



Neutral citation [2023] CAT 1

IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos: 1441/7/7/22

1442/7/7/22

1443/7/7/22

1444/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

13 January 2023

Before:

BEN TIDSWELL
(Chair)

Sitting as a Tribunal in England and Wales

BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS I LIMITED

Applicant /
Proposed Class Representative

- v -

- (1) MASTERCARD INCORPORATED
- (2) MASTERCARD INTERNATIONAL INCORPORATED
- (3) MASTERCARD EUROPE SA
- (4) MASTERCARD/EUROPAY UK LIMITED
- (5) MASTERCARD UK MANAGEMENT SERVICES LIMITED
- (6) MASTERCARD EUROPE SERVICES LIMITED

Respondents /
Proposed Defendants

AND BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS II LIMITED

Applicant /
Proposed Class Representative

- v -

- (1) MASTERCARD INCORPORATED

- (2) **MASTERCARD INTERNATIONAL INCORPORATED**
- (3) **MASTERCARD EUROPE SA**
- (4) **MASTERCARD/EUROPAY UK LIMITED**
- (5) **MASTERCARD UK MANAGEMENT SERVICES LIMITED**
- (6) **MASTERCARD EUROPE SERVICES LIMITED**

Respondents /
Proposed Defendants

AND BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS I LIMITED

Applicant /
Proposed Class Representative

- v -

- (1) **VISA INC.**
- (2) **VISA INTERNATIONAL SERVICE ASSOCIATION**
- (3) **VISA EUROPE SERVICES LLC**
- (4) **VISA EUROPE LIMITED**
- (5) **VISA UK LTD**

Respondents /
Proposed Defendants

AND BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS II LIMITED

Applicant /
Proposed Class Representative

- v -

- (1) **VISA INC.**
- (2) **VISA INTERNATIONAL SERVICE ASSOCIATION**
- (3) **VISA EUROPE SERVICES LLC**
- (4) **VISA EUROPE LIMITED**
- (5) **VISA UK LTD**

Respondents /
Proposed Defendants

Heard remotely on 13 December 2022

RULING

APPEARANCES

Michael Bowsher KC and Derek Spitz (instructed by Marcus Parker Limited) appeared on behalf of the Proposed Class Representatives in Case Nos. 1441-1444/7/7/22.

Matthew Cook KC and Hugo Leith (instructed by Freshfields Bruckhaus Deringer LLP and Jones Day) appeared on behalf of the Proposed Defendants in Case Nos. 1441 and 1442/7/7/22.

Brian Kennelly KC and Daniel Piccinin (instructed by Linklaters LLP and Milbank LLP) appeared on behalf of the Proposed Defendants in Case Nos. 1443 and 1444/7/7/22.

A. THE PROPOSED PROCEEDINGS

1. In four connected cases which are being managed together, the Proposed Class Representatives, Commercial and Interregional Card Claims I Limited and Commercial and Interregional Card Claims II Limited (respectively, “CICC I” and “CICC II”, and together, the “PCRs”) bring proposed opt-in and opt-out proceedings against Mastercard and Visa group companies in relation to commercial and inter-regional multilateral interchange fees, or MIFs, which apply to certain transactions within the Mastercard and Visa card schemes.
2. In each proceeding, the PCRs contend that the relevant rules of the Mastercard and Visa schemes, and the relevant MIFs, are the result of anticompetitive conduct (whether in the form of an agreement, concerted practice or decision of an association of undertakings). The PCRs contend that the relevant MIFs, in effect, fix a price floor for the Merchant Service Charge payable by merchants. This is said to lead to a restriction of price competition in the acquiring market by artificially raising prices, to the detriment of merchants such as the proposed class members, which results in them being overcharged.
3. Inter-regional MIFs are fees which are applicable to consumer card transactions which take place between merchants located in the EEA with consumer cards issued by an issuer outside the EEA (for example, a merchant in the EEA accepts payment by a card issued in the US to a consumer). Commercial card MIFs are fees applicable to transactions in the UK and EEA involving commercial cards, which might for example be issued by a company to its employees for use in meeting work related expenses.
4. The proposed classes for the opt-in claims are intended to comprise merchants with a turnover of £100 million or more. The proposed classes for the opt-out claims are intended to comprise merchants with turnover of less than £100 million.
5. I am told by Mr Bowsher KC, for the PCRs, that there is significant support for the applications for a collective proceedings order. A witness statement made by Mr Ross (his third statement) on behalf of the PRCs, explains in some detail

the activities carried out the by the PCRs' team to (1) gather support from trade associations for the proposed opt-out proceedings and (2) build a "book" of merchants who are interested in participating in the proposed opt-in proceedings. Mr Ross's statement does not identify any individual merchant in either respect.

