



IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1288/5/7/18

BETWEEN:

SAINSBURY'S SUPERMARKETS LTD

Claimant

- v -

(1) VISA EUROPE SERVICES LLC
(2) VISA EUROPE LTD
(3) VISA UK LTD

Defendants

(the "Proceedings")

ORDER

UPON the joint application of the Parties to the Proceedings that, pursuant to Rules 53(2)(h), 101(1) and (3) of the Competition Appeal Tribunal Rules 2015, documents containing confidential information which are disclosed or filed with the Tribunal in the Proceedings, be subject to the terms of this Order

AND UPON the Parties agreeing that documents containing confidential information shall be marked up to indicate either where they contain the Parties' confidential information or that the entire document is confidential

AND UPON such confidentiality markings being without prejudice to (i) any disputes as to whether confidential treatment should be accorded which may need to be determined by the Tribunal; and (ii) the Parties' right to make further requests for confidential treatment

AND UPON the Tribunal considering that an Order is appropriate to deal efficiently with confidentiality issues in the Proceedings

AND UPON the Parties having agreed to the terms of this Order

IT IS ORDERED BY CONSENT THAT:

1. For the purposes of this Order:
 - 1.1. **“Confidential Documents”** are documents containing Confidential Information (whether in whole or in part). For the avoidance of doubt, any notes, copies, reports, submissions or other documents containing, reproducing or reflecting the content of Confidential Documents are themselves Confidential Documents unless all Confidential Information contained in them has been redacted. Documents that use Confidential Information in Confidential Documents (for example, to provide an aggregation of Confidential Information) but which do not reveal the content of Confidential Information shall not be Confidential Documents.
 - 1.2. **“Confidential Information”** means (i) information the disclosure of which would be contrary to the public interest; (ii) commercially sensitive information, the disclosure of which by one Party to another and/or to third parties could significantly harm the legitimate business interests of the undertaking(s) to which it relates (which, for the avoidance of doubt, may include undertaking(s) other than the Designating Party); and/or (iii) information relating to the private affairs of an individual, the disclosure of which could significantly harm that individual's interests. Confidential Information shall exclude information which is, at the time of disclosure, already published or generally available to the public or, after the time of disclosure, is published or becomes generally available to the public, other than through the act or omission of a receiving Party or a Permitted Person (as defined below).
 - 1.3. **“Designating Party”** shall mean, in relation to any document, the Party that disclosed or filed that document.
 - 1.4. **“External Permitted Person”** shall mean a Permitted Person who is an external legal or other professional adviser to a Party in the Proceedings

and who is listed in Annex A and has provided to the Tribunal an undertaking in the form set out in Annex B.

1.5. **“Internal Permitted Person”** shall mean a Permitted Person who is an internal legal adviser to a Party in the Proceedings and who is listed in Annex A and has provided to the Tribunal an undertaking in the form set out in Annex B.

1.6. **“Party”** shall mean any party to the Proceedings.

1.7. **“Permitted Persons”** shall mean those persons listed in Annex A (as amended from time to time pursuant to the terms of this Order and/or by the Tribunal) that have provided to the Tribunal signed undertakings in the form set out in Annex B. Permitted Persons include Internal Permitted Persons and External Permitted Persons. Each person so listed shall be a Permitted Person in respect of all Confidential Documents except that, save as otherwise agreed in writing, an Internal Permitted Person advising the Defendants shall not be permitted to receive or to see Confidential Information which relates to Mastercard Incorporated, Mastercard International Incorporated, Mastercard Europe SA, or Mastercard/Europay UK Limited. For the avoidance of doubt, such an Internal Permitted Person is permitted to receive and to see Confidential Information relating to the Claimant.

1.8. **“Tribunal”** shall mean the Competition Appeal Tribunal.

2. This Order shall apply to all documents disclosed or filed with the Tribunal in the Proceedings.

3. Confidential Information and Confidential Documents shall be provided by one Party to another only in accordance with this Order.

Designation of Confidential Documents

4. Any Confidential Document(s) shall be designated as such by the Party that discloses or files it in the Proceedings. Any document which is designated as

Confidential may be subject to challenge in accordance with paragraph 8 of this Order.

5. Each Party shall be responsible, in respect of any document containing Confidential Information belonging to them which is disclosed or filed with the Tribunal, for labelling and highlighting any Confidential Documents and Confidential Information in the following ways:

5.1. Where possible and appropriate in view of its format, each Confidential Document shall be marked as “Confidential” on each page of the document and will identify the Party or Parties to which the Confidential Information in that Confidential Document relates.

