COMPETITION APPEAL TRIBUNAL

NOTICE OF AN APPLICATION TO COMMENCE COLLECTIVE PROCEEDINGS UNDER SECTION 47B OF THE COMPETITION ACT 1998

CASE NO. 1444/7/7/22

Pursuant to rule 76(8) of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) ("the Rules"), the Registrar gives notice of the receipt on 1 June 2022 of an application to commence collective proceedings, under section 47B of the Competition Act 1998 ("the Act"), by Commercial and Interregional Card Claims II Limited ("CICC II") ("the Applicant/Proposed Class Representative") against: (1) Visa Inc.; (2) Visa International; (3) Visa Europe Services LLC; (4) Visa Europe Limited; and (5) Visa UK Ltd (together, "Visa" or "the Proposed Defendants"). The Applicant/Proposed Class Representative is represented by Harcus Parker Limited, 7th Floor, Melbourne House, 44-46 Aldwych, London, WC2B 4LL (Reference: Thomas Ross/Pierre Welch/Jeremy Robinson).

The Applicant/Proposed Class Representative makes an application for a collective proceedings order permitting it to act as the class representative bringing opt-out proceedings on behalf of all merchants which have accepted Visa payment cards at any time between the period 1 June 2016 and continuing to date of judgment in the claim ("the Application"). The definition of the proposed class is more fully explained below.

The proposed collective proceedings would combine multiple stand-alone claims under section 47A of the Act caused by the Proposed Defendants' breaches of statutory duty in infringing section 2(1) of the 1998 Act ("the Chapter I Prohibition") and/or Article 101 of the Treaty on the Functioning of the European Union ("TFEU"). Although these are stand-alone proceedings, the proposed collective proceedings rely on a final decision and two commitments decisions by the European Commission ("the Commission") and the judgments of the European Courts and the UK Court of Appeal and Supreme Court which according to the Application, have determined that collusive arrangements which are substantially similar to those at issue in these proceedings infringe or may infringe UK and European competition law.

The Applicant/Proposed Class Representative

The Applicant/Proposed Class Representative is a company incorporated in the United Kingdom as a Special Purpose Vehicle, with a registered address of 7th Floor, Melbourne House, 44-46 Aldwych, London, WC2B 4LL. The director of the Proposed Class Representative is Mr. Stephen Allen.

The Respondents/Proposed Defendants

It is contended that the Proposed Defendants are all part of a single economic entity and form an undertaking for the purposes of UK and EU competition law and that each of the members of the undertaking is jointly and severally liable for all of the loss and damage caused to the proposed class.

The Claims

The claims relate to two separate categories of Merchant Interchange Fees ("MIF"). First, the MIF applicable to consumer card inter-regional transactions concluded at merchants located in the EEA with consumer debit, credit and prepaid cards issued by an issuer located outside the EEA, which is described

as the "Inter-regional MIF". Second, the MIF applicable to commercial card transactions in the UK and EEA, whether UK MIF, Intra-regional MIF and/or inter-regional MIF, which is described as the "Commercial Card MIF". A "Merchant" is defined as a person that accepts payments by means of payment cards and who has a contractual relationship, typically known as a Merchant Services Agreement, with an Acquirer that provides services to the Merchant enabling the acceptance of a Visa payment card at that Merchant's point of sale in accordance with the applicable rules laid down in the Visa Scheme Rules ("the Visa Scheme"), and in consideration of a payment of a Merchant Service Charge ("MSC") by the Merchant to the Acquiring bank or financial institution.

The Applicant/Proposed Class Representative's case on behalf of the class members is that Visa has acted unlawfully in establishing and imposing Inter-regional and Commercial Card MIF. It is said that these MIF accounted for, and continue to account for, a very significant part of the MSC that the class members were required to pay, and have throughout the relevant period paid, to their acquirers in relation to each Commercial Card Transaction or Inter-regional Transaction for purposes of the Visa Scheme Rules from time to time in force.

The Applicant/Proposed Class Representative contends that both the Inter-regional MIF and the Commercial Card MIF fix a price floor for the MSC, which leads to a restriction of price competition in the acquiring market by artificially raising prices, to the detriment of Merchants such as the class members, which results in them being overcharged. It is said that the relevant rules under which the inter-regional MIF and the commercial card MIF were and are set, and/or the setting of those MIF at positive levels, constituted, and continue to constitute, a decision of an association of undertakings and/or an agreement and/or a concerted practice between the Proposed Defendants and other participants in the Visa Scheme, which restricted competition by establishing an effective minimum price for the MSC that Merchants (including the class members) must pay to accept payments as part of a commercial card transaction or inter-regional transaction. The Application states that as a consequence of the unlawful inter-regional MIF and commercial card MIF, the MSCs paid by merchants, including the class members, were higher than they would otherwise have been, causing the class members loss and damage for which the Proposed Defendants are individually or jointly and severally liable.

The Claim Period

The Claim Period is defined as follows: (a) as regards claims in respect of inter-regional transactions, the period beginning on 1 June 2016 through to the date of judgment; and (b) as regards the claims in respect of commercial card transactions, the period commencing on 1 June 2016 through to the date of judgment. The period of the claim runs until the date of judgment, as the Proposed Class Representative contends that the infringements with which the claims are concerned continue at the time of issuing and, it appears, will continue until the Tribunal grants the relief sought in the Collective Proceedings Form.

