliance with the page limits in paragraph 3 of the Competition Appeal Tribunal’s Practice Direction 1/2021, shall be filed and served by **4pm on 3 January 2024**.
19. By **2pm on 5 January 2024**, the Umbrella Interchange Fee Claimants shall file four hard copies of the hearing bundles and the authorities bundle (if applicable).
20. By **2pm on 5 January 2024**, the Parties shall file four hard copies of their respective skeleton arguments.

MERRICKS COLLECTIVE PROCEEDINGS

21. The Class Representative shall participate in the process set out above and the Further Evidential Hearing with a view to participating in Trial 2, unless the Tribunal makes a direction in due course that a separate trial for the resolution of the pass-on issues in the Merricks proceedings is appropriate.

NON-STAYED NON-ACTIVE CLAIMANTS

22. To the extent they have not already done so, the Non-Stayed Non-Active Claimants are to notify the Tribunal as to whether they wish to participate in Trial 1 or Trial 2 or apply to be stayed on the usual terms by **4pm on 22 December 2023**.

OTHER MATTERS

23. Costs in the Merchant Interchange Fee Proceedings and the Merricks Collective Proceedings.
24. Liberty to apply.

Sir Marcus Smith
President of the Competition Appeal Tribunal

Made: 5 December 2023
Drawn: 5 December 2023