5.2. Any text and/or extract which contains Confidential Information will be highlighted save to the extent that the document is confidential in its entirety in which event the document will be identified as such.

5.3. To the extent that any Confidential Document is included in a hearing bundle, the bundle index shall state which documents are Confidential Documents and identify the Party or Parties to which the Confidential Information in those Confidential Documents relates.

6. For the avoidance of doubt, a designation under paragraphs 4 and 5 above may be made by the Designating Party after a document is disclosed or filed in the Proceedings.

7. For the avoidance of doubt, any documents disclosed or filed with the Tribunal in the Proceedings (otherwise than under the confidentiality arrangements described at paragraph 22 below) prior to the date of this Order that have been identified by the Designated Party as confidential will constitute Confidential Documents.

Challenge to Confidential Designation

8. The designation of a Confidential Document by a Party may be challenged in accordance with the terms below:

- 8.1. If a Party wishes to challenge the designation of a Confidential Document, that Party shall do so by providing written notice to the Designating Party. The Parties shall make reasonable endeavours to ensure that any such challenges are brought, insofar as possible, in manageable batches and with reasonable expedition.
- 8.2. In the event that a challenge is made pursuant to paragraph 8.1, the Designating Party may respond in writing to the challenge, providing a written explanation as to why the document has been designated confidential, or confirming that the designation will be modified. Such response shall be given as soon as reasonably possible but in any event within seven (7) days of receipt of the notice.
- 8.3. Absent a response in accordance with paragraph 8.2, each document in question shall be deemed not to be a Confidential Document after the expiry of the seven (7) day period, or any extension to the seven (7) day time limit that has been agreed in accordance with paragraph 8.5.
- 8.4. If the Party challenging confidentiality wishes to maintain its challenge following receipt of the Designating Party's response pursuant to paragraph 8.2, it shall provide written notice to the Designating Party setting out its reasons for doing so within seven (7) days of receipt of the Designating Party's response. The Party challenging confidentiality may apply to the Tribunal for determination of whether or not the document qualifies as a Confidential Document. Any such application must be made as soon as reasonably possible but in any event within fourteen (14) days following receipt of the Designating Party's response pursuant to paragraph 8.2. For the avoidance of doubt, a document in respect of which an application is made shall continue to be designated a Confidential Document until such time as the challenge is upheld by the Tribunal.
- 8.5. The deadlines in this paragraph 8 may be extended by agreement between the challenging Party and Designating Party. Consent to a request for an extension shall not be unreasonably withheld.

- 8.6. For the avoidance of doubt, to the extent that the Tribunal asks for submissions as to why a document qualifies as a Confidential Document, it will be a matter for the Designating Party to address this.

Disclosure and Inspection of Confidential Documents

9. Subject to this Order, the Party receiving Confidential Documents shall permit those documents to be inspected only by the Permitted Persons in respect of that document and only on the basis that:

- 9.1. the recipient Permitted Person has provided to the Designating Party a signed copy of the Undertaking at Annex B;

- 9.2. the Confidential Documents will be treated by each such Permitted Person as confidential and will be used by each such person solely for the purpose of the proper conduct of the Proceedings; and

- 9.3. no such Permitted Person will, save as expressly provided for below at paragraph 10, discuss, disclose, copy, reproduce or distribute any Confidential Document or any Confidential Information contained therein.

10. Nothing in this Order shall prohibit any such Permitted Person from:

- 10.1. making notes or copies of, or preparing reports, submissions or other documents concerning, containing or reflecting any Confidential Document or its content (which notes, copies, reports, submissions or other documents would themselves be Confidential Documents); and/or

- 10.2. disclosing any Confidential Document to any other person who is a Permitted Person in respect of that document, or any Confidential Information to any other person who is a Permitted Person in respect of a document containing such information,

provided always that such actions are effected solely for the purpose of the proper conduct of the Proceedings and that no Confidential Information shall be

otherwise directly or indirectly disclosed in the conduct of the Proceedings beyond the relevant Permitted Persons.

11. During any hearing in respect of the Proceedings, each Party wishing to refer to a Confidential Document shall be responsible for indicating to the Tribunal that the document contains Confidential Information and asking the Tribunal to put in place arrangements for the maintenance of any such Confidential Information.
12. Nothing in this Order shall prevent or prohibit a receiving Party from taking any action (including in particular disclosing Confidential Information and/or Confidential Documents to a person who is not a Permitted Person and/or referring to such documents or information in open court) which has been authorised in writing by the Designating Party or which a Party in receipt of Confidential Documents is required to take by applicable law or by a court of competent jurisdiction.