B. THE FIRST CMC

6. At the first joint CMC held remotely on 13 December 2022, the Proposed Defendants raised two issues. The first concerned the Tribunal's recent Ruling in *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Ors* [2022] CAT 53 ("*McLaren*"), in which the Tribunal considered the appropriateness of a number of defendants to the collective proceedings writing directly to class members (as opposed to the class representative). The second issue was an application by the Proposed Defendants for disclosure and further information from CICC I (in relation to the opt-in claims) and CICC II (in relation to the opt-out claims).

(1) Communications with potential class members

7. Mr Kennelly KC, for Visa, explained that the Proposed Defendants are constantly receiving communications from merchants seeking to resolve claims against the card schemes through correspondence such as letters before action or offers to settle in proceedings which have already been issued.
8. The concern expressed by Mr Kennelly (and supported by Mr Cook KC for Mastercard) was that, in responding to this correspondence, the Proposed Defendants might find themselves offending the rule set out in *McLaren*, which is essentially that defendants in collective proceedings should not seek to communicate directly with actual or potential class members (i.e. including members of a proposed class prior to certification of a collective proceedings) in relation to matters concerning those collective proceedings.
9. On the other hand, to refrain from responding to such approaches could be unfair to both the merchants and the Proposed Defendants, by unnecessarily delaying

potential settlements. The communications in question are generally made on a “without prejudice” basis, which means it would be inappropriate to involve the PCRs or the Tribunal.

10. The Proposed Defendants therefore seek permission from the Tribunal to respond to settlement approaches from merchants, including by settling those claims where they are so advised.
11. Mr Bowsher helpfully expressed a willingness on the part of the PCRs to find a practical solution to the problem, perhaps involving the supervision of the Tribunal. However, he also emphasised the importance in the next few months, leading up to the hearing of the collective proceedings applications, of protecting the interests of, and the integrity of any choice by, actual or potential class members in any of the proposed collective proceedings.
12. In *McLaren*, the solicitors for many of the defendants to those collective proceedings wrote to a number of large businesses concerning their participation as class members in the proceedings. The letters warned the recipients that if they did not opt out of the proceedings then there would likely be applications by the defendants against them for disclosure, which would be expensive and time consuming.
13. The Tribunal held that the defendants did not act properly in sending the letters and should not have done so. The Tribunal said at [20] that:

“The whole point of the collective proceedings regime is that the represented persons are represented by a class representative. Communications regarding the collective proceedings – which begin, as we have stressed, on the making of the application for a collective proceedings order – should be between the parties to those proceedings, and this does not include represented persons or putative represented persons.” (emphasis as in original)
14. This was held to be consistent with, and even necessary to, the essential purposes and structure of the collective proceedings regime (at [24]). In response to the suggestion that this inhibited the defendants from properly exercising their rights of defence, the Tribunal noted that only communications with class members concerning the collective proceedings were prohibited and that any necessary or desirable communication could be supervised by the

Tribunal, which has ultimate responsibility for supervising the conduct of collective proceedings, and in particular the extent to which it is appropriate to involve individual class members (at [28]).

15. *McLaren* confirms the supervisory jurisdiction of the Tribunal over potential communications with class members (and potential class members). Communications about settling claims which might be part of proposed collective proceedings clearly “concern the collective proceedings”. It is therefore appropriate that the Proposed Defendants have raised their concerns with the Tribunal in these proceedings. That is the proper course for any defendant (or proposed defendant) who considers it necessary or desirable to communicate with class members (or potential class members), as opposed to the class representative (or proposed class representative), concerning the collective proceedings (or proposed collective proceedings from the time a collective proceedings application is made).

16. There are a number of features in this matter which seem important considerations in the exercise by the Tribunal of its supervisory jurisdiction:
 - (1) There is a great number of merchants who may have claims based on a variety of different MIFs, including UK domestic or EEA MIFs as well as inter-regional and/or commercial card MIFs – for example, any merchant in the UK who has accepted payment by card which has been processed through the card schemes of the Proposed Defendants may be able to argue that they have incurred an overcharge based on one or more type of MIF.

 - (2) A large number (now numbering many hundreds) of merchants have already issued proceedings against the Proposed Defendants, many of which are being managed by the Tribunal in the Merchant Interchange Fee Umbrella Proceedings (Case No. 1517/11/7/22 (UM)) (the “Umbrella Proceedings”). As is apparent from the various rulings in the

Umbrella Proceedings and related actions, those claims are based on a wide variety of MIFs¹.