Proposed Class Members

The Proposed Class comprises all merchants who paid a MSC in respect of one or more inter-regional card transactions and/or commercial card transactions: (i) during the claim period; and (ii) where the transaction occurred in the UK. The Proposed Class does not include Excluded Merchants. These are merchants with an average annual turnover greater than or equal to £100 million per annum in the period 2016 – 2019. Such merchants may elect to be included in the parallel opt-in proceedings. Those proceedings are sought to be brought by a different representative, Commercial and Interregional Card Claims I Limited ("CICC I").

Certification of the proposed collective proceedings

1. The Applicant/Proposed Class Representative will act fairly and adequately in the interests of the Proposed Class Members:

   (a) The Applicant/Proposed Class Representative is not a member of the Proposed Class and would be able to act impartially in the interests of all its members.

   (b) The Applicant/Proposed Class Representative's director has extensive experience in industries including sectors of merchants which are particularly impacted by commercial and inter-regional MIFs, and in industry-representative bodies.

   (c) The Applicant/Proposed Class Representative's director is highly motivated to act as class representative and has the time and capacity to do so.

   (d) The Applicant/Proposed Class Representative will appoint an Advisory Panel to ensure further expertise, including from a highly experienced consultant in the hospitality sector.

   (e) The Applicant/Proposed Class Representative is a legal person and as such, if it were necessary to supplement the director's skills and experience to assist the Proposed Class Representative, it would be so possible.

2. The Applicant/Proposed Class Representative has prepared, along with its legal and expert team, a Litigation Plan.

3. The Applicant/Proposed Class Representative has obtained assistance from a number of specialists to assist with the notification, administration and publicization of the Proposed Collective Proceedings.

4. The Applicant/Proposed Class Representative does not have any material interest that is in conflict with the interests of the Proposed Class.

5. The Applicant/Proposed Class Representative has sufficient funding arrangements in place to pay the Respondents'/Proposed Defendants' recoverable costs if ordered to do so.

6. No interim injunction is sought (therefore the question of the Applicant/Proposed Class Representative's ability to satisfy any undertaking in damages does not arise).

According to the Application, the claims are brought on behalf of an identifiable class of person. It is said that the essential concepts on which the class definition relies are terms of art which are well understood in the industry and reflected in the Visa Scheme Rules. Further, it is anticipated that all of the issues arising for determination in respect of the Proposed Class in relation to liability, and substantial issues arising for determination in relation to causation and loss, will be common issues. Specifically, the following are common to all claims: (i) whether the Tribunal has jurisdiction to hear the claims made in the Proposed Collective Proceedings; (ii) the substantive law applicable to the claims; (iii) the relevant limitation period applicable to the claims; (iv) whether the Visa rules under which the inter-regional and commercial card MIFs were (and are) set constitute a decision of an association of undertakings and/or an agreement and/or a concerted practice between the Proposed Defendants and other participants in the Visa scheme, which had the effect of restricting competition; (v) if and in so far as properly raised by Visa, was there an objective justification for such an arrangement; (v) whether the arrangements constituted a decision, agreement or concerted practice contrary to Chapter I of the 1998 Act and/or Article 101 TFEU; (vi) what is the scope of the infringements established by the Commission Decision in *Mastercard I* and to what extent (if at all) is Visa's conduct in respect of the imposition of the Inter-regional and/or Commercial Card MIFs distinguishable from the conduct the Commission bindingly found impermissible, not objectively justified or exemptible, and hence unlawful in *Mastercard I*; and (vii) there are common issues across the class concerning the quantum of damages.

The Application states that the Claims are suitable to be brought in collective proceedings because:

1. There is a very large number of members of the Proposed Class with material claims against Visa, raising common issues in respect of both liability and quantum. It would be inefficient to require each prospective claimant to bring proceedings before the Tribunal on an individual basis. The costs of doing so are likely to make such a course unviable, having regard to the quantum at issue.
2. In the absence of a conclusive determination of liability by the European Commission or the CMA, it is likely that merchants within the proposed class would have to pursue very costly standalone proceedings in order to obtain compensation for the losses sustained. The bringing of separate proceedings, and the associated risk of inconsistent judgments, can be avoided by the collective proceedings since the determination of liability will raise common issues between the claimants.
3. The opt-out collective proceedings are brought alongside analogous opt-in proceedings for businesses with annual turnover equal to or greater than £100 million per annum. The same common issues on liability arise on each set of Proposed Collective Proceedings. Appropriate joint management of these claims will further reduce costs and simplify proceedings before the Tribunal.
4. Collective proceedings represent the most appropriate approach in terms of costs/benefits to determining the claims for the parties to the proposed proceedings. The individual costs to the Proposed Defendants of litigating the same (or substantially the same) issues on liability and quantum would be considerable. The costs of bringing the proposed collective proceedings are proportionate in view of the aggregate value of the claim.
5. The Proposed Class involves a very large number of claims and the nature of the class is such that there are substantial common issues, both as regards liability and quantum. These issues can be more effectively managed and determined in collective proceedings.
6. The definition of the Proposed Class has been formulated so that any person can clearly determine whether they are a member of the proposed class.
7. The claims are suitable for an aggregate award of damages.

Finally, having regard to the strength of the claims and the practical advantages of bringing opt-out proceedings, it is efficient and desirable to treat the proceedings as opt-out proceedings.

The relief sought in these proceedings is:

(1) Damages;
(2) Simple interest pursuant to section 35A of the Senior Courts Act 1981, at such rate and for such period as the Court thinks fit;
(3) Costs; and
(4) Such further or other relief as the Court thinks fit.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively, the Tribunal Registry can be contacted by post at Salisbury Square House, 8 Salisbury Square, London EC4Y 8AP, or by telephone (020 7979 7979) or email (registry@catribunal.org.uk). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, QC (Hon)
Registrar
Published 1 August 2022