Addition of Permitted Persons

13. A Party seeking to designate an additional person as a Permitted Person must:
 - 13.1. request permission from the other Party in writing for the additional person to be designated as a Permitted Person and added to Annex A;
 - 13.2. provide in such request details of that proposed Permitted Person's role and an explanation of why his or her designation as a Permitted Person is necessary;
 - 13.3. state in such request if that person is to be an Internal Permitted Person or an External Permitted Person; and
 - 13.4. upon the other Party's agreement to the designation of the additional Permitted Person, provide to the Tribunal and the other Party with a copy of the Annex B Undertaking signed by the proposed Permitted Person and an amended version of Annex A which adds that Permitted Person to Annex A.

14. The Party receiving the request that the additional person shall be designated as a Permitted Person shall confirm within three (3) days of the request pursuant to paragraph 13.1 whether it consents to the additional person being designated as a Permitted Person. Such consent shall not be unreasonably withheld.
15. If the Party receiving the request refuses consent to the additional person being designated a Permitted Person in accordance with paragraph 14, then it must provide written reasons for why consent is refused.
16. If, in relation to any proposed additional Permitted Person who is an external adviser to the Party making the request or a member of its internal legal team, the Party receiving the request neither confirms nor refuses consent in accordance with paragraphs 14 and 15 above, then following the expiry of three (3) days, the additional person shall be designated as a Permitted Person.
17. If, in relation to any proposed additional Permitted Person who is not an external adviser to the Party making the request, nor a member of its internal legal team, the Party receiving the request neither confirms nor refuses consent in accordance with paragraphs 14 and 15 above, then following the expiry of seven (7) days, the additional person shall be designated as a Permitted Person.
18. If there are any disputes which cannot be resolved by the Parties, the Party seeking to include the additional person as a Permitted Person may apply to the Tribunal to have the issue determined.

General Provisions

19. The production of further copies of the Confidential Documents shall be limited to those required by the Permitted Persons to whom they are disclosed.
20. The Parties may agree and/or any Party may apply to the Tribunal to vary the terms of this Order, remove any document from the category of Confidential Documents, or vary the lists of Permitted Persons in Annex A.

21. Nothing in this Order or the terms of the Annex B undertaking shall prevent or prohibit any Permitted Persons (as may be extended from time to time) from acting in other interchange fee related proceedings.
22. Nothing in this Order shall override the confidentiality terms applicable in previous proceedings between the Parties in relation to the use of documents in those proceedings, including the provisions of: (i) the Order of Mr Justice Hamblen dated 13 March 2015 which governed the confidentiality arrangement for, inter alia, Sainsbury's claim against Visa (Claim No. 2015-259) in the High Court; (ii) the Order of the Lord Justice Flaux dated 27 March 2018 which governed the confidentiality arrangement for, inter alia, the Sainsbury's v Visa appeal (A3/2017/3493) in the Court of Appeal; and (iii) the Confidentiality Agreement dated 16 July 2019 which governed the confidentiality arrangement for, inter alia, the Sainsbury's v Visa appeal (UKSC 2018/0154) in the Supreme Court.
23. Costs in the case.
24. There shall be general liberty to apply.

The Hon Mr Justice Michael Green
Chairman of the Competition Appeal Tribunal

Made: 8 June 2021
Drawn: 11 June 2021

Annex A

Part 1: Permitted Persons for the Claimant

Internal Permitted Persons
Nicolas Grant, Sainsbury's Supermarkets Ltd
Edward Anderson, Sainsbury's Supermarkets Ltd
Judith Bonné, Sainsbury's Supermarkets Ltd
Amy McMeekin, Sainsbury's Supermarkets Ltd
Timothy Fallowfield, Sainsbury's Supermarkets Ltd
External Permitted Persons
<i>Counsel</i>
Mark Brealy QC, Monckton Chambers
Derek Spitz, One Essex Court
<i>External solicitors (Morgan, Lewis & Bockius UK LLP)</i>
Frances Murphy
Joanna Christoforou
Leonidas Theodosiou
Michael Zymler
Gabrielle Martin
Aaron Nemeti
<i>External economists (CEG Europe)</i>
Nils von Hinten Reed
Mark Conaty
Alison Sprague
Loes Van Bohemen
Wouter Hollenberg
Robert Tandell
Cem Ermagan