- (3) In most, if not all, of those existing proceedings, the merchants will be legally represented. This means that those merchants are well placed to receive legal advice to inform their decision about the merits of continuing with an existing action, settling that, or participating in one of the proposed collective proceedings.
- (4) If a collective proceedings order is made in respect of any of the proposed collective proceedings, merchants who have existing proceedings will not be able to continue their claims in the collective proceedings without first staying or discontinuing the existing claim. See section 47B(3)(c) of the Competition Act 1998 and rule 82(4) of the Competition Appeal Tribunal Rules 2015.² As a result, merchants with existing claims will at some stage need to make an active choice as to whether to proceed with their own claims or to join the proposed collective proceedings, regardless of whether the relevant collective proceedings are opt-in or opt-out proceedings.
- (5) The concern raised by the Proposed Defendants relates to merchants approaching the Proposed Defendants. It is not suggested that the Proposed Defendants should be entitled to initiate communications with merchants to encourage them to settle their claims.
- (6) The joint hearing of the applications for a collective proceedings order in the four proposed collective proceedings is fixed for 3 April 2023. At that stage, merchants will be able to understand the format of any collective proceedings order made, including the precise class description for any opt-in or opt-out collective proceedings. Until then, there remains uncertainty about whether a merchant might be subject to

¹ See for example the Tribunal's judgments in *Dune Group Limited and Ors v Mastercard & Ors*; *Dune Shoes Ireland Limited and Ors v Visa & Ors* [2021] CAT 35 and [2022] CAT 14.

² Unless otherwise stated, all statutory references in this Ruling are to the Competition Act 1998 and all references in this Ruling to rules are to the Competition Appeal Tribunal Rules 2015.

an opt-out or opt-in regime, or indeed no collective proceedings regime at all.

17. There is also a balance to be struck between, on the one hand, the legitimate commercial interests of merchants wishing to settle their claims against the Proposed Defendants and, on the other hand, ensuring that such merchants have had an opportunity to make an informed choice about their participation in any collective proceedings, and that the settlements are not otherwise used as a pre-emptive tool to undermine the efficacy of the proposed collective proceedings.
18. In relation to informed choice, a merchant who has retained legal advisers and who is aware of the proposed collective proceedings may be taken to understand the implications of seeking to settle claims with the Proposed Defendants prior to any collective proceedings order being made. It is of course the case that, once any collective proceedings order is made, a merchant can either choose to be represented in the relevant collective proceedings or choose to maintain their pursuit of a separate path.
19. In relation to undermining the efficacy of the proposed collective proceedings, it is possible to conceive of ways in which settlement of claims prior to the hearing of an application for a collective proceedings order might have that effect. The most obvious is the possibility that merchants who might otherwise be inclined to opt in to collective proceedings could be induced to settle their claims rather than participating in the collective proceedings, thereby potentially making the opt-in proceedings less viable. The position is complicated in these proposed collective proceedings by the reference point for opt-in and opt-out proceedings, which is proposed to be an annual turnover of £100 million. That may or may not be the threshold which the Tribunal approves, if it makes any collective proceedings order at all.
20. It is therefore far from clear whether any particular merchant might be entitled to participate in an opt-in or opt-out collective proceedings in relation to the inter-regional and commercial card MIFs, if and when a collective proceedings order is made. As a result, the implications of any settlement with that merchant cannot be easily assessed.

21. Against that background, it is helpful to consider the question of appropriate supervision by reference to the following categories of communication which the Proposed Defendants might receive in relation to settling claims or potential claims:
- (1) Communications received by the Proposed Defendants regarding claims which are outside the scope of the proposed collective proceedings.
 - (2) Communications received by the Proposed Defendants regarding claims made in proceedings which predate the making by the Tribunal of any proposed collective proceedings order (pursuant to the applications made in each of the proposed collective proceedings) and which are within the scope of the proposed collective proceedings (in whole or in part) and have not been discontinued.
 - (3) Communications received by the Proposed Defendants regarding potential claims which are within or partially within the scope of the proposed collective proceedings and which are not the subject of existing proceedings.
- (a) *Communications received by the Proposed Defendants regarding claims which are outside the scope of the proposed collective proceedings*
22. The rule in *McLaren* applies only to communications concerning the collective proceedings. Many of the merchants contacting the Proposed Defendants to seek settlement will have claims based on other MIFs (such as domestic or intra-EEA MIFs), and also perhaps (but not necessarily) claims based on inter-regional and/or commercial card MIFs. To the extent that any approach by a merchant is in relation to claims based on MIFs other than inter-regional or commercial cards, there can be no objection to the Proposed Defendants responding to communications about those claims and settling them if they are so advised. The same applies where the claim periods do not overlap.

(b) Communications received by the Proposed Defendants regarding claims made in proceedings which predate any proposed collective proceedings order and which are within (or partially within) the scope of the proposed collective proceedings and have not been discontinued

23. Merchants who have issued existing proceedings are likely to be legally represented and it is a matter for the Proposed Defendants, when engaging with them, to ensure that those legal representatives are aware of the proposed collective proceedings, including the identity and contact details of the PCRs' solicitors.
24. In addition, these existing claims are likely to include claims based on other MIFs, as well as inter-regional and/or commercial card MIFs.
25. In circumstances where these factors apply, the Tribunal accepts that there can be adequate assurance that the merchant is making an informed choice. The benefits of permitting resolution of the existing claims outweighs any concerns about undermining the proposed collective proceedings by pre-emptive settlements, given the need for the merchant to make a choice at some stage by virtue of the application of rule 82(4).
26. Accordingly, where a merchant, acting through legal advisers who have been alerted to the existence of the proposed collective proceedings, wishes to continue settlement discussions in relation to existing proceedings which include but are not based solely on inter-regional or commercial card MIFs, then the Proposed Defendants are permitted to respond to communications about those claims and settle them if they are so advised.
27. In cases in this category where the conditions in [26] above are not all satisfied, the Proposed Defendants will need to apply to the Tribunal for specific permission before taking further steps in relation to any communication from a merchant seeking to settle an existing proceeding.

(c) Communications received regarding potential claims which are within or partially within the scope of the proposed collective proceedings and which are not the subject of existing proceedings

28. A merchant in this category will be entitled to make a choice about opting out of, or declining to opt in to, any collective proceeding, with a view to pursuing a claim against and potentially settling with the Proposed Defendants on an individual basis. That choice is most obviously made after any collective proceedings order is made, at which time the definition of the class and basis of the collective proceedings (if any) will be known.
29. Prior to the making of any collective proceedings order, it is more difficult to be confident that the merchant is properly advised and informed, and that the efficacy of the proposed collective proceedings are not being undermined (deliberately or inadvertently), without a reasonably active and invasive degree of scrutiny by the Tribunal of the communications between that merchant and the Proposed Defendants.
30. In light of the relative proximity of the hearing of the applications for collective proceedings orders, and the potential complications in creating a satisfactory regime to monitor dealings between the Proposed Defendants and the relevant merchants, I am not prepared to give permission at this stage for the Proposed Defendants to communicate directly with this category of potential class members about settlement of their claims which have not been commenced yet and are within the subject of the proposed collective proceedings.
31. If the Proposed Defendants consider that particular circumstances warrant a different approach in the meantime, they may apply to the Tribunal for further directions. That will inevitably require a degree of disclosure (to the Tribunal and the relevant Proposed Class Representative) of the identity of the merchant and the nature of the discussion.

(2) Application for disclosure

32. The material sought by the Proposed Defendants from CICC I concerns the “book building” exercise for the opt-in proceedings which CICC I and its advisers are carrying out to ascertain interest from merchants. Specifically, the Proposed Defendants seek information about the identity of merchants who have responded to contact from CICC I, their reaction to the contact (whether they are interested or not) and certain information about the nature of transactions conducted.
33. The Proposed Defendants argue that this information is potentially relevant and helpful in relation to the hearing of the applications for collective proceedings orders, where issues about the size, composition, similarity or difference of merchants within the proposed classes may arise, as well as whether the proposed collective proceedings are appropriate mechanisms to pursue these claims.
34. In particular, Mr Cook relied on rules 79(1) and 79(2), which provide:

“79.—(1) The Tribunal may certify claims as eligible for inclusion in collective proceedings where, having regard to all the circumstances, it is satisfied by the proposed class representative that the claims sought to be included in the collective proceedings—

- (a) are brought on behalf of an identifiable class of persons;
- (b) raise common issues; and
- (c) are suitable to be brought in collective proceedings.

(2) In determining whether the claims are suitable to be brought in collective proceedings for the purposes of paragraph (1)(c), the Tribunal shall take into account all matters it thinks fit, including—

- (a) whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;
- (b) the costs and the benefits of continuing the collective proceedings;
- (c) whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;
- (d) the size and the nature of the class;

...”

35. Mr Cook suggested that information about the nature of the sector in which a merchant operates or the merchant’s domicile would be helpful in the Tribunal understanding the extent to which there might be common issues in the claims and their suitability for collective proceedings. For example, if there were a number of merchants based in countries outside the UK who had expressed interest in the claims, then that might indicate a risk that the issues would not necessarily be common ones.
36. The material sought by the Proposed Defendants from CICC II relates to the opt-out proceedings. The Proposed Defendants seek similar information from CICC II about the identity of merchants who have responded to contact from CICC II and certain (more limited) information about the nature of transactions conducted. The reasons advanced for seeking this material are broadly the same: to allow the Tribunal properly to understand the nature of the class and therefore whether collective proceedings orders should be made.
37. The PCRs resist the applications for disclosure. In relation to the opt-in proceedings, CICC I argues that the information it has about contact with merchants is both confidential and sensitive. In particular, if merchants know that their names might be disclosed to the Proposed Defendants, this might have a chilling effect on the book building exercise. In any event, Mr Ross, in his witness statement describes some of the interested merchants in general terms, giving some examples of domicile and sector, and that is sufficient to allow the Tribunal to form a view on the range of different merchants who might participate.
38. In relation to the opt-out proceedings, CICC II has records of discussions with trade associations, which are described in some detail by Mr Ross. It also has the names of those merchants who have to date registered interest on the relevant claims website, but there has been no further interaction with those merchants.

39. In respect of both the proposed opt-in and opt-out collective proceedings, the PCR's resist any attempt to require them to undertake further work to identify the information sought by the Proposed Defendants about the nature of transactions, or indeed any other information which the PCR's have not yet collected. They say it would be disproportionate and unfair to require them to carry out this further work.
40. In relation to the opt-in proceedings, I agree with the Proposed Defendants that information about the merchants who have been in contact with CICC I as part of the book building process is relevant to the Tribunal's assessment of the applications for collective proceedings orders. An indication of the range of sectors, domiciles and size of entity is likely to be useful in considering the questions of common issues and suitability. Mr Ross has already provided some information about these matters, but it is incomplete.
41. I recognise the concern that Mr Bowsher raises about the potential for merchants to be put off from having discussions with the PCR's if their identities are made known to the Proposed Defendants or made public in other ways. It does not seem necessary for individual merchant identities to be made known in order to obtain the benefit of the information the PCR's have about merchants who have expressed interest in the opt-in proceedings and those who have not.
42. Instead, it seems sufficient for CICC I to provide generic information about the proportions of merchants in each category, by reference to sector, domicile and estimated turnover within, say, bands of £25 million. To the extent this requires additional work from CICC I to obtain information which it has not already gathered, it does not seem unduly onerous.
43. Accordingly, by 4pm on 25 January 2023, CICC I is to provide the following further information to the relevant Proposed Defendant:
- (1) The number of merchants who, prior to 31 December 2022, have expressed interest or registered to join the corresponding opt-in claim.

- (2) A breakdown of the merchants referred to in (1), showing proportions by sector, domicile and estimated turnover³ within bands of £25 million.
 - (3) The number of merchants who, prior to 31 December 2022, have not responded to any contacts by CICC I's solicitors, representatives or CICC I itself, or have declined or failed to register to join the corresponding opt-in claim.
 - (4) A breakdown of the merchants referred to in (3), showing proportions by sector, domicile and estimated turnover within bands of £25 million.
44. I make no other order for further information or disclosure at this stage. I am not persuaded that disclosure of the number, sector, domicile, estimated turnover or identities of merchants who have registered on the website for the opt-out claim is of any material value to consideration of the applications for those collective proceedings orders. Unlike the opt-in proceedings, where the interest expressed is informative about the potential constitution of the class, registration on the website tells us nothing about the nature of the proposed class in opt-out proceedings, which is informed primarily by the proposed class definition itself.
45. Nor do I consider it appropriate to require the PCRs to undertake further work to investigate the other matters requested by the Proposed Defendants. To do so would require additional interaction with merchants, which may be unwelcome and would be an unreasonably burdensome task, which is disproportionate to the additional benefit it might bring.

³ I leave it to the PCR to identify the most appropriate basis for assessing turnover, noting that there is a definition in the proposed collective proceedings but also recognising that the available information may differ for different merchants. The approach should be as transparent and consistent as possible.

Ben Tidswell
Chair

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 13 January 2023