



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

Case No: 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

(the “Merricks Class Representative”)

- v -

**(1) MASTERCARD INCORPORATED**

**(2) MASTERCARD INTERNATIONAL INCORPORATED**

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

Mastercard Defendants

(the “Merricks Collective Proceedings”)

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**REASONED ORDER**  
**(POSITIVE CASES)**

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**UPON** the Order of the President made on 23 December 2022 and drawn on 13 January 2023 setting out directions as to the future conduct of proceedings (“Future Conduct Order”) in the Merchant Umbrella Interchange Fee Proceedings (“Umbrella Proceedings”)

**AND UPON** the Order of the President made on 30 January 2024 and drawn on 7 February 2024 setting out directions to Trial 2 in the Umbrella Proceedings (“Directions to Trial 2 Order”)

**AND UPON** reading the letters and supporting materials provided by the SSH, Allianz and Primark Claimants and the Mastercard Defendants, dated 8 July 2024, and the responses of Primark Claimant, the Merricks Class Representative and the Visa Defendants each dated 9 July 2024

**IT IS ORDERED THAT:**

1. Paragraph 3 of the Directions to Trial 2 Order is varied:
  - (a) to require each party to set out its positive case as to the facts and extent (if any) of merchant pass-on by **4pm on 7 August 2024**; and
  - (b) vacate the date for each party to set out its positive case as to the facts and extent (if any) of acquirer pass-on, the date for which is to be set down by further order.

**REASONS**

1. The trial on pass-on issues in these Umbrella Proceedings (“Trial 2”) is scheduled to start on 11 November 2024 and run through to 19 December 2024. There is then a week set aside for closing arguments from 31 March 2025. However, it is possible that, as a result of the progression of acquirer pass-on issues being delayed and being likely to be combined with closings, Trial 2 will be a week shorter and will in fact commence a week later, on 18 November 2024.
2. The timetable from today until the start of Trial 2 is very tight. Under the terms of the Directions to Trial 2 Order, Positive Cases are due on 19 July 2024, Responsive Cases are due on 20 September 2024 and a pre-trial review is to take place in the week of 14 October 2024.

3. A number of the parties now seek an extension of time for the filing and service of Positive Cases. Specifically:
  - (a) Mastercard and the SSH claimants seek an extension to 30 August (with Mastercard putting forward alternative proposals for staggered Positive Cases at earlier dates).
  - (b) Mr Merricks proposes an extension to 9 August 2024 for the merchant pass-on Positive Cases.
  - (c) Allianz and Primark Claimants both seek extensions to 2 August 2024.
4. The main reasons put forward by most parties for the extensions relate to the timing for the provision of usable data to the experts for the purposes of econometric analysis of price, cost and other matters from a selection of claimant entities. Work has been taking place over a number of months to secure, clean and process the data for this purpose. That has taken longer than expected (and indeed some of the data is still not in all respects fully available as usable data) and the period in which the experts have had to work on the data has therefore been significantly compressed. Mastercard's expert, Ms Webster, maintains that a minimum period of eight weeks is required to be able to produce results from data of this type, with that time period becoming longer where (as here) there are multiple sets of data to work on simultaneously.
5. Visa opposes any extension, on the basis that an extension would either unfairly compress the time available for preparation of their Responsive Case or would seriously threaten the trial date.
6. It has always been the Tribunal's position that the presentation of claimant specific material would only be permitted if it could be adduced without threatening the date for Trial 2. For example, in the Tribunal's Ruling on Evidential Pass-on, [2023] CAT 60 at footnote [13], the Tribunal stated that "*general questions of proportionality and the controlled use of public resources means that the evidence must be made to fit the very generous but not unlimited time that has been allocated for Trial 2.*" It is unfortunate that the process of securing and cleaning the data has been delayed to the

extent that the experts have less time than they say they need to complete the work. That seems also partly to be a function of the characteristics of some of the data sets, where continued interaction between the experts and the relevant claimants is required in order to make proper use of the data. However, the consistent position of the Tribunal has been that the parties need to find a way to make the evidence gathering process fit the trial date, not the other way round.

7. In Mastercard's case, it is said by Ms Webster that there is also a resource constraint because she is required to consider and opine on each analysis undertaken. Mastercard has recently decided to instruct Ms Webster instead of (as opposed to alongside) its previous expert, Dr Niels. It was made plain by the Tribunal that it was open to Mastercard to have permission for two experts, but that was not the course chosen by it.
8. It is in my view possible, within the timetable to Trial 2, to allow an extension of time for a period of a little over two weeks, in order to allow the experts more time to deal with the late arrival of usable data. I consider that to be an appropriate extension. There is some uncertainty about when the data provided by each claimant to the experts has arrived in usable form, given that there remain open questions about some of the data. However, as far as I can ascertain, a great deal of the data from the majority of the claimant entities in question was available and capable of manipulation by the experts by mid-June, and some of the data was available well before then. An extension to 7 August 2024 is therefore in my view sufficient to reflect a proper balance between: (1) the experts having time to work on the data, recognising that it may be necessary for them to select and prioritise some data sets over others; (2) there being a suitable period of time between Positive Cases and Responsive Cases to allow the latter to be prepared properly; and (3) there being a suitable period between Responsive Cases and Trial 2, to allow adequate preparation for Trial 2. I am therefore granting an extension of time for the filing and service of Positive Cases to 7 August 2024.
9. An informal CMC will take place on 19 July 2024 at 2 pm to discuss any consequential changes to the timetable. It seems inevitable that the date for filing and service of Responsive Cases will need to be adjusted in light of this Order, and that new dates will be set after the informal CMC. The hearing scheduled to take place on 30 or 31

July 2024 will not now take place. The parties should be ready at the informal CMC on 19 July 2024 to discuss the process for any disclosure or other applications which might be required once they have sight of the Positive Cases of the other parties. The Tribunal intends to set a date for a CMC in late September or early October to discuss the shape of Trial 2 and any other issues that require attention at that stage.

10. Paragraph 1 mentions the possibility of acquirer pass-on issues being heard in 2025, which is as yet undecided. I understand that the relevant acquirer data has not yet been obtained from third parties and provided to the parties' experts for analysis. There is no certainty at this stage about when this will occur. The date for filing Positive Cases on acquirer pass-on issues has been vacated by the Order and is to be considered along with the other changes to the timetable discussed at paragraph 9 above. The parties should be ready at the informal CMC on 19 July 2024 to address the Tribunal on any changes to the timetable that could be accommodated if acquirer pass-on issues were to be heard in 2025, preferably on an agreed basis.

**Mr Ben Tidswell**

Chair of the Competition Appeal Tribunal

Made: 11 July 2024

Drawn: 12 July 2024