Part 2: Permitted Persons for the Defendants

Internal Permitted Persons
Monika Chleblowska-van Loon, Visa Europe Limited
Adam Eaton, Visa Inc.
Julia Holtz, Visa Europe Limited
Robin Morton-Fincham, Visa Europe Limited
Rebecca Moore, Visa Europe Limited
Jo-Ann Quintana, Visa Inc.
Verity Reynolds, Visa Europe Limited
Emma Slatter, Visa Europe Limited
Hugh Stokes, Visa Europe Limited
David Winfield, Visa Europe Limited
External Permitted Persons
<i>Counsel</i>
Isabel Buchanan, Blackstone Chambers
Brian Kennelly QC, Blackstone Chambers
Daniel Piccinin, Brick Court Chambers
Jason Pobjoy, Blackstone Chambers
Laurence Rabinowitz QC, One Essex Court
<i>External solicitors (Linklaters LLP)</i>
Benja Arnott
Joanne Brodie
Tom Cassels
Alastair Cotterell
Anna Fava
Alexander Fawke
Anthony Forde
Airlie Goodman

Fiona Garrahan
Karris Graham-Moore
Ankit Handa
Madison Hardwicke-Hunter
Grace Harper (née Dickinson)
Lucy Hodgkinson
Jasmine Olomolaiye
Charlotte Sallery
Jason Shardlow-Wrest
Benjamien Smolders
Michael Smyth
Rachel To
Sarina Williams
Cheryl Yu
<i>External solicitors (Milbank LLP)</i>
Cormac Alexander
Michael Bingham
Adrian Embarba Reina
Hollie Fenwick
Isabella Heber
Emily Henderson
Emma Hogwood
Sophie Lawrence
Mark Padley
Julian Stait
<i>External experts (AlixPartners LLP)</i>
Safter Burak Darbaz
Felix Hammeke

Derek Holt
Atanas Kodzhamanov
Polyxeni Chardouveli
Darrell Lim
<i>External experts (Berkeley Research Group (UK) Ltd)</i>
Adam Garside
Colm Gibson
Benjamin Johnson
Bethany Kirkpatrick
Daniel Ryan
<i>External experts (CRA International, Inc.)</i>
Ugur Akgun
Emilie Bartels
Javier Bruges
Gaber Burnik
Oliver Latham
Hasnain Khaki
Edward Selway
Robert Stillman
Chara Tzanetaki
Dustin Walpert
<i>External advisers to the VE Member Representative (Allen & Overy LLP)</i>
Russell Butland
Rachel Donelan (née Penfold)
Jonathan Hitchin
Robert Steele
<i>VE Member Representative</i>
Marco Bolgiani

Adrian Phillips
Kim Rosenbaum
<i>E-Disclosure Providers</i>
Epiq eDiscovery Solutions
Epiq Systems Ltd

Annex B
Confidentiality Undertaking

The terms used but not defined in this document shall have the meaning given in the Order for the proceedings attached to, or accompanying, this document (the “**Order**”).

I, [NAME], of [ORGANISATION], being an [*delete as applicable*: Internal / External] Permitted Person [and regulated so far as my professional conduct is concerned by [*insert regulatory body*]], undertake to the Parties and to the Tribunal that:

1. I have read a copy of the Order and understand the implications of the Order and the giving of this undertaking;
2. I will treat all Confidential Documents and/or any information contained in such Confidential Documents made available to me for the purpose of the Proceedings as secret and confidential and will use any such Confidential Documents and/or information only for the purpose of the proper conduct of the Proceedings;
3. Except as expressly contemplated by the Order, I will not use, disclose, discuss, copy, reproduce or distribute any such Confidential Documents and/or their content or authorise, enable or assist any person to do so;
4. I will take all such steps as may be necessary or expedient on my part to comply with any request made under or pursuant to the terms of the Order; and
5. I will otherwise comply with the terms of the Order and/or, as the case may be, take all steps within my power to ensure that the terms of the Order are complied with (including by not disclosing, other than to other Permitted Persons, any Confidential Documents and/or any information contained in such Confidential Documents, or assisting or enabling any person to do so).

PROVIDED ALWAYS that nothing in this document shall prevent or prohibit me from taking any action which has been authorised in writing by the Designating Party or which I am required to take by applicable law or by a court of competent jurisdiction.

Signed:

Dated: